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Re: Applicability of Freedom to Breathe Act to Indian Tribes/Reservations

Gentlemen:

You have asked for a legal opinion as to whether the Minnesota Clean Indoor Air Act (“MCIAA”) and the “Freedom to Breathe Act” amendments, which took effect on October 1, 2007, apply to Indian tribal businesses on Indian reservations, and whether Minnesota would have authority to enforce such laws there. My opinion follows.

Short Answer

Minnesota generally lacks authority to enact or enforce civil regulatory laws on Indian reservations, even if the civil regulatory law has criminal enforcement provisions. Since the Freedom to Breathe Act is primarily a regulatory law, the law is not generally enforceable against an Indian or an Indian tribal business on an Indian reservation. It presents a much closer question as to whether Minnesota has authority to enforce the law against non-Indian proprietors and employers within the boundaries of an Indian reservation.

Brief Background on the Freedom to Breathe Amendments

The MCIAA was originally enacted in 1975 and regulated smoking in many indoor places. Minnesota Clean Indoor Air Act, Minn. Stat. 144.411 (2006). On May 16, 2007, the Minnesota state legislature expanded on the original regulations in the MCIAA and enacted the Freedom to Breathe Act of 2007, amending the MCIAA by expanding significantly the number of public places in which persons cannot smoke in the State of Minnesota. Freedom to Breathe Act, Minn. Session Laws, ch. 82 (2007). The MCIAA and the Freedom to Breathe Act amendments are codified in the “Department of Health” chapter and the stated purpose of the MCIAA is to “protect the general public from the hazards of secondhand smoke by eliminating smoking in public places, places of employment, public transportation, and at public meetings.” *Id.*

The law defines “public place” and “place of employment” broadly, endeavoring to prohibit smoking in nearly all public indoor areas, including home offices and work vehicles. *Id.* Proprietors of the public place or place of employment have affirmative obligations under MCIAA to prevent smoking in the public place or place of employment. *Id.* Proprietors who are found to have violated the MCIAA as well as individuals who violate the MCIAA by smoking in prohibited areas are guilty of a

petty misdemeanor. *Id.* In Minnesota a ‘petty misdemeanor’ means a “petty offense which is prohibited by statute, which does not constitute a crime and for which a sentence of a fine of not more than \$300 may be imposed.” Minn. Stat. 609.02 §4(a).

However, the statute does not regulate indoor smoking in private places and there are several exceptions to the other prohibitions outlined in the MCIAA. *Id.* Specifically, the MCIAA does not prohibit smoking in circumstances involving: scientific study participation, traditional Native American ceremonies, tobacco product shops, heavy commercial vehicles, farm vehicles/construction equipment, family farms, disabled veterans camps and theatrical productions. *Id.* Beyond the exception for “traditional Native American ceremonies,” the MCIAA contains no provision specifically directed at tribes, Indians, or casinos. However, the MCIAA has been criticized for allowing tribes to remain exempt from the smoking regulations. Rep. Steve Sviggum, *Commentary: Statewide Smoking Ban Intrusive, Hypocritical*, Bemidji Pioneer, Feb. 4, 2007.

The Freedom to Breathe Act went into effect on October 1, 2007. Whether the State has the authority to apply this new law on reservations of federally-recognized American Indian tribes is purely a question of federal law, governed by federal statutes and decisions. However, because Minnesota state courts frequently address this federal question, state decisions are also analyzed below.

Background on Federal Principles of Tribal Sovereignty

Whether tribes have sovereign control over internal tribal affairs and tribal sovereignty is “dependent on, and subordinate to, only the Federal Government and not the States.” U.S. Const. art. I § 8; *California v. Cabazon Band*, 480 U.S. 202, 207 (1987) (citing *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 145 (1980)); *State v. Stone*, 572 N.W.2d 725, 728 (Minn. 1997). State laws may be enforced on Indian reservations only if Congress has expressly granted such authority to a state. *Cabazon*, 480 U.S. at 207 (1987); *Stone*, 572 N.W.2d at 728. Absent a governing act of Congress, states may not act in a manner that infringes “on the right of reservation Indians to make their own laws and be ruled by them.” *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 332 (1983); *McClanahan v. Arizona State Tax Comm’n*, 411 U.S. 164, 171-172 (1972) (quoting *Williams v. Lee*, 358 U.S. 217, 219-220 (1959)).

However, a state may regulate *non-Indians* on tribal reservations unless preempted “by the operation of federal law and tribal interest reflected by federal law.” *Mescalero*, 462 U.S. at 334 (citing *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980)).

Public Law 280 and State Authority

In 1953, Congress explicitly conferred on Minnesota broad criminal jurisdiction and limited civil jurisdiction over all Minnesota tribes under what is commonly referred to as Public Law 280. Pub.L. No. 83-280, 67 Stat. 588-89 (1953) (codified as amended at 18 U.S.C. § 1162 (1994), 25 U.S.C. § 1360 (1994)). However, the Red Lake Band of Ojibwe was specifically excluded from the grant of jurisdiction; and in 1973 all criminal jurisdiction was retroceded back to the Bois Forte Band pursuant to federal law.

In *Bryan v. Itasca County*, 426 U.S. 373 (1976), a case arising in Minnesota, the U.S. Supreme Court issued a unanimous opinion that Public Law 280 did not grant the State of Minnesota general regulatory authority on Indian reservations. The scope of the state’s limited jurisdiction under Public

Law 280 was further clarified by the Court's ruling in *California v. Cabazon Band*, 480 U.S. 202, 207 (1987), which addressed a civil regulatory law that had criminal penalties. In *Cabazon*, the Court held "when a state seeks to enforce a law within an Indian Reservation under Pub.L. 280, it must be determined whether the law is criminal in nature, and thus fully applicable to the reservation . . . or civil in nature, and applicable only as it may be relevant to private litigation in state court." 480 U.S. at 208.

The Minnesota Clean Indoor Air Act is a regulatory law that seeks to prohibit smoking in places of employment with limited exceptions. The question presented is whether the law's criminal component as well as the law's "prohibitions" make this a law that is criminal/prohibitory, and therefore enforceable by the state under Public Law 280, or a civil/regulatory law and therefore unenforceable. The analysis of whether this law is criminal/prohibitory or civil/regulatory is guided by the analytical framework provided by the Court in *Cabazon* and informed by subsequent Minnesota cases dealing with the distinction between civil/regulatory and criminal/prohibitory laws.

***Cabazon* and the State Court Interpretations of Public Law 280**

The Court in *Cabazon* reviewed California's attempt to enforce the state's bingo gaming laws on Indian reservations. California claimed that it could regulate the tribes because high stakes and unregulated bingo were prohibited and punished as misdemeanors under California law. *Cabazon*, 480 U.S. at 211. The Court held that California did not prohibit *all* forms of gambling. The Court found that California had chosen to regulate bingo, rather than prohibit it, and, thus, California's gaming laws were regulatory. *Cabazon*, 480 U.S. 211. The Court held "that an otherwise regulatory law is enforceable by criminal as well as civil means does not necessarily convert it into a criminal law within the meaning of P.L. 280." *Id.* The "shorthand" test for determining what was criminal/prohibitory under *Cabazon* is whether the conduct addressed by the state law violates the state's public policy. *Cabazon*, 480 U.S. at 209.

Minnesota courts have had many opportunities to consider this distinction. In two cases decided on the same day, the Minnesota Supreme Court expanded on the *Cabazon* analytical framework. *State v. Stone*, 572 N.W.2d 725 (Minn. 1997); *State v. Robinson*, 572 N.W.2d 720 (Minn. 1997). The court established a two-step test for determining whether a law is civil/regulatory and therefore unenforceable under Public Law 280. The two-step analysis was developed to remedy the inconsistent results reached when lower courts would either focus on the broad conduct being regulated (*e.g.*, driving) or the narrow conduct (*e.g.*, drinking and driving). Compare *Bray v. Commissioner of Public Safety*, 555 N.W.2d 757 (Minn. App. 1996) with *State v. Stone*, 557 N.W.2d 588 (Minn. App. 1996).

Under the guidance of the Minnesota cases, the first step is to determine the appropriate focus of the *Cabazon* analysis. *Stone*, 572 N.W.2d at 729-30. A court will first consider the broad conduct as under the *Cabazon* analysis *unless* the narrow conduct "presents substantially different or heightened public policy concerns" compared to those underlying the broad conduct. *Id.* The second step applies the *Cabazon* test: "if the conduct is generally permitted, subject to exceptions, then the law controlling the conduct is civil/regulatory. If the conduct is generally prohibited, the law is criminal/prohibitory." *Id.* A Minnesota court may also consider the "shorthand public policy test" in *Cabazon* which holds that "conduct is criminal if it violates the state public policy." *Id.*

Recognizing that all laws implicate public policy, the Minnesota Supreme Court has refined the “shorthand public policy test” and interpreted it to mean “public *criminal* policy.” *Id.* (emphasis in original). “Public criminal policy goes beyond merely promoting public welfare. It seeks to protect society from serious breaches in the social fabric which threaten grave harm to persons or property.” *Id.* The Minnesota Court outlined four non-exclusive, non-dispositive factors for determining whether the policy violation is so serious it rises to the level of “criminal”:

- (1) The extent to which the activity directly threatens physical harm to persons or property, or invades the rights of others;
- (2) The extent to which the law allows for exceptions and exemptions;
- (3) The blameworthiness of the actor;
- (4) The nature and severity of the potential penalties for a violation of the law.

Id.

These four factors have been used to determine, under the first step of the *Stone* analysis, whether the law raises heightened policy concerns and, in close cases, whether a law is criminal/prohibitory or civil/regulatory under the second step of the test. *State v. Busse*, 644 N.W.2d 79, 87 (Minn. 2002) (using the four factors in the second step of the *Stone* analysis to determine the focus of the analysis under the first *Stone* step: comparing driving with driving after cancellation as inimical to public safety). To emphasize the non-dispositive nature of the four factors, the Minnesota Court restated the principle established in *Cabazon*: the presence of a criminal penalty does not transform a civil/regulatory law into a criminal/prohibitory law but “the nature of the penalty may be used to weigh the importance of the public policy underlying the statute.” *Id.*

The Minnesota Supreme Court applied this two-step test in *Stone* to find many state traffic laws to be civil/regulatory and thus unenforceable under Public Law 280. *Stone*, 572 N.W.2d at 731. These state traffic laws were found to be civil/regulatory despite the fact that many of these violations constituted a misdemeanor offense. *Id.* (Offenses found regulatory include: driving without insurance, speeding, driving without a seatbelt, driving without a license and failure to have a child in a child restraint seat); *see also State v. Johnson*, 598 N.W.2d 680 (Minn. 1999) (holding driving after revocation to be a civil/regulatory law).

However, the Minnesota Supreme Court in *Busse* found the specific crime of driving after cancellation as inimical to public safety, to be a criminal/prohibitory law and thus enforceable. 644 N.W.2d at 87. The Court in *Busse* used the four factors in the second prong of the test to demonstrate that there were “heightened public policy concerns” which narrowed the analytic focus under the first prong. *Id.* at 88. The *Busse* court found that the particular criminal sanction of a gross misdemeanor (compared to a simple misdemeanor in driving-after-revocation cases) reflected a direct threat to physical harm. The court also held that the absence of any exceptions to the specific law demonstrated “the heightened policy concerns.”

The Minnesota Supreme Court found heightened public policy concerns in *State v. Robinson* when examining a statute governing underage consumption. 572 N.W.2d 720, 721 (1997). Drawing a contrast between time, place, and manner regulations aimed at adults, the court noted heightened policy considerations embodied in the regulation of underage alcohol consumption. *Id.* at 724. Looking at the narrow conduct of underage drinking, the conduct was easily determined to be prohibited and enforceable under Public Law 280.

Applying the two-step test to the Minnesota Clean Indoor Air Act (“MCIAA”), as amended, it must first be determined what the general focus of the *Cabazon* analysis should be. Unless the specific conduct regulated raises heightened policy concerns substantially different than the broad conduct, *Stone* requires that the broad conduct be the focus of the analysis.

The broad conduct of the MCIAA is the regulation of smoking and the narrow conduct is the regulation of smoking in public places and places of employment or, alternatively, smoking indoors (as the title of the act would indicate). The court in *Stone* held that only *serious breaches in the social fabric threatening grave harm* to persons or property can raise sufficient public policy concerns for the purpose of *Cabazon* analysis. The distinction between the narrow and broad conduct under the MCIAA does not appear to raise substantially different policy concerns than general smoking laws. The anti-smoking laws are generally directed not at grave harms of an immediate nature, but at long term concerns about public health. If the court were to look at the broad conduct of regulating smoking, it is clear that MCIAA regulates the conduct of smoking but does not generally prohibit it.

If, as in *Busse*, a court were to use the four factors in the second step of the *Stone* test to determine if the narrow conduct is the proper focus of the *Cabazon* analysis, the result would likely be the same. Under the four factor analysis in *Stone*, the first factor is the extent to which the conduct threatens harm to persons or property. While this factor could conceivably be thought to weigh in favor of a finding of heightened policy concerns, as second hand smoke is considered harmful to others, it has not been interpreted that way. Though speeding and failing to have a child in a proper child restraint clearly threatens substantial harm to persons in the aggregate, the court failed to find this factor relevant in *Stone*.

The second factor weighs against finding heightened public policy concerns as there are several enumerated exceptions to the MCIAA. In contrast, there were no exceptions to the laws in *Busse* and in *Johnson*.

The third factor has not been well articulated by the courts. However, the “blameworthiness” of a violator of the MCIAA is not significantly different than a person who risks safety by speeding. Finally, the fourth factor weighs strongly against a finding of heightened policy concerns because a violation of the MCIAA is punishable “criminally” only by a petty misdemeanor.

Under either of the approaches commonly used in Minnesota cases, the MCIAA seems to be a civil/regulatory statute, even if the narrow conduct was examined under the second step of the *Stone* test. In *Stone*, *Robinson*, *Busse* and *Johnson* the Minnesota Supreme Court applied the second factor of the *Stone* test and looked to see if the conduct in question was generally prohibited or generally permitted subject to exceptions. Here, if the narrow focus of the law is indoor smoking, it is clear that the law allows smoking in indoor private places (*e.g.*, homes, apartments), but does not in public places and places of work. If the narrow focus of the law is smoking in public places and places of employment, the conduct is arguably prohibited but it is subject to significant exceptions (family farms, a veterans’ rest camp, tobacco shops, hotel rooms, etc.). In a close case such as this, the *Stone* court directed that the four factor “public criminal policy” analysis be used to decide the issue.

Just as three of the four factors were strongly against a finding of “heightened public policy,” three of the four factors would weigh strongly against a finding that the conduct of smoking in public places or places of employment violates the state’s policy in a manner serious enough to be considered criminal. Further, in *Robinson* the Minnesota Supreme Court found important the distinction between

the time, place, and manner restrictions on adult alcohol consumption and the prohibition on underage consumption. Here the difference between creating a time, place and manner restriction on smoking and totally prohibiting smoking is an important distinction illustrating the regulatory nature of the MCIAA.

Finally, the MCIAA would clearly be found to be civil/regulatory if it were examined only under the *Cabazon* standard, which is the standard that federal courts would use. In *Cabazon*, the State of California regulated gaming heavily, prohibiting gaming under most circumstances and allowing gaming only under limited circumstances and specific regulations. Violations of the California regulations were punishable as a misdemeanor. Similarly, the MCIAA heavily regulates when and where people may smoke and, like the California gaming laws, prohibits certain conduct. However, the MCIAA does not regulate all smoking and does not prohibit all indoor smoking or even all smoking in public places. Further, the penalty for MCIAA violations is merely a petty misdemeanor, which Minnesota does not even characterize as a criminal offense. This makes it even less significant than the penalty for violation of the provisions of the California law in *Cabazon*. Thus, it would be very difficult to argue that the MCIAA is a criminal/prohibitory law.

Scope of the Limitations on State Authority

Under federal law, the limitations on state authority would generally track the federal definition of Indian country, 18 U.S.C. § 1151. Thus, the crucial question as to whether the state has jurisdiction on any given piece of Indian land is whether the land is within the boundaries of an Indian reservation, or is an allotment that remains in tribal or individual Indian ownership, or constitutes a “dependent Indian community.” The simple approach to answering these questions is to ask whether the United States holds the land in trust for the tribe. If so, the State almost certainly lacks jurisdiction to apply the Freedom to Breathe Act on such lands.

State Authority over Non-Members on Indian Reservations

Tribes are considered to have sovereign control over internal affairs and tribal sovereignty “dependent on, and subordinate to, only the Federal Government and not the States.” U.S. Const. art. I § 8; *Cabazon*, 480 U.S. at 207 (citing *Washington*, 447 U.S. at 145). However, “under certain circumstances a State may validly assert authority over the activities of nonmembers on the reservation, and . . . in exceptional circumstances a State may assert jurisdiction over the on-reservation activities of tribal members.” *Cabazon*, 480 U.S. at 215 (citing *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331-332 (1983)). In *Cabazon* the Court examined whether “the State may prevent the Tribes from making available high stakes bingo games to non-Indians.” The Court indicated that the decision turned on “whether state authority is preempted by federal law” and held that state law is preempted “if it interferes or is incompatible with federal and tribal interests reflected in federal law.” *Cabazon*, 480 U.S. at 216. The interests found to preempt state law in *Cabazon* were “traditional notions of Indian sovereignty and the Congressional goal of Indian self-government, including the ‘overriding goal’ of encouraging tribal self-sufficiency and economic development.” *Id.*

The Minnesota Supreme Court held in *State v. R.M.H.* that a “state’s jurisdictional relationship to a person on a tribal reservation varies depending on whether that person is an enrolled member of the tribe” 617 N.W.2d 55, 61 (Minn. 2000). In analyzing Supreme Court precedent, that court concluded that “Indian sovereignty is at its strongest in the context of self-governance, that is,

authority over members of the governing tribe. In contrast, the strength of Indian sovereignty is less with respect to authority over nonmembers of the governing tribe.” *Id.* The Minnesota Supreme Court has viewed the limited circumstances where State laws may be applied to tribes absent an express grant by Congress in light of the principle that tribes retain the right to “make their own laws and be ruled by them.” *Stone*, 572 N.W.2d at 732 (citing *Bracker*, 448 U.S. at 142).

This distinction between Indians and non-Indians, or tribal members and non-members, may provide a limited hook for state regulation over non-Indians, at least where there is no overriding federal issue of pre-emption. For example, the Minnesota Supreme Court found no preemption of state enforcement of traffic laws against non-members on tribal land. *R.M.H.*, 617 N.W.2d at 63. The court examined the state, federal, and tribal interest and concluded that federal and tribal interests were not threatened by the application of state law over a non-member of the tribe. *Id.* at 65. In contrast, Minnesota’s interest in regulating “the safe flow of traffic on its state-operated and maintained highways” was sufficiently strong to justify state jurisdiction. *Id.* Throughout this analysis the court continuously placed emphasis on the fact that the person being subjected to state jurisdiction was a non-member of the tribe. *Id.* at 62- 66.

Thus, although the broad terms of the MCIAA might seem to apply to Indians, non-Indians, and arguably tribal government operations themselves, state authority cannot reach this far. Like the driving regulations in *Stone*, there appears to be no authority for the regulation of tribal members within reservations. On the other hand, the law may be able to reach non-Indians on the reservation.

Cabazon dealt with a regulation that affected both tribal and non-tribal members. The Court concluded that federal policy of sovereignty and economic self sufficiency prohibited the state from exercising jurisdiction for the purpose of regulating non-tribal members within the reservation. Here the regulation does not specifically address an economic venture (like gaming in *Cabazon*) but it does address policy considerations that may have an impact on the economic success and the health of the tribe.

The state may assert that it has an extremely strong interest in the health and welfare of its citizens that is strong enough to justify regulation of non-tribal members within the reservation. However, the MCIAA is distinct from the traffic laws in *R.M.H.* where the court found an overriding state interest permitting regulation. The MCIAA is directed primarily at proprietors and employers and not at individuals. It seems clear that the state would not have authority to apply the law to the tribes or tribally-owned casinos on Indian reservations. The law does not appear to make smoking a crime in a facility for which the state lacks the authority to impose a smoking ban. While the state could theoretically enact a statute that would make it an offense for a non-tribal citizen to smoke in an Indian casino, the MCIAA does not seem to accomplish such a goal.

It is a much closer question as to whether the MCIAA would apply to non-Indian proprietors and employers who are otherwise within the boundaries of Indian reservations. It turns on the question of whether there is federal pre-emption of such state authority and it is beyond the scope of this opinion to consider that question.

Conclusion

While the MCIAA does not specifically exempt tribes from the Act’s regulations, federal law bars application of the MCIAA smoking regulations on Indian reservations and other Indian trust lands.

Under current Public Law 280 analysis, the MCIAA, as amended, is a civil/regulatory law which cannot be applied to a tribe under the rule established in *Cabazon*.

The State does have an option available that might allow it to ban smoking on Indian reservations. If the State adopted an outright criminal prohibition on smoking in general, as it does, for example, for marijuana, the State would have a much stronger argument under Public Law 280 that it could extend the prohibition to Indian reservations, particularly if it increased the penalties and insured that there were no exemptions or exceptions to the prohibition.

If you have any further questions, please do not hesitate to contact me.

Very truly yours,

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