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' REPLY BRIEF

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INTRODUCTION

The Barona Band of Mission Indians, also known as Barona Group of Capitan Grande Band of Mission Indians; and Barona Tribal Gaming Authority (the "Tribe") attempts to make a constitutional mountain out of a tax molehill. The Tribe characterizes this case as one in which the State of California is attempting to turn back time and assert control over the Tribe on its sovereign land. The Tribe claims that the State imposition of the sales tax was constitutionally invalid as a direct tax on the Tribe itself. Despite the lack of

federal common law to support their position, the Tribe continues to assert that all non-Indian contractors working on the Casino project were the Tribe's agents. The Tribe argues that the Indian Gaming Regulatory Act ("IGRA") completely preempts all state action on Indian land, regardless of whether the action is outside the scope of the federal regulatory scheme or not. The Tribe alternately argues that federal law preempts the state tax because the Tribe's interest in avoiding the economic burden they assumed voluntarily through contract outweighs the State's valid interests in raising revenue. Because the Tribe starts from the mistaken premise that the Tribe bears the legal incidence of the tax, it also is argues that the tax is invalid because there is no nexus between the tax and the tribal activity being taxed.

The Members of the State Board of Equalization (the "Board") disagree with the Tribe's characterization of the State's intentions and especially with the Tribe's assertion that the tax is on the Tribe at all. The Board has no intent to impair the sovereignty of the Tribe. Provisions of the California tax code already provide for an exemption for sales tax on sales made to Indians. The Board's imposition of sales tax resulted from a random audit of Helix Electric, Inc. ("Helix"), the non-Indian subcontractor. It is undisputed that the legal incidence of the tax in question is on the purchaser. It is also undisputed that Helix was the

purchaser, as the contractor operating under a lump-sum construction contract. The Tribe is only responsible through their voluntary decision to indemnify Helix for any sales tax incurred which establishes sufficient nexus between Helix and the State of California. The Board's position is that while the Bracker balancing test is the correct preemption analysis for this case, the district court erred in applying the test to the facts of the case and the evidence presented.

I.

THE "WHO" AND "WHERE" OF THIS CASE SHOW THE TAX WAS VALIDLY IMPOSED

The answers to the questions "who" bears the legal incidence and "where" the taxable event occurred determine if the tax at issue is validly imposed. Wagnon v. Prairie Band of Potawatomi Nation, 546 U.S. ___, 126 S.Ct. 676 at 681 (2005); quoting Oklahoma Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 458 (1995). Answering the "who" question set forth in Wagnon, the Tribe and the Board agree that under federal law, the legal incidence of the tax is on the purchaser. The Board has shown that the purchaser under California law is subcontractor Helix. The Tribe, however, attempts to circumvent the identity of the purchaser by arguing that the purchaser, Helix, a private, non-Indian corporation, acquired the Tribe's Indian status and tax immunity by being designated as a purchasing agent of the Tribe.

The Board and the Tribe agree that "where" the sales occurred was on the reservation. Because the legal incidence of the tax is on a non-Indian, but the taxable event took place on an Indian reservation, to determine if the tax is valid, the Court must apply the Bracker interest-balancing test. White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980). There is no per se preemption as argued by the Tribe. "But if the legal incidence of the tax rests on non-Indians, no categorical bar prevents enforcement of the tax; 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 levy . . ." Chickasaw, *supra*, at 459, citing Washington v. Confederated Tribes of Colville Reservation, 447 U.S. 134, 154-157 (1980). The Bracker balancing test is the correct preemption analysis in this case. "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." Wagnon, *supra*, 126 S.Ct. at 681, discussing White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980).

The Tribe's argument for categorical preemption is based on the incorrect premise that the prime contractor and subcontractors were agents of the Tribe, and as such, the tax was a direct tax on the Tribe. It is correct that, if the legal

incidence of the tax is on Indians, and the taxable event takes place on the Indian reservation, Indian tribes and individuals are generally exempt from state taxation. "When Congress does not instruct otherwise, a State's excise tax is unenforceable if its legal incidence falls on a Tribe or its members for sales made within Indian country." Chickasaw, *supra*, 515 U.S. at 453. See also, e.g., Montana v. Blackfeet Tribe, 471 U.S. 759, 764 (1985); Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 (1973). However, as the district court held, the Tribe is incorrect that federal common law governs the question of whether a non-Indian is an agent for purposes of determining "legal incidence." Excerpts of Record ("ER"). p. 659, District Court order, p. 7. The Tribe continues to argue that the Tribe's tax immunity can be shared with non-Indian subcontractors by purporting to make them agents of the Tribe.

II.

THE NON-INDIAN CONTRACTORS ARE NOT AGENTS OF THE TRIBE FOR STATE SALES TAX PURPOSES

The Tribe continues to take a portion of the Mescalero opinion out of context for support that the prime contractor, and Helix as its subcontractor, were agents for purposes of tax immunity. In Mescalero Apache Tribe v. Jones, the immunity of the tribal enterprise itself was being challenged, not the exercise of tax immunity by purported agents. 411 U.S. 145, 148 (1973). The state of New

Mexico asserted that the tribal enterprise that ran the ski resort was not entitled to share the tribe's tax immunity. Specifically, New Mexico's position was that "the Indian Reorganization Act did not render the Tribe's enterprise a federal instrumentality, constitutionally immune from state taxation" under the Indian Reorganization Act of 1934. Id. at 147. The U.S. Supreme Court examined the Indian Reorganization Act in general and section 465 of the Act specifically. After examining the Indian Reorganization Act's general provisions, the Supreme Court held that "[t]he Tribe's broad claim of tax immunity must therefore be rejected. But there remains to be considered that scope of the immunity specifically afforded by § 5 of the Indian Reorganization Act. 25 U.S.C. § 465." Id. at 154. After examining section 465, the Supreme Court ruled: "[w]e therefore hold that the exemption in § 465 does not encompass or bar the collection of New Mexico's nondiscriminatory gross receipts tax and that the **Tribe's ski resort is subject to that tax.**" Id. at 157-158 (emphasis added). Ignoring the Supreme Court's specific holding, the Tribe repeatedly cites to a fragment of footnote 13 of the Mescalero opinion for the proposition that "the particular form in which the Tribe chooses to conduct its business" doesn't control the issue of tax immunity. (E.R. p. 23, Tribe's Motion for Summary Judgment, p. 15, Tribe's Brief of the Appellees, p. 17). The Supreme Court's footnote 13, however, addresses the issue

of whether the tribal ski resort enterprise was incorporated as an Indian chartered corporation pursuant to the Indian Reorganization Act **or** under the Tribe's own constitution. The Supreme Court did not conclude that the method of incorporation, whether federal law or Indian law, of a wholly tribal owned and operated enterprise determined the tax immunity question.[1/] The corporate status or form of the Tribe's gaming authority, Barona Tribal Gaming Authority ("BGTA"), has never been challenged by the Board. In fact, the Board and the Tribe both cite Winnebago Tribe v. Kline for the proposition that a wholly owned subsidiary such as the BGTA is entitled to share the Tribe's tax immunity. 297 F.Supp. 2d 1291, 1300 (D. Kan. 2004). In sum, the point to which Winnebago Tribe speaks (whether the sale to a tribal enterprise is equivalent to a sale to a Tribe) is not disputed. The case does not stand for the proposition that purported purchasing agents are entitled to share tribal tax immunity.

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1. The full text of footnote n13: It is unclear from the record whether the Tribe has actually incorporated itself as an Indian chartered corporation pursuant to § 477. But see Charters, Constitutions and By-Laws of the Indian Tribes of North America, pt. III, pp. 13-15 (G. Fay ed. 1967). The Tribe's constitution, however, adopted under 25 U.S.C. § 476, gives its Tribal Council the powers that would ordinarily be held by such a corporation., Art. XI, and by both practice and regulations, the two entities have apparently merged in important respects. See 25 CFR § 91.2; Comment, n. 6, supra, at 973. 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. at 158., fn. 13.

The Tribe argues that because Indian tribes are entitled to act through agents in some situations, those agents are entitled to share the Tribe's tax immunity. The cases the Tribe relies upon for this argument, however, involve tribal members and officials and the scope of tribal immunity. The Board acknowledges it is a settled point of federal law that tribal officials acting within the scope of their official duties are entitled to sovereign immunity. Courts must determine if the contested action of the parties fell within the scope of their official duties. Indian Country, U.S.A., Inc. v. Oklahoma, 829 F.2d 967 (10th Cir. 1987) is cited by the Tribe in support of granting the non-Indian subcontractors in this case tax immunity. The issue in Indian Country was whether the state of Oklahoma had the authority to regulate bingo on the tribal lands of the Creek Nation. 829 F.2d at 970. The bingo enterprise at issue was managed by a non-tribal entity. Id. at 972. The management contract between the tribe and the non-tribal entity was approved by the tribe and the federal Bureau of Indian Affairs. Id. A large portion of the Tenth Circuit's opinion is dedicated to the discussion of the "Indian country" status of the land upon which the bingo operation was located. Id. at 973-976. The Court concluded that the land was Indian country and therefore proceeded to balance the federal, tribal and state interests involved in the state's attempt to regulate the bingo operation on the

reservation. Id. at 981. The Court concluded that the state's interest did not justify its imposition of state law on the tribal bingo operation. Id. The state of Oklahoma had also argued that the bingo operation was not a tribal enterprise and thus it and its non-tribal manager were not shielded from state regulation. The Court disagreed, finding that the bingo enterprise was owned, governed and operated by the tribe and was therefore a tribal enterprise and immune from state regulation. Id.

The Court took special note that the management contract was approved by the Bureau of Indian Affairs and held that the tribal enterprise's immunity from state regulation of bingo extended to the non-Indian management company. Id. The Court discussed the imposition of the state sales tax on the bingo enterprise separately and concluded that the state's interest in taxing was also outweighed under the circumstances of the case by the federal and tribal interests and by the nature of the activity sought to be taxed. Id. at 987. The nature of the activity was the operation of a bingo game, conducted wholly within tribal boundaries. Id. The Board is not seeking to regulate or tax the operation of a Tribal game within Tribal boundaries.

The case of Davis v. Littell, 398 F.2d 83 (9th Cir., 1968) can be distinguished on the basis that it deals with the unique, privileged relationship between an attorney and client, not a contractor and owner. As the Davis court stated, the fact that the tribe's attorney was employed by contract and didn't hold a tribal office in the normal sense did not control the disposition of the case. Davis, 398 F.2d at 85. "The question, then, is not how the position is filled or the security of its tenure but whether it encompasses public duties, official in character." Id. Under the tribe's code, the general counsel's duties were required in the administration of the tribe's public affairs and the Court determined that the contested action therefore fell within the scope of the attorney's official duties and was immune from suit. Id. The Court noted that the "rule of privilege is not grounded on the need of the individual officer, but on the public need for the performance of public duties untroubled by the fear that some jury might find performance to be maliciously inspired." Id. The rule of privilege necessary in the context of immunity from suit for tribes to be able to hire "capable legal officers" to perform public administrative duties for the tribe does not apply to the Tribe's ability to extend their tax immunity to construction contractors.

Sycuan, Barona, and Viejas Bands of Mission Indians v. Roache is also factually distinguishable. In that case, officers of the State of California executed

search warrants, raided reservation gaming centers and criminally prosecuted four individuals associated with tribal gaming centers. 798 F.Supp. 1498, 1501 (S.D. Cal. 1991), aff'd. 38 F.3d 402 (9th Cir. 1994). The Court held that the state did not have the authority to enforce its gaming laws under the IGRA because a tribal-state compact did not permit the defendants to enforce its slot machine laws on the reservations. Id. at 1504. The Court further held that the state lacked authority to execute the warrants and to criminally prosecute the four individuals. Id. The instant case does not involve criminal jurisdiction over tribal employees or tribal gaming. Helix is not being criminally prosecuted and the Board is not attempting to control, let alone stop, the Tribe's "gaming machine."

The Tribe is attempting to expand the bounds of tax immunity to non-Indians. "To permit such non-Indians to enjoy the immunity designed for Indians requires, we believe, a stronger Congressional signal than a statute which neither precludes nor authorizes the taxation in question." Fort Mojave Tribe v. County of San Bernardino, 543 F.2d 1253, 1257 (9th Cir. 1976) (non-Indian lessees of Indian land not entitled to share Indian immunity from state tax because there was no authority for extension of immunity in the Indian Reorganization Act or PL-280).

III.

THE LEGAL INCIDENCE OF TAX IS ON HELIX AS THE PURCHASER

The Tribe and the Board agree that under federal law, the legal incidence of California's sales tax is on the purchaser. Diamond National Corp. v. State Bd. of Equalization of Calif., 425 U.S. 268 (1976); U.S. v. Calif. Bd. of Equalization, 650 F.2d 1127 (1981). It is undisputed that both the prime contract between the Tribe and the general contractor and the general contractor's subcontract with Helix were lump-sum contracts. (E.R. pp. 519-520, Undisputed Fact No. 5 & No. 7). Under California Sales and Use Tax Law, a construction contractor furnishing and installing materials under a lump-sum contract is the purchaser of tangible personal property, and therefore the consumer of the materials. Sales tax applies to the vendor's retail sale of materials to the contractor, not to the installation of the materials on the property of the customer. Cal. Code Regs. Tit. 18 § 1521(b)(2)(A)1. Contractors who perform construction work under lump-sum contracts are consumers. They are not retailers and make no retail sale of the materials they furnish and install. Thus, in lump-sum construction contracts, no tax is charged to the contractor's customer, whether the customer is an Indian or non-Indian.

In addition to arguing that Helix was the agent of the Tribe, the Tribe argues that the legal incidence of the tax is actually on the Tribe because the Tribe is contractually obligated to indemnify Helix. The voluntary contractual obligation to indemnify may place an "economic incidence" on the Tribe, but that does not constitute legal incidence, which is the proper test. Yavapai-Prescott Indian Tribe v. Scott, 117 F.3d 1107, 1113 (9th Cir. 1997)(citing Oklahoma v. Chickasaw, 515 U.S. 450 (1995) as "dispositive in rejecting an economic approach to the incidence of taxation and insisting that legal incidence is the proper test."). The Wagnon court conclusively reaffirmed that the Bracker test remains the proper test for state regulation of non-Indians on reservations. Wagnon, *supra* at 681.

IV.

THE TAXATION AT ISSUE IS NOT "DIRECTLY RELATED" TO INDIAN GAMING AND IS OUTSIDE THE PREEMPTIVE SCOPE OF IGRA AND THE GAMING COMPACT

The Tribe is correct that IGRA completely preempts the field in the governance *of gaming activities on Indian lands*. However, as the Eighth Circuit noted in Gaming Corp. of America v. Dorsey & Whitney, "[t]he term 'complete preemption' is somewhat misleading because even when it applies, all claims are not necessarily covered." 88 F.3d 536, 543 (8th Cir. 1996). For IGRA to

preempt, the subject action must fall within the scope of the governance of gaming activities on Indian lands. The Dorsey case contains a helpful analysis of the scope of preemption. Id. at 548. The Eighth Circuit in Dorsey noted that "the key question is whether a particular claim will interfere with tribal governance of gaming" to determine if the claims at issue were preempted by IGRA. Id. at 549. It also noted that another district court had decided that the state law question it had faced was "resolvable without reference to IGRA and therefore outside the scope of any preemption." Id. at 544, fn.8. This tax issue is resolvable without reference to the IGRA because it does not involve the regulation of Indian gaming and is therefore outside the scope of any preemption.

The Tribe's position that the sales tax at issue is automatically preempted by IGRA is based on the assumption that the taxation of a non-Indian contractor on the Indian reservation falls within the intended scope of IGRA and Indian gaming. Preemption analysis is highly fact-specific. New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 334 (1983). The cases cited by the Tribe deal with matters "directly related" to the regulation of Indian gaming. The California sales tax at issue in this case does not involve matters "directly related" to gaming and therefore is outside the scope of Indian gaming and not preempted by IGRA. The purpose of IGRA is to "provide a statutory basis for the operation and regulation

of gaming by Indian tribes." Confederated Tribes of Siletz Indians of Oregon v. State of Oregon, 143 F.3d 481, 482 (9th Cir. 1998)(citation omitted). Under IGRA, gaming is divided into three classes. Id. IGRA also prescribes the process by which states negotiate gaming compacts with tribes. Id. At issue in Siletz was whether Oregon's public release of a state investigative report concerning the tribe's casino was enjoined by IGRA and the compact between Oregon and the tribe. Id. The tribe in the Siletz case argued that no state law can apply to Indian activities on Indian lands unless Congress has expressly made the law applicable. Id. at 484. "According to the Tribe's argument, IGRA provides for the application of state laws and regulations directly related to class III gaming, but not for the application of state laws unrelated to gaming, such as the Oregon Public Records Laws." Id.

The tribe in Siletz also argued that because the tribe's compact with Oregon did not contain a provision allowing the release of reports in the compact, Oregon's proposed application of its records laws was preempted by federal law. Id. This Court, however, did not agree:

> "We are not persuaded that a preemption analysis is necessary here. Rather, we look to the Compact itself. The Tribe correctly contends that the Compact, a direct result of federal authority granted through IGRA, serves as the basis for any analysis of federal preemption. Without either IGRA or the Compact, there would be simply no question of federal law at stake. Contrary to the Tribe's argument, however, the Report's

> discussion of Indian gaming does not make Oregon's control of that report ipso facto a regulation of the Tribe. Nor does the generation of the Report under an IGRA-sponsored Compact necessarily make control of that document a matter of federal law. In our view, the Compact itself controls. To the extent the Compact specifically permits or prohibits the release of the Report, the parties are bound by it. Where the Compact is silent, however, neither IGRA, the Indian Commerce Clause, nor any other federal law prevents Oregon from releasing the Report."143 F.3d at 484-485.

This Court determined that, while the compact addressed the application of Oregon's records laws, it did not specifically allow or prohibit the release of the contested report. Id. at 485. Therefore, this Court determined, through simple contract interpretation, that Oregon's release of the report did not violate the compact. Id. The Court continued to address the parties' preemption arguments.

The Oregon tribe also argued that since IGRA expressly preempted the field of gaming activities on Indian land, federal courts should not conduct a balancing test between federal, state and tribal interests. Id. at 486, fn7. This Court noted: "The Tribe's argument should be rejected, however, as the application of Oregon law here as no effect on the determination 'of which gaming activities are allowed.' " Id. at 486, citing Cabazon Band of Mission Indians v. Calif., 37 F.3d 430 (9th Cir. 1994).

A recent decision from the Second Circuit held that IGRA did not confer federal court jurisdiction over a contract to construct a casino. 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). In that case, the tribe was arguing that a construction contract to build the casino facility was void because it had not been approved by the National Indian Gaming Commission, which is formed under IGRA. The district court dismissed for lack of jurisdiction and Second Circuit Court of Appeals affirmed. Both courts held that because the construction contract was not required to be approved by the Commission, unlike management contracts, it was, therefore, outside the scope of IGRA and the claim was dismissed by the district court. The Second Circuit went farther, stating that because the contract was outside the scope of IGRA, the district had lacked federal question jurisdiction. "We decline to hold that regulation of Indian gaming contracts under IGRA creates federal question jurisdiction over any contract claim relating to Indian gaming." Id. at 51.

The Second Circuit was affirming the district court, which had held:

> "The only possible connection to a gaming operation mentioned in the Construction Contract is that a "casino facility" is being constructed. It contains nothing whatsoever related to operation of games, receipt of revenue, issuance of prizes, or payment of expenses. Plainly the Construction Contract does not fall within the definition of management contract/collateral agreement."

The district court concluded:

> "[t]he Construction Contract does not pertain to the management of a gaming operation. It therefore is not a management contract or collateral agreement that requires approval of the Commission under the IGRA. It necessarily follows that it is not void for failure to obtain approval."

United States ex rel. St. Regis Mohawk Tribe v. President R.C. - St. Regis Mgmt. Co., No. 2005 U.S. Dist. LEXIS 12456 at *12 (D.N.Y. June 13, 2005)

The Tribe tries to undermine the importance of this holding by arguing that IGRA preempts the tax, not the contract. (Tribe's Brief of the Appellees, p. 34). IGRA thus does not preempt the application of sales tax on sales of construction materials to non-Indian contractors. The application of the sales tax on the use of materials consumed by non-Indian contractors in this case has no effect on the determination of which gaming activities are allowed, and therefore, the matter is squarely outside the scope of the "complete preemption" of IGRA.

The Tribe alternately argues that the gaming compact it entered into with California preempts the application of sales tax because it was not expressly authorized by the compact's terms. As this Court in Siletz noted, the fact that the compact is silent as to a provision, it is not automatically prohibited by federal law. Once again, the determinative issue is whether the contested regulation is directly related to gaming such that it falls within the scope of the compact and IGRA.

V.

THE STATE OF CALIFORNIA WAS NOT COMPENSATED IN FULL FOR THE COSTS ASSOCIATED WITH INDIAN GAMING

The Tribe argues that the compact contains two major revenue streams from the Tribe to California, and states that the issue of sales tax was not negotiated with the Tribe. In the case In re Indian Gaming Related Cases; Coyote Valley Band of Pomo Indians v. California (Coyote), a tribe brought suit to force the state to negotiate a compact pursuant to IGRA. 147 F.Supp. 2d 1011, 1013 (N.D. Cal. 2001). At issue were two funds, the Revenue Sharing Trust Fund and the Special Distribution Fund, which California wanted to include in the proposed compact and are in fact contained in the Barona compact. The tribe in Coyote argued that the revenue provisions were not within the scope of allowable subject matter for gaming compacts and the state was therefore not negotiating in good faith as required by IGRA. Id. at 1016. The Court explained that the Revenue Sharing Trust Fund provisions "apply only to the operation of gaming devices beyond the maximum number of devices normally allowed." Id. at 1016. The Special Distribution Fund payments were calculated "as a percentage of the average gaming device net win." Id. The Court examined IGRA and determined that the Revenue Sharing Trust Fund provisions are "licensing provisions, and

thus are authorized" by IGRA and was not "a direct taxation of the tribe or tribal lands." Id. at 1018. The Special Distribution Fund's purpose is "covering the State's costs of overseeing gaming operations and programs addressing secondary effects of gaming operations, such as gambling addiction." Id. The Court concluded that both of the funds were directly related to the operation of gaming and therefore allowable subject matter for the proposed gaming compact pursuant to IGRA. Id. at 1018.

The Tribe argues that the Tribe's contributions to the two revenue streams completely compensate the State for any costs incurred from the Tribe's casino. However, the Tribe presented no evidence as to the actual dollar amount the Tribe has paid to the State of California nor any evidence as to the actual cost to the State of California resulting from Indian gaming. A May 2006 report prepared by the California Research Bureau at the request of California Attorney General Bill Lockyer gave an overview of gambling, including Indian gaming, in California since 1998, including its social and economic impacts.

> "Based on national estimates, the annual cost of adult pathological gamblers in California is an estimated $489 million, and the annual cost of adult problem gamblers is an estimated $509 million--nearly one billion dollars in total. These costs derive from a number of social and personal problems that correlate with problem gambling including crime, unpaid debts and bankruptcy, mental illness, substance abuse, unemployment and public assistance."

Gambling in the Golden State: 1998 Forward. By Charlene Wear Simmons, California Research Bureau, California State Library. CRB 06-004 (The Bureau, Sacramento, California) May 2006, p.5.[2/]

VI.

SALES TAX COULD NOT BE INCLUDED IN THE COMPACT PROVISIONS

When California negotiated the compact with the Barona Tribe, it could not include a provision regarding sales tax on construction materials because that would not be allowable subject matter for the gaming compact. "States cannot insist that compacts include provisions addressing subjects that are only indirectly related to the operation of gaming facilities." Coyote ,*supra*, at p. 1018. California and the Tribe had no reason to include a provision regarding sales tax in the compact: 1) IGRA prohibited a state from demanding any taxes directly from a tribe, and 2) California Sales and Use Tax law already contained exemptions from sales tax for Indians as required by federal law. See Cal. Code Regs. Tit. 18 § 1616. The Tribe recognized this exemption and attempted to confront it through Attachment "O" to the prime contract and subcontract.

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2. The Board respectfully requests the Court to take judicial notice of a study, found online at http://www.library.ca.gov/crb/06/04/06-004.pdf). Fed. Rules of Evid. Rule 201(b).

VII.

THE REQUIRED NEXUS FOR TAXATION PURPOSES IS BETWEEN HELIX AND CALIFORNIA, NOT BETWEEN THE TRIBE AND CALIFORNIA

The argument that there is no nexus between the state and the tribe is based on the incorrect assumption that the tax is on an Indian. As the district court correctly determined, and the Board has shown above, the legal incidence of the tax is on Helix, as the consumer in a lump sum construction contract. 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). Because the legal incidence of the tax was on Helix, the non-Indian subcontractor, the required nexus must be between Helix, and California. Helix, the non-Indian contractor, is a California business receiving state services off the reservation. The state's "interest in 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, *supra*, 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 Corp. v. New Mexico, 490 U.S. 163, 190 (1989).

The fact that the sales tax goes into the State of California's General Fund does not impact the nexus between Helix and the State because all of California's taxes are received into the General Fund before being distributed to the various state programs.[3/]

VIII.

THE BALANCING TEST CASES SUPPORT THE BOARD'S POSITION THAT STATE TAXES IMPOSED ON SALES BY NON-INDIANS TO NON-INDIANS ON AN INDIAN RESERVATION WERE NOT PREEMPTED BY FEDERAL LAW

Complete, per se preemption as argued by the Tribe (Tribe's Brief of the Appellees pp. 8-10) is not supported by the case law. Rather, the U.S. Supreme Court has applied the "particularized inquiry approach" to the Bracker balancing test when analyzing cases involving state taxation or regulation of non-Indian activity on Indian land. The Court has applied the balancing test in cases with very different factual situations, and the outcomes have been divided between those in favor of state action and those finding the state action was preempted. The cases in this line of authority have found the state action to be preempted:

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3. Cal. Rev. and Tax. Code §§ 7101, 7101.3, 7102 (West 2006). Money collected from sales tax is allocated to cities and counties as prescribed by statute, and the balance transferred to the General Fund. The General Fund is made up of all general taxes, defined as "any tax imposed for general governmental purposes." Cal. Const., Art. XIII C, § 1.

Bracker, *supra* (holding that the use fuel tax on non-Indian logger using reservation roads is preempted), Central Machinery Co. v. Arizona State Tax Commission, 448 U.S. 160, 165 (1980) (holding that the tax on sales of tractors by non-Indian who is not licensed to be an Indian trader is preempted), Ramah Navajo Board Inc. v. Bureau of Revenue of New Mexico, 458 U.S. 832 (1982) (holding that the gross receipts tax on non-Indian contractor building Indian school preempted).

Other cases have upheld state taxation: Cotton, *supra,* at 191 (Court upheld state taxation on non-Indian oil and gas extraction), County of Yakima v. Confederated Tribes and Bands of Yakima Nation, 502 U.S. 251, 270 (1992). (Court upheld state ad valorem tax on reservation land owned by tribes and Indians in fee), Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463, 483 (1992) (Court upheld sales tax on cigarette sales to non-Indian purchasers), Colville, *supra,* at 176 (Court also upheld state sales tax on cigarette sales to non-Indian purchasers, which was in addition to tribal tax), Calif. Bd. of Equalization v. Chemehuevi Indian Tribe, 474 U.S. 9, 12 (1985) (Court upheld state requirement that tribe collect cigarette sales tax from non-Indian purchasers). This appeal falls

squarely in the second line of balancing test cases, which hold that state taxes imposed on sales by non-Indians to non-Indians on an Indian reservation were not preempted by federal law.

The district court agreed with the Board that the Bracker balancing test was the proper foundation for analysis for this case. However, the court erred in concluding that the state's interests did not justify the imposition of the tax under the federal law. Because the construction of the Casino Project falls outside the intended scope of the IGRA, the tax at issue is not preempted by IGRA. The primary stated goal of IGRA is to ensure that Indian tribes are the beneficiaries of the revenue from the tribal gaming operations. In this case, however, the tax does not affect the amount of gaming revenue that the Barona Tribe will receive, it merely affects the overall cost of the Casino Project. A comparison of the IGRA to the federal statutes at issue in other Indian tax cases shows that the scope of IGRA is not so comprehensive that it preempts state law when the result is a mere increase in the given tribe's economic costs.

In applying the balancing test under Bracker, having properly concluded that the legal incidence of the tax was on the contractor and not on the Tribe, the court erred in considering the economic burden on the Tribe that resulted from the tax being imposed on the Helix's purchase of materials. In reaching its conclusion

regarding the balancing test, the court relied heavily on Ramah Navajo Board Inc. v. Bureau of Revenue of New Mexico, *supra*, which involved a state's attempt to tax non-Indian contractors constructing a school on a reservation. The dissent in Ramah strongly criticized the majority for not properly applying the Bracker test. (Ramah, *supra*, pp. 853-855.) The district court's reliance on Ramah is incorrect concerning the economic burden on the Tribe. The Ramah Court's decision to invalidate the state tax was based on the fact that the Tribe would bear the economic burden by the increased cost of building the school. The Supreme Court in both Bracker and Wagnon held that the proper test was to determine who bore the legal incidence of the tax, not who bore the economic burden of the tax. The economic burden approach was rejected by the Supreme Court in Chickasaw Nation 515 U.S. 450 (1995). The district court's reliance on Ramah as, therefore, wrong.

CONCLUSION

The Tribe's position that IGRA and the gaming compact both preempt the state tax on the non-Indian contractors stems from the assumption that the state tax is "directly related" to Indian gaming. Under the facts of this case, the sales tax at issue is not "directly related" to Indian gaming, and therefore not preempted by either IGRA or the compact.

The District Court agreed with the Board that under California law, because the contract was a lump sum contract, Helix was the purchaser of the materials. The Court further found that Helix was not the agent of the Tribe and therefore the legal incidence of the tax was on Helix as the purchaser, not on the Tribe. The Board's acknowledgment that the sales occurred on the reservation places this case squarely within the Bracker balancing test which requires the Court to balance the interests of the parties. The District Court erred in concluding that the economic burden to the Tribe, assumed voluntarily, controlled the outcome of the balancing test. The District Court further erred in concluding the State of California's interests were not sufficient to justify the imposition of the tax on a non-Indian.

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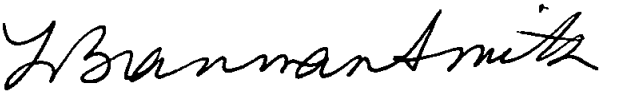
Dated: December 18, 2006

Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California



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DECLARATION OF SERVICE BY U.S. MAIL

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I declare:

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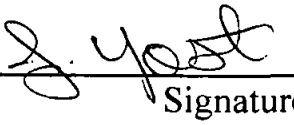
Hon. Dana M. Sabraw
United States District Court
Southern District of California
940 Front Street
San Diego, CA 92101-8900

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 December 18, 2006, at San Diego, California.

J. YOST
Declarant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