

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 GOVERNOR BRAD HENRY'S TO
PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION**

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The Plaintiff, the Muscogee (Creek) Nation (the “Nation”), hereby submits its Reply to Defendant Governor Brad Henry’s Brief in Opposition to Application for Preliminary Injunction (Doc. 50) (hereinafter “Response Brief”).¹

INTRODUCTION

The Muscogee (Creek) Nation Does Not Borrow Sovereignty— It Asserts and Defends its Own²

The Nation filed the instant case to protect its sovereignty against encroachment by the state of Oklahoma. The American constitutional system is, in essence, a system of divided sovereignty and competing sovereigns. *See, e.g.*, James Madison, *Federalist No. 45*, in ALEXANDER HAMILTON, JAMES MADISON & JOHN JAY, *THE FEDERALIST PAPERS* 277, 289 (Clinton Rossiter, ed., Signet Classic 1961). Significantly, the United States Constitution gives the federal government the power to regulate Indian commerce. U.S. CONST. ART. I., § 8, cl.3; JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* § 4.2 at 155 & nn. 8-10 (6th ed. 2000) (“Nowak & Rotunda”). State laws that purport to regulate Indian commerce are preempted by federal law. Nowak & Rotunda at 155 & nn. 9-10.

The Nation's status as a sovereign has been admitted and is beyond cavil. The United States Court of Appeals for the Tenth Circuit has held that “Indian tribes are domestic dependent nations with sovereignty over their members and territories.” *Native American Distributing v. Seneca-Cayuga Tobacco Company*, 546 F.3d 1288, 1292 (10th Cir. 2008) (internal quotation marks omitted), *citing E.F.W. v. St. Stephen's Indian High Sch.*, 264 F.3d 1297, 1304 (10th Cir.

¹ The Nation incorporates by reference the arguments set forth in the currently filed reply briefs to the opposition filed by the Attorney General, and the Oklahoma Tax Commission and Commissioners.

² This is in response to the heading in the Introduction to the brief filed on behalf of Oklahoma Governor Brad Henry. The Muscogee (Creek) Nation borrows neither sugar nor poker chips. The Nation asserts, protects and defends its sovereignty from all onslaughts by the state of Oklahoma—even though Plaintiff's treaty rights were protected and recognized by federal law prior to defendant's statehood in the Organic Act [Act of Congress, May 2, 1890, 26 U.S. Stat. 81, 88, 97, 99] and the Enabling Act [Act of Congress, June 16, 1906, 34 Stat. 267, Third] and subsequently in a Constitution adopted by defendant. Okla. Const., art. 1, § 3.

2001). *See* 25 C.F.R. § 83.2 (describing effect of federal recognition on tribes). Issues of intergovernmental immunity inform, but do not completely control or dictate, the answer to the question of state taxation of federally-recognized Indian tribes. *E.g.*, *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 169-170 (1973). Such issues must be evaluated on their own merits. *Id.* *And see Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 512-514 (1991) (under the doctrine of tribal sovereign immunity, the State of Oklahoma cannot tax the sale of cigarettes to Indians); *Nowak & Rotunda* at 155.

"The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the...history " of the United States. *Rice v. Olson*, 324 U.S. 786, 789 (1945), *quoted in* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 6.01[2] at 501 & n. 19 (2005 edition) (hereinafter, "Cohen").

I.³

THE NATION'S CLAIM OF IRREPARABLE HARM IS BASED UPON ITS RIGHT TO ENGAGE IN INDIAN COMMERCE FREE FROM INTERFERENCE BY THE STATE AND ITS AGENTS

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*

³ This Section I addresses the arguments raised in Propositions I, II and III of the Response Brief (Doc. 50, pp. 4-15).

Indian Nation, 502 U.S. 251, 258 (1992)); Cohen § 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 § 8.03[2] at 712-713 (preemption and infringement tests).

The Governor contends that the Nation's challenge to the state's enforcement Oklahoma tax laws and regulations is the same challenge made by other Indian Tribes and those previous challenges have been rejected. The Governor cites a number of cases in support of this contention. In fact, all the cited cases are distinguishable from the present case and thus offer the Governor no support.

Washington v. Confederated Tribes, Colville Reservation, 447 U.S. 134 (1980) involved Washington, a Public Law 280 State. See Pub.L. 280, 67 Stat. 588; Cf. *Colville*, 447 U.S. at 142, n.8. Public Law 280 is an Act that mandated a transfer to six States of federal law enforcement over Indian country. It also allowed the other states to assume jurisdiction. 28 O.S. § 1321-1322. Washington elected to assume such jurisdiction. Oklahoma did not. *Lewis v. Sac and Fox Tribe of Oklahoma Housing Authority*, 1994 OK 20, ¶ 7 n.21, 896 P.2d 503. *Colville* did not involve intertribal or intra-tribal commerce between non-contiguous Indian country. The seizures in *Colville* were from non-Indian wholesalers located outside of the State of Washington who were en route to the reservation. Id. at 152. The wholesalers were not Indians nor tribal enterprises. In this case, the manufacturers and the distributors of the cigarette products located on Indian lands and are distributing their product to the Nation. The Nation is then distributing its products within its Indian country. *Colville* does not support the Governor's contention.

In *Oklahoma Tax Commission v. Citizen Band Potawatomi*, 408 U.S. 505 (1991), the court held that the OTC could not tax a tribe, but that a tribe ought to collect sales taxes for the State on sales to non-tribal members. *Id.* at 512-513. However, “Oklahoma complains” that the Court has recognized a “right without a remedy.” *Id.* 514. The Court answered this complaint by saying: “There is no doubt that sovereign immunity keeps the State from pursuing the most efficient remedy, but we are not persuaded that it lacks any adequate alternatives.” *Id.* 514. In *obiter dicta*, the Court then hypothecates what “alternatives” might exist if a tribe refuses to collect taxes on sales to non-members. *Id.* at 514. The *dicta*, because it was not necessary to the case, is not precedential authority. *Great Lakes Dredge & Dock Co. v. Tanker*, 957 F.2d 1575, 1578 (11th Cir.) (*dicta* is neither the law of the case nor binding precedent). In any event, *Citizen Band Potawatomi* strengthens the Nation’s sovereignty claim. It provides no guidance as to how the state’s seizures of tribal property would avoid tribal sovereignty nor does it authorize seizures of the Nation’s property being transported inter-tribally or intra-tribally. The Court did not authorize the seizure of tobacco products from any entity immune from taxation. *Citizen Band* does not support the Governor’s contention.

Department of Taxation and Finance of New York v. Milhelm Attea & Bros., Inc., 512 U.S. 61, 72 (1994) restated *dicta* from the *Potawatomi* case. (“we explained that alternative remedies existed for state tax collectors, such as damages actions against individual tribal officers or agreements with the tribes.”) This language is *dicta* as well. *Milhelm Attea & Bros.* was a lawsuit brought by Indian traders licensed by the BIA to enjoin the State of New York from enforcing its tax regulations. *Id.* at 68-69. The case did not directly challenge the legality of the tax, nor did the lawsuit involve any tribal officers or employees. The Defendants were non-

Indian wholesalers doing business on Indian reservations. *Milhelm Attea & Bros.* did not involve tribal sovereign immunity.

In *Milhelm Attea*, the Supreme Court distinguished permissible state regulation by holding that while the State may be permitted to impose “reasonably necessary” methods or “reasonable regulatory burdens” that constitute no more than a “minimal burden” on Indian traders for the purpose of collecting valid taxes owed by non-Indians, the State is not permitted to impose direct regulations on the Indian trader by, for example, dictating “the kind and quantity of goods and the prices at which such goods shall be sold to the Indians.” *Milhelm Attea, supra*, 512 U.S. at p. 75.) The Court noted that the New York regulation was permissible, in part, because “[i]ndian traders remain[ed] free to sell to Indian tribes and retailers as many cigarettes as they wish, of any kind and whatever price.” *Id.* The regulatory scheme identified by the *Milhelm Attea* Court regarding the New York statute and regulations governing collection of valid taxes from non-Indians distinguished permissible State regulation from that which is subject to preemption under *Warren Trading Post* and *Central Machinery*.

However, under no circumstances, is the State permitted to enact a “tax [which is] imposed directly on Indian traders, on enrolled tribal members or tribal organizations, or on ‘value generated on the reservation by activities involving the Tribes.’” *Dept. of Taxation & Finance of New York v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 73 (1994). In contrast, permissible regulation has been described as “minimal burdens reasonably tailored to the collection of valid taxes from non-Indians,” “reasonable regulatory burdens upon Indian traders,” “regulation that is reasonably necessary to the assessment or collection of lawful state taxes,” and “policies against wholesale evasion of . . . valid taxes without unnecessarily intruding on core tribal interests.” *Id.* at 75. Crucially, no State regulation may impose “excessive regulatory

burdens” on the Tribe, Tribal organization, or Indian traders which “dictate ‘the kind and quantity of goods and the prices at which such goods shall be sold to Indians.’” *Id.* With respect to Indian traders, they must “remain free to sell Indian tribes and retailers as many cigarettes as they wish, of any kind and at whatever price.” *Id.*

SB 608 and the state’s taxing regulations do not meet the requirement of reasonable regulations designed to impose a minimal burden in furthering the State’s interest in tax collection. Instead, SB 608 and its regulations attempt to impose a ban on the sale of tobacco products within the Nation’s territory, improperly impose direct taxes on the Nation, its members, and their affiliated entities, prescribes criminal penalties for violations of the statutes, dictate to the Nation how to regulate its enterprises, and impose licensure requirements directly on the Nation’s enterprises. Clearly, these statutory requirements fail the “minimal burden” and “reasonable collection requirements” test and therefore the Nation is likely to succeed in its argument that they are preempted.⁴ *Milhelm Attea* does not support the Governor’s contention.

Contrary to the Governor’s assertion, in the instant case, the Nation is not simply “marketing a tax exemption.” On the contrary, the Nation is dealing in a commodity manufactured, moved and marketed in the stream of Indian commerce. 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. Meanwhile, should the Nation be subject to state enforcement during the pendency of this legal proceeding, it will suffer irreparable harm

⁴ In *Milhelm Attea*, the Supreme Court expressly noted that “this case does not require us to assess for all purposes each feature of New York’s tax enforcement scheme that might affect tribal self-government or federal authority over Indian affairs. Here we confront the narrower question whether the New York scheme is inconsistent with the Indian Trader Statutes.” *Milhelm Attea*, 512 U.S. at 69-70. Accordingly, the Court did not even evaluate whether these requirements, if applied to Indians or Tribes in Indian Country would pass muster under the test set out in *Moe and Colville*.

without an injunction as once the taxes are collected by the State, the Nation and its members will more than likely not be able to sue the State for damages regarding past collection of unlawful taxes due to the Eleventh Amendment.

II.

THE TOBACCO PRODUCTS MOVED IN INDIAN COMMERCE ARE NOT SUBJECT TO THE TAXING AUTHORITY OF THE STATE

The Nation is not contending that it does not have to obey any of the laws of the State of Oklahoma when it operates outside of Indian country. However, the Nation does contend that 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 conduct interfere with the Nation's movement of product within inter-tribal or intra-tribal commerce. The civil, criminal and regulatory authority cannot exist when and where the primary taxation authority does not. Therefore, the state should be enjoined from asserting its civil, criminal and regulatory authority outside of Indian country when the state's actions are intended to regulate the Nation's activities within its Indian country.

In the application of SB 608, the state is seeking to enforce its tax laws against the Nation for activity that may occur within Indian country. The tax laws of Oklahoma cannot be enforced within Indian country against the Nation, nor can they be indirectly enforced by arbitrarily labeling Indian products as "contraband". The state's authority attaches only when a product has left Indian hands. Thus, should a non-tribal member purchase cigarettes from an Indian tribe within Indian country and the purchased cigarettes not bear the Oklahoma tax stamp, the purchaser may be liable for the tax when he left Indian country. However, until that moment, the Oklahoma tax laws have no legitimate impact on the cigarettes.

The Governor contends the state can require Indian tribes to sell only cigarettes on which the MSA escrow payments have been collect. The lone case cited by the Governor in support of

its proposition is just that—a lone case. *Omaha Tribe of Nebraska v. Miller* does not support the Governor’s contention. In 2006, two years after the *Omaha* case was decided, Congress amended the U.S. Patriot Act clearly stating federal law and policy that nothing in the Federal Contraband Act shall be used to allow a state or local law enforcement to seize contraband tobacco from Indians. *See* 18 U.S.C. 3246 (“Nothing in this chapter shall be deemed to abrogate or constitute a waiver of any sovereign immunity of a State or local government, or an Indian tribe against any unconsented lawsuit under this chapter, or otherwise to restrict, expand, or modify any sovereign immunity of a State or local government, or an Indian tribe.”)

III.

THE GOVERNOR CAN BE ENJOINED

The Governor of the State of Oklahoma is not a mere figurehead for tax policy and Indian policy within the State government. As a result, the Nation has standing to sue the Governor in his official capacity because of the causal connection between the Governor’s office and the enforcement of taxation which the Nation claims is unlawful in this action.

The Tenth Circuit has held repeatedly that a governor defendant in an action to enjoin the enforcement of a state statute or regulation in violation of federal law by virtue of their general obligations to enforce state laws. *See, e.g., Timpanogos Tribe v. Conway*, 286 F.3d 1195 (10th Cir. 2002) (suit against governor of Utah regarding state infringement of tribal hunting and fishing rights on tribal land); *Branson School Dist., RE-28 v. Romer*, 161 F.3d 619 (10th Cir. 1998) (allowing suit against governor of Colorado regarding state constitutional amendment relating to school trust lands); *Elephant Butte Irrigation Dist. of N.M.*, 160 F.3d 602 (against Governor of New Mexico regarding allegedly illegal profits from land leases); *Duran v. Carruthers*, 885 F.2d 1485 (10th Cir. 1989) (allowing suit against governor of New Mexico

regarding prisoner's civil rights). To support his that no injunction should lie against him, the Governor offers only the unpublished, and non-precedential *Bishop* case, which holds that the governor was not a proper defendant because Oklahoma's marriage laws are carried out by the judicial branch of government, of which the governor is not a member.

The Governor is simply incorrect in stating that a general obligation to enforce state tax law is insufficient. *See Harris v. Owens*, 264 F.3d 1282, 1290 (10th Cir. 2001) (allowing suit against governor of Colorado pursuant to *Ex Parte Young* because governor wields "supreme executive power of the state" in lawsuit regarding excess payments of Tobacco Settlement). The Tenth Circuit specifically cited to the Colorado Constitution's grant of general power to the governor found at Colo. Const. art. IV, § 2 and concluded, "Defendants can be enjoined to prevent the state from appropriating funds that belong to Harris or other Medicaid recipients." *Id.* In Oklahoma "the Supreme Executive power shall be vested in a Chief Magistrate, who shall be styled The Governor of the State of Oklahoma." Okla. Const. art. VI § 2. The Governor of Oklahoma is further charged to "cause the laws of the State to be faithfully executed." Okla. Const. art. VI § 8. In *Reproductive Services Inc. v. Keating*, 35 F. Supp. 2d 1332, 1334 (N.D. Okla. 1998) the Northern District of Oklahoma ruled that a suit against the Governor was proper because of the Governor's constitutional obligation to ensure that the state's laws were to be faithfully executed. "As a result, the Governor's connection to the statute in question here is not tangential." *Id.*

A causal connection, meaning some connection, between the governor and the enforcement of the statute at issue is all that is necessary to provide standing to name the Governor as a party defendant. *See also, Prairie Band of Potawatomi Indians v. Wagnon*, 276 F. Supp. 2d 1168, 1182 (D. Kan. 2003) ("Contrary to defendants' argument, the defendants do not

need to have ‘special connection’ to the enforcement of the disputed state laws for an *Ex Parte Young* action to proceed. The Supreme Court, in *Ex Parte Young* stated that ‘[t]he fact that the state officer, by virtue of his office, has some connection with the enforcement of the act, is the important and material fact.’”); *Sportsmen's Wildlife Def. Fund v. United States Dep't of the Interior*, 949 F. Supp. 1510, 1514-15 (D. Colo. 1996) (relying on “some connection” language of *Ex Parte Young*). As succinctly stated by the Second Circuit Court of Appeals, “Under *Ex Parte Young*, the state officer against whom a suit is brought ‘must have some connection with the enforcement of the act’ that is in continued violation of federal law. So long as there is such a connection, it is not necessary that the officer's enforcement duties be noted in the act.” *Dairy Mart Convenience Stores, Inc. v. Nickel*, 411 F.3d 367, 372-3 (2nd Cir.2005) (citing *Ex Parte Young*, 209 U.S. 123, 154 (1908)). The Governor’s general obligation to enforce all state laws, including tax laws, is sufficient to establish “some connection” as it is the executive branch of government which does enforce state tax laws. The Governor also appoints the Tax Commissioners. The Governor may order the state police force to assist, or not to assist, the Tax Commission in its enforcement efforts. The Governor actually does have power, and relief against the office of the Governor would be effective.

CONCLUSION

A preliminary injunction should be entered preventing the OTC from altering the status quo until the court has decided the merits of this case.

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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)

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