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 Revenue of the State of South Dakota; and DENNIS DAUGAARD, Governor of the State of South Dakota, Defendants.	CIVIL NO. 14-4171 **TRIBE'S BRIEF IN REPLY TO THE STATE'S OPPOSITION TO THE TRIBE'S MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS** **(ORAL ARGUMENT REQUESTED)**

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ARGUMENT

I. The Court Should Exercise Its Jurisdiction to Adjudicate the Tribe's Claims.

There is a strong federal interest in ensuring that Indian tribes are not burdened by state taxation that intrudes upon tribal sovereignty and federal authority over reservation activities. This federal interest overcomes any comity-based justification for this Federal Court to yield jurisdiction to State decisionmakers to determine whether the State's tax requirement is contrary to federal law. The State does not even attempt to counter this governing principle in its opposition brief or in the prior briefs incorporated therein. *See* Doc. 51 at 2-3 (incorporating Doc. 38, probably at 7-16, and Doc. 46, probably at 2-7). The State has pointed to its "interest … in the regulation of alcohol within its borders," Doc. 46 at 6, but federal judicial authority specifically holds that "for violations that occur on an Indian reservation," such State interest exists "only if federal law gives [the State] jurisdiction," and therefore the State interest does not favor the federal court's abstention of its jurisdiction. *Fort Belknap Indian Community v. Mazurek*, 43 F.3d 428, 432 (9th Cir. 1994). More to the point, an interest in regulating alcohol is not relevant to the focus of this case, which primarily turns not on alcohol regulation, but on the State's authority to impose its use tax on the Tribe's reservation. The State contends it would not deny reissuance of an alcoholic beverage license based on failure to remit a tax a court has determined to be invalid, Doc. 46 at 15-16, and the Tribe does not object to maintaining State alcoholic beverage licenses, where reissuance is not conditioned upon collection and remittance of invalid taxes. Therefore the decisive issue is not the extent of the State's regulatory authority over alcohol, it is whether or not the use taxes the State claims the Tribe must collect and remit are valid under federal law. This is a question to be adjudicated by a Federal Court.

The Tenth Circuit most recently reiterated the governing rule that "where, as here, states seek to enforce state law against Indians in Indian country 'the presumption and the reality are

that federal law, federal policy, and federal authority are paramount' and the state's interests are insufficient 'to warrant *Younger* abstention.'" *Ute Indian Tribe v. Utah*, Nos. 14-4028, et al., --- F.3d ----, 2015 WL 3705904, *6 (10th Cir. Jun. 16, 2015), quoting *Seneca-Cayuga Tribe of Okla. v. State of Okla. ex rel. Thompson*, 847 F.2d 709, 713-14 (10th Cir. 1989) (alterations omitted). Likewise, the federal "common law adjudicatory principle[]" of "administrative estoppel" is not suitable to a case like this one, requiring the Court to interpret and apply IGRA, where Congress' evident intent was for federal courts alone to make such decisions. *Astoria Federal Sav. and Loan Ass'n v. Solimino*, 501 U.S. 104, 108-110 (1991); *Gaming Corp. of America v. Dorsey & Whitney*, 88 F.3d 536, 545 (8th Cir. 1996).

The State has repeatedly characterized the State administrative and judicial review process as a "unitary system" for purposes of *Younger* abstention, Doc. 38 at 15-16, Doc. 46 at 5-6, and similarly has cited a State court case which held that appeal of an administrative ruling pursuant to SDCL ch. 1-26 is necessary to exhaust administrative remedies, Doc. 46 at 2. The State sidesteps SDCL 1-26-30, which plainly contemplates a non-unitary system for judicial review of administrative decisions, providing: "This section does not limit utilization of or the scope of judicial review available under other means of review, redress, or relief, when provided by law." Review of an agency decision as part of an *Ex parte Young* suit in federal court is one such "other means of review, redress, or relief … provided by law," apart from review in State court, but nevertheless authorized by State statute. *Id.* And while a party who does not timely appeal an administrative decision might not be able later to challenge the decision in State court, the same is not true for a separate challenge in federal court under *Ex parte Young*, which, as the Tribe has explained, requires exhaustion of state administrative remedies, but not state judicial remedies, and which distinctly implicates the federal interest in subjecting State agencies and

their officials to the restrictions of the Federal Constitution and laws. 17A Wright & Miller, *Federal Practice & Procedure* §§ 4231 at 141, and 4233 at 180-81 (3d ed. 2007).

II. The Question of the State's Authority to Enforce a Tax Requirement on the Actual Playing of Class III Games Presents a Ripe Case or Controversy.

Denying the existence of a ripe controversy concerning this issue, the State insists it "has not sought to impose a tax on the actual play of Class III games at the casino complex," recognizing that to do so would be "unlawful." Doc. 51 at 4. The ripeness of this issue is evident, however, in the broad wording of SDCL 35-2-24, the Department's limitless application of that statute against the Tribe, and the State's assertion in its answer of the Tribe's obligation "to collect use tax from nonmember patrons for *all* purchases of tangible personal property and services and remit the collected use tax to the State." Doc. 34, ¶ 55 (emphasis added).

The State claims its "tax code exempts gaming from the use tax…." Doc. 51 at 4 fn.1. It cites first to SDCL 10-46-52, but that provision only exempts *Deadwood* gaming ("gaming allowed by chapter 42-7B") from the use tax. This exemption does not benefit the Tribe, because it is not chapter 42-7B that allows the Tribe's gaming, but IGRA, the Tribal-State Gaming Compact, and the Tribe's gaming laws. SDCL 42-7B-1 authorizes gaming only "within the city limits of the city of Deadwood, South Dakota[.]" This is pursuant to a limited exception carved out from the general constitutional prohibition on the State legislature's ability to authorize any gaming in the State. S.D. Const. art 3, § 25 (stating: "The Legislature shall not authorize any game of chance, lottery, or gift enterprise, under any pretense, or for any purpose whatever," and providing exceptions for charities, the state lottery, and specified games "within the city limits of Deadwood."). Chapter 42-7B only relates to tribal gaming in that the State Gaming Commission created by chapter 42-7B is authorized to carry out duties that may be imposed on it by a Tribal-State Gaming Compact, and then only if the commission is adequately

funded by payments made under the compact. SDCL 42-7B-11(8). As a general matter, chapter 42-7B treats tribal gaming as something occurring in a separate jurisdiction. SDCL 42-7B-67, for instance, provides that a person with a State-issued gaming license "who intends to become involved in gaming operations outside of the State of South Dakota or on any Indian reservation located in whole or in part in the State of South Dakota shall notify the commission in writing of that licensee's intention to engage in such additional gaming operations and gaming business." *See also* SDCL 42-7B-61 (authorizing State gaming commission to exclude people from Deadwood gaming establishments based on consideration of, *inter alia*, prior "violation of the gaming laws of any state, the United States, any of its possessions or territories including Indian tribes"). In its Tribal-State Gaming Compact, the Tribe has agreed to regulate gaming at its facility at least as stringently as the State regulates gaming at Deadwood, but with its own Tribal ordinances and regulations. Doc. 32-3 at 2 (Compact § 4.1), and 3 (Compact § 6.1).

The State also cites SDCL 10-46-7, the State use tax code's constitutional backstop.[1] This is indeed the section of the State's use tax code which requires that tribal gaming be exempt from the State tax, as the Tribe sought to convince the Department and the Office of Hearing Examiners. But this is the first time the State has acknowledged that § 10-46-7 limits the taxes the State asserts the Tribe is required to collect and remit. The Department's final administrative decision did not recognize any such constraint. In fact, the decision did not cite or refer to § 10-46-7 at all. Nor did it cite or refer to 25 U.S.C. § 2710(d)(4), the IGRA section cited in the State's brief as authority that the State tax code exempts gaming from the use tax. Doc. 51 at 4,

[1] "Tangible personal property … the storage, use or other consumption of which this state is prohibited from taxing under the Constitution or laws of the United States of America … is hereby specifically exempt from the tax imposed by this chapter." SDCL 10-46-7.

n.1. Nor did the decision acknowledge the general Indian law federal preemption doctrine, or the existence of any federal limits on State taxation of Tribal gaming operations.

The State claims that by interpreting IGRA's term "gaming activities" as "limited to the playing of the actual game," the Department's administrative decision in fact held that the State use tax does not apply to gaming activities, so defined. *See* Doc. 51 at 5-6, quoting Doc. 32-2 at 15-16. But the Department's decision never excluded gaming from the activities the decision determined were taxable. Rather, it first concluded that certain sales – "the sale of alcoholic beverages and other tangible personal property and services" – are "not covered by IGRA" at all. Doc. 32-2 at 16. And while the Department did acknowledge the fact that IGRA *does* cover the playing of games, the Department's decision denied that IGRA had any effect on the State's authority to tax such gaming.

In the administrative proceeding, the Tribe had argued, as it does now, that, in the Eighth Circuit's words, "IGRA has a carefully balanced jurisdictional scheme, through which Congress gave the states the right to negotiate tribal-state compacts but declined to grant them broader authority without tribal consent." *Gaming Corp.*, 88 F.3d at 547. With the exception of a total gaming prohibition, "Congress left the states without a significant role under IGRA unless one is negotiated through a compact." *Id.* IGRA expressly *authorizes* State taxation of gaming activities in limited circumstances – where such taxation may be, and is, authorized in a Tribal-State gaming compact, and it *prohibits* such taxation where it is not. 25 U.S.C. § 2710(d)(3)(C)(iii) & (d)(4). Therefore, if the State is to have authority to tax the Tribe's gaming activities, that authority must come through the Tribal-State gaming compact. The Department's decision responded to this argument by denying the function of the compacting process.

> [T]he argument that IGRA requires the collection and remittance of taxes within the State-Tribal gaming compact is not supported by the plain language of IGRA.

> The language is permissive not mandatory. Therefore, based on the above, further examination into IGRA is not necessary in the limited scope of the issue herein.

Doc. 32-2 at 16.

By stating IGRA's "language is permissive not mandatory," the Department's decision denied that the IGRA compacting process has any preemptive effect. The State continues to press this argument. Doc. 51 at 9-10. Its reasoning is contrary to IGRA and Eighth Circuit precedent. § 2710(d)(4); *see Gaming Corp.*, 88 F.3d at 546 ("Congress … left states with no regulatory role over gaming except as expressly authorized in IGRA, and under it, the only method by which a state can apply its general civil laws to gaming is through a tribal-state compact."). It is also incompatible with the State's late concession that § 2710(d)(4) prohibits state taxation of gaming activities. In this regard, it is especially ironic that IGRA expressly *authorizes* State taxation of gaming activities – the one thing the State currently *denies* it is authorized to tax and the only thing the State asserts the Department's administrative decision determined that the State is without authority to tax. *See* Doc. 51 at 4, n.1; Doc. 46 at 8. Section 2710(d)(4) provides that except as contained in a Tribal-State gaming compact, "nothing in this section shall be interpreted as conferring upon a State … authority to impose any tax … upon an Indian tribe or upon any other person or entity authorized by an Indian tribe to engage in a class III activity." But if IGRA's channeling of state authority through gaming compacts were not mandatory but merely permissive, then it would be necessary to also ask whether the State possesses any taxing authority outside of IGRA. If it were to possess a baseline authority to tax gaming (and if the compacting process were "permissive" rather than mandatory in order for the State to retain such baseline authority), then § 2710(d)(4) would not, alone, bar such taxation. But the State now acknowledges that § 2710(d)(4) does bar such taxation. On the other hand, if the State does not possess any background authority to tax gaming activities, then the prohibition

on such taxation can be found in the limits of the only place Congress granted the State *some* taxing authority, § 2710. In fact, the pre-IGRA caselaw that formed the legal backdrop against which Congress wrote IGRA establishes that, before IGRA, states had *no* authority to tax or regulate tribal gaming enterprises. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216-22 (1987) (no state authority to regulate tribal gaming); *Indian Country U.S.A., Inc. v. State of Okla.*, 829 F.2d 967, 983-87 (10th Cir. 1987) (no state authority to impose state sales tax upon any part of tribal gaming enterprise). *See Wisconsin v. Ho-Chunk Nation*, 784 F.3d 1076, 1081-82 (7th Cir. 2015) (stating that with IGRA, "Congress was legislating against the background of the Supreme Court's decisions," specifically *Cabazon*). In the absence of authority to tax or regulate, except the authority granted by IGRA, it is necessarily *mandatory* that if a State wishes to exercise such authority, it must do so as directed by IGRA. IGRA's prescribed method is the gaming compact. Efforts to apply State law through other methods are preempted.

The State concedes in its brief that some of the transactions at the Tribe's casino complex "may certainly be exempt under state or federal law[.]" Doc. 51 at 5. The State then claims it was unnecessary in its agency decision (as well as its answer in this case) "to parse out which transactions were subject to tax because *no* tax was remitted[.]" Doc. 51 at 6. The Tribe disagrees because the State has never demonstrated that *any* tax was due.[2] But whatever were

[2] The State must overcome the "presumption against state jurisdiction in Indian country." *Indian Country U.S.A.*, 829 F.2d at 976. It can do so by showing that Congress authorized the taxes in question, or by showing the taxes are justified by the State's strong interest in taxation, outweighing the tribal and federal interests in protecting Tribal commerce from undue State burdens and promoting Tribal self-governance and self-sufficiency. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 150-51 (1980); *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164, 170-72 (1973). If the State withheld the Tribe's alcoholic beverage licenses for non-payment of any tax the State lacked the demonstrated authority to impose, then the State's action was unlawful.

the Department's procedural, evidentiary, or due process requirements during the agency proceeding, the Department specified in its final decision that nothing less than remittance of "all use tax incurred by nonmembers as a result of the operation of the licensed premises" would suffice to satisfy the Tribe's obligation. Doc. 32-2 at 17, ¶ V. How can the Tribe possibly comply with that order in the absence of a determination of which transactions were subject to tax (and the necessary corollary – which were not)? If the decision implicitly exempted gaming (without ever addressing the subject of exemptions), are there other unstated exemptions as well? Would remitting a single dollar of use tax be enough? Or is the Tribe expected to write checks to the State's treasury until the Department of Revenue says, "that's enough, now we will reissue your liquor licenses"? Implied exemptions that supposedly lie hidden between the lines of the Department's decision cannot reasonably assure the Tribe, or the Court, of the State government's understanding of the federally-imposed constraints on its taxing and enforcement authority.

The State cites paragraph 79 of the First Amended Complaint as showing the Tribe "understood that the tax at issue is not any tax on gaming, but rather, is the tax on the use of good[s] and services *other than* gaming." Doc. 51 at 4 (emphasis in original). The State, however, misreads the Tribe's complaint. The cited paragraph reads:

> Casino Complex patrons who purchase food, beverages, gift shop items, and other goods and services at the Casino Complex come to the Casino Complex primarily to gamble, not to make these other purchases. The Tribal-State Gaming Compact contains no provision authorizing the State to impose the State use tax on the use and consumption of goods and services purchased from the Tribe at the Casino Complex and used or consumed at the Casino Complex.

Doc. 32, ¶ 79.[3] The first sentence distinguishes "gambl[ing]" from "other purchases," but as the context reveals, the purpose is to allege a fact in support of the Tribe's claim that the property and services purchased at the casino which are not the actual playing of the games should be treated as "directly related to the operation of gaming activities," 25 U.S.C. §§ 2710(d)(3)(B), (d)(3)(C)(vii), because such commerce is primarily in support of the gambling at the casino. The broader point evident throughout the complaint is that the actual playing of the games, *and* the products and services other than the actual playing of the games, are *all* covered by IGRA. (And, to the extent IGRA might not apply, they are all covered by generally applicable federal Indian law, including the *Bracker* balancing test.)

The State itself lists thirteen paragraphs of the First Amended Complaint which do not distinguish gaming from other activities. Doc. 51 at 5.[4] The State calls this the "broad tone of the Tribe's assertions," but the Tribe's allegations are broad because the State's enforcement action seeking to compel the Tribe to collect and remit taxes was broad. SDCL 35-2-24 is broad, and the Department rejected all the Tribe's arguments for narrowing it. Therefore the Tribe alleged that the goods and services sold at the casino, and used and consumed on the premises, include, among several other things, "gambling," Doc. 32 ¶¶ 30, 48, and that the State was attempting to impose its use tax on the "use, storage, and consumption by nonmembers of *all* goods and services sold by the Tribe at the Casino Complex," *id.* ¶ 55 (emphasis added). The State answered as broadly as it deemed warranted, admitting the Tribe offers gambling, Doc. 34 ¶ 30, and admitting that "it has reminded the Tribe that the Tribe is required to collect use tax from nonmember patrons for *all* purchases of tangible personal property and services and remit

[3] The State also cites paragraph 77 of the Tribe's original complaint (superseded by the amended complaint), which is identical to paragraph 79 of the amended complaint.

[4] Curiously, the State's string of citations includes paragraph 79, which it cited just prior for the opposite proposition.

the collected use tax to the State," *id.* ¶ 55 (emphasis added). The State denied, without exception, the Tribe's allegation that "IGRA prohibits the State from taxing the use or consumption of goods and services purchased from the Tribe at the Casino Complex and used or consumed at the Casino Complex." Doc. 34 ¶ 80; Doc. 32 ¶ 80. The State's disclaimer of further admissions in paragraph 55 of its answer indicates the State was aware of the requirement to parse the complaint and only "admit the part that is true and deny the rest," Fed. R. Civ. P. 8(b)(4), rather than provide a broad admission or denial and later claim it did not entirely mean it, that it merely reflected what it now characterizes as the complaint's "broad tone."[5] The State identifies no authority that would give it leave to now assert facts contrary to the admissions and denials in its answer.

In its initial brief, the Tribe quoted statements from the State's previous briefing in which the State emphasized the absence of any court decision determining "that any portion of the State's use tax is not validly imposed on certain transactions," and that with such a decision – but not before – "the State would not condition alcoholic beverage license reissuance on remittance of the invalid portion of the tax." Doc. 50 at 13, quoting Doc. 46 at 14, 15 & 16. Nothing in the State's opposition brief offers comfort in this regard. The Department's decision held that the Tribe must collect and remit all State use taxes incurred by nonmembers as a result of the operation of the Tribal casino, without exception. Belated, inconsistent representations by the Office of the Attorney General are insufficient to assure the Tribe or the Court that the defendant officials would not enforce the Department's decision according to its terms. *Cf. 281 Care*

[5] The complaint's general description of the Tribal Tax Act, which does not catalogue all the exemptions the Tribal Tax Act provides, does not evidence a "broad tone" with respect to the allegations concerning the State's taxation of Tribal gaming. *See* Doc. 51 at 5. The State does not indicate how the identification of any of the Tribal Tax Act's exemptions are relevant to the complaint. (The State claimed to be "without sufficient knowledge to admit or deny" the allegations concerning the Tribal Tax Act. Doc. 34 ¶¶ 19, 123.)

Committee v. Arneson, 766 F.3d 774, 796-97 (8th Cir. 2014) (defendant attorney general's sworn affidavit disclaiming any intention to enforce the state law that was subject to *Ex parte Young* challenge established there was no threat of her enforcing the challenged statute against the plaintiffs).

SDCL 35-2-24 does not on its face admit the exemption of tribal gaming activities from the State's use tax. Nor does the Department's final agency decision. Nor does the State's answer in this action. Each asserts the Tribe must collect and remit "all" use tax. The State cannot render the issue premature with its latecoming concession that an exemption exists (especially when paired with its protest that no court has yet told it any imposition of the tax is invalid) and thereby block the Tribe from obtaining the judicial determination needed to halt the unlawful imposition of use taxes and the unlawful denial of alcoholic beverage licenses.

III. IGRA Preempts State Laws Incompatible with IGRA's Jurisdictional Regime for Tribal Casinos.

The field IGRA preempts is defined by the federal and tribal interests reflected in IGRA, by IGRA's particular statutory purposes, and by the carefully-balanced jurisdictional regime Congress established to further these interests and the Act's purposes. State laws that interfere or are incompatible with IGRA, including those that are not compatible with Congress' system for balancing federal, tribal and state jurisdiction to tax and regulate tribal casinos, are preempted.

IGRA provides a statutory basis for Indian tribes to operate complex casino gaming enterprises on the model of Las Vegas-style casinos. IGRA does not directly provide the State authority to tax or regulate tribal casino enterprises. If a state wishes to have that authority, IGRA requires it to negotiate with the Tribe and to set forth the resulting agreement in a Tribal-State gaming compact for approval by the Department of the Interior. With the exception of the ability to obtain limited taxing power in a gaming compact, IGRA denies the State authority to

impose any tax on the Tribe or its customers at the tribal casino. This federal jurisdictional regime – channeling the State's regulatory authority and (limited) taxing authority through the gaming compact – protects the Tribe's power to operate a tribal casino under tribal and federal supervision, without undue interference from the State. A State law that circumvents IGRA's jurisdictional regime by regulating or taxing the Tribe's casino enterprise beyond the authority agreed to in the gaming compact, or beyond what is permitted by IGRA, is incompatible with the federal statute, and is preempted.

The State's initial response is that preemption extends only to state regulations or taxes that would, incompatibly with IGRA, "'usurp tribal control'" over "the actual play of the games." Doc. 51 at 7-9, quoting *Confederated Tribes of Siletz Indians v. State of Oregon*, 143 F.3d 481, 487 (9th Cir. 1998) and citing *Michigan v. Bay Mills Indian Community*, 134 S.Ct. 2024, 2032 (2014). The State's reliance on *Bay Mills* to narrowly define IGRA's preemptive scope remains misplaced. As the Tribe explained in prior briefing, *see* Doc. 42 at 14-15, *Bay Mills* did not purport to define the limits of IGRA preemption, but only the limits of a specific statutory grant of jurisdiction to federal courts and concomitant abrogation of tribal immunity from suit in a case where Michigan sought to "enjoin a class III gaming activity located on Indian lands and conducted in violation of [a] Tribal-State compact[.]" 25 U.S.C. § 2710(d)(7)(A)(ii); *Bay Mills* at 2029. Because the activity Michigan sought to enjoin was *not* located on Indian lands, the Court held that § 2710(d)(7) did not abrogate the Tribe's immunity.[6] In response, Michigan urged that the Tribe's off-site supportive administrative and regulatory activities – which *were* located on Indian lands, but which the State did not complain violated

[6] As the Court pointed out, "the very premise of this suit – the reason Michigan thinks Bay Mills is acting unlawfully – is that the Vanderbilt casino is *outside* Indian lands." *Bay Mills* at 2032 (emphasis in original).

IGRA or the compact – served as a jurisdictional hook for its suit. The Court held that the off-site activity neither supported extension of the waiver to the violative activities off Indian lands, nor were themselves within the statutory waiver. The crux of *Bay Mills* was that "the proceedings of the off-site administrative authority" did not constitute a "Class III gaming activity" for purposes of the limited abrogation of tribal immunity in IGRA. 134 S.Ct. at 2032-33; *see* 25 U.S.C. § 2710(d)(7)(A)(ii).[7] Instead, a "'class III gaming activity' is what goes on in a casino[.]" *Bay Mills* at 2032. The *Bay Mills* Court focused on *gambling* as the activity that "goes on in a casino," *id.*, but *Bay Mills* is fully consistent with recognizing that IGRA contemplates more than just gambling in a tribal casino.

Bay Mills held that the State could not do indirectly what IGRA prohibited doing directly. It could not circumvent IGRA's limited and specific abrogation of the Tribe's immunity. *Bay Mills* construed IGRA in accordance with the "enduring principle of Indian law" that "courts will not lightly assume that Congress in fact intends to undermine Indian self-government." *Id.* at 2031-32. The same principle should guide the Court in this case to reject the State's effort to circumvent IGRA's jurisdictional framework, which safeguards Indian self-government by giving the State only limited authority and limited means to exercise it. *See Gaming Corp.*, 88 F.3d at 549 ("If a state, through its civil laws, were able to regulate the tribal licensing process outside the parameters of its compact with the nation, it would bypass the balance struck by Congress.").

[7] *Bay Mills* described in the following terms what was *not* a "class III gaming activity" for jurisdictional and immunity-abrogation purposes: "administrative action" occurring distant from the casino, "off-site licensing or operation of the games," "the proceedings of the off-site administrative authority," the activities of "the tribal regulatory body meant to oversee" gaming, and "action on [the tribe's] reservation to license or oversee the [off-reservation] Vanderbilt facility." *Bay Mills* at 2032-33. *Bay Mills* thus addressed administrative and regulatory activities conducted at a location physically distant from the casino.

The State points to §§ 2705(a)(1) and 2713(b)(1), asserting the two sections' use of the terms "gaming activities" and "Indian game" are "interchangeabl[e]." Doc. 51 at 7-8. It is indeed notable that § 2713(b)(1) deals with the NIGC Chairman's "temporary closure of an *Indian game*," while § 2713(b)(2) concerns "permanent closure of the *gaming operation*," and § 2713(d) addresses tribal authority to regulate "a *gaming establishment*." The variations in terminology within this single section indicate Congress did not confine itself to terms of art when drafting IGRA, using a variety of terms to express the idea elsewhere expressed as "gaming activities," § 2705(a)(1), and, conversely, using the term "gaming activities" to mean different things in different contexts. *See King v. Burwell*, No. 14-114 --- S.Ct. ----, 2015 WL 2473448, *12 n.3 (Jun. 25, 2015) (in construing Affordable Care Act, observing that context "readily" allows an identical statutory term to "mean different things in different places").

Based on IGRA's use of the term "Indian game" in § 2713(a)(1), the State professes skepticism of the NIGC Chairman's authority to order closure of more than the game itself. However, NIGC regulations implementing § 2713 provide that "the Chair may issue an order of temporary closure of all or part of an Indian *gaming operation*" (emphasis added) for a broad range of violations, including some that do not involve the actual playing of games. 25 C.F.R. § 573.4(a) (e.g., "a gaming operation defrauds a tribe," or a "gaming operation's facility is constructed, maintained, or operated in a manner that threatens the environment or the public health and safety" in violation of NIGC-approved tribal laws).

Moreover, the Eighth Circuit has held that the NIGC Chairman's power to close "gaming activities" (Doc. 51 at 8) is expansive enough to support closure of an entire casino – not just the games. In *In re Sac & Fox Tribe of Mississippi in Iowa*, 340 F.3d 749 (8th Cir. 2003), the Court upheld a district court's injunction to enforce the NIGC Chairman's order temporarily closing

the Meskwaki Casino-Bingo-Hotel. *Id.* at 750-51. Pursuant to the injunction, "U.S. Marshals closed the casino." *Id.* at 754. The Court noted the Chairman's power to "'order temporary closures of *Indian gaming facilities* operating in violation of IGRA[.]'" *Id.* at 759, quoting *United States v. Santee Sioux Tribe of Nebraska*, 135 F.3d 558, 562 (8th Cir. 1998) (emphasis added). *See also California v. Picayune Rancheria of Chukchansi Indians*, No. 114-CV-01593-LJO-SAB, 2014 WL 5485940, *4, *6-7 (E.D.Cal. Oct. 29, 2014) (under jurisdiction pursuant to IGRA, court enjoined a wide range of conduct, not limited to the operation or playing of class III games, "within 1,000 yards from the Casino, the property on which the Casino is located, and tribal properties surrounding the Casino, including the adjacent hotel and nearby tribal offices"). It is not necessary for the Court in this case to decide which parts of the Tribe's casino might be subject to closure by the Chairman, but rather it is sufficient to recognize that IGRA's provisions authorizing the Chairman to close a gaming operation are an example of IGRA applying to more than just the actual playing of the games, with the specifics of its reach – potentially encompassing a tribe's entire gaming enterprise and beyond – dependent upon the circumstances.

Whether or not *Bay Mills* requires each and every reference to "gaming activities" in IGRA to be construed to refer to only the actual play of the games themselves, the fact remains that IGRA *requires*, e.g., § 2710(b)(1), (b)(2), (b)(3) & (d)(2), – and therefore must "cover" or "apply to" – related administrative and regulatory activities, *and* directs certain specified subjects, and "*any other subjects that are directly related to the operation of* gaming activities," be addressed in a Tribal-State compact if a State is to have any authority over the subject. § 2710(d)(3)(C)(vii) (emphasis added). If IGRA, as the jurisdictional "traffic cop" for taxation and

regulation of Indian casinos, preempts state laws on every subject it covers, then it preempts much more than the state laws covering rolls of the dice or spins of the wheel.[8]

The *Siletz* case discussed by the State, Doc. 51 at 8-9, actually bolsters the Tribe's argument. In *Siletz*, Oregon and the Confederated Tribes of Siletz Indians had a gaming compact that, among other things, authorized the State to review tribal gaming records and prepare an investigatory report. *Siletz*, 143 F.3d at 483-84. The compact stated that tribal records were to be treated as confidential for purposes of disclosure under Oregon's public records laws. *Id.* A public request was made for a report prepared by the state, and the tribe sued to prevent its release, arguing that IGRA preempted the application of Oregon's public records laws to the report. *Id.* at 484. Importantly, the Siletz tribes' preemption argument was quite different from the Tribe's argument in this case. The Siletz tribes argued that "the application of state laws *unrelated* to Indian gaming, such as the Oregon Public Records Laws," were "preempted by federal law." *Id.* at 484 (emphasis added). The Tribe argues in the instant case, however, that the application of state laws *related* to tribal casino activities are preempted, unless validly authorized in a gaming compact.

In *Siletz*, the Ninth Circuit first held that the gaming compact was controlling, making a preemption analysis unnecessary. *Id.* at 484-85. The compact specifically addressed the application of Oregon public records laws with respect to the tribal records, and did not prohibit public release of the state-prepared report; indeed, it implicitly permitted Oregon to release the report, as long as the release was consistent with the terms of the compact and the state laws invoked in the compact. *Id.* at 485. The pertinent observation is that the tribal-state gaming

[8] In *Bay Mills* itself, the Court noted that Michigan could have bargained with the Tribe to include in the gaming compact a waiver of the Tribe's immunity, including its immunity from suits to enjoin gaming outside Indian lands. *Bay Mills* at 2035. This is a subject IGRA allows to be covered in a compact, even though it is not within the Act's abrogation of tribal immunity.

compact contained detailed provisions for protecting confidentiality and addressing potential public disclosure under state law of the "records maintained by the Tribal gaming operation." *Id.* at 483. The State's minimalist view in this case of the matters covered by IGRA – matters directly related to the actual playing of the games – would not permit such a far-flung subject as protection of confidential business records to be included in a compact. Yet in *Siletz* it was in a compact provision that controlled the outcome of the case.

The Court also addressed the Siletz tribes' preemption argument. *Id.* at 485-87. (Notably, the *Siletz* Court's approach to IGRA preemption was different from the Eighth Circuit's.[9]) *Siletz* found, however, that any preemption analysis was unnecessary, as the release of the state's report would not interfere with the federal and tribal interests reflected in IGRA – not because the subject matter is not covered by IGRA, but because releasing the report was consistent with the gaming compact and "IGRA's goal of fair and honest gaming." *Siletz* at 487. Furthermore, the Siletz tribes themselves took the position that the application of the state statute was "unrelated to Indian gaming," *id.* at 484, 487, and the facts of the case confirm that the relevant activity to which the Oregon public records laws applied was Oregon's own conduct

[9] According to *Siletz*, the Ninth Circuit's practice was to apply the standard Indian law preemption balancing test (commonly known as "*Bracker* balancing") to IGRA, *id.* at 486 n.7, whereas the Eighth Circuit has held that Congress has already done the balancing, choosing "not to allow the federal courts to analyze the relative interests of the state, tribal, and federal governments on a case by case basis" and instead creating a "fixed division of jurisdiction," *Gaming Corp.* at 546-47. Subsequent Ninth Circuit decisions indicate a view more closely aligned with the Eighth Circuit's. *See Artichoke Joe's California Grand Casino v. Norton*, 353 F.3d 712, 715 (9th Cir. 2003) ("'IGRA is an example of 'cooperative federalism' in that it seeks to balance the competing sovereign interests of the federal government, state governments, and Indian tribes, by giving each a role in the regulatory scheme.'" (quoting *Artichoke Joe's v. Norton*, 216 F.Supp.2d 1084, 1092 (E.D.Cal. 2002))). *See also New York v. United States*, 505 U.S. 144, 167 (1992) (describing "cooperative federalism" as an arrangement in which Congress "offer[s] States the choice of regulating [an] activity according to federal standards or having state law preempted by federal regulation").

occurring off-reservation – not the conduct of the tribes or casino patrons engaged in casino activities on Indian land.[10]

Neither the *Siletz* analysis nor its outcome is inconsistent with the Tribe's position in this case. *Siletz* simply reflects that the State may apply its laws to matters that are, at best, "merely peripherally associated with tribal gaming" without constraint by IGRA. *Casino Resource Corp. v. Harrah's Entertainment, Inc.*, 243 F.3d 435, 439 (8th Cir. 2001); *see Siletz* at 487. Under *Siletz*, a state law may be preempted by IGRA when its application would "usurp tribal control over gaming," "threaten to undercut federal authority over Indian gaming," or affect the Tribe or the business of the Tribe's casino operation in a manner inconsistent with IGRA's goals, *id.* at 487. In other words, when a state law interferes with IGRA's division of jurisdiction with respect to tribal casino operations, it is subject to preemption. *Siletz* neither supports the State's cramped construction of "gaming activities" nor contradicts the Tribe's position that IGRA's jurisdictional regime extends to all "subjects that are directly related to the operation of gaming activities." 25 U.S.C. § 2710(d)(3)(C)(vii).

Like *Siletz*, the quotation the State relies upon from *Rincon Band of Luiseño Mission Indians v. Schwarzenegger*, 602 F.3d 1019 (9th Cir. 2010), *see* Doc. 51 at 9, only reiterates what the Tribe readily acknowledges – that IGRA's coverage, and thus its preemptive scope, has limits. In fact, *Rincon* locates the definition of those limits in the same place the Tribe does: 25 U.S.C. §§ 2710(d)(3)(C) and (d)(4). *Rincon* at 1039.

The Tribe stated in its previous brief that IGRA does not "create or authorize a split of jurisdictional regimes within a single tribal gaming establishment." Doc. 50 at 20. The State

[10] A Supreme Court decision subsequent to *Siletz* clarified that even the *Bracker* balancing test for federal preemption does not apply to off-reservation conduct. *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 99 (2005).

argues otherwise, but it misses the Tribe's point when it refers to IGRA authorizing gaming compacts to include provisions allocating criminal and civil jurisdiction among the Tribe and State. *See* Doc. 51 at 10.[11] Rather, the Tribe's point is that there is one and only one jurisdictional regime applicable to the entire casino: the federal jurisdictional regime set forth in IGRA. That regime assigns some matters to federal supervision, entrusts others to tribal control, and allows states to negotiate with tribes for authority to regulate casino activities and, to a limited degree, tax them. What IGRA does not countenance is a tribal casino in which this carefully balanced jurisdictional framework applies, for example, to a person's right hand pulling the lever of a slot machine, but not to her left hand eating a sandwich, drinking a Coke, or smoking a cigarette. IGRA governs all of these activities at a casino operating under IGRA. And it does not permit the State to interfere with any of these activities by applying its taxes absent agreement in a gaming compact.

Contrary to the State's suggestions, the Tribe's motion does not ask the Court to declare that everything in the Tribe's casino operation is directly related to the operation of gaming activities, or that IGRA preempts "all economic activity" in the casino. *See* Doc. 51 at 6-7, 9.[12]

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[11] In connection with this argument, the State cites *Hatcher v. Harrah's NC Casino Co., LLC*, 565 S.E.2d 241 (N.C. Ct. App. 2002), in which a tribal casino patron sued the casino management company for unfair trade practices after it allegedly failed to pay out the patron's video poker winnings. The court agreed with the Eighth Circuit that "IGRA preempts state laws regulating gaming," *id.* at 278, because "there is a strong federal policy … supporting the Tribe's authority to regulate gaming," *id.* at 279. The case was remanded and when it returned on appeal the second time, the court held the state courts lacked jurisdiction over the suit. *Hatcher v. Harrah's NC Casino Co., LLC*, 610 S.E.2d 210, 211 (N.C. Ct. App. 2005). "[F]or our courts to exercise jurisdiction in this case would plainly interfere with the powers of self-government conferred upon the Eastern Band of Cherokee Indians and exercised through the Cherokee Tribal Gaming Commission." *Id.* at 213. Further, "the Tribal-State [Gaming] Compact does not grant state courts jurisdiction over this matter[.]" *Id.* at 214. The North Carolina court's rationale and conclusions are in harmony with the Tribe's arguments here.

[12] The State twice truncates quotations from the Tribe's brief, claiming the Tribe's motion requests a ruling that "'everything within the casino operation' is 'directly related to the

Rather, the Tribe asks the Court to decide the legal question, how did Congress intend IGRA's jurisdictional framework to operate? But, except regarding the actual play of class III games, the Court is *not* asked at this juncture to apply the legal rule and decide the next question – which parts of the Tribe's operation come within IGRA's scope? The Tribe expects to present expert testimony and evidence concerning the industry standard practices for operating casinos that house class III-type games, in the casino gaming industry generally, in the tribal gaming industry, and at the Tribe's casino. The Tribe will present evidence of economic theory and empirical quantitative data to explain industry standard practices such as "bundling," and how those standard practices are based on concepts such as "economies of scale" and "economies of scope." This evidence will help provide the factual predicate to show concretely what it means to be "directly related to the operation of gaming activities."

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operation of gaming activities.'" Doc. 51 at 6 & 9, quoting Doc. 50 at 19-20. But the State leaves out the important qualifier that tethers the Tribe's argument to Congress' intent. The Tribe will repeat the quoted portions in full: "IGRA's division of jurisdiction supports this [Congressional] goal by applying its constraints to everything within the Tribal gaming operation *that is commonly part of a Las Vegas-style casino*." Doc. 50 at 19 (emphasis added). "In light of this canon of construction and the purposes that drove Congress to enact IGRA's protective jurisdictional framework, the 'other subjects that are directly related to the operation of gaming activities' must be construed to include everything within the casino operation *that is a typical component of a Las Vegas-style casino*." *Id.* at 20 (emphasis added).

This leads the State to characterize the Tribe's argument much more broadly than the Tribe does (and with increasing breadth as the State's brief goes on), omitting the significant limitation proposed by the Tribe: "In effect, the Tribe seeks a declaratory ruling that IGRA preempts state law relating to *all economic activity within its 'casino complex.'*" Doc. 51 at 7 (emphasis added). "But [§ 2710(d)(3)(C)(vii)] does not permit the states and the tribes to negotiate on *all economic activities of a casino or a Tribe's adjacent businesses*." *Id.* at 9 (emphasis added). "[E]ven if IGRA permitted the states and the tribes to negotiate on *all economic activities*, the states and the tribes are not required to do so." *Id.* at 9-10 (emphasis added). The Tribe proposes, and IGRA provides, a legal test that leaves room for a great deal of economic activity to be outside of IGRA's scope, because at its broadest, the activity that IGRA is concerned with is "other subjects that are directly related to the operation of gaming activities." § 2710(d)(3)(C)(vii). This is more than merely the playing of the games themselves, but it is infinitely less than "all economic activities."

So when the State asserts it is "absurd to suggest that a gift shop, RV park, gas station, bowling alley, etc., are 'directly related to' the actual play of class III games," Doc. 51 at 9, its assertion is both off the mark and not relevant to the Tribe's motion. The State also misconstrues the Tribe's argument here in order to label it "absurd." The Tribe would argue the amenities the State lists are "directly related to the operation of gaming activities," § 2710(d)(3)(C)(vii), not that they are "'directly related to' the actual play of class III games," Doc. 51 at 9. (Again, the instant motion does not seek a ruling on which amenities are or are not "directly related to the operation of gaming activities.") Notably, the State's list of amenities (as well as its similar list in Doc. 51 at 8) omits the Tribal casino's restaurants, bars, and hotel – the parts of the casino closest to its core operations – and focuses on parts closer to the periphery. But even though some aspects of the enterprise are closer to the periphery of IGRA's coverage, and even if some turn out to be *outside* the periphery, that does not impact the answer to the legal question the Tribe's motion presents: IGRA preempts State laws for those matters it covers (and not for the matters it does not cover), unless the State can, and does, acquire authority to apply its laws to the covered matters through a gaming compact.

Although the State's citations to *Casino Resources Corp. v. Harrah's Entertainment, Inc.*, 243 F.3d 435, 438 (8th Cir. 2001), and *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 64 (1978), do not really support the point (these decisions were talking about "competing purposes" "in a single statute"), the State nevertheless is correct to suggest that IGRA's comprehensive jurisdictional framework for the regulation of tribal casino activities may effect a partial implied repeal of 18 U.S.C. § 1161. *See* Doc. 51 at 10-11. This is the gist of the Tribe's sixth claim for relief. *See* Doc. 31 at ¶¶ 129-136. As the Tribe has pointed out, however, the ultimate resolution of that claim is not called for in this motion, and the issue may never need to be resolved if the

only tax-collection condition for reissuance of the Tribe's alcoholic beverage licenses is the collection and remittance of *valid* taxes, and if the Court determines *which* taxes, if any, are valid. *See* Doc. 50 at 1, n.1.

The State inexplicably claims that the Tribe's arguments based on IGRA are only meant to "distract from the real legal issue presented by the facts: whether the State can impose the use tax for nonmembers' use of tangible personal property and services within the reservation and require the Tribe to collect and remit that use tax." Doc. 51 at 11. Undoubtedly this is the ultimate legal issue. But IGRA does not "distract" from it; IGRA precisely addresses the issue. IGRA provides the rule of decision for all activities the State seeks to tax that come within IGRA's scope. It is federal Indian law, and IGRA most directly, that limits the State's authority to impose use tax and to require the Tribe to collect and remit use tax, where the tax arises as a result of the Tribe's operation of its reservation casino. *See* SDCL 35-2-24 (requiring Tribal remittance of "all use tax incurred by nonmembers as a result of the operation of the licensed premises").

IV. The Tribe is Entitled to Judgment in its Favor on the Counterclaim.

A. The Tribe Has Not Waived its Sovereign Immunity From the Counterclaim.

The State defends its counterclaim from the flawed premise that it was "[f]aced with the Tribe's request to have this Court enforce the Deposit Agreement in its favor." Doc. 51 at 12. The State's arguments largely collapse on this faulty foundation. The mere presence of the Deposit Agreement as background for the declaratory relief the Tribe seeks through its seventh claim does not mean the Tribe is seeking or has consented to have all (or any) claims regarding the Deposit Agreement adjudicated by this Court, as the State asserts. *See* Doc. 51 at 16. In fact, the Tribe *does not seek enforcement of the Deposit Agreement* in this action. The Tribe does not

claim any party has breached the Deposit Agreement. None of the Tribe's claims seek to enforce any party's obligations under the agreement, or to compel the State or the escrow agent to pay money under the agreement. If the Court grants the relief sought by the Tribe, the Tribe will be able to take that judgment to the escrow agent, Farmer's State Bank, and obtain the deposited funds in accordance with the agreement. There is no reason to think the Bank would not disburse the money, but if it refused, *then* the Tribe might be compelled to sue to enforce the Deposit Agreement. That time has not come, however, and this is not that case.

And contrary to the State's argument, the Tribe's immunity from the counterclaim does not guarantee "the tribe never loses a lawsuit." *See* Doc. 51 at 16, quoting *Rupp v. Omaha Indian Tribe*, 45 F.3d 1241, 1245 (8th Cir. 1995). Even in the absence of a counterclaim by the State, the Court might deny some or all of the Tribe's request for declaratory relief in its seventh claim and determine that the State *does* "have authority to assess sales and use tax on transactions between the Tribe and nonmembers taking place" at the Tribe's casino, Doc. 32 at 38, in which case the State may take that order to the Bank and obtain release of such funds to which it might be entitled.

"Supreme Court precedent couldn't be clearer on this point: a tribe's decision to go to court doesn't automatically open it up to counterclaims – even compulsory ones." *Ute Indian Tribe v. Utah*, 2015 WL 3705904 at *9, citing *Okla. Tax Com'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509-10 (1991). As the Tenth Circuit explained in *Ute*, *Rupp* does not "undermine[] this principle. … The tribe in *Rupp* explicitly invited the defendants' counterclaims, 'affirmatively asking the defendants to assert any right, title, interest or estate they may have had in the disputed lands.'" *Ute Indian Tribe* at *9, quoting *Rupp* at 1245 (alterations omitted). The State has never received an invitation like that from the Tribe.

The Deposit Agreement itself does not waive the Tribe's immunity either. The State claims to find a "clear waiver" in the following language from Recital F of the agreement:

> [I]n the event a final determination is not reached in CIV93-1033, the amount of disputed tax liability, deposited pursuant to this agreement, together with any accrued interest thereon, shall remain with the escrow agent pending a disbursement agreement between the State and the Tribe or a final determination by a court of proper jurisdiction, whichever occurs first.

Doc. 32-1, Recital F, *see* Doc. 51 at 13. The "final determination" refers to a judicial determination of the nature described in § 5.B: a "final determination … declar[ing] that the State does [or does not] have jurisdiction to assess sales and use tax on transactions between the Tribe and non-members taking place in a Tribally owned and operated gambling casino[.]" Doc. 32-1, § 5.B.

Even if the quoted provision were a waiver, it only contemplates a court making a final determination of the State's taxing authority. But the State's counterclaim is not a suit to determine whether the State may assess tax on nonmembers at the Tribe's casino – it seeks an order directing the Tribe to deposit more money into escrow. The court determination referenced in Recital F is not for "suits regarding the Deposit Agreement," or "claims arising from the Deposit Agreement," as the State expansively says, Doc. 51 at 13, 14, but only for a claim determining the State's power to impose sales and use tax at the casino, a claim that exists apart from the agreement rather than arising from it.[13]

[13] The State also asserts: "The Tribe clearly consented to that suit [the 1994 litigation, *Flandreau Santee Sioux Tribe v. State of South Dakota*, *see* Doc. 32 ¶ 93] arising from the Deposit Agreement in the District Court of South Dakota, which consent waives its sovereign immunity as to the State's counterclaim in this action regarding the Deposit Agreement." Doc. 51 at 14. Nothing indicates the Tribe waived its immunity in connection with the 1994 case any more than it did by filing this suit – the Tribe was the plaintiff and there was no counterclaim, and the suit did not "aris[e] from the Deposit Agreement" by seeking to enforce contractual obligations, but instead, like this suit, sought to determine the extent of the State's taxing authority at the tribal casino. *See also Ute Indian Tribe* at *9 (rejecting argument "that the Tribe waived its immunity by bringing the original *Ute* litigation some forty years ago").

More fundamentally, the quoted provision simply does not contain the requisite "express[] and unequivocal[]" waiver. *Amerind Risk Management Corp. v. Malaterre*, 633 F.3d 680, 685-86 (8th Cir. 2011). *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411 (2001), the State's only authority on this point, found a clear waiver in a construction contract provision in which the tribe agreed "'to submit disputes arising under the contract to arbitration, to be bound by the arbitration award, and to have its submission and the award enforced in a court of law.'" *Id.* at 420, quoting *Sokaogon Gaming Enterprise Corp. v. Tushie-Montgomery Assoc., Inc.*, 86 F.3d 656, 659 (7th Cir. 1996). Specifically, the relevant provision in *C & L* provided:

> All claims or disputes between the Contractor [C & L] and the Owner [the Tribe] arising out of or relating to the Contract, or the breach thereof, shall be decided by arbitration…. The award rendered by the arbitrator shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.

C & L at 415 (alterations original). Oklahoma law governed the contract pursuant to a choice-of-law clause, and Oklahoma's arbitration act specified that its courts possessed jurisdiction to enforce agreements providing for arbitration in the state, and to enter judgment on an arbitration award issued pursuant to such an agreement. *Id.* at 415-16.

There is nothing in the Deposit Agreement approaching an equivalent waiver. The parties did not agree to enforce the agreement, or to resolve disputes relating to the agreement, in any forum at all, let alone to specify, directly or indirectly, which court would have jurisdiction to decide such a dispute, enforce such a decision, or enter a judgment on either. *See Amerind Risk Management*, 633 F.3d at 688, n.9 (8th Cir. 2011). In fact, the agreement states: "The parties agree that this escrow agreement *does not constitute a waiver of any defenses* or causes of action *in any pending or future action* not *specifically* waived in this agreement." Doc. 32-1, §

4.B (emphasis added). While specific waivers are made in the agreement,[14] no such specificity is present in the purported waiver held forth by the State. Both the agreement and federal law expressly forbid reading any such waiver into the agreement by mere implication, if any there were.

The language of Recital F relied upon by the State specifies the alternative conditions for the escrow agent's disbursement of the escrowed funds. The State has not carried its burden to prove that it also constitutes a clear waiver of the Tribe's sovereign immunity for suits to enforce the agreement against the Tribe. *See Amerind Risk Management*, 633 F.3d at 685-86.

B. The Court Lacks Supplemental Jurisdiction over the State Law Counterclaim.

Asserting supplemental jurisdiction for its counterclaim, the State contends that its counterclaim and the Tribe's claims (or least the Tribe's seventh claim) derive from a common nucleus of operative facts, of which "[t]he Deposit Agreement is part…." Doc. 51 at 17. While the State's counterclaim does derive from the Deposit Agreement, the Tribe's claims do not. The Deposit Agreement is not an "operative fact" with respect to any of the Tribe's claims. The Deposit Agreement does not "form[] the basis for one of the Tribe's claims for relief." Doc. 51 at 17. The sum total of its relevance to the Tribe's seventh claim (the only one directly connected to the Deposit Agreement) is that the Tribe asks for a declaratory judgment regarding the State's taxing authority at the Tribe's casino consistent with the terminology used in the Deposit Agreement. (This is what the Tribe means when, in its complaint, it requests an order

[14] For instance, the agreement provides that in exchange for certain payment by the Tribe in satisfaction of an administrative order, "*the State will consider* … all further rights or causes of action the State may have to *the same waived*." Doc. 32-1, Recital G (emphasis added). As penalty for failing to make its monthly deposit, the Tribe forfeits its right to sell alcohol, "without further demand, notice, or hearing, which notice and hearing is *specifically waived by the Tribe*[.]" *Id.*, § 2 (emphasis added).

"in accordance with the Deposit Agreement." Doc. 32 at 38; *see* Doc. 51 at 17.) The Tribe does not claim it is entitled to any relief in this action as a result of rights arising from the Deposit Agreement.

The Tribe's fundamental claim is that federal law preempts the State from assessing use tax and sales tax on Tribal casino transactions. Roughly, the operative facts concern the nature of the activities the State would tax (i.e., gaming-related activities or not) and, for anything not decided based on IGRA, the nature of the State's interests in assessing its tax and the Tribal and federal interests in conducting Tribal reservation commerce free from a State tax burden, pursuant to the *Bracker* balancing test.

The operative facts for the counterclaim are the promises made by Farmer's National Bank and by the Tribe as set forth in the Deposit Agreement, and the parties' actions toward meeting or failing to meet these contractual obligations.

Because the Tribe's claims asserting federal preemption of the State's taxing authority do not derive from the same operative facts as the State's counterclaim "seeking to have the Deposit Agreement enforced in the State's favor, … includ[ing] a request that the Tribe be ordered to deposit into the escrow account the 'disputed tax liability' … for those months in which the Tribe has not done so," Doc. 51 at 12, the counterclaim does not come within the Court's supplemental jurisdiction. *See Auto-Owners Ins. Co. v. Tribal Court of Spirit Lake Indian Reservation*, 495 F.3d 1017, 1024 (8th Cir. 2007) (no supplemental jurisdiction existed where the potential federal question depended on facts relating to the application of federal statutes and the state law contract claim depended on the interpretation and application of the contracts' language).

C. The Counterclaim Fails to State a Claim.

1. The Deposit Agreement Required the Tribe to Make Payments of the Disputed Tax Liability Only Until Final Resolution of CIV93-1033.

The State conflates two different contractual terms and two separate concepts to argue that the Tribe's deposit obligation continued past the 1998 resolution of CIV93-1033. *See* Doc. 51 at 18-19. The first sentence of the Deposit Agreement's Recital F defines, in terms of time, the "disputed tax liability" to be deposited into escrow. The Tribe is to deposit "the aggregate amount of any disputed tax liability prior to a final resolution of the matter now pending … referred to as 'CIV93-1033[.]'" Doc. 32-1, Recital F. (Similarly, the State's agreement to "not make a final determination regarding the Tribe's application for renewal of its existing liquor license" also extends "until final resolution of CIV93-1033." *Id.*, Recital H.) The first sentence of Recital F (as well as the time provision in Recital H) addresses the duration of the parties' mutual obligations to act or refrain from acting – in the Tribe's case, to deposit funds into escrow.

The second sentence of Recital F addresses a different concept, the *disbursement* of the funds in escrow. The second sentence defines two of the alternative conditions for transferring legal title to the escrowed funds: (1) an agreement between the State and Tribe, or (2) "a final determination by a court of proper jurisdiction[.]" *Id.*, Recital F. As explained earlier, the "final determination" referenced in Recital F is the judicial determination described in § 5.B: a "final determination … declar[ing] that the State does [or does not] have jurisdiction to assess sales and use tax on transactions between the Tribe and non-members taking place in a Tribally owned and operated gambling casino[.]" *Id.*, § 5.B.

The concepts of a "final resolution" and a "final determination" are distinct: CIV93-1033 can reach a "final resolution" (i.e., an ending, a conclusion) without a "final determination" of

this particular legal question. That is, in fact, what happened. CIV93-1033 was dismissed by stipulation of the parties, but without the court having finally determined the State's authority or lack of authority to tax.

And of course the obligation to deposit is distinct from the conditions for disbursement. The agreement specifically provides alternative conditions for disbursement "in the event a final determination is not reached in CIV93-1033[.]" *Id.*, Recital F. It does not, however, specify any alternative duration for the Tribe's duty to make deposits (or the State's duty to forebear action on the Tribe's alcoholic beverage license) in that event. While disbursement depends on the outcome of the question in controversy – who has the legal right to the disputed tax liability – the agreement does not tie the parties' mutual obligations to that determination.

The State offers nothing to support its conclusory assertion that the "final resolution" of the 1994 litigation really means the "final determination" of the contested tax liability. Nor does the State address the inconsistency between the contract interpretation it now advances and its prior conduct, for example, failing to ever advise the Tribe of any perceived breach, and in 2014 denying reissuance of the Tribe's licenses, again with no reference to the Tribe's alleged contractual default, in each case acting as if the parties were no longer bound to their duties under the agreement. *See* Doc. 50 at 28. *See also* Doc. 32-1 § 2; fn.17, *infra*. The State's counterclaim for additional escrow payments must fail because the Tribe has made all the deposits due under the agreement.

2. The Counterclaim is Time-Barred as a Matter of Law.

The State asserts the question of its contract claim's accrual is a jury question, but it does not identify any disputes of material fact to be presented to a jury. *See* Doc. 51 at 20-21. In the absence a factual question of when accrual occurred, the Court decides as a matter of law

whether the limitations period has expired. *East Side Lutheran Church of Sioux Falls v. NEXT, Inc.*, 852 N.W.2d 434, 438-39 (S.D. 2014).

The State claims it was not damaged by the alleged breach, and will not be, until the determination is made that satisfies the condition to disburse the funds to the State. *See* Doc. 51 at 20-21. It does not cite any authority supporting this conception of damages. To the contrary, the law of escrow provides that a party to an escrow agreement acquires certain rights in the escrowed property sooner than when the conditions of the escrow are met. *See Matter of Newcomb*, 744 F.2d 621, 626 (8th Cir. 1984). The party who gains the legal right to the escrowed property upon fulfillment of the condition or contingency possesses an equitable interest in the property from the moment it is deposited. *Id.*, *see* 28 Am. Jur. 2d Escrow § 16 (2015); 30A C.J.S. Escrows § 4 (2015). Further, "the transfer of 'legal title' that occurs when conditions of an escrow are met can relate back to the creation of the escrow when equity so requires." *Matter of Newcomb* at 626. Thus, if the Tribe had failed to deposit money that should have been deposited, the State would have been injured at the time of that failure by the diminishment of its equitable interest in the escrow fund.[15] There was no lack of (alleged) damages preventing the State from bringing in 1998 the contract claim it now asserts in this action.[16]

[15] The Tribe addresses the claim and the injury in the terms alleged by the State, and sets to one side the fact that under the Deposit Agreement, suing to enforce the Tribe's deposit obligations is not an authorized remedy. The sole remedy for the Tribe's failure to make a required payment is the forfeiture of the "Tribe's right and authorization to sell alcoholic beverages." Doc. 32-1, § 2. The State is not seeking, and has never sought, to enforce this remedy.

[16] The State draws attention to another problem with its no-damages/no-accrual argument when it says, "Even if the Hearing Examiner's decision is not deemed a final decision of a court of competent jurisdiction, as required by the Deposit Agreement, this Court will make that final decision in this Action. At that time, the State's cause of action regarding the Deposit Agreement will accrue." Doc. 51 at 21. The State makes no discernable argument to the effect that the Hearing Examiner's decision (really the Department's decision) constitutes a final

3. The Department's Decision Is Not Preclusive Under Res Judicata Principles.

The State insists the Department's final agency decision preclusively determined, for the federal court, whether or not the Department contravenes federal law when it takes the actions it decided to take in that final agency decision. In support, the State urges the Court to accept a myopic view of the Restatement (Second) of Judgments, to conclude that res judicata does not apply to administrative decisions being subjected to judicial review, but only when that review takes the form prescribed by statute. *See* Doc. 51 at 23-24. The State quotes a paragraph from Restatement (Second) of Judgments § 83, comment a, concerning the judicial review exception to the res judicata effect of administrative decisions. *Id.* at 23. The comment describes, initially, one type of judicial review: "Judicial review in modern administrative procedure is usually prescribed by statute[.]" Restatement (Second) of Judgments § 83 cmt. a (1982). This is the fragment on which the State seizes (though the State ignores the word "*usually*," a fissure in its rigid interpretation), but the comment is not finished. Next it states there are *other* forms of judicial review: "In older procedural systems, such review may take the form of a 'collateral attack' on the administrative determination, premised on the proposition that the judgment is 'invalid.'" *Id.* The comment then concludes that whether the second action is in a form prescribed by statute or takes another form, the rules of res judicata do not foreclose the second action: "Whatever its form, such a review is a continuation of the original administrative litigation and the final outcome is still in contest. The rules of res judicata do not foreclose the appellate contest, just as they do not prevent an appellate court from reversing a lower judicial

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determination by a court of proper jurisdiction. Instead it argues the Department's decision should be accorded preclusive effect. Doc. 51 at 21-25. At best, if the State's argument prevails, this Court will make the "final determination" as required by res judicata. If the State's no-damages position were correct, then its claim would not accrue until that determination was made, and at present would be premature, and subject to dismissal on that basis.

tribunal." *Id.* The State's mantra that only judicial review "prescribed by statute" qualifies is flatly contradicted by the Restatement.

This *Ex parte Young* action is the quintessence of judicial review as developed under the "older procedural systems." It is a "collateral attack" on the Department's decision, in which the Court is not asked to overturn the agency's internal decision, but which is premised on the proposition that the decision is "invalid" because it is contrary to federal law. The Court is asked, in part, to enjoin the defendants from taking any prospective acts in accordance with the decision that would be invalid as contrary to federal law. Furthermore, the State's judicial review statute does not limit such review to the "modern" procedure, review as prescribed by statute, but also expressly allows review under whatever "older procedural system" is "provided by law." *Id.*, SDCL 1-26-30 ("This section does not limit utilization of or the scope of judicial review available under other means of review, redress, or relief, when provided by law.").

To treat the Department's decision as the unimpeachable last word on the validity under federal law of State officials' future conduct disables the federal court's enforcement of federal and Constitutional law as a limitation on State officials' subordinate authority, and would deny the Tribe a suitable forum to protect its federally-guaranteed rights from State interference. The State cites no legal authority that condones, let alone requires, such an evisceration of both *Ex parte Young* and federal Indian law.

CONCLUSION

The Tribe's motion demonstrates grounds for the Court to reach legal determinations regarding four aspects of this case: First, the Court should not resolve this *Ex parte Young* suit by declining to exercise jurisdiction or treating the Department's agency decision as having preclusively decided the federal issues at stake. Second, IGRA prohibits the State's taxation of the actual playing of class III games at the Tribe's casino where, as here, such taxation is not

authorized by the Tribal-State Gaming Compact. Third, IGRA preempts the application of State laws on all subjects IGRA covers with its framework for allocating regulatory and taxing authority among the Federal, Tribal and State governments, unless the application of those State laws is provided in the Tribal-State Gaming Compact. Finally, the State's counterclaim to enforce the Tribe's alleged duty to deposit additional funds into escrow pursuant to the 1994 Deposit Agreement must be dismissed for all the reasons described above and in the Tribe's initial brief. The Tribe therefore respectfully asks the Court to grant the Tribe's motion for partial judgment on the pleadings.

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Respectfully submitted,

FLANDREAU SANTEE SIOUX TRIBE

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WORD COUNT CERTIFICATE

I certify that the foregoing brief, Flandreau Santee Sioux Tribe's Brief in Opposition to Defendants' Motion for Judgment on the Pleadings, complies with the type volume limitation of Local Rule 7.1(B)(1).

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REQUEST FOR ORAL ARGUMENT

Pursuant to D.S.D. LR 7.1(C), the Tribe respectfully requests the Court order oral argument.