

**UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT**

---

**APPEAL NO. 11-7005**

---

**MUSCOGEE (CREEK) NATION,  
Appellant,**

**v.**

**SCOTT PRUITT, Attorney General of Oklahoma,  
THE OKLAHOMA TAX COMMISSION,  
THOMAS KEMP, JR., Chairman, Oklahoma Tax Commission,  
JERRY JOHNSON, Vice-Chairman, Oklahoma Tax Commission and  
DAWN CASH, Secretary, Oklahoma Tax Commission,  
Appellees.**

---

**Appeal from United States District Court  
for the Eastern District of Oklahoma  
Honorable James Payne, Presiding  
Dist. Ct. No. 10-CV-019-JHP**

---

**REPLY BRIEF FOR APPELLANT**

---

**Oral Argument Requested**

**June 27, 2011**

**Galen L. Brittingham, OBA #12226  
Michael A. Simpson, OBA #21083  
ATKINSON, HASKINS, NELLIS,  
BRITTINGHAM, GLADD & CARWILE, P.C.  
1500 Park Centre  
525 South Main  
Tulsa, Oklahoma 74103-4524  
Telephone: (918) 582-8877  
Facsimile: (918) 585-8096**

**Conly J. Schulte, NE #20158  
Joseph V. Messineo, NE #21981  
FREDERICKS PEEBLES &  
MORGAN LLP  
3610 North 163rd Plaza  
Omaha, NE 68116  
Telephone: (402) 333-4053  
Facsimile: (402) 333-4761**

**Counsel for Appellant,  
Muscogee (Creek) Nation**

## TABLE OF CONTENTS

TABLE OF CONTENTS .....	i
TABLE OF AUTHORITIES .....	ii
INTRODUCTION.....	1
I. The Complementary Act Directly Regulates The Activity Of Tribal Members On Nation Trust Land.....	1
II. United States Supreme Court Precedent Does Not Grant States Unfettered Power to Tax And Regulate Reservation Cigarette Sales To Non-Tribal Members — The District Court Was Required To Weigh State and Tribal Interests.....	5
III. The OTC’s statutory waiver of immunity applies to this case.....	8
IV. The Nation has pleaded a Young claim that the OTC and Attorney General are unfairly enforcing the tobacco laws .....	10
V. The Nation has not waived or abandoned any arguments or claims.....	11
VI. The State impermissibly requires the Nation’s wholesale operation to be State-licensed, or to purchase tobacco products from other State-licensed wholesalers .....	14
CONCLUSION .....	16

## TABLE OF AUTHORITIES

### Cases

<i>California v. Cabazon Band of Mission Indians</i> , 480 U.S. 202 (1987) .....	5
<i>Children’s Healthcare is a Legal Duty, Inc. v. Deters</i> , 92 F.3d 1412 (6th Cir. 1996) .....	10
<i>Department of Taxation and Finance of New York v. Milhelm Attea &amp; Bros.</i> , 512 U.S. 61(1994) .....	6, 14, 15
<i>Ex Parte Young</i> , 209 U.S. 123 (1908) .....	1, 10
<i>Keweenaw Bay Indian Community v. Rising</i> , 477 F.3d 881 (6th Cir. 2007).....	14
<i>McClanahan v. Arizona State Tax Comm’n</i> , 441 U.S. 164 (1973) .....	3, 4
<i>Moe v. Confederated Salish &amp; Kootenai Tribes</i> , 425 U.S. 463 (1976) .....	5, 10, 12, 15
<i>Muscogee (Creek) Nation v. Oklahoma Tax Comm’n</i> , 611 F.3d 1222 (10th Cir. 2010).....	13
<i>New Mexico v. Mescalero Apache Tribe</i> , 462 U.S. 324(1983) .....	3, 4
<i>Oklahoma Tax Comm’n v. Chickasaw Nation</i> , 515 U.S. 450 (1995) .....	12
<i>Oklahoma Tax Comm’n v. Citizen Band Potawatomi Indian Tribe</i> , 498 U.S. 505 (1991) .....	14
<i>Oklahoma Tax Comm’n v. Smith</i> , 1980 OK 74, 610 P.2d at 801 .....	9

*Puyallup Tribe, Inc. v. Department of Game of the State of Washington*,  
433 U.S. 165 (1977) .....4

*Stallings v. Oklahoma Tax Comm’n*,  
1994 OK 99, 880 P.2d 912 .....8, 9

*State v. Bruner*,  
1991 OK 77, 815 P.2d 667 (1991) ..... 10, 15

*United States v. Baker*,  
63 F.3d 1478 (9th Cir. 1995) .....14

*United States v. Orenduff*,  
548 F.2d 931 (10th Cir. 2008) .....13

*Wagon v. Prairie Band Potawatomi Nation*,  
546 U.S. 95 (2006) .....6, 7

*Washington v. Confederated Tribes of the Colville Indian Reservation*,  
447 U.S. 134 (1980) ..... 5, 12

*White Mountain Apache Tribe v. Bracker*,  
448 U.S. 136 (1980) ..... 5, 7, 12

**Statutes**

37 Okla. Stat. § 600.....11

68 Okla. Stat. § 226..... 8, 9, 10, 13

68 Okla. Stat. § 349..... 11, 12, 13, 15

68 Okla. Stat. § 360..... 2, 11

68 Okla.St. Ann. § 302.....7

**Rules**

Fed. R. Civ. Proc 12.....8

**Regulations**

25 C.F.R. § 140 .....13

## INTRODUCTION

The Defendants'<sup>1</sup> response brief takes many liberties with the scope and application of Oklahoma's cigarette tax law and the Complementary Act. These laws have a substantial negative impact upon the Nation, as well as Nation members and non-members engaging in commerce *on the Nation's trust land*. As such, they are entirely unenforceable on the Nation's trust land against the Nation and members of the Nation. Additionally, to the extent these laws regulate non-members on the Nation's trust land, the District Court was required to balance the State's interest in enforcement against those of the Nations. The District Court failed to do so in making its determination that the Nation stated no plausible ongoing violation of federal law. The remainder of the State's response sets forth various arguments regarding its waiver of immunity and the general failure of the Nation to satisfy pleading requirements of *Ex Parte Young*, 209 U.S. 123 (1908). As set forth herein, these arguments misstate what is required under the law.

### **I. The Complementary Act Directly Regulates The Activity Of Tribal Members On Nation Trust Land**

Throughout its response brief, the State misconstrues the Complementary Act and how it interacts with the Escrow Statute. The State correctly surmises that the

---

<sup>1</sup> Defendants are Attorney General Scott Pruitt, the Oklahoma Tax Commission, and its three commissioners Thomas Kemp, Jr., Jerry Johnson, and Dawn Cash, all sued in

Complementary Act primarily bans the sale of cigarettes made by manufacturers that fail to comply with the Escrow Statute; that only manufacturers have a compliance obligation under the Escrow Statute;<sup>2</sup> that the Escrow Statute only applies to taxed cigarettes, and that sales to tribal members made on the Nation's trust land are not taxed. However, the State then makes fantastic leaps of logic to reach the false conclusion that the Complementary Act does not prevent sales of non-directory cigarettes to tribal members, or prevents Nation retailers and individuals from even possessing non-directory brands.

As set forth fully in Section II.D. of the Nation's Opening Brief, the proscriptions of the Complementary Act cannot be separated from the untaxed sales made to Tribal members on the Nation's trust land. The Complementary Act requires manufacturers to annually certify that they are in compliance with the Escrow Statute. If they fail to comply with the Escrow Statute for *any sales* in the State, the State will prohibit listing such manufacturer in Oklahoma's cigarette directory. Cigarette brands of any manufacturer not listed in the directory cannot be sold or even possessed in the State of Oklahoma by any person, including the Nation and its members. These brands are deemed contraband subject to immediate seizure. 68 Okla.St. § 360.7(B).

their official capacities. The Defendants will be referred to collectively as the "Defendants" or "State."

<sup>2</sup> The Nation has never claimed that it has a direct Escrow Statute compliance obligation.

There is no exception in the Complementary Act for cigarettes held by Indian tribes, Indian wholesalers or retailers operating on trust land, even for sales to tribal members. There is no exception for individual Indians, *even for their own personal consumption on their tribe's trust land*. Such unlisted brands are contraband, period.

The State's position that it does not enforce the Complementary Act against members of the Nation is dubious. The State has engaged in wholesale seizures of cigarette shipments destined for the Nation's trust land. (*See e.g.* Apx. at 42.) These seizures have not differentiated between those cigarettes that would be sold to Nation wholesalers or Nation members; the State simply seizes entire shipments of cigarettes.

Clearly, the State is not making an accommodation for those cigarettes to be shipped to Nation wholesalers or retailers for sale to Nation members.

The Complementary Act directly regulates sales made on the Nation's trust land to the Nation-owned wholesalers, and also regulates sales by Indian retailers both to tribal members and non-tribal members — indeed it dictates the type of cigarettes that the Nation *itself* may purchase for resale to its own members. As such, the Complementary Act is categorically unenforceable. *McClanahan v. Arizona State Tax Comm'n*, 441 U.S. 164 at 170-71 (1973); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331-32 (1983).



The Supreme Court has opined, “state laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State law shall apply.” *McClanahan*, 441 U.S. at 170-71. It has also written that only in “exceptional” circumstances may a state regulate Indians acting on their reservation. *Mescalero Apache Tribe*, 462 U.S. at 331-32. The Court in *Mescalero* supported this proposition with a citation to *Puyallup Tribe, Inc. v. Department of Game of the State of Washington*, 433 U.S. 165 (1977). The “exceptional” circumstances in *Puyallup* involved tribal members fishing a species to the brink of extinction, clearly a dire situation that might have required state intervention. Here, the Complementary Act is nothing more than a tool to protect a stream of revenue for the State, i.e., the State’s payments under the MSA. It is doubtful that such a statute could constitute “exceptional” circumstances as to be enforceable directly against a reservation Indian. If such were the case, almost any statute relating to revenue could be considered “exceptional.” This would throw open a flood of state regulation of Indian tribes and individual Indians on their reservations — something clearly not contemplated by Supreme Court precedent. Even if the Complementary Act could be deemed regulation of non-Indians, or non-Indian interaction with Indians on their trust land, the State’s interest in enforcement must still be weighed against those of the Nation. *See* Section II, *infra*.

## **II. United States Supreme Court Precedent Does Not Grant States Unfettered Power to Tax And Regulate Reservation Cigarette Sales To Non-Tribal Members — The District Court Was Required To Weigh State and Tribal Interests**

Throughout its Response Brief, the State persists in mischaracterizing United States Supreme Court precedent on State power to regulate and tax reservation cigarette sales to non-tribal members. Relying primarily upon the decisions in *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976) and *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980), the State asserts that precedent categorically empowers states regulate such sales under all circumstances. The State's position is simply incorrect. Both of these cases require the court to employ a balancing test that weighs the interests of the state, the tribe and the federal government to determine whether the state has sufficient interest in regulating the reservation activity in question.<sup>3</sup> See *Colville*, 447 U.S. at 151; *Moe*, 425 U.S. at 483; accord *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980). As set forth in United States Supreme Court precedent, this is a "particularized inquiry" into the facts of each situation. *Bracker*, 448 U.S. at 137,

---

<sup>3</sup> The State posits that as the Complementary Act is not a tax and that regardless of whether a balancing analysis is required for taxation, none is required for non-tax regulation. See e.g. Response Brief, pp.47 and 55. The United States Supreme Court has made it clear, that the balancing of interest analysis is required for all attempts at state regulation of reservation activity by non-Indians. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987) (applying balancing test to state's attempt

144-45. This is further borne out by a case heavily relied upon by the State, *Department of Taxation and Finance of New York v. Milhelm Attea & Bros.*, 512 U.S. 61, 73 (1994) (opining that determination of whether a state could regulate on-reservation sales of cigarettes to non-Indians depended on “a particularized inquiry into the nature of the state, federal, and tribal interests at stake” (internal quotations deleted)). Thus, contrary to the State’s categorical assertion that these cases, “established the right to state taxation of on-reservation sales to non-tribal members” (Response Brief, p. 17), they did no such thing. They merely establish that, depending on the particular facts of each case, a state *might* have jurisdiction to tax and/or regulate such sales. The District Court failed to engage in this analysis, and instead applied an unprecedented categorical rule that permits the State to tax and regulate all transactions with non-Indians in Indian Country regardless of any interests the tribe might have.

Throughout its brief, the State also argues that the District Court did not need to perform a balancing test, because the regulatory burdens complained of by the Nation do not occur within the Nation’s trust land. The State cites to *Wagon v. Prairie Band Potawatomi Nation*, 546 U.S. 95 (2006) as legal support for this conclusion. While the State is correct that the *Wagon* case held that no balancing of state versus tribal to regulate, not tax, a tribe’s on reservation bingo game involving non-tribal members).

interests need be performed for regulation that occurs *off the reservation*, the *Wagon* ruling is factually inapposite to the case at bar. In *Wagon*, the tax was owed by the distributor for off-reservation fuel deliveries who could then choose to pass on the *economic burden* of the tax to reservation sales. Thus, in *Wagon*, the taxable event occurred off of reservation land. In this case, both the taxable event and regulation by the Complementary Act occurred *on the Nation's trust land*.

*Wagon* sets forth that the “where” of taxation is determined by where the legal incidence of the tax occurs. *Wagon*, 546 U.S. at 101-102. The legal incidence of the tax can be conclusively determined by the language of the state’s taxing statute. *Id.* at 102. In this case, the legal incidence of Oklahoma’s cigarette tax law unquestionably occurs on the Nation’s trust land:

The impact of [Oklahoma’s cigarette excise tax] is hereby declared to be on the vendee, user, consumer, or possessor of cigarettes in this state and when the tax is paid by any other person, such payment shall be considered as an advance payment and shall thereafter be added to the price of the cigarettes and *recovered from the ultimate consumer or user*.

(emphasis added) 68 Okla.St. Ann. § 302. And in this case, the relevant transaction with the consumer occurs in Indian Country — on the Nation’s trust lands.<sup>4</sup> Because the “where” of the tax in question in the case at bar is on the Nation’s trust land, the

---

<sup>4</sup> In any event, to the extent the State maintains that the legal incidence falls upon the wholesaler, the State is also requiring the Nation to become a state licensed wholesaler or otherwise attempting to subject the Nation to these regulatory burdens for receipt and sales of cigarettes on its trust land. See Section VI, *infra*.

District Court was required to perform the balancing test set forth in *Bracker. Wagnon*, 546 U.S. at 99 (“the *Bracker* interest-balancing test applies only where ‘a State asserts authority over the conduct of non-Indians engaging in activity on the reservation.’”).

As set forth in Section I, *supra*, and at length in the Nation’s Opening Brief, the Complementary Act also regulates on-reservation activity (that argument will not be repeated here). However, the State again attempts to obfuscate the operation of the Complementary Act. The State asserts that the fee required by the Complementary Act is paid by the manufacturer off of tribal trust land. This may be so, but that is only one very small facet of the Complementary Act. The Complementary Act also regulates activity on the Nation’s trust land by directly dictating the brands of cigarettes the Nation may acquire *on the Nation’s trust lands* for sale to its own members *on the Nations’ trust lands*.

Because the District Court was required to engage in a fact-specific balancing of interests, dismissal on a 12(b)(6) motion was inappropriate, and the decision below must therefore be reversed for this reason alone.

### **III. The OTC’s statutory waiver of immunity applies to this case**

In arguing that 68 Okla. Stat. § 226 does not waive its Eleventh Amendment immunity in this case, the OTC only gives the Court part of the picture in relying upon *Stallings v. Oklahoma Tax Comm’n*, 1994 OK 99, 880 P.2d 912 (1994). In

concluding in *Stallings* that a tax protestor must pay the tax at issue under protest, and provide notice before bringing suit, the Oklahoma Supreme Court specifically distinguished situations in which a tax has already been paid, or is due, with situations where a “pre-deprivation” suit is available to the plaintiff because no tax is yet due. As the *Stallings* court repeated from an earlier ruling, “one adversely affected by a statute which he contends is invalid on its face need not violate that law in order to obtain a declaration of its validity or invalidity.” *Id.* at ¶ 11, 880 P.2d at 917 (quoting *Oklahoma Tax Comm’n v. Smith*, 1980 OK 74, 610 P.2d at 801). Thus, *Stallings* recognizes that the jurisdictional prerequisites of 68 Okla. Stat. § 226 must only be complied with when “a taxpayer opts to pay a tax before challenging it.” *Id.*

Contrasting the facts in *Stallings* and *Smith* illustrates this distinction further. In *Stallings*, the plaintiffs had already paid income taxes on their federal retirement benefits voluntarily over time without protest, then brought suit (without notice) to challenge the rate at which the benefits were taxed. 1994 OK 99, ¶ 1, 880 P.2d at 914. In *Smith*, the plaintiff, like the Nation in this case, brought a direct challenge to the constitutionality of a newly enacted taxation law. 1980 OK 74, ¶ 1, 610 P.2d at 797. The Oklahoma Supreme Court held in *Smith* that 68 Okla. Stat. § 226 did not impose any prerequisite to bringing this type of suit. *Id.* at ¶¶ 13-14, 610 P.2d at 801-802.

Of note, the OTC is also using circular logic in citing to *Stallings*. Throughout its Response Brief, the OTC argues that (1) the Nation does not pay any tobacco tax

because the tobacco excise taxes are collected from the wholesaler and passed through to any non-Indian consumer, and (2) the Nation's intra-tribal tobacco sales are tax-free. In relying on section 226(b), however, the OTC is also arguing that the Nation has to pay the tobacco excise tax at issue (i.e., the tax that it does not have to pay) before it can sue the OTC. These arguments are in direct contradiction.

In reality, section 226(a) authorizes suits over the constitutionality of "provisions of this article [68]," not just suits over taxes. The Nation's claims do not challenge the payment of any excise tax, but challenge the regulatory burdens imposed by the OTC in enforcing its "tax stamp" system, in particular by not allowing the Nation's wholesale operation access to those stamps at all. The Nation also challenges the OTC's admitted practice (Resp. Br. at 4) of requiring the Nation to obtain a wholesaler license before the OTC will allow the Nation to utilize those stamps, which is clearly unconstitutional. *See Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 480 (1976); *State v. Bruner*, 1991 OK 77, ¶ 13-14, 815 P.2d 667, 669-70.

#### **IV. The Nation has pleaded a *Young* claim that the OTC and Attorney General are unfairly enforcing the tobacco laws**

The Attorney General argues in its Response Brief that *Ex parte Young* only applies to officers who "threaten and [are] about to commence proceedings" to enforce a State law. (Resp. Br. at 42-43 (citing *Children's Healthcare is a Legal Duty, Inc. v. Deters*, 92 F.3d 1412, 1415 (6th Cir. 1996))). This argument is faulty for multiple

reasons. First, and most obvious, the Complaint actually pleads this fact pattern, i.e., that the OTC and Attorney General have exceeded their authority in collectively enforcing 68 Okla. Stat. § 349.1, and the Escrow and Complementary Acts, to tax and regulate all sales of tobacco in the Nation’s Indian Country. (*See* Apx. at 19, 21, 34-36, 42.)<sup>5</sup>

In addition, the Attorney General only applies this argument to the Escrow Act, which completely ignores the effect of the Complementary Act. While the Attorney General is technically correct that the Escrow Act, by itself, only applies to cigarette manufacturers, the enforcement mechanism for collection of unpaid escrow payments is in the Complementary Act, which is applicable to *anyone* who possesses, or transacts in, cigarettes made by a non-Escrow Act compliant manufacturer. *Compare* 37 Okla. Stat. §§ 600.22-600.23 *with* 68 Okla. Stat. §§ 360.7-360.8.

**V. The Nation has not waived or abandoned any arguments or claims.**

Scattered throughout its Response Brief, the OTC and the Attorney General

---

<sup>5</sup> The Attorney General also argues in footnote 3 to the Response Brief that the Nation mentions the *State v. Larkin* case, currently pending in the District Court for Tulsa County, for the first time in the Opening Brief. Not so — the Nation’s counsel discussed that case during oral argument on the motions to dismiss before the district court. (Apx. at 446.) Further, the Nation does not mention *Larkin* to make a “collateral attack” on the remand of *Larkin* from federal court as the Attorney General argues. Rather, the Nation discusses *Larkin* in the Opening Brief as further evidence that the State is in fact currently enforcing section 349.1 and the Complementary Act against the Nation, including by bringing a lawsuit against the Nation’s officers in State court.



suggest that the Nation has abandoned or not preserved certain arguments. This is incorrect.

For instance, on page 14 of the Response Brief, the Defendants argue that the Nation has abandoned various claims for deprivation of constitutional rights as set forth in the Complaint. In actuality, the Nation cites to the same federal precedents as the OTC and Attorney General in debating the reach that states have in Indian Country to tax and regulate commerce in Indian country.<sup>6</sup> See *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450 (1995); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 146-147 (1980) (“*Colville*”); *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 480-481 (1976).

With the exception of *Colville*, none of these cases discuss the Constitutional underpinnings for their decisions in any detail, but instead speak in broader concepts of federal control and supremacy over the regulation of commerce in Indian Country. Further, as noted in the written Closing Arguments to the district court, while the Complaint alleges six separate theories that section 349.1 and the Complementary Act

---

<sup>6</sup> Contrary to the OTC and Attorney General’s insinuation on page 14 of the Response Brief, the Nation never pleaded a claim solely based on the Native American Business Development Trade and Promotion Act or the Food, Drug and Cosmetic Act. These laws are simply cited in the Complaint as evidence of a broader Congressional intent to pre-empt State taxation or regulation of Indian commerce, including tobacco-related commerce. (See Apx. 38-40, 44, 47.)

violate substantive areas of the Constitution or federal law, at its core, the Complaint only makes one claim for procedural relief — a declaratory judgment (and injunctive relief to enforce that declaration). (Apx. 49-51, 360.) The OTC and Attorney General cannot dispute that the Nation has preserved its overall claim that section 349.1 and the Complementary Act are invalid and unenforceable. Next, in footnote 2 to the Response Brief, the Attorney General insinuates that the Nation has not preserved its argument that a regulation implementing the Indian Trader Statute, 25 C.F.R. § 140.17, has preemptive effect over the Oklahoma Prevention of Youth Access to Tobacco Act. In reality, the Nation raised this particular argument in the Closing Argument brief requested by the district court. (*See* Apx. 361-363.) Thus, this argument is clearly preserved for appeal.

Finally, the OTC argues that the Nation did not previously raise the OTC's statutory waiver of its sovereign immunity and, therefore, "suggests" the Nation has waived that argument, citing to *Muscogee (Creek) Nation v. Oklahoma Tax Comm'n*, 611 F.3d 1222 (10th Cir. 2010). (Resp. Br. at 10.) In *Nation v. OTC*, however, this Court noted that the Nation (through other counsel) did not raise 68 Okla. Stat. § 226 until its *reply* brief. In this case, the Nation discusses section 226 in the Opening Brief, and the response to the motion to dismiss before the district court certainly preserves the broader issue that the OTC does not enjoy Eleventh Amendment immunity, and, therefore, federal subject matter jurisdiction exists in this case. (*See*

Apx. 167-170.) *Cf. United States v. Orenduff*, 548 F.2d 931, 942 (10th Cir. 2008) (noting that Eleventh Amendment immunity may be raised for first time on appeal, and can also be waived by a state at any time).

**VI. The State impermissibly requires the Nation's wholesale operation to be State-licensed, or to purchase tobacco products from other State-licensed wholesalers**

In pages 36-37 of the Response Brief, the OTC and Attorney General argue that federal courts have upheld state laws that require purchasing tobacco products only from state-licensed wholesalers. This is incorrect. In fact, three of the cases cited by the OTC and Attorney General do not even involve Indian wholesalers. *See Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 507 (1991) (lawsuit against Indian tribe operating retail convenience store); *Keweenaw Bay Indian Community v. Rising*, 477 F.3d 881, 884-885 (6th Cir. 2007) (suit initiated by tribe after seizure of tobacco products shipped to Native American retailers); *United States v. Baker*, 63 F.3d 1478, 1484 (9th Cir. 1995) (noting that defendants are managers of retail smokeshops).

While the fourth case, *Department of Taxation & Finance v. Milhelm Attea & Bros., Inc.*, was brought by Indian wholesalers, those wholesalers were *federally* licensed under the Indian Trader Statutes to transact business on Indian reservations. 512 U.S. 61, 67 (1994). The Supreme Court did not hold that these wholesalers were required to purchase from State-licensed wholesalers or to be State-licensed; rather,

the Supreme Court held that New York's regulations setting a "probable demand" limit on purchases of cigarettes by the wholesalers, and requiring oversight as to those purchases, were not pre-empted "on their face" by the Indian Trader Statutes. *Id.* at 75-76. In this case, by not providing the Nation with the "tax-free stamps" needed to document intra-tribal sales, the OTC is enforcing 68 Okla. Stat. § 349.1 in a way that bars the Nation from operating its wholesale enterprise *at all*.<sup>7</sup>

As for the OTC's argument that the Nation must purchase cigarettes from State-licensed wholesalers, the OTC argues that outside its Indian Country boundaries, "the Nation is subject to laws of general application." (Resp. Br. at 37-38.) The Nation does not quarrel with this proposition. Here, however, the State is prohibiting the Nation's wholesalers from acquiring cigarettes in a transaction that occurs on Nation lands. Moreover, any effort by the OTC to require the Nation's wholesaler to be licensed, and barring the wholesaler from acquiring tobacco products until it is licensed, is a *de facto* State regulation of the Nation within its Indian Country. As noted above, the United States Supreme Court and the Oklahoma Supreme Court both have held that such state action is unconstitutional. *See Moe*, 425 U.S. at 480; *Bruner*, 1991 OK 77, ¶ 13-14, 815 P.2d at 669-70.

---

<sup>7</sup> As discussed in the Opening Brief at 25-26, *Milhelm Attea* states in dicta that Indian wholesalers may sue a state when the state unfairly enforces regulations that are otherwise constitutional and not pre-empted by federal law. 512 U.S. at 75-76.

## **CONCLUSION**

The State's response, like the District Court's decision, is almost exclusively based upon its incorrect reading of the law which asserts that State laws do not impact activities of Nation members and other persons engaging in commerce on the Nation's trust land; and that the State has the unfettered right to regulate cigarette sales within the Nation's trust land. These positions are both incorrect. The Nation has properly stated claims against the State, and the District Court erred in dismissing the complaint. At a very minimum, the Nation must be allowed to amend its complaint.

Dated this 27th day of June, 2011.

Respectfully Submitted,

/s/ Joseph V. Messineo

Conly J. Schulte, NE #20158  
Joseph V. Messineo, NE #21981  
FREDERICKS PEEBLES & MORGAN LLP  
3610 North 163rd Plaza  
Omaha, NE 68116  
Telephone: (402) 333-4053  
Facsimile: (402) 333-4761

/s/Michael A. Simpson

Galen L. Brittingham, OBA #12226  
Michael A. Simpson, OBA #21083  
ATKINSON, HASKINS, NELLIS,  
BRITTINGHAM, GLADD & CARWILE, P.C.  
1500 Park Centre  
525 South Main  
Tulsa, Oklahoma 74103-4524  
Telephone: (918) 582-8877  
Facsimile: (918) 585-8096  
(Signed electronically with permission)

**Counsel for Appellant,  
Muscogee (Creek) Nation**

**Certificate of Compliance**

I hereby certify that (1) this brief complies with the type-volume limitation of Fed. R. App. Proc. 32(a)(7)(B) because this brief contains 3,980 words, excluding the parts of the brief exempted by Fed. R. App. Proc. 32(a)(7)(B)(iii), and (2) this brief complies with the typeface requirements of Fed. R. App. Proc. 32(a)(5) and the type style requirements of Fed. R. App. Proc. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Times New Roman 14-point font.

/s/ Joseph V. Messineo  
Joseph V. Messineo  
Attorney for Appellant

**Certificate of Service**

This is to certify that on this, the 27th day of June 2011, a true, correct, and exact copy of the above and foregoing instrument was sent via ECF to:

Larry Patton, Esq.      [lpatton@tax.ok.gov](mailto:lpatton@tax.ok.gov)

E. Clyde Kirk, Esq.      [Clyde.Kirk@oag.ok.gov](mailto:Clyde.Kirk@oag.ok.gov)

/s/ Joseph V. Messineo  
Joseph V. Messineo  
Attorney for Appellant