

Why Indian Country Must Stop the STOP Act
Prepared for the National Tobacco Trade Association (NTTA)

Indian tribes are not engaged in illegal smuggling of tobacco. Indian tribes oppose the STOP Act because it interferes with completely legal tobacco sales on Indian reservations, and with tribal government collection of tobacco taxes that fund critical governmental services.

Tribal entrepreneurs, regulated and taxed by tribal governments, are able to sell their products at below-market prices because they are not part of the Big Tobacco market. Big Tobacco has sought to monopolize and price-fix through state taxation and regulation, particularly through those provisions of state law that implement the Master Settlement Agreement. The STOP Act would tip the scales towards Big Tobacco, via the states, through state tax collection and the standardization of tobacco prices before tobacco products ever reach Indian Reservations. These revenue-controlling provisions of the STOP Act have nothing to do with public health or child welfare.

Further, the STOP Act will very likely violate U.S. Constitutionally protected Indian Treaties and upset tribal-state tax compacts; undermine the legal tribal manufacture of tobacco; and impermissibly sanction tribal commerce – exchange that is protected by the federal Constitution’s mandate that Congress regulate commerce “among the several states, and with the Indian tribes.” It is time for Congress to stand up to its responsibilities and fully include Indian tribal regulatory and taxing authority in the laws that regulate commerce in tobacco.

Section 103(a) would require that every manufacturer or importer (including tribal governments) stamp each tobacco package with a “unique identification marker.” Although 103(b) requires that the “unique identification marker” “not interfere” with state, local or Indian tax stamps, the marker would be designed to “facilitate collection of” all currently applicable state and federal taxes and to “facilitate the enforcement” of other federal laws against tribal manufacturers, wholesalers or distributors, such as the PACT Act. The marker must provide the “value” of the marker, a tracking code, the name and address of the stamper, the date that it was stamped, and the name and address of the “first unrelated person purchasing or otherwise receiving” the product. Although the “marker” is couched as a tracking device, rather than a tax stamp, the statute arguably leaves room for all forms taxation at the manufacturer level. The fact that the stamp has a “value” is especially telling.

Section 105(a) would require that every tribal manufacturer, wholesaler or importer of tobacco obtain a permit from the Secretary of Treasury (presumably). In order to obtain the permit, the applicant must be in compliance with the PACT Act, the Jenkins Act, and numerous other tobacco-specific laws and regulations. The applicant must also be in compliance with “all other Federal, State, and Indian tribal laws relating to the taxation, manufacture, importation, exportation, distribution, marketing, sale, or transportation of tobacco products” In other words, it forces tribal manufacturers, wholesalers, and importers to comply with state laws (even if not expressly subject to state taxation per Section 301). Importantly, it also forces tribal manufacturers to comply with state laws that implement the Master Settlement Agreement, something that tribes had nothing to do with.

Section 108(b) would make it illegal to ship, transport, deliver, or receive any tobacco products that are unstamped. It also makes it illegal to sell more than 3,000 cigarettes in a single transaction or a series of related transactions. Considering how the Department of Justice has to date construed the PACT Act and its definitions of “inter-state commerce” and “delivery seller,” Section 108(b) likely interferes with certain Indian Treaty rights to travel for purpose of commerce, including tobacco commerce, unfettered from state and federal limitations. *See, e.g.,* The Treaty With the Yakama, 12 Stat. 951, Art. III (1859).

Section 301 says that “[n]othing in this Act or the amendments made by this Act shall be construed to amend, modify, or otherwise affect . . . any agreements, compacts, or other intergovernmental agreements . . . relating to the collection of taxes on tobacco products sold in Indian country.” Of course, these agreements and compacts arose in a different climate, one where federal law did not sanction the collection of state taxes and otherwise subjecting tribal governments to local restrictions. Under the STOP Act, states no longer have an incentive to stay in compliance with these agreements because the execution of otherwise non-enforceable state regulations can now be facilitated in Indian Country by the United States and its Treasury and Justice Departments.

Section 301 does contain the following disclaimer:

Nothing in this Act or the amendments made by this Act shall be construed to amend, modify, or otherwise affect . . . any limitations under Federal or State law, including Federal common law and treaties, on State, local, and tribal tax and regulatory authority with respect to the sale, use, or distribution of tobacco products or processed tobacco by or to Indian tribes, tribal members, tribal enterprises, or in Indian country; . . . any Federal law, including Federal common law and treaties, regarding State jurisdiction, or lack thereof, over any Indian tribe, tribal member, tribal enterprise, Indian reservations, or other land held by the United States in trust for one or more Indian tribes; or . . . any State or local government authority to bring enforcement actions against persons located in Indian country.

This savings clause is similar to that of Section 5 the PACT Act. However, as we have seen with the PACT Act, such provisions are not enough to deter states and Big Tobacco from seeking to destroy inter-tribal tobacco commerce via state regulation and taxation and federal enforcement. In order to be effective, the savings clause should specifically integrate tribal governments as appropriate regulatory and tax collection entities on the same basis as state governments, as well disclaim any application of state regulations to tribal tobacco businesses acting in Indian Country, especially in inter-tribal or reservation-to-reservation commerce.