UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

FLANDREAU SANTEE SIOUX TRIBE, a Federally recognized Indian Tribe, Plaintiff, v. ANDY GERLACH, Secretary of the State of South Dakota Department of Revenue; and DENNIS DAUGAARD, Governor of the State of South Dakota, Defendants.	Civ. No. 14-4171 DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS

The Defendants, Andy Gerlach and Dennis Daugaard (the State) in their official capacities, by and through their counsel, Matt Naasz and Kirsten E. Jasper, submit this brief in support of the State's Motion for Judgment on the Pleadings. The State moves to dismiss Plaintiff's Verified First Amended Complaint (Complaint), Doc. 32, in its entirety pursuant to Fed. R. Civ. P. 12(c) as a matter of law.

The Flandreau Santee Sioux Tribe (the Tribe) seeks, through its Complaint, a judgment stating the State does not have authority to (1) impose its use tax on nonmembers' on-reservation purchases[1] and use of tangible

[1] When tangible personal property is delivered in South Dakota or when services are purchased in South Dakota, there is prima facie evidence that the property and services will be used in South Dakota and are subject to the use tax. SDCL 10-46-18, -18.1.

personal property and services; (2) compel the Tribe to collect and remit this use tax; (3) deny reissuing the Tribe a South Dakota alcoholic beverage license; or (4) require compliance with South Dakota alcoholic beverage licensing laws. These arguments by the Tribe have already been rejected in an administrative hearing, which the Tribe chose not to appeal to the South Dakota Circuit Court and instead chose to file this collateral action.

This Court should not exercise jurisdiction over this attempt to obtain federal court intervention in a state licensure and taxation matter despite the Tribe's access to an adequate state remedy. Even if that were not the case, the Tribe's claims fail as a matter of law. It is clearly established that "the doctrine of tribal sovereign immunity does not prevent a State from requiring Indian retailers doing business on tribal reservations to collect" valid state taxes from nonmembers. *Oklahoma Tax Com'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 513 (1991) (citing *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976) and *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 160 (1980)). This action should be dismissed.

FACTS AND PROCEDURAL HISTORY[2]

The Tribe is a federally recognized Indian Tribe. Doc. 32, ¶ 15. The Tribe's "home" is within Moody County, South Dakota and is commonly known

[2] The State's recitation of the relevant facts and history is taken from the facts asserted in the Complaint and other pleadings filed in this matter, given the standard of review for the Motion. The State's use or recitation of facts throughout this memorandum is not an admission or concession of any fact or argument.

as the Flandreau Indian Reservation. Doc. 32, ¶ 17. Within the reservation, the Tribe owns and operates the Royal River Casino, the Royal River Bowling Center, and the First American Mart (collectively, "the Tribe's Casino Complex"). Doc. 32, ¶¶ 23-26. The Tribe's Casino Complex has been divided into several departments, including: gaming, hotel, gift shops, restaurants, entertainment venues, bowling alley, and convenience store. Doc. 32, ¶¶ 28, 31, 35. "The Tribe operates the entire Casino Complex, including all of its departments, as a single gaming enterprise, with management overseen by the Tribe's elected governing body, the Flandreau Santee Sioux Executive Committee." Doc 32, ¶ 38. The total revenue from all departments is treated by the Tribe as the "'net revenues' of the gaming activities conducted by the Tribe." Doc. 32, ¶¶ 43-44. Of these net revenues, forty-five percent are distributed to tribal members. Doc. 32, ¶¶ 43-44.

The State and the Tribe have maintained a Tribal-State Gaming Compact governing the Tribe's gaming operations. Doc. 32, Ex. C. The Compact does not contain provisions addressing the State's authority to apply its alcoholic beverage laws to the Tribe's "gaming facility," the State's authority to impose the state use tax on nonmember purchases made at the Tribe's Casino Complex, or the Tribe's obligation to collect and remit use tax from nonmember patrons at the Casino Complex. Doc. 32, ¶¶ 75, 79, 81.

Approximately sixty percent "of the patrons at the Casino Complex" are residents of South Dakota. Doc 32, ¶ 49. The Tribe offers its patrons "goods and services" including "bowling, shows and other live entertainment, lodging,

food, beverages, package cigarettes, and other sundry items." Doc. 32, ¶ 48. The Tribe admits that nonmembers[3] purchased tangible personal property[4] and services sold at the Casino Complex. Doc. 32, ¶¶ 54-55. The Tribe admits it had "not remitted to the Department of Revenue use tax the State asserts has been incurred by nonmembers as a result of the Tribe's operation of the licensed premises." Doc. 32, ¶ 60. The Tribe also admits it was notified by the State that SDCL 35-2-24 requires the Tribe to collect and remit the use tax from nonmembers for the alcoholic beverage licenses to be reissued. Doc. 32, ¶ 55.

The State had issued to the Tribe three alcoholic beverage licenses: (1) License Number RL-5579 issued to the Tribe d/b/a Royal River Casino; (2) License Number RL-6191 issued to the Tribe d/b/a Royal River Family Entertainment Center; and (3) License Number PB-1462 issued to the Tribe d/b/a First American Mart. Doc. 32, ¶ 56. In December 2009 and later in 2010, the State received separate applications from the Tribe seeking reissuance of these alcoholic beverage licenses. Doc. 32, ¶¶ 59-60. The State denied the Tribe's applications for reissuance based on SDCL 35-2-24, which prohibits the State from reissuing an alcoholic beverage license to an Indian

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[3] The Tribe admits that the State has not attempted to impose the use tax on tribal members for purchases at the Casino Complex. Doc. 32, ¶¶ 54-55.

[4] Tangible personal property is defined as "personal property that can be seen, weighed, measured, felt, or touched, or that is in any other manner perceptible to the senses if furnished or delivered to consumers or users within this state. The term includes electricity, water, gas, steam, and prewritten computer software[.]" SDCL 10-46-1.

tribe until the Tribe remits the state use tax incurred by nonmembers at the licensed establishments. Doc. 32, ¶¶ 59-60.

Pursuant to SDCL 1-26-16, the Tribe requested a hearing before the South Dakota Office of Hearing Examiners on the State's denial to reissue the alcoholic beverage licenses.[5] Doc. 32, ¶¶ 61, 63. The Hearing Examiner concluded all nonmember purchases at the Casino Complex were subject to the use tax and because the Tribe failed to remit any use tax on those nonmember purchases, the Tribe was not entitled to reissuance of the alcoholic beverage licenses. Doc, 32, ¶ 63.

Before the Hearing Examiner's decision became final, the Tribe initiated this federal suit by filing its original complaint on November 18, 2014. The Tribe also moved for a preliminary injunction requesting this Court to enjoin any state action based on the Hearing Examiner's decision. Rather than litigating the preliminary injunction, the State and the Tribe entered into a stipulation in which the State agreed to recognize the three licenses as unexpired during this litigation. Doc. 26. Thereafter, the Tribe chose not to appeal the Hearing Examiner's decision in state court. Doc. 32, ¶ 64.

In this proceeding, the Tribe does not allege state law failed to provide an adequate remedy or venue regarding alcoholic beverage licensing. Rather, the Tribe argues the State does not have authority to tax nonmember's

[5] The Tribe applied for reissuance of the licenses each year since the State's initial denials. *See, Complaint 59-60.* The State continued to deny the Tribe's applications on the same basis as its initial denials. *See, Complaint 59-60.* Even though the State has denied reissuance of the licenses since 2010, the Tribe has continued operating under those licenses pursuant to SDCL 1-26-28, which permits a licensee to continue the activity until a final agency decision.

on-reservation use of tangible personal property and services purchased on a reservation from a tribal retailer.

First, the Tribe asserts that all commercial activity being conducted at the Casino Complex is "gaming activity," and based on that assertion, the Tribe alleges that: (1) imposition of the state use tax on nonmembers is preempted by the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 (IGRA), (First Claim for Relief); (2) any attempt to compel the Tribe to collect and remit the use tax on nonmembers violates IGRA (Second Claim for Relief); and (3) any attempt by the State to enforce its alcoholic beverage licensing laws regarding sales of alcoholic beverages made at the Casino Complex violates the Tribe's rights under IGRA to engage in gaming activities (Sixth Claim for Relief).

Then, the Tribe alleges that the State's interest in collecting the use tax on nonmembers is outweighed by Tribal and Federal interests prohibiting imposition of the state use tax (Third Claim for Relief). The Tribe further alleges that the State unlawfully discriminates by not providing a tax credit to nonmembers for the Tribal sales and use tax remitted to the Tribe by nonmembers for on-reservation purchases (Fourth Claim for Relief). Additionally, the Tribe alleges that the State imposes too heavy a burden by requiring the Tribe to determine which on-reservation transactions with nonmembers will result in off-reservation use or consumption of the goods or services (Fifth Claim for Relief). The Tribe next requests that this Court release to the Tribe funds deposited into an escrow account pursuant to the Deposit

Agreement entered into between the Tribe and the State in 1994[6] (Seventh Claim for Relief). Finally, the Tribe challenges the State's authority to condition its alcoholic beverage licensing on remittance of the state use tax (Eighth Claim for Relief).

ARGUMENT

I. Jurisdiction.

The State first moves this Court to refrain from exercising its jurisdiction over this matter. Whether a court decides to exercise its jurisdiction over a case must be addressed before proceeding to address the merits because "[w]ithout jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998)(quotation marks omitted). Here, res judicata and *Younger* abstention support a decision by this Court to not exercise jurisdiction over the Tribe's claims.

a. Res judicata.

Res judicata or claim preclusion "bars relitigation of the same claim between parties or their privies where a final judgment has been rendered upon the merits by a court of competent jurisdiction." *Plough v. West Des Moines Community Sch. Dist.*, 70 F.3d 512, 517 (8th Cir. 1995) (quoting *Smith v.*

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[6] This Agreement was entered in connection with the first attempt to litigate this issue in Federal Court.

Updegraff, 744 F.2d 1354, 1362 (8th Cir. 1984)). Res judicata applies when the party against whom it is to be used "had a full and fair opportunity to investigate and litigate the matter concluded." *Id.* Federal courts are required "to give preclusive effect to state-court judgments whenever the courts of the State from which the judgments emerged would do so." *Allen v. McCurry*, 449 U.S. 90, 96, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980). *See also* 28 U.S.C. § 1738.

Here, the claims raised in the case *sub judice* were raised in an administrative proceeding. The administrative decision became a final and binding decision when the Tribe failed to seek further appellate review as provided by statute. *See Beals v. Wagner*, 2004 S.D. 115, ¶ 6, 668 N.W.2d 415, 417-18. Under South Dakota law, the doctrine of res judicata applies to final administrative decisions. *See Schmidt v. Zellmer*, 298 N.W.2d 178, 180 (S.D. 1980). *See also Peery v. Brakke*, 826 F.2d 740, 744 n.4 (8th Cir. 1987).

Therefore, this Court must determine if the requirements of South Dakota law have been met in order to apply the doctrine of res judicata. *See General Drivers and Helpers Union v. Wilson Trailer Co.*, 827 F. Supp. 2d 1048, 1051 (D.S.D. 2011); *Onnen v. Sioux Falls Independent School District #49-5*, 2011 WL 691620 (D.S.D. 2011). Under South Dakota law, res judicata is applicable when there is "'(1) a final judgment on the merits in an earlier action; (2) the question decided in the former action is the same as the one decided in the present action; (3) the parties are the same; and (4) there was a full and fair opportunity to litigate the issues in the prior proceeding.'" *Farmer*

v. South Dakota Dept. of Revenue and Regulation, 781 N.W.2d 655, 659 (S.D. 2010) (citations omitted).

The first issue is whether there is a final judgment on the merits. When the Tribe chose not to appeal the Hearing Examiner's decision, the order of the Hearing Examiner became final. *Beals*, 2004 S.D. 115, ¶ 6, 668 N.W.2d at 417-18. As previously noted, res judicata is applicable to final administrative decisions under South Dakota law. *See Schmidt*, 298 N.W.2d at 180.

The next factor for consideration is whether the two actions are the same, which has been further articulated in South Dakota as follows:

> In order for res judicata to apply, the cause of action in the prior litigation must be the same as the cause of action in the subsequent litigation. This Court adopted the broad test in *Hanson v. Hunt Oil Co.*, for determining if both causes of action are the same. A cause of action is comprised of the facts that gave rise to, or established, the right the party seeks to enforce. If the wrong sought to be redressed is the same in both actions, then res judicata applies.

Dakota Plains AG Ctr., LLC v. Smithey, 2009 S.D. 78, ¶ 20, 772 N.W.2d 170, 179-80 (internal citations omitted).

Here, the "wrongs sought to be redressed" are the same. In the administrative action, the Tribe sought to overrule the Department's decision to deny reissuance of the three alcoholic beverage licenses to the Tribe. Before the Hearing Examiner, the Tribe argued that no use tax was owed and therefore to deny reissuance of the alcoholic beverage licenses pursuant to SDCL 35-2-24 was improper. The Hearing Examiner's Order (Doc. 32-2) states: "The Tribe argues that the State's position regarding SDCL § 35-2-24 is

incorrect and that the state's actions are not allowed pursuant to the Indian Gaming Regulatory Act (IGRA) and the Tribal-State compact entered into pursuant to IGRA." Doc. 32-2 at 15-16. The Tribe also argued that no use tax was lawfully imposed: "The Tribe contends that there has been no tax incurred, that there is nothing for the Tribe to remit and therefore, no basis upon which the Department can decline to renew a license based on SDCL 35-2-24." Doc. 32-2 at 16.

In this federal action, the Tribe's Complaint also questions the denial of the alcoholic beverage licenses' reissuance, as evidenced by the Tribe's Motion for Preliminary Injunction that focused on the Tribe's ability to acquire and sell alcoholic beverages at its Casino Complex. Like the state action, the Tribe primarily focuses on IGRA and that all commercial activity at the Casino Complex, including all purchases made by nonmembers, is "gaming activity." Also, as in the administrative action, the Tribe alleges that no use tax is incurred by nonmembers, rendering the State's decision to deny reissuance of the alcoholic beverage licenses inappropriate. As this litigation raises the same claims decided by the Hearing Examiner, the second factor is met.

Additionally, the parties to this action and the action before the Hearing Examiner are the same: the State and the Tribe. And finally, as noted by the Hearing Examiner, the Tribe had a full and fair opportunity to litigate its claims before that tribunal. "Opportunity shall be afforded all parties to respond and present evidence on issues of fact and argument on issues of law or policy."

Doc. 32-2 (quoting SDCL 1-26-18). Thus, each of the four requirements for the application of res judicata is satisfied.

As res judicata applies, the Hearing Examiner's final decision should be afforded preclusive effect. The Hearing Examiner's determinations that the nonmember purchases at the Casino Complex are not "gaming activity," that state use tax was incurred in connection with those transactions, and that the State properly denied reissuance of the alcoholic beverage licenses should not be re-litigated here.

As in *Krull v. Jones,* after choosing to pursue an administrative claim challenging the applicability of the state use tax, the Tribe's remedy for an adverse decision was to appeal to South Dakota circuit court. 46 F. Supp. 2d 997, 1000 (D.S.D. 1999).

> However, once he instituted a state administrative claim, lost and did not appeal[,] the final judgment is entitled to preclusive effect. Plaintiff's remedy for what he deems an "inadequate" administrative process was to appeal the hearing examiner's decision to the South Dakota Circuit Courts. His failure to do so resulted in the agency's ruling becoming a final order entitled to preclusive effect.

Krull, 46 F. Supp. 2d at 1004. The Tribe's failure to appeal the Hearing Examiner's final decision resulted in that decision becoming a final order that is entitled to preclusive effect.

b. *Younger* abstention.

The Court should also decline jurisdiction under the *Younger* abstention doctrine. The Tribe commenced a state proceeding when it requested an administrative hearing pursuant to SDCL 1-26 regarding the Department of

Revenue's decision not to reissue the alcoholic beverage licenses. Doc 32, ¶ 61. The proceedings before the Hearing Examiner that resulted in the Hearing Examiner's decision were a step in the enforcement of South Dakota's alcoholic beverage licensing laws. At the time the Tribe filed the original complaint (Doc. 1) initiating this action, the Hearing Examiner's decision had not been appealed and the Tribe's time to appeal that decision to South Dakota Circuit Court had not yet expired. Doc. 10.

In *Younger v. Harris*, the Supreme Court held that federal courts should not typically enjoin pending state criminal actions. 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971). The Supreme Court has since applied that doctrine outside of the criminal context.

> We have since recognized that our concern for comity and federalism is equally applicable to certain other pending state proceedings. We have applied the *Younger* principle to civil proceedings in which important state interests are involved. We have also applied it to state administrative proceedings in which important state interests are vindicated, so long as in the course of those proceedings the federal plaintiff would have a full and fair opportunity to litigate his constitutional claim.

Ohio Civil Rights Com'n v. Dayton Christian Schools, Inc., 477 U.S. 619, 627 (1986) (internal citations omitted). One category of civil proceedings to which *Younger* abstention applies is "civil enforcement proceedings" when the "state proceedings are 'akin to criminal prosecutions' in 'important respects.'" *Sprint Communications, Inc., v. Jacobs*, 134 S.Ct. 584, 592 (2013)(quoting *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 604 (1975)). "Such enforcement actions are

characteristically initiated to sanction the federal plaintiff, i.e., the party challenging the state action, for some wrongful act." *Id.*

Here, the present proceedings involve the State seeking to sanction the Tribe by not reissuing the alcoholic beverage licenses due to the Tribe's failure to remit use tax as required by state law. The relevant determination before the Hearing Examiner was whether the Tribe violated the State's alcoholic beverage licensing laws by failing to remit the appropriate use tax. The Hearing Examiner determined that the Tribe did not comply with the State's alcoholic beverage licensing statutes and denying reissuance of the alcoholic beverage licenses was required under law. Because the state proceeding was akin to a criminal prosecution in important respects, *Younger* abstention applies. *See e.g., Huffman*, 420 U.S. at 604.

In the Complaint, the Tribe admits that it did not timely appeal the Hearing Examiner's decision. Doc 32, ¶ 64 ("The Tribe did not pursue State judicial review."). But the Tribe's decision not to appeal does not prevent application of *Younger*. The Supreme Court addressed this issue in *Huffman*, where the state court's judgment became final, "in the sense of being nonappealable," after the federal plaintiff filed in district court. 420 U.S. 592, 608. The Supreme Court concluded: "[W]e believe that a necessary concomitant of *Younger* is that a party in appellee's posture must exhaust his state appellate remedies before seeking relief in the District Court, unless he can bring himself within one of the exceptions specified in *Younger*." *Id.* And, "[i]n short, we do not believe that a State's judicial system would be fairly

accorded the opportunity to resolve federal issues arising in its courts if a federal district court were permitted to substitute itself for the State's appellate courts. We therefore hold that *Younger* standards must be met to justify federal intervention in a state judicial proceeding as to which a losing litigant has not exhausted his state appellate remedies." *Id.* at 609. The Court concluded this discussion holding: "[t]he District Court should not have entertained this action, seeking pre-appeal interference with a state judicial proceeding, unless appellee established that early intervention was justified under one of the exceptions recognized in *Younger*."[7] *Id.* at 611.

Further, *Younger* application isn't barred merely because the state action commenced as an administrative proceeding. While the Supreme Court has not explicitly ruled on this issue, it has on more than one occasion "assum[ed] without deciding, . . . that an administrative adjudication and the subsequent state court's review of it count as a 'unitary process' for *Younger* purposes." *Sprint*, 134 S.Ct. at 592. A case mentioned by the *Sprint* Court provided additional discussion on this topic.

> For *Younger* purposes, the State's trial-and-appeals process is treated as a unitary system, and for a federal court to disrupt its integrity by intervening in mid-process would demonstrate a lack of respect for the State as sovereign. For the same reason, a party

[7] The *Younger* exceptions were also discussed in *Huffman*. "*Younger* and its civil counterpart which we apply today, do of course allow intervention in those cases where the District Court properly finds that the state proceeding is motivated by a desire to harass or is conducted in bad faith, or where the challenged statute is 'flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whether manner and against whomever an effort might be made to apply it." *Huffman*, 420 U.S. at 611. Those exceptions do not apply here.

> may not procure federal intervention by terminating the state judicial process prematurely – forgoing the state appeal to attack the trial court's judgment in federal court. "A necessary concomitant of *Younger* is that a party [wishing to contest in federal court the judgment of a state judicial tribunal] must exhaust his state appellate remedies before seeking relief in the District Court." *Huffman v. Pursue, Ltd.*, supra, 420 U.S., at 608, 95 S.Ct., at 1210. Respondents urge that these principles apply equally where the initial adjudicatory tribunal is an agency – i.e., that the litigation, from agency through courts, is to be viewed as a unitary process that should not be disrupted, so that federal intervention is no more permitted at the conclusion of the administrative stage than during it. . . . We will assume, without deciding, that this is correct.

New Orleans Public Service, Inc. v. City of New Orleans, 491 U.S. 350, 369 (1989). As pointed out by the *New Orleans Public Service* opinion, the Supreme Court's precedent suggests that "an administrative proceeding to which *Younger* applies cannot be challenged in federal court even after the administrative action has become final." *Id.* at n.4. The assumption of the Supreme Court, suggested by its own precedent and based on the same legal principle articulated in *Younger*, is appropriate. The Tribe's appeal of the Hearing Examiner's decision to the South Dakota Circuit Court was part of a unitary process that should be protected from federal disruption by *Younger* abstention.

At the time the original Complaint was filed, state appellate remedies were available to the Tribe. Pursuant to those Supreme Court decisions applying *Younger* in similar cases, the Tribe was obligated to exhaust those remedies rather than bringing this action in district court. Application of

Younger mandates that this lawsuit, clearly a collateral attack of an unexhausted state action, be dismissed.

II. Judgment on the Pleadings.

Even if the Court chooses to exercise its jurisdiction over this case, the State should be granted judgment on the pleadings. Judgment on the pleadings is appropriate "where no material issue of fact remains to be resolved and the movant is entitled to judgment as a matter of law." *Clemons v. Crawford*, 585 F.3d 1119, 1124 (8th Cir. 2009)(citation omitted). As a general rule, a Rule 12(c) motion for judgment on the pleadings is reviewed under the same standard as a 12(b)(6) motion to dismiss. *Id.*

This standard was announced in *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007); and further clarified in *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009).

> To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim for relief that is plausible on its face." A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'"

Iqbal, 129 S.Ct. at 1949, (quoting *Twombly*, 550 U.S. at 570, 556 and 557).

The Eighth Circuit Court of Appeals has stated complaints

> should be read as a whole, not parsed piece by piece to determine whether each allegation, in isolation, is plausible. *See Vila v. Inter-Am. Inv. Corp.*, 570 F.3d 274, 285 (D.C.Cir.2009) (factual

> allegations should be "viewed in their totality"); *cf. Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322–23, 127 S.Ct. 2499, 168 L.Ed.2d 179 (2007) ("The inquiry [under the Private Securities Litigation Reform Act] is whether *all* of the facts alleged, taken collectively, give rise to a strong inference of scienter, not whether any individual allegation, scrutinized in isolation, meets that standard.").

Braden v. Wal-Mart Stores, Inc., 588 F.3d 585, 594 (8th Cir. 2009).

Although a court must generally take factual allegations as true, legal conclusions and indeterminate factual allegations cannot be used to survive a motion to dismiss. *Id.* The Eighth Circuit added that while generally a court may only consider the facts asserted in the pleadings,

> it may [also] consider "some materials that are part of the public record or do not contradict the complaint," *Missouri ex rel. Nixon v. Coeur D'Alene Tribe,* 164 F.3d 1102, 1107 (8th Cir.), *cert. denied,* 527 U.S. 1039, 119 S.Ct. 2400, 144 L.Ed.2d 799 (1999), as well as materials that are "necessarily embraced by the pleadings." *Piper Jaffray Cos. v. National Union Fire Ins. Co.*, 967 F.Supp. 1148, 1152 (D.Minn.1997). *See also* 5A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure: Civil 2d* § 1357, at 299 (1990) (court may consider "matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint").

Porous Media Corp. v. Pall Corp., 186 F.3d 1077, 1079 (8th Cir. 1999).

The State is entitled to judgment on the pleadings because, when assuming the allegations in the Complaint as true, the Tribe's claims are not supported by settled law and do not establish a "plausible claim" for which relief can be granted.

a. Indian Gaming Regulatory Act.

In the Tribe's first, second, and sixth claims for relief, the Tribe contends that IGRA preempts the State's actions. The Tribe's requests for relief are

based on its theory that the "taxed activity" and "licensed activity" are "gaming activities" and therefore preempted by IGRA. However, IGRA is inapplicable and does not preempt the state regulation of alcohol beverage licensing, the imposition of the use tax on nonmembers for on-reservation purchases of tangible personal property and services used on the reservation, or the requirement that the Tribe collect and remit the use tax.

In this case, IGRA is inapplicable. To determine whether a federal law applies,

> [C]ourts must look primarily to statutory language [. . .] in determining the meaning and scope of a statute. [citations omitted] When a statute's text is encompassing, clear on its face, and productive of a plausible result, it is unnecessary to search for a different, contradictory meaning in the legislative record.

State of Rhode Island v. Narragansett Indian Tribe, 19 F.3d 685, 697-698. Courts must use the "plain meaning" of the statute. *Barona Group of Capitan Grande Band of Mission Indians v. American Management & Amusement, Inc.*, 840 F.3d 1394, 1404 (1987).

First, the Complaint couches every economic activity that occurs at or within "the Tribe's Casino Complex" as a gaming activity subject to IGRA. However, the challenged taxed activity (i.e. the imposition of use tax on nonmember purchases and required collection of that use tax) and the state alcoholic beverage licensing laws are not actions against, or impositions of tax on, any "gaming activity," revenue, or profits as defined by IGRA. Congress did not intend for IGRA to apply to *all* of a Tribe's economic endeavors, rather it

was specifically limited to "gaming activity". As the State's activities do not involve "gaming activities," they fall outside IGRA's scope.

IGRA's stated purpose is to provide a statutory scheme for "the operation of gaming by Indian tribes" and "for the regulation of gaming by Indian tribes". 25 U.S.C. 2702. IGRA provides definitions for three classes of "gaming", delineating which "gaming activity" it intends to regulate. 25 U.S.C. 2703(6) – 2703(8). IGRA's congressional findings and declarations of purpose do not touch on alcohol regulation, taxation of tangible personal property and services purchased by nonmembers on the reservation, or the collection and remittance of use tax by a tribe. *See* 25 U.S.C. 2701-2702. In fact, the terms "liquor" and "alcohol" do not make a single appearance in any of IGRA's provisions. *See* 25 U.S.C. 2701-2721.

Regardless, "regulation of gaming" cannot reasonably or plausibly be construed to involve the regulation of alcoholic beverages, the taxation of tangible personal property and services, or the collection and remittance of the tax by a tribe. The Tribe attempts to stretch the definition of "gaming activities," as comprehended by IGRA, to include selling alcoholic beverages, personal property and services at all three licensed establishments. The Tribe asserts that the three licensed establishments are all "part of the Tribe's Casino Complex." Based on that assertion, the Tribe contends that all those establishments' operations (hotel, bowling alley, restaurants, gift shop, convenience store) are a "single enterprise" under the heading of "casino" and subject to IGRA. This is unpersuasive and an implausible reading of IGRA's

clearly defined provisions. Regardless of how the Tribe "departmentalizes" its endeavors, IGRA specifically limited its regulations and application to "gaming activities."

Had Congress intended such a sweeping and broad interpretation, it would not have limited its purpose to the regulation and operation "of gaming" and then provided definitions of the type of "gaming" involved. 25 U.S.C. 2702. The application of a federal statute is not determined by a tribe's business decision regarding how it structures its business entities. Not only is such a result strained and implausible, but it contradicts the stated purpose of IGRA.

The United States Supreme Court recently emphasized in *Michigan v. Bay Mills Indian Community*, that "gaming activities" are **limited to the playing of the actual games**:

> numerous provisions of IGRA show that "class III gaming activity" means just what it sounds like—the stuff involved in playing class III games. For example, § 2710(d)(3)(C)(i) refers to "the licensing and regulation of [a class III gaming] activity" and § 2710(d)(9) concerns the "operation of a class III gaming activity." Those phrases make perfect sense if "class III gaming activity" is what goes on in a casino—each roll of the dice and spin of the wheel. ... The same holds true throughout the statute. Section 2717(a)(1) specifies fees to be paid by "each gaming operation that conducts class II or class III "gaming activity"—signifying that the gaming activity is the gambling in the poker hall, not the proceedings of the off-site administrative authority. And §§ 2706(a)(5) and 2713(b)(1) together describe a federal agency's power to "clos[e] a gaming activity" for "substantial violation[s]" of law—e.g., to shut down crooked blackjack tables, not the tribal regulatory body meant to oversee them.

572 U.S. at ___, 134 S.Ct. at 2032-33 (brackets original). Under *Bay Mills'* definition, the sales of alcoholic beverages and other tangible personal property and services at the three licensed establishments do not qualify as "gaming

activities." The Tribe's assertions that the Casino Complex contains a number of departments and that all the activities and operations of those departments qualify as "gaming activity" are without merit. IGRA does not apply to the State's actions as alleged by the Tribe in the Complaint.

Not only has the United States Supreme Court interpreted IGRA's "gaming activities" to be limited to the actual playing of games, but the Secretary of the United States Department of the Interior, Kevin K. Washburn, also spoke to a similar assertion in a decision issued January 9, 2015 (Washburn Decision). Ex. A. Secretary Washburn found the 2014 Amendments to the Forest County Potawatomi Community of Wisconsin and the State of Wisconsin's Class III Gaming Compact violated IGRA, stating:

> The calculation of the Mitigation Payment is based in part on revenue from Class II gaming, food and beverage, hotel and entertainment activity, **none of which are directly related[8] to Potawatomi's Class III gaming activity**. ... As tribal gaming has matured, many tribes—including the Potawatomi have developed businesses or amenities that are ancillary to their gaming activities, such as hotels, conference centers, restaurants, spa, golf courses, recreational vehicle parks, water parks, and marinas. These businesses are often located near or adjacent to tribal gaming facilities. **It does not necessarily follow, however, that such ancillary businesses are "directly related to the operation of gaming activities," and therefore subject to regulation or inclusion under a tribal-state compact**.

Washburn Decision; Ex A, p. 6, n.32 (emphasis added). Secretary Washburn further added that "class II gaming, food and beverage, hotel, and

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8 IGRA does provide that tribal-state compacts "may include provisions ... related to or directly related to gaming activities." 25 U.S.C. 2710(d)(3)(c). Not only is this provision irrelevant, but its language is permissive rather than mandatory.

entertainment activities" "fall outside the permissible subjects of negotiation under IGRA." Washburn Decision; Ex. A, p. 8. Thus, in reviewing the plain language of IGRA and the Supreme Court's and Secretary Washburn's interpretation of IGRA, the state's alcoholic beverage licensing and taxing of nonmembers' purchases of tangible personal property and services are not encompassed within IGRA's statutory scheme.

Not only does IGRA not apply to the Tribe's assertions, but in order for a federal law to preempt state jurisdiction over nonmembers' activities in Indian country, the state jurisdiction must interfere with or be "incompatible with federal and tribal interests reflected in federal law, . . . it is enough that the state law conflicts with the purpose or operation of a federal statute." *Cabazon Band of Mission Indians*, 37 F.3d 430, 433 (9th Cir. 1994)(citations omitted). Courts are reluctant to find a statute to have "extraordinarily pre-emptive power" or be completely preemptive. *Gaming Corp. of America v. Dorsey & Whitney*, 88 F.3d 536, 543 (8th 1996)(citing *Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58, 65 (1987). Here, there is no conflict between IGRA and the State's taxation of nonmembers' purchases of tangible personal property and services, the requirement to collect and remit the use tax, and the alcoholic beverage licensing laws. The requirements do not interfere with the Tribe's "gaming operations."

In *Mashantucket Pequot Tribe v. Town of Ledyard*, the Second Circuit Court of Appeals determined that IGRA did not "expressly or by plain implication" preempt a Connecticut State tax imposed on lessors of slot

machines used by a tribe at the tribe's casino as the tax did "not affect the Tribe's 'governance of gaming' on its reservation." 722 F.3d 457, 469 (2nd Cir. 2013) (citing *Barona Band of Mission Indians v. Yee,* 528 F.3d 1184, 1192 (9th Cir. 2008).

> "[n]ot every contract that is merely peripherally associated with tribal gaming is subject to IGRA's constraints." *Casino Res. Corp. v. Harrah's Entm't, Inc.,* 243 F.3d 435, 439 (8th Cir.2001). In determining whether a state tax imposed on a third party is preempted by IGRA's occupation of the "governance of gaming" field, courts have been quick to dismiss challenges to generally-applicable laws with *de minimis* effects on a tribe's ability to regulate its gambling operations. For example, courts have held that IGRA's preemptive scope is not implicated in cases involving gaming management and service contracts with a tribe, *id.* at 438-39; contracts to acquire materials to build a casino, *Barona Band,* 528 F.3d at 1192; and release of detailed investigative reports on the management of gaming, *Siletz,* 143 F.3d at 487. Similarly, we conclude that any preemption of the "field" of gaming regulations is not at issue here, where the state tax on property is not targeted at gaming. [...] But under IGRA, *mere ownership* of slot machines by the vendors does not qualify as gaming, and taxing such ownership therefore does not interfere with the "governance of gaming."

Mashantucket at 469-70 (emphasis original). The Second Circuit ruled IGRA did not "directly preempt, by its text or by plain implication, the imposition of Connecticut's generally-applicable personal property tax." *Id.* at 471. If IGRA does not explicitly forbid a state from applying its personal property tax to a tribe's vendors who own the gaming machines, as in *Mashantucket,* then it does not forbid a state from imposing use tax on nonmember activities not related to any IGRA gaming activity, as here. The *Bay Mills* decision and Secretary Washburn's interpretation of IGRA, discussed above, are in line with *Mashantucket's* finding that IGRA does not directly preempt by its text or

implication a state's generally-applicable use tax on nonmember nongaming activities at a facility that provides gaming.

Contrary to the strained assertions of the Tribe, the state use tax and laws requiring tribes to collect and remit the use tax from nonmembers do not conflict with the Tribe's ability to regulate gaming activities. The use tax has no bearing on the Tribe's "gaming operations". The allegations of the Tribe have nothing to do with gaming as defined by IGRA. While the taxable actions and the sale of alcoholic beverages (which requires the Tribe to have an alcoholic beverage license) may occur at or near a casino where gaming activity occurs, it does not make the questioned actions gaming. The alcoholic beverage licensing laws, imposition of use tax on tangible personal property and services, and required collection and remittance of use tax to the State do not involve "a roll of the dice," "a spin of the wheel," or a "crooked black jack table." *Bay Mills.*

Ultimately, the State's actions (as alleged by the Tribe) in no way regulate gaming, nor can the State's action be interpreted as a concealed attempt to regulate tribal gaming. The state alcoholic beverage licensing laws and the use tax laws can coexist, are reconcilable, and do not conflict "with the purpose or operation" of IGRA. *Cabazon Band*, 37 F.3d at 433. IGRA does not preempt the State's ability to regulate its alcoholic beverage licenses, imposition of the use tax on nonmembers for their activities, nor the requirement that the Tribe collect and remit the use tax to the State. As it is clear IGRA does not apply to

the facts asserted by the Tribe, this Court should enter judgment in the State's favor on the Tribe's First, Second and Sixth Claims for Relief.

In addition, as the Complaint is replete with references to IGRA and "gaming activities" and as IGRA is not preemptive and not applicable to the Tribe's claims, no claims remain for which relief can be granted and the Complaint as a whole should be dismissed. The Tribe has crafted all the facts and allegations contained in the Complaint to create the illusion that all of its economic endeavors are "gaming" and therefore within the web of IGRA. Given IGRA does not apply and that gaming (and therefore IGRA) references seep into each of the Tribe's claims for relief, IGRA it is not logically separable from the other claims and the entire Complaint should be dismissed. *See United States v. O'Neil*, 709 F.2d 361 (5th Cir. 1983) (examining the characterization and consequences of a Rule 21 severance of actions).

b. *Mescalero.*

In its Fourth Claim for Relief, the Tribe alleges that "The State's Attempt to Impose Use Tax on the Use or Consumption of Goods and Services Purchased from the Tribe on the Tribe's Reservation, Constitutes Unlawful Discrimination Against the Tribe as a Similarly Situated Sovereign." The Complaint clarifies that the Tribe raises a preemption issue under *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973). The United States Supreme Court stated: "[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State." *Id.* at 148-149.

Decisions analyzing this *Mescalero* language have determined the preemption analysis turns on whether the regulated activity occurred within Indian Country. In *Wagnon v. Prairie Band of Potawatomi Nation*, the Court noted that the *Mescalero* test applies "when a State asserts its taxing authority outside of Indian Country." 546 U.S. 95, 112 (2005). The Ninth Circuit determined that "because the regulated activity [was] the tribal police officers' display of emergency light bars when traveling on public roads, we conclude that the appropriate test is that for **off-reservation activities** as set forth in *Mescalero*." *Cabazon Band of Mission Indians v. Smith*, 388 F.3d 691, 698 (9th Cir. 2004)(emphasis added).

Pursuant to this authority, the *Mescalero* test does not apply when the regulated conduct occurs **on the reservation**. Here, there is no question that the regulated activity occurs on the reservation. In fact, the Tribe alleged in the Complaint "under federal law, the State of South Dakota does not have authority to impose its use tax on the use, storage or consumption, by nonmembers of the Tribe, **on the Tribe's reservation**, of goods and services purchased by nonmembers from the Tribe at the Tribe's gaming facility[.]" Complaint, Doc 32, ¶ 1 (emphasis added). Accordingly, the validity of any use tax incurred off the reservation is not subject to this declaratory judgment action. *See infra*, Doc 32, ¶¶ 126-128. Pursuant to *Mescalero*, *Wagnon*, and *Cabazon*, the *Mescalero* test does not apply because the Tribe challenges taxation of the use and consumption of goods and services that occurs on the reservation, rather than off-reservation. The Tribe's Fourth Claim for Relief

alleges recovery based on a legal theory that does not apply to the facts alleged in the Tribe's Complaint, therefore that claim for relief should be dismissed.

c. Ripeness.

The State is entitled to a judgment on the pleadings for the Tribe's Fifth Claim for Relief. The Tribe claims that requiring it to determine which of its sales transactions will result in the purchaser's off-reservation use or consumption of goods and services imposes too heavy a burden on the Tribe. The Tribe alleges that requiring such a determination and requiring the collection and remittance of the use tax associated with such transactions violates federal law.

While the Tribe's general assertion is contrary to the settled federal law set forth below, an important distinction needs to be made at the outset. By this claim, the Tribe challenges the State's ability to require it to collect and remit use tax on nonmembers' **off-reservation use** of tangible personal property and services purchased on the reservation.[9] It appears the Tribe presumes that the use tax imposed on nonmembers' **on-reservation use** of tangible personal property and services is unlawful even though this issue has not been decided.

In this claim, the Tribe focuses its argument on the burden imposed in collecting and remitting the use tax on nonmembers' off-reservation use of tangible personal property and services. This claim is not ripe. "The

[9] The Tribe does not challenge the validity of the use tax imposed on nonmembers' off-reservation use of tangible personal property and services. Doc. 32, ¶ 127.

touchstone of a ripeness inquiry is whether the harm asserted has matured enough to warrant judicial intervention. A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Parrish v. Dayton*, 761 F.3d 873, 875-76 (8th Cir. 2014)(internal citations and quotation marks omitted). The Tribe's claim rests entirely on a contingent future event that may not occur as the Tribe anticipates, if at all.

In order for the burden challenged by the Tribe to be identified, this Court must first determine that the state use tax on nonmembers' on-reservation use of tangible personal property and services purchased on-reservation at the Casino Complex is unlawful. However, if this Court upholds the state use tax in those situations, all purchases[10] by nonmembers would be subject to the valid imposition of the use tax regardless of whether the use occurred on or off-reservation. The equation would be simple, if the purchaser is not a member of the Tribe, the state use tax is validly imposed and therefore must be collected and remitted. Collection and remittance in this manner certainly is not overly burdensome, as the Tribe has done this in the past. *See* Doc. 32-1.

If a decision in favor of the Tribe becomes final, the state use tax would presumably be validly imposed only on those on-reservation transactions

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[10] When tangible personal property is delivered in South Dakota or when services are purchased in South Dakota, there is prima facie evidence that the property and services will be used in South Dakota and are subject to the use tax. SDCL 10-46-18, -18.1.

resulting in off-reservation use of tangible personal property and services. The State would then need to determine an appropriate mechanism to collect the concededly lawful tax. Only then would there be identifiable burdens placed on the tribal retailer that could be challenged.

Should there one day be a tax collection mechanism to consider, the Tribe will bear the burden of establishing that the collection mechanism is overly burdensome. "Contrary to the District Court, we find the State's recordkeeping requirements valid *in toto*. The Tribes, and not the State as the District Court supposed, bear the burden of showing that the recordkeeping requirements which they are challenging are invalid." *Colville*, 447 U.S. at 160 (1980).

The Tribe cannot take the position that every obligation to collect and remit a concededly lawful tax would be overly burdensome. The Supreme Court's previous decisions are to the contrary. "The State's requirement that the Indian tribal seller collect a tax validly imposed on non-Indians is a minimal burden designed to avoid the likelihood that in its absence non-Indians purchasing from the tribal seller will avoid payment of a concededly lawful tax." *Moe*, 425 U.S. at 483.

In *Colville*, the Supreme Court upheld a process that placed several requirements on the tribal retailer.

> The state sales tax scheme requires smokeshop operators to keep detailed records of both taxable and nontaxable transactions. The operator must record the number and dollar volume of taxable sales to nonmembers of the Tribe. With respect to nontaxable sales, the operator must record and retain for state inspection the

> names of all Indian purchasers, their tribal affiliations, the Indian reservations within which sales are made, and the dollar amount and dates of sales. In addition, unless the Indian purchaser is personally known to the operator he must present a tribal identification card.

Colville, 447 U.S. at 159. But here, the quality of the burden cannot be established because there are currently no identifiable burdens. The issue of whether any currently unknown obligations are overly burdensome should be addressed if and when it arises. See *Dep't of Taxation & Fin. of New York v. Milhelm Attea & Bros. Inc.*, 512 U.S. 61, 76, 114 S.Ct. 2028, 2037, 129 L. Ed. 2d 52 (1994). Currently, there are no burdens associated with the tribal collection and remittance of the off-reservation use of tangible personal property and services purchased on reservation by nonmembers for this Court to analyze. And the burdens may never come at all. Therefore, the Tribe's Fifth Claim for Relief rests entirely on a hypothetical and speculative disagreement and should be dismissed. *See, e.g., Parrish*, 761 F.3d at 875-76.

d. The Tribe Consented to the State's Licensing Authority.

In its Eighth Claim for Relief, the Tribe alleges that the State has exceeded its authority by conditioning the reissuance of an alcohol beverage license on the remittance of the use tax. Unlike the Tribe's other claims for relief, the Tribe does not challenge imposition of the state use tax. In analyzing this claim, it is important to note that the Tribe consented to application of South Dakota's alcoholic beverage licensing laws, which include SDCL

35-2-24[11], by requesting issuance and reissuance of the three alcoholic beverage licenses. SDCL 35-2-24 requires all alcoholic beverage licensees to remit all applicable taxes before an alcoholic beverage license will be reissued. As this claim does not challenge the validity of the tax, it is presumed valid and the relevant inquiry is whether SDCL 35-2-24 can be applied to the Tribe.

In this case, the Tribe admits it did not remit use tax allegedly incurred by nonmembers as a result of the operations of the three licensed establishments. Therefore, under SDCL 35-2-24, the State was required to deny reissuance of the alcoholic beverage licenses in this matter, a decision affirmed by the Hearing Examiner. SDCL chapter 35-2 sets forth alcoholic beverage licensing policies and procedures. In order to sell alcoholic beverages for consumption, a business must comply with the State's policies and procedures in that chapter. SDCL 35-1-5. The Tribe, by obtaining alcoholic beverage licenses from the State, chose to avail itself of the State's policies and

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[11] SDCL 35-2-24 provides:

> No license granted under this title may be reissued until all taxes incurred by the licensee as a result of the operation of the licensed premises, including municipal and state sales and use taxes, unemployment insurance tax, or any other state tax, are paid or are not delinquent. No license granted under this title may be reissued until all property taxes which are the liability of the licensee levied on the licensed premises are paid or are not delinquent. No license granted under this title may be reissued to an Indian tribe operating in Indian country controlled by the Indian tribe or to an enrolled tribal member operating in Indian country controlled by the enrolled tribal member's tribe until the Indian tribe or enrolled tribal member remits to the Department of Revenue all use tax incurred by nonmembers as a result of the operation of the licensed premises, and any other state tax has been remitted or is not delinquent.

procedures in SDCL chapter 35-2 in order to be issued alcoholic beverage licenses.

In order to sell alcohol in Indian Country, Congress requires the Tribe to comply with the state laws and regulations regarding alcohol transactions through 18 U.S.C. 1161, which provides:

> any act or transaction [regarding the use and distribution of alcohol is not prohibited by federal law] within any area of Indian country provided such act or transaction is in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the [governing] tribe[.]

The United States Supreme Court determined that this language "leads us to conclude that Congress authorized, rather than pre-empted, state regulation over Indian liquor transactions." *Rice v. Rehner*, 463 U.S. 713, 726 (1983). After first recognizing that historically and traditionally, tribes did not have sovereign immunity or inherent authority when it came to liquor regulation, the Supreme Court confirmed that by enacting section 1161, Congress delegated the authority to regulate alcoholic beverages within Indian country to the states. *Id.* at 722-725, 726-729. The Supreme Court recognized that states have "an unquestionable interest in the liquor traffic that occurs within its borders, and this interest is independent of the authority conferred on the States by the Twenty-First Amendment." *Id.* at 724. The Supreme Court found Congress's intent in passing 18 U.S.C. 1161 was to legalize liquor transactions in Indian country "as long as those transactions conformed both with tribal ordinance and state law." *Id.* at 728. Therefore, the Tribe must comply with

the state laws and regulations in order to participate in the sale and use of alcohol within its reservation boundaries.

"Application of the state licensing scheme does not 'impair a right granted or reserved by federal law. On the contrary, such application of state law is specifically authorized by Congress and does not interfere with federal policies concerning the reservations." *Id.* at 734-35 (internal quotation marks and citations omitted). Other courts have determined that section 1161 specifically and plainly means that both state law and tribal ordinances[12] must be complied with for the lawful use of alcohol in Indian country. *See Fort Belknap Indian Cmty. of the Fort Belknap Indian Reservation v. Mazurek*, 43 F.3d 428 (9th Cir. 1994); *City of Timber Lake v. Cheyenne River Sioux Tribe*, 10 F.3d 554 (8th Cir. 1993); *Citizen Band Potawatomi Indian Tribe v. Oklahoma Tax Comm'n*, 975 F.2d 1459 (10th Cir. 1992); *Squaxin Island Tribe v. Washington*, 781 F.2d 715 (9th Cir. 1986)(upholding state tax on liquor sales to nonmembers and regulation of all tribal liquor sales); *see also* Felix S. Cohen, Cohen's Handbook of Federal Indian Law, 13.02 (5th Ed. 2012).

Given the clear language of section 1161, as well as its interpretation by the Courts, the Tribe faced a business decision: comply with South Dakota's alcoholic beverage licensure requirements or refrain from selling alcohol on its reservation. At all times pertinent, the South Dakota alcoholic beverage licensing scheme included the requirement that the licensee remit all sales and

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[12] The tribal ordinance is required to be approved by the Secretary of the Department of the Interior. 18 U.S.C. 1161.

use tax owed to the State as a result of the operation of the licensed premises. *See* SDCL 35-2-24 (1990; 2006). Aware of this requirement, the Tribe chose to seek three licenses, sell alcohol, and applied for issuance and then reissuance of the three South Dakota alcoholic beverage licenses.

Despite applying for and being issued the alcoholic beverage licenses regulated by South Dakota law, the Tribe now seeks a declaration that it is not subject to ***all*** the state licensing requirements. Doc. 32, ¶¶ 143-151. However, it is undisputed that the Tribe voluntarily entered into a relationship with the State in order to be issued alcoholic beverage licenses. As part of the application process, the Tribe consented and agreed, like all licensees, to follow all the regulations and policies to maintain alcoholic beverage licenses.

The tribe argues that the State exceeded its authority granted by section 1161 when it conditioned alcoholic beverage licensing on the collection and remittance of the validly imposed use tax. Section 1161 does not grant certain enumerated powers to states over tribes; it does exempt alcohol transactions within Indian Country complying with state laws from criminal prosecution. *See*, 18 U.S.C. 1154, 1156, 3113, 3488, 3669. Therefore, the Tribe can accept the state alcoholic beverage licensing scheme, or face criminal sanctions for engaging in alcohol transactions without section 1161's protection. Here the Tribe consented to state jurisdiction over the alcoholic beverage licenses.

Further, section 1161's plain language does not prohibit or restrict state regulation of beverage licensure. In fact, when section 1161 is read alongside settled federal caselaw, which has repeatedly provided that tribes are not

excused from "obligations to assist the collection of validly imposed state taxes" on nonmembers, the state law is allowable. *See, Potawatomi,* 498 U.S. 505; *Colville,* 447 U.S. 137; and *Moe,* 425 U.S. 463. This is especially true considering the State's interest in enforcing its valid use tax. The Supreme Court has recognized this interest in *Colville,* where the Court found Washington's seizure of cigarettes in transit to a reservation and conditioning their release to the tribe on the collection and remittance of a valid state tax, did not "unnecessarily intrud[e] on core tribal interests." 447 U.S. at 161-162; *see also Potawatomi,* 498 U.S. at 515 ("There is no doubt that sovereign immunity bars the State from pursuing the most efficient remedy, but we are not persuaded that it lacks any adequate alternatives").

Federal law and section 1161 require the Tribe to make a choice: comply with the state alcoholic beverage licensure requirements, including collection and remittance of the use tax, or refrain from making alcohol transactions. The Tribe made its choice knowing the requirements. The Tribe subjected itself to all the requirements of state alcoholic beverage licensure, including in this case remittance of the lawfully imposed use tax obligation, when it applied for reissuance under SDCL 35-2-24. Having subjected itself to South Dakota's alcoholic beverage licensing laws, the Tribe should not now be heard to complain that they are not bound by all the provisions within that scheme. Therefore, the Tribe's Eighth Claim for Relief must be dismissed.

CONCLUSION

This Court should not exercise jurisdiction over the Tribe's attempt to obtain federal court intervention in a state licensure and taxation matter and further, the Tribe's claims fail as a matter of law. The State respectfully requests entry of an order of dismissal or in the alternative a judgment on the pleadings as to the claims raised in the Complaint.

Dated this 27th day of March 2015.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of March, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the Southern Division by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

/s/ Kirsten Jasper
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