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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

CONFEDERATED TRIBES OF THE
CHEHALIS RESERVATION, et al.,

Plaintiffs,

v.

THURSTON COUNTY BOARD OF
EQUALIZATION, et al.,

Defendants.

CASE NO. C08-5562BHS

ORDER TO SHOW CAUSE

This matter comes before the Court on Plaintiffs' Motion for Summary Judgment (Dkt. 54). The Court has considered the pleadings filed in support of and in opposition to the motion and the remainder of the file and hereby orders the parties to show cause as stated herein.

I. PROCEDURAL BACKGROUND

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

1 On September 18, 2008, Plaintiffs also filed a Motion for Preliminary Injunction.
2 Dkt. 2. On September 29, 2008, Defendant Thurston County Assessor responded and
3 argued that the Court should either abstain from asserting its jurisdiction or was divested
4 of jurisdiction pursuant to the Tax Injunction Act, 28 U.S.C. § 1362. Dkt. 13 at 2-3. On
5 October 16, 2008, the Court held a hearing on the preliminary injunction motion and
6 heard oral arguments from counsel. Dkt. 21.

7 On October 21, 2008, the Court asserted jurisdiction over this action, declined to
8 abstain from this action, and found that “Plaintiffs, as joined” met a 28 U.S.C. § 1362
9 exception to the Tax Injunction Act. Dkt. 24 at 4-6. With regard to abstention, the Court
10 stated that the state court action did not “provide the relief that Plaintiffs are seeking in
11 this action” and that “although functionally equivalent, a state tax exemption is not
12 federal immunity from state taxation.” *Id.* at 5. With regard to the Tax Injunction Act,
13 the Court found that the Tribe’s involvement in this action was a “significant factor” in
14 favor of finding that Plaintiffs met “the [28 U.S.C.] § 1362 exception to the Tax
15 Injunction Act.” *Id.*

16 On March 9, 2006, Plaintiffs filed a First Amended Complaint for Declaratory and
17 Injunctive Relief. Dkt. 46. Plaintiffs allege a new claim that reads as follows:

18 [The State of Washington Department of Revenue (“Revenue”)] has
19 control over Defendants’ administration of assessment and tax laws
pursuant to RCW 84.08.010, *et seq.*

20 Defendants must follow any act, order or direction issued by
21 Revenue as to any matter relating to the administration of the assessment
and taxation laws of the State of Washington **pursuant to RCW 84.08.010,**
et seq.

22 Defendant County Assessor Costello sought Revenue’s opinion
regarding the preemption of the instant personalty tax on the Improvements.

23 Revenue issued an opinion that, based on the balance of the federal,
24 state, and Tribal interests at issue, federal law preempted the instant
personalty tax on the Improvements.

25 By assessing and attempting to collect the instant personalty tax
26 through distraint of the Improvements, Defendants are in direct conflict
with an act, order or direction issued by Revenue.

27 Because Defendants must follow, and have no authority to act in
28 conflict with, an act, order or direction of Revenue, their actions regarding
the assessment, taxation and distraint of the Improvements **violate state law**
and federal preemption law.

1 *Id.* ¶¶ 56-61 (emphasis added).

2 On March 12, 2009, Plaintiffs filed a Motion for Summary Judgment Re:
3 Department of Revenue Decision. Dkt. 47. Plaintiffs argue that:

4 Summary judgment is appropriate because there are no genuine issues of
5 material fact regarding Defendants’ failure to comply with an August 2008
6 decision issued by the Washington State Department of Revenue . . .
7 pursuant to the requirements of state and federal law.

8 *Id.* at 2. On March 30, 2009, Defendants responded. Dkt. 52. On April 3, 2009,
9 Plaintiffs replied. Dkt. 54.

10 II. FACTUAL BACKGROUND

11 A. The Lodge

12 The Tribe occupies a reservation at the confluence of the Black and Chehalis
13 Rivers in Southwest Washington (“Reservation”). *Confederated Tribes of the Chehalis*
14 *Indian Reservation v. State of Washington*, 96 F.3d 334, 338 (9th Cir. 1996). The
15 Reservation, which was created by Secretarial Order in 1864, was set aside for “the use
16 and occupation of the Chehalis Indians.” 1 Kappler, *Indian Affairs, Laws and Treaties*
17 901-04 (2d ed. 1904). The Tribe has approximately 800 members, which include persons
18 descended from the Upper Chehalis, the Lower Chehalis, Cowlitz, Satsop, Qualioqua and
19 other aboriginal tribes of Southwest Washington. Dkt. 3, Declaration of Chairman
20 Burnett, ¶ 5 (“Burnett Decl.”). The Reservation has a land area of approximately 4,200
21 acres (about 7.022 square miles) in southeastern Grays Harbor and southwestern Thurston
22 Counties. *Id.*

23 Approximately five years ago, the Tribe purchased 43 acres near the I-5 freeway,
24 Exit 88, Highway 12, in Grand Mound, WA. Burnett Decl, ¶ 7. That property was
25 subsequently converted to non-contiguous federal trust property and is currently held in
26 trust by the United States for the benefit of the Tribe. *Id.*; *see also id.*, Exh. B at 2.

27 In 2005, the Tribe and Great Wolf Resorts Inc., a non-Indian corporation with
28 water park expertise, formed CTGW, a limited liability company, under Delaware law,
for the purpose of building and owning Great Wolf Lodge Grand Mound (“Lodge”). *Id.* ¶

1 8. The Lodge is located on 39 of the 43 acres that are held in trust for the Tribe and
2 consists of a hotel, conference center, indoor water park and other improvements
3 (“Improvements”). *Id.* ¶ 9. The Tribe leases the property to CTGW. *Id.*, Exh A., U.S.
4 Dept. of the Interior Business Development Lease (recorded by the Bureau of Indian
5 Affairs on July 2, 2007) (“Lease”). Under the CTGW operating agreement, the Tribe has
6 a majority “proportionate share” of CTGW’s profits of 51%, and Great Wolf receives the
7 remaining 49% of CTGW’s profits. Burnett Decl. ¶ 11. Plaintiffs claim that “[u]nder this
8 unique structure, the Tribe is both the owner-lessor of the property and the majority-
9 interest owner of the lessee.” Amended Complaint, ¶ 22.

10 **B. State Taxation**

11 In Washington, “personal property,” for purposes of taxation, includes “all
12 improvements upon lands the fee of which is still vested in the United States.” RCW
13 84.04.080. The Washington Administrative Code further defines personal property as
14 including “[a]ll privately owned improvements, including buildings and the like, upon
15 publicly owned lands which have not become part of the realty.” WAC 458-12-005. A
16 county may enforce such taxes by placing liens on the assessed improvements and then
17 selling them at a tax sale. RCW 84.60.020.

18 The State of Washington Department of Revenue exercises general supervision
19 over state taxation and may formulate rules and processes for the assessment of taxes.
20 The Washington statute that grants Revenue these powers reads, in part, as follows:

21 The department of revenue shall:

22 (1) Exercise general supervision and control over the administration
23 of the assessment and tax laws of the state, over county assessors, and
24 county boards of equalization, and over boards of county commissioners,
25 county treasurers and county auditors and all other county officers, in the
26 performance of their duties relating to taxation, and perform any act or give
27 any order or direction to any county board of equalization or to any county
28 assessor or to any other county officer as to the valuation of any property,
or class or classes of property in any county, township, city or town, or as to
any other matter relating to the administration of the assessment and
taxation laws of the state, which, in the department’s judgment may seem
just and necessary, to the end that all taxable property in this state shall be
listed upon the assessment rolls and valued and assessed according to the

1 provisions of law, and equalized between persons, firms, companies and
2 corporations, and between the different counties of this state, and between
3 the different taxing units and townships, so that equality of taxation and
4 uniformity of administration shall be secured and all taxes shall be collected
5 according to the provisions of law.

6 (2) Formulate such rules and processes for the assessment of both
7 real and personal property for purposes of taxation as are best calculated to
8 secure uniform assessment of property of like kind and value in the various
9 taxing units of the state, and relative uniformity between properties of
10 different kinds and values in the same taxing unit. The department of
11 revenue shall furnish to each county assessor a copy of the rules and
12 processes so formulated. The department of revenue may, from time to
13 time, make such changes in the rules and processes so formulated as it
14 deems advisable to accomplish the purpose thereof, and it shall inform all
15 county assessors of such changes.

16 RCW 84.08.010.

17 In support of its motion for summary judgment, Plaintiffs have submitted the
18 declaration of Revenue's Deputy Director, Leslie Cushman. Dkt. 48 ("Cushman Decl.")).
19 Ms. Cushman declares, in part, as follows:

20 In February 2007, Revenue issued a letter determination regarding
21 the applicability of Washington state excise taxes to various elements of
22 CTGW LLC, the joint venture that owns the personal property at issue in
23 [this] lawsuit.

24 In making its determination under the federal balancing test,
25 Revenue analyzed state, tribal and federal interests. Based on a review of
26 the tribal, state, and federal interests at issue, Revenue determined that all
27 Washington state sales and use taxes were exempted under the doctrine of
28 federal preemption.

In early 2008, the Thurston County Assessor's office requested that
Revenue render an opinion regarding whether the improvements located at
Great Wolf Lodge in Grand Mound, Washington were subject to property
taxation.

On August 28, 2008, Revenue issued an opinion regarding the
preemption of the personal property tax under the federal balancing test.

In making its determination, Revenue analyzed state, tribal and
federal interests. The opinion concluded that "it appears that the balance of
the federal, state, and tribal interests tilt in favor of federal preemption"
with respect to the property owned by CTGW, LLC that is in question in
this litigation.

29 *Id.* ¶¶ 5-9.

30 Plaintiffs allege that "[i]n 2007, the Thurston County Assessor determined the
31 value of the Improvements for taxation in 2008 as partially completed." Amended
32 Complaint, ¶ 34. Plaintiffs also allege that the assessor "then reduced that value by the
33 Tribe's 51% ownership interest in CTGW, to a 2007 taxable value of \$10,115,462, and
34

1 then assessed CTGW a personal property tax based on the 49% interest of Great Wolf in
2 CTGW.” *Id.* On the other hand, Plaintiffs allege that, for the 2008 tax year, the Assessor
3 “has assessed the Improvements at full completion at their full value” and “increased the
4 value of the Improvements for taxation in 2009 to 100%, irrespective of the Tribe’s 51%
5 ownership in CTGW.” *Id.* ¶ 35.

6 **III. DISCUSSION**

7 Plaintiffs have alleged a new claim in their complaint that Defendants’ failure to
8 follow Revenue’s opinion is a violation of both state and federal law. *See supra.* The
9 original complaint, however, involved claims based only on issues of federal law. *See*
10 Dkt. 1. Thus, before reaching the merits of Plaintiffs’ summary judgment motion, the
11 Court orders Plaintiffs to show cause, if any they have, why this Court should exert
12 jurisdiction over this new claim. Although Plaintiffs allege that Defendants’ failure to
13 follow Revenue’s decision is also a violation of “federal preemption law,” there has been
14 no showing that a county assessor violates federal preemption law solely by failing to
15 follow a state agency’s opinion as to the imposition of a tax. In other words, if Revenue
16 had opined that the tax was not preempted and the assessor refused to impose the tax, it is
17 questionable whether the assessor’s action in conflict with Revenue’s opinion would raise
18 a federal question invoking this Court’s jurisdiction. Therefore, the new claim seems to
19 be purely a matter of state law regarding the authority of the state agency, Revenue, over
20 the Thurston County Assessor.

21 Plaintiffs bear the burden to show why the Court should assert jurisdiction over
22 this state law claim and why the Court (1) should not abstain from this matter, (2) is not
23 divested from jurisdiction over this matter, or (3) should not decline to exercise
24 supplemental jurisdiction over the new claim pursuant to 28 U.S.C. § 1367(c)(1). For the
25 purposes of clarity, the Court will briefly explain its concerns.

1 **A. Abstention**

2 Under the *Younger* abstention doctrine, a federal court should abstain from hearing
3 a case if the following three criteria are met: (1) state judicial proceedings are ongoing;
4 (2) the state proceedings implicate an important state interest; and (3) the state
5 proceedings offer an adequate opportunity to litigate federal constitutional issues. *Ft.*
6 *Belknap Indian Cmty. v. Mazurek*, 43 F.3d 428, 431 (9th Cir. 1994), *cert. denied*, 516
7 U.S. 806 (1995). Abstention, however, is the rare exception to a district court’s “virtually
8 unflagging obligation” to exercise jurisdiction. *Id.* at 431.

9 Defendants argue that Plaintiff CTGW has two available state remedies: (1) it may
10 request a tax exemption under RCW 84.48.010; and (2) it may make a “payment under
11 protest” and then bring a state court action to recover the allegedly unlawful tax pursuant
12 to RCW 8.68.020. Dkt. 13 at 2-3. In the denial of Plaintiffs’ motion for a preliminary
13 injunction, the Court dismissed these arguments by stating that “Defendants’ argument is
14 unavailing because the current state proceeding neither involves all of the Plaintiffs in this
15 action nor **provides the relief that Plaintiffs are seeking in this action.**” Dkt. 24 at 5
16 (emphasis added). However, if there is an important state interest and an adequate
17 remedy available under state law, namely that the Washington Supreme Court has held
18 that Revenue’s opinion is binding on Defendants, then the Court should reevaluate its
19 determination whether abstention is appropriate.

20 **B. Tax Injunction Act**

21 “The district courts shall not enjoin, suspend or restrain the assessment, levy or
22 collection of any tax under State law where a plain, speedy and efficient remedy may be
23 had in the courts of such State.” 28 U.S.C. § 1341 (“Tax Injunction Act”). Plaintiffs
24 may show cause, if any they have, why bringing their new state law claim in state court
25 would not result in a plain, speedy and efficient remedy.

1 **C. Supplemental Jurisdiction**

2 “The district courts may decline to exercise supplemental jurisdiction over a claim
3 under subsection (a) if . . . the claim raises a novel or complex issue of State law” 28
4 U.S.C. § 1367(c)(1). Plaintiffs may show cause, if any they have, why the Court should
5 not decline to exercise supplemental jurisdiction over their new state law claim.

6 **IV. ORDER**

7 Therefore, it is hereby

8 **ORDERED** that Plaintiff may **SHOW CAUSE**, if any they have, as stated herein
9 no later than May 15, 2009 in a brief not to exceed 15 pages. Defendants may respond no
10 later than May 22, 2009, in a brief not to exceed 15 pages. Plaintiffs may reply no later
11 than May 29, 2009, in a brief not to exceed 8 pages.

12 Plaintiffs’ Motion for Summary Judgment (Dkt. 47) is renoted for consideration on
13 the Court’s June 18, 2009 calendar.

14 DATED this 29th day of April, 2009.

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BENJAMIN H. SETTLE
United States District Judge