

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

(1) THE ABSENTEE SHAWNEE TRIBE	)	
OF OKLAHOMA and (2) THUNDERBIRD	)	
ENTERTAINMENT CENTER, INC.,	)	
	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	Case No. CIV-09-91-F
	)	
(1) THE HONORABLE DOUGLAS COMBS,	)	
DISTRICT COURT OF POTTAWATOMIE	)	
COUNTY, OKLAHOMA, and (2) SHANTONA	)	
BITTLE, individually,	)	
	)	
Defendants.	)	

**PLAINTIFFS' RESPONSE AND OBJECTION TO  
DEFENDANT BITTLE'S MOTION TO DISMISS**

**COME NOW** Plaintiffs The Absentee Shawnee Tribe of Oklahoma and Thunderbird Entertainment Center, Inc., (“Plaintiffs”), and for their response and objection to Defendant Shantona Bittle’s Motion to Dismiss, provides the Court with the following. Plaintiffs show the Court that Defendant Bittle’s Motion to Dismiss mirrors that of the State Court and requires denial for the same reasons set forth in Plaintiff’s Response and Objection to the State Court’s Motion to Dismiss filed on March 5, 2009 (Doc. 13). Plaintiffs incorporate that Response in its entirety, including exhibits, by reference herein. Plaintiffs would like to further explain its response to the cumulative and repetitive argument asserted by Defendants that the Oklahoma Supreme Court opinion in the *Bittle* action is a “final order” as to *all* the issues presented in this separate and distinct action. This is simply incorrect.

### **BRIEF IN SUPPORT**

Defendants conclusively state that the *Bittle* decision is a “judgment” and “final order”. In fact, this opinion only addressed a very limited issue and then remanded the case for further proceedings. There is no final “judgment” in the underlying state court case, only an opinion that purports to grant subject matter jurisdiction.

The Oklahoma Supreme Court was presented with only four issues to decide as evidenced by Defendant Bittle’s Petition in Error: **Issue No. 1:** Whether, the Defendants are entitled to *sovereign immunity* for dispensing alcohol to a noticeably intoxicated person who then leaves the Defendants’ premises, travels on the State’s highways and injures one of the State’s citizens. **Issue No. 2:** Whether the Tribe waived *sovereign immunity* by applying for and accepting a State license to sell and distribute alcoholic beverages in accordance with the Oklahoma Alcoholic Beverage Control Act, 37 O.S. §501, et seq. **Issue No. 3:** Whether the Plaintiff can maintain a cause of action against the Defendants for violation of 37 O.S. §527, i.e. a dram shop case. **Issue No. 4:** Whether the Defendants waived *sovereign immunity* by adopting its own Alcohol Regulation Statute and agreeing to follow and be bound by the State law as enumerated in 37 O.S. §537. Except for Issue 3, these all deal only with subject matter jurisdiction. Plaintiffs’ Complaint addresses many more legal bases for the issuance of an injunction.

The Court was provided the *Bittle* Opinion by the State Court with its Motion to Dismiss and Defendant Bittle quoted the opinion at length in her Motion to Dismiss. The Oklahoma Supreme Court was only faced with the four issues raised on appeal by Defendant Bittle set out above. The Oklahoma Supreme Court issued its opinion, and in ¶1 states that “we find the Indian Tribe and its casino have not established that they are shielded by the doctrine of *tribal sovereign immunity* from the exercise of state court jurisdiction in this case.” (emphasis added). The

holding in *Bittle* is that no sovereign immunity exists in the area of alcohol regulation. *Bittle* at ¶54. The Oklahoma Supreme Court goes on to state that even if sovereign immunity did exist, which it does not, then the Tribe and TEC waived it. *Id.* at ¶¶46 and 55.

Tribal sovereign immunity is a matter of subject matter jurisdiction. *E.F.W. v. St. Stephen's Indian High Sch.*, 264 F.3d 1297, 1302-03 (10th Cir.2001). Therefore, the Oklahoma Supreme Court only decided this limited issue of subject matter jurisdiction as evidenced by the opinion. The Oklahoma Supreme Court did not address all of the separate issues raised in this action and certainly did not issue a final judgment as to these issues. This action is not aimed at questioning whether the Oklahoma Supreme Court got the subject matter jurisdiction issue wrong. It is aimed at enjoining the state court action for numerous reasons, subject matter jurisdiction being only one of them.

The issues before this Court are numerous and not limited to whether subject matter jurisdiction exists as determined by the Oklahoma Supreme Court. Assume Defendants are correct that a final order exists determining the issue of subject matter jurisdiction. That does not resolve the other issues raised in this action. The State Court action is still pre-empted and in violation of federal statutory and common law. The Tribal Court of the Absentee Shawnee Tribe of Oklahoma still has exclusive jurisdiction over the controversy. Venue is not proper in the State Court. Venue is appropriate in the Tribal Court in accordance with Defendant Bittle's pending action. Plaintiffs will suffer imminent and irreparable injury if Defendants are not enjoined from proceeding, despite the existence of subject matter jurisdiction. The exercise of State Court subject matter jurisdiction will violate federal Indian law and will infringe upon the Absentee Tribe's federally protected rights of self-government and self-determination. The issues are numerous in this action and are more fully detailed in the Complaint. Defendants cannot meet

their burden of establishing a right of dismissal. None of these issues were addressed by the *Bittle* decision and it is not a final order.

Defendants provide no authority for their conclusion that this entirely different lawsuit cannot be procedurally maintained before this Court because the *Bittle* decision was not appealed to the United States Supreme Court. In fact, federal injunctions are routinely sought in cases where a state court attempts to act improperly under the law. The case of *Seneca-Cayuga Tribe of Oklahoma v. State of Oklahoma ex rel. David L Thompson, the duly elected District Attorney of Ottawa County, Oklahoma, Bob Sills, the duly elected Sheriff of Ottawa County, Oklahoma; Jon D. Douthitt, Associated District Judge for the 13<sup>th</sup> Judicial Administrative District of Oklahoma, Defendants*, 874 F.2d 709 (10<sup>th</sup> Cir. 1989) is analogous. In that action, the Indian tribes (consolidated actions) brought a federal action seeking declaratory and injunctive relief against the State of Oklahoma and the district judge, even after the Oklahoma Supreme Court issued a decision found at 711 P.2d. 77 (Okla. 1985). The Oklahoma Supreme Court held in its opinion that the state court suits were not barred by tribal sovereign immunity and state regulation of bingo in Indian country was permissible, much the same as it ruled in the *Bittle* opinion. Rather than appealing that decision to the United States Supreme Court, the tribes sought an injunction in federal district court. The tribes were successful in obtaining the injunction and the 10<sup>th</sup> Circuit Court of Appeals later affirmed the Northern District's award of the injunction.

In *Seneca-Cayuga*, the federal district court, The Honorable Thomas R. Brett issued an Opinion and Findings of Fact and Conclusions of Law on June 5, 1986, which is attached as Exhibit 1. In that Opinion, which was ultimately appealed to the Tenth Circuit, and upheld, the Court acknowledged that the "the highest appellate court in the State has already ruled adversely to the movants." *Id.* at p.5. Judge Brett then analyzed whether he could enjoin the state court

proceeding because the Oklahoma Supreme Court decision was contrary to federal law and whether the requirements of an injunction could be met. All this despite the fact that the Oklahoma Supreme Court already ruled upon the “fundamental question.” *Id.* at p.6. The injunction was issued and upheld by the 10<sup>th</sup> Circuit, just as is sought in this case. *See also Oglala Sioux Tribe v. C & W Enterprises, Inc.*, 516 F.Supp.2d 1039 (D.S.D. 2007) (Indian tribe brought action to enjoin state court action against it arising from dispute over road construction project after a state court petition was filed to confirm an arbitration award against the tribe); *Tohono O’odham Nation v. Schwartz*, 837 F.Supp. 1024 (D.Ariz. 1993) (Indian tribe filed suit in federal court to enjoin the state court proceeding after its motion to dismiss for lack of subject matter jurisdiction was denied); *Bowen v. Doyle*, 230 F.3d 525 (2d Cir. 2000) (federal court enjoined a state court from further decision regarding a dispute involving internal tribal affairs).

### **CONCLUSION**

This action seeks an injunction, which would prohibit the state court action from proceeding any further. The Oklahoma Supreme Court’s decision of remand regarding the limited issue of subject matter jurisdiction means nothing to whether this relief is available as a matter of procedure. There is legal precedent in this unique area of Indian law for prohibiting state courts from acting inconsistent with the Constitution and law of the United States, especially as to the issue of sovereign immunity. Defendant’s procedural grounds for dismissal, i.e. collateral estoppel, issue preclusion, Full Faith and Credit, etc. are inapplicable to this action because this case does not concern identical parties, identical issues, or a final judgment in the state court disposing of all the claims and defenses. But even if this Court is mildly convinced that the Defendants’ arguments have any merit as to that single issue being finally determined and incapable of collateral attack in this court, the Court should be mindful of the fact that

Plaintiffs' Complaint seeks to address numerous other issues to which the *Bittle* opinion has absolutely no application and remain undetermined. Defendants' Motions to Dismiss have no legal support and the theories asserted therein are inapposite to the issues before this Court.

WHEREFORE, the Absentee Shawnee Tribe of Oklahoma and Thunderbird Entertainment Center, Inc. respectfully request the Court to deny Defendant State Court and Defendant Bittle's Motions to Dismiss and grant them all other relief to which they are entitled.

Respectfully submitted,

s/ Jeremy Z. Carter

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 26th day of March, 2009, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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