No. 06-55918

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BETTY T. YEE, BILL LEONARD, CLAUDE PARRISH, JOHN CHIANG, and STEVE WESTLEY, each in his or her official capacity as a member of the California State Board of Equalization,

Defendants-Appellants,

vs.

BARONA BAND OF MISSION INDIANS, also known as the BARONA GROUP OF THE CAPITAN GRANDE BAND OF MISSION INDIANS, and BARONA TRIBAL GAMING AUTHORITY,

Plaintiffs-Appellees.

On Appeal from the United States District Court
for the Southern District of California,
Honorable Dana M. Sabraw, Judge
No. CV-05-00257-DMS

BRIEF OF THE APPELLEES, THE BARONA BAND OF MISSION INDIANS, ET AL.

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JURISDICTIONAL STATEMENT

The Appellants' Jurisdictional Statement is adequate, except that the Tribe notes that it proceeded against Appellants under *Ex Parte Young*. See *Agua Caliente Band of Cahuilla Indians v. Hardin,* 223 F.3d 1041, 1045-1049 (9th Cir., 2000) regarding this point and the same appellants.

For clarity, the Barona Band of Mission Indians and its sub-entity the Barona Tribal Gaming Authority will be referred to collectively herein as the "Tribe." The Appellants will be referred to collectively as the "Board."

STATEMENT OF ISSUES PRESENTED FOR REVIEW

In addition to the two identified by the Board, the Tribe presents a third issue:

3. Does the Indian Gaming Regulatory Act of October 17, 1988, 25 U.S.C. §2701, et seq., preempt whatever jurisdiction California might otherwise have to impose its sales tax on the Tribe's purchases of construction materials under the facts of this case?

STATEMENT OF THE CASE

The Board's Statement of the Case is adequate as far as it goes. In addition, the Tribe notes that it also argued the third issue identified above in the preceding Statement of Issues. Because the District Court held in favor

of the Tribe on general federal preemption grounds (the second issue), it never reached this third issue, although it was fully briefed and argued.

STATEMENT OF FACTS

The Board correctly incorporates the Joint Statement of Undisputed Material Facts (ER 518-525) in its Statement of Facts. To these facts, the Tribe will add that the District Court considered much evidence on the question of where the sales and deliveries[1] of the construction materials occurred, and found as a fact "that the Helix transactions occurred on the Reservation." (ER 661:11-12)

In addition, the Tribe must point out that it is not a stranger to this Court. In its efforts to become economically self-sufficient and to provide basic services to its people, the Tribe has been before this Court four times before. To inform the Court of the prior conflicts between the Tribe and California and its agencies, the Tribe will briefly describe those conflicts.

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[1] As stated in *Wagnon v. Prairie Band of Potawatomi Nation,* 546 U.S. ___, 126 S.Ct. 676, 681 (2005), "under our Indian tax immunity cases, the 'who' and 'where' of the challenged tax have significant consequences." In this case, the District Court determined the "where" of this case, finding as a fact that all the sales in question "occurred on the Reservation" (ER 661:11-12), as opposed to off the Barona Indian Reservation. (If the Board challenges this finding in its reply brief, the Tribe will seek leave to respond.) The "who" is a separate question.

First, after the local sheriff threatened arrests, this Court recognized the right of all California tribes to conduct high-stakes bingo games on their federal Indian reservations without obeying the restrictions of state law.[2]

Second, after the Indian Gaming Regulatory Act of October 17, 1988, 25 U.S.C. §2701, et seq. ("IGRA"), established the statutory jurisdictional framework for tribal governmental gaming, on the advice of the California Attorney General, the sheriff raided the gaming establishments of the Tribe and of two other local tribes in 1991. The sheriff confiscated gaming devices, arresting Indians and non-Indians.

The Tribe claimed in District Court that, under IGRA, in the absence of a compact[3], the United States had exclusive jurisdiction to arrest and prosecute violations of federalized state law regarding gaming. The District Court agreed, enjoining the prosecutions.[4] This Court affirmed, holding that the tribal-state compact specified by IGRA was the *only* source for California to exercise *any* jurisdiction over on-reservation tribal governmental gaming. In the absence of such a compact, IGRA preempted

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[2] *Barona Group of Capitan Grande Band of Mission Indians v. Duffy*, 694 F.2d 1185 (9th Cir., 1982)

[3] A "compact" is a tribal-state agreement authorized and required by IGRA. A compact is required for a tribe to engage in class III (Las Vegas-style) gaming. 25 U.S.C. §2710(d)((1)(C).

[4] *Sycuan, Barona, and Viejas Bands of Mission Indians v. Roache,* 788 F.Supp. 1498 (S.D.Cal., 1992)

any jurisdiction that California and its sheriffs might otherwise have had over such on-reservation tribal gaming.[5]

Third, the Tribe was one of the tribes involved in litigation that twice reached this Court concerning the allocation of a state license fee or tax imposed on simulcast wagering on horseracing conducted by several tribes under tribal-state compacts covering just that one form of gaming. This Court first held that IGRA preempted the state fee or tax and that, under the terms of the compacts, California must pay the fee or tax to the tribes.[6]

Fourth, in response to this Court's above holding, California "refused to pay the fees to the Bands, declared the Compacts invalid, and threatened to cut off the simulcast signal,"[7] claiming that the tribes were violating their compacts by engaging in forms of gaming other than the simulcast wagering covered by the compacts. This Court again held that the simulcast compacts covered *only* simulcast wagering on horseracing, and no other form of gaming, so the tribes were not violating their compacts. This Court reaffirmed that the explicit terms of a compact are the *sole* source of any state's authority over any aspect of gaming on a reservation by a tribe. Since

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[5] *Sycuan, Barona, and Viejas Bands of Mission Indians v. Roache,* 54 F.3d 535 (9th Cir., 1995)

[6] *Cabazon Band of Mission Indians v. Wilson*, 37 F.3d 430, 433 (9th Cir., 1994) (hereinafter, "*Cabazon I*")

[7] *Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050, 1054 (9th Cir., 1997) (hereinafter, "*Cabazon II*")

the simulcast compacts did not mention any other form of gaming, the tribes could not be violating those compacts regarding other unmentioned games.[8]

Therefore, California and its officials have a long history in this Court of overreaching, of asserting state jurisdiction that does not exist over various aspects of this Tribe's gaming. In the present case, a California agency seeks to impose a tax on the Tribe's gaming construction activities, a tax for which California could have asked in negotiating the present compact. That compact deals with other aspects of the same construction activities in great detail. But California did not even ask, so the compact does not mention the tax. As before, California now asserts jurisdiction regarding the Tribe's gaming activities that is again preempted by IGRA.

Although this case does involve a good deal of money, the Tribe's primary interest in this case is the same as in its previous four conflicts with California and its agencies. That interest is holding California to its bargain in its compact with the Tribe, and resisting any claim of state jurisdiction that the compact does not provide. By doing so, the Tribe wishes to avert a state attempt to impose a property tax on its gaming improvements, or to regulate its use of water, or to impose local land use controls on the location of any future gaming development on the Barona Indian Reservation. All

[8] *Id.*, 124 F.3d at 1059-1060

these forms of state jurisdiction are also outside the scope of state jurisdiction negotiated in the compact. As a matter of pure tribal sovereignty, the Tribe has *always* resisted *all* attempts of California and its agencies to usurp Tribal control of its on-reservation gaming beyond what federal law and the terms of the compact allow. It continues to do so now.

SUMMARY OF ARGUMENT

As in the District Court, the Tribe makes three alternate substantive arguments, all of which, and any one of which, supports affirmance.

First, the tax in question is a direct tax on the Tribe itself for sales that occurred on the Barona Indian Reservation. The Tribe is the buyer, on whom the legal incidence of the tax falls, even though the Tribe chose to act through non-Indian agents. Their involvement does not defeat the per se immunity from state taxation that the Supreme Court recognizes for all state taxes that fall on tribes for their on-reservation activities.

Second, as the District Court found, federal law preempts the state tax in that the federal and tribal interests outweigh the state interests. Moreover, to uphold such an on-reservation state tax, this Court has required a nexus between the tax and the tribal activity being taxed. On this record, the District Court's balancing of the interests was correct, and the Board made no showing of the required nexus.

Third, IGRA expressly preempts all state jurisdiction over all subjects that were *or could have been* included in a compact. Although California negotiated detailed provisions about other aspects of the same construction project in the compact, California never even asked to tax the Tribe's purchase of construction materials for the same project in that compact. This Court has recently held that another state's failure to negotiate payment of that state's tax on another tribe's gaming activities in that tribe's compact is fatal to that state's claim that that tribe must pay the state tax: "If Idaho had wanted to condition [certain terms] on renegotiating the Compact, it should have bargained for that term . . .".[9] Therefore, because a compact is the *exclusive* source of state authority for any state tax or other form of state jurisdiction over any tribal gaming activity, and the Tribe's compact includes no such state tax, IGRA necessarily preempts that tax now.

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[9] *Idaho v. Shoshone-Bannock Tribes*, ___ F.3d ___, No. 04-35636 (9th Cir., Oct. 11, 2006), Slip Op., pp. 17545, 17555; 2006 DJDAR 13786, 13788 (Oct. 12, 2006).

ARGUMENT

I. AS A DIRECT TAX ON THE TRIBE ITSELF, THE STATE SALES TAX IS NECESSARILY PREEMPTED.

A. If the Tribe is the buyer, the *per se* rule applies.

Although the Supreme Court employs a balancing of interests test if a state tax involves non-Indians on a reservation,[10] when the question is application of a state tax to on-reservation activities of a tribe, the Supreme Court does not balance interests, and instead employs a per se rule:

> In the special area of state taxation of Indian tribes and tribal members, we have adopted a *per se* rule. . . . "In keeping with its plenary power over Indian affairs, Congress can authorize the imposition of state taxes on Indian tribes and individual Indians. It has not done so often, and the Court consistently has held that it will find the Indians' exemption from state taxes lifted only when Congress has made its intention to do so unmistakably clear. [cit.om.]" We have repeatedly addressed the issue of state taxation of tribes and tribal members and the state, federal, and tribal interests which it implicates. We have recognized that the federal tradition of Indian immunity from state taxation is very strong and that the state interest in taxation is correspondingly weak. Accordingly, it is unnecessary to rebalance these interests in every case. . . . such taxation is not permissible absent congressional consent.
>
> *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215, n. 17 (1987)

[10] *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144-145 (1980)

> But when a state attempts to levy a tax directly on an Indian tribe or its members inside Indian country, rather than on non-Indians, we have employed, instead of a balancing inquiry, "a more categorical approach: '[A]bsent cession of jurisdiction or other federal statutes permitting it,' we have held, 'a State is without power to tax reservation lands and reservation Indians." [cit.om.]"
>
> *Oklahoma Tax Commission v. Chickasaw Nation,* 515 U.S. 450, 458 (1995)

Therefore, much of the litigation concerning state taxation and Indian tribes centers on which party bears the legal incidence of the tax,[11] because this question often determines whether an on-reservation activity is subject to state tax or not:

> The initial and frequently dispositive question in Indian tax cases, therefore, is who bears the legal incidence of a tax. If the legal incidence of an excise tax rests on a tribe or on tribal members for sales made inside Indian country, the tax cannot be enforced absent clear congressional authorization. [cit.om.] But if the legal incidence of the tax rests on non-Indians, no categorical bar prevents the enforcement of the tax [and the balancing test applies.]
>
> *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450, 458-9 (1995)

In *Diamond National Corp. v. State Board of Equalization,* 425 U.S. 268 (1976) the Supreme Court held that the buyer, rather than the seller,

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[11] See, e.g., *Coeur d'Alene Tribe v. Hammond,* 384 F.3d 674, 681-688 (9th Cir., 2004)

bears the legal incidence of the California sales tax. Therefore, if the Tribe is the buyer in this case, the per se rule applies, and the Board cannot now impose this state tax on the Tribe. The Tribe maintains that it is the buyer, although the District Court and the Board disagreed, believing that the Tribe's non-Indian agent was the buyer, rather than the Tribe, of the construction materials at issue.

B. All of the sales at issue took place on the Barona Indian Reservation.

The Tribe engaged a non-Indian firm, Hensel Phelps Construction Co. ("HP"), as its general contractor in a prime contract for a fixed price, including both labor and materials (ER 519:14-16; full text plus relevant attachments ER 123-209). Under this prime contract, HP was to construct the Barona Valley Ranch Resort & Casino, consisting of an expanded casino, a hotel, an events center, a wedding chapel, a parking structure, and related improvements (the "Project") on lands held in trust by the United States for the Tribe as the Barona Indian Reservation. (ER 519:7-13) HP could subcontract portions of the work (e.g., plumbing, electrical, steel, painting, drywall, etc.) to non-Indian subcontractors, but had to use a prescribed form of subcontract (ER 520:19-20; full text ER 184-204).

HP entered into such subcontracts for various trades (ER 243-246), including a subcontract with Helix Electric, Inc. ("Helix"), a non-Indian

firm, for electrical work. (ER 520:13-22; full text ER 211-41) The prime contract and all subcontracts incorporated Attachment O. (ER 520:23-24; full text ER 207-209)

The Tribe's first argument turns on Attachment O, in which the Tribe authorized and directed HP, Helix, all the other subcontractors of any tier, and their respective suppliers of all tiers, to be and to act as the Tribe's purchasing agents for the purchase of all materials needed for the construction of the Project: The relevant terms of Attachment O bear setting forth in full:

> 1. [As] a federally-recognized Indian tribe . . . the Owner hereby designates the Contractor and its Subcontractors and Suppliers of all tiers as the Owner's purchasing agent for the procurement of Construction Supplies . . .
>
> 3. As the Owner's agent, the Contractor and its Subcontractors and Suppliers shall have the following obligations:
>
> (a) The Contractors and its Subcontractors and Suppliers shall negotiate on the Owner's behalf with each lower-tier subcontractor or supplier the terms and conditions of all purchase orders and contracts for Construction Supplies (each a "Procurement Contract') and shall ensure:
>
> (i) that all Procurement Contracts are issued by the Contractor or Subcontractor as the Owner's Purchasing Agent (e.g., "Hensel Phelps Construction Co., as Purchasing Agent for the Barona Tribal Gaming Authority"), and specify that the sale is not complete, and title to the Construction Supplies will not pass until delivery is accepted on the Barona Indian Reservation by the Contractor or Subcontractor as purchasing agent for the Owner; and

(ii) that all contracts with the Contractor, Subcontractors and Suppliers, and in all invoices and other statements submitted to support the payment applications under this Contract, the Contractor, and all such Subcontractors, Sub-subcontractors, and Suppliers shall separately state the sales price of all fixtures, machinery, equipment and materials, exclusive of any charge for installation in such Contract. It is the intent of the Parties that the Contractor and Subcontractors be "sellers" of materials as provided in 18 CAC Section 1521(b)(2)(A)(2).

(iii) that all Construction Supplies shall be shipped to Contractor or the Subcontractor who is making the purchase as the purchasing agent of the Owner the Barona Tribal Gaming Authority for delivery on the Barona Indian Reservation and the Contractor or Subcontractor receiving the Construction Supplies at the Barona Indian Reservation as purchasing agent for Owner shall receive and maintain bills of lading and delivery receipts confirming that the Construction Supplies have been delivered on the Barona Indian Reservation and accepted by the Owner through Owner's purchasing agent. All shipping orders and delivery receipts, including those placed with and received from a third party used for shipping (e.g., common carrier, freight company, overnight express) shall include the following language:

> THIS SALE IS NOT COMPLETE, AND TITLE DOES NOT PASS, UNTIL DELIVERY IS ACCEPTED BY THE BUYER ON THE BARONA INDIAN RESERVATION. . . .

(c) With each Application for Payment, the Contractor shall submit to the Owner a separate list of all payments which are due during the current payment period for Construction Supplies.

(i) Following approval of the amounts listed in the Payment Application for Construction Supplies, Owner shall issue a separate payment to "Contractor as Purchasing Agent

for the Barona Tribal Gaming Authority" for the amounts approved for payment for Construction Supplies.

(ii) Upon receipt of the funds from Owner which are to be used to pay for Construction Supplies, Contractor shall forward as the "Purchasing Agent of the Barona Tribal Gaming Authority" the payments due suppliers, vendors and Subcontractors for Construction Supplies.

(iii) If the payment for Construction Supplies has been issued to a Subcontractor who in turn must forward the funds to the party actually selling and delivering the Construction Supplies to Owner, the Subcontractor shall forward the funds received for the Construction Supplies to the party supplying and delivering such construction Supplies and such funds shall be issued by the Subcontractor as "Purchasing Agent of the Barona Tribal Gaming Authority."

Attachment O (ER 207-209)

Thus, Attachment O designated HP and Helix to be and to act as the Tribe's purchasing agents. When issuing purchase orders to suppliers, they had to identify themselves as the Tribe's agents, stating explicitly that the sale is not complete, and that title did not pass, until delivery was accepted by the buyer on the Reservation.[12] All prices were to be stated separately from tax or installation. All invoices were to bear the same recitation about title passing, and the sale being complete, only upon acceptance of delivery on the Reservation. Each monthly pay application, both those from HP to

[12] The requirement for delivery on the Reservation flows from Revenue &Taxation ("R&T") Code §6010.5, which states that "the place of sale or purchase of tangible personal property is the place where the property is physically located at the time the act constituting the sale . . . takes place." R&T §6010(a) defines "purchase" as "any transfer of title or possession . . ."

the Tribe and those from Helix to HP, would have to break out such materials separately from the other work being claimed. Similarly, each month the Tribe would make two payments to HP, one in HP's own name, and the other to HP as purchasing agent for the Tribe. HP would do the same regarding its subsubcontractors and suppliers.

To show that the above procedures of Attachment O were in fact followed, the Tribe provided copies of the following documents, including some offered as typical of many others:

1. Matrix of all of HP's monthly pay applications to the Tribe, showing two payments to HP each month, one in HP's name for its services, the other to HP for construction materials purchased as purchasing agent for the Tribe (ER 248)

2. HP's typical pay application to the Tribe for April 2002 for $7,203,108, broken into $1,517,034 for "Materials purchased as agent for [Tribe]" with separate accounts of such materials, and $5,686,074 for "Remainder of work completed" (ER 250-262)

3. Two typical wire transfers from the Tribe to HP, one for $5,686,074 directly to "HP" and a second to "HP As Purchasing Agent for the [Tribe]" for $1,517,034, both for the same month of April 2002 (ER 264-266)

4. Helix's typical pay application to HP for April 2002 for $937,822 for work performed by Helix during that month, but excluding "Tax Exempt Materials" of $279,911 (ER 268-270)

5. Helix's typical pay application to "HP as purchasing agent for the Tribe" for April 2002 for $279,911 for "Tax Exempt Materials," less 10% for retainage (ER 279-282)

6. Typical purchase orders from Helix to various suppliers (ER 284-287, 289-290), each containing the following language, or more elaborate variations thereof:

> Per Ordinance No. 00-1 of the Barona Group of the Capitan Grande Band of Mission Indians Establishing the Barona Tribal Gaming Authority (BTGA): SALES OR USE TAX DOES NOT APPLY TO THIS PROJECT. Helix Electric, Inc. is acting as purchasing agent for the BTGA. THIS SALE IS NOT COMPLETE, AND TITLE DOES NOT PASS UNTIL DELIVERY IS ACCEPTED BY THE BUYER ON THE BARONA INDIAN RESERVATION.

7. Typical invoice from a supplier to Helix, bearing a variation on the above recitation (ER 292).

Therefore, both by the terms of the prime contract with HP, and in HP's subcontract with Helix, there were two separate but parallel systems, with separate payments and accountings, one for construction materials and a second for all other costs. At every point, both HP and Helix conducted their purchases of materials explicitly as purchasing agents of the Tribe, as acknowledged by the suppliers. This was so not only as a matter of contract terms, but also in practice. The District Court found as a fact that

> In light of the Tribe's contractual scheme, the declarations indicating the subcontractors conformed with that scheme, and the stipulations of the parties, the Court finds that the Helix transactions [i.e., the sales and deliveries in question] occurred on the reservation.
>
> ER 661:10-11

Thus, all of the sales in question took place on the Barona Indian Reservation because all deliveries were made there and title passed only there. If the Tribe had not engaged HP and Helix as its purchasing agents, the per se rule would unquestionably apply, and California could not tax those sales without express Congressional authorization. However, the District Court held that the involvement of non-Indian purchasing agents changes this result, by making Helix the buyer, rather then the Tribe, even though the sales all occurred on the Reservation and the above separate contractual, accounting, and payment procedures were in fact followed.

C. The Tribe's immunity from on-reservation state taxation is not defeated by the involvement of non-Indian agents.

Like all governments, tribes can act only through their agents. The cases show that the immunities of tribes from all forms of state jurisdiction (including but certainly not limited to state taxation) does not turn on the involvement in various ways of non-Indians. As long as a tribe acts to advance a clearly tribal interest, rather than acting as a sham for the benefit of non-Indians, federal law recognizes that tribes maintain those immunities even when acting through non-Indian agents.

This result flows largely from the Supreme Court's seminal pronouncements on the subject:

> In any event, the question of tax immunity cannot be made to turn on the particular form in which the Tribe chooses to conduct its business.
>
> *Mescalero Apache Tribe v. Jones,* 411 U.S. 145, 157, n. 13 (1973)

> It is irrelevant that the sale was made to a tribal enterprise rather than to the Tribe itself. See *Mescalero Apache Tribe v. Jones,* 41 U.S. 145, 157, n. 13, 93 S.Ct. 1267, 1275, n. 13 . . . (1973)
>
> *Central Machinery Co. v. Arizona State Tax Commission,* 448 U.S. 160, 163, n. 3 (1980)

This Court's recognition of the retention of tribal immunities in tax and non-tax contexts, despite the involvement of non-Indians, began even earlier, in a case in which an action was brought against the non-Indian legal counsel of a tribe for defamation concerning statements made by that attorney in his official tribal capacity:

> That a tribe finds it necessary to look beyond its own membership for capable legal officers, and to contract for their services, should certainly not deprive it of the advantages of the rule of privilege otherwise available to it.
>
> *Davis v. Littell*, 398 F.2d 83, 85 (9th Cir., 1968)

This Court reached the same conclusion in *Sycuan, Barona, and Viejas Bands of Mission Indians v. Roache*, 54 F.3d 535 (9th Cir., 1995),[13]

[13] The District Court had enjoined the pending criminal prosecutions of "James Trant, Emmet Munley, Helen Chase, and Anthony Pico." *Sycuan, Barona, and Viejas Bands of Mission Indians v. Roache*, 798 F.Supp. 1498,

holding that "The State's prosecutions, although directed immediately at the individuals conducting the tribal gaming operation, are aimed at stopping the Bands' machine gaming in its tracks." 54 F.3d at 538.

Previously, this Court had three times rejected the notion that providing an indirect benefit to non-Indians somehow defeats a tribe's immunity from state jurisdiction.

First, in *Hoopa Valley Tribe v. Nevins,* 881 F.2d 657, 658 (9th Cir., 1989) this Court held that a state tax on tribal timber yield was preempted, even though the incidence of the tax was on non-Indian timber companies as "the first non-exempt person to acquire legal or beneficial title to the timber."

Second, in *U.S. v. County of Humboldt*, 615 F.2d 1260, 1261 (9th Cir., 1980) this Court affirmed an injunction "enjoin[ing] the County of Humboldt, California from enforcing its zoning and building codes against four Indian construction projects on Indian Trust Property within the Hoopa Valley Reservation." Although the reported opinion does not so state, the judgment that this Court affirmed enjoined that county from enforcing those measures "against the Hoopa Valley Tribe, the Hoopa Valley Housing

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1500 (S.D.Cal., 1992). Three of these are non-Indians; the fourth, Anthony Pico, is an Indian. ER 558:8-10; 559:2-8)

Authority or its contractors and employees involving the four [specified] construction projects."[14]

Third, in parallel appeals on the question of whether municipal rent control ordinances applied to housing subleased to non-Indians under a master lease from an Indian owner of allotted trust land to a non-Indian master lessee, both this Court[15] and the California Court of Appeal[16] found federal preemption of the local ordinances. The Court of Appeal rejected as "disingenuous" the city's "attempt to minimize the ordinance's effect on the Band's sovereignty by claiming that the ordinance affects only non-Indian relationships which 'just happen to take place' on Indian land."[17] This rejection was largely on the basis that "the crucial factor in the *Santa Rosa* holding, as expressed by the Ninth Circuit in *Humboldt*, was the Indian character of the *land*, and not its *users*." *Id.*

Even more instructive is *Indian Country, U.S.A., Inc. v. Oklahoma*, 829 F.2d 967, 983 (10th Cir., 1987) in which the Tenth Circuit rejected Oklahoma's attempt to tax sales of bingo cards by " a South Dakota corporation which serves as the general partner of a limited partnership . . .

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[14] The Tribe requests the Court to take judicial notice of this judgment under Rule 201 of the Federal Rules of Evidence. *Smith v. Duncan,* 274 F.3d 1245, 1251 (9th Cir., 2001).

[15] *Segundo v. City of Rancho Mirage,* 813 F.2d 1387 (9th Cir., 1987)

[16] *Zachary v. Wilk*, 173 Cal.App.3d 754 (1985)

[17] *Id.*, at 763

[that] operates Creek Nation Bingo under a management agreement" with the Creek Nation on its reservation. The Tenth Circuit refused to inquire into the relationship between that tribe and its non-Indian agent, focusing instead on federal preemption of the entire tribal gaming enterprise, including the involvement of non-Indians :

> the district court properly declined to give much weight to the fact that the Creek Nation has engaged non-Indian capital and expertise in developing and operating Creek Nation Bingo. . . .
>
> The State focuses too narrowly on whether a strict "master-servant" agency relationship exists between the Creek Nation and ICUSA, and suggests that only if ICUSA is such an "agent" can it be afforded immunity from state regulations. We are not persuaded. The preemption of state laws extends to Creek Nation tribal bingo enterprise as a whole, which included the involvement of non-Indians.
>
> *Indian Country, U.S.A., Inc. v. Oklahoma,* 829 F.2d 967, 983 and n. 7 (10th Cir., 1987)

The District Court found otherwise, holding that, even though the incidence of the tax in question is on the buyer, the buyer in this case is Helix, not the Tribe. (ER 658-659) This conclusion was in error for the reasons noted below.

1. Once a fair reading of the California sales tax statute determines whether the legal incidence of the tax is on the buyer or the seller, state law ceases to be relevant.

As the Supreme Court has noted, "a fair interpretation of the [state] taxing statute as written and applied"[18] determines whether the legal incidence of a sales tax is on the buyer or the seller. Once state law has performed this function, it ceases to be relevant, and only federal law determines whether federal law preempts the state tax.

> This result flows largely from the principle that all tribal immunities depend on only federal law, and cannot be defeated by state law. Nonetheless, in the absence of federal authorization, tribal immunity, like all aspects of tribal sovereignty, is privileged from diminution by the States.
>
> *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering*, 476 U.S. 877, 891 (1986)

> . . . tribal sovereignty is dependent on, and subordinate to, only the Federal Government, and not the States.
>
> *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987), quoting *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134, 154 (1980)

This is so not only for tribal tax immunities, but all federal law immunities:

> The judgment is reversed. We are not bound by the California court's contrary conclusion, and

[18] *California State Board of Equalization v. Chemehuevi Indian Tribe*, 474 U.S. 9, 11 (1985)

> hold that the incidence of the state and local sales tax falls upon the national bank as purchaser and not upon the vendors.
>
> *Diamond National Corp. v. State Board of Equalization,* 425 U.S. 268 (1976)

Therefore, once it has been determined where the legal incidence of the California sales tax falls, it does not matter what the content of the California sales tax statute might be. The California Legislature cannot arrogate to itself the unilateral power to impose a tax, the legal incidence of which is on an Indian tribe, in derogation of federal law:

> . . . the only entities that can determine the extent to which the immunities and protection [of federal law] are afforded to tribes are Congress and the applicable tribes, themselves. The state legislatures have no such right.
>
> *Multimedia Games, Inc. v. WLGC Acquisition Corp.*, 214 F.Supp.2d 1131, 1141 (N.D. Okla., 2001)

The Board's claims regarding "lump-sum" versus "time and materials" contracts, the need to follow particular state regulations to qualify for tax-exempt re-sale of materials, the need for accounting based on actual item-by-item costs rather than progress payments that still add up to 100% at completion, are all irrelevant to the pivotal question of federal law: did Congress authorize the State Defendants to tax these sales? All these points raised by the Board are creatures of state law that would matter only if the exemption in question originated in or was dependent on state law. Instead,

only federal law matters after the "fair reading" of the state taxing statute determines whether the buyer or the seller bears the legal incidence of the tax.

2. Federal law precludes the tax at issue.

The leading case on this point is *Central Machinery Co. v. Arizona State Tax Commission,* 448 U.S. 160 (1980), in which another federal statute preempted the subject of sales of merchandise to a tribe on a reservation. Arizona had sought to impose its gross receipts tax on a non-Indian seller for a sale to a tribe where the sale and delivery were made on the reservation. The Supreme Court held that this other federal statute preempted the state tax on the non-Indian seller, even though that seller had no place of business on the reservation and even though the seller had not complied with the statute.

In reaching this conclusion, the Supreme Court cited[19] fn. 13 from *Mescalero Apache Tribe v. Jones,* 411 U.S. 145, 157 (1973), which states: "In any event, the question of tax immunity cannot be made to turn on the particular form in which the Tribe chooses to conduct its business." This holding is a confirmation that federal common law, and not state law of agency or the intricacies of state tax regulations, determines tribal tax

[19] *Id.,* 448 U.S. at 164

immunity. That a tribe chooses to conduct its business through agents, as in the cases cited above, does not defeat its immunities.

The District Court, instead, discarded federal common law, and relied on California regulations to determine that, as between the Tribe and Helix, the legal incidence of the California tax was on Helix. "First, none of he cases cited by the Tribe support the notion that federal common law determines the legal incidence of tax for Indian taxation. . . . In addition, the Supreme Court has directed lower courts to determine legal incidence through "a fair interpretation of the taxing statute as written and applied." (ER 659:15-18, citing *California State Board of Equalization v. Chemehuevi Indian Tribe,* 474 U.S. 9, 11 (1985).)

As noted above, this "fair reading" of the state tax statute does serve to determine, as between the buyer and the seller, which bears the legal incidence of a state tax. But there is no indication in *Chemehuevi* that the "fair reading" serves any other function. Instead, federal common law has never defeated a tribe's tax immunity due to the particular form in which a tribe chooses to conduct its business. In addition to the cases cited above in which the involvement of agents did not matter, see *Ramah Navajo School Board v. Bureau of Revenue of New Mexico*, 458 U.S. 832 (1982), *Winnebago Tribe of Nebraska v. Kline*, 297 F.Supp.2d 1291, 1303

2004) and *Barker v. Menominee Nation Casino,* 897 F.Supp. 389, 393-394 (E.D.Wis., 1995) in both of which tribes asserted their immunities through non-Indian agents.

Despite the slight variations in facts of the above cases, an overarching principle does emerge from *Mescalero, Ramah, Sycuan, Hoopa, Davis, ICUSA, Winnebago,* and *Barker*. A tribe's immunity from various forms of state jurisdiction is never defeated solely because it asserted that immunity through non-Indian agents. Sometimes those agents are owned by the tribes,[20] sometimes not.[21] Some of those agents are Indians,[22] while others are non-Indians, both individual[23] and corporate.[24] Some act under contract with the tribe,[25] some not.[26] Some are sub-agents,[27] some not.

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[20] The ski resort in *Mescalero,* and HCL in *Winnebago.*

[21] The construction contractor in *Ramah,* and the third-party management contractor in *ICUSA.*

[22] Chairman Pico in *Sycuan,* the tribal legislature in *Barker.*

[23] Emmett Munley, Helen Chase, and James Trant in *Sycuan,* and the tribal attorney in *Davis.*

[24] The construction contractor in *Ramah,* the bingo management firm in *ICUSA,*

[25] The construction contractor in *Ramah,* Emmett Munley on behalf of his management firm in *Sycuan,* and the tribal attorney in *Davis.*

[26] The ski resort in *Mescalero,* HCL in *Winnebago,* and the tribal legislature in *Barker.*

[27] The "South Dakota corporation which serves as the general partner of a limited partnership . . . [that] operates Creek Nation Bingo under a management contract" in *ICUSA*, 829 F.2d at 983.

Some involve state taxes,[28] some not.[29] But in *every* case the tribe has been held to be entitled to act through its designated agent, despite these variations from case to case. The distinctions regarding whether the agent was owned by the tribe or not, whether Indian or not, individual or not, sub-agent or not, taxation or not, have *all* been rejected, largely on the strength of the Supreme Court's above pronouncement on the issue in *Mescalero.* In each of these cases, the analysis is governed by federal common law, and not a "fair reading" of state law.

3. The Tribe does not seek to bestow its tax immunity on Helix.

In the District Court the Board argued that the Tribe was attempting to bestow its federal immunity from state taxation on Helix. This is not so. The Tribe asserts its own immunity from state taxation for its own purchases that it made on its own federal Indian reservation under a federal statute intended to benefit it. If the Tribe had had its own suitable construction staff on hand, it would have constructed its Project with its own forces, without the involvement of HP or Helix at all.

In the above-cited cases, the non-Indian agent often benefited incidentally from the tribal principal's immunity. Central Machinery Company did so in *Central Machinery.* The construction firm in *Ramah*

[28] *Mescalero, Ramah, Hoopa, ICUSA,* and *Winnebago.*
[29] *Sycuan, Davis,* and *Barker.*

certainly did, as did the non-Indian Tribal attorney in *Davis,* the non-Indians arrested in *Sycuan,* the non-Indian firm in *Indian Country*, and many others.

Such an incidental benefit to a non-Indian agent of a tribe has never troubled this Court, which has held "That a tribe finds it necessary to look beyond its own membership for capable legal officers, and to contract for their services, should certainly not deprive it of the advantages of the rule of privilege otherwise available to it."[30] What has troubled this Court, and the Supreme Court, is the prospect that a non-Indian buyer, on whom the legal incidence of a state sales tax falls, will evade his duty to pay the tax simply because he makes his purchase from a tribe on a reservation:

> It is painfully apparent that the value marketed by the smokeshops to persons coming from outside is not generated on the reservations by activities in which the Tribes have a significant interest. [cit.om.] What the smokeshops offer . . . is solely an exemption from state taxation.
>
> *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134, 155 (1980).

This Court has already contrasted this language from *Colville*, holding

> That a Tribe plays an active role in generating activities of value on its reservation gives it a strong interest in maintaining those activities free from state interference.
>
> *Cabazon Band of Mission Indians v. Wilson*, 37 F.3d 430, 434-435 (9th Cir., 1994)

[30] *Davis v. Littell*, 398 F.2d 83, 85 (9th Cir., 1968)

In this case, there is not even such an incidental benefit to Helix. Because of Helix's indemnification claim against the Tribe (ER 522:9-12), Helix will likely not pay the disputed sales tax in any event.

Therefore, the District Court was in error in declining to follow federal common law to conclude that the Tribe's tax immunity turns on the intricacies of state agency and sales tax law. State law is not the origin of, and cannot limit, a tribe's federal immunity which cannot be made to turn on the particular manner in which the tribe chooses to conduct its business.

II. THE DISTRICT COURT CORRECTLY FOUND GENERAL FEDERAL PREEMPTION OF THE STATE TAX.

A. The District Court employed the correct standard.

The current test for federal preemption of state jurisdiction on an Indian reservation when non-Indians are involved is as follows:

> More difficult questions arise where, as here, a State asserts authority over the conduct of non-Indians engaging in activity on the reservation. [In such cases, we engage in] a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law.
>
> *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144-145 (1980)[31]

[31] See also *Wagnon v. Prairie Band Potawatomi Indians*, 546 U.S. ___, 126 S.Ct. 676, 681-682 (2005), citing and relying on *Bracker*.

As part of this test, the Supreme Court and this Court both require a nexus between the state tax and the particular activity at which the tax is aimed:

> And equally important, respondents have been unable to identify any regulatory function or service performed by the State that would justify the assessment of taxes for activities on Bureau and tribal roads within the reservation.
>
> *Id.,* 448 U.S. at 148-149

> Although California points to a variety of services that it provides to residents of the reservation . . ., none of those services is connected with the timber activities directly affected by the tax.
>
> *Hoopa Valley Tribe v. Nevins*, 881 F.2d 657, 661 (9th Cir., 1989)

The District Court properly identified this test:

> . . . even where, as here, "a State imposes the legal incidence of its tax on a non-Indian seller, the tax may nonetheless be pre-empted if the transaction giving rise to tax liability occurs on the reservation and the imposition of the tax fails to satisfy the *Bracker* interest-balancing test." *Prairie Band Potawatomi Nation,* 126 S.Ct. 681-2
>
> ER 661:22-25

The District Court also insisted on the required nexus:

> . . . there must be some link between "the governmental functions [the state] provides to those who must bear the burden of paying the tax" and the tax it seeks to assess. [cit.om.] The Ninth Circuit has interpreted this to require a nexus between the state services provided and the economic activity to be taxed. [cit.om.]
>
> ER 663:4-7

The District Court therefore employed the correct legal standard

B. The District Court properly found general federal preemption.

The District Court properly identified the federal interests to be considered in the *Bracker* balancing analysis.

First, "the existence of federal regulation concerning the economic activity being taxed . . . Indian gaming, an area that is heavily regulated by federal law under IGRA." ER 661:14-19

Second, the purposes of IGRA: "Intended to 'promot[e] tribal economic development, self-sufficiency, and strong tribal governments,' IGRA seeks to 'ensure that the Indian tribe is the primary beneficiary of the gaming operation.' 25 U.S.C. §§2701(1) and (2). The *Cabazon* court[32] found that a conflict between a state tax statute and federal goals represented by IGRA favored preemption. The federal interest favored preemption of California's licensing fee because it diminished the plaintiff-tribe's return from its gaming activities, thereby interfering with IGRA's intent that the Indian tribe be the primary beneficiary of its gaming operation." ER 661:21 to 662:6.

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[32] *Cabazon Band of Mission Indians v. Wilson*, 37 F.3d 430 (9th Cir., 1994) (hereinafter, "*Cabazon I*")

The District Court also properly identified the tribal interests: In addition to the above purposes of IGRA, "The Tribe also has an important interest in economic self-determination" ER 662:17. As noted above, California and its agents, on the one hand, and the Tribe, on the other, have had repeated conflicts over various assertions of state jurisdiction, in all four of which conflicts this Court has ruled in favor of the Tribe. Aside from saving itself considerable sums in possible indemnification of Helix and possibly other subcontractors, the Tribe's primary goal is to hold California to the bargain that California and the Tribe struck in the compact that governs the conduct of the Tribe's gaming enterprise in the structures whose construction is closely regulated by that compact. In this way, the Tribe's interest is "promoting tribal economic development, self-sufficiency, and strong tribal governments," the avowed purpose of IGRA, 25 U.S.C. §2702(1).

The District Court found that, "in contrast to these federal and tribal interests, California's interest is minimal." (ER 663:1) Relying on and quoting from two of this Court's previous rulings,[33] the District Court held that there was no nexus between the tax and the on-reservation activity to be taxed:

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[33] *Cabazon I*, 37 F.3d at 435 and *Hoopa Valley Tribe v. Nevins,* 881 F.2d 657, 661 (9th Cir., 1989), ER 663:6-14.

> Under the reasoning of *Hoopa* and *Cabazon,* California does not have a compensatory interest. The party that bears the economic burden of this tax is the Tribe, and the economic activity is Indian gaming on a Reservation. The parties agree that the sales tax in question, Cal. Rev. & Tax. Code §6051, is California's general sales tax. [cit.om.] Thus, by definition, the tax is not narrowly tailored to account for state services provided in connection with Indian gaming. As in *Cabazon*, presumably 100 percent of the tax will go to the State's general fund.
>
> ER 663: 15-20

The District Court found that, even if the Tribe's on-reservation activities did impose some incremental cost on California, that cost was offset by payments that the Tribe makes to California under its compact:

> Further, as agreed in its Compact with the State of California, the Tribe already provides ample revenue to offset environmental, regulatory and non-routine costs caused by on-reservation gambling. [cit.om.][34] Therefore, even if the subject

[34] Under its compact, the Tribe pays millions into the Special Distribution Fund. (ER 559:13-18) According to the Compact, these payments must be used for

> (a) grants, including any administrative costs, for programs designed to address gambling addiction; (b) grants, including any administrative costs, for the support of state and local government agencies impacted by tribal government gaming; (c) compensation for regulatory costs incurred by the State Gaming Agency and the state Department of Justice in connection with the implementation and administration of the Compact; (d) payment of shortfalls that may occur in the Revenue Sharing

> sales tax was narrowly-tailored, the State would still not have a compensatory interest as the Tribe already has paid the costs associated with Indian gaming.
>
> ER 663: 21-25

After finding that California lacks a valid compensatory interest regarding the tax in question, the District Court also found that

> California does not have a "specific, legitimate regulatory" interest that justifies the sales tax. [cit.om.] In general, California has limited authority over Indian gaming. [cit.om.] Moreover, the compact between the Tribe and California gives the Tribe exclusive authority to oversee the construction of gaming facilities. . . . Defendants therefore lack a regulatory interest in Indian gaming, as well as in the construction of the gaming facility in question.
>
> ER 664:1-12[35]

> Trust Fund; and (e) any other purposes specified by the Legislature.
>
> ER 67, §5.2.

While it is true that the Tribe provided no evidence that these payments offset *all* of California's costs flowing from the Tribe's gaming enterprise, it is equally true that California provided no evidence that they do not. If the Special Distribution Fund is insufficient to meet purpose (b) above (i.e., impacts on state and local government agencies), the reason is that the Legislature has assigned a higher priority to three other purposes in actually distributing the funds that the Tribe pays into this fund. See Government Code §12012.85(g). The Tribe pays into the Special Distribution Fund, as the Compact requires, but does not control how the Legislature spends it.

[35] The District Court also rejected California's interest in avoiding fraud, largely because that interest is not peculiar to tribal construction contracts. ER 664: 11-19.

Lacking either a valid compensatory interest or a regulatory interest, California's interest was simply a generalized desire to raise revenue, without the required nexus between the Tribe's on-reservation activity and the state sales tax aimed at it. As this Court held in *Cabazon I*, 37 F.3d at 435, the above federal and tribal interests simply outweigh California's generalized interest in raising revenue. The District Court's conclusion on this point was correct.

C. The Board's attempt to re-balance the interests is unavailing.

In response to the District Court's conclusion that the federal and tribal interests outweigh the state interest, California advances four arguments. Each is unavailing, for the following reasons.

1. IGRA preempts the state tax in question, not the construction contract.

The Board asserts that IGRA does not preempt the prime construction contract between the Tribe and HP.[36] The Board misconstrues the Tribe's claim. The Tribe does not claim that IGRA preempts this *contract*, but rather that IGRA preempts this *tax*. Any garden-variety contract that relates to tribal gaming is not within the preemptive scope of IGRA. This Court has

[36] "Construction activities do not fall within the activities IGRA regulates." Board's Opening Brief ("BOB"), p. 20, lines 7-8.

long held that an ordinary construction contract dispute involving a tribe does not even arise under federal law.[37]

However, state taxation *is* a subject preempted by IGRA. While IGRA does not mention construction contracts, IGRA expressly prohibits any provision in a compact allowing free-standing state taxation of tribes:

> Except for [certain regulatory] assessments . . . nothing in this section shall be interpreted as conferring upon a State . . . authority to impose any tax, fee, charge, or other assessment upon an Indian tribe . . .
>
> 25 U.S.C. §2710(d)(4)

As will be more fully discussed below, IGRA preempts the state tax in this case. Until then, it is sufficient to note that in *Cabazon I*, 37 F.3d at 432, this Court did not even consider whether the *contract* for providing the simulcast signal between SCOTWInc. and the tribes was preempted by IGRA. Instead, this Court held that federal law preempted the state's *tax* on tribal operations using that signal. Even if the Tribe's prime construction contract with HP is not itself within the preemptive scope of IGRA, the construction performed under that contract is, as will be described in detail below in Part III of this brief. State taxation of that construction is certainly within the preemptive scope of IGRA, as similarly described below.

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[37] *Gila River Indian Community v. Henningston, Durham & Richardson*, 626 F.2d 708, 714-715 (9th Cir., 1980)

Therefore, California cannot dismiss the federal interest in protecting tribes from state taxation under IGRA by pointing out that IGRA does not preempt the construction contract in this case. IGRA preempts the state *tax* here, not the construction *contract*.

2. The District Court's reliance on *Ramah* was well-founded.

The District Court related casino construction to IGRA in the same way that the Supreme Court related school construction to federal Indian education statutes in *Ramah Navajo School Board v. Bureau of Revenue of New Mexico*, 458 U.S. 832 (1982):

> Defendants argue the construction of a casino is separate and distinct from the regulation of Indian gaming, which is the focus of IGRA. The preemption analysis under *Bracker*, however, allows for expansive consideration of the economic impact of a proposed tax on various parties. *See Ramah Navajo,* 458 U.S. at 838 ("Relevant federal statutes and treaties must be examined in light of the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence."); *Cabazon*, 37 F.3d at 433-34 (stating preemption analysis focuses on whether the Tribe bears the economic impact of a tax.) In *Ramah Navajo*, the Supreme Court preempted a tax on the construction of a school, based in part on the federal government's extensive regulation of Indian education. 458 U.S. at 838. The same ancillary relationship exists between the construction of a school and education, on the one hand, and the construction of a casino and gaming, on the other.
>
> ER 661:23-28

The Board takes issue with the District Court's analogy, claiming that the degree of federal regulation of Indian education is much less than that of Indian gaming. (BOB, p. 19, n.3) The District Court was clearly correct.

The Supreme Court described federal regulation of Indian education as "both comprehensive and pervasive,"[38] based on various statutes and a "detailed regulatory scheme."[39] This Court has often described IGRA as "comprehensive."[40] Congress expressly intended that IGRA preempt the entire field of tribal government gaming activities:

> S. 555 is intended to expressly preempt the field in the governance of gaming activities on Indian lands.
>
> S.Report 446 (Committee on Indian Affairs), 100th Cong., 2nd Sess. 6, Sept. 15, 1988; 5 U.S.C.C.&A.N. 3071, 3076 (1988)

The preemptive force of IGRA is so great that it meets the standard for complete preemption, thereby converting what might otherwise be state law claims into federal claims.[41] IGRA itself is long and complex. Among many other things, it establishes a new federal agency, the National Indian

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[38] *Ramah Navajo, supra,* at 839

[39] *Id.,* at 841

[40] *Crow Tribe v. Raciot*, 87 F.3d 1039, 1041 (9th Cir., 1996); *Hein v. Capitan Grande Band of Mission Indians*, 201 F.3d 1256, 1260 (9th Cir., 2000); *Idaho v. Shoshone-Bannock Tribes*, ___ F.3d ___, No. 04-35636, (9th Cir., Oct. 11, 2006); 2006 DJDAR 13786, Oct. 12, 2006

[41] *Gaming Corp of America v. Dorsey & Whitney*, 88 F.3d 536, 547 (8th Cir., 1996)

Gaming Commission ("NIGC") to perform specified regulatory functions.[42] The NIGC has itself issued an entire chapter of regulations on many subjects.[43] However, a unique feature of IGRA is that it entrusts the following large and important subjects to a compact to be negotiated between a tribe and a state:

> (i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity;
> (ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;
> (iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;
> (iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities;
> (v) remedies for breach of contract;
> (vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and
> (vii) any other subjects that are directly related to the operation of gaming activities.
>
> 25 U.S.C. §2710(d)(3)(C)

Thus, between the intricate statute itself, the NIGC's extensive regulations, and the very broad range of subjects that can be included in a tribal-state compact authorized by this statute, IGRA regulates all aspects of

[42] 25 U.S.C. §§2704-2708
[43] 25 C.F.R. Parts 501-577

not just the gaming itself, but also "any other subjects that are directly related to the operation of gaming activities." 25 U.S.C. §2710(d)(3)(C)(vii). This regulation is at least as comprehensive and pervasive as that considered in *Ramah Navajo.* This is especially so regarding state taxation, which IGRA[44] expressly prohibits, and which the statutes and regulations considered in *Ramah Navajo* did not even address.

While federal regulation of Indian gaming differs from that of Indian education in that the former also authorizes a negotiated role for the states through compacts, the test for federal preemption remains the same in both cases: "This regulatory scheme precludes any state tax that 'stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.'"[45] In both areas the underlying Congressional policy is the same: "the express federal policy of encouraging tribal self-sufficiency in the area of [Indian] education"[46] is the same as the statutory purpose of IGRA "to provide . . a means of promoting tribal . . . self-sufficiency . . ."[47]

In addition, this Court has applied *Ramah Navajo* just as did the District Court. In *Cabazon I*, this Court considered whether IGRA preempts a state license fee or tax whose legal incidence fell on non-Indian

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[44] 25 U.S.C. §2710(d)(4)
[45] *Ramah, supra,* at 845
[46] *Id.*, at 846
[47] 25 U.S.C. §2702(1)

horseracing associations, rather than a tribe. This Court's analysis bears repeating in full because, even if the legal incidence of the sales tax now at issue is on Helix, this Court applied *Ramah Navajo* to find that IGRA preempted this other California tax:

> We agree with the district court that the license fee imposed falls directly upon the racing association, and not the Bands. [fn.om.] To say that the fee is a direct tax only upon the racing associations is not to say that the Bands are not economically burdened by such fee, however. Discussing federal preemption, the Supreme Court in *Ramah Navajo* [cit.om.] declined to adopt a "legal incidence test," under which "the legal incidence and not the actual burden of the tax would control preemption inquiry." The Court instead focused on the fact "that the economic burden of the asserted taxes would ultimately fall on the Tribe," even though the legal incidence of the tax was on the non-Indian logging company. *Id.*
>
> Here, as in *Ramah Navajo*, the Bands bear the actual burden of the license fee. . . . "The licensing scheme currently imposed thus constitutes an economic burden" [on the tribes].
>
> *Id.*, 37 F.3d at 434

Therefore, the District Court properly relied on and followed *Ramah Navajo.*

3. The District Court also properly followed this Court's holding in *Cabazon I.*

The Board asserts that *Cabazon I* does not apply here because, while the state tax in *Cabazon I* was greater than the amounts paid to the tribes, the

amount of the state tax at issue in this case is less than the amount that the Tribe earns from its gaming enterprise. (BOB, pp. 21-22)

Such a dollar-for-dollar comparison was not the sole or determining factor in this Court's holding that IGRA preempted that state tax in *Cabazon I*. As this Court explained in *Cabazon II*,

> In that context [i.e., 37 F.3d at 433], we observed that the federal interest in ensuring that the Bands are the primary beneficiaries of the gaming operations was threatened by the State's collection of the license fee. *Id.* However, our analysis did not end there. In order to resolve whether the license fees were impermissible, we considered both the Bands' interests and the State's interests.
> *Id.*, at 434-35.
>
> *Cabazon II*, 124 F.3d at 1059

Thus, this Court has already rejected the Board's claim that its finding of preemption of the state tax in *Cabazon I* was based solely, or even largely, on a dollar-for-dollar comparison of the amounts of the state tax and tribal gaming revenues. This Court stated in *Cabazon II* that it had "considered both the Bands' interests and the State's interests . . . at [37 F.3d] 434-35",[48] just as it should have done under the *Bracker* balancing test, and just as the District Court did in this case.

If the Board were correct in claiming that such a dollar-for-dollar comparison was the *sole* preemptive factor in *Cabazon I*, then presumably a

[48] *Id*, 124 F.3d at 1059

state income tax of 49% of a tribe's income would not be preempted, because such a state tax would still be less than the tribe's revenue. Therefore, the fact that the Tribe may earn more from its gaming enterprise than the amount of the sales tax in this case does not mean that the District Court's reliance on *Cabazon I* was erroneous.

However, the Tribe does not claim, as the Board asserts (BOB, pp. 22-24), that *any* state tax related to an on-reservation tribal enterprise is necessarily preempted *solely* because it increases the tribe's costs or decreases its revenue. What the Tribe does claim is that such an increased cost is one factor in any preemption analysis, as will be shown below.

In contrast to the Board's claim, this Court did not stop when it concluded in *Cabazon I* that "The licensing scheme currently imposed constitutes an economic burden."[49] Instead, this Court next analyzed how the nature of the value at which the state tax was aimed was value generated on the reservation, thus supporting preemption:

> In assessing the Bands' interests, we must consider the nature of the activity taxed. *Cf. California v. Cabazon Band of Mission Indians,* 480 U.S. 202, 219-20 . . . (1987) (state regulation of on-reservation bingo games preempted because tribe was generating value on reservation); *Washington v. Colville Confederated Tribes . . .*, 447 U.S. 134, 155 . . . (1980) (upholding state tax on on-reservation

[49] *Cabazon I*, 37 F.3d at 434

> sales of cigarettes to non-Indians because value of transaction was "not generated on the reservations by activities in which the Tribes have a significant interest"). "That a tribe plays an active role in generating activities of value on its reservation gives it a strong interest in maintaining those activities free from state interference." *Gila River Indian Community v. Waddell,* 967 F.2d 1404, 1410 (9th Cir., 1992)
>
> *Cabazon I*, at 434-435

Then this Court considered the State's "weaker, although certainly not trivial" interests,[50] that of compensation for costs of regulation. However, this Court eliminated this factor because of "the compacts—by which Bands can reimburse the State for regulatory costs, outside the State tax structure."[51] Furthermore, in this Court's view, those state interests were further weakened by the lack of a nexus between the state tax asserted and the activity being taxed: "Here, there is no narrow tailoring since California does not use the license fee revenues to fund services related to the regulation of off-track betting. Rather, 100% of the license fee earned from Indian wagering goes into the State General Fund."[52]

Based on *all* these factors (increased cost to the tribes in a federally-regulated area, no unreimbursed costs to the state, no nexus between state tax and activity being taxed), this Court in *Cabazon I* found federal

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[50] *Id.*, at 435
[51] *Id.*
[52] *Id.*

preemption. That finding was *not* based solely on increased costs to the tribe, although that was one significant factor.

4. *Wagnon* does not change the *Bracker* preemption analysis.

The Supreme Court's recent opinion in *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. ___, 126 S.Ct. 676 (2005) does not change this result. The Board asserts that *Wagnon* returns the focus to the party bearing the legal incidence of the state tax, rather than the party bearing its economic burden. If this is true, it is true only as to a non-preemption analysis of sales that take place *off* a reservation:

> If a State may apply a nondiscriminatory tax to Indians who have gone beyond the boundaries of a reservation, then it follows that it may apply a nondiscriminatory tax where, as here, the tax is imposed on non-Indians as a result of an off-reservation transaction. In these circumstances the interest-balancing test set forth in *Bracker* is inapplicable.
>
> *Wagnon, supra,* 126 S.Ct. at 688

> . . . we hold that the Kansas motor fuel tax is a nondiscriminatory tax imposed on an off-reservation transaction between non-Indians. Accordingly, the tax is valid and poses no affront to the Nation's sovereignty.
>
> *Id.,* 126 S.Ct. at 689

Thus, *Wagnon* means that the *Bracker* interest-balancing test does not apply to transactions with non-Indians that occur *off* a reservation. This is

because the reservation boundary and the identity of the parties have always been crucial factors in all such analyses:

> As the Nation recognizes, under out Indian tax immunity cases, the "who" and the "where" of the challenged tax have significant consequences. We have determined that '[t]he initial and frequently dispositive question in Indian tax cases . . . is *who* bears the legal incidence of [the] tax," *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 458 . . . (1995) (emphasis added [by Court]) . . . We have further determined that, even when a State imposes the legal incidence of its tax on a non-Indian seller, the tax may nonetheless be pre-empted if the transaction giving rise to tax liability occurs on the reservation and the imposition of the tax fails to satisfy the *Bracker* interest-balancing test.
>
> *Id.*, 126 S.Ct. at 681

The crucial distinction from *Wagnon* in this case is that the sales in question took place *on* the Barona Indian Reservation. After a full analysis of the evidence, the District "Court finds that the Helix transactions occurred on the reservation." (ER 660:20-21) Therefore, under *Wagnon*, the *Bracker* interest-balancing test remains fully applicable in the preemption analysis as to such on-reservation sales. That analysis is set forth in *Ramah Navajo* and *Cabazon I.* It includes serious consideration of how the Tribe bears the economic burden of the state tax as one factor in the preemption analysis. The *Wagnon* non-balancing analysis applies *only* to transactions that take place *off* a reservation. That is not the case here.

5. Under *Bracker*, the federal and tribal interests outweigh the state interests in this case.

The District Court properly found "an important federal interest favoring preemption" to be "the existence of federal regulation of the economic activity being taxed . . . Here, the general area of economic activity that is affected by the State's proposed tax is Indian gaming, an area heavily regulated by federal law under IGRA." (ER 661:14-19) The District Court relied on *Cabazon I* to describe that federal interest, and then the Tribal interest:

> . . . the federal interests represented by IGRA . . . "are clearly set forth in the language of IGRA itself. [IGRA is] Intended to 'promot[e] tribal economic development, self-sufficiency, and strong tribal governments,' . . . 25 U.S.C. §§2701(1) and (2)." [*Cabazon,*] 37 F.3d at 433-34. The Cabazon Court found that a conflict between a state tax statute and the federal goals represented by IGRA favored preemption . . . [of California's licensing fee because] it diminished the plaintiff-Tribe's return from its gaming activities . . .
>
> The same analysis favors preemption in this case. As in *Cabazon*, the state tax statute here taxes a non-Indian party closely connected to an Indian enterprise in a manner that interferes with Congress' stated goals. The sales tax on materials, if allowed, would raise the cost of Helix's work on the casino by several hundred thousand dollars. (Compl. ¶16) In addition, the State theoretically could impose sales tax on the other subcontractors involved in the casino project. Given the size of the casino construction contract and the number of subcontractors involved, this could potentially

> result in a substantial economic impact on the Tribe. Such large actual (and potential future) economic burdens conflict with IGRA's stated purpose of promoting "tribal economic development and self-sufficiency" by raising the cost of casino construction and thereby potentially discouraging the Tribe from building the optimal gaming facility for attracting patrons. *See Cabazon*, 37 F.3d 430 at 434.
>
> ER 661:21-22 and 662:1-16

The District Court also correctly identified some of the Tribal interests:

> The Tribe also has an important interest in economic self-determination. The Ninth Circuit has directed that, when assessing a tribe's interest, the court must "consider the nature of the taxed activity." *Cabazon*, 37 F.3d at 434. "That a tribe plays an active role in generating activities of value on its reservation gives it a strong interest in maintaining those activities free from state interference." *Gila River Indian Community,* 967 F.2d at 1410; *Hoopa Valley Tribe v. Nevins*, 881 F.2d 657, 659 (9th Cir., 1989) In the present case, the taxed activity is the construction of [a] casino complex that presumably will create significant economic activity on the reservation. (Compl. ¶2, 11) The Ninth Circuit has recognized that a Tribe has a valid interest favoring preemption when it has "invested significant funds and effort to construct and to operate wagering facilities and to attract patrons." *Cabazon*, 37 F.3d at 435. As explained, the state sales tax will harm the Tribe's interest because the economic impact of the tax will fall on the Tribe, making it more difficult for the Tribe to sustain its value-generating activities.
>
> ER 662:17-28

In addition to these Tribal interests, the Tribe has another interest: holding California to the bargain that California struck with the Tribe in its gaming compact. The Tribe will set this interest forth in full in Part III of this brief. This interest is especially acute to the Tribe because of California's long history of overreaching and arrogating to itself various forms of jurisdiction over this Tribe's gaming activities, as chronicled in the four times that this Tribe has had to seek protection from this Court from that overreaching.

Against these formidable federal and Tribal interests, the District Court found that "California's interest is minimal." (ER 663:1) First, the District Court found that California had no valid compensatory interest:

> For a state to have a valid compensatory interest, there must be some link between 'the governmental functions it provides to those who must bear the burden of paying the tax' and the tax it seeks to assess. [*Ramah* Najavo, 458 U.S. 832,] at 843. The Ninth Circuit has interpreted this to require a nexus between the state services provided and the economic activity to be taxed. *Cabazon*, 37 F.3d at 435.
>
> ER 663:4-7

> The parties agree that the sales tax in question, Cal. Rev. & Tax Code §6051, is California's general sales tax. [cit.om.] Thus, by definition, the tax is not narrowly tailored to account for state services provided in connection with Indian gaming. As in *Cabazon*, presumably, 100 percent of the tax will go to the State's general fund.
>
> ER 663:17-20

The District Court also noted that, under its compact, the Tribe already reimburses California for whatever indirect costs California may incur as a result of its activities under that compact[53]:

> Further, as agreed in its Compact with the State of California, the Tribe already provides ample revenue to offset environmental, regulatory and non-routine costs caused by on-reservation gambling. [cit.om.] Therefore, even if the subject sales tax was narrowly-tailored, the State still would not have a compensatory interest as the Tribe already has paid the costs associated with Indian gaming.
>
> ER 663:21-25

Against this showing that California has no unreimbursed costs from the Tribe's on-reservation gaming enterprise, the Board argues that the nexus requirement is met because "The non-Indian supplier and contractor are California businesses receiving state services off the reservation." (ER 27) To this claim, the Tribe makes three responses.

First, the Board misquotes *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134 (1980). The Board cites language (BOB,

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[53] Under its compact (ER 55-103), the Tribe pays for all services provided by the state concerning its gaming activities, including gambling addition programs, costs of "state and local government agencies impacted by tribal governmental gaming," state regulatory costs (Compact, §§5.1-5.2, ER 66-67), non-routine costs of the state gaming agency (Compact, §7.3, ER 79), worker and unemployment compensation (Compact, §§10.3-10.4, ER 33-34), and mitigation of off-reservation environmental impacts (Compact §10.8.2.b.2., ER 91). Those payments have, in fact, been made. ER 559: 13-18.

p. 27, lines 9-11) in a way that implies it is from the majority opinion when, in fact, it is from Justice Rehnquist's separate concurrence.

Second, this claim assumes that the required nexus must exist with those non-Indian firms. This is not what this Court has held. Instead, this Court has stated that the nexus must be "between the tax imposed on the on-reservation activity and the state interest asserted to justify such tax."[54] The on-reservation activity in this case is the Tribe's purchase of construction materials, with such sales and the construction occurring on the reservation. In *Cabazon I*, it did not matter to this Court that SCOTWInc., the Tribe's off-reservation non-Indian contractor, also presumably received the same ordinary state services as do HP and Helix.

Third, this Court has already rejected essentially the same argument. In the *Cabazon* litigation, the District Court had found no preemption, partly because it had

> found that the value of the Bands' activity was derived from live horse racing, an activity "occurring outside the reservation and operated by non-Indian racing associations." [cit.om.] Consequently, the court concluded, "[b]ecause the betting occurs on Indian land, but is dependent on events occurring elsewhere, this factor is neutral in balancing tribal, state, and federal interests." *Id.*
>
> *Cabazon* I, 37 F.3d at 435

[54] *Cabazon I*, 37 F.3d at 435

This Court reversed, holding that not every aspect of the taxable event must occur on the reservation, and the involvement of non-Indians does not matter:

> The district court has mischaracterized the Bands' interest, in our view. In this instance, the Bands have invested significant funds and effort to construct and to operate wagering facilities and to attract patrons. It is not necessary, as the district court appears to posit, that the entire value of the on-reservation activity come from within the reservation's borders. It is sufficient that the Bands have made a substantial investment in the gaming operations and are not merely serving as a conduit for the products of others. . . . *Cabazon*, 480 U.S. at 219 . . . ("Here . . . the Tribes are not merely importing a product onto the reservations for immediate resale to others..")
>
> *Id.*

So, too, here. Even though the subcontractor's place of business is off the reservation, and California does provide normal state services to it, the sales in question and the construction both still occurred on the reservation. The subcontractor's off-reservation location is not nearly enough to defeat preemption when other factors strongly favor it. One such favorable factor is what the Tribe did with the construction materials. The Tribe did not immediately re-sell them to others. Instead, the Tribe used all of them to construct its casino complex, a project that this Court has already held to be on-reservation value, and thus a factor favoring preemption.

Therefore, the off-reservation location of Helix and Helix's receipt of normal state services does not constitute the kind of nexus with the activity to be taxed that this Court has required todefeat a finding of federal preemption. It is sufficient that the sales occurred on the reservation, and the items purchased went entirely into a project of on-reservation value with no resale to anyone.

III. THE STATE TAX IN QUESTION IS PREEMPTED UNDER THE INDIAN GAMING REGULATORY ACT.

Even without any specific federal statute, the above discussion shows how federal law in general preempts the taxes in question in this case. However, it is a critical aspect of this case that there IS a specific federal statute, one that completely preempts all state jurisdiction to tax the sales that might otherwise exist. Both the federal statutory scheme and the tribal-state compact that *exclusively* describes the extent of state taxation and other forms of state jurisdiction over the Project preclude the state tax now.

A. IGRA completely preempts the entire field of tribal gaming.

As noted above (fn. 40), this Court has often held that IGRA establishes a "comprehensive" federal regulatory scheme for the conduct of gaming by tribes. This conclusion flows not only from the pervasiveness of

the statutory scheme itself, but also from IGRA's Senate report where the goal of federal preemption is expressly stated:

> S. 555 is intended to expressly preempt the field in the governance of gaming activities on Indian lands.
>
> S.Report 446 (Committee on Indian Affairs), 100th Cong., 2nd Sess. 6, Sept. 15, 1988; 5 U.S.C.C.&A.N. 3071, 3076 (1988)

The preemptive force of IGRA is especially acute regarding state taxation. IGRA expressly prohibits a state from requiring any degree of direct state taxation as an element of a compact, although a tribe may consent to a degree of state taxation in return for some other concession of comparable value:

> . . . 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 . .
>
> 25 U.S.C. 2710(d)(4)

Therefore, while not every contract or claim that has anything to do with a tribal gaming enterprise is subject to federal preemption,[55] IGRA does preempt the entire subject of state taxation regarding tribal gaming, whether based on compact provisions or otherwise. As described below, unless a compact provision expressly permits it, such taxation that could be included in a compact is absolutely prohibited.

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[55] See Part II.C.1. of this brief, *supra.*

B. IGRA preempts the state taxes at issue in this case.

The Tribe has provided a copy of its compact with California. ER 55-103. In that compact, California contemplated that the Tribe would soon embark on a major expansion project, and set forth the conditions under which that could occur. For example, §6.4.2.b. of the compact (ER 69) states that:

> all Gaming Facilities of the Tribe constructed after the effective date of this Gaming Compact, and all expansions or modifications to a Gaming Facility in operation as of the effective date of this Compact, shall meet the building and safety codes of the Tribe, which, as a condition for engaging in that construction, expansion, modification, or modification, shall amend its building and safety codes, if necessary, or enact such codes if there are none, so that they meet the standards of either the building or safety codes of any county within the boundaries of which the site of the Facility is located, or the Uniform Building Codes, . . .

Similarly, §10.8 (ER 33-35) goes into great detail concerning the kind of environmental review and mitigation of off-reservation impacts that the Tribe must provide concerning its "Project," defined at §10.8.2.c. as "any expansion or other significant renovation or modification of an existing Gaming Facility, or any significant excavation, construction, or development associated with the Tribe's Gaming Facility or proposed Gaming Facility. . ." Any new facility must receive periodic certificates of occupancy, based

on specified inspections by tribal and state inspectors. (Compact §6.4.2.c., ER 12-13.)

Therefore, California certainly contemplated in the compact that the Tribe would construct its Project, and specified the manner in which the Tribe would do so in great detail, as set forth in the compact and noted above. California could have negotiated additional compact terms relating to this same construction, had it wished to do so.

Even though IGRA prohibits direct state taxation of the Tribe, California did negotiate two major revenue streams from the Tribe to the State in the compact. First, to obtain licenses to operate gaming devices above the number previously operated, the Tribe must pay (and does pay) large license fees into the State's Revenue Sharing Trust Fund. (Compact, §4.3.2.2.a.2, ER 7-9). Second, the Tribe must pay (and does pay) stated percentages of its net win into the State's Special Distribution Fund, to be used to mitigate the off-reservation impacts of gaming, and for other stated purposes. (Compact §5.1.a., ER 9-10) In return for these two large quarterly payments (currently in the millions), the Tribe receives the right to operate additional gaming devices, a degree of exclusivity (Compact §12.4, ER 36), as well as the right to conduct the expanded scope of gaming set forth in §4.1 of the compact (ER 63).

In contrast, even though California contemplated that the Tribe would construct an expansion, and even though California negotiated the above two major revenue streams from the Tribe to it, California is entirely silent in the compact on the subject of sales tax regarding construction of the contemplated expansion project.

This crushing silence takes great meaning from the prior course of dealings between California and its political subdivisions, on the one hand, and the Tribe on the other. As noted above, after the sheriff's raid and arrests at the Tribe's gaming facility, this Court held that,[56] in the absence of a compact that could have transferred jurisdiction over state gambling offenses that had been federalized by IGRA back to California, California had no jurisdiction at all over any activity that fell within the preemptive scope of IGRA. In other words, the prospect of gaining or regaining such jurisdiction is one of the incentives offered to a state by IGRA to negotiate a compact with a tribe, because such a compact, and only such a compact, could make such a transfer of federal jurisdiction to California to enforce state gaming laws.[57] A state has *only* the jurisdiction that a compact provides as to matters that are encompassed, or could be encompassed, in a

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[56] *Sycuan, Barona, and Viejas Bands of Mission Indians v. Roache*, 54 F.3d 535 (1995)

[57] IGRA §23, 18 U.S.C. §1166.

compact. Even if a state had pre-existing jurisdiction, the preemptive force of IGRA is such that IGRA preempts any such pre-existing jurisdiction, leaving the parties to a compact to allocate such jurisdiction as they agree.

This Court brought into even sharper focus the preemptive power of IGRA regarding taxation in *Cabazon I* and *II*. Together with this Court's opinion in *Sycuan*, *Cabazon I* and *II* establish the framework of analysis for whether IGRA preempts the state sales tax in this case. Without a compact, a state has absolutely zero jurisdiction over subjects that are or could be covered in a compact, such as the two kinds of payments that the Tribe now makes to California under its above compact. A compact, and only a compact, is the *sole* source for a state's authority concerning any subject that is, or could be, covered in a tribal-state compact, even if the state previously had such jurisdiction from some other source. IGRA preempts a state tax, even with a compact, when that tax interferes with the federal goals expressed in IGRA, even if another party bears the legal incidence of the tax, as long as the economic burden of the tax falls on the tribe.

The application of these principles to this case is clear. Even if California previously had jurisdiction to tax the purchases now at issue,[58]

[58] This Court's opinion in *Sycuan* is especially instructive. Before IGRA, California had criminal jurisdiction over on-reservation gaming activities to the extent provided by P.L. 280, 18 U.S.C. §1162. This Court held in

IGRA preempts that jurisdiction. California negotiated two revenue streams to itself in the compact, in return for providing significant benefits to the Tribe. California could have negotiated a third revenue stream, sales tax on the construction materials used in the Project, as well as other future projects, had it wished to do so. But California did not even mention sales tax in the compact. Therefore, California has no more jurisdiction to impose its sales tax on the sales in question as it would have to tax the income of the Tribe, another subject that California didn't even bring up in the compact.

This Court has very recently reaffirmed that, when a compact is silent as to a state tax that could have been included in a compact, the tax cannot apply. In *Idaho v. Shoshone-Bannock Tribes*, ___ F.3d ___, No. 04-35636, Oct. 11, 2006, 2006 DJDAR 13786 (Oct. 12, 2006), this Court repeated the general proposition that only a compact can be the source of state authority over a subject that is or could be included in a compact, as well as the specific proposition that only language in a compact can be the source of a state's power to impose a payment obligation on a tribe.

Sycuan that IGRA ousted California of such previous jurisdiction, and allowed California and the Tribe to return that jurisdiction to California by appropriate language in a compact, as they did in this case. See Compact §8.2, ER 83. Therefore, even if California had jurisdiction before IGRA to tax the purchases now at issue, IGRA ousted such jurisdiction because the compact is silent on the subject.

In *Shoshone-Bannock*, Idaho wished to have this Court read into its compact with the Shoshone-Bannock Tribes an agreement by those tribes agree to obey the limits on the number of gaming devices that they could operate found in a state statute, based on the agreement of other tribes in other compacts to obey that statute. This Court refused to do so. Slip Op., p. 17556. This conclusion was an affirmation of the general principle of *Sycuan* that a state has only that jurisdiction over subjects that are or could be included in a compact as that compact expressly provides.

In the same case, Idaho also wished the Shoshone-Bannock Tribes to obey a state statute requiring payments by tribes of 5% of their annual net gaming income to local educational programs and schools. Unlike the compacts of certain other tribes, the compact between Idaho and the Shoshone-Bannock Tribes contained no agreement to obey this state statute, although the compact repeated IGRA's prohibition on state taxation of the Shoshone-Bannock Tribes. This Court held that the Shoshone-Bannock Tribes had no compact obligation to make these payments under a state statute to which they did not agree in their compact:

> The Tribes' case is even stronger with regard to the payments to educational programs and schools. As with the limitation on number of machines, there is no justification for reading a school payment requirement into the plain meaning of "additional games." But in addition, section 19 of

> the Compact prohibits Idaho from imposing its desired school payments on the Tribes' gaming operation.
>
> It is true that the prohibition on taxation in section 19.b echoes a similar prohibition in the IGRA. See 25 U.S.C. §2710(d)(4).
>
> *Id.,* Slip Op., p. 17557

> The compact negotiated between the Tribes and Idaho retained the prohibition against taxes or payments . . . and the Tribes did not bargain away their immunity from such taxes or payments in the Compact. The fact that other tribes have accepted a package of benefits and burdens when they voluntarily amended their compacts does not change the terms of the Compact between the Tribes and Idaho. That Compact prohibits the imposition of the payments that Idaho would now require.
>
> *Id.,* Slip Op., p. 17558

> If Idaho wanted to condition section 24.d amendments on renegotiating the Compact, it should have bargained for that term, as it appears to have done with regard to section 11.
>
> *Id.,* Slip Op., p. 17555

Therefore, IGRA preempts the California sales tax in this case. IGRA prohibits state taxation relating to tribal on-reservation gaming activities, either under any prior authority or under the terms of the compact, unless tribe expressly consents to such state taxation in the compact. California did negotiate the Tribe's payment of two other major revenue streams to California in the compact, the Tribe's payments into the Revenue Sharing Trust Fund (Compact §§4.3.2.1.-4.3.2.2., ER 7-9), and into the Special

Distribution Fund (Compact, §§5.1-5.3, ER 9-11). California could have negotiated, and presumably obtained, an agreement to pay this sales tax in its compact with California. But California did not even ask, and the compact is silent on this subject. Therefore, as in this Court's opinions in *Sycuan*, both *Cabazon* opinions, and *Shoshone-Bannock*, IGRA preempts the California sales tax in this case.

C. The Board's objections are unavailing.

Against the above claim of preemption by IGRA, the Board argued in the District Court that "California and the Tribe had no reason to include a provision regarding sales tax in the compact [because] IGRA prohibited a state from demanding any taxes directly from a tribe . . ."[59] The Board also argued that, because "The California Sales Tax at issue in this case does not involve matters 'directly related' to gaming[[60]] and therefore is outside the scope of Indian gaming and not preempted by IGRA."[61] To these claims, the Tribe responds as follows.

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[59] ER 576:16-18

[60] The Board refers to "gaming." But 25 U.S.C. §2710(d)(3)(C)(vii) refers to "gaming activities," a term that this Court has construed broadly. *In re Indian Gaming Related Cases,* 331 F.3d 1091, 1110-1116 (9th Cir., 2003)

[61] ER 574:8-10

1. The Board's position is inconsistent with California's compact.

California negotiated for the Tribe to pay two taxes to California in its compact with the Tribe, the Tribe's payments of millions annually into the Revenue Sharing Trust Fund and the Special Distribution Fund. The former payment is measured by the number of licenses to operate new gaming devices allowed by the compact, the latter as a percentage of the Tribe's net win. Each is a tax in that it is a payment, not for services or goods, but for expenditure by the California Legislature as it sees fit.

The Board protests that California could not have sought payment of state sales tax in this case because IGRA does not permit state taxation. Yet California has already obtained payment of the above two taxes in the very same compact in which it claims that its sales tax would be prohibited. If IGRA permits two state taxes in a compact, it permits three.

The reason why any of these state taxes is permitted is because this Court has interpreted IGRA to permit such state taxes, not as free-standing revenue producers, but in return for some other concession by California of comparable value to tribes:

> Where, as here, however, a State offers meaningful concessions in return for fee demands, it does not exercise "authority to impose" anything [under 25 U.S.C. §2710(d)(4)]. Instead, it exercises its authority to negotiate, which IGRA clearly permits. [citation to Senate Committee report

> omitted] Depending on both the nature of the fees demanded and the concessions offered in return, such demands might, of course, amount to an attempt to "impose" a fee, and therefore amount to bad faith on the part of a State. If, however, offered concessions by a State are real, §2710(d)(4) does not categorically prohibit fee demands.
>
> *In re Indian Gaming Related Cases*, 331 F.3d 1094, 1112 (9th Cir., 2003)

Therefore, the Board is wrong in claiming that IGRA prohibited it from asking for a third income stream, state sales tax on gaming construction materials, in its compact. It could have, in return for a concession of equal value. This is exactly what California did regarding the above two income streams, for which the Tribe received a degree of exclusivity and a broadened scope of gaming. *Id.*, 331 F.3d at 1112.

2. The sales tax was a proper subject for inclusion in the compact.

IGRA lists the subjects that may be covered in a compact. 25 U.S.C. §2710(d)(3)(C)(i)-(vii), set forth in full at Part II.C.2., p. 38, above. One such subject is item (vii): "any other subjects that are directly related to the operation of gaming activities." This Court construed this language broadly in upholding the propriety of California's demands to tax tribes to support the Revenue Sharing Trust Fund and the Special Distribution Fund, as well as to adopt a specified labor relations ordinance. This Court's rationale concerning the labor ordinance is directly relevant:

> We hold that this provision is "directly related to the operation of gaming activities" and thus permissible pursuant to 25 U.S.C. §2710(d)(3)(C)(vii). Without the "operation of gaming activities," the jobs this provision covers would not exist; nor, conversely, could Indian gaming activities operate without someone performing these jobs.
>
> *Id.*, 331 F.3d at 1116

The same rationale applies here. This Court held that the labor relations ordinance was "directly related to the operation of gaming activities" because without labor there would be no gaming activities. Similarly, without a suitable building, there would be no gaming activities.

Therefore, in return for a concession of comparable value, California could have negotiated in the compact for the Tribe to pay California sales tax on the construction materials. Construction of a casino is as "directly related to the operation of gaming activities" as are labor relations to those employed in that casino.

Therefore, IGRA preempts the California sales tax at issue. California could have included payment of this tax in its compact, as it did with two other taxes, all of which are permissible as "directly related to the operation of gaming activities." California's failure to have negotiated this third tax into the compact precludes it now, as in *Shoshone-Bannock.*

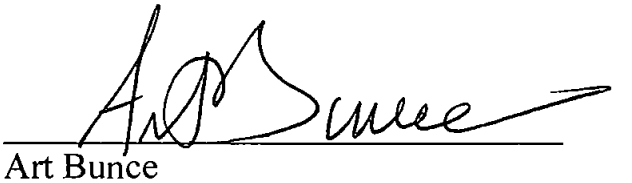
CONCLUSION

As this Court held the last time this Tribe was before it resisting California's overreaching, "this case begins and ends with the . . . Tribal-State compacts." *Cabazon II,* 124 F.3d at 1053. Under both general federal preemption, and especially under IGRA and the Tribe's compact with California, federal law preempts California's attempt to impose its sales tax on the Tribe's on-reservation purchases of materials for the construction of its gaming Project. The Tribe's use of non-Indian contractors does not defeat its immunity from the taxation for which California could have negotiated, but did not even request, in the same compact in which California obtained the Tribe's payment of two other state taxes.

For the reasons set forth above, the Tribe urges the Court to affirm the judgment of the District Court.

Dated: December 3, 2006

Respectfully submitted,



Art Bunce
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STATEMENT OF RELATED CASES

To the best of the knowledge of the undersigned counsel for the Barona Band of Mission Indians, there are no related cases pending before the Court, within the meaning of Circuit Rule 28-2.6.

Dated: December 3, 2006

Art Bunce
Attorney for Appellees

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of F.R.App.P. 32(a)(7)(B)(i) in that it contains 13,995 words, excluding parts of the brief exempted by F.R.App.P. 32(a)(7)(B)(iii).

I further certify that this brief complies with the typeface requirements of F.R.App.P. 32(a)(5) in that this brief has been prepared in a proportionally-spaced typeface using Word 2000 in 14 point Times New Roman type.

Dated: December 6, 2006

Art Bunce
Attorney for Appellees

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
COUNTY OF SAN DIEGO)

I am a citizen of the United States and a resident of the county aforesaid; I am over the age of eighteen (18) years and not a party to the within action; my business/residence address is:

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101 State Place, Suite C
Escondido, CA 92025

on the 4th day of December, 2006, 19___, I served the within Brief of the Appellees, the Barona Band of Mission Indians, et al., (U.S. Court of Appeals for the Ninth Circuit, No. 06-55918)

on the counsel for appellants in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office Box at Escondido, California addressed as follows:

Bill Lockyer, Attorney General
W. Dean Freeman, Sead Supervising Deputy Attorney General
Domini Pham, Deputy Attorney General
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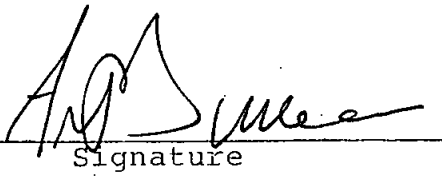
San Diego, CA 92101

I declare under penalty of perjury that the foregoing is true and correct.

Dated: December 4, 2006, ___.



Signature

Art Bunce