No.

In the Supreme Court of the United States

SOUTH POINT ENERGY CENTER, LLC,
PETITIONER,

v.

ARIZONA DEPARTMENT OF REVENUE; MOHAVE COUNTY,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Indian Reorganization Act of 1934 provides that Indian trust "lands … shall be exempt from State and local taxation." 25 U.S.C. § 5108. It is settled that § 5108 preempts state and local taxation on "permanent improvements" upon tribal land. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 158 (1973). But courts have split over whether that principle covers non-Indian-owned permanent improvements. In this case, petitioner South Point Energy Center, LLC owns a permanent improvement, a natural-gas-fired power plant, on the Fort Mojave Indian Reservation. The plant falls completely on trust land and is regulated entirely by the Tribe and the federal government. Yet Mohave County, Arizona, imposes property taxes on the plant. The Arizona Supreme Court upheld that tax solely because South Point, the owner of the permanent improvement, "is a non-Indian." Pet.App.42a.

The questions presented are:

1. Whether 25 U.S.C. § 5108 expressly preempts state and local taxation of permanent improvements on trust land when the improvement's owner is a non-Indian.

2. Whether federal law impliedly preempts state and local taxation of petitioner's permanent improvement.

CORPORATE DISCLOSURE STATEMENT

Petitioner South Point Energy Center, LLC is a wholly owned subsidiary of Calpine Corporation, a privately held corporation.

Calpine recently executed a definitive agreement to be acquired by Constellation Energy Corporation, a publicly traded company. That transaction has not yet closed.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

- *S. Point v. Ariz. Dep't of Revenue, et al.*, No. CV-24-0076-PR (Ariz.) (denial of petition for review entered on December 4, 2024).
- *S. Point Energy Ctr. LLC v. Ariz. Dep't of Revenue, et al.*, No. 1 CA-TX 20-0004 (Ariz. Ct. App.) (opinion and judgment issued on March 19, 2024, regarding implied preemption).
- *S. Point Energy Ctr. LLC v. Ariz. Dep't of Revenue, et al.*, No. CV-21-0130-PR (Ariz.) (opinion and judgment issued on April 26, 2022, regarding express preemption).
- *S. Point Energy Ctr. LLC v. Ariz. Dep't of Revenue, et al.*, No. 1 CA-TX 20-0004 (Ariz. Ct. App.) (opinion and judgment issued on April 27, 2021, regarding express preemption).
- *S. Point Energy Ctr. LLC v. Ariz. Dep't of Revenue, et al.*, No. TX 2013-000522 (Ariz. Tax Ct.) (judgment issued on March 10, 2020; opinion on implied preemption entered on February 4, 2020; opinion on express preemption entered on May 16, 2018).
- *S. Point Energy Ctr. LLC v. Ariz. Dep't of Revenue, et al.*, Nos. 1 CA-TX 15-0005, 1 CA-TX 15-0006 (Ariz. Ct. App.) (opinion and judgment issued on November 3, 2016, reversing tax court's dismissal).
- *S. Point Energy Ctr. LLC v. Ariz. Dep't of Revenue, et al.*, No. TX 2013-000522 (Ariz. Tax Ct.)

(judgment issued on June 10, 2015; order denying motion for reconsideration entered on May 13, 2015; order granting motion to dismiss entered on February 27, 2015).

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner South Point Energy Center, LLC respectfully petitions for a writ of certiorari to review the judgments of the Arizona Supreme Court and Arizona Court of Appeals.

OPINIONS BELOW

The order of the Arizona Supreme Court denying discretionary review of the Arizona Court of Appeals' post-remand decision on implied preemption is unreported and appended at Pet.App.1a-2a. The post-remand opinion of the Arizona Court of Appeals in favor of respondents on implied preemption is reported at 546 P.3d 1130. Pet.App.3a-20a. The opinion of the Arizona Supreme Court vacating and remanding the Arizona Court of Appeals' decision on express preemption is reported at 508

P.3d 246. Pet.App.21a-43a. The Arizona Court of Appeals' opinion on express preemption is reported at 490 P.3d 372. Pet.App.44a-57a. The Arizona Tax Court's summary judgment opinion is unreported and available at 2020 WL 13907987. Pet.App.58a-62a. The Arizona Tax Court's decision denying South Point's motion for partial summary judgment on express preemption is unreported and appended at Pet.App.63a-70a.

JURISDICTION

The judgment of the Arizona Court of Appeals was entered on March 19, 2024. The order of the Arizona Supreme Court denying a timely filed petition for discretionary review was entered on December 4, 2024. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article VI of the United States Constitution provides in relevant part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof … shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

25 U.S.C. § 5108 (Section 5 of the Indian Reorganization Act of 1934) provides in relevant part:

> The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments,

> whether the allottee be living or deceased, for the purpose of providing land for Indians.
>
> …
>
> Title to any land or rights acquired pursuant to this Act … 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.

The full text of Article VI of the Constitution and 25 U.S.C. § 5108 is set forth in the Appendix. Pet.App.71a-72a.

STATEMENT

Tribal lands are some of the most economically vulnerable places in our Nation. Attracting non-Indian-owned permanent improvements—like power plants—that tribes can tax spurs economic development on tribal lands. State and local taxes on such permanent improvements undercut those efforts. As tribes and tribal organizations argued in this case as amici, such taxes "interfere with tribal sovereignty by undermining tribes' ability to raise revenue" and "chill[] the economic activity on which the vitality of reservation economies depend." Fort Mojave Indian Tribe et al. Amicus Br. (Tribes Br.) 17-18, *S. Point Energy Ctr. LLC v. Ariz. Dep't of Revenue*, 508 P.3d 246 (Ariz. 2022) (No. CV-21-0130-PR).

Section 5 of the Indian Reorganization Act, 25 U.S.C. § 5108, provides that "lands or rights" taken in trust for tribes by the United States "shall be exempt from State or local taxation." Given that taxes on permanent improvements function as taxes on land, this Court has long

understood "land" in § 5108 to encompass "permanent improvements on [a] Tribe's tax-exempt land." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 158 (1973). This case presents the important question whether the statute preempts state and local taxation of such permanent improvements owned by non-Indians. That issue demands a national resolution that only this Court can provide.

In the decision below, the Arizona Supreme Court held that § 5108 does not "exempt taxation of non-Indian-owned permanent improvements." Pet.App.36a. That holding squarely conflicts with decisions of the Ninth and Eleventh Circuits. The Ninth Circuit held that § 5108 preempts state taxation of permanent improvements to trust land "*without regard to the ownership of the improvements*." *Confederated Tribes of Chehalis Rsrv. v. Thurston Cnty. Bd. of Equalization*, 724 F.3d 1153, 1159 (9th Cir. 2013) (emphasis added). The Eleventh Circuit similarly held that § 5108 preempts a state tax imposed on "non-Indian lessees." *Seminole Tribe of Fla. v. Stranburg*, 799 F.3d 1324, 1328 (11th Cir. 2015). The split between the Arizona Supreme Court and the Ninth Circuit in particular plunges into uncertainty Arizona's 22 federally recognized tribes and the non-Indian businesses that own permanent improvements on the tribes' 19 million acres of trust land and threatens to discourage investment on these trust lands.

Further, the Arizona Court of Appeals held below that federal law does not impliedly preempt the County's tax. The implied preemption inquiry in this context calls for an examination "into the nature of the state, federal, and tribal interests at stake." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980). The court gave short shrift to the significant federal and tribal interests

at stake and improperly treated the State's general interest in generating revenue as dispositive, in significant tension with this Court's precedents and with federal circuit precedents. That one-sided assessment of the relevant interests skewed the implied preemption analysis in the State's favor and amplifies the case for this Court's review.

The decisions below upset the consistent and even-handed application of federal law on questions that strike at the heart of tribal sovereignty and self-sufficiency. This case offers an optimal vehicle to resolve these questions, as the decisions below turned entirely on the questions presented. Only this Court can resolve the warring preemption rules that linger over tribes and their business partners.

A. Legal Background

1. In 1934, Congress enacted the Indian Reorganization Act "to restore the principles of tribal self-determination and self-governance" that earlier federal policies had sought to extinguish. *Upper Skagit Indian Tribe v. Lundgren*, 584 U.S. 554, 558 (2018) (citations omitted). Section 5108 is "the capstone of the IRA's land provisions." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 226 (2012) (citation omitted). Section 5108 authorizes the Secretary of the Interior "to acquire … any interest in lands … for the purpose of providing land for Indians." 25 U.S.C. § 5108.[1] "Title to any lands or rights acquired" under this law are taken in trust for the relevant Indian tribe, and

[1] Before the 2016 reclassification of Title 25 of the U.S. Code, current § 5108 was instead § 465. *See* U.S. Code Editorial Reclassification Table, http://uscode.house.gov/editorialreclassification/t25/T25-ERT.pdf.

"such lands or rights shall be exempt from State and local taxation." *Id.*

This provision plays "a key role in the IRA's overall effort 'to rehabilitate the Indian's economic life.'" *Patchak*, 567 U.S. at 226 (quoting *Mescalero*, 411 U.S. at 152). Trust land insulated from state and local taxation "functions as a primary mechanism to foster Indian tribes' economic development." *Id.* This Court has held that § 5108's tax exemption for trust land extends to permanent improvements on that land, confirming the decades-old rule that permanent improvements enjoy the same tax-exempt status as the land beneath them. *Mescalero*, 411 U.S. at 158 (citing *United States v. Rickert*, 188 U.S. 432, 441-43 (1903)).

2. Congress exerts extensive control over leasing of trust lands. Any tribe wishing to lease trust land must obtain "the approval of the Secretary of Interior." 25 U.S.C. § 415(a). To guide the lease-approval process, the Secretary has promulgated "an extensive, exclusive, comprehensive, and pervasive regulatory framework governing the leasing of Indian land." *Stranburg*, 799 F.3d at 1341. The Bureau of Indian Affairs (BIA) manages the Secretary's lease-approval process. The "regulations cover all aspects of leasing," from big-ticket items like BIA authorization to details like land valuations and late payments. Residential, Business, and Wind and Solar Resource Leases on Indian Land, 77 Fed. Reg. 72,440, 72,447 (Dec. 5, 2012).

The BIA also heavily regulates permanent improvements created pursuant to these leases, including "construction of … permanent improvements," 25 C.F.R. § 162.414; "ownership of permanent improvements," *id.* § 162.415; "removal of the permanent improvements," *id.* § 162.416; "due diligence requirements" for permanent

improvements, *id.* § 162.417; "performance bond[s]" for "[t]he construction of any required permanent improvements," *id.* § 162.434(a)(2); and "insurance" for "all insurable permanent improvements," *id.* § 162.437.

A BIA regulation confirms § 5108's application to taxation of all permanent improvements to trust land: "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 by any State or political subdivision of a State." *Id.* § 162.017(a) (emphasis added). The BIA explained that it used the phrase "without regard to ownership" "to indicate that no improvements on leased Indian land are subject to State taxation, regardless of who owns the improvements." 77 Fed. Reg. at 72,449. According to the BIA, "State and local taxation of improvements undermine Federal and tribal regulation of improvements." *Id.* at 72,448. Of course, "[i]mprovements may be subject to taxation by the Indian tribe with jurisdiction." 25 C.F.R. § 162.017(a).

B. Factual Background

1. The Fort Mojave Indian Tribe is a federally recognized Indian tribe organized under the Indian Reorganization Act. *Fort Mojave Tribe v. San Bernardino County*, 543 F.2d 1253, 1255 (9th Cir. 1976). The Fort Mojave Indian Reservation consists of 33,000 acres of desert land, spanning portions of Arizona, California, and Nevada. Pet.App.76a-77a, 145a; BIA, Southpoint Power Plant: Final Environmental Impact Statement 99 (Jan. 1999) (EIS).[2] The Secretary of Interior holds title to all of

[2] https://www.energy.gov/sites/prod/files/2015/04/f22/EIS-0308-FEIS.pdf.

the Reservation's land in trust for the Tribe's benefit. EIS at 115.

2. In 1999, the Tribe leased 320 acres of Reservation trust land to South Point for the construction of a 500-megawatt natural-gas-fired power plant (the "Facility").[3] Pet.App.23a, 74a, 143a. South Point was drawn to the Tribe's trust land in part because the Tribe had perfected water rights to the Colorado River in quantities adequate to meet the Facility's consumptive use requirements. EIS at 164-65. After the 1999 lease was executed, South Point built and operated the Facility. Pet.App.23a. In 2012, the Tribe and South Point executed an amended lease that altered the parties' financial obligations but otherwise remained substantially the same. Pet.App.24a-25a. The Facility falls entirely on Reservation trust land leased from the Tribe, within the geographical boundaries of Mohave County, Arizona. EIS at S-2. South Point owns the Facility, Pet.App.24a-25a, pictured here:[4]

[3] While the Tribe initially leased to South Point's predecessors-in-interest, South Point now owns the facility and directly leases the trust land.

[4] Appellant's Br. 16, *S. Point Energy Ctr., LLC v. Ariz. Dep't of Revenue*, 490 P.3d 372 (Ariz. Ct. App. 2021) (No. 1 CA-TX 20-0004).

The Facility would typically be subject to tribal taxes. Pet.App.134a, 202a. But the Tribe generally grants taxpayers on the Reservation a credit against tribal taxes for similar state or local taxes. Pet.App.134a, 202a. Alternatively, the Tribe allows developers to enter agreements for lump-sum payments in lieu of separately assessed annual taxes. Pet.App.134a-135a, 203a.

The Tribe and South Point settled on lump-sum payments. Under a modification to the 1999 lease, South Point agreed to pay the Tribe $2 million per year in lieu of leasehold interest taxes. Pet.App.86a, 152a. South Point made these payments in addition to payments for other items, like base rent and water rights. Pet.App.86a, 151a-152a. The 2012 lease superseded this arrangement and authorized South Point to make a lump-sum payment of $27 million, together with annual payments totaling $18 million, in satisfaction of amounts owed for the ground lease, water usage, and tribal taxes. Pet.App.88a-89a, 158a. South Point's payments helped the Tribe achieve its goal of becoming debt-free by 2017. Pet.App.133a, 201a.

3. The United States has regulated the Tribe's lease to South Point from its inception. The BIA approved each version of the lease and its modifications. Pet.App.7a; *see also* Pet.App.83a-85a, 88a, 149a-151a, 157a. The approval involved a 374-page BIA-issued Environmental Impact Statement. EIS at S-1. The BIA concluded that the Facility would bring "substantial economic benefits to the [Tribe] through the land lease revenues, water lease payments, … and employment opportunities." EIS at 31. The BIA further found that the Facility would help "fulfill stated tribal goals for economic development and self-sufficiency." EIS at 193.

The Tribe also regulates the Facility. Tribal laws required South Point to obtain water use and building permits. EIS at 4. South Point had to get certificates of occupancy from the Tribe's Building and Safety Department. Pet.App.119a, 189a. The lease required South Point to enter a compliance agreement with the Tribe regarding tribal employment preferences at the Facility. Pet.App.109a, 176a. And federal environmental laws require the Tribe to regulate South Point's on-reservation activities for emergency planning purposes. Pet.App.102a-104a, 168a-170a.

The Tribe provides the Facility with all customary government services. The Fort Mojave Tribal Police Department takes care of law enforcement. Pet.App.81a-82a, 148a. Fire and emergency-response services come from the Mohave Valley Fire Department under a service agreement with the Tribe. Pet.App.126a-127a, 195a-196a. Tribal entities provide sewer, telephone, internet, and back-up power services. Pet.App.128a-131a, 197a-200a.

4. The County admits that it has no regulatory authority over South Point, the Tribe, or on-reservation activities. Pet.App.102a, 120a-121a, 168a, 189a-191a. And

the County admits that it provides no services to the Facility. Pet.App.125a, 130a-131a, 195a, 198a-200a; *see also* Pet.App.19a.

Yet the County seeks to tax the Facility as if it were any other property within the State. Between 2010 and 2017 (and continuing to this day), the Arizona Department of Revenue centrally valued the Facility as an electric generation plant, and Mohave County assessed and collected state *ad valorem* property taxes on the Facility based on the Department's valuation. Pet.App.75a-76a, 143a-144a; *see also* Pet.App.23a. South Point timely paid these taxes, which totaled more than $20 million. Pet.App.76a, 144a; S. Point Disclosure 2-4, *S. Point Energy Ctr. LLC v. Ariz. Dep't of Revenue, et al.*, No. TX 2013-000522 (Ariz. Tax Ct. Mar. 11, 2020).

C. Procedural History

1. After entering the 1999 lease, the Tribe challenged the County's taxing authority in the U.S. District Court for the District of Arizona. South Point attempted to intervene. *Fort Mojave Indian Tribe v. Killian*, No. 02-cv-1212, slip op. at 3 (D. Ariz. Jan. 29, 2004), ECF No. 99. The district court, however, dismissed South Point's intervenor complaint for lack of jurisdiction under the Tax Injunction Act. *Id.* at 8-9. And the district court dismissed the Tribe's complaint for lack of Article III standing, reasoning that any harm to the Tribe would not be "fairly traceable" to the County's tax against South Point. *Killian*, No. 02-cv-1212, slip op. at 21 (Mar. 31, 2004), ECF No. 138.

South Point also sued the County under state law for a refund in the Arizona Tax Court. *Calpine Constr. Fin. Co. v. Ariz. Dep't of Revenue*, 211 P.3d 1228, 1231 (Ariz. Ct. App. 2009). But the Arizona Court of Appeals upheld

the tax under Arizona law because South Point, not the Tribe, owned the permanent improvements. *Id.* at 249.

2. Around the time of the 2012 lease agreement, South Point returned to the Tax Court, claiming that federal law expressly or impliedly preempts the County's tax. The Tax Court did not agree. Pet.App.62a, 69a.

The Arizona Court of Appeals, however, held that "§ 5108 establishes a categorical exemption for permanent improvements on Indian land held in trust by the United States." Pet.App.57a. The court recognized that this rule comported with the rule in the Ninth Circuit, which "held § 5108 applies to all permanent improvements on trust land, regardless of whether they are tribal-owned." Pet.App.50a (citing *Chehalis*, 724 F.3d at 1157, 1159). The court did not reach implied preemption. Pet.App.51a-52a.

The Arizona Supreme Court granted review and vacated the decision. The Arizona Supreme Court recognized that § 5108 "preempts state and local taxes imposed on [trust] land." Pet.App.42a. But the court held that § 5108 "does not preempt a state or locality from taxing [permanent] improvements" when the "lessee" of trust land "is a non-Indian." Pet.App.42a. The Arizona Supreme Court then remanded for the court of appeals to consider implied preemption. Pet.App.43a.

On remand, the Arizona Court of Appeals held that South Point was not "impliedly exempt from the County's tax." Pet.App.20a. The court rejected "the pervasiveness of federal regulation of tribal leases" as "immaterial." Pet.App.17a. The court discounted the Tribe's "interest in economic development" because, according to the court, the "legal incidence" of the tax fell on South Point. Pet.App.18a. And the court credited the County's general interest in revenue generation, even though "South Point

demands few direct services from" the County. Pet.App.19a.

The Arizona Supreme Court denied South Point's petition for discretionary review. Pet.App.1a.

REASONS FOR GRANTING THE PETITION

As tribes and tribal organizations emphasized below, this case presents "an issue of critical importance for tribal self-government and self-sufficiency." Tribes Br. 3. The Arizona Supreme Court's decision creates a direct conflict with the Ninth and Eleventh Circuits over whether federal law expressly preempts state and local taxes on non-Indian-owned permanent improvements to tribal trust land. Especially pernicious is the split with the Ninth Circuit, which subjects Arizona's 22 tribes and their business partners to conflicting rules: state and local taxes on non-Indian-owned permanent improvements to trust land in Arizona are simultaneously preempted (if in federal court) and valid (if in state court). Only this Court can end the uncertainty that threatens to chill desperately needed investment and development on tribal land.

I. The Arizona Supreme Court's Express Preemption Holding Requires This Court's Review

The Arizona Supreme Court's holding that 25 U.S.C. § 5108 does not preempt state or local taxes on permanent improvements to trust land if a non-Indian entity owns those improvements flatly contradicts the rule in the Ninth and Eleventh Circuits and demands this Court's review.

A. The Decision Below Creates an Intolerable Split Over Whether § 5108 Expressly Preempts State and Local Taxes on Non-Indian-Owned Permanent Improvements to Trust Land

Section 5108 provides that trust "lands or rights shall be exempt from State or local taxation." These trust "lands" include "permanent improvements upon [the] land" given that permanent improvements are "so intimately connected with use of the land itself." *Mescalero*, 411 U.S. at 158. In holding that § 5108 does not "exempt taxation of non-Indian-owned permanent improvements," Pet.App.36a, the Arizona Supreme Court created a direct conflict with the Ninth and Eleventh Circuits.

1. The Ninth Circuit confronted this question in *Chehalis*, which concerned a local property tax on a permanent improvement on trust land—the Great Wolf Lodge. The district court upheld the tax because, in its view, "state and local governments are not necessarily prohibited from taxing permanent improvements, like the Great Wolf Lodge, that are owned by non-Indians." 724 F.3d at 1155. The Ninth Circuit reversed, holding that § 5108 "preempts state and local taxes on permanent improvements built on" trust land "*without regard to the ownership of the improvements*." *Id.* at 1159 (emphasis added).

The Arizona Supreme Court recognized the conflict. The court posited that *Chehalis* was distinguishable because the tribe owned 51% of the LLC that owned the Great Wolf Lodge. Pet.App.38a; *see Chehalis*, 724 F.3d at 1154. Given that fact, the Arizona Supreme Court concluded that *Chehalis* stands only for the proposition that § 5108 "preemption applies to permanent improvements regardless of the ownership vehicle a *tribe* uses to own the improvements." Pet.App.39a. The Arizona Supreme

Court recognized, however, that the Ninth Circuit broadly stated that § 5108 preempts "without regard to the ownership of the improvements." Pet.App.39a (quoting *Chehalis*, 724 F.3d at 1159) (emphasis omitted). The Arizona Supreme Court stated that, if the Ninth Circuit meant that "broader reading," the Arizona Supreme Court "reject[ed]" it. Pet.App.39a.

Chehalis makes clear that the Ninth Circuit's broad language was intentional. The Ninth Circuit viewed the appeal as raising a "purely legal question," 724 F.3d at 1155, and its reasoning did not turn on the facts surrounding the Tribe's ownership of the LLC. Its analysis focused exclusively on *where* the permanent improvement sits, not *who owns* the permanent improvement: if land is "held in trust pursuant to [§ 5108]," § 5108's "exemption from state and local taxation applies to the permanent improvements on that land." *Id.* at 1157. And the court made clear that its conclusion was not limited to permanent improvements with ownership structures like the Great Wolf Lodge, as it held that the county could not "tax the Great Wolf Lodge *or other permanent improvements* on that land." *Id.* (emphasis added). Indeed, the Eleventh Circuit likewise has read *Chehalis* as "invalidat[ing] a Washington state tax on permanent improvements owned by a non-Indian corporation." *Stranburg*, 799 F.3d at 1333.

Similarly, both States and localities within the Ninth Circuit have understood *Chehalis* plainly to foreclose State taxation of non-Indian-owned permanent improvements to trust land. Citing *Chehalis*, Nevada's Department of Taxation announced that "[d]ue to recent decisions by Federal courts … any permanent improvement *owned by any person or company* and located on trust lands, are not taxable property by the State of Nevada and its subdivisions." Nev. Dep't of Tax'n, Guidance

Letter 14-001, *Taxability of Real Property Located on Tribal Lands Held in Trust by the U.S. Government* 1 (Sept. 17, 2014). Washington's State Department of Revenue similarly explained that under *Chehalis* "state and local governments cannot assess property tax on permanent improvements built on trust land" "without regard to the ownership of the improvements." Wash. State Dep't of Revenue, Property Tax Advisory 1.1.2014, *Taxation of Permanent Improvements on Tribal Trust Land* 1-2 (Mar. 31, 2014). And, following *Chehalis*, Oregon passed legislation providing that "*[r]egardless of ownership*, permanent improvements are exempt from state and local property taxes and fees … if the improvements are located on [trust] land." Or. Rev. Stat. § 307.181(2)(a). There is no doubt that, had this case been in federal court, state taxation would have been foreclosed.

2. The outcome below also would have been different in the Eleventh Circuit. In *Stranburg*, the Eleventh Circuit held that § 5108 preempted a state rental tax imposed on "non-Indian lessees" of tribal land. 799 F.3d at 1328. The Eleventh Circuit reasoned that § 5108 extends to rental taxes by equating them to taxes on permanent improvements, which it deemed unquestionably within the ambit of § 5108: "[j]ust as the use of permanent improvements on land 'is so intimately connected with use of the land itself,' … payment under a lease is intimately and indistinguishably connected to the leasing of the land itself." *Id.* at 1331 (quoting *Mescalero*, 411 U.S. at 158). The court then explained why § 5108 preempts taxes that "fall[] on the non-Indian lessees": "By the plain text of the statute, the tax exemption contained in [§ 5108] attaches to the [trust] land and the rights in that land." *Id.* at 1331 n.8. A fortiori then, § 5108 preempts state and local taxes on non-Indian-owned permanent improvements in the Eleventh Circuit.

B. The Express Preemption Question Is Important and Squarely Presented

This split over the meaning of § 5108 is enormously consequential for tribes and their business partners. And the question implicates an issue that demands a national, uniform rule.

1. The Arizona Supreme Court created an intolerable split over the meaning of a federal statute that will cause disparate outcomes based on location and court system. Most absurdly, in federal courts in Arizona, § 5108 "preempts state and local taxes on permanent improvements built on" Indian trust land, "without regard to the ownership of the improvements." *Chehalis*, 724 F.3d at 1159. But down the street in state court, § 5108 "does not preempt a state or locality from taxing the improvements" when the "lessee is a non-Indian." Pet.App.42a.

Worse, the affected parties may not be able to obtain a federal forum in the first instance. Because of the Tax Injunction Act, 28 U.S.C. § 1341, non-tribal taxpayers are stuck bringing their challenges to state taxes in state court. *See supra* p. 11. That leaves the tribes, which are not barred by the Tax Injunction Act, to challenge the tax in federal court. *See Moe v. Confederated Salish & Kootenai Tribes of Flathead Rsrv.*, 425 U.S. 463, 474-75 (1976). But tribes may not always succeed in establishing standing, as occurred in this case. *See supra* p. 11.

The decision below has therefore plunged into uncertainty the 22 federally recognized tribes in Arizona[5] and the non-Indian businesses that own permanent improvements to the tribes' trust land. For parties who entered

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[5] Ariz. Dep't of Educ., *22 Federally Recognized Tribes in Arizona*, https://www.azed.gov/oie/22-federally-recognized-tribes-arizona.

leases relying on *Chehalis*, their mutual understanding of the deal will be upended if they cannot get into federal court. And going forward, to find out which reading of federal law applies, tribes and taxpayers will be forced to put their fate in the which-court-will-we-get roulette. As the National Congress of American Indians has explained, such "uncertainty" surrounding state and local taxation has a "chilling effect on both outside and tribal investment."[6]

The geographical makeup of some tribes compounds the prospect of disparate outcomes. Numerous tribes have reservation trust land that spans several States. In Arizona, for instance, the Fort Mojave Tribe, the Navajo Nation, the Colorado River Indian Tribes, and the Quechan Tribe all occupy land in several States.[7] These tribes and their lessees will face conflicting taxation rules depending on the location of leased land within the *same tribe's* sovereign boundaries.

2. The tax status of non-Indian-owned permanent improvements to tribal trust lands is enormously

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[6] NCAI, *Supplemental Comments on ANPRM for 25 C.F.R. Part 140*, at 4 (Oct. 30, 2017), https://www.bia.gov/sites/default/files/dup/assets/as-ia/raca/pdf/40%20-%20NCAI.pdf; *see also, e.g.*, Kelly S. Croman & Jonathan B. Taylor, *Why Beggar Thy Indian Neighbor?*, JOPNA 2016-1, at 24 (May 4, 2016), https://nnigovernance.arizona.edu/sites/nnigovernance.arizona.edu/files/2024-02/2016_Croman_why_beggar_thy_Indian_neighbor.pdf.

[7] Fort Mojave Indian Tribe, *The People by the River*, https://www.fortmojaveindiantribe.com/about-us/; Bureau of Land Mgmt., *The Lands of Navajo Nation* (Nov. 30, 2020) https://www.blm.gov/blog/2020-11-30/lands-navajo-nation; Colo. River Indian Tribes, *About the Mohave, Chemehuevi, Hopi and Navajo Tribes*, https://www.crit-nsn.gov/crit_contents/about/; Inter Tribal Council of Ariz., *Quechan Tribe*, https://itcaonline.com/member-tribes/quechan-tribe/.

consequential. State taxes on permanent improvements on trust land severely undercut tribal sovereignty. "The power to tax is an essential attribute of Indian sovereignty." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982).

Moreover, as the BIA has explained, "[s]tate and local taxation of lessee-owned improvements … can impede a tribe's ability to attract non-Indian investment to Indian lands," which is "critical to the vitality of tribal economies." 77 Fed. Reg. at 72,448. "[E]mployment opportunities are few" on tribal trust land because there is "virtually no private sector." Adam Crepelle, *How Federal Indian Law Prevents Business Development in Indian Country*, 23 U. Penn. J. Bus. L. 683, 690 (2021). And the lack of "income, property, or sales" on trust land means "there is no stable tax base on most reservations." Matthew L.M. Fletcher, *In Pursuit of Tribal Economic Development as a Substitute for Reservation Tax Revenue*, 80 N.D. L. Rev. 759, 774 (2004).

The decision below puts tribes into a cruel and economically unbearable dilemma that only this Court can correct. The tribe can forgo taxing permanent improvements on trust land, for which the tribe provides utilities, law enforcement, and fire and emergency services. As the tribal amici below explained, that would mean losing out on "crucial tax revenues." Tribes Br. 19. Or the tribe can tax permanent improvements even though the improvements are subject to state and local taxes, which will "depress[] investment in projects key to the vitality of tribal communities." *Id.* That can mean the loss of facilities like South Point's, which provide the Tribe "substantial economic benefits" through "lease revenues" and "employment opportunities," and thereby help the tribe achieve its "goals for economic development and self-

sufficiency." EIS at 31, 193. And it can mean the loss of businesses that provide critical services to Indians such as grocery stores. Only this Court can restore these vital economic lifelines for tribes in Arizona and restore uniformity for other tribes across the Nation.

3. This case is the ideal vehicle to resolve the express preemption question. There are no jurisdictional or procedural barriers to this Court's review. And the question presented squarely determined the outcome in the Arizona Supreme Court. Pet.App.42a.

C. The Arizona Supreme Court's Interpretation of § 5108 Is Incorrect

The Arizona Supreme Court wrongly interpreted § 5108 as not preempting state and local taxes on non-Indian-owned permanent improvements to trust land.

1. The plain text of § 5108 displays no preference for Indian ownership. Section 5108 preempts state and local taxes on land "taken in the name of the United States in trust for" Indians. If the land is trust land, § 5108 preempts state and local taxes on that land. And permanent improvements on trust land are part of the trust land such that taxes on permanent improvements amount to taxes on the land. *Mescalero*, 411 U.S. at 158; *Rickert*, 188 U.S. at 441-42. That principle does not change depending on who owns the permanent improvement. After all, the legal incidence of a property tax falls on the *property*, not the owner. *See United States v. Allegheny County*, 322 U.S. 174, 184 (1944); *see also Peabody Coal Co. v. Navajo County*, 572 P.2d 797, 800 (Ariz. 1977) ("it is the property that owes the tax and not the owner"). And the relationship between a permanent improvement and the land is based on the improvement's permanence, not its ownership.

The BIA recognizes this basic principle. As the agency has explained, "a property tax on … improvements burdens the land, particularly if a State or local government were to attempt to place a lien on the improvement." 77 Fed. Reg. at 72,448. A BIA regulation thus provides that "permanent improvements on the leased land, *without regard to ownership of those improvements*, are not subject to" state or local taxation. 25 C.F.R. § 162.017(a) (emphasis added).

2. The Arizona Supreme Court's contrary reasoning is unpersuasive. *First*, the court reasoned that *Mescalero* does not control because *Mescalero* "concerned tribal property and tribal activities." Pet.App.36a. But ownership of the permanent improvements was not relevant to the Court's logic in *Mescalero*. *See* 411 U.S. at 158-59.

Second, the Arizona Supreme Court stated that *Rickert*, this Court's pre-§ 5108 case holding permanent improvements on trust land immune from state and local taxes, "turned on the property owners' status as Indians." Pet.App.36a. But *Rickert* did not turn on ownership; it turned on the fact that the improvements were *permanent* improvements, making them "essentially a part of the lands." 188 U.S. at 442.

Third, the Arizona Supreme Court pointed to pre-*Mescalero* cases that indicated that the Constitution does not by its own force preempt state and local taxes on non-Indian-owned permanent improvements. *See* Pet.App.36a-37a. Those cases, where preemption had no statutory basis, are irrelevant to the interpretation of § 5108.

Finally, the Arizona Supreme Court concluded that § 5108 does not apply because "the Indian beneficiary has

no possessory or use interest in the permanent improvements, and the federal government's 'lands or rights' [thus] do not include those improvements." Pet.App.38a. But permanent improvements to trust land are literally attached to the federal government's trust land. And tribes retain an interest in regulating and taxing permanent improvements on tribal trust lands even if they do not own or possess them.

II. The Arizona Court of Appeals' Implied Preemption Holding Also Merits Review

The Arizona Court of Appeals' post-remand decision on implied preemption involves questions that have divided courts and also merits this Court's review. This Court should grant review on both questions presented to give itself the broadest possible set of preemption grounds to resolve this case.

1. This Court has "rejected the proposition that in order to find a particular state law to have been preempted by operation of federal law, an express congressional statement to that effect is required." *Bracker*, 448 U.S. at 144. The normal presumption against preemption "is reversed" in this context because the "backdrop of tribal sovereignty" "free from state jurisdiction and control is deeply rooted in the Nation's history." 1 *Cohen's Handbook of Federal Indian Law* § 7.03 (citations omitted).

In this context, courts assess "the nature of the state, federal, and tribal interests at stake" to ascertain whether "the exercise of state authority would violate federal law." *Bracker*, 448 U.S. at 145. The Arizona Court of Appeals mangled its analysis of all three sets of interests.

2. State regulation implicating a "pervasive" "federal regulatory scheme" puts at issue significant federal interests. *Id.* at 148. This is true even when the federal

government does not directly regulate "the activity taxed." *Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of N.M.*, 458 U.S. 832, 839-42 & n. 5 (1982) (citation omitted); *see also Bracker*, 448 U.S. at 147-49.

The federal government has a strong interest in regulating permanent improvements on tribal trust land. "[T]he federal government administers an extensive, exclusive, comprehensive, and pervasive regulatory framework governing the leasing of Indian land," spanning "dozens of congressional statutes and federal regulations." *Stranburg*, 799 F.3d at 1341; *see supra* pp. 6-7. And the BIA specifically regulates permanent improvements on trust land. *See supra* pp. 6-7. In this case, the BIA approved each version of South Point's lease and its modifications. *See supra* p. 10. State tax authority over permanent improvements constructed pursuant to these leases frustrates the federal scheme.

In assessing the federal interests, the court below overlooked this Court's precedents and put Arizona on the wrong side of an acknowledged conflict over what establishes a legally cognizable federal interest—in particular, whether a federal regulatory scheme must directly regulate the object of state taxation to create a cognizable federal interest.

The Arizona Court of Appeals held that "the pervasiveness of federal regulation of tribal *leases* is immaterial because no aspect of the lease" itself "is subject to tax." Pet.App.17a (emphasis added). The Arizona Court of Appeals aligned itself with the California Court of Appeal, which held that "extensive" federal regulation of *leases* on Indian land did not sufficiently evince a federal interest regarding taxes on *possessory interests in property* under those leases. *Herpel v. County of Riverside*, 258 Cal. Rptr. 3d 444, 454-57 (Cal. Ct. App. 2020). The California Court

of Appeal acknowledged "that this [view] puts [it] in disagreement with courts that have described the federal interest in the context of the Leasing Regulations as similar to those in *Bracker* and *Ramah*." *Id.* at 456.

Contrary to the decision below, other courts have held that extensive federal regulation of leasing gives rise to substantial federal interests in the *Bracker* analysis even when the state tax is not imposed directly on the lease. In holding a state rental tax impliedly preempted, the Eleventh Circuit held that federal regulations concerning leasing of Indian land demonstrate a federal interest in not only state regulation of the "leasing of Indian land" itself, but also state "regulation of the activities occurring under the lease." *Stranburg*, 799 F.3d at 1339; *see also Agua Caliente Band of Cahuilla Indians v. Riverside County*, 749 F. App'x 650, 652 (9th Cir. 2019) (Watford, J., concurring) ("pervasive[]" BIA regulation of the "leasing of Indian trust lands" creates a "substantial" federal interest in taxes on "non-tribal-member lessees").

Likewise, the Eighth Circuit held that the Indian Gaming Regulatory Act's regulation of gaming activities on tribal land evinces a federal and tribal interest in avoiding state taxes on non-tribal individuals' purchases of amenities at tribal casinos, even if not "directly related to the operation of gaming activities." *Flandreau Santee Sioux Tribe v. Noem*, 938 F.3d 928, 936 (8th Cir. 2019). It sufficed that those purchases "contribute significantly to the economic success of" the gaming activities. *Id.*

What is more, the Eighth Circuit recognizes that an especially "strong[]" federal interest exists "in cases where the Federal Government has blessed the Tribe's venture." *HCI Distrib., Inc. v. Peterson*, 110 F.4th 1062, 1069 (8th Cir. 2024). The federal government blessed the

venture here, *see supra* p. 10, yet the Arizona Court of Appeals erroneously deemed the federal government's involvement in the leasing categorically "immaterial" because Arizona is not taxing the lease itself, Pet.App.17a.

3. The Arizona Court of Appeals also erred in assessing the State's interest. A State's "generalized interest in raising revenue [is not] sufficient." *Bracker*, 448 U.S. at 150; *Ramah*, 458 U.S. at 845. Even where a State provides "significant services" to a tribe, those services must be "related to" the on-reservation activity being taxed to "justify the imposition of [the] tax." *Ramah*, 458 U.S. at 845 & n.10.

Here, as in *Bracker* and *Ramah*, "this 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." *Bracker*, 448 U.S. at 150; *Ramah*, 458 U.S. at 843. The Arizona Court of Appeals acknowledged that "South Point demands few direct services from the state or Mohave County." Pet.App.19a. The County, in fact, concedes that it provides *no services* to the Facility. *See supra* pp. 10-11.

The Arizona Court of Appeals nonetheless found that the state interest in taxation outweighed the competing federal and tribal interests, pointing to the County's interest in generating revenue to pay for schools, to "maintain roads," and to provide, among other things, "flood control," "libraries," and "law enforcement." Pet.App.20a. As just discussed, that approach conflicts with *Ramah* and *Bracker*. It also conflicts with circuit-level authority. The Eleventh Circuit held that a "state's interests in a particular tax can outweigh federal tribal interests" only when the State's tax "relate[s] to services it provides *in connection with the entity and activity being taxed* and not merely serve a generalized interest in raising revenue."

Stranberg, 799 F.3d at 1337 (emphasis added). And the Eighth Circuit held that "a 'generalized interest in raising revenue' … to provide government services throughout" the State "does not outweigh … federal and tribal interests." *Flandreau Santee Sioux*, 938 F.3d at 937 (citation omitted).

4. Finally, the Arizona Court of Appeals erred in discounting the tribal interests at stake. The court held that the Tribe lacks a strong interest because South Point, not the Tribe, "bears the tax's legal incidence." Pet.App.18a. But this Court has expressly rejected the view that "the legal incidence and not the actual burden of the tax would control the pre-emption inquiry" and has deemed "it significant [if] the economic burden of the asserted taxes would ultimately fall on the Tribe, even though the legal incidence of the tax was on the non-Indian" entity. *Ramah*, 458 U.S. at 844 n.8. The tax here imposes real burdens on the Tribe. *See supra* pp. 9-11.

The court below believed that this Court's decision in *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989), supported its narrow approach to measuring tribal interests. Pet.App.18a-19a. *Cotton Petroleum*, however, did not direct courts to categorically ignore taxes' true impacts on a tribe. The Eleventh Circuit has therefore considered indirect economic burdens on a tribe in conducting the *Bracker* analysis. *See Stranburg*, 799 F.3d at 1340-41.

* * *

The court's one-sided analysis of each factor tipped the analysis in the State's favor. Under the court's analysis, it is difficult to conceive of *any* situation in which a state or local tax could be impliedly preempted, making *Bracker* preemption meaningless. The implied preemption question implicates the same weighty interests that

undergird the express preemption question. At the very least, this Court should grant review on both questions presented to have all possible arguments available to the Court on the merits.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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MARCH 3, 2025

APPENDIX

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APPENDIX A

Supreme Court

STATE OF ARIZONA

ANN A. SCOTT TIMMER
Chief Justice

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TRACIE K. LINDEMAN
Clerk of the Court

December 4, 2024

RE: SOUTH POINT v ADOR et al
Arizona Supreme Court No. CV-24-0076-PR
Court of Appeals, Division One No. 1 CA-TX 20-0004
Arizona Tax Court No. TX2013-000522
Arizona Tax Court No. TX2016-001228
Arizona Tax Court No. TX2017-001744
Arizona Tax Court No. TX2018-000019
Arizona Tax Court No. TX2019-000086
Arizona Tax Court No. TX2014-000451
Arizona Tax Court No. TX2015-000850

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on December 3, 2024, in regard to the above-referenced cause:

ORDERED: Petition for Review = DENIED.

FURTHER ORDERED: Request for Attorneys' Fees (Appellant South Point Energy) = DENIED.

Tracie K. Lindeman, Clerk

TO:
Patrick Derdenger
Karen M. Jurichko Lowell
Bennett Evan Cooper
Vail Cloar
Cameron C. Artigue
Christopher L. Hering
Amy M. Wood
eg

APPENDIX B

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

SOUTH POINT ENERGY CENTER LLC,
Plaintiff/Appellant,

v.

ARIZONA DEPARTMENT OF REVENUE, et al.,
Defendants/Appellees.

No. 1 CA-TX 20-0004
FILED 3-19-2024

Appeal from the Arizona Tax Court
No. TX2013-000522
TX2014-000451
TX2015-000850
TX2016-001228
TX2017-001744
TX2018-000019
TX2019-000086
(Consolidated)

The Honorable Christopher T. Whitten, Judge

AFFIRMED

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OPINION

Judge Cynthia J. Bailey delivered the opinion of the Court, in which Presiding Judge Paul J. McMurdie and Judge D. Steven Williams joined.

B A I L E Y, Judge:

¶1 Plaintiff South Point Energy Center, LLC ("South Point") appeals the tax court's summary judgment for the Arizona Department of Revenue ("ADOR") and Mohave County (collectively, "the County"). South Point argues that the tax court erred in concluding that the County's valuation and taxation of South Point's electric power generating plant ("the Plant") is not preempted under *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980). The issue comes to us on remand from the Arizona Supreme Court, which directed us to consider whether applying the *Bracker* interest-balancing test evidences Congress's implicit intent to preempt taxing the Plant—a question previously raised by South Point on appeal but not decided by this court. *See S. Point Energy Ctr. LLC v. Ariz. Dep't of Revenue* (*South Point I*), 251 Ariz. 263, 268, ¶ 24 (App. 2021), *vacated in part and remanded by S. Point Energy Ctr. LLC v. Ariz. Dep't of Revenue* (*South Point II*), 253 Ariz. 30, 39, ¶¶ 37–38 (2022). For the following reasons, we affirm the tax court, which correctly ruled that the Plant is not exempt from the County's tax under *Bracker*.

FACTS AND PROCEDURAL HISTORY[1]

¶2 In 1999, Calpine Construction Finance Co. ("Calpine"), a non-Indian-owned entity, leased 320 acres of undeveloped land on a long-term basis from the Fort Mojave Indian Tribe ("the Tribe") to build and operate the Plant on reservation land. Beginning operations in 2001, the Plant is a "merchant plant" that sells electrical energy to public and private utility companies for resale to end-users. It does not supply electrical power to the Tribe or any person or entity on the reservation. The Tribe did not finance the Plant and does not contribute any operating funds.

¶3 Mohave County then assessed ad valorem property taxes against the Plant based on valuations determined by ADOR. *See* former Ariz. Const. art. 9, § 2(13) ("All property in the state not exempt under the laws of the United States or under this constitution or exempt by law under the provisions of this section shall be subject to taxation to be ascertained as provided by law.")[2]; *accord* Ariz. Rev. Stat. ("A.R.S.") § 42-11002. ADOR assessed the value of the Plant itself and the personal property used to operate the Plant; ADOR did not assess the value of the underlying land.

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[1] The facts set out in this section are largely taken from our supreme court's opinion in *South Point II*. *See* 253 Ariz. at 31–33, ¶¶ 2–8.

[2] In the November 8, 2022 general election, voters approved Proposition 130 to amend the Arizona Constitution with regard to property tax exemption provisions. Article 9, Section 2, of the Arizona Constitution was amended effective December 5, 2022, to reflect the results of the election, and Section 2(A) now provides: "All property in this state that is not exempt under the laws of the United States or under this section is subject to taxation as provided by law."

¶4 Calpine paid the taxes and unsuccessfully sued for a refund, arguing the Tribe, as lessor, owned all improvements to the leased property, thereby exempting the Plant from state taxation according to federal law. *See Calpine Constr. Fin. Co. v. Ariz. Dep't of Revenue*, 221 Ariz. 244, 249, ¶ 22 (App. 2009); *see also Cass Cnty. v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 110 (1998) ("State and local governments may not tax Indian reservation land 'absent cession of jurisdiction or other federal statutes permitting it.'" (quoting *Cnty. of Yakima v. Confederated Tribes & Bands of Yakima Nation*, 502 U.S. 251, 258 (1992))). On appeal, this court acknowledged the general rule that a lessor owns all real property improvements made by a lessee, but concluded the parties' lease varied that rule by providing that Calpine owned all improvements. *Calpine Constr.*, 221 Ariz. at 248, ¶¶ 16–17. Consequently, this court affirmed the tax court's judgment that Calpine was liable for property taxes based on the value of the Plant and related personal property. *See id.* at 246, ¶ 1.

¶5 After a series of transactions involving Calpine and several of its related entities, the Tribe's land and the Plant were sublet to South Point, another Calpine-related entity, with the Tribe's consent and approval by the United States Bureau of Indian Affairs ("the BIA"). In 2012, the Tribe and Calpine's successor-lessees, which are included in references to "South Point," executed an amended lease that remained in place during this lawsuit. The amended lease provides that no partnership exists between the Tribe and South Point. The amended lease also reaffirms that the Plant and "all [i]mprovements and associated materials, supplies, and equipment" are "owned and controlled" by South Point, and that at the

expiration of the lease, South Point must remove all above-ground real property improvements and personal property, excepting roads and foundations.

¶6 The amended lease contemplates that ad valorem property taxes may be assessed on the Plant. In addition, the amended lease requires South Point to timely pay all taxes levied by any governmental entity to prevent the imposition of any liens and to hold the Tribe harmless against any imposed liens. The BIA approved the amended lease.

¶7 South Point initiated these consolidated lawsuits seeking a refund of payments for property taxes imposed from 2010 to 2018, to the extent they were based on valuations of the Plant. *See* A.R.S. § 42-11005 (authorizing a lawsuit to recover illegally levied, assessed, or collected taxes). South Point did not challenge the tax assessments based on ownership of the Plant, as Calpine did in its earlier lawsuit. Instead, South Point argued that § 5 of the Indian Reorganization Act of 1934 ("the Act"), *see* 25 U.S.C. § 5108 (former 25 U.S.C. § 465), expressly preempts states from imposing property taxes on any real property improvements, regardless of ownership, located on land held in trust by the federal government to benefit Indian tribes or individual Indians. Alternatively, South Point argued that applying the balancing test announced in *Bracker* demonstrates Congress's implicit intent to preempt taxing the Plant.

¶8 The tax court rejected both of South Point's arguments and granted summary judgment for the County. We reversed, concluding § 5 of the Act expressly and categorically exempted permanent improvements on the Tribe's land from state taxation regardless of ownership. *See South Point I*, 251 Ariz. at 269, ¶ 30. We

remanded for the tax court to conduct an analysis under *Whiteco Industries, Inc. v. Commissioner*, 65 T.C. 664 (1975),[3] to determine which, if any, of the assets making up the Plant constituted permanent tax-exempt improvements. *South Point I*, 251 Ariz. at 269, ¶ 30. We did not apply the *Bracker* balancing test but directed the tax court to do so in considering whether property taxes on the Plant's impermanent assets were preempted. *Id.*

¶9 The Arizona Supreme Court granted the County's petition for review to decide whether the Act's § 5 "expressly preempts taxing permanent improvements constructed on tribal lands acquired under that section when those improvements are owned by non-Indians." *South Point II*, 253 Ariz. at 33, ¶ 9. The supreme court then vacated a portion of our opinion, holding that the Act does not expressly preempt Mohave County's ad valorem property tax on the Plant. *Id.* at 31, 39, ¶¶ 1, 37–38. The court remanded the case to this court, *see* ARCAP 23(m)(2), to decide the remaining issue we had not addressed: "whether the tax court correctly ruled that the Plant is also not impliedly exempt from the County's tax under *Bracker*," *South Point II*, 253 Ariz. at 39, ¶ 37.

¶10 On remand, we ordered additional briefing by the parties and invited other interested parties to file amicus briefs, setting forth their respective positions on the issue.[4] We now address the question presented to us on

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[3] Whether an asset is a permanent improvement or personal property turns on the guidelines set out in *Whiteco*. *See* 65 T.C. at 672–73. *See also PPL Corp. v. Comm'r*, 135 T.C. 176, 193–97 (2010); *Trentadue v. Comm'r*, 128 T.C. 91, 99–108 (2007).

[4] At oral argument on remand, the parties agreed that we need not remand for a *Whiteco* analysis.

remand, and after consideration of *Bracker* and its progeny, we affirm the tax court.

DISCUSSION

¶11 "We review the tax court's entry of summary judgment de novo, viewing the facts in the light most favorable to South Point as the nonmoving party." *South Point II*, 253 Ariz. at 33, ¶ 10 (citing *Dinsmoor v. City of Phoenix*, 251 Ariz. 370, 373, ¶ 13 (2021)). We will affirm if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* (citing *Dinsmoor*, 251 Ariz. at 373, ¶ 13; Ariz. R. Civ. P. 56(a)).

¶12 Preemption is a question of law, and we can decide the issue "based on a *de novo Bracker* analysis of the record before us." *Seminole Tribe of Fla. v. Stranburg*, 799 F.3d 1324, 1329 (11th Cir. 2015). The burden rests on South Point, as plaintiff, to prove implied federal preemption of state law. *See Pickerel Lake Outlet Ass'n v. Day Cnty.*, 953 N.W.2d 82, 92, ¶ 23 (S.D. 2020).

¶13 Our primary goal in interpreting federal statutes is to determine and give effect to Congress's intent. *See Steven H. v. Ariz. Dep't of Econ. Sec.*, 218 Ariz. 566, 570, ¶ 14 (2008) (citing federal cases). We read words within the statutory context and aim to bring about the plain, logical meaning of a statute unless doing so would bring about an absurd result. *See Conroy v. Aniskoff*, 507 U.S. 511, 515–16 (1993); *Armstrong Paint & Varnish Works v. Nu-Enamel Corp.*, 305 U.S. 315, 332–33 (1938); *Welch v. Cochise Cnty. Bd. of Supervisors*, 251 Ariz. 519, 523, ¶ 11 (2021). If the language is ambiguous, we consider secondary interpretive principles, such as an act's subject matter, history, and purpose, and the consequences of differing interpretations. *See Conroy*, 507 U.S. at 516–18;

United States v. Am. Trucking Ass'ns, 310 U.S. 534, 543–44 (1940); *Welch*, 251 Ariz. at 523, ¶ 11.

¶14 By statute, the United States Secretary of the Interior can acquire "any interest in lands, water rights, or surface rights to lands, within or without existing reservations . . . for the purpose of providing land for Indians." 25 U.S.C. § 5108. This statute further provides that "[t]itle to any lands or rights acquired . . . 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. § 5108.

¶15 In *South Point II*, our supreme court determined that although § 5 of the Act "preempts state and local taxes imposed on land and rights acquired by the Secretary of the Interior and titled in the name of the United States in trust for Indian tribes or individual Indians," "[w]hen that lessee is a non-Indian, § 5 does not preempt a state or locality from taxing the improvements." 253 Ariz. at 39, ¶ 36. Thus, under the facts present here, no express authorization for preemption exists under § 5 of the Act. But express authorization is not necessarily required for preemption to apply. *See Bracker*, 448 U.S. at 144. "In the absence of express pre-emptive language, Congress' intent to pre-empt all state law in a particular area may be inferred where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary state regulation." *Hillsborough Cnty. v. Automated Med. Laboratories, Inc.*, 471 U.S. 707, 713 (1985) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). We will not, however, lightly presume that preemption exists.

See Washington v. Confederated Tribes of Colville Indian Rsrv., 447 U.S. 134, 155–56 (1980).

¶16 *Bracker* imposes a balancing test that applies when "a State asserts authority over the conduct of non-Indians engaging in activity on the reservation." 448 U.S. at 144. To determine whether a state or local tax on non-Indians doing business on the reservation is preempted, a court undertakes 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." *Id.* at 145; *accord Dep't of Tax'n & Fin. of N.Y. v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 73 (1994) ("Resolution of conflicts of this kind does not depend on 'rigid rules' or on 'mechanical or absolute conceptions of state or tribal sovereignty,' but instead on 'a particularized inquiry . . . .'" (quoting *Bracker*, 448 U.S. at 142, 145)). In balancing these interests, "[t]he traditional notions of Indian sovereignty provide a crucial 'backdrop' against which any assertion of State authority must be assessed," as does the fact that "both the tribes and the Federal Government are firmly committed to the goal of promoting tribal self-government, a goal embodied in numerous federal statutes." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334–35 (1983) (internal citations omitted). If the state authority "interferes or is incompatible with" federal and tribal interests, the state authority will be preempted, "unless the State interests at stake are sufficient to justify the assertion of State authority." *Id.* at 334 (citations omitted).

¶17 In applying *Bracker*, courts must consider "(1) the extent of the federal and tribal regulations governing the taxed activity; (2) whether the 'economic burden' of the

tax falls on the tribe or the non-Indian individual or entity; and (3) the extent of the state interest in justifying the imposition of the taxes." *Ute Mountain Ute Tribe v. Rodriguez*, 660 F.3d 1177, 1187 (10th Cir. 2011). A federal statutory scheme, agency regulations, and day-to-day agency supervision can "inform the federal and tribal interests" and "signal a federal regulatory scheme that is so pervasive that it preempts the state tax." *Seminole Tribe*, 799 F.3d at 1337 (citing *Bracker*, 448 U.S. at 145–48). Further, a tax may be impermissible when "a number of the policies underlying the federal regulatory scheme are threatened" by its application, and the taxing authority is "unable to justify the taxes except in terms of a generalized interest in raising revenue." *Bracker*, 448 U.S. at 151.

¶18 Courts have applied the *Bracker* interest-balancing test in several circumstances involving the imposition of state or local taxes on non-Indians. *See, e.g., Yavapai–Prescott Indian Tribe v. Scott*, 117 F.3d 1107, 1111–12 (9th Cir. 1997) (ruling against preemption of state transaction privilege taxes on lodging, food, and beverage sales on tribal land); *Gila River Indian Cmty. v. Waddell*, 91 F.3d 1232, 1236, 1239 (9th Cir. 1996) (allowing transaction privilege taxes on tickets and concessionary items at a raceway and concert center on tribal land); *Salt River Pima–Maricopa Indian Cmty. v. Arizona*, 50 F.3d 734, 736, 738 (9th Cir. 1995) (holding that taxes on sales to non-Indians by a non-Indian business on Indian land were not preempted). *But see Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of N.M.*, 458 U.S. 832, 841–43 (1982) (holding that a tax imposed on the gross receipts that a non-Indian construction company received from a tribal school board for the construction of a school for Indian

children on the reservation was preempted because the Interior Department had a detailed regulatory plan for Indian schooling and the State of New Mexico had declined to take any responsibility for the education of the Indian children).

¶19 None of the aforementioned cases dealt with a property tax like the one at issue, however. In *Seminole Tribe*, an Indian tribe sued the Florida Department of Revenue executive director, challenging the imposition of a rental tax on rent paid to the tribe by non-Indian lessees for the use of commercial space at the tribe's casinos. 799 F.3d at 1326–27. The 11th Circuit Court of Appeals held that the tax was preempted, partly because it was a tax on "*a right in land*" rather than a tax on economic activity or tangible property removed from the land. *Id.* at 1331–32. In effect, *Seminole Tribe* held that the leases were so connected to the land that their taxation amounted to taxation of the land itself. *Id.* at 1329, 1331. Similarly, in *Confederated Tribes of Chehalis Reservation v. Thurston County Board of Equalization*, the Ninth Circuit Court of Appeals barred property taxes on permanent improvements on non-reservation Indian trust lands. 724 F.3d 1153, 1159 (9th Cir. 2013).

¶20 This case is distinguishable from *Seminole Tribe* and *Chehalis*. Here, the amended lease provides that the Plant and related operating equipment are owned and controlled by South Point, which must remove all above-ground real property improvements and personal property, except roads and foundations, at the expiration of the lease. And neither the land itself nor South Point's leasehold interest in the land is a factor in the tax because (1) in determining the tax, ADOR assessed only the value of the Plant itself and the personal property used to

operate it and did not assess the value of the underlying land, and (2) the amended lease provides that no partnership exists between the Tribe and South Point. Since land owned by the Tribe is exempt from state property taxes, no portion of the fee interest, including South Point's leasehold interest, is taxed.

¶21 South Point relies on United States Department of the Interior/BIA regulations—and specifically 25 C.F.R. § 162.017(a)—as support for its preemption argument. Recently, the South Dakota Supreme Court upheld an ad valorem property tax assessed by a local taxing authority on non-Indian owners of structures and permanent improvements located on Indian trust land. *See Pickerel Lake*, 953 N.W.2d at 85, ¶ 1.[5] In considering the extent of the regulations governing the taxed activity, the court rejected reliance on 25 C.F.R. § 162.017(a) as authority for implied preemption, concluding that "Congress has not authorized the BIA to preempt the State's authority to tax structures owned by non-Indians." *Pickerel Lake*, 953 N.W.2d at 92–93, ¶¶ 25–29; *see also South Point II*, 253 Ariz. at 39, ¶ 35 (holding that "the regulation itself [25 C.F.R. § 162.017(a)] cannot preempt the County's tax" and "we have no need to defer to the Department of Interior's interpretation" (citations omitted)). The *Pickerel Lake* court further concluded that any preemptive language in the federal regulations should have no impact on its

[5] The court applied what it deemed a "standard preemption analysis" rather than a *Bracker* analysis after noting (1) the parties agreed *Bracker* did not apply, (2) the Tribe had not intervened, and (3) the record contained no evidence that (a) tribal interests weighed against the county's taxation authority with respect to non-Indian lessees, (b) the county's separate ad valorem tax affected the Tribe's ability to lease the land, or (c) the taxes had otherwise impacted tribal interests. *Pickerel Lake*, 953 N.W.2d at 88, ¶ 12.

analysis and found "little evidence of congressional intent to supersede the State's authority." 953 N.W.2d at 93, ¶ 30 (citing *Wyeth v. Levine*, 555 U.S. 555, 576 (2009)); *see also South Point II*, 253 Ariz. at 39, ¶ 35 ("The Department of Interior has taken the position in other cases that '§ 162.017 has no legal effect at all,' and . . . is 'agnostic' on whether any specific state tax is preempted." (citing *Desert Water Agency v. U.S. Dep't of the Interior*, 849 F.3d 1250, 1254–55 (9th Cir. 2017) (adopting the view that the phrase "[s]ubject only to applicable Federal law" in the regulation means subject to a *Bracker* analysis))).

¶22 The court also reasoned that although the federal government retains exclusive power to regulate Indian affairs, it "has asserted little to no regulatory power in the area of state-imposed ad valorem taxes on structures owned by non-Indians," and "[i]t is generally within the province of the State to assess property taxes." *Pickerel Lake*, 953 N.W.2d at 94, ¶ 31 (citations omitted). The court noted that courts "presume that 'Congress does not intend to pre-empt areas of traditional state regulation,'" and "assume the State retains its historic power to regulate by imposing state and local taxes." *Id.* (citations omitted). Finally, in concluding that implied preemption did not apply, the *Pickerel Lake* court held: "Because there is little or no federal regulatory scheme in place with respect to property taxes, and because the State's taxation does not implicate Indians or their tribes, thereby implicating federal law, the State's assessment of nondiscriminatory ad valorem property taxes against structures owned exclusively by non-Indians [on Indian trust land] is not [impliedly] preempted by federal law." *Id.* at ¶ 32. *See also N. Border Pipeline Co. v. State*, 772 P.2d 829, 835 (Mont. 1989) (upholding a state property tax on a pipeline

crossing tribal land); *Thomas v. Gay*, 169 U.S. 264, 273–74 (1898) (holding that Oklahoma could tax cattle owned by non-Indian lessees of Indian land and rejecting the suggestion that the tax constituted a tax on the land); *Utah & N. Ry. Co. v. Fisher*, 116 U.S. 28, 29–30, 33 (1885) (upholding a territorial tax of a section of a non-Indian's railroad that crossed onto reservation land, reasoning that the tax did not interfere with tribal sovereignty).[6]

¶23 The truisms relied on by the *Pickerel Lake* court apply here as well, and South Point points to nothing about the federal regulation of power plants that is more extensive or intensive when a plant is on tribal land or how a particularized inquiry into the nature of the federal, tribal, and state interests at stake leads to the conclusion that the tax is preempted. *See generally Ute Mountain Ute Tribe*, 660 F.3d at 1187. As the tax court noted, the pervasiveness of federal regulation of tribal leases is immaterial because no aspect of the lease is subject to tax, and federal regulation of power plants applies to all power plants regardless of their location; thus, if state or local taxation of power plants on reservations is preempted, state taxation on every other power plant would also be preempted.

¶24 As for whether the economic burden of the County's property tax falls on the non-Indian entity (South Point) or the Tribe, *see id.*, it is clear the tax is being levied on the Plant and related improvements, all of which are wholly and separately owned by South Point,

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[6] *Bracker* cited both *Thomas* and *Fisher* but did not overrule either case. *See* 448 U.S. at 142, 145; *see also Mashantucket Pequot Tribe v. Town of Ledyard*, 722 F.3d 457, 472 (2d Cir. 2013) (concluding that "*Thomas* [and other pre-*Bracker* non-Indian lessee cases] inform[]" but do not forgo a *Bracker* analysis).

and not on the land, which the Tribe owns, and that no partnership exists between South Point and the Tribe. Thus, South Point is the actual taxpayer and bears the tax's legal incidence. *See Circle K Stores, Inc. v. Apache Cnty.*, 199 Ariz. 402, 407, ¶ 13 (App. 2001). Moreover, the United States Supreme Court has rejected the argument that when the federal government's or a tribe's interest in economic development on reservations—and the associated profitability that comes with that interest—might be indirectly affected, that indirect burden supports granting non-Indian contractors immunity from state or local taxation:

> It is, of course, reasonable to infer that the existence of the state tax imposes some limit on the profitability of Indian oil and gas leases—just as it no doubt imposes a limit on the profitability of off-reservation leasing arrangements—but that is precisely the same indirect burden that we rejected as a basis for granting non-Indian contractors an immunity from state taxation in *Helvering v. Mountain Producers Corp.*, 303 U.S. 376 (1938); *Oklahoma Tax Comm'n v. United States*, 319 U.S. 598 (1943); *Oklahoma Tax Comm'n v. Texas Co.*, 336 U.S. 342 (1949); *Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U.S. 463 (1976); and *Colville*, 447 U.S. at 134.

Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 191 (1989) (citations cleaned up); *accord Waddell*, 91 F.3d at 1239 (concluding that indirect economic effects, including those flowing from double taxation, were insufficient grounds to preempt a state tax). As the Supreme Court previously stated in *Colville*, "We do not believe that

principles of federal Indian law, whether stated in terms of pre-emption, tribal self-government, or otherwise, authorize Indian tribes thus to market an exemption from state taxation to persons who would normally do their business elsewhere." 447 U.S. at 155.

¶25 Moreover, no salient argument exists that should the property tax not be paid, the State could impose a tax lien on the underlying real property, thereby damaging the Tribe. We cannot see how a tax lien could be imposed on land exempt from taxation, and A.R.S. § 42-17153 provides that "a tax that is levied on real or personal property is *a lien on the assessed property*." (Emphasis added.) Under the amended lease, South Point's property never becomes part of the land, so the Tribe's land is not part of the assessed property.

¶26 Finally, as to the extent of the state interest in justifying the imposition of the taxes, *see Ute Mountain Ute Tribe*, 660 F.3d at 1187, we conclude that although South Point demands few direct services from the state or Mohave County, there has also been no complete declination of responsibility for services as found to exist in *Ramah Navajo School Board*, *see* 458 U.S. at 843–45, *cited in Cotton Petroleum*, 490 U.S. at 184–87. As the *Cotton Petroleum* court recognized, there is no "proportionality requirement" imposed on the taxing authority, and preemption should occur only when there has been a "complete abdication or noninvolvement" by the state or County. 490 U.S. at 185.

¶27 Here, the tax revenue supports local services that help South Point, its employees, and the Tribe, including "services on the reservation" and "services off the reservation that benefit the reservation and members of the Tribe." *See id.* at 171 n.7, 185 (relying on the trial

court's factual findings to distinguish the case from *Bracker* and *Ramah Navajo School Board*). For example, the tax revenue supports the local school districts, and both tribal-member children and children of South Point non-Indian employees attend schools in these districts. *See N. Border Pipeline*, 772 P.2d at 835 (finding no preemption because "the State's interest in funding the school districts involved here and providing local services outweighs the federal/tribal interests asserted"). Additionally, the tax helps Mohave County maintain roads that provide important and commonly used access to the Plant. Revenue from the tax also supports numerous other state and County services—some of which aid the reservation—including flood control, law enforcement and emergency planning, local fire districts, libraries, the County Recorder, and the Arizona Corporation Commission's oversight and inspection of the pipelines used to fuel the Plant. A substantial state interest exists justifying the imposition of the taxes, and the funding of these numerous services militates against finding an implied preemption of the County's tax. Accordingly, application of the interest-balancing test announced in *Bracker* does not establish Congress's implicit intent to preempt taxing the Plant.

CONCLUSION

¶28 We affirm the tax court, which correctly ruled that the Plant is not impliedly exempt from the County's tax under *Bracker*.

AMY M. WOOD • Clerk of the Court
FILED: AA

APPENDIX C

IN THE
SUPREME COURT OF THE STATE OF ARIZONA

SOUTH POINT ENERGY CENTER LLC,
Plaintiff/Appellant,

v.

ARIZONA DEPARTMENT OF REVENUE, ET AL.,
Defendants/Appellees.

No. CV-21-0130-PR
Filed April 26, 2022

Appeal from the Arizona Tax Court
The Honorable Christopher T. Whitten, Judge
Nos. TX2013-000522, TX2014-000451, TX2015-000850,
TX2016-001228, TX2017-001744, TX2018-000019,
TX2019-000086 (Consolidated)

Opinion of the Court of Appeals, Division One
251 Ariz. 263 (App. 2021)

VACATED IN PART AND REMANDED

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VICE CHIEF JUSTICE TIMMER authored the opinion of the Court, in which CHIEF JUSTICE BRUTINEL and JUSTICES BOLICK, LOPEZ, BEENE, MONTGOMERY, and KING joined.

VICE CHIEF JUSTICE TIMMER, opinion of the Court:

¶1 The issue here is whether the Indian Reorganization Act of 1934 (the "Act") expressly preempts Mohave County's ad valorem property tax on a power plant owned by non-Indian lessees of land purportedly acquired by the federal government under the Act and held in trust for the benefit of an Indian tribe. We hold the Act does not expressly preempt this tax.

BACKGROUND

¶2 In 1999, Calpine Construction Finance Co. ("Calpine"), a non-Indian-owned entity, leased 320 acres of undeveloped land on a long-term basis from the Fort Mojave Indian Tribe (the "Tribe") to construct and operate an electric power generating plant (the "Plant") on reservation lands. The Plant, which began operating in 2001, is a "merchant plant" that sells electrical energy to public and private utility companies for resale and redistribution to end-users. It does not supply electrical energy to the Tribe or to any person or entity located on the reservation. The Tribe did not finance the Plant's construction and does not contribute any operating funds.

¶3 After the Plant was built, Mohave County assessed ad valorem property taxes against the Plant based on valuations determined by the Arizona Department of Revenue ("ADOR"). *See* Ariz. Const. art. 9, § 2(13) ("All property in the state not exempt under the laws of the United States or under this constitution or exempt by law under the provisions of this section shall be subject to taxation to be ascertained as provided by law."); A.R.S.

§ 42-11002 (to same effect). ADOR assessed only the value of the Plant itself and the personal property used to operate it; ADOR did not assess the value of the underlying land.

¶4 Calpine paid the taxes and unsuccessfully sued for a refund, arguing the Tribe, as lessor, owned all improvements to the leased property, thereby exempting the Plant from state taxation pursuant to federal law. *See Calpine Constr. Fin. Co. v. Ariz. Dep't of Revenue*, 221 Ariz. 244, 249 ¶ 22 (App. 2009); *see also Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 110 (1998) ("State and local governments may not tax Indian reservation land 'absent cession of jurisdiction or other federal statutes permitting it.'" (quoting *County of Yakima v. Confederated Tribes & Bands of Yakima Nation*, 502 U.S. 251, 258 (1992))). In the ensuing appeal, the court of appeals acknowledged the general rule that a lessor owns all real property improvements made by a lessee but concluded the parties' lease varied that rule by providing that Calpine owns all improvements. *Calpine Constr.*, 221 Ariz. at 248 ¶¶ 16–17. Consequently, the court affirmed the tax court's judgment that Calpine was liable for property taxes based on the value of the Plant and related personal property. *See id.* at 246 ¶ 1.

¶5 After a series of transactions involving Calpine and several of its related entities, the Tribe's land and the Plant were sublet to South Point Energy Center LLC ("South Point"), another Calpine-related entity, with the Tribe's consent and approval by the Bureau of Indian Affairs (the "BIA"). In 2012, the Tribe and Calpine's successor-lessees, which we include in our references to "South Point" for convenience, executed an amended lease, which remained in place during this lawsuit. Among

other things, the amended lease provides that no partnership exists between the Tribe and South Point. It further reaffirms that the Plant and "all [i]mprovements and associated materials, supplies, and equipment" are "owned and controlled" by South Point, and that at the expiration of the lease, South Point must remove all above-ground real property improvements and personal property, excepting roads and foundations.

¶6 The amended lease contemplates that ad valorem property taxes may be assessed on the Plant. The lease requires South Point to timely pay all taxes levied by any governmental entity to prevent imposition of any liens and to hold the Tribe harmless against any liens that are imposed. The BIA approved the amended lease.

¶7 South Point initiated these consolidated lawsuits seeking a refund of payments for property taxes imposed from 2010 to 2018, to the extent they were based on valuations of the Plant. *See* A.R.S. § 42-11005 (authorizing suit to recover illegally levied, assessed, or collected taxes). South Point does not challenge the tax assessments based on ownership of the Plant, as Calpine did in its earlier lawsuit. Instead, South Point argues that § 5 of the Act, 25 U.S.C. § 5108, expressly preempts states from imposing property taxes on any real property improvements, regardless of ownership, located on land held in trust by the federal government for the benefit of Indian tribes or individual Indians. Alternatively, South Point argues that application of a balancing test announced in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), evidences Congress's implicit intent to preempt taxing the Plant.

¶8 The tax court rejected both of South Point's arguments and granted summary judgment for Mohave County and ADOR (collectively, the "County"). The court of appeals reversed, reasoning that § 5 of the Act expressly and categorically exempts permanent improvements on the Tribe's land from state taxation regardless of ownership. *S. Point Energy Ctr. LLC v. Ariz. Dep't of Revenue*, 251 Ariz. 263, 269 ¶ 30 (App. 2021). It remanded for the tax court to determine which, if any, of the assets making up the Plant constitute the tax-exempt permanent improvements. *Id.* The court did not itself apply the balancing test under *Bracker* but instead instructed the tax court to do so in considering whether property taxes on the Plant's impermanent assets were taxable. *Id.*

¶9 We granted review to decide whether § 5 of the Act expressly preempts taxing permanent improvements constructed on tribal lands acquired under that section when those improvements are owned by non-Indians, an issue of statewide importance.

DISCUSSION

I.

¶10 We review the tax court's entry of summary judgment de novo, viewing the facts in the light most favorable to South Point as the nonmoving party. *Dinsmoor v. City of Phoenix*, 251 Ariz. 370, 373 ¶ 13 (2021). We will affirm if there is no genuine dispute of material fact and the State is entitled to judgment as a matter of law. *Id.*; Ariz. R. Civ. P. 56(a). We review the prior courts' preemption decisions and their

interpretation of § 5 of the Act de novo as issues of law. *See Conklin v. Medtronic, Inc.*, 245 Ariz. 501, 504 ¶ 7 (2018) (preemption); *Brenda D. v. Dep't of Child Safety*, 243 Ariz. 437, 442 ¶ 15 (2018) (statutory interpretation).

II.

A.

¶11 The Supremacy Clause of the United States Constitution makes valid federal laws predominate over conflicting state laws. *See* U.S. Const. art. 6, cl. 2. Within constitutional limits, Congress may generally preempt application of state law in a few ways, including "by so stating in express terms," which is known as "express preemption." *See Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 203–04 (1983) (describing different types of preemption). In deciding whether state laws apply to non-Indian activities conducted on an Indian reservation, the Court in *Bracker* provided an additional pathway for finding federal preemption. 448 U.S. at 144–45. A court faced with a preemption challenge in that circumstance, absent express preemption, should make "a particularized inquiry into the nature of the state, federal, and tribal interests at stake . . . to determine whether, in the specific context, the exercise of state authority would violate federal law." *Id.* If so, the state law is impliedly preempted. *See id.*; *see also Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 176–77 (1989) ("It bears emphasis that although congressional silence no longer entails a broad-based immunity from taxation for private parties doing business with Indian tribes, federal preemption is not limited to cases in which Congress has

expressly—as compared to impliedly—preempted the state activity.").

¶12 The only issue before us is whether § 5 of the Act expressly preempts application of Arizona's ad valorem tax laws against the Plant. *See Confederated Tribes of Chehalis Rsrv. v. Thurston Cnty. Bd. of Equalization*, 724 F.3d 1153, 1159 (9th Cir. 2013) (stating that when § 5 of the Act applies to preempt taxation, there is no need to consider implied preemption under *Bracker*).

B.

¶13 Section 5 of the Act provides in relevant part:

> The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.
>
> . . . .
>
> Title to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955 (69 Stat. 392), as amended (25 U.S.C. 608 et seq.) 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. § 5108 (emphasis added). South Point argues that the above-emphasized language categorically exempts the Plant from the County's property tax regardless of ownership. The County asserts that because the Plant is not owned by the United States in trust for the Tribe or for individual Indians, the Plant is not included in "such lands or rights" exempt from tax under § 5.

¶14 Our primary goal in interpreting § 5 is to determine and give effect to Congress's intent. *See Steven H. v. Ariz. Dep't of Econ. Sec.*, 218 Ariz. 566, 570 ¶ 14 (2008). We read words in context and effectuate the plain meaning of § 5 unless doing so would be absurd. *See Welch v. Cochise Cnty. Bd. of Supervisors*, 251 Ariz. 519, 523 ¶ 11 (2021). If the language is ambiguous, we consider secondary interpretive principles, such as the Act's subject matter, history, and purpose, and the consequences of differing interpretations. *Id.*

¶15 We start with § 5's plain language. The provision exempts "such lands or rights" from state and local taxation. § 5108. "Such lands or rights" are identified as "any interest in lands, water rights, or surface rights to lands" acquired by the Secretary of the Interior "for the purpose of providing land for Indians" and titled "in the name of the United States in trust for [an] Indian tribe or [an] individual Indian." *Id.* These "lands or rights" can be located "within or without existing reservations." *Id.* Thus, to fall under § 5's tax exemption, the Plant must be (1) an "interest in lands, water rights, or surface rights to lands," (2) acquired by the Secretary of the Interior pursuant to § 5, and (3) titled "in the name of the United States in trust for the Indian tribe or [an] individual Indian." *See id.* The primary issue here is whether the

Plant is included within the federal government's ownership rights, and thus the Tribe's beneficial rights, in the land underlying the Plant. If it is, and § 5's additional requirements are satisfied, the Plant is tax exempt.

¶16 The Act itself does not delineate the rights included in the federal government's ownership of land under § 5. According to the BIA, those rights include "any interests, benefits, and rights inherent in the ownership of the real property." 25 C.F.R. § 150.2. As acknowledged in *Calpine Construction*, such rights generally include ownership of permanent improvements constructed by a tenant on leased property. 221 Ariz. at 248 ¶ 16; *see also Cutter Aviation, Inc. v. Ariz. Dep't of Revenue*, 191 Ariz. 485, 492 (App. 1997) (recognizing that generally "a permanent structure placed upon and attached to the realty by a tenant is real property belonging to the lessor"). This general rule does not apply when, as here, the lease provides that the tenant owns the permanent improvements. *See Calpine Constr.*, 221 Ariz. at 248 ¶¶ 16–17; *Cutter Aviation*, 191 Ariz. at 492. The BIA recognizes this exception as applying to leases of land owned by the federal government pursuant to § 5. 25 C.F.R. § 162.415(a) ("A business lease must specify who will own any permanent improvements the lessee constructs during the lease term and may specify under what conditions, if any, permanent improvements the lessee constructs may be conveyed to the Indian landowners during the lease term.").

¶17 It is settled that South Point, not the federal government, owns the Plant. *Calpine Constr.*, 221 Ariz. at 248 ¶ 17. Based on this fact alone, § 5 seemingly does not exempt the Plant from the County's property taxes

because the land owned by the United States in trust for the Tribe does not include the Plant. *See* § 5108. As South Point notes, however, the Supreme Court expansively applied § 5 in *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), to exempt a state tax imposed on a tribal entity for using permanent improvements it constructed and owned on land leased from the federal government. In doing so, the Court relied on *United States v. Rickert*, 188 U.S. 432, 441–43 (1903), a pre-Act case, which disallowed a state property tax on permanent improvements constructed by Indians on land held in trust for them by the federal government. We therefore consider these cases in determining whether § 5 broadly applies to categorically exempt all permanent improvements affixed to land owned by the federal government in trust for Indians. *See James v. City of Boise*, 577 U.S. 306, 307 (2016) (concluding that state and federal courts are bound by the Supreme Court's interpretation of federal law); *Weatherford ex rel. Michael L. v. State*, 206 Ariz. 529, 532 ¶ 8 (2003) (acknowledging that a Supreme Court decision on a substantive federal issue binds the state courts on that issue).

¶18 The Court in *Rickert* addressed whether a South Dakota county could assess and impose property taxes on permanent improvements and personal property owned by Indians and used in cultivating lands allotted them under the now-defunct General Allotment (Dawes) Act of 1887, ch. 119, 24 Stat. 388 (codified as amended in scattered sections of 25 U.S.C.). 188 U.S. at 432–33. That act authorized the federal government to allot agricultural and grazing lands on Indian reservations to individual Indians. General Allotment Act, § 1. Upon allotment, the land was owned by the government in trust for the sole

use and benefit of allottee Indians for twenty-five years, at which time the government would convey fee simple title to them and discharge the trust. *Id.* § 5. After all Indians were allotted reservation lands, any remaining lands could be sold to the United States, which could then open them to non-Indians for homesteading. *Id.* "[T]he allotment process was designed to assimilate Indians into the larger society," the theory being that by the time they took fee title to the lands, the Indians would have adapted to the mainstream western agricultural economy. Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 Yale L.J. 1, 14–15 (1999).

¶19 The *Rickert* Court first concluded that the South Dakota county lacked authority "to assess and tax the lands in question until at least the fee was conveyed to the Indians." 188 U.S. at 437. It characterized the allotted trust lands as "an instrumentality employed by the United States" to benefit Indians and reasoned that permitting taxation would defeat the government's statutory obligation to convey the land in fee to allottees free of any encumbrances, including tax liens. *Id.* at 437–38.

¶20 The Court applied similar reasoning in holding the county could not assess and tax the Indians' permanent improvements or personal property (cattle, horses, and the like), the latter having been purchased with federal funds to fulfill the government's goal of aiding the Indians in successfully cultivating the allotted lands. *See id.* at 441–45. The Court stated that allotting lands to individual Indians evidenced Congress's expectation that those lands "would be improved and cultivated by the allottee," and concluded "that object would be defeated if the

improvements [and personal property] could be assessed and sold for taxes." *Id.* at 442. Responding to the county's suggestion that the government's only interest was conveying the allotted land free from encumbrance after twenty-five years and not the improvements or personalty, the Court explained that the government owed a duty of "care and protection" to the Indians that transcended its contractual obligation. *Id.* at 442–43. "The government would not adequately discharge its duty to these people if it placed its engagements with them upon the basis merely of contract, and failed to exercise any power it possessed to protect them in the possession of such improvements and personal property as were necessary to the enjoyment of the land held in trust for them." *Id.* at 443.

¶21 After *Rickert*, and by the 1920s, allotment proved disastrous for Indian tribes and individual Indians. *See* Frickey, *supra*, at 15 (describing the loss of "huge amounts of Indian land . . . through sales and tax foreclosures" after the Indians became fee owners of the allotted lands); L. Scott Gould, *The Consent Paradigm: Tribal Sovereignty at the Millennium*, 96 Colum. L. Rev. 809, 829 (1996) ("Although the [General Allotment Act] was ostensibly intended to reduce poverty among Indians, it had the opposite effect."). Confronting this failure, Congress passed the Act in 1934 "to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism" by giving Indian tribes and Indians control of their own property and affairs. *See Mescalero*, 411 U.S. at 152 (quoting H.R. Rep. No. 73-1804, at 6 (1934)). In addition to authorizing the Secretary of the Interior to acquire lands, water rights, or surface rights in trust for

Indians, the Act discontinued the allotment program and strengthened means for Indian tribes and Indians to self-govern and perpetuate their cultures. *See* Indian Reorganization (Wheeler-Howard) Act, Pub. L. No. 73-383, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461–479) (describing the Act as one "[t]o conserve and develop Indian lands and resources; to extend to Indians the right to form business and other organizations; to establish a credit system for Indians; to grant certain rights of home rule to Indians; to provide for vocational education for Indians; and for other purposes").

¶22 This brings us to *Mescalero*. The Mescalero Apache Tribe owned and operated an off-reservation ski resort in New Mexico, which the tribe developed under the Act. *Mescalero*, 411 U.S. at 146. Specifically, the United States Forest Service leased land to the tribe, and the federal government loaned the tribe money to build and equip the resort.[1] *See id.* New Mexico imposed both a sales tax on the resort's gross receipts and a use tax for the tribe's use of two ski lifts operating at the resort. *See id.* at 146–47. In the tribe's subsequent challenge under § 5 of the Act, then codified at 25 U.S.C. § 465, the Court upheld the sales tax, reasoning that "[o]n its face, the statute exempts land and rights in land, not income derived from its use." *Id.* at 155. The Court acknowledged that an exemption for sales tax is arguably supported by the context and purposes of § 5 but concluded that "absent

[1] The Court acknowledged that "[t]he ski resort land was not technically 'acquired' 'in trust for the Indian tribe.'" *Mescalero*, 411 U.S. at 155 n.11. It nevertheless concluded that § 5 applied to the tribe's interest in the land as "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." *Id.*

clear statutory guidance, courts ordinarily will not imply tax exemptions." *Id.* at 155–56; *see also id.* at 156 (stating that a tax exemption affecting Indians "can not [sic] rest on dubious inferences" but must be expressed by Congress "in plain words" (quoting *Okla. Tax Comm'n v. United States*, 319 U.S. 598, 607 (1943))).

¶23 The Court reached a contrary conclusion regarding the use tax, which taxed the tribe's use of the ski lifts and was assessed based on the out-of-state purchase price for the materials used to construct the lifts. *See id.* at 147, 158. The Court initially noted the ski lifts had been permanently attached to the land and, citing *Rickert*, concluded they "would certainly be immune from the State's ad valorem property tax." *Id.* at 158. It found that the same immunity extended to the use tax, reasoning that use of land "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." *Id.* (quoting *Henneford v. Silas Mason Co.*, 300 U.S. 577, 582 (1937)). And because "use of permanent improvements upon land is so intimately connected with use of the land itself," the Court concluded that § 5's exemption applied to the use tax. *Id.*

¶24 South Point argues *Mescalero* categorically bars the County's assessment of property taxes on the Plant under § 5 regardless of South Point's ownership of the facility. It asserts that, as with use of the ski lifts in *Mescalero*, the Plant is included within the "bundle of privileges" comprising the Tribe's beneficial ownership of the land underlying the Plant, and taxing the Plant necessarily, and impermissibly, taxes that "bundle." The County counters *Mescalero* had "nothing to do with the

taxation of non-Indian property," and we should therefore apply the plain language of § 5 to find it does not exempt the Plant from the County's tax.

¶25 We do not read *Mescalero* as applying § 5 to exempt taxation of non-Indian-owned permanent improvements. First, the Court's analysis solely concerned tribal property and tribal activities. A tribal-owned entity owned and used the ski lifts, and New Mexico assessed the use taxes "against the [Mescalero Apache] Tribe." *Id.* at 147. The Court did not address whether New Mexico could impose a use tax on non-Indians using property at the ski resort or whether it could assess a property tax on non-Indian-owned property affixed to the resort land.

¶26 Second, *Rickert*, which the *Mescalero* Court relied on for its use-tax analysis, turned on the property owners' status as Indians. Specifically, *Rickert* prohibited imposition of property taxes on Indian-owned permanent improvements and personal property on allotted lands to avoid taxing "an instrumentality" employed by the federal government to benefit and protect allottee Indians in improving and cultivating trust lands. 188 U.S. at 437, 442–44; *cf. M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 436–37 (1819) (disallowing a state-levied tax on the operations of a national bank that, in violation of the Supremacy Clause, interfered with the federal government's execution of powers). Taxing permanent improvements owned by non-Indians would not affect those objectives. Thus, it does not necessarily follow that *Rickert*, as applied in *Mescalero* to interpret § 5, exempts non-Indian-owned property from state taxation.

¶27 Third, before *Mescalero*, the Court had refused to extend *Rickert*'s "federal instrumentality" analysis to exempt state property taxes and state excise taxes for non-Indian lessees of Indian lands if those taxes were imposed on similarly situated persons. *See Okla. Tax Comm'n v. Tex. Co.*, 336 U.S. 342, 343, 366–67 (1949) (holding that a non-Indian lessee of mineral rights on lands allotted under the General Allotment Act was not immunized by the Supremacy Clause from state taxes levied against both the lessee's property used in producing petroleum and on the oil and gas produced in the tax year); *Taber v. Indian Territory Illuminating Oil Co.*, 300 U.S. 1, 3–5 (1937) (upholding a state's non-discriminatory ad valorem property taxes on dwelling, tool house, garage, and equipment used by non-Indian lessee of restricted Indian lands to produce oil and gas). The Court in *Oklahoma Tax Commission v. Texas Co.* concluded that "whether immunity shall be extended in situations like these is essentially legislative in character," and because Congress had not created such immunity by affirmative action, the taxes there were validly levied. 336 U.S. at 365–66.

¶28 The *Mescalero* Court recognized that *Oklahoma Tax Commission v. Texas Co.* and other cases had "cut to the bone the proposition that restricted Indian lands and the proceeds from them were—as a matter of constitutional law—automatically exempt from state taxation." 411 U.S. at 150. In determining § 5's applicability, the Court also relied on *Oklahoma Tax Commission v. Texas Co.* in stating that "[l]essees of otherwise exempt Indian lands are also subject to state taxation." *Id.* at 157. In light of this pronouncement, if the Court had interpreted § 5 as also exempting permanent

improvements owned by non-Indian lessees from state and local taxation, we would expect the Court to have said so rather than leaving confusion in its wake. It did not.

¶29 Fourth, applying *Mescalero*'s holding outside the context of Indian-owned property would ignore § 5's requirement that the federal government own the "lands or rights" in trust for an Indian tribe or for individual Indians. *See* § 5108. *Mescalero* included permanent improvements and their use as among the "bundle of privileges" making up property or property ownership because such improvements are "intimately connected with use of the land itself." 411 U.S. at 158. But when ownership of permanent improvements is purposefully plucked from that bundle, as occurred here, it loses that intimate connection. In that circumstance, the Indian beneficiary has no possessory or use interest in the permanent improvements, and the federal government's "lands or rights" do not include those improvements.

¶30 *Chehalis* does not persuade us that *Mescalero* interpreted § 5 as imposing the categorical bar urged by South Point. There, the Ninth Circuit considered whether § 5 preempted a county tax on a resort, conference center, and water park owned by a limited liability company and built on land held in trust by the United States for the Confederated Tribes of Chehalis Reservation. 724 F.3d at 1154–55. The tribe, which formed the company and owned an undivided 51% interest in it, leased the land to the company for twenty-five years. *Id.* at 1154. Per the lease, the tribe would take ownership of all buildings and other improvements at the end of the leasehold term. *Id.* at 1154–55.

¶31 The Ninth Circuit found *Mescalero* dispositive and held the county was barred from taxing the company's permanent improvements. *See id.* at 1157–58. In its concluding paragraph, the court stated, "*Mescalero* sets forth the simple rule that [§ 5] preempts state and local taxes on permanent improvements built on non-reservation land owned by the United States and held in trust of an Indian tribe. *This is true without regard to the ownership of the improvements*." *Id.* at 1159 (emphasis added). In isolation, this statement supports South Point's view of *Mescalero*. But the body of the opinion clarifies that § 5 preemption applies to permanent improvements regardless of the ownership vehicle a *tribe* uses to own the improvements. Specifically, the court rejected the county's argument that *Mescalero* was distinguishable because a private company rather than the Confederated Tribes of Chehalis Reservation itself owned the permanent improvements. *See id.* at 1157. The court characterized *Mescalero* as instructing that "the question of tax immunity cannot be made to turn on the particular form in which the [t]ribe chooses to conduct its business." *Id.* at 1156 (quoting *Mescalero*, 411 U.S. at 157 n.13). The court then concluded that "the [t]ribe's decision to give ownership of the [permanent improvements] to its limited liability company for the duration of the lease" was irrelevant. *Id.* at 1157. *Chehalis*, therefore, does not support applying *Mescalero* to exempt the tax against the Plant. Alternately, if the Ninth Circuit indeed intended the broader reading of *Mescalero* urged by South Point, we reject that reading for the reasons previously explained. *See supra* ¶¶ 25–29.

¶32 We are also unpersuaded that other federal authorities cited by South Point establish that § 5

preempts the County's tax on the Plant. In *Seminole Tribe of Florida v. Stranburg*, 799 F.3d 1324, 1326 (11th Cir. 2015), one issue was whether § 5 exempted a state tax on rents paid by a non-Indian lessee of food-court operations inside two Indian-owned casinos. Under Florida law, the tax was imposed for the "privilege [of engaging] in the business of renting, leasing, letting, or granting a license for the use of any real property," assessed against the lessee and collected by the landlord, which remitted the tax to the state. *Id.* (alteration in original) (quoting Fla. Stat. § 212.031(1)(a)). Relying heavily on *Mescalero*, the Eleventh Circuit concluded that § 5 preempted the rental tax. *Id.* at 1328–32. The court described *Mescalero* as "stand[ing] for the proposition that [§ 5] precludes state taxation of that 'bundle of privileges that make up property or ownership of property.'" *Id.* at 1330 (quoting *Mescalero*, 411 U.S. at 158). After concluding that leasing property "is a fundamental privilege of property ownership," the court found that Florida's tax on that privilege was tantamount to the use tax at issue in *Mescalero* and similarly preempted. *Id.*

¶33 *Stranburg* did not apply *Mescalero*'s holding to taxing non-Indian-owned permanent improvements because the case did not involve taxing such improvements. Nevertheless, South Point seizes on *Stranburg*'s description of *Mescalero* as meaning § 5 preempts state and local taxes on privileges attending Indians' beneficial ownership of property, asserts the Tribe's ownership privileges include benefitting from South Point's "use of the land and any permanent improvements," and argues the tax here infringes those privileges and are therefore preempted under § 5. This is

a leap too far. The County's property tax is not imposed on South Point's rental payments, so the tax does not burden the Tribe's use of its land as was the case in *Stranburg*. And as previously explained, the Tribe has no ownership interest in the Plant, so the tax could not infringe on it. *Cf. Okla. Tax Comm'n*, 336 U.S. at 353 (stating that the taxes there raised no issues regarding the immunity of Indian lands because "[t]here is no possibility that ultimate liability for the taxes may fall upon the owner of the land"). Thus, because the Tribe derives no benefit from the Plant, the tax cannot infringe on it.

¶34 South Point also asks us to give weight to a Department of Interior regulation concerning Indian land leases. *See Wade v. Ariz. State Ret. Sys.*, 241 Ariz. 559, 563 (2017) (acknowledging that absent legislative direction, the court will give weight to an agency's construction of the system it administers). Title 25, § 162.017(a) of the Code of Federal Regulations states that "[s]ubject 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 by any State or political subdivision of a State."

¶35 The regulation does not persuade us to interpret § 5 differently. First, the regulation itself cannot preempt the County's tax. *See Kansas v. Garcia*, 140 S. Ct. 791, 801 (2020) (stating preemption can arise only from "the Constitution itself or a valid statute enacted by Congress"). Second, Congress has provided direction on the exemption at issue by enacting § 5. We can ascertain that provision's meaning by applying interpretive principles, and we have no need to defer to the

Department of Interior's interpretation. *See Wade*, 241 Ariz. at 563 (recognizing the judiciary has final authority in interpreting statutes). Third, the regulation is "[s]ubject . . . to applicable Federal law," which includes § 5, the cases interpreting it, and *Bracker*. § 162.017(a). The Department of Interior has taken the position in other cases that "§ 162.017 has no legal effect at all," and the department is "agnostic" on whether any specific state tax is preempted. *Desert Water Agency v. U.S. Dep't of the Interior*, 849 F.3d 1250, 1254 (9th Cir. 2017). Instead, the regulation merely reflects the agency's view that when a *Bracker* analysis is conducted, "the federal and tribal interests at stake are strong enough to have a preemptive effect in the generality of cases." *See id.*; *see also Stranburg*, 799 F.3d at 1337–38 (declining to defer to § 162.017 and describing the preamble to the regulations as "outlin[ing] the *Bracker* balancing test and then appl[ying] it generally").

¶36 In sum, § 5 preempts state and local taxes imposed on land and rights acquired by the Secretary of the Interior and titled in the name of the United States in trust for Indian tribes or individual Indians. Ownership rights in land generally include permanent improvements affixed to that land by a lessee but not if the parties agree that the lessee owns those improvements. When that lessee is a non-Indian, § 5 does not preempt a state or locality from taxing the improvements. Neither *Mescalero* nor other federal authorities provides otherwise.

¶37 Here, South Point indisputably owns the Plant, and the property taxes fall solely on it and not the Tribe's land. Consequently, § 5 does not exempt the Plant from

taxation, and the court of appeals erred by holding otherwise. Considering our decision, we need not address the County's additional argument that exemption does not apply because the Secretary of the Interior did not acquire the land underlying the Plant pursuant to § 5. Because the court of appeals did not address whether the tax court correctly ruled that the Plant is also not impliedly exempt from the County's tax under *Bracker*, we remand to the court of appeals to decide that issue. *See S. Point Energy Ctr.*, 251 Ariz. at 268 ¶ 24.

CONCLUSION

¶38 For the foregoing reasons, we vacate the court of appeals' opinion ¶¶ 9–24 and the first sentence in ¶ 30. We remand to the court of appeals to decide the remaining issue left undecided by that court.

APPENDIX D

IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

SOUTH POINT ENERGY CENTER LLC,
Plaintiff/Appellant,

v.

ARIZONA DEPARTMENT OF REVENUE, et al.,
Defendants/Appellees.

No. 1 CA-TX 20-0004
FILED 4-27-2021

Appeal from the Arizona Tax Court
No. TX2013-000522
TX2014-000451
TX2015-000850
TX2016-001228
TX2017-001744
TX2018-000019
TX2019-000086
(Consolidated)

The Honorable Christopher T. Whitten, Judge

VACATED AND REMANDED

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OPINION

Judge Cynthia J. Bailey delivered the opinion of the Court, in which Presiding Judge Paul J. McMurdie and Judge Lawrence F. Winthrop joined.

B A I L E Y, Judge:

¶1 In these consolidated actions challenging the state and county's power to tax property on tribal land, South Point Energy Center, LLC ("Taxpayer") appeals the tax court's grant of summary judgment to the Arizona Department of Revenue and Mohave County (collectively, "ADOR"). For the following reasons, we vacate the judgment and remand to the tax court for further proceedings.

FACTS AND PROCEDURAL HISTORY

¶2 Taxpayer is a non-Indian entity that owns and operates an electrical generating plant ("Facility") in

Mohave County on land it leases from the Fort Mojave Indian Tribe ("Tribe").[1] Under the lease ("Lease"), Taxpayer owns "[t]he Facility and all Improvements," but at the end of the term, it will have to "remove any and all above ground Improvements and personal property from the Leased Land," except for certain roads, foundations, and underground piping and equipment.

¶3 In 2013 and 2014, Taxpayer sued ADOR to recover property taxes paid on the Facility for the property tax years 2010-2013. ADOR moved to dismiss, arguing issue preclusion barred Taxpayer from relitigating the tax's legality and that Taxpayer was not entitled to error-correction relief, and the court entered judgment for ADOR. *See* Ariz. R. Civ. P. 12(d). After Taxpayer appealed, this court vacated the judgment and remanded for further proceedings. *See S. Point Energy Ctr., LLC v. Ariz. Dep't of Revenue*, 241 Ariz. 11, 13, ¶¶ 1-2 (App. 2016).

¶4 On remand, the tax court ultimately consolidated the cases with five other lawsuits in which Taxpayer challenged property taxes it had paid on the Facility for years 2014-2018. The court denied the parties' cross-motions for partial summary judgment on whether 25 U.S.C. § 5108 per se preempts property taxes levied on the Facility. On a second set of cross-motions, the court then

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[1] Taxpayer and its predecessor-in-interest have been involved in earlier actions in this court relating to property taxes on the Facility. *See Calpine Constr. Fin. Co. v. Ariz. Dep't of Revenue*, 221 Ariz. 244, 248-49, ¶¶ 17, 22 (App. 2009) (holding Taxpayer's predecessor-in-interest, not the Tribe, owned the improvements and personal property that comprise the Facility and that the predecessor-in-interest was liable for property taxes); *Ariz. Dep't of Revenue v. S. Point Energy Ctr., LLC*, 228 Ariz. 436, 441, ¶ 20 (App. 2011) (holding the Arizona Department of Revenue did not err within the meaning of the error-correction statutes in valuing the Facility).

ruled the Facility is not a permanent improvement exempt under § 5108 because the Lease requires Taxpayer to remove the above-ground improvements at the conclusion of the term. The court granted summary judgment to ADOR, holding that under *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 151 (1980), tribal sovereignty does not preempt taxation of the Facility.

¶5 Taxpayer timely appealed, and we have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and A.R.S. §§ 12-120.21, -170(C) and - 2101(A)(1).

DISCUSSION

¶6 Taxpayer argues the tax court erred by (1) rejecting its contention that 25 U.S.C. § 5108 categorically preempts state and local property taxes on permanent improvements on leased tribal land; (2) ruling based on state law, and without briefing or hearing evidence, that the entirety of the Facility is personal property rather than permanent improvements; and (3) erroneously applying the *Bracker* interest-balancing analysis to the Facility.

¶7 We conclude the tax court erred by disregarding § 5108 and categorizing the Facility as personal property without conducting the proper analysis. We therefore vacate the judgment and remand for further proceedings consistent with this Opinion.

I. Standard of Review

¶8 We review a grant of summary judgment de novo. *Jackson v. Eagle KMC L.L.C.*, 245 Ariz. 544, 545, ¶ 7 (2019). In doing so, we view the evidence and reasonable inferences in the light most favorable to the nonmoving

party. *Harianto v. State*, 249 Ariz. 563, 565, ¶ 7 (App. 2020).

II. Whether the tax court erred by granting summary judgment to ADOR.

A. Whether the tax court erred by failing to apply 25 U.S.C. § 5108 to the Facility.

¶9 Taxpayer argues the tax court erred by failing to rule the Facility is exempt from taxes under § 5108, which, in relevant part, states that "lands or rights" taken in the name of the United States in trust for an Indian tribe "shall be exempt from State and local taxation." Under the statute, taxation of such property is per se preempted.

¶10 To support its argument, Taxpayer cites four cases: *United States v. Rickert*, 188 U.S. 432 (1903), *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), *Confederated Tribes of the Chehalis Rsrv. v. Thurston Cnty. Bd. of Equalization*, 724 F.3d 1153 (9th Cir. 2013), and *Seminole Tribe of Florida v. Stranburg*, 799 F.3d 1324 (11th Cir. 2015). Of course, United States Supreme Court cases bind Arizona courts on issues of federal preemption. *See Weatherford ex rel. Michael L. v. State*, 206 Ariz. 529, 532-33, ¶¶ 8-9 (2003). As Taxpayer recognizes, federal circuit decisions are not binding on Arizona courts. *See Plan. Grp. of Scottsdale, L.L.C. v. Lake Mathews Mineral Props., Ltd.*, 226 Ariz. 262, 267, ¶ 22 (2011). They may be persuasive, however, *id.*, especially when they are "consistent and well-reasoned," *Filer v. Tohono O'Odham Nation Gaming Ent.*, 212 Ariz. 167, 174, ¶ 28 (App. 2006).

¶11 *Rickert* is the first Supreme Court case addressing state and local taxation of permanent improvements on land held in trust by the United States. 188 U.S. at 432.

In that case, two tribal members owned improvements that were built on allotted land held in trust. *Id.* Although *Rickert* was decided before Congress enacted § 5108, it established that a state may not tax land held in trust by the United States and that "[e]very reason that can be urged to show that the land was not subject to local taxation applies to the assessment and taxation of the permanent improvements" on such land. *Id.* at 437-38, 442.

¶12 Congress enacted § 5108 in 1934 to codify *Rickert*'s holding. *See* 25 U.S.C. § 5108; *Club One Casino, Inc. v. United States Dep't of the Interior*, 328 F. Supp. 3d 1033, 1045 (E.D. Cal. 2018) ("Under Ninth Circuit authority, this Court should treat land placed in trust for a tribe pursuant to [§ 5108] . . . in the same manner as land held in trust for tribes prior to enactment of the [Indian Reorganization Act] in 1934."), *aff'd sub nom. Club One Casino, Inc. v. Bernhardt*, 959 F.3d 1142 (9th Cir. 2020), *cert. pending* (Dec. 23, 2020).

¶13 *Mescalero* then addressed whether New Mexico could impose a use tax on permanent improvements owned by an Indian entity on trust land. 411 U.S. at 146. Applying § 5108, the Supreme Court held that the improvements, being permanently attached to the land, were "certainly . . . immune from the State's ad valorem property tax" because "use 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." *Id.* at 158.

¶14 In *Chehalis*, the Ninth Circuit built upon *Rickert* and *Mescalero*. 724 F.3d at 1155-56. The tribe in question was not the sole owner of the improvements, but the court

held § 5108 applies to all permanent improvements on trust land, regardless of whether they are tribal-owned. *Id.* at 1157, 1159. The court also held that federal law governs whether the property at issue is a permanent improvement subject to § 5109. *Id.* at 1157-58.

¶15 Finally, two years later, the Eleventh Circuit in *Seminole Tribe of Florida v. Stranburg* addressed Florida's attempt to tax rent that a non-Indian entity paid to do business on trust land. 799 F.3d at 1326. The court concluded that § 5108 barred the rental tax because the leasehold was "so connected to the land that the tax amounted to a tax on the land itself." *Id.* at 1329. The court held in the alternative that, although § 5108 precluded the tax, it also would be precluded under *Bracker*. *Id.* at 1335.

¶16 ADOR argues *Rickert*, *Mescalero*, and *Chehalis* are inapplicable to this case because the permanent improvements in those cases were owned by Indians, while Taxpayer is a non-Indian entity. *See Rickert*, 188 U.S. at 433; *Mescalero*, 411 U.S. at 146; *Chehalis*, 724 F.3d at 1154. Contrary to ADOR's contention, the cited cases do not hold that the exemption applies only to Indian-owned improvements. *See Rickert*, 188 U.S. at 442-43; *Mescalero*, 411 U.S at 158; *Chehalis*, 724 F.3d at 1159. Indeed, as noted, *Chehalis* expressly held that § 5108 categorically bars a state tax on permanent improvements on trust land regardless of whether those improvements are owned by Indians.

¶17 As *Stranburg* explained at length, § 5108 forecloses taxes on "the bundle of privileges that make up property or ownership of property." 799 F.3d at 1330 (quoting *Mescalero*, 411 U.S. at 157). The court reasoned that the rental tax was effectively a tax on the tribal land subject

to the lease because "[t]he ability to lease property is a fundamental privilege of property ownership." 799 F.3d at 1330. Further, viewed from the other side of the lease transaction, the rent the lessee paid to the tribe secured its "possessory interest *in the land* for the duration of the lease." *Id.* at 1331 (stating that "payment under a lease is intimately and indistinguishably connected to the leasing of the land itself"). It did not matter that the lessee that paid the tax was a non-Indian entity; the tax was barred because it amounted to a tax on the tribe's exercise of one of the privileges of owning the land. *Id.*[2]

¶18 Section 5108's text supports the conclusion that permanent improvements on trust land are exempt regardless of ownership. The statute states that "lands and rights" taken by the federal government in trust for a tribe are "exempt from State and local taxation," and, contrary to ADOR's assertions, no statutory language limits that exemption to Indian-owned improvements. Ownership of permanent improvements on "lands" taken in trust, accordingly, is immaterial.

¶19 In sum, applying the text of § 5108 and the reasoning of the several federal cases applying the statute, we conclude that a tax on any permanent improvements subject to the Lease is effectively a tax on one of the privileges of the Tribe's ownership of trust land, and therefore is barred by § 5108.

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[2] ADOR argues the lease in *Stranburg* did not require the non-Indian tenant to remove improvements at the end of the lease term. That is beside the point. To the extent that the improvements at the Facility are permanent, *Stranburg* and *Chehalis* teach that § 5108 bars ADOR from collecting taxes on those improvements.

¶20 ADOR nevertheless argues that whether the tax is preempted is controlled not by § 5108 but instead by *Bracker*, a case that addressed a challenge to fuel taxes and motor vehicle licensing fees imposed on a non-Indian company doing business on trust land. But *Bracker* has nothing to say about property that is categorically exempt from taxation under § 5108.[3] As *Bracker* itself explained, there are "two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members." 448 U.S. at 142. The first barrier is preemption by "federal law." *Id.* The second is unlawful infringement "on the right of reservation Indians to make their own laws and be ruled by them." *Id.* (quoting *Williams v. Lee*, 358 U.S. 217, 220 (1959)). "[E]ither [barrier], standing alone, can be a sufficient basis for holding state law inapplicable to activity undertaken on the reservation or by tribal members." *Id.* at 143; *see Stranburg*, 799 F.3d at 1335 (after holding the rental tax violated § 5108, but before addressing *Bracker*, noting that "[w]e could, of course, stop our analysis regarding the Rental Tax at this point").

¶21 ADOR cites a rule issued by the Bureau of Indian Affairs that it contends supports its assertion that *Bracker* applies to permanent improvements owned by non-Indians on leased land. 25 C.F.R. § 162.017; *see* Residential, Business, and Wind and Solar Resource Leases on Indian Land, 77 Fed. Reg. 72,439 (Dec. 5, 2012).

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[3] Neither *Bracker* nor any of the cases ADOR cites applying *Bracker* discuss § 5108 or address permanent improvements on land held in trust by the United States. *See, e.g.*, *Bracker*, 448 U.S. at 137; *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 457-58 (1995) (motor fuels excise tax); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 187-89 (1989) (severance tax on the production of oil and gas).

However, neither § 162.017 nor the Bureau's explanation of it supports ADOR's argument. Section 162.017 provides:

> (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 by any State or political subdivision of a State. Improvements may be subject to taxation by the Indian tribe with jurisdiction.
>
> (b) *Subject only to applicable Federal law*, activities under a lease conducted on the leased premises are not subject to any fee, tax, assessment, levy, or other charge (e.g., business use, privilege, public utility, excise, gross revenue taxes) imposed by any State or political subdivision of a State. Activities may be subject to taxation by the Indian tribe with jurisdiction.
>
> (c) *Subject only to applicable Federal law*, the leasehold or possessory interest is not subject to any fee, tax, assessment, levy, or other charge imposed by any State or political subdivision of a State. Leasehold or possessory interests may be subject to taxation by the Indian tribe with jurisdiction.

(Emphasis added.)

¶22 ADOR contends that the "subject only to applicable Federal law" language refers to *Bracker*. Although we agree that *Bracker* constitutes "federal law," "federal law" also includes § 5108 and the cases applying

that statute, including *Rickert*, *Mescalero*, *Chehalis*, and *Stranburg*.

¶23 The rest of the regulation's language also supports our interpretation. The regulation unambiguously says, "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 by any State or political subdivision of a State." 25 C.F.R. § 162.017(a). Because federal law—including *Rickert*, *Mescalero*, *Chehalis*, and *Stranburg*—does not conflict with this language, the regulation's language supports our interpretation of § 5108. The Bureau of Indian Affairs's explanation of the rule also supports our interpretation of § 162.017(a). *See* 77 Fed. Reg. at 72,448 (stating that because permanent improvements are "affixed to the land," "a property tax on the improvements burdens the land, particularly if a State or local government were to attempt to place a lien on the improvement," and "State and local taxation of improvements undermine Federal and tribal regulation of improvements").

¶24 Because we have concluded that § 5108 categorically exempts any permanent improvements subject to the Lease, we need not determine whether taxes imposed on those permanent improvements also would be barred under a *Bracker* analysis. We next examine whether the tax court erred by ruling that the entirety of the Facility is personal property, not permanent improvements to which § 5108 would apply.

B. Whether the tax court erred by ruling the entirety of the improvements are non-permanent and not subject to 25 U.S.C. § 5108.

¶25 Taxpayer argues the tax court erred by concluding without the benefit of briefing or evidence that the entirety of the Facility is personal property not subject to § 5108. It contends this ruling violated "the principle of party presentation."

¶26 "In our adversary system, in both civil and criminal cases, in the first instance and on appeal, we follow the principle of party presentation." *Greenlaw v. United States*, 554 U.S. 237, 243 (2008). "That is, we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present." *Id.* Although the principle of party presentation is "supple, not ironclad," *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020), "as a general rule, '[o]ur adversary system is designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief,'" *Greenlaw*, 554 U.S. at 244 (quoting *Castro v. United States*, 540 U.S. 375, 386 (2003) (Scalia, J., concurring in part and concurring in judgment)). Although violation of this principle does not constitute reversible error, the rationale behind the principle is particularly applicable here. *See Sineneng-Smith*, 140 S. Ct. at 1579, 1581 ("[A] court is not hidebound by the precise arguments of counsel.").

¶27 During the second round of summary judgment briefing, the parties agreed that the Facility contained both personal property and permanent improvements. The tax court nevertheless concluded the Facility was entirely personal property, based upon the Lease

provision that requires Taxpayer to remove all above-ground improvements at the end of the term. As the court reasoned, "[i]f [Taxpayer] retain[ed] the right to remove an improvement, that improvement is by definition not a permanent improvement." In making this ruling, however, the tax court disregarded the principle that federal law, not state law, determines whether specific property is a permanent improvement exempt from taxation under § 5108. *See Drye v. United States*, 528 U.S. 49, 52 (1999) (holding that what constitutes "property [and] rights to property" for purposes of a federal tax statute is determined by federal law, not state law); *Chehalis*, 724 F.3d at 1158 (stating "it is irrelevant whether permanent improvements constitute personal property under [state] law"). Under federal tax law, whether an asset is a permanent improvement or personal property turns on six factors set out in *Whiteco Indus., Inc. v. Comm'r*, 65 T.C. 664 (1975). *See PPL Corp. v. Comm'r*, 135 T.C. 176, 193 (2010); *see also Trentadue v. Comm'r*, 128 T.C. 91, 99 (2007).

¶28 The *Whiteco* factors primarily focus on "the permanence of depreciable property and the damage caused to it or to realty upon removal of the depreciable property." *Trentadue*, 128 T.C. at 99. The factors are: (1) "Is the property capable of being moved, and has it in fact been moved?"; (2) "Is the property designed or constructed to remain permanently in place?"; (3) "Are there circumstances which tend to show the expected or intended length of affixation, i.e., are there circumstances which show that the property may or will have to be moved?"; (4) "How substantial a job is removal of the property and how time-consuming is it? Is it 'readily removable'?"; (5) "How much damage will the property

sustain upon its removal?"; and (6) "What is the manner of affixation of the property to the land?" *Whiteco*, 65 T.C. at 672-73.

¶29 Under *Whiteco*, although the existence of a contract requiring removal of the property is relevant, it is not determinative. *See id.* (considering contract term under factors (2) and (3)). The tax court accordingly erred by concluding the Facility was "by definition" not a permanent structure without conducting a *Whiteco* analysis.

CONCLUSION

¶30 Because we conclude that 25 U.S.C. § 5108 establishes a categorical exemption for permanent improvements on Indian land held in trust by the United States, and that the tax court erred by concluding the Facility was entirely personal property without conducting the proper analysis, we vacate the court's grant of summary judgment to ADOR. We remand this case to the tax court to conduct a *Whiteco* analysis to determine which, if any, of the assets that make up the Facility are permanent improvements that therefore are exempt from taxation under § 5108. The court then should consider whether property taxes on the assets that are not permanent improvements are preempted under *Bracker*. *See Mashantucket Pequot Tribe v. Town of Ledyard*, 722 F.3d 457, 459-60 (2nd Cir. 2013) (applying *Bracker* analysis to state personal property tax).

AMY M. WOOD • Clerk of the Court
FILED: AA

APPENDIX E

THE SUPERIOR COURT OF THE STATE OF ARIZONA IN THE ARIZONA TAX COURT

TX 2013-000522	02/04/2020
HONORABLE CHRISTOPHER WHITTEN	CLERK OF THE COURT D. Tapia Deputy
SOUTH POINT ENERGY CENTER L L C	PATRICK DERDENGER
v.	
ARIZONA DEPARTMENT OF REVENUE, et al.	KENNETH J LOVE

MINUTE ENTRY

The Court has Plaintiff's Motion for Summary Judgment in *Bracker* Phase of Litigation, filed September 17, 2019 and Defendants' Cross Motion for Summary Judgment on that same subject, filed October 18, 2019. Briefing on the motions was completed on January 17, 2020.

The Court benefited from very helpful oral argument on the competing motions on January 31, 2020.

Certainly, there is no explicit Congressional authorization for preemption here, though that is not required for preemption to exist. *White Mtn. Apache Tribe v. Bracker*, 448 U.S. 136, 144 (1980). But preemption is not to be presumed lightly. *See, e.g., Washington v.*

Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 155-56 (1980).

Bracker therefore imposes a balancing test. "Resolution of conflicts of this kind does not depend on rigid rules or on mechanical or absolute conceptions of state or tribal sovereignty, but instead on 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." *Department of Taxation and Finance of New York v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 73 (1994), quoting *Bracker, supra* at 145.

At issue here is the imposition of Arizona's personal property tax on South Point, and to analyze that the Court turns to the Second Amended Lease. Notable in it is paragraph 9.1, which gives South Point the option to "remove, repair, replace, modify or otherwise alter" the Facility or any part of it. If South Point retains the right to remove an improvement, that improvement is by definition not a permanent improvement, which becomes part of the realty. The land itself is not a factor in the tax. Neither is South Point's leasehold interest in the land. In Arizona, leasehold interests are taxed to the fee owner. Since land owned by the Tribe (or, technically, BIA) is exempt from state property taxes, no portion of the fee interest, including South Point's leasehold interest, is taxed.[1] *Contrast Seminole Tribe of Florida v. Stranburg*,

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[1] A.R.S. Const. Art. IX § 2(1). This also answers South Point's argument that, should the personal property tax not be paid, the State could impose a tax lien on the underlying real property, damaging the Tribe. But a tax lien cannot be imposed on property that is exempt from taxation. In addition, A.R.S. § 42-17153 allows a lien only on the

799 F.3d 1324, 1331-32 (11th Cir. 2015) (rejecting tax on "a right in land").

The pervasiveness of federal regulation of tribal leases is thus immaterial because no aspect of the lease is subject to tax. Federal regulation of power plants applies to all power plants regardless of their location. Preemption would have to be all or nothing; if state taxation of power plants on reservations is preempted, then so must be state taxation on every power plant in the country. There is no basis for the argument that a regulatory scheme founded upon a Congressional power other than the Indian Commerce Clause is material to the *Bracker* analysis. *See Bracker, supra* at 141-43.

South Point next makes the general argument that the federal government's interest in economic development on reservations is affected by the possibility of double taxation, making the business less profitable. This is addressed in *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 190-91 (1989):

> It is, of course, reasonable to infer that the existence of the state tax imposes some limit on the profitability of Indian oil and gas leases—just as it no doubt imposes a limit on the profitability of off-reservation leasing arrangements—but that is precisely the same indirect burden that we rejected as a basis for granting non-Indian contractors an immunity from state taxation in (five cited opinions).

"assessed property." As seen, by the terms of the Second Amended Lease, South Point's property never becomes part of the land, so the land is not part of the assessed property.

That South Point demands few services from the State is of little consequence. "Nothing is more familiar in taxation than the imposition of a tax upon a class or upon individuals who enjoy no direct benefit from its expenditure, and who are not responsible for the condition to be remedied. A tax is not an assessment of benefits. It is, as we have said, a means of distributing the burden of the cost of government." *Id.* at 190, quoting *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 622-23 (1981).

South Point finally alleges that, although the tax is plainly targeted at its personal property, its incidence actually falls on the Tribe. The Tribe voluntarily agreed to reimburse South Point for taxes it is required to pay the State. South Point claims that as a result, the State is directly taxing the Tribe, something unquestionably forbidden.

Few legal principles are more firmly established than that an indemnitor stands in the shoes of the indemnitee and is entitled to only those defenses that the indemnitee has. Obviously, South Point has no sovereign immunity to invoke. The indemnity clause purports to cloak South Point in the Tribe's sovereignty, making a debt lawfully and enforceably owed by South Point into an invalid and unenforceable debt against the Tribe.

The Supreme Court has, in many of its opinions interpreting Indian law, given only fuzzy guidance to lower courts obliged to pick largely undirected through the historical debris that still guides federal policy toward Native Americans. Occasionally, however, a bright line is drawn. "We do not believe that principles of federal Indian law, whether stated in terms of pre-emption, tribal self-government, or otherwise, authorize Indian tribes

thus to market an exemption from state taxation to persons who would normally do their business elsewhere." *Colville, supra* at 155; *see also, e.g., Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 113-15 (2005).

The cases brought forward by South Point, chiefly *Seminole Tribe of Florida, supra,* are distinguishable. *Seminole Tribe* addressed a state tax on leaseholds, holding that leases are so connected to the land that their taxation amounts to taxation of the land itself. 799 F.3d at 1329. Amended Lease, protected from becoming part of the realty, so it is not an interest in land. Similarly, *Confederated Tribes of Chihalis Reservation v. Thurston County Bd. Of Supervisors*, 724 F.3d 1153 (9th Cir. 2013) bars based on statute law property taxes against Indian trust lands. *Ramah Navajo School Bd., Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832 (1982), concerned taxes for schools; the Interior Department had a detailed regulatory plan for Indian schooling, which the state had largely washed its hands of. Here, there are no permanent improvements or affixed property treated as tribal land; nothing about the federal regulation of power plants is more intensive when the plant is on tribal land.

ACCORDINGLY, Defendants' Cross Motion for Summary Judgment is **granted** and Plaintiff's Motion for Summary Judgment is **denied**.

APPENDIX F

THE SUPERIOR COURT OF THE STATE OF ARIZONA IN THE ARIZONA TAX COURT

TX 2013-000522	05/16/2018
HONORABLE CHRISTOPHER WHITTEN	CLERK OF THE COURT T. Cooley Deputy
SOUTH POINT ENERGY CENTER L L C	PATRICK DERDENGER
v.	
ARIZONA DEPARTMENT OF REVENUE, et al.	KENNETH J LOVE

MINUTE ENTRY

The Court has considered Defendants' Motion for Partial Summary Judgment, filed December 4, 2017, Plaintiff's Response and Cross-Motion for Partial Summary Judgment Based on Categorical Preemption of Taxes on Permanent Improvements, filed January 18, 2018, Defendants' Reply and Response filed March 5, 2018 and Plaintiff's reply, filed on April 12, 2018. The Court benefited from oral argument on the competing motions on April 30, 3018.

The Statute and Supreme Court opinions

25 U.S.C. § 5108 states in relevant part:

> Title to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955 (69 Stat. 392),

> as amended (25 U.S.C. 608 et seq.) 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.

The Supreme Court has on several occasions interpreted this statute. In *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973) the Court upheld a state tax imposed on a tribal-owned and -operated enterprise, a ski resort, located off the reservation. *Id.* at 146, 149-50. At the same time, it struck down a state use tax on improvements built on tax-exempt land. *Id.* at 158. In so doing, it found unproblematic the Tribe's use of a corporation to conduct the ski operation, concluding, "the question of tax immunity cannot be made to turn on the particular form in which the Tribe chooses to conduct its business." *Id.* at 157 n.5.

Cass County, Minn. v. Leech Lake Band of Chippewa Indians, 524 U.S. 103 (1998), deals with the alienation of tribal land. The important holding is that land taken in trust under § 5108 can be alienated with Congressional approval and is thenceforward fully taxable by state and local governments unless a contrary intent is clearly manifested. *Id.* at 112-13.

There is another line of Supreme Court precedent addressing the use of tribal immunity from state and local taxation granted under other statutes by or for the benefit of non-tribal entities. These cases are generally critical of the practice. *See, for instance, Oklahoma Tax Comm. v. Chickasaw Nation*, 515 U.S. 450, 459 (1995); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980). In *Colville* in particular, the Court was

sharply critical of the tribe's use of its immunity to benefit non-Indians:

> It is painfully apparent that the value marketed by the smokeshops to persons coming from outside is not generated on the reservations by activities in which the Tribes have a significant interest. What the smokeshops offer these customers, and what is not available elsewhere, is solely an exemption from state taxation. The Tribes assert the power to create such exemptions by imposing their own taxes or otherwise earning revenues by participating in the reservation enterprises. If this assertion were accepted, the Tribes could impose a nominal tax and open chains of discount stores at reservation borders, selling goods of all descriptions at deep discounts and drawing custom from surrounding areas. We do not believe that principles of federal Indian law, whether stated in terms of pre-emption, tribal self-government, or otherwise, authorize Indian tribes thus to market an exemption from state taxation to persons who would normally do their business elsewhere.

Id. at 155 (internal citations omitted).

Similar concern is expressed in *Mescalero*. Quoting from Congressional hearings on the what is now § 5108, the Court wrote, "These provisions were designed to encourage tribal enterprises 'to enter the white world on a footing of equal competition.' In this context, we will not imply an expansive immunity from ordinary income taxes that businesses throughout the State are subject to." 411

U.S. at 157-58 (quoting 78 Cong. Rec. 11732; internal citation omitted).

Although no case in this line has directly addressed Section 5108, each of them evidences the Supreme Court's reluctance to a statutory construction broad enough to allow tribes to sell their tax immunity for the benefit of non-Indian businesses. There is no reason to believe it has any less concern for property tax immunity.

Beyond *Mescalero*: *Confederated Tribes of Chehalis Reservation*

The key case underlying Plaintiff's argument for categorical pre-emption is *Confederated Tribes of Chehalis Reservation v. Thurston County Bd. of Equalization*, 724 F.3d 1153 (9th Cir. 2013). In that case, the Tribe joined with a non-Indian corporation to form CTGW, LLC. The Tribe retained a controlling majority interest in CTGW, LLC. The Tribe then entered into a 25-year lease agreement with CTGW under which it would erect permanent improvements for a water park and convention center. Title to the improvements was held by CTGW for the lease term, but reverted to the Tribe at its conclusion. *Id.* at 1154-55. The court, citing *Mescalero* as its principal authority, held that the improvements owned by CTGW were exempt under § 5108 from state and local property taxation. *Id.* at 1156.[1]

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[1] The *Chihalis* court dealt with the BIA regulations cited by Plaintiff in a footnote, concluding that they merely "clarif[y] and confirm[]" the substance of the statute and so declined to address their applicability or the level of deference afforded to them. *Id.* at 1157 n.6. This Court agrees that, despite its expansive language, the limitation "subject only to applicable Federal law" confines the regulation to the four walls of the statute.

Under the facts in *Chihalis*, the Ninth Circuit's reasoning indeed follows from *Mescalero*: CTGW was a tribal business, and that the Tribe chose this particular corporate form to conduct its business is immaterial to its tax immunity. But in its conclusion, the Ninth Circuit went beyond its facts to enunciate a more sweeping doctrine: "*Mescalero* sets forth the simple rule that § 465 preempts state and local taxes on permanent improvements built on non-reservation land owned by the United States and held in trust for an Indian tribe. This is true without regard to the ownership of the improvements." *Id.* at 1159. With great respect, the holding in *Mescalero* is not so broad.[2]

The Supreme Court, in the passage relied on by the Ninth Circuit and quoted above, held that "the question of tax immunity cannot be made to turn on the particular form in which the Tribe chooses to conduct its business." The humble stature of the possessive pronoun *its* belies its critical significance. The *form* used by the Tribe to conduct business is immaterial to its exempt status, but

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[2] Although opinions of the Ninth Circuit are generally persuasive precedent, they are not binding on Arizona courts. *Weatherford ex rel. Michael L. v. State*, 206 Ariz. 529, 533 ¶ 29 (2003); *see Johnson v. Williams*, 568 U.S. 289, 305 (2003). This applies especially when the reasoning of the Ninth Circuit is "problematic." *Planning Group of Scottsdale, L.L.C. v. Lake Mathews Mineral Properties, Ltd.*, 226 Ariz. 262, 267 ¶ 7 (2011). It is not necessary to reject *Chihalis* in its entirety, however. Its holding with respect to tribal-owned businesses on tribal land (the fact pattern in both *Mescalero* and *Chihalis*) is entitled to great deference. But its expansive conclusion, applying the principle to all similarly-situated property irrespective of ownership, is *gratis dictum*, "a court's stating of a legal principle more broadly than is necessary to decide the case." Black's Law Dict. (10th ed. 2014), dictum. Dictum is not binding precedent in the Arizona courts. *Swenson v. County of Pinal*, 243 Ariz. 122 ¶ 10 (App. 2017).

whatever the form taken, in order to be entitled to the exemption, it must be used in the conduct of tribal business.

Nothing in *Mescalero* suggests that property on tribal land owned by a non-Indian entity not conducting tribal business is entitled to the exemption. Such an interpretation would turn the Supreme Court's concern, quoted above, for putting tribal enterprise on "a footing of equal competition" on its head, allowing the exemption to place an entity already at home in the "white world" on a footing of unequal competition. *Id.* 411 U.S. at 157-58, *and compare Colville*, quoted above, at 155.

Ownership of South Point's Permanent Improvements

It is undisputed that full ownership of the permanent improvements is vested in South Point. The Tribe has surrendered all rights to the improvements, both during and after the lease. Plaintiff argues that this does not matter: Property permanently attached to the land becomes part of the realty; therefore, because the Tribe still has ownership of the land, the exemption of the land automatically attaches to anything permanently erected on it.

The distinction between real and personal property is, of course, drilled into every lawyer in the first weeks of law school. Here, however, its rote recitation is irrelevant, because the statute does not exempt "real property," as it could easily have done. "On its face, the statute exempts 'land and rights in land.'" *Mescalero*, *supra* at 155. Permanent improvements are not land; only land is land. Ownership of land carries certain rights with respect to permanent improvements erected on it, rights which are

covered by the statutory language. *Id.* at 158. But, as *Cass County* reminds us, these rights can be alienated.

The alienation of the Tribe's rights in this case goes beyond the possessory interests alienated by a typical lease. Yet *Cass County* addressed alienation of the land itself, which necessarily includes all rights inherent in its ownership. If that is within the scope of tribal authority, provided that any necessary federal approval is forthcoming, so must be alienation of any or all rights inhering in the land while retaining ownership of the land itself. And once a right is alienated, revenues deriving from the use of that right, that would have been exempt had the Tribe retained the right, no longer are.

Conclusion

Disputed issues of fact prevent the Court from granting either parties' motion for partial summary judgment. The facts in this case could point in either of two ways.

Although it is difficult to see how an entity entirely owned by non-Indians might serve as a form in which the Tribe would conduct its business, that is a possible conclusion.

Alternatively, this may be no more than a sale of the exemption to an otherwise taxable private business. Federal law allows the Tribe considerable latitude to conduct its business affairs to its members' advantage, but does not countenance the creation for profit of a domestic tax haven. *See Colville*, *supra* at 155; *Mescalero*, *supra* at 157-58.[3]

---

[3] In a relatively recent pronouncement on the subject, the

Because the case for or against categorical preemption is not clear-cut, the Court believes that a hearing to develop the record for *Bracker* analysis is the correct course. The parties are ordered to prepare a scheduling order to complete the work necessary to do so.

Supreme Court said:

> under our Indian tax immunity cases, the 'who' and the 'where' of the challenged tax have significant consequences. We have determined that the initial and frequently dispositive question in Indian tax cases ... is who bears the legal incidence of the tax, and that the States are categorically barred from placing the legal incidence of an excise tax on a tribe or on tribal members for sales made inside Indian country without congressional authorization. We have further determined that, even when a State imposes the legal incidence of its tax on a non-Indian seller, the tax may nonetheless be pre-empted if the transaction giving rise to tax liability occurs on the reservation and the imposition of the tax fails to satisfy the *Bracker* interest-balancing test."

Wagnon v. Prairie Band Potawatomi Nation, 546 U.S. 95, 101-02 (2005) (internal citations omitted, emphasis in original).

APPENDIX G

United States Constitution, Article VI. Debts Validated—Supreme Law of the Land—Oath of Office

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

APPENDIX H

25 U.S.C. § 5108. Acquisition of lands, water rights or surface rights; appropriation; title to lands; tax exemption

The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.

For the acquisition of such lands, interests in lands, water rights, and surface rights, and for expenses incident to such acquisition, there is authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed $2,000,000 in any one fiscal year: *Provided*, That no part of such funds shall be used to acquire additional land outside of the exterior boundaries of Navajo Indian Reservation for the Navajo Indians in Arizona, nor in New Mexico, in the event that legislation to define the exterior boundaries of the Navajo Indian Reservation in New Mexico, and for other purposes, or similar legislation, becomes law.

The unexpended balances of any appropriations made pursuant to this section shall remain available until expended.

Title to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955 (69 Stat. 392), as amended (25 U.S.C. 608 et seq.) 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.

APPENDIX I

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SUPERIOR COURT OF ARIZONA
IN THE ARIZONA TAX COURT

South Point Energy Center LLC, Plaintiff, v. Arizona Department of Revenue, an Agency of the State of Arizona, and Mohave County, a political	No. TX2013-000522 Consolidated with: TX2014-000451, TX2015-000850, TX2016-001228, TX2017-001744, and TX2018-000019 **PLAINTIFF'S STATEMENT OF FACTS IN SUPPORT OF ITS MOTION FOR**

subdivision of the State of Arizona, Defendants.	**SUMMARY JUDGMENT IN THE *BRACKER* PHASE OF LITIGATION** (PROPERTY TAX) (Tax Years 2010 through 2017) (Assigned to Honorable Christopher Whitten)

Plaintiff South Point Energy Center, LLC ("SPEC") submits the following statement of undisputed material facts in support of its Motion for Summary Judgment in the Bracker Phase of Litigation.

I. The Parties

1. SPEC is a limited liability company organized under the laws of the State of Delaware and is authorized to do business in Arizona.

Support: Compl. ¶ 1, No. TX2013-000522 ("'522") (consolidated case for property tax years 2010-2018); '522 Answer ¶ 1.

2. SPEC owns a natural gas-fired combined-cycle electric energy generation facility (the "Facility") located on the Fort Mojave Indian Reservation, in Mohave County Arizona.

Support: '522 Compl. ¶ 2; '522 Answer ¶ 2.

3. The Arizona Department of Revenue (the "Department") is an independent agency of the State of Arizona created and organized under Title 42, Chapter 1, Article 1 of the Arizona Revised Statutes.

Support: '522 Compl. ¶ 3; '522 Answer ¶ 3.

4. Mohave County (the "County") is a political subdivision of the State of Arizona.

Support: '522 Compl. ¶ 3; '522 Answer ¶ 3.

II. Valuation of the Facility by the Arizona Department of Revenue

5. The Facility is identified for property tax purposes as Centrally Valued Property ID number 50-665 and as Mohave County collection parcel number 96651601G.

Support: Compl. ¶ 2, No. TX2015-000850 ("'850") (property tax year 2014); '850 Answer ¶ 2.

6. For property tax years 2010 to 2017, the Department centrally valued the Facility as "property . . . used by taxpayers . . . in the . . . [o]peration of an electric generation facility" pursuant to A.R.S. §§ 42-14151 to 42-15158.

Support: Compl. ¶ 8, No. TX 2014-000451 ("'451") (property tax years 2010-2011); '451 Answer ¶ 8; '522 Compl. ¶ 8; '522 Answer ¶ 8; '850 Compl. ¶ 8; '850 Answer ¶ 8; Compl. ¶ 8, No. TX2016-001228 ("'1228") (property tax year 2015); '1228 Answer ¶ 8; Compl. ¶ 8, No. TX2017-001744 ("'1744") (property tax year 2016); '1744 Answer ¶ 8; Compl. ¶ 8, No. TX2018-000019 ("'0019") (property tax year 2017); '0019 Answer ¶ 8.

III. Timely Payment of All Property Taxes

7. For property tax years 2010 to 2017, the County assessed, imposed, and collected ad valorem property taxes on the Facility based on the Department's valuations.

Support: '451 Compl. ¶ 9; '451 Answer ¶ 9; '522 Compl. ¶ 9; '522 Answer ¶ 9; '850 Compl. ¶ 9; '850 Answer

¶ 9; '1228 Compl. ¶ 9; '1228 Answer ¶ 9; '1744 Compl. ¶ 9; '1744 Answer ¶ 9; '0019 Compl. ¶ 9; '0019 Answer ¶ 9.

8. For property tax years 2010 to 2017, SPEC timely paid the ad valorem property taxes on the Facility that were assessed, imposed, and collected by the County.

Support: '451 Compl. ¶¶ 10-14; '451 Answer ¶¶ 10-14; '522 Compl. ¶¶ 10-14; '522 Answer ¶¶ 10-14; '850 Compl. ¶¶ 10-12; '850 Answer ¶¶ 10-12; '1228 Compl. ¶¶ 10-12; '1228 Answer ¶¶ 10-12; '1744 Compl. ¶¶ 10-12; '1744 Answer ¶¶ 10-12; '0019 Compl. ¶¶ 10-12; '0019 Answer ¶¶ 10-12.

IV. The Fort Mojave Indian Tribe

9. The Fort Mojave Indian Tribe (the "Tribe") is a federally recognized Indian tribe organized under the Indian Reorganization Act of 1934, 25 U.S.C. §§ 5101–5144 (formerly 25 U.S.C. §§ 461–494a), as amended.

Support: '522 Compl. ¶ 15; '522 Answer ¶ 15; *Fort Mojave Tribe v. San Bernadino Cty.*, 543 F.2d 1253, 1255 (9th Cir. 1976) (recognizing that "[t]he Fort Mojave Tribe is organized under the provisions of the Indian Reorganization Act of 1934"); Constitution and Bylaws of the Fort Mojave Indian Tribe p. 15 (". . . in accordance with Section 16 of the Indian Reorganization Act of June 18, 1934 (48 Stat. 984) as amended by the Act of June 25, 1935 (49 Stat. 378)") [SP-2NDSUPPDISCSTMT-000462] (Declaration of Verrin T. Kewenvoyouma Ex. A).

10. The Fort Mojave Indian Reservation (the "Reservation" or "FMIR") consists of approximately 33,000 acres of desert land.

Support: US Bureau of Indian Affairs, US Western Area Power Administration & Fort Mojave Indian Tribe,

Southpoint Power Plant: Final Environmental Impact Statement (Jan. 1992) (cited hereafter as "EIS") p. 99 ("The FMIR is approximately 33,000 acres of desert land") [SP-2NDSUPPDISCSTMT-000671] (Declaration of Barbara McBride Ex. J), also *available at* https://energy.gov/sites/prod/files/2015/04/f22/EIS-0308-FEIS.pdf

11. The Reservation encompasses land in Arizona, California, and Nevada.

Support: *Fort Mojave Tribe*, 543 F.2d at 1255 (recognizing that the Reservation "is located within three states, California, Nevada and Arizona").

12. The U.S. Secretary of the Interior holds title to all of the Reservation's land in trust for the benefit of the Tribe.

Support: *S. Point Energy Ctr., LLC v. Ariz. Dep't of Revenue*, 241 Ariz. 11, 13, ¶ 3 (App. 2016) ("The United States Department of the Interior holds the land in trust for the benefit of the Tribe"); EIS at Executive Summary p. S-1 ("Indian lands are held in trust by the United States. The BIA has been delegated trust responsibility for Indian lands and resources") [SP-2NDSUPPDISCSTMT-000560].

13. Most of the Tribe's land and tribal members are located in Arizona.

Support: EIS p. 99 ("[M]ost of the Tribe's land and tribal members are in Arizona") [SP-2NDSUPPDISCSTMT-000671].

14. Prior to the construction of the Facility, the annual tribal budget was $3,500,000.

Support: EIS p. 101 ("The annual tribal budget is $3.5 million") [SP-2NDSUPPDISCSTMT-000673].

15. Of the annual tribal budget prior to the construction of the Facility, $2,000,000 came from federal or other government sources.

Support: EIS p. 101 ("Two million dollars come from federal or other government sources") [SP-2NDSUPPDISCSTMT-000673].

16. $1,500,000 of the pre-Facility annual tribal budget came from tribal revenues from various tribal enterprises, ground leases, and agricultural leases and farming activities.

Support: EIS pp. 101-102 ("$1.5 million come from tribal revenues. . . The majority of profits from both the farms and the smokeshop/convenience store have been reinvested. . . Other land leases and development fees make up the balance of the tribal revenues") [SP-2NDSUPPDISCSTMT-000673 to -000674].

17. Currently, the annual tribal budget is approximate $30,000,000 to $32,000,000, plus an additional $8,000,000 to $10,000,000 received from the federal government.

Support: Deposition of Michael Devita (cited hereafter as "Devita Deposition") p. 15 lines 20-24 ("Q: So what is the tribe's annual budget? A: Excluding – excluding federal funding and state funding, talking about general fund, it is, I want to say, 30 to 32 million. Q: And how much do you get from federal funding? A: Approximately 8 to 10 million) (Declaration of Pat Derdenger Ex. A).

18. The Tribe's five main revenue sources are the Avi Casino, the Spirit Mountain Casino, SPEC, agricultural leases, and the Fort Mojave Development Corporation.

Support: Devita Deposition p. 15 lines 2-6 ("Q: So what does the - what is the tribe's main source of income then? A: Receive – I would say the Avi Casino, Spirit Mountain Casino, Calpine, farms, and the Fort Mohave Development Corp [sic] are five major revenue generating").

19. Avi Casino, Spirit Mountain Casino, and the Fort Mojave Development Corporation are tribally owned enterprises.

Support: Devita Deposition p. 9, lines 6-9, 12-13 ("[O]ur local entities would be Avi Casino. We have Spirit Mountain Casino. We have AMPS, which is Aha Macav Power Services, telecom, and also water board. . . we also have – we have some – an enterprise called FDMC"); Devita Deposition p. 16 lines 14-24 ("Q: So what are some of the businesses that the tribe is engaged in? You mentioned the casinos. A: Yeah, the ones that I stated are the ones we're engaged in. The – Q: The two casinos. A: – casino, the golf course – Q: The golf course. A: – the smoke shop. Q: Smoke shop. Okay. And then farming? A: Then farming").

20. The Fort Mojave Development Corporation operates two smoke shops and two golf courses, of which one each is located in Arizona and the others in California.

Support: Devita Deposition p. 15 lines 13-18 ("A: They–they [Fort Mojave Development Corporation] are the entity that operates the two smoke shops and the two golf courses of which one golf course and one smoke shop

is in Arizona and one smoke shop and one golf course is in Nevada").

21. The agricultural leases are leases of Reservation land made by the Tribe to agricultural lessees.

Support: Devita Deposition p. 12 lines 10-13 ("Q: Do you lease land for agriculture to entities? A: We used to. We do not anymore. Again, I'm only focused on Arizona. We do lease some farmland in California").

22. The Tribe also receives approximately $1,100,000 annually from a gaming compact with the State of California.

Support: Devita Deposition p. 15 lines 2-3, 7-8 ("Q: So what does the – what is the tribe's main source of income then? A: . . . And then there's the compact we have with California, so we get a million – 1.1 million from that compact").

23. The Tribe receives no funding from any County sources.

Support: Devita Deposition p. 16 lines 11-13 ("Q: How about do you get any funding from any – any county entities? A: Not that I'm aware of, no").

24. The Tribe receives approximately $8,000,000 annually from the Avi Casino.

Support: Devita Deposition p. 40 lines 5-6 ("A: . . . we receive 8 million or so from Avi Casino").

25. The Tribe receives approximately $2,000,000 annually from the Spirit Mountain Casino.

Support: Devita Deposition p. 40 lines 6-7 ("A: We receive 2 million from Spirit Mountain").

26. The Tribe receives approximately $4,000,000 annually from the agricultural leases.

Support: Devita Deposition p. 40 lines 6-8 ("A: We receive. . . say 4 million from the farms").

27. In 1994, the Tribe received a $33,000,000 loan underwritten by the BIA to be used to develop on-Reservation roads, water, sewer, and other infrastructure, and to build the Avi Casino.

Support: EIS p. 102 ("In 1994 the FMIT secured a $33 million development loan underwritten by a BIA loan guarantee. This capital paid for roads, water, sewer, and other infrastructure in Aha Macav, and construction of the Avi Casino" [SP-2NDSUPPDISCSTMT-000674].

28. Telecommunications services on the Reservation are provided by a tribal entity, Fort Mojave Telecommunications, Inc.

Support: EIS p. 207 ("[T]elecommunications would be provided by the tribal company, Fort Mojave Telecommunications, Inc.") [SP-2NDSUPPDISCSTMT-000780].

29. Underground cable for telecommunications services for the Facility is routed on tribal land.

Support: EIS p. 207 ("Underground cable would be routed on tribal land") [SP-2NDSUPPDISCSTMT-000780].

30. The Fort Mojave Tribal Police Department has primary jurisdiction over on-Reservation activities.

Support: Fort Mojave Tribal Public Safety Ordinance (Ordinance No. 32) [SP-4THSUPPDISCSTMT-000310 to -000316] (Declaration of

Verrin T. Kewenvoyouma Ex. B); Agreement to Provide Mutual Aid Law Enforcement Services in Emergency Situations between the Fort Mojave Tribal Police Department and the Arizona Department of Public Safety (hereafter cited as "Mutual Aid Agreement") § 3 ("AUTHORIZATION: Both parties agree that when emergency assistance is requested by the FMPTD [sic] that DPS responding to the request will operate under the direction and authorization of the FMPTD [sic], and that the DPS work on Tribal lands will be restricted to the emergency event") [SP-2NDSUPPDISCSTMT-000292] (Declaration of Verrin T. Kewenvoyouma Ex. C).

31. The Tribe receives funding for the training of its Tribal Police Department from the BIA.

Support: Law Enforcement Uniform Police Services Contract No. CTH51T60443 (hereafter cited as "Police Services Contract") § 6 [SP-2NDSUPPDISCSTMT-000298 to -000299] (Declaration of Verrin T. Kewenvoyouma Ex. D); Police Services Contract at Statement of Work § C.1.B(1) [SP-2NDSUPPDISCSTMT-000313].

32. The purpose of the Law Enforcement Uniform Police Services Contract between the BIA and the Tribe is to ensure that professional, effective, and efficient uniform patrol law enforcement services are provided to the Tribe utilizing accepted law enforcement techniques and practices.

Support: Police Services Contract at Statement of Work § C.2.A [SP-2NDSUPPDISCSTMT-000314 to - 000315].

33. The BIA regulates the training requirements, equipment, and uniforms utilized by the Fort Mojave Tribal Police Department.

Support: Police Services Contract at Statement of Work § C.2.H [SP-2NDSUPPDISCSTMT-000318 to - 000324].

34. Non-tribal law enforcement agencies may provide support on Reservation lands pursuant to a mutual aid agreement but only under the supervision and direction of the Fort Mojave Tribal Police Department.

Support: EIS p. 104 ("Enforcement responsibility on the Arizona side of the reservation is shared by Tribal Police and the Mohave County Sheriff's Department through a mutual aid agreement") [SP-2NDSUPPDISCSTMT-000676]; Devita Deposition p. 31 lines 15-24 ("Q: Does the tribe work – the tribe police work with other law enforcement agencies as well? A: Multitude of them. Q: So do they have mutual aid agreements in place then? A: That is my understanding. Q: Okay. Name them. A: DPS, Needles, and then Mohave County. Q: The sheriff? A: The sheriff"); Mutual Aid Agreement at § 3 (". . .DPS responding to the request will operate under the direction and authorization of the FMPTD [sic]. . .") [SP-2NDSUPPDISCSTMT-000292].

V. The Lease Between the Tribe and SPEC

35. The Tribe leased the land on which the Facility is located to CPN South Point, LLC pursuant to the Amended and Restated Ground Lease Agreement ("A&R Ground Lease"), BIA Lease No. B-1778-FM, dated August 4, 1999, which was approved by the U.S. Secretary of the Interior on August 19, 1999.

Support: Amended and Restated Ground Lease Agreement between the Fort Mojave Indian Tribe and Calpine South Point, LLC (hereafter cited as "A&R Ground Lease") [SP-DISCSTMT-000001 to -000126] (Declaration of Kurt Fetters Ex. E).

36. The parties to the A&R Ground Lease agreed upon certain amendments and modifications that were memorialized in a Second Amended and Restated Ground Lease Agreement ("Second A&R Ground Lease"), BIA Lease No. B-1778-FM, dated December 10, 2012 and approved by the U.S. Secretary of the Interior on December 17, 2012, under which the Tribe leased the land on which the Facility is located to South Point OL-1, LLC, South Point OL-2, LLC, South Point OL-3, LLC, and South Point OL-4, LLC.

Support: Second Amended and Restated Ground Lease Agreement between the Fort Mojave Indian Tribe and South Point OL-1, LLC, South Point OL-2, LLC, South Point OL-3, LLC, and South Point OL-4, LLC (hereafter cited as "Second A&R Ground Lease") [SP-DISCSTMT-000127 to -000203] (Declaration of Kurt Fetters Ex. F).

37. The A&R Ground Lease required SPEC to pay both base rent, plus a contingent rent amount determined by the Facility's output, through 2048.

Support: A&R Ground Lease §§ 6.2, 6.3 [SP-DISCSTMT-000010]; A&R Ground Lease Exhibit H: Land Rent Schedule [SP-DISCSTMT-000079 to -000084].

38. Under the terms of the A&R Ground Lease, SPEC was required to pay a demand fee of $700,000 for the right to use up to 4,000 acre feet of the Tribe's

Colorado River water allotment and a one-time $2 million tribal water payment.

Support: A&R Ground Lease § 7.6 [SP-DISCSTMT-000012].

39. Under the A&R Ground Lease, SPEC was also required to pay an additional annual fee of $175 per acre foot for each acre-foot of water actually used.

Support: A&R Ground Lease § 7.3 [SP-DISCSTMT-000011].

40. The A&R Ground Lease required SPEC to pay the Tribe $250,000 in compliance fees in satisfaction of the terms of the Tribal Employment Rights Ordinance.

Support: A&R Ground Lease § 22.2 [SP-DISCSTMT-000033].

41. The A&R Ground Lease required SPEC to enter agreements with tribally owned utility companies for the provision of utility services to the Facility.

Support: A&R Ground Lease § 26.1 [SP-DISCSTMT-000034].

42. Amounts for the provision of utility services were not included in the A&R Ground Lease as the lease required SPEC to contract separately for such services.

Support: A&R Ground Lease § 8.3.2 [SP-DISCSTMT-000015].

43. On May 24, 2001, the parties entered into Lease Modification No. 1 as approved by the BIA.

Support: A&R Ground Lease at Lease Modification No. 1 [SP-DISCSTMT-000105 to -000115].

44. Under Lease Modification No. 1, SPEC was required to pay the Tribe a lump-sum payment of $24,500,000 on May 24, 2001.

Support: A&R Ground Lease at Lease Modification No. 1 § 1 [SP-DISCSTMT-000106].

45. Of the $24,500,000 payment, $2,500,000 was in lieu of the base rent owed to the Tribe in the A&R Ground Lease.

Support: A&R Ground Lease at Lease Modification No. 1 § 1(a) [SP-DISCSTMT-000106].

46. $20,000,000 of the $24,500,000 lump-sum payment represented prepayment of the Water Demand Fee and Water Usage Fees owed to the Tribe for the first 20 years of the A&R Ground Lease.

Support: A&R Ground Lease at Lease Modification No. 1 § 1(b) [SPDISCSTMT-000107].

47. The remaining $2,000,000 of the $24,500,000 lump-sum payment represented prepayment of taxes owed by SPEC to the Tribe under Chapter 202 of the Tribal Tax Ordinance for the 2002 property tax year.

Support: A&R Ground Lease at Lease Modification No. 1 § 1(c) [SP-DISCSTMT-000107].

48. In addition to the amount included in the lump-sum payment, SPEC was required to pay to the Tribe $2,000,000 annually in lieu of leasehold interest taxes applicable under the Tribal Tax Ordinance.

Support: A&R Ground Lease at Lease Modification No. 1 § 1(c) [SP-DISCSTMT-000109].

49. The Tribe and SPEC agreed that the annual payments in lieu of leasehold interest tax would be

reduced dollar-for-dollar by any property taxes paid by SPEC to the State of Arizona on the Facility.

Support: A&R Ground Lease at Lease Modification No. 1 § 1(c) [SP-DISCSTMT-000109].

50. SPEC was also required to begin paying $87,675.30 per year for water usage rights.

Support: A&R Ground Lease at Lease Modification No. 1 § 1(b) [SPDISCSTMT-000107].

51. Lease Modification No. 1 also required SPEC to pay $25,000 annually to the Tribe in lieu of any tribal personal property taxes on the Facility.

Support: A&R Ground Lease at Lease Modification No. 1 § 1(c) [SP-DISCSTMT-000111].

52. Lease Modification No. 1 added a provision limiting tribal taxes to a rate no higher than the lowest combined state, county, and local tax imposed in the unincorporated areas of Mohave County, Arizona, Clark County, Nevada, or San Bernardino County, California.

Support: A&R Ground Lease at Lease Modification No. 1 § 1(c) [SP-DISCSTMT-000108].

53. Lease Modification No. 1 also added a provision allowing SPEC to offset any tribal real property, personal property, sales, use, excise, leasehold, possessory interest, utility, special, or other similar tax on a dollar-for-dollar basis by the amount of equivalent state, county, or local tax paid by SPEC.

Support: A&R Ground Lease at Lease Modification No. 1 § 1(c) [SP-DISCSTMT-000108].

54. SPEC was also required to pay the Tribe a one-time payment of $5,500,000 as consideration for Lease Modification No. 1.

Support: A&R Ground Lease at Lease Modification No. 1 § 2 [SP-DISCSTMT-000112].

55. On October 17, 2001, the parties entered into Lease Modification No. 2 as approved by the BIA.

Support: A&R Ground Lease at Lease Modification No. 2 [SP-DISCSTMT-000116 to -000126].

56. Under the terms of Lease Modification No. 2, SPEC was required to pay the Tribe $2,000,000 per year annually in lieu of tribal leasehold interest tax for the 2002 through 2020 property tax years.

Support: A&R Ground Lease at Lease Modification No. 2 § 1 [SP-DISCSTMT-000117 to -000118].

57. Beginning in the 2021 property tax year, Lease Modification No. 2 requires SPEC to pay the Tribe leasehold interest tax pursuant to the provisions of the Tribal Tax Ordinance, subject to any offsets for state or local taxes authorized by the lease.

Support: A&R Ground Lease at Lease Modification No. 2 § 1 [SP-DISCSTMT-000117 to -000118].

58. Lease Modification No. 2 required SPEC to pay the Tribe $1,000,000 as consideration.

Support: A&R Ground Lease at Lease Modification No. 2 § 7 [SP-DISCSMTM-000122].

59. Under the terms of the Second A&R Ground Lease, the Tribe received a $27,000,000 lump-sum payment from SPEC in 2012.

Support: Second A&R Ground Lease § 7.1 [SP-DISCSTMT-000141].

60. The Tribe also received or will receive annual payments totaling $18,000,000 from SPEC starting December 31, 2012 and ending December 31, 2021, pursuant to the terms of the Second A&R Ground Lease.

Support: Second A&R Ground Lease § 7.2 [SP-DISCSTMT-000141].

61. These payments reflect the amounts owed to the Tribe by SPEC for the ground lease, water usage, and tribal taxes that would otherwise be imposed on the Facility and its operations under the Second A&R Ground Lease.

Support: Second A&R Ground Lease § 7.3 [SP-DISCSTMT-000141 to -000142].

62. These payments do not include amounts for utilities or other administrative or governmental fees.

Support: Second A&R Ground Lease § 7.3 [SP-DISCSTMT-000141 to -000142].

63. The $27,000,000 lump-sum payment and the $18,000,000 annual payments were negotiated with the Tribe and represented the present value of the remaining fees owed by SPEC to the Tribe at the time the Second A&R Ground Lease was negotiated in 2012.

Support: Devita Deposition p. 81 lines 14-17 ("Q: So that was a front-loading of the payments that would have otherwise been made during the course of the lease? A: That is correct").

VI. Location and Operation of the Facility

64. In 1999, the Tribe, by means of a lease approved by the U.S. Secretary of the Interior, leased approximately 320 acres of Reservation land in Mohave County, Arizona, to SPEC's predecessor in interest for the construction and operation of the Facility.

Support: *Calpine Constr. Fin. Co. v. Ariz. Dep't of Revenue*, 221 Ariz. 244, 246 ¶ 2 (App. 2009) ("Calpine and the Fort Mojave Indian Tribe are parties to Lease No. 640-050-99 dated August 4, 1999. This document, approved by the Bureau of Indian Affairs, allows Calpine to lease trust land from the Tribe in order to construct and operate an electric power generating plant with related improvements." (definitions omitted)); EIS at Executive Summary p. S-3 ([T]he "power plant [is] on 320 leased acres on the FMIR") [SP-DISCSTMT-000562]; Appellees' Answering Br. 11 n.1, *South Point Energy Ctr., LLC v. Ariz. Dep't of Revenue*, Nos. 1 CA-TX 15-0005, 1 CATX 15-0006, 2016 WL 1061424 (Jan. 14, 2016) (admitting that "Calpine is the predecessor-in-interest to South Point, which now owns and operates the Facility" and "South Point's privity with Calpine is uncontested" (citation omitted)).

65. The Facility was constructed and is located on Reservation trust land leased from the Tribe.

Support: '522 Compl. ¶ 16; '522 Answer ¶ 16; *S. Point Energy Ctr.*, 241 Ariz. at 13, ¶ 3 ("The Plant is located on land leased from the Fort Mojave Indian Tribe. . . .").

66. During property tax years 2010 through 2018, SPEC or its predecessor in interest owned and operated the Facility.

Support: '522 Compl. ¶¶ 2, 25; '522 Answer ¶¶ 2, 25; *Calpine Constr. Fin.*, 221 Ariz. at 246, 248, ¶¶ 2, 17 (recognizing that while the land is leased Reservation trust land, "Calpine owns the improvements"); *Ariz. Dep't of Revenue v. S. Point Energy Ctr., LLC*, 228 Ariz. 436, 437, ¶ 2 (App. 2011) (recognizing as to property tax years 2003-2004 that "[t]he electric generation facility operated by [SPEC] is owned by Calpine Corporation and located on land leased from the Fort Mohave Indian Tribe [sic]" (footnote omitted).

67. The Facility is a merchant plant, which sells electrical energy on a spot-market basis to public and private utility companies for resale and redistribution to end consumers.

Support: EIS at Executive Summary p. S-2 ("The proposed Southpoint power plant would be a 'merchant plant' which sells electrical energy on a spot-market basis to public and private utility companies for resale and redistribution to end-consumers") [SP-2NDSUPPDISCSTMT-000561].

68. Calpine Energy Services, an affiliate of SPEC located in Houston, Texas, is responsible for marketing and selling the power generated by the Facility. Calpine Energy Services sells the electricity generated at the Facility to third-party buyers including utilities, independent power producers, or other market participants.

Support: Deposition of Kurt John Fetters (hereafter cited as "Fetters Deposition") p. 10 lines 5-6; 14-18 ("Q: So Calpine Energy Services, what exactly – what all did they do in terms of your operations? What was – A. They would purchase gas for us to run, and then they would sell the

power on the opposite side") (Declaration of Pat Derdenger Ex. B; Declaration of Kurt Fetters at ¶ 2.

69. No customers come to the Facility to order, purchase, or take delivery of the electricity produced at the Facility. Calpine Energy Services contracts with third-party buyers and the electricity is delivered onto WAPA's grid for distribution to those buyers off the Reservation. The Facility is closed to the public.

Support: Declaration of Kurt Fetters ¶¶ 3-5.

70. The Western Area Power Administration ("WAPA") is a part of the United States Department of Energy.

Support: Western Area Power Administration Website ("We're one of four power marketing administrations within the U.S. Department of Energy") (Declaration of Pat Derdenger Ex. J).

71. Energy produced by the Facility for delivery to customers is transmitted through WAPA's system via a substation located in Topock, Arizona and along WAPA-owned transmission lines. SPEC buys these transmission services directly from WAPA.

Support: EIS p. 1 ("[E]lectric energy produced by the proposed Southpoint power plant would enter the WAPA system via the planned Topock substation and transmission facilities") [SP-2NDSUPPDISCSTMT-000571].

72. WAPA determined the number, location, and configuration of the transmission lines required to interconnect the Topock substation with its existing 230kV transmission line.

Support: EIS p. 204 ("WAPA would determine the quantities, locations, and configurations of the transmission lines required to interconnect the Topock substation with WAPA's existing 230kV transmission line") [SP-2NDSUPPDISCSTMT-000777].

73. The Facility required construction of the Topock substation and two 230kV transmission lines in order to connect to and wheel power to WAPA's transmission grid.

Support: EIS at Executive Summary pp. S-2 to S-3 ("The proposed Southpoint power plant would require construction of an off-site substation and two 230kV transmission lines in order to wheel power to [WAPA's] distribution grid") [SP-2NDSUPPDISCSTMT-000561 to -000562].

74. Neither the Topock substation nor the two transmission lines are owned by SPEC.

Support: EIS p. 21 ("Within this utility corridor, two 69kV powerlines [sic] and the Topock substation would be constructed by [Arizona Electric Power Co-op] and [Mohave Electric Co-Op] to improve local electric service. The [Environmental Assessment] also addressed the inclusion of the two 230kV transmission lines") [SP-2NDSUPPDISCSTMT-000591].

75. The two transmission lines and the Topock substation are located on land owned by the United States Bureau of Land Management.

Support: EIS p. 21 ("The proposed transmission line and substation would be built within existing BLM ROW") [SP-2NDSUPPDISCSTMT-000591].

76. El Paso Natural Gas Company and Transwestern Pipeline Company have interstate natural gas

transmission lines in the vicinity of the Facility and the ability to supply the natural gas for the operation of the Facility.

Support: EIS at Executive Summary p. S-2 ("El Paso Natural Gas Company (EPNGC) and Transwestern Pipeline Company (TPC) have natural gas transmission lines in the vicinity of the proposed power plant") [SP-2NDSUPPDISCSTMT-000561]; EIS p. 21 ("Calpine's proposed Southpoint power plant would require a natural gas supply from EPNGC and TPC") [SP-2NDSUPPDISCSTMT-000591]; Arizona Corporation Commission Pipeline Safety Programs website (hereafter cited as "ACC Pipeline Safety Website") (list of interstate gas transmission pipelines) (Declaration of Pat Derdenger Ex. E).

77. New gas lines connecting the Facility to El Paso Natural Gas Company's and Transwestern Pipeline Company's main natural gas lines were constructed on a new right of way across federal Bureau of Land Management land and are regulated by the US Department of Transportation.

Support: EIS at Executive Summary p. S-2 ("New lines connecting the proposed power plant to the main natural gas lines would be constructed on a new right of way (ROW) across Bureau of Land Management (BLM) land") [SP-2NDSUPPDISCSTMT-000561]; National Pipeline Mapping System website map of pipelines in Mohave County (Declaration of Pat Derdenger Ex. F).

78. Between 2005 and 2017, a minimum of 15 employees and a maximum of 25 employees worked at the Facility. In 2018, one employee worked at the Facility.

Support: Declaration of Robert Parker ¶¶ 2-3.

79. In 2000 and 2001, there were four Native Americans employed at the Facility, of which three were enrolled members of the Fort Mojave Indian Tribe and one was a member of the Choctaw Nation. The job titles of these employees were Operator Technician I, Operator Technician II, and Operator Technician III.

Support: Declaration of Robert Parker ¶¶ 4-5.

80. From 2002 through 2016, there were five Native Americans employed at the Facility, of which four were enrolled members of the Fort Mojave Indian Tribe and one was a member of the Choctaw Nation. The job titles of these employees were Operator Technician I, Operator Technician II, and Operator Technician III.

Support: Declaration of Robert Parker ¶¶ 6-7.

81. In 2017, there were four Native Americans employed at the Facility. The job titles of these employees were Operator Technician I and Operator Technician III.

Support: Declaration of Robert Parker ¶¶ 8-9.

82. In 2018, there were zero Native American employees at the Facility.

Support: Declaration of Robert Parker ¶ 10.

83. SPEC paid a total of $2,091,064.14 in wages to Native American employees at the Facility for years 2005-2010.

Support: Declaration of Robert Parker ¶ 11.

84. SPEC paid a total of $1,475,918.32 in wages to Native American employees at the Facility for years 2011 through 2013.

Support: Declaration of Robert Parker ¶ 12.

85. For 2014 through 2018, SPEC paid a total of $2,058,883.83 in wages to Native American employees at the Facility.

Support: Declaration of Robert Parker ¶ 13.

86. For 2005 through 2010, SPEC paid at least $9,832,125.03 in wages to all employees working at the Facility.

Support: Declaration of Robert Parker ¶ 14.

87. For 2011 through 2013, SPEC paid a total of $7,931,836.51 in wages to all employees working at the Facility.

Support: Declaration of Robert Parker ¶ 15.

88. For 2014 through 2018, SPEC paid a total of $8,886,241.42 to all employees working at the Facility.

Support: Declaration of Robert Parker ¶ 16.

VII. Federal Regulation of the Leasing of Indian Lands

89. Congress has plenary power under the Indian Commerce Clause to regulate land and economic activity in Indian country.

Support: U.S. Const. art. 1, § 8, cl. 3 (Congress shall have the power "to regulate Commerce. . . with the Indian Tribes").

90. Congress has affirmatively authorized the executive branch to enact regulations addressing any and all aspects of Indian affairs.

Support: 25 U.S.C. § 9 ([T]he "President may prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to

Indian affairs, and for the settlement of the accounts of Indian affairs").

91. Congress authorized Indian tribes, including the Fort Mojave Indian Tribe, to lease Indian lands to non-Indians only upon the approval of the U.S. Secretary of the Interior.

Support: 25 U.S.C. § 415(a) ("Any restricted Indian lands, whether tribally, or individually owned, may be leased by the Indian owners, with the approval of the Secretary of the Interior, for public, religious, educational, recreational, residential, or business purposes").

92. Congress specifically empowered and authorized the U.S. Department of the Interior to prescribe regulations addressing leases of Indian lands.

Support: 25 U.S.C. § 415(a) ("[A]ll leases and renewals shall be made under such terms and regulations as may be prescribed by the Secretary of the Interior").

93. The Bureau of Indian Affairs ("BIA") is a federal agency within the U.S. Department of the Interior, which is an executive department of the U.S. Government.

Support: 43 U.S.C. § 1451 ("There shall be at the seat of government an executive department to be known as the Department of the Interior").

94. The U.S. Department of the Interior, through the BIA, has promulgated comprehensive regulations governing all aspects of leases of Indian lands, which are contained in the Code of Federal Regulations and published in the Federal Register.

Support: 25 C.F.R. Part 162; Residential, Business, and Wind and Solar Resource Leases on Indian Land, 77 Fed. Reg. 72,440 (Dec. 5, 2012).

95. In the Preamble to the regulations found at 25 C.F.R. Part 162 and published in the Federal Register, the Secretary of the Interior made the following findings regarding the leasing of Indian lands:

a. "The Federal statutory scheme for Indian leasing is comprehensive, and accordingly precludes State taxation." 77 Fed. Reg. 72,447.

b. "[T]he Federal regulatory scheme is pervasive and leaves no room for State law." 77 Fed. Reg. 72,447.

c. "The purposes of. . . leasing on Indian land are to. . . allow Indian landowners to use their land profitably for economic development, ultimately contributing to tribal well-being and self-government." 77 Fed. Reg. 72,447.

d. "Congress intended to maximize income to Indian landowners and encourage all types of economic development on Indian lands." 77 Fed. Reg. 72,447 (citing Sen. Rpt. No. 84-375 (May 24, 1955)).

e. "Assessment of State and local taxes would obstruct Federal policies supporting tribal economic development, self-determination, and strong tribal governments." 77 Fed. Reg. 72,447.

f. "State and local taxation also threatens substantial tribal interests in effective tribal government, economic self-sufficiency, and territorial autonomy." 77 Fed. Reg. 72,447.

g. "The leasing of trust or restricted lands facilitates the implementation of the policy objectives of tribal governments through vital residential,

economic, and governmental services." 77 Fed. Reg. 72,447.

h. "State and local taxation of lessee-owned improvements. . . 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." 77 Fed. Reg. 72,448.

i. "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." 77 Fed. Reg. 72,448.

j. "In many cases, tribes contractually agree to reimburse the non-Indian lessee for the expense of the tax, resulting in the economic burden of the tax ultimately being borne directly by the tribe." 77 Fed. Reg. 72,448.

k. "[T]he very possibility of an additional State or local tax has a chilling effect on potential lessees as well as the tribe that as a result might refrain from exercising its own sovereign right to impose a tax to support infrastructure needs." 77 Fed. Reg. 72,448.

l. "[D]ual taxation can make some projects less economically attractive, further discouraging development in Indian country." 77 Fed. Reg. 72,448.

m. "Economic development on Indian lands is critical to improving the dire economic conditions faced by American Indians." 77 Fed. Reg. 72,448.

n. "[A] property tax on the improvements burdens the land, particularly if a State or local government were to attempt to place a lien on the improvement." 77 Fed. Reg. 77,248.

o. "Numerous provisions in the regulations address all aspects of improvements, requiring the Secretary to ensure himself that adequate consideration has been given to the enumerated factors under section 415(a)." 77 Fed. Reg. 77,248.

p. "[T]he regulations require the BIA to comply with tribal law, including tribal laws regulating improvements, when making decisions concerning leases of trust or restricted land." 77 Fed. Reg. 77,248.

q. "State and local taxation of improvements undermine Federal and tribal regulation of improvements." 77 Fed. Reg. 77,248.

Support: Residential, Business, and Wind and Solar Resource Leases on Indian Land, 77 Fed. Reg. 72,440 (Dec. 5, 2012).

96. Pursuant to the Department of the Interior's Secretarial Order No. 3175 on the Department's Responsibilities for Indian Trust Resources, dated November 8, 1993, the BIA is responsible for protecting Indian Trust Assets. Indian Trust Assets are values derived from land resources.

Support: EIS p. 227 ("Under Secretarial Order 3175, The [sic] BIA is responsible for protecting Indian Trust Assets. Indian Trust Assets are values derived from land resources") [SP-2NDSUPPDISCSTMT-000800].

97. In order to fulfill its trust responsibilities with respect to federal Indian lands, the BIA was required to review and approve the Tribe's lease to SPEC prior to the start of construction of the Facility.

Support: EIS p. 2 ("The proposed lease between Calpine and the FMIT must be reviewed and approved by the BIA in fulfillment of its trust responsibilities for federal Indian lands") [SP-2NDSUPPDISCSTMT-000572].

98. The BIA was required to analyze and address the environmental consequences of the Facility before making a determination as to whether to approve the lease between SPEC and the Tribe.

Support: EIS at Executive Summary p. S-1 ("The BIA must analyze and address adequately the environmental consequences of the proposed Southpoint power plant before making a determination as to whether the lease between Calpine Southpoint, Inc. (Calpine) and the FMIT should be approved") [SP-2NDSUPPDISCSTMT-000560].

99. Approval of leases of federal Indian trust lands requires documentation of the BIA's compliance with the National Environmental Policy Act, found at 40 C.F.R. § 1500 *et seq*.

Support: EIS p. 2 ("Approval of leases of federal Indian trust lands also requires documentation of BIA compliance with NEPA, as amended (40 CFR, 1500 *et seq.*))" [SP-2NDSUPPDISCSTMT-000572].

100. As part of the approval process, the BIA prepared an Environmental Impact Statement to provide information to the public and to interested public agencies

regarding the environmental consequences of the approval of a long-term lease for the construction and operation of the Facility.

Support: EIS at Cover Letter p. 1 ("The purpose of this document is to provide information to the public and to interested public agencies regarding the environmental consequences of the approval of a long-term lease for the construction and operation of the proposed Southpoint power plant") [SP-2NDSUPPDISCSTMT-000539].

101. Neither the State of Arizona nor Mohave County regulate the leasing of Indian lands.

Support: Defendants' Response to South Point Energy Center LLC's Third Set of Requests for Admission to Defendants Relating to the Bracker Phase of Litigation ("EXHIBIT 1 Ds' Response to RFA No. 3") at No. 1 (April 9, 2019).

102. No political subdivision of the State of Arizona regulates the leasing of Indian lands.

Support: D's Response to RFA No. 3 at No. 1.

VIII. Federal and Tribal Regulation and Oversight of Construction and Operations at the Facility

103. Congress has not delegated any authority to state or local jurisdictions that would apply to the Facility.

Support: EIS p. 3 ("Congress has not delegated any authority to state or local jurisdictions which would apply to the proposed Southpoint power plant") [SP-2NDSUPPDISCSTMT-000573].

104. Any facility located within the exterior boundaries of the Reservation that has a regulated chemical inventory onsite must comply with the

Emergency Planning and Community Right-to-Know Act of 1986, also known as Superfund Amendments and Reauthorization Act Title III, (the "EPCRA") through a chemical emergency preparedness program put into place by the Tribe and as required under the EPCRA.

Support: EIS p. 196 ("Any facility located within the exterior boundaries of the reservation that has a regulated chemical inventory onsite must comply with EPCRA through the tribal program") [SP-2NDSUPPDISCSTMT-000769]; USEPA Emergency Planning and Community Right-to-Know Act (EPCRA) website (hereafter cited as "EPCRA Website") ("The Emergency Planning and Community Right-to-Know Act (EPCRA) of 1986 was created to help communities plan for chemical emergencies. It also requires industry to report on the storage, use and releases of hazardous substances to federal, state, and local governments. EPCRA requires state and local governments, and Indian tribes to use this information to prepare for and protect their communities from potential risks") (Declaration of Pat Derdenger Ex. G).

105. The EPCRA requires local emergency planning committees to develop and annually review a localized emergency response plan.

Support: US EPA Local Emergency Planning Committees website (hereafter cited as "Local Emergency Planning Committees Website") ("Under the Emergency Planning and Community Right-to-Know Act (EPCRA), Local Emergency Planning Committees (LEPCs) must develop an emergency response plan, review the plan at least annually, and provide information about chemicals in the community to citizens") (Declaration of Pat Derdenger Ex. H).

106. The membership of the local emergency planning committee must include: elected state and local officials; police, fire, civil defense, and public health professionals; environment, transportation, and hospital officials; facility representatives; and representatives from community groups and the media.

Support: Local Emergency Planning Committees Website ("Plans are developed by LEPCs with stakeholder participation. . . The LEPC membership must include (at a minimum): Elected state and local officials; Police, fire, civil defense, and public health professionals; Environment, transportation, and hospital officials; Facility representatives; Representatives from community groups and the media").

107. The governor of each state, including Arizona, is required to designate a state emergency response commission responsible for implementing the EPCRA.

Support: US EPA State Emergency Response Commissions Contacts website (hereafter cited as "Emergency Response Website") ("The Governor of each state has designated a State Emergency Response Commission (SERC) that is responsible for implementing EPCRA provisions within its state") (Declaration of Pat Derdenger Ex. I).

108. Title IV of the 1990 Clean Air Act Amendments (the Acid Rain Program), found at 40 C.F.R. Parts 72-76, imposes stringent requirements on electrical utilities to control emissions of sulfur dioxide (SO2) and nitrogen oxide (NOx).

Support: EIS p. 163 ("Title IV of the [Clean Air Act Amendments] imposes stringent requirements on

electrical utilities to control emissions of SO2 and NOx") [SP-2NDSUPPDISCSTMT-000736].

109. The Acid Rain Program requirements are enforced through the Title IV Acid Rain Permit Program, administered by the US Environmental Protection Agency ("USEPA").

Support: EIS p. 163 ("[The Acid Rain Program] requirements will be enforced through the administration of the Title IV Acid Rain Permit Program. . . The allowance system is administered by the USEPA") [SP-2NDSUPPDISCSTMT-000736].

110. SPEC is responsible for satisfying all appropriate environmental protection standards as stated in the National Environmental Policy Act of 1969 and any other applicable federal environmental laws.

Support: EIS at Record of Decision for the Southpoint Power Plant Lease Development Project on the Fort Mojave Indian Reservation p. 8 ("[I]t shall be the responsibility of Calpine to satisfy all appropriate environmental protection standards as stated in the National Environmental Policy Act of 1969 or as otherwise provided under any other applicable environmental laws") [SP-2NDSUPPDISCSTMT-000893].

111. The off-site substation and two 230kV transmission lines needed to connect the Facility to WAPA's grid required an environmental assessment, which was prepared by the Bureau of Land Management as lead agency and WAPA as a cooperating agency. A Finding of No Significant Impact and Record of Decision was approved on December 2, 1997.

Support: EIS at Executive Summary pp. S-2 to S-3 ("An Environmental Assessment (EA) for the proposed substation and transmission line was prepared with the BLM as lead agency and WAPA as a cooperating agency. A Finding of No Significant Impact (FONSI) and [Record of Decision] was approved on December 2, 1997") [SP-2NDSUPPDISCSTMT-000562].

112. The USEPA Region IX staff reviewed the list of chemicals to be used or stored on-site at the Facility and concluded that a Resource Conservation and Recovery Act permit would not be required.

Support: EIS p. 195 ("The USEP A Region IX staff reviewed the list [of on-site chemicals] and concluded that no Resource Conservation and Recovery Act (RCRA) permit would be required") [SP-2NDSUPPDISCSTMT-000768].

113. WAPA uses the National Electric Safety Code Regulations for 69kV and larger power lines.

Support: EIS at Record of Decision for the Southpoint Power Plant Lease Development Project on the Fort Mojave Indian Reservation, Addendum No. 1 at A4 ("[WAPA] uses the National Electric Safety Code Regulations for 69kV and larger power lines") [SP-2NDSUPPDISCSTMT-000897].

114. Executive Order 12898 requires the BIA to consider the environmental justice of a proposed project, including the Facility. Achieving environmental justice means the BIA will identify and address disproportionately high and adverse human health or environmental effects on minority populations and low-income populations.

Support: EIS p. 227 ("Executive Order 12898 requires consideration of 'environmental justice.' The potential impacts on area minority and low income populations must be considered when evaluating the environmental consequences of a proposed project" [SP-2NDSUPPDISCSTMT-000800]; Executive Order 12898, 59 FR 7629 (Feb. 16, 1994) ("each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations") (Declaration of Pat Derdenger Ex. D).

115. SPEC is required to monitor the actual effects of the evaporation pond on migratory waterfowl and to determine when and if environmental impact mitigation measures are necessary, in consultation with the Havasu National Wildlife Refuge manager.

Support: EIS p. 184 ("Calpine, in consultation with the Havasu National Wildlife Refuge manager, would monitor actual effects of the evaporation pond on migratory waterfowl . . . netting or other appropriate deterrents would be implemented by Calpine, in consultation with the Manager of the Havasu National Wildlife Refuge, the FMIT and the BIA") [SP-2NDSUPPDISCSTMT-000757].

116. The BIA and the Tribe will monitor and inspect construction and operation activities at the Facility during the life of the lease to ensure compliance with the environmental mitigation requirements addressed in the Record of Decision for the Southpoint Power Plant Lease Development Project on the Fort Mojave Indian Reservation.

Support: EIS at Record of Decision for the Southpoint Power Plant Lease Development Project on the Fort Mojave Indian Reservation p. 8 ("The BIA and FMIT will monitor and inspect construction and operation activities on the lease hold [sic] during the life of the lease to ensure compliance with the mitigation requirements addressed above and in the Final EIS") [SP-2NDSUPPDISCSTMT-000893].

117. SPEC was required to prepare an emergency preparedness plan for adoption by resolution by the Tribal Council and implementation in compliance with the EPCRA.

Support: EIS p. 196 ("In cooperation with the FMIT, Calpine would prepare an emergency preparedness plan for Tribal Council adoption by resolution and implementation in compliance with EPCRA") [SP-2NDSUPPDISCSTMT-000769].

118. The Tribe extensively regulates on-Reservation activities through its adoption of various tribal codes, including the Building Code, the Residential Code, the Plumbing Code, the Energy Conservation Code, the Performance Code for Buildings and Facilities, the Mechanical Code, the Fuel Gas Code, the Existing Building Code, the Electrical Code, the Property Maintenance Code, and the Fire Code.

Support: Fort Mojave Indian Tribe Resolution #2004-25 dated February 20, 2004 [SP-2NDSUPPDISCSTMT-000421 to -000444] (Declaration of Verrin T. Kewenvoyouma Ex. E); Fort Mojave Indian Tribe Resolution #2013-89 dated December 3, 2013 [SP-2NDSUPPDISCSTMT-000360-000385] (Declaration of Verrin T. Kewenvoyouma Ex. F).

119. SPEC was required to enter a Compliance Agreement with the Tribe regarding tribal employment preferences at the Facility.

Support: A&R Ground Lease § 22 [SP-DISCSTMT-000033]; A&R Ground Lease at Exhibit E: Fort Mojave Indian Tribe-Calpine Compliance Agreement with Tribal Employment Rights Office [SP-DISCSTMT-000068 to - 000072].

120. Under federal pipeline safety laws, the US Department of Transportation Office of Pipeline Safety has exclusive regulatory authority over pipelines that are defined as interstate pipelines: pipelines used to transport gas and hazardous liquids across state lines throughout the nation.

Support: ACC Pipeline Safety Website ("Under federal pipeline safety laws, the United States Department of Transportation (US DOT), Office of Pipeline Safety, has exclusive regulatory authority over pipelines that are defined as interstate pipelines – those pipelines used to transport gas and hazardous liquids across state lines throughout the nation".

121. In Arizona, interstate pipelines include the natural gas facilities operated by El Paso Natural Gas and Transwestern Pipeline Company.

Support: ACC Pipeline Safety Website ("In Arizona, interstate pipelines include natural gas facilities operated by El Paso Natural Gas/Kinder Morgan, Questar and Transwestern").

122. Federal pipeline safety laws preempt Arizona or any other state from regulating interstate pipeline safety.

Support: ACC Pipeline Safety Website ("Federal pipeline safety laws preempt any state from regulating interstate pipeline safety").

123. Only the US Department of Transportation may impose sanctions against interstate operators for violating federal pipeline safety regulations.

Support: ACC Pipeline Safety Website ("Accordingly, only the US DOT may impose sanctions against interstate operators for violating federal pipeline safety regulations").

124. The US Department of Transportation Office of Pipeline Safety has authorized the Arizona Corporation Commission's Pipeline Safety Section to perform as its agent the required federal inspections and audits of interstate operators with facilities in Arizona, including the pipelines connecting the Facility to the gas transmission lines.

Support: ACC Pipeline Safety Website ("The US DOT Office of Pipeline Safety has authorized the ACC's Pipeline Safety Section to perform the required federal inspections and audits of interstate operators with facilities in Arizona").

125. This delegated authority requires that the Arizona Corporation Commission adhere to specific conditions and terms contained in an Interstate Agent Agreement, which is subject to annual renewal.

Support: ACC Pipeline Safety Website ("This delegated authority and our ability to perform these inspections for the federal office requires that we adhere to specific conditions and terms contained in an agreement

(Interstate Agent Agreement), which may be renewed annually").

126. If the Arizona Corporation Commission finds a violation of federal pipeline safety standards, it submits a report with recommendations to the US Department of Transportation regarding enforcement action, and it is up to the federal office to enforce the federal laws governing pipeline safety.

Support: ACC Pipeline Safety Website ("When we find a potential or probable violation of federal pipeline safety standards, we submit a report with recommendations to the US DOT regarding enforcement action. It is then up to the federal office to enforce the federal laws governing pipeline safety").

IX. Permits Required for Construction and Operation of the Facility

127. The following federal permits are required for the construction and operation of the Facility: a Prevention of Significant Deterioration Air Quality Permit, issued by the USEPA; a Section 404 Permit issued by the US Army Corps of Engineers ("USACE") pursuant to the Clean Water Act; a Section 10 permit issued by the USACE pursuant to the River and Harbor Act of 1899; a Section 401 Water Quality Certification issued by the USEPA pursuant to the Clean Water Act; a National Pollutant Discharge Elimination System Permit issued by the USEPA pursuant to Section 402 of the Clean Water Act; an Acid Rain (Title IV) Permit issued by the USEPA pursuant to the Clean Air Act; and a Title V Operating Permit issued by the USEPA pursuant to the Clean Air Act.

Support: EIS pp. 4-6 (summary of required federal permits) [SP-2NDSUPPDISCSTMT-000574 to -000576].

128. The following Tribal permits or approvals are required for the construction and operation of the Facility: Water Use Permit and Building Permit.

Support: EIS p. 4 (summary of required tribal permits) [SP-2NDSUPPDISCSTMT-000574].

A. Federal Prevention of Significant Deterioration Air Quality Permit

129. The Prevention of Significant Deterioration Air Quality Permit is required because the Facility is considered a major new source for the emission of air pollutants.

Support: EIS p. 4 ("Based on the proposed Southpoint power plant's potential emission of air pollutants, the proposed facility would be considered a major new source. An air quality permit known as the PSD is require by the USEPA for all stationary sources of air pollutants") [SP-2NDSUPPDISCSTMT-000574].

130. SPEC is required to mitigate operations-related air quality impacts to insignificance by providing control technology that does not result in exceedances of the National Ambient Air Quality Standards.

Support: EIS p. 230 ("Calpine will mitigate operations-related air quality impacts to insignificance by providing control technology that does not result in exceedances of the [National Ambient Air Quality Standards]" [SP-2NDSUPPDISCSTMT-000804].

131. The mechanism for determining the appropriate control technology to mitigate operations-related air

quality impacts is the Prevention of Significant Deterioration Permit issued by the USEPA.

Support: EIS pp. 230-231 ("The mechanism for determining the appropriate control technology to mitigate operations-related air quality impacts is the Prevention of Significant Deterioration Permit that will be processed by the US Environmental Protection Agency") [SP-2NDSUPPDISCSTMT-000804 to -000805].

132. SPEC filed a Prevention of Significant Deterioration Air Quality Permit with the USEPA prior to starting construction of the Facility.

Support: EIS at Record of Decision for the Southpoint Power Plant Lease Development Project on the Fort Mojave Indian Reservation p. 7 ("Calpine has filed with the EPA Region IX a Prevention of Significant Deterioration (PSD) permit application for the power plant emissions") [SP-2NDSUPPDISCSTMT-000892].

133. The US Environmental Protection Agency issued a Prevention of Significant Deterioration Air Quality Permit/Approval to Construct a Stationary Source for the Facility on May 24, 1999.

Support: Approval to Construct a Stationary Source dated May 24, 1999 (attached to Letter from D. Howekamp (Environmental Protection Agency) to R. Hollenbacher (Calpine Corporation)) [SP-DISCSTMT-000228 to -000251; SP-7THSUPPDISCSTMT-000001 to - 000002] (Declaration of Barbara McBride Exs. H and I).

B. Federal Clean Water Act Permits

134. The USACE regulates grading, filling, mechanized land clearing, ditching, and other similar

activities that impact waters and wetlands of the United States under Section 404 of the Clean Water Act.

Support: EIS p. 5 ("Activities regulated [by the USACE] under Section 404 include, but are not limited to, grading, filling, mechanized land clearing, ditching, or other similar activities which impact a water of the US") [SP-2NDSUPPDISCSTMT-000575].

135. SPEC obtained Clean Water Act Section 10 and Section 404 permits from the USACE prior to starting construction of the Facility.

Support: EIS at Record of Decision for the Southpoint Power Plant Lease Development Project on the Fort Mojave Indian Reservation, Addendum No. 1 at A1 ("US Army Corps of Engineers (USACE) Section 10 and Section 404 permits are in place") [SP-2NDSUPPDISCSTMT-000897].

136. The USEPA is the federal agency responsible for issuing Section 401 Water Quality Certifications for projects on Indian reservations that impact the waters of the United States.

Support: EIS p. 5 ("Under Section 401 of the Clean Water Act, the USEPA is the agency responsible for issuing individual 401 water quality certifications for projects on Indian reservations that affect waters of the US") [SP-2NDSUPPDISCSTMT-000575]

137. The US Environmental Protection Agency issued a Section 401 Water Quality Certification for the Facility on December 13, 1996.

Support: EPA Region IX Final Action on December 13, 1996 Nationwide Permit Clean Water Act Section 401 Certification in Indian Country [SP-

7THSUPPDISCSTMT-000003 to -000004] (Declaration of Barbara McBride Ex. K).

C. Federal National Pollutant Discharge Elimination System Program and Permit

138. The USEPA has jurisdiction over Indian reservation lands for administration of the National Pollutant Discharge Elimination System program under Section 402 of the Clean Water Act. A permit is required if there is a point source discharge of wastewater into dry washes, streams, or other waters of the United States.

Support: EIS p. 5 ("The USEPA has jurisdiction over Indian reservation lands for administration and enforcement of the National Pollutant Discharge Elimination System (NPDES) program under Section 402 of the Clean Water Act. An NPDES permit is required if there is a point source discharge of wastewater into '. . . waters of the United States'") [SP-2NDSUPPDISCSTMT-000575].

139. SPEC did not obtain a Section 402 National Pollutant Discharge Elimination System Permit prior to construction of the Facility because such permit is only required if discharge will take place offsite and no offsite discharge was anticipated.

Support: EIS p. 142 ("An NPDES permit would be required if there is a discharge offsite. However, such discharge is not anticipated") [SP-2NDSUPPDISCSTMT- 000715].

D. Federal Title V Operating Permit

140. Areas under federal administration, including tribal lands, are subject to the federal Operating Permit

program under Title V of the Clean Air Act as contained in 40 C.F.R. 71 *et seq*.

Support: EIS p. 163 ("Areas under federal administration, including Tribal lands are subject to the federal operating permit program as contained in 40 CFR 71") [SP-2NDSUPPDISCSTMT-000736].

141. The Title V Operating Permit is required of all major sources of air pollution, and the application was required to be submitted within 12 months of commencing operations at the Facility.

Support: EIS p. 6 ("Title V of the [Clean Air Act Amendments] requires all major sources of air pollution to obtain a permit to operate. . . The proposed Southpoint power plan would be required to submit a complete Title V application to the USEPA within 12 months of commencing operations") [SP-2NDSUPPDISCSTMT-000576].

142. The Acid Rain Permit is incorporated into the Title V Operating Permit.

Support: EIS p. 6 ("The proposed Southpoint power plan would be subject to the Title IV [Acid Rain] program. Its acid rain permit would be incorporated into its Title V operating permit") [SP-2NDSUPPDISCSTMT-000576].

143. SPEC received an Acid Rain Program Certificate of Representation dated July 28, 1999.

Support: Environmental Protection Agency Acid Rain Program Certificate of Representation dated July 28, 1999 [SP-DISCSTMT-000215 to -000222] (Declaration of Barbara McBride Ex.A).

144. The USEPA issued SPEC a Title V Permit to Operate dated May 20, 2003.

Support: Environmental Protection Agency Title V Permit to Operate dated May 20, 2003 [SP-DISCSTMT-000296 to -000333] (Declaration of Barbara McBride Ex. B).

145. The USEPA issued a renewed Title V Permit to Operate dated March 22, 2012.

Support: Environmental Protection Agency Title V Permit to Operate dated March 22, 2012 [SP-DISCSTMT-000259 to -000295] (Declaration of Barbara McBride Ex. C).

146. SPEC submitted a Title V Operating Permit Renewal Application dated August 24, 2016 to the USEPA.

Support: South Point Energy Center, LLC Title V Operating Permit Renewal Application dated August 24, 2016 [SP-3RDSUPPDISCSTMT-006559 to -006667] (Declaration of Barbara McBride Ex. D).

147. The USEPA issued a Title V Permit to Operate dated September 13, 2018 to SPEC.

Support: Environmental Protection Agency Title V Permit to Operate dated September 13, 2018 [SP-4THSUPPDISCSTMT-000009 to -000047] (Declaration of Barbara McBride Ex. E).

E. Other Federal Permits and Certifications

148. The USEPA issued a Storm Water Permit dated November 8, 1999 to SPEC.

Support: Environmental Protection Agency Storm Water Permit #AZR10A90I dated November 8, 1999 [SP-DISCSTMT-000252 to -000253] (Declaration of Barbara McBride Ex. F).

149. The USEPA issued a Storm Water Permit dated August 2, 2000 to SPEC.

Support: Environmental Protection Agency Storm Water Permit #AZR10G554 dated August 2, 2000 [SP-DISCSTMT-000257 to -000258] (Declaration of Barbara McBride Ex. G).

F. Tribal Water Use Permit

150. The Tribe's Water Use Ordinance requires SPEC to apply for, and the Tribe to grant, a Water Use Permit before water can be used for the Facility.

Support: EIS p. 4 ("The FMIT Water Use Ordinance requires application for, and approval of, a water use permit before water may be used") [SP-2NDSUPPDISCSTMT-000574].

151. The Tribe issued a Water Use Permit to SPEC for the term March 15, 1999 through March 14, 2069.

Support: Water Use Permit Issued by the Fort Mojave Indian Tribe [SPDISCSTMT-000213] (Declaration of Kurt Fetters Ex. A).

G. Tribal Building Permits

152. The Tribe's regulations required SPEC to apply for, and the Tribe to grant, a building permit before construction could begin on the Facility.

Support: EIS p. 4 ("The FMIT requires application for, and issuance of, a building permit before construction of any development") [SP-2NDSUPPDISCSTMT-000574].

153. SPEC applied for a building permit from the Tribe on June 7, 1999.

Support: Approved Building Permit Application filed with the Fort Mojave Indian Tribe Building Department dated June 7, 1999 [SP-DISCSTMT-000214] (Declaration of Kurt Fetters Ex. B).

154. The Tribe approved the building permit application for the construction of the Facility on June 7, 1999.

Support: Approved Building Permit Application filed with the Fort Mojave Indian Tribe Building Department dated June 7, 1999 [SP-DISCSTMT-000214] (Declaration of Kurt Fetters Ex. B).

155. The Tribe's Building and Safety Department issued a Certificate of Occupancy for the Water Treatment Building to SPEC dated August 31, 2001.

Support: Certificate of Occupancy (Water Treatment Building) issued by the Fort Mojave Indian Tribe Building and Safety Department dated August 31, 2001 [SPDISCSTMT-000211] (Declaration of Kurt Fetters Ex. C).

156. The Tribe's Building and Safety Department issued a Certificate of Occupancy for the Administration Building dated August 31, 2001.

Support: Certificate of Occupancy (Administration Building) issued by the Fort Mojave Indian Tribe Building and Safety Department dated August 31, 2001 [SPDISCSTMT-000212] (Declaration of Kurt Fetters Ex. D).

H. No State or County Permits Required

157. No permits or approvals from the State of Arizona or any county or local jurisdictions are required because of the FMIT's sovereign status.

Support: EIS p. 3 ("No permits or approvals from the State of Arizona, or county or local jurisdictions, are required because of the FMIT's sovereign status") [SP-2NDSUPPDISCSTMT-000573].

158. The Tribe has not entered into any intergovernmental agreements or memoranda of understanding with state or local jurisdictions that would delegate its permitting authority to any entity outside the tribe.

Support: EIS p. 3 ("[T]he FMIT has not entered into any intergovernmental agreements or memoranda of understanding with state or local jurisdictions which would delegate its permitting authority to any entity outside the tribe") [SP- 2NDSUPPDISCSTMT-000573].

159. Neither the State of Arizona nor Mohave County issued or was required to issue building permits to South Point for the construction of the Facility.

Support: D's Response to RFA No. 3 at No. 5.

160. No political subdivision of the State of Arizona issued or was required to issue building permits to South Point for the construction of the Facility.

Support: D's Response to RFA No. 3 at No. 5.

161. Neither the State or Arizona nor Mohave County issued or was required to issue a certificate of occupancy for the Facility.

Support: D's Response to RFA No. 3 at No. 6.

162. No political subdivision of the State of Arizona issued or was required to issue a certificate of occupancy for the Facility.

Support: D's Response to RFA No. 3 at No. 6.

163. Neither the State of Arizona nor Mohave County issued or was required to issue storm water permits relating to the Facility.

Support: D's Response to RFA No. 3 at No. 7.

164. No political subdivision of the State of Arizona issued or was required to issue storm water permits relating to the Facility.

Support: D's Response to RFA No. 3 at No. 7.

165. Neither the State of Arizona nor Mohave County issued or was required to issue environmental permits relating to the operation of the Facility.

Support: D's Response to RFA No. 3 at No. 8.

166. No political subdivision of the State of Arizona issued or was required to issues environmental permits relating to the operation of the Facility.

Support: D's Response to RFA No. 3 at No. 8.

167. The Facility would be subject to state regulation and permitting if it were not located on the Reservation.

Support: Deposition of Barbara McBride p. 12 lines 23-25, p. 13 line 1 ("Q: And what differs in terms of regulation and permitting when a plant is located on tribal land? A: It's only under federal jurisdiction. There's no state authorization") (Declaration of Pat Derdenger Ex. C).

X. Water Used at the Facility

168. The Facility uses water withdrawn from the Colorado River and piped to the plant in a buried pipeline owned by the Tribe and located on reservation land as the primary source of water for the steam turbine and cooling towers.

Support: EIS at Executive Summary p. S-3 ("The proposed Southpoint power plant would use water withdrawn from the Colorado River and piped to the plant in a buried pipeline constructed, owned and operated by the FMIT on reservation land as the primary source of water for the steam turbine and cooling towers") [SP-2NDSUPPDISCSTMT-000562]; Fetters Deposition p. 24 lines 7-9 ("Q: And the pipeline runs entirely on tribal land; is that correct? A. Yes.").

169. The Tribe has perfected water rights to Colorado River water in quantities adequate to meet the 4,000 acre-feet per year consumptive use requirements of the Facility.

Support: EIS at Executive Summary p. S-5 ("The FMIT has perfected water rights to Colorado River water in quantities adequate to meet the estimated 4,000 acre feet per year consumptive use requirements of the proposed power plant") [SP-2NDSUPPDISCSTMT-000564].

170. The source of water for the Facility is from the Tribe's allocation of Colorado River water.

Support: EIS at Record of Decision for the Southpoint Power Plant Lease Development Project on the Fort Mojave Indian Reservation, Addendum No. 1 at E1 ("The source of water for the power plant project is

from the FMIT's allocation of Colorado River water") [SP-2NDSUPPDISCSTMT-000901].

171. The source of the water for the Facility is not from the State of Arizona's Colorado River water allocation.

Support: EIS at Record of Decision for the Southpoint Power Plant Lease Development Project on the Fort Mojave Indian Reservation, Addendum No. 1 at E1 (The source of water for the power plant project is. . . not from the State of Arizona's allocation") [SP-2NDSUPPDISCSTMT-000901].

172. The Tribal Water Ordinance required the Tribe to issue a Water Permit before water could be used at the Facility.

Support: EIS p. 76 ("The Water Ordinance requires issuance of a Water Permit before water may be used on any development approved under the FMIT's Planned Area Development and Subdivision Ordinance") [SP-2NDSUPPDISCSTMT-000648].

173. Water from wells or from the Colorado River would be considered to be sub-flow of the Colorado River, and would be accounted for as surface water from the Tribe's allocation of Colorado River water by the US Bureau of Reclamation, the federal agency responsible for Colorado River management.

Support: EIS p. 165 ("Either source of water would be considered to be subflow of the river, and would be accounted as surface water from the Tribe's allocation of Colorado River water by the [US Bureau of Reclamation], the federal agency responsible for Colorado River management") [SP-2NDSUPPDISCSTMT-000738].

174. Water directly withdrawn from the Colorado River is the preferred primary water supply source for the Facility because river water has better quality than well water.

Support: EIS p. 166 ("Water directly withdrawn from the Colorado River is the preferred primary water supply sources for the Southpoint power plant because river water has better quality than well water") [SP-2NDSUPPDISCSTMT-000739].

175. Water is pumped from the Colorado River by pumps, equipment, and pipeline owned by the Tribe and maintained by SPEC with the permission of the Tribe.

Support: Fetters Deposition p. 24 lines 18-22 ("A: Once the pipeline was constructed and built by Calpine, ownership of it is for the Fort Mojave Indian Tribe. So if there was a repair to that pipeline, we would have to go to the tribe and say, 'Hey, there's a hole. Can we dig it up?").

176. The US Bureau of Reclamation and the US Coast Guard, which review structures placed in the river for navigational safety, reviewed and approved the Tribe's water pumping equipment at the time of its installation.

Support: EIS p. 166 ("The platform [the Tribe's water pumping equipment] has been in place for many years, and was approved at the time of its installation by river managing entities such as the [US Bureau of Reclamation] and the US Coast Guard, which reviews structures placed in the river for navigational safety") [SP-2NDSUPPDISCSTMT-000739].

177. Under the A&R Ground Lease, SPEC is permitted to extract up to 4,000 acre-feet of water per year in consumptive water rights from the Tribe's

Colorado River water allocation for the Arizona portion of the Reservation and to use this water in its operation of the Facility.

Support: A&R Ground Lease § 7.1 [SP-DISCSTMT-000011].

178. Under the Second A&R Ground Lease SPEC is permitted to extract up to 4,000 acre-feet of water per year in consumptive water rights from the Tribe's Colorado River water allocation for the Arizona portion of the Reservation and to use this water in its operation of the Facility.

Support: Second A&R Ground Lease § 8.1, [SP-DISCSTMT-000142].

XI. Services Provided to the Facility

179. The water pipe from the Colorado River serves the Facility exclusively and does not serve agricultural irrigation purposes.

Support: EIS p. 167 ("The [water] pipe would serve the power plant exclusively, and would not serve agricultural irrigation") [SP-2NDSUPPDISCSTMT-000740].

180. The Tribe provides the water used in the Facility's operations.

Support: D's Response to RFA No. 3 at No. 4.

181. Neither the State of Arizona nor Mohave County provide water services to the Facility.

Support: D's Response to RFA No. 3 at No. 4.

182. No political subdivision of the State of Arizona provides water services to the Facility.

Support: D's Response to RFA No. 3 at No. 4.

183. Fire protection and emergency medical response for the Facility, is provided by modification of the preexisting contract between the Tribe and the Mohave Valley Fire Department for on-Reservation fire protection and emergency services.

Support: EIS pp. 229-230 ("Fire protection (and emergency medical response) shall be provided by modification of the existing contract between the FMIT and the [Mohave Valley Fire Department] to include the Southpoint power plant's proposed location on Section 8, the Preferred Alternative site. The contract modification shall be executed before construction activity commences, and shall remain in place for the life of the proposed power plant") [SP-2NDSUPPDISCSTMT-000803 to -000804].

184. The Tribe pays the Mohave Valley Fire Department for the fire protection and emergency response services it provides on the Reservation.

Support: Fire Protection and Emergency Medical Services Agreement between the Fort Mojave Indian Tribe and Mohave Valley Fire District commencing July 1, 2005 § 6 [SP-2NDSUPPDISCSTMT-000402 to -000404] Declaration of Verrin T. Kewenvoyouma Ex. J); Fire Protection and Emergency Medical Services Intergovernmental Agreement between the Fort Mojave Indian Tribe and Mohave Valley Fire District, dated August 22, 2001 § 6 [SP-2NDSUPPDISCSTMT-000414] (Declaration of Verrin T. Kewenvoyouma Ex. K); Fire Protection and Emergency Medical Services Agreement between the Fort Mojave Indian Tribe (North) and

Mohave Valley Fire District commencing October 1, 2016 § 6 [SP-4THSUPPDISCSTMT-000360 to -000361] (Declaration of Verrin T. Kewenvoyouma Ex. L); Fire Protection and Emergency Medical Services Agreement between the Fort Mojave Indian Tribe (South) and Mohave Valley Fire District, commencing October 1, 2016 § 6 [SP-4THSUPPDISCSTMT-000373] (Declaration of Verrin T. Kewenvoyouma Ex. M).

185. The Tribe was required to enter into a contract with the Bullhead City Fire Department or other entity capable of meeting hazardous materials response emergencies.

Support: EIS p. 230 ("[T]he FMIT shall enter into a contract with the [Bullhead City Fire Department], or other entity, capable of meeting hazardous materials response emergencies") [SP-2NDSUPPDISCS TMT-000804].

186. The USEPA has a hazardous materials technical assistance team that is available to the BIA to provide assistance as emergency response and as an onsite emergency coordinator.

Support: EIS p. 196 ("[T]he USEP A has a hazardous materials technical assistance team which is available to the BIA") [SP-2NDSUPPDISCSTMT-000769].

187. As a sovereign Indian tribe, the Tribe is also eligible to receive hazardous materials response assistance directly from the USEPA through the EPCRA.

Support: EIS p. 196 ("As a sovereign Indian tribe, the FMIT is also eligible to receive hazardous materials response assistance directly from the USEPA through the Emergency Planning and Community Right-to-know Act

of 1986 (EPCRA, aka SARA Title III)") [SP-2NDSUPPDISCSTMT-000769].

188. Response to large-scale medical emergencies is available to the BIA and the Tribe through the Federal Emergency Management Agency.

Support: EIS p. 199 ("Response to large scale medical emergencies would also be available to the BIA and FMIT through the USEP A, and through FEMA") [SP-2NDSUPPDISCSTMT-000772].

189. The Tribe provides sewer service to Tribal and non-tribal members on the Arizona side of the Reservation through the Fort Mojave Tribal Utilities Authority.

Support: EIS p. 114 ("The Tribe provides sewer service to Tribal and non-tribal members on the Arizona side of the FMIR") [SP-2NDSUPPDISCSTMT-000686]; Devita Deposition p. 17 lines 20-22 ("Q: And is there also utilities as well, a water – A: Yes. Correct. Water and sewer").

190. The Fort Mojave Tribal Utility Authority plant has adequate capacity to receive and treat the estimated 4,000 gallons per day output from the Facility.

Support: EIS p. 205 ("The [Fort Mojave Tribal Utility Authority] plant has adequate capacity to receive and treat the estimated 4,000 gpd output from the proposed Southpoint power plant") [SP-2NDSUPPDISCSTMT-000778].

191. SPEC contracts with Republic Services for the Facility's waste pick-up and hauling.

Support: Second Amendment to the Combined Offering Multiple Location Master Service Agreement

effective November 19, 2018 [SP-6THSUPPDISCSTMT-000001], Declaration of Kurt Fetters Ex. G; Amendment to the Combined Offering Multiple Location Master Service Agreement effective March 31, 2016 [SP-6THSUPPDISCSTMT-000002 to -000011], Declaration of Kurt Fetters Ex. H; Purchase Order dated SP020-2000000930 February 12, 2013; Purchase Order SP020-2000000992 dated May 10, 2013; Purchase Order SP020-2000000992 dated May 10, 2013; Purchase Order SP020-2000001064 dated July 26, 2013; Purchase Order SP020-2000001147 dated November 5, 2013; Purchase Order SP020-2000001192 dated December 19, 2013; Purchase Order SP020-2000001235 dated January 14, 2014; Purchase Order SP020-2000001385 dated May 12, 2014; Purchase Order SP020-2000001155 dated November 17, 2014; Purchase Order SP020-2000001555 dated November 17, 2014; Purchase Order SP020-2000001693 dated March 13, 2015; Purchase Order SP020-2000001693 dated March 13, 2015; Purchase Order SP020-2000001819 dated July 17, 2015; Purchase Order SP020-2000001831 dated August 4, 2015; Purchase Order SP020-2000001844 dated August 17, 2015; Purchase Order SP020-2000001880 dated September 30, 2015; Purchase Order SP020-2000002189 dated February 13, 2018; Purchase Order SP020-2000002225 dated July 31, 2018; Purchase Order SP020-2000002225 dated July 31, 2018 [SP-6THSUPPDISCSTMT-000012 to-000053], Declaration of Kurt Fetters Ex. I.

192. The tribal electric company, Aha Macav Power Service (AMPS), has a power distribution system on the Reservation.

Support: EIS p. 113 ("The tribal electric company, Aha Macav Power Service (AMPS), has a limited power

distribution system on the reservation") [SP-2NDSUPPDISCSTMT-000685].

193. Electricity for the Facility is generated on site as part of the power production process. Back-up power for the Facility is provided by AMPS on an as-needed basis, and AMPS invoices SPEC for such power as used.

Support: EIS p. 206 ("[E]lectricity for plant operation would be generated on site as part of the power production process") [SP-2NDSUPPDISCSTMT-000779]; Fetters Deposition, p. 14 lines 8-10 ("It would be almost like if you shut – if the power shut off in your house and you rented a generator to power it up before it came back on").

194. Neither the State of Arizona nor Mohave County provide electric utility services to the Facility.

Support: D's Response to RFA No. 3 at No. 2.

195. No political subdivision of the State of Arizona provides electric utility services to the Facility.

Support: D's Response to RFA No. 3 at No. 2.

196. Natural gas for incidental use in operation of the Facility would come from the same source as the Facility's fuel for energy production, the gas line connecting the Facility to El Paso Natural Gas Company's and Transwestern Pipeline Company's main natural gas lines.

Support: EIS p. 207 ("Regardless of the project alternative site selected, natural gas for incidental use in operation of the plant, other than fuel turbines, would come from the same source as the plant's fuel for energy production") [SP-2NDSUPPDISCSTMT-000780].

197. The Facility does not require natural gas from area utility service providers.

Support: EIS p. 207 ("Natural gas would not be required from area utility service providers") [SP-2NDSUPPDISCSTMT-000780].

198. Telecommunications, including fiber optic cable, satellite connection, and cellular communications are provided by and available from Fort Mojave Telecommunications, Inc.

Support: EIS p. 114 ("Telecommunications, including fiber optic cable, satellite connection, and cellular communications are available from Fort Mojave Telecommunications, Inc. (FMTI)") [SP-2NDSUPPDISCSTMT-000686].

199. The Tribe provides telephone utility services to the Facility through its tribally-owned entity, Fort Mojave Telecommunications, Inc.

Support: D's Response to RFA No. 3 at No. 9; Devita Deposition p. 17 lines 13-14 ("A: . . . they [the Tribe] provide the telephone and Internet services to the local community, not just the tribe").

200. Neither the State of Arizona nor Mohave County provide telephone utility services to the Facility.

Support: D's Response to RFA No. 3 at No. 9.

201. No political subdivision of the State of Arizona provides telephone utility services to the Facility.

Support: D's Response to RFA No. 3 at No. 9.

XII. Benefits to the Tribe Provided by the Facility

202. Before approving the lease, the BIA concluded that the Facility would result in a number of benefits to the Tribe, including revenue from the 320-acre ground lease, additional income from SPEC's use of 4,000 acre-feet of water per year, tribal tax revenues, increased employment and training opportunities for tribal members, diversified economic development on the reservation, and self-sufficiency.

Support: EIS at Record of Decision for the Southpoint Power Plant Lease Development Project on the Fort Mojave Indian Reservation pp. 6-7 ("Several important advantages are gained by the FMIT from the approval of the lease development project on the reservation. These advantages include: 1) the lease revenue from the 320 acre ground lease; 2) additional lease income for the FMIT from Calpine's use of the 4,000 AF of water per year; 3) tax revenues; 4) increase [sic] employment and training opportunities for tribal members; 5) enhancement of diversified economic development on the reservation; and most important, 6) self sufficiency [sic] by the FMIT") [SP-2NDSUPPDISCSTMT-000891 to -000892].

203. The BIA concluded that construction jobs associated with the Facility and permanent jobs associated with its operation could offer preferable and higher paying occupations to some tribal members.

Support: EIS p. 189 ("Construction jobs associated with the proposed power plant, and permanent jobs associated with its operation, may offer preferable, and higher paying, occupations to some tribal members, allowing them to move into new job types that would

become available for qualified tribal members") [SP-2NDSUPPDISCSTMT-000762].

204. The BIA determined that the Facility would partially fulfill stated tribal goals for economic development and self-sufficiency.

Support: EIS p. 193 ("The power plant would partially fulfill stated tribal goals for economic development and self-sufficiency") [SP-2NDSUPPDISCSTMT -000766].

205. The lump-sum prepayment under the Second Amended Lease Agreement allowed the Tribe to achieve its goal of becoming debt-free by 2017.

Support: Devita Deposition p. 41 lines 7-12 ("Q: So the first five-year plan was 2012 through 2017, and that was to become debt free? A: Correct. Q: And that involved getting prepayments from Calpine? A: Yes").

XIII. Tribal Taxation of Reservation Activities

206. The Tribe initially adopted its current Tribal Tax Ordinance, Ordinance No. 46, on April 22, 1993.

Support: Tribal Ordinance amending Tribal Tax Code passed September 27, 2005 ("Whereas, pursuant to Resolution No. 93-49 dated April 22, 1993, the Tribal Council adopted as Tribal law the Fort Mojave Indian Tribe Tax Ordinance (Ordinance No. 46), the Tax Ordinance having been amended from time to subsequent time thereto") [SP-4THSUPPDISCSTMT-000198 to - 000200] (Declaration of Verrin T. Kewenvoyouma Ex. G).

207. It is the policy of the Tribe to promote economic development and tribal self-sufficient on the Reservation, and to utilizes its tax power to help defray to the cost of government and to promote strong tribal government.

This policy goal is achieved by the Tribe's adoption of a tax scheme conductive to economic development in the private sector.

Support: Fort Mojave Tribal Tax Ordinance (hereafter cited as "Tribal Tax Ordinance") § 101.003(3) [SP-4THSUPPDISCSTMT-000057] (Declaration of Verrin T. Kewenvoyouma Ex. H).

208. The Tribe imposes a tax on leasehold interests in Reservation land.

Support: Tribal Tax Ordinance § 202.001 *et seq*. [SP-4THSUPPDISCSTMT-000076 to -000082].

209. The Tribe offers taxpayers a credit against taxes owed to the Tribe for identical or similar lawful state taxes paid by the taxpayer during the same tax period in Section 402.002 of the Tribal Tax Ordinance.

Support: Second A&R Ground Lease at Exhibit G: Tribal Tax Ordinance § 402.002(1) [SP-DISCSTMT-000189 to -000191].

210. The Tribal Council adopted Section 402.002 of the Tribal Tax Ordinance because it found that the specter of dual tribal and state taxation frustrates economic development on the Reservation and unduly burdens Reservation commerce.

Support: Second A&R Ground Lease at Exhibit G: Tribal Tax Ordinance § 402.001(2) [SP-DISCSTMT-000189 to -000191].

211. Section 403.003 of the Tribal Tax Ordinances permits the Tribal Council to authorize a payment in lieu of taxes ("PILOT") or total or partial tax exemption to the developer of the project to be located on Reservation lands.

Support: Fort Mojave Indian Tribe Resolution #99-80 dated August 4, 1999, adopting Tribal Tax Ordinance § 403.003 [SP-DISCSTMT-000883 to -000885] (Declaration of Verrin T. Kewenvoyouma Ex. I).

212. The A&R Ground Lease did not contain any provisions specific to the payment of tribal taxes by SPEC on the Facility.

Support: A&R Ground Lease [SP-DISCSTMT-000001 to -000126].

213. Under Lease Modification No. 1, the Tribe granted SPEC a tax credit against any tribal taxes that reduced the tax due dollar-for-dollar by the amount of any equivalent tax imposed by the State of Arizona or Mohave County or any other taxing jurisdiction.

Support: A&R Ground Lease at Lease Modification No. 1 § 1(c) [SP-DISCSTMT-00108].

214. Under Lease Modification No. 1, the Tribe granted SPEC a tribal sales and use tax exemption for its wholesale sale of electricity produced on the Reservation as well as its purchases of supplies and materials needed for the Facility's operation.

Support: A&R Ground Lease at Lease Modification No. 1 § 1(c) [SP-DISCSTMT-000108 to -000109].

215. Under Lease Modification No. 1, the Tribe agreed to waive all other tribal taxes on SPEC's activities on the Reservation pursuant to the lease.

Support: A&R Ground Lease at Lease Modification No. 1 § 1(c) [SP-DISCSTMT-00111 to -00112].

216. In the Second A&R Ground Lease, the Tribe authorized a payment in lieu of any and all tribal taxes of

any nature, whether currently imposed or imposed at any point during the duration of the lease, and including any tribal tax rate increases for SPEC pursuant to § 403.003(1) of the Tribal Tax Ordinance.

Support: Second A&R Ground Lease § 7.3 [SP-DISCSTMT-000141 to -000142].

217. As consideration for the Second A&R Ground Lease, the Tribe waived its sovereign right to impose any tribal tax on SPEC, the Facility, or its operations as of the date of the Second A&R Ground Lease.

Support: Second A&R Ground Lease § 7.3 [SP-DISCSTMT-000141 to -000142].

218. At least one proposed development project on the Reservation fell through due to the threat of double taxation by the Tribe and the State of Arizona.

Support: Devita Deposition p. 83 lines 20-24 ("Q: Are you aware of any negative impacts on either – on a business opportunity on tribal land because the company may have had to pay state or local property taxes in addition to the tribal taxes? A: Yes").

219. Negotiations between First Solar, a non-Indian company, and the Tribe for the development of solar energy installation on approximately 2,400 acres of Reservation land ceased over disagreements over how the tribal and state taxes should be paid.

Support: Devita Deposition pp. 84 lines 1-3 ("A: So one example would be first – we had a First Solar project that the – part of the breakdown, the breakdown consisted of how taxes would be paid").

220. The Tribe has granted exemptions or agreed to payments in lieu of tax for tribal sales and use taxes to

non-Indian lessees operating on the Reservation where sales and use taxes are being paid but to other jurisdictions.

Support: Devita Deposition p. 84 lines 11-14 ("A: . . . And I do know that we have – in certain leases right now, that there are sales and use taxes that are being paid but not to us, and we've only been receiving the leasehold portion of the tax").

DATED this 17th day of September, 2019

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: */s/Pat Derdenger*
Pat Derdenger
Karen Lowell

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By: */s/Bennett Evan Cooper*
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COPY of the foregoing served by AZTurboCourt this 17th day of September, 2019, on the following:

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SUPERIOR COURT OF ARIZONA
IN THE ARIZONA TAX COURT

South Point Energy Center LLC, Plaintiff, v. Arizona Department of Revenue, an agency of the State of Arizona, and Mohave County, a political subdivision of the State of Arizona, Defendants.	No. TX2013-000522 **DECLARATION OF VERRIN T. KEWENVOYOUMA IN SUPPORT OF PLAINTIFF'S SEPARATE STATEMENT OF FACTS IN THE BRACKER PHASE OF LITIGATION** (Assigned to Honorable Christopher Whitten)

Verrin T. Kewenvoyouma declares as follows:

1. I am Managing Partner in the law firm of Kewenvoyouma Law, PLLC, counsel, which serves as the general counsel to the Fort Mojave Indian Tribe. I make this declaration based on my personal knowledge.

2. Attached as Exhibit A to this declaration is a true and correct copy of the Constitution and Bylaws of the Fort Mojave Indian Tribe [SP-2NDSUPPDISCSTMT-000448-000462].

3. Attached as Exhibit B to this declaration is a true and correct copy of the Fort Mojave Tribal Public Safety Ordinance (Tribal Ordinance No. 32) [SP-4THSUPPDISCSTMT-000310-000316].

4. Attached as Exhibit C to this declaration is a true and correct copy of the Agreement to Provide Mutual Aid Law Enforcement Services in Emergency Situations between the Fort Mojave Tribal Police Department and the Arizona Department of Public Safety [SP-2NDSUPPDISCSTMT-000292-000293], as well as Tribal Ordinance No. 2002-20 [SP-2NDSUPPDISCSTMT-000290-000-291] and Intergovernmental Agreement Determination [SP-2NDSUPPDISCSTMT-000289] approving said agreement.

5. Attached as Exhibit D to this declaration is a true and correct copy of Law Enforcement Uniform Police Services Contract No. CTH51T60443 between the Secretary of the Department of the Interior and the Fort Mojave Indian Tribe [SP-2NDSUPPDISCSTMT-000294-0003 59].

6. Attached as Exhibit E to this declaration is a true and correct copy of Fort Mojave Indian Tribe Resolution

#2004-25 dated February 20, 2004 [SP-2NDSUPPDISCSTMT-000421-000444].

7. Attached as Exhibit F to this declaration is a true and correct copy of Fort Mojave Indian Tribe Resolution #2013-89 dated December 3, 2013 [SP-2NDSUPPDISCSTMT-000360-0003 85].

8. Attached as Exhibit G to this declaration is a true and correct copy of a Tribal Ordinance amending Tribal Tax Code passed September 27, 2005 [SP-4THSUPPDISCSTMT-000198-000200].

9. Attached as Exhibit H to this declaration is a true and correct copy of the Fort Mojave Tribal Tax Ordinance (Ordinance No. 46) [SP-4THSUPPDISCSTMT-000048-000197].

10. Attached as Exhibit I to this declaration is a true and correct copy of Fort Mojave Indian Tribe Resolution #99-80 dated August 4, 1999 [SP-DISCSTMT-000883-000885].

11. Attached as Exhibit J to this declaration is a true and correct copy of the Fire Protection and Emergency Medical Services Agreement between the Fort Mojave Indian Tribe and Mohave Valley Fire District commencing July 1, 2005 [SP-2NDSUPPDISCSTMT-000396-000407].

12. Attached as Exhibit K to this declaration is a true and correct copy of the Fire Protection and Emergency Medical Services Intergovernmental Agreement between the Fort Mojave Indian Tribe and Mohave Valley Fire District, dated August 22, 2001 [SP-2NDSUPPDISCSTMT-0004 l 0-000420].

13. Attached as Exhibit L to this declaration is a true and correct copy of the Fire Protection and Emergency Medical Services Agreement between the Fort Mojave Indian Tribe (North) and Mohave Valley Fire District commencing October 1, 2016 [SP-4THSUPPDISCSTMT-000355-000369].

14. Attached as Exhibit M to this declaration is a true and correct copy of the Fire Protection and Emergency Medical Services Agreement between the Fort Mojave Indian Tribe (South) and Mohave Valley Fire District, commencing October 1, 2016 [SP-4 THSUPPDISCSTMT-0003 70-0003 82].

I declare under penalty of perjury that the foregoing is true and correct. Executed this *13th* day of September, 2019.

Verrin T. Kewenvoyouma
Verrin T. Kewenvoyouma

APPENDIX J

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THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN THE ARIZONA TAX COURT

SOUTH POINT ENERGY CENTER, LLC, Plaintiff, vs. ARIZONA DEPARTMENT OF REVENUE, an agency of the State of Arizona, and MOHAVE COUNTY, a political subdivision of the State of Arizona, Defendants.	No. TX2013-000522 **RESPONSE TO PLAINTIFF'S STATEMENT OF FACTS** **(Oral Argument Requested)** (Property Tax) (Assigned to Honorable Christopher Whitten)

Pursuant to Rule 56, Ariz. R. Civ. P., Defendants, the Arizona Department of Revenue (the "Department") and Mohave County (the "County") (collectively "Defendants"), hereby submit their Response to Plaintiffs Statement of Facts in Support of its Motion for Summary Judgment in the Bracker Phase of Litigation ("PSOF"). Each of Plaintiffs facts in the PSOF is set forth below and follows with the Defendants' response and/or objection in bold.

1. SPEC is a limited liability company organized under the laws of the State of Delaware and is authorized to do business in Arizona.

Not disputed.

2. SPEC owns a natural gas-fired combined-cycle electric energy generation facility (the "Facility") located on the Fort Mojave Indian Reservation, in Mohave County Arizona.

Not disputed.

3. The Arizona Department of Revenue (the "Department") is an independent agency of the State of Arizona created and organized under Title 42, Chapter 1, Article 1 of the Arizona Revised Statutes.

Not disputed.

4. Mohave County (the "County") is a political subdivision of the State of Arizona.

Not disputed.

5. The Facility is identified for property tax purposes as Centrally Valued Property ID number 50-665 and as Mohave County collection parcel number 96651601G.

Not disputed.

6. For property tax years 2010 to 2017, the Department centrally valued the Facility as "property . . . used by taxpayers . . . in the [o]peration of an electric generation facility" pursuant to A.R.S. § 42-14151 to 42-15158.

Not disputed except to the extent that Plaintiff omitted the terms "owned or leased" after the word "property" in A.R.S. § 42-14151. The statement should read as follows: For property tax years 2010 to 2017, the Department centrally valued the Facility as "property, owned or leased, and used by taxpayers . . . in the [o]peration of an electric generation facility" pursuant to A.R.S. § 42-14151 to 42-15158. Moreover, the Department has centrally valued the property since 2003. *Ariz. Dep't of Revenue v. South Point Energy Ctr., LLC*, 228 Ariz. 436, 438, ¶ 5 (App. 2009).

7. For property tax years 2010 to 2017, the County assessed, imposed and collected ad valorem property taxes on the Facility based the Department's valuations.

Not disputed except to clarify that the County also did so beginning in tax year 2003.

8. For property tax years 2010 to 2017, SPEC timely paid the ad valorem property taxes on the Facility that were assessed, imposed, and collected by the County.

Not disputed.

9. The Fort Mojave Indian Tribe (the "Tribe") is a federally recognized Indian tribe organized under the Indian Reorganization Act of 1934, 25 U.S.C. §§ 5101-5144 (formerly 25 U.S.C. §§ 461-494a), as amended.

Not disputed.

10. The Fort Mojave Indian Reservation (the "Reservation or "FMIR") consists of approximately 33,000 acres of desert land.

Not disputed.

11. The Reservation encompasses land in Arizona, California, and Nevada.

Not disputed.

12. The U.S. Secretary of the Interior hold title to all of the Reservation's land in trust for the benefit of the Tribe.

Not disputed.

13. Most of the Tribe's land and tribal members are located in Arizona.

Not disputed.

14. Prior to the construction of the Facility, the annual tribal budget was $3,500,000.

Not disputed.

15. Of the annual tribal budget prior to the construction of the Facility, $2,000,000 came from federal or other government sources.

Not disputed.

16. $1,500,000 of the pre-Facility annual tribal budget came from tribal revenues from various tribal enterprises, ground leases, and agricultural leases and farming activities.

Not disputed.

17. Currently, the annual tribal budget is approximately $30,000,000 to $32,000,000, plus an

additional $8,000,000 to $10,000,000 received from the federal government.

Not disputed.

18. The Tribe's five main revenue sources are the Avi Casino, the Spirit Mountain Casino, SPEC, agricultural leases, and the Fort Mojave Development Corporation.

Not disputed.

19. Avi Casino, Spirit Mountain Casino, and the Fort Mojave Development Corporation are tribally owned enterprises.

Not disputed.

20. The Fort Mojave Development Corporation operates two smoke shops and two golf courses, of which one each is located in Arizona and the others in California.

Disputed in part. Misstates the evidence as to the location of the other smoke shop and golf course being in California. The testimony is that "one golf course and one smoke shop is in Arizona and one smoke shop and one golf course is in Nevada." Devita Deposition, 15:13-18.

21. The agricultural leases are leases of Reservation land made by the Tribe to agricultural lessees.

Not disputed.

22. The Tribe also receives approximately $1,100,000 annually from a gaming compact with the State of California.

Not disputed.

23. The Tribe receives no funding from any County sources.

Not disputed.

24. The Tribe receives approximately $8,000,000 annually from the Avi Casino.

Not disputed.

25. The Tribe receives approximately $2,000,000 from the Spirit Mountain Casino.

Not disputed.

26. The Tribe receives approximately $4,000,000 annually from the agricultural leases.

Not disputed.

27. In 1994, the Tribe received a $33,000,000 loan underwritten by the BIA to be used to develop on-Reservation roads, water, sewer, and other infrastructure, and to build the Avi Casino.

Objection: Relevance. Disputed in part. Misstates the evidence. The EIS states that the "capital paid for roads, water, sewer, and other infrastructure in Aha Macav," not Reservation land in general. Aha Macav is "the Tribe's planned 4,000 acre new town on the Nevada lands." EIS at 102.

28. Telecommunications services on the Reservation are provided by a tribal entity, Fort Mojave Telecommunications, Inc.

Objection: Relevance. Not disputed.

29. Underground cable for telecommunications services for the Facility is routed on tribal land.

Objection: Relevance. Not disputed.

30. The Fort Mojave Tribal Police Department has primary jurisdiction over on-Reservation activities.

Objection: Relevance. Not disputed.

31. The Tribe receives funding for the training of its Tribal Police Department from the BIA.

Objection: Relevance. Disputed in part. Misstates the evidence. The cited support states that the contractor shall receive funding for "all programs to be operated and services to be delivered by the Contractor through this contract on behalf of the BIA."

32. The purpose of the Law Enforcement Uniform Police Services Contract between the BIA and the Tribe is to ensure that professional, effective, and efficient uniform patrol law enforcement services are provided to the Tribe utilizing accepted law enforcement techniques and practices.

Objection: Relevance. Not disputed.

33. The BIA regulates the training requirements, equipment, and uniforms utilized by the Fort Mojave Tribal Police Department.

Objection: Relevance. Disputed in part due to vagueness. It is not disputed that the contract specifies that the contractor shall provide all uniformed law enforcement officers with certain items and sets forth the training requirements for law

enforcement officers. The fact is disputed because the wording "regulates" is vague.

34. Non-tribal law enforcement agencies may provide support on Reservation lands pursuant to a mutual aid agreement but only under the supervision and direction of the Fort Mohave Tribal Police Department.

Objection: Foundation, Relevance. Disputed in part. It is not disputed that non-tribal law enforcement agencies may provide support on Reservation lands pursuant to a mutual aid agreement. The cited evidence for the language "only under the supervision and direction of the Fort Mojave Tribal Police Department" is from the mutual aid agreement with DPS. Plaintiff does not provide the mutual aid agreements with other non-tribal law enforcement agencies.

35. The Tribe leased the land on which the Facility is located to CPN South Point, LLC pursuant to the Amended and Restated Ground Lease Agreement ("A&R Ground Lease"), BIA Lease No. B-1778-FM, dated August 4, 1999, which was approved by the U.S. Secretary of the Interior on August 19, 1999.

Not disputed.

36. The parties to the A&R Ground Lease agreed upon certain amendments and modifications that were memorialized in a Second Amended and Restated Ground Lease Agreement ("Second A&R Ground Lease), BIA Lease No. B-1778-FM, dated December 10, 2012 and approved by the U.S. Secretary of the Interior on December 17, 2012, under which the Tribe leased the land on which the Facility is located to South Point OL-1, LLC,

South Point OL-2, LLC, South Point OL-3, LLC, and South Point OL-4, LLC.

Not disputed.

37. The A&R Ground Lease required SPEC to pay both base rent, plus a contingent rent amount determined by the Facility's output, through 2048.

Not disputed except to clarify as follows: Although the A&R Ground Lease required SPEC to pay contingent rent, according to the Land Rent Schedule, the contingent rent payment is zero during the first 16 years of the lease. Moreover, it is not clear from the lease that the contingent rent is actually contingent on the output of the Facility. The lease simply includes a schedule showing how the annual amounts of "contingent rent" were calculated. Those calculations show contingent rent to be based on 100% availability of the Facility, not the actual output of the Facility. A&R Ground Lease Exhibit H: Land Rent Schedule.

38. Under the terms of the A&R Ground Lease, SPEC was required to pay a demand fee of $700,000 for the right to use up to 4,000 acre feet of the Tribe's Colorado River water allotment and a one-time $2million tribal water payment.

Not disputed.

39. Under the A&R Ground Lease, SPEC was also required to pay an additional annual fee of $17 5 per acre foot for each acre-foot of water actually used.

Disputed in part. It is undisputed that SPEC was required to pay $175 per acre foot of water used as a

water use charge. The Tribe invoices the charge on a monthly, not annual basis. A&R Ground Lease§ 7.3.

40. The A&R Ground Lease required SPEC to pay the Tribe $250,000 in compliance fees in satisfaction of the terms of the Tribal Employment Rights Ordinance.

Not disputed.

41. The A&R Ground Lease required SPEC to enter agreements with tribally owned utility companies for the provision of utility services to the Facility.

Not disputed.

42. Amounts for the provision of utility services were not included in the A&R Ground Lease as the lease required SPEC to contract separately for such services.

Not disputed.

43. On May 24, 2001, the parties entered into Lease Modification No. 1 as approved by the BIA.

Not disputed.

44. Under Lease Modification No. 1, SPEC was required to pay the Tribe a lump-sum payment of$24,500,000 on May 24, 2001.

Not disputed.

45. Of the $24,500,000 payment, $2,500,000 was in lieu of the base rent owed to the Tribe in the A&R Ground Lease.

Not disputed.

46. $20,000,000 of the $24,500,000 lump-sum payment represented prepayment of the Water Demand Fee and

Water Usage Fees owed to the Tribe for the first 20 years of the A&R Ground Lease.

Not disputed.

47. The remaining $2,000,000 of the $24,500,000 lump-sum payment represented prepayment of taxes owed by SPEC to the Tribe under Chapter 202 of the Tribal Tax Ordinance for the 2002 property tax year.

Disputed. Lease Modification No. 1 § 1(c) provides that $2,000,000 constitutes payment of amounts owing under Chapter 202 of the Tribal Tax Ordinance through the end of the 2001 calendar year. It does not state the 2002 property tax year.

48. In addition to the amount included in the lump-sum payment, SPEC was required to pay to the Tribe $2,000,000 annually in lieu of leasehold interest taxes applicable under the Tribal Tax Ordinance.

Not disputed except to clarify that the $2,000,000 in lieu of the payment of the Tribal leasehold tax was for calendar (tax) years 2002 through 2020.

49. The Tribe and SPEC agreed that the annual payments in lieu of leasehold interest tax would be reduced dollar for dollar by any property taxes paid by SPEC to the State of Arizona on the Facility.

Disputed in part. In effect, the payments in lieu of leasehold tax were not reduced dollar for dollar by any property taxes paid by SPEC. Although the Tribe and SPEC agreed that the annual in lieu of payment shall be reduced on a dollar for dollar basis by the amount of any tax paid by SPEC to the State of Arizona, Lease Modification No. 1 provided that the limitation *did not* apply to the 2002 year. Although the limitation would

have applied to payments in lieu of the tribal leasehold tax beginning 2003 through 2020, the lease was modified again before the limitation took effect. The second modification in October of 2001 also provided that South Point pay an "in lieu of the tribal leasehold tax" in the amount of $2,000,000 for the years 2002 through 2020. Section 11.1.2(A). The second modification made clear that the payment in lieu of the tribal leasehold tax for the years 2002 through 2020 was *not* subject to any limitation provisions. The section provided:

> **The provisions of Sections 11.1(A) and 11.1(B) hereinabove shall under no circumstances apply to, limit or otherwise affect the obligation of Calpine to make the $2,000,000 per annum in lieu of payments provided for in this Section 11.1.2(A), nor shall any other provisions of this Lease or any other circumstances, now or hereafter existing, including but not limited to imposition of the Arizona tax [or any similar tax] and the result of the lawsuit(s) referred to in Section 3 of Lease Modification No. 1 to the Lease . . . limit or reduce the obligation of Calpine to make the $2,000,000 per annum in lieu of payments provided for in this Section 11.1.2(A).**

Lease Modification No. 2 at 1-2. In other words, although the Tribe and SPEC may have agreed that the annual payments in lieu of leasehold interest tax would be reduced dollar-for-dollar by any property taxes paid by SPEC on the Facility, other provisions of that agreement (lease) ensured that there would never be a reduction in monies owing the Tribe under the

Lease regardless of whether property taxes were paid on the Facility by SPEC.

50. SPEC was also required to begin paying $87,675.30 per year for water usage rights.

Disputed in part. The obligation "to begin" paying $87,675.30 per year of water usage rights does not begin until "the first day of the twenty-first (21st) year subsequent to the Commercial Operations Date." Lease Modification No. 1 § 1(b).D.

51. Lease Modification No. 1 also required SPEC to pay $25,000 annually to the Tribe in lieu of any tribal personal property taxes on the Facility.

Not disputed.

52. Lease Modification No.1 added a provision limiting tribal taxes to a rate no higher than the lowest combined state, county, and local tax imposed in the unincorporated areas of Mohave County, Arizona, Clark County, Nevada, or San Bernardino County, California.

Not disputed except to clarify that the stated limitation provision had no actual effect as to the payments in lieu of tax. Lease Modification No. 1 provided that the above limitation *did not* apply to the 2002 year. Although the limitation would have applied to payments in lieu of the tribal leasehold tax beginning 2003 through 2020, the lease was modified again before the limitation took effect. The second modification in October of 2001 also provided that South Point pay an "in lieu of the tribal leasehold tax" in the amount of $2,000,000 for the years 2002 through 2020. Section 11.1.2(A). The second modification made clear that the payment in lieu of the tribal leasehold

tax for the years 2002 through 2020 was subject to any limitation provisions. The section provided:

> **The provisions of Sections 11.1(A) and 11.1(B) hereinabove shall under no circumstances apply to, limit or otherwise affect the obligation of Calpine to make the $2,000,000 per annum in lieu of payments provided for in this Section 11.1.2(A), nor shall any other provisions of this Lease or any other circumstances, now or hereafter existing, including but not limited to imposition of the Arizona tax [or any similar tax] and the result of the lawsuit(s) referred to in Section 3 of Lease Modification No. 1 to the Lease . . . limit or reduce the obligation of Calpine to make the $2,000,000 per annum in lieu of payments provided for in this Section 11.1.2(A).**

Lease Modification No. 2 at 1-2. In addition, Lease Modification No. 1 modified Section 11.1.3 to provide that the limitation did not apply to the payment in lieu of the Tribal personal property tax. Lease Modification No. 1 at 6.

53. Lease Modification No. 1 also added a provision allowing SPEC to offset any tribal real property, personal property, sales, use, excise, leasehold, possessory interest, utility, special or other similar tax on a dollar-for-dollar basis by the amount of equivalent state, county, or local tax paid by SPEC.

Not disputed except to clarify that the stated limitation provision had no actual effect as to the payments in lieu of tax. Lease Modification No. 1 provided that the above limitation *did not* apply to the

2002 year. Although the limitation would have applied to payments in lieu of the tribal leasehold tax beginning 2003 through 2020, the lease was modified again before the limitation took effect. The second modification in October of 2001 also provided that South Point pay an "in lieu of the tribal leasehold tax" in the amount of $2,000,000 for the years 2002 through 2020. Section 11.1.2(A). The second modification made clear that the payment in lieu of the tribal leasehold tax for the years 2002 through 2020 was subject to any limitation provisions. The section provided:

> **The provisions of Sections 11.1(A) and 11.1(B) hereinabove shall under no circumstances apply to, limit or otherwise affect the obligation of Calpine to make the $2,000,000 per annum in lieu of payments provided for in this Section 11.1.2(A), nor shall any other provisions of this Lease or any other circumstances, now or hereafter existing, including but not limited to imposition of the Arizona tax [or any similar tax] and the result of the lawsuit(s) referred to in Section 3 of Lease Modification No. 1 to the Lease . . . limit or reduce the obligation of Calpine to make the $2,000,000 per annum in lieu of payments provided for in this Section 11.1.2(A).**

Lease Modification No. 2 at 1-2. In addition, Lease Modification No. 1 modified Section 11.1.3 to provide that the limitation did not apply to the payment in lieu of the Tribal personal property tax. Lease Modification No. 1 at 6.

54. SPEC was also required to pay the Tribe a one-time payment of $5,500,000 as consideration for Lease Modification No. 1.

Disputed. The consideration was not a payment but a loan from SPEC to the Tribe. Lease Modification No. 1 states that "[a]s additional consideration for this Lease Modification No. 1, Calpine shall make a nonrecourse loan ("Loan") to the Tribe in the principal amount of Five Million Five Hundred Thousand Dollars ($5,500,000)." The modification further specifies SPEC's remedy if the Tribe defaults in payment on the loan. Lease Modification No. 1 at 7, § 2.

55. On October 17, 2001, the parties entered into Lease Modification No. 2 as approved by the BIA.

Not disputed.

56. Under the terms of Lease Modification No. 2, SPEC was required to pay the Tribe $2,000,000 per year annually in lieu of tribal leasehold interest tax for the 2002 through 2020 property tax years.

Not disputed.

57. Beginning in the 2021 property tax year, Lease Modification No. 2 requires SPEC to pay the Tribe leasehold interest tax pursuant to the provisions of the Tribal Tax Ordinance, subject to any offsets for state or local taxes authorized by the lease.

Not disputed.

58. Lease Modification No. 2 required SPEC to pay the Tribe $1,000,000 as consideration.

Not disputed.

59. Under the terms of the Second A&R Ground Lease, the Tribe received a $27,000,000 lump-sum payment from SPEC in 2012.

Not disputed.

60. The Tribe also received or will receive annual payments totaling $18,000,000 from SPEC starting December 31, 2012 and ending December 31, 2021, pursuant to the terms of the Second A&R Ground Lease.

Not disputed.

61. These payments reflect the amounts owed to the Tribe by SPEC for the ground lease, water usage, and tribal taxes that would otherwise be imposed on the Facility and its operations under the Second A&R Ground Lease.

Not disputed except to clarify that these payments also include amounts owed to the Tribe by SPEC for payment of all amounts due, if any, with respect to the Fort Mojave Indian Tribal Employment Rights Ordinance (TERO). Second A&R Ground Lease at 10, § 7.3.

62. These payments do not include amounts for utilities or other administrative or governmental fees.

Not disputed.

63. The $27,000,000 lump-sum payment and the $18,000,000 annual payments were negotiated with the Tribe and represented the present value of the remaining fees owed by SPEC to the Tribe at the time the Second A&R Ground Lease was negotiated in 2012.

Not disputed.

64. In 1999, the Tribe, by means of a lease approved by the U.S. Secretary of the Interior, leased approximately 320 acres of Reservation land in Mohave County, Arizona to SPEC's predecessor in interest for the construction and operation of the Facility.

Not disputed.

65. The Facility was constructed and is located on Reservation trust land leased from the Tribe.

Not disputed.

66. During property tax years 2010 through 2018, SPEC or its predecessor in interest owned and operated the Facility.

Not disputed.

67. The Facility is a merchant plant, which sells electrical energy on a spot-market basis to public and private utility companies for resale and redistribution to end consumers.

Not disputed.

68. Calpine Energy Services, an affiliate of SPEC located in Houston, Texas, is responsible for marketing and selling the power generated by the Facility. Calpine Energy Services sells the electricity generated at the Facility to third-party buyers including utilities, independent power producers, or other market participants.

Not disputed.

69. No customers come to the Facility to order, purchase, or take delivery of the electricity produced at the Facility. Calpine Energy Services contracts with third-party buyers and the electricity is delivered onto

WAPA's grid for distribution to those buyers off the Reservation. The Facility is closed to the public.

Objection: Relevance. Not disputed.

70. The Western Area Power Administration ("WAPA") is part of the United States Department of Energy.

Not disputed.

71. Energy produced by the Facility for delivery to customers is transmitted through WAPA's system via a substation located in Topock, Arizona and along WAPA-owned transmission lines. SPEC buys these transmission services directly from WAPA.

Objection: Foundation. Not disputed except to the extent that cited support for the statement does not state anything about SPEC buying these transmission services directly from WAPA.

72. WAPA determined the number, location, and configuration of the transmission lines required to interconnect the Topock substation with its existing 230 kV transmission line.

Not disputed.

73. The Facility required construction of the Topock substation and two 230kV transmission lines in order to connect to and wheel power to WAPA's transmission grid.

Not disputed.

74. Neither the Topock substation nor the two transmission lines are owned by SPEC.

Not disputed.

75. The two transmission lines and the Topock substation are located on land owned by the United States Bureau of Land Management.

Not disputed.

76. El Paso Natural Gas Company and Transwestern Pipeline Company have interstate natural gas transmission lines in the vicinity of the Facility and the ability to supply the natural gas for the operation of the Facility.

Not disputed.

77. New gas lines connecting the Facility to El Paso Natural Gas Company's and Transwestern Pipeline Company's main natural gas lines were constructed on a new right of way across federal Bureau of Land Management land and are regulated by the US Department of Transportation.

Not disputed.

78. Between 2005 and 2017, a minimum of 15 employees and a maximum of 25 employees worked at the Facility. In 2018, one employee worked at the Facility.

Not disputed.

79. In 2000 and 2001, there were four Native Americans employed at the Facility, of which three were enrolled members of the Fort Mojave Indian Tribe and one was a member of the Choctaw Nation. The job titles of these employees were Operator Technician I, Operator Technician II, and Operator Technician III.

Not disputed.

80. From 2002 through 2016, there were five Native Americans employed at the Facility, of which four were

enrolled members of the Fort Mojave Indian Tribe and one was a member of the Choctaw Nation. The job titles of these employees were Operator Technician I, Operator Technician II, and Operator Technician III.

Not disputed.

81. In 2017, there were four Native Americans employed at the Facility. The job titles of these employees were Operator Technician I and Operator Technician III.

Not disputed.

82. In 2018, there were zero Native American employees at the Facility.

Not disputed.

83. SPEC paid a total of $2,091,064.14 in wages to Native American employees at the Facility for years 2005-2010.

Not disputed.

84. SPEC paid a total of $1,475,918.32 in wages to Native American employees at the Facility for years 2011 through 2013.

Not disputed.

85. For 2014 through 2018, SPEC paid a total of $2,058,883.83 in wages to Native American employees at the Facility.

Not disputed.

86. For 2005 through 2010, SPEC paid at least $9,832,125.03 in wages to all employees working at the Facility.

Not disputed.

87. For 2011 through 2013, SPEC paid a total of $7,931,836.51 in wages to all employees working at the Facility.

Not disputed.

88. For 2014 through 2018, SPEC paid a total of $8,886,241.42 to all employees working at the Facility.

Not disputed.

89. Congress has plenary power under the Indian Commerce Clause to regulate land and economic activity in Indian Country.

Objection: The asserted statement is an analysis of the U.S. Constitution, not a statement of fact. U.S. Const. art. 1, § 8, cl. 3 speaks for itself. Defendants dispute the import given by Plaintiff to the U.S. Constitution that it precludes state and local taxation of non-Indians conducting activities on Indian land. The U.S. Supreme Court has made clear that Indians' right to make their own laws and be governed by them does not exclude all state regulatory and taxation authority on the reservation. *Nevada v. Hicks*, 533 U.S. 353, 361 (2001) ("State sovereignty does not end at a reservation's border.")

90. Congress has affirmatively authorized the executive branch to enact regulations addressing any and all aspects of Indian affairs.

Objection: The asserted statement is a general statement regarding broad congressional authority, not a statement of fact. 25 U.S.C. § 9 speaks for itself. Defendants dispute the import given by Plaintiff to the

statute that it precludes state and local taxation of non-Indians conducting activities on Indian land. The U.S. Supreme Court has made clear that Indians' right to make their own laws and be governed by them does not exclude all state regulatory and taxation authority on the reservation. *Nevada v. Hicks*, 533 U.S. 353, 361 (2001) ("State sovereignty does not end at a reservation's border.")

91. Congress authorized Indian tribes, including the Fort Mojave Indian Tribe, to lease Indian lands to non-Indians only upon the approval of the U.S. Secretary of the Interior.

Objection: 25 U.S.C. § 415(a) speaks for itself. Defendants dispute the import given by Plaintiff to the statute that it precludes state and local taxation of non-Indians conducting activities on Indian land. The U.S. Supreme Court has made clear that Indians' right to make their own laws and be governed by them does not exclude all state regulatory and taxation authority on the reservation. *Nevada v. Hicks*, 533 U.S. 353, 361 (2001) ("State sovereignty does not end at a reservation's border.")

92. Congress specifically empowered and authorized the U.S. Department of the Interior to prescribe regulations addressing leases of Indian lands.

Objection: 25 U.S.C. § 415(a) speaks for itself. Defendants dispute the import given by Plaintiff to the statute that it precludes state and local taxation of non-Indians conducting activities on Indian land. The U.S. Supreme Court has made clear that Indians' right to make their own laws and be governed by them does

not exclude all state regulatory and taxation authority on the reservation. *Nevada v. Hicks*, 533 U.S. 353, 361 (2001) ("State sovereignty does not end at a reservation's border.")

93. The Bureau of Indian Affairs ("BIA") is a federal agency within the U.S. Department of the Interior, which is an executive department of the U.S. Government.

Not disputed.

94. The U.S. Department of the Interior, through the BIA, has promulgated comprehensive regulations governing all aspects of leases of Indian lands, which are contained in the Code of Federal Regulations and published in the Federal Register.

Objection: Vague insofar as "all aspects" is undefined and the BIA regulations speak for themselves. Not disputed except to the extent that this statement purports to present a view that the regulations are so comprehensive as to preclude taxation here. The U.S. Supreme Court has made clear that Indians' right to make their own laws and be governed by them does not exclude all state regulatory and taxation authority on the reservation. *Nevada v. Hicks*, 533 U.S. 353, 361 (2001) ("State sovereignty does not end at a reservation's border.") The leasing regulations do not control the economic activities that non-Indian lessees can engage in or directly regulate the non-Indian lessees or their property.

95. In the Preamble to the regulations found at 25 C.F.R. Part 162 and published in the Federal Register, the Secretary of the Interior made the following findings regarding the leasing of Indian lands:

> a. "The Federal statutory scheme for Indian leasing is comprehensive, and accordingly precludes State taxation." 77 Fed. Reg. 72,447.
>
> . . . .
>
> q. "State and local taxation of improvements undermine Federal and tribal regulation of improvements." 77 Fed. Reg. 77,248.

Objection: The asserted paragraph constitutes selective citations in the preamble to federal regulations, not a fact statement. The Residential, Business, and Wind and Solar Resource Leases on Indian Land, 77 Fed. Reg. 72,440 (December 5, 2012) speak for themselves. Defendants dispute the import given by Plaintiff to these regulations. These revised regulations did not go into effect until January 4, 2013, which is long after the BIA approved the A&R Ground Lease in 1999, the 2001 modifications, and the Second A&R Ground Lease in 2012. The regulations do not change the authority allowing states and local entities to apply generally-applicable taxes to non-Indian lessees conducting activities on Indian lands. In unrelated litigation, the BIA has confirmed that "so far as preemption is concerned, § 162.017 has no legal effect at all: it does not purport to preempt any specific state taxes. . . or to alter the judge-made and judge-administered balancing test that has governed Indian preemption cases since at least 1980, when the Supreme Court decided *Bracker*." *Desert Water Agency v. U.S. Dep't of the Interior*, 849 F.3d 1250, 1254 (9th Cir. 2017). As to "the ultimate question of whether any specific state tax or charge is preempted under *Bracker*, [the BIA] is agnostic; courts must

answer such questions in the same way they always have, by applying the *Bracker* test de novo." *Id.*

96. Pursuant to the Department of the Interior's Secretarial Order No. 3175 on the Department's Responsibilities for Indian Trust Resources, dated November 8, 1993, the BIA is responsible for protecting Indian Trust Assets. Indian Trust Assets are values derived from land resources.

Not disputed.

97. In order to fulfill its trust responsibilities with respect to federal Indian lands, the BIA was required to review and approve the Tribe's lease to SPEC prior to the start of construction of the Facility.

Not disputed.

98. The BIA was required to analyze and address the environmental consequences of the Facility before making a determination as to whether to approve the lease between SPEC and the Tribe.

Not disputed.

99. Approval of leases of federal Indian trust lands requires documentation of the BIA's compliance with the National Environmental Policy Act, found at 40 C.F.R. § 1500 *et seq.*

Not disputed.

100. As part of the approval process, the BIA prepared an Environmental Impact Statement to provide information to the public and to interested public agencies regarding the environmental consequences of the

approval of a long-term lease for the construction and operation of the Facility.

Not disputed.

101. Neither the State of Arizona nor Mohave County regulate the leasing of Indian lands.

Not disputed.

102. No political subdivision of the State of Arizona regulates the leasing of Indian lands.

Not disputed.

103. Congress has not delegated any authority to state or local jurisdictions that would apply to the Facility.

Disputed. SPEC owns the intrastate gas pipeline facilities associated with the Facility and the Arizona Corporation Commission has authority to oversee the construction, operation and maintenance of intrastate pipelines-basically those pipelines that begin and end within Arizona's borders, such as SPEC's. Arizona Corporation Commission, https://www.azcc.gov/safety/pipeline/nplho.

104. Any facility located within the exterior boundaries of the Reservation that has a regulated chemical inventory onsite must comply with the Emergency Planning and Community Right-to-Know Act of 1986, also known as Superfund Amendments and Reauthorization Act Title III, (the "EPCRA") through a chemical emergency preparedness program put into place by the Tribe and as required under the EPCRA.

Objection: Relevance. Not disputed except to the extent that this statement purports to present a view that the federal government extensively regulates the

Facility so as to preempt the County's taxation of the Facility. The EPCRA would apply regardless of whether a natural gas-fired combined cycle energy generation facility was located on tribal land, and thus exists for reasons wholly independent of tribal economic development.

105. The EPCRA requires local emergency planning committees to develop and annually review a localized emergency response plan.

Objection: Relevance. Not disputed except to the extent that this statement purports to present a view that the federal government extensively regulates the Facility so as to preempt the County's taxation of the Facility. The EPCRA would apply regardless of whether a natural gas-fired combined cycle energy generation facility was located on tribal land, and thus exists for reasons wholly independent of tribal economic development.

106. The membership of the local emergency planning committee must include: elected state and local officials; police, fire, civil defense, and public health professionals; environment, transportation, and hospital officials; facility representatives; and representatives from community groups and media.

Objection: Relevance. Not disputed except to the extent that this statement purports to present a view that the federal government extensively regulates the Facility so as to preempt the County's taxation of the Facility. The EPCRA would apply regardless of whether a natural gas-fired combined cycle energy generation facility was located on tribal land, and thus

exists for reasons wholly independent of tribal economic development.

107. The governor of each state, including Arizona, is required to designate a state emergency response commission responsible for implementing the EPCRA.

Objection: Relevance. Not disputed except to the extent that this statement purports to present a view that the federal government extensively regulates the Facility so as to preempt the County's taxation of the Facility. The EPCRA would apply regardless of whether a natural gas-fired combined cycle energy generation facility was located on tribal land, and thus exists for reasons wholly independent of tribal economic development.

108. Title IV of the 1990 Clean Air Act Amendments (the Acid Rain Program) found at 40 C.F.R. Parts 72-76, imposes stringent requirements on electrical utilities to control emissions of sulfur dioxide (SO2) and nitrogen oxide (NOx).

Objection: Relevance. Not disputed except to the extent that this statement purports to present a view that the federal government extensively regulates the Facility so as to preempt the County's taxation of the Facility. Title IV of the 1990 Clean Air Act Amendments would apply regardless of whether a natural gas-fired combined cycle energy generation facility was located on tribal land, and thus exists for reasons wholly independent of tribal economic development.

109. The Acid Rain Program requirements are enforced through the Title IV Acid Rain Permit Program,

administered by the US Environmental Protection Agency ("USEPA").

Objection: Relevance. Not disputed except to the extent that this statement purports to present a view that the federal government extensively regulates the Facility so as to preempt the County's taxation of the Facility. Title IV of the 1990 Clean Air Act Amendments would apply regardless of whether a natural gas-fired combined cycle energy generation facility was located on tribal land, and thus exists for reasons wholly independent of tribal economic development.

110. SPEC is responsible for satisfying all appropriate environmental protection standards as stated in the National Environmental Policy Act of 1969 and any other applicable federal environmental laws.

Objection: Relevance. Not disputed except to the extent that this statement purports to present a view that the federal government extensively regulates the Facility so as to preempt the County's taxation of the Facility. The National Environmental Policy Act of 1969 and other federal environmental laws would apply regardless of whether a natural gas-fired combined cycle energy generation facility was located on tribal land, and thus exists for reasons wholly independent of tribal economic development.

111. The off-site substation and two 230kV transmission lines needed to connect the Facility to WAPA's grid required an environmental assessment, which was prepared by the Bureau of Land Management as lead agency and WAPA as cooperating agency. A

Finding of No Significant Impact and Record of Decision was approved on December 2, 1997.

Objection: Relevance. Not disputed except to the extent that this statement purports to present a view that the federal government extensively regulates the Facility so as to preempt the County's taxation of the Facility. The two transmission lines and the substation are located on land owned by the United States Bureau of Land Management. See Plaintiff's Statement of Fact #75. The requirement of an environmental assessment for transmission lines and a substation would apply regardless of whether a natural gas-fired combined cycle energy generation facility was located on tribal land, and thus exists for reasons wholly independent of tribal economic development.

112. The USEP A Region IX staff reviewed the list of chemicals to be used or stored on-site at the Facility and concluded that a Resource Conservation and Recovery Act permit would not be required.

Objection: Relevance. Not disputed except to the extent that this statement purports to present a view that the federal government extensively regulates the Facility so as to preempt the County's taxation of the Facility. The Resource Conservation and Recovery Act, which gives the EPA the authority to control hazardous waste from the "cradle-to-grave," would apply regardless of whether a natural gas-fired combined cycle energy generation facility was located on tribal land, and thus exists for reasons wholly independent of tribal economic development.

113. WAPA uses the National Electric Safety Code Regulations for 69kV and larger power lines.

Objection: Relevance. Not disputed except to the extent that this statement purports to present a view that the federal government extensively regulates the Facility so as to preempt the County's taxation of the Facility. The National Electric Safety Code Regulations would apply regardless of whether a natural gas-fired combined cycle energy generation facility was located on tribal land, and thus exists for reasons wholly independent of tribal economic development.

114. Executive Order 12898 requires the BIA to consider the environmental justice of a proposed project, including the Facility. Achieving environmental justice means the BIA will identify and address disproportionately high and adverse human health or environmental effects on minority populations and low-income populations.

Objection: Relevance. Not disputed except to the extent that this statement purports to present a view that the federal government extensively regulates the Facility so as to preempt the County's taxation of the Facility. Executive Order 12898 would apply regardless of whether a natural gas-fired combined cycle energy generation facility was located on tribal land, and thus exists for reasons wholly independent of tribal economic development.

115. SPEC is required to monitor the actual effects of the evaporation pond on migratory waterfowl and to determine when and if environmental impact mitigation

measures are necessary, in consultation with the Havasu National Wildlife Refuge manager.

Objection: Relevance. Not disputed except to the extent that this statement purports to present a view that the federal government extensively regulates the Facility so as to preempt the County's taxation of the Facility. The evaporation pond may attract sensitive, threatened, or endangered wildlife. The monitoring of the pond in consultation with the Fish and Wildlife Service manager to protect wildlife would apply regardless of whether a natural gas-fired combined cycle energy generation facility was located on tribal land, and thus exists for reasons wholly independent of tribal economic development.

116. The BIA and the Tribe will monitor and inspect construction and operation activities at the Facility during the life of the lease to ensure compliance with the environmental mitigation requirements addressed in the Record of Decision for the Southpoint Power Plant Lease Development Project on the Fort Mojave Indian Reservation.

Objection: Relevance. Disputed to the extent that this statement purports to present a view that the BIA and the Tribe extensively monitored and inspected the Facility so as to preempt the County's taxation of the Facility. The cited support for this statement is from the 1999 EIS. There is no evidence that BIA and the Tribe did much as far as monitoring and inspecting the Facility over the past twenty years. The evaporation pond monitoring simply involved SPEC taking a sample of the pond water, sending the sample to a lab for evaluation, and then sending the results to the

Tribe either monthly or quarterly. McBride Deposition at 14:18-15:15. Eventually, the pond sampling was done on an annual basis. Fetters Deposition at 41:12-17. The Tribe may have had some role twenty years ago in issuing a couple of permits as to the construction of the Facility but the Tribe did not regulate or inspect operation activities at the Facility. McBride Deposition at 15:19-16:2. There is no evidence of any BIA interaction with the Facility. Fetters Deposition at 34:18-35:2; McBride Deposition at 16:10-16.

117. SPEC was required to prepare an emergency preparedness plan for adoption by resolution by the Tribal Council and implementation in compliance with the EPCRA.

Objection: Relevance. Not disputed except to the extent that this statement purports to present a view that the federal and tribal governments extensively regulate the Facility so as to preempt the County's taxation of the Facility. The requirement to prepare an emergency preparedness plan would apply regardless of whether a natural gas-fired combined cycle energy generation facility was located on tribal land, and thus exists for reasons wholly independent of tribal economic development.

118. The Tribe extensively regulates on-Reservation activities through its adoption of various tribal codes, including the Building Code, the Residential Code, the Plumbing Code, the Energy Conservation Code, the Performance Code for Buildings and Facilities, the Mechanical Code, the Fuel Gas Code, the Existing

Building Code, the Electrical Code, the Property Maintenance Code, and the Fire Code.

Disputed. The listed codes do not establish that the Tribe extensively regulates anything related to the operation of the Facility. The Tribe had little to no active involvement in the Facility's operations.

119. SPEC was required to enter a Compliance Agreement with the Tribe regarding tribal employment preferences at the Facility.

Objection: Relevance. Not disputed except to the extent that this statement purports to present a view that the Tribe extensively regulates the Facility so as to preempt the County's taxation of the Facility.

120. Under federal pipeline safety laws, the US Department of Transportation Office of Pipeline Safety has exclusive regulatory authority over pipelines that are defined as interstate pipelines: pipelines used to transport gas and hazardous liquids across state lines throughout the nation.

Objection: Relevance. Not disputed except to the extent that this statement purports to present a view that the federal government extensively regulates the Facility so as to preempt the County's taxation of the Facility.

121. In Arizona, interstate pipelines include the natural gas facilities operated by El Paso Natural Gas and Transwestern Pipeline Company.

Not disputed.

122. Federal pipeline safety laws preempt Arizona or any other state from regulating interstate pipeline safety.

Objection: Relevance. Not disputed except to the extent that this statement purports to present a view that the federal government extensively regulates the Facility so as to preempt the County's taxation of the Facility.

123. Only the US Department of Transportation may impose sanctions against interstate operators for violating federal pipeline safety regulations.

Objection: Relevance. Not disputed except to the extent that this statement purports to present a view that the federal government extensively regulates the Facility so as to preempt the County's taxation of the Facility.

124. The US Department of Transportation Office of Pipeline Safety has authorized the Arizona Corporation Commission's Pipeline Safety Section to perform as its agent the required federal inspections and audits of interstate operators with facilities in Arizona, including the pipelines connecting the Facility to the gas transmission lines.

Objection: Relevance. Not disputed except to the extent that this statement purports to present a view that the federal government extensively regulates the Facility so as to preempt the County's taxation of the Facility.

125. This delegated authority requires that the Arizona Corporation Commission adhere to specific conditions and terms contained in an Interstate Agent Agreement, which is subject to annual renewal.

Objection: Relevance. Not disputed except to the extent that this statement purports to present a view

that the federal government extensively regulates the Facility so as to preempt the County's taxation of the Facility.

126. If the Arizona Corporation Commission finds a violation of federal pipeline safety standards, it submits a report with recommendations to the US Department of Transportation regarding enforcement action, and it is up to the federal office to enforce the federal laws governing pipeline safety.

Objection: Relevance. Not disputed except to the extent that this statement purports to present a view that the federal government extensively regulates the Facility so as to preempt the County's taxation of the Facility.

127. The following permits are required for the construction and operation of the Facility: a Prevention of Significant Deterioration Air Quality Permit issued by the USEP A; a section 404 Permit issued by the US Army Corps of Engineers ("USACE") pursuant to the Clean Water Act; a Section 10 permit issued by the USACE pursuant to the River and Harbor Act of 1899; a Section 401 Water Quality Certification issued by the USEPA pursuant to the Clean Water Act; a National Pollutant Discharge Elimination System Permit issued by the USEPA pursuant to Section 402 of the Clean Water Act; an Acid Rain (Title IV) Permit issued by the USEPA pursuant to the Clean Air Act; and Title V Operating Permit issued by the USEPA pursuant to the Clean Air Act.

Objection: Relevance. Not disputed except to the extent that this statement purports to present a view that the federal government extensively regulates the

Facility so as to preempt the County's taxation of the Facility. The Clean Water Act, the River and Harbor Act of 1899, and the Clean Air Act would apply regardless of whether a natural gas-fired combined cycle energy generation facility was located on tribal land, and thus exist for reasons wholly independent of tribal economic development. The only federal permit currently required for the operation of the Facility is a Title V permit, which is renewed every five years and which would be required even if the Facility were not located on the Reservation. McBride Deposition at 8:17-9:18.

128. The following Tribal permits or approvals are required for the construction and operation of the Facility: Water Use Permit and Building Permit.

Objection: Relevance. Not disputed except to the extent that this statement purports to present a view that the Tribe extensively regulates the Facility so as to preempt the County's taxation of the Facility.

129. The Prevention of Significant Deterioration Air Quality Permit is required because the Facility is considered a major new source for the emission of air pollutants.

Objection: Relevance. Not disputed except to the extent that this statement purports to present a view that the federal government extensively regulates the Facility so as to preempt the County's taxation of the Facility. Clean air laws would apply regardless of whether a natural gas-fired combined cycle energy generation facility was located on tribal land, and thus exist for reasons wholly independent of tribal economic development.

130. SPEC is required to mitigate operations-related air quality impacts to insignificance by providing control technology that does not result in exceedances of the National Ambient Air Quality Standards.

Objection: Relevance. Not disputed except to the extent that this statement purports to present a view that the federal government extensively regulates the Facility so as to preempt the County's taxation of the Facility. Clean air laws would apply regardless of whether a natural gas-fired combined cycle energy generation facility was located on tribal land, and thus exist for reasons wholly independent of tribal economic development.

131. The mechanism for determining the appropriate control technology to mitigate operations-related air quality impacts is the Prevention of Significant Deterioration Permit issued by the USEPA.

Objection: Relevance. Not disputed except to the extent that this statement purports to present a view that the federal government extensively regulates the Facility so as to preempt the County's taxation of the Facility. Clean air laws would apply regardless of whether a natural gas-fired combined cycle energy generation facility was located on tribal land, and thus exist for reasons wholly independent of tribal economic development.

132. SPEC filed a Prevention of Significant Deterioration Air Quality Permit with the USEPA prior to starting construction of the Facility.

Objection: Relevance. Not disputed except to the extent that this statement purports to present a view that the federal government extensively regulates the

Facility so as to preempt the County's taxation of the Facility. Clean air laws would apply regardless of whether a natural gas-fired combined cycle energy generation facility was located on tribal land, and thus exist for reasons wholly independent of tribal economic development.

133. The US Environmental Protection Agency issued a Prevention of Significant Deterioration Air Quality Permit/Approval to Construct a Stationary Source for the Facility on May 24, 1999.

Objection: Relevance. Not disputed except to the extent that this statement purports to present a view that the federal government extensively regulates the Facility so as to preempt the County's taxation of the Facility. Clean air laws would apply regardless of whether a natural gas-fired combined cycle energy generation facility was located on tribal land, and thus exist for reasons wholly independent of tribal economic development.

134. The USACE regulates grading, filling, mechanized land clearing, ditching, and other similar activities that impact waters and wetlands of the United States under Section 404 of the Clean Water Act.

Objection: Relevance. Not disputed except to the extent that this statement purports to present a view that the federal government extensively regulates the Facility so as to preempt the County's taxation of the Facility. Clean water laws would apply regardless of whether a natural gas-fired combined cycle energy generation facility was located on tribal land, and thus exist for reasons wholly independent of tribal economic development.

135. SPEC obtained Clean Water Act Section 10 and Section 404 permits from the USACE prior to starting construction of the Facility.

Objection: Relevance. Not disputed except to the extent that this statement purports to present a view that the federal government extensively regulates the Facility so as to preempt the County's taxation of the Facility. Clean water laws would apply regardless of whether a natural gas-fired combined cycle energy generation facility was located on tribal land, and thus exist for reasons wholly independent of tribal economic development.

136. The USEPA is the federal agency responsible for issuing Section 401 Water Quality Certifications for projects on Indian reservations that impact the waters of the United States.

Objection: Relevance. Not disputed except to the extent that this statement purports to present a view that the federal government extensively regulates the Facility so as to preempt the County's taxation of the Facility. Water quality laws would apply regardless of whether a natural gas-fired combined cycle energy generation facility was located on tribal land, and thus exist for reasons wholly independent of tribal economic development.

137. The US Environmental Protection Agency issued a Section 401 Water Quality Certification for the Facility on December 13, 1996.

Objection: Relevance. Disputed in part. Defendants do not dispute that the US Environmental Protection Agency issued a Certification. The Certification appears to have been issued in general,

not issued specifically for the Facility. Defendants dispute the import given by Plaintiff to the Certification. Clean water laws would apply regardless of whether a natural gas-fired combined cycle energy generation facility was located on tribal land, and thus exist for reasons wholly independent of tribal economic development.

138. The USEPA has jurisdiction over Indian reservation lands for administration of the National Pollutant Discharge Elimination System program under Section 402 of the Clean Water Act. A permit is required if there is a point source discharge of wastewater into dry washes, streams, or other waters of the United States.

Objection: Relevance. Not disputed except to the extent that this statement purports to present a view that the federal government extensively regulates the Facility so as to preempt the County's taxation of the Facility. Clean water laws would apply regardless of whether a natural gas-fired combined cycle energy generation facility was located on tribal land, and thus exist for reasons wholly independent of tribal economic development.

139. SPEC did not obtain a Section 402 National Pollutant Discharge Elimination System Permit prior to construction of the Facility because such permit is only required if discharge will take place offsite and no offsite discharge was anticipated.

Objection: Relevance. Not disputed except to the extent that this statement purports to present a view that the federal government extensively regulates the Facility so as to preempt the County's taxation of the Facility. Clean water laws would apply regardless of

whether a natural gas-fired combined cycle energy generation facility was located on tribal land, and thus exist for reasons wholly independent of tribal economic development.

140. Areas under federal administration, including tribal lands, are subject to the federal Operating Permit program under Title V of the Clear Air Act as contained in 40 C.F.R. 71 *et seq.*

Objection: Relevance. Not disputed except to the extent that this statement purports to present a view that the federal government extensively regulates the Facility so as to preempt the County's taxation of the Facility. The Clear Air Act would apply regardless of whether a natural gas-fired combined cycle energy generation facility was located on tribal land, and thus exists for reasons wholly independent of tribal economic development.

141. The Title V Operating Permit is required of all major sources of air pollution, and the application was required to be submitted within 12 months of commencing operations at the Facility.

Objection: Relevance. Not disputed except to the extent that this statement purports to present a view that the federal government extensively regulates the Facility so as to preempt the County's taxation of the Facility. The clean air laws would apply regardless of whether a natural gas-fired combined cycle energy generation facility was located on tribal land, and thus exist for reasons wholly independent of tribal economic development.

142. The Acid Rain Permit is incorporated into the Title V Operating Permit.

Objection: Relevance. Not disputed except to the extent that this statement purports to present a view that the federal government extensively regulates the Facility so as to preempt the County's taxation of the Facility. The clean air laws would apply regardless of whether a natural gas-fired combined cycle energy generation facility was located on tribal land, and thus exist for reasons wholly independent of tribal economic development.

143. SPEC received an Acid Rain Program Certificate of Representation dated July 28, 1999.

Objection: Relevance. Not disputed except to the extent that this statement purports to present a view that the federal government extensively regulates the Facility so as to preempt the County's taxation of the Facility. The clean air laws would apply regardless of whether a natural gas-fired combined cycle energy generation facility was located on tribal land, and thus exist for reasons wholly independent of tribal economic development.

144. The USEPA issued SPEC a Title V Permit to Operate dated May 20, 2003.

Objection: Relevance. Not disputed except to the extent that this statement purports to present a view that the federal government extensively regulates the Facility so as to preempt the County's taxation of the Facility. The clean air laws would apply regardless of whether a natural gas-fired combined cycle energy generation facility was located on tribal land, and thus exist for reasons wholly independent of tribal economic development.

145. The USEPA issued a renewed Title V Permit to Operate dated March 22, 2012.

Objection: Relevance. Not disputed except to the extent that this statement purports to present a view that the federal government extensively regulates the Facility so as to preempt the County's taxation of the Facility. The clean air laws would apply regardless of whether a natural gas-fired combined cycle energy generation facility was located on tribal land, and thus exist for reasons wholly independent of tribal economic development.

146. SPEC submitted a Title V Operating Permit Renewal Application dated August 24, 2016 to USEPA.

Objection: Relevance. Not disputed except to the extent that this statement purports to present a view that the federal government extensively regulates the Facility so as to preempt the County's taxation of the Facility. The clean air laws would apply regardless of whether a natural gas-fired combined cycle energy generation facility was located on tribal land, and thus exist for reasons wholly independent of tribal economic development.

147. The USEPA issued a Title V Permit to Operate dated September 13, 2018 to SPEC.

Objection: Relevance. Not disputed except to the extent that this statement purports to present a view that the federal government extensively regulates the Facility so as to preempt the County's taxation of the Facility. The clean air laws would apply regardless of whether a natural gas-fired combined cycle energy generation facility was located on tribal land, and thus

exist for reasons wholly independent of tribal economic development.

148. The USEPA issued s Storm Water Permit dated November 8, 1999 to SPEC.

Objection: Relevance. Not disputed except to the extent that this statement purports to present a view that the federal government extensively regulates the Facility so as to preempt the County's taxation of the Facility. The storm water pollution prevention laws would apply regardless of whether a natural gas-fired combined cycle energy generation facility was located on tribal land, and thus exist for reasons wholly independent of tribal economic development. In addition, the Storm Water Permit was terminated August 19, 2003. Letter from USEPA to SPEC dated August 21, 2003. A copy is attached to Defendants' Statement of Facts as Exhibit 9.

149. The USEPA issued a Storm Water Permit dated August 2, 2000 to SPEC.

Objection: Relevance. Not disputed except to the extent that this statement purports to present a view that the federal government extensively regulates the Facility so as to preempt the County's taxation of the Facility. The storm water pollution prevention laws would apply regardless of whether a natural gas-fired combined cycle energy generation facility was located on tribal land, and thus exist for reasons wholly independent of tribal economic development. In addition, the Storm Water Permit was terminated August 19, 2003. Letter from USEPA to SPEC dated August 21, 2003. A copy is attached to Defendants' Statement of Facts as Exhibit 9.

150. The Tribe's Water Use Ordinance requires SPEC to apply for, and the Tribe to grant, a Water Use Permit before water can be used for the Facility.

Objection: Relevance. Not disputed except to the extent that this statement purports to present a view that the Tribe extensively regulates the Facility so as to preempt the County's taxation of the Facility.

151. The Tribe issued a Water Use Permit to SPEC for the term March 15, 1999 through March 14, 2069.

Objection: Relevance. Not disputed except to the extent that this statement purports to present a view that the Tribe extensively regulates the Facility so as to preempt the County's taxation of the Facility.

152. The Tribe's regulations required SPEC to apply for, and the Tribe to grant, a building permit before construction could begin on the Facility.

Objection: Relevance. Not disputed except to the extent that this statement purports to present a view that the Tribe extensively regulates the Facility so as to preempt the County's taxation of the Facility.

153. SPEC applied for a building permit from the Tribe on June 7, 1999.

Objection: Relevance. Not disputed except to the extent that this statement purports to present a view that the Tribe extensively regulates the Facility so as to preempt the County's taxation of the Facility.

154. The Tribe approved the building permit application for the construction of the Facility on June 7, 1999.

Objection: Relevance. Not disputed except to the extent that this statement purports to present a view that the Tribe extensively regulates the Facility so as to preempt the County's taxation of the Facility.

155. The Tribe's Building and Safety Department issued a Certificate of Occupancy for the Water Treatment Building to SPEC dated August 31, 2001.

Objection: Relevance. Not disputed except to the extent that this statement purports to present a view that the Tribe extensively regulates the Facility so as to preempt the County's taxation of the Facility.

156. The Tribe's Building and Safety Department issued a Certificate of Occupancy for the Administration Building dated August 31, 2001.

Objection: Relevance. Not disputed except to the extent that this statement purports to present a view that the Tribe extensively regulates the Facility so as to preempt the County's taxation of the Facility.

157. No permits or approvals from the State of Arizona, or county or local jurisdictions, are required because of the FMIT's sovereign status.

Not disputed except that the Arizona Corporation Commission (ACC) has authority over intrastate pipeline operators. Arizona Corporation Commission, https://www.azcc.gov/safety /pipeline/nplho.

158. The Tribe has not entered into any intergovernmental agreements or memoranda of understanding with state or local jurisdictions that would

delegate its permitting authority to any entity outside the tribe.

Objection: Relevance. Not disputed except to the extent that this statement purports to present a view that the Tribe extensively regulates the Facility so as to preempt the County's taxation of the Facility.

159. Neither the State of Arizona nor Mohave County issued or was required to issue building permits to South Point for construction of the Facility.

Objection: Relevance. Not disputed.

160. No political subdivision of the State of Arizona issued or was required to issue building permits to South Point for construction of the Facility.

Objection: Relevance. Not disputed.

161. Neither the State of Arizona nor Mohave County issued or was required to issue a certificate of occupancy for the Facility.

Objection: Relevance. Not disputed.

162. No political subdivision of the State of Arizona issued or was required to issue a certificate of occupancy for the Facility.

Objection: Relevance. Not disputed.

163. Neither the State of Arizona nor Mohave County issued or was required to issue storm water permits relating to the Facility.

Objection: Relevance. Not disputed.

164. No political subdivision of the State of Arizona issued or was required to issue storm water permits relating to the Facility.

Objection: Relevance. Not disputed.

165. Neither the State of Arizona nor Mohave County issued or was required to issue environmental permits relating to the Facility.

Objection: Relevance. Not disputed.

166. No political subdivision of the State of Arizona issued or was required to issue environmental permits relating to the Facility.

Objection: Relevance. Not disputed.

167. The Facility would be subject to state regulation and permitting if it were not located on the Reservation.

Objection: Relevance, Form (vague and ambiguous), Foundation (the cited support does not support the statement).

168. The Facility uses water withdrawn from the Colorado River and piped to the plant in a buried pipeline owned by the Tribe and located on reservation land as the primary source of water for the steam turbine and cooling towers.

Objection: Relevance. Not disputed except to the extent that this statement purports to present a view that the Tribe extensively regulates the Facility so as to preempt the County's taxation of the Facility and to clarify as follows: Where the pipe would cross public roads it would require an encroachment permit but ROW acquisition is not required. Landowners in the Mohave Valley routinely deal with the checkerboard

land ownership pattern by granting encroachment permits to allow passage from one section of tribal land to the next, and the tribe extends the same practical land management practice of reciprocity to private, state, and county lands. EIS at 167.

169. The Tribe has perfected water rights to Colorado River water in quantities adequate to meet the 4,000 acre-feet per year consumptive use requirements of the Facility.

Objection: Relevance. Not disputed except to the extent that this statement purports to present a view that the Tribe extensively regulates the Facility so as to preempt the County's taxation of the Facility.

170. The source of water for the Facility is from the Tribe's allocation of Colorado River water.

Objection: Relevance. Not disputed except to the extent that this statement purports to present a view that the Tribe extensively regulates the Facility so as to preempt the County's taxation of the Facility.

171. The source of water for the Facility is not from the State of Arizona's Colorado River water allocation.

Objection: Relevance. Not disputed except to the extent that this statement purports to present a view that the Tribe extensively regulates the Facility so as to preempt the County's taxation of the Facility.

172. The Tribal Water Ordinance required the Tribe to issue a Water Permit before water could be used at the Facility.

Objection: Relevance. Not disputed except to the extent that this statement purports to present a view

that the Tribe extensively regulates the Facility so as to preempt the County's taxation of the Facility.

173. Water from wells or from the Colorado River would be considered to be sub-flow of the Colorado River, and would be accounted for as surface water from the Tribe's allocation of Colorado River water by the US Bureau of Reclamation, the federal agency responsible for the Colorado River management.

Objection: Relevance. Not disputed except to the extent that this statement purports to present a view that the Tribe or the federal government extensively regulates the Facility so as to preempt the County's taxation of the Facility.

174. Water directly withdrawn from the Colorado River is the preferred primary water source supply for the Facility because river water has better quality than well water.

Objection: Relevance. Not disputed except to the extent that this statement purports to present a view that the Tribe extensively regulates the Facility so as to preempt the County's taxation of the Facility.

175. Water is pumped from the Colorado River by pumps, equipment, and pipeline owned by the Tribe and maintained by SPEC with the permission of the Tribe.

Objection: Relevance. Not disputed except to the extent that this statement purports to present a view that the Tribe extensively regulates the Facility so as to preempt the County's taxation of the Facility.

176. The US Bureau of Reclamation and the US Coast Guard, which review structures placed in the river

for navigational safety, reviewed and approved the Tribe's water pumping equipment at the time of its installation.

Objection: Relevance. Not disputed except to the extent that this statement purports to present a view that the Tribe or the federal government extensively regulates the Facility so as to preempt the County's taxation of the Facility.

177. Under the A&R Ground Lease, SPEC is permitted to extract up to 4,000 acre-feet of water per year in consumptive water rights from the Tribe's Colorado River water allocation for the Arizona portion of the Reservation and to use this water in its operation of the Facility.

Objection: Relevance. Not disputed except to the extent that this statement purports to present a view that the Tribe extensively regulates the Facility so as to preempt the County's taxation of the Facility.

178. Under the Second A&R Ground Lease SPEC is permitted to extract up to 4,000 acre-feet of water per year in consumptive water rights from the Tribe's Colorado River water allocation for the Arizona portion of the Reservation and to use this water in its operation of the Facility.

Objection: Relevance. Not disputed except to the extent that this statement purports to present a view that the Tribe extensively regulates the Facility so as to preempt the County's taxation of the Facility.

179. The water pipe from the Colorado River serves the Facility exclusively and does not serve agricultural irrigation purposes.

Objection: Relevance. Not disputed except to the extent that this statement purports to present a view that the Tribe extensively regulates the Facility so as to preempt the County's taxation of the Facility.

180. The Tribe provides the water used in the Facility's operations.

Objection: Relevance. Not disputed except to the extent that this statement purports to present a view that the Tribe extensively regulates the Facility so as to preempt the County's taxation of the Facility.

181. Neither the State of Arizona nor Mohave County provide water services to the Facility.

Objection: Relevance. Not disputed except to the extent that this statement purports to present a view that the federal government or Tribe extensively regulates the Facility so as to preempt the County's taxation of the Facility.

182. No political subdivision of the State of Arizona provides water services to the Facility.

Objection: Relevance. Not disputed except to the extent that this statement purports to present a view that the federal government or Tribe extensively regulates the Facility so as to preempt the County's taxation of the Facility.

183. Fire protection and emergency medical response for the Facility, is provided by modification of the preexisting contract between the Tribe and the

Mohave Valley Fire Department for on-Reservation fire protection and emergency services.

Objection: Relevance. Not disputed except to the extent that this statement purports to present a view that the Tribe extensively regulates the Facility so as to preempt the County's taxation of the Facility.

184. The Tribe pays the Mohave Valley Fire Department for fire protection and emergency response services it provides on the Reservation.

Objection: Relevance. Not disputed except to the extent that this statement purports to present a view that the Tribe extensively regulates the Facility so as to preempt the County's taxation of the Facility.

185. The Tribe was required to enter into a contract with the Bullhead City Fire Department, or other entity, capable of meeting hazardous materials response emergencies.

Objection: Relevance. Not disputed except to the extent that this statement purports to present a view that the Tribe extensively regulates the Facility so as to preempt the County's taxation of the Facility.

186. The USEPA has a hazardous materials technical assistance team that is available to the BIA to provide assistance as emergency response and as an onsite emergency coordinator.

Objection: Relevance. Not disputed except to the extent that this statement purports to present a view that the Tribe or the federal government extensively regulates the Facility so as to preempt the County's taxation of the Facility.

187. As a sovereign Indian tribe, the Tribe is also eligible to receive hazardous materials response assistance directly from the USEPA through EPCRA.

Objection: Relevance. Not disputed except to the extent that this statement purports to present a view that the Tribe or the federal government extensively regulates the Facility so as to preempt the County's taxation of the Facility.

188. Response to large-scale medical emergencies is available to the BIA and the Tribe through the Federal Emergency Management Agency.

Objection: Relevance. Not disputed except to the extent that this statement purports to present a view that the Tribe or the federal government extensively regulates the Facility so as to preempt the County's taxation of the Facility.

189. The Tribe provides sewer service to Tribal and non-tribal members on the Arizona side of the Reservation through the Fort Mojave Tribal Utilities Authority.

Objection: Relevance. Not disputed except to the extent that this statement purports to present a view that the Tribe extensively regulates the Facility so as to preempt the County's taxation of the Facility.

190. The Fort Mojave Tribal Utility Authority plan has adequate capacity to receive and treat the estimated 4,000 gallons per day output from the Facility.

Objection: Relevance. Not disputed except to the extent that this statement purports to present a view that the Tribe extensively regulates the Facility so as to preempt the County's taxation of the Facility.

191. SPEC contracts with Republic Services for the Facility's waste pick-up and hauling.

Not disputed except to clarify that the solid waste that Republic Services collects from SPEC is deposited into the Mohave County's Mohave Valley Landfill. Defendants' Statement of Facts, ¶ 211.

192. The tribal electric company, Aha Macav Power Service (AMPS), has a power distribution system on the Reservation.

Objection: Relevance. Not disputed except to the extent that this statement purports to present a view that the Tribe extensively regulates the Facility so as to preempt the County's taxation of the Facility.

193. Electricity for the Facility is generated on site as part of the power production process. Back-up power for the Facility is provided by AMPS on an as-needed basis, and AMPS invoices SPEC for such power as used.

Objection: Relevance. Not disputed except to the extent that this statement purports to present a view that the Tribe extensively regulates the Facility so as to preempt the County's taxation of the Facility.

194. Neither the State of Arizona nor Mohave County provides electric utility services to the Facility.

Objection: Relevance. Not disputed except to the extent that this statement purports to present a view that the federal government or Tribe extensively regulates the Facility so as to preempt the County's taxation of the Facility.

195. No political subdivision of the State of Arizona provides electric utility services to the Facility.

Objection: Relevance. Not disputed except to the extent that this statement purports to present a view that the federal government or Tribe extensively regulates the Facility so as to preempt the County's taxation of the Facility.

196. Natural gas for incidental use in operation of the Facility would come from the same source as the Facility's fuel for energy production, the gas line connecting the Facility to El Paso Natural Gas Company's and Transwestern Pipeline Company's main natural gas lines.

Objection: Relevance. Not disputed except to the extent that this statement purports to present a view that the federal government or Tribe extensively regulates the Facility so as to preempt the County's taxation of the Facility.

197. The Facility does not require natural gas from area utility providers.

Objection: Relevance. Not disputed except to the extent that this statement purports to present a view that the federal government or Tribe extensively regulates the Facility so as to preempt the County's taxation of the Facility.

198. Telecommunications, including fiber optic cable, satellite connection, and cellular communications are provided by and available from Fort Mojave Telecommunications, Inc.

Objection: Relevance. Not disputed except to the extent that this statement purports to present a view

that the Tribe extensively regulates the Facility so as to preempt the County's taxation of the Facility.

199. The Tribe provides telephone utility services to the Facility through its tribally-owned entity, Fort Mojave Telecommunications, Inc.

Objection: Relevance. Not disputed except to the extent that this statement purports to present a view that the Tribe extensively regulates the Facility so as to preempt the County's taxation of the Facility.

200. Neither the State of Arizona nor Mohave County provide telephone utility services to the Facility.

Objection: Relevance. Not disputed except to the extent that this statement purports to present a view that the federal government or Tribe extensively regulates the Facility so as to preempt the County's taxation of the Facility.

201. No political subdivision of the State of Arizona provides telephone utility services to the Facility.

Objection: Relevance. Not disputed except to the extent that this statement purports to present a view that the federal government or Tribe extensively regulates the Facility so as to preempt the County's taxation of the Facility.

202. Before approving the lease, the BIA concluded that the Facility would result in a number of benefits to the Tribe, including revenue from the 320-acre ground lease, additional income from SPEC's use of 4,000 acre-feet of water per year, tribal tax revenues, increased employment and training opportunities for tribal

members, diversified economic development on the reservation, and self-sufficiency.

Not disputed.

203. The BIA concluded that construction jobs associated with the Facility and permanent jobs associated with its operation could offer preferable and higher paying occupations to some tribal members.

Not disputed.

204. The BIA determined that the Facility would partially fulfill stated tribal goals for economic development and self-sufficiency.

Not disputed.

205. The lump-sum prepayment under the Second Amended Lease Agreement allowed the Tribe to achieve its goal of becoming debt-free by 2017.

Not disputed.

206. The Tribe initially adopted its current Tribal Tax Ordinance, Ordinance No. 46, on April 22, 1993.

Not disputed.

207. It is the policy of the Tribe to promote economic development and tribal self-sufficient [sic] on the Reservation, and to utilizes [sic] its tax power to help defray to [sic] the cost of government and to promote strong tribal government. This policy goal is achieved by the Tribe's adoption of a tax scheme conductive to economic development in the private sector.

Not disputed that the Fort Mojave Tribal Tax Ordinance§ 101.003(3) makes this statement.

208. The Tribe imposes a tax on leasehold interests in Reservation land.

Not disputed.

209. The Tribe offers taxpayers a credit against taxes owed to the Tribe for identical or similar lawful state taxes paid by the taxpayer during the same tax period in Section 402.002.

Objection: Relevance, Foundation (the cited support for this statement does not support the statement). Second A&R Ground Lease at Exhibit G addresses Section 403.003 of the Tribe's Tax Ordinance, not Section 402.002. Not disputed that Section 402.002 of the Tribal Tax Ordinance grants taxpayers a credit against taxes paid under the Ordinance for the amount of identical or similar taxes paid by the taxpayer during the same tax period. Disputed to the extent that the statement purports to present a view that this credit provision ever applied to SPEC under its lease agreements with the Tribe.

210. The Tribal Council adopted Section 402.002 of the Tribal Tax Ordinance because it found that the specter of dual tribal and state taxation frustrates economic development on the Reservation and unduly burdens Reservation commerce.

Objection: Relevance, Foundation (the cited support for this statement does not support the statement). Second A&R Ground Lease at Exhibit G addresses Section 403.003 of the Tribe's Tax Ordinance, not Section 402.002. Not disputed that Section 402.001(2) of the Tribal Tax Ordinance states the Tribal Council found that the specter of dual tribal and state taxation frustrates economic development

on the Reservation and unduly burdens Reservation commerce. Disputed to the extent that the statement purports to present a view that the property tax at issue here frustrated or burdened any tribal interest.

211. Section 403.003 of the Tribal Tax Ordinances [sic] permits the Tribal Council to authorize a payment in lieu of taxes ("PILOT") or total or partial tax exemption to the developer of the project to be located on Reservation lands.

Not disputed.

212. The A&R Ground Lease did not contain any provisions specific to the payment of tribal taxes by SPEC on the Facility.

Disputed. The A&R Ground Lease at 18, § 11.1 specifically addressed the payment of taxes by SPEC.

213. Under Lease Modification No 1, the Tribe granted SPEC a tax credit against any tribal taxes that reduced the tax due dollar-for-dollar by the amount of any equivalent tax imposed by the State of Arizona or Mohave County or any other taxing jurisdiction.

Objection: Relevance. Disputed in part. Although the Tribe and SPEC agreed that the annual in lieu of payment shall be reduced on a dollar for dollar basis by the amount of any tax paid by SPEC to the State of Arizona, Lease Modification No. 1 provided that the limitation *did not* apply to the 2002 year. Although the limitation would have applied to payments in lieu of the tribal leasehold tax beginning 2003 through 2020, the lease was modified again before the limitation took effect. The second modification in October of 2001 also provided that South Point pay an "in lieu of

the tribal leasehold tax" in the amount of $2,000,000 for the years 2002 through 2020. Section 11.1.2(A). The second modification made clear that the payment in lieu of the tribal leasehold tax for the years 2002 through 2020 was *not* subject to any limitation provisions. The section provided:

> **The provisions of Sections 11.1(A) and 11.1(B) hereinabove shall under no circumstances apply to, limit or otherwise affect the obligation of Calpine to make the $2,000,000 per annum in lieu of payments provided for in this Section 11.1.2(A), nor shall any other provisions of this Lease or any other circumstances, now or hereafter existing, including but not limited to imposition of the Arizona tax [or any similar tax] and the result of the lawsuit(s) referred to in Section 3 of Lease Modification No. 1 to the Lease . . . limit or reduce the obligation of Calpine to make the $2,000,000 per annum in lieu of payments provided for in this Section 11.1.2(A).**

Lease Modification No. 2 at page 2.

214. Under Lease Modification No. 1, the Tribe granted SPEC a tribal sales and use tax exemption for its wholesale sale of electricity produced on the Reservation as well as its purchases of supplies and materials needed for the Facility's operation.

Objection: Relevance. Not disputed except to the extent that the statement purports to present a view that the Tribe granted the exemption to avoid dual taxation. There is no actual evidence of dual taxation.

215. Under Lease Modification No. 1, the Tribe agreed to waive all other tribal taxes on SPEC's activities on the Reservation pursuant to the lease.

Objection: Relevance, Form (vague and ambiguous). Disputed in part. The statement omits the exceptions. Lease Modification No. 1 amended Section 11.1.4, which provided that no other tribal taxes shall be imposed. Section 11.1.4, however, listed exceptions to this provision. *"Other than as expressly provided in Section 11.1.1, 11.1.2 and 11.1.3 of this Lease*, the Tribe shall not impose a tax" on SPEC's activities on the Reservation pursuant to the lease. Lease Modification No. 1 at 6, § 1(c) (emphasis added). Section 11.1.2 addressed the payment in lieu of the leasehold tax for years 2002 through 2020 and the leasehold tax for years beginning on January 1, 2021 and Section 11.1.3 addressed the payment in lieu of the tribal personal property tax.

216. In the Second A&R Ground Lease, the Tribe authorized a payment in lieu of any and all tribal taxes of any nature, whether currently imposed or imposed at any point during the duration of the lease, and including any tribal tax rate increases for SPEC pursuant to§ 403.003(1) of the Tribal Tax Ordinance.

Disputed. Misstates the evidence. Section 7.3 of the Second A&R Ground Lease provided that the "Lump Sum Payment, together with the Annual Payments constitutes the sole and complete payments to the Tribe associated with this Second A&R Lease . . . including, but not limited to . . . as payment in lieu of any and all Tribal Taxes."

217. As consideration for the Second A&R Ground Lease, the Tribe waived its sovereign right to impose any tribal tax on SPEC, the Facility, or its operations as of the date of the Second A&R Ground Lease.

Objection: Relevance. Disputed. Misstates the evidence. The statement purports to present a view that the Second A&R Lease required the Tribe to waive its sovereign rights to impose any future taxes on SPEC. Section 7.3 of the Second A&R Ground Lease provides that "[i]n consideration for the making of the Lump Sum Payment and Annual Payments, "the Tribe waived its sovereign right to impose any tribal tax on SPEC. The consideration was the upfront payments representing the fair present value of the future revenue streams under the renegotiated lease. Second A&R Lease, Exhibit C, Tribal Council Resolution No. 2012-83 ("[T]he Tribe retained a nationally-recognized financial consulting firm to analyze the value of the Original Lease revenue streams and to make recommendations to the Tribe regarding a fair present value to the Tribe for these revenue streams under the Second A&R Lease"). There is no actual evidence that the property tax at issue here has in any way limited the financial benefit to the Tribe of the lease to SPEC.

218. At least one proposed development project on the Reservation fell through due to the threat of double taxation by the Tribe and the State of Arizona.

Disputed. Objection: Relevance, Foundation, Hearsay, Speculation. The deponent specifically states that he was "not involved at any negotiation other than providing the financial component based

on the information that's provided to me." Devita Deposition at 85:11-20.

219. Negotiations between First Solar, a non-Indian company, and the Tribe for the development of solar energy installation on approximately 2,400 acres of Reservation land ceased over disagreements over how the tribal and state taxes should be paid.

Disputed. Objection: Relevance, Foundation, Hearsay, Speculation. The deponent specifically states that he was "not involved at any negotiation other than providing the financial component based on the information that's provided to me." Devita Deposition at 85:11-20.

220. The Tribe has granted exemptions or agreed to payments in lieu of tax for tribal sales and use taxes to non-Indian lessees operating on the Reservation where sales and use taxes are being paid but to other jurisdictions.

Disputed. Objection: Relevance, Foundation, Hearsay, Speculation. The statement purports to present a view that the Tribe granted exemptions or payments in lieu of tax to avoid dual taxation. There is no actual evidence of dual taxation.

Respectfully submitted this 18th day of October, 2019.

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Original of the foregoing e-filed
this 18th day of October, 2019.

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this 18th day of October, 2019, to:

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Copy of the foregoing electronically served
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