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.

Case No. 1:16-CV-1652-CRC

TRIBAL ENTITIES' REPLY BRIEF IN SUPPORT OF CROSSMOTION FOR SUMMARY JUDGMENT

I. Introduction

The AG concedes that the "single issue ripe for disposition via summary judgment" is "whether the CCTA recordkeeping requirements" apply to Indian tribes in Indian country under 27 C.F.R. Part 646. They then fail to recognized distinctions drawn in the CCTA, reading "or locality" out of the key tax provision of 18 U.S.C. §2341(2) and citing cases involving individuals and private corporations, to argue academic and irrelevant matters regarding substantive violations of the statute which are outside the scope of this litigation. *See, e.g.* AG's Reply Brief in Support of MSJ (Reply) at 2-3. *See also,* AG's Motion for Summary Judgment (MSJ) at 9. The bulk of the MSJ and Reply is irrelevant to whether the "Territorial extent" of 27 C.F.R. §646.142 impliedly subsumes Indian tribes in violation of federal Indian law the text and purpose of the Contraband Cigarette Trafficking Act (CCTA).

The Tribal Entities were shocked when they received the June 24, 2016 letters from ATF taking the position, for the first time since "Congress . . . maintained the same definition of the term State since 1978" and since the regulations were promulgated in 1980, that Indian tribes, and specifically the Tribal Entities, are subsumed within those regulations. Reply at 12. Because the AG's attempt to imply coverage of the Tribal Entities into the "Territorial extent" of 27 C.F.R. Part 646 violates federal Indian law and the text and purpose of the CCTA, the Court should deny their MSJ. Furthermore, the AG is not entitled to deference because their change in position that the Tribal Entities are now subject to 27 C.F.R. Part 646 affects the Tribal Entities as parties to this litigation and is not persuasive. The Court should therefore deny their MSJ, grant the Tribal Entities' Cross Motion for Summary Judgment (Cross MSJ), and award the relief requested in the Tribal Entities' Complaint.

II. The Territorial Extent Of The Regulations May Not Be Implied To Subsume Tribes

In their MSJ and Reply, Defendants ignore federal Indian law and the statutory language and congressional intent of the CCTA in urging an interpretation of 27 C.F.R. Part 646 that violates all three.[1]

The AG argues, as they must, for a malleable definition of "State" and say that, because "State" as used in the regulations does not exclude "Indian country," it includes it. Reply at 14. This is wrong. In fact, the AG does not, and cannot, point to any statutory language or legislative history subsuming Indian tribes into "States." Neither have they ever taken the drastic measure of implying coverage of Indian tribes into the regulations in their nearly forty years of enforcement.

[1] The Tribal Entities in no way "concede" that "State" includes "Indian country" for any purpose under the CCTA. *E.g.,* Reply at 1, 11. Just the opposite. The Tribal Entities argue that "Indian country" cannot be subsumed within the explicit and concise "Territorial scope" of 27 C.F.R. 646.142. Any "substantive CCTA offenses" the AG attempts to interject are, as argued in the Tribal Entities' Cross MSJ and as admitted by the AG, beyond the scope of this lawsuit. Cross MSJ at 16-20; Reply at 2.

Initially, the AG's argument for implied regulatory coverage must fail. Any waiver of tribal sovereign immunity must be clear and explicit. Similar to the present case, at issue in *Osage Tribal Council ex rel. Osage Tribe of Indians v. U.S. Dep't of Labor* was whether to enforce the employee protection provisions of the Safe Drinking Water Act (SWDA) against a tribe. 187 F.3d 1174, 1180 (10th Cir. 1999). The Court found that, while Congress can waive tribal sovereign immunity through statute, such waiver "cannot be implied but must be unequivocally expressed." *Id.* at 1181 (internal quotations omitted). "In determining whether a particular federal statute waives tribal sovereign immunity, courts should tread lightly in the absence of clear indications of legislative intent." *Id.* (internal quotations omitted).

Utilizing this test, the Court determined that "Indian tribes are included within the whistle blower enforcement provisions [of the SDWA]." *Id.* This, the court found, is because the "definitional sections of the SDWA define the term 'person' to include a 'municipality.' In turn, 'municipality' is defined to include 'an Indian tribe.' Thus, under the express language of the Act, Indian tribes are included within the coverage of the whistle blower enforcement provisions." *Id.* (internal citations omitted). *See also, Miller v. Wright*, 705 F.3d 919, 926-927 (9th Cir. 2013) (holding that because Congress did not "unequivocally abrogate tribal sovereign immunity" in the statute, "federal antitrust laws are not intended to apply to tribes.").

Similarly, to determine statutory coverage or non-coverage of governmental entities when the statute's text is unclear, legislative intent should govern. *Jefferson Cty. Pharm. Ass'n, Inc. v. Abbott Labs.*, 460 U.S. 150, 176 (1983) (Justice O'Connor, dissenting). "Resolution of the statutory construction question cannot be made to depend upon the abstract assertion that the term 'person' is broad enough to embrace States and municipalities." *Id.* The decision of whether or not to include a governmental entity within

a statute is a "policy judgment appropriately left to legislative determination." *Id.* at 178. Thus, so as not to "fill gaps where Congress has not clearly expressed its intent," courts should "refrain from attributing to Congress an intent to cover" a governmental entity within a statute when such intent is not clear from the statute or legislative history. *See Id.* at 178-180.

Here, the "Territorial extent" of the regulations implementing the record keeping provisions do not include "Indian tribes" or "Indian country." The intent of Congress to subsume Indian tribes within "States" in 1978, and the intent of the AG to carry that definition forward in the regulations starting in 2016, cannot be implied. Because the statutory text and legislative history do not include Indian tribes within "State," the AG cannot fill the gaps with an abstract assertion that they are included in "State" to subsume Indian country within the "Territorial extent" of the regulations. Because there is no clear text or legislative history extending coverage of Indian tribes into the regulations, the AG's arguments must fail and the Court should deny the MSJ.

The AG now, after nearly forty years, strays beyond the "Territorial extent" of 27 C.F.R. Part 646 in an attempt to imply coverage of those regulations to Indian tribes. The legislative intent and regulatory text, however, do not support the AG's attempted illegal extension of the regulations. In fact, the text and purpose of the CCTA contradict the AG's position.

A. Implying Tribal Coverage Into The Territorial Extent Of The Regulations Would Restrict Tribal Sovereignty And Expand State Sovereignty In Violation Of The CCTA's Text

As argued in the Tribal Entities' Cross MSJ at 6-13, the CCTA contains rules for interpreting its provisions, stating that nothing in the statute "shall be deemed . . . to restrict, expand, or modify any sovereign immunity of a State or local government, or an Indian tribe." 18 U.S.C. §2346(b)(2). The AG does not address this language, apparently

attempting to argue that because their interpretation does not affect sovereignty, they may imply Indian tribes into the "Territorial extent" of the regulations. Reply at 10-13. The AG is wrong.

Initially, as argued above, the AG cannot simply imply coverage of the regulations onto Indian tribes. What the AG asks this Court to issue is a policy decision best left to Congress and the deliberative process legislative activity provides. Regardless, the AG's attempt to extend coverage here certainly restricts Indian tribal sovereignty while expanding State sovereignty and is invalid under the plain language of the CCTA, 18 U.S.C. §2346(b)(2).

Tribal sovereignty is both territorial and tax-based. Cross MSJ at 9-11. Implying that Indian tribes are "in the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and the Virgin Islands" modifies long-retained and hard-fought sovereign Tribal rights by subsuming Indian tribes through administrative fiat into the explicit and distinct sovereigns enumerated in the regulations at 27 C.F.R. §646.142.

Additionally, implying Indian tribes into the "Territorial extent" of the regulations would restrict their sovereignty and expand State sovereignty by requiring Indian tribes to comply with State licensing and regulatory laws. It would also require Indian tribes to adopt the Master Settlement Agreement, a private, 1998-settlement agreement between 46 states' attorneys general and major tobacco manufacturers resolving suits over the healthcare-related costs from smoking (MSA).

As argued in the Cross MSJ at 18-19, state regulations are generally inapplicable to on-reservation conduct. If Indian tribes are impliedly subsumed into the "Territorial extent" of the regulations, in order to be "exempted" under 27 C.F.R. 646.143, they must, among other things, be "licensed or otherwise authorized by the State . . . [and in compliance with] the accounting and payment requirements related to . . . [that] license or authorization . . . ."

or an "agent . . . of an individual State, or of a political subdivision of a State . . . ." If they are not "exempted," they are deemed to be holding "contraband cigarettes" under 27 C.F.R. 646.143 and are thus subject to fines and imprisonment under 27 C.F.R. §646.154 and probably forfeiture under 27 C.F.R. §646.155. The AG's attempt to argue that applying the regulations to the Tribal Entities does not affect their tribal sovereignty is clearly wrong. Requiring now, after nearly forty years of enforcement, that Indian tribes must be licensed by States and remain in compliance with State regulatory law or act as an agent of a State or political subdivision of a State or risk severe penalties is unconscionable. Such position violates the Tribal Entities' basic rights of due process under the United States Constitution and violates federal Indian law, restricts long-standing tribal sovereign rights while expanding state sovereignty over Tribes in violation of the CCTA, and is invalid.

Not only do States and political subdivisions of States not have regulatory jurisdiction over Tribes, but also implying tribal coverage in the regulations would require the Tribal Entities to ratify and comply with the terms of the MSA.

Through the MSA, 46 states agreed to protect participating manufacturers' markets in exchange for a fixed share of their revenues. The amount of a state's revenue share, in turn, depends on its efforts to police and exclude non-participating manufacturers, including legitimate tribal business operated by federally recognized Indian tribes, from its cigarette markets.

To protect their market share and insure their sizable revenues, big tobacco manufacturers and distributors forced the participating states to adopt provisions in the MSA into state laws regulating what cigarettes may be sold, what prices may be charged, and what persons may engage in tobacco sales generally.

To enforce these provisions, the MSA requires settling states to enact qualifying statutes. A safe harbor qualifying statute was attached to the MSA as Exhibit T. This model

statute, enacted by all 46 settling states, is known commonly as the non-participating manufacturer escrow statute (Escrow Statute). This Escrow Statute has been slightly modified over life of MSA but its main operating provisions (requiring ongoing payments to states for the sale of participating brands by state-authorized distributors) remains as attached to MSA in Exhibit T. *See e.g.* Cal. Rev. & T. Code §30165.1. A *de facto* federal agreement, the MSA handed participating manufacturers a secure national market by eliminating price arbitrage with non-participating states and non-participating manufacturers and distributors like the Tribal Entities.

Even though 30 of the 46 states which are signatories to the MSA are home to over 340 federally-recognized tribes, neither the MSA states nor the participating manufacturers ever invited any of these tribes to participate in the settlement discussions that led to the agreement nor have they ever sought to share any of the benefits of the MSA with those tribes. They also did not seek to involve Congress, which, since 1789, has exercised exclusive and plenary power over Indian affairs.

The big tobacco companies and state governments that executed the MSA are clearly unhappy that Indian tribes are generally not bound by its terms. Since execution of the MSA in 1998, they have sought ways to implement its restrictions on non-signatory, Indian tribal manufacturers and distributers. The AG is now complicit in these efforts by seeking to impose the terms of the MSA on the Tribal Entities.

Licensure or authorization by signatory states as pressed by the AG not only illegally extends state regulatory jurisdiction over the Tribal Entities but also would require the Tribal Entities to comply with the MSA as executed and adopted by those states. Far from merely enforcing State cigarette taxes (which is not at issue in this case), the MSA and state escrow statutes encompass the whole of the states' cigarette tax and regulatory scheme, a scheme that may not be applied to Indian tribes under federal Indian law. Requiring the Tribal

Entities to be licensed or authorized by a state under 27 C.F.R. Part 646 not only violates federal Indian law on limits to state jurisdiction in violation of the CCTA, but also binds them to the provisions of the MSA. This expands State sovereignty while restricting tribal sovereignty and would violate 18 U.S.C. §2346(b)(2). Because implying coverage of the Tribal Entities into the "Territorial extent" of the regulations would affect state and tribal sovereignty, the AG's argument must fail and the Court should deny their MSJ.

B. The Legislative History is Clear that Tribes are Not To Be Subsumed Into the Territorial Extent of the Regulations

The only relevant legislative history, which the AG ignores, makes clear that the purpose of the CCTA is to fight "criminal organizations, including terrorist groups, . . . [that] purchase cigarettes in a State with a low excise tax and then transport them to a high-tax State to sell. . . . Indian tribal governments that are legally involved in the retailing of tobacco products are clearly not the types of entities we are targeting with this provision. . . . [The 2006 amendment] will go a long way to protecting tribal governments and tribal sovereignty."151 CONG. REC. H6273-04, (daily ed. July 21, 2005), 2001 WL 1703380, at *H6284-6285. Despite this clear intent, the AG's attempt to subsume Indian tribes into the Territorial extent of the regulations does not "protect tribal government and tribal sovereignty," violates the purpose of the CCTA, and must be rejected.

Aside from the text and legislative history, the same Congress that enacted the CCTA enacted numerous other statutes crucial to recognizing and upholding tribal sovereignty.[2] Reading these contemporary statutes *in pari materia* with the CCTA further evidences that the AG's post-hoc position suddenly adopted forty years later is unreasonable and that the "Territorial extent" of the regulations does not impliedly subsume the Tribal Entities. *See Bryan v. Itasca County*, 426 U.S. 373, 389-390 (1976).

[2] E.g. the Indian Child Welfare Act of 1978, *25 U.S.C. §§1901 (2)*; the American Indian Religious Freedom Act of 1978, *42 U.S.C. §1996.*

III. The AG Is Not Entitled To Deference And Any Ambiguity Should Be Resolved In Favor Of The Tribal Entities

Just in the scope of this litigation, the AG takes contradictory, self-serving positions based on mismatched statutory and regulatory terms promulgated by an agency not even delegated authority under the statute. As argued in the Tribal Entities' Cross MSJ at 6-7, 15-16, these positions are not entitled to deference and any ambiguities should be resolved in favor of the Tribal Entities.

Initially, should the "Territorial extent" of 27 C.F.R. 646.142 be deemed ambiguous such that "Indian tribes" and "Indian country" may be subsumed within the jurisdictions explicitly enumerated therein, the Indian canon applies and the regulations are to be read liberally in favor of Indians. *City of Roseville v. Norton,* 348 F.3d 1020, 1032 (D.C.Cir. 2003). *See also* 18 U.S.C. §2346(b)(2) (providing a rule of interpretation under the CCTA in favor of Indian tribes.) Under this rule of interpretation, the Court should grant the Tribal Entities' Complaint for relief.

Even if the law of deference to agency action applies here, which it does not when, as here, an agency seeks to interpret an unambiguous federal regulation in a manner that impairs tribal rights, the AG's arguments must fail. As admitted, the AG's impliedly subsuming Indian tribes into "States" was not the result of any formal rule-making procedure. Reply at 15. Instead, it is an ad hoc position adopted now for the first time since Congress defined "State" in 1978. At no time prior to this case has the AG ever attempted to enforce the regulations contained in 27 C.F.R. Part 646 against the Tribal Entities. Individuals within ATF now assert that the Tribal Entities fall within the regulations and are attempting to enforce the regulations against them. *See* Letter from Cohen to Peebles dated August 4, 2016 (attached to the Complaint as Exhibit 1). Such individuals also attempt to tie this position, not to regulations promulgated by the Attorney General as required under the statute, but to regulations promulgated by the Secretary of Treasury. MSJ at 15. The

informal interpretation that the Tribal Entities fall within the "Territorial extent" of 27 C.F.R. §646.142, made without formal notice and comment rulemaking, lacks the force of law and is not entitled to *Chevron* deference. *Christensen v. Harris Cty.*, 529 U.S. 576, 587 (2000).

Unlike *Chevron* deference, *Skidmore* deference may apply to an informal agency interpretation, but only if that interpretation is thorough, valid, consistent, and persuasive. *Nat'l Distrib. Co. v. U.S. Treasury Dep't, Bureau of Alcohol, Tobacco & Firearms*, 626 F.2d 997, 1019 (D.C. Cir. 1980) (quoting *Skidmore v Swift & Co.*, 323 U.S. 134, 140 (1944)). The AG's interpretation of "State" in the regulations to subsume Indian tribes in Indian country is lacking in these elements and therefore does not warrant *Skidmore* deference.

The AG's surprise position taken now for the first time since Congress defined "State" in 1978 lacks the persuasiveness necessary for *Skidmore* deference. Most importantly, their attempt to graft "Indian country" onto the Territorial extent of 27 C.F.R. Part 646 and to bring the Tribal Entities within its provisions is "at odds with the language of the statute and with the legislative history [of the CCTA] . . . ." *Id.* Additionally, there appears to have been no "thorough consideration" of any need to change the interpretation of the regulations to include Indian tribes. *Id.* Because the ATF's interpretation taken in this litigation is at odds with the legislative history and statute, it lacks persuasiveness, *Skidmore* deference does not apply, and the Court should grant the Tribal Entities' Complaint for declaratory and injunctive relief.

In addition to the lack of persuasiveness, the AG's position here lacks consistency and hence *Skidmore* deference is inappropriate. Notwithstanding the text of the CCTA and its intended purposes, the AG relies on inconsistent positions taken in this litigation to apply the regulations and statute in an arbitrary and discriminatory way against the Tribal Entities.

Initially, the AG has not previously sought to apply 27 C.F.R. Part 646 against the

Tribal Entities or, it appears, any Indian tribe despite the fact that the definition of "State" has not changed since 1978. Reply at 12. It further appears that no thorough consideration went into changing its interpretation to apply the regulations against the Tribal Entities. When such a change in the rules occurs, and the agency fails to "acknowledge a change and adequately explain it, the changed position will be afforded no deference in litigation under either *Chevron* or *Auer*." *United Student Aid Funds, Inc. v. King*, No. 15-CV-01137 (APM), 2016 WL 4179849, at *4 (D.D.C. Aug. 5, 2016)("*But where, as here, an agency's announcement of its interpretation is preceded by a very lengthy period of conspicuous inaction, the potential for unfair surprise is acute*.... Accordingly, whatever the general merits of *Auer* deference, it is unwarranted here.") (emphasis in original) (quoting *Christopher v. SmithKline Beecham Corp.*, __U.S.__, 132 S.Ct. 2156, 2168 (2012)).

Additionally, just in the context of this litigation, the AG takes inconsistent positions. In arguing the applicability of the regulations to Indian tribes in Indian country, the AG states that "Indian country" and "State" are the same thing. *E.g.*, Reply at 9. Contrast that with substantive violations under the CCTA, where their position appears to be that tribes are not "States" and tribal taxes are not "state or local" taxes under 18 U.S.C. §2341(2) for the purposes of determining "applicable" tax stamps. *E.g.* MSJ at 12. This inconsistent interpretation of "State," whereby the AG attempts to bring the Tribal Entities operating in "Indian country" into the regulations by equating them with a "State" while ignoring their jurisdictional and tax authority as a "State" is arbitrary and capricious, an abuse of discretion, and violates the Tribal Entities' due process rights under the United States Constitution. Because the AG's past and current positions are inconsistent, and the Tribal Entities' serious reliance interests under the AG's lengthy period of conspicuous inaction are unaccounted for in promulgating the new position, the AG is not entitled to deference and

the Tribal Entities' Complaint for declaratory and injunctive relief should be granted.[3]

Not only is the AG's position not persuasive or consistent, it is also not thorough and is thus not entitled to deference. The regulations at 27 C.F.R. Part 646 apply to "the several States of the United State, the District of Columbia, the Commonwealth of Puerto Rico, and the Virgin Islands." 27 C.F.R. §646.142. In application, the ATF does not adhere to these enumerated jurisdictions but attempts to graft "Indian country" onto the "Territorial extent" of 27 C.F.R. Part 646. "Indian country" is not synonymous with the enumerated jurisdictions "nor equivalent in their narrowing force." *De La Mota v. U.S. Dep't of Educ.*, 412 F.3d 71, 80 (2d Cir. 2005). Indian country is neither geographically the same as a "State," as the AG seems to argue (Reply at 14 (stating, "Indian country" is "within the borders of a State")), nor jurisdictionally the same as the CCTA recognizes and upholds. *See* 18 U.S.C. §2346(b)(carrying forward the definition of Indian country found in 18 U.S.C. §1151 and protecting the sovereign immunity of Indian tribes.) Even if the AG had promulgated the regulations at issue, they could not constitutionally subsume Indian tribes into a "State" and make tribes subject to State licensing and regulatory laws and the MSA. Const. Art. I, sec 8. *See also* supra at pgs. 5-8.

Furthermore, thoroughness is impossible when the agency attorney asserting the position "bears no law-making authority, and is unconstrained by political accountability. Thorough consideration requires a macro perspective that a staff member, acting alone, lacks." *De La Mota*, 412 F.3d at 80. More critically, the thoroughness of one staff member's position is irrelevant when the statute in question designates authority to the Attorney General. *See Id.* The Attorney General has the "macro perspective" and expertise to properly

[3] Additionally, the AG is not entitled to *Auer* deference as they are not interpreting their own regulations. *See United Student Aid Funds, Inc. v. King*, No. 15-CV-01137 (APM), 2016 WL 4179849, at *4 (D.D.C. Aug. 5, 2016). The Secretary of Treasury promulgated the regulations at issue in this case. The Attorney General "has yet to promulgate CCTA regulations . . . ." MSJ at 15.

weigh the impacts that its proposed interpretation will have on tribal sovereignty. As the Attorney General did not promulgate the regulations or the position advanced here *(see* MSJ at 15. *See also,* Letter from Cohen to Peebles dated August 4, 2016), there is no agency position to defer to and the interpretation contained in the August 4, 2016, letter must fail.

Moreover, it is insufficient if the Attorney General has now chosen to adopt the ATF's position after the fact or now adheres to ATF's position taken in the course of this litigation. "[A] position adopted in the course of litigation lacks the indicia of expertise, regularity, rigorous consideration, and public scrutiny that justify *Chevron* deference. Such endorsements also lack the thoroughness required for *Skidmore* respect." *Id.* (alteration in original)(internal quotations/citation omitted). Because the Indian canon of construction applies here, and alternatively because the AG's position lacks persuasiveness, consistency, and thoroughness, deference to their unacknowledged and sudden change in position after nearly forty years of enforcement is inappropriate and the Tribal Entities' Complaint for declaratory and injunctive relief should be granted.

IV. Conclusion

The AG seeks to change their position and impliedly subsume the Tribal Entities into the Territorial extent of 27 C.F.R. Part 646. Because the text and purpose of the CCTA prohibit the AG's interpretation of the regulations, the Court should deny their MSJ and grant the Tribal Entities' Complaint for relief. Additionally, because the AG's position is not persuasive and is not entitled to deference here, and because the Tribal Entities' are entitled to deference, the Court should interpret any ambiguity in the "Territorial extent" of the regulations to the benefit of the Tribal Entities and grant the Tribal Entities' Complaint for relief.

Respectfully submitted this 24th day of January, 2017,

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