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' REPLY BRIEF

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INTRODUCTION

This reply is in response to the Brief of Appellee Flandreau Santee Sioux Tribe ("TB") and uses the same references to the parties and record as set forth in the Defendants-Appellants' Brief ("SB"). The State relies on the Statement of the Case and Facts, the Standard of Review, and all argument presented in its initial brief.

Contrary to the Tribe's portrayal, the State is merely attempting to collect a valid tax on nonmembers' use of goods and services purchased within the State—taxing authority the State has. *See* TB 10. This case is not about gaming or IGRA's regulation of gaming. *See Gaming Corp. of Am. v. Dorsey & Whitney*, 88 F.3d 536, 546 (8th Cir. 1996) (emphasis added) (indicating that IGRA "left states with no regulatory role over gaming except as expressly authorized by IGRA, and under it, the only method by which a state can apply its general civil laws to gaming is through a tribal-state compact."). Rather, the State seeks to impose its use tax on the non-gaming Amenities, which are not regulated by IGRA.

ARGUMENTS

As an initial matter, the Tribe relied on "facts" from its Reply to the State's Response to the Tribe's Statement of Undisputed Material Facts in Support of the Tribe's Motion for Summary Judgment (Reply SUMF, JA 471 through JA 701). This Reply SUMF was submitted in a manner inconsistent with the rules of civil procedure, without permission of the district court, and to which the State objected. *See* JA 702-03. While the district court did not respond to the State's objection, this Court should not consider those citations or any arguments for which they rely. *See* TB 10-13, 47-50, 56-57.

The Tribe's Reply SUMF is not permissible under either D.S.D.Civ.L.R. 56.1 or Fed.R.Civ.P. 56. It was also a clear attempt to circumvent the word limitation provided by L.R. 7.1(B)(1) (12,000 words), given numerous responses contained improper and additional legal statements, legal conclusions, or factual arguments. Fed.R.Civ.P. 56(a) and L.R. 56.1; *see Sancom, Inc. v. Qwest Commc'ns Corp.*, No. CIV. 07-4147-KES, 2010 WL 299477, at *2 (D.S.D. Jan. 21, 2010) (stating, "a party may not use its statement of facts to circumvent the 25-page limitation on legal briefs[,]" where

movant filed an 82 page, 195 paragraph statement of facts). The Reply SUMF also aggravates L.R. 56.1's purpose to "distill to a manageable volume the matters that must be reviewed by a court undertaking to decide whether a genuine issue of fact exists for trial. [It is] designed to prevent a district court from engaging in the proverbial search for a needle in the haystack." *Sancom, Inc.*, 2010 WL 299477, at *1 (internal quotation marks omitted).

Here, the Tribe's initial SUMF was 80 pages and contained 366 paragraphs, many of which contained subparts. JA 195-274.[1] By the time the Tribe submitted its Reply SUMF, it had expanded to 231 pages. JA 471-701. For these reasons, the Reply SUMF violated L.R. 56.1 and should not be considered by this Court.

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

Regarding the State's general taxation authority, the Tribe makes two critical missteps. First, the Tribe relies on several cases focused on taxing or regulating Indians, rather than non-Indians. TB 18-33. In contending that a presumption for preemption applies

[1] By comparison, the State's initial SUMF consisted of 27 pages and 134 paragraphs. JA 166-92.

here, the Tribe quotes *Oklahoma Tax Commission v. Sac & Fox Nation*, 508 U.S. 114 (1993), in stating that "[a]bsent explicit congressional direction to the contrary, we presume against a State's having the jurisdiction to tax within Indian country[.]" TB 19. The Tribe also focuses on *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164 (1973), which involves a state's jurisdiction to impose a "personal income tax on a reservation Indian whose entire income derives from reservation sources[,]" and *Williams v. Lee*, 358 U.S. 217 (1959), a case where a state court was found not to have civil jurisdiction over an Indian for actions which occurred on-reservation. These cases are inapplicable as the so-called "presumption for preemption" relates to a state's authority over Indians, which requires a test entirely different than a state's authority over non-Indians. *See Sac & Fox Nation*, 508 U.S. at 123-26; *see also White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144 (1980) (noting that generally, state law is inapplicable regarding an Indian's on-reservation conduct, but for non-Indian on-reservation conduct, a particularized inquiry is undertaken to determine the state's authority); Felix S. Cohen, Cohen's Handbook of Federal Indian Law, 8.03[1][d] (5th Ed. 2012).

The Tribe also extensively relies upon *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983), but that case involved a state regulatory scheme which conflicted with, and effectively rendered moot, a tribe's regulatory scheme. *Id.* at 337-39, 343-44. The Supreme Court analyzed the state's regulatory scheme in the context of whether a state may restrict a tribe's authority to regulate hunting and fishing by nonmembers on a reservation. *Id.* at 330. Such facts do not align with this case. Here, both federal and state law can coexist; the state tax on nonmembers' use of Amenities would not "supplant" any federal or tribal regulatory scheme. *See id.* at 339.

The Tribe's second misstep is its argument that the State needs a grant of authority to impose the use tax because it otherwise has none. TB 17-23. But, a state's taxation authority over nonmembers on the reservation is addressed in the context of preemption. *See, e.g., Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 176-77, 186-87 (1989); *Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832, 834 (1982); *Bracker*, 448 U.S. at 144. For something to be preempted, it has to exist in the first place. *See Preemption*, Black's Law Dictionary

(10th ed. 2014) (5. "The principle (derived from the Supremacy Clause) that a federal law can supersede or supplant any inconsistent state law or regulation.") (emphasis added). 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 Ramah,* 458 U.S. at 837-38, *and Bracker,* 448 U.S. at 142-45 (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); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980) *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); *see also Barrier,* Merriam Webster Dictionary, https://www.merriam-webster.com/dictionary/barrier ("1a: something material that blocks or is intended to block passage") (last visited April 3, 2018); Cohen's, 8.03[1][d] ("If the legal incidence [of the tax] falls on the nonmember, taxes may be prohibited if they are preempted by

federal law or if the state tax would interfere with the tribe's ability to exercise its sovereign functions."). *Contra* TB 17-23.

In this case, there are no barriers to the State's authority to impose tax on nonmembers' use of Amenities. IGRA neither expressly nor impliedly preempts the use tax and the State's interests outweigh any remaining tribal interests.

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

The first barrier that may block the state's taxation authority is when the state tax is preempted by federal law, either expressly or impliedly. *See Ramah,* 458 U.S. at 837-38; *Cotton Petroleum,* 490 U.S. at 176-77. The Tribe asserts that IGRA preempts the tax on nonmembers' use of Amenities. TB 33-54. Although the Tribe dismisses "the State's reliance on cases not involving preemption in Indian country[,]"[2] the Tribe fails to acknowledge the State's cited

[2] The Tribe indicates that the State's reliance on *Altria Group, Inc. v. Good*, 555 U.S. 70 (2008) is misplaced because that case did not involve preemption in Indian country. TB 19. In its brief, the State relied on *Altria Group* to define implied preemption. *See* SB 20, 21. The State also relied on *Altria Group, Inc.* to clarify that a preemption analysis must focus on "the purpose of Congress," a point also supported by *Rice v. Rehner*, 463 U.S. 713 (1983), an (continued. . .)

cases discussing preemption in the context of IGRA. *See* TB 19. In *Gaming Corporation of America,* the Eighth Circuit noted that courts are reluctant to find a statute to have "extraordinary pre-emptive power" or be completely preemptive. 88 F.3d at 543 (quoting *Metro. Life Ins. Co. v. Taylor,* 481 U.S. 58, 65 (1987)); *see also* SB 14-15. Such statement is consistent with the "duty to accept the reading that disfavors pre-emption." *See Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005). In addition, in *Michigan v. Bay Mills Indian Community*, 134 S.Ct. 2024 (2014), the Supreme Court interpreted IGRA under the rule that "'Congress wrote the statute it wrote'—meaning, a statute going so far and no further." *Id.* at 2033-34; *see also* SB 19. IGRA's preemptive scope must be determined by keeping in mind this aversion to stretch its statutory language.

1. IGRA does not expressly preempt the use tax.

(. . .continued)
Indian country case. *See* SB 21; *Rice*, 463 U.S. at 718 ("The goal of any pre-emption inquiry is to determine the congressional plan[.]") (internal quotation marks omitted). These two notions are informative regardless of the specific facts in this case.

Contrary to the Tribe's assertions and the Decision, section (d)(4) does not expressly preempt the tax on nonmembers' use of Amenities. Section (d)(4) is not an express preemption clause: "the failure to confer authority to tax [is not] a prohibition to tax." *Cabazon Band of Mission Indians v. Wilson*, 37 F.3d 430, 433 (9th Cir. 1994). Section (d)(4) was not aimed at preempting a state tax on any activity within a casino; instead, it was tailored to limit 25 U.S.C. 2710(d)(3)(C)(iii), which permits states to include as a compact provision an assessment on gaming activities for the amounts "necessary to defray the costs of regulating such activity[.]" Section (d)(4) ensured that states could not withhold compact negotiations by attempting to impose a tax on the gaming activity beyond what was necessary to cover its regulatory costs. Cohen's, 12.05[2].

The Tribe urges this Court to interpret section (d)(4) as expressly preempting all taxes on "any person the Tribe authorizes to engage in gaming, including the Tribe's patrons." TB 38, 41-42. But if section (d)(4) prevented the State from imposing a tax on any individual "authorized" by the Tribe to play class III games, the State would have jurisdiction to tax patrons under the age of 21

because the Tribe has not authorized them to play class III games. *See* JA 82. This is absurd[3] and serves none of IGRA's purposes.

The Tribe also attempts to use Interior letters to support its interpretation of section (d)(4), stating the letters "expressly prohibit[] virtually all state taxation." TB 38-39. However, the full sentence in those letters reflects otherwise: "The IGRA expressly prohibits the imposition of a tax, fee, charge, or other assessment on Indian gaming except to defray the state's costs of regulating Class Ill gaming activities. 25 U.S.C. 2710(d)(4)." Doc. 125-17 at 3; Doc. 125-18 at 2 (emphasis added). Rather, Interior's interpretation buttresses that section (d)(4) is only a prohibition on the taxation of gaming. *See* SB 15-20.

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. The use tax here is not imposed on the "class III activity," the gaming

[3] The Tribe's response to the State's other "absurd result" argument (SB 19) was an attempt to explain it away by arguing that taxes which are expressly preempted by, but incompatible with, IGRA's purposes are then impliedly preempted. *See* TB 44. For good reason, the Tribe has no legal authority to support this proposition.

proceeds, or even the Tribe, and section (d)(4) does not expressly preempt the tax on nonmembers' use of Amenities.

2. IGRA does not impliedly preempt the use tax.

a. No comprehensive regulation of the taxed activity

To find a federal statute impliedly preempts state law, the federal regulation must be so "comprehensive and pervasive" that it leaves no room for the state tax. *See Ramah*, 458 U.S. at 838-39, 842. IGRA fails to meet that standard here.

The Tribe asserts that IGRA "regulates tribal casinos," including all amenities offered at "Las Vegas-Style" casinos, and then attempts to fit this case within *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). TB 36, 47-48. The Tribe extends that case far past its actual scope. *Cabazon Band* does not stand for the premise that state regulation of all activities occurring within a tribal casino is preempted. *See generally* 480 U.S. 202. Rather, *Cabazon Band* ruled that the state's gambling laws and ordinances (namely, the regulation of bingo and certain card games) are preempted. 480 U.S. at 205-06, 210-11, 220-22. It did not rule

upon the preemption of any state laws outside of the regulation of gambling. *See generally Cabazon Band*, 480 U.S. 202.

Preempting the state tax on all amenities provided by what a Tribe deems its "Casino" would allow for gamesmanship and give tribes complete control of a state's authority over nonmembers purely through business decisions. For example, a tribe could merely add a single gaming device (such as a pull tab machine) into any of its deemed "Casino departments" in order to bring that entire business venture within the scope of IGRA.

The Tribe asserts that "hundreds of detailed federal regulations promulgated pursuant to IGRA govern tribal casinos" and "provide[] federal oversight over the entire field." TB 36 (citing to 25 C.F.R. 501.1-585.7; 290.1-293.16) (emphasis added), 48-49. This is a vast overstatement given IGRA's provision that the federal oversight of class III gaming operations is primarily limited to gaming compact requirements. *See* 25 U.S.C. 2710(d). IGRA provides minimal federal oversight as the process is left to tribes and states to agree how class III gaming could be conducted by a tribe. IGRA provides that the NIGC's involvement in class III gaming operations is mainly limited to the Chairman's duties of

approving the tribal gaming ordinances, 25 U.S.C. 2705(a)(3); 25 U.S.C. 2710(d)(1)(A), and approving management contracts, 25 U.S.C. 2705(a)(4).

In reality, the Tribe is not required by federal law to follow the "hundreds of detailed regulations[.]"[4] *See* TB 36. The NIGC has no authority to regulate class III gaming activities and therefore, the NIGC's regulations are irrelevant in this litigation. *See Colo. River Indian Tribes v. Nat'l Indian Gaming Comm'n,* 466 F.3d 134, 137–40 (D.C. Cir. 2006) (affirming the district court's determination that the NIGC has no authority to regulate class III gaming operations, including through regulations, monitoring, or inspection of class III gaming); *see also* Cohen's, 12.02[3][a].

Further, the Tribe's cited NIGC regulations do not expand IGRA's scope to encompass everything within the Tribe's "Casino" moniker. TB, *generally*. The Tribe asserts that NIGC regulations govern activities or operations at the Casino (including health and safety, surveillance, slots, table games, etc.). JA 210(41); TB 36.

[4] The Tribe concedes that the "NIGC's class III MICS are not mandatory." TB 49 n.12.

But save for a regulation on complimentary items and services (which the State does not impose its tax), the Tribe has not identified any actual regulation of the taxed activity – nonmembers' use of Amenities. *Cf.* JA 210(40-41); TB, *generally*.

The Tribe argues that it is unnecessary "to locate an exact match between the federal laws and the activity sought to be taxed." TB 24. The Tribe indicates that there was no such "exact match" in *Bracker* and *Ramah*. TB 24. However, this is an inaccurate reflection of the regulations in those cases.

In *Bracker*, the taxes at issue were a use fuel tax and motor carrier license tax, which the state sought to impose on nonmembers' hauling of timber. 448 U.S. at 139-40. The comprehensive federal regulatory scheme in *Bracker* included timber hauling regulations, such as the roads to use when hauling the timber, the hauling equipment to be employed, the rate of speed that the logging equipment must travel, and the timber load size, including weight, length, height, and width restrictions. *Id.* at 145-48.

The regulations in *Ramah* were similarly tied to the taxed activity. In that case, the tax at issue was a gross receipts tax on a

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

b. IGRA's catchall provision

The Tribe also asserts the State tax is preempted by IGRA's "catchall provision." 25 U.S.C. 2710(d)(3)(C)(vii) (compacts "may include provisions relating to . . . any other subjects that are directly related to the operation of gaming activities"); TB 46-54. The Tribe claims that because the "Casino's amenities are tightly woven into its business" they are "directly related to the operation of" the Casino. TB 49-51. However, the district court correctly

rejected this theory when finding the convenience store does not fall within IGRA's preemptive scope. The district court explained,

> the mere fact that the convenience store falls within the same business enterprise operated by the Tribe is not sufficient to equate such services as directly related to the operation of gaming. [...] Were...the convenience store to be within the scope of 25 U.S.C. 2710(d)(3)(C)(vii), there would be no end to what other activities would fall under the IGRA's protection when, by virtue of a business decision, they are somehow operated under the same umbrella as an IGRA-sanctioned casino.

ADD 62.

The Tribe also argues that the State cannot impose tax on nonmembers' use of Amenities "without a valid provision in the gaming compact permitting it." TB 46. According to the Tribe, because the Compact did not include a provision regarding taxation of nonmembers' use of Amenities, the State has effectively waived any authority to impose this tax. TB 37, 46, 53.

This argument must be rejected for the reasons set forth in the State's Brief 20-41 and because the Compact incorporates applicable civil federal law. The Compact only governs activities to the extent it permits or prohibits those activities. *See Confederated Tribes of Siletz Indians of Oregon v. State of Oregon*, 143 F.3d 481, 485 (9th Cir. 1998). *Barona Band of Mission Indians v. Yee*, 528

F.3d 1184 (9th Cir. 2008) confirms as much. The compact in *Yee* contained no provision regarding a state tax on construction materials for a casino. *See Brief of Appellees Barona Band of Mission Indians, et al.*, No. 06-55918, 2006 WL 4012116, at 56 (9th Cir. filed Dec. 6, 2006). The Ninth Circuit seemingly accorded no weight to the absence of such taxation provision by determining that the tax was "outside the scope of the compact" and IGRA did not preempt it. *See Yee*, 528 F.3d at 1193 & n.4.

Moreover, paragraph seven of the Compact, entitled "Civil Jurisdiction," provides:

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

JA 81. The Tribe and State agreed to this provision.

Ultimately, as indicated by Kevin Washburn (who authored compact approval and disapproval letters on behalf of Interior), "amenities that are connected in a business sense to the casino operation and are co-located with a casino, . . . do not themselves constitute gaming." ADD 94-95. The Decision and the Tribe's

asserted tests for implied preemption leave IGRA's preemptive scope unknown, undefined, and malleable. This outcome is inconsistent with IGRA's purposes and the case law upon which it was founded.

c. Alcohol

The Tribe boldly states that because of concessions made by the State in this litigation, the Tribe withdrew its claim addressing IGRA's effect on 18 U.S.C. 1161. TB 53-54 (citing Doc. 130 at 58-59). But contrary to the Tribe's assertions, the State only conceded that the State could not condition an alcohol beverage license renewal on the collection of an invalid tax. *Compare* Doc. 130 at 58-59 *with* Doc. 135, 10-42. Regardless, the Tribe's assertion does not refute that, 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 partially repealed section 1161 because as stated, the Amenities included the beverage services. ADD 61.

"Congress, when enacting IGRA […] explicitly stated in two separate provisions […] that *IGRA should be considered in light of other federal law.*" *Texas v. Ala. Coushatta Tribe of Tex.*, No. 9:01-

CV-299, 2018 WL 731516, at *11 (E.D. Tex. Feb. 6, 2018) (emphasis in original). That the State's authority to tax nonmembers' use of Amenities, including alcoholic beverages, falls within this IGRA-referenced "other federal law" is supported by IGRA's purpose and intent. *See* SB 21-26.

B. The state interests outweigh any remaining tribal interests

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."

The second barrier to a state's authority to tax nonmembers' on-reservation activities is when the taxation "unlawfully infringe[s] on the right of reservation Indians to make their own laws and be ruled by them." *Bracker*, 448 U.S. at 142 (internal quotation marks omitted); *Ramah*, 458 U.S. at 848; *see* SB 45-46. To support its contention that the tax on nonmembers would unlawfully infringe upon tribal self-government and tribal sovereignty, the Tribe relies on a number of cases that considered tribal interests in the context of a State's jurisdiction over Indians. *See* TB 23-29; *Williams*, 358 U.S. 217 (state court's jurisdiction over an Indian defendant for activities occurring on the reservation); *McClanahan*, 411 U.S. 164

(state's jurisdiction to impose a "personal income tax on a reservation Indian whose entire income derives from reservation sources."); *Marty Indian Sch. Bd., Inc. v. State of South Dakota*, 824 F.2d 684 (8th Cir. 1987) (state's jurisdiction to impose motor fuel tax on a school board for an Indian boarding school, in which all board members were tribal members). But, any tribal interests relating to preemption of state taxes on tribal members within their governing tribe's reservation are irrelevant here, where the State is imposing a tax on nonmembers. *See Colville*, 447 U.S. at 161 ("Nor would the imposition of [the state] tax on [Indians not members of the governing tribe] contravene the principle of tribal self-government, for the simple reason that nonmembers are not constituents of the governing Tribe. . . . There is no evidence that nonmembers have a say in tribal affairs or significantly share in tribal disbursements.")

The Tribe asserts a strong tribal interest here because its enterprise is operated under federal law. TB 25. The Tribe also claims that the tax imposes an economic burden on the Tribe and is aimed at value generated by the Tribe. TB 28, 30-31, 56. Yet as stated above, the Amenities do not fall within the purview of IGRA

and are not operated under federal law. *Colville* disposes of the Tribe's remaining two contentions.

Regarding the Tribe's contention that it is burdened by the tax, *Colville*[5] supports that "[the State] does not infringe the right of reservation Indians to 'make their own laws and be ruled by them[]' merely because the result of imposing its taxes will be to deprive the Tribe[] of revenues which they are currently receiving." *See* 447 U.S. at 156 (internal citation omitted) (quoting *Williams*, 358 U.S. at 220); *see also* SB 44-56.

Next, the Tribe argues that the value it adds to the goods and services sold is the general operation of the Licensed Premises (e.g. construction, staffing, maintenance, surveillance, and marketing), and that it has "'made a substantial investment' in the Casino enterprise." TB 56-57; Doc. 117 at 27. But in *Colville*, the Supreme Court did not recognize the tribes' general operation of its

[5] *Colville* presented facts similar to this case, where the tribes imposed tribal taxes on the cigarettes being sold and in some instances, received the markup over the wholesale price from sale of the cigarettes. 447 U.S. at 144-45. Because of this, a reduction in the sale of cigarettes to nonmembers would diminish the tribal government's revenues. *Id.*

smokeshops as "value added" by the tribal retailers. *See* 447 U.S. at 154-55. *Cf. Bracker*, 448 U.S. 136, and *Hoopa Valley Tribe v. Nevins*, 881 F.2d 657 (1989) (both involving the taxation of tribal timber, which was heavily regulated, grown on, and originated within Indian country); *Cotton Petroleum*, 490 U.S. 163 (upholding state tax on minerals derived from reservation).

The Tribe only points to pre-IGRA cases where courts recognized a tribe's value added to the construction and operation of the casino when striking down taxes on the actual play of games. TB 54-57. While *Indian Country U.S.A., Inc. v. State of Oklahoma*, 829 F.2d 967 (10th Cir. 1987), involved a sales tax on food services and bingo supplies/accessories in addition to the play of bingo, the Tenth Circuit's analysis was centered around the taxation of bingo. *Id.* at 972. Moreover, the Tenth Circuit's pre-IGRA consideration of the play of bingo, food services, and bingo supplies collectively as "bingo activities" is not in line with recent authority rejecting the classification of food services as "gaming activities" under IGRA. *See* SB 15-44.

The Tribe contends that *Colville* and other cigarette tax cases are not controlling because of the cigarette outlets' "unique

business model of high-volume tax-free retail cigarette sales." TB 30, 56. But as in those cases, the value of the products sold in this case is generated off the reservation. *See* SB 47-56. The only goods the Tribe modifies before their sale is certain food, but even the food products used for food preparation are imported from off-reservation entities. SB 54; JA 177(55). Such goods receive the benefit of state services as they are manufactured or transported within South Dakota's borders, or both. *See* Doc. 79-1. While it may be true that the close proximity of the Amenities to gaming generates value for the Tribe, the value of the Amenities to the customer is the actual products, the vast majority of which are imported from off-reservation and sold in the form the Tribe receives them. SB 47-56.

The Tribe also attempts to distinguish *Cotton Petroleum*, asserting the Supreme Court in that case found there was no economic burden on the tribe from the state tax. TB 30-32. But this assertion is misleading. In *Cotton Petroleum*, the Supreme Court recognized an economic burden likely existed, noting that it was "reasonable to infer that the [state] taxes have at least a marginal effect on the demand for on-reservation leases, the value

to the Tribe of those leases, and the ability of the Tribe to increase its tax rate." 490 U.S. at 186-87. Yet the burden on the tribe was "too indirect and too insubstantial to support [the taxpayer's] claim of pre-emption." *Id.* *Cotton Petroleum* supports that any burden on the Tribe is "too indirect and too insubstantial to support" preemption of the tax here.

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

Under the balancing test, the State interests implicated here outweigh any federal and tribal interests. The Tribe seeks to "count" the services it makes available as a tribal interest to be weighed. *See* TB 25-26 (noting "an important interest in acting as a functioning government, with the authority and responsibilities of a sovereign over its territory and the people within it."), 56 (highlighting the "interest in raising revenues for essential government programs") (quoting *Colville*, 447 U.S. at 156-15). However, regarding State services that weigh in favor of the State's tax, the Tribe contends that the State services that "count" are only those "connected to the Casino or the taxed transactions." TB 27-28, 54-55. This double standard must be rejected.

The Tribe cites to several cases to support its position that the State services available to the nonmember taxpayers while they are patronizing or traveling to the Casino property should not be considered. *See* TB 27-29, 54-55. But a number of the cases cited by the Tribe were decided prior to Supreme Court's more recent clarification in *Cotton Petroleum* of the state services relevant in the balancing test: "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."[6] *Compare Cotton Petroleum*, 490 U.S. at 189 *with* TB 27-29 (citing *Mescalero Apache Tribe*, *Ramah*, *Marty*). *See also Yee*, 528 F.3d at 1192-93 ("Raising revenue to provide general government services is a legitimate state interest.").

The Tribe dismisses *Cotton Petroleum* by claiming that the balancing test applied in that case was a modified balancing test

[6] While the Tribe cites some cases decided after *Cotton Petroleum,* these were decisions by lower courts rather than the Supreme Court. *See* TB 54-55 (citing *Hoopa Valley*, 881 F.2d 657, *Seminole Tribe of Florida v. Stranburg*, 799 F.3d 1324 (11th Cir. 2015), *Tulalip Tribes v. Washington*, No. 2:15-cv-00940-BJR, 2017 WL 58836, *7-8 (W.D. Wash. Jan. 5, 2017)).

due to the intergovernmental tax immunity doctrine and other federal acts involved. TB 30-32. But the balancing test is modified to fit each individual case as it is "flexible [and] sensitive to the particular facts and legislation involved [and] 'requires a particularized examination of the relevant state, federal, and tribal interests.'" *Cotton Petroleum*, 490 U.S. at 176 (quoting *Ramah*, 458 U.S. at 838). Under this test, each case will present its own nuanced facts and varying federal law. *See id.* *Cotton Petroleum* is not distinguishable merely because the historical backdrop of the federal laws in that case differs from the historical backdrop of the federal laws in this case.

Ultimately, an abundance of State services are available to the nonmember taxpayers, many of which are available to the nonmembers while they are patronizing the Casino's ancillary businesses. *See* SB 56-59. The State has a strong interest in imposing its tax on those nonmembers to fund these State services. Considering this strong state interest, coupled with the minimal federal and tribal interests, the tax on nonmembers' use of Amenities must be upheld.

II. Validity of SDCL 35-2-24.

Regarding conditioning the renewal of State alcoholic beverage licenses on the remittance of use taxes incurred at the Licensed Premises, the Tribe's rebuttal errs in similar fashion to its analysis of a state's general taxation authority. The Tribe and the district court attempt to shift the burden to the State to prove that the Supreme Court or other courts have upheld a state's authority to enact such condition. TB 58 ("There is no Supreme Court decision . . . (nor any decision by any other court, to the Tribe's knowledge), upholding state enforcement of a tribal retailer's obligation to collect and remit the general use taxes imposed upon its nonmember customers by denying the tribe's alcohol licensure."); TB 62 ("As the district court observed, 'the Supreme Court did not recommend imposing conditions on licensing requirements, liquor or otherwise.'"); *see also* TB 59 ("The cases the State relies on do not establish that its police powers regarding the regulation of alcoholic beverages include the power to compel Indian tribes to collect and remit general taxes.") (internal quotation marks omitted). However, section 1161 has provided a broad grant of state authority to "regulate the use and distribution of alcoholic beverages in Indian

country." *Rice v. Rehner*, 463 U.S. 713, 715 (1983). In light of that broad grant of state authority, the Tribe has failed to point to any legal authority rejecting or even diminishing a state's authority to impose conditions regarding who is qualified to obtain (or renew) an alcoholic beverage license. *See* TB 57-63.

Instead, the authority weighs in favor of the validity of SDCL 35-2-24. In *Rice*, the Supreme Court seemingly upheld the state alcoholic beverage licensing scheme as a whole under section 1161, stating that "[a]pplication of the state licensing scheme [did] not 'impair a right granted or reserved by federal law.'" 463 U.S. at 734 (emphasis added). The licensing scheme in *Rice* included the state's reservation of "the power to deny any trader the right to sell [liquor], and from those to whom it grants permission, it requires a [$6,000 application] fee" that was to be deposited into the state's general fund. *Id.* at 737 & n.1 (Blackmun, J. dissenting). Yet the Supreme Court did not invalidate the state's reservation to deny licenses or the application fee. *Id.* at 734 (majority opinion). Indeed, the Supreme Court recognized section 1161's broad grant of authority, indicating that neither the text of the statute nor the legislative history differentiated between state substantive laws (e.g. "hours of

operation and legal age for consumption") and state regulatory laws (e.g. "state requirements relating to the distribution and licensing of liquor"). *Id.* at n.18; *Rehner v. Rice*, 678 F.2d 1340, 1344 (9th Cir. 1982) (*rev'd*, 463 U.S. 713).

Moreover, the Supreme Court highlighted that alcoholic beverage licensing requirements, even when imposed on a member of the governing tribe, do not infringe upon tribal sovereignty. *Rice,* 463 U.S. at 715 n.2, 720 n.7; *see also Squaxin Island Tribe v. State of Wash.*, 781 F.2d 715, 719 (9th Cir. 1986). The Supreme Court stated that such regulation "does not 'contravene the principle of tribal self-government . . . and, therefore, neither [the enrolled tribal member retailer] nor the [governing tribe] have any special interest that militates against state regulation[.]" *Rice*, 463 U.S. at 720 n.7.[7]

[7] In *Rice,* the Supreme Court pointed out that the state's ability to regulate alcoholic beverages in Indian country is different than the states' ability to tax. *Rice*, 463 U.S. at 722-25; *see also* TB 58-59. This analysis was made in the context of regulation and taxation of Indians. *Rice*, 463 U.S. at 722-25. In that situation, the State's authority is markedly different. Generally, states have no authority to tax enrolled member Indians on Indian country controlled by their governing tribe. *Bracker*, 448 U.S. at 144. However, pursuant to section 1161, states have authority to regulate Indians regarding the use and distribution of alcohol.

Because there was no infringement of tribal self-government, the Supreme Court indicated that it "only [had] to determine whether application of the state licensing laws would 'impair a right granted or reserved by federal law.'" *Id.* at 726.

Here, SDCL 35-2-24 complies with federal law, rather than impairing a federally-granted right. As indicated above regarding the Amenities, and in the district court's decision regarding the First American Mart, the use tax on nonmembers at the Licensed Premises is valid. *See supra*; JA 732. The Supreme Court has repeatedly upheld a state's requirement that a Tribe or a tribal member retailer collect state tax from nonmembers 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); *Dep't of Tax & Fin. v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61 (1994). A valid collection requirement does not become invalid merely because it is coupled with the state's authority to regulate the use and distribution of alcoholic beverages. 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 *Rice*, 463 U.S. at 734).

The Tribe next contends that the State's procedure violates "basic due process." TB 61. The Tribe indicated that "the State refused to engage in the process ordinarily expected of any tax assessment or collection proceeding, declining to identify any single transaction or category of sales on which any tax was owed or not owed, and declining to state the amount that would satisfy the Tribe's obligation." TB 60. This contention loses sight of the State's challenged action in this case: the nonrenewal of three alcoholic beverage licenses. JA 15. This is not a "tax assessment or collection proceeding." *Cf.* TB 60. The Tribe has sold goods and services at the Licensed Premises to nonmembers. JA 59-62. Therefore, the Tribe had an obligation to collect and remit that use tax. *See, e.g., Citizen Band*, 498 U.S. at 512-13; *Milhelm Attea*, 512 U.S. 61. Because the Tribe failed to do so, under SDCL 35-2-24, the State was required to deny reissuance of the licenses. *See* JA 59-62; SDCL 35-2-24 ("No license granted . . . may be reissued to an Indian tribe operating in Indian country controlled by the Indian tribe . . . until the Indian tribe . . . remits to the Department of

Revenue all use tax incurred by nonmembers as a result of the operation of the licensed premises[.]").

Finally, the Tribe contends that the burden placed on the Tribe to collect the tax is not "reasonably tailored." TB 62-63. But as discussed in the State's opening brief, the "reasonably tailored" standard that the Tribe seeks to apply comes from *Milhelm Attea*, a case not involving section 1161, which grants states the authority to regulate alcoholic beverage licenses in Indian country. *See* TB 62 (citing *Milhelm Attea,* 512 U.S. at 73-74).[8] Moreover, as is relevant in this case, SDCL 35-2-24 is indeed reasonably tailored; it is directed at those valid use taxes incurred "as a result of the operation of the [L]icensed [P]remises[.]" Ultimately, SDCL 35-2-24's requirement that the Tribe remit "all use tax incurred by nonmembers as a result of the operation of the licensed premises" prior to the reissuance of a license must be upheld.

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[8] The Tribe asserts that the State, while previously advocating for the application of *Milhelm Attea*, "[n]ow protests that the district court erred in relying on" that case. TB 61. But the State only pointed to *Milhelm Attea* regarding the Supreme Court's acknowledgement that a state may use alternative remedies to collect a validly imposed tax on nonmembers. *See* Doc. 79 at 66.

CONCLUSION

The State respectfully requests the Court 1) reverse the ruling that IGRA preempts the tax on nonmembers' use of Amenities; 2) rule that such tax is not preempted by federal common law; and 3) reverse the invalidation of 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 7th day of May, 2018.

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CERTIFICATE OF COMPLIANCE

1. I certify that the Appellants' Brief is within the limitation provided for in Rule 32(a)(7) using bookman old style typeface in 14 point type. Appellants' Brief contains 6,492 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 7th day of May, 2018.

/s/ Kirsten E. Jasper
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Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that on May 7, 2018, I electronically submitted the Defendants-Appellants' Reply Brief with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit for review by using the CM/ECF.

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