UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

FLANDREAU SANTEE SIOUX TRIBE, a Federally recognized Indian Tribe, Plaintiff, v. JAMES TERWILLIGER, Secretary of Revenue of the State of South Dakota; and KRISTI NOEM, Governor of the State of South Dakota, Defendants.	)	Civ. No. 17-4055 DEFENDANTS' POST TRIAL BRIEF

INTRODUCTION

Pursuant to SDCL chapter 10-46A, the State of South Dakota (State) imposes a contractor's excise tax upon certain construction projects and construction services. While the tax may be preempted by federal law in certain instances, the State determined that federal law does not preempt the tax on a non-Indian contractor's construction services at the Plaintiff Flandreau Santee Sioux Tribe's (the Tribe's) casino. The non-Indian contractor, Henry Carlson Construction, remitted to the State the tax on its services then requested that the Tribe be refunded.

The Tribe seeks (1) a declaration that the State has no authority to impose contractor's excise tax on contractors performing realty improvement or construction services related to an on-reservation construction project;

(2) preliminary and permanent injunctions against the State's imposition of its contractor's excise tax on any future gross receipts related to its casino construction project; (3) recovery of contractor's excise tax previously remitted, or to be remitted, to the State by contractors or the Tribe. *See* Doc. 1, ¶¶ 1-3, Relief Requested ¶¶ 1-3.

FACTS AND PROCEDURAL HISTORY

The Tribe is a federally recognized Indian tribe whose reservation, the Flandreau Indian Reservation, is wholly within Moody County, South Dakota. Plaintiff's Stipulated Facts, Doc. 149-1, 1 (PSF 1)[1]. Within the reservation, the Tribe owns and operates the Royal River Casino (Casino.) PSF 2.

The State and the Tribe have maintained a Tribal-State gaming compact (Compact), entered into pursuant to the Indian Gaming Regulatory Act (IGRA), which regulates Class III gaming activities at the Casino. PSF 23, Trial Exhibit 5. The Casino offers Class III games such as slot machines and blackjack, the Casino currently does not offer Class II gaming. PSF 31. The Compact does not contain provisions specifically relating to construction standards, construction activities, or the taxation of construction activities at the Casino. PSF 26.

The Tribe planned a $24 million renovation and expansion of its Casino (Construction Project). The Tribe retained Leo A. Daly (Architect) as the

[1] Each party filed, as a part of their pretrial submissions, a list of facts to which the parties stipulated. Plaintiff's list of stipulated facts is Document No. 149-1. Throughout this brief references to plaintiff's stipulated facts will be designated as PSF followed by the number designation of the referenced fact.

architectural firm for the Construction Project in July 2015. PSF 36. In October 2015, the Tribe contracted with a non-Indian construction company, Henry Carlson Company (Contractor), as the general contractor for the Construction Project. Defendants' Stipulated Facts, Doc. 147, 1 (DSF 1)[2]. The Construction Project included renovation of several areas of the existing casino and additions including a larger gaming area and a "new administration building to house the Casino's operations departments." PSF 38. Actual construction for the Construction Project at the Casino began about December 1, 2016. Doc. 1, ¶ 30.

Pursuant to SDCL chapter 10-46A, a contractor's gross receipts are subject to a two percent contractor's excise tax if: (1) its services are enumerated in Division C (construction) of the Standard Industrial Classification Manual of 1987; or (2) its services "entail the construction, building, installation, or repair of a fixture to realty[.]" SDCL 10- 46A-1, -2, -2.2. The legal incidence of this tax is on the contractor. DSF 9. The contractor may choose to pass the tax to its customers, but it is not required to do so. SDCL 10-46A-12.

While there are few state statutory exemptions from contractor's excise tax, certain construction projects located within Indian country are exempt pursuant to federal law. DSF 10, 11; *see* SDCL 10-46A-18, -18.1. Within the

[2] Each party filed, as a part of their pretrial submissions, a list of facts to which the parties stipulated. Defendants' list of stipulated facts is Document No. 147. Throughout this brief references to defendants' stipulated facts will be designated as DSF followed by the number designation of the referenced fact.

boundaries set by federal law, the South Dakota Department of Revenue (Department) administers this exemption after receiving a request from the contractor or owner of the project. The Department analyzes the circumstances surrounding each construction project to determine whether the project qualifies for the exemption.

The Contractor submitted to the Department a Request for consideration of Indian Use Only Projects to request an exemption for the construction services. After its review, the Department denied the request. Trial Exhibit 196. Subsequently, the Tribe submitted a second Request for consideration of Indian Use Only Projects, which was also denied. Trial Exhibit 189. During the course of the Construction Project, the Contractor remitted to the Department the tax which the Contractor identified as relating to the construction services. The Contractor indicated it was paying the tax under protest pursuant to SDCL 10-27-2 and requested that the Department refund that tax to the Tribe. Trial Exhibit 83. Because requests for refund (also referred to as "requests for allegedly overpaid tax") of contractor's excise tax are governed by SDCL chapter 10-59 rather than SDCL 10-27, the Department treated the Contractor's "payment under protest" as a refund request under SDCL chapter 10-59. Trial Exhibit 1003. The Department denied the refund requests and indicated to the Contractor that it may request a hearing regarding the denials. Trial Exhibit 1003.

The Tribe filed this federal suit on April 21, 2017, alleging that the contractor's excise tax is preempted by federal law, including IGRA, Indian

trader statutes, and the standards set forth by the Supreme Court, and that the tax infringes on the Tribe's sovereignty. Doc. 1, ¶¶ 73, 76, 80. The Tribe seeks a declaration that the "officials of the State . . . do not have authority to impose the State's contractor's excise tax" on the Construction Project. Doc. 1, ¶ 1, Relief Requested ¶ 1.

On April 6, 2018, the State and the Tribe each filed a Motion for Summary Judgment along with all supporting documents. Docs. 32-75 (exclude 67). Subsequently, on July 16, 2018, this Court found in favor of the Tribe on its first, second, and third claims. Doc. 102. This Court dismissed the Tribe's fourth claim for lack of jurisdiction. *Id.* The State's motion was denied. *Id.* The State appealed this Court's decision, and on September 6, 2019, the Eighth Circuit United States Court of Appeals reversed and remanded this matter for "further proceedings not inconsistent with this opinion." Doc. 121, p.9.

ARGUMENT

The determination of the State's authority to impose a tax requires a multi-step analysis. "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. *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 458 (1995). "[I]f the legal incidence of the [state] tax rests on non-Indians, no categorical bar prevents enforcement of the tax[.]" *Id.* at 459. It has previously been determined in this case that the legal incidence of this tax is on the non-Indian contractor. Doc. 102, p.5. Therefore, the Court must

determine whether the imposition of the tax is preempted by Federal law or whether, utilizing the Bracker balancing test, it infringes on the Tribe's right to make their own laws and be ruled by them.

There are two potential "barriers" to the state's authority to impose this tax. *See Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of N.M.*, 458 U.S. 832, 837 (1982). 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, 176-77 (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.'" *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980) (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" (*Bracker* balancing test). *Id.* at 144-45.

I. Federal Legislation Does Not Preempt The Contractor's Excise Tax In This Matter.

Neither IGRA nor the Indian trader statutes preempt the tax. Previously in this matter, the Eighth Circuit determined that the Indian Gaming Regulatory Act (IGRA) does not, expressly or by implication, preempt the imposition of the Contractor's Excise Tax. Doc. 121, p.6. "IGRA is a gambling statute, not a code governing construction contractors, the legalities of which are of paramount state and local concern." *Id.* (quoting *Barona Band of Mission*

Indians v. Yee, 528 F.3d 1184, 1192 (2008).)

The Tribe claims that the Indian trader statutes, 25 U.S.C. §§ 261-264, are federal interests sufficient to preempt the contractor's excise tax on the non-Indian Contractor. The Tribe stated in their Pretrial Brief that the Indian trader statutes reflect longstanding federal policy exercising control over persons trading with Indian tribes so that the Tribes are free to govern themselves. Doc. 149-2, p.7. The Tribe's position must be rejected because the Indian trader statutes do not apply to construction services.

The Indian trader statutes were enacted in 1790 by the first Congress and were found in the very first compilation of federal statutes. *Warren Trading Post Co. v. Ariz. State Tax Comm'n*, 380 U.S. 685, 688 (1965). The most recent Indian trader statute was passed in 1903. *See* 25 U.S.C. § 262 credits. The purpose of the Indian trader statutes is to "prevent fraud and other abuses by persons trading with Indians." *Dep't of Taxation & Finance of New York v. Milhelm Attea & Bros.*, 512 U.S. 61, 70 (1994).

The Indian trader statutes do not apply to the taxed activity, construction services. According to the text of the Indian trader statutes, the statutes only govern the trade of goods, not services. 25 U.S.C. §§ 261, 263, 264; *see also Warren*, 380 U.S. at 689 (stating that the Commission of Indian Affairs will have the authority to specify the kind and quantity of goods and the prices at which the goods will be sold); *Central Machinery Co. v. Arizona State Tax Commission*, 448 U.S. 160, 165 (1980)(stating that a fundamental purpose of the Indian trader statutes is to "protect Indians from becoming victims of fraud

in dealings with persons selling goods"). In this case, the tax is imposed on the Contractor's services. Therefore, the Indian trader statutes are not implicated.

The Commissioner of Indian Affairs promulgated regulations regarding the Indian trader statutes. *See* 22 F.R. 10670 (Dec. 24, 1957). These regulations purport to include both goods and services in the Indian trader licensing scheme. *See* 25 C.F.R. § 140.5 ("Trading" means buying, selling, bartering, renting, leasing, permitting, or any other transaction involving the acquisition of property or services.") (emphasis added). However, expanding the regulated subject to include the trade of services, when the plain text of the statute only implicates goods, is impermissible and exceeds any rulemaking authority granted by the Indian trader statutes. Indeed, if a federal agency can "enlarge [a] statute at will . . . [s]uch power is not regulation; it is legislation." *See United States v. George*, 228 U.S. 14, 22 (1913). Thus, any regulation by the Indian trader statutes regarding the trade of services on Indian reservations is invalid and unenforceable.

Unlike the regulations that govern sale of goods (kind, quality, price, and forfeiture of goods for violation), there are very few regulations that would arguably apply to the sale of services. Nor is there any evidence to suggest that contractors providing services are actually regulated by the statutes. In this case, the Tribe did not require the Contractor to attain an Indian trader license before performing the services. DSF 20. Furthermore, the Tribe has not identified any other service providers that have been required to obtain an Indian trader license. In fact, testimony showed that the Tribe was unable to

even procure an Indian trader license application from the Bureau of Indian Affairs (BIA) for the Contractor. DSF 21, 22. Cf. *U.S. ex rel. Keith v. Sioux Nation Shopping Center*, 634 F.2d 401 (8th Cir. 1980)(holding that an unlicensed Indian trader cannot be held liable for statutory penalties under the Indian trader statutes if the trader was unable to obtain a license because "bureaucratic nonfeasance [by the Secretary of the Interior made] it impossible to obtain the federal trader's license[.]")

Notably, in *Central Machinery*, the Supreme Court noted how the BIA followed the obligations of the Indian trader statutes, specifically with regard to the sale of goods at issue. 448 U.S. at 161. The BIA approved the transaction, the contract of sale, and the tribal budget, which allocated money for the purchase of the machinery. *Id.* at 165, n.4; *see also Ramah*, 458 U.S. at 839-842 (noting considerable federal oversight of the construction of the school including monitoring and reviewing of subcontracting agreements, on-site inspections, approval of architectural and engineering agreements, and maintenance of records for the Secretary's inspection). In this case, there was no similar involvement. DSF 16, 17, 18, 19, 23. No federal agency has been involved in the Construction Project's contract process to ensure a fair price for the construction services. DSF 22. The federal government did not have to approve the contract and was not involved in the financing. Thus, unlike the goods at issue in *Warren* and *Central Machinery*, the Indian trader statutes, when applied to services, cannot be considered comprehensive and pervasive federal regulation.

The Supreme Court has, however, chipped away at any notion that the Indian trader statutes are comprehensive and pervasive regulation. In *Department of Taxation and Finance of New York v. Milhelm Attea & Bros.,* 512 U.S. 61, the Court concluded that the Indian trader statutes do not preempt all state regulation of Indian traders. *Id.* at 75 (authorizing state regulation of Indian traders that "is reasonably necessary to the assessment or collection of lawful state taxes."). *Milhelm* eliminates the possibility that the Indian trader statutes impliedly preempt state law because the statutes occupied the field of Indian trading on reservations.

Both the tenth and second circuits have more recently declined to preempt state regulation of non-Indians by implicating the Indian trader statutes. The Tenth Circuit has accorded little, if any, weight to the statutes. In *Sac & Fox Nation of Missouri v. Pierce*, 213 F.3d 566, the Tenth Circuit rejected a tribe's argument that the Indian trader statutes preempted a state tax on motor fuel that was sold by a distributer to a tribe's retail gas stations. 213 F.3d 566, 569, 582-83 (10th Cir. 2000). The Court held:

> The Kansas motor fuel tax law imposes a non-discriminatory tax on all wholesale fuel distributers for fuel distributions to retailers within the State of Kansas- Indian or otherwise. Nothing in the record indicates the Tribes' distributors distribute all their fuel, or even a significant portion of it, to the Tribes. Thus, the threat of distributers perpetrating fraud or abuse upon the Tribe appears negligible. . . . We conclude that the Indian trader statutes do not so pervade the field that they preempt the Kansas motor fuel tax, the legal incidence of which falls upon the distributors and which imposes only an indirect burden on the Tribes.

Id. at 582-83.

The facts here require the same outcome as *Sac & Fox Nation*. Here, the tax is a non-discriminatory state tax imposed on the gross receipts of contractors performing construction work in South Dakota. *See* SDCL chapter 10-46A. Neither the Contractor nor Architect perform construction work only for the Tribe. DSF 24, 26. In fact, the opposite is true. A majority of their work is with non-Indian projects. *Id.* Furthermore, a competitive bidding process was used by the Tribe prior to hiring the Contractor. At trial, both the Tribe and Contractor testified that the Tribe reached out to the Contractor to solicit a bid based on a previous positive experience. Thus, the threat of fraud or abuse on the Tribe is slight, if any.

Similarly, in *Mashantucket Pequot Tribe v. Town of Ledyard*, 722 F.3d 457 (2d Cir. 2013), the Second Circuit Court of Appeals found that the Indian trader statutes are not a bar for any state regulation of transactions with Indians occurring on reservations. *Ledyard*, 722 F.3d at 467. The Court stated;

> The ability of a state to apply generally-applicable taxes to non-Indians performing otherwise-taxable functions on an Indian reservation is well established. *Oneida Nation,* 645 F.3d at 167; *Milhelm Attea,* 512 U.S. at 73, 114 S.Ct. 2028; *Cotton Petroleum,* 490 U.S. at 191, 109 S.Ct. 1698. Neither the Tribe's interests in economic development and fair dealing nor the federal interests in protecting the Tribe by monitoring and regulating its commercial partners are implicated by Connecticut's generally-applicable personal property tax. *See Colville,* 447 U.S. at 156–57, 100 S.Ct. 2069.

Ledyard, 722 F.3d at 468–69. The same can be said in this case. Neither the Tribe's interests in economic development nor federal interests in protecting

the Tribe by regulating its commercial partners are implicated by the Contractor's excise tax. For these reasons, the Indian trader statutes do not preempt the tax on the non-Indian Contractor.

II. Under The *Bracker* Test, The State's Interests Outweighs Tribal Interests.

The Tribe contends that IGRA and the Indian trader statutes represent the federal interests to be weighed in the *Bracker* balancing test. Neither comprehensively and pervasively regulate the taxed activity of construction. As discussed above, the Indian trader statutes are certainly not comprehensive regulation. Nor does IGRA regulate construction. Simply stating that the construction, maintenance, and operation of the gaming facility must adequately protect the environment and public health and safety does not constitute comprehensive or pervasive regulation of construction activity. *See* 25 U.S.C. §2710(b)(2)(E). Nothing in IGRA specifies how the construction must be conducted, nor are there penalties for violations.

Whether the tribal council meets occasionally within the Casino's administration building is not relevant under the *Bracker* analysis. The Contractor submitted to the Department a Request for consideration of Indian Use Only Projects. In the course of reviewing the request for exemption, the Department contacted Henry Carlson Company. Based on its discussions with Henry Carlson Company and materials available to it, and consistent with Plaintiff's Stipulation of Fact 38, the Department determined that the purpose of the renovation project was commercial and to increase gambling and gaming revenue. The Tribe planned to make the following improvements to the Casino:

> (1) enlargement of the gaming floor;
> (2) upgrade of Casino's overall electrical system to accommodate additional slot machines;
> (3) replacement of Casino's roof;
> (4) replacement of the Casino's HVAC system;
> (5) updates to the Casino's finishes and fixtures;
> (6) replacement of the Casino's bar/lounge to the middle of the Casino gaming floor;
> (7) addition of a VIP Gaming lounge with gaming and food/beverage and bar service;
> (8) *construction of a new administration building to house the Casino's operations departments, previously located in the area the expanded gaming floor now occupies;*
> (9) renovation of the Casino cage;
> (10) renovation of the Casino snack bar;
> (11) renovation of the Casino restaurant;
> (12) renovation of the corridor connecting the gaming floor and the hotel, and
> (13) renovation of the hotel lobby.

PSF 38 (emphasis added). Consequently, the Department denied the request. Trial Exhibit 196. Subsequently, the Tribe submitted a Request for consideration of Indian Use Only Projects which included additional supporting documentation. The additional documentation did not alter the Department's understanding of the project and the Tribe's request for exemption was denied. Trial Exhibit 189.

The Tribe now argues the portion of the project relating to the "construction of a new administration building to house the Casino's operations departments, previously located in the area the expanded gaming floor now occupies[,]" should be preempted. To support its argument, the Tribe, without providing supporting evidence alludes to tribal meetings that "at times" occur in the administrative buildings. Trial Exhibit 197. To resolve this issue, one only need to look at the primary purpose of the building. Here, the

primary purpose of the building was "to construct a new administration building to house the Casino's operations department." At best, the record evidences a *de minimus* use by the Tribe. However, that does not change the original primary commercial purpose of the construction – to increase gambling and gaming revenue. Just as when a state agency arranges a meeting, or multiple meetings, at a local hotel or convention center does not transmute the character of the hotel or convention facility into that of a state agency satellite office; neither should the *de minimus* use of a building designed to house the Casino's operations department to hold a meeting transmute the use of that office into something other than an area primarily designated for a commercial purpose. As such, the Tribe's argument must be dismissed.

Because no federal interests are implicated in this taxed activity, the remaining interests to be weighed are the tribal and state interests. The Tribe alleges that the imposition of the Contractor's excise tax infringes on the Tribe's sovereignty and places an economic burden on the Tribe. However, neither alleged tribal interest presents a barrier to State taxation of the construction services.

A. Imposing the Contractor's excise tax on the construction services does not infringe on the right of the Tribe 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 837.

The second barrier primarily provides the "back- drop" for the federal enactments under the first barrier. *Ramah*, 458 U.S. at 837-38. "[T]he trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption." *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 172 (1973).

1. Tribal Self Government

The Supreme Court has signaled that a state tax on non-Tribal members does not infringe upon tribal self-government. *See Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 161, 100 S. Ct. 2069, 2085, 65 L. Ed. 2d 10 (1980). In *Colville*, the Supreme Court upheld a tax 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 individuals 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 non-Indian Contractor has any "say in tribal affairs or significantly share[s] in tribal disbursements." *See id.* Thus, *Colville* confirms that the contractor's excise tax does not infringe on the right of the Tribe "to make [its] own laws and be ruled by them." *See Bracker*, 448 U.S. at 142.

2. Economic Burden

Next, prior to considering the Tribe's economic burden contention, it must be emphasized that the legal incidence of the tax is on the Contractor. DSF 9; SDCL 10-46A-1, -1.8, -2. The Contractor, rather than the Tribe, is legally obligated to pay the tax. Although the Contractor may pass the tax on to its customers, it is not required to do so. SDCL 10-46A-12. Here, pursuant to the terms of its agreement with the Contractor, the Tribe has agreed to reimburse the Contractor for the amount of the excise tax. Trial Exhibit 24, p.100656. "[B]ut for the contractual arrangement providing for indemnification by the Tribe, it would be [the Contractor's] revenues-and not the Tribe's-that would be reduced." *See Yee*, 528 F.3d at 1192.

Regardless, *Colville* reinforces that any impact of the tax on the Tribe's finances is insufficient to outweigh the State interests. In *Colville*, the Supreme Court upheld a state tax on the sale of cigarettes even though evidence showed that the tax would substantially interfere with tribal revenue. 447 U.S. at 144-45; *see Confederated Tribes of Colville Indian Reservation v. State of Wash.*, 446 F. Supp. 1339, 1347 (E.D. Wash. 1978), *aff'd in part, rev'd in part sub nom. Colville*, 447 U.S. 134 (indicating that imposing 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); *Crow Tribe of Indians v. Montana*, 650 F.2d 1104, 1116 (9th Cir. 1981) ("It is clear that a state tax is not invalid merely because it erodes a tribe's revenues, even when the tax substantially impairs the tribal government's ability to sustain itself

and its programs."). The Supreme Court indicated that a 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 currently are receiving." *Colville*, 447 U.S. at 156 (quoting *Williams*, 358 U.S. at 220) (internal citation omitted).

Expanding on this point in his concurring opinion, 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 (Rehnquist, J., concurring in part, concurring in result in part, and dissenting in part). 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 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.

The Supreme Court 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[.]" *See Cotton Petroleum*, 490 U.S. at 187. While the Supreme Court 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.* at 187.

Here, even assuming that the economic burden asserted by the Tribe is "at least . . . marginal," it does not justify preemption of the contractor's excise tax. *See Cotton Petroleum*, 490 U.S. at 186-87. The Contractor stated that the contractor's excise tax for the Construction Project is $384,436, which is based on services billed of $18,844,899. Trial Exhibit 179. That two percent tax is "too indirect and too insubstantial" to justify preemption. *See* SUMF 50; *Yee*, 528 F.3d at 1191-92 (determining that a reduction of tribal revenues by $200,000 for one subcontractor's work, which would be "compounded by amounts paid to the other subcontractors," because of the state tax on those subcontractors was insufficient to invalidate the state tax) (emphasis added); *see also 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).

Furthermore, the potential negative effect to the Tribe is even less

substantial than the Tribe would like the Court to believe. Tim Morrisey, Royal River Casino Operations Director, testified that the purchase of 20 slot machines at $20,000 each will, conservatively, generate $1.3 million in revenue each year. Given this 238% return on investment in one year, the Tribe could quickly recover the cost of this one-time tax considering the space now available for additional slot machines. The State, however, does not have the same opportunity to recoup the cost of taxes lost.

B. The State's interests reinforce the State's jurisdiction to tax the construction services.

Any federal and tribal interests, as discussed above, must be weighed against the State's interests in imposing the tax on the Contractor. *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 makes available both on- and off-reservation to the non-Indian Contractor, the subcontractors, and other entities involved in the Construction Project. Trial Exhibit 1001; *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 contractor's excise tax is generally deposited), include, but certainly are not limited to: funding for schools, vocational education, education for blind and hard of hearing, access to the courts and the Office of Hearing Examiners, court services, community health programs, long term care services, public safety services, taxpayer licensing and education services, services relating to complaints of employer labor practices and worker's compensation, access to public media, and vocational rehabilitation services. Trial Exhibit 1001.

The *Bracker* test requires that the court consider the value of the services provided to the party the state seeks to tax. *Tulalip Tribes v. Washington*, 349 F.Supp. 3d 1046, 1050 (W.D. Wash. 2018). The Contractor may have received some Tribal governmental services while on the reservation, however, the State provides the majority of its regulatory services. A number of State services funded by the State general fund specifically relate to the Contractor or the Construction Project. These include certain services relating to Contractor's worker's compensation, such as administration of first reports of injuries, and unemployment insurance (Department of Labor and Regulation), business services and notary public services (Secretary of State); regulation of attorneys (Unified Judicial System); taxpayer services (Department of Revenue); and supervision of parolees (Department of Corrections). Trial Exhibit 1001.

The Tribe's governmental services provided to the Contractor are confined to the 3.68 square miles of the Tribe's reservation. The building specifications for the Construction Project identify certain items that should be

fabricated or preassembled "in the shop[s] to the greatest extent possible." DSF 6, 8; Trial Exhibits 1004, 1005, 1006, 1007, 1008. The Contractor's shop is located in Sioux Falls, South Dakota, which is approximately 35 miles away from the Tribe's reservation. PSF 35; DSF 3. But the Tribe does not provide governmental services in Sioux Falls. Moreover, the State offers services to the Contractor that are not offered by the Tribe. In *Colville* the Court stated;

> While the Tribes do have an interest in raising revenues for essential governmental programs, that interest is strongest when the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services. The State also has a legitimate governmental interest in raising revenues, and that interest is likewise strongest when the tax is directed at off-reservation value and when the taxpayer is the recipient of state services.

Colville, 447 U.S. at 156–57. A majority of the services provided to the Contractor are provided by the State not the Tribe. That is particularly true off the reservation. But even on the reservation, the Contractor cannot receive certain Tribal governmental services because some of those services are not available to non-Indians. DSF 28. Tribal members, on the other hand, have access to both State and Tribal services.

The services provided by the State utilizing State general fund dollars are available to Indians and non-Indians alike. Each of the State's witnesses testified that the services provided were not limited to non-tribal members or even persons residing outside of the reservation. Rather, the State's services are available to all citizens of South Dakota. In *Tulalip*, the Court was presented with a similar issue as is presented in this case. The Court

determined that the defendants, State of Washington *et al*, provided services to the Tribes as well as taxpayers living outside of the reservation. Those services included, but were not limited to, social and health services, support for nursing homes, State correctional facilities, and administration of worker's compensation, unemployment insurance, business licensing, and consumer protection. *Tulalip*, 349 F.Supp. 3d at 1061. Not unlike the services provided by the State of South Dakota in this case. Ultimately, the Court in *Tulalip* found that the tax was not preempted because 1) there was an absence of comprehensive and pervasive federal regulation; 2) it was taxation of non-Indian parties for goods produced off reservation; 3) the Tribes could not demonstrate more than a financial interest in the taxation; 4) the State and County have a substantial interest in enforcing generally applicable taxes within their borders; and 5) the State and County have not abdicated their responsibility for providing those service to the Tribes or taxpayers. *Id*. at 1062. With the exception of the subject of taxation, goods produced off reservation versus construction services provided on and off reservation, all the same conclusions can be made here.

Ultimately, an abundance of State services are available to the Contractor. The State has a strong interest in imposing its tax on the non-Indian Contractor to fund those State services. The State's interests outweigh any tribal interests that are present.

CONCLUSION

Preemption of state general taxation authority is narrow. *Tulalip*, 349 F.Supp. 3d at 1063. Where there is no extensive federal regulatory scheme, the taxed activity involves non-Indians, and the State has not abdicated responsibility to the Tribe to provide and continues to provide government service to the taxpayer there is no justification for preemption. *Id.* Such is the case here. Neither IGRA nor the Indian trader statutes comprehensively or pervasively regulate construction services. The tax is on services provided by a non-Indian entity. The State has not abdicated to the Tribe its responsibility to provide governmental services to the Contractor and, in fact, provides a myriad services to the Contractor as well as the Tribe. Thus, the State's interests outweigh any tribal interest. Accordingly, the imposition of the Contractor's excise tax is a valid exercise of state authority and should be upheld.

Dated this 17th day of July 2020.

Respectfully submitted,

/s/ Yvette K. Lafrentz

Yvette K. Lafrentz
Assistant Attorney General
Jeffery J. Tronvold
Deputy Attorney General
South Dakota Attorney General's Office
1302 E. Highway 14, Suite #1
Pierre, SD 57501
Telephone: 605-773-3215
Email: Yvette.Lafrentz@state.sd.us
Attorneys for the State of South Dakota