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):
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> 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]
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> [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,

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[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]
>
> [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]
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> [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 Harjo-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