

WHEREFORE, the Defendant Tribe requests that this action be dismissed with prejudice to refiling.

BRIEF IN SUPPORT OF MOTION TO DISMISS

STATEMENT OF RELEVANT FACTS

1. The Kickapoo Tribe is a federally recognized Indian Tribe (See Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs, 72 Fed.Reg. 13648 (March 22, 2007)).

2. On January 18, 1938, members of the Defendant Tribe approved the Corporate Charter of the Kickapoo Tribe of Oklahoma ("1938 Charter") (Def. Exh. 2) under authority of the Oklahoma Indian Welfare Act ("OIWA"), 25 U.S.C. § 503.

3. The Kickapoo Tribe operates as a governmental entity in accordance with the Constitution of the Kickapoo Tribe of Oklahoma, which was ratified by tribal members on December 10, 1977, under authority of the OIWA, 25 U.S.C. § 503 ("1977 Constitution")(Def. Exh. 3).

4. The 1977 Constitution Recitals state that the 1977 Constitution expressly superseded the Constitution and Bylaws of the Kickapoo Tribe, which was approved by tribal members forty years earlier, on September 18, 1937, only a few months before tribal members had ratified the 1938 Charter.

5. The Kickapoo Tribe maintains its governmental offices in McLoud, Oklahoma (Def. Exh. 1).

6. The Plaintiffs in this action, Terry Murphy and Roger Lackey, are citizens of the State of Oklahoma and are not members of the Kickapoo Tribe of Oklahoma (Complaint, ¶ 1).

7. On May 20, 2005, the Kickapoo Business Committee enacted Resolution KTP 2005-24,¹ which stated the intent of the Business Committee that the Kickapoo Casino be considered an enterprise separate and apart from the Tribe, but also stated that the Casino would remain a wholly owned business of the Tribe. Resolution KTP 2005-24 contains no reference to the 1938 Charter (Def. Exh. 5).

8. Plaintiffs are asserting completely unrelated claims against Defendant Tribe in the First Cause of Action. Plaintiff Lackey has asserted breach of an alleged employment contract and retaliatory discharge under Oklahoma law (Complaint, ¶¶ 9 – 14); and Plaintiff Murphy has asserted breach of an unrelated contract (Complaint, ¶¶ 15 – 17; Def. Exh. 4). Plaintiffs have jointly alleged actual or constructive fraud of the Defendant Tribe regarding the authority of the Kickapoo District Court to determine their respective claims against Defendant Tribe in their Second Cause of Action (Complaint, ¶¶ 18 – 25).

9. Plaintiff Lackey has already litigated the same claims that are the subject of the present action in the District Court of the Kickapoo Tribe of Oklahoma, which dismissed the case on grounds of sovereign immunity, in Lackey v. Kickapoo Casino, Kickapoo Tribe of Oklahoma District Court, CIV-2004-16, Order (May 2, 2006)(Def. Exh. 6), and failed to file an appeal within or without the time prescribed by the Code of Laws of the Kickapoo Tribe of Oklahoma, Title 2, § 102 (Def. Exh. 8).

10. Plaintiff Murphy has already litigated the same claims that are the subject of the present action in the District Court of the Kickapoo Tribe of Oklahoma, which dismissed the case on grounds of sovereign immunity, in Murphy v. Kickapoo Business Committee, Kickapoo Gaming Commission and Kickapoo Casino, Kickapoo Tribe of Oklahoma District Court, CIV-

¹ The designation of this Resolution as "KTP" is erroneous, and should read "KTO" (an abbreviation for "Kickapoo Tribe of Oklahoma").

2004-16, Order (May 2, 2006)(Def. Exh. 7), and failed to file an appeal within or without the time prescribed by the Code of Laws of the Kickapoo Tribe of Oklahoma, Title 2, § 102 (Def. Exh. 8).

11. The Defendant Tribe maintains various insurance policies, including a policy for Workers Compensation, which was used to pay a settlement to Plaintiff Lackey in an Oklahoma Workers Compensation case, Lackey v. Kickapoo Tribe of Oklahoma, Oklahoma Workers' Compensation Court, Court Claim No. 2004-13810 (Def. Exh.1).

12. There is no waiver of the Defendant Tribe's sovereign immunity in its insurance coverage for general liability protection in effect in 2004 (Def. Exh. 9).

ARGUMENTS AND AUTHORITIES

PROPOSITION I. THIS COURT POSSESSES NO SUBJECT MATTER OVER THIS ACTION BECAUSE THERE IS NO FEDERAL STATUTE OR OTHER BASIS FOR A SUIT AGAINST A TRIBE BASED ON ALLEGED STATE LAW CLAIMS OF BREACH OF CONTRACT OR RETALIATORY DISCHARGE OF AN EMPLOYEE.

The Defendant Tribe seeks dismissal of this case on two grounds. First, the Plaintiffs have failed to assert any jurisdictional basis for their claims in their Complaint. On the Civil Cover Sheet, they have selected diversity jurisdiction in Part II, "Basis of Jurisdiction," and have identified the Kickapoo Tribe as a "Citizen or Subject of a Foreign Country" in Part III, "Citizenship of Principal Parties." This description is erroneous and does not support diversity jurisdiction. Indian Tribes are not treated in the federal system as foreign nations; they are instead recognized as "domestic dependent nations." Cherokee Nation v. Georgia, 30 U.S. (5 Pet) 1, 19–20 (1831) (describing the Cherokee Nation as a "domestic dependent nation," and finding that it was not a foreign state within the meaning of the constitutional provision that gave the court original jurisdiction over disputes between states and foreign nations). Thus, the Defendant Tribe is not a foreign country for purposes of diversity jurisdiction under 28 U.S.C. § 1332.

See also Tenney v. Iowa Tribe of Kansas, 243 F. Supp. 2d 1196, 1198 (D. Kansas 2003) (citing Garcia v. Akwesasne Housing Authority, 268 F.3d 76, 80, n.1 (2nd Cir. 2001), in support of its ruling that an Indian tribe is not a citizen of a state and may not be sued in federal court under the court's diversity jurisdiction).

In addition, Plaintiffs also allege no federal question jurisdiction in this case, and there is none. Instead, this action seeks enforcement of alleged employment and service contracts against an Indian tribe, and Plaintiff Lackey invokes Oklahoma statutes in support of his claims.² See Morris v. City of Hobart, 39 F.3d 1105, 1111-12 (10th 1994), cert. denied 514 U.S. 1109 (1995) (finding that federal jurisdiction lies only if resolution of a contract dispute requires resolution of a substantial question of federal law; explaining that "contract actions are traditionally reserved for state courts").

PROPOSITION II. THIS COURT POSSESSES NO SUBJECT MATTER OVER THIS ACTION BECAUSE THE KICKAPOO TRIBE IS IMMUNE FROM SUIT.

A. Indian Tribes Are Immune from Suit, Absent Express Waiver of Immunity.

The Kickapoo Tribe has sovereign immunity from suit, and has not expressly waived its immunity with regard to the types of claims advanced by Plaintiffs in this action. "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978) (citations omitted). Absent tribal waiver or congressional abrogation, an Indian tribe is shielded from suit by sovereign immunity, an immunity that extends to "suits on contracts, whether those contracts involve governmental or commercial activities, and whether they were made on or off a reservation." Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. 751, 760

² Plaintiff Lackey claims retaliatory discharge and damages under 85 O.S. §§ 5 and 6 (Complaint, ¶ 13).

(1998). "[A] waiver of sovereign immunity cannot be implied, but must be unequivocally expressed." Santa Clara Pueblo, 436 U.S. at 58-59 (citations and internal quotations omitted); accord Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505, 509 (1991). "Due to their sovereign status, suits against tribes or tribal officials in their official capacity 'are barred in the absence of an unequivocally expressed waiver by the tribe or abrogation by Congress.'" Dry v. United States, 235 F.3d 1249, 1253 (10th Cir. 2000), quoting Fletcher v. United States, 116 F.3d 1315, 1324 (10th Cir. 1997); see also E.F.W. v. St. Stephen's Indian High School, 264 F.3d 1297 (10th Cir. 2001); Osage Tribal Council ex rel. Osage Tribe of Indians v. U.S. Dep't Labor, 187 F.3d 1174, 1181 (10th Cir. 1999).

Tribal agencies and enterprises also enjoy the same sovereign immunity from unconsented suit. Courts routinely recognize such immunity for tribal agencies and enterprises even in the absence of expressed provisions. See, e.g. Hagen v. Sisseton-Wahpeton Community College, 205 F.3d 1040, 1043 (8th Cir. 2000) (holding community college chartered by tribe was an arm of tribe entitled to "the full extent of the Tribe's sovereign immunity"); Multimedia Games, Inc. v. WLGC Acquisition Corp., 214 F.Supp.2d 1131, 1135 (N.D. Okla. 2001) (finding corporate and economic entities created by Indian tribe to further governmental objectives possess attributes of tribal sovereignty); Duke v. Absentee Shawnee Tribe Housing Authority, 199 F.3d. 1123, 1125 (10th Cir. 1999) (affirming that state-chartered housing authority of tribe shared tribe's sovereign status for purposes of federal employment law); Worrall v. Mashantucket Pequot Gaming Enterprise, 131 F.Supp.2d 328, 331 (D.Conn 2001) (holding gaming enterprise of tribe entitled to same immunity that protects the tribe from suit); In re Greene, 980 F.2d 590 (9th Cir. 1992) (finding wholly-owned enterprise of Yakima Tribe enjoyed the tribe's sovereign immunity from a suit by the bankruptcy trustee). The Kickapoo Tribe's

sovereign immunity thus extends to contract disputes involving the Kickapoo Casino, a wholly owned tribal economic enterprise.

B. The Kickapoo Tribe is Immune from Suit, Regardless of the Plaintiffs' Characterization of the Tribe as Acting Under a Federal Charter.

There are no waivers of the Kickapoo Tribe's sovereign immunity related to the present action, contrary to the assertions of the Plaintiffs. Plaintiffs argue that a waiver exists based on their claim that the Defendant Tribe operates the Kickapoo Casino under the "Corporate Charter of the Kickapoo Tribe of Oklahoma." They suggest that this Charter was ratified on January 18, 1988 (the same year of enactment of the Indian Gaming Regulatory Act, 25 U.S.C. § 2701, et seq.). In fact, the Charter was ratified on January 18, 1938, less than a year after the 1937 Kickapoo Constitution was adopted, almost forty years before the Kickapoo Tribe replaced the 1937 Constitution with its 1977 Constitution, and long before the Kickapoo Tribe began its gaming operations (Def. Exhs. 1, 3).

Plaintiffs expand their assertion of applicability of the federal charter by suggesting that a May 20, 2005, resolution approved by the Business Committee on May 20, 2005, Resolution KTP 2005-24 (Def. Exh. 5) somehow established the Kickapoo Casino as an operation under the 1938 Charter. There is no mention of the charter in Resolution KTP 2005-24. The Recitals of Resolution KTP 2005-24 expressly state (emphasis added) that "the Business Committee hereby establishes its intent that the Kickapoo Casino be considered an enterprise separate and apart from the Kickapoo Tribe of Oklahoma;" that the "*Kickapoo Casino is a wholly owned business of the Kickapoo Tribe of Oklahoma and will remain as such;*" and that the Business Committee recognizes that the Kickapoo Casino may accrue assets and liabilities separate and apart from the Kickapoo Tribe, and may choose to use such assets to collateralize loans as deemed appropriate. The only resolution portion of Resolution KTP 2005-24 authorized the Chairman and Vice-

Chairman of the Business Committee "to sign any and all necessary documentation to implement the objectives of this Resolution." However, the Resolution does not suggest that one of its objectives is to place operation of the Casino under the 1938 Charter or to waive sovereign immunity, and no officials of the Defendant Tribe have executed any document establishing the Kickapoo Casino as an entity subject to operation by the Defendant Tribe under the 1938 Charter (Def. Exh. 1).

Furthermore, even if the Kickapoo Tribe did operate the Casino under the 1938 Charter, which it does not, it would still be protected by sovereign immunity. Plaintiffs only partially quoted the limited waiver of sovereign immunity contained in § 3(a) of the 1938 Charter (Complaint, ¶4). It eliminated the following italicized provisions (emphasis added):

3. The Kickapoo Tribe of Oklahoma, subject to any restrictions contained in the Constitution and laws of the United States or in the Constitution and Bylaws of the Tribe, and subject to the limitations of Section 4 and 5 of this Charter, shall have the following corporate powers as provided by Section 3 of the Oklahoma Indian Welfare Act of June 26, 1936.

* * *

(b) To sue and be sued; to complain and defend in any court: *Provided, however, That the grant or exercise of such power shall not be deemed a consent by the Tribe or by the United States to the levy of any judgment, lien or attachment upon the property of the Tribe other than income or chattels specially pledged or assigned.*

(Def. Exh. 2). This provision merely grants the Kickapoo Tribe the power, when operating under the 1938 Charter, to consent to suit, but only with regard to tribal income or chattels specially assigned for that purpose. Plaintiffs have not identified any express waiver by the Tribe, in its governmental or charter capacity, and further, have not alleged that the Defendant Tribe has specially pledged or assigned income or chattels for purposes of any waiver of sovereign immunity related to their claims, because there are no such pledges.

C. There Are No Express Waivers of Sovereign Immunity in Contracts or Insurance Policies Relevant to Plaintiffs' Claims.

The alleged services contract upon which Plaintiff Murphy bases his claims in this action contains no waiver of sovereign immunity (Def. Exh. 4). Plaintiff Lackey has no written employment agreement; therefore, there is no express waiver of sovereign immunity arising from his contractual claims. Likewise, there is no waiver of the Defendant Tribe's sovereign immunity in its insurance coverage for general liability protection in effect in 2004 (Def. Exh. 9).

D. This Court Does Not Possess Subject Matter Jurisdiction Over this Action.

Sovereign immunity is a jurisdictional issue and, if a defendant is protected by sovereign immunity, and has not waived it, then a court does not have subject matter jurisdiction over claims against that defendant. See Fletcher v. United States, 116 F.3d 1315, 1323-26 (10th Cir. 1997); Ramey Const. Co. v. Apache Tribe of the Mescalero Reservation, 673 F.2d 315, 318 (10th Cir. 1982). Thus, the Defendant Tribe's sovereign immunity would be rendered meaningless if this case proceeded to trial. See id. at 1326; see also Tamiami Partners v. Miccosukee Tribe of Indians, 63 F.3d 1030, 1050 (11th Cir. 1995). The Defendant Tribe has not expressly consented to be sued in federal court. Accordingly, this case should be dismissed.

E. Tribal Sovereign Immunity Is Exercised by the Kickapoo Tribe, and Other Tribes, in a Manner Similar to the Exercise of Sovereign Immunity by Other Sovereigns.

This Court has expressed a concern that tribes may improvidently use sovereign immunity as a shield against claims to such an extent that Congress will respond by legislatively restricting or eliminating tribal sovereign immunity. The Kickapoo Tribe assures the Court that it does not exercise its sovereign immunity defense lightly with respect to the present case or other actual or potential claims against it. Nor does the Tribe routinely utilize that defense to avoid any and all claims against the Tribe, as demonstrated by its settlement of Plaintiff Lackey's

worker's compensation claim against it (Def. Exh. 1). Instead, the Kickapoo Tribe, like other tribes nationwide, has an incentive to create a business climate that is amenable to establishment of economic relationships with non-Indian parties, and like any other sovereign, may choose to consent to suit or may prospectively waive sovereign immunity through statute or contract. See, e.g. Alzheimer & Gray v. Sioux Mfg. Corp., 983 F.2d 803, 812 (7th Cir. 1993) cert. denied, 510 U.S. 1019 (1993); Namekagon Dev. Co. v. Bois Forte Reservation Hous. Auth., 517 F.2d 508, 510 (8th Cir. 1975); McClendon v. United States, 885 F.2d 627, 631 (9th Cir. 1989); American Indian Agric. Credit Consortium, Inc. v. Standing Rock Sioux Tribe, 780 F.2d 1374, 1379 (8th Cir. 1985); Wichita and Affiliated Tribes v. Hodel, 788 F.2d 765, 773 (D.C. Cir. 1986).

Consistent with this economic reality, all Oklahoma tribes that have entered into tribal/state compacts for class III gaming operations have consented to limited waivers of sovereign immunity for prize claims against tribal gaming facilities and for tort claims made against tribal gaming facilities for personal injury or property damage arising out of incidents occurring at the facilities. See 3A O.S. § 281, Oklahoma Model Tribal Gaming Compact, Part 6 A (2) and B (1). Compacting Oklahoma tribes have also waived their immunity with respect to certain claims by the State of Oklahoma. See 3A O.S. § 281, Oklahoma Model Tribal Gaming Compact, Part 12. At least 33 tribes in Oklahoma—including the Kickapoo Tribe—have entered into motor fuel compacts with the State of Oklahoma in which the tribes and the State each waive their sovereign immunity from suit. See Okla. Indian Affairs Comm'n, Oklahoma Indian Nations Information Handbook, 50 (2004–05 ed. 2004). The text of these waivers appear in the Oklahoma Motor Fuel Tax Code, 68 Okla. Stat. § 500.63(8)–(9). Likewise, the Kickapoo Tribe and other tribes routinely enter into a variety of commercial contracts with companies and private parties in which they waive their immunity in varying respects. Although these waivers

do not apply to the types of employee and contract claims presented by Plaintiffs in this case, they demonstrate that the Kickapoo Tribe³ and other compacting tribes do not treat the rights of others cavalierly.

In addition, tribes have enacted limited waivers of tribal sovereign immunity for purposes of tort claims, employment rights, or the like. See, e.g. Navajo Nation Sovereign Immunity Act, 1 N.N.C. § 551, et seq.. In fact, in Oklahoma, a Model Tribal Tort Claims Act has been recently developed, and various Oklahoma tribes may consider enactment of some version of that law. See Model Tribal Tort Claims Act for Non-Gaming Related Torts, SOVEREIGNTY SYMPOSIUM XX Manual (2007), at V-244.⁴

Tribes may utilize liability insurance for coverage of personal injury and property damage claims, and may include either a blanket waiver of sovereign immunity in the policy, or may consent to suit on a case by case basis, usually up to the limits of liability. As demonstrated by the absence of a blanket waiver of immunity in the insurance policy maintained by the Kickapoo Tribe at the time that the claims of the Plaintiffs arose in 2004 (Def. Exh. 9), the Kickapoo Tribe has chosen the latter method. This affords it the ability to evaluate claims covered by insurance and to utilize a sovereign immunity defense when the Tribe, or the

³ The Kickapoo Tribe has a federally approved gaming compact with the State of Oklahoma. See 70 Fed. Reg. 12230-01 (March 11, 2005).

⁴ Although not directly relevant to the present case, which does not name any tribal officials as defendants, it is also noteworthy that tribal courts have ruled that tribal sovereign immunity does not extend to suits for declaratory or injunctive relief against tribal officials involving actions outside of the scope of their authority. See Gallegos v. French, 2 Okla. Trib. 209, 237-238 (Delaware CIA 1991); Election Bd. v. Snake, 1 Okla. Trib. 209, 242-243 (Ponca CIA 1988).

insurance company, determines that such claims are frivolous, not covered, or otherwise have no merit.⁵

In many respects, therefore, tribal immunity is parallel to the immunity enjoyed by the United States and the fifty state governments. Specifically, the United States possesses sovereign immunity from suit, except where it has expressly chosen to provide a remedy. For instance, in 1946, Congress enacted the Federal Tort Claims Act, which authorizes suit against the United States for certain tort claims after the claimant has met certain prerequisites to filing. 28 U.S.C. § 2675. In addition, in the Quiet Title Act the United States has authorized actions against it to adjudicate title disputes involving real property in which the United States claims an interest, but has chosen not to waive its immunity from suit under that act for disputes involving Indian lands. 28 U.S.C. § 2409(a); Block v. North Dakota, 461 U.S. 273, 275-76, 283 (1983). States, like Oklahoma, also possess sovereign immunity from suit and invoke or waive it as they see fit. 51 Okla. Stat. § 152.1.⁶ For instance, although Congress directed states to negotiate in good faith with tribes regarding gaming compacts in the Indian Gaming Regulatory Act, 25 U.S.C. § 2710(d)(3)(A), and authorized federal suits by tribes when States have failed to do so, some states have chosen to raise their immunity from suit to avoid compacting with tribes. See Seminole Tribe of Florida v. State of Florida, et al., 517 U.S. 44 (1996).

⁵ Although it is not necessary to make such determination, in the present case it is highly questionable whether the policy would even cover the claims presented by the plaintiffs in this action (Def. Exh. 9)

⁶ The Oklahoma Governmental Tort Claims Act, 51 Okla. Stat. § 152.1, provides that the State, its officers, and agents are immune from suit by virtue of the doctrine of sovereign immunity. The Act provides for a limited waiver of the State's sovereign immunity for certain tort claims against the State.

PROPOSITION III. PLAINTIFFS ARE PRECLUDED FROM CHALLENGING TRIBAL COURT JURISDICTION AT THIS STAGE OF THE PROCEEDINGS, HAVING FAILED TO EXHAUST REMEDIES IN THEIR SUITS IN THE KICKAPOO COURTS RELATED TO THE SAME CLAIMS THAT ARE RAISED IN THIS FEDERAL ACTION.

Plaintiffs previously submitted to the jurisdiction of the Kickapoo District Court in cases that were based on the same facts and claims as presented in this Federal action, Lackey v. Kickapoo Casino, Kickapoo Tribe of Oklahoma Dist. Ct. Case No. CIV-2004-16, and Murphy, d/b/a Environmental Products v. Kickapoo Tribe of Oklahoma, Dist. Ct. Case No. CIV-2004-15. The Kickapoo District Court ruled in those cases on May 2, 2006, that the doctrine of sovereign immunity applied, found that sovereign immunity had not been waived, and dismissed each case (Def. Exhs. 6, 7). Plaintiffs now complain that Defendant Tribe "expressly advised" them that the Kickapoo courts had exclusive jurisdiction for resolution of their claims and that their attorney filed suit in the Kickapoo District Court "upon said misrepresentation" (Complaint, ¶¶ 19, 20). Although Plaintiffs' purpose in making this complaint is unclear, it appears that they are asking the federal court to hear their claims on the grounds that the Kickapoo District Court's dismissal of the case left them without a remedy in tribal court, rather than questioning the Kickapoo Court's jurisdiction to make that decision.

Plaintiffs failed to file an appeal of the Kickapoo District Court and have accordingly failed to exhaust all tribal court remedies, as required by National Farmers Union Insurance Companies v. Crow Tribe, 471 U.S. 845 (1985) and Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 16-17 (1986) ("The federal policy of promoting tribal self government encompasses the development of the entire trial court system, including appellate courts."). Under the doctrine of comity recognized in National Farmers and Iowa Mutual, parties normally may seek federal court review of the jurisdiction of a tribal court to make a challenged ruling after exhausting

tribal court remedies. The purposes of the exhaustion requirement include the furtherance of the Congressional policy supporting tribal self-government and self-determination and the orderly administration of justice. National Farmers Union Insurance Companies v. Crow Tribe, 471 U.S. at 856. However, in the present case, Plaintiffs sought an affirmative tribal court remedy, failed to timely appeal the tribal court's dismissal of their cases, and waited almost a year before filing this federal action.

Although there are three exceptions to the tribal exhaustion rule, none are applicable in this case, and none have been asserted. Under the particular circumstances of this case, Plaintiffs cannot complain that the tribal actions that they filed were motivated by a desire of the Tribe to harass them or were conducted in bad faith, cannot complain that the Kickapoo Court's dismissals of their cases were patently violative of express jurisdictional prohibitions, and cannot complain that they did not have an adequate opportunity to challenge the Kickapoo Court's jurisdiction to make a determination on the sovereign immunity issue. See National Farmer's Union v. Crow Tribe, 471 U.S. at 857, n.21. In fact, with respect to the latter, they chose to forego the opportunity to challenge the Kickapoo District Court's rulings through appeals. The Complaint does not request any federal court review of the jurisdiction of the Kickapoo District Court to determine that the Tribe is protected by sovereign immunity, and none should be afforded under the unique circumstances of this case.

Plaintiffs are now speculating that if they had appealed the dismissals, the Kickapoo Supreme Court would have affirmed those decisions. This is not a sufficient reason to bypass exhaustion of tribal remedies. See White v. Pueblo of San Juan, 728 F. 2d 1307, 1313 (10th Cir. 1984) ("The explanation given with respect to their failure to seek tribal remedies is a consequence of their belief that tribal remedies did not exist; but that is not really the equivalent

of pursuing the remedy nor can there be any justification for this failure. It was insufficient to allege that they felt that it would be futile to pursue the remedy even if they did believe that."); see also Bank of Oklahoma v. Muscogee Creek Nation, 972 F.2d 1166, 1170 (10th Cir. 1992) ("Bank cannot simply assert that it is not subject to tribal court jurisdiction; rather, it must actually seek adjudication of this issue in tribal court."). Plaintiffs have forfeited any right they may have possessed related to federal court review of the tribal court decisions by failing to file a timely appeal, which requires dismissal of the present action.

CONCLUSION

For the foregoing reasons, the Defendant Tribe requests that the Court dismiss this action, deny Plaintiffs' prayer for judgment against Defendant Tribe, grant attorneys fees to the Defendant Tribe, and grant such other relief as the Court may deem equitable and proper.

Dated this 1st day of June, 2007.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of June, 2007, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing. Based on the records currently on file, the Clerk of Court will transmit a Notice of Electronic Filing to the Following ECF Registrants:

John Michael Johnston:
Johnstonlaw@coxinet.net

s/ L. Susan Work
L. Susan Work