UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 18-2750

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

THE HONORABLE KAREN E. SCHREIER
United States District Court Judge

DEFENDANTS-APPELLANTS' REPLY BRIEF

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INTRODUCTION

This reply responds to the Brief of Appellee Flandreau Santee Sioux Tribe ("Tribe's Brief"). The State relies on the Statement of the Case and Facts, the Standard of Review, and all argument presented in its initial brief ("State's Brief").[1]

ARGUMENT

The State's general authority to tax Henry Carlson Company (Contractor) for its construction services must be upheld. IGRA does not preempt matters outside the governance of tribal gaming, such as Contractor's services at issue here. *See* ADD 002-003; JA 311(¶13). This is evidenced by IGRA's lack of regulation over the construction process for the casino and ancillary businesses.

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[1] As in the State's Brief, the Defendants and Appellants 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 to the State's Brief 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: "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 the Interior; and "BIA" means the federal Bureau of Indian Affairs.

Further, the State's interest in providing services to the Contractor outweighs the downstream effect of the State tax on the Tribe, which was instigated by the Tribe's own agreement with the Contractor. *See* JA 324(¶48).

I. No presumption for preemption applies in this case.

At the outset, the Tribe begins with the misconception that there is a presumption in favor of preemption of the State tax on the non-Indian Contractor. Tribe's Brief at 20-24 & n.21. However, the Tribe's asserted presumption applies to the state taxation of tribes' and tribal members' on-reservation activities, which is not at issue here. *See* Tribe's Brief at 20-24. It further ignores *Washington v. Confederated Tribes of Colville Indian Reservation,* 447 U.S. 134 (1980), as well as other Supreme Court decisions, which show that for taxation purposes generally, a state may tax nonmembers' on-reservation activities without any congressional authorization. 447 U.S. at 154-59, 160-61 (upholding state tax on nonmembers' on-reservation purchases even though there was no indication that the tax was congressionally authorized); *see 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, albeit no mention of congressional authorization); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 177, 186-87 (1989) (indicating that the applicable federal statutory scheme contained no express grant of state taxation authority, yet upholding a state tax on non-Indians' on-reservation activity). This is strengthened by the Supreme Court's use of the terminology, "barriers to the exercise of state authority," as well as couching its analysis in terms of "pre-emption". *See, e.g., Ramah Navajo Sch. Bod. v. Bureau of Revenue of N.M.*, 458 U.S. 832, 837, 838 (1982) (emphasis added); *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 November 26, 2018).[2]

[2] The Tribe cites to *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994 (8th Cir. 2010) in challenging the state's general authority to tax non-tribal members' on-reservation activities. *See* Tribe's Brief at 21 n.7. The Tribe notes that according to *Podhradsky*, "as a general rule Indian country falls under the primary civil, criminal, and regulatory jurisdiction of the federal government and the resident Tribe rather than the states."). *See* Tribe's Brief at 21 n.7. But that case is inapposite as it relates to jurisdiction over reservation land, rather than non-Indian activities. *See Podhradsky*, 606 F.3d at 1006.

In particular, the Tribe quotes *Oklahoma Tax Commission v. Sac and Fox Nation*, 508 U.S. 114 (1993), in stating that "[a]bsent explicit congressional direction to the contrary, we presume against a State's having the jurisdiction to tax within Indian country[.]" Tribe's Brief at 20-21 (second alteration in original). The Tribe also focuses on *Williams v. Lee*, 358 U.S. 217 (1959), a case where a state court was found not to have civil jurisdiction over an Indian for actions which occurred on-reservation, and *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973), which involved a state's jurisdiction to impose a "personal income tax on a reservation Indian whose entire income derives from reservation sources." *See* Tribe's Brief at 23-24, 39-40, 54, 58 n.16; *see also* Tribe's Brief at 22 (citing *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987)) (involving the state's regulatory authority to "enforce its gambling laws against Indian tribes") (emphasis added).

These cases regarding the so-called "presumption for preemption" relate to a state's authority over Indians, which requires a test entirely different than a state's authority over non-Indians. *See, e.g., Sac & Fox Nation*, 508 U.S. at 123-26; *see also*

White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 144 (1980) (noting that generally, state law is inapplicable regarding an Indian's on-reservation conduct, but for non-Indian on-reservation conduct, a particularized inquiry is undertaken to determine whether a state's authority is preempted). The Supreme Court has identified that this presumption for preemption applies "when a [s]tate attempts to levy a tax directly on an Indian tribe or its members inside Indian country, rather than on non-Indians[.]" *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 458 (1995) (emphasis added); *see also Sac & Fox Nation*, 508 U.S. at 123.

The Tribe also relies upon *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983), but that case involved a state regulatory scheme which conflicted with, and effectively rendered moot, a tribe's regulatory scheme. *Id.* at 337-39, 343-44. The Supreme Court analyzed the state's regulatory scheme in the context of whether a state may restrict a tribe's authority to regulate hunting and fishing by nonmembers on a reservation. *Id.* at 325, 330. Such facts do not align with this case. Here, both federal and state law can coexist and the State tax on the non-Indian Contractor would not "supplant" any federal or tribal regulatory scheme. *See*

id. at 339. *Cf.* Defendants-Appellants' Reply Brief, *Flandreau Santee Sioux Tribe v. Gerlach*, Appeal No. 18-1271 (8th Cir. May 7, 2018). Ultimately, the "'deeply rooted" policy of "leaving Indians free from state jurisdiction and control" discussed by the Tribe pertains to situations involving the state's authority over Indians and is not applicable in this case. *See* Tribe's Brief at 22; *see also Sac & Fox Nation*, 508 U.S. at 123-24.

II. No barrier blocks the State's authority to tax the non-Indian Contractor.

As discussed in the State's Brief, the two barriers to a state's authority to tax a nonmembers' on-reservation activity are: 1) if the tax is preempted by federal law; and 2) 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*, 358 U.S. at 220). In this case, neither barrier exists.

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

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

a. *IGRA is centered upon on the regulation of gaming rather than the regulation of the construction process.*

First, IGRA does not preempt the State tax. The Tribe and the State agree that IGRA was enacted to address tribal gaming on Indian country. *See, e.g.,* Tribe's Brief at 25. But the Tribe takes the phrase "tribal gaming" two steps past its intended scope. First, the Tribe supplants "tribal gaming", the activity regulated by IGRA, with "tribal casino." *Compare* Tribe's Brief at 25 ("IGRA 'reveals a comprehensive regulatory structure for Indian gaming'") (quoting *Gaming Corp. of Am. v. Dorsey & Whitney*, 88 F.3d 536, 544 (8th Cir. 1996)) *with* Tribe's Brief at 28 ("In pursuant of Congress' stated goal, IGRA extensively regulates tribal casinos"). The Tribe next extends "tribal casino" to encompass ancillary businesses such as a hotel, restaurant, bar, and snack bar. *See* Tribe's Brief at 18 n.5 (noting the district court properly viewed the casino construction project as including areas in addition to those identified in "Phase 1"); ADD 002-003 (indicating that the construction project includes a snack bar, restaurant, hotel, VIP lounge, administration building, cage area, and adding slot machines). With its stretched definition of "tribal gaming" in hand, the Tribe then points to a number of cases discussing the states' lack of jurisdiction over "gaming" to

argue that the construction services fall within IGRA's preemptive scope. *See* Tribe's Brief at 24-31.

However, all of the Tribe's quoted language regarding tribal gaming must be read in the context of IGRA's legislative history. "As the Supreme Court has repeatedly stated, Congress' intent is preemption analysis' 'ultimate touchstone.'" *Pueblo of Pojoaque v. State*, 233 F. Supp. 3d 1021, 1118 (D.N.M. 2017) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)). Senate Report 100-446 provides insight to this congressional intent: IGRA "is intended to expressly preempt the field in the governance of gaming activities on Indian lands." S. Rep. No. 100-446, 6 (1988). Additionally signaling IGRA's scope, the Senate Report indicated that Congress balanced the federal, state, and tribal interests as related to gaming activities, without reference to the tribal casino as a whole. *See* S. Rep. No. 100-446, 6 ("Federal courts should not balance competing Federal, State, and tribal interests to determine the extent to which various gaming activities are allowed."). *Cf.* Tribe's Brief at 30, 31 (citing page 6 of the Senate Report in stating that "[t]he courts are not to interfere with [Congress's] balancing of interest[s]" and indicating that Congress, through IGRA's

enactment, balanced the federal, state, and tribal interests relating to a tribal casino). And as recently indicated by the Supreme Court, class III gaming activity, which is the class of gaming offered at the casino, is the "roll of the dice and spin of the wheel." *Michigan v. Bay Mills Indian Comty.*, 572 U.S. 782, 792 (2014); *see* JA 308-309(¶¶6-7).

Case law reinforces that IGRA is centered upon the operation of the games. As discussed in the State's Brief and as recognized by the Tribe, in *Gaming Corp.*, 88 F.3d 536, the Eighth Circuit analyzed whether the "tribal governance of gaming" is involved to determine if IGRA's preemptive scope reaches certain activities. *See* 88 F.3d at 548-49; Tribe's Brief at 44 (noting that the Eighth Circuit's application of the "tribal governance of gaming" standard in *Gaming Corp.* "was apt . . . given its facts."). Under this analysis (or one akin to it), courts have indicated that while the tribal licensing of casino management companies through a system of background checks on "primary management officials and key employees of the gaming enterprise" is within IGRA's "governance of gaming" preemptive scope, a tax on construction materials used to construct a casino, as well as a tax on the slot machines within a

casino, fall outside that scope. *See Gaming Corp.*, 88 F.3d at 549 (citing 25 U.S.C. §§ 2710(b)(2)(F)(ii), (d)(1)(A)(ii)); *Barona Band of Mission Indians v. Yee*, 528 F.3d 1184, 1193 (9th Cir. 2008) (indicating that "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.'"); *Mashantucket Pequot Tribe v. Town of Ledyard*, 722 F.3d 457, 460, 467, 469 (2d Cir. 2013).[3]

Although the Tribe recognizes the Eighth Circuit's application of the "tribal governance of gaming" standard in *Gaming Corp.* to determine IGRA's scope, the Tribe rejects that test in this case: "state interference with tribal *governance* or *regulation* of gaming is not the extent of IGRA's preemption. IGRA is at least as concerned with the *revenue* involved in gaming." Tribe's Brief at 44 (emphases in original). Yet the unappealed portion of *Flandreau Santee Sioux*

[3] The Tribe contends that *Mashantucket* is distinguishable because the Court in that case upheld a tax that fell "on the non-Indian's *ownership of property*, rather than on the *transaction* between the Tribe and the non-Indian." Tribe's Brief at 45 (quoting *Mashantucket*, 722 F.3d at 469). However, the Court emphasized this distinction in the context of preemption by the Indian Trader statutes. *See Mashantucket*, 722 F.3d at 469.

Tribe v. Gerlach, 269 F. Supp. 3d 910 (D.S.D. 2017), concluded that IGRA did not preempt the State use tax on non-Tribal member purchases at a convenience store, even though the store was a "department" of the Tribe's casino and part of its revenues. *See* 269 F. Supp. 3d at 914-15 & n.2, 925; *see also Flandreau Santee Sioux Tribe v. Gerlach*, Appeal No. 18-1271 (8th Cir. Filed March 20, 2018). As supported by that unappealed determination, IGRA cannot be extended to preempt everything that may have an impact on the "*revenue* involved in gaming." *See* Tribe's Brief at 44. *Cf. Yee*, 528 F.3d at 1191-92 (upholding a state tax on a non-Indian's construction materials used in a casino construction project, even though the tax was passed to the tribe pursuant to an agreement with the contractor).

b. The IGRA provision requiring approval of a tribal ordinance is not comprehensive regulation of the construction of a tribal casino and ancillary amenities.

The Tribe argues that the tax is preempted because IGRA regulates the construction project. Tribe's Brief at 31. But absent from IGRA and its implementing regulations is any governance of the actual construction process of a tribal casino and its ancillary

amenities. The Tribe has pointed to no federal regulation within IGRA that imposes requirements for that process. *Cf.* Tribe's Brief at 31-33.

The Tribe contends that "[i]nspections are conducted by Indian Health Service, a federal agency, as directed by Casino management, and by HDR, an independent inspection company paid for by the Tribe, to ensure the gaming facility retains its Tribal gaming facility license, as required by IGRA." Tribe's Brief at 32. But this contention is inconsistent with the record. The Indian Health Service (IHS) is not a regulatory agency charged with regulating the Casino. JA 330-331(¶64). Neither the federal government nor the Tribal Gaming Commission appears to require IHS inspections. *See* JA 329(¶¶59-60). And there is no indication that the federal government or the Tribal Gaming Commission requests or receives the reports generated by the entities performing those inspections. *See* JA 330(¶¶61-63).

The lack of IGRA regulation of a casino construction project was highlighted by the Ninth Circuit in *Yee*. In that case, the Ninth Circuit provided that "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. *Cf.* Tribe's Brief at 43 (stating that none of the authorities relied upon by the State "establish that IGRA's scope is so restricted that it does not encompass the Casino construction project.").

The Tribe attempts to dismiss *Yee*'s application by stating that unlike this case, in *Yee*, there was manipulation of tax policy. *See* Tribe's Brief at 46-47. However, as discussed in the State's Brief, *Yee*'s interpretation of IGRA's preemptive scope was not based on the tribe's manipulation of tax policy. *See Yee*, 528 F.3d at 1192. *Yee*'s conclusion that IGRA does not govern construction contractors is, therefore, germane.

The Tribe contends that "[h]undreds of detailed federal regulations promulgated pursuant to IGRA govern tribal casinos[.]" *See* Tribe's Brief at 28. However, a substantial number of the Tribe's cited regulations address the operation of Class II games, which are not offered at the Tribe's casino. JA 308-309(¶¶6-7). IGRA "plainly did not intend to give the NIGC the authority to issue [minimum internal control standards] for Class III gaming." *Colo. River Indian Tribes v. Nat'l Indian Gaming Comm'n,* 383 F. Supp. 2d 123, 132 (D.D.C. 2005). Thus, these regulations are irrelevant. *See*

id. at 133 ("Congress may choose . . . to amend the IGRA to provide the NIGC with Class III regulatory authority. . . . If the need for federal regulation of Class III gaming is as great as the NIGC claims, the Commission may be able to persuade Congress to take that step.").

The Tribe also contends that IGRA regulates the construction of the facility by requiring the Tribe "to enact and enforce Tribal laws that ensure the construction of the gaming facility is conducted in a manner which adequately protects the environment and the public health and safety." Tribe's Brief at 31-32. The Tribe then asserts that it "regulates . . . the quality of construction[.]" Tribe's Brief at 32. But the Tribe has pointed to no such Tribal laws.[4] While the Tribe, as a party to the construction contracts, may have set building parameters for this project, there are no

[4] The Tribe contends that its "gaming regulatory agency has promulgated the comprehensive Rules and Regulations Manual which incorporates and adheres to applicable federal regulations, including standards for ensuring that the 'construction and maintenance of the gaming facility . . . adequately protects the environment and the public health and safety.'" *See* Tribe's Brief at 12 (emphasis added). However, the Tribe's citations do not support that the Manual contains any such standards. *See id.*

governing Tribal laws that must be satisfied prior to a determination that the casino is constructed and maintained in a manner which adequately protects the environment and the public health and safety. *See* 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).

Ramah reveals a regulatory scheme governing a construction project that justified preemption of a state tax on a non-Indian contractor. 458 U.S. at 839, 841. The regulations in *Ramah* addressed the actual construction of a school and set forth specific requirements to be followed during the construction process. *See* State's Brief at 28-29; *see also Ramah*, 458 U.S. at 839, 841. The presence of these regulations in *Ramah* brings to light that this case is void of any IGRA regulation of the construction process. *Cf.* JA 328-333(¶¶55-73).

In a similar vein, the Tribe argues that "[p]reemption does not require that IGRA or federal regulations provide the minute details of casino building standards." Tribe's Brief at 32. As support, the Tribe quotes the dissenting opinion in *Ramah*, which states that "the federal government . . . played *no role* in regulating or

supervising the actual construction of the school [i.e. the taxed activity]." *See* Tribe's Brief at 33 (emphasis in original). However, the majority opinion in *Ramah* provided otherwise. It stated that the "[f]ederal regulation of the construction and financing of Indian educational institutions is both comprehensive and pervasive."). *See Ramah*, 458 U.S. at 839 (emphasis added). Here, the Tribe points to no similar comprehensive and pervasive "[f]ederal regulation of the construction" of the casino and ancillary businesses such as a hotel, restaurant, and bar. *See id.*

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

In line with the district court's decision, the Tribe next argues that the State tax falls within the catchall provision, in that it is a subject "directly related to the operation of gaming activities." Tribe's Brief at 35; *see* ADD 010-013. The Tribe contends that therefore, the State tax is preempted because it is a compactable subject that is not included in the State-Tribal gaming compact. Tribe's Brief at 35.

The Tribe ignores that its position conflicts with the Indian canon of construction, which requires courts to interpret law in a

manner that is most favorable to tribes in general. *See Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985). Under the Tribe's broad interpretation of "directly related to the operation of gaming activities", a state-tribal gaming compact would be permitted to include a number of topics outside the "gaming" realm. *See* 25 U.S.C. § 2710(d)(3)(c)(vii). This is to the demise of other tribes' interests. *See Forest Cty. Potawatomi Cmty. v. United States*, 330 F. Supp. 3d 269, 280 (D.D.C. 2018) (noting that "[i]t is not in the interest of Indian tribes generally" to expand the scope of the permissible subjects to include in a state-tribal gaming compact). The Tribe has failed to explain how all other tribal interests must give way to its own interests in this particular case.

The Tribe also contends that through the State's imposition of the contractor's excise tax here, the State is inserting itself "into Tribal Casino planning decisions." Tribe's Brief at 31. But the Tribe's overly broad interpretation of the catchall provision permits just that. Applying the Tribe's interpretation, the State may compact to have input in the planning of a construction project concerning a casino or ancillary businesses. *See* Tribe's Brief at 35 ("State jurisdiction over the Casino construction project is

compactable"). Yet as stated above, this position conflicts with the Indian canon of construction.

The Tribe, like the district court, points to the Ninth Circuit case of *In re Indian Gaming Related Cases*, 331 F.3d 1094 (9th Cir. 2003 [*Coyote Valley II*], to analyze the scope of the catchall provision. Tribe's Brief at 35-38. However, the adoption of this "but for" test in *Gerlach*, 269 F. Supp. 3d 910, which is on appeal, and the Tribe's and district court's reliance on it must be rejected, at least to the extent it conflicts with the Eighth Circuit's "governance of gaming" test. The catchall provision must be interpreted within the confines of IGRA's "governance of gaming" preemptive scope. *See* 25 U.S.C. § 2710(d)(3)(A) (indicating that a state-tribal gaming compact is to govern "the conduct of gaming activities").

Moreover, the district court's and the Tribe's application of the "but for" test reveals that it is inapt, especially under the facts of this case. The Tribe contends that the construction and renovation of the casino and ancillary businesses is necessary to "expand or maintain its customer base in the face of competition" and to continue the casino's viability. Tribe's Brief at 37. Under this

rationale, adding amenities such as a swimming pool or golf course may be "necessary" in the Tribe's view. But that does not make those ancillary amenities "directly related to the operation of gaming activities" and, therefore, compactable. *See* 25 U.S.C. § 2710(d)(3)(C)(vii); *see also* 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."); *Id.* at 395 ("[r]arely do any of the ancillary activities pose the kind of risks that Congress enabled States to address in Class III gaming compacts."); *Id.* 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.").

The Tribe argues that reading the state-tribal compacting methodology in conjunction with 25 U.S.C. section 2710(d)(4), which addresses state taxation of gaming activity, results in IGRA's

preemption of the state tax. Tribe's Brief at 41. But the Tribe's reliance on Section 2710(d)(4) is misplaced.

Section 2710(d)(4) provides,

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

The State tax on the Contractor does not fall within this provision for several reasons. First, Section 2710(d)(4) is not an express preemption clause: "the failure to confer authority to tax [is not] a prohibition to tax." *Cabazon Band of Mission Indians v. Wilson*, 37 F.3d 430, 433 (9th Cir. 1994). Section 2710(d)(4) was not aimed at preempting a state tax on any activity within a casino or ancillary businesses; instead, it was tailored specifically to limit 25 U.S.C. § 2710(d)(3)(C)(iii), to ensure states could not withhold compact negotiations by attempting to impose a tax on the gaming activity. *See* Felix S.

Cohen, Cohen's Handbook of Federal Indian Law, 12.05[2] (5th Ed. 2012).

Even if Section 2710(d)(4) is read to preempt a state tax on certain activities, that section specifies the activity implicated: "a class III gaming activity," which IGRA has defined to primarily include slot machines and card games.[5] *See* 25 U.S.C. § 2703(8); 134 Cong. Rec. H8146 at H8153; *Bay Mills Indian Cmty.*, 572 U.S. at 792. And finally, the tax in this case is imposed on the non-Indian Contractor, not the Tribe or an "entity authorized by [the Tribe] to engage in a class III activity." *See* Section 2710(d)(4); *see also Twenty-Nine Palms Band of Mission Indians v. Schwarzenegger*, EDVC 08-1753-VAP, 2009 WL 10671376, at *5 (C.D. Cal. Sept. 4, 2009) (indicating that Section 2710(d)(4) "refers to the power of [the

[5] The United States Department of the Interior also narrowly construes Section 2710(d)(4), as illustrated by its approval of "revenue sharing provisions" in compacts where the tribe and state share a tribal casino's class III gaming proceeds. *Flandreau Santee Sioux Tribe v. Gerlach,* Civ. 14-4171, Doc. 125-18 (July 8, 2011 Interior letter). According to Interior, the revenue sharing provisions are not considered taxes on the class III gaming proceeds under Section 2710(d)(4) when "the state has offered meaningful concessions to the tribe." *Id.*;*Gerlach,* Civ. 14-4171, Doc. 125-17 (Aug 1, 2013 Interior letter).

state] to impose taxes upon tribal governments and their authorized gaming operators; it does not refer to natural persons[.]").

The Tribe urges this Court to interpret Section 2710(d)(4) as expressly preempting all taxes that may be passed down to the Tribe. *See* Tribe's Brief at 41-43. Under the Tribe's interpretation, the tax in *Yee* would have been preempted by Section 2710(d)(4), as the disputed tax was ultimately paid by the tribe pursuant to an agreement with the contractor. *See Yee*, 528 F.3d at 1188, 1190. But *Yee* rejected the application of Section 2710(d)(4), concluding that "the tax in question [was] imposed upon the non-Indian outfit . . .and not on the Tribe itself." *Yee*, 528 F.3d at 1193 n.3. The same is true in this case, and thus, Section 2710(d)(4) does not justify preemption of the State tax.

B. Tribal Interests - The tax on the non-Indian Contractor does not "infringe on the right of reservation Indians to make their own laws and be ruled by them."

As discussed above, the second barrier to a state's authority to tax non-tribal members' on-reservation activities is if 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 Tribe contends that its interests "in economic development and Tribal self-government" outweigh the State's interest in this case. *See* Tribe's Brief at 52. The Tribe quotes *Mescalero*, 462 U.S. 324, stating that "[t]he 'broad federal commitment' to tribal self-government necessarily implicates tribal 'power to manage the use of its territory and resources by both members and nonmembers, . . . to undertake and regulate economic activity within the reservation, . . . and to defray the cost of governmental services by levying taxes.'" Tribe's Brief at 53. But the Tribe fails to identify how the State tax on the non-Indian Contractor prevents the Tribe from performing these functions.[6]

In advocating for the placement of this barrier, the Tribe wholly relies on the tax's downstream economic effects on the Tribe.

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[6] In the specific context of IGRA, the Tribe contends that the two percent state tax on the non-Indian Contractor's receipts thwarts Congress's goals of "promoting tribal economic development, tribal self-sufficiency, and strong tribal government" because it "direct[s] hundreds of thousands of dollars away from the Tribe[.]" Tribe's Brief at 43. Yet, the two percent tax (not imposed on the Tribe's gaming revenues) is much less than the 30 to 40 percent of actual tribal gaming revenues that Congress, through IGRA, permits casino management companies to receive. *See* 25 U.S.C. § 2711(c).

See Tribe's Brief at 53-59. Yet, the Tribe fails to acknowledge that the burden on the Tribe from paying the State tax is the result of the Tribe's agreement with the Contractor, a fact deemed pertinent by the Ninth Circuit in *Yee*. *See* JA 309(¶10); *Yee*, 528 F.3d at 1192 ("[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."). The Tribe "cannot invalidate the [State] tax by complaining about a decrease in revenues" prompted by its agreement with the non-Indian Contractor. *See Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 114 (2005); *see also Yee*, 528 F.3d at 1191-92 (stating that although the imposition of a state tax on a nonmember contractor for materials used in the casino construction "may affect the overall profitability of the Tribe's casino operation[,]" "[t]his alone . . . does not bar the imposition of the [state] tax" and that "[a]s with the related tribal interest, the federal government's interest in Indian economic vitality does not alone defeat an otherwise legitimate state tax"); *Cf. Colville*, 447 U.S. at 156 (noting that a state does not infringe upon tribes' right 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.") (quoting *Williams*, 358 U.S. at 220) (internal citation omitted).

The lack of emphasis on the tax's downstream economic effects in this case is buttressed by the Supreme Court's discussion in *Chickasaw*, 515 U.S. 450. In *Chickasaw*, the Supreme Court invalidated a state fuel tax, the legal incidence of which fell upon a tribal retailer on its reservation. 515 U.S. at 453, 458-60. The state argued that the Supreme Court should consider the economic incidence of the tax on the consumers, stating that "the legal incidence of [the] tax 'has no relationship to economic realities.'" *Id.* at 459-60. In rejecting the state's argument, the Supreme Court emphasized that its "focus on a tax's legal incidence accommodates the reality that tax administration requires predictability." *Id.* *See also id.* at 460 ("[A] 'legal incidence' test . . . 'provides a reasonably bright-line standard which, from a tax administration perspective, responds to the need for substantial certainty as to the permissible scope of state taxation authority.'").

Importantly, in a portion of the decision not appealed by the Tribe, the district court in *Gerlach* applied *Colville*'s analysis of the tribal interest in self-government. *Gerlach*, 269 F. Supp. 3d at 929.

The *Gerlach* district court recognized that "[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." *Id.* (quoting *Colville,* 447 U.S. at 159, 161) (second and third alterations in original) (internal citations and quotation marks omitted). *See also Colville*, 447 U.S. at 161 (concluding that a state tax on individuals who are not members of the governing tribe does not infringe on tribal self-government because "[t]here is no evidence that nonmembers have a say in tribal affairs or significantly share in tribal disbursements."). The same rings true here.

The Tribe argues against the application of *Colville* because in that case, the Supreme Court's conclusion regarding the lack of infringement on tribal self-government "was not part of the Court's preemption analysis" and because the business model for cigarettes "is what diminished the relevance of the tribes' interest in self-government[.]" Tribe's Brief at 55. But these two points are contrary to the decision. *Colville*'s discussion of infringement was

in the context of whether the state tax on a nonmember Indian was preempted. *See Colville*, 447 U.S. at 160-61. Moreover, because the disputed tax was not merely on cigarettes, but also on other goods, the dismissal of the tribes' interest in self-government could not be solely attributed to the business model for cigarettes. *See Colville*, 447 U.S. at 150 n.25, 160-61.

The Tribe also attempts to distinguish *Cotton Petroleum* by contending that the lower court in that case had found "no economic burden . . . on the tribe by virtue of the state taxes[.]" Tribe's Brief at 58. This assertion is misleading. The Supreme Court recognized that an economic burden on the Tribe likely existed, but such burden was still "too indirect and too insubstantial to support [the taxpayer's] claim of preemption." *Cotton Petroleum*, 490 U.S. at 186-87.[7]

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[7] The Tribe further argues that the State's reliance on *Cotton Petroleum* is inappropriate because it involved the doctrine of limited intergovernmental tax immunity. Tribe's Brief at 57-58. In *Cotton Petroleum*, the Supreme Court indicated that "[u]nder current doctrine, . . . a State can impose a nondiscriminatory tax on private parties with whom the United States or an Indian tribe does business, even though the financial burden of the tax may fall on the United States or tribe." 490 U.S. at 175 (emphasis added). While the Tribe contends that the doctrine only applied in *Cotton*

(continued. . .)

Ultimately, the Supreme Court has made clear that:

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

Nevada v. Hicks, 533 U.S. 353, 361 (2001) (quoting *Bracker,* 448 U.S. at 141 (quoting *Worcester v. Georgia,* 6 Pet. 515, 561, 8 L.Ed. 483 (1832))). Here, the State tax does not infringe upon the Tribe's "right to make [its] own laws and be governed by them[.]" *Id.* Thus, the State's authority to tax the non-Indian Contractor is not excluded. *See id.*

(. . .continued)
Petroleum because of "significant factual distinctions[,]" it appears the doctrine may have been previously applied in *Colville*. Tribe's Brief at 58; *see Colville*, 447 U.S. at 151. In phrasing substantially similar to *Cotton Petroleum*, the Supreme Court stated in *Colville* that "[t]he State may sometimes impose a nondiscriminatory tax on non-Indian customers of Indian retailers doing business on the reservation. Such a tax may be valid even if it seriously disadvantages or eliminates the Indian retailer's business with non-Indians." *See id.*

C. 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.

Regarding the State's interests, the Tribe argues, and the court found, that the State cannot support the imposition of its tax by pointing to services it makes available to the taxpayer if there is no connection to the taxed activity. *See* Tribe's Brief at 59-64; ADD 021. However, applying the *Bracker* balancing test to the convenience store, the *Gerlach* district court weighed the state services generally available and did not require any connection to the taxed activity. *See Gerlach*, 269 F. Supp. 3d at 929. Considering these state interests, the court found that the *Bracker* balancing test tipped in favor of the State's authority to impose a tax on non-Indians' on-reservation use of goods and services purchased at the Tribe's convenience store. *Id.* at 927-29. Notably, the Tribe did not appeal that conclusion in *Gerlach*. *See generally Flandreau Santee Sioux Tribe v. Gerlach*, Appeal No. 18-1271. The unchallenged approach taken by the *Gerlach* district court should apply here as it accounts for the Contractor's use of State services

at any time, even if the services have not been provided at the time of the litigation.

The Tribe cites to *Mescalero* and *Ramah* to support its position that the State services available to the Contractor off the reservation should not be considered. Tribe's Brief at 59-60. Both those cases were decided prior to the Supreme Court's more recent statement in *Cotton Petroleum* that "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." *Compare Cotton Petroleum*, 490 U.S. at 189 *with* Tribe's Brief at 59-60. Also, while the Tribe argues that the statement in *Cotton Petroleum* was in an argument separate from the preemption issue, *Yee* seemingly dismisses that the only relevant services are those provided on the reservation: "[ra]ising revenue to provide general government services is a legitimate state interest." *Yee*, 528 F.3d at 1192-93.

Considering the foregoing, the plethora of services that the State makes available, and in some instances has actually provided, to the Contractor and the construction project is relevant. *See* JA 337-43(¶¶83-93); *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). This includes off-reservation services available to the Contractor, as its shop is located in Sioux Falls, South Dakota - approximately 35 miles away from the Tribe's reservation, and as the Contractor and its employees have to travel through non-Reservation property to access the casino and ancillary businesses. JA 314-315 (¶¶23, 25). The State's interest in funding these services, coupled with the lack of comprehensive federal regulation, is more than sufficient to tip the scale in the State's favor.

CONCLUSION

This case commands the same result as *Yee*, where the state tax was upheld. IGRA does not comprehensively regulate construction contractors. Moreover, although the Tribe ultimately paid the tax pursuant to an agreement, the state interests in imposing the tax on the non-Indian Contractor outweigh any federal and tribal interests implicated. 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 27th day of November 2018.

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CERTIFICATE OF COMPLIANCE

1. I certify that the Appellants' Reply Brief is within the limitation provided for in Rule 32(a)(7) using bookman old style typeface in 14-point type. Appellants' Brief contains 6,368 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.

Dated this 27th day of November 2018.

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

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 27th day of November 2018, a true and correct copy of Appellants' Reply Brief was submitted to the Eighth Circuit Court of Appeals for review.

/s/ *Stacy R. Hegge*
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