06-55918

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BARONA BAND OF MISSION INDIANS, also known as BARONA GROUP OF CAPITAN GRANDE BAND OF MISSION INDIANS; AND BARONA TRIBAL GAMING AUTHORITY,

Respondents,

v.

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

Appellants.

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

APPELLANTS' OPENING BRIEF

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Appellants.

INTRODUCTION

Appellants BETTY T. YEE, BILL LEONARD, CLAUDE PARRISH, JOHN CHIANG, and STEVE WESTLY are members of the California State Board of Equalization. Each was sued in his or her official capacity. Collectively they will be referred to as the "Board." The Board has filed an appeal from the order granting the BARONA BAND OF MISSION INDIANS, also known as

BARONA GROUP OF CAPITAN GRANDE BAND OF MISSION INDIANS; AND BARONA TRIBAL GAMING AUTHORITY'S, (hereinafter referred to as the "Tribe") motion for summary judgment and denying the Board's cross-motion for summary judgment. The District Court erred in granting the Tribe's motion.

STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction to entertain the suit by filed by the Tribe against the Board under 28 U.S.C. §§ 1331 and 1362.

The district court entered its order granting the Tribe's motion for summary judgment (and denying the Board's cross motion for summary judgment) on May 22, 2006. This judgment for the Tribe was final and this Court has appellate jurisdiction under 28 U.S.C. §§ 1291 and 1292. The Board timely filed its notice of appeal on June 20, 2006, pursuant to the requirement of Federal Rule of Appellate Procedure, rule 4(a)(1).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the Board's imposition of sales tax on the sale of construction materials by non-Indian contractors hired by the Tribe to expand its casino resort complex is considered to be a direct tax on the Tribe imposed for transactions occurring on a reservation, and is thus preempted under the "per se" or "categorical" rule set forth in California v. Cabazon Band of Mission Indians, 480

U.S. 202, 215 n.17, 107 S. Ct. 1083, 94 L. Ed. 2d 244 (1987), and Oklahoma Tax Commission v. Chickasaw Nation, 515 U.S. 450, 458-59, 115 S. Ct. 2214, 132 L. Ed. 2d 400 (1995).

2. Whether the Board's imposition of sales tax on the sale of construction materials by non-Indian vendors to non-Indian contractors hired by the Tribe to expand its casino resort complex is preempted under the interest-balancing test set forth in White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142-45, 100 S. Ct. 2578, 65 L. Ed. 2d 665 (1980), which weighs state, tribal and federal interests.

STATEMENT OF THE CASE

The Tribe, which operates a casino on its reservation, contracted with a non-Indian construction company to expand the its casino resort complex (the "Project"). The Board determined that one of the construction company's subcontractors, Helix Electrical, Inc. ("Helix"), had failed to pay sales tax on construction materials purchased for the Project from non-Indian vendors, claiming the purchase and sale was exempt from tax, and no sales tax was paid to the Board. The Board issued a notice of determination of taxes due to Helix, and the Tribe filed suit in district court for declaratory relief and to enjoin the collection to the tax. The Tribe claimed that the state law imposing the tax was preempted under federal law.

The Board filed a motion to dismiss, contesting the Tribe's standing to bring the action and arguing that the Tax Injunction Act barred the action. The district court denied the motion.

The Board and the Tribe then filed cross motions for summary judgment. The district court granted summary judgment in favor of the Tribe and denied the Board's motion for summary judgment.

This appeal ensued.

STATEMENT OF FACTS

The underlying facts are undisputed. ER 518-525: Joint Statement of Undisputed Material Facts. The Tribe is a federally recognized Indian Tribe whose reservation is in San Diego County, California. Since 1996, the Tribe has operated a tribal gaming enterprise, along with a hotel, golf course, and other related amenities, known as the Barona Valley Ranch Resort and Casino. In 2001, the Tribe planned a $75 million expansion of the Resort and Casino, which included enlarging the existing casino and hotel, and building an events center, wedding chapel, parking structure and other related improvements. ER 519: Undisputed Facts 3, 4, and 5. The Tribe entered into a general construction contract for the Project with Hensel Phelps Construction ("Hensel Phelps") for a lump sum amount. ER 519: Undisputed Fact No. 4. Helix then entered into an $8

million lump sum subcontract with Hensel Phelps to furnish and install the electrical portion of the Project. ER 520: Undisputed Fact No. 7. All of the various trade subcontractors selected by Hensel Phelps thereafter entered into subcontracts with Hensel Phelps that were incorporated into the General Contract. ER 520: Undisputed Fact Nos. 6-8.

Attachment "O" to the General Contract included provisions regarding sales and use tax. ER 520: Undisputed Fact No. 8. In an apparent effort to avoid tax on the use of all of the materials going into the Project, Attachment "O" attempted to make the general contractor and all of the subcontractors agents of the Tribe. ER 520: Undisputed Fact No. 10. Attachment "O" further provided that if the general contractor or any of the subcontractors were held liable for payment of sales or use tax in connection with their purchases of materials pursuant to the Project, they would be indemnified by the Tribe. ER 207-209: Exhibit 9 to Tribe's MSJ, Attachment "O", ER 520: Undisputed Fact No. 11.

Helix, as a Hensel Phelps subcontractor, purchased materials from various non-Indian, non-reservation vendors for the Project. Helix used Attachment "O" as a sales tax exemption certificate and purchased the construction materials without paying sales tax to the vendors.

Helix was selected for a routine audit and the Board examined Helix's records for the period April 1, 2001 to March 31, 2004. ER 521: Undisputed Fact No. 12; ER 495: Scheib decl. ¶ 2. The Board determined that the contract was a lump sum contract and that Helix (rather than the Tribe) was the purchaser; therefore, charges for the materials supplied for, and installed in, the Project were not exempt from sales tax. ER 496 and 497: Declaration of Board Supervising Tax Auditor II, Sue Scheib, ¶ 5, ¶ 10. Helix contacted Hensel Phelps, who in turn contacted the Tribe and demanded indemnification under the General Contract. ER 522: Undisputed Fact No. 15.

STANDARD OF REVIEW

The standard of review on an appeal from a grant of summary judgment is *de novo*. *See* Botosan v. Paul McNally Realty, 216 F.3d 827, 830 (9th Cir. 2000). The appellate court must determine whether the district court correctly applied the relevant substantive law. *See* Lopez v. Smith, 203 F.3d 1122, 1131 (9th Cir. 2000) (*en banc*).

SUMMARY OF ARGUMENT

The district court erred in granting summary judgment in favor of the Tribe.

The district court properly held that the legal incidence of the sales tax fell upon Helix, not on the Tribe, and that the sales tax was not a direct tax on the Tribe which would have resulted in preemption of the tax under the "per se" or "categorical" rule set forth in California v. Cabazon Band of Mission Indians, supra, 480 U.S. at 215 n.17, and Oklahoma Tax Commission v. Chickasaw Nation, supra, 515 U.S. at 458-59. (Since appellee Tribe likely will raise this issue, the Board will address it herein in its opening brief.)

The district court erred, however, when it held in favor of the Tribe that the tax was preempted under the interest-balancing test set forth in White Mountain Apache Tribe v. Bracker, supra, 448 U.S. at 142-45, which weighs state, tribal and federal interests. The court erred when it found (1) that the federal interests favored preemption because the tax conflicted with the Indian Gaming Regulatory Act, and (2) that the tribal interests favored preemption because the tax placed a *general* economic burden on the Tribe. The court also erred when it concluded that the state had no compensatory or regulatory interests that justified the tax.

The court was wrong: the interest-balancing test does not favor preemption because (1) the tax did not conflict with the Indian Gaming Regulatory Act, (2) the *general* economic burden of the tax was not an important tribal

interest under the interest-balancing test, and (3) the tax imposed by the state did have both compensatory and regulatory interests that justified the tax.

ARGUMENT

I.

THE SALES TAX AT ISSUE IN THIS CASE IS NOT PREEMPTED

This case involves the issue of whether the Board may impose sales tax upon the purchase and sale of materials by a non-Indian subcontractor (Helix), from non-Indian vendors, working on the expansion of an Indian Tribe's casino resort complex. The Board determined that because the contract was a lump sum contract, the retail sale was from the non-Indian vendor to Helix, the legal incidence of the tax in this particular case fell on the purchasing subcontractor, not on the Tribe, and that the tax was properly imposed. The Tribe sued for declaratory and injunctive relief, claiming that the tax was preempted.

A. Background – Historical Limitations On State Authority Over Indian Tribes

In understanding the present case, it is important to understand the evolution of the basic principles that limit state regulatory authority over Indians and Tribes. At one point long ago, the rule was that state laws had no force or effect within reservation boundaries. Worchester v. Georgia, 6 Pet. 515, 561

(1832). That view no longer controls. White Mountain Apache Tribe v. Bracker, supra, 448 U.S. at 141-42 ("Bracker"). However, there is no question that the United States Supreme Court has "recognized that the Indian tribes retain 'attributes of sovereignty over both their members and their territory.' *United States v. Mazurie*, 419 U.S. 544, 557 (1975)." Id. at 142. Accordingly, "there is no rigid rule by which to resolve the question whether a particular state law may be applied to an Indian reservation or to tribal members." Id. at 142.

In Bracker, the Supreme Court explained that state regulation of Indian tribes is limited in some situations by the tribes' own sovereignty:

> [T]he tribes have retained a semi-independent position . . . not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided.

Bracker, 448 U.S. at 142 (internal quotation marks omitted) (ellipses in original). In addition, the Court explained that state regulation is also limited by Congress' power to regulate the tribes, noting that "Congress has broad power to regulate tribal affairs under the Indian Commerce Clause, Art. 1, § 8, cl. 3." Id. at 142.

According to the Court in Bracker, these two factors "have given rise to two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members." Id. at 142. The first barrier is that a state's

attempt to regulate may improperly infringe on a tribe's right to "make their own laws and be ruled by them." Id. at 142. The second is that a state's attempt may be preempted by existing federal enactments. Id. at 142.

The fact that these factors are "independent but related" results in something of a sliding scale of preemption when used as a lens to view various factual situations. At one end of the scale are situations in which state regulation is almost invariably preempted (such as state attempts to regulate the transactions of Indians or tribes on the reservation), while at the other end of the scale are situations in which state regulation is almost never preempted (such as state attempts to regulate the transactions of non-Indians off of the reservation).[1/]

In fact, in the area of state taxation, the Supreme Court has adopted an essentially *per se* rule that state taxation of Indians or tribes for transactions on the

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1. The Court has cautioned that standard preemption analysis is generally unhelpful in cases dealing with Indian tribes:

> The unique historical origins of tribal sovereignty make it generally unhelpful to apply to federal enactments regulating Indian tribes those standards of pre-emption that have emerged in other areas of the law. Tribal reservations are not States, and the differences in the form and nature of their sovereignty make it treacherous to import to one notions of pre-emption that are properly applied to the other.

Bracker, 448 U.S. at 143.

reservation is barred absent a federal statute expressly authorization. In McClanahan v. Arizona State Tax Commission, 411 U.S. 164, 93 S. Ct. 1257, 36 L. Ed. 2d 129 (1973), the Court explained that:

> State laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply. It follows that Indians and Indian property on an Indian reservation are not subject to State taxation except by virtue of express authority conferred upon the State by act of Congress.

Id. at 170-71 (quoting U.S. Dept. of the Interior, Federal Indian Law 845 (1958)).

Similarly, in Oklahoma Tax Commission v. Chickasaw Nation, supra, 515 U.S. at 458, the Court explained that:

> [W]hen 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: 'Absent cession of jurisdiction or other federal statutes permitting it,' we have held, a State is without power to tax reservation lands and reservation Indians." . . . . Taking this categorical approach, we have held unenforceable a number of state taxes whose legal incidence rested on a tribe or on tribal members inside Indian country.

Id. at 458 (citations omitted). *See also* California v. Cabazon Band of Mission Indians, supra, 480 U.S. at 215 n.17.

It is equally clear, however, that there is no preemption at the other end of the spectrum. In New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 103 S. Ct. 2378, 76 L. Ed. 2d 611 (1983), ("Mescalero") the Court noted that:

> Our cases have recognized that tribal sovereignty contains a "significant geographical component." *Bracker, supra*, at 151. Thus the off-reservation activities of Indians are generally subject to the prescriptions of a "nondiscriminatory state law" in the absence of "express federal law to the contrary." *Mescalero Apache Tribe v. Jones, supra*, at 148-149.

Id. at 338, n.18.

As would be expected, though, those cases falling between the two ends of the spectrum are more difficult. "More difficult questions arise where, as here, a State asserts authority over the conduct of non-Indians engaging in activity on the reservation." Bracker, supra, 448 U.S. at 144. In those cases, the Supreme Court explained, "we have examined the language of the relevant federal treaties and statutes in terms of both the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence." Id. at 144-145. As the court further stated, this examination "is not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but has called for 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." Id. at 145.

This "particularized inquiry" that the Court engaged in in Bracker is a weighing (or interest-balancing) test that weighs and compares the state, federal

and tribal interests. The question is whether, balanced against the federal interests and the tribal interests, the state interests at stake are sufficient to justify the state's asserted authority.

> State jurisdiction is preempted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority.

Mescalero, supra, 462 U.S. at 334.

Finally, it is clear when looking at this spectrum of preemption that *who* bears the legal incidence of the tax (Indian or non-Indian), and *where* the taxable events take place (on- or off-reservation), play a critical role. In Wagnon v. Prairie Band Potawatomi Nation, 546 U.S. ___, 126 S. Ct. 676, 163 L. Ed. 2d 429 (2005), the Supreme Court recently explained that:

> [T]he "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," . . . , and that the States are categorically barred from placing the legal incidence of an excise tax "*on a tribe or on tribal members* for sales made *inside Indian country*" without congressional authorization, ... 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.

546 U.S. at ___, 126 S. Ct. at 681 (citations omitted) (italics in original).

In this case, it will be shown below that (1) the legal incidence of the tax falls on the non-Indian subcontractors, so that the per se test does not apply, and (2) that the Bracker factors favor imposition of the tax.

B. The Legal Incidence Of The Tax Was On The Non-Indian Sub-Contractors; Therefore The Per Se Test Does Not Apply

The Tribe claimed that the non-Indian sub-contractors were its agents under the terms of the contracts for the expansion of the casino resort complex, and that the legal incidence of the tax therefore fell on the Tribe. Since the taxable transactions occurred on the reservation,[2/] the Tribe claimed that the tax was preempted under the "per se" or "categorical" rule set forth in California v. Cabazon Band of Mission Indians, supra, 480 U.S. at 215 n.17, and Oklahoma Tax Commission v. Chickasaw Nation, supra, 515 U.S. at 458-59. *See also* McClanahan v. Arizona State Tax Commission, supra, 411 U.S. at 170-71 ("Indians and Indian property on an Indian reservation are not subject to State taxation except by virtue of express authority conferred upon the State by act of Congress").

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2. The district court found that for the purposes of summary judgment all Helix deliveries occurred on the reservation. ER 660-661: district court decision at. pp. 8-9.

In support of its agency theory, the Tribe relied on its contract with the general contractor, which was incorporated by reference into all of the subcontracts, and which contained a provision regarding taxes (Attachment "O") that attempted to designate the prime contractor, all subcontractors and all suppliers of "all tiers" as agents of the Tribe. ER 207-209: Exhibit 9 to the Tribe's MSJ. The Tribe asserted that under federal law, a tribe can make a non-Indian an agent of the tribe for tax immunity purposes. ER 16-18: Tribe's MSJ.

The parties agreed that federal courts must look to state law to determine who bears the legal incidence of California sales tax, and that under California law the purchaser bears the legal incidence. Diamond Nat'l Corp. v. State Bd. of Equalization, 425 U.S. 268 (1976); United States v. Cal. State Bd. of Equalization, 650 F.2d 1127,1132 (9th Cir. 1981), aff'd, 456 U.S. 901 (1982). The parties disagreed as to the identity of the purchaser.

The uncontroverted evidence showed that the contract between Helix and the Tribe was a lump sum contract. ER 658: district court decision at p. 6; ER 465: Squire depo. at 13; ER 520: Undisputed Facts Nos. 6, 7. Under California tax law, a lump sum construction contract makes the contractor the consumer of materials furnished and installed. ER 453-454: Cal. Code Regs. tit. 18,

§1521(b)(2)(A). Thus, the taxable event is the vendor's retail sale of the materials to the lump sum contractor for use in its performance on a real property work of improvement. ER 453-454: Cal. Code Regs. tit. 18, §1521(b)(2)(A).

In determining who bears the legal incidence, the court must engage in a "fair interpretation of the taxing statute as written and applied . . . ." Cal. State Bd. of Equalization v. Chemehuevi Indian Tribe, 474 U.S. 9, 11 (1985). In this case, the district court did precisely that and held that the legal incidence of the sales tax was on Helix, a non-Indian. ER 659: district court decision at p. 7. Under California's state tax statues and regulations, Helix (as the materials contractor in a lump sum construction contract) was the consumer-purchaser of the materials in the retail sale of the construction materials. As the district court correctly concluded, Helix was not the agent of the Tribe for the purpose of determining legal incidence, but rather was a non-Indian purchaser who bore the legal incidence of the tax. ER 659: district court decision at p.7. Therefore, the legal incidence of the tax was not on the Tribe and the per se test does not apply.

C. The State May Impose Sales Tax Under The Bracker Interest Balancing Test

In White Mountain Apache Tribe v. Bracker, supra, 448 U.S. 136, the United States Supreme Court explained that "[m]ore difficult questions arise where, as here, a State asserts authority over the conduct of non-Indians engaging

in activity on the reservation." Id. at 144. Like Bracker, the situation here involves the "extent of state authority over the activities of non-Indians engaged in commerce on an Indian reservation." Id. at 138. The test set forth in Bracker is a "particularized inquiry into the nature of the state, federal and tribal interests at stake." Id. at 145. Under the Bracker test, "if the balance of federal, state, and tribal interests favor the State, and federal law is not to the contrary, the State may impose its [tax]." Oklahoma Tax Commission v. Chickasaw Nation, supra, 515 U.S. at 459 (Chickasaw) (citing Washington v. Confederated Tribe of the Colville Reservation, 447 U.S. 134, 154-157, 100 S. Ct. 2069, 65 L. Ed. 2d 10 (1980)).

The district court incorrectly held that imposition of the tax in this case was preempted under Bracker's interest-balancing test. The district court held that:

> The federal and tribal interests set forth above favor preemption, and there are no weighty state compensatory or regulatory interests justifying the tax. Accordingly, the state sales tax is preempted under Bracker.

ER 664: district court decision at p.12.

The Board agrees that the Bracker test applies; however, the Board disagrees that the factors favor preemption. Here, "the balance of federal, state, and tribal interests favor the State" (Chickasaw, supra, at 459), and the tax should not be preempted. Therefore, the district court erred as a matter of law in concluding that the imposition of tax was preempted under the Bracker test.

1. The Federal Interests Here Do Not Favor Preemption

Federal interests can be indicated by the existence of a federal statutory scheme or regulation. Washington v. Confederated Tribe of the Colville Indian Reservation, supra, 447 US at 155 ("Colville"). A state tax is preempted if it interferes with or stands as an obstacle to the full accomplishment of the federal goal or purpose. Mescalero, supra, 462 US at 336. Indian gaming is regulated by the federal Indian Gaming Regulatory Act ("IGRA").

The district court found that the federal interests in this case favored preemption. The court noted that under Bracker, "[a]n important federal interest favoring preemption is the existence of federal regulation concerning the economic activity being taxed." ER 661: district court decision at p. 9. "Here," the district court noted, "the general area of economic activity that is affected by the State's proposed tax is Indian gaming, an area that is heavily regulated by federal law under IGRA." ER 661: district court decision at p. 9. However,

contrary to the conclusion of the district court, state sales tax on construction materials sold to non-Indian construction contractors is outside the scope of IGRA.[3/]

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3. The district court analogized the present case to Ramah Navajo School Bd., Inc. v. Bureau of Revenue of New Mexico, 458 U.S. 832 (1982) ("Ramah"), and stated that:

> 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 US. 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 662, district court order at p. 9, fn.3, lines 18-19. Yet the analogy is inaccurate.

The federal regulatory scheme at issue in Ramah was much more pervasive than the one in the present case. The Supreme Court detailed the extreme level of involvement of the federal government on every level of the school construction project at issue in the case, and concluded that it was pervasive. For example, the federal government provided the funds for the construction, and the federal government approved all contracts.

Here, however, the federal government's regulation of Indian gaming through IGRA does not rise to the level of involvement detailed in Ramah, especially in terms of the expansion of the casino complex itself. The tribal-state compact, authorized by IGRA, in fact, allows the Tribe complete independence from the federal government in building the casino and related amenities. ER 69-70: Tribal State Gaming Compact, pp. 12-13. In further contrast to Ramah, contracts to construct casinos are not regulated by IGRA and require no federal government approval. St. Regis, supra, 451 F.3d at 52. The funds for the Tribe's expansion project were provided by the Tribe itself, not by the federal government as in Ramah. Helix's activities as a California licensed contractor working on a

Congress passed the Indian Gaming Regulatory Act in 1988. 25 U.S.C. § 2710 et seq. IGRA's stated goal is to provide a statutory basis for the operation and regulation of gambling conducted by Indian tribes. 25 U.S.C. §2702(1)-(2). Under IGRA, all gambling activities on Indian reservations are subject to each tribes' own gaming laws, ordinances and commissions, but IGRA does not preempt laws unrelated to gaming. Confederated Tribes of Siletz Indians of Oregon v. State of Oregon, 143 F.3d 481, 482 (9th Cir. 1998). Construction contracts do not fall within the activities IGRA regulates. Cf. United States of America, ex rel. The Saint Regis Mohawk Tribe v. President R.C.- St. Regis Management Company, 451 F.3d 44, 47 (2d Cir. 2006) (IGRA did not confer federal court jurisdiction over contract to construct casino). IGRA thus does not preempt the application of sales tax on sales of construction materials to non-Indian contractors.

The district court concluded that the federal interest favors preemption because taxing the non-Indian subcontractors affected the general economic activity of the Tribe's gaming activities and fell within the activities IGRA

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construction project were regulated by state law, not federal law. California Business & Professions Code §§ 7000 et seq. In sum, the construction of the school building in Ramah was very different from the construction of the casino resort expansion project in this case.

regulates. In so holding, the district court relied on this Court's decision in Cabazon Band of Mission Indians v. Wilson, 37 F.3d 430 (9th Cir. 1994) ("Cabazon") for a proposition for which it does not stand. Plaintiffs Cabazon Band of Mission Indians and Sycuan Band of Mission Indians (the "Bands") had built on-reservation facilities at which patrons could bet on off-reservation horse races. The state was collecting a license fee from all horse race wagers placed in California, including those "off-track" wagers placed at the Bands' facilities. Id. at 432. This Court analyzed the competing federal, tribal and state interests under Bracker interest-balancing test, explaining with respect to federal interests that:

> The federal interests before us are clearly set forth in the language of IGRA itself. Intended to "promote tribal economic development, self-sufficiency, and strong tribal governments," IGRA seeks to "ensure thatthe Indian tribe is the *primary beneficiary* of the gaming operation." 25 U.S.C. §§ 2701(1) and (2) (emphasis added).

Id. at 433. Because the state had collected substantially more money in license fees from wagers placed at the Bands' facilities than the Bands themselves had received, this Court held that the purpose of IGRA was contravened. IGRA's specific language categorically states that its purpose is to "ensure that the Indian tribe is the *primary beneficiary* of the gaming operation" (emphasis added), yet here the state collected more money from off-track betting than the Bands had. Under these circumstances it is clear that the Bands could not be the primary

beneficiaries and that the tax contravened the purposes of IGRA. As this Court stated, "[i]n both cases, the State benefitted from the tribal gaming operation to a considerably greater extent than the Bands. Neither Band would be described as a 'primary beneficiary.' Such an outcome contravenes the purposes of IGRA." Id. at 433.

Unfortunately, the district court in this case completely ignored this Court's reliance on the "primary beneficiary" language of IGRA. The district court held that:

> The *Cabazon* court found that a conflict between a state tax statute and the 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. *Id.* at 433-4.

ER 662, district court order at p. 10, lines 2-6 (emphasis added). The district court held that the "[t]he same analysis favors preemption in this case." ER 662, district court order at p. 10, line 7. According to the court, if the tax is allowed, it would not only raise the cost of Helix's work, but the cost of other subcontractor's work as well, and could "potentially result in a substantial economic impact on the Tribe." ER 662, district court order at p. 10, lines 9-13. Citing this Court's decision in Cabazon, the district court concluded that:

> 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 662, district court order at p. 10, lines 13-16.

However, that is not what this Court held; contrary to the district court's conclusion, this Court's determination in *Cabazon* was not based on the fact that the Tribe's return from its gaming activities was *diminished,* or that the tax imposed an *economic burden* but rather because under the state's taxing system neither Band was a "primary beneficiary." Neither Band could be a "primary beneficiary of the gaming operation" if the state was deriving more revenue from the activity than it was. This is both a quantitative and a qualitative difference distinguishing *Cabazon* from this case. In this case, it is simply not correct that the sales tax prevents the Tribe from continuing to be the a "primary beneficiary of the gaming operation."

The district court erred in concluding that the simple fact that the sales tax would increase the Tribe's cost of construction directly conflicted with the federal goals of IGRA and was thus a factor in favor of preemption. ER 662, district court order at p. 10, lines 9-10.

In fact, there is no federal goal of maximizing the tribal treasury, and a state tax is not invalid simply because it increases the cost of construction or has an "adverse effect on the Tribe's finances." Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 187 (1989) ("Cotton Petroleum"). Moreover, although the district court speculated that raising the cost of construction could potentially discourage the Tribe from building the "optimal gaming facility," there was no evidence presented by the Tribe regarding the economic impact, if any, of the tax.

Simply put, the district court's conclusion that the federal interest favors preemption is incorrect.

2. The Tribal Interests Here Do Not Favor Preemption

The traditional tribal interests are self government and self sufficiency. Mescalero, supra, 462 U.S. at 335. In this case, the Tribe has identified no intrusion into tribal self-government or self-sufficiency. In weighing the Tribe's potential interest, however, the district court incorrectly considered the economic burden of the tax on the Tribe as a factor.

The district court explained that "[t]he Tribe also has an important interest in economic self-determination" and concluded that "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."[4] ER 662: district court decision at p. 10. However, this Court has "repeatedly held, as has the Supreme Court, that reduction of tribal revenues does not invalidate a state tax."[5] A state does not infringe the right of reservation Indians to "make their own laws and be ruled by them, . . . merely because the result of imposing its taxes will be to deprive the Tribes of revenues which they currently are receiving." Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463, 481-482, 96 S. Ct. 1634, 48 L. Ed. 2d 96 (1976) (internal quotation marks omitted). "Of course, the fact that the economic burden of the tax falls on the Tribe does not by itself mean that the tax is pre-empted, . . ." Bracker, supra, at p. 151, n.15. A state tax, however, is not invalid simply because it adversely affects the Tribe's finances. Cotton Petroleum, supra, 490 U.S. at 187.[6]

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4. It also must be recalled that because the Tribe here agreed to indemnify the contractor if the scheme to avoid taxes failed, the Tribe voluntarily assumed the economic burden. The fact that the Tribe contracted to bear the economic burden does not invalidate the state imposition of tax on Helix.

5. There was also no evidence presented that established that the tax could have a substantial negative economic impact on the tribe, a fact that the court seemed to acknowledge when it stated that "this could *potentially* result in a substantial economic impact on the Tribe." ER 662: district court decision at p. 10 (emphasis added).

6. In a similar vein, *see* Colville, 447 U.S. at 157-58; Squaxin Island Tribe v. Washington, 781 F.2d 715, 720 (9th Cir. 1986); Crow Tribe v. State of Mont., 650 F.2d 1104, 1116 (9th Cir. 1981); White Mountain Apache Tribe v. Arizona,

In addition, the recent Supreme Court case of Wagnon v. Prairie Band Potawatomi Nation, supra, 546 U.S. ___, 126 S. Ct. 676, reinforced the notion that the proper focus is really on the legal incidence, rather than the economic burden. In Wagnon, Kansas imposed a tax on the receipt of motor fuel by fuel distributors within Kansas. 126 S. Ct. at 680. Kansas imposed the tax on non-Indian fuel distributors located off the reservation, but who delivered the fuel to a gas station owned and operated by an Indian tribe for their casino patrons. The Supreme Court found that the Kansas statute put the legal incidence clearly on the non-Indian distributor. 126 S. Ct. at 682. The Supreme Court was not swayed by the tribe's argument that the tax was passed on to the tribe, who then bore the economic burden of the tax. 126 S. Ct. at 688. In this case, to the extent that the taxpayer bears the cost of the tax, the burden falls equally on all construction contractors purchasing materials for lump sum contracts in California, regardless if on a reservation.

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649 F.2d 1274, 1282 (9th Cir. 1981) ; and Fort Mojave Tribe v. County of San Bernardino, 543 F.2d 1253, 1258 (9th Cir. 1976), *cert. denied*, 430 U.S. 983, 97 S. Ct. 1678, 52 L. Ed. 2d 377 (1977).

3. The State Interests Here Do Not Favor Preemption

The district court held that the state's interest is minimal because neither type of potential state interest, compensatory or regulatory, exists here. ER 663, district court order at p. 11, lines 1-3. The court noted that in order to have a valid state interest there must be "a nexus between the state services provided and the economic activity to be taxed. *Cabazon* 37 F.3d at 435." ER 663, district court order at p. 11, lines 6-7. The court found that there was no nexus between the tax and the services provided.[7] However, the court's position is based upon the incorrect assumption that the tax is on an Indian. The nexus must be "between the State and the burdened merchant" and be "sufficient to satisfy principles of due process." Colville, supra, 447 US at 182 (citation omitted).

Here, the tax is on sales of construction materials produced off reservation by a non-Indian supplier to a non-Indian construction contractor for that contractor's own use. The non-Indian supplier and contractor are California businesses receiving state services off the reservation. The state's "interest in

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7. To the extent that the court is saying that there is no nexus between the sales tax and Indian gaming, that is not necessarily correct. California and the Tribe did enter into a state-tribal contract as required by IGRA in order for the Tribe to conduct Class III gaming. The compact provides for two revenue funds, but there was no evidence presented by the Tribe that they entirely compensate the state for the cost of gaming.

raising revenue is . . . strongest when the tax is directly at off-reservation value and the taxpayer is the recipient of state services." Mescalero, supra, at 336, quoting Colville at 157). Furthermore, there is "no constitutional requirement that the benefits received from a taxing authority by an ordinary commercial taxpayer -- or by those living in the community where the taxpayer is located -- must equal the amount of its tax obligations." Cotton Petroleum, supra, at 190. The sales tax is otherwise constitutional and nondiscriminatorily applied to all citizens and therefore was validly imposed on Helix's purchase of construction materials.

The court also held that "California does not have a specific, legitimate regulatory interest that justifies the sales tax," noting that "[i]n general, California has limited authority over Indian gaming." (ER 664, district court order at p. 12, lines 1-3.) Again, however, the court's holding is based upon the incorrect assumption that the tax is on an Indian. Not only does the tax pay for the governmental infrastructure as explained above, but part of that revenue also goes to support a comprehensive system regulating construction contractors that protects both Indians and non-Indians alike. Cal. Bus. & Prof. Code §§ 7000 et seq.; Gila River Indian Community v. Waddell, 91 F.3d 1232, 1239 (9th Cir. 1996).

Moreover, California has a legitimate governmental interest in raising revenues. Colville, supra, 447 U.S. at 156. "The State also has a legitimate governmental interest in raising revenues, and that interest is likewise strongest when the tax is directed at off-reservation value and when the taxpayer is the recipient of state services." Id. at 157; Mescalero, supra, 462 U.S. at 336.

The facts of this case are very similar to those in Salt River Pima-Maricopa Indian Community v. State of Arizona, 50 F.3d 734 (9th Cir. 1995) ("Salt River"). The Court held in Salt River that Arizona could collect taxes on sales transactions that took place on Indian land between non-Indians. Id. at 739. In fact, as in this, in Salt River: (1) the tax was divided among the local and state government (Id. at 735); (2) the goods sold were non-Indian and had no reservation added value (Id. at 737); (3) the legal incidence the tax fell on non-Indians (Id. at 737); and (4) the state and its agents provide the majority of the governmental services used by the taxpayers (Id. at 737). Under these circumstances, as in Salt River, "the State's interest is at its strongest, not its weakest." (Id. at 737.) As this Court stated:

> Applying these principles to the facts here, it is clear that the balance tips in favor of Arizona's taxation. Most importantly, the goods and services sold are non-Indian, and the legal incidence of Arizona's taxes falls on non-Indians. *See* Colville, 447 U.S. at 151 (citing *Moe,* 425 U.S. at 482). Furthermore, Arizona and its agents provide the majority of the

> governmental services used by these taxpayers. Consequently, the State's interest is at its strongest, not its weakest. 447 U.S. at 157.

(Id. at 737.)

California is not divested of its taxing jurisdiction merely "because its taxes have 'some connection' to commerce with the Tribe." Cotton Petroleum, supra, 490 U.S. at 191. There was no evidence presented that the one time imposition of sales tax to the purchase of construction materials by Helix in any way affects the ability of the Tribe to attract visitors to its casino resort. Such taxes spread evenly the burden of the cost of governmental activities available to all citizens, Indian and non-Indian alike. (Id. at 190.) Thus, the primary state interest in raising revenue to support the operation of the state government is a sufficient state interest.

Finally, the Tribe argued that the sales tax was invalid because it was not included in the terms of the compact. ER 552: Tribe's opposition to MSJ at p. 22. However, it is not necessary that the compact include reference to the sales tax. For example, the state-tribal compact does not address cigarette taxes, but California validly imposes the tax on the non-Indian purchasers of cigarettes purchased on the reservation. Chemehuevi Indian Tribe v. California State Bd. of Equalization, 800 F.2d 1446, 1448 (9th Cir. 1986).

4. Application Of The Bracker Factors In This Case Results In The Conclusion That California's Sales Tax Is Not Preempted

Applying the Bracker principles to the facts in this case shows that the balance is clearly in favor of the imposition of California's sales tax. There is no significant federal interest because state sales tax on construction materials sold to non-Indian construction contractors is outside the scope of IGRA. There is no significant tribal interest impaired merely because a state tax may adversely affect the Tribe's finances. Finally, the state does have a significant interest: the materials purchased for the Project are non-Indian, the legal incidence of the tax falls on non-Indians, and the state provides the majority of the governmental services used by these non-Indian taxpayers.

CONCLUSION

The district court was correct that the legal incidence of the sales tax fell upon Helix, not on the Tribe. Under this circumstance, the sales tax was not a direct tax on the tribe which would have resulted in preemption of the tax under the "per se" or "categorical" rule set forth in California v. Cabazon Band of Mission Indians, supra, 480 U.S. at 215 n.17, and Oklahoma Tax Commission v. Chickasaw Nation, supra, 515 U.S. at 458-59.

The district court erred, however, when it preempted the sales tax under the interest-balancing test of White Mountain Apache Tribe v. Bracker, supra, 448 U.S. at 142-45, which weighs state, tribal and federal interests. Because application of the Bracker factors clearly favors the imposition of California's sales tax, this Court should reverse the district court's order granting summary judgment to the Tribe, with instructions to enter an order granting summary judgment to the Board.

Dated: October 17, 2006

Respectfully submitted,

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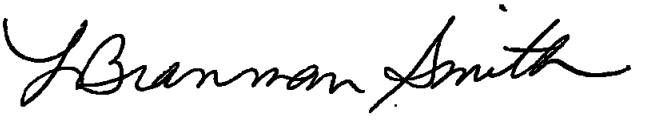

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06-55918

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BARONA BAND OF MISSION INDIANS, also known as BARONA GROUP OF CAPITAN GRANDE BAND OF MISSION INDIANS; AND BARONA TRIBAL GAMING AUTHORITY,

Respondents,

v.

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

Appellants.

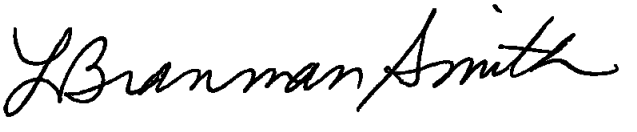
STATEMENT OF RELATED CASES

To the best of our knowledge, there are no related cases.

Dated: October 17, 2006

Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California



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CERTIFICATE OF COMPLIANCE WITH
RULE 32(a) For Case Number 06-55918

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **Barona v. Yee** No.: **06-55918**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On October 18, 2006, I served the attached **APPELLANTS OPENING BRIEF** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West "A" Street, Suite 1100, San Diego, California 92101, addressed as follows:

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Hon. Dana M. Sabraw
United States District Court
Southern District of California
940 Front Street
San Diego, CA 92101-8900

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on October 18, 2006, at San Diego, California.

J. YOST
Declarant

L. Yost
Signature