IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

PICKEREL LAKE OUTLET ASSOCIATION, a South Dakota non-profit corporation; GARY WALD; KELSEY BECKSTROM; GREG BURGESS; NANCY BURGESS; LAUREN JOHNSON; KATHLEEN JOHNSON; GREG JOHNSON; MARY JOHNSON; BRUCE MAY; RHONDA MAY; MARK THOMPSON; JUNE THOMPSON; JUSTIN HANSON; MATT PAULSON; JOSH LARSON; SCOTT KRAM; KIM KRAM; THOMAS MEYER; DALITA MEYER; MICAH LIKNESS; JOHN WOODMAN; RAMONA WOODMAN; ROGER RIX; PAM RIX; CLARK LIKNESS; GERRY LIKNESS; GREG PETERSON; EMERY SIPPEL; MARC SIPPEL; LYNN PETERSON; SCOTT VOGEL; ROBERT BISGARD; AL VANDERLAAN; JASON SNELL; RON BELDEN; BENJAMIN JOHNSON; NICOLE JOHNSON; PAUL TVINNEREIM; KRIS TVINNEREIM; DAWN FRIEDRICHSEN,

Plaintiffs/Appellants,

-vs-

DAY COUNTY, SOUTH DAKOTA, A SOUTH DAKOTA PUBLIC CORPORATION, AND THE STATE OF SOUTH DAKOTA,

Defendants/Appellees.

Appeal No. 29066

APPEAL FROM THE CIRCUIT COURT
FIFTH JUDICIAL CIRCUIT
DAY COUNTY, SOUTH DAKOTA

THE HONORABLE JON S. FLEMMER
CIRCUIT COURT JUDGE

APPELLANTS' BRIEF

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NOTICE OF APPEAL FILED
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PRELIMINARY STATEMENT

In this brief, the Appellants, Pickeral Lake Outlet Association, Inc., and the other individual plaintiffs who are identified in the Second Amended Complaint will be collectively referred to as "plaintiffs." Appellee Day County will be referred to as "County." Appellee State of South Dakota will be referred to as "State." The Day County Clerk of Courts' record will be referred to by the initials "CR" and the corresponding page numbers. The Appendix to this brief will be referred to as "Appx." followed by the corresponding page number.

JURISDICTIONAL STATEMENT

This is an appeal from the trial court's Order Granting Defendants' Motion for Summary Judgment and Judgment, which was filed on June 12, 2019. (Appx. 1-5; CR 660.) Notice of Entry was served on June 24, 2019. (CR 661.) Plaintiffs filed a Notice of Appeal on July 19, 2019. (CR 668.) This Court may exercise jurisdiction pursuant to SDCL 15-26A-3(1), because plaintiffs are appealing from a judgment.

QUESTION PRESENTED

I. WHETHER THE CIRCUIT COURT ERRED BY CONCLUDING THAT DAY COUNTY'S *AD VALOREM* PROPERTY TAXES ON LAKE CABINS AND OTHER STRUCTURES LOCATED ON INDIAN TRUST LAND ARE NOT PREEMPTED BY FEDERAL LAW.

The Circuit Court concluded that 25 U.S.C. § 465 (transferred to 25 U.S.C. § 5108) does not preempt Day

County's ad valorem property taxes on lake cabins and other structures on Indian Trust land.

United States v. Rickert, 188 U.S. 432 (1903).

Mescalero Appache Tribe v. Jones, 411 U.S. 145 (1973).

S.D. Const. art. XXII, § 2

SDCL 10-4-1

SDCL 10-4-2

SDCL 10-4-2.1

25 U.S.C. § 465, transferred to 25 U.S.C. § 5108[1]

STATEMENT OF THE CASE

This is an action for prospective declaratory relief brought pursuant to SDCL 15-6-57 and the Uniform Declaratory Judgments Act, SDCL Chapter 21-24, regarding the validity of a state tax. The individuals named as plaintiffs own lake homes, cabins, and cottages on the western shore of Pickerel Lake on land held in trust by the United States for the Sisseton Wahpeton Oyate Indian Tribe. (CR 97.)

On December 14, 2014, plaintiffs commenced this action against the County. (CR 1-6.) Pursuant to a stipulation of the parties, plaintiffs filed an Amended Summons and Amended Complaint, adding the State as a defendant. (CR 17-18; 23-27.) The parties later stipulated to allow

[1] Recently, 25 U.S.C. § 465 was transferred to 25 U.S.C. § 5108. Because all of the relevant cases refer to the former citation of the statute, the Appellants' Brief will primarily use that citation.

plaintiffs to file Plaintiffs' Second Amended Complaint. (CR 41-44; 45-52.)

On May 17, 2017, plaintiffs moved for summary judgment and sought declaratory relief that:

1. Federal law, 25 U.S.C. § 5108 (formerly cited as 25 U.S.C. § 465), preempts state and local taxes on permanent improvements, defined under applicable federal law as "buildings, other structures, and associated infrastructure attached to the leased premises," on land owned by the United States and held in trust for an Indian Tribe without regard to the ownership of the improvements; and

2. The taxes assessed under SDCL 10-4-2.1 by Day County against the plaintiffs for their buildings, other structures, and associated infrastructure attached to the leased land owned by the United States and held in trust for the Sisseton Wahpeton Oyate Tribe are preempted by federal law.

(CR 65.)

In a Memorandum Decision dated January 11, 2018, the Circuit Court, the Honorable Jon S. Flemmer presiding, denied plaintiffs' Motion. (Appx. 12-18; CR 571-577.) An Order Denying Plaintiffs' Motion for Summary Judgment was filed on January 29, 2018. (CR 578-579.)

On September 21, 2018, Defendant State of South Dakota filed a Motion for Summary Judgment. (CR 590.) On October 2, 2018, Defendant Day County filed a Response indicating its joinder in the State of South Dakota's Motion. (CR 641.) On May 17, 2019, Judge Flemmer entered a Memorandum

Decision which granted the State of South Dakota's Motion for Summary Judgment. (Appx. 2-5; CR 655-658.) An Order Granting Defendants' Motion for Summary Judgment and Judgment was entered on June 12, 2019. (Appx. 1; CR 660.) Notice of Entry was served on June 24, 2019. (CR 661.) Plaintiffs' Notice of Appeal was timely filed on July 19, 2019. (CR 668-669.)

STATEMENT OF FACTS

Pickerel Lake, in Day County, is a spring-fed lake almost 1,000 acres in size and one of the deepest natural lakes in South Dakota, offering many recreational opportunities such as boating and fishing. (CR 96.) There are many private lake cabins and cottages around Pickerel Lake. (Id.) Some of the land on which the private lake cabins and cottages are located around Pickerel Lake is held in trust by the United States for the Sisseton Wahpeton Oyate, a federally recognized tribe under the Indian Reorganization Act. (CR 54; South Dakota v. U.S. Dep't of Interior, 665 F.3d 986, 987 (8th Cir. 2012)).

The individual plaintiffs are members of the Pickerel Lake Outlet Association, a South Dakota domestic non-profit corporation in good standing. (CR 96-97; 101-104.) On behalf of its members, the Association has leased a 31.28-acre parcel of Indian trust land on the western shore of Pickerel Lake designated as Allotment #1199 Henry Campbell. (CR 96-98; 106; 107-113.) The official description of the

leased trust land is: "Kosciusko Township — Day County, SD - Fifth Principal Meridian, Allot. # 1199 - LOT 8, Sec. 22, T. 124 N. R. 53 W." (CR 98; 107-113.) The most recent lease was entered into on November 9, 2015, by the U.S. Department of Interior, Bureau of Indian Affairs, on behalf of the Sisseton Wahpeton Oyate and individual Indians as allottees under Title 25 of the Code of Federal Regulations, Part 162 (Leases and Permits). (CR 107-113; CR 256-301.)

Although the individual plaintiffs are not members of the Sisseton Wahpeton Oyate Tribe, they own lake cabins, cottages, garages, and other buildings, structures, and associated infrastructure attached to the leased property held in trust for the Sisseton Wahpeton Oyate Tribe. (CR 97–98; 171-195.) Under its tribal jurisdiction and authority, the Tribe assesses and collects *ad valorem* property taxes from the plaintiffs for their lake cabins and cottages on the Indian trust land. (CR 99; 142-170.)

Day County also now has assessed and collected *ad valorem* property taxes against the individual plaintiffs on the same lake cabins and cottages on the leased Indian trust land under SDCL 10-4-1, SDCL 10-4-2, and SDCL 10-4-2.1. (CR 99; 114-141.) As a result, the individual plaintiffs are being double-taxed on their lake cabins, cottages, and other structures on leased federal Indian trust land because they

are being required to pay *ad valorem* property taxes on those permanent improvements by both the Sisseton Wahpeton Oyate Indian Tribe and Day County. (CR 99-100; 114-170; 199-203; 240-241.)

The Department of the Interior, Bureau of Indian Affairs, published regulations entitled "Residental, Business, and Wind and Solar Resource Leases on Indian Land" on December 5, 2012. (CR 257.) The regulations state 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." (CR 288, 25 C.F.R. § 162.017(a).) The Federal Register notice states that the federal statutes and regulations governing leasing on Indian lands "occupy and preempt the field of Indian leasing," and that the federal statutory scheme is "comprehensive" and "pervasive," so it "precludes State taxation." (CR 318, 77 Fed. Reg. 72, 440 (Dec. 5, 2012) (codified at 25 C.F.R. pt. 162).)

ARGUMENT

A. STANDARD OF REVIEW.

This Court reviews a circuit court's summary judgment ruling under the de novo standard of review. Heitmann v. Am. Family Mut. Ins. Co., 2016 S.D. 51, ¶ 8, 883 N.W.2d 506, 508.

Similarly, "'[s]tatutory interpretation and application are questions of law, and are reviewed by this Court under the de novo standard of review.'" In re Estate of Flaws, 2016 S.D. 61, ¶ 12, 885 N.W.2d 580, 583 (quoting State v. Powers, 2008 S.D. 119, ¶ 7, 758 N.W.2d 918, 920).

B. HISTORIC TREATMENT OF INDIAN TRUST LAND.

The historic framework helps to explain why the *ad valorem* taxes imposed by Day County on plaintiffs' structures on federal Indian trust land are pre-empted by federal law.

1. Dawes Act

In 1887, Congress passed the General Allotment Act of 1887, 24 Stat. 388, as amended, 25 U.S.C. § 331 et seq., also known as the Dawes Act. This legislation provided that parcels of tribal land would be patented to individual Indians and held in trust by the United States for a 25-year period, after which the government would convey title to the allottees, who then were free to sell it. See Cass County v. Leech Lake Band of Chippewa Indians, 524 U.S. 103, 106-07 (1998); Yankton Sioux Tribe v. Podhradsky, 606 F.3d 994, 999 (8th Cir. 2010); McGuire v. Aberle, 2013 S.D. 5, ¶ 45, 826 N.W.2d 353, 355.

This practice of allotment resulted in the sale of Indian lands to non-Indians and the substantial diminishment of Indian reservations. For example, the Sisseton Wahpeton

Oyate Indian Tribe lost all non-trust land and became an "open" reservation without recognized, contiguous borders. See DeCoteau v. District County Court for Tenth Judicial Circuit, 420 U.S. 425, 427-28 & 448-49 (1975).

2. Indian immunity from state taxation on federal Indian trust land.

Indians tribes and their members, when inside Indian country, are categorically immune from state taxation. See Oklahoma Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 458 (1995) (quoting County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation, 502 U.S. 251, 258 (1992)). Absent Congressional authorization, states are without power to tax reservation lands. See id. This categorical prohibition applies throughout "Indian country," broadly defined to include "Indian allotments, whether restricted or held in trust by the United States." Oklahoma Tax Comm'n v. Sac & Fox Nation, 508 U.S. 114, 123 (1993).

The Supreme Court "has prohibited state taxation of Indians on fee lands within reservation boundaries, as well as taxation of Indians and tribes on trust lands outside reservations or in dependent Indian communities." COHEN'S HANDBOOK OF FEDERAL INDIAN Law, § 8.03[1][b] (2005 ed.) (collecting cases). Categorical state tax immunity, however, only extends to the members of a tribe and not to non-member Indians who enter Indian country. See Cotton

Petroleum Corp. v. New Mexico, 490 U.S. 163, 176 (1989). Thus, state taxes on nontribal members in Indian country are not *categorically* barred. See Id.

3. United States v. Rickert.

The original case addressing attempts by state and local governments to tax improvements on Indian trust land arose out of South Dakota. In United States v. Rickert, 188 U.S. 432 (1903), the issue was whether Roberts County could assess property taxes on improvements (a house and barn) held by members of the Sisseton Wahpeton Tribe on land held by the United States in trust for tribe members under the Dawes Act. See id. at 441-42. The United States Supreme Court held that state and local governments had no power to tax the permanent improvements on Indian trust land, even though South Dakota law had characterized the improvements as taxable "personal property." Id. at 442-43. As the Court later explained:

> In United States v. Rickert, the same rule was held to apply where the United States holds legal title to land in trust for an Indian or a tribe. The United States there held legal title to certain lands in trust for a band of Sioux Indians which was in actual possession of the lands. *This Court held that neither the lands nor the permanent improvements thereon were subject to state or local ad valorem taxes.* It was emphasized that the fee title remained in the United States in obvious execution of its protective policy toward its wards, the Sioux Indians. *To tax these lands and the improvements thereon, without congressional consent, would be to tax a means*

employed by the Government to accomplish beneficent objects relative to a dependent class of individuals.

West v. Oklahoma Tax Comm'n, 334 U.S. 717, 724 (1948) (emphasis supplied).

However, Rickert did not specifically address whether state and local governments could validly tax improvements owned by non-Indians, but on Indian trust land. And Rickert was decided three decades before the passage of the Indian Reorganization Act of 1934, which included the federal statute at issue in this case.

4. Indian Reorganization Act of 1934.

In 1934, federal Indian policy shifted when Congress enacted the Indian Reorganization Act ("IRA"), 48 Stat. 984, 25 U.S.C. § 461 et seq., which ended the practice of making federal allotments to individual Indians. See Cass County, 524 U.S. at 108. The IRA "reflected a new policy of the Federal Government and aimed to put a halt to the loss of tribal lands though allotment." Mescalero Apache Tribe v. Jones, 411 U.S. 145, 151 (1973); see also Yankton Sioux Tribe, 606 F.3d at 1001; South Dakota v. U. S. Dep't of Interior, 423 F.3d 790, 798 (8th Cir. 2005) (Wollman, J.).

The IRA allowed the United States to acquire additional lands "within or without existing reservations . . . for the purpose of providing land for Indians." Id. (quoting 25 U.S.C. § 465); Carcieri v. Salazar, 555 U.S. 379, 381 (2009).

Lands taken into trust for a tribe may not be alienated to be exempt from State and local taxation. 25 U.S.C. § 465; see also City of Sherrill, N.Y. v. Oneida Indian Nation of New York, 544 U.S. at 220; Cass County, 524 U.S. at 114-15.

5. Taxation of land held in trust for the United States for the Sisseton Wahpeton Oyate on Pickerel Lake.

The land on which plaintiffs' private lake cabins and cottages are located is held in trust by the United States for the Sisseton Wahpeton Oyate, a federally recognized tribe under the Indian Reorganization Act. Here, then, "the United States holds legal title to the trust land at issue." Estate of Ducheneaux v. Ducheneaux, 2015 S.D. 11, ¶ 9, 861 N.W.2d 519, 522. Such trust land meets the definition of Indian country under federal law and is
removed from state jurisdiction. Id.; City of Sherrill, 544 U.S. at 221; S.D. Const, art. XXII, § 2.

As part of their residual sovereignty, tribes retain power to legislate and to tax activities on their lands, including certain activities by nonmembers. See Plains Commerce Bank v. Long Family Land and Cattle Co., 554 U.S. 316, 327 (2008) (citation omitted). Specifically, Indian tribes retain the power to tax leasehold interests held in tribal lands and to impose *ad valorem* taxes on improvements on tribal lands, including land held by the United States in trust for the tribe.

See e.g. Kerr-McGee Corp. v. Navajo Tribe, 471 U.S. 195, 196-97 (1985); Washington v. Confederated Tribes of Colville Reservation, 447 U.S. 134, 153 (1980).

The individual plaintiffs are not members of the Tribe, but they own lake cabins, cottages, other structures on the Sisseton Wahpeton Trust Land. Under its tribal jurisdiction and authority, the Tribe assesses and collects ad valorem property taxes from the plaintiffs for their lake cabins and cottages on the Indian trust land.

Day County also now has assessed and collected ad valorem property taxes against the individual plaintiffs for these same lake cabins and cottages on this leased Indian trust land under SDCL 10-4-1, SDCL 10-4-2 and SDCL 10-4-2.1. That latter statute provides:

> Buildings and improvements on leased sites are classified for tax purposes and are taxed as real property. Delinquent taxes on these buildings and improvements shall be collected as provided for the collection of taxes on manufactured homes pursuant to chapter 10-22.

SDCL 10-4-2.1; see also National Food Corp. v. Aurora County Bd. of Comm'rs, 537 N.W.2d 564, 566 (S.D. 1995) (explaining that under South Dakota law, "[i]f a property is a structure, then it is taxable as real property" under SDCL 10-4-2); Rushmore Shadows, RFC v. Pennington County Bd. of Equalization, 2013

S.D. 73, ¶¶ 12-20, 838 N.W.2d 814, 818-19 (holding that recreational park trailers constructively affixed to real estate constituted improvement to land so as to be subject to *ad valorem* taxation by the state as real property).

As a result, the individual plaintiffs are being double-taxed on their lake cabins, cottages, and other structures on leased federal Indian trust land because they are being required to pay *ad valorem* property taxes on those permanent improvements by both the Sisseton Wahpeton Oyate Indian Tribe and Day County. The double-taxation prompted this action seeking declaratory relief.

C. DAY COUNTY'S ATTEMPT TO ASSESS PROPERTY TAXES FOR PERMANENT IMPROVEMENTS LOCATED ON INDIAN TRUST LAND IS PREEMPTED BY FEDERAL LAW.

Plaintiffs maintain that the trial court erred by ruling in defendants' favor, because Day County's attempt to assess *ad valorem* property taxes for permanent improvements on federal Indian trust land is explicitly preempted by 25 U.S.C § 465 (transferred to 25 U.S.C. § 5108).

1. Federal law is controlling in matters pertaining to Indian lands, including lands held by the United States in trust for the Tribe.

Subject to constitutional limitations, States have broad jurisdiction to tax persons and property within their boundaries. However, state and local taxing jurisdiction can

be preempted by federal law. See Estate of Flaws, 2016 S.D. 60, ¶ 22, 885 N.W.2d 336, 343 (Flaws I); Estate of Flaws, 2016 S.D. 61, ¶ 16,885 N.W.2d 580, 584 (Flaws II). Both the United States and South Dakota Constitutions recognize the federal constitution as "the supreme law of Law of the Land[.]" Flaws I, 2016 S.D. 60, ¶ 22, 885 N.W.2d 336, 343 (citing U.S. Const, art. VI, cl. 2; S.D. Const, art. VI, § 26). In addition, the South Dakota Constitution is one of several state constitutions to include a disclaimer provision required by the federal government as a condition of admission to the Union that expressly honors federal preemption of state taxing jurisdiction over Indian lands. DeCoteau v. District County Court for Tenth Judicial District, 211 N.W.2d 843, 845 n.* (S.D. 1973); Washington v. Confederated Bands and Tribes of Yakima Indian Nation, 439 U.S. 463, 479-80 & n. 25 (1979) (Yakima); Rickert, 188 U.S. at 440; Rosebud Sioux Tribe v. State of South Dakota, 900 F.2d 1164, 1166 & n. 3 (8th Cir. 1990).

The Enabling Act of February 22, 1889, ch. 180, § 4, 25 Stat. 676, ratified as Article XXII of the South Dakota Constitution, provides:

> That we, the people inhabiting the state of South Dakota, do agree and declare that we forever disclaim all right and title to the unappropriated public lands lying within the boundary of South Dakota, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United

> States, the same shall be and remain subject to the disposition of the United States; and *said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States* . . .

S.D. Const, art. XXII, § 2 (emphasis supplied). Thus, "South Dakota's Constitution expressly acknowledges the supremacy of the federal government in matters pertaining to Indian lands." Estate of Ducheneaux, 2015 S.D. 11, ¶ 10, 861 N.W.2d at 522; see also Flaws I, 2016 S.D. 60, ¶ 22, 885 N.W.2d at 343; Flaws II, 2016 S.D. 61, ¶ 16, 885 N.W.2d at 584.

As the South Dakota Supreme Court has made clear, this constitutional recognition extends to federal Indian trust lands, such as the trust lands at issue here. See Risse v. Meeks, 1998 S.D. 112, ¶ 11, 585 N.W.2d 875, 877 (explaining that because conduct occurred on leased real property "owned by the United States of America in trust . . . any claim of state jurisdiction is disposed of by S.D. Const, art. XXII"); O'Neal v. Diamond A Cattle Co., 260 N.W. 836, 837-38 (S.D. 1935); Peano v. Brennan, 106 N.W. 409, 411 (S.D. 1906) (explaining that "[t]he object of the constitutional provision was not merely to declare that the state disclaimed all title to the Indian lands, but that it disclaimed all rights to interfere by its legislation or courts in the management or control of the Indians or in the management or control of the Indian reservation lands").

2. State and local *ad valorem* property taxes on permanent improvements on Indian trust land are explicitly preempted by federal law.

Here, although the plaintiffs who own the improvements on Indian trust land are not tribe members, "the United States holds legal title to the trust land at issue," Estate of Ducheneaux, 2015 S.D. 11, ¶ 9, 861 N.W.2d at 522, which is overseen by the Bureau of Indian Affairs ("BIA") for the benefit of the Sisseton-Wahpeton Oyate. Although "[s]tate taxes on nontribal members in Indian county are not categorically barred," courts generally apply a "flexible preemption analysis sensitive to the particular facts and legislation involved." Cotton Petroleum Corp., 490 U.S. at 176; see also White Mountain Apache Tribe v. Bracken, 448 U.S. 136, 142 (1980).

Congressional authority over tribal affairs under the Indian Commerce Clause and the status of tribes as distinct political communities with attributes of self- government "have given rise to two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members." Bracken, 448 U.S. at 142. "First, the exercise of such authority may be preempted by federal law." Id. "Second, it may infringe '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)). As the

Supreme Court has clarified, "[t]he two barriers are independent because either, 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.

The South Dakota Supreme Court likewise has recognized that a state's exercise of its general authority "may be pre-empted by federal law." Flaws I, 2016 S.D. 60, ¶ 22, 885 N.W.2d at 343 (quoting Bracken, 448 U.S. at 142). "Federal preemption 'occurs when Congress . . . expresses a clear intent to pre-empt state law, . . . where there is implicit in federal law a barrier to state regulation, where Congress has legislated comprehensively, . . . or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress." Flaws I, 2016 S.D. 60, ¶ 24, 885 N.W.2d at 344 (quoting LFL. Pub. Sew. Comm'n v. FCC, 476 U.S. 355, 368-69 (1986)).

This case primarily involves "explicit federal preemption," the first type of barrier to state regulatory authority (in this case state and local taxing authority) over real property in Indian country. Flaws I, 2016 S.D. 60, 25, 885 N.W.2d at 344 ("We first address explicit federal preemption"). As the South Dakota Supreme Court recognized in the Flaws I, Flaws II, and Estate of Ducheneaux cases, complex analysis "is not required, however, when an act of

Congress clearly expresses a constraint on state authority." 2015 S.D. 11, ¶ 11, 861 N.W.2d 519, 523 (quoting Williams v. Lee, 358 U.S. at 220) (explaining that "[e]ssentially, *absent governing Acts of Congress*, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them").

Here, Congress has enacted a federal law that explicitly preempts the taxes sought to be assessed by Day County on permanent improvements on Indian trust land. The Day County property taxes in question are directly preempted by 25 U.S.C. § 465 (transferred to 25 U.S.C. § 5108), enacted as part of the IRA. The IRA allowed the United States to acquire additional lands "within or without existing reservations, including trust or otherwise restricted allotments, . . . for the purpose of providing land for Indians." 25 U.S.C. § 465 (transferred to 25 U.S.C. § 5108); Carcieri, 555 U.S. at 381. The statute also expressly provided that such lands taken into trust by the federal government for a tribe may not be alienated and are exempt from State and local taxes:

> Title to any lands 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.

25 U.S.C. § 465 (transferred to 25 U.S.C. § 5108) (emphasis supplied); see also City of Sherill, 544 U.S. at 220. This

statute codified the Supreme Court's holding in Rickert and further indicated that trust lands and the permanent improvements on those lands, regardless of who owned the improvements, are immune from state and local taxation.

3. The United States Supreme Court and other courts have recognized the preemptive effect of 25 U.S.C. § 465 as to non-Indian-owned improvements.

In Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973), the United States Supreme Court applied 25 U.S.C. § 465 to preclude a local tax. In Mescalero Apache Tribe, the State of New Mexico sought to impose a "compensating use tax" on the items used to construct permanent improvements in the form of ski lifts for a non-Indian-owned ski resort on land held in trust by the United States for the Mescalero Apache Tribe. The Supreme Court held that the State could not assess use taxes on that property under 25 U.S.C. § 465 because "these permanent improvements on the Tribe's tax- exempt land would certainly be immune from the State's ad valorem property tax." Id. at 158 (citing Rickert, 188 U.S. at 441-43). As the Court explained, "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. (emphasis supplied). The Court affirmed that "[e]very reason that can be urged to show that the land was not subject to

taxation applies to the assessment and taxation of the permanent improvements." Id. at 158-59 (quoting Rickert, 188 U.S. at 442).

Regarding what are essentially federal questions, the South Dakota Supreme Court has stated that it is guided and bound by federal statutes and decisions of federal courts interpreting those statutes. See St. Cloud v. Reapley, 521 N.W.2d 118, 122 (S.D. 1994). Beginning with the Supreme Court's holding in Mescalero Apache Tribe, 411 U.S. at 158-59, that "these permanent improvements on the Tribe's tax-exempt land would certainly be immune from the State's ad valorem property tax," the federal courts uniformly have interpreted 25 U.S.C. § 465 (transferred to 25 U.S.C. § 5108) as preempting state and local taxation of permanent improvements on Indian trust land.

In Confederated Tribes of Chehalis Reservation v. Thurston Cnty. Bd. of Equalization, 724 F.3d 1153, 1154 (9th Cir. 2013), the Ninth Circuit recognized that, under Mescalero and 25 U.S.C. § 465, state and local governments did not have the power to tax permanent improvements built on land held in trust for Indians, regardless of ownership. As the court of appeals explained:

> 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. Because the Supreme Court has not revisited this holding we are required to apply it.

Id. at 1159. The court of appeals held that such taxes were directly preempted under section 465 and Mescalero and no further preemption analysis was necessary. Id.

In Seminole Tribe of Florida v. Stranburg, 799 F.3d 1324, 1330 (11th Cir. 2015), similarly, the Eleventh Circuit held that 25 U.S.C. § 465 preempted Florida's attempts to impose a rental tax on leased Indian trust land. As the court of appeals explained:

> In our view, Mescalero stands for the proposition that § 465 precludes state taxation of that "bundle of privileges that make up property or ownership of property." The ability to lease property is a fundamental privilege of property ownership. . . . By taxing the "privilege" of "engag[ing] in the business of renting, leasing, letting, or granting a license for the use of any real property," the State of Florida is taxing a privilege of ownership just as New Mexico's tax in Mescalero taxed the privilege of use.

Id. (quoting Mescalero Apache Tribe, 411 U.S. at 158). As a result, the Eleventh Circuit held that "Florida's Rental Tax is expressly precluded by 25 U.S.C. § 465, and, in the alternative, is preempted by the comprehensive federal regulation of Indian land leasing." Stranburg, 799 F.3d at 1353.

4. Federal regulations confirm that permanent improvements on leased Indian trust land may not be taxed, without regard to who owns the improvements.

The BIA's regulations support the argument that the Day County's *ad valorem* taxes are preempted. The South Dakota Supreme Court has noted that it "give[s] a federal agency's interpretation of the statutes it administers highly deferential review." Filing by GCC License Corp., 2001 S.D. 32, ¶ 19, 623 N.W.2d 474, 481-82 (citing Chevron USA v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984)); see also Mulder v. South Dakota Dep't of Social Services, 2004 S.D. 10, ¶ 6, 675 N.W.2d 212, 214.

The BIA's regulations clarify and confirm its interpretation of 25 U.S.C. § 465 to mean 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." 25 C.F.R. § 162.017(a) (emphasis supplied). The Federal Register notice describing the regulations recognized that the federal statutes and regulations governing leasing on Indian lands "occupy and preempt the field of Indian leasing," and that the federal statutory scheme is "comprehensive" and "pervasive," so it

"precludes State taxation." 77 Fed. Reg. 72,440 (Dec. 5, 2012) (codified at 25 C.F.R. pt. 162) (CR 318); see also Agua Caliente Band of Cahuilla Indians v. Riverside County, 181 F.Supp.3d 725, 732 (C.D. Cal. 2016).

As further detailed by the BIA in the Federal Register, the legislative history of the IRA "demonstrates that Congress intended to maximize income to Indian landowners and encourage all types of economic development on Indian lands" and that "[a]ssessment of State and local taxes would obstruct Federal policies supporting tribal economic development, self determination, and strong tribal governments." Id. (CR 319.) As a result, "[s]ubject only to applicable Federal law, permanent improvements on trust or restricted land are not taxable by States or localities, regardless of who owns the improvements." Id. (CR 320).

As defined by the federal regulations, "Permanent improvements means buildings, other structures, and associated infrastructure attached to the leased premises." 25 C.F.R. § 162.003 (CR 264.) See People of South Naknek v. Bristol Bay Borough, 466 F.Supp. 870, 875 (D. Alaska 1979) (explaining that "the tax immunity question is a matter of federal law . . . . No state, of course could remove the tax immunity by applying a narrow definition of fixtures or reclassifying the improvements as personal property") (citing Rickert, 188 U.S. at 442; Mescalero Apache Tribe, 411 U.S. at 158).

Federal regulations thus confirm the preemptive effect of 25 U.S.C. § 465 in these circumstances to prohibit

state and local taxation of permanent improvements on Indian trust lands. See Confederated Tribes of Chehalis Reservation, 724 F.3d at 157 n. 6 (explaining that "[b]ecause this regulation 'merely clarifies and confirms' what § 465 'already conveys,' we need not reach the applicability of this regulation or the level of deference owed to the Bureau of Indian Affairs in this context"); Desert Water Agency v. U.S. Dep't of Interior, 849 F.3d 1250, 1254-56 (9th Cir. 2012) (holding that 25 C.F.R. § 162.017 did not itself preempt state and local taxes on Indian trust land, but rather confirmed BIA's interpretation that 25 U.S.C. § 465 preempted such taxes). The sum conclusion is that States and localities may not tax real property held by the United States in trust for an Indian tribe — or buildings, other structures and associated infrastructure attached to the property — regardless of who owns those improvements.

5. If the *ad valorem* tax is not expressly preempted, it is impliedly preempted.

Plaintiffs maintain that Congress has enacted a federal law that explicitly preempts the taxes sought to be assessed by Day County on permanent improvements on Indian trust land. However, even if the Court does not find that 25 U.S.C. § 465 expressly preempts the *ad valorem* taxes, it may still find that such taxes were impliedly preempted.

Implied preemption exists when the legislative scheme is "sufficiently comprehensive to make reasonable the inference

that" the Legislature "'left no room' for supplementary" local regulation. In re Yankton Cnty. Comm'n, 2003 S.D. 109, ¶ 16, 670 N.W.2d 34, 39 (citation omitted) (quoting Hillsborough Cnty. v. Automated Med. Labs., Inc., 471 U.S. 707, 713 (1985)).

In the area of tribal leases involving trust land, Congress and the BIA have combined to create a massive regulatory framework. (CR 253-372.) Such regulations govern every conceivable situation that could come up concerning trust lands. Under the circumstances, Congress intended to occupy this field and Day County's local regulations are impliedly preempted.

CONCLUSION

For these reasons, plaintiffs submit that the explicit federal preemption of state and local taxation of permanent improvements on leased Indian trust land is an absolute bar to the *ad valorem* property taxes on the lake cabins and other structures on Indian trust land that Day County seeks to collect. As such, plaintiffs urge the Court reverse the Circuit Court's summary judgment in favor of defendants, and remand with instructions that summary judgment be entered in favor of plaintiffs on their claim for declaratory relief.

Respectfully submitted this 7th day of October, 2019.

RICHARDSON, WYLY, WISE, SAUCK & HIEB, LLP

By /s/ Zachary W. Peterson

By /s/ Jack H. Hieb

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Brief complies with SDCL 15-26A-66(4). This Brief is 26 pages long, exclusive of the Table of Contents, Table of Authorities, Certificate of Compliance and Certificate of Service, is typeset in Courier New (12 pt.) and contains 5,516 words. The word processing software used to prepare this Brief is Word Perfect.

Dated this 7th day of October, 2019.

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CERTIFICATE OF SERVICE

The undersigned, one of the attorneys for the appellant, hereby certifies that on the 7th day of October, 2019, a true and correct copy of **APPELLANTS' BRIEF** was electronically transmitted to:

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Day County State's Attorney

and the original and two copies of **APPELLANTS' BRIEF** were mailed by first-class mail, postage prepaid, to Ms. Shirley Jameson-Fergel, Clerk of the Supreme Court, Supreme Court of South Dakota, State Capitol Building, 500 East

Capitol Avenue, Pierre, SD 57501-5070. An electronic version of the Brief was also electronically transmitted in Word Perfect format to the Clerk of the Supreme Court.

Dated at Aberdeen, South Dakota, this 7th day of October, 2019.

RICHARDSON, WYLY, WISE, SAUCK & HIEB, LLP

By /s/ Zachary W. Peterson
Attorneys for Appellants

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

PICKEREL LAKE OUTLET ASSOCIATION, a South Dakota non-profit corporation; GARY WALD; KELSEY BECKSTROM; GREG BURGESS; NANCY BURGESS; LAUREN JOHNSON; KATHLEEN JOHNSON; GREG JOHNSON; MARY JOHNSON; BRUCE MAY; RHONDA MAY; MARK THOMPSON; JUNE THOMPSON; JUSTIN HANSON; MATT PAULSON; JOSH LARSON; SCOTT KRAM; KIM KRAM; THOMAS MEYER; DALITA MEYER; MICAH LIKNESS; JOHN WOODMAN; RAMONA WOODMAN; ROGER RIX; PAM RIX; CLARK LIKNESS; GERRY LIKNESS; GREG PETERSON; EMERY SIPPEL; MARC SIPPEL; LYNN PETERSON; SCOTT VOGEL; ROBERT BISGARD; AL VANDERLAAN; JASON SNELL; RON BELDEN; BENJAMIN JOHNSON; NICOLE JOHNSON; PAUL TVINNEREIM; KRIS TVINNEREIM; DAWN FRIEDRICHSEN,

Plaintiffs/Appellants,

-vs-

DAY COUNTY, SOUTH DAKOTA, A SOUTH DAKOTA PUBLIC CORPORATION, AND THE STATE OF SOUTH DAKOTA,

Defendants/Appellees.

Appeal No. 29066

APPEAL FROM THE CIRCUIT COURT
FIFTH JUDICIAL CIRCUIT
DAY COUNTY, SOUTH DAKOTA

THE HONORABLE JON S. FLEMMER
CIRCUIT COURT JUDGE

A P P E N D I X

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NOTICE OF APPEAL FILED
JULY 19, 2019

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	)SS	
COUNTY OF DAY	)	FIFTH JUDICIAL CIRCUIT
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Plaintiffs,	)	ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND JUDGMENT
v.	)	
DAY COUNTY, SOUTH DAKOTA, a South Dakota Public Corporation, and the STATE OF SOUTH DAKOTA,	)	
Defendants.	)	

On September 21, 2018, Defendant State of South Dakota ("State") filed a motion for summary judgment. On October 2, 2018, Defendant Day County filed a response in which it joined the State's Motion for Summary Judgment. Briefs were submitted by both the State and the Plaintiffs on the issue of summary judgment.

After reviewing the pleadings, briefs, and record, this Court rules that there are no genuine issues of material fact and Defendants are entitled to judgment as a matter of law. The Court's Memorandum Decision, dated May 17, 2019, is attached hereto and incorporated herein by this reference. Therefore, it is:

ORDERED, ADJUDGED, and DECREED that the Defendants' motion for summary judgment is granted.

It is further ORDERED, ADJUDGED, and DECREED that Judgment shall be issued in favor of Defendants on all claims.

Attest:
Sattler, Jessica
Clerk/Deputy

BY THE COURT:

Signed: 6/10/2019 1:55:42 PM

The Honorable Jon S. Flemmer
Circuit Judge, Fifth Judicial Circuit

Filed on: 06/12/2019 DAY County, South Dakota 18CIV14-000072

STATE OF SOUTH DAKOTA	FILED	IN CIRCUIT COURT
COUNTY OF DAY	MAY 17 2019	FIFTH JUDICIAL CIRCUIT
	CLAUDETTE OPITZ DAY CO. CLERK OF COURTS	
PICKEREL LAKE OUTLET ASSOCIATION, a South Dakota non-profit corporation; et al., Plaintiffs, v. DAY COUNTY, SOUTH DAKOTA, a South Dakota Public Corporation, and THE STATE OF SOUTH DAKOTA, Defendants.		**18CIV14-72** **MEMORANDUM DECISION**

The above entitled matter is currently before this Court on Defendant State of South Dakota's Motion for Summary Judgment dated September 21, 2018. Briefs were submitted by both parties on the issue of summary judgment. The Court has now had an opportunity to carefully review the record contained in the Court's file and the briefs that were filed with the Court and hereby issues this Memorandum Decision.

FACTUAL AND PROCEDURAL BACKGROUNDS

Several individuals and the Pickerel Lake Outlet Association [hereinafter Plaintiffs], all of whom are non-tribal members, own cabins, garages, sheds, and other structures on the western shore of Pickerel Lake in Day County, South Dakota. State's MF ¶¶ 1, 2. These structures are located on a parcel of land held in trust by the United States for the benefit of the Sisseton Wahpeton Oyate Tribe and several individual Indians. State's MF ¶ 6. The parcel is leased by the United States Bureau of Indian Affairs (BIA) to the Pickerel Lake Outlet Association, of which the individual plaintiffs are all members. State's MF ¶¶ 3, 12. While the bylaws of the association indicate that membership in

the association includes a "sub-leased lot of approximately fifty [feet] (50') of lake frontage[,]" there is no evidence of subleases to the individual plaintiffs. State's MF ¶¶ 14, 15.

In accordance with South Dakota Codified Law 10-4-1, 10-4-2, and 10-4-2.1, Day County assessed tax on the structures owned by the individual plaintiffs. State's MF ¶ 17. Pursuant to SDCL 10-4-1, all real property in South Dakota is subject to tax unless it is otherwise exempt. This tax, referred to as an *ad valorem* tax, provides that tax is imposed on, among other things, "buildings and improvements on leased sites." SDCL § 10-4-2 (West 2019).

A Memorandum Decision was issued by this Court to rule on Plaintiff's Motion for Summary Judgment in January of 2018. Memorandum Decision, at 7. In its Decision, the Court determined that "[b]eyond not explicitly preempting the state taxation of non-Indian owned permanent improvements, federal law has not completely occupied the field to be considered 'comprehensive' and 'pervasive.'" Memorandum Decision, at 6 (citing 77 Fed. Reg. 72, 440). The Court determined that the field "is not so 'occupied' as to be considered to preempt state and local taxation," consequently denying Plaintiff's Motion for Summary Judgment. Memorandum Decision at 6.

Defendant State of South Dakota [hereinafter the State] filed a Motion for Summary Judgment in September 2018 requesting that the Court find that the County's tax on the structures owned by non-tribal member individuals and located on Indian trust land is not preempted by federal law. Defendant State of South Dakota's Memorandum in Support of State's Motion for Summary Judgment, at 6. The State argues that no federal law preempts the tax on the structures, thus entitling the State to summary judgment in its favor. *Id.*

STANDARD OF REVIEW

Summary judgment is granted if there is "no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." SDCL 15-6-56(c)(3). The burden is on the

moving party to clearly show such an absence. *U.S. Bank Nat. Ass'n v. Scott*, 2003 SD 149, ¶ 14, 673 N.W.2d 646, 651.

ANALYSIS AND DECISION

Generally, a state may tax non-tribal members' property on Indian lands. *See Lebo v. Griffith*, 173 N.W. 840, 841 (S.D. 1919) (holding that "property owned by persons other than Indians may be taxed by the state in which the reservation is located."). State regulatory authority which extends over tribal reservations "may be pre-empted by federal law." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980). Preemption occurs when: (1) "there is implicit in federal law a barrier to state regulation," (2) "where Congress has legislated comprehensively," or (3) "state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress." *In re Estate of Flaws*, 2016 SD 60, ¶ 24, 885 N.W.2d 336, 344 (quoting L.A. Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 368-69 (1986)). The South Dakota Supreme Court has held that "[t]here is a strong presumption against federal preemption." *In re Estate of Flaws*, 2016 SD 60, ¶ 23, at 343 (citing *FMP Corp. v. Holliday*, 498 U.S. 52, 62 (1990)).

Plaintiffs rely on *Mescalero Apache Tribe v. Jones* in their response to The State's motion for summary judgment to interpret 25 U.S.C. section 465 as saying that permanent improvements on leased land are not subject to local taxation. However, the facts of *Mescalero* are distinguishable from the facts of the case at hand. In *Mescalero*, the Mescalero Apache Tribe operated a ski resort on land located outside the boundaries of the Tribe's reservation. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 146 (1973). The state asserted the right to impose a tax on the gross receipts of the ski resort as well as a use tax on certain personalty purchased out of state and used in connection with the resort. *Id.* The United States Supreme Court held that permanent improvements on the Tribe's tax-exempt land was immune from the state's ad valorem property tax. *Id.* at 158. The difference between *Mescalero* and the case at hand, however, lies in the fact that the plaintiffs in this case are

non-Indian landowners, whereas in *Mescalero*, tribal activities were being conducted outside the reservation. *Mescalero*, 411 U.S. 145 at 148. Plaintiffs here do not dispute the fact that they are not members of a tribe. As was stated in this Court's previous Memorandum Decision issued in January of 2018, it is the land itself that is held in trust, not the structures. Memorandum Decision, at 4.

There are no member-Indians being taxed in this case, and the group of Plaintiffs consist entirely of non-tribal members. Although the State argues that Plaintiffs do not have standing because their interests are not within the "zone of interests" of 25 U.S.C. section 465, this Court is not dismissing for lack of standing. While Plaintiffs here are non-tribal members, they are the owners of the structures being assessed for tax purposes here and therefore have standing.

The State has established that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. Therefore, summary judgment is hereby granted for Defendant State of South Dakota. Counsel for the State is hereby directed to draft an appropriate Order Granting Summary Judgment for Defendants.

DATED this 17th day of May, 2019 at Webster, South Dakota.

BY THE COURT:

Jon S. Flemmer
Circuit Judge

By: Deputy Clerk

STATE OF SOUTH DAKOTA	FILED	IN CIRCUIT COURT
COUNTY OF DAY	MAY 17 2019	FIFTH JUDICIAL CIRCUIT
	CLAUDETTE OPITZ DAY CO. CLERK OF COURTS	
PICKEREL LAKE OUTLET ASSOCIATION, a South Dakota non-profit corporation; et al., Plaintiffs, v. DAY COUNTY, SOUTH DAKOTA, a South Dakota Public Corporation, and THE STATE OF SOUTH DAKOTA, Defendants.		18CIV14-72 **MEMORANDUM DECISION**

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non-Indian landowners, whereas in *Mescalero*, tribal activities were being conducted outside the reservation. *Mescalero*, 411 U.S. 145 at 148. Plaintiffs here do not dispute the fact that they are not members of a tribe. As was stated in this Court's previous Memorandum Decision issued in January of 2018, it is the land itself that is held in trust, not the structures. Memorandum Decision, at 4.

There are no member-Indians being taxed in this case, and the group of Plaintiffs consist entirely of non-tribal members. Although the State argues that Plaintiffs do not have standing because their interests are not within the "zone of interests" of 25 U.S.C. section 465, this Court is not dismissing for lack of standing. While Plaintiffs here are non-tribal members, they are the owners of the structures being assessed for tax purposes here and therefore have standing.

The State has established that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. Therefore, summary judgment is hereby granted for Defendant State of South Dakota. Counsel for the State is hereby directed to draft an appropriate Order Granting Summary Judgment for Defendants.

DATED this 17th day of May, 2019 at Webster, South Dakota.

BY THE COURT:

Jon S. Flemmer
Circuit Judge

By: Deputy Clerk

STATE OF SOUTH DAKOTA) ss. COUNTY OF DAY	)	IN CIRCUIT COURT FIFTH JUDICIAL CIRCUIT
PICKEREL LAKE OUTLET ASSOCIATION, a South Dakota non-profit corporation; et al., Plaintiffs, v. DAY COUNTY, SOUTH DAKOTA, a South Dakota Public Corporation and THE STATE OF SOUTH DAKOTA, Defendants.	)	18 Civ. 14-72 ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

On May 17, 2017, Plaintiffs Pickerel Lake Outlet Association et al. filed a Motion for Summary Judgment, requesting this Court to declare that 1) federal law preempts state and local taxation on all permanent improvements placed on land held in trust by the United States for the benefit of an Indian tribe; and specifically, that 2) federal law preempts Day County's imposition of tax on cabins, garages, sheds, and other structures owned entirely by non-Indian individuals, yet placed on land held in trust by the United States for the benefit of the Sisseton Wahpeton Oyate. A hearing regarding the motion was held on September 6, 2017, at the Day County Courthouse.

After reviewing the pleadings, briefs, and evidence, and after hearing the parties' arguments, this Court rules that Plaintiffs have failed to prove that there is no genuine issue of material fact and that they are entitled to judgment as a matter of law. The Court's Memorandum Decision, dated January 11,

2018, is attached hereto and incorporated herein by this reference. Therefore, it is:

ORDERED, ADJUDGED, and DECREED that the Plaintiffs' Motion for Summary Judgment is denied.

Attest:
Sattler, Jessica
Clerk/Deputy

BY THE COURT:

Signed: 1/29/2018 11:16:33 AM

The Honorable Jon S. Flemmer
Circuit Judge, Fifth Judicial Circuit

STATE OF SOUTH DAKOTA	IN CIRCUIT COURT
COUNTY OF DAY	FIFTH JUDICIAL CIRCUIT
PICKEREL LAKE OUTLET ASSOCIATION, a South Dakota non-profit corporation, et. al., Plaintiffs, v. DAY COUNTY SOUTH DAKOTA, a South Dakota Public Corporation, and the STATE OF SOUTH DAKOTA, Defendants.	**#18CIV14-72** **MEMORANDUM DECISION**

The above entitled matter is currently before this Court on Plaintiffs' Motion For Summary Judgment dated May 17, 2017. Arguments were presented by counsel to this Court at a hearing held on September 6, 2017. At the time of hearing, Ronald J. Parsons, Jr. and Kari Bartling appeared for Plaintiffs and Kirsten E. Jasper, Stacey R. Hegge and Danny R. Smeins appeared for Defendants. Prior to that hearing, the Court received Plaintiffs' Brief In Support Of Summary Judgment dated May 17, 2017 and Defendant State Of South Dakota's Memorandum In Opposition To Plaintiffs' Motion For Summary Judgment dated August 29, 2017. The Court has now had an opportunity to carefully review the record contained in the Court's file, arguments of counsel, and the briefs that were filed with the Court and hereby issues this Memorandum Decision.

FACTUAL AND PROCEDURAL BACKGROUNDS

The General Allotment Act of 1887 "provided that parcels of tribal lands would be patented to individual Indians and held in trust by the United States for a 25-year period, after which the Federal Government would convey title to the individual allottees." *Cass Cnty. v.*

Leech Lake Band of Chippewa Indians, 524 US 103, 106-07 (1998); *see* Plaintiffs' Statement of Undisputed Material Facts In Support of Motion for Summary Judgment at ¶ 1, *Pickerel Lake Outlet Ass. v. Day Cnty., South Dakota*, 18CIV14-000072 [Hereinafter Plaintiffs' Statement of Undisputed Facts]. Members of the Pickerel Lake Outlet Association [hereinafter Plaintiffs], are a non-profit corporation. Collectively, they own cabins, garages, sheds, and other structures on the western shore of Pickerel Lake in Day County, South Dakota. Plaintiffs' Statement of Undisputed Facts at ¶¶ 11, 12, 15, 16. The Plaintiffs "are not members of the Sisseton Wahpeton Oyate Tribe." Plaintiffs' Statement of Undisputed Facts at ¶ 17. These lake cabins and cottages are located on land held in trust by the United States for the Sisseton Wahpeton Oyate, a federally recognized tribe under the Indian Reorganization Act. Plaintiffs' Statement of Undisputed Facts at ¶ 10. Sisseton Wahpeton Oyate assesses *ad valorem* property taxes for this land located on Indian trust land. Plaintiffs' Statement of Undisputed Facts at ¶ 18. Day County assesses *ad valorem* property taxes against South Dakota property. Plaintiffs' Statement of Undisputed Facts at ¶ 19. Plaintiffs brought this suit contending that the Day County tax is preempted by 25 U.S.C. § 465 (transferred to 28 U.S.C. § 5108) and the nonprofit corporation should only be subject to the *ad valorem* tax assessed by the Sisseton Tribe. Plaintiffs' Statement of Undisputed Facts at ¶¶ 20-21.

STANDARD OF REVIEW

Summary judgment is granted if there is "no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." SDCL 15-6-56(c)(3). The burden is on the moving party to clearly show such an absence. *U.S. Bank Nat. Ass'n v. Scott*, 2003 SD 149, ¶ 14, 673 N.W.2d 646, 651.

ANALYSIS AND DECISION

Due to "congressional authority" state regulatory authority over tribal reservations "may be pre-empted by federal law." *White Mountain Apache Tribe v. Bracker*, 448 US 136, 142 (1980). Preemption can occur if it is demonstrated that: (1) "there is implicit in federal law a barrier to state regulation," (2) "where Congress has legislated comprehensively," or; (3) "state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress." *In re Estate of Flaws*, 2016 SD 60, ¶ 24, 885 N.W.2d 336, 344 (quoting *L.A. Pub. Serv. Comm'n v. FCC*, 476 US 355, 368-69 (1986)). In review, the South Dakota Supreme Court has noted "[t]here is a strong presumption against federal preemption." *In re estate of Flaws*, 2016 SD 60, ¶ 23, at 343 (citing *FMC Corp. v. Holliday*, 498 US 52, 62 (1990)). Rather, it is presumed that "Congress does not intend to preempt areas of traditional state regulation." *FMC Corp. v. Holliday*, 498 US 52, 62 (1990). When there is more than one possible reading of the Congressional intent, "courts ordinarily accept the reading that disfavors pre-emption." *Altria Group Inc. v. Good*, 555 US 70, 77 (2008). The Supreme Court of the United States has "repeatedly said that tax emptions are not granted by implication . . . ." *Mescalero Apache Tribe v. Jones*, 411 US 145, 156 (1973). In practice, "[e]ach case 'requires a particularized examination of the relevant state, federal, and tribal interests.'" *Cotton Petroleum Cor. v. New Mexico*, 490 US 163, 176 (1989) (quoting *Ramah Navajo School Bd., Inc. v. Bureau of Revenue of New Mexico*, 458 US 832, 838 (1982))

To fulfill the first possible example of preemption it must be proven that "an act of Congress clearly expresses a constraint on state authority." *Estate of Ducheneaux v. Ducheneaux*, 2015 SD 11. ¶ 11, 861 N.W.2d 519, 523 (quoting *Williams v. Lee*, 358 US 217, 220 (1959)). The text provides:

> Title to any lands 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.

25 U.S.C. § 465 (emphasis added). This text does not expressly preempt the tax on non-Indian structures. It is undisputed that the property involved is owned entirely by the non-tribal member individual plaintiffs. There is no fiduciary duty to maintain structures because "the United States does not hold the structures in trust on behalf of the Tribe or individual Indians, or even the Plaintiffs." Defendant State Of South Dakota's Memorandum In Opposition To Plaintiffs' Motion For Summary Judgment at 10, *Pickerel Lake Outlet Ass. v. Day Cnty., South Dakota* , 18CIV14-72 [hereinafter Defendant Memo]. For example, "unlike the restraint on alienation of Indian trust land, there are no relevant past or present restraints on alienation of the structures. *Id.* As such, "[t]o levy and collect taxes on personal property situated on the reservation belonging to the [non-tribal members], does not deprive the Indians of any of their rights nor infringe upon the jurisdiction of the United States Government." *Lebo v. Griffith*, 173 N.W. 840, 841-42 (SD 1919). Here, "the taxation of the structures . . . does not interfere with tribal interests because it solely involves the property of non-tribal members." Defendant Memo at 13.

While the land itself in this case *is* held in trust, the structures *are not*. Neither the tribe nor its members have any ownership interests in the structures. *See Bracker*, at 142 ("state regulatory authority over *tribal reservations and members* . . . may be pre-empted by federal law") (emphasis added). It is also clear that this tax does not infringe "on the right of reservation Indians to make their own laws and be ruled by them." *Id.* There are no member-Indians being taxed. The Plaintiffs consist entirely of non-tribal members. Defendant Memo at 1. While Plaintiffs purport that "regardless of who owned the improvements [Plaintiffs] are immune from

state and local taxation," Plaintiff's Brief In Support Of Motion For Summary Judgment at 13, *Pickerel Lake Outlet Ass. v. Day Cnty., South Dakota* , 18CIV14-72 [hereinafter Plaintiff Memo], that is not what the caselaw demonstrates. *Compare Utah & N. Ry. Co. v. Fisher*, 116 US 28 (1885) (upholding county tax), *Thomas v. Gay*,169 US 264 (1898) (upholding county tax on non-Indian cattle because the property in question was the cattle and not the land itself), *Taber v. Indian Territory Illuminating Oil Co.*, 300 US 1 (1937) (upholding tax despite Indian ownership interest under a lease that "agree[d] that any buildings or permanent improvements erected on the leasehold by it should become the property of the Indian owners,") Brief of Respondent, *Taber v. Indain Territory Illuminating Oil Co.* No. 280, 1936 WL 40050, at *9, *and Lebo v. Griffith*, 42 SD 198, 173 N.W. 840 (1919) (upholding state tax on non-Indians' personal property on an Indian Reservation because "personal property" included permanent improvements), *with Mescalero Apache Tribe v. Jones*, 411 US 145 (1973) (preempting taxes on a tribal enterprise interest in both the land and the permanent improvements), *Seminole Tribe of Florida v. Stranburg*, 799 F.3d 1324 (11th Cir. 2015) (preempting tax that effected tribe's privilege and status as landlord), *United States v. Rickert*, 188 US 432 (1903) (preempting tax in an attempt to protect the tribal members' ownership of the structures), *and Confederated Tribes of Chehalis Reservation v. Thurston Cnty. Bd. of Equalization*, 724 F.3d 1153 (9th Cir. 2013) (invalidating state and local tax on permanent improvements that had a 51% ownership interest by the tribe).

Plaintiffs also contend that the tax does interfere with tribal interest because the improved structures owned by the non-member plaintiffs are "so intimately connected with use of the land itself" that it becomes inherently intertwined with the trust land involved. *Mescalero Apache Tribe v. Jones*, 411 US 145, 158 (citing *US v. Rickert*, 188 US 432, 441-43). However, the

Court's holding in *Mescalero* was because permanent improvements resulted from money loaned from the Federal Government pursuant to section 10 of the Indian Reorganization Act, therefore preempting any tax assessed because of the Indian Interest involved. *Mescalero* at 146. Such a showing does not take place here. Unlike *Mescalero*, the record does not indicate anything was acquired pursuant to the IRA. *Contra id.* If "[e]ach case "requires a particularized examination of the relevant state, federal, and tribal interests[,]" the reading of this case shows no tribal interest in the structures being taxed while at the same time providing an interest for the state in taxing the improved structures. *Cotton Petroleum Cor. v. New Mexico*, 490 US 163, 176 (1989). The Plaintiffs' fear that the state "could remove the tax immunity by applying the definition of fixtures or reclassifying the improvements as personal property" does not take place. *People of South Naknek v. Bristol Bay Borough*, 466 F.Supp. 870, 875 (D. Alaska 1979). It is simply not the state's designation of the tax that brings about preemption, but rather it is the lack of member-Indian ownership interest in any of the structures.

Plaintiffs' reliance on the Federal Register notice on interpretation of 25 U.S.C. § 465 regarding that "permanent improvements on the leased land [are] without regard to ownership of those improvements" is not persuasive. The aforementioned caselaw directly ruled that non-native ownership interest is critical to preemption of state and local regulation. Moreover, the legislative history, existing as secondary authority, is not as persuasive as caselaw.

Beyond not explicitly preempting the state taxation of non-Indian owned permanent improvements, federal law has not completely occupied the field to be considered "comprehensive" and "pervasive." 77 Fed. Reg. 72,440. In the near-exhaustive list of case distinctions listed above, it is clear that the field is not so "occupied" as to be considered to preempt state and local taxation (depending on the minutiae of the facts presented).

Therefore, Plaintiffs have failed to establish that there are no genuine issues of material fact and that they are entitled to judgment as a matter of law. Plaintiffs' Motion For Summary Judgment is hereby denied.

Both parties have submitted a proposed Order in the event that the Court ruled in their favor. Plaintiffs' proposed Order was submitted to the Court by e-mail from Ron Parsons on December 20, 2017, and Defendants' proposed Order was submitted by e-mail and first class mail from Stacey R. Hegge on December 22, 2017.

Ms. Hegge should modify Defendants' proposed Order to remove the reference to "proposed" and submit the modified order to the Court on Odyssey for filing. If Plaintiffs also wish to submit their proposed Order on Odyssey, they may do so and the Court will mark it "Denied".

DATED this 11th day of January, 2018 at Webster, South Dakota.

BY THE COURT:

Jon S. Flemmer
Circuit Judge

Claudette Opitz, Clerk of Courts

By: _____, Deputy Clerk

STATE OF SOUTH DAKOTA) :ss COUNTY OF DAY)	IN CIRCUIT COURT FIFTH JUDICIAL CIRCUIT
PICKEREL LAKE OUTLET ASSOCIATION, a South Dakota non-profit corporation, et al., Plaintiffs, vs. DAY COUNTY, SOUTH DAKOTA, a South Dakota Public Corporation; and THE STATE OF SOUTH DAKOTA, Defendants.	CIV. 14-72 **PLAINTIFFS' STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

The plaintiffs own lake homes, cabins, and cottages on the western shore of Lake Pickerel on land held in trust by the United States for the Sisseton Wahpeton Oyate Indian Tribe. The plaintiffs have moved for summary judgment on their claim for prospective declaratory relief that *ad valorem* property taxes assessed by Day County on those permanent improvements are explicitly preempted by federal law. The plaintiffs respectfully submit this Statement of Undisputed Material Facts. In addition to the pleadings in the record, it is supported by the Affidavit of Roger Rix with attached exhibits A-H, and Affidavit of Counsel with attached exhibits 1-6.

1. In 1887, Congress passed the General Allotment Act of 1887, 24 Stat. 388, as amended, 25 U.S.C. § 331 *et seq.*, also known as the Dawes Act, which provided that parcels of tribal land would be patented to individual Indians and held in trust by the United States for a 25-year period, after which the government would convey title to the allottees, who then were free to sell it. *See Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 106-07

(1998); *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994, 999 (8th Cir. 2010); *McGuire v. Aberle*, 2013 S.D. 5, ¶ 45, 826 N.W.2d 353, 355.

2. This practice of allotment resulted in the sale of Indian lands to non-Indians and the substantial diminishment of Indian reservations. For example, the Sisseton Wahpeton Oyate Indian Tribe lost all non-trust land and became an "open" reservation without recognized, contiguous borders. *See DeCoteau v. District County Court for Tenth Judicial Circuit*, 420 U.S. 425, 427-28 & 448-49 (1975).

3. In 1934, federal Indian policy shifted when Congress enacted the Indian Reorganization Act (IRA), 48 Stat. 984, 25 U.S.C. § 461 *et seq.*, which ended the practice of making federal allotments to individual Indians. *See Cass County*, 524 U.S. at 108.

4. The IRA "reflected a new policy of the Federal Government and aimed to put a halt to the loss of tribal lands though allotment." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 151 (1973); *see also Yankton Sioux Tribe*, 606 F.3d at 1001; *South Dakota v. U. S. Dep't of Interior*, 423 F.3d 790, 798 (8th Cir. 2005) (Wollman, J.).

5. The IRA allowed the United States to acquire additional lands "within or without existing reservations ... for the purpose of providing land for Indians." *Id.* (quoting 25 U.S.C. § 465); *Carcieri v. Salazar*, 555 U.S. 379, 381 (2009).

6. Lands taken into trust for a tribe may not be alienated and the law declares them to be exempt from State and local taxation. 25 U.S.C. § 465; *see also City of Sherrill, N.Y. v. Oneida Indian Nation of New York*, 544 U.S. at 220; *Cass County*, 524 U.S. at 114-15.

7. Pickerel Lake, in Day County, is a spring-fed lake almost 1,000 acres in size and one of the deepest natural lakes in South Dakota, offering many recreational opportunities such as boating and fishing. (Rix Aff., ¶ 2).

8. Pickerel Lake Recreation Area is a South Dakota State Park with two campgrounds, one on each side of the lake. (Rix Aff., ¶ 2).

9. There are also many private lake cabins and cottages around Pickerel Lake. (Rix Aff., ¶ 2).

10. Some of the land on which the private lake cabins and cottages are located around Pickerel Lake is held in trust by the United States for the Sisseton Wahpeton Oyate, a federally recognized tribe under the Indian Reorganization Act. (Rix Aff., Ex. E; State's Answer, ¶ 2); *South Dakota v. U.S. Dep't of Interior*, 665 F.3d 986, 987 (8th Cir. 2012).

11. The individual plaintiffs are members of the Pickerel Lake Outlet Association, a South Dakota domestic non-profit corporation in good standing. (Rix Aff., ¶¶ 3, 6).

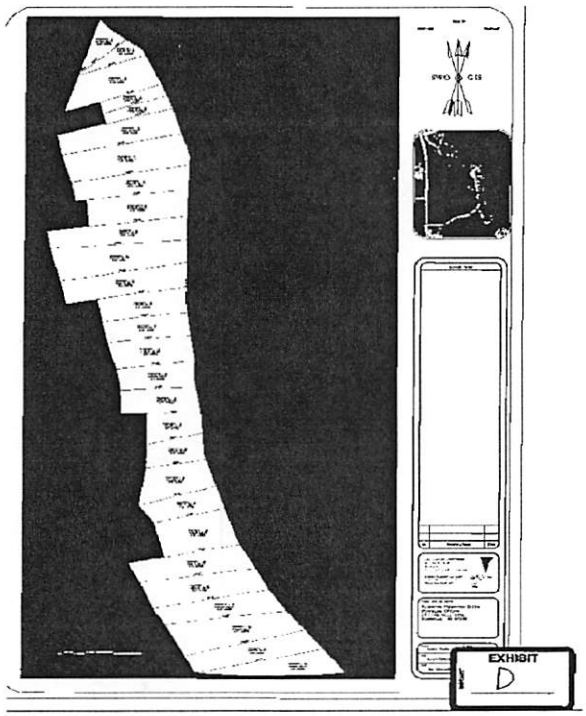
12. On behalf of its members, the Association has leased a 31.28-acre parcel of Indian trust land on the western shore of Lake Pickerel designated as Allotment # 1199 Henry Campbell. (Rix Aff., ¶¶ 3, 11 & Ex. E).

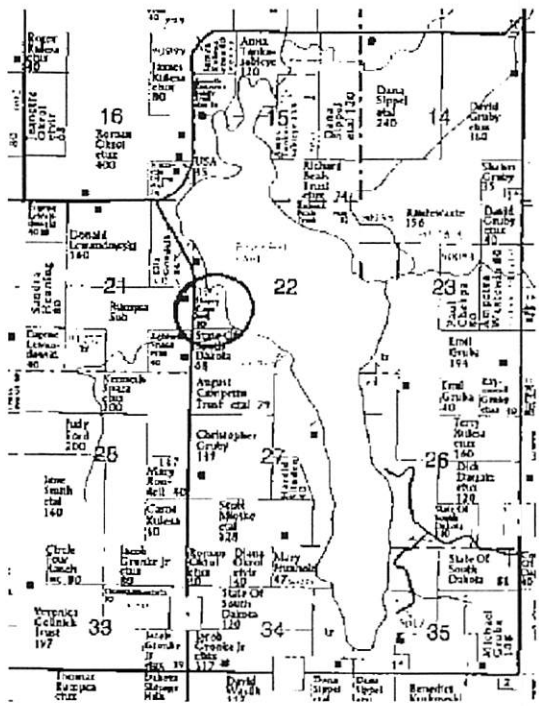
13. The official description of the leased trust land is: "Kosciusko Township – Day County, SD – Fifth Principal Meridian, Allot. # 1199 – LOT 8, Sec. 22, T. 124 N. R. 53 W." (Rix Aff., ¶ 10 & Ex. E).

14. The most recent lease was entered into on November 9, 2015, by the U.S. Department of Interior, Bureau of Indian Affairs, on behalf of the Sisseton Wahpeton Oyate

and individual Indians as allottees under Title 25 of the Code of Federal Regulations, Part 162 (Leases and Permits). (Rix Aff., Ex. E at 1-2; Parsons Aff., Ex. 5).

15. In the map on the left below, the leased property is shown in white, while in the map on the right below, the location of that same parcel of Indian trust land is shown in yellow:





(Rix Aff., ¶¶ 9-10 & Exs. C, D).

16. The individual plaintiffs own lake cabins, cottages, garages, and other buildings, structures, and associated infrastructure attached to this leased property held in trust for the Sisseton Wahpeton Oyate Tribe. (Rix Aff., ¶¶ 7-8, 16 & Ex. H).

17. The individual plaintiffs are not members of the Sisseton Wahpeton Oyate Tribe, but they own lake cabins, cottages, other structures on this Sisseton Wahpeton Trust Land. (Rix Aff., ¶¶ 6-8, 16 & Ex. H).

18. Under its tribal jurisdiction and authority, the Tribe assesses and collects *ad valorem* property taxes from the plaintiffs for their lake cabins and cottages on this Indian trust land. (Rix Aff., ¶¶ 14-15 & Ex. G; Parsons Aff., Ex. 3 at pp. 32-33).

19. Day County also now has assessed and collected *ad valorem* property taxes against the individual plaintiffs for these same lake cabins and cottages on this leased Indian trust land under SDCL 10-4-1, SDCL 10-4-2 and SDCL 10-4-2.1. (Rix Aff., ¶¶ 12-13 & Ex. F; Parsons Aff., Exs. 1, 2).

20. As a result, the individual plaintiffs are being double-taxed on their lake cabins, cottages, and other structures on leased federal Indian trust land because they are being required to pay *ad valorem* property taxes on those permanent improvements by both the Sisseton Wahpeton Oyate Indian Tribe and Day County. (Rix Aff., ¶¶ 12-13, 14-15 & Exs. F, G; Parsons Aff., Exs. 1, 2 & 3 at pp. 32-33).

21. The plaintiffs contend that Day County's attempt to assess these *ad valorem* property taxes for permanent improvements on federal Indian trust land is explicitly preempted by 25 U.S.C § 465 (transferred to 28 U.S.C. § 5108).

22. The defendants disagree with the plaintiffs' position. (Parsons Aff., Ex. 2).

23. To resolve this controversy, the plaintiffs brought this action for prospective declaratory relief.

24. The South Dakota Constitution is one of several state constitutions to include a disclaimer provision required by the federal government as a condition of admission to the Union that expressly honors federal preemption of state taxing jurisdiction over Indian lands. *DeCoteau v. District County Court for Tenth Judicial District*, 211 N.W.2d 843, 845 n.* (S.D. 1973); *Washington v. Confederated Bands and Tribes of Yakima Indian Nation*, 439 U.S. 463, 479-80 & n. 25 (1979) (*Yakima*); *Rickert*, 188 U.S. at 440; *Rosebud Sioux Tribe v. State of South Dakota*, 900 F.2d 1164, 1166 & n. 3 (8th Cir. 1990).

25. It is the position of the Bureau of Indian Affairs as set forth in its regulations that under 25 U.S.C. § 465 (transferred to 28 U.S.C. § 5108), "[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." 25 C.F.R. § 162.017(a) (Parsons Aff., Ex. 5 at p. 33).

26. The Federal Register notice states that the federal statutes and regulations governing leasing on Indian lands "occupy and preempt the field of Indian leasing," and that the federal statutory scheme is "comprehensive" and "pervasive," so it "precludes State taxation." 77 Fed. Reg. 72,440 (Dec. 5, 2012) (codified at 25 C.F.R. pt. 162) (Parsons Aff., Ex. 6 at p. 17).

27. It is the position of the Bureau of Indian Affairs as set forth in the Federal Register, the legislative history of the IRA "demonstrates that Congress intended to maximize income to Indian landowners and encourage all types of economic development on Indian lands" and that "[a]ssessment of State and local taxes would obstruct Federal policies

supporting tribal economic development, self-determination, and strong tribal governments." *Id.* (Parsons Aff., Ex. 6 at p. 18).

28. It is the position of the Bureau of Indian Affairs as set forth in the Federal Register, "[s]ubject only to applicable Federal law, permanent improvements on trust or restricted land are not taxable by States or localities, regardless of who owns the improvements." *Id.* (Parsons Aff., Ex. 6 at p. 19).

29. It is the position of the Bureau of Indian Affairs as set forth in the Federal Register that for purposes of 25 U.S.C. § 465 (transferred to 28 U.S.C. § 5108), "Permanent improvements means buildings, other structures, and associated infrastructure attached to the leased premises." 25 C.F.R. § 162.003 (Parsons Aff., Ex. 5 at p. 9).

WHEREFORE, the Plaintiffs respectfully request that this Honorable Court grant their Motion for Summary Judgment and enter declaratory relief that:

1. Federal law, 25 U.S.C. § 5108 (formerly cited as 25 U.S.C. § 465), preempts state and local taxes on permanent improvements, defined under applicable federal law as "buildings, other structures, and associated infrastructure attached to the leased premises," on land owned by the United States and held in trust for an Indian Tribe without regard to the ownership of the improvements; and

2. The taxes assessed under SDCL 10-4-2.1 by Day County against the plaintiffs for their buildings, other structures, and associated infrastructure attached to the leased land owned by the United States and held in trust for the Sisseton Wahpeton Oyate Tribe are preempted by federal law.

Dated this 17th day of May, 2017.

JOHNSON, JANKLOW, ABDALLAH, REITER & PARSONS, LLP

BY */s/ Ronald A. Parsons, Jr.*
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Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was served electronically via the Odyssey system upon:

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Day County State's Attorney
506 Main Street
Webster, SD 57274

Attorney for Defendant Day County

Kirsten E. Jasper
Assistant Attorney General
1302 E. Highway 14, Suite 1
Pierre, SD 57501

Attorneys for Defendant State of South Dakota

Dated this 17th day of May, 2017.

/s/ Ronald A. Parsons, Jr.
Ronald A. Parsons, Jr.

STATE OF SOUTH DAKOTA : SS COUNTY OF DAY	)	IN CIRCUIT COURT FIFTH JUDICIAL CIRCUIT
PICKEREL LAKE OUTLET ASSOCIATION, a South Dakota non-profit corporation; et al., Plaintiffs, v. DAY COUNTY, SOUTH DAKOTA, a South Dakota Public Corporation and THE STATE OF SOUTH DAKOTA, Defendants.	)	18 Civ. 14-000072 DEFENDANT STATE OF SOUTH DAKOTA'S RESPONSE AND OBJECTIONS TO PLAINTIFFS' STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

The State of South Dakota (State), through its attorneys Stacy R. Hegge and Kirsten E. Jasper, submits this response and objections to the Plaintiffs' Statement of Undisputed Material Facts in Support of Motion for Summary Judgment ("Plaintiffs' SUMF") pursuant to SDCL 15-6-56(c)(2).

GENERAL OBJECTIONS

1. The State objects to the Plaintiffs' SUMF to the extent the statements are legal statements. All law cited by the Plaintiffs is a legal statement and speaks for itself.

2. The State objects to the Plaintiffs' SUMF to the extent the statements are vague or ambiguous.

RESPONSE

Subject to the foregoing objections, the following numbered paragraphs correspond to the same numbered paragraphs from the Plaintiffs' statements:

1. In 1887, Congress passed the General Allotment Act of 1887, 24 Stat. 388, as amended, 25 U.S.C. § 331 *et seq.*, also known as the Dawes Act, which provided that parcels of tribal land would be patented to individual Indians and held in trust by the United States for a 25-year period, after which the government would convey title to the allottees, who then were free to sell it. *See Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 106-07 (1998); *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994, 999 (8th Cir. 2010); *McGuire v. Aberle*, 2013 S.D. 5, ¶ 45, 826 N.W.2d 353, 355.

Response: Undisputed.

2. This practice of allotment resulted in the sale of Indian lands to non-Indians and the substantial diminishment of Indian reservations. For example, the Sisseton Wahpeton Oyate Indian Tribe lost all non-trust land and became an "open" reservation without recognized, contiguous borders. *See DeCoteau v. District County Court for Tenth Judicial Circuit*, 420 U.S. 425, 427-28 & 448-49 (1975).

Response: The State objects because the phrase, "'open' reservation" is ambiguous. Subject to the foregoing objection, the State disputes. The State recognizes that the Lake Traverse Indian Reservation was "created by an 1867 treaty between the United States and the Sisseton and Wahpeton bands of Sioux Indians," but the reservation was terminated and disestablished by the Act of March 3, 1891. *See DeCoteau v. District County Court*

***for Tenth Judicial Circuit*, 420 U.S. 425, 426-28, 95 S. Ct. 1082, 1084-85 (1975).**

3. In 1934, federal Indian policy shifted when Congress enacted the Indian Reorganization Act (IRA), 48 Stat. 984, 25 U.S.C. § 461 *et seq.*, which ended the practice of making federal allotments to individual Indians. *See Cass County*, 524 U.S. at 108.

Response: Undisputed.

4. The IRA "reflected a new policy of the Federal Government and aimed to put a halt to the loss of tribal lands though allotment." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 151 (1973); *see also Yankton Sioux Tribe*, 606 F.3d at 1001; *South Dakota v. U. S. Dep't of Interior*, 423 F.3d 790, 798 (8th Cir. 2005) (Wollman, J.).

Response: Undisputed.

5. The IRA allowed the United States to acquire additional lands "within or without existing reservations ... for the purpose of providing land for Indians." *Id.* (quoting 25 U.S.C. § 465); *Carcieri v. Salazar*, 555 U.S. 379, 381 (2009).

Response: Undisputed.

6. Lands taken into trust for a tribe may not be alienated and the law declares them to be exempt from State and local taxation. 25 U.S.C. § 465; *see also City of Sherrill, N.Y. v. Oneida Indian Nation of New York*, 544 U.S. at 220; *Cass County*, 524 U.S. at 114-15.

Response: The State disputes to the extent that this statement encompasses structures or other property owned by non-tribal members which may be alienated and are located on land held in trust by the United States for the benefit of a tribe or individual Indians.

7. Pickerel Lake, in Day County, is a spring-fed lake almost 1,000 acres in size and one of the deepest natural lakes in South Dakota, offering many recreational opportunities such as boating and fishing. (Rix Aff., ¶ 2).

Response: Undisputed.

8. Pickerel Lake Recreation Area is a South Dakota State Park with two campgrounds, one on each side of the lake. (Rix Aff., ¶ 2).

Response: Undisputed.

9. There are also many private lake cabins and cottages around Pickerel Lake. (Rix Aff., ¶ 2).

Response: Undisputed.

10. Some of the land on which the private lake cabins and cottages are located around Pickerel Lake is held in trust by the United States for the Sisseton Wahpeton Oyate, a federally recognized tribe under the Indian Reorganization Act. (Rix Aff., Ex. E; State's Answer, ¶ 2); *South Dakota v. U.S. Dep't of Interior*, 665 F.3d 986, 987 (8th Cir. 2012).

Response: Undisputed.

11. The individual plaintiffs are members of the Pickerel Lake Outlet Association, a South Dakota domestic non-profit corporation in good standing. (Rix Aff., ¶¶ 3, 6).

Response: Undisputed.

12. On behalf of its members, the Association has leased a 31.28-acre parcel of Indian trust land on the western shore of Lake Pickerel designated as Allotment # 1199 Henry Campbell. (Rix Aff., ¶¶ 3, 11 & Ex. E).

Response: Undisputed.

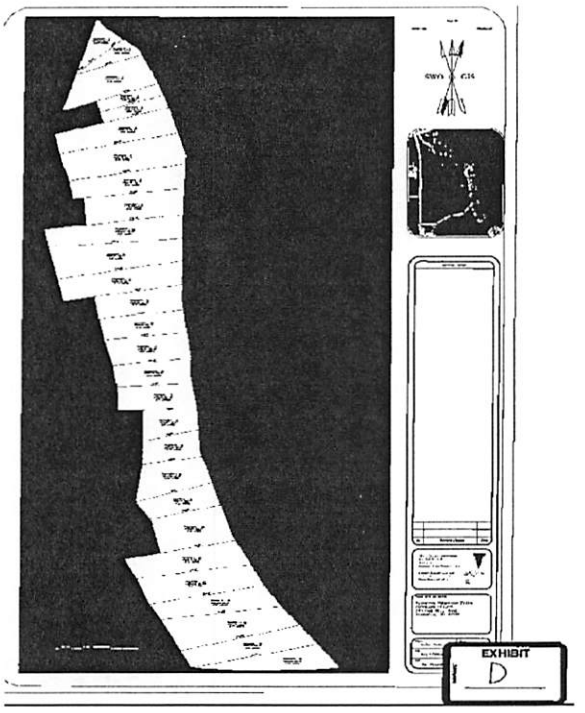
13. The official description of the leased trust land is: "Kosciusko Township – Day County, SD – Fifth Principal Meridian, Allot. # 1199 – LOT 8, Sec. 22, T. 124 N. R. 53 W." (Rix Aff., ¶ 10 & Ex. E).

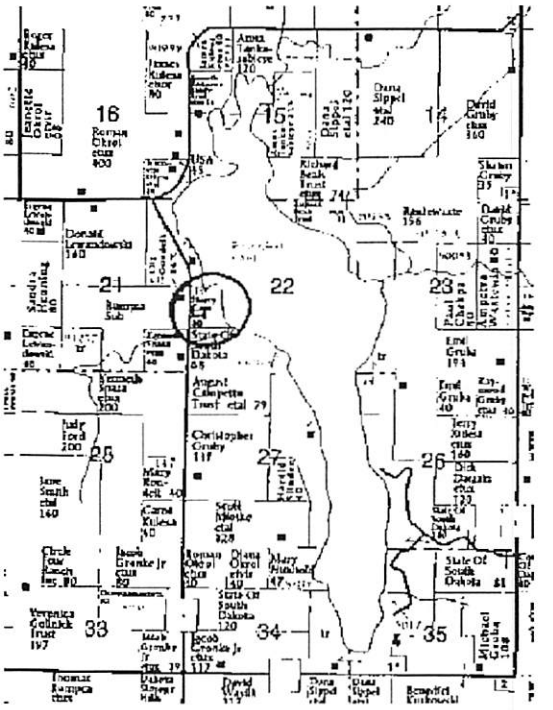
Response: Undisputed.

14. The most recent lease was entered into on November 9, 2015, by the U.S. Department of Interior, Bureau of Indian Affairs, on behalf of the Sisseton Wahpeton Oyate and individual Indians as allottees under Title 25 of the Code of Federal Regulations, Part 162 (Leases and Permits). (Rix Aff., Ex. E at 1-2; Parsons Aff., Ex. 5).

Response: Undisputed.

15. In the map on the left below, the leased property is shown in white, while in the map on the right below, the location of that same parcel of Indian trust land is shown in yellow:





(Rix Aff., ¶¶ 9-10 & Exs. C, D).

Response: The State disputes the statement that the left map is a map of the leased property because the left map identifies that it is a map of Lot 4, Section 22, Township 124 North, Range 53 West. *See* Plaintiffs' Statement of Undisputed Material Fact #13 (describing the leased property as Lot 8, Section 22, Township 124 North, Range 53 West) (emphasis added); *see also* Lease Agreement between the Bureau of Indian Affairs and the Pickerel Lake Outlet Association, attached as Exhibit E to the Affidavit of Roger Rix in Support of Plaintiffs Motion for Summary Judgment.

16. The individual plaintiffs own lake cabins, cottages, garages, and other buildings, structures, and associated infrastructure attached to this leased property held in trust for the Sisseton Wahpeton Oyate Tribe. (Rix Aff., ¶¶ 7-8, 16 & Ex. H).

Response: Undisputed to the extent that the lake cabins, cottages, garages, and other buildings, structures, and associated infrastructure are located on the leased property held in trust for the Sisseton Wahpeton Oyate.

17. The individual plaintiffs are not members of the Sisseton Wahpeton Oyate Tribe, but they own lake cabins, cottages, other structures on this Sisseton Wahpeton Trust Land. (Rix Aff., ¶¶ 6-8, 16 & Ex. H).

Response: Undisputed.

18. Under its tribal jurisdiction and authority, the Tribe assesses and collects *ad valorem* property taxes from the plaintiffs for their lake cabins and cottages on this Indian trust land. (Rix Aff., ¶¶ 14-15 & Ex. G; Parsons Aff., Ex. 3 at pp. 32-33).

Response: Undisputed.

19. Day County also now has assessed and collected *ad valorem* property taxes against the individual plaintiffs for these same lake cabins and cottages on this leased Indian trust land under SDCL 10-4-1, SDCL 10-4-2 and SDCL 10-4-2.1. (Rix Aff., ¶¶ 12-13 & Ex. F; Parsons Aff., Exs. 1, 2).

Response: Undisputed.

20. As a result, the individual plaintiffs are being double-taxed on their lake cabins, cottages, and other structures on leased federal Indian trust land because they are being required to pay *ad valorem* property taxes on those permanent improvements by both the Sisseton Wahpeton Oyate Indian Tribe and Day County. (Rix Aff., ¶¶ 12-13, 14-15 & Exs. F, G; Parsons Aff., Exs. 1, 2 & 3 at pp. 32-33).

Response: Undisputed.

21. The plaintiffs contend that Day County's attempt to assess these *ad valorem* property taxes for permanent improvements on federal Indian trust land is explicitly preempted by 25 U.S.C § 465 (transferred to 28 U.S.C. § 5108).

Response: Undisputed.

22. The defendants disagree with the plaintiffs' position. (Parsons Aff., Ex. 2).

Response: Undisputed.

23. To resolve this controversy, the plaintiffs brought this action for prospective declaratory relief.

Response: Undisputed.

24. The South Dakota Constitution is one of several state constitutions to include a disclaimer provision required by the federal government as a condition of admission to the Union that expressly honors federal preemption of state taxing jurisdiction over Indian lands. *DeCoteau v. District County Court for Tenth Judicial District*, 211 N.W.2d 843, 845 n.* (S.D.

1973); *Washington v. Confederated Bands and Tribes of Yakima Indian Nation*, 439 U.S. 463, 479-80 & n. 25 (1979) (*Yakima*); *Rickert*, 188 U.S. at 440; *Rosebud Sioux Tribe v. State of South Dakota*, 900 F.2d 1164, 1166 & n. 3 (8th Cir. 1990).

Response: The State disputes to the extent that this statement encompasses structures or other property owned by non-tribal members and located on land held in trust by the United States for the benefit of a tribe or individual Indians. The remainder of the statement is undisputed to the extent it is consistent with the law.

25. It is the position of the Bureau of Indian Affairs as set forth in its regulations that under 25 U.S.C. § 465 (transferred to 28 U.S.C. § 5108), "[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." 25 C.F.R. § 162.017(a) (Parsons Aff., Ex. 5 at p. 33).

Response: Undisputed to the extent that the statement is the language in 25 C.F.R. § 162.017(a).

26. The Federal Register notice states that the federal statutes and regulations governing leasing on Indian lands "occupy and preempt the field of Indian leasing," and that the federal statutory scheme is "comprehensive" and "pervasive," so it "precludes State taxation." 77 Fed. Reg. 72,440 (Dec. 5,

2012) (codified at 25 C.F.R. pt. 162) (Parsons Aff., Ex. 6 at p. 17).

Response: Undisputed to the extent that the statement is the language in the Federal Register at 77 Fed. Reg. 72,447 (Dec. 5, 2012).

27. It is the position of the Bureau of Indian Affairs as set forth in the Federal Register, the legislative history of the IRA "demonstrates that Congress intended to maximize income to Indian landowners and encourage all types of economic development on Indian lands" and that "[a]ssessment of State and local taxes would obstruct Federal policies supporting tribal economic development, self-determination, and strong tribal governments." *Id.* (Parsons Aff., Ex. 6 at p. 18).

Response: Undisputed to the extent that the statement is the language in the Federal Register at 77 Fed. Reg. 72,447 (Dec. 5, 2012).

28. It is the position of the Bureau of Indian Affairs as set forth in the Federal Register, "[s]ubject only to applicable Federal law, permanent improvements on trust or restricted land are not taxable by States or localities, regardless of who owns the improvements." *Id.* (Parsons Aff., Ex. 6 at p. 19).

Response: Undisputed to the extent that the statement is the language in the Federal Register at 77 Fed. Reg. 72,448 (Dec. 5, 2012).

29. It is the position of the Bureau of Indian Affairs as set forth in the Federal Register that for purposes of 25 U.S.C. § 465 (transferred to 28 U.S.C. § 5108), "Permanent improvements means buildings, other structures, and associated infrastructure attached to the leased premises." 25 C.F.R. § 162.003 (Parsons Aff., Ex. 5 at p. 9).

Response: Undisputed to the extent that the statement the language in 25 C.F.R. § 162.003. The State disputes that the text of 25 U.S.C. § 465 (transferred to 25 U.S.C. § 5108) contains the term "permanent improvements." *See* 25 U.S.C. § 465.

Dated this 29th day of August, 2017.

STATE OF SOUTH DAKOTA

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STATE OF SOUTH DAKOTA)) SS COUNTY OF DAY)	IN CIRCUIT COURT FIFTH JUDICIAL CIRCUIT
PICKEREL LAKE OUTLET ASSOCIATION, a South Dakota non-profit corporation; et al., Plaintiffs, v. DAY COUNTY, SOUTH DAKOTA, a South Dakota Public Corporation and THE STATE OF SOUTH DAKOTA, Defendants.	18 Civ. 14-000072 DEFENDANT STATE OF SOUTH DAKOTA'S STATEMENT OF UNDISPUTED MATERIAL FACTS

Pursuant to SDCL 15-6-56(c), the State of South Dakota ("State") submits the following statement of undisputed material facts in support of its Motion for Summary Judgment:

1. All individual plaintiffs in this case are non-tribal members. Defendant State of South Dakota's Response and Objections to Plaintiffs' Statement of Undisputed Material Facts in Support of Motion for Summary Judgment ¶ 17 [hereinafter "State's Response to Plaintiffs' MF ¶ ___"]; Plaintiffs' Response to Defendant State of South Dakota's Interrogatories and Requests for Production of Document, Interrogatory # 21 [hereinafter "Plaintiffs' Response to Interrogatory # ___"] (Exhibit 1 to the August 29, 2017 Affidavit of Stacy R. Hegge in Support of Defendant State of South Dakota's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment [hereinafter, "Ex. ___

to First Hegge Affidavit"]); *see also* Plaintiffs' Brief in Support of Motion for Summary Judgment, at 7, 11 [hereinafter "Plaintiffs' Brief in Support, at ___"].

2. The individual plaintiffs own cabins, garages, sheds, and other structures (collectively, "structures") on the western shore of Pickerel Lake in Day County, South Dakota. State's Response to Plaintiffs' MF ¶¶ 7, 12, 16, 17; *see also* Plaintiffs' Brief in Support, at 1.

3. All individual plaintiffs are members of the Pickerel Lake Outlet Association ("Association"). State's Response to Plaintiffs' MF ¶ 11.

4. The structures are owned entirely by the individual plaintiffs. *See* State's Response to Plaintiffs' MF ¶¶ 16-17; Plaintiffs' Response to Interrogatory # 21 (Ex. 1 to First Hegge Affidavit); *see* Plaintiffs' Answers to Defendant State of South Dakota's Requests for Admission (Plaintiffs' Admissions) # 6-9 (Ex. 4 to First Hegge Affidavit).

5. No tribe or tribal members have any ownership interest in the structures. *See* State's Response to Plaintiffs' MF ¶¶ 16-17; Plaintiffs' Responses to Interrogatories # 21, 31 (Ex. 1 to First Hegge Affidavit); *see* Plaintiffs' Admissions # 6-7 (Ex. 4 to First Hegge Affidavit).

6. The structures are located on a parcel of land currently held in trust by the United States for the benefit of the Sisseton Wahpeton Oyate ("Tribe") and several individual Indians. State's Response to Plaintiffs' MF ¶¶ 10, 12, 14, 16; *see also* Plaintiffs' Brief in Support, at 1.

7. The United States does not hold the structures in trust on behalf of the Tribe or individual Indians. Plaintiffs' Admissions # 5, 9 (Ex. 4 to First Hegge Affidavit).

8. The only restraint on alienation of the structures is that the purchaser of each structure is required to become a member of the Association. Plaintiffs' Response to Interrogatory # 24 (Ex. 1 to First Hegge Affidavit).

9. There is no evidence that the federal government owes a fiduciary duty to preserve and maintain the structures. *See* Plaintiffs' Response to Interrogatory # 26 (Ex. 1 to First Hegge Affidavit); Lease Agreement, Exhibit E to Affidavit of Roger Rix in Support of Motion for Summary Judgment ("Ex. E to Rix Affidavit").

10. There is no evidence that the title or rights to the structures were acquired pursuant to the Indian Reorganization Act (IRA). *See* Plaintiffs' Response to Interrogatories # 8, 21, 22, 26, 32 (Ex. 1 to First Hegge Affidavit); *accord* Plaintiffs' Admissions # 1-4 (Ex. 4 to First Hegge Affidavit) (admitting that the Association did not acquire title or rights to the structures through the IRA and that the individual plaintiffs are uncertain whether they acquired title or rights to the structures through the IRA).

11. There is no evidence that funds used to build the structures were provided to an Indian chartered corporation to promote economic development of a tribe and its members. *See generally* State's Response to Plaintiffs' MF; Plaintiffs' Response to Interrogatories # 8, 21, 22, 26, 32 (Ex. 1 to First Hegge Affidavit); *accord* Plaintiffs' Admissions # 1-4 (Ex. 4 to First Hegge Affidavit)

(admitting that the Association did not acquire title or rights to the structures through the IRA and that the individual plaintiffs are uncertain whether they acquired title or rights to the structures through the IRA).

12. The parcel on which the structures are located is leased by the United States Bureau of Indian Affairs (BIA) to the Association. State's Response to Plaintiffs' MF ¶¶ 12, 14, 16.

13. The lease agreement between the BIA and the Association indicate that any subleases of the lease must be approved by the BIA. Ex. E to Rix Affidavit, at 3.

14. The Association's bylaws indicate that membership in the Association includes a "sub-leased lot of approximately fifty [feet] (50') of lake frontage." *See* Bylaws of Pickerel Lake Outlet Association, PLOA 005 (Ex. 2 to First Hegge Affidavit).

15. There is no evidence of lots subleased from the Association to the individual plaintiffs. *See* Plaintiffs' Response to Defendant State of South Dakota's Interrogatories and Requests for Production of Document, Request for Production # 5-6, including provided documents PLOA 053-157 (Ex. 3 to First Hegge Affidavit).

16. The lease agreement between the BIA and Pickerel Lake Outlet Association provides that "[a]ll buildings and improvements . . . shall remain the property of the lessee and sub-lessees and must be removed from the premises no later than thirty (30) days after the termination date of the lease[.]" Ex. E to Rix Affidavit, at 6.

17. Day County, a subdivision of the State, assessed tax on the structures owned by the individual plaintiffs. State's Response to Plaintiffs' MF ¶ 19.

18. The taxes levied and collected on the structures in this case are paid to the following entities: Webster Area School District #18-5, Koskuisko Township, Day County, and Pickerel Lake Sanitary District. Affidavit of Bonnie Fosheim ("Fosheim Affidavit"), ¶ 4; *see* Exhibits A & B to Fosheim Affidavit.

19. The levies by these entities pay for a variety of services such as the following: operation of a school, including capital outlays and special education; fire protection; law enforcement; ambulance services; and 911 services/emergency communications. Fosheim Affidavit, ¶¶ 5-7; *see* Exhibits A & B to Fosheim Affidavit.

20. The Koskuisko Township and Day County levies pay for maintenance and repair of township roads and county highways. Fosheim Affidavit, ¶¶ 6-8; Exhibits A & B Fosheim Affidavit.

21. A Koskuisko Township road and three Day County highways provide access to the leased parcel in this case. Fosheim Affidavit, ¶¶ 6, 8; *see* Exhibit A to Fosheim Affidavit.

22. The Pickerel Lake Sanitary District levy funds the operation of its collection and lagoon services and provides for sewer services. Fosheim Affidavit, ¶ 9.

23. The sewer services mentioned in Paragraph 22 are available to the individual plaintiffs' structures. Fosheim Affidavit, ¶ 9.

24. There is no indication that the tax has interfered with the Tribe's ability to collect its own tax. *See* State's Response to Plaintiffs' MF ¶ 18; Rix Affidavit, ¶¶ 14-15; Second Amended Complaint, ¶ 11.

25. Plaintiffs are aware of no development of the leased parcel by the Tribe. Plaintiffs' Response to Interrogatory # 8 (Ex. 1 to First Hegge Affidavit).

26. Plaintiffs cannot conclusively identify any services provided by the Tribe to the parcel or structures. Plaintiffs' Response to Interrogatories # 41-42 (Ex. 1 to First Hegge Affidavit).

27. The Tribe has not authorized any of the Plaintiffs to bring this action on the Tribe's behalf. Plaintiffs' Response to Interrogatory # 39 (Ex. 1 to First Hegge Affidavit).

Dated this 21st day of September 2018.

STATE OF SOUTH DAKOTA

/s/ Stacy R. Hegge

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STATE OF SOUTH DAKOTA) : SS.		IN CIRCUIT COURT
COUNTY OF DAY)		FIFTH JUDICIAL CIRCUIT
PICKEREL LAKE OUTLET ASSOCIATION, a South Dakota non-profit corporation; et al.,		File 18CIV14-72
Plaintiffs, -vs-		**PLAINTIFFS' RESPONSE TO DEFENDANT STATE OF SOUTH DAKOTA'S STATEMENT OF UNDISPUTED MATERIAL FACTS**
DAY COUNTY, SOUTH DAKOTA, a South Dakota Public Corporation, and THE STATE OF SOUTH DAKOTA,		
Defendants.		

Pursuant to SDCL 15-6-56(c)(2), the plaintiffs respond to Defendant State of South Dakota's Statement of Undisputed Material Facts ("State's SUMF") as follows.

Paragraphs 1, 2, 3, 4, 6, 8, 12, and 17 of the State's SUMF are undisputed.

Paragraphs 5, 7, 9, 10, 11, 13, 14, 15, 16, 25, and 26 of the State's SUMF are undisputed, but are immaterial to the preemption analysis. Day County's attempt to assess the *ad valorem* property taxes for permanent improvements on federal Indian trust land is explicitly preempted by 25 U.S.C. § 465 (transferred to 28 U.S.C. § 5108). It is undisputed that the structures at issue are located on a parcel of leased land currently held in trust by the United States for the benefit of

the Sisseton Wahpeton Oyate Tribe and several individual Indians. (State's SUMF ¶6.) The Bureau of Indian Affairs has issued regulations clarifying and confirming its interpretation of 25 U.S.C. § 465 to mean 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." 25 C.F.R. § 162.017(a) (emphasis supplied) (Parsons Aff., Ex. 5 at p. 33); see also Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973) (§ 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).

Paragraphs 18, 19, 20, 21, 22, and 23 of the State's SUMF are undisputed, but immaterial to the preemption analysis. Regardless of how the taxes are used, Day County's attempt to assess the *ad valorem* property taxes for permanent improvements on federal Indian trust land is explicitly preempted by 25 U.S.C. § 465 (transferred to 28 U.S.C. § 5108).

Paragraph 24 of the State's SUMF is undisputed to the extent that the Sisseton Wahpeton Oyate Tribe has assessed taxes which plaintiffs have paid.

Paragraph 27 of the State's SUMF is undisputed, but immaterial. No outside authorization from anyone is needed for

the plaintiffs to bring a state declaratory judgment action concerning the applicability of state or county *ad valorem* or property taxes to the permanent improvements owned by the plaintiffs.

Plaintiffs incorporate by this reference the 29 paragraphs set forth in Plaintiffs' Statement of Undisputed Material Facts in Support of Motion for Summary Judgment, filed on May 17, 2017.

Dated this 6th day of December, 2018.

RICHARDSON, WYLY, WISE, SAUCK & HIEB, LLP

By /s/ Zachary W. Peterson
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10-4-1. Property generally subject to taxation. All real property in this state and the property of corporations existing or hereafter created, and the property of all banks or banking companies existing or hereafter created, except such as is hereinafter expressly excepted, is subject to taxation; and such property, or the value thereof, shall be entered in the list of taxable property for that purpose, in the manner prescribed in chapter 10-6.

Source: SL 1897, ch 28, § 2; RPolC 1903, § 2053; RC 1919, § 6667; SDC 1939, § 57.0310; SL 1992, ch 80, § 11.

10-4-2. Definition of real property for ad valorem taxation purposes. Real property, for the purposes of ad valorem taxation, includes:

(1) Land and all rights and privileges thereto belonging;

(2) Improvements to land and all rights and privileges thereto belonging, consisting of items permanently affixed to and becoming part of the real estate. The term, permanently affixed, refers to the economic life of the improvement rather than perpetuity;

(3) Mines, minerals, and quarries;

(4) Buildings and structures which are on foundations, and improvements to buildings and structures including any heating system, air conditioning, ventilation, sanitation, lighting, or plumbing which is part of the building or structure; and

(5) Mobile homes as defined in subdivision 32-3-1(8) which are on foundations.

For assessment purposes, a structure is anything constructed or erected from an assembly of materials, which requires a permanent location on or in the ground.

For assessment purposes, a building is a structure designed to stand permanently and cover a space of land which is enclosed by walls and is covered with a roof.

Source: SDC 1939, § 57.0312; SL 1974, ch 88, § 3; SL 1987, ch 29, § 3; SL 1992, ch 74, § 1; SL 1997, ch 51, § 1.

10-4-2.1. Improvements on leased sites taxed as real property--Collection of delinquent taxes. Buildings and improvements on leased sites are classified for tax purposes and are taxed as real property. Delinquent taxes on these buildings and improvements shall be collected as provided for the collection of taxes on manufactured homes pursuant to chapter 10-22.

Source: SL 1978, ch 72, § 4; SL 1982, ch 87; SL 1992, ch 80, § 12.

ARTICLE XXII

COMPACT WITH THE UNITED STATES

The following article shall be irrevocable without the consent of the United States and the people of the state of South Dakota expressed by their legislative assembly:

First. That perfect toleration of religious sentiment shall be secured, and that no inhabitant of this state shall ever be molested in person or property on account of his or her mode of religious worship.

Second. That we, the people inhabiting the state of South Dakota, do agree and declare that we forever disclaim all right and title to the unappropriated public lands lying within the boundary of South Dakota, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States; and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States; that the lands belonging to citizens of the United States residing without the said state shall never be taxed at a higher rate than the lands belonging to residents of this state; that no taxes shall be imposed by the state of South Dakota on lands or property therein belonging to or which may hereafter be purchased by the United States, or reserved for its use. But nothing herein shall preclude the state of South Dakota from taxing as other lands are taxed any lands owned or held by any Indian who has severed his tribal relation and has obtained from the United States, or from any person a title thereto by patent or other grant save and except such lands as have been or may be granted to any Indian or Indians under any act of Congress containing a provision exempting the lands thus granted from taxation. All such lands which may have been exempted by any grant or law of the United States, shall remain exempt to the extent, and as prescribed by such act of Congress.

Third. That the state of South Dakota shall assume and pay that portion of the debts and liabilities of the territory of Dakota as provided in this Constitution.

Fourth. That provision shall be made for the establishment and maintenance of systems of public schools, which shall be open to all the children of this state, and free from sectarian control.

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heirs or lineal descendants of such member or any other Indian person for whom the Secretary of the Interior determines that the United States may hold land in trust" for "or any heirs of such members", was executed by making the substitution for "or any heirs of such member" to reflect the probable intent of Congress.

EFFECTIVE DATE OF 2006 AMENDMENT

Amendment by Pub. L. 109–221 effective as if included in the enactment of Pub. L. 108–374, see section 501(c) of Pub. L. 109–221, set out as a note under section 348 of this title.

EFFECTIVE DATE OF 2005 AMENDMENT

Pub. L. 109–157, §9, Dec. 30, 2005, 119 Stat. 2953, provided that: "The amendments made by this Act [amending this section, sections 2204 to 2206, 2212, 2214, and 2216 of this title and provisions set out as a note under section 2201 of this title] shall be effective as if included in the American Indian Probate Reform Act of 2004 (25 U.S.C. 2201 note; Public Law 108–374)."

EFFECTIVE DATE OF 2004 AMENDMENT

Amendment by Pub. L. 108–374 applicable on and after the date that is 1 year after June 20, 2005, see section 8(b) of Pub. L. 108–374, set out as a Notice; Effective Date of 2004 Amendment note under section 2201 of this title.

§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.)[1] 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.

(June 18, 1934, ch. 576, §5, 48 Stat. 985; Pub. L. 100–581, title II, §214, Nov. 1, 1988, 102 Stat. 2941.)

REFERENCES IN TEXT

This Act, referred to in text, is act June 18, 1934, ch. 576, 48 Stat. 984, popularly known as the Indian Reorganization Act, which is classified generally to this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 5101 of this title and Tables.

Act of July 28, 1955, referred to in text, is act July 28, 1955, ch. 423, 69 Stat. 392, which was classified to sections 608 to 608c of this title prior to omission from the Code as being of special and not general application.

CODIFICATION

Section was formerly classified to section 465 of this title prior to editorial reclassification and renumbering as this section.

AMENDMENTS

1988—Pub. L. 100–581 inserted "or the Act of July 28, 1955 (69 Stat. 392), as amended (25 U.S.C. 608 et seq.)" after "this Act".

§5109. Indian forestry units; rules and regulations

The Secretary of the Interior is directed to make rules and regulations for the operation and management of Indian forestry units on the principle of sustained-yield management, to restrict the number of livestock grazed on Indian range units to the estimated carrying capacity of such ranges, and to promulgate such other rules and regulations as may be necessary to protect the range from deterioration, to prevent soil erosion, to assure full utilization of the range, and like purposes.

(June 18, 1934, ch. 576, §6, 48 Stat. 986.)

CODIFICATION

Section was formerly classified to section 466 of this title prior to editorial reclassification and renumbering as this section.

§5110. New Indian reservations

The Secretary of the Interior is hereby authorized to proclaim new Indian reservations on lands acquired pursuant to any authority conferred by this Act, or to add such lands to existing reservations: *Provided*, That lands added to existing reservations shall be designated for the exclusive use of Indians entitled by enrollment or by tribal membership to residence at such reservations.

(June 18, 1934, ch. 576, §7, 48 Stat. 986.)

REFERENCES IN TEXT

This Act, referred to in text, is act June 18, 1934, ch. 576, 48 Stat. 984, popularly known as the Indian Reorganization Act, which is classified generally to this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 5101 of this title and Tables.

CODIFICATION

Section was formerly classified to section 467 of this title prior to editorial reclassification and renumbering as this section.

§5111. Allotments or holdings outside of reservations

Nothing contained in this Act shall be construed to relate to Indian holdings of allotments or homesteads upon the public domain outside of the geographic boundaries of any Indian reservation now existing or established hereafter.

(June 18, 1934, ch. 576, §8, 48 Stat. 986.)

[1] See References in Text note below.

25 CFR 162.017

This document is current through the September 16, 2019 issue of the Federal Register. Title 3 is current through August 2, 2019.

Code of Federal Regulations > TITLE 25 -- INDIANS > CHAPTER I -- BUREAU OF INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR > SUBCHAPTER H -- LAND AND WATER > PART 162 -- LEASES AND PERMITS > SUBPART A -- GENERAL PROVISIONS > LEASE ADMINISTRATION

§ 162.017 What taxes apply to leases approved under this part?

(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.

Statutory Authority

AUTHORITY NOTE APPLICABLE TO ENTIRE PART:

5 U.S.C. 301, R.S. 463 and 465; 25 U.S.C. 2 and 9. Interpret or apply sec. 3, 26 Stat. 795, sec. 1, 28 Stat. 305, secs. 1, 2, 31 Stat. 229, 246, secs. 7, 12, 34 Stat. 545, 34 Stat. 1015, 1034, 35 Stat. 70, 95, 97, sec. 4, 36 Stat. 856, sec. 1, 39 Stat. 128, 41 Stat. 415, as amended, 751, 1232, sec. 17, 43 Stat. 636, 641, 44 Stat. 658, as amended, 894, 1365, as amended, 47 Stat. 1417, sec. 17, 48 Stat. 984, 988, 49 Stat. 115, 1135, sec. 55, 49 Stat. 781, sec. 3, 49 Stat. 1967, 54 Stat. 745, 1057, 60 Stat. 308, secs. 1, 2, 60 Stat. 962, sec. 5, 64 Stat. 46, secs. 1, 2, 4, 5, 6, 64 Stat. 470, 69 Stat. 539, 540, 72 Stat. 968, 107 Stat. 2011, 108 Stat. 4572, March 20, 1996, 110 Stat. 4016; 25 U.S.C. 380, 393, 393a, 394, 395, 397, 402, 402a, 403, 403a, 403b, 403c, 409a, 413, 415, 415a, 415b, 415c, 415d, 416, 477, 635, 2201 et seq., 3701, 3702, 3703, 3712, 3713, 3714, 3715, 3731, 3733, 4211; 44 U.S.C. 3101 et seq.

History

[77 FR 72440, 72467, Dec. 5, 2012]

Annotations

Notes

[EFFECTIVE DATE NOTE:

77 FR 72440, 72467, Dec. 5, 2012, revised Subpart A, effective Jan. 4, 2013.]

Case Notes

LexisNexis® Notes

Governments : Native Americans : Property Rights
Governments : Native Americans : Taxation

Governments : Native Americans : Property Rights

Desert Water Agency v. United States Doi, 849 F.3d 1250, 2017 U.S. App. LEXIS 4007 (9th Cir Mar. 7, 2017).

Overview: *25 C.F.R. § 162.017 did not itself operate to preempt the California agency's charges, and did not command the agency to modify its behavior by doing or refraining from doing anything. The agency lacked standing because it did not suffer a cognizable injury at the hands of the United States Department of the Interior.*

- Among the new regulations is 25 C.F.R. § 162.017, entitled "What taxes apply to leases approved under this part?" The relevant subsection states that, 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, 25 C.F.R. § 162.017(c). Subsection (a) applies the same language to permanent improvements on the leased land, while subsection (b) does likewise for "activities under a lease conducted on the leased premises, 25 C.F.R. § 162.017(a)??"(b). Go To Headnote

Governments : Native Americans : Taxation

Desert Water Agency v. United States Doi, 849 F.3d 1250, 2017 U.S. App. LEXIS 4007 (9th Cir Mar. 7, 2017).

Overview: *25 C.F.R. § 162.017 did not itself operate to preempt the California agency's charges, and did not command the agency to modify its behavior by doing or refraining from doing anything. The agency lacked standing because it did not suffer a cognizable injury at the hands of the United States Department of the Interior.*

- Among the new regulations is 25 C.F.R. § 162.017, entitled "What taxes apply to leases approved under this part?" The relevant subsection states that, 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, 25 C.F.R. § 162.017(c). Subsection (a) applies the same language to permanent improvements on the leased land, while subsection (b) does likewise for "activities under a lease conducted on the leased premises, 25 C.F.R. § 162.017(a)??"(b). Go To Headnote

- 25 C.F.R. § 162.017begins with a caveat: 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. The preamble to § 162.017's Notice of Proposed Rulemaking says that the regulation simply clarifies the agency's view that improvements on trust or restricted land are not taxable by States or localities. Clarifying the agency's understanding of how existing law applies in general is very different from attempting to change existing law. Go To Headnote

Research References & Practice Aids

NOTES APPLICABLE TO ENTIRE TITLE:

CROSS REFERENCES: Regulations pertaining to migratory birds, applicable to Indians living on reservations: See Wildlife and Fisheries, 50 CFR chapter I.

Bureau of Land Management regulations pertaining to Indians: See Bureau of Land Management, 43 CFR part 2530.

Public Health regulations pertaining to contracts and health: See Public Health, 42 CFR chapter I.

Other regulations issued by the Department of the Interior appear in title 30, chapters II, III, IV, VI, VII; title 36, chapter I; title 41, chapter 114; title 48, chapter 14; title 43; and title 50, chapters I and IV, Code of Federal Regulations.

NOTES APPLICABLE TO ENTIRE CHAPTER:

[PUBLISHER'S NOTE: For Federal Register citations concerning Chapter I Availability of Final Report, see: 82 FR 50532, Nov. 1, 2017.]

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

Nos. 29066, 29074

PICKEREL LAKE OUTLET ASSOCIATION, a South Dakota non-profit corporation, et al.,

Plaintiffs-Appellants,

v.

DAY COUNTY, SOUTH DAKOTA, a South Dakota Public Corporation, and THE STATE OF SOUTH DAKOTA,

Defendants-Appellees.

APPEAL FROM THE CIRCUIT COURT
FIFTH JUDICIAL CIRCUIT
DAY COUNTY, SOUTH DAKOTA

THE HONORABLE JON S. FLEMMER
Circuit Court Judge

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ASSOCIATION ET AL

Notice of Appeal filed July 19, 2019
Appellee State of South Dakota's Notice of Review filed July 29, 2019
Appellee Day County's Notice of Review filed August 5, 2019

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DAY COUNTY, SOUTH DAKOTA, a South Dakota Public Corporation, and THE STATE OF SOUTH DAKOTA,

Defendants-Appellees.

PRELIMINARY STATEMENT

For the convenience of the Court, Defendant-Appellee State of South Dakota is referred to as "the State"; Defendant-Appellee Day County is referred to as "the County"; Plaintiff-Appellant Pickerel Lake Outlet Association is referred to as "Association"; the individuals named as plaintiffs in the Second Amended Complaint for Declaratory Relief are referred to as "individual plaintiffs"; the Association and individual plaintiffs are collectively referred to as "Plaintiffs"; the Sisseton Wahpeton Oyate is referred to as "Tribe"; and the United States Bureau of Indian Affairs is referred to as "BIA".

Plaintiffs' Brief for this appeal is cited as "Plaintiffs' Brief." The record of the Fifth Circuit Clerk of Court is cited as "R." The Appendix submitted by Plaintiffs is cited as "Plaintiffs' App." All references will be followed by appropriate page and paragraph designations.

JURISDICTIONAL STATEMENT

On June 12, 2019, the circuit court filed an Order Granting Defendants' Motion for Summary Judgment and Judgment. R. 660 (Plaintiffs' App. 1). Notice of Entry for this Order was filed on June 24, 2019. R. 661-67. Plaintiffs filed a Notice of Appeal on July 19, 2019. R. 668-69. The State filed a Notice of Review on July 29, 2019, and the County filed a Notice of Review on August 5, 2019. *See* State's and County's Notices of Review.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

I. WHETHER A COUNTY TAX ON STRUCTURES ENTIRELY OWNED BY NON-TRIBAL MEMBER INDIVIDUALS AND LOCATED ON INDIAN TRUST LAND IS PREEMPTED BY FEDERAL LAW.

The circuit court ruled that federal law exempting certain Indian trust lands from state and local taxation does not preempt the County tax on structures owned by non-tribal member individuals and located on Indian trust land.

Relevant Statute:

25 U.S.C. § 5108 (formerly 25 U.S.C. § 465)

Relevant Cases:

Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973)

Okla. Tax Comm'n v. Texas Co., 336 U.S. 342 (1949)

Black Hills Institute of Geological Research v. S.D. Sch. of Mines & Tech., 12 F.3d 737 (8th Cir. 1993)

N. Border Pipeline Co. v. State, 772 P.2d 829 (Mont. 1989)

II. WHETHER PLAINTIFFS LACK STANDING BECAUSE THEY FAILED TO PROVE THAT THEIR INTERESTS ARE WITHIN THE "ZONE OF INTERESTS" OF THE FEDERAL LAW THAT FORMS THE BASIS OF THEIR COMPLAINT.

The circuit court ruled that Plaintiffs have standing to bring this suit because they own the structures that are taxed by the County.

Relevant Cases:

Rosebud Sioux Tribe v. McDivitt, 286 F.3d 1031 (8th Cir. 2002)

Chase v. McMasters, 573 F.2d 1011 (8th Cir. 1978)

STATEMENT OF THE CASE

Plaintiffs, consisting of several non-tribal member individuals and the Association, seek a declaration that a County tax on structures owned by the individual plaintiffs and located on trust land is preempted by 25 U.S.C. § 465[1], which exempts certain Indian trust lands from state and local taxation, and the regulations purportedly implementing that statute. *See* R. 3-5, 25-27, 45-52. Plaintiffs moved for summary judgment, which, after oral argument, was denied by the Honorable Jon S. Flemmer, Circuit Court Judge for the Fifth Judicial Circuit. R. 65; 578-79 (Plaintiffs' App. 10-11). The State and County subsequently moved for summary judgment, arguing that 25 U.S.C. § 465 does not preempt the tax, and alternatively, that Plaintiffs have

[1] 25 U.S.C. § 465 has been transferred to 25 U.S.C. § 5108. Because a substantial amount of the case law refers to 25 U.S.C. § 465, the State refers to the statute as § 465 rather than § 5108 for ease of reference.

no standing to invoke that federal statute. R. 591-617. Although the court rejected the State and County's standing argument, the court concluded that 25 U.S.C. § 465 does not preempt the County tax and therefore upheld the tax. R. 657-58 (Plaintiffs' App. 4-5). Plaintiffs are appealing the court's grant of the State's and County's motion for summary judgment. R. 668-69. The State and County seek review of the court's ruling regarding standing. *See* State's and County's Notices of Review.

STATEMENT OF FACTS

The individual plaintiffs, all of whom are non-tribal members,[2] own cabins, garages, sheds, and other structures (collectively "structures") on the western shore of Pickerel Lake in Day County, South Dakota. R. 618-19 (Plaintiffs' App. 38-39: ¶¶ 1, 2); *see also* R. 92 (Plaintiffs' App. 23: ¶ 17). The structures are not located on an Indian reservation, as the Lake Traverse Indian Reservation was disestablished in 1891. *See DeCoteau v. Dist. Cty. Ct. for Tenth Jud. Dist.*, 420 U.S. 425, 427-28 (1975); *State v. Owen*, 2007 S.D. 21, ¶ 39, 729 N.W.2d 356, 368; *cf.* Plaintiffs' Brief at 8 (claiming that the Tribe has an "open" reservation). However, the structures are located on a parcel of land currently held in trust by the United States for the benefit of the Tribe and several individual Indians. R. 619 (Plaintiffs' App. 39: ¶ 6). The

[2] It is undisputed that the individual plaintiffs are non-tribal members and Plaintiffs have also not alleged that any of the individual plaintiffs are Indian. *See* R. 45-52, 88-95 (Plaintiffs' App. 19-26).

parcel is leased by the BIA to the Association, of which the individual plaintiffs are all members. R. 619, 621 (Plaintiffs' App. 39, 41: ¶¶ 3, 12). While the Association's bylaws indicate that membership in the Association includes a "sub-leased lot of approximately fifty [feet] (50') of lake frontage[,]" there is no evidence of subleases to the individual plaintiffs. R. 621 (Plaintiffs' App. 41: ¶¶ 14, 15).

Although the parcel is held in trust, the structures at issue in this case are owned entirely by the individual plaintiffs; there is no allegation that a tribe or tribal members have any ownership or reversionary interest in the structures. R. 45-52, 619-20 (Plaintiffs' App. 39-40: ¶¶ 4-8). Indeed, the lease agreement between the BIA and the Association provides that "[a]ll buildings and improvements . . . shall remain the property of the lessee [the Association] and sub-lessees and must be removed from the premises no later than thirty (30) days after the termination date of the lease[.]" R. 621 (Plaintiffs' App. 41: ¶ 16).

In accordance with SDCL 10-4-1, 10-4-2, and 10-4-2.1, the County, a subdivision of the State, assessed tax on the structures owned by the individual plaintiffs.[3] R. 622 (Plaintiffs' App. 42: ¶ 17). Pursuant to SDCL 10-4-1, all real property in South Dakota is subject to tax unless it is otherwise exempt. Plaintiffs' App. 47. Referred to as

[3] Plaintiffs do not allege that the County has assessed tax on the parcel on which the structures are located. *See* Plaintiffs' Brief at 5-6; R. 45-52.

an *ad valorem* tax, SDCL 10-4-2 provides that tax is imposed on the following:

> (1) Land and all rights and privileges thereto belonging;
>
> (2) Improvements to land and all rights and privileges thereto belonging, consisting of items permanently affixed to and becoming part of the real estate. . . .;
>
> (3) Mines, minerals, and quarries;
>
> (4) Buildings and structures which are on foundations, and improvements to buildings and structures . . .; and
>
> (5) Mobile homes as defined in subdivision 32-3-1(8) which are on foundations.
>
> For assessment purposes, a structure is anything constructed or erected from an assembly of materials, which requires a permanent location on or in the ground.
>
> For assessment purposes, a building is a structure designed to stand permanently and cover a space of land which is enclosed by walls and is covered with a roof.

Plaintiffs' App. 48. SDCL 10-4-2.1 specifies that the type of structures at issue here, "[b]uildings and improvements on leased sites[,]" are subject to tax. Plaintiffs' App. 49.

The taxes levied and collected on the structures in this case are paid to the following entities: Webster Area School District #18-5, Koskuisko Township, the County, and Pickerel Lake Sanitary District. R. 622 (Plaintiffs' App. 42: ¶ 18). The levies by these entities pay for a variety of services such as the following: operation of a school, including capital outlays and special education; fire protection; law enforcement; ambulance services; and 911 services/emergency

communications. R. 622 (Plaintiffs' App. 42: ¶ 19). The Koskuisko Township and the County levies pay for maintenance and repair of township roads and county highways, some of which provide access to the leased parcel in this case. R. 622 (Plaintiffs' App. 42: ¶¶ 20, 21). Also, the Pickerel Lake Sanitary District levy funds the operation of its collection and lagoon services and provides for sewer services, which are available to the individual plaintiffs' structures. R. 622 (Plaintiffs' App. 42: ¶¶ 22, 23).

While the Tribe also imposes a tax on the structures, there is no indication that the County tax on the structures has interfered with the Tribe's ability to collect its tax. R. 623 (Plaintiffs' App. 43: ¶ 24). Plaintiffs are aware of no development of the leased parcel by the Tribe. R. 623 (Plaintiffs' App. 43: ¶ 25). Moreover, Plaintiffs cannot conclusively identify any services provided by the Tribe to the parcels or structures. R. 623 (Plaintiffs' App. 43: ¶ 26).

Plaintiffs brought this suit, challenging the County tax on the individual plaintiffs' structures. *See* R. 3-5, 25-27, 45-52. Through a motion for summary judgment, Plaintiffs argued that the County tax is preempted by 25 U.S.C. § 465, which exempts certain trust lands from state and local taxation, or alternatively, that the County tax is preempted by the BIA regulatory scheme purporting to implement 25 U.S.C. § 465. R. 76-86. The court denied Plaintiffs' motion, holding that 25 U.S.C. § 465 does not preempt the County tax. R. 574

(Plaintiffs' App. 15). The court highlighted that the structures are not held in trust on behalf of a tribe or tribal member; rather, the structures are entirely owned by non-tribal members. R. 574-76 (Plaintiffs' App. 15-17). Considering these facts, the court concluded that caselaw supports the County's authority to tax the structures. R. 574-76 (Plaintiffs' App. 15-17). The court also concluded that the BIA regulatory scheme did not preempt the County tax. R. 576 (Plaintiffs' App. 17).

After the court denied Plaintiffs' motion, the State and County moved for summary judgment, challenging Plaintiffs' standing in that Plaintiffs do not fall within the "zone of interests" encompassed by the statute they invoked, 25 U.S.C. § 465, and also arguing against federal preemption of the County tax on the structures. R. 578-79 (Plaintiffs' App. 10-11), 590-617, 641. Without addressing the "zone of interests" argument, the circuit court concluded that Plaintiffs had standing because Plaintiffs owned the structures subject to the County tax. R. 658 (Plaintiffs' App. 5). Although rejecting the State and County's standing argument, the court, in line with its earlier reasoning, upheld the County tax against Plaintiffs' claim of federal preemption. R. 657-58 (Plaintiffs' App. 4-5). Plaintiffs now appeal the court's grant of the State's and County's motion for summary judgment and the State and County request review of the standing issue.

ARGUMENTS

I. THE CIRCUIT COURT CORRECTLY DETERMINED THAT THE COUNTY TAX ON STRUCTURES OWNED BY NON-TRIBAL MEMBERS IS NOT PREEMPTED BY FEDERAL LAW.

The issue raised by Plaintiffs on appeal is whether the County tax on structures entirely owned by non-tribal member individuals and located on Indian trust land is preempted by federal law. The circuit court's grant of summary judgment in favor of the State and the County is reviewed de novo. *See* R. 660 (Plaintiffs' App. 1); *Larimer v. Am. Family Mut. Ins. Co.*, 2019 S.D. 21, ¶ 6, 926 N.W.2d 472, 475. Under that standard of review, "this Court only decides whether genuine issues of material fact exist and whether the law was correctly applied." *Id.* (quoting *Ass Kickin Ranch, LLC v. N. Star Mut. Ins. Co.*, 2012 S.D. 73, ¶ 6, 822 N.W.2d 724, 726).

Plaintiffs do not contend that there is a genuine dispute of material fact. *See* Plaintiffs' Brief; *see also* R. 649-51 (Plaintiffs' App. 44-46). The only question on appeal is whether the circuit court correctly applied the law. This Court may "affirm the circuit court for any basis which supports the [circuit] court's ultimate determination." *Larimer*, 2019 S.D. 21, ¶ 6, 926 N.W.2d at 475. In this case, the circuit court correctly concluded that federal law does not preempt the County tax on the individual plaintiffs' structures, and therefore, the court's decision must be affirmed.

A. Absent federal preemption, the structures owned by the non-tribal member plaintiffs are subject to state and local taxation.

As a general rule, a state and its subdivisions[4] may tax non-tribal members' property on Indian lands. *See, e.g., Okla. Tax Comm'n v. Texas Co.*, 336 U.S. 342 (1949); *Thomas v. Gay*, 169 U.S. 264 (1898); *Utah & N. Ry. Co. v. Fisher*, 116 U.S. 28 (1885); *cf.* R. 78-79 (Plaintiffs recognizing the state's general regulatory authority over non-tribal members in Indian country unless that authority is preempted by federal law). *Accord Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980); *see also* R. 657 (Plaintiffs' App. 4). This rule is recognized in several United States Supreme Court and South Dakota Supreme Court decisions.

In *Utah & N. Ry. Co. v. Fisher*, 116 U.S. 28 (1885), the United States Supreme Court upheld a territorial and county tax on a railroad company's[5] property, including its railroad and depots, located within an Indian reservation. *Id.* at 29, 32-33. Next, in *Thomas v. Gay*, 169 U.S. 264 (1898), the Supreme Court upheld a county tax on non-Indian lessees' cattle located on leased Indian reservation land, stating that

[4] "Political subdivisions of states—such as counties . . . are subordinate governmental instrumentalities created by the state to assist in carrying out state governmental functions." *Edgemont Sch. Dist. 23-1 v. S.D. Dep't of Revenue*, 1999 S.D. 48, ¶ 14, 593 N.W.2d 36, 40. For this reason, case law regarding a state's taxation authority applies in this case and is relevant when determining a subdivision's taxation authority.

[5] There is no indication of a tribal ownership interest in the railroad company. *See Utah & N. Ry. Co. v. Fisher*, 116 U.S. 28 (1885).

"[t]he taxes in question . . . were not imposed on the business of grazing, or on the rents received by the Indians, but on the cattle as property of the lessees[.]" *Id.* at 268, 274-76.

In a similar context, the Supreme Court in *Taber v. Indian Territory Illuminating Oil Co.*, 300 U.S. 1 (1937), upheld a state ad valorem tax on the following property owned by a government agent and located on leased Indian lands: "one dwelling, portable, one garage, one tool house, engines, pump, water well equipment, tanks, derricks, casing, tubing, rods, pipe-lines, and one trailer truck[.]"[6] *Id.* at 3, 5. And finally, in *Okla. Tax Comm'n v. Texas Co.*, 336 U.S. 342 (1949), the Supreme Court upheld a state tax on petroleum produced from Indian lands by a non-Indian lessee of the mineral rights. *Id.* at 343-45, 367. The Court identified that the tax was "a tax on the lessee's property [and] not an occupation or excise tax." *Id.* at 346. In its decision, the Court referenced *Taber* and indicated that "it is well established that property purchased by a private person from the Federal Government

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[6] The Supreme Court in *Taber* upheld the state's taxation authority even though the Indian land owners had an ownership interest in the structures: under the lease, the lessee "agree[d] that any buildings or permanent improvements erected on the leasehold by it should become the property of the Indian owners[.]" Brief of Respondent, *Taber v. Indian Territory Illuminating Oil Co.*, No. 280, 1936 WL 40050, at *9 (1936); *cf.* R. 618 (Plaintiffs' App. 38: ¶ 1) (indicating that there is no tribe or tribal member ownership interest present in this case). Thus, *Taber* appears to recognize that a state's taxation authority on Indian lands may extend beyond the tax upheld by the circuit court in this case, where there is no tribal member ownership interest in the structures. *See* R. 618-21 (Plaintiffs' App. 38-41: ¶¶ 1, 4-5, 7-8, 16).

becomes a part of the general mass of property in the state and must bear its fair share of the expenses of local government." *Id.* at 353-54.

The Court in *Oklahoma Tax Commission* highlighted that its case "present[ed] no question concerning the immunity of the Indian lands themselves from state taxation. There is no possibility that ultimate liability for the taxes may fall upon the owner of the land." *Id.* at 353. The same is true in this case: no tribe, individual Indian, or the BIA have any ownership or reversionary interest in the structures.

Along those same lines, this Court, in *Lebo v. Griffith*, 42 S.D. 198, 173 N.W. 840 (1919), upheld a state tax imposed upon non-Indians' on-reservation personal property. *Id.* at 841-42. Significantly, at the time of the *Lebo* decision, "personal property" included permanent improvements. *See* R. 550-59 (1915 S.D. Sess. Laws, ch. 296 & S.D. Revised Code §§ 6667, 6669 (1919)); *cf. United States v. Rickert*, 188 U.S. 432, 442 (1903) (stating that "the statutes of South Dakota, for the purposes of taxation, classify all improvements made by persons upon lands held by them under the laws of the United States as personal property") (internal quotation marks omitted). In upholding the tax, this Court emphasized that "[t]he state cannot tax Indian lands that are held in trust by the United States, nor the permanent improvements thereon, nor the personal property supplied to the Indians by the United States. *But property owned by persons other than Indians may be taxed by the state in which the reservation is*

located." *Lebo*, 173 N.W. at 841 (emphasis added) (internal quotation marks omitted).

This Court indicated in *Lebo* that no tribal interests were implicated by the taxation of the non-Indian property located on a reservation: "[t]o levy and collect taxes on personal property situated on the reservation, but belonging to the whites, does not deprive the Indians of any of their rights nor infringe upon the jurisdiction of the United States Government." *Id.* "We believe it may be said that the state may exercise any governmental function upon an Indian reservation within such state that does not interfere with the Indians or their property or the jurisdiction of the United States in maintaining order and administering the Indian affairs." *Id.* at 841-42. As in *Lebo*, taxation of the structures owned by the non-tribal members in this case does not interfere with tribal government affairs. With this backdrop in mind, the County tax must be upheld unless the tax is preempted by federal law.

B. The County tax on the structures owned entirely by the non-tribal member individual plaintiffs is not preempted by federal law.

Plaintiffs contend that the County tax is preempted by 25 U.S.C. § 465, and as such, Plaintiffs bear the burden of proving preemption. *See Sunflour R.R., Inc. v. Paulson*, 2003 S.D. 122, ¶ 18, 670 N.W.2d 518, 523. This Court has recently reaffirmed that "[t]here is a strong presumption against federal preemption." *In re Estate of Flaws*, 2016

S.D. 61, ¶ 17, 885 N.W.2d 580, 584 (citing *FMC Corp. v. Holliday*, 498 U.S. 52, 62 (1990)). It is presumed that "Congress does not intend to pre-empt areas of traditional state regulation[,]" and as noted above, the state traditionally may tax non-tribal members' property on Indian lands. *See FMC Corp.*, 498 U.S. at 62; *cf. Hurley v. State*, 82 S.D. 156, 162, 143 N.W.2d 722, 725 (S.D. 1966) ("The three broad inherent powers of governmental sovereignty by which the state carries out its fundamental purpose of protecting the health, safety, morals, and general welfare of the public are the powers of taxation, police, and eminent domain."). Therefore,

> [i]n the interest of avoiding unintended encroachment on the authority of the States, . . . a court interpreting a federal statute pertaining to a subject traditionally governed by state law will be reluctant to find pre-emption. . . . [P]re-emption will not lie unless it is 'the clear and manifest purpose of Congress.'

CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 663-64 (1993) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947)). Under the context of this presumption against preemption, federal law does not preempt the County tax in this case.

1. The tax on the structures is not expressly preempted by 25 U.S.C. § 465.

Plaintiffs primarily rely on section five of the Indian Reorganization Act of June 18, 1934, 48 Stat. 985 (IRA), codified at 25 U.S.C. § 465, in arguing that the tax on the individual plaintiffs' structures is preempted. *See* R. 48, 49-50 (¶¶ 12, 15, 20), 65-66, 410

(Plaintiffs' App. 34: ¶ 21); Plaintiffs' Brief at 13-14, 18-22. Pursuant to § 465, the Secretary of Interior may "acquire . . . any interest in lands, water rights, or surface rights to lands . . . for the purpose of providing land for Indians." Section 465 also provides that trust lands[7] and rights acquired pursuant to the IRA are exempt from state and local taxes:

> Title to any lands 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*.

25 U.S.C. § 465 (emphasis added).[8] Plaintiffs' argument that this tax exemption extends to the structures in this case is without merit. *See* R. 573-77 (Plaintiffs' App. 14-18).

a. <u>The structures are not "lands" within the purview of 25 U.S.C. § 465.</u>

First, any contention that the individual plaintiffs' structures are "lands" encompassed by § 465 must be rejected in light of the Eighth

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[7] Plaintiffs posit that the trust land in this case "meets the definition of Indian country under federal law and is removed from State jurisdiction[.]" Plaintiffs' Brief at 11. However, the question of whether the land is Indian country is not relevant because 25 U.S.C. § 465 relates to trust land, not Indian country.

[8] 25 U.S.C. § 465 also addresses title to land or rights acquired pursuant to the Act of July 28, 1955, 69 Stat. 392, as amended. This Act and its amendments (which have since been omitted) involve Indian lands on the Yakima Indian Reservation and are irrelevant in this case. *See* 25 U.S.C. § 465; Act of July 28, 1955, 69 Stat. 392; 25 U.S.C. § 608 *et. seq*.

Circuit Court of Appeals' interpretation of "lands" in 25 U.S.C. § 464,[9] which immediately precedes § 465. In *Black Hills Institute of Geological Research v. South Dakota School of Mines and Technology*, 12 F.3d 737 (8th Cir. 1993) [hereinafter "*Black Hills Institute*"], the Eighth Circuit analyzed whether a fossil was "land" within the meaning of § 464, which prohibits the sale of certain Indian trust lands unless particular conditions are met. *Id.* at 741-42. Critical to its ruling, the Eighth Circuit pointed out that Congress did not define "land" in the IRA so the Court looked to state property law to define it as "the solid material of the earth, whatever may be the ingredients of which it is composed, whether soil, rock, or other substance."[10] *Id.* at 742 (quoting SDCL 43-1-4). The Eighth Circuit determined that the fossil was "land" under that definition, and so the United States held the fossil in trust and the conditions of § 464 regarding the sale of Indian trust lands applied. *Id.* Because those conditions had not been satisfied prior to a purported sale of the fossil, the Eighth Circuit voided that sale. *Id.* at 742-43.

"When two statutory provisions employ the same word in close proximity, the 'normal rule of statutory construction that identical

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[9] 25 U.S.C. § 464 is now codified at 25 U.S.C. § 5107. This statute provides that subject to certain exceptions, "no sale, devise, gift, exchange, or other transfer of restricted Indian *lands* . . . shall be made or approved[.]" *See* 25 U.S.C. § 5107 (emphasis added); *see also Black Hills Institute of Geological Research v. S.D. Sch. of Mines & Tech.*, 12 F.3d 737, 742 (emphasis added).

[10] The definition of "land" in SDCL 43-1-4 has remained unchanged since *Black Hills Institute*.

words used in different parts of the same act are intended to have the same meaning' carries even greater weight." *United States v. Kowal*, 527 F.3d 741, 746-47 (8th Cir. 2008) (quoting *Comm'r v. Lundy*, 516 U.S. 235 (1996)); *see also State ex rel. Holmes v. Shannon*, 7 S.D. 319, 64 N.W.2d 175, 176 (1895) ("It is . . . a cardinal principle of statutory construction . . . that words and phrases repeatedly used in the same statute will bear the same meaning throughout, unless a different intention clearly appears[.]"). Considering this rule of statutory construction, the Eighth Circuit's adopted definition of "land" for purposes of § 464 should also be used to define "land" in § 465 as that statute immediately follows § 464. And applying that definition here, the structures do not fall within the purview of § 465 because they are not "the solid material of the earth[.]" *See Black Hills Institute*, 12 F.3d at 742.

b. <u>The structures are not "such lands or rights" that are exempt from state and local taxation pursuant to 25 U.S.C. § 465.</u>

Even if the structures implicate § 465, the structures do not qualify as "*such* lands or rights" that are entitled to the tax exemption. *See* 25 U.S.C. § 465 (emphasis added). As stated above, § 465 provides, in relevant part:

> Title to any lands 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.*

(Emphasis added.) Under this statute, to qualify as "*such* lands or rights[,]" two conditions must be satisfied: 1) the title to the lands or the rights were acquired under the IRA; and 2) they are held in trust by the United States for the benefit of the "tribe or individual Indian for which the land [was] acquired[.]" *See* 25 U.S.C. § 465 (emphasis added). Here, the structures satisfy neither condition.

First, Plaintiffs have failed to allege that the parcel on which the structures sit was acquired by the BIA pursuant to the IRA, and more importantly, there is no evidence that the title or rights to the actual structures were acquired under the IRA. *See* R. 45-52, 620-21 (Plaintiffs' App. 40-41: ¶¶ 10-11); Plaintiffs' Brief. This fact alone distinguishes today's case from *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973) [hereinafter *Mescalero*], which is the case primarily relied upon by Plaintiffs. *See* Plaintiffs' Brief at 19-22. In *Mescalero*, the State of New Mexico sought to impose a use tax on the Mescalero Apache Tribe for materials used to construct ski lifts at a tribal ski resort on federal land. 411 U.S. at 146-47. The United States Supreme Court ruled that the state use tax on the materials, which had become "permanently attached to the realty[,]" was preempted by § 465. *Id.* at 158-59. In invalidating the tax, the Supreme Court stated that the permanent improvements on the tax-exempt land "would certainly be immune from the State's ad valorem property tax" and "the same

immunity extends to the compensating use tax on the property." *Id.* at 158.

Importantly, in *Mescalero*, the permanent improvements satisfied the requirement in § 465 that they be acquired pursuant to the IRA. *Id.* at 146. The tribal ski resort "was developed under the auspices of the Indian Reorganization Act of 1934, 48 Stat. 984, as amended, 25 U.S.C. [§] 461 et seq." *Mescalero*, 411 U.S. at 146. The "equipment and construction money [for the resort] was provided by a loan from the Federal Government under [§] 10 of the [IRA], 25 U.S.C. [§] 470," which authorizes the Secretary of Interior to "make loans to Indian chartered corporations for the purpose of promoting the economic development of such tribes and of their members[.]" *Id.*; Indian Reorganization Act of June 18, 1934, ch. 576, § 10, 48 Stat. 986; 25 U.S.C. § 470 (transferred to 25 U.S.C. § 5113). Therefore, the improvements in *Mescalero* that were "certainly . . . immune from [an] ad valorem tax" were "acquired pursuant to [the IRA.]" *See* 411 U.S. at 158-59; 25 U.S.C. § 465.

Conversely, the structures in this case were not "developed under the auspices of the [IRA]." R. 620-21 (Plaintiffs' App. 40-41: ¶¶ 10-11); *see Mescalero*, 411 U.S. at 146. Unlike *Mescalero*, nothing in the record indicates that the funds used to build the structures were provided to an Indian chartered corporation to promote economic development of a tribe and its members. R. 40-41 (Plaintiffs' App. 40-41: ¶ 11); *see Mescalero*, 411 U.S. at 146. The Supreme Court's determination that

the permanent improvements in *Mescalero* were exempt from state and local taxes under § 465 does not support that the structures here qualify for that same tax exemption.

Next, the structures do not satisfy the second prerequisite: that they be held in trust by the United States for the benefit of the tribe or individual Indians "for which the land [was] acquired." *See* 25 U.S.C. § 465. Here, while the parcel is in trust, the structures are not. *See* R. 619-20 (Plaintiffs' App. 39-40: ¶¶ 6-7). *Cf.* R. 626-34 (Indian Trust Management Reform – Implementation of Statutory Changes, 76 Fed. Reg. 7501 (interim final rule Feb. 10, 2011)) (describing the interim final rule's changes to the probate of permanent improvements, stating that "[a]s a general rule, the Department [of Interior] considers permanent improvements to be non-trust property[.]"). The structures are owned entirely by non-tribal members; the United States does not hold the structures in trust on behalf of the Tribe or individual Indians. *See* R. 618-20 (Plaintiffs' App. 38-40: ¶¶ 1, 4-5, 7-8). Along those lines, there is no evidence that the federal government owes a fiduciary duty to preserve and maintain the individual plaintiffs' structures. R. 620 (Plaintiffs' App. 40: ¶ 9). *See United States v. White Mountain Apache Tribe*, 537 U.S. 465, 475 (2003) (indicating that for property in trust, the United States owes a duty to preserve the property and "not allow it to fall into ruin on [the fiduciary's] watch"). And unlike the restraint on alienation of Indian trust land, there are no relevant past or present

restraints on alienation of the structures. *See* 25 U.S.C. § 5107 (formerly 25 U.S.C. § 464); R. 620 (Plaintiffs' App. 40: ¶ 8). Ultimately, Plaintiffs cannot capitalize on the tax exemption granted through § 465 because the structures were not acquired pursuant to the IRA and are not held in trust by the United States for the benefit of a tribe or individual Indians.

2. Case law regarding taxation of property and activities in which Indians have an interest is inapposite.

The cases relied upon by Plaintiffs have one important fact in common that distinguishes them from the facts here: a tribe or individual Indian had an interest in the property or activity sought to be taxed by the state or local authorities.[11] *See* Plaintiffs' Brief at 19-22. In *Mescalero*, 411 U.S. 145, the ski resort was owned and operated by a tribal enterprise. *Id.* at 146-47. There is no indication that the tribe did not own the structures; indeed, the use tax related to the improvements was imposed upon the tribe. *See id.* at 147. The *Mescalero* Court stated that "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." 411 U.S. at 158. That

[11] The Indian canon of construction provides that "statutes are to be construed liberally in favor of the Indians with ambiguous provisions interpreted to their benefit." *Chickasaw Nation v. United States*, 534 U.S. 84, 88 (2001). Plaintiffs have not shown that they are entitled to this liberal construction as this is a case involving non-tribal members. *See* R. 618-19 (Plaintiffs' App. 38-39: ¶¶ 1, 4).

statement must be read within the context of the next sentence: "Every 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." *Id.* at 158-59 (quoting *Rickert*, 188 U.S. at 442). Together, these statements reiterate the crucial fact that the tribe had an interest in both the land and the permanent improvements. *See id.* at 146-47.

In this case, there is no tribal interest in the structures. *See* R. 618-20 (Plaintiffs' App. 38-40: ¶¶ 1, 4-5, 7-8). Contrary to *Mescalero*, every reason supporting the parcel's exemption from local taxation *does not apply* to the structures. *See* 411 U.S. at 158-59. Moreover, as stated above, the permanent improvements in *Mescalero* were acquired pursuant to the IRA. *See supra* I.B.1.b. For these reasons, *Mescalero* does not support that § 465 exempts the County tax on the structures.

Seminole Tribe of Florida v. Stranburg, 799 F.3d 1324 (11th Cir. 2015), also does not support preemption of the tax. In *Stranburg*, the Eleventh Circuit Court of Appeals ruled that § 465 preempted a state tax on a non-Indian lessee's rental payments to the Seminole Tribe for the commercial lease of Indian land. 799 F.3d at 1328-29. The tax at issue was on "the privilege of engaging in the business of renting, leasing, letting, or granting a license for the use of any real property in the state." *Id.* at 1326 (internal quotation marks omitted). While the State of Florida assessed the tax on the non-Indian lessee's rental

payments, the tribe, as the landlord, was required to "collect[ ] and remit[ ] the tax to the state and [was] liable to pay the tax and incur penalties if it fail[ed] to perform these duties." *See id.* The Court of Appeals concluded that the tax was invalid because it was imposed on the tribe's leasing of property, which is a transaction involving the tribe's "bundle of privileges that make up property or ownership of property." *Id.* at 1330; *cf. Thomas*, 169 U.S. at 273, 275 (indicating that "[t]he taxes in question . . . were not imposed on the business of grazing, or on the rents received by the Indians, but on the cattle as property of the lessees" and that such tax was "too remote and indirect to be deemed a tax upon the lands or privileges of the Indians."). But while *Stranburg* involved a tax on a transaction involving the tribe and its privileges of property ownership, the tax at issue here is on property that is entirely owned by the individual plaintiffs. Given the factual distinctions, *Stranburg* offers no guidance in this case.

United States v. Rickert, 188 U.S. 432 (1903), is inapplicable for the same reasons. In *Rickert*, a decision prior to the enactment of § 465, the United States Supreme Court invalidated a county tax on permanent improvements used by Indians and located on Indian lands held in trust by the United States. 188 U.S. at 433, 441-43. The *Rickert* Court highlighted the importance of protecting the tribal members' possession of the structures. *Id.* at 442-43. The Supreme Court noted that Congress expected Indian allottees to improve and

cultivate the land, but this expectation "would be defeated if the improvements could be assessed and sold for taxes." *Id.* at 442. "[T]he permanent improvements could no more be sold for local taxes than could the land to which they belonged. Every 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." *Id.* The Supreme Court went on to say that "[t]he government would not adequately discharge its duty to [the Indians] if it . . . 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. But here, the concern of protecting an Indian's ownership or possession of the taxed property does not exist because no tribe or individual Indian owns the structures. *See* R. 619 (Plaintiffs' App. 39: ¶ 5). Thus, *Rickert*'s exemption of tax on the property and the reasoning behind such exemption are irrelevant in this case.

The non-binding Ninth Circuit Court of Appeals case of *Confederated Tribes of Chehalis Reservation v. Thurston County Board of Equalization*, 724 F.3d 1153 (9th Cir. 2013), also does not justify preemption of the tax. *Cf.* Plaintiffs' Brief at 21. In *Confederated Tribes of Chehalis Reservation*, the Ninth Circuit invalidated a state and local property tax on permanent improvements located on lands held in trust for the Confederated Tribes of the Chehalis Reservation. *See* 724 F.3d

at 1154. But even though the lower court had indicated that a nonIndian corporation owned the permanent improvements, the tribe held a 51 percent undivided interest in that corporation. *See id.* at 1154-55. Additionally, pursuant to the lease agreement, the tribe was to become the sole owner of the improvements after twenty-five years. *See id.* Thus, there was a tribal interest in the property that the state and its subdivision sought to tax.

Ultimately, in this case, no tribe or individual Indian has any alleged ownership or reversionary interest in the structures. R. 619 (Plaintiffs' App. 39: ¶ 5); R. 45-52. The Tribe's lack of ownership or reversionary interest in the structures is evidenced by the lease agreement between the BIA and the Association: "[a]ll buildings and improvements . . . shall remain the property of the lessee and sub-lessees and must be removed from the premises no later than thirty (30) days after the termination date of the lease[.]" R. 621 (Plaintiffs' App. 41: ¶ 16). Accordingly, case law in which a tribe or individual Indian has an ownership or reversionary interest in the exempt property does not support preemption of the County tax here.

3. Article XXII of the South Dakota Constitution does not support preemption of the County tax on the structures.

Plaintiffs contend that Article XXII of the South Dakota Constitution supports federal preemption of the County tax in this case. Plaintiffs' Brief at 14-16. Article XXII provides, in relevant part:

> *That we, the people inhabiting the state of South Dakota, do agree and declare that we forever disclaim all right and title to* the unappropriated public lands lying within the boundary of South Dakota, and to *all lands lying within said limits owned or held by any Indian or Indian tribes*; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States; *and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States . . . .*

S.D. Const. art. XXII (emphasis added) (Plaintiffs' App. 50). Contrary to Plaintiffs' contention that this "disclaimer clause" supports preemption of the County tax, Article XXII was not aimed to "withhold[] power from the [S]tate[] to exercise jurisdiction over the reservations[.]" *See Anderson v. Brule Co.*, 67 S.D. 308, ___, 292 N.W. 429, 431 (1940). Rather, it was included in the South Dakota Constitution "for the purpose of maintaining ample supreme powers on the part of the United States to permit it to fully respond to its legal and moral obligations to the Indians[.]" *Id.*; *see also Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, P.C.*, 467 U.S. 138, 149 (1984) (stating that "specific jurisdictional disclaimers [in enabling acts] rarely [have] had controlling significance in [the United States Supreme Court's] past decisions about state jurisdiction over Indian affairs or activities on Indian lands."); *Arizona v. San Carlos Apache Tribe of Ariz.*, 463 U.S. 545, 563 (1983) (indicating that the United States Supreme Court has "rarely . . . invoked reservations of jurisdiction contained in statehood enabling acts by anything more than a passing mention[.]").

Further, for the same reasons above, the "*lands* . . . owned or held by any Indian or Indian tribe" mentioned in Article XXII do not encompass the structures owned by the non-tribal member Plaintiffs in this case. *See supra* I.B. The structures are not "under the absolute jurisdiction and control of the Congress of the United States[.]" Art. XXII, § 2 (Plaintiffs' App. 50). And indeed, any assertion that the term "lands" under Article XXII includes the structures at issue is contradictory. Article XXII signals a disclaimer of "all right and title to . . . lands . . . owned or held by any Indian or Indian tribes[.]" If "lands" encompassed the structures, Article XXII would seem to direct that Plaintiffs disclaim their title and rights in the structures. *See, e.g., Organized Vill. of Kake v. Egan*, 369 U.S. 60, 69 (1962) (Article XXII's "disclaimer of right and title by the State was a disclaimer of proprietary . . . interest."). Yet Plaintiffs do not refute their unequivocal ownership of the structures. R. 619-20 (Plaintiffs' App. 39-40: ¶¶ 4-8). For these reasons, Plaintiffs' reliance on Article XXII is misplaced.

4. The BIA leasing regulations neither explicitly nor impliedly preempt the County tax.

Plaintiffs next argue that the County tax is either expressly or impliedly preempted[12] by the BIA leasing regulations found at 25 C.F.R. Part 162, which purport to govern the leasing of Indian lands. *See* Plaintiffs' Brief at 22-26. Plaintiffs specifically point to 25 C.F.R.

[12] Of note, the United States Supreme Court "has repeatedly said that tax exemptions are not granted by implication[.]" *Mescalero Apache Tribe*, 411 U.S. at 156.

§ 162.017, which provides 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." Plaintiffs' Brief at 23. However, neither 25 C.F.R. § 162.017 nor the leasing regulatory scheme preempt the tax on the structures.

As an initial matter, the BIA did not comply with Executive Order 13132 when enacting its leasing regulations. Executive Order 13132 is aimed "to ensure that the principles of federalism established by the Framers [of the Constitution] guide the executive departments and agencies in the formulation and implementation of policies[.]" R. 561 (64 Fed. Reg. 43255 (August 10, 1999)). To advance that purpose, the Executive Order requires agencies to consult with, or at least make efforts to consult with, the states when enacting regulations with federalism implications. R. 563-64 (64 Fed. Reg. 43257-58).

In addressing its responsibility under the Executive Order, the BIA contended that the leasing regulations "ha[ve] no substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." R. 350 (77 Fed. Reg. 72464 (Dec. 5, 2012)). But undoubtedly, any attempt to preempt state and local taxes has a "substantial direct effect on the

States": "That the taxing power is of vital importance; that it is essential to the existence of government; are truths which it cannot be necessary to reaffirm." *Providence Bank v. Billings*, 29 U.S. 514, 524 (1830); *see* 25 C.F.R. § 162.017. Thus, under Executive Order 13132, the BIA should have consulted with the states but there is no indication that a consultation occurred. *See* R. 308 (77 Fed. Reg. 72442) (only noting tribal consultations and a public comment period).

Turning next to the substance of the leasing regulations, they cannot be read to preempt the County tax. The United States Department of Interior, of which the BIA is an agency, has indicated 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[.]" *See* 25 U.S.C. §§ 1, 1(a); *Desert Water Agency v. U.S. Dep't of the Interior*, 849 F.3d 1250, 1254 (9th Cir. 2017). *Accord Stranburg*, 799 F.3d at 1335, 1337-39 (declining "to accord the [BIA leasing] regulations deference" when analyzing the federal, tribal, and state interests in the imposition of a state tax). Moreover, the BIA cannot expand the tax exemption in § 465 beyond what the statute provides, and as discussed above, § 465's exemption does not extend to structures entirely owned by non-tribal members. *See United States v. George*, 228 U.S. 14, 22 (1913) (indicating that if the Secretary of Interior can "enlarge [a] statute at will . . . [s]uch power is not regulation; it is legislation.").

As further confirmation that the BIA leasing regulations do not preempt the County tax, it appears the structures are not being regulated pursuant to the leasing regulations. *See* 25 C.F.R. part 162. Generally, under the leasing regulations, and under the lease between the BIA and the Association in this case, any subleases must be approved by the BIA. 25 C.F.R. §§ 162.353, 162.453; R. 621 (Plaintiffs' App. 41: ¶ 13). But even though the Association's bylaws indicate that the individual plaintiffs are sublessees of their respective lots, there are no BIA-approved subleases. R. 621 (Plaintiffs' App. 41: ¶¶ 14, 15). Thus, it does not appear that the individual plaintiffs are acting under the guise of the BIA regulations.

Regardless, the tax in this case does not fall upon the activity regulated by the BIA: the leasing of Indian lands. Addressing the BIA's regulation of rights-of-way on Indian lands, a topic similar to the BIA's regulation of leases on Indian lands, the Montana Supreme Court highlighted the distinction between a tax on the BIA's regulated activity and a tax on the ownership of property. *See N. Border Pipeline Co. v. State*, 772 P.2d 829 (Mont. 1989); *compare* 25 C.F.R. part 169 (BIA rights-of-way regulations) *with* 25 C.F.R. part 162 (BIA leasing regulations).[13] In *Northern Border Pipeline Co. v. State*, 772 P.2d 829

[13] The BIA right-of-way regulations contain a provision substantially similar to the BIA's leasing regulations regarding the taxation of permanent improvements on Indian lands: "Subject only to applicable Federal law: . . . Permanent improvements in a right-of-way, without regard to ownership of those improvements, are not subject to any fee,

(Mont. 1989), the Montana Supreme Court upheld a state tax on a non-Indian owned pipeline located within a right-of-way through Indian trust land. *Id.* at 830-31, 837. The Court reasoned that the tax was not imposed on the BIA-regulated activity, the granting of rights-of-way:

> The activity being regulated is the granting of rights-of-way. The State does not seek to tax the right-of-way itself or any facet of the granting process. The State's tax is on the pipeline; the property of Northern Border that was not put in place until after the right-of-way grant was obtained.

Id. at 834. Similar to *Northern Border Pipeline Co.*, where the tax was on the non-Indian owned property and not on the right-of way, the tax here is on the structures rather than the lease itself or any part of the leasing process.

Any contention that a tax on the structures would obstruct Congress's intention of encouraging "tribal economic development, self-determination, and strong tribal governments" must be rejected. *Cf.* Plaintiffs' Brief at 23 (quoting R. 319 (77 Fed. Reg. 72447 (Dec. 5, 2012)). Plaintiffs "do[ ] not have standing to assert the [Tribe's] sovereign right of self-government[.]" *See N. Border Pipeline Co.*, 772 P.2d at 836. The Tribe is not a party in this litigation, has not authorized any Plaintiff to bring this action on the Tribe's behalf, and has not asserted the tax is infringing upon any of those objectives. *See* R. 45-52; 623 (Plaintiffs' App. 43: ¶ 27).

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tax, assessment, levy, or other charge imposed by any State or political subdivision of a State[.]" 25 C.F.R. § 169.11(a)(1).

Moreover, no tribal interests are implicated by the County tax on the structures owned by non-tribal members. This Court in *Lebo* confirms as much, concluding that state taxation of non-Indian property (including permanent improvements) on an Indian reservation does not infringe upon Indian affairs. *See* 173 N.W. at 841-42. Specifically, in this case, there is no indication the tax has interfered with the Tribe's ability to collect its own tax. *See* R. 623 (Plaintiffs' App. 43: ¶ 24); Plaintiffs' Brief; *see also N. Border Pipeline Co.*, 772 P.2d at 835 (stating that the non-Indian plaintiff showed "no present injury to tribal revenues resulting from the State's tax" on plaintiff's on-reservation property). Plaintiffs are aware of no development of the leased parcel by the Tribe. *See* R. 623 (Plaintiffs' App. 43: ¶ 25). And Plaintiffs cannot conclusively identify any services provided by the Tribe to the parcel or structures.[14] *See* R. 623 (Plaintiffs' App. 43: ¶ 26). Given these facts and controlling case law, the tax on the non-tribal members' structures does not interfere with any tribal affairs.

[14] Conversely, the County tax levied and collected on the structures are paid to entities that use the funds to provide a variety of services, including operation of a school, including capital outlays and special education; fire protection; law enforcement; ambulance services; and 911 services/emergency communications; maintenance and repair of township roads and county highways, some of which provide access to the leased parcel in this case; and operation of the sanitary district's collection and lagoon services and provision of sewer services, which are available to the individual plaintiffs' structures. R. 622 (Plaintiffs' App. 42: ¶¶ 19-23).

II. BECAUSE PLAINTIFFS' INTERESTS ARE NOT WITHIN THE "ZONE OF INTERESTS" OF 25 U.S.C. § 465, THE CIRCUIT COURT ERRED IN RULING THAT PLAINTIFFS HAVE STANDING.

The second issue in this case, as set forth in the State's and County's notices of review, is whether the court erred in concluding that Plaintiffs have standing. "Whether a party has standing to maintain an action is a question of law reviewable by this Court de novo." *Howlett v. Stellingwerf*, 2018 S.D. 19, ¶ 11, 908 N.W.2d 775, 779; *see also Steger v. Franco, Inc.*, 228 F.3d 889, 892 (8th Cir. 2000) ("the plaintiff's standing to sue 'is the threshold question in every federal case, determining the power of the court to entertain the suit.'") (quoting *Warth v. Seldin et al.*, 422 U.S. 490, 498 (1975)).

In its Order and Judgment granting the State's and County's Motion for Summary Judgment, the court concluded that Plaintiffs have standing because "they are the owners of the structures being assessed for tax purposes here[.]" R. 658 (Plaintiffs' App. 5). The court erred in this ruling, and specifically in its failure to address the State's position that Plaintiffs do not have standing because they do not fall within the zone of interests of 25 U.S.C. § 465, the statutory provision forming the basis of Plaintiffs' complaint. *See* R. 48-50 (¶¶ 12, 15, 20), 65-66, 410 (Plaintiffs' App. 34: ¶ 21); *see also Rosebud Sioux Tribe v. McDivitt*, 286 F.3d 1031, 1036 (8th Cir. 2002).

"[T]o establish standing, a plaintiff . . . must . . . show the injury complained of falls within the zone of interests sought to be protected by the statutory provision." *See Rosebud Sioux Tribe*, 286 F.3d at 1036; *see also In re Estate of Flaws*, 2016 S.D. 60, ¶ 29, 885 N.W.2d 336,4345 (noting the five requirements to establish standing, including showing "that the injury falls within the zone of interests protected by the constitutional guarantee involved.") "'Whether a plaintiff's interest is arguably . . . protected . . . by the statute within the meaning of the zone-of-interests test is to be determined not by reference to the overall purpose of the Act in question . . . but by reference to the particular provision of law upon which the plaintiff relies.'" *Rosebud Sioux Tribe*, 286 F.3d at 1036 (*quoting Bennett v. Spear,* 520 U.S. 154, 175-76 (1997)) (alteration in original).

Section 465 and the above case law such as *Mescalero* and *Stranburg* confirm that the tax exemption in § 465 is not aimed to protect the interests of non-tribal members such as Plaintiffs. *See supra* I.B; *Chase v. McMasters*, 573 F.2d 1011, 1016 (8th Cir. 1978). Rather, it is intended to protect the interests of individual Indians and tribes. *Id.* Through the IRA, Congress aimed to reverse the loss of tribal lands that occurred during the allotment era and specified that the purpose of § 465 is "to provid[e] land for Indians." 25 U.S.C. § 465; *Chase*, 573 F.2d at 1016. Congress's inclusion of the tax exemption clause furthered that objective: "Because many Indians who were

unable to manage their allotted lands had sold them or had them sold at a tax sale, immunity from property taxes was an important means of halting further loss of Indian land." *Chase*, 573 F.2d at 1016 (citation omitted); *see also Rickert*, 188 U.S. at 442-43. But here, exempting Plaintiffs' structures from the County tax serves no role in "halting the loss of Indian land[.]" *See Chase*, 573 F.2d at 1016. As indicated above, the tax liability rests solely on the individual plaintiffs. *See* SDCL chapter 10-22 (governing the collection of delinquent property taxes). Plaintiffs' claimed injury – that the taxes assessed against their structures are preempted by § 465 – does not fall within the "zone of interests" of § 465 and therefore, Plaintiffs lack standing.

CONCLUSION

The presumption against federal preemption, combined with the applicable case law, confirms that the County tax on the non-tribal members' structures is not preempted. This case "present[s] no question concerning the immunity of the Indian lands themselves from state taxation. There is no possibility that ultimate liability for the taxes may fall upon the owner of the land." *See Okla. Tax Comm'n*, 336 U.S. at 353. The structures are owned entirely by non-tribal members, and the tax on those structures is valid. Moreover, Plaintiffs lack standing to sue under 25 U.S.C. § 465. As the State prevails under either theory, the Court's decision must be affirmed.

Dated this 6th day of November, 2019.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I certify that the Appellees' Brief is within the limitation provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in 12-point type. Appellees' Brief contains 8,708 words.

2. I certify that the word processing software used to prepare this brief is Microsoft Word 2016.

Dated this 6th day of November 2019.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 6th day of November 2019, a true and correct copy of Appellees' Brief in Appeal Nos. 29066, 29074, *Pickerel Lake Outlet Association, et al. v. Day County & the State of South Dakota* was served via electronic mail upon the following:

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

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Plaintiffs/Appellants,

-vs-

DAY COUNTY, SOUTH DAKOTA, A SOUTH DAKOTA PUBLIC CORPORATION, AND THE STATE OF SOUTH DAKOTA,

Defendants/Appellees.

Appeal No. 29066

APPEAL FROM THE CIRCUIT COURT
FIFTH JUDICIAL CIRCUIT
DAY COUNTY, SOUTH DAKOTA

THE HONORABLE JON S. FLEMMER
CIRCUIT COURT JUDGE

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REPLY ARGUMENT

A. THE UNITED STATES SUPREME COURT'S RULING IN MESCALERO DICTATES THAT PLAINTIFFS' PERMANENT IMPROVEMENTS ARE EXEMPT FROM TAXATION.

The Day County property taxes in question are directly preempted by 25 U.S.C. § 465 (transferred to 25 U.S.C. § 5108). This is the only conclusion that can possibly comport with the United States Supreme Court's holding in Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973).

The State's brief begins with a discussion of cases decided by this Court and the United States Supreme Court in which local taxes were upheld, which included a number of cases relied upon by the Circuit Court. See e.g. Utah & N. Ry. Co. v. Fisher, 116 U.S. 28 (1885); Thomas v. Gay, 169 U.S. 264 (1898); Taber v. Indian Territory Illuminating Oil Co., 300 U.S. 1 (1937); Okla. Tax Comm'n v. Texas Co., 336 U.S. 342 (1949); Lebo v. Griffith, 42 S.D. 198, 173 N.W. 840 (1919); (Appellees' Brief, pgs. 10-13; Appx. 16.) These cases pre-dated Mescalero, the majority of the cases pre-dated the Indian Reorganization Act ("IRA") and, in many instances, the cases did not concern taxes upon permanent improvements to land. They offer little to the express preemption discussion here.

The State then discusses Black Hills Institute of Geological Research v. South Dakota School of Mines and Technology, 12 F.3d 737 (8th Cir. 1993), in support of its argument that plaintiffs' structures are not "land" within the meaning of 25 U.S.C. § 465. While Black Hills Institute provides an interesting analysis of whether a fossil buried in the earth constitutes "land" under South Dakota law, the Eighth Circuit's ruling is not germane to the resolution of the issues of this case. There is no need to resort to state law or the construction of neighboring statutes such as 25 U.S.C. § 464.[1] The United States Supreme Court's decision in Mescalero interpreted the scope of 25 U.S.C. § 465 without reference to state law, and determined that permanent improvements situated upon land - such as plaintiffs' cabins, cottages, and other structures - fell within the scope of immunity specifically afforded by § 465. Id. at 158; see also Confederated Tribes of the Chehalis Reservation v. Thurston Cnty. Bd. of Equalization, 724 F.3d 1153, 1158 (9th Cir. 2013) ("[I]t is irrelevant whether permanent improvements constitute personal property under Washington law.")

The State attempts to blur the clear holding in Mescalero based upon an argument that the structures in this case were not developed under the auspices of the IRA. First,

[1] Now codified at 25 U.S.C. § 5107.

there is no dispute that the leased land at issue in this case is held in trust by the United States for the Sisseton Wahpeton Oyate Tribe ("Tribe"), a federally-recognized Indian tribe. (Appx. 30-31, ¶¶ 9-12.) Second, when 25 U.S.C. § 465 is applied as the United States Supreme Court has directed, improvements "permanently attached to the realty" enjoy the same legal protections as the land itself. Mescalero, 411 U.S. at 158. As the Court explained, "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. "In view of § 465, these permanent improvements on the Tribe's tax-exempt land would certainly be immune from the State's ad valorem property tax." Id.

The steady drumbeat of the State's argument is that there is an exception contemplated by the Mescalero decision based on non-tribal ownership of the permanent improvements. The State convinced the Circuit Court. (Appx. 4-5.) But the Mescalero Court did not carve out any exceptions based upon ownership of the permanent improvements. Both the Ninth Circuit Court of Appeals and the Bureau of Indian Affairs ("BIA"), the agency charged with promulgating regulations interpreting 25 U.S.C. § 465, have concluded that ownership status is irrelevant. See 25 C.F.R.

§ 162.017(a) ("Subject only to applicable Federal law, permanent improvements on the leased land, *without regard to ownership of those improvements*, are not subject to any fee, tax, assessment, levy, or other charge imposed by any State or political subdivision of a State.")(Emphasis added.)

When confronted with this issue in Confederated Tribes of the Chehalis Reservation v. Thurston Cnty. Bd. of Equalization, the Ninth Circuit Court of Appeals correctly applied the Mescalero holding and reversed the district court's ruling that Thurston County had the authority to impose taxes on permanent improvements owned by non-Indians. In that case, Thurston County argued that the Mescalero Apache Tribe case was distinguishable, because the improvements at issue were owned by CTGW, LLC, a Delaware limited liability company, not the Tribe.[2] The Ninth Circuit disagreed: "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.**" Confederated Tribes of the Chehalis Reservation, 724 F.3d at

[2] While the State points out that the Confederated Tribes of the Chehalis Reservation owned 51% of CTGW, LLC, Appellees' Brief, pg. 25, this fact was not pertinent to the Court of Appeals' application of the holding in Mescalero.

1159 (emphasis added); see also Seminole Tribe of Florida v. Stranburg, 799 F.3d 1324, 1330 (11th Cir. 2015) (quoting Mescalero, 411 U.S. at 158) ("In our view, Mescalero stands for the proposition that § 465 precludes state taxation of that 'bundle of privileges that make up property or ownership of property.'").

Under the guidance of the Mescalero and Confederated Tribes of the Chehalis Reservation decisions, 25 U.S.C. § 465 forecloses local property taxes on both the land and the permanent improvements situated thereon, *regardless* of who owns the improvements.

B. THE BIA HAS INTERPRETED 25 U.S.C. § 465 IN A WAY THAT EXEMPTS PLAINTIFFS' PERMANENT IMPROVEMENTS FROM LOCAL TAXATION.

The State misinterprets plaintiffs' reliance on 25 C.F.R. § 162.017. Plaintiffs did not argue that the regulation, in and of itself, has a preemptive effect. Rather, plaintiffs argued that the language of 25 C.F.R. § 162.017 clarifies and confirms what 25 U.S.C. § 465 clearly intended, as expressed in Mescalero, namely, that 25 U.S.C. § 465 forecloses local property taxes on both the land and the permanent improvements situated thereon, *regardless* of who owns the improvements. The fact that the BIA has given this interpretation to 25 U.S.C. § 465 is significant, because this Court "give[s] a federal agency's interpretation of the statutes

it administers highly deferential review." Filing by GCC License Corp., 2001 S.D. 32, ¶ 19, 623 N.W.2d 474, 481.

The State seems to raise a challenge to the BIA's regulations based on Executive Order 13132, although the State does not spell out what result its challenge is intended to drive. Presumably, the reason that the State does not take the next step with the Executive Order argument is because there is no next step. It leads exactly nowhere. Executive Order 13132 "is intended only to improve the internal management of the executive branch, and is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any person." 64 Fed. Reg. 43255. Courts considering this provision and similar provisions in executive orders have found that no judicial review of agency compliance with their provisions is available. See e.g. Air Transport Ass'n of America V. Federal Aviation Admin., 169 F.3d 1, 8-9 (D.C. Cir. 1999); Zhang v. Slattery, 55 F.3d 732, 747 (2nd Cir. 1995); Valentine Props. Assocs., LP v. United States HUD, 785 F.Supp. 2d 357, 368 (S.D.N.Y. 2011); Calef v. Barnhart, 309 F.Supp. 2d 425, 433 (E.D.N.Y. 2004). The BIA's compliance or noncompliance with Executive Order 13132 is a complete red herring, having no effect on the validity of 25 C.F.R. § 162.017 whatsoever.

The State also argues that the tax in this case does not fall upon the activity regulated by the BIA. (Appellees' Brief, pg. 30.) That view is short-sighted, and flatly ignores the purposes behind the IRA, as expressed by the BIA in its regulations with specific regard to leased trust property. "Mescalero makes it clear that where the United States owns land covered by § 465, and holds it in trust for the use of a tribe (regardless of 'the particular form in which the [t]ribe chooses to conduct its business'), § 465 exempts permanent improvements on that land from state and local taxation." Confederated Tribes of the Chehalis Reservation, 724 F.3d at 1157. The Tribe is putting the trust land at issue in this case to an economically beneficial use through its lease with the Association. That is how it has chosen to "conduct its business."

As further detailed by the BIA in the Federal Register, the legislative history of the IRA "demonstrates that Congress intended to maximize income to Indian landowners and encourage all types of economic development on Indian lands" and that "[a]ssessment of State and local taxes would obstruct Federal policies supporting tribal economic development, self-determination, and strong tribal governments." 77 Fed. Reg. 72,440 (Dec. 5, 2012) (codified at 25 C.F.R. pt. 162) (CR 319.) There is a lengthy discussion

in the Federal Register about the importance of tribes having the ability to control and lease trust lands, without the burden of local taxation:

> Another important aspect of tribal sovereignty and self-governance is taxation. Permanent improvements and activities on the leased premises and the leasehold interest itself may be subject to taxation by the Indian tribe with jurisdiction over the leased property. . . . State and local taxation of lessee-owned improvements, activities conducted by the lessee, and the leasehold interest also has the potential to increase project costs for the lessee and decrease the funds available to the lessee to make rental payments to the Indian landowner. Increased project costs can impede a tribe's ability to attract non-Indian investment to Indian lands where such investment and participation are critical to the vitality of tribal economies. . .
>
> 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. Accordingly, the 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 tribal tax to support its infrastructure needs. Such dual taxation can make some projects less economically attractive, further discouraging development in Indian country. Economic development on Indian lands is critical to improving the dire economic conditions faced by American Indians and Alaska Natives. . .

Id. (CR 320.)

The State's suggestion that the ad valorem tax does not concern activity regulated by the BIA is incorrect. The IRA was intended to give Tribes the ability to foster economic independence. In this instance, the Tribe decided to lease its land and allow plaintiffs' structures to be built upon it, so

long as the lessees pay their lease payments and tribal taxes. Allowing a double-taxation scheme to perpetuate very clearly runs contrary to the rationale and purpose of Congress in enacting the IRA, as is made clear in the BIA's regulations.

C. PLAINTIFFS HAVE STANDING.

The State's argument concerning the "zone of interests" test misinterprets the nature of the case and urges the Court to apply federal prudential standing considerations. See Rosebud Sioux Tribe v. McDivitt, 286 F.3d 1031, 1036 (8th Cir. 2002) ("In addition to constitutional requirements, standing also involves prudential limits on the exercise of *federal jurisdiction*."). This is not a federal case, and federal jurisdiction over this case is not an issue. This Court has given no indication in its prior decisions that a litigant who wishes to pursue a declaratory judgment action must satisfy a federal prudential standing test. See e.g. MT & M Gaming, Inc. v. City of Portland, 360 Or. 544, 561, 383 P.3d 800, 809 (2016) (Oregon supreme court rejected the application of the "zone of interests test" to standing under Oregon's declaratory judgments act).

This is an action for prospective declaratory relief brought pursuant to SDCL 15-6-57 and the Uniform Declaratory Judgments Act, SDCL Chapter 21-24, regarding the validity of

a state tax. This Court has approved of claims brought under the Uniform Declaratory Judgments Act, SDCL 21-24-1 et seq., for prospective declaratory relief to settle such controversies involving the legality or applicability of a tax. See Dan Nelson Automotive, Inc. v. Viken, 2005 S.D. 109, ¶ 31, 706 N.W.2d 239, 251-52. "The State cannot change the nature of the claim in order to oust a court of jurisdiction." Benson v. State, 2006 S.D. 8, ¶ 21, 710 N.W.2d 131, 141. Here, plaintiffs seek relief in the form of a declaratory judgment to establish whether "[t]he taxes assessed pursuant to SDCL 10-4-2.1 by Day County against the individual plaintiffs for their property located on land owned by the United States and held in trust for the Sisseton Wahpeton Oyate Tribe are preempted by federal law." (CR 50.) This request comports with the purpose of the Declaratory Judgments Act, which "is to 'declare rights, status, and other legal relations.'" Kneip v. Herseth, 87 S.D. 642, 647, 214 N.W.2d 93, 96 (1974) (citing SDCL 21-24-1).

In Benson, landowners Robert and Judith Benson and Jeff and Patricia Messmer brought an action seeking declaratory and injunctive relief against the State of South Dakota, a state agency, and certain state officials. They sought to challenge the constitutionality of SDCL 41-9-1.1(2), which concerned the shooting of small game from public rights-of-way. The State

challenged the plaintiffs' standing to challenge the statute. The South Dakota Supreme Court analyzed the standing issue, and the majority of the Court concluded that the plaintiffs met the requirements. "Standing to bring an action depends on an allegation by the litigant 'that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant.'" Benson, 2006 S.D. at ¶ 22, 710 N.W.2d at 141 (quoting Parsons v. South Dakota Lottery Comm'n, 504 N.W.2d 593, 595 (S.D. 1993) (quoting Gladstone, Realtors, et al. v. Bellwood, 441 U.S. 91, 99 (1979)).

In Benson, this Court also recited the United States Supreme Court's rule that, in order to establish standing, a litigant must show: (1) an injury in fact suffered by the plaintiff, (2) a causal connection between the plaintiff's injury and the conduct of which the plaintiff complains, and (3) the likelihood that the injury will be redressed by a favorable decision. Id. (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992)).

In this case, it is undisputed that Day County has assessed taxes against the structures and permanent improvements that plaintiffs own pursuant to SDCL 10-4-2.1. (Appx. 42.) Plaintiffs' injury is fairly traceable to SDCL 10-4-2.1. Finally, a finding that SDCL 10-4-2.1 is preempted by federal law, such that Day County lacks the authority to

assess and collect the taxes or other charges imposed on the structures and permanent improvements, would redress plaintiffs' injury. Under the guidance of Benson, plaintiffs have established standing to pursue this declaratory judgment action.

Even to the extent the zone of interests is a part of this Court's standing analysis, plaintiffs satisfy the requirement. The applicable prudential standing requirement is "whether the interest sought to be protected by the complainant is *arguably* within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." Bennett v. Spear, 520 U.S. 154, 163 (1997) (quoting Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 153 (1970) (emphasis added)). As argued above, 25 U.S.C. § 465 has been interpreted by Courts and the BIA to mean that permanent improvements on leased trust land, *regardless of ownership of the improvements*, are not subject to local taxation. Plaintiffs are the owners of permanent improvements that are situated on leased trust land. Plaintiffs easily satisfy this minimal threshold and have standing to pursue this matter.

CONCLUSION

Plaintiffs urge the Court reverse the Circuit Court's summary judgment in favor of defendants, and remand with

instructions that summary judgment be entered in favor of plaintiffs on their claim for declaratory relief.

Respectfully submitted this 6th day of December, 2019.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Reply Brief complies with SDCL 15-26A-66(4). This Brief is 13 pages long, exclusive of the Table of Contents, Table of Authorities, Certificate of Compliance and Certificate of Service, is typeset in Courier New (12 pt.) and contains 2,728 words. The word processing software used to prepare this Reply Brief is Word Perfect.

Dated this 6th day of December, 2019.

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CERTIFICATE OF SERVICE

The undersigned, one of the attorneys for the appellant, hereby certifies that on the 6th day of December, 2019, a true and correct copy of **APPELLANTS' REPLY BRIEF** was electronically transmitted to:

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and the original and two copies of **APPELLANTS' REPLY BRIEF** were mailed by first-class mail, postage prepaid, to Ms. Shirley Jameson-Fergel, Clerk of the Supreme Court, Supreme Court of South Dakota, State Capitol Building, 500 East Capitol Avenue, Pierre, SD 57501-5070. An electronic version of the Brief was also electronically transmitted in Word Perfect format to the Clerk of the Supreme Court.

Dated at Aberdeen, South Dakota, this 6th day of December, 2019.

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