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Indian Nations update

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Selected Court Decisions

In *Rosebud Sioux Tribe v. United States*, 2021 WL 3744427 (8th Cir. 2021), the United States had entered **Treaty of Fort Laramie of 1868** with the Sioux (Treaty). Under the Treaty, the United States acquired vast tracts of land and, in exchange, made a number of promises, including, at Article XIII, to "furnish annually to the Indians the physician, teachers, carpenter, miller, engineer, farmer, and blacksmiths, as herein contemplated, and that such appropriations shall be made from time to time ... as will be sufficient to employ such persons" and, at Article IV, to provide a residence for the physician. In Article IX, the United States reserved the right to withdraw the physician after 10 years, but only if the United States paid $10,000 annually to the tribes. The federal government subsequently provided health care under the Snyder Act and, later, under the Indian Health Care Improvement Act (IHCIA). The Indian Health Services (IHS) operated the Rosebud Hospital on the Reservation of the Rosebud Sioux Tribe (Tribe), one of the 1868 signatory tribes, under the IHCIA. In 2015, the Centers for Medicare & Medicaid Services (CMS) found considerable deficiencies in the emergency care provided by the Rosebud Hospital and determined that the identified deficiencies resulted in "an immediate and serious threat to the health and safety of patients." Later the same year, IHS placed the Rosebud Hospital Emergency Department on "divert" status, which meant emergency patients were diverted approximately 50 miles away. In June 2016, surgical and obstetrics services were diverted as a result of staffing shortages. The Emergency Department reopened on July 15, 2016. The Tribe sued the United States, the Department of Health and Human Services (HHS) and its Secretary, IHS and its Acting Director, and the Acting Director of the Great Plains Area of the IHS (the Government), seeking declaratory and injunctive relief. The district court granted the Government's motion to dismiss several statutory and constitutional claims but allowed the suit to proceed on the Tribe's claim that the Government has a "specific, special trust duty, pursuant to the Snyder Act, the IHCIA, [the Treaty], and federal common law, to provide health care services to the Tribe and its members and to ensure that health care services provided ... do not fall below the highest possible standards of professional care." On cross-motions, the district court denied the Government's motion to dismiss, holding that the Government owed the Tribe a judicially enforceable duty "to provide competent physician-led health care to the Tribe's members." The Eighth Circuit affirmed: "Given the special trust relationship between the Government and the Tribe, the history of reinforced promises, and the unacceptable state of health care provided at Rosebud Hospital, the district court's order is a treaty-based declaration to define (and assign) the duty owed to the Tribe in light of IHS's stated purpose to raise the level of Indian health care. The 'physician-led' portion of the duty is based on the Government's promise—originating from the Treaty—to furnish a physician and to appropriate funds to employ the physician. The 'competency' portion of the duty comes from the recognition that some 'adjustment and accommodation' must occur to make a tribe whole when treaties are read

decades later. … The Treaty created a duty, reinforced by the Snyder Act and the IHCIA, for the Government to provide competent, physician-led health care to the Tribe and its members."

In *Cook Inlet Tribal Council, Inc. v. Dotomain*, 2021 WL 3730016 (D.C. Cir. 2021), Cook Inlet Tribal Council ("Council"), a consortium of eight Alaska tribes, operated an alcohol recovery program under a contract with Indian Health Service under the **Indian Self-Determination Act**, which requires the government to reimburse contracting tribes for "direct" costs, i.e., at least the amount the Indian Health Service would have spent on the program if it directly provided the health care, as well as "contract support" costs, defined to mean the "amount for the reasonable costs for activities which must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management, but which — … (A) normally are not carried on by the respective Secretary in his direct operation of the program. ..." 25 U.S.C. § 5325(a)(2)(A). In 2014, the Council proposed amending the contract to add more than $400,000 in annual facility costs as contract support costs, although IHS had previously agreed to include a lower amount, including rent and a partial salary for a facilities coordinator, as direct costs. The Council sued Indian Health Service after it denied the Council's proposal. The D.C. Circuit granted summary judgment to the government, holding that the facilities costs in question did not qualify as contract support costs under 25 U.S.C. § 5325(a)(2)(A): "[I]t is self-evident that the agency normally pays for space and staff when it runs a health care center, especially one with in-patient services. Whether or not a health center is government-run, patients need a place to be treated. And they need medical and support staff to treat them and maintain the space. The staff, in turn, needs a place to work. And at the risk of belaboring the obvious, all of the above — staff, workspace, and patient rooms — costs money whether or not the program is government-run."

In *Williams v. Hansen*, 5 F.4th 1129 (5th Cir. 2021), Williams, a Colorado prison inmate, sued prison officials under 42 U.S.C. § 1983 after they banned the use of tobacco for religious services for 30 days and banned any Native American religious services for at least nine days. The District Court denied the defendants' motion to dismiss on qualified immunity grounds and the Fifth Circuit affirmed, holding that (1) it was clearly established that an indefinite denial of religious services would violate right of prisoner to freely exercise his religious beliefs, as required to overcome assertion of qualified immunity, (2) the plaintiff's claim related to ban on religious services was not subject to dismissal on qualified immunity grounds, and (3) the **ban on tobacco use violated Williams' clearly established right to exercise his religious beliefs**, as required to overcome assertion of qualified immunity.

In *Snoqualmie Indian Tribe v. Washington*, 2021 WL 3439659 (4th Cir. 2021), the Ninth Circuit in 1975 had affirmed a District Court decision finding that 14 Washington tribes had retained off-reservation fishing rights under the **1855 Treaty of Point Elliott** (*Washington I*). In 1981, the Ninth Circuit held in that Snoqualmie and Samish tribes, which had not been recognized by the federal government at the time, could not exercise off-reservation fishing rights under the Treaty (*Washington II*). Declaring that the "single necessary and sufficient condition for the exercise of treaty rights by a group of Indians descended from a treaty signatory" was that "the group must have maintained an organized tribal structure," the Court concluded that the district court's factual "finding of insufficient political and cultural cohesion" with respect to the Snoqualmie and Samish tribes was not "clearly erroneous." In 1995, In *Greene v. Babbitt* (*Greene II*), the Ninth Circuit upheld the district court's denial of a motion by the Tulalip tribe, asserting an interest in preventing the Samish from acquiring treaty fishing rights, to intervene in litigation relating to the Samish Tribe's challenge to the Interior Department's denial of its application for recognition because, the Court explained, federal recognition was an issue wholly separate from treaty fishing rights and achievement of the former would not negate *Washington II*. After the Samish and Snoqualmie tribes achieved federal recognition, in 1996 and 1997, respectively, they sought to reopen the judgment in *Washington II*. In 2005, the Ninth Circuit held, in *Washington III*, that federal recognition was a "sufficient condition for the exercise of treaty rights." In an *en banc* ruling five years later, in *Washington IV*, however, the Court changed its mind and held that the rule of *Greene II* controlled: "[T]reaty adjudications have no estoppel effect on recognition proceedings, and recognition has no preclusive effect on treaty rights litigation." The Court explicitly overruled *Washington III* and affirmed the district court's denial of the Samish Nation's motion to reopen *Washington II*. Conceding that they were bound by *Washington II*'s determination that they had no off-reservation fishing rights, the Samish and Snoqualmie initiated proceedings asserting that they nonetheless retained off-reservation hunting and gathering rights under the 1855 Treaty. The district court dismissed, holding that the same factors that mandated denial of the tribes' fishing rights in *Washington II* applied equally to

the alleged hunting and gathering rights and that the tribes were bound by that decision. The Ninth Circuit affirmed: "The issue the Snoqualmie now seeks to litigate is identical to that actually litigated and decided in *Washington II*. In its complaint, the Snoqualmie seeks a declaration that it 'is a signatory to the Treaty of Point Elliott,' 'has maintained a continuous organized structure since,' and is thus 'entitled to exercise rights'—including the hunting and gathering rights at issue here—under the Treaty. In other words, the Snoqualmie seeks to litigate its treaty-tribe status under the Treaty, … Absent treaty-tribe status, the Snoqualmie has no claim to any rights under the Treaty. … In *Washington II*, the district court—and this court on appeal—considered and decided this exact issue."

In *Becker v. Ute Indian Tribe*, 2021 WL 3361545 (10th Cir. 2021), the Ute Tribe had hired Becker to run its mineral development department under a contract providing for Becker to earn 2% of revenues earned by the Tribe. The Agreement included a waiver of sovereign immunity and agreement to federal court jurisdiction for dispute resolution or, in the absence of federal jurisdiction, jurisdiction in any court of competent jurisdiction. The Tribe refused to pay amounts allegedly due, claiming that the Agreement was void for lack of appropriate tribal approval and conveyance of an interest in trust assets without required federal approval. Becker sued in federal court, which dismissed for lack of subject matter jurisdiction. Becker then sued in Utah state court. The Tribe then filed suit in tribal court, which ruled that the Agreement was invalid. Becker sued in federal court to enjoin the tribal court's exercise of jurisdiction. The federal district court preliminarily enjoined tribal court proceedings, concluding that the Agreement was likely to be found valid. On appeal, the Tenth Circuit reversed, holding that, notwithstanding the jurisdictional provisions of the Agreement, Becker must **exhaust tribal court remedies** before challenging the tribal court's jurisdiction in federal court: "At the heart of the dispute before us is a written contract—i.e., the Agreement—between the Tribe and a non-Indian that was to be performed, in part, on Tribal lands and the purpose of which was to promote the Tribe's mineral assets in order to produce revenues for the Tribe and its people. It is undisputed that the Agreement expressly purported to waive the Tribe's sovereign immunity and to have all disputes settled in a non-Indian court by way of Utah state law. Nevertheless, the Tribe has raised serious questions regarding the validity of the contract as a whole, as well as the validity of the purported waiver of sovereign immunity in particular. Out of respect for tribal self-government and self-determination, we conclude that the questions the Tribe has raised regarding the validity of the Agreement, as well as the threshold question of whether the Tribal Court has jurisdiction over the parties' dispute, must be resolved in the first instance by the Tribal Court itself. In reaching this conclusion, we note that defendants have not persuaded us that any of the narrow exceptions to the tribal exhaustion rule apply here. Of course, Becker asserts, in reliance on the Agreement itself, that the Tribe expressly waived Tribal Court jurisdiction. But that waiver provision is only applicable if the Agreement itself is determined to be valid, and, as we have noted, the Tribe has asserted nonfrivolous challenges to the validity of the Agreement. … [T]he Tribal Court has determined that it has jurisdiction over the Tribe's suit against Becker and has also agreed with the Tribe that the Agreement is void under both federal and tribal law. But, due in no small part to the district court's issuance of an injunction prohibiting the parties from proceeding in Tribal Court, Becker 'has not yet obtained appellate review' of the Tribal Court's conclusions. *Iowa Mut*., 480 U.S. at 17, 107 S. Ct. 971. Until such appellate review is complete, the Ute Indian Tribal Courts have not had a full opportunity to evaluate the Tribe's claims and federal courts should not intervene. … If and when the Tribal Appeals Court upholds the lower court's determination that the tribal courts have jurisdiction, Becker may challenge that ruling in the District Court or in his pending Utah state court action." (Internal emendations, quotations and citations partially omitted.)

In *Menominee Indian Tribe v. Lexington Insurance Company*, 2021 WL 3727070 (N.D. Cal. 2021), the Menominee Indian Tribe purchased a policy of insurance covering its various subsidiaries and subdivisions from Lexington Insurance Company, including coverage of "loss resulting directly from interruption of business, services or rental value caused by direct physical loss or damage, as covered by this Policy to real and/or personal property insured by this Policy. After Lexington denied the Tribe's claim for losses relating to the **COVID-19** pandemic, Menominee filed a class action lawsuit seeking a declaration of coverage. Lexington removed the action to federal court and the federal district court dismissed: "[B]ecause the presence of COVID-19 cannot constitute 'direct physical loss or damage' under Wisconsin law, any amendment to Menominee's claims would be futile."

In *City of Council Bluffs, Iowa v. United States Department of the Interior*, 2021 WL 3848159 (4th Cir. 2021), Congress had enacted the Ponca Restoration Act (PRA or Act) in 1990. Section three of the Act restored federal recognition to the Ponca Tribe (Tribe) and provided that "[a]ll Federal laws of general application to Indians and Indian

tribes … shall apply with respect to the Tribe and to the members." Subsection 4(c) provided that the Secretary of Interior "shall" accept not more than 1,500 acres located in Knox or Boyd Counties, Nebraska in trust Tribe" in trust for the Tribe and also authorized, but did not require, the Secretary to accept additional acreage in Knox or Boyd Counties pursuant to Section 5 of the Indian Reorganization Act (IRA). Section 4(e) of the Act provided that "[r]eservation status shall not be granted any land acquired by or for the Tribe" and designated as the Tribe's "service area" tribal members residing in Sarpy, Burt, Platte, Stanton, Holt, Hall, Wayne, Knox, Boyd, Madison, Douglas, or Lancaster Counties of Nebraska, Woodbury or Pottawattomie Counties of Iowa, or Charles Mix County of South Dakota. In 1999, the Tribe purchased the Carter Lake Parcel in Pottawattamie County, Iowa, within the service area. In 2000, the BIA Regional Director, at the Tribe's request, agree to acquire the Parcel in trust. The State of Iowa and Pottawattamie County appealed but the Interior Board of Indian Appeals (IBIA) affirmed the Regional Director's decision (IBIA Trust Decision). In 2002, pursuant to an oral agreement between the State and the Tribe's attorney (2002 Agreement), the Tribe's attorney sent BIA an email requesting that the BIA include in its publication of its Federal Register notice of intent to acquire the property that the acquisition "has been made for non-gaming related purposes, as requested by the Ponca Tribe and discussed in the September 15, 2000 decision under the Regional Director's analysis of 25 C.F.R. 151.10(c). As an acquisition occurring after October 17, 1988, any gaming or gaming-related activities on the Carter Lake lands are subject to the Two-Part Determination under 25 U.S.C. Sec. 2719. In making its request to have the Carter Lake lands taken into trust, the Ponca Tribe has acknowledged that the lands are not eligible for the exceptions under 25 U.S.C. Sec 2719(b)(1)(B). There may be no gaming or gaming-related activities on the lands unless and until approval under the October 2001 Checklist for Gaming Acquisitions, Gaming-Related Acquisitions and Two-Part Determinations Under Section 20 of the [IGRA] has been obtained." In 2006, the Tribe submitted a gaming ordinance to the National Indian Gaming Commission (NIGC) for gaming at the Carter Lake Parcel under the restored lands exception to the IGRA prohibition against gaming on lands acquired after October 1988. The NIGC Chair denied the application, concluding that the Carter Lake Parcel did not fall within the exception but the IBIA reversed. A federal court reversed the BIA. The Eighth Circuit reversed the federal court and remanded for consideration of the validity of the 2002 Agreement. In 2012, without applying the IGRA Part 292 regulations adopted in 2008, the DOI provided NIGC with its opinion that the Tribe's restored lands were not limited to lands in Knox and Boyd counties. In 2017, the NIGC concluded that the 2002 Agreement was invalid and that the Tribe could seek to conduct gaming on the Carter Lake Parcel under IGRA's **restored lands exception**. The City of Council Bluffs sued under the Administrative Procedure Act to challenge NIGC's decision. On summary judgment motions, the court held that (1) the Tribe was not estopped by the 2002 Agreement from asserting that the Carter Lake Parcel qualified for the restored lands exception, (2) NIGC did not err in determining that the Part 292 regulations were inapplicable, (3) the NIGC erred in failing to consider the impact of the 2002 Agreement and Federal Register Notice on the Carter Lake Parcel's status as restored lands. Accepting an interlocutory appeal on the key question, the Eighth Circuit affirmed: "The issue on appeal is whether the Ponca Restoration Act restricts land that can qualify as part of 'the restoration of lands' for the Tribe to land located in Knox and Boyd Counties, Nebraska. …" That Congress specified a geographic area in which the Secretary is required to accept land for the Tribe under the Ponca Restoration Act does not mean that only land within that area can be part of the restoration of lands for the Tribe. Lands expressly granted to a tribe in the tribe's restoration act may be the 'paradigm' of restored lands, … but lands acquired for a tribe through means other than a restoration act also can qualify."

In *Pasqua Yaqui Tribe v. United States*, 2021 WL 3855977 (D. Ariz. 2021), six Indian tribes sued the federal officials to challenge two final rules promulgated by the United States Environmental Protection Agency (EPA) and the United States Army Corps of Engineers (Corps of Engineers) (Agencies). One, entitled "Definition of 'Waters of the United States'—Recodification of Pre-Existing Rules," repealed the 2015 "Clean Water Rule." The second, entitled "The Navigable Waters Protection Rule: Definition of 'Waters of the United States', (NWPR)," established a new definition of the phrase "Waters of the United States" in the Clean Water Act (CWA). On the government's motion, the court remanded to the two agencies for reconsideration the rules and, on the tribes' motion, vacated the two rules pending reconsideration.

In *Mattwaoshshe v. United States*, 2021 WL 3633695 (D.D.C. 2021), Mattwaoshshe, a member of the Kickapoo Tribe, and a non-Indian neighbor, sued various United States agencies and corporate entities to stop the construction of a **wind generation project** in Nemaha County, Kansas, near the plaintiffs' property, asserting that the project would damage their health, kill local endangered species, and interfere with quiet and peaceful enjoyment of their properties. The plaintiffs contended that the corporate defendants were negligent in constructing the project, that the project was a private nuisance under Kansas law and that the federal defendants, including the Department of Transportation, the Federal Aviation Administration ("FAA"), the Federal Energy Regulatory Commission ("FERC"), the U.S. Army Corps of Engineers, the U.S. Department of Justice, and the heads of each of those agencies, had a legal obligation to stop the project. The district court disagreed and dismissed for lack of jurisdiction, rejecting all of Mattwaoshshe's legal theories, including the theories that the American Indian Religious Freedom Act and 25 U.S.C. § 185, relating to the federal obligation to protect interests in tribal trust lands, obligated the Department of Justice to represent Mattwaoshshe.

In *Backcountry Against Dumps v. United States Bureau of Indian Affairs*, 2021 WL 3611049 (S.D. Cal. 2021), the Campo Band of Diegueno Indians (Tribe) had entered into a lease with Terra-Gen for development of a **wind energy project** (the "Lease"), to be built principally on the Tribe's reservation in San Diego County (Project), comprised of 60 turbines and 15 miles of access roads within a 2,200-acre corridor on the Reservation. The Bureau of Indian Affairs (BIA) approved the Lease after performing an environmental impact statement issuing a Record of Decision (ROD). Neighboring property owners sued the BIA under the Administrative Procedure Act (APA). The Tribe intervened for the purpose of moving to dismiss on the ground that it was a necessary party under Fed. R. Civ. Proc. 19 and could not be joined as a defendant because of its sovereign immunity. The district court agreed and dismissed: "[T]he Court finds that the Tribe has a substantial and legally protected interest in the Lease, and the benefits it already has derived and will continue to derive from the Lease, that extends beyond a simple financial stake, including the Tribe's sovereign ability to control its resources and the bargained-for hiring preference the Lease contains. … the Court also finds that the Tribe's ability to protect said interest would be impaired should the Court adjudicate this action absent the Tribe. … Plaintiffs urge the Court to allow this action to proceed under the 'public rights' exception. … Nor is the Court convinced that this litigation transcends the litigants' private interests. Indeed, the FAC indicates that 'Plaintiff BACKCOUNTRY AGAINST DUMPS … is a community organization comprising numerous individuals and families residing in eastern San Diego County and Imperial County who will be directly affected by the Project and its connected actions,' and that the members of Backcountry Against Dumps 'use the area affected by the Project for aesthetic, scientific, historical, cultural, recreational, quiet rural residential and spiritual enjoyment.' … It further alleges that 'construction and operation of the Project will harm Ms. Tisdale's use and enjoyment of her ranch and the surrounding natural resources, diminish her health, well-being and quality of life in her senior years, and jeopardize her lifetime investment in her property.' … Thus, despite Plaintiffs' protestations to the contrary, … it seems their private interests are a significant factor in the bringing of this litigation."

In *Stand Up For California v. United States*, 2021 WL 3418729 (E.D. Cal. 2021), the Department of Interior (DOI) had taken 305 acres into trust for the North Fork Rancheria of Mono Indians (Tribe) under the Indian Reorganization Act and granted an exemption from the Indian Gaming Regulatory Act (IGRA) general prohibition against gaming on land acquired after the IGRA's enactment under the "two-part determination" exception, which requires a determination that the gaming enterprise be in the best interest of the applying tribe, that it not be detrimental to the surrounding community and that the governor of the State where the facility is located concur. When the State later refused to negotiate a Class III gaming compact, the Tribe secured authorization to conduct Class III gaming under the IGRA's secretarial procedures (Secretarial Procedures). Stand Up For California (Stand Up) and sued, asserting that the Secretarial Procedures violated the Johnson Act, National Environmental Policy Act (NEPA) and Clean Air Act (CAA). The Ninth Circuit affirmed the District Court's dismissal of the Johnson Act claims. On remand, the District Court granted summary judgment on the NEPA and CAA claims: "[T]he Court finds that prescribing Secretarial Procedures under IGRA fits squarely within the traditional exclusion of nondiscretionary agency actions from NEPA for want of a major federal action. This conclusion is supported not only by the text of the Secretarial Procedures provision itself, but also by the structure and purposes of IGRA more generally. Collectively, these sources show that Congress directed the Secretary to perform a specific duty without authority to meaningfully account for environmental considerations.

Because agency actions of this kind are not major federal actions under NEPA, an EIS was not required and the environmental statute was not violated."

In *Lavallie v. Jay*, 2021 WL 3412313 (N.D. 2021), Lavallie was allegedly injured as a result of the negligence of Jay and Charette, members of the Turtle Mountain Chippewa Tribe (Tribe), on a road located on land held in trust for the Tribe, but outside the boundaries of the Tribe's reservation, adjacent to Jay's residence, also located on tribal trust land. Lavallie sued in the state district court, which rejected Jay's challenge to its jurisdiction on the ground that Jay had failed to prove that Lavallie was a tribal member. The North Dakota Supreme Court reversed, holding that the state's exercise of jurisdiction would constitute an impermissible infringement of the Tribe's sovereignty under the rule of *Williams v. Lee*: "Under the first category of the [***Williams v. Lee***] infringement test, state subject matter jurisdiction is precluded when 'a non-Indian asserts a claim against an Indian for conduct occurring on that Indian's reservation.' … The United States Supreme Court's use of the word 'reservation' in the *Williams* infringement test has been interpreted to encompass more than formal reservations. … The status of the land where the accident occurred being held in trust validly sets it apart for use by the Tribe and its members. … The trust land is therefore part of Indian country for purposes of determining subject matter jurisdiction. As a result, the state district court has no subject matter jurisdiction over this matter because it is an action brought by Lavallie, against an Indian, Jay, for conduct occurring in Indian country."

In *Albrecht v. County of Riverside*, 2021 WL 3578876, Not reported (Cal. App. 2021), non-Indians holding leasehold interests in land held by the United States in trust for the Agua Caliente Band of Cahuilla Indians (Agua Caliente tribe) or the Colorado River Indian Tribe (CRIT), or their members, sued Riverside County, contending that the County's **"possessory interest" tax**, as well as certain voter-approved taxes, violated Section 5 of the Indian Reorganization Act (IRA), 25 U.S.C. § 5108, which provides that "any lands or rights ... acquired pursuant to this Act ... shall be exempt from State and local taxation." The California Court of Appeals disagreed, observing that the tribal lands in question, pre-dated the IRA and rejecting the plaintiffs' argument that a 1990 amendment to the IRA should apply to Agua Caliente and CRIT lands: "In amending the IRA, Congress extended the provisions of section 5102 to all Indian tribes and all lands held in trust. (25 U.S.C. § 5126.) However, section 5102 by its very terms applies only to 'existing periods of trust,' extending those existing periods of trust indefinitely. (25 U.S.C. § 5102.) Given this language, the 1990 amendment cannot reasonably be interpreted as creating a new trust right. Even as extended by section 5126, the express terms of section 5102 still require an 'existing trust right' to have any application." Citing is own recent decision related to the same tax in *Herpel v. County of Riverside* (2020) 45 Cal. App.5th 96 (*Herpel*), the Court concluded that the challenged taxes were permissible under the rule of *White Mountain Apache v. Bracker* and that they did not infringe the tribes' right of self-government contrary to *Williams v. Lee*: "[O]ur decision in *Herpel* already assumed that a separate tax imposed by the tribal authority would lead to a diminution in the value of leases but nevertheless concluded that the state's interest, when compared to that of the tribal interest involved, did not warrant a finding of preemption. … Finally, nothing in this case suggests that our view of the state interest in upholding the county's possessory interest tax, as well as the voter-approved taxes, should be any different from that expressed in *Herpel*. In *Herpel*, … we concluded that the state's interest in imposing the possessory interest tax was strong because the tax was directly connected to the provision of numerous services that were provided by the county to non-Indian lessees of allotted land or tribal trust land, such as education, fire, police, health and sanitation, road maintenance, and flood control."