

# WINNEBAGO TRIBE OF NEBRASKA

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February 23, 2011

Sen. Mike Gloor  
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P.O. Box 94604  
Lincoln, NE 68509

Sen. Abbie Cornett, Chairperson  
District 45  
Room #1116  
P.O. Box 94604  
Lincoln, NE 68509

Sen. Greg Adams  
District #24  
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Sen. Deb Fischer  
District #43  
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Sen. Galen Hadley  
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Sen. LeRoy Loudon  
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Sen. Dave Pankonin  
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Sen. Pete Pirsch  
District #04  
Room # 1404  
P.O. Box 94604  
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Sen. Dennis Utter  
District #33  
Room # 2015  
P.O. Box 94604  
Lincoln, NE 68509

Re: *LB 590 – Change provisions relating to cigarette taxation*

Dear Senator Gloor and Members of the Revenue Committee:

As Chairman of the Winnebago Tribe of Nebraska (the “Tribe”), I am writing to express my concerns regarding LB 590, a bill purporting to change certain provisions relating to cigarette taxation and Nebraska laws related to the 1998 Tobacco Master Settlement Agreement (“MSA”).<sup>1</sup> This bill is of great concern to me because it is a direct attack on Indian tribes and tribal sovereignty. As you are no doubt aware, the Tribe and the State of Nebraska (“State”) have for some now time been negotiating a possible compact regarding cigarettes. The Tribe originally supported the concept of this bill as enabling legislation for compacting. However, LB 590 does nothing to settle the longstanding dispute or provide the enabling legislation we had thought would address both of our needs. I have attached a list of concerns outlining specific sections of LB 590 that are of particular concern.

I must point out that among the many troubling and outright offensive sections in the bill is the criminalization of the exercise of our rights as a sovereign tribal nation. This bill proposes the authorization of “economic sanctions” against Indian tribes by punishing anyone conducting

<sup>1</sup> These MSA laws are commonly referred to as the non-participating manufacturer tobacco escrow statute and the cigarette directory statute. Neb.R.Stat. §§ 69-2702 through 69-2711.

**TRIBAL COUNCIL**

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VICE-CHAIRMAN- BRIAN K. CHAMBERLAIN

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business with an Indian tribe that dares to assert its rights as a sovereign guaranteed by federal law. LB 590 Section 15 is specifically designed to target Indian tribes. There is no other entity in regular business that could accurately claim that it is not subject to enforcement of states laws by reason or lack of state jurisdiction or sovereign immunity. It is well-established federal law that states lack jurisdiction over Indian tribes **and** Indian tribes enjoy sovereign immunity. What is most telling is that this section does not target persons who simply ignore the law, it only punishes Indian tribes for asserting rights guaranteed to them by federal law. The State has no right to do this, and frankly, the attempt is consistent with Big Tobacco's agenda to use government regulation to crush its competition under the guise of supporting public health.

In 1998, Nebraska, along with 45 other states of the union entered into a "settlement" agreement with the four major cigarette manufacturers: the MSA. I have placed the word settlement in quotations, because the MSA is in no way a settlement for the signatory states. Instead, the MSA has become a prescription for ongoing litigation and fights between the signatory states and Big Tobacco. Big Tobacco wields the MSA over the State like a Sword of Damocles, continually threatening to default on its payments to the State should the State refuse to use the sanction of law to crush Big Tobacco's competitors. There is currently being conducted an arbitration in the State of New York in which this very issue will be determined for one year's payment. The MSA will likely require the same determination to be made year after year, ad infinitum. LB 590 is just the latest incarnation of the State being forced to carry the water for Big Tobacco to crush its small competitors. To add *injury to injury*, tribal governments do not share in whatever benefits are bestowed by the MSA, even though the payments to signatory states are calculated using sales made within tribal jurisdictions. LB 590 is simply the *coup de grâce* to ensure that tribes not only do not share in the MSA payments, but that they cannot engage in their own tobacco commerce either.

Any claim that this bill is not meant to target or does not offend Indians is laughable. If all offending portions of this proposed legislation were taken out, there would be nothing left but a few definitions. Even then, the definitions themselves are offensive and target Indians. For example, Section 6 includes a definition of a "Person" to mean "any *natural person*, trustee, company, partnership, corporation, or other legal entity, including any Indian tribe or instrumentality thereof *or any member of an Indian tribe*" (emphasis added). There is no possible justification to include a definition that specifies a tribal member as distinct from a natural person. Our tribal members, I assure you, are natural persons, most of whom reside in and are citizens of the State of Nebraska.

Frankly, we are shocked that the State would consider a bill whose sole purpose is to put tribal cigarette businesses out of business. Passage of this bill would not be a win for public health. As set forth above, it is only a win for Big Tobacco which has been systematically attacking the Indian tobacco industry, which helps support the poorest and neediest communities in this country. The revenue generated by Tribal tobacco businesses for the Tribe is a trifling amount compared to the total amount of revenue generated in the state by cigarette taxes. These small amounts earned by the Tribe mean little or nothing to the State in the big picture but mean everything to the Tribe, supporting essential social services for tribal members including the award-winning Winnebago Community Development Fund and housing Down Payment

Assistance Program. Yet even this small amount has been deemed a threat by Big Tobacco, and thus it has been targeted for destruction. For our Tribe, this bill amounts to nothing less than an attempt to dehumanize Indian people and exterminate crucial tribal services. Make no mistake, this bill, under the guise of public health, is a means for Big Tobacco to stamp out its competition and keep control over the cigarette market to the detriment of this country's poorest citizens.

Sincerely,

A handwritten signature in cursive script, appearing to read "John Blackhawk".

John Blackhawk,  
Chairman

Cc: office file  
Ho-Chunk, Inc.  
Enclosure

## Winnebago Tribe of Nebraska's Concerns with LB 590

- **Section 15:** Section 15 is so profoundly offensive to tribes that it is hard to believe it is in this bill. Additionally, it is illegal as it punishes tribes for asserting rights guaranteed to them by federal law. This section provides that any person that claims they do not have to comply with the tobacco escrow statute, the directory statute or state cigarette tax laws due to the state's lack of jurisdiction over them or sovereign immunity are put on a "list" to be compiled by the state's tax authorities. No person may buy or sell cigarettes from a person on the list or sell that person cigarette making materials, machines, tobacco, paper, etc. There are criminal penalties for persons that do not comply. This section is targeted directly at Indian tribes; there are simply no other entities in regular business other than tribes that can claim the state lacks jurisdiction over them or that they have sovereign immunity. This section represents an attempted end run around federal law. State limits on jurisdiction over Indians, Indian Tribes and Indian lands are well established under federal law, as is sovereign immunity of tribes. Most offensive is that even persons that are scofflaws and simply do not comply with the laws are not put on this list. It is only persons that do not comply under a claim of *legal rights* regarding lack of jurisdiction or sovereign immunity that get put on the list. Thus, there is no doubt that this is purposely designed to prevent Indian tribes from asserting rights guaranteed to them by federal law by making them economic pariahs for doing so.

Section 15 goes so far as to make it impossible for a tribe to manufacture cigarettes on its reservation. This type of "value added" activity is encouraged and protected by federal law and the State and the United States Attorney has acknowledged such in the past. The bill represents an unprecedented attempt to target tribal businesses. Given its purpose of denying tribes the ability to assert rights guaranteed them by federal law, Section 15 cannot be saved by alteration. It must simply be deleted from LB 590.

- **Section 20(4):** Section 20 generally sets forth provisions for state-tribe compacts and provides that no compact can be inconsistent with state cigarette tax laws. State cigarette tax laws set forth very specifically how the revenue is to be distributed. Sub (4) would prevent any compact from having tax revenue sharing provisions with a tribe. This is the heart and soul of compacts. Additionally, tribes would be required to accept the full panoply of state cigarette tax law in order to have any compact. This section essentially ties the State's own hands and limits its ability to compact and must be rewritten to create flexibility in the compacting process. .
- **Section 5(2)(d):** This provides that importers shall be jointly liable for escrow deposits required by the MSA non-participating manufacturers tobacco escrow statute. This is wholly inconsistent with the position that the Nebraska Attorney General has taken since the inception of the MSA that ONLY the manufacturer can comply with the MSA tobacco escrow statute. It is also inconsistent with the stated purpose of the escrow statute: to provide a fund to pay for possible future liability of the manufacturer. Is the State of the opinion that they could bring a "released claim" against an importer for a cigarette manufactured by someone else? That is an untenable position. This is a provision designed to cut tribes out from getting cigarettes or force them to comply with

state cigarette laws for operations on their reservation. No alteration can save this provision and it must be deleted from LB 590.

- **Section 5(b)(iv):** This provides tribes can seek a release of tobacco escrow payments. However, there is no explanation as to under what circumstances LB 590 envisages a Tribe making any tobacco escrow payments. The state simply lacks jurisdiction over tribes to force them to make tobacco escrow payments. This section seems superfluous, however, any indication that the State might try and force tribes to make escrow deposits poses a serious concern to the Tribe. Exactly how this section is intended to operate needs to be explained by the drafters. .
- **Section 7(2)(c):** This provides that in order to be listed in the directory that manufacturer must have a federal manufacturer's permit. Foreign manufacturers cannot get this permit. Is it the intent of this section to not allow foreign manufacturers in the directory? This would seem to be patently illegal if that is the state's intent, or even the ultimate effect. The Tribe cannot offer an opinion on this section without further explanation from the drafters on how they view this section will operate.
- **Section 24:** This provides that all persons shipping cigarettes out of the state provide reports to NE regarding those cigarettes. What interest does the State have in cigarettes that are shipped out of the State? The Tribe cannot offer an opinion on this section without further explanation from the drafters on how they view this section will operate.
- **Section 10:** This section is confusing as to whether stamping agents are required or merely authorized to collect tobacco escrow deposits from the manufacturer. At the very least, this is just a poorly drafted provision and needs to be clarified. The Tribe cannot offer an opinion on this section without further explanation from the drafters on how they view this section will operate.