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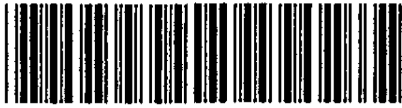

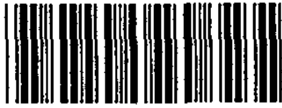

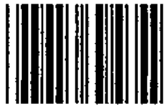

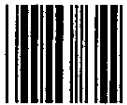

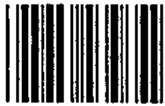

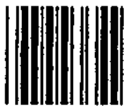

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

BARONA BAND OF MISSION INDIANS, et. al., Plaintiffs, vs. BETTY YEE, et. al., Defendants.	CASE NO. 05CV257 - DMS (POR) **ORDER: (1) GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT; (2) DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** [Doc. Nos. 18, 21]

Presently before the Court are cross-motions for summary judgment from Plaintiffs Barona Band of Mission Indians and the Barona Tribal Gaming Authority (collectively "the Tribe"), and Defendants Betty 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 (collectively "Defendants"). For the following reasons, the Court grants the Tribe's motion for summary judgment and denies Defendants' motion for summary judgment.

I.
FACTUAL AND PROCEDURAL BACKGROUND

A. Factual Background

This case involves a dispute over the State of California's attempt to impose a sales tax on the purchase of construction materials used to expand and renovate the Barona Valley Ranch Resort and

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Casino. (Compl. ¶¶ 2, 11.) In 2001, the Tribe hired general contractor Hensel Phelps Construction Company ("Hensel Phelps") to build a larger casino structure, hotel, and events center on the reservation. (*Id.* at ¶ 12.) To carry out the project, Hensel Phelps entered into a series of subcontracts with various plumbers, electricians, mill-workers, and others. (*Id.*)

At issue is the Tribe's attempt to avoid state sales taxes by designating Hensel Philips and its subcontractors as "purchasing agents" for the procurement of construction supplies for the project in question. Attachment "O" is part of the "prime contract" between the Tribe and Hensel Philips, and it sets forth the terms of the agency and the manner in which construction supplies would be purchased. It provides:

1. The Tribe designates Hensel Philips and its subcontractors as purchasing agents for the procurement of construction supplies.
2. Hensel Philips and its subcontractors shall negotiate on behalf of the Tribe to purchase construction supplies.
3. All procurement contracts are issued by the contractor or subcontractor as the Tribe's purchasing agent.
4. All contracts shall separately state the prices for materials, fixtures and installation.
5. All construction supplies shall be delivered to the Barona Indian Reservation.
6. No sale is complete until accepted by the Tribe on the Barona Indian reservation.

(Tribe Memo. ISO Motion at 11-12) (excerpting Attachment O).

Hensel Phelps hired Helix Electric, Inc. ("Helix") as its electrical subcontractor. (Compl. ¶ 12.) While working on the project, both Hensel Phelps and Helix purchased construction materials from vendors located off the reservation in accordance with Attachment O. (*Id.* at ¶ 13.) In the event the State pursued Hensel Phelps or any of its subcontractors for "sales and use tax . . . on the Construction Supplies," the Tribe agreed to defend and indemnify such contractors. (Compl. ¶ 15.)

B. Procedural Background

On December 16, 2004, after an audit of Helix's book and records, Defendants issued a formal Notice of Determination to Helix demanding that it pay sales tax on the purchase of materials for the construction project in the amount of $204,079.29, including interest, penalties and other adjustments,

1 by December 31, 2004. (*Id.* at ¶ 16.) Thereafter, Helix sought indemnification from Hensel Phelps,
2 which in turn sought indemnification from the Tribe, pursuant to the prime contract and relevant
3 subcontracts. (*Id.* at ¶ 17.)
4 On February 7, 2005, the Tribe filed a complaint against Defendants with this Court requesting
5 declaratory relief. Specifically, the Tribe seeks a judicial determination as to whether California sales
6 tax is due on the purchase of materials made in connection with the casino renovation project. On
7 March 20, 2006, the parties filed cross-motions for summary judgment. [Doc. Nos. 18 and 21.] On
8 April 14, 2006, Judge Irma Gonzalez transferred the case to this Court. [Doc. No. 28.] The motions
9 thereafter came on for hearing on May 3, 2006. For the reasons, set forth below the Court grants the
10 Tribe's motion for summary judgment.
11 II.
12 LEGAL STANDARD
13 Summary judgment is appropriate under Rule 56 of the Federal Rules of Civil Procedure on
14 "all or any part" of a claim where there is an absence of a genuine issue of material fact and the
15 moving party is entitled to judgment as a matter of law. *See* Fed.R.Civ.P. 56(a) & (c); *Celotex Corp.*
16 *v. Catrett*, 477 U.S. 317, 322 (1986). A fact is material when, under the governing substantive law,
17 it could affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986);
18 *Freeman v. Arpaio*, 125 F.3d 732, 735 (9th Cir. 1997). A dispute about a material fact is genuine if
19 "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*,
20 477 U.S. at 248.
21 A party seeking summary judgment bears the initial burden of establishing the absence of a
22 genuine issue of material fact. *Celotex*, 477 U.S. at 323. If the moving party fails to discharge this
23 initial burden, summary judgment must be denied and the court need not consider the nonmoving
24 party's evidence. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159-60 (1970). If the moving party
25 meets this initial burden, the nonmoving party cannot defeat summary judgment by merely
26 demonstrating "that there is some metaphysical doubt as to the material facts." *Matsushita Elec.*
27 *Indus. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Rather, the nonmoving party must
28 "go beyond the pleadings and by [his or] her own affidavits, or by 'the depositions, answers to

interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex*, 477 U.S. at 344 (quoting Fed.R.Civ.P. 56(e)).

When making its determination, the Court must view all inferences drawn from the underlying facts in the light most favorable to the party opposing the motion. *See Matsushita*, 475 U.S. at 587. "Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, [when] he is ruling on a motion for summary judgment. *Anderson*, 477 U.S. at 255.

III.

DISCUSSION

The Tribe asserts three arguments in support of summary judgment. First, it argues that under California law the legal incidence of the subject tax falls on the "buyer," and buyer is the Tribe. Therefore, in the Tribe's view, the sales tax is a direct tax on a tribe regarding transactions on a reservation, which "cannot be enforced absent clear congressional authority" (Tribe's Memo ISO Motion at 9) (citing *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450, 458-9 (1995). Second, the Tribe contends that even if the legal incidence of the tax falls on a non-tribe member, the Tribe still prevails because the sales of the materials in question took place on the reservation, and a weighing of state, tribal and federal interests under *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), favors invalidating the tax. Finally, the Tribe contends the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701 *et seq.*, preempts the sales tax. (Tribe Memo. ISO Motion at 18-24.)[1]

Defendants' motion for summary judgment is the mirror opposite of the Tribe's. Though they agree that the legal incidence of the sales tax falls on the buyer, Defendants contend the "buyer" is Helix (the electrical subcontractor which purchased the materials for use in the construction). (Def. Memo ISO Motion at 5-10.) Defendants dispute the Tribe's assertion that all sales transactions occurred on tribal land, but argue that even if all such sales occurred on the reservation, a weighing of state, tribal and national interests under *Bracker* supports upholding the tax. (Def. Opp. at 13-14.) Defendants also argue this Court lacks subject matter jurisdiction under the Tax Injunction Act.

[1] Because the Court finds for the Tribe under the *Bracker* "interest-balancing" test, it does not reach the Tribe's preemption argument under IGRA.

A. Jurisdiction

Defendants argue that "because Helix is not an agent of the Tribe, the Court should construe this action as one affecting collection by state sales tax authorities. Therefore, the Tax Injunction Act, 28 United States Code § 1341, divests this Court of jurisdiction over the Tribe's claims." (Def. Memo. ISO Motion at 19.) The Tribe, on the other hand, argues this Court has jurisdiction pursuant to 28 U.S.C. § 1331 (providing federal courts with jurisdiction over questions of federal law) and 28 U.S.C. § 1362 (civil actions brought by Indian tribes within the jurisdiction of federal courts).

The Tax Injunction Act precludes courts from enjoining "the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341. The Supreme Court, however, has held that the Act does not bar suits brought by Indian tribes under § 1362 to enjoin the application of a state tax. *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 474-75 (1976); *see also Gila River Indian Cmty. v. Waddell*, 967 F.2d 1401, 1407 (9th Cir. 1992).

In an earlier ruling in this case, this Court held that the Tribe alleged a sufficiently particularized injury to meet constitutional and prudential standing doctrines, thus the instant suit should be treated as one properly brought by an Indian Tribe. Subject matter jurisdiction therefore exists under § 1362 as the Tribe challenges the imposition of a state-imposed tax. *See Moe*, 425 U.S. at 463. In addition, the Act would not apply even if the Court were to conclude that Helix is not an agent of the Tribe, because the Tribe still could challenge the state sales tax under *Bracker* and under traditional preemption doctrine. Defendants' motion on this ground is therefore denied.

B. The Sales Tax is Not a Direct Tax on the Tribe

The Tribe argues the sales tax is a direct tax on a tribe relating to a transaction occurring in Indian country, therefore it is barred under *Chickasaw Nation*, 515 U.S. at 458. (Tribe Memo. ISO Motion at 9.) Defendants counter that the sales tax falls upon a non-Indian, Helix.

In *Wagnon v. Prairie Band Potawatomi Nation*, 126 S.Ct. 676 (2005), the Supreme Court set forth the principles governing an Indian tribe's challenge to a state tax based on its sovereign tax immunity:

> [U]nder our 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,' . . . *Chickasaw Nation*, 515 U.S. at 458 . . . 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, *id.*, at 459 . . . 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. (Citations omitted.)

126 S.Ct at 681-2.

Accordingly, to trigger the "categorical bar" of taxing a tribe for sales made in Indian country, the "legal incidence" of the sales tax must fall on the Tribe. To determine the legal incidence of a tax, a district court conducts "a fair interpretation of the taxing statute as written and applied." *California State Bd. of Equalization v. Chemehuevi Indian Tribe*, 474 U.S. 9, 11 (1985). The "'dispositive language' from the state legislature is determinative" of legal incidence. *Potawatomi Nation*, 126 S.Ct. at 682.

Here, Defendants have shown that a fair interpretation of the taxing statutes establishes that the legal incidence of the sales tax falls upon Helix. Under California statutes and regulations, a construction contractor is the "consumer" of materials furnished later to a client pursuant to a construction contract. *See, e.g.,* Cal. Code of Reg. 1521(b)(2)(A)1 ("Either sales tax or use tax applies with respect to the sale of the materials to or the use of the materials by the construction contractor.") In addition, the uncontroverted evidence indicates Helix is a contractor under a "lump-sum" contract with the Tribe. Deposition testimony from the Project Manager indicates:

> Q: Is it your understanding that your contract with the Barona tribe was a lump sum contract?
>
> A: Yes.
>
> Q: And the - - well, Helix Electric as a subcontractor was also a lump sum; correct?
>
> A: Correct.

(Squire Depo. at 13, Defendant's Ex. "F.")

Regulation 1521(A)(8) defines a lump-sum contract as "a contract under which the contractor for a stated lump sum agrees to furnish and install materials or fixtures, or both. A lump sum contract does not become a time and material contract when the amounts attributable to materials, fixtures and labor,

or tax are separately stated in the invoice." (Defendant's Ex. "E." at 2.) As indicated by the Regulation, a lump sum contract is a regular construction contract subject to the general rule set out in Regulation 1521(b)(2)(A)1 that contractors are consumers of the materials they furnish and install.

In sum, the parties agree that the legal incidence of the sales tax is on the buyer. California law provides that a contractor who buys materials and later uses those materials in the performance of a construction contract is the consumer of those materials. Helix and the Tribe had a lump-sum contract, in which Helix purchased materials and used such materials for the Tribe's casino. A lump-sum contract is a regular type of construction contract for which California has deemed the contractor to be the "buyer." This establishes that the legal incidence of the sales tax falls on Helix.

The Tribe argues that it is the buyer of the construction materials, and that Helix merely acted as the Tribe's purchasing agent pursuant to Attachment O. The Tribe apparently believes that federal common law governs the question of whether a non-Indian is an agent for purposes of determining "legal incidence." (Tribe Opp. at 6.) ("Whatever state law may say about agency, federal courts have recognized that tribes may act through agents.") The Court declines to follow the Tribe's suggestion that it look to federal common law for two reasons. First, none of the cases cited by the Tribe support the notion that federal common law determines the legal incidence of tax for Indian taxation. (See Tribe Memo. ISO Motion at 16-18.) 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." *Chemehuevi Indian Tribe*, 474 U.S. at 11. Given the directive to follow state law, this Court declines to adopt the Tribe's federal common law approach.

C. The Sales Tax is Preempted Under the *Bracker* Interest-Balancing Test

As noted previously, 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. at 681-2. The *Bracker* Court described the inquiry 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 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. This inquiry 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.

Bracker, 448 U.S. at 144-45. The Supreme Court further noted that "ambiguities in federal law have been construed generously in order to comport with . . . traditional notions of sovereignty and with the federal policy of encouraging tribal independence." *Id.* at 143.

1. The Helix Transactions Occurred on the Reservation

Bracker-balancing applies only to transactions occurring on the reservation. *Prairie Band Potawatomi Nation*, 126 S.Ct. at 687. Defendants dispute whether all the Helix transactions occurred on the reservation. First, Defendants question the validity of Attachment O. They argue the provision that declares title does not pass until delivery is made on the reservation is invalid, because Helix is in fact the "consumer" of the materials. (Def. Reply at 8.) However, the determination of who is the "buyer" for purposes of applying a tax statute should not interfere with the general provisions of a contract. The Court therefore declines to find that Attachment O does not apply.

Second, Defendants submit a small number of invoices that do not contain Attachment O, and assert that some deliveries of materials were made off-site. (*Id.*) The Tribe does not respond to Defendants' first assertion, but rebuts the second contention with declarations and documentary evidence showing that the vast majority of deliveries occurred on the reservation. (Tribe Reply at 7.) Based on the evidence presented and the concessions made by the parties, the Court finds that the Helix transactions occurred on the reservation.[2]

The Tribe has submitted a portion of its prime contract with Hensel Philips providing that all construction supplies shall be delivered to the reservation and that no sale is complete until accepted by the Tribe on the reservation. (Tribe Memo. ISO Motion at 11-12.)(excerpting Attachment O.)

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[2] At oral argument, the Court indicated a material question of fact might exist regarding whether all deliveries were made on the reservation. The parties, however, urged the Court to decide the motions as matter of law. They further stipulated that any appeal would involve only issues of law; *i.e.*, the parties would not argue the Court erred in granting summary judgment because material questions of fact (as to any theoretical factual dispute) precluded the Court from ruling as a matter of law.

Attachment O indicates that the Tribe's contracts direct all contractors and subcontractors, including Helix, to conduct their business in a manner such that all relevant transactions would occur on the reservation. The Tribe submits evidence that Attachment O was followed. *See* Third Decl. of Art Bunce ¶ 7 ("I know that virtually all such purchase orders included the Recitation, as did a large majority of the invoices.") Additionally, the Tribe has offered to produce "all relevant items" if necessary to establish the situs of the transactions. (Tribe Memo. ISO Motion at 13.) Against this evidence, Defendants have offered a few isolated invoices that do not include Attachment O or that fail to conform with its provisions. (Def. Ex. A, attached to Def. Opp.) These deviations are *de minimis* when considered against the large number of documents generated during the construction of the casino. 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 occurred on the reservation.

2. *On Balance, Tribal, State and Federal Interests Favor Preemption*

An important federal interest favoring preemption is the existence of federal regulation concerning the economic activity being taxed. *Bracker*, 448 U.S. 136 at 145; *Ramah Navajo School Board Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832, 838-9 (1982) ("Federal regulation of the construction and financing of Indian educational institutions is both comprehensive and pervasive.") Here, 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.[3]

In *Cabazon*, the Ninth Circuit discussed the federal interests represented by IGRA, noting that the "federal interests before us are clearly set forth in the language of IGRA itself. Intended to 'promot[e] tribal economic development, self-sufficiency, and strong tribal governments,' IGRA seeks

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[3] 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.

to 'ensure that the Indian tribe is the primary beneficiary of the gaming operation.' 25 U.S.C. §§ 2701(1) and (2)." 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. 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.

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.

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 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.

In contrast to these federal and tribal interests, California's interest is minimal. The Supreme Court has discussed two types of potential state interests, compensatory and regulatory. *Ramah Navajo*, 458 U.S. at 843-4. Neither interest exists here.

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 this tax" and the tax it seeks to assess. *Id.* 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 ("Furthermore, this court has required that the State demonstrate a close relationship between the tax imposed on the on-reservation activity and the state interest asserted to justify the tax . . . . Here, there is no narrow tailoring since California does not use the license fee revenues to fund services related to the regulation of offtrack betting. Rather, 100% of the license fee earned from Indian wagering goes into the State General Fund."); *accord Hoopa*, 881 F.2d at 661 ("Although California points to a variety of services that it provides to residents of the reservation and the surrounding area, none of those services is connected with the timber activities directly affected by the tax.")

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. (Def. Memo. ISO Motion at 6) 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.

Further, as agreed in its Compact with State of California, the Tribe already provides ample revenue to offset environmental, regulatory and non-routine costs caused by on-reservation gambling.[4] (Pl. Ex. 3, § § 5.1-2, 7.3, 10.3 and 10.82.) 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.

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[4] Defendants point out that California provides off-reservation services to Helix, *e.g.*, maintenance of roads that allow Helix to move materials around the state. Such services, however, are not a sufficient basis for the imposition of a tax where the "ultimate burden falls on the tribal organization." *Ramah Navajo*, 458 U.S. at 843-44.

Likewise, California does not have a "specific, legitimate regulatory" interest that justifies the sales tax. *Ramah Navajo*, 458 U.S. at 844. In general, California has limited authority over Indian gaming. *See, e.g., Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535 (9th Cir. 1995); *accord Gaming Corp. of America v. Dorsey & Whitney*, 88 F.3d 536, 549 (8th Cir. 1996). Moreover, the compact between the Tribe and California gives the Tribe exclusive authority to oversee the construction of gaming facilities. *See* Pl. Ex. 3., § 6.42 ("[A]ll 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 . . . .") Defendants therefore lack a regulatory interest in Indian gaming, as well as in the construction of the gaming facility in question.

Defendants also contend that California has a legitimate regulatory interest in taxation to discourage contractors from fraudulently delivering materials to reservations for later off-site distribution in order to escape state taxation. Whatever the merits of this argument, it cannot justify the tax here because – as the State admits – the Tribe could have avoided the subject tax simply by restructuring its contracts into a "properly drafted . . . time and material construction contract" (as opposed to a lump-sum contract). (Def. Memo. ISO Motion at 11.) Such a restructured contract, however, would be just as susceptible to fraud as the Tribe's current contract. The State's interest in regulating fraud, therefore, is not connected in any specific way to the lump-sum contract, gaming, or the construction of the gaming facility at issue.

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*.

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IV.

CONCLUSION

For these reasons, the Court **GRANTS** Plaintiffs' motion for summary judgment and **DENIES** Defendants' motion for summary judgment. The Clerk of the Court shall enter judgment accordingly. The Clerk is instructed to close the case.

IT IS SO ORDERED.

Dated: 5-19-06

DANA M. SABRAW
United States District Judge

CC: JUDGE PORTER
ALL PARTIES OF RECORD