**UNITED STATES COURT OF APPEALS**

**FOR THE EIGHTH CIRCUIT**

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**No. 18-2750**

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**FLANDREAU SANTEE SIOUX TRIBE, a Federally recognized Indian Tribe,**

**Plaintiff-Appellee,**

**v.**

**RICHARD SATTGAST, et al.,**

**Defendants-Appellants.**

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH DAKOTA, SOUTHERN DIVISION**

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**THE HONORABLE KAREN E. SCHREIER**
**United States District Court Judge**

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# DEFENDANTS-APPELLANTS' BRIEF

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## SUMMARY OF THE CASE AND ORAL ARGUMENT REQUEST

The Flandreau Santee Sioux Tribe contracted with a non-Indian contractor to renovate and expand the Tribe's casino located on its reservation. While the State imposes a two percent tax on a contractor's gross receipts for construction services, certain construction projects on Indian country are exempt from tax pursuant to federal law. The State determined that the non-Indian Contractor's construction services related to the casino renovation and expansion did not qualify for the tax exemption and thus were subject to the contractor's excise tax.

The Tribe filed this lawsuit, challenging the State's authority to impose the tax on the contractor. On cross motions for summary judgment, the district court ruled, in relevant part, that 1) the Indian Gaming Regulatory Act preempts the contractor's excise tax on the non-Indian contractor's construction services; and 2) the tax infringes on the Tribe's right to make its own laws and be ruled by them.

The State requests 30 minutes of oral argument to present that the district court's ruling is contrary to established law.

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## JURISDICTIONAL STATEMENT

On April 21, 2017, the Tribe filed a Complaint in the United States District Court, District of South Dakota, challenging the imposition of a state tax on a non-Indian contractor for construction services at the Tribe's casino on the Flandreau Indian Reservation.[1] JA 011-017; JA 310(¶12). The district court had jurisdiction over the matter pursuant to 28 U.S.C. § 1331.

On July 16, 2018, the district court entered an Order Granting Plaintiff's Motion for Summary Judgment in Part and Denying in Part and Denying Defendant's Motion for Summary Judgment in Part but Dismissing Plaintiff's Fourth Claim without Prejudice.

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[1] Throughout this brief, the Defendants and Appellants, Richard Sattgast, Treasurer of the State of South Dakota, Andy Gerlach, Secretary of the South Dakota Department of Revenue, and Dennis Daugaard, Governor of the State of South Dakota are referred to as "the State"; and Plaintiff and Appellee, Flandreau Santee Sioux Tribe, is referred to as "the Tribe." The parties' Joint Appendix is cited as "JA"; the Addendum is cited as "ADD"; and docket entries filed in the District Court Clerk's record, 4:17-CV-04055-KES, are cited as "Doc." followed by the docket number.

Other abbreviations used throughout the brief are as follows: "Department" means the South Dakota Department of Revenue; "IGRA" means the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.*; "NIGC" means the National Indian Gaming Commission; "Interior" means the United States Department of Interior; and "BIA" means the federal Bureau of Indian Affairs.

ADD 001-023. A Judgment was filed on July 16, 2018, and the State timely filed a Notice of Appeal on August 14, 2018. ADD 024-025; Doc. 107. The Judgment is a final order and this Court has jurisdiction pursuant to 28 U.S.C. § 1291.

## STATEMENT OF ISSUE

WHETHER A STATE TAX ON A NON-INDIAN CONTRACTOR'S CONSTRUCTION SERVICES FOR A TRIBE'S CASINO IS PREEMPTED BY FEDERAL LAW?

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

*Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989)

*Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of N.M.*, 458 U.S. 832 (1982)

*White Mountain Apache Tribe v. Bracker,* 448 U.S. 136 (1980)

## STATEMENT OF THE CASE AND FACTS

### I. Factual Background

The Tribe is a federally recognized Indian tribe whose reservation, the Flandreau Indian Reservation, is wholly within Moody County, South Dakota. JA 307(¶¶1, 2). Within the reservation, the Tribe owns and operates the Royal River Casino and Hotel (Casino). JA 308(¶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. JA 308(¶5). While the Casino offers Class III games such as slot machines and blackjack, the Casino currently does not offer Class II gaming. JA 308-09(¶¶6-7). The Compact does not contain provisions specifically relating to construction standards, construction activities, or the taxation of construction activities at the Casino. JA 309(¶8); *see* JA 018-030.

The Tribe planned a $24 million renovation and expansion of the Casino (the Construction Project), which includes adding slot machines, a VIP lounge, and casino administration offices, as well as relocating the bar and renovating the casino cage area, snack bar, restaurant, and hotel. *See* ADD 002-003; JA 311(¶13). Phase 1 of the Construction Project involved:

> 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, "Phase 1"]. JA 007(¶28); Doc. 72-7 (SD_00175-SD_00176).

The Tribe retained an architect for the Construction Project in July 2015. JA 310(¶11). In October 2015, the Tribe contracted with a non-Indian construction company, Henry Carlson Company (Contractor), as the contractor for the Construction Project. JA 310(¶12). The Contractor's shop is located in Sioux Falls, South Dakota, which is approximately 35 miles away from the Tribe's reservation. JA 314(¶23). Actual construction for the Construction Project began about December 1, 2016. JA 314(¶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[.]" JA 315(¶26); *see* SDCL 10-46A-1, -2, -2.2. The legal incidence of this tax is on the contractor. JA 013(¶63). The contractor may pass the tax to its customers, but it is not required to do so. JA 316(¶28); *see* SDCL 10-46A-12 (providing that "[a] contractor may list the contractor's excise tax . . . as a

separate line item on all contracts and bills[.]") (emphasis added). Using funds generated in part by contractor's excise tax revenue, the State provides a substantial number of governmental services to entities and individuals within its borders. *See* Doc. 33-5.

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. JA 317(¶¶31-32); *see* SDCL 10-46A-18, -18.1. The South Dakota Department of Revenue (Department) administers this exemption by having contractors or project owners complete an Indian Country Project Request for Exemption.[2] JA 318(¶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. JA 319(¶36).

Consistent with the above, the Contractor submitted to the

[2] The Indian Country Project Request for Exemption has been referred to as "Indian Use Projects" or "Indian Use Only Projects", but the Department has made efforts to eliminate such references from its publications. JA 318-19(¶¶34-35).

Department an Indian Country Project Request for Exemption for Phase 1 of the Construction Project.[3] JA 320(¶39); *see* JA 048. After its review, the Department denied the request. JA 320(¶40); *see* JA 048. Subsequently, the Tribe submitted a second Indian Country Request for Exemption for Phase 1, which was also denied by the Department. JA 321(¶41); *see* JA 049-051; Doc. 72-7.

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 Project. *See* JA 349(¶5); Doc. 90-1; *see, e.g.*, Doc. 79-1. 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. JA 321-322(¶43); *see, e.g.*, Doc. 79-1. The Department denied the

[3] The Tribe does not contend that the construction services at issue do not fall within those services typically taxed under SDCL chapter 10-49A; the Tribe only contends that federal law and tribal sovereignty prohibits the imposition of the tax here. *See generally* JA 001-017.

refund requests and informed the Contractor that it may request a hearing regarding the denials. JA 323(¶¶46-47).[4]

## II. Procedural History

The Tribe filed this federal lawsuit on April 21, 2017, alleging that the contractor's excise tax on Phase 1 of the Construction Project 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. JA 014(¶73), 015(¶¶76,80); *see also* JA 007(¶28) (defining the scope of the "Project" as Phase 1); JA 016(Relief Requested ¶1). Through its Complaint, the Tribe also sought a refund of "contractor's excise tax paid, or to be paid, under protest" to the State by the Contractor. JA 001(¶3); JA 016(Relief Requested ¶3).

After engaging in discovery, both the State and the Tribe moved for summary judgment. JA 071-072, 096-098. On July 16,

[4] After the district court's decision in this case, the Department has credited $140,493.12 to the Contractor's tax license, representing the amount of contractor's excise tax that the Contractor had remitted to the Department for the Construction Project. *See* State's Reply to Plaintiff's Opposition to Defendants' Motion to Stay Proceeding, Appeal No. 18-2750, at 3.

2018, the district court issued an Order regarding the parties' motions for summary judgment ("Decision"). ADD 001-023. In the Decision, the court applied the *Bracker* balancing test, which provides that federal and tribal interests are weighed against the state's interests "to determine whether, in the specific context, the exercise of state authority would violate federal law." ADD 005-007; *see White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980). In applying this test, the court concluded that IGRA preempts the contractor's excise tax on the Construction Project. *See* ADD 006-013. The court also concluded that "the State's interests in imposing the excise tax do not outweigh the tribal and federal interests in promoting self-sufficiency[.]" ADD 021. For these reasons, the court held that the State has no authority to impose its tax on the non-Indian Contractor for the Construction Project.[5] ADD 021. The court dismissed the Tribe's claim for a

[5] The Tribe's Complaint and Indian Country Request for Exemption defined the "Project" as Phase 1 (construction of casino administrative offices and renovation of the bingo hall to add gaming space and a VIP lounge). *See* JA 007(¶28); Doc. 72-7 (SD_00175-SD_00176). The Tribe's first three claims for relief were expressed in terms of its "Project." *See* JA 014(¶73), 015(¶¶76, 80).

(continued. . .)

refund of tax paid by the Contractor for lack of jurisdiction. ADD 022, 025. The State now appeals.[6]

## SUMMARY OF THE ARGUMENT

The State tax on the non-Indian Contractor for the Construction Project is not preempted by federal law. IGRA and its implementing regulations do not comprehensively regulate the

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(. . .continued)
However, the Decision appears to have not limited the Tribe's claims to Phase 1. *See* ADD 001-023 (indicating on ADD 002-003 that "the project includes doubling the number of slot machines, adding a VIP lounge, renovating the casino cage area, relocating the bar, and renovating the snack bar, restaurant, and hotel," and not recognizing the Tribe's defined scope of "Project"); *cf.* ADD 024 (granting judgment in favor of the Tribe as to claims one, two, and three (regarding Phase 1), but also permanently enjoining the State from assessing contractor's excise tax on the project).

[6] Through the Tribe's second claim for relief, the Tribe alleged that the contractor's excise tax is preempted by the federal Indian Trader Statutes. *See* JA 014-015(¶¶74-76). In the Decision, the court stated, that "[b]ecause the court finds in favor of the Tribe under . . . the *Bracker* analysis, it does not reach the other theory raised by the Tribe – namely whether the Indian Trader Statutes preempt the State's ability to impose the contractor's excise tax." ADD 021. However, seemingly in error, the court entered judgment in favor of the Tribe on its second claim for relief. *See* ADD 024. Because the appeal has been docketed and is currently pending, the State will wait to pursue an amended judgment unless otherwise advised by this Court. *See* Fed. R. Civ. P. 60(a).

Construction Project; instead, IGRA's federal regulatory scheme concentrates on the operation of the casino games. However, any comprehensive regulation of the operation of games at a tribal casino does not equate to the comprehensive regulation of the Construction Project.

Evidencing that IGRA's scope does not include the contractor's excise tax, the tax may not be included in a gaming compact entered into under the provisions of IGRA. Through 25 U.S.C. § 2710(d)(3)(C)(vii), IGRA permits gaming compacts to contain provisions for subjects that are "directly related to the operation of gaming activities." But that provision must be construed narrowly and under that narrow construction, it does not encompass the contractor's excise tax here.

Finally, tribal interests in self-government and self-sufficiency do not justify preemption of the State tax. In light of the substantial number of State services available to the Contractor and the minimal federal and tribal interests implicated, the State has authority to impose the tax on the non-Indian Contractor in this case.

## STANDARD OF REVIEW

The State challenges the portion of the Decision granting summary judgment in favor of the Tribe. The grant of summary judgment is subject to de novo review, "with all justifiable factual inferences being drawn in favor of the party opposing summary judgment." *Cook v. United States*, 86 F.3d 1095, 1097 (Fed. Cir. 1996) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)); *Karras v. Karras,* 16 F.3d 245, 247 (8th Cir. 1994). "Summary judgment is appropriate only where there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Butler v. Crittenden Cty., Ark.*, 708 F.3d 1044, 1049 (8th Cir. 2013) (internal quotation marks omitted). Questions of law, including the interpretation and application of a federal statute, are reviewed de novo. *United States v. Tebeau*, 713 F.3d 955, 959 (8th Cir. 2013); *United States v. Vig*, 167 F.3d 443, 447 (8th Cir. 1999).

## ARGUMENT

As pointed out by the district court, "[t]he initial and frequently dispositive question in Indian tax cases . . . is who bears the legal incidence of a tax." *Okla. Tax Comm'n v. Chickasaw*

*Nation*, 515 U.S. 450, 458 (1995); *see* ADD 005. "[I]f the legal incidence of the [state] tax rests on non-Indians, no categorical bar prevents enforcement of the tax[.]" *Okla. Tax Comm'n*, 515 U.S. at 459. The district court correctly stated that "the legal incidence of the tax is on the non-Indian contractor because under South Dakota law, the contractor has the legal obligation to pay the contractor's excise tax." ADD 005. Consequently, the State is not categorically barred from imposing its tax. *See Okla. Tax Comm'n*, 515 U.S. at 458-59.

Although no categorical bar is present, there are two possible "barriers" to the State's imposition of contractor's excise tax on the non-Indian Contractor.[7] *See Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of N.M.*, 458 U.S. 832, 837 (1982) [hereinafter, "*Ramah*"].

[7] The Supreme Court's use of the phrase "barriers to the exercise of state authority" confirms that states generally have authority to tax non-tribal members' on-reservation activity unless something impedes it. *See Ramah,* 458 U.S. at 837-38; *Bracker,* 448 U.S. at 142-45; (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 Oct. 2, 2018).

The first barrier is if the tax is preempted by federal law. *See id.* at 837; *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 176-77 (1989). The second barrier is if the tax "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 (quoting *Williams v. Lee*, 358 U.S. 217, 220 (1959)). These barriers, representing 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 145.

Contrary to the Decision, neither barrier is present in this case. IGRA does not preempt the tax and the tax on the non-Indian Contractor does not "unlawfully infringe" on the Tribe's right of self-government. Moreover, the State's interests support the validity of the tax. Thus, the state's general authority to tax the non-Indian Contractor's on-reservation activities must prevail. *Cf. supra* n.7; *see also Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 481-83 (1976) (upholding state tax on cigarettes sold by Indians to non-Indians); *Wash. v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134,

150 n.25, 154-59, 160-61 (1980) (upholding a state tax on non-Indians' on-reservation purchases of cigarettes, as well as a state tax on on-reservation purchases of cigarettes and other goods by an Indian who was not a member of the governing tribe).

## I. Federal Interests - IGRA is not a barrier to State jurisdiction.

The district court ruled that IGRA is a barrier to the contractor's excise tax for two alternate reasons. The court concluded that IGRA comprehensively regulates Indian gaming and leaves no room for the tax on the Construction Project. ADD 006-010. The court also determined that pursuant to IGRA's compacting process, the contractor's excise tax could have been included in a gaming compact. ADD 012-013. However, because the State-Tribal gaming compact for the Casino did not include any provision regarding contractor's excise tax, the State has no authority to impose the tax on the Construction Project. ADD 013. Both of these rulings are contrary to IGRA's purpose and scope.

### A. *IGRA does not comprehensively regulate the construction of the Casino in a manner that leaves no room for the State tax on the non-Indian Contractor.*

#### 1. *IGRA is centered upon on the regulation of gaming rather than the regulation of construction.*

First, the district court overextends the scope of IGRA in ruling that IGRA comprehensively regulates the taxed activity in this case—the Construction Project. *See* ADD 006-010. IGRA "is a gambling regulation statute, not a code governing construction contractors, the legalities of which are of paramount state and local concern." *Barona Band of Mission Indians v. Yee*, 528 F.3d 1184, 1192 (9th Cir. 2008). IGRA's primary focus is on the operation of the gaming:

> 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) (alteration in original); *see* 25 U.S.C. § 2701 *et. seq.* Indicative of Congress's intent, the Act was passed

in response to *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) [hereinafter, "*Cabazon*"], in which the United States Supreme Court ruled that California's gambling laws and ordinances (namely, the regulation of bingo and certain card games) were preempted. *Cabazon*, 480 U.S. at 205-06, 220-22; *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, ___, 134 S.Ct. 2024, 2034 (2014) ("Congress adopted IGRA in response to [*Cabazon*], which held that States lacked any regulatory authority over gaming on Indian lands.") (emphasis added). Congress, through its enactment of IGRA and the creation of the tribal-state compacting process for on-reservation gambling, squarely addressed *Cabazon*. *Cf.* JA 018-030 (Gaming Compact between the Flandreau Santee Sioux Tribe and the State of South Dakota regulating the operation of gaming activities and incorporating State of South Dakota gambling laws found in SDCL chapter 42-7B).

Congress's concentration on gaming rather than construction activities is supported by IGRA's 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). These purposes are not hindered by the imposition of the tax. The tax does not involve regulating or operating the "roll of the dice," "spin of the wheel," or blackjack tables. *See Bay Mills Indian Cmty.,* 572 U.S. at ___, 134 S.Ct. at 2032, 2033. Moreover, nothing in the record indicates that the tax on the Construction Project changes the Tribe's status as the primary beneficiary of the Casino. *See* JA 324(¶¶49-50). Ultimately, the tax on the non-Indian Contractor does not interfere with, and can co-exist with, these stated purposes.

In the Decision, the court indicates that the tax "undermines the objective of IGRA because the tax is passed from the contractor

to the Tribe which interferes with the Tribe's ability to make a profit from gaming activities." ADD 010. But this determination fails to acknowledge that the Tribe agreed to pay the tax pursuant to its contract with the Contractor. *See* JA 324(¶48); *see also* Docs. 33-16 (FSST 100656); 79-1 (SD_04959). "[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. As such, IGRA's identified objectives do not support preemption of the tax on the Construction Project.

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., Gaming Corp. of America v. Dorsey & Whitney*, 88 F.3d 536, 548-49 (8th Cir. 1996); *Mashantucket Pequot Tribe v. Town of Ledyard*, 722 F.3d 457, 469 (2d Cir. 2013); *Pueblo of Pojoaque v. N.M.*, 863 F.3d 1226, 1232 (10th Cir. 2017); *see also Confederated Tribes of Siletz Indians of Or. v. State of Or.*, 143 F.3d 481, 486 n.7 (9th Cir. 1998) ("[IGRA] is intended to expressly exempt the field in the governance of gaming activities on Indian lands.") (alteration in original)

(quoting S. Rep. No. 444, 100th Cong., 2d Sess., at 5, 6 (1988)). The Eighth Circuit has recognized that "[n]ot every contract that is merely peripherally associated with tribal gaming is subject to IGRA's constraints." *Casino Resource Corp. v. Harrah's Entm't. Inc.*, 243 F.3d 435, 439 (8th Cir. 2001). And indeed, "courts 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 Pequot Tribe*, 722 F.3d at 470.

Pursuant to the Eighth Circuit's ruling in *Gaming Corp. of America*, on one end of the "governance of gaming" spectrum is a tribal gaming commission's licensing of tribal casino management companies, which is within IGRA's preemptive scope.[8] 88 F.3d at

[8] A tribe's contracts with companies to manage gaming operations are regulated by IGRA and the National Indian Gaming Commission (NIGC). *See, e.g.*, 25 U.S.C. §§ 2705(a)(4), 2711, 2712; 25 C.F.R. pts. 531, 533, 535, 537. A contract is a management contract "if it gives the contractor the authority to control or direct aspects of gaming activity." Cohen's Handbook of Federal Indian Law, § 12.08[3] (2012 ed. & 2017 Supp.) (citing *First Am. Kickapoo Operations v. Multimedia Games*, 412 F.3d 1166, 1177 (10th Cir. 2005). Here, there is no evidence that the Tribe's contract with the Contractor is a management contract requiring approval by the NIGC. *Cf.* JA 257(¶219); *see also* 25 C.F.R. § 533.1. Indeed, the

(continued. . .)

539, 549-50; *accord Harrah's Entm't. Inc.*, 243 F.3d at 437 (quoting *Gaming Corp. of America*, 88 F.3d at 549) (indicating that 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[.]") (first and second alteration in original). According to the Ninth Circuit in *Yee*, a state tax on construction materials used to construct a tribal 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.

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(. . .continued)
Tribal Gaming Commission reviewed the financing agreements for the Construction Project to "ensure they were not management contracts." JA 257(¶219).

Like the Ninth Circuit in *Yee*, the Eighth Circuit Court of Appeals and the Second Circuit Court of Appeals 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 Pequot Tribe*, 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 because the tax did "not affect the [t]ribe's 'governance of gaming' on its reservation[.]" 722 F.3d at 460, 467, 469 (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.*, 143 F.3d at 487 (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 Pequot Tribe*, the generally applicable tax at issue here does not

affect the Tribe's ability to regulate its gaming to "assure that 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 preempt a state tax on construction materials used at a casino, certain claims relating to a gaming management and service contract, or a state personal property tax on slot machines, then it does not preempt the tax on the Construction Project. Contrary to the Decision, there is room for both the tax on the non-Indian Contractor and the regulation of gaming. *See* ADD 010.

*2. The IGRA provision requiring approval of a tribal ordinance is not comprehensive regulation of the construction of a tribal casino.*

In considering the specific provisions of IGRA, the district court erred in concluding that IGRA "created a comprehensive and pervasive regulatory scheme" that preempts the tax. *See* ADD 010. According to the court, "Congress intended for IGRA to completely regulate Indian gaming[.]" ADD 010. In reaching its conclusion, the court references the lone IGRA provision relevant to Class III

gaming that mentions construction, 25 U.S.C. section 2710(b)(2)(E)[9]:

> 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* ADD 008. But other than requiring the National Indian Gaming Commission (NIGC) to approve a tribal ordinance regarding a casino's construction and maintenance, 25 U.S.C. § 2710(b)(2)(E) does not actually regulate the Construction Project.

The NIGC's only regulations on this topic repeat, but do not expand upon, the requirement that a tribal ordinance must provide that 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. §§ 559.1-559.7; 25 C.F.R. § 522.4(b)(7). The

[9] One other IGRA provision contains the term "construction." *See* 25 U.S.C. § 2711(b)(3)-(4). That provision is not relevant in this case because it addresses construction costs in the context of a management contract. *Cf. supra* n.8.

court emphasizes that "[t]he Tribe must certify to the NIGC that the gaming facilities meet the standards set forth in IGRA and the Chairman may inspect the Tribe's documentation and can close the casino if the casino fails to meet the appropriate standards." ADD 008; *see also* ADD 013 (indicating that "the Tribe would risk a casino closure if the Chairman of the NIGC determined that the Tribe failed to maintain the appropriate standards."). Yet, the evidence shows a lack of standards and NIGC involvement to ensure that the Casino is constructed "in a manner which adequately protects the environment and the public health and safety[.]" 25 U.S.C. § 2710(b)(2)(E). For example, the NIGC does not inspect the Casino to ensure that any health or safety standards are being met. JA 329(¶58). Tellingly, the NIGC has not supervised the Construction Project and the Tribal Gaming Commission, which regulates the operation of gaming at the Casino, has not submitted any of the construction plans to the NIGC for the NIGC's approval. JA 331-332(¶¶67-68); JA 191(¶54).

In accordance with an NIGC regulation, the Tribe 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." JA 327(¶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. JA 328-329(¶¶56-57) (indicating that the only specific standards or regulations relating to the construction of the gaming facility are those required via contract). This is so even though the Tribal Gaming Commission is the Tribal agency "charged with regulation, enforcement and oversight of all gaming activities at the Casino." JA 192(¶56).

Indeed, although the Casino may be inspected by the Indian Health Service (IHS), the IHS is not a regulatory agency charged with regulating the Casino. JA 330(¶64). Neither the federal government nor the Tribal Gaming Commission seems to require IHS inspections. *See* JA 329(¶¶59-60). And there is no indication that the federal government or the Tribal Gaming Commission provides oversight of the facility through requesting or receiving the reports generated by the entities performing those inspections. *See* JA 330(¶¶61-63). Any report generated by an IHS inspection is

merely the IHS's voluntary checklist for the Tribe. JA 331(¶¶65, 66). Finally, the federal Bureau of Indian Affairs (BIA) has had no role 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. JA 333(¶¶70-72). The BIA was not even made aware of the Tribe's contract with the Contractor during the negotiations of the contract. JA 333(¶73).

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 a state's taxation authority. In *Bracker* and *Ramah*, the Supreme Court ruled that a state tax was preempted by a comprehensive federal regulatory scheme. *Bracker*, 448 U.S. at 151; *Ramah*, 458 U.S. at 845. But unlike this case, in *Bracker* and *Ramah*, the comprehensive regulatory scheme included both the regulation of the topic, generally, and the regulation of the specific taxed activity.

In *Bracker*, 448 U.S. 136, the Supreme Court invalidated a state use fuel tax and a state motor carrier license tax, which the state sought to impose on a non-Indian corporation's hauling of

timber. 448 U.S. at 139-40. In concluding that there was extensive federal regulation of on-reservation timber, the Supreme Court considered Congressional Acts, detailed Secretary of Interior regulations, and the BIA's daily supervision. *Id.* at 145, 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 applicable Secretary of Interior regulations established clear-cutting restrictions, detailed 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 set fees and rates relevant to the timber operations. *Id.* at 149. The BIA was also directly and profusely 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, and the amount of timber to cut. *Id.* at 147. Importantly, a number of the regulations in *Bracker* dealt specifically with the taxed activity – the hauling of

timber. The federal regulatory scheme included regulations such as the roads to use when hauling the timber, the hauling equipment to be employed, the rate of speed that the logging equipment must travel, and the timber load size, including weight, length, height, and width restrictions. *Id.* at 147. Other applicable federal regulations also governed the construction and maintenance of roads used for logging operations. *Id.* 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,* 458 U.S. 832, the Supreme Court determined that the federal government's regulation of both "the construction and financing of Indian educational institutions" was "comprehensive and pervasive." 458 U.S. at 839. Specifically regarding the construction of Indian schools, the Supreme Court recognized that 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 "monitor and review" the tribe's subcontracting agreements with the contractors, and may even require provisions such as 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. As stated in *Ramah*, "[t]he direction and supervision provided by the Federal Government for the construction of Indian schools leave no room for the additional burden sought to be imposed by the State[.]" *Id.* at 841-42.[10]

In today's case, there is no federal regulation of the taxed activity—the Construction Project—comparable to that in *Bracker* and *Ramah*. As stated above, the asserted comprehensive regulation of the Construction Project is no more than one standard: that the facility be constructed "in a manner which adequately protects the environment and the public health and

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[10] In the Decision, the district court discussed *Marty Indian School Board, Inc. v. State of South Dakota*, 824 F.2d 684 (8th Cir. 1987). *See* ADD 016-017. In that case, the Eighth Circuit Court of Appeals analyzed the state's authority to impose motor fuel tax "on fuel purchased and used by the [Indian boarding] school exclusively for educational purposes." 824 F.2d at 685. All of the school board members for the boarding school were tribal members. *Id.* at 687. But any tribal interests relating to preemption of state taxes on tribal members within their governing tribe's reservation are irrelevant here, where the State is imposing a tax on a non-Indian. *Cf. Okla. Tax Comm'n*, 515 U.S. at 458-59 (stating that generally, a state has no authority to tax tribal members within Indian country, and the *Bracker* balancing test applies to determine a state's authority to tax non-Indians' activity within Indian country).

safety[.]" *See supra*; 25 U.S.C. § 2710(b)(2)(E). Unlike *Bracker* and *Ramah*, 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. Considering the lack of regulation of the taxed activity in this case, as compared to that in *Bracker* and *Ramah*, IGRA does not support preemption of the contractor's excise tax.[11]

[11] The Supreme Court upheld a state tax even when federal regulation of the taxed activity far exceeded any IGRA regulation of the taxed activity in this case. In *Cotton Petroleum Corp.*, 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 during drilling, protecting tribal resources during production, plugging and abandoning of wells, monitoring of lease production, [and] assuring royalty compliance with federal regulations and tribal ordinances[.]" *See* Brief for Appellant at *19-20, *Cotton Petroleum Corp.*, 490 U.S. 163 (No. 87-1327), 1987 WL 880197; *see also Cotton Petroleum Corp.*, 490 U.S. at 186 (noting that "the federal and tribal regulations in [the] case are extensive.").

### B. *IGRA's catchall provision does not encompass the contractor's excise tax.*

The district court's alternate ruling in favor of IGRA preemption is also contrary to law. Here, the district court concluded that the contractor's excise tax falls within 25 U.S.C. section 2710(d)(3)(C)(vii), otherwise known as IGRA's catchall provision. ADD 013. Under this provision, a negotiated gaming compact may include provisions relating to "any other subjects that are directly related to the operation of gaming activities." 25 U.S.C. § 2710(d)(3)(C)(vii). The court then relies on the silence of the Tribe and the State's gaming compact to conclude that IGRA preempts the State tax: "Because the excise tax is a subject that falls within IGRA's catchall provision and it was not included in the Tribal-State compact, the State cannot impose the contractor's excise tax on the casino construction project." ADD 013.

The district court fails to acknowledge the congressional intent to exclude the subject of taxes from the compacting process. 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 Cal.*

*Grand Casino,* 353 F.3d at 716 (citing 25 U.S.C. § 2710(d)(3)(C)). 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). While certain topics may be included in a gaming compact, Congress signaled that other topics are not appropriate for a compact:

> 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 such 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 district court also erred in broadly interpreting the phrase, "directly related to the operation of gaming activities," to include the contractor's excise tax on the Construction Project. ADD 010-013. Important to the interpretation of the catchall provision, the Supreme Court in *Bay Mills Indian Community* indicated that "gaming activity" in IGRA is the "gambling in the poker hall"; in other words, the "roll of the dice and spin of the wheel." 572 U.S. at ___, 134 S.Ct. at 2032, 2033. Thus, a state-tribal compact may include only those subjects that are "directly related to the operation of" the games. *See id.*; 25 U.S.C. § 2710(d)(3)(C)(vii) (emphasis added). For purposes of IGRA's compacting process, not all "casino-related" activities involving a tribe's casino operation are "gaming-related." *See* Kevin Washburn, *Recurring Issues in Indian Gaming Compact Approval,* 5 Gaming L.R. & Econ. 388, Doc. 33-3, at 394-95 (2016) (noting that some casinos have amenities, including but not limited to snack shops, swimming pools, hotels, and restaurants, that "are connected in a business sense to the casino operation and are co-located with a casino, but do not

themselves constitute gaming."); *see also* Dave Palermo, *Signed, Sealed . . . and Then?*, Global Gaming Business, Doc. 33-4, at 57 (January 2016) ("Tribal-state compact negotiations under IGRA are largely restricted to the scope and regulation of gambling with states reimbursed for regulatory costs.") (emphasis added).

Limiting "the scope of the subjects over which states can regulate Indian tribes" is in line with the Indian canon of construction, which requires courts to interpret law in a manner that is most favorable to tribes in general. *See Forest Cty. Potawatomi Cmty. v. United States*, No. 15-105, 2018 WL 4308570, at *12 (D.D.C. Sept. 10, 2018) (regarding the permissive subjects to include in a state-tribal gaming compact, stating that "[i]t is not in the interest of Indian tribes generally to increase the scope of the subjects over which states can regulate Indian tribes."); *see also Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985) (discussing the Indian canon of construction). 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, highlighted the dangers of interpreting the catchall provision broadly. *See* Washburn, Doc.

33-3, at 383, 393. Washburn 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." Washburn, Doc. 33-3, at 393.

"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, Doc. 33-3, at 392; *see also* Palermo, Doc. 33-4, 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."). Yet the Decision seemingly goes against this Congressional goal. The district court's conclusion that the Construction Project, which encompasses a restaurant and hotel, is "directly related to the operation of gaming activities" effectively opens up compact negotiations to include ancillary businesses. *See* ADD 002-003, 010-013. But "[r]arely do any of the ancillary activities pose the kind of risks that Congress

enabled States to address in Class III gaming compacts." *See* Washburn, Doc. 33-3, at 395. As an example of such ancillary activity, "while swimming pools pose serious risks to life and health, regulating the risks posed by swimming pools was not what Congress sought to accomplish in IGRA." Washburn, Doc. 33-3, at 395; *see also* Washburn, Doc. 33-3, at 395-96 (discussing an arbitrator's decision that a state could not "apply its compact regulatory scheme to the tribal hotel . . . [that] was physically connected to the casino."); *Forest Cty. Potawatomi Cmty.*, No. 15-105, 2018 WL 4308570, at *6-7 (granting deference to the Interior's Assistant Secretary of Indian Affairs' interpretation that Class II gaming and ancillary businesses were not permissible topics for a tribal-state gaming compact as they did not fall within the catchall provision).

Informative to this case, 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, Doc. 33-2, at 64. However, the Ninth Circuit seemingly rejected the tribe's position, quoting *In re Indian Gaming Related Cases*, 147 F. Supp. 2d 1011, 1018 (N.D. Cal. 2001): "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. Given the above interpretations of the catchall provision, the State tax on the non-Indian Contractor is not "directly related to the operation of gaming activities."

In concluding that the construction services fall within the catchall provision, the district court applied the Ninth Circuit's one-sentence "test"[12] set forth in *In re Gaming Related Cases*, 331 F.3d

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[12] In *In re Indian Gaming Cases*, the extent of the Ninth Circuit's development of its "test" is as follows:

> We hold that this provision [regarding casino employees] is 'directly related to the operation of gaming activities' and thus permissible pursuant to [the catchall provision]. Without the 'operation of gaming activities,' the jobs this provision covers would not exist; nor conversely, could Indian gaming activities operate without someone performing these jobs. We therefore reject [the tribe's] argument that IGRA categorically forbids its inclusion in the [gaming] Compact.

(continued. . .)

1094 (9th Cir. 2003) and adopted in *Flandreau Santee Sioux Tribe v. Gerlach*, 269 F. Supp. 3d 910 (D.S.D. 2017), a case currently on appeal. ADD 011-013; *Gerlach*, 269 F. Supp. 3d at 923-25, *appeal docketed*, No. 18-1271 (8th Cir. Feb. 6, 2018). Pursuant to the district court's interpretation of *Gerlach*, "an activity falls within the catchall provision if, but for the tribal gaming, the activity would not exist, and if the [t]ribe could not operate its gaming activities without the activity." *See* ADD 011.

That test, or at least its application in this case, should be rejected because it extends IGRA past its intended scope, the governance of gaming activities. *See supra* at I.A.1.; *see also* Defendants-Appellants' Brief, *Gerlach*, No. 18-1271, at 34-37 (8th Cir. filed March 20, 2018). Application of this test would have, in all likelihood, altered the rulings that IGRA's preemptive scope did not include construction equipment used to build the casino (*Yee,* 528 F.3d 1184), certain claims regarding gaming management and service contracts (*Harrah's Entertainment, Inc.*, 243 F.3d 435),

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(. . .continued)
*In re Indian Gaming Related Cases*, 331 F.3d at 1116.

investigative reports on the tribe's operation of gaming (*Confederated Tribes of Siletz Indians of Or.*, 143 F.3d 481), and the leasing of slot machines (*Mashantucket Pequot Tribe*, 722 F.3d 457), all of which would not have existed "but for the existence of the casino" and for which the casinos would not have been operational without. *Cf.* ADD 011. In line with these rulings, the "but for" test should not have been applied in this case to determine whether IGRA preempted the state tax. In considering the foregoing, the first barrier to state taxation does not exist.

## II. Tribal Interests - The tax on the Construction Project 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 non-tribal members' 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).

Irrespective of the trend, the district court concluded that this second barrier blocked the State's authority to impose the tax. ADD 021. In ruling that the tax infringes upon the Tribe's right to self-government, the court seemingly relied upon the Tribe's interest in self-sufficiency and the tax's downstream economic effects on the Tribe, but these factors do not support preemption. *See* ADD 014-015, 019.

First and foremost, the Supreme Court has hinted 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 on-reservation purchase of cigarettes and other goods by Indians who resided on the reservation but were not members of the governing tribe. *Id.* at 150 n.25, 160-61. 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; *see also Gerlach*, 269 F. Supp. 3d at 929 ("[T]he State does not interfere with the Tribes' power to regulate tribal enterprises when it simply imposes its tax on [use by] nonmembers. Nor would the imposition of [the] tax on these purchasers contravene the principle of tribal self-government, for the simple reason that nonmembers are not constituents of the governing tribe.") (quoting *Colville,* 447 U.S. at 159, 161) (alterations in original) (internal citations omitted).

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 Colville*, 447 U.S. at 161. Under *Colville*'s rationale, the tax here 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.

In the Decision, the court dismissed *Colville*'s application to this case. The court reasoned that in *Colville*, there was manipulation of tax policy in that "the Indian cigarette retail sellers were marketing a tax exemption to non-Indian cigarette buyers who would otherwise have been subject to the state tax," but no similar

manipulation of tax policy is present here. ADD 020. However, *Colville* did not rely upon the tribe's marketing of a tax exemption in concluding that the state tax did not infringe upon the tribe's right of self-government. *Colville*, 447 U.S. at 160-61. Further, the court's analysis ignores that *Colville* addressed more than a state tax on the on-reservation purchase of cigarettes; the *Colville* Court also upheld a state tax imposed on the purchase of goods other than cigarettes by Indians who were not members of the governing tribe. *See Colville*, 447 U.S. at 150 n.25, 160-61. Accordingly, *Colville*'s analysis of the tribal interest in self-government is relevant in this case.

*B. Economic Burden*

In erecting a second barrier to state taxation, the district court also relied upon the downstream economic effects of the tax on the Tribe. In the Decision, the Court points out that "the Tribe is the entity ultimately responsible for paying the tax[.]" ADD 019. Hinting at how this tax on the non-Indian Contractor may affect the Tribe, the court mentions Congress's acknowledgement that "for tribes, gaming income 'often means the difference between an adequate governmental program and a skeletal program that is

totally dependent on Federal funding.'" *See* ADD 015 (quoting *City of Duluth v. Fond du Lac Band of Lake Superior Chippewa*, 785 F.3d 1207 (8th Cir. 2015) (quoting S. Rep. No. 100-446, at 3 (1988))).[13] But the court's consideration of indirect effects is contrary to Supreme Court precedent.

First, it must be emphasized that the legal incidence of the tax is on the Contractor. *See* JA 013(¶63); 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. JA 316(¶28); *see* SDCL 10-46A-12 (providing that "[a] contractor may list the contractor's excise tax . . . as a separate line item on all contracts and bills[.]") (emphasis added).

[13] *City of Duluth* involved a tribe's payments, pursuant to a consent decree, of approximately 19 percent of its casino's gross revenues to the City of Duluth, Minnesota. *City of Duluth*, 785 F.3d at 1208. The Tribe's payments to the City of Duluth totaled $75 million for the years 1994 to 2009. *Id.* In contrast, this case does not involve taxation of the Casino's gross revenue, and certainly not to the tune of a $75 million payment to the State.

Regardless, *Colville* reinforces that the downstream impact of the tax on the Tribe's finances because of the Tribe and Contractor's agreement is insufficient to outweigh the State interests. The *Colville* 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 governmental 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.") (citing *Colville*, 447 U.S. at 152-56). 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 [t]ribes 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*, 546 U.S. 95 (2005), 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. at 114-15.

The Supreme Court in *Cotton Petroleum Corp v. New Mexico*, 490 U.S. 163 (1989) also determined that incidental effects on a tribe's finances from a state tax on non-tribal members' on-reservation activities were too indirect to preempt taxation. 490 U.S. at 186-87. *Cotton Petroleum* upheld five severance taxes on a non-Indian corporation's on-reservation production of oil and gas. *Id.* at 168, 186. In doing so, the Supreme Court explained 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 [t]ribe's finances caused by the taxation of a private party contracting with the [t]ribe would be ground[s] to strike the state tax." *See id.* at 187. While the Supreme Court recognized an economic burden likely existed, the presumed burden was "too indirect and too insubstantial to support [the taxpayer's] claim of preemption." *Id.* at 186-87 (stating that 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").

Likewise, in this case the two percent tax on the non-Indian Contractor is "too indirect and too insubstantial" to justify preemption. *Compare* JA 324(¶¶49-50) (the Tribe estimating the contractor's excise tax for the Construction Project as $480,000) *with Yee*, 528 F.3d at 1191-92 (determining that a state tax burden of $200,000 on the tribe for one subcontractor's work, which would

be multiplied by the tribe's payments to other subcontractors, was insufficient to invalidate the state tax); *see also Cotton Petroleum Corp.*, 490 U.S. at 168, 186 (determining that an additional 8 percent in state taxes is not "an unusually large state tax" that would substantially burden a tribe). Given the facts of this case, a tribal interest in economic self-sufficiency "carries minimal weight in the context of a [$24] million casino expansion, and where but 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; JA 309(¶10).

Although the district court rejected *Yee*'s application because of the manipulation of tax policy, the *Yee* court's ruling regarding the manipulation of tax policy actually aligned two key aspects of that case with the facts of this case. *See* ADD 018-020. In *Yee*, the tribe attempted an "end-run around the 'legal incidence' test by structuring its contract to designate subcontractors as 'purchasing agents' for the tax-exempt [t]ribe." *Yee*, 528 F.3d at 1190. By doing so, the tribe sought to invoke the *per se* invalidity rule where a state tax "is unenforceable if its legal incidence falls on a [t]ribe or its

members for sales made within Indian country." *See Yee*, 528 F.3d at 1189 (quoting *Okla. Tax Comm'n*, 515 U.S. at 453). The *Yee* court rejected the tribe's attempt to shift the legal incidence and directed that the legal incidence fell on the non-Indian subcontractor. *Yee*, 528 F.3d at 1190 ("[W]e decline to extend the *per se* test, rooted in due respect for Indian autonomy, to provide tax shelters for non-Indian businesses."). Because the Tribe failed to shift the legal incidence to itself, *Yee* presented a case analyzed under *Bracker* where 1) the legal incidence of the state tax fell upon a non-Indian; and 2) the Tribe ultimately paid the tax pursuant to an agreement. *Id.* at 1188, 1190. Crucially, the manipulation of tax policy in *Yee* did not affect the Ninth Circuit's determination that IGRA does not comprehensively regulate construction contractors. *See id.* at 1192. Based on those aspects, the Ninth Circuit's decision in *Yee*, involving the construction of a gaming facility and IGRA's preemptive scope, is instructive here.

### III. State Interests - The State's interest in funding services available to the non-Indian Contractor, both on- and off-reservation, reinforce the State's authority to tax the non-Indian Contractor.

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 837-38. The State has a strong interest in funding services it makes available both on- and off-reservation to the Contractor, the subcontractors, and other individuals and entities involved in the Construction Project. *See* JA 337-338(¶¶83-86); Doc. 33-5; *see also Cotton Petroleum Corp.*, 490 U.S. at 189 ("the relevant services provided by the [s]tate include those that are available to the [taxpayers] and the members of the [t]ribe off the reservation as well as on it."). Considering the minimal federal and tribal interests, this State interest tips the scale in favor of the State's authority to tax the non-Indian Contractor.

The district court discounted the State's interest "because there is not a nexus between State services and the excise tax[.]" ADD 021. Quoting *Bracker*, the court avers that a State's "'general desire to raise revenue' is insufficient." ADD 014 (quoting *Bracker*,

448 U.S. at 150). *Cf. Gerlach*, 269 F. Supp. 3d at 929 ("[I]t stands to reason that South Dakota residents generally benefit from the services provided by the general fund, regardless of the extent to which those services are provided on the reservation."). However, the Supreme Court's statement in *Bracker* was made in light of a highly federally regulated activity: "We do not believe that [the state's] generalized interest in raising revenue is in this context sufficient to permit its proposed intrusion into the federal regulatory scheme with respect to the harvesting and sale of tribal timber." *See Bracker*, 448 U.S. at 150. With no element of comprehensive federal regulation, according to the Ninth Circuit, "[r]aising revenue to provide general government services is a legitimate state interest" and "a nexus between the taxed activity and the [state] government function" is not necessarily required. *Yee*, 528 F.3d at 1192-93. And of note, a state's interest in raising revenues for its general purpose fund may be enough to outweigh even a highly federally regulated activity. *See, e.g., supra* n.11.

Even so, the State's interests here encompass more than just a general desire to raise revenues. Using funds from the State general fund (in which the contractor's excise tax is generally

deposited), the State makes a substantial number of services available to the Contractor, including, but certainly 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* JA 316(¶30), 337-38(¶¶83-86); *see also* Doc. 33-5 (a more comprehensive list of State services that weigh in favor of the State's authority to impose the contractor's excise tax). Even if the Contractor has not yet utilized certain State services, it has the opportunity to do so at any time. *See* JA 337-38 (¶¶83-86); Doc. 33-5. And although the State does not track all recipients of its services, there is documentation that a number of State services funded by the State general fund have specifically been tied to the Contractor or the Construction Project. *See* JA 339-43 (¶¶87-93); Doc. 33-5. These include certain services relating to the Contractor's worker's compensation 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* JA 339-43 (¶¶87-93); Doc. 33-5.

In writing off the State services available to the Contractor, the district court overlooked that Contractor's shop is located in Sioux Falls, South Dakota, which is approximately 35 miles away from the Tribe's reservation. JA 314(¶23). And while 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* JA 311(¶14); *see also* JA 312-13(¶¶15-18), the Tribe does not provide services in Sioux Falls. JA 346(¶100). Indeed, the Tribe's governmental services provided to the Contractor are generally confined to the 3.68 square miles of the Tribe's reservation. JA 308(¶3), 346(¶101).

Also reinforcing the State's interest in imposing its tax on the Contractor, the State offers services to the Contractor that are not

offered by the Tribe.[14] *Compare* JA 337-38(¶¶83-85); Doc. 33-5 (governmental services offered by the State using general funds) *with* JA 345(¶99); Doc. 33-6 (governmental services offered by the Tribe); *see* JA 347(¶¶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* JA 347(¶¶103-

[14] 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.*, JA 344-45(¶¶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. *See* JA 337-38(¶¶83-85); *cf.* ADD 017, 020 (incorrectly stating, "the State argues that the general fund goes toward . . . the licensing of electricians [and] plumbers[.]"). 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." JA 313(¶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." JA 314(¶20). Yet, the Tribe does not issue licenses to any types of professionals, other than a business/tax license. JA 346(¶102).

104). Ultimately, an abundance of State services are available to the Contractor, a number of which may be used in connection with the Construction Project. *See* Doc. 33-5, JA 337-38(¶¶83-93). The State has a strong interest in imposing its tax on the non-Indian Contractor to fund those State services.

## CONCLUSION

IGRA does not preempt the taxed activity—the Construction Project—and 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 reverse the portion of the district court's Decision granting summary judgment in favor of the Tribe.

Dated this 5th day of October 2018.

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## CERTIFICATE OF COMPLIANCE

1. I certify that the Appellants' Brief is within the limitation provided for in Rule 32(a)(7) using bookman old style typeface in 14-point type. Appellants' Brief contains 10,857 words.

2. I certify that the word processing software used to prepare this brief is Microsoft Word 2016, and it is herewith submitted in PDF format.

3. I certify that the brief addendum submitted herein has been scanned for viruses and that the brief is, to the best of my knowledge and belief, virus free.

Dated this 5th day of October 2018.

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

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the 5th day of October 2018, a true and correct copy of Appellants' Brief and addendum was submitted to the Eighth Circuit Court of Appeals for review.

/s/ *Stacy R. Hegge*
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