MICHAEL A. ROBINSON, ESQ. (SBN 214666)
E-Mail: MROBINSON@NDLAW.COM
JAMES QAQUNDAH, ESQ. (SBN 270700)
E-Mail: JQAQUNDAH@NDLAW.COM
Fredericks Peebles & Morgan LLP
2020 L Street, Suite 250
Sacramento, CA 95811
T: (916) 441-2700
F: (916) 441-2067

Attorneys for Defendant
DARREN ROSE dba BURNING ARROW I
and BURNING ARROW II

IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, ex rel. Kamala D. Harris, Attorney General of the State of California,

Plaintiff,

v.

DARREN ROSE, individually, and dba BURNING ARROW I and BURNING ARROW II, AND DOES 1 THROUGH 20,

Defendant.

Case No. 2:13-cv-00675-LKK-DAD

DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION TO REMAND AND FOR ATTORNEY FEES AND COSTS

Date: May 13, 2013
Time: 10:00 am
Dept: 4
Judge: Hon. Lawrence K. Karlton

Removed From Superior Court of California, County of Shasta

Table of Contents

TABLE OF AUTHORITIES iii

I. INTRODUCTION 1

II. ISSUES PRESENTED 2

III. ARGUMENT 2

A. The State's Authority to Impose and Enforce Its Laws In Indian Country is Completely Preempted By Federal Law. 2

1. *California surrendered any claim to regulatory authority when it joined the Union.* 2

2. *Today, if California wishes to regulate Indians in Indian country, Congress must specifically grant it such authority.* 6

3. *Congress has not restored any regulatory authority to California.* 6

4. *Public Law 280 completely preempts California's assertion of civil regulatory authority.* 7

B. California's Complaint Raises a Substantial Federal Question. 8

1. *California Raised the Federal Issue On the Face of Its Complaint.* 8

2. *Even if not raised on the face of the Complaint, the Complaint raises a substantial federal question.* 9

C. That California's Claims Necessarily Derive from Federal Law is Indicated By the Fact that California's Complaint is Not Well-Pleaded if Exhibit A of California's Complaint is Not a Part of the Complaint. 14

D. The Federal Issues In This Case Are Too Central to the Federal Government to be Left To California and Its Courts. 16

E. The Other State Cases Addressed in California's Request for Remand Are Factually Distinct and Do Not Provide Support Here. 17

F. Oklahoma Tax Commission v. Graham Does Not Apply To the Instant Case 19

G. Other Considerations 21

H. Attorney Fees and Costs are Inappropriate in the Instant Case. 22

IV. CONCLUSION 22

FREDERICKS PEEBLES & MORGAN LLP
2020 L ST., STE 250
SACRAMENTO, CA

TABLE OF AUTHORITIES

Cases

Agua Caliente Band of Mission Indians' Tribal Council v. City of Palm Springs (C.D. Cal. 1971)
347 F.Supp. 6, 20

Alden v. Maine (1999)
527 U.S. 706 20

American Vantage Companies, Inc. v. Table Mountain Rancheria (9th Cir. 2002)
292 F.3d 1091 10

Arizona v. San Carlos Apache Tribe (1983)
463 U.S. 545..... 16

Boisclair v. Superior Court (1990)
51 Cal.3d 1140 ..... 14, 15

Bryan v. Itasca County (1976)
426 U.S. 373..... 6, 13

California v. Cabazon band of Mission Indians (1987)
480 U.S. 202..... 6, 7, 13

Caterpillar, Inc. v. Williams (1987)
482 U.S. 386..... 7, 8, 14, 15

Cel Tech Communications v. Los Angeles Cellular Tel. Co. (1999)
20 Cal.4th 163 (1999) 1

Cherokee Nation v. Hitchcock (1902)
187 U.S. 294 10

Christianson v. Colt Industries Operating Corp. (1988)
486 U.S. 800..... 9

Department of Taxation and Finance of New York v. Milhelm Attea & Bros., Inc. (1994)
512 U.S. 6..... 1

Doe v. Mann, (9th Cir. 2005)
415 F.3d 1038 ..... 7, 12, 13, 20

National Farmers Union v. Insurance Cos. v. Crow Tribe (1985)
471 U.S. 845..... 11

FREDERICKS PEEBLES & MORGAN LLP
2020 L ST., STE 250
SACRAMENTO, CA

Franchise Tax Board of State of California v. Construction Laborers Vacation Trust for Southern California, (1983)
463 U.S. 1 ..... 7, 9

Idaho v. Coeur d'Alene Tribe (1997)
521 U.S. 261 16

Johnson v. McIntosh (1823)
21 U.S. 543 2

Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc. (1998)
523 U.S. 751 20

Kwikset Corp v. Superior Court (Cal. 2011)
51 Cal.4th 320 1

Lippitt v. Raymond James Fin. Servs. (9th Cir. 2003)
340 F.3d 1033 9

Lone Wolf v. Hitchcock (1903)
187 U.S. 553 10

McClanahan v. Arizona State Tax Comm'n (1973)
411 U.S. 164 ..... 10, 18

Merrion v. Jicarilla Apache Tribe (1982)
455 U.S. 130 10

Metropolitan Life Ins. Co. v. Taylor (1987)
481 U.S. 58 7

Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation (1976)
425 U.S. 463 1

Morongo Band of Mission Indians v. Rose (9th Cir. 1990)
893 F.2d 1074 ..... 10, 11, 13

New Mexico v. Mescalero Apache Tribe (1983)
462 U.S. 324 16

Oklahoma Tax Commission v. Graham (1989)
489 U.S. 838 ..... 17, 18, 19

Oklahoma Tax Comm'n v. Sac & Fox Nation (1993)
508 U.S. 114 10

Oneida Indian Nation v. County of Oneida (1974)
414 U.S. 661 16

FREDERICKS PEEBLES & MORGAN LLP
2020 L ST., STE 250
SACRAMENTO, CA

People v. Black Hawk Tobacco (C.D. Cal. Aug. 14, 2009)
No. EDCV 09-1380-VAP, 2009 WL 5793504 ..... 1, 17

People v. Native Wholesale Supply Co (E.D. Cal. 2008)
632 F.Supp.2d 988 ..... 1, 17

Sparta Surgical Corp. v. National Ass'n of Sec. Dealers (9th Cir. 1998)
159 F.3d 1209 (9th Cir. 1998) 9

State of California v. Harvier (1983)
700 F.2d 1217 6

United States v. Kagama,
118 U.S. 375 (1886) 16

Verlinden B.V. v. Cent. Bank of Nig. (1983)
461 U.S. 480 (1983) 20

Williams v. United States (9th Cir. 1969)
405 F.2d 951 8

Winton v. Amos (1921)
255 U.S. 373 10

Worcester v. Georgia (1832)
31 U.S. 515 ..... 2, 4

Statutes

18 U.S.C. § 1162(a) 13
25 U.S.C. 2701 et seq. 6
28 U.S.C. § 1331 ..... 9, 14
28 U.S.C. § 1360 6
28 U.S.C. § 1360(a) 13
Cal. Bus. & Prof. Code, sec. 17200, et seq. 1, 9
Cal. Bus. & Prof. Code, section 17204 1
Cal. Health & Saf. Code §§ 14950-14960 9
Cal. Rev. & Tax Code, § 30165.1 9

Rules

Fed R. Civ. P. 10(c) 8
Fed. R. Civ. P. 8 14

Other Authorities

The Dormant Indian Commerce Clause,
27 Conn. L. Rev. 1055 (1995) 3

FREDERICKS PEEBLES & MORGAN LLP
2020 L ST., STE 250
SACRAMENTO, CA

I. INTRODUCTION

This case raises an unprecedented situation where a state government seeks to impose its laws directly on an Indian for his commercial actions conducted from Indian land held in trust by the United States for his own use and benefit. This is not *People v. Native Wholesale Supply Co,* 632 F.Supp.2d 988 (E.D. Cal. 2008), where California sought to regulate the activities of an out-of-state entity incorporated under the laws of an Oklahoma Indian tribe which under federal law is recognized as an non-Indian. This is not *People v. Black Hawk Tobacco*, No. EDCV 09-1380-VAP, 2009 WL 5793504 (C.D. Cal. Aug. 14, 2009), where California sought to regulate a California corporation doing business on an Indian reservation within the geographical boundaries of California. Nor, is this a case where California seeks to directly regulate ordinary California residents going into Indian country for the sole purpose of evading California taxes and seeks assistance from an Indian retailer in capturing those taxes.[1]

To the contrary, this is an effort to directly impose California law on an Indian in Indian country. On top of that, this in an effort to impose California's Unfair Competition Law, state law that is so broad and all-encompassing that it would subject Indian country to full reach of all California laws. And, it would open the door to not only to actions by California but also private actions against Indian entities for any purported violation of any California law, or simply for matters that California or private parties considered "unfair."[2] As stated at the outset, this is unprecedented in American jurisprudence.

More importantly, in relation to California's motion for remand, California unequivocally surrendered all authority to regulate Indians in Indian country to the federal government. As a consequence, in order to bring its regulatory action in any court is must first answer the threshold

---

[1] *See Department of Taxation and Finance of New York v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61 (1994); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S.134 (1980); *Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463 (1976).

[2] California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code, sec. 17200, et seq., is a sweepingly broad statute providing civil remedies for unfair competition. *Kwikset Corp v. Superior Court*, 51 Cal.4th 320, 320 (Cal. 2011). The UCL "borrows violations of other laws and treats them as unlawful business practices, making them independently actionable such that virtually any law, federal, state, or local can serve as a predicate for a UCL action. *Cel Tech Communications v. Los Angeles Cellular Tel. Co.*, 20 Cal.4th 163, 180 (1999). Moreover, actions under the UCL are not limited merely to violations of state and other laws, but may also be brought for act that may be considered "unfair." *Kwikset*, 51 Cal. 4th at 320. Both the California Attorney General and private individuals who claim actual injury may bring actions under the UCL. *Id.*; Cal. Bus. & Prof. Code, section 17204.

FREDERICKS PEEBLES & MORGAN LLP
2020 L ST., STE 250
SACRAMENTO, CA

question: From what federal law does its asserted regulatory authority derive? And despite the nature or origin of the statutes California seeks to enforce, in order regulate in this instance, and in order to bring an action enforcing any purported regulatory authority, California must affirmatively, at the outset, rely on federal law.

This critical threshold federal question is raised on the face of California's Complaint. Even if it had not been expressly raised, the Complaint necessarily raises the threshold federal question because California is not entitled to relief under any theory without first establishing that it may apply its laws to Indians in Indian country.

Because of the nature of this case, and because the issue appears on face on California's complaint, federal jurisdiction over this action is not only proper, but is necessary.

II. ISSUES PRESENTED

The sole issue to be decided in this matter at this time is as follows: Whether a court can apply California state laws to Indians in Indian country without deciding, as a threshold matter, the federal question of whether Public Law 280 or some other federal statute grants the state authority to apply such state laws to Indian country.

III. ARGUMENT

A. The State's Authority to Impose and Enforce Its Laws In Indian Country is Completely Preempted By Federal Law.

1. *California surrendered any claim to regulatory authority when it joined the Union.*

When Europeans first colonized North America, they encountered Indian nations that were strong, social and political societies. These Indian nations were not subject to any external authority. Rather, they were entirely independent and sovereign. *Worcester v. Georgia*, 31 U.S. 515, 542-43 (1832).

Once settled, the Colonists did not exercise any form of dominion over the Indians. *Id.* at 542-48; *Johnson v. McIntosh*, 21 U.S. 543, 600-04 (1823). Instead, as was necessary, the Colonists – through their royal representatives – conducted relations with the Indians pursuant the laws of

FREDERICKS PEEBLES & MORGAN LLP
2020 L ST., STE 250
SACRAMENTO, CA

nations, treaties, and contracts between sovereigns.[3] See *generally*, Cohen's Handbook, § 1.02[1], p. 15.

The only power the Colonists exercised with regard to Indians was in management of the of their specific Colony's "day-to-day" interactions. However, even this power was severely curtailed by the power of the English Crown, which always reserved ultimate authority over Indian affairs. Cohen's Handbook, § 1.02[1], p. 18 (*citing* Robert N. Clinton, *The Dormant Indian Commerce Clause*, 27 Conn. L. Rev. 1055, 1066-69 (1995). Moreover, management of Indian affairs did not include exercising dominion over Indians, imposing the laws of the Colony on Indians, or unilaterally determining the rights or powers of the sovereign Indian nations. *See id.* Thus, although somewhat independent due to their isolation from the English Crown, local American governments did not begin their existence by having any independent authority over Indians. Rather, from the beginning, Indian relations have always been centralized and managed on a national level.

To the extent that the "national" character of Indian affairs took on a more "local" flavor, those changes were incomplete and fleeting, in that they were limited to the fourteen (14) year period between the American Colonies formal separation from England and the ratification of the Constitution when the nascent states existed under the Articles of Confederation.

Even under the Articles of Confederation, however, the newly formed states did not exercise dominion over Indians or their land. To the contrary, the states continued to deal with Indians as sovereigns and treated their lands as sovereign territory. Cohen's Handbook, § 1.02[2], p. 20. To the extent, the states exercised direct – non-negotiated – authority that exercise was limited to attempting to regulate the activities of non-Indians who entered tribal territories.

[3] While day-to-day Indian relations were left to the colonies, the British Crown always reserved ultimate authority over Indian affairs. Cohen's Handbook, § 1.02[1], p. 18 (*citing* Robert N. Clinton, *The Dormant Indian Commerce Clause*, 27 Conn. L. Rev. 1055, 1066-69 (1995).

More importantly, with regard to the complete federalization of Indian affairs, the Articles of Confederation did not clearly define whether the primary power to regulate external relations with the Indians rested with the national government or was reserved to the states. For example, Article IX conferred on the national government "the sole and exclusive right and power of . . . regulating trade and managing all affairs with the Indians," that were not considered "members" of the states. Art. of Confed. art. IX. The Articles of Confederation left unanswered exactly which Indians were "members" of a particular state.

Further confusing the matter, Article IX conferred the power of regulating and managing all Indian affairs upon the Congress with the caveat that "the legislative right of any State within its own limits [shall] be not infringed or violated." (*Id.*) This provision left open the question of whether a state could legislate on behalf of Indians whose lands were geographically located within that state's territory.

Even worse, Article VI recognized the right of each individual state to take up arms against Indians without congressional consent—on the mere receipt of "advice of a resolution being formed by some nation of Indians to invade such State." Art. of Confed. art. VI. Leaving open the possibility that state's retained war powers vis-à-vis the Indians irrespective of whether the Indians were found within, or without the state.

Predictably, these irreconcilable provisions led to confusion and discontentment among the states and national government as they struggled over the seat of power. *Worcester*, 31 U.S. at 559. And, because of the inconsistencies within the Articles concerning the issue of control over Indian affairs, the issue was taken up in the debates regarding the ratification – with the most vocal commenters advocating for complete federalization.

For instance, in arguing for federalization of authority over Indian affairs, James Madison lamented that the division of jurisdiction over Indian affairs was the source of "frequent perplexity

FREDERICKS PEEBLES & MORGAN LLP
2020 L ST., STE 250
SACRAMENTO, CA

and contention in the federal councils." Federalist No. 42 at 269 (Madison) (C.Rossiter ed. 1961). On this issue, Madison wrote:

> The regulation of commerce with the Indian tribes is very properly unfettered from two limitations in the articles of confederation, which render the provision obscure and contradictory. The power is there restrained to Indians, not members of any States, and is not to violate or infringe the legislative right of any State within its own limits. What description of Indians are to be deemed members of a State, is not yet settled; and has been a question of frequent perplexity and contention in the Federal Councils. And how the trade with Indians, though not members of a State, yet residing within its legislative jurisdiction can be regulated by an external authority, without so far intruding on the internal rights of legislation is absolutely incomprehensible. This is not the only case in which the articles of confederation have endeavored to accomplish impossibilities; to reconcile a partial sovereignty in the Union, with complete sovereignty in the States; to subvert a mathematical axiom, by taking away a part, and letting the whole remain.

Federalist No. 42 at 269.

Those members of the Constitutional Convention favoring the federalization of all Indian affairs won the day. With the ratification of the Constitution, the states intentionally and expressly surrendered all power and authority to regulate commerce with the Indians to the federal government. Additionally, the states likewise surrendered all corollary powers – the power to enter into treaties and the power to declare war – they may have claimed to enjoy with regard to Indians under the Articles.

Any doubt as to whether surrender of these powers was intended to be absolute was answered by Alexander Hamilton: Hamilton astutely noted the alienation of state authority under the Constitution would be complete:

> [… I]n three cases; where the Constitution in express terms granted an exclusive authority to the Union; where it granted in one instance an authority to the Union and in another prohibited the States from exercising like authority; and where it granted an authority to the Union, to which similar authority in the States would be absolutely and totally contradictory and repugnant.

Federalist No. 32 at 198 (Hamilton) (C. Rossiter, ed. 1961).

In other words, after the states ratified the Constitution, they surrendered any and all authority they may have once had – including the police power to regulate economic activity – to the federal

FREDERICKS PEEBLES & MORGAN LLP
2020 L ST., STE 250
SACRAMENTO, CA

government and reserved none for themselves. Nonetheless, here, California seeks to exert the precise police power it bargained away when it sought admission into the Union.

2. *Today, if California wishes to regulate Indians in Indian country, Congress must specifically grant it such authority.*

As a threshold matter, California must now point to some federal law from which any restored police powers derives.[4] See *Santa Rosa Band of Indians v. Kings County* ("*Santa Rosa*"), 532 F.2d 655, 658-59 (9th Cir. 1975); *Agua Caliente Band of Mission Indians' Tribal Council v. City of Palm Springs*, 347 F.Supp. 42, 49 (C.D. Cal. 1971), *vacated* in an unpublished opinion 1975) (both recognizing that powers surrendered by the states must be affirmatively restored to them through congressional grants.[5] As *Santa Rosa* and *Agua Caliente* recognize, the only identifiable congressional act restoring any police powers over Indian affairs to California is Public Law 280, 67 Stat. 589, 28 U.S.C. § 1360.

3. *Congress has not restored any regulatory authority to California.*

However, as the Ninth Circuit instructed in *Santa Rosa* and the Supreme Court confirmed in *Bryan v. Itasca County*, 426 U.S. 373 (1976), and *California v. Cabazon band of Mission Indians*, 480 U.S. 202 (1987), Public Law 280 did not restore ceded regulatory authority to California. Instead, these cases establish that the civil jurisdiction that California derives from this Public Law 280 is extremely limited. In particular civil jurisdiction is limited to California courts having the authority, to resolve "*private* legal disputes between reservation Indians and between Indians and other *private* citizens." *Bryan*, 426 U.S. at 384. Public Law 280 did not to grant California the authority to impose the full array of state laws, but only those laws relating to "*private rights and status.*" *Id.* Those laws do not include civil regulatory laws such as those California seeks to impose

[4] California has previously acknowledged that it must rely on federal law to apply its laws to Indians in Indian country and include this reliance in its complaint. In *State of California v. Harvier*, 700 F.2d 1217 (1983), California "sought a declaration that it was empowered, *under federal Indian law*, to apply and enforce its fish and game laws against non-Indians on the Quechan reservation." *Id.* at 1217. In a dissent, Judge Norris specifically noted that "California averred in its complaint a right to enter the reservation and apply its laws to non-Indians there present under 'general principles of federal Indian law, upon the provisions of Public law 280." *Id.* at 1222 (Norris, J., dissenting). Notably, in *Harvier*, California was seeking to regulate *non-Indians* within Indian country and, even then, recognized that it must rely on federal Indian law for authorization and plead such authorization in its complaint.

[5] In the absence of federal authority to regulate Indians in Indian country, California could, of course, lobby Congress to enact a federal law that would grant such authority in a specific area, such as the states successfully did with regards to on-reservation Indian gaming. *See* Indian Gaming Regulatory Act, 25 U.S.C. 2701 *et seq.*

FREDERICKS PEEBLES & MORGAN LLP
2020 L ST., STE 250
SACRAMENTO, CA

here. *Cabazon*, 480 U.S. at 208, 212; see also, *Doe v. Mann*, 415 F.3d 1038, 1051, 1059 (9th Cir. 2005.)

This established set of authorities makes one thing abundantly clear: California does not derive any regulatory authority over Indians in Indian country from Public Law 280.

4. *Public Law 280 completely preempts California's assertion of civil regulatory authority.*

Additionally, *Santa Rosa* makes clear that by defining the limits of power restored to California in Public Law 280, Congress preempted "and reserve[d] to the Federal government or the tribe jurisdiction not so granted." *Santa Rosa*, 532 F.2d at 659. In other words, because Congress did not grant regulatory authority to California in Public Law 280, Congress necessarily preempted California from exercising that authority. *Id.* Moreover, by reserving all regulatory authority pertaining to Indians in Indian country to itself, Congress' preemption is complete and, as shown below, provides a proper basis for removal.

The "complete preemption doctrine" provides and independent basis for federal jurisdiction. *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 393 (1987). "Complete preemption" applies when the preemptive force of a federal statute "is so 'extraordinary' that it 'converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule.'" *Caterpillar*, 482 U.S. at 393 (*citing Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 65 (1987)). Thus, once state authority has been completely preempted by federal law, "any claim purportedly based on [a] preempted state law is considered, from its inception, a federal claim, and therefore arises under federal law." *Id.* (*citing Franchise Tax Board of State of California v. Construction Laborers Vacation Trust for Southern California*, 463 U.S. 1, 24 (1983)).

Here as discussed above, the combination of California's constitutional surrender to the federal government, combined with Congress' failure to restore regulatory power to California, but instead reserving all such power to itself, completely preempts California from exercising the authority it seeks to impose here. *Santa Rosa*, 532 F.2d at 659. As a consequence, the preemptive reach of Public Law 280, necessary converts any attempt by California to regulate Indians in Indian country

FREDERICKS PEEBLES & MORGAN LLP
2020 L ST., STE 250
SACRAMENTO, CA

into a federal cause of action for purposes of the well-pleaded complaint rule. *Caterpillar*, 482 U.S. at 393.

B. California's Complaint Raises a Substantial Federal Question.

California is asserts that it successfully avoided raising the federal question in its Complaint. California's assertion is mistaken.

1. California Raised the Federal Issue On the Face of Its Complaint.

"A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes." Fed R. Civ. P. 10(c). California's Complaint includes, as Exhibit A, a letter from California Deputy Attorney General Dennis Eckhart to Rose. As an attachment to California's Complaint, this letter "is a part of the pleading *for all purposes*."

In the attached letter, and therefore the Complaint, California acknowledges that the properties where the alleged activity is taking place "are tribal-member allotments held in trust by the United States." (Complaint, Exhibit A, at 1). California further asserts that the land's trust status "is irrelevant to the application of [the State] laws." *Id.*

California's conclusory assertion in its letter –that it may apply State laws on the activity of Indians on Indian trust lands – raises the federal issue on the face of the Complaint

California may indeed believe that the trust status of the land in question is "irrelevant" to the State's ability to regulate Indians in Indian country. However, California's conclusory assertion is far from a foregone conclusion. Rather, as discussed above, California is completely preempted from imposing its civil regulatory laws on Indians operating in Indian country. If California does insist that it has such civil regulatory jurisdiction, it must establish this critical point as a matter of federal law. The fact that California asserted such an ability to impose State statutes in Indian country in a conclusory statement, without actually identifying any supporting authority, does not change the fact that California raised the federal issue on the face of its Complaint.

Moreover, the Complaint raises the federal question by including the facts that the land where the alleged activity occurred is Indian trust land. See *Williams v. United States*, 405 F.2d 951, 954 (9th Cir. 1969) ("If facts giving the court jurisdiction are set forth in the complaint, the provision

FREDERICKS PEEBLES & MORGAN LLP
2020 L ST., STE 250
SACRAMENTO, CA

conferring jurisdiction need not be specifically pleaded."). Accordingly, a federal issue is raised on the face of California's Complaint.

2. *Even if not raised on the face of the Complaint, the Complaint raises a substantial federal question.*

Even if California had not attached Exhibit A, thereby raising the federal issue on the face of the Complaint, the Complaint still raises the federal question. California attempted to avoid the federal issue by omitting facts of which California was aware, and by only asserting claims based on California statutes. [6] However, despite California's artful pleading, the Complaint raises the federal question and this Court would still possess jurisdiction over the instant case.

California asserts that removal "is permitted only if a federal question appears on the face of the complaint." (Memorandum of Points and Authorities in support of Motion to Remand, pp. 1:12-3:14). This is not the case.

There are two ways in which a federal court may obtain jurisdiction under 28 U.S.C. § 1331. *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 809 (1988). First, jurisdiction extends to cases where federal law creates a cause of action within the constraints of the well-pleaded complaint. *Franchise Tax Bd. Of Cal. V. Constr. Laborers Vacation Trust*, 463 U.S. 1, 8-9 (1983). Second, jurisdiction is proper where, under all of the theories under which a plaintiff may recover on its claims, the resolution of a substantial question of federal law is necessary for recovery on those claims. *Id.* at 28; *Christianson*, 486 U.S. at 809. A plaintiff's artful phrasing so as to omit the federal aspects of his complaint will not alone justify remand. *See Lippitt v. Raymond James Fin. Servs.*, 340 F.3d 1033, 1041 (9th Cir. 2003). Likewise, a plaintiff cannot avoid federal jurisdiction by omitting from the complaint federal law essential to his or her claim by casting in state law terms a claim that can only be pursued if authorized by federal law. *Sparta Surgical Corp. v. National Ass'n of Sec. Dealers*, 159 F.3d 1209, 1212 (9th Cir. 1998). In this case, even if the federal issue is not expressly raised on the face of the Complaint, the federal question inheres in the Complaint.

[6] California's allegations include claims that Rose violated: (1) California's Tobacco Directory, established pursuant to Cal. Rev. & Tax Code, § 30165.1; (2) California's Cigarette Fire Safety and Firefighter Protection Act, Cal. Health & Saf. Code §§ 14950-14960; and (3) California's Unfair Competition Law, Business and Prof. Code §§ 17200, et seq. (Memorandum of Points and Authorities in support of Motion to Remand, pp. 1:12-1:22).

Under established federal law, a state presumptively lacks the authority to regulate the property or conduct of Indian tribes or tribal-member Indians in Indian country. *Oklahoma Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 125 (1993); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 167-68, 179-80 (1973); discussion, *supra*. Therefore, except in a very limited class of cases, the only sovereign other that may regulate a tribal members acting within their reservations is the federal government. See *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 169 n. 18 (1982) (United States has plenary authority in regard to Indian tribe's and tribal sovereignty).[7] Consequently, because of the unique protective relationship between the federal government and Indian tribes, a state seeking to impose its laws and regulations on Indians in Indian country bears the burden of showing that federal law authorizes such action. *See generally McClanahan*, 411 U.S. 164 (1973).

The issue of whether a state can impose its laws and regulations on Indians in Indian country is the inverse of the issue discussed by the Ninth Circuit in *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074 (9th Cir. 1990). There, a California Indian tribe attempted to enforce its Tribal gaming ordinance against a non-Indian. *Id.* at 1076-77. The Ninth Circuit held that, in attempting to enforce tribal law, the Indian tribe "necessarily invoke[d] its sovereign power and relie[d] on its disputed ability, under principles of federal common law, to apply that power against one outside of its community." *Id.* at 1077. The Ninth Circuit found that, because the tribe relied on federal law to enforce its own law, the "federal question of the Band's power inheres in its complaint." *Id.* The *Morongo* Court expressly rejected the defendant's argument that the tribe's enforcement of its law against a non-Indian was an internal tribal matter, observing that there would be no federal issue involved if the Morongo Band was attempting to internally enforce its law against a tribal member within the reservation. *Id.* at 1077-78. In response to the defendant's arguments that the Indian tribe

[7] *See also Winton v. Amos*, 255 U.S. 373, 391 (1921) (Congress has plenary authority over Indians and all of their tribal relations, and exclusive power to legislate concerning tribes); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903) (Plenary authority over tribal relations has always been located in Congress); *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 308 (1902) (Congress has full and exclusive power to regulate Indian tribes); see also *American Vantage Companies, Inc. v. Table Mountain Rancheria*, 292 F.3d 1091, 1096 (9th Cir. 2002) (because Congress possess plenary power over Indian affairs, Indian tribes fall under "nearly exclusive federal, rather than state, control.").

FREDERICKS PEEBLES & MORGAN LLP
2020 L ST., STE 250
SACRAMENTO, CA

had power over the defendant, the Ninth Circuit stated that is "point is that [the defendant's] arguments at best go toward *answering* the federal question; *they do not erase it from the complaint*." *Id.* at 1078 (second emphasis added).

In *Morongo*, the non-Indian defendant argued that the federal question of whether the Indian tribe could regulate a non-Indian only arose by way of defense. *Id.* at 1078. The Ninth Circuit rejected this argument. It noted that "[t]o enforce its ordinance against [the non-Indian defendant], the Band will first have to establish its sovereign power to exercise civil authority civil authority over" a non-Indian. *Id.* "That question of the power to regulate 'the affairs of non-Indians' is one of federal law," *id.* (quoting *Nat'l Farmers Union v. Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 851-52 (1985)), and necessarily "arises from the nature of the complaint itself, *id.* at 1078-79. Accordingly, the Ninth Circuit found that the federal court had jurisdiction had jurisdiction over the Indian tribe's claim against the non-Indian defendant. *Id.* at 1079.

Here, it is undisputed that, like the Indian tribe in *Morongo*, California has an inherent right to enforce its own laws against its citizens within California's jurisdictional authority. It is likely for this reason that California crafted its Complaint to appear as an internal matter of enforcing State statutes against a typical non-Indian defendant outside of Indian country. However, the State is in fact attempting to regulate activity which is outside of its inherent jurisdiction. Like the Indian tribe in *Morongo*, California must rely on federal law – indeed a specific federal statute – in order enforce its statutes against an Indian acting in Indian Country. Because federal law defines these limits, like in *Morongo*, California "will first have to establish its sovereign power to exercise civil authority civil authority over" an Indian in Indian country. *Id.* To do so, California must "rel[y] on its disputed ability . . . to apply that power against one outside of its community." *Id.* As discussed above, California is completely preempted by from applying its statutes against Rose by federal law. California may assert otherwise, but the threshold question of whether *federal law* preempts

FREDERICKS PEEBLES & MORGAN LLP
2020 L ST., STE 250
SACRAMENTO, CA

California's attempts to impose its laws on Rose is necessarily a question of federal law. *See* Cohen's Handbook, § 2.01[1], p. 115-16.[8]

The Ninth Circuit has provided two examples that whether a state may apply its laws to Indians in Indian country is a substantial question of federal law that must be decided before any other merits are reached. In *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655 (1975), the Ninth Circuit considered an attempt to enforce county zoning ordinances. The Court noted that "*[a]t the outset*, we emphasize that this suit involves an attempt to regulate Indian use of Indian trust lands." *Id.* at 658 (emphasis added). The Court further observed that "in any even any concurrent jurisdiction the states might inherently have possessed to regulate Indian use of reservation lands has long ago been preempted *by extensive Federal policy and legislation*." *Id.* (emphasis added) (citations omitted). The *Santa Rose Band* Court construed Public Law 280 and found that it did not grant California counties authority to apply zoning or any other ordinances to Indian lands. *Id.* at 668-69. The Court further noted that, in regards to county ordinances that incidentally regulate activity on Indian lands, the courts "must determine on a case-by-case basis when concrete disputes arise whether the County has jurisdiction to enforce a particular ordinance" under federal law. *Id.* at 669.

In *Doe v. Mann*, 415 F.3d 1038 (2005), the Ninth Circuit considered the application of California child dependency laws. The Court stated that it first must determine whether the state had jurisdiction to apply its laws and that the "answer to that question lies in the interplay between California's child dependency law and Public Law 280." *Id.* at 1048. The Court then provided a roadmap for determining whether a state has jurisdiction under federal law to enforce its statutes in

[8] Cohen's handbook states:

> Three types of sovereign entities may claim authority to regulate activities in Indian country: Indian nations, the states, and the federal government. When conflicts arise, however, federal law takes precedence. Although federal law may point to another sovereign's law as the source of the law to be applied, federal law remains the supreme law of the land with respect to the states, and the law governing the extent to which the United States law recognizes tribal status and property rights.

Cohen's Handbook, 2.01[1], p. 115-16.

FREDERICKS PEEBLES & MORGAN LLP
2020 L ST., STE 250
SACRAMENTO, CA

Indian country. The Court stated that it must first determine whether the state law "embodies either a criminal offense under 18 U.S.C. § 1162(a) or a civil cause of action (civil adjudicatory) under 28 U.S.C. § 1360(a)," or a "regulatory statute." *Id*. at 1048-49. If the state statute is either criminal or civil adjudicatory, then the state may properly exercise jurisdiction. *Id.* at 1048. If the state law "is a regulatory statute, then the tribe ha[s] exclusive jurisdiction" and the state law "is invalid." *Id.* at 1048-49 (citing *Bryan v. Itasca County*, 426 U.S. 373 (1976). In *Doe*, the Ninth Circuit found that Public Law 280 fell within Public Law 280's civil adjudicatory jurisdiction, and therefore California could apply its child dependency laws. *Id.* at 1049. The Ninth Circuit also found that the Indian Child Welfare Act provided authority for California to apply its child dependency laws to Indians in Indian country. *Id.* at 1064.

Taken together, *Santa Rosa Band* and *Doe* establish that in any case involving a state's attempt to apply its laws to Indians in Indian country, a court must determine whether Public Law 280 or some other federal statute authorizes the application of those state laws to Indians in Indian country as a primary and threshold matter. *See also Cabazon*, 480 U.S. at 208 ("Accordingly, when a State seeks to enforce a law within an Indian reservation under the authority of Pub. L. 280, it must be determined whether the law is criminal in nature, and thus fully applicable to the reservation under § 2, or civil in nature, and applicable only as it may be relevant to private civil litigation in state court."). Thus, as in *Morongo*, any arguments made by California that it has the authority to impose its statutes upon Rose "at best go toward answering the federal question; they do not erase it from the complaint." *Morongo*, 893 F.2d at 1078.

Such a federal authority, if it were to exist, is therefore necessary to California's causes of action. There is not a single theory under which California may recover on its claims that does not depend entirely on the substantial federal question of whether California may in fact impose and enforce the California statutes alleged in the Complaint against Rose. Accordingly, the federal

FREDERICKS PEEBLES & MORGAN LLP
2020 L ST., STE 250
SACRAMENTO, CA

question inheres in California's Complaint, and the Complaint satisfies the second prong of the *Christianson* test. This Court therefore possesses jurisdiction under 28 U.S.C. § 1331.

C. That California's Claims Necessarily Derive from Federal Law is Indicated By the Fact that California's Complaint is Not Well-Pleaded if Exhibit A of California's Complaint is Not a Part of the Complaint.

As noted above, the general test for whether a complaint is removable is whether "a federal question is presented on the face of the plaintiff's *properly pleaded complaint*." *Caterpillar, Inc.* v. Williams, 482 U.S. 386, 392 (1987) (citation omitted). In order to properly plead a cause of action, a complaint must establish the court's jurisdiction and plead facts necessary to establish that the plaintiff is entitled to relief. Fed. R. Civ. P. 8; *Boisclair v. Superior Court*, 51 Cal.3d 1140 (1990) ("The general rule is that subject matter jurisdiction is determined from the face of a well-pleaded complaint."). It is the plaintiff's burden in the first instance to establish in the complaint the court's jurisdiction and the facts necessary to state a cause of action. A defendant's calling attention to a plaintiff's failure to meet its initial burdens in a complaint does not raise a federal defense.

As discussed above, California must establish that some federal law authorizes California to impose and enforce its laws on Indians in Indian country. Because California cannot sustain any of its causes of actions under any theory without such an authorization, a pleading of such federal law is necessary to establish that California is entitled to relief. In addition, as California is aware, Rose is an Indian and the land in question is Indian trust land within the jurisdiction of the Alturas Indian Rancheria. Pretending these facts do not exist does not make them any less necessary to the proper pleading of California's causes of action. Thus, if Exhibit A was not included on the face of the Complaint, California's Complaint would not be well-pleaded.

Moreover, if Exhibit A is not included in the Complaint, the State Court lacks jurisdiction over the Complaint under California Supreme Court precedent. In *Boisclair v. Superior Court*, 51 Cal. 3d 1140 (1990), the Supreme Court of California held that the California courts lack jurisdiction

FREDERICKS PEEBLES & MORGAN LLP
2020 L ST., STE 250
SACRAMENTO, CA

over any case that involves a dispute over whether a particular parcel of land is Indian trust land. *Id.* at 1156. The California Supreme Court stated, "As long as the Indian party to the litigation claims that the property is Indian trust or allotted land, the dispute may be characterized as one concerning ownership and possession of Indian land, and is therefore barred from state court jurisdiction." *Id.* at 1154. The State Court noted that "once an area of state law has been completely pre-empted, any claim purportedly based on that pre-empted state law is considered, from its inception, a federal claim, and therefore arises under federal law." *Id.* at 1156 (quoting *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 393 (1987)). The "United States Supreme Court has specified that Indian property law is one area in which the 'complete preemption doctrine' is applicable." *Id.* (citing *Caterpillar*, 482 U.S. at 393 n.8). Further, the State Court concluded that "it is incumbent on the state court, as in the case of areas of law completely preempted, to look beyond the face of the complaint in order to determine from the totality of the pleadings whether the case before it is a dispute over the ownership or right to possession of Indian land or any interest therein." *Id.*

In the instant case, California's Complaint complains of activity alleged to occur in Siskiyou County, California and Shasta County, California. (Complaint, at ¶¶ 10-11, 18-19). If Exhibit A is not included in the face of California's Complaint, the Complaint fails to acknowledge the trust status of the land and, by that omission, asserts that the land is non-trust land in California.[9] Rose, on the other hand, "claims that the property is Indian trust or allotted land." *Id.* at 1154. Therefore, the "dispute may be characterized as one concerning ownership and possession of Indian land, and is therefore barred from state court jurisdiction." *Id.* at 1154.

Because California would have failed to establish jurisdiction in the State Court, the Complaint is not well-pleaded. In order to cure the State court's lack of jurisdiction, California

[9] California must either acknowledge that the land is Indian trust land, thereby raising the federal issue of whether it can properly regulate the activity of Indians in Indian country, or assert that the land is non-trust land subject to general applicability of California law. It cannot have it both ways.

would be required to amend the Complaint to include the essential facts regarding the trust status of the land, Rose's status as a member of an Indian tribe, and the State's federal basis for asserting authority to regulate the activity of Indians in Indian country. This of course is assuming California does indeed acknowledge the trust status of the land.

D. The Federal Issues In This Case Are Too Central to the Federal Government to be Left To California and Its Courts.

Indeed, due to the historic – and unfortunately continuing – hostilities between states and Indians that reside within the states' geographical borders, the reference to federal law and availability of a federal forum is even more crucial. More and more, as Indians and Indian tribes develop tribal economies, redevelop their societies, and establish truly self-sustaining governments, they are beset with assertions of state authority that have no grounding in federal law. As such, reservation Indians must be able to invoke the jurisdiction of federal courts when states overstep their sovereign rights in ways that have not been authorized by the federal government—the state's sole source of power. Federal jurisdiction is critical to preventing the state's exercise of unauthorized authority and long-standing federalization of Indian affairs. This is too central of a concern of the federal government to leave in the hands of state courts. Indeed, as the Supreme Court recognized long ago, state and local decision-making is often hostile toward reservation Indians. *See New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 339 (1983).

Unfortunately, as the Supreme Court has also recognized, this potential hostility does not end with state and local legislative bodies but also all too often infects the state courts as well. *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 566-67 (1983) (stating that there is "a good deal of force" to the view that "[s]tate courts may be inhospitable to Indian rights"); *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 678 (1974) ("[S]tate authorities have not easily accepted the notion that federal law and federal courts must be deemed the controlling considerations in dealing with the Indians."); *see also Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 313 n.11 (1997) ("[T]he readiness of the state courts to vindicate the federal right[s of Indian tribes] has been less than perfect.") (Souter, J., with Stevens, Ginsburg, and Breyer, JJ., dissenting); *United States v. Kagama*, 118 U.S. 375, 384

FREDERICKS PEEBLES & MORGAN LLP
2020 L ST., STE 250
SACRAMENTO, CA

(1886) (recognizing that "[b]ecause of the local ill feeling, the people of the States where [the Indians] are found are often their deadliest enemies").

Accordingly, the question of whether federal law authorizes a state to impose its laws on Indians acting within Indian country should not be left to the state courts.

E. The Other State Cases Addressed in California's Request for Remand Are Factually Distinct and Do Not Provide Support Here.

In addition to incorrectly asserting that this case does not present a facial federal question, California also asserts that this court should adopt the decisions to remand cases California brought against cigarette retailers by the this Court – *People of the State of California v. Native Wholesale Supply Co.*, 632 F.Supp.2d 988 (E.D. Cal. 2008) – the Central District of California – *People of the State of California v. Black Hawk Tobacco, Inc.*, No. EDCV 09-1380-VAP (C.D. Cal. Aug. 14, 2009) – and *People of the State of California v. Huber*, No. C 11–1985 RS, 2011 WL 2976824 (N.D. Cal. July 22, 2011). California's comparisons to the above cases are mistaken. Both *Native Wholesale* and *Black Hawk Tobacco* are factually distinct from this case and did not raise the issue of whether federal law authorized California to impose its laws against reservation Indians for actions occurring within their own reservation. *Huber*, on the other hand, did involve similar facts but was decided on a misapplication of *Oklahoma Tax Commission v. Graham*, 489 U.S. 838 (1989) and was therefore erroneously decided.

Native Wholesale involved an out-of-state, corporation owned by a member of the Seneca Nation and headquartered on reservation lands in New York. The corporation imported cigarettes off its own reservation into various free trade zones where they were stored. Eventually, some of the cigarettes made their way into the geographical boundaries of California by distributing them to Indian tribes for resale at tribal smoke shops or through tribal distribution systems. Thus, *Native Wholesale* involved the actions of a non-member Indian corporation far removed from the corporation's home reservation.

Black Hawk Tobacco is similar to *Native Wholesale* in certain important regards. For instance, *Black Hawk Tobacco* like *Native Wholesale* involved an Indian owned corporation involved in the sale of cigarettes. *Black Hawk* was owned by a member of the Sac & Fox Tribe of Oklahoma

FREDERICKS PEEBLES & MORGAN LLP
2020 L ST., STE 250
SACRAMENTO, CA

and was incorporated under the laws of both the State of California and the Sac & Fox Tribe. *Black Hawk Tobacco* conducted its business from locations situated within the boundaries of the Agua Caliente Indian Reservation in southern California. Thus, like *Native Wholesale*, *Black Hawk Tobacco* involved the actions a non-member Indian corporation far removed from its home reservation.

Neither *Native Wholesale* nor *Black Hawk Tobacco* involved the factual situation here, where California seeks to impose directly against an Alturas Indian Rancheria tribal member conducting business on Indian trust land within Alturas jurisdiction. Consequently, to say – as California does – that any of the above cases are "nearly identical" to the instant case is simply wrong. While those cases no doubt implicate Indian commerce, this case cuts to the heart of reservation Indians right to make and live under their own laws free from interference from the state that is not authorized pursuant to federal law—it directly attacks the sovereignty of Indian tribes which can only be divested through federal authority, which California does not have.

Again, the distinction may be subtle but it is critically important. As noted above, when it comes to the regulation of non-member in Indian country, the Supreme Court has determined that the non-Indian or non-member bears the burden of showing that a particular state law or regulation is unenforceable. *See generally Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S.134 (1980). Arguably, such a claim arises only as a defense to the state action. Conversely, however, when a state attempts to impose its laws directly against a reservation Indian, or an Indian tribe, the state presumptively lacks powers and thus it bears the burden of showing that federal law authorizes its intended regulatory action. *McClanahan*, 411 U.S. 164. Therefore, anytime a state attempts regulate an Indian tribe or Indian in Indian country, the power to do so must expressly derive from federal law.

In contrast to *Native Wholesale* and *Black Hawk Tobacco*, *Huber* does contain similar facts to the instant case. However, *Huber* was mistakenly decided, primarily because the Northern District mistakenly understood the defendant to be raising the issue of the tribal sovereign immunity. The Northern District Court relied heavily upon *Oklahoma Tax Commission v. Graham*, 489, U.S. 838 (1989). Even if *Huber* had raised that issue, California expressly acknowledges that this case does

not raise the issue of tribal sovereign immunity, and therefore *Graham* does not apply as discussed more fully below. Accordingly, *Huber* is inapplicable to the instant case.

F. Oklahoma Tax Commission v. Graham Does Not Apply To the Instant Case.

In its motion for remand, California obliquely raises *Oklahoma Tax Comm'n v. Graham*, 489 U.S. 838 (1989), and asserts that *Graham* would suggest there is no federal question in matter. However, in doing so California openly acknowledges that *Graham* is irrelevant in that Rose has not asserted sovereign immunity as a basis for federal jurisdiction. (Memorandum of Points and Authorities in support of Motion to Remand, p. 2:19-20.)

Graham, as the Court is obviously aware, determined that the issue of tribal sovereign suit immunity that was not raised on the face of the complaint was merely a federal defense to claims otherwise based solely on state law. Consequently, the Court found that tribal sovereign immunity standing alone, although it may be an issue in the case once raised, does not provide a basis for federal jurisdiction. *Graham*, 489 U.S. at 841-42.

To the extent that California may change its position and put more reliance on *Graham* that reliance would be misplaced for at least two reasons.

First, as discussed above, the federal issue in this case appears on the face of California's complaint. As noted, California attached a letter dated December 6, 2012 to its complaint. Therefore, that letter and any statements or allegations therein are part of, and appear on the face of, the complaint.

In its December 6, 2012, letter the Attorney General asserts that Darren Rose and the Burning Arrow Smoke Shops are selling cigarettes in violation of several California law. The letter further acknowledges that all of the sales occur from Mr. Rose's tribal-member allotment which is held in trust by the United States. The Attorney General then unilaterally declares that the fact that the tribal members' sales occur on trust land is "irrelevant to the application of these [state] laws . . . ." [10]

[10] Importantly, with regard to the Northern District's decision in *California v. Huber* ("*Huber*"), No. C 11-09185 RS, 2011 WL 2976824 (N.D. Cal. July 22, 2011) California did not make any similar assertions, in attached letters or otherwise, that cigarettes were being sold by tribal members from Indian lands. Nor did California unilaterally declare that such facts would be "irrelevant" if they existed.

FREDERICKS PEEBLES & MORGAN LLP
2020 L ST., STE 250
SACRAMENTO, CA

The "relevancy" of the identity of the defendant and the status of the land has with regard to the application of state law can only be determined by reference to the federal law from which California's regulatory authority derives. Because, as shown, if there is any regulatory authority it can only derive from a federal grant. See *Doe v. Mann, supra,* 415 F.3d at 1059; *Santa Rosa, supra,* 532 F.2d at 659; *Agua Caliente, supra,* 347 F.Supp. at 49. California's inclusion of its December 6, 2012 raises this issue on the face of the complaint. Consequently, federal jurisdiction is proper.

Second, what California would miss, and what the Northern District arguably missed in *Huber*, is that the issue of sovereign immunity is always an affirmative defense, irrespective of whether it is an Indian or the federal government that raises this issue. *See Alden v. Maine*, 527 U.S. 706, 737 (1999); *Verlinden B.V. v. Cent. Bank of Nig.*, 461 U.S. 480, 493, n. 20 (1983). Presumably, this is because immunity is subject to waiver or limitation by statute. Immunity only becomes an issue once it is raised, and it does not affect the applicability of the underlying laws; it only determines whether an entity may be sued even if the laws apply. *See generally Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751 (1998) (discussing tribal sovereign immunity from suit and distinguishing it from application of state application of substantive laws to Indians).

Here the situation is reversed. California has no inherent right to regulate Indians in Indian country. To the contrary, as discussed in detail above, California unequivocally surrendered any such right when it joined the Union. Consequently, California must rely on federal law as a basis for bringing any regulatory action like this one. Thus, the burden in the first instance falls on California to identify the federal law that forms the basis of its asserted authority the issue. This issue, unlike the issue of sovereign immunity does not arise as an affirmative defense. It arises as a fundamental prerequisite to any regulatory suit against an Indian for actions occurring in Indian country. *See Doe v. Mann, supra,* 415 F.3d at 1059; *Santa Rosa, supra*, 532 F.2d at 659; *Agua Caliente, supra*, 347 F.Supp. at 49

Finally, again, as discussed, the only federal law that is relevant to California's asserted regulatory authority is Public Law 280. Public Law 280 defines the scope of California's civil authority over Indians in Indian country. And while Public Law 280 grants California courts the limited authority to determine private litigation, it completely preempts California's ability to impose

FREDERICKS PEEBLES & MORGAN LLP
2020 L ST., STE 250
SACRAMENTO, CA

state regulations directly against actions Indians undertake in Indian country. *Santa Rosa*, 532 F.2d at 659.

G. Other Considerations

President Obama's administration endorsed the United States Declaration on the Rights of Indigenous Peoples and thereby re-emphasized the federal government's strong interest in protecting and fostering Indian tribe's efforts at self-determination. In particular, Articles 3, 4, 5, and 20 of the Declaration establish that – in the eyes of the federal government -- state encroachment upon the sovereign territory of Indian tribes is wholly inappropriate.[11]

Article 3 of the Declaration provides: "Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." Expanding on the of this right, Article 4 provides: "Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions. Article 5 of the Declaration reinforces the right of Indian tribes to be free from the external interference of states by providing that: "Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State." And finally, Article 20(1) openly acknowledges the sovereign status of Tribe's by providing that: "Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities."

Some – including California – may think that by signing onto the Declaration, the federal government has promoted an expansion of tribal rights. Such a view, if taken, is mistaken. Instead of expanding rights, what the federal government has done by signing onto the Declaration is simply to acknowledge, and reaffirm what was fixed by federal law long ago, which is that under federal law

[11] Article 3 of the Declaration provides: "Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." Similarly, Article 4 provides: "Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or

– and perhaps soon under international law – states have no inherent right to interfere with matters dealing with tribal members and the actions they take within their Tribe's sovereign territory. In order to do so, the state has the burden of showing that federal law authorizes its actions.

H. Attorney Fees and Costs are Inappropriate in the Instant Case.

As discussed above, this case is factually and legally distinguishable from *Huber*, *Native Wholesale*, and *Black Hawk Tobacco*. Moreover, contrary to California's claims, Defendant Rose has raised substantially different arguments in the instant case than arguments raised in previous cases. The arguments raised in the instant case are supported by existing precedent, which supports that removal is proper. Accordingly, attorney fees and costs are inappropriate in this case.

IV. CONCLUSION

For the foregoing reasons, Defendant Rose respectfully requests that this Court deny California's Motion to Remand and for Attorney Fees and Costs.

Dated: April 29, 2013

FREDERICKS PEEBLES & MORGAN LLP

By: /s/ Michael A. Robinson
Michael A. Robinson
Attorneys for Darren Rose, individually, dba Burning Arrow I and Burning Arrow II

FREDERICKS PEEBLES & MORGAN LLP
2020 L ST., STE 250
SACRAMENTO, CA

FREDERICKS PEEBLES
& MORGAN LLP
2020 L ST., STE 250
SACRAMENTO, CA