IN THE US DISTRICT COURT, EASTERN DISTRICT OF OKLAHOMA

MUSCOGEE (CREEK) NATION, a federally-recognized Tribe, Plaintiff, vs. BRAD HENRY, Governor of Oklahoma, W.A."DREW" EDMONDSON, Attorney General of Oklahoma, THE OKLAHOMA TAX COMMISSION, THOMAS KEMP, JR., Chairman, Oklahoma Tax Commission, JERRY JOHNSON, Vice Chairman, Oklahoma Tax Commission, and CONSTANCE IRBY, Secretary, Oklahoma Tax Commission Defendants	)	Case No. **CIV 10-0 19-JHP**

BRIEF AND RESPONSE OF DEFENDANTS, OKLAHOMA TAX COMMISSION AND ITS COMMISSIONERS, KEMP, JOHNSON AND IRBY TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION (DOC 43) AND SUPPORTING BRIEF (DOC 44)

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March 4 , 2010

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MAY IT PLEASE THIS HONORABLE COURT:

Come now the Defendants, Oklahoma Tax Commission ("OTC") and its Commissioners, Thomas Kemp, Jr., Jerry Johnson and Constance Irby ("Commissioners"), appearing specially and without waiver of objection to this Court's subject matter jurisdiction and all defenses, and submit their Response to Plaintiff's Motion for Preliminary Injunction (Doc 43) and Brief in support (Doc 44), and show:

I.
INTRODUCTION: THIS CASE IS ABOUT MONEY

This case is about money, which Plaintiff seeks to conceal under the cloak of a claim of tribal sovereignty. It is about a lot of money made by Plaintiff and certain of its retailers from selling cigarettes which are non-Oklahoma excise tax paid and also non-Oklahoma escrow compliant. This case is about making money on sales of non-tax paid, non-escrow compliant cigarettes to non-members of Plaintiff's tribe. ***There is no Oklahoma excise tax imposed or due on sales by Plaintiff's licensed retailers to Plaintiff's tribal members occurring on the Indian country of Plaintiff, 68 O.S. § 349.1.B.*** (Exhibit "A"). Yet Plaintiff's Brief's arguments are grounded upon the assumption that some tax is being imposed upon sales to tribal members. Not true.

Then, what is this case about? It is about Plaintiff, on behalf of itself and certain of its retailers, arguing that its sovereignty can be projected beyond the boundaries of its Indian country, to trump the sovereignty of the State of Oklahoma in the enforcement of its laws, including seizure of non-Oklahoma tax paid, non-escrow compliant cigarettes *outside* the Indian country of the Muscogee.

Here's where the money is. The required escrow payment pursuant to 37 O.S. § 600.23 (Exhibit "B") is $5.49 per carton (Exhibit "C", Stambeck Affidavit, p. 5, ¶ 17).

The required Oklahoma cigarette excise tax on sales to non-tribal members of Plaintiff is $10.30 per carton, 68 O.S. §§ 302-302-5 (Exhibit "D"), 68 O.S. § 349.1.A. (Exhibit "A").

By dealing in cigarettes of a manufacturer who fails to comply with Oklahoma escrow requirements, Plaintiff and certain of its licensed retailers obtain another benefit: avoidance of Oklahoma cigarette excise taxes. Oklahoma excise tax stamps are to be affixed to cigarettes sold by State licensed wholesalers before sale to retailers, 68 O.S. § 305.A. (Exhibit "E"). Pursuant to the Oklahoma Master Settlement Agreement Complementary Act ("Complementary Act"), 68 O.S. §§ 360.1-360.9 (Exhibit "F"), State licensed wholesalers may not affix Oklahoma tax stamps to cigarettes manufactured by non-escrow compliant entities or sell, offer or possess for sale such noncompliant cigarettes, 68 O.S. § 360.3 .C. (Exhibit "F").

Not coincidentally, Plaintiff admittedly controls the sale of tobacco products by owning and operating a non-State licensed cigarette and tobacco wholesaler (Complaint, ¶ 41-43) , which purchases non-escrow compliant cigarettes for distribution to Plaintiff's licensed retailers that elect participate in this scheme (Complaint, ¶ 110, 112). Those retailers sell to the general public. Those cigarettes will not have Oklahoma cigarette excise stamps affixed, because Plaintiff's wholesaler isn't State licensed (Exhibit "G", Leonard affidavit, p.2, ¶7).

Selling non-escrow compliant, non-excise tax paid cigarettes to non-tribal members of Plaintiff affords a price advantage of **$15.79/carton** over non-tribal retailers, an advantage over the retailers of neighboring tribes, between **$11.59 and $13.51/carton** *and* **$15.79/carton** *over Plaintiff's licensed retailers who do not participate in this scheme* (Exhibit "G", Leonard affidavit, p.1-2, ¶4,Ex.1). **That is what this case is about.**

II.
A CLAIM OF EXTRATERRITORIAL "SUPER SOVEREIGNTY", REDUX

This case is not Plaintiff's first attempt to seek to avoid the consequences, ***outside Plaintiff's Indian country,*** of dealing in non-escrow compliant, non-tax paid cigarettes. Plaintiff previously instituted suit in the US District Court, ND OK, seeking to enjoin the State from stopping vehicles on State roads and highways, outside of Plaintiff's Indian country, inspecting paperwork to determine whether contraband was being transported, and, if contraband was being transported, seizing the contraband (Exhibit "H", Amended Petition). This suit ("Muscogee I") was founded on theories very similar to those set forth in the Complaint herein, in particular: that Muscogee sovereignty was violated by enforcement actions taken by the State *outside* of Muscogee Indian country.

Muscogee I was dismissed: as to the OTC, by reason of its sovereign immunity, and, as to the Commissioners, for failure to state a claim on which relief could be granted, because the Plaintiff was not a "person" entitled to bring suit pursuant to 42 USC § 1983 (Exhibit "I", Order).

Plaintiff then sought entry of an injunction pending appeal, which was denied by the Court (Exhibit "J", Order). Despite a claim of damage to sovereignty, very similar to the claim made by the Motion, the Court found no irreparable injury to Plaintiff, as claimed (Exhibit "J", Order, p. 8). The Court concluded that substantial harm would be suffered by the State, in the event an injunction were issued, by reason of: lost tax revenue and diminution and endangerment of Oklahoma's share of funds from the Master Settlement Agreement (Exhibit "J",Order, pp. 8-9).

Because the essential facts of the two proceedings are similar, damage resulting to the State, were an injunction issued, would be similar: Tax revenue loss (Exhibit "G",

Leonard affidavit, p. 2-3, ¶4 & 8, Ex. 3 & 4) and diminution and endangerment of Oklahoma's share of MSA funds (Exhibit "C", Stambeck affidavit, pp. 5-6, ¶ 18-20). Further, public health is adversely affected by the sale of cheap cigarettes, because the price of cigarettes affects the incidence of smoking (Exhibit "K" Matheny affidavit, pp. 2-3, ¶ 6,7 & 11) and Exhibit "L", Oklahoma State Plan for Tobacco Use Prevention & Cessation). The Muscogee I Court correctly decided that requested injunctive relief was not in the public interest (Exhibit "J", Order, p. 9).

This proceeding is "another bite at the apple" by the Plaintiff. The Motions to Dismiss and Briefs of all Defendants are incorporated and demonstrate preliminary injunctive relief is inappropriate, because the Complaint should be dismissed.

III.
PLAINTIFF'S BURDEN OF PROOF

The Briefs of all Defendants are adopted and incorporated by reference herein, especially Proposition I of Governor Henry's Response as to Plaintiff's burden of proof.

IV.
NO IRREPARABLE HARM TO PLAINTIFF IF INJUNCTIVE RELIEF DENIED

Plaintiff claims a sort of "per se" damage to its tribal sovereignty, citing to generalized statements in cases, but no facts. As shown by Propositions V.1., V.3., V.5.a. and V.7., ruling Supreme Court precedent holds that sovereignty rights are not damaged by the enforcement of state cigarette excise tax laws upon sales of cigarettes to nontribal members within a Tribe's Indian country. There is no "per se" violation.

And, ruling Supreme Court precedent also holds that Plaintiff cannot fall back on arguments of economics, because any decrease in revenue would result from the elimination of Plaintiff and certain of its licensed retailers' marketing of an exemption

from state taxes and escrow compliance to consumers not entitled to that exemption, see Propositions V.1., V.5.a. and V.7..

But, entry of a preliminary injunctive relief, allowing the continuance of Plaintiff's distribution for sale to the public of nontax paid, non-escrow compliant cigarettes would violate and frustrate the state policy regarding the serious health concerns presented by cigarette smoking, 37 O.S. § 600.21 (Exhibit "B" hereto) which is recognized to cause damage to the fiscal soundness of the state and its public health, 68 O.S. § 360.2 (Exhibit "F" hereto). The 10th Circuit recognizes that avoidance of Oklahoma's escrow laws violates public policy, *KT & G Corp., et al. vs. Edmondson, et al.*, 535 F.3d 1114, 1121 (10th Cir. 2008) , citing to 37 O.S. § 600.21(2) (D) (Exhibit "B"). Such relief is also counter to published State policy,see Oklahoma State Plan for Tobacco Use Prevention and Cessation (Exhibit "L" hereto) which calls for increase, not elimination of cigarette excise tax (Exhibit "L", page 21). The damage suffered to the Oklahoma economy in medical costs and loss productivity due to premature death and disease from smoking is $7 .62/pack (Exhibit "L", page 7).

The non-escrow compliant, non-tax paid cigarettes in which Plaintiff trades are also not listed on the Oklahoma Fire Safe Cigarette directory, and may not be lawfully sold in Oklahoma pursuant to the Oklahoma Fire Safety Standard and Firefighter Protection Act, 74 O.S. § 326.1-326.11 (Exhibit "M") , see 74 O.S. § 326.3.A. and Exhibit "C", Stambeck affidavit, pp 4-5, ¶ 16). Oklahoma's tax revenue and escrow payment losses, as well as the endangerment of Oklahoma's continued receipt of escrow payments are discussed at Proposition VI. hereafter.

V.
LITTLE LIKELIHOOD THAT PLAINTIFF WILL PREVAIL ON THE MERITS

Plaintiff repeats the theories of its Complaint as proof that is likely to prevail on the merits, but, its burden is proof of a *substantial likelihood of prevailing.* Defendants' incorporated Motions to Dismiss and Briefs demonstrate that Plaintiff cannot demonstrate a substantial likelihood of prevailing, and that, instead, dismissal is required.

1. **Enforcement of the State's tax laws and regulations is not preempted.** There is no tax imposed upon sales to tribal members, Proposition I herein. Plaintiff ignores decades of ruling Supreme Court precedent which permits taxation and collection of taxes on all sales of cigarettes occurring on Indian country except sales to tribal members (Propositions V.1,V.3, V.5a and V.7.) , which Oklahoma does not tax, 68 O.S. § 349.1 .B. (Exhibit "A").

Approval by the Supreme Court of state taxation of sales of cigarettes within Indian country to non-tribal members began in 1976, in *Moe, et al. vs. Confederated Salish, etc. Tribes, et al.,* 425 US 463, 483, 96 S.Ct. 1634, 1646, 48 L.Ed.2d 96 (1976), which held that nothing in the burden of collecting taxes on sales of cigarettes within Indian country to non-Native Americans "... frustrates tribal self-government... or runs afoul of any congressional enactment dealing with the affairs of reservation Indians...".

In *Washington vs. Confederated Tribes, Colville Reservation*, 447 US 134, 161, 100 S.Ct. 2069, 2085, 65 L.Ed.2d 10 (1980) the Supreme Court approved state taxation of sales of cigarettes within Indian country to Native American non-tribal members. The Court tersely held:

"... We do not believe that principles of federal Indian law, whether stated in terms of pre-exemption, tribal self-government, or otherwise, authorize Indian tribes to

market an exemption from state taxation to persons who would normally do their business elsewhere". *Colville, supra,* 155, 2082.

Specifically, the Court rejected an "economic argument" that permitting state taxation of all cigarette sales on Indian country somehow runs afoul of tribal self-government, holding:

"Washington does not infringe the right of reservation Indians to "make their own laws and be ruled by them" [citation omitted] merely because the result of imposing its taxes will be to deprive the Tribes of revenues which they currently are receiving...", *Colville, supra,* 156-157, 2082-2083.

The Supreme Court made clear that *Moe* and *Colville* stood for the proposition that the state has authority to tax sales of cigarettes to non-members of a tribe at tribal smokeshops, *Oklahoma Tax Commission vs. Citizen Band Potawatomi, etc.*, 498 US 505, 512-514, 111 S.Ct. 905, 911-912, 112 L.Ed.2d 1112 (1991).

The 10th Circuit followed *Citizen Band Potawatomi,* noting, in the decision of *Buzzard, et al. vs. Oklahoma Tax Commission,* 992 F.2d 1073, 1075, f.n.3 (10th Cir. 1993), cert. den., sub nom., *United Keetowah, etc. vs. Oklahoma Tax Commission*, 510 US 994, 114 S.Ct. 555, 126 L.Ed.2d 456 (1993), even if the property in dispute were Indian country, Oklahoma could require the Tribe to collect taxes on cigarette sales to nontribal members.

In *Wagnon vs. Prairie Band Potawatomi Nation,* 546 US 95, 114, 126 S.Ct. 676, 688-689, 163 L.Ed.2d 429 (2006), which concerned collection of the Kansas motor fuel tax, the Supreme Court demonstrated the continued viability of *Colville,* in rejecting an

"economic argument" regarding the "downstream economic consequences" of imposition of a Kansas motor fuel tax on fuel sales in Indian country. The court observed:

"... The Nation merely seeks to increase those revenues by purchasing untaxed fuel. But the Nation cannot invalidate the Kansas tax by complaining about a decrease in revenues. See *Colville*, 447 US, at 156, 100 S.Ct. 2069 ("Washington does not infringe the right of reservation Indians to "make their own laws and be ruled by them", *Williams vs. Lee*, 358 US 217, 220, 79 S. Ct. 269, 3 L.Ed.2d 251 (1959), merely because the result of imposing its taxes will be to deprive the Tribes of revenues which they are currently receiving")....", *Wagnon, supra*, 114, 688-689.

Within the Muscogee's Indian country, sales of cigarettes to nontribal members, Native American or not, are subject to state taxation, which, per ruling Supreme Court precedent, does not interfere with tribal self-government or the right of the Muscogee "to make their own laws and be ruled by them".

2. Oklahoma's tax laws and regulations are not preempted by the federal Family Smoking Prevention and Tobacco Control Act ("Tobacco Control Act"), 21 USC §§ 387,et seq.. Plaintiff argues that Congress has expressly preempted state law in the field of Indian affairs by adoption of the Tobacco Control Act, 21 USC §§ 387, et seq., which does nothing of the sort.

The Tobacco Control Act provides, at 21 USC § 387 p.(a)(1):

"... No provision of this subchapter shall limit or otherwise affect any ***State, tribal, or local taxation of tobacco products"****.* (Emphasis supplied).

The preemption to which Plaintiff refers is limited to:

"... any requirement under the provisions of this subchapter relating to tobacco products standards, premarket review, adulteration, misbranding , labeling, registration, good manufacturing standards, or modified risk tobacco products", 21 USC § 387 p.(a)(2)(A).

An even cursory view of the Act, especially its title, the Family Smoking Prevention and Tobacco Control Act, shows that it is directed to smoking cessation and safety issues concerning: adulterated products, § 387b; misbranded products, § 387c; plans for advertisement and promotion restrictions, § 387f-1; prohibited contents of cigarettes (e.g., flavors), § 387g; pre-marketing review of new/modified products, § 387j; and modified risk tobacco products § 387 k., while taxation is specifically excluded.

There is no federal preemption of the field, by the Tobacco Control Act.

3. 68 O.S. § 349.1 is fully enforceable pursuant to and consistent with ruling Supreme Court authority: *Moe, Colville and Citizen Potawatomi.* Plaintiff's Proposition III .B.3. consists of generalized statements relating to the authority of States to tax within Indian country. Plaintiff ignores that, as to cigarette excise taxes, the Supreme Court spoke, beginning 34 years ago, in *Moe, et al. vs. Confederated Salish etc. Tribes, et al.*, 425 US 463, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976) ("*Moe*"), upholding taxation of sales of cigarettes to non-Indian purchasers on Indian country. 30 years ago, in *Washington, et al. vs. Confederated Tribes, Colville Indian Reservation,* 447 US 134, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980) ("*Colville*") upheld taxation of sales of cigarettes to non-tribal members, and also upheld seizure of unstamped cigarettes bound for a reservation, holding:

"We find that Washington's interest in enforcing its valid taxes is sufficient to justify the seizures.... It is significant that the seizures take place outside the reservation, in locations where state power over Indian affairs is considerably more expansive than it is within reservation boundaries.Cf. *Mescalero Apache Tribe v. Jones*, 411 US 145, 93 S.Ct. 1267, 36 L.Ed.2d 114 (1973). By seizing cigarettes en route to the reservation, the State polices against wholesale evasion of its own valid taxes *without unnecessarily intruding on core tribal interests*", supra, 161-162, 2085 (emphasis supplied).

19 years ago, in *Oklahoma Tax Commission vs. Citizen Band Potawatomi, etc.,* 498 US 505, 513, 111 S.Ct. 905, 911 112 L.Ed.2d 1112 (1991) ("*Citizen Potawatomi*") the Supreme Court cited to *Moe* and *Colville* for the proposition that tribal sovereign immunity does not prevent a State from requiring Indian retailers doing business on tribal reservations to collect a state-imposed cigarette tax on their sales to nonmembers of the Tribe. The Court, citing to *Colville*, also reiterated that seizure of unstamped cigarettes off the reservation was one of the means by which a state could enforce its tax laws, *supra*, 514, 912.

17 years ago, in *Buzzard, et al. vs. Oklahoma Tax Commission,* 992 F.2d 1073, 1075, f.n.3 (10th Cir. 1993), cert. den., sub nom., *United Keetowah, etc. vs. Oklahoma Tax Commission*, 510 US 994, 114 S.Ct. 555, 126 L.Ed.2d 456 (1993), The 10th Circuit followed *Citizen Band Potawatomi,* noting that even if the property in dispute were Indian country, Oklahoma could require the Tribe to collect taxes on cigarette sales to nontribal members.

Plaintiff's claim of preemption is wholly unsubstantiated by reference to any controlling Supreme Court authority regarding taxation of cigarette sales occurring on Indian country. There is no such preemption; that has been the law for a very long time.

4. 68 O.S. § 349.1 is not preempted by the provisions of the "Indian Trader Statutes", which do not preempt State taxation of sales of cigarettes to nontribal members on Indian country, per ruling Supreme Court authority. Plaintiff's claim that the "Indian Trader Statutes", 25 USC §§ 261-264, represent a preemption of the field concerning sales of cigarettes within Indian country is incorrect, as an even cursory reading of the Indian Trader Statutes would show.

The subject of the Indian Trader Statutes is trade with the Indians *on any reservation,* 25 USC § 261 and 25 CFR § 140.1. Licenses issued under the Statutes are for a location within a reservation. A license to trade cannot be issued unless the proposed licensee has a right to use of land on which the business is to be conducted, see 25 CFR § 140.11. Trading privileges granted by the license are restricted to the place specified in the license, 25 CFR § 140.14.

The Supreme Court has recognized that the Indian Trader Statutes:

"... show that Congress has taken the business of Indian trading *on reservations* so fully in hand that no room remains for state laws imposing additional burdens on traders....", *Warren Trading Post Company vs. Arizona State Tax Commission, et al.*, 380 US 685, 690, 85 S. Ct. 1242, 1245, 14 L.Ed.2d 165 (1965) (emphasis supplied).

In *Warren Trading Post*, Arizona imposed a tax upon a licensed trader with Indians on Arizona's part of the Navajo Indian Reservation, *supra*, 685-686, 1243. In striking down the Arizona statute, the Supreme Court found that, insofar as the state tax

laws were applied to a federally licensed Indian trader with respect to sales made to reservation Indians on the reservation, the statute could not stand, *supra*, 691-692, 1246.

Plaintiff's Complaint is absolutely devoid of any allegation that: there is a federally licensed trader involved; the identity of any federally licensed trader; or the licensed place of business of any federally licensed trader. There are no such allegations because there is no such federally licensed trader. The Muscogee reservation was disestablished as a part of the allotment process, *Murphy vs. Sirmons*, 497 F.Supp.2d 1257, 1290 (ED OK 2007), citing and collecting abundant authorities, including Congressional recognition that all Indian reservations, as such, have ceased to exist in Oklahoma. There could be no trader, licensed pursuant to the Indian Trader Statutes, because there are no Indian reservations in Oklahoma and, in particular, no Muscogee reservation.

Finally, Plaintiff's theory is equally flawed because the Supreme Court has spoken regarding the effect of statutes such as 68 O.S. § 349.1., upon a challenge to such a statute by a licensed Indian Trader, *Department of Taxation and Finance, New York et al. vs. Milhelm Attea & Brothers, etc., et al.*, 512 US 61, 114 S.Ct. 2028, 129 L.Ed.2d 52 (1994). The Supreme Court succinctly held that, although *Moe* and *Colville* dealt most directly with claims of interference with tribal sovereignty, the reasoning of those decisions required rejection of the proposition that 25 USC §§ 261, et seq. bars any and all state-imposed burdens on Indian traders, *supra*, 74, 2036.

The Court noted that the state law found to be preempted in *Warren Trading Post* was a tax directly imposed upon Indian traders for selling to Indians, a characterization which does not apply to regulations designed to prevent circumvention of concededly

lawful taxes owed by non-Indians. Therefore, the Court held that Indian traders are not wholly immune from state regulation which is reasonably necessary to the assessment or collection of lawful state taxes, *supra*, 74-75, 2036.

Analysis such as the foregoing is consistent with the 10th Circuit's analysis of whether Kansas motor fuel tax statutes were preempted by the Indian Trader Statutes, *Sac and Fox Nation, etc., et al. vs. Pierce*, 213 F.3d 566, 580-583 (10th Cir. 2000). We note: The recitation of facts in *Sac and Fox* does not indicate that any party was a licensed Indian trader. The Court noted ruling Supreme Court precedent, including *Warren Trading Post* and *Milhelm*, concluding that the Circuit's en banc decision in *Mescalero Apache Tribe vs. O'Cheskey*, 625 F.2d 967 (10th Cir. 1980) was consistent with the narrow interpretation of the application of Indian Trader Statutes made in *Milhelm.*

In concluding that the Indian Trader Statutes did not preempt the field with regard to fuel taxes, the Court noted that no special tax was imposed upon retail traders for trading with the Indians, nor was there any comprehensive federal regulatory scheme governing wholesale distribution of motor fuel to Indian tribes, *supra*, 582-583.

In this case: there is no showing of any comprehensive federal regulatory scheme governing wholesale distribution of cigarettes to Indian tribes, and no special tax imposed upon traders for trading with the Indians (or that there are or could be such traders).

The claim that Indian Trader Statutes had preempted Washington's cigarette taxing scheme, in defense of prosecution of Native American defendants for a violation of the federal Contraband Cigarettes Trafficking Act (18 USC § 2341, et seq.) was rejected by the Ninth Circuit, in reliance upon *Milhelm.* The opinion does not indicate whether any of the defendants were licensed Indian traders. But, the Court noted that the

incidence of any state tax fell upon non-Native American purchasers, and that *Milhelm* held that the Trader Statutes were not a bar to the requirement that Native Americans pre-collect taxes due on sales to non-Native Americans. Further, it noted *Milhelm's* holding that, as to tax-free cigarettes, determination of the "probable demand" quota did not dictate the kind or quantity of goods and prices at which goods would be sold to Indians, and, therefore, did not violate the Indian Trader Statutes. *US vs. Baker*, 63 F.3d 1478, 1489-1490 (9th Cir. 1995), cert. den., 516 US 1079, 116 S.Ct. 824, 133 L.Ed.2d 767.

68 O.S. § 349.1 (Exhibit "A"), like the regulations in *Milhelm* and *Baker*, recognizes the right of tribal members to purchase cigarettes from a tribally-licensed smokeshops on the tribe's Indian country free of taxation (68 O.S. § 349.1.B.2.). And the statute, like the regulations in *Milhelm* and *Baker*, limits the quality of untaxed cigarettes that may be sent to tribal retailers. Insofar as establishing the number of tax-free cigarettes made available, the statute follows the regulations approved in *Milhelm* and is similar to those in *Baker* in calculating "probable demand" for tax-free cigarettes by tribal members by multiplying the state average per capita cigarette consumption by the number of resident members of the tribe (68 O.S. § 349.1.C.). The regulations at stake in *Milhelm* imposed additional requirements upon retailers and wholesalers which 68 O.S. § 349.1 does not, *Milhelm*, *supra*, 64-67, 2031-2032. Oklahoma's laws are similar to the Washington laws at issue in *Baker* since regulation and administration are handled "off reservation" through wholesalers. As the *Baker* court observed, such a tax law is less burdensome to Native Americans than the procedures and requirements approved by the Supreme Court in *Colville,* see discussion, *Baker, supra*, 1489.

Plaintiff has not and cannot show preemption by the Indian Trader Statutes.

5. Nothing in the Native American Business Act represents a preemption of the field of taxation of sales of cigarettes to nontribal members on Indian country. Ignoring ruling Supreme Court precedent upholding state taxation of sales of cigarettes to non-tribal members on Indian country (see Propositions V.1., V.3., V.5a and V.7 herein) , Plaintiff argues that the provisions of the Native American Business Development, Trade Promotion and Tourism Act, 25 USC §§ 4301, et seq. preempt the field. Yet, Plaintiff cannot cite a single provision of the Act purporting to preempt the field and inviscerate the ruling Supreme Court precedent represented by *Moe, Colville and Citizen Potawatomi.* Plaintiff cites no such provision because there is no such provision.

The Act establishes an Office of Native American Business Development within the US Department of Commerce, 25 USC § 4303(b)(1), and directs the Office to carry out a Native American export and trade promotion program, 25 USC § 4304(a). The Office is to conduct a Native American tourism program, 25 USC § 4305. And, the Office is to yearly report to Congress regarding activities conducted and recommendations for legislation necessary to carry out 25 USC §§ 4303-4305.

It is a sheer flight of fancy to suggest that 25 USC §§ 4301, et seq. represents a preemption of the field insofar as taxation of cigarettes sold by Native American retailers. The Act simply says nothing to that effect.

In *Omaha Tribe of Nebraska vs. Miller*, 311 F.Supp.2d 816, 822-823 (S.D. IA 2004), virtually identical arguments were made by the Native American plaintiff tribe and rejected by the Court, which painstakingly reviewed the federal statutes in effect, as of 2004, relating to tobacco, and concluded:

"Congress' tobacco-specific legislation has created a specific regulatory schema for addressing the tobacco industry and problems relating to tobacco and health, but these federal statutes do not indicate a congressional intention to preempt the entire field of cigarette regulation", *Omaha Tribe, supra,* 823.

The *Omaha Tribe* Court also reviewed pertinent federal acts in support of the proposition of a congressional intent to support and encourage Indian tribal self-determination and economic self-sufficiency, noting that none of the cited acts contained provisions which either explicitly or implicitly would preempt a tobacco escrow statute, *Omaha Tribe, supra,* 823.

At day's end, precedent clarifies that federal interest in encouraging Indian tribal economic self-sufficiency and tribal self-determination is, alone, insufficient to preempt state jurisdiction to regulate *off reservation tribal commerce*, *Omaha Tribe, supra,* 824.

The Native American Business Development, Trade, Promotion and Tourism Act is not preemptive of the authority and right of states to tax sales of cigarettes to non-tribal members occurring on Indian country and enforce their tax laws outside Indian country.

5.a. Ruling Supreme Court precedent rejects the notion that State taxation of sales of cigarettes to nontribal members on Indian country is barred by the "Indian commerce clause". Plaintiff's propositions III.B.2.-5. suggest, without specific citation of ruling precedent, that the "Indian commerce clause" somehow preempts state taxation of sales of cigarettes to nontribal members occurring on Indian country and/or the right of states to enforce their tax laws by seizures outside of Indian country. That exact argument has been rejected by ruling Supreme Court precedent.

Moe, et al. vs. Confederated Salish etc. Tribes, et al., 425 US 463, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976) ("*Moe*") rejected the notion of any automatic exemption under the Commerce Clause (of which the "Indian commerce clause" is a part), *supra*, 481, 1645, f.n. 17.

As to collection of taxes on sales of cigarettes on Indian country to non-Indians, *Moe* held that this requirement did not frustrate tribal self-government, or run afoul of any congressional enactment dealing with the affairs off reservation Indians, and upheld the tax on non-Indian purchasers, supra, 483, 1646.

In *Washington, et al. vs. Confederated Tribes, Colville Indian Reservation,* ("*Colville*") 447 US 134, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980), Tribes claimed that the imposition of cigarette excise taxes and sales taxes on sales made to non-tribal members on the Tribes' Indian country, was preempted by the "Indian commerce clause", and the Supremacy Clause. The Supreme Court, citing to *Moe*, rejected the "... stark and rather unhelpful motion that the Commerce Clause provides an '*automatic* exemptio[n]' as a matter of constitutional law'...", noting that the Clause is not taken "entirely out of play" in the field of state regulation of Indian affairs, *supra*, 148, 2078. (Emphasis, the Court's).

The Tribes argued that their involvement in operation and taxation of cigarette marketing on Indian country ousted the state from any power to tax transactions by nonmembers on Indian country, an "economic" argument which the Court rejected:

"It is painfully apparent that the value marketed by the smokeshops to persons coming from outside is not generated on the reservations by activities in which the Tribes have a significant interest [citations omitted]. What the smokeshops offer these

customers, and what is not available elsewhere, is solely an exemption from state taxation.... *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*". *Colville, supra,* 155, 2082 (emphasis supplied).

Regarding the suggested bar of the "Indian commerce clause", the Court held:

"It can no longer be seriously argued that the Indian Commerce Clause, of its own force, automatically bars all state taxation of matters significantly touching the political and economic interests of the Tribes [citing to *Moe*]. That clause may have a more limited role to play in preventing undue discrimination against, or burdens on, Indian commerce. But Washington's taxes are applied in a nondiscriminatory manner to all transactions within the state. *And although the result of these taxes will be to lessen or eliminate tribal commerce with nonmembers, that market existed in the first place only because of a claimed exemption from these very taxes.* The taxes under consideration do not burden commerce that would exist on the reservations without respect to the tax exemption.", *Colville, supra,* 157, 2083 (emphasis supplied).

In *Oklahoma Tax Commission vs. Citizen Band Potawatomi, etc.,* 498 US 505, 513, 111 S.Ct. 905, 911 112 L.Ed.2d 1112 (1991) the Supreme Court cited to *Moe* and *Colville* for the proposition that tribal sovereign immunity does not prevent a State from requiring Indian retailers doing business on tribal reservations to collect a state-imposed cigarette tax on their sales to nonmembers of the Tribe, and approved by seizures outside Indian country for enforcement of state tax laws.

The Supreme Court decision in *Seminole Tribe of Florida vs. Florida, et al.,* 517 US 44, 72 116 S. Ct. 1114, 1131-1132, 134 L.Ed.2d 252 (1996) concerned the extent of authority vested in the Congress pursuant to the Indian commerce clause. The Court held that state sovereign immunity, embodied in the 11th Amendment, could not be abrogated by Congress in reliance upon its authority to regulate Indian affairs pursuant to the "Indian commerce clause".

In the context of subject matter jurisdiction, the 10th Circuit, in *Sac and Fox Nation, et al. vs. Pierce*, 213 F.3d 566, 572 (10th Cir. 2008) observed that, after *Seminole Tribe, the 11th Amendment generally bars in Indian tribe's suit in federal court against a state, when the tribe's claim rests solely on Article I's "Indian commerce clause".*

The grant of authority to the federal government by the "Indian commerce clause" and preemption of state authority extends only to activities occurring in "Indian country", *Grand River Enterprises, etc. vs. Pryor, et al.*, 425 F.3d 158, 173 (2d Cir. 2005).

The Muscogee makes a generalized claim of authority to act, without consequence, outside of its Indian country. The Supreme Court counseled against such generalizations in *Mescalero Apache Tribe vs. Jones* , 411 US 145, 147-148, 93 S. Ct. 1267, 1270, 36 L.Ed.2d 114, ("*Mescalero*"), observing that generalizations on this subject have become particularly treacherous. *Mescalero* rejected the broad assertion that the federal government has exclusive jurisdiction over tribes for all purposes, which prohibits states from enforcing revenue laws against tribal enterprises, wherever located.

The limit of any federal preemption , pursuant to the "Indian commerce clause" or otherwise, is the geographic limit of a Tribe's Indian country. As *Mescalero* held, tribal activities conducted outside the reservation present different considerations, and:

"Absent *express federal law to the contrary*, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State. [citations omitted] *That principle is as relevant to a State's tax laws* as it is to state criminal laws [citation omitted]..." *Mescalero, supra*, 148-149, 1270-1271 (emphasis supplied).

Plaintiff fails to show any "express federal law to the contrary".

Oklahoma has the right, per ruling Supreme Court precedent, to seize contraband and otherwise enforce its tax and other laws outside of Plaintiff's Indian country, without violation of Plaintiff's sovereignty rights. Plaintiff's argument in this case depends on the extent of its sovereignty rights. Since sovereignty rights are not violated, there is no federal right requiring vindication in federal court, *Yakama Indian Nation vs. State of Washington, etc.*, 176 F.3d 1241, 1246-1247 (9th Cir. 1999).

6. The notion of tribal sovereignty, pursuant to a treaty or otherwise, does not support a claim of preemption. Plaintiff makes a generalized, non-specific argument that a "backdrop of tribal sovereignty in this specific context" counsels against enforcement of the statutes in Plaintiff's Indian country. That faulty theory ignores ruling Supreme Court precedent discussed at Propositions V.1. and V.3. that States may collect taxes on sales of cigarettes to nontribal members on Indian country. Further, the seizure complained of in the Motion was ***outside*** Plaintiff's Indian country and treaty rights.

Mescalero Apache Tribe vs. Jones , 411 US 145, 147-148, 93 S. Ct. 1267, 1270, 36 L.Ed.2d 114 ("*Mescalero*") held:

"Absent *express federal law to the contrary*, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise

applicable to all citizens of the State. [citations omitted] *That principle is as relevant to a State's tax laws* as it is to state criminal laws [citation omitted]..." *Mescalero, supra*, 148-149, 1270-1271 (emphasis supplied).

In *Oklahoma Tax Commission vs. Chickasaw Nation,* 515 US 450, 115 S.Ct. 2214, 132 L.Ed.2d 400 (1995) the Nation asserted that the State could not tax the wages of members of the Nation who worked for the Nation, whether they resided in the Indian country of the Nation or not. The Nation sought to avoid the rule of *Mescalero* by arguing that there was an "express federal law to the contrary", a treaty. The treaty, the Supreme Court observed, applied only to persons and property within the Nation's limits. The Court continued:

"... We comprehend this Treaty language to provide for the Tribe's sovereignty *within Indian country*. We do not read the Treaty as conferring *supersovereign authority to interfere with another jurisdiction's sovereign right to tax* income, from all sources, of those who choose to live within that jurisdiction's limits." *Chickasaw, supra*, 465-466, 2223-2224 (emphasis supplied).

There is no showing of preemption by treaty or otherwise.

7. 68 O.S. § 349.1 does not affect Plaintiff's "tribal self-governance". Plaintiff's argument ignores ruling Supreme Court precedent. *Moe, et al. vs. Confederated Salish, etc. Tribes, et al.,* 425 US 463, 483, 96 S.Ct. 1634, 1646, 48 L.Ed.2d 96 (1976), which held that nothing in the burden of collecting taxes on sales of cigarettes within Indian country to non-Native Americans "... frustrates tribal self-government... or runs afoul of a congressional enactment dealing with the affairs a reservation Indians...".

Washington vs. Confederated Tribes, Colville Reservation, 447 US 134, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980) held:

"... We do not believe that principles of federal Indian law, whether stated in terms of pre-exemption, tribal self-government, or otherwise, authorized Indian tribes to market an exemption from state taxation to persons who would normally do their business elsewhere". *Colville, supra,* 155, 2082.

"Washington does not infringe the right of reservation Indians to "make their own laws and be ruled by them" [citation omitted] merely because the result of imposing its taxes will be to deprive the Tribes of revenues which they currently are receiving...", *Colville, supra,* 156-157, 2082-2083.

Plaintiff's "tribal self-government" claim is the same old economic impact claim rejected by *Colville* 30 years ago, and, more recently by *Wagnon vs. Prairie Band Potawatomi Nation,* 546 US 95, 114, 126 S.Ct. 676, 688-689, 163 L.Ed.2d 429 (2006):

"... The Nation merely seeks to increase those revenues by purchasing untaxed fuel. But the Nation cannot invalidate the Kansas tax by complaining about a decrease in revenues. See *Colville*, 447 US, at 156, 100 S.Ct. 2069 ("Washington does not infringe the right of reservation Indians to "make their own laws and be ruled by them", *Williams vs. Lee*, 358 US 217, 220, 79 S. Ct. 269, 3 L.Ed.2d 251 (1959), merely because the result of imposing its taxes will be to deprive the Tribes of revenues which they are currently receiving")....", *Wagnon, supra*, 114, 688-689.

There is no interference with the right to tribal self-governance.

7.a. 68 O.S. § 349.1 is non-discriminatory in its application. To assert a valid equal protection claim, a plaintiff must plead sufficient facts to demonstrate that he

has been treated differently from others with whom he is similarly situated and that the unequal treatment was a result of an intentional or purposeful discrimination, *Veney vs. Wyche*, 293 F.3d 726, 730 (4th Cir. 2002). The threshold showing required is that Plaintiff was treated differently from others similarly situated to them, *Barney vs. Pulsipher*, 143 F.3d 1299, 1312 (10th Cir. 1998). The Muscogee is, admittedly, a non-compacting tribe. 68 O.S. § 349.1 relates to tobacco taxes on sales by licensees of non-compacting tribes. There is no showing the Muscogee is treated differently than any other non-compacting tribe. Sales to members of non-compacting tribes by licensed retailers of those tribes are tax free, 68 O.S. § 349.1 B.. Sales to all others are at the regular Oklahoma cigarette excise tax rate, 68 O.S. § 349.1.A., which is the rate applicable to sales of cigarettes throughout the state, except as may be varied by compact, 68 O.S. § 346.

The imposition and collection of State tax on sales of cigarettes to nontribal members upon Indian country is sanctioned by Supreme Court precedent, Propositions V.1. and V.3. herein. Plaintiff's citizens are not taxed on their purchases, 68 O.S. § 349.1.B.. There is no showing that the Muscogee is treated differently from others similarly situated to them. There is no showing of discrimination.

7.b. A State's right to collect tax on sales of cigarettes to nontribal members on Indian country and seize non-tax paid cigarettes outside Indian country is a matter of ruling Supreme Court precedent. Plaintiff's Proposition III .B.7. is composed of generalized statements to support the unique proposition that Oklahoma's cigarette tax laws cannot be enforced in Plaintiff's Indian country. It is unsupported by any specific citation to that effect. The seizure about which the Motion

complains did not take place within the Indian country of Plaintiff. And, collection of taxes on sales of cigarettes to non-members of Plaintiff on Plaintiff's Indian country is sanctioned by ruling Supreme Court precedent, Propositions V.1., V.3., V.5a., and V.7 herein.. Ruling Supreme Court precedent also sanctions seizures of non-tax paid cigarettes outside of Indian country for enforcement of States' tax laws, Proposition V.3.. Plaintiff does not and cannot show to the contrary.

VI.
INJUNCTIVE RELIEF IS COUNTER TO THE PUBLIC INTEREST

Discussion at Propositions II and IV herein are republished, to demonstrate that the public interest would be harmed by a grant of injunctive relief, while Propositions V.1., V.3., V.5a., and V.7 establish that plaintiff's sovereignty interests are not harmed by the enforcement of Oklahoma's laws, outside Plaintiff's Indian country.

Not only would injunctive relief affect public interest and public health, the public treasury is also affected. Oklahoma cigarette excise tax avoided on the one seizure of which Plaintiff complains in this suit amounted to: $45,732 .00 (Exhibit "G", Leonard affidavit, p. 3 and Ex. 4). The enormity of the laws is made clear by the calculation of Oklahoma cigarette excise tax avoided on transactions by the Plaintiff in 2009: A revenue loss of **$12,983,636.33** ((Exhibit "G", Leonard affidavit, p. 2 and Ex. 3).

Although an adequate bond might protect the State's financial interest, it is impossible to quantify, in money, the damage to public health concerns of the State of Oklahoma and, indeed, the Muscogee Nation. Promotion of cheap cigarettes is simply contrary to public health and interest, that is what Plaintiff does, and Plaintiff neither merits nor deserves injunctive relief to continue acting against the public health and interest of the State and the Muscogee Nation.

VII.
SUBSTANTIAL BOND IS REQUIRED, WERE RELIEF GRANTED

Plaintiff has provided the Court with a benchmark regarding the adequacy of a bond. The Coleman affidavit (Doc 44-2), Exhibit 1 to Plaintiff's Brief (Doc 44) and an admission against interest, revealed that Plaintiff received approximately $925,000 in tax revenues on sales of cigarettes to its licensed retailers. These were untaxed sales, because Plaintiff's wholesaler is not licensed by the State, and could not affix the required state tax stamps (Exhibit "G", Leonard affidavit, ¶ 7 and 68 O.S. § 305, Exhibit "E"). The OTC calculates that Plaintiff concedes having sold 1,681,818 cartons of nontax paid cigarettes. At the 2009 tax rate, that is a revenue loss of **$12,983,636.36.** But, the 2009 tax rate was $0.7725/pack. The 2010 tax rate is $1.03 per pack, 68 O.S. § 349.1.A. (Exhibit "A") and 68 O.S. §§ 302-302-5 (Exhibit "D"). Thus, if we take the average number of cartons sold each month by Plaintiff, 140,151.5 and apply the current tax rate, $10.30/carton (10 tax per carton at $1.03 per pack), the result is $1,447,309.65 for each month that any proposed injunction would remain in place. This addresses only the state excise tax revenue loss. There is no amount of bond adequate to compensate for damage to public health and interest.

The requested relief should be denied.

RESPECTFULLY SUBMITTED,

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*Signed by the filer with permission

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, for filing pursuant to LCvR 5.1 and service upon Plantiff's counsel of record:

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I further certify that on the 4th day of March , 2010, I served the attached document by First Class US Mail, postage prepaid, upon the following counsel:

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