

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA**

1. GAUGHAN GAMING – NATIVE
LIGHTS, LLC, and
2. GAUGHAN GAMING – TONKAWA,
LLC

Plaintiffs,

vs.

1. THE TONKAWA TRIBE OF
INDIANS OF OKLAHOMA and
2. THE TONKAWA TRIBAL GAMING
COMMISSION

Defendants.

Case No.: CIV-11-330-HE

[Kay County District Court No: CJ –
2011 – 54]

**DEFENDANT TONKAWA TRIBE OF OKLAHOMA’S NOTICE OF REMOVAL
TO FEDERAL COURT UNDER 28 U.S.C. §§ 1441(b), 1331 (FEDERAL
QUESTION)**

TO THE CLERK OF THE ABOVE ENTITLED COURT:

PLEASE TAKE NOTICE THAT pursuant to 28 U.S.C. §§ 1441 and 1446, Defendant Tonkawa Tribe of Indians of Oklahoma (“the Tribe”) hereby removes the above-captioned action from the District Court of Kay County, State of Oklahoma, to the United States District Court for the Western District of Oklahoma and sets forth in support of its Notice of Removal of Action the following:

1. On March 22, 2011, an action was commenced in the District Court of Kay County, State of Oklahoma, entitled *Gaughan Gaming – Native Lights, LLC and Gaughan Gaming – Tonkawa, LLC v. The Tonkawa Tribe of Indians of Oklahoma and the Tonkawa Tribal Gaming Commission*. True and correct copies of the Petition for Injunctive Relief and Emergency Motion for Temporary Restraining Order and Temporary Injunction (“Petition”) and summons in that action filed by Gaughan Gaming – Native Lights, LLC and Gaughan

Gaming – Tonkawa, LLC (collectively “Gaughan Gaming”) are attached hereto as Exhibits 1-4, which constitutes “all process, pleadings, and orders” served upon the Tribe, and Defendant Tonkawa Tribal Gaming Commission (the “TTGC” and collectively with the Tribe “Defendants”) pursuant to 28 U.S.C. 1446(a).

2. A copy of this Notice of Removal is being filed with the Clerk of the District Court of Kay County, and is being served on the Plaintiffs’ counsel of record pursuant to 28 U.S.C. §§ 1446(a) and (d).

A Federal Question Exists That Warrants Removal to Federal Court

3. This action is a civil action of which this Court has original jurisdiction under 28 U.S.C. § 1331, and is one which may be removed to this Court by the Tribe and the defendants named individually, pursuant to the provisions of 28 U.S.C. § 1441(b) in that it arises under the Federal Arbitration Act (9 U.S.C. §§ 1-16), the Indian Gaming Regulatory Act (25 U.S.C. § 2701, *et. seq.*), and the federal common law doctrine of tribal sovereign immunity, as set forth below.

4. Any civil action brought in a State court of which the district courts of the United States have original jurisdiction may be removed by the defendant or the defendants to the district court of the United States for the district and division embracing the place where such action is pending. 28 U.S.C. § 1441(a). Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. 28 U.S.C. § 1441(b).

5. The jurisdictional statute invoked by the Defendants, 28 U.S.C. § 1331, authorizes federal district courts to hear civil actions “arising under the Constitution, laws or treaties of the United States” and 28 U.S.C. § 1441, authorizes a state court defendant to remove a case “when a federal court would have had jurisdiction if the case had been filed there originally.” *See Topeka Housing Auth. v. Johnson*, 404 F.3d 1245, 1247 (10th Cir. 2005); *see also Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987).

6. The Complaint specifically alleges that the action arises under two Management Agreements executed in 2007 that were duly approved by the National Indian Gaming Commission (“NIGC”) as required by the Indian Gaming Regulatory Act, and NIGC Regulations promulgated and codified at 25 C.F.R. Parts 531 and 533. Petition at ¶ 6. Plaintiff’s claims against Defendants rest principally upon allegations of a waiver of sovereign immunity permitting arbitration in the event of disputes between the parties to the Management Agreements.

7. Via letter of March 10, 2010, the Tribe notified Gaughan Gaming of its intent to declare a default of the Management Agreements based upon number of material breaches asserted by the Tribe.

8. On August 17, 2010 Gaughan Gaming served notice of its demand for arbitration to the the Tribe pursuant to Article 20 of the Management Agreements.

9. On September 29, 2010, Gaughan Gaming filed its written Notice of Intent to Arbitrate with the American Arbitration Association.

10. On October 20, 2010, the Tonkawa Tribe of Oklahoma filed its Answering Statement and Counterclaim with American Arbitration Association.

11. Section 16.1 of the Management Agreements provides that a limited waiver of tribal sovereign immunity is authorized for purposes of enforcing the dispute resolution provisions (which require arbitration) only in tribal or Oklahoma federal court and the waiver is expressly limited to enforcing the arbitration provision but does not serve as a general waiver of the Tribe’s immunity from suit:

16.1 Preference for Tribal or Federal Court Jurisdiction. Subject, at all times, to the prohibition against compelling, overturning, negating or in any manner modifying any Tribal Governmental Action as set forth in Section 16.2 below, the Tribe hereby grants to the Manager a limited waiver of sovereign immunity with respect to the following purposes and for no others:

(a) For the purpose of allowing the Manager to take any and all actions necessary to enforce the provisions of this Agreement pursuant to the

alternative dispute resolution procedures set forth below, including those which seek injunctive or declaratory relief, damages (limited to recover from the personal property assets and future revenues of the Tribe), specific performance or other legal and equitable remedies in the court or courts authorized by this Agreement and to effect enforcement of any remedy granted therein.

(b) For the purpose of allowing the Manager to take any and all actions necessary to contest, or seek appeal or review of, the decisions or procedures of the Tribal Gaming Commission or other regulatory body, subject to the provisions of the Ordinance creating the Tribal Gaming Commission or such other body; nothing in this clause (b), or the Ordinance, shall limit any right of the Manager to take the actions described in clause (a).

(c) Subject to this Article 16, pursuant to its limited waiver, the Tribe expressly waives its immunity from suit for the limited purpose of Manager's enforcement of this Agreement, the Line of Credit Loan Documents, the Loan Agreement and the Note (and all loan documents executed in connection therewith) in the event of a material breach of any of such agreements by the Tribe, only in the manner and to the extent described in this Article 16, provided that the limited waiver contained in this Section applies only to arbitration with Manager conducted in accordance with Article 20 of this Agreement and to no other entity or person; and provided further that such waiver applies only to enforcement of an arbitration award against the Tribe in the courts of the Tribe; in the United States District Court for the Western District of Oklahoma; the United States Court of Appeals; the United States Supreme Court; or in any other court of competent jurisdiction. If the United States District Court for the Western District of Oklahoma lacks jurisdiction, the Tribe consents to be sued in any other court of competent jurisdiction; provided that each party agrees to vigorously raise any and all arguments for United States District Court jurisdiction.

(d) The Tribe agrees that it shall not plead or raise as a defense the requirement of exhaustion of tribal court remedies, abstention, or comity, as the parties have expressly agreed that Federal Court jurisdiction may be sought for judicial enforcement of any arbitration award. The Tribe agrees that in the event jurisdiction is denied by the United States District Court, Manager may in such suit seek similar relief from a court of competent jurisdiction.

(e) The limited waiver of sovereign immunity granted here does not include any waiver, either express or implied, to any third party.

(f) Nothing in this Agreement shall be deemed to be a general waiver of the Tribe's sovereign immunity from suit, which immunity is expressly asserted.

12. The Tonkawa Tribe enacted the Tonkawa Tribal Gaming Ordinance and the Ordinance was approved by the Chairman of the NIGC on March 22, 2006 as required by the Indian Gaming Regulatory Act and NIGC regulations promulgated and codified at 25 C.F.R. Part 522.

13. The issue of tribal sovereign immunity is a matter of federal law; an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity. *Kiowa Tribe v. Mfg. Technologies, Inc.*, 523 U.S. 751, 754 (1998).

14. In its Petition, Gaughan Gaming alleges the existence of a waiver of tribal sovereign immunity. Petition at ¶¶ 11. Consequently, the dispute arises under federal law.

15. The Indian Gaming Regulatory Act at 18 U.S.C. § 2701 et seq., provides *inter alia*, a federal regulatory scheme for the operation of gaming **by Indian tribes** as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments; to ensure that Indian tribes retain the sole proprietary interest and responsibility for the conduct of any gaming activity, and to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players.

16. In its Petition, Gaughan Gaming alleges the existence of certain Management Agreements requiring approval of the Chair of the National Indian Gaming Commission as required by the Indian Gaming Regulatory Act. Petition at ¶¶ 5-6. Consequently, the dispute arises under federal law.

17. The Federal Arbitration Act creates a body of federal substantive law of arbitrability applicable to any arbitration agreement within the scope of the Act. *Moses H. Cone Memorial Hosp. v. Mercury Const. Corp.*, 460 U.S. 1 (1983).

18. In its Petition, Gaughan Gaming alleges the existence of a dispute involving Management Agreements, the provisions of which include terms requiring disputes to be resolved in arbitration. Petition at ¶ 13. Consequently, the dispute arises under federal law.

19. Under Tonkawa tribal law, specifically the Tonkawa Tribal Gaming Ordinance and the Regulations promulgated by the TTGC to implement the Gaming Ordinance, Gaughan Gaming is required to hold and maintain a license to operate all gaming facilities within the jurisdiction of the Tribe.

20. On September 28, 2010 the TTGC suspended Gaughan Gaming's license to operate the Tribe's gaming facilities and initiate proceedings to revoke the license of Gaughan Gaming for a number of violations of the Tonkawa Tribal Gaming Ordinance.

21. In its prayer for relief, Plaintiff asks that, among other things, the Court direct that Gaughan Gaming be immediately restored to its position as manager of the Tribe's casinos as provided in the Management Agreement, the Tribe immediately deliver possession and management control of the Tribe's casinos to Gaughan Gaming, and direct that Gaughan Gaming's license remain in full force and effective until such time as the underlying disputes are resolved in the arbitration.

The Other Requirements for Removal Are Met

22. This Notice of Removal is being filed within thirty (30) days of receipt by the defendants, "through service or otherwise" of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based." Therefore, this Notice of Removal is timely filed under 28 U.S.C. § 1446(b).

23. Removal to the United States District Court, Western District of Oklahoma is proper because the District Court of Kay County, State of Oklahoma, where the above-captioned action was originally filed is located within the Western District of Oklahoma. 28 U.S.C. § 1446(a).

24. Defendants' legal counsel certifies that a copy of this Notice is filed with the Clerk of the District Court of Kay County, State of Oklahoma, as specified in paragraph 3 above. 28 U.S.C. § 1446(d).

25. Defendants' legal counsel certifies that notice is given to legal counsel of record for the Plaintiff, as specified in paragraph 2 above. 28 U.S.C. § 1446(d).

26. On March 22, 2011, counsel for Defendant Tonkawa Tribe of Oklahoma conferred with counsel for Codefendant Tonkawa Tribal Gaming Commission, at which time counsel for Defendant Tonkawa Tribe Gaming Commission confirmed its consent to joinder of this Notice of Removal.

27. Pursuant to LCvR81.2(a), a copy of the docket sheet of the underlying state court case is attached as Exhibit "5".

RESPECTFULLY SUBMITTED this 24th day of March, 2011.

By: */s/ Stephanie Moser Goins*

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TONKAWA TRIBE OF OKLAHOMA

CERTIFICATE OF SERVICE

This is to certify that on the 24th day of March 2011 a true and correct copy of the foregoing was sent via U.S. Mail, postage prepaid thereon, facsimile, and electronic mail to the following:

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