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)

PLAINTIFF MASHANTUCKET PEQUOT TRIBE'S REPLY BRIEF IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The Tribe has demonstrated that there is no genuine issue of material fact, that the tax at issue is preempted by federal law and impermissibly intrudes on the Tribe's sovereignty, and that the Tribe is entitled to summary judgment. In their response briefs, Defendants fail to present any arguments or evidence that preclude summary judgment in favor of the Tribe.[1]

Indian Trader statutes. Defendants cannot avoid the plain holdings of the Supreme Court rulings in *Warren Trading*, *Central Machinery* and *Milhelm Attea*. Instead Defendants claim that this is a "newfound" argument, that the statutes do not apply to gaming, and do not apply to the Vendors because they are not licensed as Indian traders. In fact, Defendants have been aware of the Tribe's Indian Trader statutes argument for over two years, the regulations under the statutes show that they apply to gaming, and the Court in *Central Machinery* in 1980 laid to rest any argument that the Indian Trader statutes only apply to licensed Indian traders.

IGRA preemption. IGRA was carefully crafted to give the states a limited role in regulating Indian gaming, but only through the compacting process. Once a compact (here, the Gaming Procedures) is in place, federal law does not allow a state to unilaterally regulate or tax gaming on an Indian reservation.

Bracker balancing. The tax is also preempted based on a balancing of the relevant federal, tribal, and state interests. In light of the comprehensive federal regulatory schemes in the Indian Trader statutes and IGRA, the strong tribal interests against taxation, and the minimal interest of the Town unrelated to any services performed with respect to the Vendors and the Gaming Enterprise, the tax is unlawful. This conclusion is augmented by the fact that the Tribe, not the Town, provides all of the essential governmental services to the Gaming Enterprise.

[1] Per agreement of the parties, the Tribe is filing a single brief in reply to both Defendants' responses.

Intrusion on tribal sovereignty. The tax infringes on the Tribe's sovereignty in a number of ways, including the fact that it diminishes the ability of the Tribe to use Reservation resources for Reservation purposes. The tax itself cannot be considered in isolation from the statutory enforcement provisions that purport to allow invasion of the Tribe's territory for the purpose of seizing property at issue. Even Defendants shy away from this blatant violation of sovereignty, but their assurances that the enforcement provision won't be exercised is little comfort.

ARGUMENT

I. FEDERAL REGULATION OF INDIAN TRADERS AND GAMING PREEMPTS ANY STATE TAX ON RESERVATION GAMING ACTIVITY.

A. The Indian Trader Statutes Preempt the Town's Tax.

In its opening brief, the Tribe established that the Town's tax is "a tax directly imposed upon Indians traders for trading with Indians" and, following established Supreme Court precedent, it is thus preempted by the Indian Trader statutes. *Department of Taxation & Finance of New York v. Milhelm Attea & Bros, Inc.*, 512 U.S. 61, 74 (1994); *Central Machinery Co. v. Arizona State Tax Comm'n*, 448 U.S. 160 (1980); *Warren Trading Post Co. v. Arizona State Tax Comm'n*, 380 U.S. 685 (1965). According to the Supreme Court, the Indian Trader statutes and the "apparently all-inclusive regulations" thereunder show 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" – *i.e.*, a direct tax – "upon traders." *Milhelm Attea*, 51 U.S. at 70-71 (quoting *Warren Trading*, 380 U.S. at 690). Because the Vendors leased goods to the Tribe on the Reservation, they are Indian Traders within the jurisdiction of the Indian Trader statutes – licensed or not. Any direct state tax on them and their transactions with the Tribe is prohibited.

The State disingenuously describes the Indian Trader statutes claim as a "newfound argument." State's Response Brief ("St. Resp. Br.") at 3. But the State is well aware that the

Tribe has long intended to present this argument. Indeed, the Tribe informed Defendants as early as June 2009 that the Town's tax "is preempted by federal Indian law, including the Indian Gaming Regulatory Act (25 U.S.C. §§ 2701-2721) and the Indian Trader Statutes (25 U.S.C §§ 261-264)."[2] Defendants' feigned surprise at the Tribe's Indian Trader statutes argument is only matched by their dubious arguments in response, each of which is meritless.

First, the State erroneously claims that the Indian Trader statutes do not apply to gaming transactions. St. Resp. Br. at 5, 7, 13. This assertion is contradicted by the very authority offered by the State in its support, namely, the regulation under the Indian Trader statutes which provides that "[g]ambling, by dice, cards, or in any way whatsoever, is strictly prohibited in any licensed trader's store or on the premises." 25 C.F.R. § 140.21; St. Br. at 7. Because this regulation expressly prohibits a subset of gaming transactions on a reservation – those occurring in the "store" or on the "premises" of an Indian Trader – the Indian Trader statutes obviously apply to gaming transactions. Of course, this prohibition does not apply to the Vendors'

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[2] In its September 23, 2009 response to Defendants' Interrogatory No. 3 (served by Defendants in connection with the WMS case), the Tribe stated that:

> The Indian Trader Statutes, 25 U.S.C. §§ 261 -264, confer the federal government exclusive authority, through the Commissioner of Indian Affairs, over the licensing and regulation of non-Indians trading with the Indians. Further . . . regulations promulgated pursuant to the Indian Trader Statutes are found at 25 U.S.C. §140, which governs "Licensed Indian traders." The Indian Trader Statutes so comprehensively and pervasively regulate trade with the Indians that any state tax that falls directly upon an Indian trader, whether licensed or not, is preempted.

Second Nichols Aff. Ex. P. The Tribe made the same argument in its brief opposing Defendants' motion to compel, filed on June 22, 2009. (Doc. No. 142 at 1 and 12). The State acknowledged its awareness of the argument in June 2011 by asking questions about it in both Vendor depositions. (Defendants' LR 56(a)(1) Statement Ex.11 (AC Coin Dep. Tr. at 121); Ex. 9a (WMS Dep. Tr. at 131).

activities, who have no "store" or "premises" on the Reservation, nor does the prohibition apply to the activities of the Tribe, which is not an Indian Trader.

Second, Defendants mistakenly contend that the Indian Trader statutes do not apply where the federal government has "no involvement in the transactions at issue." St. Resp. Br. at 10; *see also* Town's Response Brief ("Town Resp. Br.") at 10-11. The Town cites *Central Machinery* for this claim, Town Resp. Br. at 11-12, but that case clearly repudiates any such limitation. The Court emphasized that Congress enacted the Indian Trader statutes to combat fraud and injustice in dealings with reservation Indians and that this purpose "would be easily circumvented if a seller could avoid federal regulation simply by failing to adopt a permanent place of business on a reservation or by failing to obtain a federal license." 448 U.S. at 165. The federal scheme imposed by the Indian Trader statutes *itself* constituted federal oversight and "[i]t is the existence of the Indian trader statutes, then, and not their administration, that preempts the field of transactions with Indians occurring on reservations." 448 U.S. at 165.[3]

[3] The Town also seeks support from *Mescalero Apache Tribe v. O'Cheskey*, 625 F.2d 967, 971 (10th Cir. 1980), from which it quotes the statement that "[t]he position of the trader in *Warren* as licensed and regulated was obviously a very significant factor" in the Supreme Court's holding. Town Br. at 11-12. This conclusion by the 10th Circuit was directly retracted by the subsequent Supreme Court holding in *Central Machinery*. *See Laguna Indus., Inc. v. New Mexico Tax. & Rev. Dep't*, 845 P.2d 167, 176-77 & n.3 (N.M. Ct. App. 1992) (recognizing that *Central Machinery* effectively overruled *O'Cheskey*), *aff'd*, 855 P.2d 127 (N.M. 1993). Moreover, the specific holding in *O'Cheskey* – that the Indian Trader statutes do not preempt state taxes on contractors doing work on a reservation for an Indian tribe because of the legal principles applicable to *federal* contractors – was repudiated two years later by the Supreme Court in *Ramah Navajo School Board, Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832 (1982), and by the Tenth Circuit itself in *Indian Country, U.S.A., Inc. v. Oklahoma Tax Commission*, 829 F.2d 967, 981-82 (10th Cir. 1987), *cert. denied*, 487 U.S. 1218 (1988). For these reasons, New Mexico itself has departed from the position it took in *O'Cheskey*, *see* N.M. Admin. Code § 3.2.4.9E; N.M. Tax. Rev. Dept. Rul. No. 401-02-2 (May 2, 2002). *O'Cheskey* is simply not good law, and the Court should reject Defendants' arguments based on that decision. *See* St. Br. at 21; Town Br. at 11-12, 26

The lower federal courts, moreover, have repeatedly applied the Indian Trader statutes to sellers who made private, unmonitored sales to reservation Indians. *See, e.g., Ashcroft v. United States Dep't of Interior*, 679 F.2d 196, 198-200 (9th Cir. 1982); *United States ex rel. Carl B. Hornell v. One 1976 Chevrolet Station Wagon*, 585 F.2d 978 (10th Cir. 1978). In fact, in a case cited by the State, St. Resp. Br. at 4, the Seventh Circuit refused to dismiss a suit alleging violations of the Indian Trader statutes by defendants that "entered into lease contracts for goods and services to be used by the Tribe in the operation of gaming activities on their reservation." *United States ex rel. Hall v. Tribal Development Corporation*, 49 F.3d 1208, 1210 (7th Cir. 1995). Though the court later dismissed the suit for failure to join an indispensable party (the Tribe),[4] it held that, taking as true the relator's claims of violations of the Indian Trader statutes and 25 U.S.C. § 81, "the United States has suffered a sufficient injury and therefore has standing to maintain this action through the *qui tam* relators." *Id.* at 1214. In short, the Vendors' leases to the Tribe clearly classifies them as Indian Traders subject to the Indian Trader statutes.

Third, Defendants contend that the Indian Trader statutes simply can't apply to the Vendors because, if so, their failure to obtain Indian Trader licenses means that they have "engaged in extensive criminal activity nation-wide." St. Resp. Br. at 5; *see also* Town Resp. Br. 9, 16. The thrust of this argument appears to be that because the Vendors are not licensed, they are not protected by the preemptive effect of the Indian Trader statutes. The Supreme Court in *Central Machinery*, however, foreclosed this argument by holding that the Indians Trader statutes preempt state taxation of an unlicensed Indian trader. Defendants' emphasis on the "criminality" inherent in failing to obtain a license, moreover, is misleading. Courts have recognized that the BIA has been lax in issuing licenses under the statutes. For this reason, the

[4] *See United States ex rel. Hall v. Tribal Development Corporation*, 100 F.3d 476 (7th Cir. 1996), discussed below.

Eighth Circuit recognized that holding a tribal license to do business on a reservation substantially satisfies the licensure requirement in 25 U.S.C. § 264. *United States ex. rel. Keith v. Sioux Nation Shopping Center*, 634 F.2d 401, 403 n.8 (8th Cir. 1980). Accordingly, the Vendors' registrations as suppliers of gaming equipment by the Tribe's Gaming Commission and under Gaming Procedure § 6(a)(ii) satisfy the Indian Trader licensure requirement. Affidavit of Gaming Commission Chairman Henningsen at ¶¶ 2-6**.** Courts have also held that any *qui tam* action against an Indian Trader will be dismissed unless the Indian tribe, as an indispensable party, joins the action. *See United States ex rel. Hall*, 100 F.3d 476, 481 (7th Cir. 1996). In short, no action against an Indian Trader could succeed without the voluntary participation of the affected Indian tribe unless the action was brought by the United States itself, which is unlikely in the absence of a substantive violation of the Indian Trader statutes involving fraud or injustice.

Finally, Defendants incorrectly argue that the preemptive effect of the Indian Trader statutes on state taxation of Indian Traders is undermined by Supreme Court's decision in *Milhelm Attea, supra*. The exact opposite is true. *Milhelm Attea* upheld New York regulations that required cigarette wholesalers to keep detailed records of their sales to Indian tribes, obtain approval for such sales, and file monthly reports with the state of New York. Certain cigarette wholesalers challenged these administrative requirements on grounds that they were Indian Traders upon whom the state could not impose additional "burdens" pursuant to *Warren Trading* and *Central Machinery*. The Court rejected this argument on the ground that New York's administrative requirements are different in kind from a tax "which fell directly upon an Indian trader." *Milhelm Attea*, 512 U.S. at 71. The Court noted that the tax at issue, a cigarette tax imposed only on non-Indian consumers – not on Indian Traders – was a concededly "lawful" and "valid" tax, and, that the administrative duties in question 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.'" *Id.* at 73 (emphasis added). *Milhelm Attea* thus squarely reaffirmed the central holding of *Warren Trading* and *Central Machinery*, that "a tax imposed directly on Indian traders," like the tax at issue here, is preempted under federal law. *Id*.

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

IGRA's regulatory scheme is both comprehensive and pervasive with respect to Indian gaming and, thus, preempts the Town's tax. Moreover, IGRA itself prescribes the State's limited authority. It provides states with only one opportunity to participate in the regulation of Indian gaming – through negotiating a tribal-state compact. Here, the State negotiated and proposed a final compact, which the Secretary of Interior adopted as the Gaming Procedures. These Procedures form the sole basis for the limited authority enjoyed by the State with respect to the Tribe's gaming operation, and they make no provision for imposition of the tax at issue.

1. IGRA's regulatory scheme is comprehensive and pervasive.

Congress enacted IGRA in the exercise of its plenary authority over Indian affairs. S. Rep. No. 100-446, at *5-6 (1988), *reprinted in* U.S.C.C.A.N. 3071, 3075-76**.** IGRA's provisions are contained in 21 detailed statutory sections. IGRA created the National Indian Gaming Commission ("NIGC"), a new federal commission within the Department of the Interior, to administer and enforce key provisions of the statute. 25 U.S.C. § 2704. Pursuant to regulatory authority granted by Congress in IGRA, the NIGC has promulgated 28 sets of regulations and the Secretary of the Interior has promulgated 4 additional sets of regulations. These regulations encompass 32 Parts in Title 25 of the Code of Federal Regulations.[5]

[5] The regulations promulgated pursuant to IGRA are contained in 25 C.F.R. Parts 290-93, 501-

IGRA distinguishes between "Class I," "Class II," and "Class III" gaming. Class I gaming (purely social or traditional ceremonial games) is subject to exclusive regulation by tribes. Class II gaming (primarily of bingo, pull-tabs, and similar games) must be conducted in conformance with IGRA and tribal law, and is subject to federal oversight by the NIGC. Class III gaming – those games not defined as Class I or Class II gaming, including slot machines – is subject to negotiation between Indian tribes and the state governments under tribal-state compacts approved by the Secretary of the Interior. Class III gaming conducted pursuant to an approved tribal-state compact must be conducted in conformance with IGRA, tribal law, and the compact, with federal oversight by the NIGC. *See* 25 U.S.C. §§ 2703(3), (6), (7), & (8), 2710; *see also* Memorandum Decision and Order - Colorado River Indian Tribe, NOV/CFA 01-01 (May 30, 2002) at http://www.nigc.gov/Reading Room/Enforcement Actions/.

Under IGRA's regulatory scheme, Indian tribes play the central and primary role with respect to gaming consistent with federal policy in effect since at least the Nixon administration to promote strong tribal governments, tribal self-sufficiency, and tribal economic development. 25 U.S.C. § 2702(1); *see also* Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 450 *et seq.* (stating this policy in 25 U.S.C. § 450a); Indian Financing Act of 1974, 25 U.S.C. § 1451 *et seq.* (stating this policy in 25 U.S.C. § 1451); Special Message to Congress on Indian Affairs from President Nixon (July 8, 1970) (Second Nichols Aff. Ex. R). In order for a tribe to undertake Class II and Class III gaming under IGRA, the governing body of the tribe must adopt an ordinance which must then be approved by the Chairman of the NIGC. 25 U.S.C. § 2710(b). The tribal gaming ordinance sets the framework for the tribe's operation of permitted Class II and Class III gaming and for the tribe's role as primary regulator of the gaming

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3, 513-19, 522-24, 531, 533, 535, 537, 539, 542-43, 547, 556, 558, 559, 571, 573, 575, 577.

activities. *Id.* Among other things, IGRA requires the tribal gaming ordinance to provide that (1) the tribe's net revenues from gaming will be used to fund tribal government operations and programs and other specified purposes, (2) annual outside audits will be conducted of the gaming operation, including any supply contracts in excess of $25,000, (3) construction and maintenance of the gaming facilities, and the gaming operations themselves, will be conducted in a manner which adequately protects the environment and the public health and safety, and (4) there is an adequate system for conducting background investigations, licensing, and ongoing oversight of all primary management officials and key employees of the gaming operations, with notices to the NIGC regarding the background investigations and licensing. *Id.*

The federal government, too, plays an important role under IGRA with respect to Class II and Class III gaming. As noted above, IGRA created the federal NIGC to administer and enforce the statute. The NIGC has promulgated 28 sets of regulations in the aid of this administration and enforcement, including minimum control standards governing the tribe's operation of gaming. The NIGC must approve the tribal gaming ordinance, any management contracts, and any tribal/state compacts before they can become effective. The NIGC receives the results of required background investigations and licensing determinations from the tribe. The NIGC may enter the tribal gaming facilities at any time to conduct inspections and enforce the statute, and may issue temporary and permanent closure orders and impose fines for violations of IGRA, any of the NIGC's regulations, and any provisions of the tribal gaming ordinance. To defray some of the costs of this regulation, the tribe must pay the NIGC a fee established by the NIGC based on the tribe's revenues from Class II and Class III gaming. 25 C.F.R. 514; *see* Sample 2011 Fee Worksheet, available at http://www.nigc.gov/.

2. The State's limited regulatory role is prescribed by IGRA in the Gaming Procedures.

Though Indian tribes play the central and primary role with respect to Indian gaming under IGRA's regulatory scheme, IGRA also prescribes a role for state governments with respect to Class III gaming. Congress carefully limited the state role, however, to that spelled out in a tribal/state compact – here, the Gaming Procedures. 25 U.S.C. § 2710(d). As discussed in the Tribe's opening brief, the Gaming Procedures provide for State licensing of gaming vendors and the collection of a liquor tax, but make no provision for collection of a personal property tax with respect to slot machines or other gaming property. Tribe Br. Mot. S. J. at 27. The absence of any such authority in the Gaming Procedures, in the face of IGRA's comprehensive regulatory scheme, is sufficient to invalidate the tax at issue.[6]

Without IGRA – and the Tribe's federally approved gaming ordinance and Gaming Procedures required under IGRA's regulatory scheme – the Vendors could not lease, sell, or transport slot machines to the Tribe, because the Tribe's operation of slot machines and the Vendors' leasing of slot machines to the Tribe would violate Section 5 of the Gambling Devices Transportation Act, more commonly known today as the Johnson Act. 64 Stat. 1134, 1135 (Jan. 2, 1951), *codified as amended at* 15 U.S.C. § 1175(a). Section 5 of the Johnson Act prohibits any sale, lease, or transport of slot machines by any person in Indian country. Violations of this

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[6] In an effort to avoid this result, the Town advises the Court that the State is already collecting a hotel occupancy tax on the Tribe's Reservation. Town Br. at 22. The Town provides no support for this contention, and with good reason – it is false. The Connecticut hotel occupancy tax is not paid to the State for any stays at on-reservation hotels, and Connecticut has specifically held that "[s]ales by a Tribe of lodging (*i.e.*, rooms and accommodations) located within Indian country of the Tribe are not subject to Connecticut sales tax because the value of the lodging is generated within Indian country of the Tribe." Conn. Legal Ruling No. 2002-3 (May 29, 2002) Second Nichols Aff. Ex. Q; Ferguson Aff. ¶ 3. The hotel occupancy tax, as well as the state sales tax on meals served by the Tribe to non-Indian customers, are prohibited by this Revenue Ruling on the grounds that the *Bracker* balancing test forbids the taxes.

provision are subject to fines and imprisonment. IGRA provides an exception from Section 5 of the Johnson Act, as long as the slot machine gaming is conducted in compliance with IGRA.[7]

IGRA's regulatory scheme is similar in its comprehensiveness and pervasiveness to the regulatory schemes at issue in *Bracker* and *Ramah Navajo* (and in *Warren Trading* and *Central Machinery*). IGRA and the 32 sets of federal regulations promulgated to enforce its provisions are just the sort of comprehensive scheme that was at issue in these Supreme Court cases. As the Supreme Court held in *Central Machinery* with respect to the Indian Trader statutes, it is the *existence*, not the administration, of IGRA that preempts the field with respect to Indian gaming. 448 U.S. at 165. And it is indisputable that the federal government plays a very active role in the administration and enforcement of IGRA.[8]

The Town's attempts to narrow the scope of IGRA to exclude the Vendors' leasing of slot machines are without foundation. The Town's contention, for example, that the Vendors are not "engaging in a Class III activity," is simply not true. Town Resp. Br. at 19-20. The Vendors are in fact engaging in a Class III activity within the meaning of IGRA, because they are required to be licensed under Section 6 of the federally-mandated Gaming Procedures. Moreover, if the

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[7] As noted by Defendants, the Tribe and the State disagreed as to whether Connecticut law permitted any person to operate slot machines and, thus, disagreed as to whether the Tribe's slot machine gaming would be permissible under IGRA. The Vendors could not lease or sell gaming equipment to the Tribe in accordance with IGRA until the parties resolved their disagreement by entering into the MOU. The MOU, thus, effectively served as an amendment to the Gaming Procedures.

[8] The State notes that in *Cabazon Band of Mission Indians v. Wilson*, 37 F.3d 430, 433 (9th Cir. 1994), the Ninth Circuit held that Section 2710(d)(4) of IGRA was not an express grant of immunity from a state fee imposed on non-Indians. The Tribe does not rest its IGRA preemption argument on Section 2710(d)(4) alone, however, but rather on the entire regulatory scheme, the strong preemption language in the legislative history, the federal court decisions according IGRA preemptive scope addressed in its earlier briefs, and the Supreme Court decisions involving similar comprehensive and pervasive federal statutory and regulatory schemes. It also bears noting that the Ninth Circuit easily found the fee at issue in *Wilson* to be preempted under the *Bracker* balancing test.

Vendors were not operating pursuant to IGRA, their leasing and transport of slot machines to the Tribe would be illegal under the Johnson Act. Indeed, the Town's argument is contradictory in this respect, because Defendants also seek to justify the tax on what they describe as the State's "major" regulatory role with respect to both the Vendors' activities and other Class III gaming activities within the Tribe's Reservation. It is only as a result of IGRA's regulatory scheme, moreover, that the State has any regulatory role at all with respect to the Vendors, but the State's role is *only* that specifically laid out in the Gaming Procedures, as mandated under IGRA's regulatory scheme. Nothing within those Procedures authorizes the Town's property tax.[9]

The Town's contention that IGRA only preempts the field with respect to the "governance of gaming", and that this does not include the leasing of slot machines, is without merit. "Governance" means the exercise of governmental authority and control.[10] One synonym for "governance" is "jurisdiction."[11] Given the plain meaning of "governance," IGRA's reference to the "governance of gaming" means the exercise of governmental authority and jurisdiction with respect to gaming. The Tribe's gaming obviously includes its slot machine activities. Accordingly, the "governance of gaming" under IGRA's comprehensive regulatory scheme includes any exercise of governmental authority or jurisdiction over slot machine activities.

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[9] The Town cites *Trump Hotels & Casino Resorts Dev. Co. LLC v. Roskow*, 2004 WL 717131, at *2 (D. Conn. Mar. 31, 2004), a case not discussed in either of the Tribe's previous briefs, as additional support for its argument that the Vendors' leasing of slot machines to the Tribe is outside of IGRA's preemptive scope. Town Resp. Br. at 18. That case is inapposite, however, because the contractual dispute there was with a tribe that had not yet received federal recognition, and no gaming was being conducted pursuant to IGRA.

[10] One authoritative source, for example, defines "governance" as: "1.government; exercise of authority; control; 2. a method or system of government or management." *The Random House Dictionary of the English Language* at 826 (2d ed. 1987).

[11] The Random House Dictionary defines "jurisdiction" to include " . . . 2. power; authority; control; . . . ." *Id.* at 1039.

The State also misstates the federal law at the time IGRA was enacted in an effort to support its contention that taxation of the slot machines would be consistent with IGRA. The State cites *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989), as providing a "default rule" that "a State can impose a non-discriminatory tax on [non-Indians] with whom . . . an Indian tribe does business, even though the financial burden of the tax may fall on the . . . Tribe," and that this "rule" was in effect when Congress enacted IGRA. State Resp. Br. at 10 (quoting *Cotton Petroleum*, 490 U.S. at 175). The Court in *Cotton Petroleum* was not stating a rule at all (much less a "default rule"), but an outcome that would occur *if* the state prevailed under the various preemption doctrines. Besides, the State got its timing wrong, because Congress enacted IGRA in *1988* before *Cotton Petroleum* was decided. In any case, there was not and never has been a "default rule" permitting state taxation on non-Indians with respect to their dealings with Indian tribes on reservation and trust lands. As *Cotton Petroleum* itself demonstrates, the permissibility of such state taxation must always be evaluated under the doctrines of express preemption, implied preemption, and the *Bracker* balancing test. 490 U.S. at 175-77.[12]

Finally, Defendants object that it is improper to focus on money the State gets from the Tribe "through other mechanisms," because the issue here is whether the tax at issue is permissible. Defendants miss the point, which is that this money is paid to the State *pursuant to the Gaming Procedures (and the MOU)*, which is the only appropriate mechanism for addressing state governmental authority and the State's ability to tax the Tribe's gaming on the Reservation. If the State wished, in addition, to impose its *tax* on the slot machines used in the Tribe's gaming, that needed to be spelled out in the Gaming Procedures.

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[12] Nor does the case of *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759 (1985), provide any support for the supposed "default rule" described by the State, since that case involved a state's attempt to tax an Indian tribe, which categorically violates federal law in the absence of a federal statute or treaty expressly permitting such taxation.

II. THE TOWN'S TAX IS INVALID UNDER *BRACKER* BALANCING.

The Tribe showed in its opening brief that the Town's tax is preempted under the *Bracker* balancing test because a "particularized inquiry into the nature of the state, federal, and tribal interests" indicates that the federal and tribal interests grossly outweigh the Town's interest in imposing the tax. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980). The federal interest is very heavy because the tax interferes with two pervasive and comprehensive federal regulatory schemes. One of these regulatory schemes, the Indian Trader statutes, has three times been held by the Supreme Court to preempt state taxes imposed directly on Indian Traders like the Vendors. The other scheme, IGRA, has been cited by the Connecticut Department of Revenue itself as evidence that Indian gaming is "completely the province of the Federal government" and thus that the state sales tax cannot be imposed on contractors purchasing construction materials for Indian gaming facilities.

The Tribal interest here is similarly heavy because the economic burden of the tax not only falls on the Tribe, but also because the tax burdens the Tribe's Gaming Enterprise, which the Tribe built and operates and controls on the Reservation and which thus represents significant "reservation value." The Town's interest in imposing the tax, in contrast, consists of nothing more than a generalized desire to increase revenue and not by any need to reimburse itself for services provided on the Reservation. The Tribal government, not the Town, provides all essential governmental services to the Gaming Enterprise and the Vendors benefit from these services. Because the federal and tribal interests against imposition of the tax overwhelm the Town's pecuniary interest in maximizing its revenue, the tax cannot be imposed under *Bracker* balancing. Defendants' arguments to the contrary have no merit.

As to the federal interest, Defendants argue that the federal regulatory schemes are not comprehensive or do not apply to the tax at issue. The Tribe has responded to these: both the

Indian Trader statutes and IGRA are precisely the type of comprehensive federal regulatory schemes held in *Bracker*, *Ramah*, *Central Machinery* and *Warren Trading* to preempt a state tax.

With respect to the Tribe's interest, Defendants' arguments are also meritless. First, Defendants' arguments that the economic burden imposed by an indemnity agreement should be disregarded is directly contrary to established federal law. *Bracker* itself involved an indemnity agreement that shifted the economic burden of a state tax to an Indian tribe, and this contractual agreement was made *after* the state imposed its tax. 448 U.S. at 140 n.7. The *Bracker* Court's decision striking down the state tax demonstrates that liability imposed pursuant to contract must be respected.[13] The State's further argument, that *Cotton Petroleum* holds that an indirect economic burden on an Indian tribe should be disregarded, is not only contrary to *all* cases imposing the balancing test (which assesses the validity of state taxes *not* imposed on Indians), but is directly contrary to *Cotton Petroleum* itself, which applied the balancing test.

Second, Defendants' contentions questioning the Tribe's factual liability for the Town's tax are groundless. The original leases imposed a requirement to pay the tax and indemnify the Vendors; these contractual provisions were standard in the industry; these provisions imposed a substantive legal liability for the tax on the Tribe; any purported forbearance policy formerly exercised by the Vendors is insufficient to invalidate the Tribe's contractual obligations and such

[13] The State tries to distinguish the facts in *Bracker* (and *Ramah*) by claiming that in those cases the Tribe was somehow "compelled" to indemnify the non-Indians who paid the tax in order to keep their business, and that no such compulsion exists in this case. The facts in *Bracker* and *Ramah*, however, are exactly parallel to the facts in this case: in both situations an expectation and settled custom existed that the non-Indian would pass on any state taxes to its customer, the Indian tribe. The State's claim that the Tribe here (unlike the tribes in *Bracker* and *Ramah*) could peremptorily disregard its lease contracts and refuse any indemnification requests *with no harmful effects to its business relationship* with the Vendors is nothing more than baseless speculation. St. Br. at 21-24.

policy has since been revoked by Vendors; and the Tribe has reimbursed AC Coin for its tax payments and covered the litigation expenses of both Vendors pursuant to lease obligations.

Third, the State mistakenly contends that there exists a "history" of permitting the imposition of State "property taxes on non-Indian parties for tribal leases," citing *Thomas v. Gay*, 169 U.S. 64 (1898). St. Br. at 14-16. The Tribe's response brief showed that neither *Thomas* nor its successor cases applies to this case because each involved state taxation of non-Indian *lessees* (not lessors) of tribal property who could not pass the economic burden of the tax to the Tribe and who used the taxed property in a business that was wholly owned, operated, and controlled by non-Indians. Because the gaming machines that the Town seeks to tax form an integral part of the Tribe's Gaming Enterprise, the present case actually falls within the judicial "history" of prohibiting state regulation or taxation of property or activities which incorporate "reservation value." Thus, in a pre-IGRA case applying the *Bracker* balancing test, the Supreme Court prohibited state regulation of gaming on the Cabazon and Morongo reservations because the tribes' modern gaming facilities "are generating value on the reservations through activities in which [the tribes] have a substantial interest." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 220 (1987). Similarly, the Tenth Circuit prohibited the imposition of state sales taxes on bingo activities and related concessions in a tribe's casino because these taxes burdened the "on-reservation value" inherent in the Tribe's gaming facility. *Indian Country, U.S.A., Inc. v. Oklahoma*, 829 F.2d 967, 986 (10th Cir. 1987). Connecticut itself has held that it cannot impose its sales tax on the sale of lodging or meals within tribally owned facilities within Indian country because reservation value inherent in such items tilts the balancing test against the state interest. Conn. Legal Ruling No 2002-3 (May 29, 2002). Because the Tribe uses the leased gaming machines within its wholly owned Gaming Facilities to offer gaming opportunities solely within

the Reservation, the Town's tax would significantly burden "reservation value" and should be enjoined under the authorities cited above.

Finally, with respect to the Town's interest, Defendants simply reiterate erroneous contentions that the Tribe has refuted in its response brief. As the Tribe there showed, the Town's interest must be assessed by examining whether the Town has a "legitimate regulatory interest" that is "*served* by the taxes [it seeks] to impose." *Bracker*, 448 U.S. at 150 (emphasis added). This regulatory interest must be provided on the Reservation "to those who must bear the burden of the tax." *Ramah*, 458 U.S. at 843. Under this inquiry, regulatory services performed within the Reservation by the State have no relevance because the Town's tax does not support *any* of these services, which are reimbursed pursuant to the Gaming Procedures and which the State itself has admitted are irrelevant to the balancing test. Tr. Resp. Br. at 33. The purported State interest in the integrity of its property tax system and its compliance procedures is similarly irrelevant to the balancing test because any such interest is contingent on the validity and legality of tax as imposed, which is hotly disputed.

The only relevant evidence of the Town's interest here would be services or regulation provided by the Town to the Vendors or the Tribe's Gaming Enterprise within the Reservation. *Ramah*, 458 U.S. at 843. On this point, Defendants can point to no specific services to the Vendors or the gaming operation, and instead attempt to rely on what amount to bald factual assertions in the Defendants' 56(a)(1) statement that the Town provides some services on the Reservation. St. Resp. Br. at 29; Town Resp. Br. at 30. The Tribe objected to many of these claimed services because they constitute little more than vague generalities that fail to show that the services were even performed within the Reservation. The remaining claims involve services performed outside of the Reservation, such as education, which are not relevant to the balancing

test, *Ramah*, 458 U.S. at 843-44, and which are funded by the property taxes paid by the Tribe and Tribal members with respect to land held outside the Reservation.[14]

The Town, in short, points to no relevant services or regulatory duties performed within the Reservation. It is the Tribe that provides all governmental services to the gaming enterprise. Tribe Br. Mot. S. J. at 4-6. The Town's interest consists of nothing more than its desire to augment its revenues, and imposition of the tax would result in a windfall to the Town. Accordingly, the Town's interest is far outwighed by the heavy federal and tribal interests against imposition of the tax.

III. THE TAX INTERFERES WITH THE TRIBE'S SOVEREIGNTY.

The tax imposed by the Town interferes with the Tribe's sovereignty because it places a direct economic burden on the Tribe and 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. Try as they might, Defendants cannot avoid the inherently governmental nature of the Gaming Enterprise.[15] It is an arm of the tribal government and its activities are conducted solely for the benefit of the Tribe to promote a strong tribal government. Butler Aff. ¶¶ 3-4; 25 U.S.C. § 2702(1). A tax burdening the Gaming Enterprise diminishes the Tribe's ability to use

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[14] For the first time in their Response Briefs (Town Resp. Br. at 30; State Resp. Br. at 29), Defendants claim that the Town provides maintenance on roads used by the Vendors and Gaming Enterprise customers. The Town cites to Chairman Butler's testimony as support for this proposition, but Chairman Butler actually testified that most vendors use *state* roads and there is no direct path through the Town to the Tribe's gaming enterprise. In fact, *State* Highway Route 2, not a Town road, is the primary access to the Tribe's gaming operation, and since 1996 the Tribe has expended $88,534,348 to make improvements to that highway. Affidavit of Charlie Ferguson at ¶ 2.

[15] Instead of addressing that issue squarely, the Town relies on cases that have no bearing on a state's exercise of authority over a tribal government. *E.g.*, *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174 (2d Cir. 1996) (concerning application of federal statute to the Tribe). It may be the case that in some circumstances *federal* law may apply to tribal government activities, but this says nothing about state taxation that burdens a tribal government.

Reservation resources for Reservation purposes. Even worse, the tax could be enforced by invading the reservation to seize gaming machines. Conn. Gen. Stat. §§ 12-155, 12-195b, 12-195e. Defendants concede that this would be an unlawful intrusion on the Tribe's sovereignty. Town Resp. Br. at 32 ("The Town has . . . probably no authority to enter the Tribe's reservation to enforce the State tax."). To avoid the consequences of this concession, Defendants suggest that intrusive enforcement measures are not necessary, at least for now. *Id*. But, Defendants cannot pretend that the seizure provision in the taxing statute does not exist. Furthermore, the suggested alternative means of enforcement – withholding licenses – would also interfere with the Gaming Enterprise. Defendants cannot reconcile their claim that the tax does not infringe the Tribe's sovereignty with their concession that tax enforcement would be an infringement.[16]

[16] Similarly, the argument that a single transaction might be taxed by more than one sovereign with legitimate taxing authority is irrelevant, because Defendants have not shown that the Town's authority to impose the tax here is legitimate. Town Resp. Br. at 32-33.

CONCLUSION

For all of the reasons stated herein, as well as in the Tribe's opening brief, the Court should grant summary judgment in favor of the Tribe.

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CERTIFICATE OF SERVICE

I certify that on November 16, 2011, a copy of Plaintiff Mashantucket Pequot Tribe's Reply Brief in Support of its Motion 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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