UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

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

INTRODUCTION/FACTS

The State incorporates by reference its "Introduction," "Statement of Facts," and "Standard" in the State's Memorandum, Doc. 79 at 1-7.

ARGUMENT

The Indian Gaming Regulatory Act, 25 U.S.C. 2701 *et seq.* (IGRA), does not expressly preempt the state use tax on nonmembers' use of goods and services purchased at the Licensed Premises. *See* State's Memorandum, I, Doc. 79; *infra* I.A. Also, the balancing of the federal, tribal, and state interests confirms the State's jurisdiction to impose its use tax on nonmembers. *See* State's Memorandum, II, Doc. 79; *infra* I.B. Finally, under state and federal law, the State is not required to provide a reciprocal tax credit for tribal taxes paid. *See* State's Memorandum, III, Doc. 79; *infra* II. Therefore, the Tribe's

motion for summary judgment should be denied, and in turn, for the reasons and authorities cited herein and in the State's Memorandum, Doc. 79, the State's motion for summary judgment should be granted.

I. STATE JURISDICTION TO IMPOSE USE TAX ON NONMEMBER PURCHASES

The Tribe argues that the State does not have jurisdiction to tax nonmembers' use of goods and services purchased at the Licensed Premises because the tax is expressly preempted by IGRA, or alternatively, the tax is impliedly preempted through the balancing of federal, tribal, and state interests. *See* Tribe's Memorandum, Doc. 117 at 17-29. In contending that there is a presumption against a state's jurisdiction to tax within Indian country, the Tribe relies on *McClanahan v. State Tax Commission of Arizona*, 93 S.Ct. 1257 (1973), a United States Supreme Court case involving a state's jurisdiction to impose a "personal income tax on a reservation Indian whose entire income derives from reservation sources[.]" Tribe's Memorandum, Doc. 117 at 12 (citing *Oklahoma Tax Commission v. Sac and Fox Nation*, 113 S.Ct. 1698. 1706 (1993)). However, the current presumption is directly opposite of the Tribe's contention.

"[A]t one time, [a state tax on on-reservation activity by non-Indians] was held invalid unless expressly authorized by Congress[.]" *Cotton Petroleum Corp. v. New Mexico*, 109 S.Ct. 1698, 1706 (1989). But "the evolution of the doctrine of intergovernmental tax immunity" has recently changed and such presumption is now in favor of state taxation: "[M]ore recently, such taxes have been upheld unless expressly or impliedly prohibited by Congress." *Id.*

Here, the state use tax is not "expressly or implied prohibited by Congress" and so, the use tax must be upheld. *See id.*

A. EXPRESS PREEMPTION – IGRA

IGRA provides that in order for a tribe to operate class III gaming, the gaming must be "conducted in conformance with a tribal-state compact" and approved by the Department of Interior ("DOI").[1] 25 U.S.C. 2710(d)(1)(C) and (d)(3). IGRA provides the framework for states and tribes to enter into tribal-state gaming compacts on certain topics, as listed in 25 U.S.C. 2710(d)(3)(C). One such topic is "subjects that are directly related to the operation of the gaming activities." *See* 25 U.S.C. 2710(d)(3)(C)(viii).

With no analysis, the Tribe maintains that all activities the State seeks to tax at the Licensed Premises are "subjects that are directly related to the operation of the gaming activities" pursuant to 25 U.S.C. 2710(d)(3)(C)(vii), IGRA's "catchall provision." Not only does the Tribe contend that all activities at the Licensed Premises are topics permissible for discussion in tribal-state compact negotiations under IGRA's catchall provision, but then the Tribe contends that because those activities are permissible topics for a gaming

[1] DOI provides that a tribal-state compact establishes "the terms and conditions for the operation and regulation of the tribe's Class III gaming activities". 25 C.F.R. 293.2(b)(2) (emphasis added). When reviewing a compact, DOI "may disapprove a compact or amendment only if it violates: (a) Any provision of [IGRA]; (b) Any other provision of Federal law that does not relate to jurisdiction over gaming on Indian lands; or (c) The trust obligations of the United States to Indians." 25 C.F.R. 293.14.

compact, they are therefore subject to 25 U.S.C. 2710(d)(4). Relying upon 25 U.S.C. 2710(d)(4), IGRA's only provision that uses the word tax, the Tribe asserts the "State has no authority to impose any tax on the Tribe or any person the Tribe authorizes to engage in gaming." Doc. 117 at 20 (citing 25 U.S.C. 2710(d)(4)). The Tribe asserts this provision is all encompassing and the State may not assess any tax on the Tribe or any person engaged in any activity covered by IGRA's catchall provision.

The Tribe urges this Court to broadly paint IGRA's preemptive scope to include the State taxation of nonmembers' use of goods and services[2] purchased at the Licensed Premises, arguing the tax itself is preempted because those patrons are authorized to or are participating in the Tribe's class III gaming activity. However, this interpretation of IGRA does not align with IGRA's express language, the rules of statutory construction, IGRA's stated intent, IGRA's legislative history, other courts' interpretations of IGRA, or the DOI's interpretation of IGRA's scope. In this case, IGRA is inapplicable and does not preempt the use tax on nonmembers' use of goods and services purchased at the Licensed Premises. *See* State's Memorandum, Doc. 79 at 7-31 and State's SUMF, Doc. 114.

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[2] South Dakota Codified Law uses the phrase "tangible personal property." *See, e.g.,* SDCL ch. 10-46. For ease of reference, the State uses the term "goods" throughout this response. In addition, when the State refers to the "purchase of goods and services," the word "services" is not intended to include class I, II, or III gaming. The State has previously asserted it cannot and does not tax this activity. *See* State's Memorandum, Doc. 79 at 8, n.6; State's SUMF 89; *see also* Tribe's Memorandum, Doc. 117 at 3, n.3.

1. IGRA's Taxation Provisions

IGRA contains two provisions that address an assessment or tax. The first appears within the provision that sets forth the permissible subjects for negotiation in the state-tribal compacts and states: "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) (hereinafter "section (d)(3)(C)(iii)"). The other provision is quite similar and 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. No State may refuse to enter into negotiations described in paragraph (3)(A) based upon the lack of authority in such State, or its political subdivisions, to impose such a tax, fee, charge, or other assessment.

25 U.S.C. 2710(d)(4) (hereinafter "section (d)(4)") (emphasis added).

The provision specifies the activity that is not to be taxed: "a class III gaming activity" (emphasis added). "A class III gaming activity" is a defined term in IGRA, as set forth below. *See infra* I.A.2.a. Section (d)(4) was tailored specifically to reinforce section (d)(3)(C)(iii) and ensure that states cannot attempt to withhold compact negotiations given they are without authority to impose a tax on the gaming activity. Felix S. Cohen, Cohen's Handbook of Federal Indian Law, 12.05[2] (5th Ed. 2012). Importantly, this reading of the statute fits within IGRA's stated purposes: to regulate gaming and ensure the tribe is the primary beneficiary. *See* 25 U.S.C. 2702. The Second Circuit's decision in *Mashantucket Pequot Tribe v. Town of Ledyard* supports this

interpretation when it stated the "plain text of IGRA does not bar the [personal property] tax [and] any preemption of the 'field' of gaming regulations is not at issue here, where the state tax on property is not targeted at gaming." 722 F.3d 457, 470 (2d Cir. 2013).

The Tribe argues that section (d)(4) prevents the State from imposing a tax on any individual that the Tribe authorizes to play class III games at the Licensed Premises. Under this interpretation of section (d)(4), the State would have no jurisdiction to tax any individual that the Tribe has authorized to play class III games at its Casino. However, because the Tribe has not authorized patrons under the age of 21 to play class III games, the Tribe's interpretation would mean that the State would have jurisdiction to tax those patrons under the age of 21. *See* Doc. 32-2, Section 9.2.

The Tribe concedes its "literal" and "limitless" reading leads to an absurd result. *See* Tribe's Memorandum, Doc. 117 at 23. In an attempt to avoid this absurd result, the Tribe subjectively provides its own boundary to IGRA's supposed preemption. It asserts that a "reasonable" reading of section (d)(4) prohibits the State "from taxing all in-Casino[3] activities by customers." Doc. 117 at 23.

[3] Given the Tribe's definition of Casino, this would also include activities at the Frist American Mart and Family Entertainment Center, which are in separate buildings. State's SUMF 7-8. What becomes limitless is the ability of a tribe to treat anything as "in-casino" for application of the tax exemption.

Had Congress intended through IGRA to preempt all state taxation of all economic activities within Indian country, Congress would not have included the phrase "in a class III activity." Rather, Congress would have plainly prohibited all state taxation within Indian country. The fact that Congress did not say this, weighs in favor of finding that IGRA does not preempt this type of taxation. *See Santa Clara Pueblo v. Martinez*, 98 S.Ct. 1670 (1978) ("where Congress [has sought] to promote dual objectives … courts must be 'more than usually hesitant to infer from its silence a cause of action' that while serving one legislative purposes, will disservice the other.")

Section (d)(4)'s limitation to the taxation of the actual play of games is also supported by DOI. When approving tribal-state gaming compacts, DOI has stated that "[t]he IGRA expressly prohibits the imposition of a tax, fee, charge or other assessment on Indian gaming[.]" Ex. 17 to the Second Affidavit of Matt Naasz (Second Naasz Affidavit) (Aug 1, 2013 DOI letter); Ex. 18 to the Second Naasz Affidavit (July 2011 DOI letter) (emphasis added). Given the tax at issue in this litigation is not a tax imposed on the "class III activity," the taxation provisions within IGRA do not apply and therefore do not expressly preempt the use tax on nonmembers' use of goods and services purchased at the Licensed Premises.

2. IGRA's Limited Scope of Preemption

a. Permissible Subjects for a Tribal-State Gaming Compact

As indicated above, the Tribe argues that section (d)(4) preempts state tax on all permissible subjects for a tribal-state gaming compact, including, as

the Tribe claims, all subjects directly related to gaming. The Tribe argues that "under IGRA, Tribal sales of property and services directly related to class III gaming cannot be taxed, except in limited circumstances that do not exist here." Tribe's Memorandum Doc. 117 at 17. The Tribe argues that because all "gaming-adjacent activities" and "extra-peripheral activities" are within their "tightly woven," "unified corporate structure," and "integrated infrastructure," those activities automatically become "directly related to gaming" for purposes of IGRA. Tribe's Memorandum, Doc. 117 at 17-24. Under the Tribe's theory, the use of amenities purchased at the Licensed Premises cannot be taxed. Tribe's Memorandum, Doc. 117 at 21-22.

As an initial matter, the Tribe alters what is encompassed by the catchall provision. The catchall provision permits provisions in a tribal-state gaming compact that are "directly related to the operation of gaming."[4] But rather than using IGRA's language, the Tribe drops the "related to the operation of" and uses "directly related to gaming". Tribe's Memorandum, Doc. 117 at 22-23.

IGRA only preempts state tax on the actual play of games. But even if IGRA did preempt state tax on things other than gaming, the goods and services sold at the Licensed Premises, including hotel stays, food and beverages (including alcohol), grocery items, gifts, and entertainment, are

[4] Congress defined the "gaming" it intended to regulate: class I gaming, 25 U.S.C. 2703(6); class II gaming, 25 U.S.C. 2703(7); class III gaming, 25 U.S.C. 2703(8).

neither gaming activities nor directly related to the operation of gaming activities, which is regulated by IGRA.

First, the nonmembers' purchase and use of goods and services are clearly not gaming activities. IGRA clearly defines class III gaming activities which the Tribe admits "primarily includes slot machines and certain card games." Tribe's Memorandum, Doc. 117 at 19; *See* 25 U.S.C. 2703(8); *Michigan v. Bay Mills Indian Community,* 134 S.Ct. 2024 (2014)*;* 134 Cong. Rec. H8146 at H8153 (gaming activities are "generally defined to be casino gaming and paramutuel betting").

Here, the purchase and use of these goods and services do not fall within the defined classes of gaming. *See* 25 U.S.C. 2703(6)-(8). As the purchase of hotel stays, food and beverages, alcohol, gifts, and entertainment are not "slot machines," "card games," or "paramutuel betting," it is clear they are not class III activities. DOI's interpretation, as explained in the State's Memorandum, supports this conclusion. *See* State's Memorandum, Doc. 79 at 8-13.

Also, the nonmembers' purchase and use of the goods and services at the Licensed Premises are not "directly related to the operation of gaming." In order for the Court to grant the Tribe's motion, the Court would have to find as the Tribe asserts, that everything is compactable under IGRA's "directly related to the operation of gaming" catchall provision and that it is a mandatory provision rather than a permissive provision.[5] This however does not fit within

[5] IGRA provides that compacts "may include provisions" as set forth in 25 U.S.C. 2710(d)(3)(C). Congress did not use "shall," "must," or "will." The

(continued . . .)

IGRA's intent as "[n]ot every contract that is merely peripherally associated with tribal gaming is subject to IGRA's constraints." *Casino Resource Corp. v. Harrah's Entertainment, Inc.,* 243 F.3d 435, 439 (8th Cir. 2001) (citations omitted).

The Tribe ignores decisions in which courts have held that IGRA did not preempt such "gaming-adjacent" and "extra-peripheral" activities.

> In determining whether a state tax imposed on a third party is preempted by IGRA's occupation of the "governance of gaming" field, courts have been quick to dismiss challenges to generally-applicable laws with *de minimis* effects on a tribe's ability to regulate its gambling operations. For example, courts have held that IGRA's preemptive scope is not implicated in cases involving gaming management and service contracts with a tribe, [*Harrah's Entertainment*] at 438-39; contracts to acquire materials to build a casino, *Barona Band,* 528 F.3d at 1192;[6] and release of detailed investigative reports on the management of gaming, *Siletz,* 143 F.3d at 487.[7] Similarly, we conclude that any preemption of the

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(. . . continued)

congressional record reflects this intent in the statement that "the types of provisions that may go into compacts. These provisions are not requirements." 134 Cong. Rec. S12643-01, at S12651. IGRA has been found to limit the "permissible subjects of negotiation in order to ensure that tribal-state compacts cover only those topics that are related to the conduct of gaming activities, and are consistent with the IGRA's stated purposes." *Pueblo of Santa Ana v. Nash*, 972 F. Supp. 2d 1254, 1264 (D.N.M. 2013) (emphasis added).

[6] *Barona Band of Mission Indians v. Yee*, 528 F.3d 1184, 1193 (9th Cir. 2008) (finding "IGRA's comprehensive regulation of Indian gaming does not occupy the field with respect to sales tax imposed on third-party purchases of equipment used to construct gaming facilities).

[7] *Confederated Tribes of Siletz Indians,* 143 F.3d 481, 487 (9th Cir. 1998) (ruling that the state public record laws were not preempted by IGRA as they "do not seek to usurp tribal control over gaming nor do they threaten to undercut federal authority over Indian gaming.").

> "field" of gaming regulations is not at issue here, where the state tax on property is not targeted at gaming. […] But under IGRA, *mere ownership* of slot machines by the vendors does not qualify as gaming, and taxing such ownership therefore does not interfere with the "governance of gaming."

Town of Ledyard, 722 F.3d at 469-70 (emphasis original) (determining that IGRA did not "expressly or by plain implication" preempt a Connecticut State tax on lessors of slot machines used by a tribe at the tribe's casino as the tax did "not affect the Tribe's 'governance of gaming' on its reservation."). Indeed, this Court has acknowledged that the types of activities preempted by IGRA are those directly affecting the operation of gaming: "[a]ny claim which would directly affect or interfere with a tribe's ability to conduct its own [gaming] licensing [and operation] process[es] should fall within the scope of [IGRA's] complete preemption." Doc. 59 at 15 (brackets original)(quoting *Harrah's Entertainment*, 243 F.3d at 437 (8th Cir. 2001), which cites to *Gaming Corp. of America v. Dorsey*, 88 F.3d 536, 549 (8th Cir. 1996)).

Here, the Tribe has not established or even averred that the taxation of nonmembers' use of goods and services (including alcohol) purchased at the Licensed Premises would interfere with the Tribe's licensing and operation processes. *See* Tribe's Memorandum, Doc. 117, *generally*. The Tribe broadly asserts that the taxation may reduce the Tribe's gaming customers. *See* Defendants' Response and Objections to Plaintiff's Statement of Undisputed Material Facts in Support of its Motion for Summary Judgment 335, 336, 342, 348, 357, 360 (hereinafter "Response to Tribe's SUMF"). Even if this were true, which the Tribe has not established, this is immaterial and does not establish

that such taxation would interfere with the Tribe's gaming license determinations or how the gaming process operates. Without establishing this, the Tribe has failed to meet its burden that this action falls inside IGRA's limited preemptive scope.

While there may be an indirect relationship between the goods and services and the success of the operation,[8] the goods and services do not affect the operation of the gaming. Regardless, IGRA's purpose in "regulation of gaming" cannot reasonably or plausibly be construed to involve the regulation of alcoholic beverages, the taxation of goods and services, or the collection and remittance of the use tax.

Interestingly, throughout its brief, the Tribe describes the activities at issue here as "amenities," "closely connected" to gaming, "gaming-adjacent," "extra-peripheral," "gaming-supportive," and "complements." Tribe's Memorandum, Doc. 117 at 22. While not dispositive, the Tribe's choice of words recognizes that these activities are not class III activities nor "directly related to the operation of gaming."

The Tribe essentially relies on *Rincon Band of Luiseno Mission Indians of Rincon Reservation v. Schwarzenegger,* in support of its assertions. 602 F.3d 1019 (9th Cir. 2010). While the State agrees that *Rincon* is persuasive, the Tribe misconstrues *Rincon*'s holding. In *Rincon*, through compact negotiations,

[8] The fact that the Tribe reduces the price on the goods and services to increase gaming, is again reflective of a relationship to the success of the gaming not a direct relationship to the operation of the gaming.

the state wanted a share of the tribe's gaming proceeds for deposit into a state general fund. *Id.* at 1029 (10-15 percent of the tribe's annual net win, as well as 25 percent of the tribe's revenue from any new gaming devices). The state argued that general fund revenue sharing was "directly related to the operation of gaming activities" and thus permissible under IGRA's catchall provision. *Id.* at 1033. In addressing the state's argument, the Ninth Circuit stated that whether such "revenue sharing is an authorized negotiation topic under [the catchall provision] depends on the use to which the revenue will be put[.]" *Id.* If put into a fund with undefined potential use, like a general fund, the revenue sharing is "not directly related to the operation of gaming activities." *Id.* at 1033-34.

The Tribe argues that if a state tax does not pass *Rincon's* "use analysis" test, IGRA then preempts the tax. Tribe's Memorandum, Doc. 117 at 20-21. While the State agrees that the Ninth Circuit disallowed the revenue sharing provision, it was because it was not "directly related to the operation of gaming activities" and therefore, impermissible for inclusion in a tribal-state compact under the catchall provision. *Rincon*, 602 F.3d at 1033-34. *Rincon* did not find the revenue sharing provision itself was a tax that was preempted by IGRA, but rather found that IGRA's scope was not so broad as to include the revenue sharing provision. *Id.*; *see also* State's Memorandum, Doc. 79 at 13-15. Applying *Rincon* to today's case, the tax is deposited into the general fund and thus, cannot be "directly related to the operation of gaming." Such tax does not fall within IGRA's catchall provision. Importantly, the Ninth Circuit

stressed that "IGRA does not permit the State and the tribe to negotiate over any subjects they desire; rather, IGRA anticipates a very specific exchange of rights and obligations[.]" *Rincon*, 602 F.3d at 1039.

The Tribe also relies on one National Indian Gaming Commission (NIGC) regulation to support its theory that the activities the State seeks to tax are "directly related to the operation of gaming." Tribe's Memorandum, Doc. 117 at 22. The Tribe asserts the complimentary item regulation is an example that "Federal and Tribal gaming regulators have detailed and comprehensive regulatory control" over the activities at question here. Tribe's Memorandum, Doc. 117 at 22 (citing to Tribal SUMF 136-143). However, the NIGC does not have authority to regulate class III gaming activities and therefore the NIGC's regulations are irrelevant to this litigation. *See Colorado River Indian Tribes v. National Indian Gaming Commission,* 466 F.3d 134, 137–40 (D.C. Cir. 2006) (affirming the district court's determination that the NIGC has no authority to regulate class III gaming operations, to include regulations, monitoring, or inspection of class III gaming); *see also* Felix S. Cohen, Cohen's Handbook of Federal Indian Law, 12.03[3][a] (5th Ed. 2012).

Moreover, the regulation regarding complimentary items does not support that the Licensed Premises' amenities are "directly related to the operation of gaming" for purposes of IGRA's preemptive scope. First, the regulation is immaterial because the State's use tax is not imposed on complimentary items at Licensed Premises. The state use tax only

applies to nonmember purchases. Affidavit of Roberta "Bobi" Adams (Adams Affidavit). Next, while complimentary items may be related to the playing of games, they play no direct role in the Tribe's operation of the class III games. These are two entirely different relationships. This conclusion is also supported by the fact that patrons can only earn comp points or comp dollars through the actual play of games. *See* State's Memorandum, Doc. 79 at 19.

DOI's interpretation of "directly related to gaming" is in line with the State's position. DOI has described the catchall provision as limiting the topics for negotiating "to those that bear a direct relationship to the operation of gaming activities." Ex. 18 to Second Naasz Affidavit (July 2011 DOI letter); *See also* State's Memorandum, Doc. 79 at 8-13 (discussing DOI's interpretation of the activities that do not fall within the scope of the catchall provision and specifically, that of former Assistant Secretary for Indian Affairs, Keven K. Washburn). If this Court determines that IGRA is ambiguous, the Court must defer to DOI's interpretation of the scope of IGRA and what is considered "directly related to the operation of gaming;" because IGRA's provisions, including the declarations of purpose and congressional findings, are silent on alcohol regulation, amenities, the taxation of goods and services available for use by gaming patrons, and general taxation. *See* 25 U.S.C. 2701 et seq. "Congress, when it left ambiguity in a statute administered by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever

degree of discretion the ambiguity allows." *City of Arlington, Tex. v. F.C.C.*, 133 S.Ct. 1863, 1868 (2013) (citing *Smiley v. Citibank (South Dakota), N. A.,* 116 S.Ct. 1730 (1996)) (discussing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 104 S.Ct. 2778 (1984)) (internal quotation marks omitted). The United States Supreme Court has stated that "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *City of Arlington*, 133 S.Ct. 1863, 1868 (quoting *Chevron*).

Nonmembers' use of goods and services purchased at the Licensed Premises are not gaming activities or directly related to gaming activities. Thus, they are not included in IGRA's preemptive scope. The Court must reject all of the Tribe's arguments to the contrary.

b. Purpose and Congressional Intent of IGRA

The Eighth Circuit has provided that "State jurisdiction [here the taxation of nonmember purchases of goods and services] is pre-empted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law[.]" *Harrah's Entertainment, Inc.*, 243 F.3d at 437 (citing *New Mexico v. Mescalero Apache Tribe*, 1030 S.Ct. 2378 (1983)). Here, the Tribe fails to establish how the taxation at issue in this case interferes, or is incompatible, with IGRA. As stated above, the Tribe contends that all of its amenities are gaming related. *See* Tribe's Memorandum, Doc. 117 at 21-23. Therefore, the Tribe argues that the State's ability to tax the use of these goods and services "is preempted because it is incompatible with

IGRA." Tribe's Memorandum, Doc. 117 at 17. However, the Tribe does not support these statements with case law or citations to IGRA itself, outside the general assertion that IGRA is preemptive regarding "the governance of gaming operations on Indian lands." Tribe's Memorandum, Doc. 117 at 19-20 (citing *Harrah's Entertainment* and *Gaming Corp.*). In fact, as set forth above, the taxation of nonmembers' purchases of goods and services is not related to the "governance of gaming operations on Indian lands" at all. *See Harrah's Entertainment*.

The text and legislative backdrop of IGRA shows that IGRA was never intended to include general taxation issues. At the outset, the State agrees that IGRA "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." *Gaming Corp.*, 88 F.3d at 546 (emphasis added). However, the Tribe ignores that IGRA's preemptive scope is limited to its terms and stated purpose: to provide a statutory scheme for "the operation of gaming by Indian tribes" and "for the regulation of gaming by Indian tribes." 25 U.S.C. 2702. Congress' express intention was to regulate "gaming" and nothing more.

The congressional record clarifies that IGRA "does exactly that – regulates Indian gaming. By no means is any provision of this act intended to extend beyond this field of gaming in Indian Country. [...] This act should not be construed as a departure from established principles of the legal relationship between the tribes and the United States. Instead, this law should

be within the line of developed case law extending over a century and a half by the Supreme Court[.]" 134 Cong. Rec. S12643-01 at S12654. Congress did not intend to preempt the general taxation of goods and services purchased at or within the proximity of class III gaming:

> Mr. EVANS. On the question of precedent, am I correct that the use of compacting methods in this bill are meant to be limited to tribal-state gaming compacts and that the use of compacts for this purpose is not to be construed to signal any new congressional policy encouraging the subjugation of tribal governments to state authority.
>
> Mr. INOUYE. The vice chairman is correct. No subjugation is intended. The bill contemplates that the two sovereigns address their respective concerns in the most equitable fashion. There is no intent on the part of Congress that the compacting methodology be used in such areas as taxation, water rights, environmental regulation, and land use. [...] No precedent is meant to be set as to other areas.

134 Cong. Rec. S12643-01, at S12651 (emphasis added). Additional testimony indicated that "[i]t is important to make it clear that the compact arrangement set forth in this legislation is intended solely for the regulation of gaming activities. It is not the intent of Congress to establish a precedent for the use of compacts in other areas, such as water rights, land use, environmental regulation or taxation." 134 Cong. Rec. H8146 at H8155.

Through the subsequent enactment of IGRA, Congress made clear that it was not intended to touch on states' general taxation authority. Both references to taxation within IGRA are specific to the class III gaming activity, which IGRA clearly defined, and do not include the purchase of goods and services other than class III gaming. Section (d)(4), discussed above, is a clear statement that IGRA did not intend to change taxation jurisdiction as Congress

was not conferring any additional authority, beyond what already existed, to a state for taxation purposes.

The tax on nonmembers' use of goods and services purchased at the Licensed Premises also does not interfere with IGRA's purpose of "ensur[ing] that the Indian tribe is the primary beneficiary of the gaming operation." 25 U.S.C. 2702(2). First, this does not require that the Tribe be the only beneficiary. Also, the tax on nonmembers' use of goods and services purchased at the Licensed Premises would not change who is the primary beneficiary of the gaming operation—the Tribe, by a wide margin. Ex. A to Adams Affidavit (compare the Tribe's operating income (operating revenues minus operating costs and expenses) on page 4 of the 2013, 2014, and 2015 Financial Reports of the Royal River Casino—approximately [REDACTED], to the estimates of the use tax liability—approximately $150,000 dollars). Regardless, the Tribe has not established or even asserted that the Tribe would not be the primary beneficiary as envisioned by IGRA and, therefore, the Tribe has not met its burden to show that the use tax interferes with IGRA's purposes.

3. Alcohol

The Tribe asserts that this "Court has held that 'at a minimum, alcohol purchased and consumed on a casino floor is directly related to class III gaming activity.'" Tribe's Memorandum, Doc. 117 at 21 (citing Doc. 59 at 18). However, this Court expanded upon this statement in its later holding that "alcohol sales at a casino can be directly related to class III gaming…therefore,

compactable between a tribe and a state." Doc. 59 at 22. In the end, this Court held "a factual issue remains as to whether alcohol" comes within the scope of IGRA. Doc. 59 at 23; *see also* Doc. 60 at 5.

As an initial matter, and not addressed previously by this Court, in order for IGRA to have any preemptive force regarding alcohol—whether or not on the gaming floor, this Court would have to find that IGRA expressly or impliedly repealed 18 U.S.C. 1161. *See* State's Memorandum, Doc. 79 at 26-31. But as this Court noted, "no court has ever held that alcohol is subject to IGRA." Doc. 59 at 19. IGRA, by its terms, does not expressly or impliedly repeal 18 U.S.C. 1161. *See* IGRA, *generally*.

Congress spoke when it enacted 18 U.S.C. 1161, which authorized states to regulate liquor within Indian Country. 18 U.S.C. 1161; *see also* State's Memorandum, Doc. 79 at 26-31. IGRA does not expressly repeal it, given the terms "liquor" and "alcohol" do not make a single appearance in IGRA's provisions. *See* 25 U.S.C. 2701-21. Thus, in order for IGRA to have preempted the Defendant's ability to impose its alcohol regulations at the Licensed Premises, this Court must find that IGRA impliedly repealed the State's authority to regulate alcohol, but not the Tribe's authority to regulate alcohol. Not only has no court ever made that finding, but there is no evidence to support such a finding. *See* State's Memorandum, Doc. 79 at 26-31. Importantly, in its Memorandum, the Tribe did not argue that 18 U.S.C. 1161 has been repealed in whole or in part by IGRA. *See* Tribe's Memorandum, Doc. 117, *generally*.

The legislative history of IGRA reflects that when recommending IGRA's passage, the Committee on Interior and Insular Affairs' discussed *Rice v. Rehner,* 103 S.Ct. 3291, 3304 (1983) (finding that "[b]y enacting § 1161, Congress intended to delegate a portion of its authority to the tribes as well as to the States") and the Supreme Court's holding that "States [have] concurrent jurisdiction with the tribes over liquor regulations in Indian country." H.R. 1920, H. R. Rep. No. 99-488 at 11 (1986) (Report from the Committee on Interior and Insular Affairs). The United States Supreme Court's conclusion "that there was an historical tradition of concurrent Federal and State jurisdiction over the use and distribution of alcohol on the reservation" was also mentioned. *Id.* If Congress had intended for IGRA to expressly preempt liquor regulation by states, it would have addressed it within the statutory language.

With regard to the purchase of alcohol on the gaming floor, it is instructive that this activity is not "directly related to the operation of gaming" considering that it is done in such a manner that the wait staff who serve the patrons are not even required to have a tribal gaming license. State's Memorandum, Doc. 79 at 21-22; Ex. 8 to the Affidavit of Matt Naasz; State's SUMF 70-72, Doc. 114. Not only are the bar wait staff not required to hold gaming licenses, but neither is the bartender who prepares the beverage, or the bar supervisor, snack bar manager, and the restaurant/bar manager, all who oversee the activity and supervise those employees. State's Memorandum, Doc. 79 at 21-22; Ex. 8 to the Affidavit of Matt Naasz; State's SUMF 70-72,

Doc. 114. While the alcohol sales may be "related" to gaming activities, they are not directly related to the operation of gaming to the degree that even the Tribe deems the beverages' preparation or service worthy of a gaming license.

4. Summary

Contrary to the strained assertions of the Tribe, the state use tax and laws requiring tribes to collect and remit the use tax from nonmembers do not conflict with the Tribe's ability to regulate gaming activities. The alcoholic beverage laws, imposition of use tax on goods and services, and required collection and remittance of use tax do not involve the operation or regulation of class I, class II, or class III games. Further, the nonmember purchases at the Licensed Premises, including the hotel, restaurant, convenience store, gift shop, and RV park, and the state alcoholic beverage laws are not activities which are "directly related to the operation of gaming activities" or even "class III activities" as defined by IGRA. The state tax also cannot be interpreted as a concealed attempt to regulate tribal gaming. The state alcoholic beverage laws and the state tax laws can coexist, are reconcilable, and do not conflict "with the purpose or operation" of IGRA. *Cabazon Band of Mission Indians v. Wilson*, 37 F.3d 430, 433 (9th Cir. 1994). Thus, IGRA does not preempt the application of these laws to nonmembers at the Licensed Premises.

For the reasons and argument set forth above, IGRA's prohibition on taxation is only related to a tax on the actual play of games. The taxation of goods and services and the state alcoholic beverage regulations are activities

that fall outside IGRA's preemptive scope as a matter of law and the State's motion for summary judgment should be granted, while the Tribe's is denied.

B. IMPLIED PREEMPTION – BALANCING OF INTERESTS TEST

1. Tribal and Federal Interests

a. Tribal Self Government and Tribal Sovereignty

The Tribe argues that the state use tax is impliedly preempted because the federal and tribal interests in being free from the tax on nonmembers outweigh the state's interest in imposing such tax. *See* Tribe's Memorandum, Doc. 117 at 24-29. The Tribe contends that the federal and tribal interests of "tribal economic development, tribal self-sufficiency, and strong tribal governments [which] are essentially established as a matter of law" weigh in favor of the Tribe. Tribe's Memorandum, Doc. 117 at 24, 7-17.

To support its contention that the use tax would unlawfully infringe upon tribal self-government and tribal sovereignty, the Tribe relies on a number of cases that are inapposite in this matter. *See* Tribe's Memorandum, Doc. 117 at 9-16. The courts in those cases considered tribal interests in the context of a State's jurisdiction over Indians. *Williams v. Lee*, 79 S.Ct. 269 (1959) (state court's jurisdiction over an Indian defendant for activities occurring on the reservation); *McClanahan*, 93 S.Ct. 1257 (1973) (state's jurisdiction to impose a "personal income tax on a reservation Indian whose entire income derives from reservation sources."); *Oklahoma Tax Commission*, 113 S.Ct. 1985 (1993) (state's jurisdiction to impose a personal income tax and a motor vehicle excise tax on Indians possibly residing within Indian country);

Marty Indian Sch. Bd., Inc. v. State of South Dakota, 824 F.2d 684 (8th Cir. 1987) (state's jurisdiction to impose motor fuel tax on a school board for an Indian boarding school, in which all board members were tribal members). But, any tribal interests relating to preemption of state taxes on tribal members on their own reservations are irrelevant here, where the State is imposing a tax on nonmembers' purchases.

Further, the mere existence of the principles of tribal sovereignty and self-government is insufficient to support preemption of the use tax on nonmembers. The balancing test's particularized inquiry "is not dependent on mechanical or absolute conceptions of state or tribal sovereignty[.]" *White Mountain Apache Tribe v. Bracker*, 100 S.Ct. 2578 (1980). Instead, a particularized inquiry of the circumstances of each case is necessary to "determine whether, in the specific context, the exercise of state authority would violate federal law." *Id.* When considering the particular circumstances of this case, the imposition of the use tax on nonmembers does not violate federal law.

b. No Comprehensive and Pervasive Federal Regulation of Nonmembers' Purchases at the Licensed Premises

The Tribe correctly points out that "the trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal preemption." Tribe's Memorandum, Doc. 117 at 16. The Tribe contends that federal law preempts the use tax on nonmember purchases because "Congress has taken the business of Indian gaming so fully in hand that no room remains for state laws imposing additional burdens on gamers."

See Tribe's Memorandum, Doc. 117 at 23 (citing *Warren Trading Post Company v. Arizona Tax Commission*, 85 S.Ct. 1242 (1965)). However, in its Memorandum, the Tribe has pointed to no comprehensive federal regulation of nonmembers' purchases at the Licensed Premises that leaves no room for the imposition of the use tax. *See generally* Doc. 117. A tribal employee testified that federal regulations established by the NIGC govern a plethora of activities and areas at the Licensed Premises, (including health and safety, surveillance, slots, table games, etc.). *See* Response to Tribe's SUMF 41. But save for a regulation on complimentary items and services, the Tribe has not identified any actual regulation governing all activities and areas of the Licensed Premises. *See generally* Tribe's Memorandum, Doc. 117; Tribe's SUMF, Doc. 120.

25 C.F.R. Part 542 provides several regulations addressing gaming operations. But even assuming the NIGC had the authority to enact the regulations relating to Class III gaming, *see supra* I.A.2.a., those regulations only govern certain operations within gaming areas. *See* 25 C.F.R. Part 542. Most importantly, the Tribe has failed to point to any regulation that governs the taxed activity—nonmembers' use of good and services purchased at the Licensed Premises. *Cf.* Tribe's SUMF 40-41, Doc. 120; Tribe's Memorandum, Doc. 117.

Although the Tribe highlights a regulation that addresses "comping" (i.e. providing complimentary goods and services to gamers) at a gaming

establishment, that regulation is irrelevant.[9] *See* Tribe's Memorandum, Doc. 117 at 22. The comping regulation does not actively govern comping at the Licensed Premises; it only provides that the Tribe's Gaming Commission or gaming establishment shall establish certain procedures regarding comping. *See* 25 C.F.R. 542.17. This does not equate to comprehensive federal regulation that leaves no room for the imposition of the use tax on nonmember purchases. Even if that regulation is considered a comprehensive regulation of complimentary items, it is irrelevant because use tax is not due on complimentary goods and services provided to nonmember patrons. *See* Response to Tribe's SUMF 358; Adams Affidavit; *see also* State's Memorandum, Doc. 79, and State's Memorandum in Support of Motion for Judgment on the Pleadings, Doc. 38 (both indicating that use tax is due on nonmember purchases at the Licensed Premises). Thus, no regulations preempt the use tax on nonmember purchases of goods and services at the Licensed Premises.

The only Supreme Court cases cited by the Tribe that held against state jurisdiction to tax nonmembers' on-reservation activities were in instances where those activities were subject to comprehensive federal regulation. *See generally* Tribe's Memorandum, Doc. 117; *see, e.g., Bracker*, 100 S.Ct. 2578 (timber harvesting activities), *Ramah Navajo School Board, Inc. v. Bureau of Revenue of New Mexico*, 102 S.Ct. 3394 (1982) (construction of an on-

[9] The NIGC determined that a regulation governing complimentary items was appropriate, in part, because of the concern that "abuse of the [comping] system would expose the gaming operation to high risk of loss." 64 Fed. Reg. 596 (Jan. 5, 1999). There is no similar concern of abuse regarding the purchase of goods and services at the Licensed Premises.

reservation tribal school), *Warren Trading Post*, 85 S.Ct. 1242. Specifically, the Tribe contends that the federal regulation in this case is similar to that in *Warren Trading Post*, 85 S.Ct. 1242. In *Warren Trading Post*, the Supreme Court determined that a state tax on federally licensed Indian traders was preempted because federal Licensed Indian Traders regulations directly addressed the taxed activity—the on-reservation sale of goods and services by a licensed Indian trader to Indians. 85 S.Ct. at 1242-1247.

Most detrimental to the Tribe's reliance on *Warren Trading Post* is the fact that the Supreme Court preempted the state sales tax on the federally licensed Indian trader only "with respect to sales made to reservation Indians on the reservation." *Id.* at 1246. The Supreme Court did not rule that sales by the Indian trader to nonmembers were preempted by the Licensed Indian Traders regulations. *Id.* This fact confirms that federal preemption of a state's jurisdiction to tax nonmembers' on-reservation activities is very narrow. It is limited to the activities actually addressed by the federal regulations. It does not include federal regulation of anything peripherally associated with the taxed activity. As discussed above, in this case there is no regulation of the taxed activity (the use of goods and services purchased at the Licensed Premises). *Warren Trading Post* and the other cited Supreme Court decisions relying on extensive federal regulation of the taxed activity provide no guidance here.

c. Economic Burden

The Tribe argues that another interest weighing in the Tribe's favor is that requiring the Tribe to collect and remit the use tax on nonmember purchases would economically burden the Tribe. Tribe's Memorandum, Doc. 117 at 27-28. But as discussed in the State's Memorandum, any economic burden on the Tribe is irrelevant or immaterial at most. *See* Doc. 79 at 36-41. Indeed, the Tribe points to no case where the Supreme Court ruled against a state's jurisdiction to tax nonmembers' activities solely because it imposed an economic burden on a tribe. *See generally* Tribe's Memorandum, Doc. 117.

Moreover, the Tribe has not attempted to quantify any potential economic impact of the collection of the use tax from nonmembers at the Licensed Premises. State's SUMF 92-93, Doc. 114. Even if it had, considering the Licensed Premises' average operating income of approximately [REDACTED], the use tax on nonmembers' purchases is "too indirect and too insubstantial" to preempt the State's jurisdiction. *See Cotton Petroleum*, 109 S.Ct. at 1713; Ex. A to Adams Affidavit (providing the operating income (operating revenues minus operating costs and expenses) on page 4 of the 2013, 2014, and 2015 Financial Reports of the Royal River Casino); State's Memorandum, Doc. 79 at 40; Tribe's SUMF 280, Doc. 120.

The Tribe points out that *Crow Tribe of Indians v. State of Montana*, 819 F.2d 895 (9th Cir. 1987), held the state had no jurisdiction to impose a severance tax on coal that nonmembers extracted from tribal land and a gross proceeds tax on the coal subsequently sold. *Id.* at 897. But in *Crow Tribe of*

Indians, the state was attempting to impose taxes that had a combined rate of 32.9 percent. *See Cotton Petroleum*, 109 S.Ct. at 1713 n.17. This amounted to a tax liability of approximately $7,737,500 per year from 1975 through 1982. *See Crow Tribe of Indians*, 819 F.2d at 897 (indicating that a total of $61,900,000 in taxes was collected between 1975 and 1982). The Supreme Court, in *Cotton Petroleum*, hinted that the state taxes in *Crow Tribe of Indians* were "unusually large state tax[es] [that had] imposed a substantial burden on the Tribe." *See Cotton Petroleum*, 109 S.Ct. at 1713 and n.17.

The rate of the use tax at issue in this case is only 4.5 percent, *see* State's Memorandum, Doc. 117 at 1, 40, of the purchase price of the goods and services. Unlike the taxes in *Crow Tribe of Indians*, it is not "an unusually large state tax" on nonmembers that would substantially burden the Tribe as it would likely only amount to an estimated $150,000 per year. *See* Tribe's SUMF 280, Doc. 120; State's Memorandum, Doc. 79 at 40; *Cotton Petroleum,* 109 S.Ct. at 1712-1713 (determining that an additional 8 percent in state taxes on the severance of oil and gas is not "an unusually large state tax" that would substantially burden the Tribe); *Barona Band*, 528 F.3d at 1191-92 (determining that a reduction of tribal revenues by $200,000 for one subcontractor's work, *plus the amounts for all other subcontractors' work*, because of the imposition of a state tax on those subcontractors was insufficient to invalidate the state tax).

d. Value Added

The Tribe argues that its tribal interest in raising revenues is strengthened because it generates the value of the goods and services purchased by nonmembers through its development of the gaming operation. Tribe's Memorandum, Doc. 117 at 25-27. The Tribe contends that it has added value through its "substantial investment [into] the enterprise whose property and services the State desires to tax." Tribe's Memorandum, Doc. 117 at 27. The Tribe cites to *Indian Country, U.S.A., Inc. v. State of Oklahoma*, 829 F.2d 967 (10th Cir. 1987) and *California v. Cabazon Band of Mission Indians*, 107 S.Ct. 1083 (1987) (superseded by IGRA, 25 U.S.C.A. § 2701 *et. seq.*), to support such argument.[10] *Indian Country U.S.A.* and *California v. Cabazon* mentioned a tribe's development of the gaming operation when analyzing whether state taxation and regulation of the tribes, the play of bingo games, and "bingo activities" were preempted. *Indian Country U.S.A.*, 829 F.2d at 976, 986; *Cabazon v. California*, 107 S.Ct. at 1086-1087.

In *Cabazon v. California*, the state was attempting to regulate the play of bingo at a tribal gaming establishment. 107 S.Ct. at 1086. Similarly, in *Indian Country U.S.A.*, the state was attempting to regulate the play of bingo and impose its sales tax on the play of bingo, concessions, and other sales. *See Indian Country U.S.A.*, 829 F.2d at 973, 983-87. When considering the development of the gaming operations by the Tribe, the courts in both cases

[10] Both *Indian Country, U.S.A.,* 829 F.2d 967 (10th Cir. 1987) and *California v. Cabazon,* 107 S.Ct. 1083 (1987) were decided before the enactment of IGRA (1988).

ruled against the state's jurisdiction. *Id.* at 976-81, 983-87. *Cabazon v. California* and *Indian Country U.S.A.* are distinguishable from today's case because the State is not attempting to tax or regulate the actual play of games.

Although the Tribe claims its investment into the Licensed Premises requires preemption of state jurisdiction, the general operations at the Licensed Premises are just like any other business's operation. This includes staffing, maintenance, cleaning, stocking, customer service, and food preparation. *See* State's SUMF 28-39, 43, 45-53, Doc. 114; State's Memorandum, Doc. 79 at 42-43. And the Supreme Court has seemingly rejected those operations as sufficient value to preempt state jurisdiction to tax nonmembers. *See Washington v. Confederated Tribes of Colville Indian Reservation*, 100 S.Ct. 2069, 2081-2082 (1980) (upholding the state tax on nonmembers' purchases of cigarettes at the smokeshops even though the tribes were involved "in the operation and taxation of cigarette marketing on the reservation").

The Tribe contends that *Colville* and the related cigarette tax cases are not controlling because of the cigarette outlets' unique business model of "high-volume tax-free retail cigarette sales." Tribe's Memorandum, Doc. 117 at 14. But as in those cases, the value of the products sold at the Licensed Premises is generated off the reservation. State's Memorandum, II.A.3, Doc. 79. The only goods the Tribe modifies before their sale is certain food, but even the food products used for food preparation are imported from off-reservation entities. Such goods receive the benefit of state services as they are manufactured or transported within South Dakota's borders, or both. *See* Ex.

A attached to the State's Memorandum, Doc. 79. For these reasons, the Tribe's value added argument must be rejected.

2. State's Interests

a. State Services

Regarding the Tribe's perspective of the State's interests, the Tribe contends that off-reservation services provided to patrons should not be considered as a state interest. *See* Tribe's Memorandum, Doc. 117 at 13. However, as discussed in the State's Memorandum, it is necessary for this Court to consider these off-reservation services when balancing the respective interests. *See* State's Memorandum, II.B, Doc. 79. The Supreme Court has acknowledged that off-reservation services to both Indians[11] and nonIndians are relevant in the balancing test, even though the tax is only on the nonmember patrons. *See Cotton Petroleum*, 109 S.Ct. at 1714 ("the relevant services provided by the State include those that are available to the [taxpayers] and the members of the Tribe off the reservation as well as on it"). Further, these services are available to patrons as they travel to and from the

[11] States play a large role in providing services to all individuals within their borders, including tribal members. *See, e.g., McNabb for McNabb v. Bowen*, 829 F.2d 787, 794-95 (9th Cir. 1987) ("Congress did not intend that the federal government be exclusively responsible for Indian health care. It contemplated that the IHS [Indian Health Service] would aid Indians in taking advantage of state and local programs, with the federal government meeting health care needs not met under these programs."); Ex. A to State's Memorandum, Doc. 79.

Licensed Premises, which the Tribe admits is a benefit to the Licensed Premises. *See* State's Memorandum, II.B, Doc. 79.

The Tribe downplays the amount of services that the State provides to nonmember patrons of the Licensed Premises while they are engaged in such patronage. Tribe's Memorandum, Doc. 117 at 29. Numerous state services are available to, or benefit, the patrons while they are patronizing the Licensed Premises, including but certainly not limited to, the regulation of the drinking water and certain food products, fire investigation services, criminal investigation services, emergency alert services, the provision of funds for medical equipment and services that can then be used at the Licensed Premises, and the training of law enforcement, first responders, and firefighters that may respond to incidents at the Licensed Premises.[12] *See* State's Memorandum, II.B, Doc. 79.

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[12] To determine the extent of state services used at the Licensed Premises, the State sought the identities of the Royal River Rewards Club members and the Licensed Premises employees through the discovery process. *See* Tribe's Response to Interrogatory #3 (Ex. 19 to Second Naasz Affidavit). The Tribe did not provide such information to the State, but the Tribe did provide statistical information regarding the Royal River Rewards Club members, such as the county/state of their residence. Tribe's Response to Interrogatory #3 (Ex. 19 Second Naasz Affidavit).

Pursuant to the Federal Rules of Civil Procedure 30(b)(6), the Tribe presented several matters for examination in its Notice of Taking Deposition, including the following matters:

1. Law enforcement services provided by the State of South Dakota to patrons of the Flandreau Santee Sioux Tribe's Royal River Casino, while such patrons are engaged in such patronage;

(continued . . .)

The evidence supports that the nonmember taxpayers are indeed using state services more consistently than tribal services. *See* Tribe's Response to Interrogatory #3 (Ex. 19 to Second Naasz Affidavit). Through discovery, the Tribe provided the number of members in the Royal River Players Club, in

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(. . . continued)

2. Food safety services provided by the State of South Dakota to patrons of the Flandreau Santee Sioux Tribe's Royal River Casino, while such patrons are engaged in such patronage;
3. Health services provided by the State of South Dakota to patrons of the Flandreau Santee Sioux Tribe's Royal River Casino, while such patrons are engaged in such patronage;
4. All other services, if any, provided by the State of South Dakota to patrons of the Flandreau Santee Sioux Tribe's Royal River Casino, while such patrons are engaged in such patronage[.]

See State's Amended Designation Regarding Plaintiff's Notice of Taking Deposition (Ex. 40 to the Declaration of Tim Hennessy in Support of Plaintiff's Motion for Summary Judgment, Doc. 119-40). Because the identities of patrons were unknown, the State was unable to determine the full extent of state services provided to patrons at the Licensed Premises. *See, e.g.,* Fed. R. Civ. P. 30(b)(6) Deposition of the State through Sarah Aker (14:22-15:5); Fed. R. Civ. P. 30(b)(6) Deposition of the State through Jason Husby (19:5-20:22); Fed. R. Civ. P. 30(b)(6) Deposition of the State through Carrie Johnson (10:9-13, 10:23-11:1); Fed. R. Civ. P. 30(b)(6) Deposition of the State through Eric Weiss (9:1-7). Exs. 24, 23, 22, 20 to Second Naasz Affidavit. *See also* Fed. R. Civ. P. 30(b)(6) Deposition of the State through Bryan Gortmaker (16:25-17:4, 22:2-5). Ex. 10 to Declaration of Tim Hennessy in Support of Plaintiff's Motion for Summary Judgment, Doc. 119.

As an example, because the State did not know the names of the employees of the Licensed Premises, the State was unable to determine whether the State has provided first responder training to any of those employees. *See* Fed. R. Civ. P. 30(b)(6) Deposition of the State through Jason Bauder (11:17-21) (noting that the Department of Public Safety could ascertain whether it has provided training to tribal personnel if provided the names of the personnel). Ex. 20 to Second Naasz Affidavit.

which patrons enroll in to accumulate points when playing slots and blackjack at the Licensed Premises. State's SUMF 13, Doc. 114. According to that information, [REDACTED] Players Club members are South Dakota residents. Plaintiff's Responses to Request for Production #5 (Ex. 10 to Second Naasz Affidavit). According to the Tribe, only 270 adult tribal members live in Moody County. *See* Tribe's SUMF 5, Doc. 120. Using these numbers, if all adult tribal members living in Moody County are Players Club members, the remaining [REDACTED] Players Club members from South Dakota are nontribal members or tribal members that live elsewhere in South Dakota. In other words, only .4% of the Players Club members are tribal members that reside on or near the reservation, while the remaining 99.6% of the Players Club members from South Dakota are either non-tribal members or tribal members that live in South Dakota but not in Moody County. *Cf.* State's SUMF 10-11, Doc. 114.

From this information, it can be inferred that 99.6% Players Club members who reside in South Dakota are in all likelihood using state services, more consistently than the Tribe's services.[13] *See* State's SUMF 128, Doc. 114 (indicating that some tribal services are not available to nontribal members);

[13] As pointed out in the State's Memorandum, the State offers a substantial number of services that the Tribe does not provide. *Compare* Ex. A attached to State's Memorandum, Doc. 79 *with* Ex. 6 attached to the Affidavit of Matt Naasz, Doc. 80. In instances where patrons request or require services not offered by the Tribe, the patrons would ostensibly look to the State to provide those services.

see, e.g., *Oklahoma Tax Commission v. Chickasaw Nation*, 115 S.Ct. 2214 (1995) ("Enjoyment of the privileges of residence in the state and the attendant right to invoke the protection of its laws are inseparable from responsibility for sharing the costs of government. . . . These are rights and privileges which attach to domicil within the state."); *Quill Corp. v. North Dakota*, 112 S.Ct. 1904, 1910 (1992) ("the presence of sales personnel in the State, or the maintenance of local retail stores in the State justified the exercise of [the State's taxing] power because the seller's local activities were 'plainly accorded the protection and services of the taxing State."). Thus, the State's interest in imposing its use tax on those nonmember patrons is at its strongest because the taxpayer is the recipient of state services. *See Colville*, 100 S.Ct. at 2083.

b. Raising Revenue – Cotton Petroleum

The Tribe argues that "[a] general desire to increase revenues by levying a tax is insufficient to justify imposing a burden on federally encouraged activities." Tribe's Memorandum, Doc. 117 at 13 (internal quotation marks omitted). But here, the State's interest is not merely "a general desire to increase revenues" that will be used elsewhere. *See id.* Rather, the State's interest is in raising revenue for its services that are provided or available to the nonmember patrons, as well as other individuals. *See* State's Memorandum, II.B, Doc. 79. However, even assuming state services are not available to patrons of the Licensed Premises, the Supreme Court has indicated that a state's interest in raising revenues for deposit into a general purpose

fund (for use throughout the state) is enough to outweigh even highly federally regulated activity. *See Cotton Petroleum*, 109 S.Ct. 1698.

In *Cotton Petroleum*, the state sought to impose five taxes on nonmembers' on-reservation production of oil and gas. *Id.* at 1703 and n.4. The revenue from those taxes was not earmarked to be spent on the reservation. *See Brief of Appellant, Cotton Petroleum Corp. v. State of New Mexico*, No. 87-1327, 1987 WL 880197, at *10-11. Specifically, the revenues of the two main taxes were used "primarily to finance specific capital projects located throughout New Mexico" and to "provide[] supplemental monies for the state general fund." *Id.* Despite extensive federal regulation of the taxed activity and even though the tax revenues were deposited into general purpose funds, the Supreme Court upheld the taxes under the balancing test. *Cotton Petroleum*, 109 S.Ct. 1698.

In an attempt to distinguish *Cotton Petroleum*, the Tribe argues that the Supreme Court in *Cotton Petroleum* "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." Tribe's Memorandum, Doc. 117 at 15. But contrary to the Tribe's portrayal, the Supreme Court did not rely on a federal statute's express grant of state jurisdiction in upholding the state's severance taxes on nonmembers. *See Cotton Petroleum*, 109 S.Ct. at 1707-1711.

In *Cotton Petroleum*, the Supreme Court analyzed the Indian Mineral Leasing Act of 1938 (1938 Act) to determine whether such Act permitted a state

to impose its severance taxes on on-reservation oil and gas production by nonmembers. *Id.* at 1708-11. The 1938 Act was silent as to whether the state had jurisdiction to impose the taxes, and therefore, the Supreme Court looked at whether Congress intended to preempt the state taxes with its enactment. *Id.* at 1708. The Supreme Court thus looked at the "legislative background against which Congress enacted the 1938 Act." *Id.* at 1709.

In explaining that the 1938 Act's silence on state taxation jurisdiction confirmed such state jurisdiction, the Supreme Court mentioned the Indian Oil Act of 1927 (1927 Act), which is the federal statute that the Tribe claims was relied upon by the *Cotton Petroleum* Court in its decision. *Id.* at 1710-11. The 1927 Act was an earlier federal statute that "expressly waived immunity from state taxation of oil and gas lessees operating on [certain] reservations." *Id.* The *Cotton Petroleum* Court pointed out that when the 1927 Act was enacted, there was a presumption against a state's jurisdiction to tax. *Id.* At that time, to overcome such presumption, Congress was required to expressly grant state jurisdiction and it did just that in the 1927 Act. *Id.*

Subsequently, when the 1938 Act was enacted, the presumption had been "discarded and thoroughly repudiated[.]" *Id.* at 1710-11, 1713. Thus, when the 1938 Act was enacted, it was not necessary for Congress to expressly grant states the jurisdiction to impose their taxes. *Id.* In other words, the Supreme Court only relied on the 1927 Act that expressly allows state taxation to highlight the distinction between a time when the presumption was against

state taxation jurisdiction versus the "modern rule presuming [state] taxes absent congressional disapproval." *See id.* at 1710-11.

Here, IGRA was enacted in 1988, after the modern rule was established. IGRA must be analyzed under the rule that silence requires presumption in favor of state taxation of nonmembers. *See id.* at 1710-11, 1713. This is supported by the congressional record, which shows that Congress considered states' general taxation jurisdiction when enacting IGRA. *See supra* I.A.2.b. Congress did not want IGRA to encompass those general taxation issues and so it remained silent. *Id.*; *Cotton Petroleum*, 109 S.Ct. at 1710-11. Thus, even if IGRA governs all purchases at the Licensed Premises, its silence on the State's jurisdiction to tax nonmembers' use of goods and services purchased at the Licensed Premises requires the use tax to be upheld.

II. USE TAX CREDIT FOR TRIBAL TAXES PAID

The Tribe claims that 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." Tribe's Memorandum, Doc. 117 at 30. SDCL 10-46-6.1 provides a use tax credit "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 subdivision." SDCL 10-46-6.1. The Tribe argues that it should be treated as a state for purposes of this section.

At the outset, from the information available to the State, it appears that the Tribe does not offer a reciprocal tax credit. The Tribe contends that it grants a credit against its use tax for any sales or use tax already paid to other

Indian tribes or to states. *See* Tribe's Memorandum, Doc. 117 at 31. But the Tribe's tax code provided to the State in discovery contains no such reciprocal credit of tribal use tax for sales or use tax already paid. *See* State's SUMF 90. Without such a reciprocal credit, SDCL 10-46-6.1 is not implicated. SDCL 10-46-6.1 ("However, no credit may be given under this section where taxes paid on tangible personal property, any product transferred electronically, or services in another state or its political subdivisions of that state does not reciprocally grant a credit for taxes paid on similar tangible personal property or any product transferred electronically."). But even if the Tribe's tax code contains such a provision, as alleged by the Tribe, the Tribe is not similarly situated to other states for purposes of application of SDCL 10-46-6.1.

The parties agree on the legal standard to be applied to this issue. In their respective memoranda in support of their summary judgment motions, both the State and Tribe argue whether the Tribe is "similarly situated" to other states for purposes of application of SDCL 10-46-6.1. But unlike any other state or its political subdivisions, the Tribe's reservation is wholly located within the geographic boundaries of South Dakota. As such, the reservation is part of South Dakota. "Ordinarily, it is now clear, an Indian reservation is considered part of the territory of the State." *Nevada v. Hicks*, 121 S.Ct. 2304, 2311 (2001) (internal quotations and citations omitted). The Tribe's reservation's geographic inclusion within the boundaries of South Dakota requires the conclusion, that for purposes of SDCL 10-46-6.1, the Tribe and other states are not similarly situated.

In their respective memoranda on this issue, the Tribe and State rely on two different authorities from cases involving disputes between the Prairie Band Potawatomi Nation and the State of Kansas. *See Wagnon v. Prairie Band Potawatomi Nation*, 126 S.Ct. 676 (2005) ("*Wagnon*") (cited by the State in its memorandum); *Prairie Band Potawatomi Nation v. Wagnon*, 476 F.3d 818 (10th Cir. 2007) ("*Prairie Band*") (cited by the Tribe in its memorandum). The State relies on *Wagnon*, which held that the state motor fuel tax at issue was not impermissibly discriminatory. *Wagnon*, 125 S.Ct. at 689. The Tribe points to *Prairie Band*, a Tenth Circuit Court of Appeals decision holding that the state regulation at issue (motor vehicle registration and titling laws) impermissibly discriminated against similarly situated sovereigns. *Prairie Band*, 476 F.3d at 827.

In rendering its decision, the Tenth Circuit distinguished the facts before it from the facts presented to the Supreme Court. The Tenth Circuit's discussion establishes why it is the Supreme Court's holding in *Wagnon*, and not the Tenth Circuit's decision in *Prairie Band*, that controls.

As the Tenth Circuit noted:

> The fact that the Supreme Court, in [*Wagnon*], found that the Nation was not similarly situated to other sovereigns in relation to motor fuel taxation is of no moment. First, this is not a tax case where, "[w]hen two sovereigns have legitimate authority to tax the same transaction, exercise of that authority by one sovereign does not oust the jurisdiction of the other." . . . As we have detailed, the two regulations at issue here cannot coexist, and allowing Kansas to effectively eviscerate the Nation's regulation would clearly oust the Nation's jurisdiction; however, the Nation's regulation does not oust Kansas of jurisdiction any more than do the regulations of any other sovereign.

Prairie Band, 476 F.3d at 827. Here, this is precisely a case of "two sovereigns hav[ing] legitimate authority to tax the same transaction[.]" *Colville*, 100 S.Ct. 2088 n.9 (Rehnquist, J., concurring in part, concurring in result in part, and dissenting in part). In such a situation, "exercise of that authority by one sovereign does not oust the jurisdiction of the other." *Id.* And because the issue is one of taxation on non-member activity by two sovereigns, both regulations can co-exist. *See id.*

The Tenth Circuit Court further distinguished its decision from the Supreme Court's decision on the lack of relevance of revenue to the issue.

> [W]hile the Supreme Court [in *Wagnon*] rested its determination on the use of the fuel tax proceeds, here there is no evidence in the record regarding use of titling and registration proceeds that could serve as any point of distinction between the Nation and other sovereigns. Indeed, both sides have disclaimed the relevance of revenue to this issue.

Prairie Band, 476 F.3d at 827. As today's case is one of taxation, revenue is clearly relevant to the issue presently before this Court. As pointed out in the State's Memorandum (Doc. 79), in the present case, South Dakota bears the responsibility for providing services to all individuals within its borders, including those residing on South Dakota's reservations. *See, e.g., Chickasaw*, 115 S.Ct. at 2222 ("Enjoyment of the privileges of residence in the state and the attendant right to invoke the protection of its laws are inseparable from responsibility for sharing the costs of government. . . . These are rights and privileges which attach to domicil within the state."). These services cannot be provided without revenue. The revenue generated by South Dakota's use tax is

utilized to provide governmental services in South Dakota. *See* State's SUMF 97-100.

For the purposes of application of SDCL 10-46-6.1, the Tribe, with its reservation wholly located within the State, is not similarly situated to other states, or the political subdivisions of those states, whose geographic boundaries are not located within the South Dakota. Summary Judgment on this issue is therefore properly granted in favor of Defendants, not the Tribe.

Request for Oral Argument

The State respectfully requests oral argument on this Motion.

Dated this 17th day of March 2017.

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CERTIFICATE OF COMPLIANCE

1. I certify that the Memorandum in Opposition to Plaintiff's Motion for Summary Judgment is within the word limitation 11,344 words, using Bookman Old Style typeface in 12 point type.

2. I certify that the word processing software used to prepare this brief is Microsoft Word 2010.

/s/ *Kirsten E. Jasper*
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CERTIFICATE OF SERVICE

I hereby certify that on March 17, 2017, I electronically filed *State's Memorandum in Opposition of Plaintiff's Motion for Summary Judgment* with the Clerk of the Court for the United States District Court for the Southern Division by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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