



December 22, 2011

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Via Facsimile: 202-648-9741

Via electronic mail: ASAEO.DOJTribalConsultation@usdoj.gov

Re: Request for Tribal Input on Policy and Guidance under the PACT Act

Dear Mr. Ficaretta:

The National Congress of American Indians (NCAI), the United South and Eastern Tribes (USET), the California Association of Tribal Governments (CATG), and the Native American Finance Officers Association (NAFOA) submit our comments regarding the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) request for tribal views on the Prevent All Cigarettes Trafficking (PACT) Act. NCAI, USET, CATG and NAFOA have united around four priority issues that our membership has determined are essential to lay the foundation for economic development and self-determination in Indian Country. One of those four priority issues uniting our joint work involves efforts to promote and defend tribal rights to regulate commerce on their own reservations.

With this priority in mind, we call upon the Department of Justice (DOJ) and ATF to revise agency interpretations of the PACT Act so that the Act respects, and does not interfere with, tribal rights to regulate commerce within their own jurisdiction. We welcome DOJ's decision to continue the dialogue with tribes on the PACT Act and we look forward to working with you to develop guidance that is consistent with the statutory language and purpose of the Act to regulate retail shipments to consumers of ten pounds or less. We also wish to ensure that any future guidance properly considers the important tribal interests implicated in this matter.

Our joint comments first present our concerns regarding the sovereignty implications of the ATF interpretation of the PACT Act, including a brief discussion of Indian tribes under United States law, basic federal Indian law concepts we feel the Act infringes upon, and a quick overview of the federal Indian law canons of construction used to interpret ambiguities in federal action towards Indian tribes. Next, we address the three issues identified in the framing paper circulated by the DOJ along with its November 15, 2011, letter requesting tribal input. Finally, we conclude with several suggestions for future action by DOJ and ATF.

The ATF's PACT Act Interpretation Unlawfully Infringes upon Tribal Sovereignty Over Indian Commerce

Indian Tribes Under United States Law

Indian tribal governments occupy a well-established and unique political status under United States law, which is distinctly different from their sister governments at the local, state and federal level. These differences include protections of territorial and political rights provided under federal statutes, treaties, administrative regulations, and judicial decisions. However, Indian tribes also retain the "inherent powers of the self-governing political communities that were formed long before Europeans first settled in North America."¹ For instance, Indian tribes' power to tax has been recognized by all three branches of the federal government as "an essential attribute of self-government and territorial management."² Furthermore, most, if not all, Indian tribes have business codes built into their local governance structure, which certify and authorize business activity on the reservation.

Generally, reservation Indians are subject only to federal and tribal law, not state law. "The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history."³ In recognition of this attribute of tribal sovereignty, Congress established Section 5 of the PACT Act to expressly affirm that the Act does not modify, amend or affect "any 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."⁴

Our organizations are dissatisfied that the ATF interpretation of the PACT Act fails to respect two fundamental principles in federal Indian law: 1) that tribes retain inherent regulatory authority over Indian commerce on the reservation; and 2) that revenue generated from value created on the reservation, by activities of the tribe, are given considerable deference over state regulation and taxation.⁵

¹ *National Farmers Union Insurance Co. v. Crow Tribe of Indians*, 471 U.S. 845, 851 (1985).

² *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 139 (1982); also see, *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973)(exempting tribal members living and working on the reservation from collection of taxes on behalf of the state).

³ *Rice v. Olson*, 324 U.S. 786, 789 (1945).

⁴ Pub. L. No. 111-154, § 5 (2010) [codified as 15 U.S.C. § 375 note].

⁵ *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134, 155-157 (1980).

i. Regulatory Jurisdiction Over Tribal Lands

According to ATF, the PACT Act requires Indian tobacco enterprises to comply with state tobacco laws, such as licensing requirements – even while operating within Indian Country. For two centuries, courts have generally barred states from applying their laws to Tribes and Indian businesses within Indian Country. In *Williams v. Lee*, the Court noted that “Congress has . . . acted consistently upon the assumption that the State’s have no power to regulate the affairs of Indians on a reservation.”⁶ Notwithstanding, the ATF’s interpretation appears to create a new precedent under which state regulatory power may intrude into Indian lands to affect tribal economies despite Congress’s direct statement against it in Section 5 of the PACT Act. This interference in the right of tribes to be governed by their own laws and regulate their own economies infringes upon the sovereignty of all tribes, whether or not they are involved in tobacco commerce.

ii. Value-Added

Our second concern is the generalizations of ATF’s interpretation, which seek to diminish, or extinguish altogether, the concept of “value-added” under *Colville*.⁷ By this we mean, Section 5 was also meant to protect those cigarettes and tobacco products where the tribe has added considerable value, such as in the manufacturing phase, the packaging phase, or even the agricultural growth of the tobacco, from state taxation. “Federal common law . . . regarding *State jurisdiction, or lack thereof*,” over Indian tribes, tribal enterprises, and tribal members, includes this concept of value-added, which the Supreme Court has consistently weighed in determining matters involving state taxation over products sold by Indian tribes, including tobacco. By applying the reporting and regulation requirements to all tobacco products, the ATF’s interpretation modifies this concept in federal Indian law in a manner inconsistent with Section 5 of the Act.

Federal Indian Law Canons of Construction

The PACT Act expresses Congress’ clear intent that the law not adversely impact tribal sovereignty. The federal Indian law canons of construction require ambiguities in statutes to be resolved in favor of preserving tribal sovereignty and immunity from state authority. These canons are rooted in the special trust relationship between Indian tribes and the United States government.⁸ In other words, “[s]ince Congress is exercising a trust responsibility when dealing with Indians, courts presume that Congress’ intent . . . is benevolent” and meant to protect Indian rights.⁹ We are deeply concerned that the ATF’s current interpretations of the PACT Act have taken the very opposite approach, with the Act being construed to favor state regulation and

⁶ *Williams v. Lee*, 358 U.S. 217, 220 (1959).

⁷ *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. at 155-157.

⁸ *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 152 (1982)(“[I]f there [is] ambiguity . . . the doubt would benefit the tribe, for ambiguities in federal law have been construed generously in order to comport with . . . traditional notions of sovereignty and with the federal policy of encouraging tribal independence.”); see also, *Tulee v. Washington*, 315 U.S. 681, 684-685 (1942); see also, *Felix S. Cohen’s Handbook of Federal Indian Law*, 221-25 (1982 Ed.).

⁹ *Cohen’s Handbook of Federal Indian Law*, 221 (1982 Ed.).

taxation in Indian Country. States have already seized the DOJ's written interpretation of the PACT Act to regulate and tax tribal economies and inter-tribal Indian commerce.

By treating trade among tribes as if it were "interstate commerce" rather than "Indian commerce" the ATF interpretation negatively impacts vital tribal commerce that provides both employment and reasonably-priced goods for tribal members and generates tax revenues for tribal governments. NCAI, USET, CATG and NAFOA urge the Department to reverse this ATF interpretation.

Comments on Specific Issues Identified by the DOJ and ATF

Intertribal Trade and Interstate Commerce

Each of our organizations strongly supports efforts by tribes to diversify, develop and promote our tribal economies, including inter-tribal commerce. Trade in tobacco products is an important segment of many tribes' economies (both historical economies and modern economies), including those of many of our members'. We call upon the ATF to revise its guidance (contained in its Frequently Asked Questions (FAQs)) to make it clear that interstate commerce does not include nation to nation tobacco sales. This revision is clearly warranted based upon the plain language in the definition of the term "Interstate Commerce" which reads:

The term 'interstate commerce' means commerce between a State and any place outside of the State, commerce between a State and any Indian country in the State, or commerce between points in the same State but through any place outside of the State or through any Indian country.¹⁰

Under this definition, only three types of transactions are defined as interstate commerce: (1) commerce between a State and any place outside of the State; (2) commerce between a State and any Indian country in the State; and (3) commerce between points in the same State but through any place outside of the State or through any Indian country.

None of these definitions include commerce between tribal nations. The ATF must interpret the PACT Act definition of "interstate commerce" to include only the above described transactions and not to include the sale and transport of tobacco from one Indian reservation to another Indian reservation. (If ATF finds that there is any ambiguity in the definition, it must resolve that ambiguity in favor of tribes under Section 5(e) of the PACT Act and the federal Indian law canons of construction).

Registering and Reporting by Non-Delivery Sellers

ATF interprets the PACT Act to require that "any person" who is engaged in interstate commerce must both register and report under the Act. Under ATF's interpretation this would require non-delivery sellers (*i.e.*, those companies that do not sell via the mail or Internet) to register and report. This is an overbroad reading that is clearly inconsistent with the intent of the

¹⁰ 15 U.S.C. §375 (9) (emphasis added).

Act. The overriding, and indeed exclusive intent of the PACT Act, was to regulate “delivery sales”—sales made through mail order, Internet sales and other remote, non face-to-face means.

Although the framing paper emphasizes the term “any person” within Section 376, it overlooks the use of the term “delivery seller” within the same section: “the memorandum or invoice in each case to include the name and address of the person to whom the shipment was made, the brand, the quantity thereof, and the name, address, and phone number of the person delivering the shipment to the recipient on behalf of the *delivery seller*...” 15 U.S.C. 376(a)(2)(emphasis added).

Earlier versions of the Act, legislative history of the Act, statements of intent, and the overall structure of the Act show that Congress’s sole intent was to regulate delivery sales. For instance, Section 2A, “Delivery Sales,” places a 10 pound weight restriction on all delivery sales.¹¹ Thus, *the Act’s applicability is meant to cover those sales, 10 pounds or less*, made by a remote seller to a “consumer” and delivered via “common carrier, private delivery service, or other method of remote delivery, or the seller is not in the physical presence of the buyer when the buyer obtains possession of the cigarettes or smokeless tobacco.”¹² It was not to regulate bulk sales by manufacturers and wholesalers who do not sell by mail, Internet or remote methods. Laws with reporting and recordkeeping laws are already in place that apply to these businesses such as the Contraband Cigarette Trafficking Act.

The PACT Act carries out this sole purpose by focusing exclusively on delivery sales with no reference to the activities of non-delivery sales, such as those large bulk sales made between manufacturers and retailers. Furthermore, the PACT Act’s centerpiece is the creation of a list and database of “Unregistered or Non-Compliant Delivery Sellers” that applies only to delivery sales. The Act mandates monthly reporting requirements that include specific information relating only to delivery sellers. The type of information collected under the PACT Act reporting is useful only in the context of delivery sales. Indeed, the information provided to state tax administrators by reporting may be “used” only for enforcement against delivery sellers and not other entities. Finally, the civil penalty provisions in the Act apply only to delivery sellers. Thus it is clear that the PACT Act was meant to apply only to delivery sellers.

In short, ATF’s interpretation to sweep non-delivery sellers such as traditional “brick and mortar” manufacturers and wholesalers who do not sell over the Internet or my mail within the Act’s registration and reporting requirements is inconsistent with the Act and cannot be supported.

Definition of “Lawfully Operating”

The PACT Act imposes strict requirements on “delivery sales”, a term that refers to sales to a “consumer” who orders cigarettes by mail, the Internet or otherwise by remote (not by face-to-face means). A “consumer” is defined as a person who purchases cigarettes but, significantly, it excludes any person “lawfully operating” as a manufacturer, wholesaler, etc. There is no

¹¹ *Prevent All Cigarette Trafficking Act of 2009*, Sec. 2A (b)(3).

¹² *Id.* at Section 1 (5)(B).

definition of the phrase “lawfully operating” in the Act. Obviously, it is important for a manufacturer or wholesaler to fall within this exemption, otherwise it would be considered a consumer and be subject to the full panoply of the PACT Act requirements.

ATF has not provided guidance on this issue in its Frequently Asked Questions but indicated in an earlier letter to tribes that the phrase “lawfully operating” in the PACT Act applies only to entities that are licensed or authorized by states and local governments. Such an interpretation would conflict with Section 5 of the PACT Act that specifically provides that:

Nothing in this Act . . . shall be construed to amend, modify, or otherwise affect . . . any limitation under Federal or State law, including Federal common law and treaties, regarding State jurisdiction, *or lack thereof*, over any tribe, tribal members, tribal enterprise, tribal reservation, or other lands held by the United States in trust for one or more Indian tribes . . . any State or local government authority to bring enforcement actions against persons located in Indian Country.¹³

In the context of Indian country cigarette sales, the Court has upheld minimal state record keeping requirements on tribal and tribal member cigarette retailers necessary to facilitate collection of state taxes imposed upon non-Indian consumers.¹⁴ However, the Court never has sanctioned imposition of a state licensing on tribally owned entities. In fact, the *Moe* Court affirmed a district court judgment that Montana may not “require a member of the Tribes who sells cigarettes on the Flathead Reservation to possess a state-issued license.”¹⁵ Under Section 5 ATF cannot, and should not, interpret the PACT Act to require entities engaged in reservation trade and commerce to obtain state and local government approvals. It must respect tribal sovereignty and include tribal licensing and authorization, such as those relevant provisions found within an Indian tribe’s business code, within the definition of “lawfully operating” in the Act.

Conclusion

NCAI, USET, CATG and NAFOA appreciate DOJ and ATF working in consultation and collaboration with Indian tribes to develop guidance that can be issued to properly and correctly interpret the PACT Act of 2010 so that tribal sovereignty over reservation commerce is not threatened or infringed. In the aftermath of the December 14 consultation meeting, we also request the following actions from DOJ and ATF:

- 1) We ask that, while reviewing tribal comments and suggestions for more accurate guidelines, DOJ and ATF remove the November 18, 2010 letter from its website;

¹³ Pub. L. No. 111-154, § 5 (2010) [codified as 15 U.S.C. § 375 note] (emphasis added).

¹⁴ *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. at 159-160; *Department of Taxation and Finance v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61 (1994).

¹⁵ See, *Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 480-481 (1976).; see also, *Oklahoma Tax Comm’n v. Bruner*, 815 P.2d 667, 669-670 (Okla. 1991) (state lacks authority to impose license and permit requirements on Indian cigarette retailer).

- 2) We further ask that DOJ and ATF remove the “FAQs” from its website as well. We know several tribes have submitted redlined versions of the “FAQs,” which DOJ and ATF should strongly consider replacing the current version with on their website; and
- 3) We finally request that DOJ and ATF draft an interpretive rule reflective of the positions within these comments to ensure any guidance is respectful of tribal sovereignty, federal Indian law, and congruent with the congressional intent of the Act.

These requests are critical to protecting tribal enterprise and economies in the interim – between now and the development of an interpretive rule which is more aligned with principles of tribal self-governance. We thank you for your time and look forward to future dialogue and partnership in advancing the purpose behind the PACT Act, the promotion of tribal self-governance, and the protection of Indian tribes’ inherent regulatory jurisdiction within the boundaries of their reservations.