

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No. 18-1271

**FLANDREAU SANTEE SIOUX TRIBE, a
Federally recognized Indian Tribe,**

Plaintiff-Appellees,

v.

ANDY GERLACH, et al.,

Defendants-Appellants.

**ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF
SOUTH DAKOTA, SOUTHERN DIVISION**

**THE HONORABLE LAWRENCE L. PIERSOL
United States District Court Judge**

DEFENDANTS-APPELLANTS' BRIEF

**MARTY J. JACKLEY
ATTORNEY GENERAL**

**Kirsten E. Jasper
Assistant Attorneys General
1302 E. Highway 14, Suite 1
Pierre, SD 57501-8501
Telephone: (605) 773-3215**

**Stacy R. Hegge
Department of Revenue
Karl E. Mundt Library – DSU
820 N Washington Ave
Madison, SD 57042-1799
(605)256-5077**

***Attorneys for
Defendants-Appellants***

SUMMARY OF THE CASE AND ORAL ARGUMENT REQUEST

For purposes of this appeal, the State imposes a tax on nonmembers' on-reservation use of certain goods and services. Upon the Tribe's application, the State had issued three alcoholic beverage licenses to the Tribe, which authorized the Tribe to sell alcoholic beverages at its Casino, entertainment center, and convenience store. As part of its alcoholic beverage licensing scheme, the State requires the Tribe to collect and remit the state use tax from the taxable nonmember purchases at these licensed businesses. Because the Tribe failed to collect and remit this tax, the State denied reissuance of the licenses.

On cross motions for summary judgment, the district court ruled, in relevant part, that 1) the Indian Gaming Regulatory Act preempted the state use tax on certain transactions; and 2) the State may not condition renewal of its alcohol beverage licenses on the Tribe's obligation to collect and remit use tax incurred at the licensed businesses.

The State requests 30 minutes of oral argument to present that the court's ruling is contrary to established law.

TABLE OF CONTENTS

	<u>PAGE</u>
SUMMARY AND REQUEST FOR ORAL ARGUMENT	i
TABLE OF AUTHORITIES.....	iii
JURISDICTIONAL STATEMENT.....	1
STATEMENT OF ISSUES.....	2
STATEMENT OF THE CASE AND FACTS.....	3
SUMMARY OF ARGUMENT	9
STANDARD OF REVIEW.....	10
ARGUMENTS	
I. The State has authority to impose its tax on nonmembers' use of Amenities	12
II. Validity of SDCL 35-2-24	60
CONCLUSION	65
CERTIFICATE OF COMPLIANCE	67
CERTIFICATE OF SERVICE.....	68
ADDENDUM	

TABLE OF AUTHORITIES

PAGE

FEDERAL CASES CITED:

<i>Altria Group, Inc. v. Good</i> , 555 U.S. 70 (2008)	20, 21
<i>Anderson v. Liberty Lobby, Inc.</i> , 477 U.S. 242 (1986)	10
<i>Artichoke Joe's California Grand Casino v. Norton</i> , 353 F.3d 712 (9th Cir. 2003)	21, 22
<i>Barona Band of Mission Indians v. Yee</i> , 528 F.3d 1184 (9th Cir. 2008)	passim
<i>Bates v. Dow Agrosciences LLC</i> , 544 U.S. 431 (2005)	16
<i>Bonito Boats, Inc. v. Thunder Craft Boats, Inc.</i> , 489 U.S. 141 (1989)	23
<i>Butler v. Crittenden Cty., Ark.</i> , 708 F.3d 1044 (8th Cir. 2013)	11
<i>Cabazon Band of Mission Indians v. Wilson</i> , 37 F.3d 430 (9th Cir. 1994)	9, 16, 25, 40
<i>Casino Res. Corp. v. Harrah's Entm't, Inc.</i> , 243 F.3d 435 (8th Cir. 2001)	20, 27, 36, 43
<i>Citizen Band Potawatomi Indian Tribe v. Okla. Tax Comm'n</i> , 975 F.2d 1459 (10th Cir. 1992)	42
<i>City of Timber Lake v. Cheyenne River Sioux Tribe</i> , 10 F.3d 554 (8th Cir. 1993)	42
<i>Confederated Tribes of Colville Indian Reservation v. State of Washington</i> , 446 F. Supp. 1339, 1347 (E.D. Wash. 1978)	47
<i>Confederated Tribes of Siletz Indians of Oregon v. State of Oregon</i> , 143 F.3d 481 (9th Cir. 1998)	25, 36

<i>Cook v. United States</i> , 86 F.3d 1095 (Fed. Cir. 1996)	10
<i>Cotton Petroleum Corp. v. New Mexico</i> , 490 U.S. 163 (1989).....	passim
<i>DeCoteau v. District County Court for Tenth Judicial Dist.</i> , 420 U.S. 425 (1975)	18
<i>Dep’t of Taxation & Finance of N.Y. v. Milhelm Attea & Bros., Inc.</i> , 512 U.S. 61 (1994).....	53, 60
<i>Emery v. City of New Orleans through Rochon</i> , 473 So. 2d 877 (La. Ct. App. 1985)	62
<i>Flandreau Santee Sioux Tribe v. Gerlach</i> , 155 F. Supp. 3d 972 (D.S.D. 2015)	2
<i>Flandreau Santee Sioux Tribe v. Gerlach</i> , 269 F. Supp. 3d 910 (D.S.D. 2017)	2
<i>FMC Corp. v. Holliday</i> , 498 U.S. 52 (1990)	41
<i>Fort Belknap Indian Cmty. of the Fort Belknap Indian Reservation v. Mazurek</i> , 43 F.3d 428 (9th Cir. 1994)	42
<i>Gaming Corp. of America v. Dorsey & Whitney</i> , 88 F.3d 536 (8th 1996).....	15, 37
<i>In re Gaming Related Cases</i> , 147 F. Supp. 2d 1011, 1018 (N.D. Cal. 2001), <i>aff’d</i> , 331 F.3d 1094 (9th Cir. 2003).....	33, 34
<i>In re Gaming Related Cases (Coyote Valley II)</i> , 331 F.3d 1094 (9th Cir. 2003)	35, 36
<i>Karras v. Karras</i> , 16 F.3d 245 (8th Cir. 1994).....	10
<i>Mashantucket Pequot Tribe v. Town of Ledyard</i> , 722 F.3d 457 (2d Cir. 2013)	3, 17, 26, 36

<i>Medtronic, Inc. v. Lohr</i> , 518 U.S. 470 (1996)	62
<i>Menominee Indian Tribe of Wisconsin v. United States</i> , 136 S.Ct. 750 (2016)	29
<i>Metropolitan Life Insurance Co. v. Taylor</i> , 481 U.S. 58 (1987)	15
<i>Michigan v. Bay Mills Indian Community</i> , 134 S.Ct. 2024 (2014)	17, 19, 25
<i>Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation</i> , 425 U.S. 463 (1976)	43, 53
<i>Montana v. Blackfeet Tribe of Indians</i> , 471 U.S. 759 (1985)	33
<i>New Mexico v. Mescalero Apache Tribe</i> , 462 U.S. 324 (1983)	20
<i>Okla. Tax Comm’n v. Citizen Band Potawatomi Indian Tribe</i> , 498 U.S. 505 (1991)	6, 54
<i>Okla. Tax Comm’n v. Chicksaw Nation</i> , 515 U.S. 450 (1995)	passim
<i>Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of New Mexico</i> , 458 U.S. 832 (1982)	13, 20, 45, 56
<i>Rice v. Rehner</i> , 463 U.S. 713 (1983)	passim
<i>Rincon Band of Luiseno Mission Indians of Rincon Reservation v. Schwarzenegger</i> , 602 F.3d 1019 (9th Cir. 2010)	40, 41
<i>Roberts v. Van Buren Public Schools</i> , 773 F.2d 949 (8th Cir. 1985)	11
<i>Sac & Fox Nation v. Okla. Tax Comm’n</i> , 967 F.2d 1425 (10th Cir. 1992)	13
<i>Santa Clara Pueblo v. Martinez</i> , 436 U.S. 49 (1978)	19, 44
<i>Squaxin Island Tribe v. Washington</i> , 781 F.2d 715 (9th Cir. 1986)	passim

<i>Tulalip Tribes v. Washington</i> , No. 2:15-cv-00940-BJR, 2017 WL 58836, (W.D. Wash. Jan. 5, 2017)	58
<i>Twenty-Nine Palms Band of Mission Indians v. Schwarzenegger</i> , EDVC 08-1753-VAP, 2009 WL 10671376 (C.D. Cal. Sept. 4, 2009)	17
<i>United States v. Tebeau</i> , 713 F.3d 955 (8th Cir. 2013)	11
<i>United States v. Vig</i> , 167 F.3d 443 (8th Cir. 1999)	11
<i>Wagnon v. Prairie Band Potawatomi Nation</i> , 546 U.S. 95 (2005) ...	49
<i>Warren Trading Post Co. v. Ariz. State Tax Comm’n</i> , 380 U.S. 685 (1965)	13
<i>Washington v. Confederated Tribes of Colville Indian Reservation</i> , 447 U.S. 134 (1980)	passim
<i>White Mountain Apache Tribe v. Bracker</i> , 448 U.S. 136 (1980)	13, 14, 45, 46
<i>Williams v. Lee</i> , 358 U.S. 217 (1959)	14, 47
<i>Wyeth v. Levine</i> , 555 U.S. 555 (2009)	23, 41
<i>Zemour, Inc. v. State Div. of Beverage</i> , 347 So. 2d 1102 (Fla. Dist. Ct. App. 1977)	63

FEDERAL STATUTES CITED:

18 U.S.C. 1161	passim
25 U.S.C. 261	60
25 U.S.C. 450a(b)	29
28 U.S.C. 1291	2
28 U.S.C. 1331	2
25 U.S.C. 2701 <i>et seq.</i>	passim

25 U.S.C. 2702.....	24, 43
25 U.S.C. 2702(1).....	21
25 U.S.C. 2702(2).....	21, 25
25 U.S.C. 2703(8).....	17
25 U.S.C. 2710(d)(3)(B).....	29
25 U.S.C. 2710(d)(3)(C).....	7, 22, 27
25 U.S.C. 2710(d)(3)(C)(iii)	15
25 U.S.C. 2710(d)(3)(C)(vii)	passim
25 U.S.C. 2710(d)(4)	passim
25 U.S.C. 2302.....	29

STATE CASES CITED:

<i>Accord Crowley v. State</i> , 268 N.W.2d 616 (S.D. 1978).....	61
<i>Black Hills Truck & Trailer, Inc. v. S.D. Dep’t of Revenue</i> , 881 N.W.2d 669 (S.D. 2016).....	5
<i>State v. Dorhout</i> , 513 N.W.2d 390 (S.D. 1994).....	5

STATE STATUTES CITED:

SDCL 10-45-2	50
SDCL 10-46-1(17)	5
SDCL 10-46-2	4, 5, 12, 50
SDCL 10-46-2.1	5
SDCL 10-46-4	4, 12
SDCL 10-46-6	5
SDCL 35-2-6.2	62, 63

SDCL 35-2-6.3	63
SDCL 35-2-24	passim
SDCL ch. 10-46.....	4

OTHER AUTHORITIES:

134 Cong. Rec. H8146.....	17, 23
134 Cong. Rec. S12643-01	22
Aug 1, 2013 Interior letter	18, 24
Felix S. Cohen, <i>Cohen’s Handbook of Federal Indian Law</i> , (5th Ed. 2012)	17, 43
https://www.merriam-webster.com/dictionary/operation , 2.c. (last visited on March 13, 2018)	37
January 9, 2015 Interior decision (Washburn decision)	31, 32
July 8, 2011 Interior letter	18
Letter from Acting Assistant Secretary of Indian Affairs Laverdure of 7-13-2012	31
Washburn, <i>Recurring Issues in Indian Gaming Compact Approval</i> , 5 Gaming L.R. & Econ. 388 (2016).....	30, 31, 32, 33

JURISDICTIONAL STATEMENT

On February 14, 2014, the Department upheld the denial of the reissuance of three State alcoholic beverage licenses to the Tribe for the Licensed Premises.¹ JA 53-72. The Tribe subsequently filed a Complaint in the United States District Court, District of South Dakota on November 18, 2014. JA 1-91. Pursuant to a December 18, 2015 Order, the district court ruled that *res judicata* and *Younger* abstention did not warrant dismissal of this case.

¹ Throughout this brief, the Defendants and Appellants, Andy Gerlach, Secretary of the South Dakota Department of Revenue; and Dennis Daugaard, Governor of the State of South Dakota are referred to as “the State;” Plaintiff and Appellee, Flandreau Santee Sioux Tribe, is “the Tribe.” References to documents within the parties’ Joint Appendix are identified by “JA;” the Addendum is designated as “ADD;” and docket entries filed in the District Court Clerk’s record, Civ. 14-4171, are identified by “Doc.” and the docket number.

Other abbreviations used throughout the brief are as follows: “Amenities” means the purchased goods and services as to food and beverage services, hotel, RV park, live entertainment events, and gift shop, other than those at the First American Mart, and does not include the Casino’s slots and table games; “Department” means the South Dakota Department of Revenue; “IGRA” means the Indian Gaming Regulatory Act, 25 U.S.C. 2701 *et seq.*; “Interior” means the United States Department of Interior; “Licensed Premises” means the Royal River Casino, Royal River Family Entertainment Center, and the First American Mart; “NIGC” means the National Indian Gaming Commission; and “nonmember(s)” means individuals who are not members of the Tribe.

Flandreau Santee Sioux Tribe v. Gerlach, 155 F. Supp. 3d 972 (D.S.D. 2015), ADD 1-33, JA 118-150. Therefore, the court had jurisdiction over the matter pursuant to 28 U.S.C. 1331.

On September 15, 2017, a Memorandum Opinion and Order on Parties' Motions for Summary Judgment was entered, granting in part and denying in part each party's motion for summary judgment. *Flandreau Santee Sioux Tribe v. Gerlach*, 269 F. Supp. 3d 910 (D.S.D. 2017), ADD 47-75, JA 706-734. A Judgment was filed on October 20, 2017, and the State timely filed a Notice of Appeal on November 16, 2017. ADD 76-78, JA 735-737; Doc. 160. On February 5, 2018, an Amended Judgment was filed and the State filed an Amended Notice of Appeal on February 20, 2018. ADD 86-87, JA 745-746; Doc. 180. The Amended Judgment is a final order and this Court has jurisdiction pursuant to 28 U.S.C. 1291.

STATEMENT OF ISSUES

1. WHETHER A STATE TAX ON NONMEMBERS' USE OF AMENITIES PURCHASED AT BUSINESSES ANCILLARY TO A CASINO IS PREEMPTED BY THE INDIAN GAMING REGULATORY ACT OR FEDERAL COMMON LAW.

Barona Band of Mission Indians v. Yee, 528 F.3d 1184
(9th Cir. 2008)

*Washington v. Confederated Tribes of Colville Indian
Reservation*, 447 U.S. 134 (1980)

Mashantucket Pequot Tribe v. Town of Ledyard, 722 F.3d
457 (2d Cir. 2013)

Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163,
(1989)

2. WHETHER A STATE MAY DENY REISSUANCE OF
AN ALCOHOLIC BEVERAGE LICENSE TO A TRIBE
IF THE TRIBE FAILS TO COLLECT AND REMIT USE
TAX INCURRED BY NONMEMBERS AT THE
LICENSED ESTABLISHMENT.

Rice v. Rehner, 463 U.S. 713 (1983)

Squaxin Island Tribe v. Washington, 781 F.2d 715 (9th
Cir. 1986)

STATEMENT OF THE CASE AND FACTS

1. Factual Background

The Tribe is a federally recognized Indian tribe, with its reservation wholly located within Moody County, South Dakota. JA 166(1), 167(3). Within the reservation, the Tribe owns and operates the Licensed Premises and provides a variety of services, including: gaming, food and beverage services (snack bar, bar, and restaurant), convenience store, hotel, RV park, live entertainment,

and gift shop. JA 167(4), JA 221(97); *see* ADD 48. The Tribe and the State maintain a gaming compact, entered into pursuant to IGRA, which provides the terms under which the Tribe is authorized to conduct class III gaming activities on its reservation.

JA 191(130). The Compact is silent as to alcohol regulation and imposition of state use tax. JA 74-91.

The State issued three alcoholic beverage licenses to the Tribe for the Licensed Premises. JA 181(79). As a condition to the licenses, the Tribe is required to collect and remit to the State the use tax on nonmember purchases at the Licensed Premises. SDCL 35-2-24, ADD 98.

Pursuant to SDCL 10-46-2, the State imposes a tax on “the use, storage, and consumption in this state of [goods²] and services purchased for use in this state.” *See also* SDCL 10-46-4. The legal incidence of the use tax is on the consumer—here the nonmember patron at the Licensed Premises. JA 182(86); SDCL 10-46-2, -4. The use tax is complementary to the state sales tax, and only

² Although the South Dakota Codified Law uses the phrase “tangible personal property,” *see e.g.*, SDCL ch. 10-46, the State uses the term “goods” throughout this brief for ease of reference.

applies to transactions that have not been subjected to sales tax.

See Black Hills Truck & Trailer, Inc. v. S.D. Dep't of Revenue, 881 N.W.2d 669, 674 (S.D. 2016). Both taxes share the same rate, and for budgetary purposes, are one and the same. JA 184(96).

However, sales tax and use tax:

are different in conception, [and] are assessments upon different transactions[.] A sales tax is a tax on the freedom of purchase[.] A use tax is a tax on the enjoyment of that which was purchased.

State v. Dorhout, 513 N.W.2d 390, 392 (S.D. 1994). In South Dakota, if sales tax has not been collected, use tax on the purchase price is generally imposed on the consumer. SDCL 10-46-1(17), -2, -2.1, -6.

Using funds generated in part from use tax revenue, the State provides a substantial number of governmental services to individuals within its borders, including both non-tribal and tribal members. *See* Doc. 79-1; JA 185(99). As the sales and use tax revenue accounts for the majority of the funds in the State general fund, the non-collection of use tax impedes the State's ability to provide necessary state services. JA 185(97-98).

In this case, the state sales tax does not apply to the Tribe's sale of goods and services as federal law prohibits the State from imposing its sales tax on a tribe or tribal member on their tribe's reservation. *See Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450 (1995). Thus, when purchases are made at the Licensed Premises, no state sales tax is imposed which, for nonmembers, triggers the imposition of use tax.

A state may require tribal retailers to collect a tax from a nonmember and remit it to the State. *See, e.g., Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 512-13 (1991). Consistent with this principle, the State alcoholic beverage laws require the Department to deny reissuance of an alcoholic beverage license to a tribe when it fails to remit any taxes associated with the operation of the business. *See* SDCL 35-2-24, ADD 98.

2. PROCEDURAL HISTORY

In December 2009 and later in 2010, the Department received separate applications from the Tribe seeking reissuance of the alcoholic beverage licenses for the Licensed Premises. JA 181(81). Pursuant to SDCL 35-2-24, the Department denied the applications

because the Tribe had not been remitting the use tax on nonmember purchases at the Licensed Premises since at least January 2009. JA 182(83-84). The Tribe appealed the denials through the South Dakota Office of Hearing Examiners, which affirmed the Department's decision. ADD 3.

Instead of appealing the administrative decision, the Tribe commenced this action in federal district court, challenging the use tax and the State's legal framework for requiring the Tribe to collect and remit that tax. JA 1-91.

After filing its Answer, the State moved to dismiss the Tribe's complaint asserting, in relevant part, that judgment should be granted on the pleadings for several of the Tribe's claims for relief. JA 113-14; *see* Doc. 38. In denying the State's motion, the district court found that "alcohol sales can be directly related to gaming [and] fall within what the Supreme Court defined 25 U.S.C. 2710(d)(3)(C) as encompassing." ADD 21.

The Tribe also filed a motion for judgment on the pleadings seeking a declaration that IGRA is broad enough to "cover sales of goods and services beyond...pure gameplay on a casino floor." ADD 34. The district court granted the Tribe's motion, finding that

“IGRA covers activity beyond just pure gameplay at a casino.”

JA 155; ADD 38.

After discovery, both the State and the Tribe moved for summary judgment. JA 164-65; 193-94. On September 15, 2017, the district court issued a Memorandum Opinion and Order on Parties’ Motions for Summary Judgment (“Decision”). ADD 47-75. While the district court determined that the State use tax was “not discriminatory, as the Tribe is not similarly situated to other states which have been granted a tax credit,” ADD 69, the court ruled that IGRA preempts the tax on “nonmembers’ use of purchased goods and services as to the Casino’s slots, table games, food and beverage services, hotel, RV park, live entertainment events, and gift shop[.]” ADD 86. The court ruled for the State regarding the tax on nonmembers’ use of goods and services purchased at the First American Mart, determining that neither IGRA nor federal common law preempts the tax or the Tribe’s obligation to collect the tax. ADD 62, 70; ADD 86-87. Finally, the court invalidated SDCL 35-2-24 to the extent it “condition[ed] renewal of the Tribe’s [alcoholic] beverage license on the collection and remittance of a use tax on nonmember consumer purchases.” ADD 74, ADD 87.

Through this appeal, the State challenges the court's rulings that: 1) IGRA preempts the tax on nonmembers' use of purchased goods and services as to the food and beverage services, hotel, RV park, live entertainment events, and gift shop (Amenities); and 2) the State may not condition renewal of alcoholic beverage licenses on the Tribe's collection and remittance of this valid state use tax.

SUMMARY OF THE ARGUMENT

Contrary to the Decision, the taxation of Amenities and the state alcoholic beverage laws are activities that fall outside IGRA's preemptive scope as a matter of law. The state alcoholic beverage laws and the state tax laws can coexist, are reconcilable, and do not conflict "with the purpose or operation" of IGRA. *Cabazon Band of Mission Indians v. Wilson*, 37 F.3d 430, 433 (9th Cir. 1994). Further, the nonmembers' use of Amenities and the state regulation of alcohol are not activities which are "directly related to the operation of gaming activities" or even "class III activities" as defined by IGRA.

The State has authority to impose its tax on nonmembers' use of Amenities because the tax is not preempted by federal law.

IGRA preemption is not implicated merely because the Tribe decided to operate businesses ancillary to its Casino. This narrow interpretation of IGRA favors all tribes and is reinforced by Interior and federal common law. Moreover, given the substantial number of State services provided and the minimal, if any tribal interests implicated, imposition of the use tax is a valid exercise of the State's jurisdiction.

Finally, the State may require the Tribe to collect and remit the valid tax from nonmembers in order to obtain a State alcoholic beverage license, as Congress granted states the authority to regulate alcohol within Indian country. *See* 18 U.S.C. 1161 (“section 1161”); *Rice v. Rehner*, 463 U.S. 713 (1983).

STANDARD OF REVIEW

The State challenges a portion of the Decision granting summary judgment in favor of the Tribe. The grant of summary judgment is subject to de novo review, “with all justifiable factual inferences being drawn in favor of the party opposing summary judgment.” *Cook v. United States*, 86 F.3d 1095, 1097 (Fed. Cir. 1996)(citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)); *Karras v. Karras*, 16 F.3d 245, 247 (8th Cir. 1994).

“Summary judgment is appropriate only where there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” *Butler v. Crittenden Cty., Ark.*, 708 F.3d 1044, 1049 (8th Cir. 2013) (internal quotation marks omitted). Questions of law, including the interpretation and application of a federal statute, are reviewed de novo. *United States v. Tebeau*, 713 F.3d 955, 959 (8th Cir. 2013); *United States v. Vig*, 167 F.3d 443, 447 (8th Cir. 1999).

The district court held that IGRA preempted the tax on nonmembers’ use of Amenities. Because the court determined that ruling was dispositive, the court did not address the State’s argument that federal common law does not preempt the use tax on those transactions. The State challenges the district court’s ruling that IGRA preempts the tax. If this Court determines that ruling was erroneous, this Court may decide whether the tax is preempted under federal common law because there are no material facts in dispute. This is a question of law properly before this Court, without requiring a remand. *Cf. Roberts v. Van Buren Public Schools*, 773 F.2d 949, 955 (8th Cir. 1985)(indicating that for a question of law, the court “may determine [the] issue in the first

instance at the appellate level, possibly making remand unnecessary or limiting the scope of the issues to be considered.”).

ARGUMENTS

I. The State has authority to impose its tax on nonmembers’ use of Amenities.

When concluding that IGRA preempted the use tax, the district court bypassed the longstanding general state taxation rules applicable in Indian country. *See* ADD 47-75, *generally*. This established framework confirms the State’s authority to impose a tax on nonmembers’ use of Amenities.

“The initial and frequently dispositive question in Indian tax cases . . . is who bears the legal incidence of a tax,” that is, who has the legal obligation to pay the tax. *Chickasaw Nation*, 515 U.S. at 458. “[I]f the legal incidence of the [state] tax rests on non-Indians, no categorical bar prevents enforcement of the tax[.]” *Id.* at 459.

Here, the legal incidence of the use tax is on the nonmember consumers so the State is not categorically barred from imposing its tax. *See, e.g.*, SDCL 10-46-2; 10-46-4; *Chickasaw Nation*, 515 U.S. at 459. Generally, a state may tax nonmembers’ on-reservation activities. *See, e.g., Warren Trading Post Co. v. Ariz. 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); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980); *Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832, 837 (1982); *Sac & Fox Nation v. Okla. Tax Comm’n*, 967 F.2d 1425, 1429-30 (10th Cir. 1992)(state may tax income of tribe’s nonmember employees).

There are two potential “barriers” to this state authority.³ See *Ramah*, 458 U.S. at 837. The first barrier is when the state tax is preempted by federal law, either expressly or impliedly. See *id.* at 837-38; *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 176-

³ 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 *Colville*, 447 U.S. 134, and *Cotton Petroleum*, 490 U.S. 163 (both upholding state tax on nonmembers’ on-reservation activity even though it was not explicitly authorized by Congress); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142-45 (1980); and *Ramah*, 458 U.S. at 837-38 (both providing that there are two barriers to state authority over on-reservation commercial activities and also discussing whether federal and tribal interests preempt state authority).

77 (1989). The second barrier is when the state tax “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 (quoting *Williams v. Lee*, 358 U.S. 217, 220 (1959)). These barriers, which represent federal and tribal interests, are analyzed on a case-by-case basis along with any state interests at stake “to determine whether, in the specific context, the exercise of state authority would violate federal law” (hereinafter, *Bracker* balancing test). *Bracker*, 448 U.S. at 144-45.

Here, there are no barriers to the State’s authority to impose its tax on nonmembers’ use of Amenities. IGRA neither expressly nor impliedly preempts the use tax. In addition, the State’s interests outweigh any remaining tribal interests. Therefore, the district court’s IGRA preemption determination must be reversed as the State’s imposition of use tax on nonmembers is valid.

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

The crux of the Decision is that IGRA preempts the tax on nonmembers’ use of Amenities. But the Decision failed to acknowledge that courts are reluctant to find a statute to have

“extraordinarily pre-emptive power” or be completely preemptive. See *Gaming Corp. of America v. Dorsey & Whitney*, 88 F.3d 536, 543 (8th 1996)(citing *Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58, 65 (1987)). While the Decision found that IGRA preempted the state tax, through a newly created test, it is contrary to IGRA’s express language and stated purpose, rules of statutory construction, legislative history, other courts’ interpretations, Interior’s interpretation of IGRA, and the law on preemption. Further, a review of IGRA reveals the state use tax does not interfere with, nor is it incompatible with, IGRA. See ADD 52-63.

1. *IGRA does not expressly preempt the use tax.*

The Decision appears to conclude that 25 U.S.C. 2710(d)(4) (“section (d)(4)”) expressly preempts the State tax.⁴ ADD 62. Section (d)(4) provides in relevant part:

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

⁴ Other than section (d)(4), the only IGRA provision that addresses taxation is 25 U.S.C. 2710(d)(3)(C)(iii), which is not at issue. See ADD 97.

(emphasis added). The Decision indicates that it is “logical that [section (d)(4)’s tax prohibition] applies to nonmembers on the Casino floor authorized to gamble, which includes the costs of associated activities, i.e. gamblers and what they spend on gambling, alcohol, food, rooms, and other merchandise from the Casino.” ADD 62. This conclusion directly conflicts with the principle of express preemption, and the text and interpretations of section (d)(4).

First, section (d)(4) is not an express preemption clause: “the failure to confer authority to tax [is not] a prohibition to tax.” *Cabazon*, 37 F.3d at 433. The State does not rely on section (d)(4) for its authority to impose the use tax on nonmembers’ on-reservation activity because it already has that authority under established federal law. Nothing in section (d)(4) eliminated that authority.

Even if section (d)(4) is treated as an express preemption clause, the Decision disregards the “duty to accept the reading that disfavors pre-emption,” by stretching section (d)(4) further than its language. *See Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005). Contrary to the Decision’s unsupported “logical” approach,

section (d)(4)'s text limits its application to taxation of class III games. Compare ADD 62 (“the Court finds logical”) with *Mashantucket Pequot Tribe v. Town of Ledyard*, 722 F.3d 457, 470 (2d Cir. 2013)(“text of IGRA does not bar the [personal property tax]”); see also *Twenty-Nine Palms Band of Mission Indians v. Schwarzenegger*, EDVC 08-1753-VAP, 2009 WL 10671376, at *5 (C.D. Cal. Sept. 4, 2009)(indicating that section (d)(4) “refers to the power of the [state] to impose taxes upon tribal governments and their authorized gaming operators; it does not refer to natural persons[.]”) Section (d)(4) specifies the activity the state cannot tax: “a class III gaming activity,” which IGRA has defined to primarily include slot machines and card games. See 25 U.S.C. 2703(8); 134 Cong. Rec. H8146 at H8153; *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024 (2014).

Section (d)(4) was not aimed at preempting a state tax on all activity within a casino; instead, it was tailored specifically to ensure states could not withhold compact negotiations by attempting to impose a tax on the gaming activity. Felix S. Cohen, *Cohen’s Handbook of Federal Indian Law*, 12.05[2] (5th Ed. 2012). Further illustrating this point, the Ninth Circuit disregarded section

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

The Indian canon of construction cannot salvage the Decision's erroneous interpretation of section (d)(4). The Indian canon of construction "is not a license to disregard clear expressions of . . . congressional intent." *DeCoteau v. District County Court for Tenth Judicial Dist.*, 420 U.S. 425, 447 (1975).

Interior also narrowly construes section (d)(4), as illustrated by its approval of "revenue sharing provisions" in compacts where the tribe and state share in class III gaming proceeds. Doc. 125-18 (July 8, 2011 Interior letter). According to Interior, the revenue sharing provisions are not considered taxes on the class III gaming proceeds under section (d)(4) when "the state has offered meaningful concessions to the tribe." *Id.*; Doc. 125-17 (Aug 1, 2013 Interior letter). Both the canon and Interior support section (d)(4)'s limited application to actual play of games.

If section (d)(4) were read to preempt state taxation of all individuals that a tribe authorizes to play games at its casinos, an absurd result would follow. Tribes could “rig a state tax exemption” by indicating that all individuals on its reservation are authorized to play games at its casino. *See Yee*, 528 F.3d at 1191-92 (indicating that “the commercial activity . . . was rigged [by the Tribe] to trigger a tax exemption[.]”). If this were Congress’ intention, it would not have qualified the phrase with “to engage in a class III activity.” “‘Congress wrote the statute it wrote’—meaning a statute going so far and no further.” *Bay Mills*, 134 S. Ct. at 2033-2034 (citations omitted). The fact that Congress did not preempt all taxation weighs in favor of finding that IGRA does not preempt the use tax. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) (“[w]here Congress [has sought] to promote dual objectives ... courts must be more than usually hesitant to infer from its silence a cause of action that, while serving one legislative purpose, will disservice the other.”)

Section (d)(4) is a clear statement that IGRA did not intend to change taxation jurisdiction as Congress was not conferring any additional authority, beyond what already existed, to a state. Given

the use tax here is not imposed on the “class III activity,” the gaming proceeds, or even the Tribe, section (d)(4) does not expressly preempt the tax on nonmembers’ use of Amenities.

2. *IGRA does not impliedly preempt the use tax*

As IGRA does not expressly preempt the use tax, the analysis turns to whether the use tax is impliedly preempted. A federal statute can impliedly preempt state law “if the scope of the statute indicates that Congress intended federal law to occupy the legislative field[.]” *Altria Group, Inc. v. Good*, 555 U.S. 70, 76, (2008). In other words, a state tax is preempted if federal regulation is so “comprehensive and pervasive” that it leaves no room for the state tax. *See Ramah*, 458 U.S. at 838-39, 842. The Eighth Circuit has further explained that “State jurisdiction is pre-empted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law[.]” *Casino Res. Corp. v. Harrah’s Entm’t, Inc.*, 243 F.3d 435, 437 (8th Cir. 2001)(citing *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983)).

a. Purpose and Congressional Intent of IGRA

An “inquiry into the scope of a statute’s pre-emptive effect is guided by the rule that the purpose of Congress is the ultimate touchstone in every pre-emption case.” *Altria Group, Inc.*, 555 U.S. at 76 (internal quotation marks omitted)(citations omitted). Thus, to determine IGRA’s preemptive scope, its text must be considered within the context of IGRA’s purpose and Congress’ intent:

IGRA was Congress' compromise solution to the difficult questions involving Indian gaming. The Act was passed in order to provide “a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments” and “to shield [tribal gaming] from organized crime and other corrupting influences to ensure that the Indian tribe is the primary beneficiary of the gaming operation.” 25 U.S.C. § 2702(1), (2).

Artichoke Joe's California Grand Casino v. Norton, 353 F.3d 712, 715 (9th Cir. 2003)(citation omitted). The congressional record clarifies that IGRA “regulates Indian gaming. By no means is any provision of [IGRA] intended to extend beyond this field of gaming in Indian Country. [... IGRA] should not be construed as a departure from established principles of the legal relationship between the tribes and the United States. Instead, [IGRA] should be within the

line of developed case law extending over a century and a half by the Supreme Court[.]” 134 Cong. Rec. S12643-01 at S12654.

Through the enactment of IGRA, Congress set forth a state-tribal compacting process that “allows states to negotiate with tribes . . . regarding aspects of class III Indian gaming.” *Artichoke Joe’s*, 353 F.3d at 716 (citing 25 U.S.C. 2710(d)(3)(C)). Congress did not intend to preempt the general State taxation of nonmembers’ use of Amenities by establishing this compacting process:

Mr. EVANS. On the question of precedent, am I correct that the use of compacting methods in this bill are meant to be limited to tribal-state gaming compacts and that the use of compacts for this purpose is not to be construed to signal any new congressional policy encouraging the subjugation of tribal governments to state authority.

Mr. INOUE. 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 as taxation, water rights, environmental regulation, and land use. [...] No precedent is meant to be set as to other areas.

134 Cong. Rec. S12643-01, at S12651 (emphasis added).

Additional testimony indicated that “[i]t is important to make it clear that the compact arrangement set forth in this legislation is

intended solely for the regulation of gaming activities. It is not the intent of Congress to establish a precedent for the use of compacts in other areas, such as water rights, land use, environmental regulation or taxation.” 134 Cong. Rec. H8146 at H8155 (emphasis added).

“The case for federal pre-emption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to stand by both concepts and to tolerate whatever tension there [is] between them.” *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 166–167 (1989)(brackets original)(internal quotation marks omitted); *see also Yee*, 528 F.3d at 1194 (discussing the presumption against preemption); *Wyeth v. Levine*, 555 U.S. 555, 575 (2009). Here, Congress acknowledged the issue of taxation, yet decided not to incorporate it into the compacting process outside the application of section (d)(4). These revelations indicate that the purpose of IGRA was not to preempt a state’s general taxation authority.

IGRA’s intent to cover gaming and not taxation of amenities is also supported by its three stated purposes:

- (1) To provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments;
- (2) To provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players; and
- (3) To declare that the establishment of independent Federal regulatory authority for gaming lands, the establishment of Federal standards for gaming on Indian lands, and the establishment of a National Indian Gaming Commission are necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue.

25 U.S.C. 2702 (emphasis added). The use tax does not interfere with, and can co-exist with, these stated purposes. First, the tax on nonmembers' use of Amenities does not change the Tribe's status as the primary beneficiary of the Casino. See Doc. 126-1 (compare the Tribe's operating income (operating revenues minus operating costs and expenses) on p.4 of the 2013, 2014, and 2015 Financial Reports to the estimate of the use tax—approximately \$150,000); Cf. Doc. 125-17 (August 2013 Interior letter disapproving tribal-state compact where the state would have received 20 percent "of all

internet gaming revenues” because it “could result in the State earning more revenue than the Tribes receive from such gaming”).

Also, the use tax has no relation to who, what, where, when, or how the gaming occurs. The tax does not involve the operation or regulation of “a roll of the dice,” “a spin of the wheel,” or a “crooked black jack table.” *Bay Mills*, 134 S. Ct. at 2032.

Ultimately, the tax in no way regulates gaming or affects the Tribe’s ability to regulate its operation. The use tax can coexist, is reconcilable, and does not conflict “with the purpose or operation” of IGRA. *Cabazon*, 37 F.3d at 433.

The Decision does not harmonize with other Circuit Court of Appeals’ determinations regarding IGRA’s scope.

IGRA's comprehensive regulation of Indian gaming does not occupy the field with respect to sales taxes imposed on third-party purchases of equipment used to construct the gaming facilities. IGRA's core objective is to regulate how Indian casinos function so as to ‘assure the gaming is conducted fairly and honestly by both the operator and players.’ 25 U.S.C. § 2702(2). Extending IGRA to preempt any commercial activity remotely related to Indian gaming-employment contracts, food service contracts, innkeeper codes-stretches the statute beyond its stated purpose.

Yee, 528 F.3d at 1193. *See also Confederated Tribes of Siletz Indians of Oregon v. State of Oregon*, 143 F.3d 481, 487 (9th Cir.

1998) (state public record laws were not preempted by IGRA, as the laws “do not seek to usurp tribal control over gaming nor do they threaten to undercut federal authority over Indian gaming.”).

The Second Circuit determined that IGRA did not “expressly or by plain implication” preempt a Connecticut state personal property tax imposed on lessors of slot machines used by a tribe at the tribe’s casino as the tax did “not affect the Tribe’s ‘governance of gaming’ on its reservation.” *Mashantucket*, 722 F.3d at 469, 471 (citing *Yee*, 528 F.3d at 1192)(also stating that “any preemption of the ‘field’ of gaming regulations is not at issue here, where the state tax on property is not targeted at gaming”). Similarly, the tax at issue here does not affect the Tribe’s ability to regulate its gaming operations. If IGRA does not impliedly preempt a state personal property tax on a tribe’s vendors who own the gaming machines, as in *Mashantucket*, then it does not impliedly preempt a state tax on nonmember activities not related to the operation of gaming activity, as here.

b. IGRA's Catchall Provision.

The Decision appears to conclude that IGRA's preemptive scope is set by IGRA's "catchall provision", 25 U.S.C.

2710(d)(3)(c)(vii).⁵ The catchall provision provides that a negotiated state-tribal gaming compact "may include provisions relating to . . . any other subjects that are directly related to the operation of gaming activities." ADD 97. This permissible compact topic is IGRA's furthest extension from the actual play of gaming. See 25 U.S.C. 2701, *et seq.* "Not every contract that is merely peripherally associated with tribal gaming is subject to IGRA's constraints." *Harrah's Entmt. Inc.* 243 F.3d at 439.

⁵ Initially in this litigation, the Tribe contended that the "boundaries of IGRA's preemptive scope were set by IGRA's catchall provision." See Doc. 54 at 20 n.12 (at its broadest, the activity IGRA is concerned with is 'other subjects that are directly related to the operation of gaming activities')(citing the catchall provision); Doc. 40 at 12, 13, 16, 16, 19, 21; Doc. 50 at 20-21; and Doc. 54 at 21. see also JA 18(72), 31(134, 136). In the end, the Tribe completely reversed itself: "While the phrase ['directly related to the operation of gaming activities'] and the interpretations given to it by various authorities is useful . . . the phrase does not define the outer boundaries of IGRA's preemptive scope," providing the catchall provision "is therefore inapposite here[.]" Doc. 130 at 41 (emphasis added).

1. *The catchall provision does not establish IGRA's preemptive scope.*

First, the catchall provision does not set IGRA's preemptive scope because gaming compacts entered into pursuant to IGRA are not required to contain subjects falling within the catchall provision. The district court justifies its conclusion that IGRA, through its catchall provision, preempts the state tax by indicating that the subjects fitting within this provision are essentially mandatory. ADD 28. While the court initially found that IGRA's catchall provision was permissive and "the compact [was] not required to contain any of the subjects listed" in that provision, the court quickly reversed course. The court next indicated it was "mandatory, however, that if a tribe requests negotiation on any of those subjects, a state 'shall' negotiate in good faith on the requested subjects." ADD 63. The court concluded that "the application of the use tax to" the Amenities "is preempted by IGRA" because "the State and the Tribe did not include a provision providing for such taxation in the gaming compact." ADD 63.

Contrary to the Decision, the compact was not required to include the taxation of nonmembers' use of Amenities. There is no

evidence⁶ that the Tribe requested negotiation regarding the use tax. Therefore, a provision addressing that subject was not required in the gaming compact and cannot set IGRA's preemptive scope.

Even if IGRA preempts all subjects “directly related to the operation of gaming activities,” nonmembers’ use of Amenities does not fall within that topic. This is supported by Interior’s interpretation of the catchall provision, the Indian canon of construction, and the facts surrounding this case.

2. Interior’s interpretation aligns with the Indian canon of construction

Interior, charged with approving state-tribal gaming compacts pursuant to 25 U.S.C. 2710(d)(3)(B), has signified that the scope of the catchall provision is indeed narrow. Given the trust relationship⁷ with tribes, Interior’s approval and disapproval letters

⁶ There are no undisputed material facts in this regard. See JA 1-39, 195-274.

⁷ *Menominee Indian Tribe of Wisconsin v. United States*, 136 S.Ct. 750, 757 (2016)(citing 25 U.S.C. 450a(b)(later transferred to 25 U.S.C. 5302)) (“Congress declares its commitment to the maintenance of the Federal Government’s unique and continuing (continued. . .)

are clear statements of the federal government's view of what is authorized by IGRA and falls within the catchall provision.

In a recent publication, Kevin Washburn, former Assistant Secretary for Indian Affairs at Interior, who authored approval and disapproval letters, stated "IGRA creates a relatively bright line about what can be addressed in a compact and, from a policy point of view, preserving that bright line is important. Otherwise, a tribe might be required to negotiate issues [not related to gaming], perhaps even under duress, because the state insisted."

Washburn, *Recurring Issues in Indian Gaming Compact Approval*, 5 Gaming L.R. & Econ. 388, 392-93 (2016). ADD 88-96, Doc. 80-1.

Washburn indicates that not all activities or amenities within a Tribe's casino operation are "gaming-related" for purposes of IGRA. ADD 94-95 (explaining the amenities at a casino are "casino-related, but not gaming-related" for purposes of IGRA).

Importantly, he recognized that "[m]ost gaming operations have additional amenities that are connected in a business sense to the

(. . .continued)

relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole").

casino operation and are co-located with a casino, but do not themselves constitute gaming.” ADD 94-95 (emphasis added).

Washburn stressed that “federal regulation governed by IGRA is premised, at least in part, on the notion that gaming activities pose unique risks not presented by golf courses, swimming pools, hotels, restaurants, spas, concert venues, RV parks, or concert centers.” ADD 95. He concluded by stating, “[r]arely do any of the ancillary activities pose the kind of risks that Congress enabled states to address in Class III gaming compacts.” *Id.*

In support, Washburn highlighted a California gaming compact where the parties “sought to create state jurisdiction over food and beverage services at the casino and drinking water quality on the reservation. [Interior] noted that the Tribe’s provision of food, beverages, and drinking water to its patrons may occur on the same parcel [of land] on which it conducts class III gaming, [but] it does not . . . follow that it is directly related [to gaming] under IGRA.” ADD 92-93 (brackets original)(internal quotations omitted)(citing to Doc. 41-2). Similarly, a January 9, 2015 Interior decision found the 2014 Amendments to a state-tribal gaming compact violated IGRA, stating “[t]he calculation of the Mitigation

Payment is based in part on revenue from Class II gaming, food and beverage, hotel and entertainment activity, none of which are directly related to [the tribe's] Class III gaming activity.” Doc. 38-1.

Washburn further recognized that

many tribes . . . have developed businesses or amenities that are ancillary to their gaming activities, such as hotels, conference centers, restaurants, spa, golf courses, recreational vehicle parks, water parks, and marinas. These businesses are often located near or adjacent to tribal gaming facilities. It does not necessarily follow, however, that such ancillary businesses are “directly related to the operation of gaming activities,” and therefore subject to regulation or inclusion under a tribal-state compact.

Doc. 38-1 at 6, n.32.

Interior’s interpretation of IGRA makes clear the State tax on nonmembers’ use of Amenities is not encompassed by IGRA’s catchall provision. In this case, the Tribe provides the Amenities to attract guests to “stay, play and eat” to increase gaming.

JA 169(17). While providing the Amenities to attract more patrons may be “smart business,” it does not bring the Amenities within the scope of IGRA. Doing so would allow states the opportunity to be “involved” in tribal business decisions and thus, through compact negotiations, veto a tribal business venture.

Interior's narrow interpretation of the catchall provision aligns with the Indian canon of construction, which requires courts to interpret law in a manner that is most favorable to tribes in general. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985). And as illustrated by Washburn, it is most favorable to tribes for a narrow interpretation of the catchall provision. “By clearly, thoroughly, and explicitly identifying the subjects that can be addressed in a compact, Congress presumably intended to limit compacts to those subjects.” ADD 92. “Through the compact process, states have sometimes sought to expand the power that they can exercise over gaming to reach other activities beyond gaming and physical spaces beyond the casino floor.” ADD 95. “Congress sought to prevent a state from using its right to compact negotiations to extend state authority beyond gaming[, presumably including] using that authority to force resolution of other issues, unrelated to gaming.” ADD 92.

As stated in *In re Indian Gaming Related Cases*,

Not all such subjects are included within § 2710(d)(3)(C)(vii), because that subpart is limited to subjects that are “directly” related to the operation of gaming activities. The committee report notes that Congress did “not intend that compacts be used as a

subterfuge for imposing State jurisdiction on tribal lands.” ... it was this concern that led Congress to limit the scope of § 2710(d)(3)(C)(vii) to subjects that are “directly” related to the operation of gaming activities. States cannot insist that compacts include provisions addressing subjects that are only indirectly related to the operation of gaming facilities.

147 F. Supp. 2d 1011, 1018 (N.D. Cal. 2001), *aff’d*, 331 F.3d 1094 (9th Cir. 2003)(citations omitted).

It is shortsighted for this Decision to define the scope of IGRA, a federal act that affects tribes nationwide, in a manner that best suits the tribe in a particular case, especially when the definition would likely have negative consequences on other tribes.

Ultimately, if the Decision is upheld and taxation of nonmembers’ use of Amenities is “directly related to the operation of gaming activity,” it opens gaming compact discussions to a wide range of areas not intended, and possibly result in negotiations being stalled or refused on reasons not related to the operation of class III gaming activities.

3. The Decision incorrectly applied a “but for the existence of the casino” standard

Next, the Decision erred by applying the wrong standard when determining the use of Amenities were “directly related to class III

gaming.” The Decision acknowledged that to determine “whether certain subject matter falls within the scope of IGRA’s catchall provision, it should not be simply asked ‘but for the existence of the Tribe’s class III gaming operation, would the particular subject regulated under a compact provision exist?’” ADD 54. But, contrary to this acknowledgment, the Decision then applies the “but for” standard, concluding that the Amenities “fall into the purview” of the catchall provision because “but for the existence of the Casino” the Amenities “would not exist.” ADD 58, 60-61, 63.

The court cites to *In re Gaming Related Cases (Coyote Valley II)*, 331 F.3d 1094 (9th Cir. 2003) as support for its “but for” the existence of the casino test. ADD 59-60. However, the court’s reliance on *Coyote Valley II* is misplaced. In *Coyote Valley II*, the court determined that a labor relations provision related to employees at the casino and related facilities was directly related to the operation because the jobs would not exist without the operation of class III gaming and the casino could not operate without the employees. 331 F.3d at 1116. However, this provision was analyzed in the context of the tribe’s claim that the state did not negotiate in good faith. “The good faith inquiry is nuanced and

fact-specific, and is not amenable to bright-line rules.” *Id.* at 1113. This “good faith inquiry” is not relevant here because there is no evidence that either party requested or denied a negotiation request regarding the taxation topic at issue.

Importantly, other courts have not applied this “but for” test when holding IGRA does not preempt such “gaming-adjacent” and “extra-peripheral” activities. Application of this test would have, in all likelihood, altered the rulings that IGRA’s preemptive scope did not include gaming management and service contracts (*Harrah’s Entertainment*, 243 F.3d 435), construction equipment used to build the casino (*Yee*, 528 F.3d 1184), investigative reports on the management of gaming (*Siletz*, 143 F.3d 481), and the leasing of slot machines, all of which would not have existed “but for the existence of the casino” and for which the casinos would not have been operational without. *See Mashantucket*, 722 F.3d 457. The activities preempted by IGRA are those directly affecting the operation of gaming: “[a]ny claim which would directly affect or interfere with a tribe’s ability to conduct its own [gaming] licensing [and operation] process[es].” ADD 15 (brackets original)(quoting *Harrah’s Entertainment*, 243 F.3d at 437 (8th Cir. 2001), which

cites to *Gaming Corp.*, 88 F.3d at 549). The nonmembers' use of Amenities does not fall within this scope.

4. The facts reveal that the nonmembers' use of Amenities is not directly related to the operation of gaming activities.

Not only does the law not support the Decision, but neither do the facts. Here, the use of Amenities is not “directly related to the operation of gaming activities” so the taxable transactions are not encompassed by IGRA's catchall provision.

The catchall provision has two qualifying phrases: “directly related to the operation” and “of gaming activities.” As discussed above, what constitutes gaming activities is defined by IGRA: primarily slot machines and table games. Operation is not defined by IGRA, but commonly means “a method or manner of functioning.” <https://www.merriam-webster.com/dictionary/operation>, 2.c. (last visited on March 13, 2018). Nonmembers' use of Amenities does not fall within that boundary.

Merely because an amenity may increase the Casino's patronage, or would not exist “but for” the Casino's existence, does not mean that amenity bears a direct relationship “to the operation

of the gaming activities.” As Interior stated, “casino-related” does not mean “gaming-related.” Indeed, the Amenities can exist without the presence of gaming, as evidenced by the fact that some patrons of the Licensed Premises do not participate in the games.

JA 171(24); *see, e.g.*, JA 177(57)(noting the Casino contains the only hotel in Flandreau). In addition, no facts establish that the Casino could not function without the Amenities.

As a further indication that the Amenities are not related to the operation of the games, patrons do not earn points on their Royal Rewards card or advance through the reward tiers for purchases of Amenities. JA 168(13)-169(16). The only way patrons earn Royal Rewards points or earn “comps” is by playing games. JA 168(13)-169(15).

The lack of federal regulations over the Amenities also demonstrates that these are not activities directly related to the operation of gaming. JA 177(58). The tills from the food and beverage department are “not part of gaming,” so they are not physically escorted by security to the cage for deposit. JA 178(63-65). IGRA does not require general food and sanitation procedures. JA 178(61). On the contrary, Licensed Premises’ employees are

required to know, and actually follow, the State alcoholic beverage laws. JA 178(62).

The NIGC's requirements of the Tribal Commission on Gaming (Commission) also show that the Amenities are not directly related to the operation of gaming. The Commission is only required to file NIGC reports regarding "every class III game" offered, including where the game was produced and how it operates. JA 180(74). Only upon request by the NIGC does the Commission provide other information, such as financial reports. JA 180(75).

Finally, signaling the nongaming-related classification of the Amenities, the Tribe itself has determined that the following positions at the Licensed Premises do not require a tribal gaming license: restaurant bar manager, restaurant supervisor, snack bar manager, snack bar supervisor, bar supervisor, host/hostess, server, cashier, snack bar staff, bartender, bar wait staff, cook positions, buffet attendant, dishwasher, banquet staff, hotel manager, shift supervisor, housekeeping supervisor, operator, night auditor, hotel attendant, shuttle bus driver, and entertainment staff. JA 179(68)-180(72). The Tribe's determination that these Amenity-related employees are not so directly related to gaming as

to require a gaming license, speaks to their connection to the gaming operation—and it is not a direct one.

Moreover, *Rincon Band of Luiseno Mission Indians of Rincon Reservation v. Schwarzenegger* reaffirms that the use tax on the Amenities cannot be “directly related to the operation of gaming” and cannot be within the scope of the catchall provision. 602 F.3d 1019, 1033 (9th Cir. 2010). In *Rincon*, California sought to include a general fund revenue sharing clause within a gaming compact which allowed 10-15% of net gaming profits to be paid into the California treasury. *Id.* The Ninth Circuit looked to the revenue’s “use” to determine if it was “an authorized negotiation topic under” the catchall provision. *Rincon*, 602 F.3d at 1033.

The Ninth Circuit held “that general fund revenue sharing is not ‘directly related to the operation of gaming activities’ and is thus not an authorized subject of negotiation under” the catchall provision. *Rincon*, 602 F.3d at 1034 (citing *Cabazon*, 37 F.3d at 435)(holding that when fees go to the state’s general fund, the relationship between the revenue payments and the costs incurred in regulating gaming activities is attenuated)). Importantly, the Ninth Circuit stressed that “IGRA does not permit the State and the

tribe to negotiate over any subjects they desire; rather, IGRA anticipates a very specific exchange of rights and obligations[.]” *Id.* at 1039. The tax here is deposited into the State general fund and thus, under *Rincon*, cannot be “directly related to the operation of gaming.” Therefore, the tax does not fall within IGRA’s catchall provision.

5. Alcohol

In concluding that the use of all Amenities is “directly related to gaming activities,” the court effectively determined, without any analysis, that IGRA preempted the State’s regulation (including taxation) of alcohol and repealed section 1161 because as stated, the Amenities included the beverage services. ADD 61.

“[I]n all pre-emption cases, and particularly in those in which Congress has legislated in a field which the States have traditionally occupied, we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.”

Wyeth v. Levine, 555 U.S. at 565 (internal quotation marks omitted). In that situation, there is a strong presumption against federal preemption. *See FMC Corp. v. Holliday*, 498 U.S. 52, 62

(1990)(noting the “presumption that Congress does not intend to pre-empt areas of traditional state regulation.”). Therefore, IGRA’s interaction with section 1161 must be analyzed under the context of this presumption against preemption.

Pursuant to section 1161, to sell alcohol in Indian country, Congress requires tribes to comply with state laws and regulations:

liquor transactions in Indian country are not subject to prohibition under federal law provided those transactions are in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country[.]”

Rehner, 463 U.S. at 716 (internal quotation marks omitted). By enacting section 1161, Congress delegated the authority to regulate alcohol within Indian country to the states. *Id.* at 722-29.

Therefore, the Tribe must comply with state laws to sell alcohol within its reservation boundaries. *See Fort Belknap Indian Cmty. of the Fort Belknap Indian Reservation v. Mazurek*, 43 F.3d 428 (9th Cir. 1994); *City of Timber Lake v. Cheyenne River Sioux Tribe*, 10 F.3d 554 (8th Cir. 1993); *Citizen Band Potawatomi Indian Tribe v. Okla. Tax Comm’n*, 975 F.2d 1459 (10th Cir. 1992); *Squaxin Island Tribe v. Washington*, 781 F.2d 715 (9th Cir. 1986)(upholding state

tax on liquor sales to nonmembers and regulation of all tribal liquor sales); see also Felix S. Cohen, Cohen's Handbook of Federal Indian Law, 13.02 (5th Ed. 2012).

In *Squaxin*, the tribe challenged Washington's authority to both regulate and tax tribal liquor sales to nonmembers. 781 F.2d at 719. The Ninth Circuit rejected this challenge, finding the tribe's sovereign immunity was not infringed, and relying on *Rehner*, *Colville*, and *Moe*. *Id.* The Ninth Circuit stated, in upholding both the state tax on liquor sales to nonmembers and state regulation of all tribal liquor sales, that "[b]ecause there is no tradition of sovereign immunity in the area of liquor regulation or taxation and because the activity has potential for substantial impact beyond the reservation, we accord little, if any, weight to an asserted tribal sovereign interest." *Id.* at 720 (citing *Rehner*, 463 U.S. at 725).

State authority over alcohol within Indian country is not preempted by IGRA. IGRA's congressional findings and declarations of purpose do not address alcohol regulation. See 25 U.S.C. 2701-2702. In fact, the terms "liquor" and "alcohol" do not appear in any IGRA provisions. See 25 U.S.C. 2701-2721. See *Harrah's Entertainment, Inc.*, 243 F.3d at 438 (reiterating the

Supreme Court’s finding in *Santa Clara Pueblo*, 436 U.S. 49 (1978), that “where Congress has sought to achieve competing purposes, courts must be ‘more than usually hesitant to infer from its silence a cause of action’ that will serve one of the legislative purposes but undermine the other.”)

A finding that IGRA impliedly preempted the State’s alcoholic beverage laws by repealing section 1161 required, at a minimum, a finding that IGRA “occupied the field” of alcohol regulation.

However, “no court has ever held that alcohol is subject to IGRA,” until the Decision. ADD 19. Indeed, no case has found that IGRA occupies the field of alcohol regulation, that section 1161 has been partially repealed by any federal statute, or that IGRA met the requirements for a “partial implicit repeal” of section 1161. The Decision overlooked section 1161 when analyzing whether IGRA preempted the State’s taxation of alcoholic beverages purchased at the Amenities. ADD 52-63. The Decision’s conclusion regarding alcohol is contrary to longstanding authority and must be reversed.

B. The state interests outweigh any remaining tribal interests

The Tribe alleged that IGRA represents the federal interests to be weighed in the *Bracker* balancing test. See JA 1-39. But as set forth above, IGRA does not comprehensively and pervasively regulate the taxed activity – a nonmember’s use of Amenities. Because no federal interests are implicated by this taxed activity, the remaining interests to be weighed are the tribal and state interests. As in the lack of federal interests, no tribal interests present a barrier to State taxation of nonmembers’ use of Amenities.

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

a. Tribal Self-Government, Generally

As previously stated, 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 837. The second barrier primarily provides the “back-drop” for the federal enactments under the first barrier. *Ramah*, 458 U.S. at 837-38. As the Tribe asserted, “the trend has been away from the idea of

inherent Indian sovereignty as a bar to state jurisdiction[.]”

Doc. 117 at 16.

In *Colville*, the Supreme Court signaled that a state use tax on nonmembers’ on-reservation purchases does not infringe upon tribal self-government. See 447 U.S. at 161. The tax was upheld on the purchase of cigarettes by an Indian who resided on the reservation but was not a member of the governing tribe. *Id.* The Supreme Court concluded that imposing the tax on purchasers who are not members of the governing tribe does not “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.” *Id.* at 161.

Such is the case here. There is no evidence that the nonmember patrons of the ancillary businesses “have a say in tribal affairs or significantly share in tribal disbursements.” See *id.*; see also JA 244(224). *Colville* confirms that the tax in this case does not infringe on the right of the Tribe “to make their own laws and be ruled by them.” See *Bracker*, 448 U.S. at 142.

b. Economic Burden

Colville also reinforces that any impact of the tax on the Tribe's finances is insufficient to outweigh the State interests. In *Colville*, the tribes imposed tribal taxes on the cigarettes sold and in some instances, also received the markup price from the sale. 447 U.S. at 144-45. The evidence presented indicated that a state tax on the sale of cigarettes would substantially interfere with this tribal revenue. See *Confederated Tribes of Colville Indian Reservation v. State of Washington*, 446 F. Supp. 1339, 1347 (E.D. Wash. 1978), *aff'd in part, rev'd in part sub nom. Colville*, 447 U.S. 134 (stating that the imposition of a state tax on cigarettes sold to non-Indians would eliminate those sales, thus reducing tribal tax revenue and substantially interfering with the tribe's ability to provide services).

Presented with these facts, the Supreme Court provided, 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 Tribes of revenues which they are currently receiving." *Colville*, 447 U.S. at 156 (internal citation omitted)(quoting *Williams*, 358 U.S. at 220). A state tax on nonmember customers of Indian retailers "may be valid even if it

seriously disadvantages or eliminates the Indian retailer's business with non-Indians.” *Id.* at 151. The Supreme Court reaffirmed that “the Tribes have no vested right to a certain volume of sales to non-Indians, or indeed to any such sales at all.” *Id.* at 151, n.27.

In expanding on this point in his concurring opinion, Justice Rehnquist stated:

[t]he effect of the state tax . . . would be to reduce the tribe's governmental revenues and force the tribe to choose between losing those revenues by forgoing its tax or subjecting reservation retailers to a competitive disadvantage compared to those retailers outside the reservation not subject to the tribal tax. These may be the facts, but they are facts which *Thomas v. Gay* held to be irrelevant to the recognition of a sovereign tribal immunity.

Id. at 183-84 (Rehnquist, J., concurring in part, concurring in result in part, and dissenting in part)(indicating that “*Thomas v. Gay* is a part of the ‘backdrop’ which supports” the state’s jurisdiction to impose a cigarette tax on nonmembers’ purchases of cigarettes on the reservation). Justice Rehnquist indicated that “[e]conomic burdens on the competing sovereign . . . do not alter the concurrent nature of the taxing authority.” *See id.* at 184, n.9. Later, in *Wagnon v. Prairie Band Potawatomi Nation*, the Supreme Court relied on Justice Rehnquist’s statement when maintaining

that the “downstream economic consequences” of a state tax on a tribe were insufficient to invalidate the state tax. 546 U.S. 95, 114-15 (2005).

The *Cotton Petroleum* Court also determined that incidental effects on a tribe’s finances from a state tax on nonmembers’ on-reservation activities were too indirect to preempt taxation. 490 U.S. 163. *Cotton Petroleum* upheld five severance taxes on a non-Indian corporation’s on-reservation production of oil and gas, explaining that a financial burden on the Tribe caused by the imposition of a state tax is not sufficient to implicate preemption: “State[s] can impose a nondiscriminatory tax on private parties with whom . . . an Indian tribe does business, even though the financial burden of the tax may fall on . . . the Tribe.” *Id.* at 175, 186.

While *Cotton Petroleum* recognized an economic burden likely existed (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”), the burden did not alter the Supreme Court’s decision to uphold the tax. *Id.* at 186-87. The burden on the tribe

was “too indirect and too insubstantial to support [the taxpayer’s] claim of preemption.” *Id.*

Here, even assuming that the economic burden asserted by the Tribe is “at least . . . marginal,” it does not justify preemption of the use tax. *See Cotton Petroleum*, 490 U.S. at 186-87. The Tribe has not quantified any potential decrease in tribal revenues due to the imposition of use tax on nonmembers’ use of Amenities. *See* JA 183(92). The State, however, estimated the annual fiscal impact on the Tribe of the tax: even assuming that *all* of the patrons at the Licensed Premises are nonmembers, the annual adverse impact on the Tribe would likely be \$33,531, or at the very most \$268,248. JA 184(94); *Cf.* Doc. 126-1, p. 4 of 2013, 2014, and 2015 Financial Reports of Royal River Casino (indicating the Casino’s operating budget). Thus, based on the estimate available, the 4.5 percent state tax on nonmembers’ use of Amendities is “too indirect and too insubstantial” to preempt the tax. *See* SDCL 10-46-2; SDCL 10-45-2; *Cotton Petroleum*, 490 U.S. at 186-87 (determining that an additional 8 percent in state taxes is not “an unusually large state tax” that would substantially burden a Tribe); *Yee*, 528 F.3d at 1191-92 (determining that a reduction of tribal revenues by

\$200,000 for one subcontractor's work, plus the amounts for all other subcontractors' work, due to the imposition of a state tax on those subcontractors was insufficient to invalidate the state tax).

Finally, if the State is required to consider the economic burden on the Tribe of a tax on nonmembers' activities, it would have to undertake the exact analysis the *Chickasaw Nation* Court warned against because tax administration must be predictable: "If we were to make 'economic reality' our guide, we might be obliged to consider, for example, how completely retailers can pass along tax increases without sacrificing sales volume – a complicated matter dependent on the characteristics of the market for the relevant product." 515 U.S. at 459-60. Cf. JA 184(93)(indicating that many factors can affect gaming revenue, including the opening of another casino, weather, and other events). Ultimately, the Supreme Court has firmly rejected that "[a]ny adverse effect on the Tribe's finances caused by the taxation of a private party contracting with the Tribe would be ground[s] to strike the state tax." *Cotton Petroleum*, 490 U.S. at 187.

c. Value Added

Pursuant to *Colville*, a factor that may strengthen a tribe's interest in the preemption analysis is when the value of the taxed activity is derived from a tribe's on-reservation activities. 447 U.S. at 156-57 (majority opinion). This "value added" theory was arguably discarded by the Supreme Court in its more recent decision of *Cotton Petroleum*. As discussed, the *Cotton Petroleum* Court upheld a state's jurisdiction to impose taxes on a nonmember's severance of oil and gas from the reservation. 490 U.S. at 166, 186. In upholding the taxes, the Supreme Court made no mention whether the value of the taxed oil and gas was completely derived from the reservation. See 490 U.S. 163. Yet it is difficult to think of something more derived from the reservation than the oil and gas beneath its soil.

Even if the "value added" factor remains, the value that the Tribe claims to have added here is the marketing and the general operation of the ancillary businesses. See JA 171(28)-176(53)(indicating that the value added includes staffing, maintenance, cleaning, stocking, inventory, customer service, and food preparation); JA 176(53). But *Colville* rejected that a tribe's

marketing and general operations of a retail business are “value added” sufficient to justify preemption of a state tax. See 447 U.S. at 154-155 (upholding the state tax on nonmember purchases of cigarettes at the smokeshops even though the tribes were involved “in the operation and taxation of cigarette marketing on the reservation”). Even though several tribes in *Colville* acted as the retailer, the Court found that the “value [of the cigarettes was] not generated on the reservations by activities in which the Tribes have a significant interest.” *Id.* at 155. Since the *Colville* Court did not acknowledge these general business operations as “value added,” neither should this Court.

If a state could not impose its tax on nonmembers patronizing on-reservation tribal retailers merely because the tribal retailer marketed its products and operated its business, there could be no state taxation of nonmembers’ on-reservation activity. This result has been repeatedly rejected by the Supreme Court. See, e.g., *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463 (1976)(upholding state tax on Indian retailers’ sales to non-Indians); *Colville*, 447 U.S. 134 (upholding state tax on Tribal retailers’ sales of cigarettes to nonmembers); *Dep’t of Taxation &*

Finance of N.Y. v. Milhelm Attea & Bros., Inc., 512 U.S. 61, 64 (1994)(noting that the “[o]n-reservation cigarettes sales to persons other than reservation Indians are . . . legitimately subject to state taxation”); *Citizen Band Potawatomi*, 498 U.S. 505 (upholding state tax on nonmembers’ purchase of cigarettes from a tribe’s convenience store).

Setting aside the marketing and general operation of the Casino, the value of the products⁸ sold at the ancillary businesses is almost entirely derived off-reservation. A majority of the goods are sold in the form the Tribe receives them. JA 177(54). The only goods the Tribe modifies before selling are certain foods. JA 77(55). But even the food products are delivered to the ancillary businesses from off-reservation businesses. JA 177(56). These products are not derived from the reservation or “created on the reservation[,]” and thus, the Tribe’s interest is weak, at best.

⁸ The Tribe sells or rents the following at the Licensed Premises: Hotel rooms, RV park spaces, sundry items, fuel, cigarettes and tobacco, alcoholic beverages, nonalcoholic beverages, bottled soda, groceries, deli items, jewelry, arts and crafts, novelty and gifts, Casino apparel, vending machine items, arcade games, shuttle bus service, check cashing fees, food, convention center room, Casino and concert merchandise, Event Center entertainment tickets, bowling, and arcade games. JA 171(25-26).

Under these facts, the “value added” test must be rejected because it is unworkable and unpredictable, especially in the context of a nonmember’s purchase of food items. It would be impossible to determine the amount of value added by the Tribe that could be sufficient to preempt the use tax. For example, much like placing cigarettes on the shelves at a tribal smokeshop is not value added, placing a dessert on the buffet at the Tribe’s restaurant would not be value added. *Cf.* JA 174(41). Such a test would require a case-by-case determination whether the Tribe added value if, for example, the Tribe chopped vegetables, heated vegetables, or added its own seasoning to vegetables. JA 174(40), (42).

Moreover, the Tribe’s food preparation and food products offered for sale could be ever-changing and consequently, under the “value added” test, the state’s jurisdiction constantly would be in flux. For example, the Tribe could later decide to add prepackaged frosting or homemade frosting to the prepackaged desserts it currently serves. *See* JA 174(41). Would either change be sufficient to preempt a state tax on a nonmember’s purchase of the dessert? Requiring this analysis would leave unsettled the State’s

taxation authority and directly contradict the Supreme Court's declaration that "tax administration requires predictability." See *Chickasaw Nation*, 515 U.S. at 459-60. Thus, any "value added" theory does not support preemption of the State tax.

2. The State's interests reinforce the State's jurisdiction to impose its use tax on nonmembers' on-reservation activity.

The federal and tribal interests, reflected above, must be weighed against the State's interests in imposing the tax on nonmembers' on-reservation activity. See *Ramah*, 458 U.S. at 836-38. A state's interest in raising revenues for its general purpose fund is enough to outweigh even a highly federally regulated activity. See *Cotton Petroleum*, 490 U.S. 163. Moreover, "[r]aising revenue to provide general government services is a legitimate state interest." *Yee*, 528 F.3d at 1192-93. Even so, the State's interests here encompass more than just a general desire to raise revenues.

The State has a strong interest in funding the services it provides both on and off reservation to all patrons of the ancillary businesses. See *Cotton Petroleum*, 490 U.S. at 189 ("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.”) These services, funded by the State general fund (in which the use tax is deposited), include, but certainly are not limited to: funding for schools (Department of Education and Board of Regents); health and medical services (Department of Health); emergency management services (Department of Public Safety); Medicaid (Department of Social Services); court services (Unified Judicial System); and correctional systems (Department of Corrections). *See* Doc. 79-1 (listing a substantial number of State services); JA 185(99). Additionally, a number of State services are available to, or benefit, the patrons while at the ancillary businesses, including the regulation of drinking water and certain food products; fire investigation services; criminal investigation services; emergency alert services; the provision of funds for medical equipment and services; and the training of law enforcement, first responders, and firefighters that may respond to incidents at the ancillary businesses. JA 185(99)-190(124). These State services, along with a substantial number of other state services, benefit the patrons, including on their travels to and from the ancillary businesses. *Id.*; *see also* JA 168(11, 12, 19, 20). And as acknowledged by the district court, “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.” ADD 66.

The record indicates that the nonmember-taxpayers are most likely using State services rather than Tribal services. An estimated 99.6% of the Casino’s Players Club members that reside in South Dakota are either non-Tribal members, or are Tribal members who do not live in Moody County. See Doc. 125-10 (indicating the number of players club members that are South Dakota residents); JA 198(5)(indicating the number of adult Tribal members living in Moody County⁹); accord *Tulalip Tribes v. Washington*, No. 2:15-cv-00940-BJR, 2017 WL 58836, at *7, (W.D. Wash. Jan. 5, 2017)(“To the extent [the State] can show that they ‘provide the majority of the governmental services used by [the] taxpayers,’ their interests may weigh more heavily. There is no requirement that these services be provided . . . on the reservation.”).

While nonmembers may receive some Tribal governmental services, they are likely receiving a majority of their services from

⁹ For this calculation, the State assumes all adult Tribal members living in Moody County are Players Club Members.

the State. The Tribe's governmental services are mainly confined to the 3.68 square miles of the Tribe's reservation. *Compare* Doc. 79-1 *with* Doc. 80-6; *see* JA 425(2), 425(11). Thus, based on geography alone, the Tribal governmental services would not be readily available to individuals that do not live within Moody County. For nonmembers that reside in Moody County, they may not satisfy eligibility requirements (such as being a member of the Tribe) for many Tribal services. *See* JA 468(128). Moreover, the State offers services to nonmembers and Tribal members that are not offered by the Tribe. *Compare* Doc. 79-1 *with* Doc. 80-6; *see* JA 425(2). Finally, there is no evidence that the nonmember patrons receive significant Tribal governmental services instead of State governmental services. *See Colville*, 447 U.S. at 156-57 (indicating that the state taxes were "reasonably designed to prevent the Tribes from marketing their tax exemption to nonmembers who [did] not receive significant tribal services[.]")(emphasis added).

Ultimately, an abundance of State services are available to the nonmember taxpayers. The State has a strong interest in imposing its use tax on those nonmembers to fund its State services. This State interest outweighs the tribal interests, if any, that are present.

II. Validity of SDCL 35-2-24.

Pursuant to SDCL 35-2-24,¹⁰ for alcoholic beverage licenses to be reissued to the Tribe, the Tribe must remit to the State the use tax incurred by nonmembers “as a result of the operation of the [L]icensed [P]remises.” Relying on *Milhelm Attea & Bros.*, 512 U.S. at 75, which indicates that “Indian traders are not wholly immune from state regulation that is reasonably necessary to the assessment or collection of lawful state taxes[,]” the district court determined that the State’s condition on renewal of the licenses was not valid because it was not “reasonably necessary.” ADD 72.

The district court erred in relying on case law surrounding the federal Indian Trader Statutes¹¹ to determine the validity of the State’s licensing requirement. Those statutes are neither applicable nor relevant. Rather, the State’s authority for enacting SDCL 35-2-24 is established by section 1161 and *Rehner*, 463 U.S. 713.

There is a long tradition of state regulation over alcohol within its borders as states have “an unquestionable interest in the liquor

¹⁰ See ADD 98.

¹¹ The federal Indian Trader statutes, found at 25 U.S.C. 261 *et al.*, involve the sale of goods to Indians on Indian reservations.

traffic that occurs within its borders.” *Rehner*, 463 at 724. As indicated above, section 1161 requires Tribes to comply with state alcoholic beverage laws in order to sell alcohol in Indian country. Section 1161 “is a delegation of authority to the state to regulate tribal liquor sales, not a preemption in favor of the tribes.” *Squaxin*, 781 F.2d at 719. This grant of state authority does not limit the manner in which the states may regulate alcohol. *Cf. Rehner*, 463 U.S. at 730 n.13, 734 n.18 (rejecting a distinction between substantive and regulatory laws for purposes of section 1161’s grant of state authority).

Contrary to the unqualified text of section 1161, the court looked at a particular provision, SDCL 35-2-24, and determined that the “condition that the tribe remit all outstanding taxes on the renewal of an alcohol license [is not] reasonably necessary.”¹²

¹² The Tribe did not contend, and the district court did not conclude, that SDCL 35-2-24 violated the Tribe’s substantive due process, which would have required that the statute be analyzed under a “reasonableness” standard. *Accord Crowley v. State*, 268 N.W.2d 616 (S.D. 1978)(“any exercise of the police power [must] be reasonable . . . and the regulatory means adopted by the legislature must bear a real and substantial relation to some actual or manifest evil . . . and cannot be unreasonable, arbitrary, or capricious.”)

ADD 72. But, the court ignored the State’s historic police powers regarding the regulation of alcohol beverages within its borders. “[T]he States traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quest of all persons.” *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996)(internal quotation marks omitted). The State asserts these police powers through its alcoholic beverage licensing requirements, such as the requirement that a licensee must have good moral character and no felony convictions. See SDCL 35-2-6.2. More relevant here, State law also provides that a license may not be reissued if taxes incurred “as a result of the operation of the licensed premises” are not remitted. See SDCL 35-2-24, ADD 98. These State licensing requirements are important in protecting the health and safety of its citizens by ensuring that licensees are desirable and law-abiding citizens. See *Medtronic, Inc.*, 518 U.S. at 475; *Emery v. City of New Orleans through Rochon*, 473 So.2d 877, 880-81 (La.Ct.App. 1985)(“Municipalities have broad discretion in regulating the liquor business to protect the public from fraud and corruption. We do not believe requiring good character and reputation for managers goes beyond that discretion[.] . . . [because

the requirement] has a real and substantial relationship to promotion of orderly and legal distribution of intoxicating beverages.”); *Zemour, Inc. v. State Div. of Beverage*, 347 So.2d 1102, 1105 (Fla.Dist.Ct.App. 1977)(“repeated acts in violation of law. . . evinces the sort of mind and establishes the sort of character that the legislature . . . has determined should not be entrusted with a liquor license.”).

Here, the court proposes an unworkable test that would require parsing the State alcoholic beverage laws to determine which laws are “reasonably necessary” to regulate alcohol within Indian country. *Cf.* ADD 72-73. For example, could the State require that an applicant within Indian country have good moral character before issuing an alcoholic beverage license? *See* SDCL 35-2-6.2. Or, could the State require that an applicant within Indian country be the owner or lessee of the premises where the business is to be conducted? *See* SDCL 35-2-6.3. Such statute-by-statute approach has no basis in section 1161 and would undermine the State’s ability to ensure alcoholic beverage licenses are consistently issued to appropriate individuals.

Through section 1161, “Congress did not intend to make tribal members ‘supercitizens’ who could trade in a traditionally regulated substance free from all but self-imposed regulations.” *Squaxin*, 781 F.2d at 719-20 (quoting *Rehner*, 463 U.S. at 734). But, the district court’s test threatens to do just that.

The district court indicated that if the requirement in SDCL 35-2-24 were upheld, “there would be no limit to the authority the State would try to impose on a tribe by virtue of the State’s regulation of alcohol sales.” ADD 72. However, the State is not seeking unbridled authority to condition the remittance of any tax on the renewal of a license. *See* Doc. 26. Rather, SDCL 35-2-24 requires that the Tribe remit the “use tax incurred by nonmembers *as a result of the operation of the licensed premises[.]*” (emphasis added.) Thus, the State’s assertion of authority is directly related to the premises encompassed by the license.

Ultimately, the state use tax on nonmembers at the Licensed Premises is valid. The State may require the Tribe to collect this tax and remit it to the State. *See, e.g., Chickasaw Nation*, 515 U.S. at 460. It is well established that the State may regulate alcohol in Indian Country. *See* section 1161; *Rehner*, 463 U.S. 713. This

combination of a valid tax, the Tribe's obligation to collect and remit that tax, and the State's regulatory authority over alcohol within Indian country confirms that SDCL 35-2-24 is a valid exercise of State authority.

CONCLUSION

The State respectfully requests that the Court 1) reverse the district court's ruling that the state tax on nonmembers' use of Amenities is preempted by IGRA; 2) rule that the state tax on nonmembers' use of Amenities is not preempted by federal common law; and 3) reverse the district court's ruling that invalidated the State's condition of license renewal on the Tribe's collection and remittance of the use tax incurred by nonmembers at the Licensed Premises.

Dated this 19th day of March, 2018.

/s/ Kirsten E. Jasper

Kirsten E. Jasper
Assistant Attorney General
South Dakota Attorney General's Office
1302 E. Highway 14, Suite 1
Pierre, SD 57501
Telephone: (605) 773-3215
Kirsten.Jasper@state.sd.us

Stacy R. Hegge
Department of Revenue
Karl E. Mundt Library – DSU
820 N Washington Ave
Madison, SD 57042-1799
(605)256-5077
Stacy.Hegge@state.sd.us

Attorneys for Defendants

CERTIFICATE OF COMPLIANCE

1. I certify that the Appellant's Brief is within the limitation provided for in Rule 32(a)(7) using bookman old style typeface in 14 point type. Appellee's Brief contains 12,908 words.

2. I certify that the word processing software used to prepare this brief is Microsoft Word 2010, and it is herewith submitted in PDF format.

3. I certify that the brief submitted herein has been scanned for viruses and that the brief is, to the best of my knowledge and belief, virus free.

Dated this 19th day of March, 2018.

/s/ Kirsten E. Jasper

Kirsten E. Jasper
Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 19th day of March, 2018, a true and correct copy of Appellee's Brief was submitted to the Eighth Circuit Court of Appeals for review.

/s/ Kirsten E. Jasper
Kirsten E. Jasper
Assistant Attorney General