UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

MASHANTUCKET PEQUOT TRIBE

Plaintiff,

v.

TOWN OF LEDYARD, PAUL HOPKINS, Tax Assessor of the Town of Ledyard and JOAN CARROLL, Tax Collector of the Town of Ledyard,

Defendants,

THE STATE OF CONNECTICUT,

Intervenor-Defendant.

CIVIL ACTION NO.
3:06-CV-01212 (WWE)
3:08-CV-01355 (WWE)

MEMORANDUM OF PLAINTIFF MASHANTUCKET PEQUOT TRIBE IN OPPOSITION TO DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

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INTRODUCTION

Defendants the Town of Ledyard ("Town"), Paul Hopkins, and Joan Carroll, and Defendant Intervenor the State of Connecticut ("State") (collectively "Defendants"), seek summary judgment with respect to all three Counts of the two Amended Complaints filed by the Mashantucket Pequot Tribal Nation ("Tribe") in this consolidated action.[1] While the Town and the State have filed separate motions, their arguments do not differ substantially and can be summarized as follows: (1) the Tribe lacks standing and its claims are barred by the Tax Injunction Act because the property tax at issue has not caused economic harm; (2) there is no IGRA preemption because the property tax at issue is consistent with IGRA's provisions; (3) the state interest outweighs the federal and tribal interests under the *Bracker* balancing test; and, (4) the property tax at issue does not intrude on tribal sovereignty because the tax falls on the non-Indian vendors, not the Tribe, and federal law does not prohibit concurrent state and tribal taxation.

The Court should reject each of Defendants' arguments.

- With respect to standing, the Tribe has demonstrated injury-in-fact caused by the tax. The Tribe is contractually obligated to pay the tax, it has reimbursed one of the vendors, AC Coin, who has paid the tax under protest, it has defended vendor WMS Gaming in the Town's state court enforcement action, and it has paid for

[1] This action is a consolidation of two cases that began separately. In the first action (Case No. 3:06-cv-01212-WWE) filed in 2006, the Tribe challenged the Town's attempt to impose the property tax on machines leased by the Tribe from AC Coin. While the first action was pending in this Court, the Town in 2008 filed a state court action against WMS Gaming, seeking to recover personal property taxes relating to machines leased by the Tribe from WMS. The Tribe then filed the second action (Case No. 3:08-cv-01355-WWE), and obtained a stay of the state court action against WMS. The State of Connecticut has intervened as a Defendant in both actions. The actions were consolidated in December 2008 (Notice to Counsel, Doc. 127), shortly after the Tribe filed the WMS Action.

the representation of both vendors in responding to the Town's subpoenas in this case. The Tribe has also demonstrated that the tax, if allowed, can and will harm the Tribe in the future, because if WMS is required to pay the tax, it will demand reimbursement from the Tribe, and also because the tax statute at issue would, on its face, allow the Town to seize slot machines from the Tribe's gaming operation on its Reservation and sell those machines in the event the tax goes unpaid.

- With respect to IGRA preemption, Defendants would have the Court turn IGRA on its head, arguing that the property tax must be permitted because IGRA gave the states a role in class III gaming beyond what federal common law had permitted prior to IGRA's passage. While IGRA did give the states a role in class III gaming, that role is limited to what is explicitly provided for in the Gaming Procedures adopted by the Secretary of the Interior. Here, there is no authorization for the collection of a property tax.
- As for the *Bracker* balancing of interests test, Defendants' claims suffer three fatal flaws: First, they fail to even mention, much less discuss, the Supreme Court precedent involving the Indian Trader statutes, where the Supreme Court has already balanced the relevant interests and concluded that the strong federal interest preempts state taxation of Indian traders like AC Coin and WMS. Second, Defendants overlook the strong tribal interest against a state tax that imposes a direct burden on reservation value. Third, they fail to cite any relevant interest of the Town in imposing the tax.
- Finally, Defendants fail to provide any plausible explanation as to how a state property tax, imposed on gaming devices leased by the Tribe and used in the

> Tribe's class III gaming operation on its Reservation, does not intrude on the Tribe's sovereignty, particularly where the tax statute would allow the Town to enter the Reservation to seize and sell those machines in the event the tax goes unpaid.

As discussed in detail below, the Court should deny Defendants' motions for summary judgment.

For its Response, the Tribe relies upon the September 14, 2011 Affidavit of Rodney Butler ("Butler Aff.") (ECF Doc. No. 222); the September 13, 2011 Affidavit of Wade Blackmon ("Blackmon Aff.") (Doc. No. 219); the September 15, 2011 Affidavit of Thomas McCormick ("McCormick Aff.") (Doc. No. 216) and October 24, 2011 Affidavit of Thomas McCormick ("Second McCormick Aff."); the September 15, 2011 Affidavit of McLaurin Files ("Files Aff.") (Doc. No. 217); the September 9, 2011 Declaration of John Deane ("Deane Decl.") (Doc. No. 218) and October 25, 2011 Declaration of John Deane ("Second Deane Decl."); the September 16, 2011 Affidavit of James K. Nichols ("Nichols Aff.") (Doc. No. 221); the October 26, 2011 Affidavit of Betsy Conway; the October 26, 2011 Affidavit of Skip Durocher; the supporting documents filed with the affidavits, and the other files and records in this case.

CLARIFICATION OF FACTUAL RECORD

The Tribe has set forth the material facts relevant to this case in its Local Rule 56(a)(1) Statement, and those facts are summarized in the Tribe's memorandum supporting its motion for summary judgment (hereafter referred to as the "Tribe's Summary Judgment Brief" or "Tr. Sum. Jdgmt. Br.") (ECF Doc. No. 224). The Tribe has also submitted a Local Rule 56(a)(2) Statement responding to the Local Rule 56(a)(1) Statement submitted by the Town and adopted by the State. While in its Rule 56(a)(2) Statement the Tribe objected to and disagreed with a number of the Town's proposed findings, the Tribe will discuss here only those facts which have been the most inaccurately portrayed by the Defendants. The Tribe, however, does not contend that there are any material issues of fact – it believes that the Court should grant the Tribe's motion for summary judgment and deny the Defendants' motions as a matter of law.

I. The Tribe has Always Been Obligated to Pay any Taxes Owed on Gaming Machines Leased from the Vendors.

Both Defendants suggest that the Tribe assumed the contractual obligation to pay any taxes owed on the leased gaming equipment only as a result of revisions requested by the Tribe to the standard tax and indemnity language found in the leases with AC Coin and WMS (collectively "the Vendors"). Town Br. at 5-6; State Br. at 8-9. This claim is erroneous. From the time that the Tribe first executed leases with the Vendors, those leases expressly required the Tribe to (1) pay all taxes relating to the use of the gaming machines and (2) indemnify the vendors for any liability arising from such taxes. For example, AC Coin's standard tax provision in its very first lease agreement with the Tribe, stated:

> Taxes and any license fees applicable to the use and operation of the Game(s) shall be paid by the Casino.

McCormick Aff. ¶4. Similarly, WMS' first lease with the Tribe – signed in 1998 – stated that:

> Taxes, licenses and permit fees applicable to the installation or

operation of the Equipment shall be paid by the Casino.

Files Aff. ¶ 4. The first standard leases also required the Tribe to indemnify each of the Vendors for any liability arising from taxes or fees on the leased machines. McCormick Aff. ¶ 4; Files Aff. ¶ 4. These obligations were not at all unusual: it is customary in all commercial equipment leases (including gaming equipment leases) for lessors to contractually require lessees to bear the obligation to pay taxes relating to the leased equipment and to provide indemnifications with regard to tax obligations. Tribe's Sum. Jdgmt. Br. at 35; Deane Decl. ¶¶ 8, 10; McCormick Aff. ¶ 4; Files Aff. ¶ 4.

The Tribe's requested amendments to the leases did not alter these pre-existing obligations to pay tax and indemnify. The amendments proposed by the Tribe merely clarified that the Ledyard property tax was illegal and that the Vendors should not pay the tax. Blackmon Aff. ¶¶ 4-7. Though the Vendors agreed that the tax was illegal – WMS even retained its own outside counsel to analyze the question – they worried that failure to pay the tax could result in legal or regulatory problems. Files Aff. ¶ 10. For that reason, the Tribe agreed to clarify its indemnity obligation to make clear that the Tribe would hold the Vendors harmless with respect to any costs relating to such legal or regulatory problems, in addition to its pre-existing obligation. Blackmon Aff. ¶ 7; Files Aff. ¶¶ 4, 12; McCormick Aff. ¶¶ 4, 10.

II. The Property Tax at Issue Harms the Tribe.

Defendants argue that the Tribe has not, does not and will not suffer any economic harm as a result of the contractual obligation in the Vendors' leases requiring the Tribe to pay the property tax. Once again, Defendants's claim is clearly erroneous.

It is undisputed that the Tribe is contractually obligated to reimburse the Vendors for property taxes on the leased gaming machines. Files Aff. Ex. C ¶ 9; D ¶ 3; McCormick Aff. Ex.

F ¶ 12. Accordingly, the Tribe has reimbursed AC Coin – in response to AC Coin's demands, and as required by the leases – for all of the property tax payments that AC Coin has made to the Town of Ledyard, a total of $69,894 since 2004. First McCormick Aff. ¶ 16; Def. Ex. 11 (ACC Dep. at 99:14-16); Second McCormick Aff. ¶¶ 2-3, Ex. A. The Town's contention that the Tribe's counsel volunteered one of the two payments misconstrues the evidence. The issue of reimbursement came up in 2008, when counsel for AC Coin and counsel for the Tribe were discussing other business. According to the sworn testimony of AC Coin's General Counsel, during this conversation the Tribe's counsel confirmed that if AC Coin submitted an invoice to the Tribe, the Tribe would reimburse AC Coin as required by the leases for the taxes that had previously been paid. Def. Ex. 11 (99:20-23). After receiving the invoice, the Tribe complied with its contractual obligation and reimbursed AC Coin for the tax payments that had been made prior to 2008. Second McCormick Aff. ¶ 3. In 2011, AC Coin again requested reimbursement from the Tribe for taxes that had been paid since the previous reimbursement in 2008. According to the sworn testimony of AC Coin's General Counsel, a June 2011 meeting with AC Coin's Controller led to a review of financial records that showed additional reimbursement was due under the tax provision of the lease. Second McCormick Aff. ¶ 2. AC Coin once again submitted an invoice to the Tribe, and the Tribe once again reimbursed AC Coin in compliance with its contractual obligation. Second McCormick Aff. ¶¶ 2-3, Ex. A. There is no evidence supporting the Town's assertion that AC Coin requested reimbursement "solely because counsel for the Tribe asked that it do so." Town Br. at 5.

While WMS's lease with the Tribe contained tax language similar to that found in the AC Coin lease, WMS handled the tax issue differently. The Tribe advised WMS that it had concluded the Town's property tax was illegal, and, after retaining its own outside counsel to

analyze the issue in 2004, WMS similarly determined that Ledyard's imposition of the tax on the gaming machines leased by the Tribe was illegal. Files Aff. ¶ 10. At that point, WMS stopped paying the tax, so there has been no need for it to demand reimbursement from the Tribe. *Id*. ¶¶ 14-16, 20. WMS has stated, however, that it intends to demand reimbursement from the Tribe in the event that it is required to pay the tax. The Tribe is contractually obligated to comply with the demand pursuant to the lease contract. *Id*. ¶ 20.

During this time, the Town has aggressively enforced the property tax against the Vendors – it even commenced a lawsuit against WMS in 2008, while this suit was pending with respect to the machines leased from AC Coin, in an effort to collect the property tax. *Id*. ¶ 18. WMS could demand reimbursement under the lease for any taxes that it has paid or is required to pay, and has in fact stated that it will do so. But, even if the Vendors temporarily chose to forbear from enforcing the Tribe's reimbursement obligation – for instance, until this legal issue is resolved – the contractual obligation continues and imposes an economic burden on the Tribe. Second Deane Decl. ¶ 3. The reimbursement obligation is a liability for which the Tribe must account; delay does not make the contractual obligation vanish. *See id.*

The harm to the Tribe is not limited to its contractual obligations to the Vendors, its past reimbursement of the tax, and the threat of future reimbursement. The Tribe has also been forced to divert valuable tribal resources from other programs and activities in order to address the Town's efforts to impose this illegal tax. The Tribe's efforts began more than ten years ago, when the Tribe expended significant funds to conduct its legal analysis and draft additional language for its leases with the Vendors. In addition, as required by the indemnification obligation in its lease terms with WMS, the Tribe was required to pay the cost of WMS' defense

against State enforcement.[2] Affidavit of Betsy Conway ("Conway Aff.") ¶ 3. Furthermore, the tax statutes at issue provide that if any tax remains unpaid, the municipality may seize the property that is subject to the tax and sell it. Conn. Gen. Stat. §§ 12-155, 12-195b, 12-195e (latter provision grants municipalities the rights and remedies of secured creditors under Conn. Gen. Stat. §§ 42a-9-601 to 42a-9-628). The Town, which has been aggressive in its collection efforts to date, would no doubt feel empowered under the taxing statute to enter the Tribe's gaming facility on the Reservation, seize the machines, and put them up for sale. Such action would indisputably cause economic harm to the Tribe by disrupting its gaming facility, reducing gaming revenue and damaging the Tribe's reputation. By entering the Tribe's gaming facility, located on the Tribe's Reservation, and seizing property used by the Tribe to generate revenues for government services, the Town also would be intruding on the Tribe's sovereignty. (*See infra*, part IV).

III. The Gaming Enterprise is an Arm of the Tribe.

Defendants in their summary judgment briefs argue that the Tribe and the Gaming Enterprise are two separate legal entities, apparently hoping that this will somehow benefit them in the balancing of interests. Town Br. at 25; State Br. 24-25. This claim is simply inaccurate.

The Mashantucket Pequot Gaming Enterprise (the "Gaming Enterprise") is an arm of the tribal government that conducts gaming operations at Foxwoods Resort Casino and MGM Grand

[2] The Tribe has also paid for legal representation of WMS and AC Coin in connection with their responses to the Town's subpoenas in this case. This included responses and argument to Defendants' motion to compel (ECF Doc. Nos. 137, 142, 146, 152, 154), a motion and hearing on for protective order against Defendants' burdensome discovery requests (Doc. Nos. 159-163, 164, 167-74, 181, 186), and response to Defendants' challenges the Vendors' claims of privilege. *See* Conway Aff. at ¶ 4. Furthermore, Defendants appealed, with no success, the rulings in favor of the Vendors (Doc. Nos. 187, 201, 204, 206). The subpoenas were issued on March 14, 2009 and the document discovery process concluded over two years later with an April 26, 2011 ruling by this Court that the Vendors had fully complied in their responses to the subpoenas. (Doc. No. 206).

at Foxwoods, both of which are located on the Reservation. Butler Aff. ¶ 7; M.P.T.L. Title 3, § 1.g. It is not a separate or independent corporation or legal entity. Butler Aff. ¶ 7. The Gaming Enterprise enjoys all of the rights and immunities of the Tribe itself and, indeed, is an integral part of the Tribe. *Worrall v. Mashantucket Pequot Gaming Enter.*, 131 F. Supp. 2d 328, 330 (D. Conn. 2001) (finding that "the Gaming Enterprise is an arm of the Mashantucket Pequot Tribe"); *see also, e.g., Cook v. AVI Casino Enterprises, Inc.*, 548 F.3d 718, 725-26 (9th Cir. 2008) ("[T]he casino functioned as 'an arm of the Tribe' and accordingly enjoyed tribal immunity."); *Ingrassia v. Chicken Rach Bingo and Casino*, 676 F. Supp. 2d 953, 957 (E.D. Cal. 2009) (rejecting the plaintiffs' argument that the casino had not established that it was an arm of the tribe); *Barker v. Menominee Nation Casino*, 897 F.Supp. 389, 393 (E.D. Wis. 1995) (stating that "an action against a tribal enterprise is, in essence, an action against the tribe itself").

The Gaming Enterprise is indisputably an arm of the tribal government. Butler Aff. ¶ 7. There is no factual basis whatsoever for Defendants' assertion that the Gaming Enterprise is an entity that is separate from the Tribe in any relevant respect.

ARGUMENT

I. The Tribe Has Constitutional Standing and Can Sue Under the Tax Injunction Act.

Defendants contend that the Tribe's claims should be dismissed on grounds that it lacks standing, and also that the Tax Injunction Act prohibits its lawsuit. With respect to standing, Defendants repeatedly argue that the Tribe has suffered no injuries from the Town's tax, economic or otherwise, sufficient to give it standing. Alternatively, Defendants suggest that any injuries suffered by the Tribe have been self-inflicted and, thus, insufficient to give it standing. Town Br. at 5. The State also argues that the Tax Injunction Act flatly invalidates the Tribe's suit. State Br. at 7-10. As discussed below, Defendants' arguments are without merit.

A. The Tribe's Lease Obligations Create Economic Injuries-in-Fact Sufficient to Establish Standing.

The Tribe's contractual obligation to reimburse the Vendors for property taxes paid to the Town of Ledyard on the leased gaming machines and associated costs is sufficient, on its own, to establish the Tribe's standing in this case. A party's contractual obligation to reimburse another for compliance with legal requirements "is sufficiently concrete and imminent" to give that party standing to challenge the legal requirement, even if the reimbursement has not yet occurred. *Central Ariz. Water Conservation Dist. v. United States EPA*, 990 F.2d 1531, 1538 (9th Cir. 1993) (finding that petitioner had standing to challenge legality of regulation because it was contractually obligated to reimburse another party for the cost of compliance – but had not yet done so).

Not only does the Tribe have a contractual obligation to pay the tax and the Vendors' associated costs, the Tribe has made cash expenditures pursuant to this obligation. The Tribe has *actually* reimbursed AC Coin, pursuant to the lease, for all of the property tax payments it made to the Town. McCormick Aff. ¶ 16. Because WMS has not paid the tax since its outside counsel determined the tax was illegal, the Tribe has not needed to reimburse WMS – yet. Though WMS' handling of the tax has not yet triggered a reimbursement obligation, it has triggered a significant indemnification obligation. Conway Aff. ¶¶ 3-4. The State took aggressive enforcement actions against WMS, even suing it in Connecticut state court for taxes owed. Files Aff. ¶ 18. As required under its lease with WMS, the Tribe paid for WMS' defense of that case – which required seeking a stay of the state court action while this Court decides the legality of the tax. Conway Aff. ¶ 3. Defendants have also subjected the Vendors to burdensome subpoenas, and the Tribe has covered the cost of the Vendors' responses to those subpoenas,

including multiple motions to protect the Vendors against discovery requests that were excessively intrusive and burdensome. *Id.*; *see also supra* note 2.

The expenses and opportunity costs of this litigation also constitute injuries-in-fact that give the Tribe standing. The Town contends just the opposite, arguing that as a matter of law, the "expenses, burdens and opportunity costs associated with protecting the Tribe's federal rights" are not injuries-in-fact that establish standing, Town Br. at 7, n. 3 (citing *Fair Hous. Council of Suburban Phila. v. Montgomery Newspapers*, 141 F.3d 71 (3d Cir. 1998)). The Town is not only wrong, but its position is directly contrary to controlling precedent in this Circuit. The law in this Circuit is clear: when a defendant's actions lead a plaintiff to divert resources from its other activities –"there is some perceptible opportunity cost . . . because the expenditure of resources that could be spent on other activities constitutes far more than simply a setback to [the organization's] abstract social interests." *Nnebe v. Daus*, 644 F.3d 147, 157 (2d Cir. 2011) (quoting *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982)). The Tribe need only show "a perceptible impairment" to its activities for there to be "injury in fact." *Id*. The Town not only failed to disclose this controlling precedent in its brief, it relied on a case – *Fair Housing Council* – that was expressly rejected by the Second Circuit in *Nnebe*. Thus, contrary to Defendants' assertions, the expenses and opportunity of costs of the legal analysis to determine that the property tax is illegal, and the costs associated with renegotiating the leases with the Vendors, and the indemnification of the Vendors, are sufficient injuries-in-fact to establish standing in this Circuit. *Nnebe*, 644 F.3d at 157.

Finally, the Tribe is not just obligated to reimburse the Vendors for property tax payments, it is also liable for any loss or damage to the leased gaming machines. Files Aff. Exs. C ¶ 1 and D ¶ 5; McCormick Aff. Ex. F ¶ 10; Blackmon Aff. ¶ 12. To enforce the tax at issue,

the statute purports to allow the Town to seize and sell the gaming machines leased by the Tribe from the Vendors. Conn. Gen. Stat. §§ 12-155, 12-195b, 12-195e. If such a forcible invasion of the Reservation and seizure of the machines occurred, the Tribe would not only be financially liable to the Vendors for loss of the machines, but would suffer severe injuries to its sovereignty over Reservation activities.

B. The Tribe's Economic Injuries are Neither Manufactured Nor Self-Inflicted.

An injury is not "self-inflicted" for purposes of standing if the defendants engaged in conduct that contributed to the injury. *St. Pierre v. Dyer*, 208 F.3d 394, 403 (2d Cir. 2000). That is clearly the case here—the Town has imposed, and aggressively enforced, the challenged tax. Furthermore, it is the standard practice of the Vendors, and the standard practice in the gaming equipment lease industry, to make the lessee of gaming equipment responsible for any property taxes on the equipment. McCormick Aff. ¶ 4; Files Aff. ¶ 4; Deane Decl. ¶¶ 8, 10.[3] This obligation existed in the standard leases, and as discussed above, continued after the leases were amended to state that the property tax was illegal. There is nothing unique about this arrangement, and it certainly does not make the Tribe's injuries "self-inflicted," as the Town alleges. The most popular games are available for lease only, and with leases comes the standard contractual obligation to pay taxes on the leased equipment. The Tribe acted reasonably in

[3] Defendants argue that the Tribe cannot show causation because "Plaintiff and Plaintiff alone created the obligation of which it complains." Town Br. at 7-8, relying on *Taylor v. Federal Deposit Insurance. Co.*, 132 F.3d 753 (D.C. Cir. 1997), and *Union Cosmetic Castle, Inc, v. Amorepacific Cosmetics USA, Inc.*, 454 F. Supp. 2d 62 (E.D. N.Y. 2006). But this contradicts the record, which shows that the Vendors' standard lease practices (which are also industry standard practices) are what "created the obligation of which [the Tribe] complains." In the context of a factually correct record, there is no merit to Defendants' characterization of the Tribe's decision to enter the leases as "bad business judgment." In contrast to *Taylor* and *Union*, in which the plaintiffs sought redress for their bad business decisions, it is well established that the Tribe's injuries-in-fact confer standing.

honoring its contractual obligation when the Vendor requested it, as AC Coin did. Def. Ex. 11 (ACC Dep. at 99:14-16).

In fact, a similar arrangement established standing in *Bracker*. In that case, the White Mountain Apache Tribe agreed to reimburse a contractor for taxes paid, and did so only *after* the tax was assessed against the contractor. The tribe in *Bracker* was successful in challenging the tax, and prevailed in the U.S. Supreme Court over arguments by the state that the tribe was just a "nominal" party to the action and had no independent standing to bring the lawsuit. *See Bracker*, 448 U.S. 136, 140 & n. 7; *White Mountain Apache Tribe v. Bracker*, 585 P.2d 891, 893 n.1, 897. Likewise, in *Ramah*, the tribe prevailed despite the fact that the economic incidence of the tax fell on the tribe solely because of a contractual obligation. *Ramah Navajo School Bd., Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832, 838 (1982). Defendants conveniently ignore the fact that these apposite Supreme Court decisions – upon which Defendants also rely – arose from contracts wherein Indian tribes agreed to reimburse non-Indian contractors for taxes paid. The Tribe's obligation here and the resulting injury, as in *Bracker* and *Ramah*, is a standard and customary business arrangement; it is not "manufactured."

C. The Town's Infringement on the Tribe's Jurisdiction is also an Injury-in-Fact.

The Tribe can also establish standing based on the infringement of its right to govern reservation activity. The Town dismisses this injury as nothing more than "an abstract notion," but there is nothing abstract about usurpation of the Tribe's right to govern Reservation activity. It certainly is not "abstract" when the Town and State take affirmative steps to enforce the laws – such as the lawsuit against WMS, Files Aff. ¶ 18, or potentially enter the Reservation and seize the gaming machines in exercise of their state law remedies. There could be no more serious intrusion on the Tribe's sovereignty and right to govern itself and its territory. In *Moe v.*

Confederated Salish and Kootenai Tribes of the Flathead Reservation, 425 U.S. 463 (1976), the Supreme Court held that an Indian tribe has standing, based on its sovereign interests, to object to state taxes imposed with respect to activities taking place on the tribe's reservation. In *Moe*, in which the tribal plaintiff sought to enjoin imposition of Montana's cigarette sales taxes and personal property taxes within the reservation, the Court stated:

> [T]he Tribe, *qua* Tribe, has a discrete claim of injury with respect to these forms of state taxation so as to confer standing upon it apart from the monetary injury asserted by the individual Indian plaintiffs. Since the substantive interest which Congress has sought to protect is tribal self-government, such a conclusion is quite consistent with other doctrines of standing.

Id. at 468-69 n.7. A tribe's desire to protect its general sovereignty interests, and its desire to protect against erosion of its taxing power, both qualify as bona fide interests of the tribe sufficient to confer standing to sue to enjoin alleged improper assertions of state taxing authority. *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Zeuske*, 145 F. Supp. 2d 969, 972-73 (W.D. Wis. 2000).[4]

D. The Tax Injunction Act is no Obstacle to the Tribe's Claims

An Indian tribe is permitted by 28 U.S.C. § 1362 to bring an action for declaratory and injunctive relief from state taxation that violates federal law. 28 U.S.C. § 1362 (district courts have jurisdiction over a claim by an Indian tribe if it "arises under the Constitution, laws, or treaties of the United States."). The Tax Injunction Act ("TIA") does not change this. *Moe* , 425 U.S. at 468-69. The TIA does not even make this right of Indian tribes a conditional or qualified

[4] The Town relies on the tautology that there is no injury when "two sovereigns have legitimate authority to tax the same transaction," Town Br. at 9 (citing *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 184 n.9 (1980)), ignoring, of course, that the very issue in this case is whether the state has legitimate authority to impose its tax.

one – tribes may proceed regardless of whether the tax in question is imposed on the tribe, a tribal member, or a non-Indian. *Sac & Fox Nation v. Pierce*, 213 F.3d 566, 572 (10th Cir. 2000). The Tribe's claims are, of course, based on federal law, and it has standing –as shown above – based on its own actual and imminent injuries. Nothing more is required to establish the jurisdiction of this Court. The TIA does not bar an Indian tribe's suit to enjoin state taxes, nor does it require a tribe to make a specialized showing, of economic harm or otherwise, before availing itself of § 1362. The State's reliance on *Cotton Petroleum* in this regard is misplaced – even though the tribe in that case ultimately lost on the merits, the TIA was no bar to the Court's exercise of jurisdiction over the case. In short, the challenged tax injures the Tribe's economic and governmental interests, and the TIA does not stop the Tribe from suing to protect those interests. *Southern Ute Indian Tribe v. Bd. of County Comm'rs of the County of La Plata*, 855 F. Supp. 1194, 1197 (D. Colo. 1994), *rev'd on other grounds*, 61 F.3d 916 (10th Cir. 1995).

It makes no difference to the TIA analysis that the legal incidence of the tax at issue here falls on the Vendors rather than the Tribe; it is well established that federal courts have jurisdiction over a tribe's challenge to a state tax on non-Indian vendors. *E.g.*, *Pierce*, 213 F.3d at 572, 578-79 (district court properly rejected defendants' claim that TIA barred tribe's action, where legal incidence of tax clearly fell on non-Indian fuel distributors); *Salt River Pima-Maricopa Indian Cmty. v. Arizona*, 50 F.3d 734, 736 (9th Cir. 1995) (TIA does not bar tribe's suit for declaratory and injunctive relief from tax applied to on-reservation shopping mall owned and operated by non-tribal entities); *Gila River Indian Cmty. v. Waddell*, 967 F.2d 1404, 1407 (9th Cir. 1992) (court has subject matter jurisdiction to hear tribe's challenge to taxes levied on non-Indian entertainment enterprise operating on the reservation); *Hoopa Valley Tribe v. Nevins*, 881 F.2d 657, 659 (9th Cir. 1989) (court has jurisdiction to hear tribe's challenge to application

of timber yield tax on private companies that buy timber harvested from reservation lands); *Narragansett Indian Tribe of Rhode Island v. Rhode Island*, 296 F. Supp. 2d 153, 159, 167 (D.R.I. 2003), *aff'd in part, rev 'd in part on other grounds*, 407 F.3d 450 (1st Cir. 2005) (subject matter jurisdiction over tribe's claim for declaratory relief from state sales tax "clearly exists," even where the legal incidence of the tax fell on third-party consumers); *Zeuske*, 145 F. Supp. 2d at 973 (legal incidence of income tax on tribe member, but tribe was able to sue to "protect general sovereignty interests").[5]

The TIA is no bar to the Tribe's claims in this case.

II. IGRA Categorically Preempts the Town's Property Tax.

In contending that imposition of the Town's tax is not preempted by IGRA and that it is, indeed, *consistent* with IGRA, Defendants employ a one-sided – and misguided – analysis of congressional intent. Under a proper preemption analysis, the Court should conclude that IGRA preempts the Town's tax.

Under well-established principles of federal law, "[p]re-emption may be either express or implied, and is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Gade v. Nat'l Solid Wastes Mgmt. Assoc.*, 505 U.S. 88, 98 (1992) (citation omitted). Field preemption is a species of implied

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[5] The State's reliance on the unpublished decision of the District of Arizona in *Fort Mojave Indian Tribe v. Killian*, 2004 U.S. Dist. LEXIS 31215 (D. Ariz. 2004), for the claim that the TIA bars the Tribe's claims is telling. *Fort Mojave* involved a tax imposed on a non-Indian lessee and, thus, falls within the Non-Indian Lessee Cases which are shown below, *infra* pp. 26-29, to be very different from and irrelevant to the present case. Not only is the holding on the TIA in that case unpublished and unfollowed by any subsequent decision, the sole "analysis" that the court devoted to the TIA as it relates to the tribal claims is contained in the summary conclusion quoted by the State in its brief. The failure of the court in *Fort Mojave* to acknowledge, much less address, the authorities cited above permitting an Indian tribe to challenge a tax imposed on a non-Indian in a situation subject to the balancing test renders *Fort Mojave* completely unpersuasive.

preemption, and it arises "where the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *Id.* (citation omitted).

A close examination of IGRA, its legislative history, and its purpose all point decisively against the Town's tax under the principles of field preemption. IGRA specifically permits tribal-state compacts to include "assessment[s] by the State . . . in such amounts as are necessary to defray the costs of [state] regulati[on]," 25 U.S.C. § 2710(d)(3)(C)(iii), while also making explicit that "nothing in this section shall be interpreted as conferring upon a State *or any of its political subdivisions* authority to impose any *tax*, fee, charge, or other assessment upon an Indian tribe or *upon any other person or entity authorized by an Indian tribe to engage in a class III activity*," 25 U.S.C. § 2710(d)(4) (emphasis added). Thus, where IGRA expressly addresses taxes and other assessments, it only permits assessments to cover regulatory costs, provided such assessments are expressly authorized by the tribal/state gaming compact. Otherwise, IGRA states, this provision is *not* intended to permit state taxation of tribes or any other persons authorized by the Tribe to engage in class III gaming activities.

The Town contends that the Vendors do not "engage in a class III activity" and, thus, that Section 2710(d)(4)'s tax language is not directly implicated by the Town's property tax. Town Br. at 19-20. This contention is belied by the facts. The Vendors lease gaming machines to the Tribe that are central to the Tribe's Class III gaming. By virtue of this leasing, "the State has very substantial regulatory authority . . . over the slot machines, which form the basis for this dispute," the "slot machine vendors cannot lease machines to the Gaming Enterprise unless they possess valid current gaming registration" as prescribed in the Gaming Procedures, and "[t]he State is also authorized to bar entities [such as the Vendors] from doing business with the Tribe

if it 'determines that the entity's prior activities and reputation pose a threat to the effective regulation of gaming or create or enhance the dangers of unfair or illegal practices." Town Br. at 26, 29. The Vendors clearly are "engag[ing] in a class III activity," or the State would have no basis for conducting any regulatory role with respect to the Vendors' activities.[6]

In addition to contending that the Vendors' activities do not fall within IGRA's preemptive scope, Defendants focus on another provision in IGRA – Section 2710(d)(7)(B)(iii) – that addresses when a state would be considered to have acted in bad faith in compact negotiations in a federal court action brought by a tribe against a state alleging bad faith.[7] It is not surprising that Section 2710(d)(7)(B)(iii) requires a court to consider any demand by a state for *direct taxation of a tribe or tribal lands* as evidence of bad faith. After all, such taxation would be categorically illegal under the principles of *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450, 458 (1995), absent explicit authorization of the taxation in a statute or treaty. Defendants suggest that if, instead, a state asked a tribe in compact negotiations to agree to taxation of *non-Indians* dealing with the tribe with respect to its class III gaming activities, this request by the state would not be evidence of bad faith. Defendants reason, therefore, that taxation of non-Indians with respect to class III gaming activities must be permissible under IGRA. Defendants miss the central point: the clear import of Section 2710(d)(7)(B)(iii) is that any taxation of non-Indians with respect to class III gaming activities would be permissible *only*

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[6] Not only do the Gaming Procedures apply directly to gaming equipment suppliers like AC Coin and WMS, but the Procedures and IGRA also make it clear that, apart from its role in registration and background investigations, the State has no other regulatory – much less taxing –authority over providers of gaming equipment.

[7] Such court actions are now a thing of the past, under the Supreme Court's holding in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), that such actions are barred by the Eleventh Amendment.

if the tribe agreed to such taxation in compact negotiations. Here, of course, there has been no such agreement. And now that the Gaming Procedures are in place, the State has no other right to impose regulatory requirements or to tax gaming activities.

IGRA's legislative history, likewise, supports preemption of the Town's tax. The legislative history states that IGRA "expressly preempt[s] the field in the governance of gaming activities on Indian lands." S. Rep. No. 100-446, at *5-6 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3075-76. Just as stated, Congress intended IGRA broadly to preempt the field with respect to the regulation of gaming activities on Indian lands.[8] The legislative history further states that IGRA does not allow state regulation "unless a tribe affirmatively elects to have State laws and State jurisdiction extend to tribal lands" through a tribal-state compact:

> In determining what patterns of jurisdiction and regulation should govern the conduct of gaming activities on Indian lands, the Committee has sought to preserve the principles which have guided the evolution of Federal-Indian law for over 150 years. . . . The Committee recognizes and affirms the principle that by virtue of their original tribal sovereignty, tribes reserved certain rights when entering into treaties with the United States, and that today, tribal governments retain all rights that were not expressly relinquished.
>
> Consistent with these principles, the Committee has developed a framework for the regulation of gaming activities on Indian lands which provides that in the exercise of its sovereign rights, unless a tribe affirmatively elects to have State laws and State jurisdiction extend to tribal lands, the Congress will not unilaterally impose or allow State jurisdiction on Indian lands for the regulation of Indian gaming activities.
>
> The mechanism for facilitating the unusual relationship in which a tribe might affirmatively seek the extension of State jurisdiction and the application of state laws to activities conducted on Indian land is a tribal-State compact.

S. Rep. No. 100-446, at *5-6 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3075-76.

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[8] Gaming activities, obviously, include the use of slot machines by an Indian tribe in its gaming operation.

As explained in the Tribe's opening brief, the Gaming Procedures adopted by the Secretary of the Interior carefully define the State's regulatory and law enforcement role with respect to the Tribe's class III gaming activities. Section 11 of those procedures provides for the State to be reimbursed by the Tribe for the cost of this regulation and law enforcement. Pursuant to Section 11, the Tribe has paid the State approximately $56 million , and has also agreed in a separate Memorandum of Understanding to pay the State an additional 25% of its video facsimile revenue, which totaled more than $170 million in fiscal year 2011 alone. Tr. Sum. Jdgmt. Br. at 7-9; Butler Aff. ¶¶ 12, 13. Defendants turn IGRA on its head to argue that because IGRA gave the states a role in Class III gaming beyond what federal common law permitted prior to IGRA's passage in 1988, this enhanced, IGRA-based regulatory role provides authority for the Town's tax. Though IGRA gave the states a role in Class III gaming, however, that role is strictly limited to what is explicitly provided for in the tribal/state compact – or, here, the Gaming Procedures adopted by the Secretary of the Interior. The Gaming Procedures, of course, give no authorization to impose any tax like that at issue.

Imposition of the Town's tax also would frustrate, in dramatic fashion, IGRA's stated purpose "of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1). The consequences that the Tribe would suffer if taxation were permitted and the taxes went unpaid are far-reaching. As discussed above and in the Tribe's opening brief, the direct economic burden of the tax falls entirely upon the Tribe. Moreover, if the taxes were to go unpaid, the Connecticut statutes provide that a tax lien would arise to encumber the machines leased by the vendors to the Tribe, that the Town could take possession of the machines and remove them from the Tribe's premises, that the Town could sell the machines at a public sale, and that the Town could assign its rights in the machines to any

third party. Conn. Gen. Stat. §§ 12-155, 12-195b, 12-195e.[9] It is hard to imagine more substantial damage to "strong tribal governments" than the imposition of a tax that a separate government – which does not provide any governmental services related to the property at issue[10] – may then enforce through entry on the Reservation and seizure of the taxed property.

In *Gaming Corp. of America v. Dorsey & Whitney*, 88 F.3d 536 (8th Cir. 1996), the Eighth Circuit analyzed IGRA's language, history, and purpose and found that IGRA preempted state law for purposes of determining the court's federal question jurisdiction in circumstances similar to the present case. The court there held that IGRA completely preempted a private management company's gaming-related state law claims against an Indian tribe's outside counsel, effectively turning them into federal claims that could be removed to federal court. According to the *Gaming Corp.* court:

> Congress . . . left states with *no regulatory role over gaming except as expressly authorized by IGRA*, and under it, the only method by which a state can apply its general civil laws to gaming is through a tribal-state compact. Tribal-state compacts are at the core of the scheme Congress developed to balance the interests of the federal government, the states, and the tribes.

Id. at 546 (emphasis added).

Defendants do not mention *Gaming Corp.* in their briefs, instead contending that "[c]ourts have repeatedly held that IGRA does not exclude state regulation of Indian gaming and does not effect field or complete preemption." Town Br. at 18. Defendants cite several cases in

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[9] If there could be any doubt at all about whether IGRA preempts the Town's tax – which there is not – that doubt must be resolved in favor of the Tribe under the longstanding rule that ambiguities in statutes, like IGRA, that have been enacted to benefit Indian tribes must be resolved in favor of the tribe. *E.g., Bryan v. Itasca County, Minnesota*, 426 U.S. 373, 392 (1976).

[10] It is the Tribe, not the Town, that provides governmental services to the Gaming Enterprise and to the Vendors in connection with their business with the Gaming Enterprise. Butler Aff. ¶¶ 3-4.

support of their contention, but these cases all either held that a federal question *was* presented by the plaintiff's complaint[11] or involved very different situations than were present in *Gaming Corp.* or in this case.[12] The Town places particular emphasis on the Ninth Circtui decision in *Barona Band of Mission Indians v. Yee*, 528 F. 3d 1184 (9th Cir. 2008), in which the Ninth Circuit held that IGRA did not preempt California's sales tax on construction materials sold by a non-Indian supplier to a non-Indian contractor for incorporation into a tribal gamng facility. The tax at issue in *Barona* was not a tax with respect to class III activity, unlike in this case. While one certainly might take issue with the Ninth Circuit's view that the sale of construction materials was only "remotely related to Indian gaming," the lease of gaming machines to the Tribe is at the very core of the Tribe's class III gaming. *Barona* clearly is distinguishable from this case with respect to the IGRA preemption issue that it presented.[13]

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[11] *See Muhammad v. Comanche Nation Casino*, 742 F. Supp. 2d 1268 (W.D. Okla. 2010) (court held that federal question *was* presented by plaintiff's slip-and-fall claims – namely, whether the tribe could force a non-Indian to submit to tribal court jurisdiction with respect to such claims – so removal was proper).

[12] *See Casino Resource Corp. v. Harrah's Entertainment, Inc.*, 243 F.3d 435 (8th Cir. 2001) (state law claims of breach of contract, breach of fiduciary duty, and tortious interference with contract brought by non-Indian consultant against non-Indian management company did not implicate tribal interests and, therefore, were not preempted; court distinguished situation in which tribe must indemnify the non-Indian management company); *Confederated Tribes of Siletz Indians of Oregon v. Oregon*, 143 F.3d 481 (9th Cir. 1998) (compact itself provided for application of Oregon public records laws, pursuant to which state released its investigative report to the public); *Kersten v. Harrah's Casino-Valley Center*, No. 07cv0103, 2007 WL 951342 (S.D. Cal. Feb. 27, 2007) (non-Indian's state law slip-and-fall claims against non-Indian defendants not preempted by IGRA); *Calumet Gaming Group-Kansas, Inc. v. Kickapoo Tribe of Kansas*, 987 F. Supp. 1321 (D. Kan. 1998) (state law breach of contract claim not preempted by IGRA, because contract was not a management contract governed by IGRA or by a tribal/state compact).

[13] As the Tribe noted in its Summary Judgment Brief, the Barona decision would never have arisen in Connecticut, which reached the opposite conclusion of the Ninth Circuit on balancing of interests grounds in Conn. Gen. Rev. Rul. 95-11 at 4 (Nov. 29, 1995) (Nichols

III. The Tribe Prevails under the *Bracker* Balancing Test.

The Tribe showed in its opening brief that the federal and Tribal interests against the tax at issue here decisively outweigh the Town's interest in imposing the tax. Tr. Sum. Jdgmt. Br. at 36-7. The federal interest is represented by two pervasive federal regulatory schemes – that imposed by IGRA and by the Indian Trader statutes – which preempt the field in which the tax would be imposed. As discussed in Section II above, IGRA so preempts the field of Indian gaming that the property tax at issue is precluded.

The preclusionary effect of the Indian Trader statutes, in turn, is confirmed by the fact that the Supreme Court has held three times that these statutes prevent states from imposing a state tax upon Indian traders like AC Coin and WMS. *See Department of Taxation and Fin. of New York v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 73 (1994); *Central Machinery Co. v. Arizona State Tax Comm'n*, 448 U.S. 160 (1980); *Warren Trading Post Co. v. Ariz. State Tax Comm'n*, 380 U.S. 685 (1965). The heavy federal interest represented by IGRA and the Indian Trader statutes is bolstered here by the strong tribal interest – the Tribe's interest against the imposition of the property tax on the Vendors that directly burdens the Tribe, and that also burdens the "reservation value" inherent in the Tribe's Reservation-based Gaming Enterprise in which the Tribe has invested heavily (including provision of government services to guests, vendors, and employees) and actively controls. The Town's interest in imposing the tax at issue, in contrast, is extraordinarily weak, consisting of nothing more than a desire to raise additional revenue beyond the ample amount that the State receives from the Gaming Enterprise pursuant to the Gaming Procedures and that the Town receives from the State via the Pequot Fund.

Aff. Ex. O). While the State contends that this ruling is not binding on this Court, there is no doubt that the ruling is binding on the State itself "with respect to situations involving substantially the same facts and circumstances." Connecticut Policy Statement No. 2008(2) (Jan. 22, 2008).

None of Defendants' arguments alters the conclusion that the outcome of the balancing test decisively prohibits imposition of the tax. As shown below, these arguments rest upon the omission of relevant authorities, factual inaccuracies and the misinterpretation of fundamental Indian law principles.

A. The Town and the State Grossly Underestimate the Federal Interest by Omitting any Mention of the Indian Trader Statutes.

The failure of both the Town and the State to even mention, much less refute, the preemptive effect of the Indian Trader statutes is fatal to their balancing test analysis. By omitting the Indian Traders statutes from their discussions of the federal interest under the balancing test, Defendants have grossly underestimated the weight of the federal interest against the tax, which is preempted not only by IGRA, but also by the comprehensive and pervasive federal regulatory scheme over Indian Traders.

The Supreme Court decisions on the preemptive force of the Indian Trader statutes speak for themselves. In *Warren Trading Post*, the Supreme Court unanimously held that the detailed regulatory scheme imposed by the Indian Trader Statutes and related regulations over all aspects of trade with reservation Indians showed that "Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens upon traders." 380 U.S. at 690. It strongly reaffirmed this holding fifteen years later in *Central Machinery*, holding that the regulatory scheme imposed by Indian Trader Statutes "appl[ied] no less to a nonresident person who sells goods to Indians on a reservation than they do to a resident trader" and that a vendor constituted a trader even if it lacked an Indian Trader license. 488 U.S.. at 165. As the Court observed, "[i]t is the existence of the Indian trader statutes . . . and not their administration, that pre-empts the field of transactions with Indians occurring on reservations." *Id*. In *Milhelm Attea*, 512 U.S. at 73, the Supreme Court strongly reaffirmed its prior holdings

precluding the direct taxation of Indian traders for transactions with reservation Indians. In upholding certain administrative duties placed upon Indian traders by New York to collect tax from non-Indians, it stressed that such duties stood "on a markedly different footing from *a tax imposed directly on Indian traders*, on enrolled tribal members or tribal organizations, or on 'value generated on the reservation by activities involving the Tribes'" – which were clearly impermissible. *Id*. at 73 (emphasis added) (citing *Colville*, 447 U.S. at 156-57).

Because the Vendors in this case qualify as Indian Traders who have undertaken transactions with reservation Indians, and because the tax at issue is "imposed directly on Indian traders," the Supreme Court authorities cited above conclusively pre-empt the Town from imposing the tax on the Vendors.

B. Defendants Misrepresent the Nature and the Weight of the Tribal Interest.

In discussing the Tribe's interest against the tax at issue, Defendants argue that the economic burden of the tax on the Tribe is (1) nonexistent or a "sham," (2) an "indirect" economic burden like that permitted by *Thomas v. Gay*, 169 U.S. 264 (1898) and similar non-Indian lessee decisions, and (3) legally irrelevant because based on a contractual provision. These arguments have no merit.

1. The Economic Burden of the Tax on the Tribe is Genuine

Contrary to Defendants' repeated assertions, the economic burden of the tax on the Tribe is substantive and genuine. As shown above, from the time that the Tribe first leased the gaming machines from the Vendors, the lease contracts contained provisions that obligated the Tribe to remit and pay all taxes on the machines and to indemnify the Vendors for taxes and associated costs. (Clarification of Record, part I). The leases are valid legal contracts, drafted by attorneys and signed by executives of the Vendors and the Tribe's Gaming Enterprise Accordingly, any

assessment of tax on the machines places a substantive liability on the Tribe to pay such tax pursuant to the applicable lease contracts.

Defendants' arguments dismissing the Tribe's contractual liability for the taxes at issue are invalid. Contrary to Defendants' claims, the Tribe's tax obligation was not contrived or "manufactured" by the Tribe. As noted above, the Tribe's tax obligation to pay the taxes at issue here was established by provisions in the original leases. (Clarification of Record, part I). The indemnity provisions added to the original leases did not create new obligations, but confirmed and clarified those in the original leases. The Town's argument that the Tribe contrived to manufacture an economic liability in order to bring an expensive and time-consuming federal lawsuit is preposterous, and the Town implicitly admits the absurdity of this claim by describing this purported strategy as a "curious business decision" attributable to "bad business judgment." Town Br. at 8.

The State's repeated emphasis on the Vendors' purported "business policy" of forbearance in enforcing the tax provisions in the leases is similarly misplaced. State Br. at 2, 8, 22. Assuming such a "business policy" existed in the past, the policy no more eliminates the Tribe's contractual liability for the tax than forbearance by a lender discharges a debt. Nothing prevents the Vendors, in their sole discretion, from changing this policy at any time at their sole discretion and demanding reimbursement not only for future taxes but also for past assessments. Defendants have not come even close to showing, as they must for this argument to succeed, that the Vendors have given a formal waiver or release of the Tribe's tax obligations. The hollowness of the State's argument is highlighted by the fact that the undisputed facts show that the Vendors no longer follow this "business policy" with respect to the Tribe. AC Coin has twice demanded reimbursement from the Tribe pursuant to the indemnity provision for taxes it

has paid on the machines, and WMS has stated its intention of making similar demands in the event that it is required to pay the tax. (Clarification of Record, part II).

In short, the economic burden borne by the Tribe is clearly substantive and genuine.[14]

2. The Economic Burden of the Tax on the Tribe is Direct.

Defendants incorrectly claim that the economic burden on the Tribe resembles the indirect economic burden permitted in the 1898 case *Thomas v. Gay* and similar decisions involving non-Indian lessees (the "Non-Indian Lessee Cases"). In *Thomas v. Gay*, the Supreme Court held that a county could impose personal property taxes on cattle owned and raised by non-Indians on land leased from an Indian tribe. 169 U.S. at 275. Similar decisions have upheld the imposition of state taxes on railroads, oil and gas production, and possessory interests on reservation land leased from an Indian tribe. *See, e.g., Utah & N. Ry. Co. v. Fisher*, 116 U.S. 28 (1885) (railroads); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989) (oil and gas production); *Fort Mojave Tribe v. County of San Bernardino*, 543 F.2d 1253 (1976) (possessory interests). The relevance of the older Non-Indian Lessee Cases, including *Thomas v. Gay*, is questionable because they predate the modern balancing test and do not employ the "flexible preemption analysis sensitive to the particular facts and legislation involved" required under such test, *Cotton Petroleum*, 490 U.S. at 176. Moreover, all the Non-Indian Lessee Cases differ factually in three major ways from the facts in the present case, and as such, are completely irrelevant to assessment of the tribal interest in this case.

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[14] The State argues that "the degree to which a tax financially impacts a tribe bears on the pre-emption analysis." State Br. at 23; *see also id.* at 17, 21. The Magistrate Judge already carefully considered and rejected this argument. Ruling on Discovery Motions at 23. As the Magistrate Judge held, relying on Supreme Court cases, the Supreme Court has not "weigh[ed] the amount of the state tax in comparison to the tribal revenues," and the tribal interests at stake in the balancing test are primarily jurisdictional rather than economic interests. *Id.*

First, unlike the tax at issue in this case, none of the state taxes in the Non-Indian Lessee Cases imposed a direct economic burden on an Indian tribe. In each of the Non-Indian Lessee Cases, an Indian tribe leased property to a non-Indian, the non-Indian developed the property, and the state imposed a tax upon the non-Indian's developments of the property. Because the non-Indian was in the position of lessee/purchaser rather than lessor/vendor and had negotiated the lease with the Indian tribe before imposition of the tax, the non-Indian could not pass through or shift back the economic burden of the tax to the Indian tribe. Accordingly, the only possible economic effect on the Indian tribe of the taxes at issue in the Non-Indian Lessee Cases was indirect: a potential diminishment of future lease payments.

The property taxes at issue in this case, in contrast, are imposed on the *lessors* of the property, who are in a position to shift and pass through the full amount of the tax directly and in one step to the Tribe as lessee, and who drafted lease contracts in a manner that *explicitly and unconditionally require* the Tribe to pay such taxes or to indemnify the lessor for the amount paid. The Supreme Court has repeatedly struck down state taxes under the balancing test where the tax, as here, was imposed on a non-Indian vendor who, by market custom or contract, passed the economic burden of the tax directly to reservation Indians. *See Warren Trading, supra* (striking down gross receipts tax imposed on Indian retailer making sales to Indians within reservation on grounds that the "financial burdens" imposed by the tax "could thereby disturb and disarrange" the comprehensive federal scheme regulating Indian purchases under the Indian Trader Statutes, 25 U.S.C. §§ 261-264); *Central Machinery, supra* (same); *Bracker, supra* (striking down state vehicle taxes where the economic burden would directly be passed on to Indian tribe pursuant to an indemnification agreement); *Ramah, supra* (striking down gross

receipts tax on non-Indian construction contractor where the economic burden of the tax would be borne directly by Indian tribe).

Second, because the economic burden of the state taxes in the Non-Indian Lessee Cases was indirect, the burden was also theoretical, uncertain and frequently doubtful. The court in *Fort Mojave* held that the tax on non-Indian possessory interests at issue could "perhaps, although not certainly" reduce the amount of rent that the Indian tribe could charge the non-Indians. 543 F.2d at 1256. Similarly, in *Cotton Petroleum*, the Supreme Court emphasized that the district court found that the state oil and gas taxes imposed on non-Indians "had not affected the Tribe's ability to collect its [own] tax impose a higher tax" on the same interests and had "not in any way deterred production of oil and gas on the reservation." 490 U.S. at 171-72. None of the taxpayers in the Non-Indian Lessee Cases offered or could offer a dollar figure that quantified the economic burden that would be borne by the affected Indian tribe. Here, in contrast, the *exact amount* of the economic burden can be calculated from the assessment schedules, and there is no doubt or uncertainty that, pursuant to the lease contracts, this amount constitutes a legally enforceable economic liability of the Tribe.

Finally, none of the state taxes in the Non-Indian Lessee Cases affected "reservation value," *i.e.*, value "generated on the reservations by activities in which the Tribes have a significant interest." *Colville*, 447 U.S. at 155. On the contrary, the state tax in each Non-Indian Lessee Case was imposed on a business that was owned, operated and controlled by non-Indians, and in which the Indian tribe had no economic or participatory interest (other than passively receiving lease payments) – railroad transportation, cattle raising, petroleum extraction, luxury resort operation. The contrast with the tax at issue in this case – imposed on the most critical

piece of equipment used in the Tribe's Gaming Operation, which is financed, operated and controlled by the Tribe and is the Tribe's chief source of income – could not be more stark.

3. The Economic Burden of the Tax on the Tribe is Legally Relevant and Important.

The State argues that the economic burden of the tax on the Tribe should be disregarded because such burden results from an indemnity provision of the sort which is disregarded in federal decisions involving contractors doing business with the United States. State Br. at 24-26. This argument is seriously flawed. First, the Supreme Court has held that the preemption test applicable to state taxes imposed on those doing business with Indian tribes differs sharply from the test applicable to taxes imposed on federal contractors, which is not a balancing test and which intentionally ignores the economic burden of a tax. *Arizona Dep't of Revenue v. Blaze Construction Company*, 526 U.S. 32, 35-37 (1999) (distinguishing between "Indian preemption doctrine," which involves "[i]nterest balancing" and assessment of the economic burden of the state tax, from the "bright-line standard for taxation of federal contracts," which prohibits state taxes *only* when the technical legal incidence of the tax falls on the United States). As the Supreme Court emphasized in *Cotton Petroleum* (a case cited frequently by the Defendants), "questions of pre-emption in [the Indian] area are *not* resolved by reference to standards of pre-emption that have developed in other areas of the law." 490 U.S. at 176 (emphasis added).

Second, as noted above, the Supreme Court has repeatedly given significant weight under the balancing test to the economic burden of a state tax upon a tribe in assessing the tribal interest. *See Warren Trading, supra; Central Machinery, supra; Bracker, supra; Ramah, supra*. Finally, the same case cited by the State in support of applying the federal contractor rules to Indian tribes – *Cotton Petroleum* – conspicuously failed to do so in the case before it, which involved non-Indian oil and gas lessees on Indian land subject to state severance and ad valorem

taxes. On the contrary, *Cotton Petroleum* applied the *Bracker balancing test* to the facts before it, not the "bright-line standard" applicable to federal contractors, and carefully addressed and assessed the economic burden of the taxes on the Indian tribe. 490 U.S. at 171, 185. The *Cotton Petroleum* Court upheld the state taxes before it because, unlike the state taxes involved in *Bracker* and *Ramah*, "the economic burden of the tax" did *not* "ultimately f[a]ll on the Tribe." 490 U.S. at 184-85. Based on the above, the State's novel argument for disregarding the economic burden on the Tribe in the present case is directly contrary to governing Supreme Court precedent, including the very precedent cited by the State for its argument, and without any foundation.

C. Defendants Fail to Show that the Town has any Interest in Imposing the Tax that is Relevant under the Balancing Test.

Defendants argue that the state interest in imposing the property tax under the balancing test consists of two different components. The Town argues that the state interest is shown by the extensive regulatory authority that the State exercises over the Gaming Enterprise. The State, on the other hand, argues that the state interest consists of the State's "strong interest in the integrity of its property tax system," which is undermined by the Tribe's and the lessors' failure to file property tax declarations. Each of these "interests" is simply irrelevant to the State interest under the balancing test.

In fact, the State admitted that it has no relevant interest with respect to the tax at issue. The State made this admission early in this litigation and stood by it until the close of discovery. In early 2008, the Tribe posed an interrogatory asking the State to:

> Identify all services provided by the State during the past five years within the Tribe's reservation and trust lands, and with respect to each service, describe the expenditure incurred by the State with respect to that service.

Nichols Aff. Ex. A (Plaintiff's Interrogatory No. 5). The State responded that "*any services the State provides within the Tribe's reservation and trust lands would not be relevant to the balancing inquiry in this case*." Nichols Aff. Ex. A (Doc. No. 221) (State's Response to Plaintiff's First Set of Interrogatories No. 5) (emphasis added). True to its word at the time, the State identified no services in its response that it deemed to be relevant to the balancing test. *Id.* But just before the start of depositions, the State alerted the Tribe that it had discovered, and not yet produced, additional documents allegedly relating to State regulatory approval of a WMS Gaming device. Durocher Aff. ¶¶ 2-3. The Tribe stated that, based on the State's taking the position that "any services that the State provides within the Tribe's reservation and trust lands would not be relevant to the balancing inquiry in this case," there was no need for the State to produce the documents in question. *Id.* The State did not object to that conclusion. *Id.* The State is bound by its admission. Concessions in an answer to an interrogatory, as in any pleading, are judicial admissions that bind the State throughout this litigation. *Bellefonte Re Ins. Co. v. Argonaut Ins. Co.*, 757 F.2d 523, 528 (2d Cir. 1985) (facts admitted in a pleading bind a party through the course of litigation); *see also Gibbs v. CIGNA Corp.*, 440 F.3d 571, 578 (2d Cir. 2006) (same).

But even if evidence and arguments not disclosed in discovery are heard now, the State still cannot show any interest relevant to the balancing test. Under the *Bracker* balancing test, the courts assess the state interest in imposing a state tax by the extent to which the government has "a legitimate regulatory interest *served by* the taxes [it seeks] to impose" or, putting it another way, the extent to which the government seeks to assess the tax "*in return for* the governmental functions it provides to those who must bear the burden of paying this tax." *Bracker*, 448 U.S. at 150 (emphasis added); *Ramah*, 458 U.S. at 843. The relevant governmental

regulations and services are those provided on the reservation. *Ramah*, 458 U.S. at 843-44. The revenue raised by the tax need not correspond to the value of the state services, *Cotton Petroleum*, 490 U.S. at 189-91, but the courts insist that such revenues be assessed "in return for" and must "serve" the provision of the relevant state services on the reservation. *Ramah*, 458 U.S. at 843; *Bracker*, 448 U.S. at 150.

Under these principles, the Town's emphasis on the State's role pursuant to IGRA and the Gaming Procedures is badly misplaced. First, the relevant "services" at issue in the balancing test are those provided to the Vendors by the *Town*, not the State. Though authorized by Connecticut state law, the Connecticut Property Tax is assessed and collected by the Town, and the resulting revenue is expended by the Town for Town purposes. Nichols Aff. Ex. A at 168); Ex. C (Town's Answers to the Tribe's Third Set of Interrogatories ¶ 5); Ex. B (Town's Answers to First Set of Interrogatories ¶ 6). Because revenues from the tax do not fund *any* services performed by the State, the revenue cannot be treated as raised "in return for" any *State* services. *Id*. Second, the State's involvement in the gaming under the Gaming Procedures identified by the Town is authorized solely by IGRA and the Gaming Procedures, rather than by any original jurisdiction, cannot exceed or deviate from the strict limitations imposed by these authorities, and are funded and reimbursed (in fact and by agreement of the State) through the payments made by the Tribe pursuant to the Gaming Procedures. Under these circumstances, the revenues from the tax cannot under any conceivable interpretation be viewed as provided "in return for" the State's involvement in gaming services. Finally, as noted above, the State itself has disclaimed the relevance to the balancing test of any services that it provides to the Tribe within the reservation. For the reasons above, the State's provision of gaming services within the Tribe's reservation has no relevance to the state interest under the balancing test.

The State's argument that it has an interest in procedural compliance in order to preserve the "the integrity of its property tax system" is equally irrelevant, as the State has previously conceded. Nichols Aff. Ex. A (Doc. No. 221) (State's Response to Plaintiff's First Set of Interrogatories No. 5). The State's abstract interest in procedural compliance only has weight if imposition of the tax on the taxpayer is valid and legal. The State can have no interest in enforcing procedural compliance with respect to a tax that, as imposed, violates federal law and is illegal. Because courts use the balancing test to determine the fundamental validity and legality of a tax, they never have and never will consider the state's abstract interest in procedural compliance in assessing the state interest. The State's argument that the procedural requirements here constitute nothing more than "minimal" burdens permitted by the federal courts to be imposed on reservation Indians is similarly misplaced. The "minimal burdens" principle, which permits a state to impose recordkeeping or collection requirements on Indians or Indian traders, applies only with respect "to the collection of *valid taxes* from non-Indians." *Milhelm Attea*, 512 U.S. at 73 (emphasis added); *see also Moe*, 425 U.S. at 483 ("The State's requirement that the Indian tribal seller collect a tax *validly imposed* on non-Indians is a minimal burden designed to [ensure payment of] . . . a *concededly lawful* tax.") (emphasis added). Accordingly, the State's interest in procedural compliance has no relevance to the state interest assessed under the balancing test.

Defendants point to absolutely no services provided by the Town, let alone any services with respect to the Vendors or the leased slot machines within the Reservation.[15] Accordingly, the Town has failed to show that it has any relevant interests that justify imposition of the tax.

[15] The Town does reference, solely in its Rule 56(a)(1) statement and not in its summary judgment motion, several minimal services that it claims to provide to tribal members and the tribe. *See Town's Local Rule 56(a)(1) Statement*, part VI. None of these services, however, relates directly to the Vendors or the leased slot machines.

Based on the strong federal and tribal interests discussed above, the Tribe easily wins the *Bracker* balancing test, and Defendants' motions with respect to Count II should be denied.

IV. The Court Should Deny Defendants' Motions for Summary Judgment on Count III Because the Property Tax Infringes Upon The Tribe's Inherent Sovereignty.

As discussed above, Defendants' motions for summary judgment with respect to Counts I and II of the Amended Complaint fail because the property tax at issue is preempted by federal law. Defendants' motions on Count III also fail, because imposition of the Town's property tax would irreparably damage the Tribe's inherent sovereignty and right to self-government. *See Ramah*, 458 U.S. at 837 (recognizing that state's "interfere[nce] with the tribe's ability to exercise its sovereign functions" is alone "a sufficient basis for holding state law inapplicable to activity undertaken on the reservation"); *Crow Tribe of Indians v. Montana*, 819 F.2d 895, 902 (9th Cir. 1987) ("The self-government doctrine differs from the preemption analysis and is an independent barrier to state regulation."), *aff'd*, 484 U.S. 997 (1988); *see also* Butler Aff. ¶¶ 3-4 (revenue from the Gaming Enterprise is the primary source of funding for the Tribe's essential government services).

A state tax impermissibly infringes upon tribal sovereignty when it encroaches on "'the right of reservation Indians to make their own laws and be ruled by them.'" *Bracker*, 448 U.S. at 142 (quoting *Williams v. Lee*, 358 U.S. 217, 220 (1959)). Thus, in assessing whether a state tax is permissible, a court must consider whether and to what extent it affects tribal self-government. *Crow Tribe*, 819 F.2d at 902. The property tax in this case impermissibly burdens the Tribe's ability to self-govern in several ways.

First, as set forth in the Tribe's Summary Judgment Brief and further discussed above, the tax places a direct economic burden on the Tribe. *See* Tribe's Sum. Jdgmt. Br. at 34-35; supra at 26-29. The tax thus impedes tribal self-government "[b]y taking revenue that would

otherwise go towards supporting the Tribe and its programs." *Crow Tribe*, 819 F.2d at 902. Second, the Town's tax effectively displaces the Tribe's ability to impose its own personal property tax. *See* Tribe's Sum. Jgmt. Br. at 37-39.[16] By so doing, the Town not only deprives the Tribe of a potential source of additional revenue, but it encroaches upon a legal sphere that is otherwise subject to comprehensive Tribal control. In *Crow Tribe*, the Ninth Circuit found that by effectively displacing a tribal tax, Montana's excise tax on coal unlawfully infringed on tribal sovereignty "by limiting the Tribe's ability to regulate the development of its coal resources." *Crow Tribe*, 819 F.2d at 902-03. Similarly, in this case the Town's tax limits the Tribe's ability to fully regulate both taxation on its reservation and the development of its gaming enterprise.

Finally, if the Town's tax were determined to be valid, its enforcement mechanisms would be devastating to the Tribe's authority and control over its territory—this includes the threat of entry onto the Tribe's reservation and seizure of gaming machines located on the Tribe's land. *See supra*, at 20-21. Such threatened invasion of tribal lands goes directly to the heart of tribal sovereignty. *See New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 332-3 (1983) ("Because of their sovereign status, tribes and their reservation lands are insulated in some respects by 'an historic immunity from state and local control.'") (quoting *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973); *see also Crow Tribe*, 819 F.2d at 902-3 ("Tribal sovereignty contains a significant geographical component."). Because imposition of

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[16] The Town argues that *Colville* stands for the proposition that "[c]oncurrent taxation is entirely permissible," *see* Def. Br. at 32, but this is incorrect. The Court in *Colville* indeed concluded that under the circumstances of that case concurrent tribal and state taxation did not unlawfully infringe on tribal sovereignty, but here the circumstances are different. First, the Court emphasized in *Colville* that the state tax in that case did not interfere with tribal regulation because it only applied to "sales to nonmembers." *Colville*, 447 U.S. at 159. In this case, however, the Town's tax burdens the Tribe as well as capital equipment central to the Tribe's gaming enterprise; it thus cuts much more deeply into the heart of tribal regulatory and economic authority.

the Town's tax cannot be separated from the attendant threat of enforcement through physical invasion of the Tribe's lands and seizure of machines used in the Tribe's class III gaming operation, the tax impermissibly burdens tribal sovereignty.

The Town's arguments to the contrary are unavailing.[17] The Town relies on *Oneida Nation of N.Y. v. Cuomo*, 645 F.3d 154 (2d Cir. 2011), in support of its contention that its tax does not impermissibly burden the Tribe. In *Oneida Nation*, the Second Circuit upheld a pre-collection mechanism for state cigarette taxes that imposed economic burdens on the tribes. In concluding those burdens were permissible, however, the court relied directly on *Moe* and *Colville*, which authorized the imposition of collection duties on Indians to enforce a "valid" tax imposed on non-Indians. Here, as shown above, the tax is clearly invalid and the burden imposed on tribal sovereignty accordingly cannot be justified. *See supra* at 16-34.

The Town also argues that tribal sovereignty is somehow diminished where a tribe's business operations are involved. *See* Town's Br. at 33-36. The cases it cites have no application here, however, because each of them dealt with the issue of whether Congress intended a federal statute to apply to Indian tribes, not whether a state government could exercise authority over a tribe, as is at issue here. The sole issue in the cases cited by Defendants is whether a federal statute (silent as to its application to Indian tribes) applies to an Indian tribe and its business operations. The relationship between Indian tribes and the federal government is very different than that between the various states and tribes, because Congress has "plenary and exclusive" power over Indian tribes. *See, e.g.*, *United States v. Lara*, 541 U.S. 193, 200 (2004). This federal authority is exclusive of state authority. Accordingly, none of the cases on tribal

[17] The State does not independently analyze the issue of tribal sovereignty, but simply says that to "the extent, if any, that the analysis of the pre-emption and tribal sovereignty claims is meaningfully different in this case, the Tribe's Third Count should fail for the reasons set forth in Town Defendants' Memorandum of Law." State's Br. at 32.

sovereignty discussed by the Town is relevant. In *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985), for instance, the issue was "whether Congress intended to exercise its plenary authority over Indian tribes," *id.* (emphasis in original), *not* whether tribal sovereignty served as a bar to that federal authority. *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174 (2d Cir. 1996), followed *Donovan* through the same sort of analysis, recognizing that "tribal power, even regarding exclusively internal conflicts, may be limited by treaty or federal statute." *Id.* at 179.

In these cases, and the others on which the Town relies, the analysis was completely focused on whether, in the absence of any clear statutory expression, Congress intended a given federal statute to apply to a tribe. In the case of IGRA, Congress has spoken clearly as to when states have authority with respect to tribal gaming. IGRA, which was intended to promote "strong tribal governments," provides a very specific means for a state's involvement—the tribal/state compact. In this case, the State has not obtained permission from the federal government to exercise authority in the Tribe's territory, except through the Gaming Procedures. As demonstrated above, the Gaming Procedures do not allow for the challenged tax and, therefore, the Tribe's sovereignty acts as a bar to any state intrusion—in this case, to the tax asserted.

The law is clear: A state may not impose its taxing authority where it "interfere[s] with the tribe's ability to exercise its sovereign functions." *Ramah*, 458 U.S. at 837. The tax the Town seeks to impose would impermissibly infringe upon the Tribe's sovereign authority, and it is accordingly unlawful. For this reason, the Court should deny Defendants' motions for summary judgment with respect to Count III of the Amended Complaint.

CONCLUSION

For all of the foregoing reasons, the Tribe respectfully requests that the Court deny the Defendants' motions for summary judgment in their entirety.

Dated: October 26, 2011

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CERTIFICATE OF SERVICE

I certify that on October 26, 2011, a copy of the foregoing Memorandum of Plaintiff Mashantucket Pequot Tribe in Opposition to Defendants' Motions For Summary Judgment was filed electronically. Notice of this filing will be sent by email to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF System.

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