UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

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

INTRODUCTION

Pursuant to SDCL 10-46-2, the State of South Dakota (State) imposes a use tax "on the privilege of the use, storage, and consumption in this state of [goods[1]] purchased for use in this state at the same rate of percent of the purchase price of said property as is imposed pursuant to chapter 10-45 [sales tax]." *See also* SDCL 10-46-4 ("In addition, said tax is hereby imposed upon every person using, storing, or otherwise consuming such property within this state until such tax has been paid directly to a retailer or the secretary of revenue as hereinafter provided."). The use tax is complementary and

[1] South Dakota Codified Law uses the phrase "tangible personal property." *See e.g.*, SDCL ch. 10-46. For ease of reference, the State uses the term "goods" throughout this brief.

supplementary to the state sales tax, and only applies to certain transactions that have not been subjected to the state sales tax. *See Black Hills Truck & Trailer, Inc. v. S.D. Dept. of Revenue*, 2016 S.D. 47, ¶ 18, 881 N.W.2d 669, 674. The tax rate is the same for both and for budgetary purposes, the two taxes are one in the same. Defendants' Statement of Undisputed Material Facts (SUMF) 96; *see* SDCL 10-46-2. However, sales tax and use tax:

> are different in conception, [and] are assessments upon different transactions[.] A sales tax is a tax on the freedom of purchase[.] A use tax is a tax on the enjoyment of that which was purchased. . . . Though sales and use taxes may secure the same revenues and serve complementary purposes, they are, as we have indicated, taxes on different transactions and for different opportunities afforded by a State.

State v. Dorhout, 513 N.W.2d 390, 392 (S.D. 1994). Unlike the sales tax, in which the legal incidence is on the seller, the legal incidence of the use tax is on the consumer. SUMF 86; *compare* SDCL 10-45-2 *with* SDCL 10-46-2, -4.

For use tax purposes, the term "use" includes "the exercise of right or power" over goods and services. SDCL 10-46-1(17). For use tax purposes then, the use-taxable event occurs when a person exercises "right or power" over the goods or services in South Dakota. Therefore, for transactions occurring in South Dakota, use tax on the purchase price is generally imposed on the consumer at the time of purchase when the goods and services are received if sales tax has not been collected. SDCL 10-46-2, -2.1, -6.

In this case, the State sales tax does not apply to the Tribe's sale of goods and services at the Licensed Premises[2] as federal law prohibits the State from imposing its sales tax on a tribal retailer who is engaged in business on their tribe's reservation. *See Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 115 S. Ct. 2214 (1995). For this reason, when a consumer purchases goods or services from the Licensed Premises, no state sales tax is imposed and the use tax exemption for purchases on which sales tax has been paid does not apply. *See* SDCL 10-46-6. However, because the Licensed Premises are located within South Dakota, when a consumer purchases a good or service from the Licensed Premises and the consumer is not an enrolled member of the Tribe,[3] the state use tax is imposed on that nonmember[4] consumer's purchase.

United States Supreme Court precedent allows the State to have the tribal retailer collect from the nonmember consumer the State use tax and remit it to the State. *See, e.g., Oklahoma Tax Com'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 512-13, 111 S. Ct. 905, 911 (1991). Consistent with such precedent, the state alcoholic beverage laws require the Department of Revenue to deny reissuance of an alcoholic beverage license

[2] The Royal River Casino, the First American Mart, and the Royal River Family Entertainment Center are collectively referred to as the "Licensed Premises."

[3] Use tax is not imposed on a tribal member consumer's purchases from on-reservation Indian retailers when the consumer is an enrolled member of the governing Tribe.

[4] For purposes of this brief, "nonmember(s)" refers to individuals who are not members of the Flandreau Santee Sioux Tribe.

when the licensee fails to remit any taxes associated with the operation of the business, including any use tax obligations incurred by nonmembers within Indian country. *See* SDCL 35-2-24.

In bringing this action, the Tribe has challenged this legal framework. The Tribe challenges the State's ability to impose its use tax on nonmember consumers' purchase of goods and services at the Licensed Premises. It also challenges the State's ability to have the Tribal retailer collect and remit the use tax imposed on nonmember consumers; and it challenges the State's ability to condition reissuance of a liquor license on collection and remittance by the Tribe of the nonmember consumer's use tax liability. The Tribe's claims are based on express preemption through the Indian Gaming Regulatory Act, 25 U.S.C. 2701 et seq. (IGRA), implied preemption via application of the balancing of the relative interests, and through various other legal theories.

STATEMENT OF FACTS[5]

The State provides a substantial number of governmental services to individuals within its borders, including both non-tribal and tribal members alike. *See* Ex. A; SUMF 99. These services are provided, in part, using funds from the State's general fund. *See* Ex. A; SUMF 100. The state sales and use tax revenue accounts for the majority of the funds deposited into the State general fund. SUMF 97. It is the obligation of the Department of Revenue to

[5] This portion of the brief sets out only the general facts relevant to this litigation. A more detailed recitation of the facts pertinent to each of the Tribe's claims will be included in the specific section of the brief addressing that claim.

attempt collection of all legally imposed taxes, including the use tax SUMF 95. The noncollection of state use tax impedes the State's ability to provide necessary state services. SUMF 98.

The Tribe is a federally recognized Indian tribe, wholly located within Moody County, South Dakota. SUMF 1, 3. Within the reservation, the Tribe owns and operates the Royal River Casino, the Royal River Bowling Center (also referred to as the "bowling alley" or "Family Entertainment Center"), and the First American Mart (also referred to as "convenience store") [collectively referred to as the "Licensed Premises"]. SUMF 4. The State has issued three alcoholic beverage licenses to the Tribe: (1) License number RL-5579, issued to the Tribe d/b/a Royal River Casino; (2) License number RL-6191, issued to the Tribe d/b/a Royal River Family Entertainment Center; and (3) License Number PB-1462, issued to the Tribe d/b/a First American Mart. SUMF 79. In December 2009 and later in 2010, the State received separate applications from the Tribe seeking reissuance of these alcoholic beverage licenses. SUMF 81. The State denied the Tribe's applications for reissuance based on SDCL 35-2-24, because the Tribe had not been remitting the state use tax on nonmember purchases at the Licensed Premises since at least January 2009. SUMF 83-84. The Tribe appealed the denial through the South Dakota Office of Hearing Examiners. Doc. 59, p. 3. After the Department's decision was affirmed, the Tribe brought this action. Doc. 59, p. 3.

The Tribe and the State maintain a gaming compact, entered into pursuant to IGRA. SUMF 130. This Compact provides the terms under which

the Tribe is authorized to conduct class III gaming activities on its reservation. *Id.* The Compact is silent as to alcoholic beverage regulation and to imposition of State use tax. Doc. 32-3.

In the early 1990's, the parties sought judicial assistance to resolve this issue. SUMF 133. As part of that litigation, a deposit agreement was entered into which called for the Tribe to deposit a certain percentage of its net revenues into an escrow account. SUMF 133. The agreement called for the proceeds of the escrow account to be released to the party who prevailed on the taxability issues presented. SUMF 133. That case was dismissed without prejudice as the parties pursued settlement. Doc. 32, ¶¶100-101. The parties were unable to reach a settlement and the escrow account currently contains approximately $400,000. SUMF134. The Court's ruling in this matter will likely determine the recipient of these funds.

STANDARD

Pursuant to Federal Rules of Civil Procedure 56, summary judgment is appropriate when the moving party, using documents in the record, such as depositions, affidavits, admissions, and interrogatory responses, "shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." "By its very terms, this standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise property supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S. Ct. 2505, 2510

(1986). For the issue to be genuine, "the evidence [must be] such that a reasonable jury could return a verdict for the nonmoving party." *Id.* at 248. Addressing the materiality requirement, "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Id.*

ARGUMENTS

I. First, Second and Sixth Claims for Relief: IGRA Preemption

The Tribe's first, second, and sixth claims for relief, assert that IGRA preempts the State from imposing the use tax on nonmembers' on-reservation use of goods and services purchased at the Licensed Premises, from having the Tribe collect and remit that use tax, and from the State imposing its alcohol beverage licensing laws on the Tribe. The Tribe points out that IGRA permits States and Tribes to include provisions in a tribal-state gaming compact relating to seven topics, including "subjects that are directly related to the operation of gaming activities" (also known as the "catch-all provision"). 25 U.S.C. § 2710(d)(3)(C)(vii). In this case, the Tribe asserts that all activities at the Licensed Premises are "gaming activities" or "directly related to the operation of class III gaming activities" as provided in the catch-all provision.

As follows, the Tribe argues that if the State wanted to impose the use tax on nonmember consumers' purchase of goods and services at the Licensed Premises, have the Tribe collect and remit that use tax, and impose the State's alcoholic beverage licensing regulations, the State was required include those topics in the Tribe's and State's gaming compact. Because no such provisions

exist within the State and Tribe's compact, the Tribe argues that the State is otherwise preempted from any taxation activities or regulating alcoholic beverages at the Licensed Premises.[6] Doc. 32, ¶¶ 108-15.

However, the imposition of use tax on nonmember purchases at the Licensed Premises, including the hotel, restaurant, convenience store, gift shop, and RV park, and the state alcoholic beverage licensing laws are not "gaming activity" or an activity "directly related to the operation of gaming activities" as envisioned by IGRA. The taxation of goods and the state alcoholic beverage licensing regulations are activities that fall outside IGRA's preemptive scope. Such narrow interpretation of IGRA is reinforced by the United States Department of Interior and federal common law.

A. IGRA's catch-all provision authorizing gaming compact provisions on "subjects that are directly related to the operation of gaming activities"

1. Department of Interior's interpretation

First and foremost, the United States Department of the Interior (DOI), which is charged with approving state and tribal gaming compacts pursuant to

[6] The State admits that 25 U.S.C. § 2710(d)(4) preempts a tax or fee on the actual game play, unless it is an "assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity pursuant to 25 U.S.C. § 2710(d)(3)(C)(iii)." Here, the State does not impose, nor seek to impose, a tax on the actual play of games. SUMF 89. The State does charge fees pursuant to the gaming compact to cover costs, but those fees comply with 25 U.S.C. § 2710(d)(3)(C)(iii) and are not disputed in this case. *See* SUMF 132. The Tribe cannot establish that the State has attempted to tax the play of class III games. Therefore, 25 U.S.C. § 2710(d)(4) is inapplicable.

Additionally, the Tribe has recognized that state law provides an exemption of the use tax from gaming activities. SDCL 10-46-52. Doc. 42, p. 11.

25 U.S.C. § 2710(d)(3)(B), has signified that the scope of 25 U.S.C. § 2710(d)(3)(C)(vii) is indeed narrow. DOI's approval and disapproval letters are a clear statement regarding the federal government's view (keeping in mind the special trust relationship[7] it shares with the tribe) of what is authorized by IGRA and falls within the "subjects that are directly related to the operation of gaming activities."[8]

Kevin K. Washburn, in his role as former Assistant Secretary for Indian Affairs within DOI,[9] authored approval and disapproval letters on behalf of DOI. Washburn reviewed state-tribal gaming compacts and approved[10] or denied them based on whether the compact was within the scope of IGRA.[11] In

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[7] *Menominee Indian Tribe of Wisconsin v. United States*, 136 S. Ct. 750, 757, 193 L. Ed. 2d 652 (2016) (citing 25 U.S.C. § 450a(b), stating "Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole").

[8] In the catch-all provision, the phrase "gaming activities" is limited to the playing of the actual games. Congress specifically defined each of the three types of gaming "signifying that the gaming activity is the gambling in the poker hall, not the proceedings of the off-site administrative authority." *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024, 2032-33 (2014). Under *Bay Mills*' definition, the sales of alcoholic beverages and other goods and services at the Licensed Premises do not qualify as "gaming activities."

[9] Washburn was the former assistant secretary for Indian Affairs at DOI as well as a former general counsel of the National Indian Gaming Commission (NIGC). Ex. 1 at 394.

[10] Some compacts were "deemed approved," when DOI declined to issue either an approval or an affirmative disapproval. Ex. 1 at 390.

[11] In determining whether compacts were within the scope of IGRA, Washburn warns DOI is looking more critically at compacts that resolve matters "utterly unrelated to

(continued . . .)

a recent publication, Washburn made clear that "IGRA creates a relatively bright line about what can be addressed in a compact and, from a policy point of view[12], preserving that bright line is important." Kevin K. Washburn, *Recurring Issues in Indian Gaming Compact Approval,* 5 Gaming L. R. & Econ. 388, 393 (2016). (Attached to Affidavit of Matt Naasz, Ex. 1, hereinafter "Ex. 1").

Washburn indicates that not all activities or amenities within a Tribe's casino operation are "gaming-related" for purposes of IGRA. *See* Ex. 1 at 394 (explaining the amenities at a casino are "casino-related, but not gaming-related" for purposes of the application of IGRA). Washburn recognized that "[m]ost gaming operations have additional amenities that are connected in a business sense to the casino operation and are co-located with a casino, but do

(. . . continued)
the gaming activity" as provisions "related to non-gaming matters are usually illegal." Ex. 1 at 391-92.

[12] This is a reference to the policy, similar to the canon of construction that "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, 766, 105 S. Ct. 2399, 2403 (1985). DOI's policy is that interpretations should lean toward the benefit of greater tribal interests as a whole. Clearly the tribal interest reflected in the policy is that of overall tribal interest, which may not reflect an individual tribe's position, especially when the tribe's position is self-serving and against overall tribal interests. In this case, limiting the areas subject to compacts benefits tribal interests as states are not allowed to use "outside matters" to control or thwart gaming negotiations and thus, tribal sovereignty is preserved—this is the overall tribal interest. *See* Ex. 1 at 395.

Here, the Tribe's broad interpretation of IGRA is inconsistent with the narrow interpretation advocated by other tribes. *See* Affidavit of Matt Naasz, Ex. 34 (Amicus Brief of the Picayune Rancheria of Chukchansi Indians filed in *Rincon Band of Luiseno Mission Indians of Rincon Reservation v. Schwarzenegger*).

not themselves constitute gaming." *Id.* at 394-95 (emphasis added). Washburn stressed that "federal regulation governed by IGRA is premised, at least in part, on the notion that gaming activities pose unique risks not presented by golf courses, swimming pools, hotels, restaurants, spas, concert venues, RV parks, or concert centers."[13] *Id.* at 395. He concluded by stating, "[r]arely do any of the ancillary activities pose the kind of risks that Congress enabled states to address in Class III gaming compacts." *Id.*

In support of his conclusions, Washburn highlighted a California gaming compact where the parties "sought to create state jurisdiction over food and beverage services at the casino and drinking water quality on the reservation. The Department noted that 'the Tribe's provision of food, beverages, and drinking water to its patrons may occur on the same parcel [of land] on which it conducts class III gaming, [but] it does not . . . follow that it is "directly related [to gaming] under IGRA.'" Ex. 1 at 392-93 (brackets original)(citing Letter from Donald E. Laverdue, Acting Assistant Secretary for Indian Affairs, U.S. Department of the Interior, to the Hon. Greg Sarris, Chairman, Federated Indians of the Graton Rancheria (July 13, 2012[14]) at 11). *See* Doc. 41-2.

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[13] This Court appeared to agree with Washburn by recognizing that "[w]ere the various food, beverage, and other services to be within the scope of 25 U.S.C. § 2710(d)(3)(C)(vii), there would be no end to what other activities undertaken at an IGRA-sanctioned casino would fall under the IGRA's protection." Doc. 59, p. 21.

[14] Washburn is citing to the "Graton letter" (Doc. 41-2) this Court relied on and discussed in its memorandum decision. Doc. 59, p. 19-22.

Similarly, in a January 9, 2015 DOI decision issued by Washburn, he found the 2014 Amendments to the Forest County Potawatomi Community of Wisconsin and the State of Wisconsin's Class III Gaming Compact violated IGRA, stating "The calculation of the Mitigation Payment is based in part on revenue from Class II gaming, food and beverage, hotel and entertainment activity, none of which are directly related to Potawatomi's Class III gaming activity." Potawatomi Decision, Doc 38-1. DOI recognized that

> many tribes . . . have developed businesses or amenities that are ancillary to their gaming activities, such as hotels, conference centers, restaurants, spa, golf courses, recreational vehicle parks, water parks, and marinas. These businesses are often located near or adjacent to tribal gaming facilities. It does not necessarily follow, however, that such ancillary businesses are "directly related to the operation of gaming activities," and therefore subject to regulation or inclusion under a tribal-state compact.

Potawatomi Decision, Doc. 38-1, p. 6, n.32.

DOI's interpretation of IGRA makes clear the State's alcoholic beverage regulations and taxing of nonmember consumers' use of goods and services, other than the play of gaming, at the Licensed Premises are not encompassed within IGRA's statutory scheme and are not an authorized subject for consideration in IGRA compact negotiations. Because DOI is in charge of approving or denying gaming compacts and administering IGRA, its interpretation should be granted *Chevron* deference. *City of Arlington, Tex. v. F.C.C.*, 133 S. Ct. 1863, 1868 (2013). Given the *Chevron* deference, DOI's determination controls and the State is entitled to summary judgment on these issues.

2. Under Rincon, the collection of the state use tax is not "directly related to the operation of gaming activities"

A recent Ninth Circuit decision confirms that the State and Tribe cannot include provisions regarding the collection of the state use tax in its gaming compact because such provisions fall outside the scope of IGRA. In *Rincon Band of Luiseno Mission Indians of Rincon Reservation v. Schwarzenegger*, the Ninth Circuit interpreted the meaning of IGRA's catch-all provision, "directly related to the operation of gaming activities." 602 F.3d 1019, 1033 (9th Cir. 2010). California was attempting to include a general fund revenue sharing clause within the gaming compact with the Rincon Band, in which 10-15% of the Rincon Band's net gaming profits would be paid into the state's treasury. *Id.* The Ninth Circuit looked to the "*use* to which the revenue will be put" to determine if it was "an authorized negotiation topic under § 2710(d)(3)(C)(vii)." *Rincon*, 602 F.3d at 1033.

The Ninth Circuit held "that general fund revenue sharing is not 'directly related to the operation of gaming activities' and is thus not an authorized subject of negotiation under § 2710(d)(3)(C)(vii)." *Rincon*, 602 F.3d at 1034 (citing *Cabazon Band of Mission Indians v. Wilson,* 37 F.3d 430, 435 (9th Cir.1994) (holding that when fees go to the state's general fund, the relationship between the revenue payments and the costs incurred in regulating gaming activities is attenuated)). The Ninth Circuit explained that:

> [g]eneral fund revenue sharing, unlike funds paid into the RSTF and SDF[15], has undefined potential uses. *See* Cal. Gov. Code § 16300 (providing that the "General Fund consists of money received into the treasury and not required by law to be credited to any other fund."). Therefore, payments into the general fund cannot be said to be directly related to gaming.

Rincon, 602 F.3d at 1033-34. Importantly, the Ninth Circuit stressed that "IGRA does not permit the State and the tribe to negotiate over any subjects they desire; rather, IGRA anticipates a very specific exchange of rights and obligations[.]" *Rincon*, 602 F.3d at1039.

The facts in *Rincon* are similar to the facts before this Court, albeit the Tribe's and State's roles have reversed. Here, the funds generated by the use tax on nonmember consumers' purchase of goods and services at the Licensed Premises will be deposited into the State's general fund. SUMF 97. The State's general funds are used to provide various nongaming related services. SUMF 99-100; *see also* Ex. A. Thus, even if the state use tax were to fall on "gaming activities,"[16] the use tax on nonmember consumers' purchase of goods and services is not an authorized subject within IGRA's catch-all provision because the revenues of such will be deposited in the state general fund and used to provide nongaming related services. *See Rincon*, 602 F.3d at 1033 (noting that

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[15] The reference to the "RSTF and SDF" were the California funds at issue in *In re Indian Gaming*, which were found to be directly related to the operation of gaming activities because the funds went toward "gaming opportunities and compensation for the negative externalities caused by gaming are subjects directly related to gaming." *Rincon*, 602 F.3d at 1033 (citing to *In re Indian Gaming*, 331 F.3d 1094, 1111, 1114 (9th Cir. 2003).

[16] By this reference the State in no way concedes that the Tribe's sale of the goods and services at the Licensed Premises constitutes a "gaming activity".

"[w]hether revenue sharing is an authorized negotiation topic under [IGRA]" does not depend on the "mere fact that the revenue derives from gaming activities."). Thus, based on the Ninth Circuit's "use analysis" in *Rincon*, the State should be granted summary judgment as IGRA's scope does not include (and thus, does not preempt) the nonmember consumers' purchase of goods and services at the Licensed Premises when the taxes collected will be put to a nongaming use.

3. *Limited topics for gaming compact negotiations for the benefit of the Tribe*

As stated by Washburn, "Congress clearly and explicitly limited the scope of negotiations regarding the gaming compact" to the six subjects identified in 25 U.S.C. § 2710(d)(3)(C)(i)-(vi) and "a seventh subject, the so-called 'catchall'"—25 U.S.C. § 2710(d)(3)(C)(vii). Ex. 1 at 392. "By clearly, thoroughly, and explicitly identifying the subjects that can be addressed in a compact, Congress presumably intended to limit compacts to those subjects." *Id.* at 392. "Congress sought to prevent a state from using its right to compact negotiations to extend state authority beyond gaming[, presumably including] using that authority to force resolution of other issues, unrelated to gaming." *Id.* at 392. Congress did not want to allow a State to "withhold negotiation or consent in an effort to address matters not related to gaming, thus holding Indian gaming hostage to other demands." *Id.*

This is the exact scenario that this Court recognized when saying "it is clear from the legislative history that by limiting the proper topics for compact negotiations to those that bear a direct relationship to the operation of gaming

activities, Congress intended to prevent compacts from being use as subterfuge for imposing State jurisdiction on tribes concerning issues unrelated to gaming." Doc. 59, p 19 (citing *In re Indian Gaming*, 331 F.3d at 111). As stated in *In re Indian Gaming Related Cases*,

> Not all such subjects are included within § 2710(d)(3)(C)(vii), because that subpart is limited to subjects that are "directly" related to the operation of gaming activities. The committee report notes that Congress did "not intend that compacts be used as a subterfuge for imposing State jurisdiction on tribal lands." … The Court concludes that it was this concern that led Congress to limit the scope of § 2710(d)(3)(C)(vii) to subjects that are "directly" related to the operation of gaming activities. States cannot insist that compacts include provisions addressing subjects that are only indirectly related to the operation of gaming facilities.

In re Indian Gaming Related Cases, 147 F. Supp. 2d 1011, 1018 (N.D. Cal. 2001), *aff'd*, 331 F.3d 1094 (9th Cir. 2003)(citations omitted)(finding labor relations at the gaming facilities to be directly related to the operation of the gaming activities).

Yet here we have the reverse of Congress's concerns: the *Tribe* is attempting to force the State to negotiate on topics in areas that IGRA does not authorize. Moreover, the Tribe is expanding the topics for which the State must pursue in gaming compact negotiations, even though the language within the catch-all provision is permissive rather than mandatory. Had the State requested to include the longstanding tax dispute, now before this Court, within the context of the gaming compact negotiations, the Tribe likely would have cried "foul." *See Rincon,* 602 F.3d 1019. It appears that the Tribe's approach here has placed the State between the proverbial rock and a hard place.

4. The Indian canon of construction supports a narrow interpretation of the catch-all provision

The canons of construction apply when a provision is ambiguous—here the lack of an IGRA provision about taxation on goods or regulation of alcohol does not create ambiguity,[17] rather it is a clear statement about what cannot be included within the compact between the State and the Tribe. Courts "[a]s an initial matter,[ ]are reluctant to inject into the statute a purpose not codified within it. *Rincon*, 602 F.3d at 1034 (9th Cir. 2010) (citing *Exxon Mobil Corp. v. Allapattah Servs., Inc.,* 545 U.S. 546, 568, 125 S. Ct. 2611, 162 L. Ed. 2d 502 (2005)). However, if the Court were to apply the Indian canon of construction, the result favors the State. The Indian canon of construction requires the courts to interpret law in a manner that is most favorable to tribes in general. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766, 105 S. Ct. 2399, 2403 (1985).

As shown by Washburn's article, it is most favorable to tribes for a narrow interpretation of the catch-all provision. "Through the compact process, states have sometimes sought to expand the power that they can exercise over gaming to reach other activities beyond gaming and physical spaces beyond the casino floor." Ex. 1 p. 395. A narrow interpretation of the catch-all provision would benefit tribes by preventing a state from expanding

[17] No court has found that a state must include provisions in a gaming compact that relate to areas over which the State already has authority. Here, Congress granted states the authority to regulate alcohol within Indian country by enacting 25 U.S.C. 1161 and the state's authority to tax nonmember consumers' use of goods and services within Indian country.

what was intended to be a limited power. Ultimately, if taxation of the purchases of goods and services were included as "directly related to the operation of gaming activity," it would open gaming compact discussions to all sorts of areas not intended to be included and could result in negotiations being stalled or refused on reasons not related to class III gaming activities.

5. *Factually, the goods and services for sale at the Licensed Premises are not "directly related to the operation of gaming activities"*

Even if it is assumed that the *Rincon's* "use analysis" and the narrow interpretation of the catch-all provision does not dispose of all of the Tribe's claims, the facts reveal that the goods and services offered for sale at the Licensed Premises are not "directly related to the operation of gaming activities." Thus, the State and Tribe are not authorized to include provisions regarding the taxation of such in its gaming compact.

The operations of the Licensed Premises are organized into several relevant departments: slots, table games, food and beverage, hotel, RV park, entertainment center, convenience store, and gift shop. SUMF 6. This litigation is focused on whether the operations of those nine departments are "directly related to the operation of gaming activities" pursuant to IGRA. The State does not dispute that the slots and table games departments are gaming and, for that reason, the State is not and has not sought to tax nonmember consumers' use of those class III games. SUMF 87-89.

The remaining departments include food and beverage, hotel, RV park, entertainment center, convenience store, and the gift shop. These departments are not "directly related to the operation of gaming activities." The Tribe

repeatedly asserts that it is a "single gaming enterprise" that "intends to provide an attractive overall entertainment experience to patrons, in which every aspect of the business exists to support and enhance the gambling that takes place." *See* Doc. 32, ¶ 39. However, merely because an amenity may increase the success of the gaming activity, does not mean it is "directly related to the operation of the gaming activities" for purposes of IGRA. As Washburn said, "casino-related" does not equate "gaming-related. Indeed, the gaming operation can exist without the presence of the amenity, as evidenced by the fact that some patrons of the Licensed Premises do not game. SUMF 17. And conversely, the amenities may exist without the presence of the casino. *See, e.g.,* SUMF 9 (stating that the convenience store could survive on its own without the casino) and SUMF 57 (noting the only hotel in Flandreau is at the Licensed Premises).

The goods and services offered for sale at the Licensed Premises are not related to the operation of gaming activities, as evidenced by the fact that purchases at the nongaming departments (*i.e.,* the hotel, RV park, convenience store, bar, restaurant, and gift shop) do not result in consumers earning points on their Royal Rewards card or allowing them to move through the tier levels of the program, which could increase the consumers' "comps." SUMF 13-16. The only way in which a patron can earn points on their Royal Rewards card or earn "comps" is to increase their play of games. SUMF 13-15.

The Tribe uses the hotel, RV park, convenience store, bar, restaurant, snack bar, entertainment center, and gift shop as amenities to provide guests

with services and attract them to "stay, play and eat" to increase gaming. SUMF 17. This is especially true with regard to the food and beverage department, where the Tribe attempts "to compel people to choose us" by offering "very tasty food, but at a very compelling price, low price." SUMF 18. But while the Tribe's efforts to provide amenities to its patrons in order to attract more players may be "smart business," it does not bring all of those amenities within the scope of IGRA.

The lack of federal regulations over the goods and services offered for sale at the Licensed Premises also demonstrates that those goods and services are not directly related to the operation of gaming activities. Indeed, no federal regulations apply to the rental of hotel rooms and RV spots; the sale of sundry items at the convenience store; the sale of non-alcoholic beverages, bottled pop, groceries, deli items, jewelry, arts and crafts, novelty and gift items, and Royal River Casino apparel; the sale of food at the restaurant and snack bar; the sale of items in vending machines; or the operation of an arcade, shuttle bus, the convention center room, or live entertainment. SUMF 58. The compliance officer for the Licensed Premises, who is charged with ensuring all federal and tribal procedures are followed, testified that the tills from the food and beverage department are not physically escorted by security to the cage for deposit as they are "not part of gaming." SUMF 63-65. Moreover, the compliance officer was not aware of any federal regulations that the convenience store must comply with. SUMF 60. The compliance officer also testified that IGRA does not require general food and sanitation procedures. SUMF 61. On the

contrary, employees at the Licensed Premises are required to know, and actually follow, the State alcoholic beverage laws. SUMF 62.

Also, the physical set-up of the Licensed Premises' operations indicate that not all of the amenities are "directly related to the operation of the gaming activities." The convenience store and bowling center are in separate buildings. *See* SUMF 7-9. Further, all deliveries to the convenience store are made directly to the store and do not go through the receiving dock at the casino. SUMF 66.

The NIGC's requirements of the Tribal Commission on Gaming (Commission) also show that the amenities are not directly related to the operation of the gaming. The Commission is required to file reports with the NIGC regarding "every class III game" offered at the Licensed Premises, including the information about where the game was produced and how it operates. SUMF 74. The only time the Commission provides other information, such as financial, is when the NIGC requests it.[18] SUMF 75.

Further, the Commission is charged with issuing gaming licenses to employees of the Licensed Premises. SUMF 69. While the NIGC requires certain positions within a class III gaming operation to have a gaming license, it

[18] The testimony of Ronald E. Gilbert supports this argument. Gilbert, who until recently had been the executive secretary of the Commission for the past 28 years, testified that he was only aware of the NIGC requirements for "anything to do with regulatory, which is the gaming floor, the cage, accounting, floor walkers, slot techs, slot department. Those that – relate to actual gaming." SUMF 76-77. Gilbert also stated that IGRA does not regulate the sale of alcoholic or non-alcoholic beverages, groceries, jewelry, arts and crafts or novelty gifts, vending items, entertainment tickets, food items at the restaurant, or bar at the casino. SUMF 78.

is the Tribe that makes the final determination. SUMF 68-69. The following positions at the Licensed Premises are not required to have a gaming license: the restaurant bar manager, the restaurant supervisor, snack bar manager, snack bar supervisor, bar supervisor, host/hostess, server, cashier, snack bar staff, bartender, bar wait staff, cook positions, buffet attendant, dishwasher, banquet staff, hotel manager, shift supervisor, housekeeping supervisor, operator, night auditor, hotel attendant, shuttle bus driver, entertainment staff, the convenience store night supervisor and convenience store cashier/cook.[19] SUMF 70-72. While requiring a gaming license does not establish a direct relationship between the departments and the operation of the gaming activities, not requiring a license certainly weighs in favor of a determination that those departments are not directly related to the gaming operation. As actions speak louder than words, the Tribe's action in determining that most of the positions within food and beverage department (which includes the snack bar, the bar and the restaurant), hotel, and convenience store are not so directly related to gaming as to require a gaming license, speaks to their connection to the gaming operation—and it is not a direct one.

B. IGRA, in general

[19] Some positions only require one employee to have a license—another indication that the casino management does not believe the position is so directly related to gaming that all employees require licensure. *See* SUMF 70-73.

IGRA's congressional findings and declarations of purpose do not touch on alcohol regulation, taxation of goods and services purchased by nonmembers on-reservation, or the collection and remittance of use tax by a tribe. *See* 25 U.S.C. 2701-2702. In fact, the terms "liquor" and "alcohol" do not make a single appearance in any of IGRA's provisions. *See* 25 U.S.C. 2701-2721.

In order for a federal law to preempt state jurisdiction over nonmembers' activities in Indian country, the state jurisdiction must interfere with or be "incompatible with federal and tribal interests reflected in federal law, . . . it is enough that the state law conflicts with the purpose or operation of a federal statute." *Cabazon Band of Mission Indians*, 37 F.3d 430, 433 (9th Cir. 1994) (citations omitted). Courts are reluctant to find a statute to have "extraordinarily pre-emptive power" or be completely preemptive. *Gaming Corp. of America v. Dorsey & Whitney*, 88 F.3d 536, 543 (8th 1996)(citing *Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58, 65 (1987)).

> 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. IGRA's core objective is to regulate how Indian casinos function so as to 'assure the gaming is conducted fairly and honestly by both the operator and players.' 25 U.S.C. § 2702(2). Extending IGRA to preempt any commercial activity remotely related to Indian gaming-employment contracts, food service contracts, innkeeper codes-stretches the statute beyond its stated purpose.

Barona Band of Mission Indians v. Yee, 528 F.3d 1184, 1193 (9th Cir. 2008).

> "[C]ourts have held that IGRA's preemptive scope is not implicated in cases involving gaming management and service contracts with a tribe, [*Casino Res. Corp. v. Harrah's Entm't, Inc.*, 243 F.3d 435,

> 438-39 (8th Cir.2001)]; contracts to acquire materials to build a casino, *Barona Band,* 528 F.3d at 1192; and release of detailed investigative reports on the management of gaming, *Siletz,* 143 F.3d at 487."[20]

Mashantucket Pequot Tribe v. Town of Ledyard, 722 F.3d 457, 470 (2d Cir. 2013). "Not every contract that is merely peripherally associated with tribal gaming is subject to IGRA's constraints." *Casino Res. Corp. v. Harrah's Entm't, Inc.,* 243 F.3d 435, 439 (8th Cir. 2001).

In determining whether a state tax imposed on a third party is preempted by IGRA's occupation of the 'governance of gaming' field, courts have been quick to dismiss challenges to generally-applicable laws with *de minimis* effects on a tribe's ability to regulate its gambling operations. In *Mashantucket* the Second Circuit Court of Appeals determined that IGRA did not "expressly or by plain implication" preempt a Connecticut State tax imposed on lessors of slot machines used by a tribe at the tribe's casino as the tax did "not affect the Tribe's 'governance of gaming' on its reservation." 722 F.3d at 469 (citing *Barona Band of Mission Indians v. Yee,* 528 F.3d 1184, 1192 (9th Cir. 2008)). The Second Circuit ruled IGRA did not "directly preempt, by its text or by plain implication, the imposition of Connecticut's generally-applicable personal property tax." *Mashantucket*, 722 F.3d at 471.

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

Similarly, the taxation at issue here does not affect the Tribe's ability to regulate their gaming operations. If IGRA does not explicitly forbid a state from applying its personal property tax to a tribe's vendors who own the gaming machines, as in *Mashantucket*, then it does not forbid a state from imposing use tax on nonmember activities not related to any regulation of gaming activity, as here. No "field of gaming" regulation is at issue here, where the tax on property is not targeted at gaming. Thus, the imposition of the use tax in this case is in line with *Mashantucket's* finding that IGRA does not directly preempt by its text or implication a state's generally-applicable use tax on nonmember nongaming activities at a facility that provides gaming.

Contrary to the strained assertions of the Tribe, the state use tax and laws requiring tribes to collect and remit the use tax from nonmembers do not conflict with the Tribe's ability to regulate gaming activities. In fact, it has no bearing on the Tribe's "gaming operations". The alcoholic beverage licensing laws, imposition of use tax on goods and services, and required collection and remittance of use tax to the State do not involve the operation or regulation of "a roll of the dice," "a spin of the wheel," or a "crooked black jack table." *Bay Mills,* 134 S. Ct. at 2032.

Ultimately, the State's actions (as alleged by the Tribe) in no way regulate gaming or affect its operation, nor can the State's actions be interpreted as a concealed attempt to regulate tribal gaming. The state alcoholic beverage licensing laws and the state use tax laws can coexist, are reconcilable, and do

not conflict "with the purpose or operation" of IGRA. *Cabazon Band*, 37 F.3d at 433. Thus, IGRA does not preempt such laws.

C. Special case of alcohol regulation

In regard to the Tribe's sixth claim—that the State's imposition of its alcoholic beverage licensing laws violates IGRA[21]—even if this Court were to determine that the purchase of alcoholic beverages at the Licensed Premises was "directly related to the operation of gaming activities" for taxation purposes and therefore the state tax on those beverages was preempted by IGRA the State's alcoholic beverage laws are not preempted by IGRA.

In order for this Court to find that IGRA preempts the State's ability to impose its alcohol regulations—keeping in mind courts are reluctant to find federal statutes to have "extraordinary pre-emptive power"[22]—it would have to find at a minimum that IGRA impliedly repealed part of 18 U.S.C. 1161 because IGRA "occupied the field" of alcohol regulation. But as this Court noted, "no court has ever held that alcohol is subject to IGRA." Doc. 59, p. 19. Indeed, no case has found IGRA to occupy the field of alcohol regulation or that

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[21] In response to the State's Requests for Admissions, the Tribe admitted "that, pursuant to its applications for issuance and reissuance of the State alcoholic beverage licenses for each licensed premises, the Tribe agreed to comply with State statutory requirements for the applicable class of license, but only to the extent such requirements are valid and within the authority delegated to the State by Congress in 18 U.S.C 1161." SUMF 80. Response to Request No. 64. The Tribe does not mention or assert that the alcohol beverage license requirements are subject to IGRA. Therefore, the Tribe should be precluded from now asserting that IGRA preempts the imposition of the State alcohol beverage licensing regulations on the Tribe.

[22] *Gaming Corp. of Am. v. Dorsey & Whitney*, 88 F.3d 536, 543 (8th Cir. 1996).

18 U.S.C. 1161 has ever been partially repealed by any federal statute or that IGRA met the requirements for a "partial implicit repeal" of 18 U.S.C. 1161.

This Court recognized that "although states have no constitutional authority over Indian reservations, Congress [has] consistently authorized states to regulate or prohibit certain activities on the reservations." Doc. 59, p. 7 (quoting *Texas v. U.S.,* 497 F3d 491, 500 (5th Cir. 2007)). One of these congressional authorizations is found in 18 USC 1161.

In order to sell alcohol in Indian Country, Congress requires the Tribe to comply with the state laws and regulations regarding alcohol transactions through 18 U.S.C. 1161, which provides:

> any act or transaction [regarding the use and distribution of alcohol is not prohibited by federal law] within any area of Indian country provided such act or transaction is in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the [governing] tribe[.]

The United States Supreme Court determined that this language "leads us to conclude that Congress authorized, rather than pre-empted, state regulation over Indian liquor transactions." *Rice v. Rehner*, 463 U.S. 713, 726 (1983). By enacting section 1161, Congress delegated the authority to regulate alcoholic beverages within Indian country to the states, as states have "an unquestionable interest in the liquor traffic that occurs within its borders[.]" *Id.* at 722-29. Therefore, the Tribe must comply with the state laws and regulations in order to participate in the sale and use of alcohol within its reservation boundaries.

Other courts have determined that section 1161 specifically and plainly means that both state law and tribal ordinances[23] must be complied with for the lawful use of alcohol in Indian country. *See Fort Belknap Indian Cmty. of the Fort Belknap Indian Reservation v. Mazurek*, 43 F.3d 428 (9th Cir. 1994); *City of Timber Lake v. Cheyenne River Sioux Tribe*, 10 F.3d 554 (8th Cir. 1993); *Citizen Band Potawatomi Indian Tribe v. Oklahoma Tax Comm'n*, 975 F.2d 1459 (10th Cir. 1992); *Squaxin Island Tribe v. Washington*, 781 F.2d 715 (9th Cir. 1986)(upholding state tax on liquor sales to nonmembers and regulation of all tribal liquor sales); *see also* Felix S. Cohen, Cohen's Handbook of Federal Indian Law, 13.02 (5th Ed. 2012).

In *Squaxin Island Tribe v. Washington*, the tribe attempted to challenge the State of Washington's authority to both regulate and tax tribal liquor sales to nonmembers. 781 F.2d at 719. The Ninth Circuit rejected the tribe's challenge finding the tribe's sovereign immunity was not infringed relying on *Rice v. Rehner*, *Colville*; and *Moe*. *Squaxin*, 781 F.2d at 719. The Ninth Circuit stated, in upholding both the state tax on liquor sales to nonmembers and state regulation of all tribal liquor sales, that "[b]ecause there is no tradition of sovereign immunity in the area of liquor regulation or taxation and because the activity has potential for substantial impact beyond the reservation, we accord little, if any, weight to any weight to an asserted tribal sovereign interest. *Id.* (citing *Rice* 463 U.S. at 725, 103 S. Ct. at 3298).

[23]DOI's is required to approve the tribal ordinance. 18 U.S.C. 1161.

State authorization to regulate liquor on reservations and at casinos is also recognized by DOI, which is charged with the ability to disapprove a gaming compact "if it violates any other federal law[.]" Ex. 1 at 389. Washburn noted that DOI does not deny or disapprove gaming compacts which address liquor sales (or *Rice v. Rehner* or 25 U.S.C. 1161) at the concerned casino, "as State's have the power to regulate liquor in accordance to 25 U.S.C. 1161 and *Rice v. Rehner*." *Id.* The Tribe also recognized 1161's grant of authority to the State in their Response to Request for Admission No. 64 wherein the Tribe admitted it "agreed to comply with State statutory requirements for the applicable class of [alcoholic beverage] license, but only to the extent such requirements are valid and within the authority delegated to the State by Congress in 18 U.S.C § 1161." SUMF 80.

Given the clear language of section 1161, as well as its interpretation by the courts and the DOI, the Tribe faced a business decision: comply with South Dakota's alcoholic beverage licensure requirements or refrain from selling alcohol at the Licensed Premises. At all times pertinent, the South Dakota alcoholic beverage licensing scheme included the requirement that the licensee remit all sales and use tax owed to the State as a result of the operation of the licensed premises. *See* SDCL 35-2-24 (1990; 2006). Aware of this requirement, the Tribe chose to seek three licenses, sell alcohol, and applied for issuance, and then reissuance, of the three South Dakota alcoholic beverage licenses. SUMF 80, 82.

By applying for and being issued the alcoholic beverage licenses regulated by South Dakota law, it is undisputed that the Tribe voluntarily entered into a relationship with the State in order to be issued alcoholic beverage licenses. As part of the application process, the Tribe consented and agreed, like all licensees, to follow all the regulations and policies to maintain alcoholic beverage licenses. The Tribe subjected itself to all the requirements of state alcoholic beverage licensure, including in this case remittance of the lawfully imposed use tax obligation, when it applied for reissuance under SDCL 35-2-24.

If the Court were to hold that IGRA completely occupied the field of alcohol regulation on the casino floor, no state alcoholic beverage laws, such as those regarding the age of consumption, etc., would apply at the Licensed Premises. State regulation of alcohol, which Congress has deemed most important, would be disregarded. Ultimately, the Tribe's interpretation of IGRA would impliedly eviscerate Congress's grant of authority to the State under 18 U.S.C. 1161 without any clear language in IGRA compelling such result. *See Casino Resources Corp v. Harrah's Entertainment, Inc.*, 243 F.3d at 438 (reiterating the United States Supreme Court's finding in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 98 S. Ct. 1670 (1978), that "where Congress has sought to achieve competing purposes, courts must be 'more than usually hesitant to infer from its silence a cause of action' that will serve one of the legislative purposes but undermine the other.")

For the reasons and argument set forth above, the imposition of use tax on nonmember purchases at the Licensed Premises, including the hotel, restaurant, convenience store, gift shop, and RV park, and the state alcoholic beverage licensing laws are not an activity which "directly related to the operation of gaming activities" as envisioned by IGRA. The taxation of goods and the state alcoholic beverage licensing regulations are activities that fall outside IGRA's preemptive scope as a matter of law and the State's motion for summary judgment should be granted regarding the First, Second, and Sixth Claims for Relief.

II. Third Claim for Relief: Balancing of Interests

In the Tribe's Third Claim for Relief, the Tribe alleges that the Indian Commerce Clause and federal common law preempt the State's jurisdiction to impose state use tax on nonmember consumers' purchase of goods and services at the Licensed Premises. The Tribe argues that the use tax is preempted because "the Tribal interests and Federal interests in promoting Tribal sovereignty and Tribal economic development outweigh the State's interest in collecting the tax." Doc. 32, ¶ 118. However, United States Supreme Court precedent rejects such argument.

The legal incidence of the use tax is on the consumers, which in this case are the patrons of the Licensed Premises. *See, e.g.,* SDCL 10-46-2; 10-46-4; Doc. 32, ¶¶ 52-55. Here, the State is only attempting to impose use tax on nonmember consumers. *See* Doc. 32, ¶¶ 54-55; SUMF 87-88. Thus, because the legal incidence of the use tax falls on the nonmember consumers, the State

is not categorically barred from imposing use tax. *See Chickasaw*, 515 U.S. at 459.

When there is no categorical bar to state taxation, courts have turned to a balancing of the federal, tribal, and state interests to determine whether the state has jurisdiction to impose its tax. *Id.* at 459. In *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 100 S. Ct. 2069 (1980), the United States Supreme Court applied the balancing test to determine whether the State of Washington had jurisdiction to tax nonmembers' purchases of cigarettes from Indian-owned smokeshops[24] on an Indian reservation. *Id.* at 144, 154-61. The Supreme Court stated that "[t]he principle of tribal self-government, grounded in notions of inherent sovereignty and in congressional policies, seeks an accommodation between the interests of the Tribes and the Federal Government, on the one hand, and those of the State, on the other." *Id.* at 156-57. In weighing the federal and tribal interests against the State of Washington's interests, the Supreme Court upheld the state tax on nonmembers' purchases of the cigarettes. *Id.* at 154-61.

Less than three weeks after *Colville*, in *White Mountain Apache v. Bracker*, 448 U.S. 136, 100 S. Ct. 2578 (1980), the Court examined whether certain state taxes[25] imposed on a non-Indian enterprise's on-reservation

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[24] Three of the four Tribes that were plaintiffs in *Colville* were the retailers in the cigarette enterprises. *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 144, 151, 100 S. Ct. 2069, 2076-77, 2080 (1980).

[25] In *White Mountain Apache v. Bracker*, 448 U.S. 136, 100 S. Ct. 2578 (1980) the State sought to impose a 2.5 percent state motor carrier license tax on the motor

(continued . . .)

timber operations were preempted under federal law. *Bracker*, 448 U.S. at 137-38. The Court again balanced the respective interests, stating that it must make "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." *Id.* at 144-45. In applying the balancing test, the Court concluded that the state taxes were preempted by federal law because "there was no room for [the state] taxes in the comprehensive federal regulatory scheme." *Id.* at 148.

More recently, the Supreme Court applied the balancing test in *Cotton Petroleum Corporation v. New Mexico*, 490 U.S. 163, 109 S. Ct. 1698 (1989), to determine whether a state had jurisdiction to impose five severance taxes on a non-Indian corporation's on-reservation production of oil and gas. *Cotton*, 490 U.S. at 166. The Supreme Court ultimately upheld the severance taxes. *Id. at* 186. In doing so, the Court explained that a financial burden on the Tribe caused by the imposition of a state tax on nonmembers is not sufficient to preempt a state tax: "State[s] can impose a nondiscriminatory tax on private parties with whom the United States or an Indian tribe does business, even though the financial burden of the tax may fall on the United States or the Tribe." *Id.* at 175.

(. . . continued)
carrier's gross receipts and a $.08 per gallon use fuel tax on any fuel used to propel a motor vehicle on any State highways. *Id.* at 139-40.

In applying the balancing test to the particular circumstances of this case, the tribal and federal interests in exempting nonmember consumers from the use tax do not outweigh the State's interests in imposing the tax. Although the balancing test requires an analysis of the circumstances specific to each case, summary judgment is appropriate here because even if the Tribe's factual assertions are assumed to be true, those assertions are not enough to outweigh the State's interests under Supreme Court precedent. The following analysis of the federal, tribal, and State interests supports such conclusion:

A. Federal and Tribal Interests in Exempting Nonmember Consumers From the State Use Tax

1. Federal Regulation

The Tribe contends that the Indian Commerce Clause promotes the federal and tribal interests of tribal sovereignty and tribal economic development, and those interests outweigh the State's interests in imposing the use tax on nonmembers at the Licensed Premises. Doc. 32, ¶¶ 117-19. For this reason, the Tribe argues that the imposition of the use tax on nonmembers violates the Indian Commerce Clause. Doc. 32, ¶¶ 117-19. However, the Indian Commerce Clause neither explicitly preempts the use tax on nonmembers nor establishes interests sufficient to outweigh the State's interest in imposing the tax.

First, under the Indian Commerce Clause, Congress has the power to "regulate commerce . . . with the Indian Tribes." Article I, § 8, clause 3. The main purpose of the Indian Commerce Clause is "to provide Congress with plenary power to legislate in the field of Indian affairs." *Cotton*, 490 U.S. at

192. Because the Indian Commerce Clause only authorizes Congressional action but does not establish any federal regulation of Indian affairs itself, there is no direct conflict between the Indian Commerce Clause and the state use tax. *Compare* Article I, § 8, clause 3 *with* SDCL Ch.10-46. As the *Colville* Court stated, "[i]t can no longer be seriously argued that the Indian Commerce Clause, of its own force, automatically bars all state taxation of matters significantly touching the political and economic interests of the Tribes." *Colville*, 447 U.S. at 157.

The Tribe points to IGRA as the congressional action taken by Congress under the Indian Commerce Clause to preempt the use tax. *See generally* Doc. 32. *See also Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 116 S. Ct. 1114, 1117 (1996) (noting that IGRA was "passed by Congress pursuant to the Indian Commerce Clause"). However, as discussed above, IGRA cannot preempt the use tax because IGRA only regulates the operation of the gaming at the Licensed Premises, not the purchase of goods and services. Thus, there is no conflict between IGRA and the state taxation of nonmember consumers' purchase of goods and services at the Licensed Premises. *See supra* I.

Moreover, the federal and tribal interests apparent through IGRA are promoting tribal economic development only to the extent of ensuring the Tribe is the *primary* beneficiary of *gaming*. 25 U.S.C. 2702 (2). IGRA does not demand that the Tribe be the *sole* beneficiary of gaming *and other ancillary activities*. *Cf. Cotton*, 490 U.S. at 179, 180 (stating that through the enactment of certain federal legislation, "Congress sought to provide Indian tribes with a

profitable source of revenue[,]" but there is "no evidence for the further supposition that Congress intended to remove all barriers to profit maximization."). Therefore, the federal and tribal interests of ensuring that the Tribe is the main beneficiary of gaming do not weigh in favor of preempting the use tax on nonmember consumers' purchase of goods and services other than gaming.

As the Indian Commerce Clause and IGRA do not regulate nonmembers' purchases of goods and services other than gaming, neither conflict with the use tax or offer a "comprehensive federal regulatory scheme" that would leave no room for the use tax. *See Bracker*, 448 U.S. at 148. Further, neither establishes federal and tribal interests that weigh in favor of preempting the state use tax on nonmembers. Thus, the lack of federal regulation and related federal and tribal interests tips the balancing of interests in favor of the state's jurisdiction to tax nonmember consumers.

2. Economic Burden on Tribe

A number of tribal interests presented by the Tribe appear to revolve around the contention that a use tax on nonmember purchases would impose an economic burden on the Tribe. *See* Doc. 32, ¶ 118; SUMF 91. The Tribe's contention appears to presume the use tax on nonmember consumers will negatively affect the nonmembers' demand for goods and services at the Licensed Premises, which would reduce the Tribe's profits and tribal tax

revenues[26] at the Licensed Premises. *See* Doc. 32, ¶ 118; SUMF 91. Regardless, even if the Tribe's underlying premise is true, it is irrelevant and immaterial.

First, the Tribe has "no vested right to a certain volume of sales to [nonmembers], or indeed to any such sales at all." *See Colville*, 447 U.S. at 151 n.27. Moreover, in responding to the Tribe's claim that the use tax is an economic burden to the Tribe, the State is forced to undertake the exact analysis that the Supreme Court in *Chickasaw* warned against because tax administration must be predictable: "If we were to make 'economic reality' our guide, we might be obliged to consider, for example, how completely retailers can pass along tax increases without sacrificing sales volume-a complicated matter dependent on the characteristics of the market for the relevant product." 515 U.S. at 459-60. *Cf.* SUMF 93 (indicating that many factors can affect gaming revenue, including the opening of another casino, weather, and other events).

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[26] Because the Tribe operates the Licensed Premises and receives both the profits and tax proceeds from such, there is no difference between the Licensed Premises' profits *(e.g.,* gaming revenues) and the tax revenues it generates. *See Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 114-15, 126 S. Ct. 676, 688 (2005) ("Given that the Nation sells gas at prevailing market rates, its decision to impose a tax should have no effect on its net revenues from the operation of the station; it should not matter whether those revenues are labeled profits or tax proceeds."); SUMF 21 (noting that both revenue from the Licensed Premises and tribal tax revenue are sent to the Tribe). Indeed, both the gaming revenues and tribal tax revenues may be used to provide stimulus or per capita payments to tribal members. SUMF 22-23.

Colville confirms that any economic burden on the Tribe caused by the State's taxation of nonmembers is irrelevant. 447 U.S. at 184 n.9. "Economic burdens on the competing sovereign . . . do not alter the concurrent nature of the taxing authority." *Id.* at 184 n.9. In *Colville*, the Supreme Court upheld the state tax even though evidence[27] showed that the tax would substantially interfere with the Tribe's revenues. *See Confederated Tribes of Colville Indian Reservation v. State of Washington*, 446 F. Supp. 1339, 1347 (E.D. Wash. 1978), *aff'd in part, rev'd in part sub nom. Colville*, 447 U.S. 134 (stating that the facts showed "tribal taxes could not be a continuing source of income if tribal cigarette sales to non-Indians are also subject to State's cigarette tax; tribal cigarette sales to non-Indians would be eliminated and the cigarette sales commerce between the Tribes and non-Indians would be destroyed. Thus, each Tribe's ability to fund its sponsored programs would suffer substantial interference."). As the Court stated in *Colville*,

> [t]he effect of the state tax [may] be to reduce the tribe's governmental revenues and for the tribe to choose between losing those revenues by forgoing its tax or subjecting reservation retailers to a competitive disadvantage compared to those retailers outside the reservation not subject to the tribal tax. These may be the facts, but they are facts which *Thomas v. Gay* held to be irrelevant to the recognition of a sovereign tribal immunity.

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[27] Relying on the affidavit of the Confederated Tribe's expert, who was an economist "specializ[ing] in the area of American Indian economic development[,]" the District Court in *Colville* stated that "[c]igarettes are highly price elastic and even a small difference can have a substantial effect on purchasing habits." *See Confederated Tribes of Colville Indian Reservation v. State of Washington*, 446 F. Supp. 1339, 1347 fn. 5 (E.D. Wash. 1978), *aff'd in part, rev'd in part sub nom. Colville*, 447 U.S. 134.

447 U.S. at 183–84 (indicating that "*Thomas v. Gay* is a part of the 'backdrop' which supports" the State of Washington's jurisdiction to impose a cigarette tax on nonmembers' purchases of cigarettes on the reservation). *See also Bracker*, 448 U.S. at n.15 ("Of course, the fact that the economic burden of the tax falls on the Tribe does not by itself mean that the tax is preempted, as *Moe v. Salish* . . . makes clear."); *Wagnon,* 546 U.S. at 114 ("[T]he Nation cannot invalidate the Kansas tax by complaining about a decrease in revenues."); *Cotton*, 490 U.S. at 191 ("It is . . . reasonable to infer that the existence of the state tax imposes some limit on the profitability of Indian oil and gas leases-just as it no doubt imposes a limit on the profitability of off-reservation leasing arrangements-but that is precisely the same indirect burden that we rejected as a basis for granting non-Indian contractors an immunity from state taxation. . . "); *Barona Band of Mission Indians v. Yee*, 528 F.3d 1184, 1191-92 (9th Cir. 2008) (stating that although the imposition of a state tax on a nonmember contractor for performing construction work on a casino "may affect the overall profitability of the Tribe's casino operation[,]" [t]his alone . . . does not bar the imposition of the [state] tax") and that "[a]s with the related tribal interest, the federal government's interest in Indian economic vitality does not alone defeat an otherwise legitimate state tax"); *Squaxin*, 781 F.2d at 717 n.2, 719, 720 (in upholding a 17.1 percent state tax on a tribe's liquor sales to nonmembers, stating that "a state tax or regulation is not invalid merely because it erodes a tribe's revenues, even if the tax substantially impairs the tribal government's ability to sustain itself and its programs.").

Even if the economic burden on the Tribe is considered in this case, such burden does not justify preemption of the use tax. The use tax's effects on the nonmembers' demand for the goods and services, the value of those goods and services, and the Tribe's ability to tax such services may "at least be marginal." *See Cotton*, 490 U.S. at 186-87 ("It is, of course, reasonable to infer that the [8 percent state taxes on the severance of oil and gas] have at least a marginal effect on the demand for on-reservation leases, … and the ability of the Tribe to increase its tax rate"). But even so, "[a]ny impairment to the federal policy . . . that might be caused by these effects . . . is simply too indirect and too insubstantial to support [the Tribe's] claim of preemption." *See id.*

Here, the Tribe has not attempted to quantify any potential decrease in tribal revenues at the Licensed Premises due to the imposition of the use tax on nonmembers. *See* SUMF 92. The State has presented evidence that even if it is assumed that *all* of the patrons at the Licensed Premises are nonmembers, the annual adverse impact on the Tribe would likely be $33,531, but at the very most $268,248. SUMF 94. Thus based on the only estimate available, the 4.5 percent state use tax on nonmembers' purchases is "too indirect and too insubstantial" to preempt the State's jurisdiction. *See also* SDCL 10-46-2; SDCL 10-45-2 (establishing the use tax rate of 4.5 percent); *Cotton*, 490 U.S. at 186-87 (determining that an additional 8 percent in state taxes on the severance of oil and gas is not "an unusually large state tax" that would substantially burden a Tribe); *Yee*, 528 F.3d at 1191-92 (determining that a reduction of tribal revenues by $200,000 for one subcontractor's work, *plus the*

amounts for all other subcontractors' work, due to the imposition of a state tax on those subcontractors was insufficient to invalidate the state tax).

If a state could not impose a tax on nonmembers' on-reservation activity when such tax would have an economic burden on a tribe, there could be no state taxation of any nonmembers' on-reservation activity. *See Cotton*, 490 U.S. at 186-87 (noting that it is reasonable to infer that the state taxes have at least a marginal effect on the tribe). But the Supreme Court has firmly rejected such result: "Any adverse effect on the Tribe's finances caused by the taxation of a private party contracting with the Tribe would be ground to strike the state tax. Absent more explicit guidance from Congress, we decline to return to this long-discarded and thoroughly repudiated doctrine." *Id.* at 187. Accordingly, any economic burden on the Tribe in this case does not weigh in favor of preempting the use tax on nonmember consumers.

3. Value Added

The Tribe also asserts an interest because "[t]he value of the goods and services marketed to, and purchased by, non-members is generated by the Tribe through activities conducted by the Tribe on its reservation." Doc. 32, ¶ 118. The Tribe likely derives its "value added" tribal interest from the Court's statement in *Colville* that "[w]hile the Tribes . . . have an interest in raising revenues for essential governmental programs, 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*, 447 U.S. at 156-57. The Tribe asserts that it has added value to all

goods and services at the Licensed Premises and therefore its interest in raising revenues is strongest.

However, the Supreme Court arguably discarded the "value added" theory in its more recent decision in *Cotton*. As discussed above, in *Cotton*, the Court upheld a state's jurisdiction to impose taxes on a nonmember's severance of oil and gas from the reservation. *Cotton*, 490 U.S. at 166, 186. In upholding the taxes, the Court made no mention that the value of the taxed oil and gas was completely derived from the reservation. *See* 490 U.S. 163. Yet, it is difficult to think of something more derived from the reservation than the oil and gas beneath its soil.

Further, the value the Tribe claims to add to the goods and services is only the marketing and the general operation of the Licensed Premises. *See* SUMF 28-39, 43, 45-52 (indicating that the value added to the goods and services includes staffing, maintenance, cleaning, stocking, inventory, customer service, and food preparation); SUMF 53. But *Colville* itself 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. *See Colville*, 447 U.S. at 154-155 (upholding the state tax on nonmember purchases of cigarettes at the smokeshops even though the tribes were involved "in the operation and taxation of cigarette marketing on the reservation"). Indeed, if a state could not impose its tax on nonmembers patronizing on-reservation tribal retailers merely because the tribal retailer marketed its products and operated its business, there again could be no state

taxation of nonmembers' on-reservation activity. Such result has been repeatedly rejected by the Supreme Court. *See, e.g., Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation,* 425 U.S. 463, 96 S. Ct. 1634 (1976) (upholding state tax on Indian retailers' sales to non-Indians); *Colville*, 447 U.S. at 134 (upholding state tax on Tribal retailers' sales of cigarettes to nonmembers), *Cotton*, 490 U.S. at 163 (upholding state taxes on non-Indian's severance of oil and gas from reservation)*; Dept. of Taxation & Finance of N.Y. v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 114 S. Ct. 2028 (1994) (noting that the "[o]n-reservation cigarettes sales to persons other than reservation Indians are . . . legitimately subject to state taxation); *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma,* 498 U.S. 505, 111 S. Ct. 905 (1991) (upholding state tax on nonmembers' purchase of cigarettes from a Tribe's convenience store).

Even if the "value added" test is applied, in this case the value of the products sold at the Licensed Premises[28] is almost entirely derived off the reservation. SUMF 54-56. A majority of the goods are sold in the form the Tribe receives them. SUMF 54. The only goods the Tribe modifies before selling is certain food that is prepared. SUMF 55. But even the food products

[28] The Tribe has the following products and services for sale or rent at the Licensed Premises: Hotel rooms, RV park spaces, sundry items, fuel, cigarettes and tobacco, alcoholic beverages, nonalcoholic beverages, bottled soda, groceries, deli items, jewelry, arts and crafts, novelty and gifts, Royal River Casino apparel, vending machine items, arcade games, shuttle bus service, check cashing fees, food, convention center room, Royal River Casino and concert merchandise, and Event Center entertainment tickets, bowling, arcade games. SUMF 25-27.

are delivered to the Licensed Premises from off-reservation businesses. SUMF 56. These products are not derived from the reservation or "created on the reservation[,]" and thus, the Tribe's interest is weak, at best.

The Tribe's proposed application of the "value added" test must be rejected because it would be unworkable and unpredictable, especially in the context of a nonmembers' purchase of food items. It would be impossible to determine the amount of value added by the Tribe that would be sufficient to preempt the use tax. For example, much like the placing of cigarettes on the shelves at a tribal smokeshop is not value added by the Tribe pursuant to *Colville*, the placing of a dessert on the buffet at the Licensed Premises would not be value added. *Cf.* SUMF 41. But such test would require a case-by-case determination whether the Tribe added value if, for example, the Tribe chopped the vegetables, heated the vegetables, or added its own seasoning to the vegetables. SUMF 40, 42.

Moreover, the Tribe's food preparation and food products offered for sale could be ever-changing and consequently, under the Tribe's proposed "value added" theory, the state's jurisdiction would constantly be in flux. For example, the Tribe could later decide to add prepackaged frosting or homemade frosting to the prepackaged desserts it currently serves. *See* SUMF 41 (indicating that the restaurant uses prepackaged desserts). Would either change be sufficient to preempt the state's jurisdiction to tax a nonmember's purchase of the dessert? The application of such test would result in disarray of the State's taxation authority and directly contradict the Supreme Court's

declaration that "tax administration requires predictability." *See Chickasaw*, 515 U.S. at 459-60. For these reasons, the Tribe's "value added" argument must be rejected.

B. State interests

In this case, the State has a significant interest in imposing its use tax on nonmember consumers' purchase of goods and services at the Licensed Premises because of the vast array of services it provides and makes available to those consumers.

As a preliminary matter, all services provided both on and off the reservation by the State to the nonmember consumers must be considered in this case. As the Supreme Court stated in *Cotton*, "relevant services provided by the State include those that are available to the [taxpayers] and the members of the tribe off the reservation as well as on it. The value of citizenship in an organized society is not easily measured in dollars and cents[.]" *Cotton*, 490 U.S. at 189-90. *See also* Memorandum Opinion Granting in Part and Denying in Part Defendants' Motion for Summary Judgment, Denying Plaintiff's Motion for Summary Judgment, & Denying Plaintiff-Intervenor's Motion for Order Regarding Governmental Services, *Tulalip Tribes v. Washington*, No. 2:15-cv-00940-BJR, Doc. 131 at *14, (filed Jan. 5, 2017) [hereinafter *Tulalip Tribes Order*] ("To the extent [the State] can show that they 'provide the majority of the governmental services used by [the] taxpayers,' their interests may weigh more heavily. There is no requirement that these services be provided . . . on the reservation."). Indeed, the Supreme Court, in

Thomas v. Gay, 169 U.S. 264, 18 S. Ct. 340 (1898) recognized the availability of off-reservation services when upholding a tax on non-Indians' on-reservation personal property:

> [I]t cannot be maintained that those plaintiffs whose cattle are within the protection of the laws of Oklahoma receive no benefit from the expenditures in Kay county. Certainly they have some advantage in the improvement of the roads within that county, when they journey to and from the towns and settlements in the organized county. They are interested in the prevalence of the law and order in the communities adjacent to their property, and in the provision made for the care of the poor and insane. It is to be presumed that they have a right to send their children to the schools in the organized county.

Id. at 278.

Additionally, state services are available off the reservation to the consumers as they participate in the Licensed Premises' shuttle bus service, which has a 50 mile radius from the Licensed Premises, or when the patrons leave the Licensed Premises for off-reservation casino events. SUMF 19, 20. And indeed, a majority of the patrons of the Licensed Premises do not live on the Tribe's reservation. SUMF 11. Each of those patrons must pass through South Dakota's non-reservation land to access the Licensed Premises. SUMF 12. As follows, those patrons receive the benefit of state services as they travel to and from the Licensed Premises. *See* SUMF 122 (indicating that public safety services, state infrastructure, and other state services provided to patrons on their way to the Licensed Premises is a benefit to the Licensed Premises). Thus, all of these services provided to nonmember consumers both on and off the reservation must be considered in this case.

The state services that weigh in favor of the State's jurisdiction to impose the use tax on nonmembers are listed in Exhibit A attached to this brief. These state services are funded by the general fund (which the use tax is deposited into) and are provided to individuals within South Dakota's boundaries, including tribal members and nonmembers alike. *See* SUMF 99; Ex. A. The services include, for example, the following: funding for schools (Department of Education and Board of Regents); health and medical services (Department of Health); emergency management services (Department of Public Safety); Medicaid, economic assistance programs, and long-term care services (Department of Social Services); parks and recreation services (Department of Game, Fish, and Parks); court services (Unified Judicial System); and correctional systems (Department of Corrections). *See* Ex. A.

A number of these services are available at, or may benefit, the consumers of the Licensed Premises while they are patronizing the business, including but not limited to the following:

- The Tribe purchases water from the City of Flandreau for use at the Licensed Premises. SUMF 102. The State, through the Department of Environment and Natural Resources, certifies the operators of the City of Flandreau water system used by the Licensed Premises and enforces the drinking water standards. *See* SUMF 103.

- The basic training and advanced training of law enforcement personnel, including officers with the Flandreau Police Department and the Moody County Sheriff's Office.[29] SUMF 105.
- Criminal investigation services, including crime scene documentation, evidence collection, access to the Fusion center for criminal intelligence, and access to criminal histories. SUMF 106.
- Amber Alert and Endangered Missing Advisory services and sex offender registry services. SUMF 107.
- Statewide Automated Victim Information and Notification network services, which provide an automated messaging service to victims of violent crime regarding the status of the criminal case. SUMF 108.
- Disaster preparedness and response services and training for emergency management personnel. SUMF 109.
- State radio dispatch services for law enforcement and other public safety personnel. Ex. A.
- Inspection of fuel pumps. SUMF 110.
- The training of firefighters and fire investigation services. SUMF 111.

[29] The Tribe's Police Department, City of Flandreau Police Department, Moody County Sheriff's Office, and South Dakota Highway Patrol provide law enforcement services for the Licensed Premises. SUMF 104.

- The use of benefits at the Licensed Premises from the South Dakota Department of Social Services programs, including the Temporary Assistance for Needy Families program, the energy assistance program, Supplemental Nutrition Assistance Program, and Optional Social Security Supplement Program for purchases. SUMF 112.
- On the job training to employee(s) at the Licensed Premises through the South Dakota Department of Human Services Vocational Rehabilitation Program.[30] SUMF 113.
- The use of video magnifiers and low tech magnifying glasses through the South Dakota Department of Human Services loan program. SUMF 115.
- Access to the South Dakota Public Broadcasting television channel and radio station, internet streaming services, and emergency alert services. SUMF 116.
- The provision of funds, through Medicaid, for ambulatory services, wheelchairs, prostheses, crutches, canes, prescription drugs, dentures, vehicle modifications, continuous positive airway

[30] There was one instance since 2010 that the Department provided this service at the Royal River Casino. SUMF 114. The program continues to be available for employees at the Licensed Premises. SUMF 113.

pressure (CPAP) machines, and other durable medical equipment. SUMF 117.

- Licensing by the South Dakota Department of Health of food establishments. The Department of Health has licensed several vendors that provide food products to the Licensed Premises. SUMF 118-119. Although the Licensed Premises are not licensed by the Department of Health, the Tribe could request licensure by the Department of Health. *See, e.g.,* SUMF 118, 120.
- Public awareness services for health related issues, such as West Nile virus and colorectal cancer. SUMF 121.

These services are provided using general funds. *See* Ex. A (indicating that general funds are used to provide these services).

The Tribe has failed to show that it provides the majority of the governmental services used by the nonmember consumers. *See Tulalip Tribes Order*, * 14 ("To the extent [the State] can show that they 'provide the majority of the governmental services used by [the] taxpayers,' their interests may weigh more heavily. There is no requirement that these services be provided . . . on the reservation."). On the other hand, the evidence supports that the nonmember taxpayers are indeed using state services. *See* SUMF 10; Ex. A. As stated above, a majority of the patrons of the Licensed Premises do not live on the reservation, which is only approximately 3.68 square miles. SUMF 11, 2. Also, the State offers a substantial number of services that are not offered by the Tribe. *Compare* Ex. A *with* SUMF 125. For example, the Tribe does not

provide any drinking water treatment or testing, while the South Dakota Department of Environment and Natural Resources does provide those services. SUMF 126, 103.

Moreover, some of the services that the Tribe offers are not available to non-Indians. *See, e.g.*, SUMF 128. This is especially true in the context of the state court system and correctional services because in many instances, there is no tribal or federal jurisdiction for crimes involving non-Indians. *See, e.g., United States v. McBratney*, 104 U.S. 621 (1881); *Draper v. United States*, 164 U.S. 240, 17 S. Ct. 107 (1896); *People of State of N.Y. ex rel. Ray v. Martin*, 326 U.S. 496, 66 S. Ct. 307 (1946); *State v. Vandermay*, 478 N.W.2d 289 (S.D. 1991). *See also* SUMF 129. The State has exclusive jurisdiction over certain crimes and would thus be responsible for the expenses that accompany such. *See* Ex. A (indicating the state court system services and correctional services provided with general funds).

One particular good purchased at the Licensed Premises – alcoholic beverages – highlights the State's strong interest in the imposition of the use tax. According to a recent study commissioned by the United States Center for Diseases and Control, it costs the South Dakota state government approximately $0.64 per alcoholic drink sold. Sacks et al., *2010 National and State Costs of Excessive Alcohol Consumption*, 2015 Am. J. Preventative Med. 49(5): e73, e77 (Attached to Affidavit of Matt Naasz, Ex. 35); *see id.* at e74 (indicating that the number of drinks sold and state population are used to determine estimates). This amount encompasses increased healthcare costs,

costs from property damage due to crimes, law enforcement costs, court system and correctional institution costs, and legal defense costs. Ex. 35, app. 2. Here, these costs associated with nonmember patrons are, in all probability, realized by the State rather than the Tribe. *See* SUMF 128-129.

Imposing the 4.5 percent use tax on a $5.00 alcoholic beverage would only amount to $0.23 in tax revenue, and thus not be sufficient to offset the State's additional costs. However, the use tax on the nonmembers' purchases of those alcoholic beverages is important because it allows the State to recoup at least a portion of that $0.64 expended per alcoholic beverage. Likewise, the use tax on all other goods and services is important to fund the state services available to those consumers. Thus, the State has an undeniably strong interest in imposing such tax on nonmember consumers of the Licensed Premises.

C. Federal common law supports the state's jurisdiction to impose the use tax on nonmember consumers.

Finally, although the Tribe claims that the imposition of the state use tax on nonmembers violates federal common law, it is quite the opposite. *Colville*, *Bracker*, and their progeny do not invalidate, and actually support the state's jurisdiction to impose its use tax on nonmember consumers.

In *Bracker*, the Supreme Court invalidated a state tax on timber because of the extensive federal regulation of the taxed activity. *Bracker*, 448 U.S. at 151 n.15 ("Our decision today is based on the pre-emptive effect of the comprehensive federal regulatory scheme, which, . . . leaves no room for the

additional burdens sought to be imposed by state law."). Those extensive regulations of on-reservation timber included Congressional Acts, Secretary of Interior regulations, and the Bureau of Indian Affairs (BIA) supervision. *Id.* at 145. Specifically, the Secretary of the Interior regulations establish clear-cutting restrictions, guidelines for the sale of timber, regulation of timber advertising, rules for entering into contracts, a requirement that all contracts and timber-cutting permits must be approved by the Secretary, fire protection measures, and a board for administrative appeals. *Id.* at 147. Further, the Secretary sets fees and rates relevant to the timber operations. *Id.* at 149. The BIA is also directly involved in the timber operations by approving timber contracts; drafting such contracts; regulating timber cutting, hauling, and marking; and deciding matters such as which trees to cut, the amount of timber to cut, which roads and equipment will be used for hauling, the speed limits of the equipment used for hauling, and the size of the loads to be hauled. *Id.* at 147. Other applicable federal regulations also govern the construction and maintenance of roads used for logging operations. *Id.* at 148. Ultimately, *Bracker* was decided "in a context in which the federal government has undertaken to regulate the most minute details of the Tribe's timber operations." *Cotton*, 490 U.S. at 184 (quoting *Bracker*, 448 U.S. at 149). The Court determined that the federal regulation of the timber activities was so pervasive, there was no room for the state taxes that would have thwarted the federal policies. *Bracker*, 448 U.S. at 148.

In today's case, there is no comparable regulation of the taxed activity that would thwart any federal policies. *See supra* I.; II. A. 1. Moreover, in *Bracker*, the burden of the tax was on the Tribe. *Bracker*, 448 U.S. at 140. On the other hand, in this case the burden is on the nonmember consumers. SUMF 86.

Most importantly, the *Bracker* Court declared that it was "not [deciding] a case in which the State seeks to assess taxes in return for governmental functions it performs for those on whom the taxes fall." *Bracker*, 448 U.S. at 150. In *Bracker*, the State had not identified any services it provided to the taxpaying business or the Tribe. *Id.* Conversely, this *is* a case where the State is imposing a use tax on nonmember consumers for the governmental services it provides to individuals within its borders, *including* those patrons. *See supra* II. B. The State has provided a comprehensive (but by no means exhaustive) compilation of those services. *See supra* II. B.*; Ex. A.* Thus, while the federal and tribal interests outweighed the state interests in *Bracker*, the same cannot be said for this matter.

After *Bracker,* the Supreme Court invalidated a state tax on a non-Indian contractor's gross receipts from its construction of an Indian school. In *Ramah Navajo School Board, Inc. v. Bureau of Revenue of New Mexico,* 458 U.S. 832, 102 S. Ct. 3394 (1982), the Court found that the federal government's regulation of both "the construction and financing of Indian educational systems" was "comprehensive and pervasive." *Id.* at 839. The federal regulation consisted of treaties, numerous statutes, and BIA regulations on

this topic. *Id.* at 839-40. Specifically, regarding the construction of Indian schools, the BIA "must conduct preliminary on-site inspections, and prepare cost estimates for the project[.]" *Id.* at 841. Additionally, the BIA has the broad authority to require certain provisions in the Tribe's subcontracting agreements with the contractors, such as provisions regarding bonding, pay scales, and preference for Indian workers. *Id.* at 841. Finally, pursuant to the regulations, the Tribe must retain records for the Secretary of the Interior's inspection. *Id.* at 841. Thus, the Court concluded that the "comprehensive federal regulatory scheme and the express federal policy of encouraging tribal self-sufficiency in the area of education" preempted the state taxation. *Id.* at 846-47.

Again, today's case is different than *Ramah* because here, there is no comprehensive federal regulation of the taxed activity and the Tribe cannot point to one. Moreover, in *Ramah*, 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 [the] tax." *Id.* at 843. But here, the State's assessment of the use tax on nonmember consumers is "in return for the governmental functions it provides to" those consumers. *See id.* at 843; *supra* II. B., Ex. A. Therefore, the circumstances in this case require a different result than *Bracker* and *Ramah*.

The circumstances here are more like the Supreme Court cases of *Colville* and *Cotton*, in which the Court upheld the state taxes on nonmembers. As stated above, in *Colville*, the Court upheld a state tax on nonmember purchases of cigarettes from on-reservation tribal smokeshops. Like today's

case, the legal incidence of the state tax fell on the nonmembers and those nonmembers received significant state governmental services off the reservation. Moreover, as in this case, there was no federal regulation of the taxed goods in *Colville*.

The Supreme Court upheld a state tax even when the federal regulation of the taxed activity far exceeded the regulation present in *Colville* and in this case. The federal regulation of the taxed activity pointed out by the taxpayer in *Cotton* was much more extensive than in *Colville*, but still insufficient to justify preemption of the state tax. *See* Brief for Appellant at *19-20, *Cotton*, 490 U.S. 163 (No. 87-1327), 1987 WL 880197. In *Cotton*, the taxpayer indicated that the federal regulation of Cotton's activities included "regulating and administering the acquisition of leases, guaranteeing environmental protections over well locations, protecting natural resources during drilling, protecting tribal resources during production, plugging and abandoning wells, monitoring of lease production, [and] assuring royalty compliance with federal regulations and tribal ordinances." *Id.* Conversely, the federal interests in this case, if any, are minimal because there is no comprehensive and pervasive regulation of the goods and services to which the use tax applies – indeed there is no federal regulation at all.

Moreover, in *Cotton*, the taxpayer indicated that the federal government, not the state government, provided "virtually all governmental services to Cotton on the Reservation." *Id.* at *20-22. However, although the state imposed the tax for general revenue raising, those funds were used in part to

regulate wells. *See Cotton*, 490 U.S. at 186 ("not a case in which the State has had nothing to do with the on-reservation activity, save tax it."). Similarly, in this case, through the revenues generated by the use tax, the state provides services to the nonmember consumers at the Licensed Premises and elsewhere. Also like *Cotton*, the Tribe's interest here in being free from the state use tax is too "indirect and insubstantial" to preempt an otherwise valid state tax. *See supra* II. A. 2. For these reasons, the balancing of these interests tips in the State's favor even more than it did in *Cotton*, where the Supreme Court upheld the state taxes.

Ultimately, "[e]nactments of the federal government passed to protect and guard its Indian wards only affect the operation, within the colony, of such state laws as conflict with the federal enactments." *Moe*, 425 U.S. at 483. While the federal government has the ability to prohibit the use tax on goods and services at the Licensed Premises, it has not done so. *See Cotton*, 490 U.S. at 177 ("state interests must be given weight and courts should be careful not to make legislative decisions in the absence of congressional action"). The Tribe and the State have concurrent taxing jurisdiction "[u]nless and until Congress provides otherwise[.]" *Id.* at 188-89. Therefore, the use tax on nonmember patrons' purchases must be upheld and summary judgment should be granted in the State's favor on this claim.

III. Fourth Claim for Relief: The Tribe is Not Treated as a State.

For its Fourth Claim for Relief, the Tribe alleges that the State unlawfully discriminates against the Tribe as a similarly situated sovereign with respect to the State's reciprocal tax credit. Doc. 32, ¶ 125. This allegation calls into question the validity of SDCL 10-46-6.1, which provides:

> The amount of any use tax imposed with respect to tangible personal property, any product transferred electronically, or services shall be reduced by the amount of any sales or use tax previously paid by the taxpayer with respect to the property on account of liability to another state or its political subdivisions. However, no credit may be given under this section where taxes paid on tangible personal property, any product transferred electronically, or services in another state or its political subdivisions of that state does not reciprocally grant a credit for taxes paid on similar tangible personal property or any product transferred electronically.

(Emphasis Added.) The Tribe argues that it must be granted the reciprocity authorized under this statute. Doc. 32, ¶ 125.

First, the Flandreau Santee Sioux Tribal Tax Code contains no reciprocal tax credit for the payment of sales tax to South Dakota. SUMF 90. Because the Tribal Tax Code contains no reciprocal tax credit statute, this Court should not entertain the question of whether or not the Tribe should be treated as a state for purposes of SDCL 10-46-6.1. That statute does not apply absent a reciprocal tax credit statute.

Even if the Court entertains the Tribe's claim, it must be rejected. The Tribe asserts that SDCL 10-46-6.1 discriminates against it by limiting the reciprocal tax credit to other states or their political subdivisions. In essence, the Tribe is requesting that it be considered a "state" for purposes of SDCL 10-46-6.1, and insists that absent such treatment, South Dakota's sales and use

tax program is discriminatory. The Tribe cites to *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), for the proposition that SDCL 10-46-6.1 "unlawfully discriminates against the Tribe as a similarly situated sovereign." Doc. 32, ¶ 125.

> The *Mescalero* Court did not define what constitutes a nondiscriminatory state law. In determining the meaning of the Supreme Court's phrase, we deem it appropriate to follow the same procedures we employ in ascertaining the meaning of an undefined statutory term. When a statute does not define a term, a court should construe that term in accordance with its 'ordinary, contemporary, common meaning. To determine the 'plain meaning' of a term undefined by a statute, resort to a dictionary is permissible. "Discrimination" is defined as [d]ifferential treatment; esp., a failure to treat all persons equally when no reasonable distinction can be found between those favored and those not favored. Black's Law Dictionary (8th ed. 2004); It is this commonsense definition we employ here in finding that application of the challenged Vehicle Code sections to the Tribe is not nondiscriminatory and, hence, that the prohibition against the Tribe's display of light bars cannot be sustained.

Cabazon Band, 388 F.3d at 698 (internal quotation marks and citations omitted). *See also Salt River Pima-Maricopa Indian Community v. Yavapai County*, 50 F.3d 739, 740 ("A tax is discriminatory if it is not imposed equally upon similarly situated groups.").

Regardless, for purposes of SDCL 10-46-6.1, the Tribe is not similarly situated to other states or their political subdivisions. To determine whether the Tribe and other states are "similarly situated," geography controls. The Tribe's reservation is located entirely within the geographical boundaries of South Dakota. SUMF 3. No other state or another state's political subdivisions are located within the geographic boundaries of South Dakota. As the Tribe's

reservation is located within the territorial boundaries of South Dakota, it is part of the State of South Dakota.

> Our cases make it clear that Indians' rights to make their own laws and be governed by them does not exclude all state regulatory authority on the reservation. State sovereignty does not end at a reservation's border. Though tribes are often referred to as sovereign entities, it was long ago that the Court departed from Chief Justice Marshall's view that the laws of [a State] can have no force within reservation boundaries. Ordinarily, it is now clear, an Indian reservation is considered part of the territory of the State.

Nevada v. Hicks, 533 U.S. 353, 361–62, 121 S. Ct. 2304, 2311, (2001)(internal citations and quotation marks omitted). *See also Confederated Tribes of Colville Indian Reservation v. State of Washington*, 446 F. Supp. 1339, 1357 (E.D. Wash. 1978), *aff'd in part, rev'd in part sub nom. Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 100 S. Ct. 2069, 65 L. Ed. 2d 10 (1980) ("[T]he reservation exists within the territorial boundaries of [the] State. Indians are citizens of the State and are entitled to and do receive services from it.")

The United States Supreme Court considered a similar argument in *Wagnon v. Prairie Band of Potawatomi Nation*, 546 U.S. 95, 126 S. Ct. 676 (2005). There, the tribe argued that the applicable tax was discriminatory because it "exempts from taxation fuel sold or delivered to all other sovereigns." *Id.* at 115. The Court determined that the tribe was not similarly situated to the exempted sovereigns because the state expended a portion of the proceeds from the applicable tax on roads and bridges on the reservation. *Id.* The state did not offer similar services to other states or to the federal government. *Id.* Here, the State bears the responsibility for providing services to all individuals

within its borders, including those residing on South Dakota's reservations. *See, e.g., Chickasaw* 515 U.S. at 463 ("Enjoyment of the privileges of residence in the state and the attendant right to invoke the protection of its laws are inseparable from responsibility for sharing the costs of government. . . . These are rights and privileges which attach to domicil within the state.").

This situation is analogous to municipal sales tax in South Dakota. It is common in South Dakota for both a municipal sales tax and the state sales tax to apply to one transaction. *See* SDCL 10-52-2; SDCL ch. 10-45. When a candy bar is purchased within a South Dakota municipality's city limits and that municipality imposes its own sales tax, the municipal and state sales tax are added together and collected from the retailer. *See* SDCL 10-52-2; SDCL ch. 10-45. The State's sales tax is not diminished because a transaction occurs within the limits of a municipality which also imposes a tax. *See, e.g., H & R Roofing of South Dakota, Inc. v. Department of Revenue*, 2001 S.D. 39, ¶ 8, 623 N.W.2d 508, 510 (stating that goods can be subject to the state sales or use tax *and* the municipality's sales or use tax). Similar to the present situation, the State has authority over certain activity that occurs within the boundaries of a municipality. Here, the Licensed Premises are located within both the Tribe's reservation and the State. Both the Tribe and the State have authority over certain activity and certain individuals at the Licensed Premises. This is not the case with other states or their political subdivisions, as referenced in SDCL 35-2-24.

The United States Supreme Court has squarely considered simultaneous taxation by both a state and tribe of the same transaction. "State[s] may sometimes impose a nondiscriminatory tax on non-Indian customers of Indian retailers doing business on the reservation." *Colville*, 447 U.S. at 151. *See also Wagnon*, 546 U.S. at 114 ("When two sovereigns have legitimate authority to tax the same transaction, exercise of that authority by one sovereign does not oust the jurisdiction of the other. If it were otherwise, we would not be obligated to pay federal as well as state taxes on our income or gasoline purchases. Economic burdens on the competing sovereign . . . do not alter the concurrent nature of the taxing authority.").

Whether or not a tax is discriminatory depends on whether similarly situated groups are treated the same. *Salt River Pima-Maricopa Indian Community*, 50 F.3d at 740. As demonstrated above, the Tribe and other states are not similarly situated; therefore, whether the State's tax scheme treats the Tribe the same as other states is irrelevant. When such is the case, simultaneous taxation of on-reservation activity by both the State and Tribe is appropriate. Summary judgment should be granted in favor of the State on the Tribe's Fourth Claim for Relief.

IV. Fifth Claim for Relief: Where Consumption Occurs is Irrelevant

In its Fifth Claim for Relief, the Tribe claims that "[r]equiring the Tribe to determine which of its sales transactions at the Casino Complex will result in the purchaser's in-state, off-reservation use or consumption of goods, if any, imposes a heavy burden on the Tribe that is not reasonably necessary as a

means of aiding the State in collecting and enforcing the State use tax on, if any, the small proportion of transactions that may give rise to activity within the State's taxing authority." This Claim for Relief evidences the Tribe's misunderstanding of the State tax code. For purposes of South Dakota's tax system, the nonmember consumer at the Licensed Premises "uses" the goods at the time of purchase when he or she receives the goods. *See* SDCL 10-46-1(17) (defining "use" as "the exercise of right or power over [goods] or any product transferred electronically incidental to the ownership of that property . . ."). It is at that time of purchase that the nonmembers' use tax liability arises because the consumer receives their purchased good in South Dakota and no state sales tax has been paid.

Because the nonmembers' use tax liability arises at the time of purchase, the Tribe will never be required to determine whether an item purchased on the reservation will be consumed on or off the reservation. All goods purchased from the Tribe at the Licensed Premises are "used" when they are received by the consumer. Logically then, they are always "used" in-state on-reservation. The determination the Tribe complains of is unnecessary to determine the nonmember consumer's use tax liability.

This litigation turns on whether the use tax can be validly imposed upon nonmembers receiving goods and services on the Tribe's reservation. Where the goods are finally consumed is of no consequence. There is no relief to be afforded the Tribe based on its Fifth Claim for Relief. There are no issues of

material fact to be determined regarding this claim, and the State is therefore entitled to summary judgment in its favor on this claim for relief.

V. Seventh Claim for Relief: Escrow Account

In the Court's Order on Plaintiff's Motion for Judgment on the Pleadings, the Court stated: "Even though the counterclaims are dismissed, it appears to the Court that at the conclusion of this litigation, the proper disposition of the approximately $400,000 in escrow will be evident. It may be that even though the State's counterclaims are dismissed, the State might, depending upon the outcome of this case, receive some portion of the approximately $400,000 now held in escrow as those funds were paid into escrow by the Tribe pursuant to the Deposit Agreement." Doc. 60, p. 12.

The State agrees that this Court's determination regarding the applicability of the State's use tax to nonmember purchases at the Licensed Premises will determine the appropriate recipient of the proceeds of the escrow account. The State believes that its position is supported by well-established Supreme Court precedent, and as such, the proceeds of the escrow account should be ordered to the State.

If this Court determines that the imposition of the state use tax is valid, the State is entitled to the proceeds of the escrow account. Summary judgment in favor of the State would then be appropriate on this issue.

VI. Eighth Claim for Relief: Enforcement of Tribe's Obligation to Collect Use Tax

The Tribe claims that "SDCL 35-2-24[31] is an attempted enforcement of general state tax laws preempted by applicable federal law, including the Indian Commerce Clause, U.S. Const. Art. I, § 8, cl. 3, and the federal common law." But the combination of a validly imposed use tax obligation, the Tribe's obligation to collect and remit that tax obligation, and the State's regulatory authority over alcohol sales on the reservation results in the conclusion that the statute's requirement is a lawful exercise of State authority.

It is appropriate that this is the Tribe's final claim for relief. It is proper to address this claim for relief only after this Court determines that the State's use tax is validly imposed on nonmember consumers' purchase of goods and services at the Licensed Premises.[32] Because the use tax is validly imposed on nonmembers, the relevant authority makes clear that the State can have the

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[31] SDCL 35-2-24 provides:

> No license granted under this title may be reissued until all taxes incurred by the licensee as a result of the operation of the licensed premises, including municipal and state sales and use taxes, unemployment insurance tax, or any other state tax, are paid or are not delinquent. No license granted under this title may be reissued until all property taxes which are the liability of the licensee levied on the licensed premises are paid or are not delinquent. No license granted under this title may be reissued to an Indian tribe operating in Indian country controlled by the Indian tribe or to an enrolled tribal member operating in Indian country controlled by the enrolled tribal member's tribe until the Indian tribe or enrolled tribal member remits to the Department of Revenue all use tax incurred by nonmembers as a result of the operation of the licensed premises, and any other state tax has been remitted or is not delinquent.

[32] As the State has made clear, it would not condition reissuance of the Tribe's liquor license on the Tribe's collection and remittance of an invalidly imposed tax. Should this Court determine that imposition of the State's use tax on non-member transactions at the Licensed Premises is invalid, there is no need to address this Claim for Relief.

Tribe collect from the consumer and remit to the State the tax obligation of the nonmember consumers at the Licensed Premises. *See, e.g., Chickasaw*, 515 U.S. at 460 ("So, in this case, the State recognizes and the Tribe agrees that Oklahoma could accomplish what it here seeks by declaring the tax to fall on the consumer and directing the Tribe to collect and remit the levy.").

As this Court previously noted, the State's liquor license requirement is applicable to the Tribe generally. *See* Doc. 59, p. 30. ("[T]he Tribe's eighth claim for relief is not an assertion that the State's liquor license requirement is inapplicable to the Tribe generally. Based on *Rehner*, such an assertion would be plainly incorrect.").

At this point, the Court is faced with a validly imposed state tax on nonmembers, a valid requirement that the Tribe collect and remit the valid tax, and well-established Supreme Court precedent indicating that the State may regulate liquor in Indian Country. At the end of the day the State's statutory mechanism for tax collection is an "alternative remed[y]" available to state tax collectors. *Millhelm Altea*, 512 U.S. 61, 72, 114 S.Ct. 2028. And *Rice v. Rehner*, as the Court already noted, makes this remedy possible.

As noted in *Rice v. Rehner*, there is a long tradition of state regulation over liquor within its borders. 463 U.S. 713, 724, 703 S. Ct. 3291(1983)(states have an "unquestionable interest in the liquor traffic that occurs within its borders."). In such a situation, there is a strong presumption against federal preemption. *See FMC Corp. v. Holliday*, 498 U.S. 52, 62, 111 S. Ct. 403, 410, 112 L. Ed.2d 356 (1990)(noting the "presumption that Congress does not

intend to pre-empt areas of traditional state regulation."). The combination of a validly imposed state tax, the valid collection and remittance obligation of the Tribe, the State's authority to regulate tribal liquor sales, the tradition of state regulation over liquor sales within its borders, and the strong presumption against preemption, requires the result that SDCL 35-2-24 is a valid exercise of the State's authority. Summary judgment in favor of Defendants is therefore appropriate.

Request for Oral Argument

The State respectfully requests oral argument on its Motion.

Dated this 10th day of February, 2017.

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CERTIFICATE OF COMPLIANCE

1. I certify that the Memorandum in Support of Motion for Summary Judgment is within the word limitation, per an Order of the Court dated February 9, 2017 granting a motion not to exceed 19,000 words, using Bookman Old Style typeface in 12 point type. This Memorandum contains 18,030 words.

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

/s/ *Kirsten E. Jasper*
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Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that on February 10, 2017, I electronically filed with the Clerk of the Court for the United States District Court for the Southern Division by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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