KAMALA D. HARRIS
Attorney General of California
KAREN LEAF
Senior Assistant Attorney General
DENNIS ECKHART, State Bar No. 70730
BARRY ALVES, State Bar No. 232971
ERIN W. ROSENBERG, State Bar No. 262377
Deputy Attorney General
1515 Clay Street, 20th Floor
P.O. Box 70550
Oakland, CA 94612-0550
Telephone: (510) 622-2137
Fax: (510) 622-2270
E-mail: Erin.Rosenberg@doj.ca.gov
Attorneys for the People of the State of California

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

SACRAMENTO DIVISION

PEOPLE OF THE STATE OF CALIFORNIA, ex rel. Kamala D. Harris, Attorney General of the State of California, Plaintiff, **v.** **DARREN PAUL ROSE, individually, and doing business as BURNING ARROW I and BURNING ARROW II, and Does 1 through 20,** Defendants.	Case No. 2:13-CV-00675-LKK-DAD **REPLY IN SUPPORT OF THE PEOPLE'S MOTION TO REMAND AND FOR ATTORNEY FEES AND COSTS** Date: May 13, 2013 Time: 10:00 a.m. Dept: 4 Judge: The Hon. Lawrence K. Karlton Removed from: Superior Court of California, County of Shasta

INTRODUCTION

This case was improperly removed to federal court and must be remanded. California's complaint consists of three causes of action, all of which are based exclusively on state law, and none of which requires resolution of a substantial federal question. Defendant contends this case is "unprecedented," barred in all courts, and removable to federal court under the complete preemption doctrine; but his arguments are predicated upon the false assertion that states may

only exercise jurisdiction over an Indian in Indian country under a federal statute that expressly grants jurisdiction. Defendant is actually raising a different and broader defense of preemption, which does not convert state claims into federal questions. There is no federal question in the complaint, embedded or otherwise, and removal was therefore improper.

Also, given that counsel for Defendant has tried, and failed, to remove three other very similar state actions to federal courts, counsel had no basis for seeking removal here. Thus, the People ask that the Court award the People the costs and fees associated with responding to this remand motion.

ARGUMENT

I. DEFENDANT'S ARGUMENT THAT PUBLIC LAW 280 AND THE COMPLETE PREEMPTION DOCTRINE BAR THIS CASE MISSTATES THE LAW AND THE GROUNDS FOR THE PEOPLE'S JURISDICTION OVER HIM

"[S]ince 1887 it has been settled law that a case may not be removed to federal court on the basis of a federal defense, including the defense of preemption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties admit that the defense is the only question truly at issue in the case." *Franchise Tax Bd. v. Constr. Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 12-13 (1983). The federal issue "must be disclosed on the face of the complaint, unaided by the answer or the petition for removal." *Gully v. First Nat'l Bank*, 299 U.S. 109, 113 (1936). Moreover, "it is the state courts, not the federal courts, that must decide in the first instance whether the states have jurisdiction over a given case." *Timbisha Shoshone Tribe v. Kennedy*, 714 F. Supp. 2d 1064, 1072-73 (E.D. Cal. 2010) (citing *Ethridge v. Harbor House Restaurant*, 861 F.2d 1389, 1401-02 (9th Cir. 1988); *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 398 (1987)).

There is, however, one exception to this rule: cases of "complete preemption." That doctrine applies in certain rare cases where "the preemptive force of a 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 395. Complete preemption is a narrow exception to the well-pleaded complaint rule and is distinguishable from "preemption that stems from a conflict between federal and state law [which] is a defense to a state law cause

of action and, therefore, does not confer federal jurisdiction over the case." *ARCO Environmental Remediation, L.L.C. v. Dep't of Health and Envtl. Quality,* 213 F.3d 1108, 1114 (9th Cir. 2000).

Defendant's complete preemption contention is a chain argument that: (1) states surrendered all authority regarding Indians in Indian country to the federal government when they ratified the United States Constitution (Rose Opp'n at 2-5); (2) consequently, states cannot regulate any conduct by Indians in Indian country unless an express federal statute grants jurisdiction (*id*. at 6); (3) California may only regulate conduct by Indians in Indian country under Public Law 280 (*id*.); (4) Public Law 280 does not provide an express grant of federal jurisdiction in this case (*id*.); and thus, this case is completely preempted by Public Law 280.

Defendant is correct that Public Law 280 has no bearing upon this case, but the remainder of his argument misstates the law. It is well-established that states have two independent grounds for exercising regulatory jurisdiction over Indians in Indian country: (1) federal statutes that provide express grants of jurisdiction; and; (2) jurisdiction under the Supreme Court's balancing test articulated in *White Mountain Apache Tribe v. Bracker* ("*Bracker*"), 448 U.S. 136, 141 (1980). As addressed below, the Supreme Court has applied *Bracker* to uphold state laws concerning Indians selling cigarettes in Indian country. Thus, Defendant's attempt to remove the case based upon the complete preemption doctrine lacks merit.

A. Defendant's Removal Argument Is Foreclosed by the Fact That States Have Two Independent Grounds for Jurisdiction over Indians in Indian Country

As a general matter, state authority to regulate the conduct of tribes or tribal members is limited. But "generally" no longer means "absolutely." Historically, states could not impose any laws on Indians living in Indian country without the consent of the tribes, treaties, or acts of Congress. *Worchester v. Georgia*, 31 U.S. 515, 520 (1832). The modern Supreme Court, however, has modified this principle. "Long ago the Court departed from Mr. Chief Justice Marshall's view that the 'law of [a state] can have no force within reservation boundaries." *Bracker*, 448 U.S. at 141, quoting *Worchester,* 31 U.S. at 520. The Court now recognizes that, while tribes "are sovereign for some purposes, it is now clear that Indian reservations do not

partake of the full territorial sovereignty of the States or foreign countries." *Washington v. Confederated Tribes of Colville Indian Reservation* ("*Colville*"), 447 U.S. 134, 165 (1980).

There are two ways a state may exercise regulatory jurisdiction regarding conduct by Indians in Indian country:

B. Statutory Grants of Jurisdiction

First, state laws apply in Indian country if there is an express federal statute granting jurisdiction. One example of such a federal grant available in California is Public Law 83-280. 18 U.S.C. § 1162, 28 U.S.C. § 1360. Public Law 280 expressly granted six states, including California, jurisdiction over specified areas of Indian country within the States. *Cal. v. Cabazon Band of Mission Indians*, 480 U.S. 202, 214-15 (1987). Under Public Law 280, California was granted broad criminal jurisdiction over offenses committed by or against Indians within California Indian country and limited civil jurisdiction over private civil litigation involving reservations. *Id*. at pp. 207-08. "Public Law 280 was intended as a grant of jurisdiction, not as a prohibition on exercising jurisdiction the state would otherwise possess." *People of South Naknek v. Bristol Bay Borough*, 466 F. Supp. 870, 879 (D. Alaska 1979).

Defendant argues that Public Law 280 does not provide an express grant of federal jurisdiction in this case and, consequently, the action is barred by the complete preemption doctrine. Rose Opp'n at 4, 6-8. Defendant is half correct. The People do not contend that Public Law 280 or any other express grant of federal jurisdiction applies in this case. Instead, as addressed below, jurisdiction is based upon the well-established principal that states may validly assert authority over the activities of Indians in Indian country in some instances without express congressional consent. Consequently, neither Public Law 280 nor the doctrine of complete preemption is relevant to any issue in this case.

C. Jurisdiction Under the *Bracker* Balancing Test

A state's jurisdiction in Indian country is not limited to express grants of congressional consent. Without express consent, states "may validly assert authority over the activities of nonmembers on a reservation, and . . . in exceptional circumstances a State may assert jurisdiction

over the on-reservation activities of tribal members." *Cabazon*, 480 U.S. at 214-15, quoting *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331-322 (1983).

To determine whether preemption[1] bars the application of state law in Indian country, *Bracker* instructs courts to conduct a "particularized inquiry into the nature of the state, federal, and tribal interests at stake" and balance those interests under the "backdrop" of Indian sovereignty. *Bracker*, 448 U.S. at 143-45. Under the balancing test, state jurisdiction is preempted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of the state authority. *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation* (1989) 492 U.S. 408, 465-466, citations and quotations omitted. Contrary to Defendant's contentions, there is no "inflexible per se rule precluding state jurisdiction over tribes and tribal members in the absence of express congressional consent." *Cabazon*, 480 U.S. at 214-215.

One aspect of state authority the Supreme Court has addressed several times under *Bracker* is the right of states to tax on-reservation property and transactions involving tribes and Indians in Indian country. *Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation* 425 U.S. 463, 482-483 (1976); *Colville*, 447 U.S. at 155-159; *Cabazon*, 480 U.S. at 215-16. The Court has repeatedly held that states may regulate some tribal activities under certain circumstances, including where the state seeks to collect cigarette taxes from tribal tobacco shops in Indian country, because the state's assertion of jurisdiction is neither preempted nor inconsistent with any federal law regarding Indian affairs. *Id*. In *Colville*, the Supreme Court held that Washington's tax on tribal tobacco shops was not preempted by any tribal treaties, the Indian Reorganization Act of 1934, the Indian Self-Determination and Education Assistance Act of 1975, or the Indian trader statutes. *Colville*, 447 U.S. at 155-159. The Supreme Court explained: "[w]hat the smokeshops offer these customers [from outside the reservation], and what is not available elsewhere, is solely an exemption from state taxation." The Court concluded that "[w]e do not believe that principles of federal Indian law, whether stated in terms of pre-emption,

[1] *Bracke*r addresses the broader defense of preemption, not the complete preemption doctrine raised by Defendant.

tribal self-government, or otherwise, authorize Indian tribes thus to market an exemption from state taxation to persons who would normally do their business elsewhere," and no federal law "goes so far as to grant tribal enterprises selling goods to nonmembers an artificial competitive advantage over all other businesses in a State." (*Id*. at 155.)

In *Rice v. Rehner*, 463 U.S. 713 (1983), the Supreme Court also held that California can require an Indian trader to obtain a license to sell liquor for consumption off the reservation. *Id*. at 715-16. The Court cited *Moe* and *Colville*, explaining that "[r]egulation of sales to non-Indians or nonmembers of the . . . Tribe simply does not 'contravene the principle of tribal self-government,' and, therefore, neither [the trader] nor the ... Tribe has any special interest that militates against state regulation in this case, providing that Congress has not pre-empted such regulation." *Id*. at 720 n. 7 (citing *Moe*, 425 U.S. at 475-76; *Colville*, 447 U.S. at 151, 161). Furthermore, in *Nevada v. Hicks*, 533 U.S. 353 (2011) another non-tax case, the Supreme Court noted that "[w]hen . . . state interests outside the reservation are implicated, States may regulate the activities even of tribe members on tribal land, as exemplified by our decision in [*Colville*]." *Id*. at 362.

The cases above conclusively establish that states may regulate Indians in Indian country without an express federal grant of authority. Moreover, the cases conclusively disprove Defendant's argument that states were completely stripped of their authority to regulate any conduct by Indians in Indian country upon ratifying the United States Constitution. The complete preemption doctrine does not apply in this case. Instead, Defendant is addressing the broader preemption that stems from a conflict between federal and state law, which may serve as a defense to a state law cause of action, but does not confer federal jurisdiction over this case. Therefore, this matter should be remanded back to state court.

II. THERE IS NO FEDERAL QUESTION IN THE COMPLAINT RELATING TO LAND STATUS

A. Attachment A to the Complaint Does Not Raise a Federal Question Regarding the Status of the land on which Defendant's Tobacco Shops Are Located

Defendant is correct that an attachment to a complaint becomes part of a pleading. However, he goes too far in claiming that the attached letter from Deputy Attorney General

Dennis Eckhart raises a federal question. Instead, the letter underscores that the causes of action in the Complaint all arise under state law and that the status of the land on which the violations occurred "is irrelevant to the application of [the State] laws." Exhibit A to Complaint at 1; Rose Opp'n at 8. Again, Defendant confuses the well-pleaded complaint rule with the possibility of a defense based on federal preemption. It is well-established that the latter does not make the action removable. *Berg v. Leason*, 32 F.3d 422, 426 (9th Cir. 1994).

B. There Is No Inherent Federal Question Regarding the Status of the Land on Which Defendant's Tobacco Shops Are Located

Although unclear, Defendant appears to argue that the People must take a position regarding the status of the land on which Defendant's tobacco shops are located or the Complaint "would not be well-pleaded." Rose Opp'n at 14-16. He also claims that, if the Complaint does not explicitly allege that the activities occurred on trust land, then the Complaint "by that omission, asserts that the land is non-trust land in California." *Id.* at 15. Both assertions are meritless. The Complaint alleges that the causes of action, all of which arise under state law, occurred within the State of California. Complaint at ¶¶ 10-11. If Defendant wishes to raise a defense regarding the status of the land based on federal preemption (by federal statute or otherwise), he is free to do so. Again, however, the possibility of a defense based on federal preemption does not justify removal of this action. *Berg*, 32 F.3d at 426.

Moreover, this case does not involve "a dispute over whether a particular parcel of land is Indian trust land." Rose Opp'n at 15. Instead, it involves a dispute over whether Defendant violated state law by selling contraband cigarettes to California residents. Thus, *Boisclair v. Superior Court*, 51 Cal.3d 1140 (1990), is inapposite.

III. DEFENDANT'S REMOVAL ARGUMENTS ARE FORECLOSED BY THREE RECENT DISTRICT COURT CASES AND BY *OKLAHOMA TAX COMMISSION V. GRAHAM*

It is not surprising that Defendant vigorously attempts to distinguish this case from *People v. Black Hawk Tobacco, Inc., et al.*, No. EDCV 09-1380-VAP, 2009 WL 5793504 (C.D. Cal., Aug. 14, 2009), *California v. Huber*, No. C 11-01985 RS, 2011 WL 2976824 (N.D. Cal., July 22, 2011), *California v. Native Wholesale Supply Company*, 632 F. Supp. 2d 988 (E.D. Cal. 2008), and *Oklahoma Tax Commission v. Graham*, 489 U.S. 838 (1989), as these cases are directly on

point and are fatal to Defendant's removal. However, Defendant fails to make any convincing distinctions, and, instead, repeatedly misstates the law and the facts.

Defendant incorrectly argues that *Black Hawk Tobacco* is distinguishable because it allegedly did not involve reservation Indians. Rose Opp'n at 1, 17-18. Defendant is mistaken. *Black Hawk Tobacco* also named Frederick McAllister, an Indian doing business on an Indian reservation, as a defendant. *Black Hawk Tobacco*, 2009 WL 5793504, at *1.

Defendant mistakenly asserts that a "critical[ly] important" distinction exists here between regulating a non-member and regulating a member Indian in Indian country. Rose Opp'n at 18. Not so. The Supreme Court has stated repeatedly that "a State may assert jurisdiction over the on-reservation activities of tribal members" in certain circumstances, including where the state seeks to collect cigarette taxes from tribal tobacco shops on Indian reservations. *Cabazon*, 480 U.S. at 215-216 (citing *Moe*, 425 U.S. 463; *Colville*, 447 U.S. 134).

Defendant erroneously claims that "anytime a state attempts to regulate an Indian tribe or Indian in Indian country, the power to do so must expressly derive from federal law." Rose Opp'n at 18. He ignores Supreme Court precedent that "*in the absence of express congressional permission*, a State could require tribal smokeshops on Indian reservations to collect state sales tax from their non-Indian customers." *Cabazon*, 480 U.S. at 215-216, emphasis added.

Defendant admits that *Huber* involves similar facts, but argues that the Northern District Court misapplied *Graham* when it remanded *Huber* because the court "mistakenly understood the defendant to be raising the issue of tribal sovereign immunity." Rose Opp'n at 18. To the contrary, the court properly understood that the defendant had raised a federal preemption argument, but that such argument, like tribal sovereign immunity, fails under *Graham* because it simply creates a federal *defense* to state law claims. *Huber*, 2011 WL 2976824, at *2-3.

Defendant incorrectly asserts that *Graham* itself is inapplicable because it involved tribal sovereign immunity while Defendant has raised a federal preemption under Public Law 280. Rose Opp'n at 20. However, as previously discussed, a federal preemption claim, like any other defense, does not justify removal. *Gully*, 299 U.S. at 113.

Because there is no material difference between Defendant's basis for removal and the

defendants' bases for removal in the above-cited cases, the Court should remand this case.

IV. AN AWARD OF ATTORNEY FEES AND COSTS IS REASONABLE AND APPROPRIATE

Defense counsel's conduct more than justifies an award of fees and costs to the People. Defendant removed this action to federal court on an improper basis and for an improper purpose. Fed. R. Civ. P. 11(b). The People even warned defense counsel that removal was improper and that they should voluntarily remand the case or face sanctions. *See* Exhibit C to Motion for Remand. Nonetheless, Defendant refused to agree to remand the case, forcing the People to file this motion. The Court should award fees and costs to the People for several reasons:

First, as explained above, existing law does not support removing this case. Defendant has simply failed to show that a federal question exists on the face of the Complaint, or, as he argues, that a federal question is inherent. The Supreme Court has made clear that states have jurisdiction over certain activities on Indian reservations, even without express federal authority. *See, e.g., Cabazon*, 480 U.S. at 215-216. Defendant also ignores Supreme Court precedent when he asserts repeatedly that Public Law 280 "completely preempts California" from exercising regulatory authority here. Rose Opp'n at 7, 20. Public Law 280 is simply inapplicable, and does not preclude California from exercising its authority over cigarette sales to non-members. Moreover, numerous federal district courts have recently reminded Defendant's counsel that his arguments do not warrant removal. Absent any legal basis for removal, defense counsel's filing of a fourth, substantially similar notice of removal lacks an objectively reasonable basis.

Second, in an attempt to further obfuscate the issues, Defendant filed a vigorous and lengthy[2] opposition that included a discussion of irrelevant Native American history and presidential declarations, Rose Opp'n at 2-6, 21-22, citations to case law that the Supreme Court has long since rejected[3], *id.* at 2-4, and arguments that do not apply to the facts of the case, *id.* at 14-16 (asserting that this case involves a dispute over ownership of Indian land) and 16-17

[2] Defendant's 22-page opposition exceeds the permitted page limits on responses to motions. Fed. R. Civ. P. 27(d)(2).

[3] *See, e.g., White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 141 (1980) ("Long ago the Court departed from Mr. Chief Justice Marshall's view [in *Worcester v. Georgia*] that 'the laws of [a State] can have no force' within reservation boundaries.").

(asserting that the state court cannot adjudicate this dispute because of "hostilities" that "all too often infect[] the state courts"). As a result, the People spent a considerable amount of time deciphering Defendant's arguments and responding to irrelevant and inaccurate assertions.

Third, defense counsel's tactics following removal show that his true motive is to cause unnecessary delay in this case. Under the Federal Rules of Civil Procedure, a defendant who did not file an answer before removal must answer or present other defenses within seven days after the notice of removal is filed. Fed. R. Civ. P. 81(c)(2)(C). Here, service of the Complaint was effected on March 1, 2013, and Defendant filed the notice of removal on March 29, 2013. Thus, Defendant was required to respond to the People's Complaint within seven days from the date of removal, yet he failed to do so. The Court may construe this behavior as an attempt to cause delay. The Ninth Circuit "see[s] no reason for the federal courts to excuse such professional neglect" in failing to follow Rule 81(c). *Savarese v. Edrick Transfer & Storage, Inc.*, 513 F.2d 140, 147 (9th Cir. 1975).

In summary, an award of the People's fees and costs incurred in filing this motion is warranted and reasonable.

Dated: May 6, 2013

Respectfully Submitted,

KAMALA D. HARRIS
Attorney General of California
KAREN LEAF
Senior Assistant Attorney General
DENNIS ECKHART
BARRY ALVES
Deputy Attorneys General

/s/ Erin-Rosenberg
ERIN W. ROSENBERG
Deputy Attorney General
Attorneys for the People of the State of California

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