

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

**UNITED STATES OF AMERICA FOR
THE USE AND BENEFIT OF MORGAN
BUILDINGS & SPAS, INC. a Nevada
corporation, and MORGAN BUILDINGS
& SPAS, INC., a Nevada corporation**

Plaintiffs,

v.

**IOWA TRIBE OF OKLAHOMA d/b/a
BKJ SOLUTIONS, a federally-recognized
Indian Tribe, et. al.**

Defendants.

Case No. CIV-09-730-M

**IOWA TRIBE OF OKLAHOMA’S RENEWED MOTION TO DISMISS
FOR LACK OF SUBJECT MATTER AND PERSONAL JURISDICTION
AND FOR FAILURE TO STATE A CLAIM
AND BRIEF IN SUPPORT**

COMES NOW Defendant, the Iowa Tribe of Oklahoma, a federally recognized Indian Tribe (the “Tribe”), and, pursuant to the Court’s February 16, 2010 *Order* (Doc. 40)¹, and Fed.R.Civ.P. Rule 12(b)(1), (2) and (6) respectfully submits this Motion to Dismiss for Lack of Subject Matter and Personal Jurisdiction and for Failure to State a

¹ This Court’s February 16th Order denied the Defendant’s motion to dismiss “at this time” to allow Plaintiff, Morgan Building & Spas, to “conduct whatever discovery is necessary on this issue.” On March 1, the parties filed an *Agreed Schedule for Discovery and Further Pleadings* (Doc. 41) setting forth a discovery and briefing schedule. On June 22, the parties filed a *Joint Motion for Extension & Continuance* (Doc. 53) requesting an extension of the discovery and briefing schedule. On June 23, the Court entered an *Order* (Doc. 54) extending until August 30th, the time for Defendant to file its renewed motion to dismiss.

Claim upon which relief can be granted. In support of this Motion to Dismiss, the Tribe states as follows:

I.

Introduction

Plaintiff, Morgan Buildings & Spas, Inc.'s ("Morgan"), filed suit for alleged breach of contract against the "Iowa Tribe of Oklahoma d/b/a BKJ Solutions". Attached to Morgan's *Complaint* (Doc. 1) were four exhibits. Each exhibit listed the Contractor as "BKJ Solutions, Inc." No exhibit referenced the "Iowa Tribe of Oklahoma" either as an entity or as "d/b/a BKJ Solutions."

Morgan has essentially, and actually, alleged that the Tribe does business under the name BKJ Solutions, Inc. and that while using that name, the Tribe entered into a contract and waived its sovereign immunity. The Tribe asserts, and the Complaint supports, that other than the style of the pleadings and the allegation in paragraph 2 of Morgan's Complaint, there is nothing contained in the Complaint that either identifies the Tribe as a party to the Contract or asserts the Tribe has unequivocally waived its sovereign immunity from suit.

The Court's February 16th Order has allowed Morgan more than six months to support its claim as alleged in its Complaint. In the six months since the Court's Order, nothing has changed.² Morgan has not—and cannot—state facts alleging that it entered

² While there has been no change to support Morgan's claims, an order has been entered in another case in the Western District of Oklahoma that addresses the core issue in the current litigation. In *United States of America for the Use and Benefit of Comark Building Systems, Inc. v. Iowa Tribe of Oklahoma; BKJ Solutions, Inc. and Employer's*

into a contract with the Iowa Tribe of Oklahoma and, even if it could demonstrate such facts, it cannot allege facts supporting that the Iowa Tribe of Oklahoma has made any express waiver of sovereign immunity to Morgan to pursue any action against the Tribe.

II.

Statement of Undisputed Jurisdictional Facts

1. Defendant, the Iowa Tribe of Oklahoma, is a federally-recognized Indian tribe and a sovereign nation. *See* Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 74 Fed.Reg. 40218 (August 11, 2009).

2. On November 25, 2003, the Tribe, acting through its Business Committee, formed BKJ Solutions, Inc. under the Tribe's Corporation Act and the Constitution. *See* Exs. 1, 2 and 3, Resolutions of the Iowa Tribe of Oklahoma, a federally-recognized Indian Tribe; *See also* Ex. 4, Affidavit of Renee Prince, ¶ 5 (hereinafter "Prince Affidavit"). On the same day, the Articles of Incorporation for BKJ were filed. *See* Ex. 5 and Prince Affidavit at ¶ 5.

Mutual Casualty Company, Case No. CV-09-1046-W, the Court found that "BKJ is a subordinate economic organization of the [Iowa] Tribe to which the Tribe's sovereign immunity extends. It does not follow that BKJ's unequivocal waiver of its own immunity serves to waive the immunity of the Tribe. . . . Comark has offered no authority for the proposition that a waiver of immunity by a wholly-owned tribal corporation operates as a waiver of the sovereign immunity of the tribe." Likewise, in this case, Morgan has wholly failed in its pleadings to allege any facts that BKJ, an entity separate from the Iowa Tribe, waived the sovereign immunity of the Tribe when it entered into the contract at issue in this case. Morgan certainly cannot show that the Tribe waived its sovereign immunity.

3. Following the formation of the new company, the Tribe authorized the transfer of all assets from BKJ Solutions, formerly a division of the Iowa Tribe of Oklahoma, a federally-chartered corporation, to the newly formed corporation. *See* Ex. 3 and Prince Affidavit at ¶ 6.

4. Following its formation, BKJ applied to the Small Business Administration to secure certification into the SBA 8(a) program. On April 9, 2004 BKJ received approval to participate in the SBA program. *See* Prince Affidavit at ¶ 8.

5. “On or about March 26, 2008, Morgan executed a Subcontract Agreement with BKJ by which Morgan was to furnish certain supervision, labor, materials, equipment, transportation, and supplies related to the modular building scope of work for the Project. In exchange for the performance of such work, BKJ was to pay Morgan the total amount of \$6,247,291.00. A true and correct copy of the Subcontract is attached to this Complaint as Exhibit 2 and by this reference is made a part hereof.” *Complaint*, p. 3, ¶ 10.

6. The Subcontract Agreement states that the Contractor is “BKJ Solutions, Inc. “ *Id.*, Exhibit 2.

7. The Tribe did not enter into any contract in connection with the Project. *See* Prince Affidavit at ¶ 10.

8. “On or about January 30, 2008, BKJ furnished to USACE a Miller Act Payment Bond No. S368816 in the penal sum of \$2,241,364.00, upon which BKJ is the principal and EMC is the surety. Pursuant to the Payment Bond, EMC guaranteed BKJ’s prompt payment to all those supplying labor and/or materials in the prosecution of the

work provided for in the Prime Contract. A true and correct copy of the Miller Act Payment Bond is attached to this Complaint as Exhibit 1 and by this reference is made a part hereof.” *Complaint*, p. 3, ¶ 9.

9. The Payment Bond identifies “BKJ Solutions, Inc.” as the Principal.

10. The Tribe did not execute any payment or performance bond in connection with the Project. *See Prince Affidavit* at ¶ 10.

III.

ARGUMENTS AND AUTHORITIES

Tribal sovereign immunity is a matter of subject matter jurisdiction. *Kiowa Tribe of Okla. v. Mfg. Technologies, Inc.*, 523 U.S. 751, 754, 118 S.Ct. 1700, 1702, 140 L.Ed.2d 981 (1998) (“as a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized suit or the tribe has waived its immunity.”); *see also Okla. Tax Comm’n v. Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505, 509, 111 S.Ct. 905, 909, 112 L.Ed.2d 1112 (1991) (“Suits against Indian tribes are barred by sovereign immunity absent a clear waiver by a tribe or congressional abrogation”).

The judicial doctrine of tribal sovereign immunity has long protected Indian tribes from suit in state and federal courts. *White v. Pueblo of San Juan*, 728 F.2d 1307, 1311-12 (10th Cir. 1984); *see also Kennerly v. U.S.*, 721 F.2d 1252, 1258 (9th Cir. 1983). Moreover, a waiver of tribal sovereign immunity “cannot be implied but must be unequivocally expressed.” *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (internal citations omitted). This express waiver “is not a requirement that may be

flexibly applied or even disregarded based on the parties or the specific facts involved.” *Ute Distribution Corp. v. Ute Indian Tribe*, 149 F.3d 1260, 1267 (10th Cir. 1998).

As Plaintiff, it is Morgan’s burden to show the Court by a preponderance of the evidence that jurisdiction is proper. *U.S. ex rel Stone v. Rockwell Intern. Corp.*, 282 F.3d 787, 797 (10th Cir. 2002). Morgan has not—and cannot—meet that burden.

BKJ is an entity separate and apart from the Tribe, created by the Tribe under the Tribe’s Corporation Act. *See* Undisputed Jurisdictional Fact No. 2. BKJ entered into the contract with Morgan in connection with the Project. *See* Undisputed Jurisdictional Fact Nos. 5 and 6. The Tribe did not enter into any contract with Morgan in connection with the Project. *See* Undisputed Jurisdictional Fact Nos. 5, 6 and 7. BKJ executed, as principal, the payment bond on the Project. *See* Undisputed Jurisdictional Fact Nos. 8 and 9. The Tribe did not execute any payment or performance bond on the Project. *See* Undisputed Jurisdictional Fact Nos. 8, 9 and 10.

Morgan cannot identify a single act by the Tribe that constitutes any expression, unequivocal or otherwise, waiving its sovereign immunity in favor of Morgan in connection with a contract it never entered into and/or a payment bond it never executed. *See* Prince Affidavit at ¶ 12. After more than six months of jurisdictional discovery, it remains undisputed that Morgan contracted with BKJ and BKJ alone in connection with the Project.

WHEREFORE, Defendant, the Iowa Tribe of Oklahoma, prays that the Court dismiss Morgan’s claims against it in this action and for such other relief as the Court deems just and proper.

Respectfully submitted,

s/David McCullough

David McCullough, OBA No. 10898
201 Robert S. Kerr Avenue, Suite 700
Oklahoma City, Oklahoma 73102-4203
Telephone (405) 319-3500
Facsimile (405) 319-3509
dmccullough@dsda.com

*Attorneys for Defendant, Iowa Tribe of
Oklahoma*

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was served on the following persons through the court's CMF/ECF system:

Jackson D. Glisson
Shenna M. Bradshaw
GREENSFELDER HEMKER & GALE, P.C.
10 S. Broadway Ave., Ste. 2000
Oklahoma City, OK

Leif E. Swedlow
ANDREW DAVIS, P.C.
100 N. Broadway Ave., Ste. 3300
Oklahoma City, OK 73102

s/ David McCullough
David McCullough



Iowa Tribe of Oklahoma

R.R. 1, Box 721
Perkins, Oklahoma 74059
(405) 547-2402
Fax: (405) 547-5294

RESOLUTION I-03-103

A RESOLUTION APPROVING THE CREATION OF A CORPORATION CALLED BKJ SOLUTIONS, INC. AND APPROVING THE ARTICLES OF INCORPORATION OF BKJ SOLUTIONS, INC.

WHEREAS: The Iowa Tribe of Oklahoma is a federally recognized Indian Tribe, organized pursuant to the Thomas-Rogers Oklahoma Indian Welfare Act, and has a Constitution approved by the Secretary of Interior; and

WHEREAS: The Iowa Tribe of Oklahoma has the authority to grant corporate status under the Iowa Corporation Act; and

WHEREAS: The Iowa Tribe of Oklahoma has developed expertise over the years in providing construction, transportation, environmental, and archaeological services within the Tribe and to outside entities; and

WHEREAS: The Iowa Tribe of Oklahoma has determined that it may advance the standard of living for the Tribe and promote the general welfare by establishing a corporation to operate an enterprise providing construction, transportation, environmental, and archaeological services on a contractual basis to private and governmental entities; and

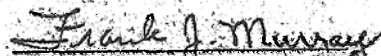
WHEREAS: The corporation created shall be called BKJ Solutions, Inc.

NOW, THEREFORE, BE IT RESOLVED That the Business Committee of the Iowa Tribe of Oklahoma, a federally recognized Indian tribe, hereby approves the Articles of Incorporation for the corporation to be known as BKJ Solutions, Inc. and grants BKJ Solutions, Inc. the status of corporation under the authority of the Iowa Corporate Act.

CERTIFICATION

The foregoing resolution was duly adopted by the Business Committee of the Iowa Tribe of Oklahoma, in a meeting held on November 25, 2003 with a quorum being declared. We do hereby certify the above Resolution #I-03-103 to be a true and exact copy as approved by a vote of 3 yeas, 0 nays, and 0 abstentions.


Christie Modlin, Secretary
Iowa Tribe of Oklahoma


Frank J. Murray, Vice-Chairman
Iowa Tribe of Oklahoma

EXHIBIT

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Iowa Tribe of Oklahoma

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IOWA TRIBE OF OKLAHOMA

RESOLUTION I-03-109

A RESOLUTION APPROVING THE SUBSCRIPTION OF STOCK IN BKJ SOLUTIONS, INC. BY THE IOWA TRIBE OF OKLAHOMA, A FEDERALLY RECOGNIZED INDIAN TRIBE

WHEREAS: The Iowa Tribe of Oklahoma is a federally recognized Indian Tribe, organized pursuant to the Thomas-Rogers Oklahoma Indian Welfare Act, and has a Constitution approved by the Secretary of Interior, and

WHEREAS: The Iowa Tribe of Oklahoma has granted corporate status under the Iowa Corporation Act to BKJ Solutions Inc., and


WHEREAS: The Iowa Tribe of Oklahoma is the sole shareholder of BKJ Solutions Inc.

NOW, THEREFORE, BE IT RESOLVED That the Business Committee of the Iowa Tribe of Oklahoma, a federally recognized Indian tribe, hereby approves submission of a subscription application for one (1) share of one dollar (\$1.00) par value common stock of BKJ Solutions, Inc. to be purchased for one dollar (\$1.00).

CERTIFICATION

The foregoing resolution was duly adopted by the Business Committee of the Iowa Tribe of Oklahoma, in a meeting held on November 25, 2003 with a quorum being declared. We do hereby certify the above Resolution #I-03-109 to be a true and exact copy as approved by a vote of 2 yeas, 0 nays, and 0 abstentions.


Christie Modlin, Secretary
Iowa Tribe of Oklahoma


Frank J. Murray, Vice-Chairman
Iowa Tribe of Oklahoma

EXHIBIT

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Iowa Tribe of Oklahoma

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IOWA TRIBE OF OKLAHOMA

RESOLUTION I-03-110

A RESOLUTION APPROVING THE TRANSFER OF THE BUSINESS UNIT KNOWN AS BKJ SOLUTIONS, FORMERLY A DIVISION OF IOWA TRIBE OF OKLAHOMA, A FEDERALLY CHARTERED CORPORATION, TO BKJ SOLUTIONS, INC.

WHEREAS: The Iowa Tribe of Oklahoma is a federally recognized Indian Tribe, organized pursuant to the Thomas-Rogers Oklahoma Indian Welfare Act, and has a Constitution approved by the Secretary of Interior; and

WHEREAS: The Iowa Tribe of Oklahoma has developed assets and expertise over the years in providing construction, transportation, environmental, and archaeological services within the Tribe and to outside entities in its business unit known as BKJ Solutions; and

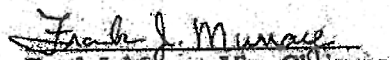
WHEREAS: The Iowa Tribe of Oklahoma has determined that it may advance the standard of living for the Tribe and promote the general welfare by transferring the BKJ Solutions business unit to its wholly owned corporation known as BKJ Solutions, Inc. to operate an enterprise providing construction, transportation, environmental, and archaeological services on a contractual basis to private and governmental entities.

NOW, THEREFORE, BE IT RESOLVED That the Business Committee of the Iowa Tribe of Oklahoma, a federally recognized Indian tribe, hereby approves the transfer of the business unit known as BKJ Solutions, formerly a division of the Iowa Tribe of Oklahoma, a federally chartered corporation, to its wholly owned concern, BKJ Solutions, Inc.

CERTIFICATION

The foregoing resolution was duly adopted by the Business Committee of the Iowa Tribe of Oklahoma, in a meeting held on November 25, 2003 with a quorum being declared. We do hereby certify the above Resolution #I-03-110 to be a true and exact copy as approved by a vote of 3 yeas, 0 nays, and 0 abstentions.


Christie Modlin, Secretary
Iowa Tribe of Oklahoma


Frank J. Murray, Vice-Chairman
Iowa Tribe of Oklahoma

EXHIBIT

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

**UNITED STATES OF AMERICA FOR THE)
USE AND BENEFIT OF MORGAN)
BUILDINGS & SPAS, INC. a Nevada)
corporation, and MORGAN BUILDINGS)
& SPAS, INC., a Nevada corporation)**

Plaintiffs,

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**IOWA TRIBE OF OKLAHOMA d/b/a)
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Defendants.

Case No. CIV-09-730-M

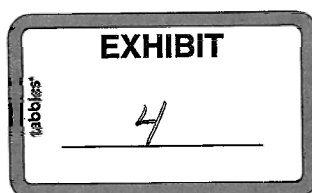
AFFIDAVIT OF RENEE PRINCE

COMES NOW, Renee Prince, Councilperson on the Business Committee of the Iowa Tribe of Oklahoma, a federally recognized Indian Tribe, and, being of lawful age and duly sworn upon oath, states as follows:

1 I submit this affidavit in support the motion by The Iowa Tribe of Oklahoma for entry of an Order dismissing Morgan Building & Spas, Inc.'s ("Morgan") claims against the Iowa Tribe of Oklahoma in the above-styled case for lack of subject matter jurisdiction.

2 I currently hold the position of Councilperson for The Iowa Tribe of Oklahoma and have held this position since 2003. As such, I am familiar with The Iowa Tribe of Oklahoma's structure, its financial and governmental affairs, as well as those of its wholly owned commercial enterprises / entities.

3 The Iowa Tribe of Oklahoma, a federally recognized Indian tribe ("Tribe"), is a sovereign nation governed by its duly adopted Constitution.



4. The Tribe raises revenue by engaging in various commercial activities by and through its wholly owned commercial enterprises / entities, i.e. BKJ Solutions, Inc. The revenue produced by these various wholly owned commercial enterprises / entities is then used to support tribal programs and services.

5. On November 25, 2003, the Tribe, acting through its Business Committee, formed BKJ Solutions, Inc. ("BKJ") under the Tribe's Corporation Act and the Constitution. On the same day, the Articles of Incorporation for BKJ were filed.

6. Following the formation of the new company, the Tribe authorized the transfer of all assets from BKJ Solutions, formerly a division of the Iowa Tribe of Oklahoma, a federally-chartered corporation, to the newly formed corporation.

7. BKJ was created by, is wholly owned by, is regulated by, and serves the governmental purposes of the Tribe.

8. Following its formation, BKJ applied to the Small Business Administration to secure certification into the SBA 8(a) program. On April 9, 2004 BKJ received approval to participate in the SBA program.

9. With regard to the project at issue in this case and located at Ft. Sill (the "Project"), BKJ was the prime contractor. As the prime contractor, only BKJ contracted with Morgan to supply temporary, relocatable buildings in connection with the Project. Only BKJ executed the payment bond against which Morgan seeks to recover in this case.

10. The Tribe did not enter into any contract in connection with the Project. The Tribe did not execute, as principal, any payment or performance bond for that matter in connection with the Project.

11. Waivers of the Tribe's sovereign immunity must be approved by a duly enacted resolution of the Business Committee.

12. There has been no waiver of sovereign immunity by the Tribe that would apply to the claims made by Morgan in its complaint at issue in the above-styled case.

FURTHER AFFIANT SAYETH NOT.

Executed this 30th day of August, 2010 within Iowa Tribe of Oklahoma, Indian Country

THE IOWA TRIBE OF OKLAHOMA,
a federally-recognized Indian tribe

Renee Prince

By: Renee Prince
Councilperson

Subscribed and sworn before me, a Notary Public, this 30th day of August, 2010.



Linda Shipley
Notary Public

My Commission Expires: _____
My Commission Number: _____

ARTICLES OF INCORPORATION

TO THE IOWA TRIBE OF OKLAHOMA:

- 1 The name of the corporation is BKJ Solutions, Inc.
- 2 The duration of the corporation is perpetual.
- 3 The address of the registered office in the Iowa Indian Country and the name of its initial registered agent at such address are Iowa Tribe of Oklahoma, Attention: Chairman, RR1 box 721, Perkins, Oklahoma, 74059.
- 4 The purpose or purposes for which the corporation is formed is to engage in any lawful act or activity for which corporations may be organized under the Constitution of the Iowa Tribe of Oklahoma and the Corporate Act of the Iowa Tribe of Oklahoma.
- 5 The corporation may sue and be sued in courts of competent jurisdiction within the United States, including, but not limited to, United States Federal Courts, but the grant or exercise of such power to sue or be sued shall not be deemed to be consent by the Tribe or by the United States to be levy of any judgment, lien or attachment upon the property of the Tribe other than income of property specifically pledged or assigned.
- 6 The aggregate number of shares which the corporation shall have authority to issue is one thousand (1,000). Such shares shall be of a single class of common stock, and shall have a par value of One Dollar (\$1.00) per share. Stock in this corporation may only be held by members of the Iowa Tribe of Oklahoma or by the tribe itself.
- 7 The number of directors constituting the initial board of directors of the corporation is five (5). The name and title of each person who is to serve as a member of the initial board of directors is:

1. Phoebe O'Dell	Chairman
2. Frank Murray	Vice-Chairman
3. Judith Shores	Treasurer
4. Christie Modlin	Director
5. Renee Prince	Director

Control of the board of directors must always be held by members of the Iowa Tribe of Oklahoma. The board of directors will always have ultimate control of the corporation and its activities.

- 8 The name and mailing address of the undersigned incorporators: Iowa Tribe of Oklahoma, RR1 box 721, Perkins, Oklahoma, 74059.

THE UNDERSIGNED, for the purpose of forming a corporation under the laws of the Iowa Tribe of Oklahoma, certifies that the facts herein stated are true, and has accordingly hereunto set my hand this 25 day of November, 2003.

IOWA TRIBE OF OKLAHOMA

By: Renee Prince
Secretary

