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 REPLY TO THE STATE'S MEM. IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

(ORAL ARGUMENT REQUESTED)

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INTRODUCTION

The State has confirmed in its opposition brief, Doc. 124, that its preferred analysis is in the mode of the intergovernmental tax immunity doctrine applicable to non-Indian cases. That doctrine does not apply generally to state taxation within Indian country, whether the tax is imposed upon an Indian tribe, a tribal member, or a non-member. The State's failure to acknowledge that Indian cases are unique and not controlled by the standards that govern intergovernmental tax issues in other contexts compromises its argument at nearly every turn. The Tribe has addressed many of the State's points in its previous briefs, Doc. 117, Doc. 130, and here replies to many of them again.

MATERIAL FACTS

The Tribe submits its reply to the State's response and objections to the Tribe's Statement of Material Facts concurrently with this reply brief.

ARGUMENT

I. *Bracker* Balancing.

A. Preemption of State tax upon nonmembers within Indian country is not governed by the standards of the federal/state intergovernmental tax immunity doctrine.

The State bookends its preemption discussion with the proposition that when a state seeks to impose tax on a non-Indian engaged in on-reservation transactions with an Indian tribe, the "presumption is now in favor of state taxation." Doc. 124 at 2. Congressional silence about state taxes on the specific transaction, the State contends, "requires presumption in favor of state taxation of nonmembers," and in this case, "requires the use tax to be upheld." Doc. 124 at 39. For this theory, the State relies on *Cotton Petroleum Corp. v. New Mexico,* 490 U.S. 163 (1989). *Cotton Petroleum* did not establish the rule the State asserts, and to apply such a rule here would sharply depart from precedent.

Both parties have discussed *Cotton Petroleum* at length. *See* Doc. 124 at 37-39; Doc. 130 at 21-25. The case involved New Mexico's power to impose severance taxes on a non-Indian company's oil and gas production on the Jicarilla Apache Reservation. *Cotton Petroleum* at 166. Central to the Court's decision to uphold the state taxes was its analysis of "the evolution of the doctrine of intergovernmental tax immunity." *Id.* at 173. The Court explained, "At one time, such a tax was held invalid unless expressly authorized by Congress; more recently, such taxes have been upheld unless expressly or impliedly prohibited by Congress." *Id.* *Cotton Petroleum* itself demonstrates that the intergovernmental tax immunity doctrine is distinct from the rules that apply to state taxation of non-Indians engaged in commerce with Indians in Indian country, and in that case the Court overlaid some of the Indian preemption principles atop the intergovernmental tax immunity doctrine. *See* Doc. 130 at 21-25. The broader context further shows that the two approaches to tax immunity are distinct, and that *Cotton Petroleum* is inapplicable to this case.

"Under the intergovernmental tax immunity jurisprudence prevailing" before the modern view took hold, as a general rule "neither the Federal nor the State Governments could tax income of an individual directly derived from *any* contract with another government." *South Carolina v. Baker*, 485 U.S. 505, 517 (1988). The contractor was judged to be an "instrumentality" of the government, such that a tax on the contractor's income enjoyed the same immunities as a tax on the government itself. *E.g.*, *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 400-01 (1932). "This general rule was based on the rationale that any tax on income a party received under a contract with the government was a tax on the contract and thus a tax 'on' the government because it burdened the government's power to enter into the contract." *South Carolina v. Baker* at 518. This broad immunity for government "instrumentalities" applied to state taxes on federal contractors, as well as federal taxes on state contractors. *Id.* at 517. "Cases concerning the tax

immunity of income derived from state contracts freely cited principles established in federal tax immunity cases, and vice versa." *Id.*; *see id.* at 518 fn.11. Private parties who leased Indian lands to extract minerals from them were, during this period, treated as federal instrumentalities. *E.g.*, *Choctaw, Oklahoma & Gulf Railroad Co. v. Harrison*, 235 U.S. 292, 298 (1914) (lessee of Indian trust land immune from state tax because it was carrying out the government's "duty in respect to opening and operating coal mines upon their lands"); *see also Okla. Tax Comm'n v. Texas Co.*, 336 U.S. 342, 354-57 (1949).

The doctrinal shift from "at one time" to "more recently" occurred eighty years ago, beginning with *James v. Dravo Contracting Co.*, 302 U.S. 134 (1937). *Cotton Petroleum* at 173, 174-75; *see South Carolina v. Baker*, 485 U.S. at 520-21 (detailing the evolution of the doctrine). "'With the rationale for conferring a tax immunity on parties dealing with another government rejected, the government contract immunities recognized under prior doctrine were, one by one, eliminated.'" *Cotton Petroleum* at 175 (quoting *South Carolina v. Baker* at 521-22).

Now, and since the late 1930s, "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." *South Carolina v. Baker* at 522. Under this rule, the only barriers to state taxation of private parties that previously had been viewed as federal instrumentalities are that the tax must not discriminate, and that Congress can "act affirmatively to pre-empt the state taxes." *Cotton Petroleum*, 173-76; *see United States v. New Mexico*, 455 U.S. 720, 736-38 (1982). *See also North Dakota v. United States*, 495 U.S. 423, 434-41 (1990) (plurality opn., upholding a state regulation that impacted federal government but did not "directly conflict with the federal statute").

Critically, however, the modern doctrine of federal preemption of state taxes within Indian country developed separately from the intergovernmental tax immunity doctrine, and well after the modern bare-bones intergovernmental tax immunity approach was first firmly established. *See* Doc. 117 at 9-12. In *McClanahan*, where the state sought to impose income tax on an Indian individual, the Court expressly distinguished prior decisions based on the intergovernmental tax immunity doctrine (what it called the "federal-instrumentality doctrine") and held that, even though that doctrine would probably not support tax immunity in that case, the Indian sovereignty doctrine did. *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 169-73 (1973).

When the Supreme Court examined whether states were authorized to impose taxes on non-Indians who transact business with Indians within Indian country, the Court did not require affirmative Congressional immunity. Instead, over time, the Court developed a flexible balancing test, examining "the language of the relevant federal treaties and statutes in terms of both the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144-45 (1980). When the Court's majority formulated the balancing test as a broader inquiry than the narrow intergovernmental tax immunities doctrine, it did so against a dissent which would have taken the narrow intergovernmental tax immunity approach. *Id.* at 159 (Stevens, J., dissenting). In the context of state taxation or regulation of non-Indians transacting business on-reservation with Tribes and tribal entities, the Court has repeatedly emphasized, "[t]hat is simply not the law." *Bracker* at 151; *see California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 fn.18 (1987).

> The question whether federal law, which reflects the related federal and tribal interests, pre-empts the State's exercise of its regulatory authority is not controlled by standards of pre-emption developed in other areas. … Instead, the traditional notions of tribal sovereignty, and the recognition and encouragement of this

> sovereignty in congressional Acts promoting tribal independence and economic development, inform the pre-emption analysis that governs this inquiry. … As a result, ambiguities in federal law should be construed generously, and federal pre-emption is not limited to those situations where Congress has explicitly announced an intention to pre-empt state activity.

Ramah Navajo School Bd., Inc. v. Bureau of Revenue of New Mexico, 458 U.S. 832, 838 (1982).

It is notable that when the Court has addressed state taxation of federal contractors, cases in which the Court applies the narrow intergovernmental immunity doctrine, the Court specifically disclaimed judicial responsibility to balance the interests of the two sovereigns. *United States v. New Mexico*, 455 U.S. at 737-38; *North Dakota v. United States*, 495 U.S. at 444 (plurality opn.). On the other hand, balancing these interests is precisely what the Court has instructed courts to do when a state seeks to exercise authority over a non-Indian on Indian land. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334-36 (1983).

The Court decided *Ramah* three months after *United States v. New Mexico*, 455 U.S. 720 (1982), which held that an indirect economic burden on federal operations did not preempt a tax on a federal contractor. Justice Rehnquist's dissent in *Ramah* argued for subjecting the two cases to the same test, and found it "inexplicable" that the tax immunity analysis in the *Ramah* context – an Indian tribe only indirectly burdened by a state tax imposed on a non-Indian – should differ from the analysis in a case like *United States v. New Mexico*. *Ramah* at 855-57 & fn.6 (Rehnquist, J., dissenting). Similar arguments were made by the dissenters in *Bracker*, 448 U.S. at 158-159 (Stevens, J. dissenting), and in Justice Rehnquist's concurring and dissenting opinion in *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 185-86 & fn.9 & 11 (1980) (opn. of Rehnquist, J.). In each case, the majority disagreed.

Cotton Petroleum did not signal a departure from decisions like *Bracker*, *Ramah*, *New Mexico v. Mescalero Apache Tribe*, and *Cabazon*. Three months after the Court decided *Cotton Petroleum*, the Ninth Circuit wrote that the decision "reaffirmed the basic principles of [*Bracker*]

and *Ramah*." *Hoopa Valley Tribe v. Nevins*, 881 F.2d 657, 660 (9th Cir. 1989). Five years after *Cotton Petroleum*, the Supreme Court reiterated that, in a conflict involving a state tax obligation imposed on non-Indians for their on-reservation purchases, resolution depends, still, "on 'a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law.'" *Dept. of Taxation and Finance of New York v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 73 (1994) (quoting *Bracker* at 145). In 2005, the Court held the *Bracker* interest-balancing test applies "where 'a State asserts authority over the conduct of non-Indians engaging in activity on the reservation.'" *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 99 (2005) (quoting *Bracker* at 144). "[W]hen a State imposes the legal incidence of its tax on a non-Indian seller, the tax may nonetheless be preempted if the transaction giving rise to the tax liability occurs on the reservation and the imposition of the tax fails to satisfy the *Bracker* interest-balancing test." *Wagnon* at 102. The Court explained in *Wagnon* the reasons that tax immunity must be analyzed differently for "on-reservation transactions between a nontribal entity and a tribe or tribal member," calling the approach "our unique Indian tax immunity jurisprudence." *Id.* at 112 (emphasis omitted). It emphasized that the balancing test relies specifically on the "backdrop" of tribal sovereignty, which "**requires us to reverse the general rule that exemptions from tax laws should be clearly expressed**." *Id.* (quoting *Okla. Tax Comm'n v. Sac and Fox Nation*, 508 U.S. 114, 124 (1993), and *McClanahan*, 411 U.S. at 176) (internal quotation marks and alterations omitted) (emphasis added). That reversal of the general rule is the "*McClanahan* presumption," *Sac and Fox Nation* at 125, 126, and according to *Wagnon*, it remains central to the analysis, even after *Cotton Petroleum*, for assertions of state taxing authority over non-Indians engaging in activity on a reservation. *Wagnon* at 112.

B. Strong interests in tribal sovereignty and self-governance weigh in favor of the Tribe.

The State attempts to minimize the importance of the tribal interests in sovereignty, economic development, and self-sufficiency in this case by distinguishing some decisions that the State says "considered tribal interests in the context of a State's jurisdiction over Indians," rather than in a context where "the State is imposing a tax on nonmembers' purchases." Doc. 124 at 23-24. One decision the State attempts to distinguish is *Williams v. Lee*, 358 U.S. 217 (1959). As the Supreme Court noted elsewhere, "It must be remembered that cases applying the *Williams* test have dealt principally with situations involving non-Indians." *McClanahan*, 411 U.S. at 179 (emphasis added).[1]

These tribal interests are weighed against state interests in almost every *Bracker* balancing case, and as the Supreme Court made clear in *Wagnon*, every *Bracker* balancing case arises "where 'a State asserts authority over the conduct of non-Indians engaging in activity on the reservation.'" *Wagnon* at 99 (quoting *Bracker* at 144) (emphasis added). The tribal interests are no less important in this case than in any other *Bracker* balancing case.

C. Comprehensive federal regulation weighs in favor of the Tribe.

The State points to *Colorado River Indian Tribes v. National Indian Gaming Commission* ("*CRIT*"), 466 F.3d 134 (D.C. Cir. 2006), which held that IGRA did not grant the NIGC authority to regulate class III gaming through mandatory Minimum Internal Control Standards ("MICS").

[1] An important aspect of *Williams* is the Court's recognition that the "exercise of state jurisdiction … would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves," even though one of the parties to the dispute was not an Indian. *Williams* at 223. "It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there." *Id.* "[T]he authority of Indian governments over their reservations" includes authority over interactions between tribal members and nonmembers. *Id.*

See id. at 294 (affirming summary judgment); *Colorado River Indian Tribes v. National Indian Gaming Comm'n*, 383 F.Supp.2d 123, 148 (D.D.C. 2005) (granting summary judgment); Plaintiff's Motion for Summary Judgment, *Colorado River Indian Tribes v. National Indian Gaming Comm'n*, No. 1:04-cv-00010, 2004 WL 3628019 (D.D.C. Sept. 23, 2004) (moving for summary judgment and a declaration that NIGC "unlawfully exceeded its authority in adopting mandatory MICS to regulate Class III gaming" (emphasis added)). Importantly, *CRIT* did not strike down the class III MICS (25 C.F.R. Part 542), as the plaintiff's case was focused on NIGC enforcing the MICS as "mandatory" minimum standards. 2004 WL 3628019 (plaintiff's motion, arguing "Had the Commission issued these standards as an advisory guidance to assist the tribes, CRIT would have welcomed the input."). If NIGC lacks authority to make standards for class III gaming mandatory, the federal standards still stand as guidance and evidence of the federal interest.

Following the *CRIT* decision, the NIGC in 2008 promulgated new "regulations that require tribes to adopt and enforce standards for facility licenses … [to] ensure that gaming facilities are constructed, maintained and operated in a manner that adequately protects the environment and the public health and safety." Facility License Standards, 73 Fed. Reg. 6019-01, 6019 (Feb. 1, 2008); *see* 25 C.F.R. Part 559. The NIGC addressed the "CRIT cases" (apparently referring to the district court and circuit court decisions), stating, "The Commission disagrees, however, that the CRIT cases stand for the broad proposition that the NIGC lacks any authority over class III gaming." *Id.* at 6022. The NIGC emphasized that notwithstanding *CRIT*, the agency possesses "oversight responsibility for health and safety at tribal gaming operations." *Id.* at 6021. It explained that these regulations implemented the provisions set out in 25 U.S.C. §§ 2706(b), 2710(b)(1), 2710(b)(1)(E), and 2713, under the authority granted to it in 25 U.S.C. § 2706(b)(10). 73 Fed. Reg. at 6021-22.

In addition, since *CRIT* affects only the class III MICS, the NIGC possesses undisputed authority over class II gaming, including the class II MICS. 25 C.F.R. Part 543.[2] Among the class II MICS is a regulation requiring tribal regulators to establish controls and procedures for issuing and recording the issuance of complimentary items and services. 25 C.F.R. § 543.13. Another establishes minimum standards for gaming promotions and player tracking systems. 25 C.F.R. § 543.12. These regulations govern class II gaming activities at the Tribe's Casino but, like the facility licensing regulations, they govern activities that in practice are not readily segregable by gaming classes. NIGC authority also undisputedly extends to other matters related to class III gaming, including tribal gaming ordinances (25 C.F.R. Part 522), gaming management contracts (25 C.F.R. Parts 531-535), and employee licensing (25 C.F.R. Parts 556 & 558).

IGRA also gives the NIGC Chairman enforcement authority to compel compliance with "tribal regulations, ordinances, or resolutions" approved by the Chairman under IGRA, including tribal laws governing class III gaming. 25 U.S.C. §§ 2713 (providing for civil penalties for violations); 2710(d)(1)(A) (requiring approval of tribal class III gaming ordinance). *See* 25 C.F.R. Parts 571-575. The Tribe has adopted the federal standards – including the standards for authorization, issuance and tracking of complimentary services and items contained in 25 C.F.R. § 542.17 – as its own tribal standards. FSST Class III Gaming Ord., § 17-3-3 (1999) (authorizing Tribal Gaming Commission to "promulgate and adopt rules … for the conduct and operation of all gaming activities, and any other matters necessary to carry out the purposes of this Ordinance."); FSST Rules and Regulations Manual, Preamble ("It is the intent and purpose of these regulations to comply with all requirements of federal law on the subject of Indian gaming.

[2] The NIGC promulgated the current class II MICS in 2012. Minimum Internal Control Standards, 77 Fed. Reg. 58708-01 (Sept. 21, 2012).

In the event that any provision of these regulations is in conflict with federal law, the provisions of federal law shall prevail over an inconsistent provision of these regulations."); § 12.1.14 ("All [facility] licensees must comply with the Gaming Internal Controls, Standard Operating Procedures and Revenue Reporting Manuals"); Ch. 21 (tracking the language of 25 C.F.R. § 542.17, providing that the "licensee shall establish and the licensee shall comply with procedures for the authorization, issuance and tracking of complimentary services and items…").[3] *See also* TSUMF 146-148 (describing the Casino's Standard Operating Procedures and Departmental Operating Procedures and highlighting how they implement the federal regulations). Accordingly, Tribal officials testified that the NIGC enforces those standards, TSUMF 38-48, including auditing the Casino's compliance with comping standards, TSUMF 45, 46.

Moreover, to the extent NIGC lacks authority to regulate class III gaming, the reason is that IGRA assigns that authority to Indian tribes and, only through federally-approved gaming compacts, to states. *CRIT* at 138. This establishment of a jurisdictional framework among the federal, tribal, and state governments is a major purpose of IGRA. Even if, under this congressionally mandated framework, class III standards were completely under Tribal authority, subject only to such State authority as the Tribe may agree to in a compact, the comprehensive and pervasive *tribal* regulations would directly advance the federal purpose. Unconsented state imposition of use tax upon casino patrons is contrary to the jurisdictional framework, frustrating the federal purpose. *See generally* TSUMF 52-70 (identifying tribal regulatory involvement at the Casino).

[3] The Gaming Ordinance and cited sections of the Rules and Regulations Manual are attached as exhibits to the Declaration of Steven Bloxham, submitted herewith.

The State says no federal regulation has been identified that governs the "taxed activity," nonmember purchases at the Casino. Doc. 124 at 25. As the Tribe explained in its Opposition Brief, *see* Doc. 130 at 6-7, the Supreme Court does not demand such a narrow focus when ascertaining conflicts between federal Indian policy and state taxes. Thus, federal regulation of timber harvesting and sales and of reservation roads supported the preemption of a state's use fuel tax and motor carrier license tax, even absent relevant regulation of fuel, licensing, or taxation. *Bracker* at 146-48. Federal regulation of Indian education and school construction agreements supported preemption of a state gross receipts tax on a construction company, even absent regulation of the construction itself (which was the taxed activity). *Ramah* at 840-42. Federal regulation of Indian education also supported preemption of a South Dakota fuel tax imposed on a reservation school, despite no regulation of the fuel, the vehicles using the fuel, or the particular uses to which those vehicles were put. *Marty Indian School Bd., Inc. v. South Dakota,* 824 F.2d 684, 687-88 (8th Cir. 1987).[4] Federal involvement "in promoting and assisting in the development of tribal bingo enterprises," federal management agreement approval, and a Secretarial "position 'strongly opposing' the imposition of state gambling regulations on Indian bingo" supported the preemption of state sales taxes on bingo, food services, and other sales, despite no federal regulation of bingo itself, or associated food sales, or the taxes that might be imposed on either. *Indian Country, U.S.A., Inc. v. State of Okla.*, 829 F.2d 967, 985-86 (10th Cir. 1987). In all of these decisions, the federal government did not regulate the specific item taxed, much less the

[4] The State seeks to distinguish this case on the grounds that the court "considered tribal interests in the context of a State's jurisdiction over Indians." Doc. 124 at 23, 24. However, the court analyzed the preemption of the State tax under the *Bracker* test, which applies only when the tax is imposed upon a non-Indian. *Marty Indian School Bd.* at 686; *Bracker* at 144-45. Evidently, the court considered the School Board, a corporation formed by the Yankton Sioux Tribe under the laws of South Dakota, to be a non-Indian. *Marty Indian School Bd.* at 685; *see Marty Indian School v. South Dakota,* 592 F.Supp. 1236, 1236 (D. S.D. 1984).

taxation of that item. Yet in all of them, the imposition of state tax interfered with and frustrated the comprehensive regulatory scheme and the federal and tribal interests of which the federal regulatory involvement was an expression. *See generally* TSUMF 36-51 (identifying federal regulations and other federal involvement at the Casino).[5]

The State is not correct to suggest that the tribal and federal regulation of complimentary items is rendered "irrelevant because use tax is not due on complimentary goods and services[.]" Doc. 124 at 26.[6] The Tribe appreciates that the State has either clarified or decided this aspect of

[5] The State raises *Warren Trading Post* in this context, *see* Doc. 124 at 27, pointing out that the Court held the state sales tax was preempted only as to on-reservation sales by traders to Indians, and not such sales to non-Indians. The State claims this is evidence that "federal preemption of a state's jurisdiction to tax nonmembers' on-reservation activities is very narrow," excluding things "peripherally associated" with the relevant regulations. *Id.* But the Court did not justify its holding in those terms, and instead explained that the case was narrow as presented to it: "Appellant's challenge to these [tax] statutes is limited to the State's attempt to apply them to gross income from sales made on the reservation to reservation Indians." *Warren Trading Post Co. v. Ariz. State Tax Comm'n*, 380 U.S. 685, 686, fn.1 (1965). Further, a sale between a non-Indian trader and non-Indian customer would feature no Indian involvement at all, which has been a fact pattern often allowing state authority. *See* Doc. 130 at 35, 36. Finally, the Court later widened the narrow holding in *Warren* to preempt the state tax when imposed on traders who were not actually federally licensed nor permanently located on a reservation. *Central Machinery Co. v. Ariz. State Tax Comm'n*, 448 U.S. 160, 164-65 (1980).

[6] This is yet another new explanation of how the State intends to apply its use tax to the Tribe, coming mid-litigation, rather than when the State sought to administratively enforce the tax through its liquor license provision. The State earlier disclaimed its intent to tax the actual gaming, though the use tax code does not require that result. *See* Doc. 50 at 10-11; Doc. 54 at 3. The State recently settled on a theory of when and where the tax is imposed, though that theory is not necessarily consistent with the tax code. *See* Doc. 130 at 54-55. During this litigation, the State has also disclaimed its intent to base its non-renewal of the Tribe's liquor licenses upon any alleged tax delinquencies other than use tax, *see* Doc. 130 at 58, or upon any tax that would be invalidly imposed, *see* Doc. 50 at 13. The administrative decision from the Department of Revenue did not acknowledge any limitation of any kind, and the Answer in this case called for the Tribe to collect and remit use tax on "*all* purchases of tangible personal property and services" by nonmembers. *See* Doc. 50 at 11-13; Doc. 34 ¶ 55 (emphasis added). The State's approach illustrates a fundamental problem with its use of the liquor license reissuance process (SDCL § 35-2-24) as an "alternative remedy" for tax collection. Doc. 79 at 66. It is missing the basic procedures and due process necessary to inform the taxpayer what the State contends is owed, forcing the taxpayer to litigate the matter to finally begin to extract the State's position.

its tax administration, and to the extent the State may be bound by its determination, the Tribe welcomes it. Again, however, the Tribe is not entirely comforted, as the State's position is not fully supported by the use tax code, and its conclusion is not given any judicial deference. *State v. Dorhout*, 513 N.W.2d 390, 392 (S.D. 1994). The Tribe agrees that, under the State sales and use tax codes, complimentary *goods* are not subject to use tax. *See* SDCL §§ 10-46-2 (imposing use tax on tangible personal property as a percent of the purchase price); 10-46-1(10) ("purchase price" means "gross receipts" as defined in chapter 10-45); 10-45-1.14 ("gross receipts" means the amount of consideration for which personal property is sold); 10-45-1.16 ("gross receipts" does not include unreimbursed discounts allowed by a retailer and taken by a purchaser). The use tax code provides different treatment for *services*, however. *See* SDCL §§ 10-46-2.1 (imposing use tax on the privilege of using services, as a "percent of the value of the services"); 10-46-18.2 ("value" of a service is presumed to be the amount paid for the service, but where "the amount paid does not represent the value of the service purchased, the tax shall be imposed on the reasonable value of the service purchased").

Furthermore, the tax code provides that the State will still impose use tax on goods sold at a discount, at the discounted price. This imposition of tax still lays a burden on the gaming patron and the Casino, by increasing the cost of items both the Casino and its guests that otherwise would be priced lower. A ten percent restaurant discount would be cut in half, and the Casino's ability to use the discount to induce guests to stay and play would be reduced accordingly. Or, to avoid that result, the Tribe would have to absorb the cost through lowering prices or increasing discounts, or by reducing or eliminating its sales tax.

D. The tax imposes an economic burden on the Tribe.

The State proposes that the economic effects of the tax on the Tribe are "irrelevant or immaterial," Doc. 124 at 28, while the economic effects on the State of not collecting the tax

justifies extending the State's taxing authority into the Tribal Casino, Doc. 124 at 36-37. If approximately $150,000 per year is an "insubstantial" amount in comparison with Casino income, is it not far less substantial still in comparison with State tax revenues, which are over one hundred times greater? *See* TSUMF 268-279. Thus, measuring the respective economic burdens under the State's proportionality standard, the Tribe's burden outweighs the State's.

The State's complaint that the Tribe has not "quantified" the economic impact is hollow. It identifies no authority that suggests such quantification is required, and indeed the authorities point the other direction. *Seminole Tribe of Florida v. Stranburg*, 799 F.3d 1324, 1341 (11th Cir. 2015) (preempting tax with "no record evidence whatsoever of the impact of the Rental tax on the Tribe's business operations or its sovereignty"); *Indian Country, U.S.A.*, 829 F.2d at 986 & fn.9 (noting the economic impact on the Tribe is "difficult to measure," and that the "preemption analysis cannot turn on the severity of a direct economic burden on tribal revenues caused by the state tax"). The Tribe is not primarily requesting damages or a refund based on taxes already remitted. *Cf. Ramah* at 835-36; *Bracker* at 140 fn.5; *Hoopa Valley Tribe v. Nevins*, 881 F.2d at 658. The Tribe does note, however, that the approximately $400,000 undisputedly contained in the escrow account, *see* State's SUMF 133 & 134, provides some quantified evidence of the degree of economic impact on the Tribe. Furthermore, the Tribe has submitted the report of economic expert Jonathan Taylor, as well as testimony of Tribal officials, explaining in detail how the economic burden will manifest. *See* TSUMF 334-363. Finally, the State itself quantified at least a portion of the Tribe's economic burden, its expert estimating a range of approximately $34,000

to $268,000 annually, and its Department of Revenue estimating annual tax remittances of approximately $150,000 to $160,000. State's SUMF 94.[7]

The State points out that the state taxes preempted in *Crow Tribe* were "unusually large," and says the taxes permitted in *Barona Band* and *Cotton Petroleum* were higher than the use tax in this case. Doc. 124 at 29 (citing *Crow Tribe of Indians v. Montana*, 819 F.2d 895 (9th Cir. 1987); *Barona Band of Mission Indians v. Yee*, 528 F.3d 1184 (9th Cir. 2008)). Neither a relatively low tax rate nor a small financial impact, however, are determinative. In *Bracker*, the Court invalidated the imposition of a 2.5% gross receipts tax and a use fuel tax of eight cents per gallon, which would have amounted to payments of no more than $5,000 to $6,000 per year, and "probably … considerably less," or "less than 1% of the total annual profits" of the Indian tribal enterprise. *Bracker* at 158-59 (Stevens, J., dissenting); *id.* at 139-40. A 2% tax was preempted in *Warren Trading Post*, and "precisely the same tax" was again preempted in *Central Machinery*, where the disputed amount was less than $3,000. *Warren Trading Post*, 380 U.S. at 685; *Central Machinery* at 162, 164 fn.3. In *Ramah*, the Court invalidated a state tax where the disputed amount was approximately $230,000, because the tax "deplete[d] the funds available" for tribal school construction, but *none* of ultimate burden rested on the Tribe, which did not fund the construction with tribal revenue. *Ramah* at 836, 842; *id.* at 852 fn.3 (Rehnquist, J., dissenting). In *Marty Indian School*, the Eighth Circuit held the imposition of South Dakota's 13 cents per gallon fuel tax, amounting to less than $8,000 in dispute, was preempted under *Bracker* balancing. *Marty Indian School Bd., Inc. v. South Dakota*, 824 F.2d at 685, 687-88.

[7] The Tribe disputes the expert's estimate as being too low, because it was based on inadequate analysis. *See* Tribe's Response to State's SUMF 94.

In notable contrast to the State's insistence that in no case has the "Supreme Court ruled against a state's jurisdiction to tax nonmembers' activity solely because it imposed an economic burden on a tribe," Doc. 124 at 28, Justice Rehnquist's dissent in *Ramah* accused the majority of doing just that. He stated, "A careful reading of the Court's opinion demonstrates that the single, determinative factor in its judgment is the fact that the challenged state taxes have increased the financial burden of constructing a tribal school." *Ramah* at 853 (Rehnquist, J., dissenting). The majority, of course, would disagree with this assessment, pointing also to the comprehensive regulatory scheme. In any event, the indirect financial burden on the tribe was more central to preempting the taxes in *Ramah* than the State now acknowledges. Moreover, the Tribe's economic burden is not, and has never been, the sole basis for the State's lack of taxing authority in this case.

E. The on-reservation value added to the taxed purchases weighs in favor of the Tribe.

The State distinguishes the "value added" analysis in *Indian Country, U.S.A.*, because here, the State is not attempting to tax the actual play of games. Doc. 124 at 31. But *Indian Country, U.S.A.* was not solely about taxing actual game play either. The preempted taxes also would have been imposed on "bingo-related activities," including "food services for patrons" and sales of "bingo supplies and accessories." *Indian Country, U.S.A.* at 970, 972. The Tenth Circuit found the tax was "directed solely at on-reservation value," namely at "a form of entertainment that is wholly created, sold, and consumed within the boundaries of Creek Nation lands" – not just bingo, but the related activities as well, which together were intended to constitute "well-run entertainment" provided to patrons in "'comfortable, clean and attractive facilities.'" *Id.* at 986 (quoting *California v. Cabazon Band of Mission Indians*, 480 U.S. at 219).

Further, neither *Indian Country, U.S.A.*, nor *Cabazon* can be distinguished on the basis that either decision afforded greater preemptive force because the exercise of state authority interfered

with "the actual play of games." Doc. 124 at 31. Before Congress enacted IGRA, there was no basis for the distinction between the actual play of games and other related activities which the State now locates in IGRA. Both cases were decided before IGRA's enactment, so their analyses were generally applicable, not founded on unique treatment of "gaming," narrowly defined.[8]

The Tribe has addressed elsewhere the State's contention that the "value of the products sold at the Licensed Premises is generated off the reservation." Doc. 124 at 31. *See* Doc. 130 at 27-31; Doc. 117 at 27. This includes the State's assertion that *Colville* rejected outright that any "value" of weight can ever be found in a Tribe's investment in the basics of operating a business on the reservation – a notion the State pulls out of its context, and which was never meant to apply universally. Doc. 124 at 31; *see* Doc. 130 at 27-28.

F. The State services do not justify the imposition of use tax.

The Tribe has also already addressed the State's view that the off-reservation services the State makes available contribute to its interest in taxing Casino purchases. Doc. 124 at 32. *See* Doc. 130 at 31-40. The State's reliance on *Cotton Petroleum* for this point is misplaced because *Cotton Petroleum* only held that general off-reservation services were relevant to whether the otherwise valid taxes – already upheld under *Bracker* – unlawfully burdened interstate commerce through multiple taxation. *Cotton Petroleum* at 187-91. In *Bracker* balancing, including *Cotton Petroleum*'s balancing analysis, the state services that justify the assertion of on-reservation taxing authority are services provided to those who bear the burden of the tax, having a direct, clear and

[8] In *Ledyard*, the Second Circuit erroneously characterized *Indian Country, U.S.A.* as having held that "IGRA's regulation of gaming itself is sufficiently comprehensive to prevent *any* tax on casino sales not accounted for in the compact." *Mashantucket Pequot Tribe v. Town of Ledyard*, 722 F.3d 457, 473 fn.16 (2d Cir. 2013). *Indian Country, U.S.A.*, however, was decided more than one year before IGRA's enactment on October 17, 1988. There was, in 1987, no IGRA and no requirement that state taxation "on casino sales" must be accomplished, if at all, through "the compact."

critical connection to the on-reservation activities to be taxed. *Id.* at 171 fn.7, 185-86; *New Mexico v. Mescalero Apache Tribe*, 462 U.S. at 335; *Ramah* at 843; *Seminole Tribe of Florida v. Stranburg*, 799 F.3d at 1342; *Hoopa Valley Tribe v. Nevins*, 881 F.2d at 661. The services the State identifies, Doc. 124 at 33, are insufficient under this standard because they bear little or no connection to nonmembers purchasing goods and services from the Casino on the reservation. *See* Doc. 130 at 38-40.

The State also makes much of its inference that almost all "Players Club members who reside in South Dakota are in all likelihood using state services, more consistently than the Tribe's services." Doc. 124 at 35. The State ignores the fact that nearly half of Players Club members do not reside in South Dakota. SUMF 10; Tribe's Response to State's SUMF 10. Setting aside the fact that generally available State services provided off-reservation lack the necessary connection to the taxed activity, the State does not explain how the inference that half the nonmember guests use South Dakota governmental services justifies the State's authority to impose use tax on *all* the nonmember guests, when the other half "in all likelihood" use the services of their home states more than they do South Dakota services. Further, the State ignores the fact that it receives sales tax every time any Casino patron travelling through the State engages in any business transaction outside the reservation, and is therefore already compensated for services provided in off-reservation locations. *See Ramah* at 844 fn.9.

The State's *Chickasaw* and *Quill* citations are completely inapposite. *See* Doc. 124 at 36 (citing *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 463 (1995) (quoting *New York ex rel. Cohn v. Graves*, 300 U.S. 308, 313 (1937)); *Quill Corp. v. North Dakota*, 504 U.S. 298, 306 (1992) (quoting *National Bellas Hess, Inc. v. Dept. of Revenue*, 386 U.S. 753, 757 (1967))). In the cited section of *Chickasaw*, the Court upheld income tax imposed on Indians domiciled within the

State, outside the reservation, for their income earned on-reservation, based on the "well-established principle of interstate and international taxation … that a jurisdiction … may tax *all* the income of its residents, even income earned outside the taxing jurisdiction[.]" *Chickasaw* at 462-63. Thus, the Court highlighted the connection between the tax and in-state "domicil."

Quill dealt with a state use tax collection requirement imposed upon an out-of-state mail-order retailer, which the Court evaluated under the Due Process Clause and Interstate Commerce Clause. *Quill* at 302-03, 305-06. In the cited section of *Quill*, the Court was recounting the history of its Due Process jurisprudence, and in the quoted passage was describing the state of the law in the years before it "evolved substantially" beginning with *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). *Quill* at 306-07. The gist of the quoted language is that, at least through the *National Bellas Hess* decision in 1967, "some sort of physical presence within the state" was necessary for taxing jurisdiction under the Due Process Clause. *Id.*[9] Due Process, however, whether it is satisfied by minimum contacts or requires physical presence in the state, is not the Supreme Court's doctrinal approach to questions of state taxation within Indian country, notwithstanding dissenting opinions urging otherwise. *See Ramah* at 854 fn.4 (Rehnquist, J. dissenting); *Bracker* at 158 (Stevens, J., dissenting). As described above, under the *Bracker* test, state services of the type provided generally to all residents, or to those physically present in the state, or even to those who have some sort of minimum contacts with the state, do not justify an on-reservation state tax if the services are unconnected to the taxed activity. *E.g.*, *Bracker* at 150-51.

[9] *Quill* held that the Due Process requirements had become less restrictive since then, *id.* at 307-308, although the Interstate Commerce Clause still required a more "substantial nexus" with the taxing state than the "minimum contacts" sufficient for Due Process, *id.* at 313.

G. The State interest in raising revenue does not justify the imposition of use tax.

Seeking to circumvent the flimsy connection between the State's tax, its governmental services, and the on-reservation purchases to be taxed, the State argues that "a state's interest in raising revenues for deposit into a general purpose fund (for use throughout the state) is enough to outweigh even highly federally regulated activity." Doc. 124 at 36-37. *Cotton Petroleum* is the State's authority. The state fund into which New Mexico deposited the tax revenues was not significant to the *Cotton Petroleum* Court, so the fact seems to have gone unremarked in the opinion. What was significant instead was the $3 million of on-reservation services the State provided to the Tribe and the non-Indian taxpayer, including regulatory services directly related to the taxed mineral extraction. *Cotton Petroleum* at 185-86 & fn. 7.

Cotton Petroleum is distinguishable from this case in many ways, as the Tribe has discussed in this brief and others. *See* Doc. 117 at 15; Doc. 130 at 18, 21-24, 34-35. One feature of *Cotton Petroleum* is that the Court found there was "simply no history of tribal independence from state taxation" of the mineral leases at issue. *Cotton Petroleum* at 182. The Court reached this conclusion based in part on the Indian Oil Act of 1927, which "expressly waived immunity from state taxation of oil and gas lessees operating in … reservations" including the Jicarilla Apache Reservation at issue. *Id.* Congress was silent regarding such taxation in the subsequent Indian Mineral Leasing Act of 1938. The Court perceived that Congress was aware, in 1938, that any tax exemption for a federal lessee (including a lessee of Indian lands for mineral production) must now be expressly stated, since lessees and other government contractors were no longer treated as federal instrumentalities entitled to federal tax immunities. *Id.* "Thus, Congress' approaches to both the 1927 and 1938 Acts were fully consistent with an intent to permit state taxation of nonmember lessees." *Id.* at 182-83.

The State asserts that "the Supreme Court only relied on the 1927 Act that expressly allows state taxation to highlight the distinction" between the old doctrine and the one that emerged by 1938. Doc. 124 at 38-39. But it was more than that. The Court itself explained that its "review of legislation that preceded the 1938 Act … is relevant in that it supplies both the legislative background against which Congress enacted the 1938 Act and the relevant 'backdrop' of tribal independence." *Cotton Petroleum* at 180. The "backdrop" was critical because it turned out to be starkly different from the backdrop in cases like *Bracker*, *Ramah*, and *Cabazon*. A backdrop in which "tribal sovereignty … historically gave state law 'no role to play' within a tribe's territorial boundaries" animates the *Bracker* test's broad view of the federal policies that aim to maintain that sovereignty and "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. at 112 (quoting *Okla. Tax Comm'n v. Sac and Fox Nation*, 508 U.S. at 123-24, and *McClanahan v. Ariz. Tax Comm'n*, 411 U.S. at 168) (internal quotation marks and alterations omitted). In contrast, the "backdrop" in *Cotton Petroleum*, where there was "no history of tribal independence from state taxation" of mineral lessees, *Cotton Petroleum* at 182, led the Court to construe congressional silence in 1938 as "fully consistent with an intent to permit state taxation," *id.* at 182-83. That finding also informed the balancing test, such that little or no weight was given to any tribal and federal interests in tribal sovereignty and self-government within the reservation, *id.* at 185-87.

II. IGRA Preemption.

A. IGRA preempts the imposition of State use tax on purchases from a tribal casino, regardless of whether the purchased items could be made the subject of a gaming compact.

Section 2710(d)(4) of IGRA, read in light of the congressional purposes stated in IGRA and the basic facts of how the Tribe's Casino and the gaming industry operate, expresses Congress' intent not to allow states to impose taxes on purchases from tribal casinos.

The State's opposition brief mischaracterizes the Tribe's IGRA argument. The State says, "The Tribe maintains that all activities the State seeks to tax at the Licensed Premises are 'subjects that are directly related to the operation of the gaming activities' pursuant to 25 U.S.C. § 2710(d)(3)(C)(vii), IGRA's 'catchall provision.'" Doc. 124 at 3.[10] Pages 3-4 and 7-16 of the State's opposition brief are dedicated to refuting this argument, and the theme reappears elsewhere in the IGRA portion of the State's brief, *e.g.* at 21-22.

The Tribe does not contend that everything the State seeks to tax at the Casino is a subject "directly related to the operation of gaming activities." The Tribe does not contend that everything the State seeks to tax at the Casino is a compactible subject. This explains why the State finds "no analysis" in support of those arguments, Doc. 124 at 3, and explains why, as the State notes, the Tribe uses words that are different from the statutory phrase, *see* Doc. 124 at 8, 12. In fact, the Tribe's brief supporting its motion for summary judgment explained that the use tax at issue here does *not* come within the list of compactible subjects in 25 U.S.C. § 2710(d)(3)(C). Doc. 117 at 21 ("Under *Rincon* and this Court's previous Order, enforcement of the general use tax, therefore, is not something the State could have insisted on bargaining for in a gaming compact, because the tax revenues would not be earmarked for uses directly related to the operation of gaming activities.").[11]

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[10] For the sake of accuracy, the statutory language is: "…subjects that are directly related to the operation of gaming activities." 25 U.S.C. § 2710(d)(3)(C)(vii). The State's quotation adds an extra *the*. The Tribe made the same error in a prior brief. Doc. 117 at 20. The State's quotations on pages 8, 9, 12, 13, 14, 15, 21 of its opposition brief omit the word *activities*. The "operation" of "activities" is what the "subjects" must directly relate to, under § 2710(d)(3)(C)(vii). "Gaming" modifies "activities."

[11] The Tribe offers a note on compactible subjects and the *Rincon* case to refute what it believes are some incorrect statements and implications in the State's brief. *See* Doc. 124 at 9, 13 & fn.5. A tribe wishing to have class III gaming activity on its Indian lands "shall request" its home state to enter into compact negotiations. 25 U.S.C. § 2710(d)(3)(A). The state "shall negotiate with the Indian tribe in good faith[.]" *Id.* A gaming compact "may include provisions relating to" the

For IGRA to preempt the use tax, it is not necessary that the purchase to be taxed is a subject listed in § 2710(d)(3)(C). IGRA demands special scrutiny of those subjects, undoubtedly, but is also casts a larger shadow, encompassing a wider range of subjects than only those matters listed in the subparagraph that identifies provisions a tribal-state compact may include. IGRA expresses an overall concern with ensuring that states do not interfere with the federal goals, which are to be achieved through economically robust tribal casino operations. 25 U.S.C. §§ 2701(4), 2702. It contains an acknowledgement that states lack authority to impose any tax "upon an Indian tribe or upon any other person or entity authorized by an Indian tribe to engage in a class III activity," and an express disclaimer of any intention to allow such state taxation (with a very limited exception). 25 U.S.C. § 2710(d)(4). In this case, these statutory provisions mean the State cannot impose use tax on transactions that are part of the Tribe's Casino operation.

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subjects listed in § 2710(d)(3)(C). "IGRA limits permissible subjects of negotiation in order to ensure that tribal-state compacts cover only those topics that are related to gaming and are consistent with IGRA's stated purposes[.]" *Rincon Band of Luiseño Mission Indians v. Schwarzenegger*, 602 F.3d 1019, 1028-29 (9th Cir. 2010) (footnotes omitted). Thus, the list of subjects is only *permissive* in that a compact is not required to contain every provision listed, but it is *mandatory* in that, if a tribe requests negotiation on any of those subjects, the state "shall" negotiate in good faith on the requested subjects. *See Rincon* at 1030; *see also Cheyenne River Sioux Tribe v. South Dakota*, 3 F.3d 273, 281 (8th Cir. 1993) (state has alternatives to engaging in compact negotiations). Further, if a state wishes to have authority over any of the listed subjects, it is mandatory that such authority be found in a valid gaming compact. *Gaming Corp. of America v. Dorsey & Whitney*, 88 F.3d 536, 546-47 (8th Cir. 1996).

A tribe can sue a state in federal court for failing to negotiate or for negotiating in bad faith. 25 U.S.C. § 2710(d)(7)(A)(i). "[A]ny demand by the State for direct taxation of the Indian tribe or of any Indian lands" is evidence of bad faith. 25 U.S.C. § 2710(d)(7)(B)(iii)(II). A finding of bad faith sends the state back into negotiations or allows the tribe to conduct class III gaming without the state's approval. 25 U.S.C. § 2710(d)(7)(B)(iii)-(vii). In *Rincon*, the state's demand for revenue sharing constituted a "demand for direct taxation of the Indian tribe," and was therefore evidence of bad faith negotiations. *Rincon* at 1029-30. The demand was also a tax imposed on the Tribe ("imposed" because it was not bargained for in exchange for a "meaningful concession") in violation of § 2710(d)(4). *Rincon* at 1033-34, 1036-37. The additional fact that the shared revenue was to go to the state's general fund supported the further holding that the demand was "not an authorized subject of negotiation[.]" *Id.* at 1034.

B. Section 2710(d)(4) expressly prohibits State taxation.

The State misconstrues § 2710(d)(4), reading it too narrowly. The State claims "[t]he provision specifies the activity that is not to be taxed: 'a class III gaming activity[.]' … 'A class III gaming activity' is a defined term in IGRA[.]" Doc. 124 at 5.[12] But § 2710(d)(4) does not specify the activity that is not to be taxed, and the State's construction is nongrammatical. The provision reads:

> Except for any assessments that may be agreed to under paragraph (3)(C)(iii) of this subsection, nothing in this section shall be interpreted as conferring upon a State or any of its political subdivisions authority to impose *any* tax, fee, charge, or other assessment upon an Indian tribe or upon any other person or entity authorized by an Indian tribe to engage in a class III activity. No State may refuse to enter into the negotiations described in paragraph (3)(A) based upon the lack of authority in such State, or its political subdivisions, to impose such a tax, fee, charge, or other assessment.

25 U.S.C. § 2710(d)(4) (emphasis added). The first sentence contains two prepositional phrases that specify *who* the State lacks authority to impose any tax upon: (1) "upon an Indian tribe" and (2) "upon any other person or entity authorized by an Indian tribe to engage in a class III activity." The phrase "a class III activity" is part of describing the second group upon whom the State cannot impose a tax under § 2710, by reference to what those in the group are authorized to do. That second prepositional phrase no longer makes grammatical sense if, as the State suggests, the words "a class III activity" or "to engage in a class III activity" are severed from it and reattached elsewhere as the object not to be taxed. The words "authorized by an Indian tribe" (or "authorized by an Indian tribe to engage in") would be left hanging and incomplete – authorized to do what? In addition, if Congress had intended to bar taxes on "a class III activity" or "to engage in a class III activity," it would be superfluous to specify upon whom the tax could not be imposed, and

[12] Section 2710(d)(4) does not contain the words "a class III gaming activity." Presumably, the State means to focus on the words "a class III activity," which § 2710(d)(4) does contain.

unnatural to insert the two "upon [whom]" phrases into the middle of the "tax … to engage in a class III activity" phrase.

Furthermore, "a class III activity" is not a "defined term in IGRA," as the State asserts. Doc. 124 at 5. IGRA defines "class III gaming," 25 U.S.C. § 2703(8), but not "a class III activity." It is natural to construe "class III activity" as a broader term than "class III gaming," since *activity* encompasses more possibilities than *gaming*.

The State's implication that the interpretation of § 2710(d)(4) should be influenced by the fact that patrons under the age of 21 are not "authorized … to engage in a class III activity," *see* Doc. 124 at 6, forgets that Indian tax exemptions are generously construed and not to be given "an especially crabbed or restrictive meaning." *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. at 176.

The State relies on *Ledyard* for support, Doc. 124 at 5-6, citing *Mashantucket Pequot Tribe v. Town of Ledyard*, 722 F.3d 457, 469, 470 (2d Cir. 2013). However, *Ledyard* did not construe § 2710(d)(4) the same way the State does. *Ledyard* at 469. Its conclusion was not based on a narrow statutory construction, but on its perception that the tax on a vendor's ownership of property "[did] not produce acute economic effects that interfere with the relevant gaming practices," because the tax fell on ownership regardless of any tribal involvement; there was no taxed transaction with the Tribe, so the tax could not be considered to have been "targeted at gaming" in any sense. *Id.* at 469-70. *See* Doc. 130 at 48-49.

The State asserts that Congress' failure in IGRA to expressly prohibit "all state taxation within Indian country" favors a finding that IGRA does not preempt the State's use tax on Casino purchases. Doc. 124 at 7. However, as discussed elsewhere in this brief, the presumption is that states have no taxing authority within Indian country. Unlike other tax immunity contexts, it is

not necessary for Congress to expressly grant tax immunities for on-reservation tribal transactions. *See* § 1.A., *supra*. Indeed, any ambiguity as to the scope of IGRA's express provision which guards against states using taxation to erect impediments to tribal gaming operations must be construed in favor of the Tribe. *See Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 767 (1985); *see also* Doc. 130 at 44-45.

The State relies on two Department of the Interior letters and asserts that the Court "must defer to DOI's interpretation of the scope of IGRA[.]" Doc. 124 at 7 (citing Exhibits 17 & 18 to the Second Affidavit of Matt Naasz), 15 (citing Naasz Ex. 18). Even assuming either letter addressed the scope of IGRA, the Department (like the courts) must construe ambiguous statutes liberally in favor of Indians. *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1444-45 (D.C. Cir. 1988) (citing *Montana v. Blackfeet Tribe of Indians* at 766). An agency interpretation disfavoring Indians cannot be given deference. *Id.* at 1445 fn.8. The interpretation of IGRA generally that is most favorable to Indians is that it has a broad preemptive scope to maintain the barriers against state authority within Indian country, while it opens a narrow door to allow states to acquire authority only over gaming and matters directly related. *See* Doc. 130 at 41-43.

Neither letter, however, suggests a narrow preemptive scope for IGRA. The July 2011 DOI letter, which disapproved and severed a gaming compact provision that called for termination of the agreement if the Tribe breached the terms of a tobacco compact (Naasz Ex. 18, *see* Doc. 124 at 15), speaks to the narrow opening for state authority allowed by the gaming compact mechanism, but it does not address the outer extent of the jurisdictional barriers IGRA aims to maintain around tribal gaming operations. As the Washburn article states, the major purpose of keeping state authority strictly limited is to maintain reservations as "sanctuaries for tribal governments from state authority" even while allowing states to address their concerns about

gambling activities. Kevin K. Washburn, Recurring Issues in Indian Country Gaming Compact Approval, 20 Gaming L. Rev. & Econ. 388, 395 (2016).

With respect to construing § 2710(d)(4), the letters are not germane to this case. Both letters state that § 2710(d)(4) "prohibits the imposition of a tax, fee, charge, or other assessment on Indian gaming except to defray the state's costs of regulating Class III gaming activities." Naasz Ex. 17 at 3; Naasz Ex. 18 at 2. Both letters, however, were addressing "revenue sharing requirements in gaming compacts." *Id.* The specific concern with revenue sharing provisions is that they may constitute a "tax, fee, charge or other assessment on Indian gaming," which would violate IGRA in the absence of meaningful concessions that provide substantial economic benefits to the tribe. *Id.* Both letters state that the revenue shared with the state was only gaming revenue. *See* Naasz Ex. 17 at 2; Ex. 18 at 1-2. The Department therefore had no reason to describe the tax prohibition in terms of anything other than "Indian gaming." The letters do not demonstrate that § 2710(d)(4) prohibits taxes imposed only upon "gaming," narrowly defined.

If anything, the two letters show that the Department views § 2710(d)(4) as *expressly prohibiting* certain state taxation (unless validly consented to by the Tribe), rather than merely stating the more limited proposition that § 2710 does not confer authority to impose such taxes. *Cf. Rincon* at 1036 ("We have interpreted § 2710(d)(4) as precluding state authority to *impose* taxes, fees, or assessments, but not prohibiting states from *negotiating* for such payments where 'meaningful concessions' are offered in return." (emphasis in original)); *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. at 177 ("it should be obvious that Congress would not have jealously protected the immunity of reservation Indians from state income taxes had it thought that the States had residual power to impose such taxes in any event").

C. IGRA's stated purposes and legislative history demonstrate its preemptive scope and help to construe § 2710(d)(4).

The State's narrow reading of the statute matches its selective view of IGRA's purposes, which are not only "to regulate gaming and ensure the tribe is the primary beneficiary." Doc. 124 at 5. IGRA contains broad pronouncements of the federal purposes and tribal interests Congress intended to serve. The first one is "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1) (emphasis added). Congress enacted IGRA to secure Indian tribes' legal right *to operate* gaming (not just to regulate it) in order to generate revenue. The next one is "to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to" accomplish certain purposes, including "to ensure that the Indian tribe is the primary beneficiary of the gaming operation." 25 U.S.C. § 2702(2). The third express purpose is to establish a federal regulatory authority and federal standards for tribal gaming and to establish the NIGC, all of which IGRA declares "are necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue." 25 U.S.C. § 2702(3) (emphasis added). Again, Congress is highlighting its purpose of protecting the tribal revenue-generating operation of gaming.

The State turns to the legislative history, Doc. 124 at 17-18, but that, too, favors the Tribe. Prior to IGRA's enactment, remember, Indian tribes already possessed the right to operate casinos within tribal jurisdiction free from state civil regulatory restrictions, *Cabazon* at 221-22, and free from state taxation, *Indian Country, U.S.A.* at 987. IGRA reduced these tribal rights, by requiring a "Tribal-State compact governing the conduct of [class III] gaming activities." 25 U.S.C. § 2710(d)(3)(A). IGRA "extends to the States a power withheld from them by the Constitution." *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 58 (1996). Both the Act and its history are

quite clear that this congressionally authorized intrusion into, and infringement of, the sovereignty of Indian tribes within their reservation was meant to have a limited scope. *See* S. Rep. 100-446 at 6, 1988 U.S.C.C.A.N. 3071 (Aug. 3, 1988) ("In no instance, does S. 555 contemplate the extension of State jurisdiction or the application of State laws for any other purpose."); 134 Cong. Rec. S12643-01 (Sept. 15, 1988) ("Permitting the States even this limited say in matters that are usually in the exclusive domain of tribal government has been permitted only with extreme reluctance."). The legislative history quoted in the State's brief expresses the same intent, that the "compacting methodology" is narrowly aimed at class III gaming activities, to preserve tribal sovereignty to the greatest extent Congress perceived was possible. Doc. 124 at 18.

The Act and its history are also quite clear that, except for the few subjects suitable for a gaming compact, Congress intended to protect tribal casinos from impositions of State authority, including taxing authority. Senator Inouye stated,

> The committee recognizes and affirms the principle that by virtue of their original tribal sovereignty, tribes reserved certain rights when entering treaties with the United States, and that today, tribal governments retain all rights that were not expressly relinquished. …
>
> Further, it is the committee's intention that to the extent tribal governments elect to relinquish rights in a tribal-state compact that they might have otherwise reserved, the relinquishment of such rights … shall not be construed … as a general abrogation of other reserved rights or of tribal sovereignty. …
>
> [U]nder S. 555, there is no blanket transfer to any State of any jurisdiction over Indian lands. Indian tribes are sovereign governments and exercise rights of self-government over their lands and members. This bill does not seek to invade or diminish that sovereignty.

134 Cong. Rec. S12643-01. Senator Evans stated in the Select Committee on Indian Affairs' report:

> [T]his bill should be construed as an explicit preemption of the field of gaming in Indian country. Thus, in accordance the fundamental legal principles upon which the Supreme Court relied in deciding *Cabazon*, where the Federal Government has preempted a field affecting Indians or Indian tribes, there should be no balancing

> of State public policy and interests when they conflict with tribal rights except where expressly provided in this bill.

S. Rep. 100-446 at 36. Senator Evans spoke again to the Senate in support of the bill:

> [I]f tribal rights are not explicitly abrogated in the language of this bill, no such restrictions should be construed. This act should not be construed as a departure from established principles of the legal relationship between the tribes and the United States. Instead, this law should be considered within the line of developed case law extending over a century and a half by the Supreme Court, including the basic principles set forth in the *Cabazon* decision. …
>
> [T]he Indian gaming regulatory act should not be construed, either inside or outside the field of gaming, as a derogation of the tribes' right to govern themselves and to attain economic self-sufficiency.

134 Cong. Rec. S12643-01. The Senators who enacted IGRA spoke of preempting "the field of gaming," thereby barring any state impositions that "conflict with tribal rights" within that field. One such conflict with tribal rights within the field of gaming arises from states imposing their taxes upon tribal casino activities. Construing § 2710(d)(4) to bar such taxes is therefore in support of the intent of Congress evident in the legislative history.

Senator Daschle of South Dakota spoke in opposition to IGRA, despite having been an original cosponsor of the bill. He stated that the "Indian tribes from South Dakota whom I represent … strongly object to any form of direct or indirect State jurisdiction over tribal matters." 134 Cong. Rec. S12643-01. He continued:

> They believe the provisions calling for a Tribal-State compact are in derogation of the status of Indian tribes as domestic sovereign nations. The direct or indirect application of State law in Indian country, they believe, is a dangerous and unwarranted precedent for further inroads upon tribal sovereignty. They further believe that opponents to Indian self-determination and strong tribal government will use this unwarranted precedent as a justification for State taxation, zoning, water regulation and further jurisdiction over tribal economic activities.

Id. The State in this case is demonstrating that South Dakota's Indian tribes were right to recognize these dangers. Congress made as clear as it could that it intended to prevent all such intrusions into the tribal economic activity at hand, except as may be agreed in a compact.

D. The use tax interferes with the casino operation.

The State's argument relies upon very close distinctions. It suggests a distinction between "the success of the operation" (or "the success of the gaming") and "the operation of the gaming." Doc. 124 at 12.[13] The implication is that IGRA is concerned with the "operation" and indifferent to the "success." IGRA's expressly stated purposes indicate otherwise. Each of IGRA's three purposes as identified in § 2702 is explicitly aimed, in part, at making tribal gaming an economic success for the tribe. Congress did not enact IGRA just to provide Indian tribes a firm basis on which to "operate" gaming, but to ensure that by doing that, tribal governments can raise revenue, build the reservation economy, and be economically self-sufficient. 25 U.S.C. § 2702. The State's use tax interferes with those federal aims by reducing the economic benefit the Tribe can realize from its gaming enterprise.

The evidence shows that the goods and services to be taxed directly support the federal and tribal interests in using gaming to generate tribal revenue. Like the amenities offered at nearly all Las Vegas-style casinos, the Casino's amenities are complements to the gaming, and federal regulators, tribal regulators, and Casino management all act in accordance with this principle. *See* TSUMF 71-173; *see generally* TSUMF 27-35 (identifying and detailing the amenities offered). Imposing additional costs on the amenities not only reduces demand for the amenities, negatively affecting Tribal revenues from the casino enterprise, but also, because of the complementary relationship, reduces demand for gaming itself. *See* TSUMF 334-363.

[13] The State makes a similar distinction between "the playing of games" and "the Tribe's operation of the class III games." Doc. 124 at 15. It should be evident that the customer playing the games and the Tribe operating the games are two sides of the same transaction. The State offers no reason, and none exists, why IGRA would preempt a tax imposed on items related to the "operation," but would allow a tax imposed on items related to the "playing." Nor is it apparent how any item can be related to one, but unrelated to the other.

It is insignificant that even if the State use tax were imposed, the Tribe would remain the "primary beneficiary of the gaming operation[.]" 25 U.S.C. § 2702(2); *see* Doc. 124 at 19. The tax interferes and is incompatible with IGRA's broad intent to establish tribal casino operations as an economic activity that stands as a federally-protected "means of generating tribal revenue" and "a means of promoting tribal economic development, self-sufficiency, and strong tribal government." 25 U.S.C. § 2702(1), (3). Congress did not intend to allow states to siphon money from the reservation on the single condition that the tribe is left with a preponderance of the operation's overall benefit.

E. The IGRA-based alcohol regulation claim is moot.

The State discusses its authority to regulate alcohol at the Casino, and whether IGRA expressly or impliedly repealed the State's delegated authority to regulate alcohol, concurrently with the Tribe, under 18 U.S.C. § 1161. Doc. 124 at 19-21. Issues of regulation (as opposed to taxation) are not part of the Tribe's summary judgment motion, and the Tribe has argued that such issues are not presently ripe for summary judgment. *See* Doc. 130 at 53-59.

In any event, it is quite possible for IGRA to preempt the imposition of the use tax upon all Casino purchases, including alcohol, without repealing 18 U.S.C. § 1161. This is so because § 1161 delegates to the State a limited authority to regulate alcohol within Indian country, and to the extent it also gives the State authority to tax such alcohol, that power is subject to the same limitation – the tax must be primarily in support of the State's liquor control regulations. *See Squaxin Island Tribe v. State of Wash.*, 781 F.2d 715, 720 (9th Cir. 1986). A generally-applicable use tax whose revenue feeds only the State's general fund is insufficiently related to alcohol regulation, even when, in a particular instance, the general tax is imposed on purchases of alcohol. If IGRA would preempt State use taxes imposed on Casino purchases, § 1161 provides no island of authority to impose the use tax on liquor purchases.

III. Tax Credit.

The State's argument regarding the need to provide a tax credit on a nondiscriminatory basis focuses in part on two sovereigns having concurrent legitimate authority to tax the same transaction. *See* Doc. 124 at 42. One does not "oust" the other. *Id.* This point would perhaps support the conclusion that, in the abstract, neither the State nor the Tribe is obliged to offer a tax credit when both impose a valid tax on the same transaction. But it says nothing about the Tribe's claim, which is that when the State chooses to offer use tax credits for the sales taxes consumers pay to other states and their political subdivisions, it is unlawfully discriminatory not to offer the same credit for sales taxes paid to the Tribe. The State need not provide any credits at all, but when it does, it cannot discriminate.

The State emphasizes that "revenue" is relevant to the issue. Doc. 124 at 42. Revenue was relevant in *Wagnon* because "Kansas uses 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, including the main highway used by the Nation's casino patrons, [but] Kansas offers no such services to the several States or the Federal Government." *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. at 115. The State cannot muster the evidence to show that similar facts exist here. Instead, it simply says the South Dakota use tax generates revenue, which the State uses to provide the services generally available to all individuals within its borders. Doc. 124 at 42-43. Unlike the Kansas fuel tax, South Dakota use tax revenue is not dedicated to funding a particular type of government service related to the taxed items or activities, and unlike Kansas' maintenance of reservation highways, South Dakota does not pay for a significant portion of the costs of any on-

reservation program, facility or infrastructure having any connection to the taxed items or activity.[14]

In each of the cited decisions that invalidated state laws as discriminatory against tribal governments, the tribe was located within the exterior borders of the respective state. *Prairie Band Potawatomi Nation v. Wagnon*, 476 F.3d 818 (10th Cir. 2007); *Cabazon Band of Mission Indians v. Smith*, 388 F.3d 691 (9th Cir. 2004). These decisions demonstrate that the Tribe's "geographic inclusion within the boundaries of South Dakota," Doc. 124 at 40, does not disqualify it from being similarly situated, in relevant respects, to the other taxing jurisdictions whose sales taxes give rise to South Dakota use tax credits.

CONCLUSION

The Tribe respectfully requests that the Court grant the Tribe's motion for summary judgment on claims one, three, and four.

[14] It is important to distinguish between services provided by the State and by other local governments because the use tax is deposited into the State general fund, not with local governments. The State services actually provided on reservation, much less those provided to the Casino and its patrons while at the Casino, are *de minimis*. For example, there is not a single office or building for any state agency located on the Tribe's Reservation. TSUMF 286. The Tribe receives no state, let alone local, government funds for maintaining or constructing reservation roads, and instead, the Tribe contributes substantial funds to the maintenance and construction of off-reservation roads used by its patrons. TSUMF 325-327.

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Respectfully submitted,

FLANDREAU SANTEE SIOUX TRIBE

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WORD COUNT CERTIFICATE

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

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REQUEST FOR ORAL ARGUMENT

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