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5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON
7 AT TACOMA

8 CONFEDERATED TRIBES OF THE
9 CHEHALIS RESERVATION, et al.,

10 Plaintiffs,

11 v.

12 THURSTON COUNTY BOARD OF
13 EQUALIZATION, et al.,

14 Defendants.

CASE NO. C08-5562BHS

ORDER GRANTING IN PART
AND DENYING IN PART
PLAINTIFFS' MOTION TO
AMEND JUDGMENT

15 This matter comes before the Court on Plaintiffs' Amended Motion to Amend
16 Judgment. Dkt. 188. The Court has considered the pleadings filed in support of and in
17 opposition to the motion and the remainder of the file and hereby grants in part and denies
18 in part Plaintiffs' motion for the reasons stated herein.

19 **I. PROCEDURAL BACKGROUND**

20 On September 18, 2008, Plaintiffs Confederated Tribes of the Chehalis
21 Reservation ("Tribe") and CTGW, LLC ("CTGW") filed a complaint against Defendants
22 Thurston County Board of Equalization; equalization board members John Morrison,
23 Bruce Reeves and Joe Simmonds; Thurston County Assessor Patricia Costell; and
24 Thurston County. Dkt. 1. Plaintiffs alleged that Defendants are violating the U.S.
25 Constitution as well as federal common law by imposing a personalty tax on CTGW's
26 facility, the Great Wolf Lodge ("Lodge"). *Id.* ¶ 1.

1 On March 9, 2009, Plaintiffs filed a First Amended Complaint for Declaratory and
2 Injunctive Relief.¹ Dkt. 46. The Court, as it did in its April 2, 2010, order (Dkt. 181 at
3 2), summarizes Plaintiffs’ five causes of action asserted in their amended complaint as
4 follows: (1) Defendants’ attempt to levy and collect taxes is *per se* invalid, (2)
5 Defendants’ taxes are preempted under *White Mountain Apache Tribe v. Bracker*, 448
6 U.S. 136 (1980), (3) Defendants are interfering “with Plaintiff Tribe’s inherent sovereign
7 right of self-governance,” (4) Defendants are acting *ultra vires*, and (5) Defendant
8 Thurston County assessor’s action is contrary to the Washington Department of
9 Revenue’s act, order, or direction. Dkt. 46, ¶¶ 41-61.

10 On March 12, 2009, Plaintiffs filed a Motion for Summary Judgment Re:
11 Department of Revenue Decision. Dkt. 47. On March 30, 2009, Defendants responded
12 (Dkt. 52), and on April 3, 2009, Plaintiffs replied (Dkt. 54). On July 2, 2009, the Court
13 dismissed Plaintiffs’ fifth claim for relief and denied Plaintiffs’ motion for summary
14 judgment on their *Rickert* claim. Dkt. 61.

15 **A. The Parties’ Motions for Summary Judgment**

16 On December 31, 2009, Defendants filed a Motion for Summary Judgment (Dkt.
17 100) and Plaintiffs filed a Motion for Summary Judgment Re: *Bracker* Preemption (Dkt.
18 107). On January 4, 2010, Plaintiffs filed a revised version of their motion. Dkt. 113-2.
19 On January 19, 2010, both parties responded. Dkts. 125 and 129. On January 22, 2010,
20 both parties replied. Dkts. 133 and 134. On March 22, 2010, the Court held a hearing on
21 the cross-motions for summary judgment. Dkt. 178.

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25 ¹ On June 15, 2010, the parties filed a stipulated motion to substitute a party defendant
26 and amend the caption in this case to reflect the May 21, 2010, appointment of Shawn Myers
27 (“Myers”) as Thurston County Treasurer. Dkt. 194. Accordingly, Myers has been substituted
28 for former treasurer Robin Hunt as a defendant in this matter and the caption has been amended
to reflect this substitution. Dkt. 195.

1 **B. The Court’s April 2, 2010, Order**

2 On April 2, 2010, the Court issued an order granting Defendants’ motion for
3 summary judgment and denying Plaintiffs’ motion for summary judgment regarding
4 *Bracker* preemption. The Court’s order provided:

5 In this case, the parties have filed cross-motions for summary judgment and
6 the Court finds that the record is sufficient to “show that there is no genuine
7 issue as to any material fact.” Fed. R. Civ. P. 56(c)(2). In fact, the parties
8 agreed at oral argument that there are no questions of material fact and that
9 a trial is unnecessary. Therefore, the Court will enter judgment as a matter
10 of law based on the current record.

11 Dkt. 181 at 9. First, under the heading titled “Preliminary Matters,” the Court stated:

12 Plaintiffs’ first claim for relief is that Defendants’ attempt to levy and
13 collect taxes is “*per se* invalid as a matter of federal law.” Amended
14 Complaint, ¶ 44. The Supreme Court has stated that in “the special area of
15 state taxation of Indian tribes and tribal members, we have adopted a *per se*
16 rule.” *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 n.
17 17 (1987). The tax, however, is levied against CTGW, a Delaware
18 corporation, which is neither an Indian Tribe nor a tribal member. In
19 Plaintiffs’ response to Defendants’ motion, they state that they “hereby
20 withdraw their tribal entity *per se* claim.” Dkt. 125 at 2. Therefore, the
21 Court grants Defendants’ summary judgment on Plaintiffs’ first cause of
22 action.

23 *Id.* at 7. Next, the Court found that, on the issue of *Bracker* preemption, “Plaintiffs have
24 failed to meet their burden in showing that the federal and tribal interests overcome the
25 state interests” and therefore granted Defendants’ motion for summary judgment and
26 denied Plaintiffs’ motion for summary judgment on that issue. *Id.* at 13-14. Finally, the
27 Court found that “Plaintiffs have failed to submit any authority for the proposition that the
28 Assessor acted *ultra vires* . . . or clear, cogent and convincing evidence that the
Assessor’s valuation is incorrect” and therefore granted Defendants’ motion for summary
judgment on that issue. *Id.* at 15.

On April 21, 2010, Plaintiffs filed their Motion to Amend April 2, 2010, Judgment
in Civil Case (Dkt. 185) and on April 30, 2010, Plaintiffs filed a withdrawal of that
motion (Dkt. 189) and their Amended Motion to Amend April 2, 2010 Judgment in Civil
Case (Dkt. 188). On May 17, 2010, Defendants responded to Plaintiffs’ amended motion
(Dkt. 192) and on May 21, 2010, Plaintiffs replied (Dkt. 193).

1 **II. FACTUAL BACKGROUND**

2 The Court incorporates the section titled “Factual Background” in the order on the
3 parties’ motions for summary judgment. Dkt. 181 at 2-7.

4 **III. DISCUSSION**

5 **A. Counts I and III of Plaintiffs’ Amended Complaint**

6 Count I of Plaintiffs’ amended complaint states:

7 Federal law does not permit Thurston County to tax Indian tribes for
8 activities conducted on their reservations, absent express authorization from
9 Congress. No Congressional authorization exists for Thurston County to
10 tax the Plaintiffs’ Improvements.

11 Permanent improvements to tribal trust property are not subject to
12 state taxation.

13 Thurston County has levied its personalty tax on CTGW with respect
14 to the permanent Improvements to the Tribe’s Trust Property. The
15 incidence of this tax falls upon CTGW, a Tribal entity.

16 Thurston County’s personalty tax is federally preempted under the
17 circumstances described herein, and Defendants’ attempt to levy and collect
18 such tax is therefore *per se* invalid as a matter of federal law.

19 Dkt. 46 at 8 ¶¶ 41-44.

20 Count III of Plaintiffs’ amended complaint states:

21 Plaintiff Tribe has the inherent and federally-recognized sovereign
22 right to make its own laws and be ruled by them.

23 The Tribe does not have a property tax base. The Tribe obtains
24 revenues for essential government services through economic development
25 and taxation associated with economic development. Thurston County’s
26 taxation of the Improvements deprives the Plaintiff Tribe of opportunity to
27 raise revenue to support essential governmental services that are necessary
28 for it to exercise its inherent sovereign rights to make its own laws and be
ruled by them and to ensure the health, safety and welfare of its members.

Thurston County’s taxation of the improvements, and its attempts to
collect such taxes through distraint of the Improvements, therefore violate
federal law by interfering with Plaintiff Tribe’s inherent sovereign right of
self-governance.

Dkt. 46 at 9-10 ¶¶ 50-52.

1 **B. Parties' Contentions**

2 In their motion to amend, Plaintiffs move the Court to amend the Court's April 2,
3 2010, judgment to correct "the apparent inadvertent dismissal of (1) Plaintiffs'
4 independent third cause of action that Defendants are interfering with Plaintiff Tribe's
5 inherent sovereign right of self governance, and (2) Plaintiffs' first count concerning
6 property *per se* tax immunity (the '*Rickert* claim')." Dkt. 188 at 1-2 (citing Dkt. 182).
7 According to Plaintiffs, Defendants did not seek summary judgment dismissal of
8 Plaintiffs' separate cause of action for sovereignty interference and such claim was not
9 briefed in the parties' cross-motions for summary judgment. Dkt. 188 at 2. Further,
10 Plaintiffs argue that Defendants failed to seek summary judgment on Plaintiffs' property
11 *per se*, or *Rickert* claim that "[p]ermanent improvements to tribal trust property are not
12 subject to state taxation." *Id.* at 2 (quoting Dkt. 46 at 8 ¶ 42). Thus, Plaintiffs maintain
13 that "the Court's entry of Judgment and apparent dismissal of Plaintiffs' separate and
14 distinct sovereignty interference and *Rickert* claims, and its related closure of Plaintiffs'
15 case, on April 2, 2010 was mistaken and manifestly unjust." *Id.* at 2. The Plaintiffs then
16 asked the Court to amend its judgment to indicate that neither their property *per se* claim
17 to their first cause of action, nor their third cause of action, were dismissed pursuant to the
18 Court's April 2, 2010 order and to reinstate those claims as the case is not closed. *Id.* at
19 3. In addition, Plaintiffs ask the Court to amend its judgment to reflect the fact that its
20 dismissal of Plaintiffs' other claims involve controlling questions of law as to which there
21 are substantial grounds for difference of opinion and that an immediate appeal from the
22 dismissal of such claims may materially advance the ultimate termination of the litigation
23 pursuant to 28 U.S.C. § 1292(b). *Id.*

24 In their response, Defendants maintain that they moved for summary judgment on
25 all of Plaintiffs' claims and that, by granting their motion, the Court properly dismissed
26 Counts I and III of Plaintiffs' amended complaint. Dkt. 192 at 1. In support of their
27 position, Defendants assert that Count III of Plaintiffs' amended complaint, that the
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1 taxation at issue “violate[s] federal law by interfering with Plaintiff Tribe’s inherent
2 sovereign right of self-governance,” is encompassed in the Court’s analysis of Plaintiffs’
3 *Bracker* claim. *Id.* at 3. Further, Defendants argue that Plaintiffs’ amended complaint
4 does not include a separate cause of action for a *Rickert* claim, and regardless, that
5 Plaintiffs’ legal theory based on *Rickert* was rejected by the Court in its July 2, 2010,
6 order. *Id.* at 7 (citing Dkt. 61 at 14).

7 **C. Ruling on Plaintiffs’ Motion**

8 Rule 59 of the Federal Rules of Civil Procedure allows a party to file a motion to
9 amend a judgment within 28 days from the entry of the judgment. Fed. R. Civ. P. 59(e).
10 The Ninth Circuit has held that “[a] Rule 59(e) motion is appropriate if the district court
11 . . . committed clear error or the initial decision was manifestly unjust.” *Circuit City*
12 *Stores, Inc. v. Mantor*, 417 F.3d 1060, 1064 (9th Cir. 2005) (internal quotation marks
13 omitted). Here, the Plaintiffs filed a motion to amend the Court’s April 2, 2010, judgment
14 within 28 days of the entry of the judgment. Plaintiffs allege that the Court, in closing the
15 case following its order of summary judgment, committed clear error and that such
16 decision was manifestly unjust. Dkt. 188 at 7. Thus, Plaintiffs’ motion is properly filed
17 pursuant to Rule 59(e).

18 Having reviewed the parties’ motions for summary judgment, the instant motion
19 and the remaining file herein, the Court concludes that summary judgment has been
20 granted on all of Plaintiffs’ claims and that the case was properly closed following the
21 Court’s April 2, 2010, order. However, in an abundance of caution, the Court concludes
22 that Plaintiffs’ motion to amend the judgment is granted in part to the extent that the
23 Court will clarify its order dismissing all of Plaintiffs’ claims. Further, because the Court
24 has concluded that all claims in this action are dismissed, Plaintiffs’ request pursuant to §
25 1292(b) regarding an immediate appeal of the Court’s orders on summary judgment is
26 denied as moot.

1 **IV. AMENDED JUDGMENT**

2 **A. Plaintiffs' Rickert Claim**

3 In the Court's July 2, 2009, order on Plaintiffs' motion for partial summary
4 judgment, the Court concluded that Plaintiffs' legal theory based on *Rickert* was not
5 applicable to the taxation issue in this case. Dkt. 61 at 13. A summary of *U.S. v. Rickert*,
6 188 U.S. 432 (1903), is contained in the Court's July 2, 2009, order. *Id.* at 12-13.

7 Following the summary of the *Rickert* case, the Court's order provides:

8 In this case, the Court is not persuaded that the rule of *Rickert*
9 applies to bar the taxation in question because this case involves a
10 significantly different factual scenario. Although the site in Grand Mound
11 is held in trust by the United States for the benefit of the Tribe, the Lessee,
12 CTGW, owns the improvements in fee during the terms of the Lease.
13 Moreover, it cannot be said that the improvements are "occupied" by the
14 Tribe as CTGW currently uses the improvements to operate a hotel,
15 conference center, and indoor water park. Therefore, the *Rickert* rule that
16 was implemented to protect a homestead and associated livestock is, in this
17 Court's opinion, **inapplicable to privately owned business ventures even
18 though the improvements are on land held in trust by the United
19 States.**

20 *Id.* at 13-14 (emphasis added). The Court was clear in its order that it was not only
21 denying Plaintiffs' motion for summary judgment on its *Rickert* claim, but was
22 concluding, as a matter of law, that *Rickert* did not apply in this case. Although Plaintiffs
23 argue in their reply to their motion to amend that they developed new evidence
24 concerning the permanence of the Lodge improvements that support their *per se* claim
25 under *Rickert* (Dkt. 193 at 5), Plaintiffs do not assert that CTGW ceases to be a "privately
26 owned business venture" (Dkt. 61 at 14). Thus, in accordance with the Court's July 2,
27 2010, order, the Court reiterates that *Rickert* is inapplicable to Plaintiffs' *per se* property
28 claim. Therefore, the Court's April 2, 2010 order granting Defendants' motion for
summary judgment on Plaintiff's *per se* property claim, was sufficient to dismiss any
remaining claims under Count I of Plaintiffs' amended complaint (Dkt. 46 at 8 ¶¶ 41-44).

1 **B. Plaintiffs’ Sovereignty Interference Claim**

2 On March 22, 2010, the Court held oral arguments on Plaintiffs’ and Defendants’
3 cross-motions for summary judgment. Dkt. 178. Although the parties had some
4 disagreement as to what facts were still in dispute, counsel for both parties agreed that a
5 trial was unnecessary and that the case could be decided by the Court on summary
6 judgment. When the Court scheduled the oral arguments, the question posed to the
7 parties was whether the Ninth Circuit, in *Yavapai-Prescott Indian Tribe v. Scott*, 117 F.3d
8 1107, 1109 (9th Cir. 1997), *cert. denied*, 522 U.S.1076 (1998), laid out the applicable
9 framework for analyzing the instant case based on the significant factual similarities. As
10 the Court stated in its April 2, 2010, order, while Plaintiffs attempted to distinguish the
11 instant case from *Yavapai* on multiple grounds during oral arguments, the Court
12 concluded that *Yavapai* “is the most factually similar precedent that frames the analysis of
13 this case.” Dkt. 181 at 10. The Court then analyzed the facts of the instant case, in
14 comparison with those present in *Yavapai*, and found that Plaintiffs failed to meet their
15 burden in showing that federal and tribal interests overcome state interests. *Id.* at 13. In
16 dismissing Plaintiffs’ argument regarding Defendants’ provision of services to CTGW,
17 the Court quoted the Ninth Circuit in its dismissal of a similar argument in *Gila River*
18 *Indian Cmty. v. Waddell*, 91 F.3d 1232 (9th Cir. 1996) (“*Gila II*”). *Id.* In *Gila II*, the
19 Ninth Circuit held that “[t]he State’s interests are sufficient to justify the imposition of its
20 tax on the entertainment events. Even against a “backdrop of Indian sovereignty,” the
21 balance of federal, tribal, and state interests present in this matter weighs against
22 preemption of the state tax.” Dkt. 181 at 13 (quoting *Gila II*, 91 F.3d at 1239). Indeed,
23 the Court in this case did not fail to address Plaintiffs’ claim that Defendants interfered
24 with their sovereign right of self-government. Rather, the Court considered this principle
25 of tribal self-government as a part of their analysis of Plaintiffs’ claim under *Bracker*.
26 This is not to say that the right to self-government is not a separate barrier to state
27 taxation, independent of preemption. Rather, the Court found it proper to consider the
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1 claim under its *Bracker* analysis just as the Supreme Court did in that case. *Bracker*, 448
2 U.S. at 142.

3 In *Bracker*, the Supreme Court “recognized that the federal and tribal interests
4 arise from the broad power of Congress to regulate tribal affairs under the Indian
5 Commerce Clause, Art. I, § 8, cl.3, and from the semi-autonomous status of Indian tribes.
6 *Ramah Navajo School Bd., Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832, 837
7 (1982) (citing *Bracker*, 448 U.S. at 142). “These interests tend to erect two ‘independent
8 but related’ barriers to the exercise of state authority over commercial activity on an
9 Indian reservation: state authority may be pre-empted by federal law, or it may interfere
10 with the tribe’s ability to exercise its sovereign functions.” *Id.* (quoting *Bracker*, 448
11 U.S. at 142).

12 In its April 2, 2010, order the Court concluded that the tax imposed by Defendants
13 was not pre-empted by federal law and such tax did not interfere with Plaintiff Tribe’s
14 ability to exercise its sovereign functions. While the Court did not separate the issue
15 under its own heading, the Court clearly addressed Plaintiffs’ sovereignty claim in its
16 analysis of the parties’ respective governmental interests. Dkt. 181 at 9-14. The Court
17 stated that:

18 Plaintiffs also argue that the Tribe’s paramount interest at stake is its
19 strong interest in economic self-sufficiency and its desire to “steadily
20 decrease its reliance upon federal funding to provide essential Tribal
21 governmental services and programs.” Dkt. 113-2 at 22, ¶ 111. While
22 there is scant evidence that the tax would substantially impair this interest,
23 the court in *Crow Tribe of Indians v. Montana*, 650 F.2d 1104 (9th
24 Cir.1981), said, “It is clear that a state tax is not invalid merely because it
erodes a tribe’s revenues, even when the tax substantially impairs the tribal
government’s ability to sustain itself and its programs.” *Id.* at 1116.
Moreover, here, as in *Gila River Indian Cmty. v. Waddell*, 91 F.3d 1232
(9th Cir. 1996), there is “no evidence in the record to indicate that the
profits from these facilities are the Tribe’s sole source of income.” *Id.* at
1238.

25 *Id.* at 12. The Ninth Circuit, in *Gila River Indian Cmty. v. Waddell*, 967 F.3d 1404
26 (9th Cir 1992) (“*Gila I*”), stated that while the doctrine of tribal self-government
27 constitutes a separate barrier to certain state taxation, it “bears some resemblance to that
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1 of federal preemption.” *Id.* (citing *Bracker*, 448 U.S. at 142). The doctrine prohibits
2 “state action which infringes on the right of reservation Indians to make their own laws
3 and be ruled by them.” *Id.* (internal quotation marks omitted). Thus, “application of the
4 doctrine requires weighing the state’s interest in raising revenue to fund state-provided
5 services, both on and off the reservation, against the Tribe’s interest in levying its own
6 taxes in order to provide tribal services on the reservation.” *Id.* (internal citations and
7 quotation marks omitted). The Court, in its April 2, 2010, order analyzed these
8 competing interests and found that Defendants’ interests outweighed those of the
9 Plaintiffs. Dkt. 181 at 9-14.

10 Moreover, any failure on the Court’s part to analyze Plaintiffs’ independent
11 sovereignty claim in more depth stems from a lack of evidence presented by Plaintiffs.
12 Defendants clearly moved for summary judgment on all of Plaintiffs claims, including the
13 sovereignty claim. *See* Dkt. 129 at 2 ¶¶ 1-9. Plaintiffs were well aware that Defendants
14 intended the Court to decide this case on summary judgment. Dkt. 100 at 1; Dkt. 133 at 2
15 & 12. Indeed, counsel for Plaintiffs stated at oral argument that there was no need for a
16 trial and that the case could be decided on summary judgment. If Plaintiffs intended to
17 submit further evidence in support of their sovereignty claim, the proper place to do so
18 was in response to Defendants’ motion for summary judgment. As the Court cited in its
19 orders on summary judgment:

20 The moving party is entitled to judgment as a matter of law when the
21 nonmoving party fails to make a sufficient showing on an essential element
22 of a claim in the case on which the nonmoving party has the burden of
23 proof.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). There is no
24 genuine issue of fact for trial where the record, taken as a whole, could not
lead a rational trier of fact to find for the nonmoving party. *Matsushita*
Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986)
(nonmoving party must present specific, significant probative evidence, not
simply “some metaphysical doubt”). *See also* Fed. R. Civ. P. 56(e).

25 Dkts. 61 at 11 and 181 at 8. In response to Defendants’ motion for summary judgment,
26 Plaintiffs failed to present evidence in support of its sovereignty claim sufficient to raise a
27 genuine issue of material fact.

1 Therefore, the Court's April 2, 2010, order granting Defendants' motion for
2 summary judgment was sufficient to dismiss any remaining claims under Count III of
3 Plaintiffs' amended complaint (Dkt. 46 at ¶¶ 50-52).

4 **V. ORDER**

5 Therefore, it is hereby

6 **ORDERED** that Plaintiffs' Amended Motion to Amend April 2, 2010 Judgment in
7 Civil Case (Dkt. 188) is **GRANTED in part** and **DENIED in part** in accordance with
8 the Court's discussion above and Plaintiffs' request pursuant to 28 U.S.C. § 1292(b) is
9 **DENIED** as moot.

10 DATED this 23rd day of June, 2010.

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13 BENJAMIN H. SETTLE
14 United States District Judge