

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 10-3165/10-3191/10-3213 Caption [use short title]

Motion for: Leave to File Amici Curiae Brief Red Earth LLC, et al v. Holder, et al.

Set forth below precise, complete statement of relief sought: Seneca Free Trade Association v. Holder, et al.

Leave for Amici to file a brief Amici Curiae in support of Appellees'/Cross Appellants

MOVING PARTY: Alabama Coushatta Tribe Amicus Curiae OPPOSING PARTY: United States of America

- Plaintiff Defendant Appellant/Petitioner Appellee/Respondent

MOVING ATTORNEY: Paul Joyce, Scott Wheat OPPOSING ATTORNEY: Mark Stern, Alisa Klein, and Michael Abate

[name of attorney, with firm, address, phone number and e-mail]

Colucci & Gallaher, P.C. US Department of Justice 424 Main Street, Suite 2000 950 Pennsylvania Ave. NW Rm. 7235 Buffalo, New York 14202 Washington, DC 20530 716-853-4080

Court-Judge/Agency appealed from: United States District Court for the Western Dist. of New York, Hon. R. Arcara U.S.D.J.

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1): Yes No (explain):

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has request for relief been made below? Yes No Has this relief been previously sought in this Court? Yes No Requested return date and explanation of emergency:

Opposing counsel's position on motion: Unopposed Opposed Don't Know

Does opposing counsel intend to file a response: Yes No Don't Know

Is oral argument on motion requested? Yes No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? Yes No If yes, enter date:

Signature of Moving Attorney: /s/ Paul Joyce Date: October 25, 2010 Has service been effected? Yes No [Attach proof of service]

ORDER

IT IS HEREBY ORDERED THAT the motion is GRANTED DENIED.

FOR THE COURT: CATHERINE O'HAGAN WOLFE, Clerk of Court

Date: By:

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RED EARTH, LLC, d/b/a SENECA
SMOKESHOP, AARON J. PIERCE, and
SENECA FREE TRADE ASSOCIATION,

Plaintiffs-appellees,

vs.

UNITED STATES, et al.,

Defendants-appellants.

No. 10-3165 [Civil Action
Nos. 10-350, 10-550
(W.D.N.Y.)]

**ALABAMA COUSHATTA TRIBE
MOTION FOR LEAVE TO FILE AMICI CURIAE IN SUPPORT OF
APPELLEES'/CROSS APPELLANTS**

The Alabama Coushatta Tribe of Texas moves pursuant to Fed. R. App. P. 29 for leave to file an amicus brief in support of Appellees’/Cross Appellants’ response brief. A copy of the proposed amicus brief has been submitted along with this motion.

I. STATEMENT OF INTEREST

The Alabama-Coushatta Tribe of Texas (“Tribe”) is a federally-recognized Indian Tribe whose reservation is located in deep East Texas, *See* 08/16/2010 *Declaration of Chairman Carlos Bullock*, ¶2 (Dkt.99-1). As a federally-recognized Indian tribe, Alabama Coushatta exercises sovereign authority over its trust lands and activities occurring thereon.

The PACT Act expressly reaffirms the sovereign status of federally-recognized Indian tribe and limits the Act’s reach to preclude the Act from becoming a federal proxy for state and local intrusions of taxing authority into Indian Country that otherwise would be prohibited under treaty, statute and federal common law. 15 U.S.C. § 375. Alabama Coushatta has a strong interest in ensuring that Defendants do not attempt implement the Act in a manner that intrudes upon its sovereign rights in violation of express provisions of the Act.

One such exercise of sovereignty is the Tribe’s imposition of an excise tax on cigarettes sold within its Reservation. *See* 08/16/2010 *Bullock Decl.* ¶2.

(Dkt.99-1). These cigarette tax revenues are the mainstay of the Tribal governmental budget and are specifically set aside under Tribal law to fund essential governmental services such as health and dental care, housing, law enforcement, fire protection and education. *See* 08/16/2010 Bullock Decl., *Ibid* (Dkt. 99-1).

As the district court recognized, the Seneca tobacco industry will suffer irreparable harm if the injunction is lifted because many SFTA member businesses will close. *See* Minute Order dated 7/7/10 in Case No. 10-cv-530 at 2, 8. The district court also found issuance of the Preliminary Injunction to be in the public interest “[i]n light of the severe economic consequences likely to befall those members of the Western New York Community.” *See* Order at 40.

In recognition of these substantial interests, this Court on August 24, 2010 granted the Tribe’s motion to file an amicus curiae brief in opposition to Defendants’ Motion to Stay Preliminary Injunction Pending Appeal and Request for Immediate Administrative Stay. (Dkt.156)

II. DESIREABILITY AND RELEVANCE OF AMICUS BRIEF

Alabama Coushatta seeks to inform this Court that the “severe economic consequences” wrought by the PACT Act will not be limited to Western New York. As specifically set forth in the Tribe’s brief, damage to the Seneca tobacco

trade will ripple throughout Indian country to adversely affect tribes such as Alabama-Coushatta, who depend on SFTA members to supply the cigarettes that provide critical tax revenues to fund essential tribal governmental services. Such harm to established sources of tribal governmental revenue undermines the strong Congressionally-recognized public interest in promoting tribal self-sufficiency and strong tribal governments. Alabama-Coushatta, because of its reliance on a robust Seneca cigarette manufacturing and wholesaling industry, is well-situated to advise the Court of these important public interest considerations.

Further, the briefs of Defendants and supporting amici inaccurately portray the scope of tribal immunities from state taxation and regulatory authority, resulting in overstatement of their claim of lost cigarette excise tax revenues resulting from the Preliminary Injunction. Defendants also ignore the substantial legal uncertainty inherent in the PACT Act's command to ensure payment of all state taxes and pertaining to the sale of cigarettes by delivery sellers while ensuring that existing tribal immunities be preserved. As set forth in the attached brief, Defendants' failure to make any attempt to resolve those uncertainties - which Congress entrusted them to do - raises concerns this Court should consider when weighing the public interests served and the harms avoided by the District Court's entry of the Preliminary Injunction.

Respectfully submitted this 25th day of October, 2010.

/s/ Scott Wheat

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RED EARTH, LLC, d/b/a SENECA
SMOKESHOP, AARON J. PIERCE, and
SENECA FREE TRADE ASSOCIATION,

Plaintiffs-appellees,

vs.

UNITED STATES, et al.,

Defendants-appellants.

No. 10-3165 [Civil Action Nos.
10-350, 10-550 (W.D.N.Y.)]

DECLARATION OF CARLOS BULLOCK

I, Carlos Bullock, Declare as follows:

1. I am the duly elected Chairman of the Alabama Coushatta Tribal Council.
2. Pursuant to the Tribe's Constitution, I am responsible, along with my fellow Councilmen, for representing the Tribe in its interactions with the United States and agencies thereof.
3. On June 8, 2010 in Washington D.C., I attended a meeting between federally recognized tribes and officials from the Department of Justice and the Department of Alcohol, Tobacco, Firearms and Explosives (Collectively the

“U.S.”), pursuant to the U.S. invitation to discuss the PACT ACT implementation issues.

4. At the meeting, U.S. officials advised tribes to not “worry” about Indian Country criminal prosecutions arising under the PACT occurring immediately after the Act’s effective date, that departmental resources are limited and that the Departments are “not looking to go after people who are making good faith efforts” to comply with PACT requirements.

5. At the request of the U.S., the Tribe submitted written comments on June 18, 2010 regarding a proposed interim rule implementing the Act. The Tribe has yet to receive any response.

6. Since the June 8, 2010 meeting, neither the Department of Justice nor ATFE have communicated with the Tribe regarding implementation of the ACT.

I declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and accurate.

Executed on this 22nd day of October, 2010.

/s/ Carlos Bullock
Carlos Bullock

PROPOSED BRIEF

10-3165-cv(L), 10-3213-cv(XAP), 10-3191-cv(XAP)

United States Court of Appeals

for the

Second Circuit

RED EARTH LLC DBA SENECA SMOKESHOP, AARON J. PIERCE,
Plaintiffs,

SENECA FREE TRADE ASSOCIATION,
Plaintiff-Appellee-Cross-Appellant,

– v. –

UNITED STATES OF AMERICA, ERIC H. HOLDER, JR., in his official
capacity as Attorney General of the United States, UNITED STATES
DEPARTMENT OF JUSTICE, JOHN E. POTTER, in his official capacity as
Postmaster General and Chief Executive Officer of the United States Postal
Service, UNITED STATES POSTAL SERVICE, NEW YORK ASSOCIATION
OF CONVENIENCE STORES,
Defendants-Appellants-Cross-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

**BRIEF OF *AMICUS CURIAE* THE ALABAMA COUSHATTA
TRIBE OF TEXAS IN SUPPORT OF APPELLEE-CROSS-
APPELLANT**

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**DISCLOSURE OF CORPORATE AFFILIATIONS
AND FINANCIAL INTEREST**

Amicus Curiae the Alabama Coushatta Tribe is a federally-recognized Indian tribal government and has no parents, subsidiaries, or affiliates that have issued shares of debt securities to the public.

/s/ Scott Wheat
Scott Wheat

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I. STATEMENT OF INTEREST¹

The Alabama-Coushatta Tribe (“Tribe”) is a federally-recognized Indian tribe possessing sovereign authority over its members, its territories and activities thereon pursuant to the laws of the United States. Maintaining pre-PACT Act taxation authority within Indian Country vis a vis state, local and tribal sovereigns is explicitly protected under the Act. 15 U.S.C. § 375. The United States and its agencies are bound by a fiduciary duty to the Tribe when interpreting and implementing the Act, including adherence to the well-rooted canons of construction applicable to federal statutes affecting the tribes. *Morton v. Mancari*, 417 U.S. 535, 555 (1974) (recognizing Congress’ unique obligation towards tribes); *U.S. v. Creek Nation*, 295 U.S. 103, 109-10 (1935) (holding that federal executive is held to a strict fiduciary duty standard in relations with Indian tribes and is to take “all appropriate measures for protecting and advancing” tribes); *H.R.I. Inc. v .E.P.A.*, 198 F.3d 1224, 1245 (10th Cir. 2000) (recognizing that U.S. trust responsibility runs to all federal agencies). The Tribe has a sovereign interest

¹ In accordance with Local Rule 29.1(b), amici state that no party’s counsel authored this brief in whole or in part, no party or party’s counsel contributed money that was intended to fund preparing or submitting the brief, and no person other than the amici curiae, their members, or counsel contributed money that was intended to fund preparing or submitting the brief.

in ensuring that Defendants interpret and enforce the Act consistent with the complex body of federal common law defining tribal immunities from state tax and regulatory authority.

Consistent with this rich body of federal common law, the Tribe has long exercised its sovereign right to impose cigarette excise taxes and relies upon those tax revenues to fund essential governmental services. *See* 8-16-2010 Decl. of Bullock ¶4 (Dkt. 99-1). A substantial portion of the products subject to the Tribe's cigarette excise tax are manufactured and distributed from within Seneca Territory by SFTA members. *See* 8-16-2010 Bullock Decl. ¶7. The Tribe has a vital interest in continued commerce with a robust tobacco industry in Seneca Territories. Those interests compel the Tribe to submit this brief in support of Appellees.

II. ARGUMENT

Appellees have demonstrated the constitutional infirmities of the Act, and the Tribe will not repeat those arguments here. *See Brief on Behalf of Plaintiffs-Appellees-Cross-Appellants Red Earth LLC dba Seneca Smokeshop and Aaron Pierce* (Dkt. 266). Instead, the Tribe will address a significant public interest weighing in favor of affirming the preliminary injunction issued below: prevention of the Act from becoming a surrogate for state intrusions into federally-protected tribal sovereign interests.

Defendants overstate the magnitude of harm caused by the preliminary injunction by incorrectly portraying the degree to which state and local governments may legally impose their tax requirements upon SFTA members and throughout Indian country if the preliminary injunction is lifted. *See Opening Brief for Appellants/Cross Appellees*, 17, 30, 39, 40. (Dkt. 277). The Act specifically does not expand state or local jurisdiction over Indian tribes, tribal enterprises, tribal members and Indian Country, “[n]othing in this Act . . . shall be construed to amend, modify, or otherwise affect . . . any limitation under Federal or State law, including Federal common law and treaties, regarding State jurisdiction, *or lack thereof*, over any tribe, tribal members, tribal enterprise, tribal reservation, or other lands held by the United States in trust for one or more Indian tribes . . . any State or local government authority to bring enforcement actions against persons located in Indian Country” (emphasis added). 15 U.S.C. § 375, *see notes*. Second, the Act expressly retains sovereign immunity of tribes from unconsented lawsuits. 15 U.S.C. 378 § (c)(1)(B). Further, “any ambiguity between the language of this section or its application and any other provisions of this Act shall be resolved in favor of this section.” 15 U.S.C. § 375, *see notes*.

A determination of whether a state cigarette tax is applicable in Indian country is not the bright line rule suggested by Appellants and supporting amici.

Instead, such determinations require complex analysis of a rich body of federal common law. Absent clear congressional consent, the legal incidence of a tax cannot fall on a Tribe or its members for transactions occurring in Indian Country. *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450, 458-459 (1995). In determining where the legal incidence lies, courts “ascertain [] the legal obligations imposed upon the concerned parties” by engaging in a “fair interpretation of the taxing statute as written and applied.” *Crow Tribe of Indians v. Montana*, 650 F.2d 1104, 1111 (9th Cir. 1981); *Cal. State Bd. of Equalization v. Chemehuevi Indian Tribe*, 474 U.S. 9, 11 (1985). This inquiry often is resolved by determining: (1) who bears the actual responsibility for paying the tax; and (2) who is held accountable if the tax is not paid. *See Coeur d’Alene Tribe v. Hammond*, 384 F.3d 674, 687-88 (9th Cir. 2004) (concluding that the “tax buck” stops at fuel retailers because fuel retailers are not entitled to set off their tax liability when consumers fail to pay taxes and must also pay taxes even on fuel that is not sold); *Squaxin Island Tribe v. Stephens*, 400 F. Supp. 2d 1250 (W.D. Wash. 2005) (fuel retailers, unlike consumers, can be audited for failure to pay fuel taxes, indicating that the “tax buck” stops at fuel retailers).

Two principal U.S. Supreme Court cases set the stage for state and local taxation of cigarettes in Indian country. In *Confederated Tribes of the Colville*

Indian Reservation v. Washington, 447 U.S. 134 (1980) (“*Colville*”) the Supreme Court held that, where the legal incidence of the state’s cigarette tax falls on the consumer: 1) the state has no jurisdiction to tax cigarette purchases within Indian country by enrolled members of a tribe; 2) tribes and states have concurrent jurisdiction to tax cigarette purchases by non-members; and, 3) the state’s interest in collecting the state cigarette tax, under the specific facts of the case, justified an “incidental burden” placed on Tribal and Tribal member retailers to collect and remit the state’s cigarette tax. *Id.*

Defendants fail to mention this component of the holding in *Colville*. However, the District Court for the Western District of New York only recently held that the burdens imposed upon New York tribes by state tax laws were far more than “minimal” and therefore invalidated those state tax laws as applied to the plaintiff in that case. *Oneida Nation of N.Y. v. Patterson*, N.D.N.Y. 2010 WL 4053080 (Oct. 14, 2010). *See also, Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 480-481 (1976) (state could not apply licensing fee to on-reservation tribal cigarette businesses).

Eleven years after deciding *Colville*, the U.S. Supreme Court issued its opinion in *Oklahoma Tax Comm’n v. Citizen Band Potawatomi*, 498 U.S. 505 (1991), holding that tribal sovereign immunity precludes a state from bringing suit

to compel a tribe to remit state cigarette taxes for sales that occur within the tribe's Indian Country. *Id.* at 514. Thus, even if a state or local excise tax "applies" in Indian Country, collection of such taxes raises entirely different legal issues (undercutting even further the arguments of Defendants and supporting amici that the District Court's injunction is resulting in millions of dollars in lost state and local tax revenues).

The complexities in determining whether a state cigarette excise tax "applies" in Indian Country can perhaps best be demonstrated by the inconsistent rulings from New York District Courts concerning the applicability of the State of New York's recent amendments to its cigarette excise tax laws to the State's Indian Country. Compare *Seneca Nation of Indians v. Paterson*, W.D.N.Y. 2010 WL 4027795 (Oct. 14, 2010) and *Oneida Nation of New York v. Paterson*, N.D.N.Y., 2010 WL 4053080 (Oct. 14, 2010). Given the complexities in determining whether state tax and regulatory authority may be exercised in Indian Country, and given the potential harm to statutorily-recognized tribal sovereign interests in the event of erroneous determinations, several tribes, including Alabama Coushatta and Seneca, requested clarification from the United States concerning implementation and enforcement of the Act. *See* 10/25/2010 Declaration of Carlos Bullock ¶3 (marked as attachment "A" and attached).

On June 8, 2010 Tribal representatives travelled to Washington D.C. along with representatives from several other tribes to advise the United States of their concerns. *See* 10/25/2010 Bullock Decl. ¶3. At the meeting, United States officials essentially advised tribes not to “worry” about Indian country prosecutions commencing immediately upon the Act’s effective date. Officials also assured tribes that regulations were being crafted to provide clarity concerning the daunting task of determining the applicability of literally thousands of state and local tax and regulations to Indian Country. *See* 10/25/2010 Bullock Decl. ¶4. The Department of Justice also invited written comments by June 18, 2010 on a proposed interim rule implementing the Act and the Tribe timely submitted comments. *See* 10/25/2010 Bullock Decl. ¶5.

To date, Defendants have yet to respond to the Tribe’s concerns and requests for clarity expressed at the June 8, 2010 meeting and within the Tribe’s June 18, 2010 written comments. Defendants have not contacted the Tribe concerning the Act since the June 8, 2010 meeting in Washington D.C. *See* 10/25/2010 Bullock Decl. ¶6.

As the tribes repeatedly have advised Defendants, this lack of clarity will create a chilling effect upon Appellees’ otherwise legitimate business activities and threatens product supply lines throughout Indian Country, including within the

Tribe's reservation in deep East Texas. By the United States' own estimate, absent guidance for the Department of Justice and the ATF, Appellees would be required to determine whether "laws generally applicable to sales of cigarettes" in up to 550 different jurisdictions to apply to their conduct within Indian Country. As the District Court found, the mere prospect of such daunting uncertainty, coupled with the criminal penalties for non-compliance, would force most Appellees to shut down their businesses. *See* District Court's July 30, 2010 Preliminary Injunction Order (listed as Docket No. 45 in W.D.N.Y. Civ. Action No. 10-530) at 8, 40.

III. CONCLUSION

Defendants and supporting amici selective concern for effectuation of important Congressional policies underlying the Act ignores the significant harm to Indian Country that would occur if this Court vacates the Preliminary Injunction. The District Court properly considered those important public interests when issuing the Preliminary Injunction, which should be affirmed.

Respectfully submitted this 25th Day of October, 2010.

/s/ Scott Wheat

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with the type-volume\limitation of Federal Rule of Appellate Procedure 29 (d). The brief is composed in a 14-point type face, Times New Roman. As calculated by my word processing software, Microsoft Word 2007, the brief contains 1,911 words. This word count excludes the disclosure statement, table of contents, table of authorities and signatures and certificates of counsel.

Date: October 25, 2010

/s/ Scott Wheat

Scott Wheat

STATE OF NEW YORK)
)
COUNTY OF NEW YORK)

ss.:

**AFFIDAVIT OF
CM/ECF SERVICE**

I, Mariana Braylovskiy, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age.

On October 25, 2010

MOTION

upon:

SEE ATTACHED SERVICE LIST

via the CM/ECF Case Filing System. All counsel of record in this case are registered CM/ECF users. Filing and service were performed by direction of counsel.

Sworn to before me on October 25, 2010

Maryna Sapyelkina
Notary Public State of New York
No. 01SA6177490
Qualified in Kings County
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