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 BRIEF IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** **(ORAL ARGUMENT REQUESTED)**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Federal Statutes

State Statutes

Federal Rules

Federal Regulations

Constitutional Provisions

Other Authorities

INTRODUCTION

Plaintiff Flandreau Santee Sioux Tribe (the "Tribe") submits this brief in response to the motion for summary judgment (Doc. 78) filed by Defendants Andy Gerlach and Dennis Daugaard (the "State"), and the State's supporting documents (Docs. 79-114). The Tribe respectfully asks the Court to deny the State's motion as to all eight claims for relief.

Two claims allege that federal law preempts the imposition of State use tax at the Tribe's Casino, either under the Indian Gaming Regulatory Act ("IGRA") (claim one), or because the tax interferes and is incompatible with important federal and tribal interests without justification (claim three). Another (claim four) alleges that the State's failure to grant credits against the State use tax to consumers who have paid sales tax to the Tribe, while it grants such credits for sales taxes paid to other states and their political subdivisions, unlawfully discriminates against the Tribe. The Tribe concurrently moved for summary judgment on these claims, which should be decided in the Tribe's favor as a matter of law, as discussed in Section I, below.

Three of the other claims in this action require the Court to decide the use tax challenges first, as the Court's decision may either render these other claims moot or provide part of the necessary factual grounding for their determination. Two claims in this category allege that a requirement to collect and remit State use taxes – if any such taxes are valid – is preempted by IGRA (claim two) and because of the undue burden imposed (claim five). Also in this category is claim eight, which alleges that requiring the Tribe to collect and remit taxes unrelated to alcohol as a condition for maintaining a liquor license exceeds the scope of the State's delegated authority to regulate alcohol in Indian country.

Summary judgment on claim six (that conditioning Tribal Casino liquor licenses on remitting any and all general purpose state taxes violates IGRA) should be denied because the

claim no longer presents a live case or controversy, in light of developments since this action commenced. The claim is therefore moot.

Finally, claim seven concerns the disposition of money in escrow since the 1990s, awaiting a judicial determination of the State's authority to impose sales and use tax at the Casino. As will be explained, summary judgment may or may not be appropriate on claim seven, depending on the Court's determination of the main use tax questions.

MATERIAL FACTS

The Tribe's Response to the State's Statement of Undisputed Material Facts is filed concurrently with this brief.

ARGUMENT

I. The imposition of State use tax at the Casino is unlawful.

The State is seeking to justify imposing State use tax upon "the privilege of the use, storage, and consumption in this state" of property and services purchased by the nonmember customers of the Tribe's Royal River Casino on the Tribe's reservation. SDCL 10-46-2; *see* Defendants' Mem. in Support of Mot. for Summary Judgment (Doc. 79) at 1, 2, 63. At the most elementary level, however, federal law does not allow the State to do so because it is not the State, but the Tribe and the United States, that is bestowing this "privilege" upon these customers. As the Supreme Court said, "the 'privilege of doing business' on an Indian reservation is exclusively bestowed by the Federal Government." *Ramah Navajo School Bd., Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832, 844 (1982); *see Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 764 (1985) ("The Constitution vests the Federal Government with exclusive authority over relations with Indian tribes."); *Dept. of Revenue v. Investment Finance Management Co.*, 831 F.2d 790, 791 (8th Cir. 1987). Nonmembers' presence on the reservation at all is a privilege within the Tribe's authority to give or withhold. *See also New Mexico v. Mescalero Apache Tribe*, 462 U.S.

324, 333 (1983) (noting that a "tribe's power to exclude nonmembers entirely" is "well established"). South Dakota does not possess the authority to grant the "privilege" for which it wants the Casino's guests to pay. For this reason and others, the State is attempting to tax a transaction in which it has no direct interest. Such a state tax is not allowed where it would interfere with Tribal and Federal interests, as the use tax would do here.

The State's approach ignores the fundamentals of preemption in the Indian law context, where the "backdrop" is tribal sovereignty, not state authority. It presents no basis in law for the Court to grant its motion for summary judgment on the Tribe's two causes of action targeting the State use tax, claim three (*Bracker* balancing) and claim one (IGRA preemption).

A. Claim three: *Bracker* balancing preempts the State tax.

The State's overall argument is fundamentally at odds with controlling authority. In part, the State's brief is an attack on the Supreme Court's interest-balancing analytical framework applicable to questions of preemption of state authority over on-reservation commerce between Indian tribes and non-Indians. The State grounds much of its analysis in the views of one Supreme Court justice, who disagreed that interest balancing was the correct approach. The State asserts that each of several factors the Supreme Court has relied upon to find state taxes preempted in other cases are irrelevant, on the ground that no single factor standing alone has been held to pre-empt state authority. The State then relies on interest-balancing cases whose fact patterns are significantly different from the fact pattern of this case – situations where Congress has historically authorized state regulation or taxation, or where tribes are attempting to shift off-reservation commerce onto the reservation by offering nothing more than a tax haven for non-Indians seeking to purchase goods (usually bulk cigarettes) at a discount. Essentially, the State's analysis attempts to convert the exceptions to the general rule into the general rule itself.

1. The taxes conflict with the federal and tribal interests in protecting the Tribe's economy and sovereignty through comprehensive federal regulation of the Casino.

The strong Federal and Tribal interests reflected in federal law weigh against State taxation of Casino goods and services. The State's use tax would interfere with, and is incompatible with, these interests. *See New Mexico v. Mescalero Apache Tribe*, 462 U.S. at 334.

The State discounts the force of both the Indian Commerce Clause and IGRA to demonstrate the federal and tribal interests at stake. The State asserts that the Indian Commerce Clause does not "explicitly preempt[] the use tax," Doc. 79 at 34, and that there is no "direct conflict" between the Indian Commerce Clause and the State's use tax, *id.* at 35. It is established, however, that the doctrine of tribal sovereignty "requires us to reverse the general rule that exemptions from tax laws should be clearly expressed." *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 112 (2005) (internal quotation marks and alterations omitted). Further, while the Indian Commerce Clause alone does not "automatically bar[] all state taxation of matters significantly touching the political and economic interests" of Indian tribes, *Colville* at 157, merely rejecting the "stark and rather unhelpful notion" of automatic invalidity "does not take that Clause entirely out of play in the field of state regulation of Indian affairs." *Id.* at 147. Rather, *Colville* suggested that the Indian Commerce Clause "may have a more limited role to play in preventing undue discrimination against, or burdens on, Indian commerce." *Id.* at 157. That role was solidified shortly thereafter in *Bracker*, which held that Congress' "broad power to regulate tribal affairs under the Indian Commerce Clause," along with "the 'semi-independent position' of Indian tribes," give rise to the twin barriers of federal preemption and unlawful infringement of tribal sovereignty. *Bracker* at 143; *see Ramah*, 458 U.S. at 837. The Indian Commerce Clause supplies a constitutional basis for congressional authority to assert (even implicitly) an interest in Indian commerce, with which the State cannot interfere absent sufficient justification.

The State asserts that "there is no conflict between IGRA" and State taxation of Casino goods and services. Doc. 79 at 35. Conflict is absent, according to the State, "because IGRA only regulates the operation of the gaming at the Licensed Premises, not the purchase of goods and services," and because even though Congress intended IGRA to promote tribal economic development, it "does not demand that the Tribe be the *sole* beneficiary of gaming *and other ancillary activities*." *Id.* (emphasis in original).

Addressing the second point first, the State is mistaken to suggest that by leaving room for others besides Indian tribes to benefit from tribal casinos on Indian land, Congress intended to signal State permission to tax tribal casinos. The State reads IGRA's purposes too narrowly. "By resting preemption analysis principally on a consideration of the nature of the competing interests at stake, our cases have rejected a narrow focus on congressional intent to preempt State law as the sole touchstone." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. at 334. As the Court stated in *Bracker*, the State's "argument is reduced to a claim that they may assess taxes on non-Indians engaged in commerce on the reservation whenever there is no express congressional statement to the contrary. That is simply not the law." *Bracker* at 150-51. Even before IGRA existed, the federal involvement "in promoting and assisting in the development of tribal bingo enterprises" and federal opposition to state interference with "tribal interests and governance" led the Tenth Circuit to hold that Oklahoma's sales tax on a tribe's "bingo ticket sales[, food] concessions[, and] other sales" was preempted. *Indian Country, U.S.A.* at 972-73, 985-86.

Regarding the State's first point, IGRA does not seek to ensure that Indian tribes benefit only from "gaming," as the State asserts, Doc. 79 at 35, but that tribes benefit from "the gaming operation," 25 U.S.C. § 2702(2), statutory language that belies the narrow focus on game play urged by the State. "Gaming operation means each economic entity that is licensed by a tribe,

operates the games, receives the revenues, issues the prizes, and pays the expenses." 25 C.F.R. § 502.10. The term "expenses" is notably broad, including "non-operating expenses," 25 C.F.R. § 502.16, that is, costs that are "not so closely tied to a business's economic activity and revenue production." Amendments to Various NIGC Regulations, 74 Fed. Reg. 36926, 36930 (July 27, 2009). IGRA intends tribes to benefit not just from the gaming *part* of its operation, but from the whole economic entity.

Addressing both points more generally, for purposes of *Bracker* balancing, the Supreme Court has not found it necessary to locate an exact match between the federal laws and the activity sought to be taxed. The *Ramah* Court recounted that in *Bracker*, "we struck down Arizona's use fuel tax and motor carrier license tax, not because of any federal interest in gasoline, licenses, or highways, but because the imposition of these state taxes on a non-Indian contractor doing work on the reservation was pre-empted by the 'comprehensive regulation of the harvesting and sale of tribal timber.'" *Ramah* at 841 fn.5 (quoting *Bracker* at 151).

In *Ramah*, the Court found that "[f]ederal regulation of the construction and financing of Indian educational institutions is both comprehensive and pervasive." *Ramah* at 839. The Court noted that the federal act codifying the government's policy spoke broadly of the "'major national goal of the United States … to provide the quantity and quality of education services and opportunities which will permit Indian children to compete and excel in the life areas of their choice, and to achieve the measure of self-determination essential to their social and economic well-being,'" and that the act "recognized that 'parental and community control of the educational process is of crucial importance to the Indian people.'" *Ramah* at 840 (quoting 88 Stat. 2203 (now codified at 25 U.S.C. §§ 5301(b)(3) & 5302(c))). The Court described the regulations promulgated to accomplish the act's purposes, which gave the BIA "authority to monitor and review" school

construction agreements, to "conduct preliminary on-site inspections," to "prepare cost estimates for the project in cooperation with the tribal organization," and to require all [such] agreements to contain certain terms, ranging from clauses relating to bonding and pay scales … to preferential treatment for Indian workers." *Ramah* at 840-41. The regulations also imposed requirements on the tribal organization, which "must approve any architectural or engineering agreements," and must "maintain records for the Secretary's inspection." *Id.* at 841.

The *Ramah* dissent characterized the same regulatory scheme as merely providing "procedures by which tribes may apply for federal funds in order to carry out school construction." *Ramah* at 851 (Rehnquist, J., dissenting). "[T]he regulations on which the Court relies do not regulate school construction, which is the activity taxed," the dissent complained, calling the regulatory scheme "little more than a grant application process." *Id.* at 851, 852 (Rehnquist, J., dissenting).

Rejecting Justice Rehnquist's dissenting view, however, the Court held that the "direction and supervision provided by the Federal Government for the construction of Indian schools leave no room for the additional burden sought to be imposed by the State through its taxation of the gross receipts paid to [the non-Indian construction contractor] Lembke by the [Tribal School] Board." *Ramah* at 842. The tax burden, the Court found, "necessarily impedes the clearly expressed federal interest in promoting the 'quality and quantity' of educational opportunities for Indians by depleting the funds available for the construction of Indian schools." *Id.*

The federal regulation of the operation of tribal casinos under IGRA is no less comprehensive and pervasive than the regulatory schemes in *Ramah* and *Bracker*, with a connection to the taxed activity that is at least as strong, and the State use tax impedes the federal interest the same way. IGRA proclaims the federal goals broadly – "to promote tribal economic

development, tribal self-sufficiency, and strong tribal government" – and then declares that the Act's purpose is to provide a basis for Indian tribes to operate casinos as a means to accomplish those goals. 25 U.S.C. §§ 2701(4), 2702(1). Its purposes also include providing for tribal regulation of gaming "to ensure that the Indian tribe is the primary beneficiary of the gaming operation," and providing for federal regulation of Indian gaming "to protect such gaming as a means of generating tribal revenue." 25 U.S.C. § 2702(2), (3). "IGRA is meant to exalt tribal development," among other things, this Court observed in a prior Order. Doc. 59 at 23. Its purpose is "amplifying tribal development as it relates to gaming." *Id.*

The federal and tribal regulatory scheme IGRA created in pursuit of these interests is comprehensive and pervasive. IGRA established the National Indian Gaming Commission ("NIGC") as an "independent Federal regulatory authority for gaming on Indian lands." 25 U.S.C. §§ 2702(3), 2704(a). Among other duties, IGRA provides that the NIGC "shall monitor class II gaming conducted on Indian lands on a continuing basis," "shall inspect and examine all premises located on Indian lands on which class II gaming is conducted," "may … audit all papers, books, and records respecting gross revenues of class II gaming conducted on Indian lands," and "shall promulgate such regulations and guidelines as it deems appropriate to implement" IGRA's provisions. 25 U.S.C. § 2706(b).

IGRA also created the office of the NIGC Chairman. 25 U.S.C. § 2706(b)(1)(A). The Chairman's powers include enforcement of IGRA, federal regulations, and tribal gaming laws through temporary closure orders and fines. 25 U.S.C. §§ 2705(a)(1) & (2), 2713(a) & (b). The Chairman's approval is required for any tribal ordinance or resolution authorizing class II or class III gaming activities, and the Tribal law must meet the requirements set forth in IGRA. 25 U.S.C. §§ 2705(a)(3), 2710(b), (d)(1). Provisions of Tribal law which IGRA makes mandatory include

the requirement that "the Indian tribe will have the sole proprietary interest and responsibility for the conduct of any gaming activity," § 2710(b)(2)(A); restricting the Tribe's use of "net revenues from any tribal gaming" to, essentially, tribal governmental purposes, § 2710(b)(2)(B); independent audit requirements for the gaming and "all contracts for supplies, services, or concessions for a contract amount in excess of $25,000 annually … relating to such gaming," § 2710(b)(2)(C), (D); and requirements for licensing and background investigation of "primary management officials and key employees of the gaming enterprise," with reporting to the NIGC, § 2710(b)(2)(F). The Chairman's approval is also required for any management contracts for class II or class III gaming operations. 25 U.S.C. §§ 2705(a)(4), 2710(d)(9), 2711.

IGRA assigns approval authority to the Secretary of the Interior for any tribal plan to allocate tribal gaming revenues that calls for the tribe to make per capita payments to its members. 25 U.S.C. § 2710(b)(3). IGRA also sets forth a process for states to acquire limited authority over class III gaming through agreements with tribes, subject to approval by the Secretary. 25 U.S.C. § 2710(d)(3). Addressing taxes, IGRA allows states to negotiate for certain taxation to be included in a gaming compact "in such amounts as are necessary to defray the costs of regulating" the tribal gaming activities. 25 U.S.C. § 2710(d)(3)(C)(iii). The Act then cautions that nothing in § 2710 confers any authority upon a state to impose any tax "upon an Indian tribe or upon any other person or entity authorized by an Indian tribe to engage in a class III activity." 25 U.S.C. § 2710(d)(4). It adds that states may not refuse to enter into compact negotiations "based upon the lack of authority in such State, or its political subdivisions, to impose such a tax, fee, charge, or other assessment." *Id.*

Pursuant to Congress' directive, the NIGC and the Secretary have promulgated literally hundreds of regulations governing tribal casinos. 25 C.F.R. §§ 501.1-585.7. These detailed

regulations cover a wide variety of matters: for example, they set the fees tribes must pay to the NIGC, §§ 514.1-514.17; they prescribe procedures and standards for federal approval of class II and class III tribal gaming ordinances, §§ 522.1-522.12; they list mandatory provisions for any gaming management contract and procedures for federal approval of management contracts, §§ 531.1-537.4; they establish comprehensive minimum internal control standards for class III tribal gaming operations, including standards for the operation of six game genres (§§ 542.8-542.13), the cash cage and use of credit (§§ 542.14, 514.15), accounting (§ 542.19), drop and count (§ 542.21), audits (§ 542.22), and surveillance (§ 542.23), many of which vary according to the casino's revenue tier. Among the minimum internal control standards is a rule governing "complimentary services or items," which requires the tribal casino to heed procedures, approved by tribal regulators and meeting minimum federal standards, "for the authorization, issuance, and tracking of complimentary services and items, including cash and non-cash gifts." § 542.17(a). The casino must prepare monthly reports with detailed information for all comps of $100 or more, and make the reports available to tribal regulators and the NIGC. § 542.17(b)-(c). There is another equally comprehensive set of minimum internal control standards for class II gaming operations, §§ 543.1-543.24, and technical standards for class II games and equipment, §§ 547.1-547.17. The regulations govern tribal gaming licenses, both for employees and the facility itself. §§ 556.1-559.7. The facility license provisions require the Tribe to certify that the "construction and maintenance of the gaming facility, and the operation of that gaming, is conducted in a manner which adequately protects the environment and the public health and safety." § 559.4. The regulations provide procedures governing NIGC's "monitoring and investigations of Indian gaming operations," enforcement of the federal regulations and assessment civil fines, §§ 571.1-575.7, and processes for appeals of a variety of NIGC decisions, §§ 580.1-585.7.

The Secretary has also issued extensive regulations covering the allocation of tribal gaming revenue to tribal members, procedures for class III gaming in the event a state fails to negotiate a compact in good faith, the lands eligible for tribal gaming, and gaming compact approvals by the Secretary. 25 C.F.R. §§ 290.1-293.16.

In sum, IGRA and its regulations pervade the entirety of tribal casino operations. Congress intended the federal government to have comprehensive involvement in the casinos it encouraged Indian tribes to build and operate on their tribal lands. Congress permitted state involvement too, but only to the limited extent specified in the law, agreed to by the Tribe, and approved by the Secretary of the Interior. Even if IGRA's express limits on such state involvement does not forbid South Dakota's use taxes, "the federal regulatory scheme is so pervasive as to preclude the additional burdens sought to be imposed in this case." *Bracker* at 148.

As in *Ramah*, the burden of the tax "necessarily impedes the clearly expressed federal interest in promoting" tribal economic development, self-sufficiency, and strong tribal government via tribal gaming operations "by depleting the funds available" for the Tribe to operate its casino enterprise competitively, and to maintain the government functions supported by casino profits and tribal tax revenues generated at the Casino. *See Ramah* at 842. As in *Bracker*, the tax would obstruct the federal policy of "assuring that the profits derived from" casino operations "will inure to the benefit of the Tribe," subject only to expenses set by the federal government or, through an agreed-upon gaming compact only, by the State. *See Bracker* at 149. "The imposition of the taxes at issue would undermine that policy in a context in which the Federal Government has undertaken to regulate the most minute details" of tribal casinos, and "expressed a firm desire that the Tribe should retain the benefits derived" from the development and operation of a tribal casino. *Id.* The tax would put "additional factors into the federal calculus" for approving gaming management

contracts, for which IGRA sets the maximum management fee as a percentage of gaming revenues to protect tribal profits while still attracting quality professional casino managers. *Id.*; 25 U.S.C. §§ 2710(d)(9), 2711(c). "The assessment of state taxes would … reduc[e] tribal revenues and diminish[] the profitability of the enterprise for potential contractors." *Bracker* at 149. The tax burden on the Casino and Tribe would also leave the Tribe "with reduced sums with which to pay out federally required expenses," such as the annual NIGC fee and the expenses of ensuring the facility, the tribal regulatory authority, and all aspects of the operation continue to meet federal standards. *See Bracker* at 150.[1]

2. Economic impacts are not irrelevant.

The State incorrectly claims that "any economic burden on the Tribe caused by the State's taxation of nonmembers is irrelevant." Doc. 79 at 38. Inaccuracies and out-of-context quotations in the State's brief make it necessary to closely examine its argument regarding the economic burden on the Tribe.

When the *Colville* Court stated, "the Tribes have no vested right to a certain volume of sales to non-Indians, or indeed to any such sales at all," *Colville* at 151 fn.27; *see* Doc. 79 at 37, it was speaking to the facts before it, and was not suggesting that there is never a tribal interest in protecting tribal commerce with non-Indians from intrusive state taxation. The Court was

[1] *Bracker* concluded with the statement that it was "in all relevant respects indistinguishable from *Warren Trading Post*." *Bracker* at 152, referring to *Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685 (1965). Although not decided as a "balancing" case, *Warren Trading Post* similarly "held that the 'comprehensive federal regulation of Indian trading' prohibited the assessment of the attempted taxes." *Bracker* at 152 (quoting *Warren Trading Post* at 688). The Court decided *Central Machinery Co. v. Arizona Tax Comm'n*, 448 U.S. 160 (1980), on the same day as *Bracker*, and on identical grounds as *Warren Trading Post*. The "comprehensive federal regulation of Indian trading" in *Central Machinery* and *Warren Trading Post*, as described in those decisions, was not nearly as detailed as IGRA is, yet it left "'no room for the States to legislate on the subject.'" *Central Machinery* at 166 (quoting *Warren Trading Post* at 691 fn.18).

describing "principles relevant to the present cases" which its *Moe* decision had established. *Colville* at 151. In *Moe*, as the Court recounts in *Colville*, "'the competitive advantage which the Indian seller doing business on tribal land enjoys over all other cigarette retailers, within and without the reservation, is dependent on the extent to which the non-Indian purchaser is willing to flout *his* legal obligation to pay the tax.'" *Id.* (quoting *Moe* at 482). In such circumstances, a state may impose a tax on those non-Indian customers, "even if it seriously disadvantages or eliminates the Indian retailer's business with non-Indians." *Id.* The Court appended footnote 27, quoted in part above, as a response to the assertion that *Moe* simply did not apply to any case "in which the economic impact on tribal retailers is particularly severe." *Id.* at 151 fn.27. *Moe* applies even then, the Court said, because the non-Indian cigarette sales in cases like *Moe* and *Colville* only exist because of the purported tax advantage, *id.* at 155, and it cannot matter whether the advantage nets the Tribe very large returns or very little – if the advantage is illegitimate, it can be eliminated entirely and not touch the Tribe's legitimate interests. In contrast, an Indian tribe certainly has the right to conduct business on its reservation and, when its sales to non-Indians advance legitimate tribal interests, federal policies and tribal sovereignty protect those sales from being diminished by state interference. *See Indian Country, U.S.A.*, 829 F.2d at 986 (holding that state tax on bingo admission tickets and related amenities sold by tribe to non-Indians was preempted and noting that "the state's attempt to tax bingo activities adds an additional burden to an enterprise in which the federal government opposes state interference"); *Seminole Tribe of Florida v. Stranburg*, 799 F.3d 1324, 1340-41 (11th Cir. 2015) (holding that state tax on leases by Tribe to non-Indians was preempted, based on the "increase in costs for on-reservation projects attributable to the state tax" in combination with extensive and exclusive federal regulation of Indian land leases).

The State also quotes *Chickasaw* out of context. Doc. 79 at 37. There, the Court declined "to make 'economic reality' our guide" to determining which of two analytical approaches would apply – *Bracker* balancing or per se tax immunity. *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 459 (1995). "If the legal incidence of an excise tax rests on a tribe or on tribal members for sales made inside Indian country, the tax cannot be enforced absent clear congressional authorization." *Id.* "But if the legal incidence rests on non-Indians, no categorical bar prevents enforcement of the tax; if the balance of federal, state, and tribal interests favors the State, and federal law is not to the contrary, the State may impose its levy[.]" *Id.* Oklahoma urged the Court to look beyond the legal incidence (which, in the case of the Oklahoma fuel tax at issue, was on the Indian tribal retailer), and consider the "economic realities." *Id.* (internal quotation marks omitted). In other words, Oklahoma wanted the "economic reality" to allow it to avoid the categorical bar against taxing reservation Indians, and open the door to balancing the interests instead. *Id.* The Court said no. *Id.* at 459-60. *Chickasaw* did not hold, or warn, as the State suggests, that when dealing with an interest-balancing case, it is undesirable to take note of the economic burden that falls on a Tribe when a tax's legal incidence falls on the non-Indian on the other side of the transaction.

In fact, the *Ramah* Court rejected this exact argument, declining New Mexico's invitation "to adopt the 'legal incidence' test, under which the legal incidence and not the actual burden of the tax would control the pre-emption inquiry." *Ramah* at 844 fn.8. The interest balancing test is designed to accommodate such a flexible, fact intensive approach. *Bracker* at 145 (the balancing test is a "particularized inquiry" dependent on the "specific context," and not on "mechanical or absolute conceptions of state or tribal sovereignty"). Where the balance includes a "comprehensive federal regulatory scheme," the Court does not "allow the State to impose

additional burdens on the significant federal interest in [accomplishing the federal purpose], even if those burdens are imposed indirectly through a tax on a non-Indian" for on-reservation activities. *Ramah* at 844 fn.8. The Supreme Court based its decisions invalidating state taxes levied on non-Indians engaged in reservation commerce with tribes in part on the economic burdens those taxes imposed on the tribes. *Bracker* at 149-50; *Ramah* at 843-44 & fn.8. *See Cabazon Band of Mission Indians v. Wilson*, 37 F.3d 430, 434 (9th Cir. 1994).

The State asserts that "*Colville* confirms" that economic burdens are irrelevant, but instead of relying on the *Colville* majority opinion, the State only quotes the separate opinion of Justice Rehnquist, who concurred in part and dissented in part. *See* Doc. 79 at 38-39 (quoting *Colville* at 184 fn.9, and 183-84 (opn. of Rehnquist, J.)). The State's citations do not indicate that the references are to a minority opinion, and its text incorrectly attributes the quotations to the Court. Justice Rehnquist's opinion did not carry a majority of the Court, and in fact was not joined by any other Justices. Justice Rehnquist was in dissent again, twice, three weeks later when the Court decided *Bracker* and *Central Machinery*. *Bracker* at 153-159 (Stevens, J., dissenting, with Stewart and Rehnquist, JJ., joining), *Central Machinery* at 166-170 (Stewart, J., dissenting, with Powell, Rehnquist and Stevens, JJ., joining). He dissented again in *Ramah*. *Ramah* at 847-857 (Rehnquist, J., dissenting); *see id.* at fn.5 (rejecting Justice Rehnquist's argument that a state tax burden is compatible with federal interests because it is simply a "'normal cost of school construction'"). His views did not state the legal tests that have come to govern federal preemption in Indian tax cases. This is evident in his *Colville* opinion, which states, directly at odds with the majority rule, "I see no need for this Court to balance the state and tribal interests in enacting particular forms of taxation in order to determine their validity." *Colville* at 177 (opn. of Rehnquist, J.).

Justice Rehnquist advocated an approach where a state tax or regulation could be preempted absent an express preemptive provision in federal law, only if a tradition of Indian sovereignty existed relevant to the narrow question at hand. Where, however, the Court found no such tradition of sovereignty, federal preemption would require an express Congressional conferral of immunity. *Id.* at 179. Furthermore, Justice Rehnquist expressed his understanding that there was no tradition of sovereignty to render Indian tribes immune from the economic impacts of state taxes on non-Indians within a reservation. *Id.* at 182-184. Therefore, in his view, tribal evidence of economic harms was irrelevant, because the only question was whether express Congressional preemption existed. Justice Rehnquist placed the issue – state taxation of nonmembers on an Indian reservation – into the same analytical framework as "all [other] areas of tax immunity." *Id.* at 185-86.

While Justice Rehnquist's opinion rejected outright the relevance of the economic effects of the state tax, the *Colville* majority took a different approach. The Court stated that the Tribes' "primary argument is economic," and proceeded to evaluate whether the state taxes' economic impacts on the Tribes triggered statutory or constitutional preemption or contravened the principle of tribal self-government. *Colville* at 154. Ultimately, the Court upheld the state cigarette tax based on its conclusion that the Tribal cigarette market was entirely driven by the Tribes "market[ing] an exemption from state taxation to persons who would normally do their business elsewhere" – i.e., at off-reservation cigarette retailers. *Id.* at 155. In contrast to the Rehnquist opinion on which the State relies, the *Colville* majority did not hold that economic burdens were inevitably irrelevant, but only that where a Tribe derives its revenues from off-reservation value, namely the willingness of non-Indians to avoid state taxes by buying cigarettes on-reservation

which they otherwise would have purchased off-reservation, no legitimate tribal interest is burdened.

The State's string of citations that follows is little better. *See* Doc. 79 at 39. In *Bracker*, the Court stated that an economic burden "does not by itself mean that the tax is preempted," *Bracker* at 151 fn.15, as a footnote to its observation that "the economic burden of the asserted taxes will ultimately fall on the Tribe," which was a fact that supported the Court's conclusion that the state tax was preempted. *Id.* at 151. The Court explained that where "the economic burden of the state taxes would eventually be passed on to the Indians themselves," that imposition can "'disturb and disarrange the [federal] statutory plan'" of comprehensive regulation. *Id.* at 152 (quoting *Warren Trading Post* at 691.) *Bracker* explained at length how the state taxes would economically "threaten the overriding federal objective of guaranteeing Indians that they will 'receive … the benefit of whatever profit [the forest] is capable of yielding….' 25 CFR § 141.3(a)(3) (1979)," would undermine the federal regulators' ability to effectively exercise authority by "throw[ing] additional factors into the federal calculus, reducing tribal revenues and diminishing the profitability of the enterprise for potential contractors," and "would adversely affect the Tribe's ability to comply" with federal policies because the "imposition of state taxes on [the Tribal enterprise's] contractors would effectively diminish the amount of those revenues and thus leave the Tribe and its contractors with reduced sums with which to pay out federally required expenses." *Bracker* at 149-50. Based on the economic burden, in combination with a backdrop of tribal sovereignty and an absence of State "governmental functions [performed] for those on whom the taxes fall," giving rise to a mere "general desire to raise revenue" for the state's off-reservation functions, the Court held the state could not impose its taxes. *Bracker* at 150. In footnote 15, cited by the State, *Bracker* simply notes that it not the economic burden *alone* that

preempts the state tax, but it is the fact that the "comprehensive federal regulatory scheme … leaves no room for the additional burdens," including the economic burden the tax would impose. *Bracker* at 151 fn.15.

The statement the State quotes from *Wagnon*, that "the Nation cannot invalidate the Kansas tax by complaining about a decrease in revenues," came in response to the tribal plaintiff's "complaint about the downstream economic consequences of the Kansas tax," which the Court had already concluded was imposed off-reservation, where the State's power to tax is unencumbered by any tribal sovereignty interests. *Wagnon* at 114. In today's case, however, it is not disputed that the tax is imposed on-reservation, where the backdrop of Indian sovereignty and the tribal and federal interests are integral to the analysis.

Cotton Petroleum rejected the asserted "indirect burden" on the profitability of tribal oil and gas leases as a basis for granting immunity from state taxes to non-Indian mineral extractors. *Cotton Petroleum* at 191, *see* Doc. 79 at 39. There, however, the Court was addressing an argument that New Mexico's taxes imposed "an unlawful multiple tax burden on interstate commerce," which was separate and distinct from the Indian law preemption discussion in that case (and which is not at issue in this case). *Cotton Petroleum* at 187-88 (internal quotation marks omitted). The Court also determined that there was, in fact, no economic burden on the tribe. *Id.* at 185, 190.

The two Ninth Circuit cases the State relies on do not support the State's argument that negative economic impacts are irrelevant. The first, *Barona Band of Mission Indians v. Yee*, 528 F.3d 1184 (9th Cir. 2008), asked "whether a non-Indian contractor who purchases construction materials from non-Indian vendors, which are later delivered to a construction site on Indian land, is exempt from state sales taxes." *Id.* at 1186. The Ninth Circuit held the state tax was not

preempted because, like the cigarette sellers in *Colville* and *Moe*, the Tribe had "merely marketed a sales tax exemption to non-Indians as part of a calculated business strategy[.]" *Id.*; *see id.* at 1190-91 (noting the "parallel line of authority," exemplified by *Colville*, in which the Supreme Court "expressed disfavor toward tribal manipulation of tax policy to gain 'an artificial competitive advantage over all other businesses in a State'" (quoting *Colville* at 155)). The court explained that although the "Tribe enjoys a right to autonomy within its territory, … the right of territorial autonomy is significantly compromised by the Tribe's invitation to the non-Indian subcontractor to theoretically consummate purchases on its tribal land for the sole purpose of receiving preferential tax treatment." *Id.* at 1191. Similarly, the federal "interest in the Tribe's economic self-sufficiency … fade[s] when the commercial activity is rigged to trigger a tax exemption." The court differentiated *Bracker* and similar cases: "That these sophisticated parties contracted to create a taxable event on Indian territory which otherwise would occur on non-Indian territory factually distinguishes the present case from the multitude of cases where courts have analyzed state taxation on non-Indians performing work on Indian land." *Id.* Thus, since there were scant legitimate federal or tribal interests in allowing the tribe to artificially make its reservation into a haven from state taxes, the court aptly held that the fact that the tax could "affect the overall profitability of the Tribe's casino operation" did not, "alone, … bar the imposition of a tax on non-Indians." *Id.* But *Barona* was not stating a general rule, and the conclusion it reached is not applicable to this case, where the Tribe is not creating an "artificial" market for tax-free commerce that ordinarily would have occurred, and been taxed by the State, off-reservation.

The second Ninth Circuit decision, *Squaxin Island Tribe v. State of Washington*, 781 F.2d 715 (9th Cir. 1986), involved "whether the State of Washington may lawfully regulate and tax tribal liquor sales to non-Indians." *Id.* at 717. As this Court noted in its December 18, 2015

opinion, *Squaxin Island* involved a liquor tax on package sales of liquor that the court determined was integrally related to the liquor regulation scheme and interests of the state. *Id.* at 719-720; Doc. 59 at 32. Once again, the Court took the view that no legitimate tribal or federal interest was impacted by the state tax in this case, because the Supreme Court had held in *Rice v. Rehner*, 463 U.S. 713 (1983), that there was no tradition of tribal sovereignty in the area of liquor regulation, *Squaxin Island* at 719, 720 ("we accord little, if any, weight to an asserted tribal sovereignty interest"), and because, as in *Colville* once more, "the value marketed here by the tribes to non-tribal members 'is not generated on the reservations by activities in which the Tribes have a significant interest' but is instead 'solely an exemption from state taxation.'" *Id.* at 720 (quoting *Colville* at 155); *see id.* at 720 fn.7 (distinguishing five cases that "involve tribal interest in value generated within the reservation boundaries").

The decisions selectively quoted by the State only tell us that in cases where there is no federal policy or legitimate tribal interest in immunity from the state tax, then an economic burden alone cannot create preemption. This is not controversial. "But this argument only goes so far because the Tribe is not contending that the sole federal interest at stake here is income maximization or that income maximization automatically preempts any state taxation. Rather, Indian economic well-being is one of the many federal interests embodied in the extensive federal regulation of [gaming] activity, and it is a valid interest weighing in favor of preemption in the final balance." *Seminole Tribe of Florida v. Stranburg*, 799 F.3d at 1340 (discussing "regulation of leasing activity"). When the value the State seeks to tax is generated on-reservation through an activity in which the Tribe or the federal government, or both, have a substantial interest, then it is appropriate and necessary to consider evidence of how those interests are to be burdened by the

State tax, including both economic burdens and diminishment of the Tribe's sovereignty within its territory.

3. The taxes impose a significant economic burden on the Tribe.

The State returns to *Cotton Petroleum* to support its assertion that the likely economic impact about which its own expert testified is "'too indirect and too insubstantial' to preempt the State's jurisdiction." Doc. 79 at 40 (quoting *Cotton Petroleum* at 187). The State's expert opined that the State tax would result in the Tribe losing revenue within a range of approximately $34,000 to $268,000 every year. Doc. 79 at 40, SUMF 94.

Cotton Petroleum engaged in a truncated interest-balancing analysis which was subordinate to the primary doctrine at issue in the case, "the doctrine of intergovernmental tax immunity." *Cotton Petroleum* at 173. The *Cotton Petroleum* quotation on page 33 of the State's brief is the Court's summary of the then-current state of the intergovernmental tax immunity doctrine. *See Cotton Petroleum* at 175; *see also South Carolina v. Baker*, 485 U.S. 505, 523 (1988) ("In sum, then, under current intergovernmental tax immunity doctrine the States can never tax the United States directly but can tax any private parties with whom it does business, even though the financial burden falls on the United States, as long as the tax does not discriminate against the United States or those with whom it deals."). The doctrine has been commonly utilized in the context of oil and gas leases within Indian country. *See Cotton Petroleum* at 173-75 & fn.10. It is not, however, generally applicable to questions of federal preemption of State taxes on reservation activities.[2] Under the doctrine of intergovernmental tax immunity (like preemption in

[2] In his dissenting opinion in *Ramah*, Justice Rehnquist urged importing into Indian tax preemption cases the core principles of the intergovernmental tax immunity doctrine. *Ramah* at 855-56 & fn.4 & 5 (Rehnquist, J., dissenting) (citing *United States v. New Mexico*, 455 U.S. 720 (1982)). The Court's majority did not agree.

non-Indian contexts generally) federal preemption of a state tax on a person engaged in commerce with a federal entity requires an affirmative act of Congress. *Cotton Petroleum* at 175. But federal preemption in Indian country "is not limited to cases in which Congress has expressly – as compared to impliedly – pre-empted the state activity." *Id.* at 176-77; *see, e.g.*, *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14 (1987) ("The federal policy favoring tribal self-government operates even in areas where state control has not been affirmatively pre-empted by federal statute.").[3]

The *Cotton Petroleum* opinion, after describing the facts of the case in Part I (including the notable fact that the affected Indian tribe was not a party, but merely an amicus curiae, *id.* at 172), outlines in Part II the rise and fall of the intergovernmental tax immunity doctrine. *Id.* at 173-76. Part III largely consists of the Court's analysis of a succession of federal acts governing mineral leases on Indian reservations. *Id.* at 177-183. Congress had authorized mineral leasing on certain Indian lands (not including so-called "Executive Order reservations," such as the Indian country at issue in *Cotton Petroleum*) in 1891, and expressly authorized state taxation of oil and gas production on such lands in 1924. *See id.* at 180-81. That express waiver of tax immunity was required because, at the time, the intergovernmental tax immunity doctrine would have preempted any state taxation of such lessees if Congress remained silent. *Id.* at 181. Mineral leasing on Executive Order reservations was first authorized in 1927. *Id.* at 180-81. With that authorization, Congress also "expressly waived immunity from state taxation of oil and gas lessees operating in

[3] "The usual preemption approach in fields where states traditionally have broad authority presumes that state jurisdiction will prevail unless sufficient contrary congressional intent can be found. But the opposite presumption prevails in Indian law because the policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history[.]" Cohen's Handbook of Federal Indian Law § 6.03[2][a], at 519 & 2015 Supp. at 19 (Nell Jessup Newton, ed., 2012 (footnotes and internal quotation marks omitted). *See also id.* § 8.03[1][d], at 707-08 (stating that the Indian preemption analysis "is both more appropriate and more consistent with the weight of authority" than the intergovernmental immunities doctrine).

those reservations. … Thus, at least as to Executive Order reservations, state taxation of nonmember oil and gas lessees was the norm from the very start. There is, accordingly, simply no history of tribal independence from state taxation of these lessees to form a 'backdrop' against which the 1938 Act must be read." *Id.* at 182. The "1938 Act" reauthorized mineral leases in Indian country, but was silent about whether state taxation was allowed. *Id.* at 177. In the meantime, the prior rule of the intergovernmental tax immunity doctrine was significantly undermined in 1937 and ultimately overruled in 1938, in favor of the rule permitting state taxes on lessees of government land in the event of Congressional silence. *Id.* at 174-75, 182; *see Helvering v. Mountain Producers Corp.*, 303 U.S. 376, 386-87 (1938). Based on this history, the Court concluded that "Congress' approaches to both the 1927 and 1938 Acts were fully consistent with an intent to permit state taxation of nonmember lessees." *Cotton Petroleum* at 182-83.

Part III of the *Cotton Petroleum* opinion closes with the Court's interest-balancing analysis, deployed in this case to determine whether the balance of interests was inconsistent with the otherwise evident Congressional "intent to permit state taxation." *See id.* at 183-87. Notably, this analysis did not mention reservation-generated value (which had been important just two years earlier in *California v. Cabazon Band of Mission Indians* ("*Cabazon*"), 480 U.S. 202, 219-20 (1987)), or refer to tribal and federal interests in Indian self-government or self-sufficiency, as the Court had determined the typical "backdrop" of "traditional notions of Indian self-government," *Bracker* at 143, was replaced in this case with a backdrop of *no* independence from state taxation. Instead, the only federal interest mentioned is the "federal policy favoring the exploitation of on-reservation oil and gas resources by Indian tribes." *Cotton Petroleum* at 187. Any impairment of this "broad congressional purpose" was "too indirect and too insubstantial" to overcome the evidence of Congressional intent to allow the state tax. *Id*. The factual distinctions from *Bracker*

and *Ramah* also favored the state. Primarily, the lower court had found that the state provided "substantial services to both the Jicarilla Tribe and Cotton, costing the State approximately $3 million per year." *Id.* at 185 (internal quotation marks omitted). These were on-reservation services. *Id.* at 171 fn.7. Further, and critically, the lower court had found that "**no economic burden falls on the tribe** by virtue of the state taxes, … and that **the Tribe could, in fact, increase its taxes** without adversely affecting on-reservation oil and gas development." *Id.* at 185 (emphasis added, internal quotation marks omitted). Finally, the State provided on-reservation regulation directly connected to the taxed commerce. *Id.* at 186 ("the State regulates the spacing and mechanical integrity of the wells located on the reservation"). Given these facts, the balance of interests did not undermine the Court's conclusion that Congress intended to permit taxation.

The Court expressly noted that the balancing was conducted within the confines of the modern doctrine of intergovernmental tax immunity, stating that in the special context of that case, "[t]o find pre-emption of state taxation in such indirect burdens on this broad congressional purpose, absent some special factor such as those present in *Bracker* and *Ramah Navajo School Bd.*, would be to return to the pre-1937 doctrine of intergovernmental tax immunity." *Id.* at 187. This is the "long-discarded and thoroughly repudiated doctrine" to which the Court "decline[d] to return," in the *Cotton Petroleum* quotation at page 41 of the State's brief (Doc. 79). *Cotton Petroleum* did not banish economic impacts from the analysis of federal preemption and infringement of tribal sovereignty in *Bracker* balancing cases.

The State's reliance on *Cotton Petroleum* to minimize the significance of the economic burden of the South Dakota use tax on the Tribe is therefore unjustified. This is not a case in the vein of the "pre-1937 doctrine of intergovernmental tax immunity," where the Tribe would seek to have the non-member Casino guests treated as federal instrumentalities whose economic burden

is partially and indirectly shared by the Tribe. The economic burden is much more direct, as the tax revenues will either be transferred from the Tribe to the State as the Tribe is forced to reduce or eliminate its sales tax for non-members, or the double tax rate will unsustainably raise the cost of the Casino's products, reducing what it can offer its gaming patrons and shrinking its gaming revenues. This is not a case where there is no tradition of tribal sovereignty and independence from state interference, as a result of an express Congressional waiver of immunity from state taxation. Instead, the backdrop relevant here consists of "traditional notions of Indian sovereignty and the congressional goal of Indian self-government, including its 'overriding goal' of tribal self-sufficiency and economic development." *Cabazon*, 480 U.S. at 216; *see Indian Country, U.S.A.*, 829 F.2d at 981-82; 25 U.S.C. § 2702. Here, the State does not regulate the taxed activity or provide significant on-reservation services to the Tribe or the non-member Casino guests. Here, the economic burdens on the Tribe are not a *replacement* for the strong tribal and federal interests in sovereignty and independence from state taxes, and it is not necessary for these burdens alone to defeat a Congressional intent to allow state taxation and to outweigh legitimate state interests in imposing the tax, as in *Cotton Petroleum.*

As for the size of the burden, the State's expert's estimate is approximately $34,000 to $268,000 per year. Doc. 79 at 40. The Tenth Circuit recognized, in a case where the nature of the economic burden on the tribe was nearly identical to the burden in this case, that the "preemption analysis cannot turn on the severity of a direct economic burden on tribal revenues caused by the state tax." *Indian Country, U.S.A.* at 986 fn. 9. *See also Seminole Tribe of Florida v. Stranburg*, 799 F.3d at 1341 (tribe's "generalized economic arguments" with "no record evidence whatsoever" of specific economic impacts were nevertheless sufficient, in light of comprehensive federal regulatory scheme, to show interference with federal and tribal interests). *Indian Country,*

U.S.A. acknowledged that "the economic impact on the Tribe of adding the state sales tax onto the price of [the taxed goods and services] is perhaps more difficult to measure" in a case like this, "when a tribal enterprise acts as seller to non-member purchasers." *Indian Country, U.S.A.* at 986 fn.9. This is because there will not necessarily be a tribal tax to come into direct conflict with the state tax, since "tribal revenues are generated in the form of profits from sales." *Id.* Nevertheless, such cases feature "greater … tribal interest and involvement" than those involving private tribal retailers, where the tribal government's economic involvement may be limited to imposing a tribal sales tax. *Id.* In this case, the Tribe not only receives revenues from the business profits, it also imposes a tribal tax on the gaming amenities at issue. The State's expert's estimate of the Tribe's harm is based on the displacement of tax dollars from the Tribe's treasury to the State's, in the amount of use tax the State collects. Frankenfeld Depo., 90:7-15. If that amount were $150,000 per year, as the State's Department of Revenue has stated, it would be approximately 40 to 50 percent of the Tribe's yearly revenue from sales tax. TSUMF 280, 205. This is a larger impact than the tax struck down in *Bracker*, which amounted to "$5,000-$6,000 or less than 1% of the total annual profits" produced by the tribal logging operation. *Bracker* at 158-59 (Stevens, J., dissenting); *see Ramah* at 841 fn.5. The State's evidence alone is sufficient to conclude that the State's tax would adversely impact the Tribal government's finances.[4] This interference is incompatible with federal and tribal interests reflected in federal law.

[4] The Tribe's evidence shows that, in addition, the Casino (and therefore the Tribe) would also lose revenues through fewer sales of the taxed goods and services, and through the Casino's reduced ability to provide such goods and services to gaming patrons for free or at reduced prices, decreasing the number of patrons willing to spend their gaming dollars at the Casino. TSUMF 334-346.

4. The value the Tribe adds on the reservation to the taxed activity weighs in favor of preemption and infringement.

The State's suggestion that *Cotton Petroleum* "arguably discarded the 'value added' theory" is unsupportable. In *Milhelm Attea*, five years after *Cotton Petroleum*, the Court was still explaining that it considers it significant when a state tax is imposed "on 'value generated on the reservation by activities involving the Tribes[.]'" *Dept. of Taxation and Fin. v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 73 (1994). *See also, e.g., Cabazon Band of Mission Indians v. Wilson*, 37 F.3d 430, 434-35 (9th Cir. 1994); *Gila River Indian Community v. Waddell*, 967 F.2d 1404, 1410-11, 1413 (9th Cir. 1992); *Hoopa Valley Tribe v. Nevins*, 881 F.2d 657, 659-60 (9th Cir. 1989); *Cayuga Indian Nation v. Village of Union Springs*, 317 F.Supp.2d 128, 147-48 (N.D.N.Y. 2004).

The State incorrectly says that *Colville* "rejected that a tribe's marketing and general operations of a retail business are 'value added' that would justify preemption of a state tax on nonmembers." Doc. 79 at 42 (citing *Colville* at 154-55). The *Colville* court did not perceive that the tribal retailers added *any* reservation value to the cigarettes sold to non-Indians – "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 smokeshops offer these customers, and what is not available elsewhere, is solely an exemption from state taxation." *Colville* at 155. The tribes' non-Indian cigarette sales would not exist if not for the tax savings. *Id.* at 157. Even if the price were identical, "the bulk of the smokeshops' present business would still be eliminated, since nonresidents of the reservation could purchase cigarettes at the same price and with greater convenience nearer their homes and would have no incentive to travel to the smokeshops for bargain purchases as they do now." *Id.* at 158. There was no evidence of any sales at all that "would occur on the reservation because of its location and

because of the efforts of the Tribe in importing and marketing the cigarettes." *Id.* Those efforts, the Court established, added zero value.

The evidence in this case calls for a different conclusion. The value of the property and services non-members purchase at the Casino is not an exemption from state taxation. Just like the tribal casinos in *Cabazon* and *Indian Country, U.S.A.*¸ here the Tribe has "built modern facilities which provide recreational opportunities and ancillary services to [its] patrons, who do not simply drive onto the reservation[], make purchases and depart, but spend extended periods of time there enjoying the services the Tribe[] provide[s]." *Cabazon*, 480 U.S. at 219; *see Indian Country, U.S.A.* at 986. "The product of value is not a tax exemption," but rather, the hotel rooms, the food and beverages served in the restaurant, bar and snack bar, the live entertainment, the snacks and sundries offered in the convenience store, and the other Casino amenities at issue, all of which are marketed, priced and situated to provide support for gaming at the Casino. The Tribe has, as the Court recognized of the casino in *Cabazon*, "a strong incentive to provide comfortable, clean, and attractive facilities … in order to increase attendance at the games." *Cabazon* at 219. This, too, is a factor in the value the Tribe adds to the taxed property and services – value is added to both the gaming itself and the supporting amenities because the Casino offers both complementary products under one umbrella.

Thus, the absence of reservation-generated value in *Colville* is an invalid analogy to this case. The other cigarette cases the State relies on are similarly inapposite, for the same reason. *See* Doc. 79 at 43 (citing *Moe, Colville, Milhelm Attea, Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505 (1991)).

The State also again tries to separate one of the factors that makes up the flexible balancing test, and asserts that that mere factor alone cannot invalidate a state tax. Doc. 79 at 42-43. Again,

this is true, but has nothing to do with the Tribe's argument. *Bracker* balancing weighs a number of factors on both sides, and a single factor is not likely to be determinative. It is still the rule that Indian tribes "have an interest in raising revenues for essential governmental programs, [and] that interest is strongest when the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services." *Colville* at 156-57. The State cannot impose its tax on nonmembers patronizing an on-reservation tribal business when the Tribe's interests are so strong, as a result of reservation-generated value or other factors, that the State's interests do not outweigh them.

The State would have the Court believe that "a majority of the goods are sold in the form the Tribe receives them," and therefore that the value of the Casino's amenities "is almost entirely derived off the reservation." Doc. 79 at 43. Even assuming the State's "majority" characterization were accurate (without knowing whether the State means the "majority" in terms of revenues, or majority in terms of types of items, or something else, it is difficult to assess the accuracy of the State's contention), the amenities' *value* – the value to the Casino as seller, and to the nonmember consumer – is generated by the Tribe's on-reservation efforts.

The Ninth Circuit discussed an analogous set of facts in *Cabazon Band of Mission Indians v. Wilson*. That case involved California's attempt to impose indirectly a tax on a Tribal casino's off-track betting operation, where gamblers place bets at the casino on horse races taking place elsewhere, off-reservation. 37 F.3d at 432. The tax was found to be preempted under a *Bracker* balancing analysis. *Id.* at 433-35. The circuit court overturned the lower court's conclusion that "because the betting occurs on Indian land, but is dependent on events occurring elsewhere, [the value-added] factor is neutral in balancing tribal, state, and federal interests." *Id.* at 435 (internal

quotation marks and alteration omitted). The Ninth Circuit found that this "mischaracterized the Bands' interest[.]" *Id.*

> [T]he Bands have invested significant funds and effort to construct and operate wagering facilities and to attract patrons. It is not necessary, as the district court appears to posit, 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 are not merely serving as a conduit for the products of others.

Id.

The State asserts that "even the food products" the Casino's kitchen prepares "are delivered to the Licensed Premises from off-reservation businesses." Doc. 79 at 43-44. The *meal*, though, is created on the reservation, and it is the meal, not its constituent ingredients, that people are there to consume. What is being marketed, and what customers value, is what the Tribal business makes out of those ingredients. Furthermore, even food served with little or no additional preparation by the Casino, like some pastries or desserts, are imbued with a significant part of their value because they are served at the Casino (that is, on-reservation) together with the restaurant's coffee, or a meal, in convenient proximity to the gaming floor, and often at a discount that only exists because of the food's connection to gaming. The same is true of the items at the Casino's gift shop or convenience store, which are offered largely in order to provide Casino patrons the opportunity to buy the amenities they expect a Casino to have available, and to allow the Casino to provide incentives to increase gaming revenues. Moreover, it is apparent that many amenities other than restaurant meals are not in any sense simply imported for unmodified resale, such as the hotel rooms, RV spaces, and the convention center. This is the case with the live entertainment as well. Although a performer's show might be essentially the same from place to place, it is the *place* of the show that generates value for customers. The same performer's show halfway across the state might as well not exist, but if it is at the nearby Casino, or at the Casino where one is already

staying and playing, there is now value in that show, which the Tribe has generated by booking the show and providing a venue on the reservation.

The State paints a picture of an "ever changing" amount of value in the various products at the Casino, resulting in State jurisdiction that is constantly "in flux," attributing this hypothetical unpredictability to the "Tribe's proposed 'value added' theory." Doc. 79 at 44. First, it is not the Tribe's proposed theory, but a factor the Supreme Court deemed an important part of the balance of interests thirty-seven years ago, and which it and lower courts have consistently applied in the decades since. *See Colville* at 156-57. More to the point, the feared unpredictability only stems from the State's view that the reservation-generated value of the taxed amenities is measured solely by the proportion of Casino man-hours put into each individual product. That has never been the test. Thus, a minute alteration in a recipe, for instance, such as a change from fresh eggs to pre-scrambled prepared eggs, cannot alter the meal's taxability, because the major factors that make up the meal's value – and the value of the entire enterprise – remain unchanged: it is cooked and served in a restaurant built and paid for by the Tribe, by Tribal employees, within the Tribe's Casino, as part of the Casino's overall integrated marketing plan, reflecting tribal investment on the reservation in pursuit of tribal economic development and self-sufficiency.

5. The State's interests do not justify the tax.

The State asserts that all the services it provides – and, apparently, all those it merely makes available – to nonmember Casino guests both on and off the reservation must be considered in weighing the State's interests. *See* Doc. 79 at 45.

According to *Bracker*, "any applicable regulatory interest of the State must be given weight." *Bracker* at 144. "[O]rdinarily," a State must justify the exercise of its authority "which imposes additional burdens on a tribal enterprise … by functions or services performed by the

State in connection with the on-reservation activity." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. at 335; *see also id.* at 342.

In *Ramah*, the Court explained that New Mexico's interests were insufficient because the state did "not seek to assess its tax in return for the governmental functions it provides to those who must bear the burden of paying this tax." *Ramah* at 843. When it referred to "those who must bear the burden," the Court meant the Tribe, which bore the economic burden of the tax. The Court noted that the State had "no duties or responsibilities" "for the education of these Indian children," and that the "case would be different if the State were actively seeking tax revenues for the purpose of construction, or assisting in the effort to provide, adequate education facilities for Ramah Navajo children." *Id.* at 843 & fn.7. The Court then expressly distinguished state functions and services provided off-reservation to the non-Indian construction contractor, stating, "The only arguably specific interest advanced by the State is that it provides services to *Lembke* [the construction contractor] for its activities *off the reservation*. This interest, however, is not a legitimate justification for a tax whose ultimate burden falls on the tribal organization." *Id.* at 843-44 (emphasis in original). "Furthermore," the Court continued, "although the State may confer substantial benefits on Lembke as a state contractor, we fail to see how these benefits can justify a tax imposed on the construction of school facilities *on tribal lands* pursuant to a contract between the tribal organization and the non-Indian contracting firm." *Id.* at 844 (emphasis in original). What's more, the Court observed that it could be presumed that "the state tax revenues derived from Lembke's off-reservation business activities are adequate to reimburse the State for the [off-reservation] services it provides to Lembke." *Id.* at 844 fn.9.[5]

[5] The dissenting opinion in *Central Machinery* took issue with the majority decision "inexplicably ignor[ing] the State's wholly legitimate purpose in taxing the appellant, a [non-Indian] corporation that does business within the State at large and presumably derives substantial benefits from the services provided by the State at taxpayer's expense." *Central Machinery Co. v. Arizona State*

Balancing the interests with respect to state taxation of tribal bingo and related amenities, the Tenth Circuit acknowledged that the state "has a general interest in taxing its residents, for whom it provides [off-reservation] services. Nevertheless, this interest is substantially diminished when the residents engage in activities largely beyond the state's jurisdiction and control, unless the activity or circumstances somehow undermine the state's ability to protect its economy and tax base." *Indian Country, U.S.A.* at 987.

The Eleventh Circuit's recent *Stranburg* analysis emphasized the fundamental focus of *Bracker* and *Ramah*, holding that even the state services provided on-reservation did not justify the rental tax at issue there, because "none of these services are tied to the business of renting commercial property on Indian land." *Seminole Tribe of Florida v. Stranburg*, 799 F.3d at 1341-42. *Stranburg* explained that, whether on- or off-reservation, state governmental services may justify a tax imposed on-reservation only where "the tax was clearly and critically connected to the services rendered." *Id.* at 1342.

Similarly, in *Hoopa Valley Tribe v. Nevins*, the Ninth Circuit held that general state services provided to "residents of the reservation and the surrounding area," none of them "connected with the timber activities directly affected by the tax," were insufficient to justify the state's timber yield tax. 881 F.2d at 661. "To be valid, the California tax must bear some relationship to the activity being taxed. … Showing that the tax serves legitimate state interests, such as raising revenues for services used by tribal residents and others, is not enough." *Id.* The court emphasized that the "road, law enforcement, welfare, and health care services provided by the state and county

---

Tax Comm'n, 448 U.S. 160, 169 (1980) (Stewart, J., dissenting). In *Ramah*, the Court expressly acknowledged that the state's taxing jurisdiction was preempted "notwithstanding the substantial services that the State undoubtedly provided to the off-reservation activities of the non-Indian seller." *Ramah* at 844 fn.9.

benefit both tribal and non-tribal members." *Id.* But there was "no direct connection between revenues from the timber yield tax and the provision of services to tribal members or area residents generally. *Id.*

Importantly, given the nature of the balancing test, even the existence of a "legitimate" state interest does not decide the matter in the State's favor, if compelling federal and tribal interests support the tribal enterprise into which the State seeks to extend its authority. *Cabazon*, 480 U.S. at 221.

Cotton Petroleum's statement that "the relevant services provided by the State include those that are available to lessees and the members of the Tribe off the reservation as well as on it," *Cotton Petroleum* at 189, *see* Doc. 79 at 45, does not carry the weight the State places upon it. The quotation comes from the section of that opinion devoted to the claim that the New Mexico taxes imposed an unlawful burden on interstate commerce. *See Cotton Petroleum* at 187-90 (part IV of the opinion). Specifically, the Court was answering the contention that "tax payments by reservation lessees far exceed the value of services provided by the State to the lessees, or more generally, to the reservation as a whole." *Id.* at 189. The "relevant services" in that context were *all* the services that contribute to the "intangible value of citizenship in an organized society," *id.*, rather than *only* those services performed "in connection with the on-reservation activity," *New Mexico v. Mescalero Apache Tribe* at 335. *Cotton Petroleum* makes this plain, explaining that under longstanding general tax principles, neither the Due Process Clause nor the Commerce Clause require state taxes to be "reasonably related to the value of the services provided to the activity," and that, to the contrary, "[n]othing is more familiar in taxation than the imposition of a tax upon a class or upon individuals who enjoy no direct benefit from its expenditure." *Cotton Petroleum* at 190-91 (internal quotation marks omitted). This is emphatically not the rule in

Bracker balancing, as the cases discussed above demonstrate. Indeed, in *Cotton Petroleum*'s discussion of *Bracker* balancing, the only state services noted as weighing in New Mexico's favor were the $3 million worth of "substantial services" provided to the Tribe and Cotton, which the Court elsewhere explained were "on-reservation services," and which specifically included state regulation of "the spacing and mechanical integrity of wells located on the reservation." *Cotton Petroleum* at 171 fn.7, 185-86. *See Stranburg*, 799 F.3d at 1342 ("Even *Cotton Petroleum*, while finding that some state services were provided to the plaintiff and tribe, affirmed the general principle that the services rendered must be connected to the tax."). *Cotton Petroleum* was "not a case in which the State has had nothing to do with the on-reservation activity, save tax it." *Cotton Petroleum* at 186.

The State's reliance on the Washington district court's order in the *Tulalip* case is inapposite here. *See* Doc. 79 at 46 (citing *Tulalip Tribes v. State of Washington*, No. 2:15-cv-00940-BJR, 2017 WL 58836, *7 (W.D. Wash. Jan. 5, 2017)). There, the court described the scenario before it as involving state taxes imposed on "transactions between non-Indians." *Tulalip* at *7. It was guided by Ninth Circuit cases which upheld "state taxes on the sale of *non-Indian goods to non-Indians by a non-Indian business* on a reservation." *Gila River Indian Community v. Waddell*, 91 F.3d 1232, 1236 (9th Cir. 1996) (emphasis added); *see Yavapai-Prescott Indian Tribe v. Scott*, 117 F.3d 1107 (9th Cir. 1997), *Salt River Pima-Maricopa Indian Community v. State of Arizona*, 50 F.3d 734 (9th Cir. 1995) Relying on these cases, the *Tulalip* court set up a sliding scale: "when the transaction is comprehensively regulated by the federal government or when the value of the taxed resources is derived almost exclusively on the reservation …, the State may be required to demonstrate that its services maintain a close nexus with the taxed transaction itself. [But] where the tribe is not a direct party to the transaction and the taxed goods have been

imported from off the reservation for sale to non-Indians also living off the reservation, the State's interests may be demonstrated, in part, by evidence of services provided off the reservation to the non-Indian taxpayers." *Id.* This formulation might be consistent with the Ninth Circuit decisions cited in *Tulalip*, but it certainly is not required by the Supreme Court's decisions. In any case, both conditions for using evidence of off-reservation services to demonstrate the State's interests are absent in this case, where the Tribe *is* a direct party to the transactions and the value of the taxed goods and services is, in significant part, generated on reservation by activities involving the Tribe, rather than being simply imported for resale. Further, the court's words, "in part" indicate that even when federal and tribal interests are at their lowest ebb, *Tulalip*'s sliding scale still calls for evidence of something more than the provision of off-reservation services. Also of note, the *Tulalip* court did not decide the outcome of the balance of interests, but ruled only that the State of Washington was entitled to present evidence of the services it provided off the reservation to the non-Indian taxpayers. *Id.*

For the proposition that off-reservation state services must be considered, the State also places undue reliance on *Thomas v. Gay*, 169 U.S. 264 (1898), in which the Court upheld a territorial tax on the personal property of non-Indians located on reservation leased lands, holding "that a tax put upon the cattle of the lessees is too remote and indirect to be deemed a tax upon the lands or privileges of the Indians." *Id.* at 273. For one thing, "the law has changed since the 1880s; the Supreme Court has clarified the ways in which courts should evaluate assertions of preemption of state laws." *Mashantucket Pequot Tribe v. Town of Ledyard*, 722 F.3d 457, 472 (2d Cir. 2013). In addition, to the extent it may still inform the inquiry, *Thomas v. Gay* exemplifies a fact pattern (like *Tulalip*) involving minimal Indian participation in the taxed activity. The "taxes in question [t]here were not imposed on the business of grazing, or on the rents received by the Indians, but

on the cattle as property of the lessees[.]" *Thomas* at 275. As in *Cotton Petroleum*, no Indian tribe was a party to the case, so the tribal interests were being raised vicariously and precariously.

Furthermore, like its *Cotton Petroleum* citation, the language quoted in the State's brief (Doc. 79 at 46) is from a section of *Thomas* addressing an argument not germane to this case. After concluding that Oklahoma had the "power" to tax personal property located on-reservation and owned by non-Indians, the Court introduces the next topic, "the mode in which that power was exercised," by describing the cattle-owners' "assertion that, so far as non-resident owners of cattle grazing within the Indian reservations are concerned, it is taxation without representation, and that such persons derive no benefit from the expenditure of the moneys accruing from the tax." *Thomas* at 275. These are not arguments the Tribe is making is this case. The Court rejected the out-of-state cattle owners' "taxation without representation" argument – "the property, both real and personal, of nonresidents may be lawfully subject to the tax laws of the state in which they are situated," *id.* at 277 – and turned to the contention that the cattle owners did not receive any benefit from the territory's expenditure of tax revenues in a county where neither the cattle nor their owners were located. The Court's answer to this argument produces the passage quoted in the State's brief (Doc. 79 at 46), to the effect that the people who keep their cattle outside of Kay County nevertheless benefit from the government improvements made within that county. *Id.* at 278. "In truth," the Court confided, "benefits *always* flow from the appropriation of public moneys to such [public] purposes[.]" *Id.* at 280 (emphasis added). "'[W]ho can adjust with precise accuracy the amount which each individual in an organized civil community shall contribute to sustain it, or can insure in this respect absolute equality of burdens and fairness in their distribution among those who must bear them?'" *Id.* at 279 (quoting *Kelly v. Pittsburg*, 104 U.S. 78, 82 (1881)). Thus, "taxes, otherwise lawful, are not invalidated by the allegation, or even the fact, that

the resulting benefits are unequally shared." *Thomas* at 278. This general principal, however, did not determine the separate contention in *Thomas v. Gay* that the tax would interfere with tribal interests, *id.* at 273-75, and it does not control the modern balancing test, where sufficiently strong state interests are demonstrated not by the nearly infinite range of benefits that "always" accrue to the entire civil society (and which exist in every case in which a State tax or regulation has been preempted), but by "functions or services performed by the State in connection with the on-reservation activity." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. at 335.

In economic terms alone, the State's interest in imposing and collecting the disputed tax is de minimis. As in *New Mexico v. Mescalero Apache Tribe*, here the "insubstantial" loss of revenues to the State indicates that "any financial interest the State might have in this case is simply insufficient to justify the assertion of concurrent jurisdiction." 462 U.S. at 343. The amount the State has indicated it is owed, approximately $150,000 per year, is about 0.015% – only fifteen thousandths of a percent – of the State's annual sales and use tax revenues. SUMF 94; TSUMF 280, 272-274.

The State's list of its services that "are available at, or may benefit, the consumers of the Licensed Premises while they are patronizing the business," Doc. 79 at 47, is similar to the services unconnected to the taxed activity rejected in cases like *Ramah*, *Hoopa Valley* and *Stranburg*. The State claims its evidence shows, for instance, that it: certifies, off-reservation, the off-reservation operators of the water system from which the Tribe buys its water; provides training, off-reservation, to law enforcement and fire protection personnel; makes available, from off-reservation, general public safety and public information services, broadcasted or otherwise available to all State residents. The Tribe already pays for many of these services, however. TSUMF 220.e (dispatch services), 220.e (ambulance services), 284.e (drinking water), 284.i

(public broadcasting). Other services are generally available, but there is no evidence of the Tribe, Casino, or Casino guests ever having made use of them. TSUMF 284.c (criminal investigations, Amber Alerts, victim information network), 284.d (services for low-income individuals), 284.f (aids for the visually impaired), 284.k (Medicaid services). Others are miniscule, such as the single $75 general fund expenditure in 2011 for on-the-job training. TSUMF 283.c. The State provided training to tribal law enforcement personnel while the Tribe and the City of Flandreau operated a joint police force, and has not provided training since the joint powers agreement ended in 2015. Tribe's Response to State's SUMF 105. The State licenses, off-reservation, some of the Casino's off-reservation food vendors (although not the North Dakota-based vendor that provides nearly all of its food products, TSUMF 34), but the State charges the vendors a fee for those services. Tribe's Response to State's SUMF 119. As the State has said, the services it identifies are available to Casino patrons in common with all people within the boundaries of the State. TSUMF 285.b, c. Neither the purpose of the State use tax, nor the governmental services it funds, bear any specific relationship to on-reservation tribal commerce.

Given that these represent the character of the services the State provides, or makes available, to the Casino's guests, and that their actual connection to the taxed transactions is slim to none, it is implausible for the State to suggest that it, not the Tribe, provides "the majority of governmental services" connected with the Casino transactions being taxed. *See* Doc. 79 at 50. For the general and off-reservation services the State provides to its residents during the daily course of their lives (even those that indirectly set individuals on a path that allows them to choose to enter the reservation to visit the Royal River Casino) we can surely presume, with the *Ramah* Court, that the off-reservation taxes those individuals pay State are sufficient to cover the costs. *See Ramah* at 844 fn.9. The societal and governmental costs of alcohol consumption fall into this

category.[6] No evidence indicates that the use taxes the State would collect at the Casino are intended to fund these particular costs, nor that these costs have any particular relationship to the taxed transactions, most of which do not involve alcohol. Indeed, when the Tribe buys alcoholic beverages from its vendors, it already indirectly pays the State's two separate alcohol taxes, both of which the State presumably enacted to address these very concerns, and one of which is, in part, expressly dedicated to cover some of these costs locally. SDCL 35-5-2, 35-5-3 (imposing tax on manufacturers and wholesalers for all alcoholic beverages purchased for sale to a retailer), 35-5-22.2 (dedicating 25% of revenues from that tax to counties for "expenses related to county law enforcement, jails, state's attorneys, public defenders, and court-appointed attorneys"), 35-5-6.1 (imposing additional tax on alcohol wholesalers).

The use tax does not fund services that directly relate to the non-member commerce with the Tribe at the Casino, and is otherwise unconnected with the Tribe's reservation commerce, while its imposition interferes with the important tribal and federal interests the Tribe's commercial gaming enterprise is meant to advance. Under *Bracker* and its progeny, the tax is unlawfully imposed.

B. Claim one: IGRA preempts the State tax.

To the extent the disputed tax would be imposed on transactions that Congress intended IGRA to protect against state interference, IGRA preempts the tax. Such preemption applies not only to those subjects for which a State must enter into gaming compact negotiations, but applies to other subjects as well, including those for which the State is prohibited from insisting on making part of a gaming compact – specifically, taxes imposed on the Tribe or its Casino guests, except in amounts to defray the State's gaming regulatory costs.

[6] The State overstates these costs. *See* Tribe's Response to State's SUMF 123.

1. IGRA's preemptive scope includes matters that States cannot insist be the subject of gaming compact negotiations.

Arguing for a narrow interpretation of IGRA's preemptive scope, the State focuses on the phrase "subjects directly related to the operation of gaming activities," 25 U.S.C. § 2710(d)(3)(C)(vii), which sets an outside limit on the "permissible subjects of [gaming compact] negotiation" on which a state may insist. *Rincon Band of Luiseño Mission Indians v. Schwarzenegger*, 602 F.3d 1019, 1028 (9th Cir. 2010). While the phrase and the interpretations given to it by various authorities is useful to show that IGRA's regulatory scope encompasses more than the actual game play (already established in this case, *see* Doc. 60 at 5), the phrase does not define the outer boundaries of IGRA's preemptive scope. It is therefore inapposite here.[7]

The State's brief takes the opposite tack, positing that if the State cannot acquire authority over a matter through mandatory compact negotiations, then that matter is outside of IGRA's concern, so the State is free to exercise power over the matter. *See* Doc. 79 at 8. This is not so. The State generally has zero pre-existing or default authority to tax or regulate nonmembers engaged in business with the Tribe on its reservation, and a State that wishes to impose such a tax or regulation must justify itself by showing its interests outweigh the federal and tribal interests. *See, e.g.*, *Wagnon* at 102; *New Mexico v. Mescalero Apache Tribe*, 462 U.S. at 331-336 (1983); *Indian Country, U.S.A.* at 986. The authorities cited in the State's brief show that through IGRA,

[7] The State is incorrect to suppose that "the Tribe is attempting to force the State to negotiate" the subject of use tax into the gaming compact. *See* Doc. 79 at 16. It appears the parties agree that the imposition, collection and remittance of State use tax is not one of the subjects the State or Tribe must negotiate, if asked. *See* Tribe's Mem. in Support of its Motion for Summary Judgment, Doc. 117, at 26-27. To be clear, under *Rincon*, even a subject outside of IGRA's seven mandatory negotiation subjects may sometimes be part of gaming compact negotiations. *Rincon* at 1036. So it remains possible that State use tax provisions could appear in a gaming compact. And it remains the Tribe's position that only through such a compact provision may the State acquire authority to impose use tax at the Casino.

Congress opened a door to allow States to acquire such authority, within limits and in accordance with the statutory compact mechanism. But the walls around that door still stand, and one of IGRA's concerns – the reason for placing limitations on what a State can demand to include in a gaming compact – is maintaining those pre-existing barriers.

The Washburn article on which the State relies, *see* Doc. 79 at 9-11, makes this very point. Washburn rhetorically asks, "Why would Congress limit the subjects to be included in a Class III gaming compact? A clear message that comes through in the legislative history is that Congress sought to prevent a state from using its right to compact negotiation to extend state authority beyond gaming." Kevin K. Washburn, Recurring Issues in Indian Gaming Compact Approval, 20 Gaming L. Rev. & Econ. 388, 392 (2016). Everyone seems to agree on this. *See* Doc. 79 at 15-16 (quoting Washburn and the Court's December 2015 Order, Doc. 59 at 19). The State fails to acknowledge, however, that this itself is an expression of federal preemption.

Washburn also explains:

> Under general principles of Indian law, states generally lack regulatory authority over ordinary activities by tribes and Indian people on tribal lands. … Indeed, in some ways, reservations are properly viewed as sanctuaries for tribal governments from state authority. Congress created the compact negotiation process to give a state the opportunity to address its unique and legitimate regulatory concerns about gambling activities that involve state citizens and occur within the boundaries of a state.
>
> The compact process … was not created to allow state authorities to encroach on tribal sovereignty on other subjects that do not pose the unique risks of gaming. If the state lacks authority to regulate a tribal business activity in the absence of a casino, it may not gain authority over such activity by virtue of the tribe's decision to pursue Class III gaming.

Washburn at 395. Gaming matters present unique concerns (e.g., large amounts of cash, risks of theft, corruption, money laundering, organized crime, and the problem of compulsive gambling, *id.*), so Congress granted states an avenue to regulate those matters only. And as Washburn says, "[t]he congressional authors of IGRA presumably hoped for tribal support of its passage," and

"tribes were highly unlikely to support legislation that rolled back rights that they felt they had already won[.]" Washburn at 394. These existing rights included the presumption against state taxation burdening a tribe's reservation commerce.

The limited nature of IGRA's conditional grant of state authority is therefore evidence that Congress was concerned with both sides of the coin: giving states the right to regulate and tax some matters, while maintaining the barriers against state interference in all other matters. IGRA bars such interference by "subterfuge," such as when a State seeks to insert non-gaming issues into a gaming compact, *see In re Indian Gaming Related Cases*, 331 F.3d 1094 (9th Cir. 2003), *City of Duluth v. Fond du Lac Band of Lake Superior Chippewa*, 785 F.3d 1207 (8th Cir. 2015), and by bald assertion of state authority to tax or regulate tribal casino sales, for which the Tribe knows of no precedent since IGRA's enactment. This means that a matter outside the mandatory subjects for compact negotiation like general-fund taxation of Casino amenities that are "connected in a business sense to the casino operation and are co-located with [the] casino," Washburn at 394-95, is squarely within IGRA's field of preemption.

2. IGRA preempts State taxation of the casino-related property and services the State seeks to tax.

Section 2710(d)(4) expressly preempts state 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). This Court has stated that it "finds logical 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," although "the logic becomes tenuous" for amenities farther from the gaming floor. Doc. 59 at 23.

The logical gap regarding the scope of the activities included within the tax proscription can be bridged by resolving any ambiguity that exists in § 2710(d)(4) in favor of the Tribe, in accordance with the Indian canon of construction. The Indian canon of construction, discussed in the State's brief at 17-18, supports an interpretation of IGRA that preempts the State use tax in this case. As the Court has previously noted, *see* Doc. 59 at 16-17, "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit[.]" *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 767 (1985). "Indeed, the Court has held that although tax exemptions generally are to be construed narrowly, in 'the Government's dealings with Indians the rule is exactly the contrary. The construction, instead of being strict, is liberal.'" *Id.* at 767 fn.4 (quoting *Choate v. Trapp*, 224 U.S. 665, 675 (1912)).

The Indian canon of construction does not favor the State here, *see* Doc. 79 at 10 fn.12, 17-18, because there is no need to expansively construe the term "directly related to the operation of gaming activities," for the reasons described above, and thus no danger of opening compact negotiations to allow state regulation of new areas. Although the Tribe occasionally has described the whole range of its Casino amenities using words such as "gaming related," *e.g.*, Doc. 117 at 29, this is not to say they are all "subjects that are directly related to the operation of gaming activities" as that phrase is used in § 2710(d)(3)(c)(vii). They need not come within the class of subjects over which Congress allowed states to negotiate for authority.[8] Whether they are part of this central classification, closest to gaming, or part of a broader class, not so close to gaming that they are compactible, the Casino's amenities are, either way, a critical part of the economic enterprise that IGRA was enacted to promote as a means of advancing tribal economic

[8] The State is therefore not correct, at least from the Tribe's perspective, when it states, "This litigation is focused on whether the operations of [the Casino's] nine departments are 'directly related to the operation of gaming activities' pursuant to IGRA." Doc. 79 at 18.

development and self-sufficiency. Neither § 2710(d)(4) nor IGRA's framework for allocating authority among the three sovereigns, nor the interests Congress intended it to advance, leave room for unconsented state interference with, or tax burdens on, any part of the federally-encouraged tribal casino. Thus, construing § 2710(d)(4) in the Tribe's favor – to preempt the State's imposition of use tax upon all nonmember guests of the Casino, for all the property and services they may buy or receive from the Casino – also aligns with the text and purpose of IGRA.

The State's characterizations of the Casino's amenities do not affect the conclusion that they comprise an integral part of the casino business as operated by the Tribe, in line with standard casino industry practice, economic theory and the Tribe's experience, such that the amenities come within IGRA's protective, preemptive umbrella. Moreover, many of the State's premises and its conclusions do not logically match up. "[S]ome patrons of the Licensed Premises do not game" is not evidence that "the gaming operation can exist without the presence of the amenity." Doc. 79 at 19. "[T]he only hotel in Flandreau is at the Licensed Premises" is not evidence that "the amenities may exist without the presence of the casino." *Id.* "[T]he fact that purchases at the nongaming departments … do not result in consumers earning points on their Royal Rewards card or … increase the consumers' 'comps'" is not evidence that "[t]he goods and services offered for sale at the Licensed Premises are not related to the operation of gaming activities." *Id.* (Nongaming amenities are typically the Casino's loss leaders – offered at low prices to all, and available at further discounts, or in exchange for Royal Rewards points, or free, to those who spend money gaming. TSUMF 97-135.)

The State is incorrect to assert that "no federal regulations apply" to a list of Casino goods and services. Doc. 79 at 20 (citing SUMF 58). The entire facility is subject to inspection by the Indian Health Service and NIGC, and under IGRA, the entire facility must meet minimum health

and safety standards. *See* Tribe's Response to State's SUMF 58. All amenities provided to guests as comps – which can include everything offered for sale throughout the Casino property – are subject to federal reporting standards and NIGC audit. TSUMF 45, 46. *See also* Section I.A.1., *infra* (detailing the range of federal regulations). Furthermore, if the explanation given in the Washburn article is accurate, then when it comes to regulating the operation of tribal casinos, Congress and the NIGC are more concerned with taming the unique challenge of ensuring honest and safe gambling, and less concerned with setting detailed standards for every potential nongaming activity at a casino. Washburn at 395. This does not diminish the fact that IGRA reveals an intention to encourage and protect the development and operation of profitable tribal casinos – including the parts where regulatory standards are the Tribe's responsibility – as a means of promoting important federal and tribal goals.

The State's case authority is inapposite. In *Barona Band of Mission Indians v. Yee*, 528 F.3d 1184, the Ninth Circuit held "that IGRA's comprehensive regulation of Indian gaming does not occupy the field with respect to sales taxes imposed on third-party purchases of equipment used to construct the gaming facilities." *Id.* at 1193. This conclusion, and the court's very brief recitation of the reasons for it, demonstrate the distinctions between that case and this one.

First, the taxed transaction in *Barona* had a much more attenuated connection to the tribal casino business. In *Barona*, California imposed sales tax on a non-Indian electrical subcontractor's off-reservation purchases of equipment from non-Indian sellers. *See id.* at 1187-88. Construction agreements purported to locate the purchases on the reservation, but the court was unwilling to ignore the fact that the transaction, "which otherwise would occur on non-Indian territory," was simply "rigged to trigger a tax exemption," and held that because of this, the tribe's "right of territorial autonomy is significantly compromised," as was the "federal government's interest in

Indian economic vitality[.]" *Id.* at 1191-92. The only connection to the casino was the subsequent use of the equipment to construct the gaming facilities, and as the court noted, at the time the tax was imposed on the purchases, the equipment "could [have] be[en] used for a multitude of purposes unrelated to gaming." *Id.* at 1192.

Second, the Ninth Circuit noted that 25 U.S.C. § 2710(d)(4) did not apply because "the tax in question has been imposed upon the non-Indian outfit Helix Electric and not on the Tribe itself." *Id.* at 1193 fn.3. Unspoken by the court, but still clear, § 2710(d)(4) also did not apply because Helix Electric was not within the second part of the statutory tax exemption either, since it was not a "person or entity authorized by an Indian tribe to engage in a class III activity," as the Casino guests in this case are.

Third, *Barona*'s view of the relationship between IGRA and *Bracker* interest balancing was at odds with the Eighth Circuit's holdings that control this case. *Barona* stated,

> The Court has developed the *Bracker* test to determine whether federal interests preempt state taxes. If we were to accept the Tribe's argument that IGRA itself preempts the state taxation of non-Indian contractors working on tribal territory, we would effectively ignore *Bracker* and its progeny. The Court has provided an analytical framework to resolve this question, which we must apply here.

Barona at 1193. It would be contrary to Supreme Court precedent to claim that, as a general rule, *Bracker* balancing replaces statutory preemption. *See New Mexico v. Mescalero Apache Tribe*, 462 U.S. at 333-34 (noting that in addition to the balancing test, "a State will certainly be without jurisdiction if its authority is preempted under familiar principles of preemption"). Furthermore, as the Eighth Circuit has held, in factual situations within IGRA's purview, including the division of jurisdiction among tribal and state governments for casino activities, "Congress … chose not to allow the federal courts to analyze the relative interests of the state, tribal, and federal governments on a case by case basis. Rather, it created a fixed division of jurisdiction." *Gaming Corp. of America v. Dorsey & Whitney*, 88 F.3d 536, 546-57 (8th Cir. 1996). "This avoids inconsistent

results depending upon the governmental interests involved in each case." *Id.* at 547. In a case like this, where the state's jurisdiction to impose a tax on casino guests' casino transactions is the issue, it is appropriate for a court to heed the "fixed division of jurisdiction" created by Congress, rather than bringing all the governmental interests Congress already balanced back to the front line.

In *Mashantucket Pequot Tribe v. Town of Ledyard*, the Second Circuit upheld a state personal property tax imposed upon a non-Indian vendor for slot machines the vendor had leased to an Indian tribe and used at its casino. 722 F.3d at 460. Very similar to *Barona*, this was a tax on a non-Indian for an activity (here, owning personal property within the state) that did not involve an Indian tribe. The tribe's involvement was only through its lease, a separate event which did not alter the taxability of the non-Indian's ownership of personal property. *See Ledyard* at 469 (noting that the "incidence of the generally applicable tax falls on the non-Indian's *ownership of property*, rather than on the *transaction* between the Tribe and the non-Indian") (emphasis in original). The tax was therefore "not targeted at gaming," but at a third party's ownership of personal property, a taxable event which occurs with no casino involvement. *Ledyard* at 470. Here, in contrast, the use tax arises only as a result of a transaction between the Casino and the guest; in the State's view, the tax is effectively on the transaction itself. *See* Doc. 79 at 2-3. The Tribe's right to transact that business as part of its gaming operation, without the State levying a tax on it, is protected by IGRA, undiminished by *Ledyard*'s upholding a tax on an event with no casino or tribal involvement at all.

Ledyard also implied that the personal property tax there was potentially an "'assessment[] by the State of amounts necessary to defray the costs of regulating Class III activity,'" and that since, under IGRA, the Tribe's gaming procedures could have included provisions barring or

limiting such a tax, but did not, IGRA did not expressly bar the tax. *Ledyard* at 469 (quoting 25 U.S.C. § 2710(d)(3)(C)(iii)) (court's alterations omitted).[9] This would be at odds with the principle that "[t]he only avenue for significant state involvement [in Indian gaming] is through tribal-state compacts covering class III gaming." *Gaming Corp. of America v. Dorsey & Whitney*, 88 F.3d at 544. "Congress left the states without a significant role under IGRA unless one is negotiated through a compact." *Id.* at 547.

C. Claim four: a nondiscriminatory tax scheme must give consumers who pay Tribal sales tax the same tax credits given to those who pay other states' sales tax.

The State provides no legitimate basis to grant summary judgment in its favor on the Tribe's fourth claim. As the Tribe has shown, the State's failure to give tax credits to consumers who pay the Tribal sales tax, while giving such credits to consumers who pay sales tax to other states and their political subdivisions, unlawfully discriminates against the Tribe.

First, the State's assertion that the Tribe's Tax Code "contains no reciprocal tax credit for the payment of sales tax to South Dakota" (Doc. 79 at 58) is incorrect. Title 23, Chapter 3, Subchapter II, of the Tribal Code establishes the Tribal Use Tax.[10] Section 3.36 reads in relevant part:

> The amount of any tax imposed by this Subchapter with respect to tangible personal property or services shall be reduced by the amount of any sales or use tax previously paid by the taxpayer with respect to the property or services on account of liability to another tribe or state or their political subdivisions.

[9] *Ledyard* reports that the Mashantucket Pequot Tribe operated its casino under gaming procedures prescribed by the Secretary of the Interior, rather than a tribal-state gaming compact, but the two IGRA-based mechanisms are not materially different for present purposes. *See Ledyard* at 461; *see also* 25 U.S.C. § 2710(d)(7)(B)(vii) (authorizing Secretarial procedures).

[10] The Tribal Tax Act, as amended on September 26, 2014, including the provisions at issue herein, was provided to the State on January 22, 2015, as part of the Tribe's initial disclosures in this case. *See* Tribe's Response to State's SUMF 90.

23 FSST Tribal Law and Order Code § 3.36; *compare* SDCL 10-46-6.1 (containing equivalent language). This is the reciprocal tax credit statute which opens the door for the application of the State's tax credit statute.

The State argues that, relative to the other states and political subdivisions to which South Dakota's use tax credit applies, the Tribe is not a "similarly situated sovereign," and therefore need not be afforded the same treatment. *See* Doc. 79 at 59. The State's reductive position that "geography controls" overlooks the fundamental fact that although the Tribe and its Reservation are located within the State's exterior boundaries, the Tribe possesses a sovereignty that is independent from, and not subordinate to, the State. The Tribe's relationship to the State is not analogous to a municipality's, nor is it analogous to the State's relationship with the Federal government. The fact that the Tribe's jurisdictional territory lies within State borders does nothing to advance the State's argument. This fact is the beginning of the argument, not the end of it. The geographical overlap is the predicate for the existence of any amount of concurrent State jurisdiction within the Tribe's reservation. If the Tribe's territory were not within the State's borders, the parties would not be disputing the key issue in this case, the doctrinal limits of that State authority.

It is insufficient for the State to recite statements such as, "'Ordinarily, it is now clear, an Indian reservation is considered part of the territory of the State.'" Doc. 79 at 60 (quoting *Nevada v. Hicks*, 533 U.S. 353, 362 (2001)). *Hicks* recognized that despite the reservation being "part of" the State's territory, the State may not "exert the same degree of regulatory authority within a reservation as they do without," and the opinion was dedicated to ascertaining the respective limits of Tribal and State authority with respect to the subject at issue, state execution of process related to off-reservation crimes. *Id.*

The State asserts that geography provides the answer because the "State bears the responsibility for providing services to all individuals within its borders, including those residing on South Dakota's reservations." Doc. 79 at 60-61. The Tribe, however, bears this responsibility as well, within its own borders, and the evidence herein demonstrates that by a wide margin, most of the governmental services provided on the reservation are provided by the Tribe. South Dakota's making governmental services available to all state residents, including those in Indian country, is very different from the circumstances in *Wagnon*, where the State of Kansas actually "use[d] the proceeds from its fuel tax to pay for a significant portion of the costs of maintaining the roads and bridges on the Nation's reservation[.]" *Wagnon*, 546 U.S. at 115. South Dakota does not dedicate the proceeds from its use tax to pay for a significant portion of the costs of any governmental service on the Tribe's reservation. TSUMF 277, 281-295. Furthermore, the State "bears the responsibility" to serve all people within its borders in part because equal protection principles require it to. The State's responsibility to serve its residents without discrimination cannot justify discriminatory treatment of the Tribal governments within its borders.

The State's reliance on *Chickasaw* in this regard is misplaced. The passage from *Chickasaw* that the State quotes, Doc. 79 at 61 was part of *Chickasaw*'s analysis upholding Oklahoma's income tax as applied to tribal members who live in the state, *outside Indian country*. *Chickasaw*, 515 U.S. at 463. The State's taxing authority outside Indian country is not disputed here, nor is the magnitude of State services provided outside Indian country.

The State analogizes the Tribe to a South Dakota municipality, which, as a political subdivision of the State, exists and possesses taxing authority entirely under State law. *See* SDCL Title 9, 10-52-2, 10-52A-2; *see also FTC v. Phoebe Putney Health System, Inc.*, 133 S.Ct. 1003, 1010 (2013) ("municipalities and other political subdivisions are not themselves sovereign"). The

State asserts that in the case of a transaction subject to State and municipal taxes, the "State's sales tax is not diminished" by the existence of concurrent taxing authority. Doc. 79 at 61. Diminishment of the State's tax, however, is not the danger in that scenario, because the State authorized the municipal tax and has the power to withdraw that authorization.

Although the State asserts that both it and the Tribe "have authority over certain activity and certain individuals" at the Casino, in the case of sales and use taxes, it is not the same authority. The State acknowledges that it does not have authority to impose sales tax at the Casino. Doc. 79 at 3. It seeks to fill that void with the use tax. Even assuming the State has the use tax authority it asserts, the division of taxing jurisdiction between the State and the Tribe where the Tribe imposes its own sales tax would amount to the same division that exists in relation to other states, where South Dakota cannot impose its sales tax, but will collect use tax when the other sovereign does not impose a sales tax. Contrary to its line of argument, the difference in the State's treatment of the Tribe, in comparison to its treatment of other states, cannot be justified by the "concurrent" taxing authority it asserts in this case. The fact that "simultaneous taxation by both a state and tribe of the same transaction," Doc. 79 at 62, might be allowed in some circumstances – and even if it turns out to be allowed in this case based on a balance of interests favoring the State – does not render the tribal government dissimilar from a sister state in any relevant respect. The discriminatory or nondiscriminatory character of the State tax scheme is a distinct question from preemption generally. When *Wagnon* stated that the exercise of one sovereign's legitimate taxing authority "'does not oust the jurisdiction'" of another legitimately-taxing sovereign, *Wagnon* at 114 (quoting *Colville* at 185 fn.9 (Rehnquist, J., concurring in part and dissenting in part)) (*see* Doc. 79 at 62), it was addressing Kansas' *authority* to tax concurrently with the Prairie Band Potawatomi, not whether the state might be doing so in a discriminatory manner. When *Wagnon*

did address the separate discrimination question, it did not simply repeat its conclusion that the State had authority to tax the off-reservation transaction, but analyzed whether the tribe was similarly situated to other sovereigns. *Wagnon* at 115. Here, the Tribe is similar in all relevant respects to other states and their political subdivisions, such that consumers' payment of Tribal sales taxes should be given the same treatment as consumers' payment of sales taxes to other states and their political subdivisions.

II. The Tribe's claims challenging the State's authority to regulate the Tribe's conduct are not presently subject to summary judgment.

Claims two and five allege that the State's authority to require the Casino to collect and remit use tax is preempted by IGRA and federal Indian common law, respectively. Claims six and eight challenge the State's authority to place conditions on its alcoholic beverage licenses that are inconsistent with IGRA (claim six) or that are unrelated to alcohol regulation or otherwise invalid, and thus outside the State's delegated authority under 18 U.S.C. § 1161 (claim eight).

One of these claims, claim six, has become moot as a result of factual developments since the commencement of this action. The other three protective claims require further factual development, primarily a determination on the use tax questions that are the main focus of the case, and they may not require resolution at all.

A. Claims two and five, collection burdens: summary judgment depends on the determination of tax validity.

If the Court finds the disputed taxes are wholly invalid, then the collection and remittance claims would become moot. If some or all of the disputed taxes are found to be valid, then the State's ability to burden the Casino with collection and remittance requirements would be at issue, and only then would claims two and five need to be analyzed.

Deciding the claims directed at the collection and remittance burden requires grounding in a factual context that is not yet known. The Casino's burden cannot be evaluated until the

conditions for valid taxes are known – e.g., whether the State is entitled to assess use tax only on certain products or services, or at certain Casino departments, or subject to an in-state receipt or delivery qualification.

The State construes its use tax by insisting that "[w]here the goods are finally consumed is of no consequence," and explaining that, essentially, the purchase (and receipt) at the Casino *is* the "use" to be taxed. Doc. 79 at 3, 63. The State's interpretation is not the inevitable construction of the use tax code, nor even necessarily the correct construction.[11] However, if the State is bound by this characterization, then some of the Casino's anticipated collection burdens would not arise.

[11] For instance, SDCL 10-46-2 imposes use tax "on the privilege of the use, storage, and consumption in this state of tangible personal property *purchased for use in this state*" (emphasis added), but the State's view seems to render the underlined language and the purchaser's intent superfluous. *See also* SDCL 10-46-18 (the sale of goods "for delivery in state" is "prima facie evidence" that the goods were "sold for use in the state," suggesting that other factors might indicate otherwise and rebut the presumption). In addition, *State v. Dorhout*, 513 N.W.2d 390 (S.D. 1994), emphasizes that "a sales tax and a use tax are assessments upon *different* transactions," *id.* at 393 (internal quotation marks omitted) – which would seem inconsistent with the State's approach of simply assessing the use tax on the same transaction that would typically be subject to sales tax. Furthermore, two Department of Revenue publications state that "use tax is applied after the purchase is made," Use Tax Form: Everyone's Responsibility, at 1, (June 2016), or "after the transaction takes place," Use Tax at 1, (June 2016) (both available at http://dor.sd.gov/Taxes/Business_Taxes/Publications/Tax_Facts.aspx, last visited March 15, 2017).

Department of Revenue Deputy Secretary David Wiest was the first to indicate that in the Department's view, goods purchased at the Casino are subject to South Dakota use tax the moment the buyer takes possession in South Dakota, and that this is true regardless of the buyer's out-of-state residence or intent to consume the goods out-of-state. Wiest Deposition, 21:25-22:13 (Oct. 25, 2016). The Director of the Department's Business Tax Division, Doug Schinkel, had earlier testified that the Department took a very different view, before recanting that testimony. Schinkel Deposition, 21:22-22:15; 25:25-27:9 (Oct. 25, 2016), *see* Affidavit of Douglas Schinkel (Dec. 8, 2016). Then Secretary Gerlach, deposed the next day, testified that the place of a product's consumption – on-reservation or out-of-state – *would* be a consideration for the Department in determining whether use tax applies to a non-member's on-reservation purchase from a tribal retailer. Gerlach Deposition, 20:4-21; 23:16-24:12 (Oct. 26, 2016).

"[W]hether a statute imposes a tax under a given factual situation is a question of law and thus no deference is given to any conclusion reached by the Department of Revenue[.]" *Dorhout* at 392.

The State does emphasize that the goods must be "received" in South Dakota, Doc. 79 at 2 and 63, and since it is common for travelers to have purchases shipped back home (or elsewhere), and many of the Casino's guests reside out-of-state, this may be part of the Casino's record-keeping burden.[12] Further, the reasonable necessity of the burdens imposed on the Casino would depend on the extent of tax avoidance at stake, as a burden that appears minor relative to a large amount of tax to be collected could be unjustified if only a small proportion of Casino transactions were taxable. These claims cannot be determined until it is known what taxes the Casino will have to reckon with.

B. Claim eight, liquor license conditions restricted by State's limited authority under federal law: summary judgment depends on the determination of tax liability.

The State averred during this litigation (after contrary indications in the Department of Revenue's final decision not to reissue the Casino's liquor licenses) that it "would not condition reissuance of the Tribe's liquor license on the Tribe's collection and remittance of an invalidly imposed tax." Doc. 79 at 65 fn.32; *see also* Doc. 46 at 15. The Court observed the soundness of this position, stating, "If a tax on Indian land is invalid, as a corollary, it seems axiomatic that a state cannot condition certain powers on the payment of those very same invalid taxes." Doc. 59 at 31. Consequentially, if the Court determines there are no valid taxes, then there would be no active dispute about the conditions imposed on the alcoholic beverage licenses,[13] because the State would not deny the licenses on the basis of SDCL 35-2-24 and the Casino would continue to conform to the State's alcohol regulations and maintain its State-issued liquor licenses as a matter

[12] The State uses the non-statutory verb "receive," Doc. 79 at 2, 63, apparently as a synonym for the statutory term "delivery." SDCL 10-46-18. A sale is "consummated by delivery[.]" *Dorhout* at 393. A sale does not occur in South Dakota when a seller is obligated to deliver the property out of state. *Id.*; *see* ARSD 64:06:01:24.

[13] The State appears to agree. *See* Doc. 79 at 65 & fn.32.

of comity, as it has done for years.[14] There would be no case or controversy with respect to the eighth claim (or the sixth claim, addressed below).

In the event the Court determines that any of the use taxes are valid, there will remain an issue of whether the State can validly condition the granting of a liquor license on the payment of use taxes wholly unrelated to alcohol regulation or alcohol taxation by the State. The eighth claim raises a constitutional issue under the Indian Commerce Clause, Article I, § 8, cl. 3, as well as other federal law, including 18 U.S.C. § 1161. *See* Doc. 32 at 33-34. The Supreme Court has long held that if an issue can be decided on other grounds, the court should not confront constitutional issues that are unnecessary to resolution of the dispute before the Court. *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 478 (1995).

The State's basis for seeking summary judgment on the eighth claim for relief is that its use tax is valid, and that it has the power to regulate alcohol under the Supreme Court's decision in *Rice v. Rehner*. *See* Doc. 79 at 66. While *Rehner* recognizes the State's power to protect its interests in regulating alcohol for the protection of citizens residing within the State, there is no evidence that SDCL 35-2-24 has any nexus with the State's interests in regulating alcohol. The State concedes this point when it states in its summary judgment brief that "the State's statutory mechanism for tax collection is an 'alternative remed[y]' available to state tax collectors." Doc. 79 at 66. The case cited for this proposition, *Milhelm Attea*, is inapplicable to the case at hand. *Milhelm Attea*, 512 U.S. at 72. As set forth in Section I.A.2, *infra*, *Milhelm Attea* and the entire line of bulk cigarette cases is wholly distinct from this case, which does not involve the Tribe marketing a tax exemption to sell discounted goods produced off reservation. Further, the "alternative remedies" discussed by the Court in *Milhelm Attea* were "damages actions against

[14] *See* First Am. Compl., Doc. 32, ¶ 57.

individual tribal officers or agreements with the tribes," or efforts to "collect the sales tax from cigarette wholesalers, either by seizing unstamped cigarettes off the reservation…, or by assessing wholesalers who supplied unstamped cigarettes to the tribal stores." *Id.* at 72-73. The Court did not condone enforcement of a general use tax through an alcohol licensure non-renewal.

There is not a single case that upholds the State's power to collect general use taxes through denying alcohol licensure to a Tribe. The closest the State can find is the case of *Squaxin Island Tribe v. Washington*, 781 F.2d 715, in which the court upheld the validity of an alcohol tax under 18 U.S.C. § 1161. Doc. 79 at 28. As previously addressed in Plaintiff's Response to Defendant's Motion for Judgment on the Pleadings, *Squaxin Island* is not applicable to this matter. Doc. 42 at 34. In that case, the court found the alcohol tax was integrally related to the state's alcohol regulatory scheme. In this case, the State is not asserting, nor is there in fact, any interrelationship between collection of the general use tax and the need to regulate alcohol distribution and consumption. All of the other cases cited by the State in its brief deal with the right to regulate alcohol – not the imposition of taxes. Doc. 79 at 28. This Court has already recognized that these cases are indeed distinct from this case of general use tax collection as a condition on alcohol licensure. Doc. 59 at 31-32.

Finally, the state asserts once again that the Tribe consented to the imposition of SDCL 35-2-24 when it applied for alcohol licensure. Doc. 79 at 30. As the Tribe argued in its reply to the Motion for Judgment on the Pleadings, where the state lacks jurisdiction to impose the condition as a matter of federal law, there can be no valid consent to the unlawful conditions imposed. Doc. 42 at 33-34. *United States v. State Tax Comm'n of Mississippi*, 421 U.S. 599, 613-614 (1975); *Dept. of Revenue v. James Beam Dist. Co.*, 377 U.S. 341, 346 (1963); *Duckworth v. Arkansas*, 314 U.S. 390, 398 (1941); *Epstein v. Lord*, 261 F. Supp. 921, 941 (D.N.J. 1966), *aff'd.* 389 U.S. 29

(1967). As this Court explained, rejecting the State's consent argument, while the State may require the Tribe to obtain an alcohol license under the holding in *Rehner*, the case law "is bereft of instruction as to what states may permissibly tax before issuing a liquor license." Doc. 59 at 31.

That question, what the State may permissibly tax (and, potentially, answering the collection and remittance issue that would spring from a determination that valid tax exists) needs to be answered prior to making a determination on the eighth claim for relief.

C. Claim six, liquor license conditions restricted by IGRA: the claim is moot.

With its sixth claim, the Tribe asserts that the State cannot set conditions for maintaining a liquor license that are preempted by IGRA. For the same reasons that apply to the eighth claim, claim six would not present a case or controversy if the Court determines none of the disputed taxes are valid.

Unlike the eighth claim, however, because of certain representations the State has made during litigation, a determination that any use tax at issue is valid still will not give rise to a case or controversy with respect to this claim. Although SDCL 35-2-24 calls for a Tribal liquor license not to be reissued if the Tribal licensee fails to remit "use tax incurred by nonmembers as a result of the operation of the licensed premises, *and any other state tax*" (emphasis added), the State during this litigation declared that the use tax, and not any other tax, is the State's only alleged basis for not reissuing the Tribe's licenses. State's Admission No. 7 (Jan. 19, 2016), Doc. 119-36 at p. 6. This disclaimer has made the sixth claim moot.

If the use tax (or any part of it) at the Casino were found to be valid, this would mean the tax (or part of it) was compatible with IGRA. Given that no other basis is asserted as an unmet condition to maintain the liquor licenses (and assuming the Court also holds that remittance of the Casino use tax is a valid condition under 18 U.S.C. § 1161) then the Tribe does not perceive any

remaining ground for maintaining a claim that IGRA bars conditioning the liquor license on a tax the Court already will have found IGRA does not bar. Therefore, claim six no longer presents a case or controversy. It is moot. The Tribe therefore respectfully requests that the Court dismiss claim six without prejudice. *See Hickman v. State of Missouri*, 144 F.3d 1141, 1142 (8th Cir. 1998).

III. Claim seven, disposition of escrow funds: summary judgment depends on the determination of the Tribe's use tax liability, but may require additional evidence.

Determination of the use tax claims should also govern the Court's disposition of the seventh claim, which asked the Court to make a declaration that would allow for disbursement of the funds the Tribe deposited into escrow twenty years ago.[15] A holding that no State use tax is valid at the Casino, or that no collection and remittance can be required, should suffice to cause the escrow agent to disburse the funds to the Tribe.[16] Likewise, a determination entirely in the State's favor would be sufficient to allow all the escrowed funds to be disbursed to the State. However, a split decision would require additional evidence to determine how much of the Casino's 1994-1998 receipts were taxable or untaxable under the Court's decision.

[15] The Agreement required the Tribe to report its "total gross receipts resulting from the sales to non-members of food, beverages and other tangible personal property, as defined in SDCL 10-46, at the Tribe's casino," and to "deposit a sum equal to four percent" of those receipts into an escrow account. Deposit Agreement (Doc. 32-1) § 1.

[16] The Deposit Agreement refers to a judicial declaration "that the State does not have jurisdiction to assess *sales and use tax* on transactions between the Tribe and non-members taking place in a Tribally-owned gambling casino." First Am. Compl. (Doc. 32) ¶ 139; Deposit Agreement (Doc. 32-1) § 6(B)(2) (emphasis added). The State has now disavowed any jurisdiction to assess sales tax on such transactions. Doc. 79 at 3 ("federal law prohibits the State from imposing its sales tax on a tribal retailer who is engaged in business on their tribe's reservation").

CONCLUSION

For the foregoing reasons, the Tribe respectfully requests that the Court deny the State's motion for summary judgment in its entirety. To the extent the Court's rulings may provide a basis to do so, the Tribe also respectfully asks the Court to grant summary judgment in favor of the Tribe pursuant to Fed. R. Civ. P. 56(f)(1) on those claims on which the Tribe has not moved for summary judgment.

Dated: March 17, 2017

Respectfully submitted,

FLANDREAU SANTEE SIOUX TRIBE

By: /s/ Ronald A. Parsons, Jr.

Ronald A. Parsons, Jr., S.D. Bar No. 2765
Steven M. Johnson, S.D. Bar No. 2181
JOHNSON, JANKLOW, ABDALLAH, REITER AND PARSONS, LLP
101 South Main Avenue, Suite 100
Sioux Falls, South Dakota 57104
Telephone: (605) 338-4304
Fax: (605) 338-4162
steve@janklowabdallah.com
ron@janklowabdallah.com

Rebecca L. Kidder, S.D. Bar No. 2774
FREDERICKS PEEBLES & MORGAN LLP
520 Kansas City Street, Suite 101
Rapid City, South Dakota 57701
Telephone: (605) 791-1515
Fax: (605) 791-1915
rkidder@ndnlaw.com

John M. Peebles, *Pro Hac Vice*
Steven J. Bloxham, *Pro Hac Vice*
John Nyhan, *Pro Hac Vice*
Tim Hennessy, *Pro Hac Vice*
FREDERICKS PEEBLES & MORGAN LLP
2020 L Street, Suite 250
Sacramento, California 95811
Telephone: (916) 441-2700
Fax: (916) 441-2067
jpeebles@ndnlaw.com
sbloxham@ndnlaw.com
jnyhan@ndnlaw.com
thennessy@ndnlaw.com

WORD COUNT CERTIFICATE

I certify that the foregoing brief, Flandreau Santee Sioux Tribe's Brief in Opposition to Defendants' Motion for Summary Judgment, is within the word limitation set by the Court's Order of March 15, 2017, granting the Tribe permission to exceed the 12,000 word limit set forth in the Local Rules, but not to exceed 21,000 words in length. (Doc. 122).

According to the word count of the word processing system used to prepare the brief, the brief contains 20,442 words, excluding the cover page, tables, signature block and this certificate.

/s/ Ronald A. Parsons, Jr.

REQUEST FOR ORAL ARGUMENT

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