

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

MUSCOGEE (CREEK) NATION, )  
a federally recognized Tribe )  
Plaintiff, )

vs. )

BRAD HENRY, Governor of the State 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. )

Case No. CIV-10-019-JHP

Defendants. )

---

**MUSCOGEE (CREEK) NATION'S REPLY TO RESPONSE OF  
DEFENDANT ATTORNEY GENERAL W.A. DREW EDMONDSON TO  
PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION**

---

DOERNER, SAUNDERS, DANIEL &  
ANDERSON, L.L.P.

Bryan J. Nowlin, OBA No. 21310  
320 South Boston Avenue, Suite 500  
Tulsa, Oklahoma 74103-3725  
Telephone (918) 582-1211  
Facsimile (918) 591-5360  
bnowlin@dnda.com  
Attorneys for Plaintiff Muscogee (Creek)  
Nation

David McCullough, OBA No. 10898  
201 Robert S. Kerr Avenue, Suite 700  
Oklahoma City, Oklahoma 73102-4203  
Telephone (405) 319-3500  
Facsimile (405) 319-3509  
dmcullough@dsla.com  
Application for Admission to Bar of U.S. District  
Court for the Eastern District of Oklahoma pending

Roger Wiley, OBA No. 11568  
Muscogee (Creek) Nation Attorney General  
PO Box 580  
1008 E. Eufaula  
Okmulgee, OK 74447  
Telephone (918)295-9720  
Facsimile (918) 756-2445  
rwiley@muscogeenation-msn.gov

The Plaintiff, the Muscogee (Creek) Nation (the “Nation), hereby submits its Reply to Defendant Attorney General Drew Edmondson’s Response to the Plaintiff’s Motion for Preliminary Injunction (Doc. 51) (hereinafter “Response Brief”).<sup>1</sup>

### **INTRODUCTION**

The Nation incorporates the arguments and authorities it has made in its reply briefs filed in response to Defendants Oklahoma Tax Commission, its Commissioners and Governor Brad Henry’s and adopts those arguments as part of this brief. For purposes of this reply, the Nation will reply to arguments advanced in Proposition I of the Attorney General’s Response Brief.

#### **Proposition I.**

#### **THE STATE MAY NOT APPLY THE ESCROW STATUTES IN A MANNER THAT AFFECTS THE NATION’S ENGAGEMENT IN INDIAN COMMERCE**

The Attorney General states in Proposition I of its Response Brief that the Nation has not shown it will suffer irreparable harm. This is simply not the case. As the Nation stated and demonstrated in its brief in support of its Motion for Preliminary Injunction (Doc. 44), the Tenth Circuit has repeatedly concluded that a Tribe suffers irreparable harm where its sovereign interests are infringed. It is indisputable that the Oklahoma taxing and regulatory scheme which necessitated the Nation’s filing of this lawsuit infringes upon sovereign interests of the Nation. Therefore, the Nation has met its burden to demonstrate irreparable harm.

In November of 1998, Oklahoma negotiated and entered a Master Settlement Agreement with the four largest United States cigarette manufacturers thus concluding multi-state tobacco litigation in which Oklahoma was a party. *See KT&G Corp., et.al. v. Edmondson, et. al.*, 535 R.3d 1114, 1118 (10<sup>th</sup> Cir. 2008). The MSA is a reference to an agreement settling a lawsuit that covers the sale of virtually every name brand cigarette marketed in the United States (Marlboro,

---

<sup>1</sup> The Nation incorporates by reference the arguments set forth in the two currently filed reply briefs to the responses filed by the Governor of Oklahoma, and the Oklahoma Tax Commission (OTC).

Kools, Virginia Slims, etc.) (hereafter “Name Brand Cigarettes”). The cigarettes that the state is seeking to prohibit the Nation from either selling or transporting intra-tribally or inter-tribally in Indian commerce are not the Name Brand Cigarettes (Marlboro, Kools, Virginia Slims, etc.), but rather cigarettes manufactured on reservation lands bearing names like, Seneca, King Mountain, and Sky Dancers, more commonly called generic brand cigarettes (hereinafter “Native Brand Cigarettes”).

Oklahoma’s Master Settlement Agreement Complimentary Act-escrow statutory scheme (including the recently enacted SB 608) is an unlawful intrusion upon inter-tribal and intra-tribal commerce that may only be regulated by Congress or the state with Congressional authorization. A state has no authority to settle a lawsuit with a private party by agreeing to adopt laws regulating the private party’s competitors, including those engaged in Indian commerce on Indian lands.

**A. Oklahoma’s Attempt to Apply its laws in Indian Country is an Unlawful Infringement on the Nation’s Sovereignty**

The Attorney General states that the Escrow Statute and Complementary Act do not apply to non-taxed sales to tribal members. This is correct. However, the state does purport to tax and regulate sales in Indian Country that extend far beyond the sale of cigarettes to tribal members and have established civil and criminal penalties that it threatens to enforce against individuals who engage in commerce within the Nation’s Indian country. This enforcement includes banning or preventing the sale of Native Brand cigarettes in the Nation’s Indian country.

First, The Escrow and Complementary Statutes purport to impose regulatory burdens on the Nation and its members for cigarette sales made exclusively within the territorial boundaries of the Nation. *See generally* 37 O.S. §§ 600.21, et seq.; 68 O.S. § 360.1, et seq. The State

requires certain tobacco manufacturers, including those non-member Indians which exclusively manufacture Native Brand Cigarettes on their own reservations for transport to and sale within the Nation's territory to the Nation and its members, to certify that they have complied with the financial requirements of the Escrow statute. (Complaint at ¶¶ 52-57.) Those manufacturers that provide proper certification are then placed on a list ("State Directory") which indicates that the manufacturer's brands may be sold in the State. *Id.* An additional enforcement mechanism makes it "unlawful for a person to . . . sell or distribute cigarettes, or 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." 68 O.S. § 360.7(E)(1)(a)-(b). Accordingly, the statute has the legal effect of imposing a statutory ban on any sales of cigarette brands by the Nation and its affiliated entities or its members that are not properly certified and listed as required by the Oklahoma statute. This not a minimal burden reasonably tailored to collect a valid state tax. It is a significant burden that infringes on the rights of Indians to conduct commerce within Indian country. See *Department of Taxation and Finance of New York v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 73 (1994).

Second, the Nation itself bears the legal incidence and regulatory burden of the tax by "[o]bligat[ing] tribal retailer[s] for payment of the applicable Oklahoma cigarette excise tax, together with the costs and attorney fees associated with any civil action brought to collect the unpaid Oklahoma cigarette excise tax. Such actions may be instituted in the district court in and for the county in which the tribal retailer is located." 68 O.S. § 349.1(C)(7) & (D)(7). Section 349.1, subdivision (E) also states that "[t]he provisions of this section are intended to, and shall be construed to apply only to, sales of cigarettes and other tobacco products on the 'Indian

country’ of noncompacting federally recognized Indian tribes or nations to the members of such tribes or nations.” Penalties for violations of the foregoing provisions include fines, imprisonment and forfeiture of property, regardless of whether that person is a tribal member, Nation employee, or otherwise exempt from the State tax laws under United States Supreme Court precedent. 68 O.S. § 349.1(F) & (G). This statute discriminates against noncompacting tribes by forcing acceptance of the State’s compact terms, or alternatively suffer severe penalties both economic and criminal.

Third, the Escrow Statute and Complementary Act provide that: “The Oklahoma excise tax on all tobacco products other than cigarettes (hereafter ‘other tobacco products’) held for sale by Oklahoma-licensed wholesalers shall be paid by the wholesaler . . . including those other tobacco products which may be purchased by members of noncompacting tribes and nations on the ‘Indian country’ of such tribe or nation from a retailer licensed or owned by such tribe or nation.” 68 O.S. § 349.1(D). The statute also attempts to license wholesalers which sell tobacco products to the Nation and members and attempts to set conditions under which the Nation’s licensed retailers can purchase cigarettes. 68 O.S. § 350. Penalties imposed on sales made by wholesalers to Tribal retailers that do not comply with the statute are subject to seizure and forfeiture. 68 O.S. § 351.

The Escrow Statute and Complementary Act provisions that purport to prohibit the Nation, its members, and third-party wholesalers, distributors and retailers that sell to the Nation and its members from selling certain brands of cigarettes except dictated on the State’s terms<sup>2</sup>, infringe upon the sovereignty of the Nation.

---

<sup>2</sup> Other provisions of the Oklahoma scheme bolster the Nation’s claim that the incidence of the tax falls on the Tribe. For example, a wholesaler that receives documentation from a person claiming that those cigarettes will be sold at a tribally owned or licensed store, is “relieved of any liability for any additional tax due or required to be collected should it be later determined that the cigarettes were not purchased for sale at tribally owned or licensed store.” 68

Not only do these statutes improperly place the burden and incidence of the regulation on the Nation, its suppliers and its members, the statutes also impermissibly extend the State's civil regulatory authority over the Nation, its suppliers and its members, notwithstanding the categorical bar to the exercise of such jurisdiction. *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 458 (1995).

Under these circumstances, the Nation is likely to prevail on its claim that the state's taxing and regulatory schemes are categorically barred from being enforced within the Nation's territory against the Nation, its affiliated entities, and its members because the scheme places the legal incidence/regulatory burden on the Nation and/or its members for payment of those taxes/fees and compliance with those statutes. In addition, there is no Congressional statute which otherwise permits the State to exercise its taxing and regulatory authority in this context, and therefore enforcement of the subject statutes are preempted.

The Supreme Court addressed the application of state regulation and taxation of Indian cigarette sales for a third time in *Department of Taxation and Finance of New York v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 73 (1994). In examining whether the state regulation at issue fell within the bounds of the "minimal burden test" the Court found that:

The specific kind of state tax obligation that New York's regulations are designed to enforce- which falls on non-Indian purchasers of goods that are merely retailed on a reservation-stands on a markedly different footing from a tax imposed directly on Indian traders, on enrolled tribal members or tribal organizations, or on "value generated on the reservation by activities involving the Tribes, Colville, 447 U.S. at 156-157, 100 S.Ct. at 2083. ...In particular, these cases [referring to Moe, Colville, and Potawatomi] have decided that States may impose

---

O.S. § 350.1. In addition, like the tax invalidated by the Supreme Court in the *Chickasaw Nation* and the Ninth Circuit in *Hammond*, Oklahoma's cigarette tax impermissibly (1) requires tribally owned retailers to remit the tax to the state; (2) contains no provision requiring a refund of taxes to tribal retailers that are ultimately uncollectible from the consumer; (3) contains no provision which indicates that the tribal retailer is acting as a mere collector of the tax, as opposed to the payor of the tax; (4) imposes liability on tribal retailers and members for purchasing cigarettes that are not sold in jot-for-jot compliance with the statute.

on reservation retailers minimal burdens reasonably tailored to the collection of valid taxes from non-Indians. *Id.* at 73. (emphasis added)

The Court went on to describe the types of activities that could constitute a substantial burden that would go beyond that “reasonably necessary” for the limited exception carved out under *Colville* and *Moe*.

By imposing a quota on tax-free cigarettes, New York has not sought to dictate “the kind and quantity of goods and the prices at which such goods shall be sold to the Indians.” 25 U.S.C. § 261. Indian traders remain free to sell Indian tribes and retailers as many cigarettes as they wish, of any kind and at whatever price. *Id.* at 75.

The Attorney General’s attempt to assert regulatory authority pursuant to the State Directory statute directly conflicts with the holding in *Milhem Attea*. The burdens the State wishes to impose are not minimal nor are they reasonable. Here, unlike *Moe*, *Colville* or *Milhem Attea*, the State asserts a right to enforce the State Directory statute on the reservation, which creates a substantial burden falling directly on the Indian entities, not on non-Indian consumers. The State Directory statute dictates what *kind* of cigarettes can be sold on the reservation, the *quality* of the cigarettes, and the *price*. In effect the State asserts the right to demand payment from Indian owned and operated businesses conducting business on the reservation. The responsibility for paying these fees and compliance with this statute does not fall on the non-Indian consumer, but on the Indian owned business operating on the reservation. *See Goodman Oil Co. of Lewiston v. Idaho State Tax Comm’n* 28 P.3d 996, 1004 (Idaho 2001); *Squaxin Island Tribe v. Stephens* 400 F.Supp.2d 1250, 1261 (W.D. Wash. 2005); *Coeur d’Alene v. Hammond* 224 F.Supp.2d 1264, 1268-70 and 1271 (D. Idaho 2002); and *Winnebago Tribe of Neb. v. Kline* 150 P.3d 892, 904 (Kan. 2007).

Taken together, these statutes and regulations seek to “dictate the kind, quantity and price” of cigarettes sold by Indian wholesalers to the Nation and its members on the State’s terms within Indian Country. Assertion of such taxing and regulatory authority violates the Supreme Court’s ruling in *Milhelm-Attea*. This transcends the boundary which the Supreme Court

demarcated between permissible and impermissible burdens, as prohibiting the State from dictating “the kind and quantity of goods and the prices at which such goods shall be sold to the Indians.” *Id.* at 75. What the State attempts to do here constitutes an impermissible burden on Indians and Indian tribes. The State is prohibited from dictating the kind, quantity, and price of such products in Indian country, and doing so would cause harm to the Nation through threats of criminal and civil prosecution of its members, and loss of revenues that support critical Nation services. The Nation has demonstrated the irreparable harm necessary to support the Court’s granting of the requested injunctive relief.

**B. The State May Not Engage in Enforcement Action Outside Indian Country that Is Intended to Enforce State Law Within Indian Country**

The Attorney General—the “chief law officer of the state [74 O.S. § 18]—asserts that the State can seize the Nation’s property when it is located outside Indian country because said property is “contraband.” This is precisely the faulty argument that was unsuccessfully argued by Kansas in *Winnebago Tribe of Nebraska v. Kline*, 297 F.Supp.2d 1291 (D.Kan. 2004). The Court, in granting the tribe an injunction, held that the state’s “argument is faulty in that it presupposes that the plaintiffs are responsible for the fuel tax and have therefore committed tax evasion.” *Id.* at 1303. The Attorney General is using the same faulty assumption here in stating it can enforce its taxing statutes and regulatory scheme against the Nation. In doing so, it is necessarily invading the Nation’s sovereignty and in essence imposing a tax on the Nation and Indians that the Attorney General has no authority to impose. The Attorney General’s contention that once the Nation’s cigarette products leave Indian Country, the Nation loses its sovereignty was previously asserted by the OTC as to car tags and rejected by the Supreme Court. *Oklahoma*

*Tax Commission v. Sac & Fox Nation*, 508 U.S. 114, 128 (1993) ((holding even motor vehicle tax unlawful even though tribal members use motor vehicles outside of Indian country).

The United States Supreme Court has opined that “[l]ike foreign sovereign immunity, tribal immunity is a matter of federal law” and that immunity extends to commercial activity and to activity off Indian lands. *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 532 U.S. 751 (1998). Discussing the Supreme Court *Kiowa* decision, the Oklahoma Supreme Court stated that: “the High Court held [in *Kiowa*] that ‘[a]s a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity.’” *Aircraft Equipment Co. v. Kiowa Tribe of Oklahoma*, 1998 OK 126, ¶ 5, 975 P.2d 450, 451. The Court further noted that thus far, no distinction has been drawn as to whether the activity is commercial or governmental. *Id.* Although noting certain circumstances in which a state may apply its substantive law, the Court concluded that this does not always include the right to enforce a judgment:

In *Potawatomi [Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma]*, 498 U.S. 505 (1991) for example, we reaffirmed that while Oklahoma may tax cigarette sales by a Tribe’s store to nonmembers, the Tribe enjoys immunity from a suit to collect unpaid state taxes. There is a difference between the right to demand compliance with state laws and the means available to enforce them.

*Id.* (citations omitted). The reason for this is because “‘tribal immunity is a matter of federal law and not subject to diminution by the States.’ Enforcement of such a judgment could result in the state’s diminution of tribal immunity.” *Id.*

The state may not assert taxation jurisdiction and authority over the Nation's inter-tribal and intra-tribal commerce. Further, the United States Supreme Court has held that states may not directly tax Indian tribes and Indians in Indian Country. The prohibition is categorical. No balancing of interests is required.

[W]hen a State attempts to levy a tax directly on an Indian tribe or its members inside Indian country, rather than on non-Indians, we have employed, instead of a balancing inquiry, "a more categorical approach: Absent cession of jurisdiction or other federal statutes permitting it, we have held a State is without power to tax reservation lands and reservation Indians."

*Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. at 458 (1995), (internal brackets and quotations omitted) (quoting *County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251, 258 (1992)); Cohen Handbook § 8.03[1][b] at 693 & n. 190. See *California v. Cabazon Band*, 480 U.S. 202, 215 n. 17 (1987) (noting that where the legal incidence of a tax falls upon the tribe or its members, rebalancing the state and tribal interests in every case is unnecessary because "the federal tradition of Indian immunity from state taxation is very strong and the state interest in taxation is correspondingly weak"); Cohen Handbook § 8.03[2] at 712-713 (preemption and infringement tests).

The United States Supreme Court has held that a state may impose a sales tax where: (1) the legal incidence of the tax falls upon a non-Indian and (2) the value of the item to be taxed was generated off-reservation, even though the sale itself is consummated on Indian land.

In the instant case, the Nation is dealing in a commodity manufactured, moved and marketed in the stream of Indian commerce on Indian lands. The relevant economic and commercial transactions – the theoretically taxable events – took place in Indian country. Under such circumstances, the state's interest in the transaction and the value added by the state to the transaction are comparatively insignificant. Whereas under these same circumstances, the Nation's interest in the transaction and the value added in Indian country is significant. Indeed, as the tobacco products never leave Indian country until presumably after purchase, there is absolutely no value added anywhere outside of Indian country.

If the State does not have the power to tax the Nation and its members, it follows that the State does not have the authority to seize the Native Brand cigarettes when the product is located off Indian country, nor does it have the authority to criminally or civilly prosecute the Nation or Indians selling Native Brand cigarettes in Indian country.

The state has no authority to regulate inter-tribal and intra-tribal commerce, including the Indian cigarette industry because the Nation's cigarette business is not a "closely-regulated" industry for the purposes of federal law. *See Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 476 (1976).

Moreover, there is no "substantial" state interest in regulation of Indian commerce through taxation. The primary interest of the state is raising revenue. When the state interest is only to collect taxes, the state interest in regulating cigarettes transported in Indian Commerce is not sufficient enough so that the state can seize the cigarettes as "contraband". *United States v. Smiskin*, 487 F.3d 1260, 1271 (9<sup>th</sup> Cir., 2007). Further, the amount of tobacco revenue which the State receives from its taxation is an insubstantial portion of the overall revenues generated by Oklahoma's tobacco tax scheme.

The Nation has not violated, and is not violating the Federal Contraband Trafficking Act. 18 U.S.C. § 2346. The Nation does not dispute the ability of federal authorities to regulate tribal commerce. The Nation disputes the legal authority of the State of Oklahoma to call certain Indian-manufactured products, or Native Brand cigarettes "contraband". The Nation also disputes the authority of the State of Oklahoma to impose its civil and criminal jurisdiction to interrupt the Nation's Indian commerce.

For these reasons, the Nation asserts it has demonstrated the requisite harm necessary to support the Court's granting of the requested injunctive relief.

DOERNER, SAUNDERS, DANIEL &  
ANDERSON, L.L.P.

By: /s/ Bryan J. Nowlin  
Bryan J. Nowlin, OBA No. 21310  
320 South Boston Avenue, Suite 500  
Tulsa, Oklahoma 74103-3725  
Telephone (918) 582-1211  
Facsimile (918) 591-5360  
bnowlin@dsda.com  
Attorneys for Plaintiff Muscogee (Creek)  
Nation

David McCullough, OBA No. 10898  
201 Robert S. Kerr Avenue, Suite 700  
Oklahoma City, Oklahoma 73102-4203  
Telephone (405) 319-3500  
Facsimile (405) 319-3509  
dmcullough@dsda.com  
Application for Admission to Bar of U.S. District  
Court for the Eastern District of Oklahoma  
pending

Roger Wiley, OBA No. 11568  
Muscogee (Creek) Nation Attorney General  
PO Box 580  
1008 E. Eufaula  
Okmulgee, OK 74447  
Telephone (918)295-9720  
Facsimile (918) 756-2445  
rwiley@muscogeenation-msn.gov

**CERTIFICATE OF SERVICE**

I hereby certify that on March 8, 2010, I electronically transmitted the above and foregoing document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants (names only are sufficient): Edward Clyde Kirk (clyde.kirk@oag.ok.gov), Larry Patton (lpatton@oktax.state.ok.us) and Neal Leader (neal.leader@oag.ok.gov), and Leisa Gebetsberger (lgebetsberger@oktax.state.ok.us)

s/Bryan J. Nowlin