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## A Precedent-Setting Ninth Circuit Victory for Tribes and Their Business Partners

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*In a landmark decision, the Ninth Circuit has held that state and local governments lack the power to tax permanent improvements built on non-reservation land that is held in trust by the federal government.*

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### Case Background

The Confederated Tribes of the Chehalis Reservation, a federally recognized Indian tribe in Washington State, partnered with Great Wolf Resorts, Inc. to build a combination resort, conference center, and waterpark known as the Great Wolf Lodge. As part of their joint venture agreement, the parties created CTGW, LLC, a Delaware limited liability company. The Tribe owned a 51 percent interest in CTGW.

The Tribe successfully petitioned the Department of the Interior to take into trust 43 acres of land owned by the Tribe, known as the “Grand Mound Property.” The Tribe then entered into a lease with CTGW that gave CTGW the right to use the Grand Mound Property for development and operation of the Great Wolf Lodge. The agreement provided that all buildings and improvements on the property would be owned initially by CTGW, but upon termination of the lease would become property of the Tribe.

After the Great Wolf Lodge was constructed, Thurston County began assessing property taxes on the Lodge. Under federal law, the buildings would not be taxable if owned directly by the Tribe; however, the County argued that the Lodge was not tax-exempt because it was owned by the CTGW joint venture, not by the Tribe itself.

Asserting the property taxes were barred by federal law, the Tribe and CTGW brought suit against the County, seeking declaratory and injunctive relief. The district court granted summary judgment to the County, holding that state and local governments are not necessarily prohibited from taxing permanent improvements on tribal land that are owned by non-Indians.

### The Ninth Circuit Opinion

In a precedent-setting opinion, *Confederated Tribes of the Chehalis Reservation v. Thurston County Board of Equalization*, 724 F.3d 1153 (9th Cir. 2013), the Ninth Circuit held that permanent improvements on tribal land are not subject to state and local taxes, regardless of ownership. The Secretary of the Interior has statutory authority to acquire land to be held in trust for the benefit of tribes and their members. The statute that grants the authority to take land into trust also explicitly states that such lands shall be exempt from State and local taxation. 25 U.S.C. § 465. Several U.S. Supreme Court cases have held that permanent improvements are so intimately connected with the land itself that they must be equally exempt from taxation.

The Ninth Circuit extended protection from state and local taxes to all permanent improvements on tribal land regardless of the ownership of those improvements. The court specifically stated that tax exemption cannot be made to turn on the particular form in which the Tribe chooses to conduct its business. Imposing taxes on some types of tribal business but not others is too much of an imposition on the Tribe's sovereignty.

The Ninth Circuit also acknowledged the new leasing regulations recently promulgated by the Department of the Interior. Those regulations provide that permanent improvements on leased land in Indian Country are not subject to any state or local tax, regardless of the ownership of those improvements. (The regulations also provide that activities conducted pursuant to a lease of Indian land are exempt from state and local taxes, and that leasehold or possessory interests are likewise exempt.) The Ninth Circuit did not reach the applicability of the regulations, or the deference owed them, given its larger holding that the taxes were preempted based on 25 U.S.C. § 465 and U.S. Supreme Court case law. Nevertheless, the regulations provide another basis to argue that state and local governments cannot tax permanent improvements on tribal land — and those regulations have nationwide applicability.

### What This Means for Tribes & Their Business Partners

The *Chehalis* decision is an affirmation of tribal sovereignty and tribes' ability to seek business development opportunities, structured without the interference of state and local taxation. By adopting a simple bright-line rule – permanent improvements on tribal land are exempt from state and local taxation regardless of how or by whom the improvements are owned – the Ninth Circuit has created certainty that will allow tribes and their partners to move forward on joint ventures without fear that state and local taxes will upset the economics of their deal. Further, it may give tribes and their business partners recourse to seek refunds of property taxes already paid that should never have been assessed.

The *Chehalis* decision was issued on July 30, 2013, and on September 23, 2013 the Ninth Circuit denied the County's petition for rehearing en banc. The deadline for seeking certiorari review by the U.S. Supreme Court has recently passed, and hence the decision is now final and binding for the entire Ninth Circuit.

On appeal in the Ninth Circuit, Pillsbury was lead counsel and argued the case for the Confederated Tribes of the Chehalis Reservation and its joint venture, CTGW.

If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the authors of this alert.

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