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 RESPONSE TO DEFENDANTS' MOTION TO DISMISS AND BRIEF IN SUPPORT

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March 27, 2023

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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:

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:

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 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 has filed as attachments to its Statement of Position and Motion for Declaratory Judgment (Doc. 176-00), 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. (Docs. 176-01 to 176-13).

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. ix - xx) and is also included in Volume 01 of the filed Appendix. Volumes 02 - 13 contain individual volume indices.

Supplemental Appendix - Volume 14. Other exhibits that were part of the proceedings before the MCN Supreme Court and which are not already filed of record in this case are 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 - Doc. 176-15.

Attachment 15 (Doc. 176-15) is the proposed Order and Notice Regarding Joinder of Parties. It has been reworded to correct misstatements and typographical errors in its language and will be submitted as a proposed Order (in Word format) through ECF.

5. Exhibits to this Brief.

The following excerpts from the Congressional Record are attached to this Brief:

Exhibit 01 103rd Congress, SB1654 - May 19, 1994, Vol. 14, part 8: <https://www.congress.gov/bound-congressional-record/1994/05/19/senate-section:> (last checked 3/25/2023).

Exhibit 02 103rd Congress, H3802 - May 23, 1994: Volume 140, Part 8: <https://www.congress.gov/bound-congressional-record/1994/05/23/house-section> (last checked 3/25/2023).

PLAINTIFF THLOPTHLOCCO RESPONSE TO DEFENDANTS' MOTION TO DISMISS AND BRIEF IN SUPPORT

THLOPTHLOCCO TRIBAL TOWN ("Thlopthlocco" or "TTT"), a federally recognized Indian Tribe and Plaintiff, comes before the Court and submits its Response to the Motion to Dismiss of the Muscogee (Creek) Nation ("MCN") Defendants.[1]

I. INTRODUCTION.

The Defendants rely upon the premise that the successful dismissal of both tribal court cases means that Plaintiff does not suffer an injury sufficient to maintain jurisdiction in this Court and the case is therefore moot. They do not account for the results that while the second case (CV-2011-08) successfully terminated on a determination of Thlopthlocco's right to sovereign immunity against suit, the first case (CV-2007-39) terminated by an adjudication on the merits resulting from an exercise of the court's jurisdiction without Thlopthlocco's consent.

This is because the MCN courts refused Thlopthlocco's withdrawal of consent to jurisdiction after that consent was ignored and abused by the MCN courts for over two

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

Plaintiff has filed the original thirteen (13) volume Appendix used on appeal in the MCN Supreme Court. (Docs. 176-01 to 176-13). *See* p. xxiii, xxiv.(Referenced as (App. (page numbers)).

Other exhibits used before the MCN courts and not previously filed in this Court were included in an additional Supplemental Appendix. (Doc. 176-14; Supplemental Volume 14). (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.'").

years and the MCN courts were successful in avoiding its consideration until required to do so by the Tenth Circuit.

As the Circuit made clear, the ability to withdraw consent, once given, is an attribute of sovereignty recognized by the federal common law. *Thlopthlocco Tribal Town v. Stidham*, 762 F.3d 1226, 1240 (10th Cir. 2014) (". . . under federal law, a sovereign 'may withdraw its consent whenever it may suppose that justice to the public requires it.'"). The ability to withdraw consent follows from the general principle that if a sovereign grants an exception to its immunity, it has broad discretion to determine the terms of its consent to jurisdiction. *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 . . .").

Because Thlopthlocco cannot now access the tribal court without a consequential waiver of its sovereign immunity, it is "chilled" in its access to courts. Thlopthlocco's "chill" is more than a conjecture. When the MCN's refusal to recognize Thlopthlocco's withdrawal of consent to jurisdiction is coupled with the realistic expectation that Thlopthlocco will need a judicial forum in the future,[2] the necessary waiver of sovereign imunity so as to access the MCN judiciary comes at a very high cost of the diminution of its rights as a sovereign to access courts.

This injury is especially critical because Thlopthlocco has no judiciary itself. On the other hand, the Creek judiciary draws funding from federal sources to the exclusion

[2] *See Plaintiff's Statement of Position and Motion for Declaratory Judgment* (Hereafter "*Mot. for Dec. Judgment*") (Doc. 176-00, p. 22-23) (Indicating plans for eventual elections).

of Thlopthlocco, yet refuses to follow federal common law applicable to Indian tribes regarding that exercise of jurisdiction.[3]

As Plaintiff argued in its *Motion for Declaratory Judgment* (Doc. 176-00), the Defendants offered no explanation related to its common history or previous relationship with Thlopthlocco to justify an exercise of jurisdiction against Thlopthlocco contrary to federal common law.[4] (*Mot. Dec. Judgment*, Doc. 176-00, p. 28-9). The only explanation offered involves vague contentions of "judicial efficiency" over time and fairness to other parties. These are not historical antecedents any different from the usual risks of a party or a court that engages with, or considers litigation involving sovereigns.

Besides, under federal statute MCN's exercise of sovereignty is not superior to that of Thlopthlocco, but, at best, only equal. (*See* Prop. C, p. 21).

Finally, the United States Supreme Court has struck down a State Supreme Court's interpretation of a statute that required an Indian tribe to waive sovereign immunity as a condition of access to state court. *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g*, 467 U.S. 138, 104 S. Ct. 2267 (1984).

Until "sovereign" really means "sovereign" in MCN courts, and until Thlopthlocco is entitled to the authority of a "sovereign" under federal common law, it suffers a

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[3] *See Thlopthlocco v. Stidham*, 762 F.3d at 1231:

> Further, while the Tribal Town has its own constitution and governing structure, it does not have its own courts. Although the Tribal Town's federal recognition empowers it to create its own judiciary, H.R. Rep. No. 103-781, at 3, it has struggled to find the necessary federal funding. The Bureau of Indian Affairs gives federal funding earmarked for judicial services for the Thlopthlocco people to the Muscogee courts.

[4] Other than the passage of an indefinite period of time after consent, the MCN Defendants did not identify any "colorable claims" involving "some significant Muscogee tribal interest" to exercise jurisdiction in the absence of Thlopthlocco's consent. *Thlopthlocco v. Stidham*, 762 F.3d at 1240.

substantial injury. After further notice,[5] this Court should issue a declaratory judgment that Plaintiff is entitled to sovereign immunity and that it has the ability to withdraw any consent to submission to jurisdiction it may give before judgment.

This case is ripe for decision. Defendants have made no claim of a need for further exhaustion.[6] Respectfully, this Court has complied with its obligations of comity, nor would it be prudent to take another 8 year detour back to MCN tribal courts.

II. STATEMENT OF FACTS AND COURSE OF THE PROCEEDINGS.

1. Adoption of Statement of Facts in Plaintiff's Statement of Position and Motion for Declaratory Judgment.

Plaintiff adopts and restates the Tenth Circuit's summary of historical facts of the Creek Tribal Towns which are incorporated herein by reference. *Thlopthlocco v. Stidham*, 762 F.3d at 1229-33.

Plaintiff further adopts and restates the statement of facts and course of the proceedings included in *Plaintiff's Motion for Declaratory Judgment* (Doc. 176-00, pp. 2-10) which are also incorporated herein by reference.

III. ARGUMENT

PROPOSITION A

THE MCN TRIBAL COURTS' EXERCISE OF JURISDICTION IN RESOLVING CV-2007-39 ON ITS MERITS OVER THLOPTHLOCCO'S OBJECTION IS A "CONCRETE INTEREST" SUFFICIENT TO REQUIRE ADJUDICATION BY THIS COURT.

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[5] Plaintiff has revised the previous proposed order and notice submitted as Doc. 176-15. The proposed notice misstated that the MCN Supreme Court failed to rule on Thlopthlocco's ability to withdraw consent once given. Instead, the MCN Supreme Court stated no historical reasons why Thlopthlocco could not withdraw its consent in affirming the decision of the MCN district court. A revised draft order and notice will be submitted as a proposed order (in Word format) through ECF. (Doc. 176-00, Prop. F. p. 30).

[6] *See Mot. For Decl. Judgment*, (Doc. 176-00, Proposition C, p. 18).

Defendants, after involving Plaintiff in 13 years of litigation beyond Thlopthlocco's withdrawal of consent, and 15 years after Thlopthlocco internally resolved the problem by its removal of Anderson as Mekko, now advises this Court that its defense is "no harm, no foul." They ask this Court to dismiss this case as moot. Read another way, Defendants also ask this Court to disregard the Tenth Circuit's 2014 determination that, "[A]abatement will enable the district court to exercise its jurisdiction on the merits after exhaustion in tribal court regardless of the outcome there." *Thlopthlocco v. Stidham*, 762 F.3d at 1241. (Emphasis added).[7]

Thlopthlocco sought enforcement of its revocation of consent to jurisdiction with a Conditional Motion to Dismiss. (App. 833-841; 854-76). In response, after years the tribal district court has now made a specific determination that Thlopthlocco can not withdraw its consent to jurisdiction. (Doc. 159-01, p. 13 ("This Court finds that by 2009, Thlopthlocco could no longer voluntarily dismiss the action and to allow such dismissal would be unjust to the defendants and inconsistent with concepts of judicial efficiency.").[8] These stated reasons are inconveniences no different from those that

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[7] This court is obligated to follow the mandate of the Tenth Circuit. *See Mot. For Decl. Judgment*. (Doc. 176-00, Prop. A, pp. 10-11).

[8] Respectfully, if the tribal district court was truly concerned about judicial efficiency, it would have acted upon Thlopthlocco's early Notice of Internal Resolution filed on August 8, 2007, less than two months after it filed suit. (App. 813-18). This Notice informed the court Anderson had been removed as Mekko by an internal grievance procedure under Thlopthlocco law. This was the very same basis upon which the tribal court finally resolved Case No. 2007-39. (Doc. 159-01).

In fairness to the tribal district court, this followed, in part, the confusing guidance from the MCN Supreme Court about the effect of its prior decisions regarding the question whether Thlopthlocco was subject to the jurisdiction of the MCN courts. (App. 845; 847). And, perhaps, in fairness to the MCN Supreme Court, its decision relied upon language from the *Thlopthlocco v. Tomah* (*Tomah I*) Tribal District Court decision. (App. 846-7; 587). At that time Thlopthlocco had not yet withdrawn its consent.

Judicial efficiency is also not evidenced by the 56 Status Reports filed with this

(continued...)

might be suffered by any party that litigates with a sovereign.[9]

The district court's refusal rested on no historical antecedents of the relationship between Thlopthlocco and the MCN that justified treatment of Thlopthlocco different from that of the federal common law.

In ruling that Thlopthlocco could not withdraw its consent, the tribal district court, exercised subject matter jurisdiction on the merits over Thlopthlocco's claims in No. CV-2007-39 finding that ". . . Anderson is no longer a credible threat to the Thlopthlocco government." (Doc. 159-01, p. 19). The tribal district court then dismissed CV-2007-39 because "Anderson is no longer Mekko." *id.*

The tribal district court also adjudicated the Anderson Defendants' cross-claims in CV-2007-39 holding, "Defendants attempt to stretch the case beyond the dispute that gave rise to the lawsuit and those claims are therefore barred." (Doc. 159-01, p. 19). It is not clear if this decision involved sovereign immunity, or some other rule of law that required dismissal.

The decision of the tribal district court that Thlopthlocco could not withdraw consent was affirmed by the Muscogee (Creek) Nation ("MCN") Supreme Court. (Doc. 168-04, p. 23). This final decision apparently affirmed the tribal district court on the

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[8](...continued)
court of which 44 were filed after the remanded tribal district court case came at issue in May 2016. There would have been many more status reports, but for this Court's eventual grant on November 28, 2018 of a suggestion by the parties that the report interval be changed to quarterly. (Docs. 140, 141).

This Court also ordered "all past and future status reports . . . be filed with the Tenth Circuit Court of Appeals" on September 27, 2018. (Doc. 138, p. 2).

[9] *See Beers v. Arkansas*, 61 U.S. (20 How.) 527, 530 (1858) (". . . nor can this court inquire whether the law operated hardly or unjustly upon the parties whose suits were then pending.").

same grounds as the tribal district court since it stated no disagreement with the district court:

> This Court finds this decision consistent with the analysis outlined in Part I above. The Appellant voluntarily filed this action within the courts of the Muscogee (Creek) Nation and specifically argued before this Court in SC-2007-01 in support of an order affirming the Nation's jurisdiction over the matter. The Court finds that the Appellant waived its sovereign immunity in this action, both by its arguments before the Court and by its June 7, 2007 waiver of sovereign immunity, and that jurisdiction was proper within the Muscogee (Creek) Nation Courts. The Court also finds no clear error in the MCN District Court's factual analysis concerning the current political status of Nathan Anderson, nor, after de novo review of the law, does this Court find any legal inconsistency in the MCN District Court's Order. As such, the Court affirms the MCN District Court's decision with respect to CV-2007-39.

Thlopthlocco v. Anderson, et al., Doc. 168-04, p. 23.

The MCN Supreme Court's reference to Part I (Doc. 168-04, pp. 17-22) is to its discussion why Thlopthlocco is entitled to sovereign immunity.

Logically, if Thlopthlocco cannot withdraw its consent to jurisdiction after two years (or some other indefinite time identified by the MCN courts), Thlopthlocco's initial entitlement to sovereign immunity is impaired because whether it takes two days or two years before it cannot withdraw its consent, Thlopthlocco no longer has the common law attributes of sovereign immunity. Thus, before Thlopthlocco initiates suit, its access to court is "chilled" because of the MCN requirement it may not withdraw consent. This is a significant "concrete interest" or "redressable actual injury" to give this Court jurisdiction:

> 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 (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. (Emphasis added).

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

Defendants contend that Thlopthlocco obtained all its injunctive relief, because " . . . the MCN Supreme Court issued a decision adopting the Town's position as to its sovereign immunity and the jurisdiction of the MCN courts. It granted the Town full relief, remanding one of the two pending cases with orders to dismiss (which the Tribal District Court did) and affirming the lower court's dismissal of the other." (Doc. 177, p. 1-2). Respectfully, this statement misrepresents Thlopthlocco's position about its withdrawal of consent because it wrongfully equates the mere termination of the litigation in tribal court with jurisdiction over a dispute about federal common law in this Court. It confuses the successful termination of cross-claims and suits against it involving Nathan Anderson's parties with the separate and distinct claim in this Court that the MCN courts do not follow federal common law. They are not the same.

The MCN ruling "chills" Thlopthlocco's access to courts because in the future

Thlopthlocco must consider whether to allow an irrevocable "waiver of sovereign immunity" before it brings a suit.

Thlopthlocco Has Standing to Maintain this Action.

Article III standing consists of the following three elements: (1) an injury in fact; (2) a causal connection between the injury and the challenged action; and (3) a likelihood that a favorable decision will redress the injury. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 180-81, 120 S. Ct. 693 (2000).

The requirement for "injury in fact" requires "an invasion of a legally protected interest which is (a) concrete and particularized; and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992) (citations omitted) (internal quotation marks omitted). The exercise of jurisdiction by the MCN courts after Thlopthlocco has withdrawn consent is an invasion of a "legally protected interest" under federal common law that is "concrete and particularized" to Thlopthlocco in that it actually occurred, and can recur in the future, and therefore is not "conjectural."

This is not a "one-off," but is, instead, a rule that will be applied against Thlopthlocco every time it grants consent to jurisdiction in the MCN courts. Given the history of litigation over tribal elections, that is not an unlikely occurrence.[10]

Mootness does not apply because this present litigation will settle the dispute of whether Thopthlocco will be denied full sovereign immunity by the MCN courts and will affect the behavior of the MCN courts toward Thlopthlocco in the future:

[10] As represented in Plaintiff's Motion for Declaratory Judgment, this is "a matter capable of repetition, yet evading review." (Doc. 176-00, pp. 21-23; See also Proposition D, p. 20).

> "'Mootness is a threshold issue because the existence of a live case or controversy is a constitutional prerequisite to federal court jurisdiction.'" *Disability Law Ctr. v. Millcreek Health Ctr.*, 428 F.3d 992, 996 (10th Cir. 2005) (quoting *McClendon v. City of Albuquerque*, 100 F.3d 863, 867 (10th Cir. 1996)). "'Without a live, concrete controversy, we lack jurisdiction to consider claims no matter how meritorious.'" *Habecker v. Town of Estes Park*, 518 F.3d 1217, 1223 (10th Cir. 2008) (quoting *Mink v. Suthers*, 482 F.3d 1244, 1253 (10th Cir. 2007)). Declaratory judgment actions must be sustainable under the same mootness criteria that apply to any other lawsuit. *See Unified Sch. Dist. No. 259* [*v. Disability Rights Ctr. of Kan.*], 491 F.3d [1143] at 1147 [(10th Cir. 2007)]("Actions seeking a declaratory judgment must comport with the same mootness principles as any other suit." (internal quotation marks omitted)). As we noted in *Cox v. Phelps Dodge Corp.*, [43 F.3d 1345 (10th Cir. 1994)] "[i]t is well established that what makes a declaratory judgment action a proper judicial resolution of a case or controversy rather than an advisory opinion is the settling of some dispute which affects the behavior of the defendant toward the plaintiff." 43 F.3d 1345, 1348 (10th Cir. 1994) (brackets, en dash, and internal quotation marks omitted), *superseded by statute on other grounds*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 102, 105 Stat. 1071, 1072 (codified at 42 U.S.C. § 1981a), as recognized in *Walker v. UPS Inc.*, 240 F.3d 1268, 1278 (10th Cir. 2001). "'The crucial question is whether granting a present determination of the issues offered will have some effect in the real world.'" *Wyoming v. U.S. Dep't of Agric.*, 414 F.3d 1207, 1212 (10th Cir. 2005) (emphasis added) (quoting *Citizens for Responsible Gov't State Political Action Comm. v. Davidson*, 236 F.3d 1174, 1182 (10th Cir. 2000)).

Rio Grande Silvery Minnow v. Bureau of Reclamation, 601 F.3d 1096, 1109-10 (10th Cir. 2010)

It is incorrect for Defendants to claim Thlopthlocco no longer has a "live issue" with regard to its withdrawal of consent. (Doc. 177, p. 15-16). The impingement on Thlopthlocco sovereignty is the exact question the Tenth Circuit directed this Court to resolve. This case is not moot.

PROPOSITION B

THLOPTHLOCCO IS ENTITLE TO WITHDRAW ITS CONSENT TO JURISDICTION. THE MCN JUDICIARY MADE NO "COLORABLE CLAIMS" RELATED TO ITS TRIBAL INTERESTS SUFFICIENT TO OVERCOME THLOPTHLOCCO'S SOVEREIGN IMMUNITY UNDER FEDERAL COMMON LAW.

The MCN Supreme Court agreed Thlopthlocco was entitled to sovereign immunity in its courts, but it also adopted the district court's refusal to allow Thlopthlocco to withdraw its consent. (Doc. 168-04, p. 23).

"Sovereign immunity is a jurisdictional question . . .It is a fundamental principle of Indian law that Indian tribes are sovereign entities. As dependent sovereigns, they retain 'attributes of sovereignty over both their members and their territory,' although they do not have the full powers of sovereign nations. It has long been settled law that retained tribal sovereign immunity is co-extensive with that of the United States." *Seneca-Cayuga Tribe of Oklahoma v. State of Okl. ex rel. Thompson*, 874 F.2d 709, 714 (10th Cir. 1989).

"Co-extensive" means "having the same spatial or temporal scope or boundaries."[11] This suggests that if the United States could not be sued in the MCN courts, then neither could Thlopthlocco.

The very extent of the present litigation now in excess of 15 years is a very practical example why MCN courts should not be allowed to exercise jurisdiction greater than the federal common law.

The MCN Supreme Court's Refusal to Allow Thlopthlocco to Withdraw its Consent to Jurisdiction Is a Significant and Unjustified Departure from Federal Common Law.

The Tenth Circuit's remanded for exhaustion to allow the MCN to identify some reason " . . 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.

The Tenth Circuit identified the federal common law standard:

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[11] *See*: <http://www.merriam-webster.com/dictionary/coextensive> (last visited 3/24/2023).

> *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.").

Thlopthlocco v. Stidham, 762 F.3d at 1240.

The only explanation offered by the tribal district court was fairness to the litigants and "judicial efficiency." (Doc. 159-01, p. 13).

In affirming the MCN district court, the MCN Supreme Court offered no guidance as to why a sovereign was no longer "sovereign" in its courts other than the rationale of the district court. Under federal law a court may not make an assessment of the effect of a change in the law of a sovereign on opposing parties:

> 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. . . . [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 v. Salazar, 607 F.3d at 1234.

In *Iowa Tribe*, the Circuit analyzed the invocation of sovereign immunity by the United States in ". . . a long-running dispute over whether the Secretary of the Interior properly took a small tract of land into trust on behalf of the Wyandotte Tribe of Oklahoma." *Iowa Tribe v. Salazar*, 607 F.3d at 1228. The tract of land under consideration for acquisition in trust was in downtown Kansas City and its trust status was opposed by several Indian tribes and the Governor of the State of Kansas. The litigation history was extensive, yet after 14 years, the Court allowed the BIA to invoke sovereign immunity to essentially terminate the litigation.[12]

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[12] The case began in 1996 with two consolidated actions. *Sac & Fox Nation v. Babbitt*, No. 96-4129, No. 96-4130, 1996 WL 512147, 1996 U.S. Dist. LEXIS 13275 (D.

(continued...)

The case first proceeded under the Administrative Procedure Act, 5 U.S.C. § 551 *et seq*. (APA), but once the tract in question was taken into trust,[13] Plaintiffs shifted their claims from an administrative challenge to a trust action to invocation of the Quiet Title Act (QTA), 28 U.S.C. § 2409a. The QTA waived sovereign immunity for disputes over title held by the U.S., but not as to trust or restricted Indian lands. Plaintiffs argued that because the case began with a waiver of sovereign immunity under the APA, the "time of filing" rule applied and the waiver of sovereign immunity would continue. The Tenth Circuit held that the "time of filing" rule was not appropriate in this instance because the rule was typically applied in diversity cases and not to a "federal question." *Iowa Tribe v. Salazar*, 607 F.3d at 1233. Citing *Beers*, the Tenth Circuit held sovereign immunity is not assessed only at the time of filing, but is a continuous question of subject matter jurisdiction during the litigation and subject to post-filing revision.

In *Beers*, the plaintiff sued the State of Arkansas in state court to collect interest due on his bonds. Meanwhile, the Legislature passed an act requiring state-bond claimants to present the bonds at issue to the court or the case would be dismissed. Beers did not present his bonds and the state court dismissed. The Tenth Circuit

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[12](...continued)
Kan. Sep. 3, 1996). The case was dismissed. *Sac & Fox Nation v. Babbitt*, 92 F. Supp. 2d 1124 (D. Kan. 2000). The dismissal was reversed. *Sac & Fox Nation v. Norton*, 240 F.3d 1250 (10th Cir. 2001) and *Kickapoo Tribe of Indians v. Deer*, 246 F.3d 681, 4 Fed. Appx. 728 (10th Cir. 2001).

[13] The land was taken into trust early in the litigation:

> . . . on July 15, 1996, the Tenth Circuit vacated the injunction, and that same day, the Secretary accepted title to the Shriner Tract in trust for the Wyandotte's benefit.

Wyandotte Nation v. Nat'l Indian Gaming Comm'n, 437 F. Supp. 2d 1193, 1198 (D. Kan. 2006).

described the result:

> On appeal, the Supreme Court affirmed. The Court's 1857 rationale regarding the supremacy of the doctrine of sovereign immunity guides our analysis today:
>
> > It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission; but it may, if it thinks proper, waive this privilege, and permit itself to be made a defendant in a suit by individuals, or by another State. And as this permission is altogether voluntary on the part of the sovereignty, it follows that it 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.
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> *Id*. [*Beers*] at 529.
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> . . . 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. 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. . . . [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.
>
> There is an irreconcilable conflict between the Court's holding that a state may withdraw a waiver of sovereign immunity in the throes of litigation and the time-of-filing rule plaintiffs ask us to endorse. If the existence of sovereign immunity were determined at the time a complaint is filed, a sovereign could not withdraw its consent after filing, as was permitted in *Beers*.
>
> The logic of *Beers* has withstood the test of time. Eleven years ago, the Supreme Court confirmed its continued adherence to *Beers*, noting, "We have even held that a State may, absent any contractual commitment to the contrary, alter the conditions of its waiver [of sovereign immunity] and apply those changes to a pending suit." *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd*., 527 U.S. 666, 676, 119 S. Ct. 2219 (1999) (citing *Beers*). And seven years ago, the First Circuit--relying in part on *Beers*--rejected a time-of-filing rule with respect to sovereign immunity determinations. *Maysonet-Robles v. Cabrero*, 323 F.3d 43 (1st Cir. 2003). (Emphasis added)

Iowa Tribe v. Salazar, 607 F.3d at 1233-35.

There is little difference between the legislative act of the Arkansas Legislature and the Resolution of Thlopthlocco's Business Committee revoking its consent to jurisdiction. The Thlopthlocco Resolution was not really an effort to short circuit the existing suit. It was, instead, a defensive action to stop judicial overreach by the MCN that threatened Thlopthlocco's own tribal self-government and the control of its internal relations. In the absence of consent, this cannot be done without congressional approval. *Montana v. United States*, 450 U.S. 544, 564-65, 101S.Ct. 1245 (1981).

Even during the time that Thlopthlocco was in the MCN courts voluntarily, MCN judicial actions greatly exceeded the authority granted by Thlopthlocco's original consent. The Resolution provided for only a limited consent and waiver of sovereign immunity and specifically exempted any claims regarding elections:

> BE IT FURTHER RESOLVED, that the Thlopthlocco Tribal Business Committee does hereby waive its immunity on a limited basis only for the purposes of adjudicating this dispute only, only claims brought by the Plaintiff, Thlopthlocco Tribal Town, and only for injunctive and declaratory relief. This waiver of immunity shall not include election disputes.

App. 714-15.

The MCN courts ignored the election exclusion. Even had Thlopthlocco extended consent to review election controversies, there really were none because Anderson's claims were simply false and yet, again this was overlooked by the MCN courts.

Anderson was "elected" Mekko[14]. He himself reported the results of the

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[14] As Plaintiff previously noted, the only official "elected" under a cloud was Anderson because he did not get a majority of the votes as required under the Tribal Constitution. *See Motion for Declaratory Relief*, Doc. 176-00, p. 16, fn. 15.

Nor was there any 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

(continued...)

Thlopthlocco Election to the local BIA Superintendent on February 22, 2007. (App. 711). At the very least, Anderson should have been estopped to challenge the election given that he vouched for the results to a federal official.

By the time of Anderson's letter, each of the Thlopthlocco officers had been elected, taken the oath and assumed office on February 10, 2007. (App. 1398-402, 1403, 1404-06, 1407- 11, 1408, 1412-13 ("Town King, Nathan Anderson administered the oath of office to the Newly Elected Business Committee Officers")).

Once a person take office, he or she acquires the official color of office even if there is a question about the validity of how the officeholder achieved office. In *Ryan v. Tinsley*, 316 F.2d 430 (10th Cir., 1963), a prisoner sought habeas corpus based upon a claim that the Colorado Legislature failed to redistrict before passing a habitual offender statute under which he had been convicted. The Tenth Circuit held that even if there was some impropriety about the office, the legislative incumbents were at least *de facto* members of the Legislature and their acts were valid. *Id*., 316 F.2d at 432.

See also *Dawson v. Bomar*, 322 F.2d 445, 447 (6th Cir., 1963)("Even if the legislature has no *de jure* existence, the acts are generally upheld on the basis of the *de facto* doctrine. This conclusion is reached because the offices created by a state constitution are *de jure* offices and if the officers filling these legislative positions were elected under an unconstitutional statute, as we have assumed, they would nevertheless be *de facto* officers . . .").

The questions of Anderson's coup were settled by his removal and the MCN courts were notified of this internal resolution, but to no avail. (App. 813-18 filed

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[14](...continued)
from direct suit, we are of the opinion [the Indian nations] possess a similar immunity from cross-suits.'").

8/8/2007 ("The Thlopthlocco citizens heard the claims and defenses and voted to remove Anderson by a vote of 66 for and 57 against.")). This was two months after suit was filed). After revocation of its consent to jurisdiction, Plaintiff filed a Conditional Motion to Dismiss on June 11, 2009. (App. 854-76). The MCN courts responded by setting Anderson's bogus election claims for jury trial. (App. 877-78).

Yet, the tribal district court eventually dismissed on the merits that Anderson was no longer Mekko, over 15 years after the question was settled by the filing of the Notice of Internal Resolution. (Doc. 159-01).

When Anderson sued the Thlopthlocco Election and Business Committee members preceding the 2011 election (No. CV-2011-08), both the Election Committee and the Business Committee adopted Resolutions suspending elections. (App. 1161, 1162-64 (". . . election to be reset until the issues of Thlopthlocco Tribal Town sovereignty are resolved including Thlopthlocco Tribal Town ability to control its Election process without interference from other Indian Tribes or Court Systems.")). Despite Thlopthlocco's objection (App. 1178-94), on January 28, 2011, the MCN district court enjoined the election pending consideration of Anderson's claims (App. 1195-97), then later entered a preliminary order ordering an election.[15] (App. 1250-54).

Thlopthlocco's withdrawal of consent was in protection of its own tribal self-government and the control of its internal relations.

The United States Supreme Court has struck down a state supreme court

[15] Not only did the MCN district order an election, it never remanded to Thlopthlocco to allow exhaustion of its own tribal remedies. The appeals from the Election Committee decisions disqualified only Anderson and Montmayor as candidates, and disallowed the protests of Cheek and Berryhill. (App. 1149-60). These were to be heard by the Business Committee, but were delayed after Anderson's suit. (App. 1162-64).

interpretation of a statute that required a waiver of sovereign immunity by an Indian tribe before it could access a state court. *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, P. C.*, 476 U.S. 877, 106 S. Ct. 2305 (1986). In *Three Affiliated Tribes*, the North Dakota Supreme Court's interpretation of a statutory assumption of jurisdiction under Public Law 280 (18 U.S.C. §1162; 28 U.S.C. §§1360, 1362) (1953))[16] required an Indian Tribe to waive sovereign immunity as a prerequisite to suit in a state court to access defendants not accessible in tribal court.

In her opinion Justice O'Connor said the North Dakota plan was inconsistent with the federal scheme and thus pre-empted. Although Public Law 280 is obviously not applicable to the MCN, the Court held the statutory interpretation pre-empted because ". . . the state interest advanced by the North Dakota jurisdictional scheme in this context is overshadowed by longstanding federal and tribal interests." *Three Affiliated Tribes v. Wold*, 476 U.S. at 884. This rested in part on ". . .[t]he federal interest in ensuring that all citizens have access to the courts . . ." *Id*. 476 U.S. at 888. The Supreme Court determined:

> North Dakota conditions the Tribe's access to the courts on its waiver of its tribal sovereign immunity and agreement to the application of state civil law in all state court civil actions to which it is or may be a party. These conditions apply regardless of whether, as here, the Tribe has no other effective means of securing relief for civil wrongs. . . . thus, the Tribe cannot be said to have a meaningful alternative to state adjudication by way of access to other tribunals in such cases. . . Respondent argues that the Tribe is not truly deprived of access to the courts by the North Dakota jurisdictional scheme because the Tribe could have unrestricted access to the State's courts by "merely" consenting to the statutory conditions. We

[16] Initially, States that assume jurisdiction over Indian land did not need permission of the tribes, but "Title IV of the Civil Rights Act of 1963 amended Pub. L. 280 to require that all subsequent assertions of jurisdiction be preceded by tribal consent. Pub. L. 90-284, §§ 401, 402, 406, 82 Stat. 78-80, codified at 25 U. S. C. §§ 1321, 1322, 1326." *Three Affiliated Tribes v. Wold*., 476 U.S. at 879.

> conclude, however, that those statutory conditions may be met only at an unacceptably high price to tribal sovereignty and thus operate to effectively bar the Tribe from the courts.
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> The North Dakota jurisdictional scheme requires the Tribe to accept a potentially severe intrusion on the Indians' ability to govern themselves according to their own laws in order to regain their access to the state courts.
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> This result simply cannot be reconciled with Congress' jealous regard for Indian self-governance.
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> [This] requirement that the Tribe consent to suit in all civil causes of action before it may again gain access to state court as a plaintiff also serves to defeat the Tribe's federally conferred immunity from suit. The common law sovereign immunity possessed by the Tribe is a necessary corollary to Indian sovereignty and self-governance.
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> Nonetheless, in the absence of federal authorization, tribal immunity, like all aspects of tribal sovereignty, is privileged from diminution by the States. (Emphasis added)

Three Affiliated Tribes Wold, 476 U.S. at 889-91.

An Indian tribe is not exempt from all processes of the host court and may be subject to discovery and other proceedings that would ensure a fair trial such as a counterclaim arising out of the same transaction, or recoupment. But as Justice O'Connor explains, these are not ". . . unduly intrusive on the Tribe's common law sovereign immunity, and thus on its ability to govern itself according to its own laws." *Id*.

By the same logic, the MCN refusal in this case to fully recognize Thlopthlocco's common law right to withdraw its consent to jurisdiction gives Thlopthlocco "milk carton picture" status as a "lost sovereign" demonstrated by the "severe impairment" and interference to its internal operations at the hands of the MCN courts.

The correct decision in this case should have been: Once Thlopthlocco withdrew its consent, the tribal court no longer had jurisdiction. "Questions of jurisdiction, of course, should be given priority-since if there is no jurisdiction there is no authority to sit

in judgment of anything else." *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 778 (2000).

"Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause. And this is not less clear upon authority than upon principle." *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1869).

PROPOSITION C

THIS LITIGATION IS "CAPABLE OF REPETITION, YET EVADING REVIEW" AND THEREFORE IS NOT MOOT.

Plaintiff previously contend in its *Motion for Declaratory Relief* that this case is not moot because "it is capable of repetition, yet evading review." (Doc. 176-00, Proposition D, pp. 21-23)). The argument is incorporated here by reference.

Defendants strengthen this contention because this case is capable of repetition and, yet, under their theory, the case is moot, further causing it to "evade review."

The MCN limitation of sovereign immunity implicates Thlopthlocco's sovereign immunity from the beginning of any lawsuit that it need to initiate in the MCN courts because it can only do so by agreeing to a diminishment of its sovereignty. Thus, an effort to withdraw consent need not itself be capable of repetition. Only the likelihood that Thlopthlocco may initiate a suit in the MCN courts need be capable of review because before Thlopthlocco may choose to do so, it must decide whether to accept a loss of an important attribute of its sovereignty.

PROPOSITION D

THLOPTHLOCCO AND THE MUSCOGEE NATION ARE SEPARATE FEDERALLY RECOGNIZED TRIBES. CONGRESS HAS EXPLICITLY DETERMINED THAT INDIAN TRIBES STAND ON EQUAL FOOTING WITH RESPECT TO EACH OTHER AND TO THE FEDERAL GOVERNMENT.[17]

By federal statute, Congress has mandated the equal status of Thlopthlocco and the MCN.[18]

25 U.S.C. §476(f) provide as follows:

> (f) Privileges and Immunities of Indian Tribes; Prohibition on New Regulations.--Department or agencies of the United States shall not promulgate any regulation or make any decision or determination pursuant to the Act of June 18, 1934, (25 U.S.C. 461 *et seq*., 48 Stat. 984) as amended, or any other Act of Congress, with respect to a federally recognized Indian tribe that classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes. (emphasis added).

Section 476(f) was part of the Technical Corrections Act of 1994[19] (SB1654) as amendments to the Indian Reorganization Act[20] (25 U.S.C. §461 *et seq*., 48 Stat. 984).

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[17] This proposition was included in Plaintiff's MCN tribal district court Motion to Dismiss (App. 1536-41) and also in the Interlocutory Appeal Brief-in-Chief. (Doc. 163-05, p. 34).

[18] Thlopthlocco is one of 574 "Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs," Federal Register, Vol. 88, No. 8, January 12, 2023, p. 2112-16 found at: <https://www.govinfo.gov/content/pkg/FR-2023-01-12/pdf/2023-00504.pdf> (last checked 3/25/2023) ("The listed Indian entities are recognized to have the immunities and privileges available to federally recognized Indian Tribes by virtue of their government-to-government relationship with the United States as well as the responsibilities, powers, limitations, and obligations of such Indian Tribes." *id*.) (For Thlopthlocco Tribal Town, see p. 2114).

[19] Although Oklahoma tribes were organized pursuant to the Oklahoma Indian Welfare Act, 25 U.S.C. §503, *et seq*. and the IRA, SB1654 makes clear it is a blanket enactment applicable to all Indian tribes by inclusion of the phrase, "or any other Act of Congress" and use of the term, "a federally recognized Indian tribe." 25 U.S.C. §476(f).

[20] Excerpts from the 103rd Congress Congressional Record regarding SB1654 (continued...)

During the introduction of SB1654, Senators McCain and Inouye stated the amendments grew out of a concern the Department of the Interior had previously interpreted §476 to allow the Department to categorize or classify Indian tribes as being either "created or historic." Created tribes were allowed to exercise only those powers of self-government as the Secretary may confer on them. Senator McCain concluded there no basis in law or policy for this:

> The recognition of an Indian tribe by the Federal Government is just that--the recognition that there is a sovereign entity with governmental authority which predates the U.S. Constitution and with which the Federal Government has established formal relations. Over the years, the Federal Government has extended recognition to Indian tribes through treaties, executive orders, a course of dealing, decisions of the Federal courts, acts of Congress and administrative action. Regardless of the method by which recognition was extended, all Indian tribes enjoy the same relationship with the United States and exercise the same inherent authority. All that section 16 was intended to do was to provide a mechanism for the tribes to interact with other governments in our Federal system in a form familiar to those governments through tribal adoption and Secretarial approval of tribal constitutions for those Indian tribes that choose to employ its provisions. (emphasis added).

Congressional Record-Senate, May 19, 1994, Vol. 14, part 8, p. 11234. (Ex. 01).

Nothing in the context of Senator McCain's remarks exclude other tribal governments as "other governments in our Federal system."

Senator Inouye emphasized the Amendment placed each tribe on an equal

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[20](...continued)
and H3802 can be found by commencing a search from this location for the date: <https://www.congress.gov/congressional-record/103rd-congress/browse-by-date?loclr=bloglaw> (last checked 3/25/2023).

The Senate consideration is 103rd Congress, SB1654 - May 19, 1994, Vol. 14, part 8 and can be downloaded as a PDF for that day: <https://www.congress.gov/bound-congressional-record/1994/05/19/senate-section:> (last checked 3/25/2023). (Ex. 01).

The House consideration is 103rd Congress, H3802 - May 23, 1994: <https://www.congress.gov/bound-congressional-record/1994/05/23/house-section> (last checked 3/25/2023). (Ex. 02).

footing in relationship to the Federal government and each other:

> Our amendment makes it clear that it is and has always been Federal law and policy that Indian tribes recognized by the Federal Government stand on an equal footing to each other and to the Federal Government. That is, each federally recognized Indian tribe has the same governmental status as other federally recognized tribes by virtue of their status as Indian tribes with a government-to-government relationship with the United States. Each federally recognized Indian tribe is entitled to the same privileges and immunities as other federally recognized tribes and has the right to exercise the same inherent and delegated authorities. This is true without regard to the manner in which the Indian tribe became recognized by the United States or whether it has chosen to organize under the IRA. (emphasis added).

Congressional Record-Senate, May 19, 1994, Vol. 14, part 8, p. 11235. (Ex. 02).

There was a similar understanding in the explanation offered in the House.

Representative Richardson explained:

> The Federal Government has extended recognition to Indian tribes through treaties, Executive orders, a course of dealing, decisions of the Federal courts, acts of Congress and administrative action. Whatever the method by which recognition was extended, all Indian tribes enjoy the same relationship with the United States and exercise the same inherent authority.
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> The amendment makes it clear that it is and has always been Federal law and policy that Indian tribes recognized by the Federal Government stand on an equal footing to each others and to the Federal Government, and that each federally recognized Indian tribe is entitled to the same privileges and immunities as other federally recognized tribes.
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> The Congress has never acknowledged distinctions in or classifications of inherent sovereignty possessed by federally recognized Indian tribes. Tribal sovereignty must be preserved and protected by the executive branch and not limited or divided into levels which are measured by the Bureau of Indian Affairs and the Department of the Interior. (emphasis added).

Congressional Record-House, May 23, 1994, Vol. 14, part 8, p. 11377. (Ex. 02).

As a matter of federal law, the MCN has no legal status that makes it different from Thlopthlocco including the ability to subjugate Thlopthlocco sovereignty to that of the MCN. Nor does it appear from §476(f) that federal funding allocated to the MCN

could be used to make such a differentiation. The ruling of the MCN district and Supreme Courts that Thlopthlocco cannot withdraw its consent to jurisdiction is inconsistent with federal common law.

IV. CONCLUSION

This case is not moot. The MCN judiciary exercise of jurisdiction against Thlopthlocco without its consent is a "concrete interest" or "substantial injury" of an existing dispute that can be remedied by this Court's declaratory judgment.

Defendant have provided no antecedents of the historical relationship between the MCN and Thlopthlocco that justifies a rule that Thlopthlocco must yield its sovereign immunity when it litigates in MCN court. This requirement "chills" Thlopthlocco's access to courts in that it must concede an impairment of sovereignty before it chooses to consent to jurisdiction. The MCN reasons for refusing to allow Thlopthlocco to withdraw its consent are inadequate for such a harsh requirement of sovereignty waiver.

Plaintiff respectfully requests that after notice of joinder, 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,

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THLOPTHLOCCO TRIBAL TOWN, a
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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:

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