

**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

**PLAINTIFF FLANDREAU SANTEE
SIOUX TRIBE'S MEMORANDUM IN
OPPOSITION TO STATE DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT**

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INTRODUCTION

Plaintiff Flandreau Santee Sioux Tribe (“Tribe”) opposes the motion for summary judgment by the defendant State officials (“State”) on the Tribe’s first three claims for relief. The State’s imposition of contractor’s excise tax on the Tribe’s Casino construction project is preempted by the Indian Gaming Regulatory Act (“IGRA”), by the Indian Trader Statutes, and under the *Bracker* balancing test. In view of the State’s assertion in this Court of its Eleventh Amendment immunity from its constitutional obligation to return unlawfully collected taxes, the Tribe does not oppose the State’s request to dismiss the Tribe’s fourth claim for lack of jurisdiction.

UNDISPUTED MATERIAL FACTS

The Tribe submits with this brief a response to the State’s statement of material facts in accordance with Local Rule 56.1(B).

ARGUMENT

I. Federal law preempts and prohibits the imposition of State contractor’s excise tax on the Tribe’s Casino construction project.

Under decades of Supreme Court precedent, a nonmember engaged in commerce with an Indian tribe on the tribe’s reservation is not subject to state taxation unless Congress expressly authorizes it, or the state shows that its intrusion into Indian commerce is justified by relevant state interests that outweigh the interference with established federal and tribal interests.

Wagon v. Prairie Band Potawatomi Nation, 546 U.S. 95, 110-11 (2005); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983) (“*Mescalero*”); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144-45 (1980) (“*Bracker*”). The State’s interests in this case are insufficient.

With respect to tribal gaming activities governed by IGRA, Congress weighed the competing interests and enacted the resulting framework for allocating regulatory and taxing authority among federal, tribal and state governments. *Gaming Corp. of Am. v. Dorsey & Whitney*, 88 F.3d 536, 546-47 (8th Cir. 1996). Under IGRA's framework, except for certain limited taxes agreed to in a tribal-state gaming compact, the State cannot tax the Tribal Casino or commerce related to gaming at the Casino, including this construction project. 25 U.S.C. § 2710(d)(4). Where IGRA prohibits state taxation, the result is ordained by Congress, and no new balancing of interests is permitted. *Gaming Corp.* at 547.

The Indian Trader Statutes, simply through their existence, preempt the on-reservation imposition of state taxes upon Indian traders for trading with Indians in Indian country. *Dep't of Tax. and Fin. v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 74 (1994) ("*Milhelm Attea*"); *Central Machinery Co. v. Arizona State Tax Comm'n*, 448 U.S. 160, 165-66 (1980); *Warren Trading Post Co. v. Arizona State Tax Comm'n*, 380 U.S. 685, 691 (1965). They, too, preempt the State tax on the Casino construction project.

A. Principles of federal preemption of state taxes imposed within Indian country.

While it is true that there is "no categorical bar" to state taxes falling on non-Indians in Indian country, *see* Doc. 32 at 11, state assertions of authority over Indians, and over non-Indians engaged in commerce with Indians in Indian country, are presumptively preempted. The State therefore misstates the law when it says, "Generally, a state may tax nonmembers' on-reservation activities." Doc. 32 at 11. Instead, only "under certain circumstances" may a state "validly assert authority over the activities of nonmembers on a reservation." *Mescalero*, 462 U.S. at 331. "[S]uch authority may be asserted only if not preempted by the operation of federal law." *Id.* at 333.

“Preemption” in this context is applied in a “special sense,” founded on the “‘unique historical origins of tribal sovereignty’ and the federal commitment to tribal self-sufficiency and self-determination[.]” *Mescalero* at 333-34 (quoting *Bracker* at 143). “The question whether federal law, which reflects the related federal and tribal interests, pre-empts the State’s exercise of its regulatory authority is not controlled by standards of preemption developed in other areas.” *Ramah Navajo School Bd., Inc. v. Bureau of Revenue*, 458 U.S. 832, 838 (1982). “Instead, the traditional notions of tribal sovereignty, and the recognition and encouragement of this sovereignty in congressional Acts promoting tribal independence and economic development, inform the pre-emption analysis that governs this inquiry.” *Id.*

The State’s reliance on cases not involving preemption in Indian country is therefore misplaced. *See* Doc. 32 at 13, 14, 15 (citing *Altria Group, Inc. v. Good*, 555 U.S. 70 (2008); *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141 (1989); *Wyeth v. Levine*, 555 U.S. 555 (2009)). These cases speak of a “presumption against preemption,” as does the State, Doc. 32 at 13, “[b]ut the opposite presumption prevails in Indian law because the policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation’s history, a policy continuously recognized in the Supreme Court’s Indian law jurisprudence, beginning with *Worcester v. Georgia*.” Cohen’s Handbook of Federal Indian Law § 6.03[2][a], at 519 (Newton, ed., 2012) (“Cohen”) (footnotes and internal quotation marks omitted).

“Absent explicit congressional direction to the contrary, we presume against a State’s having the jurisdiction to tax within Indian country[.]” *Okla. Tax Comm’n v. Sac and Fox Nation*, 508 U.S. 114, 128 (1993). “The presumption of preemption derives from the rule against construing legislation to repeal by implication some aspect of tribal self-government.” *Rice v. Rehner*, 463 U.S. 713, 726 (1983); *see Indian Country, U.S.A., Inc. v. State of Okla.*, 829 F.2d

967, 976 (10th Cir. 1987); *compare Wyeth*, 555 U.S. at 565 fn.3 (typical “presumption against pre-emption” arises from “respect for the States as ‘independent sovereigns in our federal system’ and resulting assumption “that ‘Congress does not cavalierly pre-empt state-law causes of action’”). Contrary to the general rule that “the purpose of Congress is the ultimate touchstone in every pre-emption case,” *Altria*, 555 U.S. at 76 (*see* Doc. 32 at 21), *Mescalero* held that, in cases involving the clash of state authority and tribal self-government in Indian country, “[b]y resting preemption analysis principally on a consideration of the nature of the competing interests at stake, our cases have rejected a narrow focus on congressional intent to preempt State law as the sole touchstone.” *Mescalero* 462 U.S. at 334.

Bracker observed that Congress’ broad constitutional power to regulate tribal affairs and the position of Indian tribes as “a separate people” “have given rise to two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members. First, the exercise of such authority may be pre-empted by federal law. ... Second, it may unlawfully infringe ‘on the right of reservation Indians to make their own laws and be ruled by them.’” *Bracker* at 142 (quoting *Williams v. Lee*, 358 U.S. 217, 220 (1959).) Either of the two barriers “can be a sufficient basis for holding state law inapplicable to activity undertaken on the reservation[.]” *Id.* at 143. A state’s lack of authority to impose taxes in Indian country persists unless it can overcome these two “barriers.” *Id.* at 142.

These dual barriers to state authority embody the “basic policy of *Worcester*,” that the “‘laws of [the state] can have no force’” in Indian country. *Williams*, 358 U.S. at 219 (quoting *Worcester v. Georgia*, 31 U.S. 515, 561 (1832)); *see* Cohen § 6.03[2][a], at 518 & 2015 Supp. at 19. *Williams* explained that over the years, the Court had “modified” *Worcester*’s broad principles “in cases where essential tribal relations were not involved and where the rights of

Indians would not be jeopardized,” but continued to apply them where Indian rights *would* be jeopardized. *Williams* at 219-20.

Congress, too, has “acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation,” encouraging stronger tribal governments and permitting willing States to assume jurisdiction over reservation Indians only when that could be done “without disadvantage to them.” *Williams* at 220-21. “Significantly, when Congress has wished the States to exercise this power it has expressly granted them the jurisdiction which *Worcester* ... had denied.” *Id.* at 221.

When a state tax falls on a non-Indian in Indian country and Congress has not expressly allowed (or prohibited) the tax, the Court uses “*Bracker* balancing” to determine whether the state can overcome the presumption by demonstrating that the taxation advances the state’s legitimate interests while not unduly burdening those of the tribe and the federal government. *Bracker*, 448 U.S. at 150-51. It is a “particularized inquiry into the nature of the state, federal, and tribal interests at stake[.]” *Id.* at 145. The inquiry examines “relevant federal treaties and statutes in terms of both the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence.” *Id.* at 144-45. It also weighs “any applicable regulatory interest of the State,” *id.* at 144, identified in *Bracker* as “government functions [the state] performs for those on whom the taxes fall,” or “a legitimate regulatory interest served by the taxes [the state] seek[s] to impose,” *id.* at 150. A “general desire to raise revenue” alone is insufficient. *Id.*

In *Bracker*, the Court struck down two state taxes imposed on a non-Indian logging company working on-reservation for a tribal enterprise. *Bracker* at 137-40. In *Ramah*, federal law preempted a state gross receipts tax imposed on a non-Indian construction company for its

on-reservation construction of a tribal school. *Ramah*, 458 U.S. at 834. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), held that state regulation of a tribal casino and its non-Indian customers was preempted “by the operation of federal law,” viewed “in light of traditional notions of Indian sovereignty and the congressional goal of Indian self-government, including its ‘overriding goal’ of encouraging tribal self-sufficiency and economic development.” *Id.* at 216 (quoting *Mescalero* at 335). In *Mescalero*, the Court explained that “when a tribe undertakes an enterprise under the authority of federal law, an assertion of State authority must be viewed against any interference with the successful accomplishment of the federal purpose.” 462 U.S. at 336.

The Eighth Circuit has applied the *Bracker* balancing test to preempt South Dakota’s motor fuel tax on fuel purchased by a tribal school board. *Marty Indian School Bd., Inc. v. South Dakota*, 824 F.2d 684, 688 (8th Cir. 1987). The Eighth Circuit has also relied on the *Bracker* line of decisions, especially *Cabazon*, to find that IGRA has the “extraordinary preemptive force” necessary to convert a state law claim into a federal cause of action. *Gaming Corp.*, 88 F.3d at 546-48.

1. Relevant federal and tribal interests.

“Certain broad considerations guide [the] assessment of the federal and tribal interests. The traditional notions of Indian sovereignty provide a crucial ‘backdrop,’ ... against which any assertion of State authority must be assessed.” *Mescalero* at 334. “[N]umerous federal statutes” embody the “goal of promoting tribal self-government,” which “encompasses far more” than internal tribal matters, “but includes Congress’ overriding goal of encouraging ‘tribal self-sufficiency and economic development.’” *Id.* at 335 (quoting *Bracker* at 143).

The “broad federal commitment” to tribal self-government necessarily implicates tribal “power to manage the use of its territory and resources by both members and nonmembers, ... to

undertake and regulate economic activity within the reservation, ... and to defray the cost of governmental services by levying taxes.” *Mescalero* at 335-36. That is, the Tribe has an important interest in acting as a functioning government, with the authority and responsibilities of a sovereign over its territory and the people within it. Tribes have exceptionally strong economic and governmental interests in being free from state taxes upon the value the tribes generate on their reservations through activities in which they have a substantial interest. *Cabazon* at 219-20; *Mescalero* at 341. As the Senate Indian Affairs Committee noted in its report on IGRA,

A tribe’s governmental interests include raising revenues to provide governmental services for the benefit of the tribal community and reservation residents, promoting public safety as well as law and order on tribal lands, realizing the objectives of economic self-sufficiency and Indian self-determination, and regulating activities of persons within its jurisdictional borders.

S.Rep. No. 100-446, at 14 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3083.

The State attempts to minimize the importance of tribal self-government because the tax’s legal incidence falls upon a non-Indian. Doc. 32 at 37. However, the tax is imposed upon the contractor’s gross receipts earned from and paid by the Tribe, for work on the Tribe’s Casino, such that the ultimate burden falls upon the Tribe, and the location of the incidence of the tax is the Tribe’s reservation. Tribe’s SUMF 199-203, 223-224, 254, 256-257. As the Supreme Court noted, “It must be remembered that cases applying the *Williams* test [now incorporated into the *Bracker* analysis] have dealt principally with situations involving non-Indians.” *McClanahan v. State Tax Comm’n*, 411 U.S. 164, 179 (1973). A key point of *Williams* is the Court’s recognition that the “exercise of state jurisdiction ... would undermine the authority of the tribal [government] over Reservation affairs and hence would infringe on the right of the Indians to govern themselves,” even when one party is not an Indian. *Williams* at 223. “It is immaterial that respondent is not an Indian,” the Court stated. *Id.* “He was on the Reservation and the

transaction with an Indian took place there.” *Id.* “[T]he authority of Indian governments over their reservations” includes authority over interactions between tribal members and nonmembers. *Id.*

Colville did not “signal[]” otherwise. *See* Doc. 32 at 37 (citing *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 161 (1980) (“*Colville*”). In the passage the State cites, *Colville* merely held that nonmember Indian residents “stand on the same footing as non-Indians resident on the reservation.” *Colville* at 161. This conclusion was not part of the Court’s preemption analysis, however. The Court had already upheld the state cigarette tax imposed on non-Indians due to the unique factors of the tribes’ business model. *See Colville* at 155-57; *see infra* at § I.A.3. This business model – marketing “solely an exemption from state taxation,” *id.* at 155 – is what diminished the relevance of the tribes’ interest in self-government within their reservations, not the non-Indian (or non-member) status of the taxpayers alone. To the contrary, *Colville* confirmed that a “fundamental attribute of sovereignty” possessed by Indian tribes is their “civil jurisdiction over the activities of non-Indians on Indian reservation lands in which the Indians have a significant interest[.]” *Colville* at 152-53. **Every** *Bracker* balancing case arises “where ‘a State asserts authority over the conduct of *non-Indians* engaging in activity on the reservation.’” *Wagnon*, 546 U.S. at 99 (quoting *Bracker* at 144) (emphasis added). The tribal interests are no less important in this case than in any other *Bracker* balancing case.

2. Relevant state interests.

As for the State’s interest, “[t]he 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*. ... Thus a State seeking to impose a tax on a transaction between a Tribe and nonmembers must point to more than its general interest in

raising revenues.” *Mescalero* at 336 (emphasis added). The State’s reliance on *all* the conceivable services that might be available to contractors and “other entities,” whether on or off the Reservation, and whether related to the Casino construction project or not, is contrary to the law. *See* Doc. 32 at 41-44; Tribe’s SUMF 281-282, 285-309.

Ramah explained that the “relevant” state interest was “[t]he State’s interest in exercising its regulatory authority over the activity in question[.]” *Id.* at 837-38. *Ramah* held that New Mexico’s interests were insufficient because the state did “not seek to assess its tax in return for the governmental functions it provides to those who must bear the burden of paying this tax.” *Ramah* at 843. When it referred to “those who must bear the burden,” the Court meant the tribal organization, which bore the ultimate economic burden of the tax. *Id.* at 843-44 & fn.7&8. The Court expressly distinguished state functions and services provided off-reservation to Lembke, the non-Indian contractor, and presumed that “the state tax revenues derived from Lembke’s off-reservation business activities are adequate to reimburse the State for the services it provides to Lembke.” *Id.* at 843-44 & fn.9.

Likewise, the Eighth Circuit found that South Dakota’s interests did not justify imposing fuel tax on a tribal school’s reservation fuel purchases, where revenues from the state tax were not used to directly benefit the students or to promote tribal self-sufficiency. *Marty*, 824 F.2d at 688. The State’s off-reservation “construction and maintenance of roads in the reservation area” was funded by off-reservation sources, including off-reservation fuel taxes the school paid. *Id.*; *cf.* Tribe’s SUMF 15-28.

Similarly, in *Hoopa Valley Tribe v. Nevins*, 881 F.2d 657 (9th Cir. 1989), the Ninth Circuit held that general state services provided to “residents of the reservation and the surrounding area,” none of them “connected with the timber activities directly affected by the

tax,” were insufficient to justify the state’s timber yield tax. *Id.* at 661. “To be valid, the California tax must bear some relationship to the activity being taxed.” *Id.* The Eleventh Circuit held that even state services provided on-reservation did not justify a state rental tax, because “none of these services are tied to the business of renting commercial property on Indian land.” *Seminole Tribe of Florida v. Stranburg*, 799 F.3d 1324, 1341-42 (11th Cir. 2015). *Stranburg* explained that state governmental services may justify an on-reservation tax only where “the tax was clearly and critically connected to the services rendered.” *Id.* at 1342.

3. Supreme Court decisions that permit state taxation of non-Indians engaged in on-reservation commerce with Indians are factually distinguishable from this case.

Absent an act of Congress authorizing the state tax, the only cases in which the Supreme Court has approved state taxation of nonmembers engaged in on-reservation commerce with Indians are those involving the unique business model of high-volume tax-free retail cigarette sales. *Milhelm Attea*, 512 U.S. at 73-74; *Cal. State Bd. of Equalization v. Chemehuevi Indian Tribe*, 474 U.S. 9, 12 (1985); *Colville*, 447 U.S. at 155-57; *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 481-82 (1976). In these cases, the Court concluded that the tribal cigarette sellers were in business *only* because they offered off-reservation customers “an exemption from state taxation.” *Colville* at 155; *see Moe* at 482. The state tax in these cases was “directed at off-reservation value,” i.e., the sales which the Court found “would otherwise” have occurred outside of Indian country. *Colville* at 157. The Court permits states to tax these transactions because their value arises off-reservation, where states have nearly unfettered taxing power. *Wagon*, 546 U.S. at 99. Along with *Cotton Petroleum Corp. v. New Mexico*, 490 U.S.

163 (1989), these are the Supreme Court’s Indian law decisions upon which the State principally relies.¹

In *Cotton*, the Court permitted New Mexico to impose a severance tax on a non-Indian company that leased tribal land for oil and gas production, in part because the Court deduced that Congress had first expressly permitted such state taxation, then, without repealing the earlier express permission, intended to continue to allow such taxation even as its new legislation did not contain express permission. *Cotton* at 180-83. *Cotton* sketched the rise and fall of the intergovernmental tax immunity doctrine,² then analyzed a succession of federal acts governing mineral leases on Indian reservations in light of that history. *Id.* at 173-83. The Court deployed a truncated interest-balancing analysis to determine whether the balance of interests was inconsistent with the otherwise evident congressional “intent to permit state taxation.” *See id.* at 183-87. Notably, this analysis did not mention reservation-generated value (which had been important just two years earlier in *Cabazon*, 480 U.S. at 219-20), or refer to any tribal and federal interests in Indian self-government or self-sufficiency, because the Court had determined the typical “backdrop” of “traditional notions of Indian self-government,” *Bracker* at 143, was replaced in this case with a backdrop of *no* independence from state taxation, since “state taxation of nonmember oil and gas lessees was the norm from the very start.” *Cotton* at 182; *id.* at 187 (distinguishing *Bracker* and *Ramah*).

¹ The State also relies on lower court decisions allowing on-reservation state taxation of non-Indians, none of which involve non-Indians’ on-reservation commerce with Indians. These are addressed below.

² This doctrine, which requires affirmative preemption of state taxes imposed on private entities doing business with the United States, has been kept distinct from the Indian tax immunity doctrine, in which preemption is presumed. *McClanahan*, 411 U.S. at 169-73 & fn.5. The Court has rejected efforts to apply it in Indian contexts. *Ramah*, 458 U.S. at 855-57 & fn.6 (Rehnquist, J., dissenting); *Bracker* 448 U.S. at 158-59 (Stevens, J., dissenting); *Colville*, 447 U.S. at 185-86 & fn.9 & 11 (Rehnquist, J., concurring and dissenting).

Further distinguishing *Cotton*, there the state provided “substantial services to both the Jicarilla Tribe and Cotton, costing the State approximately \$3 million per year.” *Cotton* at 185 (internal quotation marks omitted). These services were on-reservation and directly connected to the taxed commerce. *Id.* at 171 fn.7, 185-86. Further, the lower court had found that “no economic burden falls on the tribe by virtue of the state taxes, ... and that the Tribe could, in fact, increase its taxes without adversely affecting on-reservation oil and gas development.” *Id.* at 185 (internal quotation marks omitted). Given these distinct facts, the balance of interests did not undermine the Court’s conclusion that Congress intended to permit state taxation.

Cotton did not signal a departure from decisions like *Bracker*. Three months after *Cotton*, the Ninth Circuit wrote that the decision “reaffirmed the basic principles of [*Bracker*] and *Ramah*.” *Hoopa Valley*, 881 F.2d at 660. The Supreme Court itself subsequently reaffirmed these principles in *Milhelm Attea*, 512 U.S. at 73, and *Wagnon*, 546 U.S. at 99. For “on-reservation transactions between a nontribal entity and a tribe or tribal member,” the Court continues to analyze questions of preemption using its “unique Indian tax immunity jurisprudence,” relying on the “backdrop” of tribal sovereignty and “revers[ing] the general rule that exemptions from tax laws should be clearly expressed.” *Wagnon* at 112 (internal quotation marks and Court’s alterations omitted).

B. IGRA preemptively governs the field of Indian gaming, including matters related to Indian gaming and State taxation of such matters.

1. Congress enacted IGRA to establish and protect tribal casinos as a source of tribal government revenue.

IGRA “extends to the States a power withheld from them by the Constitution.” *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 58 (1996). Those powers not extended to the states remain withheld from them. For all matters within IGRA’s preemptive scope, the lack of authority in the states exists not as a nebulous constitutional principle dependent on the strength

of state interests, but as the result of statutory preemption. Congress, having considered the states' interests, allowed states to obtain certain powers by specific means, and prohibited any other state involvement in the field. *Gaming Corp.*, 88 F.3d at 546-47.

IGRA “should be construed as an explicit preemption of the field of gaming in Indian country.” S.Rep. No. 100-446 at 36. “Congress intended [IGRA to] completely preempt state law.” *Gaming Corp.*, 88 F.3d at 544; *see Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians*, 63 F.3d 1030, 1033 (11th Cir. 1995). “Congress thus left states with no regulatory role over gaming except as expressly authorized by IGRA, and under it, the only method by which a state can apply its general civil laws to gaming is through a tribal-state compact.” *Gaming Corp.* at 546. The sole question is whether the Casino construction project, or the State's taxation of it, are within IGRA's preemptive scope.

The “core principles underlying the IGRA ... 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). Central to these underlying principles are “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[.]” *Id.* Congress developed IGRA's structure – a three-way division of jurisdiction over tribal casinos – against the backdrop of these core principles with intent to reinforce them. Congress also expressly identified the purposes of IGRA's extensive statutory framework, including: “to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments,” 25 U.S.C. § 2702(1), “to provide a statutory basis for the regulation of gaming by an Indian tribe” for reasons including ensuring “that that the Indian tribe is the primary beneficiary of the gaming operation,”

25 U.S.C. § 2702(2), and to establish federal controls “to protect such gaming as a means of generating tribal revenue.” 25 U.S.C. § 2702(3). *See City of Duluth v. Fond du Lac Band of Lake Superior Chippewa*, 785 F.3d 1207, 1211 (8th Cir. 2015). “[N]one of the purposes outlined in § 2702 includes the State’s general economic interests.” *Rincon Band of Luiseño Mission Indians v. Schwarzenegger*, 602 F.3d 1019, 1034 (9th Cir. 2010).

The State ignores the content of IGRA’s stated purposes in favor of underlining each instance the word *gaming* appears in § 2702. *See* Doc. 32 at 16. But the statutory language makes clear that one of IGRA’s major interests is generating tribal revenue. The State insists IGRA allows the tax because the Tribe would remain the Casino’s “primary beneficiary,” but even if the Tribe still retains the greater share of the Casino revenue, the State nevertheless makes itself a “primary” beneficiary by taxing the Casino, in that it is a “direct” beneficiary or “first in order of time or development.”³ Furthermore, directing hundreds of thousands of dollars away from the Tribe is directly contrary to IGRA’s goals of promoting tribal economic development, tribal self-sufficiency and strong tribal government. *See City of Duluth v. Fond du Lac Band of Lake Superior Chippewa*, No. 09-cv-2668(SRN/LIB), 2015 WL 4545302, *5 (July 28, 2015); *see also* Tribe’s SUMF 260-272.

In pursuit of Congress’ stated interests, IGRA extensively regulates tribal casinos. Hundreds of detailed federal regulations promulgated pursuant to IGRA govern tribal casinos. 25 C.F.R. §§ 501.1-585.7; 290.1-293.16. IGRA’s fundamental and most pervasive form of regulatory control, though, is the tripartite jurisdictional framework, which assigns most aspects of tribal gaming operations to tribal authority, allows for state authority with respect to gaming-related subjects through a negotiated compact, and provides federal oversight over the entire

³ *See* Merriam-Webster, <https://www.merriam-webster.com/dictionary/primary>, 1, 3.

field. *See* 25 U.S.C. § 2710; *Gaming Corp.*, 88 F.3d at 546. The framework functions as intended only because it is erected in a field emptied of underlying state authority, both by judicial decisions founded on the tribal right to self-government, and by Congress itself.

2. IGRA prohibits states from taxing gaming-related matters unless such authority is acquired through a tribal-state gaming compact.

“Tribal-state compacts are at the core of the scheme Congress developed to balance the interests of the federal government, the states, and the tribes.” *Gaming Corp.*, 88 F.3d at 546. “Congress did not intend to transfer any jurisdictional or regulatory power to the states by means of IGRA unless a tribe consented to such a transfer in a tribal-state compact.” *Id.* at 545.

A gaming compact “may include provisions relating to” the subjects listed in 25 U.S.C. § 2710(d)(3)(C). “IGRA limits permissible subjects of negotiation in order to ensure that tribal-state compacts cover only those topics that are related to gaming and are consistent with IGRA’s stated purposes[.]” *Rincon*, 602 F.3d at 1028-29 (footnotes omitted). The list of subjects is *permissive* in that a compact is not required to address every subject listed, but it is *mandatory* in that, if a tribe requests negotiation on any of those subjects, the state “shall” negotiate in good faith on the requested subjects. 25 U.S.C. § 2710(d)(3)(A); *see Rincon* at 1030. Further, if a state wishes to have authority over any gaming-related subject, it is *mandatory* that such authority be found in a valid gaming compact. *Gaming Corp.* at 544-47. The compacting provisions, like IGRA as a whole, address gaming and gaming-related matters.

The State claims “Congress did not intend to preempt the general State taxation framework,” but instead intended to subject tribal casinos to state taxation, based on excerpts of

the legislative history and caselaw not involving federal Indian law. Doc. 32 at 14-15.⁴

Undoubtedly, IGRA applies to “the field of gaming in Indian Country,” and the legislators quoted by the State were stating that by establishing a compacting methodology for states to acquire authority within that field, IGRA did not also “establish a precedent” for states to acquire authority “in other areas” such as “taxation.” *See* Doc. 32 at 14, 15 (quoting 134 Cong. Rec. S12643-01). “On the contrary,” the Senator’s statement continues, “the tribal power to regulate such activities, recognized by the U.S. Supreme Court ... remain[s] fully intact.” 134 Cong. Rec. S12643-01. The limited permission given to states to intrude into certain matters that are usually in the exclusive domain of tribal government, and the continued exclusion of state authority over all other areas, illustrate Congress’ desire to prevent “the subjugation of tribal governments to state authority.” Doc. 32 at 15 (quoting 134 Cong. Rec. S12643-01). Rather than supporting the existence of state authority, the legislative history denies it. Furthermore, nothing in these excerpts supports the proposition that the “field of gaming” is so limited that it does not encompass the construction and renovation of the casino itself, or that Congress intended to allow states to exploit the tribes’ on-reservation activities involved in the operation of gaming to gain an economic benefit from tribal casinos for themselves.

IGRA expressly allows state taxation at tribal casinos, subject to specific limitations, and prohibits states from imposing any other such taxes. Gaming compacts may include provisions relating to “the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity.” 25 U.S.C. § 2710(d)(3)(C)(iii). IGRA further provides:

⁴ The State cites *Barona Band of Mission Indians v. Yee*, 528 F.3d 1184, 1194 (9th Cir. 2008), which is an Indian tax case, but the citation seems to be erroneous. *See* Doc. 32 at 15. *Barona* does not discuss “the presumption against preemption” at page 1194 or elsewhere.

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

25 U.S.C. § 2710(d)(4).

Accordingly, under IGRA, the Tribe or State may require one another to negotiate for State taxes on gaming activities only as necessary to defray the State's regulatory costs.

Otherwise, the State has no authority to "impose" taxes on the Tribe or any person the Tribe authorizes to engage in gaming – not through a gaming compact, because IGRA expressly prohibits that, and not otherwise, because IGRA channels all possible state authority over tribal gaming operations through gaming compacts. *See Gaming Corp.*, 88 F.3d at 547. Section 2710(d)(4) constitutes an express prohibition of state taxes imposed on tribal gaming and related activities.

This interpretation is consistent with the obligation to construe IGRA liberally in favor of tribal interests and the Act's express purposes, and in light of the background against which it was enacted. *See McClanahan*, 411 U.S. at 177 ("it should be obvious that Congress would not have jealously protected the immunity of reservation Indians from state income taxes had it thought that the States had residual power to impose such taxes in any event"); *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655, 658-59 (9th Cir. 1975) (a federal statute, "by defining the limits of the jurisdiction granted [to states], necessarily preempts and reserves to the Federal government or the tribe jurisdiction not so granted").

In a superficial statutory construction of § 2710(d)(4), the Ninth Circuit has stated that "the failure to confer authority to tax" was not "a prohibition to tax." *Cabazon Band of Mission*

Indians v. Wilson, 37 F.3d 430, 433 (9th Cir. 1994). Contrary to usual rules of statutory construction, *Wilson* interpreted the first sentence of § 2710(d)(4) in isolation, separated from its immediate statutory context – both the balance of § 2710 (to which the sentence refers), and the second sentence of the provision, in which the gaming compact framework expressly relies on “*the lack of authority* in such State ... to impose such a tax, fee, charge or other assessment.” 25 U.S.C. § 2710(d)(4) (emphasis added). *Wilson*’s interpretation was also divorced from the broader context of IGRA and Indian law construction and preemption principles. *Wilson* failed to perceive, as the Eighth Circuit later did, how the *lack* of authorization functions within the tripartite allocation of jurisdiction provided in § 2710, where states have “no regulatory role over gaming except as expressly authorized by IGRA,” and then only “through a tribal-state compact.” *See Gaming Corp.* 88 F.3d at 546. It also failed to perceive what the Eighth Circuit later held, based on the legislative history’s “strong statement about IGRA’s preemptive force,” that when IGRA governs, the courts are not to conduct a balancing analysis. *Gaming Corp.* at 544, 546-47; *see* S.Rep. No. 100-446 at 3, 6. *Wilson*’s construction of § 2710(d)(4) is also contrary to the Ninth Circuit’s subsequent construction in the revenue sharing context. *Rincon*, 602 F.3d at 1036 (“We have interpreted § 2710(d)(4) as precluding state authority to *impose* taxes, fees, or assessments, but not prohibiting states from *negotiating* for such payments where ‘meaningful concessions’ are offered in return.”) (emphasis in original). None of these detract from the correctness of *Wilson*’s interest-balancing analysis, however, because although *Wilson* held § 2710(d)(4) was not an express prohibition on state taxation, it went on to analyze the provision in view of the broader factors of *Bracker* balancing, and concluded that “[t]he express objectives of IGRA, when combined with the Bands’ interests, preclude the application of the State’s license fee.” *Wilson* at 435.

Section 2710(d)(4) is not limited in its application to “the actual play of class III games,” *see* Doc. 32 at 15-16. The provision does not specify *the activity* that is not to be taxed. Rather, it specifies *who* the State lacks authority to impose any tax upon: (1) “upon an Indian tribe” and (2) “upon any other person or entity authorized by an Indian tribe to engage in a class III activity.” The phrase “a class III activity” is part of describing the second group upon whom the State cannot impose a tax under § 2710, by reference to what those in the group are authorized to do. Notably, Congress chose to describe states’ general lack of taxing authority in § 2710(d)(4) using language different from the language it used in § 2710(d)(3)(C)(iii), describing the specific limited taxing authority granted the states. This change in phrasing signifies a change in scope.

Any ambiguity as to the scope of IGRA’s express prohibition of state taxation must be construed broadly in favor of the Tribe. *See Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985); *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976). “Indeed, the Court has held that although tax exemptions generally are to be construed narrowly, in ‘the Government’s dealings with Indians the rule is exactly the contrary. The construction, instead of being strict, is liberal.’” *Blackfeet* at 766 fn.4 (quoting *Choate v. Trapp*, 224 U.S. 665, 675 (1912)). Statutory language relevant to Indian tax exemptions are not to be given “an especially crabbed or restrictive meaning.” *McClanahan*, 411 U.S. at 176.

Neither *Michigan v. Bay Mills Indian Community*, 134 S.Ct. 2024 (2014), nor the other authorities the State relies upon establish that IGRA’s scope is so restricted that it does not encompass the Casino construction project. *Bay Mills* focused on the definition of “class III gaming activity” because IGRA “authorizes a state to sue a tribe to ‘enjoin a class III gaming activity...,’” and that statutory abrogation of tribal immunity was the central issue. 134 S.Ct. at 2032. Section 2710(d)(3), (4), and (5), however, speak to gaming compacts, which address more

than just the “roll of the dice and spin of the wheel” that is the class III gaming activity itself. *Bay Mills* at 2032.

The State focuses narrowly on “tribal governance of gaming” as the key to IGRA’s scope. Doc. 32 at 16-17. Such a focus was apt in *Gaming Corp.*, given its facts. But state interference with tribal *governance* or *regulation* of gaming is not the extent of IGRA’s preemption. IGRA is at least as concerned with the *revenue* involved in gaming. The jurisdictional framework, the gaming compact mechanism – really, all of IGRA – serve to set rules for operating a commercial enterprise, whose goal is to generate revenues for the tribal government. State involvement in, or interference with, the operation of the Tribal Casino enterprise, if not authorized by the Tribe, is incompatible with IGRA. *Cf. Mescalero*, 462 U.S. at 336 (“when a tribe undertakes an enterprise under the authority of federal law, an assertion of state authority must be viewed against any interference with the successful accomplishment of the federal purpose”).

As discussed in the Tribe’s brief in support of its summary judgment motion, IGRA does not preempt state involvement in matters that are only peripherally associated with tribal gaming, such as where the tribe itself is not a party to the activity in question. *See* Doc. 75 at 41-43. In *Barona*, the Ninth Circuit upheld a state sales tax imposed on a transaction between two non-Indians; the subsequent use of the purchased materials in tribal casino construction did not convert the earlier transaction into an activity governed by IGRA. 528 F.3d at 1190-94. The *Barona* language the State emphasizes (Doc. 32 at 18) declares that IGRA’s “core objective” is fair and honest gaming, citing 25 U.S.C. § 2702(2), while ignoring IGRA’s purposes of “promoting tribal economic development, self-sufficiency, and strong tribal government,” and “generating tribal revenue,” 25 U.S.C. § 2702(1), (3). It is inadequate to focus solely on the

congressional purpose that is ostensibly the motivation for permitting any state regulation of tribal gaming, i.e., the one that matters to the states, to the exclusion of those purposes aimed at protecting tribal interests. In contrast to *Barona*, the Eighth Circuit stated that “[t]he 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 at 1108.

Casino Resource Corp. v. Harrah’s Entertainment, Inc., 243 F.3d 435 (8th Cir. 2001), relied upon by the State, held that IGRA did not preempt “state law claims by one non-tribal entity against another[.]” *Id.* at 438. “[A] non-tribal entity’s state law claim (that does not implicate tribal interests) against another non-tribal entity is not of central concern to IGRA.” *Id.* at 440. It was partly the failure to “implicate tribal interests,” even indirectly, that decided the case, for the court distinguished hypothetical “potential situations ... where a tribe’s interests could be jeopardized by disputes between non-tribal entities, such as where a valid management contract calls for a tribe to indemnify a non-tribal management company or the management company is acting as an agent for the tribe.” *Id.* at 440 fn.7. These scenarios are roughly analogous to this case, where the Tribe’s interests are jeopardized by the State tax imposed on a non-tribal entity and paid by the Tribe as part of the taxed transaction.

Mashantucket Pequot Tribe v. Town of Ledyard, 722 F.3d 457 (2d Cir. 2013) is similarly distinguishable. The court upheld a state tax imposed on a non-tribal entity’s ownership of personal property on Indian land. The subject of the tax – independent non-Indian “ownership,” rather than a “transaction” with the tribe – featured no tribal involvement, so the tax did not implicate the tribe’s interests. *Id.* at 469 (emphasis in original).

In *Confederated Tribes of Siletz Indians v. Oregon*, 143 F.3d 481 (9th Cir. 1998), the court examined whether IGRA prohibited Oregon from publicly releasing a state investigative report concerning a tribal casino, in accordance with state public records laws. *Id.* at 482-84. Rather than basing its decision on IGRA preemption, the court found the parties' gaming compact itself controlled the outcome. *Id.* at 485. The compact specifically called for the application of state public records laws to the tribal casino records obtained by the state, and the court determined that the compact implicitly "assume[d]" the state would treat related state reports "as it would any other state record." *Id.* Notably, the Siletz tribes' preemption argument contended that "the application of state laws *unrelated* to Indian gaming, such as the Oregon Public Records Laws," was "preempted by federal law." *Id.* at 484 (emphasis added). The Tribe argues in the instant case, however, that the application of state laws to subjects *related* to tribal casino operations is preempted, unless validly authorized in a gaming compact. The *Siletz* court, explaining why its decision based on "simple contract interpretation" was not foreclosed by IGRA, observed that applying state public records laws was "fully consistent" with the IGRA goal of "fair and honest gaming," and that it did not undercut tribal or federal control of Indian gaming. *Id.* at 485, 487. All of this contrasts with the state tax in this case. The contractor's excise tax is not authorized by the gaming compact, even by implication. Additionally, IGRA specifically constrains states' authority to impose a tax, and specifically assigns the regulation of facility construction and maintenance to the tribes, while *Siletz* noted that IGRA says nothing about states' treatment of tribal casino information. 25 U.S.C. §§ 2710(b)(2)(E), 2710(d)(4); *see Siletz* at 485 fn.5. Imposing a tax on casino construction is contrary to IGRA's jurisdictional framework and inconsistent with IGRA's stated purpose that tribal gaming operate as a tool to

raise revenues for tribal governments, not for states. *See* 25 U.S.C. § 2702; *Rincon* 602 F.3d at 1034.

The State’s arguments regarding the “catch all” provision, 25 U.S.C. § 2710(d)(3)(C)(vii), largely ignores the significance of the “carefully balanced jurisdictional scheme” IGRA establishes for regulating tribal gaming matters, and the resulting rule that (with limited exceptions) if a state is to have regulatory authority over a gaming-related matter, then such authority must be set forth in a gaming compact. *Gaming Corp.* at 547. The State’s exercise of authority over a gaming-related matter, “outside the parameters of its compact with the [Tribe], ... would bypass the balance struck by Congress.” *Id.* at 549.

The State fails to acknowledge that the authorities it relies on emphasize and illustrate principles of federal preemption. *See* Doc. 32 at 21-25 (citing the district court opinion in *In re Indian Gaming Related Cases*, 147 F.Supp.2d 1011 (N.D. Cal. 2001), *aff’d*, 331 F.3d 1094 (9th Cir. 2003) (“*Coyote Valley II*”); Kevin Washburn, *Recurring Issues in Indian Gaming Compact Approval*, 5 Gaming L.R. & Econ. 388 (2016); and *Rincon*, 602 F.3d 1019).

By placing limits on what a state can demand to include in a gaming compact, IGRA expressly prevents state intrusion into federally-protected tribal commerce. The Washburn article rhetorically asks, “Why would Congress limit the subjects to be included in a Class III gaming compact? A clear message that comes through in the legislative history is that Congress sought to prevent a state from using its right to compact negotiation to extend state authority beyond gaming.” Washburn at 392. States cannot use gaming compacts as a “subterfuge for imposing State jurisdiction on tribal lands.” 147 F.Supp.2d at 1018 (internal quotation marks omitted). Thus, states cannot, through a gaming compact, “force resolution of other issues, unrelated to gaming,” Washburn at 392; they “cannot insist that compacts include provisions

addressing subjects that are only indirectly related to the operation of gaming facilities,” 147 F.Supp.2d at 1018. Restricting compact subjects in order to protect tribes from states acquiring authority over the non-compactible subjects is itself is an expression of federal preemption. Non-compactible subjects are so categorized to ensure they remain beyond the states’ authority.

Rincon does not assist the State either. The State fails to see that the “use” of state tax revenue, standing alone, does not decide whether a given tax provision may be included in a gaming compact (or whether such tax may be imposed if not in a compact). *Rincon* held that California’s revenue sharing demand constituted a demand for “direct taxation of the Indian tribe,” and was therefore evidence of bad faith negotiations. *Rincon*, 602 F.3d at 1029-30. The demand was also a tax imposed on the Tribe (“imposed” because it was not bargained for in exchange for a “meaningful concession”) in violation of § 2710(d)(4). *Id.* at 1030-31, 1036-37. The additional fact that the revenue sharing provision was to “put tribal money into the pocket of the State,” rather than dedicate it to a purpose such as the “fair distribution of gaming opportunities” or “compensation for the negative externalities caused by gaming,” caused the court to “rul[e] out” the catch-all clause as legitimizing the state’s insistence on the tribe paying annual fees into the state general fund. *Id.* at 1033-34. To use tribal gaming revenue for only “state general economic interests” was inconsistent with IGRA’s purposes. *Id.* at 1034-35. It was therefore bad faith under IGRA for the state to *insist* that the tribe either accept such “nonbeneficial provisions *outside the permissible scope of §§ 2710(d)(3)(C) and 2710(d)(4)*, or go without a compact.” *Rincon* at 1039 (emphasis in original). Some gaming compacts, however, *do* contain provisions for general-fund revenue sharing, *if* the tribe agrees to such a provision in exchange for meaningful concessions. *See Rincon* at 1036-40 (noting, “we do not

hold that no future revenue sharing is permissible,” and that “consideration for general fund revenue sharing ... must be for something ‘separate’ than basic gaming rights”).

Rincon, Washburn’s article, and similar authorities cited by the State, as well as § 2710(d)(4), indicate that the State cannot demand that the gaming compact include a provision applying the contractor’s excise tax to the Casino construction project. *Gaming Corp.* and § 2710(d)(4) provide that the State cannot impose the tax outside of the gaming compact either.

3. The Casino construction project is directly related to the operation of gaming activities.

The State makes the unfounded argument that IGRA’s provision “that specifically addresses the construction of a gaming facility” leaves room for the State to tax the construction of a gaming facility. Doc. 32 at 25 (citing 25 U.S.C. § 2710(b)(2)(E)); *see also* 25 U.S.C. §§ 2710(b)(1) (requiring a tribally-issued license for each facility where gaming is conducted); 2710(d)(1)(A)(ii) (making subsection (b)’s requirements applicable to class III gaming). Because IGRA preempts the field, its requirement that casino construction must be regulated under tribal law stands as both an affirmative statement of tribal authority over the matter (with federal supervision and concurrent tribal and federal enforcement), and a congressional rejection of state authority. The absence of state authority is evident in 25 U.S.C. § 2710(d)(3)(C)(vi), which allows states to *acquire* authority to regulate the “standards for the ... maintenance of the gaming facility, including licensing,” by way of a negotiated gaming compact provision. *Id.* In this case, the State does not regulate the Casino construction project, or have any role in determining what standards apply to its design and construction. Tribe’s SUMF 172-178.

It is IGRA’s “jurisdictional framework,” its “regulatory structure for Indian gaming” that is “comprehensive.” *Gaming Corp.* at 544. “[S]tate regulation of gaming [must only] take place within the statute’s carefully defined structure.” *Id.* at 547. Thus, it is not necessary for IGRA or

federal regulations to provide the minute details of casino building standards to be preemptive. The statute's allocation of authority to tribes, rather than to states, is a clear preemption of state authority with respect to gaming facility construction. *Cf. Ramah*, 458 U.S. at 840 (noting emergence of federal policy "encouraging the development of Indian controlled institutions on the reservation").

The State understates the federal and tribal regulation and oversight of the Casino project. The Tribe sets the project's building standards (which are not primarily state standards) by contract. Tribe's Response to State's SUMF ¶ 56. Inspections are conducted by Indian Health Service, a federal agency, as directed by Casino management, and by an independent inspection company paid for by the Tribe, HDR, to ensure the gaming facility retains its Tribal gaming facility license, as required by IGRA. *Id.* ¶¶ 56, 62, 66-67; Tribe's SUMF 197-198. The Tribe regulates both the quality of construction and the conduct of construction personnel while on the Reservation. Tribe's SUMF 162-174, 176-188, 194-198.

Furthermore, preemption of state taxation in Indian country does not require an exact match between the federal laws and the activity sought to be taxed. In *Bracker*, federal regulation of timber harvesting and sales, and reservation roads, preempted the state's use fuel tax and motor carrier license tax, even absent relevant regulation of fuel, licensing, or taxation. *Bracker* at 145-48; *see Ramah* at 841 fn.5 (describing *Bracker*). In *Ramah*, federal regulation of Indian education and school construction agreements preempted a state gross receipts tax on a construction company, even absent regulation of the taxed construction activity itself. *Ramah* at 839-42. The Eighth Circuit held that federal regulation of Indian education preempted South Dakota fuel tax imposed on a tribal school, despite no regulation of the fuel, the vehicles using the fuel, or the particular uses of those vehicles. *Marty*, 824 F.2d at 687-88. Federal

involvement “in promoting and assisting in the development of tribal bingo enterprises,” federal management agreement approval, and a Secretarial “position ‘strongly opposing’ the imposition of state gambling regulations on Indian bingo” preempted state sales taxes on casino bingo, food services, and other sales, despite no federal regulation of bingo itself, associated food sales, or the taxes on either. *Indian Country*, 829 F.2d at 985-86. In all of these decisions, the federal government did not regulate the specific activity taxed or the taxation of that activity. Yet in all of them, the state tax interfered with and frustrated the comprehensive regulatory scheme and the federal and tribal interests.

Finally, as discussed in the Tribe’s brief supporting its motion for summary judgment, Doc. 75 at 40-41, the Casino construction project is “directly related to the operation of gaming activities” under the test used in *Coyote Valley II*, 331 F.3d at 1116, and by this Court in *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 renovation of the Casino would not be occurring if not for the Tribe’s operation of casino gaming activities, and the Tribe would not be able to operate gaming activities to fulfill the purposes of IGRA without engaging in this Casino renovation. Tribe’s SUMF 112-129.

C. The Indian Trader Statutes preempt the contractor’s excise tax.

Contrary to the State’s arguments, the Indian Trader Statutes preempt state taxes imposed on reservation sales of *services*, as well as goods, to Indians. First, the state fails to acknowledge that its tax applies to both the “labor and materials” (i.e., the goods and services) that make up the contractor’s gross receipts from the project. SDCL 10-46A-3. Second, for the reasons explained in the Tribe’s brief supporting its summary judgment motion, the statutes do govern trade in services. *See* Doc. 75 at 22-29. The Department of the Interior’s express and longstanding regulatory definition is consistent with Congress’ own interpretation of the term

trade as used in a companion statute; the Supreme Court’s instructions to construe the Indian Trader Statutes broadly and its practice of doing so in modern and early decisions; principles of statutory construction in Indian law contexts; historical facts about trade in services; contemporaneous judicial interpretations of the term in other statutory contexts; and the comprehensive congressional purposes of the trader statutes. The State cites no authority for its restricted construction.

The State’s position that the Indian Trader Statutes are “defunct,” Doc. 32 at 30, 35, is contrary to *Central Machinery* and unsupported by relevant authority. The State contends that “[b]ecause it was impossible for the Contractor to obtain a license, the Indian trader statutes are irrelevant here.” Doc. 32 at 33. The Supreme Court held exactly the opposite, stating, “Under the Indian trader statutes, 25 U.S.C. §§ 261-264, this transaction is plainly subject to federal regulation. It is irrelevant that appellant is not a licensed Indian trader.” *Central Machinery*, 448 U.S. at 164. While the Court in *Central Machinery* noted that the BIA had approved the sales contract in question and the tribal budget, this was not the basis for the Court’s decision. *Id.* at 165 fn.4. The Court did not hold that BIA approvals were necessary, absent a federal trader license, to preempt state taxation, and instead expressly stated the opposite: “It is the existence of the Indian trader statutes, then, and not their administration, that pre-empts the field of transactions with Indians occurring on reservations.” *Central Machinery* at 165. The Court observed that the statutes’ fundamental purposes “would be easily circumvented if a seller could avoid federal regulation simply by ... failing to obtain a federal license.” *Id.* The necessary implication is clear from the decision. If a trader “could avoid federal regulation” by remaining unlicensed, then state regulation – including taxation – could fill the void, leaving the Indian buyers without the protections afforded by Congress.

U.S. ex rel. Keith v. Sioux Nation Shopping Center, 634 F.2d 401 (8th Cir. 1980), fails to support the State’s argument. In *Keith*, the plaintiff sought to have fines imposed on a trader who was trading on the Pine Ridge Reservation without a federal license. *Id.* at 402-03. Federal licenses, however, were impossible to obtain. *Id.* at 403. The Court held that “given the unavailability of the federal trader’s license,” the act of trading with Indians on the reservation “does not amount to a violation of section 264.” *Id.* The Court gave two reasons. First, “[i]t would be both ironic and unjust to fine [a trader] for not having obtained an unobtainable license.” *Id.* (Here the Court noted that the plaintiff would have been better served to seek an order directing the Secretary of the Interior to fulfill his duty to enforce the statutes. *Id.* at 403 fn.7.) Second, having obtained a tribally-issued permit, which “serves the same function as the federal trader’s license,” the trader “must be deemed to be in substantial compliance with the legal requirements of the statute.” *Id.* at 403. The Court held only that *one* of the statutes’ requirements – federal licensure – could not be strictly enforced, and that the tribal license sufficed for substantial compliance with that requirement. Nothing in *Keith* suggests that “bureaucratic nonfeasance” with respect to licensing makes room in the otherwise comprehensive and preemptive federal regulations and statutes for state laws to impose additional state burdens upon traders. Furthermore, whatever void may be created by the absence of federal licensing is filled in this case, as it was in *Keith*, by the Casino project contractors having obtained business licenses from the Tribe. Tribe’s SUMF 277-279. As in *Keith*, the Tribe regulates traders through an application and licensure process. Tribe’s SUMF 277-278. To obtain a tribal business license, applicants must agree to comply with requirements imposed under the Indian Trader Statutes in addition to complying with tribal laws. Tribe’s SUMF 278; Decl. of Ryan Kills A Hundred (Doc. 74) ¶ 66 and Exhibits 11 & 14.

Milhelm Attea does not “eliminate[] the possibility” that the Indian Trader Statutes preempt the State tax. Doc. 32 at 35. *Milhelm Attea* preserved the holdings of *Warren Trading Post* and *Central Machinery*, distinguishing those cases from the circumstances in *Milhelm Attea*. 512 U.S. at 74-75. In *Warren Trading Post* and *Central Machinery*, the Indian Trader Statutes preempted “a tax directly ‘imposed upon Indian traders for trading with Indians.’” *Id.* at 74 (quoting *Warren Trading Post*, 380 U.S. at 691, and citing *Central Machinery*, 448 U.S. at 164). The state laws at issue in *Milhelm Attea* had a fundamentally different character – these regulations were “designed to prevent circumvention of ‘concededly lawful’ taxes owed by non-Indians.” *Milhelm Attea* at 75. That is, when an Indian trader sells wholesale cigarettes on-reservation to Indians for subsequent retail sale to nonmembers, the cigarettes can be subject to a valid state tax on the consumer and, if they are validly taxed (as they were in *Milhelm Attea*), then the state can require the trader (instead of the tribal retailer, as authorized in *Colville*) to comply with a regulatory scheme to assist the state in its collection of that tax. The facts of this case are akin to *Warren Trading Post* and *Central Machinery*, not *Milhem Attea*. The State tax is imposed on the trader’s on-reservation sales to the Tribe, not on sales to non-Indians. Under all three Supreme Court decisions, the Indian Trader Statutes preempt such a tax.

Sac and Fox Nation v. Pierce, 213 F.3d 566 (10th Cir. 2000), is distinguishable. *Sac and Fox* involved the same Kansas fuel tax and the same basic fact pattern that was later the subject of *Wagnon*, *supra*, 546 U.S. 95. See *Sac and Fox* at 569; *Wagnon* at 99-100. The tax was imposed “on the distribution of motor fuel to retailers within the State.” *Sac and Fox* at 569. The Tenth Circuit correctly determined the legal incidence of the tax fell upon the distributors, not the on-reservation tribal retailers. *Id.* at 578-80; *Wagnon* at 103. This determination led the court to consider whether the Indian Trader Statutes or the balance of interests preempted the tax.

Sac and Fox at 580, 583. As the Supreme Court would later emphasize in *Wagnon*, (reviewing another Tenth Circuit decision), the Kansas fuel tax was imposed upon distributors at the moment of their “off-reservation receipt” of the fuel. *Wagnon* at 106. *Wagnon* further held, however, correcting the Tenth Circuit’s approach, that “beyond the boundaries of the reservation,” states may apply non-discriminatory taxes to Indians and non-Indians, regardless of the “downstream economic consequences” for reservation Indians. *Wagnon* at 113-14. *Sac and Fox*, five years prior to *Wagnon*, found a basis to reject application of the Indian Trader Statutes that was more circuitous than simply relying on the off-reservation incidence of the tax, though based on comparable notions. *Sac and Fox* distinguished taxes imposed “upon retail traders for trading with Indians,” as in “*Warren Trading* and its progeny,” from the Kansas fuel tax, imposed “on all wholesale fuel distributors for fuel distributions to retailers within the State of Kansas – Indian or otherwise.” *Sac and Fox* at 582. The “indirect burden on the Tribes” did not bring such a tax within the field controlled by the Indian Trader Statutes. *Id.* at 583.

Whether the salient distinction in *Sac and Fox* was the fact that the traders were wholesalers (irrelevant under *Wagnon*), or that the tax was imposed upon them off-reservation (as *Wagnon* held), neither fact is present in this case. The taxed transaction is the sale to the Tribe of construction labor and materials. It is a retail sale, as the Tribe will not be reselling the labor and materials to buyers of its own. The State has not argued otherwise. The tax is imposed on the Tribe’s Reservation, at the location of the construction project. Tribe’s SUMF 224; *see* State’s SUMF 32-33 (discussing “certain construction projects within Indian country”).

When the taxed transaction is an on-reservation sale to the Tribe by the trader, as it is in this case, it is not relevant if the trader also makes other sales to non-Indians. *See Laguna Ind., Inc. v. New Mexico Tax. & Rev. Dept.*, 114 N.M. 644, 645-46 (N.M. Ct. App. 1992), *aff’d*, 115

N.M. 553 (N.M. 1993) (trader statutes preempted state tax on sales to tribal entity by major defense contractor Raytheon). This is implicit in *Central Machinery*'s holding that the "Indian trader statutes and their implementing regulations apply no less to a nonresident person who sells goods to Indians on a reservation than they do to a resident trader." *Central Machinery*, 448 U.S. at 165. Nonresident traders are likely to have customers other than reservation Indians, yet their sales to Indians on the reservation are covered by the Indian Trader Statutes.

D. The contractor's excise tax is preempted because insufficient State interests exist to justify the burden on the Tribal and federal interests.

Because IGRA prohibits the State tax on the Casino construction project, "courts are not to interfere with [Congress'] balancing of interests, they are not to conduct a *Cabazon* balancing analysis." *Gaming Corp.* at 547. However, even if IGRA did not preempt the contractor's excise tax, and therefore *Bracker* balancing applied, no State interests would justify the additional burdens on the Tribe. The State performs no significant functions or services connected to the Casino or the taxed transaction, and certainly none that are funded by the contractor's excise tax. *See* Tribe's SUMF 280-309. This leaves only an asserted "general interest in raising revenues." *Mescalero*, 462 U.S. at 336; *cf. Cotton*, 171 fn.7 & 185-86 (state provided \$3 million in on-reservation services, including regulation of the taxed mineral extraction); *Stranburg*, 799 F.3d at 1342 (noting that *Cotton* "affirmed the general principle that services rendered must be connected to the tax"); *Tulalip Tribes v. Washington*, No. 2:15-cv-00940-BJR, 2017 WL 58836, *7-8 (W.D.Wash. Jan. 5, 2017) ("close nexus" required between state services and taxed activity, where tribe is a direct party to taxed transaction and value of taxed activity is generated on reservation by tribe); *see also Ramah* at 843-44 & fn.7 & 9; *Indian Country*, 829 F.2d at 987; *Hoopa Valley*, 881 F.2d at 661, *Marty*, 824 F.2d at 688.

The State relies on services it assertedly “makes available, both on- and off-reservation, to the non-Indian Contractor, the subcontractors, and other entities involved in the construction project.” Doc. 32 at 41. As detailed in the Tribe’s Response to the State’s SUMF, many of the identified State services are not even funded by the general fund, and therefore are not funded with contractor’s excise tax revenues. Tribe’s Response to State’s SUMF 84-85, 87-92; *see* Tribe’s SUMF 288-289. Seven services are claimed to “specifically relate to the Contractor or the Construction Project,” Doc. 32 at 42, but the evidence shows little if any relevant connection. No worker’s compensation services have been provided related to the project. Tribe’s Response to State’s SUMF 87. Nor have unemployment insurance services, *id.* ¶ 88, services of the Secretary of State’s Office, *id.* ¶ 89, notary public licensure, *id.* ¶ 90, attorney regulation, *id.* ¶ 91, taxpayer services, *id.* ¶ 92, or parolee supervision, *id.* ¶ 93, been provided specifically for the Casino construction project. The State’s position is untenable given the rejection of identical fact patterns in cases like *Ramah*, *Marty*, *Hoopa Valley*, and *Stranburg*.

The State’s general desire to raise revenue for services that do not directly benefit the Tribe or its enterprise is inadequate when weighed against the important Tribal and federal interests in economic development and Tribal self-government. *See Bracker* at 149-151; *Ramah* at 842-44 & fn.8. “Indian economic well-being is one of the many federal interests embodied in the extensive federal regulation of [gaming] activity, and it is a valid interest weighing in favor of preemption in the final balance.” *Stranburg* at 1340 (discussing “regulation of leasing activity”); *see City of Duluth*, 785 F.3d at 1211; 25 U.S.C. § 2702.

Citing *Barona*, the State argues that the Tribe’s interest in being free from the economic burden of the State tax is diminished because the tax is not directly on the Tribe itself. Doc. 32 at 38. If the tax were on the Tribe, it would be categorically barred, absent clear congressional

authorization. *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 458-59 (1995). Being on a non-Indian engaged in commerce with the Tribe on its Reservation, then (assuming IGRA does not preempt it directly) the balance of interests determines the tax's validity. *Id.* In such cases, "the economic burden of the asserted tax[]" is a "significant" factor, even if that burden is "imposed indirectly through a tax on a non-Indian contractor for work done on the reservation." *Ramah*, 458 U.S. at 844 fn.8. The significance was lessened in *Barona*, along with all the tribal and federal interests, because (as explained previously, *see* Doc. 75 at 42-43) the court held that the tribe there was not a party to the taxed transaction which, in the court's view, the tribe had attempted to manipulated for an artificial tax advantage. *Barona*, 528 F.3d at 1190-93.

The State's reliance on *Colville* is inapt for similar reasons. The cigarette sales in *Colville* existed solely because of the artificial tax advantage the tribes sought to create, selling their tribal tax immunity to nonmembers who would normally buy their cigarettes off-reservation, paying state taxes on them. *Colville*, 447 U.S. at 155. No federal law or policy supported the preemption of otherwise valid state taxes just to allow the tribes to market an exemption from state taxation. *Id.* at 155-56. What remained was the Tribe's interest in raising revenues, weakened because revenues were derived from the "off-reservation value" of cigarette sales to nonmembers who would otherwise purchase their cigarettes off-reservation. *Id.* at 156-57. There is no such manipulation in this case to diminish the Tribe's economic interests. *Crow Tribe of Indians v. Montana*, 650 F.2d 1104 (9th Cir. 1981), which the State cites together with *Colville*, held that in a case where the tribe was *not* "simply marketing a tax exemption," "[a]ny substantial incursion into the revenues" the tribe obtains from value generated on its reservation "cuts to heart of the Tribe's ability to sustain itself." *Crow Tribe* at 1117.

The State relies on Justice Rehnquist's separate opinion in *Colville* (see Doc. 32 at 39), which rejected the interest-balancing analysis and deemed evidence of tribal economic harm irrelevant, in favor of only considering express congressional preemption. *Colville* at 177, 185-86 (opn. of Rehnquist, J.) This opinion is directly at odds with the majority rule. *Id.* at 156-57; *Bracker* at 144-45. *Wagnon*'s subsequent citation to Justice Rehnquist's *Colville* opinion came in response to the tribal plaintiff's "complaint about the downstream economic consequences of the Kansas tax," which the Court had already concluded was imposed *off-reservation*, where the State's power to tax is unencumbered by any tribal interests. *Wagnon* at 114. This case is about on-reservation taxation of a transaction directly involving the Tribe, where the backdrop of Indian sovereignty and the Tribal and federal interests, including the significant interest in generating gaming revenue to fund the Tribal government, are integral to the analysis.

Reliance on *Cotton* here is misplaced for all of the reasons set forth in section I.A.3, *supra*. The quotations from *Cotton* the State relies on are statements of the doctrine of intergovernmental tax immunity that generally apply in the non-Indian context, and applied in *Cotton* because of the evident congressional intent to allow state taxation, eliminating the backdrop of tribal independence, and the significant factual distinctions from *Bracker* and *Ramah*. *Cotton* at 175, 186-87; see Doc. 32 at 40.

As for the size of the economic burden, neither a relatively low tax rate nor a small financial impact is determinative. The "preemption analysis cannot turn on the severity of a direct economic burden on tribal revenues caused by the state tax." *Indian Country* at 986 fn. 9. The tax burden here is larger than that in several cases where the state tax was preempted. See *Bracker* at 139-40, *id.* at 158-59 (Stevens, J., dissenting) (2.5% gross receipts tax and 8 cent use fuel tax, amounting to "\$5,000-\$6,000 or less than 1% of the total annual profits" produced by

the tribal enterprise); *Central Machinery*, 448 U.S. at 162 (disputed amount less than \$3,000); *Ramah* at 836, 842; *id.* at 852 fn.3 (Rehnquist, J., dissenting) (disputed amount approximately \$230,000, but *none* of the ultimate burden rested on the Tribe, which did not fund the school construction with tribal revenue); *Marty*, 824 F.2d at 685, 687-88 (13 cent fuel tax, amounting to less than \$8,000 in dispute). *See* Tribe’s SUMF 260-272 (\$480,000 in taxes at 2.5% of gross receipts).

II. The Tribe does not oppose dismissal of its fourth claim for lack of jurisdiction.

The Tribe and Henry Carlson paid the subject taxes under protest and brought suit as provided in SDCL 10-27-2.⁵ The Tribe sought an order from this Court directing the return of the taxes paid to the State, relying on the waiver of the State’s sovereign immunity found in section 10-27-2. The statutory waiver of immunity allows a person who pays tax under protest to “commence an action against [the treasurer to whom the tax was paid] for the recovery of the tax in any court of competent jurisdiction.” SDCL 10-27-2.

However, the State now asserts that its “authorization of suits ‘in any court of competent jurisdiction’ does not waive the State’s Eleventh Amendment sovereign immunity.” Doc. 32 at 10. The weight of authority indeed supports interpreting such a statutory waiver to allow suits in *state* courts, but not in *federal* courts. *E.g.*, *Kennecott Copper Corp. v. State Tax Comm’n*, 327 U.S. 573, 578-80 (1946); *McKlintic v. 36th Judicial Circuit Court*, 508 F.3d 875, 877 (8th Cir. 2007).

⁵ The Tribe was not required to pursue its refund claim under the process provided in SDCL chapter 10-59. SDCL 10-59-1 provides that the provisions of chapter 10-59 “may only apply to proceedings commenced under this chapter....” The Tribe did not commence any proceeding under chapter 10-59, so the procedure established in that chapter, and any provisions making such procedure mandatory, do not apply.

Of course, the State does not claim its immunity bars this Court from determining whether the tax is unlawfully imposed. Doc. 32 at 6-7, 11. Retaining the taxes paid under protest, if the Court should declare the tax invalid, would constitute a due process violation. *See McKesson Corp. v. Div. of Alcoholic Beverages and Tobacco*, 496 U.S. 18, 38-39 (1990); *Ward v. Board of County Comm'rs*, 253 U.S. 17, 24 (1920). The State thus only invokes its immunity to shield it from having to provide the remedy the Constitution requires, if the Court declares the tax preempted.

Given the State's assertion of its sovereign immunity and the limitation of the statutory waiver to state courts only, the Tribe concedes that the Court does not have jurisdiction to grant the relief sought in the Tribe's fourth claim.⁶ The Tribe therefore does not oppose the State's motion with respect to the fourth claim for relief, and does not oppose dismissal of the fourth claim and defendant Sattgast, without prejudice, for lack of jurisdiction.

CONCLUSION

The State's imposition of contractor's excise tax violates the Tribe's federally-protected right to self-government and the strong federal interest in Tribal self-sufficiency by diverting Casino revenues from the Tribe to the State. The Indian Trader Statutes, IGRA and *Bracker* balancing preempt such taxation. The Tribe respectfully requests that the Court deny the State's motion with respect to the first, second and third claims.

⁶ The Tribe notes that State sovereign immunity would not bar a tax refund claim brought by the United States on the Tribe's behalf, or by the Tribe itself in a suit in which the United States makes a parallel claim. *U.S. ex rel. Cheyenne River Sioux Tribe v. South Dakota*, 105 F.3d 1552, 1560 (8th Cir. 1997); *Standing Rock Sioux Tribe v. Janklow*, 103 F.Supp.2d 1146, 1157-58 (D.S.D. 2000).

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Respectfully submitted,

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WORD COUNT CERTIFICATE

I certify that the foregoing brief, Plaintiff Flandreau Santee Sioux Tribe's Memorandum in Opposition to the State Defendants' 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 11,966 words, excluding the cover page, tables, signature block and this certificate.

/s/ Shannon R. Falon