

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF OKLAHOMA

**FILED**

**JAN 11 2010**

WILLIAM B. GUTHRIE  
Clerk, U.S. District Court

By                       
Deputy Clerk

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

Plaintiff, )

v. )

Case No: CIV 10 - 019 - JHP

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; )

Defendants. )

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**COMPLAINT**  
**(Action for Declarative and Injunctive Relief)**

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COMES NOW the Muscogee (Creek) Nation (hereinafter the "Nation"), a federally-recognized Indian tribe the "Plaintiff"), and files this Complaint against Defendants the State of Oklahoma, Governor Brad Henry, Attorney General W.A. "Drew" Edmondson, the Oklahoma Tax Commission ("OTC"), and its Commissioners in their official and individual capacity Thomas Kemp, Jr., Jerry Johnson, and Constance Irby (the "Defendants" or the "State"). The Nation seeks declaratory and preliminary and permanent injunctive relief against the Defendants for violations of the Constitution and laws of the United States including due process of law, equal protection of law, the Indian commerce clause, and the federal Indian trader statutes (25 U.S.C. §§261-264).

I.

**STATEMENT OF THE CASE**

1. This action arises out of the Defendants' ongoing attempts to unlawfully enforce the State of Oklahoma's cigarette tax code (the "Tax Code")<sup>1</sup> as amended by SB 608 which became effective on January 1, 2010, against the Nation, its members, employees, and licensees. The Defendants impermissibly burden Indian commerce through their attempt to unilaterally impose State mandated restrictions on the sale of tobacco products in Indian country, including tribe-to-tribal member sales (hereinafter "Indian-to-Indian sales"), enforcement of State law concerning the Master Settlement Agreement (the Master Settlement Agreement (MSA) is described in further detail below), and the sale of tobacco products manufactured, marketed, and sold in the stream of Indian commerce ("Native Manufactured" products).

2. The Nation is a federally recognized Indian tribe with inherent sovereignty and the power to regulate commerce within the territorial boundaries of its reservation.. The Nation has adopted, consistent with the Nation's Constitution, a tribal code for the regulation of tobacco trade and sales within the Indian country of the Nation ("Tribal Code"). The Tribal Code regulates the shipment, transportation, receipt, possession, distribution, and purchase of tobacco products within the Indian country of the Nation. The Nation also regulates tobacco trade and sales through licensing tribal wholesalers and retailers to sell and trade tobacco within the Indian country of the Nation.

3. Federal law prohibits States from interfering with Indian commerce or from placing undue burdens on Indians, Indian tribes or Indian traders conducting business within Indian country. The State may not interfere with or burden the Nation's right to sell and trade cigarettes of any kind, quantity, and at whatever price deemed appropriate by the Nation to

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<sup>1</sup> Unless otherwise noted, all references to the Tax Code are to Oklahoma Statutes, title 68.

Indians on the reservation. The State may not interfere with or regulate the distribution or sale of tobacco products that are manufactured, marketed, and sold exclusively within the stream of Indian commerce to Indians and non-Indians within the Indian country of the Nation .

4. Without preliminary and permanent injunctive relief, the State will continue to unlawfully regulate and tax Indians, Indian tribes, and Indian traders in violation of the United States Constitution and the laws of the United States.

## II.

### JURISDICTION AND VENUE

5. Subject matter jurisdiction arises under 28 U.S.C. § 1331, as this case arises under the Constitution and laws of the United States, including the Indian Commerce Clause, and Fifth and Fourteenth Amendments to the United States Constitution, and the Indian Trader Statutes, 25 U.S.C. 261-264. Jurisdiction also arises under 28 U.S.C. § 1362, as this action is brought by a federally recognized Indian tribe.

6. Subject matter jurisdiction is also predicated upon the Nation's right (in its parens patriae capacity) to protect its individual members from the deprivation under the color of the law of the State of Oklahoma of rights privileges and immunities of the Tribe and its individual members secured by the Fifth Amendment and the Fourteenth Amendment of the Constitution of the United States providing for due process and equal rights of all citizens of the United States.

7. Subject matter jurisdiction is also predicated upon Article I, section 8, clause 3 (Indian Commerce Clause) of the Constitution of the United States which delegates the regulation of commerce among Indians and Indian tribes exclusively to the Congress of the United States.

8. Subject matter jurisdiction is also predicated upon Article VI, Section 2 (Supremacy Clause) of the Constitution of the United States which, in addition to the Indian Commerce Clause, commits to Congress the exclusive regulation of trade and commerce within Indian Country and among Indians and Indian Tribes.

9. This is an action for declaratory judgment pursuant to 28 U.S.C. § 2201 for the purpose of determining a question of actual controversy between the parties, as hereinafter more fully appears, and for injunctive relief pursuant to 28 U.S.C. § 2202. The claims set forth herein are civil actions brought by an Indian tribe, wherein the controversy arises under the United States Constitution, and federal laws and treaties. As a consequence, this action could have been brought by the United States on behalf of the Nation and original jurisdiction arises under 28 U.S.C. §§ 1331, 1345, and 1362.

10. This Court also has subject matter jurisdiction over this action under federal common law which defines the regulatory and taxing authority over Indian Commerce, and Indian Tribes. Federal common law severely limits State authority as to economic activity occurring within Indian Country.

11. This Court also has subject matter jurisdiction over this action under the doctrine of Ex Parte Young, 209 U.S. 123 (1908), in that the Defendants, by seeking to enforce a State regulatory scheme which violates federal law and the constitution, have acted beyond the scope of their lawful authority and may be sued.

12. All of the events and omissions giving rise to this action occurred in this judicial district, and venue is proper pursuant to 28 U.S.C. § 1391(b).

13. This Court has authority to issue declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201 and 2202.

### **III.**

#### **PARTIES**

14. The Plaintiff is a federally-recognized Indian Tribe existing under the laws of the United States. See 74 Fed. Reg. 40,218-02 (Aug. 11, 2009).

15. Plaintiff operates a tobacco wholesale business, organized and existing under the Constitution and Code and laws of the Nation. At all relevant times, Plaintiff's tobacco wholesale business through 2009 has acquired, marketed and sold tobacco products to tribally-licensed retailers within the Indian country of the Nation. The Nation intends to continue such sales without the unlawful interference of Defendants alleged herein.

16. Plaintiff in accordance with Nation law licenses wholesalers and retailers that sell tobacco within the Indian Country of the Nation.

17. Defendant State of Oklahoma is a state of the United States of America, with its capital located in Oklahoma City, Oklahoma.

18. Defendant Brad Henry is the Governor and Chief Executive Officer of the State of Oklahoma (hereinafter the "State"). Brad Henry is being sued solely in his capacity as "The Governor" of the State of Oklahoma. Okla. Const., art. 6, § 2. While serving in this capacity, Governor Henry is the "Supreme Executive Power" for the State of Oklahoma. Id. at § 2. The Governor has a constitutional mandate to "cause the laws of" Oklahoma "to be faithfully executed." Id. at § 8. The Governor is also conferred with the authority to negotiate and conclude tribal-state compacts governing cigarette sales in the State and on tribal lands to the extent the Nation is willing to and agrees to negotiate such compacts. See section 346.

19. Defendant W.A. "Drew" Edmondson is the Attorney General of the State of Oklahoma and is the "chief law officer of the state." 74 O.S. 2001 § 18.



20. Defendant Thomas Kemp, Jr. ("Kemp") is now, and was at all times material, the Chairperson of the OTC, a department or division of the State of Oklahoma, organized and existing under the Constitution and laws of the State of Oklahoma. Facts giving rise to this action are based on the directives, statements, threats, enforcement actions and other conduct of Defendant Kemp. Defendant Kemp is sued in both his individual and official capacities.

21. Defendant Jerry Johnson ("Johnson") is now, and was at all times material, the Vice-Chairperson of the OTC. Facts giving rise to this action are based on the directives, statements, threats, enforcement actions and other conduct of Defendant Johnson. Defendant Johnson is sued in both his individual and official capacities.

22. Defendant Constance Irby ("Irby") is now, and was at all times material, the Secretary of the OTC. Facts giving rise to this action are based on the directives, statements, threats, enforcement actions and other conduct of Defendant Irby. Defendant Irby in both her individual and official capacities.

23. Plaintiffs are informed and believe, and thereon allege, that each Defendant was and is the agent and/or representative of the remaining Defendants, and that in doing the things alleged herein, acted and continues to act with the knowledge and consent of the remaining Defendants.

#### **IV.**

#### **FACTUAL ALLEGATIONS COMMON TO ALL CAUSES OF ACTION**

##### **(BACKGROUND)**

24. Plaintiff is an Indian tribe recognized through numerous treaties, including the Treaty with the Creeks, 1866, 11 Stat. 699, as a sovereign under the protection of the laws, jurisdiction and government of the United States of America.

25. Article 4 of said treaty provides that "no State or Territory shall ever pass laws for the government of the Creek . . . and that no portion of either of the tracts of country defined in the second article of this agreement shall ever be embraced or included within, or annexed to, any Territory or State . . . ."

26. 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.

27. Plaintiff is governed by a Constitution, ratified October 9, 1979, pursuant to the Oklahoma Indian Welfare Act of June 20, 1936 (49 Stat. 1967), as subsequently amended.

28. The Constitution provides that all properties of the Tribe, "real and personal [shall] be TAX-EXEMPT from Federal and State taxation, when not inconsistent with Federal law."

29. The Constitution was approved by the federal government, Department of Indian Affairs, on August 17, 1979.

30. The political jurisdiction of the plaintiff is as it geographically appeared in 1900 and is based upon those Treaties entered into by the Muscogee (Creek) Nation and the United States of America. This jurisdiction includes, but is not limited to, properties held in trust by the United States of America and to such other properties, real and personal, as held by the Muscogee (Creek) Nation, exempt from federal and state taxation except as otherwise provided by federal law. Indian country includes all public roads and highways along section lines within the Nation's Reservation. This political jurisdiction was recognized and approved by the United

States Department of the Interior on August 17, 1979, pursuant to the Act of June 25, 1936, 49 Stat., 1967.

31. By virtue of the Treaties, Statutes, and court decisions of the United States, the Tribal lands, enterprises, and personal property of the plaintiff are free from the taxing, criminal, and civil jurisdiction of the State of Oklahoma.

32. Plaintiff controls sale of cigarettes and tobacco products within plaintiff's Indian country. Since 1983, the Nation has granted licenses to retailers for the sale of cigarette and tobacco products within Nation's reservation.

33. On May 28, 1992, the legislature of the State of Oklahoma enacted Enrolled Senate Bill 759. The Oklahoma law purported to, inter alia, tax the sale of cigarette and tobacco products within Indian country and regulate and tax personal property of the Indian tribes.

34. On April 21, 1993, agents of Defendant OTC entered a Muscogee Nation tobacco retail outlet located on property, within the Nation's reservation, held in trust by the United States of America for the Muskogee (Creek) Nation, also known as the Duck Creek Indian Community.

35. Agents of the OTC attempted to seize the Nation's tobacco products from the reservation facility upon order of Defendant OTC.

36. The Nation's Police Department ordered the OTC's agents to leave. The OTC agents left the Reservation facility, but remained on the Reservation, stationing their vehicle next to the tobacco retail outlet.

37. While Defendants were engaged in the action outside the tobacco retail outlet, other agents of the Defendants caused a truck carrying a shipment of the Nation's tobacco product to be stopped and seized.



38. The Nation immediately brought an action to enjoin Defendants from seizing the Nation's trucks and tobacco products.

39. On June 11, 1993, the district court entered a minute order granting an injunction prohibiting the OTC from initiating any forfeiture proceedings against the truck and tobacco product. The Court further ruled that "State Troopers & peace officers in Okla[homa] may no[t] specifically target for pursuit no[r] stop tribally owned vehicles for purposes of investigating into, seizing or forfeiting tribally owned tobacco products, and at any stop wherein it reasonably appears the vehicle & product are tribally owned, the vehicle & product will be promptly released." *Muscogee (Creek) Nation v. Oklahoma Tax Commission, et al.*, Case No. 93-CV-742-WEA.

40. The parties subsequently settled the litigation after a compact acceptable to the Nation was negotiated.

41. Plaintiff controls the sale of tobacco products through the Muscogee (Creek) Nation's Trade and Commerce Authority ("TCA").

42. TCA is an entity created under the laws of the Nation. See Muscogee (Creek) Nation Code Ann. Title 17, § 2-101 et. seq. Nation law authorizes TCA to establish a wholesale enterprise for the "purpose of purchasing and importing cigarettes and tobacco products for wholesale distribution to licensed retail stores which will sell cigarettes and tobacco products within the Muscogee (Creek) Nation territorial jurisdiction." See Muscogee (Creek) Nation Code Ann. Title 37, § 5-105.A.

43. Plaintiff further controls sale of cigarettes and tobacco products within plaintiff's Indian country in that the Nation's chartered Indian communities operate retail stores and all persons and entities selling cigarettes and tobacco products within the Nation's Indian Country

are licensed by the Nation to conduct such sales. See Muscogee (Creek) Nation Code Ann. Title 37, § 5-112. All retail licensees must be “located within Muscogee (Creek) Nation territorial jurisdiction. *Id.* at § 5-112.B.2. Plaintiff further licenses all wholesalers who sell tobacco to the Plaintiff’s licensed retailers, whether the wholesalers are located within or outside of the Nation’s territorial jurisdiction.

44. On May 29, 2008, Defendant OTC brought an action against Native Wholesale Supply (“Native Wholesale”), alleging, *inter alia*, that from February 2007 thru October 2008, and continuing to the date of filing of the suit, Native Wholesale sold Native manufactured tobacco products provided by Grand River Enterprises (“GRE”) to the Muscogee (Creek) Nation. See *State of Oklahoma v. Native Wholesale Supply*, Case No. CJ-2008-4942 (Okla. Cty. Dist. Ct.).

45. The Tax Commission sought to prohibit Native Wholesale from making such sales of GRE brand tobacco to the Muscogee (Creek) Nation because GRE and its brands were not listed as a Compliant Tobacco Manufacturer on the Oklahoma Attorney General’s directory of MSA complaint manufacturers.

46. On February 6, 2009, District Court Judge Bryan Dixon dismissed the Tax Commission and Attorney General’s Petition for failure to state a cause of action. The Court granted the State twenty days in which to amend.

47. On April 10, 2009, District Court Judge Bryan Dixon entered an order of dismissal with prejudice because the court “lacks subject matter jurisdiction under Indian Commerce Clause.”

48. The Defendants, in their official or individual capacities as members of the OTC, have no authority to tax tobacco products sold to tribal members within the Indian country of the Nation.

49. Because the Nation acts as the wholesale entity for its communities and other licensed retailers for Native Manufactured tobacco products and the Oklahoma State tobacco tax scheme requires tobacco wholesalers to prepay the applicable cigarette sales tax for sales within Indian Country, the Tax Code impermissibly shifts the legal incidence of the tax to Indians.

50. The Tax Code also impermissibly requires tribally licensed retailers to only sell cigarettes and tobacco products that carry a State approved tax or tax free stamp. The Tax Code impermissibly regulates the kind, quantity, and price of tobacco products sold in Indian country.

51. The Defendants have no authority to tax the sale of tobacco products that are manufactured, marketed and sold exclusively in Indian commerce, whether to tribal members or non-members. The State has no authority to require Native Manufactured tobacco products to carry a State tax stamp or State tax free stamp.

(STATE MSA AND RELATED LAWS)

52. On November 23, 1998 the State entered into a settlement agreement, the MSA with major United States tobacco manufacturers (the "Majors"). The MSA required the Majors to make annual "settlement" payments, subject to certain contingencies, adjustments, and offsets. Each of the Major's share of the foregoing annual payments is based on its relative market share in comparison to the other Majors, and total sales volume in the United States.

53. During negotiations of the MSA the parties to the MSA discussed the increased competition the Majors would face as a result of the MSA once the Majors raised their prices to fund the "settlement" payments. In response to these<sup>4</sup> concerns and subsequent demands by the

Majors, the parties drafted the MSA to apply not only to the Majors but to all manufacturers, including Subsequent Participating Manufacturers (“SPMs”) that might choose to “settle” with the States joining the MSA as well as Non-Participating Manufacturers (“NPMs”) that would elect not to join the MSA even though these smaller manufacturers had never been, or may never be, sued or threatened with suit by the States.

54. After the MSA was signed the State enacted the “Oklahoma Prevention of Youth Access to Tobacco Act” (Escrow Statute). The Escrow Statute requires tobacco product manufactures to either 1) become a participating manufacturer and perform its general financial obligations under the MSA, or 2) place into an escrow account the amount required by the Escrow Statute, codified at Title 37 O.S. §§ 600.21 et seq. Unlike the State cigarette excise tax, the burden of this financial responsibility requirement (which serves the same purpose of a tax) is upon the Indian manufacturer conducting business in Indian country with an Indian tribe. Thus the legal incidence of this tax or financial responsibility falls on Indians, Indian tribes, and Indian traders conducting business in Indian country.

55. In 2004, the State legislature enacted the “Oklahoma Tobacco Master Settlement Agreement Complementary Act” (the “Complementary Act”) codified at 68 O.S. § 360.1 et seq. The Complementary Act requires tobacco manufacturers to submit an annual certification to the OTC and Attorney General demonstrating that it is a PM or is a NPM in compliance with the Escrow Statute. See 68 O.S. § 360.4 and 37 O.S. § 600.23(E). NPMs are required to submit information to the State as to the number of cigarettes sold in the preceding calendar year and certify that they have established and continue to maintain an escrow fund consistent with the Escrow Statute. See Sections 360.4 and 360.6. The Escrow Statute imposes an undue and impermissible burden on Indian commerce by means of directly regulating Indians who conduct

business within Indian country by selling and trading Native made cigarettes with other Tribes, Indians and Indian-owned entities, and imposing an unlawful financial responsibility requirement on Indians dealing within this stream of commerce in Indian country.

56. The Attorney General uses the information obtained through the certification process to publish a directory on its website listing all the tobacco manufacturers that have provided evidence and verification of compliance with the Complementary Act and Escrow Statutes (combined the “MSA Statutes”). See Section 360.4(B). The State does not list manufacturers that do not comply with the certification requirement of the Escrow Statute, and asserts that these manufacturers cannot sell tobacco products in the State, including within Indian country. See sections 360.4(B) and 360.8(A); and 37 O.S. sections 600.21 – 600.23.

57. Title 68 O.S. § 360.7(E) of the Complementary Act 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 of a tobacco product manufacturer or brand family not included in the State Directory. The State asserts this provision of law applies to the trade and commerce of tobacco in Indian country. This provision of law interferes with Indian commerce by placing an undue burden on Indians, Indian tribes, and Indian traders conducting business in Indian country. The provision attempts to dictate the kind, quantity and price of tobacco products sold in Indian country. The provision of law unduly discriminates against Native manufactures conducting business exclusively in Indian country in direct violation of Supreme Court precedent and federal common law. See *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95 (2005)

(AMENDMENT OF THE STATE CODE THROUGH ADOPTION OF SB 608)



58. Recently, the Oklahoma Legislature attempted to amend the regulatory scheme applicable to taxation of tobacco products through adoption of a law that is not of general application but, rather, concerns only taxation of cigarettes sold by Indians in Indian country of a non-compacting tribe or nation, which became effective January 1, 2010. See 68 OS. § 346 et. Seq. and § 349.1.

59. Under this amended regulatory scheme the State continues to authorize the Governor to enter into tribal state tobacco tax Compacts with Indian tribes pursuant to section 3456 of the Tax which was not amended. Indian tribes that enter into compacts with the State make a “payment in lieu of state...excise taxes.” See 68 O.S. § 346(C)(1).

60. Section 346 of the Tax Code specifically acknowledges that “Federal law recognizes the right of Indian tribes or nations to engage in sales of cigarettes and tobacco products to their members free of state taxation.” See section 346(A)(1)

61. Despite the recognition that Indian nations have the right to engage in sales of cigarettes and tobacco products to their members free of state taxation, SB 608 creates a State mandated regulatory scheme that imposes conditions on non-compacting tribes, such as the Nation, as to the collection of State excise taxes on the sale of cigarettes to Indians and non-Indians, licensing of wholesalers, the brand of cigarettes that can be sold, and civil and criminal penalties for non-compliance with the State law.

62. Section 349.1 subjects cigarette and other tobacco product sales on the reservation to State excise taxes when sold by retailers licensed by non-compacting tribes. See section 39.1(A).

63. Section 349.1 places conditions on the tax free purchase of cigarettes and other tobacco products by members of non-compacting Nations. See section 349.1(B).

64. Section 349.1 requires that the retail license be issued by the Nation for retail facilities on land of the Nation, and the purchaser must be a member of the Nation in order to receive cigarettes with tax free stamps for sale by retailers located on tribal lands. See section 349.1(B)(2).

65. Section 349.1 requires that all cigarettes, including those sold by the Nation or its licensees, bear a stamp issued by the State evidencing that the cigarettes are tax free (tax free stamp) or that the State tax has been paid (tax stamp). See sections 349.1(C) and 349.1(F).

66. Section 349.1 requires all Nation licensed retailers to purchase cigarettes and tobacco products from State licensed wholesalers. The State pursuant to this section requires the Nation as a wholesaler of Native manufactured cigarettes to be licensed by the State. See section 349.1.

67. Only a limited number of tax free stamps are available based on “probable demand” as determined exclusively by the OTC. The State bases its calculation of “probable demand” by multiplying the number of tribal members residing in the State by the number of cigarettes consumed by the average Oklahoma or U.S. resident, whichever is greater. See section 349.1(C)(1).

68. The Nation may submit evidence to support a different “probable demand”. The OTC makes the final determination of “probable demand” and notifies the wholesalers and non-compacting tribe of such determination. See section 349.1(C)(1).

69. The OTC allocates the “probable demand” tax free stamps for each Oklahoma licensed wholesaler as to each non-compacted Nation for each calendar year, based on the previous year’s sales. The wholesalers receive the allocated tax free stamps quarterly. See section 349.1(C)(4) and (5).

70. Section 349.1 states that if a tribally licensed retailer sells tax free cigarettes to a non-member of the Nation the licensed retailer must pay the excise tax plus litigation costs and fees. The State statute requires that the litigation commence in State court even though the State has no jurisdiction over Indians in Indian country. See section 349.1(C)(7).

71. The State excise tax for sales to non-members must be paid by the State licensed wholesaler, and the product must be stamped. See section 349.1(D).

72. Section 349.1 only applies to non-compacting Nations. See section 349.1(E).

73. Pursuant to section 349.1, any person who knowingly ships, transports, receives, possesses, sells, distributes, or purchases cigarettes without a State tax stamp or tax free stamp is guilty of a State misdemeanor subject to a \$1,000 fine. A second offense is a felony with a \$5,000 and /or up to 2 years in jail penalty under State law. See section 349.1(G).

74. Section 349.1 also includes penalties of forfeiture of property for the sale of unstamped cigarettes. See section 349.1(H).

75. The State has no criminal jurisdiction over Indians in Indian country. Through adoption of section 349.1 the State in violation of federal law applies State criminal jurisdiction over Indians and Indian traders conducting business in Indian country. This unilateral imposition of criminal jurisdiction only applies to non-compacting tribes.

76. The State has no authority to tax Indians or Indian traders conducting business in Indian country with Indians. Though adoption of section 349.1 the State in violation of federal law has created a unilaterally imposed system of taxation that dictates how many cigarettes may be sold to Indians, what kind of cigarettes may be sold to Indians, and at what price cigarettes may be sold to Indians in the Indian country of non-compacting tribes.

77. SB 608 penalizes tribes that do not have a current Compact with the State.

78. This legislation as adopted creates civil and criminal penalties for sales of cigarettes that do not comply with the Tax Code, including provisions that would prevent the sale of Native Manufactured cigarettes in Indian country. (See Exhibits A and D; sections 349.1 and 37 O.S. §§ 600.21- 600.23.)

79. The State has informed the Nation that it intends to enforce SB 608, specifically section 349.1 within Indian country, including both civil and criminal penalties.

80. The Nation's Compact with the State expired in 2005. A new Compact has not been negotiated due in part to a disagreement that arose between the parties concerning the treatment of Native manufactured cigarettes.

81. Through adoption of section 349.1, the State has unilaterally imposed the collection of State cigarette taxes and MSA statute requirements on Native manufactured cigarette sales within the Indian country of the Nation to Indian and non-Indian patrons.

82. The State unilaterally determined the amount of cigarette sales retailers within the Indian country of the Nation sell to members of the Nation, and has required that these cigarettes be stamped with a State tax exempt stamp before the cigarettes can be sold to Indians in Indian country to Indians.. See 68 O.S. §349.1 (A) and Exhibit B – October 16, 2010 letter.

83. Under the Tax Code all cigarettes sold within Indian country must bear a State tax stamp or tax exempt stamp.

84. Under the Tax Code all tribally owned or licensed stores must purchase, receive, stock, possess, sell or distribute stamped cigarettes obtained from wholesalers licensed by the State.

85. All cigarettes sold by State licensed wholesalers must bear a State tax stamp or a State tax exempt stamp. All cigarettes bearing a State tax stamp or State tax exempt stamp must

be manufactured by manufacturers that are in compliance with the state MSA laws (the Complimentary Act and Escrow Statutes). This requirement effectively bans Native manufactured cigarettes from sale in Indian country, and impermissibly burdens Indian commerce. See sections 349.1(C) and 37 O.S. sections 600.21- 600.23.

86. The Tax Code requires that tobacco product wholesalers selling to non-compacting tribes are responsible for collecting, reporting and remitting the tax on the tobacco product inventory sold to the tribally owned or licensed store. See section 427.

87. Section 349.1 of the Tax Code requires the wholesaler of tobacco products to prepay the cigarette tax in advance of any sales to retailers or consumers.

88. Defendants have taken and threaten to continue to take enforcement actions against Plaintiffs, their employees, agents and privies, including seizures of inventory that do not bear an Oklahoma State cigarette stamp. (See section 349.1 and Exhibit B (OTC October 16 letter))

89. The Nation received a letter dated October 16, 2009 from the OTC informing the Nation of the OTC determination as to “probable demand”. The letter did not state how the OTC reached the conclusion that it would use the average rate of consumption of cigarettes in Oklahoma rather than the United States. The letter also does not account for known studies that conclude Native Americans smoke at a rate 33% higher than the average population.

#### (INDIAN COMMERCE CLAUSE VIOLATIONS)

90. Defendants are prohibiting and will continue to prohibit the Nation (including wholesalers and retailers licensed by the Nation) and its employees, agents and privies from receiving, distributing and selling cigarettes that do not bear an Oklahoma State tax stamp or tax exempt stamp. This prohibition, particularly as to Native Manufactured tobacco products,



interferes with Indian commerce, and violates federal policy that encourages intertribal commerce. See 25 U.S.C. § 4301(b)(5), the Native America Business Development Act.

91. Defendants have unlawfully forced the Nation to temporarily suspend distribution of Native manufactured cigarettes through passage of SB 608 and subsequent threats to enforce both civil and criminal penalties adopted as part of SB 608. These actions are in violation of federal law and State Court decisional law. See U.S. Const. Art. I, § 8; *State of Oklahoma v. Native Wholesale Supply*, Case No. CJ-2008-4942 Opinion issued June 10, 2009, District Court of Oklahoma County of the State of Oklahoma, (holding that application of the Complementary Statute to sales by NWS to the Nation is barred by the Indian Commerce Clause.

92. Section 349.1 of the Tax Code impermissibly taxes Indian-to-Indian sales by requiring that all wholesalers affix Oklahoma State tax stamps or tax exempt stamps to all cigarettes sold to retailers within Indian country.

93. Enforcement and collection of such taxes infringes upon the sovereignty of the Nation, impermissibly shifts the burden of such taxes to the Nation, tribal members and tribal entities in violation of federal law.

94. The formula set forth in section 349.1 to determine the allowance for the quantity of tax free cigarettes is arbitrary and was not developed in consultation with the Nation.

95. The formula set for in section 349.1 and the letter from OTC dated October 16, 2009 dictates the quantity of cigarettes that the Nation will be allowed to sell to Indians within Indian country as a non-compacting tribe.

96. SB 608 sets forth a mandate that would limit the quantity of cigarettes the Nation would be able to sell to Indians within Indian country. The State has not adopted a regulatory system to implement this mandate.

97. The regulatory tax scheme mandated by SB 608 requires that all tobacco products sold within Indian country bear a tax or tax exempt stamp. In order to have a State tax stamp or tax exempt stamp the cigarettes must be purchased by a State licensed wholesaler and comply with the State MSA laws (the Complimentary Act and Escrow Statute). This is in direct violation of a State Court determination issued June 10, 2009. See *State of Oklahoma v. Native Wholesale Supply*, Case No. CJ-2008-4942 Opinion issued June 10, 2009, District Court of Oklahoma County of the State of Oklahoma (See Exhibit C).

98. Section 349.1 of the Tax Code impermissibly places the incidence of the tax on the Indian wholesaler, with substantial burden, by requiring wholesalers (including the Nation) to pay the cigarette tax in advance of any retail sales. This tax must be paid and the cigarettes must bear a State tax or tax exempt stamp pursuant to Section 349.1. Thus, placing the legal incidence of the State tax on Indians, Indian tribes, and Indian traders within Indian country.

99. Section 349.1 of the Tax Code creates a unilateral State mandated regulatory scheme on the sale of tobacco within Indian country that impermissibly dictates the kind, quantity, and price of cigarettes, including Native-manufactured cigarettes that have value added by Indians within Indian Country in violation of federal law.

100. The definition of contraband cigarettes included in SB 608 impermissibly outlaws non-state stamped cigarettes sold to Indians within Indian country and Native manufactured cigarettes sold exclusively within Indian country.

101. The State through passage of SB 608 has attempted to criminalized legal economic development opportunities within Indian country in order to protect the market share of participating tobacco manufacturers and therefore also protect the State's portion of the MSA payments received from these participating manufacturers at the expense of the Nation.

102. The Federal government enacted a statute entitled the Family Prevention and Smoking Control Act (Tobacco Control Act) (21 U.S.C. §387 et seq.) (the “Tobacco Control Act”), Division A of Public Law 111-31, §§ 1-302, on June 22, 2009, codified at 21 U.S.C. section 387, et seq.

103. The Tobacco Control Act contains express provisions that preempt state law in the field of Indian affairs. See 21 U.S.C. section 387p.

104. The Congressional findings demonstrate that Congress acted pursuant to its authority under the Indian Commerce Clause to exclusively regulate Tribes and Indians in adopting the Tobacco Control Act. Section 387, Findings, subd. (9) “Under article I, section 8 of the Constitution, the Congress is vested with the responsibility for regulating...commerce with Indian tribes.”

105. The Secretary of Health and Human Services is tasked with exercising authority to enforce the Tobacco Control Act and implementing regulations, including those “relating to the retail sale of tobacco products”, with respect to Indian tribes. See section 387a-1, subd. (a)(5).

106. Congressional intent to exercise its exclusive authority with respect to Indian tribes is demonstrated through the definitional section of the statute which expressly defines “Indian country”, “Indian tribe”, and “trust territory”. See U.S.C. section 387, subds. (9), (10) and (22).

107. Additional evidence of Congressional intent to exercise its exclusive authority with respect to Indian tribes is found in the section concerning labeling, recordkeeping, and records inspection. This section states, “[t]he Secretary shall not authorize an officer or employee of the government of any of the several States to exercise authority under the

preceding sentence on Indian country without the express written consent of the Indian tribe involved.” See 21 U.S.C. section 387t.

108. The Tobacco Control Act states, “nothing in this subchapter, or rules promulgated under this subchapter, shall be construed to limit the authority of ...an Indian tribe to enact, adopt, promulgate, and enforce any law, rule, regulation, or other measure with respect to tobacco products that is in addition to, or more stringent than, requirements established” under the Tobacco Control Act. See 21 U.S.C section 387p.

109. The Tobacco Control Act states “Nothing in this section is intended or shall be construed to expand, contract, or otherwise modify or amend the existing limitations on State government authority over tribal restricted fee or trust lands. See 21 U.S.C. section 331 note.

(INTERTRIBAL COMMERCE AND VALUE ADDED)

110. The Nation has received marketed and distributed cigarettes that are manufactured by Indian tribes and/or tribally licensed entities for sale within Indian country.

111. The Nation has temporarily suspended its receipt, marketing, and distribution of Native manufactured cigarettes pending a determination by this Court as to the requested preliminary injunction.

112. The Nation has licensed a tribally owned corporation as a wholesale entity that markets and distributes Native manufactured tobacco products. This entity supplies retailers licensed by the Nation with Native manufactured tobacco products.

113. The movement of tobacco products manufactured within Indian country of one federally-recognized Indian tribe for sale within the Indian country of another federally-recognized Indian tribe represents “Indian commerce”, which is committed to the control of the United States Congress and is not subject to state interference. See U.S. Const. Art. I sec. 8.

114. The State through amending its Tax Code, including the adoption of section 349.1 unlawfully interferes with Indian commerce in violation of the United States Constitution, Indian trader statutes, and Supreme Court precedent.

115. The Native American Business Development Act, 25 U.S.C. section 4301(b)(5) sets forth a federal policy encouraging intertribal trade and commerce as a mechanism to assist Indian communities in increasing productivity and the standard of living among members of Indian tribes. Section 349.1 and enforcement of such provision interferes with this, among other, federal Indian policies intended to promote economic development and self-sufficiency within Indian country.

V.

**FIRST CLAIM FOR RELIEF**  
**VIOLATION OF DUE PROCESS**

(Declaratory Judgment that it is Unlawful for the Defendants to regulate Indian-to-Indian Sales and the Sale of Native Manufactured Cigarettes within Indian Country)

116. Plaintiffs repeat and re-allege each of the foregoing allegations as though set forth fully herein..

117. Defendants have adopted amendments to the Tax Code that may not validly be enforced as to the sale of Native manufactured cigarettes and Indian-to-Indian sales within the Indian country of the Nation. The adopted changes to the Tax Code deny the Nation due process of law and infringe on the Nation's federally protected rights of self governance, as well as interfere with the Nation's federally protected right to promote economic development within the Indian country of the Nation.



118. The Defendants are impermissibly attempting to regulate the kind of cigarettes sold by the Nation to Indians and non-Indians within Indian country through the imposition of an unlawful State regulatory scheme that discriminates against Native manufacturers.

119. Due process includes a geographic or territorial limitation. The Nation maintains primary jurisdiction to regulate Indians and Indian traders within the Indian country of the Nation. The State may not infringe on the Nation's right to self-govern within the bounds of Indian country. Therefore the State cannot lawfully impose regulation over Indians, Indian tribes or Indian traders within Indian country absent express authorization by Congress. The State has no jurisdictional authority to enforce SB 608 against the Nation, its members, employees, licensees, and patron within Indian country.

120. Defendants require and continue to require members of the Nation to purchase cigarettes bearing Oklahoma State tax stamps or tax exempt stamps or be subject to civil and criminal sanctions. These requirements, including the allocation system for tax exempt cigarettes, were unilaterally adopted by the State without consultation with the Nation.

121. Defendants require and continue to require members of the Nation to purchase cigarettes bearing Oklahoma State tax stamps or tax exempt stamps or be subject to civil and criminal sanctions. These requirements, including the allocation system for tax exempt cigarettes, were unilaterally adopted by the State without consultation with the Nation.

122. Defendants require and continue to require members of the Nation to purchase cigarettes from State licensed wholesalers or be subject to civil and criminal sanctions in violation of federal law and Supreme Court precedent.

123. Members of the Nation are being forced to sell and purchase cigarettes bearing the State tax stamp or tax free stamp even for Indian-to-Indian sales. This means Indians and

non-Indians within Indian country cannot purchase Native Manufactured cigarettes on the reservation which are not listed on the State Directory. Such conduct constitutes an ongoing violation of federal law and is in violation of Supreme Court precedent as it dictates the kind, quantity and price of cigarettes sold within Indian country by Indians.

124. The State has unlawfully seized cigarettes in transit to the Indian country of the Nation in violation of federal law. The Nation has reason to believe that the State will again attempt such unlawful seizures of tobacco products destined for Indian country under color of law based on the provisions of section 349.1.

125. Through adoption and enforcement of SB 608 the State has created a system for a State mandated limited allowance of tax exempt sales to Indians within Indian country. The State through adoption of SB 608 dictates the kind, quantity and price of such cigarettes that may be sold to Indians within Indian country.

126. The State's regulatory scheme impermissibly places substantial burdens on Indians, Indian tribes, and Indian traders in Indian country.

127. The State of Oklahoma and its officials, the Defendants, do not have criminal or civil jurisdiction over the Nation, its members or sub-entities for on-reservation activities related to the taxation of cigarettes. The State through SB 608 has adopted civil and criminal penalties that it threatens to enforce within the jurisdiction of the Nation in violation of federal law.

## VI.

### **SECOND CLAIM FOR RELIEF EQUAL PROTECTION**

(Declaratory Judgment that It is Unlawful for the Defendants to Enforce a Discriminatory Taxation and Regulation Scheme Against the Nation and Its Privy for Conduct Within Indian Country)

128. Plaintiffs repeat and re-allege each of the foregoing allegations as though set forth fully herein.

129. Defendants are enforcing the Tax Code and against the Nation, its members, and licensees in a discriminatory manner.

130. The State has adopted a discriminatory law that only applies to Indian tribes, and only as to non-compacting Indian tribes that impermissibly infringes on tribal sovereignty and imposes substantial burdens on the Nation.

131. The Oklahoma tax scheme requires tribal retailers to acquire products from state-licensed wholesalers (rather than tribal wholesalers) and force tribal entities to apply for a state wholesaler license despite the fact that they are exempt from State taxation and regulation.

132. Section 349.1 of the Tax Code unlawfully places the legal incidence of the tax on Indians, Indian tribes, and Indian traders conducting business in Indian country.

133. Section 349.1 unlawfully requires the Plaintiffs to function as a tax collector for the State in a discriminatory manner inconsistent with federal law. Such application of the law discriminates against the Nation by creating a taxing scheme that impermissibly burdens those tribes that do not concede to the States unilateral imposition of compact terms.

134. As interpreted and applied by the Defendants, Section 346 and 349.1 of the Tax Code is unconstitutional because it purports to confer state jurisdiction over Indian country in a manner prohibited by federal law.

## **VII.**

### **THIRD CLAIM FOR RELIEF PREEMPTION UNDER INDIAN TRADER STATUTES**

135. Congress through adoption of the Federal Indian Trader Statutes, at 25 U.S.C. §§261-264, has created a comprehensive regulatory scheme to regulate trade with Indians and

Indian Tribes within Indian Country. The State Tax Code interferes with this comprehensive regulatory scheme by dictating the kind, quality and price of tobacco products sold within the Indian Country of the Nation.

136. The regulatory effect of the legislation is to impermissibly burden the Tribe, its members, and Indian individuals who purchase cigarettes at retail, or otherwise, on the reservation because there is no mechanism for ensuring that those purchasers shall not be subjected to the regulation.

137. As a result, the Defendants' conduct (adoption of 349.1 and enforcing provisions of the Tax Code) constitutes an ongoing violation of federal law, by interfering with Indian commerce and the federal policy to promote economic development within Indian country and among Indian tribes. See Native American Business Development Act, 25 U.S.C. § 4301(b)(5) (recognizing the specific purpose "to encourage intertribal . . . trade and business development in order to assist in increasing productivity and the standard of living of members of Indian tribes and improving the economic self-sufficiency of the governing bodies of Indian tribes").

## VIII.

### **FOURTH CLAIM FOR RELIEF VIOLATION OF THE INDIAN COMMERCE AND SUPREMACY CLAUSES**

138. The Defendants through enacting SB 608 as enacted, the Master Settlement Agreement Complimentary Act, 68 O.S. § 360, et seq., and the Escrow Statutes at 37 O.S. § 600.21, et seq. violate the Indian Commerce and Supremacy Clauses, Art. I, Sec. 8, cl. 3 and Art. VI, § 2, by directly regulating and unduly burdening Indian commerce, through regulation and taxation beyond the jurisdictional borders of the State of Oklahoma within Indian country. Regulation of Indian Commerce is committed exclusively to Congress under these provisions.

139. The Defendants have and continue to violate the Indian Commerce Clause by enacting legislation implementing the terms of the MSA in collusion with other participating States by unduly restricting commerce among Indian tribes. This legislation impermissibly raises the cost of Native Manufacturers conducting business exclusively within Indian country and not a party to the MSA by requiring them to contribute to Oklahoma's escrow fund pursuant to its Escrow Statutes. This legislation unduly interferes with Congress' exclusive constitutional power to regulate Indian commerce by burdening and regulating Indian commerce with regard to Native Manufactured cigarette sales.

140. The Defendants through enactment of SB 608 as enacted, the Master Settlement Agreement Complimentary Act, 68 O.S. § 360, et seq., and the Escrow Statutes at 37 O.S. §600.21, et seq. violate the Indian Commerce Clause and Supreme Court precedent as to taxation of Indians in Indian country through taxation or imposition of a financial responsibility fee that serves the same purpose as a tax on Indians, Indian tribes, and Indian traders conducting business exclusively within the bounds of Indian country. The State through these statutes is attempting to regulate the kind, quantity and price of Native manufactured cigarettes sold exclusively within Indian country to both Indians and non-Indians.

141. The Defendants through enactment of SB 608 as enacted, the Master Settlement Agreement, Complimentary Act, 68 O.S. § 360, et seq., and the Escrow Statutes at 37 O.S. §600.21, et seq. violate the Indian Commerce Clause, the Supremacy Clause, and Supreme Court precedent through imposition of State regulation on the conduct of Indians within Indian country.

142. Taxation of Indians and non-Indians purchasing Native manufactured products that have value added and are sold exclusively within Indian country violates federal policy and Supreme Court precedent. This legislation violates the Nation's right to self-governance and



interferes with the Nation's right to promote economic development within Indian country through sale of products that have value added by Indians within Indian country.

143. This legislation as enacted by the State constitutes a discriminatory tax imposed on Indians conducting business within Indian country. The taxation and regulation is discriminatory in that the legislation unilaterally imposes a system of regulation on the Nation (non-compacting tribes) in direct violation of *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991); *Wagnon v. Prairie Band of Potawatomi*, 546 U.S. 95 (2005); and *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

144. This legislation as enacted by the State constitutes a discriminatory tax imposed on Indians conducting business within Indian country in direct violation of *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450 (1995). The legislation imposes a tax or financial responsibility requirement that serves the same purpose as a tax with the legal incidence falling on Indians conducting business exclusively within Indian country. The Supreme Court has drawn a bright line rule that Indians cannot be taxed for conduct that occurs within Indian country.

145. This legislation as enacted by the State constitutes a discriminatory tax imposed on Indians and Indian traders conducting business within Indian country in direct violation of *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), and *Dep't of Taxation & Finance of New York v. Milhelm Attea & Bros. Inc.*, 512 U.S. 61 (1994). The legislation imposes a tax on the sale of Native manufactured cigarettes sold within Indian country to Indians and non-Indians. Supreme Court precedent has consistently held that States cannot tax products or services that have value added

on the reservation. The Tax Code effectively bans Native manufactured tobacco products sold exclusively within Indian country, impermissibly infringes on the Nation's right to self-govern, and substantially burdens Indian commerce.

146. The State attempts to interfere with the Nation's retained rights to regulate commerce within the Indian country of the Nation, and unlawfully interferes with the federally protected right of Indian tribes to trade with other Indian entities and individuals without interference.

147. Congress adopted the Tobacco Control Act, Division A of Public Law 111-31 § H0302 on June 22, 2009, codified at 21 U.S.C. Section 387, et seq. The Tobacco Control Act contains express provisions which preempt State law in the field of Indian Affairs. Congress enacted this law pursuant to its authority under the Indian Commerce Clause creating a comprehensive regulatory scheme as to the retail sale of tobacco products with respect to Indian Tribes.

148. SB 608 as enacted interferes with this comprehensive federal regulatory scheme and interferes with the sovereign rights of the Nation to regulate in the area of tobacco retail sales.

149. SB 608 and the State MSA laws violate the Tobacco Control Act in that it requires regulation for or in addition to the Tobacco Product Standards set forth in the act, These violations include the mandated registration requirements of 37 O.S. sections 600.21 – 600.23 which are preempted by the Tobacco Control Act.

## **IX.**

### **FIFTH CLAIM FOR RELIEF** **VIOLATION OF TRIBAL SELF-GOVERNMENT**

150. The regulation imposed by the legislation is invalid as a matter of federal law because its enforcement infringes on the rights of tribal self-government of the Tribe and violates the Tribe's inherent sovereign right to make its own laws.

151. This legislation as enacted by the State constitutes a discriminatory tax imposed on Indians conducting business within Indian country in direct violation of *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), and *Dep't of Taxation & Finance of New York v. Milhelm Attea & Bros. Inc.*, 512 U.S. 61 (1994). The legislation imposes a tax on the sale of Native manufactured cigarettes sold within Indian country to Indians and non-Indians. Supreme Court precedent has consistently held that States cannot tax products or services that have value added on the reservation. The Tax Code effectively bans Native manufactured tobacco products sold exclusively within Indian country, impermissibly infringes on the Nation's right to self-govern, and substantially burdens Indian commerce.

152. The State attempts through adoption of SB 608 to interfere with the Nation's retained rights to regulate within the Indian country of the Nation, and unlawfully interferes with the federally protected right of Indian tribes to trade with other Indian entities and individuals without interference.

## **X.**

### **SIXTH CLAIM FOR RELIEF VIOLATION OF RIGHT OF EQUAL PROTECTION AND RIGHT TO BE FREE FROM DISCRIMINATION**

153. The Nation asserts this cause of action on behalf of all the members and licensees of the Nation in its *parens patriae* capacity.

154. The State has violated Nation's right as an inherent sovereign government to protect its members and licensees from unlawful interference and discrimination. The State is attempting to enforce the Tax Code in a manner which violates the Nation, its members and licensees' rights to equal protection and the right to be free from discrimination under the Fourteenth Amendment to the Constitution. The State has also violated these federal statutes by denying Tribal members the right to due process in enforcing the Tax Code.

155. The State has demonstrated a pattern and practice of selective enforcement of the Tax Code against Nation members and licensees of the Nation within Indian country, including the targeting of the Nation's vehicles and common carriers transporting tobacco products to and from the Indian country of the Nation.

## **XI.**

### **RELIEF REQUESTED**

WHEREFORE, the Nation requests that this Court:

1. Issue a judgment declaring that the State may not enforce section 349.1 or any other provision of the Tax Code on the Nation's Indian lands or against Native manufacturers conducting business with the Nation for sale of products within Indian country;
2. Declare that the Tax Code as amended and in effect on January 1, 2010 constitutes a substantial burden that is not reasonably tailored for the collection of a valid state tax with the legal incidence falling on non-Indian consumers.
3. Declare that the Tax Code as amended by the State and in effect on January 1, 2010 constitutes an attempt by the State to dictate the kind, quantity and price of cigarettes sold within Indian country in direct violation of federal policy and Supreme Court precedent.

4. Declare that the Tax Code as amended by the State and in effect as of January 1, 2010 effectively creates a ban on Native Manufactured cigarettes within Indian country in direct violation of the United States Constitution, the Indian trader statutes, and the Tobacco Control Act.

5. Issue a preliminary and permanent injunction prohibiting the State of Oklahoma from enforcing the Tax Code within Indian country with respect to the sale of Native Manufactured cigarettes, and requiring the State of Oklahoma to engage in good faith negotiations with the Tribe regarding the scope of regulation under the Tax Code which is reasonably tailored to collect valid state excise taxes applied to the sale of non-Native manufactured cigarettes to non-Indians within Indian country.

6. Enter a declaratory judgment that it is unlawful for the Defendants to attempt to collect a State tobacco tax or apply any State regulation or taxation with respect to Indian-to-Indian sales of tobacco products that dictates the kind, quantity or price of cigarettes sold within the Indian country of the Nation, or that is otherwise preempted or violates the federal common law concerning the extent of state regulatory and taxing jurisdiction in Indian Country;

7. Issue a permanent injunction against the State prohibiting enforcement of the Master Settlement Agreement Complementary Act and Escrow Statutes against the Nation or Native manufactures conducting business with the Nation exclusively in Indian country.

8. Declare the MSA and related statutes (Complimentary Act and Escrow Statutes) have no force and effect within the territorial boundaries of the Nation's reservation or lands over which the Nation has jurisdiction.

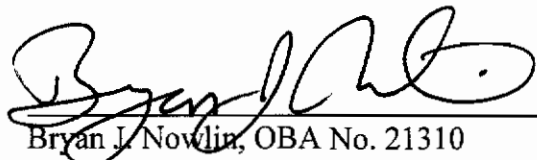


9. Issue a permanent injunction against the State prohibiting it from denying the Nation, its members, and licensees due process and/or equal protection of the laws, or granting special privileges and/or immunities to other similarly situated persons or entities;
10. Grant such other relief as the Court may deem appropriate for the State's denial of the Tribe's Constitutional and other federal rights; and
11. Order that the Tribe is entitled to costs, attorneys' fees, and such other further relief as the Court may deem just and proper.

Dated: January 11, 2010

DOERNER, SAUNDERS, DANIEL  
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immediately upon commencement of action

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