

**EXHIBIT A**

**AFFIDAVIT OF WALTER FRATZKE**

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF MICHIGAN**

KEWEENAW BAY INDIAN  
COMMUNITY, a federally-recognized  
Indian tribe, on its own behalf and as *parens*  
*patriae* for its members,

Plaintiff,

v.

ROBERT J. KLEINE, Treasurer of the State  
of Michigan; JAY RISING, former Treasurer  
of the State of Michigan; MICHAEL  
REYNOLDS, Administrator of the Collection  
Division of the Michigan Department of  
Treasury; WALTER A. FRATZKE, Native  
American Affairs Specialist of the Michigan  
Department of Treasury; and TERRI LYNN  
LAND, Secretary of State of Michigan,

Defendants.

Case No. 2:05-cv-0224

Hon. Gordon J. Quist

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**AFFIDAVIT OF WALTER FRATZKE**



members of Treasury staff as well as members of the Attorney General's Office and the Governor's Office when necessary to carry out these responsibilities.

5. The process through which federally recognized tribes, tribal members, and tribal entities, can claim an exemption from sales tax or use tax depends on whether the tribe, tribal member, or tribal entity is covered by a comprehensive tax agreement executed with the State under the authority granted in M.C.L. § 205.30c.
6. KBIC negotiated with the State through December 2002 but did not execute a comprehensive tax agreement with the State. Ultimately eight other tribes did execute a comprehensive tax agreement with the State and a ninth tribe is in discussions with the State regarding a comprehensive tax agreement. KBIC is now one of the only federally recognized tribes in Michigan that does not already have or is not seeking to negotiate a comprehensive tax agreement with the State.

**Sales and Use Tax Exemption Process**  
**For Tribes *With* Comprehensive Tax Agreements**

7. Comprehensive tax agreements with federally recognized tribes are authorized under M.C.L. § 205.30c. All comprehensive tax agreements between federally recognized tribes and the State are substantially similar because it would be difficult to administer multiple comprehensive tax agreements that varied widely.
8. Each comprehensive tax agreement between the State and a tribe specifies the taxes to which it applies; the circumstances in which a tax exemption applies; the geographic area where the agreement is effective; whether tribes, resident tribal members (RTMs), and tribal entities covered by the comprehensive tax agreement may claim an exemption from

sales tax or use tax by using either a certificate of exemption or by seeking a refund; and the waivers of sovereign immunity.

9. Treasury makes Form 3996 available to tribes, RTMs, and tribal entities where the tribes choose a tax refund system instead of a certificate of exemption. Form 3996 is currently available on the pages of the Treasury website at [http://www.michigan.gov/treasury/0,1607,7-121-1750\\_23288---,00.html](http://www.michigan.gov/treasury/0,1607,7-121-1750_23288---,00.html) and [http://www.michigan.gov/treasury/0,1607,7-121-1748\\_23287---,00.html](http://www.michigan.gov/treasury/0,1607,7-121-1748_23287---,00.html) and at other locations. See **Attachment 1, Treasury Form 3996** (a true and correct copy).
10. Treasury issues Form 3998 to the tribes that elected to use a certificate of exemption to obtain their sales tax and use tax exemptions. See **Attachment 2, Treasury Form 3998** (a true and correct copy). Form 3998 must be used in conjunction with a Letter of Authorization from the State.

**Sales and Use Tax Exemption Process**  
**For Tribes *Without* Comprehensive Tax Agreements**

11. Treasury offers an informal process for a federally recognized tribe, its tribal entity, or tribal member residing in his or her tribe's Indian Country (as defined in 18 U.S.C. §1151) to seek an exemption or refund of sales tax or use tax if there is no applicable comprehensive tax agreement with the State.
12. The tribe, tribal entity, or tribal member seeking a tax exemption for a sale that has not yet been completed must make a request in writing to Treasury. Though retailers sometimes inquire about exemptions, the person or entity claiming the exemption must provide information necessary to determine whether the transaction in question is taxable.

13. The request for a tax exemption should include the following information:
- (a) Whether the party making the request (the applicant for the exemption) is a federally recognized Indian tribe, a tribal entity, or a member of a federally recognized Indian tribe.
  - (b) If the applicant is a federally recognized Indian tribe, the unit purchasing the item, such as the police department or a commercial enterprise owned by the tribe.
  - (c) If the applicant is a member of a federally recognized Indian tribe, whether he or she resides within his or her own tribe's Indian Country as defined under 18 U.S.C. §1151.
  - (d) If the applicant is a tribal entity, the tribal membership of its owners, nature of its organization, and whether it is operating within its own tribe's Indian Country as defined under 18 U.S.C. §1151.
  - (e) The item being purchased and the location of the retailer's business.
  - (f) Whether the retailer is owned by a federally recognized tribe, a member of a federally recognized tribe, or a tribal entity, or in the absence of such, the nature of the retailer and its business with Indian tribes.
  - (g) The place where each component of the sale will take place, which may include information regarding (as appropriate) where the sale was solicited, the sale was made, the contract signed, payment made, or delivery made, etc.
  - (h) Where the item is intended to be used, *i.e.*, exclusively within the tribe or tribal

member's Indian Country as defined in 18 U.S.C. §1151, or both inside and outside the Indian Country.

- (i) If the applicant is a federally recognized tribe, the function for which the item being purchased will be used and if it can or will be used outside of the tribe's Indian Country as defined in 18 U.S.C. §1151.
14. Depending on the information provided by the applicant, Treasury may ask for additional information and documentation in support of the claim for an exemption.
15. If the transaction is exempt from the sales tax or use tax under current Treasury guidelines, Treasury issues a letter to the retailer indicating that that specific transaction is exempt from the sales tax or use tax. If the transaction involves a motor vehicle, watercraft, off-road vehicle, or snowmobile that would normally be titled or licensed by the Secretary of State, Treasury also issues a letter to the Secretary of State's Office indicating that the transaction is exempt from tax.
16. If the sale is not exempt under current Treasury guidelines, the transaction is deemed taxable unless a separate and generally applicable Michigan statutory exemption exists. This determination is then conveyed to the party inquiring about the taxable status of the sale, usually a seller, and typically explains why the exemption was denied.
17. If the applicant for the tax exemption does not provide sufficient evidence to support the claim of an exemption or does not respond to requests for information surrounding the transaction, then Treasury denies the request for a tax exemption and typically explains why the exemption was denied.

18. The same process and information is required if the applicant is seeking a refund of a sales tax or use tax that was already collected. In that case, however, Treasury would issue a refund to the tribe or tribal member if Treasury agrees that the transaction was tax exempt or an explanation if the transaction is not exempt.
19. If a refund or exemption is denied, the tribe, tribal entity, or tribal member is entitled to appeal Treasury's determination through the normal appeals process provided in the Revenue Act, M.C.L. § 205.22.
20. Treasury keeps records of its written determinations.
21. Treasury has not developed a specific form to solicit the information needed to make a tax determination for tribes, tribal entities, and tribal members not subject to a comprehensive tax agreement because of the infrequent number of requests and because Treasury policy continues to evolve to reflect the changing federal law in this area.
22. It is my understanding and belief that the federally recognized tribes in Michigan that do not have comprehensive tax agreements with the State, including the Community, were made aware of this informal process in the late 1990s because I have received requests for exemptions since that time. Most of the requests for exemptions or refunds have been from tribes in connection with the purchase of motor vehicles , watercraft, snowmobiles, and off-road vehicles. On occasion, I have been contacted via telephone by a contractor or retailer regarding other transactions, but usually only in general terms; I do not recall many, if any, written follow-ups regarding exemptions for these transactions.
23. It is my understanding and belief that these tribes also inform their members of this

process because I have received inquiries regarding exemptions or refunds from tribal members in the past. However, until the Community filed this lawsuit, almost no individual tribal members filed claims for refunds.

24. Tribes, tribal entities, and tribal members can also contact Treasury simply by calling the Treasury information line or emailing the Sales, Use, and Withholding Taxes Division; that telephone number and email address are available on the Treasury website at <http://www.michigan.gov/treasury/0,1607,7-121-4313-8483--,00.html>.
25. Outside of this litigation, I do not recall having a tribe, tribal entity, or tribal member seeking an exemption or refund for a sale indicate to me that this informal process was burdensome or otherwise objectionable. In fact, Treasury has regularly determined that numerous sales were exempt from sales tax and use tax and have either provided a letter in support of the exemption or have refunded the tax.
26. This informal process benefits the tribes and tribal members requesting an exemption or refund because, once Treasury is provided with adequate information, it can usually provide a determination regarding the taxable status of a sale within a day or two.
27. Treasury continues to receive requests for exemptions or refunds from the Community despite the fact that this lawsuit is pending. Treasury continues to handle the Community's requests by following this informal process. For instance, Treasury recently authorized the exempt purchase of a Ford truck and GMC van and issued letters to the seller and the Secretary of State's Office to that effect. **See Attachment 3, Letters Approving Tax Exemptions for 2006 GMC Savana Van and Ford F-150 Truck (September 29, 2006)** (true and correct copies).

28. There has been a marked increase in requests for exemptions or refunds from individual members of the Community since this lawsuit was instituted. However, I am holding those requests filed by the Community on behalf of its members pending the outcome of this litigation because Treasury would have to gather additional information in order to make a determination regarding the taxable status of each individual transaction and the Community is challenging Treasury's authority to request that information.
29. I do not recall reviewing any request for exemption from the LaFerniers or the Misegans regarding the taxable status of any of their transactions mentioned in the Memorandum In Support Of Plaintiff's Motion For Partial Summary Judgment And Request For Oral Argument or attachments. I do not recall any of them calling me to discuss the taxable status of any of those transactions. Nor am I aware of them contacting anyone else within Treasury regarding these transactions. Therefore, Treasury did not have an opportunity to determine it would agree with their claim that they are entitled to a tax exemption in those transactions.

**The State's Interest In Preventing Fraud And  
Collecting Revenue**

30. The State, through Treasury, must collect the revenue needed to perform its vast governmental functions for the benefit to its citizens, including the Community's members. These State benefits that extend to the Community and its members include social services, roads, employment assistance and job training, and K-12 education.
31. Upon information and belief, US-41 and M-38 pass through the Community's reservation and neither road is designated as a Bureau of Indian Affairs Road or an Indian Reservation Road. Upon information and belief, State funding and taxes are used to

maintain these roads.

32. Preventing fraud from occurring in the first place by collecting the tax at the time of a transaction is very important because the State has limited options for correcting fraud once it is perpetrated and a tax is not collected.

(a) A seller that gathers the documentation required to establish a tax exemption for a transaction cannot be held liable for a tax if the purchaser improperly claims the exemption. See M.C.L. § 205.62(5) and M.C.L. § 205.104b(5). Therefore, if purchasers are misrepresenting their entitlement to a tax exemption, it may be impossible to collect the tax from the seller, even when the legal incidence of the tax falls on the seller.

(b) Federally recognized tribes have sovereign immunity that extends to tribal entities and tribal officers acting within the scope of their authority, making it difficult or impossible to find a forum in which the State can seek to collect the tax due from them if a tax is not collected at the time of a transaction.

(c) States have limited recourse against tribal members for actions that occur on a reservation. Therefore, it may be difficult or impossible to find a forum in which the State can seek to collect the tax due from tribal members if a tax is not collected at the time of a transaction.

(d) The cost the State would incur to attempt to collect taxes improperly withheld in individual transactions can also be prohibitively expensive, especially when the tax revenue associated with any specific transaction may be relatively small.

When aggregated, even these small amounts of money can amount to a significant loss of the revenue to the State if they are not collected.

33. The formal exemption and refund process used with tribes, tribal entities, and tribal members subject to a comprehensive tax agreement incorporates specific checks intended to combat fraud, including but not limited to restrictions on who can determine whether a transaction is exempt, documentation in support of the exemption, record-keeping, auditing, and a waiver of the tribe's sovereign immunity to permit enforcement.
34. The State's fear of fraud and under-collection of taxes is not abstract. For example, Attachment 6 to the Community's Memorandum In Support Of Plaintiff's Motion For Partial Summary Judgment And Request For Oral Argument is an Affidavit of Cynthia A. Collins, with exhibits that include copies of a Treasury Form 3372 signed by Francis LaPointe, the Chief Financial Officer of the Community doing business as Ojibwa Casinos and Ojibwa Bay Inn. Ms. Collins states that this form was submitted to the Baraga Telephone Co. and represented to be evidence that the Community is entitled to an exemption from sales tax and use tax for the services the Baraga Telephone Co. provides to the Community. The self-determined basis of the asserted exemption was "TRIBAL GOVERNMENT/ENTERPRISE." Ms. Collins also asserts in her affidavit that Baraga Telephone Company has received other demands for tax exemptions.
35. But tribes and their members are not permitted to use Form 3372 to assert an exemption from sales tax or use tax. Form 3372 may be used only when there is a statutory basis for the tax exemption. The only statutory exemptions for sales tax or use tax apply to federally recognized tribes, tribal members, or tribal entities that are subject to a

comprehensive tax agreement with the State – and KBIC has no such agreement.

36. Unlike the Baraga Telephone Co., not every seller will necessarily understand that tribes and tribal members cannot use Form 3372 and may erroneously but in good faith fail to remit the sales tax or use tax for a transaction, thereby limiting the State's ability to collect the tax.
37. The telephone calls I have personally received from retailers asking me to confirm claims by tribes and tribal members are exempt from sales tax and use tax further demonstrates that there is a real risk that individuals who represent themselves to be tribal members or representatives are seeking to determine the tax exempt status on their own, without any formal oversight.
38. Even the Community itself has indicated in Paragraph 49 of the Complaint that it "generally has been able to purchase, lease, or rent such office furnishings and equipment from of Michigan sales and use taxes," but I do not recall being contacted regarding those transactions.
39. The informal exemption and refund process Treasury uses with federally recognized tribes and their tribal members who are not subject to a comprehensive tax agreement is designed to combat fraud.
  - (a) Treasury, not the purchaser, must determine whether an exemption applies.
  - (b) The tax exemption determination is made either before a transaction is complete or after a tax has been collected, minimizing the opportunity for under-collection of taxes and the problems associated with finding a proper forum to collect taxes.

- (c) The party requesting an exemption or refund must provide documentation that the transaction is exempt from sales tax or use tax.
- (d) Treasury maintains its right to request necessary information pursuant to the Revenue Act to determine whether a transaction is tax exempt.
- (e) Treasury keeps records of its written determinations so that it can perform audits.

40. The injunctive relief that the Community has requested in the Conclusion to its Memorandum In Support Of Plaintiff's Motion For Partial Summary Judgment And Request For Oral Argument (pages 21-23) does not include any of these or other checks to prevent fraud or the improper under-collection of sales tax and use tax. If this Court were to issue the injunction that the Community requests, the following circumstances and problems would be likely to occur:

- (a) The Community and its members will decide for themselves whether a particular transaction is exempt, regardless of the limitations on exemptions even the Community would recognize.
- (b) The State will be prevented from collecting taxes for the use, consumption, storage, etc., of personal property or services off the Community's reservation and outside its trust lands as long as the tangible personal property remains on the reservation and trust lands for some "principal" amount of time, as determined by each purchaser.
- (c) There will be unlimited distribution of exemption certificates, making it possible that individuals not entitled to an exemption will obtain and use the certificate to

mislead retailers and leave the State unlikely to be able to collect the proper taxes from the seller or purchaser.

- (d) The records kept will have such limited information that the State will be unable to audit the exemptions to determine whether they are being claimed consistently with the law and the declaration the Community seeks to define the scope of proper exemptions.
- (e) Because the Community is not granting a waiver of its sovereign immunity, the State will have no recourse against it if the Community, its officers acting within the scope of their authority, or tribal entities involved in violations of the restrictions even the Community would place on these exemptions.

