UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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 the United States District Court
for the Eastern District of Oklahoma
Honorable James Payne, Presiding
District Court No. 10-CV–019-JHP

RESPONSE BRIEF OF APPELLEES

LARRY D. PATTON, OBA #6963
ASSISTANT GENERAL COUNSEL
Oklahoma Tax Commission
120 N. Robinson, Suite 2000W
Oklahoma City, OK 73102-7801
(405) 319-8538 Fax: (405) 601-7144

ATTORNEY FOR APPELLEES OKLAHOMA TAX COMMISSION AND ITS COMMISSIONERS

E. CLYDE KIRK, OBA #10572
ASSISTANT ATTORNEY GENERAL
313 N.E. 21st Street
Oklahoma City, OK 73105
(405) 521-4274 Fax: (405) 522-4534

ATTORNEY FOR APPELLEE, E. SCOTT PRUITT, OKLAHOMA ATTORNEY GENERAL

JUNE 9, 2011

ORAL ARGUMENT IS NOT REQUESTED

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STATEMENT OF RELATED APPEALS

The Statement of Related Appeals of Appellant, Muscogee (Creek) Nation (hereafter, "the Nation") is accepted, with the correction that the prior appeal involved only searches and seizures by the State *outside* the Indian country of the Nation.

JURISDICTIONAL STATEMENT

The Nation's Jurisdictional Statement is accepted and addressed hereafter.

STATEMENT OF ISSUES

The Nation's Statement of Issues is accepted and addressed hereafter.

STATEMENT OF THE CASE

The Nation's Statement of the Case is accepted.

STATEMENT OF FACTS

The Nation's Statement of Facts contains the Nation's arguments, as well as factual recitations, and, for that reason, cannot be accepted.

The Nation instituted this case, alleging that the Oklahoma Tax Commission and its Commissioners (hereafter, collectively, "OTC") was unlawfully enforcing Oklahoma's cigarette tax code, in particular, 68 O.S. § 349.1 (copy attached). The Nation alleged that "Defendants", which included the Oklahoma's Attorney General (hereafter, "State"), were impermissibly burdening "Indian commerce" by restricting sales of tobacco products in Indian country, enforcing State law

concerning the Master Settlement Agreement (hereafter, "escrow laws"), and restricting sales of tobacco products allegedly manufactured, marketed and sold in the stream of "Indian Commerce", referred to as "Native Manufactured" products (Complaint, ¶ 1, Apx., p. 19).

The Nation is a federally recognized Indian tribe. Its internal laws regulate trade and sales within the Indian country of the Nation, which includes tobacco trade. The Nation licenses wholesalers and retailers to sell tobacco within the Indian country of the Nation (Complaint, ¶ 2, Apx., p. 19).

Oklahoma imposes an excise tax (68 O.S. § 203) on the sale of cigarettes (68 O.S. § 301) which is collected from state-licensed cigarette wholesalers (68 O.S. § 305, copy attached) and passed through to the ultimate consumer, on whom the incidence of the taxes is placed (68 O.S. § 302, copy attached). Oklahoma also imposes an excise tax on the sale of tobacco products (68 O.S. § 402), which is collected from state-licensed tobacco wholesalers (68 O.S. §§ 403 and 403.1) and passed through the ultimate consumer, on whom the incidence of the taxes is placed.

In 2009, the Oklahoma legislature recodified laws concerning taxation of the sale of cigarettes and tobacco products in the Indian country of Indian tribes and nations with which the State did not have a cigarette and tobacco products

Compact (12 O.S. § 349.1). The Nation does not have a cigarette and tobacco products Compact with the State (Complaint, ¶ 80, Apx. 34).

12 O.S. § 349.1 imposes the same rate of cigarette excise tax on the sale of cigarettes to non-tribal members as is generally applicable in Oklahoma (12 O.S. § 349.1.A.). Sales to tribal members are tax exempt (12 O.S. § 349.1.B.), but must bear a tax stamp, evidencing a tax-free sale (12 O.S. § 349.1.C.). A determination of the probable demand of each non-compacting tribe or nation for stamps for tax-free cigarettes is required (12 O.S. § 349.1. C.1.).

Probable demand is calculated by determining total Oklahoma resident membership of a tribe or nation and multiplying that number by the percentage of smokers in Oklahoma or the US, whichever is greater. That calculation is then multiplied by the average yearly consumption of cigarettes by of smokers in Oklahoma or the US, whichever is greater. The resulting number is deemed to constitute the probable demand for tax-free stamps (12 O.S. § 349.1.C.1.). This preliminary determination is furnished to the tribe or nation which may submit verifiable information regarding probable demand (12 O.S. § 349.1.C.2.). After considering all verifiable information furnished by a tribe or nation, a final determination of probable demand is made and furnished the tribe or nation and all Oklahoma-licensed cigarette wholesalers (12 O.S. § 349.1.C.3.). Specific

procedures regarding determination of probable demand, including hearing and appeal rights, were adopted at Oklahoma Administrative Code (OAC) 710: 70-7-10 (copy attached).

Statutory definitions were also recodified at 68 O.S. § 348 (copy attached), including definitions for contraband and unstamped cigarettes.

The Nation was notified of the initial determination of its probable demand, its rights regarding same, and the time within which such rights could be exercised (Exhibit "B-1", Apx. 97-107). The Nation did not protest the determination, and provided an allocation of its probable demand among Oklahoma licensed wholesalers doing business with the Nation (Exhibits "B-2 and 3", Apx. 109-115).

The Nation requested that it receive all tax-free stamps for sales to its tribal members, which was refused, because neither the Nation or its tribally owned wholesaler were Oklahoma-licensed wholesalers(Exhibit "B-3", Apx. 113).

The Nation claims that the OTC and State have no authority to tax the sale of tobacco products manufactured, marketed and sold exclusively in "Indian commerce", whether to tribal members or non-members. The Nation further claims the State has no authority to require "Native Manufactured" Tobacco products to carry a State tax stamp or a State tax-free stamp (Complaint, ¶ 51, Apx. 28). The Nation concedes that all cigarettes sold by State licensed wholesalers

must bear a State tax stamp or tax-free stamp. And, all cigarettes sold in Oklahoma must be manufactured by manufacturers which are in compliance with the State's escrow laws. These laws, the Nation concedes, effectively ban the sale of "Native Manufactured" cigarettes from sale in Indian country (because the cigarettes do not bear State tax stamps, and the manufacturer is not in compliance with the State's escrow laws) (Complaint, ¶ 85, Apx. 34-35). The Nation intends to continue such commerce (Complaint, ¶ 15, Apx. 22).

The OTC and State have taken enforcement actions, including seizures of inventory which does not bear an Oklahoma tax stamp (Complaint, ¶ 88, Apx. 35). These enforcement actions have caused the Nation to "temporarily suspend" distribution of "Native Manufactured" cigarettes (Complaint, ¶ 91, Apx. 36).

This is the second attempt by the Nation to obtain relief from the enforcement of Oklahoma's cigarette tax and escrow laws. The first attempt ended in dismissal of the Nation's Complaint, affirmed by this Court in *Muscogee (Creek) Nation vs. Irby, et al.,* 611 F.3d 1222 (10th Cir. 2010). The trial Court's denial of a requested preliminary injunction against enforcement of the State's cigarette tax and escrow laws in this case was appealed, but that appeal was withdrawn.

SUMMARY OF ARGUMENT

There is no jurisdiction of the OTC pursuant to 28 USC § 1362. The Nation claims the OTC has waived its 11th Amendment immunity by virtue of 68 O.S. § 226 (copy attached). There is no waiver, because the Nation did not comply with the statute's predicate requirement of payment of tax in controversy. The OTC's 11th Amendment immunity prevails, and 28 USC § 1362 does not confer jurisdiction, because taxation does not take place *within* the Indian country of the Nation.

There is no jurisdiction of the OTC's Commissioners or the Attorney General pursuant to *Ex Parte Young*. There is no jurisdiction of the OTC's Commissioners or the Attorney General because the Complaint fails to set forth a plausible claim of violation of federal law.

Controlling Supreme Court and 10th Circuit precedent have already "weighed the interests", validating Oklahoma's cigarette excise tax laws. The Nation claims the trial Court was obliged to "weigh the interests" regarding the application of Oklahoma's cigarette excise tax laws to sales of cigarettes within the Indian country of the Nation to non-tribal members. Such a "weighing of interest" has been precedentially established by Supreme Court decisions 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), *Washington, et al. vs. Confederated Tribes, Colville Indian Reservation,* ("*Colville*") 447 US 134, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980) and *Oklahoma Tax Commission vs. Citizen Band Potawatomi, etc.,* 498 US 505, 512-514, 111 S.Ct. 905, 911 112 L.Ed.2d 1112 (1991). This Circuit acknowledges the enforceability of Oklahoma's cigarette excise tax laws within the Indian country of the Nation, *Muscogee (Creek) Nation vs. Oklahoma Tax Commission*, 611 F.3d 1222, 1237 (10th Cir. 2010).

The "*Bracker*" interest balancing test does not apply in this case. The "*Bracker"* interest balancing test is only applied in cases involving taxation of non-Indians for activities taking place on Indian country, *Wagnon vs. Prairie Band Potawatomi Nation,* 546 US 95, 126 S.Ct. 676, 163 L.Ed.2d 429 (2006) and *Prairie Band Potawatomi Nation vs. Wagnon, et al.*, 476 F.3d 818, 823 (10th Cir. 2007). Neither the Escrow Statute or Master Settlement Agreement Complementary Act ("MSACA") impose a tax. Any financial obligation imposed by the Escrow Statute or the MSACA arise as the result of off-reservation activities and fall upon a third-party and not the Nation.

The "Indian Trader Act" does not apply in this case. The "Indian Trader Act", regarding on-reservation trading with Indians, does not apply in this case because there is no showing of the involvement of an Indian trader, and because

the Nation's reservation was this established long ago. Even assuming, *arguendo*, that the Act might apply, *Department of Taxation, etc. vs. Milhelm Attea & Bros.*, 512 US 61, 114 S.Ct. 2028, 129 L.Ed.2d 52 (1994) has already determined that the Act is not violated by cigarette tax laws comparable to Oklahoma's. Moreover, the "Indian Trader" Act does not apply to the Escrow Statute and MSACA as neither apply a tax, and all financial obligations are placed upon third parties, upstream from the Nation. See Wagnon, 546 U.S. at 99-105); The Escrow Statute and MSACA do not regulate the "kind" of goods the nation can purchase and sell to Tribal members, they only regulate cigarettes destined for sale to non-tribal members. No sovereign interest is implicated when the Nation sells products to non-tribal members. See Rice v. Rehner, 463 U.S. 713 at 720, 720 fn.7, and 721 (1983). The "Indian Trader Act" does not grant tribal members selling to non-tribal members the artificial competitive advantage the Nation seeks over other businesses and Tribes selling cigarettes in the State. See Colville, 447 U.S. at 155).

Oklahoma's cigarette tax laws follow of the New York laws approved in the Supreme Court *Milhelm* decision. The Oklahoma law laws in issue, especially as to determination of probable demand for tax-free sales to tribal members, follow the New York laws approved by the decision of *Department of*

Taxation, etc. vs. Milhelm Attea & Bros., 512 US 61, 114 S.Ct. 2028, 129 L.Ed.2d 52 (1994) and also the Washington laws approved in *US vs. Baker*, 63 F.3d 1478 (9th Cir. 1995), cert. den., 516 US 1079, 116 S. Ct. 824, 133 L.Ed.2d 767.

The Nation cannot project its limited sovereignty rights outside of its Indian country to interfere with or preempt Oklahoma tax laws. Ruling Supreme Court precedent establishes that Indian tribes and nations assess only aspects of sovereignty, as to what is necessary to protect tribal self-government or controlled internal relations. Matters which bear no clear relationship to those limited aspects are beyond the powers of a tribe. Supreme Court precedent further establishes that, outside of Indian country, Indians are generally subject to a nondiscriminatory state laws otherwise applicable to all citizens of the state, including a state's tax laws. Ruling precedent validates those aspects of Oklahoma's tax laws challenged by the Nation, as not violating tribal sovereignty rights. And, enforcement of Oklahoma's laws takes place outside Indian country of the Nation.

ARGUMENT

I. THE OTC HAS NOT, BY STATUTE, WAIVED ITS IMMUNITY.

The Nation, as it unsuccessfully attempted in *Muscogee (Creek) Nation vs.*

Oklahoma Tax Commission, 611 F.3d 1222 (10th Cir. 2010) ("*Muscogee I")*, suggests that the OTC has waived its statutory immunity, pursuant to the provisions of 68 O.S. § 226. In *Muscogee I*, Nation raised the argument for the first time in its Reply Brief, which the Court rightly refused to consider, *id*, 1228, fn 3. Here, the argument is not raised in the Nation's Response to the Motions to Dismiss of the OTC and its Commissioners, nor in Nation's written closing argument. This suggests the argument should not be considered, for reasons set forth in *Muscogee I*.

Assuming, arguendo, that the argument were properly raised, it is without merit. 68 O.S. § 226 does indeed create a litigative remedy for taxpayers to challenge the state tax law. But, to avail themselves of the remedy, the taxpayer is required to pay any tax in the issue to the OTC and, at time of payment, give notice of intention to file suit for the recovery of the tax, 68 O.S. § 226(b). Only when the taxpayer has complied with the predicate requirements of payment of taxes in issue and notice of suit is there a legal remedy under 68 O.S. § 226(c), *Stallings vs. Oklahoma Tax Commission*, 1994 OK 99, ¶¶ 6-10, 880 P.2d 912, 915-916. Nation's Complaint alleges neither payment of tax nor notice of suit. There is no statutory waiver of the OTC's immunity.

II. THERE IS NO JURISDICTION OF THE OTC PURSUANT TO 28 USC § 1362.

The trial Court properly ruled there was no jurisdiction of the OTC pursuant to 28 USC § 1362. The Nation suggests that this Court's decision in *Muscogee I*, *Muscogee (Creek) Nation vs. Oklahoma Tax Commission*, 611 F.3d 1222 (10th Cir. 2010) is determinative of the issue. *Muscogee I*'s opinion thoroughly discussed decisions regarding jurisdiction pursuant to § 1362, *id,* 1228-1230, concluding that the Nation's Complaint in that case did not invoke § 1362 jurisdiction, because it not seek to enjoin state taxation "within the tribe's territorial boundaries", *id*, 1230-1232.

Now, we inquire: Where in the Nation's 34 page Complaint is it effectively alleged that the State is taxing *within* the Nation's Indian country? Where in those 34 pages is it effectively alleged that State laws impose any obligation within Indian country outside those obligations already approved by ruling Supreme Court precedent?

The taxes in question are imposed upon non-tribal members. Cigarettes sold to tribal members are tax-free. The tax imposed is paid by wholesalers outside the Nation's Indian country. No tax is imposed on the Nation or its members residing within its Indian country. The laws require no actions by the Nation or its retailers to assist in the collection of taxes or maintain records in support thereof, unlike the

requirements imposed directly upon tribes and tribal retailers in *Moe* and *Colville*. Complaints which contain no more than "labels and conclusions" or "formulaic recitation of the elements of a cause of action", "will not do", *Robbins, et al. vs. Oklahoma, et al.*, 519 F.3d 1242, 1247 (10th Cir. 2008). The Court need not accept unsupported conclusory allegations, *Muscogee (Creek) Nation vs. Oklahoma Tax Commission*, 611 F.3d 1222, 1227 (10th Cir. 2010). Once again, the Nation fails to invoke jurisdiction of the OTC pursuant to 28 USC § 1362.

III. THERE IS NO JURISDICTION OF THE COMMISSIONERS OF THE OTC PURSUANT TO EX PARTE YOUNG.

The Nation suggests that the trial Court erred by evaluating the merits of its alleged claims for relief for purposes of determining whether *Ex Parte Young* jurisdiction existed over the OTC's Commissioners. In particular, the Nation *assumes* that the "straightforward inquiry" required by *Verizon, etc. vs. Public Service Commission, etc.*, 535 US 635,, 645, 122 S.Ct. 1753, 1760, 152 L.Ed.2d 871 (2002) was not followed in the decision of *Yakama Indian Nation vs. State of Washington, etc.*, 176 F.3d 1241 (9th Cir. 1999), cert. den. 528 US 1116, 120 S.Ct. 935, 145 L.Ed.2d 813 (2000). The Nation is incorrect. The *Yakama* decision as to whether a plaintiff was seeking prospective relief to enjoin a state officer's ongoing violation of federal law specifically cites to Justice O'Connor's concurrence in

Idaho vs. Coeur d'Alene, etc., 521 US 261, 117 S.Ct. 2028, 138 L.Ed.2d 438 (1997), which was adopted in the *Verizon* decision, *Yakama, supra,* 1246. The *Yakama* Court determined, as did the trial Court in this case, that the Complaint did not state an ongoing violation of federal law, *id*, 1248.

What the Nation would have a court to do, when making the "straightforward inquiry" as to *Ex Parte Young* applicability, is ignore the most recent pronouncements of the Supreme Court regarding the sufficiency of pleadings and plausibility, accepting naked legal conclusions as sufficient. That cannot be the rule. The Court is not required to accept unsupported conclusory allegations, *Muscogee (Creek) Nation vs. Oklahoma Tax Commission, et al.*, 611 F.3d 1222, 1227 (10th Cir. 2010). A claim must be "plausible on its face", *id*, 1236, citing and relying upon *Ashcroft vs. Iqbal*, -US-, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009); this is the standard of pleading in all civil actions in United States District Courts, *Ashcroft, supra*, 1953. The Nation's Complaint failed to measure up to that pleading standard, resulting in dismissal of the OTC's Commissioners as not within *Ex Parte Young*, for failing to state a plausible claim of continuing violation of federal law by the OTC's Commissioners. And, alternatively, those claims of violation of federal law were dismissed for failure to

state a plausible claim (Apx. 408). *Ex Parte Young* jurisdiction was not plausibly pled.

IV. THE NATION'S COMPLAINT FAILED TO STATE A *PLAUSIBLE* CLAIM UPON WHICH RELIEF COULD BE GRANTED

A. THE NATION HAS ABANDONED MANY OF ITS CLAIMS.

The Nation's claims in its 34 page Complaint have been a moving target. Comparing the Complaint to the Nation's Brief herein, the Nation has now abandoned its claims for: deprivation of due process (First Claim); equal protection (Second Claim); Indian Commerce Clause (Fourth Claim), the revised Food, Drug and Cosmetic Act and the Native American Business Development Trade and Promotion Act (Fourth Claim); and relief sought in a Parens Patriae capacity (Sixth Claim).

The Nation presents and argues only preemption pursuant to the Indian Trader Act (Nation's Brief, Proposition II.C., pp. 29-37, claiming the preemption of Oklahoma's Escrow Statute and Complementary Act in Indian Country [Third Claim]) and Tribal Sovereignty (Nation's Brief, Proposition II.B., pp. 20-29 Fifth Claim]).

B. OKLAHOMA'S CIGARETTE EXCISE TAX LAWS ARE VALIDATED BY CONTROLLING SUPREME COURT AND 10TH CIRCUIT PRECEDENT REGARDING

"WEIGHING" STATE VERSUS TRIBAL SOVEREIGNTY INTERESTS TO ENSURE THE STATE USES "MINIMAL BURDENS" TO COLLECT AND ENFORCE ITS LAWFUL TAXES.

The Nation proceeds from the erroneous assumption that the Court below was required to "weigh the state's sovereign interests versus the Indian tribe's sovereign interests to ensure the state uses "minimal burdens" to collect and enforce that tax". This faulty theory ignores ruling precedent.

The Oklahoma cigarette tax is an excise tax, 68 O.S. § 203. It is lawfully imposed upon performance of an act or enjoyment of a privilege within Oklahoma, *Scott-Rice Company vs. Oklahoma Tax Commission*, 1972 OK 75, ¶ 14, 503 P.2d 208. The obligation to pay the tax is based upon voluntary action of the person taxed, *In re: City of Enid*, 1945 OK 135, ¶ 12-19, 158 P.2d 348. The impact of the tax is upon the consumer, 68 O.S. § 302 and evidenced by the affixing of a stamp by wholesalers, proving payment of the tax, 68 O.S. § 305.

The decision of *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) ("*Moe*") held that state laws, requiring tribal retailers to collect taxes on sales of cigarettes on Indian country to non-Indians and maintain records regarding such sales, did not frustrate tribal self-government, or run afoul of any congressional enactment dealing with the affairs of reservation Indians. *Moe* established a State's right to tax sales of

cigarettes to non-Indian purchasers, even though those sales occurred on an Indian reservation, *Moe, supra*, 483, 1646. Even though collection and record keeping duties were imposed upon Indian retailers upon their tribal reservation, taxation of on-reservation transactions was approved. In this case, by statute, collection and record-keeping duties are imposed upon Oklahoma-licensed wholesalers, outside of the Indian country of their tribal retailer customers.

In *Washington, et al. vs. Confederated Tribes, Colville Indian Reservation,* ("*Colville*") 447 US 134, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980), the imposition of cigarette excise taxes and sales taxes on sales made to non-tribal members on the Tribes' Indian country was at issue. 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 argument the Court characterized as "economic". But, the Court looked to the heart of the matter and held:

"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).

The Court specifically held that the state's taxation of sales to non-tribal members did not infringe on the right of reservation Indians to make their own laws and be ruled by them, simply because imposition of taxes might deprive the tribes of revenues which they were currently receiving. In *Colville,* Washington, like Oklahoma, enforced its cigarette excise tax with tax stamps, and dealers were required to sell only cigarettes to which the tax stamp was affixed. Tribes were permitted to possess unstamped cigarettes for resale to tribal members, but required by regulation to collect the tax with respect to sales to non-tribal members, *Colville, supra,* 141-142, 2075. *Colville* established the right to state taxation of on- reservation sales to non-tribal member Native Americans, expanding the scope of permissible on-reservation taxation and regulation established by *Moe.* Again, even though collection and record keeping duties were imposed upon Indian retailers upon their tribal reservation, taxation of on-reservation transactions was approved. In this case, by statute, collection and record-keeping duties are

imposed upon Oklahoma-licensed wholesalers, outside of the Indian country of their tribal retailer customers.

In *Oklahoma Tax Commission vs. Citizen Band Potawatomi, etc.,* 498 US 505, 512-514, 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. And, the Supreme Court held, despite tribal sovereign immunity, the State could collect the tax from cigarette wholesalers, *id*, 514, 912. Oklahoma collects the tax from cigarette wholesalers, 68 O.S. § 302, which is passed through to the ultimate consumer on whom the incidence of the tax is placed.

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.

The balancing of interests for which the Nation argues has been precedentially established by ruling Supreme Court decisions, and this Court has followed such precedent, 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), that, even if the property in dispute were Indian country, Oklahoma could require the Tribe to collect taxes on cigarette sales to non-tribal members. Recently, in *Muscogee (Creek) Nation vs. Oklahoma Tax Commission*, 611 F.3d 1222, 1237 (10th Cir. 2010), this Court characterized Oklahoma's tax collection and remittance obligations as being validly imposed on the Nation.

There was no further "balancing of interests" by the trial Court required. Ruling precedent is that tax collection and remittance obligations are validly imposed, even upon Tribes and their members, with reference to sales on a Tribe's Indian country to nonmembers. And, as to tribal members, sales are tax-free, but required to be evidenced by an appropriate stamp, as discussed hereafter.

The Nation's claim to enjoin state taxation was facially insufficient. The mere assertion of a claim does not render that claim valid. Under ruling precedent, the asserted claim lacked both specificity and validity. A Complaint must give the court reason to believe that the Plaintiff has reasonable likelihood of mustering factual support for their claims, *Robbins, et al. vs. Oklahoma, et al.*, 519 F.3d 1242, 1247 (10th Cir. 2008). Complaints which contain no more than "labels and conclusions" or "formulaic recitation of the elements of a cause of action", said the Court, "will not do", *Robbins, supra,* 1247. The Court need not accept unsupported conclusory allegations, *Muscogee (Creek) Nation vs. Oklahoma Tax Commission*, 611 F.3d 1222, 1227 (10th Cir. 2010). Given ruling and applicable law, the Nation's Complaint failed to set forth any claim which was "plausible on its face", *id*, 1236. To nudge claims across the line from conceivable to plausible, the Nation had to allege facts sufficient to show that Defendants *plausibly violated*

clearly established constitutional rights, *Robbins, supra,* 1249. This, the Nation failed to do, requiring dismissal.

C. THE NATION MISCONSTRUES AND MISAPPLIES RULING SUPREME COURT PRECEDENT REGARDING THE *BRACKER* "INTEREST BALANCING" TEST.

The Nation claims the trial court erred in failing to "balance the interests" of taxation of non-members within the Nation's Indian country, supposing that the "interest balancing" requirement of *White Mountain Apache Tribe, et al. vs. Bracker, et al.*, 448 US 136, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980) (*"Bracker"*) applies to this case. The Nation is wrong. *Bracker* involved Arizona's effort to tax a non-Indian engaged in commerce on an Indian reservation, *id*, 138, 2581. The decision reminds us that there are two barriers to the assertion of state regulatory authority over *tribal reservations and members*: First, exercise of such authority may be preempted by federal law; or, Second, assertion of authority may unlawfully infringe "on the right of reservation Indians to make their own laws and be ruled by them", *id*, 142, 2583. As to the first barrier, the decision cites to *Moe vs. Salish & Kootenai Tribes,* 425 US 463, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976) ("Moe") as informing a determination whether the exercise of state authority over *the reservation and tribal members* has been preempted by operation of federal law, *id,* 143, 2583.

The decision then addressed the "unlawful infringement" issue: the authority of a State over conduct of non-Indians engaging in activity on the reservation, *id,* 144, 2584. It is as to this issue that the "particularized inquiry into the nature of the state, federal and tribal interests at stake... designed to determine whether, in the specific context, the exercise of state authority would violate federal law", the *Bracker* "interest balancing" test, was formulated and applies, *id,* 145, 2584.

In *Wagnon vs. Prairie Band Potawatomi Nation,* 546 US 95, 126 S.Ct. 676, 163 L.Ed.2d 429 (2005) ("*Wagnon*") at issue was this Circuit's conclusion that the *Bracker* "interest balancing" test applied to Kansas' attempt to impose a fuel tax on non-Indian distributors, based on those distributors' off reservation receipt of motor fuel, *id*, 110,686. The *Wagnon* decision observed that the Supreme Court had applied the balancing test only where *the legal incidence of a tax* fell on a non-tribal entity engaged in a transaction with tribes or tribal members. *Wagnon* held that the *Bracker* "interest balancing" test is to be applied *exclusively* to *on reservation* transactions between a non-tribal entity and a tribe or tribal member, *id*, 686-110-112, 688. The rule is different when a State asserts its taxing authority outside of Indian country. The decision concludes: If a State may apply a nondiscriminatory tax to Indians who have gone beyond the boundaries of the reservation, it follows it may apply a nondiscriminatory tax where the tax is

imposed on non-Indians as result of an off reservation transaction, and the *Bracker* "interest balancing" test is inapplicable, *id*, 112-113 688.

Interestingly, the Tribe argued, in *Wagnon,* that any off-reservation tax imposed on the manufacture or sale of any good imported by the Nation or one of its members would be subject to interest balancing. The decision rejected the argument, holding "Such an expansion of the application of the *Bracker* test is not supported by our [the Supreme Court's] cases", *id*, 114, 688. This is exactly what the Nation claims in this case. The US Supreme Court has already said no.

This Circuit has recognized that, despite its reliance on the *Bracker* interest balancing test in decisions prior to *Wagnon,* the test's use must be limited to instances in which a State exercises authority over the conduct of non-Indians engaging in activity on the reservation, *Prairie Band Potawatomi Nation vs. Wagnon, et al.*, 476 F.3d 818, 823 (10th Cir. 2007).

The Nation's reliance upon *Department of Taxation, etc. vs. Milhelm Attea & Bros.*, 512 US 61, 114 S.Ct. 2028, 129 L.Ed.2d 52 (1994) ("*Milhelm*"), decided 11 years before *Wagnon*, is also misplaced. The respondents were licensed "Indian traders", who sold cigarettes to reservation Indians, *id*, 67, 2032. New York enacted a regulatory system, imposing record keeping requirements and quantity limitations on cigarette wholesalers who sold untaxed cigarettes to reservation

Indians. Thus, application of the *Bracker* "interest balancing" test to determine whether the New York regulatory system violated federal law (the Indian Trader Act) was appropriate. Here, tax is imposed on consumers of cigarettes, and the duty to collect and remit that tax placed upon wholesalers, as a result of an off-Indian country transaction, and, not only is the *Bracker* test inapplicable, imposition of such a tax is sanctioned by ruling Supreme Court precedent, *Wagnon*, *supra*, 113, 688.

The Nation suggests that an analogous situation was addressed in the decision of *Sac & Fox Nation, etc. vs. Pierce*, 213 F.3d 566 (10th Cir. 2000) ("*Pierce*") which was issued five years before *Wagnon*. Factually, the differences are significant. The wholesalers on which the Kansas tax was imposed were Indian traders, *id*, 581, fn 11. The wholesalers sold fuel to retail gasoline stations, located on tribal land, owned and operated by the Tribes, *id*, 569. The Tribes contended: (1) federal law preempted the motor fuel tax; (2) the motor fuel tax did not apply to fuel distributed to the tribes; and, (3) imposing motor fuel tax on the Tribes could irreparably harm their economic viability, *id*, 570-571.

As to the Indian Trader Act, *Pierce* concluded the Kansas motor fuel laws, imposed a non-discriminatory tax on all wholesale fuel distributors for fuel distribution to retailers within the state, and the tax was not imposed upon traders

for trading with Indians, or contrary to any comprehensive federal regulatory scheme, were not preempted by the Indian Trader Act, citing to *Milhelm* and *Mescalero Apache Tribe vs. O'Cheskey*, 625 F.2d 967 (10th Cir. 1980) (en banc).

Pierce remanded the case to the trial court for a "balancing" under the "balancing of interests" test of *Oklahoma Tax Commission vs. Chickasaw Nation*, 515 US 450, 115 S.Ct. 2214, 132 L.Ed.2d 400 (1995) ("*Chickasaw*") which references prior Supreme Court decisions in which interests were balanced, *id*, 458, 2220. But the *Chickasaw* Court did not employ the "balancing test" as to the motor fuel taxes in question. It looked, instead, to the issue of where the incidence of the tax fell, which was on the tribal retailer, *id*, 461-462, 2221-2222, which made the motor fuel tax fall within the rule: Absent cession of jurisdiction or federal statutes permitting, a State is without power to tax reservation lands and reservation Indians, *id*, 458, 2220.

Pierce concluded that the incidence of the motor fuel tax was upon the distributors, not the tribally owned gasoline retailers, *id*, 580. The appeal was from sustension of summary judgment in favor of the Tribes, and entry of a permanent injunction against the State from enforcing its motor vehicle tax, *id*, 570. Its reversal for "balancing" (especially five years before the *Wagnon* decision) can be distinguished and attributed to the fact that the summary judgment included a

"balancing" on a record deemed by *Pierce* to be insufficient and overlooking Supreme Court precedent, *id*, 583. Here, "balancing" has already taken place, by prior Supreme Court precedent, which the trial Court recognized and applied.

D. THE INDIAN TRADER ACT IS NEITHER PERTINENT TO THIS CASE, NOR VIOLATED BY OKLAHOMA'S CIGARETTE TAX LAWS

The Nation argues that the Indian Trader Act, 25 USC §§ 261-264, is violated by the Oklahoma's cigarette excise tax laws. However, as the Nation concedes, the 34 page Complaint is silent as to (1) whether any federally licensed Indian trader is involved and (2) whether any federally licensed Indian trader is doing business in the Nation's Indian country (Nation's Brief, p. 29). The Nation claims that Act has been violated, but it has failed to plead HOW the Act was violated. Does the Complaint state a plausible claim for relief? It does not.

The Nation argues that a licensed trader need not be involved to trigger the Act's application. But, the cases cited to support this contention are inapplicable. US, etc. vs. *One 1976 Chevrolet Station Wagon*, 585 F.2d 978, 980-981 (10th Cir. 1978) involved the US seeking a monetary penalty and forfeiture for the transaction of business on an Indian reservation by one not licensed as an Indian trader. *Central Machinery Co. vs. Arizona State Tax Commission*, 448 US 160, 164-166, 100 S.Ct. 2592, 2595-2596, 65 L.Ed.2d 684 (1980) involved an Arizona

"privilege" tax on persons doing business within the state, which was imposed on a non-licensed Indian trader doing business on a reservation. The Complaint is bereft of any allegation that the Oklahoma tax is imposed on a party for doing business on an Indian reservation. There is no plausible claim which invokes the Act and requires a determination of whether Oklahoma's laws conflict with the Act.

Assuming, *arguendo,* that the Indian Trader Act applies, a determination of the validity of state statutes very similar to Oklahoma's has already been made in the decision of *Department of Taxation, etc., New York vs. Milhelm Attea & Brothers*, 512 US 61, 114 S.Ct. 2028, 129 L.Ed.2d 52 (1994) ("*Milhelm*"). New York, like Oklahoma, imposed a cigarette excise tax on the sale of cigarettes on Indian reservations to non-tribal members, collected by licensed agents (in Oklahoma, wholesalers) who purchase and affix tax stamps to cigarette packs in advance of first sale, the incidence of which is upon the consumer, *id*, 64, 2031. The Respondents were licensed Indian traders who were wholesalers of cigarettes to reservation Indians, *id*, 67, 2032. Respondents claimed that the New York tax laws interfered with their federally protected activities as Indian traders, *id*, 69, 2033.

Since a specific federal statute was involved, the Supreme Court applied the *Bracker* "balancing test", *id*, 73, 2035. The Supreme Court concluded that

precedent preempting taxes, *directly imposed on Indian traders for trading with Indians*, did not apply to tax laws 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, *id*, 74-75, 2036.

The *Milhelm* Respondents, like the Nation, objected to the limitation of the amount of tax-exempt cigarettes which could be sold, pursuant to a "probable demand" mechanism, very similar to Oklahoma's. The Court rejected that argument, finding a legitimate interest in avoiding tax evasion by non-Indian consumers, and concluding that imposing a quote on tax-free cigarettes does not dictate "the kind and quantity of goods and the prices at which such goods shall be sold to the Indians", *id*, 75, 2036. The Court properly refused to speculate as to the possibility of inadequate quotas, that the legitimate demand for tax exempt cigarettes would be underestimated, rejecting this facial attack on the statutes, *id*, 75-76, 2036-2037. The Court specifically found that record keeping requirements and eligible buyer restrictions were no more demanding than comparable measures approved in *Colville*, *id*, 76, 2037.

Even assuming, arguendo, that the Indian Trader Act applies, ruling Supreme Court precedent has balanced the interests and found acts, such as Oklahoma's, do not intrude upon the Indian Trader Act.

Finally, one might practically question whether the Indian Traders Act applies at all, since 25 USC § 262 applies to "Any person desiring to trade with the Indians on any Indian reservation ", and the Muscogee "reservation" was disestablished long ago, *Murphy vs. Sirmons*, 497 F.Supp.2d 1257, 1290 (E.D. OK 2007).

E. OKLAHOMA'S TOBACCO LAWS FOLLOW THE NEW YORK LAWS APPROVED BY THE SUPREME COURT IN *MILHELM*.

Oklahoma's laws, summarized in the Statement of Facts, are necessarily repeated for purposes of this discussion. 12 O.S. §§ 349.1, et seq., imposes the same rate of cigarette excise tax on the sale of cigarettes to non-tribal members as is generally applicable in Oklahoma (12 O.S. § 349.1.A.). Per ruling Supreme Court precedent, sales to tribal members are tax exempt (12 O.S. § 349.1.B.), but must bear a tax stamp, evidencing a tax-free sale (12 O.S. § 349.1.C.). Following the lead of New York and Washington States, to guard against sale of tax free cigarettes to other than tribal members, a determination of the probable demand for stamps for tax-free cigarettes is required (12 O.S. § 349.1. C.1.).

Probable demand is calculated by determining total Oklahoma resident membership of a tribe or nation and multiplying that number by the percentage of smokers in Oklahoma or the US, *whichever is greater.* That calculation is then multiplied by the average yearly consumption of cigarettes by of smokers in Oklahoma or the US, *whichever is greater*. The resulting number is deemed to constitute the probable demand for tax-free stamps (12 O.S. § 349.1.C.1.). This preliminary determination is furnished to the tribe or nation which may submit verifiable information regarding probable demand (12 O.S. § 349.1.C.2.). After considering all verifiable information furnished by a tribe or nation a final determination of probable demand is made and furnished the tribe or nation and all Oklahoma-licensed cigarette wholesalers (12 O.S. § 349.1.C.3.). Specific procedures regarding determination of probable demand, including hearing and appeal rights, were adopted at Oklahoma Administrative Code (OAC) 710: 70-7-10.

Collective Exhibit "B" to OTC's Motion to Dismiss demonstrates, from public records, that the Nation was notified of the initial determination of its probable demand, its rights regarding same, and the time within which such rights could be exercised (Exhibit "B-1", Apx. 97-107). The Nation did not protest the determination, and provided an allocation of its probable demand among

Oklahoma licensed wholesalers doing business with the Nation (Exhibits "B-2 and 3", Apx. 109-115).

Oklahoma-licensed wholesalers are entitled to receive allocations of tax-free stamps on a quarterly basis. If the quarterly share proves insufficient, the wholesaler and/or tribe or nation may submit verifiable information for consideration and determination by the OTC on a case-by-case basis (12 O.S. § 349.1.C.5.). The Nation neglects to mention this.

Oklahoma's law not only closely tracks the *Milhelm*-approved New York system, but also the Washington State system approved in *US vs. Baker*, 63 F.3d 1478 (9th Cir. 1995), cert. den., 516 US 1079, 116 S. Ct. 824, 133 L.Ed.2d 767. Washington allowed tribal members to purchase tax-free unstamped cigarettes on the reservation, but limited the quantity of unstamped cigarettes that could be delivered to the reservations, which was to be determined by probable demand, computed either by multiplying tribal population by a national average cigarette consumption per capita, or employing statistical evidence furnished by tribal vendors, *id*, 1486. Washington, like Oklahoma, collects tax from suppliers/wholesalers, which are required to purchase and affix tax stamps for all sales, other than to tribal members, *id*, 1486; such a tax law is less burdensome than the law approved in *Colville*, as the regulatory program and administration is accomplished off-reservation (like

Oklahoma's), *id*, 1489. *Baker* approved Washington law as consistent with *Milhelm, id,* 1490.

In fact, Oklahoma's law is less burdensome than New York's *Milhelm*-approved law, which required purchasers of untaxed cigarettes to provide valid exemption certificates and maintenance of detailed records on tax-exempt transactions by wholesalers, which the Supreme Court found no more demanding than comparable measures approved in *Colville*, see *Department of Taxation, etc. vs. Milhelm, etc.*, 512 US 61, 76, 114 S.Ct. 2028, 2037, 129 L.Ed.2d 52 (1994). New York, like Oklahoma and Washington, determined probable demand either upon evidence submitted by the tribe or multiplying New York average consumption per capita by the number of enrolled members of the tribe, *id*, 66, 2032. In New York, like Oklahoma and Washington, requires wholesale distributors of tax exempt cigarettes to hold state licenses authorizing them to purchase and affix state cigarettes stamps and must collect taxes on nonexempt sales, *id*, 67, 2032.

Oklahoma's provisions for hearing and appeal rights on probable demand determinations, and for adjustment of those determinations, appear to be unique and more favorable to affected tribes and nations, furnishing rights and remedies apparently not available in approved New York and Washington laws. Likewise, Oklahoma's provisions for use of US cigarette consumption information in

determination of probable demand, if greater than Oklahoma's, also appear to be unique and more favorable to affected tribes and nations than the approved New York and Washington laws.

Oklahoma's statutory enforcement scheme is consistent with and patterned upon controlling Supreme Court authority. The Nation fails to state a plausible claim to the contrary.

F. THE NATION CANNOT PROJECT ITS LIMITED SOVEREIGNTY RIGHTS OUTSIDE ITS INDIAN COUNTRY TO INTERFERE WITH OR PREEMPT OKLAHOMA TAX LAWS.

1. TRIBAL SOVEREIGNTY IS LIMITED.

A claim of violation of tribal sovereignty can only be assessed upon a prior determination of the limitation and extent of that limited sovereignty. *US vs. Wheeler,* 435 US 313, 323, 98 S. Ct. 1079, 1086, 55 L.Ed.2d 303 (1978), citing prior precedent, reminds us that Indian tribes are no longer possessed of "the full attributes of sovereignty". The sovereignty which tribes retain is both unique and limited, existing only at the sufferance of Congress and subject to complete defeasance. *Wheeler* held that tribes possess only those aspects of sovereignty not withdrawn by treaty or statute, or by implication, as a necessary result of their dependent status. *US vs. Montana,* 450 US 544, 564, 101 S.Ct. 1245, 1257-1258, 67 L.Ed.2d 493 (1981) held that *exercise of tribal power beyond what is necessary*

to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes and cannot survive, without "express congressional delegation". Based upon ruling precedent, the Supreme Court concluded that matters which bore no clear relationship to tribal self-government or internal relations were *beyond* powers consistent with a tribe's diminished status as a sovereign, *supra*, 565-566, 1258. See, also, *Nevada v. Hicks,* 533 US 353, 358, 121 S.Ct. 2304, 2309-2310, 150 L.Ed.2d 398 (2001)

Recognizing ruling precedent, this Court has held that no Indian tribe can unilaterally create sovereign rights in itself which do not otherwise exist, *Kansas vs. US,* 249 F.3d 1213, 1229 (10th Cir. 2001).

This Court has stated that it has long been recognized Indian tribes no longer possess full attributes of sovereignty, but are unique aggregations possessing attributes of sovereignty over both their *members and their territory*, *Merrion, et al. v. Jicarilla Apache Tribe, et al.*, 617 F.2d 537, 541 (10th Cir. 1980).

In *Tenneco Oil Co. v. Sac and Fox Tribe, etc., et al.,* 725 F.2d 572, 574-575 (10th Cir. 1984), this Court, examining the issue of whether or sovereign immunity was available to tribal officials, recognized the test of the validity of exercise of tribal power as being whether it goes "beyond what is necessary to protect tribal-self-government or to control internal relations", citing to *Montana*, *Wheeler* and

Colville. Tribal officials who have acted outside of the amount of authority that the tribal sovereign is capable of bestowing are liable to suit, and may not claim the sovereign immunity of the tribe, held the *Tenneco* Court. ***Any other rule***, said the Court, ***would mean that the claim of sovereign immunity would protect the sovereign in an exercise of power which it did not possess***. The Nation is without tribal sovereignty beyond that which is necessary to protect tribal self-government or to control internal relations.

2. THE NATION'S LIMITED SOVEREIGNTY RIGHTS END AT THE GEOGRAPHIC BOUNDARIES OF ITS INDIAN COUNTRY.

Mescalero Apache Tribe v. Jones, et al., 411 US 145, 148-149, 93 S.Ct. 1267, 1270-1271, 36 L.Ed.2d 114 (1973), referencing abundant ruling precedent, held that, absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state laws otherwise applicable to all citizens of the state. *That principle is relevant to a state's tax laws ,* the Court held.

Rejecting the claim of the Chickasaw Nation that tribal members employed by the Tribe, but residing within the State and outside of the Tribe's Indian country, were exempt from Oklahoma state income tax, the Supreme Court made it clear that sovereignty rights are confined to the geographic limits of a Tribe or Nation's

Indian country. The Court rejected the Chickasaw Nation's argument that a treaty exempted its tribal members from taxation, and held:

"... By its terms, the Treaty applies only to persons and property "within [the Nation's] limits" we comprehend this Treaty language to provide for the Tribe's sovereignty *within Indian country*. We do not read the Treaty as conferring *super sovereign 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", *Oklahoma Tax Commission v. Chickasaw Nation*, 515 US 450, 466, 115 S.Ct. 2214, 2224, 132 L.Ed.2d 400 (1995) (emphasis supplied).

Indeed, as the Second Circuit observed, the limit of the authority of Congress pursuant to the "Indian commerce clause" and preemption of state authority extends only to activities occurring *in Indian country*, so that activities outside of Indian country are no different than the off-reservation activities in the *Mescalero* decision*, Grand River Enterprises, etc., et al. vs. Pryor, et al.,* 425 F.3d 158, 173-174 (2d Cir. 2005).

3. THE NATION'S LIMITED SOVEREIGNTY RIGHTS DO NOT PREEMPT OKLAHOMA'S CIGARETTE AND TOBACCO TAX LAWS.

Requirement of purchases from Oklahoma-licensed wholesalers. The Nation complains that cigarettes and tobacco products must only be purchased

from Oklahoma-licensed wholesalers, 12 O.S. §§ 349.1.C. and D., but cites no specific authority establishing that alleged right. State laws requiring purchase only from state-licensed wholesalers have been upheld by the Supreme Court, see *Department of Taxation, etc. vs. Milhelm , etc.*, 512 US 61, 64, 114 S.Ct. 2028, 2031, 129 L.Ed.2d 52 (1994) (*"Milhelm"*) (New York); see, also, *US vs. Baker*, 63 F.3d 1478, 1489 (9th Cir. 1995), cert. den. 516 US 1097, 116 S.Ct. 824, 133 L.Ed.2d 767 (*"Baker"*) (Washington); *Keweenaw Bay Indian Community vs. Rising, et al.,* 477 F.3d 881, 884 (6th Cir. 2007) (*" Rising"*) (Michigan). *Oklahoma Tax Commission vs. Citizen Band Potawatomi, etc.,* 498 US 505, 514, 111 S.Ct. 905, 912, 112 L.Ed.2d 1112 (1991) approved collection of Oklahoma's cigarette tax through its licensed wholesalers. Oklahoma has elected to enforce its tax laws in an off-reservation mode, which is less burdensome than imposing the obligation on tribal retailers, as was approved in *Moe* and *Colville*, *Milhelm, supra,* 74, 2036; *Baker, supra*, 1489. The Nation has no valid or plausible claim.

Requirement of state licensing of wholesalers. The Nation complains that only Oklahoma-licensed wholesalers may purchase tax stamps, which would require the Nation's tribally owned wholesaler to become licensed by the State, in order to have access to obtain tax-free stamps. Again, the Nation attempts to project its limited sovereignty outside its borders to dictate Oklahoma's tax policy

and enforcement procedures, and cites no specific authority to support its claim. There is no such authority. The Nation is free to conduct its business within its Indian country as it sees fit. However, outside its Indian country boundaries, the Nation is subject to laws of general application, *Mescalero Apache Tribe v. Jones, et al.,* 411 US 145, 148-149, 93 S.Ct. 1267, 1270-1271, 36 L.Ed.2d 114 (1973) and *Wagnon vs. Prairie Band Potawatomi Nation*, 546 US 95, 112-113, 126 S. Ct. 676, 688, 163 L.Ed.2d 429 (2005) ("*Wagnon*"). As set forth in the preceding proposition, statutes requiring licensing of wholesalers have been uniformly upheld.

Restriction of number of tax-free stamps available. The Nation complains that there is a restriction on the number of tax-free stamps available through wholesalers, claiming this violates the Nation's right to trade with its own members and tax that trade. This argument, unsupported by specific authority, is specious. Nothing prohibits the Nation from trading with its own members, and taxing sales of state tax-free cigarettes to its members. The Oklahoma laws in question do not even address those subjects. The discussion of this subject at Section IV. E., pp. X herein, need not be repeated.

Prepayment of tax on tobacco products. The Nation complains, without explanation of its standing or citation of specific authority, that wholesalers are

required to prepay tax on tobacco products. This is because tobacco products are not stamped. 68 O.S. § 403 requires stamping, but 68 O.S. § 403.1 allows the OTC to establish procedures for collection of excise tax on tobacco products other than through stamping. The OTC requires monthly reporting and payment of the excise tax by the wholesaler, OAC 710:70-5-1, et seq.. The Nation fails to mention that, if a credit of 1/12th of a wholesaler's allocation for tax-free sales of tobacco products is inadequate, further credit is available for good cause shown by verifiable information, considered and determined by the OTC on a case-by-case basis, 68 O.S. § 349.1.D.5.. This statutory provision is mentioned in the Complaint, ¶ 71 (App. 33), but no specific relief sought. This argument appears in neither the Nation's Response to the OTC's Motion to Dismiss or in its written Closing Argument. There is no indication of it being presented to and ruled upon by the trial Court.

Oklahoma enforcement procedures take place outside of the Nation's Indian country. The common thread running through the Nation's arguments at its Brief, pp. 22-24, is that actions of the OTC, outside of the Nation's Indian country, interfere with its sovereignty rights within its Indian country. That, of course, is contrary to the teachings of the Supreme Court and 10th Circuit, discussed in Section IV.B., pp. X herein. The arguments are also contrary to the

Supreme Court holdings in *Milhelm*, discussed in Section IV.E., pp. X herein. Finally, the alleged rights which the Nation purports to assert are outside its limited sovereignty rights, as set forth in this Section IV.F,, pp. X herein.

V. THE 11TH AMENDMENT BARS PLAINTIFFS CLAIM FOR INJUNCTIVE RELIEF, UNDER THE EX PARTE YOUNG DOCTRINE, BECAUSE THE MUSCOGEE CREEK NATION COMPLAINT FAILED TO ALLEGE A PLAUSIBLE ONGOING VIOLATION OF FEDERAL LAW BY THE OKLAHOMA ATTORNEY GENERAL.

The Muscogee Creek Nation ("MCN") seeks prospective injunctive relief against the Oklahoma Attorney to restrain his enforcement, against the Nation, of two related statutes, 37 O.S.§§ 600.1through 600.23 known as the Oklahoma Prevention of Youth Access to Tobacco Act, 37 O.S. §§ 600.21 (Escrow Statute) and the Oklahoma Master Settlement Agreement Complementary Act ("MSACA"), 68 O.S. §§360.1 through 360.9. The Nation alleges that the Attorney General's enforcement of these two statutes violate its Tribal Sovereign interests and the Indian Trader Statute. The District Court in a well-reasoned decision found that the Complaint failed to state a plausible claim of a continuing violation of federal law by the Attorney General. Alternatively, the claimed violations of federal law by the Attorney General were dismissed for failure to state a plausible claim.

A. BECAUSE THE ESCROW STATUTE IS NOT ENFORCED AGAINST NON TOBACCO PRODUCT MANUFACTURERS, SUCH AS THE MUSCOGEE CREEK NATION, THE DISTRICT COURT DID NOT ERR IN DISMISSING THE NATION'S CHALLENGE TO THE ESCROW STATUTE UNDER THE ELEVENTH AMENDMENT.

On November 23, 1998, leading United States tobacco product manufacturers entered into a settlement agreement, entitled the "Master Settlement Agreement," ("MSA") with the State of Oklahoma. The MSA obligates the participating manufacturers ("PMs") to make health concessions and pay substantial annual payments to the State in perpetuity.

After the Master Settlement Agreement was signed, the Oklahoma Legislature passed the "Oklahoma Prevention of Youth Access to Tobacco Act," 37 O.S. § 600.21, et seq., which contains a provision known as the "Escrow Statute." The "Escrow Statute" requires cigarette manufacturers selling to Oklahoma consumers, either directly or indirectly through an intermediary, to become a Participating Manufacturer ("PM") or make annual payments into an escrow account as a non-participating manufacturer ("NPM"). The purpose of the escrow account is ". . .to guarantee a source of compensation and to prevent such manufacturers from deriving large, short term profits and then becoming judgment proof before liability may arise." The funds placed into escrow are in proportion to

the number its "Units Sold" in the State. "Units Sold" is defined as the number of individual cigarettes sold as measured by excise taxes collected by the state on packs bearing a state excise stamp. See 68 O.S. § 360.4. The manufacturer receives interest on these funds and at the end of twenty-five years, any funds not used to pay a judgment are returned to the manufacturer. Unlike cigarette excise tax statutes, the burden of funding an escrow account is upon the upstream manufacturer, not wholesalers, retailers, or consumers. The enforcement provision of Oklahoma's escrow statute is found at 37 O.S. §600.23(E). The plain language of the enforcement provision demonstrates that the escrow statue is enforced through the commencement of a civil action against a tobacco product manufacturer:

> E. Each tobacco product manufacturer that elects to place funds into escrow pursuant to paragraph 2 of subsection A of this section shall annually certify to the Attorney General that it is in compliance with paragraph 2 of subsection A of this section. The Attorney General may bring a civil action on behalf of the state against any tobacco product manufacturer that fails to place into escrow the funds required under this section.

A State official must "threaten and be about to commence proceedings" before the *Ex Parte Young* exception applies. See *Children's Healthcare*, 92 F.3d at 1415(*emphasis added*). A "proceeding" is "the regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and

the entry of judgment." BLACK'S LAW DICTIONARY, 8th ed. (West 2004). The Escrow statute does not authorize the Oklahoma Attorney General to commence a civil proceeding to enforce the Escrow Statute against a non manufacturer, such as the Muscogee Creek Nation. Accordingly, the *Ex Parte Young* exception, upon which the Nation relies, does not confer jurisdiction on this Court. Since the escrow statute is not enforced against the Muscogee Creek Nation, there is nothing to enjoin. The Nation's challenge to the Escrow Statute is barred by the Eleventh Amendment.

B. OKLAHOMA'S MSA COMPLEMENTARY ACT PROHIBITS THE IMPORTATION OF CIGARETTES INTO THE STATE FROM NON COMPLIANT TOBACCO PRODUCT MANUFACTURERS, IT DOES NOT APPLY TO TAX EXEMPT SALES OF THOSE CIGARETTES TO TRIBAL MEMBERS ON TRIBAL LAND.

In 2004, to address enforcement difficulties, the Oklahoma Legislature enacted statutes referred to as "the MSA Complementary Act." This legislation requires all manufacturers whose products are sold within the State to file an annual certification attesting that it is either (I) a PM meeting its payment obligations under the MSA or (ii) making its required escrow payments as an NPM. The complementary legislation also requires the Attorney General to maintain a directory, on its website, listing all of the tobacco manufacturers that are

in compliance with the MSA or escrow statutes. Tobacco manufacturers that have not met the certification requirements are not listed on the directory and a stamping agent cannot affix a tax stamp, which is required for lawful cigarette sales, to any cigarette package of a manufacturer not listed in the directory. See 68 O.S. § 360.4(B); and 68 O.S. § 360.8(A).

Under 68 O.S. §349.1 tribal members of non-compacting tribes do not pay state cigarette excise taxes for cigarettes purchased from tribal retailers on Indian land. Tobacco Product Manufacturers owe no escrow obligation for these "tax free" sales because their escrow account obligation is based upon the number of cigarette "units sold" to Oklahoma consumers within a given year. The term "units sold" to which the escrow requirements attach is a defined term, under Oklahoma law providing that "units sold" means the number of individual cigarettes sold in the State by the applicable tobacco product manufacturer . . . during the year in question**, as measured by the excise tax collected by the state on the packs, or "roll-your-own" tobacco product bearing the excise tax stamp of the State** ..." Okla.Stat.tit. 37, Supp. 2009, §600.22(10)(emphasis added).

The Court correctly found that the requirement of the Escrow Statute only attaches to cigarettes sold in the State of Oklahoma upon which taxes have been collected, as evidenced by the attachment of an Oklahoma excise tax stamp.

As noted by the Court, the Escrow Statute only applies to cigarettes on which tax has been collected, and because under the provisions of Okla.Stat.tit. 68, Supp. 2009, § 349.1, sales to tribal members are tax exempt, the Escrow Statute does not apply to any sales made to the Nation's tribal members. Therefore, the provisions of the Complementary Escrow Enforcement Statute do not apply to sales to tribal members, as there is no escrow requirement that attaches to sales to non-members, and the purpose of the Complementary Escrow Enforcement Statute is to enforce the Escrow Statute (Okla.Stat.tit. 68, Supp. 2009, §§360.1 through 360.9). As has been shown neither the Escrow Statute nor the Complementary Escrow Enforcement Statute interfere with the Nation's right to self government as:

1. The escrow requirements are placed upon cigarette manufacturers — the Muscogee (Creek) Nation is not a tobacco manufacturer,

2. The Escrow and Complementary Statutes only apply to sales upon which State tax has been collected as evidenced by the attachment of a state excise stamp; thus, they do not apply to sales to tribal members, as sales to tribal members are tax-free sales under Okla.Stat.tit. 68, Supp. 2009, § 349.1.

The Nation is free to sell any brand of cigarettes to its members on a tax-free basis, as the Escrow Statute and complementary statutes do not apply, and, thus,

the statutes do not dictate what cigarettes the Nation can sell to its member constituents.

The Complementary Statute does prohibit the importation into the state of cigarettes manufactured by non compliant manufacturers for sale to non-tribal members, regardless of where those sales occur. Unlike the "Escrow Statute" which applies only to Tobacco Product Manufacturers, as defined in the statute, complementary legislation applies to any person who holds, owns, possesses, transports, imports, or causes to be imported cigarettes that the person knows or should know are intended for distribution, sale or personal consumption in violation of the statute. See Title 68 O.S. §360.4(C) and 360.7 (E). As soon as non-compliant cigarettes enter the state, they become subject to Oklahoma's complementary statutes. The act of importing the cigarettes for sale to Oklahoma consumers occurs at the time the cigarettes enter the State, well before the cigarettes travel across hundreds of miles of non-Indian land of the State to reach Creek Nation Wholesale in Okmulgee, Oklahoma.

C. THE NATION'S CLAIM THAT THE INDIAN TRADER STATUTES PRE-EMPT THE ESCROW STATUTE AND THE MSA COMPLEMENTARY ACTS ARE WHOLLY INSUBSTANTIAL AND FRIVOLOUS.

The Nation makes a flawed argument that the Indian Trader Statutes pre-empt the Escrow Statute and MSACA and that the District Court incorrectly

interpreted its claims regarding those Acts. (Nation's Opening Br. at Pg.2, ¶4). The Nation is wrong for at least *five* reasons.

First, the Indian Trader Statute cases cited by the Nation are inapposite to the Escrow Statute and the MSACA because these cases are limited to the situation in which a State imposes a "tax" on Indian Traders dealing with Indian Tribes. See *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 99-105 (2005). The escrow owed by tobacco product manufacturers pursuant to the Escrow Statute is not a "tax".[1] It is merely a reserve fund to ensure "that the state will have an eventual source of recovery from [tobacco product manufacturers] if they are proven to have acted culpably **.....** and to prevent such manufacturers from deriving large, short-term profits and then becoming judgment proof before liability may arise." 37 O.S. §600.21(D). Oklahoma has no right to the funds deposited in escrow by a tobacco product manufacturer unless it obtains a settlement or judgment for tobacco related claims against the manufacturer. See 37 O.S. §600.23(B)(1). If the escrowed amounts are not claimed by the State, they are released to the tobacco product manufacturer after 25 years; in the meantime, the

[1] The Oklahoma Tax Code is codified at Title 68 of the Oklahoma Statutes. Tellingly, the Escrow Statute is not found in Title 68. Instead, it is found in Title 37. See 37 O.S. §600.21 *et seq*.

manufacturer that deposited the escrow receives the interest on the amount deposited as it is earned. See 37 O.S. §600.23(B). Similarly, the MSACA imposes no "tax" on the Nation. See 68 O.S. §360.1 *et seq.* The MSACA simply requires tobacco product manufacturers selling cigarettes in Oklahoma to register with the AG and places certain regulations on the sale of such manufacturer's products. See 68 O.S. §360.1 *et seq.* Since no "tax" is involved, the Indian Trader Statute cases relied upon by the Nation are irrelevant.

Second, even if the Escrow Statute and MSACA did impose a tax, which they don't, the financial obligation imposed by such statutes would not be on the Nation. Therefore, there is no affront to the Nation's sovereignty. In *Wagnon v. Prairie Band Potawatomie Tribe*, supra., the Prairie Band Nation challenged a Kansas tax that applied to the receipt of motor fuel by off-reservation distributors that subsequently delivered the fuel they received to a gas station owned by, and located on, the Prairie Band Reservation. The Prairie Band Nation argued that the tax on the off-reservation distributors was an impermissible affront to its sovereignty under the Indian Trader Statutes. The *Wagnon* Court rejected the Prairie Band Nation's argument, because the legal incidence of the tax was on the off-reservation distributor, not the Tribe. In resolving the dispute, the United States Supreme Court noted that "the 'who' and 'where' of the challenged tax

have significant consequences." See *Wagnon*, 546 U.S. at 101(*emphasis added*). The *Wagnon* Court ruled that when the legal incidence of a tax rests on off-reservation distributors, as opposed to the Tribe to whom the distributor was selling the fuel, the tax is not in contravention of the Indian Trader Statutes. See *Wagnon*, 546 U.S. at 101-105.

The *Wagnon* case is directly on point with respect to the application of the Escrow Statute and MSACA. In this case, the escrow requirement found in the Escrow Statute is enforced against tobacco product manufacturers that are not signatories to the Master Settlement Agreement ("MSA"):

> A. Any tobacco product manufacturer selling cigarettes to consumers within the state, whether directly or through a distributor, retailer or similar intermediary or intermediaries, after July 1, 1999 shall do one of the following:
> 1. Become a participating manufacturer, as that term is defined in Section II(jj) of the Master Settlement Agreement, and generally perform its financial obligations under the Master Settlement Agreement; or
> 2. Place into a qualified escrow fund, by April 15 of the year following the year in question, the following amounts, as such amounts are adjusted for inflation:
>
> .....
>
> e. for each of 2007 and each year thereafter: one hundred eighty-eight thousand four hundred eighty-two one-hundred-thousandths of once cent ($.0188482) per unit sold.

37 O.S. §600.23(A)(*emphasis added*); See also 37 O.S. §§600.21(C)-(D) and 600.22(9). The Nation is not a "tobacco product manufacturer." See 37 O.S.

§600.22(9). Therefore, just as the Prairie Band Nation did not pay the motor fuel tax in the *Wagnon* case, the Nation does not make the escrow payments required under the Escrow Statute. See 37 O.S. §600.22(9). Similarly, the MSACA was enacted to enhance enforcement of the Escrow Statute and the collection of escrow from tobacco product manufacturers that are not signatories to the Master Settlement Agreement. See 68 O.S. §360.2.

As noted by the Nation, the MSACA does impose a financial obligation in the form of a registration fee. But, that fee is also paid by tobacco product manufacturers that desire to be on Oklahoma's Directory of Manufacturers/Brands Approved for sale. See 68 O.S. §360.4(A)(10). The Nation does not pay this registration fee either. Thus, just like in *Wagnon*, the wrong "who" is involved to state a valid claim under the Indian Trader Statutes. Simply put, neither the escrow due under the Escrow Statute, or the registration fee due under the MSACA are paid by the Nation. See *Wagnon*, 546 U.S. at 101-105.

Third, the US Supreme Court has already ruled that the Indian Trader Statutes do not pre-empt any and all State regulation of persons or entities trading with Tribes:

> Although *Moe* and *Colville* dealt **.....** directly with claims of interference with tribal sovereignty, the reasoning of those decisions requires rejection of the submission that 25 U.S.C. §261 bars any and all state imposed burdens on Indian Traders.

Department of Taxation and Finance of New York v. Milhelm Attea & Bros., Inc., 512 U.S. 61, 74 (1994). Instead, it has already been determined that the Indian Trader Statutes do not bar the States from imposing reasonable regulatory burdens upon Indian traders. See *Milhelm*, 512 U.S. at 74. Also see, *Oklahoma, ex rel. Edmondson v. Native Wholesale Supply*, 2010 OK 58, 237 P3d 199, *cert. denied,* 131 S.Ct. 2150 (U.S. Okla. 2011). In this case, the MSACA makes it illegal to possess, sell, distribute, import, or cause to be imported cigarettes manufactured by tobacco product manufacturers that are not contained on Oklahoma's Directory of Approved Manufacturers/Brands for failing to pay escrow obligations and/or registering with the AG. See 68 O.S. §§360.7(E) and 360.7(B). The Nation is challenging the Escrow Statute and the MSACA in an attempt to be able to sell illegal tax and non-escrow compliant cigarettes of such delinquent tobacco manufacturers to non-tribal members in order to gain an artificial competitive advantage over all other cigarette sellers in the State, including other legitimate sellers associated with other Tribes. Therefore, the Escrow Statute and MSACA are nothing more than reasonable regulatory burdens to staunch the flow of illegal untaxed and non-escrow compliant contraband cigarettes to non-tribal consumers in Oklahoma. See *Milhelm*, 512 U.S. at 74.

Fourth, the Nation's Indian Trader Statute argument is almost entirely based

upon the incorrect assertion that the State is attempting to dictate the "kind" of goods the Nation can sell to its' tribal members:

> The Complimentary [sic] Act **.....** prohibitions dictate the type of products that the tribally owned wholesaler can acquire for *resale to reservation retailers*, and also the type of products that a reservation retailer can have on its shelves and offer for sale *to tribal members*.

(Nation's Opening Br. at Pg.36)(*emphasis original*); See also (Nation's Opening Br. at Pg.2, ¶5). This statement is not correct. As noted *supra*, the OTC does not tax the Nation's cigarette sales to its own members. Accordingly, the AG does not collect escrow from the manufacturer of cigarettes sold by the Nation to its own tribal members. Similarly, the AG does not enforce the MSACA against appropriately stamped cigarettes for tribal member sales. As long as the cigarettes bear the appropriate "Native American tax free stamps" required by 68 O.S. §349.1(C), the Nation remains free to transport and sell whatever brand of cigarettes it desires to its' retailers, and its' retailers remain free to sell whatever brand of cigarettes it desires to tribal members. This is so regardless as to whether the appropriately stamped cigarettes for tribal member sales are found on Oklahoma's Directory or not. Oklahoma is not dictating the "kind" of cigarettes the Nation can transport and sell to its own members. Contrary to the Nation's erroneous argument, the District Court recognized this and properly addressed the issue in the Dismissal Order.

Fifth, no sovereign interest of the Nation is implicated when it sells products to non-tribal members. To the extent that Indian Tribes seek to sell products to non-Indians, or to Indians who are not members of the Tribe, the decisions of the United States Supreme Court have already foreclosed the argument that the Indian Trader Statutes pre-empt State regulatory law. See *Rice v. Rehner*, 463 U.S. 713 at 720, 720 fn.7, and 721 (1983)(holding California liquor licensing regulation not pre-empted by Indian Trader Statutes when on-reservation non-tribal member sales involved); See also *Oklahoma Tax Comm. v. Citizen Band Potawatomi Indian Tribe of Okla*., 498 U.S. 505, 512-13 (1991); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 150-52 and 154-161(1980); and *Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463 (1976)(all in accord regarding on-reservation Tribal cigarette transactions involving non-members). Therefore, it is clear that neither the Nation, its' wholesale operation, or its' licensees have any sovereign interest to engage in violations of state law with respect to sales to non-tribal members. Accordingly, the Nation's Indian Trader Statute pre-emption argument has no force in regard to it's transportation of non-escrow compliant cigarettes destined for ultimate sale to non-tribal members.

Sixth, the Indian Trader Statute cases cited by the Nation dealt with the trade

of goods, products, and/or services that were otherwise legal - such as tractors in *Central Machinery* and motor fuel in *Chickasaw Nation*. Conversely, in this case, the Nation is attempting to rely on the Indian Trader Statutes to sell illegal non-taxed, non-escrow compliant products to non-tribal members in order to gain an artificial competitive advantage over all other businesses and tribes within the State. Neither the Indian Trader Statutes, or any other federal statute for that matter, recognize a tribal sovereign interest in committing violations of state law so as to gain an ill-gotten advantage over their law-abiding competitors:

> The federal statutes ..... evidence to varying degrees a congressional concern with fostering tribal self-government and economic development, but none goes so far as to grant tribal enterprises selling goods to non-members an artificial competitive advantage over all other businesses in a State.

Colville, 447 U.S. at 155 (*emphasis added*). The Nation does not state a viable claim when it contends the Indian Trader Statutes entitle it to such an artificial competitive advantage over all other businesses in the State, including other law-abiding businesses operated by other Indian Tribes.

The Nation's claim that the Indian Trader Statutes pre-empt the Escrow Statute and MSACA are wholly insubstantial and frivolous.[2] Accordingly, the

[2] The Nation also asserts at Pg. 30 of its Opening Brief that 25 C.F.R. §140.17 "arguably" preempts the Oklahoma Escrow Statute. However, this is a new argument raised for the first time on appeal that is not properly before this Court. See *Lone Star Steel Co. v. United Mine Workers of Amer.*, 851 F.2d 1239, 1243 (10th Cir.1988)(holding "a party may not lose in the district court on one theory of the case and then prevail on appeal on a different theory.") Moreover, the Nation

Nation has failed to state a viable claim that the AG committed an ongoing violation of federal law. Dismissal was proper.

D. THE DISTRICT COURT WAS NOT REQUIRED TO EMPLOY THE "BRACKER" BALANCING TEST WHEN CONSIDERING THE ESCROW STATUTE AND MSACA BECAUSE THE EVENTS COMPLAINED OF BY THE NATION DID NOT OCCUR ON INDIAN LAND.

Finally, the Nation erroneously argues that "[t]he district court committed legal error in dismissing its Complaint without using the *'Bracker'* test to analyze the impact of the State's tobacco **.....** escrow laws on the Nation's sovereign rights[.]" (Nation's Opening Br. at Pg. 2, ¶3). The Nation is wrong for at least *two* reasons.

First, the *Bracker* balancing test is utilized when a Court analyzes a State's ability to tax transactions involving Tribes:

> We have applied the balancing test articulated in *Bracker* only where the legal incidence of the tax fell on a non-tribal entity engaged in a transaction with tribes or tribal members[.]

Wagnon v. Prairie Band Pot. Nat., 546 U.S. 95, 110(2006)(*emphasis added*). As outlined in the previous section, neither the Escrow Statute or the MSACA impose a "tax." Thus, *Bracker* analysis was not necessary as no tax is involved. *Second*, the escrow requirement of the Escrow Statute arose off of the Nation's Indian land.

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does not describe in what manner 25 C.F.R. §140.17 "arguably" preempts the Escrow Statute. Thus, it is impossible to respond to this new undeveloped argument and it should not be considered.

The *"Bracker"* balancing test only applies when a Court considers the validity of a State tax that is triggered by an on-reservation transaction involving a Tribe or tribal entity and a non-tribal member:

> [T]he doctrine of tribal sovereignty **.....** has a significant geographical component.
>
> **.....**
>
> Limiting the [*Bracker*] interest-balancing test exclusively to *on-reservation* transactions between a non-tribal entity and a tribe or tribal member is consistent with our unique Indian tax immunity jurisprudence.

Wagnon, 546 U.S. at 112 (*emphasis original*). Again, in analyzing these types of cases "the 'who' and 'where' of the challenged tax have significant consequences." See *Wagnon*, 546 U.S. at 101(*emphasis added*). With this rule in mind, the US Supreme Court has made it clear that the *"Bracker"* balancing test is not applied where a State tax is triggered by an off-reservation transaction. See *Wagnon*, 546 U.S. at 99 and 105-115(holding *"Bracker"* balancing test not required when Kansas motor fuel tax imposed on off-reservation receipt of fuel). In the current case, even if the escrow owed was a tax, which it is not, it arose as a result of a transaction that occurred off of the Nation's Indian Trust Land.

As noted earlier, tobacco product manufacturers that are not signatories to the Master Settlement Agreement are required to deposit escrow based upon the number of "units sold" in the State. See 37 O.S. §600.22(10). "Units sold" is defined as the "number of individual cigarettes sold in the state by the applicable

tobacco product manufacturer **.....** during the year in question, as measured by excise taxes collected by the state on packs ..... bearing the excise tax stamp of the state." 37 O.S. §600.22(10)(*emphasis added*). Thus, according to the Escrow Statute, two things must be present before a "units sold" occurs upon which escrow is due: 1) excise tax must be collected by the State; and 2) an excise tax stamp of the State must be affixed to a pack of NPM cigarettes.

Oklahoma collects its cigarette excise tax through the purchase of tax stamps by licensed wholesalers from the OTC. The licensed wholesalers are the entities that affix the excise tax stamps. The licensed wholesalers are statutorily required to affix the tax stamps to cigarettes upon withdrawal from storage and prior to resale in the State. See 68 O.S. §§305(A) and 301(8). At the time a licensed wholesaler withdraws a pack of cigarettes manufactured by a manufacturer that is not a signatory the Master Settlement Agreement and attaches an excise tax stamp thereto, both pre-conditions to a "units sold" have occurred (*i.e.* the tax has been collected and the pack bears a stamp). See 37 O.S. §600.22(10); and 68 O.S. §360.6(A)-(B). Oklahoma licensed wholesalers report the number of "units" of cigarettes of each tobacco product manufacturer, that is not a signatory to the Master Settlement Agreement, that it stamped and "sold" in the State to the OTC on a monthly basis. See 68 O.S. §360.6(A)-(B). The information reported by the licensed wholesalers regarding "units sold" is used by the Attorney General to

determine the escrow obligation of each tobacco product manufacturer that is not a signatory to the Master Settlement Agreement. Accordingly, the affixing of excise tax stamps by licensed Oklahoma wholesalers is the triggering event for the occurrence of a "units sold." See 37 O.S. §600.22(10); and 68 O.S. §360.6(A)-(B).

Any escrow obligation owed by any manufacturer of cigarettes that the Nation desires to sell arose at the time that a licensed Oklahoma wholesaler affixed an excise tax stamp to the pack in which the cigarettes were contained (*i.e.* the time when both preconditions to a "units sold" had occurred). The licensed wholesalers that affix tax stamps are not located on the Nation's Tribal Trust Land. Accordingly, the escrow requirement of the cigarette manufacturer arose off Indian Land and therefore *Bracker* balancing was not required to evaluate the Escrow Statute. Moreover, the Nation is illegally evading the State cigarette excise tax and stamping requirements by refusing to sell taxed and stamped cigarettes. Since the cigarettes the Nation is selling were not purchased from a licensed wholesaler, they were not taxed, were not stamped, or reported to the OTC and, therefore, the State was unlawfully prevented from assessing the appropriate escrow to the tobacco product manufacturer for such cigarettes.

Likewise, the MSACA was enacted to aid in the enforcement of the Escrow Statute and the collection of escrow. See 68 O.S. §360.2. Again, the escrow obligation of the tobacco product manufacturer, which the MSACA aids in the

enforcement of, arises off-reservation at the licensed wholesaler level. The MSACA makes it illegal to possess, sell, distribute, import, or cause to be imported cigarettes manufactured by tobacco product manufacturers that are not contained on Oklahoma's Directory of Approved Manufacturers/Brands. See 68 O.S. §§360.7(E) and 360.7(B). A tobacco product manufacturer is not placed on Oklahoma's Directory of Manufacturers/Brands Approved for Sale if it fails to pay escrow obligations that arose off-reservation at the licensed wholesaler level, and/or if it did not register with the AG to be placed on the Directory. Accordingly, if a tobacco product manufacturer and its brands are not on the Oklahoma's Directory of Manufacturers/Brands Approved for Sale, it is a direct result of off-reservation activity. The financial obligation imposed by the MSACA is a registration fee on a tobacco product manufacturer desiring it's product to be listed on Oklahoma's Directory of Manufacturers/Brands Approved for sale. See 68 O.S. §360.4(A)(10). The registration fee is paid by the tobacco product manufacturer directly to the AG's office. Thus, this obligation also arises off the Nation's Trust Land. Finally, the enforcement of the MSACA has been limited to in rem seizures of contraband cigarettes that occur off of the Nation's Tribal Trust land. The off-reservation location of the seizures is important as the United States Supreme Court has repeatedly held that "[a]bsent 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." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973) (and collection of authorities cited therein). Oklahoma has never enforced or threatened to enforce the MSACA through on reservation seizures. All enforcement of the MSACA has been off-reservation.[3]

From the foregoing, it is clear that the "geographical component" required for *Bracker* balancing in evaluating the Escrow Statute and MSACA is missing. Any financial obligations imposed by the Escrow Statute and/or MSACA arose as a result of off reservation transactions not involving the Nation. See *Wagnon*, 546 U.S. at 112. Just like in *Wagnon*, the wrong "where" is involved to trigger *"Bracker"* balancing. The District Court committed no legal error in it's analysis of the Nation's claims.

The U.S. Supreme Court has repeatedly held that the activities of Indians occurring off of Indian reservations are subject to regulation by the State. See, *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49, 93 S.Ct. 1267, 1270-71,

[3] The Nation, for the first time on appeal, mentions that the OTC and the AG currently have a pending lawsuit in the District Court of Tulsa County. (Nation's Opening Br. at Pg. 9). Although the Nation does not specifically identify the case, The case it is referring to is *The State of Oklahoma v. Larkin*, Case No. CJ-2009-0868 which was removed to the United States District Court for the Northern District of Oklahoma. The Nation is apparently attempting to make a collateral attack on the federal court's remand Order. The nature of that case is throughly discussed in the court's Order remanding the case back to state court. See, *Oklahoma, ex rel. Edmondson v. Larkin*, 2010 WL 1542573 (N.D. Ok.)

36 L.Ed.2d 114 (1973); *Puyallup Tribe v. Dept. of Game of Wash.*, 391 U.S. 392, 398, 88 S.Ct. 1725, 1728, 20 L.Ed.2d 689 (1968); and *Organized Village of Kake v. Eagan*, 369 U.S. 60, 75-76, 82 S.Ct. 562, 570-71, 7 L.Ed. 573 (1962). 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. *Mescalero Apache Tribe*, 411 U.S. at 148-49, 93 S.Ct. at 1270-71.[4]

CONCLUSION

The dismissal of the Nation's suit was proper and should be affirmed.

STATEMENT REGARDING ORAL ARGUMENT

The Appellees do not request oral argument because the dispositive issues on appeal have been authoritatively decided. Oral argument would not significantly aid the decisional process.

Respectfully submitted,

s/E. Clyde Kirk
E. CLYDE KIRK, OBA #10572
ASSISTANT ATTORNEY GENERAL
313 N.E. 21st Street
Oklahoma City, OK 73105
(405) 521-4274 Fax: (405) 522-4534
clyde.kirk@oag.ok.gov

[4] Congress did not intend to make tribal members "super citizens" who could trade in a traditionally regulated substance free from all but self-imposed regulations. *Rice v. Rehner*, 463 U.S. 713, (1983);

ATTORNEY FOR APPELLEE
OKLAHOMA ATTORNEY GENERAL

s/ Larry D. Patton*
LARRY D. PATTON, OBA #6963
ASSISTANT GENERAL COUNSEL
OKLAHOMA TAX COMMISSION
120 N. Robinson, Suite 2000W
Oklahoma City, OK 73102-7801
(405) 319-8538 Fax: (405) 601-7144
lpatton@tax.ok.gov

ATTORNEY FOR APPELLEES
OKLAHOMA TAX COMMISSION
AND ITS COMMISSIONERS

*Larry D. Patton's electronic signature is affixed with express authorization from Mr. Patton.

CERTIFICATE OF COMPLIANCE

As required by Fed.R.App.P.32(a)(7)(C), I certify that this brief is proportionally spaced typeface using WordPerfect X4 and contains 13,917 words.

[X] I relied on my word processor to obtain the count which is WordPerfect X4.

s/E. Clyde Kirk
E. CLYDE KIRK, OBA #10572
ASSISTANT ATTORNEY GENERAL

CERTIFICATE OF MAILING

On this 8TH day of June, 2011, a true and correct copy of the foregoing was mailed and emailed to:

Galen L. Breittingham
Michael A. Simpson
1500 Park Centre
535 South Main
Tulsa, OK 74103

Conly J. Schulte
Joseph V. Messineo
3610 North 163rd Plaza
Omaha, NE 68116

Larry D. Patton
Assistant General Counsel
Oklahoma Tax Commission
120 N. Robinson, Suite 2000W
Oklahoma City, OK 73102-7801

s/E. Clyde Kirk
E. CLYDE KIRK, OBA #10572
ASSISTANT ATTORNEY GENERAL