

**Testimony of Dale E. Kildee, M.C.  
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**Committee on Judiciary  
Subcommittee on Crime, Terrorism, and Homeland Security**

**Legislative Hearing**

**on**

**H.R. 4081, the Prevent All Cigarette Trafficking Act of 2007 and  
H.R. 5689, the Smuggled Tobacco Prevention Act of 2008**

**May 1, 2008**

**I. INTRODUCTION**

MR. CHAIRMAN, THANK YOU FOR INVITING ME TO TESTIFY AT THE HEARING THIS MORNING. AS DEMOCRATIC CO-CHAIRMAN OF THE HOUSE NATIVE AMERICAN CAUCUS, I AM PLEASED TO EXPRESS MY VIEWS ON H.R. 4081, THE "PREVENT ALL CIGARETTE TRAFFICKING ACT OF 2007 AND H.R. 5689, THE "SMUGGLED TOBACCO PREVENTION ACT OF 2008."

WHILE I DO NOT OPPOSE THE PRIMARY GOALS AND OBJECTIVES OF THESE BILLS, MY GOAL IN TESTIFYING TODAY IS TO URGE THIS COMMITTEE, AS IT PROCEEDS IN CONSIDERING TOBACCO RELATED LEGISLATION, TO GIVE AMPLE OPPORTUNITY FOR INPUT FROM TRIBAL GOVERNMENTS, TO SAFEGUARD STATE AND TRIBAL GOVERNMENT AGREEMENTS RELATING TO STATE TAXATION IN INDIAN COUNTRY, AND TO AVOID UNNECESSARY STATE ENFORCEMENT ACTIONS AGAINST TRIBAL GOVERNMENTS.

**II. BROAD OVERVIEW OF STATE TAXATION AUTHORITY OF TOBACCO PRODUCTS SOLD ON INDIAN LAND**

THE ISSUE OF STATE TAXATION AUTHORITY ON INDIAN LAND IS A DELICATE MATTER. U.S. SUPREME COURT RULINGS RELATING TO THE COLLECTION OF STATE TOBACCO TAXES ON SALES BY AN INDIAN SELLER TO NON-INDIAN OR NONMEMBER INDIAN BUYERS ARE COMPLEX AND OFTEN ARE THE SUBJECT OF INTERPRETATIONAL DIFFERENCES OF OPINION.

IN GENERAL, TRIBAL GOVERNMENT SALES OF TOBACCO PRODUCTS TO TRIBAL MEMBERS CANNOT BE TAXED BY A STATE. HOWEVER, A STATE MAY COLLECT TAXES ON TOBACCO PRODUCT SALES TO NON-INDIAN AND NONMEMBER INDIANS, SUBJECT TO CERTAIN QUALIFICATIONS THAT I WILL NOT EXAMINE HERE. A NEGATIVE RESULT OF THESE RULINGS IS THAT TRIBAL GOVERNMENTS ARE NOT INCLINED TO IMPLEMENT THEIR OWN TAX SYSTEMS BECAUSE DUAL TAXATION WOULD HINDER THEIR ECONOMIC OPPORTUNITIES.

BECAUSE INDIAN TRIBES ARE SOVEREIGN GOVERNMENTS AND ENJOY SOVEREIGN IMMUNITY, THE U.S. SUPREME COURT IN LISTING OPTIONS FOR THE COLLECTION OF THE STATE TAX ENCOURAGES INTERGOVERNMENTAL AGREEMENTS WITH TRIBAL GOVERNMENTS TO AVOID FURTHER DISPUTES OVER STATE TAXATION AUTHORITY AND ENFORCEMENT OF STATE TAXES.

UNFORTUNATELY, SPECIAL INTEREST GROUPS THAT HAVE LONG BEEN ATTEMPTING TO UNDERMINE TRIBAL SELF-GOVERNMENT AND ERODE THE SOVEREIGN IMMUNITY OF TRIBAL GOVERNMENTS USE FEDERAL LEGISLATION TO UNDERMINE THOSE STATE-TRIBE AGREEMENTS.

PREVIOUS MEASURES CONSIDERED BY THIS COMMITTEE WOULD HAVE CREATED UNPRECEDENTED NEW STATE AUTHORITIES BY ALLOWING STATE GOVERNMENTS TO ENFORCE THE FEDERAL JENKINS ACT AGAINST TRIBAL GOVERNMENTS. IN ADDITION, THIS PROVISION WOULD ONLY SERVE TO DISRUPT STATE/TRIBAL AGREEMENTS WHERE ENFORCEMENT IS ADDRESSED. H.R. 4081, WHICH AMENDS THE JENKINS ACT, DOES NOT INCLUDE THIS TYPE OF PROVISION.

MR. CHAIRMAN, I STRONGLY OPPOSE INCLUSION OF THIS TYPE OF PROVISION IN ANY MEASURE AS IT WOULD REVERSE MORE THAN 200 YEARS OF FEDERAL INDIAN POLICY DESIGNED TO PROTECT THE GOVERNMENT-TO-GOVERNMENT RELATIONSHIP BETWEEN TRIBES AND THE FEDERAL GOVERNMENT. I WANT TO BE CLEAR THAT TRIBAL GOVERNMENTS ARE NOT ASKING TO BE EXEMPTED FROM APPLICATION OF THE JENKINS ACT; THEY SIMPLY ASSERT THAT ENFORCEMENT OF FEDERAL LAW SHOULD REMAIN WITHIN THE PROVINCE OF THE FEDERAL GOVERNMENT.

AND, THAT FEDERAL LEGISLATION SHOULD PRESERVE EXISTING AGREEMENTS BETWEEN A STATE AND TRIBE. I BELIEVE THAT H.R. 4081 ACHIEVES THOSE OBJECTIVES.

H.R. 5689 WOULD ESTABLISH A SYSTEM FOR REQUIRING CODES ON PACKAGES OF TOBACCO PRODUCTS FOR THE PURPOSE OF TRACKING THE COLLECTION OF TAXES THROUGH THE DISTRIBUTION SYSTEM UNDER THE AUTHORITY OF THE TREASURY SECRETARY. MANUFACTURERS WOULD BE REQUIRED TO PRINT A UNIQUE SERIAL NUMBER ON ALL PACKAGES OF TOBACCO. A SPECIFIC PROVISION OF THE BILL WOULD ALSO REQUIRE THAT

“EACH PACKAGE OF A TOBACCO PRODUCT THAT IS SOLD ON AN INDIAN RESERVATION...SHALL BE VISIBLY AND PROMINENTLY LABELED AS SUCH”. DUE TO THE VARYING TAXATION ARRANGEMENTS THAT STATE AND TRIBAL GOVERNMENTS HAVE ESTABLISHED, A GENERALLY APPLIED “ONE SIZE FITS ALL” APPROACH TO TRACKING THE COLLECTION OF TAXES MAY HAVE THE UNINTENDED EFFECT OF UNDERMINING INTERGOVERNMENTAL AGREEMENTS, AS THE CASE MAY BE IN THE STATE OF MICHIGAN.

### **III. TAX AGREEMENTS IN MICHIGAN**

PRESENTLY, 8 OUT OF THE 12 FEDERALLY RECOGNIZED INDIAN TRIBES IN MICHIGAN HAVE ENTERED INTO COMPREHENSIVE TAX AGREEMENTS WITH THE STATE OF MICHIGAN THAT, AMONG OTHER THINGS, PROVIDES A CLEAR UNDERSTANDING OF THE APPLICATION OF MICHIGAN TAXES IN INDIAN COUNTRY.

EXCEPT FOR THE LAND AREAS DESCRIBED FOR EACH TRIBE, THESE AGREEMENTS ARE BOILERPLATE, AND INCLUDE SIX AREAS OF STATE TAXATION: SALES AND USE TAXES, MOTOR FUEL TAXES, INCOME TAXES, MICHIGAN SINGLE BUSINESS TAX, AND TOBACCO TAXES. EACH AGREEMENT DESCRIBES IN GREAT DETAIL THE EXEMPTIONS, ENFORCEMENT, ADMINISTRATION, AND TERMINATION.

WITH REGARD TO TOBACCO PRODUCTS, A TRIBE CHOOSES ONE OF TWO SYSTEMS TO ACQUIRE TOBACCO PRODUCTS FOR TRIBAL AND TRIBAL MEMBER USE. THE TRIBE MAY CHOOSE A QUOTA SYSTEM OR A REFUND SYSTEM. MOST TRIBES HAVE OPTED FOR THE QUOTA SYSTEM WHICH REQUIRES A TRIBE AND STATE TO AGREE ON A CAP OR QUOTA OF TOBACCO PRODUCTS THAT A TRIBE MAY PURCHASE TAX FREE FROM A PRE-IDENTIFIED WHOLESALER. THE REFUND METHOD REQUIRES A TRIBE TO PREPAY STATE TAXES ON TOBACCO AND REQUEST A REFUND FROM THE STATE.

IN GENERAL, IMPLEMENTATION OF THE TAX AGREEMENTS IN THE STATE OF MICHIGAN IMPOSES SUBSTANTIAL ADMINISTRATIVE RESPONSIBILITIES ON THE TRIBE. THE AGREEMENTS REQUIRE THE TRIBE TO STAMP TOBACCO PRODUCTS FOR THE PURPOSES OF USING THE QUOTA METHOD, MAINTAIN A RECORD OF SALES, REPORTING AND ENFORCEMENT DUTIES. THE STATE HAS THE RIGHT TO INSPECT TRIBAL FACILITIES. DISPUTES ARE RESOLVED BY BINDING ARBITRATION. THE AGREEMENTS ARE PERPETUAL, BUT MAY BE TERMINATED BY EITHER PARTY UPON NOTICE.

I HAVE OVERSIMPLIFIED THE TAX AGREEMENTS IN MICHIGAN AS THEY ARE QUITE COMPLICATED. MY POINT, HOWEVER, IS TO EMPHASIZE THE IMPORTANCE OF PRESERVING INTERGOVERNMENTAL TAX AGREEMENTS.

**IV. CONCLUSION**

I WANT TO THANK THE CHAIRMAN FOR HIS WILLINGNESS TO ENSURE THE PARTICIPATION OF A TRIBAL LEADER AT THIS HEARING. I COMMEND YOU FOR SUPPORTING FEDERAL POLICIES DESIGNED TO ADVANCE TRIBAL SELF-DETERMINATION AND ECONOMIC SELF-SUFFICIENCY.

I LOOK FORWARD TO WORKING WITH THIS COMMITTEE TO ADDRESS CONCERNS OF TRIBAL GOVERNMENTS TO AVOID UNINTENDED IMPACTS ON INTERGOVERNMENTAL AGREEMENTS AND TO CLEAR UP ANY AMBIGUITY WITH RESPECT TO ENFORCEMENT.

THANK YOU.