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.	)	

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

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April 10, 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 and previous filings. 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. viii - 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 was submitted as a proposed Order (in Word format) through ECF with Plaintiff's Response to Defendants' Motion to Dismiss.

5. Exhibits to Response Brief to Defendants' Motion to Dismiss.

The following excerpts from the Congressional Record are attached to Plaintiff's

Response to Defendants' Motion to Dismiss:

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).

REPLY TO DEFENDANTS' RESPONSE TO 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, submits its Reply to Defendants' Response on remand to *Thlopthlocco Tribal Town v. Stidham*, 762 F.3d 1226 (10th Cir. 2014).[1]

PLAINTIFF'S INJURY TO ITS SOVEREIGN IMMUNITY IS "IRREPARABLE HARM".

It is true, as Defendants have suggested, that both tribal district court actions (CV-2007-39 and CV-2011-08) have been dismissed. It is also true Plaintiff has, at this time, withdrawn a request for an injunction. (Doc.180, p. 1). But that does not mean the existing "dispute" is not "live." Defendants say because Thlopthlocco "won" both cases in the tribal courts, it has suffered no injury. This is a simple "sleight of hand."

Thlopthlocco has argued the resolution of the two cases caused an injury by the diminution of its sovereign immunity when the MCN courts exercised jurisdiction over Thlopthlocco without its consent. Such an injury is an "irreparable harm" that will also continue to chill Thlopthlocco "access to courts" until resolved by this Court.

The Tenth Circuit has held long an invasion or interference with tribal sovereignty is "irreparable harm." *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1250-51 (10th Cir. 2001); *Wyandotte Nation v. Sebelius*, 443 F.3d 1247, 1255 (10th Cir. 2006); *Ute Indian Tribe v. State of Utah*, 790 F.3d 1000, 1005-06 (10th Cir. 2015).

This is no surprise since the court is simply following U. S. Supreme Court

[1] Because Defendants include related argument from their Motion to Dismiss (Doc. 177), Plaintiff incorporates by reference as if set out in full, its Response to Defendants' Motion to Dismiss. (Doc. 178). This Court is asked to take judicial notice pursuant to Fed.R.Evid. 201(c)(2). *Also, see* Doc. 176-00, fn. 1.

precedent in a context similar to that between Indian tribes and the States. To understand, one might exchange the court's use of the phrase "state authority" in the following reference with the applicable phase, "judicial authority of another tribe":[2]

> The exercise of state authority may also be barred by an independent barrier -- inherent tribal sovereignty -- if it "unlawfully]infringes] 'on the right of reservation Indians to make their own laws and be ruled by them.'" *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980), quoting *Williams v. Lee*, 358 U.S. 217, 220 (1959). "See also *Washington v. Yakima Indian Nation*, 439 U.S. 463, 502 (1979); *Fisher v. District Court*, 424 U.S. 382 (1976) (*per curiam*); *Kennerly v. District Court of Montana*, 400 U.S. 423 (1971)." 448 U.S., at 142-143.

New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 334 n.16, 103 S. Ct. 2378, 2386 (1983).

There seems little doubt the refusal of the Creek judicial officials to accord Thlopthlocco's its status as a full sovereign in MCN courts as required by federal common law unlawfully infringes on the Thlopthloccos' ability "to make their own laws and be ruled by them." The MCN judiciary's exercise of jurisdiction threatened to upend Thlopthlocco elections and its governmental structure. And this injury still exists because Thlopthlocco can only return to the MCN courts as a crippled sovereign restricted from the ability to withdraw consent in litigation before MCN courts.

Even the burden of unwanted litigation (as Thlopthlocco has endured since 2011[3]

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[2] As previously argued by Plaintiff, the MCN produced no evidence of any antecedents or historical relationship between the MCN and Thlopthlocco that entitled it to exercise jurisdiction over Thlopthlocco without its consent. Logically, the historical evidence was quite the opposite, as even the MCN Supreme Court finally had to admit: Thlopthlocco is entitled sovereign immunity in MCN courts.

Further, under federal statute, the MCN is not different, and certainly not superior to Thlopthlocco in term of the inherent jurisdiction it exercises over its tribal members, which does not include Thlopthlocco. 25 U.S.C. §476(f); (Doc. 178, pp. 20-24, Prop. D).

[3] Plaintiff identifies 2009 as the date of the withdrawal of consent, but the improper exercise of jurisdiction actually began in August 2007 after Thlopthlocco gave notice of internal resolution, and the MCN courts entertained cross-claims and requests

(continued...)

caused by extended delay and inaction by the MCN courts) is an significant interference with Thlopthlocco sovereignty:

> . . . the Tribe should not be compelled "to expend time and effort on litigation in a court that does not have jurisdiction over them." *Id*.; *see also* [*Kiowa Tribe v*.] *Manufacturing Tech*., [523 U.S. 751,] 118 S. Ct. [1700] at 1705 (1998) (holding "Tribes enjoy immunity from suits on contracts"). The Tribe's full enjoyment of its sovereign immunity is irrevocably lost once the Tribe is compelled to endure the burdens of litigation. *Cf*. *Seminole Tribe v. Florida*, 517 U.S. 44, 116 S. Ct. 1114, 1124, 134 L. Ed. 2d 252 (1996) (pointing out how the Eleventh Amendment immunity of a State "serves to avoid 'the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties'") (quoting *Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc*., 506 U.S. 139, 146, 113 S. Ct. 684 (1993))

Kiowa Indian Tribe of Okla.v Hoover, 150 F.3d 1163, 1172 (10th Cir. 1998).

Respectfully, it is incorrect to say that because the MCN Supreme Court determined Thlopthlocco was entitled to sovereign immunity, there is nothing further to decide. The MCN Supreme Court (Doc. 168-04) does not treat Thlopthlocco as a sovereign. "The common-law sovereign immunity possessed by an Indian tribe is a necessary corollary to Indian sovereignty and self-governance." *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering*, 476 U.S. 877, 890-1, 106, S.Ct. 2305, 2313 (1986).[4] It is not subject to dimunition by the MCN because only Congress

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[3](...continued)
for attorney fees filed by Anderson which should have been dismissed out of hand as Thlopthlocco never consented to adjudicate questions about elections or fees.

[4] As previously argued, unless this Court enters a declaratory judgment, Thlopthlocco's "access to courts" will be chilled. Every decision to litigate in the MCN courts must include consideration of a forced waiver of Thlopthlocco's right to withdraw from litigation a requirement inconsistent with federal common law. (Doc. 178, pp. 7-9, 17-20); *Three Affiliated Tribes v. Wold*, *id*. 467 U.S. 138, 104 S. Ct. 2267 (1984). (Doc. 178-00, pp. 17-20)(Required waiver of sovereign immunity to litigate in State court denies "access to court.").

In this same manner, the present MCN tribal court decisions also carry with them the "collateral consequences" of the diminution of Thlopthlocco sovereignty. *See* p. 10.

(continued...)

can "unequivocally" express the abrogation of tribal immunity and a tribe's waiver must be "clear." *C & L Enterprises, Inc. v. Citizen Band of Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418, 121 S.Ct. 1589, 1594 (2001).

When coupled with the likelihood Thlopthlocco will again need a judicial forum, this dispute is "live enough" to entitle Thlopthlocco to declaratory judgment. It is simply unreasonable to expect that Thlopthlocco, as a separate sovereign without its own judiciary, will not need a judicial forum in the future. With an upcoming election after this Court resolves this action, Plaintiff identified four previous instances, three of which involved election disputes and another, a "Coup d'état," that made it necessary for Thlopthlocco to resort to a judicial forum. This is capable of repetition. *See*, p. 7.

Approaching 14 years of litigation overall, this case demonstrate the need for sovereign immunity. Plaintiff earlier listed three cases from the Tenth Circuit of how sovereign immunity protects governmental entities from unnecessary litigation. *Wyandotte* was a precursor litigation to *Iowa Tribe Of Kansas and Nebraska v. Salazar*, 607 F.3d 1225 (10th Cir. 2010) mentioned in Plaintiff's Response to Defendants' Motion to Dismiss (Doc. 178-00, p. 13-14). The federal district court issued a preliminary injunction against the State preventing it from interfering with the Wyandotte's use of a tract of land in trust by attempts to enforce state law on it. The State argued no irreparable harm. The Circuit disagreed, "We have repeatedly stated that such an invasion of tribal sovereignty can constitute irreparable injury." *Wyandotte*, 443 F.3d at

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[4](...continued)
The chilling of "access to courts" is typically found in First Amendment violations. *See Bill Johnson's Rests. v. NLRB*, 461 U.S. 731, 741, 103 S. Ct. 2161, 2169 (1983) (". . . the right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances."). *Three Affiliated Tribes* is one of the few cases to discuss the "chilling" of "access to court" in the context of sovereign immunity.

1255.

In *Ute Indian Tribe*, then Judge Gorsuch repeated the same phrase in holding that the district court improperly failed to recognize "irreparable harm" in the efforts of a local County attempting to prosecute a tribal member in State court for an "offense" committed within tribal land. Judge Gorsuch held the action constituted "irreparable harm" within the requirements for an injunction. *Ute Indian Tribe*, 790 F.3d at 1005. ("And we can divine no reason or authority that might justify a different result here, where the invasion of tribal sovereignty is so much greater.").

In *Ute Indian Tribe*, Judge Gorsuch relied upon *Prairie Band*, a case where the federal district court of Kansas issued a preliminary injunction prohibiting enforcement of state motor vehicle registration and titling laws with respect to vehicles owned by the Native American Tribe member plaintiffs. The Circuit affirmed the injunction because it concluded the Tribe would suffer irreparable harm from the citation of individual vehicles of tribal members:

> "The extent of tribal sovereignty . . . clearly involves more than simple geographic limits, but includes the 'tradition of Indian sovereignty over the reservation and tribal members.' Certain aspects of tribal sovereignty, such as tribal immunity from suit, have been held to be so fundamental as to preempt the enforcement in court of state laws regardless of where the activity takes place." (Emphasis added)

Prairie Band of Potawatomi Indians v. Pierce, 253 F.3d 1234, 1256 (10th Cir. 2001).

A DECLARATORY JUDGMENT WILL ESTABLISH AND PROTECT THLOPTHLOCCO SOVEREIGN IMMUNITY.

Defendants argue a declaratory judgment "cannot affect the rights of the litigants in the case before them."[5] (Doc. 180, p. 2). This is incorrect because of the irreparable

[5] Defendants' cited cases do not necessarily involve an irreparable harm to a (continued...)

[5](...continued)
sovereign's immunity from suit. Some have very little application to this case at all.

Ghailani v. Sessions, 859 F.3d 1295 (10th Cir. 2017) involved a dispute over sale of leases brought by an environmental group concerned about the environmental effect of the proposed use. Before oral argument, the BLM terminated the two remaining leases for nonpayment. While the environmental group contended it still had interest in certain violations of the federal law with regard to the way the leases were handled, there was no expectation the BLM would handle future sales in the same manner unlike this case where Thlopthlocco suffers diminished sovereignty that assures in future litigation it will be unable to withdraw consent as a sovereign right.

In footnote 2, p. 3, Defendants cite three additional cases. In *Charles v. Ute Indian Tribe of the Uintah & Ouray Reservation*, No. 2:17-cv-00321 -DN, 2018 WL 611469, 2018 U.S. Dist. LEXIS 14455 (D. Utah Jan. 29, 2018), there is not much detail to understand what even happened. Although Plaintiff Grant Charles sues "in his official capacity as attorney for Roosevelt City, Utah," there is no indication he invoked sovereign immunity. Even if he did, the underlying case in tribal court (with unidentified causes of action), where he was apparently a defendant, was dismissed. While the tribal defendants said the federal court did not have jurisdiction to review its exercise of jurisdiction, the district court shot that down, ". . . a federal court may determine under 28 U.S.C. § 1331 whether a tribal court has exceeded the lawful limits of its jurisdiction as a federal question." *id*. at *3.

Defendants' use of *Sitton v. Native Vill. of Northway*, No. A03-0134-CV (HRH), 2005 WL 2704992, 2005 U.S. Dist. LEXIS 46304 (D. Alaska Oct. 14, 2005) is no more applicable. Again the plaintiff was not a sovereign. This involved a custody dispute in tribal court and once certain objections were entered, the tribal court terminated jurisdiction. Under Alaska law, the state court took exclusive jurisdiction over the case and thus there was no "reasonable threat of future injury." *id*. at *13.

Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians, 898 F. Supp. 1549 (S.D. Fla. 1994) also does not sound helpful for Defendants. Again, the plaintiff was not sovereign. The federal district court held that the exercise of jurisdiction over a nontribal member was a federal question. The tribe, its business council, and the tribal gaming agency were entitled to sovereign immunity, but individual tribal officials remained proper defendants and exhaustion was not required because of bad faith.

As in this case, the court also held that the question of whether the tribal court or its judges exceeded their jurisdiction or sovereign powers in asserting jurisdiction over disputes between a tribe and a non-Indian supported federal court jurisdiction. *Tamiami Partners*, 898 F. Supp. at, 1557. (". . . such an issue supports federal court jurisdiction under the Supreme Court's holding in *National Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 85 L. Ed. 2d 818, 105 S. Ct. 2447 (1985)).

Defendants' use of *Bd. of Educ. for the Gallup-Mckinley Cty. Sch. v. Henderson*, 696 F. App'x 355 (10th Cir. 2017) is also inapplicable. This unpublished and nonprecedential case was an employment dispute involving a principal hired by the school district to work at an Indian school within the Navajo reservation. The school district told the employee he would not be rehired. He initiated administrative

(continued...)

harm to Thlopthlocco sovereignty. A declaratory judgment will prospectively secure Thlopthlocco from that "irreparable harm" to its sovereignty caused by MCN overreach of jurisdiction incompatible with federal common law.

CAPABLE OF REPETITION, YET EVADING REVIEW.

Besides the existence of a present, real, and chilling irreparable harm that immediately makes this case justiciable, there is a reasonable expectation Thlopthlocco will need access to a judicial forum in the future. As the Tenth Circuit noted, it is the only judicial forum made available to Thlopthlocco since the federal government will not separately fund a Thlopthlocco judiciary. *Thlopthlocco v. Stidham*, 762 F.3d at 1231.

Plaintiff contends this case is capable of repetition, yet evading review. (Doc. 176-00, p. 21-3). Defendants reject this argument claiming that plaintiff has made no showing of either element because there is no "election law" challenged here and there is no election to moot the matter. (Doc. 180, p. 13-16).

Defendants also say Plaintiff does not satisfy the "insufficient time" argument. This is an odd argument to be made when timing in the tribal court was solely in the hands of the MCN in refusing to recognize Thlopthlocco's claims early, and then

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[5](...continued)
proceedings before the Office of Navajo Labor Relations. His application was untimely. Further administrative appeals eventually wound up before the Navajo Nation Supreme Court which asserted it had jurisdiction over the case, but resolved the particular case in favor of the school district as untimely. The School District challenged the Navajo Supreme Court's claim it had jurisdiction. Judge Tymkovich held the school district was not injured because it was conjectural if the court would assert jurisdiction in the future, nor was it certain a legally protected interest was involved. ". . . inherent in the notion of "injury" is the idea that the plaintiff is, or will be, worse off as a result of the complained-of conduct." *Bd. of Educ. for the Gallup-Mckinley Cty. Sch*. 696 F. App'x at 358. Unlike the school district, the MCN Defendants has made it clear its precedent will not permit Thlopthlocco its sovereign rights under federal common law to withdraw consent and therefore Thlopthlocco will be "worse off" as a result of that precedent.

significantly delaying the case after remand by the Tenth Circuit and finally ruling in such a way to claim the case is moot. In reality, the "capable of repetition, yet evading review" doctrine does not permit the MCN courts to find a result they think will avoid adjudication of Plaintiff's claim of irreparable harm to sovereign immunity while still maintaining a firm grip over aspects of Thlopthlocco sovereignty.

The "capable of repetition" doctrine is not applied as parsimoniously as Defendants claim. It has been applied by the Supreme Court in a case involving a right to counsel by a parent charged with contempt for failing to pay child support after facing incarceration for up to a year. The State officials argued the case was moot because the defendant had served his one year jail term and there were no "collateral consequences" of the contempt determination to keep it alive. Given that the contemnor has been previously charged with contempt (as Thlopthlocco's history of prior litigation also demonstrates), the Supreme Court responded:

> At the same time, there is a more than "reasonable" likelihood that Turner will again be "subjected to the same action." . . . The short, conclusive answer to respondents' mootness claim, however, is that this case is not moot because it falls within a special category of disputes that are "capable of repetition" while "evading review."

Turner v. Rogers, 564 U.S. 431, 439, 131 S. Ct. 2507, 2514-15 (2011).

The exception is driven by a principle that the question of the litigation can recur, but not be subject to challenge, and therefore is not moot. In the instant case it is driven by more than happenstance since alleged "mootness" was conjured by the MCN.

The Supreme Court first enunciated the "capable of repetition" test in a case completely unrelated to elections, instead applying it to changing circumstances which

might make it impossible to adjudicate a case fully.[6] It relied upon an earlier decision on a question of "public rights" involved in the litigation:

> This court has said a number of times that it will only decide actual controversies, and if, pending an appeal, something occurs without any fault of the defendant which renders it impossible, if our decision should be in favor of the plaintiff, to grant him effectual relief, the appeal will be dismissed.
>
> - - - - -
>
> But there is a broader consideration. The questions involved in the orders of the Interstate Commerce Commission are usually continuing (as are manifestly those in the case at bar) and their consideration ougth not to be, as they might be, defeated, by short term orders, capable of repetition, yet evading review, and at one time the Government and at another time the carriers have their rights determined by the Commission without a chance of redress.
>
> In *United States v. Trans-Missouri Freight Ass'n*[,166 U.S. 290, 17 S. Ct. 540 (1897)], *supra*, the object of the suit was to obtain the judgment of the court on the legality of an agreement between railroads, alleged to be in violation of the Sherman law. In the case at bar the object of the suit is to have declared illegal an order of the Interstate Commerce Commission. In that case there was an attempt to defeat the purposes of the suit by a voluntary dissolution of the agreement, and of the attempt the court said: "The mere dissolution of the association is not the most important object of this litigation. The judgment of the court is sought upon the question of the legality of the agreement itself, for the carrying out of which the association was formed, and if such agreement be declared to be illegal the court is asked not only to dissolve the association named in the bill,

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[6] *See also Dunn v. Blumstein*, 405 U.S. 330, 333 n.2, 92 S. Ct. 995 (1972). *Dunn*, involved a class action challenge to durational residency requirement to register to vote where plaintiff satisfied the residency requirement before the case came to judgment. The Supreme Court said plaintiff "has standing to challenge them as a member of the class of people affected by the presently written statute."

Justice Rehnquist also recognized the same principle in a class action challenge to durational residency requirement for divorce where "the issue sought to be litigated escapes full appellate review at the behest of any single challenger, does not inexorably become moot by the intervening resolution of the controversy as to the named plaintiffs." *Sosna v. Iowa*, 419 U.S. 393, 401, 95 S. Ct. 553, 558 (1975).

In *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 546-47, 96 S. Ct. 2791 (1976), the Supreme Court applied "capable of repetition" principle to a prior restraint order, in part, because the State of Nebraska was a party. 427 U.S. at 547 ("Yet, if we decline to address the issues in this case on grounds of mootness, the dispute will evade review").

> but that the defendant should be enjoined for the future. . . . Private parties may settle their controversies at any time, and rights which a plaintiff may have had at the time of the commencement of the action may terminate before judgment is obtained, or while the case is on appeal, and in any such case the court, being informed of the facts, will proceed no further in the action. Here, however, there has been no extinguishment of the rights (whatever they are) of the public, the enforcement of which the Government has endeavored to procure by the judgment of a court under the provisions of the act of Congress above cited. The defendants cannot foreclose those rights nor prevent the assertion thereof by the Government as a substantial trustee for the public under the act of Congress, by any such action as has been taken in this case." (Emphasis added).

S. Pac. Terminal Co. v. Interstate Commerce Commerce, 219 U.S. 498, 514, 31 S. Ct. 279, 283 (1911).

In other words, similar to the colluders in *Trans-Missouri Freight*, the MCN defendants "attempt to defeat the purposes of the suit" to avoid judgment on matters involving a public right, *i.e.*, irreparable harm by impairment of tribal sovereignty.

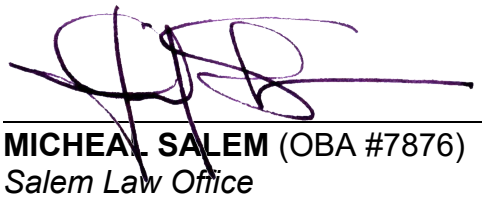
Finally, as earlier mentioned, there is another category of cases not mooted because they have "collateral consequences." These are more readily recognized in criminal appeals where a defendant discharges a sentence before the court is able to consider the challenge. The case is not moot where the defendant "has a substantial stake in the judgment of conviction which survives the satisfaction of the sentence imposed on him." *Sibron v. New York*, 392 U.S. 40, 58, 88 S. Ct. 1889, 1900 (1968).

By analogy, even though the instant case was resolved, it was resolved leaving the "collateral consequences" of the impairment of Thlopthlocco's sovereignty.

CONCLUSION

Defendants' arguments should be rejected. Plaintiff is entitled to a declaratory judgment of protection from the collateral consequences and irreparable harm of the impairment of its sovereign immunity by the MCN Judicial Defendants.

Respectfully submitted,



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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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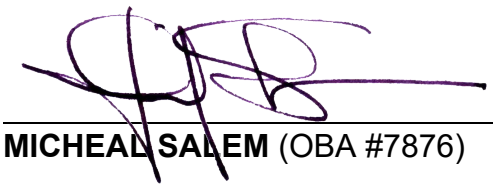
on the DATE SHOWN by the ECF.



MICHEAL SALEM (OBA #7876)