IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OKLAHOMA

(1) **THLOPTHLOCCO TRIBAL TOWN**, a federally-recognized Indian Tribe,	)	
Plaintiff	)	
-vs-	)	**No. 09-CV-527-JCG-CDL**
(2) **GREGORY R. STIDHAM**, et al.,	)	
Defendants.	)	

PLAINTIFF THLOPTHLOCCO'S STATEMENT OF POSITION AND MOTION FOR DECLARATORY JUDGMENT AND BRIEF IN SUPPORT (SUMMARY JUDGMENT)

MICHEAL SALEM OBA #7876
Salem Law Offices
101 East Gray, Suite C
Norman, Oklahoma 73069
Phone: (405) 366-1234
Fax: (405) 366-8329
msalem@msalemlaw.com

ATTORNEY FOR PLAINTIFF
THLOPTHLOCCO TRIBAL TOWN, a
Federally Recognized Indian Tribe

March 6, 2023

TABLE OF CONTENTS

Page

TABLE OF CONTENTS . . . . -i-

TABLE OF CASES . . . . -v-

FEDERAL AUTHORITY . . . . -viii-

STATE AND OTHER AUTHORITY . . . . -ix-

TABLE OF CONTENTS OF APPENDIX . . . . -xi-

TABLE OF CONTENTS OF THLOPTHLOCCO'S SUPPLEMENTAL APPENDIX - VOLUME 14 . . . . -xxii-

VOLUME LIST TO APPENDICES. . . . . -xxiv-

NOMENCLATURE AND IDENTIFICATIONS USED IN THIS BRIEF . . . . -xxv-

1. Glossary of Abbreviations and Terms . . . . -xxv-

2. Identification of Parties . . . . -xxv-

3. Judicial Decisions of the Tribal Courts. . . . . -xxvi-

4. Appendix in this Case . . . . -xxvi-

4. Attachment 15 . . . . -xxvii-

I. INTRODUCTION . . . . -1-

II. STATEMENT OF FACTS AND COURSE OF THE PROCEEDINGS . . . . -2-

1. THE HISTORICAL AND CURRENT RELATIONSHIP AMONG THE TRIBAL TOWNS AND THE MCN . . . . -2-

2. THE THLOPTHLOCCO ELECTION CONTROVERSIES . . -5-

3. THE 2007 GOVERNANCE DISPUTE (CV-2007-39). . . . . . -6-

4. THE 2011 ELECTION CANDIDACY CONTROVERSY (CV-2011-08) . . . . -7-

5. THE DECISION OF THE TENTH CIRCUIT. . . . . -8-

6. REMAND FOR TRIBAL COURT EXHAUSTION . . . . -9-

III. ARGUMENT . . . . -10-

PROPOSITION A . . . . -10-

THIS COURT IS OBLIGATED TO FOLLOW THE MANDATE OF THE TENTH CIRCUIT WHICH REQUIRES FURTHER PROCEEDINGS . . . . -10-

PROPOSITION B . . . . -12-

NOW THAT TRIBAL EXHAUSTION HAS CONCLUDED, THIS COURT SHOULD ISSUE A DECLARATORY JUDGMENT REGARDING THE FEDERAL QUESTIONS OF THLOPTHLOCCO TRIBAL SOVEREIGN IMMUNITY AND ITS ABILITY TO WITHDRAW A CONSENT TO JURISDICTION ONCE GIVEN . . . . -12-

1. THLOPTHLOCCO IS ENTITLED TO DECLARATORY JUDGMENT THAT IT ENJOYS SOVEREIGN IMMUNITY IN THE COURTS OF THE CREEK NATION AND MAY, IF IT CHOOSES, CONSENT TO SUCH JURISDICTION . . . . . -13-

2. THLOPTHLOCCO IS ENTITLED TO DECLARATORY

JUDGMENT THAT IT MAY WITHDRAW ITS CONSENT TO JURISDICTION UNDER APPROPRIATE CIRCUMSTANCES . . . . -15-

PROPOSITION C . . . . -18-

THE CLAIM FOR WITHDRAWAL OF CONSENT HAS BEEN EXHAUSTED OR EXHAUSTION IS OTHERWISE EXCUSED BECAUSE OF FUTILITY . . . . -18-

PROPOSITION D . . . . -21-

THIS CASE IS NOT MOOT IN THAT IT IS CAPABLE OF REPETITION YET EVADING REVIEW . . . . -21-

PROPOSITION E . . . . -23-

DEFENDANTS CANNOT MEET THE HEAVY BURDEN OF SHOWING MOOTNESS. . . . . -23-

1. THE MCN COURTS' FAILURE TO FOLLOW THEIR OWN DECISIONS THAT RECOGNIZED THLOPTHLOCCO'S SOVEREIGN IMMUNITY. . . . . -25-

2. THE DELAY IN RESPONDING TO THE TENTH CIRCUIT'S MANDATE TO EXHAUST . . . . -26-

3. THE MCN COURTS FAILURE TO FOLLOW THE MANDATE INSTRUCTIONS THEY CONSIDER THE QUESTION OF THOLOPTHLOCCO'S ABILITY TO WITHDRAW ITS CONSENT TO JURISDICTION . . . . -28-

4. EVEN THOUGH THE TENTH CIRCUIT DIRECTED NO ELECTION OCCUR UNTIL THLOPTHLOCCO HAD A CHANCE TO RETURN TO THIS COURT, THE MCN DISTRICT COURT DIRECTED AN ELECTION AND REAFFIRMED A PREVIOUS TRIBAL COURT RULING THAT

THLOPTHLOCCO CONDUCT AN ELECTION WITHIN 90 DAYS . . . . -29-

PROPOSITION F . . . . -30-

IN ACCORDANCE WITH THE TENTH CIRCUIT'S MANDATE, THIS COURT SHOULD JOIN PRESENT MEMBERS OF THE MCN JUDICIARY WHO ARE NOT NOW DEFENDANTS. NOTICE SHOULD BE GIVEN TO OTHER ADDITIONAL DEFENDANTS. THEY MAY, OR MAY NOT, MAKE AN ENTRY OF APPEARANCE IN THE SUIT . . . . -30-

III. CONCLUSION . . . . -33-

Signature of Attorney . . . . -34-

CERTIFICATE OF SERVICE . . . . -34-

TABLE OF CASES

Page

Anderson v. Celebrezze, 460 U. S. 780, 103 S. Ct. 1564 (1983) . . . . -21-

Beers v. Arkansas, 61 U.S. 527, 15 L. Ed. 991 (1857) . . . . -9-, -17-

Brown v. Buhman, 822 F.3d 1151(10th Cir. 2016) . . . . -22-

Citizen Ctr. v. Gessler, 770 F.3d 900 (10th Cir. 2014). . . . . -22-

City of Mesquite v. Aladdin's Castle, 455 U.S. 283,
102 S. Ct. 1070 (1982) . . . . -24-

Collins v. Daniels, 916 F.3d 1302 (10th Cir. 2019) . . . . -22-

Crowe & Dunlevy P.C. v. Stidham, 640 F.3d 1140
(10th Cir. 2011) . . . . -5-, -14-

Davis v. Federal Election Comm'n, 554 U.S. 724,
128 S. Ct. 2759 (2008) . . . . -21-

Ex Parte Young, 209 U.S. 123, 28 S.Ct. 441 (1908) . . . . -30-

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.,
528 U.S. 167, 120 S. Ct. 693 (2000) . . . . -24-

Harjo v. Andrus, 581 F.2d 949, 189 U.S. App. D.C. 171
(D.C. Cir. 1978) . . . . -2--4-, -12-

Harjo v. Kleppe, 420 F. Supp. 1110 (D.C.D.C. 1976) . . . . -5-

Honig v. Doe, 484 U.S. 305, 108 S. Ct. 592 (1988). . . . . -22-

Ind v. Colo. Dep't of Corr., 801 F.3d 1209 (10th Cir. 2015) . . . . -22-

Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9,
107 S. Ct. 971 (1987) . . . . -18-

Iowa Tribe of Kansas and Nebraska, et al., v. Salazar,
607 F.3d 1225 (10th Cir. 2010). . . . . -15-, -17-

Jordan v. Sosa, 654 F.3d 1012 (10th Cir. 2011) . . . . -22-

Knox v. Serv. Emps. Int'l Union, Local 1000, 567 U.S. 298,
132 S. Ct. 2277, 183 L. Ed. 2d 281 (2012) . . . . -22-

MacArthur v. San Juan Cnty., 309 F.3d 1216 (10th Cir. 2002) . . . . . . -14-

Marceau v. Blackfeet Hous. Auth., 540 F.3d 916 (9th Cir. 2008) . . . . -13-

Montana v. United States, 450 U.S. 544,
101S.Ct. 1245 (1981) . . . . -14-, -26-

Muscogee (Creek) Nation v. Hodel, 851 F.2d 1439
(DC Cir. 1988) . . . . -3-

Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians,
471 U.S. 845, 105 S. Ct. 2447 (1985) . . . . -18--20-

Nevada v. Hicks, 533 U.S. 353, 121 S.Ct. 2304 (2001). . . . . -27-

Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe,
498 U.S. 505, 111 S. Ct. 905 (1991) . . . . -16-

Prison Legal News v. Fed. Bureau of Prisons, 944 F.3d 868
(10th Cir. 2019) . . . . -22-

Proctor & Gamble Co. v. Haugen, 317 F.3d 1121
(10th Cir. 2003) . . . . -10-

Rio Grande Silvery Minnow v. Bureau of Reclamation,
601 F.3d 1096 (10th Cir. 2010). . . . . -22-

St. Louis Baptist Temple v. Fed. Deposit Ins. Corp.,
605 F.2d 1169 (10th Cir. 1979) . . . . -1-

Thlopthlocco Tribal Town v. Stidham, 762 F.3d 1226
(10th Cir. 2014) . . . . -2--14-, -17-, -19-, -20-, -26-, -29-, -31-

Thlopthlocco Tribal Town v. Tomah, 8 Okla. Trib. 451
(Must. (Cr.), D.Ct., 2004) (Tomah I). . . . . -5-, -25-

Thlopthlocco Tribal Town v. Tomah, et al., 8 Okla. Trib.
576 (Must. (Cr.), D.Ct., 2004) (*Tomah II*). -5-, -25-

United Keetoowah Band of Cherokee Indians v. Barteaux,
527 F. Supp. 3d 1309 (N.D. Okla. 2020) . . . . -11-

United States v. Ahidley, 486 F.3d 1184 (10th Cir. 2007) . . . . -1-

United States v. Dutch, 978 F.3d 1341 (10th Cir. 2020) . . . . -10-

United States v. Trans-Missouri Freight Asso., 166 U.S. 290,
17 S. Ct. 540 (1897) . . . . -24-

United States v. W. T. Grant Co., 345 U.S. 629,
73 S. Ct. 894 (1953) . . . . -24-

United States v. West, 646 F.3d 745 (10th Cir. 2011) . . . . -10-

Vermont Agency of Natural Res. v. United States ex rel. Stevens,
529 U.S. 765, 120 S.Ct. 1858 (2000) . . . . -27-

FEDERAL AUTHORITY

Page

25 U.S.C. §503 (Oklahoma Indian Welfare Act, also known as the Thomas-Rogers Act), 49 Stat. §1967 (Approved June 26, 1936) . . . . . -4-

25 U.S.C. §§ 1301, et seq., Federal Indian Civil Rights Act . . . . -20-

Curtis Act of 1898, c. 517, 30 Stat. 495 . . . . -4-

Dawes Act of 1887, 25 U.S.C. §331, *et seq*. . . . . -4-

Federal Rule of Civil Procedure 25 . . . . -30-

Federal Rule of Evidence 201(c)(2). . . . . -1-

STATE AND OTHER AUTHORITY

Page

18B Wright & Miller, Federal Practice and Procedure § 4478.3
(2d ed. 2002) (Oct. 2020 update) . . . . -10-, -11-

1979 Muscogee (Creek) Nation Constitution (amended 12/09/2010) . . . . -26-

Cohen's Handbook of Federal Indian Law 134 (2012). . . . . -12-

Constitution and By-Laws of the Thlopthlocco Tribal Town
(ratified April 13, 1939) . . . . -6-

Indian Reorganization Act, 25 U.S.C. 461 et seq., 48 Stat. 984 . . . . -4-

Jon S. Blackman, OKLAHOMA'S INDIAN NEW DEAL
(University of Oklahoma Press, 2013) . . . . -4-

MCNA, Title 27, §1-103 . . . . -20-

Ohland Moore, "Reconstruction in the Creek Nation," Chronicles of
Oklahoma, Volume 9, No. 2, June, 1931, p. 171 also found at
<https://gateway.okhistory.org/ark:/67531/metadc1827027/m1/67/>(last checked
3/2/2023) . . . . -3-

Ohland Morton, "Early History of the Creek Indians," *Chronicles of Oklahoma*,
Vol. 9, No. 1 (March, 1931), beginning at p. 17, also found at:
<https://gateway.okhistory.org/ark:/67531/metadc1826985/m1/35/>(last checked
3/2/2023) . . . . -3-

Ohland Morton, "The Government of the Creek Indians," (Part 1) Chronicles
of Oklahoma, Volume 8, No. 1, March 1930, p. 42 also found at
<https://gateway.okhistory.org/ark:/67531/metadc1826922/m1/46/>(last checked
3/2/2023) . . . . -3-

Ohland Morton, "The Government of the Creek Indians," (Part II) Chronicles
of Oklahoma, Volume 8, No. 2 June 1930, p. 189 also found at
<https://gateway.okhistory.org/ark:/67531/metadc1826929/m1/61/>(last checked
3/2/2023) . . . . -3-

Oxford Academic
<https://academic.oup.com/function/article/4/1/zqac073/6987091>
(last checked 3/1/2023) . . . . -25-

Quote Investigator <https://quoteinvestigator.com/2013/10/20/no-predict/>
(Last checked 3/1/2023) . . . . -25-

Sarah Deer, & Cecilia Knapp, *Muscogee Constitutional Jurisprudence: Vhakv Em Pvtakv (The Carpet Under the Law)*, 49 Tulsa L. Rev. 125 (2014) . . . . -4-, -5-

TABLE OF CONTENTS OF APPENDIX
(Attachments 1 to 14)

Page

THLOPTHLOCCO'S APPENDIX - VOLUME 1

001 - Constitution and By-Laws of the Thlopthlocco Thlopthlocco Tribal Town ratified April 13, 1939 . . . . 1 - 7

002 - Corporate Charter of the Thlopthlocco Tribal Town Oklahoma ratified April 13, 1939. . . . . 8 - 15

003 - Solicitor's Opinion authored by Frederic Kirgis dated July 15, 1937 regarding Thlopthlocco Tribal Town Recognition. . . . . 16 - 21

004 - Solicitor's Opinion authored by Federic Kirgis dated July 29, 1937 regarding Keetowah - Organzation as Band . . . . 22 - 23

005 - Morris Opler, "The Creek Indian Towns of Oklahoma in 1937", Volume 13, Issue 1 of "Papers in Anthropology", (Department of Anthropology, University of Oklahoma, 1972 (116 pages) (ISSN: 0479-4745) . . . . 24 - 147

006 - *Thlopthlocco Tribal Town v. Stidham*, 762 F.3d 1226 (10th Cir. 2014) . . . 148 - 163

THLOPTHLOCCO'S APPENDIX - VOLUME 2

007 - Proclamation, April 14, 1941, from Indian Affairs: Laws and Treaties . . 164 - 167

008 - Web page from Oklahoma State Digital Library regarding Thlopthlocco Tribal Town 168

009 - Web page from Oklahoma State Digital Library regarding Alabama-Quarrarte Tribal Town 169

010 - Web page from Oklahoma State Digital Library regarding Kialegee Tribal Town 170

011 - Ohland Morton, "Early History of the Creek Indians," *Chronicles of Oklahoma*, Vol. 9, No. 1 (March, 1931), beginning at p. 17, also found at: <https://gateway.okhistory.org/ark:/67531/metadc1826985/m1/35/>(last checked 3/2/2023) . . . . 171 - 182

012 - Ohland Morton, “The Government of the Creek Indians,” (Part 1) Chronicles of Oklahoma, Volume 8, No. 1, March 1930, p. 42; (Doc. 047-14) <https://gateway.okhistory.org/ark:/67531/metadc1826922/m1/46/>(last checked 3/2/2023) . . . . 183 - 204

013 - Ohland Morton, “The Government of the Creek Indians,” (Part II) Chronicles of Oklahoma, Volume 8, No. 2 March 1930, p. 189. (Doc. 047-15) <https://gateway.okhistory.org/ark:/67531/metadc1826929/m1/61/>(last checked 3/2/2023) . . . . 205 - 240

014 - (App. 1183-1193) Ohland Moore, “Reconstruction in the Creek Nation,” Chronicles of Oklahoma, Volume 9, No. 2, June, 1931, p. 171 also found at <https://gateway.okhistory.org/ark:/67531/metadc1827027/m1/67/>(last checked 3/2/2023) . . . . 241 - 251

015 - John Swanton - “Social Organizations and Social Usages of the Indians of the Creek Confederacy” (Johnson Reprint Company; New York, N. Y., 1970) . . . . 252 - 314

016 - John Swanton, “Early History of Creek Indians and Their Neighbors” (Government Printing Office: Washington, D.C., 1922)) . . . . 315 - 326

017 - January 16, 1980 Memorandum to Muskoee Area Director from the Assistant Secretary - Indian Affairs. Subject: United Keetoowah Band of Cherokees and the Creek Tribal Towns) . . . . 327 - 328

018 - December 22, 1989, Letter to Chief Claude Cox (Muscogee (Creek) Nation); Johnny Billy, Kialegee Tribal Town; Kenneth Tiger, Alabama Quassarte Tribal Town; Ms. Barbara Kelly, Thlopthlocco Tribal Town . . . . 329 - 330

019 - November 25 1989 Memorandum to Muskogee Area Director from the Assistant Secretary -Indian Affairs. Subject: Appeal of August 24, 1989, letter re Creek Cherokees and the Creek Tribal Towns) 331

020 - April 20 19(?) Memorandum to the Muskogee Area Director :Subject - The Thlopthlocco , Kialegee, and Alabama-Quassarte Tribal Towns and P. L 93-638 Contracting 332

THLOPTHLOCCO’S APPENDIX - VOLUME 3

021 - Treaty With the Creeks, 1790 . . . . 334 - 339

021 - Treaty With the Creeks, 1796 . . . . 339 - 347

021 - Treaty With the Creeks, 1802 . . . . . 347 - 350

021 - Treaty With the Creeks, 1805 . . . . . 350 - 352

021 - Treaty With the Creeks, 1814 . . . . . 352 - 356

021 - Treaty With the Creeks, 1818 . . . . . 356 - 358

021 - Treaty With the Creeks, 1821 . . . . . 358 - 362

021 - Treaty With the Creeks, 1825 . . . . . 363 -367

029 - Treaty With the Creeks, 1826 . . . . . 367 - 373

021 - Treaty With the Creeks, 1827 . . . . . 373 - 376

021 - Treaty With the Creeks, 1832 . . . . . 376 - 379

021 - Treaty With the Creeks, 1833 . . . . . 379 - 383

021 - Treaty With the Comanche, Etc., 1835 . . . . . 383 - 391

021 - Treaty With the Kiowa, Etc., 1837 . . . . . 391 - 395

021 - Treaty With the Creeks, 1838 . . . . . 395 - 398

021 - Treaty With the Creeks and Seminole, 1845 . . . . . 398 - 402

021 - Treaty With the Creeks, 1854 . . . . . 403 - 404

021 - Treaty With the Creeks, Etc., 1856 . . . . . 404 - 413

021 - Treaty With the Creeks, 1866 . . . . . 413 - 420

021 - Articles of Cession and Agreement, 1889 . . . . . 420 - 423

021 - Allotment Act, 1898 . . . . . 423 - 430

021 - Allotment Act, 1901 . . . . . 430 - 442

021 - Allotment Act, 1902 . . . . . 443 - 448

022 -1866 Creek Treaty (Original Copy) . . . . . 449 - 454

023 - Treaty with Creeks, 1901 . . . . . 455 - 468

024 - 1867 Creek Constitution-Oklahoma Chronicles . . . . 469 - 475

025 - 1867 Creek Constitution . . . . 476 - 490

026 - 1979 Muscogee Creek Nation Constitution (updated 12 09 2010) . . . . . 491 - 506

THLOPTHLOCCO'S APPENDIX - VOLUME 4

027 - *Crowe And Dunlevy PC v Stidham*, 640 F.3rd 1140 (10th Cir. 2011). . . . 507 - 521

028 - *TTT v. Stidham*, 762 F.3rd 1226 (10th Cir. 2014). . . . . 522 - 537

029 - *MCN v. Hodel*, 851 F2d 1439 (DC Cir. 1988) . . . . 538 - 545

030 - *The Creek Nation v. The United States of America*, Doc. 274,
20 Ind. Cl. Comm. 44 (Nov. 5, 1968) . . . . 546 - 549

031 - *Ellis v. Bristow, et al.*, No. CV-2009-33, MCN District Court
(April 21, 2009) . . . . 550 - 566

032 - *Crowe & Dunlevy v. Stidham*, Answer to Complaint,
No. 09-CV-095-TCK-PJC, DC ND, Okla. (May 8, 2009) . . . . 567 - 571

033 - *Thlopthlocco v. Babbitt*, No. 97-306-P, ED Okla. 2002) . . . . 572 - 586

034 - *Thlopthlocco Tribal Town v. Tomah*, 8 Okla. Trib. 451
(Must. (Cr.), D.Ct., 2004) (Tomah I). . . . . 587 - 596

035 - *Thlopthlocco Tribal Town v. Tomah, et al.*, 8 Okla. Trib.
576 (Must. (Cr.), D.Ct., 2004) (*Tomah II*). . . . . 597 - 609

036 - MCN Title 7 - Citizenship/Census . . . . 610 - 630

037 - MCN Title 11- Chapter 1 - Communities. . . . . 632 - 632

038 - MCN Title 25 - Inter-Governmental and Inter-Tribal Relations . . . . 633 - 640

039 - MCN Title 26 - Chapter 1 - Judicial Branch/Courts. . . . . 641 - 643

040 - MCN Code - Title 27 - Chapter 1 - Judicial Procedures . . . . 644 - 649

041 - MCN Title 30 - pp. 136 - 140 - Legislative Branch (Code of Laws). . . . . . 650 - 654

042 - MCN Title 39 - Tribal Towns (Reserved for Future Use) 655

043 - MCN Claimed Geographical Jurisdiction - MCN Website 656

044 - MCN Tribal Town Map - MCN Website 657

045 - Kialegee Constitution . . . . 658 - 664

046 - Seminole Constitution. . . . . 665 - 680

047 - John Swanton, "The Indian Tribes of North America," (Bureau of American Ethnology, Bulletin Number 145 (1952), Reprint Edition 1969. . . . . 681 - 710

THLOPTHLOCCO'S APPENDIX - VOLUME 5

048 - Anderson 2/22/2007 Letter to BIA Announcing Election Results 711

049 - 6/28/2007 TTT-Resolution Stripping Anderson of Authority - 712-713

050 - 6/7/ 2007 TTT Business Committee Resolution . . . . 714 - 715

051 - 06/11/2007 - Complaint CV-2007-39, *Thlopthlocco v. Anderson, et. al*, DC MCN . . . . 716 - 810

052 - 7/30/2007 -Resolution Removing Anderson as Mekko . . . . 811 - 812

053 - Thlopthlocco Tribal Town's Notice of Internal Resolution - *Thlopthlocco v. Anderson, et. al*, No. CV-2007-39, August 8, 2007. . . . . 813 - 818

054 - Anderson-Defendants' Cross-Claim, *Thlopthlocco v. Anderson, et. al.*, 7/11/2007. . . . . 819 - 829

055 - Declaration of Tonya Walker, 6/11/2009 830

056 - 2/19/2009 TTT Resolution 2009-7, ... 831 - 832

057 - Thlopthlocco, No. CV-2007-39 - Revocation of Consent to Jurisdiction, *Thlopthlocco v. Anderson, et. al* . . . ., 833 - 841

058 - 6-29-2007 No. CV-2007-39 *Thlopthlocco v. Anderson, et. al*, MCN Court Minute Re: Jurisdiction . . . . 842 - 844

059 - MCN Supreme Court Order - Re Jurisdiction, *Thlopthlocco v. Anderson, et. al*

2007-10-26 . . . . 845 - 849

060 - MCN Supreme Court Order - Re attorney fees, *Thlopthlocco v. Anderson, et. al* 1/18/2009 . . . . 850 - 851

061 - 2-12-2009 MCN Supreme Court Order denying rehearing regarding attorney fees, *Thlopthlocco v. Anderson, et. al* . . . . 852 - 853

062 - Plaintiff's Thlopthlocco Conditional Motion to Dismiss 6-11-2009, *Thlopthlocco v. Anderson, et. al* . . . . 854 - 876

063 - 8-4-2009 Court Minute Setting Jury Trial, *Thlopthlocco v. Anderson, et. al* . . . . 877 - 878

THLOPTHLOCCO'S APPENDIX - VOLUME 6

064 - 6-20-2007, *Thlopthlocco v. Anderson, et. al* MCN DC Transcript (Excerpt)Trial . . . . 878 - 904

065 - Transcript 3-6-2009 Hearing Trial, *Thlopthlocco v. Anderson, et. al* . . . . . 905 - 937

066 - Transcript 7-16-2009 Hearing Trial, *Thlopthlocco v. Anderson, et. al* . . . . 938 - 985

067 - Transcript - *Anderson v. Burden*, 2011-01-28 TTT PI Hearing Trial . . . . 986 - 1081

068 - TTT Resolution 2012-11 . . . . 1082 - 1093

THLOPTHLOCCO'S APPENDIX - VOLUME 7

069 - 11/11/2010 - Thlopthlocco Business Committee Minutes . . . . 1094 - 1096

070 - 11/11/2010 - Thlopthlocco Election Ordinance . . . . 1097 - 1102

071 - 5/10/2010 - Thlopthlocco Election Procedures . . . . 1103 - 1120

072 - 12/15/2010 - Election Committee Instructions - Plaintiff's Ex. 10 1121

073 - Drumbeat, Oct.-Nov-Dec. 2010, Volume 2, Issue 4 . . . . 1122 - 1127

074 - Election Complaints . . . . 1128 - 1131

075 - Hearing Notices Before Election Committee - Anderson Group . . . . . . 1132 - 1136

076 - 1/22/2011 - Election Committee Order on Hearing - Anderson . . . . . . 1149 - 1151

077 - 1/22/2011 - Election Committee Order on Hearing - Montmayor . . . . . 1152 - 1154

078 - 1/22/2011 - Election Committee Order on Hearing - Cheek . . . . 1155 - 1157

079 - 1/22/2011 - Election Committee Order on Hearing - Berryhill. . . . . 1158 - 1160

080 - 1/27/2011 - Minutes - Election Committee and Resolution
Delaying Election 1161

081 - 1/27/2011 - Minutes - TTT Business Committee and Resolution
Staying Hearing and Election. . . . . 1162 - 1164

082 - 2011-01-26 Complaint-MCN Court, *Anderson, et al., v. Burden, et al.*,
No. CV-2011-08 MCN District Court . . . . 1165 - 1172

083 - 2011-01-26 Temporary Restaining Order, *Thlopthlocco v. Anderson, et. al.*,
No. CV-2011-08, MCN District Court . . . . 1173 - 1175

084 - 2011-02-25 Special Entry of Appearance of Defendants, *Thlopthlocco v. Anderson, et. al.*, No. CV-2011-08, MCN District Court . . . . 1175 - 1177

085 - 2011-01-28 - Objection of Defendants, *Thlopthlocco v. Anderson, et al.*,
No. CV-2011-08, MCN District Court . . . . 1178 - 1194

086 - 2011-01-28 - Temporary Ord. (CV11-08) Suspending Election
No. CV-2011-08, MCN District Court . . . . 1195 - 1197

087 - 2011-06-30 Defendants FOF and COL, No. CV-2011-08, MCN District
Court . . . . 1198 - 1249

088- 2011-07-29 Preliminary Order, No. CV-2011-08, MCN District Court . . 1250 - 1254

089 - 2011-08-22 Report of Election Committee, No. CV-2011-08,
MCN District Court . . . . 1255 - 1258

THLOPTHLOCCO’S APPENDIX - VOLUME 8

090 - AFFIDAVIT in Support of Motion (Re [5] MOTION for
Preliminary Injunction of Vernon Yarholar . . . . 1259 - 1268

091 - Exhibit Ex A - Thlopthlocco Constitution . . . . 1269 - 1275

092 - Exhibit Ex. B - Solicitors Memorandum . . . . 1276 - 1281

093 - Exhibit Ex. C - Resolution of June 7, 2007 . . . . 1282 - 1283

094 - Exhibit Ex. D - MCN SCt Minute on Jurisdiction . . . . 1284 - 1287

095 - Exhibit Ex. E - MCN SCt Order on Jurisdiction . . . . 1288 - 1292

096 - Exhibit Ex. F - Resolution Removing Anderson . . . . 1293 - 1294

097 - Exhibit Ex. G - MCN SCt Order on Fees . . . . 1295 - 1298

098 - Exhibit Ex. H - Resolution 2009-7. . . . . 1299 - 1300

099 - Exhibit Ex. I - Transcript Excerpt - July 16, 2009 and e-mails. . . . . 1301 - 1328

100 - Exhibit Ex. J. Order Setting Jury Trial on 10-5-2009. . . . . 1329 - 1330

101 - Exhibit Ex. K - TTT-Anderson - MCN DC Order on Fees 2-5-2009 . . . 1331 - 1332

102 - Exhibit Ex. L - MCN DC Order on Show Cause 3-6-3009 . . . . 1333 - 1334

103 - Exhibit Ex. M - TTT-Anderson - MCN SCt Order denying
Petition for Rehearing . . . . 1335 - 1336

104 - Exhibit Ex. N - 6-20-2007 MCN DC Transcript (Excerpt) . . . . 1337 - 1362

105 - DECLARATION of Mekko George Scott (Re [5] MOTION
for Preliminary Injunction . . . . 1363 - 1385

THLOPTHLOCCO'S APPENDIX - VOLUME 9

106 - DECLARATION OF MEKKO RYAN MORROW
(With Exhibits) . . . . 1386 - 1397

107 - Exhibit 01 to Declaration of Mekko Ryan Morrow - 2007-01-027
Minutes of Business Committee Tribal Election Meeting and results of
votes for Thlopthlocco Tribal Town Elected Officials (5 pages) . . . . 1398 - 1402

108 - Exhibit 02 to Declaration of Mekko Ryan Morrow - 2007-01-27
Resolution 07-09 - Thlopthlocco Tribal Town Business Committee
Certification of the Election of Tribal Officers (4 pages)) . . . . 1403 - 1406

109 - Exhibit 03 to Declaration of Mekko Ryan Morrow - 2007-02-04 Thlopthlocco Tribal Town Emergency Business Committee Meeting (5 pages)) . . . . 1407 - 1411

110 - Exhibit 04 to Declaration of Mekko Ryan Morrow - 2007-02-10 Thlopthlocco Tribal Town Inaugural Ceremony Minutes (2 pages)) . . . . . . 1412 - 1413

111 - Exhibit 05 to Declaration of Mekko Ryan Morrow - Thlopthlocco Tribal Town History Web Page (2 pages)) . . . . 1414 - 1416

112 - Exhibit 06 - Thlopthlocco Tribal Town Terms of Use Web Page (9 pages)) . . . . 1417 - 1425

113 - Exhibit 07 - Letters from MCN Regarding Cooperative Housing Agreement (Complete - 13 pages)) . . . . 1426 - 1438

Consisting of:

2009-07-08 Letter from MCN National Council Speaker Thomas Yarholar to Principal Chief A. D. Ellis 1426

2009-07-15 Memo to Thomas Yarholar from Ron Qualls, MCN Housing Director . . . . 1427 - 1428

2009-06-09 Memo to A. D. Ellis and Ron Qualls from Shannon Cozzoni, First Assistant Attorney General (With attachments) . . . . 1429 - 1438

114 - Thlopthlocco Resolution 2013-31 Establishing A Special Jurisdiction Tribal Court to Hear and Decide Gaming Commission or Other Administrative Appeals and Appointment of Special District Judge (December 26, 2013) . . . . 1439 - 1440

115 - Thlopthlocco Tribal Town - Judicial Code . . . . 1441 - 1478

THLOPTHLOCCO'S APPENDIX - VOLUME 10

116 - Plaintiff Thlopthlocco Tribal Town and Official Capacity Cross-Defendants Motion to Dismiss Defendants' Cross-Claim, Plaintiffs' Conditional Motion to Dismiss and Brief in Support, filed February 5, 2016 . . . . 1479 - 1564

117 - Response to Plaintiff Thlopthlocco Tribal town and Official Capacity Cross-Claim Defendants' Motion to Dismiss, Filed April 5, 2016 . . . . 1565 - 1662

THLOPTHLOCCO'S APPENDIX - VOLUME 11

118 - Plaintiff Thlopthlocco Tribal Town and Official Capacity Cross-Defendants Reply to Motion to Dismiss Defendants' Cross-Claim, Plaintiffs' Conditional Motion to Dismiss and Brief in Support, filed May 5, 2016 . . . . 1663 - 1717

119 - Plaintiff's Motion for Summary Judgment Granting Final Orders and Brief in Support, Filed February 5, 2016 filed in CV-2011-08, but not filed in CV-2007-37 . . . . 1718 - 1869

THLOPTHLOCCO'S APPENDIX - VOLUME 12

120 - Thlopthlocco Tribal Town and Official Capacity Parties Response to CV-2011-08 Plaintiffs Motion for Summary Judgment Granting Final Orders and Brief in Support, Filed April 5, 2016 . . . . 1870 - 1932

121 - Reply to Plaintiff and Official Capacity Cross-Claim Defendants Response to Anderson et al's Motion for Summary Judgment, filed May 3 2016 . . . . 1933 -2036

THLOPTHLOCCO'S APPENDIX - VOLUME 13

122 - Plaintiff's Motion Requestion (sic) Preliminary Orders to Hold Thlopthlocco Tribal Town Election be Reinstated and Parties be Named as Indispensible for Federal Action, filed January 15, 2020. . . . . 2037 - 2066

123 - Plaintiff Thlopthlocco Tribal Town and Official Capacity Defendants Response to Plaintiff's Motion Requestion Preliminary Orders To Hold Thlopthlocco Tribal Town Election Be Reinstated and Parties Be Named Indispensible Parties for Federal Action and Brief in Support, filed January 27, 2020 . . . . 2067 - 2093

124 - Thlopthlocco Tribal Town Response to "Plaintiff's Motion for Final Orders and Response Defendant's Motion for Status Conference", filed March 9, 2015 . . . . 2094 - 2117

125 - All Official Capacity Defendants' Second Supplemental Authority in Support of Motion to Dismiss Defendants' Cross-claim, Plaintiffs' Conditional Motion to Dismiss And Brief in Support. 2118 - 2124

126 - Administrative Order in CV2007-39 and CV-2011-08,

filed November 18, 2020 . . . . 2125 - 2126

127 - Adminstrative Order 2020-05 filed in In Re: Administration of the
Nation's Judicial Branch, Supreme Court of the Muscogee (Creek)
Nation, filed October 30, 2020 . . . . 2127 - 2129

128 - Status Report filed in Response to Adminstrative Order 2020-05
filed in In Re: Administration of the Nation's Judicial Branch,
Supreme Court of the Muscogee (Creek) Nation, filed November, 12, 2020. 2130 - 2131

TABLE OF CONTENTS OF THLOPTHLOCCO'S SUPPLEMENTAL APPENDIX - VOLUME 14

Page

129 - Thlopthlocco Tribal Town Motion to Stay May 24, 2021 Order and Brief in Support,filed June 1, 2021 . . . . 2132 - 2136

130 - Thlopthlocco Tribal Town Motion to Consolidate Cases for Purposes of Appeal and Brief in Support, filed June 1, 2021. . . . . 2137 - 2145

131 - Special Entry of Appearance of Thlopthlocco Tribal Town and Official Capacity Parties and Brief in Support, filed June 1, 2021 . . . . 2146 - 2149

132 - Order Acknowledging Receipt of Interlocutory Appeal, filed June 2, 2021 . . . . 2150 - 2152

133 - Supplement to Application for Interlocutory Appeal of Thlopthlocco Tribal Town, filed June 28, 2021. . . . . 2153 - 2159

134 - Determination of Interlocutory Merit by MCN Tribal District Court, filed July 1, 2021 . . . . 2160 - 2162

135 - Order Accepting Appellant's Application for Interlocutory Appeal and Granting Motion to Consolidate Cases by MCN Supreme Court, filed July 2, 2021 . . . . 2163 - 2166

136 - Thlopthlocco Motion for Leave to Enlarge Page Limits of Brief and Brief in Support, filed July 8, 2021 . . . . 2167 - 2176

137 - Order Granting Appellant's Motion for Leave to Enlarge Page Limits of Briefs by MCN Supreme Court, Filed July 22, 2021 . . . . 2177 - 2179

138 - Order of Notice, by MCN Supreme Court, filed November 19, 2021 . . . . 2180 - 2181

139 - Letter dated July 3, 2019, from Joshua W. Atwood, Staff Attorney, MCN Supreme Court regarding execution of new *Consent to Jurisdiction* Form by all MCN Supreme Court Bar Members . . . . 2182 - 2183

140 - Second Letter dated August 16, 2019 from Joshua W. Attwood, Staff Attorney, MCN Supreme Court regarding execution of new *Consent to Jurisdiction* Form by all MCN Supreme Court

Bar Members . . . . 2184 - 2185

141 - Response Letter dated August 30, 2019 to Joshua Atwood, Staff Attorney, from Micheal Salem regarding *Consent to Jurisdiction* Form to be executed by all MCN Supreme Court Bar Members . . . . 2186 - 2189

142 - Executed *Consent to Jurisdiction* Form by Micheal Salem "In accordance with *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1130 (10th Cir. 2011) and *Thlopthlocco Tribal Town v. Stidham*, 762 F.3d 1226 (10th Cir. 2014), dated August 30, 2019 . . . . 2190 - 2190

143 - USPS Tracking Information dated September 14, 2019, showing certified letter arrived on September 5, 2019 and tracked to Okmulgee Post Office and ready for pickup . . . . 2191 - 2191

144 - Email string between Micheal Salem and Joshua Atwood on September 14, 2019; Response from Mr. Atwood and Reply to Mr. Atwood . . . . 2192 - 2194

145 - Letter from Andrew Adams, III, Chief Justice, MCN Supreme Court, dated January 23, 2020 . . . . 2195 - 2196

146 - Letter from Micheal Salem to Joshua Atwood, Staff Attorney, MCN Supreme Court, dated January 29, 2020 including executed *Consent to Jurisdiction Form* . . . . 2197 - 2198

147 - Minutes of Special Meeting of Thlopthlocco Tribal Town Business Committee dated July 19, 2022 . . . . 2199 - 2201

148 - Thlopthlocco Tribal Town Resolution No. 2022-08 adopted July 19, 2022 adopting and approving Election Ordinance, Rules, and Procedures of Thlopthlocco Tribal Town governing future elections of tribal officer . . . . 2202 - 2203

149 - Thlopthlocco Tribal Town Election Ordinance and Election Committee Rules and Procedures, dated July 19, 2022 . . . . 2204 - 2233

VOLUME LIST TO APPENDICES

For the benefit and reference of the Court the following table identifies the pages contained in each Volume of the Appendices included here as attachments to this Statement and Motion:

Volume	Page
Volume 1	001 - 163
Volume 2	164 - 332
Volume 3	333 - 506
Volume 4	507 - 710
Volume 5	711 - 878
Volume 6	879 - 1093
Volume 7	1094 - 1258
Volume 8	1259 - 1385
Volume 9	1386 - 1478
Volume 10	1479 - 1662
Volume 11	1663 - 1869
Volume 12	1870 - 2036
Volume 13	2037 - 2131
Volume 14 - Supplemental Appendix	2132 - 2233

NOMENCLATURE AND IDENTIFICATIONS USED IN THIS BRIEF

1. Glossary of Abbreviations and Terms.

Plaintiff identifies the following abbreviations and terms used in this filing. Some may already be known to the Court, but are included in the interest of completeness:

Term		Definition
Business Committee	-	Governing Body of Thlopthlocco Tribal Town, a Federally recognized Indian Tribe, as specified by its Constitution. (App. 001)
Mekko	-	Also "Miko," "Town King." A leader of a Creek tribal town.
MCN	-	Abbreviation for Muscogee (Creek) Nation, a federally recognized Indian Tribe. The MCN reorganized in 1979 under the Oklahoma Indian Welfare Act. This term may also be used to refer to the Defendant members of the MCN judiciary herein.
Talwa	-	Ancient name for a Creek Tribal Town which also connotes to "tribe." In Creek, the traditional term is *etvwlv* from which the term "talwa" may have been derived.
Thlopthlocco or TTT	-	Abbreviation for Thlopthlocco Tribal Town, a federally recognized Indian Tribe. Thlopthlocco reorganized in 1939 under the Oklahoma Indian Welfare Act; Plaintiff in this case; Plaintiff in the MCN Tribal Court in CV-2007-39; Official capacity Cross-Defendants in CV-2007-39; Official capacity Defendants in CV-2011-08; and Appellant in SC-2021-03.

2. Identification of Parties.

Thlopthlocco parties, other parties, witnesses, or persons involved in this proceeding may also be referred to by their last names, title, or as referenced in this court where appropriate, *e.g.*, "Defendant(s)," "Justices," "Judge(s)," or collectively as previously noted.

In the Tribal District Court and on appeal, the CV-2007-39 Cross-Defendants are generally the same parties as CV-2011-08 Defendants and official capacity members of the Thlopthlocco Business Committee. There are no vacancies on the TTT Business Committee at the present time.

There are additional Defendants in CV-2011-08 who are official capacity members of the Thlopthlocco Election Committee. By the time of the pendency of the appeal of the tribal district court cases, all three offices of the TTT Election Committee were vacant by death or resignation.

As noted in the styles of filings in the tribal courts, the CV-2007-39 Defendants and the CV-2011-08 Plaintiffs are the parties identified with Nathan Anderson. They are not identical groups. (See Supp. App. 2153-59). They will generally be referenced as "Anderson" or "Anderson's group," or separately as necessary.

3. Judicial Decisions of the Tribal Courts.

Tribal District Judge Stacy Leeds' consolidated decision for CV-2007-39 and CV-2011-08 in the Tribal District Court has been filed in this Court as Doc. 159-01.

The consolidated decision, No. SC-2021-03, by the Muscogee (Creek) Nation Supreme Court for CV-2007-39 and CV-2011-08 has been filed with this Court as Doc. 168-04.

4. Appendix in this Case.

Thlopthlocco will file as attachments to this Motion and Brief the original Appendix submitted to the MCN Supreme Court with its *Application for Interlocutory Appeal* (No. SC-2021-03). This consists of thirteen (13) Volumes with sequentially

numbered pages from 0001 to 2131.

Citations to this original Appendix will be as follows: (App. (page number), additional identification as necessary).

A Table of Contents of the complete original Appendix is included in the Table of Contents of this Brief (p. xi - xxiii) and is also included in Volume 01 of the filed Appendix. Volumes 02 - 13 contain individual volume indices.

Other exhibits that were part of the proceedings before the MCN Supreme Court and which are not already filed of record in this case will be included in an additional single volume Supplemental Appendix - Volume 14. Page numbers of the Supplemental Appendix will be sequentially numbered starting with 2132 to 2233 so as to follow the original Appendix.

Citations to this Supplemental Appendix Volume will be identified as follows: (Supp. App. (page number), additional identification as necessary).

4. Attachment 15.

Included as Attachment 15 to this Statement and Motion is a proposed Notice Regarding Joinder of Parties as discussed in Proposition F beginning at page 30.

PLAINTIFF THLOPTHLOCCO'S STATEMENT OF POSITION AND MOTION FOR DECLARATORY JUDGMENT AND BRIEF IN SUPPORT

THLOPTHLOCCO TRIBAL TOWN ("Thlopthlocco" or "TTT"), a federally recognized Indian Tribe and Plaintiff in this matter, comes before the Court and submits the following Statement of Position and Motion for Declaratory Judgment and Brief in Support.[1] Thlopthlocco moves for declaratory judgment by summary judgment.

I. INTRODUCTION.

The Muscogee (Creek) Nation ("MCN") Supreme Court has now had an opportunity to fully consider the questions raised and submitted to it for exhaustion by the Tenth Circuit. Having satisfied its obligation of comity, this Court should enter a declaratory judgment that consistent with federal common law, Thlopthlocco Tribal Town is entitled to sovereign immunity in the courts of the MCN.

Further, Thlopthlocco is further entitled to declaratory judgment that should it consent to jurisdiction in the courts of the MCN, it may, consistent with federal common law, withdraw that consent to jurisdiction prior to judgment.

Entry of this declaratory judgment will serve as a bulwark securing sovereign

---

[1] Some exhibit references will be to documents previously filed with this court and referenced as (Doc. (Number)).

Plaintiff will file the original thirteen (13) volume Appendix used on appeal in the MCN Supreme Court. (Referenced as (App. (page numbers)). *See* p. xxvi, xxvii.

Other exhibits used before the MCN courts and not filed in this court will be included in an additional Supplemental Appendix. (Referenced as (Supp. App. (page number)).

This Court is asked to take judicial notice of these documents pursuant to Fed.R.Evid. 201(c)(2). *See United States v. Ahidley*, 486 F.3d 1184, 1192 n.5 (10th Cir. 2007) ("*See St. Louis Baptist Temple v. Fed. Deposit Ins. Corp.*, 605 F.2d 1169, 1172 (10th Cir. 1979) ('[I]t has been held that federal courts, in appropriate circumstances, may take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue.'").

immunity for Thlopthlocco in any future litigation before the MCN courts in a manner consistent with the concerns suggested by the Tenth Circuit about any Thlopthlocco candidate for office who willingly attempts to trade Thlopthlocco sovereignty in exchange for MCN judicial assistance in gaining tribal office. *Thlopthlocco Tribal Town v. Stidham*, 762 F.3d 1226, 1241 (10th Cir. 2014).

A declaratory judgment will also have the salutatory effect of establishing or strengthening any claim of sovereign immunity by two other federally recognized Creek tribal towns, Kialegee Tribal Town and Alabama-Quassarte Tribal Town. These tribes have similar origin stories and identical sovereign autonomy within the old Creek Confederacy and the subsequent Creek Nation. All three tribal towns will thus be protected from MCN overreach.

II. STATEMENT OF FACTS AND COURSE OF THE PROCEEDINGS.

1. THE HISTORICAL AND CURRENT RELATIONSHIP AMONG THE TRIBAL TOWNS AND THE MCN.

The Tenth Circuit briefly summarized historical facts of the Creek Tribal Towns which are incorporated herein by reference. *Thlopthlocco Tribal Town v. Stidham*, 762 F.3d 1226, 1229-33 (10th Cir. 2014). The Circuit described the precursor of what became the Muscogee (Creek) Nation ("MCN") as "'. . . a confederacy of autonomous tribal towns, or Talwa, each with its own political organization and leadership.' *Harjo v. Andrus*, 581 F.2d 949, 952, 189 U.S. App. D.C. 171 at n. 7 (D.C. Cir. 1978)." *Thlopthlocco v. Stidham*, 762 F.3d at 1229.

As noted by the Tenth Circuit:

> As one analysis puts it, "[t]he Creeks had a peculiar form of government in that the confederation seemed to have no central control. The population of a town, regardless of the number of clans represented, made up a tribe ruled by an elected chief or 'miko,' who was advised by the council of the

> town on all important matters." Ohland Morton, Early History of the Creek Indians, 9 Chronicles of Okla. 17, 20 (March 1931) [(App. 171-82)]. Thus, "[t]he Creek town ... represented an autonomy such as is usually implied by the term 'tribe.' " *Id*. at 21; *see also Harjo*, 581 F.2d at 952 n. 7 (D.C.Cir. 1978) (discussing the historic role of autonomous talwa). Though autonomous, the many talwa were closely affiliated throughout most of the Creeks' history, giving rise to references to the "Creek Confederacy" or the "Muscogee Nation," named for the talwa's shared language.
>
> \- - - - -
>
> Further, "[t]hat the Indians themselves recognized the existence of the Creek tribal towns is clear from an examination of the constitutions and laws of the Muscogee Nation. . . . The towns are recognized as having an existence not derived from the constitution of the Muscogee Nation but in fact antedating and continuing alongside the constitution." *Id*. at 4.

Thlopthlocco v. Stidham, 762 F.3d at 1229-31.[2]

---

[2] *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1440-42 (DC Cir. 1988) (App. 538-45) also contains a brief history of the Creeks from the time of removal to Oklahoma through the organization of the MCN in 1979.

There are other references in the Appendix which provide historical facts regarding the Creek Indians:

> (App. 171-82) Ohland Morton, "Early History of the Creek Indians," *Chronicles of Oklahoma*, Vol. 9, No. 1 (March, 1931), beginning at p. 17. <https://gateway.okhistory.org/ark:/67531/metadc1826985/m1/35/>(last checked 3/2/2023).
>
> (App. 183-204) Ohland Morton, "The Government of the Creek Indians," (Part 1) Chronicles of Oklahoma, Volume 8, No. 1, March 1930, p. 42. <https://gateway.okhistory.org/ark:/67531/metadc1826922/m1/46/>(last checked 3/2/2023).
>
> (App. 205-40) Ohland Morton, "The Government of the Creek Indians," (Part II) Chronicles of Oklahoma, Volume 8, No. 2 June 1930, p. 189. <https://gateway.okhistory.org/ark:/67531/metadc1826929/m1/61/>(last checked 3/2/2023).
>
> (App. 241-51) Ohland Moore, "Reconstruction in the Creek Nation," Chronicles of Oklahoma, Volume 9, No. 2, June, 1931, p. 171. <https://gateway.okhistory.org/ark:/67531/metadc1827027/m1/67/>(last checked 3/2/2023).

Previous URL's for the documents have changed, but are now available from the Oklahoma Historical Society website as shown.

As punishment for some Talwa joining with the Southern Confederacy during the Civil War, and not wanting to deal with multiple talwa, the Federal Government insisted on centralization of the 44 Creek Talwa to form a single constitutional government in 1867. This was opposed by some full-blood members. Even after this forced confederation, ". . . largely because the centralized government had little power, the talwa continued to govern themselves, behaving more like states than municipalities." *Thlopthlocco v. Stidham*, 762 F.3d at 1230.

The United States attempted assimilation of the Creeks. This began with abolishment of the tribal governments under the Curtis Act of 1898, c. 517, 30 Stat. 495 and the Dawes Act of 1887, 25 U.S.C. §331, *et seq*. After this period, the Creek Nation was mostly inactive.[3]

In 1936 under the "Indian New Deal", Congress allowed tribal reorganization with the passage of the Oklahoma Indian Welfare Act [4] ("OIWA"). This would permit any "recognized tribe or band of Indians" in Oklahoma to adopt a constitution and bylaws and be acknowledged by a federal charter of incorporation. Thlopthlocco was one of

---

[3] *See* Sarah Deer, & Cecilia Knapp, *Muscogee Constitutional Jurisprudence: Vhakv Em Pvtakv (The Carpet Under the Law)*, 49 Tulsa L. Rev. 125 (2014) (hereafter "Deer and Knapp").This article is available at:

<http://digitalcommons.law.utulsa.edu/tlr/vol49/iss1/5> (Last checked 2/8/2023).

The Creek constitutional government was not well documented and essentially lapsed between 1906 and 1976. 49 Tulsa L. Rev. at 164, Fn. 337 ("In 1978, the United States Court of Appeals noted that 'the Creek National Council per se has not met in more than sixty years.' *Harjo v. Andrus*, 581 F.2d 949, 952 (D.C. Cir. 1978).").

[4] *See generally* Chapt. 4, Jon S. Blackman, OKLAHOMA'S INDIAN NEW DEAL (University of Oklahoma Press, 2013). Congress passed the Indian Reorganization Act, 25 U.S.C. §461, *et seq.* and then the Oklahoma Indian Welfare Act ("OIWA") also known as the Thomas-Rogers Act, 49 Stat. §1967 (Approved June 26, 1936)), 25 U.S.C. §503.

three of sixteen remaining tribal towns still active that sought and received a federal charter in 1939. The rest of the talwas did not organize until 1979 and then became the Muscogee (Creek) Nation after adopting a Constitution.

Thlopthlocco and the other Tribal Towns took no part in the organization of the MCN although individual members may have participated as members of the MCN.[5]

As the Circuit noted, the Muscogee Constitution does not mention Thlopthlocco, but provides it "shall not in any way abolish the rights and privileges of persons of the Muscogee Nation to organize tribal towns." *Thlopthlocco v. Stidham*, 762 F.3d at 1231.

At the time of the present controversies, both Thlopthlocco and the MCN were separate federally recognized tribes. *Thlopthlocco v. Stidham*, 762 F.3d at 1233. (". . . our cases recognize the legal separation of the Tribal Town and the Muscogee Nation. 'While the Creek Nation has jurisdiction to regulate its own citizens, the Thlopthlocco is an independent tribal entity that elects its own government pursuant to its own Constitution and is not itself a citizen of the Creek Nation.' *Crowe & Dunlevy P.C. v. Stidham*, 640 F.3d 1140, 1152 (10th Cir. 2011)").

2. THE THLOPTHLOCCO ELECTION CONTROVERSIES.

In previous years Thlopthlocco elections resulted in litigation. *Thlopthlocco Tribal Town v. Tomah*, 8 Okla. Trib. 451 (Must. (Cr.), D.Ct., 2004)("*Tomah I*")(App. 587, 799) and *Thlopthlocco Tribal Town v. Tomah, et al.*, 8 Okla. Trib. 576 (Must. (Cr.), D.Ct.,

---

[5] Deer and Knapp note that MCN governance was not revived until *Harjo v. Kleppe*, 420 F. Supp. 1110 (D.C.D.C. 1976).

Previously organized tribal towns were excluded from the new constitutional government. 49 Tulsa L. Rev. at 168-69, Fn. 384 ("Chief Cox opposed the inclusion of *etvlwv* governments as part of the government structure." Cox explained: "[t]he town setup is impractical. Thlopthlocco town owns property and is organized to some extent but it is torn like a wagon sheet by faction and strife. A big cumbersome council from all those towns would never agree on anything, never get anything done.").

2004) ("*Tomah II*")(App. 597).

The two cases that are part of this litigation allege a governance controversy in 2007 (CV-2007-39) and a dispute about election candidacy in 2011 (CV-2011-08). All litigation took place in the MCN judicial system because Thlopthlocco ". . .is without a judiciary, but the BIA's funding stream implies that the Tribal Town members use, or at least can use, the Muscogee courts." *Thlopthlocco v. Stidham*, 762 F.3d at 1231.

3. THE 2007 GOVERNANCE DISPUTE (CV-2007-39).

This controversy arose in June 2007 out of an attempted *coup d'état* by Nathan Anderson, the elected Town King against all other members of the Business Committee more than four months after they were elected and sworn into office.[6]

Anderson declared himself the only legitimately elected official and also declared all other offices vacant. He then proceeded to fill those office with his family members and cronies using a provision of the Thlopthlocco Constitution that allows the remaining elected officers of the Business Committee (himself only) to appoint replacements. (Thlopthlocco Const., Art. V, Sec. 6) (App. 04).

To combat Anderson's actions, the original Business Committee stripped Anderson of his authority and adopted a limited waiver of sovereign immunity <u>which specifically excluded election disputes</u>. They then filed suit on June 11, 2007 in the MCN tribal district court for declaratory and injunctive relief. (CV-2007-39). (App. 712-13; 714-15; 716-810).

---

[6] The terms "election" and "appointed" are used hereafter because the Thlopthlocco Constitution calls for the election of five officers ("Town King, two Warriors, a Secretary and a Treasurer."). These five officers then appoint (or select) five additional tribal members as "advisory council" to serve on the Business Committee. (TTT Const. Art. V, Secs. 1, 3) (App. 03-04).

Although having allowed such litigation in the past, the MCN district court ruled it lack jurisdiction to hear the claim. On appeal, the Muscogee Supreme Court reversed, holding that although Thlopthlocco is a separate federally recognized Indian tribe under federal law, it is also Muscogee Nation town under tribal law and subject to jurisdiction in Muscogee courts. *Thlopthlocco v. Stidham*, 762 F.3d at 1232.

Anderson then filed cross-claims against the members of the Business Committee challenging their original elections and their ability to strip Anderson of authority. (App. 819-29). Rather than dismiss on grounds of sovereign immunity, the tribal district court allowed these claims to continue following the MCN Supreme Court decision that it could exercise jurisdiction over Thlopthlocco.

Eventually, Anderson was subjected to a grievance procedure under the Thlopthlocco Constitution and removed from office. *Thlopthlocco v. Stidham*, 762 F.3d at 1232. The MCN courts were notified of this internal resolution by Thlopthlocco on August 8, 2007. (App. 813-18). But the courts gave it no effect and continued to exercise jurisdiction over Anderson's bogus claim of election fraud.

The original Business Committee later revoked its consent to jurisdiction and filed a conditional motion to dismiss without success. (App. 831-32; App. 833-41):

> But Anderson continued to pursue his cross-claims. As a result, the Tribal Town withdrew its waiver of sovereign immunity and moved to dismiss the suit. The Muscogee district court denied that motion, finding that, even in the absence of the Tribal Town's consent, the Muscogee courts had jurisdiction to hear the suit for the same reasons the Muscogee Supreme Court articulated in the earlier appeal. The Tribal Town filed an interlocutory appeal. Citing its previous finding that, under tribal law, the Tribal Town was part of the Muscogee Nation, the Muscogee Supreme Court denied the appeal.

Thlopthlocco v. Stidham, 762 F.3d at 1232.

4. THE 2011 ELECTION CANDIDACY CONTROVERSY (CV-2011-08).

The 2007 litigation continued to the next Thlopthlocco election cycle in 2011. Anderson filed another case in the Muscogee district court:

> In January 2011, the Thlopthlocco people were scheduled to elect a new Business Committee. Shortly before the election, Anderson filed a new action in Muscogee district court, alleging that individual Business Committee members and members of the Thlopthlocco Election Committee illegally removed him and other candidates from the ballot (*Anderson v. Burden* (*Anderson II*)). The Muscogee district court denied the Committee members' motion to dismiss for lack of jurisdiction and suspended the election. Subsequently, the Muscogee district court ordered that the Tribal Town hold an election and include Anderson and the other *Anderson II* plaintiffs on the ballot.

Thlopthlocco v. Stidham, 762 F.3d at 1232.

Thlopthlocco filed this action to enjoin the tribal court proceedings:[7]

> With these developments, the Tribal Town filed suit in the Northern District of Oklahoma. It requested that the federal court enjoin the Muscogee judicial officers from asserting jurisdiction over the Tribal Town's election procedures. The district court denied the request and instead granted the Muscogee judicial officers' motion to dismiss the suit because: the federal court lacked subject matter jurisdiction; the Muscogee judicial officers were entitled to sovereign immunity; the Tribal Town had failed to join indispensable parties; and the Tribal Town had not exhausted its tribal court remedies.

Thlopthlocco v. Stidham, 762 F.3d at 1232-33.

5. THE DECISION OF THE TENTH CIRCUIT.

On September 3, 2014 the Tenth Circuit ruled that Thlopthlocco's federal charter was "strong evidence" of Thlopthlocco independence from the Muscogee Nation, affirmed a previous ruling that Thlopthlocco was not a member of the Creek Nation, but remanded back to the district court to refer the case to the tribal courts to exhaust tribal

---

[7] As this Court's docket reflects, Thlopthlocco actually initiated this litigation on August 18, 2009 when the tribal district court set Anderson's bogus election claims for a jury trial. (App. 877). The federal proceedings were abated as various stays were entered by the Tribal courts in apparent response to the Federal litigation.

remedies. The Circuit remanded a question of whether the Creek courts could make "colorable claims" of jurisdiction involving "some significant Muscogee tribal interest" in the absence of Thlopthlocco's consent. *Thlopthlocco v. Stidham*, 762 F.3d at 1240.

The Tenth Circuit also remanded the question of whether Thlopthlocco could withdraw its waiver of consent in the presence of some Muscogee rule of procedure that prevents a sovereign from doing so, although noting, "in this way, tribal law varies significantly from federal law."[8] *Thlopthlocco v. Stidham*, 762 F.3d at 1240.

6. REMAND FOR TRIBAL COURT EXHAUSTION.

Following the Tenth Circuit's mandate, this court remanded to the tribal courts on December 30, 2014 (Doc. 089). The delay of resolution was extensive.

A decision was issued by Tribal District Judge Stacy Leeds on May 24, 2021. (Doc. 159-01). Plaintiff filed an interlocutory appeal with the MCN Supreme Court. (Docs. 159-02, 159-03). The case was accepted and the two tribal district court cases were consolidated. (Docs. 161-01, 161-02). The case was at issue on September 15, 2021, the date of filing Plaintiff's Reply Brief. (Doc. 163-07). The Order and Opinion of the MCN Supreme Court was filed on February 28, 2022. (Doc. 168-04).

The MCN Supreme Court's decision held that Thlopthlocco was entitled to sovereign immunity in the MCN courts. Thlopthlocco could also consent to jurisdiction. (Doc. 168-04 ("The Appellant is entitled to sovereign immunity in the Courts of the Muscogee (Creek) Nation. The Appellant, via its unique status under Muscogee

---

[8] *See Thlopthlocco v. Stidham*, 762 F.3d at 1240:

See, e.g., Beers v. Arkansas, 61 U.S. 527, 529, 15 L. Ed. 991 (1857) (providing that, under federal law, a sovereign "may withdraw its consent whenever it may suppose that justice to the public requires it.").

tribal law, is also able to voluntarily submit to the jurisdiction of the Muscogee (Creek) Nation Courts.”).

The decision did not directly address the second question of the Tenth Circuit as to whether Thlopthlocco could withdraw a consent to jurisdiction once given.

III. ARGUMENT

The Tenth Circuit (Doc. 074) reversed this court’s dismissal and judgment (Docs. 064 and 065) and remanded for further proceedings. *Thlopthlocco v. Stidham*, 762 F.3d at 1242 (“Accordingly, we REVERSE the district court's dismissal and REMAND . . .”). Respectfully, in light of this mandate this court’s previous judgment should be vacated.

PROPOSITION A

THIS COURT IS OBLIGATED TO FOLLOW THE MANDATE OF THE TENTH CIRCUIT WHICH REQUIRES FURTHER PROCEEDINGS.

It is axiomatic that lower courts are “strictly” bound by the mandate instructions of the appellate court. The mandate instructs and directs the action of the lower court.[9]

---

[9] *See*, *United States v. Dutch*, 978 F.3d 1341, 1345 (10th Cir. 2020):

A decision by this court establishes the law of the case and prevents an issue decided by it from being relitigated on remand. *United States v. West*, 646 F.3d 745, 747-48 (10th Cir. 2011). When we remand a case, we generally provide instructions to the district court—the so-called “mandate.” We have said “[t]he mandate consists of our instructions to the district court at the conclusion of the opinion, and the entire opinion that preceded those instructions.” *Proctor & Gamble Co. v. Haugen*, 317 F.3d 1121, 1126 (10th Cir. 2003).

The mandate rule follows from the law of the case doctrine. *See* 18B Wright & Miller, Federal Practice and Procedure § 4478.3 (2d ed. 2002) (Oct. 2020 update) (“Law-of-the-case terminology is often employed to express the principle that an inferior tribunal is bound to honor the mandate of a superior court within a single judicial system.”). It requires the district court to strictly comply with any mandate rendered by this court on remand. *West*, 646 F.3d at 748. "There is nothing surprising about

(continued...)

The initiation of this lawsuit included a request for declaratory and injunctive relief and Plaintiff is entitled to adjudication of these claims.[10] Plaintiff does not seek an injunction.

Despite a suggestion by Defendants in a status report (Doc. 171) this case is moot because the MCN Supreme Court has recognized Thlopthlocco sovereign immunity in MCN courts, that is only a precursor result to adjudication by this court. Until this court rules on the pending federal common law questions regarding Thlopthlocco sovereign immunity, this lawsuit is not over. The Tenth Circuit recognized as much when it ordered abatement. *Thlopthlocco v. Stidham*, 762 F.3d at 1241. ("Abatement will enable the district court to exercise its jurisdiction on the merits after exhaustion in tribal court <u>regardless of the outcome there</u>."). (emphasis added).

Thus tribal exhaustion is just a step in the process to a decision of this Court. This is true because under ordinary circumstances, a federal court is not entitled to consider the merits of a case until exhaustion occurs. *United Keetoowah Band of Cherokee Indians v. Barteaux*, 527 F. Supp. 3d 1309, 1322 (N.D. Okla. 2020) ("Under the tribal exhaustion rule, '[u]ntil petitioners have exhausted the remedies available to them in the Tribal Court system, it [is] premature for a federal court to consider any relief.'"). After years in litigation, the time to consider relief is nigh.

Such an opinion is in no way advisory. Entry of the requested declaratory judgment will protect Thlopthlocco from future disruption to both its internal operation and constitutional election procedures at the hands of the MCN judiciary.

---

[9](...continued)
[this] basic principle, which inheres in the nature of judicial hierarchy."
Wright & Miller at § 4478.3.

[10] *See*, Doc. 002, pp. 01 (Style), 04, 12, 29, 30; Doc. 037, pp. 1 (Style), 09, 17, 35, 36; Doc, 047, pp. 01, 02, 51, 54, 55.

PROPOSITION B

NOW THAT TRIBAL EXHAUSTION HAS CONCLUDED, THIS COURT SHOULD ISSUE A DECLARATORY JUDGMENT REGARDING THE FEDERAL QUESTIONS OF THLOPTHLOCCO TRIBAL SOVEREIGN IMMUNITY AND ITS ABILITY TO WITHDRAW A CONSENT TO JURISDICTION ONCE GIVEN.

As noted, the Tenth Circuit left two federal questions pending before this court. The first question was recognition of Thlopthlocco sovereign immunity from suit in the tribal courts of the MCN judiciary. As a matter of federal law, the Circuit described Thlopthlocco as a "freestanding" federally recognized Indian Tribe separate and apart from that of the MCN. *See Thlopthlocco v. Stidham*, 762 F.3d 1226 at 1233:

> . . . in 1937, when the United States Department of the Interior issued a charter formalizing the Tribal Town's status as a recognized tribe, the Department expressly resolved that the Thlopthlocco's relationship with the Muscogee did not impede the Tribal Town's recognition as a discrete entity. The Tribal Town's federal charter is strong evidence of its independence from the Muscogee Nation and of its quasi-sovereign status. *See* Cohen's Handbook of Federal Indian Law 134 (2012) (discussing the legal significance of federal recognition of an Indian tribe). Under federal law, the Tribal Town is therefore a freestanding tribe.

The Department of Interior decision was guided by the opinion of its Acting Solicitor, Frederic Kirgis. (App. 016-21; Doc. 002-03, Memorandum to the Commissioner of Indian Affairs 1 (July 15, 1937)) Kirgis relied upon an anthropology field report by Morris Opler. *Thlopthlocco v. Stidham*, 762 F.3d at 1229-30.[11]

Even so, the Circuit concluded exhaustion was required in the form of a remand to allow the MCN Supreme Court a chance to identify "colorable claims" that

---

[11] Opler Report (Doc. 047-05, also erata correction at Doc. 051, 051-01, 051-02). Kirgis', supported by other historical reports and case citations concluded that "The Creek Nation, historically and traditionally, is actually a confederacy of autonomous tribal towns, or Talwa, each with its own political organization and leadership." *Thlopthlocco v. Stidham*, 762 F.3d at 1229 citing *Harjo v. Andrus*, 581 F.2d 949, 952, 189 U.S. App. D.C. 171 at n.7 (D.C. Cir. 1978).

nevertheless entitles the MCN to exercise jurisdiction over Thlopthlocco despite sovereign immunity. *Thlopthlocco v. Stidham*, 762 F.3d at 1240.[12].

1. THLOPTHLOCCO IS ENTITLED TO DECLARATORY JUDGMENT THAT IT ENJOYS SOVEREIGN IMMUNITY IN THE COURTS OF THE CREEK NATION AND MAY, IF IT CHOOSES, CONSENT TO SUCH JURISDICTION.

In its February 28, 2022 Order, the MCN Supreme Court did not identify any local historical tribal relationships or “colorable claims” that varies the Tenth Circuit’s federal common law determination that Thlopthlocco was entitled to sovereign immunity in MCN courts. *Thlopthlocco v. Anderson, et. al*., (Doc. 168-04, p. 22) (“The Appellant is entitled to sovereign immunity in the Courts of the Muscogee (Creek) Nation. The Appellant, via its unique status under Muscogee tribal law, is also able to voluntarily submit to the jurisdiction of the Muscogee (Creek) Nation Courts.”*).*

Logically, the reference to “unique status under Muscogee tribal law” as a basis to “voluntary submit to the jurisdiction” of the MCN courts is superfluous. The MCN

---

[12] *See*, *Thlopthlocco v. Stidham*, 762 F.3d at 1240:

> We have already concluded that, for the purposes of creating federal question jurisdiction, federal law distinguishes between the tribes, but it does not necessarily follow that the Muscogee courts cannot make a colorable claim that they have jurisdiction in the Anderson litigation. See *Marceau v. Blackfeet Hous. Auth.*, 540 F.3d 916, 920 (9th Cir. 2008) (“Principles of comity require federal courts to dismiss or to abstain from deciding claims over which tribal court jurisdiction is ‘colorable.’”). We have not made any inquiry into whether, under tribal law, the tribes are distinct or into what effect that determination has on the tribal court's jurisdiction. Nor have we determined whether tribal law or federal law should define when a tribal court's involvement in a cause of action is an exercise of self-government. And we have not considered whether there may be another reason, aside from the Tribal Town's alleged affiliation with the Muscogee Nation, that this case might implicate some significant Muscogee tribal interest.

regularly allows non-members and non-Indians to submit to jurisdiction in its courts, even though limited by the nexus requirement of *Montana v. United States*, 450 U.S. 544, 564-65, 101S.Ct. 1245 (1981). *See Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1151 (10th Cir. 2011) ("Such a 'consensual relationship' may establish tribal court jurisdiction under *Montana* only if there is a sufficient 'nexus' between that relationship and the attendant 'exertion of tribal authority.' *MacArthur v. San Juan Cnty*., 309 F.3d 1216, 1223 (10th Cir. 2002).").[13]

Following its analysis, the MCN Supreme Court affirmed the dismissal of CV-2007-39 and reversed and dismissed the CV-2011-08 finding that Thlopthlocco officials were subject to jurisdiction of the court in a direct suit. (Doc. 168-04, p. 27).

Thus the MCN Defendants have made no "colorable claims" that suggests the MCN can assert jurisdiction over Thlopthlocco without consent.

---

[13] The MCN Supreme Court regularly allows non-Indians to consent to jurisdiction in its court. Plaintiff has included in the Supplemental Appendix communications from the MCN Supreme Court at the time of 2019 Bar membership renewal directed to Plaintiff's counsel and demanding he execute a new consent to jurisdiction which required "consent" be made "unreservedly." (Supp. App. 2182-98).

In response, this counsel expressed concern that the use of the word, "unreservedly" appeared to exceed the nexus limitation of jurisdiction specified by the Tenth Circuit in *Crowe & Dunlevy v. Stidham*. (Supp. App. 2186-89) The MCN Supreme Court replied this was for purposes of enforcing bar discipline. (Supp. App. 2195-96).

Yet, nothing in the Tenth Circuit's decision in *Crowe v. Stidham* indicated any jurisdictional limitation on discipline in MCN Bar proceeding, or even disputes between attorneys and Indian clients. *Crowe v. Stidham*, 640 F.3d at 1151-53.

In fact, the Tenth Circuit specifically noted numerous cases cited by defendants that involved bar discipline and distinguished them. *Crowe v. Stidham*, 640 F.3d at 1151. ("The vast majority of cases Judge Stidham cites for his proposition that a tribal court has power to regulate attorneys who practice before it are cases addressing disciplinary matters, in which courts have permitted suits against defendant-attorneys for alleged misconduct.").

The new requirement that consent be made "unreservedly" is arguably an effort to wire around *Crowe's* holding. The MCN Supreme Court would not let counsel sign a consent that expressly referenced jurisdiction pursuant to *Crowe* and *Thlopthlocco*. (Supp. App. 2190; 2195-96). The final result? Sign, or else. (Supp. App. 2197-98).

In consideration of tribal exhaustion of this question, this Court should enter a declaratory judgment that Plaintiff Thlopthlocco is entitled to sovereign immunity in the courts of the MCN, but it may consent to such jurisdiction.

2. THLOPTHLOCCO IS ENTITLED TO DECLARATORY JUDGMENT THAT IT MAY WITHDRAW ITS CONSENT TO JURISDICTION UNDER APPROPRIATE CIRCUMSTANCES.

The second federal question remanded by the Tenth Circuit was whether Thlopthlocco, like other sovereigns including Indian tribes, is able to withdraw a consent to jurisdiction under appropriate circumstances. *See*, *Iowa Tribe Of Kansas and Nebraska v. Salazar*, 607 F.3d 1225, 1233-4 (10th Cir. 2010) (a "sovereign . . . may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted, and may withdraw its consent whenever it may suppose that justice to the public requires it").

Instead of responding to the Tenth Circuit's mandate, the tribal district court pivoted to a factless finding nobody sought or even raised that ". . . Anderson is no longer a credible threat to the Thlopthlocco government." because "Anderson is no longer Mekko." (Doc. 159-01, p. 19). Based on this ruling, the MCN District Court dismissed No. CV-2007-37. (Doc. 159-01, p. 19).

This "no credible threat" finding arose without any hearing or testimony of witnesses. Moreover, even though Anderson himself in January 28, 2011[14] did finally admit he was no longer Mekko and had been removed in 2007, his removal was readily made known to the court. Yet, the Creek courts continued to allow Anderson to press the election challenge in their cross-claim in CV-2007-39 it was dismissed by the May

---

[14] *See*, App. 1040-41. Anderson testified George Scott was the Mekko. ("A: -- clearly Mr. Scott is the Town King." Q: You acknowledge that now? A: Yes, sir.).

24, 2021 decision. Even more so, Anderson and his group continued to press the legal case on appeal to the MCN Supreme Court, hardly the definition of "no credible threat."

Nor did the ruling of the Court addressed the position of Anderson's co-defendants in CV-2007-39 that Anderson "removed" the elected and selected members of the Business Committee and alternatively appointed them as replacements.[15]

As noted, both the MCN District Court and eventually the MCN Supreme Court were aware of this "fact" from the time it was filed in the district court record on August 8, 2007. (App. 813-18); Doc. 027-08, Notice of Internal Resolution").

As a practical matter, Plaintiff had little reason to quibble with the ultimate dismissal of Anderson's claims and having raised the question of Thlopthlocco's ability to withdraw consent numerous times, it would be futile to ask the MCN courts to reconsider their rulings. (See Proposition C at p. 18).

The MCN courts were squarely presented with the question, had sufficient opportunity to resolve the issue, but instead sidestepped the Circuit's mandate. Considering the "opportunity" of exhaustion extended by the Tenth Circuit, it is fair to

---

[15] Even in the absence of jurisdiction, Plaintiff contends these election claims were meritless. Anderson himself reported the results of the election to the local BIA Agency Office without any claim of invalidity. (App. 711).

In truth, only Anderson's election was infirmed. The Thlopthlocco Constitution requires that "Election shall be by standing vote and a majority of the votes cast shall determine the action thereon." (App. 004, Thlopthlocco Const., Art. V, Sec. 5). Anderson received the most votes: 92 to 77 to 22 in a three candidate race. (App. 1399). There was no run-off election. Anderson's vote tally was not a majority although Anderson later falsely claimed he "won by a landslide." (App. 2038).

Besides, there simply was no jurisdiction to consider Anderson's cross-claims. *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509, 111 S. Ct. 905, 909 (1991) ("We held that a tribe does not waive its sovereign immunity from actions that could not otherwise be brought against it merely because those actions were pleaded in a counterclaim to an action filed by the tribe. . . . 'Possessing . . . immunity from direct suit, we are of the opinion [the Indian nations] possess a similar immunity from cross-suits.'").

say that the MCN Supreme Court offered no "colorable claim" under tribal law that would affect the federal law as stated by the Tenth Circuit " . . of whether the Muscogee court may exercise jurisdiction despite the Tribal Town's withdrawal of its immunity waiver." *Thlopthlocco v. Stidham*, 762 F.3d.at 1237.

It was in the public interest for Thlopthlocco to withdraw its consent. Thlopthlocco conditionally withdrew its waiver of sovereign immunity when the MCN courts refused to recognize Thlopthlocco sovereignty or observe the restrictions of Thlopthlocco's limited consent. *Iowa Tribe*, 607 F.3d at, 1233-4 (10th Cir. 2010) ("sovereign . . . may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted, and may withdraw its consent whenever it may suppose that justice to the public requires it").

Iowa Tribe references *Beers v. Arkansas*, 61 U.S. (20 How.) 527, 529, 15 L.Ed. 991 (1857) ("Beers"). *Iowa Tribe* and *Beers* stand for the proposition that waivers of sovereign immunity can be specified upon terms dictated by the sovereign and can be withdrawn by the sovereign under certain circumstances:

> Although the focus of the Court in *Beers* was the contention that: Arkansas' actions violated the Contracts Clause, . . ., we may not lightly disregard the holding that a waiver of sovereign immunity may be withdrawn "whenever [a sovereign] may suppose that justice to the public requires it," *Beers*, 61 U.S. at 529. <u>The Supreme Court aimed this language squarely at post-filing withdrawals of consent to be sued, further stating that courts cannot "inquire whether the law operated hardly or unjustly upon the parties whose suits were then pending</u> . . . . [The Legislature] might have repealed the prior law altogether, and put an end to the jurisdiction of their courts in suits against the State, if they had thought proper to do so . . . ." *Id*. at 530. (emphasis added)

Iowa Tribe, 607 F.3d at 1234.

Iowa Tribe notes the Supreme Court continues to adhere to the *Beers* holding. *Iowa Tribe*, 607 F.3d at 1235 ("The logic of *Beers* has withstood the test of time.").

In the face of such a strong federal policy applicable to sovereigns, the ruling of the MCN Supreme Court that Thlopthlocco is entitled to sovereign immunity in the MCN courts, the opportunity to address the issue of the withdrawal of consent, and the failure of the MCN Supreme Court to state any countervailing “colorable claims” that Thlopthlocco may not withdraw consent to jurisdiction in Creek courts once given, compels the conclusion that Thlopthlocco may withdraw its consent in the Creek courts.

This conclusion should be reduced to declaratory judgment.

PROPOSITION C

THE CLAIM FOR WITHDRAWAL OF CONSENT HAS BEEN EXHAUSTED OR EXHAUSTION IS OTHERWISE EXCUSED BECAUSE OF FUTILITY.

Because the MCN Supreme Court has entered a final order adjudicating Thlopthlocco’s claim of sovereignty, exhaustion is complete:

> As *National Farmers Union* [*Ins. Cos. V. Crow Tribe*, 471 U.S. 845 (1971)] indicates, proper respect for tribal legal institutions requires that they be given a “full opportunity” to consider the issues before them and “to rectify any errors.” 471 U.S., at 857.The federal policy of promoting tribal self-government encompasses the development of the entire tribal court system, including appellate courts. At a minimum, exhaustion of tribal remedies means that tribal appellate courts must have the opportunity to review the determinations of the lower tribal courts. (emphasis added).

Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 16-17, 107 S. Ct. 971, 977 (1987).

Exhaustion is a salutary opportunity offered to the tribal courts to provide an exacting explanation as to its exercise of jurisdiction. *Nat’l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 857, 105 S. Ct. 2447, 2454 (1985)(“Exhaustion of tribal court remedies, moreover, will encourage tribal courts to explain to the parties the precise basis for accepting jurisdiction, and will also provide other courts with the benefit of their expertise in such matters in the event of further judicial review.”). The

response by both the MCN tribal court and its Supreme Court did not identify any "precise basis" for its exercise of jurisdiction or whether Thlopthlocco can withdraw its consent as would be the case with other sovereigns including Indian tribes.

The question of withdrawal of consent to jurisdiction was the subject of a "full opportunity" of consideration by the tribal courts and avoided although teed up directly for the MCN judiciary by the Tenth Circuit. Under this test of "opportunity", both questions can reasonably be said to be exhausted since the MCN Supreme Court decision was a final decision.

Plus, an avoidance by the MCN courts to answer the question posited to them should not be rewarded, nor should Thlopthlocco be disadvantaged even though it properly raised the question at every stage of the tribal exhaustion process.

Stated another way, the MCN Supreme Court has now recognized Thlopthlocco immunity from suit in its judicial forums, and that it can consent to jurisdiction. By implication, in the absence of any statement of "colorable claims" as to withdrawal of consent, the MCN Supreme Court ruling bodes no objection to Thlopthlocco's withdrawal of consent, a prerogative of the sovereign under federal common law.

The refusal to answer the mandate question by the MCN Supreme Court implicates and excuses exhaustion by futility. The Tenth Circuit recognized Thlopthlocco's futility argument had merit in relationship to an election being ordered before the Federal Court had a chance to review the tribal court decision. *Thlopthlocco v. Stidham*, 762 F.3d 1226, 1239 ("The futility exception crafted in *National Farmers* applies where the federal court plaintiff will not have an adequate opportunity to challenge the tribal court's jurisdiction."). The failure of the MCN courts to address this issue may leave Thlopthlocco again facing a refusal to dismiss in future litigation if

Thlopthlocco attempts to withdraw consent (also implicating Thlopthlocco standing).

As the Circuit noted, a futility exception can apply in instances where a tribe has no judiciary. *Thlopthlocco v. Stidham*, 762 F.3d at 1239 ("But other circuits have held that the futility exception also bars application of the tribal exhaustion rule to tribes whose constitution does not create a judiciary—the Town's situation here."). Arguably, by analogy, this exception can apply in this instance because Thlopthlocco has no access to a judiciary, other than this one, willing to give such an answer.[16]

There is an additional argument of futility. It is arguable that under tribal law MCN courts are forbidden by the MCN National Council to even apply federal law unless it has been approved or consented by the National Council or the law is expressly made applicable to Indian tribes by Federal statutes.[17]

---

[16] *See Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856 n.21, 105 S. Ct. 2447, 2454 (1985) Exhaustion is not required "where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction." A refusal by the MCN courts to address the mandate question denies that "adequate opportunity" to challenge the court's jurisdiction.

[17] *See*, . MCNA, Title 27, §1-103(B) provides:

> The Muscogee (Creek) Nation Courts shall apply the Federal Indian Civil Rights Act, 25 U.S.C. §§ 1301 *et seq*. No other statutes and laws of the United States shall be applied by the Muscogee (Creek) Nation courts unless: (1) expressly made applicable by law of the Muscogee (Creek) Nation enacted by the National Council or (2) expressly made applicable by an agreement to which the Muscogee (Creek) Nation is a party and which has been approved by the National Council, or (3) expressly required to be applied by the Muscogee (Creek) Nation courts in specific circumstances by compact made between the Muscogee (Creek) Nation and the United States pursuant to the Indian Self-Determination and Education Assistance Act of 1978, as amended, with the approval of the National Council or (4) expressly made applicable to Indian tribes by duly enacted Federal statute. (emphasis added)

App. 495.

Thus, MCN courts are expressly directed to ignore federal common law, case law, and federal statutes that do not directly or specifically implicate either the MCN or Indian tribes. This is a functional equivalent to the scenario there is no MCN judiciary that can adjudicate the federal common law issue of Thlopthlocco's ability to withdraw a consent to jurisdiction. There is irony in the idea that a court of clearly limited jurisdiction is even further limited in jurisdiction by its legislative body.

PROPOSITION D

THIS CASE IS NOT MOOT IN THAT IT IS CAPABLE OF REPETITION YET EVADING REVIEW.

There is a realistic expectation that in future elections that Thlopthlocco will need access to a judicial forum by way of consent, then chose to withdraw that consent to jurisdiction. Thlopthlocco preserved the question of its ability to withdraw a consent in its interlocutory appeal from the decision of the MCN District Court. (Doc. 159-03, p. 17-18, 49-50, 63-64, 66-70; Doc. 163-05, p. 8, 29-30, 39).

Thlopthlocco's "stake" in a "withdrawal of consent" is avoidance of the diminution of its sovereignty under federal common law, not just in the past, but in future litigation.

An exception to mootness is the doctrine of "capable of repetition, yet evading review." The U.S. Supreme Court routinely invokes such an exception in election cases, and it "applies where (1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *Davis v. Federal Election Comm'n*, 554 U.S. 724, 735, 128 S. Ct. 2759 (2008) (internal quotation marks omitted) (resolving dispute in 2006 election); *see also Anderson v. Celebrezze*, 460 U. S. 780, 784, 103 S. Ct. 1564 and n. 3 (1983) (resolving dispute in 1980 election).

Courts do not require certainty of repetition, but only whether it is capable of repetition, "[o]ur concern in these cases" is whether "the controversy was capable of repetition and not . . . whether the claimant had demonstrated that a recurrence of the dispute was more probable than not." *Honig v. Doe*, 484 U.S. 305, 319 n.6. (1988).

Thus, Thlopthlocco still has real world stake in the outcome of this case. The Tenth Circuit has previously recognized such a rule even if the stakes are small, but claims of sovereignty are much more than a trifle:

> An action becomes moot "[i]f an intervening circumstance deprives the plaintiff of a personal stake . . . at any point." *Brown* [*v. Buhman*], 822 F.3d [1151] at 1165 [(10th Cir. 2016) (quotations omitted). In a moot case, a plaintiff no longer suffers a redressable "actual injury." *Ind v. Colo. Dep't of Corr*., 801 F.3d 1209, 1213 (10th Cir. 2015) (quotations omitted). But an action is not moot if a plaintiff has "a concrete interest, however small, in the outcome." *Knox v. Serv. Emps. Int'l Union, Local* 1000, 567 U.S. 298, 307-08, 132 S. Ct. 2277, 183 L. Ed. 2d 281 (2012) (quotations omitted).
>
> The court must decide whether a case is moot as to "each form of relief sought." *Collins v. Daniels*, 916 F.3d 1302, 1314 (10th Cir. 2019) (explaining the plaintiff's "burden to demonstrate standing for each form of relief sought . . . exists at all times throughout the litigation" (quotations omitted)). Thus, interim developments that moot a claim for prospective relief do not necessarily moot a claim for damages. And "[t]he mootness of a plaintiff's claim for injunctive relief is not necessarily dispositive regarding the mootness of his claim for a declaratory judgment" *Jordan v. Sosa*, 654 F.3d 1012, 1025 (10th Cir. 2011).
>
> "Generally, a claim for prospective injunction becomes moot once the event to be enjoined has come and gone." *Citizen Ctr. v. Gessler*, 770 F.3d 900, 907 (10th Cir. 2014). A claim for declaratory relief that does not "settl[e] . . . some dispute which affects the behavior of the defendant toward the plaintiff" is moot, *Rio Grande Silvery Minnow* [*v. Bureau of Reclamation*], 601 F.3d [1096,] at 1110 [(10th Cir. 2010)] (quotations omitted), because it fails to "seek[] more than a retrospective opinion that [the plaintiff] was wrongly harmed by the defendant," *Jordan*, 654 F.3d at 1025.

Prison Legal News v. Fed. Bureau of Prisons, 944 F.3d 868, 879-80 (10th Cir. 2019).

There is a likelihood that Thlopthlocco may very well require access to a judicial

forum in the future. Thlopthlocco still does not have a judiciary and there is an upcoming tribal election.

After the MCN Supreme Court's decision, Thlopthlocco began preparation for its quadrennial election which has remained deferred since 2011 by the Tenth Circuit and realistically should not be expected to occur until this Court rules on this request for declaratory relief as contemplated by the Tenth Circuit. Plaintiff includes within the Supplemental Appendix copies of the following resolutions and policies and procedures for Thlopthlocco's next election:

> 2022-07-19 Minutes of the Thlopthlocco Tribal Town Business Committee showing adoption of Resolution No. 2022-08. (Supp. App. 2199-201).
>
> Thlopthlocco Tribal Resolution No. 2022-08 Adopting Election Ordinance and Creating Election Committee. (Supp. App. 2202-03).
>
> Thlopthlocco Tribal Town Election Ordinance and Election Committee Rules & Procedures dated July 19, 2022. (Supp. App. 2204-233).

Chapter 9 of the Election Ordinance provides for Election of Judicial Remedies which allows the Business Committee to initiate a court action after adopting a written resolution stating the extent of consent to jurisdiction, setting the parameters of contested issues, and allowing the withdrawal of consent. (Supp. App. 2227-28). The ordinance offers a "reasonable expectation" of a recurrence of the events of this action.

PROPOSITION E

DEFENDANTS CANNOT MEET THE HEAVY BURDEN OF SHOWING MOOTNESS.

Defendants may arguably claim that by mere court order, they have abandoned the issues which caused this longstanding controversy that consumed 15 years, the resources of this court, and those of the Tenth Circuit. But that is only arguable, and respectfully, is certainly not conceded by Plaintiff if the prior history of MCN treatment of

Thlopthlocco sovereignty is any predictor. In such instance a declaratory judgment will ensure significant prospective protection of Thlopthlocco sovereignty.

Even so, the burden of demonstrating mootness by voluntary cessation belongs to Defendants. It is a high one, and it is not met in this case.

Given that the Creek Nation judiciary overlooked federal law and its own case authority for 15 years in failing to quickly resolve questions of sovereign immunity, very close scrutiny should be afforded any claim by Defendants they have voluntarily ceased the illegal action of which the Plaintiff complains:

> It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice. Such abandonment is an important factor bearing on the question whether a court should exercise its power to enjoin the defendant from renewing the practice, but that is a matter relating to the exercise rather than the existence of judicial power. In this case the city's repeal of the objectionable language would not preclude it from reenacting precisely the same provision if the District Court's judgment were vacated.

City of Mesquite v. Aladdin's Castle, 455 U.S. 283, 289, 102 S. Ct. 1070, 1074-75 (1982).

Footnote 10 to this selected quotation denominates the test in such circumstances:

> The test for mootness in cases such as this is a stringent one. Mere voluntary cessation of allegedly illegal conduct does not moot a case; if it did, the courts would be compelled to leave "[the] defendant . . . free to return to his old ways." *United States v. W. T. Grant Co.*, 345 U.S. 629, 632 (1953); *see, e. g.*, *United States v. Trans-Missouri Freight Assn.*, 166 U.S. 290 (1897). A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur. . . . Of course it is still open to appellees to show, on remand, that the likelihood of further violations is sufficiently remote to make injunctive relief unnecessary. at 633-636.

City of Mesquite v. Aladdin's Castle, *id*. (Seeking injunctive relief).

See also, *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S.

167, 190 (2000) ("Thus the burden a defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur.").

With a nod to an insight and its versions variously attributed to Yogi Berra, Mark Twain, Neils Bohr, and others,[18] "It's difficult to make predictions, especially about the future." This may be equally applicable to all parties in this case. But we are also advised by Confucius to "Study the past if you would define the future."[19] And the past history of MCN actions in this case fall far short of the heavy burden of showing a voluntary cessation of conduct that can moot this case.

The following recitations are not intended to reflect any disrespect for the MCN judiciary and are otherwise drawn from public records.

1. THE MCN COURTS' FAILURE TO FOLLOW THEIR OWN DECISIONS THAT RECOGNIZED THLOPTHLOCCO'S SOVEREIGN IMMUNITY.

As has been previously identified by Plaintiff, and admitted by the MCN Supreme Court, the MCN courts varied from their own decisions in first recognizing Thlopthlocco sovereign immunity, to then later refusing to acknowledge it, and finally after 14 years rediscovering that Thlopthlocco is truly sovereign.

Plaintiff has already identified the reversals that occurred from *Tomah I* and *Tomah II*, to the later clear disregard of them by the very judge who originally entered

---

[18] *See* <https://quoteinvestigator.com/2013/10/20/no-predict/> (Last checked 3/1/2023).

[19] <https://academic.oup.com/function/article/4/1/zqac073/6987091> (Last checked 3/1/2023)

those decisions apparently following the lead of the MCN Supreme Court.[20]

Respectfully, the exercise of jurisdiction over Thlopthlocco lacks credibility when reasoning by analogy as to whether MCN National Council could exercise legislative authority over Thlopthlocco, a nonmember. As the Tenth Circuit pointed out, there is very little authority of the Tribes over each other both historically as well as in the Thlopthlocco and MCN Constitutions. In fact, the basic tribal constitutional rule of the MCN is "hands off" since the only recognition of tribal towns in the Creek Constitution requires it "'shall not in any way abolish the rights and privileges of persons of the Muscogee Nation to organize tribal towns.' App. 1197." *Thlopthlocco v. Stidham*, 762 F.3d at 1231 (App. 421, MCN Const., Art. II, Sec. 5).

2. THE DELAY IN RESPONDING TO THE TENTH CIRCUIT'S MANDATE TO EXHAUST.

The very contention that Anderson is <u>no longer</u> a "credible threat" is an admission of the extensive passage of time and further realization that Thlopthlocco's sovereignty was not a matter of urgency before the tribal courts.

But this is exact opposite of what is required. "Questions of jurisdiction, of course, should be given priority-since if there is no jurisdiction there is no authority to sit

---

[20] Business Committee member Tonya Scott-Walker is an enrolled member only of Thlopthlocco and is not a member of the MCN. (App. 830, 864, 1094, 1162-63, 1179 (Specific objection to jurisdiction in CV-2011-08), 1202, 1206, 1234). Even so, the MCN district court found that Walker was subject to jurisdiction even though not a member of the MCN, but because she is "eligible to do so," citing, although not identifying "express provisions of both Thlopthlocco and Muscogee (Creek) constitutions" that somehow suggests "eligible" means "subject to jurisdiction." (Doc. 159-01, p. 3, fn. 7).

The 1979 MCN Constitution in Article III provides for a Citizenship Board. (App. 492-3). Article II, Section 1 provides that "Each Muscogee (Creek) Indian shall have the opportunity for citizenship in the Muscogee (Creek) Nation." But the court offers no explanation or authority that "opportunity" subjects Ms. Scott-Walker to jurisdiction even though she is a <u>nonmember</u>. A nontribal member is still <u>a nontribal member</u>.

The more logical conclusion to this *nonsequitur* ruling under *Montana* is that no MCN jurisdiction extends to Scott-Walker.

in judgment of anything else." *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 778 (2000). It is difficult for defendants to make a straight faced assertion this case was given priority in consideration of the lapse of almost 15 years of litigation.

Again, the default should be "no jurisdiction" since the MCN was attempting to exercise authority over Thlopthlocco, a nonmember. As to nonmembers, "[T]ribal courts . . . cannot be courts of general jurisdiction in this sense, for a tribe's inherent adjudicative jurisdiction over nonmembers is at most only as broad as its legislative jurisdiction. *Nevada v. Hicks*, 533 U.S. 353, 367 (2001).

In the MCN tribal district court, the priority of determination of questions of jurisdiction was honored only in the breach. The Tenth Circuit's decision was September 3, 2014. This court remanded to the tribal court on December 30, 2014 and presciently directed the parties to file status reports every 30 days. (Doc. 089).

On February 20, 2015, Thlopthlocco filed a Motion to Set a Status Conference in both cases. (*See* Dockets; Doc. 168-01, p. 2 (CV-2007-39); Doc. 168-02, p. 2 (CV-2011-08)). Finally on August 7, 2015, the tribal district court issued a notice of hearing on August 27, 2015, which was continued to September 8, 2015.[21] *id*. A briefing schedule was established and with requested extensions by the parties, the case was at issue on May 5, 2016 when replies to motions of the parties were filed. *Id*.

On September 27, 2018, this court ordered that "all past and future status reports ordered by this court (Dkt.#89), beginning February 27, 2015 (Dkt.#90) be filed with the Tenth Circuit Court of Appeals consistent with the Decision (Dkt.#74) and

---

[21] The continuance was entered because counsel for defendant did not appear as he had miscalendared the date of the hearing.

Mandate (Dkt.#75) issued in this case on September 3, 2014 (Doc. 138).

On November 11, 2018, the frequency of the Status Reports was changed to quarterly. (Doc. 141).

On November 18, 2020, the case in the tribal district court was assigned to Tribal Judge Stacy Leeds. (Doc. 156-01). This followed an administrative order from the MCN Supreme Court requesting status reports about the cases. (Docs. 156-01, 156-02, 156-03). At a status hearing on December 17, 2020, Judge Leeds expected "resolution of the pending Motions by the end of February [2021]." (Doc. 156, p. 2).

Judge Leeds issued a decision on May 24, 2021. (Doc. 159-01). Plaintiff filed an interlocutory appeal with the MCN Supreme Court. (Docs. 159-02, 159-03). The case was accepted and the two district court cases were consolidated. (Docs. 161-01, 161-02). The appeal was at issue on September 15, 2021. (Docs. 163-07, 168-03).

The Order and Opinion of the MCN Supreme Court was filed on February 28, 2022. (Doc. 168-04). Respectfully, there was no priority to the resolution of Thlopthlocco's claim for sovereign immunity.

3. THE MCN COURTS FAILURE TO FOLLOW THE MANDATE INSTRUCTIONS THEY CONSIDER THE QUESTION OF THOLOPTHLOCCO'S ABILITY TO WITHDRAW ITS CONSENT TO JURISDICTION.

If there need be "badges" that counter an argument of voluntary cessation, we must certainly look at the failure of the MCN courts to follow Tenth Circuit's mandate that they consider Thlopthlocco's ability to withdraw its consent once given.

This question was not answered by the MCN district court nor was it taken up by the MCN Supreme Court. Instead, respectfully, the MCN district court avoided the question with an issue nobody raised or even asked, and that is the factless finding no

one asked for, or anticipated, that "Anderson is no longer a credible threat to the Thlopthlocco government." (Doc. 159-01, MCN District Court, p. 19). On appeal, instead of analyzing the question posited by the Tenth Circuit with historical reason or rule regarding Thlopthlocco's ability to withdraw its consent, the MCN Supreme Court adopted the finding of the district court. (Doc. 168-04, p. 14, 23).

Both the district court and the MCN Supreme Court determined this newfound finding of Anderson's "lack of credible threat" rendered CV-2007-39 as "no longer justiciable as a practical matter" and dismissed the case. (Doc. 159-01, p. 19) (Doc. 168-04, p. 14, 23).

4. EVEN THOUGH THE TENTH CIRCUIT DIRECTED NO ELECTION OCCUR UNTIL THLOPTHLOCCO HAD A CHANCE TO RETURN TO THIS COURT, THE MCN DISTRICT COURT DIRECTED AN ELECTION AND REAFFIRMED A PREVIOUS TRIBAL COURT RULING THAT THLOPTHLOCCO CONDUCT AN ELECTION WITHIN 90 DAYS.

The Tenth Circuit built two protections into its mandate to preserve the status quo. First, the Tenth Circuit abated ongoing proceedings rather than dismissal without prejudice until tribal remedies were exhausted. Second, the Tenth Circuit expected that no election would occur until Thlopthlocco was able to return to this Court.

In so doing the Tenth Circuit explicitly recognized the threat to Thlopthlocco sovereignty that Anderson might willingly trade Thlopthlocco sovereignty for an election victory supported by the MCN courts:

> Thus, we expect the tribal court to reach a final decision on the jurisdictional issue before it considers ordering an election. Accordingly, the Tribal Town will have the opportunity to exhaust its tribal court remedies and return to federal court before the tribal court has taken an action that the Tribal Town might not be able to challenge effectively.

Thlopthlocco v. Stidham, 762 F.3d at 1241 n.8.

Despite this very clear direction, the MCN District Court disregarded this portion of the Circuit's mandate and directed that an election occur after reaffirming a prior order of the Tribal Court that ordered an election:

> In *Anderson II*, this Court now restates Judge Moore's Preliminary Order dated July 29, 2011 that Thlopthlocco should hold an election under Thlopthlocco laws, and that the election be overseen and moderated by Thlopthlocco.

See Doc. 159-01, p. 19.

The "Preliminary Order" (App. 1250-53) is the clearest example of the disregard of Thlopthlocco sovereignty by the MCN courts. It ordered the TTT Election Committee to advise of the "earliest date said General Election may reasonably be held, which shall under no circumstances be later than 90 days from the date of this Preliminary Order." (App. 1253). This necessitated a stay application submitted with Thlopthlocco's Interlocutory Appeal to the MCN Supreme Court (Supp. App. 2132-36) which eventually stayed all district court proceedings. (Doc. 161-02, p. 2; Supp. App. 2163-64).

PROPOSITION F.

IN ACCORDANCE WITH THE TENTH CIRCUIT'S MANDATE, THIS COURT SHOULD JOIN PRESENT MEMBERS OF THE MCN JUDICIARY WHO ARE NOT NOW DEFENDANTS. NOTICE SHOULD BE GIVEN TO OTHER ADDITIONAL DEFENDANTS. THEY MAY, OR MAY NOT, MAKE AN ENTRY OF APPEARANCE IN THE SUIT.

After remand from the Tenth Circuit, Plaintiff filed an unopposed motion that additional members of the MCN Judiciary be joined to this action in consideration of Fed.R.Civ.P. 25 and *Ex Parte Young*, 209 U.S. 123 (1908). (Doc. 086, p. 3-4).

The Tenth Circuit decision listed Defendants Gregory Stidham, Richard Lerblance, Andrew Adams, III, and Gregory Bigler. (Doc. 074). Stidham and Bigler are District Court Judges. Lerblance and Andrews were the then Chief Justice and Vice

Chief Justice.[22]

Plaintiff's Motion listed the then judiciary members: Andrew Adams, III; George Thompson, Jr., Leah Harjo-Ware, Kathleen R. Supernaw, Montie R. Deer, and Richard Lerblance. (Doc. 086). The MCN Court's website show that it has since added Justice Amos McNac. *Id*.

During the pendency of the decision in the Tribal District Court, the case was assigned to and decided by Judge Stacy Leeds. (Docs. 156-00, 156-01, 156-02, 156-03). The Order of reassignment in the Tribal District Court indicates that Judges Stidham and Bigler are still involved in the case. (Doc. 156-01).

Respectfully, in compliance with Fed.R.Civ.P. 25, Plaintiff respectfully requests that an Order of this Court adds as parties the following parties: Justice Amos McNac, and District Judge Stacy Leeds. District Judge Patrick Moore and Supreme Court Justice Houston Shirley are no longer part of the judiciary and should be substituted.

The Tenth Circuit's decision directed that "the district court should consider joining additional interested parties on remand." *Thlopthlocco v. Stidham*, 762 F.3d at 1241. This included the *Anderson I defendants*, the *Anderson II* Plaintiffs, as well as the *Anderson I* cross-defendants and *Anderson II* Defendants (adding the Election Committee to the Business Committee Defendants) citing their possible interest in tribal court jurisdiction over them for their official duties. *Id*.

At the request of Defendants, the parties submitted a later joint Motion asking that remanded issues of joinder be stayed during the exhaustion of tribal remedies.

[22] According to the MCN Supreme Court website, Richard Lerblance is now the Chief Justice and Amos McNac is the Vice Chief Justice:

<https://www.creeksupremecourt.com/justices/> (Last checked 2/15/2023).

(Docs. 87, 87-01, 87-02). This court entered orders granting the motion. (Order, Doc. 88). The court also stayed further action on joinder of other parties until the exhaustion of tribal remedies. (Order, Doc. 89).

After the MCN Supreme Court court recognized Thlopthlocco sovereign immunity, the question of immunity against suit as to Thlopthlocco officials in their individual and official capacity (*Anderson I* cross-defendants and *Anderson II* Defendants including the Election Committee) is attenuated. Thlopthlocco does not anticipate requests from individual Thlopthlocco parties in their individual or official capacities seeking joinder to this action.

As to joinder of the *Anderson I defendants* and the *Anderson II* Plaintiffs, since the time of the entry of the decision of the MCN Supreme Court on February 28, 2022 (Doc. 168-04), neither group has undertaken any effort to seek joinder to this action, nor does Plaintiff think they are necessary to completion of these proceedings since the issue of Thlopthlocco sovereignty has been resolved favorably to Thlopthlocco and the Anderson parties were been dismissed. Realistically, the more likely scenario is these parties may not want to be involuntarily joined to federal litigation.

Even so, the mandate directs an inquiry of their interest in joinder to this case. Plaintiff respectfully suggests that the *Anderson I* defendants, the *Anderson II* plaintiffs, and their counsel be provided a notice that this Court has under consideration certain federal questions regarding the jurisdiction of the MCN judiciary over Thlopthlocco. The notice should set a deadline for these parties to enter appearances as Defendants to the case and also provide that if the parties do not enter an appearance by that date, this will be taken as an indication those parties waive the right to appear in this action.

The addresses of these parties are readily available. As a part of the appellate

process in the MCN Supreme Court, the parties were required under court rule to submit a filing with the names and addresses of these individual parties. (Supp. App. 2153-59, filed on June 28, 2021). A proposed notice is included with this Motion as Attachment 15.

III. CONCLUSION

Perhaps the most urgent reason to enter a declaratory judgment is to "short circuit" any future effort by the MCN courts to repeat the proposed "redo" of the 2007 and 2011 elections by favoring Nathan Anderson's cross-claims and original claims by ignoring Thlopthlocco sovereign immunity. Had Anderson used MCN judicial power to regain power in Thlopthlocco, the MCN courts would have created a precedent that it, and not Thlopthlocco, had the ultimate control of the nonmember tribal towns. So now, even if Anderson were to regain power in the Tribal Town and attempt to again subordinate Thlopthlocco sovereignty to the jurisdiction of the MCN courts, any subsequent elected official could regain that sovereignty by invoking this Court's declaratory judgment and "revoke" the "consent" of any such future "Anderson." Without such an immutable determination, the MCN courts are free to make another run at Thlopthlocco's sovereignty as they have clearly demonstrated in the past.

Plaintiff respectfully requests this Court enter a declaratory judgment that as a matter of federal common law Thlopthlocco Tribal Town is entitled to sovereign immunity in the courts of the MCN, and should it consent to jurisdiction in those courts, it may, consistent with federal common law, withdraw that consent prior to judgment and for such other and further relief as to which Plaintiff is entitled under law.

Respectfully submitted,

Signature of Attorney

MICHEAL SALEM (OBA #7876)
Salem Law Office
101 East Gray, Suite C
Norman, Oklahoma 73069
Telephone: (405) 366-1234
Telefax: (405) 366-8329
msalem@msalemlaw.com

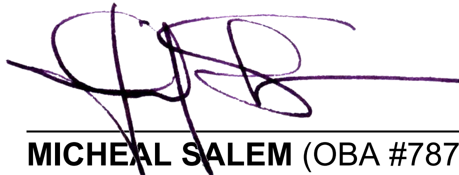
ATTORNEY FOR PLAINTIFF
THLOPTHLOCCO TRIBAL TOWN, a
Federally Recognized Indian Tribe

CERTIFICATE OF SERVICE

I certify that I electronically transmitted the above and foregoing document with attached Exhibit(s) (if any) and Appendix and Supplemental Appendix consisting of 14 volumes to the Clerk of the United States District Court for the Northern District of Oklahoma using the ECF System for filing and transmittal of a Notice of Electronic Filing to:

David Giampetroni
Philip Tinker
Kanji & Katzen, PLLC
303 Detroit St., Suite 400
Ann Arbor, MI 48104
dgiampetroni@kanjikatzen.com
ptinker@kanjikatzen.com

on the DATE SHOWN by the ECF.



MICHEAL SALEM (OBA #7876)

D:\D\WP51\Thlopthlocco-WP\Federal Court\Statement of Position and Motion\2023-03-06 Statement of Position and Motion for Declaratory Judgment-05.wpd