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,
THE HONORABLE JAMES PAYNE, UNITED STATES DISTRICT JUDGE
District Court Case No. 09-CV-527-JHP-FHM

ANSWER BRIEF OF DEFENDANTS-APPELLEES

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June 7, 2013

Oral Argument Requested

CORPORATE DISCLOSURE STATEMENT

Each Defendant-Appellee is an individual judicial officer of the Muscogee (Creek) Nation, a federally recognized Indian Tribe having and exercising the powers of self-government. They are each sued in their official capacities. The Muscogee (Creek) Nation constitutes a tribal governmental entity having a government-to-government relationship with the United States.

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STATEMENT OF ALL PRIOR OR RELATED APPEALS [1]

There are no prior or related appeals of this matter between the parties. The District Court decision, *Thlopthlocco Tribal Town v. Stidham*, 2013 WL 65234 (N.D.Okla. Jan. 03, 2013) (No. 09-CV-527-JHP-FHM) is unreported.

Appellee Stidham was the subject of a prior appeal arising out of the underlying cases in the Courts of the Muscogee (Creek) Nation instituted by an entity not a part of this appeal. See, *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140 (10th Cir., 2011). The District Court decision in that appeal is found at *Crowe & Dunlevy, P.C. v. Stidham*, 609 F.Supp.2d 1211 (N.D.Okla., 2009).

[1] See 10th Cir. Rule 28.2(C)(1).

GLOSSARY [2]

The following defined acronyms or abbreviations have the meanings set out besides the particular term for purposes of this brief unless otherwise specifically stated or the context otherwise requires. While Appellees assume that the Court is familiar with some of these designations, they will be repeated here for purposes of clarity, convenience, and to assure compliance with the Rule.

Acronym or Abbreviation	Meaning
2nd Am. Compl.	Plaintiff-Appellant TTT's Second Amended Complaint which appears to comprise volumes five and six of the Appendix including its Exhibits
Anderson Group	Mekko Anderson and his political supporters some of whom are parties to the various litigation concerning their dispute with the BC Group
Anderson I	The lawsuit filed by the BC Group in the name of TTT against the Anderson Group in the Courts of the MCN, MCN District Court Case No. CV-2007-39
Anderson II	The lawsuit filed by the certain members of the Anderson Group against certain members of the BC Group as individuals in the Courts of the MCN, MCN District Court Case No. CV-2011-08
App. V-___, pp.___	The reference is to the Appendix to the Opening Brief of TTT, Volume-number, "p" (page) or "pp" (pages)-number. Thus, App. V-1, pp. 10-41 is a reference to Volume One, Pages 10 through 41 inclusive of TTT's Appendix to its Opening Brief

[2] See 10th Cir. Rule 28.2(C)(6)

Acronym or Abbreviation	Meaning
BC Group	The group holding office as members of the TTT Business Committee prior to June 7, 2007 (and where appropriate their political supporters) who alleged that the Anderson Group had unlawfully removed and "ousted" them from their offices and who caused the various proceedings in MCN and Federal Court to be filed in the name of TTT
BIA	Bureau of Indian Affairs, U.S. Department of the Interior
Business Committee	The governing body of the Thlopthlocco Tribal Town as set out in its Constitution (App. V-1, pp. 042-48)
MCN	Muscogee (Creek) Nation, a federally recognized Indian Tribe
Mekko	The chief executive officer of TTT pursuant to its Constitution.
Secretary	The Secretary of the Interior unless otherwise specified
Thlopthlocco	Thlopthlocco Tribal Town (Plaintiff-Appellant), a federally recognized Indian Tribe
TTT	Thlopthlocco Tribal Town (Plaintiff-Appellant), a federally recognized Indian Tribe

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Defendants-Appellees.

ANSWER BRIEF OF DEFENDANTS-APPELLEES

INTRODUCTION

This case is here after a series of disputes between two political factions of the TTT arising under the Constitution and laws of the TTT concerning which group is the legitimate leadership. As noted in the Statement of Facts which follows, there are two pending actions in the Courts of the MCN regarding these matters. Anderson I was filed by the BC Group in the name of the TTT, and Anderson II was filed by certain members of the Anderson Group against individual Indians of

the BC Group. Although the BC Group voluntarily invoked the jurisdiction of the MCN Courts in TTT's name, they now seek to avoid the ongoing decisional process by seeking protection from the Courts of the United States.

It should also be noted at this point that, as these tribal disputes are still pending in the Courts of the MCN, the named Defendant-Appellees take no position on the merits of those ongoing disputes beyond the positions stated in the official decisions and opinions of the relevant judicial officers of the MCN. The Defendant-Appellees have no interest in the underlying disputes as the real parties in interest thereto are the two factions and their respective leadership. The Judicial Officers of the MCN named in this federal action as Defendant-Appellees appear solely to assert their authority to adjudicate the controversies the real parties in interest have submitted to them for decision as authorized by the relevant laws of the MCN and recognized by the Government of the United States.

JURISDICTIONAL STATEMENT

Defendants-Appellees are not dissatisfied with the jurisdiction statement of the TTT, Appellant, but would point out that 28 U.S.C. § 1362, like 28 U.S.C. § 1131, requires that an action predicated upon that statute be one arising under the Constitution, laws, or treaties of the United States (a federal question).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Defendants-Appellants assert that the following are the true issues presented by this appeal:

1. Whether a Federal Question Exists pursuant to 28 U.S.C. §§1331 or 1362
2. Whether Defendants-Appellants Are Entitled to Sovereign Immunity
3. Whether Ex Parte Young Applies to This Action
4. Whether Thlopthlocco has failed to join necessary, indispensable parties
5. Whether Thlopthlocco has failed to Exhaust Tribal Remedies Available to It

STATEMENT OF THE CASE

Plaintiff-Appellant Thlopthlocco Tribal Town filed this action in the United States District Court for the Northern District of Oklahoma on August 18, 2009 (App. V-1, pp. 10-41) complaining that the Courts of the MCN were adjudicating TTT's claims for affirmative relief and the responses thereto in the MCN Courts. The individual defendants against whom TTT filed its action, were not made parties to this federal litigation in the Court below or on this appeal. On September 05, 2011, TTT filed its First Amended Complaint (App. V-4, pp. 836-874), followed by its Second Amended Complaint on May 22, 2012 (App. V-5, pp. 886 – App. V-6, pp. 1211) in the United States District Court for the Northern District of Oklahoma. The Defendant-Appellee Judicial Officers of the MCN's

Judicial Branch moved to dismiss, (App. V-2, pp. 222-442), and to dismiss the Second Amended Complaint on June 18, 2012. (App. V-7, pp. 1247-1436)

In an Opinion and Order entered January 3, 2013, The Honorable James H. Payne, United States District Judge, granted Appellee-Defendants' Motion to Dismiss (App. V-8, pp. 1608-1625) and entered Judgment in favor of Defendants and against Plaintiff. (App. V-8, p. 1626) TTT filed its Notice of Appeal on January 11, 2013. (App. V-8, pp. 1627-1628)

STATEMENT OF THE FACTS

This case arose when one group of Creek Indians became embroiled in a political dispute arising under the Constitution and laws of the TTT with another group of Creek Indians – each claiming to be the lawful Business Committee and political leadership of the TTT. (App. V-2, pp. 259-442) The allegations of the original verified complaint filed in the MCN District Court as Case No. CV-2007-39 were that Mekko Anderson and his political supporters (hereafter "Anderson Group") had unlawfully removed and "ousted" the lawful members of the Business Committee (hereafter the "BC Group") from their offices and unlawfully replaced them in violation of the TTT Constitution. *Id.* at pp. 261, 267-272.

TTT having no tribal court of its own, *Id.* at pp. 272-273, the BC Group caused suit to be filed in the name of the TTT as plaintiff against their individual political opponents, the Anderson Group, seeking affirmative relief in the District

Court of the Muscogee (Creek) Nation. *Id.* The defendants in that case filed counterclaims denominated as cross-claims. *Id.*, at 406-416.

Following allegations stating in part that the BC Group was unlawfully attempting to prevent some of their political opponents in the Anderson Group from running against them in the next election and from voting in that election, a related collateral action was filed by some of the Anderson Group against certain TTT officials as individual MCN/TTT joint citizens alleging violations of the Constitutions and laws of the TTT and MCN. (App. V-4, pp. 666-673)

Apparently finding themselves dissatisfied with the ongoing determinations of the MCN Courts as that litigation has unfolded, the BC Group, in the name of the TTT, now seek to obtain the protection of the federal courts from the consequences of the ongoing adjudication of their own lawsuit in the forum of their own choosing. (App. V-1, pp. 10-136) The United States District Court for the Northern District of Oklahoma rightfully dismissed that claim (App. V-8, pp. 666-673) and this Court should affirm.

The Court below made the following findings of fact which are quoted here with added references to the Appendix, and which do not appear to be controverted in this appeal:

"1. Thlopthlocco is the plaintiff in the two lawsuits referenced in the Second Amended Complaint, which are pending before the Muscogee (Creek) Nation

("MCN") tribal courts. In the first lawsuit ("Anderson I"), Thlopthlocco seeks a declaratory judgment finding the members of the Thlopthlocco Business Committee ("the Business Committee"), which is Thlopthlocco's governing body, are the "lawful leaders of Thlopthlocco," and attempts to void certain actions by the individual defendants. (App. V-8, p. 1609)

"2. The Business Committee's purported authority to file Anderson I on behalf of Thlopthlocco emanates from Resolution No. 2007-21, passed on June 7, 2007. Thlopthlocco argues the Resolution only provides a "limited waiver of Thlopthlocco's sovereign immunity. Thlopthlocco does not address, however, the following relevant language contained in the Resolution:

> WHEREAS, although Thloptholocco Tribal Town is a separate federally recognized Indian tribe, it is also a traditional Muscogee (Creek) Nation [town) and subject to that nation's courts and jurisdiction; and
>
> WHEREAS, the Muscogee (Creek) Nation pursuant to a self-governance compact with the United States of America, received federal monies for judicial services based upon Thlopthlocco's population numbers for the benefit of Thlopthlocco people;

Thus, even before filing Anderson I, the Business Committee recognized the MCN courts (including the judicial officers in the instant case) had jurisdiction to hear Anderson I and, in fact, the United States Government, pursuant to its Indian "self-governance" policies, pays federal money to the MCN courts to hear cases such as Anderson I. (App. V-8, p. 1609)

"3. While Thlopthlocco is a separate federally recognized Indian tribe, many of its members are also enrolled members of the MCN. Further, all but one of the sitting members of the Business Committee are members of the MCN. Additionally, as admitted by Plaintiff, Thlopthlocco is organized as a "tribal town" of the MCN. (App. V-8, p. 1609)

"4. In the Anderson I Complaint, Thlopthlocco repeatedly asserted the MCN courts retained jurisdiction to adjudicate that litigation, a fact which Thlopthlocco now contests in the instant case. Specifically, the Anderson I Complaint stated the MCN District Court had jurisdiction over "the parties" because:

> (a) The MCN District Court "has authority to hear civil actions arising under the laws of the Muscogee (Creek) Nation";
>
> (b) Jurisdiction and venue lie in this [MCN District Court] under the Muscogee (Creek) Nation Title 27, § 1-102(B) and Thlopthlocco Tribal Town v. Martha "Tilly" Tomah, [et al.]";
>
> © [Sic] The Anderson defendants are all MCN citizens; and

(App. V-8, p. 1609)

> (d) Thlopthlocco has "not established a tribal court, is located within the historical boundaries of the Muscogee (Creek) Nation, is one of the original confederated tribal towns of the Muscogee (Creek) Nation, and receives federal funding for judicial services allocated for Thlopthlocco's behalf."

(App. V-8, p. 1610)

"5. Thlopthlocco initially requested, and obtained, a temporary restraining order from the MCN District Court on June 11, 2007, that gave Thlopthlocco the

relief it sought — an order preventing the Anderson I defendants from further interference in the operations of the Business Committee. (App. V-8, p. 1610)

"6. The MCN District Court later dismissed Anderson I based on a Motion to Dismiss filed by the Anderson I defendants, which also effectively dissolved the temporary restraining order. Thlopthlocco immediately appealed to the MCN Supreme Court through an Application for Writ of Mandamus which again requested a ruling that the MCN tribal courts had jurisdiction to hear Thlopthlocco's case. Specifically, the Application for Writ of Mandamus stated to the MCN Supreme Court:

> This Court has jurisdiction pursuant to (I) a special grant of limited jurisdiction to decide from Thlopthlocco Tribal Town v. Tomah, 8 Okla. Trib. 451 (musc. (Cr.) D. Ct. 2004); (ii) pursuant to the Muscogee (Creek) Nation Constitution, Art. VII, § I; and (iii) pursuant to law, Muscogee (Creek) Nation Code Ann. ("Mvskoke Code") Title 27, § 1-101. © [sic] and 1-1-2. Writs are authorized pursuant to Mvskoke Code, Title 27, App. 2, ("MCN RAP") Rule 2 and pursuant to the inherent powers of this Supreme Court.
>
> The Thlopthlocco is also a traditional Creek Tribal Town and enjoys special rights and privileges pursuant to the Muscogee (Creek) Nation Constitution and Art. II, § 5. **The District Court has a duty to exercise jurisdiction** pursuant to Mvkoke Code, Title 27, § 1-101 (D)(2) and (3); 1992 NCA 92-205, §2. Jurisdiction and venue was, and is appropriate in both the District and Supreme Court pursuant to Title 27, § 1-102(B). Upon the Thlopthlocco conferring appropriate jurisdiction by resolution to the Muscogee (Creek) Nation Court, jurisdiction properly lies. (emphasis added).

(App. V-8, p. 1610) (the emphasis here was added by the Honorable James Payne, United States District Judge, in his opinion from which these statements/findings of fact are quoted.)

"7. The MCN Supreme Court granted the requested writ of mandamus on June 26, 2007, holding in a minute order that "the Muscogee (Creek) Nation Courts do have jurisdiction over this matter." The MCN Supreme Court reiterated this position in a formal, written opinion issued on October 26, 2007. In this opinion, which again accepted Thlopthlocco's position that the MCN courts had jurisdiction to hear Anderson I, the Court articulated:

> The relationship between Thlopthlocco and the federal government is different from the relationship between Thlopthlocco and the Mucogee [sic] (Creek) Nation. Under federal law, Thlopthlocco is a Muscogee (Creek) Nation tribal town ... The Tribal Town Constitution [(App. V-8, p. 1610)] 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.
>
> The members of Thlopthlocco Tribal Town, as citizens of the Muscogee Nation, have requested relief in the courts of the Muscogee (Creek) Nation. Neither the Town nor its members will be abandoned by the Nation's Courts.

Even though Thlopthlocco requested this ruling, and the ruling served Thlopthlocco's purposes in obtaining an injunction against the Anderson I defendants, Thlopthlocco now asks this Court to overturn this ruling through

injunctive relief, including, ultimately, a permanent injunction to cease all efforts by the MCN to exercise jurisdiction over the Creek citizens who are parties in the underlying lawsuits. (App. V-8, p. 1611)

"8. Shortly before the MCN Supreme Court's above-quoted final decision issuing the writ, the Anderson I defendants filed "cross-claims" on October 11, 2007, that sought related injunctive and declaratory relief. The pleading alleged that most members of the Business Committee had committed various violations of the Thlopthlocco Constitution. As such, the Anderson I defendants' pleading demanded equitable relief, under tribal law, (1) voiding the adoption of certain individuals as members of Thlopthlocco, (2) declaring the Business Committee's alleged refusal to allow certain individuals to run for office and vote in a Thlopthlocco election as a violation of their rights and (3) enjoining the "cross-defendants" from interfering with their own attempts to lead Thlopthlocco. (App. V-8, p. 1611)

"9. Thlopthlocco admitted to this Court in the original Complaint that these "cross-claims" were brought individually against nine members of the Business Committee, who are jointly enrolled members of Thlopthlocco and the MCN. Accordingly, regardless of Thlopthlocco's immunity status as the plaintiff in Anderson I, it is for the MCN courts to determine, under tribal law, whether they

have jurisdiction as to the issues in these cross-claims, which involve the political affairs of fellow Creek Indians. (App. V-8, p. 1611)

"10. Thlopthlocco filed a "conditional" motion to dismiss in Anderson I on June 12, 2009, (App. V-8, p. 1611) which asked the MCN District Court to dismiss Anderson I in its entirety. Thlopthlocco asserted that the individual third-party defendants in Anderson I enjoyed sovereign immunity and could not be sued under *Ex Parte Young*, 209 U.S. 123 (1908) because the underlying issues in Anderson I did not involve federal law. The conditional motion concluded this argument by noting:

> Tribal officials are immunized from suits brought against them in their individual capacities when suit is brought against them because of their official capacities. This would be in circumstances where the suit is brought because of the powers the individual possesses in his or her official capacity enables that person to grant the relief requested on behalf of the tribe.

(App. V-8, p. 1612)

"11. The defendant, Judge Stidham, denied the conditional motion from the bench during a July 16, 2009 hearing. Judge Stidham noted Thlopthlocco did not attempt to withdraw its immunity waiver until after it received unfavorable rulings in the case, disagreed Thlopthlocco could withdraw that immunity waiver at will. In advance of this ruling, Thlopthlocco had already stated that "if this motion is denied in whole, or in part, Thlopthlocco respectfully reserves the right to

continue to assert the primary and defensive claims it asserted so as to preserve them for appellate review." (App. V-8, p. 1612)

"12. Judge Stidham's order denying Thlothlocco's [sic] dispositive motion was interlocutory, not final. Thlopthlocco never moved for, or otherwise formally requested, Judge Stidham certify his decision for interlocutory appeal to the MCN Supreme Court, which is required by that court's Rule of Appellate Procedure 3(A). (App. V-8, p. 1612)

"13. Thlopthlocco filed an interlocutory appeal to the MCN Supreme Court on August 3, 2009, based upon the same jurisdictional argument it now asserts in the instant case. After this federal case was filed, the MCN Supreme Court entered an order on August 27, 2009, allowing the parties in Anderson I to brief whether the MCN Supreme Court should hear the interlocutory appeal. That order stayed further proceedings in the MCN District Court until the interlocutory appeal was denied or resolved. (App. V-8, p. 1612)

"14. The MCN Supreme Court has since issued an opinion and order in this appeal on March 9, 2012. The court's order reiterates its earlier holding that Thlopthlocco is "analogous to a city/state or federal/state governmental relationship" under tribal law, and notes there is no "compelling reason" raised in Thlopthlocco's second appeal to overrule its earlier decision. The MCN Supreme Court held the issues in the (App. V-8, p. 1612) appeal were "unripe until

fact-finding is conducted and final judgment rendered" by the MCN trial court. (Id. at p.2.) Accordingly, the MCN Supreme Court held, as a matter of law, that the jurisdictional issues raised by Thlopthlocco were better raised in a final appeal after Thlopthlocco exhausted all remedies in the tribal district court. (App. V-8, p. 1613)

"15. In the Second Amended Complaint, Thlopthlocco now seeks to enjoin a second lawsuit filed by Mr. Anderson and other Thlopthlocco citizens against individual members of the Thlopthlocco Business Committee and the Thlopthlocco Election Committee — hereinafter called "Anderson II". Thlopthlocco is not a party to this lawsuit. (App. V-8, p. 1613)

"16. After the MCN District Court entered an order requiring the individual defendants in Anderson II to allow Mr. Anderson and Wesley Montemayor to be placed on the Thlopthlocco election ballot, the individual defendants filed an interlocutory appeal and sought writs from the MCN Supreme Court. The tribal jurisdictional issues raised by Thlopthlocco in this federal case were also raised in its writ brief to the MCN Supreme Court. (App. V-8, p. 1613)

"17. As Thlopthlocco concedes in its latest amended pleading, the MCN Supreme Court did not rule on the merits of its jurisdictional argument in this particular appeal in Anderson II. (2nd Am. Compl. ¶16.) Rather, the tribal appellate court simply held the writ application was procedurally inappropriate because an

interlocutory appeal was available to the individual defendants. The interlocutory appeal, however, had been untimely filed pursuant to MCN Supreme Court rules. In other words, the Thlopthlocco officials named as defendants still have not exhausted all available remedies in Anderson II, including the jurisdictional issues raised in this federal lawsuit. (App. V-8, p. 1613)

SUMMARY OF THE ARGUMENT

In this action the TTT attempts to prevent the ongoing adjudication of the action that it filed in the District Court of the MCN after counterclaims were filed against it in that litigation and those who it made defendants filed related claims against certain individuals who claimed political authority in TTT. All these claims are essentially in the nature of a political dispute between Creek Indians resulting in contests filed in the MCN Courts to try titles to those offices and to resolve an election and voting dispute.

None of these matters present of federal question, nor arise under any federal law. They instead present a classic intra-tribal dispute that is not within the federal judicial power nor the federal question jurisdiction of the court under either 28 U.S.C. §§ 1331 or 1362. By filing its claim in the MCN Courts, TTT waived its immunity for all counterclaims, setoff, or similar actions regarding the same transactions and controversies authorized by the MCN law and rules of

procedure, and therefore are not protected by the doctrine of sovereign immunity to the extent of their waiver.

On the other hand, the MCN and its judicial branch, as well as the Judges and Justices who have been made Defendant-Appellees herein have not waived their sovereign immunity nor have they filed any request for affirmative relief. As such, they are fully protected by the doctrine of sovereign immunity. Further, since there is no specific substantive allegation that they are acting outside the scope of their lawful authority, the *Ex Parte Young* doctrine is inapplicable.

Finally, as the rights of the MCN as well as the defendants in the action filed by TTT in the MCN District Court are implicated in this litigation such that the Court below cannot protect their claimed rights in their absence, this action must be dismissed pursuant to Rule 19. Also, TTT has failed to exhaust its tribal remedies as required by the relevant Supreme Court jurisprudence. Since it has not litigated the actions in which it is involved in the MCN District Courts to a conclusion, its attempt to do so here is premature and the Court below was right to dismiss it.

ARGUMENT

STANDARDS OF REVIEW

Questions of law respecting the Order granting the Motion to Dismiss under Rule 12(b)(1) are reviewed *de novo*, *Devon Energy Production Co., L.P. v. Mosaic*

Potash Carlsbad, Inc., 693 F.3d 1195 (10th Cir., 2012); *Kaw Nation ex rel. McCauley v. Lujan*, 378 F.3d 1139 (10 Cir., 2004), while challenges to the Court's Findings of Fact, if any, are reviewed for clear error. *Merrill Lynch Business Financial Services, Inc. v. Nudell*, 363 F.3d 1072, 1074 (10th Cir., 2004). Questions and Decisions committed to the sound discretion of the Court below are reviewed for abuse of discretion. *Sac and Fox Nation of Mo. v. Norton*, 240 F.3d 1250 1258 (10th Cir., 2001).

PROPOSITION I: THE COURT LACKS SUBJECT MATTER JURISDICTION AS NO FEDERAL QUESTION EXISTS.

Thlopthlocco predicates jurisdiction in this case upon 28 U.S.C. §§ 1331, 1362. (2nd Am. Compl. ¶¶ 23-24)(App. V-5, p. 894). 28 U.S.C. § 1331 provides:

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

and 28 U.S.C. § 1362 which provides that:

> "The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States."

These statutes require the existence of a federal question – that the action arise under federal law – before a federal court may exercise jurisdiction. *Mescalero Apache Tribe v. Martinez*, 519 F.2d 479, 480 (10th Cir., 1975)

However, not every civil claim which involves Indians or a federal issue arises under the Constitution, laws, or treaties of the United States so as to satisfy the requirements of U.S. Const. Art. III, Sec. 2, Cl. 1 defining the federal judicial power. *Hansen v. Harper Excavating, Inc.*, 641 F.3d 1216 (10th Cir., 2011). In order to determine whether a claim arises under federal law, the courts examine only the "well-pleaded" allegations of the complaint while avoiding potential defenses, *Devon Energy Production Co., L.P. v. Mosaic Potash Carlsbad, Inc.*, 693 F.3d 1195 (10th Cir., 2012), matter which clearly appears to be immaterial, allegations made solely for the purpose of obtaining jurisdiction, and claims which are insubstantial and frivolous. *Verizon Maryland, Inc. v. Public Service Com'n of Maryland*, 535 U.S. 635 (2002); *Groundhog v. Keeler*, 442 F.2d 674 (10th Cir., 1971). It must be clear on the face of the complaint that a federal question exists. *Devon Energy*, supra; *Hansen v. Harper Excavating, Inc.*, 641 F.3d 1216 (10th Cir., 2011). Under the "well-pleaded complaint" rule, "a suit arises under federal law 'only when the plaintiff's statement of his own cause of action shows that it is based' on federal law." *Schmeling v. NORDAM*, 97 F.3d 1336, 1339 (10th Cir.1996) (quoting *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149 (1908)); *Turgeau v. Administrative Review Bd.*, 446 F.3d 1052, 1060 (10th Cir., 2006); see also Erwin Chemerinsky, FEDERAL JURISDICTION § 5.2.3, at 295 (6th ed. 2012)

In *Gully v. First Nat. Bank*, 299 U.S. 109, 112-13 (1936), the Supreme Court stated that in order to plead a federal question,

> a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action. The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another. A genuine and present controversy, not merely a possible or conjectural one, must exist with reference thereto (citations omitted).

See also, *Image Software, Inc. v. Reynolds and Reynolds Co.*, 459 F.3d 1044 (10th Cir., 2006) citing *Empire Healthchoice Assur., Inc. v. McVeigh*, 547 U.S. 677, 689 (2006). The Court in *Empire Healthchoice* (At 689-690) said:

> A case "aris[es] under" federal law within the meaning of § 1331, this Court has said, if "a well-pleaded complaint establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law.

Quoting, *Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust for Southern Cal.*, 463 U.S. 1, 27–28 (1983). Without proper jurisdiction, the Court must dismiss. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998).

Thlopthlocco states in paragraph 25 of the 2nd Amended Complaint (App. V-5, p. 894) that the "specific issue raised in this action is the federal question of the extent of a tribal court's jurisdiction and the sovereign immunity of Thlopthlocco Tribal Town, a federally recognized Indian Tribe." TTT nowhere explains how the various federal Constitution and statutory provisions which it

then cites bear upon Thlopthlocco's claim to immunity, or how its claim to immunity requires construction or interpretation of those provisions, nor how those provisions apply to the underlying substantive issues in Anderson I and Anderson II. (App. V-5, p. 894, 895). Simply stated, no federal question is pled.

It is obvious that the initial controversy concerning the removal of the BC Group from their various positions on the Business Committee of the TTT which gave rise to the litigation in the Courts of the MCN referred to as "Anderson I" is properly characterized as an action in the nature of a Quo Warranto, an adequate remedy at law, to try the title to a tribal office. Adjudicating the claim of two claimants to a public office is the function of the Writ Quo Warranto, *Burns v. Hayes*, 201 U.S. 650 (Mem) (1906); *Wilson v. State*, 169 U.S. 586 (1898); *Taylor v. Beckham*, 178 U.S. 548 (1900); *Boyd v. State of Nebraska*, 143 U.S. 135 (1892); *Delgado v. Chavez*, 140 U.S. 586 (1891); *U. S., for Use of Crawford v. Addison*, 73 U.S. 291 (1867); see also, *Tillett v. Lujan*, 931 F.2d 636 (10th Cir.,1991). It is also obvious that the subsequent contest filed by the Anderson Group in the Courts of the MCN against certain individuals in the BC Group ("Anderson II") constitutes a classic tribal election dispute such as has been before in federal courts in cases such as *Nero v. Cherokee Nation of Oklahoma*, 892 F.2d 1457 (10th Cir., 1989); *Wheeler v. Swimmer*, 835 F.2d 259 (10th Cir., 1987); *Wheeler v. U.S. Dept. of*

Interior, BIA, 811 F.2d 549 (10th Cir., 1987); *Groundhog v. Keeler*, 442 F.2d 674 (10th Cir., 1971).

Further, inasmuch as TTT is the plaintiff in Anderson I who voluntarily brought claims for affirmative relief before the Courts of the MCN on behalf of the BC Group, TTT's claims of immunity as to that litigation and the subsequent actions in the nature of counterclaims ring hollow. It is black letter law that when a sovereign submits a controversy to a court for decision, including courts of other sovereigns, the sovereign plaintiff has waived its immunity into its selected forum subject to that forum's rules for the purpose of the adjudication of a setoff, counterclaim or other matter in recoupment against it – at least to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the sovereign submitting the case for decision. *First Nat. City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 630, (1983); partially superceded on other issues by statute as noted in *Weinstein v. Islamic Republic of Iran* 609 F.3d 43 (2nd Cir., 2010); *First Nat. City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 769 (1972). The leading case, which was codified in the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611 (1976 ed.); See H.R.Rep. No. 94-1487, p. 23 (1976), is *National City Bank v. Republic of China*, 348 U.S. 356, 361 (1955) wherein the Court said:

> And so we come to the immediate situation before us. The short of the matter is that we are not dealing with an attempt to bring a recognized foreign government into one of our courts as a defendant and subject it to the rule of law to which nongovernmental obligors must bow. We have a foreign government invoking our law but resisting a claim against it which fairly would curtail its recovery. It wants our law, like any other litigant, but it wants our law free from the claims of justice. It becomes vital, therefore, to examine the extent to which the considerations which led this Court to bar a suit against a sovereign in The Schooner Exchange are applicable here to foreclose a court from determining, according to prevailing law, whether the Republic of China's claim against the National City Bank would be unjustly enforced by disregarding legitimate claims against the Republic of China. As expounded in The Schooner Exchange, the doctrine is one of implied consent by the territorial sovereign to exempt the foreign sovereign from its 'exclusive and absolute' jurisdiction, the implication deriving from standards of public morality, fair dealing, reciprocal self-interest, and respect for the 'power and dignity' of the foreign sovereign.

Id., (footnotes and citations omitted.) The Tenth Circuit has also followed this rule in Indian cases, *Berrey v. Asarco Inc.*, 439 F.3d 636 (10th Cir., 2006); *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324 (10th Cir., 1982). This is so even when the United States brought an action as trustee on behalf of an individual Indian against another Indian for possession of trust or restricted Indian lands. In *United States v. Tsosie*, 92 F.3d 1037 (10th Cir.,1996) this court held that the United States had to exhaust tribal remedies in the Navajo Nation Court's, even though it had not waived its immunity, because it was suing on behalf of a Navajo Indian and was subject to Ms. Tsosie's counterclaim for possession of the same lands. It is therefore clear that the MCN, as a condition of allowing another Indian tribe

access to its courts is fully authorized to require that other tribe to submit to setoffs, counterclaims, and similar matters in recoupment as do other sovereigns.

Indian Tribal governments have existed since time immemorial, and pre-existed the ratification of the Constitution. *United States v. Wheeler*, 435 U.S. 313 (1978); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Talton v. Mayes*, 163 U.S. 376 (1896). Tribal sovereign immunity is one of the inherent powers of tribal self-government which has existed since time immemorial and does not depend on federal law for its existence – even though it is recognized by the United States. *Santa Clara*, supra. Tribal sovereign immunity has been repeatedly recognized by Congress, see 18 U.S.C. §§ 2346(b)(2); 25 U.S.C. §§81, 450f(c), 450 n, 2507(a)(13), 3746; 30 U.S.C. §§ 1300(j)(3), 1733(a)(4). However, in tribal sovereign immunity cases, the question is whether a statute of Congress has abrogated tribal sovereign immunity into a federal or state court, not whether Congress has granted immunity to the Tribe. *Native Am. Distrib. v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288 (10th Cir. 2008); *Miner Elec., Inc. v. Muscogee (Creek) Nation*, 505 F.3d 1007 (10th Cir. 2007).

Therefore, while a tribe would have a federal right to enforce its federally recognized immunity from suit in a federal or state court, no similar federal right exists that prohibits suit against a tribe in tribal courts – such a right would arise under tribal law, not federal law. Issues regarding the nature, extent, and character

of a tribal waiver (or abrogation) of sovereign immunity in a tribal court would, be cognizable only in the tribal court as a matter of tribal law. *Iowa Mutual Ins. Co. v. LaPlante*. 480 U.S. 9, 14-15 (1987); *National Farmers Union Inc. Co. v. Crow Tribe*, 471 U.S. 845, 857 (1985), as would decisions by a tribe as to whether its courts would be open to other sovereigns without requiring those sovereigns to comply with the normal rules that requires sovereign plaintiffs to submit to counterclaims and setoffs regarding the claims they voluntarily submit for adjudication. Thus, it is clear that tribal immunity from suit in tribal courts is controlled by tribal law, not federal law. In an analogous case involving the intratribal dispute doctrine, the Tenth Circuit stated:

> Plaintiffs contend that the district court had jurisdiction to hear their case because the underlying controversy is not purely intratribal. They recite a "litany" of "actual and potential non-intratribal impact[s] of Lujan's illegal exercise of jurisdiction." But even if the effects of Lujan's exercise of judicial authority reach beyond tribalmembers, the underlying controversy is over whether he was properly appointed to the KNDC. To establish jurisdiction under either §1331 or §1362, Plaintiffs must point to a law that makes the appointment of Lujan – or of Morris or Tripp – a federal question. As discussed above, however, these appointments are governed by tribal rather than federal law. A dispute over the meaning of tribal law does not "arise under the Constitution, laws, or treaties of the United States," as required by 28 U.S.C. §§ 1331 and 1362. This is the essential point of opinions holding that a federal court has no jurisdiction over an intratribal dispute.

Kaw Nation v. Lujan, 378 F.3d 1139, 1143 (10th Cir. 2004) (citations omitted).

Likewise, the dispute over the meaning and continuing effect, if any, of the Thlopthlocco immunity waiver in the MCN courts and the consequences of the filing of the TTT claim for affirmative relief in the Anderson I suit involves solely questions of tribal law, not federal law.

Also, the Anderson I defendants' claims against the individual BC Group members in the Anderson II suit are predicated solely upon alleged violations of the Thlopthlocco Constitution. Thus, because the scope of MCN's jurisdiction in the Anderson cases is a matter of tribal law, no federal question is, or can be, raised.

Simply stated, nothing in the Treaty Clause, U.S. Const. Art. II, Sec. 2, Cl. 2; the Supremacy Clause, U.S. Const. Art. VI, Cl. 2; the Oklahoma Indian Welfare Act ("OIWA"), 25 U.S.C. §503, [3] or the Indian Commerce Clause, U.S. Const. Art. 1, Sec. 8, Cl. 3; [4] creates a cause of action in favor of TTT on these facts, and

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[3] In fact, the D.C. Circuit held that the OIWA actually authorized the MCN to establish a judiciary to deal with tribal disputes. *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439 (D.C. 1998). That Court would have authority in cases such as Anderson I and Anderson II.

[4] The Indian Commerce Clause authorizes Congress to regulate commerce "with" the Indian tribes using the same language as applicable to foreign nations, and not "among" or "of" the Indian Tribes. The Supreme Court has held the Clause does not confer upon the United States authority to regulate the affairs of Indians within Indian Country, *United States v. Kagama*, 118 U.S. 375, 378 (1886), though such regulation has sometimes been approved by the assertion of Congressional plenary power in Indian affairs in a manner analogous to the recognized federal power over foreign relations. *Id.*; *Lone Wolf v.*

none of these provisions need to be interpreted and applied to answer the questions of tribal law presented by this action or the underlying actions in the MCN Courts.

The "central function" of the Indian Commerce Clause "is to provide Congress with plenary power to legislate in the field of Indian affairs." *United States v. Lara*, 541 U.S. 193, 200 (2004) and to regulate commerce with Indian tribes. Thlopthlocco cites no federal legislation prohibiting the MCN tribal courts from giving effect to the consent of Thlopthlocco to sue in its courts, or from accepting the case filed by TTT with or without the formality of a waiver of sovereign immunity given the recoupment rules mentioned *supra*. Congress has exercised its "Indian Commerce Clause" powers to appropriate funds to the MCN tribal courts to exercise jurisdiction over "intertribal" disputes, which obviously includes the Anderson I defendants. Congress has further exercised its authority to formally recognize and affirm the inherent authority of tribal courts to punish all Indians regardless of their tribe. 25 U.S.C. § 1301(2); *U.S. v. Lara*, 541 U.S. 193 (2004). It would seem to be a strange rule that would say that a tribe may incarcerate an Indian of another tribe for crimes committed, but was powerless to adjudicate important civil matters affecting that same Indian prior to criminal conduct occurring. There is no need for this Court to adopt such a rule.

Hitchcock, 187 U.S. 553 (1903).

Accordingly, Thlopthlocco cannot, state a claim under the Indian Commerce Clause. Simply stated, Thlopthlocco points to no federal statutory language or Constitutional provision granting it rights as against the MCN, its Courts, or its judicial officers, particularly when TTT itself invoked their authority as a plaintiff.

The Supremacy Clause, of its own force, does not create rights, rather, it secures federal rights by according them priority whenever they come into conflict with state law." *Oklahoma Nursing Home Assoc. v. Demps*, 792 F. Supp. 721, 729 (W.D. Okla. 1992) (citing *Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103 (1989)). However, the Supremacy Clause does not apply to the internal governmental actions of Indian tribes. U.S. Const. Art. VI, Cl. 2; *Talton*, supra. Thus, the Supremacy Clause itself does not create a separate, independent "federal law" that can be violated by a tribe, and certainly does not grant rights against a tribe or its judicial officers who are not referred in the clause, are not participants in the legal and political system established by the United States Constitution, and are not made subject to that clause. See, e.g., *United States v. Wheeler*, 435 U.S. 313 (1978); *Santa Clara Pueblo*, 436 U.S. 49; *Talton*, 163 U.S. 376; *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831).

The Court lacks subject matter jurisdiction as no federal question exists. Intra-tribal disputes such as the underlying cases (and this one) are simply not federal questions. *Kaw Nation v. Lujan*, 378 F.3d 1139, 1143 (10th Cir. 2004);

Tillett v. Lujan, 931 F.2d 636 (10th Cir., 1991); *Wheeler v. U.S. Dept. of Interior, Bureau of Indian Affairs*, 811 F.2d 549 (10th Cir., 1987); *Potts v. Bruce*, 533 F.2d 527 (10th Cir., 1976); *Motah v. U.S.*, 402 F.2d 1, 2 (10th Cir., 1968); *Groundhog v. Keeler*, 442 F.2d 674 (10th Cir., 1971); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978). Review of these various provisions of federal law demonstrates Thlopthlocco has not, raised a federal question based upon the facts asserted in the Second Amended Complaint. Therefore, the Court below lacked subject matter jurisdiction and properly dismissed this case.

PROPOSITION II: DEFENDANTS ARE ENTITLED TO SOVEREIGN IMMUNITY

The Court lacks jurisdiction for the further reason that the Defendants are entitled to sovereign immunity. It would appear from the voluminous pleadings and historical documents filed in the Federal District Court below that TTT wishes to use this case as a vehicle to litigate their status as a federally recognized Indian Tribe and/or its relationship to the MCN. With all due respect, the Defendant-Appellee Judicial Offices must decline to do so as authorizing such litigation against the MCN is the prerogative of the Office of the Principal Chief and the National Council of the MCN – the political branches of the MCN government under its constitution. The status of Indian Tribes in their relation to the United States is a political question. *See*, e.g., *Baker v. Carr*, 369 U.S. 186 (1962).

Unlike Thlopthlocco, the Defendant-Appellee Judicial Officers and MCN have not requested affirmative relief nor consented to be sued.

A basic tenet of Indian law is that Indian tribes possess common law immunity from suit traditionally attributed to sovereign and quasi-sovereign entities. See, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *Puyallup Tribe, Inc. v. Washington Department of Game*, 433 U.S. 165, 172-173 (1977); *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512 (1940); *Turner v. United States*, 248 U.S. 354, 358 (1919). While this immunity from suit is subject to the plenary power of Congress, *Santa Clara Pueblo v. Martinez***,** 436 U.S. 49, 58 (1978); *Puyallup Tribe v. Washington Department of Game***,** 433 U.S. 165, 173 (1977), it is beyond cavil that the Indian Nations, are immune from suit absent express authorization from Congress or the tribal government. *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506 (1940), quoted in *Santa Clara Pueblo v. Martinez*, supra. In *Santa Clara Pueblo v. Martinez***,** 436 U.S. 49, 55 (1978), the Court said that:

> Indian Tribes are "distinct, independent political communities, retaining their original natural rights" in matters of local self-government. Although no longer "possessed of the full attributes of sovereignty," they remain a "separate people, with the power of regulating their internal and social relations." Indian tribes have long been recognized as possessing the common law immunity from suit traditionally enjoyed by sovereign powers. (Citations Omitted.)

The courts have uniformly recognized the sovereign immunity from suit of Indian tribes and this principle has been uniformly followed. *United States v. Mitchell*, 455 U.S. 535 (1980); *Lehman v. Nakshian*, 453 U.S. 156 (1981); *United States v. King*, 395 U.S. 1 (1969); *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984); *Larsen v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682 (1949); *United States v. Sherwood*, 312 U.S. 584 (1941); *Begay v. Albers*, 721 F.2d 1274 (10th Cir. 1983); *Ramey Construction Company v. Apache Tribe of the Mescalero Reservation,* 673 F.2d 315 (10th Cir. 1982); *Kenai Oil and Gas v. Department of Interior*, 522 F.Supp. 521 (D. Utah 1981) aff'd 671 F.2d 383 (10th Cir. 1982); *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324 (10th Cir. 1982); *Cherokee Nation v. State*, 461 F.2d 674 (10th Cir. 1972); *Dicke v. Cheyenne-Arapahoe Tribe, Inc.,* 304 F.2d 113 (10th Cir. 1962); *Native American Church v. Navajo Tribal Council*, 272 F.2d 131 (10th Cir. 1959).

The inherent immunity of Indian tribes is coextensive with the immunity of the United States and can only be abrogated by express and unequivocal congressional action, or waived by express and unequivocal tribal action. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-59, 56 L.Ed.2d 106 (1978); *Hamilton v. Nakai*, 453 F.2d 152 (9th Cir. 1971), cert. denied, 406 U.S. 945 (1972); *United States v. United States Fidelity and Guaranty Co.*, 309 U.S. 506, 84 L.Ed. 894 (1940); *Kennerly v. United States*, 721 F.2d 1252 (9th Cir. 1983). The defense of

sovereign immunity goes to the subject matter jurisdiction of the Court since a sovereign is immune from suit except as it consents to be sued, and the terms of its consent to be sued in any court define that Court's jurisdiction to entertain the suit. *United States v. Mitchell*, 445 U.S. 535, 538 (1980); *Lehman v. Nakshian*, 453 U.S. 156, 160 (1981); *United States v. Testan*, 424 U.S. 392, 399 (1976); *United States v. Sherwood*, 312 U.S. 584, 586 (1941); *Ramey Construction Company v. Apache Tribe of the Mescalero Reservation*, 673 F.2d 314 (10th Cir. 1982); *Thebo v. Choctaw Tribe*, 66 F. 372 (8th Cir. 1895).

A waiver of sovereign immunity by a sovereign such as an Indian tribe is not a submittal to the personal jurisdiction of the Court, but is an investiture of subject matter jurisdiction in the Court concerning the actions of the Sovereign where none theretofore existed. For this reason a waiver of sovereign immunity cannot be implied but must be unequivocally expressed by such language as will leave no room for any other reasonable construction. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *United States v. Mitchell*, 445 U.S. 535, 538 (1980); *Lehman v. Nakshian*, 453 U.S. 156, 160 (1981); *United States v. Testan*, 424 U.S. 392, 399 (1976); *United States v. King*, 395 U.S. 1, 4 (1969); *Ramey Construction Company v. Apache Tribe of the Mescalero Reservation*, 673 F.2d 314 (10th Cir. 1982). These limitations encompass not merely whether the sovereign may be sued but, in addition, where it may be sued, and failure to

particularly designate a court is fatal to the authority of that court to hear an action against the sovereign. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 239-41 (1985).

Congress has expressed a strong interest in promoting tribal sovereignty, including developing tribal courts. *Iowa Mut. Ins. Co.*, 480 U.S. at 14-15; see also *Smith v. Moffett*, 947 F.2d 442 (10th Cir. 1991). Tribal sovereign immunity deprives this Court of subject matter jurisdiction to decide any of the matters between the parties. See *Miner Elec.*, 505 F.3d at 1009. In deference to the strong public interest in developing tribal courts, the "federal courts have acknowledged the need to allow tribal courts to make an initial determination of tribal jurisdiction over matters arising on Indian [lands]." *Smith*, 947 F.2d at 444 (emphasis added).

Further, It is black letter hornbook law that litigants cannot emasculate the doctrine of sovereign immunity by bringing Court actions for relief against governmental agents acting on behalf of the sovereign. For the sovereign can act only through its agents, and when a judgment is entered against the sovereign agents, the judgment is a judgment against the sovereign although the judgment is nominally directed against the sovereign's agent. *Larsen v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682 (1949); See also, *Ramey Construction Company v. Apache Tribe of the Mescalero Reservation*, 673 F.2d 315 (10th Cir. 1982) (holding that the Inn of the Mountain Gods, a motel operated as a subentity of the

Tribe, was clothed with the sovereign immunity of the Tribe and was not subject to suit). It is equally clear that a lawsuit cannot be brought indirectly against the tribe by suing tribal governmental agencies or the United States as trustee for the tribe. *Native American Church v. Navajo Tribal Council*, 272 F.2d 131 (10th Cir. 1959); *Thebo v. Choctaw Tribe of Indians*, 66 F. 372 (8th Cir. 1895).

In the Second Amended Complaint, Thlopthlocco sued the MCN's judges in their official capacities. In fact, the actions complained of by Thlopthlocco against the tribal jurists are actually acts of the MCN courts. (2nd Am. Compl. ¶¶ 39-44, 49)(App. V-5, p. 900-902). A lawsuit against a government agent in his or her official capacity, however, is nothing more than a claim against the entity. *Brandon v. Holt*, 469 U.S. 464, 471-72 (1985). In an official capacity lawsuit, there is no need to name the individual defendants. *Id.* The MCN and the individual Judges and Justices who are Defendants-Appellees herein are immune from suit.

PROPOSITION III: EX PARTE YOUNG HAS NO APPLICATION TO THIS ACTION

Thlopthlocco also claims that *Ex Parte Young*, 209 U.S. 123 (1908), which authorizes prospective injunctive relief against officials of a sovereign engaged in an "ongoing violation" of federal law, is applicable here. (2nd Am. Compl. ¶49) (App. V-5, p. 903) To support of that claim, Thlopthlocco alleges the exercise of

jurisdiction by the MCN courts violates the Oklahoma Indian Welfare Act, 25 U.S.C. §503, as well as the Indian Commerce Clause (Art. 1, sec. 8), the Treaty Clause (Art. II, sec. 2, cl. 2), and the Supremacy Clause (Art. VI, sec. 2) of the Constitution. (2nd Am. Compl. ¶¶ 50-52 & p. 52, ¶2)(App. V-5, p. 903-904, 937). As explained previously, Thlopthlocco itself recognized in filing the Anderson I lawsuit in the MCN courts that "the MCN pursuant to a self-governance compact with the United States of America, received federal monies for judicial services based upon Thlopthlocco's population numbers for the benefit of Thlopthlocco people." (Compl. Ex. C (Doc. No.02-4) at 1). This refers to the Indian Tribal Justice Act, 25 U.S.C. §§ 3601-3631, which appropriates federal money to Indian tribes, including the MCN, for the purposes of establishing self-governing tribal judicial systems. See also, 1993 U.S.C.C.A.N. at 2432. For these reasons, 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, 1993U.S.C.C.A.N. at 2435 (emphasis added). Accordingly, the MCN courts are not acting in violation of federal law in exercising jurisdiction over Thlopthlocco in Anderson I and II, but rather are following express Congressional policy of providing an "intertribal" court system to Thlopthlocco, which has no independent judiciary.

As noted above, none of the referenced federal statutes or constitutional provisions relied upon herein in any way prohibit the MCN from allowing Thlopthlocco to file claims for affirmative relief in its courts and apply its normal adjudicatory and procedural rules to such actions – including recognizing the counterclaims, setoffs, and other related claims of the defendants hauled into court at the instance of Thlopthlocco.

Thlopthlocco's attempt to plead a violation of federal law via the *Young* doctrine by the MCN courts is misplaced. There is no Congressional restriction on the ability of the MCN tribal courts to adjudicate the Anderson I and II litigation, particularly when Thlopthlocco filed that litigation and demanded that the tribal courts exercise jurisdiction. If anything, as noted above, the OIWA and the Indian Tribal Justice Act set forth a Congressional policy which allows the Anderson I and II cases to proceed before the MCN courts as an "intertribal" dispute. Thus, there is no articulated ongoing violation of federal law and, therefore, no Young claim that can be asserted against the MCN judicial officers sued in the instant case. Without a clear violation of federal law, the *Ex Parte Young* doctrine is wholly inapplicable herein.

PROPOSITION IV: THLOPTHLOCCO HAS FAILED TO JOIN NECESSARY, INDISPENSABLE PARTIES

Thlopthlocco has failed to join parties who are both necessary and indispensable to a fair, complete, and adequate adjudication of the matters they attempt to raise in this action. As noted above, Thlopthlocco is actually seeking relief in this case which would effectively terminate the Anderson I and II cases, thus depriving the Anderson I defendants, and the Anderson II plaintiffs, of their "day" in tribal court. Accordingly, this Court cannot provide complete relief from any alleged harm through injunctive relief.

Fed. R.Civ.P. 19(a)(l), requires joinder of a party if:

> (A) in that person's absence, the court cannot accord complete relief among existing parties; or
>
> (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
>
> > (i) as a practical matter impair or impede the person's ability to protect the interest, or
> >
> > (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Clearly the Anderson I defendants, and Anderson II plaintiffs, possess an "interest" under Rule 19(a)(1)(B) in being involved in this litigation because any injunction from this Court would impair or impede their ability to proceed before the tribal courts. As the Anderson litigation parties are necessary parties, Rule

19(a)(2) requires the Court to "order that the person [s] be made" defendants in this case if this action were allowed to proceed.

Further, the MCN itself has an interest in this litigation because a ruling by this Court as to the MCN's jurisdiction could impede or impair future efforts of the MCN to continue amicable relations with Thlopthlocco, or other Creek tribal towns, to provide assistance to them through the exercise jurisdiction it appropriate cases, or to otherwise exercise its right to self-determination with respect to the relationship between the MCN and the Creek Tribal Towns. Though the MCN is necessary to the Court's ability to provide complete relief to the existing parties under Rule 19(a), it is "not feasible" to join the MCN under Rule 19(b) because it also enjoys the immunities discussed above. Thus, under Rule 19(b), the court "must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed." The factors to consider are:

> (1) the extent to which ajudgment rendered in the person's absence might prejudice that person or the existing parties;
>
> (2) the extent to which any prejudice could be lessened or avoided by:
>
> > (A) protective provisions in the judgment;
> > (B) shaping relief;
> > (C) other measures;

> (3) whether a judgment rendered in the person's absence would be adequate; and whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder. Fed.R.Civ.P. 19(b).

Based on these factors, the MCN itself is an indispensable party and it is clear that the Judge of the District Court did not abuse his discretion when dismissal was ordered (in part) pursuant to Rule 19(b).

First, as noted, an injunction from this Court would prejudice any effort by the MCN to maintain amicable relations with all Creek tribal towns. Second, there is no conceivable alternative remedy in this Court that could "lessen" or "avoid" this prejudice — an injunction would terminate the Anderson I and II cases, thereby removing them completely from the jurisdiction of the MCN. Third, without injunctive relief against the entire MCN judiciary and the MCN itself, nothing prevents the Anderson I defendants from refiling their third-party claims as a new action before the tribal courts because the Defendants have no means to prevent any such refiling. Thlopthlocco will not be harmed by dismissal for nonjoinder because it still has an adequate remedy in proceeding with the Anderson I and II cases before tribal court, i.e., (1) Thlopthlocco could prevail on the merits of its jurisdictional question before the MCN Supreme Court, or (2) it could prevail on the substantive merits of either of the Anderson cases, which would render its jurisdictional issue moot.

Bringing all interested parties before the court is one of the avowed objectives of the federal rules. *Atlantic City v. American Cas. Ins. Co.* 254 F.Supp. 396 (D. N. J. 1966). Thus, if such a person has not been joined and can be joined, Rule 19(a)(2) provides that "the court must order that person be made a party." The Tenth Circuit has held that the absent party need not "possess" an interest in the litigation for Rule 19(a) to apply, the absent party must only "claim" an interest, which includes any claimed interest that is not "patently frivolous." *Davis v. United States*, 192 F.3d 951, 958-59 (10th Cir. 1999). Since the claimed interests of the Anderson Group and the MCN are clear, substantial, and cannot be protected, the Court below did not err in finding that Rule 19 required dismissal.

PROPOSITION V: THLOPTHLOCCO HAS FAILED TO EXHAUST TRIBAL REMEDIES AVAILABLE TO IT

Assuming arguendo that § 1331 confers jurisdiction upon the court, the matter should first be litigated in the tribal courts. The Supreme Court has long recognized that Congress is committed to the support of tribal self-government and self-determination as federal policy. *Williams v. Lee*, 358 U.S. 217, 223 (1959); *Morton v. Mancari*, 417 U.S. 535, 551 (1974); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143-144, and n. 10 (1980); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 138 n. 5 (1982); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 332, 103 S.Ct. 2387, 2385 (1983); *National Farmers Union*

Ins. Co. v. Crow Tribe, 471 U.S. 845, 854 (1985). Tribes should be allowed to litigate matters in which they are involved as primary characters in their own forum. After parties have exhausted remedies in the tribal judicial system an appeal can be made to federal court to test the subject matter jurisdiction of the Tribal Court. Only in that way can the tribe or its agencies be haled into a federal forum. See *Iowa Mutual Ins. Co. v. La Plante*, 480 U.S. 9, 14-15 (1987).

In *Iowa Mutual*, supra, the United States Supreme Court espoused that:

> [a]lthough petitioner alleges that federal jurisdiction in this case is based on diversity jurisdiction, rather than the existence of a federal question, the exhaustion rule announced in *National Farmers Union* applies here as well. Regardless of the basis for jurisdiction, the federal policy supporting tribal self-government directs a federal court stay its hand in order to give the Tribal Court a `full opportunity to determine its own jurisdiction.' In diversity as well as federal-question cases, unconditional access to the federal forum would place it in direct competition with the tribal courts, thereby impairing the latter's authority over reservation affairs. Adjudication of such matters by any non-tribal court also infringes upon tribal law-making authority, because tribal courts are best qualified to interpret and apply tribal law.

The United States Supreme Court requires all "litigants to exhaust their tribal remedies before a federal district court may evaluate the existence of a tribal court's jurisdiction." *MacArthur v. San Juan County*, 497 F.3d 1057, 1065 (10th Cir. 2007) (quoting *Burrell v. Armijo*, 456 F.3d 1159, 1168 (10th Cir. 2006) (citing

Iowa Mut. Ins. Co., 480 U.S. at 15-16)). Further, the law of the Tenth Circuit "is that a federal court should not hear a challenge to tribal court jurisdiction until tribal court remedies have been exhausted." *Bank of Oklahoma v. Muscogee (Creek) Nation*, 972 F.2d 1166, 1169(10th Cir., 1992). "For reasons of comity, federal courts should abstain from hearing cases that challenge tribal court jurisdiction until tribal court remedies, including tribal appellate review, are exhausted." *Id.* at 1169-70. When the doctrine applies, a district court should dismiss or abate the federal suit. *MacArthur*, 497 F.3d at 1065 (citing *National Farmers Union*, 471 U.S. at 857).

Thlopthlocco has not yet exhausted its tribal remedies. Even if a tribal court determines it has jurisdiction at an early stage of the tribal litigation, the federal court must still abate or dismiss the jurisdictional challenge until the entire tribal litigation comes to a conclusion. *Kerr-McGee Corp. v. Farley*, 115 F.3d 1498, 1508 (10th Cir. 1997) ("Because of *Iowa Mutual's* expansive abstention, we are required to allow full exhaustion of tribal court litigation, potentially including litigation of the merits.") (emphasis added). In fact, when the underlying dispute involves internal tribal matters, the exhaustion rule is "an inflexible bar to consideration of the merits of the petition by the federal court." *Texaco, Inc. v. Zah*, 5 F.3d 1374, 1378 (quoting *Smith v. Moffet*, 947 F.2d 442, 445 (10th Cir. 1991)).

The Court below properly applied these rules to the instant case, finding that Thlopthlocco has not exhausted its tribal remedies in either of the pending actions in the District Court of the MCN which are the object of its complaints here. (App. V-8, pp. 1622-1624, ¶¶36-41)

Since there has been no final decision by the tribal courts as to whether they still retain jurisdiction over the Anderson I "cross-defendants" and Anderson II defendants and the exhaustion rule is "inflexible" in requiring the tribal court litigation to reach its final conclusion on the merits before this Court could conceivably rule on the tribal court's jurisdiction, the Court below was correct in ordering this matter dismissed, in part, because TTT has failed to exhaust its tribal court remedies.

CONCLUSION

Wherefore, premises considered, this Honorable Court should AFFIRM the Order and Judgment of the United States District Court for the Northern District of Oklahoma from which this appeal was taken.

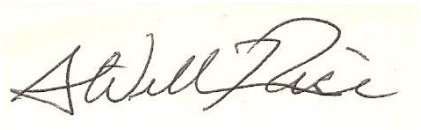
STATEMENT REGARDING ORAL ARGUMENT

In accordance with Tenth Circuit Rule 28.2(C)(4), Defendant-Appellees respectfully suggest that this appeal does not appear to be frivolous, that some of the issues which may be dispositive do not appear to be authoritatively decided, and it is believed that the decisional process would be significantly aided by oral

argument. Specifically it is believed that oral argument will aid the Honorable Court in deciding issues presented relating to the Federal Judicial Power, federal question jurisdiction, and some Indian law issues.

SIGNATURE OF COUNSEL

Respectfully Submitted,



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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 Times New Roman proportionately spaced fonts with 14 point type and contains 10,139 words.

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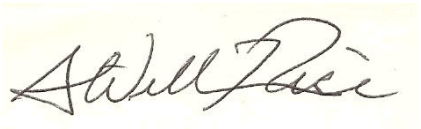

/s/ G. William Rice

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(with digital attachments if any) to which this certification is attached was served by electronic transmission through the Court's CM-ECF system (and/or mailed or delivered by delivery service, or electronically served via email):

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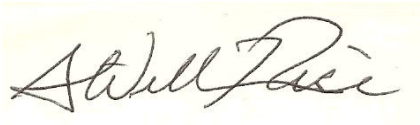

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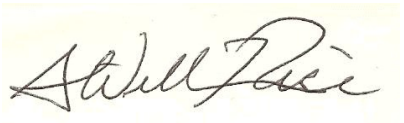

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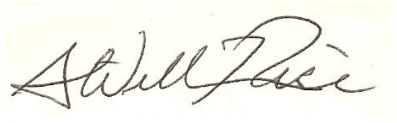

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The undersigned hereby certifies that to the best of his knowledge, information, and belief, the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program (Microsoft Security Essentials engine version 1.1.9506.0 with Virus Database version 1.151.1470.0), and, according to the program, are free from viruses.

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