UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

KEWEENAW BAY INDIAN COMMUNITY, a federally-recognized Indian tribe, on its own behalf and as *parens patriae* for its members,

Plaintiff,

v.

ROBERT J. KLEINE, Treasurer of the State of Michigan; JAY RISING, former Treasurer of the State of Michigan; MICHAEL REYNOLDS, Administrator of the Collection Division of the Michigan Department of Treasury; WALTER A. FRATZKE, Native American Affairs Specialist of the Michigan Department of Treasury; and TERRI LYNN LAND, Secretary of State of Michigan,

Defendants.

Hon. Gordon J. Quist

Civil Action No. 2:05-CV-0224

REPLY TO DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

INTRODUCTION

Under long-settled rules of federal law, the Community, its members, and their vendors enjoy absolute immunity from state sales and use taxes with respect to the purchase or use of tangible personal property and services by the Community and its members within the Reservation and Trust Lands. Despite its enormous length, Defendants' responsive brief fails to articulate any basis for ignoring the applicable Supreme Court precedents establishing this immunity.

Defendants expend their greatest effort in their response brief[1] attempting to justify the Department's so-called "procedures" requiring that the Community or Community member submit a written exemption claim to the Department prior to each and every one of their tax-immune transactions within the Reservation and Trust Lands. According to Defendants, a written exemption claim must be filed so that Defendant Fratzke can perform an "interest-balancing inquiry" on a case-by-case basis to determine whether the transaction qualifies for tax-free treatment. As demonstrated in the Community's opening brief and further below, *all* of the transactions at issue in the Community's motion are immune from Michigan's sales and use taxes under long-settled federal law and are not subject to the general interest-balancing test of White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980).[2] The Department's "procedures," therefore, are illegal and unnecessary.

Defendants' "procedures," moreover, prevent the Community and its members from enjoying the federal tax immunity to which they are entitled. The Community's Reservation encompasses 59,840 acres. Keweenaw Bay Indian Community v. Naftaly, 370 F. Supp.2d 620, 623 (W.D. Mich. 2005), aff'd, 452 F.3d 514 (6th Cir. 2006), cert. denied, 2006 WL 2783702 (U.S. Nov. 27, 2006). There are two villages located within the Reservation, the Villages of L'Anse and Baraga. There are approximately 3,339 enrolled members of the Community, 893 of

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1 Defendants' contention that the Community has no standing to bring its claims is without merit. The Community and its members bear the economic incidence of the sales tax and the legal incidence of the use tax in all of the situations that are at issue in this motion. The Supreme Court held long ago in Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation, 425 U.S. 463 (1976), that an Indian tribe has standing, based on its sovereign interests, to object to state taxes affecting Indians residing on the tribe's reservation. See also Ramah Navajo School Board, Inc. v. Bureau of Revenue of New Mexico, 458 U.S. 832 (1982); White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980) (upholding tribal challenges to state taxes imposed on non-Indians doing business with tribe).

2 Even if the general interest-balancing test applied – which it does not – the balancing must be applied by a federal court, not a self-interested state revenue department.

whom live on the Reservation and Trust Lands. Misegan Aff. (filed with the Community's opening brief) ¶ 2. Undoubtedly, the Community and its members purchase hundreds of items of personal property each day within the Reservation and Trust Lands, in routine transactions ranging from the purchase of small items such as toothpaste and other toiletries, to the purchase of furniture and appliances, to the purchase of motor vehicles. All of these hundreds of transactions are absolutely immune from state taxation. The Department's "procedures," quite clearly, have been designed to make it impossible for the Community and its members to enjoy their immunity from state taxation, to attempt to gain leverage for the Department in its effort to pressure the Community to enter into a tax agreement the provisions of which the Community deems to be inconsistent with federal law and tribal sovereignty. The Departments' "procedures" are not legitimate tax administration measures.

The Court should grant partial summary judgment in favor of the Community with respect to its claims in Counts IX and XIII.

STATEMENT OF UNDISPUTED FACTS

Defendants have not demonstrated any issues of material fact regarding the Community's motion. The Community described certain past transactions in its opening brief to illustrate the classes of transactions to which this motion is addressed: the purchase, lease, rental, or use of tangible personal property and services by the Community and its members within the Reservation and Trust Lands. Defendants' quibbling over minor details of these transactions has no bearing on the availability of absolute federal tax immunity in the classes of transactions at issue.[3]

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[3] For example, Defendants complain that affiant Debra Polzin has not adequately identified Secretary of State's office employees "Connie" and "Tom," with whom she spoke regarding ERA Chevrolet, Inc.'s sale of a 1993 Buick Park Avenue to Community members Duane and Jennifer Misegan within the Reservation and Trust Lands. Defendants further complain that there are unspecified

The Community does wish, however, to provide the Court with additional factual background regarding the "procedures" that Defendants are so desperate to maintain. It is undisputed that the "procedures," described by Defendant Fratzke variably as an "informal process" and "current Treasury guidelines," Affidavit of Walter Fratzke ("Fratzke Aff.") ¶¶ 11-29, were not adopted pursuant to the Michigan Administrative Procedures Act of 1969, Mich. Comp. Laws §§ 24.201-24.328, or otherwise formally adopted, set forth in a written policy, or communicated to the tribes or their members.[4] Moreover, much of the information that Defendant Fratzke contends the Department must examine for each transaction is entirely irrelevant to whether the immunity is available, such as "[w]hether the retailer is owned by a federally recognized tribe, a member of a federally recognized tribe, or a tribal entity, or in the absence of such, the nature of the retailer and its business with Indian tribes" and "[t]he place where each component of the sale will take place, which may include information regarding (as appropriate) where the sale was solicited, the sale was made, the contract signed, payment made, or delivery made, etc." Fratzke Aff. ¶ 13(f) & (g). There is no need for the Department's

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"inconsistencies" in the employees' alleged description of Michigan's tax exemption policy. See Def. Br. 7. Defendants also contend that Ms. Polzin's report regarding the Secretary of State's employees' statements is hearsay. The hearsay contention is particularly specious, because the employees' statements are admissions of the agent or servant of a party, Defendant Terri Lynn Land, concerning a matter within the scope of their agency or employment. Fed. R. Evid. 801(d)(2)(D). In any case, the details of the employees' statements to Ms. Polzin are immaterial to the Community's motion. What is material, and what Defendants have conceded, is that the Department does not permit vendors to sell vehicles to Community members within the Reservation and Trust Lands free from sales tax, unless the Community member files a written exemption claim and obtains a pre-approval letter from Defendant Fratzke. Fratzke Aff. ¶¶ 11-29. Of course, if Defendants truly were impeded in responding to the Community's motion due to lack of necessary information, they could have filed a motion pursuant to Rule 56(f) of the Federal Rules of Civil Procedure identifying the precise discovery that they needed and seeking a continuance of the summary judgment motion until they obtained such discovery. They chose not to do so, and with good reason – the material facts with respect to the Community's motion are not in dispute.

4 Defendant Fratzke states that the Department has not formalized its "procedures" in a written policy in part "because Treasury policy continues to evolve to reflect the changing federal law in this area." Fratzke Aff. ¶ 21. As the Community has demonstrated, however, the federal tax immunities at issue in this motion are among the oldest and best-settled immunities in federal Indian law.

"procedures" or other case-by-case determination by the Department regarding entitlement to immunity.

In certain instances, involving the Community's large fleet of motor vehicles, the Community has acceded to the Department's "procedures" only because it effectively has been forced to do so in order to register titles for the vehicles, which are necessary for the Community's ongoing government operations and programs. See Fratzke Aff. ¶¶ 15, 27 & Att. 3. The Department's "procedures," even in these instances, have caused significant disruption to the Community. LaFernier Aff. ¶¶ 19-20. The Community and its members do not have the practical ability and resources to prepare and file written exemption claims for all of the hundreds of tax-immune transactions that take place each day within the Reservation and Trust Lands. Moreover, the Department could not possibly review and approve such claims on a timely basis.[5]

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[5] With respect to the "infrequent number of requests" that Defendants claim are made to the Department pursuant to its "procedures," Fratzke Aff. ¶ 21, Defendant Fratzke makes the general assertion that "once [the Department] is provided with adequate information, it can usually provide a determination regarding the taxable status of a sale within a day or two," Fratzke Aff. ¶ 26. It should be noted that the processing period was much longer than one or two days in the case of the Community's recent purchase of a 2006 GMC Savanna Van. As the undisputed facts show, the Community initially sought Defendant Fratzke's approval of the purchase of the van on a tax-free basis on March 28, 2006. Baker Aff. ¶ 3, Ex. B. On March 30, 2006, Defendant Fratzke asked the Community three follow-up questions regarding the transaction and the Community's intended use of the vehicle, which the Community answered on September 4, 2006, after initially objecting to do so. Baker Aff. ¶¶ 4-7, Exs. C-F. It took over three weeks for Defendant Fratzke to respond to the Community on September 26, 2006, with eight additional follow-up questions regarding the transaction. Supplemental Affidavit of John R. Baker ("Baker Supp. Aff."), served with this brief as Attachment 1, ¶ 4, Ex. B. Although the information sought by Defendant Fratzke on September 26 was noted by the Community's Tribal Attorney to be irrelevant to the federal tax immunity of the Community and its vendor and to "go beyond anything that you have requested . . . in the past," the Community nevertheless answered the eight new questions on September 28, 2006, in order to expedite the tax-free transfer of the vehicle to the Community. Baker Supp. Aff. ¶ 5, Ex. C. Defendant Fratzke finally rendered his approval of the transaction on September 29, 2006, 25 days after the Community provided answers to Defendant Fratzke's first three follow-up questions. Fratzke Aff. ¶ 27 & Att. 3.

ARGUMENT

I. FEDERAL LAW PROHIBITS DEFENDANTS FROM IMPOSING THE MICHIGAN SALES TAX UPON RETAILERS FOR THE SALE, LEASE OR RENTAL OF TANGIBLE PERSONAL PROPERTY TO THE COMMUNITY OR ITS MEMBERS WITHIN THE COMMUNITY'S RESERVATION AND TRUST LANDS.

Since its decision over 40 years ago in Warren Trading Post Co. v. Arizona Tax Commission, 380 U.S. 685 (1965), the Supreme Court has consistently and repeatedly held that the Indian Trader Statutes, 25 U.S.C. §§ 261-264, absolutely bar a state from imposing a tax upon an Indian trader for sales made to Indians within their Indian country. See Central Machinery Co. v. Arizona Tax Comm'n , 448 U.S. 160, 165 (1980); Department of Taxation & Fin. of New York v. Milhelm Attea & Bros., Inc., 512 U.S. 61, 73 (1994). The Court, moreover, has clearly held that for purposes of this federal immunity, the term "Indian trader" means any vendor that makes sales to Indians within their Indian country, regardless of whether such vendor has a place of business within such Indian country, regularly makes sales to Indians, or holds a federal Indian trader's license. Central Machinery, 448 U.S. at 165. Because the Michigan sales tax falls directly upon the retail vendor, as both parties agree, and such vendor constitutes an "Indian trader" with respect to any sales made to Indians within Indian country, the Indian Trader Statutes flatly preclude Defendants from imposing the Michigan sales tax upon retailers for their sales of tangible personal property to the Community or its members within the Reservation and Trust Lands.

In response to these long-established rules, Defendants have done nothing in their response brief other than resurrect arguments that the Supreme Court has previously considered and decisively rejected. Contrary to Defendants' assertions, the general interest-balancing test described in White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980), no longer applies to state taxation of Indian traders for their sales to Indians within Indian country. The Court in

Central Machinery pointedly refused to apply the general interest balancing test in analyzing state taxation of an Indian trader, though invited to do so by Justice Stewart's dissent, 448 U.S. at 169-70. In so holding, the Court clearly concluded that it had already performed this balancing analysis with respect to such a tax in Warren Trading Post, and that the only issue before it was whether the Central Machinery facts fell within the scope of the preemption established in Warren Trading Post. See Central Machinery, 448 U.S. at 164-65. On this question, the Court in Central Machinery concluded that ***any sale to Indians within Indian country*** fell "squarely within" the language of the Indian Trader Statutes, 448 U.S. at 164, and that these statutes clearly preempt the imposition of a state tax on such a transaction, as Warren Trading Post held. Central Machinery, 448 U.S. at 164-66.[6]

The inapplicability of the general interest-balancing test to state taxation of Indian traders is confirmed by the Bracker decision, which Defendants erroneously claim should govern the present facts. Because the Bracker decision was issued on the very same day as Central Machinery (June 27, 1980), the Court surely would have applied the Bracker test to the facts of Central Machinery if it thought the test remained applicable to the taxation of Indian traders making sales to Indians within Indian country. Instead, the Bracker Court expressly modeled its formulation of the general interest-balancing test on the balancing previously performed by the Court in Warren Trading Post. Bracker, 448 U.S. at 152-53. The Bracker Court struck down the state taxes imposed on a non-Indian lumber company within an Indian reservation because the federal timber regulations and similar factors made "[t]he present case. . . in all relevant respects

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6 As a New Mexico decision explained in refusing to authorize application of the general interest-balancing test to state taxation of Indian traders, "[r]emand is . . . unnecessary in light of the fact that the U.S. Supreme Court *has already balanced these interests* in Warren Trading Post. In that case, it concluded that, when a sale is made to reservation Indians on the reservation, the state tax on the receipts of the sale is preempted." Laguna Industries, Inc. v. New Mexico Taxation & Rev. Dep't, 845 P.2d 167, 171 n.1 (N.M. Ct. App. 1992) (emphasis added), aff'd, 855 P.2d 127 (N.M. 1993).

indistinguishable from Warren Trading Post." Id. at 153. The Bracker decision, in short, viewed the Warren Trading Post conclusion with respect to the Indian Traders Statutes as settled law, and treated the earlier decision's balancing test as a model for evaluating the preemptive effect of *other* federal regulatory schemes.

Moreover, and contrary to Defendants' contention, the Supreme Court has never retreated from the *per se* rule against state taxation of Indian traders established in Warren Trading Post and Central Machinery. Though the Court in Milhelm Attea permitted New York to impose administrative regulations upon Indian traders, it carefully distinguished these regulations from the state *taxes* at issue in the earlier cases. Thus, the Court emphasized the New York's regulations differed from "the *tax* in Warren Trading Post, which *fell directly upon an Indian trader*." Milhelm Attea, 512 U.S. at 71 (emphasis added). The Court evaluated the regulations under the general interest-balancing test because they stood "*on a markedly different footing from a tax imposed directly on Indian traders*." Id. at 73 (emphasis added). As the Court concluded:

> The state law we found pre-empted in Warren Trading Post was a tax directly "imposed upon Indian traders for trading with Indians." 380 U.S., at 691. See also Central Machinery, 448 U.S. at 164. That characterization does not apply to regulations designed to prevent circumvention of "concededly lawful" taxes owed by non-Indian [retail purchasers].

Id. at 74-75 (citations shortened). The Court in Milhelm Attea, in short, concluded that federal preemption of state taxes falling "directly upon an Indian trader" for sales to Indians within their Indian country was settled law.

Based on the above authorities, the federal Indian Traders Statutes absolutely bar the State of Michigan from imposing its sales tax upon any sales transaction that meets the following two requirements: (1) the sale is made to the Community or a Community member as purchaser,

and (2) the sale occurs within the purchaser's Indian country. Provided that these requirements are satisfied, the Indian Trader Statutes preempt the state tax regardless of the "function" or "purpose" of the item sold, the "nature" of the retailer's "business with Indian tribes," the place of solicitation of the sale, or any of the other irrelevant characteristics raised by Defendants. See Def. Br. 5, 6. Nor does the Department need to "evaluate," "determine," "analyze," or balance "detailed information regarding the transaction." Def. Br. 6, 7, 8, 25. *Any* transaction that meets the two objective requirements is exempt from Michigan sales tax.

A vendor can easily determine at the time of sale whether that sale satisfies the two requirements for federal sales tax immunity – whether the purchaser is a tribal member and whether the purchase takes place on the reservation – *without* the necessity of obtaining Defendant Fratzke's advance blessing and *without* worrying that Defendants or the Department will seek to impose tax liability. The vendor can identify the purchaser as an enrolled tribal member or tribal entity by requiring that the member or entity present a tribal identification card and/or an exemption certificate. Numerous states rely on such a procedure to verify the Indian status of purchasers on Indian reservations. For example, the Wisconsin Department of Revenue uses Form S-211, Wisconsin Sales and Use Tax Exemption Certificate, posted at <http://www.dor.state.wi.us/forms/sales/s-211.pdf>. Any enrolled tribal member residing on the tribe's reservation who checks the box, signs the certification statement, and provides the completed form to a vendor may thereafter make nontaxable purchases from the vendor of any property or services delivered to the reservation. Idaho, New York, and Washington, for example, use similar certificates, which are posted at <http://tax.idaho.gov/pdf/2004/Forms/Sales%20Tax/ST00621_ST101_SalesTxResale-ExemptCertif_4-26-04W.pdf>, <http://www.tax.state.ny.us/pdf/1996/apcert/dtf801_496.pdf>,

and <http://dor.wa.gov/Docs/Forms/ExcsTx/ExmptFrm/BuyersRetailTxExmptCert_E.pdf>. These forms are attached to this brief as Attachment 2. The Department itself uses a comparable procedure and Form 3372, Michigan Sales and Use Tax Certificate of Exemption, posted at <http://www.michigan.gov/documents/3372_2006_140031_7.pdf>, to verify other sales subject to a federal tax immunity or a state tax exemption based on the status of the purchaser, including sales to a federal, state, or local government entity, to a church or school, or to other exempt purchasers. If the purchaser checks the box on the form with the label "Blanket certificate," the certificate will cover all purchases made by the purchaser from the vendor for four years from the date of signature. The Michigan Form 3372 is attached to this brief as Attachment 3.

Vendors also can objectively identify the location of a sale at the time of sale, as they routinely do with respect to sales to out-of-state purchasers – again without Defendant Fratzke's intervention. That is because the Michigan Sales Tax Act contains unambiguous "sourcing" rules that identify the location of the sale for purposes of imposing the tax. If a product sold is received by a purchaser at the business location of the seller, the Sales Tax Act sources the sale to that business location; otherwise, the Sales Tax Act sources the sale to the location where the product is received by the purchaser or the purchaser's designee, including the location indicated by the instructions for delivery to the purchaser. Mich. Comp. Laws § 205.69(1). As described in more detail in Mich. Comp. Laws § 205.69, in the case of motor vehicles leased or rented pursuant to a periodic payment arrangement, each payment is sourced to the primary property location as indicated by the address of the property provided by the lessee and the property location is not considered altered by intermittent use at a different location; in the case of most other tangible personal property leased or rented pursuant to a periodic payment arrangement, the first payment is sourced in the same manner provided for a sale and the remaining payments are

sourced in the same manner provided for motor vehicles. Mich. Comp. Laws § 205.69(2) & (3). These express statutory rules have superseded the older state common-law sourcing authorities cited by Defendants, Def. Br. 13-14, and permit a vendor to ascertain immediately and precisely the location of a sale and the potential applicability of Michigan sales tax. Under these clear sourcing rules, for example:

- ERA Chevrolet, Inc.'s sale of the 1993 Buick Park Avenue to Community members Duane and Jennifer Misegan on May 9, 2005, in which an employee of the vendor delivered the vehicle to the Misegans' home on the Reservation, Misegan Aff. ¶ 5, Ex. A, was made on the Reservation.

- Ferellgas's periodic sales of propane gas to the Misegans, delivered to their home on the Reservation, Misegan Aff. ¶ 8, Ex. B, were made on the Reservation.

- L'Anse Furniture Mart, Inc.'s sale of furniture to Community member Susan LaFernier, delivered to Ms. LaFernier's home on the Reservation in late 2005, LaFernier Aff. ¶ 9, Ex. A, was made on the Reservation.

In light of Michigan's clear statutory sourcing rules, Defendants' argument that Defendant Fratzke needs to engage in a "balancing analysis" to decide where each sale takes place is without any merit.[7] The Department's "procedures," in reality, are a bureaucratic pretext, designed to obstruct the simple and absolute tax immunity of the Community and it members for their purchases within the Reservation and Trust Lands.

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[7] Defendant Fratzke's claim that the Department's procedures are necessary to prevent "fraud" or under-collection of sales and use taxes within the Reservation and Trust Lands is disingenuous. Fratzke Aff. ¶ 40. As Defendant Fratzke undoubtedly knows, the *vendor* rather than the Community or a Community member will in practice determine whether the federal immunity applies, and can make such determination in accordance with objective rules regarding tribal status and location of the taxable activity. Defendant Fratzke presents no reason why vendors cannot play the same role in administering the federal immunities at issue in this motion that they do in administering other federal immunities and state statutory exemptions, by verifying and documenting that the requirements for such exemptions have been satisfied.

Accordingly, this Court should enjoin Defendants from enforcing the Sales Tax Act with respect to the sale, lease, or rental of tangible personal property, as defined in the Sales Tax Act, to the Community and its members within the Reservation and Trust Lands.

II. FEDERAL LAW PROHIBITS DEFENDANTS FROM IMPOSING THE MICHIGAN USE TAX UPON THE COMMUNITY OR ITS MEMBERS FOR (1) THE USE OF TANGIBLE PERSONAL PROPERTY OR SERVICES WITHIN THE RESERVATION AND TRUST LANDS, OR (2) THE USE OF TANGIBLE PERSONAL PROPERTY WITHIN AND WITHOUT THE RESERVATION AND TRUST LANDS WHEN THE PROPERTY IS PRINCIPALLY HOUSED, STORED OR GARAGED WITHIN THE RESERVATION AND TRUST LANDS.

The Supreme Court has repeatedly held that, absent express congressional permission to the contrary, states are categorically barred from imposing a tax the legal incidence of which falls "directly on an Indian tribe or its members inside Indian country, rather than on non-Indians." Oklahoma Tax Commission v. Chickasaw Nation, 515 U.S. 450, 458 (1995); see also Pl. Br. 17-18. This federal preemption against taxation of Indian activities within Indian country is so absolute that the courts have repeatedly enjoined the imposition of state taxes on an Indian activity that takes place both within and without Indian country, even where just a *portion* of such a tax would be imposed within Indian country. Most notably, on three separate occasions the Supreme Court has struck down state taxes imposed on the use of Indian-owned motor vehicles principally garaged within Indian country, but used in part outside of Indian country. See Oklahoma Tax Comm'n v. Sac & Fox Nation, 508 U.S. 114 (1993); Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. 134 (1980); Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation, 425 U.S. 463 (1976). In each case, the Court enjoined the tax because the activity subject to the tax – ownership or use – transpired in part within Indian country, and the taxing statute failed to apportion the tax to exclude the activity within Indian country.

Defendants concede – as they must – that federal law precludes the imposition of the Michigan use tax upon the Community's or its members' use of property within the Reservation and Trust Lands. Def. Br. 28.[8] Defendants contend, however, that federal law permits application of the use tax to Community and Community member property such as motor vehicles, which are principally housed within the Reservation and Trust Lands, but used in part outside of such Indian country. Defendants' contention is contrary to the law established in Moe, Colville and Sac & Fox.

The Michigan use tax is identical in all relevant respects to the motor vehicle excise taxes that were enjoined by the Supreme Court in Colville and Sac & Fox. Like the tax in Colville, for example, which was imposed on "the privilege of using in the state any motor vehicle," 447 U.S. at 142, the Michigan tax is imposed "for the privilege of using, storing, or consuming tangible personal property in this state," Mich. Comp. Laws § 205.93(1). Though technically a personal property tax, the tax in Colville was triggered by the "use" of a motor vehicle within the state, as is the Michigan use tax. Id.; see also Sac & Fox, 508 U.S. at 119-20 (state tax was imposed "upon the use" of any vehicle).[9] The Colville Court enjoined the tax because the "use" subject to the tax occurred in part within the Colville Reservation, and the State of Washington made no attempt to exclude such on-reservation "use" from the tax. Thus the Court remarked that "[h]ad Washington tailored its tax to the amount of *actual off-reservation use*, or otherwise varied

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8 However, Defendants' concession on this point is inconsistent with their insistence that the Community and its members must file exemption claims and obtain pre-approval of their use tax-free purchases of, for example, telephone services provided to them within the Reservation and Trust Lands.

9 Defendants' argument that the Supreme Court holdings in Colville and Sac & Fox turned on the fact that the taxes were "personal property taxes" is contradicted by the very quotations they cite, which repeatedly stress that the taxes in question violate federal law because they are not apportioned to reflect only off-reservation use and therefore fall upon the "use" of Indian property within Indian country. See Def. Br. 29-30 (quoting Colville, 447 U.S. at 163-64, and Sac & Fox, 508 U.S. at 128).

something more than mere nomenclature, this might be a different case." 447 U.S. at 163-64 (emphasis added); see also Sac & Fox, 508 U.S. at 128 (quoting this language from Colville in enjoining Oklahoma's similar tax). Like the taxes in Colville and Sac & Fox, the Michigan use tax lacks an apportionment formula that would tailor it to the amount of actual use of tangible personal property outside the Reservation and Trust Lands.

Defendants' contention that the Michigan use tax is meaningfully different from the taxes enjoined in Moe, Colville and Sac & Fox is without foundation and should be rejected by this Court, just as the Michigan Tax Tribunal rejected the Department's similar contentions last year in Chosa v. Michigan Department of Treasury, Michigan Tax Tribunal Docket No. 283437 (Apr. 20, 2005), Baker Aff. Ex. A.[10] Defendants' assertion that the Michigan use tax "addresses a single, identifiable event," i.e., the first use of property in Michigan, is simply wrong. Def. Br. 31. The Michigan Use Tax Act is expressly imposed for the "*privilege of using*" tangible personal property within Michigan, a privilege that is not limited to one specific event of use, that continues to be enjoyed by the user until disposition of the property, and which the Supreme Court has expressly and repeatedly required to be apportioned to reflect only actual off-reservation use. The fact that the Michigan tax is paid once rather than annually like the motor vehicle taxes is irrelevant, because in both cases the tax is paid for a privilege of using property that is exercised in part by Indians within Indian country. Finally, Defendants err in arguing that the Michigan use tax falls only on that use that occurs outside of Indian country, thus making apportionment unnecessary.[11] The Supreme Court in Colville rejected this very argument by the State of Washington with respect to its motor vehicle excise tax. Noting that the motor vehicle

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[10] The Department initially appealed the decision in Chosa but voluntarily dismissed the appeal this fall.

[11] By its terms, the use tax applies to the use, storage, or consumption of tangible personal property within the state, Mich. Comp. Laws § 205.96(1), and Indian reservations "are part of the state in which they lie," Surplus Trading Co. v. Cook, 281 U.S. 647, 651 (1930).

excise tax was a use tax triggered by use of a vehicle within the state, Washington had argued that "when an Indian-owned vehicle comes off the reservation the tax event under the motor vehicle excise tax likewise takes place off the reservation – and the state can reach it . . . ." Appellants' Opening Brief at 114, Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980) (No. 78-630), available at 1979 WL 200126. The Supreme Court dismissed this argument, holding that charging the full amount of the tax without apportionment implicitly taxed the on-reservation use of Indian-owned vehicles. Colville, 447 U.S. at 163-64.

Accordingly, as Defendants concede, under the longstanding federal law reaffirmed in Chickasaw Nation, Defendants are absolutely precluded from imposing the Michigan use tax upon the Community or its members with respect to their use, storage, or consumption of tangible personal property or services within the Reservation and Trust Lands. Similarly, pursuant to Moe, Colville, and Sac & Fox Nation, Defendants are absolutely precluded from imposing the Michigan use tax upon tangible personal property that is principally housed, stored or garaged within the Reservation and Trust Lands, regardless of whether it is also used outside of the Reservation and Trust Lands.

As with the sales tax, a vendor can easily determine at the time of sale when the federal exemption from use tax applies to a transaction without need of pre-approval or "balancing" by Defendant Fratzke. The vendor need only confirm, by a tribal identification card and/or exemption certificate, two requirements: (1) that the purchaser is an enrolled tribal member or tribal entity, and (2) that the purchaser lives within or will use or principally garage or store the property within the Reservation and Trust Lands. Because Michigan does not apportion the use

tax to reflect actual off-reservation use, the locations where the property will be used is irrelevant. No other requirements need to be satisfied.

Accordingly, this Court should enjoin Defendants from enforcing the Use Tax Act against the Community, its members, or any vendor to the Community or its members with respect to the use, storage, or consumption by the Community and its members of any tangible personal property or services as defined in the Use Tax Act within the Reservation and Trust Lands. The Court should also enjoin Defendants from enforcing the Use Tax Act against the Community, its members, or any vendor to the Community or its members with respect to the use of any tangible personal property that its principally housed, stored, or garaged on the Reservation and Trust Lands, including but not limited to motor vehicles, snowmobiles, motorcycles, recreational watercraft, off-road vehicles, bicycles, clothing, food and beverages, and mobile phones.

CONCLUSION

For the foregoing reasons, the Community respectfully requests that this Court enter summary judgment in favor of the Community with respect to Counts IX and XIII of its Second Amended Complaint.

Dated: December 15, 2006

Respectfully submitted,

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