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NO. 54514-4-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

PHILLIP EDWARD SIFFERMAN, et al.,

Appellants,

v.

CHELAN COUNTY, et al.,

Respondents.

BRIEF OF RESPONDENTS

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TABLE OF CONTENTS

I. INTRODUCTION.....1

II. STATEMENT OF THE ISSUES.....3

III. COUNTERSTATEMENT OF THE CASE5

IV. ARGUMENT9

 A. Standard of Review.....9

 B. The Statutory Definition of “Sale” Expressly Includes Transfers of Improvements Constructed Upon Leased Land10

 C. Federal Law Does Not Preempt Applying the REET to Off-Reservation Sale Transactions Between Non-Indians17

 1. Title 25 U.S.C. Section 5108 is inapplicable.....17

 2. Section 5108 would not preempt the REET even if it applied18

 3. *Bracker* balancing should not be extended to off-reservation transactions24

 4. *Bracker* would not preempt the REET if it applied.....26

 D. The Prepayment Requirement in RCW 82.32 Does Not Violate Due Process.....31

 E. Sellers Are Not Entitled to Declaratory Relief33

 1. Neither the Uniform Declaratory Judgment Act nor RCW 82.32.150 support granting declaratory relief33

 2. RCW 82.32.150 does not independently authorize excise tax refund actions39

F.	Class Claims May Not Be Brought in an Excise Tax Refund Action Under RCW 82.32.180.....	44
V.	CONCLUSION	45

TABLE OF AUTHORITIES

Cases

<i>Activate, Inc. v. Dep't of Revenue</i> , 150 Wn. App. 807, 209 P.3d 524 (2009).....	10
<i>Agua Caliente Band of Mission Indians v. County of Riverside</i> , 442 F.2d 1184 (9th Cir. 1971)	22
<i>AOL, LLC v. Dep't of Revenue</i> , 149 Wn. App. 533, 205 P.3d 159 (2009).....	35, 36
<i>Ariz. Dep't of Revenue v. Blaze Constr. Co.</i> , 526 U.S. 32, 119 S. Ct. 957, 143 L. Ed. 2d 27 (1999).....	25
<i>Avnet, Inc. v. Dep't of Revenue</i> , 187 Wn.2d 44, 384 P.3d 571 (2016).....	43
<i>Baldwin v. Moore</i> , 7 Wash. 173, 34 P. 461 (1893)	31
<i>Barona Band of Mission Indians v. Yee</i> , 528 F.3d 1184 (9th Cir. 2008)	26, 28
<i>Barry v. AT&T Co.</i> , 563 A.2d 1069 (D.C. 1989)	33
<i>Belas v. Kiga</i> , 135 Wn.2d 913, 959 P.2d 1037 (1998).....	13
<i>Berdson v. Graystone Materials, Co.</i> , 34 Wn.2d 530, 209 P.2d 326 (1949).....	38
<i>Boeing Aircraft Co. v. Reconstruction Fin. Corp.</i> , 25 Wn.2d 652, 171 P.2d 838 (1946).....	38
<i>Booker Auction Co. v. Dep't of Revenue</i> , 158 Wn. App. 84, 241 P.3d 439 (2010).....	33, 35, 36, 41

<i>Bravern Residential, II, LLC v. Dep't of Revenue,</i> 183 Wn. App. 769, 334 P.3d 1182 (2014).....	9
<i>California Dep't of Tax & Fee Admin. v. Superior Court,</i> 48 Cal. App. 5th 922, 262 Cal. Rptr. 3d 397 (2020).....	33
<i>California v. Grace Brethren Church,</i> 457 U.S. 393, 102 S. Ct. 2498, 73 L. Ed. 2d 93 (1982).....	36
<i>Coast Pacific Trading, Inc. v. Dep't of Revenue,</i> 105 Wn.2d 912, 719 P.2d 541 (1986).....	13
<i>Columbia Riverkeeper v. Port of Vancouver USA,</i> 188 Wn.2d 421, 395 P.3d 1031 (2017).....	11
<i>Confederated Tribes of Chehalis Reservation v. Thurston County Board of Equalization,</i> 724 F.3d 1153 (9th Cir. 2013)	21, 22
<i>County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation,</i> 502 U.S. 251, 112 S. Ct. 683, 116 L. Ed. 2d 687 (1992).....	22, 23
<i>Desert Water Agency v. U.S. Dep't of the Interior,</i> 849 F.3d 1250 (9th Cir. 2017)	23
<i>Dot Foods, Inc. v. Dep't of Revenue,</i> 185 Wn.2d 239, 372 P.3d 747 (2016).....	43
<i>Etco, Inc. v. Dep't of Labor & Indus.,</i> 66 Wn. App. 302, 831 P.2d 1133 (1992).....	42
<i>Everi Payments, Inc. v. Dep't of Revenue,</i> 6 Wn. App. 2d 580, 432 P.3d 411 (2018), <i>rev. denied</i> , 193 Wn.2d 1014 (2019).....	passim
<i>Fuentes v. Shevin,</i> 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972).....	32
<i>Group Health Coop. v. Dep't of Revenue,</i> 8 Wn. App. 2d 210, 438 P.3d 158 (2019).....	43

<i>Guy F. Atkinson Co. v. State</i> , 66 Wn.2d 570, 403 P.2d 880 (1965).....	34, 35
<i>Hawkins v. Empres Healthcare Mgmt., LLC</i> , 193 Wn. App. 84, 371 P.3d 84 (2016).....	37
<i>Herpel v. County of Riverside</i> , 45 Cal. App. 5th 96, 258 Cal. Rptr. 3d 444 (2020).....	18, 22
<i>In re Bankr. Petition of Wieber</i> , 182 Wn.2d 919, 347 P.3d 41 (2015).....	41
<i>Irwin Nats. v. Dep't of Revenue</i> , 195 Wn. App. 788, 382 P.3d 689 (2016).....	43
<i>Johnson v. State</i> , 187 Wash. 605, 60 P.2d 681 (1936)	38
<i>Kirkland v. Dep't of Revenue</i> , 45 Wn. App. 720, 727 P.2d 254 (1986).....	39, 40, 41, 42
<i>Lacey Nursing Ctr., Inc. v. Dep't of Revenue</i> , 128 Wn.2d 40, 905 P.2d 338 (1995).....	34, 35, 44, 45
<i>Mahler v. Tremper</i> , 40 Wn.2d 405, 243 P.2d 627 (1952).....	20, 21, 22
<i>Mashantucket Pequot Tribe v. Town of Ledyard</i> , 722 F.3d 457 (2nd Cir. 2013)	27
<i>Mescalero Apache Tribes v. Jones</i> , 411 U.S. 145, 93 S. Ct. 1267, 36 L. Ed. 2d 114 (1973).....	19, 20, 21
<i>Morrison-Knudsen Co. v. Dep't of Revenue</i> , 6 Wn. App. 306, 493 P.2d 802 (1972).....	40
<i>Nat'l Private Truck Council, Inc. v. Oklahoma Tax Comm'n</i> , 515 U.S. 582, 115 S. Ct. 2351, 132 L. Ed. 2d 509 (1995).....	36
<i>Nelson v. Dunkin</i> , 69 Wn.2d 726, 419 P.2d 984 (1966).....	35

<i>Oklahoma Tax Comm'n v. Texas Co.</i> , 336 U.S. 342, 69 S. Ct. 561, 93 L. Ed. 721 (1949).....	20
<i>PeaceHealth St. Joseph Medical Ctr. v. Dep't of Revenue</i> , 9 Wn. App. 2d 775, 449 P.3d 676 (2019).....	43
<i>Peters v. Sjöholm</i> , 95 Wn.2d 871, 631 P.2d 937 (1981).....	32
<i>Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of N.M.</i> , 458 U.S. 832, 102 S. Ct. 3394, 73 L. Ed. 2d 1174 (1982).....	27
<i>Reeder v. King County</i> , 57 Wn.2d 563, 358 P.2d 810 (1961).....	37
<i>Salt River Pima-Maricopa Indian Cmty. v. Arizona</i> , 50 F.3d 734 (9th Cir. 1995)	28, 29
<i>Seattle-King County Council of Camp Fire v. Dep't of Revenue</i> , 105 Wn.2d 55, 711 P.2d 300 (1985).....	37, 38
<i>Starr v. Long Jim</i> , 227 U.S. 613, 33 S. Ct. 358, 57 L. Ed. 670 (1913).....	18
<i>State v. Reis</i> , 183 Wn.2d 197, 351 P.3d 127 (2015).....	39
<i>Texaco Ref'g & Mktg. Co. v. Dep't of Revenue</i> , 131 Wn. App. 385, 127 P.3d 771 (2006).....	9, 16
<i>TracFone Wireless, Inc. v. Dep't of Revenue</i> , 170 Wn.2d 273, 242 P.3d 810 (2010).....	13, 15
<i>Tulalip Tribes v. Washington</i> , 349 F. Supp. 3d 1046 (W.D. Wash. 2018).....	29
<i>Tyler Pipe Indus., Inc. v. Dep't of Revenue</i> , 96 Wn.2d 785, 638 P.2d 1213 (1982).....	36
<i>United States v. City of Detroit</i> , 355 U.S. 466, 78 S. Ct. 474, 2 L. Ed. 2d 424 (1958).....	20

<i>United States v. Hoffman</i> , 154 Wn.2d 730, 116 P.3d 999 (2005).....	11
<i>United States v. Moore</i> , 161 F. 513 (9th Cir. 1908)	18
<i>United States v. Oregon</i> , 787 F. Supp. 1557 (D. Ore. 1992)	18
<i>Wagon v. Prairie Band Potawatomi Nation</i> , 546 U.S. 95, 126 S. Ct. 676, 163 L. Ed. 2d 429 (2005).....	24, 26
<i>Wash. Imaging Servs., LLC v. Dep't of Revenue</i> , 171 Wn.2d 548, 252 P.3d 885 (2011).....	10
<i>Washington v. Confederated Tribes of Colville Indian Reservation</i> , 447 U.S. 134, 100 S. Ct. 2069, 65 L. Ed. 2d 10 (1980).....	29
<i>White Mountain Apache Tribe v. Bracker</i> , 448 U.S. 136, 100 S. Ct. 2578, 65 L. Ed. 2d 665 (1980).....	passim

Constitutional Provisions

Const. art. II, § 26.....	35
---------------------------	----

Statutes

25 U.S.C. § 465 (1934).....	17, 19
25 U.S.C. § 5108 (1988)	passim
Act of July 4, 1884, 48th Cong., 1st Sess., ch. 180	18
Laws of 1935, ch. 180, § 198.....	39
Laws of 1935, ch. 180, § 199.....	39
RCW 82.14B.040.....	15
RCW 82.14B.042(3).....	15

RCW 82.32	2, 4, 33, 38
RCW 82.32.150	passim
RCW 82.32.170	31, 32
RCW 82.32.180	passim
RCW 82.45.010	11
RCW 82.45.010(1).....	3, 11, 12, 13
RCW 82.45.010(3)(c)	13
RCW 82.45.060	11
RCW 82.45.060(1) (2013).....	6
RCW 82.45.080(1).....	11
RCW 82.45.150	34, 45
RCW 82.46.010(5).....	11, 34, 45

Rules

CR 56(c).....	10
CR 57	39

Regulations

25 C.F.R. § 162.017	23
25 C.F.R. § 162.017(a).....	23
25 C.F.R. § 162.017(c).....	23
WAC 458-61A-106(1)(b)	13, 14
WAC 458-61A-301(12)(c).....	43

WAC 458-61A-301(12)(d) 42
WAC 458-61A-301(12)(e)..... 43

Treaties

Agreement with the Columbia and Colville 1883, July 7, 1883, 1883
WL 41518 18

Other Authorities

22A Am. Jur. 2d *Declaratory Judgments* § 51 (2003) 38

I. INTRODUCTION

This case involves the off-reservation taxation of non-Indians on transactions between non-Indians. Appellants are sellers of improvements located on subleased land held in trust for a Native American family (the Wapatos). Several Sellers¹ paid real estate excise tax (REET) based on their total transaction prices, while others paid REET calculated on 50 percent of their total transaction prices. The superior court granted summary judgment to respondents Chelan County, Chelan County Treasurer David Griffiths, and Department of Revenue and dismissed Sellers' action seeking refunds of the REET they paid. Sellers raise numerous arguments urging reversal, but every argument is contrary to the law, the undisputed material facts, or both.

State law does not preclude taxing the transactions at issue here. The statutory definition of "sale" for purposes of the REET expressly includes transfers of improvements located on leased land. In addition, Sellers bore the statutory burden to prove the correct amount of tax. They chose, however, to offer no evidence to prove those amounts. Thus, the superior court correctly determined that state law did not require refunds.

¹ This brief will refer to Appellants collectively as "Sellers" unless the context requires otherwise.

Federal law does not preclude taxing the transactions either. The federal statute Sellers rely on does not preempt the REET because it applies only to trust lands acquired in 1934 or later, and the Wapato family acquired the trust land at issue here around 1884. Similarly, the *Bracker*² balancing inquiry does not implicitly preempt the REET as it applies only to on-reservation transactions. Furthermore, requiring a taxpayer to pay an excise tax prior to court review does not violate due process. Indeed, the Washington Supreme Court so held in a case regarding the statutory provisions in RCW 82.32 involved in this case. Sellers, therefore, received due process. The superior court correctly determined that federal law did not require refunds.

This Court need not reach Sellers' claims for declaratory relief and seeking class action status because their substantive claims are meritless. But if it chooses to address the issues, each Seller sought a REET refund. The Legislature's waiver of sovereign immunity authorizing excise tax refund actions is the exclusive remedy available to taxpayers seeking such refunds. For this and other reasons, the superior court correctly declined to grant declaratory relief. The superior court also properly denied class action status based on controlling Washington Supreme Court authority.

² *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 100 S. Ct. 2578, 65 L. Ed. 2d 665 (1980).

The applicable law is directly contrary to every argument that Sellers raise. Therefore, this Court should affirm the superior court.

II. STATEMENT OF THE ISSUES

1. The definition of “sale” in RCW 82.45.010(1) includes the “transfer of improvements constructed upon leased land.” When Sellers transferred improvements constructed upon leased land, did they make “sales” under the statutory definition?

2. Title 25 U.S.C. Section 5108 preempts state and local taxes that are imposed on certain real property acquired and placed into trust no earlier than 1934.

- a. Is § 5108 inapplicable here when the federal government placed the land at issue into trust around 1884?
- b. If § 5108 applies, is the REET permissible under § 5108 as a transactional tax on the sale of real property rather than a tax on the real property itself?

3. Under the *Bracker* balancing inquiry, when transactions occur on a reservation the court must weigh the federal, tribal, and state interests to determine whether federal law implicitly preempts imposing state and local taxes on the transactions.

- a. Is *Bracker* inapplicable here, when the transactions occurred on trust land, but not on a reservation?

b. If *Bracker* applies, is the REET permissible under the balancing analysis when the federal and tribal interests are quite weak, and the state interests are strong?

4. Through RCW 82.32.180, the Legislature grants taxpayers the opportunity to challenge the validity of an excise tax after paying the tax. The Washington Supreme Court has held the procedures in RCW 82.32 affording taxpayers a post-payment hearing provide adequate due process. Did the post-payment hearing afforded to Sellers to challenge the REET they paid satisfy due process?

5. RCW 82.32.150 authorizes a court to grant injunctive relief in the limited circumstance where a taxpayer seeks to enjoin the collection of an assessment that violates the federal or state constitutions. Here, none of the Sellers sought to enjoin the collection of an assessment. Is declaratory relief unavailable under RCW 82.32.150?

6. Is declaratory relief unavailable under the Uniform Declaratory Judgment Act when the Legislature has provided a specific statutory remedy for aggrieved taxpayers, a refund action under RCW 82.32.180?

7. Case law recognizes that class claims are not permitted in excise tax refund actions under RCW 82.32.180. Are Sellers precluded from asserting class claims in their refund action under that statute?

III. COUNTERSTATEMENT OF THE CASE

The improvements at issue are part of Wapato Point, a resort with private residence homes, full-share condominiums, and time-share condominiums located in Chelan County. CP 125-26. The improvements are constructed on trust land allotted to the Wapato family. CP 3 (¶ 4.1). The allotted land is a portion of “the original Indian trust allotment, Moses Agreement No. 10 (Que-til-qua-soon, or Peter Wapato) . . . in Chelan County[.]” CP 253. Each Seller held portions of the land pursuant to subleases and assignments of sublease rights. CP 4 (¶ 4.2). No Seller is a member of the Wapato family, nor did any of them allege that they are a member of an Indian tribe. *See* CP 1-11, 94, 134, 139-40. And no tribe is involved in this litigation or the transactions at issue.

Appellant Philip Edward Sifferman³ entered into a real estate transaction in which he assigned his sublease of certain property and sold the improvements constructed thereon. *See* CP 4 (¶ 4.4). Sifferman reported a “Gross Selling Price” and “Taxable Selling Price” of \$1,022,500.00 on his REET Affidavit. CP 102. Accordingly, the Chelan

³ Sifferman’s first name is misspelled in the caption. *See* CP 93.

County Treasurer collected state and county REET totaling \$18,200.50 (1.78 percent of \$1,022,500.00).⁴ CP 4 (¶ 4.4), 102.

Appellants Bruce and Raelyn Penoske entered into a real estate transaction in which they assigned their sublease of certain property and sold the improvements constructed thereon. *See* CP 2 (¶ 3.2), 4 (¶ 4.6). The Penoskes reported a “Gross Selling Price” and “Taxable Selling Price” of \$1,300,000.00 on their REET Affidavit. CP 103. Accordingly, the Treasurer collected state and county REET totaling \$23,140.00 (1.78 percent of \$1,300,000.00). CP 4 (¶ 4.6), 103.

Appellants Steven and Jacqueline Ramels entered into a real estate transaction in which they assigned their sublease of certain property and sold the improvements constructed thereon. *See* CP 3 (¶ 3.3), 5 (¶ 4.8). The Ramels reported a “Gross Selling Price” and “Taxable Selling Price” of \$550,000.00 on their REET Affidavit. CP 104. Accordingly, the Treasurer collected state and county REET totaling \$9,790.00 (1.78 percent of \$550,000.00). CP 5 (¶ 4.8), 104.

Appellants Michael and Diane Lass, Thomas and Sharon Jansen, and Patrick French (the Lass owners) entered into a real estate transaction

⁴ The rate applied by the Treasurer consisted of a state rate of 1.28 percent and a county rate of .5 percent. *See* RCW 82.45.060(1) (2013); CP 102-07; Department of Revenue, *Real Estate Tax Rates* (2019) (available at <https://dor.wa.gov/sites/default/files/legacy/Docs/forms/RealEstExcsTx/RealEstExTxRates.pdf> (last accessed July 2, 2020)).

in which they assigned their sublease of certain property and sold the improvements constructed thereon. *See* CP 3 (¶ 3.4), 5 (¶ 4.10). The Lass owners reported a “Gross Selling Price” of \$624,500.00, claimed an exemption of \$312,250.00, and reported a “Taxable Selling Price” of \$312,250.00 on their REET Affidavit. CP 105-06. Accordingly, the Treasurer collected state and county REET totaling \$5,558.05 (1.78 percent of \$312,250.00). CP 5 (¶ 4.10), 105-06.

Appellant Paradise Lake House LLC, a Washington limited liability company, entered into a real estate transaction in which it assigned its sublease of certain property and sold the improvements constructed thereon. *See* CP 5 (¶ 3.5), 5 (¶ 4.12). Paradise Lake House reported a “Gross Selling Price” and “Taxable Selling Price” of \$514,500.00 on its REET Affidavit. CP 107. Accordingly, the Treasurer collected state and county REET totaling \$9,158.10 (1.78 percent of \$514,500.00). CP 5-6 (¶ 4.12), 107.

With respect to the five transactions discussed above, Sellers or their agents provided the information reported on the REET Affidavits. CP 84 (¶ 3). Chelan County does not fill out such affidavits, nor dictate to sellers or agents how they should fill them out. CP 84-85 (¶¶ 3-4). For each transaction, REET was calculated using the “Taxable Selling Price” reported by Sellers or their agents. *See* CP 85 (¶ 5), 102-07.

Sellers did not pay a tribal tax or fee on their sale transactions. Pursuant to a Business Lease executed in 1976, each paid a 3.5 percent contractual fee to the Wapato family collected by Wright-Wapato, Inc. CP 114, 128, 327. Wright-Wapato, Inc. oversees the Business Lease regarding Wapato Point. *See* CP 3 (¶ 4.1), 124-25.

In the superior court, Sellers repeatedly claimed that they paid a tribal tax. *See, e.g.*, CP 4, 5, 6, 163, 167, 176. In their opening brief, however, Sellers at first appear to concede they did not pay a tribal tax. *See* App. Br. at 4 (“The transaction required payment to Wright-Wapato, Inc., a tribal fee of 3.5% of the transaction price . . .”). But later in their brief, they inconsistently assert that “[e]ach transaction was subjected to ‘taxation’ by the Indian tribe (3.5%), which was assessed and paid.” *Id.* at 13. Regardless, the record conclusively establishes that Sellers paid a contractual fee required by the Business Lease, and not a tribal tax or fee. CP 114, 128, 327.

In May 2017, Sifferman sued respondents in Grant County Superior Court seeking declaratory relief and a refund of the REET he paid. *See* CP 15. His complaint also asserted refund claims on behalf of an alleged class of unnamed, similarly-situated taxpayers. *See id.* The Grant County Superior Court transferred venue to Thurston County. CP 15-16.

Following transfer of venue to Thurston County, Sifferman filed an amended complaint adding additional taxpayers seeking REET refunds. CP 1-11. The amended complaint continued to seek refunds on behalf of an alleged class of unnamed, similarly-situated taxpayers. CP 8-9. Respondents moved to strike the amended complaint and to dismiss the class refund claims. CP 12-19. The superior court denied the motion to strike but granted the motion to dismiss the class claims. CP 66-68.

Subsequently, all parties moved for summary judgment. CP 69-81, 161-73. The superior court granted summary judgment to respondents, denied summary judgment to Sellers, and dismissed Sellers' amended complaint with prejudice. CP 371-73. This appeal followed.

IV. ARGUMENT

A. Standard of Review

Sellers seek refunds of REET under RCW 82.32.180. In an excise tax refund action under that statute, the taxpayer must prove that the tax it paid was incorrect and also prove the correct amount it owed. *Bravern Residential, II, LLC v. Dep't of Revenue*, 183 Wn. App. 769, 776, 334 P.3d 1182 (2014); *Texaco Ref'g & Mktg. Co. v. Dep't of Revenue*, 131 Wn. App. 385, 398, 127 P.3d 771 (2006).

The superior court denied Sellers' REET refund claims pursuant to cross motions for summary judgment. This Court reviews a grant of

summary judgment de novo, engaging in the same inquiry as the trial court. *Activate, Inc. v. Dep't of Revenue*, 150 Wn. App. 807, 812, 209 P.3d 524 (2009). Summary judgment is appropriate when no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. CR 56(c).

Here, the material facts are undisputed. Thus, this case involves the application of various statutes, constitutional law, and case law to undisputed facts, which is a question of law. *Wash. Imaging Servs., LLC v. Dep't of Revenue*, 171 Wn.2d 548, 555, 252 P.3d 885 (2011). The superior court appropriately resolved this action through summary judgment.

B. The Statutory Definition of “Sale” Expressly Includes Transfers of Improvements Constructed Upon Leased Land

The superior court correctly concluded that under state law REET applies to transfers of improvements constructed upon leased land. Before the superior court, Sellers urged that REET does not apply to such transfers under state law. CP 6-7, 164, 290-91, 355-56. They appear to have abandoned that argument on appeal. *See, e.g.*, App. Br. at 7 (“State law limits REET to the value of improvements assigned by lease.”); *id.* at 8 (“At most, Washington statutes would permit REET on the value of improvements transferred as determined by the county assessment roles

[sic].”). But in any event, REET expressly applies to transfers of improvements constructed upon leased land.

In Washington, “each sale of real property” is subject to state and any applicable local REET. RCW 82.45.060; RCW 82.46.010(4) (local REET “must be collected from persons who are taxable by the state under chapter 82.45 RCW”). The person selling the real property must pay the REET. RCW 82.45.080(1).

RCW 82.45.010 defines “sale” for REET purposes. That definition expressly includes the “transfer of improvements constructed upon leased land.” RCW 82.45.010(1). “When interpreting a statute, the court’s fundamental objective is to ascertain and give effect to the legislature’s intent.” *Columbia Riverkeeper v. Port of Vancouver USA*, 188 Wn.2d 421, 435, 395 P.3d 1031 (2017). “It is an axiom of statutory interpretation that where a term is defined we will use that definition.” *United States v. Hoffman*, 154 Wn.2d 730, 741, 116 P.3d 999 (2005). Sellers themselves describe the transactions for which they seek refunds as *transfers of improvements* constructed upon leased land. *See* App. Br. at 4; CP 163. Accordingly, under the controlling statutory definition, any argument that transfers of improvements constructed upon leased land are not “sales” under RCW 82.45.010(1) would be meritless.

Sellers, without citing the record, assert that they did “not ‘own’ the improvements” at issue. App. Br. at 3. The evidence in the record, however, establishes otherwise. CP 126 (testimony of Scott Hutchinson that full-share owners own their homes), 135 (admission of Patrick French that the Lass owners owned their improvement).⁵ Moreover, ownership of improvements is not required to incur a REET obligation. REET applies to “any conveyance . . . or transfer of . . . *any estate or interest therein* for a valuable consideration[.]” RCW 82.45.010(1) (emphasis added). Consequently, when Sellers transferred their interests in the subject improvements for valuable consideration, they made “sale[s]” under RCW 82.45.010(1).

Although Sellers in their brief appear to concede that their transfers of improvements were taxable under state law, they make several statements inconsistent with that concession. For example, Sellers assert that “RCW 82.45.010(3)(c) provides that ‘sale’ does not include the ‘transfer of any leasehold interest’, other than a lease with an option to purchase real property.” App. Br. at 7. That is inaccurate. Subsection (3)(c) instead lists various transfers that are not “sale[s]” under the statutory definition, including the “transfer of any leasehold interest *other*

⁵ Sifferman did not admit that he owned the improvements that he sold. CP 95-96. Inconsistently, however, he admitted he owns the improvements located on an adjacent site at Wapato Point. CP 99.

than of the type mentioned above.” RCW 82.45.010(3)(c) (emphasis added). And as discussed above, RCW 82.45.010(1) expressly mentions the “transfer of improvements constructed upon leased land.”

Sellers also mention WAC 458-61A-106(1)(b) and point out their “properties are not entered on the assessment roles [sic] of the county assessor because they are situated on Indian land.” App. Br. at 7. In the superior court, Sellers relied on WAC 458-61A-106(1)(b) to argue that REET did not apply to their transfers of improvements. For example, based on the Department’s rule, they reasoned: “If defendants agree that Indian land is not carried on the assessor tax rolls and is not subject to property tax on the land or improvements, how can they logically conclude REET applies to the same property or improvements?” *See CP 290-91*. But any argument that REET did not apply to Sellers’ transfers of improvements based on WAC 458-61A-106(1)(b) would be seriously flawed.

First, an administrative rule cannot provide an exemption that is not founded in statute. *Coast Pacific Trading, Inc. v. Dep’t of Revenue*, 105 Wn.2d 912, 917, 719 P.2d 541 (1986). In addition, tax “[e]xemptions may not be created by implication.” *TracFone Wireless, Inc. v. Dep’t of Revenue*, 170 Wn.2d 273, 297, 242 P.3d 810 (2010) (quoting *Belas v. Kiga*, 135 Wn.2d 913, 935, 959 P.2d 1037 (1998)). Here, no statutory

exemption from REET exists for improvements that do not have values listed on a county's assessment rolls. Hence, no such exemption may be implied based on WAC 458-61A-106(1)(b) or otherwise.

Second, the Department's rule does not in fact exempt an improvement from REET if its value is not listed on a county's assessment rolls. Rather, WAC 458-61A-106(1)(b) provides: "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." (Emphasis added). Properly read, the rule simply authorizes the use of an improvement's assessed value as the default if no reasonable way exists to determine its selling price.

Moreover, even if WAC 458-61A-106(1)(b) carved out a potential exemption, Sellers had a reasonable way to prove the selling prices of their improvements. They could have offered into evidence fair market appraisals. Sellers, however, chose to produce no evidence whatsoever regarding those selling prices. CP 150-55 (Interrogatory Nos. 10, 13, 16, 20, 23), 296, 363.

Third, Sellers' argument based on WAC 458-61A-106(1)(b) is reminiscent of an argument that the Washington Supreme Court rejected in *TracFone*. There, TracFone claimed it did not owe E-911 taxes because

the taxing statutes required the amount of the tax ““be stated separately on the billing statement”” sent to subscribers, and it did not send billing statements to its subscribers. *TracFone*, 170 Wn.2d at 289-90 (quoting RCW 82.14B.040 and RCW 82.14B.042(3)). The Court rejected TracFone’s faulty argument: “The fact that TracFone does not send monthly billing statements is a consequence of the way in which it chooses to conduct its business. It does not relieve TracFone of its obligations under the taxing statutes nor does it convert a plainly taxable event into a nontaxable event.” *TracFone*, 170 Wn.2d at 290.

Similarly, this Court should conclude that the absence of assessed values on the property tax rolls for Sellers’ improvements did not relieve them of their “obligations under the taxing statutes” nor “convert a plainly taxable event into a nontaxable event.” The superior court correctly declined to exempt Sellers’ transactions from REET merely because the County’s property tax rolls did not list values for their improvements.

At the superior court, Sellers repeatedly argued that “no tax is due” so they should receive full refunds. CP 363; *see also* CP 296 (“Defendants correctly point out that plaintiffs ‘have steadfastly alleged they owe no REET at all.’”). Sellers now argue that “Sifferman, Penoske, and Ramels, who were required to pay REET on 100% of the lease transfer consideration, should at least be entitled to a 50% refund of REET paid

pursuant to Washington law and DOR policy.” App. Br. at 8. The so-called “policy” they rely on is a letter sent to the Wapato Point Development Company by the Department’s REET coordinator in January 1994.⁶ *See id.*

The superior court did not err in denying refunds to Sifferman, the Pensokes, and the Ramels. In an action under RCW 82.32.180, a taxpayer’s burden is twofold. It must “(1) show the tax paid was incorrect and (2) establish the correct amount.” *Texaco*, 131 Wn. App. at 398. Here, Sellers *chose to produce no evidence* proving the values of their improvements. CP 150-55 (Interrogatory Nos. 10, 13, 16, 20, 23), 296, 363. Therefore, none of them produced any evidence establishing the correct amount of tax. Consequently, Sellers failed to meet the applicable burden of proof under RCW 82.32.180.

Furthermore, that the Lass owners and possibly the Paradise Lake House paid REET based on 50 percent of their transaction prices provides no basis to grant any relief to Sifferman, the Pensokes, or the Ramels.⁷ No evidence in the record supports that the parties to any of the transactions at issue valued the improvements at 50 percent of the total transaction prices.

⁶ A copy of the letter is included in the record. CP 86-87.

⁷ Paradise Lake House alleged that it paid REET based on 50 percent of its total consideration of \$1,029,000.00. *See* CP 5-6 (¶ 4.12). On its REET Affidavit, however, Paradise Lake House reported a “Gross Selling Price” and “Taxable Selling Price” of \$514,500.00. CP 107.

And if any party relied on the Department's January 1994 letter, it did so in error. The letter, by its express terms, applies to the taxation of "time-share," "condominium units." CP 86-87. Here, Sellers transferred improvements (private homes) constructed upon leased land, not time-share, condominium units. *See* CP 2-6, 126. Thus, the superior court properly disregarded it.⁸

For the reasons stated, this Court should conclude that the superior court properly rejected Sellers' arguments based on state law.

C. Federal Law Does Not Preempt Applying the REET to Off-Reservation Sale Transactions Between Non-Indians

The superior court also correctly concluded that federal law did not preempt the REET with respect to the transactions at issue. The federal authority Sellers rely on in their brief is inapplicable or readily distinguishable.

1. Title 25 U.S.C. Section 5108 is inapplicable

Sellers first raise 25 U.S.C. § 465 (re-codified at 25 U.S.C. § 5108). App. Br. at 9-10. By its express terms, § 5108 applies only to lands and rights acquired under "this Act"—*i.e.*, the Indian Reorganization Act of 1934—or the "Act of July 28, 1955 (69 Stat. 392), as amended (25

⁸ Although neither the Lass owners nor the Paradise Lake House likely paid the correct amount of REET, respondents did not assert a counterclaim in the superior court alleging that either underpaid REET and, therefore, did not seek affirmative relief—*i.e.*, the payment of additional REET—with respect to either of them. CP 80.

U.S.C. 608 et seq.).”⁹ Sellers, however, offered no evidence establishing that United States Department of Interior acquired the allotment at issue under either Act. Nor could they have since Congress established the Moses allotments in 1884 following the 1883 Moses Agreement. *See United States v. Oregon*, 787 F. Supp. 1557, 1564 (D. Ore. 1992); Agreement with the Columbia and Colville 1883, July 7, 1883, 1883 WL 41518; Act of July 4, 1884, 48th Cong., 1st Sess., ch. 180; *see also Starr v. Long Jim*, 227 U.S. 613, 615-18, 33 S. Ct. 358, 57 L. Ed. 670 (1913) (discussing 1883 Moses Agreement); *United States v. Moore*, 161 F. 513, 516-18 (9th Cir. 1908) (same). Consequently, Sellers err in relying on § 5108 in support of federal preemption.¹⁰

2. Section 5108 would not preempt the REET even if it applied

Sellers next discuss two cases interpreting § 5108 when it was codified as § 465. App. Br. at 10-11. These cases are irrelevant because

⁹ The federal statute provides in full:
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 (emphasis added).

¹⁰ The California Court of Appeal recently concluded that § 5108 does not apply to land taken into trust prior to the Indian Reorganization Act of 1934. *Herpel v. County of Riverside*, 45 Cal. App. 5th 96, 118-22, 258 Cal. Rptr. 3d 444 (2020).

§ 5108 is inapplicable. But even if it applied, § 5108 would not preempt the REET.

In *Mescalero Apache Tribes v. Jones*, 411 U.S. 145, 93 S. Ct. 1267, 36 L. Ed. 2d 114 (1973), the United States Supreme Court addressed § 5108 (then § 465) in a case involving a tribal ski resort and New Mexico's gross receipts tax and use tax. The Supreme Court held that § 5108 did not preempt the gross receipts tax but did preempt the use tax.

The Supreme Court first rejected the Tribes' broad claims of tax immunity, explaining in part: "Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been subject to non-discriminatory state law otherwise applicable to all citizens of the State." *Mescalero*, 411 U.S. at 148-49. The Supreme Court then turned to the scope of the immunity § 5108 affords.

Regarding § 5108, the Supreme Court noted "[o]n its face, the statute exempts land and rights in land, not income derived from its use." *Id.* at 155. It further stated: "[A]bsent clear statutory guidance, courts ordinarily will not imply tax exemptions and will not exempt off-reservation income from tax simply because the land from which it is derived, or its other source, is itself exempt from tax." *Id.* at 156. Consistent with these principles, the Supreme Court has held that "[l]esseees of otherwise exempt Indian lands are also subject to state

taxation.” *Id.* at 157 (citing *Oklahoma Tax Comm’n v. Texas Co.*, 336 U.S. 342, 69 S. Ct. 561, 93 L. Ed. 721 (1949)). Accordingly, the *Mescalero* Court concluded that § 5108 did not bar the collection of New Mexico’s nondiscriminatory gross receipts tax as applied to the ski resort operations by the tribal business. *Id.* at 158.

The Supreme Court reached a different conclusion with respect to New Mexico’s use tax, which it described as “the compensating use tax on the personalty installed in the construction of the ski lifts.” *Id.* It held that the “use of permanent improvements upon land is so intimately connected with use of the land itself that an explicit provision relieving the latter of state tax burdens must be construed to encompass . . . the former.”¹¹ *Id.* Section 5108 thus barred New Mexico from collecting use tax from the tribal enterprise operating the ski resort.

Here, the REET is comparable to New Mexico’s gross receipts tax and unlike its use tax. The REET is not a tax on lands or rights in land. For that reason, the Washington Supreme Court long ago rejected the claim that the REET is a property tax, holding that “a tax upon the sales of property is not a tax upon the subject matter of that sale.” *Mahler v. Tremper*, 40 Wn.2d 405, 409, 243 P.2d 627 (1952). Rather, the REET “is

¹¹ The Supreme Court cautioned, however, “[t]his is not to say that use taxes are for all purposes to be deemed simple ad valorem property taxes.” *Id.* (citing *United States v. City of Detroit*, 355 U.S. 466, 78 S. Ct. 474, 2 L. Ed. 2d 424 (1958)).

a tax upon the act or incidence of transfer.” *Id.* at 410. As a “tax upon the act or incidence of transfer,” the REET is a transactional tax like New Mexico’s gross receipts tax, and unlike New Mexico’s use tax.

In upholding New Mexico’s gross receipts tax, the Court in *Mescalero* relied in part on the principle that “[l]esseees of otherwise exempt Indian lands are also subject to state taxation.” *Mescalero*, 411 U.S. at 157. Here, Sellers subleased otherwise exempt Indian lands, and the REET they paid was a tax on their sales transactions and not a tax on lands or rights in land. Consequently, even if § 5108 applied, it would not preempt the REET.

Finally, the facts in *Mescalero* and the facts here are materially different. New Mexico sought to impose its use tax on a tribal business. Here, in contrast, non-Indian Sellers owed REET on the sales of their improvements. This Court should conclude that § 5108, if it applies, does not preempt the REET.

Sellers further claim that *Confederated Tribes of Chehalis Reservation v. Thurston County Board of Equalization*, 724 F.3d 1153 (9th Cir. 2013), is controlling. App. Br. at 11. Not so.

In *Confederated Tribes*, the Ninth Circuit held that § 5108 preempted *property taxes* on permanent improvements located on trust land. 724 F.3d at 1159 (“[T]he case before us involves only property taxes

on permanent improvements.”). The Ninth Circuit reasoned: “Under *Mescalero*, § [5108]’s exemption from state and local taxation applies to the permanent improvements on that land. . . . Thurston County’s *property taxes* on the Grand Mound Property are therefore invalid under § [5108] and *Mescalero*.” *Id.* at 1157 (emphasis added). The Ninth Circuit explained, however, that § 5108 *does not apply* “when state or local governments impose taxes on interests other than the ‘lands or rights’ covered by § [5108].” *Id.* at 1158 n.7 (citing *Agua Caliente Band of Mission Indians v. County of Riverside*, 442 F.2d 1184, 1186 (9th Cir. 1971)).¹² The Ninth Circuit thus found “critical” the difference between a property tax imposed on improvements and a transactional tax imposed on possession rights. *Id.*

In contrast to the property tax at issue in *Confederated Tribes*, the REET, as explained above, is “a tax upon the act or incidence of transfer.” *Mahler*, 40 Wn.2d at 410. Because the REET is a transactional tax, not a property tax, *Confederated Tribes* is not on point.

Sellers next rely on *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 112 S. Ct. 683, 116 L. Ed. 2d 687 (1992). Br. App. at 11-12. *County of Yakima*, however, offers no

¹² The court in *Herpel* relied in part on *Agua Caliente* in upholding a possessory interest tax imposed on lessees of tribal land. See 45 Cal. App. 5th at 98, 122.

support for their federal statutory preemption claim. It addressed whether Yakima County could impose the REET on *tribal sellers*. The United States Supreme Court held that “a tax upon the *Indian’s* activity of selling the land . . . is void[.]” *County of Yakima*, 502 U.S. at 269 (emphasis added). The Supreme Court neither addressed the taxation of sales of improvements by non-Indians nor construed § 5108.

Sellers also purport to rely on leasing regulations issued by the Bureau of Indian Affairs (25 C.F.R. § 162.017) as support for the claim that their sales of improvements “should not have been subject to *any* Washington State real estate excise tax.”¹³ *See* App. Br. at 12-13 (emphasis in original). But § 162.017 “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) (footnote omitted). The regulations thus lack “independent legal effect.” *See id.* at 1254.

¹³ 25 C.F.R. § 162.017(a) and (c) state respectively:

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.

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.

(Emphasis added).

Consequently, they do not—nor could they—provide an independent basis to conclude that federal law preempts the REET.

3. *Bracker* balancing should not be extended to off-reservation transactions

Sellers next argue that the *Bracker* balancing inquiry, although inapplicable here, favors preemption. App. Br. at 13-15. Courts use the *Bracker* balancing inquiry to determine whether federal law implicitly preempts state authority over conduct on reservations. Sellers are wrong; even if *Bracker* applies, it does not favor preemption.

As a threshold matter, the United States Supreme Court has not applied *Bracker* to off-reservation transactions between non-Indians. As that Court has observed, “[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.” *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 110, 126 S. Ct. 676, 163 L. Ed. 2d 429 (2005). The *Wagnon* Court explained: “Limiting the interest-balancing test exclusively to *on-reservation* transactions between a nontribal entity and a tribe or tribal member is consistent with our unique Indian tax immunity jurisprudence.” 546 U.S. at 112 (emphasis in original). Here, Sellers offered no evidence establishing that the allotment at issue is located within a recognized

reservation. Therefore, Sellers correctly concede that the *Bracker* balancing inquiry is inapplicable. App. Br. at 13.

This Court, however, recently applied *Bracker* broadly to transactions between non-Indians occurring on a reservation. *Cf. Ariz. Dep't of Revenue v. Blaze Constr. Co.*, 526 U.S. 32, 37, 119 S. Ct. 957, 143 L. Ed. 2d 27 (1999) (declining to apply *Bracker* where the legal incidence of the tax fell on a nontribal entity engaged in an on-reservation transaction with the United States). Rejecting the Department's argument that *Bracker* did not apply to on-reservation transactions between non-Indians, the court explained:

Courts utilize the *Bracker* test to analyze transactions between non-Indians on Indian land. *See Bracker*, 448 U.S. at 144, 100 S.Ct. 2578 (holding that the test applies when "a State asserts authority over the conduct of non-Indians engaging in activity on the reservation"); *Barona Band [of Mission Indians v. Yee]*, 528 F.3d [1184,] 1190 [(9th Cir. 2008)]. The action at issue here falls squarely within the *Bracker* court's category of state action to be balanced. Because Everi's cash access services are between non-Indians on Indian lands, the *Bracker* balancing test applies.

Everi Payments, Inc. v. Dep't of Revenue, 6 Wn. App. 2d 580, 596 n.11, 432 P.3d 411 (2018), *rev. denied*, 193 Wn.2d 1014 (2019).

But unlike in *Everi*, *Bracker*, and *Barona Band*,¹⁴ no evidence in the record indicates that the transactions at issue here occurred on a reservation. This Court should not extend *Bracker* yet even further by applying it to off-reservation transactions between non-Indians. Rather, it should follow the jurisprudence of the United States Supreme Court “limiting the [*Bracker*] interest-balancing test exclusively to *on-reservation* transactions.” *Wagnon*, 546 U.S. at 112 (emphasis in original).

4. *Bracker* would not preempt the REET if it applied

Even if *Bracker* applied, the balancing inquiry would tip overwhelmingly in favor of imposing the REET. In *Everi*, the taxpayer argued that *Bracker* balancing preempted the state business and occupation (B&O) tax. *Everi*, 6 Wn. App. 2d at 585. The court rejected *Everi*’s argument, concluding that “after balancing federal, tribal, and state interests, the B&O tax here is not implicitly preempted by federal law.” *Id.* at 599-600 (footnote omitted).

¹⁴ See *Everi*, 6 Wn. App. 2d at 588 (Everi sought refund for “its *on-reservation* cash access transactions”); *Bracker*, 448 U.S. at 137 (case involved “the activities of non-Indians engaged in commerce on an *Indian reservation*”); *Barona Band of Mission Indians v. Yee*, 528 F.3d 1184, 1187 (9th Cir. 2008) (discussing provision of a tract of land “to serve as a *reservation* for the Tribe”), and 1188-89 (discussing the application of state laws on reservations).

The *Everi* court first discussed the relevant factors to consider in conducting the *Bracker* balancing inquiry, including:

- The underlying broad policies of federal law as well as historical notions of tribal independence and sovereignty;
- The tribe’s economic interests;
- Whether the exercise of state authority may interfere with the tribe’s ability to exercise its sovereign functions; and
- The state’s interest in exercising its regulatory authority over the activity in question.

6 Wn. App. 2d at 600-01 (citing *Bracker*, 448 U.S. at 144-45, 152; *Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of N.M.*, 458 U.S. 832, 838, 102 S. Ct. 3394, 73 L. Ed. 2d 1174 (1982); *Mashantucket Pequot Tribe v. Town of Ledyard*, 722 F.3d 457, 471, 476-77 (2nd Cir. 2013)).

The *Everi* court then balanced the federal, tribal, and state interests. Regarding the federal interests, it concluded “[t]he B&O tax has a minor effect on the federal interest involved.” 6 Wn. App. 2d at 602. The court explained that the “taxed cash access services are between Everi and non-Indian individuals who are accessing their cash” and “tribes remain the primary beneficiaries of their gaming operations.” *Id.* at 601-02. Therefore, the “B&O tax does not interfere with policies supporting tribal self-sufficiency, economic independence, and tribal governance.” *Id.*

Regarding the tribal interests, this Court found important that the transaction at issue involved activities between non-Indians:

Where a state seeks to impose a tax on a transaction between a tribe and non-Indians, the State must point to an interest beyond generally raising revenues. *Mescalero*, 462 U.S. at 336. However, the State need not point to a specific interest in assessing a tax on activities between non-Indians. *See Mescalero*, 462 U.S. at 336.

Everi, 6 Wn. App. 2d at 602. The court concluded that the impact on the tribes' economic and sovereignty interests was "weak" and "minimal." *Id.* at 603. The reasons it gave included: Everi's payment of B&O taxes did not affect the commissions Everi paid to tribes; the tribes "control[led] their relationships and contracts with Everi, determining the fees and commissions associated with cash access services"; the B&O tax applied to business activities between non-Indians; and the legal incidence of the tax fell on Everi. *Id.*

The *Everi* court also discussed state interests. It recognized a state's "legitimate interest in raising revenue to provide general government services." 6 Wn. App. 2d at 604 (citing *Barona Band*, 528 F.3d at 1192-93). The court further explained that a "state's interests are 'strongest when non-Indians are taxed, and those taxes are used to provide [those non-Indians] with government services.'" *Id.* at 604 (brackets in original) (quoting *Salt River Pima-Maricopa Indian Cmty. v. Arizona*, 50

F.3d 734, 739 (9th Cir. 1995); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 157, 100 S. Ct. 2069, 65 L. Ed. 2d 10 (1980)).

Based on its balancing of the federal, tribal, and state interests, the *Everi* court held that “the state interest in the tax outweighs the federal and tribal interests and the B&O tax assessed against Everi is not preempted by federal law.” 6 Wn. App. 2d at 605.¹⁵ Similarly, here, the balance of federal, tribal, and state interests weighs strongly in favor of the State and County. The REET has little or no effect on any federal interest. Indeed, Sellers do not identify any federal interest at all. *See* App. Br. at 14. Nor could Sellers seriously argue that the REET interferes with policies supporting tribal self-sufficiency, tribal economic independence, or tribal governance. No tribe is even involved here. The improvements at issue are located on allotted land held in trust for an Indian family, not for a tribe.

Sellers also presented no evidence demonstrating that paying the REET had an adverse impact on any taxes owed to any tribe. Obviously,

¹⁵ The United States District Court likewise recently ruled in favor of the State and Snohomish County after conducting the *Bracker* balancing inquiry. *Tulalip Tribes v. Washington*, 349 F. Supp. 3d 1046, 1054-63 (W.D. Wash. 2018). *Tulalip Tribes* involved a challenge to the State and Snohomish County’s collection of B&O taxes, retail sales and use taxes, and personal property taxes from non-Indian businesses located on an Indian reservation. *Id.* at 1048. The most relevant factors found by the District Court included: the lack of a pervasive federal regulatory scheme governing the taxed activity; the transactions at issue involved non-Indians; the State and Snohomish County’s substantial interest in enforcing generally applicable taxes within their borders; and the services provided by the State and Snohomish County to the taxpayers. *Id.* at 1062.

the Wapato family has no authority to impose a tax. Nor did Sellers show that paying the REET had any impact on the contractual fees paid to Wright-Wapato, Inc. *See* CP 4-6 (¶¶ 4.7, 4.9, 4.11, 4.13, 4.17); CP 114; CP 128. Accordingly, this Court should conclude that the impact of the REET on tribal economic and sovereignty interests is “minimal” and “weak,” at best.

The state interests, on the other hand, are significant. The State and local governments provided substantial services to Wapato Point residents. Those services included fire services, law enforcement, schools, courts, landfill services, water, electricity, and roads. CP 337-39. In contrast, Wright-Wapato, Inc. and the Wapato family provided *no* governmental services. CP 340.¹⁶ And as recognized in *Everi*, the State has a “legitimate interest in raising revenue to provide general government services.” 6 Wn. App. 2d at 604. Moreover, that interest is strongest here because the transactions the State and County taxed occurred between non-Indians. In sum, the State and County’s interests in imposing the REET significantly outweighs any nominal tribal or federal interests. If this Court were to

¹⁶ Pursuant to an agreement with Chelan County, Wapato Point Resources, Inc., makes voluntary contributions in lieu of certain taxes. CP 194-99. The payments are intended to compensate for fact that the properties and improvements at Wapato Point are not subject to the property tax or the leasehold tax. CP 194. The agreement does not address the REET.

apply the *Bracker* balancing test, it should conclude that federal law does not implicitly preempt the REET.

D. The Prepayment Requirement in RCW 82.32 Does Not Violate Due Process

Sellers next argue that having to pay the REET as a condition to record their transfer transactions violated their due process rights under the United States and Washington constitutions. App. Br. at 15-18. The sole case law authority they offer in support is a musty 3-2 decision from the 1890s. *Id.* at 16-18 (discussing *Baldwin v. Moore*, 7 Wash. 173, 34 P. 461 (1893)). In *Baldwin*, the Court struck down on due process grounds a statute prohibiting the county auditor from recording a deed conveying real property unless all taxes on the property were fully paid. 7 Wash. at 178. Sellers' due process claim is without merit.

First, *Baldwin* is distinguishable. A significant factor in *Baldwin* was that “[n]o provision [was] made in the act whereby an interested party can test the validity of the tax, or the truthfulness of the record.” 7 Wash. at 174. But here, the Legislature has granted taxpayers ample opportunity to challenge the validity of the REET through an administrative refund claim under RCW 82.32.170 or a superior court refund action under RCW 82.32.180.

Second, and more importantly, under modern-day jurisprudence, providing taxpayers the opportunity to be heard satisfies due process, even if that opportunity is not available until *after* collection of the taxes at issue. *Peters v. Sjolholm*, 95 Wn.2d 871, 877, 631 P.2d 937 (1981) (citing *Fuentes v. Shevin*, 407 U.S. 67, 90-92, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972)). In fact, in *Peters*, the Washington Supreme Court upheld the post-payment procedures afforded by RCW 82.32.170 and RCW 82.32.180 against a due process challenge:

[P]etitioner had the opportunity to challenge the tax assessment after the taxes had been paid. He could have applied for a refund and for a conference to examine and review the tax liability, RCW 82.32.170, or appealed to the Superior Court of Thurston County for a refund, RCW 82.32.180. In the area of tax collection, it is constitutionally sound to postpone the opportunity for a hearing until after the payment of the delinquent taxes.

95 Wn.2d at 877 (citing *Fuentes*, 407 U.S. at 91-92).

Here, Sellers availed themselves of the opportunity to challenge the REET they paid through this refund action under RCW 82.32.180. Consequently, no violation of their due process rights has occurred.

Finally, requiring a taxpayer to pay a disputed tax and then seek a refund is sound policy that supports the government's "strong interest in the efficient collection of taxes which has long been recognized by the judiciary." *Peters*, 95 Wn.2d at 885 (Brachtenbach, J., concurring)

(citations omitted). The “prepayment requirement” furthers the State’s interest in the “prompt and orderly collection of taxes.” *Booker Auction Co. v. Dep’t of Revenue*, 158 Wn. App. 84, 89, 241 P.3d 439 (2010). *Accord Barry v. AT&T Co.*, 563 A.2d 1069, 1074 (D.C. 1989) (recognizing the “universal principle” that courts should refrain from granting injunctions and declaratory relief in cases involving the collection of taxes absent clear proof of a lack of remedy at law and emphasizing that the “pay and sue” rule should be circumvented only in extraordinary circumstances).¹⁷

The post-payment hearing options provided to taxpayers under RCW 82.32 are constitutionally adequate. Therefore, this Court should reject Sellers’ due process claim.

E. Sellers Are Not Entitled to Declaratory Relief

The superior court also correctly concluded that Sellers were not entitled to declaratory relief.

1. Neither the Uniform Declaratory Judgment Act nor RCW 82.32.150 support granting declaratory relief

Soldiering on, Sellers next argue that “prospective declaratory relief against Chelan County is appropriate,” apparently to restrain the

¹⁷ The California Court of Appeal in *California Dep’t of Tax & Fee Admin. v. Superior Court*, 48 Cal. App. 5th 922, 937, 262 Cal. Rptr. 3d 397 (2020), recently held that California’s “‘pay first’ requirement accords with due process.”

County in the future from collecting REET on sales of improvements located on the real property at issue. *See* App. Br. at 20-21. Neither the Uniform Declaratory Judgment Act (UDJA) nor RCW 82.32.150, however, provide any basis to grant declaratory relief against the County. Instead, had Sellers met their burden under RCW 82.32.180 by proving the refund amounts that were due, such relief would be limited to an order granting those refunds to Sellers.

In seeking declaratory relief against the County, Sellers overlook that local REET “must comply with all applicable rules, regulations, laws, and court decisions regarding real estate excise taxes as imposed by the state under chapter 82.45 RCW.” RCW 82.46.010(5). They further disregard that most of the administrative procedures in RCW 82.32, including RCW 82.32.150 and RCW 82.32.180, apply to both state and local REET. RCW 82.45.150.

Granting declaratory relief to Sellers under the UDJA, contrary to the limits placed on equitable relief in RCW 82.32.150, would be inconsistent with established principles of sovereign immunity. Those principles dictate that when the Legislature has granted a right to seek review of an excise tax, that right must be exercised in the manner provided by the statute. *Lacey Nursing Ctr., Inc. v. Dep’t of Revenue*, 128 Wn.2d 40, 52, 905 P.2d 338 (1995); *Guy F. Atkinson Co. v. State*, 66

Wn.2d 570, 575, 403 P.2d 880 (1965); *Booker Auction*, 158 Wn. App. at 88.¹⁸

RCW 82.32.150 and RCW 82.32.180 “constitute the legislature’s specific pronouncement with regard to tax disputes in superior court.” *Booker Auction*, 158 Wn. App. at 89-90. These statutes control over general statutory schemes. *Id.* at 90; *AOL, LLC v. Dep’t of Revenue*, 149 Wn. App. 533, 549 n.19, 205 P.3d 159 (2009). Accordingly, courts should not employ the UDJA in a manner that is inconsistent with RCW 82.32.150 and RCW 82.32.180.

Through RCW 82.32.150, the Legislature has authorized limited injunctive relief with respect to excise taxes. RCW 82.32.150 does not broadly allow claims for injunctive relief. Rather, under the statute, a taxpayer may seek injunctive relief in superior court solely to challenge the *collection* of an *assessment* of unpaid taxes on constitutional grounds:

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*

¹⁸ Under the Washington Constitution, the Legislature “shall direct by law, in what manner, and in what courts, suits may be brought against the state.” Const. art. II, § 26. Washington’s courts have long held that the right to sue the State must be derived from statute, and the Legislature may establish conditions that must be met before that right can be exercised. *Nelson v. Dunkin*, 69 Wn.2d 726, 729, 419 P.2d 984 (1966). This long-established fundamental principle applies in actions challenging an excise tax. *Guy F. Atkinson*, 66 Wn.2d at 575; *Lacey*, 128 Wn.2d at 52.

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 (emphasis added).¹⁹

RCW 82.32.150 is unambiguous. *Booker Auction*, 158 Wn. App. at 89 (describing its language as clear). By its express terms, the statute “limits the court’s equitable powers.” *Tyler Pipe Indus., Inc. v. Dep’t of Revenue*, 96 Wn.2d 785, 791, 638 P.2d 1213 (1982). RCW 82.32.150 permits injunctive relief *only* with respect to the *collection* of an *assessment* of unpaid taxes. *See AOL, LLC v. Dep’t of Revenue*, 149 Wn. App. 533, 547, 205 P.3d 159 (2009) (noting the obvious, with respect to RCW 82.32.150’s second sentence, that “[t]here is no reason for a court to enjoin the Department’s collection of a tax” that has already been paid).

Here, having paid the disputed REET, there was no assessment to collect from Sellers and thus declaratory relief under RCW 82.32.150 was

¹⁹ The phrase “restraining order or injunction” in RCW 82.32.150, properly read, should be construed to include declaratory relief. *See California v. Grace Brethren Church*, 457 U.S. 393, 407-08, 102 S. Ct. 2498, 73 L. Ed. 2d 93 (1982) (construing the phrase “enjoin, suspend or restrain” in the federal Tax Injunction Act, 28 U.S.C. § 1341, to include declaratory relief); *Nat’l Private Truck Council, Inc. v. Oklahoma Tax Comm’n*, 515 U.S. 582, 591, 115 S. Ct. 2351, 132 L. Ed. 2d 509 (1995) (quoting *Grace Brethren Church* for the proposition that “there is little practical difference between injunctive and declaratory relief”).

unavailable to them. Consequently, to obtain court review, Sellers had to proceed in a refund action under RCW 82.32.180:

Any person . . . having paid any tax as required and feeling aggrieved by the amount of the tax may appeal to the superior court of Thurston county 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.

Later in RCW 82.32.180, the Legislature drove home that the authorized procedure for recovering taxes is a refund action under RCW 82.32.180 and not a circuitous action seeking declaratory relief under the UDJA: “[N]o court action or proceeding of any kind shall be maintained by the taxpayer to recover any tax paid, except as herein provided.”

Furthermore, declaratory relief is unavailable if the Legislature has provided an adequate statutory method for determining a particular type of case. *Seattle-King County Council of Camp Fire v. Dep’t of Revenue*, 105 Wn.2d 55, 58, 711 P.2d 300 (1985) (“In this state, ‘a plaintiff is not entitled to relief by way of a declaratory judgment if, otherwise, he has a completely adequate remedy available to him.’”) (quoting *Reeder v. King County*, 57 Wn.2d 563, 564, 358 P.2d 810 (1961)). This principle prevents a party from seeking declaratory relief as a means to circumvent a special statutory remedy granted by the Legislature. See *Hawkins v. Empres Healthcare Mgmt., LLC*, 193 Wn. App. 84, 102, 371 P.3d 84 (2016)

(“Declaratory relief is a rare, exceptional remedy. A court does not provide this remedy when it can provide an adequate alternative remedy.” (Citations omitted)); 22A Am. Jur. 2d *Declaratory Judgments* § 51 (2003) (“Where a statute provides a special form of remedy for a specific type of case, the statutory remedy shall be followed, and a party may not circumvent those special statutory proceedings by a declaratory judgment action.”). RCW 82.32.150 and .180 provide taxpayers plain, speedy, and adequate remedies at law. Therefore, this Court should not grant Sellers declaratory relief under the UJDA.

Sellers misplace their reliance on *Boeing Aircraft Co. v. Reconstruction Fin. Corp.*, 25 Wn.2d 652, 171 P.2d 838 (1946). App. Br. at 19. *Boeing Aircraft* precedes *Council of Camp Fire*, which squarely held that a taxpayer “is not entitled to relief by way of a declaratory judgment if, otherwise, he has a completely adequate remedy available to him.” 105 Wn.2d at 58. *Boeing Aircraft* also did not involve a challenge to an excise tax governed by RCW 82.32. Nor did the Court address sovereign immunity or the limits to the equitable relief that a court may grant under RCW 82.32.150.²⁰

²⁰ Sellers also cite *Johnson v. State*, 187 Wash. 605, 60 P.2d 681 (1936) and *Berndson v. Graystone Materials, Co.*, 34 Wn.2d 530, 209 P.2d 326 (1949). App. Br. at 19. These cases are inapt for the same reasons.

Sellers' reliance on CR 57 likewise is misplaced. Under CR 57, the "existence of another adequate remedy does not preclude a judgment for declaratory relief in cases *where it is appropriate*." (Emphasis added). Here, respondents have demonstrated that a judgment for declaratory relief would be contrary to RCW 82.32.150 and RCW 82.32.180.

2. RCW 82.32.150 does not independently authorize excise tax refund actions

Sellers contend that RCW 82.32.150 authorizes refund lawsuits, offering *Kirkland v. Dep't of Revenue*, 45 Wn. App. 720, 727 P.2d 254 (1986), for support. App. Br. at 20-21. That argument too is flawed. RCW 82.32.150 does not independently authorize excise tax refund actions, it merely grants an exception to the usual pre-payment requirement.

The Legislature initially enacted RCW 82.32.150 and RCW 82.32.180 as part of the Revenue Act of 1935. *See* Laws of 1935, ch. 180, §§ 198, 199. Courts should read the two statutes together. *State v. Reis*, 183 Wn.2d 197, 209, 351 P.3d 127 (2015) ("We interpret laws dealing with the same or similar issues by considering them together."). These two statutes, properly read, allow taxpayers challenging the collection of an assessment on constitutional grounds to proceed under

RCW 82.32.150, but require taxpayers seeking excise tax refunds to proceed under RCW 82.32.180.

Unfortunately, the court in *Kirkland* twice used erroneous and unnecessary language. First, in discussing RCW 82.32.150's pre-payment requirement, it stated that "Kirkland's only remedy is to challenge the assessment in a refund action under RCW 82.32.150." *Kirkland*, 45 Wn. App. at 723 (citing *Morrison-Knudsen Co. v. Dep't of Revenue*, 6 Wn. App. 306, 493 P.2d 802 (1972)). Second, in discussing injunctive relief, the court stated: "RCW 82.32.150, which provides the remedy of a refund suit to the taxpayer, also limits the court's equitable power to issue injunctions." *Id.* at 726. Sellers seize onto this latter statement. App. Br. at 20-21 (quoting *Kirkland*, 45 Wn. App. at 726). But this Court should reject Sellers' argument relying on *Kirkland* for at least four reasons.

First, *Kirkland* erred in citing *Morrison-Knudsen* as support for the proposition that Kirkland's only remedy was a refund action under RCW 82.32.150. Nothing in *Morrison-Knudsen* remotely supports the statement. Instead, the court in *Morrison-Knudsen* merely said: "RCW 82.32.150 denies a taxpayer access to the courts to protest a tax assessment unless the assessment is paid to the Department of Revenue." 6 Wn. App. at 313.

Second, *Kirkland* never mentions RCW 82.32.180. Therefore, the court made no effort to read RCW 82.32.150 and RCW 82.32.180 together

and harmonize the two statutes. More recently, however, when Division III discussed the two statutes in a decision, it stated: “Once a tax has been paid, a taxpayer may bring a refund action directly in superior court in Thurston County. RCW 82.32.180.” *Booker Auction*, 158 Wn. App. at 91.

Third, to conclude that taxpayers may bring excise tax refund actions under RCW 82.32.150 would render meaningless the mandatory conditions set forth by the Legislature in RCW 82.32.180 that taxpayers must satisfy. For example, taxpayers would not have to file refund actions in Thurston County or “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.” RCW 82.32.180. Courts, however, should read statutes together to achieve a harmonious total statutory scheme that maintains the integrity of the respective statutes. *In re Bankr. Petition of Wieber*, 182 Wn.2d 919, 926, 347 P.3d 41 (2015).

Fourth, the issue of whether RCW 82.32.150 authorizes excise tax refund actions was not before the court in *Kirkland*. *Kirkland* involved a tax warrant filed in Spokane County and a court action filed by Kirkland contesting the collection of the assessed taxes upon which the Department based its warrant. The court found that Kirkland had not paid the assessment in full as required by RCW 82.32.150. *Kirkland*, 45 Wn. App. at 722-24. The court also held that Kirkland failed to satisfy the necessary

elements required for injunctive relief under RCW 82.32.150. *Id.* at 726-27. Therefore, the court reversed the trial court order denying summary judgment to the Department. *Id.* at 728.

To resolve the issues involving RCW 82.32.150, the court needed to address only whether Kirkland had paid in full and, if not, whether Kirkland met the criteria for obtaining equitable relief. Thus, the erroneous statement that Kirkland's only remedy was a refund action *under RCW 82.32.150* was unnecessary. *See Etco, Inc. v. Dep't of Labor & Indus.*, 66 Wn. App. 302, 307, 831 P.2d 1133 (1992) (literal words of a court opinion are not dispositive and may be reexamined if the court did not in fact address or consider the issue).

This Court should avoid making the same mistake as the *Kirkland* court. Taxpayers must file excise tax refund actions under RCW 82.32.180. And they may not file excise tax refund actions under RCW 82.32.150.

Finally, presumably to support their argument that declaratory relief under the UDJA or RCW 82.32.150 is warranted, Sellers try to argue their claims "are beyond the specific limitations imposed by RCW 82.32.180." App. Br. at 22. This argument is dead wrong.

To support the argument that they cannot bring their claims under RCW 82.32.180, Sellers solely offer WAC 458-61A-301(12)(d). App. Br.

at 21-22. Subsection (12) of Rule 301, however, has nothing to do with RCW 82.32.180. Instead, it applies to administrative refund claims filed with the Department or with counties. For example, subsection 301(12)(c) provides:

Refund request forms are available from the department or the county. The completed form along with supporting documentation is submitted to the county office where the tax was originally paid. If the tax was originally paid directly to the department, you may apply for a refund using the forms and procedures provided at the department's website at dor.wa.gov.

See also WAC 458-61A-301(12)(e) addressing refund requests submitted to the county. Contrary to Sellers' argument, WAC 458-61A-301(12)(d) does not limit the claims that may be raised in a refund action in court under RCW 82.32.180.

Moreover, in excise tax refund actions under RCW 82.32.180, taxpayers regularly challenge the validity of excise taxes, including raising constitutional claims. *See, e.g., Avnet, Inc. v. Dep't of Revenue*, 187 Wn.2d 44, 384 P.3d 571 (2016); *Dot Foods, Inc. v. Dep't of Revenue*, 185 Wn.2d 239, 372 P.3d 747 (2016); *PeaceHealth St. Joseph Medical Ctr. v. Dep't of Revenue*, 9 Wn. App. 2d 775, 449 P.3d 676 (2019); *Group Health Coop. v. Dep't of Revenue*, 8 Wn. App. 2d 210, 438 P.3d 158 (2019); *Everi Payments*, 6 Wn. App. 2d 580; *Irwin Nats. v. Dep't of Revenue*, 195 Wn. App. 788, 382 P.3d 689 (2016). Therefore, Sellers simply err in

arguing that their claims “are beyond the specific limitations imposed by RCW 82.32.180.” App. Br. at 22.

F. Class Claims May Not Be Brought in an Excise Tax Refund Action Under RCW 82.32.180

Finally, Sellers also argue that the superior court erred in dismissing their class action claims. App. Br. at 23. The Washington Supreme Court, however, has unequivocally held that class actions are not permitted in excise tax refund actions under RCW 82.32.180:

RCW 82.32.180 is a conditional, partial waiver of the sovereign immunity afforded by article II, section 26 of the Washington Constitution. . . . The right to bring excise tax refund suits against the state must “be exercised in the manner provided by statute.” *If the Legislature intended to permit class action lawsuits for taxpayers seeking excise tax refunds, it would have made express provision for it. This it did not do. The trial court was in error in interpreting RCW 82.32.180 to allow class actions.*

Lacey Nursing Ctr., Inc. v. Dep’t of Revenue, 128 Wn.2d 40, 55-56, 905 P.2d 338 (1995) (emphasis added; footnote omitted).

No amount of sophistry can negate that Sellers brought their refund action under RCW 82.32.180. Their amended complaint plainly sought REET refunds. CP 10-11. And the sole statutory authority to bring such refund claims is found in RCW 82.32.180. *Lacey* is controlling authority that precludes Sellers’ class claims.

Sellers, pointing out that they also sought REET refunds against Chelan County, argue that *Lacey* “has limited applicability” to refund actions “pursuant to RCW 82.32.180” and thus “applies to refund actions against the State only.” App. Br. at 24. Yet again, Sellers misunderstand the law.

Under the applicable statutes, RCW 82.32.180 and *Lacey* equally apply in superior court actions seeking refunds of local REET. First, RCW 82.32.180—like most of the administrative provisions in RCW 82.32—expressly applies to local REET. *See* RCW 82.45.150. Second, local REET “must comply with all applicable rules, regulations, laws, and court decisions regarding real estate excise taxes as imposed by the state under chapter 82.45 RCW.” RCW 82.46.010(5). Because RCW 82.32.180 as held in *Lacey* precludes class excise tax refund actions against the State, it likewise precludes class REET refund actions against counties.

Finally, none of the cases Sellers cite in support of class action status involved an excise tax refund action under RCW 82.32.180. *See* App. Br. at 23-24. Therefore, the cases they cite, and not *Lacey*, are inapplicable.

V. CONCLUSION

For the reasons stated above, the superior court properly granted summary judgment to respondents, denied summary judgment to Sellers,

and dismissed with prejudice Sellers' amended complaint. The superior court also properly dismissed Sellers' class action claims. This Court should affirm.

RESPECTFULLY SUBMITTED this 5th day of August, 2020.

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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.

DATED this 5th day of August, 2020, at University Place, WA.

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