CIV-10-019-JHP

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, Oklahoma Tax Commission;
JERRY JOHNSON, Vice-Chairman, Oklahoma Tax Commission;
CONSTANCE IRBY, Secretary, Oklahoma Tax Commission,

Defendants.

DEFENDANT GOVERNOR BRAD HENRY'S BRIEF IN OPPOSITION TO APPLICATION FOR A PRELIMINARY INJUNCTION

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DEFENDANT GOVERNOR BRAD HENRY'S BRIEF IN OPPOSITION TO APPLICATION FOR A PRELIMINARY INJUNCTION

Introduction.

Can I Borrow a Cup of Sovereignty?

While an Indian tribe can borrow a cup of sugar from another tribe — or perhaps in today's world a cup of poker chips — it can not borrow a cup of sovereignty. In a very real sense, the Muscogee (Creek) Nation's novel theory of Indian commerce relies on just that: one tribe borrowing another tribe's sovereignty.

Tribes going beyond the boundaries of their own Indian country are generally subject to non-discriminatory state laws.[1] This is so because an Indian tribe's sovereign powers end at its own Indian country's border, just as Oklahoma's sovereign powers end at the Kansas or Texas borders. Under the Muscogee's Indian commerce theory, an Indian tribe's sovereign power would no longer be confined to the boundaries of its own Indian country — it would extend to its activities beyond its boundaries if the activities took place within another tribe's Indian country or were related to dealing with the other tribe, such as transporting its products outside of its own Indian country.

This theory is offered up in support of an avaricious goal, for what the Muscogee (Creek) Nation seeks to do in this case is to increase the profits of certain tobacco retailers operating within the Nation's Indian country by drastically reducing the costs of cigarettes based upon claims that all sales in the Nation's Indian country are exempt from State Excise Tax and that all sales are exempt from Manufacturer Escrow Requirements. These claimed exemptions, would give certain Muscogee Nation retailers a price advantage in excess of $15.00 per carton over non-tribal retailers and significant price advantages over neighboring Tribes and Nations. The Muscogee Nation's retailers have no right to such exemptions under Indian law, whether expressed in terms of preemption, Indian commerce, tribal self-government, tribal economic interests or otherwise.

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[1] Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148-49 (1973) which is discussed in Proposition IV.

No injunction is necessary to protect the Muscogee (Creek) Nation's interests in the sale of tobacco products to **its tribal members**, because the challenged tax statutes do **not** tax sales to tribal members, and the challenged Tobacco Manufacturer Escrow Statute and related Complementary Enforcement Act do **not** apply to sales to tribal members.

With respect to sales to **non-tribal members**, the United States Supreme Court has already recognized the State's right to impose its tobacco taxes on sales to non-tribal members, as well as the State's right to impose tax collection and other regulatory obligations upon tribal retailers, and the State's right to make **off Indian country** seizures of contraband cigarettes. Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 498 U.S. 505 (1991), and Confederated Tribes of the Colville Indian Reservation v. United States, 447 U.S. 134 (1980).

The Muscogee (Creek) Nation's claimed damages all ultimately trace back to the loss of a claimed right not included within the Nation's sovereignty — a right to sell non-tribal members exemptions from State taxation and regulation — a right which does not exist. In short, the Nation suffers no real harm, because it is claiming a loss of something it never possessed in the first instance.

As to the Governor, the injunctive relief sought is the enjoining of the enforcement of statutes which the **Governor has no specific duty to enforce**: tax statutes which are enforced by the Oklahoma Tax Commission and the Escrow Statute and related Complementary Enforcement Act which are both enforced by the Attorney General. No

injunction should lie against the Governor based upon his generalized duty to enforce the laws of the State. Indeed, the Governor is sued solely in his official capacity based solely upon that generalized duty, and thus is not a proper party in this cause.

The Governor leaves the primary defense of the challenged enactments to those charged with their enforcement, the Tax Commission and Attorney General, and adopts the arguments they offer in opposition to the issuance of an injunction.

The Governor, nevertheless, offers the following arguments and authorities as additional and ancillary arguments in opposition to the issuance of a preliminary injunction in this cause.

Proposition I

As an Extraordinary Remedy, the Right to a Preliminary Injunction Must be Clear and Unequivocal, and to be Entitled to a Preliminary Injunction, a Party Must Show:

1. He or She Will Suffer Irreparable Injury Unless the Injunction is Issued;

2. The Threatened Injury Outweighs Whatever Damage the Proposed Injury May Cause to the Opposing Party;

3. The Injunction, if Issued, Would Not be Adverse to Public Policy Interests; and

4. There is a Substantial Likelihood of Success on the Merits.

Further, Because the Muscogee (Creek) Nation Seeks to Enjoin Governmental Action Taken in the Public Interest Pursuant to a Statutory or Regulatory Scheme, the Less

Rigorous "Fair-Ground-For-Litigation Standard" Does Not Apply, and the Nation Has the Burden of Showing a Substantial Likelihood of Success on the Merits.

In Nova Health Systems v. Edmondson, 460 F.3d 1295 (10th Cir. 2006), the Court of Appeals summarized the standard used when a party seeks a preliminary injunction:

> " '[A] **preliminary injunction is an extraordinary remedy**, [and thus] the **right** to **relief must be clear and unequivocal**.' " *Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1258 (10th Cir.2005) (*quoting SCFC ILC, Inc. v. Visa USA, Inc.,* 936 F.2d 1096, 1098 (10th Cir.1991)). In order for a party **to be entitled to a preliminary injunction**, that **party must show**
>
> "(1) he or she **will suffer irreparable injury unless the injunction issues**; (2) the **threatened injury outweighs whatever damage the proposed injunction** may **cause the opposing party**; (3) **the injunction**, if issued, **would not be adverse to the public interest**; and (4) there is a **substantial likelihood of success on the merits**."

Id. at 1298 (footnote omitted and emphasis added).

In some circumstances, when a party seeking a preliminary injunction establishes that the three "harm" factors tip decidedly in its favor, a less vigorous probability of success standard — a "fair-ground-for-litigation" standard — is available. Id. That relaxed standard, however, is not available, as the Nova Court noted: "'where a preliminary injunction seeks to stay governmental action taken in the public interest pursuant to a statutory or regulatory scheme, the less rigorous fair-ground-for-litigation standard should **not** be applied.'" Id. (Emphasis added)(quoting *Heideman v. S. Salt Lake City*, 348 F.3d 1182 (10th Cir. 2003).

Because the Muscogee (Creek) Nation seeks to enjoin such governmental action, the relaxed standard does **not** apply here.

Proposition II

Under the Challenged Tax Enactment, Sales to Tribal Members are Tax-Free. The Manufacturer Escrow Statute Does Not Apply to Sales to Tribal Members Because it Only Applies to Taxed Sales. The Challenged Complementary Statute, Which Was Enacted to Enforce the Escrow Statute — Which is Not Applicable to Tax-Free Sales — is Accordingly Not Applicable to Sales to Tribal Members. Thus, No Injunction Should Lie Regarding Sales to Tribal Members.

The challenged tax statute does **not** impose a tax on the sale of cigarettes or tobacco products **to tribal members**. Okla. stat. tit. 68 § 349.1(B) (Supp. 2009). The escrow payments required to be made by third party tobacco manufacturers under the challenged Escrow Statute are based upon "units sold" in the State. Okla. stat. tit. 37 § 600.23 (2001). The definition of "units sold" makes it clear that the escrow payment requirements imposed upon third party cigarette manufacturers apply to cigarettes upon which excise tax had been collected by the State. Okla. stat. tit. 37 § 600.22(2001)(which, in pertinent part, indicates that "units sold" means "the number of individual cigarettes sold in the State by the applicable tobacco product manufacturer, . . . **as measured by the excise tax collected by the state** on packs, or 'roll-your-own' tobacco containers bearing the excise tax stamp of the state.")(Emphasis added).

Because sales to tribal members are tax exempt, the Escrow Statute, which only applies to taxed sales, does **not** apply to sales to tribal members.

Nor does the Complementary Enforcement Act apply to sales to tribal members. That statute was enacted to enforce the Escrow Statute. Okla. stat. tit 68 § 360.2 (Supp. 2009). Because the Complementary Act was enacted as a means of enforcing the Escrow Statute, and because the Escrow Statute does not apply to sales to tribal members, the challenged Complementary Act also does **not** apply to sales to tribal members.

Because the challenged tax statutes do not tax sales to tribal members and the other challenged enactments do **not** apply to sales to tribal members, an injunction with regard to sales to tribal members should not lie.

Proposition III

In Light of the United States Supreme Court's Specific Recognition in Moe, Colville, Potawatomi and Milhelm, of the State's Right to Impose Cigarette Taxes on Sales to Non-Tribal Members and to Impose Reasonably Necessary Regulatory Requirements to Enforce Such Taxes, the Tribe's Reliance on General Principles of Preemption and Their Presumptions is Misplaced.

The Nation's Claim of Irreparable Harm is Based on the Claim That the Challenged Statutes Infringe on Its Sovereign Interests in Imposing Its Own Tobacco Taxes and Enforcing Its Own Tobacco Regulations. Like Claims Were Rejected by the Supreme Court in Colville.

In Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973), the United States Supreme Court rejected the broad assertion "that the Federal Government has exclusive jurisdiction

over the Tribe for all purposes and that the State therefore is prohibited from enforcing its revenue laws against any tribal enterprise. Id. at 147-48. The Mescalero Court further recognized that, "even on reservations, state law may be applied unless such application would interfere with reservation self-government or would impair a right granted or reserved by federal law." Id. at 148.

With respect to the application of state tax on cigarette sales within Indian Country, the United States Supreme Court has been more specific. First, in Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation, 425 U.S. 463 (1976), the Supreme Court held that a State's requiring tribal sellers of cigarettes to collect a tax validly imposed on non-Indians was a minimal burden designed to avoid the likelihood that in its absence, non-Indians purchasing from the tribal seller would avoid payment. The Court then concluded that:

> . . . to the extent that the "smoke shops" sell to those upon whom the State has validly imposed a sales or excise tax with respect to the article sold, **the State may require the Indian proprietor simply to add the tax to the sales price and thereby aid the State's collection and enforcement thereof.**

425 U.S. at 483 (**emphasis added**)

More recently, in Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980), the United States Supreme Court was faced with the State's assertion that it had the power to apply its sales and cigarette tax to Indian residents on the reservation who were not enrolled in the governing tribe. Reaffirming its decision in

Moe, the Supreme Court concluded that the **imposition of Washington's tax on Indian consumers who were not members of the governing tribe did not contravene "the principle of self-government, for the simple reason that non-members are not constituents of the governing Tribe**. For most practical purposes those Indians stand on the same footing as non-Indian residents on the reservation . . . We find therefore, that the **State's interest in taxing these purchases outweighs any tribal interest that may exist in preventing the State from imposing its tax**." 447 U.S. at 161 (emphasis added).

There are many similarities between the case presented in Colville and the case now before this Court:

- Like the Muscogee (Creek) Nation, the tribes in Colville challenged the State's statutes claiming they were preempted by federal statutes regulating Indian affairs, were inconsistent with the principles of tribal self-government, treaties and also invalid under the Indian Commerce Clause.

- Like the Muscogee (Creek) Nation, the tribes in Colville imposed their own tax upon the sale of cigarettes.

- Like the Muscogee (Creek) Nation, the tribes in Colville imported cigarettes manufactured by third parties onto their Indian Country.

- Like the Muscogee (Creek) Nation, the tribes in Colville claimed that the State's taxation scheme was contrary to and preempted by the Indian Trader Statute. Indeed, in Colville, the dealer at each tribal tobacco outlet was a federally licensed Indian Trader.

- Like the Muscogee (Creek) Nation, the tribes in Colville had enacted comprehensive ordinances regulating the

> marketing of cigarettes on their Indian Country. In Colville those ordinances had in fact been approved by the Secretary of Interior.
>
> • The tobacco business of the Muscogee (Creek) Nation, like that of the tribes in Colville, is dependent, to a substantial degree, upon the **sales to non-members being exempt from state taxes**, and **if tribal sales were not entitled to an exemption, the Tribe would lose substantial sales**.

At pages five and six of its Brief in Support of Preliminary Injunction, the Muscogee (Creek) Nation claims that if an injunction is not issued, it will be **irreparably harmed because its sovereign interests** in **imposing its own tobacco taxes** and in **regulating the sale and trade of cigarettes within its Indian Country** will be infringed. Like claims were rejected by the United State Supreme Court in Colville.

In Colville the Supreme Court specifically rejected the tribe's claim that the tribe's imposition of its own tribal tax preempted the State's ability to impose a tax. In rejecting this claim the Court noted, "[w]hat the **smoke shops offer these customers**, and what is not available elsewhere, **is solely an exemption from state taxation**. The Tribes **assert the power to create such exemption by imposing their own taxes** or **otherwise earning revenues by participating in the reservation enterprise**." Colville, 444 U.S. at 155. (Emphasis added).

The Court then rejected the Tribes' claims holding:

> If this assertion were accepted, the Tribes could impose a nominal tax and open chains of discount stores at reservation borders, selling goods of all descriptions at deep discounts and

> drawing customers from surrounding areas. **We do not believe that principles of federal Indian law, whether stated in terms of pre-emption, tribal self-government, or otherwise**, authorize Indian tribes thus to **market an exemption from state taxation to persons who would normally do their business elsewhere**.

Id. (Emphasis added).

The Court came to this conclusion even though it found that imposition of the State tax would result in the tribal smoke shops losing "a large percentage of their cigarette sales and the Tribe will forfeit substantial revenues." Colville, 447 U.S. at 154.

The Colville Court also **rejected the tribes' argument that the State's taxes and regulatory requirements were preempted because they conflicted with the Tribes' own cigarette ordinances**, which the Court noted, "comprehensively regulate the marketing of cigarettes by the tribal enterprise." Colville, 447 U.S. at 159. In rejecting this preemption claim, the Court concluded that "the State does not interfere with the Tribes' power to regulate tribal enterprises when it simply imposes its tax on sales to nonmembers . . .. We recognized in *Moe* that if a State's tax is valid, the **State may impose at least minimum burdens on Indian businesses to aid in collecting and enforcing that tax**." Id.

The Colville Court then went on to conclude that the imposition of Washington State's sales and cigarettes taxes was **not preempted** by federal statutes, including the **Indian Reorganization Act**, the **Indian Financing Act**, the **Indian Self-Determination and Education Act**, and the **Indian Trader Act**, even when giving those statutes "the broadest reading to which they are fairly susceptible . . .." Colville, 447 U.S. at 155.

The Colville Court also held that the record keeping requirements imposed by the State upon tribal retailers and wholesalers were valid *in toto*. 447 U.S. at 160. Finally, the Colville **Court approved the State's power to seize unstamped cigarettes as contraband** if the Tribes did not cooperate in the collection of State taxes:

> We find that **Washington's interest in enforcing its valid taxes is sufficient to justify these seizures. Although the cigarettes in transit are as yet exempt from state taxation, they are not immune from seizure when the Tribes, as here, have refused to fulfill collection and remittance obligations which the State has validly imposed**. It is significant that these **seizures take place outside the reservation**, in locations where state power over Indian affairs is considerably more expansive than it is within reservation boundaries.

447 U.S. at 161-62 (emphasis added).

Even more recently in Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 498 U.S. 505 (1991), the United States Supreme Court reaffirmed its holdings in Moe and Colville:

> Although the doctrine of tribal sovereign immunity applies to the Potawatomis, that **doctrine does not excuse a tribe from all obligations to assist in the collection of validly imposed state sales taxes**. Washington v. Confederated Tribes of Colville Reservation, 447 U.S. 134 (1980). **Oklahoma argues that, the Potawatomis' tribal immunity notwithstanding, it has the authority to tax sales of cigarettes to nontribal members at the Tribe's convenience store. We agree**. In Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463 (1976), this Court held that **Indian retailers on an Indian reservation may be required to collect all state taxes applicable to sales to non-Indians**. **We determined that requiring the tribal seller to collect these taxes was a minimal burden justified by the State's interest in assuring the payment of these**

> **concededly lawful taxes**. Id., at 483. "**Without the simple expedient of having the retailer collect the sales tax** [498 U.S. 505, 513] from non-Indian purchasers, **it is clear that wholesale violations of the law by the latter class will go virtually unchecked**." Id., at 482. Only four years later, we reiterated this view, ruling that **tribal sellers are obliged to collect and remit state taxes on sales to nontribal members at Indian smoke-shops on reservation lands**.

498 U.S. at 512-13 (emphasis added).

Most recently in Department of Taxation and Finance of New York v. Milhelm Attea & Bros., Inc., 512 U.S. 61 (1994) the Supreme Court upheld State regulations regarding the sale of cigarettes and tobacco products on Indian land that were challenged as being preempted by the provisions of the Indian Trader Statute. New York's regulations, like the tax statutes being challenged here, contained provisions to ensure that non-exempt purchases do not likewise escape taxation. To accomplish this goal, the New York regulations, like the challenged Oklahoma statute, contained a mechanism for calculating a "probable demand" limit on the quantity of **un-taxed** cigarettes that wholesalers may sell to tribes and tribal retailers.

The Court upheld New York's regulatory regimen in Milhelm. Under that regimen, the New York Department of Taxation "fixes the untaxed cigarette limit for a tribe by multiplying the "New York average [cigarette] consumption per capita" by the number of enrolled members of the affected tribe." Milhelm, 512 U.S. at 66.

Like Oklahoma's statute, the New York regulations also required that wholesale distributors of tax-exempt cigarettes must hold State licenses authorizing them to purchase

and affix the New York cigarette tax stamp and must collect taxes on non-exempt sales. Id. at 67.

In upholding New York's regulatory regimen against the Indian Trader Statute preemption argument, the United States Supreme Court — after revisiting its long line of consistent holdings in Moe, Colville, and Potawatomi — spoke first of the State tax obligations that New York's regulations were designed to enforce, finding that the State's interest in compliance with its taxes outweighed the tribes' "modest interest in offering tax exemptions to its customers":

> The **specific kind of state tax obligation that New York's regulations are designed to enforce — which falls on non-Indian purchasers of goods that are merely retailed on a reservation – stands on a markedly different footing from a tax imposed directly on Indian traders**, on **enrolled tribal members** or **tribal organizations**, or on "value generated on the reservation by activities involving the Tribes," *Colville*, 447 U.S., at 156-157, 100 S.Ct., at 2083. ***Moe, Colville* and *Potawatomi* make clear that the States have a valid interest in ensuring compliance with lawful taxes that might easily be evaded through purchases of tax-exempt cigarettes on reservations; that interest outweighs tribes' modest interest in offering a tax exemption to customers who would ordinarily shop elsewhere**.

Milhelm, 512 U.S. at 73 (emphasis added).

The Milhelm Court then held that **in this area, the State's interests leave "more room for state regulations than other**," noting that in Moe, Colville, and Potawatomi the Court "decided that States may impose on reservation retailers minimal burdens reasonably tailored to the collection of valid taxes from non-Indians." Id.

The imposition of like burdens on Indian Traders were then considered and upheld:

> **It would be anomalous to hold that a State could impose tax collection and bookkeeping burdens on reservation retailers who are themselves enrolled tribal members**, including stores operated by the tribes themselves, **but that similar burdens could not be imposed on wholesalers**, who often (as in this case) are not. **Such a ruling might well have the perverse consequence of casting greater state tax enforcement burdens on the very reservation Indians whom the Indian Trader Statutes were enacted to protect**. Just as tribal sovereignty does not completely preclude States from enlisting tribal retailers to assist enforcement of valid state taxes, the Indian Trader Statutes do not bar the States from imposing reasonable regulatory burdens upon Indian traders for the same purpose. **A regulation designed to prevent non-Indians from evading taxes may well burden Indian traders in the sense that it reduces the competitive advantage offered by trading unlimited quantities of tax-free goods; but that consideration is no more weighty in the case of Indian traders** engaged in wholesale transactions **than it was in the case of reservation retailers**.

Milhelm, 512 U.S. at 74 (emphasis added).

The Supreme Court cases discussed above **rejected** contentions like the Muscogee's that State taxation of on-reservation tobacco sales to non-members and the attendant state collection regulations impermissibly injured the tribe's sovereign interest, including the Tribe's interests in: (1) imposing tribal tobacco taxes, (2) tribal regulation of the marketing and sale of tobacco, and (3) the tribe's "modest interest" in the marketing of tax exemption to its non-member customers. In sum, the State tax on non-member tobacco consumers and attendant collection measures do **not** impermissibly interfere with a tribe's sovereign interest and do **not** constitute the irreparable injury needed to support a preliminary injunction.

Proposition IV

Indians Going Beyond Their Reservation Boundaries are Generally Subject to Non-Discriminatory State Laws Otherwise Applicable to All Citizens of the State.

Thus, the Provisions of Oklahoma's Tobacco Escrow Statutes May be Imposed Upon the Sale of a Tribal Tobacco Manufacturer's Cigarettes When They are Sold Outside of the Manufacturing Tribe's Own Indian Country.

While a Tribal Tobacco Manufacturer's Activities Outside of Its Own Indian Country are Subject to the Substantive Law Provisions of the State — Including Oklahoma's Tobacco Manufacturer Escrow Statute — the Tribe Nevertheless Enjoys Immunity From Suit.

In Such Instances, the State May Make Off-Indian Country Seizures of a Non-Compliant Tribal Manufacturer's Products, as a Means of Enforcing Its Statute. These Off-Indian Country Enforcement Seizures Do Not Violate the Indian Commerce Clause.

Accordingly, Such Off-Indian Country Seizures Should Not be Enjoined.

As the United States Supreme Court held in Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148-49 (1973), "Absent express federal law to the contrary, **Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state laws** otherwise applicable to all citizens of the State. . . . That principle is as relevant to a State tax law as it is to State criminal law . . ., and applies as much to tribal ski resorts as it does to fishing enterprises." (Cites omitted and emphasis added).

The Muscogee (Creek) Nation — which does **not** manufacture cigarettes or tobacco products — imports tobacco products made by third parties. The Nation claims that if the third party manufacturer is a "Native Manufacturer," the application of the State's Escrow statutes and enforcement through its Complementary Act would violate the Muscogee (Creek) Nation's sovereign rights and the Indian Commerce Clause. In making this argument, the Muscogee Nation never explains what it means by the term "Native Manufacturer." Does it mean a manufacturing company which happens to be owned by a couple of members of another Tribe? Does it mean a Canadian Tribe? Does it mean a manufacturer that operates on rented Indian country? Or, does it mean a federally recognized Indian Tribe that manufacturers cigarettes on its own Indian country? In considering the Muscogee (Creek) Nation's claims, the Court should require that the Nation be specific whom it includes within its broad rubric of "Native Manufacturer."

As demonstrated above, Oklahoma's Tobacco Escrow statute only applies to the sale of tobacco products that are taxed, and thus it does **not** apply to the tax exempt sales to tribal members. In the case at hand, we are thus, considering application of the Escrow Statute to the following situations:

- Sales to non-members;
- Sales on Muscogee (Creek) Nation Indian country;
- Sales of tobacco products manufactured by third party manufacturers (as the Muscogee Nation is not a tobacco manufacturer), and
- Sales outside of the Indian country of any tribal manufacturer.

Because a tobacco manufacture's obligations under the Escrow Statute are triggered by taxed sales of its product, tribal manufacturers have no obligation under the statute for either manufacturing cigarettes or for selling them to its tribal member consumers on its own tribal land — its Indian country. In the case before the Court, a tribal tobacco manufacturer's escrow obligations are triggered by the sale of its product outside of its own Indian country — here on the Muscogees' Indian country — land over which the tribal manufacturer has no sovereign power. A tribal manufacturer's sale of its product off of its Indian country is, however, under the teaching of Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148-49 (1973), subject to non-discriminatory State laws, which would include the State Escrow Statute. Mescalero's holding recognizes that a tribe's sovereign powers end at its own Indian country border, just as Oklahoma's sovereign powers end at the Texas, Kansas and other surrounding State borders. The Muscogee's Indian commerce theory would change this and afford tobacco manufacturing tribes protection from state law outside of the Tribe's own Indian country — such as when its products are in transit, if in transit to another Tribe's Indian country. This theory would further have the sale of a tribal manufacturer's products to non-members exempt from the Escrow Statute and its enforcement provisions if the sale outside of the tribal manufacturer's own Indian country took place on another tribe's Indian country. Tribes, however, cannot borrow each other's sovereignty in this manner.

Recently in Omaha Tribe of Nebraska v. Miller, 311 F.Supp.2d 816 (S.D. Iowa 2004), the Court rejected an Indian commerce theory like the Muscogee's in upholding Nebraska's

Tobacco Escrow Statute, a statute like Oklahoma's, against an Indian Commerce Clause challenge made by the Omaha Tribe of Nebraska. In upholding the statute, the Court first addressed a similar challenge by Grand River Enterprises,[2] a Canadian Company located on tribal land in Ontario, Canada, considered in Grand River Enterprises, 2003 WL 22232974, where the Court held:

> [An] escrow obligation arises solely from its sales of cigarettes occurring off-reservation. It is well-settled that a state can regulate (i) off-reservation transactions conducted by native Americans; (ii) on-reservation sales to persons other than Native Americans; and (iii) impose certain requirements upon Native Americans in regulating those sales. *Dept. of Taxation & Finance v. Attea,* 512 U.S. 61, 114 S.Ct. 2028, 129 L.Ed.2d 52 (1994); *Washington v. Confederated Tribes of Colville Indian Reservation,* 447 U.S. 134, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980). The requirements of the Statutes are entirely consistent with these principles. Thus, there is no violation of the Commerce Clause.

Omaha Tribe, 311 F.Supp.2d. at 826 (quoting with approval from Grand River at *12).

The Omaha Court then discussed the claims of the Omaha Tribe of Nebraska, including its attacks on the application of the Escrow Statute against it and its sales in Iowa, the Court holding, in part that:

> **The State of Iowa can control cigarette manufacturing activities to the extent of sales in the state either through ultimate access to the escrow fund** (upon a finding that no tribal sovereign immunity exists for this activity), or **by denying the distribution of Omaha Nation's tobacco product in the**

[2]Grand River Enterprises is the manufacturer whose products were seized on February 10, 2010.

> **state for failure of the manufacturer to participate in the escrow system. Alternatively, the Tribe could elect, as a business matter, to waive its sovereign immunity to the extent of the escrow payments** in order to obtain the right to sell tobacco products in the state. **Even in the absence of these alternatives, the statute still has the legitimate purpose of not allowing unfair business advantage to the Tribe for its off-reservation business activities and preventing the use of the Tribe as a conduit for a manufacturer that does not enjoy immunity**.

Omaha, 311 F.Supp.2d at 827 (emphasis added).

The Omaha Court concluded that, "The Court finds no set of facts which would entitle the Plaintiff [the Omaha Tribe of Nebraska] to relief." Id. at 828.

In this discussion, I use the term "tribal manufacturer" to mean a federally recognized Indian tribe that manufactures cigarettes and tobacco products on its Indian Country. While under Mescalero, the off-reservation activities of a tribe are subject to a State's substantive laws, the tribe would still enjoy the protection of sovereign immunity, for "[t]o say substantive laws apply to off-reservation conduct, however, is not to say that a tribe no longer enjoys immunity from suit." Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. 751, 755 (1998).

As the State has the right to enforce its Escrow Statute requirements against the **off-reservation** activities of tribal manufacturers, the State — in spite of a tribe's immunity — has the right to enforce its statute by making off-reservation seizures of contraband products of non-compliant tribal manufacturers. Potawatomi, U.S. 495 at 514, and Colville, 447 U.S. at 161-62.

In the case at hand, the Escrow Statute and its Complementary Act do not apply to cigarette sales that are non-taxable, like those sold by the Muscogee's to their own tribal members. Thus, products of tribal manufacturers — even non-compliant manufacturers — could be sold to Muscogee Nation **tribal members**, as long as the cigarettes are sold through a State licensed wholesaler and have the appropriate State, tax-free stamps affixed. Unstamped products, however, would be contraband and subject to off-Indian country seizure.

Because the **off-reservation** activities of tribal tobacco manufacturers are subject to State regulations, the State's **off-reservation** enforcement of its regulations — through **off-reservation** seizures of contraband products — should **not** be enjoined.

Proposition V

Governor Henry Has No Specific Duty to Enforce the Challenged Statutes. He is Only Sued in His Official Capacity Based Upon a Generalized Duty to Enforce State Law. As Such, No Injunction Should Lie Against Governor Henry.

As the challenged statutes themselves make clear, the tax statutes are enforced by the Oklahoma Tax Commission, and both the Escrow Statute and the Complementary Enforcement Act are enforced by Oklahoma's Attorney General. There is no specific duty imposed upon the Governor to enforce any of the challenged statutes. Nor do the officials charged with enforcement of the statutes serve at the Governor's pleasure. The Attorney General may be removed only by impeachment. Okla.const. art. VIII § 1, and as the statute

creating the Oklahoma Tax Commission makes clear, "the members of the Tax Commission shall **not** be subject to removal from the office at the will and pleasure of the Governor, but must be removed only for cause in the manner provided by law for the removal of state officials not subject to impeachment . . .." Okla. stat. tit. 68 § 102 (2001). (Emphasis added).

As the Court of Appeals for the Tenth Circuit held in Bishop v. Oklahoma, 333 Fed.Appx. 361, 2009 WL 1566802 (C.A. 10), suit on the basis of the Governor's generalized duty to enforce State law alone is insufficient to subject him to suit challenging the constitutionally of a State enactment, and that "where the enforcement of the statute is the responsibility of parties other than the governor, the governor's general executive power is insufficient to confer jurisdiction." Id. at 365, *quoting from* Women's Emergency Network v. Bush, 323 F.3d 937, 949-50 (11th Cir. 2003).

Not being subject to the Court's jurisdiction, the issuance of an injunction against the Governor would not be proper. Indeed, as he does not enforce or control the actions of those who do enforce the statutes, an injunction against the Governor would be fruitless.

For these reasons, no injunction should lie against the Governor.

CONCLUSION

Wherefore, for the reasons expressed herein and those in the Briefs in Opposition and Exhibits filed by the Oklahoma Tax Commission and the Attorney, Defendant Governor Brad Henry respectfully requests that no preliminary injunction be issued against him or any other Defendant.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of March, 2010, I electronically transmitted the attached document to the Clerk of the Court using the ECF System for filing and transmittal of a Notice of Electronic filing to the following ECF registrants:

Bryan J. Nowlin
Edward Clyde Kirk
Leisa Gebetsberger

I further certify that on the 4th day of March, 2010, I served the attached document by mail on the following, who are not registered participants of the ECF System:

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