IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

HCI DISTRIBUTION, INC.; and ROCK RIVER MANUFACTURING, INC.,	)	Case No. 8:18-cv-00173-JMG-MDN
Plaintiffs,	)	**PLAINTIFFS' HCI DISTRIBUTION, INC'S AND ROCK RIVER MANUFACTURING, INC'S BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**
v.	)	
DOUGLAS PETERSON, Nebraska Attorney General; TONY FULTON, Nebraska Tax Commissioner,	)	
Defendants.	)	

INTRODUCTION

The Plaintiffs in this matter are unique. HCI Distribution, Inc. ("HCID") and Rock River Manufacturing, Inc. ("Rock River") (collectively "Tribal Entities") are subsidiaries of Ho-Chunk, Inc. ("HCI"), the premier tribal economic development corporation in the United States.[1] The Tribal Entities and HCI are all wholly owned by the Winnebago Tribe of Nebraska ("Tribe") and exist for the sole purpose of generating much needed revenue to fund essential government functions of the Tribe and to improve the lives and welfare of the people of the Winnebago Indian Reservation ("Reservation"). Rock River is one of only two tribal manufacturers of tobacco products in the Nation, making cigarettes from loose tobacco to finished product at Rock River's factory on the Reservation. HCID is a tobacco wholesaler that distributes Rock River's products to Tribally-owned retailers exclusively within Nebraska Indian Country[2] [3].

---

[1] *See* Harvard Project on American Indian Economic Development, *Honoring Nations Awardees*, *Economic Development Corporation: Ho-Chunk, Inc. -Winnebago Tribe of Nebraska*, https://hpaied.org/publications/economic-development-corporation-ho-chunk-inc-winnebago-tribe-nebraska (last visited Sep. 26, 2022).
[2] Federal law defines Indian Country as "all land within the limits of any Indian reservation under the jurisdiction of the United States government." 18 U.S.C. § 1151.
[3] Note that at the time the Complaint in this matter was filed on September 9, 2018, HCID distributed Rock River product to Indian Country throughout the Nation. As set forth in detail herein, today HCID only distributes Rock

The Tribal Entities have been a successful economic engine for the Tribe for many years, both distributing corporate revenue back to the Tribe and generating Tribal tax revenue that the Tribe collects on every sale as a function of its inherent, sovereign regulatory authority.

Acting in collusion with Big Tobacco, the State of Nebraska ("State") has laid siege to the Tribe's inherent sovereignty and the legislative jurisdiction of the United States. Pursuant to basic principles of federal law as set forth in the U.S. Constitution as affirmed by the U.S. Supreme Court over the past 200 years, tribes retain the authority to regulate activity that occurs with tribal territory unless Congress expressly legislates to limit their sovereignty. The subject of this litigation is the State's intent to illegally enforce a pair of laws that purport to regulate the Tribal Entities for this on-Reservation conduct: Neb. Rev. Stat. §§ 69-2701 through 69-2703 ("Escrow Statute") and §§ 69-2704 through 69-2706 ("Directory Statute") (collectively "MSA Laws"). The MSA Laws function both as non-tax and tax-based regulation in Indian Country that is wholly prohibited by federal law.

To be fair, the State has little choice. The State is a party to the 1998 Tobacco Master Settlement Agreement ("MSA") that resolved multiple state litigations brought to recover healthcare costs related to smoking. Big Tobacco forced the MSA upon the states to guarantee that states collude with them to protect their vast market-share in the cigarette trade in light of a significant ongoing financial penalty against Big Tobacco under the MSA. To that end, the MSA required the State to enact the MSA Laws, which function in relevant part to ensure that tobacco product manufacturers that are **not parties** to the MSA must pay into a State escrow fund in a manner that ensures price parity with Big Tobacco. Tribes are not parties to the MSA and tribes are not subject to state regulation as a matter of federal law. Tribes are also such minor players in

River product to Winnebago-owned retailers in the State of Nebraska on the Winnebago Indian Reservation and the Omaha Indian Reservation.

the American tobacco trade as to be negligible with no appreciable financial impact on the Marlboros and Altrias of the world. But Big Tobacco is nothing if not greedy and unscrupulous. If the State does not enforce these illegal MSA Laws against the Tribal Entities, Big Tobacco has the right to withhold millions upon millions of dollars that benefit the people of the State of Nebraska. *See generally* ECF 1.

This litigation, therefore, concerns a deeply disturbing web of influence. Big Tobacco has used its financial leverage against the State of Nebraska to coerce the State into violating the basic federal and Constitutional principles that protect the Winnebago Tribe of Nebraska. In short, the Court must consider the extent to which private, corporate interests are exerting their overwhelming financial power over a state sovereign, to violate the laws of the federal sovereign in order to harm the interests of a tribal sovereign. As set forth in detail herein, this scheme violates basic, principles of federal Indian law and, hence, summary judgment must be entered in favor of the Tribal Entities.

STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE TO BE TRIED

Plaintiffs HCID and Rock River submit this statement of material facts as to which there is no genuine issue to be tried.

I. GENERAL FACTS ABOUT THE WINNEBAGO TRIBE

1. The Tribe is a federally recognized tribe. 87 Fed. Reg. 4,640 (Jan. 28, 2022).

2. The Tribe adopted a written Constitution and Bylaws on April 3, 1936. Declaration of Victoria Kitcheyan ("Kitcheyan Decl.") Att. 1.

3. The Tribe's Constitution states its purpose as "to reestablish our tribal organization; to conserve and develop our natural resources; to form business and other organizations; to enjoy

certain rights of home rule; to provide education in schools of higher learning, including vocational, trade, high schools, and colleges for our people." *Id.*, Att. 1 at Preamble.

4. Article III of the Tribe's Constitution provides that the Tribe's governing body shall be the Tribal Council, composed of nine members of the Tribe. *Id.*, Att. 1.

5. The Tribe is governed by the Winnebago Tribe of Nebraska Constitution and Bylaws, the Winnebago Tribal Code, traditional government concepts, and Resolutions and amendments of the Tribal Council. *Id.* at ¶ 4 .

6. The Tribe has faced extreme poverty after being forcibly removed from their homelands by the United States. The Tribe's present-day Reservation is located in northeastern Nebraska, far from their traditional home. *Id.* at ¶¶ 7-8.

7. The Tribe settled on this Reservation in 1865, before Nebraska became a state. *Treaty Between the United States and Winnebago*, 14 Stats., 671. (March 8, 1865) *available at* https://treaties.okstate.edu/treaties/treaty-with-the-winnebago-1865.-(0874).

8. The Winnebago Reservation was created entirely from land provided by the Omaha Tribe. 14 Stats., 667. (March 6, 1865) *available at* https://treaties.okstate.edu/treaties/treaty-with-the-omaha-1865.-(0872).

9. *The Kansas-Nebraska Act* placed all Indian Country outside the jurisdiction of Nebraska and retaining all powers of the federal government to manage Indian affairs as "if this act had never passed." *Act to Organize the Territories of Nebraska and Kansas*, 10 Stat. 277-78 (1854).

10. Article IV, Section 1(o) of the Tribe's Constitution states that, under its authority and the Tribe's inherent powers of self-governance, the Tribal Council has the power to "charter

subordinate organizations for economic or political purposes and to regulate the activities of cooperative associations." Kitcheyan Decl. at ¶ 5.

11. Article IV, Section 1(c) of the Tribe's Constitution states that, under its authority and the Tribe's inherent powers of self-governance, the Tribal Council has the power "To safeguard and promote the peace, safety, morals and general welfare of the Tribe." *Id*., Att. 1.

12. Article IV, Section 1(e) of the Tribe's Constitution states that, under its authority and the Tribe's inherent powers of self-governance, the Tribal Council has the power "To manage all economic affairs and enterprises of the Tribe." *Id*., Att. 1.

13. Article IV, Section 1(f) of the Tribe's Constitution states that, under its authority and the Tribe's inherent powers of self-governance, the Tribal Council has the power "To appropriate for public purposes of the Winnebago Tribe of Nebraska, available funds within the exclusive control of the Tribal Council." *Id*., Att. 1.

14. Article IV, Section 1(g) of the Tribe's Constitution states that, under its authority and the Tribe's inherent powers of self-governance, the Tribal Council has the power "To levy and collect taxes and license fees upon persons residing on or doing business within the Reservation, and upon property actually or constructively located within the Reservation." *Id*., Att. 1.

15. Article IV, Section 1(i) of the Tribe's Constitution states that, under its authority and the Tribe's inherent powers of self-governance, the Tribal Council has the power "To regulate the conduct of trade and the use and disposition of property upon the Reservation." *Id*., Att. 1.

16. Article IV, Section 1(n) of the Tribe's Constitution states that, under its authority and the Tribe's inherent powers of self-governance, the Tribal Council has the power "To encourage the commerce of the community and discover markets for the sale of all products of the tribal members." *Id*., Att. 1.

17. Article IV, Section 1(q) of the Tribe's Constitution states that, under its authority and the Tribe's inherent powers of self-governance, the Tribal Council has the power "To promulgate and enforce statutes governing the conduct of persons located within or passing through the Reservation and providing for maintenance of law and order and the administration of justice." *Id*., Att. 1.

18. The Tribe adopted the Tribe's Business Corporation Code in 1994, which is codified at Title 11 of the Tribal Code. *Id.,* Att. 3.

19. The Tribe adopted its Limited Liability Code in 2010, which is codified at Title 11B Tribal Code. *Id.,* Att. 6.

20. The Tribal Code legislates and governs every facet of Tribal life, set forth in 18 Titles, excluding procedural rules for the Tribal Court. *Id.* at ¶ 6.

21. Title 10, Article 6 of the Tribal Code provides for regulation and taxation of tobacco products sold and manufactured within the Reservation, including the application of Tribal Tax stamps. Winnebago Tribal Tax Code 10-608. *Id*. ¶ 17.

22. The Tribe has entered into the Universal Tobacco Settlement Agreement with manufacturers, including Rock River. This agreement imposes fees on the signatory manufacturers and distributors and other restrictions regarding tobacco use within the Tribe's jurisdiction. *Id*. at ¶18

23. Tribal manufacturers and distributors paid $31,681.00 in fees under this agreement in 2017 alone. *Id*. at ¶ 19

24. The Tribe has enacted and enforces its Brand Listing Act to regulate settlement signatories. Additionally, the Tribe imposes a tax on the sale of cigarettes within its jurisdiction. Exhibit 9. *Id.* at ¶ 20

25. The Tribe collected $122,658.00 in Tribal cigarette taxes in 2017 alone. *Id. at* ¶ 21.

26. The Tribe and the State are currently parties to an Agreement for Collection and Dissemination of Motor Fuels, entered into in 2002. This State-Tribal Gas Compact is currently in force. The Winnebago Tribe has scrupulously complied with the State-Tribal Gas Compact since its execution in 2002. Tax Commissioner Tony Fulton currently enforces the State-Tribal Gas Compact. *Id*. at ¶ 22.

27. The Tribe pays fuel tax that is remitted to the State for all gas used in Tribal vehicles including HCI vehicles. Those taxes are used by the State to fund off-Reservation road construction and maintenance. *Id*. at ¶ 23.

28. Tribal business revenues, Tribal taxes, and federal allocations fund the Tribal government. The United States provides funds for employment of Tribal government personnel as well as other Tribal programs that benefit the community living both on and off the Winnebago Reservation. *Id*. at ¶¶ 24, 25.

29. Federal funding does not completely cover the costs of any Tribal governmental program, so all Tribal government programs are subsidized by Tribal funds, particularly funds derived from HCI revenues. *Id*. at ¶ 25.

30. Among the government programs the Tribe operates primarily with Tribal funds (including funds that come from Tribal owned businesses) are a free community and recreational center, and an elderly meals program, road maintenance (both on and off the Reservation), streetlight maintenance and replacement (both on and off Reservation), a fitness center, information technology services including wireless internet services, and a sex offender registry, all of which serve and are open to the entire community regardless of tribal membership. *Id.* at ¶ 42.

31. The Tribe also uses its funds innovative ways that promote its self-sufficiency. It has funded Educare Winnebago, the first Educare school to serve Native American children and families. *Id*. at ¶ 39.

32. In addition, the Tribe established the Winnebago Comprehensive Healthcare System ("WCHS") to carry out health care services on behalf of the Tribe. WCHS is comprised of two divisions: the Winnebago Public Health Department and Twelve Clans Unity Hospital, named in honor of the twelve traditional clans of the Winnebago Tribe. The hospital serves an estimated 10,000 Native Americans who live on the Winnebago Reservation and surrounding region. *Id*. ¶ 40.

33. The State of Nebraska has not established any of these programs, nor is it a significant funding source of any essential programs on the Reservation. This is all despite the fact that tribal members and other Reservation residents contribute tax revenue to the State of Nebraska. *Id*. at ¶ 42.

34. Ho-Chunk Farms, a subsidiary of HCI, has purchased the Tribe's homelands back from non-Natives. It engages in culturally significant harvesting of Indian corn and revitalized the traditional annual harvest ritual, which brings the community together. In addition, it is part of larger efforts for food sovereignty, cultural revitalization, and making the Winnebago land base whole again. *Id*. ¶ 43.

35. Unlike non-tribal, for-profit, tobacco has carried immense cultural and economic significance for Native communities since long before European settlers arrived in North America. Tobacco continues to play a significant role in Winnebago culture. It remains a foundational element of Winnebago culture that now fosters tribal economic development and improves the Winnebago way of life. *Id.* at ¶ 44, 45.

36. In the past, a full third of the Tribe's tobacco tax revenue has been contributed to the Winnebago Community Development Fund. This Fund is used to fund over 30 Tribal community programs, including the Tribal college endowment, sewer and water line construction projects for the Village of Winnebago, Reservation emergency preparedness, child welfare programs and senior housing projects. *Id.* at ¶ 46.

37. In 2006, the Winnebago Community Development Fund received the Honoring Nations Award by the Harvard Project on American Indian Economic Development for providing matching grants for projects that positively impact the community. *Id*. at ¶ 47.

38. Every dollar spent on State cigarette taxes and escrow reduces the funds available to the Tribe for social services and governmental operations. *Id*. at ¶ 48.

39. Requiring payment of sales taxes and escrow on Tribal manufactured goods will force HCI, HCID, Rock River, or the Tribe to scale back economic development. *Id*. at ¶ 49.

40. Requiring payment of sales taxes and escrow on Tribal manufactured goods will prevent the Tribe from investing in the Tribal economy and prevent job growth that would provide further income to the state in the form of employment tax and other economic activity. *Id.* at ¶ 50.

41. Any reduction in HCI's revenue reduces the Tribe's income because HCI is the Tribe's economic development corporation. Pursuant to § 11-1030 of the Business Corporation Code of the Winnebago Tribe of Nebraska, HCI Board of Directors Resolution 2018CRP-14 requires HCI to deliver a dividend of 25% of its net income to the Tribal treasury for promotion of the Tribe's general welfare of the Winnebago Tribe. *Id*. at ¶ 51

42. Any reduction in the revenue of HCI subsidiaries would have considerable secondary economic impacts across the Reservation as these companies, including Rock River, HCID, and Pony Express, provide desperately needed employment, good, services, and

cooperative development projects, such as Ho-Chunk Village that all need continuous expansion and development to meet the growing needs of the Winnebago community. *Id*. at ¶ 52.

43. While the Tribal economy has diversified, the loss of revenue as Rock River's and HCID's sales have shrunk because of this dispute with the State has had an extremely detrimental impact upon these necessities which the Tribal government provides for the Tribe. A further reduction in income would hurt further development and expansion of these important social services. *Id*. at ¶ 53.

44. Funds from HCI and its subsidiaries, including HCID, Rock River, and the Winnebago-owned convenience stores and casinos, are the single largest non-federal source of funds to the Tribal government. Declaration of Lance Morgan ("Morgan Decl.") at ¶ 53.

II. GENERAL FACTS ABOUT HCI

45. The Tribe opened the Winnavegas Casino in Iowa in 1992 to provide a source of revenue and employment for the Tribe and its members. Because of changes in Iowa's gaming laws in 1994, the Tribe realized that gaming was not going to be a sufficient source of revenue for long-term economic growth. The Tribe subsequently formed HCI as a foundational entity for diverse economic development. Kitcheyan Decl. ¶ 9.

46. Tribal Resolution 94-125 approved the Articles of Incorporation for HCI in 1994 as a corporation wholly owned by the Tribe. *Id*., Att. 2.

47. HCI is permitted to own corporations and limited liability companies as subsidiaries wholly owned by the Tribe. Title 11B Article 9 allows the Tribe to create wholly-owned limited liability companies, in addition to wholly owned subsidiary limited liability companies of wholly owned corporations. See § 11B-912 of the Limited Liability Company Code.

Similarly, Title 11 Article 10 allows the Tribe to create wholly-owned corporate subsidiaries of wholly owned companies. See § 11-1002 of the Business Corporation Code. *Id*. at ¶ 13.

48. HCI's Articles of Incorporation specifically convey the sovereign immunity of the Winnebago Tribe of Nebraska to HCI as though the Tribe had undertaken the actions itself. Those same immunities are conveyed to wholly owned corporations and wholly owned subsidiaries of wholly owned corporations in Title 11, the Winnebago Business Corporation Code, at § 11-1003. *Id*. at ¶ 14; Morgan Decl. ¶ 7.

49. The Tribal Council may remove a member of the Board of Directors of HCI at any time, with or without cause, per § 11-1003 of the Business Corporation Code. Kitcheyan Dec. ¶ 15.

50. All shares of corporations, both directly and indirectly owned by the Tribe, are held by the Tribe, and cannot be issued or transferred to others, per § 11-1021 of the Business Corporation Code. *Id*. at ¶ 16.

51. Since its creation, HCI has provided invaluable revenue and infrastructure improvements for the Tribe. *Id*. at ¶ 26.

52. The HCI Board of Directors must have five members per the Articles of Incorporation. Two members must be current members of the Winnebago Tribal Council, one member shall be a member of the Tribe who is not a member of the Tribal Council, and the other two shall be persons with business acumen, who do not have to be members of the Tribe. Morgan Decl. ¶ 8.

53. The mission of HCI is to use the Tribe's various economic and legal advantages to develop and operate successful business enterprises and provide job opportunities for Tribal

members. HCI and all its subsidiaries, including HCID, Rock River, and Winnebago-Owned Retailers, have hiring preferences for members of Indian tribes. *Id*. at ¶ 27.

54. The long-term mission of HCI is to provide the Tribe with a large enough income stream from its business operations to enable the Tribe to reach economic self-sufficiency. HCI's subsidiaries help HCI generate enough income to fulfill these missions. The profits made by HCI and its subsidiaries go back to the Tribe via social and governmental programming. As noted above, Tribal law requires HCI to deliver a dividend of 25% of its net income to the Tribe for promotion of the general welfare. *Id*. at ¶ 30; Morgan Dec. ¶ 10, 12.

55. All taxes paid to the State reduces the revenues paid to the Winnebago Tribe and reduces economic development of the Tribe. Morgan Decl.¶ 16.

56. In 2000, HCI was honored by the Harvard Project on American Indian Economic Development which stated: "Ho-Chunk, Inc. is a shining example of an economic development corporation that others can learn from and be inspired by." Kitcheyan Decl. ¶ 29.

57. The current membership of the Tribe is over 5,000 members. The current level of unemployment on the Reservation is approximately 15%. In 1990, the Reservation unemployment rate was 40% and 43.9% of those living on the Reservation lived below the poverty line and the median income was $13,850. *Id*. at ¶ 32.

58. Because of the economic development created by HCI and its subsidiaries, by 2016 median household income growth on the Winnebago Reservation grew by 83.2%. Between 2000 to 2016, individuals living in poverty decreased by 6%, children living in poverty fell from 44.2% to 38.6%, the average payroll per Reservation worker grew by 167%, and every 5 jobs added by HCI result in approximately 1 job on the Winnebago Reservation. *Id*. at ¶ 33.

59. As a direct results of the above partnership with HCI, between 2000-2016, there has been an 8.4% increase of homeownership, 23.6% increase in median home values, and as of 2018, HCI has awarded more than $1.78 million through its Down Payment Assistance Program. *Id*. at ¶ 34.

60. The Winnebago Public School District has seen 42.9% enrollment increases since 2001, and the number of adult community members with at least a bachelor's degree has increased 69.8% since 2011. *Id*. at ¶ 35.

61. In 1995, HCI had revenue totaling $183,301 with $33,497 in net income. In 2021, HCI had $361 million in total revenues, $20.2 million in net income, with $291,159,086 in total assets. *Id*. at ¶ 36.

62. The Winnebago Reservation, like many tribal communities across the United States struggled with poor and inadequate housing. To remedy this and to provide a better quality of life for its members, the Tribe partnered with HCI to create Ho-Chunk Village, a mixed use planned development. In 2015 Ho-Chunk Village won the Honoring Nations Award by the Harvard Project on American Indian Economic Development, in part for its innovative collaboration between Tribal enterprises and Tribal government in creating quality sustainable housing for the community. *Id*. at ¶ 37.

III. GENERAL FACTS ABOUT HCID

63. HCID is an operating arm of the Tribe. It is imbued by the Tribe with the Tribe's sovereignty and sovereign immunity. Morgan Decl. at ¶ 31.

64. The Tribe created HCID in 1999 to foster economic development of the Tribe and to create economic opportunities for Tribal members. Before its creation, the Tribe's Reservation was an economically depressed area experiencing chronic and severe unemployment. *Id*. at ¶ 32.

65. HCID is in the business of purchasing and re-selling tobacco products exclusively in Indian Country. The company purchases exclusively from Rock River. The goods purchased by HCID are received at a facility that serves as both warehouse and headquarters on the Tribe's Reservation. HCID resells and distributes those goods to Winnebago-owned casino and convenience store retailers ("Winnebago-Owned Retailers") exclusively in Indian Country. *Id*. at ¶ 34.

66. All of HCID's sales are made to Winnebago-Owned Retailers. Additionally, a sizeable portion of these sales are made to federally-sanctioned, Winnebago-owned casinos that are exempt from all state regulation under the Indian Gaming Regulatory Act. *Id.* at ¶ 35; Bowen Decl. at ¶ 34.

67. HCID's business model is predicated on the lawfulness of trade between federally-recognized Indian tribes in Native manufactured goods and the general exemption of such trade from impermissible state regulation. Morgan Decl. at ¶ 36.

68. HCID has held itself out as a value-added distributor. Bowen Decl. ¶ 34.

69. HCID personnel ensure cigarette quality by opening each carton and inspect for damage, with damaged product being destroyed. HCID then runs each individual pack in each carton through a stamping machine and affixes various tax stamps (which it purchased) before resealing each package. *Id*. at ¶ 43.

70. HCID in turn sells cartons of cigarettes to Rock River who in turn ships those cigarettes to Tribal purchasers with whom they have a contract to distribute. HCID also provides marketing and brand development services, as well as tax consulting services to its retailers. *Id*. at ¶ 38.

71. The tobacco products shipped by HCID to Winnebago-Owned Retailers have tribal stamps in accordance with applicable tribal law. *Id*. at ¶ 44.

72. A typical example of a purchase by HCID from Rock River was the June 15, 2022 purchase of 460 cartons for $7,981.00, or $17.35 per carton (Reb Box 100s). *Id*. at ¶ 30.

73. HCID has succeeded in improving the social and economic well-being of the Tribe's members as well as surrounding localities. HCID created jobs for Tribal members. *Id.* at ¶ 37.

74. All revenues earned by HCID belong to the Tribe. *Id.* at ¶ 38.

75. From 2014 to 2017, HCID made $ 7,093,672.00 in profits and HCID remitted to the Tribal treasury $1,418,734.40. *Id.* at at ¶ 39.

76. HCID has not been profitable since 2018 when disputes with the State and the federal government came to a head. Every lost dollar prevents the Tribe from expanding services to members and expanding Tribal economic development. *Id.* at ¶40

77. One typical sale includes the Pony Express location at Emerson, NE from HCID for 25 cartons at a price of $516.25, or 20.65 per carton (Reb Box 100s). Bowen Decl. at ¶ 39.

78. Rock River does not stamp cigarettes. *Id*. at ¶ 40.

79. HCID stamps Rock River products. *Id*. at ¶ 41.

80. HCID only uses Winnebago stamps and Native American stamps, which are used for sales on the Omaha Reservation. *Id*. at ¶ 42.

81. HCID personnel ensure cigarette quality by opening each carton and inspect for damage, with damaged product being destroyed. HCID then runs each individual pack in each carton through a stamping machine and affixes various tax stamps (which it purchased) before resealing each package. *Id*. at ¶ 43.

82. Any and all tobacco products shipped by HCID to customers have tribal or state tax stamps affixed in accordance with applicable tribal law. *Id*. at ¶ 44.

83. In 2020 HCID purchased 3,240,000 Winnebago Tribe Tobacco tax stamps for various products sold on the Reservation. *Id*. at ¶ 45.

IV. GENERAL FACTS ABOUT ROCK RIVER

84. Rock River is an operating arm of the Tribe. It is imbued by the Tribe with the Tribe's sovereignty and sovereign immunity. Morgan Decl. at ¶ 19.

85. The Tribe created Rock River in 2009 to foster economic development of the Tribe and to create economic opportunities for Tribal members. *Id*. at ¶ 20.

86. With the approval of the Winnebago Tribe, HCI invested $5,000,000 into the construction of the Rock River manufacturing plant. *Id*. at ¶ 21.

87. Rock River is a federally-licensed cigarette manufacturer with its manufacturing facilities located on the Tribe's Reservation. Morgan *Id*. at ¶ 22.

88. All Rock River product is manufactured on the Tribe's Reservation. *Id*. at ¶ 24.

89. Rock River is not a signatory to the MSA. *Id*. at ¶ 25.

90. Rock River uses a limited waiver of tribal sovereign immunity for enrollment on state Non-Participating Manufacturer Directories. *Id*. at ¶ 60.

91. Rock River's cigarettes are distributed by HCID and other national distributors to be sold to retailers throughout the country. *Id*. at ¶ 26.

92. Rock River creates jobs for Tribal members at its manufacturing facilities on the Tribe's Reservation. Like all HCI subsidiaries, Rock River has an Indian hiring preference. *Id*. at ¶ 27.

93. Rock River has operated at a loss every year since 2016 in part because of disputes with the State. In 2021 alone, Rock River lost $804,401.00. *Id*. at ¶ 28.

94. All revenues earned by Rock River belong to the Tribe. *Id*. at ¶ 29.

95. If it were currently profitable, Rock River would remit 25% of its net profits to the Tribe. Every dollar lost by the company deprives the Tribe of operating funds. *Id*. at ¶ 30.

96. Rock River product is sold exclusively by Winnebago-Owned Retailers when sold within the borders of the state of Nebraska. Bowen Decl. at ¶ 9.

97. Rock River owns substantial intellectual property that it employs in the production of cigarettes, including: the Silver Cloud and FireDance tobacco blends, Silver Cloud and FireDance names, trademarks, and logos, the package and carton designs and artwork, copyright and trademarks, as designed by the HCI subsidiary, Blue Earth Marketing, wholly owned by the Winnebago Tribe. *Id*. at ¶ 20.

98. Rock River owns substantial capital investments in equipment located on the Winnebago Reservation and employed in manufacturing (two MK9s) and packaging (two HLP2s) cigarettes, valued at approximately $4,000,000 combined. *Id*. at ¶ 21.

99. Rock River purchases tobacco blended to its specifications. *Id.* at ¶ 22.

100. Rock River purchases the paper and cardboard for packages and boxes, designed and decorated to its specifications. *Id*. at ¶ 23.

101. Together with glue, papers, and other cigarette parts, the tobacco, packaging, and all other raw materials cost approximately $3.7654 per carton of cigarette produced (Red Box 100s). *Id*. at ¶ 24.

102. The total wages paid by Rock River alone in 2021 was $213,520.360. *Id*. at ¶ 25.

103. The majority of Rock River employees are members of the Winnebago Tribe and the company maintains a member hiring preference. *Id*. at ¶ 26.

104. The combined costs of labor, overhead, utilities, and shared expenses from other HCI companies, works out to be approximately $1.6161 per carton of cigarettes (Reb Box 100s). *Id*. at ¶ 27.

105. Rock River sells the cartons of cigarettes for a variety of prices, depending on several factor, including the number of cartons purchased. *Id*. at 28.

106. The various federal and freight taxes cost approximately $10.86235 per carton. *Id*. at ¶ 29.

107. One typical example of these sales was the Rock River June 15, 2022 sale to HCID of 460 cartons for $7,981.00, or $17.35 per carton (Reb Box 100s). *Id*. at ¶ 30.

108. Rock River also provides services to its retailers, including visits to the ultimate retail outlet by a sales specialist, providing marketing advice, product placement alternatives, and talking points for retail cashiers, signage and advice for optimal placement, and promotional events, such as raffles and prizes. *Id*. at ¶ 31

V. GENERAL FACTS ABOUT HCI-OWNED CONVENIENCE AND CASINO STORES

109. In 1996, HCI created HCI Winnebago, Inc. as a wholly owned subsidiary to do business as the first Pony Express location providing convenient consumer retail options for Reservation residents and traveling Indian Traders with this first location in Winnebago, Nebraska. Morgan Decl. at ¶ 41.

110. The Articles of Incorporation for HCI Winnebago specifically convey the sovereign immunity of the Winnebago Tribe of Nebraska to HCI Winnebago as though the Tribe had

undertaken the actions itself. Title 11, the Winnebago Business Corporation Code, at § 11-1003. *Id*. at ¶ 42.

111. In 1997, HCI created the wholly owned subsidiary HCI Heritage Express, Inc. to do business as additional Pony Express locations providing convenient consumer retail options for Reservation residents and traveling Indian Traders throughout additional locations all within Indian Country. *Id*. at ¶ 44.

112. The Articles of Incorporation for HCI Heritage Express specifically convey the sovereign immunity of the Winnebago Tribe of Nebraska to HCI Heritage Express as though the Tribe had undertaken the actions itself. Title 11, the Winnebago Business Corporation Code, at § 11-1003. *Id*. at ¶ 45.

113. All of these convenience stores were created to provide convenient consumer retail options for Reservation residents and traveling Indian Traders. *Id*. at ¶ 46.

114. Currently, the Tribe owns seven convenience store locations in Iowa and Nebraska through HCI or a subsidiary, six of which are located within Indian Country. *Id*. at ¶ 47.

115. The six Indian Country convenience stores are: Pony Express Emerson, Nebraska; Pony Express Winnebago, Nebraska; Pony Express, Rosalie, Nebraska; Pony Express, Walthill, Nebraska; Heritage Food Store, Winnebago, Nebraska; and Winnevegas Heritage Express, Sloan, Iowa. *Id*. at ¶ 48.

116. The Rosalie store is a trading post located within the adjacent Omaha Reservation. *Id*. at ¶ 49.

117. The Winnebago Tribe and its economic development corporations recognize the sovereignty of the Omaha Tribe to regulate trade on their own reservation and remit taxes on Rock River cigarettes using the generic Native American stamp to the Omaha Tribe. *Id*. at ¶ 50.

118. Cigarette deliveries by HCID to the Rosalie store never leave Indian Country: the delivery truck goes from HCID's Winnebago facility to the Rosalie Pony Express store by passing directly from the Winnebago Reservation to the Omaha Reservation, and then returning the same way. The deliveries never enter Nebraska. *Id*. at ¶ 51.

119. All revenues earned by these convenience stores belong to the Tribe. *Id*. at ¶ 52.

120. All HCI subsidiaries remit 25% of their net profits to the Tribe to support Tribal programs discussed above. The remaining funds are reinvested into the companies to ensure their continuing success. *Id*. at ¶ 53.

121. The Tribal retailers provide sales to both Indians and Indian Traders traveling through the Reservation. *Id*. at ¶ 54.

122. Rock River cigarettes are also sold at the Winnebago Tribe's three casinos: WinnaVegas, located in Sloan, Iowa; Native Star, located in Winnebago, Nebraska; and Iron Horse, located in Emerson, Nebraska. *Id*. at ¶ 55.

123. The Winnebago Tribe honors and respects the sovereignty of the Omaha Tribe, complying with its tobacco regulations and pays to the Omaha Treasury taxes for the sale of all Rock River products through Winnebago owned retail outlets in Omaha territory. *Id*. at 50.

VI. NEBRASKA LAWS

124. Nebraska's Escrow Statute is Neb. Rev. Stat. §§ 69-2701-2703.1.

125. The Escrow Statute requires Non-Participating Tobacco Manufacturers ("NPM") selling cigarettes in the State either to join the MSA or to escrow funds in an amount equal to a percentage of their sales in the state each year. Neb. Rev. Stat. §§ 69-2703(1)-(2).

126. Manufacturers that fail to comply are subject to court actions, penalties, and injunctive relief preventing them from selling cigarettes in the State. Neb. Rev. Stat. § 69-2703(c)(i)-(ii).

127. Nebraska's Directory Statute is found at Neb. Rev. Stat. §§ 69-2704-2707.

128. The Directory Statute requires the State to publish a list of tobacco product manufacturers and tobacco brand families deemed lawful for sale in the State. Neb. Rev. Stat. § 69-2706(2). To be included on the list, a tobacco product manufacturer must certify that it is registered to do business in the State or has appointed a resident agent for service of process and provided notice thereof; has obtained various federal licenses, approvals and permits; certify that it is in compliance with the Escrow Statute; and certify that it is in compliance with the State's tobacco product and manufacturing licensing laws. *See* Neb. Rev. Stat. § 69-2706.

129. Cigarettes not included on the list cannot be sold in the State. Neb. Rev. Stat. § 69-2706(4).

130. State tax stamps cannot be affixed to such cigarettes either. *Id*. The prohibitions in the Directory Statute apply to "any person." *Id*.

131. Neb. Rev. Stat. §§ 69-2701-2703.1 and Neb. Rev. Stat. §§ 69-2704-2707 are collectively referred to as Nebraska's MSA Laws.

132. "Nothing in this Act shall be construed to amend, modify 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." Prevent All Cigarette Trafficking Act of 2009 or "PACT Act," Pub. L. 111-154, § 5(4).

133. Participating Manufacturers initiated an arbitration proceeding ("Arbitration Proceeding") to reduce the amounts the Participating Manufacturers owed to the settling states. Under the MSA, such payments could be reduced by hundreds of millions of dollars if a settling state did not diligently enforce its escrow statute. ECF 1 at ¶ 37.

134. Big Tobacco argued states, including Nebraska, had not diligently enforced their escrow statutes as there were a large volume of sales in Indian Country for which no escrow was deposited. ECF 1 at ¶ 38.

135. The Arbitration Proceeding between Nebraska and Big Tobacco was tentatively resolved in 2012 with the execution of a memorandum of understanding (the "Arbitration Settlement") and accompanying term sheet (the "Term Sheet"). ECF 1 at ¶ 40.

136. The Term Sheet makes clear that the terms of the Arbitration Settlement negotiated between Nebraska and Big Tobacco included provisions applicable to Tribes. ECF 1 at ¶ 41.

137. The Term Sheet includes provisions applicable to the sale of tobacco products by federally-recognized tribes. It excludes from the definition of non-compliant cigarettes, for example, those which the state is barred from requiring escrow deposits by order of a court that such deposits are barred by federal or state constitutional law except state constitutional law "as it may impact or be applied in relation to sovereign immunity or other Native American issues." Term Sheet at § III.B.2.c. ECF 1 at ¶ 42.

138. The Term Sheet contains provisions limiting the amount of escrow funds that federally-recognized tribes could receive. It provides that tribes having reservations in more than one state would be eligible for the release of escrow only from the state in which the largest portion of its reservation land is located. ECF 1 at ¶ 43.

VII. THREAT OF ENFORCEMENT

139. In March of 2014, the Nebraska Department of Revenue issued tax assessments against several Pony Express locations as reservation-based Nebraska cigarette retailers and claimed these retailers made cigarettes sales subject to State jurisdiction and owed cigarette use tax. Morgan Decl. at ¶ 56

140. This prompted HCID and Rock River to engage in compact negotiations with the Defendants pursuant to Neb. Rev. Stat. § 77-2606.06 to settle the longstanding disagreement about whether Nebraska's MSA Laws apply to HCID and Rock River's manufacture, distribution and sale of cigarettes. *Id*. at ¶ 57.

141. Defendant Peterson informed Plaintiffs on June 13, 2016 that negotiations had failed. *Id* at ¶ 58.

142. If Rock River were required to comply with either the Directory Statute or the Escrow Statute for its sales in Indian Country in Nebraska, it would have to raise its wholesale prices and would lose its customer base. Bowen Decl. ¶ 14.

143. As Rock River's customer base shrinks, its production would also shrink with the obvious need to lay off employees and loss of revenue. *Id*. at 15.

144. The threat posed by Escrow Statute enforcement limits Rock River's customer base; most distributors will not buy Rock River product. *Id*. at ¶ 16.

145. The threat posed by Escrow Statute enforcement causes Rock River to limit its production and creates a limit on the growth of its business. *Id*. at ¶ 17.

146. The current limitations on Rock River's growth means that Rock River cannot contribute as much revenue to HCI, as it otherwise would. *Id*. at ¶18.

147. Under these constraints, Rock River has not been profitable since 2015. *Id*. at 19.

VIII. INDIAN TRADER STATUTE

148. Federal law provides that "traders to the Indian tribes" are subject to the "sole power and authority" of the Commissioner of Indian Affairs (now the Secretary of the Interior and his or her delegates), *see* Reorg. Plan No. 3 of 1950, 15 Fed. Reg. 3174 (May 25, 1950)), and that all such traders require a license. 25 U.S.C. §§ 261-264.

149. The Indian Trader Statutes criminalize trading without a license, unless one is an Indian on any Indian reservation. 25 U.S.C. § 264.

150. The Bureau of Indian Affairs has further defined trading with Indians as, "buying, selling, bartering, renting, leasing, permitting and any other transaction involving the acquisition of property or services." 25 C.F.R. §140.5(a)(6).

151. The Bureau of Indian Affairs has also provided for the licensing of these rootless Indian traders traveling the roads through Indian country as "itinerant peddlers." 25 C.F.R. § 140.9(b).

152. Federal regulations provide procedures for traders and prospective traders to apply for licenses from the Bureau of Indian Affairs. 25 C.F.R. §§ 140.9-140.12.

153. Through various retail outlets the Winnebago Tribe does business with both Indians and Indian Traders on a regular basis. Morgan Decl. at ⁋⁋41 to 55.

STANDARD OF REVIEW

Summary judgment is proper if the movant shows there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(a). Pursuant to Rule 56(a), courts must view the facts and inferences in the light most favorable to the nonmoving party. *E.g.*, *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Woods v. DaimlerChrysler Corp.*, 409 F.2d 984, 990 (8th Cir. 2005). The moving

party bears the burden of establishing both the absence of a genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Enter. Bank v. Magna Bank*, 92 F.3d 743, 747 (8th Cir. 1996). A party who opposes a motion for summary judgment "may not rest upon mere allegation or denials of this pleading, but must set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 256.; *Littrell*, 459 F.3d at 921. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson*, 477 U.S. at 248. An issue of fact is genuine when "a reasonable jury could return a verdict for the nonmoving party" on the question. *Id.* To defeat a motion for summary judgment, the "nonmoving party must substantiate his allegations with sufficient probative evidence [that] would permit a finding in [their] favor based on more than mere speculation, conjecture, or fantasy." *Wilson v. IBM, Corp.*, 62 F.3d 237, 241 (8th Cir. 1995).

When the parties have filed cross-motions for summary judgment, as here, "the normal course for the trial court is to consider each motion separately, drawing inferences against each movant in turn." *Wright v. Keokuk Cnty. Ctr.*, 399 F.Supp.2d 938, 946 (S.D. Iowa 2005) (citing *EEOC v. Steamship Clerks Union, Local 1066*, 48 F.3d 594, 603 n.8 (1st Cir. 1995)).

While these general summary judgment principles guide the parties' factual and prcoedural burdens, where courts evaluate questions of state, tribal and federal preemption, taxation, and most importantly, tribal sovereignty, federal law imposes more specific burdens, discussed in turn below, arising from important principles of federal Indian law.

ARGUMENT

Whether the State may tax and regulate sales of Rock River cigarettes, as distributed by HCID, to both members and nonmembers in Indian Country is a question of several separate and independent, but interrelated, preemption analyses that emanate from important questions of federal Constitutional and federal Indian law: (I) the categorical federal bar against state regulation of Indians in Indian Country arising from the Indian Commerce Clause of the U.S. Constitution; (II) a hybrid federal preemption-tribal self-government preemption in *Bracker* balancing that weighs state, tribal, and federal interests; (III) the pure tribal sovereignty and tribal self-government "value-added" preemption analysis, derived from *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1978) and *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980); and (IV) the pure federal preemption analyses in the Indian Trader Statutes.

If HCID and Rock River prevail on any one of these preemption analyses, state taxation and regulation of HCID's sales of Rock River cigarettes in Indian Country to either members or nonmembers is illegal and the State must lose.

In fact, HCID and Rock River prevail on all four analyses. The two Tribal Entities and their parent company, HCI, are unique in Indian Country. It is not hyperbole to say that federal courts have not yet had an opportunity to evaluate a tribal economic development operation that is so vertically integrated, with so many functions that occur squarely within Indian Country, and that so successfully achieves the federal policy of supporting tribal self-determination and self-government. As a consequence, and as set forth in detail below, HCID and Rock River meet and exceed every test and preemption analysis discussed herein.

Consequently, reading the facts in a light most favorable to the Defendants, the Court must declare that Nebraska's MSA Laws may not be enforced against Plaintiffs HCID and Rock River for any activity that occurs in Indian Country. The Court must further enjoin Defendants from taking any action to enforce Nebraska's MSA Laws against HCID and Rock River for any activity that occurs in Indian Country.

I. THE IMPOSITION OF A STATE ESCROW REQUIREMENT UPON ROCK RIVER CONSTITUTES A DIRECT TAX UPON A TRIBAL ECONOMIC DEVELOPMENT CORPORATION AND AS SUCH IS CATEGORICALLY BARRED BY FEDERAL INDIAN LAW

As set forth in detail herein, the state escrow requirement constitutes a direct tax upon Rock River, a wholly-owned subdivision of the Winnebago Tribe of Nebraska. As such, it operates a tax upon the Tribe itself doing business wholly within Indian Country. State taxation of an Indian or Indian tribe in Indian Country is categorically barred by fundamental principles of federal law deriving from Congress's plenary authority over Indians deriving from the Indian Commerce Clause of the U.S. Constitution. *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 458 (1994) ("The Constitution vests the Federal Government with exclusive authority over relations with Indian tribes, and in recognition of the sovereignty retained by Indian tribes even after formation of the United States, Indian tribes and individuals generally are exempt from state taxation within their own territory."); *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 765 (1985) (holding that "[i]n keeping with its plenary authority over Indian affairs, [only] Congress can authorize the imposition of state taxes on Indian tribes and individual Indians"). In this Circuit and others, when a party seeks to demonstrate that Congress has acted to restrict tribal sovereignty, that party bears the burden of proof. *See*, *e.g.*, *Amerind Risk Mgmt. Corp. v. Malaterre*, 633 F.3d 680, 685-86 (8th Cir. 2011) (imposing the burden of proving that Congress has waived sovereign immunity on the non-tribal party); *see also Welch v. United States*, 409 F.3d 646, 651 (4th Cir.

2005); *Garcia v. Akwesasne Hous. Auth.*, 268 F.3d 76, 84 (2d Cir. 2001). Consequently, it is the State's clear burden to prove that Congress has exercised its plenary power to overcome the presumption against state regulation and taxation of Indians in Indian Country and to restrict tribal sovereignty. *See, e.g.*, *Amerind Risk Mgmt. Corp.*, 633 F.3d at 685-86. The State cannot prove that Congress has ever authorized the State of Nebraska to directly tax the Winnebago Tribe of Nebraska or the Tribal Entities by forcing the state escrow requirement upon them and so the State cannot prevail.

A. The Nebraska Escrow Statute Is a Tax

1. Defining a Tax

As an initial matter, although the Tribal Entities and the Defendants have both previously disclaimed that the laws at issue in this litigation constitute a tax, a close review of the authorities reveals that this Court was correct that, in practical effect, the Escrow Statute in fact functions as a tax. In its December 19, 2018 Order on Defendants' Motion to Dismiss, this Court held that "the escrow requirement found in § 69-2703 *could be* viewed as imposing a tax." ECF No. 35 at 14 (emphasis in original). The Plaintiffs agree. In reaching this conclusion, this Court looked in part to the U.S. Supreme Court's decision in *National Federation of Independent Businesses v. Sebelius*, in which the Supreme Court held explained that "[a] shared responsibility payment may for constitutional purposes be considered a tax, not a penalty." 567 U.S. 519, 566 (2012).

Sebelius provided further critical guidance for defining a tax in its analysis of the "individual mandate" of the Affordable Care Act ("ACA"). The "individual mandate" provision of the original ACA required that individual Americans maintain health insurance after a certain point in time, otherwise, they were subject to what the ACA characterized as a "penalty":

> If a taxpayer who is an applicable individual . . . fails to meet the [health coverage] requirement for 1 or more months, then, except as provided in subsection (e), there

> is hereby imposed on the taxpayer a penalty with respect to such failures in the amount determined under subsection (c).

26 U.S.C. § 5000A (b)(1) (2012 version). Subsection (c) then requires that

> The amount of the penalty imposed by this section on any taxpayer for any taxable year with respect to failures described in subsection (b)(1) shall be equal to the lesser of –
> (A) the sum of the monthly penalty amounts determined . . . for months in the taxable year during which 1 or more such failures occurred, or
> (B) an amount equal to the national average premium for qualified health plans which have a bronze level of courage, provide coverage for the applicable family size involved, and are offered through Exchanges for plan years beginning in the calendar year with or within which the taxable year ends.

26 U.S.C. § 5000A (c)(1) (2012 version).

The U.S. Supreme Court found that these "Individual Mandate" provisions constitute a tax because they are payments required by the federal government that is not a penalty. Under their analysis, "[t]he question is not whether that is the most natural interpretation of the [Individual Mandate], but only whether it is a 'fairly possible' one." *Sebelius*, 567 U.S. at 563 (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932). In *Sebelius*, the payment required by the law at issue was a calculated amount due to be paid to the federal Treasury if the taxpayer met the trigger requirements. *Id.* at 563-564. "This process yields the essential feature of any tax: It produces at least some revenue for the Government." *Id.* (citing *United States v. Kahriger*, 345 U.S. 22 (1953). As Justice Roberts noted, the U.S. Supreme Court has previously held that "exactions not labeled taxes nonetheless were authorized by Congress's power to tax," in cases such as the *License Tax Cases*, 72 U.S. 462 (1866), and *New York v. United States*, 505 U.S. 144 (1991), because the operative factors in determining whether something is a tax are not what it is called, but "its substance and application." *Sebelius*, 567 U.S. at 565 (internal quotation marks omitted) (quoting *United States v. Constantine*, 296 U.S. 287 (1935)). The Supreme Court found in *Sebelius* that the "Individual Mandate" shared responsibility payment "may for constitutional purposes be

considered a tax" for three reasons: (1) because the payment was lower than the cost of insurance; (2) because the "individual mandate contains no scienter requirement"; and (3) "the payment is collected solely by the IRS through the normal means of taxation." *Id.* at 566.

This Court further commented in its 2018 Order that "[a] 'tax' is an enforced contribution to provide for the support of government." ECF 35 at 14 (quoting *United States v. La Franca*, 282 U.S. 568, 572 (1931)). This Court also cited to *Michigan Employment Security Commission v. Patt* for the proposition that "an involuntary exaction, levied for a governmental or public purpose, can be held to be nothing other than a tax within the purview of the Federal bankruptcy act." 144 N.W.2d 663, 665 (Mich. Ct. App. 1966). *Patt* further states that "the essential characteristics of a tax are that it is not a voluntary payment or donation, but an enforced contribution, exacted pursuant to legislative authority." *Id.* (internal quotations and citation omitted). "In distinguishing penalties from taxes, this Court has explained that 'if the concept of penalty means anything, it means punishment for an unlawful act or omission.'" *Sebelius*, 567 U.S. at 567 (quoting *United States v. Reorganized CF & I Fabricators of Utah, Inc.*, 518 U.S. 213 (1931)).

2. The Nebraska Escrow Statutes

The statutes at issue in this case require that all NPMs must deposit a certain amount of money (the present rate is $0.0188482 per cigarette) on a quarterly basis into an escrow account in order to sell cigarettes in Nebraska. Neb. Rev. Stat. § 69-2703 (2)(a). The stated purpose for these Escrow Statute is for the Nebraska Attorney General "to enforce the Master Settlement Agreement and to investigate and litigate potential violations of state tobacco laws." Neb. Rev. Stat. § 69-2701 (2).

The statute further notes that "[a]ny money in the fund available for investment shall be invested by the state investment officer pursuant to the Nebraska Capital Expansion Act and the

Nebraska State Funds Investment Act. *Id.* While the interest on these funds is available to the NPM, the funds paid into the escrow account are otherwise only available under the following conditions:

> (i) To pay a judgment or settlement on any released claim brought against such tobacco product manufacturer by the state or any releasing party located or residing in the state . . ..;
> (ii) To the extent that a tobacco product manufacturer establishes that the amount it was required to place into the escrow on account of units sold in the state in a particular year was greater than the Master Settlement Agreement Payments, as determined pursuant to section IX(i) of that Agreement after final determination of all adjustments, that such manufacturer would have been required to make on account of such units sold had it been a participating manufacturer, the excess shall be released from escrow and revert back to such tobacco product manufacturer;
> (iii) To the extent not [otherwise released], funds shall be released from escrow and revert back to such tobacco product manufacturer **twenty-five years after** the date on which they were placed into escrow; or
> (iv) An Indian tribe may seek release of escrow deposited pursuant to this section on cigarettes sold on an Indian tribe's Indian country to its tribal members pursuant to **an agreement entered into between the state and the Indian tribe** pursuant to section 77-2602.06. **Amounts the state collects on a bond under section 69-2707.01 shall not be subject to release under this section.**

Neb. Rev. Stat. § 69-2703 (b)(i)-(iv) (emphasis added). Further, "The [Nebraska] Legislature finds that violations of sections 69-2702 and 69-2703 threaten the integrity of the tobacco Master Settlement Agreement, the fiscal soundness of the state, and the public health." Neb. Rev. Stat. § 69-2704.

While the tribal exception provision may seem redemptive, review of the statutory requirements for such an agreement reveals how punitive such an agreement would be for Rock River:

> The agreement shall specify (a) Its duration; (b) Its purpose; (c) Provisions for administering, collecting, and enforcing the agreement and for the mutual waiver of sovereignty immunity objections with respect to such provisions; (d) Remittance of taxes and escrow collected; (e) the division of the proceeds of the tax and escrow between the parties . . ..
>
> (2) The agreement shall require tribal taxes to be imposed equally on all cigarettes

> and other tobacco products regardless of manufacturer or brand; (3) The agreement shall require that all packages of cigarettes bear either a [Nebraska] stamp . . . or a tribal stamp under section 77-2603.01

Neb. Rev. Stat. §§ 77-2602.06 (1)(a)-(e); 77-2602.06 (2)-(3). As this Court noted, these agreements require Tribes to agree "to significant state regulatory control and a limited waiver of sovereign immunity." ECF 35 at 16.

Nebraska's requirements for tribes that sign such agreements do not stop there. Section 69-2707.01 also makes it abundantly clear that all tribally owned manufacturers who make such an agreement must pay a bond to the state for Nebraska's benefit: "All non-participating manufacturers subject to the certification requirements of section 69-2706, **or whose sales are authorized pursuant to an agreement under section 77-2602.06**, shall post a bond, or its cash equivalent, for the benefit of the state." Neb. Rev. Stat. § 69-2707.01 (1) (emphasis added). The minimum bond requirement for NPMs is

> the greater of: (a) One hundred thousand dollars; (b) The greatest required escrow amount due from the nonparticipating manufacturer . . . as such terms may be defined and liabilities may be established within sections 69-2701 to 69-2711, for any of the preceding twenty calendar quarters; or (c) The greatest required annual total of quarterly escrow amounts due from the nonparticipating manufacturer . . ., as such terms may be defined and liabilities may be established within sections 69-2701 to 69-2711, for any of the preceding five calendar years, if the Attorney General deems the [NPM] to pose an elevated risk of noncompliance.

Neb. Rev. Stat. § 69-2707.01(2). The **explicit purpose** of the bond is "first to recover delinquent escrow, which amount shall be deposited into a qualified escrow account . . ., and then to recover civil penalties and costs authorized under such section." Neb. Rev. Stat. § 69-2707.01 (5). Furthermore, the Tribal agreement provision of 69-2703 states that the "[a]mounts the state collects on a bond under section 69-2707.01 shall not be subject to release." Nebraska's Annual and Quarterly Certification of Non-Participating Manufacturer Bond or Cash Equivalent forms, as well as the initial Non-Participating Manufacturer Bond form are mailed to the office of the

Nebraska Attorney General and the Nebraska Tax Commissioner. These certifications are required to be sent to these persons by section 69-2706 of the Nebraska Code. The Nebraska Tax Commissioner is also in charge of the directory for the state of Nebraska, and the Nebraska Attorney General's Office works in conjunction with the Nebraska Tax Commissioner to determine whether an NPM can be included on the Nebraska Directory. Neb. Rev. Stat. § 69-2706 (2).

3. The Nebraska Directory Statutes

Nebraska's escrow requirement is inextricably linked with its tobacco directory requirements. In order to be a listed Non-Participating Manufacturer in Nebraska, the NPM must certify annually that it is "in full compliance with subdivision (2) of section 69-2703., Nebraska's escrow statute" Neb. Rev. Stat. § 69-2706 (1)(a). Further, Nebraska's directory requirements further prohibit affixing "a tribal stamp to a package or other container of cigarettes of a tobacco product manufacturer or brand family not included in the directory except as authorized by an agreement pursuant to section 77-2602.06" or to "sell, offer, or possess for sale in this state cigarettes of a tobacco product manufacturer or brand family in this state cigarettes of a tobacco product manufacturer or brand family in this state not included on the directory." In other words, Section 69-2706 makes it unlawful for a tribe to sell tribally-stamped cigarettes unless the tribe subjugates itself to State regulation, including the payment of at least $100,000 in bond and the **additional** escrow payment requirement. Effectively, Nebraska is attempting to force Rock River, HCID, and by extension, the Winnebago Tribe of Nebraska, into a punitive tax agreement that gives the state the power to tax the economic development activities of the Winnebago Tribe of Nebraska.

4. Nebraska's Escrow and Directory Statutes Work Together to Tax Rock River

Nebraska's Escrow Statute clearly imposes a tax on cigarette manufacturers to support the costs of smoking on the Nebraska state government. While Nebraska does not codify their Escrow Statute under its tax code, of the 46 states who are signatories to the Master Settlement Agreement, 15 of those states codify some or all their escrow and directory statutes under a portion of their tax code.[4] An additional five states codify their escrow and directory statutes under statutory chapters with titles like "State Property and Funds," and "Public Finances."[5] In total, **18** of the 46 MSA states characterize escrow statutes as either a tax or as a source of public revenue. Nebraska specifically considers these escrow payments to be for the Nebraska Attorney General "to enforce the Master Settlement Agreement and to investigate and litigate potential violations of state tobacco laws." Neb. Rev. Stat. § 69-2701 (2), and for investment in various state funds when feasible. Neb. Rev. Stat. § 69-2703 (2)(a).

In practice, Nebraska is no different. In their August 13, 2021 Attorney General's Opinion entitled "Whether the Nebraska cigarette excise tax, stamping, precollection, and reporting laws apply to cigarettes sold by Rock River Manufacturing," ("AG Opinion") Declaration of Nicole Ducheneaux ("Ducheneaux Decl."), Att. 1. The two authors of the AG Opinion, Defendant in this matter Douglas Peterson and defense counsel Daniel Muelleman, declared that "the State's interests in enforcing a lawful cigarette excise tax and the regulations attendant to the tax in Indian

[4] Arkansas (Ark. Code §§ 26-57-201 *et. seq*.); Colorado (Colo. Rev. Stat. §§ 39-28-101 *et seq*.); Iowa (Iowa Code 453d *et seq*.); Kentucky (Ky. Rev. Stat. §§ 131.600-131-630); Michigan (Mich. Comp. Laws §§ 205.401, 445.2051-52, 129.261 *et seq*.); Montana (Mont. Laws §§ 16-11-401 *et seq.* and 16-11-501 *et seq.*); Nevada (Nev. Stat. §§ 370.001 *et seq*. and 370a.010 *et seq.*); Oklahoma (Okla. Stat. Tit. 68, §§ 360.1 *et seq*.); Oregon (Or. Rev. Stat. §§ 323.800 *et seq*.); Rhode Island (R.I. Gen. Laws §§ 44-20-28 to 40-20-28.1, 23-71-1 *et seq*. and 42-133-1 *et seq*.); South Dakota (S.D. Codified Laws §§ 10-50b-1 *et seq*.); Tennessee (Tenn. Code §§ 47-31-101 *et seq*. and 67-4-2601 *et seq.* and 67-4-1601 *et seq.*); and Utah (Utah Code §§ 59-14-601 *et seq.* and 59-22-1 *et seq*.)

[5] Connecticut (Conn. Gen. Stat. §§ 4-28e *et seq.*); Illinois (Ill. Comp. Stat. 167/1 *et seq.*); New Mexico (N.M. Stat. §§ 6-4-9 *et seq.*); South Carolina (S.C. Code §§ 11-47-10 *et seq.* and 11-47-10 *et seq.*); and Wyoming (Wyo. Stat. §§ 9-4-1201 *et seq.*

country within Nebraska are more powerful than coincident federal or tribal interests." AG Opinion at 13. The Escrow Statute is, by its own admission, part of Nebraska's cigarette taxation system. Without compliance with the Escrow Statute through payment of escrow funds and payment of an at-least six figure bond to the state of Nebraska, Nebraska considers Rock River to be operating unlawfully.

Further, according to the laws discussed above, Rock River cannot even sell Tribally-stamped cigarettes without a "tribal agreement" with Nebraska, that necessarily includes a broad waiver of sovereign immunity and some sort of scheme to remit taxes to Nebraska, **in addition to** making escrow and bond payments to the state. The "tribal agreement" provision, Neb. Rev. Stat. Section 77-2602.06, explicitly anticipates a "division of the proceeds of the tax and escrow between the parties," demonstrating that Nebraska views both the 'tax' and the escrow as producing revenue, a quintessential aspect of a tax. 77-2602.06(1)(e).

It is also clear from Rock River's communications with the State regarding Rock River's desire to be listed on the Nebraska NPM Directory that the Defendants also see these escrow payments as part of their tax system. In 2021, Rock River attempted to apply to be listed as an NPM for the purposes of selling cigarettes outside of Indian Country in Nebraska. Morgan Decl. at ¶¶ 59-64. In the first rejection letter from Defendant Attorney General Fulton's office, Rock River was informed that its application was denied for the following reasons:

> **In order to comply fully with the escrow requirements, Rock River must deposit funds into a qualified escrow fund on a quarterly basis according to the statutory escrow rate for each unit sold.** A unit sold is a cigarette sold in Nebraska in a pack required to bear a stamp pursuant to Neb. Rev. Stat. §§ 77-2603 or 77-2603.01. *See,* Neb. Rev. Stat. § 69-2702(14). We are not aware of any tribal compact authorizing a tribal cigarette stamp in Nebraska; consequently, Rock River cannot avail itself of the allowances provided in § 77-2603.01 [the tribal agreement statute]. Therefore, Rock River's cigarettes would have to be in compliance with the requirements of Neb. Rev. Stat. § 77-2603 such that **the tax shall be paid, and the stamp shall be affixed,** to all Rock River cigarettes intended to be sold in

> Nebraska.
>
> Ordinarily … an Indian reservation is considered part of the territory of the State." *Nevada v. Hicks*, 533 U.S. 353, 361-62 (2001) . . .. Rock River no doubt remains well aware of this legal principle as it applies to the company and its cigarette sales conduct within Indian Country. *See, Ho-Chunk, Inc. v. Sessions*, 894 F.3d 365, 368 (D.C. Cir. 2018).

Morgan Decl., Att. 6. This structure, as outlined by Defendant Fulton's office, demonstrates that the Defendants expect a payment, from a Tribally-owned company, for each pack of cigarettes manufactured by that company, under a law that is characterized by Defendant Fulton and defense counsel as part of their cigarette tax system.

On May 14, 2021, Defendant Fulton's office transmitted a second rejection letter, which included the analysis of Defendant Peterson and defense counsel in this litigation, Daniel Muelleman. Morgan Decl., Att 7. Both letters and the AG Opinion refer to the statutory "choice" for the Winnebago Tribe to enter into a cigarette agreement with Nebraska, however, the choice itself is illusory. As these quotes illustrate, the Defendants believe that they have a right to tax and regulate a tribally-owned business located within the exterior boundaries of that tribe's reservation, unless the tribe acquiesces to the State's taxation and regulation of their tobacco business in the form of a compact. The choice to either cede tax and regulatory authority to Nebraska or face enforcement actions for failure to pay Nebraska taxes on tribally-manufactured cigarettes is no choice at all, nor is it a reasonable remedy.

Beyond the issue of taxation through the Escrow Statute, it is also important to note that the "tribal agreement" option fails as a reasonable or even possible remedy because of the Defendants' positions regarding waivers of sovereign immunity. Defendant Fulton has already made it clear to Rock River that Nebraska expects a broad waiver of sovereign immunity if Rock River desires to be listed on the Nebraska directory. One of the grounds for Nebraska's denial of

that application is that Nebraska wanted a **significantly broader** waiver of sovereign immunity than the one Rock River filed. The limited waiver of sovereign immunity to which the quote below refers is the waiver Rock River uses in every other state in which Rock River's brands are listed:

> [Rock River's] waiver does not consent to suit for the full scope of the required statutory range, does not include any rules promulgated pursuant to the statutes, includes impermissible limitations on scope and time . . .. And, finally, a self-issued waiver of sovereign immunity does not constitute a clear and unambiguous waiver of tribal sovereign immunity . . ..

Morgan Decl., Att. 7. Defendant Fulton expects the Winnebago Tribe to provide a clear and unambiguous waiver of the Winnebago Tribe's sovereign immunity to even **consider** listing Rock River's brands on the Nebraska Directory, which is a necessary step toward "fully complying" with any of Nebraska's tobacco laws. Why should Rock River expect that Defendants demand any less of a sovereign immunity waiver for a "tribal agreement"? Rather, Defendants expect the Winnebago Tribe of Nebraska to compromise its own sovereignty in order to operate their own businesses on their Reservation.

A. The State of Nebraska Is Categorically Barred from Taxing Federal Indian Tribes Without Express Congressional Permission.

The U.S. Supreme Court's position on state taxation of Indian Tribes is crystal clear:

> [W]hen a State attempts to levy a tax directly on an Indian tribe or its members inside Indian Country, rather than on non-Indians, we have employed, instead of a balancing inquiry, a more categorical approach: absent cessation of jurisdiction or other federal statutes permitting it, we have held, a State is without power to tax reservation lands and reservation Indians. Taking this approach, we have held unenforceable a number of state taxes whose legal incidence rested on a tribe or on tribal members inside Indian country.

Chickasaw Nation, 515 U.S. at 458. "The initial and frequently dispositive question in Indian tax cases, therefore, is who bears the legal incidence of a tax." *Id.* The Supreme Court further explains:

> If the legal incidence of an excise tax rests on a tribe or on tribal members for sales made in Indian country, the tax cannot be enforced absent clear congressional authorization. But if the legal incidence of the tax rests on non-Indians, no categorical bar prevents enforcement of the tax; if the balance of federal, state, and tribal interests favors the State, and federal law is not to the contrary, the State may impose its levy.

Id. at 459. "If the legal incidence of a state tax falls on a Tribe or its members for sales made within Indian country, like the state motor fuels excise tax at issue in *Chickasaw Nation*, the tax is categorically unenforceable, without regard to its 'economic realities.'" *Flandreau Santee Sioux Tribe v. Noem*, 938 F.3d 928, 932 (8th Cir. 2019).

When considering the legal incidence of a tax, "[t]he terms of a statute control where the legal incidence of the tax falls." *United States v. Lohman*, 74 F.3d 863, 866 (8th Cir. 1996). "In the absence of such dispositive language, the question is one of 'fair interpretation of the taxing statute as written and applied.'" *Chickasaw Nation*, 515 U.S. at 461 (quoting *California Bd. of Equalization v. Chemehuevi Tribe*, 474 U.S. 9, 11 (1985) (*per curiam*)). While Eighth Circuit has not yet addressed the legal incidence of escrow requirements, the Tenth Circuit held that legal incidence of Oklahoma's escrow statute "falls on the [non-participating tobacco] manufacturers." *Muscogee (Creek) Nation v. Pruitt*, 669 F.3d 1159, 1179 (10th Cir. 2012). Oklahoma's escrow statute—like Nebraska's—requires "tobacco product manufacturers that do not participate in the Master Settlement Agreement to make payments into a qualified escrow fund." *Id.*

The *Chickasaw* test applies here. The Defendants intend to enforce Nebraska Revised Statute § 69-2703 against Rock River, an economic development corporation wholly owned by the Winnebago Tribe of Nebraska, and force Rock River to make escrow payments to the State of Nebraska. As set forth in detail above, Nebraska's Escrow and Directory Statutes are a tax as a matter of federal law. Analyzing the tax function of the Escrow and Directory Statutes, it is clear from the plain language of Nebraska Revised Statute § 69-2703 that the legal incidence of the tax

falls to the NPM, who in this case is Rock River. Nebraska Revised Statute § 69-2703 states in part that:

> Any tobacco product manufacturer selling cigarettes to consumers within the state, whether directly or through a distributor, retailer, or similar intermediary or intermediaries, after April 29, 1999, shall do one of the following:
> (1) Become a participating manufacturer, as that term is defined in section II(jj) of the Master Settlement Agreement, and generally perform its financial obligations under the Master Settlement Agreement; or
>
> (2) (a) Place into a qualified escrow fund on a quarterly basis, no more than thirty days after the end of each calendar quarter in which sales are made, the following amounts, as such amounts are adjusted for inflation . . .
> (v) for the year 2007 and each year thereafter: $.0188482 per unit sold.

NPMs clearly bear the legal instance of making escrow payments to Nebraska based on the Nebraska Escrow Statute. Rock River is considered a NPM for purposes of the MSA, and is consequently the entity expected to pay escrow according to the Defendants. While stamping agents can also be ordered by the Nebraska Attorney General to "precollect" escrow for a NPM, the stamping agent is considered to be precollecting such escrow "on behalf of the nonparticipating manufacturer" in order to cover what the state considers to be a shortfall in escrow payments, and the "stamping agent shall have a claim against the [NPM] for such amount." Neb. Rev. Stat. §§ 29-2705(19); 69-2708.01(2). As a result, NPMs are the entity bearing the legal burden of making escrow payments to the State of Nebraska, and Rock River is one such entity the Defendants claim must comply. Rock River, however, unlike almost all other NPMs in the United States, is wholly owned by an Indian Tribe, and is located within Indian Country. As a result, the entity actually bearing the legal incidence of the escrow tax is Rock River's owner, the Winnebago Tribe of Nebraska, whom the Defendants expect to tie up hundreds of thousands of dollars for the privilege of doing business on the Tribe's own sovereign Reservation. This sort of taxation is exactly the kind of taxation the U.S. Supreme Court intended to prohibit in *Oklahoma Tax Commission v.*

Chickasaw Nation, and it should be prohibited by this Court.

II. THE STATE'S INTEREST IN TAXING HCID'S SALES OF ROCK RIVER CIGARETTES IN INDIAN COUNTRY IS OUTWEIGHED BY THE IMPORTANT FEDERAL AND TRIBAL SELF-GOVERNMENT INTERESTS

Even where a tax is not considered to be a tax directly on an Indian tribe or individual Indian, and hence categorically barred, a state still is presumed, as a basic principle of federal Indian law. to lack regulatory power over the on-reservation conduct of Indians. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144 (1980). In such cases, courts must engage in a weighing of state, federal, and tribal interests that considers preemption principles as well as principles of tribal self-government in a process called *Bracker* balancing. As state tax and regulation in Indian Country violates the general rule prohibiting state authority over on-reservation conduct of Indians, federal courts characterize *Bracker* balancing as an occasion where the state seeks an exception. *E.g.*, *Noem*, 938 F.3d at 932 (holding that courts apply *Bracker* balancing "[w]hen **a state seeks** to impose a nondiscriminatory tax on the actions of nonmembers on tribal land") (emphasis added); *Gila River Indian Cmty. v.Waddell*, 967 F.2d 1404, 1412 (9th Cir. 1992) (characterizing *Bracker*-style balancing as requiring the state to "avoid the preemption of its taxing authority"). Although the federal courts have not explicitly defined the *Bracker* burden of proof, as with other kinds of exceptions, courts have previously assumed it is the party seeking the exception who bears the burden. *See Waddell*, 967 F.2d at 1421 (requiring state to advance "proof" of connection between tribal activity to be taxed and state functions to demonstrate that state interest outweighs tribal and federal interests).

Furthermore, the courts have considered this to be a high burden, that requires proof that the taxes a state seeks to impose on tribal activities in Indian Country are "'narrowly tailored" to funding state services in Indian Country. *Id.* at 1412 (quoting *Crow Tribe of Indians v. Montana*,

650 F.2d 1104, 1114 (9th Cir. 1981), *cert denied*, 459 U.S. 916 (1982). In meeting this high burden of proof that requires demonstrating "narrowly tailored" taxes aimed at Indian Country services, a state must do more than point to provision of services "typically available to all of its citizens" and instead must establish a "direct connection" between state tax revenues and provision of services to "tribal members" or reservation residents. *Waddell*, 967 F.2d at 1412 (quoting *Hoopa Valley Tribe v. Nevins*, 881 F.2d 657, 661 (9th Cir. 1981), *cert denied*, 494 U.S. 1055 (1990)). "'[A] State seeking to impose a tax on a transaction between a tribe and nonmembers must point to more than its general interest in raising revenues.'" *Noem*, 938 F.3d at 932 (quoting *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 336 (1983)).

In the instant case, the State cannot provide proof that its interests in the activity conducted by HCID and Rock River on the Reservation as to nonmembers outweigh the significant federal interests and unique and overwhelming Tribal interests at issue such that the State is entitled to an exception to the general rule.

A. *Bracker* Balancing Principles Require Significant State Interests to Outweigh Important Federal and Tribal Self-Government Interests Such that State Tax May Apply to On-Reservation Activity of a Tribe

In *White Mountain Apache Tribe v. Bracker,* the Supreme Court addressed Arizona's motor carrier license and use fuel taxes as applied to a non-Indian logging company's use of roads that were located on tribal land. 448 U.S. at 139-40. The Supreme Court found that Arizona's general desire to raise revenue without "a responsibility or service that justifies the assertion of taxes imposed for on-reservation operations conducted solely on tribal and Bureau of Indian Affairs roads" was not sufficient to overcome tribal and federal interests. *Id*. at 150. The Court found it was "undisputed that the economic burden of the asserted taxes [would] ultimately fall on the Tribe" and concluded that the state tax was preempted. *Id*. at 151.

If not expressly preempted by federal law, a state may unlawfully infringe "on the right of reservation Indians to make their own laws and be ruled by them." *Bracker*, 448 U.S. at 142 (quoting *Williams v. Lee*, 358 U.S. 217, 220 (1959)). Where a state asserts authority over on-reservation conduct of non-Indians, a court must engage in a "particularized inquiry into the nature of the state, federal, and tribal interests at stake, [and]. . . determine whether, in the specific context, the exercise of state authority would violate federal law." *Id*. at 144-45.

The Supreme Court has also considered a New Mexico gross receipts tax that had been imposed on a non-Indian construction company for the construction of a tribal school on a reservation. *Ramah Navajo Sch. Bd. v. Bureau of Revenue of N.M.*, 458 U.S. 832, 835-36 (1982). Although the construction company initially paid the state tax, the company was reimbursed by the tribal school board for the tax payment, and thus, as in *Bracker*, the economic incidence of the tax ultimately fell on the tribe. *Id*. at 835. The Court held that the state was unable to identify "any specific, legitimate regulatory interest to justify the imposition of its gross receipts tax." *Id*. at 843.

In *Ramah*, the Supreme Court found "the State [had] not [sought] to assess its tax in return for the governmental functions it provides to those who must bear the burden of paying this tax." *Id*. The Court stated that "[t]he State's ultimate justification for imposing [the] tax amount[ed] to nothing more than a general desire to increase revenues," a justification that was "insufficient to justify the additional burdens imposed by the tax . . . on the express federal policy of encouraging Indian self-sufficiency. . . ." *Id*. at 845. Thus, considering the *Bracker* factors, the Court held New Mexico's gross receipts tax to be preempted by federal law. *Id*. at 846-47.

The Eighth Circuit has also applied the *Bracker* test in numerous cases, including in *Marty Indian School Board*, *Inc*. *v. South Dakota*, 824 F.2d 684, 687 (8th Cit. 1987). In *Marty Indian*

School Board, the state of South Dakota sought to impose a tax on motor fuel that was purchased by the school from a non-Indian oil company. *Id*. at 685. The Eighth Circuit, applying *Bracker*, found a strongly expressed federal interest and policy in favor of developing Indian-controlled educational opportunities that were "tailored to the needs and goals of the Indian people." *Id*. at 687. Thus, the court held that, under *Bracker*, "the strong federal policy of promoting Indian self-determination and education and the pervasive involvement of the federal government" left no room for the additional burden which the state's tax would impose," and thus the tax was left preempted. *Id*.

The Eighth Circuit recently applied the *Bracker* test in *Flandreau Santee Sioux Tribe v. Noem* 938 F.3d at 935. In *Noem*, the court identified the factors to be weighed under *Bracker*, noting that "[s]alient factors include the extent of federal regulation and control, the regulatory and revenue-raising interests of states and tribes, and the provision of state or tribal services." 938 F.3d at 935 (quoting Felix S. Cohen, *Handbook of Federal Indian Law* § 8.03[1][d] (2012)). Analyzing these *Bracker* factors, the Eighth Circuit held that (1) South Dakota's interest in collecting a state use tax from the Royal River Casino's patrons was merely a "generalized interest in raising revenue," and (2) the State's interest did not outweigh the federal and state tribal interest at stake. *Noem*, 938 F.3d at 937 (quoting *Bracker*, 448 U.S. at 150).

The Supreme Court has repeatedly applied and reaffirmed the *Bracker* interest-balancing test. *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 100-11 (2005). Courts applying the test have typically focused on three primary factors: "(1) the extent of the federal and tribal regulations governing the taxed activity; (2) whether the economic burden of the tax falls on the tribe or the non-Indian individual or entity; and (3) the extent of the state interest justifying the imposition of the taxes." *Ute Mountain Ute Tribe v. Rodriquez*, 660 F.3d 1177, 1187 (10th Cir.

2011).

The State's MSA Laws are preempted under the *Bracker* balancing test. 448 U.S. at 150-51. This preemption is clear when balancing "the extent of federal regulation and control" demonstrated by the Indian Trader Statutes, "the regulatory and revenue-raising interests of" the Winnebago Tribe and the State of Nebraska, and "the provision of state or tribal services" provided. Cohen, *Handbook of Federal Indian Law* § 8.03[1][d]. The history of Tribal independence in commerce, the federal policies reflected in the Indian Trader Statutes, and the Winnebago Tribe's reliance on its business and manufacturing operations to support its community demonstrate factors that overcome the State's interest in creating general-fund revenue through the taxation of Tribally manufactured goods.

B. The History of Tribal Sovereignty in Commerce and the Strong Federal Interests Reflected in the Indian Trader Statutes Preempt Any State Interests.

For purposes of *Bracker* balancing, "[t]he history of tribal sovereignty over a subject "serves as a necessary backdrop" to the preemption question." *Noem*, 938 F.3d at 936 (quoting *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 176 (1989)). The Supreme Court has consistently recognized that Indian Tribes retain "attributes of sovereignty over both their members and their territory." *United States v. Mazurie*, 419 U.S. 544, 557 (1975). Absent Congressional authority, Tribes "retain their existing sovereign powers" and "possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication. . . ." *United States v. Wheeler,* 435 U.S. 313, 323 (1978). The Supreme Court recently reiterated that "[t]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in this Nation's history." *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2476 (2020) (quoting *Rice v. Olson*, 324 U.S. 786, 789 (1945)).

The Supreme Court explained in *Bracker* that there is "a firm federal policy of promoting tribal self-sufficiency and economic development." 448 U.S. at 143. "Ambiguities in federal law have been construed generously in order to comport with these traditional notions of sovereignty and with the federal policy of encouraging tribal independence." *Id*. at 143-44. "Instead, the traditional notions of tribal sovereignty, and the recognition and encouragement of this sovereignty in congressional Acts promoting tribal independence and economic development, inform the pre-emption analysis that governs this inquiry." *Ramah*, 458 U.S. at 838.

The backdrop of relevant tribal sovereignty in the production and introduction of goods in Indian Country also illustrates a history of tribal independence. "[F]rom the very first days of our Government, the Federal Government had been permitting . . . Indians largely to govern themselves, free from state interference, and had exercised through statutes and treaties a sweeping and dominant control over persons who wished to trade with Indians and Indian tribes." *Warren Trading Post Co. v. Arizona State Tax Comm'n*, 380 U.S. 685, 686-87 (1965). Such comprehensive federal regulation of Indian traders has continued from that day to this. *Id.* at 688; *see also* Indian Trader Statutes, 25 U.S.C. §§ 261-64.

The Indian Trader Statutes demonstrate the significant federal interests in promotion of tribal self-sufficiency and strong tribal government, as well as promoting tribal economic development.[6] Moreover, the federal government's "sweeping and dominant control" and the comprehensive federal regulation of this field has been consistently confirmed by the Supreme Court. *Warren Trading Post Co.*, 380 U.S. at 687-87; *see also Worcester v. Georgia*, 31 U.S. 515, 556-57 (1832) ("The treaties and laws of the United States contemplate the Indian territory as completely separated from that of the states; and provide that all intercourse with them shall be

---

[6] The Indian Trader Statutes, provide a separate and independent basis for preemption of State law in this case, and are discussed more fully in part IV *infra*.

carried on exclusively by the government of the union.")

Further evidence of the federal government's "sweeping and dominant control" over the manufacture and sale of cigarettes in Indian Country can be found within the Family Smoking Prevention and Tobacco Control Act, Pub.L. 111-31, H.R. 1256 (2009) ("Tobacco Control Act"). The stated purpose of the Tobacco Control Act is to provide authority to the U.S. Food and Drug Administration (FDA) to regulate tobacco products to "address issues of particular concern to public health officials, including the use of tobacco by young people and dependance on tobacco." Pub.L. No. 111–31, § 3(2). In addition, the Act seeks "to promote cessation [of tobacco use] to reduce disease risk and the social costs associated with tobacco-related diseases." *Id.* § 3(9). As part of this purpose, the Act regulates not only the sale of tobacco products, but also the advertising and marketing of those products.

The federal government exerts its dominant and sweeping control of commerce in Indian Country—and in particular, commerce regarding cigarettes sold in Indian Country—throughout the Tobacco Control Act. For example, Congress specifically finds that "[u]nder article I, section 8 of the Constitution, the Congress is vested with the responsibility for regulating interstate commerce and commerce with Indian tribes." Pub.L. No. 111–31, § 2(9). The Act then provides that "[t]he Secretary of Health and Human Services shall ensure that the provisions of this division, the amendments made by this division, and the implementing regulations (including such provisions, amendments, and regulations relating to the retail sale of tobacco products) are enforced with respect to the United States and Indian tribes." Furthermore, the Tobacco Control Act specifically prohibits the FDA from contracting with any state to exercise enforcement authority under the Tobacco Control Act in Indian Country without the express written consent from the tribe involved. Finally, the Act disallows the Secretary of Health and Human Services

from authorizing "an officer or employee of the government of any of the several States to exercise authority" [during an investigation as to illicit trade, smuggling, or counterfeiting of tobacco products] on Indian country without the express written consent of the Indian tribe involved.

The aforementioned federal statutes and regulations illustrate the federal government's regime over the manufacture and sale of products—particularly tobacco products—within Indian Country. As the federal government has clearly articulated its dominion over commerce occurring entirely within Indian Country, the State of Nebraska's MSA Laws must be held to be preempted as to tobacco products produced by a tribal manufacturer and sold by a tribal retailer within Indian country. When balanced with strong Tribal interests and the State's inability to articulate a compelling reason to interfere in Indian commerce, these compelling federal interests must be given significant weight.

C. The Considerable Tribal Interests at Stake Require Preemption of the State's MSA Laws

Against the historical backdrop of tribal sovereignty and strong federal interests, *Bracker* balancing requires that both the tribal interests at stake and the economic burden of the state's MSA Laws must be considered. 448 U.S. at 145; *see also Ramah*, 458 U.S. at 838. Overlapping with the federal interests at issue here, the tax implicates the Tribe's interests in Tribal economic development and Tribal sovereignty.

1. The Economic Burden of the State's MSA Laws on the Tribe Is Significant

Courts consider the economic burden of a state tax when engaging in the *Bracker* balancing analysis. In *Bracker* and *Ramah*, the Supreme Court found that the economic burden of state taxes fell on the entity that was directly responsible for the taxes paid to the states. Here, like in *Bracker* and *Ramah*, the economic burden of the State's MSA Laws fall on the Tribe. While the State will

argue that the legal incidence of its tax is ultimately on the consumer in practice, this is not how the State's MSA Laws function.

The State has asserted that:

> Rock River cannot legally sell cigarettes that do not bear a Nebraska tax stamp to Woodlands or HCID. . . . Should Rock River sell unstamped cigarettes to Woodlands or HCID, neither of which possess a stamping agent license, for subsequent sale to retailers in Nebraska for ultimate consumer purchase, such sales would constitute sales of contraband cigarettes and serve as evidence of intent to evade Nebraska's cigarette excise tax laws.

AG Opinion, at 16. The State explicitly concludes that it intends to interfere in direct transactions of Indian commerce occurring entirely within Indian Country between Tribal parties. Thus, the majority of the requirements for compliance with the State's MSA Laws would fall entirely on the Tribe.

Moreover, with respect to the excise tax, this case is distinct from litigation related to on-reservation sales of cigarettes to nonmembers. Here, the Tribe does not seek to obtain a competitive price advantage over the same product that is sold elsewhere in the State by other retailers. *See Colville.*, 447 U.S. at 154-57. The subject of this litigation is cigarettes that are manufactured and marketed by a Tribe only to Indian retailers within Indian Country. Unlike in *Colville* and its progeny, "the value marketed by [retailers] to persons coming from outside" **is** "generated on the reservation[s] by activities in which the [Tribe has] a significant int/erest."[7] *Id.* at 155. Moreover, in *Colville*, the Supreme Court held that what retailers offer customers that is not available elsewhere is, in fact, entitled to exemption from otherwise applicable taxation. *Id.* Thus, the excise taxes in question here would interfere in the marketing of a product for which the value creation was entirely conducted on reservation.

---

[7] The adding of value to a product on the reservation pursuant to *Colville* is a separate and independent basis to preempt state taxation, which is discussed fully in part III *infra*.

2. The Tribe's Interests in Tribal Sovereignty and Self-Determination Are Significant

The Winnebago Tribe has important interests in tribal sovereignty and self-determination related to its own manufacture and sale of products within Indian Country. The Supreme Court has held that:

> In part as a necessary implication of [a] broad federal commitment, we have held that tribes have the power to manage the use of [their] territory and resources by both members and nonmembers, to undertake and regulate economic activity within the reservation, and to defray the cost of governmental services by levying taxes. Thus, when a tribe undertakes an enterprise under the authority of federal law, an assertion of State authority must be viewed against any interference with the successful accomplishment of the federal purpose.

Mescalero Apache Tribe, 462 U.S. 324, 335-36 (1983).

The Winnebago Tribe is governed by its Constitution that was ratified in 1934 by the United States under the Indian Reorganization Act. Kitcheyan Decl., Att 1. The Tribe has an extensive civil and criminal code that governs conduct within the Tribe's jurisdiction, including a General Revenue and Tax Code, a Business Regulation and Economic Development Code, and a Limited Liability Company Code. *Id*. at ¶ 6. Furthermore, the Tribe enacted a Settling Participant Brand Listing Act in 2015. *Id*. at ¶ 20. The Tribe passed this Settlement Participant Brand Listing Act to ensure that tobacco-product manufacturers and distributers within the Tribe's jurisdiction are in full compliance with the Universal Tobacco Settlement Agreement. Rock River and HCID are both covered pursuant to the terms of the Act. *Id*. at ¶¶ 17-20.

The Tribe provides extensive governmental services and funds the services exclusively with Tribal and federal contributions. *Id*. at ¶¶ 24, 25. Nebraska's MSA Laws drastically impede the Tribe's interest in self-determination because the Tribe is not able to fully realize its revenue from commerce occurring exclusively within Indian Country because of its tobacco product manufacturing. Instead of funding the extensive list of Reservation programs and services, the

State seeks to force the Tribe to deliver these Tribal gains to an escrow account. This demand impedes the Tribe's ability to self-govern and spend Tribal manufacturing revenue how the Tribal government directs.

3. The Tribe's Interest in Tribal Economic Development Is Significant

In addition to the direct economic burden that falls to the Tribe and the Tribe's self-governance, the Court should also consider the financial impact of the State's MSA Laws have on the Tribe's economic development. The significant revenue that the Tribe would pay to the State of Nebraska for a product wholly manufactured and sold within Indian Country severely limits the Tribe's ability to economically develop and provide essential governmental services both on and off Reservation. Among the government programs the Tribe operates primarily with Tribal funds (including funds that come from Tribally-owned businesses) are a free community and recreational center, an elderly meals program, road maintenance (both on and off Reservation), a fitness center, information technology (IT) services including wireless internet services, and a sex offender registry, all of which serve and are open to the entire community regardless of tribal membership. *Id*. at ¶ 42.

The Tribe also uses its funds innovative ways that promote its self-sufficiency. It has funded Educare Winnebago, the first Educare school to serve Native American children and families. In 2018, the Tribe began to manage the Twelve-Clans Hospital, named honor of the twelve traditional clans of the Winnebago Tribe. The hospital serves an estimated 10,000 Native Americans who live on the Winnebago Reservation and surrounding region. *Id*. at ¶¶ 39, 40

Ho-Chunk Farms, a subsidiary HCI, has purchased the Tribe's homelands back from non-Natives. It engages in culturally significant harvesting of Indian corn and revitalized the traditional annual harvest ritual, which brings the community together. In addition, it is part of larger efforts

for food sovereignty, cultural revitalization, and making the Winnebago land base whole again. *Id*. at ¶ 43.

Revenue generated by HCI flows directly back into the Winnebago community to help provide meaningful employment and housing on the Reservation. *Id*. at 51, Morgan Decl. at 12, Bowen Decl. at 3. For instance, in 2003, HCI broke ground on a 40-acre residential and commercial master plan development to build a brand-new community named Ho-Chunk Village. Kitcheyan Decl. at ¶ 37. HCI is fulfilling the dream of home ownership for tribal members and is fueling a better way of life for everyone in the Winnebago community. *Id*. at ¶ 34.

HCI is not a typical corporation; its priorities are different because it has a deeper mission to accomplish by serving a community. HCI and its subsidiaries invest in a wide variety of youth programs that include both scholarships and summer internships. Furthermore, over 80% of the employees working for HCI on-Reservation are Native American, and nearly 22% of the employees of HCI are veterans. *Id*., Att. 13, Att. 14.

HCI continues to receive national recognition for its progress in community development. Honors include recognition from the U.S. Department of State, the U.S. Department of Commerce, the Harvard School of Business, the White House, and other national organizations. Morgan Decl. at ¶ 30. Furthermore, HCI's economic impact extends beyond the Reservation by offering job opportunities and through real estate and economic investment throughout Nebraska and nearby states. Kitcheyan Decl., Att. 13, Att. 14.

D. State Interests Do Not Outweigh the Tribal and Federal Interests

1. The State Is Not Seeking to Raise Revenues in Exchange for Services Provided to the Tribe

In an application of *Bracker* balancing, the Court should consider the services that the State provides on-Reservation to the Tribe. 448 U.S. at 150. Generally, to justify the imposition of a

state tax on Indian land, a state must show that it "seeks to assess taxes in return for governmental functions it performs for those on whom the taxes fall." *Id*. "The exercise of state authority which imposes additional burdens on a tribal enterprise must ordinarily be justified by functions or services performed by the State in connection with the on-reservation activity." *Mescalero*, 462 U.S. at 336. Importantly, the State must show that its tax is "narrowly tailored" to funding state services in Indian Country and that such services not of a kind that are "typically available to all of its citizens." *Waddell*, 967 F.2d at 1412. In other words, the State "must point to more than its general interest in raising revenues." *Noem*, 938 F.3d at 932 (quoting *Mescalero*, 462 U.S. at 336). In both *Bracker and Ramah*, the Supreme Court held it was "unable to identify any regulatory function or service performed by the State that would justify the assessment of [state] taxes." *Bracker*, 448 U.S. at 148-49.

The present case "is not a case in which the State seeks to assess taxes in return for governmental functions it performs on those on whom the taxes fall." *Noem*, 938 F.3d at 937 (quoting *Bracker*, 448 U.S. at 150). The State of Nebraska performs no substantial or legitimate regulatory function or service to the Tribe or the Tribe's Reservation. Moreover, the only State services of any kind provided to the Tribe or the Tribe's Reservation could only be categorized as sporadic, indirect, or *de minimus*.

2. The State's Interest in Raising General Revenue Cannot Justify the Substantial Burden on Tribal and Federal Interests

This case requires this Court to apply the *Bracker* analysis by balancing federal, state, and tribal interests. Within that analysis is consideration of the effect of the excise tax has on the Tribe's budget and the State's budget and the reimbursement necessary to the State for any State government services. Here, the State has only demonstrated a general interest in raising revenue, and a "generalized interest in raising revenue" is insufficient to justify the State's escrow and tax

laws. *Bracker*, 448 U.S. at 150; *see also*, *Ramah*, 458 U.S. at 845 (a "generalized interest in raising revenue" is not a proper justification for imposition of a tax); *Mescalero*, 462 U.S. at 343 (finding that the state's "general desire to obtain revenues [was] simply inadequate to justify the assertion of [the tax]"); *Noem*, 938 F.3d at 932 ("[A] State seeking to impose a tax on a transaction between a tribe and nonmembers must point to more than its general interest in raising revenues.")

Nebraska applies an excise tax of $6.40 to each carton of cigarettes sold to consumers in Nebraska. Neb. Rev. Stat. § 77-2602(1). The State deposits over 75% of this amount into the State's general fund. § 77-2602(2). The rest of the taxes are directed to special funds, which are mostly completely unrelated to Indian Country and few of which have any clear nexus to the use of tobacco. These funds include: the Nebraska Outdoor Recreation Development Fund, the Health and Human Services Cash Fund, the Building Renewal Allocation Fund, the Municipal Infrastructure Redevelopment Fund, the Nebraska Public Safety Communication System Cash Fund, the Nebraska Health Care Cash Fund, and the Nebraska Capital Construction Fund. § 77-2602(2), (3)(a)-(g), and (4).

Nebraska collected $48 million in cigarette taxes in 2019. AG Opinion, at 10. While the State is likely to concede that cigarettes manufactured on the Winnebago Reservation would have a minimum impact on the State's budget, the State claims that "[i]f Nebraska does not diligently enforce the escrow law . . .or the cigarettes are not escrow compliant, then the State stands to lose most of the $40-million-per-year MSA money." AG Opinion, at 11. However, the 2012 Arbitration Settlement between Nebraska and Big Tobacco specifically excludes a finding of non-compliance as to cigarettes if the State is barred from requiring escrow deposits by order of a court that such deposits are not permitted pursuant to federal Constitutional law. Ducheneaux Decl., Att. 2.

Most importantly, however, it is the State's burden to demonstrate that this supposed lost tax revenue has anything to do with the Winnebago Tribe of Nebraska or its residents. These generalized claims that the State's inability to tax these on-Reservation transactions reduces State tax revenue is simply not enough. The State cannot prove that the Escrow Statute is "narrowly tailored" to State provision of services to Indian Country; it cannot prove any "direct connection" between the Escrow Statute and State services for Tribal members or Reservation residents. *Waddell*, 967 F.2d at 1412; *see also Noem*, 938 F.3d at 932.

E. The State's Minimal Interests in Extracting Money for a State General Fund Do Not Outweigh the Considerable Tribal and Federal Interests Under Consideration

Under a *Bracker* analysis, the State's interest in imposing its MSA Laws do not outweigh the Tribal and federal interests in promoting self-sufficiency and self-governance, protecting Tribal manufacturing as a means of Tribal revenue and employment, and securing economic development. This Court should consider all of the *Bracker* factors present here: (1) a strong historical backdrop of tribal sovereignty in Indian commerce; (2) the federal regulatory scheme related to Indian commerce and the manufacture and sale of cigarettes within Indian Country; (3) strong federal interests in the regulation of commerce conducted wholly within Indian Country and in the promotion of Reservation economic development in support of tribal self-sufficiency and strong tribal government; (4) the Tribe's own regulation of the manufacture and sale of cigarettes; (5) the economic burden of the State's MSA Laws fall directly on the Tribe; (6) the State's MSA Laws place a substantial burden on the Tribe's ability to generate gaming revenue and provide essential governmental programs; (7) there is no nexus between the services and regulations funded by the State's general or special funds and provided to the Tribe; (8) any State services provided to the Tribe or Tribal members are not related to the sale and production of

tobacco products on the Reservation and are minimal; and (9) the State provides few, if any, general fund services to the Tribe, and as a result, can only demonstrate a general interest in raising revenue. The State's interests are far from sufficient to justify the imposition of its MSA Laws where consideration is made of the significant federal and tribal interests at stake. Thus, under the *Bracker* balancing test, this Court should find Nebraska's MSA Laws are preempted by federal law.

III. STATE TAX ON ROCK RIVER PRODUCTS SOLD IN INDIAN COUNTRY IS WHOLLY PRECLUDED BECAUSE ROCK RIVER ARE A RESERVATION-BASED, VALUE-ADDED PRODUCT IN WHICH THE TRIBE HAS AS SUBSTANTIAL INTEREST

The U.S. Supreme Court in *Cabazon,* 480 U.S. 202, held that where a tribe "adds value" to an activity or product in Indian Country, the state is preempted from either regulating or taxing that activity. This concept derives from the Court's decision in in which it affirmed the application of a state tax on cigarettes sold on the reservation because "the value marketed by the smoke shops to persons coming from outside is not generated on the reservations by activities in which the Tribes have a significant interest." *Colville,* 447 U.S. at 155. Put differently, as the Eighth Circuit recently explained in *Flandreau Santee Sioux Tribe v. Noem*, and as recently adopted by Defendant Douglas Peterson and his counsel in this litigation Daniel Muelleman, where "[t]he value of Indian sales to nonmembers was [] generated by tribal activities . . . [that are more than just] the exemption of such sales from state tax," then principles of federal Indian law preempt state tax of sales of that value-added product to nonmembers. *See* 938 F.3d at 933; *see also* AG Opinion at 7.

Although the notion of value added on the reservation may factor in other preemption analyses, like *Bracker* balancing and in the Indian Trader Statutes, it represents an independent basis for finding that state taxation is preempted. First, the U.S. Supreme Court considered the question standing alone in *Colville*, a case that was decided mere days apart from *Bracker* and

during the same term. *See generally Colville*, 447 U.S. 134 (decided June 10, 1980); *Bracker*, 448 U.S. 136 (decided June 27, 1980). The U.S. Supreme Court likewise considered the question standing alone in *Cabazon*, which was decided seven years after *Bracker*. *Cabazon*, 480 U.S. at 219 (decided February 25, 1987).

It is not a standalone analysis by accident. Unlike *Bracker* balancing and analyzing the impact of a federal statutory scheme like the Indian Trader Statutes, the *Colville-Cabazon* value-added analysis is a **tribal self-government, sovereignty, and Indian Commerce Clause principle**, **not a balancing principle dependent on state or federal interests**. *See Colville*, 447 U.S. at 154-55 (discussing value added as a self-government principle emanating from "activities in which the Tribes have a significant interest"); *Cabazon*, 480 U.S. at 219-20 (discussing value added as a self-government principle related to tribal services, tribal employment, and "substantial [tribal] interest"); *see also* Bethany R. Berger, Williams v. Lee *and the Debate Over Indian Equality*, 109 Mich. L. Rev. 1463, 1521 n.492 (2011) (observing that *Colville's* "valued-added test['s] . . . lack of relation to anything having to do with congressional intent or statutory language . . . suggests that the test is an expression of the . . . self-government principle rather than of preemption.").

The value-added test is factually and analytically nearly identical to the question before the U.S. Supreme Court in *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164 (1973), in which the Court considered whether a state could "impose its personal income tax on a reservation Indian whose entire income derives from reservation sources." *Id.* at 165. As with the value-added test, the question in *McClanahan* was whether reservation-based, Indian-created value can be regulated by the state. In *McClanahan*, the analysis was neither a preemption nor a balancing principle. Instead, it was an independent, self-contained analysis emanating from pure tribal self-

government, tribal sovereignty, and Constitutional principles: "'Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.'" *Id.* at 172 (quoting *Williams v. Lee*, 358 U.S. 217, 220 (1959)). As the personal income in *McClanahan* had been generated on the reservation by an Indian under the jurisdiction of the tribe, the state lacked jurisdiction to impose the tax. The tax "infringed on the right of reservation Indians to make their own laws and be ruled by them." *Id.* at 181.

The same is true of the value-added test. Where the value is generated on the reservation by an Indian or tribe under tribal jurisdiction, states lack jurisdiction to impose a tax upon that activity as the tax would "infringe[] upon the right of reservation Indians to make their own laws and be ruled by them." *Id.* Standing alone, that is sufficient to bar states from imposing their regulations. Further, like the categorical bar discussed in Part I *supra*, as a function of tribal sovereignty, only Congress can abrogate it. *Id.* at 172. Hence, the state bears the burden of proving that its jurisdiction exists in spite of the value-added principle. *See Amerind Risk Mgmt.*, 633 F.3d at 685-86.

A. Value-Added Is an Expansive Principle that Plainly Includes Manufacturing

Although the courts have not often explicated "value-added" since *Colville* and *Cabazon*, the two cases clearly set the factual stage. In *Colville*, Indian tribes in the State of Washington challenged the state's imposition of excise tax on on-reservation sales of cigarettes to nonmembers. *Colville*, 447 U.S. at 139. The cigarettes the tribes sold in *Colville* had been purchased from out-of-state dealers and imported onto the reservation. *Id.* at 144. In holding that such sales did not preempt the state tax, the court considered the nature of the value that the tribes were marketing to the consumer. *Id.* at 155. The tribes were selling cigarettes made by non-Indians, off reservation

that could be purchased anywhere else. *See id*. If consumers purchased them elsewhere, they would subject to state tax. *See id.* However, cigarettes purchased at the tribal smoke shops in *Colville* were subject to tribal tax, which was significantly lower. *See id.* The value being marketed to consumers was simply the lower cost of otherwise identical cigarettes. *Id.* And that value derived merely from the difference between the state tax and the lower tribal tax. As the Court observed:

> What the smokeshops offer these customers, and what is not available elsewhere, is **solely an exemption from state taxation**. The Tribes assert the power to create such exemptions by imposing their own taxes or otherwise earning revenues by participating in the reservation enterprises. If this assertion were accepted, the Tribes could impose a nominal tax and open chains of discount stores at reservation borders, selling goods of all descriptions at deep discounts and drawing customers from surrounding areas. We do not believe that principles of federal Indian law, whether stated in terms of pre-emption, tribal self-government, or otherwise, authorize Indian tribes thus to market an exemption from state taxation to persons who would normally do their business elsewhere.

Id. (emphasis added).

In the 40 years since *Colville*, this principle has not changed. Value-added is not "importing a finished product and reselling it to residents and visitors." *Chemhuevi Indian Tribe v. Cal. State Bd. of Equalization*, 800 F.2d 1466, 1499 (9th Cir. 1987) (finding that state tax was not preempted where the tribe was merely reselling cigarettes manufactured wholly off-reservation as in *Colville*); *see also Salt River Maricopa-Pima Indian Cmty. v. Arizona*, 50 F.3d 734, 738 (9th Cir. 1995) (holding that value-added is not "importing non-Indian products onto the reservation for resale to non-Indians" by the operation of a tribal shopping mall populated by non-Indian tenants). Per *Colville*, state tax is preempted when tribes market value that is "generated on the reservations by activities in which the Tribes have a significant interest." *Id.*

The Court applied the value-added principle in *California v. Cabazon Band of Mission Indians* just a few years later. *Cabazon* is the seminal case that affirmed the right of tribes to offer

on-reservation gaming free of either state regulation or state tax. In *Cabazon*, California sought to draw a parallel between the tribes' cigarette importation in *Colville* and the Cabazon Band's and the Morongo Band's on-reservation gaming operations, arguing that the tribes were merely marketing an exemption from state gaming laws. *Cabazon*, 480 U.S. at 219. The Court disagreed. The Cabazon Band was "not merely importing a product onto the reservation[] for immediate resale to non-Indians." *Id.* Rather, the tribe had built a modern gaming facility, invested in recreational opportunities for patrons, and provided jobs for tribal members on the reservation. *Id.* State regulation of the gaming enterprise was preempted because "the Cabazon and Morongo Bands [had] generat[ed] value on the reservations through activities in which they [had] a substantial interest." *Id.*

Interestingly, courts that have further explicated value added since *Cabazon* have largely done so in abstract, service-oriented industries with portions of the activity occurring off reservation, confirming that adding value is not merely making a thing or manipulating a thing on the reservation. In *Cabazon Band of Mission Indians v. Wilson*, the Ninth Circuit considered whether a tribe generated value on the reservation at an on-reservation horse betting parlor where the live racing occurred off reservation and was operated by non-Indians. 37 F.3d 430, 435 (9th Cir. 1994). The Ninth Circuit held that the tribe had generated value on the reservation sufficient to preempt state taxation as the tribe had invested significant funds and effort into the operation. "It is not necessary . . . that the entire value of the on-reservation activity come from within the reservation's borders. It is sufficient that the [tribe has] made a substantial investment in the [activity] and are not merely serving as a conduit for the products of others." *Id.* (citing *Cabazon*, 480 U.S. at 219); *see also Waddell*, 967 F.2d at 1410-11 (holding that a tribe generated value on the reservation when it leased land to a non-tribal entity for a concert venue, noting that the tribe's

ownership of the property and improvements was "close involvement in the provision of quality entertainment services to the public on its lands").

The courts' expansive view of "value-added" does not arise in a vacuum. Rather it is an explicit function of federal Indian policy that has guided the United States and the federal courts for the past 50 years. Since the mid-twentieth century, federal Indian policy has shifted from a dependency model to a self-determination model that promotes tribal participation in modern mainstream commerce to generate revenue that supports tribal governments. As Justice Sotomayor commented in *Michigan v. Bay Mills Indian Community*, "[t]ribes face a number of barriers to raising revenues in traditional ways. If Tribes are ever to become more self-sufficient and fund a more substantial portion of their own governmental functions, commercial enterprises will likely be a central means of achieving that goal." 570 U.S. 782, 806 (2014) (Sotomayor, J. concurring).

To that end, Congress has enacted numerous laws over the past 50 years that urge tribes and tribal business enterprises into modern, mainstream commerce. *E.g.*, Native American Business Development, Trade, Promotion, and Tourism Act, 25 U.S.C. § 4301 (encouraging tribes to engage the "the resources of private market[,] adequate capital[,] and technical expertise" in service of economic development, including emphasizing that tribal interact with off-reservation markets and importing and exporting goods in and of Indian Country and the United States); Indian Gaming Regulatory Act, 25 U.S.C. § 2702 (explicitly encouraging tribes to engaging in modern gaming operations "as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments).

In a separate legal context that is illustrative here, this federal commitment to facilitating tribal participation in modern mainstream markets is also the reason that the U.S. Supreme Court

has rejected efforts to limit the scope of tribal sovereign immunity to on-reservation, non-commercial conduct. *See, e.g., Bay Mills Indian Cmty.*, 570 U.S. 782; *Kiowa Tribe of Okla. v. Mfr'ing Techs., Inc.*, 523 U.S. 751 (1998); *Oka Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505 (1991). The Court emphasized in *Citizen Band Potawatomi* that modern federal legal principles governing how tribes interact with states reflects "Congress' desire to promote the goal of Indian self-government, including its overriding goal of encouraging tribal self-sufficiency and economic development." 498 U.S. at 510.

In short, the federal Indian policy that motivates the value-added principle is one that encourages modern, complex, abstract commercial conduct that does not require total vertical integration of any particular on-reservation value-adding process. Even so, there may be some mystery surrounding what constitutes added value in the federal Indian law context, perhaps arising from a myopic, even racially biased, view of how tribes and tribal entities should operate in the commercial sphere.

In the sovereign immunity context, for instance, some jurists have expressed skepticism concerning tribal entities' right to engage in modern commercial conduct simply because tribes have become too sophisticated and successful. *See Bay Mills Indian Cmty.*, 572 U.S. at 822-23 (Thomas, J. dissenting). In *Bay Mills*, the minority disapproved of tribal commerce that had become too lucrative and had expanded from traditional land-based tribal economic development, like tourism and agriculture, to mainstream economic activities, "including, manufacturing, retail, banking, construction, energy telecommunications and more." *Id.* (internal citations omitted). Justice Thomas opined, wrongly and without support, that such tribal commercial conduct allegedly has exceeded the boundaries of what is appropriate to protect tribal self-government and further highlighted cigarettes, prescription drugs, financing, greeting cards, national banks, cement

plants, ski resorts, and hotels. *Id.* The dissent specifically disapprovingly referenced the parent company of the Plaintiffs here as well as the precise commercial conduct at issue in this litigation: "Ho-Chunk, Inc., a tribal corporation of the Winnebago Tribe of Nebraska operates hotels in Nebraska and Iowa, numerous retail grocery and convenience stores, a tobacco and gasoline distribution company, and a temporary labor service provider." *Id.* (citing The Harvard Project on American Indian Economic Development, The State of the Native Nations124 (2008)). In the eight years since the Court decided *Bay Mills*, the rather offensive minority opinion that tribes and tribal entities must conduct commercial activity without being too financially successful and within primitive, traditional tribal industries in order to be protected by federal legal principles that derive from self-government, has not been adopted by either the U.S. Supreme Court or any other lower federal court.

Properly rejecting this anti-Indian view of tribal commerce, leaves open the question of what can constitute "value-added" in the Indian context in the absence of a wealth of judicial guidance on this issue since *Colville* and *Cabazon*. Of course, "value-added" is not a concept unique to Indian Country, and the record is rich with examples from other contexts and industries. Indeed, the U.S. Supreme Court has had occasion to define valued added in *Trinova Corp. v. Mich. Dep't of Treasury*, 498 U.S. 358 (1991):

> Value added is an economic concept. Value added is defined as the increase in the value of goods and services brought about by whatever a business does to them between the time of purchase and the time of sale. The value a business adds to a single product is the difference between the value of the product at sale and cost of goods purchased from other businesses that went into the product.

Id. at 362. Using this definition of value added, various industries have taken advantage of tax, importation, and other benefits accruing to companies that manipulate products in various ways. Value added distributors ("VAD") and value added resellers ("VAR") are standard in industries

such as computer hardware, agriculture, and others. *See e.g.*, *Scherbert v. Comm'r of IRS*, 453 F.3d 987, 988-89 (8th Cir. 2006) (addressing value added in processing and marketing corn); *In re: Intel Corp. Microprocessor Antitrust Litig.*, No. 05-1717, 2014 WL 660194173 at *16 (Aug. 6, 2014) (describing tech industry VARs who purchase component parts and software, aggregate them, and sell them down the retail chain); 13 C.F.R. § 121.201 (describing value added process in tech industry for purposes of Small Business Administration in government contracting as "configuration consulting and design, systems integration, installation of multi-vendor computer equipment, customization of hardware or software, training, product technical support, maintenance, and end user support"); 15 C.F.R. § 995.4 (defining a value added distributor for the National Oceanographic and Atmospheric Administration as "a person or company that redistributes a NOAA ENC with additional data included or in a different format to create newly derived products used by end users"); 7 C.F.R. § 4284.902 (defining "value added agriculture product" within USDA as one that has undergone change in physical state in a manner that enhances the value of the agricultural commodity).

These sophisticated, abstract value-added scenarios in the non-Indian context contemplate much less investment of time, activity, or resources than manufacturing a product from raw materials to finished product. Value is added to these products by such things as anticipating third-party demand, interacting with disparate producers and placing orders, importing disparate products, aggregating disparate products without assembly, quality control, and filling orders from retailers. Neither the courts nor the federal government have required VADs or VARs to create a product from scratch, including producing the very raw materials from which the product is made.

It is clear, therefore, that Rock River's process of manufacturing a cigarette from loose tobacco through packaging in cartons to on-Reservation retail sale is **more than sufficient** to

constitute value added for any purpose. Indeed, both the United States and various states have acknowledged that manufacturing a product on the reservation or subjecting it to a process on the reservation that otherwise adds value to the product satisfies *Cabazon's* value-added model.

Specifically, as to cigarettes, the U.S. Department of Justice long has recognized that a manufacturing process is a "value added" process and states are preempted from taxing items manufactured and sold in Indian Country. Letter from Mark C. Van Norman, Department of Justice, Office of Tribal Justice, to Barry S. Orlow, Associate Chief Counsel ATF, dated October 8, 1997 ("DOJ-OTJ Letter"), Ducheneaux Decl., Att. 3. As the U.S. Department of Justice noted: "based on the federal policies promoting tribal self-determination and economic self-sufficiency, where Indian tribes generate value on their reservations, the goods or services provided to non-Indians are generally exempt from state regulation or taxation." DOJ-OTJ Letter at 2 (citing *Mescalero Apache Tribe*, 462 U.S. at 340; *Cabazon*, 480 U.S. at 219-220.) Significantly, in the DOJ-OTJ letter, the U.S. Department of Justice specifically considered whether federal law permitted the Defendants in this case – the State of Nebraska – to tax sales of cigarettes manufactured and sold by the Omaha Indian Tribe on the Omaha reservation to both Indians and non-Indians. **The answer was no.** "[W]here the Tribe manufactures cigarettes for resale to Indian and non-Indian consumers at retail outlets on its reservation, it is fairly clear that the State [of Nebraska] may not tax or regulate the Tribe's cigarette business within tribal territory." DOJ-OTJ Letter at 2-3.

Even the Defendants in this case – the State of Nebraska – have long recognized this important principle, as memorialized in an in-force tax compact between the State and the Winnebago Tribe of Nebraska. Agreement for the Collection and Dissemination of Motor Fuels Taxes between the State of Nebraska and the Winnebago Tribe of Nebraska, dated Jan. 16, 2002

("State-Tribal Gas Compact"), Ducheneaux Decl., Att. 4. This State-Tribal Gas Compact was entered into by Defendant Tony Fulton's predecessor Mary Jane Egr and is enforced by Defendant Fulton today. Kitcheyan Decl. at ¶ 22. In the State-Tribal Gas Compact, the State of Nebraska agrees that "[a]ny gasoline or motor fuels sold by the Tribe[, including tribally-charted corporations of entities wholly-owned by the Tribe,] within the boundaries of the Reservation shall be exempt from the imposition of the tax on these products as levied by the laws of the State of Nebraska." State-Tribal Gas Compact at 4. The agreed exemption flows from the premise that the Tribe and Tribally-owned gas retailers (also HCI subsidiaries) sell gasoline blends **manufactured on the Reservation** in a blending and retail sales process that employs Tribal members, establishing a "a "substantial [tribal] interest[] in the blending, distribution, and retail sales of blended fuels" such that state tax to **both members and nonmembers** is properly exempted under federal law. *Id.* at p. 2.

B. Cigarettes Manufactured by Rock River Are Wholly Exempt from State Taxation as Value-Added Products Manufactured on the Winnebago Indian Reservation

As a tribally-owned and operated cigarette manufacturer, Rock River is nearly unique in entire world.[8] As discussed in this section, Rock River engages in a comprehensive process that takes loose tobacco and manufactures it into a finished product. The Plaintiffs have attached an illustrative video accompanied by a descriptive declaration, that demonstrates step-by-step how this manufacturing process adds value on the Reservation and have done so via restricted access as it contains trade secret material. Declaration of Adam Bowen II ("Bowen Decl. II"), Att. 1.

[8] On information and belief, there is only one other tribally-owned tobacco product manufacturer in the world: Skookum Creek Tobacco, owned by the Squaxin Island Tribe in Washington State. Skookum Creek Tobacco, http://islandenterprisesinc.com/subsidiaries/skookum-creek-tobacco/ (last visited Sep. 24, 2022).

Rock River is a federally licensed cigarette manufacturer. Rock River, a wholly-owned subsidiary of HCI, which is wholly owned by the Winnebago Tribe of Nebraska, invested $5,000,000 in the construction of the manufacturing plant that makes Rock River cigarettes. Morgan Decl. at ¶ 21. Rock River purchased and maintains rights to a proprietary tobacco blend that it uses in its cigarettes, which is licensed by the FDA. Bowen Decl., at ¶ 20. Rock River owns trademarks and other intellectual property in Silver Cloud and FireDance brand cigarettes. *Id*. at ¶ 20 HCI subsidiary Blue Earth Marketing created and designed branding and imaging for those products. *Id*. At its manufacturing plant on the Winnebago Indian Reservation, Rock River employees, most of whom are enrolled tribal members *Id*. at ¶ 26, process this loose proprietary tobacco blend into individual cigarettes to which filters are attached. Bowen Decl. II, Att. 1. These cigarettes are packed into packages of twenty cigarettes a piece, packed into cartons of twenty packs a piece, and then packed into boxes for shipment to distributors or retailers. *Id*. The only distributor that sells Rock River cigarettes to Nebraska retailers is Rock River's sister subsidiary, HCID, and they do so exclusively within Indian Country. Morgan Decl. at ¶ 19-55.

Rock River cigarettes headed to HCID are delivered by the pallet-load to HCID's separate facility, where they are stamped with prepaid Winnebago Tribal tax stamps or prepaid Native American tax stamps for sale on the Omaha Reservation before they are shipped to individual tribal retailers on either the Winnebago Reservation or the Omaha Reservation. *Id.* Bowen Decl. at ¶¶40-42, Bowen Decl. II, Att. 1. In total, HCID ships to eight Nebraska retailers, all of which are owned by HCI and the Winnebago Tribe of Nebraska. Morgan Decl at ¶¶ 34-35, 41-55. Rock River estimates that the increase in the value of goods and services brought about by this process from the raw materials to the time of sale from Rock River to HCID is approximately $3.7654 for the raw materials, Bowen Decl. at ¶ 23, with combined costs for labor, overhead, utilities, and

shared expenses to be $1.6161 per carton of cigarettes. Bowen Decl. at ¶ 27. Various federal and freight taxes cost an additional $10.86235 per carton. Bowen Decl at ¶ 29. *See Trinova Corp.*, 498 U.S. at 362. Rock River's cigarette manufacturing process is fully funded by the Winnebago Tribe of Nebraska. This process takes raw material and turns it into a saleable product on Tribal property, using a labor force made up of almost all local employees and many tribal members), with all value adding processes occurring on the Reservation. Rock River's cigarette manufacturing process exceeds any value adding process in the many federal cases evaluating that question. The State simply cannot meet its burden of proving its jurisdiction to regulate and tax exists in light of the value-added principle.

IV. THE INDIAN TRADER STATUTES PREEMPT APPLICATION OF STATE TAX AND REGULATION ON ROCK RIVER'S AND HCID'S OPERATIONS

The Indian Trader Statutes preempt state tax in Indian Country.[9] In 1790, Congress enacted what is popularly referred to as the Indian Trader States, now codified at 25 U.S.C. §§ 261-64. An Act to Regulate Trade and Intercourse with the Indian Tribes, ch. 33 § 4, 1 Stat. 137, 138 (1790). The profound, fundamental federal character of trade with Indians in Indian Country is evidenced by the fact that the Indian Trader Statutes were among the very first laws passed by Congress in the very first years of the Republic. *See id.*; *see also* Scott A. Taylor, *A Judicial Framework for Applying Supreme Court Jurisprudence to the State Income Taxation of Indian Traders*, 2007 MICH. ST. L. REV. 841, 851. In their substance, moreover, the Indian Trader Statutes emphasize the overarching power of the federal government in Indian trade, assigning to the Commissioner

[9] Although the general rule in the Eighth Circuit is that the party asserting federal preemption bears the burden of proof (*e.g., Williams v. Nat'l Football League*, 582 F.3d 868, 880 (8th Cir. 2009)), the instant matter implicates the special case of the State seeking exception to the presumption that its tax and regulations do not apply in Indian Country, which imposes the burden on the State (*see Waddell*, 967 F.2d at 1421).

of Indian Affairs[10] the "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[.]" 25 U.S.C. §261 (emphasis added). Congress has provided that all "trade with the Indians on any Indian reservation" is permitted only "under such rules and regulations as the Commissioner of Indian Affairs may prescribe for the protection of said Indians." 25 U.S.C. § 262. Congress also delegated to the President the power to prohibit trade in Indian Country, further federalizing Indian trade. 25 U.S.C. § 263. Federal regulations define trading with Indians as, "buying, selling, bartering, renting, leasing, permitting and any other transaction involving the acquisition of property or services." 25 CFR §140.5(a)(6). The Bureau of Indian Affairs has also provided for the licensing of these rootless Indian traders traveling the roads through Indian country as "itinerant peddlers." 25 C.F.R. § 140.9(b). These rules were created under the statutory duty to proscribe rules and regulations, "for the protection of said Indians." 25 U.S.C. § 262.

Traditionally, non-Indian "Indian Traders" were licensed under these statutes to trade with Indians at established outposts. Existing case law generally addresses the old trading model by which Indian traders imported products, such as tobacco, and sold them to both Indians and non-Indians alike. These Indian traders found themselves under some reasonable state regulations designed to collect lawful taxes for these transactions between Indian traders and non-Indians. *Dep't of Taxation and Fin. of N.Y. v. Milhelm*, 512 U.S. 61, 75 (1994). But times have changed.

Now, the Winnebago Tribe is manufactures, distributes, and sells its own goods inside Indian Country. As explained above, the Tribe manufactures, distributes, and sells cigarettes

[10] Beginning in the 19th century, the federal official responsible for regulating commerce with tribes was the Commissioner of Indian Affairs. *See* Bureau of Indian Affairs, *History of BIA*, https://www.bia.gov/bia (last visited Sep. 21, 2022). In 1977, the United States established the Assistant Secretary of Indian Affairs within the Interior Department as the official responsible for regulating commerce with tribes in the Executive Branch, however, many statutes still refer to the Commissioner. *See id.*

inside Indian Country through wholly-owned subsidiaries of HCI, the Tribe's development corporation. The Indians are now manufacturing goods and selling them at their own retail outlets. Indian traders are still visiting the Winnebago Reservation, but this time as itinerate traders, purchasing Indian goods at Indian outposts. Unlike *Milhelm*, as to Rock River products, there are only sales of Indian manufactured goods from Indians to Indian Traders, and no sales to non-Indians by Indian Traders for the State to regulate. While the State may have a legitimate interest in regulating trade between non-Indians inside Indian Country, the transactions at Winnebago-owned retailers, including the Pony Express, Heritage Express, and Casino locations ("Winnebago-Owned Retailers") are always between Indians and the Indian Traders that traveled to Winnebago-Owned Retailers to buy Indian manufactured and distributed goods. Morgan Decl. at ¶ 41-55.

Under the Indian Commerce Clause, states "have been divested of virtually all authority over Indian commerce and Indian tribes." *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 62 (1996). "[T]he regulation of Indian commerce . . . is under the exclusive control of the Federal Government [and] the Constitution vests in Congress complete law-making authority over [Indian commerce]." *Id*. at 72. The Indian Trader Statutes stand as "comprehensive federal regulation" of "persons who wish[] to trade with Indians," in the form of "sweeping" statutes "permitting the Indians largely to govern themselves, free from state interference." *Warren Trading Post Co.*, 380 U.S. at 686-88. The Indian Trader Statutes preempt state regulation even where the non-Indian trader has no business location on the reservation, and even where it does not possess a federal Indian Trader license. *Central Mach. Co. v. Ariz. State Tax Comm'n*, 448 U.S. 160, 165-66 (1980). "Until Congress repeals or amends the Indian trader statutes . . . we must give them a sweep as broad as their language . . . and interpret them in light of the intent of the Congress that enacted

them." *Id*. at 166. As a rule, a transaction is governed by the Indian Trader Statutes, and federal law preempts the state regulation of the transaction, whenever a trade is made with Indians on a reservation. *Id.* at 165. The Court explained that it is not the federal government's "administration" of the Indian Trader Statutes, but the fact of their "existence . . . that pre-empts the field of transactions with Indians occurring on reservations." *Id.* In addition to the explicit statutory language that the Indian Trader Statutes are for the benefit of said Indians; the Supreme Court held the "evident congressional purpose" of the Indian Trader Statutes is "ensuring 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 Trading Post*, 380 U.S. at 691.

The Winnebago Tribe of Nebraska and Iowa has not always been of Nebraska and Iowa. Driven from their homeland in Wisconsin and Minnesota, the United States removed the Tribe to its current home on land granted by the Omaha Tribe of Nebraska in 1865 from the Omaha's existing reservation. *Treaty Between the United States and Winnebago*, 14 Stat., 671. (March 8, 1865) Consequently, even though the Treaty of 1865 that established the current Winnebago Reservation was ratified after the incorporation of the Territory of Nebraska, the new Reservation was established inside **existing** Indian Country on lands generously provided by the Omaha Tribe. Further, the *Kansas-Nebraska Act* of May 30, 1854, explicitly protects Indians from interference of the Territory and eventual State of Nebraska within Indian Country.

> [N]othing in this act shall be construed to impair the rights of persons or property now pertaining to the Indians in said Territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to include any territory which, by treaty with any Indian tribe, is not, without the consent of said tribe, to be included within the territorial or jurisdiction of any State or Territory; but all such territory shall be excepted out of the boundaries, and constitute no part of the Territory of Nebraska, until such tribe shall signify their assent to the President of the United States to be included within the said Territory

> of Nebraska, or to affect the authority of the government of the United States to make any regulations respecting such Indians, their lands, property, or other rights, by treaty, law, or otherwise, which it would have been competent to the government to make if this act had never passed.

Act to Organize the Territories of Nebraska and Kansas, 10 Stat. 277-78 (1854). *The Kansas-Nebraska Act* clearly excludes Indian territory from state jurisdiction and provides for the authority of the federal government to continue regulating commerce with Indians inside such Indian territory.

In the last 50 years, federal policy has moved to encourage greater self-governance and economic development in Indian Country. *The Indian Self-Determination and Education Assistance Act* expressed this federal policy favoring tribal control of Indian affairs. Pub. L. 93-638 (Jan. 4, 1975), 88 Stat. 2203, 25 U.S.C. § 5301 et seq.

> In accordance with this policy, the United States is committed to supporting and assisting Indian tribes in the development of strong and stable tribal governments, capable of administering quality programs and developing the economies of their respective communities. 25 U.S.C. § 5302(b).

The United States explicitly has made the Indian Trader Statutes part of this tribal self-determination movement. Specifically, in 2016, when seeking comments on updating Indian Trader regulations, the Bureau of Indian Affairs expressly committed itself to adopting new regulations "consistent with the Federal policies of Tribal self-determination and self-governance." 81 Fed. Reg. 89015, 89016 (Dec. 9, 2016). "When on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest." *Bracker,* 448 U.S. at 145. Neither the Tribe nor the federal government has surrendered their powers over trade and commerce in Indian Country to the Territory and later State of Nebraska.

The Winnebago Tribe has embraced the dual federal policies favoring self-government and

economic development, creating a set of circumstances that is squarely contemplated by the Indian Trader Statutes, therefore falling within the area preempted by federal law. This federal preemption leaves no room for additional burdens of State regulations. In 1994 the Winnebago Tribe founded HCI with the intention of diversifying the struggling Tribal economy. LGM Decl. at ¶ 3. In 1996, HCI created HCI Winnebago, Inc. as a wholly-owned subsidiary to do business as the first Pony Express convenience store, providing convenient consumer retail options for Reservation residents and traveling Indian Traders with its first location in Winnebago, Nebraska. *Id*. at ¶ 43. In 1997, HCI created the wholly-owned subsidiary, HCI Heritage Express, Inc., to open additional convenience stores throughout Winnebago and Omaha territory. *Id*. at ¶44. The Tribe created HCID, the tobacco wholesaler, in 1999 to foster economic development of the Tribe and to create economic opportunities for Tribal members. *Id*. at 32. The Tribe created Rock River in 2009, a federally-licensed cigarette manufacturer with its manufacturing facilities located on the Tribe's Reservation, to provide additional jobs, revenue, and economic opportunities for the Winnebago people. *Id*. at ¶ 20. Rock River products area also sold at the Tribe's three casinos. *Id*. at 55.

As part of this economic development and diversification, the Winnebago Tribe has accepted the responsibility and challenges of increased self-government. Title 10, Article 6 of the Winnebago Tribal Code provides for regulation and taxation of tobacco products sold and manufactured within the Reservation, including the application of Tribal tax stamps. Winnebago Tribal Tax Code 10-608. Kitcheyan Decl. at ¶ 17, Att. 9. The Tribe imposes a cigarette tax of $0.05 per pack of cigarettes on locally manufactured and sold tobacco products, including Rock River product sold at Pony Express. Winnebago Tribal Tax Code 10-601. *Id.* The Tribe collected $122,658.00 in tribal cigarette taxes were collected in 2017 alone. *Id*. at 21.

Rock River, HCID, and Winnebago-Owned Retailers are all separate corporate entities and wholly-owned subsidiaries of HCI, a corporation wholly owned by the Winnebago Tribe, and endowed with the tribal identity of the Tribe itself. Rock River manufactures product in Indian Country; HCID serves as the wholesale distributor for those Indian goods; the Winnebago-Owned Retailers are the retail outlet for those goods; but all are the Winnebago Tribe. Thus, Rock River products are Indian goods manufactured on Indian lands and sold by Indians to Indian traders in Indian country.

Nebraska's Escrow and Directory Statutes the exact kind of interference in internal Indian affairs prohibited by the Indian Commerce Clause and preempted by federal laws promoting Indian political and economic self-sufficiency. "When on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest." *Bracker,* 448 U.S. at 145. The production and distribution, entirely between wholly-owned companies of the Winnebago Tribe, of Indian manufactured goods, is exactly the type of on-reservation conduct where the state is preempted from acting. The Indian Trader Statutes preempt the remaining portions of the regulations the state is seeking to impose upon the Tribe.

The Bureau of Indian Affairs defines trade with Indians to include, "buying, selling, bartering, renting, leasing, permitting and any other transaction involving the acquisition of property or services." 25 C.F.R. §140.5(a)(6). Nonmembers purchasing Rock River products at Winnebago-Owned Retailers are engaged in trade with Indians, buying Indian-produced products on an Indian reservation. These nonmembers are Indian Traders engaged in commerce with the Winnebago Tribe, subject to federal laws in these transactions. The State is without authority to regulate the internal transactions between HCI subsidiaries and the ultimate sale of the Indian

manufactured goods to Indian Traders.

Federal law has consistently set commerce in Indian-produced goods between Indian Tribes and Indian Traders beyond the regulatory reach of Nebraska. The Indian Commerce Clause, Art. I, Sec 8 of the U.S. Constitution, places the federal government squarely in charge of regulating commerce "with the Indian Tribes[.]" With the *Kansas-Nebraska Act*, even as the territory of Nebraska was created, the federal government reasserted the intention to retain this power as "if this act had never passed." 10 Stat. 278 (1854). Congress explicitly retained control over this power, **excluding Indian Country from Nebraska's regulatory jurisdiction**, and delegated the details of regulation to the Executive Branch with the Indian Trader Statutes, providing that all "trade with the Indians on any Indian reservation" is permitted only "under such rules and regulations as the Commissioner of Indian Affairs may prescribe for the protection of said Indians." 25 U.S.C. § 262.

As Congress moved to further the policies of Tribal self-government and economic development, the Commissioner of Indian Affairs has withdrawn, in practice, the policy of licensing individual Indian Traders in favor of tribes regulating their trade with Indian Traders. As the Supreme Court has explained, it is not the federal government's "administration" of the Indian Trader Statutes, but the fact of their "existence . . . that pre-empts the field of transactions with Indians occurring on reservations." *Central Mach.*, 448 U.S. at 165. The Supreme Court held the "evident congressional purpose" of the Indian Trader Statutes is "ensuring 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 Trading Post*, 380 U.S. at 691. "[S]tatutes passed for the benefit of . . . Indian tribes are to be liberally construed, doubtful expressions being resolved in favor of the Indians." *Bryan v. Itasca County*, 426 U.S.

373, 392 (1976). The Supreme Court has historically held that the Indian Trader Statutes "'contemplate the Indian territory as completely separated from that of the states; and provide that all intercourse with them shall be carried on exclusively by the government of the union.'" *Warren Trading Post*, 380 U.S. at 688 (quoting *Worcester*, 31 U.S. at 557).

Traders foreign to the Winnebago Reservation travel into Indian Country to purchase Winnebago-manufactured goods. These Indian Traders are not to be additionally burdened for trading with Indians and neither should the Indians trading in goods entirely manufactured and distributed within Indian Country. *The Kansas—Nebraska Act* sets Indian manufacturing in Indian Country entirely outside the jurisdiction of the State. Further, the Indian Trader Statutes along with the Indian Self-Determination and Education Assistance Act, give force to the Indian Commerce Clause and preempt **any** state regulation of manufacturing, distribution, and retail sale of goods entirely produced, distributed, and sold within Indian Country outside the jurisdiction of the territory and state of Nebraska. The only reasonable conclusion is that *the Kansas-Nebraska Act*, the Indian Commerce Clause, the Indian Trader Statutes, the Indian Self-Determination and Education Assistance Act, and Supreme Court precedents establish that the field of the manufacture and sale of Indian produced goods has been entirely preempted by federal law and that Nebraska is without power to regulate the manufacture, distribution, and sales of Indian produced good inside Indian country.

While some courts have mistakenly interpreted nonmember Indians as standing in the same relationship with a Tribe as non-Indians, Congress repeatedly has reminded the courts of tribes' sovereign authority over nonmember Indians. *Big Sandy Rancheria Enters. v. Bonta*, 1 F.4th 710, 729 (2021); *Duro v. Reina,* 495 U.S. 676 (1990); 25 U.S.C. §1301(2). One area where courts have overlooked this inherent sovereign authority is in Indian Trade. As explained in detail above, the

Indian Trader Statutes entirely preempt the field of Indian commerce in Indian country with Indian Traders, but these laws also recognize the historical fact of intertribal trade and the inherent power of tribes to regulate their own trade with other Indian nations.

The Indian Trader Statutes clearly recognize, regulate, and permit trade between Indians of different nations. The Indian Trader Statutes criminalize trading without a license, unless one is an Indian on **any** Indian reservation. "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…" 25 U.S.C. § 264 (emphasis added).

One Pony Express location is a trading outpost of the Winnebago Tribe on the adjacent Omaha reservation. As the Winnebago Reservation was created entirely on land originally provided by the Omaha Tribe, the two peoples have a long history of trading with each other. This intertribal trade never touches lands under the jurisdiction of Nebraska. The Winnebago Tribe and the Winnebago-Owned Retailers recognize the inherent sovereign authority of the Omaha Tribe to regulate trade on their territory and maintain all required records and remit sales taxes on all manner of goods, including Rock River products, to the treasury of the Omaha Tribe.

Some courts have found that such intertribal commerce is neither within the scope of federal preemption nor an infringement upon the sovereignty of Indian nations, but those cases did not involve a situation where the territory was prohibited from exercising jurisdiction over Indian Country in its enabling act **and** involved a tribe trading with another entirely within the boundaries of the second tribe's prior reservation. The Ninth Circuit found that a foreign Indian corporation does not remain "on-reservation" when selling goods in another tribe's territory. *Big Sandy*, 1 F.4th at 729. While the Ninth Circuit's analysis is fatally flawed for failing to consider the Indian

Trader Statutes clearly contemplate and regulate non-member Indian trade in another tribe's territory (the matter was not pleaded by Big Sandy Rancheria), the current case is distinguishable as there is no transportation of any Indian goods outside of Indian country. *Id*. at 30.

The Ninth Circuit found a valid state regulatory interest when Indian goods were transported to a non-contiguous tribe for sale. In the current case, however, Winnebago goods never leave Omaha lands. Not only does all transport in Winnebago-produced goods remain in Indian Country, Winnebago territory is specifically created from traditional Omaha land. Winnebago produced goods travel on roads from Winnebago lands originally provided by the Omaha, to Omaha land, then sold at Winnebago outposts under the tax and regulatory authority of the Omaha Tribe. HCID provides reports of its sales to the Pony Express location on the Omaha reservation and the Winnebago Tribe provides the taxes collected to the Omaha Tribal government. The Indian goods are produced in Indian Country, transported through Indian Country, and sold in Indian Country, never touching the state territory. *The Kansas-Nebraska Act* forever keeps these lands outside the jurisdiction of Nebraska, as "if this act had never passed." 10 Stat. 278 (1854).

While the Indian Trader Statutes also preempt regulation of all Indian Trade in Indian Country, the current case is distinguishable from prior precedent in that no part of the trade in Indian goods touches any state. The Omaha and Winnebago Reservations are contiguous. The Winnebago Reservation is entirely located on lands granted by the Omaha in 1865; lands forever outside the jurisdiction of Nebraska. As such, the Court must prevent the enforcement of Nebraska's MSA Laws and enjoin Defendants from taking any action to enforce Nebraska's MSA Laws against HCID and Rock River for any activity that occurs in all Indian country, including Omaha territory.

Finally, the State may be tempted to characterize the demand of HCID and Rock River to be free of the its unlawful escrow regulations as an attempt to market an exemption to a state tax to customers who would normally do their business elsewhere. However, as discussed in part III *supra*, Rock River indisputably adds value and is not merely marketing a tax exemption.

CONCLUSION

For the foregoing reasons, HCID and Rock River respectfully request that this Court grant summary judgment in their favor.

Respectfully submitted this 26th day of September 2022

HCI DISTRIBUTION, INC.; and
ROCK RIVER MANUFACTURING, INC.

By: /s/ *Nicole E. Ducheneaux*

Nicole E. Ducheneaux (NE 25386)
Calandra S. McCool (NE 27279)
BIG FIRE LAW AND POLICY GROUP, LLP
1905 Harney Street, Suite 300
Omaha, Nebraska 68102
Telephone: (531) 466-8725
Facsimile: (531) 466-8792
Email: nducheneaux@bigfirelaw.com
Email: cmccool@bigfirelaw.com
Attorneys for Plaintiffs

CERTIFICATE OF COMPLIANCE

With permission granted by this Court to exceed the permissible word count in this Brief, [*Text Order, ECF 122]* in accordance with NeCivR 7.1(d), I hereby certify that this brief contains 24,715 words, which includes all text, including the caption, headings, footnotes, and quotations as determined by Microsoft Word for Office 365.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of September 2022 a copy of the foregoing was filed electronically with the Clerk of the Court. The electronic filing prompted automatic service of the filing to all counsel of record in this case who have obtained CM/ECF passwords.

/s/ *Nicole E. Ducheneaux*