

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

Jonathan Alexander,)	
)	
Plaintiff,)	
)	
vs.)	
)	CIV 10-271-FHS
Dusty Smith,)	
)	
)	
Defendant.)	

**REPLY TO COURT SHOW CAUSE
ORDER**

COMES NOW, the Defendant, DUSTY SMITH, by and through his attorney, WARREN GOTCHER, and respectfully shows cause why the issues of this case precludes this Honorable Court from considering the claims raised by Plaintiff, and in support thereof states the following:

PROPOSITION 1

As a mater of international comity, this Court should decline to exercise jurisdiction to consider the validity of a jurisdiction-conferring/stripping Choctaw Nation Council Bill and Executive Order.

The Plaintiff's claim that the Federal Courts have jurisdiction over Defendant pursuant to 28 U.S.C. § 1331 have no legal merit. As Plaintiff cited in his Response to Court Show Cause Order, 28 U.S.C. reads as follows:

"The district courts shall have original jurisdiction of all civil actions arising under the Constitution, law, or treaties of the United States."

There exists one critical misapplication of 28 U.S.C. § 1331 in Plaintiff's Response. Plaintiff's lack of jurisdiction claim arises under the passage of a Choctaw Nation Council Bill passed by Choctaw Lawmakers and an Executive Order Passed by the Chief of the Choctaw Nation. The Federal statutes granting Federal courts original jurisdiction used as authority by Plaintiff applies only in instances "of civil actions arising under the Constitution, law, or treaties of the United States." This statute does not apply to a jurisdictional dispute arising from the passage of Choctaw legislation and Executive Order. Indian tribes as distinct and separate sovereigns are generally unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority. *Ordinance 59 Ass'n v. Babbitt*, 970 F.Supp. 914 (D.Wyo 1997).

As evidenced by numerous motions filed by both parties, in essence, this case hinges on the interpretation of Choctaw legislation and an Executive Order passed by the Choctaw Chief. In a North Carolina District Court case involving virtually identical facts, the Court decided Federal courts, as a general matter, lack competence to decide matters of tribal law and to do so offends notions of comity. see *Auto Owners Ins. Co. v. Saunooke*, 54 F. Supp.2d 585 (W.D.N.C.,1999).

Plaintiff sites *National Farmers Union Ins. Cos. V. Crow Tribe* as authority for his Federal Court jurisdictional claim. In *National Farmers*, the Federal Courts had jurisdiction to determine Indian Court jurisdiction because the question of whether Indian tribal court retained the power to compel non-Indian property owner to submit to civil jurisdiction of tribal court in personal injury action was one to be answered by reference to Federal law. See *National Farmers Union Ins. Cos. V. Crow Tribe*, 471 U.S. 845 (1985). In the case at hand, the CFR Court jurisdictional question is one to be answered by reference to a Choctaw Nation Council

Bill and Executive Order. Although Plaintiff attempts to frame the issue as one of Due Process with respect to a parent's fundamental right over the care, custody and control of their children so that Federal law can be invoked, the issue remains whether an Executive Order signed by the Chief of the Choctaw Nation granting the CFR Court of Indian Appeals jurisdiction over all pending appeals until those appeals are final therein is valid under the Choctaw laws

Indian tribes, whose legal traditions are rooted in more informal traditions and customs than those which exist in common law countries, have formulated their own notions of due process and equal protection in compliance with both aboriginal and modern tribal law; state or federal due process and equal protection precedents, rooted in the Anglo-American system, are neither dispositive nor controlling. *Ponca Tribal Election Bd. v. Snake*, 1 Okla. Trib. 209, (Ponca. C.I.A.1988). There are no Due Process claims involving Federal or State laws involved in Plaintiff's claims. If the issue alleged by Plaintiff sincerely hinged on whether the Choctaw Nation laws allowing the termination of parental rights were unconstitutional, Due Process implications might allow Federal Court intervention, although *Cheyene-Arapaho Tribe* sheds strong doubt on such a review by the Federal Courts. Here, Plaintiff does not ask the Court to adjudicate the validity of the Choctaw Nation laws with respect to parental rights. Plaintiff's endeavors to invalidate the judgment of the CFR Court of Indian Appeals, as evidenced by Plaintiff's Complaint, are in the form of a collateral attack on the CFR Appeals Court for lack of jurisdiction. The issues presented do not involve "a civil action arising under the Constitution, law, or treaties of the United States," therefore plaintiff's claim as well as all relief sought by Plaintiff must be dismissed.

Federal district court was without jurisdiction over claim, asserted by Indian under the Indian Civil Rights Act, against the Bureau of Indian Affairs to remedy civil rights violations

allegedly committed by tribe. *Learned v. Cheyene-Arapaho Tribe*, 596 F. Supp. 537 (D.C. Okla. 1984) citing 25 U.S.C.A. § 1302; 28 U.S.C.A. § 1343(a)(4). Statute conferring jurisdiction over civil rights actions is the proper jurisdictional basis for claims under the Indian Civil Rights Act. *Id.* Plaintiff's Show Cause Motion alleges Indian Civil Right Act violations which, pursuant to *Cheyene-Arapaho Tribe*, should not be argued in Federal court.

Contrary to the principle of the Sovereign Immunity Doctrine, the Plaintiff is asking the Court to exercise jurisdiction over the Choctaw Nation, a distinct governmental agency. Because Plaintiff's claims present an intratribal governmental issue and do not implicate Federal or State Due Process concerns, this Court should exercise its discretion and refrain from adjudicating the validity of Choctaw Nation Council Bills and Executive Orders.

PROPOSITION 2

Plaintiff's claim is an intratribal governmental dispute which strips the Federal Courts of Jurisdiction until all Tribal Court remedies are exhausted

Neither the United States District Court for the Eastern District of Oklahoma nor do any other Federal courts have jurisdiction to determine the issue at hand. Internal Indian tribal affairs [such] as...government are not appropriate subjects for application of exception to doctrine of tribal sovereign immunity from suit in federal court. *Ordinance 59 Ass'n v. Babbitt*, 970 F.Supp. 914 (D.Wyo 1997). As federal courts are courts of limited jurisdiction, exhaustion of tribal remedies requires that tribal appellate courts be given the opportunity to review determinations of lower tribal courts before federal court considers issue of the tribal court's subject matter jurisdiction. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S.9 (1987). Consequently, it is presumed that jurisdiction lies outside this court and the plaintiff bears the burden of establishing the

propriety of the court's jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).

In the case at bar, Plaintiff argues that the Chief of the Executive Branch usurped legislative duties by deciding that the Court of Indian Appeals retained jurisdiction over pending appeals until "all appeals are final therein." Plaintiff now attempts to such argue intratribal governmental matters in Federal Court. It is well-established by long-standing and contemporaneous Federal case law that the Doctrine of Sovereign immunity shields such intratribal governmental matters from Federal court jurisdiction until exhaustion occurs in Tribal Court. see *National Farmers*, 471 U.S. at 845, 857. Exhaustion of tribal court remedies, moreover, will encourage tribal courts to explain to the parties the precise basis for accepting jurisdiction, and will also provide other courts with the benefit of their expertise in such matters in the event of further judicial review. *Id.* Pursuant to the Sovereign Immunity Doctrine, the Federal courts do not have subject matter jurisdiction to entertain intertribal governmental matters, a fortiori, the intratribal governmental matter at hand. Therefore this case should be dismissed for lack of subject matter jurisdiction.

As a condition precedent to filing a jurisdictional claim in Federal Court, Plaintiff must first exhaust all Tribal Court Remedies. As Plaintiff is well aware, the Choctaw Nation recently established a Choctaw Tribal Court and Choctaw Tribal Court of Appeals. Plaintiff made numerous references to the newly-established Choctaw Courts in past motions to the Court, yet the Plaintiff has failed to avail himself to the remedies established under the aforementioned courts before addressing this Court. **The newly-established Choctaw Nation Courts have made no ruling related to the jurisdictional claim Plaintiff now urges this Court to review.** Until Plaintiff has exhausted all available remedies of the Tribal courts in determining

jurisdiction, Plaintiff cannot pray to this Court for relief. Accordingly, Plaintiff's claims should be dismissed.

PROPOSITION 3

CFR Court Judge, James R. Wolfe, a Tribal judge is absolutely immune from suit in Federal Court

The Plaintiff has unconstitutionally attached Judge Steven L. Parker (hereinafter "Judge") along with other tribal officials as Defendants. The Defendants cannot be haled into Federal Court for performing an act in official capacity as a judge for the Choctaw Nation. *Ex parte Young*, 209 U.S. 123 (1908). Indian tribes are distinct, independent political communities, retaining their original natural rights in matters of local self-government, and...remain a separate people with power of regulating their internal and social relations. see *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). State and Federal officials acting in their official capacity are immune from suit. U.S.C.A Const. Amend. 11. Federally recognized Indian tribe, and a fortiori its members, are subject to Eleventh Amendment. *Id.*

Plaintiff cannot avoid the doctrine of sovereign immunity by the simple expedient of naming tribal officials of the Tribe as defendants, rather than the sovereign entity. All tribal officials listed as Defendant's by Plaintiff were acting in an official capacity. These Defendants were named merely because they at one point contributed to a legal opinion or judgment adverse to Plaintiff's interests. Plaintiff has failed to allege that the tribal officials were acting in an individual as required by *Young*. *Young*, 209 U.S. at 160. Although Congress clearly has power to authorize civil actions against tribal officers, and has done so with respect to habeas corpus relief in § 1303, a proper respect both for tribal sovereignty itself and for the plenary authority of

Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent. *Id.*

Plaintiff cannot avoid the Doctrine of Sovereign Immunity by the simple expedient of alleging that CFR Court of Indian Appeals judge lacked subject matter jurisdiction to terminate Plaintiff's parental rights. In reviewing factual attack on subject matter jurisdiction, district court may not presume truthfulness of complaint's factual allegations; court has wide discretion to allow affidavits, other documents, and limited evidentiary hearing to resolve disputed jurisdictional facts. Fed. R. Civ. P..Rule 12(b)(1). The Council Bill and Executive Bill, read in conjunction with one another, leaves no doubt that jurisdiction was to continue in the CFR Court of Indian Appeals until all pending cases were final therein, providing Judge with proper jurisdiction to terminate Plaintiff's parental rights. If, however, any doubt does exist, the two Choctaw Nation governmental documents should first be interpreted by the Choctaw Nation Courts. Plaintiff has an additional remedy of filing a Writ of Certiorari in the United States Supreme Court challenging the validity and sufficiency of Judge's decision, the proper appellate court for such a review of a decision of the CFR Court of Indian appeals.

If this case is not within the class of those forbidden by the constitutional guaranty to the tribes of immunity from suits in Federal tribunals, it is difficult to conceive the frame of one which would be.

CONCLUSION

WHEREFORE, Defendant respectfully request this Honorable Court deny Plaintiff's request for Preliminary Injunction, deny Plaintiffs request for an issuance of a temporary restraining order to the Tribal Court, deny Plaintiff's request to restore visitation rights to

Plaintiff, and the court dismiss this claim and Defendant any relief which is deemed proper and necessary.

Respectfully submitted,

s/ Warren Gotcher
Warren Gotcher, OBA # 3495
GOTCHER & BEAVER
323 East Carl Albert Parkway
Post Office Box 160
McAlester, OK 74501
Telephone: (918)-423-0412
Gotcher@Gotcher-Beaver.com

Certificate of Service

I hereby certify that a true and correct copy of the foregoing instrument was submitted to the CM/ECF filing system for electronic filing and distribution to the following CM/ECF registrants appearing in this case on the 3rd day of September 2010:

Jerry L. Colclazier
Attorneys and Counselors at Law
404 North Main Street
Seminole, Oklahoma 74868

s/ Warren Gotcher