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

Veronica Muhammad,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 09-0968-D
	)	
Comanche Nation Casino,	)	Removed from the District Court of
	)	Comanche County, State of Oklahoma,
Defendant.	)	No. CJ-2009-751

Comanche Nation Casino's Motion to Dismiss and Brief in Support

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September 9, 2009

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Defendant Comanche Nation Casino ("Nation") respectfully requests the Court to dismiss this action under Fed. R. Civ. P. 12(b)(1) and 12(b)(6). Federal law prohibits State courts from exercising jurisdiction over civil actions arising in Indian country against Indian tribes, absent Congressional authorization. The Oklahoma District Court of Comanche County ("State Court") lacks subject-matter jurisdiction because the State has not acquired jurisdiction over such actions. The State Court also lacks subject-matter jurisdiction because the Nation has not waived its sovereign immunity. Further, Plaintiff Veronica Muhammad fails to state a claim on which relief can be granted because she has filed this tort action without exhausting her tribal administrative remedies and has expressly consented to exclusive tribal court jurisdiction. The Court should, therefore, dismiss this action.

Background

Muhammad alleges that on April 10, 2007, she was injured at the Comanche Nation Casino. (Doc. 1-2, ¶ 1). The Casino—a wholly owned business enterprise of the Comanche Nation, a federally recognized Indian tribe—is located in Lawton, Oklahoma, on land held in trust by the United States for the Comanche Nation's benefit. The Comanche Nation Gaming Board, an arm of the Comanche Nation established by the federally approved Comanche Nation Gaming Ordinance (Ex. 1, hereto), operates the Casino. The land on which the Casino sits constitutes "Indian country" over which the Nation exercises governmental authority. 18 U.S.C. § 1151 (defining "Indian country"). Indian country includes "Indian lands" on which tribal government gaming facilities may be located. 25 U.S.C. § 2703(4)(B) (defining "Indian lands").

According to Muhammad, the Nation's negligence in maintaining its premises caused her injury. (Doc. 1-2, ¶¶ 3, 4). Muhammad initiated a tort claim under the mandatory tribal administrative process (Doc. 1-6), but failed to appear for her June 17, 2009, determination hearing, resulting in a voluntary withdrawal of her claim. (Doc. 1-7, 1). On July 24, 2009, Muhammad filed a tort action in the State Court. (Doc. 1-2). On September 1, 2009, the Nation removed the action to this Court. (Doc. 1).

Arguments and Authorities

1. The State Court lacks subject-matter jurisdiction over Muhammad's action.

A. Federal law prohibits Oklahoma courts from exercising jurisdiction over Muhammad's action.

Federal law prohibits states from exercising jurisdiction over civil actions arising in Indian country against Indians. Williams v. Lee, 358 U.S. 217, 222 (1959); Act of Aug. 15, 1953, Pub. L. 83-280, 67 Stat. 588 (repealed and reenacted in 1968) (codified as amended at 18 U.S.C. § 1162, 25 U.S.C. § 1321–26, and 28 U.S.C. § 1360) (commonly referred to as "Public Law 280"). See also Cohen's Handbook of Federal Indian Law § 7.03[2][a] (Nell Jessup Newton et al. eds., 2005 ed.). The only means for states to acquire such jurisdiction is Congressional authorization. The current jurisdiction-shifting statute, Public Law 280, requires tribal consent for any expansion of state jurisdiction into Indian country. 25 U.S.C. § 1326. Oklahoma has not acquired jurisdiction over civil actions against the Nation through any Congressionally approved process. Nor has the Comanche Nation approved any State acquisition of jurisdiction within its territory.

The State Court, therefore, has not acquired jurisdiction over Muhammad's action. The Nation's tribal court has exclusive jurisdiction over it. See Williams 358 U.S. at 223 (finding that "to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves"). Though the Supreme Court has authorized state courts to hear civil actions arising in Indian country **against non-Indians**, it has

repeatedly found that state-court jurisdiction over claims against Indians impermissibly intrudes on tribal self-governance. See, e.g., Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, P.C., 467 U.S. 138, 148 (1984).

State courts' lack of jurisdiction over Muhammad's action is not merely a matter of tribal sovereign immunity from suit, but a fundamental gap in the State's jurisdictional competence. See Blatchford v. Native Village of Noatak, 501 U.S. 775, 786 n.4 (1991) (explaining that sovereign immunity and jurisdiction are "wholly distinct concepts that should not be conflated"). The gap derives from the Indian Commerce Clause of the U.S. Constitution, Const. art. I, § 8, which gives Congress plenary authority over Indian tribes and Indian country. See United States v. Lara, 541 U.S. 193, 200 (2004). The Indian Commerce Clause divests the states of "virtually all authority over Indian commerce and Indian tribes." Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 62 (1996).

In an exercise of this authority, Congress conditioned Oklahoma's entry into the union on disclaiming jurisdiction over in Indian country. The Oklahoma Enabling Act prohibits the State Constitution from "limit[ing] or affect[ing] the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property or other rights." Act June 16, 1906, 34 Stat. 267–78.

The Oklahoma Constitution contains the required disclaimer. Article I, Section 3, "forever disclaims" all rights to tribal lands and agrees that "until the title to any such public land shall have been extinguished by the United States, the same shall be and remain subject to the jurisdiction, disposal and control of the United States." Federal courts have recognized that the Enabling Act preserves federal and tribal jurisdiction in

Indian country, exclusive of the State. See, e.g., Indian Country U.S.A. v. Oklahoma ex rel Okla. Tax Comm'n, 829 F.2d 967, 976–81 (10th Cir. 1987) cert. denied 487 U.S. 1218 (1988) (holding that State had not acquired jurisdiction over Creek Nation's Indian country); Muscogee (Creek) Nation v. Hodel, 851 F.2d 1439, 1446 (D.C. Cir. 1988) (noting that "under current law, Oklahoma has no jurisdiction over Indians" in Indian country).

(i) Oklahoma has not acquired Public Law 280 jurisdiction over Muhammad's action.

Congress has enacted Public Law 280 to allow states to acquire jurisdiction over civil actions arising in Indian country against Indians. But Oklahoma has not taken the steps necessary to complete the Public Law 280 process. See United Keetoowah Band of Cherokee Indians v. Oklahoma ex rel. Moss, 927 F.2d 1170, 1178 n.17 (10th Cir. 1991). ("There is no indication that Oklahoma has ever acted pursuant to this Act to assume jurisdiction."). To acquire Public Law 280 jurisdiction, Oklahoma would have to: (1) amend its Constitution to repeal the disclaimer of jurisdiction over Indian country; (2) take legislative action assuming jurisdiction over civil actions arising in Indian country against Indians; and (3) obtain the consent of the affected tribe or tribes through a federally administered Secretarial election in which a majority of voting tribal members approves the State's acquisition of jurisdiction. See 25 U.S.C. §§ 1322, 1324, and 1326; Kennerly v. District Court, 400 U.S. 423, 428 (1971). Since Oklahoma has not done so, the State Court cannot rely on Public Law 280 as a basis for taking jurisdiction.

(ii) Oklahoma has not acquired jurisdiction over Muhammad's action by virtue of the Indian Gaming Regulatory Act.

Indian gaming derives from tribal governments' inherent authority over their territory. In 1987, the U.S. Supreme Court upheld the tribes' authority to authorize, regulate, and conduct gaming within their jurisdictions. California v. Cabazon Band of Mission Indians, 480 U. S. 202 (1987). The next year, Congress passed the Indian Gaming Regulatory Act, Pub. L. No. 100-497, 102 Stat. 2467 (Oct. 17, 1998) (codified at 18 U.S.C. §§ 1166–1168, 25 U.S.C. §§ 2701–2721) (referred to herein as the "Act"), which limited tribal gaming to traditional games (Class I games) and bingo and games similar to bingo (Class II games). 25 U.S.C. § 2710(a). The Act's purpose was to enable tribes to build strong tribal governments. 25 U.S.C. §§ 2701(5), 2702(1).

Before engaging in slot-machine and other Las Vegas style gaming (Class III games), the Act requires tribes to negotiate a compact with the state in which the gaming will take place. 25 U.S.C. § 2710(d)(3). Compacts must be approved by the Secretary of the Interior. 25 U.S.C. § 2710(d)(3)(B). During 2003 and 2004, Oklahoma's Executive Branch and representatives of several Indian tribes negotiated the terms and provisions of what would become the Model Tribal Gaming Compact. See Affidavits of Governor Brad Henry and State Treasurer Scott Meacham. (Docs. 1-7 and 1-8). Oklahoma voters approved the Compact in model form. State Question No. 712, Legis. Referendum No. 335 (Nov. 2, 2004). The Comanche Nation executed the Compact on November 6, 2004, (Doc. 1-4, 56), and the Secretary approved it. 70 Fed. Reg. 3942 (Jan. 27, 2005). The

Compact authorized the play of certain Class III games, and provided that nothing in its terms would alter State or tribal courts' civil jurisdiction. (Doc. 1-4, pts. 4, 9).

In the Act, Congress only authorized the states to receive a very **limited** civil jurisdiction over Indian country only through express agreement with a tribe via the tribal-state compacting process. 25 U.S.C. § 2710(d)(3)(C)(ii) (permitting compacts to allocate civil jurisdiction "necessary for the enforcement" of laws "that are directly related to, and necessary for, the licensing and regulation of [gaming] activity"). Jurisdiction to adjudicate torts is far removed from the type of jurisdiction Congress contemplated[1] when it allowed tribes and states to allocate jurisdiction "necessary for the enforcement" of laws "directly related to, and necessary for, the licensing and regulation of [gaming] activity." Id.

No federal court has found that this provision authorizes State courts to acquire civil jurisdiction over tort actions.[2] The federal government's view seems to be that the

[1] Congress was concerned with keeping organized crime out of Indian country, 25 U.S.C. § 2702(2), and wanted States with experience in regulating gaming activities to be allowed to acquire the jurisdiction necessary to do so in Indian country. But Congress also wanted to protect Indian tribal governments from the encroachment of State governments into Indian country. As a result, this restrictive provision was created. In Oklahoma, however, the situation was reversed. At the time the Compact was negotiated, the tribes had established themselves as successful regulators of lucrative Class II gaming operations, whereas the State had no institutional structures for regulating gaming. Thus, the Oklahoma Compact does not allocate a regulatory role to the State, but rather only requires certain reporting by tribes to the State.

[2] Compare Doe v. Santa Clara Pueblo, 154 P.3d 644, 652–55 (N.M. 2007) (finding that the Act authorized New Mexico courts to acquire civil jurisdiction over tort actions against tribes through the compacting process). Unlike the Oklahoma Compact, the Pueblo's compact included an agreement to apply State tort law and expressly included state courts within the definition of "courts of competent jurisdiction" capable of hearing tort claims. Id. at 647, 655.

Act does not authorize State courts to acquire jurisdiction over tort actions. In 2000, the Department of the Interior issued a letter explaining that the Act's "authorization for the allocation of civil jurisdiction would not extend to a patron's tort claim because it is an area that is not directly related to, and necessary for, the licensing and regulation of class III gaming activity."[3]

To the extent that the Act's provision authorizing the shifting of limited jurisdiction is ambiguous, it must be interpreted through the prism of the Indian law canon of construction that statutes enacted for the benefit of an Indian tribe must be liberally construed with ambiguous provisions resolved in favor of the tribe. See, e.g., Bryan v. Itasca County, 426 U.S. 373, 392 (1976). The Act does not authorize tribes to give state courts jurisdiction over tort actions arising in Indian country through a Class III gaming compact, at least not expressly and certainly not unambiguously. Rather, the Act leaves the Public Law 280 procedure for state acquisition of such jurisdiction in place.

Even if the Act were read to imply authority by the compacting parties to give State courts jurisdiction over tort claims, the State and the Nation have expressly agreed that their Compact does not do so. Part 9 of the Compact provides: "This Compact **shall not alter** tribal, federal or **state civil adjudicatory** or criminal **jurisdiction**." (emphasis added). See also Affidavits of Governor Brad Henry and State Treasurer Scott Meacham (Docs. 1-7 and 1-8). Since, as a matter of federal law, State courts lacked jurisdiction over claims like Muhammad's when the Compact was approved, and the Compact

[3] See Doe, 154 P.3d at 655.

prohibits any alteration of State court jurisdiction, the State Court cannot exercise jurisdiction over Muhammad's action.

B. The Nation has not waived its immunity from Muhammad's State Court action.

The doctrine of tribal sovereign immunity from suit shields the Nation and its business enterprises from civil actions. See Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978). ("Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers."). Absent an express tribal waiver or congressional abrogation, an Indian tribe is shielded from suit by sovereign immunity and that immunity extends to governmental and commercial activities whether arising in or outside Indian country. See Kiowa Tribe of Okla. v. Mfg. Techs., Inc., 523 U.S. 751, 760 (1998); Native American Distrib. v. Seneca-Cayuga Tobacco Co., 546 F.3d 1288 (10th Cir. 2008) (finding that tribal sovereign immunity shields a tribal business enterprise).

"[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)). "Tribal sovereign immunity is a matter of subject matter jurisdiction." Miner

Elec., Inc. v. Muscogee (Creek) Nation, 505 F.3d 1007, 1009 (10th Cir. 2007). It "is deemed to be coextensive with the sovereign immunity of the United States," Id. at 1011. See also Walton v. Tesuque Pueblo, 443 F.3d 1274, 1277 (10th Cir. 2006) ("Indian tribes possess the same immunity from suit traditionally enjoyed by sovereign powers.").

In the Compact, the Nation agreed to a limited waiver of sovereign immunity for tort claims, provided that (1) the waiver extends only to suits in a "court of competent jurisdiction" (Doc. 1-4, pt. 6(C)) and (2) the claimant first exhausts a tribal administrative process. (Doc. 1-4, pt. 6(A) and 6(C)). The State Court cannot be a "court of competent jurisdiction" under this limited waiver of immunity because Part 9 prohibits the Compact from expanding the State Court's preexisting jurisdiction. The Nation's limited waiver of sovereign immunity, therefore, does not extend to Muhammad's State Court action. The Nation's tribal court, however, is a court of competent jurisdiction for purposes of the Compact's limited waiver. Had Muhammad properly exhausted her tribal administrative remedies and filed the action in the Nation's tribal court, the limitation would be effective and the Nation would be barred from raising its immunity defense.[4] Muhammad has not filed an action in tribal court.[5] But before doing so she would be required to exhaust her tribal administrative remedies.

[4] The Compact does not incorporate State tort law, but suggests that the parties contemplated that tribal tort law would apply, just as it would have before the Compact. The tribal administrative remedy of Part 6(A) is to be established by the tribes.

[5] The Comanche Nation exercises its judicial authority through the federally administered Court of Indian Offenses for the Comanche Nation located in Anadarko, Oklahoma. 25 C.F.R. § 11.100(b)(3).

As required by the Compact, Muhammad initially pursued her tort claim under the Nation's administrative process, the requirements of which appear in Part 6(A) of the Compact (Doc. 1-4) and the Nation's Tort Claim Regulations (Doc. 1-5). Muhammad initiated her action by filing a Tort Claim Form with the Nation. (Doc. 1-6).[6]

The Compact's waiver of immunity requires a denial of her tort claim by the Nation. (Doc. 1-4, pt. 6(A)(9)(b)). Otherwise, the waiver is not effective. (Doc. 1-4, pt. 6(C)). When a claimant fails to appear for an interview or deposition required by the tribal administrative rules and regulations, her claim is deemed voluntarily withdrawn—not denied. (Doc. 1-4, pt. 6(A)(7)). Here, the Nation's rules and regulations require an appearance at a determination hearing before the Gaming Commission Executive Director. (Doc. 1-5 § 303(c)). Failure to appear for the determination hearing constitutes a voluntary withdrawal. (Id.). Muhammad failed to appear for her determination hearing and failed to provide any justification for her absence. Accordingly her tort claim was voluntarily withdrawn. (Doc. 1-7). (Id.).

A voluntary withdrawal of an administrative action is not a denial. See e.g., Vinieratos v. U.S. Dept. of Air Force, 939 F.2d 762, 770–71 (9th Cir. 1991). Since her tort claim was not denied, her cause of action falls outside the scope of the Nation's limited waiver of sovereign immunity. The Nation has not waived its immunity for actions by tort claimants who have voluntarily withdrawn from the tribal administrative process. Without an effective waiver of the Nation's sovereign immunity, the State Court

[6] In this Tort Claim Form, Muhammad expressly consents to the exclusive jurisdiction of the Nation's courts for any resulting civil action. (Doc. 1-6, 3).

lacks subject-matter jurisdiction over Muhammad's action. Accordingly, the action should be dismissed.

C. Oklahoma State Supreme Court decisions finding that State courts have jurisdiction over similar actions against other tribes have been overturned by a Compact Arbitration Award.

The Oklahoma Supreme Court, in three badly divided cases involving other tribes, has found that State courts have jurisdiction over tort actions similar to Muhammad's. Cossey v. Cherokee Nation Enters., LLC, 2009 OK 6, 212 P.3d 447 (Jan. 20, 2009); Griffith v. Choctaw Casino of Pocola, 2009 OK 51; ___ P.3d ___, 2009 WL 1877899 (opinions filed June 30, 2009, but not yet released for publication); Dye v. Choctaw Casino of Pocola, 2009 OK 52, ___ P.3d ___, 2009 OK 52 (opinions filed June 30, 2009, but not yet released for publication). These decisions—by the judicial branch of one of the two sovereigns that are parties to the Compact—contradict federal law barring State jurisdiction over Indian country. Oklahoma has a history of attempting to extend its jurisdiction into Indian country in violation of federal law.[7] Application of the Oklahoma Supreme Court's analysis to Muhammad's action would unlawfully extend the State's civil jurisdiction over the Nation's Indian country.

[7] See, e.g., Kiowa Tribe of Okla. v. Mfg. Techs., Inc., 523 U.S. 751 (1998) (reversing State court exercise of jurisdiction over creditor action); Kiowa Tribe of Okla. v. Hoover, 525 U.S. 801 (1998) (vacating State decision wherein State exercised jurisdiction over breach-of-contract action against Indian tribe); Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 450 (1995) (holding that State cannot tax motor fuels sold by Indian tribe in Indian country); Okla. Tax Comm'n v. Sac and Fox Nation, 508 U.S. 114 (1993) (holding that Oklahoma cannot tax income or motor vehicles of Indians residing in Indian country).

The Cossey decision included a four Justice plurality, which found that Oklahoma courts have **exclusive** jurisdiction over tort claims against Indian tribes arising in Indian country, and that such jurisdiction does not derive from the Compact itself. 212 P.3d at 452, 460. The plurality recognized that the State had not acquired Public Law 280 jurisdiction, but viewed tort claimants as having a right under the Oklahoma Constitution to sue Indian tribes in State court. Id. at 460.[8] The one-justice concurrence found a tribal consent to State court jurisdiction in the Compact itself, interpreting the phrase "court of competent jurisdiction" as including State courts and disregarding Part 9's prohibition on the expansion of State court jurisdiction. Id. at 469. In Griffith and Dye,[9] the Oklahoma Supreme Court assembled a five Justice majority that treated the Compact as a State law—not as an agreement between two sovereigns. Although the terms of the State's Model Compact offer are enacted as a State statute, 3A Okla. Stat. § 281, the terms are not effective unless and until an Indian tribe executes the Compact and the Secretary of the Interior approves the executed Compact and publishes it in the Federal Register. The Griffith and Dye majorities found that the phrase "court of competent jurisdiction" in the limited sovereign-immunity waiver includes State courts in addition to tribal courts. Griffith, 2009 OK at ¶¶ 24–27 (per curium).

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[8] The plurality relied to some extent on its decision in Lewis v. Sac and Fox Tribe Housing Authority, 1994 OK 20, 896 P.2d 503, in which it found that it had jurisdiction over an action for specific performance by purchasers of a Housing Authority mutual help home to convey title to the mineral estate. Lewis is easily distinguishable from Muhammad's action, however, because the tribal Housing Authority was a state agency, not a tribal entity, and because the property was determined not to be Indian country. Id. at 513

[9] Dye contains no independent reasoning of its own, but refers to the Court's decision in Griffith.

Following Cossey, the Chickasaw Nation and Choctaw Nation invoked the Compact's dispute resolution process with the State. See Arbitration Award, Appx. 1 n.1 (Aug. 25, 2009) (Ex. 2, hereto). Part 12 of the Compact provides for disputes "over the proper interpretation of the terms and conditions of this Compact" to be referred to arbitration. (Doc. 1-4, pt. 12(2)). The State, the Chickasaw Nation, and the Choctaw Nation jointly referred the dispute to the Hon. Layn R. Phillips, a former federal district court judge, as sole arbitrator. (Ex. 2 at Appx. 1 n.1). The parties asked the arbitrator to interpret Part 6 and Part 9 of the Compact to determine whether State courts have jurisdiction over tort actions against tribes. (Id.). The arbitrator interpreted the Chickasaw and Choctaw Nations' Compacts—which contain terms identical to the Comanche Nation's Compact at issue in this action—and determined that (1) State courts are not courts of competent jurisdiction under the Compact, and (2) the Compact did not waive the tribes' sovereign immunity from tort actions in State court. (Ex. 2 at 18, 20–21).

Under the Compact's dispute-resolution provision, the Arbitration Award binds the State and precludes the State Court from exercising jurisdiction over Muhammad's action.

2. Muhammad has failed to state a claim on which relief can be granted.

A. Muhammad has failed to state a claim on which relief can be granted because she has failed to exhaust her tribal administrative remedies.

Under the Compact, any patron with a tort claim for an accident arising at a tribal gaming facility must file a written tort claim form with the facility within one year of an

accident. (Doc. 1-4, pt 6(A)(4)). Muhammad's form was filed with the Comanche Nation Gaming Commission on March 14, 2008. (Doc. 1-6). Muhammad claims damages for injuries allegedly suffered from a fall while playing a gaming machine at the Comanche Nation's Lawton, Oklahoma, facility located on land held in trust for the Nation.

The Compact requires the Nation to review the claim and to make an administrative determination for resolving the claim. In this case, an administrative determination hearing was set with notice to all parties for June 17, 2009, at the Comanche Nation. This hearing was set pursuant to the federally approved process as provided in the Compact and the Comanche Nation's administrative regulations which follow the Compact and afford administrative due process to any claimant. (Doc. 1-4, pt. 6(A), Doc. 1-5). Even though Muhammad received notice of her opportunity to be heard, she did not appear at the duly scheduled hearing and the Executive Director entered an order of voluntary withdrawal pursuant to tribal regulations. (Doc. 1-7) On July 24, 2009, Muhammad then filed the instant action in the District Court of Comanche County.

Muhammad's failure to exhaust the federally approved tribal administrative process as afforded in the Compact constitutes a violation of the Compact itself. No judicial proceeding may be maintained by any claimant until that claimant has exhausted available tribal administrative remedies.

> A judicial proceeding for any cause arising from a tort claim may be maintained in accordance with and subject to limitations of subsection c of this part **only** if the following requirements have been met: (a) the claimant has followed all procedures required by this part including, without

> limitation, delivery of a valid and timely written tort claim notice to the enterprise; (b) **the enterprise has denied the tort claim**; and (c) the claimant has filed a judicial proceeding no later than the 180th day after denial of the claim by the enterprise; provided, that neither the claimant nor the enterprise may agree to extend the time to commence a judicial proceeding.

Compact pt. 6(A)(9) (emphasis added).

Muhammad's failure to appear at the duly scheduled determination hearing constituted a withdrawal of her claim before the Nation had an opportunity to fulfill its administrative obligation under the Compact. Her subsequent action of filing the claim in the State court has resulted in a failure to exhaust available tribal administrative remedies as required by the Compact. The requirement that a claimant exhaust tribal administrative remedies is mandatory under the federally approved Compact. Federal courts have recognized that a voluntary withdrawal of an administrative process amounts to a failure to exhaust administrative remedies. See Vinieratos, 939 F.2d at 770–71 (reviewing decisions holding that "abandonment of the administrative proceeding may suffice to terminate an administrative proceeding before a final disposition is reached, thus preventing exhaustion and precluding judicial review). "[O]nce a party appeals to a statutory agency, board or commission, the appeal must be 'exhausted.' To withdraw is to abandon one's claim, to fail to exhaust one's remedies. Impatience with the agency does not justify immediate resort to the courts. We think this rule is sound." Rivera v. United States Postal Service, 830 F.2d 1037 (9th Cir. 1987) cert. denied, 486 U.S. 1009 (1988).[10]

[10] Additionally, the courts of several other states have adopted the federal-law doctrine that tribal-court remedies must be exhausted. See Nat'l Farmers Union Ins. Cos. v. Crow

Muhammad voluntarily withdrew her tribal administrative tort claim on June 17, 2009, by failing to appear at a scheduled administrative hearing, for which she had 51 days' notice. (Doc. 1-7, 2). She has, therefore, failed to state a claim on which relief can be granted.

B. Muhammad has failed to state a claim on which relief can be granted because she has expressly agreed to the exclusive jurisdiction of the Nation's tribal court.

When Muhammad filed her administrative tort claim, she signed a verification and consent form, in which she expressly consented to the jurisdiction of the Comanche Nation for the resolution of her administrative tort claim, and to the **exclusive** jurisdiction of the Comanche Nation's tribal court for resolution of any judicial review of the claim. The consent provides:

> Furthermore, I hereby consent to the exclusive civil jurisdiction of the Comanche Nation for the resolution of this Claim and consent to the exclusive civil jurisdiction of the Court of Indian Offenses, pursuant to 25 C.F.R. § 11.103, (or such other tribal court established by the Comanche Nation for such purpose) as the exclusive court forum for the adjudication of this claim.

(Doc. 1-6, 3).

Similar forum-selection clauses have been upheld by the U.S. Supreme Court. Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991). In Shute, the Court

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Tribe, 471 US 845 (1985); Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9 (1987). In these states, where—unlike Oklahoma—state and tribal courts have concurrent jurisdiction over certain civil actions, a plaintiff must exhaust tribal court remedies before the state courts will take jurisdiction as a matter of comity. See Cohen's Handbook of Federal Indian Law §§ 6.04[3][c], 7.04[3]. If it is ultimately determined that the State Court has jurisdiction over Muhammad's claim, and that Muhammad has properly exhausted her tribal administrative remedies, a similar tribal court exhaustion rule should be applied.

recognized that forum-selection clauses are subject to judicial scrutiny for fundamental fairness. Here, the claims are against the Nation and arise within the Nation's jurisdiction. It is appropriate for the Nation's courts to adjudicate them. Further, the federal government has a long-standing policy of supporting the development and functioning of tribal courts. The U.S. Supreme Court has rejected challenges to tribal court jurisdiction based on "local bias and incompetence." Iowa Mutual, 480 U.S. at 18–19 (explaining that such arguments violate Congress' policy promoting the development of Tribal courts). "Congress and the Federal courts have repeatedly recognized tribal justice systems as the most appropriate forums for the adjudication of disputes affecting personal and property rights" in Indian country. 25 U.S.C. § 3651(6).

Muhammad failed to exhaust her tribal administrative remedies, and, therefore, has not stated a claim for which relief can be granted.

Conclusion

Muhammad filed an action in State Court against the Nation seeking compensation for an alleged personal injury. There is no dispute that the injury, if any, arose in Indian country. State courts lack jurisdiction over civil actions in Indian country unless acquired through Congressional authorization. Oklahoma courts have not acquired Public Law 280 jurisdiction over Muhammad's claim. The Indian Gaming Regulatory Act does not authorize State courts to acquire jurisdiction over tort actions against Indian tribes. The Compact provides that it shall not alter State courts'

preexisting jurisdiction. Accordingly, the State Court lacks subject-matter jurisdiction over Muhammad's action.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 9, 2009, I electronically transmitted the attached document to the Clerk of the Court using the ECF System for (1) filing and (2) transmittal of a Notice of Electronic Filing to the following ECF registrants:

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I hereby certify that on September 9, 2009, I served the attached document by first-class mail, postage pre-paid, on the following, who are not registered in the ECF system for this case:

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