UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

FLANDREAU SANTEE SIOUX TRIBE, a Federally-recognized Indian tribe,

Plaintiff,

vs.

JAMES TERWILLIGER, Secretary of Revenue of the State of South Dakota; and KRISTI NOEM, Governor of the State of South Dakota,

Defendants.

4:17-cv-04055-KES

FLANDREAU SANTEE SIOUX TRIBE'S POST-TRIAL BRIEF

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INTRODUCTION

The Flandreau Santee Sioux Tribe, "Wakpa Ipaksan" (Bend in the River), has occupied the Flandreau Indian Reservation in Moody County for generations. The Tribe's forced removal from the its homelands in Eastern Minnesota began after the "Dakota Wars," which ended with the largest mass hanging in the history of the United States, in which 38 Dakota were hanged and 2 more Dakotas were killed for defending their way of life. The Tribe's place in U.S. history underscores how critical the reservation homeland is to the identity of the Tribe. After the military forced the Tribe out of Minnesota, tribal members were shipped by boat to a military prison at Fort Thompson, a journey that no children survived. Forty families then moved from the Santee Tribe in Nebraska to present day Flandreau, South Dakota, and established the Tribal reservation.

The Tribe had a meager financial existence before gaming, and a majority of the Tribe lived in poverty. More than 150 years later, the gaming enterprise the Tribe operates on its reservation allows the Tribe not only to survive, but to thrive. Title 19 of the Tribal Code, the Gaming Revenue Allocation Ordinance, section 19-1-1, recounts the essential purpose of the Tribe's Royal River Casino and Hotel ("Casino"):

> **B. Tribal Government and Tribal Economic Development.** The Flandreau Santee Sioux Tribe shall use revenues generated by tribal gaming primarily to strengthen the tribal government, tribal self-sufficiency and to support tribal economic development…
>
> **C. Preservation and Strengthening of Flandreau Santee Sioux Society, Economy, and Culture.** The Tribe shall work to reverse the lasting effects of the termination policy of the 1950s and 1960s which promoted migration away from the Reservation in an effort to encourage and expedite assimilation of Indian people into non-Indian society. The Tribe is committed to strengthening its Reservation community socially, economically, and culturally in its continuing efforts to realize its goal of self-determination….

Ex. 21 at FSST 106738.

To protect this important economic driver, the Tribe began a complete renovation of the Casino, and the State of South Dakota ("State") believes it is entitled to tax the project. In this case, the evidence demonstrates that the State contractor's excise tax on Henry Carlson Construction's gross receipts derived from the on-reservation construction and renovation of the Tribe's Casino (the "Project"), interferes with the important federal and tribal interests reflected in the Indian Gaming Regulatory Act ("IGRA") and the Indian Trader Statutes ("ITS"). The Tribe has demonstrated that the tax undermines the generation of gaming revenue in the amount of no less than $1.1 million dollars a year, and that imposition of the tax interferes directly with the Tribe's right to make and be governed by its own laws. The evidence demonstrates that the State did not regulate the Project, nor use contractor's excise tax revenues to provide services to the Project, the Casino, the reservation, or to tribal members living on the reservation. Instead, it deposits these taxes into its general fund and uses them for general programs off reservation. For the reasons set forth herein, IGRA and the ITS preempt the imposition of the tax.

DISCUSSION

I. Legal standards applicable to federal preemption analysis.

A. General preemption standards under *Bracker*.

The trial follows a pair of Eighth Circuit opinions, one of which vacated the summary judgment entered for the Tribe earlier in this action. *Flandreau Santee Sioux Tribe v. Haeder*, 938 F.3d 941 (8th Cir. 2019). The companion case affirmed in relevant part the summary judgment entered for the Tribe in another action involving federal preemption of a State tax imposed upon non-members' Casino transactions. *Flandreau Santee Sioux Tribe v. Noem*, 938 F.3d 928 (8th Cir. 2019), *cert. denied* 590 U.S. ___ (May 26, 2020). In these decisions, the Eighth Circuit identified the interests to be weighed and certain factors that influence the weight of those interests under *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980).

The Eighth Circuit summarized the salient factors of the preemption analysis: "[W]e focus on 'the extent of federal regulation and control, the regulatory and revenue-raising interests of states and tribes, and the provision of state or tribal services.'" *Haeder* at 945, quoting Felix S. Cohen, *Handbook of Federal Indian Law* 707 (2012); *accord Noem* at 935. "'State jurisdiction is preempted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority.'" *Noem* at 935-36, quoting *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983); *accord Haeder* at 945.

Mescalero elaborated on the nature of the analysis, outlining the factors that are relevant when assessing the federal and tribal interests.

> The traditional notions of Indian sovereignty provide a crucial "backdrop" … against which any assertion of State authority must be assessed. Moreover, both the tribes and the Federal Government are firmly committed to the goal of promoting tribal self-government, a goal embodied in numerous federal statutes. … We have stressed that Congress' objective of furthering tribal self-government … includes Congress' overriding goal of encouraging "tribal self-sufficiency and economic development." … In part as a necessary implication of this broad federal commitment, we have held that tribes have the power to manage the use of their 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. … Thus, when a tribe undertakes an enterprise under the authority of federal law, an assertion of State authority must be viewed against any interference with the successful accomplishment of the federal purpose.

Mescalero, 462 U.S. at 334-36 (citations and footnotes omitted); *see Bracker* at 144-45; *Ramah Navajo School Bd., Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832, 845 (1982).

Accordingly, the Eighth Circuit held that the federal and tribal interests are "the broad policies that underlie" relevant Congressional acts. *Noem* at 935; *accord*, *Haeder* at 945. The Eighth Circuit opinions focused solely on IGRA, because the ITS were not analyzed in the

summary judgment decision appealed in *Haeder* and were not at issue in *Noem*. Here, the pertinent federal statutes are IGRA and the ITS. The federal and tribal interests in promoting economic development, tribal self-sufficiency, and tribal self-determination are further reflected in numerous federal statutes and policies. Ex. 57, at Ex. 1, p. 42; *Mescalero* at 337 & n.17.

The Eighth Circuit further explained that "[t]he history of tribal sovereignty over a subject 'serves as a necessary backdrop' to the preemption question." *Noem* at 936, quoting *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 176 (1989); *accord*, *Haeder* at 945. "'The policy of leaving Indians free from state jurisdiction and control is deeply rooted in this Nation's history,'" as the Supreme Court reiterated just this term. *McGirt v. Oklahoma*, 591 U.S. __, 2020 WL 3848063, *17 (2020), quoting *Rice v. Olson*, 324 U.S. 786, 789 (1945).

Under the *Bracker* framework, once the Tribe has shown that the tax interferes or is incompatible with federal and tribal interests reflected in federal law, the State must demonstrate that imposing the tax serves state interests that outweigh the federal and tribal interests. *Mescalero* at 334; *see Joseph A. Bass Co. v. United States*, 340 F.2d 842, 844 (8th Cir. 1965) (burden of proof rests on party asserting the affirmative of an issue).

B. Federal preemption in the context of IGRA.

"[T]he broad policies that underlie IGRA and the history of tribal independence in the operation of gaming and gaming facilities" are of "great relevance" to the analysis in casino-related cases. *Noem* at 935; *see Haeder* at 946. The "text and structure of IGRA, its legislative history, and its jurisdictional framework" all "indicate[] that Congress intended it completely preempt state law. There is a comprehensive treatment of issues affecting the regulation of Indian gaming." *Gaming Corp. of Am. v. Dorsey & Whitney*, 88 F.3d 536, 544 (8th Cir. 1996). Before Congress enacted IGRA, federal preemption principles "confirmed that tribes were free from non-criminal state regulation of tribal gaming on reservations." *Noem* at 936, citing

California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987). Further, transactions at tribal gaming facilities, including concessions sales, were not subject to state taxation or regulation prior to the passage of IGRA. *Indian Country USA, Inc. v. Oklahoma*, 829 F.2d 967, 986 (10th Cir. 1987), *cert. denied*, *Oklahoma Tax Comm'n. v. Muskogee (Creek) Nation*, 487 U.S. 1218 (1988). Congress intended to retain this framework, allowing the State no authority over tribal gaming facilities except through a negotiated gaming compact. *See* S. Rep. 100-446, *5 (1988).

> IGRA endorsed substantial tribal independence and protected tribes from state interference in the operation of gaming activity, except for limited state regulation through Class III gaming compacts. The stated purposes of IGRA include "promoting tribal economic development, self-sufficiency, and strong tribal governments … ensur[ing] that the Indian tribe is the primary beneficiary of the gaming operation [and] protect[ing] such gaming as a means of generating tribal revenue."

Noem at 936, quoting 25 U.S.C. § 2702; *see Haeder* at 946 (quoting § 2702).

Noem held that even where IGRA does not expressly preempt state taxation of a particular activity, tax on the activity nevertheless may be preempted under *Bracker* where the activity "contribute[s] significantly to the economic success of the Tribe's Class III gaming at the Casino" and the tax's "impact would be contrary to IGRA's broad policies." *Noem* at 936. The primary factual issues on remand in this case relating to the tribal, federal, and state interests under IGRA are:

1. Whether "imposition of the contractor excise tax for Henry Carlson Company's work on the Casino project will impede the Tribe's ability to conduct its Class III gaming activities to generate gaming revenue." *Haeder* at 946;

2. Whether "the additional federal interests reflected in IGRA and in the history of tribal independence -- promoting strong tribal government and ensuring tribal control of gaming

operations in Indian country -- are not implicated by an excise tax that does not regulate Casino construction or gaming activities." *Id.*;

3. Whether the "tax has more than a *de minimis* financial impact on federal and tribal interests…" *Id.*;

4. Whether "the State's legitimate interests in raising revenues for essential government programs that benefit the nonmember contractor-taxpayer in this case, as well as its interest in being able to apply its generally applicable contractor excise tax throughout the State, are sufficient to justify imposing the excise tax on Henry Carlson Company's construction services performed on the Casino's realty." *Id.*

C. Federal preemption in the context of the Indian Trader Statutes.

The tax also implicates the ITS and the history of tribal independence in dealing with traders who sell goods and services to Indian tribes in Indian country. Federal preemption in this area is firmly embedded in the nation's and South Dakota's history. The United States admitted South Dakota to the Union on the express agreement by its people to:

> forever disclaim all right and title to the unappropriated public lands lying within the boundary of South Dakota, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States; and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States.

S.D. Const. art. XXII; *see* Act of Feb. 22, 1889, ch. 180 § 4, 25 Stat. 676, 677 (South Dakota Enabling Act); *see also Warren Trading Post v. Arizona Tax Comm'n*, 380 U.S. 685, 687 n.3 (1965) (discussing identical provision in Arizona Enabling Act). The South Dakota Supreme Court recently held that "Article XXII of the South Dakota Constitution serves as a 'legal principal that guides [the court's] resolution" on issues of tribal sovereignty and federal preemption of state authority. *Stathis v. Marty Indian School*, 2019 S.D. 33, ¶ 20 (S.D. 2019).

"[F]rom the very first days of our Government, the Federal Government had been permitting the Indians largely to govern themselves, free from state interference, and had exercised through statutes and treaties a sweeping and dominant control over persons who wished to trade with Indians and Indian tribes." *Warren Trading Post* at 686-87 (footnotes omitted). "Such comprehensive federal regulation of Indian traders has continued from that day to this." *Id.* at 688; *see* 25 U.S.C. §§ 261-264; *see also* 25 C.F.R. §§ 140.1-140.26 (Indian trader regulations).[1]

Congress assigned to the Commissioner of Indian Affairs the "sole power and authority to appoint traders to the Indian tribes and to make such rules and regulations as he may deem just and proper specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians." 25 U.S.C. § 261.[2] All "trade with the Indians on any Indian reservation" is permitted only "under such rules and regulations as the Commissioner of Indian Affairs may prescribe for the protection of said Indians." 25 U.S.C. § 262; *see also* 25 U.S.C. § 263 (authorizing the President to prohibit trade in any Indian country).

The express objective of these laws is "the protection of said Indians." 25 U.S.C. § 262. The "evident congressional purpose" remains "ensuring that no burden shall be imposed upon Indian traders for trading with Indians on reservations except as authorized by Acts of Congress or by valid regulations promulgated under those Acts." *Warren Trading Post* at 691. This purpose is frustrated by the assessment of State tax on a trader's gross income from selling to Indians on the reservation, because such a tax

[1] The Tribe's previous briefing outlined the statutory history in detail. *See* Doc. 75 at 17-18; Doc. 89 at 17-20.

[2] The Secretary of the Interior now exercises the Commissioner's authority. Reorg. Plan No. 3 of 1950, 15 Fed. Reg. 3174 (May 25, 1950).

> would put financial burdens on [the trader] or the Indians with whom it deals in addition to those Congress or the [Tribe] have prescribed, and could thereby disturb and disarrange the statutory plan Congress set up in order to protect Indians against prices deemed unfair or unreasonable by [federal officials].

Id.

The Supreme Court has permitted states to regulate Indian traders' transactions in Indian country in only one respect: states may impose upon traders minimal burdens reasonably tailored to the collection of valid taxes from non-Indian consumers. *Dept. of Taxation and Finance of N.Y. v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 73-74 (1994). Federal law still preempts "a tax directly 'imposed upon Indian traders for trading with Indians.'" *Id.* at 74-75, quoting *Warren Trading Post* at 691, and citing *Central Machinery Co. v. Arizona State Tax Comm'n*, 448 U.S. 160, 164 (1980). In this case, there is no transaction with non-Indian consumers – the transaction being taxed is the trade with the Tribe.

i. Express ITS preemption under *Central Machinery*.

Under *Central Machinery*, the ITS expressly preempt gross receipts taxes on an Indian trader transacting business with the Tribal government, regardless of whether the trader has obtained a federal Indian trader license. 448 U.S. at 164-66. This contractor's excise tax, like the tax in *Central Machinery*, is a gross receipts tax, imposed on a transaction between the Tribal government and its contractor. SDCL 10-46A-1. In this case, as in *Central Machinery,* the ITS "pre-empts the field of transactions with Indians occurring on reservations." *Id.* at 165.

ii. ITS preemption under *Bracker*.

In *Warren Trading Post*, the Court found preemption under the ITS in light of the complete lack of state responsibilities on the reservation. 680 U.S. at 690, 691. *Milhelm* engaged in a limited balancing of interests in determining whether the ITS preempt state regulatory burdens on Indian traders in support of a tax imposed on non-Indians. *Milhelm*, 512

U.S. at 73 (quoting *Bracker* and citing *Cotton*). Even weighing the State's interests in this case, the result is the same: the imposition of this gross receipts tax on an Indian trader, the economic burden of which falls squarely on the Tribe, is preempted because it significantly interferes with federal and tribal interests under the ITS, and the state's interests are insufficient to justify its imposition.

II. The tax implicates significant federal and tribal interests under IGRA and ITS.

A. The tax impairs the tribal and federal interests in raising tribal revenue and promoting tribal economic development and self-sufficiency through gaming.

i. The Project serves the federal and tribal interest in generating gaming revenue for the Tribe.

"Congress has noted 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.'" *City of Duluth v. Fond du Lac Band of Lake Superior Chippewa*, 785 F.3d 1207, 1211 (8th Cir. 2015) (quoting legislative history). The Tribe's Casino has been the primary driver for the tribal economy, the local Moody County economy, and the expansion of Tribal government into one capable of meeting the needs of reservation residents. (Reider testimony; Kills-A-Hundred testimony).

The expansion and modernization of the Casino facility was critical to continue and restore the economic success of the Casino including its class III gaming, and to the public health and safety of its patrons. (Reider testimony; McDermott testimony; Tim Morrissey testimony). The major aim of the Project was to increase gaming revenues in the face of the Casino's declining market share with competition in nearby Larchwood, Iowa. (Morrissey testimony.) The Casino had not been renovated in twenty years, and components were failing, finishes were outdated, and the gaming floor lacked the space and necessary electrical components to add slot machines. (Morrissey testimony; McDermott testimony; Derry testimony; Powers deposition

47:3-12.) The outdated Casino forced the Tribe to offer more comps to patrons to get them in the door, which in turn decreased net income. (Morrissey testimony). The Tribe negotiated an amended Gaming Compact increasing the number of slot machines allowed (though the Tribe had to sue the State to obtain the amendment, *see Flandreau Santee Sioux Tribe v. State of South Dakota*, No. 4:07-cv-04040-LLP (D.S.D., filed Mar. 19, 2007)), and after conducting an economic feasibility study, it determined a renovation to update the Casino and expand the gaming floor to add machines was necessary. (Kills-A-Hundred testimony.) Gaming is the Tribe's largest source of non-federal funds, and slot machines generate the vast majority of net gaming revenue. (Kills-A-Hundred testimony; McDermott testimony; Ex. 151, 152, 157.) The Project also added a second electrical room and dedicated circuits and network connections for every additional slot machine. (Morrissey testimony; Powers deposition 42:8-43:2.)

The Project improved public safety through the installation of a new air handling system, fire suppression systems, and a new emergency alarm system. (Brock Nelson testimony; Morrissey testimony; McDermott testimony; Ex. 73.) It added an additional wastewater lift station and second water supply and improved the Casino's energy efficiency. (Morrissey testimony.) These renovations ensure guests are able to game at the facility safely. (Ross deposition 66:9-67:4.) The Project also improved Casino computer systems and the equipment in the Casino's bar and snack bar. (Morrissey testimony.) The bar was relocated to the center of the gaming floor, and a VIP bar off the gaming floor was added. (Morrissey testimony; *see* Pl. Stip. 38; Ross deposition 45:20-50:13.)

The Project has produced positive results. The Casino has seen an increase in market share, which it measures by individual customer visits and coin-in, and has reduced its marketing spending, both of which lead to an overall increase to net income. (Morrissey testimony.) Hotel

renovations have allowed the Casino to double the daily rate and improve occupancy. (Morrissey testimony.) The Project was essential to the Casino remaining competitive and meeting health and safety standards. (Morrissey testimony.) The Project increased the Casino's slot machine capacity to 800 machines. (McDermott testimony). However, the Casino still operates only about 425 machines, roughly the same number as before the renovation. (McDermott testimony.) With permanent improvements complete, the final step to realizing the Project's potential is installing new gaming machines.

ii. The imposition of State contractor's excise tax impedes the Tribe's ability to generate gaming revenue.

Because of the additional tax burden on the Project, the Tribe has had to forego acquiring and installing additional slot machines, which directly impairs the Tribe's ability to conduct class III gaming activity to generate gaming revenue. The $384,000 that the Tribe would use to pay the contractor's excise tax is presently held in a Casino account. The money was borrowed as part of the Project's bond financing, so its use is restricted to Casino capital improvements and it is accruing interest. (McDermott testimony.) The terms of the Casino's financing prohibit taking on additional debt, so the Casino is not able to simply finance additional machines. (Morrissey testimony; McDermott testimony.)

If this money is not used to pay State contractor's excise tax, the Casino plans to use it to purchase slot machines because it is the most profitable use of the funds. (Morrissey testimony.) Slots produce approximately 80% of the Casino's revenues. (McDermott testimony.) Casino Management would only consider a slot machine purchase because new slot machines are the most profitable gaming asset with high return and low operational and maintenance costs. (McDermott testimony.)

At about $20,000 apiece, the Casino would buy 19 to 20 machines. (Morrissey testimony.) A brand new slot machine should be expected to generate daily revenue double to quadruple the house average, currently about $184 per day, during the first few years of its service life of at least ten years. (Morrissey testimony.) Using a conservative estimate of just the $184 daily average, and the Casino retaining 90% of those revenues as profit, 19 new machines would provide at least approximately $1.1 million in net revenue to the Casino during the first year and every year thereafter. (Morrissey testimony; McDermott testimony.) This $1.1 million represents a 10% increase in the Casino's earnings before interest, taxes, depreciation and amortization, and is substantial compared to its 2019 annual net income transfers of $4,055,131. (Morrissey testimony; McDermott Testimony; Ex. 157 at FSST 106724.)

iii. Gaming revenue is essential to the Tribe's economic development and self-sufficiency.

After servicing the renovation debt, remaining net gaming income generated at the Casino is distributed weekly to the Tribe. (McDermott testimony.) Therefore an increase or decrease in net income has an immediate, dollar-for-dollar impact on the Tribal Government operations.

Today, gaming revenue accounts for about 25% of the Tribal government's funding. (Kills-A-Hundred testimony.) The Casino distributed just over $4.5 million to the Tribe in 2019. (McDermott testimony; Ex. 157.) In past years, gaming revenue comprised about 40% of the Tribal budget (the Casino distributed $7.6 million to the Tribe in 2018, and $10.4 million in 2017); the distribution of gaming revenue to the Tribe is lower now because gaming revenue is dedicated first to paying the bonds that financed the Project. (McDermott testimony; Ex. 157.) Casino gaming revenues are by far the largest non-federal portion of the Tribe's budget, and

provide stability for tribal government operations during gaps in federal appropriations. (Kills-A-Hundred testimony.)

The Tribe's federally-approved Gaming Revenue Allocation Ordinance sets forth the Tribe's policies for using gaming revenues in accordance with the limitations set by IGRA. (Ex. 21, 22; Pl. Stip. 29, 30.) Under the Ordinance, the Tribe uses gaming revenues to preserve and strengthen the Tribe's society, economy, and culture. *See* Introduction, *infra*. (Ex. 21, § 19-1-1.C.) In pursuit of these objectives, the Tribe distributes the net revenues from Tribal gaming to economic development (35%); per capita payments (40%); the minors' trust fund (5%), government operations (15%), community assistance (4%), and higher education (1%). (Ex. 21, § 19-1-2; Pl. Stip. 29.) The higher education fund is a recent change to tribal law; previously, 1% of gaming revenue was dedicated to a local government fund, from which the Tribe paid Moody County and the City of Flandreau for expenses such as law enforcement vehicles and dispatch, teacher salaries, ambulance services and fire protection. (Kills-A-Hundred testimony.)

Gaming revenue funds essential governmental programs the Tribe would not otherwise be able to operate, and tribal economic development projects. (Kills-A-Hundred testimony). Gaming revenues funded development costs for the construction of its new health clinic. (Kills-A-Hundred testimony; Jacobs testimony; Leah Fyten deposition (Doc. 152-6) 13:18-14:16.) The clinic provides comprehensive health services (including primary care, pharmacy, imaging, dental, mental and behavioral health, and transportation services, to name a few) to eligible patients across the region – services that are not otherwise available at the levels provided by this program. (Jacobs testimony.) Eligibility extends to members of any federally-recognized tribe, any lineal descendent of a tribal member, their spouses and children, and in some cases non-

Indians living in the household, and Tribal employees. (Jacobs testimony.) None of these programs receive funding from the State. (Jacobs testimony.)

Gaming revenues fund the Tribe's comprehensive social services, including elder care, general welfare benefits funding directly to tribal members in Moody and Minnehaha Counties, child protective services, and assistance to victims of domestic violence and sexual assault, to name a few. (Jessica Morson testimony.) The Tribe provides these services to Tribal members and non-members, on and off the reservation. (Morson testimony.) The Tribe's Social Services Office frequently assists other jurisdictions with their cases; assists individuals with enrolling in income-based federal and State benefits; provides assistance with foster care placement and welfare checks on the reservation; provides expert testimony in State proceedings involving Indian children free of charge to Moody County; and supports State parolees in Moody County (regardless of their Tribal membership) with mental health, medical, financial, job support and case management services, in a program that has seen significant success reducing recidivism. (Morson testimony.) None of these programs receive funding from the State. (Morson testimony).

The Tribe implemented a coronavirus isolation assistance program that provides cash payments and other assistance to any person in Moody County who needs to isolate because of infection or exposure to COVID-19. (Reider testimony; Morson testimony; Ex. 147.) In addition, the Tribe operates substantial COVID-19 health programs including testing, treatment, quarantine housing at the Casino, and preparation and delivery of meals from the Casino. (Reider testimony, Kills-A-Hundred testimony, Jacobs testimony.) None of these programs receive funding from the State. (Morson testimony).

Gaming revenue also helps fund Tribal housing programs. (Kills-A-Hundred testimony; Marshall testimony; Ex. 143.) The Tribe's housing programs include rental homes available to households that include a member of any federally-recognized tribe; elderly housing complexes open to Tribal members and non-members; below-market rental units for Tribal members and non-members; and down payment assistance grants open to households that include a Tribal member living in Moody County, on or off the Reservation. (Marshall testimony.) None of these programs receive funding from the State. (Marshall testimony.) Because of these programs, it is now easier to find safe, affordable housing on the reservation, compared with ten years ago. (Marshall testimony.)

These essential programs, along with numerous others, demonstrate how the Tribe uses gaming revenues to reverse the lasting effects of termination policies, and to promote a migration back to the reservation community. (Reider testimony; Anderson testimony; Kills-A-Hundred testimony.) They demonstrate the promise of IGRA to ensure the Tribe has more than a "skeletal program that is totally dependent on Federal funding." *City of Duluth*, 785 F.3d at 1211.

B. The tax impairs Tribal self-government.

i. The Tribe governs the reservation free from State control.

The Tribe is governed by its Constitution, ratified in 1934 and approved by the United States in accordance with the Indian Reorganization Act. (Reider testimony.) Its governing body is the Executive Committee, made up of seven members elected by the Tribe's eligible voters as well as an appointed Treasurer. (Reider testimony.) The Tribe has an extensive body of civil and criminal law that governs conduct within the Tribe's jurisdiction. (See Ex. 19.)

The Tribal Tax Act (Ex. 43) regulates taxation on tribal land, imposing tribal sales and use taxes, taxes on cigarettes, utilities, communications, motor vehicle fuel, and more.

Construction services are exempt from sales tax (Ex. 43, § 3.13). Most importantly, the Tribe does not impose a contractor's excise tax, because the Tribe owns all the buildings on the reservation, so a tribal tax on realty improvements would be taxing only the Tribe, would serve no Tribal governmental purpose, and would increase the Tribe's costs for construction projects, thereby impeding its goals. (Reider testimony.)

The Tribe provides governmental services pursuant to Tribal law. The Tribe operates and funds essential governmental services available both on and off the reservation including a police department, a tribal court system, a health clinic and substantial health programs including a fitness center, a robust social services department, housing, an education office, environmental protection programs, tribal historic preservation programs, a land office, a liquor control office, a transportation and roads department, IT services, and a community center, among many others, all funded with tribal and federal funds. (Reider testimony; Kills-A-Hundred testimony; Kristi Bietz deposition (Doc. 152-4) (describing tribal court's civil, criminal, juvenile and appellate operations); Ex. 44-45; Ex. 47; Ex. 53; Ex. 89; Ex. 91; Ex. 94-98; Ex. 108-135.)

The Tribe's General Welfare Ordinance establishes how the Tribe uses Tribal funds to provide for the general welfare of the community on and off-reservation through benefit programs for eligible Tribal members and, in some instances, non-members. (Ex. 50, see Reider testimony.) Receipt of these Tribal benefit payments typically disqualifies recipients from eligibility for State benefit programs. (Reider testimony; Morson testimony.) There is not a single State program that provides a comparable amount of funding to Tribal Members.

The Tribe also enters agreements with local and state government agencies and volunteer fire departments to coordinate services on and off-reservation, and to reimburse local governments for providing services on-reservation to tribal members and non-members.

Significant agreements include Moody County law enforcement dispatch, wildlife management, sex offender registration data sharing, criminal detention, and fire protection. (Reider testimony; Ex. 40; Ex. 48-49; Ex. 51-52; Ex. 54-56.)

ii. Federal and Tribal regulation under IGRA and service provision to the Project and the contractor are substantial.

IGRA sets up a system of comprehensive federal and tribal regulation of gaming facilities, leaving no role for State oversight of the Casino renovation project.

The Tribe opened the Casino about thirty years ago, relocated to the current facility in 1997, and doubled the size of the hotel in 2001. (Reider testimony.) This Project began in the fall of 2016 and finished in October 2019. (Chris Johnson testimony.) Clearly, the Project was undertaken only because the Tribe developed, built and operates the Casino, for which it has expended Tribal capital, manpower, and governmental resources for decades. (*See* Pl. Stip. 32.) For this reason, the value of the Project the State seeks to tax is "generat[ed] … on the reservation[] through activities in which [the Tribe] ha[s] a substantial interest." *Cabazon* at 220.

As required by IGRA, the Tribe enacted Class II and Class III Gaming Ordinances, both of which are federally-approved. (Pl. Stip. 3, 4; Ex. 1-4.) The Tribal Gaming Commission regulates and oversees the Casino gaming facility. (Pl. Stip. 5; Ron Gilbert testimony.) IGRA and the Tribal gaming ordinances require Casino management and the Tribe's gaming regulators to ensure and certify that the Casino is built and maintained in a manner that protects the environment and the health and safety of the public. (Pl. Stip. 9, 10; 25 U.S.C. § 2710(b)(2)(E); 25 C.F.R. Part 559; Ex. 8-9; Ex. 150; Ex. 1, p. FSST 100017, §17-5-5; Ex. 41, p. FSST 103997, §VIII.) 25 C.F.R. § 559.4 requires that the Tribe "has identified and enforces laws, resolutions, codes, policies, standards, or procedures applicable to each gaming place, facility, or location that protect the environment and the public health and safety…." The Tribal Gaming

Commission annually submits to the National Indian Gaming Commission ("NIGC") the Tribally-issued facility license for the Casino, with an attestation required by federal law that the Tribe has determined the Casino facility's construction, maintenance and operation adequately protect the public health and safety. (Ex. 6, 7, 150; Ron Gilbert testimony; Pl. Stip. 13-15; 25 C.F.R. §§ 559.3, 559.4.)

If the facility is unlicensed, unsafe or hazardous, the Tribal Gaming Commission and NIGC have authority to impose fines, revoke the facility's license, or order the Casino closed. (Gilbert testimony, Pl. Stip. 16.; David Ross deposition (Doc. 152-1) 52:14-25.) For the renovation project, the extensive Project specifications developed and approved by the Tribe as the "authority having jurisdiction" supply the specific requirements to ensure the facility satisfies the health and safety obligation. (Gilbert testimony; Chris Johnson testimony.)

The Tribe enforces these standards through inspections conducted by the Casino's compliance officer, the Indian Health Service, and private companies hired by the Casino. (Pl. Stip. 18-22; Steve Nelson testimony; Ross deposition 25:2-26:6, 53:17-57:16; Ex. 12-16; Ex. 74.)

The Tribe regulates building safety as well as employee and guest safety, including the conduct of Project workers. (Steve Nelson testimony; Brock Nelson testimony.) The Casino's security department documented 19 incidents related to the contractor or construction project during the Project, none of which involved any State law enforcement response. (Brock Nelson testimony; Ex. 159-178.)

The Tribal Gaming Commission has continual daily oversight responsibility for the Casino's financials, its security and surveillance, the gaming machines, the licensing of employees, casino licensure, and badging and monitoring of vendors at the facility, including

Project contractor and subcontractor personnel. (Gilbert testimony; Johnson testimony, Powers deposition (Doc. 152-2) 41:6-19.) The Casino is required to operate in compliance with the Rules and Regulations Manual issued by the Tribal Gaming Commission, half of which consists of federal Minimum Internal Control Standards ("MICS") promulgated by the NIGC. (Ex. 42; Ex. 5; Gilbert testimony.) Federal and tribal regulations require an annual audit, without which the NIGC would impose fines and could ultimately close the Casino. (McDermott testimony; Ex. 156-157; Ex. 152.) The annual audit reports the amount of construction in progress, capital expenditures, and debt service related to the Project. (McDermott testimony.) During the Project, Tribal and federal regulations required the Tribal Gaming Commission's in-person supervision every time construction required slot machines to be relocated. (Gilbert testimony.)

The contractor and the Project also benefit from services and amenities the Tribe provides through the Tribal government and the Casino, including meeting facilities, surveilled and patrolled spaces for equipment storage and the contractor's Project trailer, utilities for the Project trailer, discounted and free hotel rooms, discounted meals, snow removal, and the use of Tribal equipment. (Morrissey testimony; Derry testimony; Johnson testimony; Ross deposition 37:17-24.) The Tribe issued certificates of occupancy certifying the facility's suitability for occupancy at the conclusion of each Project phase. (Johnson testimony; Ex. 34)

The NIGC reviewed the Project financing documents and opined that, in accordance with the NIGC's standards, the documents did not constitute gaming management contracts under IGRA and did not violate IGRA's requirement that the Tribe have the sole proprietary interest in its gaming activity. (Ex. 155; Gilbert testimony; McDermott testimony.) $6,075,000 of the Project was funded with Tribal Economic Development Bonds allocated by the United States Internal Revenue Service. (Pl. Stip. 83; McDermott testimony.)

In accordance with IGRA, the Tribe's Class III gaming activity is also governed by the Tribal-State Gaming Compact. (Ex. 17, 18.) Under the Gaming Compact, the Tribal Gaming Commission has "primary responsibility for the supervision and regulation of gaming." (Ex. 17 § 4.2.) The State's only active regulatory authority under the Gaming Compact is to inspect the Casino's slot machines for compliance with state and tribal gaming laws. (Ex. 17 §§ 9.3, 9.6, 9.7.) The Tribe reimburses the expenses of the State in performing its responsibilities. (Ex. 17 § 14.2; Ex. 192; Gilbert testimony.)

The State negotiated for the Tribe to make annual payments to Moody County – not the State – to reimburse "the possibility of increased governmental demand" resulting from the anticipated "significant expansion of the Tribe's gaming operation," because of the increase in the number of authorized slot machines. (Ex. 17 § 11.1, 11.2; Pl. Stip. 25, 27; Reider testimony.) The State did not request any compensation to the State for any burdens the Casino expansion imposed on the State – because it is not bearing any increased burdens. (Reider testimony). Further, the State does not regulate the maintenance or construction of the Casino under the Gaming Compact. (Reider testimony; Nelson testimony; Gilbert testimony; Johnson testimony; Derry testimony). The Gaming Compact does not address Casino construction, or taxation at the Casino, and it does not contain any standards or permit any State inspections related to the health and safety of the Casino facility. (Ex. 17; Pl. Stip. 26; Gilbert testimony.)

The Tribe directed the Casino to close to protect public health at the onset of the coronavirus pandemic, and developed a reopening plan to satisfy the federal and tribal gaming commissions. The State played no regulatory role in these decisions and provided no financial support to the Tribe or Casino. (Morrissey testimony.)

iii. Federal and Tribal regulation under the Indian Trader Statutes is exclusive of State regulation.

The Indian trader statutes are an additional source of federal control over the Casino renovation project. They subject every person trading with Indians in Indian country to federal licensing and regulatory requirements. In practice, the Bureau of Indian Affairs ("BIA") delegates its regulatory responsibility for on-reservation trade to the tribe. (Kills-A-Hundred testimony.) Accordingly, the Tribe requires a license for any person doing business on the reservation, including Henry Carlson Construction, Leo A Daly, and all subcontractors. (Kills-A-Hundred testimony; Ex. 37.) The State does not issue business licenses authorizing trade on the reservation and does not regulate who can engage in construction on the reservation. (Adams testimony.)

The construction contract was negotiated and executed on the reservation. (Pl. Stip. 60; Derry testimony.) This contract with the Tribe for on-reservation construction makes Henry Carlson Construction an "Indian Trader" within the meaning of the ITS. The contract included the costs of services, construction materials, permits, and all costs to complete the construction project. (Ex. 24; Ex. 179.)

The total contractor's excise tax bill for the Project was $384,436. (Ex. 179.) Typical of the universal practice throughout the construction business, the cost of contractor's excise tax was passed on to the Tribe. (Reider testimony; Derry testimony; Breck testimony.) The tax therefore imposes "financial burdens" upon the contractor or the Tribe "in addition to those Congress or the [Tribe] have prescribed." *Warren Trading Post* at 691.

The State has insisted the ITS apply only to goods, not services, ignoring that State law clearly states that the tax is imposed on the contractor's gross receipts from "*all labor and materials*." SDCL 10-46A-3 (emphasis added); *see also* Roberta Adams testimony, Doug

Schinkel deposition (Doc. 166-2) 34:21-25. Furthermore, controlling federal regulations define "trade" under the Indian trader statutes to mean any transaction "involving the acquisition of *property or services*." 25 C.F.R. § 140.5 (emphasis added). An overwhelming array of statutory construction principles confirms the soundness of this definition.[3] Congress preemptively regulates "trade" with Indians, including trade that involves services as well as goods.

The State's assertion that the contractor's lack of a federally-issued license is fatal to the preemption claim is also incorrect. The Supreme Court specifically rejected this argument forty years ago, holding that "[i]t is irrelevant that [the vendor] is not a licensed Indian trader." *Central Machinery*, 448 U.S. at 164. The State attempts to avoid this holding by theorizing that the lack of a federal license would have doomed the preemption claim in *Central Machinery*, but for the fact that the BIA had approved the sale and the tribal budget in that case. *See id.* at 164 n.4. *Central Machinery* did not hinge on this issue.[4] The Court explained that is not the federal government's "administration" of the ITS, but the fact of their "existence … that pre-empts the field of transactions with Indians occurring on reservations." *Id.* at 165.

"[M]odern conditions" cannot alter the judicial interpretation of federal statutes enacted over a century ago. *Id.* at 166. The Supreme Court recently highlighted the "perils of substituting stories for statutes," emphasizing that "extratextual sources," including "subsequent historical events," cannot "overcome congressional intent as expressed in a statute." *McGirt v. Oklahoma* at *10-*14. As with the State of Oklahoma's historical conduct in *McGirt*, where the BIA's "historical practices" do not "even *try* to conform" to the Indian trader statutes, such

[3] The Tribe's previous briefing elaborated on the reasons that "trade" includes trade in services. *See* Doc. 75 at 22-29; Doc. 89 at 14-22; *see also New Mexico Taxation and Rev. Dept. v. Laguna Ind., Inc.*, 115 N.M. 553, 554-55 (N.M. 1993).

[4] Furthermore, the transaction at issue here was also subject to federal regulation and oversight, as described below.

practices are "a meaningless guide for determining" what Congress intended. *McGirt* at *12. Accordingly, "[u]ntil Congress repeals or amends the Indian trader statutes, … we must give them 'a sweep as broad as their language, … and interpret them in light of the intent of the Congress that enacted them." *Central Machinery* at 166. The issuance or non-issuance of a federal license does not leave an opening for state regulation of on-reservation construction contractors: they remain under exclusive federal and tribal control.

Likewise, *U.S. ex rel. Keith v. Sioux Nation Shopping Center*, 634 F.2d 401 (8th Cir. 1980), does not support the State's argument. *Keith* held that sellers operating on-reservation without federal Indian traders' licenses did not violate 25 U.S.C. § 262 because it was impossible for the vendors to obtain a license from the BIA, and they had instead obtained permits from the tribe. The decision demonstrates that *tribal* regulation in the era of self-determination leaves no room for state regulation of Indian traders. *See*, *e.g.*, Indian Self-Determination and Education Assistance Act, Pub. L. 93-638 (Jan. 4, 1975), 88 Stat. 2203, 25 U.S.C. § 5301 et seq. (expressing federal policy favoring Tribal control of Indian people's relationships among themselves and with non-Indians, and disfavoring "prolonged Federal domination").

The other cases the State cites in connection with the ITS are distinguishable. *Mashantucket Pequot Tribe v. Town of Ledyard*, 722 F.3d 457 (2d Cir. 2013), held the ITS did not preempt an ad valorem tax imposed on a non-Indian's ownership of personal property located on reservation. The court emphasized that the tribal and federal interests were "particularly" inapt because "the incidence of the generally applicable tax falls on the non-Indian's *ownership of property*, rather than on the *transaction* between the Tribe and the non-Indian," noting the rule under *Central Machinery* that "Indian trader law 'pre-empts the field of *transactions* with Indians.'" *Id.* at 469, quoting *Central Machinery* at 165 (emphasis by

Mashantucket). *Sac and Fox Nation of Missouri v. Pierce*, 213 F.3d 566 (10th Cir. 2000) held that the ITS did not preempt a Kansas motor vehicle fuel tax imposed on wholesale fuel distributors located off-reservation. *Id.* at 582-83. As the Supreme Court later determined, this Kansas fuel tax was imposed upon the distributors at the moment of their "off-reservation receipt" of fuel, and not upon any on-reservation retail transaction. *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 106 (2005). In contrast to these cases, the South Dakota contractor's excise tax falls on the contractor's transaction with the Tribe on the Tribe's reservation, and the Tribe bears the economic burden. For this reason, the tax squarely implicates the same tribal and federal interests that preempted the gross receipts tax in *Central Machinery* and *Warren Trading Post*.

Notably, the Oklahoma Supreme Court's recent decision in *Video Gaming Techs., Inc. v. Rogers Cty. Bd. of Tax Roll Corr.*, held that an ad valorem tax on the owner of gaming machines leased to a tribal casino, identical to the tax in *Mashantucket*, was invalid where Rogers County did not show "it provides any regulatory functions or services to VGT … to justify its taxation of equipment which is only located in Rogers County for use in Nation's gaming enterprise." 2019 OK 83, ¶ 39; (Ok. 2019), *cert. pending* (May 19, 2020).

iv. The tax directly and significantly impairs the Tribal and federal interest in Tribal self-government and the Tribe's interest in applying its tax laws throughout its territory.

Phase I of this Project included construction of an administration building. Ex. 197; Ex. 175, p. 108004; Ex. 27. The Tribe regularly uses the building to conduct tribal government meetings, including meetings of the Tribal Executive Committee. (Reider testimony; Ex. 197; *see* Ross deposition 74:10-19). The building is essential to tribal government operations because a leak in the roof of the Tribe's main building prevents meetings from being held there during rain, and that building lacks the technology needed for videoconferencing. (Reider testimony.)

The State's tax directly interferes with and places an economic burden on the Tribe's essential governmental operations. The State concedes that federal law preempts its authority to tax the construction of a Tribal government building, yet it refused to acknowledge such preemption in this case. (Adams testimony.)

The tax also interferes with the tribal and federal interests in "promoting strong tribal government [through gaming] and ensuring tribal control of gaming operations in Indian country." *Haeder* at 946; *see Noem* at 936. The funds that the Tribe would use to pay tax to the State, and the significant gaming revenues it is losing as a result of this tax, significantly impact the Tribe's ability to provide the essential governmental services described in Section II.A.iii creating a substantial burden.

The State tax is plainly contrary to the Tribe's longstanding interest in transacting commerce with vendors on the reservation free from direct economic and regulatory burdens except those that may be authorized by Congress or the Tribe, who alone have the responsibility for governing such transactions and the privilege of taxing them. *Warren Trading Post* at 690-91.

The State also deprives the Tribe of the ability to implement its tax policy on the reservation. The Tribe (like most states) chooses not to impose an excise tax on construction, but the State imposes one anyway, denigrating the Tribe's right to self-government. Ex. 43, §3.13; *see* Section II.B.i, *infra.* Because the reservation is exclusively comprised of trust lands, only the Tribe constructs buildings on the reservation. (Reider testimony.) The imposition of this tax impedes the Tribe's ability to treat its construction projects uniformly.

III. State interests do not outweigh the tribal and federal interests.

The complete absence of any State role in regulating who engages in trade with the Tribe, and any meaningful role in regulating the Casino facility, demonstrates the lack of State interest

in taxing the Project. This case is completely different from *Barona Band of Mission Indians v. Yee*, which dealt with a sales tax imposed off-reservation on the purchase of construction materials by the non-Indian contractor from non-member vendors, that, save for a contract clause, would clearly be taxable by the State. 528 F.3d 1184 (9th Cir. 2008). Here, South Dakota law places the location of the taxable event at the location of the Project on the Reservation. (Adams testimony.) Here, the State has no history of regulating contractors performing work for tribes on-reservation. Against this backdrop, the evidence demonstrates that the State interests are minimal.

A. The State's interest in raising revenues to provide services is minimal.

"Generally, 'a State seeking to impose a tax on a transaction between a tribe and nonmembers must point to more than its general interest in raising revenues.'" *Noem* at 932, quoting *Mescalero* at 336.

> The exercise of state authority which imposes additional burdens on a tribal enterprise must ordinarily be justified by functions or services performed by the State in connection with the on-reservation activity. … A State's regulatory interest will be particularly substantial if the State can point to off-reservation effects that necessitate State intervention.

Mescalero at 336 (citations omitted); *see Ramah* at 843-45; *Bracker* at 148-49; *Warren Trading Post* at 691.

Haeder identified two factors relevant to the weight of the State's interest in raising revenue. The State interest "is 'strongest when the tax is directed at off-reservation value and when the taxpayer is the recipient of state services.'" *Haeder* at 946, quoting *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 157 (1980). The relevant state services, in the *Haeder* Court's view, "'include those that are available to the contractor and the members of the Tribe off the reservation as well as on it.'" *Haeder* at 946-47, quoting *Cotton*

at 189. *Haeder* also held, however, that the presence or absence of a specific "nexus between the taxed activity and the government function provided" is relevant to the weight of the State's interest. *Haeder* at 946-47, quoting *Barona Band*, 528 F.3d at 1193. The "state interest strengthens" where this nexus exists, *Barona Band* at 1193, and is "heavily discounted" where the nexus is absent, *Haeder* at 946. Because a state's "generalized interest in raising revenue" has little weight, *Bracker* at 150, the Eighth Circuit held in *Noem* that the State's general "interest in raising revenues to provide governmental services throughout South Dakota" is insufficient to justify a State tax that impairs federal and tribal interests, particularly in light of a history of tribal independence from state authority. *Noem* at 937.[5]

Further, because the State may only "assess its tax in return for the governmental functions it provides to those who must bear the burden of paying this tax," *Ramah* at 843, the relevant state services or functions are those funded by the tax in question. *See Marty Indian School Bd., Inc. v. South Dakota*, 824 F.2d 684, 688 (8th Cir. 1987) (noting that the "revenues from the tax" were not "used directly for the benefit of the Indian children who attend the Marty Indian School or for the promotion of Indian self-sufficiency"); *Crow Tribe of Indians v. Mont.*, 819 F.2d 895, 901-02 (9th Cir. 1987), *sum. aff'd*, *Mont. v. Crow Tribe*, 484 U.S. 997 (1988); *Ramah* at 845 n.10.

Accordingly, the State stipulated to the following rule:

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[5] The State has relied on a line of out-of-Circuit cases where a loose, indirect connection between State services and the taxed on-reservation activity was sufficient to justify taxation, but these cases are factually distinguishable, because they all involved state taxes on transactions between non-Indians only, and activities (unlike tribal gaming) not specially set aside by Congress for tribal self-government and self-sufficiency. *See Tulalip Tribes v. Washington*, 349 F.Supp.3d 1046 (W.D. Wash. 2018) (taxing non-Indian retail stores selling to non-Indian consumers); *Gila River Indian Cmty. v. Waddell*, 91 F.3d 1232 (9th Cir. 1996) (same); *Salt River Pima-Maricopa Indian Cmty. v. Arizona*, 50 F.3d 734 (9th Cir. 1995) (taxing non-Indian racetrack/amphitheater selling tickets to non-Indian consumers).

> The only State services the State contends are relevant in this action are available State services that are funded with State General Funds, and the Department of Revenue Business Tax Division services funded directly from taxes collected.

Stipulation, Jan. 31, 2018, ¶ 2.a (Doc. 149-4); *see* Pl. Stip. 57. The State further stipulated:

> The only State exercise of civil regulatory jurisdiction the State contends is relevant in this action is the State's exercise of civil regulatory jurisdiction that is related to the Project.

Stipulation ¶ 2.e. The State also made no objection to the Tribe's Motions in Limine 1 and 2, both of which the Court granted, excluding evidence of irrelevant services not funded with general funds and irrelevant regulation unrelated to the Project. *See* Pl. Mot. in Limine (Doc. 149-4).

i. The State does not regulate the contractor's Project work or the Casino construction.

Imposing contractor's excise tax on the Casino Project does not serve the State's interest in raising revenue to provide governmental services to the contractor or the Tribe related to the Project. The State played no significant role in regulating the Project. The State points to scattered references to South Dakota licensures or standards for materials, such as concrete, in the Project contract documents, and to the fact that entities involved in the project are licensed by the State. But these facts do not mean the State has any regulatory authority over the Project or the conduct of State licensees while they work on the Tribe's reservation. As the "authority having jurisdiction" over the Project, the Tribe selected the building standards and codes that governed construction. (Pl. Stip. 41; Derry testimony; Johnson testimony; *see* Pl. Stip. 44; Powers deposition 32:4-23.) Tribally selected inspectors from HDR, the Casino compliance officer, and federal Indian Health Service inspectors inspected the Project. (Pl. Stip. 19-22, 52.) Project plans and specifications were never submitted to the State Engineer for review, and no State building permit was issued or required. (Derry testimony; Pl. Stip. 42.) The Project

obtained a stormwater discharge permit directly from the EPA, not from the South Dakota DENR. (Johnson testimony; Pl. Stip. 45; Ex. 35; Ex. 81.)

Typically, an off-reservation project would include a stormwater permit from the State's Department of Environment and Natural Resources, State mechanical and fire inspectors, a local building code official, and a State Department of Health inspection if the project includes a kitchen; this Project had no such State involvement. (Derry testimony; Johnson testimony; Powers deposition 11:22-12:10, 34:15-18, 63:10-64:17; Paul Merriman deposition (Doc. 152-10) 21:11-19.) The State Department of Heath confirmed they would not inspect or license the Casino's food and beverage department unless requested by the Tribe. (Kari Williams testimony; *see* John Lorang deposition (Doc. 152-3) 50:14-51:15.) Every Tribal official and every representative of the contractor who testified stated that they were not aware of any State services provided to the Tribe, the Casino, or the contractor in connection with the Project, with the sole exception of an electrical permit and inspection. (E.g., Derry testimony, Johnson testimony.)

The fact that some people involved in the Project (or tangentially orbiting the Project, like the contractor's Nebraska-based lawyers) possessed various South Dakota licenses is no basis to justify taxing the Project. None of them acquired licenses specifically for the Project. (Derry testimony; Powers deposition 44:9-19.) The State's costs for licensure are covered by fees charged for those services, not contractor's excise tax revenues. (Powers deposition 44:9-13; Kathryn Patterson deposition (Doc. 152-15) 8:22-9:2 (architect and engineer licensing); Frank Marnell deposition (Doc. 152-16) (insurance regulation); Nina Ripley deposition (Doc. 152-17) 9:7-9, 15:5-12 (plumbing licenses)) Their licenses did not bring with them State authority to regulate their work or their conduct on the reservation, much less to tax it. (*E.g.*,

Ripley deposition 7:23-8:1, 14:17-15:4 (State has no jurisdiction to license plumbing work on reservations).) The mere existence of a State license was not the controlling factor when selecting subcontractors for the project. (Derry Deposition). Regardless of whether the Tribe chose South Dakota licensed professionals to work on the Project, all oversight and active regulation of the Project was conducted by the Tribe, not South Dakota.

The State also suggests that some portion of the tax is imposed on off-reservation value, pointing to a term in the construction contract concerning off-site prefabrication of Project components. In fact, no significant off-site prefabrication occurred. (Johnson testimony). The State presented no evidence that it regulated that activity. Further, the State imposes contractor's excise tax according to the location of the project, regardless of whether work was done at an off-site shop or at the contractor's home office. (Pl. Stip. 47; Adams testimony; Schinkel deposition 34:16-20.)

ii. The State does not provide any services to the contractor on this Project or to the Casino that are funded with the tax.

The State agreed to exclude evidence of State services not funded with contractor's excise tax dollars. (Pl. Mot. in Limine 1.) Specifically, the unopposed Motion in Limine excluded services by the State's Division of Insurance, Division of Banking, Electrical Commission, Plumbing Commission, and Board of Technical Professions. Doc. 149-4, p. 3. The electrical permit and inspection were paid by the electrician, and ultimately by the Tribe. The Electrical Commission and the permit are entirely funded by fees. (Derry testimony; Pl. Stip. 58; John Linn deposition (Doc. 152-14) 9:18-24.)

The State's maintenance of roads off the reservation is funded by state and federal fuel taxes, which the Tribe, tribal members, and the contractor pay every time they purchase fuel in South Dakota, on or off reservation. (Clark testimony; Adams testimony; Kills-A-Hundred

testimony; McDermott testimony; Johnson testimony.) The State roads near the reservation were constructed decades before the Casino was built, and traffic data shows that Casino guests and contractors make up a small fraction of traffic. (Anderson testimony; Ex. 67; Ex 146.) The State's funding of any service even marginally related to the Casino Project or Casino operations is reimbursed by direct payments from the Tribe or the contractor, or through the payment of other taxes or fees that fund those services. Pl. Stip. 66-69 (detailing certain fees paid by Tribe to State); *see* Section III.A.iv., *infra*.

iii. The State does not provide any significant services on the reservation to the Tribe or to reservation residents.

No South Dakota government office is located on the reservation. No public schools are located on the reservation. (Stoeser testimony.) No South Dakota government employee or official has ever even visited the reservation on official business, with one exception. (Williams testimony; Liza Clark testimony; Adams testimony; Sattizahn testimony; Holwegner testimony; Peterson testimony; Tidball-Zeltinger testimony; Reider testimony; Kills-A-Hundred testimony.) The exception is a State parole agent, whose presence is authorized by an agreement between the Tribe and the State Department of Corrections. (Doug Clark testimony.) The Tribe pays for local government services provided on-reservation, which are not funded by the State tax at issue. *See* Section II.B.i, *supra.*

The State does not identify any funding or services its departments have provided to the Tribe, the Casino, the contractor, or on the reservation to anyone from the Department of Health (Williams testimony), the Office of the Governor, Office of Economic Development, Office of Tribal Relations, Department of Transportation, Department of Public Safety (including the Highway Patrol), Department of Weights and Measures, Department of the Military, Department of Veteran's Affairs, and Department of Energy and Natural Resources. (Liza Clark testimony.)

So, too, for the Board of Regents (Forney testimony), the Department of Education (Stoeser testimony), the Unified Judicial System (Sattizahn testimony), the Legislative Research Council (Holwegner testimony); the Departments of Agriculture and Game, Fish & Parks (Peterson testimony); and the Department of Social Services (Tidball-Zeltinger testimony).

iv. The State does not provide any significant services off reservation and the costs of those services are offset by taxes paid by the Tribe, the Casino and its employees, reservation residents and the contractor.

Ultimately, the State presented evidence on services with no direct connection to the Project on which it seeks to impose a tax – such as health inspections the State may conduct at fast food restaurants between Sioux Falls and Flandreau (which do not exist), or emergency services the State does not directly fund, but provides training for, in the event of an accident off reservation, or public TV broadcasts of high school athletics. (Derry testimony.) A doctor once received State incentives to work at a private hospital nearby. (Williams testimony.) Part of the State's general fund is spent to maintain and update the Governor's residence. (Liza Clark testimony.) The State uses general fund dollars to repay bonds that financed fish hatcheries and park visitor centers off reservation. (Johnson testimony.) The Department of Revenue advises anyone who calls about how best to pay taxes to the State. (Adams testimony.) State courts stand ready to serve the public, although under the construction contract they lack jurisdiction over any dispute related to the project (Ex. 24 at FSST 100732; Pl. Stip. 61), and they lack jurisdiction over tribal members accused of crimes on the reservation (Sattizahn testimony). Legislative Research Council staff serve State legislators, although the legislators' policies and legislation frequently run counter to tribal interests. (Holwegner testimony). The contractor has employed individuals on State parole, although it is not clear how this constitutes a service to the contractor, and the State is not aware if they worked on this Project. (Doug Clark testimony).

Fees charged by the State fund many of the off-reservation services. (*See*, *e.g.*, Clark testimony (Tribe pays daily rate to house inmates in State facilities and Dept. of Corrections bills some inmates for the cost of incarceration and generates millions in prison industry revenue from the labor of inmates earning 25 to 35 cents per hour); Sattizahn testimony (Unified Judicial system collects fees); Johnson testimony (Dept. of Game, Fish & Parks generates half its general funds expenditures from fees).)

The State's governmental costs are reduced because of services the Tribal government provides, and by federal funds specifically earmarked for Native Americans or designed to account for the impact of tribal trust lands not subject to State taxation (*see* Stoeser testimony (discussing federal impact aid for education); Julie Stephens deposition (Doc. 152-5) (discussing Tribe's use of federal funds).) Roads on the reservation are funded by and maintained exclusively by the Tribe. (Scott Anderson testimony.) The Tribe also built and maintains roads and streetlights off the reservation, primarily using Tribal funds and using no State funding. (Anderson testimony; Kills-A-Hundred testimony.) Tribal members attend tribal colleges and universities throughout the State, and receive tribal and federal scholarship funds, significantly easing the cost to the Board of Regents. (Forney testimony.) The Tribe's resource program for parolees in the community provides benefits to parolees the State Department of Corrections does not provide, and the Tribe's case management work reduces the State's expenses. (Clark testimony.) Patients who are eligible for Medicaid, for whom the State ordinarily pays 43% of the bill, are 100% covered by federal funds for services they receive at the Tribal clinic. (Tidball-Zeltinger testimony.) The general welfare benefits the Tribe pays to tribal members in Moody and Minnehaha Counties often disqualifies the recipients and their families from income-

based eligibility for State benefit programs. (Tidball-Zeltinger testimony; Fyten deposition 16:12-22.)

Moreover, the State regularly collects taxes and fees from the Tribe, tribal members, and the contractor for their off-reservation activities, and even for some activities on the reservation. On the Project itself, the Tribe paid more than $56,000 in sales tax on the materials used by the contractor and subcontractors. (Ex. 179.) The Tribe pays county property tax on its 2,700 acres of non-trust land, including approximately $80,000 per year to Moody County. (Reider testimony.) The Tribe pays approximately $7,000 in State fuel tax annually for government vehicles (Kills-A-Hundred testimony; Ex. 38) and another $6,000 per year for Casino vehicles (McDermott testimony; Ex. 158). The Tribe's First American Mart, an on-reservation gas station and convenience store the Tribe operates as a department of the Casino, buys fuel for resale and generates nearly $300,000 per year in South Dakota fuel taxes, none of which is shared with the Tribe. (McDermott testimony; Ex. 154.) The Tribe's off-reservation gas station remits all State taxes, including fuel and sales tax. (Adams testimony.) The Tribe pays more than $20,000 per year in State unemployment taxes for its governmental employees (Kills-A-Hundred testimony; Ex. 39), and $42,000 more annually, on average, for its Casino employees (Morrissey testimony; McDermott testimony; Ex. 158; *see also* Pauline Heier deposition (Doc. 152-18) 10:14-17, 12:13-23, 31:5-10 (State unemployment benefits are funded by unemployment taxes, not by general funds)). The Tribe, tribal businesses and tribal members all pay the State telecommunications tax and alcohol taxes for both on and off reservation purchases and use. (Adams testimony.)

The Casino pays $7 million annually to its employees in salaries and benefits, and $10 million or more to vendors. (McDermott testimony.) This all provides a significant benefit to

the off-reservation South Dakota economy and the South Dakota government's revenues. There are no grocery, clothing or furniture stores on the reservation, so those essentials are purchased off-reservation and fully subject to State sales tax. (Reider testimony.) Generally, higher rates of unemployment and poverty strain the State budget. (Clark testimony.) The financial health of the Casino is in the State's economic interest. (Jonathan Taylor deposition (Doc. 152-7) 82:6-9; Jim Terwilliger deposition (Doc. 166-3) 14:19-15:8, 16:6-13, 21:1-14.)

Henry Carlson Construction has operated and paid taxes in South Dakota for 101 years. (Dave Derry testimony.) Nearly all of its projects are located outside of Indian country, and those in South Dakota generate contractor's excise tax for the State. (Derry testimony.) The State collected over $1.2 million in contractor's excise tax from Henry Carlson Construction in 2019, and nearly as much the year before. (Derry testimony; Ex. 179.) The company also pays sales tax on all the materials it buys for construction projects, including more than $56,000 in sales tax for the Casino project alone, a cost that was passed on the Tribe. (Ex. 179.) The millions of dollars in tax revenues the State collects from Henry Carlson Construction's off-reservation business activities is surely adequate to reimburse the State for the services it provides to the contractor. *See Ramah*, 458 U.S. at 844 n.9.

v. The impact of contractor's excise tax at issue on State services is infinitesimally small and insignificant to the State.

The contractor's excise tax that would be due on this Project each year (about $130,000) is a tiny fraction of the contractor's excise tax the State collects in a year ($114 million in 2019), which itself is only 7% of the State's annual general fund budget ($1.7 billion in 2019), which makes up just one-third of the State's total budget ($4.8 billion in 2019). (Breck testimony; Adams testimony; Ex. 180, 181.) The Department of Revenue does not deem it worthwhile to track the amount of revenue foregone when it grants Indian Country Project exemptions, even

for multimillion-dollar projects. (Adams testimony.) State officials agreed the amount of contractor's excise tax at issue is "infinitesimal" (Stoeser testimony) and "negligible" (Tidball-Zeltinger testimony) relative to departmental budgets. The *de minimis* impact of not collecting this tax does not tip the balance of interests in the State's favor.[6]

It is very clear, however, that a State tax which substantially burdens the federal and tribal interests in raising revenue through tribal gaming and in transacting business on the reservation independent of State interference cannot be justified by the State's general "interest in raising revenues to provide governmental services throughout South Dakota." *Noem* at 937. Without services provided to the contractor or the Tribe having a nexus to the taxed activity, the State seeks to tax on-reservation commerce while providing nothing of value in return. *Ramah* at 843-44.

B. The State's interest in applying its tax laws throughout South Dakota is insignificant.

The Eighth Circuit identified a State interest in "'being in control of, and able to apply, its laws throughout its territory.'" *Haeder* at 946, quoting *Mashantucket*, 722 F.3d at 476. *Haeder* shed no light on the weight of this interest, but *Mashantucket* explained that this "interest is diminished where, as here, the sole application of the state law at issue is on the Tribe's reservation, which occupies a unique status within the State." *Mashantucket* at 476.

Clearly, the State does not uniformly apply contractor's excise tax everywhere within its boundaries. The State has tax collection agreements with seven of the tribes in South Dakota,

[6] The State's response to these facts is that any given taxpayer could make the same argument. For most taxpayers, however, the State's authority to impose taxes is not decided by a balancing test. This case calls for a balancing of interests, and as the Eighth Circuit held, the degree to which tax assessment or preemption would impair those interests is a critical factor. *Haeder* at 946.

two of which allocate one hundred percent of contractor's excise tax collections to the tribe, while others allocate lower shares to the tribe. (Adams testimony; Ex. 182-188.) None of the agreements are the same. (Adams testimony.) Depending on the agreement in place, a Tribally-owned construction project can be effectively exempt from contractor's excise tax, or may have only a partial exemption, or none at all. (Adams testimony; David Wiest deposition (Doc. 166-1), 49:2-9.) The terms of a tax collection agreement are not driven by the consideration of any interest-balancing factors. (Adams testimony.) In some instances, for no reason other than "to buy a deal," the State agrees to let a tribe retain all the contractor's excise tax that might arise at the tribal casino and other tribal enterprises, including a grocery store and bowling alley. (Ex. 184, 188, Adams testimony; Wiest deposition 51:20-52:5.) Qualifying for an agreement requires a tribe to submit to State authority, undermining independent tribal tax laws in favor of State tax laws, because the State will not enter an agreement unless the tribal tax is identical to the State's. (Adams testimony.) This rule excludes the Tribe from entering a tax collection agreement for contractor's excise tax, because the Tribe chooses not to impose such a tax. (Adams testimony.)

Absent an agreement, the State grants ad hoc exemptions to reservation construction projects according to nebulous criteria not identified in any State law, regulation, or publication. (Adams testimony.) Based on a 1989 Department of Revenue legal memorandum, the State exempts the construction of tribal schools, hospitals, housing, and government administration buildings. (Adams testimony.) The State has granted exemptions to a pow-wow grounds electrical light pole project, granted an exemption to one community center, but not a gathering center, and in one instance granted an exemption for another tribe's casino renovation project. (Adams testimony; Wiest deposition 102:8-115:19.) These facts undermine the State's assertion that it denies exemptions to construction projects it deems "commercial," such as casinos.

(Adams testimony; Wiest deposition 53:3-7.) Likewise, despite the State's assertion it categorically exempts tribal administration buildings, in this case the State ignored the fact that a significant component of Phase I of the Casino Project was the construction of an administrative building for use by the Tribal government. (Adams testimony; Ex. 197; Reider testimony; *see* Ross deposition 74:10-19 (Tribal government uses new administration building at least weekly)).

State exemption decisions do not reflect *Bracker* principles such as whether the tax interferes with the tribe's right to make its own laws and be governed by them, or with tribal self-sufficiency; whether State law regulates the activity, whether the activity implicates federal interests; the applicability of the Indian trader statutes; whether the contractor has a federal trader license or a tribal license; or whether the tax interferes with the tribe's consensual relationship with, or regulatory authority over, the contractor. (Adams testimony.) The level of available State services does not explain why some projects are exempt and others are not, as state services do not depend on whether a project is taxable or exempt. (Stipulation (Doc. 149-4) ¶ 2.d.)

Some State documents refer to an "Indian Use Only Project" exemption, and an October 2017 Department of Revenue training presentation identifies just one consideration other than tribal ownership in Indian country where the tribe has no agreement: the project must be "Only for use by that Tribe or Tribal members. Not for general public use." (Ex. 195.) Notably, none of the four categories the State considers automatically exempt (housing, administration, hospitals, education) are used exclusively by tribal members.

The State's avowed tax collection goal, according to the Department of Revenue official who testified at trial, is "fairness" – the State only wants to collect the right amount of tax from all taxpayers, to ensure an "even playing field." (Adams testimony.) The State's disparate treatment of reservation construction projects undermines the State's assertion of an interest in

fair and indiscriminate tax administration. At a minimum, any such interest is best served by faithfully applying *Bracker*.

CONCLUSION

History matters. The State's tax is incompatible with the longstanding strong tribal and federal interests it interferes with, including the interest in generating gaming revenue at the Casino to achieve tribal economic self-sufficiency; tribal governmental programs essential to effective governance; and continuation of the longstanding federal policy of prohibiting State burdens on reservation commerce. The State's intrusion is unjustified by a specific State interest in collecting tax to pay for governmental services provided on-reservation, or to the Project, or to the contractor connected to the Project. Accordingly, federal law preempts the imposition of the contractor's excise tax.

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Respectfully submitted,

FLANDREAU SANTEE SIOUX TRIBE

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WORD COUNT CERTIFICATE

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