UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HO-CHUNK, INC., WOODLANDS DISTRIBUTION COMPANY, HCI DISTRIBUTION COMPANY, and ROCK RIVER MANUFACTURING COMPANY, Plaintiffs, v. LORETTA LYNCH, UNITED STATES DEPARTMENT OF JUSTICE, THOMAS E. BRANDON, and UNITED STATES BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES, Defendants.	)	No. 1:16-CV-1652-CRC

DEFENDANTS' OPPOSITION TO PLAINTIFFS' CROSS MOTION AND REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Plaintiffs concede that Indian country is considered in a State for purposes of substantive Contraband Cigarette Trafficking (CCTA) offenses as well as the CCTA forfeiture provisions, which they acknowledge are fully applicable in Indian country. However, they take the illogical and counterintuitive position that Indian country is not in a State for purposes of the CCTA recordkeeping provisions. On the basis of this flawed premise, they conclude that any party operating in Indian country which imports, manufactures, wholesales and commercially distributes large quantities of tobacco in interstate commerce, does not have to maintain distribution records mandated under the CCTA. This argument runs counter to fundamental principles of statutory construction that command that, absent specific statutory exceptions, statutory terms should be interpreted consistently throughout a statute.

Defendants agree with Plaintiffs that this case does not involve a reinterpretation of settled law, specifically that Indian country is considered within a State under the definition of contraband cigarettes, and that the Courts have unanimously upheld the enforcement of CCTA criminal and forfeiture provisions in Indian country.

Defendants also agree with Plaintiffs that the essential facts of this case are not in dispute and that this case involves a single legal issue that is ripe for disposition via summary judgment. The question presented is whether the CCTA recordkeeping requirements apply to manufacturers, importers and wholesale distributors in Indian country who distribute large quantities of cigarettes in interstate commerce. Defendants assert that these recordkeeping requirements apply because, absent specific statutory exemptions, the CCTA is a statute of general applicability that applies to Native Americans in Indian country. Moreover, the terms "Indian country" and "States" are not mutually exclusive. Here, Plaintiffs are located in Indian country and in the State of Nebraska. Additionally, this case involves Federal regulation, rather than State regulation, and there is no indication that a Federal law requiring all persons, including Native Americans, to maintain CCTA records violates tribal sovereignty or contradicts the text of the CCTA. Accordingly, Plaintiffs' request for declaratory and injunctive relief should be denied.

II. THE TERM "STATE" SHOULD BE INTERPRETED CONSISTENTLY THROUGHOUT THE CCTA

Plaintiffs do not and cannot dispute that the criminal provisions of the CCTA have been repeatedly enforced in Indian country and that the CCTA is a statute of general applicability that applies in Indian country. As noted in Defendants' Motion for Summary Judgment, enforcement of the criminal provisions of the CCTA is contingent upon cigarettes being located in a State that requires a tax stamp as indicia of tax payment. *See* 18 U.S.C. § 2341(2) (defining "contraband

cigarettes" under the CCTA as more than 10,000 cigarettes found in a State that lack evidence of required tax payment). *See* 18 U.S.C. § 2341(4) (definition section of CCTA sets forth uniform definition of the term State throughout statute, and the term Indian country is not excluded from term State). Thus, if Indian country were not considered to be within a State under the CCTA, ATF could never enforce the CCTA criminal provisions in Indian country. However, this is certainly not the case as ATF has repeatedly prosecuted defendants in Indian country within the borders of States under the CCTA and courts have unanimously upheld these convictions. *See e.g., United States v. Baker,* 63 F. 3d 1478, 1483 (9th Cir. 1995); *United States v. Morrison*, 686 F.3d 94, 105 (2d Cir. 2012) (reversing district court and holding that the CCTA justified conviction based on sales of unstamped cigarettes on Indian reservations, which were considered to be sales within a State for purposes of the CCTA); *see also United States v. Gord,* 77 F.3d 1192 (9th Cir. 1996) (reversing dismissal of indictment and remanding for trial based on decision in *Baker*).

One section of the CCTA, 18 U.S.C. § 2342(a), imposes criminal liability on the possession of contraband cigarettes that by definition must be in a State. Another section of the CCTA, 18 U.S.C. § 2344(a), imposes criminal punishment, on cigarettes illegally possessed or distributed in a State, which includes Indian country. *See* Defs.' Mot. for Summ. J. at 9-10 (collecting cases). Another section of the CCTA, 18 U.S.C. § 2344(c), subjects contraband cigarettes in Indian country to forfeiture. *See Grey Poplars Inc. v. 1,371,100 Assorted Brands of Cigarettes,* 282 F.3d 1175, 1178 (9th Cir. 2002) (unstamped cigarettes seized by ATF on Washington Indian Reservation are subject to seizure and forfeiture under 18 U.S.C. § 2344 as contraband cigarettes); *United States v. 1,920,000 Cigarettes*, No. 02-CV-437A, 2003 WL 2130528 at *4 (W.D.N.Y Mar. 31, 2003) (upholding seizure and forfeiture of cigarettes destined

for Indian country pursuant to CCTA); *see also* 18 U.S.C § 2341(4) (definition section of CCTA sets forth uniform definition of the term State throughout statute and term Indian country is not excluded from term State).

Plaintiffs essentially posit that although Indian country is undeniably in a State for purposes of at least three sections of the CCTA, 18 U.S.C. §§ 2341, 2342 and 2344, and there is no language in the CCTA stating that Indian country and States are mutually exclusive terms, the same location in Indian country is not "in a State" for purposes of the CCTA recordkeeping provisions under 18 U.S.C. § 2343. This is an untenable interpretation of the CCTA and is contrary to the basic canon of statutory construction that identical terms within an Act bear the same meaning. *Sullivan v. Stroop*, 496 U.S. 478, 483-84 (1990); *Sorenson v. Sec'y of Treasury*, 475 U.S. 851, 860 (1986). The Supreme Court has repeatedly held that a term appearing in several places in a statutory text is generally read the same way each time it appears. *Ratzlaf v. United States,* 510 U.S. 135, 143 (1994) (*citing Estate of Cowart* v. *Nicklos Drilling Co.*, 505 U.S. 469, 479 (1992) and *quoting United States* v. *Aversa*, 984 F.2d 493, 498 (1st Cir. 1993) (*en banc*) ("Ascribing various meanings to a single iteration of [§ 5322(a)'s willfulness requirement] — reading the word differently for each code section to which it applies — would open Pandora's jar. If courts can render meaning so malleable, the usefulness of a single penalty provision for a group of related code sections will be eviscerated and ... almost any code section that references a group of other code sections would become susceptible to individuated interpretation.")). Accordingly, Indian country within the borders of a State is in a State for all sections of the CCTA.

III. PLAINTIFFS' RELIANCE ON 18 U.S.C. § 2346(b)(1) IS MISPLACED

Section 2346(b)(1), added in the 2006 amendments to the CCTA, is the only provision of the CCTA that references the definition of "Indian country." The 2006 amendments to the CCTA did not amend the CCTA recordkeeping provisions at issue, set forth at 18 U.S.C § 2343(a), nor did the amendments change the definition of a State under the CCTA. Among other things, in these amendments Congress granted the States and others the authority to bring civil actions in United States District Court to restrain violations of the CCTA. Pub. L. 109-177, Title I, section 121(f), March 9, 2006, 120 Stat. 233. However, in accordance with general principals of Federal Indian law that, in certain instances, limit State authority to bring actions in Indian country, this section did not grant the States the ability to bring these actions against Indian Tribes or Indians in Indian country. Plaintiffs seize upon the last sentence of this section and base their entire argument upon the fact that "Indian country" is not mentioned in the definition of a "State" in the CCTA or in the "Territorial extent" of the implementing regulations. However, section 2346(b)(1) does not have the broad reach that Plaintiffs need to save their flawed arguments.

Section 2346(b)(1) permits a "State, through its attorney general, a local government, through its chief law enforcement officer …, or any person who holds a permit under Chapter 52 of the Internal Revenue Code of 1986," to "bring an action in the United States district courts to prevent and restrain violations of this chapter by any person…." 18 U.S.C. § 2346(b)(1). However, a permit holder "may not bring such an action against a State or local government," and "[n]o civil action may be commenced under this paragraph against an Indian tribe or an Indian in Indian country (as defined in section 1151)." *Id.* This section of the CCTA simply prevents non-Federal entities from bringing civil suits against tribes and individual Native

Americans living in Indian country and bars lawsuits against State and local governments. This section does not address, and certainly does not establish, that Indian country is not in a State for purposes of the CCTA, but merely sets forth the scope of this particular provision. This section certainly does not prevent the Federal government from enforcing the CCTA recordkeeping provisions, nor does it address Federal authority to regulate commercial cigarette transactions as Plaintiffs would have this Court hold.

On page 3 of the Peebles Letter, counsel writes,

> Section 2246(b)(1) [sic] of the CCTA defines 'Indian Country' as land meeting the definition contained is [sic] 18 U.S.C. 1151. Thus, one must conclude that the regulations do not apply to tribally owned entities on Indian lands. For these reasons, the recordkeeping requirements of 27 C.F.R. 646.147 do not apply to the tribe-to-tribe trade activities of HCID and Rock River.

Counsel then references the decision in *State of New York v. Mountain Tobacco Co.*, No. 12-CV-6276, 2016 WL 3962992 (E.D.N.Y. July 21, 2016), as support for this premise. Peebles Letter at 3. However, the district court's holding in *Mountain Tobacco* regarding New York's suit under the CCTA against the tribal company is tied directly to the particular civil suits specifically prohibited by section 2346(b)(1). 2016 WL 3962992 at *7. The district court granted summary judgment for King Mountain on New York's CCTA claim. *Id.* Its reasoning included this paragraph:

> The Court is also unpersuaded by the State's seemingly policy-driven argument that if King Mountain is entitled to the CCTA's "Indian in Indian Country" exemption, the result would be "a new loophole by which other non-New York Native Americans and tribes would flood New York's reservations with enormous quantities of unstamped cigarettes." As noted by King Mountain, the "Indian in Indian country" exemption is only applicable to state enforcement of the CCTA. Thus, the federal government is permitted to enforce the CCTA without regard to whether the action is against an "Indian in Indian country," which renders it unlikely that Indian reservations will be "flooded" with unstamped cigarettes.

Id. (emphasis added) (internal citations omitted).

Similarly, in *United States v. Approximately 1,784,000 Contraband Cigarettes*, No. C12-5992, 2016 WL 7387094 (W.D. Wash. Dec. 21, 2016), the court rejected the defendant-movants' arguments that 18 U.S.C. § 2346(b)(1) of the CCTA prohibited the forfeiture of Indian property. The court wrote, "The term 'State,' as it appears in § 2346(b)(1), is plainly defined in § 2341. While § 2346(b)(1) prohibits local state governments from enforcing the CCTA against an Indian tribe or an Indian in Indian Country, no such restriction exists for the United States Government." *Id.* at *3. The court cited *Mountain Tobacco* and quoted its finding that "the federal government is permitted to enforce the CCTA without regard to whether the action is against an 'Indian in Indian country.'" *Id.* The district court also rejected the argument that the 2006 amendments to the CCTA abrogated *United States v. Baker*, 63 F.3d 1478 (9th Cir. 1995), which held that the CCTA applies to Indians and that the Federal government may enforce the CCTA when Indians possess and sell contraband cigarettes. *Id.* at *4 (citing *Baker*, 63 F.3d at 1486 and 1489-91).

The CCTA definition of Indian country at 18 U.S.C. § 2346(b)(1) applies solely to the prohibition of Federal lawsuits commenced against an Indian tribe or an Indian in Indian country by non-Federal entities. Section 2346(b)(1) certainly does not exempt Indian country from being considered as part of a State for purposes of substantive of CCTA offenses or CCTA recordkeeping offenses. This section simply uses the definition to specifically bar a State or a permittee from filing a lawsuit to restrain or prevent CCTA violations against an Indian tribe or an Indian in Indian country. Indeed, section 2346(b)(1) – by creating this specific exception – once again establishes, as does the specific exception for tribal governments regarding

forwarding delivery sale (non-in-person sales to consumers) records to Government, that the remainder of the CCTA continues to be fully applicable in Indian country.

Plaintiffs are incorrect when they theorize that because Congress created specific exceptions for Native Americans reporting delivery sales, that the Government "reads the Tribal Government exception out of section 2343(b) by requiring Tribal Governments to report." *See* Pls.'s Cross Mot. for Summ. J. at 14. Section 2343(a) does not involve a reporting requirement. Rather, it requires anyone who sells more than 10,000 cigarettes to maintain certain records regarding the shipment, receipt or sale of these commercial quantities of cigarettes, which are subject to inspection by ATF. Section 2343(b) imposes a reporting requirement – not a recordkeeping requirement – regarding certain non-in-person delivery sales to consumers, such as small sales over the internet. The obligation of all persons to comply with section 2343(a) has no effect on the specific provisions of section 2343(b) that do not involve standard CCTA records.

Plaintiffs discussion of *Mountain Tobacco,* and its holding that under the Prevent All Cigarette Trafficking (PACT) Act that sales between Indian reservations located in New York and Washington do not fall within the definition of interstate commerce, it inapplicable to the instant matter. Pls.' Cross Mot. For Summ. J. at 12. Plaintiffs attempt to apply this section of the decision to a different statute and a legal issue distinct to the CCTA. Defendants assert that this portion of the decision is incorrect and certainly does not apply to the CCTA. Initially, the CCTA does not define interstate commerce and the recordkeeping requirements under section 2343(a) do not require a sale or distribution in interstate commerce.

Moreover, courts have held that because of the cumulative commercial effect that the distribution of cigarettes has, the CCTA does not require an interstate shipment of cigarettes and

is constitutional under the Commerce Clause even though it lacks a direct jurisdictional element. *United States v. Abdullah*, 162 F.2d 897, 901 (6th Cir. 1998); *see Baker*, 63 F.3d at 1492 (cigarettes, when possessed in large quantities, are likely to be regulated); *see generally Gonzales* v. *Raich*, 545 U.S. 1, 26 (2005) (regulation of intrastate production of marijuana constitutional under Commerce Clause).

The *Mountain Tobacco* court and Plaintiffs err when they imply that *Nevada v. Hicks,* 533 U.S. 353 (2001), and its progeny and all the Federal common law that establishes that an Indian reservation that is within a State are not applicable to the PACT Act. The *Mountain Tobacco* court failed to recognize that the PACT Act, in the section labeled "Exclusions regarding Indian Tribes and Tribal Matters," specifically states that the PACT Act does not affect "any limitations under Federal or State law *including Federal Common law* with respect to the distribution of cigarettes…(by) Indian Tribes. Accordingly, Federal common law establishing that an Indian reservation is in a State is fully viable under the PACT Act, and the *Mountain Tobacco* court and Plaintiffs erred by denying the applicability of this governing Supreme Court precedent. *See Hicks*, 533 at 361-62 (*quoting* U.S. Dep't of Interior, *Federal Indian Law*, 510 & n.1 (1958), *citing Utah & Northern R. Co. v. Fisher*, 116 U.S. 28 (1885)) (Indian reservation is considered part of the territory of the State); *State ex rel. Edmondson v. Native Wholesale Supply,* 237 P.3d 199, 208 (Okla. 2010) (commenting that while distributor "may operate on tribal land, that tribal land is not located in some parallel universe. It is geographically within the State of Oklahoma"); *Chemehuevi Indian Tribe v. California Bd. of Equalization,* 800 F.2d 1446, 1450 (9th Cir. 1986) ("The attributes of sovereignty possessed by [a California] Tribe do not negate the fact that [its] Reservation is a part of the State of California.").

The *Mountain Tobacco* court and Plaintiffs also assert incorrectly that the terms "State and "Indian country" are mutually exclusive. As noted, under governing Federal law, the Plaintiffs are in Indian country and they are in the State of Nebraska. The *Mountain Tobacco* court failed to recognize that the PACT Act set forth this principle when it mandated at 15 U.S.C. §§ 376(a) (2) and (a)(3) that reports must be filed with the State and tobacco tax administrators and chief law enforcement officers of the local governments *and Indian tribes* operating within the borders of the State that apply their own local or tribal taxes on cigarettes or smokeless tobacco." As such, just as tobacco distributors in New York City are in a locality and in the State of New York, tobacco distributors operating within Indian country are considered within a State and also within Indian country, and the PACT Act, rather than eliminating Indian country from its scope, simply set forth all instances wherein pertinent reports must be filed with each jurisdiction. This was done so that States, localities and tribes could all regulate tobacco traffic and collect taxes lawfully due to them.

IV. THE REQUIREMENT OF MAINTAINING CCTA RECORDS DOES NOT AFFECT TRIBAL SOVEREIGNTY

Plaintiffs do not contest that the CCTA is a statute of general of general applicability administered by the Federal government and that Congress has constitutional authority to regulate commerce among Indian Nations. The CCTA recordkeeping requirement certainly does not eliminate tribal sovereignty over their lands or involve any form of State regulation over their lands. Native American entities such as Plaintiffs are free to form tobacco distribution companies and establish tribal regulatory and tax schemes. The CCTA recordkeeping requirements simply require that tribal entities, or non-Native American businesses operating in Indian country, must keep records regarding commercial transactions in cigarettes, a pervasively regulated and highly taxed commodity. These records aid the Federal government in enforcing

the CCTA by identifying purchasers or distributors of cigarettes who illegally distribute untaxed cigarettes. *See United States v. Mohamed*, 759 F.3d 798, 803 (7th Cir. 2014) (purpose of CCTA is to enable federal enforcement agencies to assist states in curtailing untaxed interstate cigarette trafficking, which drains billions of dollars in tax revenues from state and local governments each year and often serves as a source of illicit financing for criminal organizations). It is difficult to understand that when Plaintiffs concede that they are subject to the definitional, criminal, and forfeiture provisions of the CCTA that have been held not to implicate tribal sovereignty, how the minimal congressionally-imposed burden of maintaining records of commercial transactions in cigarettes implicate tribal sovereignty.

The Supreme Court has made it clear that whatever sovereign rights a tribe may have in distributing untaxed cigarettes, those rights do not extend to members of other Native American tribes. *See Washington v. Confederated Tribes of the Colville Reservation,* 447 U.S. 134, 161 (1980) (distribution of cigarettes to other tribes is subject to taxation, which does not implicate tribal sovereignty). The Court has also held that Native American tribes do not have "super sovereign authority to interfere with another jurisdiction's sovereign right to tax" activities within its borders. *Oklahoma Tax Comm'n v. Chickasaw Nation,* 515 U. S. 450, 466 (1995); *see also Rice v. Rehner*, 463 U.S. 713, 734 (1983) (Congress did not intend to make tribal members "super citizens" who could trade in a traditionally regulated substance free from all but self-imposed regulations); *cf. Hicks*, 533 U.S. at 361 ("Our cases make clear that the Indians' right to make their own laws and be governed by them does not exclude all state regulatory authority on the reservation."). Indeed, Plaintiffs acknowledge on the HCI Distribution website that the cigarettes they distribute may be subject to regulation and taxation: "Nation to nation transactions do not automatically exempt entities, including Indian Nations or businesses

operating in Indian Country, from their reporting obligations or paying state cigarette excise taxes. Unless expressly exempted by law, state and local cigarette taxes apply. Customers should consult a knowledgeable attorney about their tax and reporting obligations." HCI Distribution, www.hcidistribution.com (last visited on January 12, 2017).

Plaintiffs allege incorrectly that the CCTA recordkeeping provisions are not self-contained or effective on their own terms. Congress delegated to the Attorney General the authority to set forth specific records that all persons (including Native Americans) must maintain. Congress did not and could not constitutionally delegate to the Attorney General the authority to exempt categories of persons, such as Native Americans from the CCTA recordkeeping provisions. *But see* 18 U.S.C. § 2341(2) (Native Americans are not listed as generally exempted parties in exemption section of CCTA). Moreover, there is no evidence that the Secretary of Treasury or the Attorney General ever intended to exempt a broad category of persons from parts of the CCTA that are generally applicable to them. As noted in our initial brief, the Secretary of Treasury, in promulgating the initial CCTA regulations simply repeated the statutory definition of a State. *See* Defs.' Mot. for Summ. J. at 15. The fact that ATF engaged in rulemaking regarding other sections of the CCTA is irrelevant to the fact that in this instance ATF did not engage in statutory interpretation. Plaintiffs' claim that the ATF CCTA regulations are "outdated" is incorrect because Congress has maintained the same definition of the term State since 1978 and, as a result, there was no need for ATF to update the regulations that repeat the statutory definition set forth in the CCTA.

Moreover, reversing their position in their complaint, which stated that ATF "chose not to use the normal definition of a State when [the Attorney General] promulgated these regulations," s*ee* Pls.' Compl. at ¶ 31, and excepted Indian country from the definition of a State,

Plaintiffs now claim that ATF is attempting to legislate and include Indian country within the definition of a State. *See* Pls.' Cross Mot. for Summ. J. at 10. However, neither claim is correct. In 1978, Congress set forth the statutory definition of a State, at 18 U.S.C. § 2341(4). If Congress had not considered Indian country as being in a State under the definitions section of the CCTA as theorized by Plaintiffs, then as discussed in Defendants' opening brief, the substantive CCTA provisions that require the possession of untaxed cigarettes in a State could not be enforced. As admitted by Plaintiffs, this is not the case and therefore their argument fails.

V. THE TERM "STATE" HAS BEEN UNDERSTOOD UNAMBIGOUSLY TO INCLUDE "INDIAN COUNTRY" FOR NEARLY 40 YEARS

Plaintiffs note that courts "typically do not apply full *Chevron* deference to an agency interpretation of an ambiguous statutory provision involving Indian affairs." Pls.' Cross Mot. for Summ. J. at 15, *citing California Valley Miwok Tribe v. United States*, 515 F.3d. 1262, 166 n. 7 (D.C. Cir. 2008). This may be an accurate statement of the law, but it does not apply in the current case where the statute in question is unambiguous. However, the statute is not unambiguous for the reasons advocated by Plaintiffs.

Plaintiffs argue that the Attorney General's interpretation of the term "State," which is defined in both 18 U.S.C. § 2341(4) and 27 C.F.R. § 646.143(g) as "a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or the Virgin Islands," is not entitled to deference under *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), because the term "state" is plainly and unambiguously defined in the CCTA as distinct from the term "Indian country." This is not accurate. The term "Indian country." defined by reference to 18 U.S.C. § 1151, is pertinent only to a discrete portion of the CCTA addressing the specific exemption of Indians in Indian country from certain civil actions. *See* 18 U.S.C. § 2346(b)(1) (stating that certain civil actions may not be commenced against an Indian in Indian

country as defined in 18 U.S.C. § 1151). As noted, this reference does not address the issue as to whether Indian county is also in a State for purposes of the CCTA.

Even if the term "Indian country" as defined in 18 U.S.C. § 1151 does pertain to the entire CCTA, which it clearly does not, the definition in section 1151 itself contemplates the possibility that a person in "Indian country" could be simultaneously in a State. It defines "Indian country" in part as "… all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state.…" 18 U.S.C. § 1151(b) (emphasis added). Section 1151(b) does not provide or even suggest that a person in "Indian country" is automatically no longer within the borders of a State. Similarly, nowhere does either 18 U.S.C. § 2341(4) or 27 C.F.R. § 646.143(g) provide or suggest any portion of "Indian country" is excluded from the territory of a State. Thus, the definitions of "Indian country" and "State" are not mutually exclusive. This conclusion is unambiguous and does not require any special interpretation. Accordingly, ATF's "interpretation" of the term "State" is simply a verbatim restatement of the definition of the term in the statute. ATF has enforced consistently the criminal provisions of the CCTA in accordance with this definition for approximately 40 years. The fact that Plaintiffs have put forth a strained, alternate interpretation of the term "State" in the CCTA cannot turn this plainly worded definition into an ambiguous one.

VI. ATF'S LONGSTANDING INTERPRETATION AND APPLICATION OF THE TERM "STATE" IN THE CCTA SHOULD BE GIVEN SUBSTANTIAL WEIGHT

To the extent the term "State" as defined in CCTA could be considered "ambiguous" despite all indications to the contrary, ATF's understanding of the meaning of that term should be afforded considerable weight and deference regardless of whether that consideration is explicitly given pursuant to *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837

(1984), *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), or *Auer v. Robbins*, 519 U.S. 452, 463 (1997). ATF's longstanding understanding and application of the term "State," which has been reinforced and supported by the courts for nearly 40 years, must be given serious consideration.

Courts ordinarily give considerable deference to adjudications and agency-promulgated rules under *Chevron*. *Buffalo Transp., Inc. v. United States*, 844 F.3d 381 (2d Cir. 2016), citing *Chevron* and *Kruse v. Wells Fargo Home Mortgage, Inc*., 383 F.3d 49, 55 (2d Cir. 2004). In this case, ATF neither had any cause to formally adjudicate its understanding of the term, nor promulgate any formal rule under it (other than reciting the statute verbatim in its regulations). Nonetheless, an informal agency interpretation that is neither a formal adjudication nor a promulgated rule may still receive deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). *Id.* Informal agency guidance is given deference "'according to its persuasiveness,' as evidenced by the 'thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade.'" *Id.* (*citing Estate of Landers v. Leavitt*, 545 F.3d 98, 107 (2d Cir. 2008) *as amended* (Jan. 15, 2009) (*quoting United States v. Mead Corp.*, 533 U.S. 218, 221, 228 (2001)) (internal citation omitted); *see also Ketchikan Drywall Servs., Inc. v. Immigration & Customs Enf't*, 725 F.3d 1103, 1112-13 (9th Cir. 2013).

Whereas *Chevron* applies only to an agency's statutory interpretations, a different line of cases stemming from *Auer v. Robbins*, 519 U.S. 452, 463 (1997), applies to an agency's interpretation of its own regulations. Courts will defer to an agency's construction of a regulation that is ambiguous, but such deference is not required when the agency's interpretation is inconsistent with the plain language of the regulation itself, conflicts with agency intent at the time of the promulgation, or exceeds the statute's limits. *K Mart Corp. v. Cartier, Inc*., 486 U.S.

281, 292, 108 S.Ct. 1811, 100 L.Ed.2d 313 (1988) ("If the agency regulation is not in conflict with the plain language of the statute, a reviewing court must give deference to the agency's interpretation of the statute."). In this case, where the language of ATF's regulation is not only consistent with the statute, but identical, and is completely consistent with the intent of the CCTA in reducing trafficking, ATF's interpretation of its regulation should be given deference under *Auer* to the extent that its meaning is considered ambiguous.

VII. CONCLUSION

The CCTA is a statute of general applicability and, absent specific exceptions, applies in Indian country. The definition of the term State is uniform throughout the CTTA and includes locations in Indian country. The terms "State" and "Indian country" are not mutually exclusive terms under the CCTA and the 2006 amendment to the CCTA did not remove Indian country from the scope of the term State under the CCTA. The CCTA does not exempt tribal businesses from complying with the CCTA recordkeeping provisions nor did ATF when it promulgated the CCTA regulations. Moreover, Supreme Court and lower court decisions have held that Indian reservations located within the geographic confines of a State is governing case law in this matter. The pertinent facts of this case are not in significant dispute as the case essentially involves the legal determination as to whether Plaintiffs are in a State for purposes of the CCTA. Accordingly, Defendants' Motion for Summary Judgment should be granted and Plaintiffs' request for equitable and declaratory relief should be denied.

Respectfully submitted,

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