UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

FLANDREAU SANTEE SIOUX TRIBE, a Federally recognized Indian Tribe, Plaintiff, v. RICHARD SATTGAST, Treasurer of the State of South Dakota; ANDY GERLACH, Secretary of Revenue of the State of South Dakota; and DENNIS DAUGAARD, Governor of the State of South Dakota, Defendants.	Civ. No. 17-4055 DEFENDANTS' MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Pursuant to SDCL chapter 10-46A, the State of South Dakota (State) imposes a contractor's excise tax upon certain construction projects and construction services. While the tax may be preempted by federal law in certain instances, the State determined that federal law does not preempt the tax on a non-Indian contractor's construction services at the Plaintiff Flandreau Santee Sioux Tribe's (the Tribe's) casino. As a result, the non-Indian contractor remitted to the State the tax on its services, but requests a refund be provided to the Tribe.

The Tribe seeks (1) a declaration that the State has no authority to impose contractor's excise tax on contractors performing realty improvement or construction services related to an on-reservation construction project; (2)

preliminary and permanent injunctions against the State's imposition of its contractor's excise tax on any future gross receipts related to its casino construction project; (3) recovery of contractor's excise tax previously remitted, or to be remitted, to the State by contractors or the Tribe. *See* Doc. 1, ¶¶ 1-3, Relief Requested ¶¶1-3.

FACTS AND PROCEDURAL HISTORY

The Tribe is a federally recognized Indian tribe whose reservation, the Flandreau Indian Reservation, is wholly within Moody County, South Dakota. Defendants' Statement of Undisputed Material Facts (SUMF) 1, 2. Within the reservation, the Tribe owns and operates the Royal River Casino. SUMF 4.

The State and the Tribe have maintained a Tribal-State gaming compact (Compact), entered into pursuant to the Indian Gaming Regulatory Act (IGRA), which regulates Class III gaming activities at the Casino. SUMF 5. While the Casino offers Class III games such as slot machines and blackjack, the Casino currently does not offer Class II gaming. SUMF 6, 7. The Compact does not contain provisions specifically relating to construction standards, construction activities, or the taxation of construction activities at the Casino. SUMF 8; *see* Doc. 1-1.

The Tribe planned a $24 million renovation and expansion of its Casino (the Construction Project). SUMF 10. The Tribe retained Leo A. Daly (Architect) as the architectural firm for the Construction Project in July 2015. SUMF 11. In October 2015, the Tribe contracted with a non-Indian construction company, Henry Carlson Company (Contractor), as the general

contractor for the Construction Project. SUMF 12. For purposes of this case, the scope of the construction services is:

> 1) construction of a new administration building for the Casino attached to the existing main Casino building, to house all administrative offices for the operation; and 2) renovation of the currently vacant bingo hall located on the north side of the main Casino building, to provide additional gaming space and a VIP area for Casino guests.

[hereinafter, "Construction Services"] SUMF 13. Actual construction for the Construction Project at the Casino began about December 1, 2016. SUMF 21.

Pursuant to SDCL chapter 10-46A, a contractor's gross receipts are subject to a two percent contractor's excise tax if: (1) its services are enumerated in Division C (construction) of the Standard Industrial Classification Manual of 1987; or (2) its services "entail the construction, building, installation, or repair of a fixture to realty[.]" SUMF 26; *see* SDCL 10-46A-1, -2, -2.2. The legal incidence of this tax is on the contractor. SUMF 27. The contractor may choose to pass the tax to its customers, but it is not required to do so. SUMF 28, 29; *see* SDCL 10-46A-12.

While there are few state statutory exemptions from contractor's excise tax, certain construction projects located within Indian country are exempt pursuant to federal law. SUMF 31, 32; *see* SDCL 10-46A-18, -18.1. Within the boundaries set by federal law, the South Dakota Department of Revenue (Department) administers this exemption by having contractors complete an

"Indian Country Project Request for Exemption."[1] SUMF 33. After receiving an Indian Country Project Request for Exemption, the Department analyzes the circumstances surrounding each construction project to determine whether the project qualifies for the exemption. SUMF 36.

Consistent with the above process, the Contractor submitted to the Department an Indian Country Project Request for Exemption for the Construction Services.[2] SUMF 39; *see* Doc. 1-3. After its review, the Department denied the request. SUMF 40; *see* Doc. 1-3. Subsequently, the Tribe submitted a second Indian Country Request for Exemption for the Construction Services, which was also denied. SUMF 41; *see* Doc. 1-4.

During the course of the Construction Project, the Contractor has remitted to the Department the tax which the Contractor identified as relating to the Construction Services. SUMF 42. The Contractor indicated it was paying the tax under protest pursuant to SDCL 10-27-2 and requested that the Department refund that tax to the Tribe. SUMF 43; *see* Doc. 1-5; Doc. 1-6. Because requests for refund (also referred to as "requests for allegedly overpaid tax") of contractor's excise tax are governed by SDCL chapter 10-59 rather than SDCL 10-27, the Department treated the Contractor's "payment under protest"

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[1] The Indian Country Project Request for Exemption has been referred to as "Indian Use Projects" or "Indian Use Only Projects", but the State has made efforts to eliminate such references from its publications. SUMF 34, 35.

[2] The Tribe does not contend that the Construction Services do not fall within those services typically taxed under SDCL chapter10-49A; the Tribe only contends that federal law and tribal sovereignty prohibits the imposition of the tax here. *See generally* Doc. 1; SUMF 37-38.

as a refund request under SDCL chapter 10-59. SUMF 44, 45; *see* SDCL 10-27-1, 10-59-1, 10-59-19 through 10-59-24. The Department denied the refund requests and indicated to the Contractor that it may request a hearing regarding the denials. SUMF 46, 47.

The Tribe filed this federal suit on April 21, 2017, alleging that the contractor's excise tax is preempted by federal law, including IGRA, Indian trader statutes, and the standards set forth by the Supreme Court, and that the tax infringes on the Tribe's sovereignty. SUMF 51; *see* Doc. 1, ¶¶ 73, 76, 80. The Tribe seeks a declaration that the "officials of the State . . . do not have authority to impose the State's contractor's excise tax" on the Construction Project. Doc. 1, ¶ 1, Relief Requested ¶ 1. The Tribe also seeks a refund of "contractor's excise tax paid, or to be paid, under protest" to the State by the Contractor, plus interest. Doc. 1, ¶ 3; Relief Requested ¶ 3.

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, "show[s] that there is no genuine dispute as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). "By its very terms, this standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Id.* at 247-48. 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.*

ARGUMENT

I. The Court has no jurisdiction to grant the Tribe's Claim for Refund of contractor's excise tax (Fourth Claim for Relief)

The Tribe alleges it is entitled to a refund of contractor's excise tax paid by the Contractor for this Construction Project. Doc. 1, ¶¶ 49, 50, 81-85. This claim must be dismissed because this Court has no jurisdiction over it. "Without jurisdiction [a] court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998). Here, the Eleventh Amendment prohibits this Court from exercising jurisdiction over the Tribe's claim for refund against the named State officials.

A. Pursuant to the Eleventh Amendment, tribes can only seek prospective relief against state officials in federal court unless the state has waived its immunity.

The Eleventh Amendment of the United States Constitution provides, "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." This Amendment grants states immunity from suit in federal court,

unless the state has waived its immunity. *Blatchford v. Native Vill. of Noatack & Circle Vill.*, 501 U.S. 775, 779 (1991). A state may invoke the Eleventh Amendment in cases "where it is not a named party but is the real party in interest in an action for the recovery of money against a state official or agency." *Standing Rock Sioux Indian Tribe v. Dorgan*, 505 F.2d 1135, 1138 (8th Cir. 1974). This is so when the monetary damages would come from the state's treasury, rather than personally from the named parties. *Id.*

Generally, tribes may only seek prospective relief against state officials in federal court; tribes cannot seek monetary damages. *See Ex Parte Young*, 209 U.S. 123, 150, 154-56 (1908); *Blatchford*, 501 U.S. 775. *Accord U.S. ex rel. Cheyenne River Sioux Tribe v. State of S.D.*, 105 F.3d 1552, 1560 (8th Cir. 1997). Arguing against this principle, the Tribe relies on *U.S. ex rel. Cheyenne River Sioux Tribe v. State of South Dakota*, 105 F.3d 1552, to claim that the Tribe is entitled to a refund of contractor's excise tax paid by the Contractor. *See* Doc. 1, ¶ 84. Yet *U.S. ex rel. Cheyenne River Sioux Tribe* lends no support to the Tribe's claim. Indeed, it is quite the opposite—that case recognizes that the Eleventh Amendment "bar[s] damage claims brought by Indian tribes against the state." *U.S. ex rel. Cheyenne River Sioux Tribe*, 105 F.3d at 1560.

While the Eighth Circuit allowed the case to proceed after an Eleventh Amendment challenge, it did so only because the suit for monetary damages was brought by the United States on behalf of the Cheyenne River Sioux Tribe, and not by the Cheyenne River Sioux Tribe, itself. *Id.* This crucial fact changed the outcome of the jurisdictional question:

> The Eleventh Amendment does not bar suits brought by the United States on behalf of Indian tribes or their members, however. The *Blatchford* Court recognized that the tribal claims would not have been barred if brought by the United States, but held that tribal access to federal court was not as broad. The Eleventh Amendment does not apply in the Cheyenne River case because the United States brought the action.

Id. (internal citations omitted). *See also Standing Rock Sioux Indian Tribe*, 505 F.2d at 1138 (stating that a tribe's suit against a state official for a tax refund is barred by the Eleventh Amendment); *Marty Indian Sch. v. State of S.D.*, 592 F. Supp. 1236, 1237 (D.S.D. 1984).

Here, the United States is not a party to this suit in which the Tribe claims monetary damages. Further, the Tribe has not alleged that it seeks the damages personally from the state officials rather than from the state treasury. *See Standing Rock Sioux Tribe*, 505 F.2d at 1138; Doc. 1. The Eleventh Amendment bars the Tribe's claim unless the State has waived its immunity.

B. The State has not waived its sovereign immunity.

"A state may voluntarily waive its sovereign immunity from federal-court jurisdiction, but the federal courts will only conclude that it has done so if the alleged waiver passes a stringent test." *McKlintic v. 36th Judicial Circuit Court*, 508 F.3d 875, 877 (8th Cir. 2007). A state may waive its immunity either 1) "if the State voluntarily invokes [federal] jurisdiction" or 2) "if the State makes 'a clear declaration' that it intends to submit itself to [federal] jurisdiction." *Id.* (quoting *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999)).

In its Complaint, the Tribe indicates that pursuant to SDCL 10-27-2, the Contractor paid under protest the contractor's excise tax. Doc. 1, ¶ 82. SDCL 10-27-2 provides in relevant part:

> Any person against whom any tax is levied or who may be required to pay the tax, who pays the tax prior to the tax becoming delinquent and under protest to the treasurer authorized to collect the tax, giving notice at the time of payment of the reasons for such protest may, at any time within thirty days thereafter, commence an action against such treasurer for the recovery of the tax in any court of competent jurisdiction.

In this case, SDCL 10-27-2 cannot be interpreted as a waiver of the State's immunity. That statute does not apply here,[3] and even if it does, it does not authorize the Tribe to recover taxes paid by the Contractor to the State.

First, the Tribe and the Contractor incorrectly implicate SDCL 10-27-2 in the claim for refund of contractor's excise tax. Doc. 1, ¶¶ 48-51, 81-85. The Contractor phrased its claim to tax remitted as a "payment under protest" under SDCL 10-27-2. *See* SUMF 43; Doc. 1, ¶¶ 49-50. But SDCL 10-27-2 only applies if the South Dakota Codified Laws do not expressly provide a different avenue for relief. *See* SDCL 10-27-1 ("[I]n any case in which, for any reason, it is claimed that any tax about to be collected is wrongful or illegal, in whole or in part, the remedy, except as otherwise expressly provided by this code, is by payment under protest and action to recover, as provided in § 10-27-2.") (emphasis added). Here, SDCL 10-27-2 does not apply because the avenue for challenging the contractor's excise tax is exclusively through SDCL

[3] Because SDCL 10-27-2 does not apply, Richard L. Sattgast, Treasurer of the State of South Dakota, should be dismissed as a Defendant.

chapter 10-59.[4] *See* SUMF 44; SDCL 10-59-1 (indicating that SDCL chapter 10-59 applies to proceedings regarding the taxes imposed by chapter 10-46A (contractor's excise tax), among others); SDCL 10-59-19 through SDCL 10-59-24 (providing the process for recovery of a refund of allegedly overpaid tax). The Tribe seems to acknowledge as much: it invokes SDCL 10-59-24 to recover interest on taxes paid by the Contractor and SDCL 10-59-34 to recover costs and attorney fees. *See* Doc. 1, ¶ 85, Relief Requested ¶ 4.

Even if SDCL 10-27-2 may be used for claims to contractor's excise tax, the Tribe may not invoke that statute to sue state officials in federal court because SDCL 10-27-2 is not "a clear declaration that [the State] intends to submit itself to federal jurisdiction." *McKlintic*, 508 F.3d at 877 (internal quotation marks omitted). SDCL 10-27-2 authorizes actions for the recovery of certain taxes to be filed "in any court of competent jurisdiction." However, "[a] state does not waive its immunity from federal suit by consenting to suit in state courts, by stating its intention to sue and be sued, or by authorizing suits against it in 'any court of competent jurisdiction.'" *McKlintic*, 508 F.3d at 877 (quoting *Coll. Sav. Bank*, 527 U.S. at 676) (emphasis added). SDCL 10-27-2's authorization of suits "in any court of competent jurisdiction" does not waive the State's Eleventh Amendment sovereign immunity.

[4] Even if the Contractor could request a refund through SDCL 10-27-2, the Contractor failed to commence an action for the recovery of the tax in accordance with that statute. *See* SDCL 10-27-2; *Cf.* Doc. 1 (Tribe's commencement of suit).

Based on the foregoing, even if this Court agrees with the Tribe's underlying argument that federal law preempts the tax, the Tribe is only entitled to prospective relief. The Tribe's fourth claim must be dismissed for lack of jurisdiction.

II. The State has authority to impose the tax on the Contractor's Construction Services (First, Second, and Third Claims for Relief).

Regarding the merits, the Tribe alleges that the State has no authority to impose a contractor's excise tax on the non-Indian Contractor for its Construction Services. *See generally* Doc. 1. "The initial and frequently dispositive question in Indian tax cases . . . is who bears the legal incidence of a tax," that is, who has the legal obligation to pay the tax. *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 458 (1995). "[I]f the legal incidence of the [state] tax rests on non-Indians, no categorical bar prevents enforcement of the tax[.]" *Id.* at 459.

Here, the legal incidence of the tax is on the non-Indian Contractor so the State is not categorically barred from imposing its tax. *See* SUMF 27; *Chickasaw Nation*, 515 U.S. at 459. Generally, a state may tax nonmembers' on-reservation activities. *See, e.g., Warren Trading Post Co. v. Ariz. State Tax Comm'n*, 380 U.S. 685 (1965) (providing that a licensed Indian trader's sales to reservation Indians were preempted from tax by the federal licensed Indian trader regulations, but the ruling was not extended to sales made to nonmembers); *Wash. v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980); *Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of N.M.*, 458

U.S. 832, 837 (1982); *Sac & Fox Nation v. Okla. Tax Comm'n*, 967 F.2d 1425, 1429-30 (10th Cir. 1992) (state may tax income of tribe's nonmember employees).

There are two potential "barriers" to this state authority.[5] *See Ramah*, 458 U.S. at 837. The first barrier is when the state tax is preempted by federal law, either expressly or impliedly. *See id.* at 837-38; *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 176-77 (1989). The second barrier is when the state tax "unlawfully infringe[s] 'on the right of reservation Indians to make their own laws and be ruled by them.'" *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 142 (1980) (quoting *Williams v. Lee*, 358 U.S. 217, 220 (1959)). These barriers, which represent federal and tribal interests, are analyzed on a case-by-case basis along with any state interests at stake "to determine whether, in the specific context, the exercise of state authority would violate federal law" (*Bracker* balancing test). *Id.* at 144-45.

Here, there are no barriers to the State's authority to impose its tax on the non-Indian Contractor's Construction Services. Neither IGRA nor the

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[5] The Supreme Court's use of the phrase "barriers to the exercise of state authority" confirms that states have authority to tax nonmembers' on-reservation activity unless something impedes it. *See White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 142-45 (1980); *Ramah,* 458 U.S. at 837-38 (both discussing the two barriers to state authority over on-reservation commercial activities and also discussing whether federal and tribal interests preempt state authority). *See also Barrier*, Merriam Webster Dictionary, https://www.merriam-webster.com/dictionary/barrier ("1a: something material that blocks or is intended to block passage") (last visited March 31, 2018).

Indian trader statutes preempt the tax. In addition, the State's interests outweigh any remaining tribal interests so the tax must be upheld.

A. Federal Interests—IGRA is not a barrier to State jurisdiction

Through its Complaint, the Tribe alleges that IGRA impliedly preempts the contractor's excise tax on the Construction Services.[6] Doc. 1, ¶ 78. A federal statute can impliedly preempt state law "if the scope of the statute indicates that Congress intended federal law to occupy the legislative field[.]" *Altria Grp., Inc. v. Good*, 555 U.S. 70, 76, (2008). In other words, a state tax is preempted if federal regulation is so "comprehensive and pervasive" that it leaves no room for the state tax. *See Ramah*, 458 U.S. at 838-39, 842. The Eighth Circuit has also explained that "State jurisdiction is pre-empted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law[.]" *Casino Res. Corp. v. Harrah's Entm't, Inc.*, 243 F.3d 435, 437 (8th Cir. 2001) (citing *N.M. v. Mescalero Apache Tribe*, 462 U.S. 324 (1983)). 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 Cir. 1996) (citing *Metro. Life Ins. Co. v. Taylor,* 481 U.S. 58, 65 (1987)). With this presumption against preemption in mind, IGRA does not preempt the tax in this case.

1. Purpose and Congressional Intent of IGRA

[6] The Tribe does not allege that IGRA expressly preempts the state contractor's excise tax on the Construction Services. *See* Doc. 1, ¶¶ 78, 79 (alleging that the tax "interferes with and is incompatible with" IGRA and federal policy regarding tribal casinos).

An "inquiry into the scope of a statute's pre-emptive effect is guided by the rule that the purpose of Congress is the ultimate touchstone in every pre-emption case." *Altria Grp., Inc.,* 555 U.S. at 76 (internal quotation marks omitted) (citations omitted). To determine IGRA's preemptive scope, its text must be considered within the context of IGRA's purpose and congressional intent:

> IGRA was Congress' compromise solution to the difficult questions involving Indian gaming. The Act was passed in order to provide "a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments" and "to shield [tribal gaming] from organized crime and other corrupting influences to ensure that the Indian tribe is the primary beneficiary of the gaming operation." 25 U.S.C. § 2702(1), (2).

Artichoke Joe's Cal. Grand Casino v. Norton, 353 F.3d 712, 715 (9th Cir. 2003) (citation omitted). The congressional record clarifies that IGRA "regulates Indian gaming. By no means is any provision of [IGRA] intended to extend beyond this field of gaming in Indian Country. [. . . IGRA] should not be construed as a departure from established principles of the legal relationship between the tribes and the United States. Instead, [IGRA] should be construed within the line of developed case law extending over a century and a half by the Supreme Court[.]" 134 Cong. Rec. S12643-01 at S12654.

Through IGRA's enactment, Congress set forth a state-tribal compacting process that "allows states to negotiate with tribes . . . regarding aspects of class III Indian gaming." *Artichoke Joe's,* 353 F.3d at 716 (citing 25 U.S.C. § 2710(d)(3)(C)). Congress did not intend to preempt the general State taxation framework by establishing this compacting process:

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

134 Cong. Rec. S12643-01, at S12651 (emphasis added). Additional testimony indicated that the compacting process "is intended solely for the regulation of gaming activities. It is not the intent of Congress to establish a precedent for the use of compacts in other areas, such as water rights, land use, environmental regulation or taxation." 134 Cong. Rec. H8146 at H8155 (emphasis added).

"The case for federal pre-emption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to stand by both concepts and to tolerate whatever tension there [is] between them." *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.,* 489 U.S. 141, 166–167 (1989) (brackets original) (internal quotation marks omitted); *see also Barona Band of Mission Indians v. Yee,* 528 F.3d 1184, 1194 (9th Cir. 2008) (discussing the presumption against preemption); *Wyeth v. Levine*, 555 U.S. 555, 575 (2009). Congress acknowledged the issue of taxation, yet decided not to incorporate it into the compacting process (outside discussing the taxation of the actual play of class III games). *See* 25

U.S.C. § 2710(d)(4). Thus, the congressional record supports that Congress decided to stand by both topics: the general State taxation framework and gaming.

Specific to this case, IGRA's intent to cover gaming and not taxation of construction activities is supported by its three stated purposes:

> (1) To provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments;
>
> (2) To provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players; and
>
> (3) To declare that the establishment of independent Federal regulatory authority for gaming lands, the establishment of Federal standards for gaming on Indian lands, and the establishment of a National Indian Gaming Commission are necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue.

25 U.S.C. § 2702 (emphasis added). The contractor's excise tax does not interfere with, and can co-exist with, these stated purposes. First, nothing in the record supports that the tax on the Construction Services changes the Tribe's status as the primary beneficiary of the Casino. *See* SUMF 49, 50. Also, the tax does not involve the regulation or operation of a "roll of the dice," "spin of the wheel," or blackjack tables. *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2032, 2033 (2014).

Citing congressional intent, Courts of Appeal have analyzed whether the "tribal governance of gaming" is involved to determine if IGRA's preemptive

scope reaches certain activities. *See, e.g.*, *Dorsey & Whitney*, 88 F.3d at 538-39; *Mashantucket Pequot Tribe v. Town of Ledyard*, 722 F.3d 457, 469 (2nd Cir. 2013); *Pueblo of Pojoaque v. N.M.*, 863 F.3d 1226, 1232 (10th Cir. 2017). "Not every contract that is merely peripherally associated with tribal gaming is subject to IGRA's constraints." *Harrah's Entm't. Inc.*, 243 F.3d at 439. "[C]ourts have been quick to dismiss challenges to generally-applicable laws with *de minimus* effects on a tribe's ability to regulate its gambling operations." *Mashantucket*, 722 F.3d at 470. As established below, the generally applicable contractor's excise tax has a *de minimus* effect—if any—on the Tribe's ability to regulate gaming at the Casino.

Pursuant to the Eighth Circuit's ruling in *Dorsey & Whitney*, on one end of the "governance of gaming" spectrum is a tribal gaming commission's licensing of tribal casino management companies. 88 F.3d at 539, 549. This licensing is both regulated and required by IGRA. *Id.* at 549. Accordingly, a tribal gaming commission's licensing involves the "tribal governance of gaming" and is within IGRA's preemptive scope. *See id.* at 550; *accord Harrah's Entm't. Inc.*, 243 F.3d at 437 (indicating that the claims preempted by IGRA are "[a]ny claim which would directly affect or interfere with a tribe's ability to conduct its own [gaming] licensing process[.]").

According to the Ninth Circuit in *Yee*, a state tax on construction materials used to construct a casino falls on the other end of the "governance of gaming" spectrum and is outside IGRA's preemptive scope:

> 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.

Yee, 528 F.3d at 1193 (emphasis added). The Eighth Circuit and the Second Circuit have similarly limited IGRA's preemptive scope. In *Harrah's Entertainment, Inc.*, 243 F.3d 435, the Eighth Circuit held that certain disputes regarding gaming management contracts are outside IGRA's preemptive scope. 243 F.3d at 438-40. Also, in *Mashantucket*, the Second Circuit determined that IGRA did not "expressly or by plain implication" preempt a Connecticut state personal property tax on lessors of slot machines 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, 471 (citing *Yee,* 528 F.3d at 1192) (also stating that "any preemption of the 'field' of gaming regulations is not at issue here, where the state tax on property [slot machines] is not targeted at gaming") (emphasis added). *See also Confederated Tribes of Siletz Indians of Or. v. State of Or.*, 143 F.3d 481, 487 (9th Cir. 1998) (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.").

As in *Yee*, *Harrah's Entertainment, Inc.*, and *Mashantucket*, the generally applicable tax at issue here does not affect the Tribe's ability to regulate its gaming to "assure the gaming is conducted fairly and honestly", and even if it

does, any effect would be *de minimus*. *See* 25 U.S.C. § 2702(2). If IGRA does not impliedly preempt a state tax on construction materials used at a casino, a gaming management and service contract, or a state personal property tax on slot machines, then it does not impliedly preempt a state tax on the non-Indian Contractor's Construction Services. "Simply put, IGRA is a gambling regulation statute, not a code governing construction contractors, the legalities of which are of paramount state and local concern." *Yee*, 528 F.3d at 1192.

2. IGRA's catchall provision does not preempt the contractor's excise tax

The Tribe appears to allege that the contractor's excise tax falls within IGRA's preemptive scope because it is a permissive topic to include in a compact and yet the Compact does not address the tax. *See* SUMF 53; Doc. 1, ¶ 62. As discussed above, IGRA permits states and tribes to enter into compacts and specifies certain topics that may be addressed. *See* 25 U.S.C. §§ 2710(d)(1)(C), 2710(d)(3). The "catchall provision," found at 25 U.S.C. § 2710(d)(3)(C)(vii), indicates that a negotiated gaming compact may contain provisions relating to "any other subjects that are directly related to the operation of gaming activities."

Here, the Tribe asserts that the Construction Services fall within this compactable topic. SUMF 52. The Tribe then relies on the Compact's silence to contend that the tax on the Construction Services is preempted. *See* SUMF 53. However, the Tribe's position must be rejected.

a. <u>IGRA's catchall provision does not establish its preemptive scope.</u>

First, the catchall provision does not set the boundaries of IGRA's preemptive scope; compacts entered into pursuant to IGRA are not required to contain provisions falling within the catchall provision. For this Court to rule that IGRA (through its compacting process) preempts the contractor's excise tax, the Court would have to conclude that all subjects "directly related to the operation of gaming activities" are required to be included in a compact, rather than permissive subjects to include. But this ignores IGRA's text: "Any Tribal-State compact . . . may include provisions relating to . . .subjects that are directly related to the operation of gaming activities." 25 U.S.C. § 2710(d)(3)(C) (emphasis added).

A gaming compact only controls activities to the extent it permits or prohibits such activities. *See Siletz*, 143 F.3d at 485. If the compact is silent as to the activity, IGRA does not prevent otherwise lawful state activity. *See id.* The Ninth Circuit, in *Yee*, reaffirms this principle. In *Yee*, the Barona Band of Mission Indians entered into a gaming compact with the State of California. *See* 528 F.3d at 1193 n.4. While the compact addressed construction standards, it contained no provision regarding taxation of the casino construction. *See* Tribal-State gaming compact between the State of California and the Barona Band of Mission Indians, as found in Excerpts of Record, *Barona Band of Mission Indians v. Yee*, No. 06-55918 (9th Cir. filed Oct. 19, 2006) (attached to Affidavit of Stacy R. Hegge as Ex. 1). Similar to this case, the tribe argued that the state was required to include a provision in the compact if the state wanted to impose a tax on casino construction materials,

but because the state did not do so, it had no authority to impose such tax. *Brief of Appellee Barona Band of Mission Indians, et al.*, No. 06-55918, 2006 WL 4012116, at 7, 52-64 (9th Cir. filed Dec. 6, 2006) (attached to Affidavit of Stacy R. Hegge as Ex. 2). The Ninth Circuit rejected the tribe's argument, concluding that the tax on the construction materials fell "outside the scope of the compact" and that IGRA did not preempt the tax. *See Yee*, 528 F.3d at 1193 & n.4.

Thus, as reinforced by *Yee,* merely because the Compact does not specifically address the taxation of construction services does not support preemption of the contractor's excise tax. *Cf.* SUMF 8-9; Doc. 1-1, at 4 ("7. Civil Jurisdiction . . . All civil matters arising from or related to Class III gaming shall be dealt with according to applicable Tribal, State, or Federal law. Nothing in this Compact shall deprive the Courts of the Tribe, the United States, or the State of South Dakota of such civil jurisdiction as each may enjoy under applicable law. . . .").

b. <u>IGRA's catchall provision does not allow a gaming compact to include provisions relating to the contractor's excise tax</u>

i. The catchall provision does not encompass state taxation of the Construction Services

Even if IGRA preempts all subjects "directly related to the operation of gaming activities[,]" taxation of the Construction Services does not fall within that topic. As stated in *In re Indian Gaming Related Cases*,

> Not all such subjects are included within [the catchall provision], 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." ... it was this concern that led Congress to limit the scope of [the catchall provision] 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.

147 F. Supp. 2d 1011, 1018 (N.D. Cal. 2001), *aff'd*, 331 F.3d 1094 (9th Cir. 2003). *See Mashantucket*, 722 F.3d 457.

The United States Department of Interior (Interior), charged with approving state-tribal gaming compacts pursuant to 25 U.S.C. 2710(d)(3)(B), has signaled that the scope of the catchall provision is indeed narrow. In a recent publication, Kevin Washburn, Interior's former Assistant Secretary for Indian Affairs who authored approval and disapproval letters of state-tribal gaming compacts, stated "IGRA creates a relatively bright line about what can be addressed in a compact and, from a policy point of view, preserving that bright line is important. Otherwise, a tribe might be required to negotiate issues, perhaps even under duress, because the state insisted." Kevin Washburn, *Recurring Issues in Indian Gaming Compact Approval,* 5 Gaming L.R. & Econ. 388, 393 (2016) (attached to Affidavit of Stacy R. Hegge as Ex. 3) [hereinafter "Washburn, Ex. 3"]. Washburn indicates that not all activities within a Tribe's casino operation are "gaming-related" for purposes of IGRA. Washburn, Ex. 3 at 394-95; *see also* Dave Palermo, *Signed, Sealed . . . and Then?*, Global Gaming Business, at 57 (January 2016) (attached to Affidavit of Stacy R. Hegge as Ex. 4) [hereinafter, "Palermo, Ex. 4"] ("Tribal-state compact

negotiations under IGRA are largely restricted to the scope and regulation of gambling with states reimbursed for regulatory costs.").

This narrow interpretation of the catchall provision aligns with the Indian canon of construction, which requires 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 (1985). And as illustrated by Washburn, a narrow interpretation of the catchall provision is most favorable to tribes. "By clearly, thoroughly, and explicitly identifying the subjects that can be addressed in a compact, Congress presumably intended to limit compacts to those subjects." Washburn, Ex. 3 at 392. "Congress sought to prevent a state from using its right to compact negotiation to extend state authority beyond gaming[, presumably including] using that authority to force resolution of other issues, unrelated to gaming." Washburn, Ex. 3 at 392; *see also* Palermo, Ex. 4 at 57 ("Critics and Indian law experts contend compact negotiations in California and elsewhere have expanded beyond the intent of [IGRA] to include jurisdictional issues and matters not related to gambling.")

On point here, the Ninth Circuit in *Yee* appeared to narrowly interpret IGRA's catchall provision to exclude from its scope a tax on the materials used to construct a casino. The tribe had argued that "[c]onstruction of a casino is . . . 'directly related to the operation of gaming activities'" and therefore, a tax on the construction materials was a permissible subject for a compact. *Brief of Appellee Barona Band of Mission Indians, et al.*, No. 06-55918, 2006 WL 4012116 at 64 (attached to Affidavit of Stacy R. Hegge as Ex. 2). However, the

Ninth Circuit seemingly rejected the tribe's position, quoting *In re Indian Gaming Related Cases*, 147 F. Supp. 2d at 1018: "States cannot insist that compacts include provisions addressing subjects that are only indirectly related to the operation of gaming facilities." *Yee*, 528 F.3d at 1193 n.4.

Considering Interior's and the Ninth Circuit's interpretation, as well as the Indian canon of construction, the state's taxation of the Construction Services is not "directly related to the operation of gaming activities."

ii. Under *Rincon*, the contractor's excise tax cannot be "directly related to the operation of gaming activities"

The Ninth Circuit reaffirmed in *Rincon Band of Luiseno Mission Indians of Rincon Reservation v. Schwarzenegger* that the contractor's excise tax cannot be "directly related to the operation of gaming activities" and is not within the permissive scope of the catchall provision. 602 F.3d 1019, 1034 (9th Cir. 2010). California sought to include within a gaming compact a general fund revenue sharing clause that allowed 10-15% of net gaming profits to be paid into the California general fund. *Id.* at 1023-25. The Ninth Circuit looked to the revenue's "*use*" (ie. where it would be deposited and how it would be spent) to determine if it was "an authorized negotiation topic under" the catchall provision. *Id.* 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" the catchall provision. *Id.* at 1034 (citing *Cabazon,* 37 F.3d at 435) (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). 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[.]" *Id.* at 1039. Similarly, the tax here is deposited into the State general fund and, under *Rincon*, cannot be "directly related to the operation of gaming activities." *See* SUMF 30; SDCL 10-46A-7, 10-45-52. Therefore, the tax does not fall within IGRA's catchall provision.

3. IGRA's regulatory scheme does not comprehensively and pervasively regulate the Construction Services

Next, IGRA and the regulations implementing IGRA do not comprehensively and pervasively regulate the taxed activity here – the Construction Services. The Tribe only identifies one provision in IGRA, 25 U.S.C. section 2710(b)(2)(E), that specifically addresses the construction of a gaming facility:

> The Chairman [of the National Indian Gaming Commission] shall approve any tribal ordinance or resolution concerning the conduct, or regulation of class II gaming on the Indian lands within the tribe's jurisdiction if such ordinance or resolution provides that . . . the construction and maintenance of the gaming facility, and the operation of that gaming is conducted in a manner which adequately protects the environment and the public health and safety.

See SUMF 54. But other than the Tribe's enactment of an ordinance regarding a casino's construction and maintenance, this provision does not regulate that construction and maintenance. The National Indian Gaming Commission's (NIGC's) only rules on this topic repeat, but do not expand upon, the

requirement that a tribal ordinance must ensure the facility is constructed and maintained "in a manner which adequately protects the environment and the public health and safety." *See* 25 C.F.R. §§ 559.1-559.5; 25 C.F.R. § 522.4(b)(7). *Cf.* SUMF 58, 67 (noting that the NIGC does not inspect the Casino to ensure any health or safety standards are being met, and the NIGC does not regulate or supervise the Construction Services).

The Tribe has submitted to the Chairman of the NIGC an attestation that the Tribe "has determined that the construction and maintenance of the gaming facility, and the operation of that gaming, is conducted in a manner which adequately protects the environment and the public health and safety." SUMF 55. But no Tribal Gaming Ordinances or Tribal Gaming Commission rules or regulations identify specific standards or regulations that must be met prior to that determination. SUMF 56, 57. Indeed, although the Casino facility may be inspected by the Indian Health Service (IHS), the IHS is not a regulatory agency. SUMF 64. Neither the federal government nor the Tribal Gaming Commission seems to require the IHS inspections. *See* SUMF 59-60. And there is no indication that the federal government or the Tribal Gaming Commission provides oversight of the facility through receiving the reports generated as a result of those inspections. *See* SUMF 61-63. Any report generated by an IHS inspection is merely a voluntary checklist for the Tribe. SUMF 65, 66.

A one-sentence provision in IGRA (repeated without elaboration in federal and tribal regulations) surely cannot be the type of "comprehensive and

pervasive regulation" envisioned by the United States Supreme Court as necessary to preempt state taxation jurisdiction. 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."). The extensive regulation 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 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 Supreme 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.

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, (1982), the Court determined 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. *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 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 state taxation. *Id.* at 846-47.

In today's case, there is no federal regulation of the taxed activity—Construction Services—comparable to that in *Bracker* and *Ramah*. The NIGC does not regulate or supervise the Construction Services. SUMF 67. The Tribal Gaming Commission has not submitted any of the Project's construction plans to the NIGC for the NIGC's approval. SUMF 68. Regarding the Construction Services, the Tribal Gaming Commission does not maintain billings, invoices, or the contract between the Contractor and Tribe for purposes of NIGC review. SUMF 69. Also, the BIA was not involved in drafting or approving the Tribe's contract with the Contractor, the Tribe's contract with the Architect, or the Construction Project's loan documents. SUMF 70-72. The BIA was not even made aware of the Tribe's contract with the Contractor during the negotiations of the contract. SUMF 73.

No federal policies would be thwarted by imposing the tax on the non-Indian Contractor. As stated in *Yee*,

> Through IGRA, Congress comprehensively regulates Indian gaming; however, [the state] tax is not on Indian gaming activity or profits, but rather on construction materials purchased by a non-Indian . . . subcontractor, which could be used for a multitude of purposes unrelated to gaming. Simply put, IGRA is a gambling regulation statute, not a code governing construction contractors, the legalities of which are of paramount state and local concern.

528 F.3d at 1192. Unlike the federal regulation involved in *Bracker* and *Ramah*, IGRA does not support preemption of the contractor's excise tax here.[7]

[7] The Supreme Court upheld a state tax even when federal regulation of the taxed activity far exceeded any regulation by IGRA in this case. In *Cotton*, the taxpayer identified that the federal regulation of the taxed activity included "regulating and administering the acquisition of leases, guaranteeing environmental protections over well locations, protecting natural resources

B. Federal Interests—Indian trader statutes are not a barrier to State jurisdiction

Next, the Tribe claims that the Indian trader statutes, 25 U.S.C. sections 261 through 264, are federal interests sufficient to preempt the contractor's excise tax on the Contractor. Doc. 1, ¶ 76. In support of this claim, the Tribe indicates that the tax on the Construction Services "interferes and is incompatible with the federal power to regulate trade with Indians in Indian country." Doc. 1, ¶ 75. The Tribe's claim must be rejected because the Indian trader statutes do not apply here, and even if they do apply, they are defunct.

The original Indian trader statutes were enacted in 1790 by the first Congress and were found in the very first compilation of federal statutes. *Warren Trading Post Co. v. Ariz. State Tax Comm'n*, 380 U.S. 685, 688 (1965). The most recent Indian trader statute was passed in 1903. *See* 25 U.S.C. § 262 credits. Through the Indian trader statutes, Congress aimed to "prevent fraud and other abuses by persons trading with Indians." *Dep't of Taxation & Finance of New York v. Milhelm Attea & Bros.*, 512 U.S. 61, 70 (1994).

Section 261 grants the Commissioner of Indian Affairs the "sole power and authority to appoint traders to the Indian tribes and to make such rules and regulations as he may deem just and proper specifying the kind and quantity of goods and the prices at which such goods shall be sold to the

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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." *See* Brief for Appellant at *19-20, *Cotton*, 490 U.S. 163 (No. 87-1327), 1987 WL 880197.

Indians." Section 262 indicates that an individual, if approved by the Commissioner, may trade with Indians on an Indian reservation under rules set by the Commissioner. Next, section 263 authorizes the President to revoke, under certain circumstances, an individual's status as an Indian trader. Finally, section 264 provides the punishment for traders that have not obtained a license under these statutes: "Any person other than an Indian of the full blood who shall attempt to . . . introduce goods, or to trade [on any Indian reservation], without [an Indian trader] license, shall forfeit all merchandise offered for sale to the Indians or found in his possession, and shall moreover be liable to a penalty of $500 . . . ."

A. The Indian trader statutes do not apply to the Construction Services

First, the Indian trader statutes do not apply here because they only govern the trade of goods on Indian reservations; the statutes do not govern the trade of services. *See* 25 U.S.C. §§ 261, 263, 264. In this case, the tax is imposed on the Contractor's services. Thus, the Indian trader statutes are not implicated.

More than fifty years after the Indian trader statutes were enacted, the Commissioner of Indian Affairs promulgated regulations regarding the Indian trader statutes. *See* 22 F.R. 10670 (Dec. 24, 1957). These regulations purport to include both goods and services in the Indian trader licensing scheme. *See* 25 C.F.R. § 140.5 ("Trading" means buying, selling, bartering, renting, leasing, permitting, or any other transaction involving the acquisition of property or services.") (emphasis added). But the regulation's expansion to include the

trade of services exceeds any rulemaking authority granted by the Indian trader statutes: if a federal agency can "enlarge [a] statute at will . . . [s]uch power is not regulation; it is legislation." *See United States v. George*, 228 U.S. 14, 22 (1913). Any regulation regarding the trade of services on Indian reservations is invalid and unenforceable.

B. Even if the Indian trader statutes apply to services, they are not comprehensive and pervasive regulation of the Construction Services.

Assuming *arguendo* that the Indian trader statutes encompass services, they are not comprehensive and pervasive federal regulation of the Construction Services because the statutes essentially provide no de facto regulation of the Construction Services. The Tribe was unable to procure an Indian trader license application from the BIA because based on its communication with the BIA, the Tribe "couldn't do such a thing in [the Tribe's] area." SUMF 75, 76. Accordingly, neither the Contractor nor its representatives are licensed Indian traders pursuant to the Indian trader statutes. SUMF 74.

At a tribal consultation with representatives of the Department of Interior, Assistant Secretary – Indian Affairs, the Tribe agreed that to its knowledge, the Indian trader statutes are not enforced:

> [Tribal representative]: . . . As it is now, [the Indian trader statutes are] ineffective on our reservation. It's not used, I don't think. . . . we don't use the statute at all. I mean, it's –
>
> [Interior representative]: . . . Do any of you know of any tribes that are having tribe – traders licenses issued for them?

> [Tribal representative]: I don't.
>
> [Interior representative]: Okay.
>
> [Tribal representative]: In fact, I've had conversations with our area office stating that, you know, we have a large construction and renovation project on our casino, and I'd asked whether or not I could have a traders license issued for our construction manage, and we haven't had any movement on that.

SUMF 77. Because it was impossible for the Contractor to obtain a license, the Indian trader statutes are irrelevant here.

U.S. ex rel. Keith v. Sioux Nation Shopping Center, 634 F.2d 401, supports this conclusion. In that case, the Eighth Circuit ruled that an unlicensed Indian trader cannot be held liable for statutory penalties under the Indian trader statutes if the trader was unable to obtain a license because "bureaucratic nonfeasance [by the Secretary of Interior made] it impossible to obtain the federal trader's license[.]" *See U.S. ex rel. Keith*, 634 F.2d at 403 (8th Cir. 1980). Likewise, the Indian trader statutes cannot be enforced against the Contractor in this case. As follows, if the statutes cannot be enforced against the Contractor, they cannot amount to comprehensive and pervasive federal regulation of the Contractor's Construction Services.

The Indian trader regulations are just as defunct as the statutes.[8] 25 C.F.R. section 140.22 requires the "superintendent [to the Commissioner of Indian Affairs] to see that the prices charged by licensed traders are fair and

[8] Recently, an Interior representative acknowledged that "there are definitely provisions in [the current Indian trader regulations] that appear to be sorely outdated and possibly not even legally appropriate anymore." SUMF 79.

reasonable." This rule, however, is not enforced in this case. No federal agency has been involved in the Project's contract process between the Tribe and the Contractor to ensure that the Contractor is charging a fair price for the Construction Services. SUMF 78.

The Supreme Court has held that the Indian trader statutes preempted a state tax on the sale of goods in two instances. First, in *Warren Trading Post Co. v. Arizona State Tax Commission*, 380 U.S. 685 (1965), the Supreme Court determined that the Indian trader statutes preempted a state income tax on a non-Indian retailer for its sales made to reservation Indians on the reservation. *Id.* at 691-92. At the time of *Warren Trading Post Co.*, the Indian trader statutes were enforced, as evidenced by the retailer's licensure under the statutes. *Id.*

Also, in *Central Machinery Co. v. Arizona State Tax Commission*, 448 U.S. 160 (1980), the Supreme Court ruled that the Indian trader statutes preempted a state sales tax on an unlicensed non-Indian retailer of farm machinery sold to an Indian on a reservation. *Id.* at 161-62, 165-66. Although the retailer was not a licensed Indian trader, the Supreme Court indicated it was the existence of the Indian trader statutes and regulations that preempted the tax. *Id.* at 164-65. Importantly, although the non-Indian retailer was unlicensed, the Court noted the federal regulation and oversight in the contract. *Id.* at 164 & n.4, 165. Seeming to fulfill the obligation to see that reasonable prices are charged, the BIA had approved the transaction, the contract of sale, and the tribal budget, which allocated money for the purchase of the machinery. *Id.* at

164 n.4. Here, as stated above, there was no similar federal involvement. SUMF 78. Ultimately, neither case offers guidance because this case involves the sale of services and the Indian trader statutes and regulations are defunct.

The Supreme Court has chipped away at any notion that the Indian trader statutes are comprehensive and pervasive regulation. In *Department of Taxation and Finance of New York v. Milhelm Attea & Bros.*, 512 U.S. 61, the Court concluded that the Indian trader statutes do not preempt all state regulation of Indian traders. *Id.* at 75 (authorizing state regulation of Indian traders that "is reasonably necessary to the assessment or collection of lawful state taxes."). *Milhelm* eliminates the possibility that the Indian trader statutes impliedly preempt state law because the statutes occupied the field of Indian trading on reservations.

Supporting the insignificance of the Indian trader statutes, the Tenth Circuit has accorded little, if any, weight to the statutes. In *Sac & Fox Nation of Missouri v. Pierce*, 213 F.3d 566, the Tenth Circuit rejected a tribe's argument that the Indian trader statutes preempted a state tax on motor fuel that was sold by a distributer to a tribe's retail gas stations. 213 F.3d 566, 569, 582-83 (10th Cir. 2000). The Court held:

> The Kansas motor fuel tax law imposes a non-discriminatory tax on all wholesale fuel distributers for fuel distributions to retailers within the State of Kansas- Indian or otherwise. Nothing in the record indicates the Tribes' distributors distribute all their fuel, or even a significant portion of it, to the Tribes. Thus, the threat of distributers perpetrating fraud or abuse upon the Tribe appears negligible. . . . We conclude that the Indian trader statutes do not so pervade the field that they preempt the Kansas motor fuel tax, the

> legal incidence of which falls upon the distributors and which imposes only an indirect burden on the Tribes.

Id. at 582-83.

The facts here require the same outcome as *Sac & Fox Nation*. Here, the tax is a non-discriminatory state tax imposed on the gross receipts of contractors performing construction work in South Dakota. *See* SDCL chapter 10-46A. There is no indication that the Contractor or Architect perform construction work only for the Tribe. *Cf.* SUMF 80, 81. Thus, the threat of fraud or abuse on the Tribe is slight, if any. For these reasons, the Indian trader statutes do not preempt the tax on the non-Indian Contractor.

C. The state interests outweigh any remaining tribal interests

The Tribe contends that IGRA and the Indian trader statutes represent the federal interests to be weighed in the *Bracker* balancing test. Doc. 1, ¶¶ 54-62, 74-80. But as set forth above, neither statutory scheme comprehensively and pervasively regulates the taxed activity—the Construction Services. Because no federal interests are implicated in this taxed activity, the remaining interests to be weighed are the tribal and state interests. The Tribe alleges that the tribal interests here include the intrusion into the Tribe's sovereignty and the tax's economic burden on the Tribe. Doc. 1, ¶¶ 68, 69. However, neither alleged tribal interest presents a barrier to State taxation of the Construction Services.

> *1. Imposing the tax on the Construction Services does not "infringe on the right of reservation Indians to make their own laws and be ruled by them."*

a. Tribal Self-Government

As stated above, the second barrier to a state's authority to tax nonmembers' on-reservation activities is when the taxation "unlawfully infringe[s] on the right of reservation Indians to make their own laws and be ruled by them." *Bracker*, 448 U.S. at 142 (internal quotation marks omitted); *Ramah*, 458 U.S. at 837. The second barrier primarily provides the "back-drop" for the federal enactments under the first barrier. *Ramah*, 458 U.S. at 837-38. "[T]he trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption." *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 172 (1973).

The Supreme Court has signaled that a state tax on non-Tribal members does not infringe upon tribal self-government. *See Colville*, 447 U.S. at 161. In *Colville*, the Supreme Court upheld a tax on the purchase of cigarettes by an Indian who resided on the reservation but was not a member of the governing tribe. *Id.* The Supreme Court concluded that imposing the tax on individuals who are not members of the governing tribe does not "contravene the principle of tribal self-government, for the simple reason that nonmembers are not constituents of the governing Tribe. . . . There is no evidence that nonmembers have a say in tribal affairs or significantly share in tribal disbursements." *Id.* at 161.

Such is the case here. There is no evidence that the non-Indian Contractor has any "say in tribal affairs or significantly share[s] in tribal disbursements." *See id.* Thus, *Colville* confirms that the contractor's excise tax

does not infringe on the right of the Tribe "to make [its] own laws and be ruled by them." *See Bracker*, 448 U.S. at 142.

b. Economic Burden

Next, prior to considering the Tribe's economic burden contention, it must be emphasized that the legal incidence of the tax is on the Contractor. *See* SUMF 27; SDCL 10-46A-1, -1.8, -2. The Contractor, rather than the Tribe, is legally obligated to pay the tax. *See id.* Although the Contractor may pass the tax on to its customers, it is not required to do so. SUMF 28, 29; *see* SDCL 10-46A-12. Here, pursuant to the terms of its agreement with the Contractor, it appears the Tribe has agreed to pay the contractor's excise tax. SUMF 48. "[B]ut for the contractual arrangement providing for indemnification by the Tribe, it would be [the Contractor's] revenues-and not the Tribe's-that would be reduced." *See Yee*, 528 F.3d at 1192.

Regardless, *Colville* reinforces that any impact of the tax on the Tribe's finances is insufficient to outweigh the State interests. In *Colville*, the Supreme Court upheld a state tax on the sale of cigarettes even though evidence showed that the tax would substantially interfere with tribal revenue. 447 U.S. at 144-45; *see Confederated Tribes of Colville Indian Reservation v. State of Wash.*, 446 F. Supp. 1339, 1347 (E.D. Wash. 1978), *aff'd in part, rev'd in part sub nom. Colville*, 447 U.S. 134 (indicating that imposing a state tax on cigarettes sold to non-Indians would eliminate those sales, thus reducing tribal tax revenue and substantially interfering with the tribe's ability to provide services); *Crow Tribe of Indians v. Montana*, 650 F.2d 1104, 1116 (9th Cir. 1981) ("It is clear that a

state tax is not invalid merely because it erodes a tribe's revenues, even when the tax substantially impairs the tribal government's ability to sustain itself and its programs."). The Supreme Court indicated that a state "does not infringe the right of reservation Indians to 'make their own laws and be ruled by them' [ ] merely because the result of imposing its taxes will be to deprive the Tribes of revenues which they currently are receiving." *Colville*, 447 U.S. at 156 (quoting *Williams*, 358 U.S. at 220) (internal citation omitted).

Expanding on this point in his concurring opinion, Justice Rehnquist indicated that "[e]conomic burdens on the competing sovereign . . . do not alter the concurrent nature of the taxing authority." *See id.* at 184, n.9 (Rehnquist, J., concurring in part, concurring in result in part, and dissenting in part). Later, in *Wagnon v. Prairie Band Potawatomi Nation*, the Supreme Court relied on Justice Rehnquist's statement when maintaining that the "downstream economic consequences" of a state tax on a tribe were insufficient to invalidate the tax. 546 U.S. 95, 114-15 (2005).

The *Cotton Petroleum* Court also determined that incidental effects on a tribe's finances from a state tax on nonmembers' on-reservation activities were too indirect to preempt taxation. 490 U.S. 163. *Cotton Petroleum* upheld five severance taxes on a non-Indian corporation's on-reservation production of oil and gas, explaining that a financial burden on the Tribe caused by the imposition of a state tax is not sufficient to implicate preemption: "State[s] can impose a nondiscriminatory tax on private parties with whom . . . an Indian

tribe does business, even though the financial burden of the tax may fall on . . . the Tribe." *Id.* at 175, 186.

The Supreme Court firmly rejected that "[a]ny adverse effect on the Tribe's finances caused by the taxation of a private party contracting with the Tribe would be ground[s] to strike the state tax[.]" *See Cotton Petroleum*, 490 U.S. at 187. While the Supreme Court recognized an economic burden likely existed (it was "reasonable to infer that the [state] taxes have at least a marginal effect on the demand for on-reservation leases, the value to the tribe of those leases, and the ability of the tribe to increase its tax rate"), the burden did not alter the Supreme Court's decision to uphold the tax. *Id.* at 186-87. The burden on the tribe was "too indirect and too insubstantial to support [the taxpayer's] claim of preemption." *Id.* at 187.

Here, even assuming that the economic burden asserted by the Tribe is "at least . . . marginal," it does not justify preemption of the contractor's excise tax. *See Cotton Petroleum*, 490 U.S. at 186-87. The Tribe has estimated that the contractor's excise tax for the Construction Project is $480,000. SUMF 49. That two percent tax is "too indirect and too insubstantial" to justify preemption. *See* SUMF 50; *Yee*, 528 F.3d at 1191-92 (determining that a reduction of tribal revenues by $200,000 for one subcontractor's work, which would be "compounded by amounts paid to the other subcontractors," because of the state tax on those subcontractors was insufficient to invalidate the state tax) (emphasis added); *see also Cotton Petroleum*, 490 U.S. at 186-87

(determining that an additional 8 percent in state taxes is not "an unusually large state tax" that would substantially burden a Tribe).

2. The State's interests reinforce the State's jurisdiction to tax the Construction Services.

Any federal and tribal interests, as discussed above, must be weighed against the State's interests in imposing the tax on the Contractor. *See Ramah*, 458 U.S. at 836-38. A state's interest in raising revenues for its general purpose fund is enough to outweigh even a highly federally regulated activity. *See Cotton Petroleum*, 490 U.S. 163. Moreover, "[r]aising revenue to provide general government services is a legitimate state interest." *Yee*, 528 F.3d at 1192-93. Even so, the State's interests here encompass more than just a general desire to raise revenues.

The State has a strong interest in funding the services it makes available both on- and off-reservation to the non-Indian Contractor, the subcontractors, and other entities involved in the Construction Project. *See* SUMF 83-86; *Cotton Petroleum*, 490 U.S. at 189 ("the relevant services provided by the State include those that are available to the [taxpayers] and the members of the Tribe off the reservation as well as on it."). These services, funded by the State general fund (in which the contractor's excise tax is generally deposited), include, but certainly are not limited to: access to the courts and the Office of Hearing Examiners, court services, emergency medical services, criminal investigation services, taxpayer licensing and education services, services relating to complaints of employer labor practices and worker's compensation,

access to public media, vocational rehabilitation services, employer training relating to human services, and funding for schools. *See* SUMF 30, 83-86; *see also* Exhibit #5 attached to Affidavit of Stacy R. Hegge for a more comprehensive list of State services that weigh in favor of the State's jurisdiction to impose the contractor's excise tax [hereinafter "Ex. #5"].

A number of State services funded by the State general fund specifically relate to the Contractor or the Construction Project. These include certain services relating to Contractor's worker's compensation, such as administration of first reports of injuries, and unemployment insurance (Department of Labor and Regulation), business services and notary public services (Secretary of State); regulation of attorneys (Unified Judicial System); taxpayer services (Department of Revenue); and supervision of parolees (Department of Corrections). *See* SUMF 87-93; Ex. 5.

The record indicates that while the Contractor may receive some Tribal governmental services, it is likely receiving a majority of its services from the State. *See* SUMF 14-18, 22-25, 100-101, 103; *Compare* SUMF 83-85; Ex. #5 (governmental services offered by the State using general funds) *with* SUMF 99; Exhibit #6 attached to Affidavit of Stacy R. Hegge [hereinafter, "Ex. #6"] (governmental services offered by the Tribe). The building specifications for the Construction Project identify that certain items should be fabricated or preassembled "in the shop[s] to the greatest extent possible." *See* SUMF 14; *see also* SUMF 15-18. The Contractor's shop is located in Sioux Falls, South

Dakota, which is approximately 35 miles away from the Tribe's reservation. SUMF 23. But the Tribe does not provide services in Sioux Falls. SUMF 100.

Indeed, the Tribe's governmental services provided to the Contractor are confined to the 3.68 square miles of the Tribe's reservation. SUMF 3, 101. Moreover, the State offers services to the Contractor that are not offered by the Tribe.[9] *Compare* SUMF 83-85; Ex. #5 (governmental services offered by the State using general funds) *with* SUMF 99; Ex. #6 (governmental services offered by the Tribe); *see* SUMF 103-104; *Tulalip Tribes v. Wash.*, No. 2:15-cv-00940-BJR, 2017 WL 58836, at *7 (W.D. Wash. Jan. 5, 2017) ("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."). And finally, the Contractor cannot receive certain Tribal governmental services because some of those services are not available to non-Indians. *See* SUMF 103-104.

Ultimately, an abundance of State services are available to the Contractor. The State has a strong interest in imposing its tax on the non-

[9] The State regulates and licenses certain professionals such as engineers, architects, plumbers, electricians, as well as certain entities such as banks and insurance companies. *See, e.g.,* SUMF 94-98. Although general funds are not used in the State's regulation of these professionals and entities, the Tribe, as well as the Architect, rely on this licensure. *Cf.* SUMF 83-85. The building specifications for the Construction Project require certain professionals to be "licensed in South Dakota" or "legally qualified to practice in jurisdiction where project is located." SUMF 19. Also, the Architect's office policy is that the architect of record and engineers of record "have to be licensed in the State in which they're performing the work." SUMF 20. Yet, the Tribe does not issue licenses to any types of professionals, other than a business/tax license. SUMF 102.

Indian Contractor to fund those State services. The State's interests outweigh any tribal interests that are present.

CONCLUSION

IGRA does not comprehensively regulate the taxed activity, the Construction Services: "IGRA is a gambling regulation statute, not a code governing construction contractors, the legalities of which are of paramount state and local concern." *Yee*, 528 F.3d at 1192. Likewise, the Indian trader statutes do not comprehensively regulate the Construction Services. Finally, the State interests in imposing the tax outweigh any remaining tribal interests. As the contractor's excise tax is validly imposed on the non-Indian Contractor, the State respectfully requests that the Court grant the State's Motion for Summary Judgment.

Dated this 6th day of April 2018.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that Defendants' Memorandum in Support of Its Motion for Summary Judgment is within the limitation provided for in D.S.D. Civ. LR 7.1 using Bookman Old Style typeface in 12 point type. Defendants' Memorandum contains 11,736 words.

Date this 6th day of April 2018.

/s/ Stacy R. Hegge
Stacy R. Hegge
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of April 2018, I electronically filed the foregoing 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.

/s/ Stacy R. Hegge
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