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

MUSCOGEE (CREEK) NATION, a federally recognized Tribe Plaintiff, vs. BRAD HENRY, Governor of the State of Oklahoma; W.A. "DREW" EDMONDSON, Attorney General of the State of Oklahoma; the OKLAHOMA TAX COMMISSION; THOMAS KEMP JR., Chairman of the Tax Commission; JERRY JOHNSON, Vice-Chairman of the Tax Commission; and CONSTANCE IRBY, Secretary of the Tax Commission. Defendants.	)	Case No. CIV-10-019-JHP

MUSCOGEE (CREEK) NATION'S REPLY TO RESPONSE OF DEFENDANT OKLAHOMA TAX COMMISSION AND ITS COMMISSIONERS, KEMP, JOHNSON AND IRBY TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

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The Plaintiff, the Muscogee (Creek) Nation (the "Nation"), hereby submits its Reply to the Response of Defendant Oklahoma Tax Commission and Its Commissioners, Kemp, Johnson and Irby to Plaintiff's Motion for Preliminary Injunction and Supporting Brief (Doc. 49) (hereinafter "Response Brief"). Defendants shall be referred to collectively as the "OTC'.[1]

INTRODUCTION

To obtain a preliminary injunction, the Nation must prove: "(1) the movant will suffer irreparable harm unless the injunction issues; (2) there is substantial likelihood the movant ultimately will prevail on the merits, (3) the threatened injury to the movant outweighs any harm the proposed injunction may cause the opposing party; and (4) the injunction would not be contrary to the public interest. *Wyandotte Nation v. Sebelius.*, 443 F.3d 1247, 1254-55 (10th Cir. 2006) (citing *Kiowa Indian Tribe v. Hoover,* 150 F.3d 1163, 1171 (10th Cir. 1998)). Without an injunction, the Nation will suffer irreparable harm in the form of illegal taxation and damage to its sovereign interests. "We have repeatedly stated that such an invasion of tribal sovereignty can constitute irreparable injury." *Wyandotte Nation v. Sebelius*, 443 F.3d 1247, 1255 (10th Cir. 2006): *Kiowa Indian Tribe of Oklahoma v. Hoover,* 150 R.3d 1163, 1171-72 (10th Cir. 1998). *See also Prairie Band of Potawatomi Indians v. Pierce,* 253 F.3d 1234, 1251 (10th Cir. 2001) (holding that infringement of tribal sovereignty constitutes irreparable injury because "it [can] not be adequately compensated for in the form of monetary damages."). In addition, should the OTC be allowed to collect the taxes at issue, the Nation nor its citizens will not likely have recourse against the State, as suits for legal damages against states are not permitted by the Eleventh Amendment.

1. This case is about Tribal Sovereignty (and the Defendants unlawful attempts to infringe upon it).

[1] The Nation incorporates by reference the arguments set forth in the currently filed reply briefs to the opposition filed by the Attorney General, and the Governor.
[3] See Response Brief, Exhibit "G", Leonard Affidavit, p. 2, ¶5.

This case is about the Sovereignty of the Muscogee (Creek) Nation, which the OTC contends can be nullified and made to disappear with the mere stroke of the Governor's pen upon paper containing mere words enacted by the state legislature. This case is about one Indian Nation engaging in commerce with another Indian Nation and that commerce not being subject to the taxing and regulatory jurisdiction of the state. This case is not about an Indian tribe projecting its sovereignty beyond its boundaries (as OTC asserts) but it is about a state improperly projecting State tax regulation into Indian country for the sole purpose of infringing upon tribal sovereignty in violation of Supreme Court precedent. That is what this case is about—tribal sovereignty, and tribal self-determination; not money.

In its Response Brief, the OTC asserts the Nation's case is "about money" and then the OTC attempts to explain this assertion by ignoring the real issues brought before this court by the Nation. The Nation asserts that a closer look at OTC's "its about the money" analysis demonstrates that this case is not about money but about an Indian Nation protecting its tribal sovereignty, and rights to self-determination.

First, as the OTC correctly point out, the Nation's sole monetary interest in each carton of cigarettes sold is Fifty-five cents ($0.55).[3] The Nation has enacted a set of codes that make the Nation the sole importer, distributor and retailer of cigarettes and tobacco products within the Nation's Indian country. The Nation exercises these functions through its agency called Trade and Commerce Authority ("TCA").[4] *See* Muscogee (Creek) Nation Code Ann. Title 17, § 2-101 et. seq. The TCA is authorized 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 36, § 5-105.A. The Nation has an

[4] Copies of the referenced tribal codes are attached as Exhibit 1.

indirect monetary interest in the profits generated by the Nation-licensed cigarette and tobacco wholesaler. Finally, Muscogee (Creek) Nation charters Indian communities that are political subdivisions of the Muscogee (Creek) Nation. 11 MNCA § 1-101. Fifteen of the thirty-two Nation-licensed smokeshops are operated by these communities. The Nation has an indirect monetary interest in the profit generated by these community retail outlets but no monetary interest in the other smokeshops. Thus, the Nation's statement that $925,000.00 in direct revenues from the licensing and distribution of Native Brand cigarettes in the Nation's Indian country is accurate. This is hardly a windfall to the Nation considering the legal and other related fees the Nation incurred in 2009 protecting and defending its sovereign immunity from the constant onslaught by the Defendants.[5] Further, the Nation's funds are extremely limited compared to that of the State. In the event that the State continues to interfere with its Indian commerce, the Nation will be forced to cut many of its social programs which directly benefit its members and further the stated Congressional policy of tribal self-government. *See, e.g.*, *Winnebago Tribe of Nebraska v. Stovall*, 216 F.Supp.2d 1226, 1240 (D.Kan. 2002).

Second, there is a price advantage inherent in the Nation's position that Oklahoma does not have territorial jurisdiction over Indian country and thus no power to tax activities occurring within Indian country. Just as Oklahoma cannot compel Arkansas or Kansas to raise its taxes so that those states' licensed retailers do not have a price advantage over Oklahoma retailers, it has no authority to compel the Nation to collect taxes on Native Brand cigarettes that the Nation contends are not subject to the taxing authority of the state.[6] The Nation will discuss its negotiations for a tobacco compact with the state later in this brief. However, it is important to

[5] By contrast, the State of Oklahoma collected more than $123 million in cigarette and tobacco tax revenue in 2008 according to a factsheet supplied by the Oklahoma Policy Institute (Exhibit 2).

[6] The issue with Oklahoma concerns only Native Brand cigarettes. As will be discussed later in this brief, the Nation's licensed retailers are incurring all taxes and escrow payments due on the major brand cigarettes sold on the Nation's Indian country.

know that had the Nation entered into a compact with the state at the beginning of 2009, the Nation would have been compelled to collect $1.50 tax on each carton of cigarettes sold.[7] In 2009, the Nation's licensed retailers sold more than 2.7 million cartons of cigarettes. (Exhibit A to Exhibit 4, Johnson affidavit, p. 1, ¶ 4) The Nation's tax collections on those sales would have been more than $4 million.[8] If it were about the money, the Nation's decision would have been simple—take the money and abandon what it believes is its sovereign right to engage in Nation-to-Nation commerce with other Indian tribes free from interference by the State of Oklahoma.

Third, the Nation and the state had conducted negotiations for a tobacco compact up to the end of 2009. On or about December 1, 2009, the Nation submitted a compact to the state wherein the Nation proposed[9] to:

- Make an in lieu payment to the state in the amount of $5.15 per carton plus increase its Tribal tax to $1.50 per carton on all cigarettes sold within the Nation's Indian country.[10]
- Cause to be paid into an escrow account established by the Nation's wholesaler the escrow payment required for non-participating MSA tribal manufacturers.

In exchange for these concessions, the Nation required that Oklahoma:

- Dismiss litigation styled *State v. Larkin*, CV-09-124 (U.S.D.C. N.D. Okla) wherein the state is attempting to collect its cigarette taxes against, *inter alia*, employees of various Creek Nation Indian Community smokeshops.
- Agree that should the Nation prevail on its claim that Native Brand cigarettes are not subject to the taxing authority of the state, the Nation would no longer be obligated to remit the compact rate tax or continue to place monies into escrow for these Native Brand cigarettes.

On December 16, 2009, the chief tobacco compact negotiator for Governor Brad Henry, his Secretary of Finance and State Treasurer Scott Meacham, informed the Nation that the proposed

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[7] See page 2 of the Nation's proposed compact which is Exhibit A to Exhibit 3, McCullough affidavit.
[8] The Nation's total tax revenues on the sale of all cigarettes in Indian country was approximately $1,486,000.
[9] The Nation's proposed compact is Exhibit A to Exhibit 3,McCullough affidavit.
[10] The total tax rate of $6.65 is equal to the compact rate of a number of tribes in the state. See Response Brief, Exhibit "G", Leonard Affidavit, Exhibit 1.

compact would not be accepted by the state.[11] Meacham stated that the Nation's proposed compact had "also [been] submitted to the Attorney General and the Tax Commission for review." *Id.* Specifically, the state rejected the Nation's proposal to sell Native Brand cigarettes regardless of whether the compact tax was paid or the escrow payments were collected by the Nation's wholesaler. The state also rejected the requirement that it dismiss its litigation in the *Larkin* case. The state's rejection of the Nation's final proposal and passage of SB 608 eventually led to the filing of the current litigation.[12] It is clear that this is not, as the OTC contends, about the money. The Nation believes the issues it has placed before this court are profoundly important to the Nation's right to conduct economic activities with other Indian Nations and within its jurisdiction free from interference by the Defendants. This is the essence of tribal sovereignty. **This is what the case is about – tribal sovereignty.**

2. The Nation's claim is based on the Indian commerce clause.

The OTC attempts to mislead this court by asserting that the Nation has already litigated and lost its claim that Defendants may not interfere with Nation's importation, distribution and sale of cigarettes within the Nation's Indian country. This is simply not the case.

The Northern District's Opinion and Order dismissing the lawsuit attached to the Tax Commission's Response Brief as Exhibit I (Doc. No. 49-10) was a dismissal based upon lack of subject matter jurisdiction and <u>not</u> a decision based upon the merits of the complaint then at issue.[13] "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of

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[11] The State's response to the Nation's proposed compact is Exhibit A to Exhibit 3, McCullough affidavit.
[12] The State's rejection of the Nation's compact proposal also led to another intended consequence. Specifically, one the Nation's retailers, in fear of criminal penalties, stopped selling Native products. (Exhibit 5, Scott affidavit)
[13] The Northern District claimed jurisdiction pursuant to *Ex Parte Young* for the Nation's stated 42 U.S.C. § 1983 claim only. The Court dismissed this claim pursuant which was a dismissal on the merits, however, this lawsuit does not involve section 1983 This Nation also has appealed this ruling which is therefore not final for purposes of res judicata. *See, e.g., Grider v. USX Corp.*, 847 P.2d 779 (Okla. 1993); *American Financial Life Ins. and Annuity Co. v. Young*,, 7 Fed.Appx. 913 (10th Cir. 2001).

announcing the fact and dismissing the cause." *Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 94 (1998); *Hernandez v. Conriv Realty Assocs.,* 182 F.3d 121, 123 (2nd Cir. 1999) ("Article III deprives federal courts of the power to dismiss a case with prejudice where federal subject matter jurisdiction does not exist."). The OTC implies that this lawsuit is a "second bite" by the Nation regarding the same issues, but does not raise the defense of claim or issue preclusion. This Complaint involves state statutes which were not even effective anytime until January 1, 2010. This Complaint does not seek to vindicate sovereign rights under 42 U.S.C. § 1983. This is a suit seeking preliminary and permanent injunctive relief regarding state taxation of an Indian tribe and its tribal members in Indian country.

In fact, it is the OTC who is attempting to take a second bite at the apple. On May 29, 2008, the OTC filed an action in Oklahoma County District Court against Native Wholesale Supply seeking, *inter alia,* an injunction prohibiting NWS from delivering the Native Brand tobacco products at issue here to the Nation and its tribal wholesaler. On February 6, 2009, the District Court granted NWS's motion to dismiss. The OTC timely filed its amended petition. On April 10, 2009, the District Court dismissed with prejudice the OTC amended petition citing in its minute order that the court "lacks subject matter jurisdiction under the Indian Commerce Clause." A copy of the Order dismissing the amended petition in *State of Oklahoma, et. al. v. Native Wholesale Supply,* Case No. CJ-2008-4942 (Okl. Cty. Dist. Ct.) is attached as Exhibit 6. Yet, with this specific admonition that such actions interfered with the Nation's rights granted it under the Indian Commerce Clause, the OTC seized cigarettes moving in Indian Commerce. Again, apparently the OTC does not want to await for a decision on appeal of that decision, but rather continues to disregard the Court's order by pursing its own agenda, causing irreparable harm by

interfering with Indian commerce and threatening criminal charges against members of the Nation, or retailers duly licensed and operating businesses within Indian country..

3. The issue is not whether the Nation is avoiding state law, but whether state law applies in Indian country.

Defendants address the Nation's argument on irreparable harm which will result if the injunction does not issue by citing [Response Brief, pp. 4-5] to *KT&G Corp., et.al. v. Edmondson, et. al.,* 535 R.3d 1114 (10th Cir. 2008) for the proposition that avoidance of Oklahoma's escrow laws violates public policy. In *KT&G*, however, the Tenth Circuit was not considering whether, as the Nation asserts here, the escrow laws do not apply within Indian country. In other words, there must first be a determination that Oklahoma's escrow laws apply to the Nation before a Court can consider whether a certain action constitutes an avoidance.

In the present litigation, the Nation is asserting its right to purchase and sell Native Brand cigarettes that have valued added on the reservation without interference by the State. The OTC and other defendants in this case have stated in their briefs that the Nation has not been specific on what constitutes Native Brand cigarettes. The Nation will specifically respond to this assertion. Native Brand cigarettes are cigarettes that are manufactured in the Indian country of a recognized Indian tribe. In her affidavit, the Nation's tax commissioner states that the Nation has toured the manufacturing facilities of the Seneca Nation in New York, the Yakima Nation in Washington and the Seneca-Cayuga Tribe of Oklahoma to confirm that the cigarettes are in fact manufactured within Indian country. (Exhibit 4, Johnson affidavit, p. 2, ¶¶ 5-8). Because the cigarettes are manufactured in Indian country and shipped to a destination in the Nation's Indian country, the cigarettes are never within the jurisdiction of state of Oklahoma and are therefore beyond its taxing and regulatory authority.

Just as it does in its challenge to the Nation's likelihood of success on the merits, the OTC's argument assumes the legal conclusion that the OTC can enforce its laws against the Nation. Whether it can or cannot enforce its tax laws on the Nation, as will be discussed in more detail below, is a legal issue before this Court, and cannot be assumed by the OTC. The OTC does not present legal authority as to how it reaches this conclusion other than generally cite to *Coville*, and *Moe*. However, those cases clearly did not allow for vender licensing fees which would be more similar to the financial responsibility fees the State is attempting to impose on Native manufacturers located the reservation, and those cases state that limited state law that imposes minimal burdens would apply to collect a valid state tax. A valid state tax occurs when the Nation or its retailers are solely attempting to market a tax exemption. That is not the case here, as the Native Brand cigarettes have value generated on the reservation, that carries over across reservation boundaries as discussed in more detail below.

The harm to the Nation through the actions of the OTC is much greater that the "theoretical damage" to the OTC which is based upon legal issues to be determined by this Court. The harm to the Nation if the preliminary injunction is not granted is irreparable, as Nation programs and services will have to shut down. If the Nation prevails later it will have to expend significant resources to restart these programs, and tribal members relying on these services will have to go without, with no mechanism to recoup any losses suffered while this matter is being litigated.

4. The Courts have not ruled against the Nation's contention regarding Oklahoma taxes on tobacco manufactured and distributed wholly within Indian country.

The OTC contends Supreme Court precedent "rejects the notion that State taxation of sales of cigarettes to non-tribal members on Indian country is barred by the Indian commerce

clause." [Response Brief, pp. 16-20] The Nation is not aware that any of the cases cited by the State involved Native Brand cigarettes and the movement of the cigarettes from one Indian tribe to another. These cigarettes are moved in Indian commerce and never come under the jurisdiction of Oklahoma or any other state, and constitute products with value added on the reservation.

The cigarettes owned by the Nation, are exempt from any regulatory authority of the State of Oklahoma under the Indian Commerce Clause of the Constitution of the United States. In *Montana v. Blackfeet Tribe*, 471 U.S. 759, 764-765 (1985), the United States Supreme Court stated:

> "The Constitution vests the federal government with exclusive authority over relations with Indian tribes. *Art. I, § 8, cl. 3;* see *Oneida Nation v. County of Oneida* 414 U.S. 661, 670 (1974), citing *Worcester v. Georgia*, 6 Pet. 515, 561 (1932) as a corollary of this authority and recognition of the sovereignty retained by Indian tribes even after the formation of the United States, Indian tribes and individuals generally are exempt from state taxation within their own territory. In the *Kansas Indians*, 5 Wall., 737 (1867) for example, the Court ruled that lands held by Indians in common as well as those in severalty were exempt from state taxation.

The Indian Commerce Clause provides Congress with plenary power "to deal with special problems of Indians" and "to single Indians out as a proper subject for separate legislation." *Morton v. Mancari*, 417 U.S. 535, 551-2 (1974); *see Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73, 84 (1977) (Congress' power over Indian affairs is plenary in nature.) It is beyond serious dispute that the federal government's power over Indian affairs displaces the powers normally exercised by the states within their own borders. "With the adoption of the Constitution, Indian relations became the *exclusive* province of federal law." *Oneida v. Oneida Indian Nation*, 470 U.S. 226, 234 (1985). "The policy of leaving Indians free from state jurisdiction and control is deeply rooted in The Nation's history." *Rice v. Olson*, 324 U.S. 786, 789 (1945) (quoted in *McClanahan v. Arizona Tax Comm.*, 411 U.S. 164, 168 (1973). In yet another case, the Court saw Congress' broad power over Indian affairs as a barrier to the

states' exercise of authority over commercial activity on Indian reservations. *Ramah Navajo School Bd. v. Bureau of Revenue*, 458 U.S. 832, 837 (1982). The Indian Commerce Clause bestows Congress with exclusive plenary powers over Indian affairs and deprives in like degree the authority of states to regulate Indian commerce.

The OTC actions are designed to impair the ability of the Nation to own, control, transport, distribute, regulate and tax, tobacco products and other personal property. Not only is such activity preempted by federal and the Nation's law, but Defendants' activities are a major incursion into the interest of the Nation. Not only is there a substantial financial interest at stake, but the tobacco activity which the Nation seeks to protect consists of the Nation's enterprises created to benefit the social welfare and economic well-being of the Nation. Therefore, Oklahoma is barred from exercising its authority over those activities. See *Montana v. Blackfeet Tribe*, supra. *Central Machinery Company v. Arizona State Tax Commission*, 448 U.S. 160 (1980); *Mescalaro v. Jones*, 411 U.S. 145 (1973); *McClanahan, supra.*

5. Bond is not required.

The OTC appears to suggest a bond of $1,447,309.65 per month. (Doc. 49, at 25). This suggestion is ridiculous. The "trial judge has wide discretion in a matter requiring security in that if there is an absence of proof showing a likelihood of harm, certainly no bond is necessary." *Continental Oil Co. v. Frontier Refining Co.*, 338 F.2d 780, 782 (10th Cir. 1964). In the instant matter, the defendants obviously would suffer little, if any, harm should they be preliminarily enjoined. *See, e.g, Winnebago Tribe of Nebraska v. Stovall*, 216 F.Supp.2d 1226, 1240 (D.Kan. 2002); *Sac and Fox Nation of Missouri v. LaFaver*, 905 F.Supp. 904, 907 (D. Kan. 1995)

CONCLUSION

The Court should grant the preliminary injunction to prevent irreparable harm to the Nation and its citizens.

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CERTIFICATE OF SERVICE

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

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