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State, ex rel. Wasden v. Maybee Supplemental Brief 2 Dckt. 35200

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IDAHO SUPREME COURT
COURT OF APPEALS

2009 MAR 10 44

IN THE SUPREME COURT OF THE STATE OF IDAHO

**STATE OF IDAHO by and through LAWRENCE)
G. WASDEN, Attorney General,)**

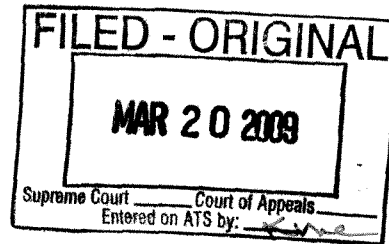
Plaintiff-Respondent,)

vs.)

**SCOTT MAYBEE d/b/a SMARTSMOKER.COM,)
BUYCHEAPCIGARETTES.COM and)
ORDERSMOKESDIRECT.COM)**

Defendant-Appellant.)

**Supreme Court
Docket No. 35200**




NOTICE OF SUPPLEMENTAL AUTHORITY

Respondent State of Idaho, by and through its Attorney General, Lawrence G. Wasden, submits the following supplemental authority pursuant to Rule 34(f), I.A.R.

On February 10, 2009, the Maine Supreme Judicial Court issued its decision in *Department of Health and Human Services v. Scott Maybee*, 2009 WL 307474 (Me.) The Court's reasoning at *2 and *3 of the Westlaw cite is relevant to the arguments in Section IV.I. (p. 36) and Section IV.J. (p. 38) of Respondent's brief. A Westlaw copy of the decision is attached.

RESPECTFULLY SUBMITTED this 20th day of March, 2009.

LAWRENCE G. WASDEN
ATTORNEY GENERAL
STATE OF IDAHO

By: 
BRET T. DeLANGE
Deputy Attorney General
Consumer Protection Division

CERTIFICATE OF SERVICE

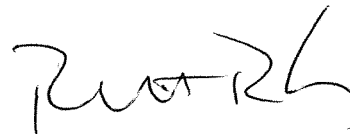
I hereby certify that on the 20th day of March, 2009, I caused to be served two true and correct copies of the foregoing instrument by the method indicated below, and addressed to the following:

J. Walter Sinclair
W. Christopher Pooser
Stoel Rives LLP
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BRET T. DeLANGE
Deputy Attorney General

jurisdiction is lacking. In *Williams* and *Kennerly*, the United States Supreme Court held that the state courts of Arizona and Montana, respectively, lacked subject matter jurisdiction because these states had not accepted jurisdiction over Native Americans on reservations. *Williams*, 358 U.S. at 222-23, 79 S.Ct. 269; *Kennerly*, 400 U.S. at 425-27, 91 S.Ct. 480.

[¶ 8] Maybee's reliance on *Williams* and *Kennerly* is misplaced. Those cases discuss activity that took place entirely within the reservation, and, for that reason, do not provide guidance here. Both involve collection actions by merchants with stores on reservations against Native Americans who purchased goods on credit at those stores. *Williams*, 358 U.S. at 217-18, 79 S.Ct. 269; *Kennerly*, 400 U.S. at 424, 91 S.Ct. 480. As mentioned above, Maybee's customers are not on the reservation. They buy their cigarettes through the Internet or by mail order, and accept delivery in Maine.

[¶ 9] Maybee's preemption argument is based on the same flawed premise; he asserts that because his businesses are physically located on the reservation when they accept orders, his transactions are governed by the law applicable to activities that occur within reservation boundaries. Maybee argues that 22 M.R.S. 1555-C(1) is preempted by federal law that restricts state authority over Native Americans conducting activities within reservations, citing *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980), and *Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976).^{FN2}

[¶ 10] In *White Mountain Apache Tribe*, the United States Supreme Court held that preemption is one of two "independent but related barriers" to the exercise of state authority over tribal reservations and members. 448 U.S. at 142-43, 100 S.Ct. 2578. Because the Indian Commerce Clause of the United States Constitution grants Congress the power to regulate commerce with Indian tribes, federal law may preempt state law in some areas. *Id.* at

142, 100 S.Ct. 2578 (citing U.S. Const. art. I, 8, cl. 3). However, there is no federal statute, federal regulation, or other federal law that preempts Maine's tobacco vendor licensing requirement.

*3 [¶ 11] The other barrier arises when state regulation infringes on tribal self-government and requires an inquiry or balancing test that the Court applies when the state seeks to regulate conduct that takes place entirely on a reservation. *Id.* at 142, 144-45, 100 S.Ct. 2578. In cases involving the on-reservation conduct of persons who are not Native American, the Court balances the tribe's interest in self-government against the state's interest in regulating on-reservation activity. *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 99, 126 S.Ct. 676, 163 L.Ed.2d 429 (2005) (citing *White Mountain Apache Tribe*, 448 U.S. at 144, 100 S.Ct. 2578).

[¶ 12] The balancing test described in *White Mountain Apache Tribe* and *Wagnon* is inapplicable to the present case because Maybee's interactions with consumers in Maine extend beyond the boundaries of the reservation. Activity of tribal members that takes place within the reservation but has an impact outside the reservation may be regulated by the states. *Nevada v. Hicks*, 533 U.S. 353, 362-66, 121 S.Ct. 2304, 150 L.Ed.2d 398 (2001) (holding that, in the absence of federal legislation to the contrary, the state has the authority to execute a search warrant on a reservation against a tribal member suspected of violating state law outside the reservation).

[¶ 13] The United States Supreme Court's holdings regarding vendor licensing requirements in *Rice v. Rehner*, 463 U.S. 713, 720, 103 S.Ct. 3291, 77 L.Ed.2d 961 (1983), and *Moe*, 425 U.S. at 480-81, 96 S.Ct. 1634 support Maine's enforcement of its tobacco vendor licensing requirements against Maybee. In *Rice*, the Court held that alcohol vendor licensing requirements, as applied to a tribal member on a reservation seeking to sell to persons who are not Native American, do not infringe upon tribal self-government. 463 U.S. at 720, 103 S.Ct.

3291.

[¶ 14] Maybee argues that *Rice* is distinguishable because it involves a federal statute that grants states and tribes the authority to regulate alcohol sales on Indian reservations, *id.* at 715, 726-27, 103 S.Ct. 3291 whereas there is no corresponding federal statute granting states the authority to regulate tobacco sales on reservations. However, the Court states in *Rice*:

To the extent that [the alcohol vendor] seeks to sell to non-Indians, or to Indians who are not members of the tribe with jurisdiction over the reservation on which the sale occurred, the decisions of this Court have already foreclosed [the vendor's] argument that the licensing requirements infringe upon tribal sovereignty.

Id. at 720, 103 S.Ct. 3291.

[¶ 15] Contrary to Maybee's contentions, *Rice* has applicability beyond alcohol vendor license fees because the Court explicitly relies upon prior decisions concerning other types of fees. One of those decisions is *Moe*, which deals with a tobacco vendor license fee. *Rice*, 463 U.S. at 720 n. 7, 103 S.Ct. 3291 (citing *Moe*, 425 U.S. at 475-76, 96 S.Ct. 1634). The Court struck down the fee in *Moe*, but under distinguishable facts, in that the state sought to enforce it against a reservation Indian conducting a cigarette business for the Tribe, on reservation land. 425 U.S. at 480-81, 96 S.Ct. 1634. Maybee, in contrast, conducts his transactions with consumers in Maine in furtherance of his private business. The Department therefore has the authority to enforce the tobacco vendor licensing requirement against Maybee. *See Rice*, 463 U.S. at 720, 103 S.Ct. 3291.

*4 The entry is:

Judgment affirmed.

FN1. The United States Supreme Court has noted that persons who are not members of a tribe are not "constituents of the govern-

ing Tribe." *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 161, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980). Maybee presumably asserts his status as an enrolled member to support his arguments on subject matter jurisdiction and preemption.

FN2. The United States Supreme Court recently held that two other provisions of the Maine law governing tobacco sales, 22 M.R.S. 1555-C(3)(C), 1555-D (2008), are preempted by a federal statute, *Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. ----, 128 S.Ct. 989, 993, 169 L.Ed.2d 933 (2008), but those provisions are not at issue in the present case.

Me., 2009.

Department of Health and Human Services v. Maybee

--- A.2d ----, 2009 WL 307474 (Me.), 2009 ME 15

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