No. 24-5011

IN THE UNITED STATE COURT OF APPEALS FOR THE TENTH CIRCUIT

THLOPTHLOCCO TRIBAL TOWN, A Federally Recognized Indian Tribe,

Plaintiff-Appellee,

-v-

ROGER WILEY, **RICHARD C. LERBLANCE**, **AMOS McNAC**, **ANDREW ADAMS, III**, **KATHLEEN R. SUPERNAW**, **MONTIE DEER**, **GEORGE THOMPSON, JR.**, and **LEAH HARJO-WARE**,

Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of Oklahoma
The Honorable Jennifer Cho-Groves*
No. 4:09-CV-00527-JCG-CDL

RESPONSE BRIEF OF PLAINTIFF-APPELLEE THLOPTHLOCCO TRIBAL TOWN

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ORAL ARGUMENT NOT REQUESTED
(See Tenth Circuit Rule 28.2(C)(2)

*Judge Jennifer Choe-Groves, of the United States Court of International Trade, sitting by designation.

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ATTACHMENT B	-	Consolidated Appeal Decision for *Thlopthlocco v. Anderson, et al*., No. CV-2007-39 and *Anderson v. Burden*, No. CV-2011-08, 2022 Muscogee Creek Nation Supreme LEXIS 1. (MCN Supreme Court, February 28, 2022), No. SC-2021-03 (SupAp 2388-416).
ATTACHMENT C	-	Consolidated Decision for *Thlopthlocco v. Anderson, et al*., No. CV-2007-39 and *Anderson v. Burden*, No. CV-2011-08, Muscogee (Creek) Nation District Court, Judge Stacy Leeds. (SupAp 2256-76).

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Plaintiff-Appellee Thlopthlocco Tribal Town's Supplemental Appendix consists of documents filed as an Appendix in the litigation in the MCN Tribal District and Supreme Courts.

This same Appendix, supplemented with additional documents from Tribal court filings and some previous filings in the Federal District Court which were filed as part of a series of Status Reports was filed in the Federal District Court as Docket numbers 176-01 to 176-14.

Documents included within the Appendix in the Tribal courts and the Federal District Court were identified with a number following the word "Doc." (Shortened from "Document") in the Table of Contents of each individual volume.

That designation is changed to "Item" in this Supplemental Appendix on appeal so as not to be confused with any reference to a docket number in the Federal District Court.

Pages in this Supplemental Appendix are Bates numbered consecutively from Volume 01 to Volume 14. References will be to the consecutive page number of the Supplemental Appendix rather than by volume and page number.

In some entries, there may be a reference that the Item was marked as an Exhibit to another document in the tribal court. This may or may not be a reference that the document is an attachment to a document in this Supplemental Appendix.

(Doc. 176-01) THLOPTHLOCCO'S SUPPLEMENTAL APPENDIX - VOLUME 01- (PP. 0001 - 0163)

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(This is Volume 14 as filed in the Federal District Court and includes additional docket entries from the Federal District Court)
(Item = Exhibit)

The following Docket Entries are included with the original Volume 14 of the Appendix filed as Doc. 174-14 and consist of additional pages 2234 to 2279:

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(Additional Documents from Federal District Court Docket)
(Item = Exhibit)

VOLUME LIST TO SUPPLEMENTAL APPENDIX

This table identifies the Federal District Court docket number of the page break between volumes of Plaintiff-Appellee Thlopthlocco Tribal Town's Supplemental Appendix as supplemented with additional District Court documents in Volumes 14 and 15. The Appendix is consecutively numbered from 1 to 2500.

GLOSSARY OF TERMS AND ABBREVIATIONS AND IDENTIFICATION OF PARTIES USED IN THIS BRIEF

1. Glossary of Abbreviations and Terms.

Plaintiff-Appellee Thlopthlocco Tribal Town identifies the following abbreviations and terms used in this filing. Some may already be known to the Court, but are included in the interest of completeness:

Business Committee	-	Governing Body of Thlopthlocco Tribal Town, a Federally recognized Indian Tribe, as specified by its Constitution. (Sup.Ap. 001, 003-4).
Mekko	-	Also "Miko," "Town King." A leader of a Creek tribal town. (SupAp 003).
MCN	-	Abbreviation used for Appellant Defendants in their official capacities as part of the Muscogee (Creek) Nation, a federally recognized Indian Tribe. The MCN reorganized in 1979 under the Oklahoma Indian Welfare Act. This term may also be used to refer to the Defendant MCN judicial officials herein. (SupAp 491).
Talwa	-	Ancient name for a Creek Tribal Town which also connotes to "tribe." In the Creek language, the traditional term is *etvwlv* from which the term "talwa" may have been derived.
Thlopthlocco or TTT	-	Abbreviation for Appellee-Plaintiff Thlopthlocco Tribal Town, a federally recognized Indian Tribe. Thlopthlocco reorganized in 1939 under the Oklahoma Indian Welfare Act also known as the Thomas-Rogers Act, 49 Stat. §1967 (Approved June 26, 1936)), 25 U.S.C. §503. ((Sup.Ap. 001).
ApltBr (Page Number)	-	Reference to the MCN judicial officials Appellant Brief.

(App (Page Number)) - References to MCN Judicial officials Appellants' Appendix.

(SupAp (Page Number)) - References to Thlopthlocco-Appellee Supplemental Appendix.

2. Supplemental Appendix in this Case.

The Supplemental Appendix in this case consists of 15 volumes. The Supplemental Appendix volumes are sequentially numbered from 0001 to 2500. The Bates numbers of the Supplemental Appendix are prefixed "TTT," but this prefix will not be included in any reference.

The Supplemental Appendix includes:

A. The original Appendix submitted to the MCN Supreme Court with TTT's *Application for Interlocutory Appeal* (No. SC-2021-03). This consists of thirteen (13) Volumes with sequentially numbered pages from 0001 to 2131. (Docs. 176-01 to 176-13).

B The Appendix in A was supplemented with selected additional filings from the Tribal courts and the Federal District Court and filed by Thlopthlocco as an attachment to its Statement of Position and Motion for Declaratory Judgment in the Federal District Court (Doc. 176-00, and attachments 01 to 14).

C. The present Supplemental Appendix also includes additional selected documents from the Federal District Court proceedings.

D. A Table of Contents of the complete Supplemental Appendix is included in the Table of Contents of this Brief (p. xi - ?) and is also included in Volume 01 of the filed Appendix. Volumes 02 - 15 contain individual indices for that Volume.

3. Identification of Parties.

Consistent with Fed.R.App.P. 28(d), Thlopthlocco parties, other parties, witnesses, or persons involved in this proceeding will be referred to by their last names, title, or the designations used in the lower court or other descriptive terms where appropriate.

Thlopthlocco (and its tribal officials in their official capacities) is the Plaintiff in the Federal District Court, Plaintiff in the MCN Tribal Court in CV-2007-39, Official capacity Cross-Defendants in CV-2007-39, and Official capacity Defendants in CV-2011-08; and Appellant in MCN Supreme Court in SC-2021-03.

In the Tribal District Court and on appeal in the MCN Supreme Court, the CV-2007-39 Cross-Defendants are generally the same parties as the CV-2011-08 Defendants and official capacity members of the Thlopthlocco Business Committee. There are no present vacancies on the TTT Business Committee at the present time.

There were additional Defendants in CV-2011-08 who are official capacity members of the Thlopthlocco Election Committee. By the time of the pendency of

the appeal of the tribal district court cases, all three offices of the TTT Election Committee were vacant by death or resignation.

As noted in the styles of filings in the tribal courts, the CV-2007-39 Defendants and the CV-2011-08 Plaintiffs are parties identified with Nathan Anderson. They are not necessarily identical groups. (See SupAp 2153-59). They will generally be referenced as "Anderson" or "Anderson's group," or separately as necessary.

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

Defendants-Appellants bring this appeal from a decision of the United States District Court for the Northern District of Oklahoma. *Thlopthlocco Tribal Town v. Wiley*, 2023 WL 8813866, 2023 U.S. Dist. LEXIS 226384, __ F.Supp.3d ___ (N.D. Okla. Dec. 20, 2023) (SupAp. 2466-98, 2499-500). The decision of the Federal District Court is included with this brief as Attachment A.

There is one prior appeal between the parties in this matter. *Thlopthlocco Tribal Town v. Stidham*, 762 F.3d 1226 (10th Cir. 2014) (SupAp. 148, 522). The District Court decision from which that appeal arose is unreported. *See Thlopthlocco Tribal Town v. Stidham*, 2013 WL 65234, 2013 U.S. Dist. LEXIS 539 (N.D. Okla. Jan. 3, 2013).

There is a related appeal that arose out of the same litigation in the tribal courts of the Muscogee (Creek) Nation and involved the official capacity Defendants in this matter. *See Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140 (10th Cir. 2011) (SupAp 507). The District Court case from which that appeal arose is *Crowe & Dunlevy, P.C. v. Stidham*, 609 F.Supp.2d 1211 (ND Okla. 2009). That decision involved a challenge to an exercise of jurisdiction by the courts of the Muscogee (Creek) Nation over non-Indian Crowe & Dunlevy, previous counsel for TTT.

The consolidated decision, No. SC-2021-03, by the Muscogee (Creek)

Nation Supreme Court for CV-2007-39 and CV-2011-08 was filed in the Federal District Court as Doc. 168-04. *See Thlopthlocco Tribal Town v. Anderson*, 2022 Muscogee Creek Nation Supreme LEXIS 1. (MCN Supreme Court, February 28, 2022) (SupAp 2388-416). The decison of the MCN Supreme Court is included with this brief as Attachment B.

Tribal District Judge Stacy Leeds' consolidated decision for CV-2007-39 and CV-2011-08 in the Tribal District Court was filed in the Federal District Court as Doc. 159-01. (SupAp 2256-76). The decision of the MCN District Court is included with this brief as Attachment C.

SUPPLEMENTAL JURISDICTIONAL STATEMENT

The District Court's subject matter jurisdiction arises under 28 U.S.C. §1331 and §1362. Both statutes require a controversy which ". . . arises under the Constitution, laws, or treaties of the United States."

Thlopthlocco Tribal Town is not a member of the MCN. The extent of a tribal court's jurisdiction over nonmembers is a question of federal common law. *Thlopthlocco Tribal Town v. Stidham*, 762 F.3d at 1233-34; *See also*, *Crowe*, 640 F.3d at 1155 citing *National Farmers Union Insurance Companies v. Crow Tribe of Indians*, 471 U.S. 845, 852, 105 S. Ct. 2447, 85 L. Ed. 2d 818 (1985) ("whether an Indian tribe retains the power to compel a non-Indian . . . to submit to the civil jurisdiction of a tribal court is one that must be answered by reference to federal law and is a 'federal question' under § 1331.'").

Thlopthlocco respectfully disagrees with the MCN Defendants that the jurisdiction circumstances "changed" before the Federal District Court ruled. This is a fiction concocted by the MCN Defendants to avoid answering the question directed to them by this Court's 2014 mandate in *Thlopthlocco*, *id.*, *i.e.*, whether Thlopthlocco can withdraw consent to jurisdiction once given.

This Court's jurisdiction is proper under 28 U.S.C. §1291 under any circumstance because a final order was entered as to all claims and all parties regardless of any "change of the jurisdictional circumstance."

COUNTER-STATEMENT OF ISSUES ON APPEAL

1. The federal District Court properly found that a "live case" existed because the question of whether the Muscogee (Creek) Nation courts may exercise jurisdiction over the Thlopthlocco Tribal Town, a federally recognized Indian tribe, after Thlopthlocco withdrew its sovereign immunity waiver and consent, was not resolved by the tribal courts, or was resolved contrary to federal law. (SupAp 2477-79).

2. Thlopthlocco has a concrete interest in a resolution of the question of its ability to withdraw its waiver and consent because any future decision by Thlopthlocco to access the MCN courts would be burdened by the rule of decision of the MCN courts that it would not be able to withdraw its consent and the dimunition of its sovereignty by this choice is irreparable harm. (SupAp 2477-79).

3. Because Thlopthlocco has no judiciary and a prior litigious history regarding resolution of its tribal officer elections, there was a more than reasonable probability that Thlopthlocco would need access to MCN courts in the future. (SupAp 2483-84).

4. Even if no "live action" remained after the disposition by the MCN Supreme Court, the likelihood of a need by Thlopthlocco to access MCN courts in the future and be confronted by its inability to withdraw consent is "capable of repetition, yet evading review." (SupAp 2479-83).

5. The federal District Court properly entered a declaratory judgment that Thlopthlocco (1) enjoys sovereign immunity in the Muscogee (Creek) Nation Courts and may, if it chooses, consent to such jurisdiction; and (2) it may withdraw its waiver of sovereign immunity and consent to jurisdiction under appropriate circumstances. (SupAp 2484-91, 2492-96, 2498, 2500).

RESPONSE BRIEF OF PLAINTIFF-APPELLEE THLOPTHLOCCO TRIBAL TOWN

THLOPTHLOCCO TRIBAL TOWN ("Thlopthlocco" or "TTT"), a federally recognized Indian Tribe and Plaintiff in the District Court, comes before the Court and submits its Response to the Opening Brief of the Muscogee (Creek) Nation, ("MCN" or Defendants-Appellants).[1]

I. INTRODUCTION.

Under federal law, a sovereign can waive its sovereign immunity and consent to jurisdiction in a court, and ". . . may withdraw its consent whenever it may suppose that justice to the public requires it."). *Thlopthlocco Tribal Town v. Stidham*, 762 F.3d 1226, 1240 (10th Cir. 2014) ("*Thlopthlocco*")(citing *Beers v. Arkansas*, 61 U.S. 527, 529, 15 L. Ed. 991 (1857)("*Beers*")).[2]

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[1] Thlopthlocco includes a fifteen volume Supplemental Appendix with this Brief. (Referenced as (SupAp (page number)). *See* p. xxxiv The Appendix of the MCN Tribal Officials will be referenced as (App (page number)). The Brief of the MCN Tribal Officials is referenced as (ApltBr (page number)).

The decision of the Federal District Court (Attachment A), the MCN Supreme Court (Attachment B), and the MCN District Court (Attachment C) are included with this Brief.

[2] This Court has noted that the Supreme Court continues to adhere to the *Beers* holding:

> The logic of *Beers* has withstood the test of time. Eleven years ago, the Supreme Court confirmed its continued adherence to *Beers*, noting, "We have even held that a State may, absent any contractual commitment to the contrary, alter the conditions of its waiver [of sovereign immunity] and apply those changes to a pending suit." *Coll.*

(continued...)

If any reason is ever needed to explain a sovereign's need to withdraw or alter a waiver of sovereign immunity in ongoing litigation, and make clear the wisdom of such a policy, this case is the child's milk carton shining example of such justification.

From the time Thlopthlocco first consented to jurisdiction in the MCN courts on June 11, 2007 (SupAp 2383) and then was later sued without its consent by candidates for tribal offices on January 26, 2011[3] (SupAp 2386), Thlopthocco

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[2](...continued)
Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 676, 119 S. Ct. 2219, 144 L. Ed. 2d 605 (1999) (citing *Beers*). And seven years ago, the First Circuit--relying in part on *Beers*--rejected a time-of-filing rule with respect to sovereign immunity determinations. *Maysonet-Robles v. Cabrero*, 323 F.3d 43 (1st Cir. 2003). (emphasis added)

Iowa Tribe v. Salazar, 607 F.3d 1225, 1235 (10th Cir. 2010).

An Indian tribe may also set the terms of that consent. *Iowa Tribe*, 607 F.3d at 1233-4. (A "sovereign . . . may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted, and may withdraw its consent . . .").

[3] This federal action arises out of two cases in the MCN District Court. In CV-2007-39 (*Anderson I*), Thlopthlocco, after waiver of sovereign immunity, consented to the jurisdiction of the MCN courts to seek declaratory and injunctive relief against former Town Mekko Nathan Anderson and his cohorts in a *coup d'état* attempt to take over the Tribal government from the duly elected officers. (*See* p. 17) (SupAp 716, 2377-83).

In CV-2011-08 ("*Anderson II*), the Thlopthlocco Business and Election Committee members were sued without tribal consent by Anderson and other candidates to enjoin decisions of the TTT Election Committee that disqualified some candidates. A temporary order of the MCN District Court prevented an

(continued...)

has endured repeated refusals by the MCN judiciary to recognize its sovereign immunity. This disregard has resulted in 17 years of unnecessary litigation, extended headscratching delays, and a more than arguable defiance of this Court's 2014 mandate by the MCN defendants.

This forced litigation and delay has significantly infringed Thlopthlocco's rights, "to make [its] . . . own laws and be ruled by them.[4] *Strate v. A-1 Contractors*, 520 U.S. 438, 453, 117 S. Ct. 1404, 1413 (1997).

In its previous 2014 ruling, this Court reaffirmed a previous decision that Thlopthlocco was a separate federally recognized Tribe that was not a member of the MCN. This Court also held Thlopthlocco was entitled to sovereign immunity and could consent to jurisdiction in a court. *Thlopthlocco* 762 F.3d at 1233-4 (discussing *Crowe*, 640 F.3d 1140 at 1152).[5]

Yet, with an abundance of caution toward exhaustion of tribal remedies, this Court directed a mandate to the MCN defendants to explain why they would not allow Thlopthlocco to withdraw its waiver and consent to jurisdiction as would

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[3](...continued)
appeal of those decisions to the TTT Business Committee. (*See* p. 20) (SupAp 1165-72, 1173, 1195, 1250, 1161, 1162, 2384-86).

[4] As an example, Thlopthlocco elections, occurring every four years, have been deferred since 2011 because of this litigation.

[5] Fortunately for this Court, the MCN Supreme Court "affirmed" Thlopthlocco's sovereignty and its ability to consent to jurisdiction under both tribal and federal law. (SupAp , 2414, 2477).

otherwise be consistent with *Beers*.[6]

Instead of promptly responding to that mandate, after a six year wait, the tribal district court on remand again exercised jurisdiction over Thlopthlocco on the merits to say, "This Court finds that Anderson is no longer a credible threat to the Thlopthlocco government." (SupAp 2274). The case was then dismissed.[7]

As to the ability to withdraw consent, the MCN District Court concluded with a wave of the hand, ". . . that ship has sailed."[8] (SupAp 2261). The MCN Supreme Court affirmed CV-2007-39.[9]

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[6] *See*, *Thlopthlocco*, 762 F.3d at 1240:

> In addition, we may benefit from the court's analysis of the effect of the Tribal Town's withdrawal of its waiver of sovereign immunity. The Muscogee judicial officers have argued that the Muscogee rules of procedure prevent a sovereign from withdrawing a waiver when the sovereign initiated the suit and, in this way, tribal law varies significantly from federal law. *See, e.g.*, *Beers v. Arkansas*, 61 U.S. 527, 529, 15 L. Ed. 991 (1857).

[7] "Now that time as(*sic*) marched on, Anderson is no longer Mekko, other successors have subsequently served as Mekko. Although this Court exercised proper jurisdiction over *Anderson* for many years, as time has passed, *Anderson I* is no longer justiciable as a practical matter. *Anderson I* is hereby dismissed as to the remedies initially sought by the parties in both the case in chief and the cross-claims . . ." (SupAp 2274).

[8] "This Court finds that by 2009, Thlopthlocco could no longer voluntarily dismiss the action and to allow such dismissal would be unjust to the defendants and inconsistent with concepts of judicial efficiency." (SupAp 2268).

[9] *See Thlopthlocco v. Anderson, et al*., (SupAp 2410):

> This Court finds this decision consistent with the analysis outlined in

(continued...)

So the previous and still existing "rule of decision" in the MCN courts is that Thlopthlocco cannot withdraw consent even though these MCN tribal courts' rulings are still inconsistent with *Beers*.[10]

The MCN courts simple failed to offer any special explanation related to the relationship between Thlopthlocco and the MCN to explain why Thlopthlocco could not alter or withdraw a waiver and consent once given.

The ruling on the merits of *Anderson I* is also inconsistent with a court's general obligation to first determine its own jurisdiction before exercising that

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[9](...continued)
Part I above. The Appellant voluntarily filed this action within the courts of the Muscogee (Creek) Nation and specifically argued before this Court in SC-2007-01 in support of an order affirming the Nation's jurisdiction over the matter. The Court finds that the Appellant waived its sovereign immunity in this action, both by its arguments before the Court and by its June 7, 2007 waiver of sovereign immunity, and that jurisdiction was proper within the Muscogee (Creek) Nation Courts. The Court also finds no clear error in the MCN District Court's factual analysis concerning the current political status of Nathan Anderson, nor, after de novo review of the law, does this Court find any legal inconsistency in the MCN District Court's Order. As such, the Court affirms the MCN District Court's decision with respect to CV-2007-39.

The MCN Supreme Court's reference to Part I (SupAp 2404-09) is to its discussion why Thlopthlocco is entitled to sovereign immunity.

[10] *See Beers*, 61 U.S. (20 How.) at 530 (". . . nor can this court inquire whether the law operated hardly or unjustly upon the parties whose suits were then pending.").

jurisdiction.[11]

Respectfully, in dismissing on the merits, it is fair to characterize the MCN tribal courts' rulings in response to this Court's 2014 mandate as neither an answer, or an explanation, but a "Sidestep."[12]

The District Court's reference to the two year time period between 2007 and 2009 is even more astounding because Thlopthlocco notified the MCN courts within 58 days of its initial Complaint (SupAp 716) that it had internally resolved the attempted *coup d'état* of its government with a Grievance Procedure under the Thlopthlocco Constitution (SupAp 4) that removed former Mekko Nathan Anderson. (SupAp 813-18).

Even so, in derogation of Thlopthlocco's internal processes, the MCN district and Supreme Courts continued to act as if Anderson was still entitled to his office by accepting and allowing his "cross-claims" for further litigation of past

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[11] "Questions of jurisdiction, of course, should be given priority-since if there is no jurisdiction there is no authority to sit in judgment of anything else." *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 778 (2000).

"Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause. And this is not less clear upon authority than upon principle." *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1869).

[12] A "sidestep" not even as graceful as that of Charles Durning in his portrayal of a certain fictional Governor:

<https://www.youtube.com/watch?v=AALREbJZEZk> (last checked 5/21/24).

elections when there simply was no jurisdiction to do so.[13] (SupAp 714-5, 819).

Finally, on February 19, 2009, in CV-2007-39, Thlopthlocco formally withdrew its waiver and consent to jurisdiction and sought dismissal. (SupAp 854, 1299). Again, the MCN tribal court ignored Thlopthlocco's reassertion of its sovereignty and set all issues for jury trial. (SupAp 1329). With no other reasonable alternative, Thlopthlocco filed this suit in Federal court.

Defendants now contend there is no "ongoing violation of federal law" because they are no longer exercising jurisdiction over Thlopthlocco and thus *Ex parte Young*[14] does not apply. But the scope of *Ex parte Young* does not swing so narrowly.

The mere existence of the rule of decision of the MCN courts that Thlopthlocco cannot withdraw a waiver and consent is an ongoing violation of federal law of immediate significance because Thlopthlocco cannot now access the MCN tribal courts without considering the need to forego an attribute of its sovereignty, the inability to recall or modify a waiver of sovereign immunity.

Defendants concede that Thlopthlocco will need judicial access in the future.

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[13] *See*, *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509, 111 S. Ct. 905, 909 (1991) ("We held that a tribe does not waive its sovereign immunity from actions that could not otherwise be brought against it merely because those actions were pleaded in a counterclaim to an action filed by the tribe. . . . 'Possessing . . . immunity from direct suit, we are of the opinion [the Indian nations] possess a similar immunity from cross-suits.'").

[14] *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441 (1908).

(*See infra*, p. 40). Should that occur Thlopthlocco's sovereignty will be diminished and "chilled" (and perhaps frozen in time like this case).

This injury is especially critical because Thlopthlocco has no judiciary itself. On the other hand, the Creek judiciary draws funding from federal sources to the exclusion of Thlopthlocco, yet refuses to follow federal common law applicable to Indian tribes regarding withdrawing sovereignty waivers.[15]

In the six years that the case was at issue in 2016 after remand, the MCN Defendants were unable to identify any "colorable claims" involving "some significant Muscogee tribal interest" to exercise jurisdiction in the absence of Thlopthlocco's consent. *Thlopthlocco v. Stidham*, 762 F.3d at 1240.

Until "sovereign" really means "sovereign" in the MCN courts, and until Thlopthlocco is entitled to properly exercise the rights of a "sovereign," a "live action" still existed at the conclusion of tribal exhaustion. The Federal District Court had a "virtually unflagging duty," (*See infra*, p. 43) to exercise its jurisdiction in the absence of any statement by MCN tribal officials to explain their

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[15] *See Thlopthlocco v. Stidham*, 762 F.3d at 1231:

> Further, while the Tribal Town has its own constitution and governing structure, it does not have its own courts. Although the Tribal Town's federal recognition empowers it to create its own judiciary, H.R. Rep. No. 103-781, at 3, it has struggled to find the necessary federal funding. The Bureau of Indian Affairs gives federal funding earmarked for judicial services for the Thlopthlocco people to the Muscogee courts.

inconsistency with federal law. The Federal District Court did consider and resolve the matter and issue its declaratory judgment. (SupAp 2498, 2499).

The District Court's decision should be affirmed.

II. COUNTER-STATEMENT OF THE CASE

As the Federal District Court in this case notes in its introductory paragraph, "This action addresses sixteen years of litigation between the Thlopthlocco Tribal Town ("Plaintiff"), the judges of the Muscogee (Creek) Nation Courts, and other members of Thlopthlocco Tribal Town, arising from an attempted *coup d'état* after the Thlopthlocco elections in 2007." *Thlopthlocco Tribal Town v. Wiley*, 2023 WL 8813866, at *1-2 (N.D. Okla. Dec. 20, 2023)(SupAp 2466).

1. The Historical and Current Relationship among the Tribal Towns and the MCN.

In 2014, this Court briefly summarized historical facts about the Creek Tribal Towns which can be referenced in *Thlopthlocco Tribal Town v. Stidham*, 762 F.3d 1226, 1229-33 (10th Cir. 2014). In brief summary, this Court described the precursor of what became the Muscogee Nation as "'. . . a confederacy of autonomous tribal towns, or Talwa, each with its own political organization and leadership.'[16] *Harjo v. Andrus*, 581 F.2d 949, 952, 189 U.S. App. D.C. 171 at n. 7

[16] The MCN Defendants describes Thlopthlocco as a "federally recognized Indian tribe and band of the Muscogee (Creek) Nation . . . " (ApltBr 2). The apparent source of this statement is the MCN Supreme Court decision (SupAp (continued...)

(D.C. Cir. 1978)." *Thlopthlocco v. Stidham*, 762 F.3d at 1229.

As noted by this Court:

> As one analysis puts it, "[t]he Creeks had a peculiar form of government in that the confederation seemed to have no central control. The population of a town, regardless of the number of clans represented, made up a tribe ruled by an elected chief or 'miko,' who was advised by the council of the town on all important matters." Ohland Morton, Early History of the Creek Indians, 9 Chronicles of Okla. 17, 20 (March 1931) [(SupAp. 171-82)]. Thus, "[t]he Creek town ... represented an autonomy such as is usually implied by the term 'tribe.'" *Id*. at 21; *see also Harjo*, 581 F.2d at 952 n. 7 (D.C.Cir. 1978) (discussing the historic role of autonomous talwa). Though autonomous, the many talwa were closely affiliated throughout most of the Creeks' history, giving rise to references to the "Creek Confederacy" or the "Muscogee Nation," named for the talwa's shared language.
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> Further, "[t]hat the Indians themselves recognized the existence of the

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[16](...continued)
2409).

This is not accurate and certainly misleading. As explained herein and consistent with the history explained by this Court in 2014, Thlopthlocco is a band of Creek Indians federally recognized in 1939 as an autonomous tribal town. At one time Thlopthlocco was part of the original Creek Confederacy, then later a forced member of the 1867 Muscogee Nation, compelled to formation by the United States after some Creek Tribal Towns sided with the South during the Civil War. *Thlopthlocco*, 762 F.3d at 1229-31 (*See*, *infra*, p. 15).

"Under federal law, the Tribal Town is therefore a freestanding tribe." *Thlopthlocco*, 762 F.3d at 1233. The MCN did not form until 1979. (SupAp 491).

Further, by decision of this Court, Thlopthlocco is not a member of the Creek Nation. *Thlopthlocco*, 762 F.3d at 1233 ("Thlopthlocco is an independent tribal entity that elects its own government pursuant to its own Constitution and is not itself a citizen of the Creek Nation.").

Thlopthlocco, an autonomous tribe, cannot be a "band" of an Indian Tribe that did not even come into existence until 40 years after Thlopthlocco's federal recognition, and especially when Thlopthlocco was intentionally excluded from being part of the Muscogee (Creek) Nation. (*See*, fn. 20).

> Creek tribal towns is clear from an examination of the constitutions and laws of the Muscogee Nation. . . . The towns are recognized as having an existence not derived from the constitution of the Muscogee Nation but in fact antedating and continuing alongside the constitution." *Id*. at 4.

Thlopthlocco v. Stidham, 762 F.3d at 1229-31.[17]

As punishment for some Talwa joining with the Southern Confederacy

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[17] *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1440-42 (DC Cir. 1988) (SupAp 538-45) also contains a brief history of the Creeks from the time of removal to Oklahoma through the organization of the MCN in 1979.

There are other references in the Supplemental Appendix which provide additional historical facts regarding the Creek Indians:

> (SupAp 171-82) Ohland Morton, "Early History of the Creek Indians," *Chronicles of Oklahoma*, Vol. 9, No. 1 (March, 1931), beginning at p. 17. <https://gateway.okhistory.org/ark:/67531/metadc1826985/m1/35/> (last checked 3/2/2023).
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> (SupAp 183-204) Ohland Morton, "The Government of the Creek Indians," (Part 1) Chronicles of Oklahoma, Volume 8, No. 1, March 1930, p. 42. <https://gateway.okhistory.org/ark:/67531/metadc1826922/m1/46/> (last checked 3/2/2023).
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> (SupAp 205-40) Ohland Morton, "The Government of the Creek Indians," (Part II) Chronicles of Oklahoma, Volume 8, No. 2 June 1930, p. 189. <https://gateway.okhistory.org/ark:/67531/metadc1826929/m1/61/> (last checked 3/2/2023).
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> (SupAp 241-51) Ohland Moore, "Reconstruction in the Creek Nation," Chronicles of Oklahoma, Volume 9, No. 2, June, 1931, p. 171. <https://gateway.okhistory.org/ark:/67531/metadc1827027/m1/67/> (last checked 3/2/2023).

during the Civil War, and not wanting to deal with multiple talwa, the Federal Government insisted on centralization of the 44 Creek Talwa to form a single constitutional government in 1867. This was opposed by some full-blood members. Even after this forced confederation, ". . . largely because the centralized government had little power, the talwa continued to govern themselves, behaving more like states than municipalities." *Thlopthlocco*, 762 F.3d at 1230.

The United States attempted assimilation of the Creeks. This began with abolishment of the tribal governments under the Curtis Act of 1898, c. 517, 30 Stat. 495 and the Dawes Act of 1887, 25 U.S.C. §331, *et seq*. After this period, the Creek Nation was mostly inactive.[18]

In 1936 under the "Indian New Deal," Congress allowed tribal reorganization with passage of the Oklahoma Indian Welfare Act [19] ("OIWA").

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[18] *See* Sarah Deer, & Cecilia Knapp, *Muscogee Constitutional Jurisprudence: Vhakv Em Pvtakv (The Carpet Under the Law)*, 49 Tulsa L. Rev. 125 (2014) (hereafter "Deer and Knapp").This article is available at:

<http://digitalcommons.law.utulsa.edu/tlr/vol49/iss1/5> (Last checked 5/26/2024).

The Creek constitutional government was not well documented and essentially lapsed between 1906 and 1976. 49 Tulsa L. Rev. at 164, fn. 337 ("In 1978, the United States Court of Appeals noted that 'the Creek National Council per se has not met in more than sixty years.' *Harjo v. Andrus*, 581 F.2d 949, 952 (D.C. Cir. 1978).").

[19] *See generally* Chapt. 4, Jon S. Blackman, OKLAHOMA'S INDIAN NEW DEAL (University of Oklahoma Press, 2013). Congress passed the Indian

(continued...)

This would permit any "recognized tribe or band of Indians" in Oklahoma to adopt a constitution and bylaws and be acknowledged by a federal charter of incorporation. Thlopthlocco was one of three of the remaining sixteen tribal towns still active that sought and received a federal charter in 1939. The rest of the talwas did not reorganize until 1979 through litigation and then, after adopting a Constitution, became one single tribe, the Muscogee (Creek) Nation. By design, its current representative structure is completely different from the historical antecedent organization.[20]

Thlopthlocco and the other Tribal Towns took no part in the organization of the MCN although individual tribal members participated as members of the MCN. As this Court noted, the Muscogee Constitution does not mention Thlopthlocco, but provides it "shall not in any way abolish the rights and privileges of persons of the Muscogee Nation to organize tribal towns." *Thlopthlocco*, 762 F.3d at 1231.

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[19](...continued)
Reorganization Act, 25 U.S.C. §461, *et seq.* and then the Oklahoma Indian Welfare Act ("OIWA") also known as the Thomas-Rogers Act, 49 Stat. §1967 (Approved June 26, 1936)), 25 U.S.C. §503.

[20] Deer and Knapp note that MCN governance was not revived until *Harjo v. Kleppe*, 420 F. Supp. 1110 (D.C.D.C. 1976).

Previously organized tribal towns were excluded from the new constitutional government. 49 Tulsa L. Rev. at 168-69, fn. 384 ("Chief Cox opposed the inclusion of *etvlwv* governments as part of the government structure." Cox explained: "[t]he town setup is impractical. Thlopthlocco town owns property and is organized to some extent but it is torn like a wagon sheet by faction and strife. A big cumbersome council from all those towns would never agree on anything, never get anything done.").

2. The Thlopthlocco Election Controversies.

In years prior to 2007, Thlopthlocco elections resulted in litigation. *Thlopthlocco Tribal Town v. Tomah*, 8 Okla. Trib. 451 (Must. (Cr.), D.Ct., 2004)("*Tomah I*")(SupAp 587, 799) and *Thlopthlocco Tribal Town v. Tomah, et al.*, 8 Okla. Trib. 576 (Must. (Cr.), D.Ct., 2004) ("*Tomah II*")(SupAp 597).

3. The 2007 Governance Dispute (CV-2007-39).

This controversy arose in June 2007 out of an attempted *coup d'état* by Nathan Anderson, the elected Town King against all other members of the Business Committee more than four months after they were elected and sworn into office.[21]

Anderson declared himself the only legitimately elected official and then declared all other offices vacant.[22] He proceeded to fill those office with his family

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[21] The terms "election" and "appointed" are used hereafter because the Thlopthlocco Constitution calls for the election of five officers ("Town King, two Warriors, a Secretary and a Treasurer."). These five officers then appoint (or select) five additional tribal members as part of an "advisory council" to serve on the Business Committee. (TTT Const. Art. V, Secs. 1, 3) (SupAp 03-04).

[22] Anderson's election claims were meritless. Anderson himself reported the results of the election to the local BIA Agency Office without any claim of invalidity. (SupAp 711).

In truth, only Anderson's election was infirmed. The Thlopthlocco Constitution requires that "Election shall be by standing vote and a majority of the votes cast shall determine the action thereon." (SupAp 004, Thlopthlocco Const., Art. V, Sec. 5). Anderson received the most votes: 92 to 77 to 22 in a three candidate race. (SupAp 1399). There was no run-off election. Anderson's vote tally was not a majority although Anderson later falsely claimed he "won by a

(continued...)

members and cronies using a provision of the Thlopthlocco Constitution that allows the remaining elected officers of the Business Committee (only himself by his claim) to appoint replacements. (Thlopthlocco Const., Art. V, Sec. 6) (App. 04).

To combat Anderson's actions, the original Business Committee stripped Anderson of his authority and adopted a limited waiver of sovereign immunity. which specifically excluded election disputes.[23] They filed suit on June 11, 2007 in the MCN tribal District Court for declaratory and injunctive relief. (CV-2007-39). (SupAp 712-13; 714-15; 716-810).

Although having allowed such litigation in the past, the MCN District Court ruled it lacked jurisdiction to hear the claim. On appeal, the Muscogee Supreme Court reversed, holding that although Thlopthlocco is a separate federally recognized Indian tribe under federal law, it is also a Muscogee Nation town under

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[22](...continued)
landslide." (SupAp 2038).

[23] The waiver was adopted on June 7, 2007:

> BE IT FURTHER RESOLVED, that the Thlopthlocco Tribal Business Committee does hereby waive its immunity on a limited basis only for the purposes of adjudicating this dispute only, only claims brought by the Plaintiff, Thlopthlocco Tribal Town, and only for injunctive and declaratory relief. This waiver of immunity shall not include election disputes.

SupAp 714-15.

tribal law and subject to jurisdiction in Muscogee courts. *Thlopthlocco*, 762 F.3d at 1232.

Anderson filed cross-claims against the members of the Business Committee. (SupAp 819-29). Rather than dismiss on grounds of sovereign immunity, the MCN District Court allowed these claims to continue.

As noted, Anderson was removed from Office by a grievance procedure. *Thlopthlocco*, 762 F.3d at 1232. (SupAp 811). The MCN court was notified of this internal resolution on August 8, 2007. (SupAp 813). But the courts gave it no effect and continued to exercise jurisdiction over Anderson's claim of election fraud.

The original Business Committee later revoked its consent to jurisdiction and filed a conditional motion to dismiss and appeal without success. (SupAp 831-32; 833-41):

> Citing its previous finding that, under tribal law, the Tribal Town was part of the Muscogee Nation, the Muscogee Supreme Court denied the appeal.

Thlopthlocco, 762 F.3d at 1232.

4. The 2011 Election Candidacy Controversy (CV-2011-08).

The 2007 litigation continued to the next Thlopthlocco election cycle in 2011:

> In January 2011, the Thlopthlocco people were scheduled to elect a new Business Committee. Shortly before the election, Anderson filed

> a new action in Muscogee district court, alleging that individual Business Committee members and members of the Thlopthlocco Election Committee illegally removed him and other candidates from the ballot (*Anderson v. Burden* (*Anderson II*)). The Muscogee district court denied the Committee members' motion to dismiss for lack of jurisdiction and suspended the election. Subsequently, the Muscogee district court ordered that the Tribal Town hold an election and include Anderson and the other *Anderson II* plaintiffs on the ballot.

Thlopthlocco, 762 F.3d at 1232.

Thlopthlocco then amended its previous federal action to enjoin the new tribal court proceedings:

> With these developments, the Tribal Town filed suit in the Northern District of Oklahoma. It requested that the federal court enjoin the Muscogee judicial officers from asserting jurisdiction over the Tribal Town's election procedures. The district court denied the request and instead granted the Muscogee judicial officers' motion to dismiss the suit because: the federal court lacked subject matter jurisdiction; the Muscogee judicial officers were entitled to sovereign immunity; the Tribal Town had failed to join indispensable parties; and the Tribal Town had not exhausted its tribal court remedies.

Thlopthlocco, 762 F.3d at 1232-33.

This Court reversed the Federal District Court, ruling that Thlopthlocco was not a member of the MCN and was entitled to sovereign immunity, and had the ability to consent to jurisdiction in a court. *Thlopthlocco*, *id*.

Under *Beers* and *Iowa Tribe*, Thlopthlocco would ordinarily be entitled to modify or withdraw a waiver of sovereign immunity or consent, but this was not permitted under the rules of procedure of the MCN courts. In an abundance of caution, this Court remanded to the District Court to return to the MCN tribal

courts to provide an explanation why it has a rule of procedure which differs from federal common law. *See*, *supra*, p. 6.

After the inordinate delay previously described, the MCN District Court instead exercised jurisdiction over Thlopthlocco and dismissed CV-2007-39 on the merits. This was affirmed by the MCN Supreme Court. *See* fn. 9.

The MCN District Court also exercised jurisdiction over Thlopthlocco in CV-2011-08, restated a previous order of the MCN District Court which ordered an election and the inclusion of Nathan Anderson and his group as candidates. On appeal, the MCN Supreme Court reversed the District Court and directed CV-2011-08 be dismissed based upon sovereign immunity. (SupAp 2410-12, 2414).

5. The Decision of the Federal District Court

After a review of the history of the parties, the Federal District Court concluded that the tribal courts did not answer the question of whether Thlopthlocco could withdraw its waiver and consent once given. (SupAp 2475)("Neither tribal court addressed the issue of whether the Tribal Town could withdraw its waiver of sovereign immunity under appropriate circumstances."). The unanswered question left a "live case." The court determined it had jurisdiction to consider the question because Thlopthlocco had a "concrete interest" in knowing whether it could withdraw a consent when it waives sovereign immunity to submit to the jurisdiction of the MCN courts. (SupAp 2477). The

court also had jurisdiction because this was a matter "capable of repetition, yet evading review." (SupAp 2479-83).

The court considered Thlopthlocco's claim for declaratory relief and reviewed the following factors from *St. Paul Fire & Marine Ins. Co. v. Runyon*, 53 F.3d 1167, 1169 (10th Cir. 1995): (1) whether a declaratory action would settle the controversy; (2) whether it would serve a useful purpose in clarifying the legal relations at issue; (3) whether the declaratory remedy is being used merely for the purpose of "procedural fencing" or "to provide an arena for a race to res judicata;" (4) whether use of a declaratory action would increase friction between federal and state courts and encroach upon state jurisdiction improperly; and (5) whether there is an alternative remedy that is better or more effective. (SupAp 2484-85). Upon analysis, the court concluded that each factor weighed in favor of a declaratory judgment. (SupAp 2491).

The court then considered that "One of the core aspects of Indian tribes' sovereignty is common law immunity, which is also necessary for a tribe's governance." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014). As such, the court issued a declaratory judgment that Thlopthlocco was entitled to sovereign immunity and may voluntarily waive its sovereign immunity to submit to the jurisdiction of the courts of another sovereign. (SupAp 2492).

The court then analyzed the question of whether Thlopthlocco could

withdraw its waiver and consent once given. Relying upon *Iowa Tribe* and *Okla. Tax Commission*, the court determined that an Indian tribe that waives its sovereign immunity still retains immunity from counterclaims and cross-claims, but not from actions in recoupment, a circumstance not present here. The court then issued a declaratory judgment that Thlopthlocco could withdraw its consent if the exercise of jurisdiction exceeds the terms of the waiver and consent. (SupAp 2494-95). The Court entered a formal judgment. (SupAp 2549-50).

III. SUMMARY OF ARGUMENT

This case was not moot. A "live case" remained after tribal court exhaustion. *Ex parte Young* actions can be brought for declaratory or injunctive relief. Defendants' previously existing and now current rule of decision that Thlopthlocco cannot withdraw a waiver of sovereign immunity and consent to jurisdiction once given is contrary to federal law and is likely to recur.

This Court's previous 2014 decision remanded to the District Court to return it to the MCN courts for exhaustion, specifically to allow it to explain why its rules prevent Thlopthlocco from withdrawing consent to jurisdiction once submitted.

Instead, the MCN judiciary passed over this Court's mandate and made no cognizable explanation why Thlopthlocco cannot withdraw its consent. The MCN courts then again exercised jurisdiction over Thlopthlocco to determine that "Anderson was no longer a threat" and dismissed. This factual finding was not

sought by either party, nor was it the result of any evidentiary hearing or fact-finding. This exercise of jurisdiction also forms a core example of the need for declaratory judgment to prevent future conduct.

Even so, Thlopthlocco's current and future access to the existing MCN tribal courts remains subject to a bar not imposed on other sovereigns under Federal common law: Thlopthlocco has no power to withdraw its consent in appropriate circumstances absent MCN's approval.

Thlopthlocco is injured in that any access to the MCN courts requires Thlopthlocco to weigh the benefits of the litigation against a significant diminution of its sovereignty. This Court has long held any invasion or interference with tribal sovereignty is "irreparable harm."

Second, the MCN's claim that the case is moot because they dismissed the action does not require Thlopthlocco to show that the action is still viable. Instead, the Supreme Court requires defendants to meet a "formidable burden" to show mootness.

A party does not necessarily automatically moot a case by suspending its challenged conduct once sued. The standard for mootness requires a defendant to show that the challenged practice cannot "reasonably be expected to recur." Defendants wholly fail to meet this burden by attempting to avoid it and maintaining a rule of decision that still refuses to allow a modification or

withdrawal of a waiver and consent.

Moreover, even it may be said there is no active ongoing litigation at this time, given the periodic litigation history of Thlopthlocco involving its elections, the likely recurrence of a need for access to court is significant. Any such access to courts will still be accompanied by the necessary decision that access is conditioned on Thlopthlocco's inability to withdraw consent to the forum. This comfortably meets the requirements of an injury that the matter is "capable of repetition, yet evading review."

The District Court's decision is correct and should be affirmed.

VI. COUNTER-STATEMENT OF THE STANDARD OF REVIEW

The standard of review in this case is different depending upon what kind of mootness is under consideration.

A case of constitutional mootness is subject to a *de novo* review. A case of prudential-mootness is a more deferential "abuse of discretion" standard. *See*, *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1121-23 (10th Cir. 2010):

> Courts recognize two kinds of mootness: constitutional mootness and prudential mootness. *See*, *e.g.*, *United States v. W.T. Grant Co.*, 345 U.S. 629, 632-34, 73 S. Ct. 894, 97 L. Ed. 1303 (1953)
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> Although we engage in similar factual inquiries to ascertain constitutional and prudential mootness, different standards of review apply to these doctrines. "The constitutional mootness question is a threshold inquiry because a live case or controversy is a constitutional

> prerequisite to federal jurisdiction. Our review of this question is *de novo*." *Fletcher* [*v. United States*], 116 F.3d [1315]at 1321 [(10th Cir. 1997)](citation omitted); . . . By contrast, "we review the district court's determination of prudential mootness for an abuse of discretion" because this doctrine "is concerned with the court's discretion to exercise its power to provide relief." *Fletcher*, 116 F.3d at 1321 (emphasis added). As a component of the mootness analysis, it naturally and ineluctably follows that the voluntary-cessation inquiry will be subject to the same standard of review as the overarching mootness question at issue--whether constitutional or prudential. *Compare Unified Sch. Dist. No. 259* [*v. Disability Right Ctr*], 491 F.3d [1143] at 1149-50 [(10th Cir. 2007)] (tacitly applying de novo standard of review to contention of voluntary cessation in the constitutional-mootness context), with *Comm. for the First Amendment v. Campbell*, 962 F.2d 1517, 1524-25 (10th Cir. 1992) (explicitly applying abuse-of-discretion standard of review to assertion of voluntary cessation in the prudential-mootness context).

Rio Grande, 601 F.3d at 1121-22.

See, *United States v. W. T. Grant Co*., 345 U.S. 629, 632-33, 73 S. Ct. 894, 897-98 (1953):

> . . . voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, *i. e.*, does not make the case moot." . . . The defendant is free to return to his old ways. This, together with a public interest in having the legality of the practices settled, militates against a mootness conclusion. . . . Along with its power to hear the case, the court's power to grant injunctive relief survives discontinuance of the illegal conduct. . . . The purpose of an injunction is to prevent future violations, . . . and, of course, it can be utilized even without a showing of past wrongs. But the moving party must satisfy the court that relief is needed. . . . The chancellor's decision is based on all the circumstances; his discretion is necessarily broad and a strong showing of abuse must be made to reverse it. To be considered are the bona fides of the expressed intent to comply, the effectiveness of the discontinuance and, in some cases, the character of the past violations."

IV. ARGUMENT

Proposition A

THE DISTRICT COURT PROPERLY FOUND THAT THLOPTHLOCCO'S RIGHT TO WITHDRAW ITS WAIVER OF SOVEREIGN IMMUNITY AND CONSENT WAS STILL AT ISSUE AND HAD NOT BEEN ADJUDICATED.

The Federal District Court correctly noted that the question of the ability to withdraw consent was not answered by the Creek Courts and remained a "live case."[24]

Even so, Defendants contend that Thlopthlocco did not respond to their claims of sovereign immunity and that the case was moot because the MCN courts stopped its exercise of jurisdiction when all tribal court cases were dismissed.

But this would be true only if one disregards, as Defendants' apparent wilful blindness suggests, the unresolved issue of Thlopthlocco's entitlement to declaratory relief which still sounds under *Ex parte Young* to settle the unanswered question of whether Thlopthlocco can withdraw its consent to jurisdiction.

Until then, this Court's prior ruling should apply. *Thlopthlocco*, 762 F.3d at 1242 ("We find the Muscogee judicial officers are not entitled to sovereign immunity. . .").

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[24] *See* SupAp 2477, "To the contrary, the Court concludes that a live case exists because the question of whether the Muscogee (Creek) Nation Courts may exercise jurisdiction over the Thlopthlocco Tribal Town after withdrawing its sovereign immunity waiver has not yet been resolved."

In actuality, there is no question of "voluntary cessation" in this case because the MCN rule of decision remains that Thlopthlocco will not be able to withdraw any waiver of sovereign immunity still exists, was actively enforced, has not been repudiated, and still violates *Beers*.

Because of the exercise of jurisdiction against Thlopthlocco and the avoidance of this Court's mandate, there is no doubt that Thlothlocco will face a question of the diminution of sovereignty the next time it must access the MCN judiciary. As such, this case is neither constitutionally nor prudentially moot.

When the Defendants say they ruled in Thlopthlocco's favor, they confuse mootness with the merits.[25] In truth, getting rid of Nathan Anderson was old news. Thlopthlocco had already done that which the MCN courts initially refused to do.

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[25] *See*, *MOAC Mall Holdings LLC v. Transform Holdco LLC*, 598 U.S. 288, 143 S. Ct. 927, 935 (2023) commenting about *Chafin v. Chafin*, 568 U.S. 165, 166, 133 S. Ct. 1017, 1020 (2013):

> We said her argument went "to the meaning of the Convention and the legal availability of a certain kind of relief," and thus "confuse[d] mootness with the merits." *Ibid*. And, at least where the father's contrary re-return argument was not "so implausible that it [was] insufficient to preserve jurisdiction," his "prospects of success [were] therefore not pertinent to the mootness inquiry."

Even partial remedies avoid mootness. *Calderon v. Moore*, 518 U.S. 149, 150, 116 S. Ct. 2066, 2067 (1996) ("The available remedy, however, does not need to be 'fully satisfactory' to avoid mootness. . . . To the contrary, even the availability of a 'partial remedy' is 'sufficient to prevent [a] case from being moot.'").

The "new" merits question is the one that accompanied this Court's mandate back to the tribal courts, and that is whether Thlopthlocco can withdraw a waiver and consent once filed. Instead, the MCN courts acted as if the Circuit mandate never happened.

Still, it certainly appears that the MCN courts have a unsophisticated concept of sovereign immunity at least in relationship to Thlopthlocco. Despite a finding by the MCN courts that Thlopthlocco was entitled to sovereign immunity, the MCN courts still exercised jurisdiction over the merits of CV-2007-39 when it ruled "Nathan Anderson is no longer a credible threat." (SupAp 2274). The MCN Supreme Court affirmed this decision. (SupAp. 2410).

Even if the exact or similar situation of the previous litigation is, as Defendants claim, unlikely to recur, and Plaintiff does not concede that is true, a refusal to allow Thlopthlocco to withdraw consent, once given, still affects any future consideration by Thlopthlocco to access the MCN courts in the first instance because it must do so knowing that a consent to jurisdiction in the MCN courts is a one-way path that allows no "reverse gear."

The Tenth Circuit has held long that an invasion or interference with tribal sovereignty is an "irreparable harm." *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1250-51 (10th Cir. 2001); *Wyandotte Nation v. Sebelius*, 443 F.3d 1247, 1255 (10th Cir. 2006); *Ute Indian Tribe v. State of Utah*, 790 F.3d

1000, 1005-06 (10th Cir. 2015).

There is a second reason that the Federal District Court had jurisdiction to resolve the unanswered question: It was part of the mandate of this Court. In 2014 in *Thlopthlocco* this Court built in a review by the Federal District Court of the MCN courts' decisions. Just because the MCN courts refused to answer this question does not preclude the Federal District Court from completing this Court's mandate.

This Court wanted to know why the MCN rule was at variance with federal law:

> In addition, we may benefit from the court's analysis of the effect of the Tribal Town's withdrawal of its waiver of sovereign immunity. The Muscogee judicial officers have argued that the Muscogee rules of procedure prevent a sovereign from withdrawing a waiver when the sovereign initiated the suit and, in this way, tribal law varies significantly from federal law. *See*, *e.g.*, *Beers v. Arkansas*, 61 U.S. 527, 529, 15 L. Ed. 991 (1857)

Thlopthlocco, 762 F.3d at 1240.

To protect Thlopthlocco's position in the litigation, this Court abated the proceedings rather than dismiss:

> The Tribal Town argues that if the tribal courts rule in favor of Anderson, he may gain control of the Tribal Town's governing body, the Business Committee, and thereby of the Tribal Town's role in this litigation. In that event, the Tribal Town argues he could prevent it from filing a cause of action in federal court. Abatement will enable the district court to exercise its jurisdiction on the merits after exhaustion in tribal court regardless of the outcome there. (emphasis added)

Thlopthlocco, 762 F.3d at 1241.

As a part of that abatement, this Court made it clear it expected that no election would be ordered until after the case had an opportunity to return to the federal courts. *See Thlopthlocco*, 762 F.3d at 1241 n.8:

> Thus, we expect the tribal court to reach a final decision on the jurisdictional issue before it considers ordering an election. Accordingly, the Tribal Town will have the opportunity to exhaust its tribal court remedies and return to federal court before the tribal court has taken an action that the Tribal Town might not be able to challenge effectively.

It is axiomatic that lower courts are "strictly" bound by the mandate instructions of the appellate court. The mandate instructs and directs the action of the lower court.[26]

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[26] *See*, *United States v. Dutch*, 978 F.3d 1341, 1345 (10th Cir. 2020):

> A decision by this court establishes the law of the case and prevents an issue decided by it from being relitigated on remand. *United States v. West*, 646 F.3d 745, 747-48 (10th Cir. 2011). When we remand a case, we generally provide instructions to the district court—the so-called "mandate." We have said "[t]he mandate consists of our instructions to the district court at the conclusion of the opinion, and the entire opinion that preceded those instructions." *Proctor & Gamble Co. v. Haugen*, 317 F.3d 1121, 1126 (10th Cir. 2003).
>
> The mandate rule follows from the law of the case doctrine. *See* 18B Wright & Miller, Federal Practice and Procedure § 4478.3 (2d ed. 2002) (Oct. 2020 update) ("Law-of-the-case terminology is often employed to express the principle that an inferior tribunal is bound to honor the mandate of a superior court within a single judicial system."). It requires the district court to strictly comply with any

(continued...)

This Court's remand to the MCN courts asked whether the Creek courts could make "colorable claims" of jurisdiction involving "some significant Muscogee tribal interest" in the absence of Thlopthlocco's consent. *Thlopthlocco*, 762 F.3d at 1240.

The mandate was greeted with a thud. Rather than faithfully following the requirements of the mandate, the MCN courts simply did nothing for eight months.[27] And that was it just getting started to really do nothing.

After the case finally came at issue in May of 2016,the MCN District Court then took no action for 6 years before filing a decision that did not answer this

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[26](...continued)
mandate rendered by this court on remand. *West*, 646 F.3d at 748. "There is nothing surprising about [this] basic principle, which inheres in the nature of judicial hierarchy." Wright & Miller at § 4478.3. (emphasis added).

[27] In his 12/30/2014 Order of remand to the tribal courts, Judge Payne optimistically ordered status reports on tribal court remedies every 30 days. (SupAp 2234).

After almost four years of delay, on 09/27/2018, Judge Payne required that "all past and future status reports ordered by this court . . . be filed with the Tenth Circuit Court of Appeals consistent with the Decision . . . and Mandate . . . issued in this case on September 3, 2014 . . ." (SupAp 2237).

These status reports were filed in this Court in Case No. 13-5006. This Court is asked to take judicial notice of these documents pursuant to Fed.R.Evid. 201(c)(2). *See United States v. Ahidley*, 486 F.3d 1184, 1192 n.5 (10th Cir. 2007) ("*See St. Louis Baptist Temple v. Fed. Deposit Ins. Corp*., 605 F.2d 1169, 1172 (10th Cir. 1979).

Finally, perhaps giving up, on 11/28/2019, Judge Payne change the reporting frequency to 90 days. (SupAp 2238).

Court's question but which the MCN Supreme Court affirmed.[28]

In affirming the MCN District Court, the MCN Supreme Court offered no guidance as to why a sovereign was no longer "sovereign" in its courts other than affirming the rationale of the MCN District Court of "fairness" or "judicial efficiency." Under federal law a court may not make an assessment of the effect of a change in the law of a sovereign on opposing parties:

> The Supreme Court aimed this language squarely at post-filing withdrawals of consent to be sued, further stating that courts cannot "inquire whether the law operated hardly or unjustly upon the parties whose suits were then pending. . . . [The Legislature] might have repealed the prior law altogether, and put an end to the jurisdiction of their courts in suits against the State, if they had thought proper to do so . . . ." *Id*. at 530. (emphasis added)

Iowa Tribe, 607 F.3d at 1234.

Then despite dismissing CV-2011-08 because Thlopthlocco had not consented, the tribal district court still attempted to exercise jurisdiction to revive a previous temporary order requiring Thlopthlocco to hold an election, a clear disregard of this Court's mandate which directed that no election be held until Thlopthlocco had a chance to return to the Federal courts. (SupAp 2257, 2273-75).

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[28] Eventually, after almost five years the MCN Supreme Court entered an administrative order directing the District Court to report on the status of the case. (SupAp 2249, 2252).

Neither of these filings were made in CV-2007-37 or CV-2011-08. Later, an administrative order was entered in both cases reflecting a change of judge. (SupAp 2247). The federal district court noted the change and directed an additional report. (SupAp 2240, 2242-54).

Revival of the previous order also required the inclusion of candidates previously disqualified by the Thlopthlocco Election Committee.

The MCN District Court then stated it would not issue a final order until the election had been set and the opportunity for new elected representatives to take their place. (SupAp. 2273-75).

This interim ruling required Thlopthlocco to take an immediate interlocutory appeal, request a stay of the order for election, and engage in a very shortened appeal (and appellate court jurisdictional) process that had to be filed within 5 days of the District Court decision.[29] (SupAp 2132, 2137, 2146, 2150, 2153, 2160,

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[29] This is not the first effort by the MCN courts to extend its jurisdiction beyond the decisions of this Court. Plaintiff includes in the Supplemental Appendix communications from the MCN Supreme Court at the time of a 2019 MCN Bar membership renewal directed to Plaintiff's counsel and demanding he execute a new consent to jurisdiction which required "consent" be made "unreservedly." (Supp. App. 2182-98).

In response, this counsel expressed concern that the use of the word, "unreservedly" appeared to exceed the nexus limitation of jurisdiction specified by the Tenth Circuit in *Crowe & Dunlevy v. Stidham*. (Supp. App. 2186-89) The MCN Supreme Court replied this was for purposes of enforcing bar discipline. (Supp. App. 2195-96).

Yet, nothing in the this Court's *Crowe v. Stidham* decision indicated any jurisdictional limitation on discipline in MCN Bar proceeding, or even disputes between attorneys and Indian clients. *Crowe v. Stidham*, 640 F.3d at 1151-53.

In fact, in *Crowe*, this Court specifically noted numerous cases cited by defendants that involved bar discipline and distinguished them. *Crowe v. Stidham*, 640 F.3d at 1151. ("The vast majority of cases Judge Stidham cites for his proposition that a tribal court has power to regulate attorneys who practice before it are cases addressing disciplinary matters, in which courts have permitted suits against defendant-attorneys for alleged misconduct.").

(continued...)

2163).[30]

The MCN Supreme Court reversed CV-2011-08 and remanded to dismiss for lack of jurisdiction. (SupAp 2412).

Third, issues of access to court conditioned upon waivers of sovereign immunity present immediate questions to be resolved because they impinge upon the rights of the sovereign parties. Besides the rule in *Beers* and this Court's mandate, the United States Supreme Court has previously struck down a state supreme court's interpretation of a statute that required a waiver of sovereign immunity by an Indian tribe before it could access a state court. *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, P. C.*, 476 U.S. 877, 106 S. Ct. 2305 (1986). In *Three Affiliated Tribes*, the North Dakota Supreme Court's interpretation of a statutory assumption of jurisdiction under Public Law 280 (18 U.S.C. §1162; 28 U.S.C. §§1360, 1362) (1953)) required an Indian Tribe to waive sovereign immunity as a prerequisite to suit in a state court to access defendants

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[29](...continued)
The new requirement that consent be made "unreservedly" is arguably an effort to "wire around" *Crowe's* holding when dealing with non-Tribal members of the MCN Bar.
The MCN Supreme Court would not let counsel sign a consent that expressly referenced jurisdiction pursuant to *Crowe* and *Thlopthlocco*. (Supp. App. 2190; 2195-96). The final result? Sign, or else. (Supp. App. 2197-98).

[30] Fortunately, the MCN District Court's decision was entered on May 23, 2021. (SupAp 2256). Because of the Memorial Day Holiday, the appeal was docketed on June 1, 2021. (SupAp 2387, 2146, 2150)

not otherwise accessible in tribal court. Justice O'Connor held that this was too high a price to pay for a tribe to access a state court:

> This result simply cannot be reconciled with Congress' jealous regard for Indian self-governance.
>
> - - - - -
>
> [This] requirement that the Tribe consent to suit in all civil causes of action before it may again gain access to state court as a plaintiff also serves to defeat the Tribe's federally conferred immunity from suit. The common law sovereign immunity possessed by the Tribe is a necessary corollary to Indian sovereignty and self-governance.
>
> Nonetheless, in the absence of federal authorization, tribal immunity, like all aspects of tribal sovereignty, is privileged from diminution by the States. (emphasis added)

Three Affiliated Tribes, 476 U.S. at 889-91.

In *Thlopthlocco* and *Crowe*, this Court has held twice held that Indian tribal officials, judges in particular, are subject to enforcement of federal law under *Ex parte Young*:

> The Supreme Court has repeatedly held that whether a tribal court has exceeded its jurisdictional authority is a question of federal common law. As the Court explained in *National Farmers Union Insurance Companies v. Crow Tribe of Indians*, "whether an Indian tribe retains the power to compel a non-Indian . . . to submit to the civil jurisdiction of a tribal court is one that must be answered by reference to federal law and is a 'federal question" under § 1331." 471 U.S. 845, 852, 105 S. Ct. 2447, 85 L. Ed. 2d 818 (1985).
>
> Thus, while *National Farmers* refers to "non-Indians," the logic of the opinion applies to non-members of a tribe, including other independent Indian tribes.

Thlopthlocco, 762 F.3d at 1233-34.

See also, *Crowe*, 640 F.3d at 1155. ("We see no reason to restrict tribal sovereign immunity from the reaches of the *Ex parte Young* doctrine, particularly when Congress retains plenary authority to do so . . ."). In both cases, MCN judicial officers were the subject defendants and logically could only be when they exercise judicial functions subject to federal common law.

The Supreme Court has never limited *Ex parte Young* to require an existing ongoing proceeding before its protections may be invoked. The Supreme Court allows a party to address an ongoing violation of federal law to claim declaratory or injunctive relief. *Reed v. Goertz*, 598 U.S. 230, 143 S. Ct. 955, 960 (2023) ("Texas invokes the State's sovereign immunity. But the *Ex parte Young* doctrine allows suits like Reed's for *declaratory or injunctive relief* against state officers in their official capacities."). Reed initially sought DNA testing in state court, but was denied by a stringent Texas chain of custody ruling. He then filed a suit under 42 U.S.C. §1983 claiming the Texas post-conviction DNA testing scheme was unconstitutional. Logically, Reed's state suit been resolved on the merits, unfavorable to him, but he was still entitled to sue in federal court.

There need be no pending proceeding to entitle a party to declaratory relief or injunctive relief. For example, in *Steffel v. Thompson*, a petitioner challenged a trespass threat under a criminal statute to his handbilling on an exterior sidewalk to a shopping center even though no pending proceeding was extant:

> When no state proceeding is pending and thus considerations of equity, comity, and federalism have little vitality, the propriety of granting federal declaratory relief may properly be considered independently of a request for injunctive relief.

Steffel v. Thompson, 415 U.S. 452, 462-63, 94 S. Ct. 1209, 1217-18 (1974).

For example, with knowledge of the rule of decision of the MCN courts, Thlopthlocco could bring a new declaratory action that the rule of decision violated federal common law, that Thlopthlocco falls into the class of potential plaintiffs who are adversely affected by the ruling because it has utilized the MCN judiciary and is likely to do so again, and that the rule of decision chills its access to court. "In determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" *Verizon Md. Inc. v. PSC*, 535 U.S. 635, 645, 122 S. Ct. 1753, 1760 (2002).

To wait until Thlopthlocco has a for certain need to access the MCN court system and then take on the question of the rule of decision would require Thlopthlocco to face a significant risk of another 16 year diversion through tribal and federal court and obscure the relief it is seeking.

In such a hypothetical suit Thlopthlocco can show standing to maintain the action. Article III standing consists of the following three elements: (1) an injury in fact; (2) a causal connection between the injury and the challenged action; and (3)

a likelihood that a favorable decision will redress the injury. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 180-81, 120 S. Ct. 693 (2000).

The requirement for "injury in fact" requires "an invasion of a legally protected interest which is (a) concrete and particularized; and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992) (citations omitted) (internal quotation marks omitted).

The exercise of jurisdiction by the MCN courts after Thlopthlocco has withdrawn consent is certainly evidence of an invasion of a "legally protected interest" under federal common law that is "concrete and particularized" to Thlopthlocco in that it actually occurred, and more than likely to can recur in the future, and therefore is not "conjectural."

The constitutional and prudential injury is evidenced by the still outstanding rule of decision that any future access to the MCN courts will require Thlopthlocco's to weigh whether it cannot withdraw consent once given.

Given its litigation history, future access to MCN courts is not speculative. It was also conceded as a "reasonable possibility" by MCN counsel in oral argument: P. 35

> 19 MR. TINKER: The town is arguing -- and that argument
> 20 requires a number of stepping stones to get to the point where
> 21 it would be capable of repetition. First, the argument is,
> 22 there would be an election dispute in the future. I don't

> 23 think we're going to deny that there is a reasonable
> 24 possibility of that. If, as the town contends and as the
> 25 tribal court has not denied, the judicial forum of the Muscogee

P. 36:

> 1 (Creek) Nation is the one available to the town, then it
> 2 certainly is a possibility that they will be back in tribal
> 3 court to adjudicate an election dispute in the future.

App. 495-6. (emphasis added).

The MCN District Court's refusal to allow the withdrawal of consent rested on no historical antecedents of the relationship between Thlopthlocco and the MCN that justified treatment of Thlopthlocco different from that of the federal common law. The Federal District Court correctly entered declaratory judgment.

PROPOSITION B

DEFENDANTS FAILED TO MEET THEIR "FORMIDABLE BURDEN" TO SHOW MOOTNESS BECAUSE THEY CANNOT PROVE "NO REASONABLE EXPECTATION" OF RECURRENCE OF ITS RULE OF DECISION THAT REFUSES TO ALLOW THLOPTHLOCCO TO WITHDRAW ITS WAIVER.

Defendants claim that Thlopthlocco's declaratory relief is constitutionally moot because the MCN courts have ceased to exercise jurisdiction over Thlopthlocco. (ApltBr 12, 26, 29, 30). But the fact that the MCN courts have voluntarily withdrawn their exercise of jurisdiction does not mean that the Federal District Court and now this Court should not provide effectual relief:

> A case remains live "[a]s long as the parties have a concrete interest,

> however small, in the outcome of the litigation," and it "'becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party.'" *Chafin v. Chafin*, 568 U. S. 165, 172, 133 S. Ct. 1017, 185 L. Ed. 2d 1 (2013).(emphasis added)

MOAC Mall Holdings LLC v. Transform Holdco LLC, 598 U.S. 288, 143 S. Ct. 927, 932 (2023).

Thlopthlocco's immediate concrete interest in this litigation, protection of its sovereign immunity, is definitely bigger than "small." Because it touches on a diminution ofThlopthlocco's sovereignyy, that interest involves "irreparable harm." (*See supra*, p. 30).

The MCN Defendants' argument that the case is moot because they are not currently exercising jurisdiction over Thlopthlocco is more like the view of an ostrich that thinks it is not affected by what is going on around it because its head cannot be seen. But that does not mean that real world consequences are no longer at issue:

> The test for mootness in cases such as this is a stringent one. 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." *United States v. W. T. Grant Co*., 345 U.S. 629, 632 (1953); *see, e. g.*, *United States v. Trans-Missouri Freight Assn*., 166 U.S. 290 (1897). A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur. . . . at 633-636.

City of Mesquite v. Aladdin's Castle, 455 U.S. 283, 289, n. 10, 102 S. Ct. 1070, 1074-75 (1982). (Seeking injunctive relief).

> *See also*, *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. Inc*., 528 U.S.

167, 190 (2000) ("Thus the burden a defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur."). (emphasis added).

While Defendants contend Plaintiffs have not shown that an active case remains, thus the actual obligation to show the case is moot is theirs and a recent decision of the U.S. Supreme Court again reinforces that this test is a "formidable burden." *FBI v. Fikre*, 144 S. Ct. 771, 777 (2024).

In *FBI*, Plaintiff Fikre, a U.S. citizen from Sudan, was placed on a "no fly" list, most likely for the purpose of inducing him to become an FBI informant. Unable to return to the U.S., Fikre traveled from country to country, incurring continued harassment including physical assault by local government agents with whom he came into contact, apparently at the behest of the FBI.

In Sweden, he sued the FBI claiming that he was listed on the "No Fly" list in violation of procedural due process, and for other constitutionally impermissible reasons such as race, religious beliefs, and national origin. *FBI*, 144 S. Ct. a 775-7.

Eventually during the litigation, the government notified Fikre that he had been removed from the "No Fly" list and they sought dismissal of his case as a result of this administrative action. The district court dismissed, but the Ninth Circuit reversed, holding that a party seeking to moot a case based on its own

voluntary cessation of challenged conduct must show "that the conduct cannot 'reasonably be expected to recur.'"

On remand, the government submitted a declaration that "based on the currently available information," Fikre would not be placed on the No Fly List in the future." The district court again dismissed, and still again the Ninth Circuit reversed holding that the government did not meet its burden because of the insufficiency of the declaration. *Id*.

This was the question the government should not have asked when it decided to take certiorari because the Supreme Court unanimously affirmed the Ninth Circuit.

"A court with jurisdiction has a "virtually unflagging obligation" to hear and resolve questions properly before it. *Colorado River Water Conservation Dist. v. United States*, 424 U. S. 800, 817, 96 S. Ct. 1236, 47 L. Ed. 2d 483 (1976)." *FBI*, 144 S. Ct. at 777.

"But the converse is also true. Sometimes events in the world overtake those in the courtroom, and a complaining party manages to secure outside of litigation all the relief he might have won." *FBI*, *id*. If so, the case must be dismissed. But that is not the end of it:

> None of this implies that a defendant may "automatically moot a case" by the simple expedient of suspending its challenged conduct after it is sued. . . . Instead, our precedents hold, a defendant's "'voluntary cessation of a challenged practice'" will moot a case only if the

> defendant can show that the practice cannot "'reasonably be expected to recur.'"
>
> - - - - -
>
> We have described this as a "formidable burden." . . . And the reason for it is simple: "The Constitution deals with substance," not strategies. . . . Were the rule more forgiving, a defendant might suspend its challenged conduct after being sued, win dismissal, and later pick up where it left off; it might even repeat "this cycle" as necessary until it achieves all of its allegedly "unlawful ends." . . . A live case or controversy cannot be so easily disguised, and a federal court's constitutional authority cannot be so readily manipulated. To show that a case is truly moot, a defendant must prove "'no reasonable expectation'" remains that it will "return to [its] old ways." That much holds for governmental defendants no less than for private ones.
>
> - - - - -
>
> What matters is not whether a defendant repudiates its past actions, but what repudiation can prove about its future conduct. It is on that consideration alone—the potential for a defendant's future conduct—that we rest our judgment.

FBI, 144 S. Ct. at 777-79.

First, this case does differ from *FBI* because the MCN defendants have never repudiated the objectionable conduct. If anything they have reinforced it. Its resolution of *Thlopthlocco v. Anderson* virtually guarantees recurrence of the question that Thlopthlocco will be confronted with a diminishment of its sovereignty each time it chooses to access the MCN courts.

Future access to the MCN judiciary is more than likely. As previously noted, MCN counsel has conceded a "reasonable possibility" of the recurrence of litigation by Thlopthlocco. (*See supra*, p. 30).

Moreover, if past is prologue, Thlopthlocco will suffer similarly in the MCN

courts as in the past. There is seventeen years of tribal history in this litigation that Thlopthlocco will never get back. This very appeal by the MCN defendants, besides showing a rejection of this Court's prior mandate, essentially guarantees there is no expectation that the MCN will act differently unless under some kind of court judgment.

Because of the MCN, Thlopthlocco's basic governmental function of tribal elections has been disrupted because it has had to defer elections pending the result of this tribal court litigation since 2011.

A declaratory judgment is important to this litigation in order to protect Thlopthlocco from future disruption to both its internal operation and constitutional election procedures at the hands of the MCN judiciary, or there will be a recurrence of this very result the next time Thlopthlocco files suit.

Most important, future incoming TTT officials who follow previous tribal officials who have chosen to waive Thlopthlocco sovereign immunity in litigation in the MCN courts can, with the benefit of a declaratory judgment, simply reassert that sovereign immunity in the same manner as withdrawing a consent to jurisdiction. This is a very real protection for Thlopthlocco sovereignty to prevent permanent interference by MCN.

Stated another way, a declaratory judgment will be of great significance and value if there are future TTT officials who chose to sell Thlopthlocco down the

"Creek."

PROPOSITION C

ALTERNATIVELY, EVEN IF AN ARGUMENT EXISTED THAT NO LIVE CASE OR CONTROVERSY REMAINS, THIS CASE IS STILL NOT MOOT IN THAT IT IS CAPABLE OF REPETITION, YET EVADING REVIEW.

Defendants argue that this case is moot because the MCN courts are no longer exercising jurisdiction over Thlopthlocco after dismissing both CV-2007-39 and CV-2011-08. They view the recurrence of a need of this same litigation scenario as remote because, they say, there is no reasonable likelihood that the specific scenario of this case will repeat in the future. They also contend that because this case extended over many years, and was not one of short duration, Plaintiff is not entitled to consideration of short litigation duration requirements that expire before a resolution is obtained.

But the extended length or brevity of opportunity to challenge the MCN actions was not caused by Thlopthlocco or even by fixed events such as elections. Instead, this timing was solely dictated by MCN defendants who refused to promptly rule and disregarded this Court's mandate they the explain why Thlopthlocco could not withdraw its consent to jurisiction. *Thlopthlocco*, 762 F.3d 1226, 1240.

The real question of timing in this action was the improper years-long

exercise of jurisdiction by the MCN courts over Thlopthlocco, and its inability to effectively challenge that exercise of jurisdiction while Thlopthlocco was waiting in the tribal court, a prisoner of the exhaustion of tribal remedies.

In this instance, the exercise of jurisdiction was very long and the ability to challenge was extremely short, and, as shown by Defendants' actions, was thwarted by the very decision made by the Defendants. This is still a reasonable and logical application of "capable of repetition, yet evading review." *Davis v. Federal Election Comm'n*, 554 U.S. 724, 735, 128 S. Ct. 2759 (2008).

At the present time, Thlopthlocco still does not have a judiciary and there is an upcoming tribal election. There is more than a likelihood of litigation because of extended and recent history of litigation by Thlopthlocco to settle election or governance disputes. *Tomah I* and *Tomah II*, noted in the Counterstatement of the case, are two examples. (*See supra*, p. 17). And, of course, No. CV-2007-39 addresses the coup attempt and CV-2011-08 was a dispute over candidate eligibility.

After the MCN Supreme Court's decision, Thlopthlocco began preparation for its quadrennial election which has remained deferred since 2011 and realistically should not be expected to occur until this Court concludes this appeal and the district court's summary judgment is secure.

To show the likelihood of recurrence, Plaintiff included within the

Supplemental Appendix copies of the following resolutions and policies and procedures for Thlopthlocco's next election:

> 2022-07-19 Minutes of the Thlopthlocco Tribal Town Business Committee showing adoption of Resolution No. 2022-08. (Supp. App. 2199-201).
>
> Thlopthlocco Tribal Resolution No. 2022-08 Adopting Election Ordinance and Creating Election Committee. (Supp. App. 2202-03).
>
> Thlopthlocco Tribal Town Election Ordinance and Election Committee Rules & Procedures dated July 19, 2022. (Supp. App. 2204-233).

Chapter 9 of the Election Ordinance provides for Election of Judicial Remedies which allows the Business Committee to initiate a court action after adopting a written resolution stating the extent of consent to jurisdiction, setting the parameters of contested issues, and allowing the withdrawal of consent. (SupAp 2483-84).

As noted by the Federal District Court, Chapter 9 of the Election Ordinance provides, "a reasonable expectation that Plaintiff will raise the issue of withdrawal and be subjected to a similar lawsuit as the current one if its withdrawal of a waiver of sovereign immunity is not accepted . . ." and thus "capable of repetition, yet evading review." (SupAp 2227-8).

Thus, even if could be argued that no present "active action" exists, and Thlopthlocco does not concede this, alternatively, the likelihood that judicial proceedings will be needed in the future falls into the mootness exception that it is

"capable of repetition, yet evading review."

The U.S. Supreme Court routinely invokes such an exception in election cases, and it "applies where (1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *Davis v. Federal Election Comm'n*, 554 U.S. at 735 (internal quotation marks omitted) (resolving dispute in 2006 election); *see also Anderson v. Celebrezze*, 460 U. S. 780, 784, 103 S. Ct. 1564 and n. 3 (1983) (resolving dispute in 1980 election).

Courts do not require certainty of repetition, but only whether it is capable of repetition, "[o]ur concern in these cases" is whether "the controversy was capable of repetition and not . . . whether the claimant had demonstrated that a recurrence of the dispute was more probable than not." *Honig v. Doe*, 484 U.S. 305, 319 n.6. (1988).

The Tenth Circuit has previously recognized such a rule even if the stakes are "small":

> In a moot case, a plaintiff no longer suffers a redressable "actual injury." *Ind v. Colo. Dep't of Corr.*, 801 F.3d 1209, 1213 (10th Cir. 2015) (quotations omitted). But an action is not moot if a plaintiff has "a concrete interest, however small, in the outcome." *Knox v. Serv. Emps. Int'l Union, Local* 1000, 567 U.S. 298, 307-08, 132 S. Ct. 2277, 183 L. Ed. 2d 281 (2012) (quotations omitted).
>
> - - - - -
>
> And "[t]he mootness of a plaintiff's claim for injunctive relief is not

> necessarily dispositive regarding the mootness of his claim for a declaratory judgment" *Jordan v. Sosa*, 654 F.3d 1012, 1025 (10th Cir. 2011).

Prison Legal News v. Fed. Bureau of Prisons, 944 F.3d 868, 879-80 (10th Cir. 2019).

For sure, claims of sovereignty are significantly more than a trifle. The Federal District Court was entitled to adjudicate the claim that the MCN courts refused to decide, that is, whether Thlopthlocco can withdraw its consent.

PROPOSITION D

THE FEDERAL DISTRICT COURT PROPERLY ENTERED DECLARATORY JUDGMENT.

Recognizing that a live unanswered question remained in this litigation, and after due consideration, the Federal District Court entered a declaratory judgment that:

1. The Thlopthlocco Tribal Town is entitled to sovereign immunity in the Muscogee (Creek) Nation Courts and may waive its sovereign immunity to consent to the jurisdiction of a court.

2. The Thlopthlocco Tribal Town may also withdraw its waiver of sovereign immunity under appropriate circumstances.

SupAp 2500. (Also see SupAp 2498).

The MCN defendants raise only sovereign immunity and constitutional and prudential mootness in their issues on appeal. (AppBr 1-2). If, as the District Court found, and Thlopthlocco contends, this case is not moot, argument that the District

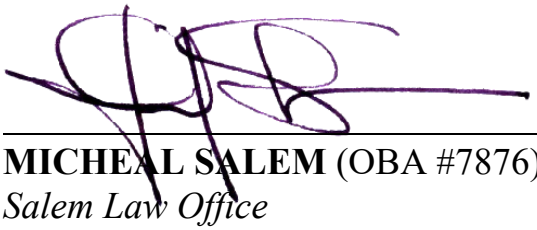
Court misapplied the five factors of *St. Paul Fire & Marine Ins. Co. v. Runyon*, 53 F.3d 1167, 1169 (10th Cir. 1995) based upon their arguments of mootness would fail.

IV. CONCLUSION

This case is not moot. The MCN judiciary rule of decision that forbids Thlopthlocco from withdrawing a waiver and consent limits Thlopthlocco's access to the MCN judicial forum because it must waive an important attribute of tribal sovereignty that clearly represents irreparable harm. Considering that it took 16 years to resolve a matter that Thlopthlocco concluded within 58 days, it can be easily demonstrated the burden is more than minimal. This is a "concrete interest" or "substantial injury" rising to the level of "irreparable harm" and is directly attributable to the existing and unchanged rule of decision of the MCN courts that was remedied by the District Court's declaratory judgment.

The declaratory judgment of the Federal District Court should be affirmed.

Respectfully submitted,



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THLOPTHLOCCO TRIBAL TOWN, a
Federally Recognized Indian Tribe

STATEMENT REGARDING ORAL ARGUMENT

Respectfully, Thlopthlocco Tribal Town does not request oral argument.

Nevertheless, Thlopthlocco is willing to appear and answer any questions the Court may have if this matter is set for oral argument.

It has been ten years since this Court's decision in *Thlopthlocco v. Stidham* reaffirmed its previous holding in *Crowe v. Stidham* that Thlopthlocco's was a separate federally recognized Indian Tribe and was not a member of the MCN.

In *Thlopthlocco*, this Court made the initial and logical default determination that, consistent with Federal common law, Thlopthlocco, like any other sovereign, was entitled to withdraw a previous waiver of sovereign immunity and consent to jurisdiction.

Nevertheless, as part of the tribal exhaustion doctrine, this Court gave the MCN tribal officers an opportunity to provide some local reasons or arguments why their procedural rules varied from Federal law.

None were forthcoming. Instead, had the Federal District Court in this case not entered its declaratory relief, we would be at exactly the same juncture as when this Court issued its decision and ordered remand on September 3, 2014 experiencing the MCN's judiciary's unexplained disregard and substantial delay of its response to this Court's mandate. Such a wait would continue to inflict a significant injury on Thlopthlocco's basic governmental functions.

CERTIFICATE OF COMPLIANCE

The attached RESPONSE BRIEF OF APPELLEE-PLAINTIFF THLOPTHLOCCO TRIBAL TOWN does not exceed the type-volume limitation imposed by Federal Rules of Appellate Procedure 32(a)(7)(B)(I).

This document contains 12,731 words, including footnotes, and excluding those parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Tenth Circuit Rule 32(B).

This document complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it was prepared using WordPerfect 2021. The typeface for both the text and footnotes is 14-point Times New Roman font.

Signature of Attorney

MICHEAL SALEM (OBA #7876)

CERTIFICATE OF DIGITAL SUBMISSION

I certify that the electronic version of the foregoing RESPONSE BRIEF OF APPELLEE-PLAINTIFF THLOPTHLOCCO TRIBAL TOWN, prepared for submission via ECF, complies with the following requirements:

1. All required privacy redactions have been made under Federal Rule of Appellate Procedure 25(a)(5) and Tenth Circuit Rule 25.5;

2. With the exception of any redactions, every document submitted in digital form or scanned PDF format will be an exact copy of the written document filed with the clerk; and

3. The ECF submission has been scanned for viruses with the most recent version of Windows Defender (Windows Security Application Version: 1000.25992.0.9000 (5/28/2024); and Windows Security Service Version: 1.0.2402.27001-0) and is virus-free according to that program.

Signature of Attorney **MICHEAL SALEM** (OBA #7876)

CERTIFICATE OF SERVICE

I certify that I caused the foregoing document to be electronically filed with the Clerk of this Court and served on all counsel of record via the Court's CM/ECF filing system on the DATE SHOWN by the ECF.

All participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF System.

Signature of Attorney **MICHEAL SALEM** (OBA #7876)

ATTACHMENT A

Thlopthlocco Tribal Town v. Wiley, 2023 WL 8813866, 2023 U.S. Dist. LEXIS 226384, __ F.Supp.3d ___ (N.D. Okla. Dec. 20, 2023) (SupAp. 2466-98, 2499-500).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

THLOPTHLOCCO TRIBAL TOWN, **a federally recognized Indian Tribe,** **Plaintiff,** **v.** **ROGER WILEY, RICHARD C. LERBLANCE, AMOS McNAC, ANDREW ADAMS III, KATHLEEN R. SUPERNAW, MONTIE R. DEER, GEORGE THOMPSON JR., and LEAH HARJO-WARE,** **Defendants.**	**Court No. 4:09-CV-00527-JCG-CDL**

OPINION AND ORDER

This action addresses sixteen years of litigation between the Thlopthlocco Tribal Town ("Plaintiff"), the judges of the Muscogee (Creek) Nation Courts, and other members of the Thlopthlocco Tribal Town, arising from an attempted coup d'état after Thlopthlocco Tribal Town elections in 2007. For the reasons stated below, the Court grants Plaintiff's motion for declaratory judgment and holds that the Thlopthlocco Tribal Town is entitled to sovereign immunity in the Muscogee (Creek) Nation Courts and may, if it chooses, waive its sovereign immunity to submit to the jurisdiction of Muscogee (Creek) Nation Courts. Furthermore, the

Court holds that under appropriate circumstances, the Thlopthlocco Tribal Town may withdraw its waiver of sovereign immunity. The Court denies Defendants' motion to dismiss.

The Thlopthlocco Tribal Town filed Plaintiff Thlopthlocco's Statement of Position and Motion for Declaratory Judgment and Brief in Support (Summary Judgment) seeking a declaratory judgment that the Thlopthlocco Tribal Town is entitled to sovereign immunity, may waive such immunity voluntarily to submit to the jurisdiction of the Muscogee (Creek) Nation Courts, and may withdraw its waiver of sovereign immunity under appropriate circumstances. Pl.'s Mot. Declaratory J. (Summary J.) [Doc. 176]. Defendants Roger Wiley (Chief Judge of the Muscogee (Creek) Nation District Court), Richard C. Lerblance (Chief Justice of the Supreme Court of the Muscogee (Creek) Nation), Amos McNac (Vice-Chief Justice of the Supreme Court of the Muscogee (Creek) Nation) and Andrew Adams III, Kathleen R. Supernaw, Montie R. Deer, George Thompson, Jr., and Leah Harjo-Ware (Justices of the Supreme Court of the Muscogee (Creek) Nation) (collectively, "Defendants") filed Defendants-Appellees' Combined Motion and Opening Brief in Support of Dismissal for Lack of Jurisdiction. Defs.' Mot. Dismiss [Doc. 177]. Defendants argue that the decision of the Supreme Court of the Muscogee (Creek) Nation ("Muscogee (Creek) Nation Supreme Court") states

clearly that the Thlopthlocco Tribal Town is entitled to sovereign immunity in the Muscogee (Creek) Nation Courts, thereby making this case moot.

This case was reassigned to the undersigned judge sitting by designation on February 27, 2023. Min. Order [Doc. 173]. The Court held oral argument on September 21, 2023. Min. Proceeding [Doc. 194].

BACKGROUND

I. Tribal History

The Thlopthlocco Tribal Town is a town of Creek Indians who originated from Mexico and migrated to present-day Georgia and Alabama in the 1500s, where they resided until relocated forcibly in the 1820s and 1830s. Thlopthlocco Tribal Town v. Stidham, 762 F.3d 1226, 1229 (10th Cir. 2014). Historically, Creek Indians have governed themselves through tribal towns known as *talwa*. Id. Members of a *talwa* lived together, but their membership was determined by ancestry, rather than geography. Id. Beginning in the 1820s and 1830s, the *talwa* commenced a unification process through which they entered into treaties with the United States Government and adopted a single constitution. Id. Although Creek Indians opposed centralization initially, they finally became a single Creek government after the American Civil War. Id. (quoting Frederic Kirgis, Memorandum to the Commissioner of Indian Affairs 1 (July 15, 1937)).

In 1867, the Creek Indians revised their constitution and created a centralized government similar to that of the United States' federal structure. Id. Each *talwa* continued to govern itself much like a state. Id. The 1867 constitution remained the Creek Indians' governing document until 1907. Id. From 1907 to 1936, the *talwa* were governed by the state of Oklahoma and the counties where each *talwa* was located. Id. at 1230. In 1936, Congress enacted the Oklahoma Indian Welfare Act ("OIWA"). Id. The OIWA invited any recognized Indian tribe or band residing in Oklahoma to adopt a constitution and bylaws and be acknowledged accordingly by a federal charter of incorporation. Id. The Thlopthlocco Tribal Town was one of the three *talwa* that sought and received federal charters in the years immediately following the OIWA's enactment. Id. After creating its own constitution, the Thlopthlocco Tribal Town received its federal charter of incorporation and became a federally recognized tribe in 1939. Id. The Muscogee (Creek) Nation became a Creek Indian tribe recognized under the OIWA in 1979, but the Thlopthlocco Tribal Town continued to be independent. Id. Members of the Thlopthlocco Tribal Town are eligible for membership in the Muscogee (Creek) Nation. Id.

Today, the Thlopthlocco Tribal Town has a ten-member Business Committee in which it vests the power to govern. Id. The Business Committee is comprised of five elected town officers and five advisors appointed by the elected

officials. Id. The Thlopthlocco Tribal Town holds elections every four years. Id. If a position becomes vacant between elections, the remaining elected officials have the authority to fill the vacancy. Id. The Thlopthlocco Tribal Town members may also remove a Business Committee member by a majority vote. Id. Despite having its own constitution and governing structure, the Thlopthlocco Tribal Town does not have a judiciary of its own because it has not acquired the necessary federal funding. Id. The Bureau of Indian Affairs provides federal funding that allows members of the Thlopthlocco Tribal Town to utilize the Muscogee (Creek) Nation Courts. Id.

II. Factual and Procedural Background

In June 2007, Nathan Anderson ("Anderson") was elected Town King of the Thlopthlocco Tribal Town and attempted a coup d'état by declaring himself the only legitimate elected official and deeming all other offices of the Thlopthlocco Tribal Town's Business Committee vacant. Id. at 1232. The Thlopthlocco Tribal Town filed an action in Muscogee (Creek) Nation District Court against Anderson for declaratory and injunctive relief. Id.; Thlopthlocco Tribal Town v. Anderson ("Anderson I"), CV-2007-39. The Thlopthlocco Tribal Town adopted a limited consent and waiver of sovereign immunity that excluded election disputes. Thlopthlocco Tribal Town, 762 F.3d at 1232. The Muscogee (Creek) Nation District Court determined initially that it lacked jurisdiction to hear the matter and

urged the Thlopthlocco Tribal Town to resolve the issues internally. Id. The Muscogee (Creek) Nation Supreme Court reversed the Muscogee (Creek) Nation District Court's initial decision, however, holding that the Thlopthlocco Tribal Town was subject to the jurisdiction of Muscogee (Creek) Nation Courts because it is a Muscogee (Creek) Nation town. Id.

Anderson then filed crossclaims against the Business Committee members on grounds of election fraud and violation of the Thlopthlocco Tribal Town's constitution. Id. The parties resolved some of the issues by removing Anderson from office according to the Thlopthlocco Tribal Town's constitution. Id. However, Anderson continued to pursue his crossclaims. Id. The Thlopthlocco Tribal Town filed a motion to dismiss its suit and withdrew its waiver of sovereign immunity, but the Muscogee (Creek) Nation District Court denied the motion, holding that it had jurisdiction to hear Anderson's crossclaims despite the Thlopthlocco Tribal Town's withdrawal of its waiver of sovereign immunity. Id. The Thlopthlocco Tribal Town filed an interlocutory appeal with the Muscogee (Creek) Nation Supreme Court, which denied the appeal and held that under tribal law, the Thlopthlocco Tribal Town was part of the Muscogee (Creek) Nation. Id.

In a new election cycle in 2011, the Thlopthlocco Tribal Town excluded Anderson and other individuals from the election ballot. Id. This led to Anderson and the other individuals filing another crossclaim against the Business Committee.

Id.; Anderson v. Burden ("Anderson II"), CV-2011-08. The Business Committee filed a motion to dismiss for lack of jurisdiction, but the Muscogee (Creek) Nation District Court denied the motion and ordered that the Thlopthlocco Tribal Town proceed with the election and include Anderson and his co-plaintiffs on the ballot. Thlopthlocco Tribal Town, 762 F.3d at 1232. The Thlopthlocco Tribal Town filed a lawsuit against the Muscogee (Creek) Nation's judicial officials in the United States District Court Northern District of Oklahoma ("District Court").[1] Id.

Plaintiff sought to enjoin the Muscogee (Creek) Nation's judicial officials from exercising jurisdiction over the Thlopthlocco Tribal Town's elections and procedures. Id. The District Court dismissed the Thlopthlocco Tribal Town's lawsuit for lack of subject matter jurisdiction and granted the Muscogee (Creek) Nation's judicial officials' motion to dismiss. Id. at 1232–33. The District Court held that the Muscogee (Creek) Nation's judicial officials were entitled to sovereign immunity, and that the Thlopthlocco Tribal Town failed to join indispensable parties and exhaust its remedies in the Muscogee (Creek) Nation Courts. Id. The Thlopthlocco Tribal Town appealed the District Court's decision to the United States Court of Appeals for the Tenth Circuit ("Tenth Circuit Court of Appeals"). Id.

[1] Thlopthlocco Tribal Town v. Stidham, 2013 U.S. Dist. LEXIS 539 (N.D. Okla. Jan. 3, 2013), aff'd in part, rev'd in part and remanded, 762 F.3d 1226 (10th Cir. 2014).

On September 3, 2014, the Tenth Circuit Court of Appeals reversed the District Court's decision, concluding that the question of whether a tribal court has jurisdiction over a non-member tribe should be decided under federal common law and is within the subject matter jurisdiction of the District Court. Id. at 1234. The Tenth Circuit Court of Appeals concluded that the Thlopthlocco Tribal Town pled sufficiently that it is a separate and independent Indian tribe beyond the reach of the Muscogee (Creek) Nation Courts' jurisdiction. Id. The Tenth Circuit Court of Appeals issued a remand to the District Court for additional proceedings to join necessary parties and abate further proceedings until the Thlopthlocco Tribal Town exhausted its tribal court remedies. Id. at 1242.

Plaintiff filed Plaintiff's Motion to Join MCN Judicial Officials and Brief in Support ("Pl.'s Mot. Joinder"), in which Plaintiff sought to join six Muscogee (Creek) Nation judicial officials as well as Anderson I defendants and Anderson II plaintiffs. Pl.'s Mot. Joinder [Doc. 86]. Defendants filed their Joint Motion to Stay Consideration of Remanded Joinder Issues. Defs.' Mot. Stay Remanded Joinder [Doc. 87]. On December 30, 2014, the District Court abated further proceedings and remanded the matter to the tribal courts. Pl.'s Mot. Declaratory J. (Summary J.) at 9. The District Court also entered orders joining members of the Muscogee (Creek) Nation judiciary and staying the remainder of the joinder issues

until after tribal exhaustion was completed. Order Pl.'s Mot. Joinder [Doc. 88]; Min. Order Defs.' Mot. Stay Remanded Joinder [Doc. 89].

On May 24, 2021, the Muscogee (Creek) Nation District Court issued its decision. Pl.'s Mot. Declaratory J. (Summary J.) at 9. The Muscogee (Creek) Nation District Court dismissed Anderson I, finding that Anderson was no longer a credible threat to Plaintiff's government, thereby making the case no longer justiciable. Muscogee (Creek) Nation Dist. Ct. Decision at 19 [Doc. 159-1]. Regarding Anderson II, the Muscogee (Creek) Nation District Court held that the Thlopthlocco Tribal Town could not rely on sovereign immunity to remove Anderson and other individuals from its election ballots. Id. at 19–20. The Muscogee (Creek) Nation District Court concluded that it had both personal and subject matter jurisdiction over Anderson II. Id. at 17.

On appeal, the Muscogee (Creek) Nation Supreme Court held that the Thlopthlocco Tribal Town is entitled to sovereign immunity in the Muscogee (Creek) Nation Courts. Muscogee (Creek) Nation Sup. Ct. Decision at 17–22 [Doc. 168-04]. The Muscogee (Creek) Nation Supreme Court also held that the Thlopthlocco Tribal Town could submit itself voluntarily to the jurisdiction of the Muscogee (Creek) Nation Courts. Id. at 22. Concluding that the Thlopthlocco Tribal Town waived its sovereign immunity in Anderson I, the Muscogee (Creek) Nation Supreme Court affirmed the Muscogee (Creek) Nation District Court's

decision to dismiss Anderson I and held that the Muscogee (Creek) Nation Courts had exercised proper jurisdiction over the case in its entirety. Id. at 23.

Regarding Anderson II, the Muscogee (Creek) Nation Supreme Court reversed the Muscogee (Creek) Nation District Court's decision, holding that Anderson's crossclaims extended outside the scope of the initial injunction action, Anderson I. Id. at 23–25. Relying on and comparing the facts of this case to Thlopthlocco Tribal Town v. Tomah ("Tomah I"), 8 Okla. Trib. 576 (Mus. (Cr.) D. Ct. 2004), the Muscogee (Creek) Nation Supreme Court held that the Muscogee (Creek) Nation Courts did not have jurisdiction because the Thlopthlocco Tribal Town's waiver did not extend to the issues in Anderson II. Muscogee (Creek) Nation Sup. Ct. Decision at 24–25. Therefore, the Muscogee (Creek) Nation Supreme Court reversed the Muscogee (Creek) Nation District Court on its ruling regarding Anderson II. Id. at 25. Neither tribal court addressed the issue of whether the Tribal Town could withdraw its waiver of sovereign immunity under appropriate circumstances.

The Tribal Town now returns to the District Court, seeking a declaratory judgment that (1) it enjoys sovereign immunity in the Muscogee (Creek) Nation Courts and may, if it chooses, consent to such jurisdiction; and (2) it may withdraw its waiver of sovereign immunity and consent to jurisdiction under appropriate circumstances. Defendants filed a motion to dismiss for lack of subject matter

jurisdiction, arguing that this case is moot and that any opinion by this Court would be advisory. Defs.' Mot. Dismiss at 14–18.

JURISDICTION

The Court begins by addressing the threshold question of whether there is subject matter jurisdiction. Under Article III of the Constitution, the court's subject matter jurisdiction is limited to live cases or controversies, ensuring that courts determine only real disputes. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 199 (2023). To prove that the case is a real dispute, a litigant must prove that it has suffered some actual injury that can be redressed by a favorable decision. Audubon of Kansas, Inc. v. U.S. Dep't of Interior, 67 F.4th 1093, 1102 (10th Cir. 2023). When the litigant no longer suffers an actual injury that can be remedied by a favorable decision, the case becomes moot. Rhodes v. Judiscak, 676 F.3d 931, 933 (10th Cir. 2012). The doctrine of mootness ensures that a matter remains a live case at the time a court renders its decision on the issues. Brown v. Buhman, 822 F.3d 1151, 1163 (10th Cir. 2016). To determine whether there remains a live case, a court ascertains whether the issues offer some effect in the real world. Audubon of Kansas, Inc., 67 F.4th at 1102. If a plaintiff retains a concrete interest in the outcome, even if it is small, the case is not moot. Id.

I. Live Case or Controversy

Defendants argue that there is no live case or controversy because the Muscogee (Creek) Nation Supreme Court pronounced that as a matter of both tribal and federal law, the Thlopthlocco Tribal Town is entitled to sovereign immunity in the Muscogee (Creek) Nation Courts. Defs.' Mot. Dismiss at 14–15. Because of the Muscogee (Creek) Nation Supreme Court's pronouncement, Defendants assert that this case is prudentially moot because Plaintiff's request for declaratory judgment will not result in any real-world benefits and will burden tribal comity and resources significantly. Id. at 16–18. Defendants also contend that Plaintiff's declaratory relief is constitutionally moot because the Muscogee (Creek) Nation Courts have ceased to exercise jurisdiction over the Thlopthlocco Tribal Town. Id. at 16.

To the contrary, the Court concludes that a live case exists because the question of whether the Muscogee (Creek) Nation Courts may exercise jurisdiction over the Thlopthlocco Tribal Town after withdrawing its sovereign immunity waiver has not yet been resolved. The resolution of this question offers a real-world effect because Plaintiff has a concrete interest in knowing whether the Thlopthlocco Tribal Town may continue to rely on Chapter 9 of its Election Ordinance ("Chapter 9") when it waives its sovereign immunity to submit to the jurisdiction of the Muscogee (Creek) Nation Courts. Chapter 9 provides:

> In the sole discretion of the Business Committee, it may initiate a court action to be filed in a court of appropriate venue selected in its sole choice. . . . In such instance, the Business Committee shall . . . , determine and state the extent of consent to jurisdiction of the judicial forum.
>
> . . . .
>
> The Business Committee *shall be entitled to withdraw any such consent to jurisdiction in the event the selected judicial forum exceeds the consent to jurisdiction authorized by the Business Committee*, and the action of such judicial body in excess of the consent to jurisdiction shall be treated as a nullity by Thlopthlocco Tribal Town Law. Iowa Tribe of Kansas & Nebraska v. Salazar [("Iowa Tribe")], 607 F.3d 1225, 1233–34 (10th Cir. 2010) (a "sovereign . . . may prescribe the terms and conditions on which it consents to be sued, . . . the manner in which the suit shall be conducted, and may withdraw its consent whenever it may suppose that justice to the public requires it"); Beers v. Arkansas, 61 U.S. 527, 529 (1857).

Pl.'s Mot. Declaratory J. (Summary J.) at App. 14 (emphasis added). The Thlopthlocco Tribal Town relied on this ordinance in making the decision to withdraw Anderson I, when the Thlopthlocco Tribal Town determined that the Muscogee (Creek) Nation Courts had exceeded the jurisdictional limits of the Thlopthlocco Tribal Town's waiver of sovereign immunity. When the Muscogee (Creek) Nation Courts continued to exercise jurisdiction, the Thlopthlocco Tribal Town brought suit before the District Court to resolve, among other questions, the issue of whether the Muscogee (Creek) Nation Courts may continue to exercise jurisdiction after the Thlopthlocco Tribal Town withdrew its waiver of sovereign immunity.

The Tenth Circuit Court of Appeals remanded the case to the tribal courts anticipating that the federal courts might benefit from the Muscogee (Creek)

Nation Courts' analysis on this issue because of any differences between the federal and tribal laws that govern waivers of sovereign immunity. Thlopthlocco Tribal Town, 762 F.3d at 1240. The Muscogee (Creek) Nation Courts did not address this issue, however, and dismissed Anderson I on other grounds. By dismissing the case without addressing the issue, the Muscogee (Creek) Nation Courts left a live case for this Court to address. Because there remains a live case and Plaintiff has a concrete interest in the outcome, the Court concludes that it has Article III subject matter jurisdiction.

II. Mootness Exception: Capable of Repetition Yet Evading Review

Alternatively, even if the Court were to accept Defendants' argument that Plaintiff's declaratory relief claim is constitutionally moot, an exception to mootness applies when an issue is "capable of repetition yet evading review." Under this exception, questions under review are not moot if they satisfy two elements: the question must be of the kind that (1) evades review because its duration as part of the challenged action is too short to be fully litigated prior to its cessation or expiration, and (2) is capable of repetition, resulting in a reasonable expectation that the same plaintiff will be subjected to the same action again. Robert v. Austin, 72 F.4th 1160, 1164–65 (10th Cir. 2023) (citing Fleming v. Gutierrez, 785 F.3d 442, 445 (10th Cir. 2015)).

A. Duration of Litigated Issue

To satisfy the first element of the exception to mootness, a litigant must proffer evidence from which the court can infer that the behavior in question is necessarily of short duration. Wyoming v. U.S. Dep't of Interior, 674 F.3d 1220, 1229 (10th Cir. 2012) (citing Jordan v. Sosa, 654 F.3d 1012, 1034–35 (10th Cir. 2011)). An issue that is of short duration by its very nature is one that "could not, or probably would not be adjudicated while fully 'live.'" Id. at 1229 (quoting Dow Chemical Co. v. EPA, 605 F.2d 673, 678 n. 12 (3d Cir. 1979)). The Tenth Circuit Court of Appeals has recognized that cases involving election disputes readily satisfy this element because of the short time frame of election cycles. See Rio Grande Found. v. Oliver, 57 F.4th 1147, 1166 (10th Cir. 2023) ("Challenges to election laws may readily satisfy the first element, as injuries from such laws are capable of repetition every election cycle yet the short time frame of an election cycle is usually insufficient for litigation in federal court.").

Defendants argue that Plaintiff cannot prove that its claim is based on an issue that has a short duration because the tribal courts' exercise of jurisdiction was not necessarily short in duration or fleeting. Defs.' Mot. Dismiss at 19. Defendants also argue that the tribal courts' assertion of jurisdiction over Plaintiff did not end too quickly to be fully litigated in the federal courts. Id. To support their arguments, Defendants contend that this case continued for at least thirteen

years after the Thlopthlocco Tribal Town withdrew its waiver of sovereign immunity. Id. Defendants assert that by the time the case was resolved by the Muscogee (Creek) Nation Supreme Court, it had been pending in federal court for nearly a decade. Id.

Plaintiff counters that the Muscogee (Creek) Nation District Court did not recognize Plaintiff's claims early, delayed the case significantly after the federal court's abatement for tribal exhaustion (the Tenth Circuit Court of Appeals issued its remand in 2014 and the Muscogee (Creek) Nation District Court delayed seven years before issuing its opinion in 2021), and ruled on the pending issues in a manner that could moot the case. Pl.'s Reply Defs.' Resp. Pl.'s Mot. Declaratory J. (Summary J.) at 7–8 [Doc 184].

Although Anderson I took sixteen years to resolve, the nature of the Muscogee (Creek) Nation Courts' assertion of jurisdiction was too short to be fully litigated by this Court. The case was short by its nature because the issues over which the Muscogee (Creek) Nation Courts asserted jurisdiction stemmed from an election dispute in Anderson I's crossclaims. The short duration is demonstrated by the fact that the election disputes were no longer justiciable by the time the Muscogee (Creek) Nation District Court decided the case after a long delay of seven years, and Anderson was no longer a threat to the Thlopthlocco Tribal Town. The Court observes that the federal case was abated in the District Court for the

Thlopthlocco Tribal Town to exhaust its tribal remedies, thus delaying the resolution of the issue in federal court regarding the effect of the Thlopthlocco Tribal Town's withdrawal of its waiver of sovereign immunity on the tribal courts' jurisdiction. Because this issue could not be litigated in the District Court while the underlying case was fully live, it was by its nature too short in duration. Therefore, the first element of the mootness exception is satisfied.

B. Expectation of Repetition

To satisfy the second element of the mootness exception, a party must show that there is a reasonable expectation of repetition that goes beyond a hypothetical possibility. Nathan M. v. Harrison Sch. Dist. No. 2, 942 F.3d 1034, 1042 (10th Cir. 2019). To prove a reasonable expectation of repetition, a party must demonstrate that it will be subjected to the same action again because of the action's potential to recur. Id.

The Court concludes that Plaintiff has demonstrated that there is a reasonable expectation that it will be subjected to the same action again because the Thlopthlocco Tribal Town does not have a judiciary of its own. There is a reasonable expectation that the Thlopthlocco Tribal Town will submit future legal disputes to the jurisdiction of the Muscogee (Creek) Nation Courts as the sole legal venue available, the Thlopthlocco Tribal Town is likely to waive its sovereign immunity when bringing future disputes before the Muscogee (Creek) Nation

Courts, and the Thlopthlocco Tribal Town is likely to withdraw its waiver of sovereign immunity under certain circumstances. Thus, legal challenges to the Muscogee (Creek) Nation Courts' exercise of jurisdiction have the potential to recur if this Court does not resolve the issue of whether the Thlopthlocco Tribal Town may withdraw its waiver of sovereign immunity. The issue has potential to recur because, in submitting to the jurisdiction of the Muscogee (Creek) Nation Courts, the Thlopthlocco Tribal Town relies on Chapter 9 of its Election Ordinance to initiate a court action and set the limits for its waiver of sovereign immunity. Chapter 9 allows the Thlopthlocco Tribal Town's Business Committee to "withdraw any such consent to jurisdiction in the event the selected judicial forum exceeds the consent to jurisdiction authorized by the Business Committee, and the action of such judicial body in excess of the consent to jurisdiction shall be treated as a nullity by Thlopthlocco Tribal Town Law." Pl.'s Mot. Declaratory J. (Summary J.) at App. 14. Because Chapter 9 permits the Business Committee to issue waivers of sovereign immunity and allows for the withdrawal of such waivers, there is a reasonable expectation that Plaintiff will raise the issue of withdrawal and be subjected to a similar lawsuit as the current one if its withdrawal of a waiver of sovereign immunity is not accepted. Therefore, the Court concludes that the Thlopthlocco Tribal Town's claim survives mootness because the "capable of repetition, yet evading review" exception applies.

ANALYSIS

Summary judgment is appropriate if there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The movant bears the burden of making a prima facie demonstration regarding absence of a genuine issue of material fact. In re Rumsey Land Co., 944 F.3d 1259, 1270–71 (10th Cir. 2019). The Thlopthlocco Tribal Town stated that it is moving "for declaratory judgment by summary judgment." Pl.'s Mot. Declaratory J. (Summary J.) at 1. An examination of the filings of both parties shows that there is no dispute of material facts. The Thlopthlocco Tribal Town's claim for relief is based on declaratory relief and makes no mention of a claim under the summary judgment standard. Because the true nature of Plaintiff's claim is for declaratory relief, the Court proceeds under a declaratory judgment motion rather than a summary judgment motion.

I. Declaratory Judgment Standard of Review

Whether to entertain a declaratory judgment action is a matter committed to the trial court's sound discretion. Kunkel v. Cont'l Cas. Co., 866 F.2d 1269, 1274 (10th Cir. 1989) (citing Alabama State Fed'n of Labor v. McAdory, 325 U.S. 450, 462 (1945)). When deciding whether to hear a declaratory judgment action, a court weighs the following factors: (1) whether a declaratory action would settle the controversy; (2) whether it would serve a useful purpose in clarifying the legal

relations at issue; (3) whether the declaratory remedy is being used merely for the purpose of "procedural fencing" or "to provide an arena for a race to res judicata;" (4) whether use of a declaratory action would increase friction between federal and state courts and encroach upon state jurisdiction improperly; and (5) whether there is an alternative remedy that is better or more effective. St. Paul Fire & Marine Ins. Co. v. Runyon, 53 F.3d 1167, 1169 (10th Cir. 1995) (citing State Farm Fire & Cas. Co. v. Mhoon ("Mhoon"), 31 F.3d 979, 983 (10th Cir. 1994)). Declaratory judgment that is otherwise appropriate is not precluded by the existence of another adequate remedy. Fed. R. Civ. P. 57.

II. Declaratory Judgment Factors

A. Declaratory Action Potential to Settle the Controversy

To determine whether a declaratory action is appropriate, the first factor that a court must consider is whether the declaratory action would settle the controversy, or whether the exercise of its jurisdiction would be "unnecessarily duplicative and uneconomical" because of another parallel action that gives a party the opportunity to raise the question at issue. See Mid-Continent Cas. Co. v. Vill. at Deer Creek Homeowners Ass'n, 685 F.3d 977, 982 (10th Cir. 2012) (holding that the district court did not abuse its discretion when it weighed this factor against exercising jurisdiction because the declaratory action would not resolve all the issues that were presented in a parallel state court case). It is economical for a

federal court to entertain a declaratory judgment action that is governed by federal law. United States v. City of Las Cruces, 289 F.3d 1170, 1183 (10th Cir. 2002) (citing Brillhart v. Excess Ins. Co. of Am., 316 U.S. 491, 495 (1942)). When there is no parallel proceeding, it is an abuse of discretion for a district court to dismiss a federal declaratory judgment action. Id.

Plaintiff seeks a declaratory judgment because the underlying tribal action was dismissed without fully addressing the issue of whether the Thlopthlocco Tribal Town, in addition to enjoying sovereign immunity and waiving it to consent to jurisdiction in the Muscogee (Creek) Nation Courts, may withdraw its sovereign immunity waiver under appropriate circumstances. Pl.'s Mot. Declaratory J. (Summary J.) at 15–18. Because the underlying action was dismissed without answering this question, there remains no parallel tribal proceeding through which Plaintiff has an opportunity to settle the controversy. Without a parallel proceeding, this Court's exercise of jurisdiction will not be unnecessarily duplicative or uneconomical because the question presented has not been fully addressed. The Court's exercise of jurisdiction is economical because the question of whether a tribal court has jurisdiction over a non-member is decided under federal common law. Thlopthlocco Tribal Town, 762 F.3d at 1233–34. The Court concludes that the first factor weighs in favor of a declaratory action.

B. Declaratory Action Purpose in Clarifying the Legal Issues

The second factor of whether a declaratory judgment would serve a useful purpose in clarifying the legal relations at issue is tied closely to the first factor because both factors require some degree of similarity between the parties and issues presented in concurrent proceedings. City of Las Cruces, 289 F.3d at 1183. When there is no parallel proceeding, the federal declaratory action serves a useful purpose in settling a controversy. Id. The Tenth Circuit Court of Appeals has held that a federal declaratory action serves some useful purpose when a state proceeding is dismissed without adjudicating the issue before the federal court. Id.

As discussed above, there is no parallel proceeding, and the tribal action was dismissed without addressing the question of whether the Thlopthlocco Tribal Town may withdraw its consent to jurisdiction under appropriate circumstances. A declaratory action would serve a useful purpose of clarifying the circumstances under which the Thlopthlocco Tribal Town may withdraw its sovereign immunity waiver appropriately. The Court concludes, therefore, that the second factor weighs in favor of a declaratory action.

C. Use of the Declaratory Action for Purposes of Procedural Fencing and Res Judicata

For the third factor of whether a party is using a declaratory action for purposes of procedural fencing, the court examines the motives of the seeking party and whether it seeks a procedural advantage in another pending litigation.

Mid-Continent Cas. Co., 685 F.3d at 984; see St. Paul Fire & Marine Ins. Co., 53 F.3d at 1170 (holding that a party used procedural fencing when it filed its federal action knowingly one day before the other party filed its state action and waited three years before seeking a declaratory action). A party seeking declaratory judgment is usually accused of procedural fencing when it engages in questionable actions. Mid-Continent Cas. Co., 685 F.3d at 984.

The record does not demonstrate that the Thlopthlocco Tribal Town engaged in questionable behavior in filing its declaratory action, and Defendants do not raise such an issue. Plaintiff seeks a declaratory judgment because it believes that the ability to withdraw its consent to litigation is necessary for its full exercise of sovereign immunity. Pl.'s Reply Defs. Resp. Pl.'s Mot. Declaratory J. (Summary J.) at 2. This motive does not suggest that the Thlopthlocco Tribal Town seeks to gain a procedural advantage in another pending tribal action, especially because the underlying action was dismissed. The dismissal of the underlying action also weighs against a finding that Plaintiff is engaging in a race to res judicata because there is no pending tribal action in which Plaintiff will gain a procedural advantage. The Thlopthlocco Tribal Town does not have a judiciary of its own and the Muscogee (Creek) Nation Courts are its only judicial venues. It cannot be said that Plaintiff is using this declaratory action for purposes of procedural fencing or

forum shopping. The Court concludes, therefore, that the third factor weighs in favor of a declaratory action.

D. Declaratory Action Effect on the Relationship Between Federal and Tribal Courts

The fourth factor for a declaratory action focuses on whether the federal action involves any undue interference with the tribal proceeding and whether the tribal court is better situated to provide the party with complete relief. Mid-Continent Cas. Co., 685 F.3d at 986; Mhoon, 31 F.3d at 983.

The Thlopthlocco Tribal Town's request for a declaratory judgment includes an issue that the Muscogee (Creek) Nation Supreme Court has already decided, which is that the Thlopthlocco Tribal Town enjoys sovereign immunity and may waive it to consent to the jurisdiction of Muscogee (Creek) Nation Courts. Pl.'s Mot. Declaratory J. (Summary J.) at 13–15. The second part of the Thlopthlocco Tribal Town's request involves a question that has been adjudicated traditionally under federal law. See Thlopthlocco Tribal Town, 762 F.3d at 1233–34 (recognizing that the Thlopthlocco Tribal Town is a sovereign tribe and that the question of whether a tribal court has jurisdiction over a non-member tribe is decided under federal common law). Because the issue involves an interpretation of federal law, this Court is well situated to address it. See, e.g., Mid-Continent Cas. Co., 685 F.3d at 986 (concluding that a state court was better situated to

address the issue regarding coverage obligations because that issue fell under state insurance law).

A declaration by this Court will not contradict the Muscogee (Creek) Nation Supreme Court's holding that the Thlopthlocco Tribal Town enjoys sovereign immunity and may waive its sovereign immunity to submit to the Muscogee (Creek) Nation Courts' jurisdiction. This Court's declaration will clarify the appropriate circumstances under which the Thlopthlocco Tribal Town may withdraw its waiver of sovereign immunity. The issue is within the traditional jurisdiction of federal courts and a declaratory action will neither increase friction between federal and tribal courts, nor encroach upon the tribal courts' jurisdiction. The Court concludes, therefore, that the fourth factor weighs in favor of a declaratory action.

E. Existence of a Better or More Effective Alternative Remedy

For the fifth factor of whether there is an alternative remedy that is better or more effective, the Court must consider whether the tribal courts are better situated to provide the seeking party with complete relief. See Mid-Continent Cas. Co., 685 F.3d at 986.

The Thlopthlocco Tribal Town seeks a declaratory judgment following tribal exhaustion of the underlying case. Because exhaustion is complete and the issue for which Plaintiff seeks clarity was not addressed in the underlying action by the

tribal courts, a declaratory judgment from this federal court is the remedy that would be most effective. The alternative would be to dismiss this action and wait for the Thlopthlocco Tribal Town to be subjected to a similar lawsuit again when the Thlopthlocco Tribal Town seeks judicial recourse in its only legal venue, the Muscogee (Creek) Nation Courts. As noted at the outset, the litigation stemming from the 2007 Thlopthlocco Tribal Town election has lasted for sixteen years and there are still outstanding legal questions that remain unanswered. It is an abuse of discretion for a court to dismiss a declaratory judgment action when there is no pending parallel proceeding that provides a party with adequate relief. See Fed. Rsrv. Bank of Atlanta v. Thomas, 220 F.3d 1235, 1247 (11th Cir. 2000) ("It is an abuse of discretion . . . to dismiss a declaratory judgment action in favor of a state proceeding that does not exist."). Because there is no alternative that provides a better remedy, the Court concludes that the fifth factor weighs in favor of a declaratory action.

All the factors support Plaintiff's request for a declaratory judgment. The Court concludes, therefore, that its exercise of jurisdiction over this declaratory judgment action is appropriate.

III. Declaratory Judgment Relief

A. Plaintiff's Sovereign Immunity and Waiver of Such Immunity

Plaintiff seeks a declaratory judgment that it enjoys sovereign immunity in the Muscogee (Creek) Nation Courts and may, if it chooses, consent to such jurisdiction.

Indian tribes exercise inherent sovereign authority over their members and territories. E.F.W. v. St. Stephen's Indian High Sch., 264 F.3d 1297, 1304 (10th Cir. 2001). One of the core aspects of Indian tribes' sovereignty is common law immunity, which is also necessary for a tribe's governance. Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 788 (2014).

This Court confirms and issues a declaratory judgment that the Thlopthlocco Tribal Town is a federally recognized tribe, and it enjoys sovereign immunity as pronounced in the Muscogee (Creek) Nation Supreme Court's decision. Muscogee (Creek) Nation Sup. Ct. Decision at 22. This Court also confirms and issues a declaratory judgment that similar to other sovereigns, the Thlopthlocco Tribal Town may voluntarily waive its sovereign immunity to submit to the jurisdiction of the courts of another sovereign. Id. at 22.

B. Withdrawal of a Waiver of Sovereign Immunity

The Thlopthlocco Tribal Town also seeks a declaratory judgment that it may withdraw its consent to jurisdiction under appropriate circumstances.

Indian tribes possess immunity from direct suits and cross-suits. Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505, 509 (1991). An Indian tribe is subject to suit when Congress has authorized the suit, or the tribe has waived its immunity unambiguously. Ute Indian Tribe of the Uintah & Ouray Rsrv. v. Utah ("Ute Indian Tribe"), 790 F.3d 1000, 1009 (10th Cir. 2015). The same principle applies to counterclaims, even compulsory ones, brought against a plaintiff tribe. Id. (citing Okla. Tax Comm'n, 498 U.S. at 509–10). When a tribe initiates an action, it does not waive its sovereign immunity from actions that could not otherwise be brought against it. Okla. Tax Comm'n, 498 U.S. at 509. This is so even if those actions were pled in a counterclaim to its original action. Id. If there is no suggestion that Congress has authorized the counterclaims, whether a court may exercise jurisdiction over the tribe turns on whether the tribe itself has waived its immunity regarding the counterclaims. Id. If a tribe waives its immunity for the counterclaims, the waiver of immunity must be expressed clearly and unequivocally. Id.

The Thlopthlocco Tribal Town argues that it draws its authority to issue waivers and withdraw them from Chapter 9 of its Election Ordinance. According to Chapter 9, the Thlopthlocco Tribal Town's Business Committee is entitled to withdraw any previously issued consent to jurisdiction if the judicial forum

exceeds the authorized consent. Pl.'s Mot. Declaratory J. (Summary J.) at App. 14; see Iowa Tribe, 607 F.3d at 1233–34; see also Beers, 61 U.S. at 529.

In Iowa Tribe, the Tenth Circuit Court of Appeals explained that a sovereign may set the terms and conditions for its consent to be sued, the way in which the suit is conducted, and "may withdraw its consent whenever it may suppose that justice to the public requires it." 607 F.3d at 1234. Because the Tenth Circuit Court of Appeals held in Ute Indian Tribe, 790 F.3d at 1009, that the principle regarding waivers and consent to be sued extends to counterclaims, it follows that Iowa Tribe applies to crossclaims and cross-suits against Plaintiff, even when Plaintiff initiates the action. See Okla. Tax Comm'n, 498 U.S. at 509 (holding that a tribe does not waive its sovereign immunity from actions that could not otherwise be brought against it, even if it initiated the action). Unless Congress authorizes the counterclaims, or the Thlopthlocco Tribal Town expressly waives its sovereign immunity with regard to the counterclaims, the Thlopthlocco Tribal Town cannot be subjected to the counterclaims without its consent. Consistent with Iowa Tribe and Beers, if the Thlopthlocco Tribal Town waives its sovereign immunity and the judicial forum's exercise of jurisdiction exceeds the limits of the waiver, Plaintiff may withdraw its waiver of sovereign immunity.

This does not mean, however, that a defendant to a suit by Plaintiff is without recourse. Oklahoma Tax Commission stands for the proposition that a

tribe does not waive immunity with regard to counterclaims that would not have otherwise been brought against it. Okla. Tax Comm'n, 498 U.S. at 509. This principle does not apply to counterclaims that a defendant asserts in recoupment. When a sovereign brings a suit, it waives immunity impliedly as to all of a defendant's claims asserted in recoupment. Berrey v. Asarco, Inc., 439 F.3d 636, 643 (10th Cir. 2006) (citing Bull v. United States, 295 U.S. 247, 260–63 (1935)). Recoupment is a defense claim that (1) arises out of the same transaction or occurrence; (2) seeks the same kind of relief as a plaintiff does; and (3) does not seek damages exceeding what a plaintiff seeks. Id. (citing F.D.I.C. v. Hulsey, 22 F.3d 1472, 1487 (10th Cir. 1994)). If Plaintiff initiates a suit and the defendant brings a suit that meets the elements of recoupment, then Plaintiff may not withdraw its waiver and invoke sovereign immunity against such claims. The Court notes that recoupment was not raised and is not relevant to this action.

The Court hereby issues a declaratory judgment that the Thlopthlocco Tribal Town may withdraw its waiver of sovereign immunity in the Muscogee (Creek) Nation Courts if the tribal courts' exercise of jurisdiction exceeds the terms and conditions of the waiver. For example, if the Thlopthlocco Tribal Town initiates a lawsuit in the Muscogee (Creek) Nation Courts and a defendant files a counterclaim or cross-suit, the Thlopthlocco Tribal Town may withdraw its waiver

and invoke sovereign immunity with respect to the counterclaim or cross-suit if its waiver did not expressly apply to the counterclaim or cross-suit.

IV. Joinder

Plaintiff argues that the Court should now consider the remaining joinder issues and join present members of the Muscogee (Creek) Nation judiciary who are not currently named as defendants, and notice should be given to other additional defendants, regardless of whether they will make an appearance in this suit. Pl.'s Mot. Declaratory J. (Summary J.) at 30–32. Because some of the judges who held office in the Muscogee (Creek) Nation Courts and were named Defendants in the initial application are no longer in office, Plaintiff requests that this Court enter an order adding Justice Amos McNac and District Judge Stacy Leeds.

Fed. R. Civ. P. 25 provides that when a public officer who is a party in an official capacity resigns, his or her successor is automatically substituted as a party. An order substituting the names of the retired judicial officials is not necessary here because under Fed. R. Civ. P. 25, the judicial officials who have succeeded the initial parties are automatically substituted, as the updated caption so reflects. The Court concludes that there are no joinder issues remaining.

CONCLUSION

The Court holds that it has jurisdiction because a live controversy exists regarding the question of Plaintiff's ability to withdraw waivers of immunity to

consent to jurisdiction. The Court denies Defendants' Combined Motion and Opening Brief in Support of Dismissal for Lack of Jurisdiction. The Court also holds that although an examination of the record shows that there is no genuine dispute of material fact, summary judgment is not appropriate because Plaintiff's motion only bases its claim in declaratory relief. The Court concludes that because Plaintiff's request for declaratory relief meets all five Mhoon factors, the Court's exercise over the declaratory judgment is appropriate. The Court grants Plaintiff's Statement of Position and Motion for Declaratory Judgment and Brief in Support (Summary Judgment) as it pertains to declaratory judgment. The Court denies Plaintiff's Motion to Join MCN Judicial Officials and Brief in Support because there are no joinder issues that remain.

ORDER

ACCORDINGLY, IT IS HEREBY ORDERED THAT:

(1) Plaintiff's Statement of Position and Motion for Declaratory Judgment and Brief in Support (Summary Judgment) [Doc. 176] is granted as it pertains to the request for Declaratory Judgment. The Thlopthlocco Tribal Town is a federally recognized tribe and entitled to sovereign immunity in the Muscogee (Creek) Nation Courts and may waive its sovereign immunity to consent to the jurisdiction of a court. The Thlopthlocco Tribal Town may also withdraw its waiver of sovereign immunity under appropriate circumstances.

(2) Defendants' Combined Motion and Opening Brief in Support of Dismissal for Lack of Jurisdiction [Doc. 177] is denied.

(3) Plaintiff's request for joinder pursuant to Plaintiff's Motion to Join MCN Judicial Officials and Brief in Support [Doc. 86] is denied.

IT IS SO ORDERED this 20th day of December, 2023.

/s/ Jennifer Choe-Groves
Jennifer Choe-Groves
U.S. District Court Judge*

*Judge Jennifer Choe-Groves, of the United States Court of International Trade, sitting by designation.

ATTACHMENT B

Consolidated Appeal Decision for *Thlopthlocco v. Anderson, et al*., No. CV-2007-39 and *Anderson v. Burden*, No. CV-2011-08, 2022 Muscogee Creek Nation Supreme LEXIS 1. (MCN Supreme Court, February 28, 2022), No. SC-2021-03 (SupAp 2388-416).

IN THE MUSCOGEE (CREEK) NATION SUPREME COURT

THLOPTHLOCCO TRIBAL TOWN, a federally-recognized Indian Tribe,

Plaintiff-Appellant,

v.

NATHAN ANDERSON, Tim Cheek, Bryan McGertt, Candice (Kendis) Rogers, Malinda (Millie) Noon, Inda McGertt, Virgil Sanders, Marian Berryhill, Mike Harjochee, Mary McGertt, Grace Bunner, Thelma Jean Noon, Wesley Montemeyer, Paula Barnes-Herrod,

Defendants-Respondents,

v.

RYAN MORROW, Brent Brown, Celesta, Johnson, Max Trickey, Janna Dickey, Tracey Hill, Barbara Carnard-Welborn, Ron Barnett, Tonya Scott-Walker,

Cross-Claim Defendants-Respondents,

NATHAN ANDERSON, Wesley Montmayor, Tim Cheek, Marian Berryhill,

Plaintiffs-Respondents,

v.

RYAN MORROW, Brent Brown, Celesta, Johnson, Max Trickey, Janna Dickey, Tracey Hill, Barbara Carnard-Welborn, Ron Barnett, Tonya Scott-Walker, Four Vacant Offices,

Defendants-Respondents.

Case No.: **SC-2021-03**
(District Court Case No. CV-2007-39)
(District Court Case No. CV-2011-08)

ORDER AND OPINION

Appeal from District Court, Okmulgee District, Muscogee (Creek) Nation.

Michael Salem, Norman, Oklahoma; for the Appellant, Thlopthlocco Tribal Town, official capacity Cross-Claim Defendants in Muscogee (Creek) Nation District Court Case No. CV-2007-39, and official capacity Defendants in Muscogee (Creek) Nation District Court Case No. CV-2011-08.

Jonathan T. Velie, Norman, Oklahoma; for the Respondents, Nathan Anderson, Tim Cheek, Bryan McGertt, Candice (Kendis) Rogers, Malinda (Millie) Noon, Inda McGertt, Virgil Sanders, Mike Harjochee, Grace Bunner, Thelma Noon, Wesley Montemayor, Paula Barnes-Herrod, Marian Berryhill, Mary McGertt.

ORDER AND OPINION

MVSKOKVLKE FVTCECKV CUKO HVLWAT VKERRICKV HVYAKAT OKETV YVNKE VHAKV HAKATEN ACAKKAYEN MOMEN ENTENFVTCETV, HVTVM MVSKOKE ETVLWVKE ETEHVLVTKE VHAKV EMPVTAKV.[1]

Before: LERBLANCE, *C.J.*; MCNAC, *V.C.J.*; ADAMS, DEER, HARJO-WARE, SUPERNAW, and THOMPSON, *JJ.*

PER CURIAM.

Order of the District Court affirmed in part and reversed in part.

[1] "The Muscogee (Creek) Nation Supreme Court, after due deliberation, makes known the following decision based on traditional and modern Mvskoke law."

Per Curiam.

The Thlopthlocco Tribal Town (hereinafter, the "Appellant") submits its interlocutory appeal of an *Order and Decision* filed by the Muscogee (Creek) Nation District Court on May 24, 2021.[2] The Appellant asserts that the District Court erred in concluding that the courts of the Muscogee (Creek) Nation have subject matter jurisdiction over the underlying cases on appeal.[3] The Appellant argues that, by virtue of its status as a federally recognized band of the Muscogee (Creek) Nation,[4] with a government-to-government relationship with the United States, it is to be treated by the Muscogee (Creek) Nation as a sovereign, immune from lawsuits in its own courts and in courts of foreign jurisdictions absent its informed consent. On the record presented, and for the reasons set forth below, we affirm in part, and reverse in part the May 24, 2021, *Order and Decision of District Court* and remand the matter back to the Muscogee (Creek) Nation District Court with orders to dismiss case number CV-2011-08 for lack of subject matter jurisdiction.

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[2] The instant appeal was filed pursuant to M(C)NCA Title 27, App. 2, Rule 3 (A), which provides:

> "A non-final judgment or order not appealable as a right under Rule 2 may be appealed via an interlocutory appeal to the Supreme Court prior to a final judgment or order upon leave granted by the Supreme Court if the original hearing body determines that an interlocutory appeal will (or may):
>
> 1. Materially advance the termination of the litigation or clarify further proceedings in the litigation;
> 2. Protect the petitioner from substantial or irreparable injury; or
> 3. Clarify an issue of general importance in the administration of justice.

On July 1, 2021, District Judge Stacy Leeds filed with this Court a *Determination of Interlocutory Merit*, wherein the original hearing body concluded that "[i]n the *Order and Decision of the District Court* dated May 24, 2021, this Court ruled on several jurisdictional issues that have been before the courts for many years, including the courts of the Muscogee (Creek) Nation and the courts of the United States. Resolution of these matters with a final exhaustion of Muscogee (Creek) Nation remedies is in the interest of justice and judicial efficiency."

[3] *See* the May 24, 2021, *Order and Decision of District Court*, at page 2, which provides, "[u]nder the laws of the Muscogee (Creek) Nation and pursuant to prior precedent of this Court and the Muscogee (Creek) Nation Supreme Court, this Court has jurisdiction to hear these cases."

[4] *See* 86 C.F.R. 7554, 7557, wherein the "Thlopthlocco Tribal Town" is listed under *Indian Entities Recognized by and Eligible to Receive Services From the United States Bureau of Indian Affairs.*

HISTORICAL BACKGROUND

The Muscogee (Creek) Nation as it is known today springs from a confederation of tribes, many of which migrated from portions of northwestern Mexico to large segments of present day Alabama and Georgia.[5] [6] Once settled in the southeast, additional tribes were incorporated from portions of present day Louisiana and Florida following times of war or due to encroachment by settlement to the east.[7] The confederation did not operate through a central government and decisions made by town representatives at periodic council meetings of the various affiliated tribes were only advisory in effect.[8] Instead, the governing unit was the Italwa, or Talwa which generally translates to the English equivalent of "town."[9]

> [T]he Creek Town is a much more significant political unit than its English name would indicate. There is no exact English equivalent for the Creek word Italwa or Talwa, which is commonly translated "Town." The Creeks do not use the term to denote a city or settlement of whites. For such a mere cluster of buildings…they use the term "Talofa."
>
> The word "Talwa" or "Italwa" refers to a body of people who are connected by heredity and traditions. Every Creek belongs to the Italwa of his mother, and consequently membership is a matter of birthright and not of residence alone. Therefore its exact meaning comes closer to the English term "tribe" than to our conception of a town. Since each Italwa has its own political organization and leadership, it may be considered at the very least a *band* of a tribe if the Creek Confederacy is to be thought of as a tribe.[10]
>
> [Emphasis Added]

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[5] Angie Debo, The Road to Disappearance "A History of the Creek Indians" 3-5 (University of Oklahoma Press) (1979).
[6] Ohland Morton, Early History of the Creek Indians, 9 Chronicles of Oklahoma 17, 17 (March 1931).
[7] Debo at 4-5.
[8] Ohland at 20.
[9] The proper Mvskoke (Creek) spelling for Italwa is Etvlwv. Likewise, the proper Mvskoke (Creek) spelling for Talwa is Tvlwv. For consistency, the Court will use the phonetic spelling adopted in the footnote 10 quote throughout this *Order and Opinion.*
[10] Morris E. Opler, *Memorandum in Regard to Creek Towns*, in VOLUME 13 PAPERS IN ANTHROPOLOGY, 20-25 (SPRING 1972).

As United States settlement began to expand westward, various treaties were entered into between the federal government and Indian tribes. "The treaties of 1790 and 1796 with the Creeks were signed by the representatives of the various towns. However, because of the pressure of the white people for land and the fact that the towns declared war and peace independently of each other, the Federal authorities found it advisable to insist upon centralization of the Creeks to avoid dealing with each Talwa. The Indians opposed this centralization and it was not until after the Civil War, in which the towns took opposing positions [in the conflict], that the Federal Government achieved the formation of a single government among the Creek Indians. And even then the union was opposed by the full-blood element." [11]

In the 1830s the Muscogee (Creek) Italwa was forcibly removed from its lands in the southeastern United States and relocated "west of the Mississippi" to portions of present day Oklahoma.[12]

In 1867, the Muscogee (Creek) Italwa formed a centralized tripartite government, complete with an executive branch headed by a "Principal Chief" and "Second Chief", a legislative branch with two houses; the "House of Kings" and "House of Warriors[,]" both comprised of one representative from each of the 44 tribal towns at the time, and a judicial branch.[13] Because legislative representation (in both houses) was drawn from each Italwa, as opposed to a representative district, the tribal towns retained significant power under the 1867 Constitution.

At the close of the 19th century, the United States government shifted its tribal policy to one of assimilation. In 1887, the General Allotment Act was passed by the United States Congress,

[11] Frederic L. Kirgis, Memorandum to the Commissioner of Indian Affairs 1-2 (July 15, 1937).
[12] Treaty of March 24, 1832, 7 Stat. 366, at 367.
[13] Creek Nation. *Constitution and Civil and Criminal code of the Muskokee Nation, approved at the Council ground Muskokee nation*. Washington, D.C., McGill & Witherow, printers, 1868. Pdf. https://www.loc.gov/item/28014186/.

taking lands held in trust for Indian tribes and redistributing smaller portions of these lands to individual tribal members in fee simple.[14] The Muscogee (Creek) Nation was excluded from this general allotment as, "the Creeks held their lands under letters patent issued by the President of the United States, dated August 11, 1852, vesting title in them as a tribe, to continue so long as they should exist as a nation and continue to occupy the country thereby assigned to them."[15] "[B]ecause of the special rights that had been conferred upon these tribes, and the fact that they held patents for their respective lands, it was considered proper, if not indispensable, to obtain the consent of the Indians to the overthrow of the communal system of land ownership."[16] As a result, the Dawes Commission was created by the United States Congress in 1893 to work out the terms of "extinguishment of the national or tribal title" with the Muscogee (Creek) Nation.[17] The tribe resisted cession of its communal lands to such an extent that in a report to Congress in December of 1894, the Commission stated "that the Indians would not, under any circumstances agree to cede any portion of their lands to the Government, but would insist that if any agreement were made for allotment of their lands it should all be divided equally among them."[18] Achieving no allotment agreement with the tribes, the United States Congress passed the Curtis Act in 1898, which (1) would initiate a forced allotment within the Muscogee (Creek) Nation if an allotment agreement was not reached, (2) made tribal law unenforceable within the United States and its territories, and (3) abolished the tribal courts.[19] As a result, an allotment agreement of Muscogee (Creek) lands was entered in 1901, which also provided that "[t]he tribal government of the Creek

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[14] 24 Stat. 388.
[15] *See*, Woodward v. De Graffenried, 238 U.S. 284, 293 (June 14, 1915).
[16] *Id.*
[17] Act of March 3, 1893, ch. 209, 27 Stat. 612, 645.
[18] S. Misc. Doc. No. 24, 53d Cong., 3d Sess., 7 (1894).
[19] Act of June 28, 1898, ch. 517, 30 Stat. 495. *See also*, Muscogee (Creek) Nation v. Hodel, 670 F.Supp 434 (September 30, 1987), for discussion on the revival of the Muscogee (Creek) Nation tribal courts.

Nation shall not continue longer than March fourth, nineteen hundred and six, subject to such further legislation as Congress may deem proper."[20] However, this date was extended indefinitely by Congress in 1906.[21] "[B]ecause there exists no equivalent law terminating what remained, the Creek Reservation survived allotment."[22]

In 1934, the United States Congress passed the Indian Reorganization Act, which authorized "[a]ny Indian tribe, or tribes, residing on the same reservation" the right to organize and adopt a Constitution for self-government.[23] The Muscogee (Creek) Nation was excluded from this initial legislation. However, in 1936 Congress passed the Oklahoma Indian Welfare Act (hereinafter, the "OIWA"), which extended similar opportunities for Oklahoma tribes.[24] Shortly thereafter the Thlopthlocco Tribal Town submitted its Constitution to be federally recognized under the OIWA. In considering this request, Acting Solicitor Frederic L. Kirgis stated the following in his 1937 *Memorandum to the Commissioner of Indian Affairs*:

> …it appears to me that the Creek towns can lay a substantial claim to the right to be considered as recognized *bands* within the meaning of section 3 of the Oklahoma Indian Welfare Act of June 26, 1936.[25]
>
> [Emphasis Added]

On February 16, 1939, the Thlopthlocco Tribal Town's charter was approved by the Assistant Secretary of the Interior of the United States and on April 13, 1939, was ratified by the town. The Thlopthlocco Tribal Town is a federally recognized band of the Muscogee (Creek) Nation under United States law.

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[20] Creek Allotment Agreement, ch. 676, 31 Stat. 861.
[21] Act of April 26, 1906, 34 Stat. 137.
[22] McGirt v. Oklahoma, 140 S. Ct. 2452, 2464 (July 9, 2020).
[23] Act of June 18, 1934, 48 Stat. 984.
[24] Act of June 26, 1936, 49 Stat. 1967.
[25] See footnote 11 at Pg. 4.

PROCEDURAL BACKGROUND

On January 27, 2007, Nathan Anderson was elected Town King or "Mekko" of the Thlopthlocco Tribal Town, along with four (4) other members elected to the Town's Business Committee.

It is alleged by the Appellant that on June 5, 2007, Anderson removed all elected members of the Thlopthlocco Business Committee (Hereinafter, the "Original BC"), in violation of the Thlopthlocco Constitution, and appointed new members (Hereinafter, the "Anderson BC") to fill these vacancies.

On June 7, 2007, the Original BC conducted a "Special Emergency Business Committee Meeting" at which time they ratified Resolution No. 2007-21, authorizing a limited waiver of sovereign immunity to the Muscogee (Creek) Nation "for the purposes of adjudicating this dispute only, only claims brought by the Plaintiff, Thlopthlocco Tribal Town, and only for injunctive and declaratory relief. This waiver of immunity shall not include election disputes."

A *Complaint and Application for Emergency Injunction* was filed by the Original BC on June 11, 2007, in the Muscogee (Creek) Nation (Dist. Ct. Case No. CV-2007-39) and a *Temporary Restraining Order* was issued by the Muscogee (Creek) Nation District Court (Hereinafter, the "MCN District Court") that same day. A *Preliminary Injunction Hearing* was scheduled for June 20, 2007.

On June 20, 2007, the MCN District Court heard testimony from the parties concerning the Court's subject matter jurisdiction. The Appellant (Original BC), at that stage of the proceedings, argued that the Muscogee (Creek) Nation "clearly has jurisdiction to decide this dispute[;]"[26] that "Sovereign governments can make decisions on how [they] exercises [their] sovereignty. And

[26] Certified Record on Appeal, Doc. 141, Transcript of Proceedings Taken on June 20, 2007, Pg. 62, Ln. 14.

conferring limited jurisdiction on this Court is one way of doing it."[27] Alternately, the Respondent (Anderson BC) argued that "[i]f Thlopthlocco is going to be a sovereign government, it needs to govern itself, it needs to make its own decisions on these matters."[28] Following the conclusion of the evidence, the MCN District Court ruled it did not have jurisdiction to hear the case; the Court stating, "I think this is a matter that must be settled at this time by Thlopthlocco. And I don't believe the Creek Nation has any business being involved in it..."[29]

On June 21, 2007, the Original BC filed its *Application for Writ of Mandamus and Emergency Motion for Stay of Trial Court's Orders Pending Determination of this Appeal*, with the Muscogee (Creek) Nation Supreme Court (Case No. SC-2007-01).

On August 8, 2007, the Appellant filed *Thlopthlocco Tribal Town's Notice of Internal Resolution* with the MCN District Court, advising the Court that Nathan Anderson was removed as Town King by a standing vote of its members.

On October 26, 2007, the Supreme Court issued its *Order and Opinion* in SC-2007-01, granting the Appellant's *Writ* and stating:

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

The MCN District Court was directed to hear the merits of the case and issue a ruling.

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[27] *Id.* at Pg. 66, Ln. 13 – 16.
[28] *Id.* at Pg. 64, Ln. 19 – 21.
[29] *Id.* at Pg. 70, Ln. 9 – 11.

On August 21, 2008, the MCN District Court ruled on an Anderson BC *Motion for Attorney's Fees*, wherein the Anderson BC argued that it was only fair for the Thlopthlocco government to pay for both party's attorney's fees until such time as the Court could determine which business committee was legitimate. The MCN District Court granted the *Motion*.

On November 4, 2008, the Original BC filed an *Interlocutory Appeal* in the MCN Supreme Court (Case No. SC-2008-01), contesting the District Court's attorney fee ruling.

On January 16, 2009, the Supreme Court reversed the MCN District Court's August 21, 2008, *Order*, finding it premature to award attorney fees, and ordered that any fees paid from the Thlopthlocco treasury be returned.

On February 19, 2009, the Original BC passed Resolution No 2009-7, withdrawing its limited waiver of sovereign immunity and consent to jurisdiction and filed a *Conditional Motion to Dismiss* in the MCN District Court.

On July 16, 2009, the MCN District Court denied the Original BC's *Conditional Motion to Dismiss*, wherein the Original BC argued jurisdiction was no longer proper following the withdrawal of the Thlopthlocco Tribal Town's limited waiver of sovereign immunity. The MCN District Court set the matter for jury trial on October 5, 2009.

On August 3, 2009, the Original BC filed an *Interlocutory Appeal* of the MCN District Court's *Order* denying their *Motion to Dismiss*. (Case No. SC-2009-07). The MCN Supreme Court held oral argument in the case on February 19, 2010.

On August 18, 2009, the Original BC filed a *Complaint for Injunctive Relief* in the U.S. District Court for the Northern District of Oklahoma.[30]

[30] See *Complaint* filed in Case No. 4:09-cv-00527-GKF-CDL, U.S. District Court for the Northern District of Oklahoma (August 18, 2009).

On January 26, 2011, Nathan Anderson and Wesley Montmayor (prospective candidates in the 2011 Thlopthlocco Tribal Town election cycle) filed a new *Complaint* in the MCN District Court (Dist. Ct. Case No. CV-2011-08) alleging that they were improperly disqualified as candidates for election in the Thlopthlocco Tribal Town's 2011 elections. The District Court entered a *Preliminary Order* finding that Anderson and Montmayor were not disqualified and should be listed as candidates.

On August 12, 2011, the Original BC filed a new *Writ* in the MCN Supreme Court (Case No. SC-2011-11) arguing that the MCN District Court lacked subject matter jurisdiction to issue an Order directing the Thlopthlocco Tribal Town to place Anderson and Montmayor on the election ballot.

On January 19, 2012, the Supreme Court issued its *Opinion and Order of Denial of Interlocutory Appeal* in SC-2011-11, finding that the Original BC failed to file their *Application* in the time prescribed by statute.

On March 9, 2012, the Supreme Court issued its *Order and Opinion* in SC-2009-07 finding the matter unripe for review until final judgment had been rendered by the MCN District Court. The Court also reaffirmed its position concerning the relationship between the Thlopthlocco Tribal Town and the Muscogee (Creek) Nation, stating "[w]e find no compelling reason to alter our previous holding on the relationship between the Muscogee (Creek) Nation and Thlopthlocco Tribal Town… We hold that any appeal in the instant matter is unripe until sufficient fact-finding is conducted and final judgment rendered by the District Court."

On January 3, 2013, the U.S. District Court for the Northern District of Oklahoma issued its *Order and Opinion* concluding that the Federal Court lacked subject matter jurisdiction to hear the case, as the dispute over the immunity waiver, it was argued, concerned solely a question of

tribal law not federal law, thus no federal question was raised. The Court also concluded that Muscogee (Creek) Nation judicial officers enjoyed sovereign immunity, stating Ex Parte Young was not applicable because the Original BC had failed to explain how the judicial officers violated any federal law. Also, that the Original BC failed to join necessary parties. And finally, that the Original BC had failed to exhaust tribal remedies, as there was no final decision from the Muscogee (Creek) Nation courts on whether they hold subject matter jurisdiction.[31]

On January 14, 2013, the Original BC appealed the U.S. District Court for the Northern District of Oklahoma's *Order and Opinion* to the U.S. Court of Appeals for the Tenth Circuit. Oral argument was conducted on September 24, 2013.[32]

On September 3, 2014, the U.S. Court of Appeals for the Tenth Circuit issued its *Order and Opinion* affirming in part and reversing in part the decision of the U.S. District Court for the Northern District of Oklahoma. The Court concluded (1) that the Original BC had presented a federal question, as the Thlopthlocco Tribal Town and Muscogee (Creek) Nation are distinct federally recognized tribes and "whether a tribal court has exceeded its jurisdictional authority is a question of federal common law." The Court stated, "we have not limited our federal question jurisdiction to jurisdictional disputes between tribes and non-Indians; we have more generally held that "[t]he scope of a tribal court's jurisdiction is a federal question over which federal courts have jurisdiction." (2) Secondly, the 10th Circuit held that the Muscogee (Creek) Nation judicial officers were not protected by sovereign immunity, that "the alleged unlawful exercise of tribal court jurisdiction in violation of federal common law is an ongoing violation of federal common law sufficient to sustain the application of the *Ex Parte Young* doctrine." (3) Next, the 10th Circuit

[31] Thlopthlocco Tribal Town v. Stidham, 2013 WL 65234 (January 3, 2013).
[32] See *General Docketing Letter* in Case No. 13-5006, Tenth Circuit Court of Appeals (January 14, 2013).

found that it was not necessary to dismiss the action for failure to join necessary parties; that before dismissal, the Court should consider the feasibility of joining the parties. (4) Finally, the 10th Circuit affirmed that exhaustion of tribal remedies was appropriate; that the Muscogee (Creek) Nation courts had not "reached a final decision about whether it could properly exercise jurisdiction over the Tribal Town after the Tribal Town has withdrawn its waiver of sovereign immunity." However, instead of dismissing the Complaint, the Court instructed the U.S. District Court for the Northern District of Oklahoma to abate the proceedings until the Tribal Town had exhausted its claims in the Muscogee (Creek) Nation courts.[33]

On December 30, 2014, the U.S. District Court for the Northern District of Oklahoma issued its *Minute Order* staying the proceedings and directing the parties to file a status report concerning tribal court remedies every thirty (30) days.[34] This was later extended to every ninety (90) days.[35]

On May 24, 2021, the MCN District Court issued its *Order and Decision*, finding (1) that, pursuant to prior precedent set in Thlopthlocco v. Tomah,[36] Thlopthlocco v. McGertt,[37], and this Court's ruling in Thlopthlocco Tribal Town v. Moore, et. al,[38] the Courts of the Muscogee (Creek) Nation have jurisdiction to hear the underlying cases on appeal in this matter and resolve any cross-claims falling within the scope of the initial case, (2) that cross-claims falling "wholly outside" the scope of the original action are barred by sovereign immunity, (3) that following a significant passage of time a Plaintiff may no longer voluntarily dismiss its action without leave of the court,

[33] Thlopthlocco Tribal Town v. Stidham, 762 F.3d 1226 (September 3, 2014).
[34] See *Minute Order* filed in Case No. 4:09-cv-00527-GKF-CDL, U.S. District Court for the Northern District of Oklahoma (December 30, 2014).
[35] See *Minute Order* filed in Case No. 4:09-cv-00527-GKF-CDL, U.S. District Court for the Northern District of Oklahoma (November 28, 2018).
[36] Muscogee (Creek) Nation District Court Case No. CV-2004-39
[37] Muscogee (Creek) Nation District Court Case No. CV-2005-28
[38] Muscogee (Creek) Nation Supreme Court Case No. SC-2007-01.

(4) that Nathan Anderson "is no longer a credible threat to the Thlopthlocco government[,]" and as such CV-2007-39 "is no longer justiciable as a practical matter[,]" and is dismissed, and finally, (5) that the MCN District Court's *Preliminary Order* issued on July 29, 2011 is still pending in CV-2011-08; that the Thlopthlocco Tribal Town should hold an election pursuant to Thlopthlocco law, overseen and moderated by Thlopthlocco, and once a date is set the MCN District Court's *Preliminary Order* will be converted to a *Final Order* and the case closed.

PRIOR NOTABLE MVSKOKE CASELAW

Tomah I: *Thlopthlocco Tribal Town v. Tomah, et. al.*, CV-2004-39[39]

There are two notable orders published by the MCN District Court concerning *Tomah I*. In June of 2004, the Thlopthlocco Tribal Town filed an action in the MCN District Court seeking to enjoin Defendants Martha Tomah, Bryan McGertt, and Marty McGertt from interfering with responsibilities of the duly elected Thlopthlocco Business Committee. The Defendants filed a *Motion to Dismiss* for lack of jurisdiction, arguing that the Court of Indian Offenses was the proper forum. On August 16, 2004, the MCN District Court issued its *Order* denying the Defendants' *Motion*; finding that:

> The relationship between Thlopthlocco and the federal government is different than the relationship between Thlopthlocco and the Muscogee (Creek) Nation. Under federal law, Thlopthlocco is a recognized Indian tribe. Under tribal law, Thlopthlocco is a Creek tribal town.[40]

Further, that with respect to subject matter and personal jurisdiction:

> The Defendants are citizens (or eligible for citizenship) within the Muscogee (Creek) Nation. The Plaintiff is the Thlopthlocco tribal town, which is located within the territorial and political jurisdiction of the Muscogee (Creek) Nation. The activities which gave rise to this cause of action occurred within the political and

[39] Published MCN District Court orders at: 8 Okla. Trib. 451 (August 16, 2004), and 3 Mvs. L. Rep. 464, 8 Okla. Trib. 576 (December 30, 2004).
[40] Thlopthlocco Tribal Town v. Tomah, et al., 8 Okla. Trib. 451, 457 (August 16, 2004).

> territorial boundaries of the Muscogee (Creek) Nation. All parties to this suit are Creek Indians.[41]

As a result, the Court concluded:

> Thlopthlocco Tribal Town, as the Plaintiff in this cause of action, has sought a forum in District Court of the Muscogee (Creek) Nation. The Muscogee (Creek) Nation Constitution preserves the rights and privileges of persons of the Muscogee (Creek) Nation to organize tribal towns. The assumption of jurisdiction in this matter is extremely limited in scope, and does not purport to extend jurisdiction of the Muscogee (Creek) Nation for any type of relief beyond what is prayed for in this complaint, nor does this decision impact the governmental immunities enjoyed by Thlopthlocco Tribal Town.[42] [43]

The Defendants in *Tomah I* filed counterclaims against the Thlopthlocco Tribal Town concerning certain employment/wrongful termination matters. On December 7, 2004, the MCN District Court issued a *Minute Order* granting Thlopthlocco's *Motion to Dismiss* the counterclaims based on

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[41] *Id.* at 460.

[42] *Id.*

[43] Article II, Section 5 of the Muscogee (Creek) Nation Constitution provides that the "Constitution shall not in any way abolish the rights and privileges of persons of the Muscogee (Creek) Nation to organize tribal towns or recognize its Muscogee (Creek) traditions." There is significant debate, even amongst this Court, as to whether the Constitutional protections of Article II, Section 5 apply only to a traditional Italwa that maintains a ceremonial fire and passes down the traditions of ceremonial dances, music, and medicine; whose matrilineal clan-based organizational structure determines positions of leadership within the tribal town. Or, if in the alternative, these Constitutional protections extend to purely governmental Muscogee (Creek) tribal towns with popularly elected leaders, such as the Appellant (whose ceremonial fire was extinguished in 1962, *See*, To Keep the Drum, to Tend the Fire: History and Legends of Thlopthlocco. Oklahoma City: Oklahoma Indian Affairs Commission, 1978). Considering that the Muscogee (Creek) Nation National Council passed legislation in the years immediately following passage of the 1979 Constitution that tends to support to this notion (*See*, TR-1985-08, (where the Muscogee (Creek) Nation National Council passed a resolution in support of the Alabama-Quassarte Tribal Town's expenditure of funds for tribal town activities based specifically on Article II, Section 5), TR-1989-01, (where the Muscogee (Creek) Nation National Council passed a resolution supporting the Thlopthlocco Tribal Town's endeavor to have a dispute concerning mineral revenues from lands held in trust for Thlopthlocco properly adjudicated), NCA-1999-12, (where the Muscogee (Creek) Nation National Council appropriated funds to the Kialegee Tribal Town to fund renovation of a facility to provide after school services for Indian youth), and TR-2000-82, (where the Muscogee (Creek) Nation National Council appropriated funds for the Kialegee Tribal Town's Annual Celebration), it may be the case that the framers of the 1979 Constitution intended these governmental entities to be included under that article's protection. However, for purposes of this *Opinion* it is not necessary for the Court to reach a decision on the proper interpretation of Article II, Section 5 at this time, as the Court finds jurisdiction would be proper in the case of CV-2007-39 even in the absence of Article II, Section 5 consideration, based on (1) the historical ties shared by the Appellant and the Muscogee (Creek) Nation, (2) the Appellant's decision to voluntarily waive sovereign immunity in the case of CV-2007-39 (and the previous Tomah cases) and its arguments in support of jurisdiction made before this Court in SC-2007-01, (3) the fact that the Appellant was (at that time) without a court to resolve the matter, and (4) the fact that the individual parties are also Muscogee (Creek) citizens and the dispute in question occurred within the historical boundaries of the Muscogee (Creek) Nation.

sovereign immunity. The second published order was filed by the MCN District Court on December 30, 2004, and references this *Minute Order*, stating:

> The Court ruled that the counterclaim was barred by the doctrine of sovereign immunity. *See* Minute Order, December 7, 2004. The Court's Order of August 16, 2004 cautioned that *the Court's assumption of jurisdiction in this case was limited to Thlopthlocco's request for injunctive and declaratory relief* to determine the lawful leaders of the tribal town. It is *beyond the Court's jurisdiction to hear claims for wrongful termination unless the tribal town specifically and expressly waives sovereign immunity* for such claims to be heard in the courts of the Muscogee (Creek) Nation. The Court finds no such waiver.[44]
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> [Emphasis Added]

No appeal was filed with respect to either *Order* of the MCN District Court in this action.

Tomah II: *Thlopthlocco Tribal Town v. McGertt, et al.*, CV-2005-28[45]

On April 20, 2005, the MCN District Court conducted an emergency hearing in a new action brought by the Thlopthlocco Tribal Town requesting that the Courts of the Muscogee (Creek) Nation enjoin certain individuals (several of whom were Plaintiffs in *Tomah I*) from "interfer[ing] with the duly elected officials of Thlopthlocco in the performance of their duties…"[46] The Court found subject matter and personal jurisdiction over the parties and issued a temporary restraining order over the Defendants. Again, no appeal was taken in the matter.

In both *Tomah I* and *Tomah II*, the Thlopthlocco Tribal Town passed Business Committee Resolutions authorizing a limited waiver of sovereign immunity for injunctive and declaratory relief prior to filing the actions within the Muscogee (Creek) Nation courts.[47]

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[44] Thlopthlocco Tribal Town v. Tomah, et al., 3 Mvs. L. Rep. 464, 470; 8 Okla. Trib. 576, 581 (December 30, 2004).
[45] Published MCN District Court orders at: 3 Mvs. L. Rep. 545, 9 Okla. Trib. 72 (April 20, 2005).
[46] Thlopthlocco Tribal Town v. McGertt, et al., 3 Mvs. L. Rep. 545, 546; 9 Okla. Trib. 72 (April 20, 2005).
[47] *See*, May 24, 2021, *Order and Decision of District Court*, filed in CV-2007-39 and CV-2011-08, at page 10: "In Tomah I, Thlopthlocco passed Business Committee Resolution No 04-28 designating Muscogee (Creek) Nation District Court as the proper judicial forum and with a limited waiver of sovereign immunity for injunctive and declaratory relief only." *See* also Page 12: "At the time Tomah II was filed, Thlopthlocco attached two waivers adopted on April 17, 2005 as part of the initial complaint. Business Committee Resolution 05-17 has the same language as Tomah I waiver noting that Muscogee (Creek) Nation District Court is the appropriate forum under Thlopthlocco and

JURISDICTION, SCOPE, AND STANDARD OF REVIEW

Appellate jurisdiction is proper under M(C)NCA Title 27, § 1-101 (C).[48] This Court will review issues of law *de novo* and issues of fact for clear error.[49] Each respective question will be addressed based on its applicable standard of review.

ISSUES PRESENTED

I. Is the Thlopthlocco Tribal Town entitled to sovereign immunity before the Courts of the Muscogee (Creek) Nation?

II. Do the Courts of the Muscogee (Creek) Nation have jurisdiction over the dispute filed with the Muscogee (Creek) Nation District Court in CV-2007-39?

III. Do the Courts of the Muscogee (Creek) Nation have jurisdiction over the disputes filed with the Muscogee (Creek) Nation District Court in CV-2011-08?

I. SOVEREIGN IMMUNITY

The central proposition the Appellant has advanced to this Court is that the Thlopthlocco Tribal Town, as a federally recognized band of the Muscogee (Creek) Nation, must be recognized by the Courts of the Muscogee (Creek) Nation as a sovereign entity and afforded all federal protections granted a sovereign through the doctrine of sovereign immunity; an established principle that

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Muscogee (Creek) Nation tribal laws limited to injunctive and declaratory relief. Business Committee Resolution 05-18 empowered the specific attorney to file the specific lawsuit."

[48] M(C)NCA Title 27, § 1-101 (C), vests this court with exclusive appellate jurisdiction over all matters described by M(C)NCA Title 27, § 1-102.

[49] *See* A.D. Ellis v. Checotah Muscogee Creek Indian Community, et al., SC 10-01 at 3, ___ Mvs. L. Rep. ___ (May 22, 2013); In the Matter of J.S. v. Muscogee (Creek) Nation, SC 93-02, 4 Mvs. L. Rep. 124 (October 13, 1994); McIntosh v. Muscogee (Creek) Nation, SC 86-01, 4 Mvs. L. Rep. 28 (January 24, 1987); Lisa K. Deere v. Joyce C. Deere, SC 17-02 at 5, ___ Mvs. L. Rep. ___ (May 17, 2018); Muscogee (Creek) Nation v. Bim Stephen Bruner, SC 18-03 at 5, ___ Mvs. L. Rep. ___ (September 6, 2018); Derek Huddleston v. Muscogee (Creek) Nation, SC 18-02 at 3, ____ Mvs. L. Rep. ___ (October 4, 2018); Bim Stephen Bruner v. Muscogee (Creek) Nation, SC 18-04 at 4, ___ Mvs. L. Rep. ___ (May 13, 2019).

dictates that a sovereign cannot be sued in its own courts, or in the courts of a foreign jurisdiction, absent the sovereign's consent.[50] [51]

M(C)NCA Title 27, § 1-102 (D) describes what lawsuits, if any, may be filed against the Muscogee (Creek) Nation. This section specifically provides that no statutory language (other than the specific waivers that are listed therein) is intended to be read as a waiver of the Muscogee (Creek) Nation's sovereign immunity.[52] As a starting point, this shows that the Muscogee (Creek) Nation views itself as a sovereign Nation, and that its status as a sovereign protects it from lawsuits filed in its own court, or in the courts of foreign jurisdictions. In the Muscogee (Creek) Nation Courts the doctrine of sovereign immunity has been the determinative factor in a number of cases (both in the MCN District Court and the MCN Supreme Court) in which the Muscogee (Creek) Nation was the sovereign seeking immunity.[53] Further, the MCN District Court has ruled, in a series of cases, that sovereign immunity protects foreign sovereigns within the Courts of the Muscogee (Creek) Nation.[54] Thus, it is clear to this Court that, under certain circumstances,

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[50] *See*, Beers v. Arkansas, 61 U.S. 527, 529 (December 1, 1857). "It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission; but it may, if it thinks proper, waive this privilege, and permit itself to be made a defendant in a suit by individuals, or by another State."

[51] *See*, Sovereign Immunity, Black's Law Dictionary (11th ed. 2019). "A government's immunity from being sued in its own courts without its consent."

[52] *See*, M(C)NCA Title 27, § 1-102 (D), which provides, "Nothing in this title shall be construed to be a waiver of the sovereign immunity of the Muscogee (Creek) Nation, its officers, employees, agents, or political subdivisions or to be a consent to any suit except as expressly stated in subsection D."

[53] *See*, (MCN Supreme Court Cases) McIntosh v. Muscogee (Creek) Nation, 4 Mvs. L. Rep. 27 (February 20, 1986), where the Court affirmed the District Court's finding that "the Muscogee (Creek) Nation has not waived its sovereign immunity to suit for Appellant to sue the Muscogee (Creek) Nation." Also, McIntosh v. Beaver, 4 Mvs. L. Rep. 186 (September 16, 1999), where the Court found "that Appellant's claim is a request for payment of funds from the National Treasury and, as such, is barred by the doctrine of sovereign immunity." *Also See* (MCN District Court Cases) Okmulgee Indian Community v. Beaver, 2 Mvs. L. Rep. 357, 358 (October 16, 1997), where the Court found "that this action is, in effect, an action against the Muscogee (Creek) Nation and, as such, is barred by the sovereign immunity of the tribe." Britton v. Muscogee (Creek) Nation, 2 Mvs. L. Rep. 531, 536 (August 15, 2000), where the Court, while addressing an Indian Civil Rights Act claim, found that "any waiver of sovereign immunity must be articulated, expressly and unequivocally, from the Muscogee (Creek) Nation itself."

[54] *See*, Ade v. Muscogee (Creek) Nation, 2 Mvs. L. Rep. 538, 540 (August 15, 2000), Golden v. Muscogee (Creek) Nation, 2 Mvs. L. Rep. 520, 523 (August 15, 2000), and Waggoner v. Muscogee (Creek) Nation, 2 Mvs. L. Rep. 524, 530 (August 15, 2000), where the Court found that the sovereign immunity of a foreign sovereign, the United States,

sovereign immunity is an available jurisdictional defense, both for the Muscogee (Creek) Nation and for foreign sovereigns that may be called into the Courts of the Nation.

The first element that we must address in any sovereign immunity analysis is whether the party asserting the jurisdictional defense is in-fact a sovereign capable of asserting such a defense. In the case of the *Italwas* of the Muscogee (Creek) Nation, this analysis can be particularly fraught with challenges. The Appellant and the Muscogee (Creek) Nation have a shared history. At various points along the historical timeline, the Appellant and the Muscogee (Creek) Nation were essentially one entity, falling under the protections of the same tribal Constitution. Both the Appellant and the Muscogee (Creek) Nation derive their government-to-government relationships with the United States from the same Creek treaties. Even today, a significant number of the Appellant's citizens are also citizens of the Muscogee (Creek) Nation. The question for this Court is whether this shared history, and in many instances, a shared sovereignty, can be divided, or if it must be centralized into one entity.

As mentioned extensively in the historical section of this *Opinion*, the story of the Muscogee (Creek) confederacy finds its beginnings in a collection of smaller, equally sovereign tribal units that worked together for greater security and strength. While the passage of time and past United States tribal policies have shaped the tribes into what they are today, this does not alter the original source of the tribes' sovereignty, within its smaller units. Following passage of the Oklahoma Indian Welfare Act, the Appellant sought a federal charter as "a recognized band of Indians

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would prohibit the Muscogee (Creek) Nation courts from asserting jurisdiction over the matter, stating "…this Court is without jurisdiction to entertain suits against the treasury of the United States in this instance. The United States, like the Muscogee (Creek) Nation, *enjoys absolute sovereign immunity* from any and all lawsuits for which they have not given express consent." [Emphasis Added]. *Also see* the Tomah I and Tomah II analysis beginning on Page 14 of this *Opinion*.

residing in Oklahoma" and developed a Constitution to govern its citizens.[55] Pursuant to federal law, the Appellant is a separate and independent band of the Muscogee (Creek) Nation.

On October 26, 2007, this Court concluded in its *Order and Opinion* that:

> The relationship between Thlopthlocco and the federal government is different from the relationship between Thlopthlocco and the Muscogee (Creek) Nation. Under federal law, Thlopthlocco is a reorganized Indian tribe; under tribal law, Thlopthlocco is a Muscogee (Creek) Nation tribal town... The Tribal Town Constitution affects neither the status of tribal town members as citizens of the Muscogee (Creek) Nation nor the relationship of the Tribal Town to the Muscogee Nation which remains analogous to a city/state government or state/federal government relationship.[56]

It is clear to the Court that this finding has been used in the years following the Court's 2007 *Opinion* as support for the argument that the Appellant is something short of a full sovereign entity; that the Appellant is beholden to the Muscogee (Creek) Nation, and its internal governmental decisions may not be honored by this Court. As with all court orders, context is key. In SC-2007-01, this Court was asked by the Thlopthlocco Tribal Town (Appellant in the current appeal) to reverse a MCN District Court order dismissing the District Court action for lack of jurisdiction. Thlopthlocco argued in its June 29, 2007, *Application to Assume Original Jurisdiction, Petition for Quo Warranto and Brief in Support*, that the Courts of the Muscogee (Creek) Nation did have jurisdiction over the matter pursuant to M(C)NCA Title 27, § 1-102 (B), and the Tomah cases.[57] Further, that the Muscogee (Creek) Nation courts were the proper venue because:

> (i) Thlopthlocco has not established a tribal court, (ii) Thlopthlocco is located within the historical boundaries of the Muscogee (Creek) Nation, (iii) Thlopthlocco is one of the original confederated tribal towns of the Muscogee (Creek) Nation and

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[55] *See*, Corporate Charter of the Thlopthlocco Tribal Town, a Federal Corporation Chartered Under the Act of June 26, 1936. (February 16, 1939).

[56] *See*, Order and Opinion in Thlopthlocco Tribal Town v. Moore, et al., SC-2007-01, Pg. 3-4 (October 26, 2007). *See also*, Harjo v. Kleppe, 420 F.Supp. 1110 (September 2, 1976), *aff'd sub nom.* Harjo v. Andrus, 581 F.2d 949 (June 9, 1978).

[57] *See* Application to Assume Original Jurisdiction, *Petition for Quo Warranto and Brief in Support*, filed on June 29, 2007 in Thlopthlocco Tribal Town v. Moore, et al., SC-2007-01, Pg. 2.

(iv) Muscogee receives federal funding for judicial services allocated for Thlopthlocco's benefit.[58]

This Court granted Thlopthlocco's writ and ordered the MCN District Court to hear the case, finding it particularly persuasive that citizens of the Muscogee (Creek) Nation (also enrolled as citizens of Thlopthlocco) might be without a court to address their legal matters.[59] In its jurisdictional analysis, the Court looked to Tomah I.[60] In that action, the MCN District Court struck a balance between federal law and tribal law, concluding that the individual parties involved in that action were citizens of the Muscogee (Creek) Nation (or eligible for citizenship), that the actions occurred within the territorial and political jurisdiction of the Muscogee (Creek) Nation, and that the Thlopthlocco Tribal Town specifically requested the case to be heard within the Nation's courts. As such, the Court found that, under certain circumstances, the Muscogee (Creek) Nation has limited jurisdiction to hear Thlopthlocco Tribal Town's claims. The MCN District Court also refused to hear certain counterclaims in that action, finding them barred by the doctrine of sovereign immunity and stating that the claims were "beyond the Court's jurisdiction…unless the tribal town specifically and expressly waives sovereign immunity[.]"[61] This balance enabled the courts of the Muscogee (Creek) Nation to hear certain actions brought by the Thlopthlocco Tribal Town, while also honoring the rights associated with Thlopthlocco's status as a federally

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[58] *Id.* at 2-3.

[59] During Oral Argument in Thlopthlocco Tribal Town v. Anderson, et al., SC-2021-03 (November 19, 2021), the Appellant advised the Court that a statute-based Judicial Code (as opposed to a Constitutional amendment adding a co-equal Judicial Branch) has since been adopted by the Appellant tribe's Business Committee, though counsel could not recall the terms of the Code at that time. Upon review of the supplemental materials filed with the Court on June 1, 2021, the Court has reviewed the *Thlopthlocco Tribal Town – Judicial Code of 2009* (beginning at Bates Stamp 1441).

[60] The Court stated in its October 26, 2007, *Order and Opinion* in Thlopthlocco Tribal Town v. Moore, et al., SC-2007-01, that "the Thlopthlocco Tribal Town has previously sought relief in the District Court of the Muscogee (Creek) Nation seeking relief in a matter similar to the present dispute… We believe the analysis and conclusion reached by Judge Stacy Leeds in Thlopthlocco was correct. The Muscogee Nation District Court had jurisdiction to hear disputes between Thlopthlocco citizens on town matters."

[61] Thlopthlocco Tribal Town v. Tomah, et al., 3 Mvs. L. Rep. 464, 470; 8 Okla. Trib. 576, 581 (December 30, 2004).

recognized band of the Muscogee (Creek) Nation. The MCN District Court reasoned that "Thlopthlocco is recognized by federal law as a separate and distinct political entity[,]" and that "[u]nder tribal law, Thlopthlocco is a Creek tribal town."[62] This finding does not impact the Appellant's status as a federally recognized band of the Muscogee (Creek) Nation, nor does it affect the rights associated with federal recognition. Also, it is important to note that M(C)NCA Title 26, § 1-103 provides specific statutory protection to the Appellant's federal rights in this regard, stating that:

> The District Trial Court Civil, Criminal, and Family Divisions shall exercise jurisdiction over any person or subject matter on any basis consistent with the Constitution and law of the Nation and not prohibited by federal law, including over the territorial and political boundaries of the Muscogee (Creek) Nation…"[63]
>
> [Emphasis Added]

The Court views its *Opinion* in SC-2007-01, as well as the precedent set by the Tomah cases, and M(C)NCA Title 26, § 1-103 as consistent with one another. The Appellant is a federally recognized band of the Muscogee (Creek) Nation. The Appellant is also something more under Muscogee tribal law. This finding does not diminish the Appellant rights, but expands them. The Appellant is entitled to sovereign immunity in the Courts of the Muscogee (Creek) Nation. The Appellant, via its unique status under Muscogee tribal law, is also able to voluntarily submit to the jurisdiction of the Muscogee (Creek) Nation Courts.

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[62] *See*, Thlopthlocco Tribal Town v. Tomah, et al., 8 Okla. Trib. 451, 456-457 (August 16, 2004).
[63] *See*, M(C)NCA Title 26, § 1-103.

II. CV-2007-39

In its May 24, 2021, *Order* the MCN District Court concluded the following with respect to CV-2007-39, a case it refers to as Anderson I:

> Anderson is no longer a credible threat to the Thlopthlocco government. Now that time [has] marched on, Anderson is no longer Mekko, other successors have subsequently served as Mekko. Although this Court exercised proper jurisdiction over *Anderson I* for many years, as time has passed, Anderson I is no longer justiciable as a practical matter. *Anderson I* is hereby dismissed as to the remedies initially sought by the parties in both the case in chief and the cross-claims for reasons just stated.[64]

This Court finds this decision consistent with the analysis outlined in *Part I* above. The Appellant voluntarily filed this action within the courts of the Muscogee (Creek) Nation and specifically argued before this Court in SC-2007-01 in support of an order affirming the Nation's jurisdiction over the matter. The Court finds that the Appellant waived its sovereign immunity in this action, both by its arguments before the Court and by its June 7, 2007 waiver of sovereign immunity, and that jurisdiction was proper within the Muscogee (Creek) Nation Courts. The Court also finds no clear error in the MCN District Court's factual analysis concerning the current political status of Nathan Anderson, nor, after *de novo* review of the law, does this Court find any legal inconsistency in the MCN District Court's *Order*. As such, the Court affirms the MCN District Court's decision with respect to CV-2007-39.

III. CV-2011-08

In its May 24, 2021, *Order* the MCN District Court reaffirmed its previous finding with respect to CV-2011-08 (a case it refers to as Anderson II), concluding that the Muscogee (Creek) Nation Courts have "both personal and subject matter jurisdiction over the parties based on the Supreme

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[64] *See*, Order and Decision of District Court in combined cases Anderson, et al. v. Burden, et al., CV-2011-08, and Thlopthlocco Tribal Town v. Anderson, et. al., CV-2007-39, Pg. 19 (May 24, 2021).

Court's decision in *Anderson I* and *Tomah I* and 27 M(C)NA § 102(B)."[65] Further, that "[t]o the extent that defendant Thlopthlocco officials prevented Anderson and Montemayor from being candidates in the election, those Thlopthlocco officials acted outside their lawful authority under Thlopthlocco law."[66] Finally, the Court concluded that its July 29, 2011, *Preliminary Order* should be restated and that the parties should again be ordered to comply, stating the following:

> In *Anderson II*, this Court now restates Judge Moore's Preliminary Order dated July 29, 2011 that Thlopthlocco should hold an election under Thlopthlocco laws, and that the election be overseen and moderated by Thlopthlocco. As in *Tomah*, this Court refuses to enter a permanent injunction taking control of any future Thlopthlocco election. Once Thlopthlocco has set its election date and location, this Court will convert the prior Preliminary Order to a Final Order by simply noting the date and location of the Thlopthlocco election as prescribed by Thlopthlocco and not this Court.[67]

The Court does not find that this ruling is consistent with the analysis made in *Part I* above. In *Tomah I* the MCN District Court held that counterclaims filed in that action (concerning wrongful termination) extended too far outside the scope of the initial injunction action (which sought to determine the rightful Business Committee members of the Thlopthlocco Tribal Town), and, as such would require Thlopthlocco to waive its sovereign immunity on the counterclaims before the Courts of this Nation could properly find jurisdiction over those claims. As was the case, no waiver was issued by Thlopthlocco and the MCN District Court concluded jurisdiction was not proper.[68] This Court finds that the Anderson/Montmayor claims of election irregularities in CV-2011-08 are so similarly situated to the wrongful termination counterclaims made in *Tomah I* that they too are not within the scope of the initial action. In CV-2007-39 (the "initial action" under the *Tomah I* analysis), the Appellant advised the MCN District Court of an alleged unlawful ouster of the duly-

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[65] *Id.* at 17.
[66] *Id.*
[67] *Id.* at 19.
[68] Thlopthlocco Tribal Town v. Tomah, et al., 3 Mvs. L. Rep. 464, 470; 8 Okla. Trib. 576, 581 (December 30, 2004).

elected Thlopthlocco Tribal Town Business Committee, and requested that the Court issue an injunction requiring the Anderson BC not to interfere with the performance of the Original BC's duties. The Appellant filed the action in the Muscogee (Creek) Nation Courts and waived its sovereign immunity with respect to those claims only. In CV-2011-08 (the "subsequent action" under the *Tomah I* analysis), Anderson and Montmayor individually filed an action contesting their removal from the 2011 Thlopthlocco Tribal Town election ballots. No waiver of sovereign immunity was granted by the Thlopthlocco Tribal Town with respect to these claims. The claims were filed as a separate case and assigned a unique case number, as opposed to being filed as a *Motion* within the already pending CV-2007-39 action, evidencing an understanding by the Plaintiffs (Anderson and Montmayor) that the claims they were submitting were separate and distinct from the initial action. Following the *Tomah I* analysis, it would be unreasonable for this Court to conclude that a subsequent, and unrelated election dispute occurring over three and a half years after the June 7, 2007, waiver of sovereign immunity was issued by the Appellant in the initial action, nonetheless extends and covers this new action. Therefore, a finding of jurisdiction would not be proper absent a waiver of sovereign immunity by the Appellant. As such, the Court reverses the May 24, 2021, Order of the MCN District Court with respect to CV-2011-08, remands the matter back to the MCN District Court with orders to dismiss the action for lack of jurisdiction.

IV. CONCLUSION

Tribal, Federal and State courts spend year after year grappling with complex jurisdictional issues, ultimately with the goal of establishing rules and procedures that protect the rights of those that enter their respective courts. These decisions are difficult. In many cases the decisions may leave even more complex matters for the Court to decide down the road. But, as Chief Justice John Marshall wrote before the United States Supreme Court:

> It is most true that this court will not take jurisdiction if it should not; but it is equally true that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the Constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution. Questions may occur which we would gladly avoid, but we cannot avoid them. All we can do is to exercise our best judgment, and conscientiously to perform our duty.[69]

Likewise, while this case may present difficult jurisdictional questions, it is our duty to reach a decision. However, the legislative and executive branches of the Muscogee (Creek) Nation, as well as the governments of the three (3) federally recognized bands of the Muscogee (Creek) Nation should all be put on notice by this decision that all parties' interests (as they may relate to court jurisdiction, dual citizenship, funding, etc.) may be best served by treaty, by intergovernmental agreement, or, in the case of the Muscogee (Creek) Nation, by further statutory clarification with respect to the relationship between the Nation and the Nation's tribal towns.[70] Many of these issues are not before the Court today, and the Court does not espouse a specific position that should be adopted. These are issues that should be left to the political branches of government. In the absence of agreements between the Nation and the federally recognized bands of the Muscogee (Creek)

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[69] *See*, Cohens v. State of Virginia, 19 U.S. 264, 404 (March 3, 1821).

[70] M(C)NCA Title 39 has been reserved specifically for Muscogee (Creek) Nation legislation concerning tribal towns.

Nation, or clear statutory guidance concerning those relationships, this Court must respect the Constitution and laws of the Nation (as they currently sit), and will look to our own legal precedent for guidance. Those laws and that precedent guide our decision today.

The Court affirms its previous reliance on the *Tomah* cases (as detailed in its *Prior Notable Mvskoke Caselaw* and *Part I* discussions above), recognizing that the Appellant is a federally recognized band of the Muscogee (Creek) Nation, and as such, under both federal and tribal law, is entitled to sovereign immunity in the courts of the Nation and that in certain circumstances, jurisdiction may be proper. Further, this Court affirms the MCN District Court's May 24, 2021, *Order* with respect to CV-2007-39, as the Appellant voluntarily submitted to the Courts of the Muscogee (Creek) Nation. Finally, this Court reverses the MCN District Court's May 24, 2021, *Order* with respect to CV-2011-08, and remands the matter back to the MCN District Court with orders to dismiss the action for lack of jurisdiction.

FILED AND ENTERED: February 28, 2022

Richard Lerblance
Chief Justice

Amos McNac
Vice-Chief Justice

Andrew Adams, III
Associate Justice

Montie Deer
Associate Justice

Leah Hario-Ware
Associate Justice

Kathleen Supernaw
Associate Justice

George Thompson, Jr.
Associate Justice

CERTIFICATE OF MAILING

I hereby certify that on February 28, 2022, I mailed a true and correct copy of the foregoing Order and Opinion with proper postage prepaid to each of the following: Michael Salem, Salem Law Offices, 101 East Gray, Suite C, Norman, Oklahoma 73069-7257; Jonathan T. Velie, 401, West Main, Ste. 300, Norman, Oklahoma 73069. A true and correct copy was also hand-delivered to: Jasen Chadwick, Staff Attorney for the Muscogee (Creek) Nation District Court.

Connie Dearman

Connie Dearman, Court Clerk

ATTACHMENT C

Consolidated Decision for *Thlopthlocco v. Anderson, et al*., No. CV-2007-39 and *Anderson v. Burden*, No. CV-2011-08, Muscogee (Creek) Nation District Court, Judge Stacy Leeds. (SupAp 2256-76).

IN THE DISTRICT COURT OF THE MUSCOGEE (CREEK) NATION
OKMULGEE DISTRICT

NATHAN ANDERSON, WESLEY MONTEMAYOR, TIM CHEEK, MARIAN BERRYHILL,
Plaintiffs,
v.

DOROTHY BURDEN, RACHEL SUMKA, BILL CHALAKE, GEORGE SCOTT, RYAN MORROW, BRENT BROWN, JEFF McCOY, RON BARNETT, CELESTA JOHNSON, BARBARA WELBORN, JANNA DICKEY, TRACEY HILL, TONYA SCOTT-WALKER,
Defendants.

Case No. CV-2011-08

AND

THLOPTHLOCCO TRIBAL TOWN,
A federally-recognized Indian tribe,
Plaintiff
v.

NATHAN ANDERSON, BRYAN McGERTT, TIMMY CHEEK, CANDISE (a/k/a/ KENDIS) ROGERS, INDA McGERTT, FRANK HARJOCHEE, VIRGIL SANDERS, MARY McGERTT, GRACE BUNNER, THELMA JEAN NOON, WESLEY MONTEMEYER, PAULA BARNES-HERROD, MALINDA NOON, and those acting in joint concert and participation with them,
Defendants,
v.

GEORGE SCOTT, RON BARNETT, VERNON YARHOLAR, BRENT BROWN, RYAN MORROW, JANNA DICKEY, TRACEY HILL, CELESTE JOHNSON, BARBARA CANARD-WELLBORN,
Cross-Claim Defendants.

Case No. CV-2007-39

ORDER AND DECISION OF DISTRICT COURT

These cases came on for a status hearing December 17, 2020, as the first hearing after this case was reassigned to District Court Judge Stacy Leeds. The transcript of that hearing was filed with this Court on January 26, 2021.

At the hearing, the parties agreed that these two cases, CV 2007-39 and CV 2011-08, are ready for consideration and the parties seek a decision from this Court with respect to all Motions for

Summary Judgment and Motions to Dismiss being extensively briefed prior to the hearing. The parties have been filing routine status reports in the United States District Court for the Northern District Oklahoma and in the United State Court of Appeal for the Tenth Circuit, as the federal cases have been abated for this Court to have the opportunity to rule on its own jurisdiction consistent with tribal court exhaustion requirements in *National Farmers*[1].

The parties agree there are no new factual or legal arguments to be submitted for this Court's review beyond a few supplemental legal authorities submitted in the briefs. Given the short turnaround time for interlocutory appeals, this Court agreed to give the parties a few days advance notice when a decision was imminent. This Court informed the parties last week that it was reaching a decision and intended to file a decision on May 24, 2021.

Practical Effect

Pursuant to the lengthy discussion and multiple rulings in today's decision, this Court hereby dismisses CV 2007-39 but retains jurisdiction over CV 2011-08 for the limited scope described herein. The parties are not enjoined by this Court and Thlopthlocco is free to conduct its own election pursuant to Thlopthlocco laws and the prior decisions of this court from *Thlopthlocco v. Tomah*[2] to the present decision. Knowing that the parties intend to continue the case in other courts, this Court issues a temporary stay.

Settled Law

Under the laws of the Muscogee (Creek) Nation and pursuant to prior precedents of this Court and the Muscogee (Creek) Nation Supreme Court, this Court has jurisdiction to hear these cases. Statutory authority is found in M(C)NA Title 27 § 1-101 and 102. This Court is bound by the constitution and laws of this Nation including the common law of the Muscogee people by customs and usages. This Court is also bound by the treaties and agreements with the United States. M(C)NA Title 27 § 1-103. When federal law is cited in this decision, it is cited to reiterate Muscogee (Creek) Nation's laws and to demonstrate federal agreement or acquiescence thereto.

The recent *McGirt v. Oklahoma*[3] decision is instructive. *McGirt* is not cited as a new source of law that grants or gives jurisdiction to the Muscogee (Creek) Nation. McGirt is cited because it demonstrates that the United States Supreme agrees with and will enforce the laws that were already set forth in Muscogee (Creek) Nation treaties, constitutions and laws. This Court notes *McGirt*'s decision for the extensive discussion in Section III of the United States Supreme Court's opinion that extensively recounts Muscogee (Creek) Nation's legal history and legal standing.

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[1] National Farmers Union v. Crow, 471 U.S. 845 (1985).
[2] CV 2004-39,
[3] 591 U.S. __ (2020)

Harjo v. Kleppe[4] is also instructive, because it chronicles as a matter of federal common law, the Muscogee (Creek) Nation's resistance to having the Creek government structure overthrown by the United States. *Harjo* highlights the struggle to maintain Muscogee (Creek) Nation governance through the darkest of times and describes Muscogee (Creek) Nation legal history including the history of Creek tribal towns. Like the Muscogee (Creek) Nation Supreme Court has described in all Thlopthlocco before it, *Harjo* explains how Thlopthlocco's current relationship with the United States does not terminate or impair the pre-existing histories and relationships of Creek tribal towns relative to the Muscogee (Creek) Nation.

Territorial Jurisdiction

All actions that give rise to these cases occurred inside the Muscogee (Creek) Nation territorial boundaries, or reservation. The Muscogee (Creek) Nation has long defined its "territorial jurisdiction" to include lands within the political and territorial boundaries of the Muscogee (Creek) Nation as defined in the 1866 Treaty and set forth again in Article I, Section 2 of the 1979. M(C)NA Title 27 § 1-102(A). This definition is consistent with 18 U.S.C. 1151 and now the 10th Circuit and the United States Supreme Court have reaffirmed the Muscogee (Creek) Nation's territorial integrity as the Muscogee (Creek) Nation has long understanding it in *Murphy v. Royal*[5] and *McGirt v. Oklahoma* as previously cited.

Civil Jurisdiction

Under Muscogee (Creek) Nation's statutes, this Court's civil jurisdiction speaks to what kind of cases can be heard, under what laws and over what persons in this Court that is described not as a Court of limited jurisdiction, but as a Court that "shall have general civil jurisdiction." M(C)NA Title 27 § 1-102(B). Personal jurisdiction exists over all defendants, regardless of whether they are Indian or non-Indian, over actions that occur inside Muscogee (Creek) Nation's Indian country and in other cases where defendants sufficient to establish personal jurisdiction over defendants. Personal jurisdiction also exists over all parties that consent to this Court's jurisdiction and this Court "shall exercise such other civil jurisdiction as described by any other law of the Muscogee (Creek) Nation. M(C)NA Title 27 § 1-102(B). This Court finds that actions of all parties to these cases establish sufficient contacts and consent to move forward, particularly as the parties have come to rely on (and frequently invoke) this Court's decision in *Thlopthlocco v. Tomah*[6] as controlling law.

All the parties that caused these lawsuits to be filed in this Court are Creek Indians, Thlopthlocco members and Muscogee (Creek) Nation citizens.[7] All parties that can carry this

[4] 420 F. Supp. 1110 (DDC 1976)
[5] 866 F. 3d 1164 (2017).
[6] CV 2004-39
[7] At one stage of the litigation, one defendant had not available themselves of Muscogee (Creek) Nation citizenship but was eligible to do so under the express provisions of both Thlopthlocco and Muscogee (Creek) Nation constitutions.

Court's orders into effect are Creek Indians, Thlopthlocco members and Muscogee (Creek) Nation citizens.

This Court restates the jurisdictional pronouncements of this Court's Preliminary Order filed by Judge Moore on July 29, 2011, that this Court has territorial, personal and subject matter jurisdiction over the parties pursuant to the Muscogee (Creek) Nation Supreme Court's decision in *Thlopthlocco v. Moore*[8] affirming *Tomah*. The controlling jurisdictional statute is M(C)NA Title 27 § 1-102(B). The controlling venue statute is M(C)NA Title 27 § 1-101(B). This Court lacks authority to deviate from those statutes.

The Muscogee (Creek) Nation statutes preserve the sovereign immunity of the Muscogee (Creek) Nation in lawsuits brought in this Court against the Muscogee (Creek) Nation. M(C)NA Title 27 § 1-102(D). Tribal towns and communities are not expressly protected to the same degree in the statutes. However, in *Tomah* this Court deferred to the autonomy of Thlopthlocco and held that cross-claims that seek to raise new claims and ask for new remedies not contemplated in the original filing by Thlopthlocco would be barred by the sovereign immunity.

In *Tomah*, this Court barred a wrongful termination suit from a defendant's cross-claim. To the extent that a defendant's cross-claim asks this Court for relief and remedies associated with the underlying dispute, however, defendant is just as free as a plaintiff to advance those claims and argue its case.

These cases are wrapped up in election/leadership disputes where Thlopthlocco asks this Court to either declare who the lawful Thlopthlocco leaders are and enjoin parties that seek to interfere with the Thlopthlocco government. To make a determination in those type of cases, this Court has necessarily had to examine evidence to determine "who" Thlopthlocco officials really are before this Court can determine whether those officials have the authority to speak for Thlopthlocco and therefore be entitled to governmental immunities. This cannot always be determined at the very early stages of a case and often require findings of fact and law before the Court can rule. In *Tomah*, the cross-claim was not barred on the basis of sovereign immunity until, after a trial on the merits, this Court could determine what parties were the Thlopthlocco leaders.

The federal courts are waiting on this Court to rule on its own jurisdiction, which includes some consideration of Thlopthlocco sovereign immunity in cross-claims and more squarely in *Anderson II*, CV 2011-08 and this Court finds like it did in *Tomah* that Thlopthlocco enjoys sovereign immunity from remedies that are wholly outside the dispute presented in the underlying case. This Court can, however, grant relief to Defendants that falls within the scope of the initial case before the Court.

These pending cases (CV 2007-39 and CV 2011-08) and controversies exclusively involving matters of tribal governance were properly before this Court. Several questions of Muscogee

[8] Muscogee (Creek) Nation Supreme Court, SC 2007-01.

(Creek) Nation law are raised, including the contours of this Court's jurisdiction and the legal and political relationships between the Muscogee (Creek) Nation, the Creek tribal towns, individual Creek citizens and dual citizens of the Muscogee (Creek) Nation and Thlopthlocco tribal town (Thlopthlocco).

Over the past two decades, Thlopthlocco has been a frequent court user. Thlopthlocco initiated lawsuits in 2004, 2005, and 2007 asking this Court to resolve Thlopthlocco election/leadership disputes. This Court provided the forum that Thlopthlocco sought and deferred to Thlopthlocco constitutions and laws in this Court's decisions.

In the lead up to the 2011 election, Thlopthlocco tribal officials were sued for allegedly violating Thlopthlocco laws and thereby exceeding their authority as Thlopthlocco officers by keeping to candidates off the upcoming ballot. The 2007 and 2011 cases have been tied up in several courts. The 2011 election never took place. Under Thlopthlocco laws, there should have been elections in 2015 and 2019 also.

In this decision, this Court will fully describe where we are and how we got here. This Court will do, like it has in the past, attempt to resolve a Thlopthlocco election/leadership dispute with an eye toward doing what is presumptively in the best interest of everyone: getting Thlopthlocco back to the business of conducting Thlopthlocco elections again with hopes that Thlopthlocco will heal and then govern Thlopthlocco town matters internally.

This Court's decision is controlled by this Court's prior decisions in *Thlopthlocco v. Tomah* (CV 2004-39) as affirmed by the Muscogee (Creek) Nation Supreme Court in *Thlopthlocco v. Moore*.[9] This Court will avoid the duplication of fulling recounting the relevant Muscogee (Creek) legal history, including the critical role of Creek tribal towns within the Muscogee (Creek) Nation, and the long path toward restoration of the modern-day Muscogee (Creek) Nation because that has been sufficiently acknowledged and set forth in this Court's prior decision in *Tomah*, and also in *Harjo v. Kleppe*[10] and more recently in *Murphy v. Royal*[11] and *McGirt v. Oklahoma*.[12]

The Thlopthlocco Lawsuits

In each of the Thlopthlocco lawsuits, the plaintiffs describe the underlying cases and controversies as "intra-tribal"[13] disputes, noting that state and federal courts could not hear the

[9] Muscogee (Creek) Nation Supreme Court Case No. SC 2007-01.
[10] 420 F. Supp 1110 (D.D.C. 1976)
[11] 875 F.3d 896 (10th Cir. 2017)
[12] 592 U.S. __ (2020)
[13] Thlopthlocco Business Committee Resolution No. 04-28, Designation of Court Jurisdiction, Limited Waiver of Immunity Regarding Noon et al Dispute (July 13, 2004)(this Court notes that this resolution came two weeks after Thlopthlocco initiated *Thlopthlocco v. Tomah).*

merits of the cases and that only this Court could. Thlopthlocco repeatedly asked Muscogee (Creek) Nation to hear these types of claims in order to fill a "jurisdictional void."[14]

When Thlopthlocco officials wanted the benefit of this Court to seek relief against other Thlopthlocco officials and members, Thlopthlocco repeated represented to this Court that Thlopthlocco was "subject to" the jurisdiction of Muscogee (Creek) Nation courts both in terms of consenting to jurisdiction by waiving sovereign immunity and by this Court's power to hear this type of case involving Thlopthlocco election/leadership disputes. At some point, issue preclusion or estoppel must apply. This means that valid prior judgments bind the plaintiffs, defendants and their relations in future lawsuits as to the same issues already litigated. Or to explain it another way: at some point, that ship has sailed.

Thlopthlocco cannot beg this Court in the first three lawsuits to hear and resolve Thlopthlocco election/leadership disputes, all the while representing to this Court that this Court has proper jurisdiction over the parties and the disputes and then completely change its tune when it does not like the outcome of some of this Court's rulings.

In the most recent filings to this Court, Thlopthlocco now makes the remarkable argument that Thlopthlocco as an entity is analogous to the non-members in the United States Supreme Court case of *Montana v. United States*.[15] In *Montana*, the Crow Tribe attempted to exercise civil regulatory authority to extend its hunting and fishing laws to everyone on the reservation, including non-members activities on non-member owned fee lands. The United States Supreme Court held that the tribe lacked jurisdiction over the non-members because the tribe cannot exclude non-members from non-member owned fee lands AND the non-members had never consented to the jurisdiction of the tribe. Thlopthlocco, a town of Creek Indians with dual citizenship in the Muscogee (Creek) Nation that has repeatedly asked this Court to hear and resolve Thlopthlocco election/leader cases is not akin to the non-member litigants in *Montana.* To hold otherwise would overturn *Tomah* and be in direct conflict with Muscogee (Creek) Nation Supreme Court's decision in *Thlopthlocco v. Moore*.

In the most recent case, Thlopthlocco was not the plaintiff. Two candidates seeking to run for office in the 2011 election filed the lawsuit in this Court advancing similar jurisdictional arguments to those previously argued set forth by Thlopthlocco: that this is the only available Creek forum to hear the claims, that all the parties are dual citizens of Thlopthlocco and Muscogee (Creek) Nation and that the laws of the Muscogee (Creek) Nation vests jurisdiction and venue in this Court and that *Tomah* controls.

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[14] *Id. See also* Thlopthlocco Business Committee Resolution No. 05-17 (April 17, 2005) with nearly identical language describing the matter as "intra-tribal" and noting the jurisdictional void as one of the reasons Thlopthlocco deems jurisdiction to be proper in the Muscogee (Creek) Nation District Court. See also Thlopthlocco Business Committee Resolution No. 2007-21 (2007) with nearly identical language describing nearly identical controversy, describing itself as a traditional Muscogee (Creek) Nation tribal town subject to the nation's courts and jurisdiction. Like the resolutions in the first two cases, this Resolution 2007-21 describes a "jurisdictional void" for these kind of disputes

[15] 450 U.S. 544 (1981).

The 2011 plaintiffs argue that Thlopthlocco officials cannot hide behind a cloak of sovereign immunity when they act outside the lawful scope of their authority by removing two candidates from the ballot in clear violation of Thlopthlocco laws. Therefore, it was impossible for this Court to dismiss the 2011 case at the early stages based on sovereign immunity grounds.

The nature of the 2011 dispute required that this Court to consider evidence to determine what the lawful scope of authority is when a Thlopthlocco official exercises power under Thlopthlocco law. Judge Moore considered fact and law and determined that Thlopthlocco officials exceeded their authority by declaring two candidates ineligible to run for office. This Court has therefore already ruled on its own jurisdiction in the 2011 case and made interim rulings based on fact and law. This Court directs the parties to reread Judge Moore's Preliminary Order dated July 29, 2011 just as Judge Moore directed the parties to the 2005 case to reread *Tomah* and conduct themselves accordingly.[16]

These cases do not exist in a vacuum and they do not exist completely independent of one another. There is significant overlap between the issues presented in each of the cases and the parties involved each of the cases are nearly the same. One case builds on the prior case and spills over to the next one.

In the end, an unhealthy outcome: Thlopthlocco has not had an election since 2007, despite the fact that the Thlopthlocco Constitution calls for an election to be held every four years.

Thlopthlocco initiated the following lawsuits seeking remedies in Thlopthlocco election disputes and/or Thlopthlocco leadership disputes. In these cases, Thlopthlocco asked this Court to declare who the lawful leaders of Thlopthlocco were and whether officials were properly removed from office under Thlopthlocco law. In each of these lawsuits, Thlopthlocco originally consented to this Court's jurisdiction, asked this Court to hear the cases and argued that this Court had lawful jurisdiction to enjoin the parties involved and make various declarations consistent with Thlopthlocco law.

- *Thlopthlocco v. Tomah,* CV 2004-39[17]
- *Thlopthlocco v. McGertt*, CV 2005-28[18]
- *Thlopthlocco v. Anderson*, CV 2007-39[19]

In each of those lawsuits, Thlopthlocco initially argued that this Court has the authority to hear the cases and rule on the merits of the underlying Thlopthlocco disputes because:

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[16] See Minute Order in CV 2005-28 dates April 5, 2005 (instructing the parties to read *Tomah).*

[17] Thlopthlocco filed the lawsuit Thlopthlocco v. Tomah and then adopted a resolution with a limited waiver of sovereign immunity two weeks later.

[18] Thlopthlocco Business Committee Resolution No. 05-17 and 05-18 (April 17, 2005).

[19] Thlopthlocco Business Committee Resolution No. 2007-21 (June 7, 2007).

- Thlopthlocco has not established a town court and therefore needs access to this forum; and
- Thlopthlocco is located inside the territorial boundaries or reservation of the Muscogee (Creek) Nation; and
- Thlopthlocco is an original/traditional Creek tribal town of the Muscogee Nation; and
- Muscogee (Creek) Nation receives federal funding allocated for Thlopthlocco's benefit.[20]

To understand the big picture and the complexity of this litigation, the history of four Thlopthlocco inter-related cases must be considered together as a whole. Each of these cases were filed in the Muscogee (Creek) Nation District Court by parties seeking injunctive and declaratory relief.

Tomah I (2004): *Thlopthlocco v. Tomah*, CV 2004-39[21]

In June 2004, *Tomah* was filed in this Court. Thlopthlocco was the plaintiff at the direction of Louis McGerrt (Town King) and Julie Scott Sharp (Tribal Secretary) and other Business Committee members. The named defendants in *Tomah I* were Martha "Tillie" Noon Tomah, Bryan McGertt, Mary McGertt.

After a trial on the merits, this Court ruled that Thlopthlocco Constitution provides for only one mechanism for the removal of tribal leaders – the Article VI Grievance Committee and procedures thereby spelled out. The Court declared who the rightful leaders of Thlopthlocco were at the time and no direct appeal was taken, including Louis McGertt and the Business Committee members sworn in after the 2004 election. The analysis of the Court in this case was later upheld by the Muscogee (Creek) Nation Supreme Court in *Thlopthlocco v. Moore*.

This Court declined to enter a permanent injunction ruling instead that this Court's decisions should be carried out internally at Thlopthlocco without further oversight by this Court.

This Court also dismissed a counter-claim against Thlopthlocco for wrongful termination because Thlopthlocco had not waived sovereign immunity or otherwise consented to that type of lawsuit, only the leadership dispute at issue.

Thlopthlocco officers are constitutionally mandated to include a Town King or Mekko, two Warriors, a Secretary and a Treasurer with an election to be held every four years. Thlopthlocco Constitution, Art. V § 1-3. The elected town officers then appoint an advisory council that consists of five Thlopthlocco members. This mixture of five elected officers and five appointed advisory council members is known as the Business Committee. Art. V, § 4.

[20] Original Complaint in Case No. 2007-39.
[21] *Thlopthlocco Tribal Town v. Tomah*, CV 2004-39 (8 Okla. Trib. 451 (Musc.(Cr.) D. Ct. 2004).

This Court was asked to restrain Defendant Tomah and others from holding themselves out as the newly elected town officials and to rule on the merits of the case providing a declaratory remedy of naming the lawfully elected Thlopthlocco officials.

The *Tomah I* case or controversy as described by Thlopthlocco was :

"individuals, who are not properly elected or appointed, are claiming to be duly elected or appointed tribal officials and have acted in joint concert in participation with others to disrupt tribal government, have interfered with orderly government decision making, delivery of services and the proper safekeeping of assets, and such matter requires adjudication and enforcement to protect Thlopthlocco citizens and the Thlopthlocco government."[22]

Tomah I is the controlling case for whether the Muscogee (Creek) Nation District Court has jurisdiction to hear a Thlopthlocco election and/or leadership disputes. *Tomah I* was not directly appealed to the Muscogee (Nation) Supreme Court but the analysis in *Tomah I* was later affirmed by the Supreme Court as the correct jurisdictional ruling on Thlopthlocco election and/or leadership controversies.[23]

There are two published *Tomah I* decisions.

The first *Tomah I* decision is limited to the jurisdictional inquiry and speaks to this Court's subject matter jurisdiction over Thlopthlocco election and/or leadership disputes, so long as Thlopthlocco is without a meaningful forum equipped to apply substantive Thlopthlocco law.

The jurisdictional ruling was based on several factors. First, the case was brought by alleged Thlopthlocco tribal leaders regarding a case of critical importance to a Muscogee (Creek) tribal town. Second, all parties to the lawsuit were Creek Indians and the cause of action arose inside the Muscogee (Creek) Nation. Third, the case met the jurisdictional requirements of the Muscogee (Creek) Constitution and laws.

The question of Thlopthlocco sovereign immunity was not addressed in the first *Tomah I* decision because at the time, Thlopthlocco had consented to jurisdiction by asking this Court for relief and there had been no cross-claims.

The second *Tomah I* decision announced the results of a trial on the merits and also addressed Thlopthlocco sovereign immunity. Defendant Tomah had filed a cross-claim for wrongful termination against Thlopthlocco. This Court ruled that Defendant Tomah's claim was barred by sovereign immunity noting that the scope of this Court's inquiry was limited to injunctive and declaratory relief originally sought by Thlopthlocco.

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[22] Thlopthlocco Business Committee Resolution No. 04-28 (July 13, 2004)(signed by Louis McGertt as Town King and Julie Scott Sharp as Tribal Secretary, recording vote of 6-0-1).

[23] *Anderson I* presented to the Supreme Court conflicting District Court opinions in favor of the *Tomah* analysis.

When *Tomah I* was decided on the merits, the *Tomah I* District Court declared the lawful leaders of Thlopthlocco to be: Louis McGertt, Julie Scott Sharp, Charles Coleman, Curry, Humble, Jones, Trickey, Canard, Yarholar. In short, the Thlopthlocco entity who sought access to this Court as Plaintiffs was determined to be the rightful leaders of Thlopthlocco and none of the named defendants prevailed.

In *Tomah I*, Thlopthlocco passed Business Committee Resolution No. 04-28 designating Muscogee (Creek) Nation District Court as the proper judicial forum and with a limited waiver of sovereign immunity for injunctive and declaratory relief only. Thlopthlocco's Resolution was passed two weeks after Thlopthlocco filed the lawsuit so, although this Court deferred to Thlopthlocco's Resolution, it was not required to do so.

The *Tomah I* court treaded lightly on Thlopthlocco autonomy, sympathetic that Thlopthlocco had no available local forum and no Creek forum, should the Muscogee (Creek) Nation courts decline to hear the case, but also mindful not to set future precedent where Thlopthlocco may be subject to lawsuits by non-Thlopthlocco parties in other circumstances.

This Court held in *Tomah I* that jurisdiction in the Muscogee (Creek) Nation District Court was proper. Although the Court reached the jurisdictional finding based on law and based on the tribally unique political, cultural and historic relationships between Creek tribal towns including Thlopthlocco and Muscogee (Creek) Nation, the Court was also moved by the fact that Thlopthlocco seemed to be abandoned by the Bureau of Indian Affairs (BIA) when Thlopthlocco previously tried to establish a court.

In *Tomah I*, this Court found that the Muscogee (Creek) Nation District Court may properly exercise jurisdiction over the Thlopthlocco election and leadership dispute where Thlopthlocco was a plaintiff seeking this forum.

The District Court held a bench trial on the merits of *Tomah* and thereafter published a second decision in December 2004.[24]

After conducting a full trial on the merits, this Court applied the Thlopthlocco constitution and laws to pronounce the lawful leaders of Thlopthlocco.[25] Out of respect for Thlopthlocco's right of local self-governance, this Court declined to enter any long-term permanent injunction or otherwise oversee Thlopthlocco matters, leaving it up to the Thlopthlocco people to move forward on their own. There was no appeal to the Muscogee (Creek) Nation Supreme Court.

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[24] *Thlopthlocco Tribal Town v. Tomah*, 8 Okla. Trib. 576 (Musc. (Cr.) D.Ct. 2004).

[25] In *Tomah I*, this Court determined the lawful leaders to be Louis McGertt with Business Committee members Scott, Coleman, Sharp, Curry, Humble, Jones, Trickey, Canard, Yarholar and other successors consistent with the Court's opinion.

Tomah II (2005): *Thlopthlocco v. McGertt*, CV 2005-28[26]

The year after *Tomah I,* the same litigants were back in this Court seeking this Court's guidance again, on who the lawful elected and appointed officials were. This time, Thlopthlocco waived sovereign immunity before filing suit. This Court found jurisdiction was proper in light of *Tomah*. The parties attempted to resolve the issue but eventually entered into a scheduling order to move the case forward in 2006. There was no direct appeal and no final resolution on the merits.

This Court will refer to this 2005 case as *Tomah II*. In *Tomah II*, Thlopthlocco was plaintiff at the direction of Charles Coleman (Warrior) and Julie Sharp (Secretary) and other Business Committee members. Coleman was a named defendant in Tomah I and Sharp directed the filing of Plaintiff Thlopthocco to initiated *Tomah I* and *Tomah II*.

In *Tomah II*, the named defendants were Louis McGertt (who directing Thlophlocco as Plaintiff in *Tomah I*), Bonnie Jones, Nathan Anderson, Malinda Noon, Candice Rogers, Bryan McGertt, Grace Bunner, Martha Tillie Noon (formerly Tomah) (who was a defendant in *Tomah I*), Timmy Cheek, Paula Barnes-Herrod.

Most of the individuals declared to be the lawful Thlopthlocco leaders by the *Tomah I* District Court were also litigants in *Tomah II*: Louis McGertt and Bonnie Jones as defendants and Julie Scott Sharp, Charles Coleman directing Thlopthlocco as Plaintiffs.

Nathan Anderson, who would become a defendant two years later in *Anderson I,* was also a the named defendant in Tomah II and the Plaintiff in *Anderson II*. *Anderson II* was a defendant in *Tomah II*. Vernon Yarhola directed Thlopthlocco to file suit as Plaintiff in *Anderson II*

The *Tomah II* case or controversy as described by new Thlopthlocco plaintiff was:

"individuals, who are not properly elected or appointed, are claiming to be duly elected or appointed tribal officials and the current "appointed" Town King has acted in joint concert in participation with others to disrupt tribal government, have interfered with orderly government decision making, delivery of services and the proper safekeeping of assets, and such matter requires adjudication and enforcement to protect Thlopthlocco citizens and the Thlopthlocco government."[27]

Thlopthlocco's case or controversy language is near identical in *Tomah I* and *Tomah II.*

The *Tomah I* plaintiffs were now the *Tomah II* defendants asking the Court to dismiss the case lack of jurisdiction after successfully availing themselves of the Court's jurisdiction in the prior

[26] CV 05-28

[27] Thlopthlocco Tribal Town Business Committee Resolution No. 05-17 (April 17, 2015)(signed by Charles Coleman Warrior with no official title and Julie Sharp as Secretary, recording a 6-0-0 vote).

controversy. The Court declined to dismiss the case, citing the same factual and legal rationales in *Tomah I*. No appeal was taken to the Muscogee (Creek) Nation Supreme Court.

At the time *Tomah II* was filed, Thlopthlocco attached two waivers adopted on April 17, 2005 as part of the initial complaint. Business Committee Resolution 05-17 has the same language as *Tomah I* waiver noting that Muscogee (Creek) Nation District Court is the appropriate forum under Thlopthlocco and Muscogee (Creek) Nation tribal laws limited to injunctive and declaratory relief. Business Committee Resolution 05-18 empowered the specific attorney to file the specific lawsuit.

This Court held that jurisdiction was proper in CV 2005 based on *Tomah*.

Anderson I (2007): *Thlothlocco v. Anderson*, CV 2007-39 (currently pending)

In the January 2007 election, Nathan Anderson was elected Mekko but it was alleged he subsequently acted with others to unlawfully remove other officials in violation of Thlopthlocco laws in June 2007. From the beginning of this case, Thlopthlocco argued *Tomah I* was controlling law on jurisdictional issues and on the substantive rulings for how officials may be lawfully removed under Thlopthlocco laws. Thlopthlocco sought the status quo of the post-Tomah government and to enjoin Thlopthlocco people from disregarding the *Tomah I* rulings.

In the original complaint, Thlopthlocco described the case as "same song – third verse" and this Court could not agree more. Thlopthlocco referred to the defendants in the case as "contempt defendants" who were in violation of *Tomah I*, noting all the defendants or their relatives had previously been successfully enjoined in this Court by Thlopthlocco.

It should also be noted that Anderson was an elected official at the time *Anderson I* was filed, but he was not deemed to be entitled to sovereign immunity, either by virtue of his participation in prior lawsuits or by virtue of the allegations that he was acting outside the scope of his lawful authority. Either way, the Court did not bar claims against him on the grounds that he was an official capacity Thlopthlocco official until there was a decision based on the evidence to make that determination. Such a determination never happened, as Thlopthlocco purported to revoke consent and file cases in other various other courts.

What is important to note of *Anderson I* was the interconnectivity of all these cases. Thlopthlocco originally characterized *Anderson I* as an enforcement action based on *Tomah I* as controlling law. *Tomah I* led to *Tomah II* led to *Anderson I* and at this point, Thlopthlocco was all in, fully consenting to this forum and arguing that the legal history and relationships between the Creek tribal towns and the Muscogee (Creek) Nation required this Court to exercise jurisdiction.

As *Anderson I* progressed and this Court made various rulings Thlopthlocco decided to change course. Thlopthlocco's arguments eventually took a one hundred and eighty degree turn from

its pleadings in all Thlopthlocco cases up to this point. It's one thing for a plaintiff to decide that plaintiff no longer wishes to pursue a lawsuit. In those instances, the Plaintiff would normally seek to voluntarily dismiss the lawsuit. When nearly two years have passed since the lawsuit was filed, the Plaintiff in any court would require the Court's permission to voluntarily dismiss. This is the routine custom in this Court and most others. There is a point in time during the pendency of every lawsuit where Plaintiff cannot dismiss the case without leave of court. *Anderson I* had progressed beyond that point.

It's an entirely different matter to now argue that this Court has never had jurisdiction over Thlopthlocco tribal towns in either the historic or modern sense and that Thlopthlocco is essentially a foreign entity outside the reach of the Muscogee (Creek) Nation. These arguments are particularly troubling given the prior arguments Thlopthlocco has made to this Court in prior cases when Thlopthlocco advanced cases for its own behalf in this Court. See *Tomah I*, Tomah II, and earlier pleadings and arguments in *Anderson I*.

Despite what it argued before, Thlopthlocco has made it clear that it no longer wants to be a plaintiff in *Anderson I* and that Thlopthlocco's previous waiver of sovereign immunity and consent to be a party to the lawsuit was subsequently revoked by Thlopthlocco Business Committee Resolution No. 2009-7 (February 19, 2009).

The question for this Court is whether the 2009 Thlopthlocco Revocation of its 2007 lawsuit requires this Court to dismiss the action, or whether there is a point of no return where a plaintiff cannot unilaterally decide to voluntarily dismiss a case it initiated. This Court finds that by 2009, Thlopthlocco could no longer voluntarily dismiss the action and to allow such dismissal would be unjust to the defendants and inconsistent with concepts of judicial efficiency.

In *Anderson I*, Thlopthlocco plaintiffs described the case or controversy language in near identical language to *Tomah I* and *Tomah II*:

"individuals, who are not properly elected or appointed, are claiming to be duly elected or appointed tribal officials and the current "appointed" Town King has acted in joint concert in participation with others to disrupt tribal government, have interfered with orderly government decision making, delivery of services and the proper safekeeping of assets, and such matter requires adjudication and enforcement to protect Thlopthlocco citizens and the Thlopthlocco government and its enterprises."[28]

The Business Committee Resolutions *Tomah I*, Tomah II and *Anderson I* are nearly identical. They each note the unique relationship between the Nation and the Town, the lack of funding for to Thlopthlocco to establish a local town tribal courts, the resulting lack of available judicial forum and they select Muscogee (Creek) Nation as the proper jurisdiction and venue.

[28] Thlopthlocco Tribal Town Business Committee Resolution No. 2007-21 (June 7, 2007)(signed by Vernon Yarholar as Warrior and Celesta Johnson as Secretary, recording a 6-0-0 vote).

The *Anderson I* resolutions differs in one respect: the waiver of sovereign immunity and consent to the lawsuit allows the case to proceed for injunctive and declaratory relief, however, it specifically states that the "waiver of immunity shall not include election disputes."

The same resolution described the controversy as involving "individuals, who are not properly elected or appointed" yet "claiming to be duly elected or appointed tribal officials." The lawsuit sought to enjoin one Thlopthlocco official and other individuals from interfering or disrupting the lawful tribal government. It's clear that Thlopthlocco wanted this Court to enjoin the actions alleged to have taken place in June 2007 but not to fully relitigate or overturn the January 2007 election. That's what this Court does in today's decision.
Earlier in the 2007 *Anderson II*, the Court could not easily determine whether individuals were "duly elected or appointed" or whether individuals were merely claiming to be tribal officials without reviewing the outcome of the 2007 election and subsequent actions.

The *Tomah I* and *Tomah II* waivers consented to "adjudicating this dispute only" but did not define whether the case they viewed the case as an election dispute or a leadership dispute. The Anderson I waiver did the same thing. It essentially limited consent to adjudicating the current *Anderson I* dispute and did not provide waivers for future cases.

In *Anderson I,* the District Court dismissed the case for lack of subject matter jurisdiction, but that decision was overturned by the Muscogee (Creek) Nation Supreme Court in June 2007.[29] *Anderson I* was the first time the Muscogee (Creek) Nation Supreme Court reviewed the jurisdictional question of whether Thlopthlocco lawsuits may be heard in the courts of the Muscogee (Creek) Nation. The Supreme Court held that jurisdiction was proper in the Muscogee (Creek) Nation Courts adopting the *Tomah* analysis urged by Thlopthlocco and remanded the case to the District Court.

The Supreme Court's decision in *Anderson I* resolved the previous conflicting jurisdictional rulings of the District Court. In *Tomah I*, the District Court exercised jurisdiction and held a full trial on the merits which resolved the issue with no appeal. In *Anderson I*, the District Court dismissed the action for lack of jurisdiction.

Important to the Supreme Court was the fact that all parties to the lawsuit are Muscogee (Creek) Nation citizens and members of the Thlopthlocco town. Also important to the Supreme Court was the fact that the litigants in *Anderson I* were seeking relief similar to *Tomah I*.

The Supreme Court adopted the analysis and conclusion of *Tomah I* holding that the Muscogee (Creek) Nation District Court has jurisdiction to hear disputes between Thlopthlocco citizens on tribal town. Most notably, the Supreme Court held that prior to adopting a new constitution under the Oklahoma Indian Welfare Act, Thlopthlocco Tribal Town was a tribal town of the Muscogee Nation and that tribal towns had representation in the Muscogee (Creek) Nation Council as it existed under the Nation's Constitution of 1867.

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[29] Thlopthlocco Tribal Town v. Moore et al, Muscogee (Creek) Nation Supreme Court case 2007-01)

The Supreme Court clarified that the Thlopthlocco is not an outside or foreign entity of the Muscogee (Creek) Nation:

> In the year 1936, Congress passed the Oklahoma Indian Welfare Act authorizing Indian tribes in Oklahoma to reorganize and adopt constitutions. At that time in the Nation's history, it was hoped that all forty-four (44) tribal towns would incorporate to strengthen the then perceived crippled confederacy. Only three (3) of our tribal towns did so. The Thlopthlocco Tribal Town adopted a constitution that was approved by the Secretary of the Interior of the United States and ratified by the membership of the Town in 1939. The preamble of the Constitution stated:
> 'Thlopthlocco reorganized as "members of the Thlopthlocco Tribes Town of the Creek Indians.'

The Supreme Court held in *Anderson I* the relationship between Thlopthlocco and the Muscogee (Creek) Nation is an internal tribal relationship as : "Thlopthlocco is a Muscogee (Creek) tribal town." The federal government's relationship with Thlopthlocco is a different relationship that serves different purposes. This was consistent with Thlopthlocco's position in the first three Thlopthlocco cases.

The existence of a federal-town relationship does not negate the fact that the underlying cause of action arising under tribal laws only. In *Tomah I*, the Muscogee (Creek) Nation District Court applied Thlopthlocco tribal law as the substantive law and procedures to reach a decision that determined the lawfully elected leaders of Thlopthlocco.

One of the Supreme Court's concerns was a sense of duty to provide a forum for Thlopthlocco disputes. As Muscogee (Creek) Nation Supreme Court Justice George Almerigi aptly stated in *Anderson I:*

> "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 Court."[30]

The Thlopthlocco Resolutions in *Tomah I, Tomah II* and *Anderson I* represent Thlopthlocco's understanding of the Nation-Town relationship matches that of the Muscogee (Creek) Nation Supreme Court and vice versa. If both Thlopthlocco and Muscogee (Creek) Nation share the same understanding of their relationship with each other, there is mutual understanding and interpretation of tribal law. Thlopthlocco tribal law and Muscogee (Creek) Nation tribal law.

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[30] *Thlopthlocco Tribal Town v. Moore et al*, Muscogee (Creek) Nation Supreme Court No. 2007-01 (appeal of District Court Case No. CV 3007-39).

The Supreme Court ordered the Muscogee (Creek) Nation District Court to proceed with the *Anderson I* case. On remand, Defendants asked for attorney fees dating back to *Tomah II*, the companion case filed in 2005. The District Court awarded attorney fees to the Defendant as the case to determine who the lawful Thlopthlocco officials continued.

Anderson I was then appealed to came Muscogee (Creek) Nation Supreme Court for a second time in 2008 on interlocutory review on the sole issue of attorney fees.

The *Anderson I* District Court ruled the Defendants were entitled to attorney fees to be paid out of the Thlopthlocco treasury given that it was unclear who the rightful Thlopthlocco were as the case progressed to the merits. Reasoning it is unfair for one side to declare themselves to be "Thlopthlocco" have access to the tribal treasury while the other side who also claims to the "Thlopthlocco" have no equal access.

The Muscogee (Creek) Nation Supreme Court (SC-2008-01) reversed the attorney fee award as premature, but acknowledged it was troublesome that the Plaintiffs could enjoy the full benefit of controlling the town treasury while a ripe dispute was being litigations and defendants did not share the same luxury as being the first to file as "Thlopthlocco" this time.

With the case remanded to the *Anderson I* District Court for a second time, a jury trial was scheduled for (month) 2009. On February 19, 2009, Thlopthlocco passed a Business Committee Resolution No. 2009-7 withdrawing ab initio, the *Anderson I* waiver of sovereign immunity and consent to the suit.[31] In doing so, Thlopthlocco changed its position as to the jurisdiction of the Muscogee (Creek) Nation courts.

The 2009 Resolution states:

"WHEREAS, the Muscogee (Creek) Nation Tribal Courts can only exercise such jurisdiction over Thlopthlocco Tribal Town controversies and its citizens with Thlopthlocco Tribal Town's consent, and such jurisdiction is strictly limited to matters for which the consent is given . . ."[32]

That matter went back to the Muscogee (Creek) Nation Supreme Court where the Supreme Court Justices declined to depart from the previous holdings regarding the relationship between the Muscogee (Creek) Nation and Thlopthlocco when it previously affirmed the analysis and rationale in *Tomah I*.

> The relationship between Thlopthlocco and the federal government is different from the relationship between Thlopthlocco and the Muscogee (Creek) Nation. Under federal law, Thlopthlocco is a reorganized Indian tribe; under tribal law, Thlopthlocco is a Muscogee (Creek) tribal town. The Tribal Town Constitution

[31] Thlopthlocco Tribal Town Business Committee, Resolution No. 2009-7 (February 19, 2009)(signed by Vernon Yarholar as Mekko and Celesta Johnson as Secretary, recording a 9-0-0 vote.
[32] Id.

> 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.[33]

The Supreme Court once again, on March 9, 2012, ordered the District Court to hear the case on the merits and enter a final judgment, finding no matters ripe for appellate review. This was the final Supreme Court pronouncement on what originated as *Anderson I*, District Court Case No. CV 07-39.

Anderson II (2011): *Anderson v. Burden*, CV 2011-08 (currently pending)

A new case was initiated in the District Court in 2011, *Anderson v. Burden*[34] seeking a temporary restraining order to suspend Thlopthlocco's January 2011 election. This case will be referred to as *Anderson II*. The lead plaintiff in *Anderson II* was Nathan Anderson, who was a named defendant in *Anderson I*. Just as in *Tomah I* and *Tomah II*, the plaintiff and defendants had now flipped.

The District Court found that it has both personal and subject matter jurisdiction over the parties based on the Supreme Court's decision in *Anderson I* and *Tomah I* and 27 M(C)NA § 102(B). The District Court found that this Court was the proper venue pursuant to 27 M(C)NA § 10101(B).

The *Anderson II* District Court ordered the January 2011 general election postponed and proceeded to hear the case, making preliminary findings of fact and conclusions of law. The *Anderson II* District Court found that Plaintiffs did not use tribal property for campaign purposes and found no evidence of undue influence or coercion. As such, the *Anderson II* plaintiffs Anderson and Montemayor remained qualified candidates for purposes of the upcoming election. To the extent that defendant Thlopthlocco officials prevented Anderson and Montemayor from being candidates in the election, those Thlopthlocco officials acted outside their lawful authority under Thlopthlocco law.

The District Court, finding no reason why the Thlopthlocco election should be further enjoined, lifted the prior injunctions halting the election and instead, ordered the election to take place in a reasonable timeframe, the date and location to be determined by Thlopthlocco officials and not the District Court.

Consistent with *Tomah I,* the *Anderson II* District Court tried to provide relief in a Thlopthlocco conflict but also tried to do so in a manner that left actions to Thlopthlocco officials to the greatest extent possible. Just as the federal courts now require of parties to these lawsuits to give status updates to the proceedings before this Court, the *Anderson II* District Court ordered

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[33] *Thlopthlocco Tribal Town v. Anderson* citing Order and Opinion of October 26, 2007 (March 9 2012).
[34] Muscogee (Creek) Nation District Court CV 2011-08

the Thlopthlocco election committee to keep this Court advised as to an election date, presumptively in the next 90 days or August 22, 2011. This District Court thereby returned control over the future Thlopthlocco election to Thlopthlocco people.

Anderson II was then appealed to the Muscogee (Creek) Nation Supreme Court, seeking a writ of mandamus or prohibition and interlocutory review seeking to set aside the *Anderson II* District Court's order for lack jurisdiction. In that appeal, defendants also argued the claims against them were barred by sovereign immunity. The *Anderson II* Supreme Court declined to rule on the merits because that appeal was not timely filed. Further, the Supreme Court noted that *Anderson I* also remained pending because the District Court had never reached the merits.

As *Anderson II* stands, Judge Moore's order instructing the Thlopthlocco Election Committee to set its own election date and location remains an outstanding order of this court that has not been withdrawn and has not been complied with. The parties inform this Court that there may also be a practical problem in that there are now no individuals on the Thlopthlocco Election Committee. All members have either resigned or are now deceased as this case as languished in tribal and federal courts.

When Anderson II was filed in 2011, these inter-related cases originally filed in the Muscogee (Creek) Nation District Court have led to two Muscogee (Creek) Nation Supreme Court Appeals, two federal district court cases and two decision of the United States Court of Appeals for the Tenth Circuit. At this time, *Anderson I* and II are pending before this Court based on rulings from the Muscogee (Creek) Nation Supreme Court. *Anderson II* is pending before the Tenth Circuit, abated for this Court to rule on jurisdictional issues pursuant to tribal court exhaustion rules.

Summary of Decision

In the 2011 case, Judge Moore entered a Preliminary Order that tried to advance Thlopthlocco toward holding an election consistent with Thlopthlocco laws.[35] Like this Court in *Tomah*, Judge Moore in *Anderson II* made his ruling, as a matter of facts and laws and made final pronouncements as to the legal issues on whether Thlopthlocco officials acted outside the scope of their authority under Thlopthlocco law, when Plaintiffs were excluded from being candidates in the 2011 election.

In that same preliminary order, the Court then provided that Thlopthlocco was free to to hold its own 2011 election pursuant to Thlopthlocco laws. The only ongoing order of the Court at that time, was that the Court be advised by Thlopthlocco officials of the date and location of the General Election so this Court could convert the preliminary order to a final one.

When Thlopthlocco holds an election, the 2011 *Anderson II* case will be resolved as far as this Court is concerned. At the same time, once Thlopthlocco announces and holds an election,

[35] "Preliminary Order" dates July 29, 2011 in CV 2011-08

there will be a new slate of lawfully elected Thlopthlocco leaders and any remaining matters from the Anderson I and Anderson II cases would then be moot.

The 2011 Plaintiff's Motion for Summary Judgment is hereby granted on the issues of this Court's jurisdiction consistent with *Tomah*. Today's decision provide additional discussion of the sovereign immunity issues raised. The 2011 Defendants' Motions to Dismiss are hereby denied as they relate to jurisdiction and sovereign immunity with one exception: this Court grants Thlopthlocco's Motion to Dismiss Anderson's cross-claims as they relate to any alleged irregularities in the 2007 election. That case centered on actions alleged to have occurred around June 2007. Like the Defendants' cross-claims in *Tomah*, Defendants attempt to stretch the case beyond the dispute that gave rise to the lawsuit and those claims are therefore barred.

Thlopthlocco's 2007 lawsuit in *Anderson I* sought to keep Anderson from taking over the government in the summer of 2007, a claim that was certainly ripe and properly before this Court in the earlier years of *Anderson I*. This Court is bound by the decision in *Thlopthlocco v. Moore,* SC 2007-01.

This Court finds that Anderson is no longer a credible threat to the Thlopthlocco government. Now that time as marched on, Anderson is no longer Mekko, other successors have subsequently served as Mekko. Although this Court exercised proper jurisdiction over *Anderson I* for many years, as time has passed, *Anderson I* is no longer justiciable as a practical matter. *Anderson I* is hereby dismissed as to the remedies initially sought by the parties in both the case in chief and the cross-claims for reasons just stated.

The 2011 Plaintiffs' Motion for Summary Judgment is hereby denied with respect to any requests that a Thlopthlocco election being overseen and moderated by the Muscogee (Creek) Nation. The parties informed this Court that as time advanced, there are currently no Thlopthlocco members on the Thlopthlocco Election Committee because they have either resigned or are deceased. If that is the case, then it is up to Thlopthlocco, and not this Court, to seat an Election Committee pursuant to Thlopthlocco laws.

Further, it is beyond the scope of this Court's jurisdiction to weigh in on who may or may not be indispensable parties to any federal lawsuit. The 2011 Plaintiffs' request for such orders is hereby denied.

In *Anderson II*, this Court now restates Judge Moore's Preliminary Order dated July 29, 2011 that Thlopthlocco should hold an election under Thlopthlocco laws, and that the election be overseen and moderated by Thlopthlocco. As in *Tomah*, this Court refuses to enter a permanent injunction taking control of any future Thlopthlocco election. Once Thlopthlocco has set its election date and location, this Court will convert the prior Preliminary Order to a Final Order by simply noting the date and location of the Thlopthlocco election as prescribed by Thlopthlocco and not this Court. Otherwise, the hereby restated Preliminary Order dated July 29, 2011 together with today's decisions stand as the final adjudication of this Court's

determination of jurisdiction to hear the cases. It also stands as a final adjudication the merits of the remaining issues before the Court based on findings of laws and facts.

This Court reiterates that *Anderson I* leaves no further justiciable issues to be resolved by this Court and especially after Thlopthlocco holds an election, all matters in *Anderson I* and *Anderson II* will be moot. A newly elected slate of Thlopthlocco officials will have taken the oath of office.

Thlopthlocco, not this Court, holds the key to Thlopthlocco's future. From this Court's perspective, Thlopthlocco is free and empowered to hold an election. Nothing in either the *Anderson I* or *Anderson II* currently enjoins Thlopthlocco or Thlopthlocco officials from holding an election. In fact, this Court has been waiting for Thlopthlocco to do just that ever since Judge Moore's July 29, 2011 Preliminary Order was first issued.

This Court hereby reissues the July 29, 2011 Preliminary Order in Anderson II. Out of respect to the parties' rights of appeal to the Muscogee (Creek) Nation Supreme Court and the pending litigation in federal courts, this Court will stay this order for the next thirty (30 days) to allow the parties to take up their next actions.

IT IS SO ORDERED.

Stacy L. Leeds

Stacy Leeds
District Court Judge

CERTIFICATE OF MAILING

I, Donna Beaver, Court Clerk for the Muscogee (Creek) Nation District Court, do hereby certify that on this 24th day of May, 2021, I emailed and mailed a true and correct copy of the foregoing **ORDER AND DECISION OF DISTRICT COURT – CV 2011-08** and **CV 2007-39** with proper postage prepaid to the following:

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Donna Beaver
Donna Beaver, Court Clerk

MUSCOGEE (CREEK) NATION
STATE OF OKLAHOMA OKMULGEE COUNTY
The undersigned hereby certifies this instrument to be a full, true and correct copy of the original, as the same appears on the record in the District Court Records
Witness this 24th day of May 2021
Donna Beaver
Court Clerk