No. 19-16777

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BIG SANDY RANCHERIA ENTERPRISES,
a federally-recognized Indian tribe incorporated under the Indian Reorganization Act,

Plaintiff-Appellant,

v.

XAVIER BECERRA, in his official capacity as Attorney General of the State of California; and NICOLAS MADUROS, in his official capacity as Director of the California Department of Tax and Fee Administration,

Defendants-Appellees.

Appeal from a Judgment of the United States District Court
for the Eastern District of California
No. 1:18-cv-00958-DAD-EPG, Judge Dale A. Drozd

APPELLANT'S OPENING BRIEF

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STATEMENT OF JURISDICTION

Plaintiff-Appellant Big Sandy Rancheria Enterprises ("BSRE") predicates the district court's jurisdiction on 28 U.S.C. §§ 1331 and 1362. This action arises under the Indian Commerce Clause, U.S. Const. art. VI, cl. 2; the Indian Trader Statutes, 25 U.S.C. §§ 261-264; and federal common law. As developed *infra*, BSRE is an "Indian tribe or band with a governing body duly recognized by the Secretary of the Interior" authorized to bring this action under 28 U.S.C. § 1362.

BSRE appeals from the final judgment and order dismissing its first through fourth causes of action with prejudice for failure to state a claim and dismissing the fifth cause of action for lack of jurisdiction. The Court has jurisdiction over this appeal from the district court's final decision under 28 U.S.C. § 1291.

The appeal is timely pursuant to the Federal Rules of Appellate Procedure, Rule 4(a)(1)(A). The judgment and order were entered on August 13, 2019, and BSRE filed the notice of appeal within thirty days, on September 10, 2019. *See* Excerpts of Record ("ER") 1, 2, 28.

ISSUES PRESENTED

1. Does BSRE's First Amended Complaint ("FAC") state a claim that federal law preempts State cigarette taxes and regulations with respect to BSRE's sales, all of which BSRE makes to Indians in Indian country?

2. Does the "Indian tribes" exemption to the Tax Injunction Act, 28 U.S.C. § 1341, allow jurisdiction over BSRE's action to enjoin the assessment or collection of California cigarette taxes as applied to BSRE's sales to Indians in Indian country?

STATEMENT REGARDING ADDENDUM

Pertinent statutes are set forth in an addendum.

STATEMENT OF THE CASE

I. Introduction

This case presents questions that go to the core of reservation Indians' right to make and be governed by their own laws free of state interference. It arises in the novel context of intertribal wholesale cigarette sales to Indians on their own Indian reservations, set against California's unique regulatory and taxing schemes. Erroneously viewing the action as "retread[ing] old ground," ER27, the district court ignored critical facts distinguishing this case from all prior decisions. This includes ignoring the content of the California laws in question, which differ significantly from the laws of all other states upheld in past decisions. Far from foreclosing BSRE's claims, the body of precedent establishes the roadmap for California Indian tribes to engage in intertribal commerce in the rightful exercise of their remaining inherent sovereign authority and the rights granted and protected by Congress, to achieve economic self-sufficiency and to govern themselves within Indian country.

II. Factual background.

A. Big Sandy Rancheria Enterprises.

Big Sandy Band of Western Mono Indians (the "Tribe") is a federally-recognized Indian tribe located on the Big Sandy Rancheria in California. ER87, 89 (FAC ¶¶ 10, 17, 18); *see* Indian Entities Recognized…, 85 Fed. Reg. 5462, 5462 (Jan. 30, 2020).

BSRE is the "incorporated tribe" organized under a federal charter issued to the Tribe in 2012 by the United States Department of the Interior under section 17 of the Indian Reorganization Act of June 18, 1934 ("IRA"), 48 Stat. 984, 988, 25 U.S.C. § 5124. ER87, 105 (FAC ¶¶ 10, 92, 94). The Tribe is also organized under its Constitution, ER87 (FAC ¶ 10), which it adopted under its "inherent sovereign power," eschewing the Secretarial approval called for in section 16 of the IRA. *See* 25 U.S.C. § 5123(h). BSRE's federal charter is the only governing document of the Tribe that has or requires the Secretary of the Interior's approval. The charter provides that BSRE is governed by the Tribe's Tribal Council acting as BSRE's Board of Directors. ER105 (FAC ¶ 95).

Through a subdivision, BSRE sells Native-manufactured cigarettes and tobacco products exclusively to tribally-owned or tribal member-owned retailers located on such tribe's or tribal member's Indian reservation in California. ER106, 109 (FAC ¶¶ 100, 123). BSRE distributes cigarettes manufactured by Azuma

Corporation ("Azuma"), a company formed under the laws of, and wholly owned and operated by, the Alturas Indian Rancheria, within Alturas' Indian country. ER108 (FAC ¶ 117); *see* ER6 fn.2 (noting BSRE previously also distributed another tribal manufacturer's cigarettes). BSRE's sales to the tribal retailers occur on the retailers' reservations, where the retailers resell the products to consumers. ER109 (FAC ¶¶ 124, 125).

B. California's cigarette tax scheme.

California imposes taxes on cigarettes at $2.87 per pack of twenty. ER100 (FAC ¶ 68); *see* Cal. Rev. & Tax. Code §§ 30101, 30123(a), 30131.2(a), 30130.51(a). The State generally requires cigarette "distributors" to affix tax stamps and remit excise taxes on each distribution of cigarettes. *Id.* §§ 30161, 30163.[1] "[I]f the vendors are untaxable," however, "the legal incidence of the tax falls on consuming purchasers." *Cal. State Bd. of Equalization v. Chemehuevi Indian Tribe*, 474 U.S. 9, 11 (1985); *see* Cal. Rev. & Tax. Code § 30107. In this circumstance, the State imposes on the vendor not a tax but a "'pass on and collect' requirement." *Chemehuevi* at 12; *see* Cal. Rev. & Tax. Code § 30108(a). Further, State law provides that if "the vendor is the type of entity on which the State cannot impose a collection requirement," then "the consumer has a duty to pay any

[1] Every person who sells, uses, consumes, or stocks untaxed cigarettes is a "distributor" under California law. *See* Cal. Rev. & Tax. Code §§ 30008, 30011.

tax directly" to the State. *Chemehuevi* at 12 (citing 18 Cal. Code Regs. § 4091); *see* Cal. Rev. & Tax. Code § 30187.

State law does not require an untaxable distributor to pre-collect taxes in anticipation of a future taxable event, but instead requires collection to occur "at the time of making the sale or accepting the order or, if the purchaser is not then obligated to pay the tax with respect to his or her distribution of the cigarettes or tobacco products, at the time the purchaser becomes so obligated[.]" Cal. Rev. & Tax. Code § 30108(a); ER102 (FAC ¶ 76). Thus, as Becerra explained to the district court, distributors are not always required to collect taxes at the time of sale, but rather must collect them "only after they become due." ER79 (Becerra's Mot. to Dismiss) at lines 22-23. As a result, where both the wholesale distributor and the retail distributor are not taxable (as BSRE contends), State law does not require the wholesale distributor to collect or remit taxes.

C. California's cigarette licensing, reporting and recordkeeping laws.

California law requires every cigarette distributor to hold two licenses. *See* ER103 (FAC ¶¶ 78-82); Cal. Rev. & Tax. Code § 30140; Cal. Bus. & Prof. Code § 22975. State law generally prohibits the sale of cigarettes to, or the purchase of cigarettes from, distributors that are not licensed. Cal. Bus. & Prof. Code § 22980.1. However, California law provides an exemption from the license-related requirements to persons "exempt from regulation under the United States

Constitution, the laws of the United States, or the California Constitution." *Id.* § 22971.4.

Distributors who are required to be licensed file a monthly "Cigarette Distributor's Tax Report" along with applicable schedules. Cal. Rev. & Tax. Code §§ 30182(a), 30183(a); 18 Cal. Code Regs. § 4031(a); *see* ER42 (Cigarette Distributor's Tax Report); ER32 (Instructions for Preparing Cigarette Tax Schedules). These documents require the distributor to report the total number of tax-exempt distributions but, with one exception not applicable here (interstate or foreign sales), distributors' reports do not identify who purchased tax-exempt cigarettes. ER35-36, 40-42. Therefore, because BSRE only sells to tax-exempt persons and entities, BSRE's compliance with State reporting requirements would not provide information about any persons or entities to whom BSRE makes its tax-exempt sales.

Distributors must also maintain records of their purchases and sales for possible review by the State. *E.g.*, Cal. Bus. & Prof. Code § 22978.5; Cal. Rev. & Tax Code § 30453; 18 Cal. Code Regs. § 4026(a); *see also* Cal. Rev. & Tax. Code § 30165.1(g); 11 Cal. Code Regs. § 999.19. These recordkeeping duties would oblige BSRE to maintain detailed information about its sales, although BSRE's records, even if the State were to review them, would not directly help the State collect any taxes that may arise from the subsequent retail sales.

D. California's Escrow Statute and Complementary Statute.

In addition to collecting cigarette excise taxes, California regulates the price of cigarettes with the Escrow Statute and Complementary Statute, which the State adopted to meet its contractual obligations to Big Tobacco under the 1998 Tobacco Master Settlement Agreement ("MSA"), an agreement to which Indian tribes were not parties. Cal. Health & Safety Code § 104557; Cal. Rev. & Tax. Code § 30165.1; *see* ER90-96 (FAC ¶¶ 23-46).[2]

The Escrow Statute requires manufacturers whose cigarettes are sold in the state either to join the MSA or to place funds into a 25-year escrow. Cal. Health & Safety Code § 104557(a). The escrow payment is approximately seventy cents per pack. ER95 (FAC ¶ 39).

Under the Complementary Statute, the Attorney General maintains a directory of tobacco product manufacturers and brands approved for sale in California. Cal. Rev. & Tax. Code § 30165.1(c). To be listed on the directory, a manufacturer must certify that it has joined the MSA or is in full compliance with the Escrow Statute and all the State's tobacco product, licensing, and manufacturing laws. *Id.* § 30165.1(b). The Complementary Statute prohibits any person from selling, offering for sale, possessing for sale, shipping or otherwise

[2] The MSA is available at oag.ca.gov/tobacco/msa.

distributing into or within California, or importing for personal consumption in California, any taxable cigarettes of a manufacturer or brand family not included on the State's directory. *Id.* § 30165.1(e)(2). Non-directory cigarettes cannot bear State tax stamps. *Id.* § 30165.1(e)(1).

Notably, the escrow obligations and the restrictions of the Complementary Statute "do not attach to cigarettes beyond the reach of state taxation." ER80:14-17, 83:13-18. That is, according to Becerra, unless and until BSRE's cigarettes are involved in a taxable distribution, the Complementary Statute does not apply to them.

III. Procedural history.

BSRE filed the operative FAC on October 8, 2018. ER85. The FAC's first two claims allege that federal common law, tribal sovereignty, and the Indian Trader Statutes preempt the Complementary Statute. ER116-117 (FAC ¶¶ 163-176). The third and fourth claims allege, on the same basis, preemption of the State's licensing requirements. ER117-119 (FAC ¶¶ 177-188). BSRE's fifth claim "seeks a judicial declaration that the Tribe has no liability – either directly or pursuant to a collection and remittance requirement – for the taxes imposed under the Cigarette and Tobacco Products Tax Law for the cigarettes and tobacco products it distributes," under a combination of federal preemption principles and a fair reading of the State's cigarette tax statutes. ER119-120 (FAC ¶¶ 189-197).

Defendant Becerra moved to dismiss the FAC for failure to state a claim and, as to the fifth cause of action, for lack of jurisdiction. ER75. Defendant Maduros moved to dismiss the fifth claim for lack of jurisdiction. ER73.

After briefing, a hearing, and supplemental briefing, the court granted defendants' motions and entered final judgment in the action, ER1, 2, from which BSRE now appeals.

SUMMARY OF THE ARGUMENT

Under established federal law, Indian tribes and their members are categorically exempt from state taxes (and most state regulatory burdens) imposed upon them in the Indian country under the jurisdiction of such tribe. Also preempted are state taxes (and most state regulatory burdens) imposed on traders (whether Indian or non-Indian, federally licensed or not, located on-reservation or elsewhere) that dictate the kind, quantity or price of goods sold to Indians in Indian country. Non-member consumers are also exempt from state taxes on their transactions with Indians in Indian country, unless the state's specific interests are strong enough, under the circumstances, to justify the taxation's interference with federal policy and the intrusion on tribal sovereignty.

Because BSRE sells exclusively to Indian tribes and tribal members on their reservations, its transactions are not subject to State tax. Further, as a wholesale distributor, BSRE is not obliged to collect and remit cigarette taxes; if that

obligation falls upon anyone, it is upon the retail distributor, who engages in the first transaction that is, depending on the circumstances, potentially taxable. The Complementary Statute does not govern BSRE's distributions because it does not apply unless and until a taxable transaction occurs. The federal Indian Trader Statutes also preempt the application to BSRE of the Complementary Statute, as well as State licensing, reporting, and recordkeeping regulations, because these regulations do not assist in the State's collection of valid taxes owed by non-Indians. Absent this justification, the State contravenes the Indian Trader Statutes when it intercedes, even off-reservation, to limit the kind of goods reservation Indian purchasers may buy and to regulate the price they must pay.

Finally, Congress allowed Indian tribes into federal court to enjoin the enforcement of state taxes that conflict with federal law. Contrary to the lower court's unprecedented conclusion, Congress did not deny this right to federally incorporated Indian tribes like BSRE simply because of their form of organization.

STANDARD OF REVIEW

The Court reviews de novo a dismissal for failure to state a claim and a dismissal for lack of subject matter jurisdiction. *Snyder & Assoc. Acquisitions LLC v. United States*, 859 F.3d 1152, 1156 (9th Cir. 2017); *Sonoma County Ass'n of Retired Employees v. Sonoma County*, 708 F.3d 1109, 1115 (9th Cir. 2013). All facts alleged in the FAC are accepted as true and construed in the light most

favorable to BSRE, with all reasonable inferences drawn in BSRE's favor. *Snyder* at 1156-57; *see Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014).

Dismissal based on Rule 12(b)(6) is warranted only if the FAC does not "contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted). "The plausibility standard is not akin to a probability requirement[.]" *Id.* (internal quotation marks omitted). "Dismissal is improper unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *DaVinci Aircraft, Inc. v. United States*, 926 F.3d 1117, 1122 (9th Cir. 2019); *Gila River Indian Community v. Waddell*, 967 F.2d 1404, 1407 (9th Cir. 1992).

Dismissal of claim five under Rule 12(b)(1) must be reversed if BSRE's "allegations are sufficient as a legal matter to invoke the court's jurisdiction." *Leite* at 1121.

ARGUMENT

I. BSRE asserts valid claims that federal law preempts California's Complementary Statute, licensing and reporting requirements, and cigarette tax obligations as applied to BSRE and its transactions.

A. State authority over Indian commerce is largely preempted by federal law and limited by tribal sovereignty.

The Supreme Court has defined the limits of state authority over transactions involving Indian tribes and tribal members, including the following:

1. "States are categorically barred from placing the legal incidence of an excise tax 'on a tribe or on tribal members for sales made inside Indian country' without congressional authorization." *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 101-02 (2005) (quoting *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 459 (1995)). The "categorical approach" to state taxation of reservation Indians stems from "Chief Justice Marshall's observation that 'the power to tax involves the power to destroy,'" *County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251, 258 (1992) (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819)), and "gives effect to the plenary and exclusive power of the Federal Government to deal with Indian tribes … and to regulate and protect the Indians and [their] property against interference even by a state," *Bryan v. Itasca County, Minn.*, 426 U.S. 373, 376 n.2 (1976) (internal quotation marks omitted). When a state seeks to tax an Indian tribe or individual Indians on their reservation, there is no weighing of the state's interest or examination of whether tribal self-government has been infringed. *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 179-80 (1973). Instead, state taxation is prohibited unless Congress has expressed an "unmistakably clear" intent otherwise. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 765 (1985).

2. Aside from direct taxation, there is no "inflexible *per se* rule precluding state jurisdiction over tribes and tribal members in the absence of

express congressional consent." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 214-15 (1987); *see id.* at 215 n.17 (noting "*per se* rule" in the "special area of state taxation of Indian tribes and tribal members"). "[I]n exceptional circumstances a State may assert jurisdiction over the on-reservation activities of tribal members." *Id.* at 215 (quoting *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331-32 (1983)). The only significant "exceptional circumstance" the Court has identified is that of retail tribal smokeshops, where nonmember consumers owe state tax "when the tax is directed at off-reservation value and when the taxpayer is the recipient of state services." *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 157 (1980). In this exceptional circumstance, the state can impose a "minimal burden" on the tribal retailers "to aid in collecting and enforcing that tax." *Id.* at 159; *see Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 482-83 (1976); *Cabazon* at 215-16 (citing *Colville* and *Moe*); *see also Dept. of Tax. and Fin. of N.Y. v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 73 (1994) ("States may impose on reservation retailers minimal burdens reasonably tailored to the collection of valid taxes from non-Indians.").

3. Where the legal incidence of a state tax falls on a non-member transacting with tribes or tribal members on the reservation, federal law preempts the tax if it fails to satisfy the balancing test articulated in *White Mountain Apache*

Tribe v. Bracker, 448 U.S. 136 (1980). *Wagnon* at 102, 110. *Bracker* calls for a "particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law." *Bracker* at 145. Courts must make this assessment "on a case-by-case basis." *Gila River Indian Community v. Waddell*, 967 F.2d at 1407.

4. As to "Indian traders" (Indian or non-Indian persons who make on-reservation sales to Indians) the Indian Trader Statutes preempt state taxes and other burdens that regulate "the kind and quantity of goods and the prices at which such goods shall be sold to the Indians," 25 U.S.C. § 261, "imposed upon Indian traders for trading with Indians on reservations," *Warren Trading Post Co. v. Ariz. State Tax Comm'n*, 380 U.S. 685, 691 (1965), with the important singular exception that such traders "are not wholly immune from state regulation that is reasonably necessary to the assessment or collection of lawful state taxes." *Milhelm* at 75. The text of the Indian Trader Statutes, 25 U.S.C. §§ 261-264, is set out in the addendum.

5. "Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973); *see Wagnon* at 113. Nevertheless, in

Milhelm, the Supreme Court recognized that the Indian Trader Statutes continued to limit the State of New York's authority to regulate an off-reservation wholesale cigarette distributor making on-reservation sales to tribal retailers. *Id.* at 67, 74-76. In other words, the Indian Trader Statutes constitute federal law expressly limiting the application of State law outside reservation boundaries. Thus, an Indian trader and its activities are governed by preemptive federal law, even while the trader's business of selling goods to Indians on-reservation finds the trader in an off-reservation location. *See id.*; *Central Machinery Co. v. Arizona State Tax Comm'n*, 448 U.S. 160 (1980).

The Indian Trader Statutes, which are central to BSRE's claims, represent a foundational policy of the federal government, "permitting the Indians largely to govern themselves, free from state interference[.]" *Warren*, 380 U.S. at 686-87. Under these laws, "the Commissioner of Indian Affairs has 'the sole power and authority to appoint traders to the Indian tribes and to make … rules and regulations specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians.'" *Central Machinery*, 448 U.S. at 162 (quoting 25 U.S.C. § 261).[3] States, therefore, cannot by their own rules and regulations dictate the kind, quantity, or price of goods sold to Indians. *Milhelm* at 75.

[3] The Secretary of the Interior now exercises the Commissioner's authority. Reorganization Plan No. 3 of 1950, 15 Fed. Reg. 3174 (May 25, 1950).

Congress conferred authority upon the President of the United States, "whenever in his opinion the public interest may require the same, to prohibit the introduction of goods, or of any particular article, into the country belonging to any Indian tribe[.]" 25 U.S.C. § 263. States, therefore, cannot prohibit goods from entering Indian country based on the states' views or public policies.

Exercising its expressly delegated authority, the Department of the Interior has promulgated "detailed regulations" to govern Indian traders, covering the same ground as the State's licensing and recordkeeping requirements. *Warren* at 689; 25 C.F.R. §§ 140.1-140.26. The regulations "prescrib[e] in the most minute fashion who may qualify to be a trader and how he shall be licensed; penalties for acting as a trader without a license; conditions under which government employees may trade with Indians; articles that cannot be sold to Indians; and conduct forbidden on a licensed trader's premises." *Warren* at 689 (citing, among others, regulations now located at 25 C.F.R. §§ 140.9, 140.3, 140.5, 140.18, 140.19, and 140.21). As part of the federal government's comprehensive governance of reservation trade, the regulations require "that detailed business records be kept and that government officials be allowed to inspect these records to make sure that prices charged are fair and reasonable." *Id.* (citing regulation now located at 25 C.F.R. § 140.22). The federal regulations also specifically govern traders' sales of cigarettes and

tobacco products to Indians, prohibiting such sales to buyers under 18 years of age, but not requiring compliance with general state laws. 25 C.F.R. § 140.17.

The express objective of regulating persons who trade with Indians on reservations is "the protection of said Indians." 25 U.S.C. § 262. The "evident congressional purpose," the Supreme Court has held, is to "ensur[e] that no burden shall be imposed upon Indian traders for trading with Indians on reservations except as authorized by Acts of Congress or by valid regulations promulgated under those Acts." *Warren* at 691. Congress set up this "statutory plan … in order to protect Indians against prices deemed unfair or unreasonable by the Indian Commissioner." *Id*.[4]

Thus, the Court held in *Warren* that the assessment and collection of a state tax on the gross income of a vendor from sales to reservation Indians "would put financial burdens on the [vendor] or the Indians with whom it deals in addition to

[4] Federal policies similar to those behind the Indian Trader Statutes continue to drive federal legislation. *See* Native American Business Development, Trade Promotion, and Tourism Act of 2000, Pub. L. No. 106-464, 114 Stat. 2012-18 (codified at 25 U.S.C. §§ 4301-4307). This Act was designed to "revitalize" tribal economies by "facilitating the movement of goods to and from Indian lands," and to improve "the economic self-sufficiency of the governing bodies of Indian tribes" by encouraging "intertribal" trade and "stimulat[ing] the demand for Indian goods and services that are available from [tribes and tribal businesses]." 25 U.S.C. §§ 4301(b), 4303, 4304. Because BSRE is an Indian tribe and tribal business, as well as an Indian trader, its intertribal business activities implicate the federal policies expressed in both this Act and the Indian Trader Statutes.

those Congress or the tribes have prescribed, and could thereby disturb and disarrange" Congress' statutory plan. *Warren* at 691. The Court later expanded on *Warren*, holding that the Indian Trader Statutes preempt state taxation of vendors for their sales to reservation Indians regardless of whether the vendor possesses a federal Indian trader license or has a permanent place of business on the reservation. *Central Machinery*, 448 U.S. at 164-66.

The Court last considered the Indian Trader Statutes in *Milhelm*. There, the Court applied to traders the same rule it had applied to tribal vendors in its bulk cigarette cases, holding that states can regulate the reservation activities of Indians and Indian traders as reasonably necessary to accomplish the collection of otherwise lawful state taxes imposed on non-Indians. *Milhelm*, 512 U.S. at 73-74. The Indian Trader Statutes still preempt "a tax directly imposed upon Indian traders for trading with Indians," the Court reiterated, but they allow "reasonable regulatory burdens upon Indian traders" where such regulations are necessary "to prevent circumvention of 'concededly lawful' taxes owed by non-Indians." *Id.* at 74-75.

Under *Warren*, *Central Machinery* and *Milhelm*, the Indian Trader Statutes preempt State taxes imposed on BSRE for its sales to Indians on their reservations, and they preempt State regulations of price, kind and other regulatory burdens imposed on BSRE's sales to Indians on their reservations, because such burdens

are not "reasonably tailored to the collection of valid taxes from non-Indians." *Milhelm* at 73; *Central Machinery* at 163-64; *Warren* at 691.

B. The State is not authorized to impose cigarette tax on BSRE's transactions, and State law does not require BSRE to collect and remit any taxes that retail consumers may owe.

Based on the foregoing principles of federal Indian law and the application of State tax statutes, federal law preempts State taxes on BSRE's wholesale distributions to Indian tribes and tribal members on their reservations. Moreover, California law does not require BSRE to collect and remit any tax that may ultimately arise from the subsequent transactions of retail distributors, nor would Indian law principles countenance any such requirement without significant changes to the State's system for taxing cigarettes sold in Indian country.

Becerra acknowledges that "cigarettes sold to tribal members in Indian country are exempt from state taxation[.]" ER78:10. This is true because under federal law, states have no authority to tax either the buyer or the seller in such a transaction. As to the buyer, states are categorically without power to tax an Indian tribe or tribal member in Indian country. *Wagnon*, 546 U.S. at 100-101; *Chickasaw*, 515 U.S. at 458. "If the legal incidence of an excise tax rests on a tribe or on tribal members for sales made inside Indian country, the tax cannot be enforced absent clear congressional authorization." *Chickasaw* at 459. As for the

seller, states cannot impose a tax "'upon Indian traders for trading with Indians.'" *Milhelm*, 512 U.S. at 75 (quoting *Warren*, 380 U.S. 691).

As a result, and taking the facts alleged in the FAC as true, the following conclusions must be made. First, the State has no authority to impose cigarette taxes on BSRE itself. California generally imposes tax upon a distributor's "distribution of cigarettes," Cal. Rev. & Tax. Code §§ 30101, 30123(a), or upon the distributor "for each cigarette distributed," *id.* §§ 30131.2(a), 30130.51(a). As pertains to BSRE, "distribution" means the "sale of untaxed cigarettes" and any "use or consumption of untaxed cigarettes" except for the "keeping or retention" of cigarettes "for the purpose of sale." *Id.* §§ 30008, 30009. BSRE's purchase of cigarettes from the manufacturer is a transaction California excludes from the tax. *Id.* § 30103.[5] And the Indian Trader Statutes preempt the imposition of State tax directly upon BSRE when it makes sales because BSRE only sells to Indian tribes and tribal members on the tribal purchasers' reservations. *Milhelm* at 74; *Central Machinery* at 160, 164-65; *Warren* at 691-92. In between these two on-reservation events, BSRE transports the cigarettes from the Big Sandy Rancheria to other Indian country in California, during which time it goes off-reservation. No tax is

[5] Furthermore, as an Indian tribal entity on its own reservation, BSRE would be categorically exempt from tax on this transaction in any event. *Chickasaw* at 458-59.

incurred off-reservation, however, because BSRE's movement of cigarettes for the purpose of sale is not a taxable event. *See* Cal. Rev. & Tax. Code §§ 30008, 30009.[6]

Second, none of BSRE's customers are taxable. Again, BSRE sells cigarettes exclusively to Indian tribal governmental, and Indian tribal-member, reservation-based retailers operating within their Indian reservations. ER109 (FAC ¶ 123). The cigarettes are sold and delivered to such retailers at their respective retail establishments within such retailers' Indian reservation. ER109 (FAC ¶ 124). In the absence of congressional authorization, the imposition of state tax upon the tribal retailers is categorically barred. *Chickasaw* at 458-59.

Third, under these circumstances, California law does not require BSRE to collect and remit cigarette taxes, even if non-member retail consumers ultimately owe taxes. Although cases establish that an Indian tribe, tribal member, or Indian trader cannot be taxed directly, a state may nevertheless impose minimal burdens on the Indian tribe, tribal member or Indian trader to help the State collect taxes validly owed by non-Indians. *E.g.*, *Chemehuevi*, 474 U.S. at 12. California law does not attempt to impose such a collect-and-remit requirement on BSRE as a

[6] Indeed, it is doubtful that the tax could be applied to products simply passing through the state from one location outside the State's taxing jurisdiction to another such location, an activity that lacks a substantial nexus with the State. *See*, *e.g.*, *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977).

wholesale distributor. *Id.* at 11-12. Instead it is only the retailer, if anyone, that is expected to collect any valid taxes and remit them to the State.

The tax code provides that an untaxable distributor shall "collect the tax from the purchaser," and that the collection must occur "at the time of making the sale or accepting the order," *unless* "the purchaser is not then obligated to pay the tax with respect to his or her distribution of the cigarettes," in which case the collection occurs "at the time the purchaser becomes so obligated." Cal. Rev. & Tax. Code § 30108(a); *see Chemehuevi*, 474 U.S. at 11 (holding that § 30108(a) "evidences an intent to impose on the [Tribal retail smoke shop] a 'pass on and collect' requirement"). As discussed above, BSRE is a non-taxable distributor. Moreover, the tribal retailers who purchase cigarettes from BSRE are also non-taxable distributors. Since these purchasers never "become obligated to pay the tax with respect to [the retailers'] distribution of the cigarettes," BSRE is not required to collect tax from them. Cal. Rev. & Tax. Code § 30108(a).

A distributor who collects the tax under § 30108 is required to file monthly reports and with them remit to the State the tax due. Cal. Rev. & Tax. Code §§ 30183, 30184. Remittance by the retail distributor leaves nothing for the wholesale distributor to do since the tax can be remitted only once. In the event the retail distributor fails to collect tax when required under § 30108, the collection duty does not shift to the wholesaler (who would have no information about the

taxable retail sale) but devolves to the "consumer or user subject to the tax," who must file a report and submit the tax due. *Id.* § 30187.

Chemehuevi illustrates how the collection requirement operates in California: in that case, untaxed cigarettes passed from a wholesaler to a tribal retailer to the non-Indian consumer, upon whom the legal incidence of the tax finally fell, and the retailer (not the wholesale distributor) was obligated to collect and remit the tax. *Chemehuevi* at 11-12. As the State successfully argued to the Supreme Court in *Chemehuevi*, both the tax and the collect-and-remit requirement do not arise until the first non-exempt distribution of cigarettes, even when the first such distribution does not occur until the retail sale. *See* Pet. for Writ of Cert. of Cal. State Bd. of Equalization, *Cal. State Bd. of Equalization v. Chemehuevi Indian Tribe*, No. 85-130, 1985 WL 695144, *6-8 (Jul. 22, 1985).

California does not have a system that predetermines the taxability of cigarettes. Rather, under California law, when consumers purchase cigarettes in Indian country, taxability is determined at the retail level, and not before. Accordingly, California law does not impose a collect-and-remit requirement at the wholesale level for such sales, when taxability is still unknown. The State could remedy this outcome by amending its tax laws, but it has refused to do so.

Several other states recognizing this issue have implemented systems that pre-calculate cigarette taxability and require wholesalers to act accordingly,

including New York, Oklahoma, and Washington. The court below relied on cases that upheld this type of statutory scheme in New York (*Milhelm*) and Oklahoma (*Muscogee (Creek) Nation v. Pruitt*, 669 F.3d 1159 (10th Cir. 2012)), on the erroneous belief that the dissimilarities between these state's laws and California's were mere "distinctions without a difference." ER21:26-27. The difference, however, is that the New York-style regime directly informs the wholesaler if a cigarette to be sold at wholesale is taxable or tax-exempt (even though the legal incidence does not fall on the wholesaler or retailer, but on the ultimate consumer), so that if the state requires the wholesaler to collect taxes and buy tax stamps, or requires taxable cigarettes to be listed on the MSA directory, there is a reasonable connection between that regulation and the known facts. With taxability established from the outset, valid taxes may be remitted by the wholesaler, while Indian distributors and consumers remain free from unjustified state burdens.

Milhelm illustrates the New York system. In New York, as in California, the taxability of cigarettes sold in Indian country depends on the circumstances of the retail sale. *Milhelm* at 64. Generally, however, wholesalers in New York were required to precollect the tax well before the retail circumstances could be known. *Id.* Thus, either tax-exempt purchasers would have no choice but to buy tax-stamped cigarettes, or taxable cigarettes would escape taxation.

To address the problem, New York adopted regulations that allocate a certain number of tax-exempt cigarettes for wholesale distribution to retailers on Indian reservations. *Id.* at 65. Wholesalers distribute tax-exempt cigarettes to reservation retailers in predetermined quantities – established by agreement with the affected Indian tribe or "based on the 'probable demand' of tax-exempt Indian consumers," as calculated by the state – and prepay taxes (ultimately the consumer's obligation) on all other cigarettes. *Id.* at 64-67.[7]

The Court upheld these regulations imposed on a cigarette wholesaler and Indian trader as "reasonably necessary to the assessment or collection of lawful state taxes … without unnecessarily intruding on core tribal interests." *Milhelm* at 75. Thanks to the predetermined quota of tax-free cigarettes (which the Court was willing to assume was adequate and would be administered fairly), "tax-immune Indians will not have to pay New York cigarette taxes and neither wholesalers nor retailers will have to precollect taxes on cigarettes destined for their consumption."

[7] The plaintiffs in *Milhelm* did not contest the State's probable demand calculations. *Id.* at 69. The Court therefore assumed the State's taxability determinations were sufficient and that the taxes imposed on non-Indian consumers were valid. *Id.* at 69, 75-76.

Id. at 75. "[T]he precollection regime will not require prepayment of any tax to which New York is not entitled." *Id.* at 76.[8]

Unlike New York and states that have adopted versions of the New York system, California's system does not differentiate, at the wholesale level, between taxable and nontaxable cigarettes. While a New York-style system that predetermines the "probable demand" for untaxable cigarettes in tribal commerce can provide the certainty necessary to avoid intruding on core tribal interests, thereby allowing a state to regulate sales of taxable cigarettes at the wholesale level and even keep tabs to verify the untaxable sales, California law ignores these realities and is, in practice, indifferent to tribal interests. Imposing an obligation on BSRE to remit tax without first establishing, consistent with federal Indian law principles, how much tax, if any, consumers will validly owe, would unjustifiably dictate the price BSRE's Indian retailer customers must pay for goods they buy on their reservations, interfering with the purpose of the Indian Trader Statutes and exceeding the State's limited authority to regulate Indian traders.

Fourth, even if California law were rewritten to allow the tax collection and remittance obligation to be moved up the chain of distribution to BSRE, it remains

[8] Oklahoma and Washington have adopted probable demand-based quota systems similar to New York's, and both have been similarly upheld against preemption claims. *Muscogee*, 669 F.3d at 1163; *United States v. Baker*, 675 F.3d 1478, 1486-90 (9th Cir. 1995).

uncertain whether anyone ever owes taxes on the cigarettes BSRE distributes. State tax is always preempted on tribal retailers' sales to tribal members. *Moe*, 425 U.S. at 480-81; *Colville*, 447 U.S. at 160-61. Sales to non-members require *Bracker*'s "particularized inquiry," weighing the relevant sovereign and economic interests. *See Bracker*, 448 U.S. at 144-45; *Colville* at 154-57. In this "case-by-case" assessment, it is insufficient to assume all sales to non-member consumers will be taxable based on the outcome of the balancing test under the facts of prior cases. *Gila River Indian Community v. Waddell*, 967 F.2d at 1407; *see id.* at 1409-10; *see also HCI Distribution, Inc. v. Peterson*, 360 F.Supp.3d 910, 922 (D. Neb. 2018) (holding that resolution of "Indian Commerce Clause claims" under *Bracker* is "exceedingly complex and context-dependent," and cannot be done on the "complaint standing alone"). For present purposes, it is enough that the complaint alleges facts supporting the conclusion that some or all of the cigarettes BSRE distributes will not be taxable at retail.[9]

[9] ER109-110 (FAC ¶¶ 126-130) (alleging sales at tribal casinos subject to preemptive federal law, *see Flandreau Santee Sioux Tribe v. Noem*, 938 F.3d 928, 936-37 (8th Cir. 2019)); ER110 (FAC ¶ 131) (alleging State tax exemption for up to two cartons of cigarettes brought into state by consumer, *see* Cal. Rev. & Tax. Code § 30106); ER108-109 (FAC ¶¶ 117-125) (tribes create value in cigarettes through wholly intertribal distribution chain, strengthening tribal and federal interests; cf. *Colville* at 155-57).

In sum, on the facts as alleged, federal law preempts the imposition of State cigarette tax upon BSRE and, further, BSRE has no obligation under State law to collect and remit the tax, which does not arise (if at all) until a taxable retail sale occurs.

C. The Complementary Statute does not apply to BSRE cigarettes unless and until they become taxable.

As Becerra emphasized before the lower court, the Complementary Statute is directly tied to taxability. Under the State's Escrow Statute, non-participating manufacturers' escrow fees "do not attach to cigarettes beyond the reach of state taxation[.]" ER80:15-16. Becerra explained below that both the Escrow Statute and the Complementary Statute "make clear" that transactions exempt from cigarette tax "are already beyond the statutes' intended reach." ER83:13-18.

The Escrow Statute requires non-participating manufacturers to deposit an amount of money "per unit sold" into an escrow fund. Cal. Health & Safety Code § 104557(a)(2). The term "units sold" excludes "cigarettes sold on federal military installations, sold by a Native American tribe to a member of that tribe on that tribe's land, or that are otherwise exempt from the state excise tax pursuant to federal law." *Id.* § 104556(j). A State publication Becerra cited explains that "[d]istributions which this state is prohibited from taxing under the Constitution or laws of the United States or under the Constitution of this state are exempt" from the Escrow Statute and the strictures of the Complementary Statute meant to

enforce escrow obligations. ER83:19-20 (quoting Cal. Bd. of Equalization, Pub. 4, Analysis of California Cigarette and Tobacco Products Tax Law 26 (2012)).

Undisputedly, then, State law allows the distribution of off-directory cigarettes if those cigarettes are exempt from tax. As discussed above, BSRE's cigarettes are tax-exempt at the time of every transaction involving BSRE. When they are sold to BSRE, when they move from the Big Sandy Rancheria to other Indian country in the State for the purpose of sale, and when BSRE sells them to tribal retailers on the retailers' reservation, the cigarettes are tax-exempt, and need not be listed on the directory. At this point, BSRE has exhausted its role in the cigarettes' distribution without ever bringing the Complementary Statute into play.

Depending on the circumstances of the retail transaction and the balance of governmental interests, some consumers may incur a valid tax when they buy cigarettes previously handled by BSRE. At this time, and not before, any such cigarettes may be deemed contraband if not listed on the directory. But by then, BSRE is not involved.

Crucially, as detailed above, California lacks a New York-style system for determining early in the distribution chain which cigarettes are taxable based on later transactions. California law, therefore, fails to establish for a wholesale distributor like BSRE how many cigarettes count as "units sold" for escrow and

directory purposes, meaning the State cannot deem any cigarettes contraband while BSRE is in the process of distributing them.

As an Indian trader, BSRE faces excessive State burdens if it is obliged to limit the cigarette brands it offers to those brands listed on the State's MSA directory, even though many of its cigarettes are acknowledged to be beyond the intended reach of the Complementary Statute. As a result, to constrain BSRE to selling only the cigarette brands listed on the State directory is to impose an unjustified intrusion on BSRE's right to sell goods to Indians, and their right to buy goods, without the State dictating "the kind and quantity of goods and the prices at which such goods shall be sold to the Indians." 25 U.S.C. § 261; *see Milhelm* at 75.

Federal law preempts the application of the Complementary Statute to BSRE for another, independent reason: this regulation of the price of cigarettes is designed to enforce the Escrow Statute, not to assist in the collection of taxes. When the Supreme Court has allowed states to exercise authority over Indian traders, it squarely limited that authority to regulation that "is reasonably necessary to the assessment or collection of lawful state taxes." *Milhelm* at 74.

Becerra acknowledges the Escrow Statute does not impose a tax. ER84:11. Nor does the escrow scheme "operate like a tax," as Becerra has argued. *Id.* Its purpose is to "effectively and fully neutralize[] the cost disadvantages that the

Participating Manufacturers experience vis-à-vis Non-Participating Manufacturers within [California] as a result of the provisions of [the MSA]." MSA § IX(d)(2)(E). That is, it enforces price parity to prop up the participating manufacturers' share of the cigarette market, by increasing the non-participating manufacturers' cost of doing business in the state. Money is not paid to the State, however, as a tax would be. Instead, funds are deposited into bank accounts where they are held in escrow for twenty-five years, paying interest to the manufacturer, then released back to the manufacturer. Cal. Health & Safety Code §§ 104556(f), 104557(b). The State receives nothing unless it wins a judgment against a nonparticipating manufacturer (or reaches settlement) on claims akin to those asserted against Big Tobacco, alleged to have committed rampant, institutional, consumer fraud and deceptive marketing. *Id.* § 104557(b)(1); *see* ER67-68 (FAC ¶¶ 22-28). If this occurs – and to BSRE's knowledge, it has never happened – the culpable manufacturer's escrow deposit may be used toward the State's damages. Cal. Health & Safety Code § 104557(b)(1). The escrow mechanism, which simply sets money aside for hypothetical judgments, fails to yield the "essential feature of any tax" – it does not produce revenue for the State government. *Nat'l Fed. of Independent Bus. v. Sebelius*, 567 U.S. 519, 564 (2012).

Instead of generating revenue, the Escrow Statute only serves the State's interest in protecting Big Tobacco's hold on the cigarette market in accordance

with the terms of a settlement agreement. This dubious interest is insufficient to justify the State's enforcement of the Escrow Statute against an Indian trader, which interferes with federal policy and the rights of Indian tribes and tribal members by dictating the "kind" of cigarettes "and the prices at which such [cigarettes] shall be sold to the Indians." 25 U.S.C. § 261; *see Milhelm* at 75. Certainly, the overriding weight of the State's interest is not so firmly established to justify dismissal of BSRE's claim at the pleading stage.

Moreover, even if the escrow obligation were a tax, it would not be validly imposed upon Azuma, the tribal manufacturer from which BSRE obtains cigarettes, whose on-reservation activity is "categorical[ly]" exempt from State taxation. *Chickasaw*, 515 U.S. at 458. Coercing the manufacturer's compliance with an unlawful tax imposition is not a valid State interest.

D. The State's licensing, recordkeeping and reporting requirements are preempted.

Where a vendor makes sales only to Indians on the Indian buyer's reservation, as in this case, the Indian Trader Statutes preempt the State's licensing, recordkeeping and reporting requirements. The Indian Trader Statutes and the regulations promulgated under their authority establish a federal regime for approving and licensing vendors who, like BSRE, make on-reservation sales to Indians. 25 C.F.R. §§ 140.9-140.15. Federal regulations call for Indian traders to retain invoices and other transaction and business records, to allow the federal

government to fulfill its "duty … to see that the prices charged by licensed traders are fair and reasonable." 25 C.F.R. § 140.22. Only the President is authorized "to prohibit the introduction of goods, or of any particular articles, into the country belonging to any Indian tribe." 25 U.S.C. § 263; 25 C.F.R. § 140.2. The federal government has seen fit to impose only one condition specific to traders' sale of cigarettes and tobacco products, that traders may not sell cigarettes "to any Indian under 18 years of age." 25 C.F.R. § 140.17. In short, subject only to the single exception announced in *Milhelm*,

> These apparently all-inclusive regulations and the statutes authorizing them would seem in themselves sufficient to show that Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens upon traders.

Warren at 690. The judicially-created *Milhelm* exception, which allows a state to impose minimal burdens designed to enhance the collection of valid state taxes owed by non-Indians, does not allow the State to impose upon BSRE its licensure and related requirements.

Moe established that states could validly impose cigarette taxes on non-Indians buying cigarettes on-reservation from tribal retailers and that states could require the tribal retailers to collect that tax from their non-Indian customers, on the ground that it was necessary to "aid the State's collection and enforcement thereof," *Moe* at 482-83, but the Court had no qualms holding that the vendor

license requirement was preempted, *id.* at 480. The Court invalidated a "vendor license fee sought to be applied to a reservation Indian conducting a cigarette business for the Tribe on reservation land." *Id*. The lower court decision that *Moe* affirmed had held that the state could not require the vendor to possess a state-issued cigarette dealer's license, *Confederated Salish and Kootenai Tribes v. Moe*, 392 F.Supp. 1297, 1307 (D. Mont. 1974), and the Supreme Court's decision has been understood similarly to have held "that an Indian vendor cannot be required to obtain a state license," *Stanger v. Wyoming State Tax Comm'n*, 682 P.2d 326, 327 (Wyo. 1984) (citing *Moe*). This holding reflects the fact that nothing about the mere possession of a license assists in the collection of valid State taxes. Instead, the license requirement adds a state-imposed burden which intrudes on the federal plan for licensing Indian traders, without the only justification sanctioned by the Supreme Court.

The recordkeeping and reporting requirements are similarly unjustified. As outlined above, BSRE's tax reports would not identify its retailer customers, much less provide the State any information about the retail transactions, which is the information necessary to ascertain the products' ultimate taxability and to inform the State from whom it should collect what is owed. And while the records BSRE would have to retain for possible inspection by the State include information about its sales to retailers, they still lack any data about those retailers' sales – whether

they are made to tribal members or nonmembers, whether they are part of federally-protected activities, such as the operation of a tribal casino, and whether other circumstances of the sale, such as the quantity of cigarettes purchased, impact taxability. The fact that the State has never sought to review such records pursuant to state law indicates that the State does not consider these records necessary to its tax collection and enforcement efforts. Meanwhile, the State has demanded the submission of equivalent information according to its interpretation of the federal PACT Act, 15 U.S.C. §§ 375-378. *See* ER136-140, 167-169 (demand letters); ER144-149 (complaint). If, as the State has contended, the PACT Act requires that BSRE report to the State or retain records (a question not presented in this case), then the State-imposed burden is redundant and therefore not reasonably necessary.

Because these regulatory burdens are not "designed to prevent non-Indians from evading taxes," or "reasonably necessary to the assessment or collection of lawful state taxes," they are not the sort of "reasonable regulatory burdens" approved by *Milhelm*, and they remain preempted. 512 U.S. at 74-75.

II. As an Indian tribe incorporated under section 17, BSRE is exempt from the Tax Injunction Act.

Finally, the district court dismissed for lack of subject matter jurisdiction BSRE's fifth claim, which sought "a judicial declaration that the Tribe has no liability – either directly or indirectly pursuant to a collection and remittance

requirement – for the taxes imposed under the Cigarette and Tobacco Products Tax Law for the cigarettes and tobacco products it distributes." ER120 (FAC ¶ 197). The court held that the Tax Injunction Act ("TIA") bars the claim because BSRE is not within the "Indian tribes" exemption from the TIA. ER 9-16.

The district court's order is the only decision by any federal court to rule that an Indian tribe incorporated under section 17 of the IRA, although it possesses the same federally protected immunity from state taxation as an Indian tribe organized in a political structure, cannot bring suit in federal court to protect that immunity. The lower court's decision reflects a fundamental misunderstanding of the nature of an Indian tribe, conflating the "tribe" and the tribe's government. The district court also failed to recognize that a section 17 corporation is a unique creation of federal law that is not comparable to other companies incorporated under state or tribal law. Congress intended section 17 to confer upon federally recognized Indian tribes the advantages of doing business in a corporate structure familiar to the business world while safeguarding tribal property and assets, not to penalize such tribes that elect to organize themselves under section 17 by limiting their access to federal court when state taxes unlawfully burden the tribal business.

Thus, as the Tenth Circuit has held, an Indian tribe that comes before the federal court as "a federally chartered corporation" remains a "'tribe' for purposes of § 1362," which grants the court jurisdiction over all the federal claims the tribe

may assert. *United Keetoowah Band of Cherokee Indians v. Okla. ex rel. Moss*, 927 F.2d 1170, 1174 (10th Cir. 1991). Congress expanded the jurisdiction of federal courts to encompass suits by recognized Indian tribes, regardless of the structure in which the tribe is organized and, with that expansion, it exempted all such Indian tribes from the TIA.

A. Relevant statutes.

Three federal statutes are at issue. First, the TIA provides that federal "district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341.

Next, the Supreme Court has found that the TIA does not apply to suits brought by Indian tribes pursuant to 28 U.S.C. § 1362, which states:

> The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.

See Moe, 425 U.S. at 472-75. *Moe* reasoned that Congress intended "to open the federal courts to the kind of claims that could have been brought by the United States as trustee [for Indian tribes], but for whatever reason were not so brought." *Id.* at 472. Such claims include an "attack on the State's assertion of taxing power," specifically, a claim "that state taxing jurisdiction has been preempted by

the applicable treaties and federal legislation." *Id.* at 473, 474 n.13. Since tribes suing under section 1362 "were to be accorded treatment similar to that of the United States had it sued on their behalf," and "[s]ince the United States is not barred by § 1341 from seeking to enjoin the enforcement of a state tax law," *Moe* held that the TIA does not bar an Indian tribe from suing to enjoin state tax enforcement. *Moe* at 474-75; *see Agua Caliente Band of Cahuilla Indians v. Hardin*, 223 F.3d 1041, 1046 n.5 (9th Cir. 2000) (noting TIA exception in case where constitutional tribe and section 17 incorporated tribe were co-plaintiffs).

Finally, BSRE is an "incorporated tribe" under section 17 of the IRA, 25 U.S.C. § 5124, under which any Indian tribe may petition the Secretary of the Interior to issue to the tribe a federal charter of incorporation. The full text of section 17, as amended, is set forth in the addendum.

Based on the language of § 1362 and the IRA, construed in the light most favorable to Indian tribes and informed by the congressional intent revealed in the history and purposes of the statutory schemes, the principles that underlie *Moe*'s analysis apply with equal force here. As a result, an "incorporated tribe" organized under a section 17 charter may assert a claim in federal court alleging that the Constitution, laws or treaties of the United States preempt a state tax and that the enforcement or collection of the tax must therefore be enjoined, just as the tribe

organized under section 16 or otherwise may seek such an injunction in federal court.

B. A tribe is a tribe, even when incorporated under section 17.

The district court misconstrued authorities addressing section 17 corporations and incorrectly concluded that there is a "distinction between [BSRE] and the Tribe." ER12:18. However, the legislative history and contemporaneous interpretations of the IRA demonstrate that under the IRA, a section 17 corporation must be regarded as the tribe just as much as a tribal political structure organized under section 16 or otherwise.

Congress made the IRA's organizational frameworks available to Indian tribes to encourage them "to revitalize their self-government through the adoption of constitutions and bylaws and through the creation of chartered corporations, with power to conduct the business and economic affairs of the tribe." *Mescalero Apache Tribe v. Jones*, 411 U.S. at 151. The IRA sought "'to give the Indians the control of their own affairs and their own property; to put it in the hands either of an Indian council or in the hands of a corporation to be organized by the Indians.'" *Id.* (quoting statement of Sen. Wheeler, 78 Cong. Rec. 11125).

The purpose of section 17, specifically, was to "permit Indian tribes to equip themselves with the devices of modern business organization, through forming themselves into business corporations." S. Rep. No. 73-1080, at 1 (1934). Section

17 thus provides one of the primary tools Congress developed to advance a cornerstone objective of the IRA – "'to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism.'" *Mescalero Apache Tribe v. Jones*, 411 U.S. at 152 (quoting H.R. Rep. No. 73-1804, at 6 (1934)); *see Cohen's Handbook of Federal Indian Law* § 4.04[3][a][i], p. 256 (Newton, ed., 2012). President Franklin D. Roosevelt saw the tribal self-determination at the center of the IRA as an existential imperative, necessary to stave off the "impending extinction, as a race," of Indians throughout the country. S. Rep. No. 73-1080, at 4 (reprinting letter from Pres. Roosevelt to Sen. Wheeler).

Contemporaneous interpretations confirm that the IRA provides multiple structures into which a tribe may choose to organize, with each structure embodying the tribe. A Solicitor's Opinion issued six months after the IRA's enactment explained that section 17 "permit[s] the same groups which may organize and adopt constitutions under section 16, to become corporate bodies." *Wheeler-Howard Act Interpretation*, Opn. M-27810 (Dec. 13, 1934), *reprinted in* 1 *Dept. of the Interior, Opinions of the Solicitor Relating to Indian Affairs 1917-1974*, at 488. Another Solicitor's Opinion explained that an Indian tribe's "character as a governmental entity is conclusively established and takes practical form when the tribe is organized under a constitution under section 16 of [the IRA]

and incorporated as a Federal corporation under section 17." *Eligibility of Indian Tribes for Loans and Grants.…*, Opn. M-30807, 57 Interior Dec. 145, 149 (Aug. 6, 1940). In the Handbook of Federal Indian Law published by the Department of the Interior in 1941, author Felix S. Cohen explained that "the incorporation provisions" of the IRA "have been consistently interpreted by the administrative authorities of the Federal Government and by the tribes themselves as *modifying only the structure of the tribe* and not relieving it of any tribal obligations or depriving it of any tribal property." *Handbook of Federal Indian Law*, ch. 14 § 4, at 279 (photo. reprint 1988) (1941) (emphasis added).[10] The Department of the Interior carried Cohen's analysis over to the Department's revised edition of the Federal Indian Law handbook in 1958. Dept. of Interior, *Federal Indian Law*, ch. VI § B.4, at 476-81 (1958).

In the same year, the Department issued the Solicitor's Opinion on which the court below relied. *See* ER13:4-17 (indirectly quoting the Solicitor's Opinion, *Separability of Tribal Organizations.…*, Opn. M-36515, 65 Interior Dec. 483 (Nov. 20, 1958)). This opinion concluded that the "political" or "constitutional tribal

[10] Cohen was Assistant Solicitor for the Department of the Interior and principle author of the IRA. He is "an acknowledged expert in Indian law," *Squire v. Capoeman*, 351 U.S. 1, 8-9 (1956), and its "foremost authority," *Turtle Mountain Band of Chippewa Indians v. United States*, 203 Ct.Cl. 426, 439 (1974). Cohen's Handbook is "the leading treatise on federal Indian law." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 226 (2012).

organization" is a "separate entity" from the "business corporation" chartered under section 17, although the two bodies are "composed of the same members." 65 Interior Dec. at 483-84. The separation of the political and business entities addressed legislators' concerns that "no one would give credit to [a governmental] organization because of its immunities[.]" *Id.* at 484; *see Am. Vantage Cos., Inc. v. Table Mountain Rancheria*, 292 F.3d 1091, 1099 (9th Cir. 2002); *Linneen v. Gila River Indian Community*, 276 F.3d 489, 492-93 (9th Cir. 2002).

The district court drew the wrong conclusion from these authorities. *See* ER12:18; ER13:18-19. Although the tribal political entity and the tribal business entity are distinct from one another, neither entity is distinct from the tribe. The tribe is an "aggregation[]" made up of "a separate people." *United States v. Mazurie*, 419 U.S. 544, 557 (1975)); *see Cohen's Handbook* § 3.02[2] at 132-33 ("federal law ordinarily uses the term 'Indian tribe' to designate a group of native people with whom the federal government has established some kind of political relationship"). Under the IRA, the people may organize as one entity to exercise political functions and organize as another entity to exercise business functions. The aggregations "form[] themselves into business corporations," S. Rep. No. 73-1080 at 1, and "become corporate bodies," *Wheeler-Howard Act Interpretation* at 488, so section 17 accurately calls the chartered entity "the incorporated tribe." 25

U.S.C. § 5124. Each entity organizes the sovereign, federally recognized tribe, so for purposes of § 1362, each entity is the "tribe."[11]

Thus, an Indian tribe that incorporates under section 17 is still that same tribe, just possessed of a corporate structure familiar to businesses and a distinct legal personhood to segregate its assets and liabilities from those of its political structure. When the Secretary issued the federal charter incorporating the Tribe as BSRE, the Tribe assumed a corporate structure that, just as much as the Tribe's political structure, organizes the Tribe itself.

The fact that the tribal commercial and political entities are distinct from one another and perform separate functions does not support the district court's conclusion that Congress meant to exclude the section 17 organization from asserting federal claims that a section 16 organization could assert. Instead, the distinctness of the two entities compels the conclusion that the tribal political entity should not be required to participate in suits that primarily concern the tribal

[11] The district court also cited *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 146 (1982), which distinguished between "the Tribe's role as a commercial partner [and] its role as sovereign." In *Merrion*, the Jicarilla Apache Tribe (which had a tribal constitution and a section 17 charter, *id.* at 134 & fn.3) leased (in its commercial role) some of its reservation lands. *Id.* at 135. The Court upheld the Tribe's power (in its sovereign role) to impose a tax on the lessees, even though the lease agreements did not address taxation. *Id.* at 148. Supporting BSRE's position, *Merrion* illustrates that behind both roles, simultaneously, is the tribe itself.

business entity. Under the IRA's design, one entity's waiver of its sovereign immunity does not affect the sovereign immunity of the other entity, allowing a tribe to permit suits against its business entity, while leaving its political entity out of it. *See Linneen*, 276 F.3d at 493. By the same token, under the IRA and § 1362, a tribe can choose to bring a federal action in the name of its business entity to enforce that entity's rights and obligations, while leaving the political entity and its rights and obligations out of the action.

C. Tribes incorporated under section 17 and tribes organized politically have the same interests in accessing federal courts to enforce their federal rights.

Each tribal organizational structure possesses attributes of tribal sovereignty protected by federal law, including immunity from state taxation, as well as immunity from federal income tax, immunity from suit, and the power to own restricted Indian lands. Congress intended § 1362 to provide a federal forum for tribes to protect these important rights, regardless of the tribe's structure. *See Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 559 n.10 (1983) (purpose of § 1362 is "to give Indian tribes access to federal court on federal issues, … reflect[ing] a congressional policy against relegating Indians to state courts").

The Department of the Interior's Solicitor explained in 1934:

> The granting of a Federal corporate charter to an Indian tribe confirms the character of such a tribe as a Federal instrumentality and agency. An Indian tribe, whether incorporated or unincorporated, is entitled to

> the same degree of exemption from State taxation as may be claimed by any other Federal instrumentality.

Wheeler-Howard Act Interpretation at 491. The courts have since turned away from the "federal instrumentality" theory of tribal tax immunity, *Mescalero Apache Tribe v. Jones*, 411 U.S. at 150-55, but tribal immunity from state taxation is still recognized under doctrines of federal preemption and tribal sovereignty. *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 169-73 (1973); *see Moe*, 425 U.S. at 474 n.13. The *Mescalero* Court echoed the Solicitor's Opinion, holding that whether a tribe is incorporated under section 17 or operates under a section 16 constitution, "the question of tax immunity cannot be made to turn on the particular form in which the Tribe chooses to conduct its business." *Mescalero Apache Tribe v. Jones*, 411 U.S. at 157 n.13. The fact that an Indian tribe has the same federal immunity from state taxes whether acting as a section 16 or section 17 entity is compelling evidence that Congress intended § 1362 to provide both entities access to federal court to litigate such immunity.

Similarly, IRS rulings hold that a section 17 corporation "shares the same tax status as an Indian tribe" for purposes of federal income tax. Rev. Rul. 81-295, 1981-2 C.B. 15; *see also* Rev. Rul. 94-16, 1994-1 C.B. 19 (holding that section 17 incorporated tribes are not subject to federal income tax on income earned from activities on or off a reservation). By regulation, the IRS has established that "tribes incorporated under section 17 … are not recognized as separate entities for

federal tax purposes." Treas. Reg. (26 C.F.R.) § 301.7701-1(a)(3) (2011). The IRS Office of General Counsel concluded, based on the language of section 17, that "the corporation and the tribe are one and the same." IRS Gen. Couns. Mem. 38853 (May 17, 1982).

In a detailed and persuasive opinion, the United States Tax Court explained the reasons this rule is specific to section 17 corporations, recognizing key distinctions between a federally-chartered section 17 corporation and a tribal corporation formed under state law. *Uniband, Inc. v. Comm'r of Internal Revenue*, 140 T.C. 230, 261-64 (2013). *Uniband* identified four characteristics that demonstrate the "special character of a section 17 corporation and its special relationship to an Indian tribe." *Id.* at 264. First, it is established at the "discretion of the Secretary of the Interior" and given only the powers the Secretary "is willing for the corporation to possess." *Id.* at 261. Second, its charter "'shall not be revoked or surrendered except by Act of Congress.'" *Id.* at 262 (quoting 25 U.S.C. § 5124). These characteristics reflect a degree of federal supervision and stability in the corporation that does not exist with other forms of tribal business entity. Third, it has "'the power to purchase restricted Indian lands,' a right that is otherwise exclusively held by tribes." *Id.* (quoting 25 U.S.C. § 5124 and citing 25 U.S.C. § 5107). This indicates a congressional intent to imbue the federally chartered corporation with uniquely tribal powers. Fourth, the section 17

corporation generally cannot sell or transfer corporate stock, and its power to alienate certain corporate land is restricted. *Id.* (citing 25 U.S.C. §§ 5107, 5124). "These limitations are obviously aimed at *preserving the tribe's assets and existence*," the court concluded, "suggesting that *the tribe exists, at least in part, through its section 17 corporation*, notwithstanding the fact that the corporation is a distinct legal entity." *Id.* (emphasis added); *see id.* at 261 (noting that the IRA "allows a tribe to operate its governmental affairs and commercial matters through separate mechanisms"). The court quoted with approval the IRS Commissioner's formulation that "'a section 17 corporation is a form of the tribe. It is a part of the organizational structure of the tribe just as much as is a tribal government formed under section 16.'" *Id.* at 260 (court's ellipses omitted).

Given the "special character" of section 17 corporations, the Supreme Court's rationale for recognizing that Indian tribes are exempt from the TIA applies with equal force when the plaintiff is an Indian tribe incorporated under section 17. *Moe* explained that Congress intended to allow Indian tribes to assert the kind of claim at issue in *Moe*, a federal preemption claim aimed at state taxing jurisdiction and seeking an injunctive remedy. *Moe*, 425 U.S. at 474 n.13. As part of their special character, section 17 corporations possess the same immunities from state taxation as Indian tribes that choose to conduct their business through their political structure. *Mescalero Apache Tribe v. Jones*, 411 U.S. at 157 n.13.

Since this federal legal right exists regardless of the tribe's corporate form, and since Congress enacted § 1362 to ensure every tribe has access to federal court to assert and enforce this legal right (including through injunctions against state tax collection, despite the TIA), then tribal access to court must exist equally for the tribe's political form and its section 17 form.

The legislative history of § 1362 reinforces the conclusion that Congress intended to include section 17 tribes. With § 1362, Congress was "particularly" concerned with addressing "cases involving tribal lands" held in trust or restricted status, because the issues in such cases are "Federal issues," and "a tribe's desire to have a Federal forum for matters based on Federal questions is justified." H.R. Rep. No. 89-2040, at 2 (1966), *reprinted in* 1966 U.S.C.A.N.N. 3145, 3146. A section 17 charter "may convey to the incorporated tribe" broad powers over "property of every description, real and personal, including the power to purchase restricted Indian lands[.]" 25 U.S.C. § 5124. Incorporated tribes, therefore, share this congressionally-recognized need for a federal forum for actions involving such lands.

Section 1362 is not limited to cases involving trust or restricted lands, but is intended to provide access to federal courts as the "appropriate" forum to address litigation involving the "large body of Federal law which states the relationship, obligations and duties which exists between the United States and the Indian

tribes." H.R. Rep. No. 89-2040 at 3. A section 17 tribe is bound to face these issues as it acts pursuant to its charter and the IRA to "preserv[e] the tribe's assets and existence." *Uniband* at 262. Congress intended to give federal courts jurisdiction over litigation, like the instant case, where the Tribe's section 17 organization is obliged to invoke federal law to clarify its relationship with the State.

Furthermore, the legislative history makes clear that Congress intended § 1362 to remove unnecessary steps that would impair an Indian tribe's access to federal court. Before the enactment of § 1362, federal courts already had jurisdiction over federal issues affecting Indian tribes, unimpaired by either the TIA or the amount-in-controversy requirement then in effect for federal-question jurisdiction, but only if the United States filed suit on the tribe's behalf. *See Moe* at 472-73; H.R. Rep. No. 89-2040 at 3. The district court's judgment leaves section 17 tribes in an equivalent position to tribes prior to § 1362: their important federal rights are relegated to state forums unless the political organization of the tribe steps in to file suit. To require this added step elevates form over substance, devalues the separateness of the two legal entities, and is contrary to the congressional purpose.

The unique character of Indian tribes incorporated under section 17, as detailed in *Uniband* and recognized by the IRS, also illustrates why *Navajo Tribal*

Utility Authority v. Arizona Dept. of Revenue, 608 F.2d 1228 (9th Cir. 1979), is not controlling here. *Navajo* did not involve a section 17 corporation, nor did it rely on any authorities involving section 17 corporations. Yet the district court found decisive *Navajo*'s conclusion that "[s]ection 1362 makes no provision for wholly controlled or owned subordinate economic tribal entities, nor did the Supreme Court in *Moe* suggest that section 1362 provided for jurisdiction beyond the plain language of the statute, that is, beyond Indian tribes or bands." *Navajo* at 1231; *see* ER13:20-24. Because BSRE *is* an Indian tribe, it comes within the plain language of the statute.

Navajo involved a tribal corporation, NTUA, which the Court described as "a subordinate economic enterprise of the Navajo Indian Tribe," *Navajo* at 1229, incorporated by the Navajo under the Navajo Tribal Code as "a somewhat, although not completely, independent entity," *id.* at 1232. "[T]hree of its seven directors are not members of the Tribe," and "[t]he Board of Directors is not synonymous with the Tribal Council or even a committee thereof." *Id.* at 1232. NTUA clearly was not an "Indian tribe or band," as required by § 1362, but argued that it "should be treated as a tribe for jurisdictional purposes" because it was "controlled by and closely related to the Tribe itself." *Id.* at 1232. The Court disagreed, ultimately holding that, "[a]t least in the absence of a significantly greater identification between tribal leadership and membership, on the one hand,

and management of the subordinate tribal enterprise, on the other, than that demonstrated here, we cannot treat NTUA as the Tribe for jurisdictional purposes." *Id.*at 1234.[12] In the instant case, the district court equated NTUA and BSRE by noting the similar "overlap of interests between the political and corporate entities," while acknowledging that BSRE and the Tribe "have a much closer relationship than the tribe and the corporation in *Navajo*." ER14:13-15.

Fundamentally distinguishing this case from *Navajo* and the "tribal corporations" cases it relied on[13] is the fact that under section 17, BSRE is itself the "incorporated tribe," not merely closely related to the Tribe, nor merely sharing the interests of the Tribe's political entity. As evidenced by the powers granted by its federal charter and the statutory conditions of its organization, BSRE "is a form

[12] Other courts have rejected *Navajo*'s reasoning. *E.g.*, *HCI Distribution, Inc. v. Peterson*, 360 F.Supp.3d at 917 n.1 (holding that § 1362 provides jurisdiction of suit brought by wholly owned subsidiaries of tribe's "economic development arm," incorporated under tribal law, and stating that "[t]o argue that the economic development arm of the Tribe is not part of the Tribe is like arguing that the defendants, as the law enforcement arms of the State, are not the State").

[13] *Navajo* relied on three cases, none of which dealt with section 17 corporations. *Id.* at 1231. The first involved an Alaska Native corporation, an entity authorized by federal law but incorporated under state law, and not designed by Congress to organize a sovereign body of native people living under their tribal government. *Cape Fox Corp. v. United States*, 456 F.Supp. 784 (D. Alaska 1978), *rev'd on other grounds*, 646 F.2d 399 (9th Cir. 1981); *see* 43 U.S.C. §§ 1604, 1606, 1607. The others involved ordinary businesses incorporated under state law. *United States v. State Tax Comm'n*, 505 F.2d 633, 636-37 (5th Cir. 1974); *Dodge v. First Wisconsin Trust Co.*, 364 F.Supp. 1124, 1127 (E.D. Wis. 1975).

of the tribe," as "the tribe exists, at least in part, through its section 17 corporation." *Uniband* at 260, 262. This case, therefore, satisfies *Navajo*'s call for "significantly greater identification" between the tribe and the enterprise – not only because the membership of the Tribe's Tribal Council and the BSRE Board of Directors are synonymous, but because both the political entity and the business entity embody the Tribe as a people. When BSRE sued to enjoin preempted State tax collection, it was following the precise guidelines that *Navajo* suggested. *See Navajo* at 1232.

D. The plain language of § 1362 does not exclude section 17 incorporated tribes.

Section 1362 opens the courthouse doors to "any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior" for actions based on federal law. The statute does not by its terms distinguish between the structures a federally recognized tribe might adopt, whether a political structure under an IRA constitution or other governing document, or the IRA's structure for business activities offered by section 17.

The district court misconstrued this statutory language, relying on the legislative history of the Federally Recognized Indian Tribe List Act of 1994 ("List Act") for a definition of the term "recognized." ER15; *see* Pub. L. No. 103-454, Title I, 108 Stat. 4791 (Nov. 2, 1994), *codified in part at* 25 U.S.C. §§ 5130-5131; H.R. Rep. No. 103-781 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3768. The List

Act came three decades after § 1362, giving its legislative history limited value, if any, in construing § 1362. *See Massachusetts v. E.P.A.*, 549 U.S. 497, 530 n.27 (2007). Further, the List Act and its legislative history both refer to the recognition of Indian *tribes*, not the recognition of their *governing bodies*. 25 U.S.C. § 5131(a); H.R. Rep. No. 103-781 at 2. The "specific legal status" conferred by federal recognition applies to the Indian tribe as a people, not to the "governing body," whether the Tribal Council or Board of Directors, as the district court suggested, ER 15:17, ER16:1-2.

Instead of turning to the List Act, the objectives of § 1362 guide its interpretation, along with the principle "that statutes passed for the benefit of Indian tribes, such as section 1362, are to be liberally construed, with doubtful expressions being resolved in Indians' favor." *Gila River Indian Community v. Henningson, Durham & Richardson*, 626 F.2d 708, 712 (9th Cir. 1980).[14] In light

[14] The district court recited the canon that "'statutory jurisdictional doubts are to be resolved against federal jurisdiction.'" ER16:3-4 (quoting *Navajo* at 1233). This rule of thumb derives from the "general policy" of federal jurisdictional acts "to contract the jurisdiction" of the district courts. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 673 (1950) (citations and internal quotation marks omitted). It is the "policy of the statute [that] calls for its strict construction." *Healy v. Ratta*, 292 U.S. 263, 270 (1934). The policy behind § 1362, however, was to enlarge the district courts' jurisdiction, not to contract it. H.R. Rep. No. 89-2040; *see Moe*, 425 U.S. at 472-73. Congress removed a jurisdictional barrier for the benefit of Indian tribes. A restrictive construction of the statute would contravene its primary objective, and the statute instead should be "read broadly" to achieve Congress'

of Congress' expansive, ameliorative objective and the Indian canon of construction, the best interpretation of § 1362's phrase "any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior" is one that includes Indian tribes incorporated under section 17.

As discussed above, Congress sought to expand the ability of tribal plaintiffs to assert federal claims in federal court, because of the unique position of Indian tribes under federal law and the conviction that they should not be relegated to state courts to litigate their rights. *See Arizona v. San Carlos Apache Tribe*, 463 U.S. at 559 n.10; H.R. Rep. No. 89-2040 at 3. It also fair to say that, despite using slightly different terminology, § 1362 applies to actions brought by federally recognized Indian tribes. This limitation excludes groups who claim to be Indian tribes but upon whom the United States has not conferred the rights and immunities § 1362 helps to safeguard. It also protects federally recognized Indian tribes by ensuring that lawsuits affecting their interests are brought by the body authorized by the tribe to act on its behalf and recognized as such by the federal government. As detailed above, an incorporated tribe possesses the important federal rights that § 1362 aims to protect, and it is entrusted by Congress and the

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purpose. *Dart Cherokee Basin Operating Co., LLC v. Owens*, 574 U.S. 81, 89 (2014) (construing removal jurisdiction in context of Class Action Fairness Act).

Secretary with uniquely tribal powers, subject to federal controls designed to protect the tribe's assets and interests.

Every incorporated tribe with a section 17 charter is a federally recognized Indian tribe, as it is the federal government's recognition of the tribe's "quasi-sovereign status" (H.R. Rep. 103-781 at 3-4) that confers upon a tribe the ability to organize under a federal charter and authorizes the Secretary to issue the charter. As noted, the Tribe is listed as a federally recognized Indian tribe. 85 Fed. Reg. at 5462. Every incorporated tribe necessarily has a governing body recognized by the Secretary, as the charter is not operative "until ratified by the governing body of such tribe." 25 U.S.C. § 5124. Further, the charter issued by the Secretary establishes the body that governs the section 17 corporation, which is, in this case, synonymous with the Tribe's Tribal Council, the governing body under the Tribal Constitution. ER105 (FAC § 95).

Therefore, it is not significant, as the district court believed, that BSRE's name is not found on the list, much less that its board of directors would not qualify for the "specific legal status" conferred upon a recognized Indian tribe. The Tribe possesses that status, which it used to incorporate as BSRE in accordance with the IRA. The Ninth Circuit has recognized, subsequent to its opinion in *Navajo*, that an Indian tribe's incorporation under section 17, with the Secretary of the Interior's approval, arguably satisfies the requirement that the tribe

or its governing body be "duly recognized" under § 1362. *Price v. Hawaii*, 764 F.2d 623, 626 (9th Cir. 1985). As an incorporated tribe chartered by the Secretary under the IRA to organize the Tribe in a corporate structure to conduct the Tribe's business, BSRE is an "Indian tribe or band with a governing body duly recognized by the Secretary of the Interior," empowered to bring this action under § 1362.

The district court spurned the reasoning put forth in a dissenting opinion by Judge Betty Fletcher, which is the only opinion of a federal judge to have analyzed how § 1362 and the TIA apply to section 17 corporations. *White Mountain Apache Tribe v. Williams*, 810 F.2d 844, 868-69 (9th Cir. 1985) (Fletcher, J., dissenting); *see* ER15:2-6. The *Williams* majority did not reach these issues, instead holding for different reasons that the tribal plaintiff had failed to state its claims. *Williams* at 852.[15] After disagreeing with that holding, Judge Fletcher's dissent went on to determine that the tribe, which had brought the action "in its capacity as an incorporated business entity under section 17," qualified for the "Indian tribes" exception to the TIA. *Id.* at 867-68 (Fletcher, J., dissenting). Judge Fletcher observed that § 1362 "does not distinguish between the 'governmental' tribe

[15] The district court found it "telling" that "the majority opinion in that case neither reached nor adopted the reasoning of that dissent, nor has any other court[.]" ER15:2-6. But the fact that the majority did not reach the issue tells us nothing about what it would have held if it had. Similarly, the precise question simply has not come up in other cases, so the silence of other courts cannot possibly constitute support for the opinion below.

provided for in IRA section 16 and the 'incorporated tribe' provided for in section 17," nor is there any indication in the text or legislative history "that it was intended to apply only to tribes acting in a sovereign or governmental capacity," despite Congress' full awareness that Indian tribes could, and did, "act in both sovereign and proprietary capacities." *Id.* at 868 (Fletcher, J., dissenting). She explained,

> The reference to a 'duly recognized' governing body in section 1362 merely indicates that the Tribe must have an IRA government organized under IRA section 16. Since tribes can become incorporated under IRA section 17 only if they already have a section 16 government, this reference to section 16 does not mean that Congress intended section 1362 to apply only to tribes acting in a sovereign or governmental capacity.

Id. at 868 n.20 (Fletcher, J., dissenting).[16] Judge Fletcher also drew support from the *Navajo* decision, noting that, like BRSE in this case, "the Tribe has followed the precise guidelines suggested in *Navajo*," having "brought the action in its own name on behalf of a tribal enterprise that it totally controls," and that nothing suggests the incorporated tribe "is semi-autonomous, or that its interests diverge

[16] Congress has since amended the IRA to clarify that an "IRA government" is not required, as Judge Fletcher stated. Rather, Indian tribes "retain inherent sovereign power to adopt governing documents under procedures other than those specified in [section 16]," as Big Sandy did in adopting its non-IRA constitution. 25 U.S.C. § 5123(h).

from the Tribe's in any way." *Id.* at 869 (Fletcher, J., dissenting). Judge Fletcher's insightful analysis should guide the Court's decision here.

CONCLUSION

Because BSRE has stated viable claims that federal law and principles of tribal sovereignty preempt the application of the State's Complementary Statute, its licensing, recordkeeping and reporting laws, and its cigarette tax laws to BSRE and its transactions, and because BSRE qualifies for the "Indian tribes" exception to the Tax Injunction Act, BSRE respectfully requests that the district court's judgment of dismissal be reversed.

Dated: February 11, 2020

FREDERICKS PEEBLES & PATTERSON LLP

By: /s/ John M. Peebles
John M. Peebles

Attorneys for Plaintiff-Appellant
Big Sandy Rancheria Enterprises

ADDENDUM

Indian Trader Statutes

Indian Reorganization Act, § 17

United States Code Annotated
Title 25. Indians (Refs & Annos)
Chapter 6. Government of Indian Country and Reservations
Subchapter III. Traders with Indians

25 U.S.C.A. § 261

§ 261. Power to appoint traders with Indians

Currentness

The Commissioner of Indian Affairs shall have the sole power and authority to appoint traders to the Indian tribes and to make such rules and regulations as he may deem just and proper specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians.

CREDIT(S)

(Aug. 15, 1876, c. 289, § 5, 19 Stat. 200.)

Notes of Decisions (50)

25 U.S.C.A. § 261, 25 USCA § 261
Current through P.L. 116-91.

End of Document

United States Code Annotated
Title 25. Indians (Refs & Annos)
Chapter 6. Government of Indian Country and Reservations
Subchapter III. Traders with Indians

25 U.S.C.A. § 262

§ 262. Persons permitted to trade with Indians

Currentness

Any person desiring to trade with the Indians on any Indian reservation shall, upon establishing the fact, to the satisfaction of the Commissioner of Indian Affairs, that he is a proper person to engage in such trade, be permitted to do so under such rules and regulations as the Commissioner of Indian Affairs may prescribe for the protection of said Indians.

CREDIT(S)

(Mar. 3, 1901, c. 832, § 1, 31 Stat. 1066; Mar. 3, 1903, c. 994, § 10, 32 Stat. 1009.)

Notes of Decisions (10)

25 U.S.C.A. § 262, 25 USCA § 262
Current through P.L. 116-91.

End of Document

United States Code Annotated
Title 25. Indians (Refs & Annos)
Chapter 6. Government of Indian Country and Reservations
Subchapter III. Traders with Indians

25 U.S.C.A. § 263

§ 263. Prohibition of trade by President

Currentness

The President is authorized, whenever in his opinion the public interest may require the same, to prohibit the introduction of goods, or of any particular article, into the country belonging to any Indian tribe, and to direct all licenses to trade with such tribe to be revoked, and all applications therefor to be rejected. No trader to any other tribe shall, so long as such prohibition may continue, trade with any Indians of or for the tribe against which such prohibition is issued.

CREDIT(S)

(R.S. § 2132.)

Notes of Decisions (1)

25 U.S.C.A. § 263, 25 USCA § 263
Current through P.L. 116-91.

End of Document

United States Code Annotated
Title 25. Indians (Refs & Annos)
Chapter 6. Government of Indian Country and Reservations
Subchapter III. Traders with Indians

25 U.S.C.A. § 264

§ 264. Trading without license; white persons as clerks

Currentness

Any person other than an Indian of the full blood who shall attempt to reside in the Indian country, or on any Indian reservation, as a trader, or to introduce goods, or to trade therein, without such license, shall forfeit all merchandise offered for sale to the Indians or found in his possession, and shall moreover be liable to a penalty of $500: *Provided*, That this section shall not apply to any person residing among or trading with the Choctaws, Cherokees, Chickasaws, Creeks, or Seminoles, commonly called the Five Civilized Tribes, residing in said Indian country, and belonging to the Union Agency therein: *And provided further*, That no white person shall be employed as a clerk by any Indian trader, except such as trade with said Five Civilized Tribes, unless first licensed so to do by the Commissioner of Indian Affairs, under and in conformity to regulations to be established by the Secretary of the Interior.

CREDIT(S)

(R.S. § 2133; July 31, 1882, c. 360, 22 Stat. 179.)

Notes of Decisions (44)

25 U.S.C.A. § 264, 25 USCA § 264
Current through P.L. 116-91.

End of Document

United States Code Annotated
Title 25. Indians (Refs & Annos)
Chapter 45. Protection of Indians and Conservation of Resources (Refs & Annos)

25 U.S.C.A. § 5124
Formerly cited as 25 USCA § 477

§ 5124. Incorporation of Indian tribes; charter; ratification by election

Currentness

The Secretary of the Interior may, upon petition by any tribe, issue a charter of incorporation to such tribe: *Provided,* That such charter shall not become operative until ratified by the governing body of such tribe. Such charter may convey to the incorporated tribe the power to purchase, take by gift, or bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real and personal, including the power to purchase restricted Indian lands and to issue in exchange therefor interests in corporate property, and such further powers as may be incidental to the conduct of corporate business, not inconsistent with law; but no authority shall be granted to sell, mortgage, or lease for a period exceeding twenty-five years any trust or restricted lands included in the limits of the reservation. Any charter so issued shall not be revoked or surrendered except by Act of Congress.

CREDIT(S)

(June 18, 1934, c. 576, § 17, 48 Stat. 988; Pub.L. 101-301, § 3(c), May 24, 1990, 104 Stat. 207.)

Notes of Decisions (35)

25 U.S.C.A. § 5124, 25 USCA § 5124
Current through P.L. 116-91.

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FOR THE NINTH CIRCUIT

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