



**COALITION OF LARGE TRIBES**

Blackfeet Nation • Cheyenne River Sioux Tribe • Crow Nation • Eastern Shoshone Tribe  
Fort Belknap Indian Community • Mandan, Hidatsa & Arikara Nation • Navajo Nation • Northern Arapaho Tribe  
Oglala Sioux Tribe • Rosebud Sioux Tribe • Shoshone-Paiute Tribes of the Duck Valley Indian Reservation  
Shoshone Bannock Tribes • Sisseton Wahpeton Oyate • Spokane Tribe • Ute Indian Tribe

December 20, 2023

**Testimony of Hon. Marvin Weatherwax, Chairman, Coalition of Large Tribes and  
Member, Blackfeet Tribal Business Council**

**Before The Senate Committee On Indian Affairs Oversight Hearing On “Fentanyl In  
Native Communities: Federal Perspectives On Addressing The Growing Crisis”**

My name is Marvin Weatherwax, Jr., and on behalf of the Coalition of Large Tribes, I thank you for holding this important oversight hearing on “Fentanyl In Native Communities: Federal Perspectives On Addressing The Growing Crisis.” The Coalition of Large Tribes is an intertribal Section 17 corporation representing the interests of the more than 50 tribes with reservations of 100,000 acres or more. Fentanyl is a crisis on many COLT Member Tribes’ reservations. Today’s testimony (attached) by President Frank Star Comes Out, President of the Oglala Sioux Tribe, a COLT Member Tribe, represents our typical experience on our large land base reservations.

Cartels are omni-present on our reservations, something about which I speak out often. *See, e.g., [Tribal Leaders Warn Biden's Menthol Ban Will Only Further Empower Cartels | National Review](#)* (“The cartels have a ‘big presence’ in his community, where tribal police don’t have authority over nonmembers. They pretty much feel unmatched; they’re just brazen, out in the open. It’s almost like it’s raining fentanyl on our community”).

The cartels are empowered by tribes’ lack of criminal jurisdiction over non-Indians. Cartels know they can get away with anything—that little to no law enforcement presence is available and prosecution is exceedingly unlikely even if they are arrested because of federal declination rates. Congress has known this for decades. Indeed, a generation after the U.S. Supreme Court’s decision in *Oliphant v. Suquamish Tribe*, finding that tribes had been implicitly divested of criminal jurisdiction over non-Indians because of tribes’ status as “conquered peoples,” then-United States Senator Ben Nighthorse Campbell questioned the impact of *Oliphant* and observed that “the word is out that people can get off the hook, so to speak, if they are not Indian and they do something on Indian land.” S. Hrg. 107-605.

COLT and other tribal organizations have long proposed solutions to address this. *See [Oversight Hearing “Opportunities and Challenges for Improving Public Safety in Tribal Communities” | Coalition of Large Tribes; COLT-Resolution-04-2022.pdf \(largetribes.org\); SAC-22-043-FINAL-SIGNED-WITH-ATTACHMENT.pdf \(largetribes.org\)](#)*.

Tribal law enforcement is also critically underfunded. COLT Member Tribes often have only one or two officers per shift on duty to serve areas the size of Delaware or West Virginia.



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The vast distances, lack of broadband and cellular coverage, and jurisdictional gaps exacerbate the crisis.

COLT has previously [echoed](#) the U.S. Senate concerns raised by Senators Cassidy, Rubio, Budd and Hagerty in their July letter to Commissioner Califf of the Food and Drug Administration, sounding the alarm over the Biden administration's plans to restrict tobacco products for Americans, potentially creating opportunities for foreign cartels to profit from illegal tobacco on the black market. [Ranking Member Cassidy, Colleagues Sound... | Senate Committee on Health, Education, Labor and Pensions](#); [COLT Chairman Echoes Senate Alarm on Foreign Illicit Tobacco Threats Amid FDA Prohibitory Rulemakings on Menthol and Nicotine in Cigarettes | Coalition of Large Tribes](#). COLT is very concerned about the illicit markets this rule will create and the pressure that will result on already-strained tribal law enforcement. This will be a cash cow for cartels already present on reservations and bombarding us with fentanyl and other drugs.

As with other forms of prohibition, unregulated supply chains will take over once legal pathways to adult consumers are closed off. Banning the legal sale of menthol and nicotine-containing cigarettes will cede control of the market to illicit producers. Tribes are painfully aware from our experience with the fentanyl crisis that criminal interests in China, the Middle East and Mexico already use various channels to traffic drugs through and concentrate drugs on our reservations, where the jurisdictional maze and chronic underfunding of tribal law enforcement leaves a persistent gaps for public safety. COLT's [June 2, 2023 Resolution #03-2022 \(WR-Las Vegas\), Calling for Pause in FDA Rulemaking on Tobacco to Allow for Tribal Consultation and Protection of Tribal Ceremonial Uses and Public Safety](#) addressed these concerns head on. COLT sent that Resolution to its Congressional delegations, the FDA and to the White House and has followed up in numerous meetings and communications since.

Yet, the FDA is barreling ahead with this despite the strong and well-grounded opposition and even as media reports on the significant illicit / cartel markets that have sprung up in California immediately after their flavor ban. *See, e.g.*, <https://www.axios.com/2023/10/13/illegal-vapes-thwart-fda-enforcement>; <https://sjvsun.com/california/study-ban-hasnt-stopped-californians-from-using-flavored-tobacco-menthols/>.<sup>1</sup>

The multi-billion-dollar product gaps created by the proposed rules will be filled by foreign criminal interests and directly and negatively impact public safety on remote rural Indian

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<sup>1</sup> Massachusetts' 2020 flavored tobacco ban is another good example of prohibition's expansion of illicit market. <https://www.wbur.org/commonhealth/2019/11/27/explainer-flavored-tobacco-vaping-law>. After the Massachusetts flavor ban went into effect adult consumers shifted their flavored tobacco purchases to neighboring states. The ban also fueled the already robust illegal market. [Sharon man charged in connection with major illegal tobacco operation \(bostonherald.com\)](#); [Smuggled cigarettes continue to flow into Massachusetts \(bostonherald.com\)](#); [Ban on menthol cigarettes sends sales to black market, convenience store owners say \(bostonherald.com\)](#).



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reservations like those of COLT Member Tribes. The California empty and discarded packs study showed the dominance of the “Sheriff” brand of menthol cigarettes which is a well-documented Mexican cartel brand, and that dominance emerged after just one year of California’s flavor ban. If FDA’s menthol rule were to go into effect, tribal law enforcement would need to be fully funded at \$2.4 billion annually<sup>2</sup> to try to address it. We are already out-manned and out-gunned and the proposed rules would provide the cartels with abundant cash as they fill the multi-billion-dollar product gap.

Why am I talking about menthol and fentanyl in the same testimony? Because if menthol is banned, the cartels will meet the demand and use the menthol illicit market as a cash cow utilizing their existing on-reservation networks that work so well for them to rain fentanyl on us with impunity. The U.S Department of the Treasury recognizes that fentanyl is coming from Mexico and being financed with other illicit products. See [U.S. Treasury Launches Counter-Fentanyl Strike Force | U.S. Department of the Treasury](#); [Remarks by Secretary of the Treasury Janet L. Yellen on New Treasury Actions to Counter Illicit Financing Tied to Fentanyl in Mexico City, Mexico | U.S. Department of the Treasury](#) (“Just last week, and thanks to collaboration with Mexican government counterparts, OFAC designated three Mexican individuals and 13 Mexican entities linked to CJNG, which traffics a large portion of the illicit fentanyl and other deadly drugs that enter the United States. These individuals and entities had engaged, directly or indirectly, in timeshare fraud, in which elderly Americans can be robbed of their life savings. These funds are then used to fuel an expansive criminal enterprise”). Why the FDA would throw fuel on the raging fentanyl fire by banning menthol is unfathomable.

To being to address the fentanyl issues, COLT recommends three things:

- 1) Don’t make it worse by inserting another product and more cash into the cartels’ arsenals by enacting the FDA menthol ban. Abandon the menthol ban.
- 2) Fully fund tribal law enforcement. By BIA-OJS’ own estimates, it would take \$2.4 billion per year to fully fund tribal law enforcement. All of BIA is funded at \$2.9 billion. We need to at least double that number because the mismatch is absurd.
- 3) Enact the public safety legislative proposal put forth by COLT and endorsed by NCAI and virtually every other major intertribal organization. Text attached.

Thank you for your consideration.

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<sup>2</sup> According the Bureau of Indian Affairs Office of Justice Services information presented in April 2023 to the Tribal Interior Budget Council, tribal law enforcement needs minimum annual funding of \$2.9 billion. That number should be the floor. Presently, all of BIA, across many dozens of functions, is funded and \$2.4 Billion. The underfunding is stark.

**Testimony of Frank Star Comes Out, President of The Oglala Sioux Tribe  
Before The Senate Committee On Indian Affairs Oversight Hearing On “Fentanyl In  
Native Communities: Federal Perspectives On Addressing The Growing Crisis.”**

**December 20, 2023**

My name is Frank Star Comes Out, and on behalf of the Oglala Sioux Tribe, I thank you for holding this important oversight hearing on “Fentanyl In Native Communities: Federal Perspectives On Addressing The Growing Crisis.”

The Oglala Sioux Tribe is a branch of the Lakota people and is part of the Oceti Sakowin (Seven Council Fires). The Oglala Sioux Tribe exercises powers of self-governance, self-determination, and jurisdiction over the Pine Ridge Reservation and is a signatory to the 1825, 1851, and 1868 Treaties, the latter of which established the Great Sioux Reservation. The Oglala Sioux have approximately 52,000 enrolled tribal members, and the seat of our tribal government lies within the Pine Ridge Reservation in southwest South Dakota, covering approximately 3.1 million acres, or slightly smaller than the State of Connecticut.

We need our federal partners and Congress to finally step up to the plate and help curb the drug crisis in Indian Country. A generation of our people are now born plagued by gangs and cartels, human and drug trafficking, organized crime, abuse, and murder. While methamphetamine remains the drug of choice for our manipulated people, every day, we see more fentanyl enter our reservation, so much so that drug overdoses from fentanyl are no longer uncommon. The relationship between these drugs and child abuse and neglect, robbery and domestic violence, and gun activity is a very real problem.

In FY 2021, the Tribe reported receiving 133,755 E-911 calls for police assistance, with only 33 police officers to respond. During this influx of emergency requests, the Bureau of Indian Affairs-Office of Justice Services did not assist with our multiple requests. By the end of September FY 2023, those police calls had increased to an officer-reported 176,799, with no increase in officers and still no federal response. That is an increase of 32,044 calls per year, which included an increase of 112 missing persons reports.

Assuming our average high of 28 officers on patrol, FY 2023 has increased the number of calls per officer by an astounding 843.2. Just between July 1, 2023, and August 31, 2023, officers reported 65 calls involving child abuse, 237 calls involving domestic violence, and 96 calls involving firearms, many related to the sale or use of illegal drugs. So, I must ask you, where is the federal response?

The State of South Dakota lacks criminal jurisdiction over Indian Country crimes; thus, in reality, the sole provider of law enforcement services to the Oglala Sioux Tribe is the federal government. We believe this federal neglect has resulted in the cartel moving on to our reservation, an increase in overdoses, and a proliferation of guns on our school properties. Add to this the fact that our officers, who all work alone, are in more danger now than ever, and you can begin to see the emergency our community is facing.

The consequences of this federal neglect result in many calls for police assistance going unanswered, officer response time has increased to the point that many criminals and witnesses are gone before an officer arrives, and all too often, our lack of usable evidence has decreased the ability to prosecute federal crimes successfully.

Twenty years ago, the Oglala Sioux Tribal Police Department had over 100 sworn police officers. Because of federal neglect, by 2021, we had just 33 officers and eight criminal investigators to handle over 133,000 emergency calls. That equates to just 6-8 officers working at any given shift. For comparison, the City of Rapid City has 176 officers to handle 115,000 emergency calls.

After years of effort to raise awareness about the dire public safety emergency on Pine Ridge, our people finally had enough. Thus, on July 26, 2022, The Oglala Sioux filed a lawsuit against the federal government for failing to provide adequate law enforcement on the Pine Ridge Reservation.<sup>1</sup>

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<sup>1</sup> <https://apnews.com/article/lawsuits-sd-state-wire-bf74022200d65062a1ddeea0de777ec4>. See, <https://www.argusleader.com/story/news/2022/07/29/oglala-sioux-tribe-sues-federal-government-over-lack-tribal-police-staffing/10174663002/>.

On May 23, 2023, the United States District Court concluded that the United States has a treaty obligation unique to the Oglala Sioux Tribe to provide protection and law enforcement cooperation and support on the Reservation.<sup>2</sup> “The level of violent crime, drug trafficking, gang activity, and trauma on the Reservation is staggering, unprecedented, and overwhelming law enforcement.” – *Oglala Sioux Tribe v. United States*, Chief Judge Lange—22-CV-05066 (May 23, 2023).

While this is the first step of many in the pending litigation, it is the first time a federal court has recognized a legally enforceable, treaty-based duty of federal support of law enforcement on the Reservation. What we really need is a federal response. So, I ask you, how many people have to die or end up in the hospital before anyone in the Administration or Congress takes this situation seriously?

Five years ago, we hardly knew what fentanyl was. Today, we have rampant overdoses, violence, guns, and cartels throughout our reservation. We also have very few resources to combat meth, our most serious problem. While federal funds appropriated by Congress do focus on meth, for us, it was some five years before it became a serious problem. Please understand that different tribes face an influx of different drugs at different times; thus, Congress must provide tribal governments the flexibility to use federal funding for programs that best address the needs of the tribe.

It is also time for the federal government to focus attention on how it is underfunding tribal law enforcement, which has left our communities victims of cartels, weapons, and drug traffickers. Our treaties provide for federal law enforcement, yet it is a responsibility that is all but ignored.

In the six months since the federal courts ruled that the U.S. government has a treaty and trust obligation to support law enforcement on the Reservation, our situation has only worsened. Everyone in the Administration is sympathetic, yet nothing happens. Unfortunately, we seem caught up in national movements that do not fit our community.

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<sup>2</sup> [https://www.newscenter1.tv/news/judge-rules-us-has-treaty-duty-to-fund-policing-on-pine-ridge-reservation-in-south/article\\_db9f17e4-008e-11ee-8081-73b27871a2e6.html](https://www.newscenter1.tv/news/judge-rules-us-has-treaty-duty-to-fund-policing-on-pine-ridge-reservation-in-south/article_db9f17e4-008e-11ee-8081-73b27871a2e6.html)

We have no reports of police abuse of our citizens, yet we are caught up in the “defund the police movement.” Additionally, while we are already funded at less than 40% of the need, tribes are victims in the “federal budget-cutting movement.” Today, we see more dollars going to South Dakota and other states despite having little to no criminal jurisdiction in Indian Country.

While we are big supporters of the FBI and the DEA, Congress needs to realize that their office stations in South Dakota are over 80 minutes away from our Reservation and that, under the existing federal jurisdiction system, they do not and cannot serve as first responders for our people.

In the meantime, drug use and drug dealers are running rampant on the Pine Ridge Reservation, and the community is the victim. According to the Centers for Disease Control, Native Americans have the highest rates of overdose death among any race, <sup>3</sup> including fentanyl.<sup>4</sup> Much of this loss of life is preventable by adequate federally funded law enforcement services at Pine Ridge, which, again, is already under federal jurisdiction and is a federal responsibility. If we cannot stop the flow of drugs and the movement of the cartel on federal land under federal jurisdiction, something is very wrong with our current system. You have the jurisdiction and the authorization; you need to use them.

Finally, on behalf of the Oglala Sioux Tribe, I thank you for holding this important hearing and urge Congress to address the issues by supporting and supplying tribal law enforcement with critical, additional resources for law enforcement and public safety.

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<sup>3</sup> CDC: [https://www.cdc.gov/nchs/products/databriefs/db457.htm#Key\\_finding](https://www.cdc.gov/nchs/products/databriefs/db457.htm#Key_finding)

<sup>4</sup> California Overdose Surveillance Dashboard: <https://skylab.cdph.ca.gov/ODdash/?tab=CA>



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## **Coalition of Large Tribes (COLT)**

### **Resolution: 08-16-2022-Resolution #03-2022 (NN-Twin Arrows)**

#### **Resolution in Support of the Intertribal Legislative Proposal for Addressing Non-Indian Crime in Indian Country**

**WHEREAS**, the Coalition of Large Tribes (COLT) was formally established in early April 2011, and is comprised of Tribes with large land base, including the Blackfeet Nation • Cheyenne River Sioux Tribe • Crow Nation • Eastern Shoshone Tribe • Fort Belknap Indian Community • Mandan, Hidatsa & Arikara Nations • Navajo Nation • Northern Arapaho Tribe • Oglala Sioux Tribe • Rosebud Sioux Tribe • Sisseton Wahpeton Sioux Tribe • Shoshone Bannock Tribes • Spokane Tribe • Ute Indian Tribe and is Chaired by President Kevin Killer, Oglala Sioux Tribe: and

**WHEREAS**, COLT was organized to provide a unified advocacy base on all issues affecting Tribes that govern large trust land bases and that strive to ensure the most beneficial use of those lands for tribes and individual Indian landowners; and

**WHEREAS**, a number of COLT member Tribes have participated in the development and advocacy in support of the attached draft Intertribal Legislative Proposal Addressing Non-Indian Crime in Indian Country and believe that the solutions offered in the draft would materially improve public safety in Indian Country, especially for large land-base tribes who suffer from a dearth of law enforcement resources and attention.

**NOW THEREFORE BE IT RESOLVED**, it is the policy of COLT to support the attached Intertribal Legislative Proposal Addressing Non-Indian Crime in Indian Country- as it might be amended from time to time as Tribes work to see it enacted.

**NOW THEREFORE BE IT FURTHER RESOLVED**, it is the policy of COLT to also support related administrative actions to the same purpose, including but not limited to: (1) seeking a Solicitor's Opinion from the Department of the Interior recognizing and affirming Tribes' inherent sovereign rights to exclude persons from our Reservations, including law enforcement personnel; and (2)





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seeking a directive from Assistant Secretary for Indian Affairs Bryan Newland instructing the BIA Office of Justice Services not to cooperate with state law enforcement unless and until specifically requested by a Tribe to do so.

**BE IT FINALLY RESOLVED**, that this resolution shall be the policy of COLT until it is withdrawn or modified by subsequent resolution.

#### **CERTIFICATION**

This resolution was enacted at a duly called meeting of the Coalition of Large Tribes held on Navajo Nation, Twin Arrows Casino, 22181 Resort Blvd. Flagstaff, AZ on August 16<sup>th</sup>, 2022 at which a quorum was present, with the resolution approved unanimously.

Dated this August 16<sup>th</sup>, 2022

Attest:

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Nathan Small, Secretary, Coalition of Large Tribes

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Kevin Killer, Chairman, Coalition of Large Tribes

## ADDRESSING NON-INDIAN CRIME IN INDIAN COUNTRY

Just as Congress passed the “*Duro fix*” in 1991, Congress must amend the Indian Civil Rights Act (ICRA) to address a looming public safety crisis. In *Oliphant v. Suquamish Indian Tribe*,<sup>1</sup> the U.S. Supreme Court eliminated tribal criminal prosecutorial authority over non-Indians. In *Oklahoma v. Castro-Huerta*, the Court has given States concurrent jurisdiction with the federal government to prosecute non-Indians who commit crimes against Indians.<sup>2</sup> Collectively, *Oliphant* and *Castro-Huerta* stripped Indian tribes of criminal jurisdiction over crimes on tribal lands and gave it to States, creating a well-known “maze of injustice” and “indefensible morass.” Resultantly, at least “[Seventy] percent of violent crimes generally committed against AI/ANs involve an offender of a different race. This statistic includes crimes against children twelve years and older. . . [I]n domestic violence cases, 75 percent of the intimate victimizations and 25 percent of the family victimizations involve an offender of a different race. Furthermore, national studies show that men who batter their companion also abuse their children in 49 to 70 percent of the cases.”<sup>3</sup> Non-Indian-on-Indian crime on Indian reservations is a crisis.

Congress must reaffirm that Tribal Nations have criminal jurisdiction to punish wrongdoers who commit crimes on tribal lands:

### *25 U.S.C. §1301 Definitions*

*For the purposes of this subchapter, the term –*

*(2) “powers of self-government” means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; and means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all ~~Indians~~ persons located on or within “Indian country” as defined by 18 U.S.C. § 1152;*

As the *Castro-Huerta* dissenting opinion recognized, the majority’s ruling is “ahistorical and mistaken,” contrary to “a mountain of statutes and precedents making plain that Oklahoma possesses no authority to prosecute crimes against tribal members on tribal reservations until it amends its laws and wins tribal consent.” The *Castro-Huerta* majority offers “contrived interpretations”<sup>4</sup> of the Court’s longstanding precedents. This results-driven posture is solely aimed at addressing the jurisdictional gap resultant from *McGirt v. Oklahoma* that decided that the Muscogee (Creek) Nation’s reservation had not been disestablished or diminished by Oklahoma’s entry into the Union and therefore, the federal government alone had prosecutorial authority for Major Crimes committed by Indians on the Creek Reservation. *McGirt* affirmed long-understood dividing lines on criminal prosecutorial authority. The *Castro-Huerta* majority invented “inherent” authority for Oklahoma whole-cloth to bridge the perceived gap in prosecutions created by: (1) the Court’s elimination of tribal criminal prosecutorial authority over non-Indians in *Oliphant*; (2) chronic federal dereliction of its Trust and Treaty obligations to secure public safety in Indian Country; and (3) difficulties in coordinating and funding law enforcement activities to respond to the legal structure recognized in *McGirt*.

But two wrongs don’t make a right. The Court was wrong to erase tribal criminal jurisdiction in *Oliphant*—on grounds that such jurisdiction was “inconsistent with [tribes’] status”<sup>5</sup> as conquered peoples. Tribes are not mere conquered peoples. They are domestic nations that retain all the inherent powers they had as nation-states at the time of the founding of the United States unless and until Congress acts to limit that sovereignty in some way. Time and time again, Congress

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<sup>1</sup> 435 U.S. 191 (1978).

<sup>2</sup> ICRA was amended in 1991 in order to overturn the Supreme Court’s decision in *Duro v. Reina*, 495 U.S. 676 (1990). The *Duro* decision held that tribal courts lack criminal jurisdiction over non-member Indians. Congress overturned the *Duro* decision (the so-called Congressional “*Duro-fix*”) by adding the language “...and means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians” to the definition of “powers of self-government.” This Congressional *Duro-fix* restored tribal court criminal jurisdiction over all Indians (members and non-members).

<sup>3</sup> U.S. Attorney General’s Advisory Committee on American Indian/Alaska Native Children Exposed to Violence, *Ending Violence So Children Can Thrive*, November 2014. Available: [Ending Violence So Children can Thrive \(justice.gov\)](https://www.justice.gov/ending-violence-so-children-can-thrive).

<sup>4</sup> *Torres v. Texas Dep’t. of Pub. Safety*, No. 20-603 (June 30, 2022, Thomas, J., dissenting).

<sup>5</sup> 435 U.S. at 208.

has safeguarded tribal criminal jurisdiction, not assailed it. The *Castro-Huerta* Court has wrongly encroached on tribal sovereignty by rewriting a revisionist history and satiating colonizers' aspirations—that States have always had jurisdiction in Indian Country—when in fact the opposite has been true from the earliest days of the republic. Long settled law that tribes are territorial sovereigns with power and authority over public safety in Indian Country is based on Treaties, the United States' Trust responsibilities, and Congress' plenary authority over Indian relations enshrined in the Constitution.

Congress can both (a) respect that tribal governments are best positioned to make decisions about their local public safety needs by relaxing previous limitations on the exercise of tribal territorial jurisdiction and enacting the above suggested changes to 25 U.S.C. §1301, and (b) also ensure proper safeguards for individual liberties by enacting a companion amendment:

*Any tribe seeking to exercise criminal jurisdiction over person not otherwise provided for by other independent statutory authority may only do so if the due process requirements set forth in 25 U.S.C. § 1302(c) are ensured.*

Additionally, we recommend elimination of ICRA's current sentencing limitations, restricting tribes to a sentence of three years for certain crimes, and when stacked with other crimes, nine years total. This proposed amendment would do away with the limitations on tribes' sentencing altogether.

*Subparagraphs (B) through (D) of section 202(a)(7) and section 202(b) shall be eliminated in their entirety.*<sup>6</sup>

Lastly, as outlined in Justice Gorsuch's dissenting opinion, PL-280 should be amended to ensure that the *Castro-Huerta* Court's recognition of a previously unknown State authority in Indian Country does not create confusion of reduce accountability of the federal and tribal governments primarily responsible for Indian Country public safety by limiting States' exercise of criminal jurisdiction on tribal lands to only those circumstances in which they have obtained tribal consent and amended their constitutions in compliance with procedures outlined in § 1324:

*§ 1321. Assumption by State of criminal jurisdiction*

*(a) Lack of State Jurisdiction Absent Compliance with § 1321 and § 1324*

*Except as otherwise authorized pursuant to, or provided by, law, a State shall not have criminal jurisdiction over a crime committed by or against an Indian in Indian country unless the State complies with the procedures to obtain tribal consent outlined in 25 U. S. C. § 1321, and, where necessary, amends its constitution or statutes pursuant to 25 U. S. C. § 1324.*

In sum, Congress' enactment of this menu of options, and coordinate appropriation of resources to federal and tribal governments will address the current crisis of non-Indian crime in Indian Country, best ensure Indian Country public safety and accountability, and honor the United States' solemn Trust and Treaty obligations.

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<sup>6</sup> NOTE—this would eliminate the following text (in purple) from ICRA:

**(B)** except as provided in subparagraph (C), impose for conviction of any 1 offense any penalty or punishment greater than imprisonment for a term of 1 year or a fine of \$5,000, or both;

**(C)** subject to subsection (b), impose for conviction of any 1 offense any penalty or punishment greater than imprisonment for a term of 3 years or a fine of \$15,000, or both; or

**(D)** impose on a person in a criminal proceeding a total penalty or punishment greater than imprisonment for a term of 9 years; ...

**(b) Offenses subject to greater than 1-year imprisonment or a fine greater than \$5,000**

A tribal court may subject a defendant to a term of imprisonment greater than 1 year but not to exceed 3 years for any 1 offense, or a fine greater than \$5,000 but not to exceed \$15,000, or both, if the defendant is a person accused of a criminal offense who--

**(1)** has been previously convicted of the same or a comparable offense by any jurisdiction in the United States; or

**(2)** is being prosecuted for an offense comparable to an offense that would be punishable by more than 1 year of imprisonment if prosecuted by the United States or any of the States.



# NATIONAL CONGRESS OF AMERICAN INDIANS

## The National Congress of American Indians Resolution #SAC-22-043

### TITLE: Calling on Congress to Enact the Legislative Proposal to Improve Public Safety in Indian Country

#### EXECUTIVE COMMITTEE

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*Quinalt Indian Nation*

1ST VICE PRESIDENT  
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*Pechanga Band of Luiseño Indians*

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**Lance Gumbs**  
*Shinnecock Indian Nation*

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*Upper Mattaponi Indian Tribe*

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**Gonzo Flores**  
*Lipan Apache Tribe of Texas*

SOUTHWEST  
**Joe Garcia**  
*Ohkay Owingeh Pueblo*

WESTERN  
**Bernadine Burnette**  
*Fort McDowell Yavapai Nation*

EXECUTIVE DIRECTOR  
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**WHEREAS**, we, the members of the National Congress of American Indians of the United States, invoking the divine blessing of the Creator upon our efforts and purposes, in order to preserve for ourselves and our descendants the inherent sovereign rights of our Indian nations, rights secured under Indian treaties and agreements with the United States, and all other rights and benefits to which we are entitled under the laws and Constitution of the United States and the United Nations Declaration on the Rights of Indigenous Peoples, to enlighten the public toward a better understanding of the Indian people, to preserve Indian cultural values, and otherwise promote the health, safety and welfare of the Indian people, do hereby establish and submit the following resolution; and

**WHEREAS**, the National Congress of American Indians (NCAI) was established in 1944 and is the oldest and largest national organization of American Indian and Alaska Native tribal governments; and

**WHEREAS**, on June 29, 2022, the Supreme Court issued its decision in *Oklahoma v. Castro-Huerta*, concluding that States have the right to exercise criminal jurisdiction on Indian country lands across the entire United States, despite the fact that Congress did not grant States such jurisdiction, and provided for this jurisdiction to be exercised without any tribal consent whatsoever; and

**WHEREAS**, the Supreme Court's June 2022 decision in *Castro-Huerta* contradicts nearly 200 years of settled jurisprudence, threatens the sovereignty of Indian Nations, and the safety of Native people across all of Indian country; and

**WHEREAS**, in deciding *Castro-Huerta*, the Court ignored the fact that Congress had just acted, in the Violence Against Women Act (VAWA) 2022, to restore tribal jurisdiction over non-Indian crimes of child violence against Indian children on Indian country lands, a restoration of tribal jurisdiction that includes authority to tribally prosecute the underlying crime committed in *Castro-Huerta*; and

**WHEREAS**, in deciding *Castro-Huerta*, the Court concluded that States have a more significant governmental interest in protecting Indian children on Indian country lands than Indian Nations; and

**WHEREAS**, in deciding *Castro-Huerta*, the Court violated the Constitution's separation of powers and disrespected Congress' exclusive authority to legislate over Indian affairs; and

**WHEREAS**, in deciding *Castro-Huerta*, the Court applied the civil jurisdiction preemption test from *White Mountain Apache Tribe v. Bracker*, 448 U. S. 136 (1980), to conclude that numerous Congressional laws, including the General Crimes Act and Public Law 83-280 (PL-280), did not preempt the exercise of state jurisdiction on Indian country lands; and

**WHEREAS**, in deciding *Castro-Huerta*, the Court granted all States jurisdiction over Indian country lands, regardless of whether the State secured tribal consent through the procedures Congress previously put in place in 25 U.S.C §§ 1321, 1324, and in doing so, the Court called into question the legitimacy of prior retrocessions of PL-280 jurisdiction where States have, before *Castro-Huerta*, agreed to retrocede jurisdiction over Indian country lands; and

**WHEREAS**, following the Court's decision in *Castro-Huerta*, individual local state and county prosecutors have elected not to refer VAWA cases to Indian Nations on the basis that *Castro-Huerta* gives States the jurisdiction to prosecute these cases;

**WHEREAS**, nothing in federal law requires local authorities to inform Indian Nations of VAWA cases that arise within their Indian country territories, even if the local state or county authority ultimately declines to prosecute the crime committed by a non-Indian against an Indian victim; and

**WHEREAS**, individual States do not owe a trust duty and responsibility to safeguard the lives of Native women and children as does the federal government; and

**WHEREAS**, historically, when Congress has acted to grant States the criminal jurisdiction that the Supreme Court just granted to all States, the rate of prosecutions of crimes committed against Native victims declines and the threats to public safety on Indian country lands increase; and

**WHEREAS**, historically, when Congress has acted to grant States the criminal jurisdiction that the Supreme Court just granted to all States, federal authorities and agencies have decreased the amount of resources and funding available to federal and tribal authorities that safeguard public safety on Indian country lands; and

**WHEREAS**, Native women and children are more likely to be abused, assaulted, raped, and murdered than any other population in the United States; and

**WHEREAS**, on some reservations, American Indian and Alaska Native women are murdered at more than 10 times the national average; and

**WHEREAS**, the United States Department of Justice has reported that the majority of violent crimes committed against Indian victims are committed by non-Indians; and

**WHEREAS**, no sovereign has a greater interest in protecting the safety and welfare of Native women and children living on Indian country lands than Indian Nations; and

**WHEREAS**, the only known solution to addressing the high-rates of crimes committed against Indian victims is the restoration of jurisdiction and sovereignty to Indian Nations; and

**WHEREAS**, during the 2016 Midyear Session of the National Congress of American Indians, held at the Spokane Convention Center, NCAI passed Resolution #SPO-16-037, stating “NOW THEREFORE BE IT RESOLVED that the National Congress of American Indians does hereby call on the United States government to expand inherent tribal criminal jurisdiction over all persons committing any crime in their Indian country in a manner that ensures the defendants have the same due process protections as required under the Tribal Law and Order Act of 2010 and the 2013 Re-authorization of the Violence Against Women Act”; and

**WHEREAS**, the Legislative Proposal to Improve Public Safety in Indian Country proposes legislative language that NCAI, in #SPO-16-037, called on the United States government to effectuate; and

**WHEREAS**, the sentencing limitations currently imposed on Indian Nations in the Indian Civil Rights Act significantly impede the ability of Indian Nations to issue sentences sufficient to deter crimes from being committed on Indian country lands, and in many instances, prevent Indian Nations from administering justice when heinous crimes are committed against tribal citizens; and

**WHEREAS**, the Legislative Proposal to Improve Public Safety in Indian Country proposes legislative language that would eliminate arbitrary and unsubstantiated sentencing limitations under federal law that prevent Indian Nations from punishing criminals with sentences that are fully commensurate with the seriousness of the crimes they commit; and

**WHEREAS**, it is critical that States not be allowed to exercise jurisdiction on Indian country lands absent tribal consent; and

**WHEREAS**, the Legislative Proposal to Improve Public Safety in Indian Country proposes legislative language to ensure that the *Castro-Huerta* Court’s manufacturing of previously nonexistent state authority in Indian country does not create confusion or reduce accountability of the federal and tribal governments primarily responsible for Indian country public safety, and ultimately, the Proposal will strengthen public safety by requiring a consensual and codified collaboration between tribal governments and States seeking to exercise jurisdiction on Indian country lands; and

**WHEREAS**, the Legislative Proposal to Improve Public Safety in Indian Country will eliminate doubt and will instead ensure that PL-280 retrocessions that occurred prior to *Castro-Huerta* remain in effect following the Court’s flawed reading of PL-280; and

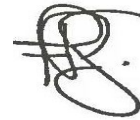
**WHEREAS**, the Legislative Proposal to Improve Public Safety in Indian County restores Congress’s exclusive role in legislating over Indian affairs, and ultimately, if passed into law, will serve to prevent erroneous interpretations of *Castro-Huerta* by lower federal courts as States attempt to expand the Court’s decision beyond the context of criminal jurisdiction.

**NOW THEREFORE BE IT RESOLVED**, that the National Congress of American Indians (NCAI) does call on the United States Congress to use the Legislative Proposal to Improve Public Safety in Indian Country as the foundation for legislation that will restore tribal sovereignty, restore Congress’s exclusive role in legislating over Indian affairs, and ultimately, ensure that States cannot exercise jurisdiction on tribal lands absent tribal consent. NCAI calls on Congress to pass this legislation with all due haste; and

**BE IT FINALLY RESOLVED**, that this resolution shall be the policy of NCAI until it is withdrawn or modified by subsequent resolution.

**CERTIFICATION**

The foregoing resolution was adopted by the General Assembly at the 2022 Annual Conference of the National Congress of American Indians, held in Sacramento, CA, October 30-November 4, 2022, with a quorum present.



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Fawn Sharp, President

**ATTEST:**



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Stephen Roe Lewis, Recording Secretary

## **Legislative Proposal to Improve Public Safety in Indian Country**

In 1991, after the Supreme Court’s ruling in [Duro v. Reina](#), 495 U.S. 676 (1990), Congress sought to clarify various jurisdictional issues created by the decision. This Congressional action is commonly referred to as the “Duro Fix.” The way Congress enacted this language and the statutory placement of this clarifying language provides a helpful guide as to how Congress may address the new jurisdictional complications created by the Court’s recent decisions. A summary of the *Duro*-related language is therefore provided for background purposes to provide context to the 2022 legislative proposal set forth below.

### **Duro Congressional Fix**

Congress amended the Indian Civil Rights Act in 1991 to overturn the U.S. Supreme Court’s decision in [Duro v. Reina](#), 495 U.S. 676 (1990). The Court had held that tribal courts lack criminal jurisdiction over non-member Indians. Congress subsequently acted to restore tribal criminal jurisdiction over all Indians—including non-member Indians.

Congress overturned *Duro* by adding language to 25 U.S.C § 1301, the definitions section that defines “powers of self-government.” Prior to the *Duro* fix, that section read as follows:

“powers of self-government” means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses . . . .

25 U.S.C. § 1301(2). Congress amended this definition to include that powers of self-government “means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians.” Thus, overturning SCOTUS’s *Duro* decision and reaffirming that tribal governments possess the inherent power to exercise criminal jurisdiction over all Indians.

### **Amending the ICRA to Relax Restrictions and Remove Sentencing Limitations**

The Indian Civil Rights Act should be amended to relax restrictions regarding tribal authority over non-Indian criminal activity and to remove sentencing limitations. These changes would ensure tribal nations are empowered to exercise criminal jurisdiction over any individual who commits a crime on tribal lands, regardless of whether they are Indian or non-Indian. In furtherance of this goal, the following preamble should be added to the ICRA:

It is the sense of Congress that Indian tribes, as sovereigns that pre-date both the United States and the United States Constitution, maintain their inherent sovereignty to govern and engage in self-government within their territorial borders.

It is the sense of Congress that the treaties the United States has signed with tribal nations, “according to the constitution of the United States, compose a part of the supreme law of the land.” [Worcester v. State of Ga.](#), 31 U.S. 515, 531 (1832).

It is the sense of Congress that because the treaties the United States signed with



tribal nations “have been duly ratified by the senate of the United States of America,” and because they acknowledge tribal nations to be “sovereign nation[s], authorised to govern themselves, and all persons who have settled within their territory,” tribal nations are therefore “free from any right of legislative interference by the several states composing [the] United States of America.” *Id.* at 530.

Thus, it is the sense of Congress that state laws “are unconstitutional and void” when they seek to exercise jurisdiction over tribal lands absent legislation from Congress authorizing a state’s exercise of jurisdiction since under the United States Constitution, that power “belongs exclusively to the congress of the United States.” *Id.* at 531.

Much like in the *Duro* fix, Congress should amend 25 U.S.C. § 1301 by adding the red language as follows:

“powers of self-government” means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; and means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all persons, Indian and non-Indian, located on or within “Indian country” as defined by 18 U.S.C. § 1151.

25 U.S.C. § 1301 (proposed language).

Moreover, additional language should be added to ensure the protection of non-Indian defendants’ due process rights. Suggested language is as follows:

Any tribal nation seeking to exercise criminal jurisdiction over non-Indian defendants not otherwise provided for by other independent statutory authority may only do so if the due process requirements set forth in 25 U.S.C. § 1302(c) are ensured.

ICRA should also be amended to remove sentencing limitations that restrict tribal nations to sentencing criminals up to three years for certain crimes, and when stacked using the Tribal Law and Order Act, nine years total. The following proposed amendments to [25 U.S.C. § 1302](#) would remove the limitations on tribal sentencing altogether:

(a) In general. – Title II of Public Law 90–284 (25 U.S.C. 1301 et seq.) (commonly known as the “Indian Civil Rights Act of 1968”) is amended by undertaking the following:

Subparagraphs (B) through (D) of section 202(a)(7) and section 202(b) shall be eliminated in their entirety.

These amendments would delete the following subparagraphs of Section 202(a)(7) (provided below in purple):

(B) except as provided in subparagraph (C), impose for conviction of any 1 offense any penalty or punishment greater than imprisonment for a term of 1 year or a fine of \$5,000, or both;

(C) subject to subsection (b), impose for conviction of any 1 offense any penalty or punishment greater than imprisonment for a term of 3 years or a fine of \$15,000, or both; or

(D) impose on a person in a criminal proceeding a total penalty or punishment greater than imprisonment for a term of 9 years;

These amendments would also delete Section 202(b) which provides:

**(b) Offenses subject to greater than 1-year imprisonment or a fine greater than \$5,000**

A tribal court may subject a defendant to a term of imprisonment greater than 1 year but not to exceed 3 years for any 1 offense, or a fine greater than \$5,000 but not to exceed \$15,000, or both, if the defendant is a person accused of a criminal offense who—

(1) has been previously convicted of the same or a comparable offense by any jurisdiction in the United States; or

(2) is being prosecuted for an offense comparable to an offense that would be punishable by more than 1 year of imprisonment if prosecuted by the United States or any of the States.

**Justice Gorsuch Proposed Amendment to Pub.L. 83-280 (18 U.S.C. § 1162)**

As described in Justice Gorsuch’s dissent, Pub.L. 83-280 must be amended to ensure that states, other than those six states with mandatory criminal jurisdiction under 18 U.S.C. 1162 (a), have no criminal jurisdiction in Indian country unless they have first obtained tribal consent to that state criminal jurisdiction and, where necessary, have amended their state constitutions or statutes to permit that jurisdiction, all in compliance with procedures outlined in 25 U.S.C § 1324. The following is suggested language to implement Justice Gorsuch’s proposed amendment:

Section 2 of Public Law 82-280, as amended and codified at 18 U.S.C. 1162, is hereby further amended by adding at the end thereof the following new subsection (e):

**(e) Lack of State Jurisdiction Absent Tribal Consent.**

Except as provided in subsection (a) of Title 18, Section 1162, a State lacks criminal jurisdiction over crimes by or against Indians in Indian Country, unless the State complies with the procedures to obtain tribal consent outlined in 25 U. S. C. § 1321, and, where necessary, amends its constitution or statutes pursuant to 25 U. S. C. § 1324.

\* \* \*



**COALITION OF LARGE TRIBES**

Blackfeet Nation • Cheyenne River Sioux Tribe • Crow Nation • Eastern Shoshone Tribe  
Fort Belknap Indian Community • Mandan, Hidatsa & Arikara Nation • Navajo Nation • Northern Arapaho Tribe  
Oglala Sioux Tribe • Rosebud Sioux Tribe • Sisseton Wahpeton Sioux Tribe  
Shoshone Bannock Tribes • Spokane Tribe • Ute Indian Tribe • Walker River Paiute Tribe

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**Coalition of Large Tribes (COLT)**

**Resolution: 06-03-2023-Resolution #01-2022 (WR-Las Vegas)**

**Resolution Calling for Pause in FDA Rulemaking on Tobacco to Allow for Tribal Consultation and Protection of Tribal Ceremonial Uses and Public Safety**

**WHEREAS**, the Coalition of Large Tribes (COLT) was formally established in early April 2011, and is comprised of Tribes with large land base, including the Blackfeet Nation • Cheyenne River Sioux Tribe • Crow Nation • Eastern Shoshone Tribe • Fort Belknap Indian Community • Mandan, Hidatsa & Arikara Nations • Navajo Nation • Northern Arapaho Tribe • Oglala Sioux Tribe • Rosebud Sioux Tribe • Sisseton Wahpeton Sioux Tribe • Shoshone Bannock Tribes • Spokane Tribe • Ute Indian Tribe • Walker River Paiute Tribe and is Chaired by Councilman Marvin Weatherwax, Blackfeet Tribal Business Council: and

**WHEREAS**, COLT was organized to provide a unified advocacy base on all issues affecting tribes that govern large trust land bases; and

**WHEREAS**, COLT tribes consist of tribes that have a land base of 100,000 acres of land or more, of which, of the 574 Federally recognized Tribes, more than 50 tribes meet this criteria; and these tribes control 95 percent of tribal lands and consist of one half of the Native population; and

**WHEREAS**, COLT member tribes have participated for many years in outreach and advocacy with federal policymakers to address matters of pressing concern to Indian Country, including regarding tobacco regulations, manufacturing and marketing and protection of tribal public safety by opposing regulations that create illicit markets; and

**WHEREAS**, Food and Drug Administration (FDA) is planning on finalizing regulation as early as August 2023 to ban menthol in all cigarettes. FDA News Release, “FDA Proposes Rules Prohibiting Menthol Cigarettes and Flavored Cigars to Prevent Youth Initiation, Significantly Reduce Tobacco-Related Death and Disease” as of April 28, 2022, [FDA Proposes Rules Prohibiting Menthol Cigarettes and Flavored Cigars to Prevent Youth Initiation, Significantly Reduce Tobacco-Related Disease and Death | FDA.](#); and



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**WHEREAS**, FDA is planning to issue a proposed regulation as early as October 2023 banning cigarettes unless they contain only trace amounts of nicotine. FDA News Release, “FDA Announces Plan for Proposed Rule to Reduce Addictiveness of Cigarettes and Other Combusted Tobacco Products,” as of 6/21/22, <https://www.fda.gov/news-events/press-announcements/fda-announces-plans-proposed-rule-reduce-addictiveness-cigarettes-and-other-combusted-tobacco>. If adopted, this regulation would ban the legal sale of over 99.9% of the cigarettes on the U.S. market today; and

**WHEREAS**, COLT’s member tribes are very concerned about the Final Menthol Rule and Proposed Nicotine Rule for several reasons. First, the FDA has not consulted with tribes at all on the Rules, despite the strong policies of the Biden Administration and numerous Executive Orders. Second, tribal tobacco manufacturers could be severely impacted by both Rules. Third, tribal ceremonial use of tobacco could be severely restricted, infringing on tribal cultural and religious practices. Additionally, the Rules will no doubt create illicit markets for menthol and nicotine-containing products, gaps that will be filled by foreign criminal interests and directly and negatively impact public safety on remote rural Indian reservations like those of COLT member tribes. We say more about each of these concerns below; and

**WHEREAS**, the FDA has not consulted with tribes **at all** about the Final Menthol and Proposed Nicotine Rules. This contravenes FDA’s own Tribal Consultation Policy, which provides:

FDA adheres to the HHS Tribal Consultation Policy (HHS TCP), which serves as a guide for federally recognized Indian or Alaska Native Tribes (hereafter, Indian Tribes) to participate in policy development by HHS and its divisions to the greatest extent practicable and permitted by law ...

As described in Section 2 of the HHS TCP, a unique government-to-government relationship exists between the Federal Government and Indian Tribes, which is grounded in the U.S. Constitution, numerous treaties, statutes, Federal case law, regulations and executive orders that establish and define a trust relationship with Indian Tribes. An integral element of this government-to-government relationship is that consultation occurs with Indian Tribes. Consultation is an enhanced form of communication which emphasizes trust, respect, and shared responsibility. True and effective consultation results in information exchange, mutual



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understanding, and informed decision making on behalf of the Tribal governments involved and the Federal Government. ...

To the extent practicable and permitted by law, consultation with Indian Tribes will occur before any policy action is taken that has tribal implications and substantial direct effects on: • one or more Indian Tribe(s), or • the relationship between the Federal Government and the Indian Tribe(s), or • the distribution of power and responsibilities between the Federal Government and the Indian Tribe(s). **A policy action includes actions such as the promulgation of a regulation ...**

[Tribal Consultation Policy - December 22, 2016 \(fda.gov\)](#). (Emphasis supplied). By failing to consult with tribes about the Rules, FDA has failed to follow its own policy as well as the policy of the Department of Health and Human Services, Executive Order 13175 and President Biden’s January 26, 2021 Memorandum on Tribal Consultation and Strengthening Government-to-Government Relationships; and

**WHEREAS**, dozens of tribes, including COLT member tribes, are engaged in manufacturing cigarettes. These tribal tobacco businesses account for significant revenues that tribes rely upon to provide government services to our citizens (because tribes lack a tax base). Additionally, the tribal tobacco industry accounts for thousands of direct and ancillary jobs in Indian Country and many millions of dollars in annual revenue for tribal businesses both large and small (mostly small businesses). The FDA has made no assessment of the impact the Rules will have on tribal economies; and

**WHEREAS**, historic tobacco use and cigarette use are essential features of many tribal cultural and religious ceremonies. Eliminating the availability of domestically manufactured cigarettes will impede tribal spiritual practices. For example, cigarettes are often given in recognition of prayers. The FDA has not considered the impacts of the Rules on tribal cultural and religious practices utilizing cigarettes; and

**WHEREAS**, as with other forms of prohibition, unregulated supply chains will take over once legal pathways to adult consumers are closed off. With cigarettes in particular, illegal markets will have significant geopolitical consequences. Banning the legal sale of menthol and nicotine-



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containing cigarettes will cede control of the market to illicit producers.<sup>1</sup> Tribes are painfully aware from our experience with the fentanyl crisis that criminal interests in China, the Middle East and Mexico already use various channels to traffic drugs through and concentrate drugs on our reservations, where the jurisdictional maze and chronic underfunding of tribal law enforcement leaves a persistent gaps for public safety. The Rules will strain already overburdened tribal law enforcement; and

**WHEREAS**, abundant cigarette manufacturing exists outside the United States, to meet US consumer demand once domestic, regulated manufacturers are barred from the market. The world’s largest cigarette manufacturer is the state-owned Chinese Tobacco Monopoly which controls the domestic Chinese market of more than 300 million smokers. This company already makes 2.3 trillion cigarettes each year. Organized Crime and Corruption Reporting Project, What is China Tobacco?, June 22, 2021, <https://www.occrp.org/en/loosetobacco/china-tobacco-goes-global/what-is-china-tobacco>. Many of COLT member tribes’ citizens are cigarette smokers. We are very concerned that illicit markets borne from the Rules -- Native American smokers who obtained such products will have no idea what foreign illicit cigarettes might be laced with -- just like certain foreign drugs today are routinely laced with fentanyl; and

**WHEREAS**, in summary, the Rules’ sweeping nicotine and menthol prohibition will result in even more illicit and unregulated products flowing into the U.S. from foreign countries like China. This will result in a completely unregulated marketplace where Native American businesses and Native American consumers pay a heavy price, including risk of contaminants. The Rules will result in loss of thousands of Native American jobs, undercutting dozens of tribal communities’ economic stability and putting Native American lives at risk.

**NOW THEREFORE BE IT RESOLVED**, COLT finds that the Rules are each a “Critical Event” as that term is defined in the FDA’s Tribal Consultation Policy because the Proposed Rules have “or may have tribal implications and substantial direct effects on Indian Tribe.” Therefore, COLT calls upon the FDA to immediately engage in tribal consultation regarding the Final Menthol and

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<sup>1</sup> Massachusetts’ 2020 flavored tobacco ban is a good example of prohibition’s expansion of illicit market. <https://www.wbur.org/commonhealth/2019/11/27/explainer-flavored-tobacco-vaping-law>. After the Massachusetts flavor ban went into effect adult consumers shifted their flavored tobacco purchases to neighboring states. The ban also fueled the already robust illegal market. [Sharon man charged in connection with major illegal tobacco operation \(bostonherald.com\)](#); [Smuggled cigarettes continue to flow into Massachusetts \(bostonherald.com\)](#); [Ban on menthol cigarettes sends sales to black market, convenience store owners say \(bostonherald.com\)](#).



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Proposed Nicotine Rule, and that such consultation be robust, given the potential wide-ranging implications of the Proposed Rule for tribal manufacturers, tribal economies, tribal ceremonial and religious uses of tobacco, and tribal law enforcement and communities based on the Rules' substantial likelihood of creating a massive illicit market.

**BE IT FURTHER RESOLVED,** COLT calls for a pause in the FDA's rulemaking with respect to the Rules unless and until the FDA satisfies its tribal consultation obligations.

**BE IT FURTHER RESOLVED,** COLT calls upon the FDA to assess in the Final Menthol and Proposed Nicotine Rule its impacts that will drive the entire tribal tobacco industry out of business.

**BE IT FURTHER RESOLVED,** COLT calls for engagement on the Proposed Rule by the Small Business Administration pursuant to Small Business Regulatory Enforcement Fairness Act to assess the Rules' impact on Indian Country small businesses.

**BE IT FURTHER RESOLVED,** COLT calls upon the FDA to exempt tribally-manufactured cigarettes from the Final Menthol and Proposed Nicotine Rules.

**BE IT FINALLY RESOLVED,** that this resolution shall be the policy of COLT until it is withdrawn or modified by subsequent resolution.



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**CERTIFICATION**

This resolution was enacted at a duly called meeting of the Coalition of Large Tribes held in Las Vegas, Nevada within the home state of the Walker River Paiute Tribe on June 2, 2023 at which a quorum was present, with the resolution approved unanimously.

Dated this June 2, 2023

Attest:

Nathan Small, Secretary, Coalition of Large Tribes

Marvin Weatherwax, Chairman, Coalition of Large Tribes