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-JHP-FHM**
(2) **GREGORY R. STIDHAM**, et al.,	)	
Defendants.	)	

PLAINTIFF THLOPTHLOCCO'S BRIEF IN SUPPORT OF FIRST AMENDED MOTION FOR PRELIMINARY INJUNCTION

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

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

June 18, 2012

TABLE OF CONTENTS

Page

TABLE OF CASES

Page

FEDERAL AUTHORITY

Page

STATE AND OTHER AUTHORITY

Page

PLAINTIFF THLOPTHLOCCO'S BRIEF IN SUPPORT OF FIRST AMENDED MOTION FOR PRELIMINARY INJUNCTION

THLOPTHLOCCO TRIBAL TOWN ("Thlopthlocco" or "TTT"), a federally recognized Indian Tribe and Plaintiff in this matter, comes before the Court and submits the following Brief in Support of its Motion for Preliminary Injunction filed herein.[1]

The Motion is submitted based upon the allegations of Plaintiff's Second Amended Complaint (Doc. 047) seeking injunctive relief and such declaratory relief as may be necessary to secure permanent prospective injunctive relief against Defendants, the parties' officers, agents, servants, employees, and attorneys; as well as other persons who are in active concert or participation with anyone as described in **Fed.Rul.Civ.Pro. 65(d)(2)(A)** or **(B)**.

Defendants are individual judicial officers of Muscogee (Creek) Nation ("MCN") and this action is brought pursuant to *Ex parte Young*, 209 U.S. 123 (1908). Tribal judicial officials are amenable to *Ex Parte Young* when they improperly exercise jurisdiction over nontribal members. *Crowe & Dunlevy v. Stidham*, 640 F.3d 1140, 1154-55 (10th Cir. 2011).

After the Civil War Thlopthlocco was required to join the Creek Nation Confederacy,[2] but it subsequently retained only its original tribal town governmental form when it reorganized as a separate Tribal town in 1939 under the Oklahoma Indian Welfare Act ("OIWA") (also known as the Thomas-Rogers Act, 49 Stat. §1967 (Approved June 26, 1936)). 25 U.S.C. §503. See Scott Declaration, ¶¶ 9, 10, 11, 12, 18, 19. (Doc. 048); (Doc. 047, 2nd Amended Compl. ¶121).

Thlolopthlocco is not a member of the Creek Nation. *Crowe & Dunlevy*, 640 F.3d at 1152.

---

[1] Exhibits will be referenced to documents that have been previously filed. A compilation of a list of such documents has been attached to the Declaration of Mekko George Scott (Doc. 048). Additional documents will be attached to this Brief.

[2] The Creek Treaty of 1866 (Doc. 042-01) forced the Creeks to cede the west half of their land to the Seminoles and required the separate Creek towns to consolidate in a single Creek Nation under the Constitution of 1867. (Doc. 047-04). *See also* Kirgis Memo, p. 2. (Doc. 002-03).

("While the Creek Nation has jurisdiction to regulate its own citizens, the Thlopthlocco is an independent tribal entity that elects its own government pursuant to its own Constitution and is not itself a citizen of the Creek Nation"). Nevertheless, most Thlopthlocco members are also citizens of the Creek Nation. (Doc. 047, 2nd Amended Compl. ¶¶ 35, 80, FN8).

Thlopthlocco has on occasion availed itself of judicial services from the Creek Nation for temporary relief in disputed matters, but has always done so pursuant to limited consents to jurisdiction. In the two most recent actions before the MCN Courts, the MCN Courts have exceeded or ignored those consents. The MCN Supreme Court considers its application of Creek law to confer some form of general jurisdiction over Thlopthlocco without regard to Thlopthlocco's sovereign immunity, somehow elevating Creek law over federal law in its application to a nonmember. (Doc. 002-06, p. 3-4; Doc. 047-03, p. 2).

I. INTRODUCTION AND STATEMENT OF FACTS

Thlopthlocco seeks an injunction to prevent the overrunning of Thlopthlocco sovereignty by the improper exercise of jurisdiction by MCN courts over Thlopthlocco internal sovereign government functions without Thlopthlocco consent.

A. STATEMENT OF FACTS

Thlopthlocco is a separate sovereign federally recognized Indian Tribe from the MCN. Its origins as a separate and independent band of Indians predate that of the United States by hundreds of years.[3] It is one of a group of forty-four Creek tribal towns forced by the United States

[3] Besides the Kirgis Memo (Doc. 002-03) which details a specific history of the Thlopthlocco Tribal Town, there are other references which provide historical facts referenced here:

(Doc. 047-13) Ohland Morton, "Early History of the Creek Indians," *Chronicles of Oklahoma*, Vol. 9, No. 1 (March, 1931), beginning at p. 17. (Cited hereinafter as (Morton, Early History, p. (number)) also found at

(continued...)

Government in removal to Oklahoma in 1835. Although Creek towns occasionally confederated for their common defense and other reason, each town was separately governed by town officials headed by a "Mekko" or "Town King."[4]

Despite Thlopthlocco's claim of separate sovereignty, the MCN Courts have retained or assumed jurisdiction over two election disputes associated with Thlopthlocco internal governmental functions in recent times. In both instances this continuation or assumption of jurisdiction was without Thlopthlocco's consent.

1. THLOPTHLOCCO LITIGATION IN 2007

In 2007 the TTT Business Committee consented to jurisdiction in the Creek Courts to

---

[3](...continued)
<http://digital.library.okstate.edu/chronicles/v009/v009p017.html>

(Doc. 047-14) Ohland Morton, "The Government of the Creek Indians," (Part 1) Chronicles of Oklahoma, Volume 8, No. 1, March 1930, p. 42 also found at <http://digital.library.okstate.edu/chronicles/v008/v008p042.html>

(Doc. 047-15) Ohland Morton, "The Government of the Creek Indians," (Part II) Chronicles of Oklahoma, Volume 8, No. 2 March 1930, p. 189 also found at <http://digital.library.okstate.edu/chronicles/v008/v008p189.html>

(Doc. 047-16) Ohland Moore, "Reconstruction in the Creek Nation," Chronicles of Oklahoma, Volume 9, No. 2, June, 1931, p. 171 also found at <http://digital.library.okstate.edu/chronicles/v009/v009p171.html>

[4] The Kirgis Memo (Doc. 002-03) is a seminal document that resulted in Thlopthlocco separate recognition as a federally recognized Indian tribe.

Another particularly important reference to Creek history is found at pp. 20-75 in the "Anthropology Report Regarding Creek Tribes" prepared by Morris Opler, an anthropologist for the Bureau of Indian Affairs in 1937. (Hereafter "Opler Report") (Doc. 047-05). This Monograph, assembled in 1972, includes reports prepared by Opler in 1937 at the time of Thlopthlocco's reorganization. There are two additional pages to supplement the Report. (Doc. 051, p. 2).

The Opler Report is the basis for the Legal Memorandum to the Commissioner of Indian Affairs (Doc. 002-03) authored by Frederic Kirgis, Acting Solicitor to the Department of Interior which identified that the individual Creek towns were sufficiently independent to be recognized as separate sovereign entities. Kirgis later identified the Tribal Towns as the "original independent units of government of the Creek Indians." (Doc. 047-17, p. 2).

restrain an attempted coup d'état by Nathan Anderson, the then elected Mekko who, four months after the election of Tribal officials, sought to depose all other members of the Business Committee except himself by claiming their elections were infirmed. Anderson asserted he was the only lawfully elected official and then proceeded to replace the Business Committee members with his cronies and family members.

Anderson and the rump committee attempted to seize bank accounts and take control of tribal government and enterprises, including obtaining cash payments from the Tribe's Casino.

The original Business Committee met and voted to restrict Anderson's powers and approved a limited consent to jurisdiction and waiver of sovereign immunity in the MCN courts so as to obtain a restraining order against Anderson and his faction.[5]

The consent was limited to adjudication of the ". . .dispute only, only claims brought by the Plaintiff, Thlopthlocco Tribal Town, and only for injunctive and declaratory relief." The waiver excluded "election disputes." (Doc. 002-04, p. 2). Eventually, Thlopthlocco resolved the dispute by Anderson's removal as Mekko through an internal grievance procedure under the Town Constitution. (Doc. 002-07). They then replaced Anderson as Mekko with another member of the Business Committee, following the officer succession provision of their Constitution.

Thlopthlocco gave notice of resolution of the problem to the MCN Courts (Doc. 027-08), but in the meantime Anderson filed a third party claims against the individual members of the original Business Committee claiming infirmity of their elections. (Doc. 017-05). Thlopthlocco

---

[5] There is no formal separation of powers inherent in the Thlopthlocco Constitution nor is a separation of powers a tradition within the Creek Tribal Towns. For example, the Mekko sits with the Business Committee and has a vote but no veto power over decisions of the Business Committee.

Under the Thlopthlocco Constitution, adjudicative or judicial decision making can also emanate from the Business Committee which has the power to transact business and otherwise speak or act on behalf of the town on all matters in which the town is empowered to act nor or in the future. (Doc. 002-02, TTT Const., Art. V, Sec. 6). See p. 13.

eventually filed a Conditional Motion to Dismiss (Doc. 017-06) based upon a withdrawal of its consent to jurisdiction. (Doc. 002-09). Rather than dismissing, the MCN Courts continued to exercise jurisdiction over Thlopthlocco including adjudication of Anderson's third party claims and set the matters, including the removal of Anderson for a jury trial. (Doc. 002-11, Order).

During the course of the original proceeding, the MCN District Court dismissed its original temporary restraining order. Thlopthlocco appealed to the MCN Supreme Court and the restraining Order was reinstated. But reinstatement also resulted in a ruling that the MCN courts, as a matter of MCN law allegedly superior to federal law and Thlopthlocco law, had broad jurisdiction over Thlopthlocco, essentially disregarding Thlopthlocco's separate sovereign immunity or the limited consent to jurisdiction. (Doc. 002-05, Ex. E). The MCN Supreme Court presumed to claim that Thlopthlocco was still subject to the plenary jurisdiction of the MCN judiciary because:

> The relationship between Thlopthlocco and the federal government is different from the relationship between Thlopthlocco and the Muscogee (Creek) Nation. Under federal law, Thlopthlocco is a reorganized Indian tribe; under tribal law, Thlopthlocco is a Muscogee (Creek) Nation tribal town. . . . The Tribal Town Constitution affects neither the status of tribal town members as citizens of the Muscogee (Creek) Nation nor the relationship of the Tribal Town to the Muscogee Nation which remains analogous to a city/state government or state/federal government relationship.

(Doc. 002-03, p. 3-4).[6]

Despite subsequent interlocutory appeals, the MCN Courts continue to exercise jurisdiction over Thlopthlocco even though the 2007 election matter has now arguably become moot by the Court's delay in decision to a time beyond the next scheduled election and Anderson's admission that he was properly removed from office.[7] (Doc. 047-03).

---

[6] Although apparently basing its decision on the forced Confederacy after the Civil War, the MCN Court ironically described it as a "perceived crippled confederacy" (Doc. 002-03, p. 3).

[7] The MCN Court apparently attempts to divert the jurisdiction of this Court in its remand (continued...)

2. THLOPTHLOCCO LITIGATION IN 2011

Although the litigation from 2007 remained unresolved, Thlopthlocco officials began preparation for a new set of elections in 2011 as required by its Constitution. Anderson and Wesley Montemayor filed for offices as Mekko and Warrior, respectfully.

Complaints by other candidates were brought against Anderson, Montemayor, and two others of Anderson's slate (Tim Cheek and Marian Berryhill) alleging violations of the Thlopthlocco Election Ordinance in that TTT property had been used for individual campaigning. Anderson obtained publication of an unpaid political attack ad against the incumbent Business Committee in The Drumbeat, the official Thlopthlocco newspaper.[8] The Election Committee received complaints from opposing candidates, scheduled a hearing, and included in the Notice a procedure for the hearing that included the possibility of appeal of any decision to the Business Committee. At the conclusion of the hearing and after deliberation, the Election Committee disqualified Anderson and Montemayor, but dismissed the complaints against Cheek and Berryhill leaving the on the ballot

---

[7](...continued)
Order, "We hold that any appeal in the instant matter is unripe until sufficient fact-finding is conducted and final judgment rendered by the District Court." (Doc. (047-03, p. 2).

It is difficult to understand what fact finding is necessary to determine the results of a tribal election held over five years ago. Moreover, even if there is fact-finding, the result will surely be that Nathan Anderson was properly removed because he has admitted that he was.

In the new 2011 case filed in the MCN District Court, No. CV-2011-08, Anderson testified at a injunction hearing on 1/28/11 that he was not Mekko and was properly removed by the Grievance Procedure before the Tribe and that George Scott was the current Mekko. (Tr. 134-35)(" -- clearly Mr. Scott is the Town King.") (Doc. 036-16).

But one matter is not moot. And that is the exercise of jurisdiction by the MCN Courts against Thlopthlocco, a matter that will likely recur, and has. Even if there was an argument of mootness of the counterclaim in the Tribal Court, that does not moot the underlying controversy as to the question of jurisdiction by the MCN courts over Thlopthlocco internal sovereign matters since this is a matter that is capable of repetition, yet evading review. *See Davis v. Federal Election Com'n*, 554 U.S. 724, 735, 128 S.Ct. 2759 (2008).

[8] The person responsible for The Drumbeat content was an unsuccessful candidate for Mekko in the 2007 Election.

because they claimed the inclusion of their names in the Ad was without their knowledge.

Anderson and Montemayor filed appeals to the Business Committee and a hearing was set for January 27, 2011, two days before the scheduled Election on January 29, 2011. Meanwhile, Anderson, Montemayor, Cheek and Berryhill filed an action in the MCN District Court against members of the Thlopthlocco Election and Business Committees and sought and obtained an *ex parte* order from MCN District Judge Patrick Moore. The Complaint, Summons, and the Order setting a hearing on a request for injunctive relief were served at the appeal hearing on those members of the Election and Business Committees who were present.

The Election Committee met, determined that the suit was an interference with Thlopthlocco sovereignty, and voted to postpone the election until it could be conducted without interference from the MCN Courts. (Doc. 047-07). The Business Committee likewise postponed the appeal (Doc. 047-08). Filing an objection to jurisdiction (Doc. 036-03), the Election and Business Committee members attended the preliminary injunction hearing the next day, one day before the scheduled election. The evidence was not concluded and MCN Judge Patrick Moore[9] issued a temporary order suspending the election pending completion of the hearing. (Doc. 036-04, 1/28/2011). The hearing was finally concluded on May 26, 2011. Moore issued an Order on July 29, 2011 ordering both Anderson and Montmayor back on the ballot and ordering the Thlopthlocco Election Committee to schedule an Election. (Doc. 036-07). The Election Committee responded. (Doc. 036-08).

Thlopthlocco file an interlocutory appeal based upon lack of subject matter jurisdiction by sovereign immunity and other issues. (Docs. 036-09; 036-10; 036-11; 036-12). After oral argument, the MCN Supreme Court issued an Order on January 19, 2012 that denied the appeal, but indicated

[9] Judge Moore also refused to recuse as he had in the previous litigation citing an *ex parte* communications with the MCN Supreme Court. See 1/28/2011 Transcript, p. 44-45. ("Well, let me inform you that I broached that subject with the Supreme Court Wednesday, and they told me to handle this case. Does that answer that question?"). See Ex. GG.

the Court would keep the stay of the lower court proceedings in place until it decided the appeal of the 2007 litigation. (Doc. 047-02). On March 9, 2012, the Supreme Court denied the interlocutory appeal from the 2007 litigation (Doc. 043-03) and declined to reconsider its previous ruling that MCN Courts had general jurisdiction over Thlopthlocco.

B. THE TEST FOR A PRELIMINARY INJUNCTION.

A preliminary injunction is appropriate when there is: "(1) a substantial likelihood of success on the merits; (2) irreparable injury to the movant if the injunction is denied; (3) the threatened injury to the movant outweighs the injury to the party opposing the preliminary injunction; and (4) the injunction would not be adverse to the public interest." *Dominion Video Satellite, Inc. v. EchoStar Satellite Corp.*, 269 F.3d 1149, 1154 (10th Cir. 2001); See also *Wyandotte Nation v. Sebelius*, 443 F.3d 1247, 1254-55 (10th Cir. 2006) (citing *Kiowa Indian Tribe of Okla. v. Hoover*, 150 F.3d 1163, 1171 (10th Cir. 1998)).

There is no apparent hierarchy in the four factors, but the Circuit has indicated the showing of "probable irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction, the moving party must first demonstrate that such injury is likely before the other requirements for the issuance of an injunction will be considered." *Dominion Video*, 356 F.3d at 1260 quoting *Reuters Ltd. v. United Press Int'l., Inc.*, 903 F.2d 904, 907 (2d Cir. 1990).

The purpose of a preliminary injunction is:

> . . . merely to preserve the relative positions of the parties until a trial on the merits can be held. Given this limited purpose, and given the haste that is often necessary if those positions are to be preserved, a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits. A party thus is not required to prove his case in full at a preliminary-injunction hearing.

University of Texas v. Camenisch, 451 U.S. 390, 395, 101 S.Ct. 1830 (1981)

Because Plaintiff wants only to preserve the relative positions of the parties, the motion has

no "heightened burden" test since it does not seek any of the "historically disfavored preliminary injunctions."[10] *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 975-76 (10th Cir. 2004).

Plaintiff is entitled to additional consideration of the:

> . . . modified approach for the "likelihood of success on the merits" aspect of the four part preliminary injunction test for certain circumstances. Under this alternative approach, if the moving party establishes that the last three factors of the test are in its favor, the party may ordinarily satisfy the first factor by "showing that questions going to the merits are so serious, substantial, difficult and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation." *Federal Lands Legal Consortium v. United States*, 195 F.3d 1190, 1195 (10th Cir. 1999).

O Centro Espirita, 389 F.3d at 1002 (Seymour, concurring in part and dissenting in part).

Alternatively, the question of alleged preemption or supremacy by MCN Law over Federal law can alter the normal rules for injunctive relief. In *Bank One, Utah v. Guttau*, 190 F.3d 844, 847-848 (8th Cir. 1999), the Eighth Circuit held that when State law has been preempted by federal statute, the balance-of-harm and public-interest factors need not be taken into account because the question of harm to the State and the matter of the public interest drop from the case. In *Bank One*, the court held that proof of preemption and irreparable harm entitled plaintiff to injunctive relief no matter what the harm to the State, and the public interest will be served by enjoining the enforcement of the invalid provisions of state law. Thlopthlocco contends its reorganization under 25 U.S.C. §503 (and historical autonomy) preempts a claim of supremacy of MCN law over federal law.

---

[10] Nor is the injunction disfavored because a permanent injunction would look identical to the preliminary injunction. *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1247 (10th Cir. 2001) ("The only reason to disfavor a preliminary injunction that grants substantially all the relief sought is if it would render a trial on the merits largely or completely meaningless. Therefore, all the relief to which a plaintiff may be entitled must be supplemented by a further requirement that the effect of the order, once complied with, cannot be undone.")(internal quotes omitted).

The preliminary injunction sought in the 2011 tribal court proceedings would be unfavored since a permanent injunction would be meaningless if the election were conducted.

Because preliminary relief is generally sought well before a full record is available to the court the Tenth Circuit has held this informality allows a significant relaxation of the Federal Rules of Evidence. See *Heideman v. South Salt Lake City*, 348 F3d 1182, 1188 (10th Cir. 2003)("A hearing for preliminary injunction is generally a restricted proceeding, often conducted under pressured time constraints, on limited evidence and expedited briefing schedules. **The Federal Rules of Evidence do not apply to preliminary injunction hearings**.") (emphasis added).

II. ARGUMENT

PROPOSITION 1

THE EXTENT OF A TRIBAL COURT'S JURISDICTION IN A FEDERAL QUESTION.

The question of the extent of a tribal court's jurisdiction is a question of federal law. See *Nat'l Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 851-53, 857 (1985).

A claim of dismissal based upon sovereign immunity is a challenge to the court's subject matter jurisdiction. *Miner Elec., Inc. v. Muscogee (Creek) Nation*, 505 F.3d 1007, 1009 (10th Cir. 2007) citing *E.F.W. v. St. Stephen's Indian High School*, 264 F.3d 1297, 1303 (10th Cir. 2001).

"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 , 120 S.Ct. 1858 (2000).

In this instance, the MCN is attempting to exercise authority over Thlopthlocco, a nonmember. As to nonmembers, "[T]ribal courts . . . cannot be courts of general jurisdiction in this sense, for a tribe's inherent adjudicative jurisdiction over nonmembers is at most only as broad as its legislative jurisdiction. *Nevada v. Hicks*, 533 U.S. 353, 367 (2001).

PROPOSITION 2

TTT IS A FEDERALLY RECOGNIZED INDIAN TRIBE AND ENTITLED TO SOVEREIGN IMMUNITY FROM SUIT.

Thlopthlocco began the 2007 litigation with a limited waiver. It is axiomatic that waivers are to be strictly construed in favor of the sovereign. *United States v. Nordic Villages, Inc.*, 503 U.S. 30, 34, 112 S.Ct. 1011 (1992)("These cases do not, however, eradicate the traditional principle that the Government's consent to be sued must be 'construed strictly in favor of the sovereign,' . . . and not 'enlarge[d] ... beyond what the language requires,") (quotes omitted) citing *McMahon v. United States*, 342 U.S. 25, 27, 72 S.Ct. 17, 19 (1951).

In 2011, the MCN Court assumed jurisdiction without consideration of any waiver by Thlopthlocco, and there was none. The litigation was brought by individual Thlopthlocco tribal members against Thlopthlocco Tribal officials in the official capacity. Suing official capacity officials is the same as a suit against the official's office and the same as a suit against the governmental entity itself. *Hafer v. Melo*, 502 U.S. 21, 26 (1991).

This immunity applies to tribal government officials acting in their official capacity. See *Native Am. Distrib. v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1296 (10th Cir. 2008) ("It is clear that a plaintiff generally may not avoid the operation of tribal immunity by suing tribal officials . . . . Accordingly, a tribe's immunity generally immunizes tribal officials from claims made against them in their official capacities"). The Thlopthlocco officials have no authority individually.

Thlopthlocco possesses sovereign immunity under federal law and by virtue of its own autonomy as an Indian tribe. Indian tribes possess the common law immunity from suit traditionally enjoyed by sovereign powers. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). This immunity includes exemption from suit without congressional authorization or waiver by the tribe. *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324, 1344 (10th Cir. 1982).

Tribal sovereign immunity is generally deemed to be coextensive with the immunity of the

United States. *Ramey Constr. Co., Inc. v. Apache Tribe of Mescalero Reservation*, 673 F.2d 315, 319-20 (10th Cir. 1982). If the United States cannot be sued in MCN Courts, then neither can Thlopthlocco:

> Indian tribes are "domestic dependent nations" that exercise inherent sovereign authority over their members and territories. *Cherokee Nation v. Georgia*, 5 Pet. 1, 17, 8 L.Ed. 25 (1831). Suits against Indian tribes are thus barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978).

Oklahoma Tax Com'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 498 U.S. 505, 509 (1991).

Thlopthlocco is not a member of the MCN and MCN Court has no "inherent sovereign authority" over Thlopthlocco. *Crowe & Dunlevy*, 640 F.3d at 1152.

A. THE MCN COURTS CANNOT ENFORCE THE THLOPTHLOCCO CONSTITUTION UNDER *EX PARTE YOUNG* BECAUSE THERE IS NO NEXUS BETWEEN THE EXERCISE OF JURISDICTION OVER THLOPTHLOCCO AND MCN TRIBAL SELF-GOVERNMENT OR CONTROL OF INTERNAL RELATIONS.

The Anderson parties (Defendants in 2007 and Plaintiffs in 2011) asserted claims pursuant to *Ex Parte Young*, 209 U.S. 123 (1908):

> The Supreme Court has explained that, in determining whether the doctrine of *Ex parte Young* applies, "a court need only conduct a straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective."

Crowe & Dunlevy, 640 F.3d at 1155.

The actions of the Thlopthlocco officials do not violate federal law since it is an internal tribal matter. If we were to apply *Ex parte Young* by analogy to the MCN courts, the analogy still fails because Thlopthlocco is not acting ultra vires to the MCN Constitution (Doc. 047-18) and the MCN courts have no authority under the Thlopthlocco Constitution to enforce Thlopthlocco law. (Doc. 002-02). This is because the "inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe except to the extent necessary to protect tribal

self-government or to control internal relations." *Nevada v. Hicks*, 533 U.S. at 360.

There is nothing about the internal governance activities of Thlopthlocco that impinge upon the tribal self-government or internals relations of the MCN.

Nor is it relevant that Thlopthlocco does not have a judiciary. While it has chosen to use the MCN judicial forum in the past,[11] resolution of internal tribal matters do not always involve judicial resolution.

In *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, FN22 (1978), the Supreme Court held that the Indian Civil Rights Act does not create a cause of action in Federal court. In *Sante Clara*, the only permissible remedy was a resort to the Tribal Council, which combined judicial and legislative power. The Court noted that "judicial authority in Santa Clara Pueblo is vested in its tribal council." *Id*., FN22.[12] Enforcement of the Indian Civil Rights Act remained with the Tribes, even those without courts, and sometimes in the hands of the very officials who refused the demands of the complainants in the first place.

It is not appropriate to expect Indian Tribes to adopt procedures not consonant with their traditions. See *Ex parte Tiger*, 2 Ind. T. 41, 47 S.W. 304 (OK Ind. T. 1898):

> If the Creek Nation derived its system of jurisprudence through the common law, there would be much plausibility in this reasoning. But they are strangers to the common law. They derive their jurisprudence from an entirely different source, and they are as unfamiliar with common-law terms and definitions as they are with Sanskrit or Hebrew.

Having thus acted to allow Oklahoma Indian tribes the right to reorganize under the OIWA, it is clear that Congress has allowed Thlopthlocco to establish the terms of that organization.

---

[11] Although Thlopthlocco has co-equal government to government relationship with the MCN, it could also chose to use a C.F.R. court with the appropriate waiver to allow adjudication of internal disputes. See 25 C.F.R. § 11.118.

[12] The Court also noted that at the time of the decision, there were 287 tribal governments and only 117 had operating tribal courts. *Id*., FN21.

Thlopthlocco had a historical position as a member of the Creek Confederacy, yet, as identified by Solicitor Kirgis, Thlopthloco was still autonomous, as would be consistent with the historical independence of the Creek Tribal Towns. Thlopthlocco's Constitution was approved and ratified with the understanding of the Solicitor ". . .as having an existence not derived from the constitution of the Muskogee Nation but in fact antedating and continuing alongside the constitution." (Doc. 002-03, p. 101).

Defendant Stidham has admitted that Thlopthlocco is an independent and autonomous tribe. See *Crowe v. Stidham*, No. CIV-09-95-TCK, (Ex. HH, Doc. 036, p. 1-2) ("Defendant admits Thlopthlocco has been a federal recognized Indian tribe since the 1930's and Thlopthlocco has a long historical relationship with the Muscogee Nation and it is an independent and autonomous tribe.").

The MCN Supreme Court acknowledged Thlopthlocco's status under federal law, but simply contends that is irrelevant in light of the apparent claim of supremacy of MCN law over Thlopthlocco's reorganization under federal law. See Doc. 002-06, p. 3. Such overreaching bulldozes the historical autonomy of tribal towns.

Thlopthlocco's reorganization was not dependent upon or even related to MCN's reorganization and was isolated from it by 34 years. There is no logical connection that Thlopthlocco, having achieved federal recognition and independent sovereignty, waited around 34 years to become just a "social club" within the Creek Nation.

Besides the historical autonomy, there is nothing in the Thlopthlocco Constitution that acknowledges either supremacy by or acquiescence to the authority of the MCN.

In the preamble of the Thlopthlocco Constitution (Doc. 002-02, p. 1) the identification of "Thlopthlocco Tribal Town of the Creek Indian Nation" in common language only acknowledges TTT's historical participation in the Creek Confederation, but these are not words of acquiescence

or supremacy of the MCN over Thlopthlocco's sovereignty. The effect of the OIWA was to restore governmental powers to the Oklahoma Tribes which had never been lost. See *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1443, Ftnte. 6 (DC Cir. 1988).

As further support for its decision, the MCN Supreme wrote that the Town's Constitution provided that the rights of its members would not be affected in their status as citizens of the Creek Nation. (Doc. 002-06, p. 3 citing Art. VII, Sec. 2, Bill of Rights of the Thlopthlocco Constitution).

But this provision of the Thlopthlocco Constitution also does not contain words of acquiescence or supremacy of the previous confederacy over Thlopthlocco's sovereignty because that same section reads in whole:

> This constitution shall not be construed in any way to alter, abridge or otherwise jeopardize the rights and privileges of the members of this town as citizens of the Creek Nation, the State of Oklahoma, or of the United States.

If this language expresses supremacy over Thlopthlocco by the Creek Nation, then it also expresses supremacy over Thlopthlocco by the State of Oklahoma and we know that not to be true.[13] See *Oklahoma Tax Commission v. Thlopthlocco Tribal Town*, 839 P.2d 180 (Okla. 1992).

Finally the MCN Supreme Court's contention that Thlopthlocco's relationship to MCN is analogous to that of a city/state or state/federal government relationship is similarly unfortunate, inaccurate, and inconsistent with federal law.

The analogy that there is a federal/state authority of MCN over TTT seriously underplays the separate sovereignty a State of the United States has under the Federal Constitution.

The governmental structures and relationships between the United States and the individual

---

[13] There is a similar provision in the MCN Constitution with regard to citizens of the State of Oklahoma. See Art. II, Sec. 2. (Doc. 047-18, p. 2). It is doubtful the MCN Supreme Court would view this as evidence of supremacy by the State of Oklahoma.

Art. II, Sec. 5 of the MCN Constitution also protects the ". . .rights and privileges of persons of the Muscogee (Creek) Nation to organize tribal towns or recognize its Muscogee (Creek) tradition." *id.* This is an arguable acquiescence to Thlopthlocco's traditional autonomy.

States are explicit and defined by the Constitution at the time of the founding. There is no such comparable explicit understanding between Thlopthlocco and MCN because of the historical independence of the Tribal towns and the time diversity of their respective reorganizations.

And while the separate independence of the tribal towns are certainly comparable to States, there are no concessions in the TTT Constitution comparable to the Supremacy Clause of the United States Constitution which cedes power by Thlopthlocco to the MCN as could compare with the federal/state relationship of the U.S. Constitution.

Under the United States Constitution there were various cedes of power by the States to the new Federal Government, but except for most obvious claim, the Supremacy Clause, the concept of the United States Constitution was one of dual sovereignty among states and the new federal government which established a **union** (as opposed to the former "confederacy"). A federal/state analogy actually strengthens Thlopthlocco's argument that the individual "Talwas" possessed an inviolable autonomy never ceded to the Creek Confederacy:

> It is incontestible that the Constitution established a system of "dual sovereignty." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991); *Tafflin v. Levitt*, 493 U.S. 455, 458, (1990). **Although the States surrendered many of their powers to the new Federal Government, they retained "a residuary and inviolable sovereignty**," *The Federalist No. 39*, at 245 (J. Madison). This is reflected throughout the Constitution's text, *Lane County v. Oregon*, 7 Wall. 71, 76 (1869); *Texas v. White*, 7 Wall. 700, 725 (1869), . . . **Residual state sovereignty was also implicit, of course, in the Constitution's conferral upon Congress of not all governmental powers, but only discrete, enumerated ones**, Art. I, § 8, which implication was rendered express by the Tenth Amendment's assertion that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."
>
> - - - -
>
> We have set forth the historical record in more detail elsewhere, see *New York v. United States*, 505 U.S. [144] at 161-166, 112 S.Ct. [2408], at 2420-2423 [(1992)], and need not repeat it here. **It suffices to repeat the conclusion: "the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States."** *Id*., at 166, 112 S.Ct., at 2423. . . . . **As Madison expressed it: "[T]he local or municipal authorities form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority than the general authority is subject to them,**

within its own sphere." *The Federalist No. 39,* at 245. (emphasis added)

Printz v. U.S., 521 U.S. 898, 919-21 (1997).

If this analogy exists for the "crippled confederacy," the MCN may regulate its individual members, but may not regulate entities that are nonmembers of the MCN, such as Thlopthlocco (by analogy, the "States") in the absence of explicit authority or cessations of authority by Thlopthlocco.

But the basic question still remains. Can the MCN abrogate Thlopthlocco's separate sovereign immunity established by federal law by claiming supremacy over Thlopthlocco? Whatever view the MCN courts may have of themself, they do not possess the plenary authority of Congress and cannot consent for Thlopthlocco. The answer thus appears to be "No."

B. THLOPTHLOCCO CAN WITHDRAW ITS CONSENT TO JURISDICTION.

After it became apparent the MCN Courts would exercise jurisdiction beyond the limits of Thlopthlocco consent as to Anderson's third party claims, Thlopthlocco filed a conditional withdrawal of consent seeking to remove subject matter jurisdiction from the Court. (Doc. 002-09). Stidham denied the Motion. (Doc. 002-10).

A sovereign may withdraw a waiver of sovereign immunity. *Iowa Tribe of Kansas and Nebraska, et al., v. Salazar,* 607 F.3d 1225, 1233-4 (10th Cir. 2010) ("Iowa Tribe") ("sovereign . . . may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted, and may withdraw its consent whenever it may suppose that justice to the public requires it").

Iowa Tribe references *Beers v. Arkansas*, 61 U.S. (20 How.) 527, 529, 15 L.Ed. 991 (1857) (Beers). *Iowa Tribe* and *Beers* stand for the proposition that waivers of sovereign immunity can be specified upon terms dictated by the sovereign and can be withdrawn by the sovereign under certain circumstances. In this instance, Thlopthlocco's withdrawal of its consent to be sued was appropriate

because the MCN Courts refused to acknowledge Thlopthlocco's immunity. The withdrawal of the waiver was based upon a need to protect tribal sovereignty and not permit it to be abrogated.

Thus, the revocation was not intended to change the original agreement for the waiver of sovereignty, but was instead to preserve the original agreement that the waiver would not extend to election disputes.

PROPOSITION 3

THE HISTORIC RELATIONSHIP WITH THLOPTHLOCCO, A NONMEMBER OF THE MCN, DOES NOT GIVE THE MCN AUTHORITY TO ENFORCE THE THLOPTHLOCCO CONSTITUTION.

Even if the MCN could overcome Thlopthlocco sovereign immunity, authority that the MCN courts may adjudicate internal Thlopthlocco governance matters does not exist because there is no nexus between that internal governance of Thlopthlocco, a nonmember of the MCN, and the MCN.

As previously noted, Thlopthlocco has a long historical relationship with MCN through its forced joinder to the old Creek Confederacy that predated abolishment of tribal courts and governments by the United States Government with the Curtis Act of 1898, c. 517, 30 Stat. 495. This was a prelude to allotment under the Dawes Commission and eventual tribal assimilation. Even then that historic relationship was not one of Thlopthlocco subservience to the Confederation. Instead each tribal town remained autonomous although cooperative under the 1867 Constitution. (Doc. 047-04). Its success as a unifying document is questionable at best.[14]

---

[14] See Doc. 047-05, Anthropology Report of Morris Opler, pp. 51 (". . . the truth is that the unity extolled was largely artificial and extremely precarious. A government which is called upon to weather six grave crises in a scant forty years of its existence cannot be accepted as too stable."

The crisis referenced are objections to forced confederation by various Creek leaders and their followers. A general discussion of these problems of the Confederacy is found in Doc. 047-14, Government of the Creek, pp. 13-22 and Doc. 047-15, Government of the Creek Indians, p. 1-6).

The Opler Report formed the basis used by the BIA in allowing reorganization of tribal (continued...)

Instead, historically such towns were independent.[15] Confederation of the several tribal towns occurred for matters such as mutual defense, otherwise towns declared war and acted autonomously.[16]

As noted by the Opler Report, the Creek Confederacy was a troubled entity and its organization was resisted by the full-bloods.[17] (Doc. 047, ¶¶ 139 - 146).

Opler emphasized in his 1972 Monograph that a purposes of OIWA was to allow individuality by the Indians in organizing. Quoting John Collier, then Commissioner of Indian Affairs, the Indians could "organize in ways agreeable to their views and traditions." because the

---

[14](...continued)
towns under the OIWA. Opler found tribal towns to be the true center of Creek society and tribal government and not the Confederacy. The BIA initially thought to organize Indians by counties. (Doc. 047-05, pp. 5 (". . . cooperatives could be . . . organized along country lines."); p. 6).

Even the MCN Supreme Court has described the political government established by the 1867 Constitution as a "crippled confederacy." (Doc. 002-06, p. 3).

[15] A town, which may include different clans, was ruled by an elected chief who was advised by the council of the town. (Doc. 041-13, Morton, Early History, p. 20, "The general policy of the confederacy was guided by a council composed of representatives from each town who met annually, or as the occasion required at a time and place, fixed by the chief or head 'miko.' . . . Its chief object was mutual defense and the power wielded by its council was purely advisory. Furthermore the lack of central control is evidenced by the fact that parts of the confederacy and even separate towns might and actually did, on occasion, declare war.").

[16] See Ex. B (Kirgis Memo, p. 1-2):

> These towns were originally recognized by the Federal Government as the governing units in the Creek Confederacy. [But] . . . because of the pressure of the white people for land and the fact that the towns declared war and peace independently of each other, the Federal authorities found it advisable to insist upon centralization of the Creeks to avoid dealing with each Talwa. The Indians opposed this centralization and it was not until after the Civil War, in which the towns took opposing positions, that the Federal Government achieved the formation of a single government among the Creek Indians. And even then the union was opposed by the full-blood element.

[17] A review of Opler Morton's articles indicates the fierce independence of the Creeks and independent opposition to dealings or treaties with the United States resisting to the point that one leader who did treaty with the United States to sell land, William McIntosh, Chief of the Lower Creeks, was assassinated by others. The Upper Creeks would not sign this treaty. (Doc. 047-13, Morton, Early History, p. 22).

". . . bill contemplates that the charter powers of different communities may differ profoundly . . . They can organize as they will and the Government stands to help them." (Doc. 051-01).

The MCN and Thlopthlocco Constitutions contain no direct references to the other besides a generic reference to Creek Indians. While the 1867 Constitution provided representation based upon tribal towns, representation in the MCN Constitution is based upon Districts. (Doc. 047-18). In other words, there is no place for Thlopthlocco in the new Creek Nation.

Thlopthlocco Tribal lands were purchased after reorganization and held in trust by the United States government. The land was repurchased after allotment by the United States government, then ". . . assigned to and declared to be held in trust for the **exclusive use and benefit of the Thlopthlocco Tribal Town** being a band of Indians of the Creek Nation organized under the Oklahoma Welfare Act." (Doc. 047-12, Department of Interior Proclamation - April 14, 1941) (emphasis added).

Kirgis, the BIA Solicitor, found a sufficient basis to conclude that Congress did not intend to deny the existence of the Creek towns and wrote ". . . if the towns are organized under Section 3 (25 U.S.C. §503). . . the Federal Government will be in a position in which it will, in many instances, **be forced to deal with those town organizations directly and as entities independent of the Creek Nation and of each other**." (Doc. 002-03, p. 102)(emphasis added).

In conclusion, Kirgis stated, "With respect to the two towns which have already submitted constitutions, it is believed that a sufficient fact basis has been established to permit organization." (Ex. B, p. 103).

Kirgis expanded on these themes in a later memorandum regarding the Keetowah Society. He identified Creek Tribal Towns as an "independent unit capable of political action, and particularly, the initiation of hostile proceedings." They have an "indispensable political character of such bodies," were the "functioning political subdivisions of the Creek Confederacy or Nation"

and the "original independent units of government of the Creek Indians." (Doc. 047-17, p. 2).

Whatever the historical origins, Thlopthlocco's autonomy depended, not upon the old Creek Confederacy or the MCN, but Thlopthlocco's own separate charter as a federally recognized Indian Tribe, especially since Thlopthlocco's Constitution predated that of the MCN by 34 years.

What Thlopthlocco got for its injunction from the MCN courts was a usurpation of the right to control exclusive tribal functions which arise from sovereignty such as its tribal elections.

Thus the MCN Supreme Court refused to recognize Thlopthlocco's federally recognized Constitution converting an autonomous tribe to no more than a social club under MCN law bounded by the false argument that, despite federal recognition, MCN law regarding Thlopthlocco is supreme over the federal statute that permitted Thlopthlocco's reorganization. The contention that MCN law is supreme over Thlopthlocco's sovereignty recognized under federal statute (25 U.S.C. §503) is wrong. Congress in its plenary authority over Indian tribes can allow federal recognition which results in sovereign immunity of individual tribes.

PROPOSITION 4

SUBJECTING THLOPTHLOCCO TO CONTINUING SUIT IS IRREPARABLE HARM.

In *Crowe v. Stidham*, 609 F.Supp.2d 1211, 1222 (ND Okla. 2009) (Doc. 027-04), this Court analyzed "irreparable harm" as follows:

> A plaintiff satisfies the irreparable harm requirement by demonstrating "a significant risk that he or she will experience harm that cannot be compensated after the fact by monetary damages." *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1210 (10th Cir. 2009)" Purely speculative harm will not suffice, but "[a] plaintiff who can show a significant risk of irreparable harm has demonstrated that the harm is not speculative" and will be held to have satisfied his burden. Id. (internal citations omitted). Further, in determining this factor, the court should assess "whether such harm is likely to occur before the district court rules on the merits." *Id*. Economic loss usually does not, in and of itself, constitute irreparable harm because such losses are generally compensable by monetary damages. See *Port City Properties v. Union Pac. R. Co.*, 518 F.3d 1186, 1990 (10th Cir., 2008); *Heideman v. S. Salt Lake City*, 438 F.3d 1182, 1189 (10th Cir. 2003).

Because the individual Defendants arguably have immunity and Thlopthlocco seeks only prospective injunctive relief, there is no monetary sum it can recover that will answer in damages. See also *Greater Yellowstone Coalition v. Flowers*, 321 F.3d 1250, 1258 (10th Cir. 2003)("An irreparable harm requirement is met if a plaintiff demonstrates a significant risk that he or she will experience harm that cannot be compensated after the fact by monetary damages").

Defendant judicial officers are absolutely immune in damages. Monetary damages that cannot be recovered for reasons such as sovereign immunity constitute irreparable injury. See *Chamber of Commerce of U.S. v. Edmondson*, 594 F.3d 742, 770-71 (10th Cir. 2010).

Considering the likelihood of prevailing on the merits, Thlopthlocco also suffers irreparable harm because it, like Crowe as this Court notes, will be forced to litigate an election dispute long since passed involving its separate sovereign cognizance in a court which likely does not have jurisdiction over it:

> See *Seneca-Cayuga Tribe of Okla. v. State of Okla. ex rel David L. Thompson*, 874 F.2d 709, 716 (10th Cir. 1989) (upholding trial court's grant of preliminary injunction and stating that Indian tribe would "be forced to expend time and effort on litigation in a court that does not have jurisdiction over them" in assessing harm to tribe if injunction were not issued); *Chiwewe v. BNSF Co.*, 2002 WL 31924768, No. 02-0387, *3 (D.N.M. April 15, 2002) (unpublished) (granting motion to preliminary enjoin tribal court proceeding based on argument that tribal court lacked jurisdiction to hear case) (finding BNSF would suffer irreparable harm if tribal court proceeding was not enjoined when BNSF would be "forced to expend unnecessary time, money and effort litigating in a court without jurisdiction over the case"); *UNC Res., Inc. v. Benally*, 518 F. Supp. 1046, 1053 (D. Ariz. 1981) (granting motion to preliminarily enjoin tribal court action when plaintiff argued that tribal court lacked jurisdiction) (finding that "it seems very probable that [plaintiff] will prevail on its claim that [the tribal court] lacks jurisdiction over it" and that plaintiff would be "faced with the possibility of irreparable injury if it were forced to appear and defend in [tribal court]").

See *Crowe v. Stidham*, 609 F.Supp.2d at 1222-23.

Thlopthlocco suffers harm other than the expenditure of money that cannot be recovered. It suffers injury to ongoing governance obligations. As identified in the separate Declaration of

Mekko Vernon Yarholar (Doc. 007), the litigation will subject Thlopthlocco's **entire governing body** to litigous uncertainty despite responsibilities that affect a $3.6 million, 50 tribal governmental employees, 125 casino employees and the second largest employer in Okfuskee County, one of the poorest areas of Oklahoma.

PROPOSITION 5

THLOPTHLOCCO'S IRREPARABLE INJURY OUTWEIGHS ANY HARM TO DEFENDANTS.

The real harm to Thlopthlocco if the MCN courts continue to exercise jurisdiction is that the the Court ordered election is a disfavored injunction because it offers Anderson and his cronies relief that essentially makes permanent relief meaningless. See *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d at 1247. If Anderson and his cronies capture sufficient offices to organize the majority of the Business Committee they would be unlikely to continue this litigation regarding Thlopthlocco sovereignty and any separate identity that Thlopthlocco would have from the MCN would be irretrievably lost. That is irreparable harm.

The *Crowe v. Stidham* district court also considered the balance of harm against Defendant Stidham and concluded that Stidham's harm was not personal nor outweighed by the "wasted time, effort, and money spent on litigating a matter before a court who is likely without jurisdiction." *Crowe & Dunlevy v. Stidham*, 609 F.Supp.2d 1211, 1224 (ND Okla. 2009).

PROPOSITION 6

THE PUBLIC INTEREST IS SERVED BY: PREVENTION OF THE UNREASONABLE EXERCISE OF JUDICIAL AUTHORITY IN VIOLATION OF SOVEREIGN IMMUNITY; ENFORCEMENT OF FEDERAL LAW AS SUPREME OVER MCN LAW IN MATTERS OF THLOPTHLOCCO SOVEREIGNTY; AND A STAY WHILE THE ISSUE OF THLOPTHLOCCO SOVEREIGNTY UNDER FEDERAL LAW IS SETTLED.

In *Crowe v. Stidham*, this Court considered the public interest that weighed in favor of issuing the injunction and concluded that the "unrestrained exertion of tribal court power over non-

consenting non-members is not in the public interest" *id*. citing *Ford Motor Co. v. Todecheene*, 221 F.Supp.2d 1070, 1088 (D. Ariz. 2002) It is similarly in the public interest that Thlopthlocco, an autonomous and sovereign entity as admitted by Defendants, not be subject to litigation against its will until important questions of sovereignty and its relationship to the MCN are settled by this Court. See *Winnebago Tribe v. Stovall*, 216 F.Supp.2d 1226, 1234 (D. Kan. 2002) (finding public interest supported preliminary injunction where "the state is only being required to stay the proceedings until these very important sovereignty issues can be adjudicated."). See also *Chiwewe v. Burlington N. & Santa Fe Ry. Co*., No. 02-0397, 2002 WL 31924768, *3 * (D.N.M. 2002) (finding public interest supported preliminary injunction enjoining tribal proceedings). By reference to civil rights, ". . .it is always in the public interest to prevent the violation of a party's constitutional rights." *Awad v. Ziriax*, 670 F.2d 1111, 1132 (10th Cir. 2012).

PROPOSITION 7

QUESTIONS OF PREEMPTION OR SUPREMACY OF FEDERAL LAW OVER MCN LAW CAN ALTER NORMAL RULES FOR INJUNCTIVE RELIEF.

The specific question of preemption or supremacy of Federal law over MCN Law can arguably alter the normal rules for injunctive relief. In *Bank One, Utah v. Guttau*, 190 F.3d 844 at 847-848 (8th Cir. 1999), the 8th Circuit held that when State law has been preempted by a federal statute, the balance-of-harm and public-interest factors need not be taken into account because the question of harm to the State and the matter of the public interest drop from the case.

In *Bank One*, the court held that if plaintiff could show that federal law preempted state law as to electronic funds transfers (EFT) and showed irreparable harm, then Bank One would be entitled to injunctive relief no matter what the harm to the State, and the public interest will perforce be served by enjoining the enforcement of the invalid provisions of state law.

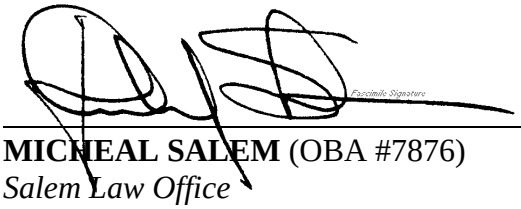
Thlopthlocco contends that its reorganization under 25 U.S.C. §503 preempts any claim of

supremacy of MCN law over federal law or Thlopthlocco law. Thlopthlocco suffers irreparable harm by the invasion of its separate autonomous sovereignty and the disruption of ongoing governmental activities occasioned by a trial. The public interest is served by the enforcement of federal law and enjoining the illegal and invalid attempted enforcement of MCN law.

III. CONCLUSION

WHEREFORE, premises considered, Plaintiff respectfully request this Court to set this matter for hearing and upon said hearing grant Plaintiff's *Application for Preliminary Injunction* and for such other and further relief as may be appropriate.

Respectfully submitted,



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

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

CERTIFICATE OF SERVICE

I hereby certify that I electronically transmitted the above and foregoing document to which this certification is attached and any attached exhibits to the Clerk of the Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF Registrants:

Michael A. Simpson
Gregory Nellis
Atkinson, Haskins, Nellis, Brittingham, Gladd & Carwile
1500 Parke Centre
525 South Main
Tulsa, Oklahoma 74103

this 18th day of JUNE, 2012.

MICHEAL SALEM (OBA #7876)

D:\WP51\Thlopthlocco Tribal Town-WP\Federal Court\Injunction\2012-06-18 Brief for Motion for Preliminary Injunction.wpd

ADDITIONAL EXHIBIT LIST

Ex. GG Anderson, *et al., v. Burden, et al*., Transcript Excerpt 1/28/2011 (Pp. 44-45)

Ex. HH *Crowe & Dunlevy v. Stidham*, Case No. 09-CV-095-TCK-PJC, Defendant Stidham Answer to Complaint. (Doc. 036).