

**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 REPLY BRIEF IN
SUPPORT OF ITS MOTION FOR
SUMMARY JUDGMENT**

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INTRODUCTION

Both the Indian Trader Statutes and the Indian Gaming Regulatory Act (“IGRA”) preempt the State’s assessment of contractor’s excise tax on the construction and renovation project underway at the Flandreau Santee Sioux Tribe’s on-Reservation Casino. The State has not established a genuine dispute as to any material fact, nor overcome the Tribe’s showing that it is entitled to judgment as a matter of law on its second and third claims for relief.

ARGUMENT

I. South Dakota imposes contractor’s excise tax on the contractor’s gross receipts from all labor and materials.

The Tribe noted in its brief supporting its summary judgment motion that the State contractor’s excise tax applies to all the contractor’s gross receipts from the Casino construction project – including all amounts the Tribe pays the contractor for both labor and materials. *See* Doc. 75 at 15, 22 & fn.7. As the Tribe expressed it, “the taxed receipts in this case were earned from the sale of construction materials *and* services[.]” Doc. 75 at 22 (emphasis in original). The State begins its opposition brief by contesting the notion that the contractor’s excise tax is therefore “partially a tax on the Contractor’s sale of materials to the Tribe.” State’s Opposition Brief (Doc. 78) at 2 (emphasis in original). Instead, the State says, the tax “is a gross receipts tax on a contractor’s *provision of construction services*.” *Id.* at 3 (emphasis added).

If the State’s point is that the tax does not apply to *materials*, the tax code plainly indicates otherwise. The contractor’s excise tax, imposed “upon the gross receipts of all prime contractors engaged in realty improvement contracts, at the rate of two percent,” SDCL 10-46A-1, “applies to the total contract price including all labor and materials,” SDCL 10-46A-3. The tax applies to materials quite expansively. Section 10-46A-3 continues: “Materials include those purchased by the contractor and those purchased by the person who let the contract or his

designee.” *See also* SDCL 10-46A-4 (broadly defining “gross receipts” and “materials”). Thus, the complete set of “construction services,” on which the tax is imposed includes (without limitation) materials purchased by the contractor and provided by the contractor to the Tribe as part of the finished product.

If the State’s contention is that the tax does not apply to the *sale* of materials, a few points may be made. First, there is no relevant distinction between characterizing the tax as imposed on a *sale* of something to the Tribe or a *provision* of something to the Tribe. The taxed transaction occurs when the contractor provides construction services (whatever that may include) and in return receives something of value (a necessary element, since the tax is on the contractor’s gross receipts). Whether the transaction is labeled *sale* or *provision*, it constitutes *trade* with the customer. As the Tribe is paying the contractor for what the contractor provides, and this trade between them occurs on the Tribe’s Reservation, it is governed by the Indian Trader Statutes and there is no room for the State to tax the transaction. *See Central Machinery Co. v. Arizona State Tax Comm’n*, 448 U.S. 160, 165-66 (1980).

Additionally, contractor’s excise tax and sales tax are materially the same type of tax. South Dakota’s sales tax is “a tax of four and one-half percent upon the gross receipts of all sales of tangible personal property...” SDCL 10-45-2, and “upon the gross receipts of any person from the engaging or continuing in the practice of any business in which a service is rendered,” SDCL 10-45-4. Similarly, the contractor’s excise tax is a “tax upon the gross receipts of all prime contractors engaged in realty improvement contracts[.]” SDCL 10-46A-1. Both apply to receipts from personal property and services. Both are excise taxes. *See Black’s Law Dictionary* (10th ed. 2014), excise (“A tax imposed on the manufacture, sale, or use of goods (such as a cigarette tax), or on an occupation or activity (such as a license tax or an attorney occupation

fee.”); 71 Am. Jur. 2d, State and Local Taxation § 23 (“An excise tax is any tax which does not fall within the classification of a poll tax or a property tax and which embraces every form of burden not laid directly upon persons or property.”); *see also* 84 Corpus Juris Secundum, Taxation §§ 162-163.¹ The legal incidence of both is upon the seller (or provider) of the property and services. *See* State’s SUMF 27 (legal incidence of contractor’s excise tax is on the contractor); *Northwestern Nat. Bank v. Gillis*, 148 N.W.2d 293, 461-62 (S.D. 1967) (legal incidence of sales tax is on retailer). If not for the exemption of construction services by statute, they would be subject to sales tax. SDCL 10-45-12.1. If the State contends there is a material difference between the two taxes, such that federal law prohibits sales tax but not contractor’s excise tax, the State has not identified the distinction.

The State is mistaken to suggest that the Tribe asserts that “sales tax [is] involved in a contractor’s provision of construction services.” *See* Doc. 78 at 3. The Tribe expressly noted the opposite in its summary judgment brief, citing the same sales tax exemption for construction services the State cites. Doc. 75 at 15 (citing SDCL 10-45-12.1). The State shifts its focus to use tax, though that tax is not at issue here either. Doc. 78 at 3-4. Both sales tax and use tax are undisputedly separate and distinct from contractor’s excise tax.² Whether sales tax was imposed on the sale of materials to the contractor, or use tax on the contractor’s use of materials, the fact

¹ The State inscrutably comments, “the contractor’s excise tax is just that – an excise tax. It is not a tax on the sale of materials.” Doc. 78 at 13. These are not mutually exclusive, however. A tax on the sale of materials is an excise tax, too.

² The contractor pays 4.5% sales tax on the construction materials when the contractor acquires them or, if the contractor acquires materials without sales tax having been paid, the contractor pays 4.5% use tax on its use of the materials. SDCL 10-46-5; *see* Dep’t. of Revenue, Contractor’s Excise Tax Guide (July 2017) at 5, available at dor.sd.gov/Taxes/Business_Taxes/Publications/PDFs/CETGuide.pdf. These taxes are passed on to the project owner. Contractor’s excise tax is imposed on the gross receipts, including any payments to the contractor for sales and use taxes.

remains that the State, separately and distinctly, imposes contractor's excise tax on the contractor's gross receipts from the project, and that the gross receipts taxed include the value of the construction materials provided to the Tribe as part of the overall construction services.

The two cases the State cites in connection with its discussion of this subject are inapposite. The Wyoming case distinguishes between a property tax on "*ownership* of property" and an excise tax on a "contractor's *use* of the property." *Sublette County School Dist. v. State Bd. of Equalization*, 770 P.2d 218, 223 (Wy. 1989) (emphasis in original). The distinction is irrelevant here, however, because the Tribe does not assert that the contractor's excise tax is a property tax; the Tribe does not argue that its "title to the final product constructed" is what precludes the State from imposing the tax. *See* Doc. 78 at 4 (quoting *Sublette* at 223). Instead, the contractor's excise tax is imposed on the contractor's business activities – specifically, on the contractor's on-reservation trade with the Tribe. This is precisely the type of state tax the Indian Trader Statutes preempt.

Sublette and the State rely on *United States v. New Mexico*, 455 U.S. 720 (1982), in which the Supreme Court applied the intergovernmental tax immunity doctrine, whose "limits" are "as significant as the rule itself," *id.* at 734, to uphold a state use tax, gross receipts tax, and sales tax imposed on contractors providing services to the federal government. *Id.* at 738-44. As discussed in the Tribe's brief opposing the State's motion for summary judgment, that doctrine follows markedly different rules than those applicable to the preemption of state taxes in Indian country. *See* Doc. 81 at 18 & fn.2. This is why in *Ramah Navajo School Bd., Inc. v. Bureau of Rev. of New Mexico*, 458 U.S. 832 (1982), the Supreme Court refused to follow *United States v. New Mexico*, which had been decided just three months earlier. The *Ramah* majority rejected the dissent's argument that the rules that generally apply "[i]n other areas of tax immunity," should

control, as specifically exemplified by *United States v. New Mexico*. *Ramah* at 854-57 & fn.4-6 (Rehnquist, J., dissenting).

II. The Indian Trader Statutes preempt the tax.

The State argues, contrary to Supreme Court precedent, that the particularities of agency administration of the Indian Trader Statutes alter the statutes' preemptive force. Doc. 78 at 10-13. But "[i]t is the existence of the Indian trader statutes," the Court has held, "and not their administration, that pre-empts the field of transactions with Indians occurring on reservations." *Central Machinery*, 448 U.S. at 165. "It is irrelevant that [the contractor] is not a licensed Indian trader." *Id.* at 164. Regardless of the irrelevant issues on which the State focuses – the contractor's lack of a federal license, the BIA's current administration of the statutes and regulations, claimed differences in administration since *Central Machinery*, and uncertainty about future administration – the Indian Trader Statutes remain in existence as federal law, and continue to preempt the field of on-reservation transactions with Indians. *Id.* at 165.³ "Until Congress repeals or amends the Indian trader statutes," they must be given "a sweep as broad as their language ... and interpret[ed] ... in light of the intent of the Congress that enacted them." *Id.* at 166. The transaction falls squarely within the language of 25 U.S.C. § 262, which makes "[a]ny person desiring to trade with the Indians on any Indian reservation" subject to federal control "for the protection of said Indians." Since the transaction is governed by the Indian Trader Statutes, federal law preempts the asserted State tax.

³ The State's contention that the Indian trader regulations are "defunct" (Doc. 32 at 33) or "obsolete" (Doc. 78 at 12) cannot be raised in the first instance in the present suit. "The proper procedure for pursuit of [the State's] grievance is set forth explicitly in the APA: a petition to the agency for rulemaking." *Auer v. Robbins*, 519 U.S. 452, 459 (1997); see 5 U.S.C. § 553(e) ("Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.").

Congress unambiguously vested the executive with general authority to administer the Indian Trader Statutes through rulemaking. 25 U.S.C. § 262 (trade with Indians on any Indian reservation is permitted “under such rules and regulations as the Commissioner of Indian Affairs may prescribe”); *see also* 25 U.S.C. § 261 (“Commissioner of Indian Affairs shall have the sole power and authority to appoint traders to the Indian tribes and to make such rules and regulations as he may deem proper...”); 25 U.S.C. § 263 (authorizing the President to prohibit trade in any Indian country); 25 U.S.C. § 264 (non-Indian clerks to traders must be licensed “by the Commissioner of Indian Affairs, under and in conformity to regulations to be established by the Secretary of the Interior”). The State argues that the trader statutes and the scope of their express delegation of policy-making authority (and therefore their preemptive scope) are limited to trade in goods only. Doc. 78 at 5-10.

The agency, however, has promulgated regulations in the exercise of its authority expressing a broader policy and interpretation. The Department of the Interior defines the term *trading*, as used in its regulations governing Indian traders, to mean any “transaction involving the acquisition of property or services.” 25 C.F.R. § 140.5. The Department’s express definition has been in effect for over 30 years. Its Indian trader regulations as a whole, in effect for more than 90 years, specifically regulate services, such as the provision of credit to Indians. 25 C.F.R. §§ 140.23; 141.32-141.49.

Under the “*Chevron* framework,” the Department’s resolution of this issue is controlling. *See Nat’l Cable & Telecom. Ass’n v. Brand X Internet Services*, 545 U.S. 967, 980-81 (2005) (“*Brand X*”) (citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)). The Department’s authoritative elucidation of the scope of the Indian Trader Statutes’ coverage of “person[s] desiring to trade with the Indians on any Indian reservation,” 25

U.S.C. § 262, promulgated by notice-and-comment rulemaking pursuant to an express statutory grant of authority, “is binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to statute.” *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001). Only if the trader statutes are unambiguously limited to trade in goods may the Court accept the State’s invitation to disregard the regulations. *See Brand X*, 545 U.S. at 982-83.

“Where Congress has established a clear line, the agency cannot go beyond it; and where Congress has established an ambiguous line, the agency can go no further than the ambiguity will fairly allow. ... If ‘the agency’s answer is based on a permissible construction of the statute,’ that is the end of the matter.” *City of Arlington v. F.C.C.*, 569 U.S. 290, 306 (2013) (quoting *Chevron*, 467 U.S. at 842); *see id.* at 301 (“the question in every case is, simply, whether the statutory text forecloses the agency’s assertion of authority, or not”). If Congress has not clearly addressed the precise question, “the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation.” *Chevron*, 467 U.S. at 843. Rather, “the question for the court is whether the agency’s answer is based on a permissible construction of the statute.” *Id.* Unless a statute is unambiguous, a judicial interpretation does not override a reasonable interpretation by the agency. *Brand X*, 545 U.S. at 982-85.

The Department’s definition of *trading* to encompass services is a permissible interpretation of the statutory term, and its regulations governing trade in services, promulgated under the express grant of authority to the agency, as permissibly construed by the agency, are policy decisions committed to the agency’s care. The Court is bound by the Department’s rules.

The State urges the Court to construe the Indian Trader Statutes, and in particular 25 U.S.C. § 262, “in their context and with a view to their place in the overall statutory scheme.”

Doc. 78 at 7 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)). Contrary to the State’s conclusion, doing so does not show that Congress clearly intended to restrict federal regulation of Indian traders to those who deal in goods. Instead, it reinforces the reasonableness of the Department’s interpretation that the Indian Trader Statutes also govern trade in services.

Brown & Williamson first examined the “core objectives” of the act before it, locating the “essential purpose [that] pervades” the legislation, and considered which of the alternative statutory interpretations “fit” within the act’s regulatory scheme. 529 U.S. at 133, 143. Here, the statute states the congressional objective: regulating persons who trade with Indians on reservations is done “for the protection of said Indians.” 25 U.S.C. § 262. Since 1790, “the Federal Government has comprehensively regulated trade with Indians to prevent ‘fraud and imposition’ upon them.” *Central Machinery*, 448 U.S. at 162 (quoting H.R.Rep. No. 23-474, 11 (1834)). More broadly, “from the very first days of our Government, the Federal Government had been permitting the Indians largely to govern themselves, free from state interference, and had exercised through statutes and treaties a sweeping and dominant control over persons who wished to trade with Indians and Indian tribes.” *Warren Trading Post Co. v. Arizona State Tax Comm’n*, 380 U.S. 682, 686-87 (1965) (footnotes omitted). Federal acts to regulate trade and intercourse with the Indians “‘manifest a firm purpose to afford that protection which treaties stipulate,’” to “‘treat them as nations [and] respect their rights[.]’” *Id.* at 688 (quoting *Worcester v. Georgia*, 31 U.S. 515, 556-57 (1832)). Such acts “‘contemplate the Indian territory as completely separated from that of the states; and provide that all intercourse with them shall be carried on exclusively by the government of the union.’” *Id.* (quoting *Worcester* at 557). The “evident congressional purpose” is to “ensur[e] that no burden shall be imposed upon Indian

traders for trading with Indians on reservation except as authorized by Acts of Congress or by valid regulations promulgated under those Acts.” *Warren Trading Post* at 691.

In light of these objectives, it is not plausible to divine a clear congressional intent to restrict these protections to only a subset of all trade with Indians. There is no clearly evident reason that Congress would have chosen to differentiate between trade in goods and trade in services while seeking to provide exclusive federal governance of all Indian intercourse in Indian country.

Brown & Williamson next considered other legislation dealing with the same subject, with the recognition that “subsequent acts can shape or focus” the “range of plausible meanings” a statute may have when it is first enacted. *Brown & Williamson*, 529 U.S. at 143. The Tribe’s brief in support of its summary judgment motion outlines the historical context of the Indian Trader Statutes, including the fact that 25 U.S.C. § 262 – the statutory section that does not mention *goods* – was enacted last of the four currently codified trader statutes. *See* Doc. 75 at 17-18. While sections 261, 263 and 264 all refer to goods, however, it is more credible to construe such references as intended to exemplify, rather than to limit, the reach of federal control over Indian commerce.

The earliest enactments of any of the four sections that make up the Indian Trader Statutes as currently codified in Title 25 of the U.S. Code were sections 3 and 4 of the 1834 Trade and Intercourse Act, codified as section 263 and (as amended) 264. Section 263 provides:

The President is authorized, whenever in his opinion the public interest may require the same, to prohibit the introduction of goods, or of any particular article, into the country belonging to any Indian tribe, and to direct all licenses to trade with such tribe to be revoked, and all applications therefor to be rejected. No trader to any other tribe shall, so long as such prohibition may continue, trade with any Indians of or for the tribe against which such prohibition is issued.

25 U.S.C. § 263 (R.S. § 2132); *see* Act of June 30, 1834, ch. 161, § 3, 4 Stat. 729, 729. This section's single reference to *goods* (and another reference to any *article*) is found among other language that is not focused on goods, including the broad phrase *licenses to trade* and two additional uses of the word *trade*, none of which are expressly restricted to trade in goods. Describing the regulated activity solely in terms of *goods* was insufficient to convey Congress' meaning. *Licenses to trade* are first mentioned in the immediately preceding section 2 of the 1834 Act, which contained no reference to *goods* or any similar limitation, whether express or implied, on the sort of *trade* to be licensed, conditioned on the trader's compliance with "the laws and regulations provided for the government of trade and intercourse with the Indian tribes[.]" Act of June 30, 1834, ch. 161, § 2, 4 Stat. 729, 729.⁴

Next, section 264 provides:

Any person other than an Indian of the full blood who shall attempt to reside in the Indian country, or on any Indian reservation, as a trader, or to introduce goods, or to trade therein, without such license, shall forfeit all merchandise offered for sale to the Indians or found in his possession, and shall moreover be liable to a penalty of \$500....

25 U.S.C. § 264 (R.S. § 2133, amended by Act of July 31, 1882, ch. 360, 22 Stat. 179, 179-80); *see* Act of June 30, 1834, ch. 161 § 4, 4 Stat. 729, 729-30. Under this section, three unlicensed acts (or attempted acts) are subject to penalty: (1) residing in Indian country or on a reservation as a trader; (2) introducing goods in Indian country or on a reservation; and (3) trading in Indian country or on a reservation. The terms *trade* and *trader* are not expressly limited and need not be narrowly defined by their proximity to the word *goods* on the disjunctive list. Furthermore, the forfeiture of merchandise as a penalty does not limit congressional authority to mercantile

⁴ Section 2 was reenacted (as amended in part by § 4 of the Act of July 26, 1866, ch. 266 (14 Stat. 255, 280)) as sections 2128, 2129, and 2131 of the Revised Statutes of the United States of 1878. These sections were not included in the U.S. Code.

trade only, any more than the monetary penalty limits congressional authority to monetary trade only (or establishes a limit on the value of trade subject to federal authority): the range of penalties does not reliably inform the scope of the regulated activity. The penalty provision's failure to reference *services* is best understood as simply reflecting the practical reality of what is plausible for the government to do – it can readily confiscate a violator's property and money, but not an intangible item like a service offered for sale to the Indians.

The next section of the 1834 Act provided that “no license to trade with the Indians shall be granted to any persons except citizens of the United States,” then made an exception authorizing the President “to allow the employment of foreign boatmen and interpreters under such regulations as he may prescribe” – indicating both federal control over these service providers in Indian country, and also association of these services with the term *trade*. Act of June 30, 1834, ch. 161 § 5, 4 Stat. 729, 730.⁵

Section 261 (enacted in 1876) authorizes the Commissioner of Indian Affairs to do two things: (1) “appoint traders to the Indian tribes” and (2) make regulations “specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians.” 25 U.S.C. § 261; *see* Act of Aug. 15, 1876, ch. 289 § 5, 19 Stat. 176, 200. Again, the focus on *goods* in the second task does not require that the broad term *traders* in the first task be restricted to traders in goods alone.

Even if Congress had intended in 1834 or 1876 to govern only trading in goods, or to so limit its delegation of rulemaking authority, Congress enlarged the scope of the field over which it asserted preemptive federal authority in 1901, when it enacted the provision that became §

⁵ This section was not reenacted in the Revised Statutes of 1878, and hence was repealed at that time, if not previously. *Cf. Clairmont v. United States*, 225 U.S. 551, 557 (1912) (discussing repeal of a different portion of the Act of June 30, 1834, ch. 161).

262, then applicable only to the Osage Reservation, and in 1903 when the provision was “amended and extended so as to apply to all Indian reservations.” Act of March 3, 1901, ch. 832 § 1, 31 Stat. 1058, 1066; Act of March 3, 1903, ch. 994 § 10, 32 Stat. 982, 1009. The 1901 enactment expressly dealt with the provision by traders of credit services, providing:

That it shall be unlawful hereafter for the traders upon the Osage Indian Reservation to give credit to any individual Indian or head of a family to an amount greater than sixty per centum of the next quarterly annuity to which such individual Indian or head of a family will be entitled; and if such traders shall give credit to any individual Indian or head of a family upon such reservation in excess of the amount herein allowed, no portion of the indebtedness thus created shall be collectible, and the same shall be void and the licenses of such traders shall be revoked.

31 Stat. 1058, 1065-66. The Act continued, with respect to the Osage Reservation:

That on and after July first, nineteen hundred and one, any person desiring to trade with the Indians on said reservation shall, upon establishing the fact, to the satisfaction of the Commissioner of Indian Affairs, that he is a proper person to engage in such trade, be permitted to do so under such rules and regulations as the Commissioner of Indian Affairs may prescribe for the protection of said Indians[.]

31 Stat. 1058 at 1066. In this Act, “trade” with Indians specifically included providing credit to Indians. Moreover, it is evident that such credit services had been part of the “trade” with Indians, in practice, for some time prior to 1901. *See* 31 Stat. 1058, 1065 (directing the Secretary of the Interior to pay Osage Indians’ debts to traders before disbursing payments to the Indians). Congress established rules to govern traders providing this service and authorized the Commissioner to prescribe additional rules and regulations to govern persons engaged in such trade. Two years later, Congress made the latter quoted provision (“...any person desiring to trade with the Indians...”) generally applicable to all Indian reservations. 32 Stat. 982, 1009. There is nothing in the nationwide extension of this provision that suggests any reason to infer that its scope was simultaneously narrowed to no longer apply to services.

The companion act to the 1834 trader statutes, governing trading between federal employees and Indians, further illuminates Congress' intentions. Congress provided in 1834 that "no person employed in the Indian department shall have any interest or concern in any trade with the Indians, except for, and on account of, the United States[.]" Act of June 30, 1834, ch. 162 § 14, 4 Stat. 735, 738. Congress modified the provision a century later to specify that "notwithstanding" the prohibition on "any trade with the Indians," federal employees "may, under such rules and regulations as the Secretary of the Interior may prescribe, be permitted to purchase from any Indian or Indian organization any ... product, service or commodity[.]" Act of June 19, 1939, ch. 210, 53 Stat. 840.

Congress authorized the Commissioner of Indian Affairs to prescribe rules and regulations for the protection of Indians, under which persons desiring to trade with the Indians on any Indian reservation shall be permitted to do so. 25 U.S.C. § 262. Neither the text of the statute, the congressional objective evident in the overall regulatory scheme, nor other federal acts addressing the same or similar subjects, reveal a clear, unambiguous intent to limit the trade regulated under § 262 to the sale of goods alone. Construing the statute broadly is consistent with these considerations as well as the canon "that statutes passed for the benefit of dependent Indian tribes are to be liberally construed, doubtful expressions being resolved in favor of the Indians," a principle that "has particular force in the face of claims that ambiguous statutes abolish by implication Indian tax immunities." *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976). The Department's regulations defining *trading* to include transactions for the acquisition of services, and regulating such transactions, were issued within the agency's authority, and its interpretation of the trader statutes was correct. For present purposes, however, the Department's interpretation need only be permissible. It is, so it is binding here.

The opinions holding or implying that the Indian Trader Statutes do not apply to services have no persuasive value, for the reasons described in the Tribe's brief in support of its motion. *See* Doc. 75 at 22-23, fn.8 (discussing *United States ex rel. Keith v. Sioux Nation Shopping Center*, 488 F.Supp. 496 (D.S.D. 1980); and *Mescalero Apache Tribe v. O'Cheskey*, 625 F.2d 967 (10th Cir. 1980)). The State refers to the court's failure to mention the Indian Trader Statutes in *Seminole Tribe of Florida v. Stranburg*, 799 F.3d 1324 (11th Cir. 2015), while upholding a state tax on utilities delivered to Indians on-reservation, but the trader statutes were simply not at issue there. Neither the district court nor the tribal plaintiff raised the trader statutes, relying instead on the theory that the utility tax was impermissible because its legal incidence was imposed directly on the tribe. *Id.* at 1345-52 (concluding that, contrary to the decision below, the legal incidence was upon the non-Indian utility company). The absence of discussion of an issue that was not raised is not persuasive authority.

The provision of construction services to the Tribe on the Reservation, together with the provision of construction materials, are subject to federal control, exclusive of state power to tax such transactions.

III. IGRA preempts the tax.

The State's discussion of *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), highlights the fault in the State's view of its authority in Indian country. *See* Doc. 78 at 13-15. Its premise is unsound – states do not “generally have the authority to tax non-Indian activities on Indian country,” and Supreme Court decisions do not “wipe[] away” state authority to tax or regulate. Doc. 78 at 13. The measure of the State's authority to impose taxes at the Tribe's Casino does not depend solely on the extent to which *Cabazon* has or has not “taken it away.” Doc. 78 at 14. Rather, states lack authority over tribal casinos because such power is “withheld from them by the Constitution.” *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 58

(1996) (citing *Cabazon*); *see id.* at 62 (through the Indian Commerce Clause, states “have been divested of virtually all authority over Indian commerce and Indian tribes”); *id.* at 72 (“the regulation of Indian commerce” is an area “that is under the exclusive control of the Federal Government”).

As *Cabazon* said, when dealing with “a state burden on tribal Indians in the context of their dealings with non-Indians,” generally “state authority is preempted by the operation of federal law ... ‘if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority.’” *Cabazon* at 216 (quoting *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983)). “The inquiry is to proceed 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.* (quoting *Mescalero* at 335). *Cabazon* undertook this analysis to answer the question before it, which, as the State emphasizes, did not specifically involve a state’s attempt to tax a tribal casino. But the same analysis, applied specifically to a “state’s general taxation authority” (Doc. 78 at 15) at a tribal casino, reveals that the operation of federal law also preempts such authority to tax. *Indian Country, U.S.A., Inc. v. Oklahoma*, 829 F.2d 967, 985-87 (10th Cir. 1987). And the same analysis, applied to a state’s power to tax a construction contractor working on-reservation for a tribe, building realty improvements that advance important tribal and federal interests (just as tribal gaming does, *Cabazon* at 217-18), reveals that the operation of federal law preempts that state tax as well. *Ramah*, 458 U.S. at 842-43.

The preemption analysis employed in cases like *Cabazon*, *Ramah*, and *Indian Country* yields the same result here – that the imposition of State contractor’s excise tax at the Casino is

preempted by the operation of federal law. It is not necessary for Congress to have “specifically preempted” the contractor’s excise tax in IGRA. Doc. 78 at 14-15. “This argument is clearly foreclosed[.]” *Ramah*, 458 U.S. at 843.

IGRA makes the common law preemption analysis unnecessary, however – indeed, the Eighth Circuit has held it must not be done – if a state law seeks to regulate an area within IGRA’s “fixed division of jurisdiction.” *Gaming Corp. of Am. v. Dorsey & Whitney*, 88 F.3d 536, 547 (8th Cir. 1996). With IGRA, Congress “fixed” into statute the results of its own balancing of the tribal, federal and state interests. *Id.* at 546. Congress dealt not only with the specific subject of *Cabazon* (state regulation of on-reservation gambling on cards and bingo), but also established a framework for the regulation of *all* gambling in Indian country, and incorporated into the framework matters beyond the actual gameplay itself, but deemed vital to fulfill the federal objectives of IGRA. Congress codified tribal authority over “the construction and maintenance of the gaming facility,” 25 U.S.C. § 2710(b)(2)(E), and the tribal issuance of a license for the facility, 25 U.S.C. § 2710(b)(1), while providing a mechanism for states to have a say in such standards, 25 U.S.C. § 2710(d)(3)(C)(vi). With the compacting mechanism, Congress also provided states a means to extend their taxing authority to tribal gaming in a limited way, 25 U.S.C. § 2710(d)(3)(C)(iii), while expressly affirming “the lack of authority” states otherwise have to impose a “tax, fee, charge, or other assessment” upon a tribe, 25 U.S.C. § 2710(d)(4).

As the Eighth Circuit recognized, the statutory allocation of jurisdiction requires federal preemption of the field because, if a state were able to apply its civil laws to a tribal casino outside the parameters IGRA established, “it would bypass the balance struck by Congress.” *Gaming Corp.* at 549. Any state law that would directly interfere with a tribe’s operation of its

casino facility to further its economic and political development free from state involvement falls within the scope of IGRA's preemption. *Id.*; see *Missouri ex rel. Nixon v. Coeur D'Alene Tribe*, 164 F.3d 1102, 1108 (8th Cir. 1999) ("The Indians' long-standing rights and interests in controlling activities on their tribal lands, and the States' correspondingly limited power to regulate activities on tribal lands except as authorized by Congress, are core principles underlying the IGRA that necessarily frame the scope of its preemptive force."). The State contractor's excise tax does that by increasing the cost of the Tribe's Casino construction project, diverting gaming revenues from the Tribe to the State and inserting State interests into Tribal Casino planning decisions.

It is not disqualifying that the tax is imposed on the contractor, a non-Indian. In *Gaming Corp.*, IGRA preempted state law claims in an action only involving non-Indian parties. *Gaming Corp.* at 549. "Tribes need to be able to hire agents," the Eighth Circuit reasoned, to "assist [the tribes] in carrying out [their] congressionally authorized" activities, and a state-law burden on the non-Indian while engaged in that relationship burdens the tribe as well. *Id.* at 549-50. The burden, though indirect, interferes with the statutory scheme. The State's reading of § 2710(d)(4) is therefore unjustifiably restrictive. See Doc. 78 at 15-16.

In light of IGRA's objectives, its focus on tribal economic development, and the applicable canon of construction, § 2710(d)(4) is better understood to prohibit states from imposing taxes, fees, charges or other assessments on on-reservation activities, the *economic incidence* of which falls upon an Indian tribe in connection with a tribal casino. Nothing in the statute's broad language requires narrowly construing it to refer only to the *legal incidence* – which, after all, would be categorically barred, and which would permit states to circumvent congressional intent by adjusting their tax code to alter the legal incidence of a tax. The

expansive language instead suggests an intent to address any state-imposed economic burden on the tribal casino operation, when the taxed activity occurs on the reservation. Considering the economic incidence is also consistent with all the modern Supreme Court decisions that have found state taxes preempted because the economic burden would ultimately fall on the tribal party, which could “disturb and disarrange the [federal] statutory plan.” *Warren Trading Post*, 380 U.S. at 691; *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 151-52 & fn.15 (1980); *Ramah*, 458 U.S. at 844 & fn.8.

In support of a narrow interpretation, the State cites *Barona Band of Mission Indians v. Yee*, 528 F.3d 1184, 1193 fn.3 (9th Cir. 2008), but in *Barona* the tribe and the gaming operation were one step removed from the taxed transaction, which was between the non-Indian subcontractor and its non-Indian vendors, so that the cost of the tax was passed on to the tribe only through “contractual creativity” that was “rigged to trigger a tax exemption.” *Barona* at 1188, 1192. In this case, nothing is rigged, and the standard industry practice (as contemplated by state statute, SDCL 10-46A-12) finds the seller’s gross receipts tax passed on to, and paid by, the buyer.

Cabazon Band of Mission Indians v. Wilson, 37 F.3d 430 (9th Cir. 1994), which the State relies on to undercut § 2710(d)(4), is unpersuasive in its statutory construction, for the reasons given in the Tribe’s opposition brief. See Doc. 81 at 24-25. *Wilson* was contrary to subsequent Eighth Circuit and Ninth Circuit analyses (see *Gaming Corp.*, 88 F.3d 546-47; *Rincon Band of Luiseño Mission Indians v. Schwarzenegger*, 602 F.3d 1019, 1036 (9th Cir. 2010)) and it construed a single sentence of § 2710(d)(4) without the benefit of context. Both the immediate statutory context and the wider view of federal Indian policy are critical to understanding § 2710(d)(4) because both demonstrate that states have no authority (including taxing authority)

over tribal casino operations absent the authority granted in § 2710. Therefore, the statement in § 2710(d)(4) that nothing in § 2710 grants to states the authority to impose any tax, fee, charge or other assessment upon a tribe means that, with respect to casino operations, nothing anywhere grants the states such authority. Courts have so construed analogous limited authorizations, as in *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164, 177 (1973), discussed *infra*. See also *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655, 658-59 (9th Cir. 1975) (construing Public Law 280). Furthermore, § 2710(d)(4)'s second sentence aims to keep the tribal and state negotiating positions on equal footing by requiring states to negotiate despite "the lack of authority" they have to impose such economic burdens. It would render § 2710(d)(4) meaningless to suppose that Congress, having gone to these lengths, intended to *allow* state taxation to burden tribal casinos, without tribal consent and with tribes receiving no value in return.

The State's reference to the preemption of state authority as presumptively "disfavor[ed]" in this context is wrong. See Doc. 78 at 16 (quoting *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005)). The Tribe's opposition brief fully addresses this issue. Doc. 81 at 10-11. Respect for state sovereignty disfavors preemption of state authority in other contexts, but respect for tribal sovereignty favors preemption of state authority within Indian country. See *Gaming Corp.*, 88 F.3d at 548 ("Because of unique federal and tribal interests a less stringent test is applied when preemption is asserted ... in cases involving Indian affairs.").

The Tribe's opposition brief also explains how the State misreads the text of § 2710(d)(4). Doc. 81 at 26; see Doc. 78 at 16. The inapplicability of *Bay Mills* to define the limits of § 2710(d)(4) has also been covered: *Bay Mills* established that "class III gaming activity" means "the roll of the dice and spin of the wheel," but § 2710(d)(4) address taxes

imposed upon a tribe, not taxes imposed upon a class III gaming activity. *Michigan v. Bay Mills Indian Community*, 134 S.Ct. 2024, 2032 (2014); Doc. 81 at 26. The Tribe has also distinguished the property tax on a non-Indian's *ownership* (rather than an excise tax on a non-Indian's *transaction* with an Indian or Indian tribe) at issue in *Mashantucket Pequot Tribe v. Town of Ledyard*, 722 F.3d 457 (2d Cir. 2013). Doc. 81 at 28; Doc. 75 at 32-33; *see* State's Opposition Brief, Doc. 78 at 16.

Although the State attempts to distinguish *McClanahan*, 411 U.S. 164 (*see* Doc. 78 at 17) the decision and its reasoning rightly apply to this case. As the State says, *McClanahan* dealt with a state's personal income tax imposed on an Indian residing and earning income on a reservation. *McClanahan* at 168. The cited portion with which the State takes issue was discussing the Buck Act, which "grants to the States general authority to impose an income tax on residents of federal areas" in 4 U.S.C. § 106(a), but "expressly provides that 'nothing in sections 105 and 106 of this title shall be deemed to authorize the levy or collection of any tax on or from any Indian not otherwise taxed.'" *McClanahan* at 176 (quoting 4 U.S.C. § 109). "[T]his proviso was meant to except reservation Indians from coverage of the Buck Act[.]" *Id.* at 176-77. The language and its effect are analogous to IGRA's § 2710(d)(4), which provides that the powers granted to states in IGRA are subject to the stated limitation. *McClanahan* held that, beyond merely limiting the authority granted in the Buck Act, the § 109 proviso indicated Congress' "obvious" understanding that states did not have "residual power to impose such taxes in any event." *McClanahan* at 177.

The Court also observed that "statutes authorizing States to assert tax jurisdiction over reservations in special situations are explicable only if Congress assumed that the States lacked the power to impose the taxes without special authorization." *McClanahan* at 177. Furthermore,

the Court pointed to the statutory “method whereby States may assume jurisdiction over reservation Indians ... ‘with the consent of the tribe occupying the particular Indian country’” and appropriate amendment of the state constitution. *Id.* at 177-78 (quoting 25 U.S.C. § 1322(a)). “[W]e cannot believe,” the Court held, “that Congress would have required the consent of the Indians affected and the amendment of those state constitutions which prohibit the assumption of jurisdiction if the States were free to accomplish the same goal unilaterally by simple legislative enactment.” *Id.* at 178.

The analogy to IGRA is plain: IGRA authorizes states to assert limited taxing authority at tribal casinos, 25 U.S.C. § 2710(d)(3)(C)(iii), which authorization is explicable only because states lack the power to impose such taxes without special authorization. IGRA also provides a statutory method for states to assume jurisdiction over tribal casinos, with the consent of the tribe having authority over the Indian land in question and federal approval of the agreement. It defies belief, as it did in *McClanahan*, that Congress would have required tribal consent and federal approval if states were free to accomplish the same goal unilaterally by simple legislative enactment. Having authorized one statutory method for states to acquire authority to impose taxes placing an economic burden on tribal casinos, and limiting the scope of the taxing authority available through that single method, and expressly disclaiming that any other authorization of state taxing power can be found within the statute, the end result is that IGRA prohibits the unconsented imposition of State tax on the construction and renovation of the Tribal Casino.

The State argues that IGRA is “aimed at the regulation of tribal gaming,” and claims that casino renovation and construction is outside of the accordingly-limited preemptive scope of the Act. Doc. 78 at 18-20 (emphasis in original). The State cites the usual decisions holding certain subjects are outside the scope. Doc. 78 at 19. All of these the Tribe has distinguished. *See* Doc.

75 at 32-33, 41-43; Doc. 81 at 27-30. Three of them reflect circumstances where the tribe was not a party to the taxed activity, making the effects on the tribal casino far more attenuated than the effects of the tax in this case. *Mashantucket*, 722 F.3d 457; *Barona*, 528 F.3d 1184; *Casino Resource Corp. v. Harrah's Entertainment Inc.*, 243 F.3d 435 (8th Cir. 2001). In the fourth, the application of the state law in question (regarding public release of state records) was authorized by the tribal-state gaming compact, and any impact on the Tribe's gaming operation was fully consistent with one of IGRA's express objectives. *Confederated Tribes of Siletz Indians v. Oregon*, 143 F.3d 481, 484-87 (9th Cir. 1998).

Making its case for the where the boundaries of IGRA preemption are located, the State underlines the use of the word *gaming* in a variety of authorities, Doc. 78 at 18, and then apparently suggests that IGRA may preempt state laws that affect the “actual play of class III games,” or affect either of two congressional purposes expressed in IGRA – ensuring the tribe is the primary beneficiary of the casino and ensuring fair and honest gaming – and that its preemptive scope goes no further. Doc. 78 at 20. The State fails to contend with state laws that affect other subjects that IGRA sweeps within its framework. *Gaming Corp.* noted that state laws that “would require examination of the relationship between Dorsey [the law firm assisting the nation with licensing of gaming management contractors] and the nation” were likely preempted, as were state laws regarding “Dorsey's duty to the nation during the licensing process[.]” *Gaming Corp.* at 550. The application of state law to such matters would impermissibly interfere with tribal regulation of its licensing process, even if indirectly. *Id.* The “actual play of class III games” need not be involved. State involvement in other subjects IGRA covers is similarly preempted, including the licensing of gaming facilities, 25 U.S.C. § 2710(b)(1); the tribal casino's use of gaming revenues, 25 U.S.C. §§ 2710(b)(2)(B), 2710(b)(3);

and construction and maintenance of the gaming facility, 25 U.S.C. § 2710(b)(2)(E).⁶ Moreover, the State allows that interference with IGRA's purposes indicates preemption, but fails to see that a State law that diminishes the Tribe's pursuit of "[T]ribal economic development, self-sufficiency, and [a] strong [T]ribal government[]" through its "operation of gaming" therefore must be preempted. 25 U.S.C. § 2702(1). So must a State law that devalues "gaming as a means of generating tribal revenue." 25 U.S.C. § 2702(3). State intrusion and interference with any of these matters is preempted by IGRA because all of these matters are within the field of gaming, a field where IGRA preempts state law.

The State seeks to minimize IGRA's governance of casino construction, *see* Doc. 78 at 21, but IGRA's preemption of state law does not depend on the degree of the federal government's hands-on involvement. Preemption here is the result of Congress allocating authority among the three sovereigns. Where authority is assigned to the tribal and federal governments, and is withheld from state governments (unless otherwise provided in a gaming compact) – as it is for the construction of a gaming facility – that constitutes federal preemption of state authority with respect to that matter. IGRA mandates that the Tribe take governmental responsibility for ensuring casino construction adequately protects the environment and the public health and safety, and gives the NIGC, a federal agency, oversight responsibility to ensure the Tribe satisfies its duty, and enforcement powers that include shutting down the Casino if the Tribe fails to meet its charge. 25 U.S.C. §§ 2710(b)(1), 2710(b)(2)(E), and 2713; 25 C.F.R. §§

⁶ Other subjects include federal oversight of contracts for supplies, services or concessions, 25 U.S.C. § 2710(b)(2)(D); actions against a state for failure to negotiate a gaming compact in good faith and actions against a tribe for violation of a gaming compact, 25 U.S.C. § 2710(d)(7); contracts for the operation and management of gaming, 25 U.S.C. §§ 2710(d)(9), 2711; enforcement of IGRA and tribal gaming laws, 25 U.S.C. §§ 2713, 2714; and designation of the lands eligible for gaming under IGRA, 25 U.S.C. §§ 2703(4), 2719.

559.3, 559.4, 559.6. The State is given no role and has no responsibility over the matter unless the gaming compact so provides. 25 U.S.C. § 2710(d)(3)(C)(vi).

The State's comparison of tribal gaming to the federal involvement in *Ramah* does not withstand scrutiny. In *Ramah*, the tribal entity entered into a contract with the BIA to use federal funds to undertake school construction that otherwise would have been the responsibility of the United States. *Ramah*, 448 U.S. at 835, 839-40; *id.* at 851 (Rehnquist, J., dissenting). The contract between the tribal school board and the BIA allowed the school board to subcontract for the actual construction work, and provided certain requirements for such subcontracts. *Id.* at 835. Although federal regulations governed the tribal application for funding and services from the BIA and authorized BIA approval of construction plans and the tribe's subcontracts, the federal government, as the dissent emphasized, "played *no role* in regulating or supervising the actual construction of the school," the activity being taxed. *Id.* at 851-52 (Rehnquist, J., dissenting) (emphasis in original); *see id.* at 835, 841. And as the majority opinion responded, the same was true in *Bracker*, yet in both cases, because the state taxes would impede the broader federal interest in accomplishing the objective behind the federal laws and regulations, the states were precluded from imposing their taxes. *Id.* at 841 fn.5.

The gaming compact has no provision allowing the State to assess contractor's excise tax at the Casino. To say that therefore "the State has effectively waived any authority to impose its tax," as the State characterizes the Tribe's view, Doc. 78 at 24, does not quite capture it. It is not a waiver, or loss of authority, but just a lack of authority. Further, it is not up to the State alone, as the waiver concept implies. There exists a method by which the State could (with a suitably designed provision) validly obtain the Tribe's consent and federal approval to tax casino

construction. The State *may* acquire this authority through a gaming compact, and the compacting method is *only* way to acquire it. *Gaming Corp.*, 88 F.3d at 546, 547.

The State notes that the gaming compact “only controls activities to the extent it permits or prohibits those activities.” Doc. 78 at 24 (citing *Siletz*, 143 F.3d at 485). This is true enough, and there is nothing in the Tribe’s gaming compact with the State that controls the tax imposed in this case. If the compact authorized the tax or prohibited it, there is little doubt it would control. But it does not, and neither did the compact in *Barona*. See Doc. 78 at 24-25. The State says the *Barona* compact “contain[ed] provisions regarding construction standards.” Doc. 78 at 25 fn.4. But the court found the tax on the transactions for the contractor’s acquisition of materials was not within the scope of what the compact covered. *Id.* (citing *Barona*, 528 F.3d at 1193 fn.4). The absence of a compact provision dealing with the tax in *Barona* was not a factor because the court also determined the taxed activity (the purchase of construction materials in a transaction between two non-tribal parties) was outside the scope of what IGRA preempts, so it did not need to be in the compact for the state to have the authority. The difference here is that the taxed activity (the provision of construction labor and materials in a transaction between the contractor and the Tribe) is within IGRA’s preemptive scope.

The State disputes the use of the “but for” test for determining whether a given subject matter is classifiable as “directly related to the operation of gaming activities,” 25 U.S.C. § 2710(d)(3)(C)(vii), but the State ignores half the inquiry. See Doc. 78 at 25-27. First, the Tribe’s Casino construction and renovation project would not exist but for the Tribe’s operation of gaming activities. Second, the Tribe’s gaming operation could not be maintained in compliance with IGRA and in fulfillment of IGRA’s objectives but for the Casino construction and renovation project. See Tribe’s Mem. in Support of Motion, Doc. 75 at 41. Contrary to the

State's incomplete reading, the *Gerlach* decision acknowledged that while one prong may be insufficient, the two prongs together demonstrate the direct relationship between the operation of gaming activities and the taxed subject. *Flandreau Santee Sioux Tribe v. Gerlach*, 269 F.Supp.3d 910, 925 (D.S.D. 2017), *appeal docketed*, No. 18-1271 (8th Cir. Feb. 6, 2018) (finding that "but for the existence of the Casino, the [gaming-related amenities] would not exist," and that the Casino could not "operate without the existence of [its gaming-related] amenities").

The fact that the test originated in a different context does not make it inapplicable here. *See* Doc. 78 at 26 (citing *In re Indian Gaming Related Cases* ("Coyote Valley I"), 331 F.3d 1094 (9th Cir. 2003)). The "nuanced and fact-specific" nature of the good-faith inquiry at issue in *Coyote Valley II* influenced the court's construction of the statutory provision directing courts to "consider any demand by the State for direct taxation of the Indian tribe or of any Indian lands as evidence that the State has not negotiated in good faith." *Coyote Valley II* at 1113 (quoting 25 U.S.C. § 2710(d)(7)(B)(iii)(II)). Such a demand is "evidence" of bad faith, but not "conclusive proof." *Id.* The nature of the good faith inquiry does not directly impact this case, because, as the State says, "the 'good faith inquiry' is not relevant here" as such. Doc. 78 at 26. However, the analysis undertaken in *Coyote Valley II* is instructive. In part, the good faith inquiry examines whether a state has insisted upon compact provisions that are "too far afield from tribal gaming to be an appropriate topic for Tribal-State compact negotiations." *Coyote Valley II* at 1115. In *Coyote Valley II*, the court focused on whether the provision was "directly related to the operation of gaming activities." *Id.* at 1116; 25 U.S.C. § 2710(d)(3)(C)(vii).⁷

⁷ The court also considered other factors in deciding that the state's insistence on the labor relations provision at issue there did not constitute a lack of good faith, including the state's interest in the employment rights of its citizens and the concessions offered in return for the

Despite arising in a different context, the question of whether a given subject comes within the scope of § 2710(d)(3)(C)(vii) is common to that case and this one. The State identifies no valid reason to address the question differently here.

The State speculates about different outcomes if the two-part but-for test had been applied in its four standby cases. Doc. 78 at 27 (citing *Casino Resource*, 243 F.3d 435; *Barona*, 528 F.3d 1184; *Siletz*, 143 F.3d 481; and *Mashantucket*, 722 F.3d 457). The facts of these cases, however, indicate otherwise. The question in *Casino Resource* was whether a gaming management company's state law claims against another gaming management company were preempted by federal law. *Casino Resource* at 436-37. Specifically, Harrah's and Casino Resource Corp. ("CRC") jointly pursued gaming opportunities with the Potawatomi Indian Nation, resulting in various development and management contracts between Harrah's and the Nation. *Id.* at 436. Harrah's and CRC entered into an agreement among themselves to formalize their relationship. *Id.* Harrah's and the Nation later agreed to dissolve the development and management contracts between them. *Id.* at 437. CRC then sued Harrah's on various state law grounds, including breach of their contract, breach of fiduciary duty, and tortious interference with CRC's contractual and prospective economic advantage. *Id.* The contractual relationship and legal claims between the two parties, both non-tribal, were "peripherally associated with tribal gaming." *Id.* at 439. In terms of the "but-for" inquiry, the relationship between Harrah's and CRC and the claims arising from it, *could* have come about in the absence of the tribal casino, since the alleged legal duties flowed only between the two non-tribal parties, involving

provision. *Coyote Valley II* at 1116. These factors did not influence the decision that the labor relations provision was "directly related to the operation of gaming activities." Rather, these were three independent factors which, together, led to the conclusion that the state did not act in bad faith.

only how they were obliged to deal with one another. Moreover, their legal rights did not affect the Nation's rights or its operation of a casino.

Barona similarly centered on transactions to which the tribe was a third party – the non-Indian construction subcontractor's purchase of materials from a non-Indian vendor. Would the transaction have occurred but for the casino? Evidently so, because, as the court noted, the materials “could be used for a multitude of purposes unrelated to gaming.” *Barona*, 528 F.3d at 1192. *Mashantucket* is similar as well. The non-Indian taxpayer would have owned the personal property that was the subject of the state tax whether or not a tribal casino leased the property in order to use it in the casino. *See Mashantucket*, 722 F.3d at 469-70.

The disputed activity in *Siletz* was the state's disposition, under state public records laws, of an investigative report it had created regarding a tribal casino. *Siletz*, 143 F.3d at 483-84. The tribe's ability to operate its casino consistently with IGRA's objectives was not undercut by the report's public release. *Id.* at 487.

IV. The relevant State interests are insufficient to justify the burden on the Tribal and federal interests.

The State claims *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989), altered the Supreme Court's position on the question of which State services are relevant to the *Bracker* balancing analysis. Doc. 78 at 29. It did not. The State quotes *Cotton* stating, “‘the relevant services provided by the State include those that are available to the [taxpayers] and the members of the Tribe off the reservation as well as on it.’” Doc. 78 at 29 (quoting *Cotton* at 189). The quotation is taken out of context and is misleading. The Court was addressing an argument separate and distinct from preemption under *Bracker* balancing. The Court explained, “Cotton also argues that New Mexico's severance taxes – ‘insofar as they are imposed without allocation or apportionment on top of Jicarilla Apache tribal taxes’ – impose an unlawful multiple tax

burden on interstate commerce.” *Cotton* at 187-88 (quoting appellants’ brief). (The Tribe makes no such argument in this case.) Specifically, the quoted remarks were responding to the aspect of that argument that was “based on the evidence that tax payments by reservation lessees far exceed the value of services provided by the State to the lessees, or more generally, to the reservation as a whole.” *Id.* at 189. Off-reservation state services are “relevant” to this apportionment argument, the Court held, because under the Due Process Clause, a taxpayer’s tax obligations to a sovereign that (as the Court separately concluded) “has taxing jurisdiction” over the activity depend not on “the value of the services provided to the activity,” but on the “intangible value of citizenship in an organized society[.]” *Cotton* at 189-90 (quoting *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 621 (1981)). “[T]his latitude afforded the States under the Due Process Clause,” however, was not a factor in *Cotton*’s separate *Bracker* analysis. *Cotton* at 190 (quoting *Commonwealth Edison* at 623).

Far from departing from its earlier *Bracker* preemption decisions, *Cotton* stated the governing rules by setting forth the factors at work in *Bracker* and *Ramah*. In *Bracker*, “the state was ‘unable to identify any regulatory function or service it performed that would justify the assessment of taxes for activities on Bureau and tribal roads within the reservation[.]’” *Cotton* at 184 (quoting *Bracker* at 148-49) (*Cotton*’s brackets and ellipses omitted); *see also id.* (quoting *Bracker* at 174 (Powell, J., concurring)) (“The State has no interest in raising revenues from the use of Indian roads that cost it nothing and over which it exercises no control.”). In *Ramah*, “[a]s in *Bracker*, the State asserted no legitimate regulatory interests that might justify the tax.” *Cotton* at 184. The Court recounted its conclusion in *Ramah*: “Having declined to take any responsibility for the education of these Indian children, the State is precluded from imposing an additional burden on the comprehensive federal scheme intended to provide this education – a

scheme which has left the State with no duties or responsibilities.” *Id.* at 185 (quoting *Ramah* at 843) (internal quotation marks omitted). *Cotton* then factually distinguished the two decisions: in contrast to the “noninvolvement of the State in the on-reservation activity” in *Bracker* and *Ramah*, in *Cotton*, New Mexico provided “substantial services to both the Jicarilla Tribe and Cotton.” *Cotton* at 185. Specifically, “New Mexico spends approximately \$3 million per year in providing on-reservation services to Cotton and the Tribe.” *Id.* at 171 fn.7. Further, in *Cotton* “the State regulate[d] the spacing and mechanical integrity of wells located on the reservation.” *Id.* at 185-86. “This is not a case,” *Cotton* concluded, “in which the State has had nothing to do with the on-reservation activity, save tax it.” *Id.* at 186.

The State points to unspecified services provided to the contractor at its shop in Sioux Falls, as well as other off-reservation services the contractor “may be taking advantage of,” or “has the opportunity to do so at any time.” Doc. 78 at 29-30. The rule expressed in *Ramah* with respect to off-reservation state services still stands. There, the Court stated:

The only arguably specific interest advanced by the State is that it provides services to *Lembke* [the construction contractor] for its activities *off the reservation*. This interest, however, is not a legitimate justification for a tax whose ultimate burden falls on the tribal organization.... Furthermore, although the State may confer substantial benefits on *Lembke* as a state contractor, we fail to see how these benefits can justify a tax imposed on the construction of school facilities on tribal lands pursuant to a contract between the tribal organization and the non-Indian contracting firm.

Ramah, 458 U.S. at 843-44 (emphasis in original). “Presumably,” the Court then noted, “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 844 fn.9.

The Eighth Circuit similarly held in *Marty Indian School Bd., Inc. v. South Dakota*, 824 F.2d 684 (8th Cir. 1987),

[W]hile it is true that the state spends some funds for construction and maintenance of the roads in the reservation area, the state also receives funds from

the payment of the fuel tax by the Tribe and by the school when it purchases fuel at commercial gas stations during trips outside the school premises. In addition, the state receives an extra allotment from the federal government for highway expenditures based on the amount of Indian land within the state. *See* 23 U.S.C. § 120. Thus, as the Court in *Ramah* concluded, the services provided by the state in this case do not justify the further imposition of the fuel tax on fuel purchased and stored on the premises of the Marty Indian School.

Marty, 824 F.2d at 688. Again, off-reservation state functions were compensated by state taxes incurred off-reservation. So too here. The Tribe and the contractor both pay state taxes on their off-reservation activities. *See, e.g.*, Declaration of John McCollister ¶ 9 & Exhibit 2 (showing total contractor's excise tax remitted by contractor); Doc. 77 ¶¶ 20-23 (Tribe pays state fuel taxes); *see also* South Dakota Dept. of Revenue, "Motor Fuel," available at http://dor.sd.gov/Motor_Vehicles/Motor_Fuel/ ("Motor fuel tax revenues are used to fund maintenance and construction of streets, roads, and bridges."); *accord Marty Indian School Board, Inc. v. South Dakota*, 824 F.2d 684, 688 (8th Cir. 1987). These taxes meet the State's interest in raising revenues for its off-reservation functions. That general statewide interest, however, does not justify burdening important Tribal and federal interests with State taxation on the Reservation.

The State notes, apparently with disapproval, the asymmetry between the relevant Tribal interests and the relevant State interests. Doc. 78 at 28-29. This disparity, however, is exactly what the Supreme Court has called for, and it simply highlights the nature of the problem the *Bracker* test is designed to address. The relevant federal and tribal interests are primarily those broadly reflected in federal law, while the relevant state interests are those specifically at stake in connection with the taxed activity. *Mescalero*, 462 U.S. at 334-36. While states and Indian tribes possess equivalent interests in self-government within their borders (including authority to govern the conduct of persons therein), the interests overlap across the entire tribal territory, but in only a fraction of state territory. If a tribe cannot be free from state authority on its

reservation, it cannot be free from it anywhere. If a state cannot exercise authority on a reservation, it can still exercise it throughout the remainder of the state. Furthermore, tribal self-government was first in time, while the subsequent overlay of state sovereignty was carried out subject to tribal rights and federal control. *See* S.D. Const. art. 26, § 18, cl. 2 (providing that the people of the State “forever disclaim” all right and title to Indian lands within the State and that “said Indian lands shall remain under the absolute jurisdiction and control” of Congress); *accord* Act of Feb. 22, 1889, § 4, 25 Stat. 676, 677 (enabling South Dakota’s admission to the Union on the same conditions); *see also* *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994, 1006 (8th Cir. 2010) (“as a general rule Indian country falls under the primary civil, criminal, and regulatory jurisdiction of the federal government and the resident Tribe rather than the states”). Thus, a state is asked to show exactly why its actual needs require it to diminish or interfere with tribal self-government and the federal programs and policies designed to advance tribal interests.

The Supreme Court requires a state to justify taxation like that at issue here by showing that it is assessing the tax “in return for the governmental functions it *provides* to those who must bear the burden of paying the tax.” *Ramah* at 843 (emphasis added); *see also* *Bracker*, 448 U.S. at 150 (state taxes preempted where state did not “seek[] to assess taxes in return for governmental functions it *performs* for those on whom the taxes fall” (emphasis added), where there existed no discernable “responsibility or service that justifies the assertion of taxes”). “The State’s interest in *exercising* its regulatory authority over the activity in question must be examined and given appropriate weight.” *Ramah* at 838 (emphasis added). A state interest in *potentially* providing government functions or merely *possessing* (but not exercising) regulatory authority is not relevant. *Ramah* observed that the state *could* “provid[e] for the education of Indian children,” but since it was not “constructing, or assisting in the effort to provide, adequate

educational facilities for Ramah Navajo children,” it lacked a sufficient relevant interest in taxing the school construction. *Id.* at 843, fn.7. “The exercise of State authority which imposes additional burdens on a tribal enterprise must ordinarily be justified by *functions or services performed by the State* in connection with the on-reservation activity. ... 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 revenue.” *Mescalero*, 462 U.S. at 336 (emphasis added).

Meanwhile, the assessment of federal and tribal interests is guided by “broad considerations,” including the “crucial ‘backdrop’” provided by “traditional notions of Indian sovereignty,” the “goal of promoting tribal self-government ... embodied in numerous federal statutes, ... Congress’ overriding goal of encouraging ‘tribal self-sufficiency and economic development,’” and the 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*, 462 U.S. at 334-35 (quoting *Bracker* at 143). It is “[b]ecause of their sovereign status,” which tribes fully retain to the extent it is “not ‘inconsistent with the overriding interests of the National Government,’” that “tribes and their reservation lands are insulated in some respects by an ‘historic immunity from state and local control[.]’” *Mescalero* at 332 (quoting *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 153 (1980), and *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973)). The sweeping tribal interests ordinarily may be outweighed only by a specific state interest in raising revenues to “perform[.]” functions or services “in connection with the on-reservation activity,” or in capturing a share of a taxed transaction’s “off-reservation value,” or in necessary regulatory interventions to deal with “off-reservation effects” of a tribal activity. *Mescalero*, 462 U.S. at 336.

In this case, the State has not identified a single governmental function or service that it actually provides to the Casino or the construction project, or to the contractor while performing services on the project site, that is funded with contractor's excise tax revenues. *See* State's Response to Tribe's SUMF (Doc. 77) at ¶¶ 281-300. No relevant State interest justifies assessing approximately \$480,000 in total contractor's excise tax on the Tribal Casino construction project, thereby depriving the Tribal government of \$480,000 in revenues for Tribal government operations. *See id.* ¶¶ 260, 264.

V. The payment under protest of contractor's excise tax is not subject to genuine dispute.

The State's brief in opposition to the Tribe's summary judgment motion disputes in its closing pages the amount of contractor's excise tax remitted to date that is related to the Casino construction project. Doc. 78 at 33-34. The State makes this point in connection with the Tribe's refund claim, as to which the Tribe does not oppose dismissal for lack of jurisdiction. In this light, the exact amount paid is not a material fact. Furthermore, the State's evidence is merely that the State cannot corroborate the Tribe's evidence; it does not present a genuine dispute.

More importantly, however, the State also suggests that the Tribe has not shown that *any* contractor's excise tax was paid, because the protest letters Henry Carlson Company submitted with the tax payments refer to the "enclosed payment of contractor's excise tax and/or use tax." *See* Doc. 78 at 34 (State's emphasis); *see also, e.g.*, Doc. 79-1 at 2. The inference is that it is *unknown* how much (if any) of the amount stated in each letter is attributable to contractor's excise tax. Other evidence, however, expressly clarifies that the entire amount is contractor's excise tax. Decl. of Ryan Kills A Hundred (Doc. 74) ¶¶ 47-48 and Exhibit 9 (Doc. 74-10); *see*

also McCollister Decl. ¶¶ 5 & 13, and Exhibit 2.⁸ In the face of this evidence of the fact itself, which the State does not contradict, it is not reasonable to infer that the fact is unknown. The protest letters' use of the phrase "contractor's excise tax and/or use tax" does not "present[] a sufficient disagreement" about the protested payments of contractor's excise tax to establish a "genuine" issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986).

CONCLUSION

The Tribe respectfully requests that the Court grant the Tribe's motion on its second and third claims and deny the State's motion on the first, second and third claims.

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Respectfully submitted,

FLANDREAU SANTEE SIOUX TRIBE

By: /s/ Shannon R. Falon

Steven M. Johnson

Shannon R. Falon

Jami J. Bishop

Johnson Janklow Abdallah & Reiter, LLP

101 South Main Avenue, Suite 100

Sioux Falls, South Dakota 57104

Telephone: (605) 338-4304

Facsimile: (605) 338-4162

steve@janklowabdallah.com

shannon@janklowabdallah.com

jami@janklowabdallah.com

⁸ According to the State, the Department of Revenue cannot verify that it received (except through discovery in this action) four of the nine protest letters Henry Carlson Company submitted with its contractor's excise tax returns and payments. *See* Affidavit of Doug Schinkel (Doc. 79). Henry Carlson Company's controller, however, affirms that each of the nine letters was submitted to the Department with its corresponding contractor's excise tax return and payment, through the Department's online system. McCollister Decl. ¶ 5 & Exhibit 1; *see also* Decl. of Ryan Kills A Hundred (Doc. 74) ¶¶ 47-48. The Tribe cannot provide any more direct documentary evidence of the letters having been submitted (besides the letters themselves, *see* Kills A Hundred Decl. (Doc. 74) ¶ 51 and Exhibit 11 (Doc. 74-12)) because the Department's submission system does not allow the submitter to obtain a receipt or other confirmation for such protest letters. McCollister Decl. ¶ 9 & Exhibit 2. Further, after learning of the discrepancy, the protest letters were all resubmitted. *Id.* ¶ 12.

Seth Pearman
Flandreau Santee Sioux Tribe
603 West Broad Avenue
Flandreau, South Dakota 57028
Telephone: (605) 997-3891
Facsimile: (605) 997-5041
spearman@fsst.org

Rebecca L. Kidder
Fredericks Peebles & Morgan LLP
520 Kansas City Street, Suite 101
Rapid City, South Dakota 57701
Telephone: (605) 791-1515
Facsimile: (605) 791-1915
rkidder@ndnlaw.com

John M. Peebles, *Pro hac vice*
Steven J. Bloxham, *Pro hac vice*
John Nyhan, *Pro hac vice*
Tim Hennessy, *Pro hac vice*
Fredericks Peebles & Morgan LLP
2020 L Street, Suite 250
Sacramento, California 95811
Telephone: (916) 441-2700
Facsimile: (916) 441-2067
jpeebles@ndnlaw.com
sbloxham@ndnlaw.com
jnyhan@ndnlaw.com
thennessy@ndnlaw.com

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 11,889 words, excluding the cover page, tables, signature block and this certificate.

/s/ Shannon R. Falon