

No. CIV 10-019-JHP

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**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF OKLAHOMA**

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**MUSCOGEE (CREEK) NATION,  
a federally recognized tribe,**

**Plaintiff,**

**-vs-**

**BRAD HENRY, Governor of Oklahoma;  
W.A. "DREW" EDMONDSON, Attorney General  
of the State of Oklahoma; THE OKLAHOMA TAX COMMISSION;  
THOMAS KEMP, JR., Chairman of the Tax Commission;  
JERRY JOHNSON, Vice-Chairman of the Tax Commission,  
and CONSTANCE IRBY, Secretary of the Tax Commission,**

**Defendants.**

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**DEFENDANT, W.A. "DREW" EDMONDSON, ATTORNEY GENERAL OF THE  
STATE OF OKLAHOMA'S RESPONSE TO PLAINTIFF'S MOTION FOR  
PRELIMINARY INJUNCTION**

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**E. CLYDE KIRK, OBA #10572  
ASSISTANT ATTORNEY GENERAL  
313 NE 21<sup>st</sup> Street  
Oklahoma City, OK 73105  
(405) 521-3921; (405) 522-4534 (FAX)**

**ATTORNEY FOR DEFENDANT  
W.A. "DREW" EDMONDSON**

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**MARCH 4, 2010**

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COMES NOW, the Defendant, State of Oklahoma *ex rel.* W.A. “Drew” Edmondson, Attorney General of Oklahoma (hereinafter referred to as “Attorney General”), and provides the following brief in response to Plaintiff, Muscogee (Creek) Nation’s (hereinafter referred to “MCN”) Motion for Preliminary Injunction. Attorney General would show the Court as follows:

### I. STANDARDS FOR A PRELIMINARY INJUNCTION

A preliminary injunction is an extraordinary remedy; it is the exception rather than the rule. *GTE Corp. v. Williams*, 731 F.2d 676, 678 (10<sup>th</sup> Cir.Utah.1984). To obtain a preliminary injunction, the moving party must establish that (1) the moving party will suffer irreparable injury unless the injunction issues; (2) the threatened injury to the moving party outweighs whatever damage the proposed injunction may cause the opposing party; (3) the injunction, if issued, would not be adverse to the public interest; and (4) there is a substantial likelihood that the moving party will eventually prevail on the merits. *Resolute Trust Corp. v. Cruce*, 972 F.2d 1195, 1198-99 (10<sup>th</sup> Cir.Kan.1992).

The Tenth Circuit has adopted the Second Circuit’s liberal definition of the ‘probability of success’ requirement. *Heideman v. South Salt Lake City*, 348 F.3d 1182, 1189 (10<sup>th</sup> Cir.Utah.2003). Accordingly, where the moving party has established that the three “harm” factors tip *decidedly* in its favor, the “probability of success requirement” is somewhat relaxed. *Heideman*, 348 F.3d at 1189. In such cases, the movant need only show questions going to the merits so serious, substantial, difficult and doubtful, as to make them fair ground for litigation. *Heideman*, 348 F.3d at 1189. However, the “relaxed probability of success standard” is not applied when a preliminary injunction attempts to avert the application of statutes that are in the public interest:

Where ... a preliminary injunction ‘seeks to stay governmental action taken in the public interest pursuant to a statutory or regulatory scheme,’ *the less rigorous fair-ground-for-litigation standard should not be applied.*” *Sweeney v. Bane*, 996 F.2d 1384, 1388 (2<sup>nd</sup> Cir.1993).

*Heideman*, 348 F.3d at 1189 (*emphasis added*). In the case at bar, Plaintiff seeks an injunction based upon a challenge to the constitutionality of Oklahoma’s cigarette tax statute, Escrow statute and Complementary statute. Oklahoma’s escrow statute serves the public interest by preventing the spread of tobacco use, particularly among youth and adolescents and by also ensuring that there will be a fund for recovery if it is eventually determined that Plaintiff acted culpably in some manner. Accordingly, the “fair-ground-for-litigation standard” is not applied. See *Heideman*, 348 F.3d at 1189. Instead, Plaintiff is required to show that there is a “substantial likelihood” that they will eventually prevail on the merits of their claims before a preliminary injunction may be issued even if, for the sake of argument, Plaintiff was able to demonstrate the “harm” factors are *decidedly* in their favor, which they are not. See *Heideman*, 348 F.3d at 1189; and *Resolute Trust Corp.*, 972 F.2d at 1198-99.

The power and authority of a Court to issue the extraordinary writ of injunction should be exercised with caution and care. *Taylor v. Gilmartin*, 434 F.Supp. 909, 910 (D.C.Okla.1977). It should not be utilized on mere speculation or guesswork. *Taylor*, 434 F.Supp. at 910. As shown below, Plaintiff cannot establish any of the four factors required for the extraordinary relief of a preliminary injunction.

**PROPOSITION I**

**THE PLAINTIFF HAS FAILED TO MEET ITS BURDEN OF SHOWING IT WILL SUFFER IRREPARABLE HARM IF THE PRELIMINARY INJUNCTION IS NOT GRANTED.**

The Muscogee (Creek) Nation claims that if an injunction is not issued, it will be irreparably harmed because its sovereign interests in imposing its own tobacco taxes and in regulating the sale and trade of cigarettes within its Indian Country will be infringed. See

Brief, p. 5,6. As will be seen the challenged statutes are all in compliance with federal law and comply with Supreme Court precedent.

**A. THE ESCROW STATUTE AND COMPLEMENTARY ACT DO NOT APPLY TO NON-TAXED SALES TO TRIBAL MEMBERS AND NO INJUNCTION SHOULD LIE IN RESPECT TO THESE SALES.**

In this action the Muscogee Creek Nation challenges a newly enacted cigarette tax statute, that applies to non-compacting tribes. Pursuant to 68 O.S. §349.1, effective January 1, 2010, enrolled tribal members of non-compacting tribes are entitled to purchase cigarettes and other tobacco products bearing tax fee stamps, from a retailer licensed by the Tribe, located on Indian land. However, sales of cigarettes and other tobacco products to non-tribal members are taxed at the regular Oklahoma excise tax rate. Tax stamps or tax free stamps are placed upon packs of cigarettes by licensed Oklahoma wholesalers depending upon whether the cigarettes are designated as tax free sales to tribal members or taxed sales to non tribal members.

The Escrow statute imposes an obligation on non-MSA signatory “tobacco product manufacturer[s] selling cigarettes to consumers within the state, whether directly or through a distributor, retailer or similar intermediary or intermediaries...” a prescribed sum of money per “unit sold.” 37 O.S. 600.23(A). The calculation of the number of “units sold” is based upon the number of individual cigarettes sold in the state by the applicable tobacco product manufacturer...as measured by excise taxes collected by the state on packs...bearing the excise tax stamp of the state.” 37 O.S. § 600.22(10).

In the present case 68 O.S. §349.1 provides that sales of cigarette to non-tribal members are taxed at the regular cigarette excise tax imposed by 68 O.S. § 302 which taxes “the sale, use, gift, possession or consumption of cigarettes within the jurisdiction of the State of Oklahoma.” Payment of the excise tax is evidenced by stamps the wholesaler purchases and affixes to each pack of cigarettes that are to be sold, used, received, possessed or consumed in Oklahoma. *Id.*

The plain language of the Escrow statute ties the calculation of the number of “units sold” to the imposition of excise tax on the cigarettes sold. In respect to cigarettes purchased by Muscogee Creek tribal members from Muscogee Creek retailers, bearing tax free stamps, no excise tax is assessed or collected and no “units” are sold for purposes of the Escrow Statute. Under the Complementary Act, “Units sold” has the same definition as that term is defined in the Escrow Statute. See 68 O.S. § 360.3(9). Because the Escrow Statute and Complementary Act only apply to cigarette sales upon which an excise tax has been levied and collected, they do not apply to non-taxed tribal member sales allowed by 68 O.S. 349.1. No injunction is necessary to protect the Muscogee (Creek) Nation’s interests in the sale of tobacco products to its tribal members, because the tax statute does not tax sales to tribal members, and the Tobacco Manufacturer Escrow Payments Statute, and the Complementary Act do not apply to non taxed sales to tribal members. Additionally, the Muscogee Creek Nation does not manufacture cigarettes and it is not subject to the escrow obligations of the Escrow Statute.<sup>1</sup>

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<sup>1</sup> Since the Escrow Statute is not being enforced against the Muscogee Creek Nation, it lacks standing to challenge the escrow statute, even if the statute is unconstitutional. See *Wisness v. Yocom*, 433 F.3d 727, 731-31 (10<sup>th</sup> Cir.2006).

**B. THE CHALLENGED STATE EXCISE TAX STATUTE, ESCROW STATUTE AND COMPLEMENTARY ACT MAY BE PROPERLY ENFORCED BY SEIZING CONTRABAND TOBACCO PRODUCTS OFF THE RESERVATION.**

As previously stated, the Escrow Statute Complementary Act only applies to cigarette sales that are taxable, the products of tribal manufacturers — even a non-compliant manufacturer — could be sold to Muscogee (Creek) Nation tribal members, as long as they were sold through a State licensed wholesaler and had the appropriate tax-free stamps affixed. Unstamped products from non-compliant manufacturers would, however, be contraband and subject to off-reservation seizure.

Challenges to state cigarette tax statutes similar to those made by the Plaintiff have been made and rejected by Supreme Court. In *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976) the Court upheld Montana taxes on cigarette sales to non-Indians, finding that the incidence of the taxes was on the non-Indian customer. The Court noted the taxes were valid even though imposing and collecting the state tax denied the tribe the substantial economic advantage of marketing an “exemption” from such state tax to non-Indians willing to “flout [their] legal obligation to pay the tax.” 425 U.S. at 482. In *Washington v. Colville Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980) the Court rejected the claim that tribal “involvement in the operation and taxation of cigarette marketing on the reservation and the existence of tribal taxing ordinances per se “ousts” the state from any power to exact its sales and cigarette taxes from nonmembers purchasing cigarettes at tribal smokeshops. *Id.* At 154-155.

The Court also rejected the tribal plaintiff's arguments, that state taxes were preempted by a host of federal statutes regulating tribal affairs; inconsistent with principles of tribal self-government; and invalid under the Indian Commerce Clause. *Id.* At 154. The Court stated: "We do not believe that principles of federal Indian law, whether stated in terms of pre-emption, tribal self-government, or otherwise, authorize Indian tribes thus to market an exemption from state taxation to persons who would normally do their business elsewhere." *Id.* at 155.

Another question answered by the court, that the Muscogee Creek Plaintiff tries to blur throughout its pleadings in this case by referring to Indian to Indian sales, is that there is a distinction between cigarette sales to members of the reservation tribe and sales to Indians who are not members of the tribe where the cigarettes are sold. The Court held that neither federal statutes ("even given the broadest reading to which they are reasonably susceptible"), nor the principle of tribal self-government can be said to preempt Washington's power to impose its taxes on Indians not members of the Tribe. *Colville*, 447 U.S. at 160-161.

The final question answered was whether the state could make off-reservation seizures of unstamped cigarettes as contraband. The Court found Washington's interest in enforcing its valid taxes sufficient to justify off-reservation seizures of unstamped cigarettes, where the Tribe had refused to fulfill collection and remittance obligations the State had validly imposed. *Id.* 161-162.

In *Oklahoma Tax Commission v. Citizen Band Pottawatomie Tribe*, 498 U.S. 505 (1991), the Court held that Oklahoma could impose state taxes on non-member purchases. *Id.* at 509-10. It also noted that although the Tribe was immune from suit, the state could employ pre-collection obligations and seize goods in order to enforce collection requirements. *Id.* at 512-13.

In *Department of Taxation and Finance v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61 (1994), the court upheld a New York Law, similar to Oklahoma's tax statute, that imposed a quota on the number of untaxed cigarettes based on an estimate of the number of cigarettes that could be consumed by the tribes membership. *Id.* at 66.

In the case at bar, any cigarettes sold by the Plaintiff, even on tribal land, to non-tribal members are subject to regulation by Oklahoma's Cigarette Tax Act and Master Settlement Agreement Complementary Act for many of the same reasons the reservation smokeshops in the Colville case were subject to regulation by Washington's cigarette tax laws. Much like in Colville, the value marketed to non-tribal Oklahoma consumers is not generated by any independent tribal activity of the MCN. Rather, the only thing that Plaintiff offers the non-tribal Oklahoma consumer, that is not available elsewhere, is an alleged exemption from Oklahoma's cigarette excise taxes and cigarettes from manufacturers who have failed to comply with Oklahoma's escrow statute and the concordant artificially low prices. These statutes do not burden commerce that would exist on MCN land without respect to the claimed exemption from said statutes. This Court, like the Colville Court, should determine that federal Indian law does not go "so far as to grant tribal enterprises selling goods to non-members an artificial competitive advantage" over other tobacco product

manufacturers in the state. See *Colville*, 447 U.S. at 155, 100 S.Ct. at 2082, 65 L.Ed.2d 10. MCN has no valid self-government interest in selling non-taxed, non-MSA compliant cigarettes at cut-rate prices to non-tribal members through tribally licensed smoke shops. Accordingly, Oklahoma's Escrow Statute and Complementary Act do not infringe on the MCN's interest in self-government.

The Muscogee Creek Nation will not suffer irreparable injury by conforming their cigarette sales to pre-existing Supreme Court precedents. Status quo will be maintained by overruling Plaintiff's Motion for Preliminary Injunction.

## **PROPOSITION II**

### **THE RELIEF PLAINTIFF SEEKS IS ADVERSE TO THE PUBLIC'S INTEREST.**

Oklahoma's interest in regulating Plaintiff's Indian land sales to non-Indians is great. The Escrow statute and the MSACA serve the important public purpose of advancing the health of Oklahoma residents and, the injunction if issued, would be adverse to the public's interest.

On November 23, 1998, leading United States tobacco product manufacturers entered into a settlement agreement, entitled the "Master Settlement Agreement," ("MSA") with the State of Oklahoma. The MSA obligates the participating manufacturers ("PMs") to make health concessions and pay substantial annual payments to the State in perpetuity.

After the Master Settlement Agreement was signed, the Oklahoma Legislature passed the "Oklahoma Prevention of Youth Access to Tobacco Act," 37 O.S. § 600.21, et seq., which contains a provision known as the "Escrow Statute." The "Escrow Statute" requires cigarette manufacturers selling to Oklahoma consumers, either directly or indirectly through an intermediary, to become a PM or make annual payments into an escrow account as a non-participating manufacturer ("NPM").

The purpose of the escrow account is “. . .to guarantee a source of compensation and to prevent such manufacturers from deriving large, short term profits and then becoming judgment proof before liability may arise.” The funds placed into escrow are in proportion to the number of its “Units Sold” in the State. “Units Sold” is defined as the number of individual cigarettes sold as measured by excise taxes collected by the state on packs bearing a state excise stamp. See 68 O.S. § 360.4. The manufacturer receives interest on these funds and at the end of twenty-five years any funds not used to pay a judgment are returned to the manufacturer. Unlike cigarette excise tax statutes, the burden of funding an escrow account is upon the manufacturer, not wholesalers, retailers, or consumers. The Escrow Statute is not a tax, but rather a public policy law that regulates the sale of cigarettes to consumers. See *Star Scientific, Inc. v. Beales*, 278 F.3d 339, 350-54 (4<sup>th</sup>Cir.2002)(recognizing the difference between state tax and regulatory nature of Escrow Statute). Despite the fact that Oklahoma had reserved its rights against the NPMs in the MSA, Oklahoma had remaining public health concerns that the NPMs - unaffected by the MSA’s marketing and advertising restriction or by any obligation to make settlement payments to Oklahoma - would expand their cigarette sales to youth and to an already-addicted adult population by offering their cigarettes for sale at artificially low prices. See 37 O.S. §600.21. Oklahoma’s Escrow Statute addresses the public health concerns of the State by eliminating the financial advantage of NPMs. Without the Escrow Statute NPMs would be able to expand their cigarette sales to youth and an already addicted adult population by exploiting the financial advantage they would have over PMs. Oklahoma’s Escrow Statute eliminates this financial advantage by forcing NPMs to pay into an escrow account an amount that is intended to mimic the payments PMs are required to make under the MSA. See 37 O.S. §§ 600.21(D) and 600.23(B)(2). This has the effect of forcing NPMs to

internalize the amounts placed in escrow into the cost of the cigarettes ultimately purchased by consumers. See *Omaha Tribe of Nebraska v. Miller*, 311 F.Supp.2d 816, 827 (S.D.Iowa2004); 37 O.S. §§ 600.21(D); and 37 O.S. §600.23(B)(2). The higher prices dampen demand for cigarettes, particularly among youth, and eliminate an underground supply of artificially cheap cigarettes. See *Omaha Tribe of Nebraska v. Miller*, 311 F.Supp.2d 816, 827 (S.D.Iowa2004); 37 O.S. §§ 600.21(D); and 37 O.S. §600.23(B)(2).

In 2004, to address enforcement difficulties, the Oklahoma Legislature enacted statutes referred to as “complementary legislation.” This legislation requires all manufacturers whose products are sold within the State to file an annual certification attesting that it is either (I) a PM meeting its payment obligations under the MSA or (ii) making its required escrow payments as an NPM. The complementary legislation also requires the Attorney General to maintain a directory, on its website, listing all of the tobacco manufacturers that are in compliance with the MSA or escrow statutes. Tobacco manufacturers that have not met the certification requirements are not listed on the directory and a stamping agent cannot affix a tax stamp, which is required for lawful cigarette sales, to any cigarette package of a manufacturer not listed in the directory. See 68 O.S. § 360.4(B); and 68 O.S. § 360.8(A).

Unlike the “Escrow Statute” which applies only to Tobacco Product Manufacturers, as defined in the statute, complementary legislation makes it unlawful for any person to: acquire, hold, own, possess, transport, import, or cause to be imported cigarettes that the person knows or should know are intended for distribution or sale in the state in violation of the Master Settlement Agreement Complementary Act. Title 68 O.S. §360.7 (E). Manufacturers who are compliant with the MSA and the Complementary Act (“MSA-compliant”) is a public record, displayed on the

website of the Oklahoma Attorney General . Cigarettes of a tobacco product manufacturer or brand family not listed in the directory are also matters of law.

The stated purpose of the MSACA is to advance the “public health” of Oklahoma residents by “safeguarding the MSA” and “enhancing” the Escrow Statute. See 68 O.S. §360.2. Tobacco use, particularly among children and adolescents, poses perhaps the single most significant threat to public health in the United States. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161, 120 S.Ct. 1291, 1316, 146 L.Ed.2d 121 (2000). Both the MSA and the Escrow Statute are related to the protection of the public health of Oklahoma residents.

The MSA’s marketing restrictions and price consequences have had a substantial impact on cigarette consumption in the United States. Cigarette smoking has declined. This decline is in large part attributable to the fact that by requiring PMs to “internalize” at least a portion of the costs of their products, consumption has declined, particularly among younger smokers. This decline in consumption will undoubtedly lead to a reduction in death and disease caused by smoking, and will result in financial benefit to the states by lowering the cost of publicly-funded medical care for smoking-related diseases.

Although the NPMs have not settled with the states, they still manufacture and sell products that cause severe health-related problems, and often times, fatal diseases. This in turn results in significant health care costs to the states where these products are sold and used. Oklahoma, like other states, was and remains concerned that NPMs may avoid their potential liability for these costs by managing their finances in such a way that they may be judgment-proof, if and when, they were ultimately held liable for the harm their products cause, or by otherwise lacking the resources to pay judgments or settlements entered against them. Given the nature of cigarette smoking, the harm

caused by this addictive habit often does not manifest itself until years after the NPMs have entered the market and perhaps long after they cease to exist or do business in this state.

In contrast to NPMs, PMs have agreed to make settlement payments to help offset the costs imposed on the Settling States by the cigarettes they manufacture and sell. PMs have accepted significant restrictions on their ability to promote their products. The Settling States were also concerned by the prospect that NPMs, which contribute nothing to the MSA, and have assumed none of its public health and anti-promotional restrictions, would take advantage of their lower costs and commercial freedom to expand their markets at the expense of companies that had chosen to settle their claims with the states. Recognizing that such tactics would stimulate demand for an unsafe product and undermine the substantial health benefits aspects of the MSA, Oklahoma and the other Settling States have required that NPMs either participate in the MSA's public health provisions, or become otherwise accountable for the harm caused by their products.

The Plaintiff seeks to allow a small number of its members to profit from the sale of cigarettes from non compliant tobacco manufacturers who circumvent their escrow obligations, under state law, by laundering, the sales to Oklahoma consumers through tribal retailers, licensed by the Plaintiff. These manufacturers are able to market their product to Oklahoma residents at substantially lower costs than compliant manufacturers because their products are sold without payment of excise taxes and without funding an escrow account. The resulting increase in the number of Oklahomans, including juveniles, suffering severe illness and death with the corresponding increase in health care costs is clearly not in the public's interest.

### PROPOSITION III

#### THE PLAINTIFF WILL NOT PREVAIL ON THE MERITS OF ITS CLAIM.

The lack of merit of Plaintiff's claim was addressed in Defendant Edmondson's Motion to Dismiss and to avoid repetition, Defendant Edmondson adopts his Motion to Dismiss. The Plaintiff, however makes a new claim in its Motion for Preliminary Injunction to which the defendant will respond.

Plaintiff asserts that the Muscogee Creek Nation, as an entity with sovereign rights, is not "in the state", and therefore it is not subject to one or all of the statutes it challenges.

This position is contrary to federal law as it fails to appreciate the corresponding sovereign rights of the state. "State sovereignty does not end at a reservation's border." *Nevada v. Hicks*, 533 U.S. 353, 361 (2001).

Chief Justice Marshall expressed the early view that state laws could have no force within reservation boundaries based upon the notion that Indian tribes are distinct sovereign nations. *Worcester v. Georgia*, 6 Pet. 515, 561, 8 L.Ed. 483 (1832); discussed in *Hicks*, 533 U.S. at 361; *Organized Village of Kake v. Egan*, 369 U.S. 60, 72 (1962). However, by 1880, the Court no longer viewed Indian Reservations as distinct nations. Ordinarily, it is now clear, an Indian reservation is considered part of the territory of the State. See U.S. Dept. Of Interior, Federal Indian Law 510, and n.1 (1958), citing *Utah & Northern Ry. Co. v. Fisher*, 116 U.S. 28 (1885). *Organized Village*, 369 US. At 72.

In *Hicks* the Court held that "When...state interests outside the reservation are implicated, States may regulate the activities of even tribal members on tribal land, as exemplified by our decision in [Colville]." *Id.*

In the present case, 68 O.S. §349.1 provides that members of non-compacting Indian tribes are entitled to purchase cigarettes bearing tax free stamps from tribal retailers, and further provides that all other cigarette sales by tribal retailers are subject to the cigarette excise tax imposed by 68 O.S. § 302.

The Escrow statute requires that tobacco manufacturers place money into an escrow account for “units sold” of individual cigarettes by the applicable manufacturer as measured by excise taxes by the state on packs upon which excise tax has been collected and bearing the excise stamp of the state. 37 O.S. 600.22(10). The Escrow statute, therefore, applies only to those sales by tribal retailers upon which 68 O.S. 349.1 imposes the regular state excise tax under 68 O.S. § 302. Since the definition of “units sold” in the Complementary Act is the same as the definition in the Escrow statute it also applies to those sales, but not to Tribe to tribal member sales where no excise tax is collected.

The Escrow Statute and Complementary Act clearly apply to all sales by tribal retailers, other than those sales to tribal members, upon which taxes are not collected and bear a non-tax stamp.

The Plaintiff makes reference to Article X of the Treaty with the Creek and Seminole Tribes of August 7, 186, 11 Stat. 699 which provides:

“The Creeks agree to such legislation as Congress and the President of the United States may deem necessary for the better administration of justice and the protection of the rights of person and property within Indian Territory; Provided, however, [That] said legislation shall not in any manner interfere with or annul their present tribal organization, rights, laws, privileges, and customs.”

The defendant responded to this treaty in its Motion to dismiss. Other than referencing the Treaty, the Plaintiff does not explain how the statutes it challenges interfere with or annul their

present tribal organization, rights, laws privileges or customs. As noted in Indian Country, *U.S.A. v. Oklahoma Tax Comm'n*, 829 F.2d 967, 981-86 (10<sup>th</sup> Cir. 1987) notwithstanding the broad language of this treaty and the continued status of certain tribal lands as “Indian Country”, tribal cigarette sales to nonmembers are subject to the same rules of state taxation that apply to other tribes.

**PROPOSITION IV**

**IN THE UNLIKELY EVENT THIS COURT SUSTAINS  
PLAINTIFF’S MOTION FOR PRELIMINARY INJUNCTION,  
PLAINTIFF MUST POST BOND.**

As demonstrated above, Plaintiff cannot meet any of the requirements for the issuance of a preliminary injunction and thus a temporary restraining order should not issue. However, in the unlikely event this Court sustains Plaintiff’s Motion for Temporary Restraining Order, the Federal Rules of Civil Procedure require Plaintiff to post a bond to provide security for MCN obligations incurred for its sales occurring during the resolution of the current case:

(c). Security. No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the United States or of an officer or agency thereof.

FED.R.CIV.P. 65(c).

According to the records of the Oklahoma Tax Commission, Plaintiff has made more than \$12,000,00.00 dollars in untaxed cigarette sales. The manufacturers who made those sales have avoided approximately \$5,000,000.00 in escrow deposits.

MCN should be required to post bonds for any future sales in Oklahoma to ensure adequate funds will be available at the conclusion of this litigation for the damages Oklahoma may sustain as a result of any cigarettes sold during the resolution of same.

**WHEREFORE, premises considered,** the Defendant, W.A. “Drew” Edmondson, Attorney General of Oklahoma, respectfully requests that this Court overrule Plaintiff’s Motion for Preliminary Injunction and provide any further relief deemed equitable and just.

Respectfully submitted,

s/ E. Clyde Kirk

**E. CLYDE KIRK, OBA #10572**  
**ASSISTANT ATTORNEY GENERAL**  
**TOBACCO ENFORCEMENT UNIT**  
313 N.E. 21<sup>st</sup> Street  
Oklahoma City, OK 73105  
(405) 521-4274 Fax: (405) 522-4534  
[clyde.kirk@oag.ok.gov](mailto:clyde.kirk@oag.ok.gov)

**ATTORNEY FOR DEFENDANT**  
**W.A. “DREW” EDMONDSON**

**CERTIFICATE OF SERVICE**

I hereby certify that on the 4<sup>th</sup> day of March, 2010, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing:

Bryan J. Nowlin  
[bnowlin@dsda.com](mailto:bnowlin@dsda.com)

Leisa Gebetsberger  
[lgebetsberger@tax.ok.gov](mailto:lgebetsberger@tax.ok.gov)

Larry Patton  
[lpatton@tax.ok.gov](mailto:lpatton@tax.ok.gov)

Neal Leader  
[neal.leader@oag.ok.gov](mailto:neal.leader@oag.ok.gov)

Roger Wiley  
[rwiley@muscogeenation-nsn.gov](mailto:rwiley@muscogeenation-nsn.gov)

I hereby certify that on the 4<sup>th</sup> day of March, 2010, I served the attached document by mail on the following, who is not a registered participant of the ECF System:

David McCullough  
Doerner, Saunders, Daniel  
& Anderson, LLP  
201 Robert S. Kerr, Suite 700  
Oklahoma City, OK 73102-4203  
[dmccullough@dsla.com](mailto:dmccullough@dsla.com)

John Peebles  
Darcie Houck  
Fredricks, Peebles & Morgan, LLP  
1001 Second Street  
Sacramento, CA 95814  
[jpeebles@ndnlaw.com](mailto:jpeebles@ndnlaw.com)  
[dhouck@ndnlaw.com](mailto:dhouck@ndnlaw.com)

s/ E. Clyde Kirk \_\_\_\_\_