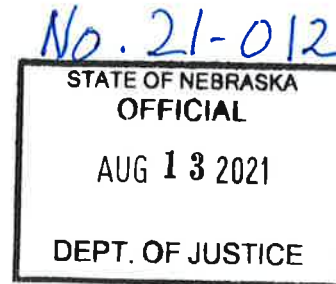




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DOUGLAS J. PETERSON
ATTORNEY GENERAL



SUBJECT: Whether the Nebraska cigarette excise tax, stamping, precollection, and reporting laws apply to cigarettes sold by Rock River Manufacturing.

REQUESTED BY: Tony Fulton
State Tax Commissioner

WRITTEN BY: Douglas J. Peterson, Attorney General
Daniel J. Muelleman, Assistant Attorney General

INTRODUCTION

You have requested our opinion concerning whether Nebraska's cigarette excise tax, stamping, precollection, and reporting laws apply to cigarettes manufactured by Rock River Manufacturing ("Rock River") in Indian country¹ governed by the Winnebago Tribe. Your questions involve cigarette excise tax stamp application, sales of cigarettes without stamps, and cigarette excise tax reporting. To answer these questions, we must first determine whether the underlying cigarette excise tax that triggers the rest of the regulatory system is a legal tax. Then, we can determine whether the stamping and reporting laws supporting the collection of the legal tax are permissible.

¹ "Indian country means (a) all land in this state within the limits of any Indian reservation under the jurisdiction of the United States, notwithstanding the issuance of any patent, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of this state, and (c) all Indian allotments in this state, the Indian titles to which have not been extinguished, including rights-of-way running through such allotments." Neb. Rev. Stat. § 77-2601(9).

When the manufacturer, wholesaler, retailer, or consumer of cigarettes is related to a federally recognized Indian tribe² the caselaw requires a particularized inquiry into the nature of the state, federal, and tribal interests at stake.³ Any Indian country is a part of the territory of the state it is in, and the Indian tribes' right to make their own laws and be governed by them does not exclude all state regulatory authority within Indian country.⁴ When a tribal member⁵ goes beyond the boundaries of their own Indian country, they are generally held subject to non-discriminatory state law otherwise applicable to all citizens of the state.⁶ When a tribal member conducts activities within the boundaries of their own Indian country, the question of the applicability of a tax depends on who bears the legal incidence: when the legal incidence of the tax rests on nonmembers,⁷ the tax applies if it satisfies the balance of state, federal, and tribal interests; when the legal incidence of the tax rests on tribal members of a different Indian tribe, the tax applies if it satisfies the balance of state, federal, and tribal interests; and, when the legal incidence of the tax rests on tribal members, the tax does not apply.⁸

The state, federal, and tribal interests involving cigarette excise taxes have been litigated and decided several times. States have interests in ensuring compliance with their lawful cigarette excise taxes, preventing tax evasion, protecting their public treasuries, defending the public health, maintaining the integrity of their contractual settlements, and preventing cigarette manufacturers from gaining unfair financial advantages in the marketplace.⁹ Federal policy promoting cigarette sales by tribes is nonexistent, federal policy favoring state regulation of cigarette sales within Indian country exists, and Congress has repeatedly refused to regulate the entire field of tobacco.¹⁰ Tribal interests include members buying cigarettes free of state cigarette excise tax when in their own Indian country. Tribal interests do not include participating in state tax evasion. Tribal revenues gained from marketing a tax exemption are not generated from

² "Indian tribe means any Indian tribe, band, nation, or other organized group or community that is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians under the laws of the United States." Neb. Rev. Stat. § 69-2702(8).

³ See *infra* at 4 and 6.

⁴ See *infra* at 4 and 15.

⁵ The term "tribal member" shall mean a member of a federally recognized Indian tribe.

⁶ See *infra* at 4 and 13.

⁷ The term "nonmember" shall mean a person who is not a member of a federally recognized Indian tribe.

⁸ See *infra* at 4-6.

⁹ See *infra* at 8-13.

¹⁰ See *infra* at 11.

activities of significant tribal interest, and tribes do not oust a state's tax and regulatory authority with tribal taxes and regulations.¹¹ The balance of interests favors state taxation and regulation of cigarette sales to nonmembers in Indian country even where collection of the state tax deprives Indian tribes of their own tax revenues.¹²

Because states have a valid interest in ensuring compliance with lawful taxes that might easily be evaded through activities within Indian country, state regulations attendant to the lawful tax may apply to tribal members in their own Indian country when minimally burdensome and reasonably tailored to the collection of the tax; therefore, wholesaler licensing, tax precollection, and uniform stamping requirements have all been upheld as minimally burdensome requirements reasonably tailored to support state cigarette excise taxes that are not preempted and do not infringe on tribal self-government.¹³

QUESTIONS PRESENTED

You have specifically asked for our clarification on three questions:

1. Whether cigarettes sold by Rock River must bear a Nebraska tax stamp consistent with Neb. Rev. Stat. § 77-2603.
2. Whether Rock River may sell cigarettes that do not bear a Nebraska tax stamp to Woodlands Distribution Company ("Woodlands") and HCI Distribution Company ("HCID"), neither of which holds a Nebraska stamping agent license, in the absence of an agreement as authorized under Neb. Rev. Stat. §§ 77-2602.06 and 77-2603.01.
3. Whether sales of cigarettes manufactured by Rock River to Woodlands and HCID in the Winnebago Tribe's Indian country are considered in Nebraska and trigger the sales entity affiliate reporting requirements in Neb. Rev. Stat. §§ 77-2604(2)(b) and 77-2604.01(3).

You have also asked whether the answers to these questions differ based on four additional factors:

1. Whether the cigarettes are sold to retailers in the Winnebago Tribe's Indian country in the State of Nebraska for subsequent sale to:
 - a. members of the Winnebago Tribe, or
 - b. non-members of the Winnebago Tribe;

¹¹ See *infra* at 11-12.

¹² See *infra* at 12.

¹³ See *infra* at 7-8.

2. Whether the cigarettes are sold to retailers in the Indian country of any other federally recognized tribe in the State of Nebraska for subsequent sale to:
 - a. members of the governing tribe, or
 - b. non-members of the governing tribe;
3. Whether the cigarettes are sold to retailers in any location not in Indian country in the State of Nebraska for subsequent sale to any consumers; or,
4. Whether or not Rock River engages in contract manufacturing of cigarettes to:
 - a. manufacture cigarette brands other than those owned by Rock River, or
 - b. have another manufacturer produce cigarette brands owned by Rock River.

ANALYSIS

Throughout the latter half of the 20th century, the United States Supreme Court established a robust framework for analyzing the legal relationships between states and tribes regarding state cigarette excise taxes and regulations for sales to tribal members, tribal members of a different Indian tribe, and nonmembers without or within Indian country. In reconciling “the plenary power of the States over residents within their borders with the semi-autonomous status of Indians living on tribal reservations” the United States Supreme Court has determined that the resolution depends not “on ‘rigid rule[s]’ or on ‘mechanical or absolute conceptions of state or tribal sovereignty,’ but instead on ‘a particularized inquiry into the nature of the state, federal, and tribal interests at stake’” in an effort “to determine whether, in the specific context, the exercise of state authority would violate federal law.” *Department of Taxation and Finance of New York v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 73 (1994) (quoting *McClanahan v. Arizona Tax Comm’n*, 411 U.S. 164, 165 (1973); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142, 145 (1980)); see *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 176 (1989).

Entering the 21st century, the United States Supreme Court affirmed that “an Indian reservation is considered part of the territory of the State” and made “clear that the Indians’ right to make their own laws and be governed by them does not exclude all state regulatory authority on the reservation.” *Nevada v. Hicks*, 533 U.S. 353, 361-62 (2001) (internal marks and citations removed). A complete inquiry also “requires that we determine whether . . . activities go beyond the boundaries of the reservation.” *King Mountain Tobacco Co., Inc. v. McKenna*, 768 F.3d 989, 993 (9th Cir. 2014); see *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973).

In order to answer your questions, we will first examine the legal incidence of the Nebraska cigarette excise tax. Then we will study the applicability of the Nebraska cigarette excise tax precollection and stamp system, including a weighing of the state, federal, and tribal interests at stake. Finally, we will analyze the applicability of certain

Nebraska cigarette excise tax reporting laws, echoing the analysis of the state, federal, and tribal interests at stake in the precollection and stamping systems.

For the reasons set forth below, we conclude that cigarettes sold by Rock River may be required to bear a Nebraska tax stamp, Rock River may not sell cigarettes that do not bear a Nebraska tax stamp to Woodlands or HCID, and cigarettes manufactured by Rock River and sold to Woodlands and HCID are considered sold within Nebraska and trigger the sales entity affiliate reporting requirements.

A. The Legal Incidence of the Nebraska Cigarette Excise Tax is on the Ultimate Consumer and the Per Se Rule Against Taxation of Tribal Members in Their Own Indian Country Does Not Apply.

“The initial and frequently dispositive question in Indian tax cases . . . is who bears the legal incidence of a tax.” *Oklahoma Tax Comm’n v. Chickasaw Nation*, 515 U.S. 450, 458 (1995). “Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State.” *Mescalero*, 411 U.S. at 148-49. “If the legal incidence of an excise tax rests on a tribe or on tribal members for sales made inside Indian country, the tax cannot be enforced absent clear congressional authorization.” *Chickasaw*, 515 U.S. at 459; see *Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 475-81 (1976). “[I]f 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.*; see *Washington v. Confederated Tribes of Colville Rsv.*, 447 U.S. 134, 154-57 (1980). If the legal incidence of the tax rests on nonmembers, then “the State’s interest in taxing these purchasers outweighs any tribal interest that may exist in preventing the State from imposing its taxes.” *Colville*, 447 U.S. at 160-61.

Courts have routinely upheld state taxes whose legal incidence fell on nonmembers. When the legal incidence of South Dakota’s use tax fell “on nonmember purchasers of goods and services” in Indian country, the Eighth Circuit recognized “the *per se* rule against state taxation of reservation Indians [did] not apply.” *Flandreau Santee Sioux Tribe v. Noem*, 938 F.3d 928, 932 (8th Cir. 2019). Because the New York cigarette excise tax law placed “the legal incidence on the consumer, not the wholesaler or retailer” through express statutory language, the Second Circuit held the tax was “not categorically barred.” *Oneida Nation of New York v. Cuomo*, 645 F.3d 154, 168 (2d. Cir. 2011). While Washington’s cigarette excise tax did not contain a specific statutory assignment, the Ninth Circuit found the overall intent was to assign the legal incidence of the tax on the consumer. *Confederated Tribes and Bands of the Yakama Indian Nation v. Gregoire*, 658 F.3d 1078 (9th Cir. 2011). The Tenth Circuit held the legal incidence of the Oklahoma cigarette excise tax fell on the consumer, even if the burden of the tax was on the wholesalers required to purchase and affix the stamps, maintain records, and precollect taxes. *Muscogee (Creek) Nation v. Pruitt*, 669 F.3d 1159, 1176 (10th Cir. 2012).

Nebraska law declares that the legal incidence of the tax is on the ultimate consumer purchasing the cigarettes, not on the stamping agent or retailer. Neb. Rev. Stat. § 77-2602.01. Nebraska law contains a specific pass-through provision for the tax: the stamping agent must add the amount of the tax to the cost of selling the cigarettes to the retailer and the retailer must then collect the amount of the tax from the ultimate consumer when selling the stamped cigarettes. *Id.* Nebraska law also provides for the compensation of stamping agents for prepayment of the tax and the application of stamps. Neb. Rev. Stat. § 77-2608. Therefore, the legal incidence of the Nebraska cigarette excise tax explicitly falls upon the ultimate consumer. Because the legal incidence of Nebraska's cigarette excise tax is on the ultimate consumer, the *per se* prohibition on taxing tribal members in their own Indian country does not apply. Nebraska's cigarette excise tax lawfully applies to nonmember consumers purchasing cigarettes in Indian country.

Applying the legal incidence test to the various scenarios you have provided permits us to determine whether the Nebraska cigarette excise tax applies to certain sales to ultimate consumers. When cigarettes are sold to any person, whether or not a member of a federally recognized tribe, when not in Indian country in Nebraska, the cigarette excise tax applies. When cigarettes are sold to members of the Winnebago Tribe in the Winnebago Tribe's Indian country in Nebraska, the cigarette excise tax does not apply. When cigarettes are sold to members of another federally recognized tribe in the Indian country of that tribe in Nebraska, the cigarette excise tax does not apply. When cigarettes are sold to nonmembers of the Winnebago Tribe in the Winnebago Tribe's Indian country in Nebraska, the cigarette excise tax applies. When cigarettes are sold to nonmembers of another federally recognized tribe in the Indian country of that tribe in Nebraska, the cigarette excise tax applies.

B. Nebraska's Cigarette Excise Tax Precollection and Stamping Laws Are Minimally Burdensome to Rock River, Reasonably Tailored to State Tax Collection, Not Preempted, and Not Infringing on Tribal Self-Government.

When the legal incidence of a state cigarette excise tax falls upon nonmember purchasers in Indian country, the state can place minimally burdensome regulatory obligations on those selling cigarettes to nonmembers in Indian country to assist in the collection of the valid state cigarette excise tax. *Moe*, 425 U.S. at 483; *Colville*, 447 U.S. at 159. "[T]he States have a valid interest in ensuring compliance with lawful taxes that might easily be evaded through purchases of tax-exempt cigarettes on reservations; that interest outweighs tribes' modest interest in offering a tax exemption to customers who would ordinarily shop elsewhere," and "[t]he 'balance of state, federal, and tribal interests' . . . in this area thus leaves more room for state regulation than in others." *Milhelm Attea*, 512 U.S. at 73 (quoting *Rice v. Rehner*, 463 U.S. 713, 720 (1983)); see also *Moe*, 425 U.S. 463; *Colville*, 447 U.S. 134; *Oklahoma Tax Com'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991). "[I]f the balance of federal, state, and tribal interests favors the State, and federal law is not to the contrary, the

State . . . may place on a tribe or tribal members 'minimal burdens' in collecting the toll[.]" *Chickasaw*, 515 U.S. at 459 (quoting *Milhelm Attea*, 512 U.S. at 73)). Recognizing the conditional nature of the legitimacy of both state taxes and the attendant regulations for certain taxable activities in the States involving tribal interests, the Court developed a way to make the required "particularized inquiry" with the interest balancing tests of preemption and infringement. See *Bracker*, 448 U.S. 136. Several of the Circuit Courts have subsequently used these tests.

The Eighth Circuit has explained that the *Colville* Court "upheld *both* the tribe's sovereign power to tax cigarette sales to nonmembers on the reservation, and a state excise tax on vendors who provided cigarettes for on-reservation sales to nonmembers." *Flandreau*, 938 F.3d at 933 (emphasis in original). "The value of Indian sales to nonmembers was not generated by tribal activities, the Court explained, only by the exemption of such sales from state tax; neither principles of federal Indian law nor any federal statute preempted the State from taxing this 'artificial competitive advantage over all other businesses in a State.'" *Id.* (quoting *Colville*, 447 U.S. at 155).

The Tenth Circuit has reiterated the longstanding holdings of the *Colville* cases and *Bracker* test by focusing "on the factors of 'who'—Indians or non-Indians—and 'where'—in or outside the tribe's Indian country." *Muscogee*, 669 F.3d at 1171 (quoting *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 101 (2005)). "[T]he preemption and infringement barriers do not prevent the state from taxing non-Indians in Indian country so long as the tax imposes only minimal burdens on the Indians." *Id.* at 1172; see *Bracker*, 448 U.S. at 144; *Milhelm Attea*, 512 U.S. at 73; *Colville*, 447 U.S. at 159; *Moe*, 425 U.S. at 482-83. "[A] state's interest in collecting its lawful tax outweighs a tribe's interest in selling tax-exempt cigarettes to non-tribal members who might normally shop elsewhere but for the discounted prices." *Id.* at 1175. Oklahoma's requirement for wholesalers to be licensed by the state and for retailers to only buy from state-licensed wholesalers, Oklahoma's probable demand tax-free stamp program, and the potential financial disadvantages of the excise tax on tribal business are all permissible and do not violate tribal rights to self-governance. *Id.* at 1176-79. "The [United States Supreme] Court has never 'go[ne] so far as to grant tribal enterprises selling goods to nonmembers an artificial competitive advantage over all other businesses in a State.'" *Id.* at 1178 (quoting *Colville*, 447 U.S. at 155).

The Second Circuit has applied the Supreme Court's holdings in *Colville* and *Milhelm Attea* to the *Bracker* interest balancing test. The Court recognized "two judgments that are well-established in the caselaw[.]" the consistent willingness of "non-Indian purchasers" to evade state cigarette excise taxes and the revenue tribes gain "derives from the marketing of a tax exemption," not from value generated in Indian country from activities of significant tribal interest. *Oneida*, 645 F.3d at 165; cf. *Colville*, 447 U.S. at 145, 155. The Circuit Court further recognized that a state's interest in ensuring the collection of taxes on cigarettes sales outweighs a tribe's interests even when the state excise tax may disadvantage or eliminate "the Indian retailer's business with non-Indians," and that tribes do not oust a state's taxing authority merely by collecting

tribal taxes for cigarette sales in Indian country and regulating their cigarette economies. *Id.*; see *Colville*, 447 U.S. at 151, 158-59. The *Bracker* interest balancing test “favors state taxation of cigarette sales to non-members even where collection of the state tax deprives tribes of their own tax revenues.” *Id.*; *Colville*, 447 U.S. at 156. As a result, “states may impose ‘on reservation retailers minimal burdens reasonably tailored to the collection of valid taxes from non-Indians.’” *Id.* at 166 (quoting *Milhelm Attea*, 512 U.S. at 73); see *Colville*, 447 U.S. at 160. The Second Circuit found that New York’s cigarette excise tax precollection and stamp system imposing a \$43.50-per-carton tax “constituted a minimal tax collection burden” that was reasonably necessary to prevent state tax evasion and ensure collection of the tax. *Id.* at 169. The court reasoned the prior approval system of tax-free cigarettes could permissibly limit the overall quantity of tax-free cigarettes sold in Indian country, and the State was not required to ensure that tribal members continue to enjoy easy access to tax-free cigarettes when the system continued to make tax-free cigarettes available to member purchasers. *Id.* at 175.

The Sixth Circuit has also examined a state’s cigarette excise tax precollection and stamping laws: Michigan law required all wholesalers to precollect the state excise tax from the retail purchasers, even where the retail purchaser was an Indian tribe or tribal member. *Keweenaw Bay Indian Cmty. v. Rising*, 447 F.3d 881, 884 (6th Cir. 2007). Michigan law required the application of a Michigan excise tax stamp to all cigarettes sold and provided for a specific refund system that worked up from the retailers through the wholesalers for precollected and stamped cigarettes sold in exempt transactions in Indian country. *Id.* The Sixth Circuit concluded that “repeated, brazen, and willful attempts to avoid remittance of the tax so as to profit from illegal sales of tax-free cigarettes to non-tribal members” justified Michigan’s precollection and refund system because it was “‘reasonably tailored to the collection of valid taxes from non-Indians.’” *Id.* at 892 (quoting *Milhelm Attea*, 512 U.S. at 75).

The *Bracker* interest balancing test does not invalidate regulations attendant to a legitimate tax because the State’s interests in “protection of the public treasury, defense of public health, and . . . maintaining the integrity of [state settlement contracts]” “would outweigh any interest the tribe or federal government might have in prohibiting” the enforcement of a state’s cigarette regulations. *State ex rel. Edmondson v. Native Wholesale Supply*, 237 P.3d 199, 216 (Okla. 2010). “There is no federal jurisprudence pronouncing Indian sovereignty in the area of cigarette distribution and sales, nor have we been directed to any congressional enactments reflecting and encouraging tribal self-sufficiency and economic development through the distribution and sale of cigarettes.” *Id.*

When comparing the “*Mescalero* cases”¹⁴ and the “*Colville* cases”¹⁵ while considering state regulations on cigarette sales by a tribal member to a nonmember in Indian country, the state has “a powerful interest in regulating the sale of cigarettes” including “a legitimate exercise of state power” to protect the public health. *Ward v. New York*, 291 F.Supp.2d 188, 202 - 207 (W.D.N.Y. 2003) (quoting *Brown & Williamson*, 320 F.3d 200, 216-17 (2d. Cir. 2003)). State regulations attendant to a legitimate tax on cigarette sales by a tribal member to a nonmember in Indian country are not in conflict with “any federal policy approving or promoting cigarettes sales by Indians,” federal policy “seems decidedly in favor of state regulation of such sales,” and the regulation on cigarette sales “restricts, but does not completely eliminate, tribal commerce with non-tribe members.” *Id.* at 206. A state “may impose at least ‘minimal burdens’ on tribal commerce with non-tribe members to further legitimate laws and regulations.” *Id.* at 205.

State regulations attendant to the cigarette excise tax do “not interfere with [Indians’] sovereign right to self-government, and [do] not discriminate against or place undue burdens on Indian commerce.” *Id.* at 826. State interests include preventing judgment-proof cigarette manufacturers from threatening the public health and preventing cigarette manufacturers from gaining an unfair financial advantage in the marketplace. *Id.* at 827-28.

Nebraska imposes an excise tax of sixty-four cents on each pack of cigarettes sold to consumers in Nebraska. Neb. Rev. Stat. § 77-2602(1). At ten packs per carton, that equals a tax of \$6.40 per carton. Nebraska-licensed stamping agents¹⁶ must pay this tax to the Nebraska Department of Revenue (“Department”) as an advance payment and apply the required excise tax stamp to each cigarette pack prior to the retail sale of the cigarettes to consumers in Nebraska. Neb. Rev. Stat. § 77-2603(1). All unstamped cigarettes subject to the Nebraska cigarette excise tax in the State are contraband

¹⁴ See *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331-44 (1983) (holding that New Mexico could not regulate hunting and fishing on the reservation); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 214-22 (1987) (finding that California regulation of on-reservation gaming violated tribal sovereignty).

¹⁵ See *Moe*, 425 U.S. at 483 (holding that Montana could require tribal retailers in Indian country to collect state taxes on sales to nonmembers); *Colville*, 447 U.S. at 154-62 (finding that the State of Washington could impose cigarette and sales taxes with respect to on-reservation purchases by non-tribe members); *Citizen Band*, 498 U.S. at 512-14 (ruling that Oklahoma could collect taxes on goods sold to non-tribe members); *Milhelm Attea*, 512 U.S. at 75 (upholding New York regulatory scheme that imposed record-keeping requirements and quantity limitations on cigarette wholesalers who sell untaxed cigarettes to tribal members in Indian country).

¹⁶ A stamping agent is a person authorized by the Nebraska Tax Commissioner to affix cigarette excise tax stamps and make the required advance payment of the tax. Neb. Rev. Stat. §§ 69-2705(20) and 77-2601(8). The person must make an application to the Tax Commissioner in order to receive a stamping agent license and can be any manufacturer, importer, sales entity affiliate, wholesale dealer, or retail dealer that engages in the business of selling cigarettes. Neb. Rev. Stat. §§ 77-2603(1) and (2).

cigarettes and subject to seizure and destruction. Neb. Rev. Stat. § 77-2620. Nebraska collected \$48 million in cigarette taxes in 2019.

State statute dedicates the proceeds from the cigarette tax to several purposes. The General Fund receives forty-nine cents of the sixty-four-cent tax on each pack. Neb. Rev. Stat. § 77-2602(2). The Nebraska Outdoor Recreation Development Cash 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 all receive varying amounts of the remainder of the tax. Neb. Rev. Stat. §§ 77-2602(2), (3)(a)-(g), and (4).

Nebraska has an additional set of regulatory statutes attendant to the cigarette excise tax that, when diligently enforced, maintain the State's receipt of millions of dollars each year in settlement funds. Nebraska's cigarette escrow law requires tobacco product manufacturers ("TPMs")¹⁷ that are not participating manufacturers ("PM")¹⁸ under the cigarette Master Settlement Agreement ("MSA") to place a specific amount of inflation-adjusted money per unit sold¹⁹ "into a qualified escrow fund"²⁰ for any of the TPM's cigarettes sold "to consumers within the state." Neb. Rev. Stat. § 69-2703(2)(a)(v). The 2021 escrow rate is \$7.60 per carton. Nebraska's cigarette escrow law relies on accurate cigarette excise tax reporting in determining units sold and is thus a regulation attendant to the cigarette excise tax. The cigarette escrow law exists because Nebraska, in November 1998, signed the Master Settlement Agreement ("MSA"), a multistate²¹ settlement contract settling lawsuits²² against certain TPMs regarding antitrust matters,

¹⁷ A TPM is generally a company that manufactures cigarettes for sale in the United States but can also include cigarette importers or successor entities. Neb. Rev. Stat. § 69-2702(13)(a)-(c); MSA § II(uu).

¹⁸ "Participating Manufacturer" means a Tobacco Product Manufacturer that is or becomes a signatory to the MSA. Neb. Rev. Stat. § 69-2705(13); MSA § II(jj).

¹⁹ Units sold are cigarettes sold in Nebraska "in packs required to bear a stamp pursuant to section 77-2603 or 77-2603.01[.]" Neb. Rev. Stat. § 69-2702(14).

²⁰ A TPM that places funds into escrow is entitled to receive the interest or other appreciation on the funds as earned while on deposit. Neb. Rev. Stat. § 69-2703(2)(b). The required funds on deposit can only be released from escrow under the following circumstances: (1) to pay a judgment or settlement on any claims brought against the TPM similar to the claims settled by the MSA; (2) to refund the TPM for amounts placed in escrow in excess of what the TPM would have paid per unit sold as a PM in the MSA; (3) as reversion to the TPM twenty-five years after the date of deposit; or, (4) to "[a]n Indian tribe [seeking] release of escrow deposited . . . 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."

²¹ Nebraska joined with the attorneys general of 45 states, 5 territories, and Washington, D.C. in the MSA.

²² See *State ex rel. Stenberg v. R.J. Reynolds Tobacco Co.*, Lancaster County District Court, Dec. 1998.

deceptive trade practices, and violations of the public health with their cigarette businesses.^{23,24,25} In addition to the significant public health victory achieved by the permanent injunctive relief of the MSA, the contractual settlement agreement also provides for a series of perpetual, annual payments by the PMs. MSA § IX. Nebraska received almost \$200 million from the MSA in the last five years, averaging \$40 million each year.

Nebraska faces two potential multi-million-dollar downward adjustments to MSA payments. The Non-Participating Manufacturer ("NPM")²⁶ Adjustment applies if Nebraska does not diligently enforce²⁷ a Qualifying Statute (the cigarette escrow law).²⁸ See MSA §§ IX(d)(1)(A)(i)-(iii); IX(d)(2)(B)(i). The SET-Paid Adjustment depends on the total amount of Non-Compliant NPM Cigarettes.²⁹ NPMASA § V.B.2. Certain cigarettes may be excluded from the Non-Compliant NPM Cigarette totals. See NPMASA § V.B.5.a., c., and d. If Nebraska does not diligently enforce the escrow law or collects the excise tax owed on cigarettes subject to the tax but the cigarettes are not escrow compliant, then the State stands to lose most of the \$40-million-per-year MSA money.

Nebraska directs the MSA funds into the Health Care Cash Fund. Neb. Rev. Stat. §§ 69-2701(2), 77-7611(1). The Health Care Cash Fund currently expends about \$60 million each year to fund programs such as biomedical research, behavioral health, mental health, children's health insurance, other public health programs, tobacco prevention and control, and MSA enforcement.

²³ The MSA is a litigation settlement contract executed by the Nebraska Attorney General on behalf of the State. Nebraska's cigarette escrow law does not act as the functional or authorizing statute giving force to the MSA, nor does the law purport to bind anyone to the terms of the MSA that did not otherwise contractually obligate themselves to the MSA.

²⁴ The MSA settled the claims by way of several permanent injunctive relief provisions protecting the public health. See MSA §§ III(a)-(r).

²⁵ By way of recognition of the comprehensive reach of such permanent relief, the parties to the MSA included an affirmative waiver of the PMs of "any and all claims that the provisions of this Agreement violate the state or federal constitutions." MSA § XV.

²⁶ "NPM" means any TPM that is not a PM. Neb. Rev. Stat. § 69-2705(10); MSA § II(cc).

²⁷ In October 2017, Nebraska signed an additional settlement agreement called the NPM Adjustment Settlement Agreement ("NPMASA") clarifying that diligent enforcement means enforcing the escrow law on all NPM cigarettes on which federal excise tax was paid and on which Nebraska has authority under federal law to tax or subject to escrow. NPMASA § V.C.5.

²⁸ Certain Escrow Statutes in the form of MSA Exhibit T are Qualifying Statutes so long as they are in full force and effect. NPMASA § II.L. Nebraska's Escrow Statutes are Neb. Rev. Stat. §§ 69-2701-2703 (2017). NPMASA, Exhibit C.

²⁹ A Non-Compliant NPM Cigarette is a NPM cigarette on which state excise tax is paid but is not escrow compliant. NPMASA § V.B.3.

Nebraska collects tens of millions of dollars in cigarette excise taxes and settlement payments each year. The Health Care Cash Fund, which contributes millions of dollars towards protecting the public health and funding the State's regulation of the cigarette production, distribution, and sales market, receives large portions of this revenue. Additional funds are allocated towards public safety and infrastructure. Enforcement of the State's cigarette excise tax system not only ensures the collection of the tax, it also ensures that the State avoids major downward adjustments to the annual settlement payments.

State interests include ensuring compliance with lawful cigarette excise taxes that could be evaded in Indian country. See *Milhelm Attea*, 512 U.S. at 73; *Colville*, 447 U.S. at 151, 158-59. In addition to protecting the public treasury, state interests include a powerful and legitimate defense of public health and maintaining the integrity of the State's contractual obligations. See *Native Wholesale Supply*, 237 P.3d at 216; *Ward*, 291 F.Supp.2d at 202-07. State interests also include preventing judgment-proof cigarette manufacturers from threatening the public health and preventing cigarette manufacturers from gaining an unfair financial advantage in the marketplace. See *Miller*, 311 F.Supp.2d at 827-28.

"Congress has repeatedly refused to regulate the entire field of tobacco." *Omaha Tribe of Nebraska v. Miller*, 311 F.Supp.2d 816, 824-25 (S.D. Iowa, 2004). "There is no federal jurisprudence pronouncing Indian sovereignty in the area of cigarette distribution and sales, nor have we been directed to any congressional enactments reflecting and encouraging tribal self-sufficiency and economic development through the distribution and sale of cigarettes." *Native Wholesale Supply*, 237 P.3d at 216. There is no "federal policy approving or promoting cigarettes sales by Indians," federal policy "seems decidedly in favor of state regulation of such sales." *Ward*, 291 F.Supp.2d at 206.

Tribal interests include the right of a tribal member to purchase cigarettes excise tax free while within the boundaries of the Indian country governed by the tribe of which they are a member. Nebraska directly vindicates this right. See Neb. Rev. Stat. § 77-2602.05. Tribally affiliated businesses conducting business in Indian country in which cigarettes are sold in these exempt transactions are assisted by Form 68 in vindicating this tribal right while also ensuring compliance with standard state cigarette excise tax law. Tribal governments can also avail themselves and the businesses within their Indian country of alternative cigarette excise tax systems in lieu of Form 68, such as a tax refund formula or tribal compacts with the State that can involve the use of a substitute tribal tax and stamping system. See Neb. Rev. Stat. §§ 77-2602.05(5), 77-2602.06, 77-2603.01.

Tribal interests do not include granting tribally affiliated businesses selling cigarettes to nonmembers in Indian country a competitive price advantage over all other businesses in Nebraska. See *Muscogee*, 669 F.3d at 1178; *Colville*, 447 U.S. at 155. Evading state excise taxation of cigarettes sales in Indian country is not an activity of significant tribal interest. See *Oneida*, 645 F.3d at 165; *Colville*, 447 U.S. at 145, 155.

Tribal interests do not oust state interests merely by placing a tribal cigarette excise tax system into effect. See *Oneida*, 645 F.3d at 165; *Colville*, 447 U.S. at 151, 158-59.

The State's interests in enforcing a lawful cigarette excise tax and the regulations attendant to the tax in Indian country within Nebraska are more powerful than coincident federal or tribal interests.

Nebraska's cigarette excise tax system and the attendant regulations also provide for vindication of federal and tribal interests. Cigarettes sold to consumers in Nebraska in tax exempt transactions³⁰ qualify the retailer and the stamping agent for a refund³¹ of the tax amount prepaid for the cigarettes; a stamping agent must have already stamped the cigarettes though. Neb. Rev. Stat. § 77-2602.05(1). As a result, Nebraska does not require consumers purchasing cigarettes in tax-exempt transactions to pay the cigarette excise tax and refunds the retailers and stamping agents the costs of the prepaid tax.

In order to assist in the cigarette excise tax refund system described in § 77-2602.05(3), the Department uses the "Nebraska Credit Computation for Cigarettes and Tobacco Products Sold to Native American Reservation Indians" Form 68 (12/2016) ("Form 68").³² Form 68 allows any retailer "located on an Indian reservation in Nebraska" selling cigarettes to "a Native American reservation Indian" while "within the boundaries of a Native American Indian reservation" to receive a credit for the cigarette excise tax previously paid to the stamping agent.³³ As a result, retailers can sell stamped cigarettes excise tax free to certain consumers in Nebraska.

As an alternative to the default cigarette excise tax refund system, Nebraska law authorizes the Department and a tribe to agree to substitute a tax refund formula in lieu of applications for refunds for cigarettes sold "in exempt transactions on an Indian tribe's Indian country by an Indian tribe." Neb. Rev. Stat. § 77-2602.05(5). Or, Nebraska can "negotiate and execute an agreement with the governing body of any federally recognized Indian tribe within the State of Nebraska concerning the collection and dissemination of any cigarette tax . . . on sales of cigarettes . . . made or sold on a federally recognized

³⁰ Tax-exempt transactions include cigarettes sold "on an Indian tribe's Indian country to its tribal members where state taxation is precluded by federal law." Neb. Rev. Stat. § 77-2602.05(2)(a)-(b).

³¹ Retailers and stamping agents seeking a refund of the prepaid cigarette excise tax must submit an application to the Department showing the cigarettes bore the correct tax stamp requiring payment of tax, that the retailer or stamping agent paid the tax, the cigarettes were sold in an exempt transaction, and the retailer or stamping agent had not previously obtained the refund. Neb. Rev. Stat. § 77-2602.05(3).

³² This analysis does not include the "Nebraska Credit Computation for Cigarettes Sold to Native American Indian Tribal Members in Indian Country" Form 68 (06/2020) whose implementation remains delayed.

³³ Form 68 must then be presented to the stamping agent who issues the credit to the retailer and then presents the form to the Department for the stamping agent's own credit for the cigarette excise tax previously prepaid to the Department.

Indian tribe's Indian country." Neb. Rev. Stat. § 77-2602.06. The law authorizes the State to enter into an agreement with a tribe to use tribal tax stamps in lieu of the State's excise tax stamps. Neb. Rev. Stat. § 77-2603.01.

Nebraska's cigarette excise tax precollection, stamping, and refund system shares substantial similarities with the systems upheld in several other cases as posing minimal burdens and being reasonably tailored towards preventing tax evasion and ensuring tax collection. See *Colville*, 447 U.S. 134; *Yakama*, 658 F.3d at 1089; *Milhelm Attea*, 512 U.S. at 75; *Oneida*, 645 F.3d at 169; *Keweenaw Bay*, 447 F.3d at 892; *Muscogee*, 669 F.3d 1159. The State offers a direct refund, a formula refund, or a substitute tribal tax and stamp system in place of the State system to vindicate the tax exemption for tribal members purchasing cigarettes within their own Indian country, all of which mirror the refund systems considered in the context of narrowly tailoring the tax system to minimally burden tribal entities and ensure collection of the state tax while preventing tax evasion in Indian country. See *Colville*, 447 U.S. 134; *Yakama*, 658 F.3d at 1081-82; *Milhelm Attea*, 512 U.S. at 69; *Oneida*, 645 F.3d at 170; *Keweenaw Bay*, 447 F.3d at 884; *Muscogee*, 669 F.3d 1176-79. Nebraska's cigarette excise tax system can exist without impermissible conflict with a tribal tax system and can permissibly eliminate an artificial competitive advantage sought by cigarette sellers in Indian country over all other cigarette sellers in the State. See *Colville*, 447 U.S. at 155; *Flandreau*, 938 U.S. at 933; *Muscogee*, 669 F.3d at 1178. Nebraska is required to make tax-free cigarettes available to tribal-member purchasers, and it does; Nebraska is not required to ensure tribal members enjoy the most accessible tax-free cigarettes. See *Oneida*, 645 F.3d at 175.

Therefore, the balance of state, federal, and tribal interests favors Nebraska, and the State's cigarette excise tax precollection, stamp, and refund system are minimally burdensome and are reasonably tailored to the collection of the tax and the prevention of tax evasion in Indian country, and Rock River's cigarette activities are governed by Nebraska's cigarette excise tax precollection, stamp, and refund laws for all cigarettes sold to consumers in Nebraska.

Activities that "go beyond the boundaries of the reservation" do not require a balancing of state, federal, and tribal interests, and generally applicable state law applies "off-reservation." *King Mountain*, 768 F.3d at 993-94. When less than half of the tobacco in the cigarettes comes from tobacco grown in Indian country, the tobacco in all of the cigarettes is threshed and blended outside Indian country, and the cigarettes are sold outside the manufacturer-located Indian country in the State and also in sixteen other states, the "tobacco-related activities [are] largely 'off-reservation.'" *Id.* at 994. A business located in one Indian country "does not remain 'on reservation' . . . by selling cigarettes on *other tribes'* reservation." *Big Sandy Rancheria Enterprises v. Bonta*, 2021 WL 2448226, 14. "[T]ribe-to-tribe sales made outside the tribal enterprise's reservation" constitute "'off reservation' activity subject to non-discriminatory state laws of general application." *Id.*; see *Muscogee*, 669 F.3d at 1172; *Native Wholesale Supply*, 237 P.3d at 215-16).

You request provides information regarding the manufacturing and sales activities of Rock River. Rock River cigarettes contain tobacco grown, processed, and shipped from North Carolina without any tobacco grown within the Winnebago Tribe's Indian country in Nebraska. Rock River cigarettes are available in 26 others states and in Indian country nationwide. These facts weigh heavily in favor of finding that certain of Rock River's cigarette-related activities are "largely off-reservation." The *Bracker* interest balancing test is not necessary when analyzing the "off-reservation" activities of Rock River and Nebraska's non-discriminatory and generally applicable cigarette excise tax laws apply.³⁴

Therefore, Rock River's "off-reservation" cigarette activities are governed by Nebraska's cigarette excise tax precollection, stamp, and refund laws for all cigarettes sold to consumers in Nebraska.

Rock River is located in Winnebago, Nebraska. When Rock River sells cigarettes from its location in the State for consumer sales in the State this triggers the cigarette excise tax stamp requirement because Rock River possesses a Nebraska stamping agent license. As a resident stamping agent in Nebraska, Rock River bears the responsibility to make the required State cigarette excise tax prepayments for, and affix the appropriate stamps to, all packs of cigarettes it sells that are sold to consumers in Nebraska. Rock River must prepay the Nebraska cigarette excise tax for, and affix the Nebraska cigarette stamp to, the cigarettes it sells to Woodlands or HCID for sale to retailers in Nebraska for ultimate consumer purchase.

Rock River is legally required to pass the cigarette excise tax through to its subsequent purchasers, including unlicensed wholesalers or retailers. Rock River's cigarettes sold to Woodlands or HCID that are sold to retailers in Nebraska and then to consumers in Nebraska are subject to Form 68. Rock River's application of the required stamps may be credited as a discount against subsequent stamp purchases. Cigarettes lawfully accounted for in Form 68 entitle the retailers, intermediate wholesalers, and ultimately Rock River to refund credits against subsequent tax stamp or stamped cigarette purchases.³⁵

When Rock River sells cigarettes that are to be sold to consumers in Nebraska, those cigarettes must bear a Nebraska tax stamp. The State's interests remain higher than any competing federal or tribal interests, the law is reasonably tailored to valid State

³⁴ If Rock River sells cigarettes that are a product of contract manufacturing, either by Rock River manufacturing cigarette brands other than those owned by Rock River or having another manufacturer produce cigarette brands owned by Rock River, then that would also contribute to a finding of "off-reservation" activities. We do not currently have the information necessary to complete an analysis of potential Rock River contract manufacturing and its impact on the "off-reservation" analysis.

³⁵ No tribe or company has currently elected to avail themselves of the tax exemption formula system, the substitute tribal system, or even a compact with the State. As such, Rock River is currently unable to use those systems; however, those systems remain legally viable for use should the applicable tribes wish to vindicate their rights in those manners.

interests, and the precollection, stamp, and refund system are minimally burdensome. Nebraska's cigarette excise tax is not preempted and does not infringe on tribal self-government. Rock River also engages in "off-reservation" cigarette activities subject to the non-discriminatory application of generally applicable state law. Therefore, when Rock River sells cigarettes that are to be sold to consumers in Nebraska those cigarettes must bear a Nebraska tax stamp.

Further, Rock River cannot legally sell cigarettes that do not bear a Nebraska tax stamp to Woodlands or HCID. The default Nebraska cigarette excise tax stamp is the only current option for regulatory application to Rock River's cigarette sales to Woodlands and HCID. Neither the Winnebago Tribe nor any other Indian tribe located in Nebraska has entered into any cigarette tax compact with the State and no authorization for the use of tribal tax stamps exists. See Neb. Rev. Stat. §§ 77-2602.06; 77-2603.01. 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.³⁶ The State cigarette excise tax stamp would not be preempted by the existence of any tribal stamp laws either. Therefore, Nebraska's minimally burdensome and reasonably tailored precollection cigarette excise tax stamp system is lawful, and Rock River cannot legally sell cigarettes that do not bear a Nebraska tax stamp to Woodlands or HCID.

This analysis does not change whether the cigarettes are sold by retailers to consumers in the Winnebago Tribe's Indian country in Nebraska, the Indian country of another federally recognized tribe in Nebraska, or in any location not in Indian country in Nebraska; nor does the analysis change if the consumer is a tribal member of the governing tribe, a tribal member of a different tribe, or a nonmember. Unlike the application of the tax, which heavily depends on these various factors,³⁷ the stamp application requirement is a part of the State's precollection system that generally applies to all cigarettes sold to consumers in Nebraska.

C. Nebraska's Sales Entity Reporting Requirements Apply to Cigarettes Sold By Rock River to Woodlands and HCID.

State regulatory authority attendant to a lawful State cigarette excise tax extends to minimally burdensome requirements on businesses in Indian country to aid in the collection and enforcement of the tax. See *Colville*, 447 U.S. at 159; *Hicks*, 533 U.S. at 361-62; *Oneida*, 645 F.3d at 166. "Indeed, because wholesale trade typically involves a

³⁶ It is possible that not all of the cigarettes Rock River sells to Woodlands or HCID, neither of which possess stamping agent licenses, are sold to retailers and consumers in Nebraska; however, Rock River cannot avail itself of corporate shell games with Woodlands and HCID to frustrate the lawful precollection and stamp systems of the Nebraska cigarette excise tax laws. Neb. Rev. Stat. § 77-2615.

³⁷ See *supra* at 5-6.

comparatively small number of large-volume sales, the transactional recordkeeping requirements . . . are probably less onerous than those imposed on retailers in *Moe and Colville*.” *Milhelm Attea*, 512 U.S. at 76. As stated above, Nebraska’s cigarette excise tax is lawful, along with the imposition of the precollection and stamping system. Under similar analysis, the cigarette excise tax reporting system can also be imposed.

Nebraska’s cigarette excise tax system requires stamping agents to report for two different wholesale distribution behaviors: sales within the State, and sales from the State into another state. In order to ensure an accurate collection of Nebraska’s cigarette excise tax stamping agents must file monthly reports with the Department regarding cigarette purchases including, among other things, identification of manufacturer, brand, number, from whom purchased. Neb. Rev. Stat. § 77-2604(1). In order to ensure a correct determination of cigarettes that were once in the State and potentially subject to taxation, but are no longer in the State and thus not subject to taxation, any person that sells cigarettes from Nebraska into another state must file monthly reports with the Department. Neb. Rev. Stat. § 77-2604.01(1). These cigarette export reports must contain the following information: the total number of cigarettes, the manufacturer and brand name of the cigarettes, the name and address of the recipients of the cigarettes, the number of different-state stamps the person affixed to the cigarettes, the total number of cigarettes contained in the different-state packages stamped, the manufacturer and brand names of the different-state stamped cigarettes, and the total number of unstamped cigarettes, including manufacturer, brand, and name and address of recipients, sold into another state along with a statement regarding the permissibility of the sale of the unstamped cigarettes into the other state (with certain qualifications). Neb. Rev. Stat. §§ 77-2604.01(2)(a)-(c).

In addition to the standard stamping agent reporting, Nebraska law requires manufacturer reporting to close the gaps. A manufacturer that sells cigarettes in the State must file a report with the Department containing the number of cigarettes sold identifying the brand name, manufacturer, and purchaser. Neb. Rev. Stat. § 77-2604(2)(b). A manufacturer that sells cigarettes from this State into another state must file a report with the Department containing the number of cigarettes sold identifying the brand name, manufacturer, and purchaser. Neb. Rev. Stat. § 77-2604.01(3). Both reporting requirements mandate the reports must include cigarettes sold through the manufacturer’s sales entity affiliates.³⁸

Nebraska’s reporting requirements in §§ 77-2604(2)(b) and 77-2604.01(3) are part of the State’s regulatory system attendant to the legitimate cigarette excise tax. Rock River manufactures its cigarettes in Winnebago, Nebraska. This land is part of the territory of the State and is not free of all State regulatory authority. Rock River claims to

³⁸ “Sales entity affiliate means an entity that (a) sells cigarettes that it acquires directly from a manufacturer or importer and (b) is affiliated with that manufacturer or importer. Entities are affiliated with each other if one directly, or indirectly through one or more intermediaries, controls or is controlled by or is under common control with the other. Unless provided otherwise, manufacturer or importer includes any sales entity affiliate of that manufacturer or importer.” Neb. Rev. Stat. § 77-2601(7).

sell the cigarettes it manufactures exclusively to Woodlands and HCID, both also located in Winnebago, Nebraska, all three entities representing themselves to be wholly-owned subsidiaries of Ho-Chunk, Inc. ("HCI"). Woodlands and HCID are sales entity affiliates of Rock River. Woodlands and HCID sell cigarettes they acquire from Rock River to retail locations in Nebraska and other states for purchase by tribal member and nonmember ultimate consumers.

In *Milhelm Attea*, New York both recognized the rights of tribal members to certain tax-free cigarette sales and ensured "that nonexempt purchasers do not likewise escape taxation." 512 U.S. at 65. "Wholesale distributors of tax-exempt cigarettes must . . . keep records reflecting the identity of the buyer in each tax-exempt sale and make monthly reports to the Department on all such sales." *Id.* at 67. The United States Supreme Court concluded that these tax enforcement regulations were facially valid. *Id.* at 78. Cigarette record-keeping and reporting requirements attendant to a legitimate state cigarette excise tax system continue to find support in federal courts. See *Oneida*, 645 F.3d 154; *Yakama*, 658 F.3d 1078; *Muscogee*, 669 F.3d 1159.

Nebraska's reporting requirements bear substantial similarity to the reporting requirements upheld in *Milhelm Attea*. The State's reporting requirements, by dividing cigarette sales accounting into in-state and out-of-state markets, ensures that tax precollection and stamping tallies for the reporting periods correspond with Form 68 applications for tax refunds and makes sure the State collects the cigarette taxes that are not subject to tax exemption. The inclusion of reporting obligations for a manufacturer's sales entity affiliates ensures that a company cannot evade tax reporting obligations through corporate shell games.

The sales entity affiliate reporting requirements are part of the State's regulatory system that generally applies to all cigarettes to be sold to consumers in Nebraska, including cigarettes sold from one business to another business in Indian country in Nebraska. As long as cigarettes sold by Rock River remain available for sale and consumption by consumers in Nebraska that do not qualify under the exempt-transaction framework of the statutes, the State's interests remain higher than any competing federal or tribal interests, the law is reasonably tailored to valid State interests, and the reporting requirements are minimally burdensome.

Therefore, sales of cigarettes manufactured by Rock River to Woodlands and HCID are considered sales of cigarettes in Nebraska. Woodlands and HCID are sales entity affiliates of Rock River. Rock River must include sales from Woodlands and HCID to wholesalers, distributors, or retailers in Nebraska or another state in its reporting to the Department as mandated by Neb. Rev. Stat. §§ 77-2604(2)(b) and 77-2604.01(3).

D. Attorney General Opinion No. 98005 is Inapplicable to This Analysis.

Your request mentions a previous opinion from this office addressing the imposition of Nebraska's cigarette tax on cigarettes manufactured by the Omaha Tribe of

Nebraska and sold by the Tribe on its Indian country in Nebraska. Op. Att'y Gen. No. 98005 (Jan. 15, 1998). At that time, the Omaha Tribe of Nebraska was doing business as the Omaha Nation Tobacco Company, had built a facility in the Omaha Tribe's Indian country in Nebraska, and was engaged in sales of cigarettes to both members and nonmembers of the Tribe within the Omaha Tribe's Indian country. *Id.* at 1-2. Nebraska statutes contained a cigarette excise tax with a legal incidence on the consumer and a requirement for cigarette wholesalers to precollect the tax and stamp the packs. Through policy of the Department, an earlier version of Form 68 allowed retailers located in Indian country in Nebraska to sell tax-free cigarettes and apply for credits from the wholesalers, who received credits from the Department. *Id.* at 2-3.

We analyzed the facts provided to us, the state statutes then enacted, and the caselaw as it existed at that time. We weighed the state, federal, and tribal interests at stake as prescribed by *Bracker*, 448 U.S. at 145. Based on the particular fact pattern provided to us, we concluded that Nebraska's cigarette tax was preempted with regard to sales by the Omaha Tribe on the Omaha Tribe's Indian country of cigarettes made by the Omaha Tribe. *Id.* at 10.

In the twenty-three years since that opinion, Nebraska law changed, the State's interests further developed, and a series of cases provided further clarification on the weighing of state, federal, and tribal interests in the area of cigarette taxation for preemption and tribal self-government.

Starting in 1999, LB574 introduced the cigarette escrow law. See Neb. Rev. Stat. §§ 69-2702 through 69-2703. In 2003, LB572 added laws modifying and supporting the cigarette escrow laws called the complimentary or directory laws. See Neb. Rev. Stat. §§ 69-2704 through 69-2711. The Nebraska Legislature updated and refined these laws on several occasions, most recently in 2019 with LB397.

In 2011, LB590 made some major adjustments to the cigarette excise tax precollection, stamping, and reporting requirements. See Neb. Rev. Stat. §§ 77-2601 through 77-2622. LB590 established the provisions spelling out the tax-exempt transactions for sales on an Indian tribe's Indian country, authorized the Department to enter into a cigarette tax refund formula system, created the framework for any potential cigarette compacts between the State and any tribe, updated the stamping agent licensing system, created the permissible tribal cigarette excise tax stamp alternative, and added sales entity affiliate reporting requirements for licensed stamping agents. See Neb. Rev. Stat. §§ 77-2602.05(2), 77-2602.05(5), 77-2602.06, 77-2603, 77-2603.01, 77-2604(2)(b), 77-2604.01(3).

Nebraska's per-pack cigarette excise tax, at sixty-four cents, is now double what it was twenty years ago. See Neb. Rev. Stat. § 77-2602(2). The cigarette excise tax is still directed toward a myriad of purposes but is now specifically directed towards the Health Care Cash Fund. See Neb. Rev. Stat. § 77-2602(3)(e). The precollection system's use of stamps dovetails with the diligent enforcement obligations Nebraska faces due to the

MSA and the enactment of the escrow laws. See Neb. Rev. Stat. §§ 69-2702(14); 77-2603(1). Nebraska directs its annual multi-million-dollar cigarette excise tax and MSA payment receipts into the Health Care Cash Fund. The State directs millions of dollars each year from the Health Care Cash Fund towards the regulation of the manufacture, distribution, and sale of cigarettes. The State also directs millions of dollars from the Health Care Cash Fund towards medical research, healthcare costs, children's health insurance support, and other healthcare or medical aid.

Subsequent to the ruling that Indian country is considered part of the territory of the State and Indian tribes' rights to make their own laws and be governed by them does not exclude all state regulatory authority on the reservation, several federal and state courts have considered various applications of state cigarette excise taxes or regulations attendant to those taxes. Not a single one of those courts employed the reasonings of *Cabazon*, 480 U.S. 202, to hold that a state cigarette excise tax or regulation was invalid.

Rather, in 2004 the Southern District of Iowa held that Iowa's regulations attendant to the legitimate cigarette tax were not preempted because the Omaha Tribe's cigarette sales in Iowa were being conducted outside the Omaha Tribe's Indian country. *Miller*, 311 F.Supp.2d at 825. In 2010, the Supreme Court of Oklahoma noted there is no federal jurisprudence pronouncing Indian tribal sovereignty in the area of cigarette distribution or sales, and no Congressional enactments encourage tribal self-sufficiency or economic development through cigarette distribution or sales. *Native Wholesale Supply*, 237 P.3d at 216. Instead, the State had an exceedingly strong interest in maintaining the integrity of its settlement contracts. *Id.* In 2011, the Second Circuit ruled that a state's interest in ensuring cigarette tax collection outweighs a tribe's interests even when the tax may disadvantage or eliminate tribal member cigarette sales in Indian country. *Oneida*, 645 F.3d at 165. Also in 2011, the Ninth Circuit examined a claim by the Yakama Tribe against the application of the Washington cigarette excise tax precollection and stamp system on Yakama member-owned retailers complying with tribal regulations holding that the State's precollection and stamp system remained valid. *Yakama*, 658 F.3d at 1089. In 2012, the Tenth Circuit analyzed the claims by the Muscogee (Creek) Nation operating a cigarette wholesale business in the tribe's Indian country selling to tribally-licensed retailers regarding the application of Oklahoma's cigarette excise tax and escrow laws and found that Oklahoma's laws were neither preempted nor in conflict with tribal self-governance. *Muscogee*, 669 F.3d at 1169-83. In 2014, the Ninth Circuit revisited Washington law for a challenge against the State's cigarette escrow law and concluded that a Yakama member-owned cigarette manufacturer making cigarettes in Yakama Indian country was subject to the application of the State's cigarette escrow law because the law was non-discriminatory and the manufacturer's cigarette-related activities, including the use of tobacco grown and processed outside Indian country, were largely "off-reservation." *King Mountain*, 768 F.3d at 995.

Unlike our earlier opinion, which addressed a small question of potentially tax-exempt sales for cigarettes made and sold within one tribe's Indian country, the current questions ask about exemption from regulations attendant to a legitimate tax for a

business operating in Indian country, using natural resources from outside Indian country, and selling its cigarettes in and outside Indian country to tribal members and nonmembers. The nature of the operation and its scale are different, the applicable caselaw has been refined, the applicable State laws have further developed, and the State's interests have increased. Accordingly, the findings and conclusions of Op. Att'y Gen. No. 98005 are inappropriate to apply in the present matter and our answers to your three questions above are a more accurate representation of application of the current facts to the current law.

E. Whether or Not Rock River is an Economic Development Corporation Does Not Matter for Purposes of This Analysis.

Your request mentions that Rock River is a wholly-owned subsidiary of HCI and that HCI represents itself to be an "economic development corporation" owned by the Winnebago Tribe. While the term "economic development corporation" carries with it a history of caselaw, the matter is essentially a red herring. Whether or not Rock River qualifies as an "economic development corporation" of the Winnebago Tribe would only impact whether or not Rock River can avail itself of the tribal sovereign immunity from suit of the Winnebago Tribe. In answering the questions of whether Nebraska's cigarette excise tax and regulations attendant to that tax would legally apply to Rock River, tribal sovereign immunity only informs on procedural matters. Potential procedural limitations do not influence the substantive questions and answers.

Tribal sovereign immunity can indeed extend to subdivisions of a tribe, including commercial subdivisions. *Native American Distributing v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1292 (10th Cir. 2008); see *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 759 (1998); see also *People v. Miami Nation Enterprises*, 386 P.3d 357, 365-66 (Cal. 2016) ("We conclude that an entity asserting immunity bears the burden of showing by a preponderance of the evidence that it is an 'arm of the tribe' entitled to tribal immunity. In making that determination, courts should apply a five-factor test."); *City of New York v. Golden Feather Smoke Shop, Inc.*, 2009 WL 2612345 (E.D.N.Y. 2009), *affirmed*, 597 F.3d 115 (2d Cir. 2010), ("[T]he issue of whether an entity is an arm of the tribe may rest on nuances in the entity's ownership and control structure, corporate purpose, and relationship with the tribal government.").

However, when deciding whether a state's cigarette excise tax precollection and stamp laws apply, whether or not a business is tribally owned or privately owned has not materially affected the applicability of the cigarette excise tax on the ultimate consumer or the regulations attendant to the tax.

In *Potawatomi*, the Citizen Band Potawatomi Indian Tribe of Oklahoma owned and operated a convenience store in Indian country in Oklahoma. 498 U.S. at 505. Referencing the holdings in *Moe* and *Colville*, the Court concluded tribes can be "obliged to collect and remit state taxes on sales to nonmembers at Indian smoke-shops on reservation lands." *Id.* at 512-13; see *Moe*, 425 U.S. 463; *Colville*, 447 U.S. 134.

"Although the doctrine of tribal sovereign immunity applies to the Potawatomis, that doctrine does not excuse a tribe from all obligations to assist in the collection of validly imposed state sales taxes." *Id.* at 512; see *Colville*, 447 U.S. 134.

In *Narragansett Indian Tribe v. Rhode Island*, the Narragansett Indian Tribe "acting pursuant to a tribal ordinance, opened a smoke shop [within its own Indian country] . . . offer[ing] an array of cigarettes for sale to . . . members . . . and nonmembers . . . to generate funds for its social programs." 449 F.3d 16, 20 (1st Cir. 2006). The First Circuit found that the tribe and its members were not free from the requirement to comply with Rhode Island's cigarette excise tax precollection and stamp system. *Id.* at 23.

In *Oneida*, the Seneca Nation had licensed approximately 172 retailers and 28 wholesalers all owned and operated by Seneca members and subject to the Seneca Nation's license requirements and cigarette tax. 645 F.3d at 162. The Unkechaug Nation had licensed approximately 25 retailers, all owned and operated by Unkechaug members, subject to the Unkechaug Nation's license requirements, wholesaler approval restrictions to two wholesalers possessing both Unkechaug and State wholesaler licenses, cigarette price fixing laws, and cigarette retail sales fees. *Id.* The Mohawk Tribe had licensed approximately 30 retailers all owned and operate by Mohawk members and subject to the Mohawk Tribe's cigarette price floor, license requirements for wholesalers and retailers, non-tribal business restrictions, and tribal tobacco fees. *Id.* The Cayuga and Oneida Nations centralized their ownership of cigarette retail stores without having independent, member-owned stores. *Id.* at 163. The Cayuga Nation owned and operated 2 retail stores selling to members and nonmembers. *Id.* The Court also held that the New York cigarette tax precollection law was reasonably tailored to New York's tax collection interest. *Id.* at 169-70. The Court's opinion was unaffected by whether or not the businesses to be regulated by New York law were owned by tribes or by private persons.

As stated above, whether or not Rock River is an "economic development corporation" for the Winnebago Tribe is a red herring. Tribal sovereign immunity is a procedural matter that does not inform on the substantive analysis of whether Nebraska's cigarette excise tax precollection, stamp, and reporting laws apply to the cigarette activities of Rock River. Nebraska law applies regardless of whether or not the State can directly prosecute Rock River for violations of Nebraska law in State court. See *Potawatomi*, 498 U.S. at 514 ("There is no doubt that sovereign immunity bars the State from pursuing the most efficient remedy, but we are not persuaded that it lacks any adequate alternatives.")

F. Rock River's Cigarette Business Continues to Merely Market a State Tax Exemption to Gain an Artificial Competitive Advantage.

The United States Supreme Court once held that a tribal bingo enterprise was not subject to state regulation based on the Court's weighing of federal and tribal interests

versus state interests and finding that state regulation of tribal gaming enterprises was contrary to federal policy. See *Cabazon*, 480 U.S. at 214-22. One year later, the United States Congress enacted the Indian Gaming Regulatory Act ("IGRA") in response to *Cabazon* and granted states the regulatory authority over gaming in Indian country that the Court had prevented, clarifying federal policy in favor of the states and directly contradicting the Court's holding in favor of the tribes. See *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 794-95 (2014). Some may cite *Cabazon* for the proposition that state taxes or regulations for certain businesses in Indian country are invalid. What is clear from the Congressional superseding the decision in *Cabazon*, the basis for the holdings in cases like *Cabazon*, and the decades of cigarette-related cases since then is that Congress disapproved of the tribes-over-states holding in *Cabazon* so much that they passed a law to abrogate the holding and Congressional intent favors state-regulated markets over tribally-marketed tax exemptions in the cigarette market. Thus, the value marketed by tribal cigarette sellers in Indian country remains merely a state tax exemption for persons who would normally do their business elsewhere.

Similar to *Cabazon*, the United States Supreme Court held that hunting and fishing by both tribal members and nonmembers on Indian country were exempt from state regulation when a tribe had established comprehensive management of fish and wildlife resources within their Indian country in substantial cooperation with the federal government to manage hunting and fishing on Indian country. See *Mescalero*, 462 U.S. 324. The Court paid particular attention to the close cooperation between the federal government and the tribal government in managing the natural resources within the tribe's Indian country at the direction of Congress. *Id.* at 328. The Court also pointed out that concurrent state jurisdiction would effectively supplant and nullify the tribe's regulations concerning nonmembers and disrupt the tribe's management program. *Id.* at 338. That the hunting and fishing took place entirely within Indian country also weighed heavily in the tribe's favor as the state could not point to any "off-reservation" effects warranting state intervention. *Id.* at 341-43.

Comparatively, when a tribe established a cigarette tax system for cigarettes sold within their own Indian country to members and nonmembers alike, the Court upheld that power of the tribe to tax but did not find that such taxation superseded the state's right to tax sales to nonmembers within the tribe's Indian country too. *Colville*, 447 U.S. 134. The Court recognized both that most cigarette purchasers within the tribe's Indian country are outsiders attracted to the bargain prices due to the claimed tax exemption, and that the tribe could be placed at a competitive disadvantage if required to collect both the state and the tribal cigarette tax. *Id.* at 154. However, "[i]t is painfully apparent that the value marketed . . . to persons coming from outside is not generated on the reservations by activities in which the Tribes have a significant interest." *Id.* at 155. The Court also found that federal law does not preempt state power to impose the cigarette tax on nonmember purchasers in Indian country. *Id.* at 160-61.

Continuing into the modern day, courts still uphold state taxation of cigarettes sales to nonmembers within Indian country consistent with the holding in *Colville* and have yet

to incorporate any of the reasonings in *Cabazon* or *Mescalero* in these contexts. “The Supreme Court has concluded that a state’s interest in collecting its lawful tax outweighs a tribe’s interest in selling tax-exempt cigarettes to non-tribal members who might normally shop elsewhere but for the discounted prices.” *Muscogee*, 669 F.3d at 1175. “They [have] also establish[ed] that: ‘[t]ribes have no vested right to a certain volume of sales to non-Indians, or indeed to any such sales at all.’” *Id.* (quoting *Colville*, 447 U.S. at 151 n. 27). “[T]he revenue tribes and retailers gain from cigarette sales to non-members derives from the marketing of a tax exemption, not from value ‘generated on the reservations by activities in which the [t]ribes have a significant interest.’” *Oneida*, 645 F.3d at 165 (quoting *Colville*, 447 U.S. at 155).

While the state interests in *Mescalero* and *Cabazon* involved less “off-reservation” effects due to the “on-reservation” nature of the involved activities of hunting, fishing, and gaming, the states have a powerful interest in the “off-reservation” effects of cigarette consumption. *Ward*, 291 F.Supp.2d at 204-05. Unregulated cigarette sales can increase adult consumption, increase minors’ access, threaten the public health, and threaten healthcare funding. *Id.* at 205. No evidence exists “of a federal policy favoring or promoting tribal control over the sale of cigarettes or confirming the power of tribes to regulate such sales.” *Id.* at 204. Evidence does exist of federal support of state regulation of cigarette sales: the Jenkins/Prevent All Cigarette Trafficking (“PACT”) Act mandating reporting to state tax administrators for cigarettes sold in interstate commerce³⁹ and the “Synar Amendment” conditioning state receipt of certain federal funds on state performance in controlling sales of tobacco products to underage persons. *Id.*; see 15 U.S.C. § 375, et seq. and 42 U.S.C. § 300x-26.

As opposed to establishing gaming facilities or working in close cooperation with the federal government to manage the natural resources within Indian country, Rock River aggregates the base materials from outside Indian country to assemble cigarettes and turns those cigarettes around for sales to consumers in multiple other states and Indian countries. Not only are the base materials produced outside Indian country, but Rock River sells its product outside Indian country. Rock River does not market an experience akin to recreational and resort opportunities dependent on the physical location and careful management within Indian country, Rock River markets a state tax exemption for cigarettes that are commercially available in many other places besides the Winnebago Tribe’s Indian country. Rock River’s unregulated cigarette sales threaten the public health and the funding of healthcare for all of the citizens of Nebraska that travel onto Winnebago Indian country to avail themselves of the advertised tax exemptions and for all those “off-reservation” citizens of the State that benefit from the public safety, public health, and transportation services provided by the State as a result of the regulated cigarette market.

³⁹ See *New York v. Mountain Tobacco Company*, 942 F.3d 536, 545-47 (2d. Cir. 2019) (Sales of cigarettes from Indian country in Washington to Indian country in New York constitute sales in interstate commerce as an expansion of the traditional understanding of the definition of interstate commerce in order to encompass a broader spectrum of commerce to be reported to state tax authorities for cigarettes sold in Indian country).

The State retains a powerful interest in regulating cigarette sales in Indian country. Congress has not acted in favor of tribal sovereign independence related to cigarette sales in Indian country; rather, Congress has acted to support state regulation of cigarette sales in Indian country. The tribal interest in cigarette sales remains simply the retention of an artificial competitive advantage in the cigarette sales market and Rock River has not situated itself for preferential treatment by merely assembling cigarettes in Indian country from materials generated outside Indian country. Marketing reduced-cost cigarettes to attract "off-reservation" buyers to come onto the reservation to buy the cigarettes and consume them outside Indian country at a later time is hardly the same as offering a recreational gaming experience in Indian country or regulating the hunting and fishing that take place in Indian country. Therefore, Rock River's cigarette sales remain subject to lawful State cigarette excise taxation and regulation for sales in Indian country in Nebraska.

CONCLUSION

Based on the foregoing, we conclude that Nebraska can impose its cigarette excise tax precollection, stamping, and reporting system on Rock River cigarettes sold to consumers in and outside Indian country in Nebraska. Therefore, when Rock River sells cigarettes that are to be sold to consumers in Nebraska, those cigarettes must bear a Nebraska tax stamp. Additionally, Rock River may not sell cigarettes that do not bear a Nebraska tax stamp to Woodlands or HCID. Finally, sales of cigarettes manufactured by Rock River through Woodlands and HCID are considered sales of cigarettes in Nebraska through sales entity affiliates and Rock River must include sales from Woodlands and HCID to wholesalers, distributors, or retailers in Nebraska or another state in its reporting to the Department.


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