

**IN THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF OKLAHOMA**

THE CADDO NATION OF	)	
OKLAHOMA, and BRENDA	)	
EDWARDS, in her capacity as Chairman	)	
of The Caddo Nation of Oklahoma,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. CIV-14-281-D
	)	
THE COURT OF INDIAN OFFENSES,	)	
FOR THE ANADARKO AGENCY,	)	
	)	
Defendants.	)	

**BRIEF IN RESPONSE TO MARCH 21, 2014, ORDER**

The United States Attorney's Office, by Robert J. Troester, Assistant United States Attorney, submits the following brief in response to this Court's March 21, 2014 Order, [Doc. No. 9].<sup>1</sup>

**STATEMENT OF THE CASE**

1. The Caddo Nation of Oklahoma is currently engaged in an internal dispute as to leadership of the tribe. (Doc. No. 2, ¶¶5-7 and Ex. 9).
2. There are two competing factions have each brought suit in the name of the Caddo Nation of Oklahoma in two separate forums:

Court of Indian Offenses = *Caddo Nation of Oklahoma v. Brenda Edwards*, Case No. CIV-14-039 (Court of Indian Offenses for the Caddo), is brought by a faction supporting Vice-Chairman Phillip Smith (Doc. No. 2, Ex. 9).

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<sup>1</sup> As more fully set forth in Proposition II, *supra*, plaintiff has failed to invoke personal jurisdiction over the defendant, Court of Indian Offenses, as they have failed to comply with Fed.R.Civ.P.4(i). The defendant does not waive any jurisdictional defenses in this response to the Court's invitation to provide briefing at this time.

U.S. District Court = *Caddo Nation of Oklahoma and Brenda Edwards v. Court of Indian Offenses*, Case No. 14-CV-281-D, the instant action, is brought by a faction supporting Chairman Brenda Edwards.

3. In the Court of Indian Offenses (“CIO”) action:

- a. Both factions have appeared and are represented by legal counsel (Doc. No. 2);
- b. Both factions have submitted legal arguments and presented evidence to the CIO Magistrate (Doc. No. 2, Exs. 10 and 11);
- a. Both factions appeared at a hearing earlier this week on March 25, 2014, where a different CIO Magistrate heard arguments from both parties (Exhibit 1 - Minute Order from CIO);
- b. Both factions have a trial set for March 31, 2014, in the CIO (*Id.*); and
- c. Both factions have the opportunity to appeal the decision of the CIO to the Court of Indian Appeals. 25 C.F.R. Subpart H, Appellate Proceedings.

4. By contrast, only one of the factions (Edwards) brings the present action asking this court to make a determination (a) without notice to the opposing faction or giving them an opportunity to be heard in this court and (b) without properly serving the defendant here to invoke personal jurisdiction – all while simultaneously pursuing her legal remedies before the CIO.

## ARGUMENT

### PROPOSITION I

#### **AS A MATTER OF COMITY, THIS COURT SHOULD NOT EXERCISE JURISDICTION UNTIL TRIBAL COURT REMEDIES ARE EXHAUSTED**

As stated by the plaintiff, the CIO acts as a tribal court for the Caddo Nation.

(Doc. No. 2, ¶1-2; 25 C.F.R. §11.100). Limitations on a CIO's jurisdiction is set out in 25 C.F.R. §11.118, including the following:

(b) A Court of Indian Offenses may not adjudicate an election dispute, take jurisdiction over a suit against a tribe, or adjudicate any internal tribal government dispute, unless the relevant tribal governing body passes a resolution, ordinance, or referendum granting the Court jurisdiction.

Tribal courts play a vital role in tribal self-governance. *See Tillet v. Lujan*, 730 F.Supp. 381 (W. D. Okla. 1990) (“*Tillet I*”), *aff'd* 931 F.2d 636 (10th Cir. 1991) (“*Tillet II*”), *citing Iowa Mutual Insurance Company v. LaPlante*, 480 U.S. 9, 14-15 (1987).

When challenging jurisdiction of the tribal courts over a party, the Tenth Circuit has stated that “as a matter of comity, a federal court should not exercise jurisdiction over cases arising under its federal question or diversity jurisdiction, if those cases are also subject to tribal jurisdiction, until the parties have exhausted their tribal remedies.” *Tillet II*, 931 F.2d at 640 (citations omitted). “Exhaustion of tribal remedies requires at a minimum that tribal appellate courts must be given the opportunity to review the determination of the lower tribal courts before federal courts consider the issue.” *Tillet I*, 730 F.Supp. at 384 (citations omitted). In *Tillet II*, the Tenth Circuit also found that “the district court did not err in requiring Tillett to permit the lower and appellate tribal courts

to address her challenge to their jurisdiction before raising that challenge in federal court.” *Tillet II*, 931 F.2d at 641.

In this case, Tribal Council resolutions were provided to the CIO that on their face grant jurisdiction to the CIO to make a determination of this internal tribal dispute. (Doc. No. 2, Ex. 9). Based on that submission, the CIO issued a temporary injunction. (Doc. No. 2, Ex. 10). Plaintiff has challenged the validity of these resolutions and determination in both the CIO and in this court.

Both disputing factions have counsel before the CIO, submitted legal arguments and evidence to the CIO, appeared at a hearing on the matter before a CIO Magistrate, and are scheduled to have a trial on the matter Monday -- where the CIO’s jurisdiction over the matter can/will be addressed. Further, both disputing factions have a further right to appeal any adverse decision regarding jurisdiction to the Court of Indian Appeals.

This court need not wade into this quagmire at this time. Rather, as in *Tillett I* and *II*, as a matter of comity, the court should require Edwards to exhaust her pending tribal trial and appellate court remedies regarding her challenge to the CIO jurisdiction before raising that challenge in federal court.

## **PROPOSITION II**

### **PLAINTIFF HAS FAILED TO INVOKE PERSONAL JURISDICTION OVER THE COURT OF INDIAN OFFENSES**

To serve the United States, the plaintiff must serve (deliver or send by registered or certified mail) a copy of the Summons and Complaint on (1) the United States Attorney, (2) the United States Attorney General, and (3) the agency. Fed. R. Civ. P. 4(i).

Failure of any leg of the rule results in a lack of personal jurisdiction. “A federal Court lacks *in personam* jurisdiction over a party defendant if service on that defendant was nonexistent or insufficient.” *Lorenzen v. U.S.*, 236 F.R.D. 553, 558 (D.Wyo.2006), *citing Oltremari v. Kansas Social & Rehab. Serv.*, 871 F.Supp. 1331, 1348 (D.Kan.1994).

Here, plaintiff had summons issued (Doc. 6), but have filed only “Certificates” that copies pleadings were faxed to the U.S. Attorney and to the Regional Director of the Bureau of Indian Affairs. (Docs. 4 and 11). Moreover, on March 25, 2014, the undersigned notified plaintiff’s counsel that proper service has not occurred. (*See* Exhibit 2 - Fax to Attorney Bertman). Plaintiff has failed to comply with Rule 4(i) and personal jurisdiction over the defendant is therefore lacking.

### **PROPOSITION III**

#### **ALTERNATIVELY, PLAINTIFF HAS FAILED TO PROVIDE NOTICE TO THE ADVERSE PARTY AND JOIN A NECESSARY PARTY**

Plaintiff argues that comity and exhaustion is not required here, and wants this court to so find without any notice and opportunity to be heard by a necessary party to that determination. As stated above, there are two competing factions. Plaintiff’s own pleadings and submitted exhibits to this court demonstrate she is well aware of the opposing faction and their attorney and the fact that the opposing faction has obtained a favorable initial adjudication in the CIO via an Emergency Temporary Injunction and Order (Doc. No. 2, Ex. 10) and a further favorable determination after a hearing on March 25, 2014, where her challenges were denied.

Yet, plaintiff comes to this court seeking a collateral attack on the CIO's rulings against her (1) while simultaneously pursuing her legal remedies before the CIO and (2) without notice to the opposing faction or giving them an opportunity to be heard in this court.

This pleading only addresses the Emergency Motion for Temporary Restraining Order (Doc. No. 2). Fed.R.Civ.P. 65(a)(1) requires that notice be given to the adverse party. Plaintiff's own "certificates" regarding the faxing of pleadings clearly show that no notice was given to the Smith faction or his attorney, Riland Rivas. Moreover, plaintiff fails to comply with the two conditions of Rule 65(b)(1) permits issuance of a temporary restraining order without notice. Since the plaintiff has failed to serve the Complaint and obtain personal jurisdiction over the defendant in this action and no response to the Complaint is yet required, a Fed.R.Civ.P. 12(b)(7) motion for failure to join a party under Rule 19 is premature.

However, should this court determine that the present matter be addressed in this forum, the plaintiff should be required to name and serve the opposing faction so that this necessary party can be heard before resolving this dispute.

#### **PROPOSITION IV**

##### **ALTERNATIVELY, PLAINTIFF HAS FAILED TO ESTABLISH JUSTIFICATION FOR A PRELIMINARY INJUNCTION**

A party seeking a preliminary injunction must satisfy the traditional four-factor test in order to be awarded temporary relief:

The requesting party must demonstrate (1) that it has a substantial likelihood of prevailing on the merits; (2) that it will suffer irreparable harm unless the preliminary injunction is issued; (3) that the threatened injury outweighs the harm the preliminary injunction might cause the opposing party; and (4) that the preliminary injunction if issued will not adversely affect the public interest.

*Prarie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1246 (10th Cir. 2001).

Plaintiff fails to meet this standard.

First, based on the competing pleadings and documents submitted by the opposing factions before the CIO, plaintiff cannot establish a substantial likelihood of success on the merits. In fact, plaintiff's jurisdictional challenges were denied after a hearing and oral argument on the issues before a different CIO Magistrate. (*See Exhibit 1 - Minute Order from CIO*).

Second, plaintiff cannot establish irreparable harm. "The party seeking injunctive relief must show that the injury complained of is of such imminence that there is clear and present need for equitable relief." *Schrier v. University of Colorado*, 427 F.3d 1253, 1267 (10th Cir. 2005) (quoting *Heideman v. South Salt Lake City*, 348 F.3d 1182, 1189 (10th Cir. 2003)). "An injury is irreparable only when money damages would provide an inadequate remedy." *Robinson v. Carney*, No. 07-0236, 2007 WL 2156391 at 2 (W.D. Okla. July 27, 2007); *see also Heideman v. South Salt Lake City*, 348 F.3d 1182, 1189 (10th Cir. 2003) ("It is also well settled that simple economic loss usually does not, in and of itself, constitute irreparable harm; such losses are compensable by monetary damages."). Plaintiff's own brief essentially argues that this is about control of the tribal money in asserting that Mr. Smith "is attempting to obtain \$1.5 million from the Caddo

treasury” and “[i]f the temporary restraining order and the preliminary injunction are not issued, the status quo will be disrupted, and there is significant potential that Mr. Smith will convert the treasury of the Nation to his own purposes.” (Doc. No. 2, pp. 5-6).

Third, “[t]o be entitled to a preliminary injunction, the movant has the burden of showing that ‘the threatened injury to the movant outweighs the injury to the other party under the preliminary injunction.’” *Heideman v. South Salt Lake City*, 348 F.3d 1182, 1190 (10th Cir. 2003) (quoting *Kikumura v. Hurley*, 242 F.3d 950, 955 (10th Cir. 2001)). As stated above, since the opposing party has not been made a party here nor has it given notice, this court cannot even conduct this balancing test.

Lastly, “[a] movant also has the burden of demonstrating that the injunction, if issued, is not adverse to the public interest.” *Heideman v. South Salt Lake City*, 348 F.3d 1182, 1191 (10th Cir. 2003). The public interest of the Caddo Nation in this action is now at issue before the CIO with both factions appearing and represented by counsel.

Plaintiff fails to meet her burden for preliminary injunction.



## CONCLUSION

Based on the above, the undersigned requests that plaintiff's Emergency Motion for Temporary Restraining Order and Preliminary Injunction (Doc. No. 2) be denied and, as a matter of comity, that plaintiff be required to exhaust her pending tribal trial and appellate court remedies regarding her challenge to CIO jurisdiction before raising that challenge in federal court.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on March 27, 2014, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

Eugene Bertman, Counsel for The Caddo Nation of Oklahoma and Brenda Edwards

I hereby certify that on March 27, 2014, I served the attached document by on the following, who are not registered participants of the ECF System: none

*s/Robert J. Troester*  
Assistant U.S. Attorney