Big Sandy Rancheria Enterprises v. Bonta, 1 F.4th 710 (9th Cir. 2021)

- **Holdings:** Tribal corporation chartered under IRA section 17 did not constitute an "Indian tribe or band with a governing body duly recognized by the Secretary of the Interior" under 28 U.S.C. § 1362 and thereby was subject to the Tax Injunction Act's prohibition against challenges to the validity of a state cigarette excise tax. The corporation also failed to state a claim with respect to several other state tobacco regulatory statutes under federal common law standards or the Indian Trader Statutes.
- **Summary:** This decision arises from an appeal from the judgment in *Big Sandy Rancheria Enters. v. Becerra*, 395 F. Supp. 3d 1314 (E.D. Cal. 2019), summarized at https://docs.google.com/document/d/1f6DMzSjzOgB5F9IQE-5PCV3s2AtKnNKw/edit. There, a challenge by a tribal enterprise incorporated under section 17 of the Indian Reorganization Act to the California Cigarette Tax Law was held barred by the Tax Injunction Act, 28 U.S.C. § 1341, and its challenges to other California tobacco regulation laws, including the State tobacco complementary statute, failed to state a claim for federal preemption. Plaintiff Big Sandy Rancheria Enterprises was created by the Big Sandy Rancheria of Western Mono Indian as "a 'tobacco distribution enterprise' whose purpose is to 'foster economic development on the Rancheria and to create economic opportunities for Tribal members.'" Enterprises consists of four sub-entities that, inter alia, act as a tobacco wholesaler and distributor to other tribes. The Rancheria has not adopted a constitution under IRA section 16 but nonetheless "retain[s] inherent sovereign power to adopt governing documents under procedures other than those specified in [section 16]." The Enterprises sued California officials in 2018

  > [s]eeking declaratory and injunctive relief, the complaint alleged that: (i) federal common law and tribal sovereignty preempt the Directory Statute as applied to the Corporation; (ii) the Indian Trader Statutes, 25 U.S.C. §§ 261–64, do so as well; (iii) federal common law and tribal sovereignty preempt California's licensing requirements as applied to the Corporation; (iv) the Indian Trader Statutes do so as well; and (v) federal common law and tribal sovereignty preempt the Cigarette Tax Law as applied to the Corporation. In connection with its fifth cause of action, the Corporation sought a declaration that it "has no liability" for taxes imposed under the Cigarette Tax Law.

  Like the district court, the Ninth Circuit concluded that Enterprises could not escape the jurisdiction bar in the TIA against challenges to the imposition of state taxes and that the remaining claims against the regulatory components of the California tobacco laws did not state a viable claim for relief. One panel member concurred in the judgment but expressed doubt about dismissal of the fifth claim for lack of jurisdiction.

  - Lack of Subject-Matter Jurisdiction. The majority opinion's determination that an IRA section 17 corporation like Enterprises was not an Indian tribe or band for § 1362 purposes derived from its understanding that federal law ordinarily associates tribal status with a political relationship with the United States. Such a relationship admittedly did not exist here:

    > As the Corporation acknowledges, the Tribe, not the Corporation, appears on the Federally Recognized Indian Tribes … as a tribe entitled to receive benefits and services from the Department of the Interior. … Even more significantly, the Corporation does not allege that the federal government, in issuing the Tribe a section 17 charter, recognized the Corporation as a distinct political entity or a

> government. Nor does the Corporation allege that it may exercise governmental functions, such as imposing taxes or establishing a judiciary—*powers* that Congress has expressly associated with tribal status.

Moreover, "[b]y permitting 'any *tribe*' to petition for a charter of incorporation, which—once ratified 'by the governing body of *such tribe*'—may convey certain powers to the 'incorporated tribe,' the statute plainly distinguishes between the tribe and the incorporated tribe." The absence of jurisdiction under § 1362 therefore made the limited exception to the TIA's prohibition carved out in *Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463 (1976), inapplicable.

- Failure to State a Claim. The panel disposed of the challenges to the regulatory statutes by claim. As to the alleged preemption via federal common law, it found *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), dispositive:

> The Corporation concedes that it leaves the Rancheria to sell cigarettes to tribal retailers on other reservations. The Corporation does not allege that the challenged regulations are discriminatory nor, for the reasons stated below, does the Corporation plausibly allege that federal law bars the Directory Statute's application to the Corporation. … The Corporation therefore fails to state a claim that the challenged regulations, as applied to its off-reservation conduct, infringe tribal self-governance.

Given this determination, "the district court properly declined to balance federal, state, and tribal interests under [*White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980)]. *Bracker* balancing is appropriate when a tribe or tribal entity challenges a state's regulation of transactions between the tribe and nonmembers *on the tribe's reservation*."

The panel found the Indian Trader Statutes challenge to the several state regulatory restrictions equally flawed. As to those laws' applicability to intertribal wholesaling by Enterprises:

> [T]he transactions that the Corporation seeks to immunize from state regulation are fundamentally different from the transactions that have led the Court to deem the Statutes preemptive of state regulation as applied to Indian traders. Specifically, the Corporation does not allege that the federal government has licensed it as an Indian trader or otherwise approved its cigarette sales to tribal retailers on other reservations. … Moreover, it strains credulity to deem a lone federal regulation that prohibits on-reservation cigarette sales to Indian minors … "comprehensive" and preemptive federal regulation of cigarette trade within Indian country.

So, too, the California tobacco settlement Directory Statute passed muster. Although the panel recognized that the Statute might have a "potential downstream effect on pricing" because "non-participating manufacturers may have an economic incentive to pass the cost of escrow deposits on to their consumers," such possible impact "does not directly affect the price that the Corporation charges its customers." California licensing, recordkeeping and reporting requirements were deemed reasonable regulatory burdens under existing Supreme Court precedent that has upheld comparable laws aimed at collecting otherwise valid tobacco taxes "from customers who purchase cigarettes on reservations to which they do not belong." *See, e.g*., *Washington v. Confederated Tribes of Colville Indian Rsrv*., 447 U.S. 134 (1980). Enterprises, finally, failed to allege plausibly that the requirements were "generally 'incompatible with the federal regulation of trade with Indians in Indian country'" or that they "usurp or interfere with the

[Commissioner of Indian Affairs's] 'sole power and authority to appoint Indian traders to the Indian tribes'" as specified in 25 U.S.C. § 261.

The concurring panel member (Berzon, J.) joined in the majority opinion on the preemption issues. However, Judge Berzon "wr[o]te separately, *dubitante*, as to [that part of the opinion], affirming dismissal of BSRE's fifth claim for lack of jurisdiction" for several reasons. First, "I view the majority's focus on whether the Corporation, itself and independently, is a federally recognized tribe as misguided. … The relevant question is … not whether BSRE is federally recognized for the purposes of § 1362, but whether BSRE, in its incorporated form, is identical with Big Sandy Rancheria for jurisdictional purposes." On this point, she looked to the dissent in *White Mountain Apache Tribe v. Williams*, 810 F.2d 844 (9th Cir. 1985), that declined to draw a distinction between tribal governments chartered under IRA section 16 and tribal entities incorporated under IRA section 16 for § 1362 purposes. Judge Berzon next stated her belief that "the majority overstates our mandate to 'narrowly construe[]' the § 1362 exception to the Tax Injunction Act." In this regard, she acknowledged that "*Navajo Tribal Util. Auth. v. Arizona Dep't of Revenue*, 608 F.2d 1228 (9th Cir. 1979), does … present a wrinkle for a more forgiving reading of the case law" but found it technically distinguishable because it "held only that § 1362 'does not cover subordinate, semi-autonomous tribal entities.'" She reasoned that "[b]y contrast, § 17 corporations appear by definition to lack autonomy" and that, as arms of a tribe, "are treated as identical to tribal governments for purposes of federal tax immunity." Judge Berzon also disagreed with the majority that "it would be 'odd' to allow tribes to allow a § 17 entity to 'selectively claim the benefits of sovereignty.'" In her view, "[t]hat many § 17 corporations choose to *waive* their inherent immunity has no bearing on whether they are "tribe[s]" under § 1362. Tribes, like all sovereigns, may waive immunity when doing so is beneficial to their interests." Nevertheless,

> I join the majority's conclusion because, with the exceptions noted, its reasoning is persuasive, and I cannot be certain, faced with an ambiguous statutory text, a thin legislative history, and sparse case law, that the majority's conclusion is incorrect. But I am quite certain that the question is a closer one than the majority opinion indicates. And as we appear to be the first federal circuit court to address this precise question, I believe there is some value in expressing these doubts publicly.

- **Relevant (2020) Deskbook Sections:** 5:16 n.2; 6:2 n.21; 11:14 n.40