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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

EASTERN DIVISION

TWENTY-NINE PALMS BAND OF MISSION INDIANS, a Federally Recognized Indian Tribe, dba TWENTY-NINE PALMS DISTRIBUTION,

Plaintiff,

v.

MERRICK GARLAND, Attorney General of the United States, in his official capacity; UNITED STATES DEPARTMENT OF JUSTICE; STEVEN DETTELBACH, Director, U.S. Bureau of Alcohol, Tobacco, Firearms and Explosives, in his official capacity; UNITED STATES BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES,

Defendants.

Case No. 5:24-cv-00379-SSS-SP

PLANTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Date: August 30, 2024
Time: 2:00 p.m.
Place: Videoconference
Judge: Hon. Sunshine S. Sykes

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INTRODUCTION

Plaintiff Twenty-Nine Palms Band of Mission Indians, ("Tribe" or "Twenty-Nine Palms"), a federally recognized Indian tribe, challenges the Bureau of Alcohol, Tobacco, Firearms and Explosives' ("ATF") October 19, 2023 decision to place the Tribe on the Prevent All Cigarette Trafficking Act ("PACT Act" or "Act") Non-Compliant List. ATF's Decision hinges on ATF's assertion that federally recognized Indian tribes must possess a state license to engage in retailing tobacco products on their reservations. Because some of the Indian tribes that purchase tobacco products from the Tribe have not obtained a state license, ATF's Decision alleges they are not "lawfully operating" and therefore "consumers" under the definitions in the Act.

ATF is wrong. Its erroneous construction, if permitted by this Court, would affect a sea change in federal Indian law and turn the concept of tribal sovereignty on its head. ATF's Decision seeks to supplant black letter law recognizing the inherent sovereign right of Indian tribes to make their own laws and be governed by them free of state encroachment, with a new requirement that state tobacco laws apply in full, without condition, to tribes operating on their own sovereign lands. Because ATF's impermissible interpretation of "consumer" violates Section 5 of the Act and decades of Supreme Court jurisprudence, it must be rejected.

FACTUAL BACKGROUND

Twenty-Nine Palms has two reservations located within the exterior boundary of the state of California. On one of its two reservations, the Tribe engages in wholesaling of tobacco products exclusively to other federally recognized Tribes for sale on their sovereign reservations in California ("Native Nation Customers"). AR-280-281. These products are manufactured by Grand River Enterprises Six Nations Ltd ("GRE") on the Six Nations of the Grand River Reserve in Ontario, Canada. All GRE products sold by Twenty-Nine Palms are legal for sale in California as they are listed on the California Tobacco Directory developed by the California Attorney General. All Grand River products purchased by the Tribe are imported by Native

Wholesale Supply Company ("NWS"), a federally licensed importer, and sold to the Tribe by the Shinnecock Indian Nation, a federally recognized Indian Tribe.

Since 2022, the Tribe has worked cooperatively with California Department of Justice ("CADOJ") on a government-to-government basis, providing information regarding its shipments and sales under the Act, 15 U.S.C. § 376(a)(1), and addressing questions CADOJ has raised as to the Tribe's tobacco operations. AR-288-292.[1] Despite the ongoing government-to-government dialogue between CADOJ and the Tribe, on June 5, 2023, ATF sent a letter to the Tribe ("Notice") which alleged the Tribe's tobacco operation violated unspecified provisions of California law, and thus the Act, and stated ATF intended to place the Tribe on the Act's Non-Complaint List. AR-282-286.

The Tribe submitted a challenge to ATF's Notice on October 2, 2023 ("Challenge") which refuted ATF's assertions, notified ATF of the Tribe's ongoing government-to-government dialogue with CADOJ, and requested ATF comply with 15 U.S.C. § 376a(e)(E)(iv) and investigate the Tribe's positions through consultation with CADOJ. AR-288-305. Thirteen business days later, on October 19, 2023, ATF sent the Tribe correspondence ("Decision") that informed the Tribe ATF was placing it on the Non-Complaint List. AR-311-324.

STANDARD OF REVIEW

The APA requires a reviewing court must set aside agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," "in excess of statutory…authority or limitations," or "without observance of procedure required by law." 5 U.S.C. § 706(2)(A), (C), (D). In deciding whether to grant summary judgment in an APA case, the district court "is not required to resolve any facts." *Occidental Eng'g Co. v. INS*, 753 F.2d 766, 769 (9th Cir. 1985). Summary judgment thus serves as the mechanism for deciding, as a matter of law, whether the

[1] Material cited from the Administrative Record is indexed and provided in Exhibits 1-13.

agency action is supported by the administrative record and otherwise consistent with the APA standard of review." *Gill v. Dep't of Justice*, 246 F. Supp. 3d 1264, 1268 (N.D. Cal. 2017).

ARGUMENT

I. ATF'S DECISION WAS CONTRARY TO THE ACT AND INFRINGES ON TRIBAL SOVEREIGNTY BY IMPERMISSIBLY EXPANDING STATE REGULATORY JURISDICTION.

The "role of the reviewing court under the APA is, as always, to independently interpret the statute and effectuate the will of Congress subject to constitutional limits." *Loper Bright Enterprises v. Raimondo*, __ U.S. __, 144 S. Ct. 2244, 2263, 2283 (2024). "Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority" and "may not defer to an agency interpretation of the law simply because a statute is ambiguous." *Id*. at 2273.

ATF admits "[t]he PACT Act expressly preserved Native American rights under treaties and common law." AR-318. More specifically, in passing the Act Congress chose to specifically confirm the Act in no way changes existing federal law controlling sovereign and regulatory relations between tribes, states, and local governments. Section 5(a) of the Act establishes, "[n]othing in the Act…shall be construed to amend, modify, or otherwise affect—

> (3) any limitations under Federal or State law, including Federal common law and treaties, on State, local, and tribal tax and regulatory authority with respect to the sale, use, or distribution of cigarettes and smokeless tobacco by or to Indian tribes, tribal members, tribal enterprises, or in Indian country;
>
> (4) Federal law, including Federal common law and treaties, regarding State jurisdiction, or lack thereof, over any tribe, tribal members, tribal enterprises, tribal reservations, or other lands held by the United States in trust for one or more Indian tribes.

Pub. L. No. 111-154, § 5(a), 124 Stat. 1110; 15 U.S.C. § 375 note.

In violation of Section 5, ATF's Decision adopts a theory of state regulation over Indian Country that has been expressly rejected by the United States Supreme Court. Specifically, ATF's Decision is based on the conclusion that because the Native Nation Customers do not possess state licenses they are not "lawfully operating" under California law. AR-311 ("Your customers fail to have the requisite distributor licenses required under California law."); AR-321 ("Accordingly, sales to persons or entities that are not licensed and in compliance with California tax laws are sales to 'consumers'[.]"); AR-278 (Claiming PACT Act violation based on a list of Native Nation Customers compared against list of California retail tobacco licensees). This erroneous legal conclusion – that California can require Indian tribes operating on their own reservations to obtain a state license and subject themselves to the myriad of obligations and penalties that follow as a condition of doing business – would affect a usurp decades of federal Indian law specifically protecting tribes from overreaching and improper state regulation of on-reservation commerce.

Indian tribes are "separate sovereigns pre-existing the Constitution." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014). Thus, when a state tries to regulate tribal affairs, there must be an affirmative showing that federal legislation confers state authority. *Id*. at 788 ("[U]nless and until Congress acts, the tribes retain their historic sovereign authority."); *United States v. Cooley*, 593 U.S. 345, 350 (2021) (instructing courts to ask if a "treaty or statute has explicitly divested Indian tribes of the . . . authority at issue"). In the PACT Act, Congress did exactly the opposite – it included language unambiguously stating the ACT *did not* in any way reduce Tribal sovereign protections existing under federal law.

In *Moe v. Confederated Salish and Kootenai Tribes,* the Supreme Court established a narrow exception to states' general inability to control on-reservation conduct of tribal members specifically as it relates to the collection of a valid state tax on the sale of tobacco to non-members. 425 U.S. 463 (1976). *Moe* concerned a

tribe's challenge of various state tax laws and "the State's vendor licensing statute as applied to tribal members who sell cigarettes…on the reservation." *Id.*

The *Moe* Court began its analysis with the presumption that "absent cession of jurisdiction or other federal statutes permitting it" states lack authority to regulate Indian lands. *Id*. at 476 (citation omitted). A unanimous Court then held the state's vendor license fee invalid as applied to on-reservation retailers and affirmed the district court which found Montana could not impose its vendor licensing statute on a tribal member selling tobacco on their reservation. *Moe*, 425 U.S. at 467-68, 480, affirming *Confederated Salish and Kootenai Tribes of Flathead Reservation v. Moe*, 392 F. Supp. 1297, 1317 (D. Mont. 1975) ("[N]or may Montana require a member of the Tribes who sells cigarettes on the Flathead Reservation to possess its cigarette dealer's license."). If a state cannot require tribal members to obtain a license, it clearly cannot impose that requirement on an Indian tribe itself.

Although the Court found Montana could not impose its licensing statute, it did hold the state could require tribal-member retailers to collect a valid state tax imposed on non-Indians through a framework that required pre-collection of the tax that was assessed on the wholesaler. *Moe*, 425 U.S at 468, n.6. The Court found that such a requirement was permissible as "a minimal burden designed to avoid the likelihood that in its absence non-Indians purchasing from the tribal seller will avoid payment of a concededly lawful tax." *Id*. at 483.

Moe's minimum burden standard was applied again in *Washington v. Confederated Tribes of Colville Indian Rsrv.*, which upheld a state law imposing on tribal member retailers a collection requirement "legally indistinguishable from the collection burden upheld in *Moe*" in addition to various recordkeeping requirements. 447 U.S. 134, 151-152; 159 (1980). Similarly, in *Dept. of Tax. and Fin. of N.Y. v. Milhelm Attea & Bros., Inc*., the Court upheld a New York law which required state licensed wholesalers to only sell untaxed cigarettes to persons who can produce valid exemption certificates and maintain records on tax-exempt transactions. 512 U.S. 61,

77 (1994). The issue was also before the Court in *California State Bd. of Equalization v. Chemehuevi Indian Tribe* which challenged the ability of California to impose a collect and remit requirement on on-reservation tobacco retailers. 474 U.S. 9 (1985). The Court relied on *Moe* in holding California "has the right to require [the tribe] to collect the tax on [it's] behalf," but unlike *Moe, Colville, and Milhelm*, the Court did not analyze a specific framework implementing a collect and remit framework or find California's scheme implemented only minimal burdens. *Id*. at 14.

Under this precedent, a state's assertion of a valid tax on on-reservation sales of tobacco products to non-Indians represents an "exceptional circumstance" under which tribal retailers may be required to comply with "minimal burdens" reasonably tailored to assist in the collection of the tax. *California v. Cabazon Band of Indians*, 480 U.S. 202, 215 (1987). The Supreme Court has upheld permissible burdens including pre-collection of the tax at the wholesale level (*Moe*, 425 U.S. at 468, n.6), recordkeeping requirements documenting tax-exempt sales (*Colville*, 447 U.S. at 134), and completion of a tax-exempt certificate (*Milhelm*, 512 U.S. at 67). Recognizing the importance of government-to-government state/tribal relations, the Court has also noted states can "enter into agreements" with tribes establishing a mutually agreeable framework for the collection of valid state tobacco taxes. *Okla. Tax Comm'n v. Potawatomi Tribe*, 498 U.S. 505, 514 (1991).

However, in *Moe* the Supreme Court rejected the impermissible burden of requiring on-reservation tribal retailers to possess a state license to conduct business. See also, *Ramah Navajo School Bd., Inc. v. Bureau of Revenue*, 458 U.S. 832, 844 (1982) ("[T]he 'privilege of doing business' on an Indian reservation is exclusively bestowed by the Federal Government."); *Bryan v. Itasca Cnty.*, 426 U.S. 373, 388 (1976) (Warning of "the undermining or destruction…if tribal governments and reservation Indians were subordinated to the full panoply of [state] civil regulatory powers.").

The Court's holding in *Moe* is based on an unassailable truth: there is no more

direct intrusion on tribal sovereignty than subjecting a tribe's on-reservation activities to a state's licensing regime. Here, California's licensing statutes require cigarette retailers to pay an annual fee, subject themselves to on-site investigations, swear to comply with all State law pertaining to tobacco, and subject themselves to substantial civil and criminal penalties. AR-317; Cal. Bus. & Prof. Code § 22973-22974. These requirements are not "minimal," are not "reasonably tailored to the collection of valid taxes," and "unnecessarily intrud[e] on core tribal interests" by requiring tribes to waive their sovereign immunity to conduct business on their own lands. *Milhelm*, 512 U.S. at 75; see also *Moe*, 426 U.S. at 483. Critically, and unlike the state statute at issue in *Milhelm*, California does not have protections for on reservation tribal economic activity similar to those found adequate in *Milhelm*.

ATF's Decision does not directly address the holding in *Moe*. Instead, it hitches its dubious legal position on a completely irrelevant package liquor case, *Rice v. Rehner*, 463 U.S. 713 (1983). AR-318. *Rehner* involved California's efforts to impose liquor licensing requirements on a tribal member who operated on the tribe's reservation. *Id*. at 715. The Supreme Court examined whether a federal statute, 18 U.S.C. § 1161, authorized the application of state liquor laws within an Indian reservation. *Id.* at 742 ("The sole question before the Court is whether 1161 grants the State regulatory jurisdiction over liquor transactions on Indian reservations, or, in other words, whether it authorizes the State to require a license as a condition of doing business.) (Justice Blackmun, dissenting).

In finding the statute delegated Congressional authority over liquor regulation in Indian Country to both Indian tribes and states concurrently, the Court looked to the colonial era to establish Indian tribes never had exclusive authority over the liquor trade in their territory. *Id*. at 722. The Court ultimately held that under 18 U.S.C. § 1161 "the assumption that the States have no power to regulate the affairs of Indians on a reservation…would be unwarranted in the narrow context of the regulation of liquor." *Id*. at 723 (citing *Williams v. Lee*, 358 U.S. 217, 220 (1959)).

Rhener is inapplicable here for a very simple reason. Unlike *Rhener,* there is no federal statute that explicitly grants states regulatory jurisdiction over on-reservation tobacco sales. In fact, the relevant statute in this case – the PACT Act - "is notably absent any conferral of state jurisdiction over the tribes themselves" and "contemplates the continuing vitality of tribal government." *Bryan*, 426 U.S. at 380. To apply the reasoning or holding of *Rhener* outside of the "narrow context" of liquor regulation would be contrary to the ruling itself. As the dissent noted, the Court's decision was necessarily limited to the context of alcohol given it conflicted with, but did not overrule, the Court's decision in *Moe*. *Id.* at 739 ("In *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463 (1976), the Court held that a State could not require the operator of an on-reservation 'smoke shop' to obtain a state cigarette retailer's license[.]") (Justice Blackmun, dissenting).

ATF's Decision also alludes to an argument that in *Big Sandy Rancheria Enters. v. Bonta*, 1 F.4th 710 (9th Cir. 2021), the Ninth Circuit held Indian tribes that sell tobacco on their reservations must possess a California license as a condition of doing business. AR-319. ATF's interpretation of *Big Sandy* has no merit. First, on-reservation retail activities of a tribe were not at issue in *Big Sandy*. The case concerned a tribal corporation's challenge to state regulation as applied to its off-reservation wholesale activities. *Big Sandy*, 1 F.4th at 718; 728-29. Beyond a single generic citation to *Chemehuevi*, the court did not discuss on-reservation tobacco retail sales. In short, *Big Sandy* did not address the application of California law to a tribe's on-reservation retail activities in any way.

Second, the decision in *Big Sandy* hinged on the fact the wholesaler was self-admittedly engaged in "off-reservation conduct," which, rendered it "subject to non-discriminatory state laws of general application." *Big Sandy*, 1 F.4th at 728-29 ("The Corporation concedes that it leaves the Rancheria to sell cigarettes to tribal retailers on other reservations"). Here, to the extent ATF claims the Tribe's Native Nation Customers leave their reservations in conducting their retail businesses, the

administrative record does not demonstrate any facts to support that conclusion. To the contrary, as noted in *Big Sandy* the application of state law to tribal retailers on their reservations is subject to an entirely different "analytical framework," under which "state law is generally inapplicable." *Id.* at 725-267.

Likewise, ATF's reliance on *State of Cal. v. Azuma Corp*., 2:23-cv-00743-KJM-DB, 2023 WL 5835794 (E.D. Cal. Sep. 8, 2023) and its preliminary injunction against a non-tribal member administrator in their individual capacity is misleading and inapplicable to the present case.[2] Initially, ATF's Decision claims *Azuma* "involves the same legal issues and business model as this case." AR-320. This could not be further from the truth. For example, the products sold by the Tribe are on the California Tobacco Directory. ECF 44, ¶ 37. The products Azuma sold were not. *Azuma,* 2:23-cv-00743-KJM-DB, Pl.'s Mot. Prelim. Inj., ECF 13, at 13, lines 15-17. Due to their status on the Directory, the products sold by the Tribe have had escrow deposited on them as required by California law. ECF 44, ¶ 37. The products Azuma sold did not. *Azuma,* ECF 13, at 13, lines 23-25. The products purchased and sold by the Tribe are reported to California in PACT Act reports submitted by both the Tribe and the Shinnecock Indian Nation. ECF 44, ¶ ¶ 39-40. The cigarettes Azuma sold were not. *Azuma,* 2023 WL 5835794, at *6.

Moreover, a preliminary injunction is a temporary order only intended to maintain the status quo until the court decides a case on the merits. The findings and conclusions made in a preliminary injunction ruling are not binding on that court, or any other finder of fact. *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981) (Finding it "inappropriate for a federal court at the preliminary-injunction stage to give a final judgment on the merits.") accord, *Flathead-Lobo-Bitterroot Citizen Task Force v. Montana*, 98 F.4th 1180, 189 (9th Cir. 2024). This is particularly true when,

[2] The district court subsequently dismissed California's claims against the Tribal Corporation and tribal governmental officials in their official capacities. *California v. Azuma Corp.*, 2:23-cv-00743-KJM-DB, 2024 WL 266121 (E.D. Cal. Jan. 24, 2024).

as Defendants admit here, appellate review of the preliminary injunction is pending. ECF 47-0, 12 n.4.

Under these circumstances and given the Congressional mandate in Section 5 of the Act, ATF was required to determine whether California law amended, modified, or otherwise affected limitations under federal law on state regulatory authority with respect to the sale of tobacco by tribes on their reservations. By failing to do so, ATF's Decision cannot be enforced as it applies an interpretation of California's cigarette licensing scheme which violates Section 5 of the Act and binding Supreme Court precedent.

II. ATF'S DECISION WAS ARBITRARY AND CAPRICIOUS

Arbitrary and capricious review is concerned with "the reasonableness of an agency's decision-making processes." *CHW W. Bay v. Thompson*, 246 F.3d 1218, 1223 (9th Cir. 2001) (citations omitted). Agency action is invalid if the agency fails to give adequate reasons for its decisions, fails to examine the relevant data, or offers no rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983); *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 998 (9th Cir. 2014).

A. DEFENDANTS' MOTION INCLUDES IMPROPER POST-HOC LEGAL JUSTIFICATIONS FOR ATF'S DECISION.

APA review "is limited to the grounds that the agency invoked when it took the action." *Dep't of Homeland Sec. v. Regents of the Univ. of Ca.*, 591 U.S. 1 (2020); accord *Nat'l Urban League v. Ross,* 977 F.3d 770, 777 (9th Cir. 2020). "It is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Nat. Res. Def. Council v. U.S. EPA*, 735 F.3d 873, 877 (9th Cir. 2013). Defendants' Motion presents legal justifications which were not articulated in ATF's Decision and cannot be considered by the Court.

The Tribe agrees with Defendants that the Act's delivery sale provisions – 15 U.S.C. § 376a(a)(3) and (4) – only apply to the Tribe's sales if its Native Nation

Customers "fit the statutory criteria for 'consumers.'" ECF 47-0, at 9. However, Defendants' Motion proffers an argument that was not made in ATF's Decision; that Twenty-Nine Palms' tribal customers are not "lawfully operating" by failing to comply with California's Licensing Act requirement that "retailers only transact with sellers that have a license." ECF 47-0, at 12-13; (citing Cal. Bus. & Prof. Code 22980.1(c), (d)). Defendants argue that because the Tribe does not possess a California license, its Native Nation Customers are in violation of those provisions and thus "consumers" as defined by the Act.

ATF's Decision is clear that the sole basis for the determination that Native Nation Customers are "consumers" under the Act is their failure to possess state licenses which ATF alleges is required to collect and remit applicable state taxes on sales to non-members. In the introduction, ATF plainly states:

> "Your customers fail to have the requisite distributor licenses required under California law…Accordingly, your customers are not lawfully operating under California law and are consumers and these off-reservation sales are "delivery sales" as defined under the PACT[.]"

AR-311 (emphasis added). ATF reiterates this single argument in the Decision's "Analysis" section:

> Accordingly, sales to persons or entities in California that are not licensed and in compliance with California tax laws are sales to "consumers" and must comply with the "delivery sales" provisions…29 Palms has failed to adhere to its PACT Act obligations and therefore ATF has decided to place 29 Palms on the Non-Compliant List[,]…Unlicensed distributors…failing to collect and remit taxes and records in violation of California law are not "lawfully operating" under applicable California law and as such are "consumers" under the PACT Act.

AR-321 (emphasis added).

ATF states three times, in unequivocal terms, that it determined the Tribe's Native Nation Customers are "consumers" because they fail to possess a California license. Nowhere in the Decision does ATF make the determination presented in Defendants' Motion that because the Tribe does not possess a California license, its Native Nation Customers are in violation of the Licensing Act. Even if the Court were to consider Defendants' supplemental argument, it fails for the same reason as ATF's original argument because it is premised on the claim that the Tribe's Native Nation Customers can be required to possess a state issued license, an argument rejected in *Moe*.

B. ATF'S DECISION CONTAINS INCONSISTENT REASONING AND A CHANGE IN POSITION WITHOUT EXPLINATION.

Inconsistent reasoning "is, absent explanation, the hallmark of arbitrary action." *Nat'l Parks Conservation Ass'n v. EPA*, 788 F.3d 1134, 1145 (9th Cir. 2015) (quoting omitted); see also *Navarro*, 579 U.S. at 211 (An "unexplained inconsistency in agency policy is a reason for holding an interpretation to be an arbitrary and capricious change."). An "agency changing its course...is obligated to supply a reasoned analysis for the change." *Motor Vehicle Mfrs. Ass'n of U.S., Inc.*, 463 U.S. at 42.

According to ATF, no Indian tribe in California can possess tobacco products that do not bear the State's tax stamp unless they are licensed as distributors by California. AR-323 ("Under California's licensing scheme, distributors are the only entities who can lawfully possess unstamped cigarettes."). This conclusion is the basis for its finding that the Tribe's Native Nation Customers are not "lawfully operating" because, ATF argues, the Tribe's possession of cigarettes without the California tax stamp violates the Cigarette Contraband Trafficking Act, or "CCTA". AR-322-324. However, this conclusion is in direct contrast to previous positions taken by ATF as demonstrated by the record.

Correspondence authored by ATF legal counsel dated March 31, 2023 and

April 7, 2023 related to its investigation into NWS, collectively describe ATF's consultation with CADOJ regarding shipments of tobacco products imported by NWS and ultimately received by the Tribe which ATF believed violated the CCTA. AR-355; 358; 360. The emails confirm that CADOJ would not adopt ATF's analysis of California law (i.e., that the Tribe could not possess unstamped cigarettes). They also confirm that consistent with the allegations in the Tribe's Complaint, CADOJ "has not complained" to ATF regarding shipments of tobacco products received by the Tribe. ECF 44, at ¶ 57; AR-360. The third document similarly relates to ATF's investigation into shipments of tobacco products ultimately delivered to the Tribe. This document memorializes the parties' understanding that pursuant to ATF's March 31, 2023 and April 7, 2023 emails, after consultation with CADOJ "there are no violations of California or federal law" concerning those shipments. AR-370.

ATF's Decision is devoid of any explanation for why it nevertheless presses a CCTA analysis which was disputed by CADOJ. The record is similarly absent of any information that would support ATF's about face. Because ATF could not even manage to "display awareness that it is changing position[,]" *Navarro*, 579 U.S. at 221, let alone provide an explanation or reason supporting having done so, the Decision was arbitrary and capricious.

C. ATF FAILED TO CONSIDER ALL RELEVANT FACTORS.

i. ATF Failed to Consider Whether Its Interpretation of California's Tobacco Statutes Allows Non-Taxable Sales to Tribal Members.

There is no dispute that in *Moe*, the Supreme Court held states cannot tax cigarettes bought on Indian reservations by tribal members without impermissibly intruding upon tribal sovereignty. *United States v. Baker*, 63 F.3d 1478, 1489 (9th Cir. 1995). As such, it is self-evident that any "minimal burden" that a state seeks to impose on tribes to collect a valid tax on sales to non-members must provide a mechanism that facilitates tax-exempt sales to tribal members. For example, the

mechanism employed by New York consists of allotting a quota on the tax-free cigarettes based on the "probable demand" among tribal members. *Milhelm*, 512 U.S. at 75. In reviewing whether the framework infringed on the ability of tribal members to purchase tax free cigarettes without interference from the state, the Supreme Court recognized that "the possibility of an inadequate quota may provide the basis for future challenge." *Id*.

As discussed above, ATF's Decision argues that no tribe or tribal retailer in California can possess tobacco products that do not bear the State's tax stamp unless they are licensed as distributors by California. AR-323. According to Defendants, this means "[e]ven if Twenty-Nine Palm's customers only sold to their own tribal members, they would still be failing to comply with the Tax Law." ECF 47-0, at 12. Subjecting Indian tribes to a state licensing scheme as a condition of doing business with their own tribal members is simply unconscionable and would violate the most basic inherent sovereign right of tribes to "make their own laws and be ruled by them." *Williams*, 358 U.S. at 220. ATF's failure to consider whether the application of California law as adopted in the Decision allows for tribes to conduct on-reservation business with their members free of state taxation and regulation was arbitrary and capricious.

ii. ATF's Decision Failed to Consider that Sales by Certain Native Nation Customers Are Un-Taxable.

Moe and its prodigy establish a limited exception that permits states to assess a minimal burden on tribal retailers which are reasonably aimed at the collection of lawful state taxes on tobacco sales to non-members. *Moe,* 425 U.S. at 483. In *White Mountain Apache Tribe v. Bracker*, the Supreme Court established a test to assess the lawfulness of state laws taxing transactions between tribal retailers and non-members in Indian Country. 488 U.S. 136, 145 (1980). The test is based on "a particularized inquiry into" state, federal, and tribal interests and "designed to determine whether, in the specific context, the exercise of state authority would

violate federal law," *Id*. Thus, a state tax imposed on non-member purchasers is valid only if a *Bracker* balancing test demonstrates it would not violate federal law. This is particularly true when tribal retailers do not simply "market an exemption from state taxation," *Colville,* 447 U.S. at 155, but have built "modern facilities which provide recreational opportunities and ancillary services to their patrons, who do not simply drive onto the reservations, make purchases and depart." *Cabazon*, 480 U.S. at 219.

The Tribe notified ATF of these federal law requirements, but ATF's Decision failed to undertake a *Braker* analysis based on an incorrect reading of *Big Sandy*. AR-319. As discussed above, *Big Sandy* concerned the narrow issue of the application of California law to the self-admitted off-reservation conduct of a wholesaler. It does not support ATF's conclusion that a tribe's purchase of goods from a seller located outside of its reservation is "off-reservation activity" subject to any non-discriminatory California statute. Defendants' Motion seeks to plug the gap in ATF's Decision by conducting its own limited *Bracker* analysis. ECF 47-0, at 21. However, courts do not entertain "counsel's post-hoc rationalizations for agency action." *Nat. Res. Def. Council v. U.S. EPA*, 857 F.3d 1030, 1040 (9th Cir. 2017) (quoting omitted); *Ctr. for Biological Diversity v. Haaland*, 998 F.3d 1061, 1068 (9th Cir. 2021).

Under Section 5 of the Act, ATF was required to consider under a *Bracker* analysis whether California's tax was valid as to the Tribe's Native Nation Customers to ensure that ATF's actions did not violate federal law. ATF's failure to do so based on ATF's erroneous reading of *Big Sandy* was arbitrary and capricious.

iii. ATF Failed to Consider Whether California's Tobacco Licensing Statute Exempts On-Reservation Retailers.

Despite spending two pages discussing California's licensing statutes, ATF's Decision does not discuss or consider provisions of California law which recognize *Moe's* prohibition on state laws requiring on-reservation retailers to possess state

licenses as a condition of doing business. The California Cigarette and Tobacco Products Licensing Act of 2003 ("Licensing Act") includes an exemption to its licensing requirements that applies to any person "who is exempt from regulation under the United States Constitution, the laws of the United States, or the California Constitution." Cal. Bus. & Prof. Code § 22971.4; see also, Cal. Bus. & Prof. Code § 22980.1(b)(2). While not explicitly stated in the statutory text, the legislative history of the Licensing Act confirms that its exemption applies to on-reservation retailers, like the Tribe's Native Nation Customers. CA B. An., A.B. 3092 Assem. (Aug. 25, 2004) ("The author indicates that distributors in the state may only sell products to licensed persons. Retailers on Indian Reservations…are not subject to the licensing requirements of the Cigarette and Tobacco Licensing Act of 2003. Nonetheless, the way the law is currently constructed, distributors cannot sell to those retailers. This exemption allows distributors to sell tobacco products to those retailers.") ATF's failure to consider these provisions of California law was arbitrary and capricious.

iv. ATF's Decision Fails to Consider the Cooperative Government-To-Government Relationship Between the Tribe And CADOJ.

On July 28, 2022, CADOJ sent correspondence ("Nomination") to ATF requesting ATF place the Tribe on the Non-Compliant List for a single reason: that the Tribe declined to register and report to California its sales activities under 15 U.S.C. § 376(a)(1)-(2). AR-101-102. In response, the Tribe engaged in government-to-government consultation with CADOJ to determine whether the parties could amicably resolve the issue. AR-153-154. As a result of those efforts, the Tribe agreed, under protest, to register and file PACT Act reports as requested by CADOJ. In return CADOJ withdrew its Nomination requesting ATF place the Tribe on the Noncompliant List. AR-165.

Since then, the Tribe has worked cooperatively with CADOJ to address questions the agency has raised regarding the Tribe's tobacco operations and sales to its Native Nation Customers. In support of these cooperative efforts, the Tribe spent

significant time and resources working on a government-to-government basis with CADOJ to ensure that the Tribe's operations are not objectionable to CADOJ and to share information necessary to combat illicit trafficking and facilitate the collection of applicable taxes from downstream entities. AR-292.

ATF's Decision sabotages the government-to-government relationship between California and the Tribe and, as discussed below, fails to comply with ATF's statutory obligation to investigate the Tribe's claims with CADOJ. Nowhere in the record does ATF grapple with the fact that prior to, at the time of, and throughout the almost year-and-a-half since the Nomination, California has never communicated to the Tribe that its sales to its Native Nation Customers violate California law. In doing so, the Decision upends the Act's delicate balance of federalism by relying on a federal agency's interpretation of state law to prohibit otherwise state sanctioned tribal economic activity and was arbitrary and capricious. *See*, Pub. L. No. 111-154, § 8, 124 Stat. 1109 (The purpose of the Act is "to help States enforce their laws.")

III. ATF'S DECISION WAS MADE WITHOUT OBSERVANCE OF PROCEDURE REQUIRED BY LAW.

Courts review an agency's compliance with legally mandated procedures de novo under an "exacting review…limited to ensuring that statutorily prescribed procedures have been followed." *Kern Cnty. Farm Bureau v. Allen*, 450 F.3d 1072, 1076 (9th Cir. 2006).

Defendants admit that Congress imposed clear procedural protections in the Act which are required prior to ATF's placement of a purported delivery seller on the Non-Compliant List. ECF 47-0, at 19. These procedural protections ensure ATF meets the statute's requirement that the agency "use reasonable procedures to ensure maximum possible accuracy and completeness of the records and information relied on for the purpose of determining that a delivery seller is not in compliance." 15 U.S.C. § 376a(e)(1)(E)(i).

The Act requires that prior to adding an entity to the List, ATF must send notice

to a purported delivery seller citing "the specific reasons for which the delivery seller is being placed on the list." ECF 47-0, at 18; 15 U.S.C. § 376(a)(e)(1)(E)(ii). Here, ATF's June 5, 2023 notice generally alleges that Twenty-Nine Palms sales to "unlicensed persons operating within the State of California" were "delivery sales" which failed to "comply with payment obligations and legal regulatory requirements" in violation of 15 U.S.C. § 376a(a)(3) and (4). AR-282. Despite Section 376a(a)(3) and (4) broadly requiring compliance with "all State, local, tribal or other laws generally applicable" to the sale of tobacco products, ATF failed to cite or allege a violation of any state, local, or tribal law which it alleged the Tribe had violated. Instead, ATF broadly alleged that the Tribe's sales to its Native Nation Customers were "subject to California's non-discriminatory licensing and excise tax statutes" and violated the Contraband Cigarette Trafficking Act and "local law." AR-284.

In their motion, Defendants argue the Act's requirement that ATF provide "specific reasons" was satisfied through their separate references to *Big Sandy* and California's licensing and excise tax statutes. ECF 47-0, at 19 (citing AR-283-84). The Notice's reference to *Big Sandy* could not have notified the Tribe of any alleged violation of California's excise tax laws for the simple reason that the court did not address it. 1 F.4th at 724, n.8 ("[W]e express no opinion as to whether the Corporation has stated a claim that California may not impose any excise taxes on the Corporation's intertribal transactions."). For the same reason, the Notice's reference to *Big Sandy* did not provide the "specific reason" which ultimately served as the crux of ATF's Decision: ATF's allegation that the Tribe's Native Nation Customers were not "lawfully operating under California law" because they failed to possess state licenses. AR-311; 321.

Separately, Defendants' argument that a reference to a single case provided the Tribe "specific reasons" is misplaced because it was one of fifteen separate cases cited in ATF's 4-page Notice. Requiring an alleged delivery seller to comb through a catalog of cases from various jurisdictions and interpret numerous state and federal

laws to decipher what laws it is alleged to have violated is anything but specific.

Given these shortcomings, the Tribe notified ATF that "without notice as to what specific state, local, or tribal laws" ATF alleged it or its customers of violating it was "unable to respond to ATF's allegations." AR-291. The Tribe requested ATF provide "specific state laws which ATF is alleging are applicable and have been violated by the Tribe" to allow the Tribe to "fully respond" to ATF's allegations. AR-292. ATF did not respond to the Tribe prior to making its decision which deprived the Tribe of the opportunity to meaningfully challenge ATF's allegations.

Nevertheless, on October 2, 2023, the Tribe attempted to decipher the claims at the heart of the Notice and raised numerous challenges to ATF's assertions. AR-288-305. The Tribe notified ATF of the on-going government-to-government consultation it had with CADOJ, during which the Tribe began submitting PACT Act reports and collaboratively engaged in information sharing about other aspects of the Tribe's operation, including its use of tribal tobacco stamps. AR-288-289. The Tribe informed ATF that CADOJ had not raised any concern or issue with the Tribe's sales to its Native Nation Customers and advised ATF of its duty to investigate its claims under 15 U.S.C. § 376a(e)(E)(iv). That statute requires ATF to investigate issues raised by in a challenge by "contacting the relevant Federal, State, tribal and local law enforcement officials" and providing "the specific findings and results of the investigation to the delivery seller not later than 30 days after the date on which the challenge was made." AR-290; 292.

The record demonstrates ATF did not investigate the Tribe's claims with CADOJ. It shows that ATF did not investigate, among others, the Tribe's claims that California taxes are not due on the Tribe's sales to its Native Nation Customers under 30108(a) and 30005.5 or the claim that the Tribe can possess unstamped cigarettes under California law. AR-296-297. ATF did not investigate the claim that California's collect-and-remit framework differs from those in other states or the argument regarding the CDTFA Publication 146. AR-298-299. ATF did not

investigate the Tribe's claim that *Moe* precludes a state tobacco tax framework that requires on-reservation retailers to possess state licenses or the Tribe's claim that it does not sell unstamped cigarettes. AR-303.

Instead, the record demonstrates that in the 13 business days between the Tribe's challenge and ATF's decision, the only thing ATF fully investigated was the factual issue of whether the Tribe's Native Nation Customers possessed state issued tobacco licenses, an issue that was not raised by the Tribe. AR-329-334. Instead of investigating the legal arguments and authorities put forth by the Tribe as required by statute, ATF simply confirmed facts supporting its pre-determined, and ultimately incorrect, legal conclusion that the Tribe's Native Nation Customers were subject to the full pantheon of California's licensing scheme.

While the record shows ATF did attempt to investigate one claim raise by the Tribe - that it and its Native Nation Customers can possess and sell tobacco products without a California tax stamp - the record demonstrates ATF could not be bothered to wait for CADOJ's response. AR-329-330.[3] Instead, while ATF had questions regarding the application of California law to the Tribe's sales pending in front of CADOJ, ATF issued its decision which contained legal conclusions ATF was still investigating. There is no justification for ATF's conduct. ATF's violation of 15 U.S.C. § 376a(e)(E)(iv) is even more egregious given the record indicates that two days prior to issuing its decision, CADOJ suggested a call to discuss ATF's interpretation of California law and what it framed as "paths [] to legality." AR-330. The record indicates no such call took place.

A federally recognized Indian tribe had informed ATF it was engaged in on-going government-to-government consultations with a state, during those consultations the state had never informed the Tribe that it believed it was in violation

[3] As explained in Plaintiff's contemporaneously filed Motion to Strike, the email communications following ATF's October 17th email in AR-329 were not before ATF when it made its October 19th Decision and therefore are not part of the administrative record.

of any state law, and explicitly requested ATF contact the state and investigate the facts and interpretation of state law asserted by ATF as required by the Act. Against this backdrop, ATF decided its predetermined interpretation of California state law obviated any need to comply with the procedural protections in the Act.

Beginning with a flawed notice and ending with its investigatory failure, ATF followed none of the Act's procedural protections and therefore failed to "use reasonable procedures to ensure maximum possible accuracy" in concluding that Twenty-Nine Palms' Native Nation Customers are "consumers" under the Act. Because ATF failed follow the statutorily mandated investigatory process established in 15 U.S.C. § 376a(e)(1)(E), the Decision failed to comply with the procedure required by law requiring denial of ATF's motion for summary judgment.

ATF's failure was not a harmless error. "In the context of agency review, the role of harmless error is constrained. The doctrine may be employed only when a mistake of the administrative body is one that *clearly* had *no bearing* on the procedure used or the substance of decision reached." *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Serv.*, 378 F.3d 1059, 1071 (9th Cir. 2004) (emphasis in original). ATF's Decision followed a half-baked investigation which sought to confirm the singular ATF determination at the heart of the Decision: Indian tribes must possess California licenses. ATF adopted legal positions which had been rejected by CADOJ mere months prior, and clearly impacted both the procedure ATF undertook as well as the substance of its decision. In doing so, the result violated statutory procedure, and resulted in an arbitrary decision. See, *Red River Valley Sugarbeet Growers Ass'n v. Regan*, 85 F.4th 881 (8th Cir. 2023) (holding rushed decision arbitrary and capricious.)

CONCLUSION

For these reasons, the Court should deny Defendants' Motion for Summary Judgement.

Dated: July 26, 2024

Respectfully Submitted,

/s/ Jesse D. Heibel

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CERTIFICATION

The undersigned, counsel of record for Plaintiff, certifies that this Response contains 6,992 words, which complies with the word limit of Local Rule 11-6.1.

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