

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

SWANDA BROTHERS, INC., an Oklahoma Corporation,)	
)	
Plaintiff,)	
)	
vs.)	Case No. CIV-08-199-D
)	
CHASCO CONSTRUCTORS, LTD, L.L.P., A Texas Limited partnership,)	
)	
Defendant,)	
)	
and)	
)	
F. G. HAGGERTY COMPANY, INC.,)	
)	
Intervenor.)	

**REPLY TO DEFENDANT, CHASCO CONSSTRUCTORS, LTD, LLP, A Texas
Limited Partnership, Response to KCOA's Motion to Dismiss**

Defendant Chasco Constructors, LTD, LLP, (CHASCO) has filed their response to the Kiowa Casino Operations Authorities (KCOA) Motion to Dismiss relying on language found on exhibit "A" of the contract (page 25 of 68) part II (A) at attached to Defendant, CHASCO's response.

The language in the contract refers explicitly to the Kiowa Indian Tribe as owner of the project. It goes on to state that the Kiowa Indian Tribe of Oklahoma grants to the builder (and no other person)...an irrevocable waiver of sovereign immunity.... The contract contains other language involving arbitration and dispute resolution in the same section of the contract. The Court is referred to facts set forth in the Motion to Dismiss filed by the KCOA. The contract is

correct in referring to the OWNER of the property as the Kiowa Indian Tribe of Oklahoma. The Owner is not the KCOA.

The contract itself was signed on behalf of the KCOA by the Chairman of the Board of Trustees and Curtis Cline of CHASCO. From that point, CHASCO failed to obtain the requisite signatures and authorities as required by the *Kiowa Constitution* (a copy of which was previously submitted as Exhibit “A” in KCOA’s Motion to Dismiss) for a proper waiver of sovereign immunity. The Court is referred to Article V. POWERS, Section I. Kiowa Indian Council.

Section I. Kiowa Indian Council. Authority to act concerning the following matters shall be vested in the Kiowa Indian Council (all members of the tribe eighteen (18) years of age or older) unless specifically delegated:

- e. Contracts with federal, state or local governments or private firms.
- h. All other powers not vested in the business committee by section 2 of this article shall be retained by the Kiowa Indian Council.

Nowhere in Section 2 is the authority granted for the Business Committee or any other subordinate committee (the KCOA is a subordinate committee of the Kiowa Business Committee) to enter into contracts which waive sovereign immunity.

Whether or not the KBC or any other subordinate board has the right to waive sovereign immunity on behalf of the KIC has been answered many times by the 25 CFR Court of Indian Offenses which acts in some cases as the tribal court but is convened pursuant to the jurisdiction granted in Title 25 Code of Federal Regulations. See Donald Tofpi in his official capacity as Chairman of the Kiowa Tribe et. al. vs. The Honorable Lisa Otipoby, Magistrate Judge of the Court of Indian Offenses, Anadarko , Oklahoma; et al., PO-09- A02, attached hereto as exhibit

“A”, wherein the Appellate Court for the 25 CFR Court found that only the KIC can waive sovereign immunity under the Kiowa Constitution. The Court stated:

“All powers not vested in the KBC, are retained by the Kiowa Tribe acting through the Kiowa Indian Council (KIC). The most significant of the powers retained by the Kiowa Tribe, is the power of the Kiowa Tribe to preserve its sovereign status. Accordingly, the KIC has sole authority to execute a waiver of tribal sovereignty.”

See also Anna Kaulaity et. al. vs. John Bear et. al., CIV-05-A09, attached hereto as Exhibit “B”, in which the Court of Indian Appeals held that only the Kiowa Indian Council could submit the Kiowa Tribe and its officers to the jurisdiction of the Court of Indian Offenses, by an appropriate resolution or ordinance, clearly setting forth a grant of jurisdiction.

**COUNSEL’S ATTEMPT TO SETTLE THE DISPUTE IS NOT A BASIS
FOR WAIVER OF SOVEREIGN IMMUNITY**

Counsel for defendant, CHASCO, implies that somehow KCOA counsel can waive sovereign immunity on the basis of attempting to get all the parties together to reach an amicable settlement of all claims the KCOA has against contactors, subcontractors, engineers, and developers (almost all of which are not before the Court).

Counsel does not deny the KCOA would like to bring all parties to the table for mediation, but not all parties are agreeable. The KCOA finds itself in the position of being unable to bring suit without the permission of the KIC against anyone with whom they have a claim. Rather the KCOA must defend any attempt by any contractor to bring the Kiowa Tribe of Oklahoma into court without the express waiver of the KIC.

The contract before the court is the first step in reaching a binding agreement with regard to the waiver of sovereign immunity. In examining the contract it is obvious that CHASCO was represented by able counsel. A simple reading of the *Kiowa Constitution* would reveal the

necessity of obtaining the consent of the KIC for the waiver of sovereign immunity portion outlined in the contract to become effective. In this case it is apparently not so. The claim of CHASCO must fail and the Motion to Dismiss granted.

KCOA respectfully requests the Court to enter an Order dismissing the joinder claim of CHASCO.

Respectfully Submitted,

s/ RYLAND L. RIVAS

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CERTIFICATE OF SERVICE

This is to certify that on the 26th day of May, 2009, a true and correct copy of the foregoing document was sent via *ECF Filing*, to the following:

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s/RYLAND L. RIVAS

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IN THE COURT OF INDIAN APPEALS FOR THE
KIOWA TRIBE OF INDIANS OF OKLAHOMA
ANADARKO, OKLAHOMA

DONALD G. TOFPI, in his official capacity)
As Chairman of the Kiowa tribe;)
SHARON PENA, in her official capacity as)
Secretary of the Kiowa Tribe;)
TOMMIE LOUISE DOYEBI, in her)
Official capacity as Treasurer of the Kiowa)
Tribe; and DAVID GEIMAUSADDLE,)
RICHARD KAUAHQO, and ALVA D.)
TSOODLE, in their official capacities as)
Members of the Kiowa Business)
Committee,)

Petitioners,)

Vs.)

THE HONORABLE LISA OTIPPOBY,)
Magistrate Judge of the Court of)
Indian Offenses, Anadarko, Oklahoma;)
WALTER F. KUALAITY, M. STEVE)
LITTLEMAN and HERBERT REDBIRD,)

Respondents.)

COURT OF INDIAN OFFENSES
FILED In The
Office Of The Court Clerk

APR 23 2009

DOCKET _____ PAGE _____ RECORDED

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MARGARET L. KOMALTY, Court Clerk

By _____ Deputy

Trial Court Case No.
CIV-09-A12
Appellate Case No.
PO-09-A02

OPINION

This comes before the Appellate Court upon Petitioners' *Application for an Order Assuming Original Jurisdiction and Prohibition* (Application), filed herein on February 19, 2009, prohibiting the Court of Indian Offenses (CFR) from exercising jurisdiction in the case below styled *Walter Kaulaity, et al., (Plaintiffs), vs. Donald Tofpi, et al., (Defendants)*.

On January 29, 2009, the Honorable Lisa Otippoby issued an Order restraining the Kiowa Business Committee (KBC) (hereinafter "Petitioners")

from taking action in connection with the "purported term expiration" of members of the Kiowa Gaming Commissioners (KGC), (hereinafter "Respondents") and from interfering with Respondents' selection and retention of legal counsel.

Once again this Court is confronted with a controversy involving the actions of Kiowa tribal officials. This Court has issued numerous opinions regarding the CFR's authority to intercede in Kiowa governmental disputes. We have consistently held that the limitations set forth in 25 C.F.R. §11.104 (the "Regulation") prohibit this court from exercising its power to address internal governmental disputes, unless and/or until appropriate action is taken by the tribal governing body. See *George Daingkau et al, CIV 06-A03P*.

Respondents assert that if this court declines to hear the matter now before the court, the KGC will be left without a process to enforce the gaming regulations for which they have been delegated the authority to enforce. Respondents further contend that without a means to enforce the gaming provisions, the KGC will be unable to operate an independent gaming facility, as required by law.

Article V of the Kiowa Tribal Constitution delegates significant authority to the KBC, including the authority to promulgate and enforce codes and ordinances governing law and order to protect the peace, health, safety and general welfare within Tribal Jurisdiction, subject to the approval of the Assistant Secretary for Indian Affairs. All powers not vested in the KBC, are retained by the Kiowa Tribe acting through the Kiowa Indian Council (KIC). The

most significant of the powers retained by the Kiowa Tribe, is the power of the Kiowa Tribe to preserve its sovereign status. Accordingly, the KIC has sole authority to execute a waiver of tribal sovereignty.

In order for the Kiowa Tribe to avail itself or allow any of its subordinate bodies access to the CFR, CFR Court, in regard to an internal tribal dispute, the Kiowa Tribe must take the precise action set forth in the Regulations. 25 C.F.R. § 11.104 states in part:

(a) A Court of Indian Offenses may not adjudicate an election dispute, take jurisdiction over a suit against a tribe, or adjudicate any internal tribal government dispute, ***unless the relevant tribal governing body passes a resolution, ordinance, or referendum granting the court jurisdiction.*** [emphasis added]

* * *

(d) A Tribe may not be sued in a Court of Indian Offenses unless its tribal governing body ***explicitly waives*** its trial immunity by tribal resolution or ordinance. [emphasis added]

Unquestionably, the relevant tribal governing body of the Kiowa Tribe is the Kiowa Indian Counsel (KIC) as it is so stated in Article 1, §2. of the Kiowa Tribal Constitution.

Pursuant to the constitutional authority given to the KBC, the KBC enacted the Gaming Ordinance of 1995, as revised by the Amended and Restated Gaming Ordinance of 2005 (2005 Ordinance). Recognizing the need for an independent and autonomous Gaming commission, the KBC stated in Article 8(a)(2) of the 2005 Ordinance:

[T]he tribe recognizes the importance of an independent gaming commission in maintaining a well-regulated gaming facility. The Commission shall act independently and autonomously from the Business Committee in all matters within its purview.

Article 2 of the 2005 Ordinance sets forth the powers of the KBC to enact laws and regulations pertaining to gaming operations on Tribal lands. Article 8 of the 2005 Ordinance establishes the KGC and sets forth the powers and duties of the KGC. While the powers granted to the KGC are broad, they are limited by the Kiowa Constitution and provisions contained in the 2005 Ordinance. Article 8 of the 2005 Ordinance recognizes that the KGC, as a department of the Tribe, enjoys and exercises the Tribe's sovereign powers and immunities, subject to any restrictions in the Tribal Constitution and in the 2005 Ordinance. The KGC is given authority to enforce provisions of the 2005 Ordinance and is given authority to regulate certain civil and criminal conduct, including limited authority to bring an action in CFR court. Section 8(j)(6) of the 2005 Ordinance grants the KGC power to waive its sovereign immunity in ***specific instances*** but ***explicitly*** provides that the KGC cannot waive Tribal immunity.

General oversight of the KGC is retained by the KBC, who also retain authority to remove gaming commissioners under certain circumstances.

On June 18, 1994, Election Ballot 94-A-5 was submitted to the KIC. Election Ballot 94-A-5 states:

"Shall the Kiowa Indian Council approve the Kiowa Tribal Gaming Ordinance." * This Ordinance is to authorize,

license, and regulate Class II and Class III gaming on Tribal Land of the Kiowa Indian Tribe of Oklahoma.*
(Insertion by Kiowa Election Board).

Yes 346 No 190 no votes.

Respondents submit that this Court must take jurisdiction over the dispute that has arisen between the KBC and the KGC, unless the Court's "lack of jurisdiction is clear and indisputable."

The CFR is created by Regulation and possesses only such authority as is set forth in the Regulations. The Court's authority is likewise limited by the Regulations.

Although there are a multitude of issues presented in the case before this Court, we must first determine if the Regulations authorize the Court to intervene in the dispute between the KBC and the KGC. The Regulations authorize this Court to hear the dispute, only if the relevant Tribal authority has explicitly waived its tribal sovereignty.

This Court has not been presented with any authority demonstrating that the KIC has taken action by resolution or otherwise to waive its sovereignty or to delegate their authority to waive tribal sovereignty to the KBC.

Did the KIC, in connection with Election Ballot 94-A-5, **wave** tribal immunity so as to allow the KGC to pursue an action in the CFR against the KBC? I would answer that question in the negative. Election Ballot 94-A-5 approves an Ordinance authorizing, licensing, and regulating Class II and Class

III gaming on Tribal Land. It does not contain language that **explicitly waives** tribal immunity as required by the Regulations.

There are immediate and pressing issues and/or problems that the Kiowa Tribe must address in order to operate an independently functioning gaming operation, as required by law. This Court is not unsympathetic as to the severity and the enormity of these problems faced by the KGB, but we cannot provide the KGB with a quick fix.

Until or unless the KIC **explicitly** passes a resolution, ordinance, or referendum granting this court jurisdiction to hear internal tribal governmental disputes, the CFR is without subject matter jurisdiction to hear this matter.

IT IS SO ORDERED THIS 23 DAY OF April, 2009

Signed. O. Ron McGee

Magistrate

Signed. Rebecca Cryer

Magistrate

Signed. Clifford B. Shilling

Magistrate

I HEREBY CERTIFY THAT THE FOREGOING IS A TRUE AND CORRECT AND COMPLETE COPY OF THE INSTRUMENT HEREWITH SET OUT AS IT APPEARS ON RECORD IN THE COURT CLERK'S OFFICE OF INDIAN OFFENSES, SOUTHERN PLAINS REGION TRIBES

Witness my hand and seal

of

MARGARET L. KOWALTY COURT CLERK

By:

Deputy

COURT OF INDIAN OFFENSES FOR THE KIOWA TRIBE
ANADARKO, OKLAHOMA

ANNA KAULAITY,
THURMAN KAULAITY,
ROBERT M. THOMPSON, and
EARL YEAHQO,

Plaintiffs,

vs.

Case No. CIV-05-A09

JOHN BEAR, KAREN PURLEY,
DEWAYNE DAVIS, CAROL
DeLEON, MARTHA KOOMSA
PEREZ, HELEN POOLAW,
JOYCETTA BEAR ELLIOT,
JACOB AHTONE, CAROLINE
NECONIE WOOSTER, and
ERNESTINE KUALAY,

Defendants.

COURT OF INDIAN OFFENSES
FILED In The
Office Of The Court Clerk

JUL 08 2005

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IN JOURNAL _____ ON PAGE _____
MARGARET L. KOMALTY, Court Clerk
By _____ Deputy

ORDER

On this the 6th day of July, 2005, the Motions of the parties filed herein came on for decision before me, the undersigned Judge, the parties having submitted pleadings and briefs herein.

The Court notes that on June 8, 2005, all parties, by and through their counsel of record, stated that the Kiowa Business Committee had complied with 25 CFR 11.104(b) by passing its resolution wherein this Court had authority to adjudicate election disputes and adjudicate internal tribal government disputes. Counsel for defendants specifically asserted that he was representing the "tribe" and not "a group" of defendants; that this Court had jurisdiction via the Kiowa Business Committee resolution.

Based on the parties' acknowledgment in open court of this Court's authority, the Court entered several rulings after negotiations by the parties. Plaintiffs now seek the enforcement of those

EXHIBIT "B"

rulings ; Defendants now submit that the Kiowa Business Committee is not the "tribal governing body" as provided for in 25 CFR 11.104(b); Defendants seek dismissal of this lawsuit via the Kiowa Constitution, claiming the Kiowa Indian Council is the "tribal governing body" as set forth in the regulation providing jurisdiction to CFR Courts

Section 5 of Article V, provides as follows:

"Section 5. Reserve Power Clause. Any right and power heretofore vested in the Kiowa Indian Tribe but not expressly referred to in this constitution shall not be abridged by this article, but may be exercised by the members of the Kiowa Indian Council through the adoption of appropriate amendments to this constitution and bylaws.

By this Article, all powers, NOT expressly vested in the business committee are reserved to the Kiowa Indian Council."

The parties agreement of June 8, 2005, that jurisdiction existed was due to a resolution passed by the Kiowa Business Committee.* Plaintiffs argue that the time of filing controls as to jurisdiction, relying upon *Grupo Dataflux v. Atlas Global Group*, 541 U.S. 567, 570-571 (2004); that the existence of subject matter jurisdiction is determined as of the time the complaint is filed. *Navarro Sav. Ass'n v. Lee*, 446 U.S. 458, 459 n.1 (1980). Plaintiffs argue that subsequent actions of the Kiowa Business Committee purporting to rescind this resolution should be of no consequence.

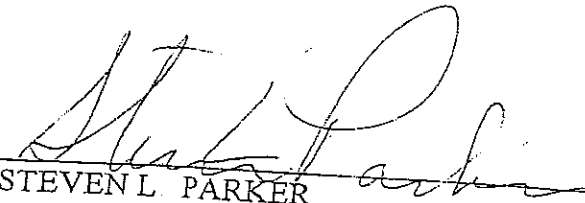
This Court agrees with Plaintiffs as concerns the actions of the Kiowa Business Committee. The question remains, however, whether, notwithstanding agreement by the attorneys for both sides that jurisdiction existed, whether jurisdiction did exist at the time of the commencement of the action.

The Court finds that the Constitution provides that in all matters not specifically provided

* Counsel for defendants has filed a Motion to Withdraw stating a potential conflict of interest and as he consented to jurisdiction, and acknowledged that there was jurisdiction, it appears he does have a conflict of interest

in the Constitution that the Kiowa Indian Council is the "tribal governing body" and, as such, must consent to jurisdiction as required by 25 CFR 11.104. Thus, absent action by the Kiowa Indian Council ceding authority to this Court as provided in 25 CFR 11.104, the Court has no jurisdiction.

The Court vacates its Order of June 8, 2005, and orders the case dismissed.


STEVEN L. PARKER
Judge