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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

FEDERAL TRADE COMMISSION,

Plaintiff,

vs.

AMG SEVICES, INC., et al.

Defendants and

PARK 269 LLC, et al.

Relief Defendants.

Case No.: 2:12-cv-0536-GMN-VCF

TROY LITTLEAXE'S OBJECTION TO ORDER AND REPORT & RECOMMENDATION (444)

Troy LittleAxe hereby files his Objection to Order and Report & Recommendation (444), which is made and based upon the following Points and Authorities, moving and

opposition papers at Document Nos. 338, 339, 355, 356, 357, 358, 359, 373, 374, 380, 387, 391, 392, 401, 408 and all related papers in the docket, all pleadings and papers on file herein and oral argument to be presented at hearing, if permitted.

LittleAxe requests the Court to reject and/or modify the Order and Report and Recommendation (444) to deny the Federal Trade Commission's Amended Motion For Partial Summary Judgment (338) and to grant the Tribal Chartered Defendants' Motion For Legal Determination as to Phase 1(B) of the Court's December 27, 2012 Bifurcation of Proceedings Order (373). LittleAxe requests the Court, in granting his Cross Motion For Legal Determination of Phase 1(B) Issues of the Court's December 27, 2012 Bifurcation of Proceedings Order, to determine as a matter of law that the FTC does not have authority over "Indian Tribes whose sovereignty is asserted in this case," including the Modoc Tribe of Oklahoma ("Modoc Tribe"), or instrumentalities or arms of tribes under the Federal Trade Commission Act, 15 U.S.C. §§ 41-58, (the "FTC Act").

LITTLEAXE'S SPECIFIC OBJECTIONS TO RULINGS OF THE ORDER, REPORT AND RECOMMENDATION (444) UNDER THE CONTROLLING STATUTE, 28 U.S.C. s. 636(b)(1) AND LOCAL RULE IB 3-2

LittleAxe makes the following specific objections pursuant to 28 U.S.C. § 636(b)(1)(B) and LR IB 3-2 to the Order, Report and Recommendation (444). In short, the Order, Report and Recommendation does not apply the controlling Indian law canons the Supreme Court requires when determining whether federal statutes apply to Indians or Indian tribes or to abrogate Indian tribal sovereignty. The standard of review under the statute and under the Local Rule is de novo for LittleAxe's specific objections identified here and discussed in the Argument section below. Id.

1. The primary ruling of the Order, Report and Recommendation to which LittleAxe objects appears on page 3, lines 20 through 23, which states, "The FTC does have authority under the FTC Act to regulate Indian Tribes, Arms of Indian Tribes, employees of Arms of Indian Tribes and contractors of Arms of Indian Tribes with regard to the subject matter of this litigation." The Order, Report and Recommendation (444) makes other related statements within its forty-six (46) pages to which LittleAxe also herein objects. The Argument section below sets

forth the legal basis, a long line of Supreme Court cases dating back for more than two centuries, which are still good law, for LittleAxe's objections.

2. Page 12 of the Order, Report and Recommendation (444) includes a heading labeled, "The Indian Law Canon of Construction." But this single page addressing the Indian law canons only recites a few authorities on the canons and only references a few statements about the canons by the Tribal Chartered Defendants. LittleAxe objects to the lack of analysis the Order, Report and Recommendation (444) provides of the canons and their applicability in this case. LittleAxe further objects to the entire omission of his extensive arguments about the canons in his eighteen (18)-page Motion (380) and in his seven (7)-page Reply (406).

3. Next, LittleAxe objects to the lack of analysis in the Order, Report and Recommendation to his Opposition (357) on pages 15 and 16. These two pages only recite LittleAxe's arguments about the fact that the FTC's motion for summary judgment did not discuss him specifically at all, but these pages provide no analysis of LittleAxe's arguments.

4. Most of the remainder of LittleAxe's objections derive from the conclusion by the Order, Report and Recommendation (444) that the FTC has authority over the Indian tribes whose sovereignty is asserted in this case, including the Modoc Tribe, and instrumentalities of tribes under the FTC Act. For example, page 27 assumes the ultimate question of whether the FTC Act authorizes the FTC to bring its claims against instrumentalities of Indian tribes by concluding the burden is on all of the defendants to show how any exception to the FTC Act applies. As discussed below, the controlling Supreme Court authorities require application of the Indian law canons. LittleAxe objects to such circular conclusions that the FTC Act applies without application of the controlling canons or any analysis of the canons whatsoever.

5. Another conclusion to which LittleAxe objects is the statement on page 31 that the FTC Act is a statute of general applicability. Again, the Order, Report and Recommendation contains no analysis of the controlling Supreme Court authorities requiring application of the Indian law canons.

6. Further, on page 21 the Order, Report and Recommendation concludes that "Federal

laws of general applicability are presumed to apply with equal force to Indians." This conclusion misses the same issue of how the Supreme Court requires the Indian law canons to apply to federal statutes, including those at issue in this case, beginning with the FTC Act.

7. Other examples of the Order, Report and Recommendation failing to apply the Indian law canons include: the conclusion on page 34, lines 8 through 11, that 42 U.S.C. § 8801 is a more specific statute than the FTC Act; and the reliance upon Ninth Circuit law, discussed in detail below, for ignoring Supreme Court precedents requiring application of the Indian canons on page 34.,lines 12 through 16, again on page 35, line 11 through page 36, line 1,and again on page 36, lines 3 through 12,; the string citation of cases in footnote 34 with no analysis of the canons or how the asserted distinction of private party involvement in some cases could make any difference to the Supreme Court's sovereignty analysis of all federal statutes under the Indian canons. Neither the FTC nor the Order, Report and Recommendation has explained why the Ninth Circuit may ignore Supreme court controlling precedent. In fact, the Ninth Circuit does not allow the ignoring of Supreme Court precedent, as discussed below.

8. LittleAxe's other specific objections include the similar conclusion on page 39, lines 13 through 16, that the FTC Act authorizes the FTC to bring this action, eliminating LittleAxe's and other defendants' affirmative defenses related to the FTC's lack of applicability to Indian tribes and their instrumentalities and officers thereof; the conclusion on page 40 that TILA and EFTA apply to Indian tribes without any analysis of either of those statutes under the Indian law canons; the summary judgments on the same basis on page 40, lines 21 through 23, on page 41, lines 4 through 13, and on page 44, lines 19 through 22.

9. Finally, LittleAxe specifically objects to the reduction of his twenty-five (25) pages of argument in his motion (380) and reply (406) to five (5) lines of argument, which include none of the controlling Supreme Court cases nor the analysis therof that LittleAxe set forth in his moving papers. Accordingly, LittleAxe also objects to the denial in part of his motion (380) without any analysis of his arguments.

ARGUMENT

SCOPE OF LITTLEAXE'S MOTION: PHASE 1 ONLY

The FTC named Troy LittleAxe as a Defendant in this case in his individual capacity and in his corporate capacity as a registered agent of Defendant Red Cedar Services, Inc. ("Red Cedar"), which is incorporated by the Modoc Tribe of Oklahoma. (Complaint, paras. 7, 22.). The Court's Order Entering Preliminary Injunction (Doc. #296), Bifurcation of Proceedings provision, paragraph B, requires the Court to determine in phase 1 whether, and to what extent, the FTC has authority over Indian tribes whose sovereignty is asserted in this case and/or their corporate instrumentalities for alleged violations of the FTC Act. This is a legal question that this Court explicitly defined in its Bifurcation of Proceedings Order (ECF No. 296), which divides these proceedings into Phases 1 and 2. (ECF No. 296 at 9.)[1] The FTC cannot demonstrate that it has authority to bring suit against either "Indian tribes whose sovereignty is asserted in this case" and/or their instrumentalities, and therefore the Defendants, including LittleAxe, are entitled to a legal determination in their in their favor on this threshold Phase 1 issue.

ARGUMENT

SUMMARY: THE FTC IGNORES THE BINDING INDIAN LAW CANONS.

The Modoc Tribe is undisputedly a Federally Recognized Indian Tribe, and the FTC Act is inapplicable to the Modoc Tribe and its registered agent with corporate capacity, Troy LittleAxe. The FTC argues in this case[2] that the FTC Act applies to Red Cedar and the other

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[1] Pursuant to the Bifurcation of Proceedings Order, the Tribal Defendants recognize that "[i]f the Court determines that the FTC Act does not give the FTC authority over the Indian tribes whose sovereignty is asserted in this case, but may give the FTC authority over AMG Services, Inc., MNE Services, Inc., Red Cedar Services, Inc. and SFS, Inc. for alleged violations of the FTC Act, the parties may resume fact discovery related to the Defendants' defense that the FTC does not have authority to bring suit against Defendants for violations of the FTC Act." (ECF No. 296 at 10.) LittleAxe has standing in phase 1 because this phase 1 determination of the FTC's authority over Indian tribes, including the Modoc Tribe, and their corporate instrumentalities may determine whether the FTC has authority over LittleAxe in his corporate capacity with Red Cedar.

[2] Plaintiff Federal Trade Commission's Memorandum of Points and Authorities in Support of Amended Motion For Partial Summary Judgment(Doc. #339), passim; Plaintiff's Memorandum of Points and Authorities in Opposition to Defendants' Motion to Dismiss (Doc. # 120), pp. 13-14; Plaintiff's Opposition to Defendants' Joint Motion for Protective Order (Doc. # 141), pp. 12-14; Transcript of Proceedings, Thursday, August 23, 2012, pp. 59. 65; Plaintiff's Points and Authorities Opposing Defendants' Objections to Magistrate's Order (Doc. # 185), passim.

tribally-owned corporate defendants in this case because of a stated presumption in *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1116 (9th Cir. 1985), that statutes of "general applicability" apply to Indian tribes. But *Donovan* fails to control here, a presumption of applicability is non-existent, and under the controlling Indian law canons of Supreme Court case law, the FTC Act is inapplicable to the Indian tribes.

The United States Supreme Court has never adopted, or even referenced, the *Donovan* test. Instead, the Supreme Court relies on a historical set of Indian law canons to decide whether a federal statute applies to Indian tribes.[3] The canons have enjoyed a long and rich jurisprudential history, dating back to the United States' early years.[4]The Supreme Court applies Indian canons to determine whether a federal statute reaches Indian tribes. There are two, longstanding Indian canons: First, "[g]eneral acts of congress do not apply to Indians, unless so expressed as to clearly manifest an intention to include them." *Elk v. Wilkins*, 112 U.S. 84, 88, 5 S. Ct. 41, 44, 28 L. Ed. 643 (1884) (citing Constitution art. 1, §§2, 8, art. 2, § 2, numerous case citations omitted).[5] Second, if there is "ambiguity on the point [of congressional intent], the doubt would benefit the Tribe, for ambiguities in federal law have been consistently construed generously in order to comport with . . .traditional notions of sovereignty and with the federal policy of encouraging tribal independence." *Merrion v. Jicarilla Tribe*, 455 U.S. 130, 152,102 S. Ct. 894,

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[3] *See, e.g. Oneida County, N.Y. v. Oneida Indian Nation of New York State*, 470 U.S. 226, 247, 105 S. Ct. 1245, 1258, 84 L. Ed. 2d 169 (1985), *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 268-69, 112 S.Ct. 683, 116 L.Ed.2d 687 (1992); *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766, 105 S.Ct. 2399, 85 L.Ed.2d 753 (1985); *Bryan v. Itasca County*, 426 U.S. 373, 390-92, 96 S.Ct. 2102, 48 L.Ed.2d 710 (1976); *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164, 176, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973); *Squire v. Capoeman*, 351 U.S. 1, 6-7, 76 S.Ct. 611, 100 L..Ed. 883 (1956); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143-44, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59-60, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978).

[4] *E.g. Fed. Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99,133, 80 S. Ct. 543, 562, 4 L. Ed. 2d 584 (1960) (Black dissent, joined by Warren and Douglas))(Indian law pre-dates Constitution); Elk v. Wilkins*, 112 U.S. 94, 99, 5 S. Ct. 41, 44, 28 L. Ed. 643 (1884).

[5] *See also e.g., Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 17, 107 S. Ct. 971, 977, 94 L. Ed. 2d 10 (1987), *United States v. Dion*, 476 U.S. 734, 739, 106 S. Ct. 2216, 2220, 90 L. Ed. 2d 767 (1986).

909, 71 L. Ed.2d 21 (1982)."[6] According to the Supreme Court, "the canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians." *Oneida County, N.Y. v. Oneida Indian Nation of New York State*, 470 U.S. 226, 247, 105 S. Ct. 1245, 1258, 84 L. Ed. 2d 169 (1985). Thus, the Supreme Court uses the Indian canons to preserve the relationship between the United States federal government and the Indian tribes.[7]

The Supreme Court uses the Indian law canons when analyzing whether a federal statute applies to an Indian tribe. *See EscondidoMut. Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 767, 104 S. Ct. 2105 at 2107, *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766, 105 S. Ct. 2399, 2403, 85 L. Ed. 2d 753 (1985), *United States v. Dion*, 476 U.S. 734, 739, 106 S. Ct. 2216, 2220, 90 L. Ed. 2d 767 (1986), *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 17, 107 S. Ct. 971, 977, 94 L. Ed. 2d 10 (1987). LittleAxe asks this Court to apply the Indian law canons to Indian tribes, including the Modoc Tribe, and their instrumentalities or arms, including Red Cedar Services, Inc., of which LittleAxe is an officer, as the Supreme Court requires.

. The FTC makes assumptions that without federal regulation there will be no regulation at all, however, Congress and States have recognized Tribes inherent rights to regulate themselves under the Indian Self Determination and Education Assistance Act, as well as recognizing the Tribe's rights to perform self-regulating such as is provided for in the Indian Gaming Regulatory Act and Tribal-State Compacts that govern gaming activities by the Tribes.However, Troy LittleAxe agrees with the FTC on one point: this is a matter of *stare decisis*. Rather than rely on the Ninth Circuit alone, LittleAxe directs this court to several, on-

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[6] *See also San Manuel Indian Bingo & Casino v. N.L.R.B.*, 475 F.3d 1306, 1311 (D.C. Cir. 2007) ("(1) ambiguities in a federal statute must be resolved in favor of Indians… and (2) a clear expression of Congressional intent is necessary before a court may construe a federal statute so as to impair tribal sovereignty.") However, *San Manuel* incorrectly concluded that the canons only apply to statutes benefiting Indians, ignoring several of these Supreme Court cases in the process, discussed below. Nonetheless, San Manuel recognized and quoted the canons as controlling law.

[7] E.g., Bryan H. Wildenthal, *How the Ninth Circuit Overruled a Century of Supreme Court Indian Jurisprudence—And Has So Far Gotten Away With It*, 2008 Mich. St. L. Rev. 547, (2008) , a copy of which is attached as Exhibit B. ("These Indian law canons thus embody a presumption that federal laws should not be construed to limit tribal sovereignty or tribal rights unless Congress clearly, intentionally, and unambiguously chooses to do so." Id.)

point Supreme Court cases. Each case involved a statute of "general applicability" and whether the statute applied to Indian tribes. The Supreme Court, presumably having full knowledge of the *Donovan* rule, has never applied or cited the *Donovan* rule. Further, the Supreme Court has never applied or cited the rule the FTC suggests to be the supposed "holding" of *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99, 80 S. Ct. 543, 4 L.Ed.2d 584 (1960).. Instead, the Supreme Court has explained the holding of *Tuscarora* to be just the opposite as the interpretation the FTC suggests. *Oneida County, New York, v. Oneida Indian Nation or New York State*, 470 U.S. 226, 247-48 n. 21, 105 S. Ct. 1245, 1258-59 (1985) (citing *Tuscarora* as implicitly reaffirming the principles of construction of refusing to abrogate tribal sovereignty absent explicit language by Congress and interpreting ambiguities to the benefit of tribes, as applied in both treaty and non-treaty matters).

I. NINTH CIRCUIT PRECEDENT ALLOWS THIS COURT TO FOLLOW THE UNITED STATES SUPREME COURT, CONTRARY TO THE FTC'S CLAIMS.

The FTC asserts that the "Ninth Circuit has already decided," the Indian sovereignty question before the court.[8] However, unless the Ninth Circuit can somehow overrule Supreme Court precedent, the FTC has misplaced its reliance on *Donovan*. The defendants, contrary to the FTC's suggestion, have much more to say about *Donovan* and *stare decisis* than *Donovan* being about OSHA rather than the FTC Act. Indeed, The FTC also asserts that the Ninth Circuit rejected an argument based on these canons in *N.L.R.B. v. Chapa De Indian Health Program, Inc*. 316 F.3d 995, 999 (9th Cir. 2003), FTC Opp. p. 7. However, *Chapa De* never reached the merits of the Indian law canon argument. *See Id.* The court in *Chapa De* merely stated that it lacked the authority to overrule *Donovan*. *See Id*. Because the Supreme Court's mode of analysis conflicts with *Donovan*, the argument in *Chapa De* also fails to apply in this case.

In the Ninth Circuit, judges are bound by precedent unless overruled or modified by either a higher appellate court or the Supreme Court of the United States. *Hart v. Massanari*, 266 F.3d 1155, 1171 (9th Cir. 2001). However, the Ninth Circuit has a broad viewpoint on what

[8] FTC's reply (391), p. 3.

constitutes overruling or modifying. *See Miller v. Gammie*, 335 F.3d 889, 899 (9th Cir. 2003). The Supreme Court can overrule or modify a precedent without expressly doing so. *See Id.* Indeed, the Ninth Circuit recognizes the underlying principle of "lower courts as being bound not only by the holdings of higher courts' decisions but also by their 'mode of analysis.'" *Id.* Thus, when a mode of analysis or literal holding by the Supreme Court is clearly irreconcilable with Ninth Circuit precedent, Ninth Circuit courts are bound to follow the Supreme Court. *Id.* at 900. Lower courts, under Ninth Circuit precedent, also lack any obligation to follow dicta. *Exp. Group v. Reef Indus., Inc.*, 54 F.3d 1466, 1472 (9th Cir. 1995). Moreover, when an overruled Supreme Court opinion forms the basis of a Ninth Circuit precedent, that precedent is likely irreconcilable with the Supreme Court, and the earlier Ninth circuit precedent is not controlling. *California Dept. of Water Res. v. Powerex Corp.*, 533 F.3d 1087, 1095 (9th Cir. 2008).

In *Donovan*, the Ninth Circuit stated that generally applicable federal laws apply to Indian tribes, unless the law touches on matters of sovereignty, treaty rights, or congressional intent shows that Congress intended the law to be inapplicable to Indian tribes. *Donovan*, 751 F.2d 1113 at 1116. The court asserted that it was following language in *Tuscarora*, which stated that "it is now well settled by many decisions of this Court that a general statute in terms applying to all persons includes Indians and their property interests." *Tuscarora*, 362 U.S. 99, at 102. In effect, the Ninth Circuit created a presumption of applicability in Federal Indian law. But, several circuit courts have relegated the entire basis for *Donovan*---the *Tuscarora* "general applicability" language---to obiter dicta status;[9] indeed, the *Donovan* court itself implicitly made this concession. Further undermining *Tuscarora*'s dictum as support for *Donovan* is the Supreme Court's utter failure to cite the statement once in the last fifty years, despite adjudicating several similar cases. Therefore, courts in the Ninth Circuit lack any obligation to follow the unbinding dicta of a presumption in *Tuscarora*. Indeed, courts who do follow the *Donovan* test have failed

[9] *See N.L.R.B. v. Pueblo of San Juan*, 280 F.3d 1278, 1283 (10th Cir. 2000) on reh'g en banc, 276 F.3d 1186 (10th Cir. 2002)(finding the statement of dicta from *Tuscarora* upon which the *Donovan* court relied implicitly overruled), *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174, 177 (2d Cir. 1996)(explicitly stating that *Donovan* borrowed its presumption from dicta in *Tuscarora*),

to explain why, exactly, they continue to follow the test because "other courts[]" do so.[10] Several commentators have also observed this pattern.[11]

However, even if *Donovan*'s presumption based on the OSHA statute can somehow stand, divorced from *Tuscarora*, the Supreme Court's current mode of analysis is in conflict with *Donovan*.[12] In fact, since *Donovan*, several laws of general applicability have come before the Supreme Court, and the Supreme Court has never applied or mentioned a presumption of applicability. The Supreme Court continued to use its Indian law canons, which conflict directly with *Donovan*, starting two months after the Ninth Circuit decided the *Donovan* case, and the Supreme Court has continued to do so for almost thirty years.[13]

The court's finding that Ninth Circuit law is well-settled, because several other circuits have also relied on *Donovan*, and the *Tuscarora* dictum, fails to change the fact that the Supreme Court undertakes a different mode of analysis. In *United States v. Dion*, the Supreme Court analyzed whether the Endangered Species Act applied to Indian tribes---the court employed the canons. *United States v. Dion*, 476 U.S. 734, 738, 106 S. Ct. 2216, 2219, 90 L. Ed. 2d 767 (1986). In *Dion*, the Yankton tribe held the right to hunt on their land under a treaty, and the court had to analyze whether the Endangered Species Act's prohibition on hunting eagles applied to modify this treaty right. *Id.* The court stated that "[w]e have required that Congress' intention to abrogate Indian treaty rights be clear and plain." *Id.* at 738. Lest a reader get the wrong idea, about limiting these canons to mere "treaty" matters---as *Donovan* suggests---the court states that

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[10] *N.L.R.B. v. Fortune Bay Resort Casino*, 688 F. Supp. 2d 858, 867 (D. Minn. 2010)(stating although *Tuscarora* statement is dictum, the court sees "no reason" to depart from what other courts follow), *River Band of Ottawa Indians v. Nat'l Labor Relations Bd.*, 747 F. Supp. 2d 872, 888 (W.D. Mich. 2010)("whether the statement in Tuscarora may be properly characterized as dictum has had "little effect on courts' willingness to adopt its language as a 'general rule.'") This approach illustrates a fundamental misunderstanding about the policy that underlies Indian canons and how much of an aberration the *Tuscarora* dictum is to those policies; this brief addresses the misunderstanding *supra* at section II.

[11] E.g., S. Chloe Thompson, *Exercising and Protecting Tribal Sovereignty in Day-To-Day Business Operations: What the Key Players Need To Know*, 49 Washburn L. J. 661 (2010); Wildenthal, supra at n. 6; and Alex Tallchief Skibineal, *Applicability of Federal Laws of General Application to Indian Tribes and Reservation Indians*, 25 U.C. Davis L. Rev. 85 (1991).

[12] Wildenthal, supra at n. 6.

[13] Id.

"Indian reservations created by statute, agreement, or executive order normally carry with them the same implicit hunting rights as those created by treaty." *Id.* at fn 8. Indeed, footnote 8 in *Dion* suggests that Indian reservations, even in the absence of the treaty, create equivalent rights. *Id.* The logical implication of this is that the court would have undertaken the *same* analysis, even in the absence of a formal treaty.[14]

In *Iowa Mutual*, the Supreme Court analyzed whether the diversity of citizenship statute applied to Indian tribes---the court employed the canons. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14, 107 S. Ct. 971, 975, 94 L. Ed. 2d 10 (1987). *Iowa Mutual* concerned an insurance company that wanted to sue an individual in federal court, because of an incident that happened on an Indian reservation. *Id.* at 971. The insurance company claimed that, despite having failed to seek an appeal in Indian tribal court, the diversity statute applied to actions against Indian tribes. *Id.* Rather than *presume* the diversity statute applied to Indian tribes, the court responded that "petitioner argues that the statutory grant of diversity jurisdiction overrides the federal policy of deference to tribal courts. We do not agree." *Id.* at 977.

The Supreme Court again reaffirmed the applicability of the Indian law canons in *Minnesota v. Mille Lacs Band*, 637 U.S. 172, 119 S. Ct. 1187 (1999). In *Mille Lacs Band*, the Court stated:

> Congress may abrogate Indian . . . rights, but it must clearly express its intent to do so. There must be "clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian . . . rights on the other, and chose to resolve that conflict by abrogating [the Indian rights]. There is no such "clear evidence" of congressional intent to abrogate . . .here.
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> Moreover, . . . the starting point for any analysis of these questions is the Treaty itself [the source of the Indian rights in Mille Lacs Band]. The Treaty must be interpreted in light of the parties' intentions, with any ambiguities resolved in favor of the Indians.

[14] For further support, *see Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766, 105 S.Ct. 2399, 85 L.Ed.2d 753 (1985)(stating that the court has recognized the canons to apply to both treaty and non-treaty matters); *Oneida*, supra at 247-48 & n. 21, 105 S. Ct. 1258-59 (same).

Id. at 202-03, 206. These are the same Indian law canons the Court followed and applied in *Dion*, *Iowa Mut. Ins. Co.*, *Montana*, *Oneida*, and the other cases of interpretation of federal statutes regarding Indian sovereignty.

If the Ninth Circuit is bound by a higher court's "mode of analysis," and if the term "mode of analysis" means anything at all, the Ninth Circuit is bound to use the Supreme Court's mode of analysis when discerning the applicability of federal statutes to Indian tribes. That mode of analysis, as shown time and again, is through the Indian canons. The Supreme Court fails to rely on, cite, or even follow the dicta in *Tuscarora,* and the Supreme Court undertakes a mode of analysis in direct conflict with the Ninth Circuit precedent of *Donovan*. Therefore, the Supreme Court has implicitly overruled the FTC's interpretion of *Tuscarora* and, by extension, *Donovan*'s..[15]

Further, while several Supreme Court decisions applying the Indian law canons came after *Donovan*, several Supreme Court decisions *before Donovan* indicate that the FTC's interpretation of *Donovan* is incorrect. In *Escondido*, the court confronted a similar factual situation to *Tuscarora*; but, rather than reference the *Tuscarora* dictum or adopt any presumption of applicability, the court instead cited *Tuscarora*'s use of the "congressional intent" canon. *Escondido*, 466 U.S. at 767. Then, the Court proceeded to apply the same statute analyzed in *Tuscarora* to Indian tribes. In *Merrion*, the Supreme Court discussed Congressional intent and tribal sovereignty at length, failing to mention *Tuscarora*. So, the Supreme Court relegated the *Tuscarora* statements to dicta before the Ninth Circuit decided *Donovan*. Unless the Ninth Circuit can, or has the ability to, overrule the Supreme Court, *Donovan*'s attempt to alter the Indian canons remains invalid. Purporting to ignore or overrule the Indian law canons was questionable even in *Donovan*'s OSHA interpretative context, if not outright bad law, when decided.[16]

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[15] *See also N.L.R.B. v. Pueblo of San Juan*, 280 F.3d 1278, 1283 (10th Cir. 2000) on reh'g en banc, 276 F.3d 1186 (10th Cir. 2002)(finding *Tuscarora* implicitly overruled), *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174, 177 (2d Cir. 1996)(explicitly stating that *Donovan* borrowed its presumption from dicta in *Tuscarora*).

[16] Wildenthal at n. 6.

In sum, looking forward, the Supreme Court has overruled such a broad interpretation of *Donovan* as the FTC advocates --- several times. Looking backward, the language ignoring Indian law canons in *Donovan* was overly broad, if not incorrect, when decided. The fact that, as discussed *supra*, no circuit court can explain why it follows a test based on irrelevant dicta---beyond "other courts have done so," is a testament to *Donovan*'s error and weakness.

Donovan's presumption fails to apply, for the aforementioned reasons. So, the FTC must show that Congress intended the FTC Act to apply to Indian tribes and their corporations, and the FTC must show that the court should resolve any ambiguity in the FTC Act, such as the meaning of the word "person", against the Modoc tribe and its corporation, rather than in favor of them. The FTC has failed to make any such showing because the FTC Act is inapplicable to Indian tribes.

II. UNDER THE INDIAN LAW CANONS, THE FTC ACT IS INAPPLICABLE TO THE MODOC TRIBE AND TO AN INSTRUMENTALITY OR ARM OF THE TRIBE.

A. The FTC Act Is Inapplicable Because Congress Lacked Any Intent To Apply the Act to Indian Tribes.

Generally, in order for courts to find Congressional intent, there must be clear evidence that Congress considered the conflict between its intended action and current Indian rights, then chose to resolve that conflict by abrogating the Indian rights. *Dion*, 476 U.S. at 740. In *Dion*, the Court recognized that Congress can manifest such an intention implicitly in the legislative history. *Id.* In *Dion*, the procedural requirements and structure of the statute authorized the Secretary of the Interior to issue permits for Indians to hunt eagles, which hunting the statute otherwise prohibited. *See Id.* at 743. The Court ruled in *Dion* that Congress enacted the Eagle Protection Act to resolve conflicting preexisting Indian rights with the Congressional action of protecting eagles; the court decided that the permit issuance procedure served as evidence of Congressional intent to abrogate Indian rights. *See Id.* In the Court's words:

> It seems plain to us, upon reading the legislative history as a whole, that Congress in 1962 believed that it was abrogating the rights of Indians to take eagles. . . . Congress expressly chose to act to put in place a regime in which the Secretary of the Interior had control over Indian hunting, rather than one in which Indian on-reservation hunting was unrestricted. Congress thus considered the special

> cultural and religious interests of Indians, balanced those needs against the conservation purposes of the statute, and provided a specific, narrow exception that delineated the extent to which Indians would be permitted to hunt the bald and golden eagle.

Id. at 743-44. Indeed, nothing in the statute explicitly prohibited Indians hunting eagles. However, the statute allows the Secretary of the Interior to issue permits for Indians to hunt eagles; this procedure shows Congressional consideration of Indian rights. As such, the Court could interpret the statute against Indians under the rule of the Indian law canons. ("What is essential is clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty." *Id*. at 739-40.)

Legislative history can serve as evidence of Congressional intent to abrogate tribal sovereignty when the legislative history shows Congressional consideration of Indian rights. *Id. See also Iowa Mutual*, at 975. ("We have repeatedly recognized the Federal Government's longstanding policy of encouraging tribal self-government. This policy reflects the fact that Indian tribes retain "attributes of sovereignty over both their members and their territory," to the extent that sovereignty has not been withdrawn by federal statute or treaty." *Id*.) But the Indian law canons require a showing of Congressional consideration to abrogate Indian law rights; otherwise, Indian tribal sovereignty remains intact.

When an indication of Congressional intent is absent, courts find that a statute is inapplicable to Indian tribes. *See Iowa Mutual*, 107 S. Ct. at 977. In *Iowa Mutual*, the court held that the diversity of citizenship statute was inapplicable to Indian tribes. *Id.* The court found that "the diversity statute, 28 U.S.C. § 1332, makes no reference to Indians and nothing in the legislative history suggests any intent to render inoperative the established federal policy promoting tribal self-government." *Id.* Elsewhere, the Supreme Court has said that "because the Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from silence…is that the sovereign power…remains intact." *Merrion,, 455 U.S. at* 148, 102 S. Ct. at 907.

1. The FTC Act does not address Indians or tribes, nor does the FTC Act limit tribal sovereignty in any way.

The FTC Act is devoid of any language pertaining to Indian tribes. The FTC Act provides that "unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful." 15 U.S.C.A. § 45. The word "Indian" is absent from the entire statute. The word "Indian" never appears in legislative history materials for the FTC Act. LittleAxe pointed this out in his Cross Motion,[17] and the FTC does not deny this fact in any of the FTC's moving or responding papers.

The FTC Act also lacks any procedure for resolving conflicts between Indian rights and federal regulation, unlike the Eagle Protection Act in *Dion*, which provided a permit system for Indians to hunt eagles. 476 U.S. at 743-44. Moreover, the FTC Act is silent on any issue regarding Indians, which means that the court should presume inapplicability. *Merrion*, 455 U.S. at 148. Also, at the time of the passage of the FTC Act in 1914, Indians were not considered citizens of the United States so it is preposterous to believe that the FTC Act was applicable to Indians or Indian Tribes.

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[17] (380), p. 6, l. 22 through p. 7, l. 7. As stated above, the FTC filed only a brief response (392) to LittleAxe's Cross Motion (380). The FTC's response (392, p.2) states that the FTC opposes LittleAxe's for the reasons stated in the FTC's memoranda in support of the FTC's amended motion for summary judgment (339). Neither the FTC's response (392) nor the FTC's memoranda (339-8) argues that Congress, by enacting the FTC Act, intended to abrogate tribal sovereignty or that Congress addressed Indians or Indian tribes in any way. Instead, the FTC argues that the FTC Act is a statute of "general applicability" under *Donovan*. The FTC essentially argues that under the Ninth Circuit authority of *Donovan*, the FTC need not provide any analysis whatsoever of the Supreme Court's required application of the Indian law canons.

Similarly, the FTC's reply brief (391) fails to provide any analysis of the Indian law canons or to even mention the Indian law canons. In fact, the FTC's reply summarizes the FTC's disregard for the Supreme Court's required application of the Indian canons, as based on the FTC's "general applicability" argument in reliance upon *Donovan*, as follows:

> All these memoranda can be distilled to the following core dispute: does the FTC Act's application to persons, partnerships, and corporations include an unstated exception for tribes and tribal corporations? The Ninth Circuit's decision in *Donovan* has already decided this question: where Congress does not explicitly address whether a federal stature applies to tribes, courts must presume that it does..

(391, p. 3, ll. 2-7.)

2. The FTC has not interpreted its own enabling statute as authorizing the FTC to promulgate regulations addressing Indians or tribes nor to limit tribal sovereignty in any way.

The FTC has also refrained from passing regulations pertaining to Indians or to Indian tribes.[18] The FTC is attempting to argue that the FTC Act, which never mentions Indians or Indian tribes on its face, in its legislative history, or in its procedures and authorized regulations, is nevertheless applicable to Indians and Indian tribes; such an argument by the FTC contravenes the Congressional intent canon of construction.

The Modoc Tribe created a lending code-- the Modoc Tribe Interests, Loans and Debt Act-- to regulate licensed lending activities by Red Cedar. (Cobb Declaration, Exhibits E and F.) The code regulates lenders by requiring an "honesty" and "fitness" requirement of all its licensees, and the code subjects violators of any license condition to penalties. (Cobb Declaration, Exhibit E, § 206(1), 220(1)(b), 222-223. Without any language in the FTC Act indicating that Congress intended to supersede, override, or supplant tribal sovereignty, the Modoc Tribe's enactments by self-governance and sovereignty control, rather than the FTC Act.

B. If There Were Any Ambiguity About Whether the FTC Act applies to Indian Tribes, the Court Should Resolve Such an Ambiguity In Favor Of the Tribes, Including the Modoc Tribe, and Their Instrumentalities.

The Supreme Court resolves ambiguities in federal statutes to the benefit of Indian tribes. *Montana*, 471 U.S. at 765. In *Montana*, the State of Montana attempted to tax Indian royalties on reservation mining activities. *Id.* Montana argued that a federal tax statute gave it the authority to tax Indians for these activities. *Id.* However, two separate taxing statutes existed, one from 1924 and one from 1938. *Id.* The 1924 statute contained explicit authorization from Congress for states to tax Indian tribes. *Id.* The 1938 statute, however, while consistent with the 1924 statute, lacked any such authorization. *Id.* Montana executed its tax under the 1938 statute. *Id.* The relevant statute section read, ""the production of oil and gas and other minerals on such lands may be taxed by the State in which said lands are located...." *Id.* at 767. Montana maintained that

[18] LittleAxe correctly pointed out in his motion (380) that the FTC has not promulgated any regulations addressing Indian tribes, indicating any interpretation of the FTC Act applying to Indian tribes (380, pp. 6-7). The FTC fails to cite even one FTC regulation or policy asserting authority over Indian tribes in the FTC's response (392), in the FTC's memoranda (339), cited in the FTC's response (392), or in the FTC's reply (391).

the 1938 Act was an amendment that added on to and expanded the 1924 Act. *Id.* The Court responded that although the two statutes were consistent with one another, the Indian canons of construction operated against allowing taxes under the 1938 Act to have the same effect on Indian tribes as the 1924 Act. *Id.* Instead, the Court held that leases under the 1938 act lacked Congressional assent to state taxation of Indian land.

Application of the canons required the Court to affirm the Ninth Circuit's en banc ruling. The Court reasoned, "'[t]he canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians.' . . . statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit. . . ." Id. at 766 (quoting *Oneida*, 470 U.S. at 247). In addition to the lack of Congressional intent, to apply the 1938 Act against the sovereignty of the Indian tribes, id. at 764, the first canon described above, the second canon requires interpretation of any ambiguities to the Indians' benefit. The Court therefore affirmed the Ninth Circuit's en banc reversal of the district court's dismissal of the tribe's action to enjoin Montana's enforcement of the state tax authorized only under the 1938 Act.

Here, the FTC and LittleAxe, along with the Tribal Lending Defendants, disagree over whether the FTC Act includes Indian tribes. The FTC argues that Congressional authority over Indian tribes, standing alone, gives it authority to subject tribal entities to suit. However, like the statute that lacked explicit authorization from Congress in *Montana*, the FTC Act is devoid of any Congressional authorization for claims under the FTC Act against Indian tribes. Indeed, to the extent that the FTC Act has an unclear reach, the Indian canons require the court to curtail, rather than expand, and resolve the ambiguity in favor of Indian tribes like the Modoc Tribe.

C. Protection By the Indian Law Canons Applies To Tribal Business Instrumentatlities Because They Are Extensions Of the Sovereign.

The FTC argues that the tribal businesses would fail to obtain any protection from any tribal sovereign immunity.[19] The FTC misplaces reliance on *F.T.C. v. Saja*. CIV-97-0666-PHX-

[19] FTC's reply (391), p. 15.

SMM, 1997 WL 703399 (D. Ariz. Oct. 7, 1997). In *F.T.C. v. Saja*, the court stated that a for-profit company working under a non-profit company was subject to the FTC Act. Specifically, in *Saja*, the entity involved was a completely separate entity, rather than an extension of the first entity. Here the Articles of Incorporation provide at Article III that Red Cedar Services, Inc. is a governmental instrumentality of the Modoc Tribe of Oklahoma. Motion for Legal Determination (Doc. #370, p. 64 of 165). At most, the FTC's argument would not apply until phase 2 under the bifurcation provisions of the Court's Order Entering Preliminary Injunction and Bifurcation, pp. 9-10. The FTC's argument has no bearing on the phase 1 issue before the Court of the FTC's authority over Indian tribes and/or their corporate instrumentalities.

Next, the FTC cites *Nat'l Fed'n of the Blind* --- but that case concerned the constitutionality of an FTC regulation rather than the actual jurisdictional reach of the FTC itself. *Nat'l Fed'n of the Blind*, 420 F.3d at 334-35. No such issue of constitutionality exists here, and the FTC fails to show it has authority over Indian tribes and /or their instrumentalities.

The FTC states that defendants' own statements contradict their "attempt" to create individual defenses. The FTC fails to cite any legal authority for the relevance of the FTC's attack on alternative defenses, if contradictions in the legal defenses did exist, which LittleAxe denies.

The Supreme Court has spoken on whether tribal businesses that extend from the sovereign share the sovereign's protection. In *Merrion*, 455 U.S. 130, 149, 102 S. Ct. 894, 904 (1982), the Supreme Court held that a tribe's sovereign rights and nature remain intact when doing business with non-Indians. In the court's words, "without regard to its source, sovereign power, even when *unexercised*, is an enduring presence that governs all contracts subject to the sovereign's jurisdiction, and will remain intact unless surrendered in *unmistakable* terms." *Id.* Such a statement is irreconcilable with *Donovan*'s statement that the right to tribal self-government fails to apply when the tribe runs a business. The Supreme Court decided *Merrion* before the Ninth Circuit decided *Donovan*, which shows that *Donovan*'s statement is incorrect or at least as the FTC would interpret *Donovan*'s statements without regard to *Merrion*.

The FTC attempts to argue that all Defendants' have somehow waived sovereign rights by including terms "any" and "all" as to compliance with federal laws or actions within the loan documents. But, the loan documents specifically state compliance with any and all "applicable" federal laws or actions. FTC's Memorandum (339), pp. 4-6, 15; FTC's Reply (391), pp. 1, 11, 12. The FTC also argues that the Defendants "admitted" that federal law applies to them in state court. The standard for a tribe losing sovereign rights remains in the canons, not in court testimony.Further, the court testimony cited by the FTC are the statements of legal counsel rather than a representative of the Tribe. Thus, the application of the FTC Act to the Indian tribes necessarily impacts tribal sovereignty under United States Supreme Court precedent; moreover, lower courts must use the Indian law canons to analyze the FTC's application to tribal entities under United States Supreme Court precedent.

The FTC's failure to rebut the applicability of the Indian law canons shows the invalidity of the FTC's position. The Court must grant LittleAxe's motion for determination of the phase 1(B) issue that the FTC does not have authority to bring any claims against Indian tribes or instrumentalities or arms of tribes under the FTC Act.

D. The Court's Jurisdiction Is a Matter That Can Be Raised At Any Time.

The FTC argues that a sovereign can somehow divest its jurisdictional protections through "restricting" its sovereign arguments to one act versus another.[20] Indeed, the language the FTC quotes allows an alternative interpretation, which conflicts with the FTC's argument: the "FTC, *at most*, would be left with its TILA and EFTA claims." The words 'at most,' qualify the entire statement. Defendants never stated that the FTC definitely had authority to prosecute under TILA or EFTA.

Moreover, the FTC argues that the Defendants' prior statements regarding the applicability of Federal Law are legally relevant.[21] Essentially, the FTC states that because a representative of a tribe stated that the tribe would be subject to federal law, that this must be so.

[20] FTC's reply (391), pp. 13-14. The FTC argues that the TILA EFTA claims would still apply to the tribal lending defendants and that the court should limit the scope of defendants' arguments to the FTC Act.

[21] FTC's memoranda (339), pp. 4-6.

The FTC fails to cite any legal authority indicating why this would be legally significant, and accordingly, the court should disregard the FTC's argument. An Indian tribe's voluntary meeting of standards that match federal law fails to function as an abrogation or waiver of sovereignty.

Further, the court can raise subject-matter jurisdiction sua sponte, despite whatever actions have taken place prior to the ruling. *See* Grupo Dataflux v. Atlas Global Grp., L.P., 541 U.S. 567, 593, 124 S. Ct. 1920, 1937, 158 L. Ed. 2d 866 (2004). And, "tribal sovereign immunity is a matter of subject matter jurisdiction, which may be challenged by a motion to dismiss…" *Miner Elec., Inc. v. Muscogee (Creek) Nation*, 505 F.3d 1007, 1009 (10th Cir. 2007). Here, because the Federal Government may only abrogate tribal sovereign immunity through Congressional intent, without Congressional intent the tribes still have sovereign immunity. Because Congress has not abrogated Indian tribal sovereignty in any way with the FTC Act, the tribes retain their sovereignty and their immunity from suit under the FTC Act.

III. EVEN BEYOND UNITED STATES SUPREME COURT PRECEDENT, ALLOWING THE FTC'S INTERPRETATION OF *TUSCARORA* IS ON THE WRONG SIDE OF UNITED STATES GOVERNMENT POLICY TOWARD THE INDIAN TRIBES.

The FTC has failed to show that Congress intended the FTC Act to apply to a tribe, to a subdivision of a tribe, to an arm of a tribe or to an instrumentality of a tribe. The FTC has failed to show that the Court should resolve any ambiguity in the FTC Act, such as whether the word "person" includes the Modoc Tribe, against the Modoc Tribe. Without either showing, the FTC Act is inapplicable to the Modoc Tribe or its instrumentality.

The FTC refers to the Indian law canons as "separate" canons, attempting to excise them from all relevance. But, the Indian law canons have had a strong presence in federal law for almost two centuries; the *Donovan* test, by chronology, is the exception, rather than the rule.[22] The canons represent more than a desire for clarity. As the Supreme Court has stated, the canons represent the trust between the Indian tribes and the United States government. While Congress

[22] Wildenthal, supra.

retains plenary authority over the Indian tribes, all branches of the United States government have recognized that Indian tribes retain a special way of life outside the United States constitution, dating to time immemorial[23].

Congress has stated that there is a government-to-government relationship between the United States and each Indian tribe. The United States has a trust responsibility to each tribal government that includes the protection of the sovereignty of each tribal government, and Congress, through statutes, treaties, and the exercise of administrative authorities, has recognized the self-determination, self-reliance, and inherent sovereignty of Indian tribes. *See e.g*, 25 U.S.C.A. § 3601.

The Executive's current policy, announced forty years ago, is "to strengthen the Indian's sense of autonomy without threatening his sense of community. We must assure the Indian that he can assume control of his own life without being separated involuntarily from the tribal group. And we must make it clear that Indians can become independent of Federal control without being cut off from Federal concern and Federal support." Richard M. Nixon, Special Message to the Congress on Indian Affairs (July 8, 1970).

The Supreme Court recognizes the general combined policy of the Federal Government in encouraging tribal self-government. *Iowa Mut.*, 107 S. Ct. at 975. The thrust of each policy is to prevent any unintentional abrogation of Indian tribal sovereign rights.

While the sovereign immunity rule employs the unintentional abrogation policy at the state level, the Indian canons represent the same policy at the federal level. The canons represent the judiciary's effort, in concert with Congress and the President, to preserve a way of life.[24] In the words of Justice Marshall, the tribes "acknowledge themselves to be under the protection of

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[23] *See Johnson v. McIntosh*, 21 U.S. 543, 550, 5 L. Ed. 681 (1823), *Talton v. Mayes*, 163 U.S. 376, 384, 16 S. Ct. 986, 989, 41 L. Ed. 196 (1896).

[24] *E.g.*, Scott C. Hall, *The Indian Law Canons of Construction v. the Chevron Doctrine: Congressional Intent and the Unambiguous Answer to the Ambiguous Problem*, 37 CONN. L. REV. 495, 542 (2004). ("The canons have been and continue to be the manner in which the Court ensures that Congress does not lightly or inadvertently terminate the sovereign rights of Indians." Id.)

the United States, and of no other power. Protection does not imply the destruction of the protected." *Worcester v. State of Ga.*, 31 U.S. 515, 518, 8 L. Ed. 483 (1832).

A presumption that United States law applies to Indian tribes would betray this trust; it would represent a lack of faith in the Indian tribes to sovereign regulation in the best interest of both themselves and the United States. Without the Indian canons, federal entities could run roughshod over the hard won tribal rights that the FTC wishes to "separate" from consideration. Indeed, the FTC's view of the Indian canons being "baseless" showcases the inconsideration cautioned against by every single United States government branch. Presuming that the FTC Act applies to Indian tribes would allow the FTC to circumvent longstanding United States government policies. Unsurprisingly, the Supreme Court has never held that a presumption of applicability of federal statutes to Indian tribes exists, be it in the form of any reference to *Donovan* or otherwise.

The canons represent more than shifting political issues and pressures, like the FTC's current desire to regulate payday lenders. Under Supreme Court precedent, short-term convenience never can outweigh the trust relationship between the United States and the Indian tribes, because "great nations, like great men, keep their word." *Tuscarora*, 362 U.S. at 142 (Black, dissenting).[25] Because *Donovan* contravenes Federal Indian law policy, this court should apply the Indian law canons to decide whether the FTC Act applies to the Modoc Tribe.

[25] The majority in *Tuscarora* nonetheless applied its analysis of the terms of the Federal Power Act's definition of the term "reservation" in accordance with the first Indian law canon of clear Congressional intent, finding no ambiguity or need to apply the second canon. 362 U.S. at 112, 80 S.Ct. at 551. ("It is difficult to perceive how congressional intention could be more clearly and definitely expressed." Id.) The Court has never since cited with approval the dictum in *Tuscarora* relied upon so fully and completely in *Donovan*. In *Oneida*, the Court explained the holding of *Tuscarora* as requiring application of the Congressional intent canon, implicitly rejecting any argument, such as *Donovan* relies upon, of presuming any applicability of federal statutes to Indian tribes. *Oneida*, 470 U.S. at 248 n.21, U.S. at 1258-59. (Referring to the Indian canons of construction, the Supreme Court in *Oneida*, stated, "*Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977), expressly reaffirmed the principles of construction [the Indian law canons] which we apply in this case. Petitioners' other cases, *e.g.*, *FPC v. Tuscarora Indian Nation*, 362 U.S. 99, 80 S.Ct. 543, 4 L.Ed.2d 584 (1960), and *Shoshone Tribe v. United States*, 299 U.S. 476, 57 S.Ct. 244, 81 L.Ed. 360 (1937), do so implicitly." Id. (emphasis added))

CONCLUSION

LittleAxe requests the Court to reject and/or modify the Order, Report and Recommendation (444) to make the phase 1 (B) legal determination under the Bifurcation of Proceedings Order as a matter of law that the FTC does not have authority to bring any claims against Indian tribes or instrumentalities or arms of tribes under the FTC Act, denying the FTC's motion (338) and granting LittleAxe's motion (380) .

DATED this 2nd day of August, 2013

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CERTIFICATE OF SERVICE

Pursuant to Federal Rule of Civil Procedure 5(b), I hereby certify that on the 2nd day of August, 2013, I submitted the foregoing Objection to Order, Report and Recommendation (444) electronically for filing and service with the United States District Court of Nevada. Service of the foregoing document shall be made to all counsel of record via electronic case filing.

/s/ Paul C. Ray

Paul C, Ray