

**UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION**

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

Plaintiff,

v.

RICHARD L. SATTGAST, Treasurer of the
State of South Dakota; ANDY GERLACH,
Secretary of Revenue of the State of South
Dakota; and DENNIS DAUGAARD,
Governor of the State of South Dakota,

Defendants.

4:17-cv-04055-KES

**FLANDREAU SANTEE SIOUX TRIBE'S
MEMORANDUM IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT**

(Fed. R. Civ. P. 56)

(ORAL ARGUMENT REQUESTED)

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INTRODUCTION

This case challenges the State of South Dakota's ongoing efforts to siphon tax revenues from transactions with the Flandreau Santee Sioux Tribe (the "Tribe") at the Tribe's Royal River Casino & Hotel ("Casino") on the Flandreau Indian Reservation. Because Indian tribes inherently possess sovereignty within their territory, and because federal law and policy guard tribal self-government in Indian country against interference by states, federal courts closely scrutinize state taxation within Indian country, prohibiting any state tax that unduly inhibits federal and tribal interests. South Dakota oversteps its authority by imposing the tax in dispute here, the contractor's excise tax, which infringes on the Tribe's sovereignty and interferes with federal law and policy, including the Indian Trader Statutes, 25 U.S.C. §§ 261-264, which comprehensively regulate trade with Indians on Indian reservations, and the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701-2721, in which Congress authorized a strictly limited state role in the business of tribal gaming in Indian country.

The Tribe moves for summary judgment on its second claim for relief, that the Indian Trader Statutes preempt the tax, its third claim for relief, that IGRA preempts the tax, and its fourth claim for relief, that the State must refund the invalid taxes.

UNDISPUTED MATERIAL FACTS

The Tribe's motion is accompanied by a separate statement of undisputed material facts ("SUMF") in accordance with Local Rule 56.1(A). This brief will cite to the numbered paragraphs in the SUMF, which contains citations to the documentary evidence in the record.

The federally-recognized Flandreau Santee Sioux Tribe, made up of approximately 765 enrolled members, is situated on the Flandreau Indian Reservation, about 35 miles north of Sioux Falls in rural South Dakota. SUMF 1, 3-4, 6. The Tribe descends from the members of the Santee, or Dakota, division of the Great Sioux Nation, who established a colony of homesteads

along the Big Sioux River in the vicinity of the present-day town of Flandreau in 1869, in accordance with the Fort Laramie Treaty of 1868, 15 Stat. 635 (Apr. 29, 1868). The colony of Santee Sioux at Flandreau formed a Tribal Council in 1929 and organized under a Constitution ratified by the Tribe and approved by the Secretary of the Interior in 1936, pursuant to section 16 of the Indian Reorganization Act (“IRA”), 25 U.S.C. § 5123. SUMF 2. The Tribe’s reservation includes, among other lands, 559 acres acquired by the United States “for the use and benefit of the Flandreau Santee Sioux Tribe of Indians,” pursuant to section 5 of the IRA, 25 U.S.C. § 5108, which the Department of the Interior proclaimed to be an Indian reservation in 1936. Proclamation, Flandreau Indian Reservation, 1 Fed. Reg. 1226, 1226 (Aug. 27, 1936). SUMF 5. The Casino is located on this original trust parcel of the Tribe’s reservation. SUMF 30.

The Tribe opened the Casino in 1990 and relocated it to the current facility in 1997. SUMF 29, 31. The Tribe added a hotel to the building in 2001. SUMF 31. The Casino building includes a gaming floor and amenities to gaming, including a restaurant, bar, gift shop, snack bar, and a live entertainment venue. SUMF 32-38. Using Tribal government funds, the Tribe paid for the construction of the original facility, paid for the construction of the new facility, paid for the addition of the hotel (another gaming amenity), and is paying for the renovations and additions at issue here. SUMF 39-40. Since the Casino’s opening, the Tribal funds largely have derived from gaming revenues. SUMF 8-9, 102.

Like all Tribal gaming facilities on Indian lands in the United States (except those operating only traditional and ceremonial “class I” gaming), the Casino is governed by IGRA, in accordance with which the Tribe has enacted a body of Tribal laws that regulate the Casino. *See*

25 U.S.C. § 2710(b)(2)(B).¹ *See also* SUMF 41-42. These include the Tribe's Class II and Class III Gaming Ordinances, both approved by the Chairman of the NIGC. SUMF 43, 58-59, 62. The Tribe's gaming regulatory agency, the Gaming Commission, 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." 25 U.S.C. § 2710(b)(2)(E); 25 C.F.R. Part 559. *See* SUMF 56, 60-61. The Casino facility possesses a Tribally-issued facility license indicating the Tribe's determination, as required by IGRA, that the facility is constructed and maintained in a manner that adequately protects the environment and the public health and safety. SUMF 63-65, 75-81.

Among many other aspects of the Casino operation, IGRA specifically limits how net gaming revenues may be used. In accordance with IGRA, Tribal law provides that 40% of the Casino's net revenues are distributed directly to qualified Tribal members and 5% to a trust fund established for members under 18 years old. SUMF 97-100. The Tribe allocates the remaining 55% for Tribal government operations and programs specified in Tribal law. SUMF 100. Pursuant to IGRA, the NIGC and the Department of the Interior approved the Tribal laws that govern the Casino's distribution of gaming revenues and the Tribal government's use of its share.² *See* SUMF 99, 101. Gaming revenues make up approximately 40% of the Tribal

¹ Section 2710(b) applies to class II gaming directly, and applies to class III gaming through § 2710(d)(1)(A)(ii). For both classes of gaming, an Indian tribe is required to adopt tribal law and obtain approval of the tribal law from the Chairman of the National Indian Gaming Commission ("NIGC").

² Section 2710(b)(2)(B) sets out the lawful uses of tribal gaming revenues. Section 2710(b)(3) provides that if gaming revenue is distributed to Tribal members in "per capita payments," the Tribe must have a revenue allocation plan that meets federal standards and is approved by the Secretary of the Interior.

government's total revenues. SUMF 103. Federal funding accounts for approximately 52% of the total Tribal revenues. SUMF 104. In addition to receiving Casino business revenues, the Tribe imposes a 6% sales tax at the Casino, which generates around \$350,000 annually, or more than 90% of the Tribe's yearly sales tax revenue. SUMF 106-111. The Tribe uses gaming and tax revenues to provide a full array of governmental services to Tribal members and non-members both on and off the reservation. SUMF 105, 108; *see* SUMF 7-28.

In accordance with IGRA, the State and the Tribe have negotiated and entered into a Tribal-State gaming compact, the most recent iteration of which was executed by the parties and approved by the Secretary of the Interior in 2016. SUMF 89; *see generally* SUMF 89-96. The gaming compact contains no provisions addressing the imposition of any State tax at the Casino, including the State contractors' excise tax. SUMF 93, 94.

Like most businesses, the Casino faces competition for customers. To compete in the marketplace, the Tribe has, from time to time, found it necessary to upgrade the Casino facility. SUMF 112. Before this renovation, no significant upgrades had been made to the gaming floor or gaming amenities other than the hotel since the facility opened more than twenty years ago. SUMF 117. The Tribe conceived the Casino construction and renovation project to expand the gaming floor and modernize the facility's gaming amenities. *See generally* SUMF 112-129. The Tribe negotiated with the State to double the number of slot machines allowed under the gaming compact, primarily to compete with a larger, newer casino that opened nearby in 2011. SUMF 112, 125-126. The project is purpose-built to provide space for the new slot machines contemplated in the gaming compact. SUMF 113-114, *see* SUMF 149-158. The project also includes a new VIP lounge area for top players, renovations to the Casino cage area, relocating the bar to the center of the gaming floor, renovations to the snack bar, restaurant, and hotel

lobby, and a new addition to the Casino facility to house Casino administrative offices, to provide space for the expanded gaming floor. SUMF 116-119, 150-155.³ The Casino's roof and rooftop HVAC units, which are nearing the end of their useful lives, are being replaced as well, to ensure the facility continues to be maintained in a manner that protects public health and safety, and to avoid interruptions of guest services. SUMF 115, 163. Every aspect of the project is conceived, designed and built to increase gaming revenue for the Tribe. SUMF 120-124, 206-217. The cost of the project, approximately \$22-24 million, is funded by the Tribe, almost entirely with Tribal gaming revenues. SUMF 218-222. The South Dakota Department of Revenue acknowledges the Tribal interest in operating the Casino, that the project was undertaken for the purpose of improving the Casino, and that this project would not be taking place if not for the Casino. SUMF 250-252.

The project activities occur on reservation trust land. SUMF 199-205; *see also* SUMF 5, 30, 130-142, 148. The construction labor is performed at the Casino. SUMF 199. Construction materials are delivered and stored on-site, and construction administration and supervision is conducted on-site. SUMF 200-205. The Tribe has the primary governmental authority over the project, not only because the project is located within the Tribe's territory, but also because the construction agreements designate the Tribe as the "authority having jurisdiction," and because it is the Tribe's responsibility under IGRA to ensure facility construction is performed in a manner that protects the environment and public health and safety, and that the construction meets Tribal standards for the issuance of a gaming facility license. SUMF 172; *see* SUMF 62-66, 164-198,

³ The Tribal government also regularly uses the new administration building for government meetings. SUMF 129, 162.

277-279. The State performs no significant government functions directly connected to the project. SUMF 280; *see* SUMF 290-317.

The State imposes the 2% contractor's excise tax "upon the gross receipts of all prime contractors engaged in realty improvement projects[.]" SDCL § 10-46A-1. It is essentially a tax on construction materials and services. The tax is assessed on the contractor's gross receipts from the performance of the contract, SDCL § 10-46A-4, including the total contract price of all labor and materials, SDCL § 10-46A-3, and including performance by subcontractors, SDCL § 10-46A-2.1. The Department of Revenue deems the contractor's excise tax imposed at the location of the construction project. SUMF 224.

The State imposes the contractor's excise tax, rather than the general sales tax, on construction services. SDCL § 10-45-12.1 (exempting "construction services" from sales tax). However, while sales of property and services to any Indian tribe are expressly exempt from the sales tax, SDCL § 10-45-10, the State provides no similar exemption from the contractor's excise tax for sales of construction materials and services to an Indian tribe, even though the taxes are materially indistinguishable. *See* SUMF 225. Instead, the Department of Revenue entertains case-by-case requests for exemptions from the contractor's excise tax when a construction project is located in Indian country. SUMF 226; *see generally* SUMF 230-247. There is, however, no State statutory or regulatory authority for such an exemption, nor any statutory or regulatory guidelines for when to grant or deny one. SUMF 227-229. Under the Department of Revenue's internal policy, reservation construction projects for "commercial" uses, including casinos, do not qualify for contractor's excise tax exemptions. SUMF 236-238.

The Department of Revenue denied requests by the Tribe and its construction manager, Henry Carlson Company, for an "Indian Country Project" exemption for the Casino construction

project. SUMF 249; *see* SUMF 253, 159. Henry Carlson therefore has made contractor's excise tax payments, but has done so under protest, following the State's procedure that allows a taxpayer to commence an action against the Treasurer "for recovery of the tax in any court of competent jurisdiction." SDCL § 10-27-2; SUMF 254-255. Each payment under protest was accompanied by a letter from the Tribe also protesting the payment. SUMF 255. As contemplated by State statute, SDCL § 10-46A-12, and following standard industry practice, Henry Carlson lists the tax as a separate item on its invoices to the Tribe, which the Tribe duly pays. SUMF 256. Henry Carlson's protest letters requested that the State issue refunds to the Tribe as the entity paying the cost of taxes. SUMF 258. Henry Carlson authorized the Tribe to commence and pursue the recovery action on its behalf. SUMF 259.

To date, the State has collected \$120,266.60 in contractor's excise tax on this project, with an expected total tax by the project's completion of approximately \$480,000. SUMF 254, 260. Because the project was financed, the total loss to the Tribe is higher. SUMF 263.

SUMMARY JUDGMENT STANDARD

Summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Once the moving party meets its initial burden, the nonmoving party must set forth specific facts showing there is a material fact genuinely in dispute, though the evidence and the inferences that may reasonably be drawn from the evidence are viewed in the light most favorable to the nonmoving party, "as long as those facts are not so blatantly contradicted by the record that no reasonable jury could believe them." *Knisley v. Lake County*, 180 F.Supp.3d 639, 647 (D.S.D. 2016) (internal quotation marks and ellipses omitted).

ARGUMENT

I. The Indian Trader Statutes preempt the tax.

A. Congress has comprehensively regulated on-reservation sales to Indians to protect Indian interests over the entire history of the United States.

“[T]he Constitution grants Congress broad general powers to legislate in respect to Indian tribes,” which the U.S. Supreme Court has “consistently described as ‘plenary and exclusive.’” *United States v. Lara*, 541 U.S. 193, 200 (2004). Exercising that power, “[f]rom the commencement of our government, Congress has passed acts to regulate trade and intercourse with the Indians[.]” *Worcester v. Georgia*, 31 U.S. 515, 556 (1832). Beginning with its “very first days ... the Federal Government ha[s] been permitting the Indians largely to govern themselves, free from state interference, and ha[s] exercised through statutes and treaties a sweeping and dominant control over persons who wished to trade with Indian tribes.” *Warren Trading Post Co. v. Arizona State Tax Commission*, 380 U.S. 685, 687-87 (1965).

The First Congress enacted the predecessor to today’s Indian Trader Statutes in 1790, with an act that was itself modeled on earlier colonial legislation, restricting all “trade and Intercourse with the Indian tribes” by requiring traders to obtain the permission of the federal government and to observe federal “rules, regulations and restrictions.” Act of July 22, 1790, 1 Stat. 137; *see* H.R. Rep. 23-474, 3-6 (1834) (discussing history of federal relations with Indians from 1775 to 1818, including “an ordinance of the 27th January, 1776,” authorizing commissioners of Indian affairs “to license Indian traders”). “Such comprehensive regulation of Indian traders has continued from that day to this.” *Warren Trading Post*, 380 U.S. at 687. As the 1790 Act expired, it was replaced with successive versions in 1793, 1796, 1799, 1802, and the final version in 1834, which is in effect today as amended in 1882, alongside a section enacted in 1876 and another enacted in 1901, as amended in 1903. *See United States v. Douglas*,

190 F. 482, 485-90 (8th Cir. 1911) (outlining history of federal regulations on trading with Indians). Regulating trade with Indians is thus a fundamental aspect of federal Indian policy since before the country declared its independence.

Under current law, unchanged for over a century, “the Commissioner of Indian Affairs has ‘the sole power and authority to appoint traders to the Indian tribes and to make ... rules and regulations ... specifying the kind and quantity of goods and prices at which such goods shall be sold to the Indians.’” *Central Machinery Co. v. Arizona State Tax Commission*, 448 U.S. 160, 162 (1980) (quoting 25 U.S.C. § 261).⁴ Enlarging the Commissioner’s authority and directing the focus of his regulations, Congress further provided that 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); 25 U.S.C. § 264 (establishing penalty for non-Indians engaging in unlicensed trade on an Indian reservation).⁵

Today, the BIA very rarely issues Indian trader licenses. SUMF 276. However, neither the failure to actively enforce the statutes nor their antique provenance makes the Indian Trader Statutes obsolete or diminishes their preemptive effect. *See Central Machinery*, 448 U.S. at 165 (trader statutes preempted state tax despite federal government’s lack of active licensing enforcement). The Department of the Interior recently requested public comments on proposed

⁴ Section 261 codifies § 5 of the Act of Aug. 15, 1876, ch. 289 (19 Stat. 176, 200). In 1950, the duties of the Commissioner of Indian Affairs were transferred to the Secretary of the Interior, and the Secretary was authorized to delegate duties to other officers. Reorganization Plan No. 3 of 1950, 15 Fed. Reg. 3174 (May 25, 1950).

⁵ Section 262 codifies part of § 1 of the Act of March 3, 1901, ch. 832 (31 Stat. 1058, 1066), as amended by § 10 of the Act of March 3, 1903, ch. 994 (32 Stat. 982, 1009). Section 263 codifies part of § 3 of the Act of June 30, 1834, ch. 161 (4 Stat. 729, 729). Section 264 codifies § 4 of the Act of June 30, 1834, ch. 161, as amended by the Act of July 31, 1882, ch. 360 (22 Stat. 179, 179-80).

revisions to the regulations implementing the Indian Trader Statutes. Traders With Indians, 81 Fed. Reg. 89015 (Dec. 9, 2016). The Department is seeking to “modernize the implementation of the Indian Trader statutes,” taking the view that the current regulations “largely reflect policies that ignore Tribal self-determination and the growth of Tribal economies.” *Id.* at 89015, 89016. The Department’s notice touts the importance of using Congress’s grant of “broad and comprehensive authority to regulate trade in Indian Country” to “promote economic viability and sustainability in Indian Country.” *Id.* at 89016. The Department specifically focused on “dual taxation on Tribal lands,” recognizing that state taxes “can undermine the Federal policies supporting Tribal economic development, self-determination, and strong Tribal governments.” *Id.*

Dual taxation of traders and activities conducted by traders and purchasers can impede a Tribe’s ability to attract investment to Indian lands where such investment and participation are critical to the vitality of Tribal economies. Tribal communities continue to struggle with unmet needs, such as in their schools and housing, as well as economic development, to name a few. Moreover, beyond the operation of their governments, Tribes continually pursue funding for infrastructure, roads, dams, irrigation systems and water delivery.

Id. When the Department issued proposed rules in 1981, also “to modernize the trading regulations,” it noted commentators’ view that “the failure of the federal government to regulate could result in permitting more state taxation of transactions involving Indians on Indian reservations.” Business Practices on Indian Reservations..., 46 Fed. Reg. 1298 (Jan. 6, 1981) Similar regulatory modernization was spurred by litigation seeking to require the Secretary to adopt and enforce the trading regulations mandated by the Indian Trader Statutes. *See Rockbridge v. Lincoln*, 449 F.2d 567 (9th Cir. 1971) (leading to the 1975 adoption of detailed Indian trader regulations applicable to Navajo, Hopi and Zuni reservations, now 25 C.F.R. Part 141).

B. The Indian Trader Statutes preempt state taxes imposed upon persons who sell to Indians on an Indian reservation.

Although in need of “modernization,” the federal regulations promulgated under the authority of the Indian Trader Statutes “prescrib[e] in the most minute fashion” the rules for acquiring and maintaining a license and for engaging in on-reservation trade with Indians. *Warren Trading Post*, 380 U.S. at 689; *see* 25 C.F.R. Part 140 (Licensed Indian Traders); *see also* 25 C.F.R. Part 141 (Business Practices on the Navajo, Hopi and Zuni Reservations).

The Supreme Court held in 1965 that the “all-inclusive regulations and the statutes authorizing them would seem in themselves sufficient to show that Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens upon traders.” *Warren Trading Post*, 380 U.S. at 690. The Court concluded that Arizona’s 2% tax on the “gross proceeds of sales, or gross income,” of a retail business located on the Navajo Indian Reservation “cannot be imposed” on the retailer’s income from trading with reservation Indians on the reservation. *Id.* at 685-86. The tax “would put financial burdens on [the trader] or the Indians with whom it deals in addition to those Congress or the tribes have prescribed,” the Court held, “and could thereby disturb or disarrange” Congress’s statutory plan. *Id.* at 691. Based on the state tax’s potential interference with the congressional purpose, together with federal laws and policy that have left the state free from the burdens of exercising state control on the reservation, the Court determined that Congress intended to deny Arizona the privilege of levying the tax. *Id.*

The Court expanded on *Warren Trading Post* in 1980, holding that the Indian Trader Statutes preempt state taxation even where the non-Indian seller has no business location on the reservation, and even where it does not possess an Indian trader license. *Central Machinery*, 448 U.S. at 165-66. “It is the existence of the Indian trader statutes, ... not their administration, that

preempts the field of transactions with Indians occurring on reservations.” *Id.* at 165. Central Machinery Company was an Arizona corporation that sold 11 farm tractors to a tribal enterprise, delivering the tractors to the tribal buyer on the reservation. *Id.* at 161. In these circumstances, the Court held, the state cannot increase the price paid by the Tribe by assessing a tax against the seller, and that “[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[.]” *Id.* at 166. As a rule, a transaction is governed by the Indian Trader Statutes, and federal law preempts the state tax on the seller’s receipts from the transaction, whenever a sale is made to Indians on a reservation. *Id.* at 165.

The Supreme Court last considered the trader statutes in *Department of Taxation and Finance of New York v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61 (1994). There, it reiterated the rule it had applied in other cases involving bulk cigarette sales, that states can regulate the reservation activities of Indians as reasonably necessary to accomplish the collection of otherwise lawful state taxes imposed on non-Indians. *Id.* at 71-72. The Court held that, similarly, states are not barred “from imposing reasonable regulatory burdens upon Indian traders for the same purpose,” that is, “to prevent non-Indians from evading taxes.” *Id.* at 74. The Court expressly distinguished its holding, about placing minimal burdens on an Indian trader as a mechanism for ensuring that *non-Indians* pay lawful taxes, from *Warren Trading Post* and *Central Machinery*, where the Indian Trader Statutes preempted “a tax directly imposed upon Indian traders for trading with Indians.” *Id.* at 74 (internal quotation marks omitted).

The tax in this case is indistinguishable from the tax struck down in *Warren Trading Post* and *Central Machinery*. It is directly imposed on a non-Indian business’ gross receipts from the business’ sales to Indians on the reservation.

C. Sales of construction materials and services to Indians on an Indian reservation constitute “trade” over which states have no taxing authority.

While both *Warren Trading Post* and *Central Machinery* invalidated taxes on the gross receipts from reservation sales of personal property to Indians (eleven tractors in *Central Machinery* and unspecified retail goods in *Warren Trading Post*),⁶ the fact that the taxed receipts in this case were earned from the sale of construction materials *and* services does not suggest a different result here.⁷

There are good reasons to construe the Indian Trader Statutes to cover trade in services, at least where they are sold together with goods, as they are here. Federal caselaw offers little to no authority directly addressing the issue. *See Rosebud Sioux Tribe v. Bureau of Indian Affairs*, 714 F.Supp. 1546, 1557 (D.S.D. 1989) (noting absence of cases “clarifying the scope and applicability of §§ 261 and 262”).⁸ However, the Department of the Interior’s consistent

⁶ The tax in both cases applied to every person in the state engaged “‘in the business of selling any tangible personal property whatever at retail[.]’” *Warren Trading Post*, 380 U.S. at 686, fn.1 (quoting Ariz. Rev. Stat. § 42-1312). It “amount[ed] to a percentage of the gross receipts of the taxable entity.” *Central Machinery*, 448 U.S. at 162.

⁷ The contractor’s excise tax applies to both “labor and materials.” SDCL § 10-46A-3.

⁸ In a *qui tam* action alleging that 128 defendants were in violation of 25 U.S.C. § 264 for trading with Indians on the Pine Ridge Reservation without a federal license, this Court entered judgment for the defendants on several grounds, including, as to some defendants, that their trade in services was not covered by § 264. *United States ex rel. Keith v. Sioux Nation Shopping Center*, 488 F.Supp. 496, 498-99 (D.S.D. 1980). The Court also found that the federal “licenses are almost impossible to obtain, at least in South Dakota,” and concluded that defendants with a tribal permit were “in substantial compliance with § 264.” *Id.* at 500. The Eighth Circuit affirmed, based entirely on the unavailability of the federal trader’s license, declining to reach other issues. *United States ex rel. Keith v. Sioux Shopping Center*, 634 F.2d 401, 402 (8th Cir. 1980). Furthermore, as the Eighth Circuit alluded to, the “federal regulations defining what constitutes trade on the Reservation within the meaning of the statute” did not exist at the time. *Id.* In light of the regulations now in effect, the different basis for the Eighth Circuit’s decision, and the absence of analysis by the lower court, its statement that § 264 does not apply to services is not persuasive authority.

interpretation has been to regulate trade in services under the Indian Trader Statutes. The federal regulations implementing the trader statutes expressly define “trading” to include the sale of services. Part 140 of the Code of Federal Regulations, Title 25, entitled “Licensed Indian Traders,” states that, “as used in this part, ... *Trading* means buying, selling ... and any other transaction involving the acquisition of property or services.” 25 C.F.R. § 140.5.

Section 140.5 and its definition of “trading” were enacted in 1984. Licensed Indian Traders ..., 49 Fed. Reg. 25433 (June 21, 1984). The BIA’s publication of the final rule explains that it was “promulgated to implement Pub. L. 96-277,” a law that originated with section 14 of the Act of June 30, 1834, ch. 162 (4 Stat. 735, 738), “which regulated trading between Federal employees and Indians.” 49 Fed. Reg. at 25433.⁹ Congress enacted this statute simultaneously with the final version of the Indian Trader Statutes (Act of June 30, 1834, ch. 161, §§ 2 & 3, 4

One other decision touches on the issue. In *Mescalero Apache Tribe v. O’Cheskey*, 625 F.2d 967 (10th Cir. 1980), the Tenth Circuit upheld a state sales tax imposed on contractors for on-reservation construction services provided to an Indian tribe. The initial opinion, issued three weeks before *Central Machinery* and *Bracker*, concluded that *Warren Trading Post* and the Indian Trader Statutes did not apply, based on the contractors’ off-reservation location and the rather bizarre finding that the contractors’ federally-issued Indian trader licenses were “of course a pretext or a fiction[.]” *Id.* at 971 (citing the decision below, 439 F.Supp. 1063, 1067-68). On rehearing, the court’s superficial examination of *Central Machinery* focused on that case having “dealt only with a sale of ‘goods,’” and concluded that “the sale of ‘things’ case was not ... applicable to our problem,” seeming to imply that the *O’Cheskey* contractors’ sale of services, rather than goods, was significant. *Id.* at 990. The court did not analyze the issue, or even expressly acknowledge it. The court’s discussion of *Bracker* on rehearing ignored the state’s burden of justifying the tax with a cognizable interest, and simply noted that without comprehensive regulation by the trader statutes, preemption was impossible. *Id.* at 991. *O’Cheskey*’s unreasoned insinuation that the trader statutes do not apply to the sale of services has no persuasive value.

⁹ “[N]o person employed in the Indian department shall have any interest or concern in any trade with the Indians, except for, and on account of, the United States[.]” Act of June 30, 1834, ch. 162, § 14. This Act became § 2078 of the Revised Statutes of the United States of 1878. It was later codified as amended (*see* Act of June 19, 1939, ch. 210, 53 Stat. 840) at 25 U.S.C. § 68, then moved to 18 U.S.C. § 437 (*see* Pub. L. 96-277, 94 Stat. 544 (1980)), and was repealed in 1996 (*see* Pub. L. 104-178, 110 Stat. 1565 (1996)).

Stat. 427), declaring that the two chapters were “intimately connected” and “parts of a system.” H.R.Rep. No. 23-474, 1 (1834). The two statutes are appropriately construed *in pari materia*. See, e.g., *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 411 (1968) (two acts passed by same Congress relating to same subject “must be construed in *pari materia*”); see generally *Erlenbaugh v. United States*, 409 U.S. 239, 243-44 (1972). Congress modified the 1834 provision 105 years later to provide that notwithstanding the complete prohibition on “any trade with the Indians,” 4 Stat. at 738, federal employees may purchase “any product, service, or commodity” from Indians subject to regulations prescribed by the Secretary of the Interior. 53 Stat. at 840.

The Department put this interpretation into practice from the outset, long before expressly defining the term. Other sections of Part 140, adopted in 1927, regulate types of services, including the provision of credit to Indians by traders. See, e.g., 25 C.F.R. § 140.23 (providing that traders give credit to Indians “at the trader’s own risk, as no assistance will be given by Government officials in the collection of debts against Indians,” and that “[t]raders shall not accept pawns or pledges of personal property by Indians to obtain credit or loans”). Part 141, which regulates trading on the Navajo, Hopi and Zuni reservations pursuant to the charge of the Indian Trader Statutes, see 25 C.F.R. § 141.1, likewise expressly construes such authority as encompassing trade in “goods or services.” 25 C.F.R. § 141.3(l); see Retail Business and Credit Transactions, 40 Fed. Reg. 39835 (Aug. 29, 1975) (publishing final rule for Part 252, now Part 141). Part 141 contains extensive regulations covering services including reservation pawnbroker practices, 25 C.F.R. §§ 141.32-141.44, and reservation businesses offering any other variety of consumer credit, 25 C.F.R. §§ 141.45-141.49. While credit services are frequently tied to sales of goods, so are construction services. See SDCL § 10-46A-3

(contractor's excise tax applies to "all labor and materials"). In fact, the inseparability of the typical service transaction and the goods sold along with it illustrates the difficulty of treating goods and services as subject to different, potentially opposing, regulatory regimes.

The Department's efforts to update the regulations also show its consistent understanding that Congress' regulation of "trade" includes the regulation of trade in services. The proposed rules published in 1981 would have regulated reservation businesses that sell "goods or services" to Indians. *Business Practices on Indian Reservations...*, 46 Fed. Reg. 1298, 1299. The advance notice of proposed rulemaking issued in 2016 sought public comments on seven topics, including "What types of trade should be regulated...?" *Traders With Indians*, 81 Fed. Reg. 89015, 89017. The Department highlighted the current definition of "trading," which refers to "property or services," and asked whether the definition required revision. *Id.* The Department's official revision efforts, like the regulations themselves, demonstrate its longstanding and consistent interpretation that the comprehensive responsibility Congress gave to the Secretary in the Indian Trader Statutes requires the Department to regulate trade comprehensively, to encompass any commerce with Indians, including both goods and services. Because Congress instructed the Secretary of the Interior to make rules and regulations implementing the Indian Trader Statutes, the agency's permissible construction of statutory terms that Congress itself did not precisely define, promulgated under its congressional authority, is given controlling deference. *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001); *Auer v. Robbins*, 519 U.S. 452, 457 (1997); *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984); *see O'Shaughnessy v. CIR*, 332 F.3d 1125, 1130 (8th Cir. 2003) (longstanding agency interpretation of "unamended or substantially reenacted statutes are deemed to have received congressional approval and have the effect of law").

New Mexico state courts performed the most complete and persuasive analysis of the issue in a case involving training and technical services performed on reservation for a tribal corporation. *New Mexico Taxation and Revenue Dept. v. Laguna Industries, Inc.*, 115 N.M. 553 (1993) (“*Laguna II*”), affirming *Laguna Industries, Inc. v. New Mexico Taxation and Revenue Dept.*, 114 N.M. 664 (Ct.App.1992) (“*Laguna I*”). These decisions relied on the regulatory definition of “trading” as well as several other factors, concluding that the Indian Trader Statutes preempted a state gross receipts tax on the services sold to the tribal entity. The Supreme Court of New Mexico summarized the grounds as follows:

- (1) The Indian trader statutes must be construed broadly and liberally in favor of the Indians;
- (2) Excluding service transactions from the statutes would not be consistent with the purposes of statutes to protect Indians from fraud and imposition;
- (3) Service transactions were a significant part of the American economy when the first Indian trader statutes were enacted;
- (4) The term “trade” in other similar contexts has not been interpreted as limited to goods;
- (5) The seminal Indian law decision of *Worcester v. Georgia*, 31 U.S. 515, 556-57 (1832), interpreted the Indian Trade and Intercourse Acts as regulating all intercourse with the Indians in their territory;
- (6) The 1834 version included express references to regulation of “boatmen” and “interpreters” who dealt in services; and
- (7) Department of Interior regulations have expressly interpreted the Indian trader statutes and related acts to include trade in services.

Laguna II, 115 N.M. at 554 (paragraph breaks added). Adopting without reservation these reasons initially set out by the lower court, the New Mexico Supreme Court specially emphasized the “object sought to be accomplished” by the trader statutes. *Id.* A narrow interpretation of “trade” that excluded service transactions would tend to defeat the congressional objectives – first, “to prevent fraud and imposition upon the Indians” and second, “to monopolize

all contacts with the Indians.” *Id.* at 555 (internal quotation marks and brackets omitted). The court found the more credible interpretation to be that Congress did not intend to comprehensively regulate the trade with Indians in goods, while simultaneously leaving Indians wholly open to fraud, imposition, and the potentially unkind hand of State authority, when the transaction is for services. *Id.*

Some other points listed in the *Laguna* opinions bear expanding upon. The “eminently sound and vital” Indian canon of construction directs that statutes passed for the benefit of Indian tribes “are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit[.]” *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985); *Bryan v. Itasca County*, 426 U.S. 373, 391 (1976); see *Gaming Corp. of America v. Dorsey & Whitney*, 88 F.3d 536, 548 (8th Cir. 1996). Consistent with this canon, the Supreme Court has called for a “broad” construction of the Indian Trader Statutes. *Central Machinery*, 448 U.S. at 166. A liberal construction of the statutory language, “Any person desiring to trade with the Indians on any Indian reservation shall ... be permitted to do so under such rules and regulations as the Commissioner of Indian Affairs may prescribe for the protection of said Indians,” cannot contain an implied limitation on the term “trade” that would exclude trade in services. 25 U.S.C. § 262.

As detailed in *Laguna I*, around the time Congress enacted the trader statutes, the term “trade” was understood to include more than merely sales of goods. Services are reported to have constituted nearly one-third of the gross national product as early as 1839. *Laguna I*, 114 N.M. at 650.¹⁰ Courts gave the word an accordingly broad interpretation in a variety of contexts.

¹⁰ In comparison, the Commerce Department’s Bureau of Economic Analysis reports that in 2016, service industries were responsible for 68.8% of gross domestic product. See

An 1834 opinion by Supreme Court Justice Joseph Story (sitting as circuit justice) expansively construed the word “trade” as it was used in the coasting and fishery act of 1793, explaining that “‘trade’ is often, and indeed generally, used in a broader sense,” and refers to businesses that “may be, and sometimes are, carried on without buying or selling goods.” *The Nymph*, 18 F.Cas. 506, 507 (C.Ct.Me. 1834); *see Laguna I*, 114 N.M. at 650. Analyzing the word “trade” in a 1911 treaty, the Supreme Court stated the word connotes not only “the purchase and sale or exchange of goods and commodities,” but also “other recognized forms of business enterprise which do not necessarily involve trading in merchandise.” *Jordan v. Tashiro*, 278 U.S. 123, 127-28 (1928); *see Laguna I*, 114 N.M. at 650-51.

The Supreme Court has also broadly construed the “intimately connected” companion legislation discussed above, limiting government employees’ “‘trade with the Indians[.]’” *Ewert v. Bluejacket*, 259 U.S. 129, 135 (1922) (quoting Rev. Stat. § 2078); *see United States v. Hutto*, 256 U.S. 524, 526-28 (1921). *Ewert* and *Hutto* focused on the congressional purpose of protecting Indians “from the avarice and cunning of unscrupulous men in official position,” regardless of the precise form of their trade with the Indians. *Ewert*, 259 U.S. at 135; *see Hutto*, 256 U.S. at 528. The Court adopted a broad construction in furtherance of this purpose, and held that the “trade with the Indians” prohibited by the statute could not be “confined” to a narrow definition. *Ewert* at 137; *see Hutto* at 527. *See also, e.g., Moffer v. Watt*, 690 F.2d 1037 (D.C. Cir. 1982) (BIA employee’s purchase of land from his wife’s cousin, an Indian, violated “trade with the Indians” prohibition). *Laguna I* recognized that given the two 1834 acts’ “common

<https://bea.gov/iTable/iTable.cfm?ReqID=51&step=1#reqid=51&step=51&isuri=1&5114=a&5102=5>

ancestry,” “[i]t is natural to assume that the word ‘trade’ should bear the same meaning in those statutes and their progeny.” 114 N.M. at 652.

Laguna I also discerned that the Supreme Court took a broad view of the federal authority over Indian trade in *Worcester v. Georgia*, in which the Court held that Georgia statutes requiring a state permit to reside within the Cherokee Nation were in “hostility with the acts of congress for regulating this intercourse [with the Indians.]” 31 U.S. at 562; *see id.* at 540 (reciting Worcester’s claim relying on the Trade and Intercourse Act of 1802); 114 N.M. at 651.

Lastly, *Laguna I* relied on the definition of “trading” in 25 C.F.R. § 140.5, as well as the “scope of the regulations” in Part 141, which “is clearly intended to include businesses that provide services.” 114 N.M. at 652.

These authorities demonstrate that the term “trade” as used in the Indian Trader Statutes should be broadly construed to include trade in services, such that any state tax on the services sold to an Indian tribe in a transaction occurring on its reservation is preempted.

D. No State interests outweigh the Indian Trader Statutes’ preemptive force.

Courts analyzing the question of state authority to tax or regulate non-Indians’ on-reservation transactions with Indians have considered whether the state’s legitimate interests might carry sufficient weight to justify the interference with federally-protected tribal interests. *E.g., Ramah Navajo School Bd., Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832 (1982); *White Mountain Apache Tribe v. Bracker* (“*Bracker*”), 448 U.S. 136 (1980). In *Bracker*, the Court determined whether state taxes could be imposed on a non-Indian company’s on-reservation activities without violating federal law or unlawfully infringing on tribal self-government by conducting a “particularized inquiry into the nature of the state, federal, and tribal interests at stake[.]” *Bracker* at 145. Finding that the state’s “generalized interest in raising

revenue” was insufficient to allow its “intrusion into the federal regulatory scheme,” the Court concluded that the case was “in all relevant respects indistinguishable from *Warren Trading Post*,” and held the state tax was impermissible. *Id.* at 152-53.

Likewise, *Ramah* was “indistinguishable in all relevant respects from [*Bracker*].” *Ramah*, 458 U.S. at 839. *Ramah* invalidated a “state tax imposed on the gross receipts that a non-Indian construction company receive[d] from a tribal school board for the construction of a school for Indian children on the reservation.” *Id.* at 834. Again emphasizing that the “State’s interest in exercising its regulatory authority over the activity in question must be examined and given appropriate weight,” the Court found the state’s interests lacking. *Id.* at 838. It determined that “the State does not seek to assess its tax in return for the governmental functions it provides to those who must bear the burden of paying the tax.” *Id.* at 843. While the state provided services to the non-Indian construction contractor “for its activities *off the reservation*,” the desire to collect revenues to pay for those services “[was] not a legitimate justification for a tax whose ultimate burden falls on the tribal organization.” *Id.* at 844. “Presumably,” the Court noted, “the state tax revenues derived from [the contractor’s] off-reservation business activities are adequate to reimburse the State for the services it provides to [the contractor].” *Id.* at 844 fn. 9.

Warren Trading Post’s treatment of the state’s interests was simply to note the absence of any interest, observing that Congress had “left the Indians ... largely free to run the reservation and its affairs without state control, a policy which has automatically relieved Arizona of all burdens for carrying on those same responsibilities.” *Warren Trading Post*, 380 U.S. at 690.

Central Machinery notably did not consider any state interests in imposing the tax, despite a dissenting opinion faulting the majority for failing to do so. *Central Machinery*, 448 U.S. at 169-70 (Stewart, J., dissenting).

State interests that, in some cases, can justify the on-reservation imposition of a state tax are those involving state governmental functions closely connected to the taxed activity. “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.” *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 336 (1983). See *Seminole Tribe of Florida v. Stranburg*, 799 F.3d 1324, 1342 (11th Cir. 2015) (“Both *Bracker* and *Ramah* note that the state tax must be sufficiently connected to the particular activity taxed to amount to more than just a generalized interest in raising revenue.”); *Hoopa Valley Tribe v. Nevins*, 881 F.2d 657, 661 (9th Cir. 1989) (“To be valid, the [state] tax must bear some relationship to the activity being taxed. ... Showing that the tax serves legitimate state interests, such as raising revenues for services used by tribal residents and others, is not enough.”); *Marty Indian School Bd., Inc. v. South Dakota*, 824 F.2d 684, 688 (8th Cir. 1987) (finding that state interests did not justify imposing fuel tax on tribal school’s reservation fuel purchases where revenues from the tax were not used directly for the benefit of the students or to promote tribal self-sufficiency, and that off-reservation state functions were funded by off-reservation sources).

The evidence here reveals a state with a desire to collect general revenues but no significant functions connected with the taxed activity. The State agrees that most governmental functions not funded by the State general fund (into which contractor’s excise tax revenues are deposited) are irrelevant to this case. SUMF 281. The State also agrees that any State exercise of civil regulatory jurisdiction unrelated to the Casino construction project is irrelevant. SUMF

284. The record contains evidence of State governmental services with only a tenuous connection, if any, to the project. SUMF 290-293 (tax audits), 294-295 (business filings), 296 (judicial system), 306-309 (technical profession licenses). Other State services are funded by user fees, not by tax revenues. SUMF 299-305 (electrical inspections, boiler inspections, notary licenses). Furthermore, there is generally no difference between the governmental services provided, or made available, to the Casino construction project and those provided, or made available, to construction projects that the State determines qualify for an “Indian Country Project” tax exemption. SUMF 297-298. This tends to demonstrate these services do not create a particularly weighty interest when the State performs its own interest-balancing test. *See* SUMF 234.

The State might also rely on its even more general interest in the uniform application of State law. But logically, this interest in uniformity *wherever State law applies* cannot be a factor in *deciding whether* State law applies. Instead, the State’s interest in uniformity must include uniformly accounting for any federal preemption that limits State authority. Furthermore, this interest in uniformity is possessed equally by all three sovereigns; it cannot tilt the balance toward the State. In one outlier case where Connecticut imposed personal property tax on a non-Indian’s ownership of slot machines located on a reservation, the Second Circuit concluded that the state’s “interest in the integrity and uniform application of [its] tax system” outweighed the federal and tribal interests. *Mashantucket Pequot Tribe v. Town of Ledyard*, 722 F.3d 457, 460 (2d Cir. 2013). But the Supreme Court has never suggested that balancing of interests would even be necessary to reach the result in *Ledyard*. Instead, the law from the late 1800s through the modern era has been that “a state tax on the personal property of a licensed trader is not ... an interference with the regulation of commerce with the Indian tribes,” so that (unlike a state tax

on “the privilege of doing business with Indians”) it is “ordinarily subject to state taxation.” Felix S. Cohen, *Handbook of Federal Indian Law* (1941 ed.), Ch. 16 § 2, p. 350-51 (citing *Thomas v. Gay*, 169 U.S. 264 (1898), and *Surplus Trading Co. v. Cook*, 281 U.S. 647, 651 (1930)); *see also Michigan v. Bay Mills Indian Community*, 134 S.Ct. 2024, 2043 (2014) (Sotomayor, J., concurring) (noting the rule that states may tax property owned by non-Indians on Indian land). To the *Ledyard* court, “uniform application of [the state’s] tax code” reflected the unexceptional notion that a tax on *property ownership* should not depend on “additional factors” such as “the *use* to which non-Indian third parties put on-reservation property.” *Ledyard* at 475-76. A tax on a *transaction* (like the contractor’s excise tax) is different: the impacted parties are inherent in the transaction; no “additional factors” are necessary to determine taxability. *Ledyard*’s reliance on State tax uniformity is a result of the strained effort in that case to identify and balance interests in circumstances that did not require it.

Furthermore, there is no uniformity in the State’s collection of contractor’s excise tax from projects in Indian country. It has entered into tax collection agreements with some tribes and has no agreement with other tribes. SUMF 248. The agreements split the tax revenues between the State and tribes at varying rates. SUMF 248. For tribes with no tax collection agreement, the Department of Revenue grants and denies Indian Country Project tax exemptions on a case-by-case basis, often for reasons unrelated to the State’s determination of whether it has authority to tax a specific project. SUMF 226-247.

This case is materially indistinguishable from *Central Machinery* and *Warren Trading Post*. The state tax imposed on the contractor’s proceeds from its trade with the Tribe on the Tribe’s reservation is preempted, because Congress has reserved to the federal government,

through the sweeping and comprehensive Indian Trader Statutes, the exclusive authority to govern such transactions.

II. IGRA preempts the tax.

A. IGRA preemptively regulates the field of Indian gaming and matters related to Indian gaming.

The Supreme Court confirmed in 1987 that Indian tribes had the right to conduct gaming in Indian country without state regulation of the tribes or their non-Indian customers. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 221-22 (1987). Shortly after the *Cabazon* decision, and before Congress enacted IGRA, the Tenth Circuit applied *Cabazon* to state taxation of tribal gaming, concluding that the state’s attempt to impose sales tax upon gross receipts at a tribal casino added an impermissible “additional burden to an enterprise in which the federal government opposes state interference.” *Indian Country, U.S.A., Inc. v. State of Okla.*, 829 F.2d 967, 986 (10th Cir. 1987). The Court observed that “the federal and tribal interests in maximizing tribal profits [at a tribal bingo enterprise] are particularly strong.” *Id.* The state’s “general interest in raising revenue,” and in “taxing its residents, for whom it provides services,” was “substantially diminished,” the Court held, “when the residents engage in activities largely beyond the state’s jurisdiction and control[.]” *Id.* at 987.

Against this backdrop, in which states had no authority to tax or regulate tribal gaming in Indian country, Congress enacted IGRA in October 1988, “creat[ing] a framework for regulating gaming activity on Indian lands.” *Michigan v. Bay Mills Indian Community*, 134 S.Ct. at 2028; *see id.* at 2034 (noting that “Congress adopted IGRA in response to [*Cabazon*], which held that States lacked any regulatory authority over gaming on Indian lands”). With IGRA, Congress gave states a way to acquire such authority, but only within prescribed limits, and only through the mechanism of a federally-approved tribal-state gaming compact. *See Seminole Tribe of*

Florida v. Florida, 517 U.S. 44, 58 (1996) (IGRA “grants the States a power that they would not otherwise have, viz., some measure of authority over gaming on Indian lands”).

The Eighth Circuit recently explained that IGRA’s express goal is to improve the financial position of tribal governments, and to fund tribal autonomy, by using tribal casinos to generate revenues for Indian tribes:

IGRA explicitly defined the policies and goals which led to its enactment. Congress indicated that its intent upon passing IGRA was “to provide a statutory basis for the regulation of gaming by an Indian tribe adequate ... to ensure that the Indian tribe is the primary beneficiary of the gaming operation.” 25 U.S.C. § 2702(2). The [NIGC] was created “to protect such gaming as a means of generating tribal revenue.” 25 U.S.C. § 2702(3). The “primary beneficiary” rule arose from Congress’s aim “to promote tribal economic development, tribal self-sufficiency, and strong tribal government” which is “a principal goal of Federal Indian policy.” 25 U.S.C. §§ 2701(4), 2702(1).

City of Duluth v. Fond du Lac Band of Lake Superior Chippewa, 785 F.3d 1207, 1211 (8th Cir. 2015). “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.’” *Id.* (quoting S.Rep. No. 100-446 (“Senate Report”), at 3 (1988), reprinted in 1988 U.S.C.C.A.N. 3071, 3072); *see also Rincon Band of Luiseño Mission Indians v. Schwarzenegger*, 602 F.3d 1019, 1027 (9th Cir. 2010) (noting that “Congress enacted IGRA to provide a legal framework within which tribes could engage in gaming—an enterprise that holds out the hope of providing tribes with the economic prosperity that has so long eluded their grasp—while setting boundaries to restrain aggression by powerful states”).

IGRA “reveals a comprehensive regulatory structure for Indian gaming.” *Gaming Corp.*, *supra*, 88 F.3d at 544. The statute divides gaming on Indian lands into three classes and places each class into the Act’s framework of federal, tribal and state jurisdiction. *See Seminole Tribe of Florida v. Florida*, 517 U.S. at 48-49 & fn.1; 25 U.S.C. §§ 2710(a)(1) (class I gaming exclusively under tribal regulation); 2710(a)(2) & 2710(b) (class II gaming under tribal and

federal regulation, subject to limited state authority). Las Vegas-style “class III” gaming, including slot machines and house-banked card games like blackjack, is subject to federally-approved tribal laws and a federally-approved compact negotiated and agreed to by the tribe and surrounding state. 25 U.S.C. § 2710(d); *see Michigan v. Bay Mills Indian Community*, 134 S.Ct. at 2028-29. The Act “is an example of ‘cooperative federalism’ in that it seeks to balance the competing sovereign interests of the federal government, state governments, and Indian tribes, by giving each a role in the regulatory scheme.” *In re Indian Gaming Related Cases* (“*Coyote Valley II*”), 331 F.3d 1094, 1096 (9th Cir. 2003) (internal quotation marks omitted).

Strong evidence of “IGRA’s preemptive force” is found in its legislative history. *Gaming Corp.*, 88 F.3d at 544. “[T]his bill should be construed as an explicit preemption of the field of gaming in Indian Country.” Senate Report at 36. Congress expressly “recognized the unique history of federal and state jurisdiction over Native Americans and Indian country,” *Gaming Corp.* at 545, stating:

It is a long- and well-established principle of Federal-Indian law as expressed in the United States Constitution, reflected in Federal statutes, and articulated in decisions of the Supreme Court, that unless authorized by an act of Congress, the jurisdiction of State governments and the application of state laws do not extend to Indian lands. In modern times, even when Congress has enacted laws to allow a limited application of State law on Indian lands, the Congress has required the consent of tribal governments before State jurisdiction can be extended to tribal lands.

Id. (quoting Senate Report at 5). “The Indians’ long-standing rights and interests in controlling activities on their tribal lands, and the States’ correspondingly limited power to regulate activities on tribal lands except as authorized by Congress, are core principles underlying the IGRA that necessarily frame the scope of its preemptive force.” *Missouri ex rel. Nixon v. Coeur D’Alene Tribe*, 164 F.3d 1102, 1108 (8th Cir. 1999).

Where IGRA applies, no asserted state interest can overcome IGRA preemption. Congress “created a fixed division of jurisdiction. ... The courts are not to interfere with [Congress’s] balancing of interests, they are not to conduct a *Cabazon* balancing analysis.” *Gaming Corp.* at 547; *see* Senate Report at 6.

“‘The mechanism for facilitating the unusual relationship in which a tribe might affirmatively seek the extension of State jurisdiction and the application of state laws to activities conducted on Indian land is a tribal-State compact.’” *Gaming Corp.* at 545 (quoting Senate Report at 6). The Eighth Circuit repeatedly explained that the compact is “[t]he only avenue for significant state involvement” in tribal gaming. *Id.* at 544. With only limited exceptions, “Congress left the states without a significant role under IGRA unless one is negotiated through a compact.” *Id.* at 547. “IGRA has a carefully balanced jurisdictional scheme, through which Congress gave the states the right to negotiate tribal-state compacts but declined to grant them broader authority without tribal consent.” *Id.*; *see also Pueblo of Pojoaque v. New Mexico*, 863 F.3d 1226, 1232 (10th Cir. 2017).

B. IGRA expressly places Casino construction under tribal and federal jurisdiction.

The taxed activity is expressly regulated by IGRA. Congress specifically assigned to tribes the primary regulatory responsibility for “the construction and maintenance of the gaming facility,” with oversight by the NIGC. 25 U.S.C. §§ 2710(b)(2)(E); 2710(d)(1)(A)(ii); 25 C.F.R. Part 559. IGRA requires 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. 25 U.S.C. §§ 2710(b)(1), 2710(b)(2)(E). The Tribe must certify to the NIGC that it has determined the gaming facility meets these Tribal standards. 25 C.F.R. §§ 559.3, 559.4. The NIGC Chairman may inspect the Tribe’s documentation related to its

determination, 25 C.F.R. § 559.6, and can fine the Tribe or close the Casino if the facility fails to meet environmental or public health and safety standards. 25 U.S.C. § 2713; *see* 25 C.F.R. Parts 573 and 575.

IGRA covers tribal casino construction at least as comprehensively as federal law covered school construction in *Ramah*. *See* 458 U.S. at 840-41. There, under authority from legislation directed at educating Indian children, the Secretary of the Interior promulgated regulations that called for BIA oversight of tribal school construction contracts. *Id.* Even though the federal statutes and regulations in *Ramah* did not expressly preempt state taxes imposed on a contractor's gross receipts from tribal school construction projects, the detailed regulatory scheme left no room for the additional burden of the state tax, which would have "necessarily impede[d] the clearly expressed federal interest in promoting the 'quality and quantity' of educational opportunities for Indians by depleting the funds available for the construction of Indian schools." *Id.* at 842. The same is true here, where the State tax depletes the funds available for casino construction and other governmental functions, impairing the federal interest in promoting Tribal self-sufficiency through gaming revenues, in the face of a "comprehensive federal scheme ... which has 'left the State with no duties or responsibilities'" for the construction and maintenance of the Casino or the economic development of the Tribe. *Id.* at 843 (quoting *Warren Trading Post* at 691); *see* SUMF 260-272, 41-96, 164-198, 280-317. IGRA's exclusive jurisdictional framework for tribal casino construction preempts State involvement outside the framework.

C. The State has no authority to tax the Casino construction project because it is not addressed in the gaming compact.

Both the gaming facility and taxation are expressly among the subjects which, under IGRA, must be included in a Tribal-State gaming compact if the State is to have any authority

over them. IGRA prescribes “the permissible scope of a Tribal-State compact.” *Seminole Tribe of Florida v. Florida*, 517 U.S. at 48; 25 U.S.C. § 2710(d)(3)(C); *see Rincon, supra*, 602 F.3d at 1028-29. Every gaming compact does not need to include everything on IGRA’s list of compactible subjects, but if a State wishes to have authority over any of the listed subjects, the only way for it to obtain such authority is to negotiate for its inclusion in a compact. *Gaming Corp.*, 88 F.3d at 546.

Among the seven listed subjects, IGRA states that a Tribal-State gaming compact may include provisions relating to “standards for ... maintenance of the gaming facility, including licensing[.]” 25 U.S.C. § 2710(d)(3)(C)(vi). Thus, just as IGRA allows the state, through a negotiated compact, to regulate class III gaming, a subject otherwise assigned to tribal and federal authority, it also permits the state, through the gaming compact, to set environmental and public health and safety standards for the casino facility, a subject otherwise entirely entrusted to tribal and federal authority.

Even if every aspect of the Casino expansion and renovation were not the “construction and maintenance of a gaming facility” or the “maintenance of a gaming facility” that IGRA expressly covers, the project is nevertheless beyond State authority unless addressed in a gaming compact. Under the residual or “catch-all” clause, a Tribal-State compact may include provisions relating to “any other subjects that are directly related to the operation of gaming activities.” 25 U.S.C. § 2710(d)(3)(C)(vii); *see Wisconsin Winnebago Nation v. Thompson*, 824 F.Supp. 167, 171 (W.D.Wis. 1993) (holding that casino site selection fits within the “catch-all category”). If the Casino construction project is a “subject[] that [is] directly related to the operation of gaming activities,” under § 2710(d)(3)(C)(vii), then State taxation of the project is invalid, because the gaming compact fails to address it.

Federal courts have developed an analysis to determine whether a particular subject is “directly related to the operation of gaming activities.” In *Coyote Valley II, supra*, 331 F.3d 1094, the Ninth Circuit addressed claims that California had failed to negotiate a gaming compact in good faith, based on the state’s insistence on three compact provisions including, most pertinently, one which required gaming tribes to adopt a tribal labor relations ordinance that met requirements set out in the compact, providing organizational rights to workers at the tribal casino and any “related facility,” which the compact defined as a facility “for which the only significant purpose is to facilitate patronage of the class III gaming operations.” *Coyote Valley II*, 331 F.3d at 1105-06 & fn.15. The court found that the subjects of all three provisions were directly related to the operation of gaming activities. The labor relations provision was permissible because, besides the provision being consistent with IGRA’s purposes and the state having granted concessions in exchange for it, the court found that “[w]ithout the ‘operation of gaming activities,’ the jobs this provision covers would not exist; nor, conversely, could Indian gaming activities operate without someone performing these jobs.” *Id.* at 1116.

This Court recently adopted the Ninth Circuit’s approach when it invalidated the State’s efforts to impose use tax at the Casino. *Flandreau Santee Sioux Tribe v. Gerlach*, 269 F.Supp.3d 910, 923-24 (D.S.D. 2017), *appeal docketed*, No. 18-1271 (8th Cir. Feb. 6, 2018). The Court held that several of the non-gaming departments of the Casino – its gift shop, hotel, RV park, restaurant and bar, and live entertainment venue – were “directly related to the operation of gaming activities,” because they would not exist in Flandreau if the Casino were not there to create a market of consumers, and the Casino could not operate without these amenities to support the gaming that is its primary generator of revenue. *Id.* at 925.

The relevant question here is two-fold: Would the Casino construction project exist if not for the “operation of gaming activities,” and could the Tribe operate its gaming activities as Congress intended without the Casino construction project? The answers to those questions show that every aspect of the Casino construction project is directly related to the operation of gaming activities.

First, if the Tribe were not operating a Casino, it is obvious that there would be no need to engage in this construction project. SUMF 120, 252. There would be no Casino to renovate. The design and implementation of the project is specific to the Casino’s needs, including those dictated by federal and tribal gaming regulations. SUMF 179-188, 206-217.

Second, facility renovations are necessary not only to maintain compliance with public health and safety standards, but also to refresh the Casino and expand or maintain its customer base in the face of competition. The continued viability of the Casino requires the Tribe to constantly evaluate its business and adjust the product it offers to customers. *See* SUMF 112-129. The Tribal-State gaming compact expressly acknowledges that the agreement to double the Tribe’s maximum number of slot machines “will result in a significant expansion of the Tribe’s gaming operation.” SUMF 91-92. Without expansion of the gaming floor, renovation of the gaming amenities, or modernization of the twenty-year-old facility, the Casino would fail to compete. Its revenues would ultimately stagnate and decline and the Tribe would be unable to achieve the purposes for which Congress enacted IGRA.

Furthermore, the State’s tax is imposed on activities that directly involve the Tribe, not on the activities of third parties to which the Tribe is simply a bystander. This distinguishes *Casino Resource Corp. v. Harrah’s Entertainment Inc.*, 243 F.3d 435, 439 (8th Cir. 2001) (holding that IGRA did not preempt state law claims “between a non-tribal general contractor

and non-tribal subcontractor” based on a contract that was “merely peripherally associated with tribal gaming”), *Mashantucket Pequot Tribe v. Town of Ledyard*, *supra*, 722 F.3d 457, and *Barona Band of Mission Indians v. Yee*, 528 F.3d 1184 (9th Cir. 2008). In *Ledyard*, the state personal property tax fell “on the non-Indian’s *ownership of property*, rather than on the *transaction* between the Tribe and the non-Indian.” *Id.* at 469. The court found that “under IGRA, *mere ownership* of slot machines by the vendors does not qualify as gaming[.]” *Id.* at 470. Notably, the court did not consider whether the vendor’s slot machine ownership might be “directly related” to gaming. As discussed above, however, a personal property tax imposed on a non-Indian’s ownership of his property is fundamentally different from a tax on the privilege of transacting business with an Indian tribe on its reservation, because the mere ownership features no Indian involvement whatsoever.

Nor is the Tribe employing a scheme “devised to circumvent” the contractor’s excise tax, distinguishing *Barona*, which involved *sales* tax imposed on a non-Indian subcontractor for construction materials purchased from non-Indian sellers to be used in a tribal casino renovation. *Id.* at 1187-88. Although construction agreements designated the subcontractor as the tribe’s “purchasing agent” for the materials, the court refused to give any legal effect to the attempted “end-run” around the sales tax and analyzed the case as if the Tribe were not a party to the taxed transaction. *Id.* at 1190. The court emphasized the fact that the transaction, “which otherwise would occur on non-Indian territory,” was simply “rigged to trigger a tax exemption,” and held that this “factually distinguishes the present case from the multitude of cases where courts have analyzed state taxation on non-Indians performing work on Indian land.” *Id.* at 1191. Similar to *Ledyard*, given that the court viewed the tribe as merely a bystander to the transaction, it held that “IGRA’s comprehensive regulation of Indian gaming does not occupy the field with respect

to sales taxes imposed on third-party purchases of equipment used to construct the gaming facilities.” *Id.* at 1193. Here, in contrast, the Tribe, not a third party, is undisputedly the purchaser in the taxed transaction at issue. *Not* at issue is the State *sales* tax imposed on the contractors’ purchase of materials from their vendors – those taxes are not challenged in this case. *Barona* is inapplicable.

Taxation is, itself, another compactible subject. A compact may include provisions related to state taxation to defray the costs of any state regulation of gaming activities, and tribal taxation in amounts comparable to state taxes. 25 U.S.C. § 2710(d)(3)(C)(iii), (iv). IGRA further states that, except for cost-defraying taxes that can be included in a gaming compact, states are not conferred any “authority to impose any tax, fee, charge, or other assessment upon an Indian Tribe” or anyone authorized by a Tribe to engage in a class III activity. 25 U.S.C. § 2710(d)(4). To protect tribes from revenue-seeking states, IGRA cautions that states cannot refuse to negotiate a gaming compact because of this lack of taxing authority. *Id.* Section 2710(d)(4) must be understood in light of IGRA’s overall purposes, the protective purpose of this section specifically, and the “unique Indian tax immunity jurisprudence,” which “requires us to reverse the general rule that exemptions from tax laws should be clearly expressed.” *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 112 (2005) (internal quotation marks and alterations omitted); *see California v. Cabazon Band of Mission Indians*, 480 U.S. at 216, fn.18. Moreover, Congress protects tribal tax immunity from state encroachment against a backdrop in which states have no “residual power to impose such taxes in any event,” absent IGRA. *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164, 177 (1973); *see Indian Country, U.S.A., supra*, 829 F.2d at 976, 984-87. In this light, the State tax on Casino construction,

imposed on the contractor but ordinarily and actually borne by the Tribe, constitutes a “tax, fee, charge, or other assessment” upon the Tribe, which, under IGRA, the State may not “impose.”¹¹

The gaming compact between the Tribe and the State contains no provision addressing the State’s contractor’s excise tax. SUMF 94. It is silent as to taxation of any kind. SUMF 93.¹² In 2016, the parties agreed to double the number of slot machines authorized to the Tribe, and the compact states that the “State and the Tribe recognize that the increase in the number of slot machines from 500 to 1,000 will result in a significant expansion of the Tribe’s gaming operation.” SUMF 91-92. But the parties did not include a provision allowing the State to impose a tax (or any manner of regulation) on the construction work inherent in such a “significant expansion” of the Casino. SUMF 93-95. In the absence of such a provision in the gaming compact, the State cannot tax the Casino construction project.

III. The State must refund to the Tribe the invalid taxes paid under protest, with interest.

“When a state tax is declared to be invalid either ‘because it is beyond the State’s power to impose’ or ‘because the taxpayers were absolutely immune from the tax,’ the State must

¹¹ The tax is not necessarily altogether barred from inclusion in a gaming compact. The State cannot “impose” the tax by making it a condition of compact negotiation but may bargain for it by offering meaningful concessions in exchange. The tax proceeds must also be limited to gaming-related uses consistent with IGRA’s stated purposes. It cannot merely “put tribal money into the pocket of the state” and promote only “state general economic interests.” *Rincon*, 602 F.3d at 1033-35; *Coyote Valley II*, 331 F.3d at 1111-12.

¹² The compact contemplates only the following payments by the Tribe: The Tribe is to make “annual contribution[s] to the county to pay for government services,” in amounts that increase with the number of slot machines in operation. SUMF 96. These payments are expressly meant to compensate for anticipated “increased government demand” resulting from the Casino expansion. *Id.* The Tribe may also make discretionary additional payments “to be used to provide public services for the citizens of Moody County, the City of Flandreau, or the State.” Compact § 11.3. Finally, the Tribe is to reimburse the State’s costs for inspecting the gaming and conducting background checks for license applicants, at the rate of \$50.00 per hour, plus travel, per diem and other expenses at rates established by state regulations. Compact § 14.2.

“undo” the unlawful deprivation by refunding the tax previously paid under duress.” *United States ex rel. Cheyenne River Sioux Tribe v. South Dakota*, 105 F.3d 1552, 1560 (8th Cir. 1997) (quoting *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18, 39 (1990)); see *Ward v. Board of County Commissioners*, 253 U.S. 17, 24 (1920) (after collecting unlawful taxes from Indians by coercive means, due process requires county to pay them back).

State law provides that a refund of taxes wrongfully collected “shall include interest.” SDCL §§ 10-59-24, 10-59-6; see *Standing Rock Sioux Tribe v. Janklow*, 103 F.Supp.2d 1146, 1156-57 (D.S.D. 2000) (holding that refund with interest is appropriate where overpayment of tax was not due to State’s innocent mistake of fact or taxpayer’s error); *Northern States Power Co. v. South Dakota Dept. of Revenue*, 578 N.W.2d 579, 581-82 (S.D. 1998) (imposing interest on refund of contractor’s excise tax).

Henry Carlson timely paid the contractor’s excise tax incurred from the Casino project under protest, following the procedure prescribed by state law. SDCL § 10-27-2. Henry Carlson’s corporate officers could have been personally liable for the failure to timely pay the tax due. SDCL § 10-46A-13; see SDCL § 10-46A-13.1 (failure to pay is a misdemeanor; multiple failures constitute a felony).

If the Court determines the tax was unlawfully imposed, then the Tribe requests a judgment directing the defendants to refund, with interest, all amounts collected by the State in excess of its lawful authority.

CONCLUSION

The State tax on the Casino construction project is incompatible with federal laws and the important federal and tribal interests behind them. Unjustified by any legitimate interest, the State extends its hand into the Tribe’s reservation to increase the cost of the Tribe’s on-reservation commerce. It extracts State revenues from the Tribal enterprise Congress specially

set aside as a means for Tribal members to build a strong sovereign government, and a vibrant and economically thriving reservation community, unencumbered by State involvement except with the Tribe's consent. The Tribe respectfully requests that the Court grant the Tribe's motion and enter judgment in its favor.

Dated: April 9, 2018

Respectfully submitted,

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WORD COUNT CERTIFICATE

I certify that the foregoing brief, Flandreau Santee Sioux Tribe's Memorandum in Support of its Motion for Summary Judgment, complies with the type volume limitation of Local Rule 7.1(b)(1).

According to the word count of the word processing system used to prepare the brief, the brief contains 11,974 words, excluding the cover page, tables, signature block and this certificate.

/s/ Jami J. Bishop

REQUEST FOR ORAL ARGUMENT

Pursuant to Local Rule 7.1(C), the Tribe respectfully requests that the Court order oral argument.