UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

MCKESSON CORPORATION, et al. Plaintiffs, vs. TODD HEMBREE, ATTORNEY GENERAL OF THE CHEROKEE NATION, in his official capacity, et al., Defendants.	No. 4:17-cv-00323-TCK-FHM

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS

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Plaintiffs file this brief in opposition to Defendant Todd Hembree's Motion to Dismiss [Dkt. 139] and Defendant Judges' Motion to Dismiss [Dkt. 140].

INTRODUCTION

After the parties submitted multiple rounds of briefing over a span of months, the Court granted Plaintiffs' motion for a preliminary injunction, temporarily enjoining Defendants (the "Tribe") from prosecuting or adjudicating the underlying tribal court action. *McKesson Corp. v. Hembree*, 2018 WL 340042, at *11 (N.D. Okla. Jan. 9, 2018). The Court found the tribal court's lack of jurisdiction to be sufficiently clear that Plaintiffs were not required to exhaust tribal remedies. *Id.* at *5, *9. Although the Tribe has made no bones about its disagreement with the Court's ruling,[1] it chose not to appeal. *See* 28 U.S.C. § 1292(a)(1). Instead, in an apparent attempt to circumvent the Court's ruling, the Tribe voluntarily dismissed the tribal court action without prejudice, refiled its claims in Oklahoma state court the same day, and moved to dismiss this action on grounds of mootness and sovereign immunity. The Court should reject the Tribe's jurisdictional gamesmanship and deny the motion.

If the Tribe genuinely intended to foreclose a future return to tribal court, it had multiple options for doing so. It could have stipulated to the entry of a permanent injunction. Or, the Tribal Council could have adopted a meaningful, general policy that the Tribe would litigate such matters against non-members in state or federal court. It did neither, choosing simply to

[1] "'We absolutely believe that we had jurisdiction in tribal court,' said Chrissi Ross Nimmo, deputy attorney general for the Cherokee. 'It's disappointing that non-Indians can come into a tribal community and decimate it, and not be held to answer in that community's court system.'" Jan Hoffman, *Cherokee Can't Sue Opioid Distributors in Tribal Court, Judge Rules*, N. Y. TIMES (Jan. 11, 2018), *available at* https://www.nytimes.com/2018/01/11/health/cherokee-opioids-lawsuit.html (attached as Ex. 1).

dismiss without prejudice and state that its current "policy" is that it does not intend to resurrect this particular action in tribal court. That is insufficient as a matter of law.

The Supreme Court has long recognized that a voluntary cessation of challenged conduct does not moot a case unless it is "absolutely clear" that the challenged conduct will not recur. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) ("*Laidlaw*") (internal quotation marks omitted). That standard is satisfied only where the defendant institutes an action of sufficient permanence—such as the enactment of a new statute or a change in formal policy—to provide assurance that the threat of the conduct to the plaintiff is over. It is not satisfied by discretionary changes in how the governmental actor conducts its litigation or by non-binding statements of "intent" like the Tribe offers here.

For similar reasons, there is no merit to the Tribe's arguments that this action is barred by sovereign immunity because there is no prospective action of Defendants that Plaintiffs can continue to challenge through the *Ex parte Young* doctrine. *Ex parte Young*, 209 U.S. 123 (1908). Inasmuch as the Tribe's vague and non-binding statements of intent as to this litigation do not moot this case, they also do not remove the threat of future prosecution or adjudication of the Tribe's claims against Plaintiffs in tribal court. Giving credence to the Tribe's theory would overturn the policy under which federal courts permit actions for prospective relief against both state and tribal officials. It should be rejected. The Tribe's motion to dismiss should be denied, and the Court should set a schedule for the briefing of a motion for permanent injunction.

ARGUMENT

I. THE TRIBE HAS NOT MET ITS HEAVY BURDEN OF PROVING MOOTNESS

The Tribe contends that, because it has now dismissed the tribal court action without prejudice, this case is moot. The Tribe is not the first unsuccessful party to try this tactic, nor is it the first to do so while clinging onto a chance of resuming its prohibited conduct. However,

the Supreme Court directs that "maneuvers designed to insulate" a party from court action "must be viewed with a critical eye." *Knox v. Serv. Employees Int'l Union, Local 1000*, 567 U.S. 298, 307 (2012). A party "should not be able to evade judicial review, or to defeat a judgment, by temporarily altering questionable behavior." *City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278, 284 n.1 (2001). Accordingly, "[a] case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party," and "[a]s long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Knox*, 567 U.S. at 307-08 (internal quotations omitted); *see also Laidlaw*, 528 U.S. at 189 (noting that the "'heavy burden' … lies with the party asserting mootness"). "Mere voluntary cessation of allegedly illegal conduct does not moot a case; if it did, the courts would be compelled to leave the defendant free to return to his old ways." *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 n.10 (1982) (internal quotations and alteration omitted).

A. The Tribe's Burden Is Heavy and Formidable.

Courts reject arguments like the Tribe's for good reason—the voluntary cessation exception exists "to counteract the possibility of a defendant ceasing illegal action long enough to render a lawsuit moot and then resuming the illegal conduct." *Chihuahuan Grasslands Alliance v. Kempthorne*, 545 F.3d 884, 892 (10th Cir. 2008). The test to overcome this exception "'is a stringent one'" (*City of Mesquite*, 455 U.S. at 289 n.10), and the Tribe "bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Laidlaw*, 528 U.S. at 190. "Such a burden will typically be met only by changes that are permanent in nature and that foreclose a reasonable chance of recurrence of the challenged conduct." *Tandy v. City of Wichita*, 380 F.3d 1277, 1291 (10th Cir. 2004) (citing *Laidlaw*, 528 U.S. at 190). A defendant can make it "absolutely clear" that the alleged wrongful conduct will not continue only where it has done something "permanent in

nature" to prevent it. *Tandy*, 380 F.3d at 1291; *Laidlaw*, 528 U.S. at 190. The Tribe's burden is not met where it has "changed course simply to deprive the court of jurisdiction." *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1115 (10th Cir. 2010) (internal quotation marks omitted).

B. The Tribe Has Made No Permanent Change.

The Tribe has not met its heavy burden here, a fact highlighted by its refusal to take any affirmative step to foreclose a future tribal action. Far from having done anything "permanent in nature," *cf. Tandy*, 380 F.3d at 1291, the Tribe has refused to consent to the entry of the preliminary injunction as final, as other litigants have done.[2] *See, e.g., Delta W. Grp., LLC v. Ruth E. Fertel, Inc.*, 164 F. App'x 650, 652-53 (10th Cir. 2005) (after entry of preliminary injunction, party stipulated to entry of permanent injunction "to show my intent" not to engage in further trademark infringement). Instead, after losing a preliminary injunction motion that it had litigated aggressively on the merits over several months of briefing, the Tribe made clear its absolute belief that this Court got the decision wrong, but elected not to appeal. Rather, it dismissed the tribal complaint without prejudice, and moved to dismiss this action as moot. This transparent effort to divest jurisdiction from this Court and thereby attempt to void the preliminary injunction does not make it "absolutely clear" the Tribe's unlawful conduct will not continue—to the contrary, it foreshadows precisely the opposite.

[2] After unilaterally filing the tribal court dismissal without prejudice, counsel for General Hembree sought a stipulation of dismissal of this case. Counsel for Plaintiffs offered to stipulate to the entry of a permanent injunction, but this offer was rejected.

C. The Tribe's Self-Interested Statement of Its Current Intent Changes Nothing.

Rather than offering certainty that it will not continue with its improper action in the future, the Tribe avers only that it "intends" to proceed to a judgment in state court and argues that Plaintiffs "will not be required to appear in tribal court at all in this matter." (Defendant Todd Hembree's Mot. to Dismiss [Dkt. 139] ("Mot.") at 5). But a mere statement of present intent, without more, "does not suffice to make a case moot." *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953). This is especially true here, where the Tribe has clearly stated to national press its disagreement with the Court's order that jurisdiction is lacking.[3] For example, in *ARW Exploration Corp. v. Aguirre*, 947 F.2d 450 (10th Cir. 1991), defendants argued that a challenge to the arbitrability of claims was moot because they were no longer seeking to arbitrate those claims. *Id.* at 453. The court disagreed and found that the defendants had failed to meet their heavy burden. Even though they stated an intention to dismiss the claims from arbitration and had refiled them in a separate federal action, they had not dismissed the arbitration claims with prejudice or amended the complaint to omit them. *Id.* at 453 & n.3.

The Tribe's authorities are inapposite. For example, the Tribe relies upon the statement in *Rio Grande* that *Laidlaw*'s heavy burden "frequently has not prevented governmental officials from discontinuing challenged practices and mooting a case." (Mot. at 6 (citing 601 F.3d at 1116)). But *Rio Grande* involved conclusive, general application changes of policy issued by the government body, not litigation-driven changes of position. 601 F.3d at 1118 (noting that the agency had issued a new "biological opinion" that established a new regulatory context.) A strategic, non-binding change in government "policy" directed only to a particular case and

[3] *See* Ex. 1.

parties is not sufficient to moot a federal court action. Absent a "permanent" assurance here—which the Tribe has refused to offer—the Tribe's self-professed present intention does not moot this case.

1. The Cherokee Nation Has No Actual Policy Preventing It From Refiling Its Tribal Court Action.

The Tribe cannot moot this case by labeling Hembree's present intent as a "policy" of the Cherokee Nation "to pursue the litigation against the pharmacies and distributors in Oklahoma state court until a judgment on the merits, and not to refile the action against these defendants in tribal court." (Hembree Decl. [Dkt. 139-1] ¶ 8.)[4] First, a decision applicable to only one case is not a "policy"; in fact, it is a litigation tactic and is precisely the sort of gamesmanship that the "voluntary cessation" exception is intended to address. General Hembree could change his mind as the litigation evolves. Moreover, he does not purport to be the final or exclusive arbiter of tribal litigation policy. *Cf. id.* ¶ 2. Cherokee law provides that the Attorney General's duties are prescribed by law by the Cherokee Constitution and by the Tribal Council. *See* Cherokee Nation Const., art. VII, § 13 (providing that the Cherokee Nation Attorney General has "such other duties as the Council may prescribe by law.").[5] While Cherokee law authorizes the Attorney General to initiate many actions at his discretion, it requires authorization by the Principal Chief and ratification by the Tribal Council to initiate any litigation against a non-Cherokee Nation

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[4] General Hembree also represents that the Cherokee Nation has never refiled a lawsuit in tribal court against non-members after being preliminarily enjoined by a federal court and dismissing the tribal court case. (Hembree Decl. ¶ 7.) Notably absent from this declaration is any indication of how often the Cherokee Nation has faced that circumstance.

[5] Available at http://www.cherokee.org/Portals/0/Documents/2011/4/308011999-2003-CN-CONSTITUTION.pdf?ver=2013-03-21-084545-933.

entity involving substantial assets or the sovereignty of the Cherokee Nation.[6] *Compare* 51 CNCA § 105(B)(2) *with* 73 CNCA §§ 203-204 (attached as Exs. 3 and 4).[7] The Principal Chief and the Tribal Council also review certain settlements prior to finalization. 51 CNCA § 105(B)(16) (*see* Ex. 3). Because the Tribal Council could direct General Hembree to refile in tribal court pursuant to their authority under the Cherokee Nation Constitution to prescribe his duties, his assertion of current Cherokee Nation policy is susceptible to change and does not moot this case. *See Finstuen v. Crutcher*, 496 F.3d 1139, 1150 (10th Cir. 2007) (holding that only "authoritative" promises could potentially establish mootness, but that state agency official's promise was not authoritative where it did not bind the state or even his successors at the agency).

General Hembree's present intent about litigation strategy could easily change as the litigation evolves. For instance, since General Hembree filed his declaration, Plaintiff McKesson Corporation has removed the Tribe's refiled state court action to federal court. *See Cherokee Nation v. McKesson Corp., et al.*, Case No. 18-cv-56-SPS (E. D. Okla.). Before this Court, the Tribe has repeatedly tied its decision not to refile in tribal court to its intent to proceed to judgment in state court. (*See* Mot. at 5; Hembree Decl. ¶ 8). This raises the question of whether, if a state court forum is not available to the Tribe, it will change its position with regard to

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[6] Notably, an act was recently proposed to the Tribal Council which was intended to force the Attorney General to appeal an adverse ruling in *Cherokee Nation v. Nash*, Case No. 13-cv-0313 (D.D.C. Aug. 30, 2017). *See* "Act Relating to Appeal a Federal District Court Decision Impacting the Sovereignty of the Cherokee Nation and the 566 Other Tribes Across the United States and Declaring an Emergency," LA 17-138 (2017) (attached as Ex. 2). While the Tribal Council tabled that act indefinitely, its submission suggests that the Council has the capacity to override the litigation decisions of the Attorney General.

[7] The Cherokee Nation Code, Annotated, is also available at http://www.cherokee.org/Portals/AttorneyGeneral/Users/213/13/213/Word%20Searchable%20Full%20Code.pdf?ver=2015-10-22-083614-130.

proceeding in tribal court. Similarly, if the Tribe is subject to an adverse pretrial ruling in either state or federal court, the Tribe might again seek to avoid an unfavorable judgment by packing up and refiling in tribal court. Litigation tactics and strategy change; nothing in General Hembree's declaration prevents this. It was only three months ago that General Hembree proclaimed the tribal court action was intended to show "every Native American tribe . . . , look at what we've developed in our court systems and our court rules, and . . . they can do it too."[8] And, it was in January that Assistant Attorney General Nimmo proclaimed her absolute belief in the tribal court's jurisdiction. The threat is real, and there is no policy to prevent it.

2. General Hembree's Case-Specific Exercise of Discretion Cannot Moot The Case.

Without a meaningful policy, Hembree's voluntary dismissal without prejudice is merely a revocable exercise of his discretion and cannot moot this case. Courts have routinely held that voluntary cessation does not moot cases where, as here, a government official's discontinuance of the challenged conduct is a case-specific exercise of discretion which the official is free to revoke at any time. For example, in *Koontz v. Watson*, --- F. Supp. 3d ----, 2018 WL 617894 (D. Kan. Jan. 30, 2018), the court held that an official's statement that the officer would have waived an allegedly unconstitutional law for the plaintiff did not moot the case because the defendant could have revoked the waiver after dismissal and "never assert[ed] that he permanently will abandon enforcement" of the unlawful act. *Id.* at *6. Moreover, even where a defendant voluntarily ceases its conduct with "'protestations of repentance and reform'"—of which the Tribe has offered none—it is insufficient to establish mootness "'when abandonment seems

[8] Andrew Westney, *Cherokee Opioid Fight Should Inspire Other Tribes, AG Says*, Law360 (Nov. 14, 2017), *available at* https://www.law360.com/articles/984922/cherokee-opioid-fight-should-inspire-other-tribes-ag-says (attached as Ex. 6).

timed to anticipate suit, and there is probability of resumption.'" *McCormack v. Herzog*, 788 F.3d 1017, 1025 (9th Cir. 2015) (quoting *W.T. Grant Co.*, 345 U.S. at 632 n.5). And, "while a statutory change 'is usually enough to render a case moot,' an executive action that is not governed by any clear or codified procedures cannot moot a claim." *McCormack*, 788 F.3d at 1025 (citing *Bell v. City of Boise*, 709 F.3d 890, 898-900 (9th Cir. 2013)). That is all we have here.

D. The Tribe's Authorities Do Not Support Dismissal.

The authorities cited by the Tribe concerning tribal litigation do not support a finding of mootness. The Tribe relies heavily on *Board of Education v. Henderson*, 696 F. App'x 355 (10th Cir. 2017), which it characterizes as having similar facts. (Mot. at 6-8). But this gloss is not borne out by the facts in *Henderson*, which involved a case filed in federal court after the termination of the tribal suit *on the merits*. 696 F. App'x at 357. As the Tenth Circuit noted, "successful litigants do not generally initiate suit in federal court over their victories." *Id.* at 358. By contrast, in this case, Plaintiffs brought suit to enjoin the Tribe, the Court granted a preliminary injunction, and the Tribe dismissed its tribal court action without prejudice. There has been no determination in Plaintiffs' favor in tribal court nor any final determination foreclosing tribal jurisdiction—indeed, the reason the Tribe has voluntarily dismissed there and seeks dismissal here is for the specific purpose of avoiding a final determination on jurisdiction. *Henderson* and similar authorities cited by the Tribe are thus inapposite. *See also Charles v. Ute Indian Tribe of the Uintah & Ouray Reservation*, 2018 WL 611469 (D. Utah Jan. 29, 2018) (dismissing federal action after tribal court dismissed tribal action for failure to state a claim and lack of jurisdiction), *appeal filed sub nom. Charles v. Hackford*, No. 18-4024 (10th Cir. Feb. 21, 2018); Ex. 1 to Mot. to Dismiss, *Charles v. Ute Indian Tribe of the Uintah & Ouray Reservation*, 2:17-cv-321 [Dkt. 44-1] (D. Utah Oct. 6, 2017) (tribal court order dismissing underlying action).

Even the Tribe's cases involving voluntary dismissal of tribal litigation are distinguishable, as the dismissal occurred either immediately after the filing of the federal complaint, or prior to any rulings on the merits in federal court.[9] Or, the court did not consider the voluntary cessation exception to the mootness doctrine.[10] Here, in contrast, the timing of the Tribe's dismissal—not at the inception of litigation but after a decisive loss on Plaintiffs' hard-fought motion for preliminary injunction—shows that the sole purpose of the Tribe's maneuver is to escape the Court's jurisdiction and avoid entry of a permanent injunction in this case, all while retaining the real possibility of refiling in tribal court, if it so desires. The Court's preliminary injunction order rested on issues of law, and little, if any, additional factual development will be required prior to motions for final judgment. By seeking to moot this case prior to entry of an adverse final judgment while leaving the door open to a refiled tribal court suit, the Tribe is engaging in precisely the conduct the voluntary cessation exception was designed to thwart. Without a permanent injunction, Plaintiffs have no assurance that the Tribe will not again seek to invoke tribal court jurisdiction.

II. DEFENDANTS ARE NOT ENTITLED TO SOVEREIGN IMMUNITY

The Tribe argues that even if this case is not moot, the officers are now entitled to sovereign immunity based on General Hembree's statement of intent. That is, because the Tribe

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[9] *See Moss v. Bossman*, 2009 WL 891867, at *6–7 (D.S.D. Mar. 31, 2009) (tribal court action voluntarily dismissed two weeks after filing of federal action, not after litigation of preliminary injunction); *State of Nev. v. Hicks*, 944 F. Supp. 1455, 1460 (D. Nev. 1996) (certain defendants voluntarily dismissed from tribal court action before federal court heard argument on summary judgment), *aff'd on other grounds*, 196 F.3d 1020 (9th Cir. 1999), *as amended* (Jan. 24, 2000), *rev'd and remanded on other grounds sub nom. Nevada v. Hicks*, 533 U.S. 353 (2001). In *State of Nevada v. Hicks*, the district court also erroneously placed the burden of establishing the voluntary cessation exception on the plaintiff. 944 F. Supp. at 1460, n.3.

[10] *Moss*, 2009 WL 891867, at *7; *Tamiami Partners, Ltd. By & Through Tamiami Dev. Corp. v. Miccosukee Tribe of Indians*, 898 F. Supp. 1549, 1559 (S. D. Fla. 1994), *aff'd in part, appeal dismissed in part*, 63 F.3d 1030 (11th Cir. 1995).

has dismissed the tribal court action without prejudice and currently intends to pursue litigation in state court, there is purportedly no longer an ongoing or threatened violation of federal law, and, therefore, no need to apply the legal fiction of *Ex parte Young*, 209 U.S. 123 (1908). This argument fails for much the same reason as the Tribe's mootness argument and would not succeed even in the one court whose decision it cites for this theory.

A. *Ex Parte Young* Allows Suit to Protect Against a Threatened Violation of Federal Law, Even If The Threat Is Not Imminent.

The *Ex parte Young* doctrine allows suit against tribal officers for prospective relief, when there is an alleged ongoing violation of federal law—including an improper exercise of tribal court jurisdiction. *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1155 (10th Cir. 2011). The Tribe asserts that, because the violation (which was ongoing when this suit was filed) is not happening *right now*, it is no longer "ongoing" and their immunity has been restored. This misunderstands the nature of the *Ex parte Young* doctrine, which protects against future, threatened action. As the Eleventh Circuit explained,

> This [ongoing violation] requirement does not mean that the enforcement of the allegedly unconstitutional state statute actually must be in progress against the particular plaintiffs initiating suit. Rather, . . . the ongoing and continuous requirement merely distinguishes between cases where the relief sought is prospective in nature, *i.e.*, designed to prevent injury that will occur in the future, and cases where relief is retrospective. As the Supreme Court explained in *Papasan* [*v. Allain*, 478 U.S. 265, 277-78 (1986)], "*Young* has been focused on cases in which a violation of federal law by a state official is ongoing as opposed to cases in which federal law has been violated at one time or over a period of time in the past." Similarly, in *Green v. Mansour*, [474 U.S. 64, 73 (1985),] the Supreme Court recognized that where there "was no threat of state officials violating the repealed law in the future," the Eleventh Amendment prohibited the issuance of a declaratory judgment to adjudicate past violations of federal law. Thus, where there is a threat of future enforcement that may be remedied by prospective relief, the ongoing and continuous requirement has been satisfied.

Summit Med. Assocs., P.C. v. Pryor, 180 F.3d 1326, 1338 (11th Cir. 1999) (citations omitted). Indeed, *Ex parte Young* itself did not involve an "in-progress" violation of federal law; it involved a pre-enforcement challenge to a statute. *See* 209 U.S. at 129.

Courts have also declined to adopt the limited view that only imminent, rather than threatened, enforcement is required. *Summit*, 180 F.3d at 1338; *accord Reed v. Bryant*, --- F. App'x ----, 2017 WL 6368842, at *6 (10th Cir. Dec. 13, 2017) (rejecting district court's dismissal for failure to allege that a future suspension was "imminent or likely," and stating "[Plaintiff] need not allege that he is likely to be suspended under the ODOC policy in the near future in order to state a claim for prospective injunctive relief."); *Waste Mgmt. Holdings, Inc. v. Gilmore*, 252 F.3d 316, 330 (4th Cir. 2001) ("The requirement that the violation of federal law be ongoing is satisfied when a state officer's enforcement of an allegedly unconstitutional state law is threatened, even if the threat is not yet imminent.").

The Tribe argues that *Ex parte Young* is more restrictive than mootness, so that even if this Court finds that the case is not moot, it should still dismiss it based on sovereign immunity. But once again, courts have declined to use *Ex parte Young* to narrow federal jurisdiction in otherwise justiciable cases. For example, in *Deida v. City of Milwaukee*, 192 F. Supp. 2d 899 (E.D. Wis. 2002), a pre-enforcement First Amendment challenge to a state law, the state officials argued that the plaintiff could not sue them under *Ex parte Young* until she faced an actual threat of prosecution. *Id.* at 915. Having already determined that the plaintiff's claims satisfied Article III's justiciability requirements under a more relaxed standard than "actual threat" of prosecution, the court declined to adopt the officials' interpretation of *Ex parte Young*, which would improperly "enable sovereign immunity to subvert the established rules of the First Amendment and Article III." *Id.* at 916. "In *Ex Parte Young*, the Court did not seek to limit

federal jurisdiction; it created a judicial fiction to ***expand federal court jurisdiction*** and expressly recognized the importance of allowing pre-enforcement challenges to be raised in federal court." *Id.* (emphasis added and citation omitted).

B. The Threat Has Not Been Dissipated by Hembree's Statement of His Current Intent.

Here, as explained in detail above, Plaintiffs still face the threat that the Tribe will continue its prior, enjoined violation of federal law in the future. Plaintiffs, therefore, still have a claim for prospective relief against tribal officers under *Ex parte Young*.

The non-binding Seventh Circuit case cited by the Tribe does not provide otherwise. *See Watkins v. Blinzinger*, 789 F.2d 474, 484 (7th Cir. 1986). Rather, as the Seventh Circuit later affirmed, "[w]hen a party, in response to an interlocutory order, refrains from engaging in the challenged practice, yet provides no assurance that the moratorium on implementing that practice is permanent, the federal interest in asserting authority to enforce federal law does not vanish as a result." *Vickery v. Jones*, 100 F.3d 1334, 1348 (7th Cir. 1996) (affirming the district court's conclusion quoted above).

The same is true here. In response to—and only after—this Court's preliminary injunction, the Tribe dismissed the tribal action without prejudice, and General Hembree's declaration provides insufficient assurance that the Tribe will not resume conduct that this Court has determined to be unlawful. Under *Ex parte Young*, there is a threat that the Tribe will reassert the jurisdiction it "absolutely believe[s]" it has.[11] Plaintiffs are entitled to prospective relief, and the tribal officers are not immune.

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[11] *See supra* n. 1.

CONCLUSION

For the foregoing reasons, Defendants' motions to dismiss this action should be denied.

Dated: March 1, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of March, 2018, I electronically transmitted the above and foregoing to the Clerk of Court using the ECF System for filing. Based on the records currently on file, the Clerk of Court will transmit a Notice of Electronic Filing to the following ECF registrants:

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