

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

FLANDREAU SANTEE SIOUX)	Civ. No. 17-4055
TRIBE, a Federally recognized)	
Indian Tribe,)	
)	
Plaintiff,)	DEFENDANTS' REPLY TO PLAINTIFF
)	FLANDREAU SANTEE SIOUX TRIBE'S
v.)	MEMORANDUM IN OPPOSITION TO
)	STATE DEFENDANTS' MOTION FOR
RICHARD SATTGAST, Treasurer of)	SUMMARY JUDGMENT
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.)	

INTRODUCTION

The State incorporates by reference its "Introduction," "Facts and Procedural History," "Standard," and "Argument" set forth in the Defendants' Memorandum in Support of its Motion for Summary Judgment ("State's Memorandum in Support"), Doc. 32. The State also incorporates by reference its "Argument" set forth in the Defendants' Memorandum in Opposition of Plaintiff's Motion for Summary Judgment ("State's Memorandum in Opposition"), Doc. 78. This reply will also use all the same references to the parties, documents, and record.

ARGUMENT

- I. **The Court has no jurisdiction to grant the Tribe's Claim for Refund of contractor's excise tax (Fourth Claim for Relief).**

The Tribe “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.” See Plaintiff Flandreau Santee Sioux Tribe’s Memorandum in Opposition to State Defendants’ Motion for Summary Judgment (“Tribe’s Memorandum in Opposition”), Doc. 81, at 43-44. Given this concession, the State requests a judgment in that regard.

II. The State has authority to impose the tax on the Contractor’s Construction Services (First, Second, and Third Claims for Relief).

The Tribe begins with its misconception that “state assertions of authority over Indians, and over non-Indians engaged in commerce with Indians in Indian country, are presumptively preempted.” Tribe’s Memorandum in Opposition, Doc. 81, at 9-12 (citing *Oklahoma Tax Commission v. Sac & Fox Nation*, 508 U.S. 114 (1993); *Williams v. Lee*, 358 U.S. 217 (1959); and *Rice v. Rehner*, 463 U.S. 713, 726 (1983)). These cases are inapplicable to the extent they relate to a state’s authority over Indians, a test entirely different than the one applicable to a state’s authority over non-Indians. Compare *Sac & Fox Nation*, 508 U.S. at 123-26, with *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144 (1980) (noting that generally, state law is inapplicable regarding an Indian’s on-reservation conduct, but for non-Indian on-reservation conduct, a particularized inquiry is undertaken to determine the state’s authority); Felix S. Cohen, *Cohen’s Handbook of Federal Indian Law*, 8.03[1][d], p. 706 (5th Ed. 2012) (“State taxes on nontribal

members in Indian Country are not categorically barred. Instead, courts apply a ‘flexible preemption analysis sensitive to the particular facts and legislation involved’¹; *see also* Tribe’s Memorandum in Opposition, Doc. 81, at 18 n.2 (citing *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164, 165 (1973), when discussing the “Indian tax immunity doctrine[,]” but not recognizing that *McClanahan* involved a state’s jurisdiction to impose a “personal income tax on a reservation Indian whose entire income derives from reservation sources”).

The Tribe relies upon its “presumption for preemption” theory in an attempt to shift the burden to the State to show that its tax is congressionally authorized. *See* Tribe’s Memorandum in Opposition, Doc. 81, at 10-12. But *Washington v. Confederated Tribes of Colville Indian Reservation*, as well as other Supreme Court decisions, show that for taxation purposes generally, a state may tax nonmembers’ on-reservation activities without any congressional authorization. 447 U.S. 134 (1980); *see, e.g., Warren Trading Post Co. v. Ariz.*

¹ The Tribe cites Cohen’s Handbook section 6.03[2][a], when indicating that a presumption for preemption applies “because ‘[t]he 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*.” *See* Tribe’s Memorandum in Opposition, Doc. 81, at 11. The cited section is located in the chapter of Cohen’s Handbook entitled “Tribal/State Relationship” under the heading “State Governing Power in the Absence of Federal Authorization” subheading, “State Authority Over Nonmember Conduct or Property.” Cohen’s Handbook, p. 487-527. But a later chapter of Cohen’s Handbook addresses the State’s authority specifically regarding the taxation of non-Indians and nonmember Indians—the chapter relied on here by the State.

State Tax Comm’n, 380 U.S. 685 (1965) (providing that a federally licensed Indian trader’s sales to reservation Indians were preempted by the federal Licensed Indian Trader Regulations, but not ruling that the sales to nonmembers were preempted); *Colville*, 447 U.S. at 154-59, 160-61 (upholding state tax on nonmembers’ on-reservation purchases even though there was no indication that the tax was congressionally authorized); *see also Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 177, 186-87 (1989) (indicating that the applicable federal statutory scheme contained no express grant of state taxation authority, yet upholding a state tax on non-Indians’ on-reservation activity).

The Tribe contends that “[a]bsent 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.” Tribe’s Memorandum in Opposition, Doc. 81, at 17. However, this contention ignores that *Colville* addressed more than a state tax on the on-reservation purchase of cigarettes. *See Colville*, 447 U.S. at 150 n.25, 160-61. Rather, the Supreme Court also upheld a state tax imposed on the purchase of goods other than cigarettes by Indians who were not members of the governing tribe. *Id.* Thus, the Tribe incorrectly asserts that *Colville* only revolved around an “artificial tax advantage” for cigarette sales. *See* Tribe’s Memorandum in Opposition, Doc. 81, at 15, 17, 41. *Colville* was not so limited.

The State is not required to establish that Congress authorized the imposition of the contractor's excise tax, as states taxation authority over nonmembers on the reservation is addressed in the context of preemption, rather than a hunt for congressional authorization. *See, e.g., Cotton Petroleum*, 490 U.S. at 176-77, 186-87; *Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832, 834 (1982); *Bracker*, 448 U.S. at 144. For something to be preempted, it has to exist in the first place. *See Preemption*, Black's Law Dictionary (10th ed. 2014) (5. "The principle (derived from the Supremacy Clause) that a federal law can supersede or supplant any inconsistent state law or regulation.") (emphasis added). Further, the Supreme Court's use of the phrase "barriers to the exercise of state authority" confirms that states have authority to tax nonmembers' on-reservation activity unless something impedes it. *See* State's Memorandum in Support, Doc. 32, at 12 n.5; *see also* Cohen's Handbook, 8.03[1][d], p. 706 ("If the legal incidence [of the tax] falls on the nonmember, taxes may be prohibited if they are preempted by federal law or if the state tax would interfere with the tribe's ability to exercise its sovereign functions."). *Contra* Tribe's Memorandum in Opposition, Doc. 81, at 11 (quoting *Bracker*, 448 U.S. at 142) ("A state's lack of authority to impose taxes in Indian country persists unless it can overcome these two 'barriers.'"). In this case, the Tribe has failed to establish a barrier which prohibits the tax on the non-Indian Contractor. As no barrier is present, the tax is valid.

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

The Tribe asserts IGRA both expressly and impliedly preempts the state tax on the non-Indian Contractor's Construction Services. See Tribe's Memorandum in Opposition, Doc. 81, at 19-32. Although the Tribe dismisses "[t]he State's reliance on cases not involving preemption in Indian country[.]"² the Tribe fails to acknowledge the State's cited cases discussing preemption in the context of IGRA. See Tribe's Memorandum in Opposition, Doc. 81, at 10. In *Gaming Corporation of America v. Dorsey & Whitney*, the Eighth Circuit noted that courts are reluctant to find a statute to have "extraordinary pre-emptive power" or be completely preemptive. 88 F.3d 536, 543 (8th Cir. 1996) (quoting *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 65 (1987)). Such statement is consistent with the "duty to accept the reading that disfavors pre-emption." *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005). In addition, the Supreme Court has interpreted IGRA under the rule that "Congress wrote the statute it wrote"—meaning, a statute going so far and no further." *Michigan v.*

² Regarding principles of federal preemption, the Tribe indicates that the State's reliance on *Altria Group, Inc. v. Good*, 555 U.S. 70 (2008) is misplaced because that case does not involve preemption in Indian country. Tribe's Memorandum in Opposition, Doc. 81, at 10. In its brief, the State relied on *Altria Group* to define implied preemption. See State's Memorandum in Support, Doc. 32, at 13. The State also relied on *Altria Group* to clarify that a preemption analysis must focus on "the purpose of Congress," a point also supported by *Rice*, 463 U.S. 713, an Indian country case. See State's Memorandum in Support, Doc. 32, at 14; *Rice*, 463 U.S. at 718 ("The goal of any pre-emption inquiry is to determine the congressional plan[.]") (internal quotation marks and citations omitted). These two notions are informative regardless of the specific facts in this case.

Bay Mills Indian Community, 134 S.Ct. 2024, 2033-34 (2014). IGRA's preemptive scope must be determined by keeping in mind this aversion to stretch its statutory language.

The Tribe also challenges the State's reliance on *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141 (1989), and *Wyeth v. Levine*, 555 U.S. 555, 575 (2009), because those cases do not involve Indian country. However, each of these cases discuss the interplay between federal law and state law when Congress has acknowledged the "state law in a field of federal interest[.]" See *Wyeth*, 555 U.S. at 575; *Bonito Boats*, 489 U.S. at 167. In this case, Congress acknowledged the issue of state taxation in IGRA's legislative history yet did not incorporate general taxation principles into the compacting process.³ See State's Memorandum in Support, Doc. 32, at 14-16. Thus, the

³ The Tribe also asserts that Congress denied "the subjugation of tribal government to state authority," in an excerpted statement from IGRA's legislative history. Tribe's Memorandum in Opposition, Doc. 81, at 23. However, the full statement does support the State's assertion that IGRA did not intend to change the already existing federal law establishing a state's authority to tax non-Indians on Indian Country. *Contra* Tribe's Memorandum in Opposition, Doc. 81, at 23-26.

Mr. Inouye: The vice chairman is correct. No subjugation is intended. The bill contemplates that the two sovereigns address their respective concerns in the most equitable fashion. There is no intent on the part of Congress that the compacting methodology be used in such areas such as taxation, water rights, environmental regulation, and land use. On the contrary, the tribal power to regulate such activities, recognized by the U.S. Supreme Court in cases such as *United States versus Montana* and *Kerr-McGee versus Navajo Tribe*, remain fully intact. The exigencies caused by the rapid growth of gaming in Indian country and the threat of corruption and infiltration by criminal elements in class III gaming warranted the utilization of existing State

(continued . . .)

rule set forth in both *Wyeth* and *Bonito Boats* support that “[t]he case for federal pre-emption is particularly weak[.]” *See Wyeth*, 555 U.S. at 575; *Bonito Boats*, 489 U.S. at 167.

The Tribe relies heavily on IGRA’s preemption of “the field of gaming” and “left states with no regulatory role over gaming except as expressly authorized by IGRA,” to support their assertion of IGRA’s preemptive force. The State asserts that a statute’s intent and scope, and therefore its preemptive force, cannot be determined without looking to the words, phrases, and definitions Congress used in the statute. *Cf.* Tribe’s Opposition, Doc. 81, 19-22, 23, 25, 26. Here, not only does the state tax on the non-Indian Contractor’s Construction Services not fall within any of the defined classes of gaming it does not fall within Congress’s purposes or findings as set forth in IGRA. 25 U.S.C. 2701(3) (“provide clear standards or regulations for the conduct of gaming”), 2702 (declare and “provide at statutory basis for” the operation and regulation “of gaming by” tribes), and 2703(6)-(8) (defining class I, II, and III gaming); *see also* State’s Memorandum in Support, Doc. 32, 13-19. IGRA’s intended scope was limited to the regulation of gaming and does not extend to the taxation of Contractor’s Construction Services. “Simply put, IGRA is a

(. . . continued)

regulatory capabilities in this one narrow area. No precedent is meant to be set as to other areas.

143 Cong. Rec. S12651 (emphasis added). IGRA was expressly limited to the narrow area of “gaming” and leaves states general authority to tax non-Indian activities on Indian country intact. State’s Memorandum in Support, Doc. 32, at 11-13.

gambling regulation statute, not a code governing construction contractors, the legalities of which are of paramount state and local concern.” *Barona Band of Mission Indians v. Yee*, 528 F.3d 1184, 1192 (9th Cir. 2008).

In its response, the Tribe proclaims that “[t]ribal-state compacts are at the core of” IGRA’s scheme and that in order for the State to have “authority” to impose the tax at issue here, that authority would have to be represented within the Compact. Tribe’s Memorandum in Opposition, Doc. 81, 22; *see also id.*, generally at 19-34. While the Tribe makes this assertion, it fails to address paragraph seven of the Compact which incorporates applicable civil federal law:

All civil matters arising from or related to Class III gaming shall be dealt with according to applicable Tribal, State, or Federal law. Nothing in this Compact shall deprive the Courts of the Tribe, the United States, or the State of South Dakota of such civil jurisdiction as each may enjoy under applicable law.

Doc. 1-1, at 4. Therefore, if IGRA is deemed to apply this provision controls and, as the State’s imposition of a state tax on a non-Indian Contractor is valid under applicable law, should be upheld.⁴ *See* State’s Memorandum in Support, Doc. 32, at 13-29; State’s Memorandum in Opposition, Doc. 78, at 13-27; *see also Confederated Tribes of Siletz Indians of Oregon v. State of Oregon*, 143 F.3d 481, 485 (9th Cir. 1998); *contra* Tribe’s Memorandum in Opposition, Doc. 81, p. 30-32 (the Tribe’s misinterpreted application of *Rincon Band of Luiseno Mission Indians v. Schwarzenegger*, 602 F.3d 1019 (9th Cir.

⁴ The Tribe contends that “the State cannot demand that the gaming compact include a provision applying the contractor’s excise tax to the Casino construction project.” Tribe’s Memorandum in Opposition, Doc. 81, at 32. However, the Tribe does not contend that this Compact provision is void.

2010)).⁵ The State does not need to rely on this Compact provision as IGRA does not present a barrier to the State's ability to impose this tax.

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

The Tribe contends that "IGRA expressly allows state taxation at tribal casinos, subject to specific limitations, and prohibits states from imposing any other such taxes." Tribe's Memorandum in Opposition, Doc. 81, at 23. The Tribe further argues that "[u]nder 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)." Tribe's Memorandum in Opposition, Doc. 81, at 9. Contrary to the Tribe's assertions section 2710(d)(4) does not expressly preempt the contractor's excise tax here imposed on the non-Indian Contractor's Construction Services. See State's Memorandum in Opposition, Doc. 78, at 15-17. Section 2710(d)(4) is not an express preemption clause: "the failure to confer authority to tax [is not] a prohibition to tax." *Cabazon Band of Mission Indians v. Wilson*, 37 F.3d 430, 433 (9th Cir. 1994). Section 2710(d)(4) was not aimed at preempting a state tax on any activity within a casino; instead, it was tailored to limit 25 U.S.C. 2710(d)(3)(C)(iii),

⁵ *Rincon* is relied on by the State for the test used to determine what constitutes "directly related to the operation of gaming" under the catchall provision for compact purposes. See State Memorandum in Support, Doc. 32, at 24-25. However, *Rincon* is not factually applicable for two reasons, first it involves a "tax" directly imposed on the Tribe and, secondly, that tax was a percentage of the gaming revenues. Neither of these critical facts is present here. 602 F.3d 1019.

which permits states to include as a compact provision an assessment on gaming activities for the amounts “necessary to defray the costs of regulating such activity[.]” Section 2710(d)(4) ensured that states could not withhold compact negotiations by attempting to impose a tax on the gaming activity beyond what was necessary to cover its regulatory costs. Cohen’s Handbook, 12.05[2], p. 891 & n.12.

The Tribe urges this Court to interpret section 2710(d)(4) as expressly preempting all taxes on the Tribe and “any person the Tribe authorizes to engage in gaming.” Tribe’s Memorandum in Opposition, Doc. 81, at 24. This interpretation of section 2710(d)(4) plagues the Tribe in several ways. First and foremost, section 2710(d)(4) does not apply because, as previously stated, the tax is imposed on the non-Indian Contractor and not the Tribe. State’s Memorandum in Opposition, Doc. 78, 15-17. Another fatality is that the Tribe failed to explain or assert how the non-Indian Contractor falls within the scope of the phrase “any person the Tribe authorizes to engage in gaming.” See Tribe’s Memorandum in Opposition, Doc. 81, *generally*; Flandreau Santee Sioux Tribe’s Separate Statement of Undisputed Material Facts, Doc. 68 (TSUMF), *generally*. Finally, if providing construction services by a non-Indian corporation were considered “gaming” and fall within IGRA’s preemptive scope, IGRA’s boundary would overextend its stated intent, be malleable, and result in absurd applications. Preempting the state tax based on a tribe’s “approval to game” would allow for gamesmanship and give tribes complete control of a state’s authority over non-Indians purely by a business decision made to bring

the activity within IGRA's scope. *Flandreau Santee Sioux Tribe v. Gerlach*, 269 F. Supp. 3d 910, 925 (D.S.D. 2017) ("there would be no end to what other activities would fall under the IGRA's protection [then], by virtue of a business decision").

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. The contractor's excise tax here is not imposed on the "class III activity," the gaming revenue, or even the Tribe. Section 2710(d)(4) does not expressly preempt the contractor's excise tax imposed on the non-Indian Contractor's Construction Services.

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

To find a federal statute impliedly preempts state law, the federal regulation must be so "comprehensive and pervasive" that it leaves no room for the state tax. *See Ramah*, 458 U.S. at 838-39, 842. IGRA fails to meet that standard on these facts. The Tribe argues that this preemption analysis "does not require an exact match between the federal laws and the activity sought to be taxed." Tribe's Memorandum in Opposition, Doc. 81, at 33. However, this is an inaccurate reflection of the regulations in those cases.

In *Bracker*, the taxes at issue were a use fuel tax and motor carrier license tax, which the state sought to impose on nonmembers' hauling of timber. 448 U.S. at 139-40. The comprehensive federal regulatory scheme in *Bracker* included timber hauling regulations, such as the roads to use when hauling the timber, the hauling equipment to be employed, the rate of speed

that the logging equipment must travel, and the timber load size, including weight, length, height, and width restrictions. *Id.* at 145-48.

The regulations in *Ramah* were similarly tied to the taxed activity. In that case, the tax at issue was a gross receipts tax on a non-Indian contractor building a tribal school. 458 U.S. at 834. The federal regulatory scheme in *Ramah* included regulations on the construction of the school, such as control over the terms of contracting agreements, on-site inspections, preparation of cost estimates for the construction, and recordkeeping requirements. *Id.* at 840-41. As stated in *Ramah*, “[t]he direction and supervision provided by the Federal Government for the construction of Indian schools leave no room for the additional burden sought to be imposed by the State[.]” *Id.* at 841-42 (emphasis added). Thus, in both *Bracker* and *Ramah*, the regulations governed the taxed activity. That is not the case before this Court.

a. IGRA’s regulatory scheme does not comprehensively and pervasively regulate the Construction Services

The Tribe asserts that IGRA “extensively regulates tribal casinos” and also regulates the gaming revenue. Tribe’s Memorandum in Opposition, Doc. 81, at 21-22, 27 (“IGRA is at least as concerned with the *revenue* involved in gaming”) (emphasis original). The Tribe asserted that “[h]undreds of detailed federal regulations promulgated pursuant to IGRA govern tribal casinos” and “provide[] federal oversight over the entire field.” Tribe’s Memorandum in Opposition, Doc. 81, at 21-22 (emphasis added). This is a vast overstatement given IGRA’s provision that the federal oversight of class III gaming operations

is primarily limited to gaming compact requirements. *See* 25 U.S.C. 2710(d). IGRA provides minimal federal oversight as the process is left to tribes and states to agree how class III gaming could be conducted by a tribe. IGRA provides that the NIGC's involvement in class III gaming operations is limited, in part, to the Chairman's duties of approving the tribal gaming ordinances, 25 U.S.C. 2705(a)(3); 25 U.S.C. 2710(d)(1)(A), and approving management contracts, 25 U.S.C. 2705(a)(4).

In reality, the Tribe is not required by federal law to follow the "hundreds of detailed regulations[.]" *See* Tribe's Memorandum in Opposition, Doc. 81, at 21-22. The NIGC has no authority to regulate class III gaming activities and therefore, the NIGC's regulations are irrelevant to this litigation. *See Colo. River Indian Tribes v. Nat'l Indian Gaming Comm'n*, 466 F.3d 134, 137-40 (D.C. Cir. 2006) (affirming the district court's determination that the NIGC has no authority to regulate class III gaming operations, including regulations, monitoring, or inspection of class III gaming); *see also* Cohen's Handbook, 12.02[3][a], p. 879.

Further, the Tribe's cited NIGC regulations do not expand IGRA's scope to encompass everything within the Tribe's "Casino" moniker. The Tribe has not identified any actual regulation of the taxed activity – a non-Indian's Contractor's Construction Services. Tribe's Memorandum in Opposition, Doc. 81, *generally*. In fact, 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. The regulations merely require 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. Additionally, IGRA requires the Tribe to enact an ordinance regarding the construction of the gaming facility. 25 U.S.C. 2710(b)(1), 2710(b)(2)(E). There is not a 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 State’s Memorandum in Support, Doc. 32, at 25-26, 29; State’s Memorandum in Opposition, Doc. 78, at 20-23. Further, neither the BIA nor the NIGC are involved in the Casino Construction Project in this case. See, *Ramah*.

There are no Tribal gaming ordinances or Tribal Gaming Commission rules or regulations setting forth these standards or enforce by the Tribe. See State’s Memorandum in Support, Doc. 32, at 26; State’s Memorandum in Opposition, Doc. 78, at 20-23. 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.

With regard to the Tribe’s contention that IGRA’s preemptive scope encompasses “the *revenue* involved in gaming.” Tribe’s Memorandum in Opposition, Doc. 81, at 27 (emphasis original). The Tribe points to no authority to support this contention other than IGRA’s general purpose to generate revenue. The Tribe argues that the contractor’s excise tax here would result in the state being a “primary beneficiary,” in violation of one of IGRA’s

purposes (25 U.S.C. 2702(2)), relying on Merriam Webster Dictionary's definition of "primary." Tribe's Memorandum in Opposition, Doc. 81, 20-21, 29-30. To the contrary, IGRA only directs that the Tribe be the primary beneficiary. Regardless of how "primary" is construed it does not mean "sole" beneficiary as urged by the Tribe. See State's Memorandum in Support, Doc. 32, at 16-17; State's Memorandum in Opposition, Doc. 78, at 20. Further, the contractor's excise tax here is not targeted at the Casino gaming, the gaming revenues, or even the Tribe. The incidence of the tax is on the non-Indian Contractor and the construction services provided.

Further, if IGRA preempted all things tied to the Casino revenue, there would be no tribal activity that it would not reach. See TSUMF 8-13 (Casino revenue is primary source of funding for tribal government). In the end this would mean that IGRA extends to all tribally funded programs. This result would be inconsistent with IGRA and "stretches the statute beyond its stated purpose." *Gerlach*, 269 F. Supp at 925 (quoting *Yee*, 528 F.3d at 1193).

Rather, the facts here are akin to the cases Judge Piersol relied on in determining IGRA's preemptive scope did not extend to the Tribe's convenience store.

[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. For example, courts have held that IGRA's preemptive scope is not implicated in cases involving gaming management and service contracts with a tribe, *Casino Res. Corp. v. Harrah's Entm't, Inc. (Harrah's Entm't)*, 243 F.3d at 438-39 (8th Cir. 2001); contracts to acquire materials to build a casino, *[Yee]*, 528 F.3d at 1192; and release of detailed investigative reports on the management of gaming, *Siletz*, 143

F.3d at 487.” *Mashantucket Pequot Tribe v. Ledyard*, 722 F.3d 457 (2d Cir. 2013). Similarly, in *Ledyard*, the court found IGRA did not preempt a property tax imposed by the state on a non-Indian vendors property leased to the tribe. *Id.* at 469–71.

Gerlach, 269 F. Supp. 3d at 920.⁶ The contractor’s excise tax is a generally applicable law with a de minimus effect, if any, on a tribe’s ability to regulate its gambling operations.⁷ Even with this tax imposed on the non-Indian Contractor’s Construction Services at the Casino, the Tribe continues to be able to regulate its gaming operations.

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

⁶ The facts and taxed activity presented here align with Judge Piersol’s determination that IGRA’s preemptive scope did not extend to prevent the State’s imposition of its use tax on nonmember purchases at the convenience store, rather than his decision regarding the same purchases at the Casino building. See *Gerlach*, 269 F. Supp. 3d at 920; State’s Memorandum in Opposition, Doc. 78, at 26; cf. Tribe’s Memorandum in Opposition, Doc. 81, at 34.

⁷ While the Tribe asserts a financial impact, that impact does not affect the Tribe’s ability to regulate the gaming at the Casino. See Tribe’s Memorandum in Opposition, Doc. 81, at 42–43.

“supplant” or even interfere with any federal or tribal regulatory scheme. *See id.* at 339. *See also Colville*, 447 U.S. at 158 (in rejecting the tribes’ claim that the state taxes are invalid, reasoning that “[t]here is no direct conflict between the state and tribal schemes, since each government is free to impose its taxes without ousting the other[.]”).

Because the regulations do not govern the taxed activity, the regulations surely do not provide the comprehensive and pervasive regulation of that activity to establish preemption.

b. IGRA’s catchall provision does not preempt the contractor’s excise tax

The Tribe also asserts IGRA’s “catchall provision,” (25 U.S.C. 2710(d)(3)(C)(vii) (compacts “may include provisions relating to . . . any other subjects that are directly related to the operation of gaming activities”)) places “limits on what a state can demand to include in a gaming compact.” Tribe’s Memorandum in Opposition, Doc. 81, at 30-34. Here the contractor’s excise tax does not fall within an activity that “is directly related to the operation of gaming activities” and the Tribe’s arguments must be rejected. *See* State’s Memorandum in Support, Doc. 32, at 19-25; State’s Memorandum in Opposition, Doc. 78, at 23-27.

The Tribe agrees that the catchall provision contains a list of permissive subjects that may be addressed in a tribal-state compact. Tribe’s Memorandum in Opposition, Doc. 81, at 22. However, the Tribe argued those topics became mandatory “if a tribe requests negotiation on any of those subjects.” *Id.* Contrary to the Tribe’s argument, the Tribe provides no

evidence⁸ that it requested negotiation regarding the contractor's excise tax. Therefore, a provision addressing that subject was not required in the Compact and cannot set IGRA's preemptive scope.

The Tribe attempts to assert that section 2710(d)(3)(C)(vi) specifically applies and requires a compact provision. Tribe's Memorandum in Opposition, Doc. 81, at 32-34. However, the Tribe does not even try to assert how the contractor's excise tax on the Contractor's Construction Services equates a "standard[] for the operation of such [gaming] activity and maintenance of the gaming facility, including licensing." 25. U.S.C. 2710(d)(3)(C)(vi). A "standard" is defined as "something set up and established by authority as a rule for the measure of quantity, weight, extent, value, or quality." Standard, Merriam-Webster Online Dictionary, <https://www.merriam-webster.com/dictionary/standard>, (4.) (last visited on May 17, 2018); *see also Standard*, Black's Law Dictionary (10th ed. 2014) ("1. A model accepted as correct by custom, consent, or authority. 2. A criterion for measuring acceptability, quality, or accuracy"). The imposition of the contractor's excise tax on the non-Indian Contractor's Construction Services cannot be construed as an attempt to set a standard for the maintenance of the gaming facility.

The Tribe further relies on inspections "conducted by Indian Health Service . . . paid for by the Tribe" to establish that the Tribe regulates the Casino Project. Tribe's Memorandum in Opposition, Doc. 81, at 33. But the

⁸ There are no undisputed material facts in this regard. *See* TSUMF, Doc. 68, *generally*.

Tribe's actions, taken on its own accord, such as these IHS inspections, do not count as regulation of the construction. Regulation is defined as "[c]ontrol over something by rule or restriction." *Regulation*, Black's Law Dictionary (10th ed. 2014). See also *Regulation*, Merriam-Webster Online Dictionary ("2a: an authoritative rule dealing with details or procedure"; "2b: a rule or order issued by an executive authority or regulatory agency of a government and having the force of law.") (last visited May 18, 2018); *Regulate*, Merriam-Webster Online Dictionary ("1a: to govern or direct according to rule"; "1b(1): to bring under the control of law or constituted authority") (last visited May 18, 2018). As the Supreme Court noted in *Colville*:

Although taxes can be used for distributive or regulatory purposes, as well as for raising revenue, we see no nonrevenue purposes to the tribal taxes at issue in these cases, and, as already noted, we perceive no intent on the part of Congress to authorize the Tribes to pre-empt otherwise valid state taxes. Other provisions of the tribal ordinances do comprehensively regulate the marketing of cigarettes by the tribal enterprises; but the State does not interfere with the Tribes' power to regulate tribal enterprises when it simply imposes its tax on sales to nonmembers. Hence, we perceive no conflict between state and tribal law warranting invalidation of the State's taxes.

447 U.S. at 158–59. The same facts are presented here—the State is simply imposing the contractor's excise tax on the non-Indian Contractor in a manner that does not interfere with the Tribe's ability to regulate.

The Compact only governs 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* contained no provision regarding a state tax on construction materials for a casino. See *Brief of Appellees Barona Band of Mission Indians*,

et al., No. 06-55918, 2006 WL 4012116, at 56 (9th Cir. filed Dec. 6, 2006). 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.

B. Federal Interests—Indian Trader statutes are not a barrier to State jurisdiction

1. The Indian Trader statutes do not apply to the Construction Services

The Tribe continues to assert that the federal Indian Trader statutes preempt “state taxes imposed on reservation sales of *services*, as well as goods, to Indians.” Tribe’s Memorandum in Opposition, Doc. 81, at 34 (emphasis in original); *see also* Tribe’s Memorandum in Support, Doc. 75, at 22-29. But the Tribe’s argument incorrectly reaches beyond the Indian Trader statutes to define “trade.” *See* Tribe’s Memorandum in Opposition, Doc. 81, at 34-35. The Indian Trader statutes are limited to the sale of goods and do not encompass the provision of services; “trade” is restricted to the trade of goods. *See* 25 U.S.C. 261, 263, 264; *see also* State’s Memorandum in Support, Doc. 32, at 31-32; State’s Memorandum in Opposition, Doc. 78, at 5-10. In the Indian Trader statutes, and as supported by case law, there is no indication that Congress intended to incorporate the provision of services. *See* State’s Memorandum in Support, Doc. 32, at 31-32; State’s Memorandum in Opposition, Doc. 78, at 5-10.

The Tribe cannot point to any federal court decision expanding the Indian Trader statutes to include the trade of services. *See* Tribe’s

Memorandum in Opposition, Doc. 81, at 34-39; Tribe's Memorandum in Support, Doc. 75, at 22 (only citing to two New Mexico state court decisions in the same case). On the other hand, the District Court of South Dakota has indicated that the Indian Trader statutes are indeed limited to the trade of goods and do not encompass the trade of services. *See U.S. ex rel. Keith v. Sioux Nation Shopping Ctr.*, 488 F. Supp. 496, 498 (D.S.D. 1980). The Tenth Circuit has similarly acknowledged as much. *See Mescalero Apache Tribe v. O'Cheskey*, 625 F.2d 967, 968, 971-92 (10th Cir. 1980). And at the highest level, Supreme Court decisions analyzing the Indian Trader statutes have been limited to the sale of goods. *See Warren Trading Post*, 380 U.S. 685; *Cent. Mach. Co. v. Ariz. State Tax Comm'n*, 448 U.S. 160 (1980); *Dep't of Taxation & Finance of New York v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61 (1994); *see also Colville*, 447 U.S. at 155 (noting that the Indian Trader statutes "incorporate a congressional desire comprehensively to regulate businesses selling goods to reservation Indians for cash or exchange[.]")

The Tribe's reliance on the Department of Interior regulations is to no avail. Although the Department of Interior attempts to expand the Indian Trader statutes to encompass the trade of services, it has no authority to "enlarge [a] statute at will[.]" *See United States v. George*, 228 U.S. 14, 22 (1913); *see also* State's Memorandum in Support, Doc. 32, at 31-32. Finally, as indicated in the State's Memorandum in Opposition, any attempt by the Tribe to classify the state contractor's excise tax as a sale of goods must be

rejected. See Tribe's Memorandum in Opposition, Doc. 81, at 34; *see also* State's Memorandum in Opposition, Doc. 78, at 2-5.

2. *Even if the Indian trader statutes apply to services, they are not comprehensive and pervasive regulation of the Construction Services*

The Indian Trader statutes are not the comprehensive and pervasive regulation that require preemption of the state tax in this case. See State's Memorandum in Support, Doc. 32, at 32-36; State's Memorandum in Opposition, Doc. 78, at 10-13. The Tribe contends that *Milhelm Attea* "preserved the holdings of *Warren Trading Post* and *Central Machinery*." Tribe's Memorandum in Opposition, Doc. 81, at 37. But the Tribe then acknowledged that *Milhelm Attea* upheld a state regulation of an Indian trader: if an Indian trader's on-reservation sale of cigarettes is subject to a valid state tax, "then the state can require the trader . . . to comply with a regulatory scheme to assist the state in its collection of that tax." Tribe's Memorandum in Opposition, Doc. 81, at 37. Through the Supreme Court's allowance of that state regulation in *Milhelm Attea*, the Court effectively chipped away at the notion that the Indian Trader statutes were comprehensive federal regulation that preempted all state laws regulating Indian traders. Compare *Warren Trading Post*, 360 U.S. at 690 (indicating that the Indian Trader statutes and regulations "would seem in themselves sufficient to show that Congress has taken the business of Indian trading on the reservations so fully in hand that no room remains for state laws imposing additional burdens upon traders.") with *Milhelm Attea*, 512 U.S. at 75 ("[W]e now hold that Indian traders are not

wholly immune from state regulation that is reasonably necessary to the assessment or collection of lawful state taxes.”).

The defunct nature of the Indian Trader statutes also demonstrates that they do not qualify as comprehensive regulation of the Contractor’s Construction Services. The Tribe claims that *Central Machinery Co. v. Arizona State Tax Comm’n*, supports its position that the Contractor’s lack of an Indian Trader license is irrelevant highlighting that “[i]t 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.” Tribe’s Memorandum in Opposition, Doc. 81, at 35 (quoting *Central Machinery*, 448 U.S. 160, 165 (1980)). The Tribe also noted the Court’s observance that “the statutes’ fundamental purposes ‘would be easily circumvented if a seller could avoid federal regulation simply by . . . failing to obtain a federal license.’” Tribe’s Memorandum in Opposition, Doc. 81, at 35 (quoting *Central Machinery*, 448 U.S. at 165) (alteration in original).

But here, there are three critical distinctions from the circumstances in *Central Machinery*. First, the failure to obtain a federal Indian Trader license is not the same as being unable to obtain one. See State’s Memorandum in Support, Doc. 32, at 32-33 (noting the Contractor was unable to procure a license). Moreover, contrary to this case, the trader in *Central Machinery* was actually being regulated under the Indian trader regulatory scheme. See State’s Memorandum in Opposition, Doc. 78, at 11-12 (noting the three different tiers of regulation and the Bureau of Indian Affairs’ involvement in

that transaction). Finally, *Central Machinery* involved the sale of goods (machinery), unlike the sale of services involved in this case. *See supra* (discussing the inapplicability of the Indian Trader statutes to the sale of services).

U.S. ex rel. Keith, supports the position that because of the Contractor's inability to obtain a federal Indian Trader license, the Indian Trader statutes are not comprehensive federal regulation of the Contractor. In applying *U.S. ex rel. Keith* to this case, the Indian Trader statutes cannot be enforced against the Contractor because of the "bureaucratic nonfeasance." 634 F.2d at 403 (noting that "given the unavailability of the federal trader's license . . . , [the defendant's] conduct does not amount to a violation of [25 U.S.C.] section 264.>").

The Tribe argues that its business/tax licensing scheme fills the "void . . . created by the absence of federal licensing" because the "Casino project contractors . . . obtained business licenses from the Tribe." Tribe's Memorandum in Opposition, Doc. 81, at 36. But first and foremost, the Tribe cites no federal law indicating that Congress has delegated its federal regulatory power under the Indian Trader statutes to the tribes. *Cf. Colville*, 447 U.S. at 156 ("[A]lthough the [t]ribes themselves could perhaps pre-empt state taxation through the exercise of properly delegated federal power to do so, we do not infer from the mere fact of federal approval of the Indian taxing ordinances, or from the fact that the [t]ribes exercise congressionally sanctioned powers of self-government, that Congress has delegated the far-

reaching authority to pre-empt valid state sales and cigarette taxes otherwise collectible from nonmembers of the Tribe.”) (internal citations omitted).

Further, the business/tax license issued by the Tribe to the Contractor was not even in play until after the contract with the Contractor was executed (October 2015), after this suit was filed (April 21, 2017), and after Phase 1 of the Construction Project was completed (December 2017). *Compare* Flandreau Santee Sioux Tribe Business/Tax License issued to Contractor, Doc. 74-16 (FSST 106540) *with* Complaint, Doc. 1 (filed Apr. 21, 2017), *and* State’s Response to Tribe’s Statement of Undisputed Material Facts, Doc. 77, # 139, 153. *Cf. Yee*, 528 F.3d at 1187, 1192-94 (rejecting the tribe’s crafting of a method “devised to circumvent state sales tax[,]” and stating that “the federal government’s interest in Indian economic vitality . . . continues to fade when the commercial activity is rigged to trigger a tax exemption.”). More than nine months after the Tribe instituted this suit, on January 30, 2018, the Tribe adopted an “updated business/tax license.” *See* Flandreau Santee Sioux Tribe Tax Commission, Resolution No. 2018-01, Doc. 74-15 (FSST 104139 through FSST 104140); *see also* Complaint, Doc. 1 (filed Apr. 21, 2017). In these updates made after the Tribe filed this suit, the Tribe added to both the application and the business/tax licenses a reference to the federal Indian Trader regulations, 25 C.F.R. Part 140. *See, e.g.,* Flandreau Santee Sioux Tribe Business/Tax License issued to Contractor, Doc. 74-16 (FSST 106540); Flandreau Santee Sioux Tribe Business/Tax License Application, Page 2 (FSST 104142), Doc. 74-15 (stating that “each applicant signing [the] application

consents its activities are subject to . . . the applicable laws of the United States, including 25 C.F.R. Part 140 (as applied by the United States).”); Kills A Hundred deposition at 12:8-11, 14:13-16:23. Attached to the Affidavit of Kirsten E. Jasper as Exhibit 1. Such pretense must be rejected.

Finally, the Tribe contends that “it is not relevant if the trader also makes other sales to non-Indians.” Tribe’s Memorandum in Opposition, Doc. 81, at 38. However, sales to non-Indians, in addition to the Tribe, show that the purpose of the Indian Trader statutes is not thwarted. See State’s Memorandum in Support, Doc. 32, at 35-36. The purpose of the Indian Trader license scheme is to “prevent fraud and other abuses by persons trading with Indians.” *Milhelm Attea*, 512 U.S. at 70. In *Sac and Fox Nation of Missouri v. Pierce*, the Tenth Circuit noted that because the state tax on the traders was not discriminatory, and because there was no evidence that the traders were mainly distributing their product to the tribes, the “threat of [the traders] perpetrating fraud or abuse upon the [t]ribe appear[ed] negligible[.]” 213 F.3d 566, 582-83 (10th Cir. 2000). As in *Pierce*, there is no indication of threat of fraud or abuse on the Tribe. Thus, the state tax on the Contractor does not conflict with the purpose of the Indian Trader statutes.

C. *The State interests outweigh any remaining Tribal interests*

1. *Imposing the tax on the Construction Services does not “infringe on the right of reservation Indians to make their own laws and be ruled by them”*

The second barrier to a state’s authority to tax nonmembers’ on-reservation activities is when the taxation “unlawfully infringe[s] on the right of

reservation Indians to make their own laws and be ruled by them.” *Bracker*, 448 U.S. at 142 (internal quotation marks omitted); *Ramah*, 458 U.S. at 848; see State’s Memorandum in Support, Doc. 32, at 36-41. To support its contention that the tax on nonmembers would unlawfully infringe upon tribal self-government and tribal sovereignty, the Tribe relies on a number of cases that considered tribal interests in the context of a State’s jurisdiction over Indians. See Tribe’s Memorandum in Opposition, Doc. 81, at 11-15, 18; *Williams*, 358 U.S. 217 (state court’s jurisdiction over an Indian defendant for activities occurring on the reservation); *McClanahan*, 411 U.S. 164 (state’s jurisdiction to impose a “personal income tax on a reservation Indian whose entire income derives from reservation sources.”); *Marty Indian Sch. Bd., Inc. v. State of South Dakota*, 824 F.2d 684 (8th Cir. 1987) (state’s jurisdiction to impose motor fuel tax on a school board for an Indian boarding school, in which all board members were tribal members). But, any tribal interests relating to preemption of state taxes on tribal members within their governing tribe’s reservation are irrelevant here, where the State is imposing a tax on a non-Indian. See *Colville*, 447 U.S. at 161 (“Nor would the imposition of [the state] tax on [Indians not members of the governing tribe] contravene the principle of tribal self-government, for the simple reason that nonmembers are not constituents of the governing Tribe. . . . There is no evidence that nonmembers have a say in tribal affairs or significantly share in tribal disbursements.”)

The Tribe asserts a strong tribal interest here because its enterprise is operated under federal law. Tribe's Memorandum in Opposition, Doc. 81, at 13. The Tribe also claims that the tax imposes an economic burden on the Tribe and is aimed at value generated by the Tribe. Tribe's Memorandum in Opposition, Doc. 81, at 14, 40-43. But none of these assertions justify preemption of the tax in this case.

First, as stated above, the Contractor's Construction Services do not fall within the purview of IGRA. *See supra*; State's Memorandum in Support, Doc. 32, at 13-29; State's Memorandum in Opposition, Doc. 78, at 13-27. Next, regarding the Tribe's contention that it is burdened by the tax, *Colville* supports that "[the State] does not infringe the right of reservation Indians to 'make their own laws and be ruled by them[]' merely because the result of imposing its taxes will be to deprive the Tribe[] of revenues which they are currently receiving." *See* 447 U.S. at 156 (internal citation omitted) (quoting *Williams*, 358 U.S. at 220); *see also* State's Memorandum in Support, Doc. 32, at 38-41. And finally, while the Tribe attempts to distinguish some of the State's cited cases because the tax was aimed at off-reservation value not generated by the Tribe, the Tribe has failed to establish, or even allege, how the tax in this case is on value generated by the Tribe. *See* Tribe's Memorandum in Opposition, Doc. 81, at 14, 39; *see also* Tribe's Memorandum in Opposition, Doc. 81, at 17, 18, 41.

The Tribe attempts to distinguish *Cotton Petroleum*, asserting the Supreme Court in that case found there was no economic burden on the tribe

from the state tax. Tribe's Memorandum in Opposition, Doc. 81, at 18-19. But this assertion is misleading. In *Cotton Petroleum*, the Supreme Court recognized an economic burden likely existed, noting that it was "reasonable to infer that the [state] taxes have at least a marginal effect on the demand for on-reservation leases, the value to the Tribe of those leases, and the ability of the Tribe to increase its tax rate." 490 U.S. at 186-87. Yet the burden on the tribe was "too indirect and too insubstantial to support [the taxpayer's] claim of preemption." *Id.* *Cotton Petroleum* supports that any burden on the Tribe is "too indirect and too insubstantial to support" preemption of the tax here. And it must not be forgotten that in this case, any burden placed on the Tribe for paying the contractor's excise tax is due to the Tribe's agreement with the Contractor to pay that tax. See State's Memorandum in Support, Doc. 32, at 38-41.

The Tribe continuously points to its right of self-governance to justify preemption of the tax on the non-Indian Contractor. See Tribe's Memorandum in Opposition, Doc. 81, *generally*. The Tribe contends that the two barriers to a state's authority "embody the 'basic policy of *Worcester*,' that the 'laws of [the state] can have no force' in Indian country." Tribe's Memorandum in Opposition, Doc. 82, at 11 (quoting *Williams*, 358 U.S. at 219, which in turn, quotes *Worcester v. Georgia*, 31 U.S. 515, 561 (1832)) (second alteration in original). But while a tribe's right to self-government is one of the factors in the balancing test, *Worcester*'s basic policy, as applicable to non-Indians, has been "long ago" abandoned:

Our cases make clear that the Indians' right to make their own laws and be governed by them does not exclude all state regulatory authority on the reservation. State sovereignty does not end at a reservation's border. Though tribes are often referred to as "sovereign" entities, it was "long ago" that "the Court departed from Chief Justice Marshall's view that 'the laws of [a State] can have no force' within reservation boundaries. *Worcester v. Georgia*, [31 U.S. 515] (1832).

Nevada v. Hicks, 533 U.S. 353, 361-62 (2001) (citing *Bracker*, 448 U.S. at 141 (alterations in original). Cf. *Williams*, 358 U.S. at 219 (indicating that "the basic policy of *Worcester* has remained" when state court determined not to have jurisdiction over an Indian defendant's on-reservation activities).

Further, as highlighted by Judge Piersol:

[t]he State does not interfere with the Tribes' power to regulate tribal enterprises when it simply imposes its tax on [use by] nonmembers." *Colville*, 447 U.S. at 159, 100 S.Ct. 2069. "Nor would the imposition of [the] tax on these purchasers contravene the principle of tribal self-government, for the simple reason that nonmembers are not constituents of the governing tribe." *Id.* at 161, 100 S.Ct. 2069.

Gerlach, 269 F. Supp. 3d at 929. For the same reasons, the tax on the non-Indian Contractor in this case does not "contravene the principle of tribal self-government[.]" See *Colville*, 447 U.S. at 161.

2. *The State's interests reinforce the State's jurisdiction to tax the Construction Services*

Under the balancing test, the State interests implicated here outweigh any federal and tribal interests. The Tribe contends that "[a] 'general desire to raise revenue' alone is insufficient" to justify a state tax. Tribe's Memorandum in Opposition, Doc. 81, at 12. But even in the context of IGRA, it has been acknowledged that "[r]aising revenue to provide general government services is

a legitimate state interest.” *Yee*, 528 F.3d at 1192-93; *see also Colville*, 447 U.S. at 157 (“The State . . . has a legitimate governmental interest in raising revenues, and that interest is . . . strongest when the tax is directed at off-reservation value and when the taxpayer is the recipient of state services.”). Judge Piersol seemingly acknowledged as much, when indicating that “it stands to reason that South Dakota residents generally benefit from the services provided by the general fund, regardless of the extent to which those services are provided on the reservation.” *Gerlach*, 269 F. Supp. 3d at 929.

Regardless, in this case, the State’s interest in imposing its tax is strong because State services funded by the general fund (in which the contractor’s excise tax is deposited) are available to the Contractor and currently, or in the future, may be utilized by the Contractor. *See* State’s Memorandum in Opposition, Doc. 78, at 29-30; *see also* State’s Memorandum in Support, Doc. 32, at 41-44. The Tribe claims that “[t]he 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.” Tribe’s Memorandum in Opposition, Doc. 81, at 39. This claim, however, is directly contrary to the record. Services, funded through the general fund that have been provided to the Contractor or the Construction Project include worker’s compensation services, certain unemployment insurance services, business services, notary public services, regulation of attorneys, and supervision of parolees. *See* State’s Memorandum in Support, Doc. 32, at 42. Additional services that are available to the Contractor or the Construction Project that

may very well relate to the Construction Project include access to the courts, court services, emergency medical services, criminal investigation services, and services relating to employer labor practices.⁹ See State's Memorandum in Support, Doc. 32, at 42

The State has a strong interest in imposing its tax on the Contractor to fund these State services. The state's interest in raising revenue for the services available to, and actually provided to, the Contractor and the Construction Project, coupled with the lack of comprehensive federal regulation, is more than sufficient to tip the scale in the State's favor in this case.

CONCLUSION

IGRA does not comprehensively regulate the taxed activity, the Construction Services: "IGRA is a gambling regulation statute, not a code governing construction contractors, the legalities of which are of paramount state and local concern." *Yee*, 528 F.3d at 1192. Likewise, the Indian trader statutes do not comprehensively regulate the Construction Services. Finally, the State interests in imposing the tax outweigh any remaining tribal interests. As the contractor's excise tax is validly imposed on the non-Indian Contractor,

⁹ As indicated in the State's Memorandum in Opposition, Doc. 78, at 29-30, the State does not track all recipients of its services in every instance. Therefore, there is no documentation of whether certain available services have been provided to the Contractor or the Construction Project. See State's Response to TSUMF, Doc. 77, #286.

the State respectfully requests that the Court grant the State's Motion for Summary Judgment.

Dated this 18th day of May, 2018.

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CERTIFICATE OF COMPLIANCE

1. I certify that the Reply Brief is within the word limitation 9,098 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/ Kirsten E. Jasper

Kirsten E. Jasper
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that on May 18, 2018, I electronically filed 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/ Kirsten E. Jasper

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