

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

FLANDREAU SANTEE SIOUX
TRIBE, a Federally recognized
Indian Tribe,

Plaintiff,

v.

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

Defendants.

Civ. No. 17-4055

DEFENDANTS' MEMORANDUM IN
OPPOSITION OF PLAINTIFF'S MOTION
FOR SUMMARY JUDGMENT

INTRODUCTION/FACTS

The Defendants (State) incorporate by reference the "Introduction," "Facts and Procedural History," and "Standard" in the State's Memorandum in Support of its Motion for Summary Judgment (State's Memorandum in Support), Doc. 32, at 1-6.

ARGUMENT

Neither the federal Indian Trader statutes nor the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.* (IGRA), comprehensively regulate the construction services of Henry Carlson Company (Contractor), a non-Indian contractor, in this case. *See infra* I.A-C.; State's Memorandum in Support, Doc. 32, II.A-B. Also, the balancing of the federal, tribal, and state interests confirms the State's jurisdiction to impose its contractor's excise tax on the

Contractor. *See infra* I.D.; State's Memorandum in Support, Doc. 32, II.C. Finally, pursuant to the Eleventh Amendment, the Flandreau Santee Sioux Tribe (Tribe) is not entitled to a refund of contractor's excise tax paid by the Contractor to the State. *See infra* II.; State's Memorandum in Support, Doc. 32, I. Therefore, the Tribe's motion for summary judgment should be denied, and in turn, for the reasons and authorities cited herein and in the State's Memorandum in Support, Doc. 32, the State's motion for summary judgment should be granted.

I. The State has authority to impose contractor's excise tax on the non-Indian Contractor's construction services.

The Tribe's Memorandum in Support of its Motion for Summary Judgment (Tribe's Memorandum in Support) is rife with statements regarding a tribe's sovereignty and right to be free of state interference. *See generally* Tribe's Memorandum in Support, Doc. 75. However, the Tribe's argument glazes over a critical fact: the contractor's excise tax is imposed on the Contractor, which in this case is undisputedly a non-Indian. *See* Defendants' Statement of Undisputed Material Facts (State's SUMF), Doc. 65, #27; Complaint, Doc. 1, ¶ 63. Based on the circumstances here, the tax on the non-Indian Contractor's construction services for the Royal River Casino project is valid.

A. The Tribe inaccurately portrays the contractor's excise tax.

As an initial matter, the Tribe attempts to classify the contractor's excise tax on the Contractor as partially a tax on the Contractor's sale of materials to the Tribe. *See, e.g.*, Tribe's Memorandum in Support, Doc. 75, at 22 ("the

taxed receipts in this case were earned from the sale of construction materials *and services*") (emphasis in original). Applying this classification, the Tribe appears to indicate that because the sale of property to the Tribe is exempt from State sales tax, a sale of construction materials to the Tribe must also be exempt. *See* Tribe's Memorandum in Support, Doc. 75, at 15 ("[W]hile sales of property and services to any Indian tribe are expressly exempt from the sales tax, . . . 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."). However, this classification is an inaccurate portrayal of the contractor's excise tax.

The contractor's excise tax is a gross receipts tax on a contractor's provision of construction services. *See* SDCL 10-46A-1, -2. The two percent contractor's excise tax applies to the contract price, regardless of any construction materials included. *See* SDCL 10-46A-3, -4. For example, if a contractor builds a home and charges \$100,000, he or she owes two percent, or \$2,000, in contractor's excise tax.

Contrary to the Tribe's assertion, there is no sales tax involved in a contractor's provision of construction services. *See, e.g.*, SDCL 10-45-12.1 (exempting construction services from sales tax). There is, however, a use tax component in those services. Separate and distinct from the contractor's

excise tax, a use tax is imposed on the contractor's use of materials¹ "in the performance of a contract or to fulfill contract . . . obligations[.]" See SDCL 10-46-5. The tax on the contractor's use of materials, imposed at the rate of 4.5 percent, is similar to the contractor's excise tax in that the legal incidence of the use tax falls upon the contractor. See SDCL 10-46-2, -5.

These two types of taxes highlight the Tribe's error in classifying any part of the transaction as a sale of construction materials. "[T]he [Tribe's] title to the final product constructed does not preclude taxing the contractor for the materials used in that construction . . . because excise taxes do not tax the *ownership* of the property; rather, they tax the contractor's *use* of the property in connection with his commercial, profit-making activities, an independently taxable activity apart from ownership." See *Sublette Cnty Sch. Dist. No. 1. v. State Bd. Of Equalization, State of Wy.*, 770 P.2d 218, 223 (Wy. 1989) (interpreting *United States v. New Mexico*, 445 U.S. 720 (1982), which upheld a gross receipts tax on a contractor's contracts with the federal government as well as a use tax on the contractor's use of government-owned materials to fulfill the contract); see also *United States v. New Mexico*, 455 U.S. 720, 739 (1982) ("t]he vital thing is that the contractors are using the property in connection with their own commercial activities. That the federal property involved was being used for the Government's benefit-something that by

¹Although South Dakota Codified Law uses the phrase, "tangible personal property," see e.g., SDCL ch. 10-46, the State uses the term "materials" or "goods" for ease of reference.

definition will be true in virtually every management contract-was irrelevant, for the contractors remained distinct entities pursuing private ends, and their actions remained commercial activities carried on for profit.”) (internal quotation marks and citations omitted).

B. The federal Indian Trader statutes do not justify preemption of the contractor’s excise tax.

Regarding the merits, the Tribe argues that the State contractor’s excise tax on the non-Indian Contractor is preempted by the federal Indian Trader statutes and United States Department of Interior (Interior) regulations seeking to implement those statutes. See Tribe’s Memorandum in Support, Doc. 75, at 17-29. The Tribe contends that these statutes and regulations comprehensively regulate the Contractor’s provision of construction services to the Tribe. See Tribe’s Memorandum in Support, Doc. 75, at 17-29. However, the Tribe’s argument must fail because the four Indian Trader statutes, coupled with Interior’s overreach in its regulations, do not trigger preemption in this case. See State’s Memorandum in Support, Doc. 32, at 30-36.

1. The Indian Trader statutes do not encompass the trade of services.

The Indian Trader statutes, as described in the State’s Memorandum in Support, Doc. 32, at 30 through 31, contain provisions regarding on-reservation trade with Indians. See 25 U.S.C. §§ 261-264. In asserting that Congress “did not precisely define ‘trade’” in the Indian Trader statutes, the Tribe posits that the term must be interpreted broadly to encompass both the trade of goods and the trade of services. See Tribe’s Memorandum in Support,

Doc. 75, at 22, 25. Yet no statutory interpretation of “trade” is necessary: Congress defined exactly what it meant as “trade” by repeatedly using that term in the context of the trade of goods. See 25 U.S.C. § 261 (authorizing the Commissioner of Indian Affairs to promulgate rules regarding the “kind and quantity of goods and the prices at which such goods shall be sold to the Indians”); 25 U.S.C. § 263 (authorizing the President “to prohibit the introduction of goods, or of any particular article, into the country belonging to any Indian tribe”); 25 U.S.C. § 264 (indicating that an unlicensed trader “shall forfeit all merchandise offered for sale to the Indians”). Throughout the four Indian Trader statutes, there is no mention of the trade of services. See 25 U.S.C. §§ 261-264. Cf. *U.S. ex rel. Keith v. Sioux Nation Shopping Ctr.*, 488 F. Supp. 496, 498 (D.S.D. 1980) (“Trading has been defined in a number of ways. . . . A common thread running throughout these various definitions is that trade involves the exchange of commodities for other commodities or money.”) (emphasis added); *Id.* at 499 (“This Court has previously granted motions for summary judgment made by several defendants who claimed they dealt only in services and that [25 U.S.C. section 264] applies only to those who deal in goods. This reasoning would appear to apply [to defendants in this case] since the selling of insurance would seem to involve the sale of a service rather than a good.”).

Although 25 U.S.C. section 262 does not include the term “goods” like the remaining three Indian Trader statutes, that section cannot be read on its own, without the other provisions in mind. “It is a ‘fundamental canon of

statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.’ A court must therefore interpret the statute ‘as a symmetrical and coherent regulatory scheme,’ and ‘fit, if possible, all parts into an harmonious whole[.]’” *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (internal citations omitted).

The Tribe points out that Interior has interpreted the Indian Trader statutes to encompass not only the trade of goods, but also the trade of services. See Tribe’s Memorandum in Support, Doc. 75, at 22-25. While Interior has attempted to regulate the trade of services to Indians through its promulgation of rules years ago, see 25 C.F.R. § 140.5, these rules are invalid. The Commissioner’s boundaries as to its rulemaking authority are apparent throughout the Indian Trader statutory scheme; the authority granted to the Commissioner is limited to rules and regulations related to goods sold to Indians. See, e.g., 25 U.S.C. §§ 261, 263, 264. Thus, the Commissioner exceeded its authority in regulating activities beyond the trade of goods to Indians, including regulating the trade of services.

Also in support of its argument, the Tribe highlights that the United States Supreme Court has interpreted “trade” broadly in certain instances. See Tribe’s Memorandum in Support, Doc. 75, at 28. But how the Supreme Court has interpreted “trade” in other federal statutes is not relevant in this case. Rather, Congress’s qualification of that term within the Indian Trader statutory scheme controls. See *supra* at 5-6.

Next, the Tribe contends that the Indian canon of construction requires a broad interpretation of “trade.” Tribe’s Memorandum in Support, Doc. 75, at 27. The Tribe posits that a liberal construction of the term “cannot contain an implied limitation on the term ‘trade’ that would exclude trade in services.” Tribe’s Memorandum in Support, Doc. 75, at 27. Although under the Indian canon of construction, “statutes are to be construed liberally in favor of the Indians with ambiguous provisions interpreted to their benefit[,]” employing this canon here would conflict with the Indian trader statutory scheme that Congress wrote. *See Chickasaw Nation v. United States*, 534 U.S. 84, 93-94 (2001). The Indian canon of construction cannot justify a disregard for the plain language used by Congress. *See DeCoteau v. Dist. Cty. Ct. for Tenth Jud. Dist.*, 420 U.S. 425, 447 (1975) (indicating that the Indian canon of construction “is not a license to disregard clear expressions of . . . congressional intent”).

The Tribe cites no federal court case extending the Indian Trader statutes to encompass services. *See* Tribe’s Memorandum in Support, Doc. 75, at 20-29; *Warren Trading Post Co. v. Ariz. State Tax Comm’n*, 380 U.S. 685 (1965) (retail trading business); *Cent. Mach. Co. v. Ariz. State Tax Comm’n*, 448 U.S. 160 (1980) (sale of farm machinery); *Dep’t of Taxation & Fin. of New York v. Milhelm Attea & Bros*, 512 U.S. 61 (1994) (state record keeping requirement regarding the sale of cigarettes).² *Cf. Seminole Tribe of Florida v. Stranburg*, 799

² Indeed, the Supreme Court has even ignored the Indian Trader statutes and regulations in a case involving the trade of goods. In *Rice v. Rehner*, 463 U.S.

(continued . . .)

F.3d 1324, 1345, 1352-53 (11th Cir. 2015) (with no mention of the Indian Trader statutes, upholding a state tax on non-Indian provider's on-reservation sale of utility services to Indians, and stating that "we discern here no pervasive federal interest or comprehensive regulatory scheme covering on-reservation utility delivery and use sufficient to demonstrate a congressional intent to preempt state taxation of a utility provider's receipts derived from on-reservation utility service"). In fact, federal court cases referenced by the Tribe actually support the premise that the trade of services is not encompassed by the Indian Trader statutes. See Tribe's Memorandum in Support, Doc. 75, at 22 n.8; see also *Mescalero Apache Tribe v. O'Cheskey*, 625 F.2d 967, 968, 971-72, 990-91 (10th Cir. 1980) (upholding tax on non-Indians' on-reservation provision of construction services for a tribe, and concluding that *Warren Trading Post* and *Central Machinery*, both involving "the sale of things", were not applicable); *U.S. ex rel. Keith*, 488 F. Supp. 496 (D.S.D. 1980) (indicating that 25 U.S.C. section 264 applies only to the trade of goods and not the trade of services).

To support its proposition that the Indian Trader statutes include the sale of services, the Tribe relies upon a New Mexico state intermediate court of appeals decision, *Laguna Industries, Inc. v. New Mexico Taxation and Revenue*

(. . . continued)

713 (1983), the Supreme Court upheld the state regulation of the on-reservation sale of liquor by a federally licensed Indian trader. 463 U.S. at 715-16, 733-35. As pointed out through a dissenting opinion, the majority failed to "explain how it reconciles [a state's on-reservation regulation of liquor] with federal law governing Indian traders."). See *id.* at 738 (Blackmun, J., dissenting).

Department (Laguna I), 845 P.2d 167 (N.M. Ct. App. 1992) and the New Mexico Supreme Court's affirmance of that decision in *New Mexico Taxation and Revenue Department v. Laguna Industries, Inc.*, 855 P.2d 127 (N.M. 1993) (*Laguna II*). The New Mexico Supreme Court agreed with the lower court that the Indian Trader statutes preempted a non-Indian's sale of services to an Indian. *See Laguna II*, 855 P.2d at 130. However, the New Mexico Supreme Court's decision presents the same flaws as the Tribe's arguments in this case: the New Mexico Supreme Court disregarded the plain language of the statute and incorrectly gave credence to Interior's regulations promulgated in violation of the law. *See Laguna II*, 855 P.2d at 128, 130. There is no indication that *Laguna I* and *Laguna II* decisions have been relied upon in any case for this principle and should not be viewed as persuasive authority by this Court. *See Bybee v. City of Albuquerque*, 896 P.2d 1164, 1166 (N.M. 1995), *Lopez v. N.M. Dep't of Taxation & Revenue*, 949 P.2d 284, 287 (N.M. Ct. App. 1997), and *State v. Romero*, 889 P.2d 230, 232 (N.M. Ct. App. 1995) (all citing *Laguna I* and *Laguna II* only for the proposition that interpreting a statute is a question of law).

2. *Even if the Indian Trader statutes encompass the trade of services, they do not comprehensively regulate the Contractor's services in this case.*

The Tribe claims that the Indian Trader statutes and regulations comprehensively regulate the trade of services, including the Contractor's services in this case. Tribe's Memorandum in Support, Doc. 75, at 20-29. Yet the Tribe admits that "the [Bureau of Indian Affairs] very rarely issues Indian

trader licenses” under those statutes and regulations. Tribe’s Memorandum in Support, Doc. 75, at 18. Here, the Contractor was unable to procure an Indian Trader license. *See* State’s SUMF, Doc. 65, #74-76. And there is no indication that the Contractor or its services are regulated under the Indian Trader statutory scheme. *See* State’s SUMF, Doc. 65, #78; State’s Memorandum in Support, Doc. 32, at 32-36. This alone requires a different outcome than in the Indian Trader cases of *Warren Trading Post* and *Central Machinery*.

In *Warren Trading Post*, the retailer was a licensed Indian trader and therefore was actually being regulated under the statutes and regulations. *See* 380 U.S. at 689-90. Moreover, in *Central Machinery*, although the retailer was not licensed under the Indian Trader statutes, it was still subject to the Indian Trader scheme. According to the tribe in that case, the Bureau of Indian Affairs (BIA) actively administered the Indian trader statutes and regulations through a three-tiered system. Appellant’s Brief, *Cent. Mach. Co. v. Ariz., State Tax Comm’n*, 448 U.S. 160 (1980), (No. 78-1604), 1979 WL 213817, at *11 [hereinafter, “Appellant’s Brief, *Central Machinery*, 1979 WL 213817, at *___”]. In the first tier, Indian traders who engaged in regular dealings with reservation Indians were “licensed after a rigorous application process[,]” which required approval by the Commissioner of Indian Affairs. Appellant’s Brief, *Central Machinery*, 1979 WL 213817, at *11-12. Regarding the second tier, the local Superintendent was authorized to issue a license or permit to traveling salespersons (i.e. peddlers) dealing with reservation Indians. Appellant’s Brief, *Central Machinery*, 1979 WL 213817, at *12. The last tier, in which a formal

license was not mandated, encompassed transactions by an Indian trader that required federal supervision of the expenditure of the tribal funds. Appellant's Brief, *Central Machinery*, 1979 WL 213817, at *12. Consequently, in *Central Machinery*, the sale was still comprehensively regulated by the BIA even though no license was obtained. See 448 U.S. at 161 (noting that the transaction was approved by the BIA), 165 n.4 (noting that "the transaction at issue . . . was subjected to comprehensive federal regulation. . . . the [BIA] had approved both the contract of sale for the tractors in questions and the tribal budget, which allocated money for the purchase of [the] machinery.").

The Tribe focuses on Interior's proposed revisions to update the Indian Trader regulations as evidence that the statutes and regulations are not obsolete. See Tribe's Memorandum in Support, Doc. 75, at 18-19 (indicating that "[t]he [Interior'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.'" (quoting *Traders with Indians*, 81 Fed. Reg. 89016 (Dec. 9, 2016))). But Interior's solicitation of comments regarding proposed revisions, without more, fails to show that Interior will actively look to enforce its rules in the future. Indeed, Interior is soliciting input to determine whether to do anything at all. See "In the Matter of: U.S. Department of Interior BIA Indian Trader Regulations, Tribal Consultation, March 2, 2017," (6:3-16) (Attached to Second Affidavit of Stacy R. Hegge as Exhibit 1) ("[O]n December 8th of 2016, [Interior] published an Advanced Notice of Proposed Rule Making . . . and that was to solicit input

on whether we should update the Indian Trader Regulations that are at 25 CFR part 140. . . . And so right now we're at the very early stages of looking at this regulation, and we haven't drafted any revisions yet because we want to hear from . . . the tribes, on whether we should leave the rule as it is, repeal it, or revise it.”).

Finally, in a last-ditch effort, the Tribe attempts to fit this case within *Warren Trading Post's* and *Central Machinery's* framework by classifying the Contractor's taxable transactions as a sale of services and goods. See Tribe's Memorandum in Support, Doc. 75, at 22 (“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” than *Warren Trading Post* and *Central Machinery*) (emphasis in original). However, as discussed above, the contractor's excise tax is just that – an excise tax. It is not a tax on the sale of materials. Neither the Indian Trader statutes nor the regulations purportedly implementing those statutes comprehensively regulate the Contractor's provision of services here.

C. IGRA does not justify preemption of the contractor's excise tax.

The Tribe next argues that the tax on the non-Indian Contractor's construction services is preempted by IGRA. See Tribe's Memorandum in Support, Doc. 75, at 34-44. Even though the states generally have the authority to tax non-Indian activities on Indian country, the Tribe contends that the United States Supreme Court in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) wiped away not only the state's general taxation authority, but also any state regulatory authority for all activities related to a

tribal casino. *See* Tribe’s Memorandum in Support, Doc. 75, at 34 (“Against this backdrop, in which states had no authority to tax or regulate tribal gaming in Indian country . . .”). The Tribe then indicates that through IGRA, Congress gave the states an avenue (through a tribal-state gaming compact) to regain some, but not all, of that lost authority. *See* Tribe’s Memorandum in Support, Doc. 75, at 34. In other words, the Tribe contends that *Cabazon* is still in play.

This position impermissibly extends *Cabazon* far past its actual scope. *Cabazon* does not stand for the premise that state regulation of all activities occurring within a tribal casino is preempted. *See generally* 480 U.S. 202. Rather, *Cabazon* ruled that the State’s gambling laws and ordinances (namely, the regulation of bingo and certain card games) are preempted. 480 U.S. at 205, 210, 220-22. It did not rule upon the preemption of any state laws outside of the regulation of gambling. *See generally Cabazon*, 480 U.S. 202. Congress, through its enactment of IGRA and the creation of the tribal-state compacting process for on-reservation gambling, squarely addressed *Cabazon*. *See, e.g.*, Doc. 1-1 (Gaming Compact between the Flandreau Santee Sioux Tribe and the State of South Dakota incorporating State of South Dakota gambling laws found in SDCL chapter 42-7B). Congress did not need to grant any other authority back to the states because *Cabazon* had not taken it away. *See generally Cabazon*, 480 U.S. 202; *see also Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2034 (2014) (“Congress adopted IGRA in response to [*Cabazon*], which held that States lacked any regulatory authority over gaming on Indian lands.”) (emphasis added). Because *Cabazon* did not eliminate a

state's general taxation authority, unless the contractor's excise tax is specifically preempted by IGRA, the state's general taxation authority over non-Indian activities on the reservation prevails.

1. *IGRA does not expressly preempt the contractor's excise tax.*

The Tribe argues that 25 U.S.C. section 2710(d)(4) expressly preempts the contractor's excise tax. See Tribe's Memorandum in Support, Doc. 75, at 43-44. That section of IGRA provides, in relevant part,

nothing in [section 2710] shall be interpreted as conferring upon a State or any of its political subdivisions authority to impose any tax, fee, charge, or other assessment upon an Indian tribe or upon any other person or entity authorized by an Indian tribe to engage in a class III activity.

25 U.S.C. § 2710(d)(4). The Tribe posits that the tax on the Contractor's construction services, but paid by the Tribe pursuant to its contract with the Contractor, is a "tax, fee, charge, or other assessment' upon the Tribe" and is therefore barred. See Tribe's Memorandum in Support, Doc. 75, at 44 (quoting 25 U.S.C. § 2710(d)(4)). The Tribe quotes *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164, 177 (1973), in stating that section 2710(d)(4) must be read to protect "tribal tax immunity from state encroachment" because "states have no 'residual power to impose such taxes in any event,' absent IGRA." See Tribe's Memorandum in Support, Doc. 75, at 43.

First and foremost, section 2710(d)(4) does not apply because, as stated above, the tax is imposed on the Contractor, not the Tribe or a person authorized by the Tribe "to engage in a class III activity." See State's SUMF, Doc. 65, #27; Complaint, Doc. 1, ¶ 63; 25 U.S.C. § 2710(d)(4). Illustrating this

point, the Ninth Circuit disregarded section 2710(d)(4)'s application when upholding a state tax on a non-Indian contractor's purchase of materials to be used to construct a casino. *Barona Band of Mission Indians v. Yee*, 528 F.3d 1184 (9th Cir. 2008). The Ninth Circuit held that section 2710(d)(4) did not apply because the tax was not imposed on the tribe. *Id.* at 1193 n.3. The same situation is presented here.

Nevertheless, contrary to the Tribe's assertion, section 2710(d)(4) is not an express preemption clause: "the failure to confer authority to tax [is not] a prohibition to tax." *Cabazon Band of Mission Indians v. Wilson*, 37 F.3d 430, 433 (9th Cir. 1994). The State does not rely on 2710(d)(4) as conferring authority to impose contractor's excise tax on the Contractor's construction services because it already has that authority under established federal law. See State's Memorandum in Support, Doc. 32, at 11-13. Nothing in section 2710(d)(4) eliminates that authority.

Even if section 2710(d)(4) is treated as an express preemption clause, it must be read in a manner "that disfavors pre-emption[.]" See *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005). Section 2710(d)(4)'s text limits its application to taxation of class III games. See *Mashantucket Pequot Tribe v. Town of Ledyard*, 722 F.3d 457, 469 (2d Cir. 2013) ("text of IGRA does not bar the [personal property] tax"). Section 2710(d)(4) specifies the activity the state cannot tax: "a class III gaming activity," which IGRA has defined to primarily include slot machines and card games. See 25 U.S.C. § 2703(8); 134 Cong. Rec. H8146 at H8153; *Bay Mills Indian Cmty.*, 134 S. Ct. 2024. Section

2710(d)(4) was not aimed at preempting a state tax on any activity within a casino; instead, it was tailored specifically to ensure states could not withhold compact negotiations by attempting to impose a tax on the gaming activity. Felix S. Cohen, *Cohen's Handbook of Federal Indian Law*, 12.05[2] (5th Ed. 2012).

Section 2710(d)(4) is a clear statement that IGRA did not intend to change taxation jurisdiction as Congress was not conferring any additional authority, beyond what already existed, to a state. Given the contractor's excise tax in this case is not imposed on the "class III activity" or even the Tribe, section 2710(d)(4) does not expressly preempt the tax on the Contractor's construction services.

Finally, the Tribe's reliance on *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164, 177 (1973), in stating that "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[,] is misleading, at best. See Tribe's Memorandum in Support, Doc. 75, at 43. *McClanahan* involved a state's "personal income tax on a reservation Indian whose entire income derive[d] from reservation sources." 411 U.S. at 165. Thus, the "such taxes" that states had no "residual power to impose" was a state tax imposed on an Indian. See *id.* at 177. Because of the markedly different facts in this case, in which the tax is imposed on the non-Indian Contractor, *McClanahan* fails to support the Tribe's position.

2. *IGRA does not impliedly preempt the contractor's excise tax.*

- a. The contractor's excise tax is not an encroachment on the regulation of Indian gaming.

The Tribe also argues that IGRA comprehensively regulates the field of gaming, and that the Contractor's construction services fall within that field, therefore leading to the implied preemption of the tax. See Tribe's Memorandum in Support at 34-37. The authority cited by the Tribe consistently recognizes that IGRA was aimed at the regulation of tribal gaming. See Tribe's Memorandum in Support, Doc. 75, at 34-37; see, e.g., *id.* at 34 (quoting *Bay Mills Indian Cmty*, 134 S. Ct. at 2028, in stating that "Congress enacted IGRA in October 1988, 'creat[ing] a framework for regulating gaming activity on Indian lands.'"); *id.* at 34-35 (quoting *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 48 (1996) in stating that "IGRA 'grants the States a power that they would not otherwise have, viz. some measure of authority over gaming on Indian lands.'"); *id.* at 35 (quoting *City of Duluth v. Fond du Lac Band of Lake Superior Chippewa*, 785 F.3d 1207, 1211 (8th Cir. 2015), "Congress indicated that its intent upon passing IGRA was 'to provide a statutory basis for the regulation of gaming . . ."); *id.* at 35 (quoting *Gaming Corp. of America v. Dorsey & Whitney*, 88 F.3d 536, 544 (8th Cir. 1996), in stating that "IGRA 'reveals a comprehensive regulatory structure for Indian gaming'"); *id.* at 36 (quoting S. Rep. No. 100-466, at 36 (1988), "This bill should be construed as an explicit preemption of the field of gaming in Indian Country.") (all emphases added).

Relying upon this authority, the Tribe's position appears to be that any activities occurring at a tribal casino involve the regulation of gaming and fall within IGRA's overall preemptive scope. See Tribe's Memorandum in Support, Doc. 75, at 34-37. However, this expansive view of IGRA's preemptive scope has been repeatedly rejected. "[C]ourts have been quick to dismiss challenges to generally-applicable laws with *de minimis* effects on a tribe's ability to regulate its gambling operations." *Mashantucket Pequot Tribe*, 722 F.3d at 469-70 (ruling that a generally-applicable state property tax on a non-Indian lessors' gaming equipment is not "preempted by IGRA's occupation of the 'governance of gaming' field" because "the state tax on property is not targeted at gaming"); see *Yee*, 528 F.3d at 1193 (determining that "IGRA's comprehensive regulation of Indian gaming does not occupy the field with respect to sales tax imposed on third-party purchases of equipment used to construct gaming facilities"); *Confederated Tribes of Siletz Indians v. State of Oregon*, 143 F.3d 481, 484, 487 (9th Cir. 1998) (ruling that the state was permitted to release a copy of a state gaming investigation report related to a tribal casino, and concluding that the state public record laws "do not seek to usurp tribal control over gaming nor do they threaten to undercut federal authority over Indian gaming[,] and therefore, were not preempted by IGRA"); *Casino Resource Corp. v. Harrah's Entertainment, Inc.*, 243 F.3d 435, 438-40 (8th Cir. 2001) (ruling that the termination of gaming management contracts with a tribe are not within IGRA's preemptive scope).

As pointed out in the State's Memorandum in Support, the tax on the non-Indian Contractor's construction services is outside IGRA's regulation of gaming activities. See State's Memorandum in Support, Doc. 32, at 14-19; 134 Cong. Rec. H8146 at H8155; *see also* 25 U.S.C. § 2703(8) (defining "class III gaming"); *Bay Mills Indian Cmty.*, 134 S. Ct. at 2032 (indicating that "class III gaming activity" is what goes on in a casino - each roll of the dice and spin of the wheel"); 134 Cong. Rec. H8146 at H8153 (gaming activities are "generally defined to be casino gaming and paramutuel betting"). The contractor's excise tax does not affect the Tribe's status as the primary beneficiary of the Casino. See State's SUMF, Doc. 65, #49, 50. The tax does not involve the actual play of the Class III games. See State's Memorandum in Support, Doc. 32, at 16. Further, the tax does not affect the Tribe's ability to ensure that "the gaming is conducted fairly and honestly." See 25 U.S.C. § 2702(2). And ultimately, IGRA was not intended to preempt a state's general taxation authority. See State's Memorandum in Support, Doc. 32, at 14-16.

- b. IGRA does not comprehensively regulate the Contractor's construction services related to the Casino.

Next, steering away from IGRA's general preemptive scope, the Tribe argues that the construction of the casino is specifically regulated through IGRA. See Tribe's Memorandum in Support, Doc. 75, at 37-38. The Tribe contends that "Congress specifically assigned to tribes the primary regulatory responsibility for 'the construction and maintenance of the gaming facility,' with oversight by the [National Indian Gaming Commission]." Tribe's

Memorandum in Support, Doc. 75, at 37. The Tribe's asserted federal comprehensive regulation of the Contractor's construction services is: 1) IGRA's requirement that the Tribe "enact and enforce³] 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"; 2) a National Indian Gaming Commission's (NIGC's) requirement that the Tribe must attest that the construction and maintenance of the facility meets that standard; 3) the NIGC's ability to inspect the Tribe's records relating to the Tribe's attestation; and 4) the NIGC's ability to impose a fine or close the Casino if it does not meet that standard. See Tribe's Memorandum in Support, Doc. 75, at 37-38. According to the Tribe, this regulation is "at least as comprehensively as federal law covered school construction in *Ramah*." Tribe's Memorandum in Support, Doc. 75, at 38.

But in *Ramah*, the federal regulations involved were much more extensive than those identified by the Tribe here. See *Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832, 839-842 (1982).

Interior had "promulgated detailed and comprehensive regulations respecting

³ The Tribe cites to 25 U.S.C. section 2710(b)(1) and 25 U.S.C. section 2710(b)(2)(E) to support its contention that IGRA requires the Tribe to both "enact and enforce Tribal laws that ensure the construction of the gaming facility is conducted in a manner which adequately protects the environment and the public health and safety." Tribe's Memorandum in Support, Doc. 75, at 37. However, the cited authority only touches upon the requirement that such tribal ordinance be enacted. See 25 U.S.C. §§ 2710(b)(1), 2710(b)(2)(E). It does not mention any requirement that the Tribe enforce any ordinance, nor is there any mention of how to ensure that the construction of the casino adequately protects the environment, public health, and safety. See *id.*

‘school construction for previously private schools now controlled and operated by tribes or tribally approved Indian organizations’ – which was precisely the taxed activity in that case. *Id.* at 840-41. And acting in accordance with those regulations, the federal government actively took part in the construction of the school in *Ramah*. *See id.* at 835, 840-41. But here, IGRA only requires a tribal ordinance and an attestation that the “tribe has determined that the construction and maintenance of the gaming facility, and the operation of that gaming, is conducted in a manner which adequately protects the environment and the public health and safety.” *See* 25 C.F.R. § 559.4. There is no regulation of the actual construction process. *See* 25 U.S.C. §§ 2710(b)(1), 2710(b)(2)(E); 25 C.F.R. § 559.4. Unlike the federal regulation in *Ramah*, neither the BIA nor the NIGC are involved in the Casino construction project in this case. *See* State’s Memorandum in Support, Doc. 32, at 25-26, 29.

Going one step further, there are no Tribal gaming ordinances or Tribal Gaming Commission rules or regulations setting forth any standards to ensure that “construction and maintenance of the gaming facility, and the operation of that gaming, is conducted in a manner which adequately protects the environment and the public health and safety.” *See* 25 C.F.R. § 559.4. *See* State’s SUMF, Doc. 65, #56, 57; *cf.* 25 C.F.R. § 559.4 (indicating that a tribe’s determination that the construction and maintenance of the gaming facility, and the operation of that gaming, is conducted in a manner which adequately protects the environment and the public health and safety . . . means that a 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[.]”). In attesting to the facility’s safety, the Tribal Gaming Commission does not review any reports relating to Indian Health Service inspections of the Casino. *See* State’s SUMF, Doc. 65, #61-63. Because the Tribal Gaming Commission does not receive or even request facility inspection reports when determining that the gaming facility is constructed, maintained, and operated “in a manner which adequately protects the environment and the public health and safety[.]” any federal regulation authorizing inspection of the tribal records reviewed is effectively irrelevant. *Compare* State’s SUMF, Doc. 65, #62, 63, *with* 25 C.F.R. § 559.6; *see* State’s Memorandum in Support, Doc. 32, at 26. The lack of federal regulation, as well as the lack of tribal regulation, is insufficient to support preemption of the contractor’s excise tax here.

- c. The State did not waive its right to impose the tax on the non-Indian Contractor by not including the topic in the Gaming Compact.

The Tribe also argues that “if a State wishes to have authority over any of [IGRA’s list of compactible subjects], the only way for it to obtain such authority is to negotiate for its inclusion in a compact.” *See* Tribe’s Memorandum in Support, Doc. 75, at 39. The Tribe contends that the Contractor’s construction services fall under two of the compactible topics: “standards for the . . . maintenance of the gaming facility, including licensing” and “any other subjects that are directly related to the operation of gaming activities.” Tribe’s Memorandum in Support, Doc. 75, at 39; 25 U.S.C. §

2710(d)(3)(C)(vi)-(vii). Along these lines, the Tribe points out that the Gaming Compact between the Flandreau Santee Sioux Tribe and the State of South Dakota (Gaming Compact) 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.’” Tribe’s Memorandum in Support, Doc. 75, at 41, 44 (quoting Gaming Compact, Doc. 1-1). According to the Tribe, because the Gaming Compact did not include a provision on the construction services “inherent in such a ‘significant expansion,’” the State has effectively waived any authority to impose its tax on the Contractor. See Tribe’s Memorandum in Support, Doc. 75, at 39, 44.

This argument must be rejected for the reasons set forth in the State’s Memorandum in Support. See State’s Memorandum in Support, Doc. 32, at 19-21. The Gaming Compact only controls activities to the extent it permits or prohibits those activities. See *Siletz*, 143 F.3d at 485. *Yee* confirms as much.

The compact in *Yee* touched upon construction standards and like here, contemplated that the casino would be undergoing construction. See Tribal-State gaming compact between the State of California and the Barona Band of Mission Indians, as found in Excerpts of Record, *Barona Band of Mission Indians v. Yee*, No. 06-55918 (9th Cir. filed Oct. 19, 2006), Doc. 33-1, at Sec. 6.4.2(b)-(d) (000028-000029), Sec. 10.2(c), (e) (000046-000047), Sec. 10.8.2(c) (000050); *Brief of Appellee Barona Band of Mission Indians, et al.*, No. 06-55918, 2006 WL 4012116, at 54-55 (9th Cir. filed Dec. 6, 2006), Doc. 33-2. However, the compact contained no provision regarding a tax on construction

materials. *See generally* Tribal-State gaming compact between the State of California and the Barona Band of Mission Indians, as found in Excerpts of Record, *Barona Band of Mission Indians v. Yee*, No. 06-55918 (9th Cir. filed Oct. 19, 2006), Doc. 33-1. The Ninth Circuit seemingly accorded no weight to the absence of such taxation provision by determining that the tax was “outside the scope of the compact” and IGRA did not preempt it. *See Yee*, 528 F.3d at 1193 & n.4.

Even so, the contractor’s excise tax does not fall within either compactible subject. The tax cannot even arguably be viewed as a “standard[] for the . . . maintenance of the gaming facility.” 25 U.S.C. § 2710(d)(3)(C)(vi). Moreover, as set forth in *Yee*, the tax⁴ is not a subject “directly related to the operation of gaming activities.” *See Yee*, 528 F.3d at 1193 n.4; 25 U.S.C. § 2710(d)(3)(C)(vii).

The Tribe urges this Court to apply a “but for” test to determine whether the Contractor’s construction services are “directly related to the operation of gaming activities.” *See* Tribe’s Memorandum in Support, Doc. 75, at 40-41; 25 U.S.C. § 2710(d)(3)(C)(vii). In other words, would the construction services

⁴ The Tribe incorrectly assumes that if the Contractor’s construction services fall within a compactible topic, the State’s taxation of the Contractor also falls within the compactible topic. This proposition is squarely rejected by *Yee*. *Compare* Tribal-State gaming compact between the State of California and the Barona Band of Mission Indians, as found in Excerpts of Record, *Barona Band of Mission Indians v. Yee*, No. 06-55918 (9th Cir. filed Oct. 19, 2006), Doc. 33-1 (compact containing provisions regarding construction standards) *with Yee*, 528 F.3d at 1193 n.4 (determining that the tax was “outside the scope of the compact.”).

occur but for the Tribe's gaming operation? See Tribe's Memorandum in Support, Doc. 75, at 41. However, this is the incorrect standard.

The Tribe cites to *In re Gaming Related Cases (Coyote Valley II)*, 331 F.3d 1094 (9th Cir. 2003) as support for its "but for" the existence of the casino test. Tribe's Memorandum in Support, Doc. 75, at 40. In *Coyote Valley II*, the court determined that a labor relations provision related to employees at the casino and related facilities was directly related to the operation because the jobs would not exist without the operation of class III gaming and the casino could not operate without the employees. 331 F.3d at 1116. But this provision was analyzed in the context of the tribe's claim that the state did not negotiate in good faith. "The good faith inquiry is nuanced and fact-specific, and is not amenable to bright-line rules." *Id.* at 1113. The "good faith inquiry" is not relevant here because there is no evidence that either party requested or denied a negotiation request regarding taxation of the construction services.

The Tribe's reliance on the recent decision of *Flandreau Santee Sioux Tribe v. Gerlach*, 269 F. Supp. 3d 910 (D.S.D. 2017) is also misplaced.⁵ In *Gerlach*, the district court acknowledged that to determine "whether certain subject matter falls within the scope of IGRA's catchall provision, it should not be simply asked 'but for the existence of the Tribe's class III gaming operation, would the particular subject regulated under a compact provision exist?'" *Id.*

⁵ The *Gerlach* decision is currently on appeal to the Eighth Circuit. See *Flandreau Santee Sioux Tribe v. Gerlach*, No. 18-1271 (8th Cir. Amended Notice of Appeal filed Feb. 20, 2018).

at 919 (quoting Letter from Donald E. Laverdure, Acting Assistant Secretary, Indian Affairs, to Greg Sarris, Chairman, Federated Indians of Graton Rancheria at 10 (July 13, 2012), filed as Doc. 42-1 in *Gerlach*). But, contrary to this acknowledgment, the district court then applied the “but for” standard, concluding that certain casino amenities such as a restaurant, hotel, and gift shop “fall within the purview” of the catchall provision because “but for the existence of the Casino,” the amenities “would not exist.” *Id.* at 925.

Importantly, other courts have not applied this “but for” test when holding IGRA does not preempt “gaming-adjacent” and “extra-peripheral” activities. Application of this test would have, in all likelihood, altered the rulings that IGRA’s preemptive scope did not include gaming management and service contracts (*Harrah’s Entertainment*, 243 F.3d 435), construction equipment used to build the casino (*Yee*, 528 F.3d 1184), investigative reports on the management of gaming (*Siletz*, 143 F.3d 481), and the leasing of slot machines, all of which would not have existed “but for the existence of the casino” and for which the casinos would not have been operational without. *See Mashantucket*, 722 F.3d 457. For these reasons, the silence of the Gaming Compact regarding the contractor’s excise tax does not justify preemption of the tax.

D. The State interests support the State’s authority to impose the contractor’s excise tax.

The Tribe argues that the State’s interests in this case do not support imposition of the contractor’s excise tax. *See* Tribe’s Memorandum in Support,

Doc. 75, at 31-34. The Tribe contends that the state has “no significant functions connected with the taxed activity” because “[t]he record contains evidence of State governmental services with only a tenuous connection, if any, to the project.”⁶ Tribe’s Memorandum in Support, Doc. 75, at 31-32. But the Tribe’s attempts to minimize the State’s interests must be rejected.

In support of preemption, the Tribe seeks to “count” the services it makes available. See Flandreau Santee Sioux Tribe’s Separate Statement of Undisputed Material Facts in Support of its Motion for Summary Judgment (Tribe’s SUMF), Doc. 68, #10, 11, 15-19, 27, 190, 265. However, when it comes to the State services that weigh in favor of the State’s tax, the Tribe contends that the State services that “count” are only those in which the State has documentation proving that the services were actually “accessed, utilized, or used” by the Contractor in relation to the Casino construction project. Compare Tribe’s Memorandum in Support, Doc. 75, at 32 (noting that “[t]he record contains evidence of State governmental services with only a tenuous connection, if any, to the project”) and January 31, 2018 Stipulation, Doc. 69-

⁶ The Tribe also contends that any State interest in the uniform application of State law is not sufficient to justify imposition of the contractor’s excise tax. See Tribe’s Memorandum in Support at 32-33. The State acknowledges that the unique federal test regarding the exemption of contractor’s excise tax for on-reservation construction projects performed by non-Indian contractors (referred to as the *Bracker* balancing test) requires each construction project to be analyzed on a case-by-case basis “to determine whether, in the specific context, the exercise of state authority would violate federal law.” *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144-45 (1980).

8, at 3.a, 3.b *with* “Services provided by the State of South Dakota agencies/departments with general funds,” Doc. 33-5.

The Tribe also seeks to limit the relevant State services to only those provided on-reservation. *See* Tribe’s Memorandum in Support, Doc. 75, at 30-31. However, the Tribe’s stance fails to acknowledge the United States Supreme Court’s more recent position on this matter. In *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989), the Supreme Court confirmed that “the relevant services provided by the State include those that are available to the [taxpayers] and the members of the Tribe off the reservation as well as on it.” *Id.* at 189. Finally, as noted in the State’s Memorandum in Support, Doc. 32, at 42-43, the Contractor’s shop is in Sioux Falls, 35 miles from the reservation, and pursuant to the building specifications, a number of items should be fabricated or preassembled ‘in the shop[s] to the greatest extent possible.’ *See* State’s SUMF, Doc. 65, #14; *see also* State’s SUMF, Doc. 65, #15-18. Any State services available to, or actually provided to, the Contractor at its shop while fabricating items for the Casino construction project would surely be services “closely connected to the taxed activity” even though those services are not provided on the Tribe’s reservation. *See* Tribe’s Memorandum in Support, Doc. 75, at 31.

The bottom line is that there are a substantial number of State services available to the Contractor both on and off the Tribe’s reservation, many of which relate to the Contractor or the Casino construction project. *See* State’s Memorandum in Support, Doc. 32, at 41-44. And the Contractor certainly may

be taking advantage of many of these State services, but because the State does not track all recipients of its services, there is no documentation of such. Compare State's Memorandum in Support, Doc. 32, at 41-44 *with* Tribe's Memorandum in Support, Doc. 75, at 32. Finally, even if the Contractor has not yet utilized certain State services, it has the opportunity to do so at any time. See State's SUMF, Doc. 65, #30, 83-86; "Services provided by the State of South Dakota agencies/departments with general funds", Doc. 33-5.⁷

II. The Tribe is not entitled to a refund of the taxes paid by the Contractor to the State.

The Tribe "requests a judgment directing the defendants to refund, with interest, all amounts collected by the State in excess of its lawful authority." Tribe's Memorandum in Support, Doc. 75, at 45. However, even if this Court were to rule that the contractor's excise tax is preempted, the Tribe is not entitled to a refund of the taxes paid by the Contractor.

⁷ The Tribe contends that "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. This tends to demonstrate these services do not create a particularly weighty interest when the State performs its own interest-balancing test." See Tribe's Memorandum in Support, Doc. 75, at 32 (internal citation omitted). However, the consistency in the State services only shows that the State interests regarding the taxation of construction projects generally remain static. The federal and tribal interests regarding each construction project fluctuate, which in turn, affects whether the project qualifies for the tax exemption under federal law. See, e.g., *Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832 (1982) (analyzing federal regulation over construction of tribal school).

A. *This Court has no jurisdiction to grant the Tribe's requested relief.*

First, the Tribe's motion for summary judgment as to its claim for refund must be denied because, as discussed in the State's Memorandum in Support, this Court has no jurisdiction to grant the Tribe's request that the named Defendants refund to the Tribe the taxes paid by the Contractor to the State. See State's Memorandum in Support, Doc. 32, at 6-11. Pursuant to the Eleventh Amendment, states are immune from suit in federal court unless the state chooses to waive that immunity. *Blatchford v. Native Vill. of Noatak & Circle Vill.*, 501 U.S. 775, 779 (1991). Generally, tribes may only seek prospective relief against state officials in federal court; tribes cannot seek monetary damages. See *Ex Parte Young*, 209 U.S. 123, 150, 154-56 (1908); *Blatchford*, 501 U.S. 775. Accord *U.S. ex rel. Cheyenne River Sioux Tribe v. State of S.D.*, 105 F.3d 1552, 1560 (8th Cir. 1997).

The Tribe quotes *U.S. ex rel. Cheyenne River Sioux Tribe v. State of S.D.*, 105 F.3d 1552 (8th Cir. 1997), in arguing that "the State must 'undo the unlawful deprivation by refunding the tax previously paid under duress.'" Tribe's Memorandum in Support at 44-45. But, as discussed in the State's Memorandum in Support, the Eighth Circuit in that case acknowledged that the Eleventh Amendment "bar[s] damage claims brought by Indian tribes against the state." *U.S. ex rel. Cheyenne River Sioux Tribe*, 105 F.3d at 1560. The only reason the court had jurisdiction regarding a refund in that case was because the suit was brought by the United States on behalf of the Cheyenne

River Sioux Tribe, rather than by the tribe itself. *Id.* (“The Eleventh Amendment does not bar suits brought by the United States on behalf of Indian tribes or their members[.]”).

The Tribe also cites *Ward v. Board of County Commissioners*, 253 U.S. 17 (1920), to support its claim to taxes paid by the Contractor. Tribe’s Memorandum in Support, Doc. 75, at 45. In *Ward*, the United States Supreme Court required a refund of property taxes paid by Indians for their allotments. *See* 253 U.S. at 18-19, 24. Importantly, *Ward* was before the United States Supreme Court on a writ of certiorari from the Supreme Court of the State of Oklahoma. 253 U.S. at 18. For this reason, the Eleventh Amendment was not in play. “[T]he Eleventh Amendment does not constrain the appellate jurisdiction of the [United States] Supreme Court over cases arising from state courts.” *McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco, Dep’t of Bus. Regulation of Florida*, 496 U.S. 18, 26-31 (1990); *see S. Cent. Bell Telephone Co. v. Alabama*, 526 U.S. 160, 166 (1999). *Cf. Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989); *Ramah Navajo Sch. Bd., Inc.*, 458 U.S. 832; *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980) (all originating in state courts)

Although states may waive their Eleventh Amendment immunity, the Tribe does not argue that such waiver is present for purposes of this case. *See* Tribe’s Memorandum in Support, Doc. 75, at 44-45. Rather, the Tribe only cites to SDCL 10-27-2 in contending that the Contractor followed the procedure established pursuant to state law. *See* Tribe’s Memorandum in

Support, Doc. 75, at 45. The Tribe asserts that the Contractor “timely paid the contractor’s excise tax incurred from the Casino project under protest, following the procedure prescribed by state law.” Tribe’s Memorandum in Support, Doc. 75, at 45.

However, SDCL 10-27-2 neither applies nor waives the State’s Eleventh Amendment immunity in this case. See State’s Memorandum in Support, Doc. 32, at 9-11. The Contractor’s avenue to request a refund of contractor’s excise tax is not through SDCL 10-27-2, the “payment under protest” statute. SDCL 10-27-1 provides: “[i]n any case in which, for any reason, it is claimed that any tax about to be collected is wrongful or illegal, in whole or in part, the remedy, except as otherwise expressly provided by this code,” is through SDCL 10-27-2’s payment under protest process. For contractor’s excise tax refund requests, the South Dakota Codified Laws expressly provide that the claims be made through SDCL chapter 10-59. See SDCL 10-59-1, 10-59-19 through 10-59-24. Moreover, nothing in SDCL 10-27-2 indicates that the State waived its Eleventh Amendment immunity. See State’s Memorandum in Support, Doc. 32, at 10. Therefore, SDCL 10-27-2 offers no support that the Tribe is entitled to a refund of contractor’s excise taxes paid by the Contractor to the State.

B. The Tribe has not met its burden of proving that it is entitled to a refund of the claimed amount.

Regardless of this Court’s lack of jurisdiction over the Tribe’s claim for refund, the Tribe has not established the amount of contractor’s excise tax that it would be owed if this Court determines the tax was invalid. The Tribe asserts that “[t]o date, the State has collected \$120,266.60 in contractor’s

excise tax on this project[.]” Tribe’s Memorandum in Support, Doc. 75, at 16. However, this amount is contrary to the record.

The total amount of tax remitted by the Contractor that the Contractor claims is related to the Casino construction project is \$66,559.18, not \$120,266.60 as asserted by the Tribe. *Compare* Affidavit of Doug Schinkel, ¶¶ 6-12, *and* Exhibit 1 to Affidavit of Doug Schinkel *with* Tribe’s SUMF, #254-255, Doc. 68. And importantly, according to the Contractor, the claimed amount of \$66,559.18 includes “contractor’s excise tax and/or use tax.” *See* Affidavit of Doug Schinkel, ¶8; Exhibit 1 to Affidavit of Doug Schinkel (emphasis added). But in this suit, the Tribe is only challenging the state’s imposition of contractor’s excise tax on the Contractor’s gross receipts for construction services performed. The Tribe has not challenged the imposition of the use tax on the contractor’s use of materials. *See generally* Complaint, Doc. 1; *see also supra* at 3-4. *Cf.* Tribe’s Memorandum in Support, Doc. 75, at 43 (“*Not* at issue [in this case] is the State *sales* tax imposed on the contractors’ purchase of materials from their vendors – those taxes are not challenged in this case.”) (emphases in original). Considering these two discrepancies, the Tribe has not met its summary judgment burden of proving that it is entitled to a refund of any amount paid by the Contractor.

CONCLUSION

The Tribe has failed to establish that, as a matter of law, the State tax on the non-Indian Contractor’s construction services is preempted. Moreover, this

Court has no jurisdiction over the Tribe's request for taxes paid by the Contractor. Therefore, the Tribe's Motion must be denied in its entirety.

Request for Oral Argument

The State respectfully requests oral argument on this Motion.

Dated this 27th day of April, 2018.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I certify that the Memorandum in Opposition to Plaintiff's Motion for Summary Judgment is within the word limitation 9,152 words, using Bookman Old Style typeface in 12 point type.

2. I certify that the word processing software used to prepare this brief is Microsoft Word 2010.

/s/ Stacy R. Hegge
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Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that on April 27, 2018, I electronically filed *Defendants' Memorandum in Opposition of Plaintiff's Motion for Summary Judgment* with the Clerk of the Court for the United States District Court for the Southern Division by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

/s/ Stacy R. Hegge
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