No. 54514-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

100348-0

PHILIP EDWARD SIFFERMAN; BRUCE PENOSKE and **RAELYN PENOSKE,** husband and wife; **STEVEN R. RAMELS** and **JACQUELINE J. RAMELS,** husband and wife; **MICHAEL F. LASS** and **DIANE E. LASS,** husband and wife; **THOMAS H. JANSEN** and **SHARON L. JANSEN**, husband and wife, and **PATRICK W. FRENCH**; and **PARADISE LAKE HOUSE LLC**,

Petitioners,

v.

CHELAN COUNTY and its **TREASURER DAVID GRIFFITHS; STATE OF WASHINGTON**, **DEPARTMENT OF REVENUE**,

Respondents.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONERS

Petitioners are taxpayers who were required to pay Real Estate Excise Tax (REET) when assigning leasehold interests on land at Wapato Point, Chelan County, held in trust by the Bureau of Indian Affairs (BIA).

II. CITATION TO COURT OF APPEALS DECISION

The Court of Appeals, Division II, case Number 54514-4-II issued a published opinion on September 28, 2021. 2021 WL 4436230. Appendix 1.

III. ISSUES PRESENTED FOR REVIEW

A. Is imposition of a REET on Assignment of Sublease transactions on Wapato Point Indian land unlawful under federal law?

B. Is a declaratory judgment proceeding challenging the unlawful imposition of REET applicable here?

C. If imposition of a REET on Assignment of Sublease transaction on Indian land is deemed lawful under federal law, shouldn't REET be limited to Department of Revenue (DOR) written policy?

D. Should the DOR and Chelan County be prohibited from imposing REET on Assignment of Sublease transactions on Wapato Point Indian land?

E. Should Petitioner taxpayers receive a refund of REET paid?

F. Should class action status be available for taxpayers similarly situated to petitioning taxpayers?

IV. STATEMENT OF THE CASE

The real property known as Wapato Point on Lake Chelan in Chelan County, Washington is land held in trust by the United States of America on behalf of a Native American family. The land is leased from the United States of America, and administered by the Department of the Interior, Bureau of Indian Affairs (CP 192).

The leased land is a portion of the original Indian trust allotment, Moses Agreement No. 10. (CP 253). It is subject to the lease restrictions found in the Indian Reorganization Act of 1934 (25 U.S.C. § 461 et seq.) (IRA) and the amendments thereto relative to Business Leases on restricted Indian lands which by reference are made a part of the Lease. (CP 210). Washington law defines "Indian country" to include all "Indian allotments". WAC 458-20-192(2)(b)(iii).

The subject Lease and its Amendments are recorded in Chelan County. (CP 205, 324). It is required that Lessee "conform to the regulations of said Bureau of Indian Affairs . . . ". (CP 218 - 219).

Article 12 of the Lease provides that building and structures erected on the demised premises "shall be deemed to be attached to the freehold and become the property of Lessor . . . and at the end or termination of the term

shall be surrendered to the Lessor . . .". (CP 227 - 228). The taxpayers do not "own" the improvements situated on the Indian land by the express terms of the Lease.

There are no taxes paid to the taxing districts within Chelan County. The improvements constructed on the land and the Lease are all exempt from real and personal property ad valorem taxes and from the state leasehold excise tax. (CP 192 - 199).

A voluntary contribution in lieu of taxes is made to Chelan County because the Wapato Point property receives services from Chelan County. The Agreement for Voluntary Contribution in Lieu of Taxes. (CP 194 - 199) is an agreement between Wapato Point Resources and Chelan County. It provides that Wapato Point Resources agrees to pay the County an amount in lieu of taxes on an annual basis "because of the exemption of the leasehold interest held by the first party from state and local taxation by reason of the leased premises constituting Indian Trust Land . . ." (CP 195)

Taxpayers held their property and improvements thereon pursuant to subleases. A transfer of the property to another is made by an Assignment of Sublease. For example, taxpayer Sifferman assigned his sublease for a total consideration of $1,022,500.00. The transaction required payment to Wright-Wapato, Inc., a fee of 3.5% of the transaction price totaling $35,638.23. Additionally, Sifferman was required to pay REET in the sum

of $18,200.50 or 1.78% for a total transfer tax obligation of 5.28% of the transaction price. Sifferman challenged the REET but Chelan County demanded Real Estate Excise Tax be paid on the total consideration for his transaction. (CP 175 - 191).

Each of the petitioner taxpayers was required to pay a REET based on either 100% of the consideration for the transaction (Sifferman, Penoske and Ramels) or 50% of the consideration for the transaction (Lass/Jansen/French and Paradise Lake House) based upon the Real Estate Excise Tax Affidavits for each transaction. (CP 279 - 284).

The Chelan County Treasurer acknowledges that 50% of the total amount paid has been charged as REET on certain assignments of subleases and sale of improvements. (CP 84 - 87).

The foregoing facts are undisputed. The varying REETs charged taxpayers illustrate the conflicting nature of Chelan County's application of REET to Assignment of Sublease transactions on Wapato Point.

V. ARGUMENT

A. Reasons Why Review Should Be Accepted.

The Court of Appeals ruled that the REET imposed on the transactions involved in this case is not preempted by federal law. The court reasoned that because the allotted land was acquired prior to the enactment of the IRA, 25 U.S.C. § 5108 does not apply to this case. That holding is

error and in direct conflict with the plain language of the IRA and its history pertaining to allotted lands. As a case of first impression in Washington state courts, the Court of Appeals holding conflicts with a decision of the United States District Court, Eastern District of Washington, and a United States Supreme Court decision involving REET and the Yakima Indian Nation.

Additionally, a significant question of law under the Constitution of the State of Washington is presented where taxpayers were denied due process rights when they were required to pay REET preempted by Federal law as a condition to recording the real estate transactions. This requirement conflicts with the Washington case, *Baldwin v. Moore*, 7 Wash. 173, 34 P. 461 (1893).

Finally, this case presents an issue of substantial public interest that should be determined by this Court. Application of REET to property transactions on Wapato Point vary from 50% to 100% of transaction consideration. Even if preemption does not apply, clarification of the correct formula for REET must be established.

B. Federal Preemption Applies.

The REET imposed on the transactions involved in this case are expressly preempted by federal law. The Court of Appeals erroneously ruled that because the allotted land was acquired prior to the Indian

Reorganization Act (IRA), 25 U.S.C. § 5108 does not apply to this case.

The language of the IRA supports application of the IRA to the allotments, including the Wapato Point Moses Allotment 10. Specifically, 25 U.S.C. § 5108 provides in part:

> 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 . . .

Additionally, 25 U.S.C. § 5102 provides: "The existing periods of trust placed upon any Indian lands and any restriction on alienation thereof are extended and continued until otherwise directed by Congress."

25 U.S.C. § 415 authorizes leasing of restricted Indian lands, and specifically references Moses Allotment 10. It is undisputed that Moses Allotment 10 is the Wapato Point property. The statute reads in part as follows:

> Any restricted Indian lands, whether tribally, or individually owned, may be leased by the Indian owners, with the approval of the Secretary of the Interior, for public, religious, educational, recreational, residential, or business purposes . . . All leases so granted shall be for a term of not to exceed twenty-five years, except . . . leases of land comprising the Moses Allotment Numbered 8 and the Moses Allotment Numbered 10, Chelan County, Washington . . . which may be for a term of not to exceed ninety-nine years.[1]

[1] Note the statute applies to "Any restricted Indian lands, whether tribally or individually owned . . ." Similarly, § 5108 applies to land "held in trust for the Indian tribe or individual Indian."

25 U.S.C. § 5108 applies because Moses Allotment 10 trust lands are specifically included in the Indian Reorganization Act by means of § 415 and § 5102. Careful reading of § 5108 further confirms its applicability to the leases at issue. That section provides:

> 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.) 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).

The "Act" clearly refers to the Indian Reorganization Act, Title 25. The lease rights held by the Wapato family were "rights" acquired pursuant to the Act. While the allotment was acquired in 1884 by the Wapato family, the right to lease the allotment property was specifically accorded by § 415. It is ludicrous to suggest that leasing rights contained in the IRA apply to the Wapato Point Allotment but not the exemption from State and local taxation in § 5108. Both sections are part of the IRA. The logical conclusion from the Court of Appeals opinion is that no tax exemption exists for Moses Allotment 10 because it was allotted prior to enactment of the IRA. Yet the Wapato Point Allotment remains exempt from property and other taxes.

The history of the Moses Allotments also illustrates application of the IRA and its amendments to the allotments. The case of *Grondal v. Mill*

Bay Members Association, Inc., 471 F.Supp.3d 1095 (USDC, E.D. WA, 2020) is instructive. In that case, the issue was whether the Moses Allotment land in Chelan County was no longer BIA Trust Land by virtue of the IRA of 1934 and amendments thereto. The court determined that Congress clearly intended to preserve the trust status of any reservation, including reservation allotments like the Moses Allotments.

The BIA administered the Moses Allotments, which it expressly considered to be "reservation" land from the Colville Reservation. In 1906 Congress provided for the issuance of trust patents to allottees to receive allotments, as contemplated by the Moses Agreement. Allotments were to be held in trust for ten years but subsequent presidential executive orders extended the trust period of the allotments. *Grondal*, at 1114-1116.

In 1934, Congress ended the nation's allotment policy through the IRA. The IRA "prohibited any further allotment of tribal land, provided that allotments then held in trust would continue in trust until Congress provided otherwise, and authorized the Secretary of the Interior to take lands into trusts for tribes and tribal members." Accordingly, the trust period on the Indian lands covered by the IRA was extended indefinitely. In 1990, Congress enacted legislation that comprehensively extended the trust period indefinitely for "all lands held in trust by the United States for Indians." 25 U.S.C. § 5126. *Grondal, supra* at p. 1116.

It is undisputed that Moses Allotment 10, the Wapato Point property was allotted in 1884, prior to the IRA of 1934. The General Allotment Act of 1887 explicitly authorized only "taxation of . . . land," not "taxation with respect to land," "taxation of transactions involving land," or "taxation based on the value of land." *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 112 S.Ct. 683, 694 (1992); see also *Squire v. Capoeman*, 76 S.Ct. 611, 616, 100 L.Ed. 883 (1956) providing that until such time as a fee patent is issued, the allotment shall be free from all taxes.

From the foregoing, it is clear Congress intended that the IRA apply to allotments, whether or not the allotments were established prior to the enactment of the IRA in 1934. 25 U.S.C. § 5108 provides that trust lands or rights are exempt from State and local taxation. This is consistent with prior statutes including the General Allotment Act of 1887. To deny applicability of this section to allotments in existence in 1934 would arguably nullify the tax exempt status of allotted lands entirely.

C. Federal Regulations Support Preemption of State and Local Taxation, Including REET.

The Secretary of the Interior approves the leasing of Indian land to third parties including to the Wapato Lease and subleases at issue in this action. 25 U.S.C. § 415. Interior has promulgated a host of regulations

governing the administration of such leases, codified at 25 CFR Part 162. Beginning in 2011, Interior overhauled such regulations through notice and comment rule-making; the new rules became effective January 4, 2013.

Among the 2013 regulations is 25 CFR § 162.017 entitled, "What taxes apply to leases approved under this part?" Pertinent subsections of this regulation are as follows:

> (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.
>
> . . .
>
> (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.

The Preamble to 25 CFR § 162.017 published in the Federal Register states that "(t)his section now addresses not only taxation of improvements on leased Indian land, but also taxation of the leasehold or possessory interest, and taxation of activity (e.g., excise or severance taxes) occurring or services performed on leased Indian land. 77 Fed. Reg. 72440-01 (Dec. 5, 2012). The Preamble specifically mentions excise taxes.

Pursuant to the foregoing federal regulation and case law, the

petitioner taxpayers' Assignment of Sublease transactions should not have been subject to *any* Washington State real estate excise tax. Each transaction was subjected to "taxation" by the Indian family (3.5%), which was assessed and paid. (CP 176, 187, 284). IRA § 415 of the IRA is the statutory authority for these Regulations. 25 U.S.C. § 415 specifically references Moses Allotment 10, the Wapato Point property. Since § 415 applies, these regulations should also be given effect.

D. Preemption of REET Is Supported by Case Law.

25 U.S.C. § 5108 provides that lands or rights held in trust by the United States for the Indian tribe or the individual Indian "shall be exempt from State and local taxation." Courts are bound to invalidate taxes on land and rights in land covered by the statute. The REET is a tax on "rights" in land, not the land itself. Under Washington law, REET "is a tax upon the act or incidence of transfer". *Mahler v. Tremper*, 40 Wash.2d 405, 409, 243 P.2d 627 (1952).

County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation, 112 S.Ct. 683, 502 U.S. 251, 116 L.Ed.2d 687 (1992) is directly on point and supports preemption of REET. It is the only case cited in this action dealing with the validity of excise tax on a sale of Indian land. The United States Supreme Court held that the excise tax on the sale of land was a tax upon the Indian's activity of selling the land and thus void. The

court stated at page 694:

> The short of the matter is that the General Allotment Act explicitly authorizes only 'taxation of . . . land', not 'taxation with respect to land,' 'taxation of transactions involving land,' or 'taxation based on the value of land.' Because it is eminently reasonable to interpret that language as not including a tax upon the sale of real estate, our cases require us to apply that interpretation for the benefit of the Tribe. Accordingly, Yakima County's excise tax on sales of land cannot be sustained. *County of Yakima, Supra* at page 694.

Mescalero Apache Tribes v. Jones, 411 U.S. 145 (1973) and *Confederated Tribes of the Chehalis Reservation v. Thurston County Board of Equalization,* 724 F.3d 1153 (9th Cir. 2013) offer support to taxpayers' position on federal preemption. In *Mescalero,* the Supreme Court construed § 465 (now § 5108) to mean that permanent improvements on land held in trust by the United States could not be taxed. *Mescalero, supra* at page 158. In *Confederated Tribes of the Chehalis Reservation*, the Ninth Circuit specified that under *Mescalero* and § 465 (now § 5108), State and local governments did not have the power to tax permanent improvements built on land held in trust for Indians, regardless of ownership. *Confederated Tribes of the Chehalis Reservation, supra* at page 1154.

The Court of Appeals opinion emphasizes the transactions at issue involve non-Indians. The 'non-Indians' issue was addressed and disposed of in the *Confederated Tribes of the Chehalis Reservation* case at page 1157 where the court held that "this distinction is irrelevant". Thurston County

had attempted to distinguish *Mescalero* on the ground that the improvements at issue were owned by a third party, not the tribe itself. The tribe entered into a lease agreement with a non-Indian entity for a hotel, indoor water park, and convention center. Here, the Wapato family entered into a lease (CP 205-265) with a non-Indian developer of Wapato Point. Taxpayers are sublessees subject to the terms of the lease (CP 234).

The opinion of the Court of Appeals conflicts with the Supreme Court decision in *County of Yakima, supra*, and the *County of Yakima* Ninth Circuit decision at 903 F.2d 1207 (1990). The *Yakima* cases are the only cases cited in this action dealing with the validity of excise tax on a sale of Indian allotted land. It is undisputed that RCW 82.45.010(1) identifies "sale" to include transfer of improvements constructed upon leased land[2].

E. Declaratory Judgment Proceedings May Determine the Validity of the REET as Applied.

The Uniform Declaratory Judgments Act codified at RCW Ch.7.24 is remedial and its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations. It is to be liberally construed and administered. See RCW 7.24.120.

RCW 7.24.020 provides that a person whose rights are affected by

[2] The Court of Appeals further erred in applying the preemption balancing test announced in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142, 100 S.Ct. 2578 (1980). If the REET is expressly preempted under § 5108, there is no need to consider Bracker or any other theory of preemption. *Chehalis, supra,* at 1159.

a statute may have determined "any question of the construction or validity" of the statute.

Declaratory judgment proceedings may be used to determine the validity of a tax assessment. See *Boeing Aircraft Co. v. Reconstruction Finance Corp*., 25 Wn. 2d 652, 171 P.2d 838 (1946). A declaratory judgment action may be used to restrain enforcement of an unconstitutional statute or a statute not yet operative. See *Johnson v. State*, 187 Wn 605, 60 P.2d 681 (1936) and *Berndson v. Graystone Materials Co.*, 34 Wn. 2d 530, 209 P.2d 326 (1949)[3].

The Court of Appeals opinion ignores that *County of Yakima, supra* was a declaratory judgment proceeding originating in Federal Court and ultimately concluded by the U.S. Supreme Court decision declaring invalid the real estate excise taxes sought to be imposed by Yakima County.

The Court of Appeals in the present action erred in ruling that the Uniform Declaratory Judgments Act did not apply to the taxpayers' claims. The Court of Appeals held that declaratory judgments are proper to determine the facial validity of an enactment, not its application or administration. However, as in the *Yakima* cases, *supra* and *Boeing, supra*,

[3] CR 57 applies to declaratory judgments and provides that the existence of another adequate remedy does *not* preclude a declaratory judgment. For taxpayers and other similarly situated sublessees of Wapato Point Indian land, prospective declaratory relief against Chelan County is appropriate.

and many others, declaratory judgment actions may determine the validity of a tax as applied under given circumstances.

Taxpayers challenge the validity of the REET as applied. In *City of Seattle v. Evans*, 184 Wash.2d 856, 862, 366 P.3d 906 (2015) the court stated:

> " '[A]n as-applied challenge to the constitutional validity of a statute is characterized by a party's allegation that application of the statute in the specific context of the party's actions or intended actions is unconstitutional' " *State v. Hunley*, 175 Wn.2d 901, 916, 287 P.3d 584 (2012) (alternation in original) (quoting *City of Redmond v. Moore*, 151 Wn.2d 664, 668-69, 91 P.3d 875 (2004)). " 'Holding a statute unconstitutional as-applied prohibits future application of the statute in a similar context, but the statute is not totally invalidated.' " *Id.* (quoting *Moore*, 151 Wn.2d at 669).

F. State Law and Policy Are Ambiguous in Applying REET on "Sale" of Improvements on Indian Land.

It is undisputed that absent federal preemption REET applies to a transfer of improvements constructed upon leased land. RCW 82.45.010(1). Assuming REET applies to the transfer of improvements constructed upon leased land, it is necessary to determine the consideration for the transfer of improvements. WAC 458-61A-106(1)(b) provides that the transfer of a lessee's interest in a leasehold for valuable consideration is taxable to the extent the transfer includes any improvements on leased land. If the selling price of an improvement is not separately stated, "or cannot

otherwise be reasonably determined, the assessed value of the improvements as entered on the assessment rolls of the county assessor will be used".

It is undisputed that no assessed values for Wapato Point properties are entered on the assessment rolls of the Chelan County assessor because they are situated on Indian land. (CP 192 - 199).

WAC 458-61A-106(1)(b) provides little guidance where the selling price of an improvement is not separately stated or entered on the assessment rolls of the county. The regulation states "or cannot otherwise be reasonably determined". The Court of Appeals would require taxpayers in these circumstances to prove the "selling" prices of their improvements by obtaining fair market appraisals[4]. Apparently it is "reasonable" for sellers to obtain and present an appraisal of leasehold improvements when entering into sublease assignments. Statutes and regulations provide no such requirement. The REET instructions provide no such requirement. There is no suggestion of an appraisal requirement anywhere.

In 1994 DOR issued a policy letter addressing this dilemma. (CP 86 - 87). Rather than impose or even suggest a cumbersome appraisal requirement, DOR recognized the difficulty in determining "the appropriate

[4] It is important to note that taxpayers do not own their improvements which are owned by the Wapato Point Lessor. The improvements are part of the sublease assignment.

method of valuing the improvements for real estate excise tax purposes." The letter further stated:

> After a thorough analysis of the Wapato Point situation by the real estate excise tax unit, we agree that the use of 50% of the sales price as a taxable value of the improvement would be fair and equitable for the Wapato Point timeshare sales. . . . (CP 86).

This policy has been sporadically followed. Taxpayers Sifferman, Penoske and Ramels were required to pay 100% of the consideration for their Assignment of Sublease transactions. Lass/Jansen/French and Paradise Lake House paid REET based upon 50% of the transaction consideration. (CP 279 - 284).

Notably, Sifferman offered to pay REET based upon 50% but Chelan County demanded REET be paid on the total consideration for his transaction. (CP 175 - 191). Yet DOR policy concluded that 50% of the total transaction price for timeshare real estate transfers was a reasonable determination.[5]

Tax statutes are strictly construed. If any doubt exists as to the meaning of a taxation statute, the statute must be construed most strongly against the taxing power and in favor of the taxpayer. *Ski Acres, Inc. v.*

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[5] The Court of Appeals attempts to distinguish the policy letter claiming it applies to timeshare condominium sales only. No authority is provided distinguishing condominium sales from other real property transactions subject to REET.

Kittitas County, 118 Wash.2d 852, 857, 827 P.2d 1000 (1992); *City of Puyallup v. Pac. NW Bell Tell Co.*, 98 Wash.2d 443, 448, 656 P.2d 1035 (1982). There is no stated method for determining REET on the value of improvements which are not listed on county tax rolls. The DOR policy letter proves that the rule lacks clarity. Even DOR policy would limit REET to 50% of the transaction consideration. This is without consideration of federal preemption of REET.

G. Requiring Payment of an Unlawful Tax as Condition to Recording a Real Estate Transaction Violates Due Process.

It is undisputed that the Chelan County Treasurer refused to record Appellant Sifferman's Assignment of Sublease transaction unless he paid REET on the total consideration for his transaction. (CP 176). Absent federal preemption, RCW 82.45.010(1) and RCW 82.45.010(3)(c) impose REET upon transfer of improvements construed upon leased land, not the leasehold interest itself.

Requiring payment of REET in violation of state law and federal preemption as a condition to recording the real estate transactions violates due process rights afforded taxpayers. *Baldwin v. Moore*, 7 Wash. 173, 34 P. 461 (1893) is directly on point. The Court of Appeals attempts to distinguish this case asserting the taxpayers had ample opportunity to challenge the tax under RCW 82.32.170 or RCW 82.32.180. Both statutes

contemplate challenges *after* payment of the tax. The Court of Appeals position was rejected by *Baldwin* where the court stated ". . . if it is an illegal or void demand the state has no right to collect it in the first instance." *Baldwin*, at page 176[6].

H. Washington Courts Consistently Allow Class Action Status in Cases Challenging the Validity of a Tax.

Taxpayers seek class action status challenging the validity of the REET under the circumstances presented in this case.

Washington courts have consistently allowed class action status in declaratory judgment proceedings challenging the validity of a tax. See *Covell v. City of Seattle*, 127 Wash. 874, 905 P.2d 324 (1995); *Okeson v. City of Seattle*, 150 Wash.2d 540, 778 P.3d 1279 (2003); *Carrillo v. City of Ocean Shores*, 122 Wash.App. 952, 94 P.3d 961 (2004); *Nelson v. Appleway Chevrolet, Inc.*, 160 Wash.2d 173, 157 P.2d 847 (2007); *Lane v. City of Seattle*, 164 Wash.2d 875, 194 P.3d 977 (2008); and *NewCingular Wireless v. City of Clyde Hill*, 185 Wash.2d 594, 374 P.3d 151 (2016).

The Court of Appeals cites *Lacey Nursing Ctr. Inc. v. Department of Revenue*, 128 Wash.2d 40, 905 P.2d 338 (1995) for its holding that class actions are not authorized in suits seeking refunds of excise taxes. *Lacey*

[6] The Court of Appeals cites *Thurston County v. Tenino Stone Quarries, Inc.*, 44 Wash. 351 (1906) and *Peters v. Sjoholm*, 95 Wash.2d 871 (1981) as distinguishing *Baldwin*. However in both cases the taxpayers were afforded an opportunity to challenge the tax before payment.

was an action by nursing homes demanding refunds of state B&O tax. *Lacey* was not a case challenging the validity of the tax. The *Lacey* taxpayers limited their claim to a refund action under RCW 82.32.180. *Lacey* does not present a blanket prohibition on class action, even under RCW 82.32.180. The *Lacey* taxpayers were claiming overpayment of B&O taxes requiring a calculation by each nursing home establishing the correctness or incorrectness of the B&O tax imposed.

In the present action potential class members would be easily identifiable based upon DOR records. The amount of the REET tax payment at issues is readily available. Under these circumstances *Lacey* is distinguishable and consideration of class action status would be generally satisfied.

VI. CONCLUSION

Taxpayers request review of the Court of Appeals decision which affirm the trial court's orders dismissing the taxpayers' claims on summary judgment. The trial court's order should be reversed, the REET as applied should be declared an invalid tax, and the case remanded for determination of class action status.

This document contains 4,653 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted this 27th day of October, 2021.

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PROOF OF SERVICE

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

SIGNED AT Seattle, Washington, this 27th day of October, 2021.

/s/ Valerie Loxtercamp
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APPENDIX 1

2021 WL 4436230
Only the Westlaw citation is currently available.
Court of Appeals of Washington, Division 2.

Philip Edward **SIFFERMAN**; Bruce Penoske and Raelyn Penoske, husband and wife; Steven R. Ramels and Jacqueline J. Ramels, husband and wife; Michael F. Lass and Diane E. Lass, Husband and Wife, Thomas H. Jansen and Sharon L. Jansen, husband and wife, and Patrick W. French; and Paradise Lake House LLC, Appellants,

v.

CHELAN COUNTY and its Treasurer, David Griffiths; State of Washington, Department of Revenue, Respondents.

No. 54514-4-II

Filed September 28, 2021

Synopsis

Background: Taxpayers brought class action refund claims, seeking declaration under Uniform Declaratory Judgments Act (UDJA) that, inter alia, federal law preempted imposition of the real estate excise tax (REET) on transfers of subleases on Native American land. The Thurston Superior Court, Christopher Lanese, J., dismissed action in part and granted summary judgment to Department of Revenue in part. Taxpayers appealed.

Holdings: The Court of Appeals, Cruser, J., held that:

[1] declaratory judgment action was not a permissible vehicle for taxpayers' challenge to excise tax;

[2] taxpayers failed to meet burden of proving the correct amount of tax that they owed, as would be required to support action for refund of REET;

[3] authorization to lease land that was previously allotted under Indian trust allotment was not a right acquired under the Indian Reorganization Act (IRA), as would be exempt from state and local taxation pursuant to IRA; and

[4] instant imposition of REET was not impliedly preempted by federal law.

Affirmed.

Procedural Posture(s): On Appeal; Motion for Declaratory Judgment.

West Headnotes (27)

[1] **Municipal Corporations** Capacity to sue or be sued in general

States Liability and Consent of State to Be Sued in General

The right to sue the state and local governments was created by statute and is not a fundamental right; consequently, the state can impose limitations on that right. Wash. Const. art. 2, § 26.

[2] **States** Tax matters

Taxation Refunding or recovery of tax paid

Because statute that sets forth the process for seeking a refund of an excise tax is a conditional, partial waiver of the sovereign immunity afforded by state constitution, taxpayers who seek refund of excise tax must exercise their right to bring suit against state in manner provided by statute. Wash. Const. art. 2, § 26; Wash. Rev. Code Ann. § 82.32.180.

[3] **Taxation** Refunding or recovery of tax paid

Tax statute generally requiring taxpayers to first pay full amount of assessed excise taxes before contesting the taxes in court, unless challenge to taxes is based on constitutional grounds, does not provide an independent basis for taxpayer to bring action for refund of excise tax. Wash. Rev. Code Ann. § 82.32.150.

[4] **Taxation** Assessment

If the challenge to an excise tax is based on constitutional grounds, then, and only then, does the legislature allow a taxpayer access to the

courts without first paying the full assessed taxes. Wash. Rev. Code Ann. § 82.32.150.

[5] **Declaratory Judgment** ⇐ Levy, assessment, collection, and enforcement

Taxation ⇐ Assessment

Taxation ⇐ Refunding or recovery of tax paid

A declaratory judgment action under the Uniform Declaratory Judgments Act (UDJA) was not a permissible vehicle for taxpayers' challenge to real estate excise taxes imposed on assignment of interests in subleased lots, and the improvements constructed thereon, on previously-allotted land held in trust by United States on behalf of Native American family; claims fell within scope of statute setting out process for seeking refund of an excise tax, and taxpayers did not challenge facial validity of real estate excise tax (REET) statute. Wash. Rev. Code Ann. §§ 7.24.010, 82.32.150, 82.32.180, 82.45.060(1).

[6] **Declaratory Judgment** ⇐ Existence and effect in general

Under ordinary circumstances, if plaintiff has another adequate remedy available, plaintiff should not proceed by way of declaratory judgment action, but declaratory relief may be appropriate in some situations, notwithstanding availability of another remedy. Wash. Super. Ct. Civ. R. 57.

[7] **Declaratory Judgment** ⇐ Validity of statutes and proposed bills

Declaratory Judgment ⇐ Ordinances in general

Under the Uniform Declaratory Judgments Act (UDJA), declaratory judgments are proper to determine the facial validity of an enactment, as distinguished from its application or administration. Wash. Rev. Code Ann. § 7.24.010.

[8] **Taxation** ⇐ Refunding or recovery of tax paid

Taxpayers failed to meet burden of proving the correct amount of tax that they owed, as required to support taxpayers' action for refund of real estate excise tax (REET) imposed on assignment of interests in subleased lots, and the improvements constructed thereon, on leased land held in trust by United States on behalf of Native American family, where taxpayers did not present any evidence demonstrating the correct values of the interest transferred in their individual improvements or that such a value would be impossible to determine. Wash. Rev. Code Ann. §§ 82.32.180, 82.45.060(1).

[9] **Taxation** ⇐ Assessment

An appraisal is not an unreasonable method for determining the value of an improvement, for calculation of real estate excise tax. Wash. Rev. Code Ann. § 82.45.060(1); Wash. Admin. Code 458.61(1)(b).

[10] **Taxation** ⇐ Refunding or recovery of tax paid

In a claim for refund of excise tax, taxpayers have an affirmative burden of establishing the correct amount of tax owed. Wash. Rev. Code Ann. § 82.32.180.

[11] **Indians** ⇐ State regulation

Native American tribes have a sovereign status that renders them immune from state and local regulatory authority in many respects.

[12] **Taxation** ⇐ Indian lands and other property

Authorization to lease land that was previously allotted under Indian trust allotment was not a right acquired under the Indian Reorganization Act (IRA), as would be exempt from state and local taxation pursuant to IRA, even though IRA established right to lease allotted land held in

trust by United States government and referred to the allotments on which property at issue was located, where allotted land was acquired prior to the enactment of IRA. 25 U.S.C.A. §§ 415, 5108.

[13] **Statutes** Language and intent, will, purpose, or policy

Statutes Purpose and intent; unambiguously expressed intent

Federal statutes are interpreted by ascertaining intent of Congress and by giving effect to its legislative will, and where intent of Congress is evidenced clearly in language of statute, court's inquiry ends there.

[14] **Indians** Purpose and construction

Canon of statutory interpretation assumes Congress intends its statutes to benefit Native American tribes.

[15] **Taxation** Statutory provisions in general

Canon of statutory interpretation warns court against interpreting federal statutes as providing tax exemptions unless those exemptions are clearly expressed.

[16] **Statutes** Express mention and implied exclusion; expressio unius est exclusio alterius

Under the interpretive canon of expressio unius est exclusio alterius, there arises a negative implication that when a statute designates certain persons, things, or manners of operation, all omissions should be understood as exclusions.

[17] **Taxation** Indian lands and other property

Federal regulation governing taxation of Indian land, providing that leasehold interests, improvements on leased land, and activities conducted on leased land are not subject to state or local taxation, does not of its own force operate to preempt any specific state tax; instead, the regulation is more properly viewed as evidence of federal interests in a particular tax in the context of balancing test for preemption under *White Mountain Apache Tribe v. Bracker*, 100 S.Ct. 2578, 65 L.Ed.2d 665. 25 C.F.R. § 162.017.

[18] **States** Revenue and taxation

Taxation Preemption

Even if a state tax is not expressly preempted by a federal statute, the tax might still unlawfully infringe on tribal sovereignty or the objectives of federal legislation; such a tax would still be implicitly preempted by federal law and deemed invalid.

[19] **States** Revenue and taxation

Taxation Preemption

A state tax is implicitly preempted by federal law if imposition of the tax does not satisfy the balancing test of *White Mountain Apache Tribe v. Bracker*, 100 S.Ct. 2578, 65 L.Ed.2d 665.

[20] **States** Revenue and taxation

Taxation Indian lands and other property

Interest-balancing test for preemption that protected sovereignty of Native American individuals, pursuant to *White Mountain Apache Tribe v. Bracker*, 100 S.Ct. 2578, 65 L.Ed.2d 665, applied to determination of whether federal law impliedly preempted state's imposition of real estate excise tax (REET) on assignment of interests in subleased lots, and the improvements constructed thereon, on previously-allotted land held in trust by United States on behalf of Native American family, even if the allotted lands at issue were not expressly designated as reservation; lands remained subject to the administrative authority of the Bureau of Indian Affairs. Wash. Rev. Code Ann. § 82.45.060(1).

[21] **Taxation** ⇐ Indian lands and other property

Test for determining whether land is Indian country, in determining state's taxing authority over individuals residing on land, does not turn upon whether that land is denominated "trust land" or "reservation"; dispositive consideration is whether the area has been validly set apart for the use of the Indians as such, under the superintendence of the government.

[22] **Indians** ⇐ State regulation

Under balancing test of *White Mountain Apache Tribe v. Bracker*, 100 S.Ct. 2578, 65 L.Ed.2d 665, for whether a state may assert authority over conduct of non-Indians engaging in activity on reservation, courts conduct a particularized inquiry, weighing the nature of the state, federal, and tribal interests at stake, to determine whether, in the specific context, the exercise of state authority would violate federal law.

[23] **States** ⇐ Revenue and taxation

Taxation ⇐ Constitutional and statutory provisions

Applying balancing test of *White Mountain Apache Tribe v. Bracker*, 100 S.Ct. 2578, 65 L.Ed.2d 665, federal law did not impliedly preempt state's imposition of real estate excise tax (REET) on assignment of interests in subleased lots, and the improvements constructed thereon, on previously-allotted land held in trust by United States on behalf of Native American family; transactions did not involve any Native American individuals or tribal members, REET did not have demonstrated effect on tribal economic interests, and state interests, including provision of government services to area in which land was located, were substantial. Wash. Rev. Code Ann. § 82.45.060(1).

[24] **Indians** ⇐ State regulation

To determine the degree of federal interests involved, in applying balancing test of *White Mountain Apache Tribe v. Bracker*, 100 S.Ct. 2578, 65 L.Ed.2d 665, for whether a state may assert authority over conduct of non-Indians engaging in activity on reservation, court examines relevant federal law in terms of the underlying policies as well as historical notions of tribal independence and sovereignty.

[25] **States** ⇐ Federal administrative regulations

An agency regulation may preempt conflicting state law where that federal regulation was enacted with the force of law.

[26] **Constitutional Law** ⇐ Property Taxes

Taxation ⇐ Constitutional and statutory provisions

State's requirement of payment of real estate excise tax (REET) as condition to recording assignment of subleases did not violate due process of taxpayers who disputed the excise taxes imposed on such transaction, where statutes provided several avenues by which a taxpayer could contest the imposition of an excise tax. U.S. Const. Amend. 14; Wash. Rev. Code Ann. §§ 82.32.150, 82.32.160, 82.32.170, 82.32.180.

[27] **Taxation** ⇐ Refunding or recovery of tax paid

Class actions are not authorized in suits seeking refunds of excise taxes. Wash. Rev. Code Ann. § 82.32.180.

Appeal from Thurston Superior Court, Docket No: 17-2-05220-2, Honorable Christopher Lanese, Judge

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PUBLISHED OPINION

Cruser, J.

***1** ¶ 1 This case involves the transfer of interests in vacation homes constructed on leased land held in trust by the United States government on behalf of a Native American family. Appellants Philip **Sifferman**, Bruce and Raelyn Penoske, Steven and Jacqueline Ramels, Michael and Diane Lass, Thomas and Sharon Jansen, Patrick French, and Paradise Lake House LLC (collectively taxpayers) paid a real estate excise tax (REET) when they assigned their interests in subleased lots and the vacation homes constructed thereon to new sublessees. None of the parties involved in the transfer were members of the Native American family for whom the land was allotted. The taxpayers filed a suit challenging imposition of the REET on their transactions on various grounds, naming both the Department of Revenue and Chelan County (collectively DOR) as defendants.

¶ 2 The taxpayers appeal from the trial court's order dismissing their class action refund claims, dismissing their motion for summary judgment, and granting DOR's motion for summary judgment. They argue that (1) they are not obligated to meet the requirements in RCW 82.32.180 to obtain a refund of the tax they paid because their claims arise under the Uniform Declaratory Judgments Act (UDJA) ch. 7.24 RCW and RCW 82.32.150, (2) the amount of tax they paid was incorrect under state law, (3) federal law preempts imposition of the REET on transfers of subleases on Native American land, (4) imposition of the REET violated their rights to due process arising under the Washington and United States Constitutions, and (5) the trial court erred in dismissing their class action claims.

¶ 3 We hold that (1) the taxpayers were obligated to satisfy the requirements in RCW 82.32.180 because they seek refunds of taxes already paid, and RCW 82.32.150 and the UDJA do not apply to their claims, (2) under RCW 82.32.180, the taxpayers failed to meet their burden of demonstrating the correct amount of tax owed, (3) federal law does not preempt the REET as applied in this case, and (4) imposition of the REET does not violate the taxpayers' rights to due process. Based on the foregoing, (5) we need not determine whether the trial court erred in dismissing the taxpayers' class action claims.

¶ 4 Accordingly, we affirm.

FACTS

I. WAPATO POINT RESORT

¶ 5 Wapato Point, located on the shorelines of Lake Chelan in Chelan County, is a segment of land that was allotted to Peter Wapato or Que-til-qua-soon by the United States Government under the original Indian [1] trust allotment, Moses Agreement No. 10. The allotted land is held in trust by the United States on behalf of the Wapato family and is administered by the Bureau of Indian Affairs.

¶ 6 In 1976, members of the Wapato family entered into a lease agreement with Wapato Point Resources, Inc. The parties envisioned that Wapato Point Resources would operate a resort complex on the premises comprised of motels, condominiums, and leased lots. Third parties would then sublease the condominiums or unimproved lots from Wapato Point Resources. Wright-Wapato, Inc. has since assumed responsibility over Wapato Point Resources' role as lessee under the lease agreement with the Wapato family.

***2** ¶ 7 At present, the resort is comprised of ten separate entities called "associations," that include time-share condominium associations, full-share private residents associations, and full-share condominium associations. Clerk's Papers (CP) at 125. Unlike the time-share associations, wherein owners split a right to use a vacation property with other members, members of the full-share associations have exclusive rights to their subleased property.

¶ 8 While the Wapato Point resort complex construction was underway, Wapato Point Resources entered into an agreement

with Chelan County wherein Wapato Point Resources agreed to make payments to the county "in lieu of taxes." *Id.* at 195. Wright-Wapato and its related entities continue to honor the agreement between Wapato Point Resources and Chelan County. The agreement was made in recognition of the fact that "under the applicable laws of the United States and of the State of Washington ... the premises, the improvements constructed or to be constructed thereon, and the said lease are all exempt from real and personal property ad valorem taxes and from the state leasehold excise tax." *Id.* at 194.

¶ 9 Because the anticipated construction and operation of the resort complex would require the county to expend its resources and provide services to Wapato Point, the payments represented "a fair contribution to cover all local governmental services." *Id.* at 195. Chelan County provides services to Wapato Point that include fire services, law enforcement, water, electricity, courts, and schools. Beyond contracting with a company for trash removal, Wright-Wapato does not provide resort residents with any services analogous to government services. Funds for the voluntary payments to the county are raised from dues collected from the resort's sublessees.

¶ 10 In 1994, DOR addressed the complexities of assessing a REET on transfers of time-share properties at Wapato Point in a letter sent to an attorney regarding the Wapato Point Development Company. The letter stated that because the value of such improvements could not readily be determined, DOR concluded that for time-share condominium units at Wapato Point, the REET should be assessed based on 50 percent of the sales price. DOR provided instructions for completing a REET affidavit for such improvements based on 50 percent of the sales price.

II. TRANSFERS OF SUBLEASES AND IMPROVEMENTS ON WAPATO POINT

¶ 11 Taxpayers **Sifferman**, the Ramels, and the Penoskes entered into real estate transactions in which they assigned their respective subleases and the improvements constructed thereon to their successors in interest. On the REET affidavit forms, **Sifferman**, the Ramels, and the Penoskes each listed a "Taxable Selling Price" for their sublease and improvements that was equivalent to the "Gross Selling Price." *Id.* at 102-04, 107. The REET is calculated based on the taxable selling price listed on the REET affidavit. Therefore, **Sifferman**, the Ramels, and the Penoskes paid their respective REETs at a rate of 1.78 percent of the total gross selling price for their leasehold properties.

¶ 12 Taxpayers Michael and Diane Lass, Thomas and Sharon Jansen, and Patrick French (the Lass owners), and Paradise Lake House LLC also entered into real estate transactions in which they assigned their subleases and the improvements constructed thereon to their successors in interest. However, unlike **Sifferman**, the Ramels, and the Penoskes, the Lass owners and Paradise Lake House LLC listed the "Taxable Selling Price" for their respective leasehold interests at half of the "Gross Selling Price." *Id.* at 105-06. Consequently, the Lass owners and Paradise Lake House LLC paid REETs at a rate of 1.78 percent based on half the gross selling price for their leasehold properties and not the total gross selling price.

***3** ¶ 13 In addition to the REET, each taxpayer paid a fee of 3.5 percent of the transaction price of their sublease transfer or assignment as required under the master lease agreement to Wright-Wapato. The fee is based on gross receipts of the sale and is paid to the beneficiaries of the Wapato family members who signed the master lease agreement as lessors of the Wapato Point trust allotment. Wright-Wapato collects the fee upon sale of a leasehold interest and remits the payment to the Wapato family beneficiaries. [2]

¶ 14 The improvements on the taxpayers' subleased properties were private residences rather than condominium units. Therefore, each taxpayer transferred or assigned a sublease to a full-share private residence as opposed to a time-share condominium unit. [3] The taxpayers are not members of the Wapato family, and none of the taxpayers identified themselves as members of a Native American tribe.

III. PROCEDURAL HISTORY

¶ 15 The taxpayers filed suit naming Chelan County and the Washington Department of Revenue as defendants and alleging that the REET they paid on transfers of their sublease properties on Native American land was an unlawful and unconstitutional tax. The complaint described the taxpayers' claims as arising under RCW 82.32.150 [4] and the UDJA, ch. 7.24 RCW. In addition to seeking declaratory relief resolving whether the REET may be applied to transfers of subleases on Native American land, the taxpayers also requested that the trial court order the county and the State to refund the taxpayers for the alleged unlawfully assessed tax. The

complaint further included a request that the trial court certify a class of similarly situated and unnamed taxpayers under CR 23(b).

*4 ¶ 16 DOR moved to dismiss the class action refund claims, arguing that a claim for a refund of a REET that has already been paid falls within the exclusive scope of RCW 82.32.180.[5] DOR asserted that, following the Supreme Court's decision in *Lacey Nursing Center, Inc. v. Department of Revenue*, 128 Wash.2d 40, 905 P.2d 338 (1995), a class action claim for an excise tax refund under RCW 82.32.180 cannot proceed.

¶ 17 The taxpayers responded that their causes of action arise under the UDJA and RCW 82.32.150 because they contest the validity of the tax imposed under the circumstances and did not merely seek a refund. The trial court agreed with DOR and, without considering certification of the putative class under CR 23(b), granted DOR's motion to strike the taxpayers' class action refund claims with prejudice.

¶ 18 Thereafter, both parties moved for summary judgment, agreeing that there were no disputes of material fact and that the issues before the court pertained solely to matters of law. DOR argued that the REET was properly imposed because the transaction met the statutory definition of a sale, federal law does not preempt imposition of the REET, and the taxpayers failed to satisfy their burden of demonstrating eligibility for a refund under RCW 82.32.180.

¶ 19 The taxpayers argued that they were entitled to summary judgment in their favor because the REET could only apply to the value of improvements on their lots rather than to the entire consideration paid for the sublease transfer, federal law preempts the REET, and imposition of the REET under the circumstances was unconstitutional. The taxpayers reasserted that their claims did not fall within RCW 82.32.180 and so they were not bound by that statute's procedural requirements. Instead, because they sought to invalidate the tax as applied under the circumstances, their claims were for declaratory relief and could proceed under RCW 82.32.150 and the UDJA.

¶ 20 The trial court granted DOR's motion for summary judgment, denied the taxpayers' motion for summary judgment, and dismissed the taxpayers' claims with prejudice. The taxpayers appeal the trial court's order dismissing their class action refund claims, and the trial court's order granting DOR's motion for summary judgment and denying their motion for summary judgment.

STANDARD OF REVIEW

¶ 21 We review a trial court's decision to grant a motion for summary judgment de novo, and we perform the same inquiry as the trial court. *Wash. Imaging Servs., LLC v. Dep't of Revenue*, 171 Wash.2d 548, 555, 252 P.3d 885 (2011). Summary judgment is appropriate where there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. CR 56(c).

DISCUSSION

I. NATURE OF THE TAXPAYERS' CLAIMS

¶ 22 The taxpayers contend that although they requested a refund of the REET they paid on transfers of their subleases and improvements, their claims do not arise under RCW 82.32.180, which is the statute that sets forth the process for seeking a refund of an excise tax such as the REET. Rather, the taxpayers assert that refund actions contemplated under RCW 82.32.180 involve computational errors, claims of entitlement to an exemption, or similar issues. Because the taxpayers broadly challenge the lawfulness or validity of the REET as applied to them, and they seek declaratory relief in addition to a refund, they argue that their claims fall within the scope of the UDJA and RCW 82.32.150.

*5 ¶ 23 DOR responds that the taxpayers cannot raise their claims under the UDJA because the legislature set forth specific procedures for contesting the imposition of a tax under RCW 82.32.180 and limited the availability of equitable remedies in RCW 82.32.150. In addition, DOR contends that declaratory relief is inappropriate in circumstances where, as here, an adequate remedy has been specifically delineated by the legislature to resolve a claim. DOR argues further that the taxpayers cannot obtain a refund of the REET under RCW 82.32.150 because the unambiguous language of the statute only provides for injunctive relief. We agree with DOR that the taxpayers' claims are refund claims within the scope of RCW 82.32.180.

[1] ¶ 24 The right to sue the state and local governments was "created by statute and is not a fundamental right." *Medina*

v. Pub. Util. Dist. No. 1 of Benton County, 147 Wash.2d 303, 312, 53 P.3d 993 (2002). Consequently, the State can impose limitations on that right. *Id.* Article II, section 26 of Washington's Constitution expressly recognizes that the legislature is entitled to "direct by law, in what manner, and in what courts, suits may be brought against the state."

¶ 25 State and local governments impose excise taxes on sales of real estate under RCW 82.45.060 and RCW 82.46.010(4). The administrative procedures set forth in ch. 82.32 RCW apply to excise taxes imposed on sales of real estate under these statutes. RCW 82.45.150; RCW 82.46.010(5). Therefore, RCW 82.32.180 and RCW 82.32.150 apply to the REET challenged here.

[2] ¶ 26 Because RCW 82.32.180 is a "conditional, partial waiver of the sovereign immunity afforded by Article II, § 26 of the Washington constitution," taxpayers who seek a refund of an excise tax must exercise their right to bring a suit against the State " 'in the manner provided by the statute.' " *Lacey*, 128 Wash.2d at 52, 905 P.2d 338 (quoting *Guy F. Atkinson Co. v. State*, 66 Wash.2d 570, 575, 403 P.2d 880 (1965)). In addition, RCW 82.32.150 designates the sole circumstance in which a taxpayer can seek to prospectively enjoin imposition of a tax. *Booker Auction Co. v. Dep't of Revenue*, 158 Wash. App. 84, 88, 241 P.3d 439 (2010). Together, RCW 82.32.180 and RCW 82.32.150 "constitute the legislature's specific pronouncements with regard to tax disputes in superior court." *Id.* at 89-90, 241 P.3d 439.

A. RCW 82.32.180 APPLIES TO THE TAXPAYERS' CLAIMS

¶ 27 RCW 82.32.180 establishes specific conditions that taxpayers are required to satisfy when seeking a refund of an excise tax. *Lacey*, 128 Wash.2d at 50, 905 P.2d 338. In addition to the requirement that a taxpayer keep certain records, taxpayers must also "(1) identify themselves, (2) state the correct amount of tax each concedes to be the true amount, (3) state reasons why the tax should be reduced or abated, and then (4) prove that the tax paid by the taxpayer is incorrect." *Id.* (summarizing the requirements in RCW 82.32.180). As provided in RCW 82.32.180, "no court action or proceeding of any kind shall be maintained by the taxpayer to recover any tax paid, or any part thereof, except as herein provided."

¶ 28 The taxpayers contend that RCW 82.32.180 does not apply to their claims because they challenge the validity of the tax as applied to them and do not merely seek a refund of the excess tax paid. We disagree.

¶ 29 After considering identical reasoning regarding an alleged distinction between a substantive challenge to the lawfulness of an excise tax and a challenge based on a computational or factual error, the supreme court held that refund claims in both circumstances must adhere to the requirements in RCW 82.32.180. *Lacey*, 128 Wash.2d at 52-53, 905 P.2d 338. There, the trial court reasoned that RCW 82.32.180 impliedly exempts from its requirements claims based on the legal basis of the tax because the conditions imposed in RCW 82.32.180 apply only to individual claims that allege factual errors pertaining to that particular tax assessment. *Id.*

*6 ¶ 30 The supreme court disagreed with the trial court's reasoning in *Lacey*, holding that "[t]he language of RCW 82.32.180 demonstrates that the Legislature intended excise tax refunds to be made only as prescribed by the statute," and "excise tax refunds may properly be appealed by a taxpayer only if the taxpayer satisfies the conditions specified under the statute." *Id.* at 53, 905 P.2d 338. Therefore, where a taxpayer seeks a refund of a tax already paid, the procedural requirements remain the same regardless of the reasoning presented in support of the refund claim. *See id.* at 52-53, 905 P.2d 338.

¶ 31 The taxpayers argue that their refund claim does not fit within the scope of RCW 82.32.180 because WAC 458-61A-301(12) limits refunds under RCW 82.32.180 to claims that meet specific circumstances, none of which apply to the taxpayers' claim that the tax is invalid as applied to them. The taxpayers are mistaken because WAC 458-61A-301(12) designates the procedures for seeking a refund directly from the county or from DOR. *See* WAC 458-61A-301(12)(c) (describing the process for submitting a tax refund request form to either the county or DOR). This regulation does not address or otherwise limit the types of claims that a taxpayer may raise when seeking a refund in an action filed in superior court under RCW 82.32.180.

¶ 32 Finally, the taxpayers argue that RCW 82.32.180 is only applicable to actions seeking refunds against the State, but they also seek a refund from the county. Local REETs,

however, "must comply with all applicable rules, regulations, laws, and court decisions regarding real estate excise taxes as imposed by the state." RCW 82.46.010(5). Because the general administrative procedures set forth in ch. 82.32 RCW apply to REETs imposed by the State, the same is true of a REET imposed by local governments. *See* RCW 82.45.150; RCW 82.46.010(5).

¶ 33 In filing their complaint, the taxpayers requested relief in the form a refund of the REET paid on the transfers of their subleases and improvements. On appeal, the taxpayers assign error to the trial court's dismissal of their request for a refund following its decision on summary judgment. Therefore, the taxpayers' claims for a refund fall within the scope of RCW 82.32.180 regardless of the manner in which they argue their entitlement to a refund, or against whom the claim is brought. *See* *Lacey*, 128 Wash.2d at 53, 905 P.2d 338.

B. RCW 82.32.150 DOES NOT INDEPENDENTLY AUTHORIZE THE TAXPAYERS' REFUND CLAIMS

[3] ¶ 34 The taxpayers argue that their claim for declaratory relief falls within RCW 82.32.150 and, relying on *Kirkland v. Department of Revenue*, 45 Wash. App. 720, 727 P.2d 254 (1986), that RCW 83.32.150 independently allows taxpayers to file suit requesting refunds. We disagree.

¶ 35 By its plain language, RCW 82.32.150 does not pertain to refunds. This statute provides in full:

> All taxes, penalties, and interest shall be paid in full before any action may be instituted in any court to contest all or any part of such taxes, penalties, or interest. No restraining order or injunction shall be granted or issued by any court or judge to restrain or enjoin the collection of any tax or penalty or any part thereof, except upon the ground that the assessment thereof was in violation of the Constitution of the United States or that of the state.

RCW 82.32.150.

[4] ¶ 36 We have previously construed RCW 82.32.150 to generally require taxpayers to first pay the full amount of assessed taxes before addressing the issue to the court unless the challenge to the assessed tax is based on constitutional grounds. *AOL, LLC v. Dep't of Revenue*, 149 Wash. App. 533, 546-47, 205 P.3d 159 (2009). If the challenge to a tax is based on constitutional grounds, "[t]hen, and only then, does the legislature allow a taxpayer access to the courts without first paying the full assessed taxes." *Id.* at 547, 205 P.3d 159. But where the taxpayers have already voluntarily paid a tax, "[t]here is no reason for a court to enjoin the Department's collection of [the] tax." *Id.*

*7 ¶ 37 The taxpayers here have paid the REET on their sublease transfers and their claims would not be remedied by injunctive relief. Although the taxpayers raise a constitutional challenge to the REET, the proviso in RCW 82.32.150 regarding injunctive relief for constitutional claims plainly does not apply here.

¶ 38 Taxpayers rely on *Kirkland* to argue that RCW 82.32.150 allows a taxpayer to seek a refund independent of the procedural requirements in RCW 82.32.180. However, *Kirkland* does not support the taxpayers' proposition. There, the court addressed whether the taxpayer was permitted to access an administrative remedy to resolve his claim where he had already paid a portion of the tax owed. 45 Wash. App. at 723, 727 P.2d 254. The court held that because the taxpayer had already made a payment before pursuing an administrative remedy, "Kirkland's only remedy is to challenge the assessment in a refund action under RCW 82.32.150." *Id.*

¶ 39 Given the narrow issue before the court in *Kirkland*, its holding was limited to the fact that RCW 82.32.150 precludes an administrative remedy when a payment has already been made. *Id.* The court neither ruled on whether RCW 82.32.150 independently authorized a refund claim nor on whether an individual who ultimately seeks a refund based on a constitutional argument can proceed under RCW 82.32.150 rather than RCW 82.32.180. *See* *id.* Moreover, RCW 82.32.180 unambiguously states that refund actions filed in state court must satisfy the requirements outlined therein. To interpret RCW 82.32.150 as separately

authorizing refund actions would create a conflict with RCW 82.32.180.

¶ 40 Because the taxpayers have already paid the REET assessed on their sublease transfers, and because RCW 82.32.150 does not independently authorize taxpayers to file a claim for an excise tax refund, RCW 82.32.150 does not apply to the taxpayers' claims.

C. THE UDJA DOES NOT APPLY TO THE TAXPAYERS' CLAIMS

[5] ¶ 41 As noted above, in RCW 82.32.180, the legislature specified the procedural requirements to which a taxpayer must adhere in an excise tax refund action filed in state court. *Lacey*, 128 Wash.2d at 52, 905 P.2d 338. In addition, in RCW 82.32.150, the legislature "provide[d] a legal remedy and limit[ed] the court's equitable powers," allowing a court to issue an injunction only in constitutional cases. *Tyler Pipe Indus., Inc. v. Dep't of Revenue*, 96 Wash.2d 785, 791, 638 P.2d 1213 (1982).

¶ 42 Despite these legislative pronouncements, the taxpayers argue that they may raise their claims under the UDJA because their claims turn on the validity of the tax as applied to them, and thus they are entitled to judicial determination of their rights, status, and legal relations. We disagree.

¶ 43 Allowing the taxpayers to proceed with a claim for a refund under the auspices of a declaratory relief action under the UDJA, while excusing the taxpayers from the explicit requirements for refund actions in RCW 82.32.180, would create a conflict between the statutes. A similar problem would arise if taxpayers could seek to restrain further imposition of the REET under the UDJA without satisfying the requirements for injunctive relief under RCW 82.32.150. Under the principles of statutory construction, if a general statute and specific statute concern the same subject matter and cannot be harmonized, the specific statute prevails. *Booker*, 158 Wash. App. at 90, 241 P.3d 439.

***8** ¶ 44 Both RCW 82.32.150 and RCW 82.32.180 specifically concern disputes regarding assessment of the REET at issue here and are the more specific statutes. Therefore, RCW 82.32.180 and RCW 82.32.150 control over the UDJA in this instance. *See id.* at 89-90, 241 P.3d 439 (holding that a taxpayer cannot proceed with a nonconstitutional challenge to imposition of a tax before payment of that tax under the Administrative Procedures Act because the procedures in ch. 82.32 RCW are more specific enactments, and the taxpayer was bound to adhere to them).

[6] ¶ 45 Moreover, under ordinary circumstances, if a plaintiff has another adequate remedy available, the plaintiff "should not proceed by way of a declaratory judgment action; but declaratory relief may be 'appropriate' in some situations, notwithstanding the availability of another remedy." *Wagers v. Goodwin*, 92 Wash. App. 876, 880, 964 P.2d 1214 (1998) (quoting *City of Federal Way v. King County*, 62 Wash. App. 530, 535 n.3, 815 P.2d 790 (1991)); *see also* CR 57 (providing that "[t]he existence of another adequate remedy does not preclude a judgment for declaratory relief in cases *where it is appropriate*" (emphasis added)). Here, declaratory relief for the taxpayers' claims would not constitute an appropriate remedy to the extent that it obviates the requirements imposed by the legislature in RCW 82.32.150 and RCW 82.32.180.

[7] ¶ 46 In addition, the UDJA is not an appropriate remedy for the taxpayers' claims because the taxpayers do not challenge the facial validity of the REET. "Declaratory judgments are proper 'to determine the facial validity of an enactment, as distinguished from its application or administration.' " *Hood Canal Sand & Gravel, LLC v. Goldmark*, 195 Wash. App. 284, 305, 381 P.3d 95 (2016) (internal quotation marks omitted) (quoting *Bainbridge Citizens United v. Dep't of Nat. Res.*, 147 Wash. App. 365, 374, 198 P.3d 1033 (2008)). The taxpayers do not ask that we declare that imposition of a REET on transfers of improvements on leased land is an invalid tax that can never be properly imposed. Instead, they ask for a refund of the taxes paid and ask that we determine that the REET should not apply to transfers of subleases on Native American land. Therefore, declaratory judgment based solely on the application of the REET under the circumstances would be improper. *See id.* [6]

¶ 47 To support their argument that courts may entertain a challenge to the validity of a tax under the UDJA, the taxpayers list several cases that involved a request for declaratory relief based on a claim that a tax was invalid. Each case is distinguishable. Most cases that the taxpayers rely on do not involve excise taxes and thus do not implicate the procedures in ch. 82.32 RCW. *See New Cingular PCS, LLC v. City of Clyde Hill*, 185 Wash.2d 594, 374 P.3d 151 (2016) (challenging imposition of a municipal fine imposed

after a taxpayer made false claims on utility tax returns); *Lane v. City of Seattle*, 164 Wash.2d 875, 194 P.3d 977 (2008) (challenging the City of Seattle's imposition of a tax on fire hydrants on Seattle Public Utilities that Seattle Public Utilities then collected by raising rates on water ratepayers); *Boeing Aircraft Co. v. Reconstruction Fin. Corp.*, 25 Wash.2d 652, 171 P.2d 838 (1946) (involving property taxes); *Texas Co. v. Cohn*, 8 Wash.2d 360, 112 P.2d 522 (1941) (challenging imposition of fuel oil taxes); *Carrillo v. City of Ocean Shores*, 122 Wash. App. 592, 94 P.3d 961 (2004) (challenging imposition of water and sewer charge as an unconstitutional property tax).

9** ¶ 48 The taxpayers also rely on *Covell v. City of Seattle*, 127 Wash.2d 874, 905 P.2d 324 (1995) ***abrogated on other grounds by *Yim v. City of Seattle*, 194 Wash.2d 682, 451 P.3d 694 (2019). That case is distinguishable because it involved a challenge to the facial validity of a street utility tax that the city incorrectly argued could be characterized as a regulatory fee or as an excise tax. *Covell*, 127 Wash.2d at 876-78, 891, 905 P.2d 324. Finally, the taxpayers cite *Nelson v. Appleway Chevrolet, Inc.*, 160 Wash.2d 173, 157 P.3d 847 (2007). The issue before the court in *Nelson* was whether a car dealership could relay the cost of its business and occupation tax on consumers and did not involve the validity of the underlying tax in any respect. 160 Wash.2d at 179, 157 P.3d 847. As this recapitulation demonstrates, the cases the taxpayers rely on are inapposite and do not support their assertion that they may challenge the validity of the REET under the UDJA in lieu of the procedures set forth by the legislature in ch. 82.32 RCW.

D. SUMMARY

¶ 49 The taxpayers' claims fall solely within the scope of RCW 82.32.180 because they seek a refund of taxes already paid and declaratory relief under the UDJA would be an inappropriate remedy under the circumstances. Accordingly, the taxpayers have the burden of proving that the amount of tax they paid was incorrect, and they have the burden of proving the correct amount of the tax owed. *See Bravern Residential, II, LLC v Dep't of Revenue*, 183 Wash. App. 769, 776, 334 P.3d 1182 (2014) (citing RCW 82.32.180).

II. ENTITLEMENT TO A REFUND UNDER WASHINGTON LAW

[8] ¶ 50 The taxpayers acknowledge that a REET may be imposed on the value of improvements transferred on leased land, but they contend that because the values of the taxpayers' improvements are not entered on the county assessor's rolls, a REET cannot be imposed on their transactions. Relying on a letter from DOR regarding other properties on Wapato Point, the taxpayers argue that at minimum, **Sifferman**, the Ramels, and the Penoskes are entitled to a 50 percent refund because their REET payments were improperly based on 100 percent of the gross selling price of their transfers.

¶ 51 DOR responds that the taxpayers did not meet their burden under RCW 82.32.180 of establishing the correct amount of tax that they owed, and summary judgment dismissal of their refund claims was proper. DOR asserts that the fact that the value of the taxpayers' improvements was not listed on county assessor's rolls does not exempt the taxpayers from their REET obligation. Moreover, to the extent that DOR's letter provides any authority in resolving this issue, DOR argues that the instructions in the letter are limited to time-share units and do not apply to the full-share residences at issue here. We agree with DOR that the taxpayers have not satisfied their burden of proving the correct amount of tax that they owe under RCW 82.32.180 to qualify for a refund.

¶ 52 A REET is assessed for each sale of real property, and the burden of paying the REET falls on the seller. RCW 82.45.060(1); RCW 82.45.080(1). A "sale" of real property is defined as,

> any conveyance, grant, assignment, quitclaim, or transfer of the ownership of or title to real property, including standing timber, or any estate or interest therein for a valuable consideration, and any contract for such conveyance, grant, assignment, quitclaim, or transfer, and any lease with an option to purchase real property ... The term also includes the grant, assignment, quitclaim, sale, or

> transfer of improvements constructed upon leased land.

RCW 82.45.010(1). Transfers of leasehold interests other than those defined as a "sale" in RCW 82.45.010(1) are not subject to a REET. RCW 82.45.010(3)(c). Accordingly, the parties agree that the REET applies to the value of the transfers of improvements on the taxpayers' subleased properties. The transfer of the interest in the subleased land, however, is not taxable under this framework. *See* RCW 82.45.010(3)(c).

***10** ¶ 53 Where a lessee transfers a leasehold interest in exchange for "valuable consideration," that transaction is taxable "to the extent the transfer includes any improvement constructed on leased land." WAC 458-61A-106(1)(b). "If the selling price of an improvement is not separately stated, or cannot otherwise be reasonably determined, the assessed value of the improvement as entered on the assessment rolls of the county assessor will be used." *Id.*

¶ 54 Relying on WAC 458-61A-106(1)(b), the taxpayers contend that without specific instructions in the REET affidavit, statutes, or regulations, and without guidance from the county assessor's rolls, they should not bear the responsibility of determining the values of their improvements. The taxpayers assert that ambiguities in the tax statutes should be construed in their favor and that therefore, no REET should be imposed. The taxpayers' argument is without merit.

¶ 55 There is no indication in the plain language of WAC 458-61A-106(1)(b) that taxpayers are exempt from the REET if the value of an improvement is not listed on the county assessor's rolls. Instead, the regulation provides that the county assessor's rolls may be used to determine the value of an improvement when other methods are impracticable. *Id.*

[9] ¶ 56 Moreover, the taxpayers have not shown that the values of their improvements cannot be reasonably determined through an appraisal or by any other means. The taxpayers argue that because there is no requirement in the REET statutes, regulations, or affidavit form compelling taxpayers to obtain an appraisal of an improvement, an appraisal is not a reasonable method for determining the value. But the fact that an appraisal is not explicitly required does not render an appraisal an unreasonable method for determining the value of an improvement.

¶ 57 The taxpayers' reliance on a DOR letter, which stated that the taxable value of a time-share improvement on leased land should be set at 50 percent of the sale price, is unavailing. DOR's letter specified that because the improvements at issue were time-share properties rather than exclusive-use properties, determining their value was particularly complicated. DOR believed that assessing the value at 50 percent of the sales price was thus an appropriate resolution in that instance. Here, however, the taxpayers transferred improvements that were private residences as opposed to time-share condominiums. Accordingly, DOR's conclusion in the letter provides little guidance to the circumstances in this case.

[10] ¶ 58 In a refund claim under RCW 82.32.180, taxpayers have an affirmative burden of establishing the correct amount of tax owed. *Bravern*, 183 Wash. App. at 776, 334 P.3d 1182. Here, the taxpayers did not present any evidence demonstrating the correct values of the interest transferred in their individual improvements or that such a value would be impossible to determine. The fact that the statutes, regulations, and REET affidavit do not specify the method for calculating the value of taxpayers' particular improvements does not entitle the taxpayers to a refund under RCW 82.32.180. And in so arguing, the taxpayers improperly displace their burden of establishing the correct amount of tax owed when seeking a refund. *See id.* Therefore, the trial court properly dismissed the taxpayers' state-law-based claims for a refund on summary judgment.

III. FEDERAL PREEMPTION

[11] ¶ 59 Indian tribes have a "sovereign status" that renders them immune from state and local regulatory authority in many respects. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 332, 103 S. Ct. 2378, 76 L. Ed. 2d 611 (1983). However, taxes imposed on non-Indians engaged in a taxable activity on Indian land, as here, have been upheld unless the tax was expressly or implicitly preempted by federal law. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 173, 109 S. Ct. 1698, 104 L. Ed. 2d 209 (1989).

***11** ¶ 60 The taxpayers assert that Chelan County lacked authority to impose the REET on their sublease transfers of improvements on Indian land because federal law preempts

imposition of the tax. The taxpayers argue that the REET at issue was expressly preempted under 25 U.S.C. § 5108.[7] The taxpayers contend further that although the issue is conclusively resolved under express preemption and we need not consider implicit preemption, the tax is also implicitly preempted under the balancing test announced in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142, 100 S. Ct. 2578, 65 L. Ed. 2d 665 (1980) (*Bracker*).

¶ 61 DOR argues that § 5108 is inapplicable and that the REET is not expressly preempted by federal law. DOR contends that even if § 5108 broadly applies, the REET is not expressly preempted because the tax is allowed under that statute. With regard to implicit preemption, DOR argues that the *Bracker* balancing test should not be invoked in transactions involving non-Indian individuals on non-reservation lands. However, even if the *Bracker* balancing test can be considered under the circumstances, DOR asserts that the REET is not implicitly preempted.

¶ 62 We agree with DOR that § 5108 does not apply to this case and that the REET is thus not explicitly preempted under federal law. We must therefore consider whether the REET is implicitly preempted. Contrary to DOR's assertion, the balancing analysis in *Bracker* applies to the allotted trust land involved in this case even if that land is not technically considered a reservation. On weighing the relevant interests under *Bracker*, the REET imposed on the real estate transactions involved in this case is not implicitly preempted.

A. EXPRESS PREEMPTION

[12] ¶ 63 The statute the taxpayers rely on in support of their federal preemption claim, § 5108, is a provision of the Indian Reorganization Act of 1934 (IRA). The statute provides in relevant part:

> 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.
>
> ....
>
> 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.) 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. § 5108 (footnote omitted). The parties do not dispute that the allotted lands on which Wapato Point is located were not acquired pursuant to the IRA or pursuant to the Act of July 28, 1955. *See United States v. Moore*, 161 F. 513, 516-18 (9th Cir. 1908) (discussing a congressional act in 1884 allotting lands under the Moses Agreement). Rather the land at issue was allotted to the Wapato family as part of the Moses Agreement in 1884. *Id.*

¶ 64 DOR contends that because the allotment on which Wapato Point is situated was not acquired pursuant to the IRA or to the Act of July 28, 1955, by its plain language, § 5108 does not apply. The taxpayers counter that because the IRA established a right to lease allotted land held in trust by the United States government in 25 U.S.C. § 415, and that provision refers to the Moses allotments on which Wapato Point is located, the right at issue here was acquired pursuant to the IRA and § 5108 applies. We agree with DOR.

***12** ¶ 65 At issue is whether the right to lease allotted lands under § 415 is a "right[ ] acquired pursuant to this Act," within the meaning of § 5108. In § 415, Congress authorized Indian owners of restricted Indian lands to lease their lands subject to the approval of the Secretary of the Interior. The Moses Allotments are explicitly referenced within the list of restricted lands that may be leased for a term not to exceed 99 years. § 415(a).

[13] **[14]** **[15]** ¶ 66 Federal statutes are interpreted by " 'ascertaining the intent of Congress and by giving effect to its legislative will,' " and " '[w]here the intent of Congress is evidenced clearly in the language of the statute, our inquiry ends there.' " *United States v. Sagg*, 125 F.3d 1294, 1295 (9th Cir. 1997) (quoting *United States v. Koyomejian*, 946 F.2d 1450, 1453 (9th Cir. 1991) (citations omitted)). The United States Supreme Court has specified 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, 93-94, 122 S. Ct. 528, 151 L. Ed. 2d 474 (2001) (quoting *Montana*

v. Blackfeet Tribe of Indians, 471 U.S. 759, 766, 105 S. Ct. 2399, 85 L. Ed. 2d 753 (1985)). However, "the canon that assumes Congress intends its statutes to benefit the tribes is offset by the canon that warns us against interpreting federal statutes as providing tax exemptions unless those exemptions are clearly expressed." *Id.* at 95, 122 S. Ct. 528.

[16] ¶ 67 It is significant here that while § 5108 discusses the Secretary of the Interior's authority to acquire "interest in lands, water rights, or surface rights to lands" on behalf of Native American tribes, § 5108 makes no mention of a right to lease allotted lands, although such leases are also administered by the Secretary. § 415. Under the interpretive canon of *expressio unius est exclusio alterius*, there arises a negative implication that " 'when a statute designates certain persons, things, or manners of operation, all omissions should be understood as exclusions.' " *Copeland v. Ryan*, 852 F.3d 900, 907 (9th Cir. 2017) (quoting *Boudette v. Barnette*, 923 F.2d 754, 757 (9th Cir. 1991)). Therefore, in listing water rights, surface rights, and interests in land in § 5108, and subsequently stating that "title to lands or rights acquired under the Act" are exempt from federal and state taxation, Congress indicated that the exemption applied to the rights and interests listed in § 5108 and not to additional, undefined rights. *See id.* at 907.

¶ 68 Notably, Congress did not describe the authorization to lease previously allotted lands as a right within § 415. Nor is there any indication within the text of § 415 that such leases are exempt from federal or state taxation. Because the statute is unambiguous and because tax exemptions must be clearly expressed, we conclude that § 5108 does not apply to the allotted lands in this case.

¶ 69 Courts in other jurisdictions have similarly held that the tax exemption in § 5108 does not apply to trust land that was not acquired pursuant to the IRA or pursuant to the Act of July 28, 1955. For example, in *Herpel v. County of Riverside*, 45 Cal. App. 5th 96, 118-22, 258 Cal. Rptr. 3d 444 (2020), the court held that § 5108 did not expressly preempt a tax on possessory interests of leased land that was allotted to tribe members prior to the IRA. Similarly, in *Pickerel Lake Outlet Ass'n v. Day County*, 2020 S.D. 72, ¶ 14-19, 953 N.W.2d 82, 89-91, the Supreme Court of South Dakota held that § 5108 was inapplicable where the taxpayers did not explain how the trust land acquired its status because the court could not determine whether the rights were acquired under the IRA.

***13** [17] ¶ 70 Because the allotted land was acquired prior to enactment of the IRA, § 5108 does not apply to this case. The taxpayers have not identified an additional statute that preempts the tax at issue.[8] Therefore, the REET imposed on the transactions involved in this case is not expressly preempted by federal law.[9]

B. IMPLICIT PREEMPTION

[18] [19] ¶ 71 Even if a state tax is not expressly preempted by a federal statute, "the tax might still unlawfully infringe on tribal sovereignty or the objectives of federal legislation." *Everi Payments, Inc. v. Dep't of Revenue*, 6 Wash. App. 2d 580, 600, 432 P.3d 411 (2018). Such a tax would still be implicitly preempted by federal law and deemed invalid. *Id.* A state tax is implicitly preempted if imposition of the tax does not satisfy the *Bracker* balancing test. *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 102, 126 S. Ct. 676, 163 L. Ed. 2d 429 (2005).

1. The *Bracker* Balancing Test Applies

[20] ¶ 72 The taxpayers contend that a *Bracker* balancing test is unnecessary because federal law expressly preempts the REET in this case. The taxpayers are incorrect because, as discussed in the preceding section, federal law does not expressly preempt the REET.

¶ 73 DOR asserts that because the allotted lands involved in this case belong to the Wapato family, and the REET is not imposed on transactions that take place on reservations, the *Bracker* balancing does not apply. DOR relies on *Wagnon*, in which the Supreme Court stated that "[t]he Bracker interest-balancing test has never been applied where, as here, the State asserts its taxing authority over non-Indians off the reservation." *Id.* at 110, 126 S. Ct. 676.

***14** ¶ 74 We disagree with DOR that the *Wagnon* court imposed so narrow a definition of "reservation" for *Bracker* interest balancing purposes as to exclude allotted lands such as those involved here. In *Wagnon*, the Court explained that the balancing the test was limited to "*on-reservation* transactions" because the test was designed to protect tribal sovereignty from the imposition of state law within its borders. *Id.* at 112, 126 S. Ct. 676. But a state

was not limited in asserting its taxing authority over Indian individuals who reside "outside of Indian country." *Id.* at 113, 126 S. Ct. 676.

[21] ¶ 75 The term "Indian country" is broader than suggested by DOR, and "the test for determining whether land is Indian country does not turn upon whether that land is denominated 'trust land' or 'reservation.' " *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 511, 111 S. Ct. 905, 112 L. Ed. 2d 1112 (1991). In outlining the geographic scope of sovereign immunity, the dispositive consideration is "whether the area has been 'validly set apart for the use of the Indians as such, under the superintendence of the Government.' " *Id.* (internal quotation marks omitted) (quoting *United States v. John*, 437 U.S. 634, 649, 98 S. Ct. 2541, 57 L. Ed. 2d 489 (1978)).

¶ 76 Here, the allotted lands are held in trust by the United States government for the benefit of the Wapato family. In addition, the allotted lands are exempt from property taxes and leasehold taxes. Even if the allotted lands are not expressly designated as a reservation, they remain subject to the administrative authority of the Bureau of Indian Affairs. In keeping with the purpose of *Bracker*, an interest balancing examination that protects the sovereignty of Indian individuals should be applied in this instance. *See Wagnon*, 546 U.S. at 112-13, 126 S.Ct. 676.

2. Bracker Does Not Preempt the REET

[22] [23] ¶ 77 In *Bracker*, the Supreme Court established a framework to guide courts in determining whether a state may "assert[ ] authority over the conduct of non-Indians engaging in activity on the reservation." 448 U.S. at 144, 100 S.Ct. 2578. Under the *Bracker* balancing test, courts conduct "a particularized inquiry," weighing "the nature of the state, federal, and tribal interests at stake," to determine "whether, in the specific context, the exercise of state authority would violate federal law." *Id.* at 145, 100 S. Ct. 2578.

¶ 78 The taxpayers urge us to determine that the REET is preempted by federal law under *Bracker* because, they contend, the federal interests are strong while the state interests are minimal. The taxpayers identify 25 U.S.C. § 415, the statute governing leasing of allotted lands as authorized by the Secretary of the Interior, and the federal regulatory scheme propounded by the Bureau of Indian Affairs, including 25 C.F.R. § 162.017, as evincing a substantial federal interest in regulating taxation of leasehold interests on Indian land. The taxpayers do not argue that tribal interests are in any way implicated by the transactions at issue. Further, because dues are collected from Wapato Point sublessees that are then paid in lieu of taxes to the county, the taxpayers contend that the state interest in assessing the tax is minimal and does not outweigh federal or tribal interests.

¶ 79 DOR responds that the federal and tribal interests in this case are minimal, but that the State, in turn, has a significant interest in imposing the tax because it provides services to Wapato Point residents. We agree with DOR that because the transactions at issue do not involve Native American individuals and do not pose a significant impact on federal interests, the state interest in collecting the tax weighs in favor of upholding the REET.

a. Federal Interests

***15** [24] ¶ 80 To determine the degree of federal interests involved, "we examine relevant federal law in terms of the underlying policies as well as historical notions of tribal independence and sovereignty." *Everi*, 6 Wash. App. 2d at 601, 432 P.3d 411. The federal statute governing leasing on allotted tribal lands, including the lands allotted pursuant to the Moses Agreement, does not express a position regarding taxation. *See* 25 U.S.C. § 415. As noted above, § 415 of the IRA removes restrictions on leasing allotted lands but is silent as to whether such activities are exempt from taxation.

¶ 81 The taxpayers are correct, however, in that the Bureau of Indian Affairs has set forth extensive regulations governing leasing on Native American land, and that these regulations generally preclude the imposition of any tax on transfers of leased interests. 25 C.F.R. §§ 162.001-.703. Of particular relevance, 25 C.F.R. § 162.017(a) provides, "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."

[25] ¶ 82 Although this regulatory scheme presents evidence of a federal interest in governing leasing on Indian land, the regulations do not establish a substantial federal interest, sufficient in its own right, to preempt imposition of the

REET. An agency regulation may preempt conflicting state law where that federal regulation was enacted with the force of law. *Wyeth v. Levine*, 555 U.S. 555, 576, 129 S. Ct. 1187, 173 L. Ed. 2d 51 (2009). But there is no indication in § 415 that Congress authorized the Bureau of Indian Affairs to wholly exempt leasing activities on Indian land from state taxation.

¶ 83 Moreover, federal interests in the *Bracker* context are associated with notions of tribal sovereignty. *Everi*, 6 Wash. App. 2d at 600, 432 P.3d 411. Although issues pertaining to leasing might impact tribal sovereignty in some contexts, such as when a tribe or member of a tribe is a party to a lease agreement, they do not do so here, where the transactions do not involve any Native American individuals or tribal members. Nor have the taxpayers identified any evidence that the REET interferes with federal interests in enabling leasing of lands allotted to tribes or Indian families under § 415. Without more particularized evidence of the federal interests impacted by the transactions involved this case, the broad-sweeping regulations addressing leasing in 25 C.F.R. §§ 162.001-.703 do not supplant the state interest in collecting the tax.

b. Tribal Interests

¶ 84 The taxpayers do not identify any tribal interests that are impacted by the imposition of the REET on the transactions involved in this case. The fact that the burden of paying the tax does not fall on members of the Wapato family or on any other Native American individuals, however, is worth noting.

¶ 85 Aside from *Bracker*, the Supreme Court has weighed the relevant interests in determining whether a state tax is implicitly preempted by federal law on two other occasions. *See Cotton Petroleum Corp.*, 490 U.S. at 164, 109 S.Ct. 1698; *Ramah Navajo Sch. Bd, Inc. v. Bureau of Revenue of NM*, 458 U.S. 832, 845, 102 S. Ct. 3394, 73 L. Ed. 2d 1174 (1982). Unlike in *Bracker* or in *Ramah*, the Supreme Court upheld the state tax in *Cotton Petroleum*, 490 U.S. at 186-87, 109 S.Ct. 1698. A critical point of distinction between *Cotton Petroleum* and *Bracker* and *Ramah* was the fact that in *Cotton Petroleum*, as here, the economic burden of the state tax did not fall on the tribe in any respect. *Id.* at 185, 109 S. Ct. 1698.

***16** ¶ 86 Accordingly, the REET does not impede tribal sovereignty, and it does not have a demonstrated effect on tribal economic interests.

c. State Interests

¶ 87 The fact that the tax is imposed "on activities between non-Indians" reduces the State's burden in demonstrating its interest in assessing the tax and "[t]he State need not point to a specific interest." *Everi*, 6 Wash. App. 2d at 602, 432 P.3d 411. In addition, the State has a legitimate interest in raising revenue and its "interests are 'strongest when non-Indians are taxed, and those taxes are used to provide [those non-Indians] with government services.' " *Id.* at 604, 432 P.3d 411 (alteration in original) (quoting *Salt River Pima-Maricopa Indian Cmty. v. Arizona*, 50 F.3d 734, 737 (9th Cir. 1995)).

¶ 88 On weighing the State's interest in *Cotton Petroleum*, the Court distinguished *Bracker* and *Ramah*, noting that "both cases involved complete abdication or noninvolvement of the State in the on-reservation activity." 490 U.S. at 185, 109 S.Ct. 1698. In *Cotton Petroleum*, however, both the company contesting the tax and the tribe received substantial state services. *Id.* The Court thus held that the state tax was not preempted, explaining that "[t]his is not a case in which the State has had nothing to do with the on-reservation activity, save tax it." *Id.* at 186, 109 S. Ct. 1698.

¶ 89 Similarly, here, Chelan County provides services to residents of Wapato Point including fire services, law enforcement, public utilities, courts, and schools. Although dues are collected from residents to pay for government services in lieu of taxes pursuant to an agreement with the county, the agreement states that the contributions are in place of leasehold and ad valorem property taxes. The agreement does not purport to replace the REET that the county would have otherwise collected from sales on property if it were not located on allotted land held in trust for the Wapato family. In addition, the 3.5 percent transactional fee imposed on the transfer of the subleases collected by Wright-Wapato is remitted to beneficiaries of the Wapato family and does not go to the provision of government services on Wapato Point. The state interests involved are thus substantial.

¶ 90 On balance, the interests weigh in favor of allowing the county to assess a REET on transfers of improvements on subleased property located on Native American land. Under *Bracker*, the REET here is not implicitly preempted by federal law.

IV. DUE PROCESS

[26] ¶ 91 The taxpayers argue that in imposing a REET as a condition to recording their transactions, the county violated their state and federal due process rights. In support, the taxpayers rely exclusively on *State ex rel. Baldwin v. Moore*, 7 Wash. 173, 34 P. 461 (1893). DOR responds that *Baldwin* is inapplicable, and that requiring payment of a REET as a condition to recording the assignment of the subleases does not violate due process. We agree with DOR.

¶ 92 *Baldwin* does not support the taxpayers' due process claims because the statutory procedures for contesting a tax did not exist when *Baldwin* was decided. There, the court held that a statute prohibiting the county auditor from filing a deed conveying property on which taxes remained unpaid was unconstitutional. *Baldwin*, 7 Wash. at 176, 34 P. 461. The court rejected the proposition that any constitutional infirmity in the statute could be cured where a plaintiff paid the tax and subsequently filed suit to recover the tax. *Id.* The dispositive issue in that case was the fact that there was "[n]o provision ... made in the act whereby an interested party can test the validity of the tax, or the truthfulness of the record." *Id.* at 174, 34 P. 461. In *Thurston County v. Tenino Stone Quarries, Inc.*, 44 Wash. 351, 359, 87 P. 634 (1906), the court declined to extend the holding in *Baldwin* where there existed "an opportunity to test the legality of the tax."

***17** ¶ 93 Here, the legislature set forth several avenues by which a taxpayer can contest the imposition of an excise tax in RCW 82.32.150, .160,[10] .170,[11] and .180. In approving the excise tax refund procedures in RCW 82.32.170 and .180 against a due process challenge, the supreme court in *Peters v. Sjoholm*, 95 Wash.2d 871, 877, 631 P.2d 937 (1981) held that "it is constitutionally sound to postpone the opportunity for a hearing until after the payment of the delinquent taxes." Therefore, *Baldwin* is distinguishable and the requirement that taxpayers pay a tax prior to challenging the validity of the assessment does not violate the taxpayers' rights to due process. *See id.*

V. DISMISSAL OF CLASS ACTION REFUND CLAIMS

[27] ¶ 94 The taxpayers assert that the trial court erred in dismissing their class action claims because it disregarded their causes of action seeking declaratory relief and improperly limited its focus to ch. 82.32 RCW. Because the REET as imposed in this case was a valid tax, we need not consider whether the trial court erred in dismissing the taxpayers' class action claims. Our decision on the substantive issue renders this determination unnecessary.[12] *See Sheehan v. Cent. Puget Sound Reg'l Transit Auth.*, 155 Wash.2d 790, 807, 123 P.3d 88 (2005) (holding that because the trial court's order dismissing the appellants' substantive claims on summary judgment was affirmed, "the class certification issue continues to be moot.").

CONCLUSION

¶ 95 We hold that (1) the taxpayers' claims arise under RCW 82.32.180 and that they cannot challenge imposition of the REET as applied to them under either RCW 82.32.150 or the UDJA. We further hold that (2) the taxpayers did not meet their burden of establishing the correct amount of tax owed under state law, (3) federal law does not preempt imposition of the REET, (4) conditioning recording of the taxpayers' real estate transaction on payment of the REET does not violate constitutional rights to due process, and (5) because the tax was a valid tax, we need not address whether the trial court erred in dismissing the taxpayers' class action claims.

¶ 96 Accordingly, we affirm the trial court's orders dismissing the taxpayers' claims on summary judgment.

We concur:

MAXA, P.J.

VELJACIC, J.

All Citations

--- P.3d ----, 2021 WL 4436230

Footnotes

1 In this opinion, we use the terms "Indian," "Indian land," or "Indian country" when referring to the cases or statutes that also use that language. Elsewhere, we use the term "Native American," which is "more formal [and] less colloquial." *See In re Dependency of Z.J.G.*, 196 Wash.2d 152, 157 n.3, 471 P.3d 853 (2020).

2 Throughout their brief, the taxpayers refer to the 3.5 percent fee on the sale of their properties as a "tribal tax." *See e.g.*, Br. of Appellants at 13, 18. This characterization is misleading because the fee is paid to members of the Wapato family and is not a tax collected by a tribe to support government functions on tribal land.

3 The parties dispute whether the taxpayers owned the improvements constructed on their leased lots. Evidence in the record supports both positions. For example, the master lease provides that any structures constructed on a leased premises "become the property of the Lessor," thus indicating that the improvements belong to the Wapato family and not to the sublessees. CP at 228. Conversely, the Vice President of Wright-Wapato testified during his deposition that individuals who own full-share private residences own their improvements. One of the owners of the Lass property also testified in a deposition that they owned the improvements constructed on their lot. This factual dispute is not material because a REET applies to "any conveyance, grant, assignment, quitclaim, or transfer of the ownership of or title to real property ... or any estate or interest therein for a valuable consideration." RCW 82.45.010 (RCW 82.45.010 was amended in 2018 and 2019. These amendments have no impact on our analysis; therefore, we cite to the current version of the statute). Therefore, ownership of an improvement is not dispositive to determining whether the REET applies to the transactions at issue and is only relevant to the extent that it impacts the value of the transferred interest.

4 RCW 82.32.150 provides that before filing a claim challenging a tax in any court, the taxpayer must first pay the tax in full. This statute provides further that the court shall not enjoin collection of a tax unless the assessment of the tax violated either the Washington or the United States Constitutions. RCW 82.32.150.

5 RCW 82.32.180 sets forth requirements and procedures for seeking a tax refund in an action before the superior court of Thurston County.

6 The arguments raised in the taxpayers' due process claim, addressed below, could arguably be construed as a facial challenge to the validity of the REET. Nevertheless, the taxpayers do not ask that we invalidate the REET in its entirety on this basis.

7 25 U.S.C. § 5108 was formerly codified at 25 U.S.C § 465.

8 The taxpayers argue that 25 C.F.R. § 162.017 independently establishes that federal law preempts the REET imposed in this case. This regulation states that leasehold interests, improvements on leased land, and activities conducted on leased land, are not subject to state or local taxation. However, courts have repeatedly held that that 25 C.F.R. § 162.017 "does not displace or modify *Bracker*—or otherwise change existing law—and therefore it does not of its own force operate to preempt any specific state tax." *Desert Water Agency v. U.S. Dep't of the Interior*, 849 F.3d 1250, 1256 (9th Cir. 2017); *see also Seminole Tribe of Fla. v. Stranburg*, 799 F.3d 1324, 1338 (11th Cir. 2015) (discussing 25 C.F.R. § 162.017 and holding that "deference to an agency's ultimate conclusion of federal preemption is inappropriate"). Instead, the regulation is more properly viewed as evidence of federal interests in a particular tax in the context of *Bracker* balancing. *Desert Water Agency*, 849 F.3d at 1256. We therefore consider the effect of this regulation on the issue before us within the scope of the *Bracker* balancing test rather than as an independent source of express federal preemption.

9 To the extent that the taxpayers rely on *County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251, 112 S. Ct. 683, 116 L. Ed. 2d 687 (1992), as conclusively establishing that the county cannot impose the REET on sales of Native American land, they are incorrect. *County of Yakima* is readily distinguishable. The land at issue in that case was allotted under the General Allotments Act. 502 U.S. at 269, 112 S. Ct. 683. The taxpayers have not shown that the same is true of the land at issue here. In

addition, the REET in *County of Yakima* was imposed directly on tribal members. *Id.* This fact led the Supreme Court to construe the ambiguity regarding taxation of Native American land in the General Allotment Act to the tribe's benefit. *Id.* Here, the REET was not imposed on tribal members, nor on members of the Wapato family to whom the land was allotted.

10 RCW 82.32.160 provides an administrative procedure for challenging imposition of a tax.
11 RCW 82.32.170 allows taxpayers to seek refunds directly from DOR without filing a lawsuit.
12 Moreover, as we explain above in section I, *supra*, claims for a refund of an excise tax already paid must arise exclusively under RCW 82.32.180. In *Lacey*, the supreme court held that the requirements for requesting a refund under RCW 82.32.180 could never be satisfied "by unnamed and unidentified plaintiffs in a class action." 128 Wash.2d at 55, 905 P.2d 338. Consequently, class actions are not authorized in suits seeking refunds of excise taxes. *Id.* at 54, 905 P.2d 338.

End of Document

APPENDIX 2

Statutes

Office of the Code Reviser

CONSTITUTION OF THE STATE OF WASHINGTON

This Constitution was framed by a convention of seventy-five delegates, chosen by the people of the Territory of Washington at an election held May 14, 1889, under section 3 of the Enabling Act. The convention met at Olympia on the fourth day of July, 1889, and adjourned on the twenty-second day of August, 1889. The Constitution was ratified by the people at an election held on October 1, 1889, and on November 11, 1889, in accordance with section 8 of the Enabling Act, the president of the United States proclaimed the admission of the State of Washington into the Union.

TABLE OF CONTENTS

In part (A), for convenience of the reader, the latest constitutional amendments have been integrated with the currently effective original sections of the Constitution with the result that the Constitution is herein presented in its currently amended form.

All current sections, whether original sections or constitutional amendments, are carried in Article and section order and are printed in regular type.

Following each section which has been amended, the original section and intervening amendments (if any) are printed in italics.

Appended to each amendatory section is a history note stating the amendment number and date of its approval as well as the citation to the session law wherein may be found the legislative measure proposing the amendment; e.g. **"[AMENDMENT 27,** 1951 House Joint Resolution No. 8, p 961. Approved November 4, 1952.]"

In part (B), the constitutional amendments are also printed separately, in order of their adoption.

(A) Constitution of the State of Washington

PREAMBLE

Article I — DECLARATION OF RIGHTS

Sections

PREAMBLE

We, the people of the State of Washington, grateful to the Supreme Ruler of the universe for our liberties, do ordain this constitution.

ARTICLE I
DECLARATION OF RIGHTS

SECTION 1 POLITICAL POWER. All political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights.

SECTION 2 SUPREME LAW OF THE LAND. The Constitution of the United States is the supreme law of the land.

SECTION 3 PERSONAL RIGHTS. No person shall be deprived of life, liberty, or property, without due process of law.

SECTION 4 RIGHT OF PETITION AND ASSEMBLAGE. The right of petition and of the people peaceably to assemble for the common good shall never be abridged.

SECTION 5 FREEDOM OF SPEECH. Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right.

SECTION 6 OATHS - MODE OF ADMINISTERING. The mode of administering an oath, or affirmation, shall be such as may be most consistent with and binding upon the conscience of the person to whom such oath, or affirmation, may be administered.

SECTION 7 INVASION OF PRIVATE AFFAIRS OR HOME PROHIBITED. No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

SECTION 8 IRREVOCABLE PRIVILEGE, FRANCHISE OR IMMUNITY PROHIBITED. No law granting irrevocably any privilege, franchise or immunity, shall be passed by the legislature.

SECTION 9 RIGHTS OF ACCUSED PERSONS. No person shall be compelled in any criminal case to give evidence against himself, or be twice put in jeopardy for the same offense.

SECTION 10 ADMINISTRATION OF JUSTICE. Justice in all cases shall be administered openly, and without unnecessary delay.

SECTION 11 RELIGIOUS FREEDOM. Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state. No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment: PROVIDED, HOWEVER, That this article shall not be so construed as to forbid the employment by the state of a chaplain for such of the state custodial, correctional, and mental institutions, or by a county's or public hospital district's hospital, health care facility, or hospice, as in the discretion of the legislature may seem justified. No religious qualification shall be required for any public office or employment, nor shall any person be incompetent as a witness or juror, in consequence of his opinion on matters of religion, nor be questioned in any court of justice touching his religious belief to affect the weight of his testimony. [**AMENDMENT 88,** 1993 House Joint Resolution No. 4200, p 3062. Approved November 2, 1993.]

NOTES:

signees, or deducted from the proceeds of sale, leases, or other sources of revenue: *Provided*, That the amounts so collected shall be covered into the Treasury as miscellaneous receipts, except when the expenses of the work are paid from Indian tribal funds, in which event they shall be credited to such funds.

(Feb. 14, 1920, ch. 75, §1, 41 Stat. 415; Mar. 1, 1933, ch. 158, 47 Stat. 1417.)

AMENDMENTS

1933—Act Mar. 1, 1933, substituted "to collect reasonable fees to cover the cost of any and all work performed for Indian tribes or individual Indians" for "to charge a reasonable fee for the work incident to the sale, leasing, or assigning of such lands, or in the sale of the timber, or in the administration of Indian forests" and "deducted from the proceeds of sale, leases, or other sources of revenue" for "from the proceeds of sales", struck out introductory text "In the sale of all Indian allotments, or in leases, or assignment of leases covering, tribal or allotted lands for mineral, farming, grazing, business or other purposes, or in the sale of timber thereon" and provided for the use of discretion and the crediting of Indian tribal funds.

§ 414. Reservation of minerals in sale of Choctaw-Chickasaw lands

On and after August 25, 1937, in all sales of tribal lands of the Choctaw and Chickasaw Indians in Oklahoma provided for by existing law, the Secretary of the Interior is hereby authorized to offer such lands for sale subject to a reservation of the mineral rights therein, including oil and gas, for the benefit of said Indians, whenever in his judgment the interests of the Indians will best be served thereby.

(Aug. 25, 1937, ch. 778, 50 Stat. 810.)

§ 415. Leases of restricted lands

(a) Authorized purposes; term; approval by Secretary

Any restricted Indian lands, whether tribally, or individually owned, may be leased by the Indian owners, with the approval of the Secretary of the Interior, for public, religious, educational, recreational, residential, or business purposes, including the development or utilization of natural resources in connection with operations under such leases, for grazing purposes, and for those farming purposes which require the making of a substantial investment in the improvement of the land for the production of specialized crops as determined by said Secretary. All leases so granted shall be for a term of not to exceed twenty-five years, except leases of land located outside the boundaries of Indian reservations in the State of New Mexico, leases of land on the Agua Caliente (Palm Springs) Reservation, the Dania Reservation, the Pueblo of Santa Ana (with the exception of the lands known as the "Santa Ana Pueblo Spanish Grant"), the reservation of the Confederated Tribes of the Warm Springs Reservation of Oregon, the Moapa Indian Reservation, the Swinomish Indian Reservation, the Southern Ute Reservation, the Fort Mojave Reservation, the Confederated Tribes of the Umatilla Indian Reservation, the Burns Paiute Reservation, the Coeur d'Alene Indian Reservation, the Kalispel Indian Reservation and land held in trust for the Kalispel Tribe of Indians, the Puyallup Tribe of Indians,,[1] the pueblo of Cochiti, the pueblo of Pojoaque, the pueblo of Tesuque, the pueblo of Zuni, the Hualapai Reservation, the Spokane Reservation, the San Carlos Apache Reservation, the Yavapai-Prescott Community Reservation, the Pyramid Lake Reservation, the Gila River Reservation, the Soboba Indian Reservation, the Viejas Indian Reservation, the Tulalip Indian Reservation, the Navajo Reservation, the Cabazon Indian Reservation, the Muckleshoot Indian Reservation and land held in trust for the Muckleshoot Indian Tribe, the Mille Lacs Indian Reservation with respect to a lease between an entity established by the Mille Lacs Band of Chippewa Indians and the Minnesota Historical Society, leases of the the[1] lands comprising the Moses Allotment Numbered 8 and the Moses Allotment Numbered 10, Chelan County, Washington, and lands held in trust for the Las Vegas Paiute Tribe of Indians, and lands held in trust for the Twenty-nine Palms Band of Luiseno Mission Indians, and lands held in trust for the Reno Sparks Indian Colony, lands held in trust for the Torres Martinez Desert Cahuilla Indians, lands held in trust for the Guidiville Band of Pomo Indians of the Guidiville Indian Rancheria, lands held in trust for the Confederated Tribes of the Umatilla Indian Reservation, lands held in trust for the Confederated Tribes of the Warm Springs Reservation of Oregon, land held in trust for the Coquille Indian Tribe, land held in trust for the Confederated Tribes of Siletz Indians, land held in trust for the Confederated Tribes of the Coos, Lower Umpqua, and Siuslaw Indians, land held in trust for the Klamath Tribes, and land held in trust for the Burns Paiute Tribe, and lands held in trust for the Cow Creek Band of Umpqua Tribe of Indians, land held in trust for the Prairie Band Potawatomi Nation, lands held in trust for the Cherokee Nation of Oklahoma, land held in trust for the Fallon Paiute Shoshone Tribes, lands held in trust for the Pueblo of Santa Clara, land held in trust for the Yurok Tribe, land held in trust for the Hopland Band of Pomo Indians of the Hopland Rancheria, lands held in trust for the Yurok Tribe, lands held in trust for the Hopland Band of Pomo Indians of the Hopland Rancheria, lands held in trust for the Confederated Tribes of the Colville Reservation, lands held in trust for the Cahuilla Band of Indians of California, lands held in trust for the Confederated Tribes of the Grand Ronde Community of Oregon, and the lands held in trust for the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana, and leases to the Devils Lake Sioux Tribe, or any organization of such tribe, of land on the Devils Lake Sioux Reservation, and lands held in trust for Ohkay Owingeh Pueblo[2] which may be for a term of not to exceed ninety-nine years, and except leases of land held in trust for the Morongo Band of Mission Indians which may be for a term of not to exceed 50 years, and except leases of land for grazing purposes which may be for a term of not to exceed ten years. Leases for public, religious, educational, recreational, residential, or busi-

[1] So in original.

[2] So in original. Probably should be followed by a comma.

ness purposes (except leases the initial term of which extends for more than seventy-four years) with the consent of both parties may include provisions authorizing their renewal for one additional term of not to exceed twenty-five years, and all leases and renewals shall be made under such terms and regulations as may be prescribed by the Secretary of the Interior. Prior to approval of any lease or extension of an existing lease pursuant to this section, the Secretary of the Interior shall first satisfy himself that adequate consideration has been given to the relationship between the use of the leased lands and the use of neighboring lands; the height, quality, and safety of any structures or other facilities to be constructed on such lands; the availability of police and fire protection and other services; the availability of judicial forums for all criminal and civil causes arising on the leased lands; and the effect on the environment of the uses to which the leased lands will be subject.

(b) Leases involving Tulalip Tribes

Any lease by the Tulalip Tribes, the Puyallup Tribe of Indians, the Swinomish Indian Tribal Community, or the Kalispel Tribe of Indians under subsection (a) of this section, except a lease for the exploitation of any natural resource, shall not require the approval of the Secretary of the Interior (1) if the term of the lease does not exceed fifteen years, with no option to renew, (2) if the term of the lease does not exceed thirty years, with no option to renew, and the lease is executed pursuant to tribal regulations previously approved by the Secretary of the Interior, or (3) if the term does not exceed seventy-five years (including options to renew), and the lease is executed under tribal regulations approved by the Secretary under this clause (3).

(c) Leases involving Hopi Tribe and Hopi Partitioned Lands Accommodation Agreement

Notwithstanding subsection (a), a lease of land by the Hopi Tribe to Navajo Indians on the Hopi Partitioned Lands may be for a term of 75 years, and may be extended at the conclusion of the term of the lease.

(d) Definitions

For purposes of this section—

(1) the term "Hopi Partitioned Lands" means lands located in the Hopi Partitioned Area, as defined in section 168.1(g) of title 25, Code of Federal Regulations (as in effect on October 11, 1996);

(2) the term "Navajo Indians" means members of the Navajo Tribe;

(3) the term "individually owned Navajo Indian allotted land" means a single parcel of land that—

(A) is located within the jurisdiction of the Navajo Nation;

(B) is held in trust or restricted status by the United States for the benefit of Navajo Indians or members of another Indian tribe; and

(C) was—

(i) allotted to a Navajo Indian; or

(ii) taken into trust or restricted status by the United States for an individual Indian;

(4) the term "interested party" means an Indian or non-Indian individual or corporation, or tribal or non-tribal government whose interests could be adversely affected by a tribal trust land leasing decision made by an applicable Indian tribe;

(5) the term "Navajo Nation" means the Navajo Nation government that is in existence on August 9, 1955, or its successor;

(6) the term "petition" means a written request submitted to the Secretary for the review of an action (or inaction) of an Indian tribe that is claimed to be in violation of the approved tribal leasing regulations;

(7) the term "Secretary" means the Secretary of the Interior;

(8) the term "tribal regulations" means regulations enacted in accordance with applicable tribal law and approved by the Secretary;

(9) the term "Indian tribe" has the meaning given such term in section 479a of this title; and

(10) the term "individually owned allotted land" means a parcel of land that—

(A)(i) is located within the jurisdiction of an Indian tribe; or

(ii) is held in trust or restricted status by the United States for the benefit of an Indian tribe or a member of an Indian tribe; and

(B) is allotted to a member of an Indian tribe.

(e) Leases of restricted lands for the Navajo Nation

(1) Any leases by the Navajo Nation for purposes authorized under subsection (a), and any amendments thereto, except a lease for the exploration, development, or extraction of any mineral resources, shall not require the approval of the Secretary if the lease is executed under the tribal regulations approved by the Secretary under this subsection and the term of the lease does not exceed—

(A) in the case of a business or agricultural lease, 25 years, except that any such lease may include an option to renew for up to two additional terms, each of which may not exceed 25 years; and

(B) in the case of a lease for public, religious, educational, recreational, or residential purposes, 75 years if such a term is provided for by the Navajo Nation through the promulgation of regulations.

(2) Paragraph (1) shall not apply to individually owned Navajo Indian allotted land.

(3) The Secretary shall have the authority to approve or disapprove tribal regulations referred to under paragraph (1). The Secretary shall approve such tribal regulations if such regulations are consistent with the regulations of the Secretary under subsection (a), and any amendments thereto, and provide for an environmental review process. The Secretary shall review and approve or disapprove the regulations of the Navajo Nation within 120 days of the submission of such regulations to the Secretary. Any disapproval of such regulations by the Secretary shall be accompanied by written documentation that sets forth the basis for the disapproval. Such 120-day period may be extended by the Sec-

retary after consultation with the Navajo Nation.

(4) If the Navajo Nation has executed a lease pursuant to tribal regulations under paragraph (1), the Navajo Nation shall provide the Secretary with—

(A) a copy of the lease and all amendments and renewals thereto; and

(B) in the case of regulations or a lease that permits payment to be made directly to the Navajo Nation, documentation of the lease payments sufficient to enable the Secretary to discharge the trust responsibility of the United States under paragraph (5).

(5) The United States shall not be liable for losses sustained by any party to a lease executed pursuant to tribal regulations under paragraph (1), including the Navajo Nation. Nothing in this paragraph shall be construed to diminish the authority of the Secretary to take appropriate actions, including the cancellation of a lease, in furtherance of the trust obligation of the United States to the Navajo Nation.

(6)(A) An interested party may, after exhaustion of tribal remedies, submit, in a timely manner, a petition to the Secretary to review the compliance of the Navajo Nation with any regulations approved under this subsection. If upon such review the Secretary determines that the regulations were violated, the Secretary may take such action as may be necessary to remedy the violation, including rescinding the approval of the tribal regulations and reassuming responsibility for the approval of leases for Navajo Nation tribal trust lands.

(B) If the Secretary seeks to remedy a violation described in subparagraph (A), the Secretary shall—

(i) make a written determination with respect to the regulations that have been violated;

(ii) provide the Navajo Nation with a written notice of the alleged violation together with such written determination; and

(iii) prior to the exercise of any remedy or the rescission of the approval of the regulation involved and the reassumption of the lease approval responsibility, provide the Navajo Nation with a hearing on the record and a reasonable opportunity to cure the alleged violation.

(f) Leases involving Gila River Indian Community Reservation; arbitration of disputes

Any contract, including a lease or construction contract, affecting land within the Gila River Indian Community Reservation may contain a provision for the binding arbitration of disputes arising out of such contract. Such contracts shall be considered within the meaning of "commerce" as defined and subject to the provisions of section 1 of title 9. Any refusal to submit to arbitration pursuant to a binding agreement for arbitration or the exercise of any right conferred by title 9 to abide by the outcome of arbitration pursuant to the provisions of chapter 1 of title 9, sections 1 through 14, shall be deemed to be a civil action arising under the Constitution, laws or treaties of the United States within the meaning of section 1331 of title 28.

(g) Lease of tribally-owned land by Assiniboine and Sioux Tribes of the Fort Peck Reservation

(1) In general

Notwithstanding subsection (a) and any regulations under part 162 of title 25, Code of Federal Regulations (or any successor regulation), subject to paragraph (2), the Assiniboine and Sioux Tribes of the Fort Peck Reservation may lease to the Northern Border Pipeline Company tribally-owned land on the Fort Peck Indian Reservation for 1 or more interstate gas pipelines.

(2) Conditions

A lease entered into under paragraph (1)—

(A) shall commence during fiscal year 2011 for an initial term of 25 years;

(B) may be renewed for an additional term of 25 years; and

(C) shall specify in the terms of the lease an annual rental rate—

(i) which rate shall be increased by 3 percent per year on a cumulative basis for each 5-year period; and

(ii) the adjustment of which in accordance with clause (i) shall be considered to satisfy any review requirement under part 162 of title 25, Code of Federal Regulations (or any successor regulation).

(h) Tribal approval of leases

(1) In general

At the discretion of any Indian tribe, any lease by the Indian tribe for the purposes authorized under subsection (a) (including any amendments to subsection (a)), except a lease for the exploration, development, or extraction of any mineral resources, shall not require the approval of the Secretary, if the lease is executed under the tribal regulations approved by the Secretary under this subsection and the term of the lease does not exceed—

(A) in the case of a business or agricultural lease, 25 years, except that any such lease may include an option to renew for up to 2 additional terms, each of which may not exceed 25 years; and

(B) in the case of a lease for public, religious, educational, recreational, or residential purposes, 75 years, if such a term is provided for by the regulations issued by the Indian tribe.

(2) Allotted land

Paragraph (1) shall not apply to any lease of individually owned Indian allotted land.

(3) Authority of Secretary over tribal regulations

(A) In general

The Secretary shall have the authority to approve or disapprove any tribal regulations issued in accordance with paragraph (1).

(B) Considerations for approval

The Secretary shall approve any tribal regulation issued in accordance with paragraph (1), if the tribal regulations—

(i) are consistent with any regulations issued by the Secretary under subsection

(a) (including any amendments to the subsection or regulations); and

(ii) provide for an environmental review process that includes—

(I) the identification and evaluation of any significant effects of the proposed action on the environment; and

(II) a process for ensuring that—

(aa) the public is informed of, and has a reasonable opportunity to comment on, any significant environmental impacts of the proposed action identified by the Indian tribe; and

(bb) the Indian tribe provides responses to relevant and substantive public comments on any such impacts before the Indian tribe approves the lease.

(C) Technical assistance

The Secretary may provide technical assistance, upon request of the Indian tribe, for development of a regulatory environmental review process under subparagraph (B)(ii).

(D) Indian Self-Determination Act

The technical assistance to be provided by the Secretary pursuant to subparagraph (C) may be made available through contracts, grants, or agreements entered into in accordance with, and made available to entities eligible for, such contracts, grants, or agreements under the Indian Self-Determination Act (25 U.S.C. 450[3] et seq.).

(4) Review process

(A) In general

Not later than 120 days after the date on which the tribal regulations described in paragraph (1) are submitted to the Secretary, the Secretary shall review and approve or disapprove the regulations.

(B) Written documentation

If the Secretary disapproves the tribal regulations described in paragraph (1), the Secretary shall include written documentation with the disapproval notification that describes the basis for the disapproval.

(C) Extension

The deadline described in subparagraph (A) may be extended by the Secretary, after consultation with the Indian tribe.

(5) Federal environmental review

Notwithstanding paragraphs (3) and (4), if an Indian tribe carries out a project or activity funded by a Federal agency, the Indian tribe shall have the authority to rely on the environmental review process of the applicable Federal agency rather than any tribal environmental review process under this subsection.

(6) Documentation

If an Indian tribe executes a lease pursuant to tribal regulations under paragraph (1), the Indian tribe shall provide the Secretary with—

(A) a copy of the lease, including any amendments or renewals to the lease; and

(B) in the case of tribal regulations or a lease that allows for lease payments to be made directly to the Indian tribe, documentation of the lease payments that are sufficient to enable the Secretary to discharge the trust responsibility of the United States under paragraph (7).

(7) Trust responsibility

(A) In general

The United States shall not be liable for losses sustained by any party to a lease executed pursuant to tribal regulations under paragraph (1).

(B) Authority of Secretary

Pursuant to the authority of the Secretary to fulfill the trust obligation of the United States to the applicable Indian tribe under Federal law (including regulations), the Secretary may, upon reasonable notice from the applicable Indian tribe and at the discretion of the Secretary, enforce the provisions of, or cancel, any lease executed by the Indian tribe under paragraph (1).

(8) Compliance

(A) In general

An interested party, after exhausting of any applicable tribal remedies, may submit a petition to the Secretary, at such time and in such form as the Secretary determines to be appropriate, to review the compliance of the applicable Indian tribe with any tribal regulations approved by the Secretary under this subsection.

(B) Violations

If, after carrying out a review under subparagraph (A), the Secretary determines that the tribal regulations were violated, the Secretary may take any action the Secretary determines to be necessary to remedy the violation, including rescinding the approval of the tribal regulations and reassuming responsibility for the approval of leases of tribal trust lands.

(C) Documentation

If the Secretary determines that a violation of the tribal regulations has occurred and a remedy is necessary, the Secretary shall—

(i) make a written determination with respect to the regulations that have been violated;

(ii) provide the applicable Indian tribe with a written notice of the alleged violation together with such written determination; and

(iii) prior to the exercise of any remedy, the rescission of the approval of the regulation involved, or the reassumption of lease approval responsibilities, provide the applicable Indian tribe with—

(I) a hearing that is on the record; and

(II) a reasonable opportunity to cure the alleged violation.

(9) Savings clause

Nothing in this subsection shall affect subsection (e) or any tribal regulations issued under that subsection.

[3] So in original. Probably should be "450f".

(Aug. 9, 1955, ch. 615, §1, 69 Stat. 539; Pub. L. 86–326, Sept. 21, 1959, 73 Stat. 597; Pub. L. 86–505, §2, June 11, 1960, 74 Stat. 199; Pub. L. 87–375, Oct. 4, 1961, 75 Stat. 804; Pub. L. 87–785, Oct. 10, 1962, 76 Stat. 805; Pub. L. 88–167, Nov. 4, 1963, 77 Stat. 301; Pub. L. 89–408, Apr. 27, 1966, 80 Stat. 132; Pub. L. 90–182, Dec. 8, 1967, 81 Stat. 559; Pub. L. 90–184, Dec. 10, 1967, 81 Stat. 560; Pub. L. 90–335, §1(f), June 10, 1968, 82 Stat. 175; Pub. L. 90–355, June 20, 1968, 82 Stat. 242; Pub. L. 90–534, §6, Sept. 28, 1968, 82 Stat. 884; Pub. L. 90–570, Oct. 12, 1968, 82 Stat. 1003; Pub. L. 91–274, §§2, 3, June 2, 1970, 84 Stat. 302; Pub. L. 91–275, §§1, 2, June 2, 1970, 84 Stat. 303; Pub. L. 91–557, §8, Dec. 17, 1970, 84 Stat. 1468; Pub. L. 92–182, §6, Dec. 15, 1971, 85 Stat. 626; Pub. L. 92–431, Sept. 26, 1972, 86 Stat. 723; Pub. L. 92–472, §7, Oct. 9, 1972, 86 Stat. 788; Pub. L. 92–488, §4, Oct. 13, 1972, 86 Stat. 806; Pub. L. 96–216, Mar. 27, 1980, 94 Stat. 125; Pub. L. 96–491, §3, Dec. 2, 1980, 94 Stat. 2564; Pub. L. 97–459, title I, §107, Jan. 12, 1983, 96 Stat. 2516; Pub. L. 98–70, Aug. 8, 1983, 97 Stat. 401; Pub. L. 98–203, §1(c), Dec. 2, 1983, 97 Stat. 1384; Pub. L. 99–221, §2, Dec. 26, 1985, 99 Stat. 1735; Pub. L. 99–389, §3(a), Aug. 23, 1986, 100 Stat. 829; Pub. L. 99–500, §101(h) [title I, §122], Oct. 18, 1986, 100 Stat. 1783–242, 1783–267, and Pub. L. 99–591, §101(h) [title I, §122], Oct. 30, 1986, 100 Stat. 3341–242, 3341–267; Pub. L. 99–575, §5, Oct. 28, 1986, 100 Stat. 3246; Pub. L. 101–630, title II, §201, Nov. 28, 1990, 104 Stat. 4532; Pub. L. 102–497, §5, Oct. 24, 1992, 106 Stat. 3255; Pub. L. 103–435, §5, Nov. 2, 1994, 108 Stat. 4569; Pub. L. 104–301, §9, Oct. 11, 1996, 110 Stat. 3652; Pub. L. 105–256, §1, Oct. 14, 1998, 112 Stat. 1896; Pub. L. 106–216, §1(a), June 20, 2000, 114 Stat. 343; Pub. L. 106–568, title XII, §1203, Dec. 27, 2000, 114 Stat. 2934; Pub. L. 107–102, §1, Dec. 27, 2001, 115 Stat. 974; Pub. L. 107–159, Apr. 4, 2002, 116 Stat. 122; Pub. L. 107–331, title X, §1002(a), Dec. 13, 2002, 116 Stat. 2869; Pub. L. 108–199, div. H, §149, Jan. 23, 2004, 118 Stat. 446; Pub. L. 109–147, §1(a), Dec. 22, 2005, 119 Stat. 2679; Pub. L. 109–221, title II, §202(a), May 12, 2006, 120 Stat. 340; Pub. L. 110–453, title II, §§202, 204, 205(a), Dec. 2, 2008, 122 Stat. 5029; Pub. L. 111–334, §1, Dec. 22, 2010, 124 Stat. 3582; Pub. L. 111–336, §1, Dec. 22, 2010, 124 Stat. 3587; Pub. L. 111–381, §1, Jan. 4, 2011, 124 Stat. 4133; Pub. L. 112–151, §2, July 30, 2012, 126 Stat. 1150.)

REFERENCES IN TEXT

The Indian Self-Determination Act, referred to in subsec. (h)(3)(D), is title I of Pub. L. 93–638, Jan. 4, 1975, 88 Stat. 2206, which is classified principally to part A (§450f et seq.) of subchapter II of chapter 14 of this title. For complete classification of this Act to the Code, see Short Title note set out under section 450 of this title and Tables.

CODIFICATION

Pub. L. 99–591 is a corrected version of Pub. L. 99–500.

AMENDMENTS

2012—Subsec. (d)(4). Pub. L. 112–151, §2(1)(A), substituted "an applicable Indian tribe" for "the Navajo Nation".

Subsec. (d)(6). Pub. L. 112–151, §2(1)(B), substituted "an Indian tribe" for "the Navajo Nation".

Subsec. (d)(8). Pub. L. 112–151, §2(1)(D)(i), (ii), struck out "the Navajo Nation" before "regulations" and substituted "with applicable tribal law" for "with Navajo Nation law".

Subsec. (d)(9), (10). Pub. L. 112–151, §2(1)(C), (D)(iii), (E), added pars. (9) and (10).

Subsec. (h). Pub. L. 112–151, §2(2), added subsec. (h).

2011—Subsec. (a). Pub. L. 111–381 inserted "and lands held in trust for Ohkay Owingeh Pueblo" after "of land on the Devils Lake Sioux Reservation,".

2010—Subsec. (a). Pub. L. 111–336, §1(1), inserted "and land held in trust for the Kalispel Tribe of Indians, the Puyallup Tribe of Indians," after "the Kalispel Indian Reservation".

Pub. L. 111–334 inserted "land held in trust for the Coquille Indian Tribe, land held in trust for the Confederated Tribes of Siletz Indians, land held in trust for the Confederated Tribes of the Coos, Lower Umpqua, and Siuslaw Indians, land held in trust for the Klamath Tribes, and land held in trust for the Burns Paiute Tribe," after "lands held in trust for the Confederated Tribes of the Warm Springs Reservation of Oregon,".

Subsec. (b). Pub. L. 111–336, §1(2), inserted ", the Puyallup Tribe of Indians, the Swinomish Indian Tribal Community, or the Kalispel Tribe of Indians" after "Tulalip Tribes".

2008—Subsec. (a). Pub. L. 110–453, §205(a), inserted "and lands held in trust for the Cow Creek Band of Umpqua Tribe of Indians," after "lands held in trust for the Confederated Tribes of the Warm Springs Reservation of Oregon,".

Pub. L. 110–453, §204, inserted "and except leases of land held in trust for the Morongo Band of Mission Indians which may be for a term of not to exceed 50 years," after "which may be for a term of not to exceed ninety-nine years,".

Subsec. (f). Pub. L. 110–453, §202, substituted "lease or construction contract, affecting" for "lease, affecting".

2006—Subsec. (a). Pub. L. 109–221, in second sentence, substituted "Moapa Indian Reservation" for "Moapa Indian reservation" and "the lands comprising the Moses Allotment Numbered 8 and the Moses Allotment Numbered 10, Chelan County, Washington," for "lands comprising the Moses Allotment Numbered 10, Chelan County, Washington,," and inserted "the Confederated Tribes of the Umatilla Indian Reservation," before "the Burns Paiute Reservation", "the" before "Yavapai-Prescott", "the Muckleshoot Indian Reservation and land held in trust for the Muckleshoot Indian Tribe," after "the Cabazon Indian Reservation,", "land held in trust for the Prairie Band Potawatomi Nation," before "lands held in trust for the Cherokee Nation of Oklahoma", "land held in trust for the Fallon Paiute Shoshone Tribes," before "lands held in trust for the Pueblo of Santa Clara", and "land held in trust for the Yurok Tribe, land held in trust for the Hopland Band of Pomo Indians of the Hopland Rancheria," after "Pueblo of Santa Clara,".

2005—Subsec. (f). Pub. L. 109–147 substituted "Any contract, including a lease, affecting land" for "Any lease entered into under sections 415 to 415d of this title, or any contract entered into under section 81 of this title, affecting land", "such contract" for "such lease or contract", and "Such contracts" for "Such leases or contracts entered into pursuant to such Acts".

2004—Subsec. (g). Pub. L. 108–199 added subsec. (g).

2002—Subsec. (a). Pub. L. 107–331 inserted "lands held in trust for the Yurok Tribe, lands held in trust for the Hopland Band of Pomo Indians of the Hopland Rancheria," after "Pueblo of Santa Clara,".

Subsec. (f). Pub. L. 107–159 added subsec. (f).

2001—Subsec. (a). Pub. L. 107–102 inserted ", the reservation of the Confederated Tribes of the Warm Springs Reservation of Oregon," after "Spanish Grant')" and "lands held in trust for the Confederated Tribes of the Warm Springs Reservation of Oregon" before ", lands held in trust for the Cherokee Nation of Oklahoma".

2000—Subsec. (a). Pub. L. 106–216 inserted "lands held in trust for the Torres Martinez Desert Cahuilla Indians, lands held in trust for the Guidiville Band of Pomo Indians of the Guidiville Indian Rancheria, lands held in trust for the Confederated Tribes of the Umatilla Indian Reservation" after "Sparks Indian Colony,".

Subsec. (d)(3) to (8). Pub. L. 106–568, §1203(1), added pars. (3) to (8).

Subsec. (e). Pub. L. 106–568, § 1203(2), added subsec. (e).

1998—Subsec. (a). Pub. L. 105–256, in second sentence, inserted "the Cabazon Indian Reservation," after "the Navajo Reservation," and "lands held in trust for the Confederated Tribes of the Grand Ronde Community of Oregon," after "lands held in trust for the Cahuilla Band of Indians of California,".

1996—Subsecs. (c), (d). Pub. L. 104–301 added subsecs. (c) and (d).

1994—Subsec. (a). Pub. L. 103–435 inserted "the Viejas Indian Reservation," after "Soboba Indian Reservation," in second sentence.

1992—Subsec. (a). Pub. L. 102–497, in second sentence, inserted "lands held in trust for the Pueblo of Santa Clara, lands held in trust for the Confederated Tribes of the Colville Reservation, lands held in trust for the Cahuilla Band of Indians of California," after "Oklahoma,".

1990—Subsec. (a). Pub. L. 101–630 inserted "the Mille Lacs Indian Reservation with respect to a lease between an entity established by the Mille Lacs Band of Chippewa Indians and the Minnesota Historical Society," after "the Navajo Reservation,".

1986—Subsec. (a). Pub. L. 99–575 inserted "the Pueblo of Santa Ana (with the exception of the lands known as the 'Santa Ana Pueblo Spanish Grant')" after "the Dania Reservation,".

Pub. L. 99–389 inserted ", and lands held in trust for the Reno Sparks Indian Colony,".

Subsec. (b). Pub. L. 99–500 and Pub. L. 99–591 added cl. (3).

1985—Pub. L. 99–221 inserted ", lands held in trust for the Cherokee Nation of Oklahoma,".

1983—Subsec. (a). Pub. L. 98–203 inserted ", and lands held in trust for the Las Vegas Paiute Tribe of Indians,".

Pub. L. 98–70 inserted ", and lands held in trust for the Twenty-nine Palms Band of Luiseno Mission Indians, and the lands held in trust for the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana".

Pub. L. 97–459 struck out "and" before "leases of land on the Agua Caliente" and authorized ninety-nine year leases of land on the Devils Lake Sioux Reservation to the Devils Lake Sioux Tribe or any organization of such tribe.

1980—Subsec. (a). Pub. L. 96–491 inserted "the Moapa Indian reservation".

Pub. L. 96–216 inserted provisions relating to lands comprising the Moses Allotment Numbered 10, Chelan County, Washington.

1972—Subsec. (a). Pub. L. 92–488 inserted "the Burns Paiute Reservation," after "the Fort Mojave Reservation,".

Pub. L. 92–472 inserted "the Coeur d'Alene Indian Reservation," after "the Fort Mojave Reservation,".

Pub. L. 92–431 inserted provision excepting leases of land located outside the boundaries of Indian reservations in State of New Mexico from the twenty-five year time limit.

1971—Subsec. (a). Pub. L. 92–182 inserted "the Kalispel Indian Reservation" after "the Fort Mojave Reservation".

1970—Subsec. (a). Pub. L. 91–557 inserted "the Soboba Indian Reservation," after "Gila River Reservation,".

Pub. L. 91–275 inserted "Yavapai-Prescott Community Reservation," after "San Carlos Apache Reservation," and inserted list of factors that the Secretary must consider before approving a lease or an extension of an existing lease.

Pub. L. 91–274, §§ 2, 3, designated existing provisions as subsec. (a) and inserted "the Tulalip Indian Reservation," after "the Gila River Reservation,".

Subsec. (b). Pub. L. 91–274, § 3, added subsec. (b).

1968—Pub. L. 90–570 inserted "the pueblo of Cochiti, the pueblo of Pojoaque, the pueblo of Tesuque, the pueblo of Zuni," after "Fort Mojava Reservation,".

Pub. L. 90–534 inserted "the Swinomish Indian Reservation," after "Dania Reservation,".

Pub. L. 90–355 inserted "the Hualapai Reservation," after "Fort Mojave Reservation,".

Pub. L. 90–335 inserted "the Spokane Reservation," after "the Fort Mojave Reservation".

1967—Pub. L. 90–184 inserted "the San Carlos Apache Reservation" after "Fort Mojave Reservation".

Pub. L. 90–182 inserted "the Gila Reservation," after "Pyramid Lake Reservation".

1966—Pub. L. 89–408 inserted "the Pyramid Lake Reservation" after "Fort Mojave Reservation,".

1963—Pub. L. 88–167 inserted "the Fort Mojave Reservation," after "Southern Ute Reservation".

1962—Pub. L. 87–785 authorized leases for not more than 99 years of lands on Southern Ute Reservation.

1961—Pub. L. 87–375 authorized longer term leases of Indian lands on Dania Reservation and excepted from renewal leases the initial term of which extends for more than 74 years.

1960—Pub. L. 86–505 authorized leases for not more than 99 years of lands on Navajo Reservation.

1959—Pub. L. 86–326 substituted "except leases of land on the Agua Caliente (Palm Springs) Reservation which may be for a term of not to exceed ninety-nine years, and except leases of land for grazing purposes which may" for "excepting leases for grazing purposes, which shall", in second sentence.

EFFECTIVE DATE OF 2008 AMENDMENT

Pub. L. 110–453, title II, § 205(b), Dec. 2, 2008, 122 Stat. 5030, provided that: "The amendment made by subsection (a) [amending this section] shall apply to any lease entered into or renewed after the date of the enactment of this Act [Dec. 2, 2008]."

EFFECTIVE DATE OF 2006 AMENDMENT

Pub. L. 109–221, title II, § 202(b), May 12, 2006, 120 Stat. 341, provided that: "The amendments made by subsection (a) [amending this section] shall apply to any lease entered into or renewed after the date of enactment of this Act [May 12, 2006]."

EFFECTIVE DATE OF 2005 AMENDMENT

Pub. L. 109–147, § 1(b), Dec. 22, 2005, 119 Stat. 2679, provided that: "The amendments made by subsection (a) [amending this section] shall take effect as if included in Public Law 107–159 (116 Stat. 122)."

EFFECTIVE DATE OF 2002 AMENDMENT

Pub. L. 107–331, title X, § 1002(b), Dec. 13, 2002, 116 Stat. 2870, provided that: "The amendment made by subsection (a) [amending this section] shall apply to any lease entered into or renewed after the date of the enactment of this title [Dec. 13, 2002]."

EFFECTIVE DATE OF 2001 AMENDMENT

Pub. L. 107–102, § 3, Dec. 27, 2001, 115 Stat. 975, provided that: "This Act [amending this section] shall take effect as of April 12, 2000."

EFFECTIVE DATE OF 2000 AMENDMENT

Pub. L. 106–216, § 1(b), June 20, 2000, 114 Stat. 343, provided that: "The amendment made by subsection (a) [amending this section] shall apply to any lease entered into or renewed after the date of the enactment of this Act [June 20, 2000]."

EFFECTIVE DATE OF 1986 AMENDMENT

Pub. L. 99–575, § 6(a), Oct. 28, 1986, 100 Stat. 3246, provided in part that the amendment made by Pub. L. 99–575 is effective Oct. 28, 1986.

SHORT TITLE OF 2012 AMENDMENT

Pub. L. 112–151, § 1, July 30, 2012, 126 Stat. 1150, provided that: "This Act [amending this section] may be cited as the 'Helping Expedite and Advance Responsible Tribal Home Ownership Act of 2012' or the 'HEARTH Act of 2012'."

SHORT TITLE OF 2000 AMENDMENT

Pub. L. 106–568, title XII, § 1201, Dec. 27, 2000, 114 Stat. 2933, provided that: "This title [amending this section

and enacting provisions set out as a note under this section] may be cited as the 'Navajo Nation Trust Land Leasing Act of 2000'."

SHORT TITLE OF 1985 AMENDMENT

Pub. L. 99–221, §1, Dec. 26, 1985, 99 Stat. 1735, provided that: "This Act [amending this section, section 450i of this title, section 3121 of Title 26, Internal Revenue Code, and section 410 of Title 42, The Public Health and Welfare, and enacting a provision set out as a note under section 410 of Title 42] may be cited as the 'Cherokee Leasing Act'."

CONGRESSIONAL FINDINGS AND DECLARATION OF PURPOSES

Pub. L. 106–568, title XII, §1202, Dec. 27, 2000, 114 Stat. 2933, provided that:

"(a) FINDINGS.—Recognizing the special relationship between the United States and the Navajo Nation and its members, and the Federal responsibility to the Navajo people, Congress finds that—

"(1) the third clause of section 8, Article I of the United States Constitution provides that 'The Congress shall have Power * * * to regulate Commerce * * * with Indian tribes', and, through this and other constitutional authority, Congress has plenary power over Indian affairs;

"(2) Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources;

"(3) the United States has a trust obligation to guard and preserve the sovereignty of Indian tribes in order to foster strong tribal governments, Indian self-determination, and economic self-sufficiency;

"(4) pursuant to the first section of the Act of August 9, 1955 (25 U.S.C. 415), Congress conferred upon the Secretary of the Interior the power to promulgate regulations governing tribal leases and to approve tribal leases for tribes according to regulations promulgated by the Secretary;

"(5) the Secretary of the Interior has promulgated the regulations described in paragraph (4) at part 162 of title 25, Code of Federal Regulations;

"(6) the requirement that the Secretary approve leases for the development of Navajo trust lands has added a level of review and regulation that does not apply to the development of non-Indian land; and

"(7) in the global economy of the 21st Century, it is crucial that individual leases of Navajo trust lands not be subject to Secretarial approval and that the Navajo Nation be able to make immediate decisions over the use of Navajo trust lands.

"(b) PURPOSES.—The purposes of this title [see Short Title of 2000 Amendment note above] are as follows:

"(1) To establish a streamlined process for the Navajo Nation to lease trust lands without having to obtain the approval of the Secretary of the Interior for individual leases, except leases for exploration, development, or extraction of any mineral resources.

"(2) To authorize the Navajo Nation, pursuant to tribal regulations, which must be approved by the Secretary, to lease Navajo trust lands without the approval of the Secretary of the Interior for the individual leases, except leases for exploration, development, or extraction of any mineral resources.

"(3) To revitalize the distressed Navajo Reservation by promoting political self-determination, and encouraging economic self-sufficiency, including economic development that increases productivity and the standard of living for members of the Navajo Nation.

"(4) To maintain, strengthen, and protect the Navajo Nation's leasing power over Navajo trust lands.

"(5) To ensure that the United States is faithfully executing its trust obligation to the Navajo Nation by maintaining Federal supervision through oversight of and record keeping related to leases of Navajo Nation tribal trust lands."

§ 415a. Lease of lands of deceased Indians for benefit of heirs or devisees

Restricted lands of deceased Indians may be leased under sections 415 to 415d of this title, for the benefit of their heirs or devisees, in the circumstances and by the persons prescribed in section 380 of this title: *Provided*, That if the authority of the Secretary under this section is delegated to any subordinate official, then any heir or devisee shall have the right to appeal the action of any such official to the Secretary under such rules and regulations as he may prescribe.

(Aug. 9, 1955, ch. 615, §2, 69 Stat. 539.)

§ 415b. Advance payment of rent or other consideration

No rent or other consideration for the use of land leased under sections 415 to 415d of this title shall be paid or collected more than one year in advance, unless so provided in the lease.

(Aug. 9, 1955, ch. 615, §4, 69 Stat. 540.)

§ 415c. Approval of leases

The Secretary of the Interior shall approve no lease pursuant to sections 415 to 415d of this title that contains any provision that will prevent or delay a termination of Federal trust responsibilities with respect to the land during the term of the lease.

(Aug. 9, 1955, ch. 615, §5, 69 Stat. 540.)

§ 415d. Lease of restricted lands under other laws unaffected

Nothing contained in sections 415 to 415d of this title shall be construed to repeal any authority to lease restricted Indian lands conferred by or pursuant to any other provision of law.

(Aug. 9, 1955, ch. 615, §6, 69 Stat. 540.)

§ 416. Leases of trust or restricted lands on San Xavier and Salt River Pima-Maricopa Indian Reservations for public, religious, educational, recreational, residential, business, farming or grazing purposes

Any trust or restricted Indian lands, whether tribally or individually owned, located on the San Xavier Indian Reservation and the Salt River Pima-Maricopa Indian Reservation, in the State of Arizona, may be leased by the Indian owners, with the approval of the Secretary of the Interior, for public, religious, educational, recreational, residential, business, farming or grazing purposes, including the development or utilization of natural resources in connection with operations under such leases, but no lease shall be executed under sections 416 to 416j of this title for purposes that are subject to the laws governing mining leases on Indian lands. The term of a grazing lease shall not exceed ten years, the term of a farming lease that does not require the making of a substantial investment in the improvement of the land shall not exceed ten years, and the term of a farming lease that requires the making of a substantial investment in the improvement of the land shall not exceed

⊟ Collapse to view only § 5102. Existing periods of trust and restrictions on alienation extended

§ 5101. Allotment of land on Indian reservations

On and after June 18, 1934, no land of any Indian reservation, created or set apart by treaty or agreement with the Indians, Act of Congress, Executive order, purchase, or otherwise, shall be allotted in severalty to any Indian.

(JUNE 18, 1934, CH. 576, § 1, 48 STAT. 984.)

CITE AS: 25 USC 5101

§ 5102. Existing periods of trust and restrictions on alienation extended

The existing periods of trust placed upon any Indian lands and any restriction on alienation thereof are extended and continued until otherwise directed by Congress.

(JUNE 18, 1934, CH. 576, § 2, 48 STAT. 984.)

§ 5103. Restoration of lands to tribal ownership

(a) Protection of existing rights

The Secretary of the Interior, if he shall find it to be in the public interest, is authorized to restore to tribal ownership the remaining surplus lands of any Indian reservation heretofore opened, or authorized to be opened, to sale, or any other form of disposal by Presidential proclamation, or by any of the public-land laws of the United States: *Provided, however,* That valid rights or claims of any persons to any lands so withdrawn existing on the date of the withdrawal shall not be affected by this Act: *Provided further,* That this section shall not apply to lands within any reclamation project heretofore authorized in any Indian reservation.

(b) Papago Indians; permits for easements, etc.

(1) , (2) Repealed. MAY 27, 1955, CH. 106, § 1, 69 STAT. 67.

(3) Water reservoirs, charcos, water holes, springs, wells, or any other form of water development by the United States or the Papago Indians shall not be used for mining purposes under the terms of this Act, except under permit from the Secretary of the Interior approved by the Papago Indian Council: *Provided,* That nothing herein shall be construed as interfering with or affecting the validity of the water rights of the Indians of this reservation: *Provided further,* That the appropriation of living water heretofore or hereafter affected, by the Papago Indians is recognized and validated subject to all the laws applicable thereto.

(4) Nothing herein contained shall restrict the granting or use of permits for easements or rights-of-way; or ingress or egress over the lands for all proper and lawful purposes.

(JUNE 18, 1934, CH. 576, § 3, 48 STAT. 984; AUG. 28, 1937, CH. 866, 50 STAT. 862; MAY 27, 1955, CH. 106, § 1, 69 STAT. 67.)

CITE AS: 25 USC 5103

§ 5104. Exchanges of land

For the purpose of effecting land consolidations between Indians and non-Indians within the reservation, the Secretary of the Interior is authorized, under such rules and regulations as he may prescribe, to acquire through purchase, exchange, or relinquishment, any interest in lands, water rights, or surface rights to lands within said reservation. Exchanges of lands hereunder shall be made on the basis of equal value and the value of improvements on lands to be relinquished to the Indians or by Indians to non-Indians shall be given due consideration and allowance made therefor in the valuation of lieu lands. This section shall apply to tribal, trust, or otherwise restricted Indian allotments whether the allottee be living or deceased.

(AUG. 10, 1939, CH. 662, § 2, 53 STAT. 1351.)

CITE AS: 25 USC 5104

§ 5105. Title to lands

United States of America in trust for the tribe or individual Indian for which acquired.

(AUG. 10, 1939, CH. 662, § 3, 53 STAT. 1351.)

CITE AS: 25 USC 5105

§ 5106. Use of funds appropriated under section 5108

For the purpose of carrying into effect the land-purchase provision of this Act, the Secretary of the Interior is authorized to use so much as may be necessary of any funds heretofore or hereafter appropriated pursuant to SECTION 5108 OF THIS TITLE.

(AUG. 10, 1939, CH. 662, § 4, 53 STAT. 1351.)

CITE AS: 25 USC 5106

§ 5107.
Transfer and exchange of restricted Indian lands and shares of Indian tribes and corporations

Except as provided in this Act, no sale, devise, gift, exchange, or other transfer of restricted Indian lands or of shares in the assets of any Indian tribe or corporation organized under this Act shall be made or approved: *Provided*, That such lands or interests may, with the approval of the Secretary of the Interior, be sold, devised, or otherwise transferred to the Indian tribe in which the lands or shares are located or from which the shares were derived, or to a successor corporation: *Provided further*, That, subject to section 8(b) of the American Indian Probate Reform Act of 2004 (PUBLIC LAW 108–374; 25 U.S.C. 2201 note), lands and shares described in the preceding proviso shall descend or be devised to any member of an Indian tribe or corporation described in that proviso or to an heir or lineal descendant of such a member in accordance with the Indian Land Consolidation Act (25 U.S.C. 2201 et seq.), including a tribal probate code approved, or regulations promulgated under, that Act: *Provided further*, That the Secretary of the Interior may authorize any voluntary exchanges of lands of equal value and the voluntary exchange of shares of equal value whenever such exchange, in the judgment of the Secretary, is expedient and beneficial for or compatible with the proper consolidation of Indian lands and for the benefit of cooperative organizations.

(JUNE 18, 1934, CH. 576, § 4, 48 STAT. 985; PUB. L. 96–363, § 1, Sept. 26, 1980, 94 STAT. 1207; PUB. L. 106–462, TITLE I, § 106(C), Nov. 7, 2000, 114 STAT. 2007; PUB. L. 108–374, § 6(D), Oct. 27, 2004, 118 STAT. 1805; PUB. L. 109–157, § 8(B), Dec. 30, 2005, 119 STAT. 2952; PUB. L. 109–221, TITLE V, § 501(B)(1), May 12, 2006, 120 STAT. 343.)

CITE AS: 25 USC 5107

§ 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

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

[1] See References in Text note below.

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.)

CITE AS: 25 USC 5108

§ 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.)

CITE AS: 25 USC 5109

§ 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.)

CITE AS: 25 USC 5110

§ 5111. Allotments or holdings outside of reservations

Title 25

PART 162 - LEASES AND PERMITS

Authority: 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.*

Source: 66 FR 7109, Jan. 22, 2001, unless otherwise noted.

Subpart A - General Provisions

Source: 77 FR 72467, Dec. 5, 2012, unless otherwise noted.

Purpose, Definitions, and Scope

§ 162.001 What is the purpose of this part?

(a) The purpose of this part is to promote leasing on Indian land for housing, economic development, and other purposes.

(b) This part specifies:

(1) Conditions and authorities under which we will approve leases of Indian land and may issue permits on Government land;

(2) How to obtain leases;

(3) Terms and conditions required in leases;

(4) How we administer and enforce leases; and

(5) Special requirements for leases made under special acts of Congress that apply only to certain Indian reservations.

(c) If any section, paragraph, or provision of this part is stayed or held invalid, the remaining sections, paragraphs, or provisions of this part remain in full force and effect.

§ 162.002 How is this part subdivided?

(a) This part includes multiple subparts relating to:

(1) General Provisions (Subpart A);

(2) Agricultural Leases (Subpart B);

(3) Residential Leases (Subpart C);

(4) Business Leases (Subpart D);

(5) Wind Energy Evaluation, Wind Resource, and Solar Resource Leases (Subpart E);

(6) Special Requirements for Certain Reservations (Subpart F); and

§ 162.015 May a lease contain a preference consistent with tribal law for employment of tribal members?

A lease of Indian land may include a provision, consistent with tribal law, requiring the lessee to give a preference to qualified tribal members, based on their political affiliation with the tribe.

§ 162.016 Will BIA comply with tribal laws in making lease decisions?

Unless contrary to Federal law, BIA will comply with tribal laws in making decisions regarding leases, including tribal laws regulating activities on leased land under tribal jurisdiction, including, but not limited to, tribal laws relating to land use, environmental protection, and historic or cultural preservation.

§ 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.

§ 162.018 May tribes administer this part on BIA's behalf?

A tribe or tribal organization may contract or compact under the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450f *et seq.*) to administer any portion of this part that is not an approval or disapproval of a lease document, waiver of a requirement for lease approval (including but not limited to waivers of fair market rental and valuation, bonding, and insurance), cancellation of a lease, or an appeal.

§ 162.019 May a lease address access to the leased premises by roads or other infrastructure?

A lease may address access to the leased premises by roads or other infrastructure, as long as the access complies with applicable statutory and regulatory requirements, including 25 CFR part 169. Roads or other infrastructure within the leased premises do not require compliance with 25 CFR part 169 during the term of the lease, unless otherwise stated in the lease.

§ 162.020 May a lease combine tracts with different Indian landowners?

(a) We may approve a lease that combines multiple tracts of Indian land into a unit, if we determine that unitization is:

(1) In the Indian landowners' best interest; and

(2) Consistent with the efficient administration of the land.

(b) For a lease that covers multiple tracts, the minimum consent requirements apply to each tract separately.

(c) Unless the lease provides otherwise, the rent or other compensation will be prorated in proportion to the acreage each tract contributes to the entire lease. Once prorated per tract, the rent will be distributed to the owners of each tract based upon their respective percentage interest in that particular tract.

§ 162.021 What are BIA's responsibilities in approving leases?

(a) We will work to provide assistance to Indian landowners in leasing their land, either through negotiations or advertisement.

(b) We will promote tribal control and self-determination over tribal land and other land under the tribe's jurisdiction, including through contracts and self-governance compacts entered into under the Indian Self-Determination and Education Assistance Act, as amended, 25 U.S.C. 450f *et. seq.*

RCW 82.32.170

Reduction of tax after payment—Petition—Conference—Determination by department.

Any person, having paid any tax, original assessment, additional assessment, or corrected assessment of any tax, may apply to the department within the time limitation for refund provided in this chapter, by petition in writing for a correction of the amount paid, and a conference for examination and review of the tax liability, in which petition he or she shall set forth the reasons why the conference should be granted, and the amount in which the tax, interest, or penalty, should be refunded. The department shall promptly consider the petition, and may grant or deny it. If denied, the petitioner shall be notified by mail, or electronically as provided in RCW **82.32.135**, thereof forthwith. If a conference is granted, the department shall notify the petitioner by mail, or electronically as provided in RCW **82.32.135**, of the time and place fixed therefor. After the hearing, the department may make such determination as may appear to it just and lawful, and shall mail a copy of its determination to the petitioner, or provide a copy of its determination electronically as provided in RCW **82.32.135**.

[**2013 c 23 § 324**; **2007 c 111 § 111**; **1967 ex.s. c 26 § 50**; **1961 c 15 § 82.32.170**. Prior: **1951 1st ex.s. c 9 § 11**; 1939 c 225 § 29, part; 1935 c 180 § 199, part; RRS § 8370-199, part.]

NOTES:

Part headings not law—2007 c 111: See note following RCW **82.16.120**.

Effective date—1967 ex.s. c 26: See note following RCW **82.01.050**.

RCW 82.32.180

Court appeal—Procedure.

Any person, except one who has failed to keep and preserve books, records, and invoices as required in this chapter and chapter 82.24 RCW, having paid any tax as required and feeling aggrieved by the amount of the tax may appeal to the superior court of Thurston county, within the time limitation for a refund provided in chapter 82.32 RCW or, if an application for refund has been made to the department within that time limitation, then within thirty days after rejection of the application, whichever time limitation is later. In the appeal the taxpayer shall set forth the amount of the tax imposed upon the taxpayer which the taxpayer concedes to be the correct tax and the reason why the tax should be reduced or abated. The appeal shall be perfected by serving a copy of the notice of appeal upon the department within the time herein specified and by filing the original thereof with proof of service with the clerk of the superior court of Thurston county.

The trial in the superior court on appeal shall be de novo and without the necessity of any pleadings other than the notice of appeal. At trial, the burden shall rest upon the taxpayer to prove that the tax as paid by the taxpayer is incorrect, either in whole or in part, and to establish the correct amount of the tax. In such proceeding the taxpayer shall be deemed the plaintiff, and the state, the defendant; and both parties shall be entitled to subpoena the attendance of witnesses as in other civil actions and to produce evidence that is competent, relevant, and material to determine the correct amount of the tax that should be paid by the taxpayer. Either party may seek appellate review in the same manner as other civil actions are appealed to the appellate courts.

It shall not be necessary for the taxpayer to protest against the payment of any tax or to make any demand to have the same refunded or to petition the director for a hearing in order to appeal to the superior court, but no court action or proceeding of any kind shall be maintained by the taxpayer to recover any tax paid, or any part thereof, except as herein provided.

The provisions of this section shall not apply to any tax payment which has been the subject of an appeal to the board of tax appeals with respect to which appeal a formal hearing has been elected.

[**1997 c 156 § 4; 1992 c 206 § 4; 1989 c 378 § 23; 1988 c 202 § 67; 1971 c 81 § 148; 1967 ex.s. c 26 § 51; 1965 ex.s. c 141 § 5; 1963 ex.s. c 28 § 9; 1961 c 15 § 82.32.180.** Prior: **1951 1st ex.s. c 9 § 12;** 1939 c 225 § 29, part; 1935 c 180 § 199, part; RRS § 8370-199, part.]

NOTES:

Effective date—1992 c 206: See note following RCW 82.04.170.

Severability—1988 c 202: See note following RCW 2.24.050.

Appeal to board of tax appeals, formal hearing: RCW 82.03.160.

RCW 82.45.010

"Sale" defined. *(Effective until January 1, 2030.)*

(1) As used in this chapter, the term "sale" has its ordinary meaning and includes any conveyance, grant, assignment, quitclaim, or transfer of the ownership of or title to real property, including standing timber, or any estate or interest therein for a valuable consideration, and any contract for such conveyance, grant, assignment, quitclaim, or transfer, and any lease with an option to purchase real property, including standing timber, or any estate or interest therein or other contract under which possession of the property is given to the purchaser, or any other person at the purchaser's direction, and title to the property is retained by the vendor as security for the payment of the purchase price. The term also includes the grant, assignment, quitclaim, sale, or transfer of improvements constructed upon leased land.

(2)(a) The term "sale" also includes the transfer or acquisition within any thirty-six month period of a controlling interest in any entity with an interest in real property located in this state for a valuable consideration.

(b) For the sole purpose of determining whether, pursuant to the exercise of an option, a controlling interest was transferred or acquired within a thirty-six month period, the date that the option agreement was executed is the date on which the transfer or acquisition of the controlling interest is deemed to occur. For all other purposes under this chapter, the date upon which the option is exercised is the date of the transfer or acquisition of the controlling interest.

(c) For purposes of this subsection, all acquisitions of persons acting in concert must be aggregated for purposes of determining whether a transfer or acquisition of a controlling interest has taken place. The department must adopt standards by rule to determine when persons are acting in concert. In adopting a rule for this purpose, the department must consider the following:

(i) Persons must be treated as acting in concert when they have a relationship with each other such that one person influences or controls the actions of another through common ownership; and

(ii) When persons are not commonly owned or controlled, they must be treated as acting in concert only when the unity with which the purchasers have negotiated and will consummate the transfer of ownership interests supports a finding that they are acting as a single entity. If the acquisitions are completely independent, with each purchaser buying without regard to the identity of the other purchasers, then the acquisitions are considered separate acquisitions.

(3) The term "sale" does not include:

(a) A transfer by gift, devise, or inheritance.

(b) A transfer by transfer on death deed, to the extent that it is not in satisfaction of a contractual obligation of the decedent owed to the recipient of the property.

(c) A transfer of any leasehold interest other than of the type mentioned above.

(d) A cancellation or forfeiture of a vendee's interest in a contract for the sale of real property, whether or not such contract contains a forfeiture clause, or deed in lieu of foreclosure of a mortgage.

(e) The partition of property by tenants in common by agreement or as the result of a court decree.

(f) The assignment of property or interest in property from one spouse or one domestic partner to the other spouse or other domestic partner in accordance with the terms of a decree of dissolution of marriage or state registered domestic partnership or in fulfillment of a property settlement agreement.

(g) The assignment or other transfer of a vendor's interest in a contract for the sale of real property, even though accompanied by a conveyance of the vendor's interest in the real property involved.

(h) Transfers by appropriation or decree in condemnation proceedings brought by the United States, the state or any political subdivision thereof, or a municipal corporation.

(i) A mortgage or other transfer of an interest in real property merely to secure a debt, or the assignment thereof.

(j) Any transfer or conveyance made pursuant to a deed of trust or an order of sale by the court in any mortgage, deed of trust, or lien foreclosure proceeding or upon execution of a judgment, or deed in lieu of foreclosure to satisfy a mortgage or deed of trust.

(k) A conveyance to the federal housing administration or veterans administration by an authorized mortgagee made pursuant to a contract of insurance or guaranty with the federal housing administration or veterans administration.

(l) A transfer in compliance with the terms of any lease or contract upon which the tax as imposed by this chapter has been paid or where the lease or contract was entered into prior to the date this tax was first imposed.

(m) The sale of any grave or lot in an established cemetery.

(n) A sale by the United States, this state or any political subdivision thereof, or a municipal corporation of this state.

(o) A sale to a regional transit authority or public corporation under RCW **81.112.320** under a sale/leaseback agreement under RCW **81.112.300**.

(p) A transfer of real property, however effected, if it consists of a mere change in identity or form of ownership of an entity where there is no change in the beneficial ownership. These include transfers to a corporation or partnership which is wholly owned by the transferor and/or the transferor's spouse or domestic partner or children of the transferor or the transferor's spouse or domestic partner. However, if thereafter such transferee corporation or partnership voluntarily transfers such real property, or such transferor, spouse or domestic partner, or children of the transferor or the transferor's spouse or domestic partner voluntarily transfer stock in the transferee corporation or interest in the transferee partnership capital, as the case may be, to other than (i) the transferor and/or the transferor's spouse or domestic partner or children of the transferor or the transferor's spouse or domestic partner, (ii) a trust having the transferor and/or the transferor's spouse or domestic partner or children of the transferor or the transferor's spouse or domestic partner as the only beneficiaries at the time of the transfer to the trust, or (iii) a corporation or partnership wholly owned by the original transferor and/or the transferor's spouse or domestic partner or children of the transferor or the transferor's spouse or domestic partner, within three years of the original transfer to which this exemption applies, and the tax on the subsequent transfer has not been paid within sixty days of becoming due, excise taxes become due and payable on the original transfer as otherwise provided by law.

(q)(i) A transfer that for federal income tax purposes does not involve the recognition of gain or loss for entity formation, liquidation or dissolution, and reorganization, including but not limited to nonrecognition of gain or loss because of application of 26 U.S.C. Sec. 332, 337, 351, 368(a)(1), 721, or 731 of the internal revenue code of 1986, as amended.

(ii) However, the transfer described in (q)(i) of this subsection cannot be preceded or followed within a thirty-six month period by another transfer or series of transfers, that, when combined with the otherwise exempt transfer or transfers described in (q)(i) of this subsection, results in the transfer of a controlling interest in the entity for valuable consideration, and in which one or more persons previously holding a controlling interest in the entity receive cash or property in exchange for any interest the person or persons acting in concert hold in the entity. This subsection (3)(q)(ii) does not apply to that part of the transfer involving property received that is the real property interest that the person or persons originally contributed to the entity or when one or more persons who did not contribute real property or belong to the entity at a time when real property was purchased receive cash or personal property in exchange for that person or persons' interest in the entity. The real estate excise tax under this subsection (3)(q)(ii) is imposed upon the person or persons who previously held a controlling interest in the entity.

(r) A qualified sale of a manufactured/mobile home community, as defined in RCW **59.20.030**.

(s)(i) A transfer of a qualified low-income housing development or controlling interest in a qualified low-income housing development, unless, due to noncompliance with federal statutory requirements, the seller is subject to recapture, in whole or in part, of its allocated federal low-income housing tax credits within the four years prior to the date of transfer.

(ii) For purposes of this subsection (3)(s), "qualified low-income housing development" means real property and improvements in respect to which the seller or, in the case of a transfer of a controlling interest, the owner or beneficial owner, was allocated federal low-income housing tax credits authorized under 26 U.S.C. Sec. 42 or successor statute, by the Washington state housing finance commission or successor state-authorized tax credit allocating agency.

(iii) This subsection (3)(s) does not apply to transfers of a qualified low-income housing development or controlling interest in a qualified low-income housing development occurring on or after July 1, 2035.

(iv) The Washington state housing finance commission, in consultation with the department, must gather data on: (A) The fiscal savings, if any, accruing to transferees as a result of the exemption provided in this subsection (3)(s); (B) the extent to which transferors of qualified low-income housing developments receive consideration, including any assumption of debt, as part of a transfer subject to the exemption provided in this subsection (3)(s); and (C) the continued use of the property for low-income housing. The Washington state housing finance commission must provide this information to the joint legislative audit and review committee. The committee must conduct a review of the tax preference created under this subsection (3)(s) in calendar year 2033, as required under chapter 43.136 RCW.

(t)(i) A qualified transfer of residential property by a legal representative of a person with developmental disabilities to a qualified entity subject to the following conditions:

(A) The adult child with developmental disabilities of the transferor of the residential property must be allowed to reside in the residence or successor property so long as the placement is safe and appropriate as determined by the department of social and health services;

(B) The title to the residential property is conveyed without the receipt of consideration by the legal representative of a person with developmental disabilities to a qualified entity;

(C) The residential property must have no more than four living units located on it; and

(D) The residential property transferred must remain in continued use for fifty years by the qualified entity as supported living for persons with developmental disabilities by the qualified entity or successor entity. If the qualified entity sells or otherwise conveys ownership of the residential property the proceeds of the sale or conveyance must be used to acquire similar residential property and such similar residential property must be considered the successor for continued use. The property will not be considered in continued use if the department of social and health services finds that the property has failed, after a reasonable time to remedy, to meet any health and safety statutory or regulatory requirements. If the department of social and health services determines that the property fails to meet the requirements for continued use, the department of social and health services must notify the department and the real estate excise tax based on the value of the property at the time of the transfer into use as residential property for persons with developmental disabilities becomes immediately due and payable by the qualified entity. The tax due is not subject to penalties, fees, or interest under this title.

(ii) For the purposes of this subsection (3)(t) the definitions in RCW 71A.10.020 apply.

(iii) A "qualified entity" is:

(A) A nonprofit organization under Title 26 U.S.C. Sec. 501(c)(3) of the federal internal revenue code of 1986, as amended, as of June 7, 2018, or a subsidiary under the same taxpayer identification number that provides residential supported living for persons with developmental disabilities; or

(B) A nonprofit adult family home, as defined in RCW 70.128.010, that exclusively serves persons with developmental disabilities.

(iv) In order to receive an exemption under this subsection (3)(t) an affidavit must be submitted by the transferor of the residential property and must include a copy of the transfer agreement and any other documentation as required by the department.

(u)(i) The sale by an affordable homeownership facilitator of self-help housing to a low-income household. The definitions in *section 2 of this act apply to this subsection.

(ii) The definitions in this subsection (3)(u) apply to this subsection (3)(u) unless the context clearly requires otherwise.

(A) "Affordable homeownership facilitator" means a nonprofit community or neighborhood-based organization that is exempt from income tax under Title 26 U.S.C. Sec. 501(c) of the internal revenue code of 1986, as amended, as of October 1, 2019, and that is the developer of self-help housing.

(B) "Low-income" means household income as defined by the department, provided that the definition may not exceed eighty percent of median household income, adjusted for household size, for the county in which the dwelling is located.

(C) "Self-help housing" means dwelling residences provided for ownership by low-income individuals and families whose ownership requirement includes labor participation. "Self-help housing" does not include residential rental housing provided on a commercial basis to the general public.

[2019 c 424 § 3; 2019 c 390 § 10; 2019 c 385 § 2. Prior: 2018 c 223 § 3; 2018 c 221 § 1; 2014 c 58 § 24; 2010 1st sp.s. c 23 § 207; prior: **2008 c 116 § 3; 2008 c 6 § 701; 2000 2nd sp.s. c 4 § 26; 1999 c 209 § 2; 1993 sp.s. c 25 § 502; 1981 c 93 § 1; 1970 ex.s. c 65 § 1; 1969 ex.s. c 223 § 28A.45.010;** prior: **1955 c 132 § 1; 1953 c 94 § 1; 1951 2nd ex.s. c 19 § 1; 1951 1st ex.s. c 11 § 7.** Formerly RCW **28A.45.010, 28.45.010.]**

NOTES:

Reviser's note:*(1) The reference to section 2 of this act is erroneous; it appears that subsection (3)(u)(ii) was intended.

(2) The tax preference enacted in section 3, chapter 223, Laws of 2018 expires January 1, 2029, pursuant to the automatic expiration date established in RCW **82.32.805**(1)(a).

(3) This section was amended by 2019 c 385 § 2, 2019 c 390 § 10, and by 2019 c 424 § 3, without reference to one another. All amendments are incorporated in the publication of this section under RCW **1.12.025**(2). For rule of construction, see RCW **1.12.025**(1).

Automatic expiration date and tax preference performance statement exemption—Effective date—2019 c 424: See notes following RCW **82.45.060**.

Expiration date—2019 c 390 § 10: "Section 10 of this act expires January 1, 2030." **[2019 c 390 § 21.]**

Tax preference performance statement—2019 c 390 § 10: "This section is the tax preference performance statement for the tax preference contained in section 10, chapter 390, Laws of 2019. This performance statement is only intended to be used for subsequent evaluation of the tax preference. It is not intended to create a private right of action by any party or be used to determine eligibility for preferential tax treatment.

(1) The legislature categorizes this tax preference as one intended to induce certain designated behaviors by taxpayers, as indicated in RCW **82.32.808**(2)(a).

(2) It is the legislature's specific public policy objective to preserve the affordable housing opportunities provided by existing manufactured/mobile home communities. It is the legislature's intent to encourage owners to sell existing communities to tenants and eligible organizations by providing a real estate excise tax exemption.

(3) To measure the effectiveness of this tax preference in achieving the specific public policy objective described in subsection (2) of this section, the joint legislative audit and review committee must, at minimum, review the number of units of housing that are preserved as a result of qualified sales of manufactured/mobile home communities and the total amount of exemptions claimed, as reported to the department of revenue.

(4) The joint legislative audit and review committee may use any other data it deems necessary in performing the evaluation under this section." **[2019 c 390 § 9.]**

Finding—Intent—2019 c 390: See note following RCW **59.21.005**.

Tax preference performance statement and expiration—2019 c 390: See note following RCW **84.36.560**.

Expiration date—2019 c 385 § 2: "Section 2 of this act expires January 1, 2030." [**2019 c 385 § 4.**]

Tax preference performance statement—2019 c 385: "(1) This section is the tax preference performance statement for this act. This performance statement is only intended to be used for subsequent evaluation of the tax preference. It is not intended to create a private right of action by any part or be used to determine eligibility for a preferential tax treatment.

(2) The legislature categorizes the tax preference as one intended to induce certain designated behavior by taxpayers, as indicated in RCW **82.32.808**(2)(a).

(3) It is the legislature's specific public policy objective to provide real estate excise tax relief to developers of self-help housing to encourage continued development of self-help housing.

(4) The joint legislative audit and review committee is directed to review:

(a) The total number of taxpayers that claimed the tax preference; and

(b) The total amount of real estate excise tax revenue that was exempt under this act, annually.

(5) In order to obtain this section, the joint legislative audit and review committee may refer to department of revenue data, as well as any other available data source." [**2019 c 385 § 1.**]

Effective date—2019 c 385: "This act takes effect October 1, 2019." [**2019 c 385 § 3.**]

Tax preference performance statement—2018 c 223 § 3: "(1) This section is the tax preference performance statement for the tax preference contained in section 3, chapter 223, Laws of 2018. This performance statement is only intended to be used for subsequent evaluation of the tax preference. It is not intended to create a private right of action by any party or to be used to determine eligibility for preferential tax treatment.

(2) The legislature categorizes this tax preference as one intended to induce certain designated behavior by taxpayers, as indicated in RCW **82.32.808**(2)(a).

(3) It is the legislature's specific public policy objective to reduce the tax burden on individuals and businesses imposed by the existing real estate excise tax rates.

(4) If a review finds that there is an increase of residential property transfers by parents of a person with developmental disabilities to a qualified entity as a result of the relief from this tax preference, then the legislature intends to extend the expiration date of this tax preference.

(5) In order to obtain the data necessary to perform the review in subsection (4) of this section, the joint legislative audit and review committee may refer to any data collected by the state." [**2018 c 223 § 2.**]

Findings—2018 c 223: "The legislature finds that there is need to expand housing opportunities for persons with developmental disabilities. The legislature finds it is often preferable for persons with developmental disabilities to remain residing in their home, when it is safe and appropriate, to foster ongoing stability. The legislature recognizes that securing a child's future housing and services provides the parents of persons with developmental disabilities peace of mind. The legislature further finds that providing a new mechanism for the transfer of residential property into housing for persons with developmental disabilities expands the state's housing capacity and helps meet demand. The legislature further finds that utilizing existing residential property will reduce the demands on the housing trust fund. The legislature finds that there is an opportunity and need, for advocates and the supporters of the developmental disabilities community to work together, to develop model transfer agreements that

will provide peace of mind and assist parents of children with developmental disabilities [to] more readily access this program." [**2018 c 223 § 1.**]

Application—2018 c 221: "This act applies with respect to transfers occurring before, on, or after July 1, 2018. However, this act may not be construed by the department of revenue, state board of tax appeals, or any court as authorizing the refund of any tax liability imposed or authorized under chapter **82.45** or **82.46** RCW and properly paid before July 1, 2018, with respect to a transfer of qualified low-income housing as defined in RCW **82.45.010**(3)(s)." [**2018 c 221 § 2.**]

Effective date—2018 c 221: "This act takes effect July 1, 2018." [**2018 c 221 § 3.**]

Uniformity of application and construction—Relation to electronic signatures in global and national commerce act—2014 c 58: See RCW **64.80.903** and **64.80.904.**

Effective date—2010 1st sp.s. c 23: See note following RCW **82.32.655.**

Findings—Intent—2010 1st sp.s. c 23: See notes following RCW **82.04.220.**

Findings—Intent—Severability—2008 c 116: See notes following RCW **59.20.300.**

Part headings not law—Severability—2008 c 6: See RCW **26.60.900** and **26.60.901.**

Findings—Construction—2000 2nd sp.s. c 4 §§ 18-30: See notes following RCW **81.112.300.**

Intent—1999 c 209: "In chapter 25, Laws of 1993 sp. sess., the legislature found that transfer of ownership of entities can be equivalent to the sale of real property held by the entity. The legislature further found that all transfers of possession or use of real property should be subject to the same excise tax burdens.

The legislature intended to apply the real estate excise tax of chapter **82.45** RCW to transfers of entity ownership when the transfer of entity ownership is comparable to the sale of real property. The legislature intends to equate the excise tax burdens on all sales of real property and transfers of entity ownership essentially equivalent to a sale of real property under chapter **82.45** RCW." [**1999 c 209 § 1.**]

Findings—Intent—1993 sp.s. c 25: "(1) The legislature finds that transfers of ownership of entities may be essentially equivalent to the sale of real property held by the entity. The legislature further finds that all transfers of possession or use of real property should be subject to the same excise tax burdens.

(2) The legislature intends to apply the real estate excise tax of chapter **82.45** RCW to transfers of entity ownership when the transfer of entity ownership is comparable to the sale of real property. The legislature intends to equate the excise tax burdens on all sales of real property and transfers of entity ownership essentially equivalent to a sale of real property under chapter **82.45** RCW." [**1993 sp.s. c 25 § 501.**]

Severability—Effective dates—Part headings, captions not law—1993 sp.s. c 25: See notes following RCW **82.04.230.**

Effective date—1981 c 93 § 2: "Section 2 of this act shall take effect September 1, 1981." [**1981 c 93 § 3.**]

Effective date—Severability—1970 ex.s. c 65: See notes following RCW **82.03.050.**

WAC 458-61A-106 Sales of improvements to land, leases, and leases with option. (1) **Introduction.**

(a) The sale of improvements constructed on real property is subject to the real estate excise tax if the contract of sale does not require that the improvements be removed at the time of sale.

(b) The transfer of a lessee's interest in a leasehold for valuable consideration is taxable to the extent the transfer includes any improvement constructed on leased land. If the selling price of an improvement is not separately stated, or cannot otherwise be reasonably determined, the assessed value of the improvement as entered on the assessment rolls of the county assessor will be used.

(2) **Lease with option to purchase.** The real estate excise tax applies to a lease with option to purchase at the time the purchase option is exercised and the property is transferred. The measure of the tax is the true and fair value of the property conveyed at the time the option is exercised.

(3) **Improvements removed from land.** The real estate excise tax does not apply to the sale of improvements if the terms of the sales contract require that the improvements be removed from the land. In this case the improvements are considered personal property and their use by the purchaser is subject to the use tax under chapter 82.12 RCW.

(4) **Documentation.** Completion of the affidavit is required for all of the above transfers except a transfer described in subsection (3) of this section, in which case the purchaser must file a use tax return with the department.

[Statutory Authority: RCW 82.32.300, 82.01.060(2), and 82.45.150. WSR 05-23-093, § 458-61A-106, filed 11/16/05, effective 12/17/05.]

SIDERIUS, LONERGAN & MARTIN, LLP

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