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

FLANDREAU SANTEE SIOUX TRIBE'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

(ORAL ARGUMENT REQUESTED)

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INTRODUCTION

The Flandreau Santee Sioux Tribe is a federally-recognized Indian tribe located in Flandreau, South Dakota. The Tribe owns and operates the Royal River Casino and Hotel ("Casino") in accordance with the Tribe's Gaming Ordinance, the federal Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701-2721, and the gaming compact between the Tribe and the State of South Dakota ("State"). The Casino is located on the Flandreau Indian Reservation, Indian land held in trust by the United States for the benefit of the Tribe. The Tribe brought this *Ex parte Young* action against the State's Governor and Secretary of Revenue in response to the State's efforts to impose the State use tax upon personal property and services nonmember customers buy from the Tribal Casino, and to require the Tribe to collect such use tax from the customers and remit it to the State. Federal law and tribal sovereignty preempt and prohibit the State's authority to impose such requirements.

BACKGROUND AND PROCEDURAL HISTORY

The Tribe and the State have disputed for many years the State's authority to impose taxes on non-Indians doing business with the Tribe within the Flandreau Indian Reservation. The Tribe sued the State in 1994 challenging the State's power to impose sales and use taxes upon nonmembers' on-reservation purchases from the Tribe. *Flandreau Santee Sioux Tribe v. State of South Dakota*, Civil No. 94-4086 (D.S.D.), *consol. with Sisseton-Wahpeton Sioux Tribe v. State of South Dakota*, Civil No. 93-1033 (D.S.D.). That action was dismissed in 1998 without resolving the issue of the State's taxing authority in Indian country.[1] Over the next decade, the Tribe and

[1] While that case was pending, the Tribe deposited the disputed sales tax liability into an escrow account, which now holds approximately $400,000. Pursuant to a Deposit Agreement between the Tribe and the State, a determination in the current action of whether the State has jurisdiction to assess use tax on transactions between the Tribe and nonmembers at the Tribe's Casino should govern how those funds are to be disbursed.

the State discussed entering into a tax compact that would have divided up the on-reservation tax revenues between the parties, similar to the tax compacts the State entered with several other South Dakota Indian tribes, but no agreement was ever reached. In 2010, the State began denying the Tribe's applications to reissue the Tribe's three State-issued alcoholic beverage licenses, citing the Tribe's refusal to collect use tax from its nonmember customers and remit the tax revenue to the State. *See* SDCL 35-2-24.[2] After further negotiations proved fruitless, the Department of Revenue issued a final decision in October, 2014, that it would not reissue the Tribe's licenses, concluding that all nonmember purchases at the Casino are subject to State use tax.

The Tribe commenced this action against the Secretary of Revenue and the Governor on November 18, 2014. Doc. 1. At the same time, the Tribe moved for a preliminary injunction to stop the State from taking any action against the Tribe on grounds of the Tribe's failure to remit the disputed use taxes. Doc. 6 & 7. The parties agreed to maintain the status quo while the case was pending, so the Tribe withdrew its preliminary injunction request. Doc. 26, 27 & 28. The State answered the complaint on December 9, 2014, also alleging a counterclaim. Doc. 29. The Tribe filed the operative First Amended Complaint and answer to the counterclaim on December 31, 2014. Doc. 32. The State answered. Doc. 34.

The State moved for judgment on the pleadings in March 2015, and the Tribe moved for partial judgment on the pleadings in May 2015. The Court ruled in favor of the Tribe on both motions. Doc. 59 & 60. First, the Court rejected the State's arguments based on res judicata and

[2] SDCL 35-2-24 currently provides in relevant part:

> No license granted under this title may be reissued to an Indian tribe operating in Indian country controlled by the Indian tribe … until the Indian tribe … 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.

Younger abstention, which were asserted in connection with the State administrative process that led to the Department of Revenue's final decision regarding the liquor licenses. Doc. 59 at 4-13.

The Court then rejected each of the State's asserted defenses.[3] It held that IGRA governs the State's authority to tax and regulate a range of "activities at a tribally-owned casino," which include, "at a minimum, alcohol purchased and consumed on a casino floor[.]" *Id.* at 18. *See also id.* at 21 ("the Court … finds that alcohol sales fall within … 25 U.S.C. § 2710(d)(3)(C)") and 22 ("the Court finds that IGRA can have application on alcohol and other services 'directly related to the operation of gaming activities.'"). In particular, the Court held that the State cannot demand that the Tribe make tax payments "from revenues accumulated from patrons' activities at a tribally-owned casino," if the State can use those funds for purposes not directly related to gaming. *Id.* at 18. The Court also noted that IGRA's proscription against states taxing "an Indian tribe or … any other person or entity authorized by an Indian tribe to engage in a class III activity," 25 U.S.C. § 2710(d)(4), logically "applies to nonmembers on the Casino floor authorized to gamble, [including] related activities, i.e., gamblers and what they spend on gambling, alcohol, and food in the casino." *Id.* at 23.

The Court also summarized much of the law pertaining to general federal preemption of state taxing authority in Indian country. *Id.* at 26-27. In short, the Court concluded, "[b]ecause

[3] The Court recognized that "[b]y the plain language of S.D.C.L. § 35-[2-24], the use tax imposed is upon nonmember patrons," Doc. 59 at 25, which the State does not dispute. The Court also recognized that the disputed use tax is "being imposed on Indian land." *Id.* at 27; *see also id.* at 25 ("it is undisputed that the state tax in issue here is taking place on reservation land"). In addition, during the course of briefing the State disclaimed any intention to apply State use tax to the actual game play at the Casino, as plainly barred by 25 U.S.C. § 2710(d)(4). Defendant's Reply Brief to Plaintiff's Brief in Opposition to Defendants' Motion for Judgment on the Pleadings, Doc. 46 at 8. The State also affirmed that it would not deny the reissuance of the Tribe's alcoholic beverage licenses under § 35-2-24 on the basis of any failure to remit taxes found to be invalid. *Id.* at 15.

this is a tax being imposed on Indian land, the interests of the Tribe, the State, and the federal government all must be weighed in order to determine if the State's taxes are permissible." *Id.* at 27.

The Court further rejected the State's assertions that one of the Tribe's claims was unripe, *id.* at 28-29, and that by applying for liquor licenses, the Tribe had consented to remit the disputed use tax, which the State had made a condition of maintaining the licenses, *id.* at 29-32. With respect to the latter, the Court observed that "[i]f a tax on Indian land is invalid … it seems axiomatic that a state cannot condition certain powers on the payment of those very same invalid taxes." *Id.* at 31.

In the Court's next order, which granted the Tribe's motion for partial judgment on the pleadings, the Court summarized part of its previous ruling: "Finding in favor of the Tribe, the Court ruled that alcohol sales to nonmember patrons at the Casino can be directly related to class III gaming and taxes on the sales are, therefore, preempted by the IGRA." Doc. 60 at 5. "Allowing a Tribe to be primary beneficiary of alcohol sales made on a casino floor is consistent with congressional intent. Having so ruled in the Memorandum Opinion and Order, the Court now grants the Tribe's motion for judgment on the pleadings and a declaration that the IGRA may encompass more than pure gameplay." *Id.* As for which other goods and services sold at the casino may relate to class III gaming, that was left for the development of evidence. *Id.* Finally, the Court held that tribal sovereign immunity barred the State's counterclaim. *Id.* at 6-12.

Following the two rulings, the parties engaged in written discovery, exchanged expert reports, and conducted depositions. The Tribe now moves for summary judgment on claims 1, 3 and 4 of its First Amended Complaint (Doc. 32).

UNDISPUTED MATERIAL FACTS

In accordance with Local Rule 56.1(A), the Tribe's motion is accompanied by a separate statement of the material facts as to which there is no genuine dispute. This brief will cite to the separate statement, which in turn contains citations to the documentary evidence in the record.

In summary, the undisputed facts demonstrate that the taxed activity – transactions at the Casino between the Tribe and nonmember guests – are subject to pervasive Federal and Tribal regulation and embody significant value created by the Tribe on the Reservation. The Tribe has a strong interest in maintaining governmental sovereignty and autonomy within its territorial jurisdiction, and in raising revenues through Tribal taxation and government-run commerce in order to fund an array of governmental services to its members and the larger community. The Federal government's express policy is to protect and advance these Tribal interests. The enforcement of State use tax on Casino activities interferes with these strong Tribal and Federal interests. The State's interest is almost entirely its general desire to raise revenue. The State has extremely minimal connections to the taxed activity occurring on the Reservation; it has almost nothing to do with these transactions except to tax them.

The undisputed facts also demonstrate the close connection between the transactions the State would tax and the Tribal gaming operation. The property and services the Tribe offers throughout the Casino are tailored to accomplish one primary goal: to attract and retain gaming guests and ultimately generate gaming revenue. As the Court observed in its December 2015 order, IGRA prohibits State taxation of nonmembers engaged in Tribal gaming and related activities. Doc. 59 at 23. Not only is State taxation unlawful under direct application of IGRA, but the evidence shows that the State's tax enforcement would interfere with and frustrate the Federal and Tribal interests behind IGRA and nearly all of modern Federal Indian law.

SUMMARY JUDGMENT STANDARD

Under rule 56(a), "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "There is a genuine dispute when the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Dick v. Dickinson State Univ.*, 826 F.3d 1054, 1061 (8th Cir. 2016) (internal quotation marks omitted). "A fact is material if it might affect the outcome of the suit. … Thus, there must be more than the mere existence of *some* alleged factual dispute to overcome summary judgment." *Id.* (internal quotation marks omitted, emphasis in original). Unsupported factual assertions are insufficient to create a genuine dispute. *Id.* "A party opposing a properly supported motion for summary judgment may not rest on mere allegations or denials, but must set forth specific facts in the record showing that there is a genuine issue for trial." *Dryer v. National Football League*, 814 F.3d 938, 942 (8th Cir. 2016); *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). "[W]hen the only question is what legal conclusions are to be drawn from an established set of facts, the entry of a summary judgment usually should be directed." 10A Wright, Miller & Kane, Federal Practice & Procedure: Civil § 2725, p. 412 (3d ed. 1998).

ARGUMENT

I. State taxation of property and services nonmembers purchase from the Tribe on the reservation is preempted by Federal law and unlawfully infringes on the Tribe's sovereignty.

Under decades of Supreme Court precedent, a person who is not a tribal member, engaged in commerce with an Indian tribe on the tribe's reservation, is not subject to State taxation unless the State shows its intrusion into Indian commerce is justified by legitimate State interests that outweigh the interference with established Federal and Tribal interests. In this case, the State use tax is incompatible with Federal and Tribal interests in protecting Tribal self-government and self-

sufficiency, and the State interests are insufficient to justify enforcing the tax. Failing to satisfy the balancing test, the State tax is unenforceable because it is preempted by Federal Indian law, and because it infringes on the Tribe's right to be governed by its own laws within its reservation.

Federal preemption also arises here through IGRA's statutory prohibition of most State taxes on Indian gaming. With respect to Indian gaming activities regulated by IGRA and tribal-state gaming compacts, Congress already balanced the competing interests and enacted the framework for allocating regulatory and taxing authority among Federal, State and Tribal governments. Under IGRA's framework, except for certain limited taxes agreed to in a tribal-state gaming compact, the State cannot tax tribal gaming activities or the guests engaged in those gaming activities. Where IGRA prohibits State taxation, the result is ordained by Congress and no new balancing of interests is necessary.

A. The *Bracker* interest balancing test.

In 1832 the Supreme Court held that "'the laws of a State can have no force' within reservation boundaries." *White Mountain Apache Tribe v. Bracker* ("*Bracker*"), 448 U.S. 136, 141 (1980) (quoting *Worcester v. Georgia*, 31 U.S. 515, 561 (1832), brackets omitted). "Over the years [the] Court has modified these principles in cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized, but the basic policy of *Worcester* has remained." *Williams v. Lee*, 358 U.S. 217, 219 (1959). As a result, "Indian tribes retain 'attributes of sovereignty over both their members and their territory.'" *Bracker*, 448 U.S. at 142 (quoting *United States v. Mazurie*, 419 U.S. 544, 557 (1975)). Indian tribes' "semi-independent position," along with Congress' "broad power to regulate tribal affairs under the Indian Commerce Clause," "have given rise to two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members. First, the exercise of such authority may be pre-empted by federal law. … Second, it may unlawfully infringe 'on the right

of reservation Indians to make their own laws and be ruled by them.'" *Bracker* at 142 (quoting *Williams v. Lee*, 358 U.S. at 220). *See also, e.g., Ramah Navajo School Bd., Inc. v. Bureau of Revenue of New Mexico* ("*Ramah*"), 458 U.S. 832, 837 (1982).

> The two barriers are independent because either, standing alone, can be a sufficient basis for holding state law inapplicable to activity undertaken on the reservation or by tribal members. They are related, however, in two important ways. The right of tribal self-government is ultimately dependent on and subject to the broad power of Congress. Even so, traditional notions of Indian self-government are so deeply engrained in our jurisprudence that they have provided an important "backdrop," … against which vague or ambiguous federal enactments must always be measured.

Bracker at 142 (quoting *McClanahan v. State Tax Com'n of Ariz.*, 411 U.S. 164, 172 (1973).)

A State's taxing and regulatory authority within an Indian reservation depends in part upon whether the State law in question is directed at Indians or non-Indians. "When on-reservation conduct involving only Indians is at issue, state law is generally inapplicable." *Bracker*, 448 U.S. at 144. In contrast, "under some circumstances a State may exercise concurrent jurisdiction over non-Indians acting on tribal reservations, … [but] such authority may be asserted only if not preempted by the operation of federal law." *New Mexico v. Mescalero Apache Tribe* ("*Mescalero*"), 462 U.S. 324, 333 (1983). "Preemption" in this context is applied in a "special sense" founded on the "'unique historical origins of tribal sovereignty' and the federal commitment to tribal self-sufficiency and self-determination[.]" *Id.* at 333-34 (quoting *Bracker* at 143). Federal preemption of State authority to assess taxes on non-Indians engaged in commerce on a reservation does not require an express congressional statement forbidding such taxation. "In a number of cases [the Supreme Court has] held that state authority over non-Indians acting on tribal reservations is pre-empted even though Congress has offered no explicit statement on the subject." *Bracker*, 448 U.S. at 151. In the inquiry into federal preemption, "ambiguities in federal law are, as a rule, resolved in favor of tribal independence." *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 177 (1989).

Thus, when "a State asserts authority over the conduct of non-Indians engaging in activity on the reservation," such as through the imposition of a tax on nonmembers, as in this case, the Supreme Court calls for "a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law." *Bracker* at 144-45. The inquiry "examine[s] the language of the relevant federal treaties and statutes in terms of both the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence." *Id*.

The analysis of interests takes the form of a balancing test that weighs the relevant State interests against those of the Federal government and the Tribe. *Wagnon v. Prairie Band Potawatomi Nation* ("*Wagnon*"), 546 U.S. 95, 110 (2005); *California v. Cabazon Band of Mission Indians* ("*Cabazon*"), 480 U.S. 202, 216-19 (1987); *Bracker*, 448 U.S. at 144-45. "State jurisdiction is preempted by the operation of federal law if it interferes with or is incompatible with federal and tribal interests reflected in federal law, unless the State interests at stake are sufficient to justify the assertion of State authority." *Mescalero*, 462 U.S. at 334.

The balancing test articulated in *Bracker* was part of the Court's effort to explain the legal developments regarding questions of tribal-state relations during the period between *Worcester v. Georgia* in 1832 and *Williams v. Lee* in 1959, an effort that had been ongoing before *Bracker* and has continued through the 2005 *Wagnon* decision. As the Court noted in *Bracker*, its opinions had "departed from" *Worcester*'s principle of absolute exclusion of state authority within an Indian reservation. The Court explained in *Williams* that its decisions since *Worcester* had "modified" the broad principles of that decision "in cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized," and it distinguished that type of case

from circumstances where Indian rights *would* be jeopardized, or as the Court put it, where "the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." *Williams* at 220. In other words, the Court allowed state regulation within Indian country only when it did not seem to interfere with tribal interests or the federal government's interests, as the Court perceived them.[4] The Court observed that "Congress has also acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation," encouraging stronger tribal governments and permitting willing States to assume jurisdiction over reservation Indians only when that could be done "without disadvantage to them." *Id.* at 220-21. "Significantly, when Congress has wished the States to exercise this power it has expressly granted them the jurisdiction which *Worcester v. State of Georgia* had denied." *Id.* at 221. The "basic policy of *Worcester* has remained," *Williams* at 219, and is now embodied in the "dual barriers to state authority[, which] are essentially the same ones the Supreme Court invoked to invalidate Georgia laws as applied to two non-Indian missionaries on the Cherokee reservation" in *Worcester*. Cohen's Handbook of Federal Indian Law § 6.03[2][a], at 518 & 2015 Supp. at 19

[4] For instance, the cases cited in *Williams* in which the Court had permitted the State to exercise authority concerned "suits by Indians against outsiders in state courts," and criminal jurisdiction over "non-Indians who committed crimes against each other on a reservation." *Williams* at 219-20, *citing Felix v. Patrick*, 145 U.S. 317 (1892); *United States v. Candelaria*, 271 U.S. 432 (1926); *People of State of N.Y. v. Martin*, 326 U.S. 496 (1946). Similarly, in early cases the Court validated the taxing authority of the territorial governments of Oklahoma and Idaho with respect to non-Indian activities on Indian reservations, but only to the extent that the taxes did not interfere with Indian interests and federal legislative power. *Thomas v. Gay*, 169 U.S. 264, 273-75 (1898); *Utah & Northern Railway Co. v. Fisher*, 116 U.S. 28, 31-32 (1885).

The federal government's interest in regulating reservation activities, and its power to do so, notwithstanding State objections, was forcefully defended in *United States v. Kagama*, 118 U.S. 375 (1886), in which the Court observed that Indian tribes "owe no allegiance to the states, and receive from them no protection. Because of the local ill feeling, the people of the states where [Indian tribes] are found are often their deadliest enemies." *Id.* at 384. Citing *Kagama*, the *Williams* Court stated that the federal government's "power over Indians" derives from the Indian Commerce Clause of the U.S. Constitution and the need to uniformly protect Indians and Indian tribes from State interference. *Williams* at 219, fn. 4.

(Nell Jessup Newton, ed., 2012) ("Cohen's Handbook"). The "right of Indians to govern themselves" – which both the Court and Congress aim to protect against State infringement – encompasses (among other things) the Tribe's right to exercise authority over non-Indians in Indian country. *Williams* at 223 (explaining that "[i]t is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there.").[5]

This is the stage on which the Court's analysis of State authority within Indian country has played out. In *Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685 (1965), a state's attempt to tax the proceeds of a retailer doing business within an Indian reservation was invalidated because the federal law permitted "the Indians largely to govern themselves, free from state interference[.]" *Id.* at 366-87; *see McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 170 (1973) (summarizing *Warren Trading Post*). Like *Williams*, *Warren Trading Post* noted the pattern in prior rulings: "Certain state laws have been permitted to apply to activities on Indian reservations, where those laws are specifically authorized by acts of Congress, or where they clearly do not interfere with federal policies concerning the reservations." *Warren Trading Post* at 687 fn.3. In *McClanahan*, which held that state income tax was "unlawful as applied to reservation Indians with income derived wholly from reservation sources," *id.* at 165, the Court reiterated the pattern of its prior decisions, and noted that while "federal pre-emption" via treaties and statutes had become the main "bar to state jurisdiction" in the "modern cases," the "Indian sovereignty doctrine" nevertheless "provides a backdrop against which the applicable treaties and federal statutes must be read." *Id.* at 171-72.

[5] Such is the continuity from the earlier modern cases to *Bracker* that the leading Indian law treatise refers not to the "*Bracker* balancing test," but to the "*Williams* preemption/infringement test," with *Bracker* identified as a "leading case" in which the Supreme Court applied the "two-pronged test of preemption and infringement," among other decisions before and after *Bracker*. Cohen's Handbook § 6.03[2][a], at 517-27.

The Court later explained that its "decision in *McClanahan* relied heavily on the doctrine of tribal sovereignty." *Oklahoma Tax Comm'n v. Sac and Fox Nation*, 508 U.S. 114, 123 (1993). It also clarified that "the *McClanahan* presumption against state taxing authority applies to all Indian country, not just formal reservations." *Id.* at 125. The "*McClanahan* presumption" is the Court's starting position for state taxing authority in Indian country: "Absent explicit congressional direction to the contrary, we presume against a State's having the jurisdiction to tax within Indian country[.]" *Id.* at 128. *See Indian Country, U.S.A., Inc. v. State of Okla.*, 829 F.2d 967, 976 (10th Cir. 1987) ("There is a presumption against state jurisdiction in Indian country" unless Congress expressly provides otherwise, or "even absent express consent in very limited circumstances."); Cohen's Handbook § 6.03[2][a], at 518-19 & 2015 Supp. at 19. When a State tax falls on a non-Indian in Indian country, the Court uses *Bracker* balancing to determine whether the State can overcome the presumption by demonstrating that the taxation advances the State's legitimate interests while not unduly burdening those of the tribe and the federal government.

"Certain broad considerations guide [the] assessment of the federal and tribal interests. The traditional notions of Indian sovereignty provide a crucial 'backdrop,' … against which any assertion of State authority must be assessed. Moreover, both the tribes and the Federal Government are firmly committed to the goal of promoting tribal self-government, a goal embodied in numerous federal statutes." *Mescalero* at 334-35. The tribal and Federal interests further the "overriding goal of encouraging 'tribal self-sufficiency and economic development.'" *Id.* at 335 (quoting *Bracker* at 143). *See also, e.g.*, *Cabazon*, 480 U.S. at 216-17. "Thus, when a tribe undertakes an enterprise" – including an economic enterprise – "under the authority of federal law, an assertion of State authority must be viewed against any interference with the successful accomplishment of the federal purpose." *Mescalero* at 336. Tribes have exceptionally strong economic and governmental interests in being free from state taxes upon the value the tribes

generate on their reservations through activities in which they have a substantial interest. *Cabazon* at 219-20; *Mescalero* at 341.

As for the State's interest, "[t]he exercise of State authority which imposes additional burdens on a tribal enterprise must ordinarily be justified by functions or services performed by the State *in connection with the on-reservation activity*. … Thus a State seeking to impose a tax on a transaction between a Tribe and nonmembers must point to more than its general interest in raising revenues." *Mescalero* at 336 (emphasis added); *see Ramah* at 843 (tax is preempted in case where "the State does not seek to assess its tax in return for the government functions it provides to those who must bear the burden of paying this tax"). A "general desire to increase revenues" by levying a tax "is insufficient to justify" imposing a burden on federally encouraged reservation activities. *Ramah*, 458 U.S. at 845. Nor can the State legitimately justify an on-reservation tax "whose ultimate burden falls on the tribal organization" by pointing to State services provided in connection with "activities off the reservation." *Id.* at 844.

When the Supreme Court has applied the balancing test in circumstances similar to today's case, where the "economic burden of the asserted taxes will ultimately fall on the Tribe" (though the legal incidence falls on a non-member), and where "the Federal Government has undertaken comprehensive regulation" of the taxed activity, "where a number of the policies underlying the federal regulatory scheme are threatened by the taxes [the State] seek[s] to impose, and where [the State is] unable to justify the taxes except in terms of a generalized interest in raising revenue … the proposed exercise of state authority is impermissible." *Bracker*, 448 U.S. at 151; *see also*, *e.g.*, *Ramah*, 458 U.S. at 839-44.

In the absence of an act of Congress authorizing the state to impose a tax, the only cases in which the Supreme Court has approved state taxation of nonmembers for on-reservation commerce

based on the weight of the state's interests are those involving the unique business model of high-volume tax-free retail cigarette sales. *Dept. of Taxation and Fin. v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 74 (1994); *Cal. State Bd. of Equalization v. Chemehuevi Indian Tribe*, 474 U.S. 9, 12 (1985); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 136, 155-57 (1980),; *Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation* ("*Moe*"), 425 U.S. 463, 482 (1976).[6]

[6] Moreover, until *Wagnon* in 2005, the Supreme Court had never clarified the critical importance of the "where" of a challenged tax. *See Wagnon* at 101 ("the 'who' and the 'where' of the challenged tax have significant consequence"); 110 ("we have never addressed this precise issue"). *Bracker* itself emphasized the "significant geographical component to tribal sovereignty," but also stated that "the reservation boundary is not absolute, [but] it remains an important factor to weigh in determining whether state authority has exceeded the permissible limits." *Bracker*, 448 U.S. at 151. It was 25 years later that the Court held the reservation boundary *is* absolute, and not just a "factor to weigh," in that Indian transactions outside the boundary are not given any special protection against complete state regulation and taxation. Thus, although the Court did not express its pre-*Wagnon* decisions in such terms, the results in the cigarette tax cases can be explained as reflecting *off-reservation* taxation. In *Colville*, for instance, the Court stated that the State's interest is strong "when the tax is directed at off-reservation value," and then noted that the State tax was "designed to prevent the Tribes from marketing their tax exemption to nonmembers … who would otherwise purchase their cigarettes outside the reservations." *Colville* at 157. In this and the other cigarette tax decisions, the states are afforded the right to tax on-reservation bulk cigarette transactions in order to claim their share of the "off-reservation value" of sales which the Court found *should* have occurred outside Indian country. *See id.* at 155 ("It is painfully apparent that the value marketed by the smokeshops to persons coming from outside is not generated on the reservations by activities in which the Tribes have a significant interest. … What the smokeshop offers these customers, and what is not available elsewhere, is solely an exemption from state taxation."); 157 (the Tribes' reservation commerce would not exist but for the state tax exemption); 158 (nonresidents of the reservation have "no incentive" to buy cigarettes on-reservation apart from avoiding the state tax); *see also Moe* at 482 (reservation retailers' "competitive advantage … is dependent on the extent to which the non-Indian purchaser is willing to flout his legal obligation to pay the tax"). This hindsight view of the cigarette tax cases has parallels in *Wagnon*, where the Court was willing to describe the off-reservation taxed event and the subsequent on-reservation tribal sale which felt "downstream economic consequences of the Kansas tax" as the "same transaction," over which both sovereigns had legitimate taxing authority. *Wagnon* at 114. Similarly, in the cigarette tax cases, the on-reservation sale and off-reservation economic consequences (the non-sale, supplanted by the illegitimate reservation commerce) make up parts of the same transaction, the off-reservation aspect of which the state has nearly unfettered power to tax because of its location.

In another decision that is distinguishable from the facts of this case, the Court permitted New Mexico to impose a severance tax on a non-Indian company that leased tribal land for oil and gas production, in part because a federal statute expressly permitted state taxation. *Cotton Petroleum*, 490 U.S. at 181-83. In addition, the tax in *Cotton Petroleum* was allowed because of the trial court's factual findings that "'New Mexico provides substantial services to both the Jicarilla Tribe and Cotton,'" as well as regulation of the taxed activity, and that "'no economic burden falls on the tribe by virtue of the state taxes[.]'" *Id.* at 185-86. All of this is in contrast to the undisputed facts here.

The Supreme Court has also balanced the federal, tribal and state interests in non-tax cases involving attempts to enforce state regulations upon non-Indians within reservations. *See, e.g.*, *Cabazon*, 480 U.S. at 216-17 (prohibiting state from regulating non-Indian customers of tribal bingo operation); *Mescalero*, 462 U.S. at 333-43 (barring enforcement of state laws against non-Indians for on-reservation hunting and fishing).

The Eighth Circuit has applied the balancing test to hold that "South Dakota's motor fuel tax on fuel purchased by the Marty Indian School and stored on the school's premises is preempted by federal law." *Marty Indian School Bd., Inc. v. State of South Dakota*, 824 F.2d 684, 688 (8th Cir. 1987).[7] The Eighth Circuit has also relied on the competing governmental interests balanced in the *Bracker* line of decisions, especially *Cabazon*, to find that IGRA has the "extraordinary

[7] It is not clear from the available record why the Eighth Circuit balanced interests, since a state tax imposed on an Indian entity on its reservation should have been impermissible *per se*. *See, e.g.*, *Cabazon*, 480 U.S. at 215 fn. 17. However, the litigation may have been influenced by a District Court decision which discussed, but did not resolve, whether the Marty Indian School should be treated as an Indian for purposes of state tax exemption, analyzing the case instead based on *Bracker* balancing. *Marty Indian School v. State of South Dakota*, 592 F.Supp. 1236, 1238 (D.S.D. 1984) (holding that State sales tax "is preempted by federal law, violating the first part of the *Bracker* test.")

preemptive force" necessary to convert a state law claim into a federal cause of action. *Gaming Corp. of America v. Dorsey & Whitney*, 88 F.3d 536, 546-48 (8th Cir. 1996); *see also, e.g., Casino Resource Corp. v. Harrah's Entm't, Inc.*, 243 F.3d 435, 437 (8th Cir. 2001).

Finally, although Indian tax cases typically focus on preemption, in *Bracker* the Supreme Court held that there are "two independent but related barriers to the assertion of state regulatory authority over tribal reservations" – federal preemption and unlawful infringement of tribal sovereignty – and that "either, standing alone, can be a sufficient basis for holding state law inapplicable to activity undertaken on the reservation or by tribal members." *Bracker*, 448 U.S. at 142-143; *see McClanahan*, 411 U.S. at 172 (noting in 1973 that "the trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption."); *Tulalip Tribes v. State of Washington*, No. 2:15-cv-00940-BJR, 2017 WL 58836, *6 (W.D. Wash Jan. 5, 2017) (holding that *Bracker*'s "unequivocal statement remains good law"). While authoritative judicial analysis of the infringement barrier is relatively sparse, it appears that infringement and preemption are subject to the same balancing test. In *McClanahan*, for instance, the Court stated that under *Williams v. Lee*'s infringement test, "the State could protect its interest up to the point where tribal self-government would be affected." *McClanahan* at 179. The Supreme Court addressed infringement in *Colville* (issued just before *Bracker*) by stating that "[t]he principle of tribal self-government, grounded in notions of inherent sovereignty and in congressional policies, seeks an accommodation between the interests of the Tribe and Federal Government, on the one hand, and those of the State, on the other." *Colville*, 447 U.S. at 156. The Supreme Court summarily affirmed the Ninth Circuit's judgment holding a Montana tax invalid based on both preemption and infringement, with both aspects of the judgment founded on the conclusion that the State tax threatened tribal and federal interests and that it was not "narrowly

tailored" to achieve the State's legitimate interests. *Crow Tribe of Indians v. State of Montana*, 819 F.2d 895, 901-03 (9th Cir. 1987), *summ. aff'd* 484 U.S. 997 (1988). The Second Circuit recently held that both infringement and preemption "are governed by the same doctrinal test and we need not distinguish between them to resolve this case." *Otoe-Missouria Tribe of Indians v. New York State Dept. of Fin. Servs.*, 769 F.3d 105, 112 fn.5 (2d Cir. 2014). Finally, as a Washington federal district court noted, "the preemption test and sovereignty test are so closely related, it is unsurprising that the party that prevails on preemption interest balancing virtually always also prevails on sovereignty interest balancing." *Tulalip* at *6.

B. State taxation of the property and services that are closely connected to the Tribe's gaming activities is preempted by IGRA, without the need for any further balancing of interests.

Before turning to the relative weight of the State's interests and the Federal and Tribal interests, it is important to recognize that State taxation of much of the commerce at the Casino, if not all of it, is statutorily preempted by IGRA. Under IGRA, Tribal sales of property and services directly related to class III gaming cannot be taxed by the State except in limited circumstances that do not exist here. The reasons for this preemption are the same reasons underlying the preemption and infringement to be demonstrated by *Bracker* balancing, but, for tribal gaming and activities related to it, Congress has already definitively performed the balancing test analysis and set down in statute its resulting rules governing State authority in Indian country. State taxation of these gaming and gaming-adjacent activities is preempted because it is incompatible with IGRA, regardless of interests asserted by the State. Meanwhile, any reservation activities that may fall beyond IGRA's zone of statutory preemption are still protected against State interference by the same federal and tribal interests underlying IGRA (and many other federal laws), although for these extra-peripheral activities, the State can attempt to justify its intrusions by showing that they advance strong legitimate State interests.

The Supreme Court confirmed in 1987 that Indian tribes had the right to conduct gaming in Indian country without State regulation. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 221-22 (1987). The *Cabazon* Court employed the *Bracker* balancing test, first noting the important federal and tribal interests in Indian self-government, self-sufficiency and economic development, as well as the fact that the tribes operating casinos were not merely "'market[ing] an exemption from state taxation to persons who would normally do their business elsewhere,'" but rather were "generating value on the reservations through activities in which they have a substantial interest," and then weighing those interests against the State's interest in combating organized crime. *Id.* at 216-21, *quoting Colville*, 447 U.S. at 155. The Court concluded "that the State's interest in preventing the infiltration of the tribal bingo enterprises by organized crime does not justify state regulation of the tribal bingo enterprises in light of the compelling federal and tribal interests supporting them. State regulation would impermissibly infringe on tribal government[.]" *Cabazon* at 221-22. Shortly after the Court decided *Cabazon* (and before Congress enacted IGRA), the Tenth Circuit applied *Cabazon* to state taxation of tribal gaming, concluding that "the state's interest in taxing Creek bingo and related activities is minimal, and is incompatible with and outweighed by federal and tribal interests." *Indian Country, U.S.A.*, 829 F.2d at 987.

Cabazon was the backdrop against which Congress enacted IGRA in October 1988. IGRA granted states a means to negotiate with tribes for limited rights to participate in the regulation and taxation of tribal gaming activities in Indian country, where previously the states had no such rights. In IGRA's first section, Congress recited the rule that "Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and

public policy, prohibit such gaming activity." 25 U.S.C. § 2701(5). As the Eighth Circuit has stated, IGRA represents "the scheme Congress developed to balance the interests of the federal government, the states, and the tribes." *Gaming Corp.* at 546. "[R]ather than directing the federal courts to perform the balancing of interests between the state on the one side and the tribe and federal government on the other, Congress conducted the balancing itself." *Id.*; *see also 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."). Congress "created a fixed division of jurisdiction," under which "courts are not to conduct a *Cabazon* balancing analysis," and which "left the states without a significant role under IGRA unless one is negotiated through a compact." *Gaming Corp.* at 547.

IGRA allows Indian tribes to engage in "class III" gaming activities (which primarily includes slot machines and certain card games) in any state that permits such gaming, if such activities are: (1) authorized by a federally-approved Tribal gaming ordinance and (2) conducted in conformance with a federally-approved Tribal-State compact entered into by the Indian tribe and the state. 25 U.S.C. § 2710(d)(1). Indian tribes enjoy the unimpaired right to regulate class III gaming on tribal lands "except to the extent that such regulation is inconsistent with, or less stringent than, the State laws and regulations made applicable by any Tribal-State compact…." 25 U.S.C. § 2710(d)(5).

The preemptive purpose of IGRA is well-recognized. "Congress, by enacting IGRA, has established the preemptive balance between tribal, federal, and state interests in the governance of gaming operations on Indian lands." *Casino Resource Corp.*, 243 F.3d at 437. "IGRA reflects the intent of Congress that tribes maintain considerable control of gaming to further their economic

and political development." *Gaming Corp.*, 88 F.3d at 549. "Examination of the text and structure of IGRA, its legislative history, and its jurisdictional framework likewise indicates that Congress intended it completely preempt state law." *Id.* at 544. "Congress … left states with no regulatory role over gaming except as expressly authorized by IGRA, and under it, the only method by which a state can apply its general civil laws to gaming is through a tribal-state compact." *Id.* at 546.

IGRA permits Tribes and States to negotiate compact provisions on "subjects that are directly related to the operation of the gaming activities," including "the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity." 25 U.S.C. § 2710(d)(3)(C)(iii). IGRA further provides:

> Except for any assessments that may be agreed to under paragraph (3)(C)(iii) of this subsection, nothing in this section shall be interpreted as conferring upon a State or any of its political subdivisions authority to impose any tax, fee, charge, or other assessment upon an Indian tribe or upon any other person or entity authorized by an Indian tribe to engage in a class III activity.

25 U.S.C. § 2710(d)(4). Thus, under IGRA the Tribe and State may negotiate for State assessments on gaming activities only as necessary to defray the State's regulatory costs, and otherwise the State has no authority to impose any tax on the Tribe or any person the Tribe authorizes to engage in gaming, including the Tribe's patrons. *See, e.g.*, *Gaming Corp.*, 88 F.3d at 547 ("Congress left the states without a significant role under IGRA unless one is negotiated through a compact."); *Rincon Band of Luiseño Mission Indians v. Schwarzenegger* ("*Rincon*"), 602 F.3d 1019, 1035-36 (9th Cir. 2010) (holding that "revenue sharing" of tribal gaming proceeds for deposit into State's general fund is not authorized by IGRA nor reconcilable with its purposes).

As the Court discussed in its December 2015 Order, *Rincon*'s "use analysis" – i.e., examining the use to which the State will put revenues it collects from the tribal casino – "would be aptly applied here." Doc. 59 at 18. It is undisputed that all of the use tax revenues at issue in this case would be deposited into the State's general fund for "undefined potential uses," *Rincon*

at 1033, just like the tax on tribal gaming that *Rincon* disallowed. SDCL 10-46-48; *see* Tribe's Separate Statement of Undisputed Material Facts ("TSUMF") 277. Under *Rincon* and this Court's previous Order, enforcement of the general use tax, therefore, is not something the State could have insisted on bargaining for in a gaming compact, because the tax revenues would not be earmarked for uses directly related to the operation of gaming activities. Doc. 59 at 18-19.[8]

As noted, section 2710(d)(4) says that except for the type of "assessments" allowed in a gaming compact under § 2710(d)(3)(C)(iii) – and we have just seen that the use tax here is not such an assessment – IGRA does not give the State authority to tax the Tribe or any person authorized by the Tribe to engage in any class III gaming activity. The Court has agreed that "that proscription applies to nonmembers on the Casino floor authorized to gamble, which includes the costs of associated activities, i.e., gamblers and what they spend on gambling, alcohol and food in the casino." Doc. 59 at 23. And the Court has held that "at a minimum, alcohol purchased and consumed on a casino floor is directly related to class III gaming activity." Doc. 59 at 18. At least as applied to such sales, "the taxes here befall as a result of casino activity." *Id.*; *see id.* at 23 ("the tax at issue here falls onto the shoulders of nonmember patrons of the casino"). Section 2710(d)(4) preempts any such tax because it would interfere with IGRA's purpose of amplifying tribal development as it relates to gaming. *See* Doc. 59 at 23. The undisputed facts demonstrate that all

[8] Even if it were permissible under IGRA for the Tribe and the State to agree to the imposition of the State use tax on the Tribe's Casino patrons though a Tribal-State compact (again, the only method by which the State can obtain a regulatory role over gaming activities), the Tribe and the State have never agreed to authorize such taxation in their Compact. The Tribe and the State entered into a Gaming Compact pursuant to IGRA on June 29, 1990. The Compact was amended in July 2011 and again in July 2016. The current Compact took effect when the Secretary of the Interior published notice of her approval of the Compact in the Federal Register on September 21, 2016. 81 Fed. Reg. 64935. Neither the original nor either amended Compact address the imposition, collection, or remittance of State use tax.

casino amenities are offered in support of tribal gaming, and that State taxation of casino amenities interferes with the Tribe's economic benefit from its gaming operation.

The Casino's full array of amenities are offered at the Casino in support of gaming – that is, they are "complements" to gaming: the amenities go hand-in-hand with the play of all class II and class III gaming. It is industry standard practice to recognize and take advantage of the connection between gaming and in-house amenities. Royal River Casino's competitors recognize the connection, and therefore they offer the same types of amenities found at Royal River. TSUMF 77-83. Moreover, the practice did not begin with Indian casinos, but was part of the casino business when Congress enacted IGRA and sanctioned Tribal gaming as a means to advance Tribal self-sufficiency and self-government. The National Indian Gaming Commission ("NIGC") wrote regulations in express recognition of the fact that a variety of amenities, goods and services are offered jointly with gaming to increase gaming revenues, stating, "Complimentary items are gaming related because they are used to attract new patrons, retain existing patrons and reward frequent patrons. Complimentary items affect gaming revenues directly or indirectly[.]" TSUMF 138. Both Federal and Tribal gaming regulators have detailed and comprehensive regulatory control over "comps" – the Casino's complimentary giveaways of gaming-supportive amenities. TSUMF 136-143.[9]

[9] In economic terms, if the cost of an amenity increases (such as because of an added State use tax) then the familiar law of supply and demand tells us demand for that amenity is likely to decrease. When demand decreases for an amenity, demand will also decrease for its complement – gaming. *See* Taylor Report § III, pp. 9-13. Aside from the behavior of Royal River Casino, its competitors, and gaming regulators, a variety of evidence shows that the casinos amenities are complements to gaming. TSUMF 71-173. A textbook dedicated to casino marketing emphasizes the importance of amenities to attract customers, especially in a competitive casino marketplace. TSUMF 74. Empirical research backs up the textbook. TSUMF 75. One study, for instance, shows how increased demand for a restaurant amenity produces increased demand for gaming – indicating a complementary relationship, and one that flows from the non-gaming amenity to the gaming activity. TSUMF 75.d-e. Casino trade publications report similar facts. TSUMF 76.

The Casino's amenities are tightly woven into its business, from the unified corporate structure of the enterprise, to the integrated infrastructure, to the plethora of evidence that Tribal regulators and Casino management oversee and operate the Casino on the data-backed theory that when they offer Casino-connected amenities at a low price, or provide them at a discount or free to gaming patrons, the Casino will attract more patrons, who will engage in more gaming. TSUMF 84-135, 144-173.

These Casino amenities are, in the plainest way, gaming related. They are the Tribal Casino's leading tools for attracting customers out to the Reservation, to spend their money at the Casino's slot machines and poker tables, to allow the Tribe to reap the benefits Congress for which enacted IGRA. Congress expressly preempted unconsented state interference with Tribal realization of these benefits, and IGRA leaves no room for State taxes that impede the Act's important federal purposes.

The result of Congress' balancing of the interests was, in part, the rule of § 2710(d)(4) that, except for limited taxes agreed to in a gaming compact, no State may tax an Indian tribe or "any other person authorized by an Indian tribe to engage in class III gaming activity." Read literally, the tax prohibition is limitless. Since it requires some reasonable bounds, however, and given the context within which IGRA carved out protections for Indian tribes in the casino industry – including in-house amenities in support of gaming as a standard industry practice – § 2710(d)(4) must mean that the State is prohibited from taxing all in-Casino activities by customers. Like Indian trading, "Congress has taken the business of Indian [gaming] so fully in hand that no room remains for state laws imposing additional burdens on [gamers]." *Warren Trading Post*, 380 U.S. at 690. Nevertheless, it is not necessary for the Court to decide the precise dividing line between the things Congress has pre-balanced and those it has not, because in this case the result is the

same on either side of the line. Casino transactions outside of IGRA's preemptive scope, if any, are still well within the zone of Federal and Tribal interests with which the State cannot justify interfering.

C. The balance of interests demonstrates that the State tax is preempted and infringes on tribal sovereignty.

1. The Federal and Tribal interests are the protection and advancement of Tribal self-government, economic development and self-sufficiency.

It is well established that both Indian "tribes and the Federal Government are firmly committed to the goal of promoting tribal self-government, a goal embodied in numerous federal statutes." *Mescalero*, 462 U.S. at 334-35. "Congress' objective of furthering tribal self-government … includes Congress' overriding goal of encouraging 'tribal self-sufficiency and economic development.'" *Id.* at 335. This "broad federal commitment" necessarily implicates tribal "power to manage the use of its territory and resources by both members and nonmembers, … to undertake and regulate economic activity within the reservation, … and to defray the cost of governmental services by levying taxes." *Id.* at 335-36. "Thus, when a tribe undertakes an enterprise under the authority of federal law, an assertion of State authority must be viewed against *any* interference with the successful accomplishment of the federal purpose." *Id.* at 336 (emphasis added). In short, the federal interests in promoting tribal economic development, tribal self-sufficiency, and strong tribal governments – including through tribal government-run casinos – are essentially established as a matter of law. TSUMF 12-21; *see also id.* 7-11, 22-26.

Just as evidence of the federal interests may be found by looking at the purposes to be accomplished by the myriad Congressional acts and executive programs and pronouncements, the Tribe's essential interest is in accomplishing the purposes of the programs and ordinances

established by the Tribal government. In other words, the Tribe has an important interest in acting as a functioning government.

As the Senate Indian Affairs Committee noted in its report on IGRA,

> A tribe's governmental interests include raising revenues to provide governmental services for the benefit of the tribal community and reservation residents, promoting public safety as well as law and order on tribal lands, realizing the objectives of economic self-sufficiency and Indian self-determination, and regulating activities of persons within its jurisdictional borders.

S. Rep. No. 100-446, at 14 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3083.

The Tribe's tax revenues and its revenues from its business enterprises make it possible for the Tribe to accomplish these purposes. The Tribe uses tribal funds to provide an array of governmental services to its members and to nonmembers, both on and off the Reservation, including the construction and maintenance of infrastructure, securing public safety, and providing for civic functions, education, health and welfare, and more. TSUMF 174-267. The Tribal government also makes payments to support State and local government functions outside the Reservation, including local school districts and city and county law enforcement. TTSUMF 318-333. The imposition of State use tax on Casino transactions would burden the Tribe's interest in accomplishing these governmental purposes.

2. The value being taxed is generated by the Tribe on the reservation.

Colville acknowledged that Indian tribes "do have an interest in raising revenues for essential government programs[.]" 447 U.S. at 156. The Court stated that the tribal interest in raising revenues is strengthened "when the revenues are derived from value generated on the reservation by activities involving the Tribes[.]" *Id.* at 156-57. Conversely, the State's interest in raising revenues is strong when "when the tax is directed at off-reservation value[.]" *Id.* at 57. The Tenth Circuit later explained that in *Colville*, the "[t]he state tax was directed at cigarette and

tobacco products that were simply imported onto the reservation for resale, and the underlying 'product' of value was the claimed tax exemption itself, attracting customers who would normally do their business elsewhere." *Indian Country, U.S.A.* at 986. The Court then distinguished *Colville* and rejected state taxing authority at a tribal bingo operation:

> Here, the 'product' is a form of entertainment that is wholly created, sold, and consumed within the boundaries of Creek Nation lands. Patrons do not travel onto Creek lands to play bingo in order to avoid sales taxes. … The state is not losing tax revenues it would otherwise obtain from sales made outside of tribal boundaries. In fact, at trial the Tribe introduced evidence that the overall economic effect of Creek Nation Bingo on the state and local economy is positive. … The product of value is not a tax exemption, but the bingo games themselves, an activity with a substantial connection to the Creek Nation's lands.

Indian Country, U.S.A., 829 F.2d at 986.

The Supreme Court relied on similar observations to reject state regulatory authority over tribal gaming in *Cabazon*, stating:

> Here, however, the Tribes are not merely importing a product onto the reservation for immediate resale to non-Indians. They have built modern facilities which provide recreational opportunities and ancillary services to their patrons, who do not simply drive onto the reservations, make purchases and depart, but spend extended periods of time there enjoying the services the Tribes provide. … The tribal bingo enterprises are similar to the resort complex, featuring hunting and fishing, that the Mescalero Apache Tribe operates on its reservation through the 'concerted and sustained' management of reservation land and wildlife resources.

480 U.S. at 219-20.

Rejecting state authority to tax off-track betting activities on tribal lands, the Ninth Circuit noted:

> In this instance, the Bands have invested significant funds and effort to construct and operate wagering facilities and to attract patrons. It is not necessary … that the entire value of the on-reservation activity come from within the reservation's borders. It is sufficient that the Bands have made a substantial investment in the gaming operations and are not merely serving as a conduit for the products of others.

Cabazon Band of Mission Indians v. Wilson, 37 F.3d 430, 435 (9th Cir. 1994).

The Tribe in this case has similarly "made a substantial investment" in the enterprise whose property and services the State desires to tax. The Tribe paid for the Casino and its supporting infrastructure to be built. TSUMF 206-215. It pays for renovations and maintenance, management and staffing, advertising and marketing, security and surveillance. *Id.* Casino management develops the Casino's product offerings, including the restaurant menu and booking live entertainment. TSUMF 206. Casino personnel prepare and serve the food and drinks. *Id.* The Tribal government regularly funds and provides essential governmental services to the Casino's patrons, including the nonmember patrons, including law enforcement, emergency medical services, court services, family services, and more. TSUMF 217-267. Furthermore, because the Casino collects Tribal sales tax, which is set at a higher rate than the State's sales and use tax, there is no tax advantage to the customer in comparison with an off-reservation Casino that collects State sales tax. TSUMF 194-196; *see id.* 216. These facts demonstrate that the Casino is not marketing an illegitimate exemption from State taxes, but is selling products and services its customers value because of the Casino's and Tribal government's investment in the enterprise.

3. The State use tax would interfere with the Tribal and Federal interests.

The collection of State use tax from nonmembers at the Casino would cause appreciable harm to the Tribe, both financially and by diminishing the Tribe's sovereignty within its Reservation. First, nonmembers would be subject to double taxation, making their combined sales and use tax rate the highest in the nation, and certainly higher than the rate at competing casinos. TSUMF 345, 361. The price of Casino amenities would increase for nonmember customers, driving down the demand for those amenities. TSUMF 360 Further, because of the complimentary relationship between non-gaming amenities and gaming, the increased prices of things such as hotel rooms and food would not only reduce demand for those amenities, but would also reduce

demand for their compliment – and the major generator of net revenues at the Casino – game play. TSUMF 334-340. The Casino also could be required to pay State tax on the market value of items it provides free to its patrons, increasing the Casino's cost of business, decreasing its ability to provide complimentary items, and further reducing its revenues from gaming. TSUMF 357, 358. Smaller sales revenues from amenities subject to the Tribal sales tax would also reduce the Tribe's sales tax collections. TSUMF 342-346.

The Tribe could attempt to mitigate the effects of the State tax by changing its own tax code. TSUMF 347, 356. To avoid charging a double tax to its nonmember customers, the Tribe would be forced to reduce or eliminate its own Tribal sales tax for nonmember sales. *Id*. The State use tax would displace the Tribal sales tax on all applicable sales to nonmembers, and that tax revenue would be shifted from the Tribal government to the State. The Tribe would lose 100% of the sales tax revenue it now collects from nonmember customers if it were forced to collect State and municipal use taxes (as the State's tax estimates indicate, TSUMF 280), or 75% of revenues if were to offset only the State's tax. TSUMF 349.

As shown above, the Tribe uses both gaming revenues and sales tax revenues generated at the Casino fund its government functions. Reduced revenues would mean reduced services. TSUMF 352-354, 362. In the past, a drop in gaming revenue caused the Tribe to tighten its eligibility criteria for Tribal members to receive "per capita" Tribal gaming benefits, eliminating those benefits for some members. TSUMF 363, 355. The State and local governments would also feel the negative impacts of a poorer Tribal government, as funds and services formerly supplied by the Tribe would be cut. TSUMF 350; *see id.* 316-333.

Apart from the economic losses to the Tribe, imposing the State use tax at the Tribe's Casino would rob the Tribe of sovereignty within its Reservation. The Tribe would find itself,

unconsented, at the mercy of the State, with the Tribal government's tax laws, its revenues, and its ability to provide government services dependent on the tax rates and policies of South Dakota. In this way, the imposition of State use tax at the Casino harms the Tribe's interests in self-sufficiency and self-government, and collides head-on with the federal interest in setting up tribal gaming as a bulwark against tribal dependence on outside governments and undesired interference by states who want a piece of the action.

4. The State's only interest is its general desire to raise revenue to provide governmental services off the Reservation.

"The exercise of State authority which imposes additional burdens on a tribal enterprise must ordinarily be justified by functions or services performed by the State in connection with the on-reservation activity. … Thus a State seeking to impose a tax on a transaction between a Tribe and nonmembers must point to more than its general interest in raising revenues." *Mescalero*, 462 U.S. at 336. The State cannot point to any significant interest in taxing the Casino's nonmember transactions, other than its general interest in raising revenues.

The State has minimal governmental presence on the Reservation and provides minimal service to Casino patrons, including nonmember patrons, in connection with their Casino patronage. TSUMF 281-295. The few government services the State provides on the Reservation are either unconnected to the transactions at issue, or already reimbursed by the Tribe, or are so rare that they cannot justify collecting taxes on every nonmember transaction. *Id*.

In fact, the evidence shows that the stronger State interest favors respecting the Tribe's right to collect its own taxes and operate its gaming enterprise without added State tax burdens; the benefits to the State of a strong Tribal economy outweigh the use taxes the State would collect from the Reservation commerce. TSUMF 301-333.

II. The State must extend to taxpayers who pay Tribal sales and use taxes the same use tax credit it provides to those who pay sales and use taxes to other states.

As this Court has recognized, in *Colville* the Supreme Court "indicated that 'states may sometimes impose a nondiscriminatory tax on non-Indian customers of Indian retailers doing business on the reservation.'" Doc. 59 at 25 (quoting *Colville*, 447 U.S. at 151). *See also Colville* at 157 (noting that the Indian Commerce Clause may have a "role to play in preventing undue discrimination against, or burdens on, Indian commerce"); *Cotton Petroleum*, 490 U.S. at 175 (noting that "oil and gas lessees operating on Indian reservations were subject to *nondiscriminatory* state taxation as long as Congress did not act affirmatively to pre-empt the state taxes" [emphasis added]).

In addition to the federal preemption and the intrusion upon Tribal sovereignty that renders the State use tax unenforceable on the reservation, the tax is invalid because it is discriminatory. Under its statutory use tax scheme, the State discriminates against the Tribal government by treating it differently from similarly situated sovereigns. Specifically, the State unlawfully discriminates against the Tribe by failing to grant a use tax credit to consumers who have paid sales or use tax to the Tribe, while granting such a credit to consumers who have paid sales or use tax to other taxing jurisdictions.

SDCL 10-46-6.1 reads in part:

> The amount of any use tax imposed with respect to tangible personal property, any product transferred electronically, or services shall be reduced by the amount of any sales or use tax previously paid by the taxpayer with respect to the property on account of liability to another state or its political subdivisions.[10]

[10] The section also provides that the credit is only available if the other state "reciprocally" grants a credit. SDCL 10-46-6.1.

Under this section, if a consumer pays another state's sales tax on her purchase, and that tax is the same as, or more than, South Dakota's tax, there is no South Dakota use tax owed. If it is less than South Dakota's tax, the difference must be paid to South Dakota. The State grants credits under § 10-46-6.1 to consumers who pay sales or use tax to forty-three states and the District of Columbia (plus their political subdivisions). TSUMF 364.

The Tribe imposes and collects sales and use taxes at the rate of six percent. 23 FSST Law and Order Code §§ 3.1-3.36; *see* TSUMF 194-199. The Tribe grants a credit against its use tax for any sales or use tax already paid to other Indian tribes or to states. 23 FSST Law and Order Code § 3.36.

Although the State grants credits to consumers for sales or use taxes paid to other states, the State does not grant any such credits to consumers who pay sales or use tax to the Tribe. TSUMF 365, 366. This makes the State's use tax scheme discriminatory.

The Ninth and Tenth Circuits have stopped the enforcement of state laws on grounds that they impermissibly discriminated against Indian tribal governments in comparison with other, similarly-situated, sovereign governments. In *Prairie Band Potawatomi Nation v. Wagnon*, 476 F.3d 818 (10th Cir. 2007), the Court enjoined Kansas officials from enforcing Kansas' motor vehicle and titling laws against persons with a vehicle registered and titled under tribal law. The Court held that the state's treatment of vehicles registered under tribal law, which was different from its treatment of vehicles registered under the laws of other states, unlawfully discriminated against the tribe's "right to make such regulations vis-à-vis other sovereigns." *Id.* at 823-24. The Kansas law in question was analogous to the South Dakota use tax credit: "Nonresidents operating vehicles in Kansas are not considered in violation of Kansas law if they are properly registered and titled in the state of their residence, provided that their state grants reciprocal recognition to

Kansas' registration and titles." *Id.* at 821. The court identified the issue as concerning the tribe's "sovereign right to make equally enforceable and equally respected regulations in an arena free of discrimination." *Id.* at 823. Kansas was unable to identify any justification for making a distinction between the Indian tribe and other sovereigns, and the Court therefore held that the State had "effectively undermined" the tribe's regulatory power, "an undeniable incident of tribal sovereignty," "through its discriminatory treatment." *Id.* at 827.

In *Cabazon Band of Mission Indians v. Smith*, 388 F.3d 691 (9th Cir. 2004), the Court held that enforcement of a State law prohibiting tribal law enforcement vehicles from traveling outside Indian country with police-style light bars impermissibly discriminated against the Indian tribe in comparison to other similarly situated sovereigns. The Court first noted that under *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), "tribal activities occurring off reservation are subject to nondiscriminatory state laws absent an express federal law to the contrary," and that the term "nondiscriminatory" refers to "discrimination, … defined as 'differential treatment; esp., a failure to treat all persons equally when no reasonable distinction can be found between those favored and those not favored.'" *Smith* at 698 (quoting Black's Law Dictionary (8th ed.2004). The Court found that the tribe's "law enforcement agency is similarly situated to the law enforcement agencies of [California and other] states," *id.* at 699, observed that California law allows its own law enforcement officials and those of neighboring states and the federal government (and even another Indian tribe) to display and activate their emergency light bars on the state's public roads, *id.* at 698-99, and concluded that "there is no rational distinction to justify prohibiting the Tribe's police vehicles from displaying light bars on its vehicles," *id.* at 700.

The Supreme Court's *Wagnon* decision addressed a claim that the Kansas fuel tax was impermissibly discriminatory because the state exempted from taxation fuel sold or delivered to

other states or to the United States, while taxing the fuel sold to the Prairie Band of Potowatomi Indians. *Wagnon*, 546 U.S. at 115. The *Wagnon* Court rejected the tribe's claim for two reasons. First, the Court held the Prairie Band was "not similarly situated to the sovereigns exempted from the Kansas fuel tax" because the state used the proceeds from the fuel tax to pay a "significant portion of the costs of maintaining the roads" on the tribe's reservation, while offering no such services to its sister states or the federal government. *Id.* Second, switching its comparison from other sovereigns to other retailers, the Court noted that all retailers within the state bore equally the cost burden of the fuel tax, whether on or off a reservation. *Id.* These reasons do not apply to the present case, where the discrimination claim arises in an entirely different context.

In this case, the Tribe is similarly situated to South Dakota's sister states and their cities and counties. Both Indian tribes and sister states exercise limited sovereignty that does not depend on a delegation of authority from South Dakota. *See Salt River Pima-Maricopa Indian Community v. Yavapai County*, 50 F.3d 739, 740-41 (9th Cir. 1995); *see also Worcester v. Georgia*, 31 U.S. 515, 559 (1832) (Indian tribes are "distinct, independent political communities"). Both the Tribe and sister states exercise their sovereignty to tax commerce within their respective territories. South Dakota does not expend significant sums from the proceeds of its use tax to provide government services within the Flandreau Indian Reservation or within the exterior boundaries of other states, let alone services specifically and uniquely funded through the challenged tax itself. Moreover, there is no appropriate comparison here between the Tribe and other retailers in the State, because the discrimination arises not from a failure to grant tax-exempt treatment to goods destined for the Tribe-as-retailer (as in *Wagnon*), but from the failure to afford equal treatment to the Tribe-as-government, via a credit that acknowledges the tax already paid under a co-equal sovereign's tax laws. Furthermore, the Tribal reservation retailer is not similarly situated to the

off-reservation retailers in the State, for only the reservation retailer is (if the State's arguments prevail) subject to the tax laws of two sovereigns. If retailers must be compared, the appropriate comparison is between the Casino and out-of-state retailers, the patrons of which, when they pay out-of-state sales or use tax, receive a credit against the South Dakota use tax and thereby are allowed to avoid double taxation.

In *Colville*, the Court addressed the State of Washington's refusal to give reservation consumers a "credit on the amount of tribal cigarette taxes paid," concluding that on the facts of that case, no credit was required. *Colville*, 447 U.S. at 157. The critical distinction between *Colville* and this case is that in *Colville*, the court found that the tribes' cigarette sales to nonmembers "existed in the first place *only* because of a claimed exemption" from the state taxes at issue. *Id.* (emphasis added). According to the Court, the tribes had not shown that any cigarette sales occurred on the reservation "because of its location and because of the efforts of the Tribes in importing and marketing the cigarettes" – instead, any sales that would be lost due to the overlapping impact of tribal and state taxation were sales illegitimately gained in the first place, through the tribes' marketing of an exemption from state taxation to customers who otherwise would have purchased their cigarettes outside the reservations. *Id.* at 157-58. In the present case, as the Tribe has shown above, the Tribe is not simply marketing an exemption from the State's sales and use taxes to draw in customers who would otherwise have no reason to do business on the Reservation. Instead, the Tribe offers services uniquely available on the Reservation and complementary goods, supported by marketing the goods and services, all at a Tribal facility designed and built to attract customers to the Reservation, and for which there is no tax advantage to the non-member customer.

CONCLUSION

For the foregoing reasons, the Tribe respectfully requests that the Court grant judgment in its favor on its First, Third, and Fourth claims.

Dated: February 10, 2017

Respectfully submitted,

FLANDREAU SANTEE SIOUX TRIBE

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WORD COUNT CERTIFICATE

I certify that the foregoing brief, Flandreau Santee Sioux Tribe's Memorandum in Support of its Motion for Summary Judgment, complies with the type volume limitation of Local Rule 7.1(B)(1).

According to the word count of the word processing system used to prepare the brief, the brief contains 11,991 words, excluding the cover page, tables, signature block and this certificate.

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REQUEST FOR ORAL ARGUMENT

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