No. 13-5006

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

THLOPTHLOCCO TRIBAL TOWN, a federally-recognized Indian Tribe,

Plaintiff-Appellant,

-vs-

GREGORY R. STIDHAM, Judge of the District Court of the Muscogee (Creek) Nation; **RICHARD LERBLANCE**, Chief Justice of the Muscogee (Creek) Nation Supreme Court; **ANDREW ADAMS III**, Vice-Chief Justice of the Muscogee (Creek) Nation; **GREGORY BIGLER** Judge of the District Court of the Muscogee (Creek) Nation; and Other judges and justices of the Muscogee (Creek) Nation acting in concert and participation with the named defendants pursuant to Fed.Rul.Civ.Pro. 65,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA BEFORE THE HONORABLE JAMES PAYNE, UNITED STATES DISTRICT JUDGE
District Court Case No. 09-CV-527-JHP

OPENING BRIEF OF PLAINTIFF-APPELLANT THLOPTHLOCCO TRIBAL TOWN

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March 22, 2013

ORAL ARGUMENT REQUESTED
(See Tenth Circuit Rule 28.2(C)(4))

(Attachments in Digital Form)

CORPORATE DISCLOSURE STATEMENT

Thlopthlocco Tribal Town is a federally recognized Indian Tribe and a sovereign Indian Nation. As such, it issues no capitol stock, has no parent corporations, and no publicly held corporation owns ten per cent or more of the stock which Thlopthlocco Tribal Town does not issue.

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STATEMENT OF ALL PRIOR OR RELATED APPEALS PURSUANT TO TENTH CIRCUIT RULE 28.2(C)(1)

There are no prior or related appeals of this matter between the parties. The district court decision is unreported. *See Thlopthlocco Tribal Town v. Stidham*, 2013 WL 65234 (ND.Okla. January 03, 2013) (NO. 09-CV-527-JHP-FHM).

Defendant Stidham was the subject of a prior appeal arising out of the same litigation that occurred in the Muscogee (Creek) Nation courts. *See Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140 (10th Cir. 2011). That district court case is *Crowe & Dunlevy, P.C. v. Stidham*, 609 F.Supp.2d 1211 (ND Okla. 2009).

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[1] Document 047-05 is identified in Doc. 051 as a monograph entitled "the Creek Indian Towns of Oklahoma in 1937" authored by Morris Opler in 1972 while a faculty member in the Department of Anthropology at the University of Oklahoma. The Monograph contains Dr. Opler's original studies of the Creek Tribal Towns from 1937 along with additional supplemental material. Page 2 of the version of Doc. 047-05 as originally filed was missing. In addition, page 67 was blank, apparently corrupted, and could not be read by Acrobat Reader. Copies of Pages 2 and 64 were filed with Doc. 051 after a library copy of the Monograph, Doc. 047-05, was located.

For simplicity, Doc. 047-05 has been altered to include pages 2 and 67 as part of the record on appeal so that it will not be necessary to refer to Doc. 051 for those two pages. Page 67 was removed because it was corrupted. Document 051 contains an explanation of the Monograph.

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VOLUME LIST TO APPENDIX

For the benefit of the Court the following table identifies the pages contained in each Volume of the Appendix:

INDEX OF ATTACHMENTS TO PLAINTIFF-APPELLANT'S OPENING BRIEF PURSUANT TO TENTH CIR. RUL. 28.2(A)(1)

Attachments to this **Opening Brief of Plaintiff-Appellant** are listed below. "App." refers to Plaintiff-Appellant's Appendix. "Doc." refers to the Docket Number as identified in the District Court. Each attachment will include the same Bates pagination as in the Appendix. Attachments ("Att. (number)") are as follows:

Attachment 1: Order denying Plaintiff's Motion for Preliminary Injunction and Dismissing Case filed 01/03/13. (App. 1608-25, Doc. 0064).

Attachment 2: Judgment for Defendants, and against the Plaintiff and dismissing case filed 01/03/2013. (App. 1626, Doc. 065).

Attachment 3: Constitution and By-Laws of Thlopthlocco Tribal Town, Oklahoma. (App. 042-48, Doc 002-02).

Attachment 4: Constitution of the Muscogee (Creek) Nation. (App. 1196-1211, Doc. 047-18).

Attachment 5: Answer to Complaint in Crowe & Dunlevy, P.C. v. Stidham, No. 09-CV-095-TCK-PJC, Filed May 8, 2009 (Doc. 036).

Attachment 6: Solicitor's Opinion, U.S. Department of the Interior, dated July 15, 1937. (App. 049-54)("Kirgis Memo").

Attachment 7: Thlopthlocco Tribal Town Business Committee Resolution No. 2007-21, dated June 7, 2007. (App. 055-56, Doc. 02-04).

Attachment 8: Thlopthlocco Tribal Town Business Committee Resolution No. 2009-07, dated February 19, 2009. (App. 072-73, Doc. 02-09)

Attachment 9: Thlopthlocco Tribal Town Business Committee Resolution No. 2007-35, dated July 30, 2007. (App. 066-67, Doc. 02-07).

Attachment 10: Order and Opinion, Thlopthlocco Tribal Town v. Honorable Patrick Moore, and Nathan Anderson, et al., Supreme Court No. 2007-01 (Dist. Court Case No. CV-2007-39), filed October 26, 2007. (App. 061-65).

NOMENCLATURE USED IN THIS BRIEF

Plaintiff Thlopthlocco Tribal Town will be identified in the same manner as in the District Court as "Plaintiff," "Thlopthlocco," "TTT," or if referenced in this case as "Appellant" or "Plaintiff-Appellant."

Appellees, other parties, witnesses, or persons involved in this proceeding will generally be referred to by their last names, title, or as referenced in the District Court where appropriate, *e.g.*, "Defendant," "Judge," "Justice,"or if referenced collectively in this case as "Appellees," or "Defendants-Appellees."

Citations to the record will be consistent with Fed.R.App.P. 28(e) and Tenth Cir. R. 28.1. Plaintiff-Appellant has submitted an Appendix containing Eight (8) Volumes totaling 1628 pages. An index of the entire Appendix is included with this Brief (pp. xvi - xxix) and is also included in Volume 1 of the Appendix. Volumes 2 - 8 contain individual volume indices. Citations to the Appendix will be as follows: (App. (page number), additional identification as necessary).

Attachments to this Brief will be referred to as (Attach. (number)). Attachments will include the Bates numbering of the same document in the Appendix.

References to entries on the District Court Docket Sheet (App. 001-009) and Docket Sheet entries will be identified as follows: (Doc. (Entry Number)).

GLOSSARY OF ABBREVIATIONS AND TERMS

For the benefit of the Court, Plaintiff identifies the following abbreviations and terms used in this Opening Brief. Some of these terms are common and 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. (Att. 3, App. 042-48)
Mekko	-	Also "Miko," "Town King" or tribal 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.
Talwa	-	Ancient name for a Creek Tribal Town which also connotes to "tribe."
TTT	-	Abbreviation for Thlopthlocco Tribal Town, a federally recognized Indian Tribe. Thlopthlocco reorganized in 1939 under the Oklahoma Indian Welfare Act

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Defendants-Appellees.

OPENING BRIEF OF PLAINTIFF-APPELLANT THLOPTHLOCCO TRIBAL TOWN

THLOPTHLOCCO TRIBAL TOWN, a Federal-Recognized Indian Tribe ("Thlopthlocco" or "TTT"), submits this Opening Brief seeking reversal and relief from dismissal and denial of preliminary injunction (App. 1608), and Judgment of Dismissal (App. 1626).

I. INTRODUCTION

According to the district court, Thlopthlocco Tribal Town, a federally recognized Indian Tribe, has no sovereign immunity when its officials are sued in their official capacity in the Tribal Court of the Muscogee (Creek) Nation ("MCN").

Instead, the district court characterized the litigation as an "intra-tribal dispute" despite separate Constitutions and separate federal recognition of Thlopthlocco and the MCN by the United States.[2] (App. 1473).

Nothing in the Thlopthlocco Constitution (App. 042-48, Att. 03) or Corporate Charter (App. 547-554) gives any jurisdiction or authority to the MCN. Likewise, nothing in the MCN Constitution (App. 1196-1211, Att. 04) gives its judicial jurisdiction over Thlopthlocco.

Although there is a historical relationship between the MCN and Thlopthlocco derived from previous confederations, nothing, not even the forced confederation of the Creek Tribal towns after the Civil War because they sided with the Confederacy, destroyed the individual sovereignty of the Tribal Towns.[3]

The MCN admitted in an Answer in related litigation that 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." (*See* Att. 5, p. 1, *Crowe v. Stidham*, No. 09-CV-95-TCK. This Court is asked to take judicial notice. Fed.R.Evid. 201(c)(2)).

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[2] Federal recognition of Thlopthlocco and the MCN are separated by 40 years. (Thlopthlocco in 1939 (App. 042); MCN in 1979 (App. 1211)).

[3] After the Civil War, the United States forced the Creek tribal towns into a confederation to avoid dealing with individual tribal towns and as punishment for siding with the South. But neither the 1866 Treaty (App. 945) or the Constitution of the Creek Confederacy (App. 961) contained any equivalent to the Supremacy Clause of the United States Constitution.

It is true there is a unique relationship between the MCN and individual Thlopthlocco members in that most of them are also members of the MCN, but this Court has determined that Thlopthlocco is not a member of the MCN. *See Crowe & Dunlevy v. Stidham*, 640 F.3d 1140, 1152 (10th Cir. 2011) ("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").

Despite the seeming importance of such a finding from a case that arises out of the same facts in the MCN courts as this case, the district court does not cite *Crowe* for any purpose in its opinion.

The district court's holding this is an intra-tribal dispute is not even consistent with its own decision in previous litigation involving Thlopthlocco. See *Thlopthlocco Tribal Town v. Babbitt* (App. 1533):[4]

> The historical and traditional background of the Muscogee (Creek) Nation is largely undisputed. The Muscogee (Creek) Nation is actually a confederacy of autonomous tribal towns, or talwa, each with its own political organization and leadership.
>
> - - - - -
>
> Thlopthlocco Tribal town is one of three Muscogee (Creek) tribal towns that is organized and federally chartered under the Oklahoma Indian Welfare Act ("OIWA"). The Thlopthlocco Tribal Town adopted a constitution on December 27, 1938, and ratified its OIWA charter on April 13, 1939. The Department of the Interior recognizes these organized tribal towns as entities separate from the Creek nation, entitled to receive Bureau of Indian Affairs ("BIA") funding and services directly, rather than through the Creek Nation who is also organized under the OIWA. (emphasis added).

[4] The district court determined that BIA funding of services to the MCN for both the MCN and Thlopthlocco citizens was a decision made by the BIA in the selection service providers and related to factors such as avoiding duplication involving dual citizenship, and not necessarily related to sovereignty issues. (App. 1540-41, 1543-44).

App. 1533-34.

Respectfully, the dismissal by the district court should be reversed and remanded for entry of a preliminary injunction.

II. STATEMENT OF JURISDICTION

Plaintiff's Complaint (App. 10, 886) invoked the jurisdiction of the district court pursuant to 28 U.S.C. §1331 (federal question) and 28 U.S.C. §1362 (civil actions brought by Indian tribes).

By Order (App. 1608) and Judgment of dismissal (App. 1626) entered January 3, 2013, the District Court dismissed the action and by implication denied Plaintiffs' Motion for Preliminary Injunction.

This Court has jurisdiction under 28 U.S.C. §1291 to review a final judgment. This Court also has jurisdiction to review denial of a preliminary injunction pursuant to 28 U.S.C. §1292(a)(1).

Plaintiffs filed a Notice of Appeal on January 11, 2013. (App. 1627).

III. ISSUES PRESENTED FOR REVIEW

1. This is not an intra-tribal dispute and a federal question exists regarding claims of sovereign immunity by nonmember Thlopthlocco, a separate federally recognized nonmember Indian tribe, in the tribal courts of MCN.

2. Sovereign immunity of Thlopthlocco, which is co-extensive with that of the United States, shields Thlopthlocco from suits without its consent in the MCN courts and is based on federal case law.

3. A suit against Thlopthlocco tribal officials for their official actions in the conduct of Thlopthlocco governmental functions, including elections, is the same as a suit against Thlopthlocco.

4. Thlopthlocco can maintain this action under *Ex Parte Young* against MCN judicial officers in their official capacity acting in excess of their jurisdiction.

5. The MCN is already a party to this action when MCN judicial officers are sued in their official capacity.

6. There is no nexus between the MCN exercise of jurisdiction over nonmember Thlopthlocco that is necessary for protection of MCN self-government or control of internal relations where the actions of Thlopthlocco officials arise only under the Thlopthlocco Constitution.

7. The Anderson litigants are not necessary parties in Federal litigation, but if they are, the district court did not join them as required by the Federal Rule 19.

8. Thlopthlocco has sufficiently exhausted tribal remedies when the MCN Supreme Court twice determined its jurisdiction over Thlopthlocco without regard to Thlopthlocco's limited waiver of sovereign immunity, and exhaustion was futile and could lead to

irreparable harm by the permanent loss of Thlopthlocco sovereign immunity in the MCN courts.

9. The district court abused its discretion in failing to issue a preliminary injunction enjoining Defendants' continued exercise of jurisdiction over Thlopthlocco internal governmental activities.

IV STATEMENT OF THE CASE

There are two MCN district court cases entwined with this case in the federal district court (No. CV-2007-39 and No. CV-2011-08). There are several appeals to the MCN Supreme Court from each of these two MCN district court cases.

Thlopthlocco filed this action on August 18, 2009 (App. 10-41) seeking injunctive and declaratory relief that Thlopthlocco was immune to suit in the MCN courts for matters involving control of its internal election procedures.

Thlopthlocco is governed by a ten member Business Committee consisting of five elected officials and five advisors selected by the elected officials. Election of officers are conducted every four years.[5]

Thlopthlocco originally brought suit (No. CV-2007-39) in the MCN district court in 2007 under a limited waiver of sovereign immunity (App. 055, Att. 7) seeking injunctive

[5] Officers specified by the TTT Constitution are: Town King, two warriors, Secretary and Treasurer. These officers then appoint an advisory council of five adult members and together with the officers constitute the Business Committee. The Business Committee can "otherwise speak or act on behalf of the town on all matters in which the town is empowered to act now or in the future." (App. 44-5, Thlopthlocco Const. Art. V, Sections 1, 3, 4, 7).

relief against its Mekko ("Town King") Nathan Anderson for an attempted coup d'état to overthrow the nine other members of the Business Committee.

After a preliminary grant of injunctive relief[6] by the MCN courts, Thlopthlocco internally resolved the issue by Anderson's removal from office under the Thlopthlocco Constitution. (App. 066-67, Att. 9). Thlopthlocco gave notice of this internal resolution to the MCN courts. (App. 541). The MCN courts continued to exercise jurisdiction over Thlopthlocco by considering election counterclaims of the Anderson parties which was forbidden by the limited waiver. (App. 056).

Thlopthlocco later withdrew its waiver of sovereign immunity. (App. 072-73, Att. 8) and filed a Conditional Motion to Dismiss in the MCN Courts (App. 417-39) which was denied. (App. 74, 83). Judge Stidham set a jury trial involving TTT elections. (App. 083-85, 102).

Thlopthlocco then brought this action to enjoin that continued exercise of jurisdiction. (App. 10).

By agreement between Thlopthlocco and Stidham, consideration of the Motion for Preliminary Injunction was deferred until the MCN Supreme Court reviewed Thlopthlocco's interlocutory appeal. (No. SC-09-07). The federal district court stayed the proceedings. (App. 214, 221, 643).

[6] The MCN district court initially denied relief, Thlopthlocco appealed and the MCN Supreme Court indicated that the MCN courts had jurisdiction to consider Thlopthlocco's claim. (App. 057, 061-64, Att. 10 (No. SC-2007-01)).

The question of MCN jurisdiction over matters of internal Thlopthlocco governance was not resolved by the tribal courts by the time of the next scheduled Thlopthlocco elections in 2011. As a result of additional disputes under a new Election Ordinance, Anderson brought another suit (No. CV-2011-08) in the MCN District Court on January 26, 2011 against Thlopthlocco government officials. (App. 666-73). The MCN district court issued an "emergency ex parte order." (App. 674).

Again, the MCN district court refused to dismiss, assumed jurisdiction over the election proceeding, and eventually ordered Thlopthlocco to proceed with the election with the Anderson parties as candidates. (App. 751). Thlopthlocco moved the federal district court to lift the stay and proceed with the preliminary injunction against the MCN judiciary. (App. 644). Thlopthlocco filed a First Amended Complaint. (App. 836).

The MCN Supreme Court (No. SC-11-11) *sua sponte* stayed the second case and set it for oral argument. (App. 879-80). Thlopthlocco and Stidham then asked the federal district court to hold in abeyance the Motion to Lift Stay and the Amended Complaint pending a decision of the MCN Supreme Court. (App. 875). This was granted. (App. 883).

The MCN Supreme Court reaffirmed its previous jurisdiction ruling and returned both appeals (Nos. SC-2009-07 (App. 957) and SC-11-11 (App. 953)) to the MCN district court for further proceedings.

Thlopthlocco then filed a Second Amended Complaint in this case adding allegations of the dismissed appeals by the MCN Supreme Court (App. 886) and also filed an Amended Motion for Preliminary Injunction. (App. 1461).

Defendants filed a Motion to Dismiss Second Amended Complaint. (App. 1247). Plaintiffs responded. (App.1548).

On January 3, 2013, the Court entered an order which granted Defendants' Motion to Dismiss. (App. 1608, Att. 1). The Court took no action on Plaintiff's request for a preliminary injunction or declaratory judgment, by implication denying it, and entered a judgment of dismissal. (App. 1626, Att. 2).

Thlopthlocco filed a Notice of Appeal on January 11, 2013. (App. 1627).

V. STATEMENT OF FACTS

1. Thlopthlocco, the Creek Tribal Towns, and the Muscogee (Creek) Nation.

Thlopthlocco Tribal Town is a sovereign federally recognized Indian Tribe. The origin of Creek tribal towns as separate and independent bands of Indians predate that of the United States.[7] Thlopthlocco was one of forty-four Creek tribal towns forced by the United

[7] Thlopthlocco originated in Georgia and Alabama. It is commonly believed that sometime before 1832, Thlopthlocco split off from a large tribal town whose name is variously represented as Hoithle Waule, Clewalla, and Thlewarthle. (App. 1104).

States in removal to Oklahoma in 1835 from the Southeastern United States.[8] (App. 1104, 1120, 1133, 1163-64).

Although Creek towns occasionally confederated for their common defense, the confederation had no actual authority and each town was a separate governmental unit governed by town officials headed by a "Mekko" ("Miko") or "Town King."[9]

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[8] *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1440-42 (DC Cir. 1988) contains a brief history of the Creeks from the time of removal to Oklahoma through the organization of the MCN in 1979.

There are other references in the Appendix which provide the historical facts referenced herein:

> (App. 1113-1124) 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 <http://digital.library.okstate.edu/chronicles/v009/v009p017.html>
>
> (App. 1125-1146) 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>
>
> (App. 1147-1182) 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>
>
> (App. 1183-1193) 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>

[9] *See* App. 1125; 1113; 1116 (". . .confederation seemed to have no central control"); 1117 ("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."); 1127 ("Each village was practically independent of the remainder of the confederacy and in reality formed a tribe by itself. In spite of the fact that the organization and administration (continued...)

Thlopthlocco was offered separate federal recognition in 1936 after passage of 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. Its application was reviewed by Frederic Kirgis, Acting Solicitor of the Department of Interior, in a Memo to the Commissioner of Indian Affairs. (App. 049-54, Att. 06).

The Kirgis Memo relied upon an Anthropology Report regarding Creek Tribes prepared by Morris Opler, an anthropologist for the Bureau of Indian Affairs in 1937. ("Opler Report") (App. 968-1087).[10]

Kirgis noted that "[e]ach Talwa was self-governing." (App. 049). Kirgis determined that Thlopthlocco possessed sufficient characteristics of a "band" to permit organization under Section 3 of the OIWA. (App. 53-4).

In a later memo, Kirgis later identified the Tribal Towns as the "original independent units of government of the Creek Indians." (App. 1195).

In that memo, Kirgis noted the distinction that a band "is a political body" which:

> . . . has functions and powers of government. It is generally the historic unit of government in those tribes where bands exist. Because of Federal

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[9](...continued)
of the villages were identical, yet the structure of the confederacy was extremely loose. The general attitude of the confederacy was strictly defensive and often when a tribe undertook an independent offensive campaign it was not sustained by the others.

There was a head chief of the confederacy but it seems that he had no particular position of command. He was elected by the general council. This council determined the policy of the confederacy but issued no orders or commands.").

[10] The Opler Report is contained in a Monograph, later assembled in 1972 by Dr. Opler while a faculty member at the University of Oklahoma. The Monograph is part of the record. (App. 968-1087, 1243).

> intervention aimed to destroy tribal organization many recognized bands have lost most if not all of their governmental functions. But their identity as a political organization must remain if the group of Indians can be considered a band or tribe.

App. 1194.

The Confederacy gained a formal structure following the Civil War. As punishment because some tribal towns sided with the Confederacy during the Civil War, the Creek Treaty of 1866 (App. 945) 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 Confederacy. Both Kirgis and Opler identified the confederation as an effort of the U.S. Government to avoid dealing with the separate and independent tribal towns.[11]

The tribal towns drafted a Constitution of Confederation in 1867. (App. 961). However, Opler called its success as a unifying document questionable at best.[12]

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[11] *See* App. 050. Kirgis writes:

> However, 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.

Opler writes, "Accordingly, every attempt was made to centralize authority among the Creeks so that the Towns would not have to be dealt with separately." (App. 994).

[12] Even the MCN Supreme Court described the political government established by the 1867 Constitution as a "crippled confederacy." (App. 063).

Neither the 1866 Treaty or the 1867 Constitution of Confederation contained any equivalent to the Supremacy Clause of the United States Constitution.

Passage of the Dawes Act of 1887, 25 U.S.C. §331, *et seq*. authorized the President to survey Indian tribal land and divide it into individual allotments to eventually lead to the abolishment of existing Tribal governments as part of a plan of assimilation of the Indian population. However, the Dawes Act did not include the Five Civilized Tribes because they held their land in fee simple and would have to agree to allotment. *Muscogee (Creek) Nation v. Hodel*, 851 F.2d at 1441. Later efforts to negotiate with the Five Tribes were unsuccessful.[13]

Congress then abolished the tribal judiciaries and greatly restricted the governments of the Five Civilized Tribes with their eventual discontinuance under the Curtis Act of 1898, c. 517, 30 Stat. 495. The Act sought to force "agreements" with several tribes, including the Creeks. An agreement eventually reached provided the Creek Tribal government would be abolished by March 6, 1906. However, individual Creeks continued to resist the allotment process. This, along with difficulties in completing tribal rolls resulted in Congress indefinitely extending the existence and government of the Five Tribes, including the Creeks, by action on April 26, 1906. This did not include the judiciary because the jurisdiction had already been transferred to the Federal courts. *Hodel*, 851 F.2d at 1441-42.

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[13] As Ohland Morton notes this is consistent with 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. (App. 1119).

Although some tribal governments remained active, they were not allowed to reorganize until the Roosevelt administration proposed and Congress passed the Indian Reorganization Act ("IRA"), 25 U.S.C. §461, *et seq.* which entitled some tribes to resume self-government with constitutions and charters and to reorganize for economic purpose. Oklahoma tribes were not included. Later in 1936, Congress passed the OIWA which provided for constitutional governments and corporate charters for Oklahoma tribes. *id*.

As noted by Kirgis, the Creek Tribal Towns were encouraged to separately seek recognition, but only three did, Thlopthlocco (in 1939), Alabama Quassarte, and Kialegee. (App. 1104, 1106, 1108). It was the view of the BIA that the Curtis Act had abolished judicial tribal courts. *Hodel*, *id*. Thlopthlocco's Constitution did not include a judiciary.

The rest of the MCN did not reorganize until 1979. *Hodel*, *id*. This did not include Thlopthlocco since it already had separate federal recognition. The new MCN Constitution provided for representation by districts, not Tribal towns. (App. 1201). The MCN Constitution included a judiciary. The BIA refused to fund the MCN courts because of the Curtis Act. *Hodel* held the tribal courts were unequivocally abolished and the OIWA did not contain an express repealer of the Curtis Act. But the normal rules of statutory construction do not apply in cases involving Indian law and courts instead require "statutes to be construed liberally in favor of the Indians." *Hodel*, at 1444 citing *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985). Applying this lenity and determining that a refusal to construe a repealer would create a judicial "no man's land," the *Hodel* court concluded that the Curtis Act had been repealed by implication and the MCN was permitted to establish a judiciary. *Hodel*, at 1444-45, 1446-47.

2. THE 2007 THLOPTHLOCCO LITIGATION ("ANDERSON I")

In 2007 the Thlopthlocco Business Committee sought jurisdiction in the MCN courts to restrain an attempted coup d'état by Nathan Anderson, the then elected Mekko who, four months after the election of Tribal officials, sought to remove all other members of the Business Committee except himself by claiming their elections were infirmed. Anderson claimed he was the only lawfully elected official and attempted to replace the Business Committee members with persons of his choosing. (App. 023, 186-87).

Anderson and the rump committee attempted to seize bank accounts and take control of tribal government and enterprises. (App. 024).

The original Business Committee met, voted to restrict Anderson's powers, and approved a limited waiver of sovereign immunity in the MCN courts so as to obtain a restraining order against Anderson and his faction. (App. 055, 187).

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." (App. 056, Att. 07).

Eventually Thlopthlocco resolved the dispute by Anderson's removal as Mekko through an internal grievance procedure under the Town Constitution. (App. 066, Att. 09, App. 189). They replaced Anderson as Mekko with another member of the Business Committee, following the officer succession provision of their Constitution. (App. 028, 189).

Thlopthlocco gave notice of internal resolution of the dispute to the MCN Courts. (App. 541). Meanwhile Anderson filed a third party claims against the individual members of the Business Committee claiming infirmity of the elections. (App. 406). Although

counterclaims involving election disputes were not within the limited waiver of sovereign immunity, the MCN courts continued to exercise jurisdiction over the case.

Thlopthlocco eventually filed a Conditional Motion to Dismiss (App. 417) based upon a withdrawal of its limited consent to jurisdiction. (App. 072, Att. 08).

The MCN courts continued to exercise jurisdiction and set all claims, including Anderson's cross-claims for a jury trial. (App. 102).

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 resulted in a ruling that the MCN courts, as a matter of MCN law allegedly superior to federal law and Thlopthlocco law, had jurisdiction over Thlopthlocco, in effect disregarding Thlopthlocco's separate sovereign immunity, and the limitations of the waiver of sovereign immunity. The MCN Supreme Court claimed 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.

(App. 63-64).

Despite subsequent interlocutory appeals, the MCN courts continue to exercise jurisdiction over Thlopthlocco even though the 2007 election matter has arguably become

moot by the Court's delay of decision to a time beyond the next scheduled election and Anderson's eventual admission that he was properly removed from office by a procedure under Thlopthlocco's Constitution.[14]

3. THE 2011 THLOPTHLOCCO LITIGATION ("ANDERSON II")

Although the litigation from 2007 remained unresolved, Thlopthlocco officials began preparation for new 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 that Thlopthlocco property had been used by them for individual campaigning. Anderson had obtained publication of an unpaid political ad against the incumbent Business Committee in *The Drumbeat*, the official Thlopthlocco newspaper. 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 them on the ballot because

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[14] In the 2011 case filed in the MCN District Court, Anderson testified at an injunction hearing on 1/28/2011 that he was not Mekko and was removed by the Grievance Procedure before the Tribe and that George Scott was the current Mekko. (" -- clearly Mr. Scott is the Town King.") (App. 833-34).

Even so, the MCN Supreme Court stated in its remand Order in the 2009 case, "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." The Court also refused to revisit its earlier order describing Thlopthlocco as a captive tribal town of the MCN. (App. 958).

they claimed the inclusion of their names in the Ad was without their knowledge. (App. 677-78).

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. (App. 674, 677-78).

The Election Committee then met, determined 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. (App. 1100). The Business Committee likewise postponed the appeal. (App. 1101-03). After filing an objection to jurisdiction (App. 676-92), 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[15] issued a temporary order suspending the election pending

[15] Judge Moore also refused to recuse as he had in the previous litigation citing an *ex parte* communications with the MCN Supreme Court. (App. 1514-15) ("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?").

Moore's recusal in the 2007 litigation was based upon a complaint of ex parte communication with Anderson and his counsel resulting in Greg Stidham appointment by the Supreme Court to hear the litigation. (App. 733-34).

completion of the hearing finding both personal and subject matter jurisdiction. (App. 693). The hearing was 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. (App. 751-55). The Election Committee responded. (App. 756-58).

Thlopthlocco file an interlocutory appeal with the MCN Supreme Court based upon lack of subject matter jurisdiction by sovereign immunity and other issues. (App. 760; 763; 766-807; 808-18). After oral argument, the MCN Supreme Court issued an Order on January 19, 2012 that denied the appeal, but indicated the Court would keep the stay of the lower court proceedings in place until it decided the appeal of the 2007 litigation. (App. 953-56). On March 9, 2012, the Supreme Court denied the interlocutory appeal from the 2007 litigation (App. 957-60) and declined to reconsider its previous ruling that MCN Courts had general jurisdiction over Thlopthlocco.

VI. DECISION OF THE DISTRICT COURT

On January 3, 2013, the district court issued an Order (App. 1608) and Final Judgment (App. 1626) which dismissed Plaintiff's action. By implication, the district court denied Plaintiff's Amended Motion for Preliminary Injunction.

The district court's dismissed for lack of federal question holding the action between Thlopthlocco and the MCN involved an intra-tribal dispute. (App. 1613). The court held a tribe would not have a federal right to prevent suit against a tribe in tribal court because

immunity arises under tribal law. (App. 1614). In a tribal sovereign immunity case, federal statutes must contain a Congressional abrogation of tribal sovereign immunity, not a grant of immunity. Tribal court immunity waivers are cognizable only in the tribal court. *id*.

The meaning and effect of the Thlopthlocco immunity waiver in the MCN courts similarly involves a question of tribal law, not federal law. (App. 1615). Likewise, Anderson II involved a claim of alleged violation of the Thlopthlocco Constitution and not of federal law and thus did not involve a federal question. *id*.

The district court reviewed the OIWA, Indian Commerce Clause, The Treaty Clause, and the Supremacy Clause and concluded that none of them contain language which discusses or relates to the sovereign immunity of any Indian tribe in tribal court. (App. 1615-17).

The district court also held Defendants are entitled to sovereign immunity. *id*. Thlopthlocco sued judicial officers in their official capacity which is the same as suing the MCN itself. (App. 1618).

Thlopthlocco's claim under *Ex Parte Young*, 209 U.S. 123 (1908) for an ongoing violation of federal law is not actionable because there is no violation of federal law. (App. 1619).

The MCN receives money pursuant to a self-governance compact and the Indian Tribal Justice Act ("ITJA"), 25 U.S.C. §§3601-3631. The legislative history of the Indian Tribal Justice Act indicates that Congress intended "for funds provided to Indian tribes under this Act [to] be used by the tribes for purposes of establishing **intertribal** court systems and regional tribal appellate systems." *Id*. at 15 (emphasis in original). Thus the MCN courts are

not acting in violation of federal law, they are following express Congressional policy of providing an "intertribal" court system to Thlopthlocco. (App. 1618-19).

Nor is there any private, federal cause of action to a tribe in the OIWA. Because *Hodel* does not place any restrictions on the MCN to establish a tribal court, it can adjudicate the kinds of claims raised in *Anderson I* and *Anderson II*. (App. 1619).

The Indian Commerce Clause, Treaty Clause, and Supremacy Clause do not afford a violation of *Ex parte Young* because Thlopthlocco has not pleaded that the tribal courts have violated a federal law or treaty with Congress that restrict the judicial power of the MCN. (App. 1619).

Thlopthlocco failed to joint necessary parties under Fed.R.Civ.P. 19(b) which the Court identified as the *Anderson I* defendants and *Anderson II* plaintiffs because the exercise of jurisdiction by the Federal court could affect their ability to proceed in tribal court. (App. 1620-21). Thlopthlocco also failed to join the MCN as an indispensable party. (App. 1621-22).

Thlopthlocco has not exhausted its tribal remedies. The rulings of the MCN Supreme Court do not definitively conclude the Creek tribal courts have jurisdiction over Thlopthlocco's disputes. (App. 1623). Thlopthlocco may, under the MCN Appellate Rules still raise these issues in an appeal after the final judgment or order. (App. 1623-24).

The court dismissed the action and by implication denied the preliminary injunction.. (App. 1626).

VII. SUMMARY OF ARGUMENT

The district court did not construe Thlopthlocco's claim of sovereign immunity strictly in favor of the sovereign.

This case is not an intratribal dispute. This Court has determined that Thlopthlocco is not a member of the MCN. The Creek tribal towns were the original governing units of the Creek Indians. Many of these Towns were originally separate tribes and each Town retained its autonomy, internal government, and individuality.

The old Creek Confederacy which predated the Civil War was formed for mutual defense of the Tribal towns and was advisory only and each tribal town acted independently. The MCN was a marginal confederation of tribal towns forced by the United States so it could avoid dealing with 44 separate tribal towns.

This separate identify is consistent with Creek history. The United States acknowledged the individual separate sovereignty in Thlopthlocco's federal recognition in 1939.

The extent of a tribal court's jurisdiction is a federal question. MCN tribal court officials in their official capacity are subject to *Ex Parte Young* when they exceed that jurisdiction. The MCN need not be separately joined because it is already a party in the person of the official capacity Defendants. To require joinder of the MCN would defeat the purpose of *Ex Parte Young*.

This case involves the extent of jurisdiction of the MCN courts over a separate sovereign nonmember Indian tribe. Tribal sovereign immunity is generally deemed to be coextensive with the immunity of the United States. "Co-extensive" means having "having

the same spatial or temporal scope or boundaries." If the United States could not be sued in the MCN court, then neither could Thlopthlocco.

Tribal sovereign immunity in Indian tribal courts or otherwise is not a function of a statute grant or section of the Constitution. Instead it is found in decisions of the Supreme Court. Sovereign immunity applies to Thlopthlocco Tribal Business and Election Committee officials acting in their official capacity. Federal common law questions of tribal sovereign immunity can be a basis for federal question jurisdiction.

The MCN courts cannot exercise jurisdiction over questions arising under the Thlopthlocco Constitution because there is no nexus between the exercise of jurisdiction over nonmember Thlopthlocco and protection of MCN tribal self-government or control of internal relations. The MCN Constitution grants MCN courts no jurisdiction over Thlopthlocco.

The Anderson parties are not necessary parties, but if the court determines that they are, it is obligated to join them to the case.

Exhaustion is already complete in that the MCN Supreme Court has twice determined it may exercise jurisdiction over Thlopthlocco tribal official officials in their official capacity. Alternatively, exhaustion is futile because requiring exhaustion could result in a change of government that would likely abandon further litigation of Thlopthlocco claims of sovereign immunity and Thlopthlocco would suffer irreparable harm in the permanent loss of its sovereign immunity in the MCN courts.

VIII. ARGUMENT

1. The District Court Did Not Construe Thlopthlocco's Claim of Sovereign Immunity Strictly in Favor of the Sovereign.

A. STANDARD OF REVIEW

A district court's denial of tribal sovereign immunity is a matter of subject matter jurisdiction and reviewed de novo. *Crowe*, 640 F.3d at 1153 citing *Miner Elec., Inc. v. Muscogee (Creek) Nation*, 505 F.3d 1007, 1009 (10th Cir. 2007).

B. DISCUSSION

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

"Co-extensive" means "having the same spatial or temporal scope or boundaries."[16] This suggests that if the United States could not be sued in the MCN courts, then neither could Thlopthlocco.

Despite immunity co-extensive with the United States, the district court recites sentences from Thlopthlocco's limited waiver, Complaint in the MCN district court, and

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[16] *See*: <http://www.merriam-webster.com/dictionary/coextensive> (last visited 3/17/2013).

The Oxford Dictionaries define co-extensive as "extending over the same space or time; corresponding exactly in extent." *See*: <http://oxforddictionaries.com/us/definition/american_english/coextensive> (last visited 3/17/2013).

tribal court appellate filings and construes these in favor of MCN jurisdiction instead of Thlopthlocco sovereignty. (App. 1609-10).

What the district court does not include in its Order is the actual language of Thlopthlocco's limited waiver of sovereign immunity in Resolution 2007-21 that authorized jurisdiction for suit:

> . . . Thlopthlocco Tribal Town does not consent to jurisdiction in any other court or any other dispute except as explicitly provided in a separate resolution.
>
> BE IT FURTHER RESOLVED, that the Thlopthlocco Tribal Business Committee does hereby waive its immunity on a limited basis only for the purposes of adjudicating this dispute only, only claims brought by the Plaintiff, Thlopthlocco Tribal Town, and only for injunctive and declaratory relief. This waiver of immunity shall not include election disputes.

App. 056.

There is nothing inconsistent with Thlopthlocco's varied assertions in court filings of MCN jurisdiction when it is considered Thlopthlocco consented to that jurisdiction. Instead the district court takes these assertions out of context and implies a waiver of immunity without construing them in favor of Thlopthlocco.

Nor should the district court rely upon legislative history of the ITJA, 25 U.S.C. §3601-3621 as a basis for waiver of sovereign immunity for "intertribal" disputes.[17] (App. 1616, 1618-19). That is simply not the law as this Court has noted:

> In *Lane v. Pena* [518 U.S. 187, 192 (1996)], it [Supreme Court] clarified that courts must construe waivers of sovereign immunity narrowly:
>
> > A waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text, and will not be implied. Moreover, a waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign. . . . A statute's legislative history cannot supply a waiver that does not appear clearly in any statutory text; the unequivocal expression of elimination of sovereign immunity that we insist upon is an expression in statutory text. (emphasis added)

Iowa Tribe Of Kansas and Nebraska v. Salazar, 607 F.3d 1225, 1236-37 (10th Cir 2010).

Rather than looking at legislative history, the statutory language of the ITJA is a reliable indicator Congress did not intend to set up a judicial system that waived immunity between Indian tribes. In particular, the district court should have considered the findings of 25 U.S.C. §3611:

> (1) there is a government-to-government relationship between the United States and each Indian tribe;
>
> (2) the United States has a trust responsibility to each tribal government that includes the protection of the sovereignty of each tribal government;

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[17] The district court's reference to "intertribal courts" may actually be referring to apparent identified court systems where tribes share court facilities and personnel. *See* 1999 Senate Report 106-219 (USGPO) "Indian Tribal Justice Technical and Legal Assistance Act of 1999" ("Today, there are over 250 tribal courts, including intertribal court systems like the Nevada Intertribal Court of Appeals, which serves 24 Indian tribes.") *See* <http://www.gpo.gov/fdsys/pkg/CRPT-106srpt219/html/CRPT-106srpt219.htm> (Last visited 3/22/2013).

> (3) Congress, through statutes, treaties, and the exercise of administrative authorities, has recognized the self-determination, self-reliance, and inherent sovereignty of Indian tribes;
>
> (4) Indian tribes possess the inherent authority to establish their own form of government, including tribal justice systems;
>
> - - - - -
>
> (6) Congress and the Federal courts have repeatedly recognized tribal justice systems as the appropriate forums for the adjudication of disputes affecting personal and property rights; (emphasis added).

If Congress intended to waive the sovereign immunity of tribes so they could sue each other in tribal courts of their choosing, any such intent is well hidden in these Congressional findings.

Although Thlopthlocco does not have a court system, the ITJA indicates that Thlopthlocco has the right to establish its "own form" of "tribal justice systems." As a MCN nonmember, it may avail itself of litigation services from the MCN courts available to its members if it chooses or it may also augment that by its own internal resolution procedures.

These findings also indicate that federally recognized tribes establish a "government to government" relationship with the United States, suggesting that each tribe is separate and not conjoined to any other tribe.

Thus it is incorrect, as the district court claims, that the MCN Court system receives money from the United States government "to hear cases such as the *Anderson* litigation." (App. 1609, 1616). As the recitation from Resolution 2007-21 indicates, the only connection is that funds are paid to MCN based on the headcount ("population numbers") of those

Thlopthlocco members who are also members of the MCN Tribe.[18] While the MCN courts may litigate cases of individual MCN citizens who are Thlopthlocco citizens, the district court present nothing in any grant of funds paid to the MCN that waives Thlopthlocco tribal sovereignty by virtue of MCN receipt of those funds.

The district court also failed to consider that Thlopthlocco can withdraw its waiver of sovereign immunity when it determined the MCN courts were exceeding their jurisdiction. *Iowa Tribe*, 607 F.3d at, 1233-4 (10th Cir. 2010) ("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"). The district court appeared to accept the MCN court ruling that Thlopthlocco cannot withdraw. (App. 1612).

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.

Iowa Tribe applies *Beers* to a case involving Indian sovereign immunity:

> Although the focus of the Court in *Beers* was the contention that Arkansas' actions violated the Contracts Clause, . . ., we may not lightly disregard the holding that a waiver of sovereign immunity may be withdrawn "whenever [a sovereign] may suppose that justice to the public requires it," *Beers*, 61 U.S. at 529. The Supreme Court aimed this language squarely at post-filing withdrawals of consent to be sued, further stating that courts cannot "inquire

[18] 25 U.S.C. §3621(g) provides for a "fair and equitable" distribution of funds "proportionate to base support funding" found in 25 U.S.C. §3613(c) and formula criteria there including "geographic area and population to be served."

> whether the law operated hardly or unjustly upon the parties whose suits were then pending . . . . [The Legislature] might have repealed the prior law altogether, and put an end to the jurisdiction of their courts in suits against the State, if they had thought proper to do so . . . ." *Id*. at 530. (emphasis added)

Iowa Tribe, 607 F.3d at 1234. quoting *Beers*, *id*. at 529 and 530.

Iowa Tribe further notes the Supreme Court continues to adhere to the *Beers* holding. *Iowa Tribe*, 607 F.3d at 1235 ("The logic of *Beers* has withstood the test of time.")

These are questions of consent and Thlopthlocco also does not waive sovereign immunity when it brings an injunctive action. *Oklahoma Tax Com'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509-510 (1991).

The district court failed to properly consider Thlopthlocco's claim of sovereign immunity and made a jaundiced eye examination instead of construing the sovereignty claim in favor of Thlopthlocco.

2. THIS IS NOT AN INTRATRIBAL DISPUTE. FEDERAL QUESTION JURISDICTION EXISTS AS TO MCN COURT JURISDICTION OVER NONMEMBER THLOPTHLOCCO.

A. STANDARD OF REVIEW

There are several standards of reviews for motions to dismiss for lack of subject matter jurisdiction under Fed.R.Civ.P. 12(b)(1): *See Merrill Lynch Business Financial Services, Inc. v. Nudell*, 363 F.3d 1072, 1074 (10th Cir. 2004) (Motions reviewed de novo and any jurisdiction findings of fact reviewed for clear error); *Breakthrough Management Group, Inc. v. Chukchansi Gold Casino*, 629 F.3d 1173, 1189-89 (10th Cir. 2010) (Jurisdiction discovery and evidentiary rulings subject to an abuse of discretion standard).

Other cases hold subject matter jurisdiction is reviewed de novo. *Robinson v. Union Pacific R.R.*, 245 F.3d 1188, 1191(10th Cir. 2001); *Mires v. U.S.*, 466 F.3d 1208, 1909 (10th Cir. 2006) ("Whether a district court had subject matter jurisdiction is a question of law that we review de novo.").

Plaintiff respectfully contends the district court erred under any of these standards using improper legal conclusions and committing clear error in its finding of jurisdictional facts. In this case there was no evidentiary hearing of jurisdictional facts, thus review of the district court's findings of fact should be de novo. This is consistent with a "standard of review" for subject matter jurisdiction on summary judgment. *U.S. ex rel. Holmes v. Consumer Ins. Group*, 279 F.3d 1245, 1249 (10th Cir. 2002) ("We also review de novo an issue of subject matter jurisdiction. . . .Because the court relied on affidavits and other evidence, however, the motion should have been treated as a motion for summary judgment.").

B. DISCUSSION

The district court's decision that no Federal jurisdiction existed because this was an intra-tribal dispute is inconsistent with Thlopthlocco's separate recognition by the United States and the history of Creek Tribal Towns. While there has been a historical relationship between Thlopthlocco and MCN, that does not mean they constituted one tribe after confederation and especially after federal recognition.

I. The History of the Creek Tribal Towns Demonstrates They Were "Original Governing Units" Which Was Not Altered After Forced Joinder to the Creek Confederacy and Evidenced by Separate Federal Recognition.

Although Thlopthlocco has a long historical relationship with MCN through its original confederacy and later forced joinder to the Creek Confederation following the Civil War, as Kirgis notes, the Talwas were self-governing. (App. 049). He apparently concluded the forced confederacy did not cause the tribal towns to lose their separate autonomous status by his determination that Thlopthlocco was entitled to Federal recognition. The success of the Confederation was questionable at best.[19]

Kirgis considered it a significant factor of autonomy that the towns declared war independent of each other (App. 1195) even when they might be of the same race or tribe as other groups noting that *Montoya v. United States*, 180 U.S. 261 (1901) identified "distinct bands so that the acts of such Indians constituted 'war' rather than individual violence" even when the band is often of the same race or tribe, but no more may be required to identify a band than "independence of action, continuity of existence, a common leadership and concert of action." (App. 50-51). Even forced confederacy was insufficient to divest Thlopthlocco of its autonomy because:

> That the Indians-themselves recognized the existence of the Creek tribal towns is clear from an examination of the constitutions and laws of the Muskogee Nation. While providing that representation in the National Council shall be

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[19] See Opler Report, App. 1022 (". . . 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 Morton, Government of the Creek, App.1137-46 and Morton, Government of the Creek Indians, App. 1147-52).

Opler found tribal towns to be the true center of Creek society and tribal government and not the Confederacy.

> by towns, nowhere does it define the towns. In fact the Compiled Statutes of the Muskogee Nation nowhere provide for defining the boundaries· of the towns. In other words, the towns are recognized as having an existence not derived from the constitution of the Muskogee Nation but in fact antedating and continuing alongside the constitution. Further evidence of this is provided by statutes referring certain election disputes to the Town Chiefs . . . and by other statutes ratifying agreements of consolidation between towns . . . and ratifying adoptions into town membership. One of the towns specifically recognized by an ordinance of October 28, 1890, is Thlopthlocco town, one of the two now applying for recognition.
>
> Under the foregoing legal authorities it appears to me that the Creek towns can lay a substantial claim to the right to be considered as recognized bands within the meaning· of section 3 of the Oklahoma Indian Welfare Act of June 26, 1936.

App. 52.

The MCN and Thlopthlocco Constitutions contain no direct references to the other besides a generic reference to Creek Indians. While the 1867 Constitution (App. 961) provided representation based upon tribal towns and had law making ability that governed the confederacy, representation in the new MCN Constitution is based upon Districts. (App. 1196, 1201). In other words, there is no place for Thlopthlocco in the new Creek Nation except on the outside.

Thlopthlocco Tribal lands were purchased after reorganization and held in trust by the United States government. The land was purchased 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." (App. 1110-1112) (emphasis added). This sovereign land is not available to the MCN, which makes illogical a claim that Thlopthlocco and the MCN constitute one tribe.

Kirgis also determined 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." (App. 053) (emphasis added).

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." (App. 1195).

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 and law 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.

ii. MCN Courts Have no Jurisdiction over a Nonmember Tribe Unless the Exercise of that Jurisdiction is Necessary to Protect MCN Tribal Self-government or Control Internal Relations.

Thlopthlocco contends MCN courts have no tribal court jurisdiction over Thlopthlocco, a non-member of the MCN, and that THLOPTHLOCCO's official capacity officers are entitled to sovereign immunity.

While the district court could not find tribal court immunity for Thlopthlocco in various federal statutes and constitutional provisions, federal questions are not so limited, but can also arise under federal common law.

Tribal courts are courts of limited jurisdiction, unlike state courts which have "general jurisdiction." See *Nevada v. Hicks*, 533 U.S. 353, 367 (2001)("Tribal courts, it should be clear, 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"). The MCN National Council has no apparent legislative jurisdiction over Thlopthlocco. In fact, the only reference to tribal towns in the MCN Constitution guarantees the rights of its citizens to organize tribal towns. (App. 1197)("This Constitution shall not in any way abolish the rights and privileges of persons of the Muscogee (Creek) Nation to organize tribal towns or recognize its Muscogee (Creek) traditions.").

There is nothing in its Constitution which gives the MCN legislature or judiciary any jurisdiction over Thlopthlocco. (App. 1203-04, Art. VI, Section 7; App. 1205, Art. VII). Nor would it be logical that it would since Thlopthlocco was not a part of the organization of the MCN at the time it sought federal recognition.

The Supreme Court has held that 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). In *National Farmers* Justice Stevens recognized that federal questions under §1331 includes federal common law:

> It is well settled that this statutory grant of "jurisdiction will support claims founded upon federal common law as well as those of a statutory origin." Federal common law as articulated in rules that are fashioned by court decisions are "laws" as that term is used in §1331.
>
> Thus, in order to invoke a federal district court's jurisdiction under §1331, it was not essential that the petitioners base their claim on a federal statute or a provision of the Constitution. . . . Petitioners contend that the right which they assert-a right to be protected against an unlawful exercise of Tribal Court judicial power-has its source in federal law because federal law defines the outer boundaries of an Indian tribe's power over non-Indians.[20]

National Farmers, 471 U.S. at 849-853.

Tribal sovereignty or sovereign immunity is itself a matter of federal common law. *See Kiowa Tribe of Okla. v. Mfg. Tech., Inc*., 523 U.S. 751, 759 (1998). ("As with tribal immunity, foreign sovereign immunity began as a judicial doctrine. . . .Like foreign sovereign immunity, tribal immunity is a matter of federal law. . . . Although the Court has taken the lead in drawing the bounds of tribal immunity, Congress, subject to constitutional limitations, can alter its limits through explicit legislation").

Thlopthlocco, a nonmember of the MCN, may properly challenge in federal court the assertion of jurisdiction over its sovereign internal governance procedures by MCN:

> We begin by noting that whether a tribal court has adjudicative authority over nonmembers is a federal question. *See Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 15 (1987); *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 852–853 (1985). If the tribal court is found to lack such jurisdiction, any judgment as to the nonmember is necessarily null and void.

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[20] In light of *Montana*, 450 U.S. 544 (1981) Stevens could have also said "non-member Indian."

Plains Commerce Bank v. Long Family Land and Cattle Co., 554 U.S. 316, 324 (2008).

The exercise of jurisdiction over Thlopthlocco, a nonmember, is not necessary to protect MCN tribal self-government or control internal relations and cannot be exercised without Congressional approval. This is the "*Montana Rule*." *See Montana v. United States*, 450 U.S. at 564-65:

> "The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe ....
>
> These limitations rest on the fact that the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently to determine their external relations. But the powers of self-government, including the power to prescribe and enforce internal criminal laws, are of a different type. They involve only the relations among members of a tribe. Thus, they are not such powers as would necessarily be lost by virtue of a tribe's dependent status." *Ibid*.
>
> Thus, in addition to the power to punish tribal offenders, the Indian tribes retain their inherent power to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members. . . . But exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973); *Williams v. Lee*, 358 U.S. 217, 219-220 (1959); *United States v. Kagama*, 118 U.S. 375, 381-382 (1886); see *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 171 (1973). (emphasis added)

By parallel logic, if the MCN is permitted to exercise jurisdiction over Thlopthlocco, it interferes with the inherent power of Thlopthlocco to protect its own tribal self-government or to control its internal relations, which is exactly what the MCN has done. It is illusory to contend that a Thlopthlocco election dispute is internal to the MCN or affects MCN self-government or its internal relations.

There is a further illogic to the district court's decision in finding no sovereign immunity when an Indian sues a tribe in the tribal court of another Tribe. Under the district court's theory, the defendant tribe would have no recourse to federal court to test the host tribal court's jurisdiction even after exhaustion. Moreover, the host tribal court could apply the laws of the host tribe instead of the law of the defendant tribe seriously injuring the defendant tribe's self-government and internal relations.

The Supreme Court has lowered the distinction between the terms non-Indian and non-member. In both *Strate v. A-1 Contractors*, 520 U.S. 438 (1997) and *Nevada v. Hicks*, 533 U.S. 353 (2001), the Court consistently used the term "non-member" not only on the facts of those cases, but also in reference to *Montana*. See *Strate*, 520 U.S. at 445 ("*Montana v. United States*, decided three years later, is the pathmarking case concerning tribal civil authority over nonmembers.")(emphasis added) This terminology is more specific and consistent with the Court's essential holdings in *Montana* that tribal sovereignty involves only the protection of tribal self-government and internal relations.

Thus, it would be fair to say that "external relations" of a Tribe (implicating nonmembers) would apply by analogy to sovereigns such as Thlopthlocco so that neither Thlopthlocco nor other nonmembers would be subject to civil jurisdiction in a Tribal court except under *Montana*.[21]

[21] The district court's citation to *Kaw Nation v. Lujan*, 378 F.3d 1139, 1143 (10th Cir. 2004) involving the authority of appointment of a tribal judge is not applicable. (App. 1613-14). There are two separate sovereigns involved in this litigation as opposed to only one sovereign trying to resolve an intra-tribal dispute as in *Kaw*.

This limitation is clearly recognized in *Duro v. Reina*, 495 U.S. 676 (1990) which held a Tribe could not criminally prosecute and punish a non-member Indian. Although the *Duro* holding,[22] as to criminal jurisdiction only, was reversed by Congressional enactment, the rationale for the similar treatment of a nonmember Indian (or by analogy, a separate sovereign) and non-Indian in a civil context survives.

Thus the district erred in failing to find a federal question. Both tribal court jurisdiction over a nonmember and tribal sovereign immunity are federal questions.

iii. It is Questionable Under MCN Law that MCN Courts have Jurisdiction to Determine Questions of Sovereignty of Another Tribe or the Extent of Its Tribal Court Jurisdiction.

By ignoring Thlopthlocco sovereignty claims, the MCN asserts that tribal law is supreme over federal common law which establishes Thlopthlocco's sovereignty and sovereign immunity, a Supremacy Clause violation. U.S. Const., Art. VI, Cl. 2.

It is arguable that under tribal law MCN courts are forbidden by the MCN National Council to even apply federal law unless it has been approved or consented by the National

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[22] *Duro* also recognized the terminology of "nonmember" equating "nonmember" with "non-Indian" suggesting they were similarly treated. See *Duro*, 495 U.S. at 696. ("It is a logical consequence of that decision that nonmembers, who share relevant jurisdictional characteristics of non-Indians, should share the same jurisdictional status").

Analysis of the internal process of Thlopthlocco, separate and isolated from the MCN, is not altered by *U.S. v. Lara*, 541 U.S. 193 (2004) which held that a tribe may criminally prosecute a non-member Indian based upon its inherent power as an Indian Tribe and not as part of "delegated federal authority." The Court recognized Congress' intention (see 25 U.S.C. §1301(2)) to reverse the *Duro* holding that such prosecution was not permissible. §1301(2) specifically limits its effect as to the inherent power of tribes "to exercise criminal jurisdiction over all Indians." The rationale of *Duro* remains otherwise applicable to the separate sovereignty of Thlopthlocco in the civil context.

Council or the law is expressly made applicable to Indian tribes by Federal statutes. MCNA, Title 27, §1-103(B) provides:

> The Muscogee (Creek) Nation Courts shall apply the Federal Indian Civil Rights Act, 25 U.S.C. §§ 1301 *et seq*. No other statutes and laws of the United States shall be applied by the Muscogee (Creek) Nation courts unless: (1) expressly made applicable by law of the Muscogee (Creek) Nation enacted by the National Council or (2) expressly made applicable by an agreement to which the Muscogee (Creek) Nation is a party and which has been approved by the National Council, or (3) expressly required to be applied by the Muscogee (Creek) Nation courts in specific circumstances by compact made between the Muscogee (Creek) Nation and the United States pursuant to the Indian Self-Determination and Education Assistance Act of 1978, as amended, with the approval of the National Council or (4) expressly made applicable to Indian tribes by duly enacted Federal statute. (emphasis added)

App. 495.

Thus, MCN courts are expressly directed to ignore federal common law, case law, and federal statutes that do not directly or specifically implicate either the MCN or Indian tribes. This also suggests that exhaustion of tribal remedies is not necessary because a MCN court is forbidden to rely upon federal common law of tribal sovereignty and jurisdiction. See Prop. 4, p. ?.

3. THIS CASE MAY BE MAINTAINED AS AN EX PARTE YOUNG ACTION AND THE MCN DEFENDANTS ARE NOT ENTITLE TO JUDICIAL IMMUNITY, NOR IS THE MCN AN INDISPENSABLE PARTY BECAUSE IT IS ALREADY JOINED TO THE ACTION.

A. STANDARD OF REVIEW

A district court's consideration of judicial immunity is reviewed de novo. *Crowe*, 640 F.3d at 1153 citing *Malik v. Arapahoe Cnty. Dept. of Soc. Servs.*, 191 F.3d 1306, 1313 (10th Cir. 1999).

A district court's determination that a party is entitled to sovereign immunity is a question of law that this court reviews de novo. *See Nanomantube v. Kickapoo Tribe in Kan.*, 631 F.3d 1150, 1151 (10th Cir. 2011).

The standard of review for joinder of parties is stated in Proposition 4(a). *See* p. 45.

B. DISCUSSION

Both the Thlopthlocco officials and the MCN judicial officials were sued in their official capacity. This is tantamount to a suit against the respective Indian tribe.

Thlopthlocco official capacity officials maintain sovereign immunity because it is a nonmember of the MCN and the questions raised in the MCN tribal court involve Thlopthlocco sovereign governmental functions, none of which affect MCN tribal self-government or internal relations.

However, MCN judicial officers do not have sovereign or judicial immunity when they act in excess of their tribal court jurisdiction.

I. Thlopthlocco Defendants are Sued For Their Official Actions Only. *Ex Parte Young* Does not Apply Because There is No Ongoing Violation of Federal Law. MCN Courts Have No Jurisdiction to Enforce Thlopthlocco Law Because Enforcement of Thlopthlocco Law is Not Related to Protection of MCN Tribal Self-Government or Internal Relations. Instead MCN Exercise of Jurisdiction Interferes with Thlopthlocco Self-Government and Internal Relations.

The Anderson parties in both Anderson I and Anderson II brought actions in the MCN courts under the Thlopthlocco Constitution alleging, by analogy, claims similar to *Ex Parte Young*. They allege only actions taken by the Election and Business Committee

members in their official capacities involving Thlopthlocco elections and they seek only injunctive and declaratory relief.[23]

Suing official capacity defendants for their official actions under *Ex Parte Young* 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) The Anderson parties cannot allege a direct violation of *Ex Parte Young* because the dispute was internal to Thlopthlocco and does not involve a violation of Federal law. *Kaw Nation ex rel. McCauley v. Lujan*, 378 F.3d 1139, 1143 (10th Cir. 2004).

If we were to apply *Ex parte Young* by analogy to the MCN courts, the analogy still fails because the Thlopthlocco officials are not acting ultra vires to the MCN Constitution. (App. 1196). Nor do the MCN courts have authority under the Thlopthlocco Constitution to enforce Thlopthlocco law because there is nothing about a violation of Thlopthlocco law that impinges the inherent sovereign powers of the MCN necessary to protect tribal self-government or to control internal relations. *Nevada v. Hicks*, 533 U.S. at 360.

Nor is it relevant that Thlopthlocco does not have a judiciary. While it has chosen to use the MCN judicial forum in the past,[24] resolution of internal tribal matters do not always

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[23] In either case the Anderson parties make no factual allegations against the individual Thlopthlocco defendants other than performance of their official duties and therefore are official capacity actions only. That the Anderson parties may allege that those actions are in excess of Thlopthlocco law raises only the question of the ability of the MCN to enforce Thlopthlocco law against an MCN nonmember (Thlopthlocco).

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

involve resolution in a strict judicial setting. There is no separation of powers in the Thlopthlocco Constitution. Separation of powers is not 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.[25] (App. 45).

In *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, Fn 22 (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, like Thlopthlocco, combined judicial and legislative power. The Court noted that "judicial

[25] That Thlopthlocco has no judiciary and leaves decisions (including appeals from the Election Committee) to the Business Committee is not inconsistent with Indian traditions or federal law. For example, the Creek Nation passed laws after adoption of its 1867 Constitution making members of the Creek National Council "judges" of the Election without any reference to the Creek Courts. (App. 965-66).

Nor is it 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. With them, "to indict" is to file a written accusation charging a person with a crime.

authority in Santa Clara Pueblo is vested in its tribal council." *Id*., Fn 22.[26] 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. Although Anderson I is arguably moot, resolution of Anderson II lies unresolved with the Thlopthlocco Business Committee.

ii. This Action Can Be Brought Under *Ex Parte Young* Against the MCN Defendants Sued in their Official Capacity on a Question of Federal Law as to Their Jurisdiction over a Nonmember. The MCN is Already Joined to this Action Through the Official Capacity Defendants.

Thlopthlocco brought claims against the MCN Defendants in their official capacity pursuant to *Ex Parte Young*, 209 U.S. 123 (1908).[27] (App. 886, 900-03, ¶49). Despite the district court's concern that "without any injunctive relief against the entire MCN judiciary" the case could be refiled (App. 1621-22), Thlopthlocco identified additional members of the MCN Judiciary who, although not named as parties, would be subject to the Court's injunction pursuant to Fed.R.Civ.P. 65(d). (App. 901, ¶¶43, 44, 45).

As noted previously, Indian tribal officials may be sued under *Ex Parte Young* to address questions of tribal court jurisdiction. *See Crowe*, 640 F.3 at 1154-55:

> We see no reason to restrict tribal sovereign immunity from the reaches of the *Ex parte Young* doctrine, particularly when Congress retains plenary authority to do so, . . . In prior cases, we have assumed that federal common law was

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[26] 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.

[27] The *Ex Parte Young* inquiry generally does not include an examination of the merits of the claim. *See Verizon Md., Inc. v. Pub. Serv. Comm'n*, 535 U.S. 635, 646 (2002).

> sufficient to sustain the application of the doctrine. . . . Today we expressly so hold.

Despite the district court's conclusion that "Defendants enjoy sovereign immunity as judicial officers of the MCN" (App. 1624), *Crowe* holds that sovereign immunity is abrogated by the application of *Ex Parte Young*. *See Crowe*, 640 F.3rd at 1155-56. ("Under *Ex parte Young*, certain official-capacity suits are excepted from the doctrine of sovereign immunity as a way to vindicate federal rights and, in the process, ensure the supremacy of federal law.").

Likewise, judicial immunity is not applicable:

> Judicial immunity applies only to personal capacity claims. *See Kentucky v. Graham*, 473 U.S. 159, 166–67 (1985) ("When it comes to defenses of liability, an official in a personal-capacity action may ... be able to assert personal immunity defenses.... In an official-capacity action, these defenses are unavailable.").

Crowe, 640 F.3d at 1156.[28]

Finally, although the district court characterized the MCN as an indispensable party (App. 1620-21, 1625), its interest is represented by the official capacity joinder of its judicial officials because as *Hafer* suggests, suits against official capacity are tantamount to a suit against the governmental entity. Even so, in equity and good conscious, the interest of the MCN are fairly represented and to require the joinder of the MCN as indispensable would defeat the very purpose of *Ex Parte Young*. *See Davis v. U.S.*, 192 F.3d 951, 960-61 (10th

[28] Although Thlopthlocco did not identify individual or official capacity of the Defendants in the style of its Second Amended Complaint (app. 886), it does identify official capacity in the allegations against Defendants. (App. 900-03). Thlopthlocco makes no claim for individual liability.

Cir. 1999) (Court must determines that in equity and good conscious a suit can proceed in the absence of a necessary party.).

4. THE ANDERSON GROUP IS NOT A NECESSARY PARTY, BUT CAN BE JOINED TO THE LITIGATION.

A. STANDARD OF REVIEW

> Dismissal under Fed.R.Civ.P. 12(b)(7) for failure to join a party is reviewed for an abuse of discretion. *Citizen Band Potawatomi Indian Tribe of Okla. v. Collier*, 17 F.3d 1292, 1293 (10th Cir. 1994). A district court's decision that a party is a required party under Rule 19(a) or an indispensable party under Rule 19(b) is reviewed for an abuse of discretion. *Sac & Fox Nation of Mo. v. Norton*, 240 F.3d 1250, 1258 (10th Cir.2001). "The court abuses its discretion in making an indispensability determination when it fails to consider a relevant factor, relies on an improper factor, or relies on grounds that do not reasonably support its conclusion." *Davis ex rel. Davis v. United States*, 343 F.3d 1282, 1289 (10th Cir. 2003). Legal conclusions underlying the district court's Rule 19 determinations are reviewed de novo. *Id*.

Northern Arapaho Tribe v. Harnsberger, 697 F.3d 1272, 1277 (10th Cir. 2012).

B. DISCUSSION

The district court concluded that the Anderson group are "necessary parties" because they have an interest in the litigation under Fed.R.Civ.P. 19(a)(1)(B).

Thlopthlocco respectfully contends they need not be joined. Whether necessary or indispensable, Fed.R.Civ.P. 19(a)(1)(A) requires joinder of additional parties only when that joinder is needed to accord complete relief among the existing parties. (". . . in that person's absence, the court cannot accord complete relief among the existing parties").

Complete relief can be accorded among the existing parties to the action because the district court can determine the sovereign immunity claims of Thlopthlocco and tribal court jurisdiction over a nontribal member without involving the Anderson parties. Even Anderson

initially claimed the MCN Courts had no jurisdiction to adjudicate Thlopthlocco tribal matters based on sovereign immunity. (App. 407, Fn 1). The judicial officer defendants will defend the exercise of their jurisdiction. The Anderson parties add nothing to the litigation and could lead the Court into the morass of the Thlopthlocco intra-tribal dispute.

However, if it is determined that the Anderson parties are necessary parties, Rule 19(a)(2) requires that if ". . . a person has not been joined as required, the court must order that person be made a party." The district court did not enter such an order of joinder and dismissed for other reasons.

5. EXHAUSTION OF TRIBAL REMEDIES ON THE ISSUE OF MCN JURISDICTION OVER THLOPTHLOCCO IS COMPLETE, ARE PATENTLY VIOLATIVE OF EXPRESS JURISDICTIONAL PROHIBITIONS, AND ARE FUTILE BECAUSE THEY COULD RESULT IN A JUDGMENT WHICH WOULD MAKE IT IMPOSSIBLE TO CHALLENGE THE TRIBAL COURT'S JURISDICTION ON APPEAL IN TRIBAL OR FEDERAL COURT.

A. STANDARD OF REVIEW

This Court reviews a ". . . dismissal for failure to exhaust only for an abuse of discretion. *Texaco, Inc. v. Zah*, 5 F.3d 1374, 1376 (10th Cir. 1993). The proper scope of the tribal exhaustion rule, however, is a matter of law which is reviewed de novo. *Id*. Thus, if the district court exceeded the scope of the rule, the district court necessarily abused its discretion in dismissing for failure to exhaust." *Enlow v. Moore*, 134 F.3d 993, 994 (10th Cir. 1998).

B. DISCUSSION

The district court determined Thlopthlocco failed to exhaust all tribal remedies. (App. 1622-23). Thlopthlocco originally submitted, then withdrew a limited waiver of immunity. The district court determined the appeals in Anderson I and Anderson II were unsuccessful in resolving MCN subject matter jurisdiction and the question could be reached after a final judgment or order.

Thlopthlocco sought adjudications from the MCN Supreme Court on the essential questions of MCN subject matter jurisdiction only to be met by an eternity of deliberation extending up to 2 ½ years for the Court to answer a question of jurisdiction. (App. 953, 957).

In two appeals (No. 2007-01, No. 2009-07), the MCN Supreme Court asserted that it had jurisdiction over Thlopthlocco without consideration of a waiver of sovereign immunity. (App. 63-63, 958). In other words, it did not matter whether Thlopthlocco gave or withdrew the waiver of sovereign immunity, the MCN courts exercised jurisdiction as a affirmative exercise, not by grant of Thlopthlocco's consent.

In the second appeal the MCN Supreme Court had Thlopthlocco's withdrawal of waiver of sovereign immunity and an extensive historical record of Thlopthlocco's federal recognition. There really was no additional factual record to be developed before a clear picture of tribal jurisdiction emerges.

Instead the MCN Supreme Court asserted that MCN law was supreme over the federal law which protects Thlopthlocco sovereignty. (App. 065, p. 3-4).

But the exercise of jurisdiction over Thlopthlocco will lead the MCN Courts into an area outside its own "inherent sovereign powers" and into the "activities of a nonmember of the tribe." *Montana v. United States*, 450 U.S. 544, 564–65 (1981) (". . . the inherent

sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.").

Besides the harm done to Thlopthlocco's self-governing rights by MCN interference, continued litigation in the MCN district court could make appellate review or review by a federal court impossible. A decision in the MCN district court in favor of the Anderson defendants might be impossible to unwind in a subsequent appeal. Anderson and his group would have no incentive or legal logic to appeal the exercise of jurisdiction by MCN Courts that put them in office. The harm to Thlopthlocco over the permanent loss of its sovereignty or even the ability to litigate its sovereignty would irreparable. A return to the MCN District Court could ring a bell that could not be unrung.[29] Thus the primacy of determining jurisdiction is intertwined with the merits of the case. Despite what the MCN Court has said, it was divested of authority to adjudicate ". . . the relations between an Indian tribe and nonmembers." *Montana*, *id.*

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[29] In the same manner the Tenth Circuit held that an injunction was necessary in *Crowe v. Stidham* because:

> Without an injunction, the Muscogee District Court will undoubtedly order Crowe to return its attorneys fees to the Thlopthlocco Treasury. Should the Anderson defendants prevail in the underlying tribal litigation, such that they are deemed the rightful governing body of the Thlopthlocco, Crowe will have no realistic way to recoup its fees. It is highly unlikely that a Thlopthlocco government, as reconstituted by the Anderson defendants, would voluntarily return funds to Crowe. And Crowe would have no legal recourse because the newly constituted Thlopthlocco would be immune from suit.

Crowe, 640 F.3d at 1157-58.

Respectfully, the MCN Defendants would also have an incentive for the same result if it cements MCN jurisdiction over Thlopthlocco and it would apply a similar ruling to the two other Tribal Towns.

"Exhaustion is not required if it is 'clear that the tribal court lacks jurisdiction,' such that 'the exhaustion requirement would serve no purpose other than delay.' *Burrell v. Armijo*, 456 F.3d 1159, 1168 (10th Cir. 2006) (internal quotation marks omitted) (quoting *Nevada v. Hicks*, 533 U.S. 353, 369 (2001))" *Crowe*, *id*.

The existence of sovereign immunity is a legitimate reason to excuse exhaustion requirements because "the tribal court lacks jurisdiction." *United States v. Yakima Tribal Court*, 806 F.2d 853, 861 (9th Cir. 1986) (concluding that "exhaustion was pointless because tribal court jurisdiction clearly was foreclosed by the sovereign immunity of the United States."). It is equally clear the MCN courts are not entitled in the absence of consent to adjudicate an internal matter of governance of Thlopthlocco.

Additionally, Thlopthlocco contends that exhaustion is unnecessary in light of the fact that MCN courts by statute are forbidden from applying federal common law to its decisions. *See* p. 38, MCN Title 27, §1-103(B) (App. 495). If so, it would be futile to exhaust remedies in a court that has no ability to apply federal common law.

6. THE DISTRICT COURT ABUSED ITS DISCRETION IN ITS FAILURE TO GRANT A PRELIMINARY INJUNCTION.

A. STANDARD OF REVIEW.

On an appeal of a preliminary injunction, the court of appeals reviews the district court's legal rulings *de novo* and its "ultimate decision to issue the preliminary injunction

for abuse of discretion." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 428 (2006); *see also, e.g., Attorney General of Oklahoma v. Tyson Foods, Inc.*, 565 F.3d 769, 776 (10th Cir. 2009).

B. DISCUSSION

A preliminary injunction is appropriate where (1) there exists a substantial likelihood of success on the merits; (2) irreparable injury will occur 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. *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)).

"We do not require a moving party to prove his case in full at a preliminary-injunction hearing." *Attorney General of Oklahoma v. Tyson Foods, Inc.*, 565 F.3d at 776 citing *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981) (internal quotes omitted). In making evidentiary rulings, this informality allows a significant relaxation of the Federal Rules of Evidence. See *Heideman v. South Salt Lake City*, 438 F3d 1182, 1188 (10th Cir. 2003) ("The Federal Rules of Evidence do not apply to preliminary injunction hearings.").

The district court should have granted Thlopthlocco's preliminary injunction.

I. Thlopthlocco's Claim of Sovereign Immunity Demonstrates a Substantial Likelihood of Success on the Merits.

Thlopthlocco demonstrates a substantial likelihood of success on the merits regarding its claim of sovereign immunity. See p. 29.

ii. Thlopthlocco Suffers Irreparable Harm By Disregard of its Sovereign Immunity Plus the Likelihood of an Irreversible Loss if Proceedings in the MCN Courts Result in Seating the Anderson Parties in a Government That Likely Would Abandon Further Challenge to MCN Exercise of Jurisdiction.

If forced to litigate in the MCN court to completion, Thlopthlocco faces the risk that any decision which places the Anderson faction in control of the Town would most likely result in an irreversible decision on the part of the faction to abandon further appeal of Thlopthlocco sovereignty which would be then be irretrievably lost. See pp. 48 .

iii. The Balance of Harms Weighs in Favor of Thlopthlocco.

Not only does Thlopthlocco suffer the possibility of irreparable harm if forced to litigate to completion in the MCN district court, sovereign immunity is also immunity from discovery and trial whereas the MCN suffers little adverse effect from decisions other than a delay in tribal court proceedings. *See Sydnes v. U.S.*, 523 F.3d 1179, 1186 (10th Cir. 2008) ("As we have said in the context of state sovereign immunity, 'immunity entitles a [sovereign] not only to protection from liability, but also from suit, including the burden of discovery.' ")

iv. A Preliminary Injunction Is Not Adverse to the Public Interest.

A preliminary injunction would not be adverse to the public interest. Quite the contrary, "'[i]t is always in the public interest to prevent the violation of a party's constitutional rights.'" *G & V Lounge, Inc. v. Mich. Liquor Control Comm'n,* 23 F.3d 1071,

1079 (6th Cir. 1994). Likewise, preservation of Thlopthlocco's sovereign immunity preserves Thlopthlocco's self-government and control of internal relations.

IX. CONCLUSION

The district court erred in its determination this was an intra-tribal dispute and the conclusion no federal question existed. The limits of a tribal court's jurisdiction over a nonmember is a federal question.

An Indian tribe's sovereign immunity is co-extensive to that of the United States and because the United States cannot be sued in the MCN courts, neither can Thlopthlocco.

This action can be maintained under *Ex Parte Young* and because the MCN judicial officers are named in their official capacity, the MCN is a party to the case. Thlopthlocco officials are also sued for their official actions.

Thlopthlocco has sufficiently exhausted tribal remedies because the MCN appellate court has twice been presented with the question of its jurisdiction over Thlopthlocco and continues to assert jurisdiction. Alternatively, exhaustion is futile because of the possibility of a change of Thlopthlocco government which would likely abandon Thlopthlocco's sovereignty claim and create irreversible harm to Thlopthlocco.

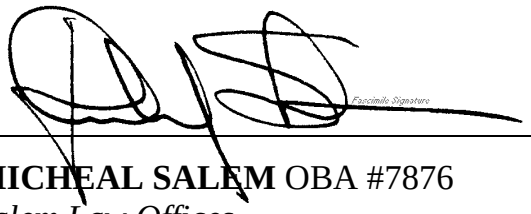
A preliminary injunction should issue enjoining the exercise of jurisdiction over Thlopthlocco.

X. STATEMENT REGARDING ORAL ARGUMENT

In accordance with **Tenth Circuit Rule 28.2(C)(4)**, Plaintiffs respectfully suggests that oral argument would be helpful to address important questions of sovereign immunity and the relationship of Thlopthlocco to the MCN and is therefore requested. Thlopthlocco, as a separate federally recognized Tribe is entitled to sovereign immunity co-extensive with that of the United States. It is also important to establish a governmental identity of Thlopthlocco separate from that of the MCN in that the Creek Tribal towns were the "original governing units" of the Creek Confederacy. The forced confederation of the Creek tribal towns after the Civil War did not constitute creation of a single Muscogee (Creek) Tribe. Thlopthlocco's separate federal recognition was based upon its individual identity as an Indian band, entitled to separate recognition as a political group.

Respectfully submitted,

SIGNATURE OF COUNSEL



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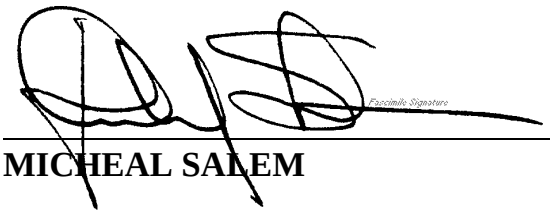
THLOPTHLOCCO TRIBAL TOWN
A Federally Recognized Indian Tribe

CERTIFICATE OF COMPLIANCE WITH FED.RUL.APP.PRO. 32(a)(7)

As required by **Fed.Rul.App.Pro. 32(a)(7)(B)** this is to certify that this Brief uses proportionately spaced fonts and contains **13,842** words.

> I relied on a wordprocessor to obtain the count (WordPerfect X4). The count was run from page 1 through page 53 inclusive, and exclusive of the style of the case and Title on page 1, the statement regarding oral argument, and the closing signature of counsel.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.



MICHEAL SALEM

CERTIFICATE OF SERVICE
(AND CERTIFICATION OF DIGITAL SUBMISSION)

This is to certify that a true and correct copy of the following instruments:

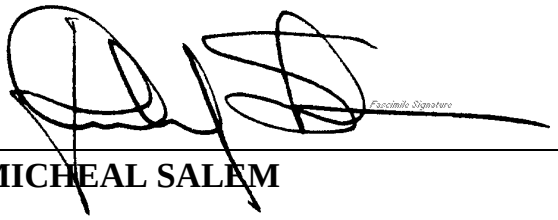
Opening Brief of Plaintiff-Appellant Thlopthlocco Tribal Town,
A Federally Recognized Indian Tribe (with digital attachments)

to which this certification is attached was electronically transmitted and mailed or served on:

Galen L. Brittingham
Jennifer Ary-Hogue
Atkinson, Haskins, Nellis, Brittingham, Gladd & Carwile
1500 Parke Centre
525 South Main
Tulsa, Oklahoma 74103

and was transmitted to the Court of Appeals by electronic means as required by the Rules and Tenth Circuit General Order on Electronic Submission of Documents (March 18, 2009), and further: (1) all required privacy redactions, if any, have been made in accordance Fed.R.App.P. 25(a)(5); (2) with the exception of any redactions, every document submitted in digital form or scanned PDF format is an exact copy of the written document filed with the Clerk; and (3) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program (AVG Professional Edition 2012.0.2240 with Virus Database version 2641/5696), and, according to the program, are free from viruses.

Dated the 22nd day of MARCH, 2013.



MICHEAL SALEM

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INDEX OF ATTACHMENTS TO PLAINTIFF-APPELLANT'S OPENING BRIEF PURSUANT TO TENTH CIR. RUL. 28.2(A)(1)

Attachments to this **Opening Brief of Plaintiff-Appellant** are listed below. "App." refers to Plaintiff-Appellant's Appendix. "Doc." refers to the Docket Number as identified in the District Court. Each attachment will include the same Bates pagination as in the Appendix. Attachments ("Att. (number)") are as follows:

Attachment 1: Order denying Plaintiff's Motion for Preliminary Injunction and Dismissing Case filed 01/03/13. (App. 1608-25, Doc. 0064).

Attachment 2: Judgment for Defendants, and against the Plaintiff and dismissing case filed 01/03/2013. (App. 1626, Doc. 065).

Attachment 3: Constitution and By-Laws of Thlopthlocco Tribal Town, Oklahoma. (App. 042-48, Doc 002-02).

Attachment 4: Constitution of the Muscogee (Creek) Nation. (App. 1196-1211, Doc. 047-18).

Attachment 5: Answer to Complaint in Crowe & Dunlevy, P.C. v. Stidham, No. 09-CV-095-TCK-PJC, Filed May 8, 2009 (Doc. 036).

Attachment 6: Solicitor's Opinion, U.S. Department of the Interior, dated July 15, 1937. (App. 049-54)("Kirgis Memo").

Attachment 7: Thlopthlocco Tribal Town Business Committee Resolution No. 2007-21, dated June 7, 2007. (App. 055-56, Doc. 02-04).

Attachment 8: Thlopthlocco Tribal Town Business Committee Resolution No. 2009-07, dated February 19, 2009. (App. 072-73, Doc. 02-09)

Attachment 9: Thlopthlocco Tribal Town Business Committee Resolution No. 2007-35, dated July 30, 2007. (App. 066-67, Doc. 02-07).

Attachment 10: Order and Opinion, Thlopthlocco Tribal Town v. Honorable Patrick Moore, and Nathan Anderson, et al., Supreme Court No. 2007-01 (Dist. Court Case No. CV-2007-39), filed October 26, 2007. (App. 061-65).