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ATTORNEY GENERAL

IN U.S. DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

LESLIE WANDRIE-HARJO, *et al.*, Plaintiffs, v. JANICE PRAIRIE CHIEF-BOSWELL, *et al.*, Defendants.	**TRIBES' SPECIAL APPEARANCE MEMORANDUM IN SUPPORT OF MOTION TO DISMISS** Case No.: 5:11-cv-00171-F Judge Stephen P. Friot

In support of the *Tribes' Special Appearance Motion to Dismiss*, the Tribes submit as follows:

STATEMENT OF THE CASE

Plaintiffs' claims involve a purely intratribal dispute purportedly brought in the name of the Tribes. However, Plaintiffs Wandrie-Harjo and Oliver lack authority to bring an action in the name of the Tribes who is the real party in interest. According to

Cheyenne and Arapaho law, only the Attorney General can initiate a suit in the name of the Tribes.

Additionally, Plaintiffs lack authority to maintain suit on those persons and entities named in *First Amended Verified Complaint and Application for Temporary Restraining Order and Preliminary Injunction* as those persons are simply not parties to this action.

ARGUMENT

I. Plaintiffs Lack Authority to Bring An Action in the Name of the Tribes and the Persons and Entities Named in the Complaint

"[T]he person or persons who prosecute the claim on behalf of the complaining party must have authority to represent the party." *Golden Hill Paugussett Tribe of Indians v. Town of Southbury, et al.*, 231 Conn. 563, 571-72, 651 A.2d 1246 (Conn. 1994)(citing *Oris v. Senatore*, 230 Conn. 459, 470, 645 A.2d 986 (1994); *State v. Nardini*, 187 Conn. 109, 112-16, 445 A.2d 304 (1982); *Barrett v. Southern Conn. Gas Co.*, 172 Conn. 362, 370, 374 A.2d 1051 (1977)). "When an appellant seeks to pursue an appeal on behalf of a tribe or a tribal entity, the appellant must demonstrate that it has authority under tribal law to bring the appeal." *McKay v. Pac. Reg'l Dir., BIA*, 40 IBIA 26, 30 (2004)(citing *Yeahquo v. S. Plains Reg'l Dir.*, 36 IBIA 11, 12 (2001)(appellants produced no evidence that the tribe had authorized them to bring the appeal on the tribe's behalf); *Shoshone-Bannock Tribal Tax Comm'n v. Acting Portland Area Dir.*, 30 IBIA 185, 186 (1997)(tribal tax commission not authorized by tribal law to appeal BIA approval of tribal ordinance). "[The] party whose authority is challenged has the burden of convincing the court that the authority exists." *Golden Hill Paugussett Tribe* at 572.

Furthermore, the Cheyenne and Arapaho Constitution ("Chey. & Arap. Const."), Art. VII § 1 authorizes the Cheyenne and Arapaho people to choose their Governor. The Chey. & Arap. Const., Art. VII, § 1 provides the Governor's term is four (4) years or until a successor has been sworn into office. The Chey. & Arap. Const., Art. VII, §§ 6(b) and 2 set forth the only methods by which a Governor may be removed: (1) recall upon valid petition; and (2) impeachment by unanimous vote and only upon a finding of good cause. The Tribes' Governor "remains Governor of the Cheyenne and Arapaho Tribes until his lawful term ends, he resigns from office, or he is validly removed according to constitutional processes." *Flyingman v. Election Commission*, SC-07-13 at 13 (Chey. & Arap. S. Ct. Sept. 24, 2007), attached hereto as **Exhibit 1**. The Constitution does not authorize one branch of government to remove or "suspend" the head of another branch of government.

In November 2009, Governor Prairie Chief-Boswell was duly elected as Governor of Tribes. She has not been removed by recall vote upon valid petition; she has not validly been impeached by unanimous vote of the Legislature; her term as Governor has not expired; she has not resigned; and she not been validly removed from office according to the constitutional processes. *See Affidavit of Governor Janice Prairie Chief-Boswell* attached hereto as **Exhibit 2**, and the *Cheyenne and Arapaho Summary of Relevant Events* discussed *infra*. After her term began, she appointed Charles B. Morris to serve as the Attorney General. *See* **Exhibit 2**.

Only the Tribe's Attorney General may represent and file an action on behalf of the Tribes. It is firmly rooted Tribal law that "legal representation of the Tribes …

(whether prosecutorially or otherwise) is one of the Executive Branch's core functions." *Flyingman v. First Legislature*, SC-2007-0002 at 14 (Chey. & Arap. S. Ct. Dec. 30, 2009), attached hereto as **Exhibit 3**. Tribal law also provides that the Attorney General may "represent not only the Tribes as a whole (and when constitutionally necessary for purposes of execution, Executive Branch officials as plaintiffs) in any litigation, but also *any* Executive Branch official against whom an 'official capacity' lawsuit (in form or fact) is brought under Article X, Section 3." *Id.* at 15.

Here, Plaintiffs have not demonstrated that they possess authority to represent the Tribes in this action because they wholly lack such authority. Such authority does not exist in Cheyenne and Arapaho law, they have produced no evidence that the Tribes authorized them to bring the appeal, and they have not met their burden of convincing the Court that the authority exists. Similarly, Plaintiffs do not have authority in Cheyenne and Arapaho law to bring suit in the name of the individuals and entities referenced in the *First Amended Verified Complaint and Application for Temporary Restraining Order and Preliminary Injunction*.

Plaintiffs argued in their *Complaint*, "[t]he Tribes have waived their sovereign immunity for the limited purpose of this action by initiating this suit," and that "Ms. Boswell was suspended of her official duties and has been removed." *Complaint* at ¶¶ 226, 228. However, Plaintiffs have only told their side of events, without regard to a full recitation of the facts. A full recitation of the facts is attached hereto as **Exhibit 4**. The briefest summary in this regard is that Governor Janice Prairie Chief-Boswell is still the Governor of the Tribes, has not been removed by constitutionally-prescribed method, the

district court judge who purports to have removed her lacked authority therefor, and the Cheyenne and Arapaho Tribes' Supreme Court is sorting this whole intra-tribal dispute out.

II. Plaintiffs Lack Authority to Bring This Action as They Are Not the Real Parties in Interest.

Fed. Rule of Civ. P. 17(a) provides that "[a]n action must be prosecuted in the name of the real party in interest." This Rule also provides that "[t]he court may not dismiss an action for failure to prosecute in the name of the real party in interest until, after an objection, a reasonable time has been allowed for the real party in interest to ratify, join, or be substituted into the action. After ratification, joinder, or substitution, the action proceeds as if it had been originally commenced by the real party in interest."

That protection against dismissal "is designed to avoid forfeiture and injustice when an understandable mistake has been made in selecting the party in whose name the action should be brought." *Gardner v. State Farm Fire and Cas. Co.*, 544 F.3d 553 (3rd Cir. 2008)(citing 6A Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, Federal Practice & Procedure, § 1555 (2d ed. 2008). Thus, it should be applied "only to cases in which substitution of the real party in interest is necessary to avoid injustice." *Id. See also, Wilson v. Tucker*, 2011 WL 43089 (N.D. Okla. 2011) (citing 6A Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, Federal Practice & Procedure, § 1555 (2d ed. 2008).

As Attorney General for the Tribes and pursuant to Cheyenne and Arapaho Law and Fed. R. Civ. P. 17, undersigned holds the capacity to sue on behalf of the Tribes, as

the Tribes are the real party in interest. Pursuant to Fed. R. Civ. P. 17(a), the Tribes must be given a reasonable time to ratify, join, or be substituted into the action on behalf of the Tribes. This protection against dismissal is to be applied "only to cases in which substitution of the real party in interest is necessary to avoid injustice." *Wilson v. Tucker*, 2011 WL 43089 (N.D. Okla. 2011) (citing 6A Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, Federal Practice & Procedure, § 1555 (2d ed. 2008).

The Tribes, however, do not wish to ratify, join, or be substituted into this action, as the Tribes never agreed to initiate this suit nor want to perpetuate it now. The Tribes wish to dismiss this action wrongfully brought on their behalf.

III. Plaintiffs Have Failed to Exhaust Their Remedies in Tribal Court.

Before a federal court can entertain question whether Indian tribal court has power to exercise civil subject matter jurisdiction over civil disputes between Indians and non-Indians that arise on Indian reservation, exhaustion of tribal court remedies is required. The existence and extent of tribal court's jurisdiction requires careful examination of tribal sovereignty, extent to which sovereignty has been altered, divested or diminished, as well as detailed study of relevant statutes, executive branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions. *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985). Congressional policy reflects a commitment of supporting Tribal self-government and self-determination. *National Farmers Union Ins.*, 471 U.S. at 856 (1985). This policy favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal basis for the challenge. *Id.* Therefore, Tribal Courts are afforded

opportunities to determine their own jurisdiction and no court should exercise jurisdiction until the parties have exhausted their Tribal remedies. *Kaul v. Wahquahboshkuk*, 838 F. Supp. 515, 516 (D. Kan. 1993).

This rule, known as the rule of "tribal exhaustion," encourages Tribal self-government by requiring that non-Indian litigants pursue their claims before the Tribal Court. *Id.* Exhaustion of Tribal Court remedies also encourages Tribal Courts to explain to the parties the precise basis for accepting jurisdiction, and provides other courts with the benefit of their expertise in such matters in the event of further judicial review. *National Farmers Ins.*, 471 U.S. at 856. In *Kaul*, the determination of whether Tribal Courts have jurisdiction over a civil case was required to be made by the Tribal Court itself and the Court said Plaintiff "is not able to escape the exhaustion doctrine by sitting on her tribal remedies." *Kaul*, 838 F. Supp. at 517. The Court dismissed the plaintiff's claim for lack of subject matter jurisdiction, stating: "the better course is to dismiss the plaintiff's suit so that she can pursue her tribal remedies." *Id*. at 518.

The United States Supreme Court has “repeatedly recognized the federal government’s longstanding policy of encouraging tribal self-government.” *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 14 (1987). The Court also recognizes that “Tribal courts play a vital role in tribal self-government, and the federal government has consistently encouraged their development.” *Id.* at 14-15. This federal policy “directs a federal court to stay its hand in order to give the tribal court a full opportunity to determine its own jurisdiction.” *Id.* at 16. The Tribal Court exhaustion requirement applies even in cases where Tribal Court jurisdiction is not clearly established by the complaint. Instead, in

cases where even a "colorable question" of Tribal Court jurisdiction exists, principles of comity require that the federal court abstain and require the plaintiff to exhaust Tribal Court remedies. *Stock West Corp. v. Taylor*, 964 F.2d 912, 920-21 (9th Cir. 1992); *Drumm v. Brown*, 716 A.2d 50 (Conn. 1998); *Klammer v. Lower Sioux Convenience Store*, 535 N.W. 2d 379 (Minn. App. 1995). Exhaustion is mandatory when a case fits within the policy. *Duncan Energy Co. v. Three Affiliated Tribes*, 27 F.3d 1294, 1300 (8th Cir. 1994); *Burlington N. R. Co. v. Crow Tribal Council*, 940 F.2d 1239, 1245 (9th Cir. 1991).

This Court should dismiss Plaintiffs' claims of violations of Tribal law as those are matters that must be decided by the Cheyenne and Arapaho Tribes' Courts, and as a matter of comity, federal courts may not exercise jurisdiction in an action against the Defendants until the plaintiff exhausts Tribal Court remedies. *Iowa Mutual Ins.*, 480 U.S. at 18; *National Farmers Ins.*, 471 U.S. 845. Furthermore, it is inappropriate to address the alleged violations of the Cheyenne-Arapaho Constitution and laws before giving the Tribal Court the opportunity to decide such issues, as the question depends upon interpretations of Tribal law. *Stock West, supra*, 964 F.2d at 920 (9th Cir. 1992). *Accord Davis v. Mille Lacs Band of Chippewa Indians*, 193 F.3d 990, 992 (8th Cir. 1999).

CONCLUSION

For the reasons cited herein, the Tribes respectfully request the *Complaint* be dismissed with prejudice.

Respectfully submitted this 19th day of April, 2011.

CHEYENNE AND ARAPAHO TRIBES

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ATTORNEY GENERAL

CERTIFICATE OF SERVICE

On the 19th day of April, 2011, I electronically filed the foregoing **TRIBES' SPECIAL APPEARANCE MEMORANDUM IN SUPPORT OF MOTION TO DISMISS** with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all parties of record as follows:

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EXHIBIT 1

CHEYENNE-ARAPAHO
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In the Supreme Court of the Cheyenne and Arapaho Tribes

DARRELL FLYINGMAN, Governor,

Plaintiff/Appellant,

v.

ELECTION COMMISSION and SCOTT SANKEY, TONITA WEASELBEAR, HARRIET, WHITESHIRT, ELIZABETH BIRDSHEAD, EVA BIGMEDICINE, NENA HAWK, and DEBRA YOUNGBULL, Commissioners, individually and in their official capacities,

Defendants/Appellees.

Case No: CNA-SC-07-13

ON APPEAL FROM THE SEPTEMBER 5, 2007 ORDER AND FINAL DETERMINATION OF THE CHEYENNE AND ARAPAHO ELECTION COMMISSION IN NO. CNA-EC-07-02

OPINION AND ORDER

BEFORE: Chief Justice Ryland L. Rivas
Associate Justice Dennis W. Arrow
Special Justice Karen Eby
Special Justice Taiawagi Helton
Special Justice Lindsay G. Robertson

FILE

IN THE SUPREME COURT
CHEYENNE AND ARAPAHO TRIBES OF OKLAHOMA
P.O. BOX 102
CONCHO, OKLAHOMA 73022

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Darrell Flyingman, Governor
Plaintiff/Appellant,

vs.

Election Commission, and Scott Sankey, Tonita Weaselbear, Harriet Whiteshirt, Elizabeth Birdshead, Eva Bigmedicine, Nena Hawk, and Debra Youngbull, Commissioners, individually and in their official capacities
Defendants/Appellees,

Case No: CNA-SC-07-13

BEFORE: Chief Justice Ryland L. Rivas, Associate Justice Dennis W. Arrow, Special Justice Karen Eby, Special Justice Taiawagi Helton, and Special Justice Lindsay G. Robertson

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JUDGMENT OF THE SUPREME COURT
OF THE CHEYENNE AND ARAPAHO TRIBES

NOW COMES the Court Clerk for the Supreme Court, Patty Bell, pursuant to Section 461 of the Appellate Procedure Code of the Cheyenne and Arapaho Tribes of Oklahoma, and hereby enters judgment in this action in accordance with the decision of the Cheyenne and Arapaho Supreme Court filed September 24, 2007.

DONE this 24th day of September, 2007.

Patty Bell
Court Clerk
Cheyenne and Arapaho Supreme Court

PER CURIAM.

I.

This is the second time in recent months that this Court has been presented with an appeal from a decision of the Election Commission upholding the recall of Governor Darrell Flyingman. Exercising the original jurisdiction vested in us by Article VIII, Section 5(b) and Article IX, Section 13 of the Cheyenne and Arapaho Constitution, in compliance with the latter section's injunction that we decide all election appeals within twenty days, and in fulfillment of our obligation to the Constitution, we again reverse the Election Commission's conclusion that the Recall Election was held in compliance with Constitution. It brings us no joy to do so.

As noted in our opinion in the first Recall Election case, *Flyingman v. Election Comm'n*, CNA-SC-07-09 (July 10, 2007), the Constitution sets forth specific procedures for Recall Elections in Article XII. Article XII, Section 6(b) provides that "[a] Governor . . . shall be removable by recall vote in a Special Election called by petition of at least thirty percent of the number of registered voters in the Tribes." Under Article XII, Section 6(c),

> [p]etitions seeking the recall of a . . . Governor . . . shall be submitted to the Election Commission. . . . Members of the Tribes shall have one-hundred twenty days to collect the requisite number of signatures on the Recall petition.

Article XII, Section 6(d) further provides that

> [u]pon receipt of a Recall petition, the Election Commission shall verify the validity of the signatures on the petition within twenty days. If the petition is valid, the Election Commission shall hold a Recall election within sixty days.

The Recall Petition triggering the September 1 Recall Election challenged in this case was received by the Election Commission on May 7, 2007. On May 14, 2007, the Election Commission certified the Recall Petition with 1,781 verified signatures. The second Recall Election was held on September 1, 2007, 110 days after the verification of signatures. This clearly falls well outside the constitutionally-mandated time limits. The September 1 Recall Election is therefore invalid.[1]

The language of the Constitution is mandatory; there is no more directive word than "shall." It is perhaps for this reason that when the plaintiff/appellant raised this objection to the Recall Election in his Notice of Appeal, the Election Commission made no response.

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[1] Contrary to the recitation at page 1 of the Election Commission's Order of September 5, 2007, this Court's Order of July 10, 2007 in the first Recall Election case did *not* "allow[] for a new Recall Election on the same Recall Petition." Rather, in our earlier order, we simply *declined to rule on the validity of the Recall Petition at all* because it was not necessary for us to resolve that issue given the constitutional and other defects in the conduct of the first (June 13/June 18) Recall *Election*. *See Flyingman v. Election Commission*, No. CNA-SC-07-09, slip op. at 9 n.6 (July 10, 2007). As a further consequence, any issue concerning the validity of the Recall Petition and/or the ability of the Election Commission to conduct a second Recall Election under the authority of the original Recall Petition was not "moot," as the Election Commission concluded at pages 2, 3, and 4 of its September 5 Order.

Nor is the requirement a mere empty technicality. It is not hard to discern the wisdom in the people's decision to fix the period during which a Recall Election must be held. The language chosen provides for clarity and fairness of process, to both incumbent officials and challenging petition signatories. When voters sign a Recall Petition, they do so with the knowledge that while their signatures reflect present commitment, the Petition they have signed has a limited life span, allowing them to revisit their views on whether a Recall Election should be held as circumstances develop. Moreover, limiting the life span of Recall Petitions avoids an incumbent's having unfairly to face repeated Recall Elections driven by the same Recall Petition, a situation clearly tending to distort normal, constitutionally-established political processes. In this case, in which the Election Commission failed to conduct a valid Recall Election the first time, the Constitution makes clear that the supporters of Governor Flyingman's recall should have begun the process anew.

II.

A.

Apart from our above-described Article XII, Section 6(c)-based holding, we conclude that the procedures cumulatively provided by the Election Commission and (especially) by the Trial Court for Mr. Flyingman to bring *pre-election* challenges to a variety of Election Commission actions violated his right to due process of law under Article I, Section 1(k), Article VIII, Section 5(a), and Article IX, Section 8(e) of the Cheyenne and Arapaho Constitution. Those constitutional provisions are no more empty formalities than is Article XII, Section 6(c). We further conclude that even were it not for the Sixty Day Clause violation described above, the cumulative Due Process Clause violation was so severe in this case as to have potentially established an independent basis for the invalidity of the second recall process.

The Due Process Clause of Article I, Section 1(k) seeks to guarantee that the government of the Cheyenne and Arapaho Tribes never devolves into lawlessness, and that every tribal citizen may demand regularity and non-arbitrariness in all of the tribal government's conduct. In relevant part, the Due Process Clause provides that "the government of the Tribes shall not make or enforce any law" which "deprive[s] any person of liberty or property without due process of law." The right to hold office, no less than tangible physical property interests, is a "property" interest subject to due process protections.

Article VIII, Section 5(a) invests the Trial Court of the Cheyenne and Arapaho Tribes with "original jurisdiction over all cases and controversies . . . arising under the Constitution [or] laws . . . of the Tribes, including cases in which the Tribes or its officials and employees shall be a party." It is in the Trial Court that *any* tribal citizen may first seek adjudication of his or her rights under tribal law.

Article IX, Section 8(e) explicitly addresses the election process, and provides in whole that "[f]or purposes of enforcement of the election laws of the Tribes, the Election Commission shall be subject to suit for non-monetary, equitable relief exclusively in the Judicial Branch." We conclude that in light of Article IX, Section 8(e) and Article I, Section 1(k), there can be no question but that Article VIII, Section 5(a) contemplates the availability of *pre-election* Trial Court relief to any party aggrieved by Election Commission action.

Article IX, Sections 3, 8, and 13 also provide a backdrop for our due-process reasoning. While Article IX, Section 3 requires the Election Commission "to conduct all elections in a fair and impartial manner" under tribal law, Article IX, Sections 8 and 13 — which prescribe various methods of challenging Election Commission decisions to the Election Commission itself — do not explicitly require it to conduct hearings as a normal mode of doing business. While the Election Commission may of course itself conduct a hearing where it determines that a hearing would enhance its decisionmaking processes (and we do not foreclose the possibility that under *some* circumstances the Due Process Clause and/or the Fair and Impartial Election Clause might *require* it to do so), the framers of the Cheyenne and Arapaho Constitution, apparently not wishing to invite anyone to "game the system" by paralyzing the Commission with hearing requests, did not require the Commission to conduct hearings in all circumstances in which a hearing is requested.

Under the circumstances of this case, we therefore conclude that the failure of the Trial Court to itself provide a meaningful forum for the adjudication of Mr. Flyingman's *pre-election* challenges to a range of Election Commission actions violated his right to due process of law. The following chronology will help explain that conclusion.

B.

After disputes arose between the Governor and the Legislature with respect to the renewal of former gaming-management contracts with an outside management company (and a variety of other related and unrelated matters), attempts to recall Governor Flyingman began in earnest in early January 2007. On or about January 5 of this year, several tribal citizens submitted a petition to recall Mr. Flyingman to the Election Commission under Article XII, Section 6(c); that provision states that "[m]embers of the Tribes shall have one-hundred twenty days to collect the requisite number of signatures." The Election Commission apparently established a May 7 deadline for submission of signatures, and a petition to recall Governor Flyingman was submitted by tribal citizens on that date. On May 15, the Election Commission certified that Recall Petition as containing the requisite number of signatures, and set June 13, 2007 as the date for the Recall Election.

On May 18, 2007, Cody Zimmer, then apparently a member of the Election Commission, sought a temporary restraining order against the Commission's proceeding with the June 13 Recall Election from the Trial Court. In his Petition, Mr. Zimmer alleged an absence of proper certification of the signatures by the Commission, improper influence by some Legislators over the Commission, and other related theories. *See* Petition for Emergency Temporary Restraining Order at 1-2, *Zimmer v. Election Comm'n,* No. CNA-CIV-07-39 (May 18, 2007). The Trial Court took no action on Mr. Zimmer's Petition between May 18 and May 25, 2007.

On May 24, 2007, Governor Flyingman filed his own Complaint in Case No. CNA-CIV-07-39, and on May 25, Mr. Zimmer, on his own behalf (and facially, also the Governor's) filed still another petition with the Trial Court. That petition, separately numbered Case No. CNA-CIV-07-42, sought declaratory relief and a permanent injunction based on substantially more detailed allegations related to the same basic events. *See Zimmer v. Election Comm'n,* No. CNA-CIV-07-42 (May 25, 2007). The Trial Court took no action on any of those pleadings between May 25 and June 5, 2007.

With the Recall Election now only a week away, Mr. Zimmer and Mr. Flyingman sought a Writ of Mandamus from this Court directing Trial Court Judge Tripp to hold a hearing and rule on

the matter before the scheduled June 13 Recall Election. *See* Petition for Writ of Mandamus at 1-8, *Zimmer v. Election Comm'n,* No. CNA-SC-07-08 (June 5, 2007). This Court did not act on that Petition between June 5 and June 8, 2007. On June 8, however, Judge Tripp entered an order striking Governor Flyingman's Complaint in Case No. CNA-CIV-07-39 on the ground Mr. Zimmer had already filed a petition in that case. Judge Tripp did not direct that Mr. Flyingman's Complaint be assigned a new case number. In his June 8 Order in Case No. CNA-CIV-07-39, Judge Tripp also stated:

> [I]n a motion such as the one at hand, just as in a Motion to Continue, counsel is to *provide an order for the Court's signature* granting said motion. This was not done in this matter, effectively slowing the process.

See Zimmer, No. CNA-CIV-07-39 (June 8, 2007) (order allowing intervention). Judge Tripp did, however, permit Mr. Flyingman to intervene in Case No. CNA-CIV-07-39 on June 8. The scheduled Recall Election was now five days away.

In light of the Trial Court's substantive inaction, later on June 8 Governor Flyingman filed a Supplement to his earlier Petition for Writ of Mandamus with this Court. In that Supplementary Petition, Mr. Flyingman again sought to have us order Judge Tripp to hold a hearing.

The Election Commission had by that time moved back the date for counting absentee ballots until June 18, but the election date was still scheduled for June 13. *See generally Flyingman v. Election Comm'n,* No. CNA-SC-07-09, slip op. at 6-8 (July 10, 2007) (describing the sequence of events). When Judge Tripp had still not acted by June 11, this Court granted the requested Writ of Mandamus, and ordered the Trial Court to conduct "a hearing and determination of the [relief] requested by petitioners." *See* Order to Conduct Hearing at 1, *Zimmer,* No. CNA-SC-07-08 (June 11, 2007).

Judge Tripp thereupon scheduled a hearing — for June 22, 2007, nine days *after* the scheduled Recall Election. In a June 19 order granting Mr. Flyingman an emergency stay pending our resolution of his appeal from the Election Commission's certification of the results of that Recall Election, we ordered the now-pointless June 22 hearing stricken from the Trial Court's docket. *See Flyingman v. Election Comm'n,* No. CNA-SC-07-09, slip op. at 1 (June 19, 2007); *cf.* CHEY. & ARAP. CONST. art. IX, § 13 (granting this Court original jurisdiction over appeals from final Election Commission decisions resolving election-results-certification protests).

On July 10, 2007, we found that the June 11/June 18 Recall Election was invalid on a variety of grounds, *see Flyingman,* No. CNA-SC-07-09 (July 10, 2007), without the necessity of our reaching every issue presented to us in that case. Among the issues that we did not need to resolve in our July 10 decision were the validity of the Election Commission's certification of the Recall Petition, whether another Recall Election could be based on the same Recall Petition, and many others. *See supra* at 1 n.1.

On July 13, 2007, three days following our July 10 Opinion and Order, Harriet Whiteshirt, as Secretary of the Election Commission, and Tonita Little Raven, as its Chairman, each promulgated a public notice on behalf of the Commission that the Commission would conduct another Recall Election on the authority of the original Recall Petition. [The dates varied somewhat as between the two notices, but election day was set for September 1 in both notices.]

On July 20, 2007, Mr. Flyingman sought an emergency temporary restraining order and permanent injunctive relief in the Trial Court on a wide variety of grounds. *See Flyingman v. Election Comm'n*, No. CNA-CIV-07-56 (July 20, 2007). On the same date, he also moved for Judge Tripp's recusal in the matter. Judge Tripp took no action regarding either request between July 20 and July 31, 2007.

On July 31, Mr. Flyingman supplemented his earlier petition and motion by filing a Complaint in No. CNA-CIV-07-56, again seeking a wide variety of emergency relief against the Election Commission's proceeding with a second Recall Election on September 1. Judge Tripp took no action (including the issuance of any order as to what he believed his jurisdiction to be) between July 31 and August 13, 2007.

In an unrelated case, however, on August 13, 2007, Judge Tripp ruled in a suit brought by a tribal member who was also challenging the conduct of the second Recall Election:

> It is the *Election Commission's decision* to proceed with a recall. If that is improper then *the Governor would have to petition the Election Commission for a hearing* and *the Election Commission make a determination one way or the other. Until that happens* this Court will not interfere with the process.

See Wells v. Election Comm'n, No. CNA-CIV-07-55, slip op. at 2 (Chey. & Arap. Trial Ct., Aug. 13, 2007). Judge Tripp thereupon dismissed the citizen's suit for lack of standing. *Id.*

Although it might have been thought that the Election Commission "determination one way or the other" had already "happen[ed]" when the Election Commission scheduled a second Recall Election for September 1, 2007, on August 22 Governor Flyingman followed Judge Tripp's implicit directive to request a hearing *from the Election Commission*, which the Commission granted, albeit in a manifestly *pro forma* manner, on August 31. Judge Tripp never held a hearing — or ruled — on any aspect of the emergency relief Governor Flyingman had been requesting for forty-two days in Case No. CNA-CIV-07-56.

Late in the afternoon of Friday, August 31, 2007 (the day before the scheduled Recall Election), Justice Arrow, who along with most if not all of the other members of this Court was completely unaware that a second Recall Election had been scheduled (and who was the only Justice who could be reached late that Friday afternoon), had directed to him an emergency request from Governor Flyingman to stay the election that was scheduled to begin the following morning. [Because the Trial Court had not ruled on anything in Case No. CNA-CIV-07-56, there was no Trial Court order that could have been *appealed* to this Court before that.] Justice Arrow's copy of the facsimile transmission reveals that he received the Governor's 82-page fax from the Court Clerk's office between 4:41 p.m. and 4:59 p.m. on Friday, August 31. At the close of business that day, he advised the Chief Court Clerk orally that he would not be staying the next day's Recall Election.

C.

Article VIII, Section 5(b) of the Cheyenne and Arapaho Constitution grants this Court original jurisdiction over appeals from final decisions of the Election Commission on election-results-certification protests, but Article IX, Section 13 grants us only twenty days from the filing of such

an appeal to rule. If we fail to decide the matter during the twenty-day "window," the decision of the Election Commission is affirmed by operation of law, with no further judicial review permitted. Presumably nonlawyer as well as lawyer-members of the Cheyenne and Arapaho Tribes will understand that twenty days is a very short period of time to very carefully review all relevant law (which we do), all documentary evidence (which we also do), and all of the hundreds of pages of briefs and exhibits that are submitted to us in a case of this importance (which we also do).

It is in that light that we inquire whether the framers of the 2006 Cheyenne and Arapaho Constitution (who have demonstrated substantial foresight with respect to many of the constitutional clauses we have so far been required to apply) intended by granting us the power to make both findings of fact and conclusions of law in election-appeals cases, *see* CHEY. & ARAP. CONST. [2006] art. VIII, § 5(b), to foreclose *pre-election* Trial Court review of at least some of those issues (which would, of course, then be appealable), and which might well (as here) spare the Tribes the expense and frustration of an inevitably invalid election. We conclude in light of Article IX, Section 8(e) that they intended no such thing, and that the Due Process Clause of Article I, Section 1(k) and the broad grant of original jurisdiction to the Trial Court in Article VIII, Section 5(a) demand it.

The Trial Court provided no meaningfully responsive judicial review of Election Commission actions to Mr. Flyingman or to any party to any other case of which we are aware. In that setting, we conclude that that fact *standing alone* might have been sufficient to invalidate the second Recall Election apart from the independently-fatal consequences of Article XII, Section 5(c) (discussed above in Part I of this Opinion and Order). Such actions were — quite simply — an abuse of discretion by the Trial Court, and so that this result may never happen again, we expressly note for the benefit of all tribal citizens our willingness to entertain applications for writs of mandamus where the Trial Court has not timely ruled on an emergency request for temporary relief, scheduled an appropriate hearing, ruled on the merits, and/or ruled on a motion to recuse.

III.

This Court will uphold any fair Recall Election that is conducted in accordance with the Constitution and other valid tribal laws and rules. While it would be impossible to anticipate (or enumerate) every conceivable way in which such an election might be invalidly conducted (and we caution that the Constitution and Election Rules contain many other election-related provisions besides those that we discuss here), the following list of procedures may serve as a *general* (if necessarily incomplete) guideline for the conduct of future Recall Elections. [References to "Art." are to articles of the Constitution; references to "Rule" are to the Election Commission Rules and Regulations adopted March 27, 2007.]

1. The Election Commission shall prepare and issue a Recall Petition form to a tribal citizen who requests it. Art. XII, § 6(c).

2. At the same time, the Election Commission shall give the requester the names and addresses of all eligible voters of the Tribes, and the minimum number of signatures required for a valid Recall Petition (for Governor or Lieutenant Governor, 30% of all the Tribes' registered voters; for a Legislator, 30% of the registered voters in that

Legislator's District). Art. XII, § 6(a), (b), and (c). Obviously, the Election Commission must have an up-to-date and accurate list of eligible voters, including absentee voters, before issuing a Recall Petition form.

3. The signed Recall Petition must be received by the Election Commission within 120 days of the date that the Election Commission gives the requesting party the Petition. Art. XII, § 6(c).

4. Within 20 days of receiving the signed Recall Petition, the Election Commission must check each of the signatures on the Recall Petition to see if they are valid. Art. XII, § 6(d). The Election Commission must check each signature to see if it matches the signature on the voter registration form. *Cf.* Rule 11(A)(1) and Rule 13(B) (requiring the Election Commission to verify signatures on absentee ballots by comparing them to signatures on voter registration forms). If the signature does not match, the signature may not be counted toward the required minimum number.

5. The Election Commission must accurately count the number of valid signatures to determine whether the Recall Petition has the minimum number of valid signatures. If it does, the Election Commission shall certify that the Recall Petition is valid and schedule a Special Election for the recall. Art. XII, § 6(d).

6. The Recall Election must be scheduled within 60 days of the date the Election Commission certifies the Recall Petition. Art. XII, § 6(d). The Election Commission must provide the public with *one* accurate written Election Announcement no less than 50 days before the date set for counting ballots. Rule 4(B). These rules, read together, mean that a recall election must be scheduled to be held on a date between 50 and 60 days after the date the Election Commission certifies the Recall Petition.

7. The Election Announcement *must be accurate.* The Election Commission should ensure that the following problems with prior Election Announcements are cured:

   - The Election Commission should refer to itself as the "Election Commission," not the "Election Board." Art. IX, § 3(a).

   - The Election Announcement should be issued only once. The Election Announcement should be checked *before* it is published and provided to the public so as to ensure that the dates are accurate and that they comply with the Constitution and Rules, and with this Opinion and Order.

   - The Election Announcement concerning a recall election should contain *no* references or citations to the Constitutional provisions concerning *referenda,* including without limitation any references to Article XI.

- The Election Announcement *shall not state* that "minor dates may change, should the need arise," or that "dates may change, should the need arise," or any similar statement. The dates contained in the Election Announcement are all dictated by the Constitution and the Rules. Therefore, those dates *may not change.*

8. The Election Announcement must state *all* of the following dates and times:

   - The date of the Election Announcement;
   - The date the Recall Petition was certified;
   - The date for mailing out of absentee ballots;
   - The date and time of the election;
   - The day for counting of the ballots;
   - The date and time of posting preliminary results of the election;
   - The date and time of the deadline for requesting a recount; and
   - The date and time of the deadline for filing a protest or challenge to the results of the election under Rule 14(D).

9. Any election-related date or deadline that requires a public office to be open in order for action to be taken cannot fall on a Saturday, Sunday, or legal holiday on which the public office is closed. This includes:

   - The date of the issuance of the Election Announcement (because it will not be possible for the Election Commission to post the Announcement at public offices that are closed). *See* Rule 4(B) (requiring that the Election Announcement be posted at the Tribal Office and other appropriate locations).
   - The date for mailing out of ballots. Rule 4(C) requires the mailing out to take place at least 21 days before the date set for counting ballots. (Placing the ballots in a postal receptacle that the United States Postal Service will not process later that day does *not* constitute mailing out of the ballots on that date.) If the date for counting ballots is set such that the 21-day deadline for the ballot mailout would fall on a Saturday, Sunday, or legal holiday, then ballots must be mailed out on the business day *before* that Saturday, Sunday, or legal holiday.

- The date for counting ballots. Rule 4(A) provides that absentee "ballots returned by mail to the Concho Post Office not later than 3:00 P.M. (the Concho Post Office closes at 3:00 P.M.) on the date set in the Election Announcement for counting ballots" shall be counted. Therefore, to allow absentee voters the full time to return their ballots, the date for counting ballots must be set for a date when the Concho Post Office *will be open* and on which its postal employees *will be placing mail received that day into the Election Commission's designated post office box.*

10. The deadlines for requesting recounts and filing protests and challenges must not be set so that it is impossible for persons wishing to file them to do so. If the date and time of posting results is set such that the time periods would run over Saturdays, Sundays, or legal holidays, the Election Commission office *must* be open on those weekend or holiday days to receive recount requests, protests, and challenges.

11. The Election Announcement should provide accurate information about the recount-request deadline. The Election Announcement must state a specific date *and time* when preliminary election returns will be posted, and must state that a recount may be demanded within 24 hours of the posting of preliminary election returns. Rule 14(A).

12. Similarly, the Election Announcement must also provide accurate information about the deadline for challenges and other protests, providing the specific date *and time* by which challenges must be filed. Rule 14(D).

13. The Election Commission must publicly post the Election Announcement at the Tribal Office and "other appropriate locations and newspapers." Rule 4(B).

14. The Election Commission shall accept voter registrations until 10 days before the date of mailing out the ballots. Rule 9(F). If the voter registration deadline falls on a Saturday, Sunday, or legal holiday, Rule 1(K) requires that the Election Commission accept registrations until the next business day following that Saturday, Sunday, or legal holiday.

15. Persons wishing to register to vote should ensure that they are doing so on the correct registration form. The Election Commission should ensure that the standard approved form currently in effect is readily available to registrants from the Election Commission, Tribal Headquarters, Tribal Secretary, Tribal Receptionists, and Legislative offices, *see* Rule 9(C), and that the correct form is available on all appropriate websites.

16. Pursuant to Rule 9(A), voter registrations *must* be delivered to the Election Commission *by the individuals registering,* either in person or by mail (though as we

indicate below, in the interests of fair notice, we apply that requirement *only prospectively,* to voter registrations that are submitted to the Election Commission *after* the date on which this Opinion and Order is filed).

17. A voter's registration is effective on the date it is received and stamped by the Election Commission, provided that it is received 30 days or more before an election date. Rule 9(B). The Election Commission should stamp voter registrations in on the day they are received; it may not refuse to consider a voter's registration effective if it was received 30 days or more before the election date.[2]

18. On the date stated in the Election Announcement for mailing out of ballots, the Election Commission shall mail to each voter on the list a ballot, a blank envelope, and an envelope addressed to the Election Commission. Rule 11(A)(1). To help ensure that voters cast their ballots according to the Rules, the mailout should include a complete description of the procedures for casting a valid ballot as stated in Rule 11(A)(1). [Rule 11(A)(1) appears to be missing three words. The second sentence of the rule should probably read "Those wishing to vote shall indicate their selection on the ballot, seal it in the blank envelope, and insert the blank envelope *in the envelope* addressed to the Election Commission." That omission should be corrected in the information provided in the mailout to absentee voters.]

19. If, before the election, a tribal citizen believes that the Election Commission is not following the rules, that person may bring suit in the Trial Court. *See* CHEY. & ARAP. CONST. [2006] art. VIII, § 5(a); *id.* art. IX, § 8(e); *supra* at 5-6; *cf. Wilson v. Business Committee,* No. CNA-SC-02-02, 8 Okla. Trib. 109, 106-35 (Cheyenne-Arapaho 2003) (noting the relative lenience of our "standing" rules where a tribal citizen seeks to challenge important aspects of alleged governmental misconduct or nonfeasance). To provide due process, the Trial Court must promptly rule upon any request for temporary, preliminary, or emergency relief, conduct appropriate hearings where necessary, promptly rule on any motion for recusal, and promptly rule on requests for permanent injunctions. "Prompt" means "early enough that the Supreme Court will have, before the election, a *meaningful* opportunity to consider and rule upon any appeal from the ruling." A hearing held or a ruling issued only a few days before an election is not "prompt" where the relief was requested in a timely manner.

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[2] Taken together, several of the Rules appear to conflict about the final day for voter registration. Rule 9(D) states that a registration received 30 days before the election date is effective. Rule 9(F) provides that registration is closed 10 days before the ballot mailout date. Rule 4(C) requires the mailout to take place at least 21 days before the ballot counting date. Assuming that the Election Commission mails ballots out on the last possible date and that the ballot counting date is the same as the election date, the last day for registration under Rule 9(D) would be 30 days before the election date, but under Rule 9(F) registration would close 31 days before. If the Election Commission mails the ballots out earlier than 21 days before the ballot counting date, the registration period would close even earlier under Rule 9(F). To give potential registrants the maximum time to participate in the election process, the Election Commission should follow Rule 9(D) and accept all registrations received 30 days before the election date.

The Trial Court shall not decline to consider a case requesting pre-election relief against an Election Commission action, ruling, and/or decision, nor shall it defer to further Election Commission procedures to avoid ruling in such a case. The Constitution expressly directs the Trial Court to consider such cases, *see* CHEY & ARAP. CONST. art. VIII, § 5(a); *id.* art. IX, § 8(e), and this Court will enforce the Constitution's requirements by writs of mandamus where necessary.

20. The Election Commission may have one, two, or three polling sites in each district. Art. IX, § 6. "The Election Commission shall properly account for all official ballots and shall ensure the integrity of the official ballots." Art. IX, § 7(c). Ensuring the integrity of the official ballots includes, without limitation, providing a voting system that prevents a voter from voting more than once in a district with multiple polling sites.

21. All elections shall be conducted by secret written ballots. Art. IX, § 7(a). The Election Commission shall ensure that its members, poll workers, observers, and others assisting with the election conduct themselves in such a way as to assure a fair and impartial election, *see* Art. IX, § 3(a), and that they refrain from conduct that favors any candidate or that changes or attempts to change the outcome of an election, *see* Rule 3(B)(1), (2), (3). Further, the Election Commission shall enforce the rule that no person may engage in electioneering within 100 feet of a polling site. Rule 10(A)(3).

22. After the ballots have been counted and the preliminary results have been posted, the Election Commission *must* be open during normal working hours during the recount, challenge and protest periods, even if those periods run over a Saturday, Sunday, or legal holiday. The Rules do not require that the person on whose behalf the recount request, protest, or challenge is filed deliver it in person. The Election Commission shall *not* refuse to accept a recount request, protest, or challenge based on the identity of the person delivering it.

23. The Election Commission's actions and rulings on any matter should reflect that the matter was considered by all Commissioners, not just those who agree with the result.

24. The Election Commission's ruling on a recount request, protest, or challenge is not final until the Supreme Court has ruled on the appeal. Art. IX, § 13. Therefore, the status quo before the election *shall* be maintained until the Supreme Court has exercised its original and exclusive jurisdiction over any appeal under Article VIII, Section 5(b) and Article IX, Section 13. Any actions by anyone in derogation of this principle are void.

25. At any stage of the process, if an Election Commissioner is alleged to have engaged in deliberate conduct that favors any candidate, or in any other conduct that would

constitute grounds for removal under Rule 3(B), the person alleging that such conduct occurred is entitled to have the Election Commission review whether the Commissioner should be removed in accordance with the procedures stated in Rule 3(C). The Commission's final determination about whether grounds exist to remove a Commissioner is subject to judicial review in the District Court. Rule 3(C). We explicitly note that Article IX, Section 3(d) of the Constitution does *not* limit its force to Election Commissioners who have been previously convicted of a criminal violation. *See id.* (providing that Article IX, Section 3(d) applies to Election Commissioners "convicted of a violation of the Election laws *or* have violated the Election laws as determined by the Judicial branch" (emphasis added)).

IV.

In a letter dated Sunday, September 2, 2007 (and file-stamped "received" by the Election Commission on Tuesday, September 4, 2007) Governor Flyingman formally protested the Election Commission's certification of the results of the September 1 Recall Election against him, and in so doing he incorporated by reference all of the objections he had attempted to raise before the Trial Court in Case No. CNA-CIV-07-56 and those raised in his August 22 letter to the Election Commission seeking a hearing before that body. On Monday, September 3, 2001 [Labor Day], he directed a Supplement to and Restatement of Formal Protest (containing more allegations and theories) to the Election Commission's attention. (Like his September 2 letter, Mr. Flyingman's Labor Day Supplemental Protest was stamped "received" by the Election Commission on Tuesday, September 4.)

Because we have resolved this appeal on the basis of the grounds discussed above, we need not address the numerous other allegations made by Mr. Flyingman in those documents. Because of apparent misinterpretations of the consequences of our having stated before that we did not find it necessary to rule on a particular matter, *see, e.g., supra* at 1 n.1, we reemphasize that when we state that we have not found it necessary to decide a matter, we mean exactly that. We do not mean that we have *rejected* the argument. We simply mean that in light of our disposition of the case on other grounds, we have not found it necessary to rule on additional theories that would *also* support our conclusion.

That said, it may be appropriate to put all parties on notice that we continue to be especially troubled by some of the allegations on which we have not found it necessary to rule in this case. Among them are alleged derogations from the principles we enumerated in Part III of this Opinion and Order, and the potentially misleading (and possibly otherwise improper) uses of letterhead to improperly influence the results and/or conduct of the Recall Election. Whether any of those matters, singly or cumulatively, might become dispositive in a future election is a matter on which we do not express an opinion herein.

V.

Wherefore it is ORDERED and DECLARED, that the September 1, 2007 Recall Election of Governor Darrell Flyingman, the challenge to which was rejected by the Election

Commission on September 5, 2007, is null and void; that the Election Commission is permanently enjoined from certifying the results of said election; and that its final determination of September 5, 2007 rejecting a challenge to its certification of the results of that election is REVERSED. For the reasons described above, *see supra* at 9 (item #16), we further order the Election Commission to promptly register the seventy-three persons whose voter registrations were submitted to the Commission by Governor Flyingman upon the Commission's prompt determination that those applicants are in fact enrolled tribal members otherwise qualified to register to vote. In consequence of the above rulings, Darrell Flyingman remains the Governor of the Cheyenne and Arapaho Tribes until his lawful term ends, he resigns from office, or he is validly removed according to constitutional processes.

IT IS SO ORDERED.

Chief Justice Ryland L. Rivas

Associate Justice Dennis W. Arrow

Special Justice Karen Eby

Special Justice Taiawagi Helton

Special Justice Lindsay G. Robertson

CERTIFICATE OF MAILING

I, Patty Bell, Court Clerk of the Supreme Court for the Cheyenne and Arapaho Tribes do hereby certify that I mailed the following document to those names who appear below in Case No: CNA-SC-07-13, Darrell Flyingman, Governor vs. Election Commission and Scott Sankey, et al.

SUPREME COURT OPINION AND ORDER ISSUED 9-24-07

via U.S. regular mail on the 24th day of September, 2007.

Mr. Robert J. Lyttle
Attorney At Law
3334 W. Main St., #507
Norman, OK 73072
- Appellant
(Opinion sent by facsimile on 9-24-07)

Mr. Charles B. Morris
Attorney At Law
401 12th Ave., #151
Norman, OK 73071
- Attorney For Appellees
(Opinion sent by facsimile on 9-24-07)

Mr. Truman Carter
Attorney General
P.O. Box 102
Concho, OK 73022

Mr. Ryland L. Rivas
Chief Justice, Supreme Court

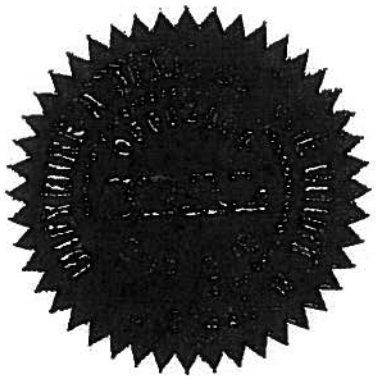
Mr. Dennis Arrow
Associate Justice, Supreme Court

Mr. Amos Black, III
Associate Justice, Supreme Court

Mr. Lindsay Robertson
Special Justice, Supreme Court

Ms. Karen Eby
Special Justice, Supreme Court

Mr. Taiawagi Helton
Special Justice, Supreme Court



Patty Bell
Court Clerk
Cheyenne and Arapaho Supreme Court

EXHIBIT 2

Leslie Wandrie-Harjo, et al. v. Janice Prairie Chief-Boswell, et al.
Case No. 5:11-cv-00171-F

AFFIDAVIT OF GOVERNOR JANICE PRAIRIE CHIEF-BOSWELL

I, Governor Janice Prairie Chief-Boswell, being first duly sworn and upon my oath swear I have personal knowledge of the contents herein and can testify to the same.

1. I am an enrolled member of the Cheyenne and Arapaho Tribes.

2. I was elected as Governor by a majority of voters of the Tribes in November 2009.

3. I cast a vote for myself as Governor in the 2009 Elections.

4. I was sworn into office and began my term as Governor of the Tribes on January 2, 2010.

5. I have not been removed as Governor by recall vote.

6. I have not been impeached by unanimous vote of the Legislature.

7. My term as Governor has not expired.

8. I have not resigned as Governor.

9. I have not been validly removed as Governor according to any constitutionally-prescribed process.

10. I currently serve as Governor.

11. Upon commencement of my term, I appointed Charles B. Morris to serve as Attorney General.

12. The Cheyenne and Arapaho Tribes' Constitution does not authorize Lieutenant Governor Leslie Wandrie-Harjo to appoint an Attorney General.

FURTHER AFFIANT SAYETH NAUGHT

Janice Prairie Chief-Boswell

Governor Janice Prairie Chief-Boswell, in her official capacity

STATE OF OKLAHOMA)
) ss.
COUNTY OF Blaine)

SUBSCRIBED AND SWORN TO before me this 15th day of April, 2011 by Janice Prairie Chief-Boswell.

Witness my hand and official seal.

[SEAL]

Diane M. Willis

Notary Public
My commission expires: 08003136

DIANE M. WILLIS
Notary Public
State of Oklahoma
Commission # 08003136 Expires 03/31/12

EXHIBIT 3

IN THE SUPREME COURT
CHEYENNE AND ARAPAHO TRIBES
CONCHO, OKLAHOMA

CHEYENNE-ARAPAHO
SUPREME COURTS OF OKLA.
FILED
IN THE SUPREME COURT

DEC 30 2009

DOCKET_____PAGE_____
FILM_____IMAGE_____
Patty Bell COURT CLERK
_____DEPUTY

IN RE: INHERENT EXECUTIVE AUTHORITY TO CONDUCT ESSENTIAL GOVERNMENTAL FUNCTIONS.

Governor Darrell Flyingman,
Plaintiff/Appellant,

vs.

First Legislature of the Cheyenne and Arapaho Tribes; [by operation of law] Second Legislature of the Cheyenne and Arapaho Tribes; and Ida Hoffman, Speaker, First Legislature; and Roy Dean Bullcoming; Mike Martin; Janice Prairiechief Boswell; Virgil Whiteshirt, Jr.; and Robert Wilson, Legislators,
Defendants/Appellees,

Case No: SC-2007-0002

BEFORE: Chief Justice Ryland L. Rivas, Associate Justice Dennis W. Arrow, Associate Justice Enid K. Boles, Special Justice Karen Eby and Special Justice Lindsay G. Robertson

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JUDGMENT OF THE SUPREME COURT
OF THE CHEYENNE AND ARAPAHO TRIBES

NOW COMES the Court Clerk for the Supreme Court, Patty Bell, pursuant to Section 461 of the Appellate Procedure Code of the Cheyenne and Arapaho Tribes and hereby enters judgment in this action in accordance with the decision of the Cheyenne and Arapaho Supreme Court filed December 30, 2009.

RECEIVED

JAN 04 2010

DONE this 30th day of December, 2009.

Patty Bell
Court Clerk
Cheyenne and Arapaho Supreme Court

CHEYENNE-ARAPAHO
SUPREME COURTS OF OKLA.
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IN THE SUPREME COURT
DEC 30 2009
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COURT CLERK
DEPUTY

In the Supreme Court of the Cheyenne and Arapaho Tribes

CONCHO, OKLAHOMA

[THE BUDGET STALEMATE CASE]	)	
	)	
IN RE INHERENT EXECUTIVE AUTHORITY TO CONDUCT ESSENTIAL GOVERNMENTAL FUNCTIONS.	)	
	)	
Governor Darrell FLYINGMAN,	)	
	)	
Plaintiff/Appellant,	)	
	)	
v.	)	No. SC-2007-0002
	)	
FIRST LEGISLATURE of the Cheyenne and Arapaho Tribes; [by operation of law] SECOND LEGISLATURE of the Cheyenne and Arapaho Tribes; and Ida Hoffman, Speaker, First Legislature; and Roy Dean Bullcoming; Mike Martin; Janice Prairiechief Boswell; Virgil Whiteshirt, Jr.; and Robert Wilson, Legislators,	)	
	)	
Defendants/Appellees.	)	

ON APPEAL FROM JANUARY 3, 2007 DECISION OF THE TRIAL COURT IN CASE NO. CNA-CIV-06-89

OPINION AND FINAL ORDER

BEFORE: Acting Chief Justice Ryland L. Rivas
Justice Dennis W. Arrow
Justice Enid K. Boles
Special Justice Karen Eby
Special Justice Lindsay G. Robertson

JUSTICE ARROW delivered the Opinion and Final Order of the Court.

I.

A.

This case has had a long history, and that history is told in substantial detail in our earlier Orders in this case.[1] To briefly summarize, *In re Inherent Executive Authority* was initiated by a December 27, 2006 Trial Court Complaint filed by the Tribes' first Governor, Darrell Flyingman. In that Complaint, Governor Flyingman averred that he was approaching the beginning of calendar year 2007 with no validly adopted tribal budget in place, and he sought declaratory relief from the Trial Court to the effect that he had inherent executive authority to continue to expend the funds necessary to provide essential governmental services to tribal members until a valid budget was enacted.

On January 3, 2007, the Trial Court decided that he could not, and that tribal government must be shut down in a budget-stalemate situation. We held otherwise on October 10, 2007, and we held that Governor Flyingman could continue to expend tribal funds on essential government services absent a valid 2007 tribal budget unless and until a valid 2007 budget was adopted.[2] (None was.)

B.

After some members of the former Election Board (and perhaps others) took repeated illegal actions that would to ultimately sabotage timely 2007 elections, we consolidated this case with the *2007 Elections Case*[3] so that Governor Flyingman might lawfully expend such tribal funds as would

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[1] *See In re Inherent Executive Authority,* No. SC-2007-02 (Chey. & Arap. S.Ct. Apr. 18, 2007) (order inviting supplemental briefing); *id.* (Chey. & Arap. S.Ct. June 12, 2007) (order allowing attorney to withdraw); *id.* (Chey & Arap. S.Ct. Oct. 10, 2007) (interim order); *id.* [consolidated with No. SC-2007-15] (Chey. & Arap. S.Ct. Oct 24, 2007) (order granting writ of mandamus and interim order furthering interim order); *id.* [consolidated with No. SC-2007-15] (Chey. & Arap. S.Ct. Nov. 27, 2007) (interim order inviting briefing); *id.* [consolidated with No. SC-2007-15] (Chey. & Arap. S.Ct. Jan. 7, 2008) (interim order); *id.* [consolidated with No. SC-2007-15] (Chey. & Arap. S.Ct. Apr. 14, 2008) (order); *id.* (Chey. & Arap. S.Ct. Oct. 31, 2008) (order severing consolidated appeals); *id.* (Chey. & Arap. S.Ct. May 11, 2009) (order suggesting mootness).

[2] *See In re Inherent Executive Authority,* No. SC-2007-02, slip op. at 6-15 (Chey. & Arap. S.Ct. Oct. 10, 2007) (interim order).

[3] *Spottedwolf v. Hoffman,* No. SC-2007-15. *See generally In re Inherent Executive Authority/ Spottedwolf v. Hoffman,* Nos. SC-2007-02 & SC-2007-15, slip op. at 11-14 (Chey. & Arap. S.Ct. Oct. 10, 2007) (cataloguing a few examples among the cascade of illegal — and to a large extent, enjoined — actions of a working majority of former Election Board members during 2007); *id.*, slip op. at 3-8 & nn. 1-3 (Chey. & Arap. S.Ct. Nov. 21, 2007) (providing further details).

be necessary to resuscitate those elections in a manner conforming as closely as possible to constitutional directives. The reconstituted Election Commission that took office pursuant to our January 7, 2008 and April 14, 2008 Orders[4] in the consolidated *Inherent Executive Authority/2007 Elections* case conducted Cheyenne District 1 and Cheyenne District 3 elections (necessarily, eight months late), in accordance with our April 14, 2008 Order therein.

In that Order, we also ruled that Patrick Spottedwolf and Ellen Sweezy were the only candidates who had validly filed to run for the new Arapaho District 3 and 4 seats (respectively),[5] and although a working majority of former Election Board members (and perhaps, as Mr. Spottedwolf argued, others[6]) had attempted to thwart their efforts, as the only timely and lawfully-filed candidates for the A-3 and A-4 seats in the Legislature, Mr. Spottedwolf and Ms. Sweezy were lawfully entitled to those seats *without* any A-3 or A-4 election.[7]

With our having caused Mr. Spottedwolf and Ms. Sweezy to assume the A-3 and A-4 legislative seats, and with Bruce Whiteman, Jr. and Charles E. Fletcher having prevailed in the C-1 and C-3 elections that were conducted by the new Election Commissioners consistent with our April 14, 2008 Order, by August 2008 the Legislature had been restored to its full complement of eight lawfully seated Legislators.

C.

With that accomplished,[8] on October 31, 2008 we severed the formerly consolidated *Inherent Executive Authority* and *2007 Elections* cases. On May 11, 2009 we entered an Order Suggesting

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[4] *See In re Inherent Executive Authority/Spottedwolf v. Hoffman,* Nos. SC-2007-02 & SC-2007-15, slip op. at 3-8 (Chey. & Arap. S.Ct. Jan. 7, 2008) (interim order); *id.,* slip op. at 1-10 (Chey. & Arap. S.Ct. Apr. 14, 2008) (order).

[5] *But cf. The 2007 Elections Case* [*Spottedwolf v. Hoffman*], No. SC-2007-15, slip op. at 5-6 n.1 (Chey. & Arap. S.Ct. Nov. 7, 2008) (noting that Doris Dolese Thunderbull had filed a petition urging us to reconsider our conclusion that Mr. Spottedwolf was the only validly-filed A-3 candidate; acknowledging that Ms. Thunderbull's claim to valid A-3 candidate status had support in the Record; but noting that before we could rule on her petition asking us to reconsider, Ms. Thunderbull withdrew her petition "in the interests of tribal healing and 'moving on'").

[6] *See id.* at 1 (quoting Petition at 2, *Spottedwolf v. Hoffman,* No. CIV-2007-45 (Chey. & Arap. Trial Ct. *filed* June 11, 2007)); *see also In re Inherent Executive Authority/Spottedwolf v. Hoffman,* Nos. SC-2007-02/SC-2007-15, slip op. at 10 (Chey. & Arap. S.Ct. Nov. 21, 2007) (discussing, but not ruling on, Mr. Spottedwolf's allegations that it was then-Speaker Hoffman who had unconstitutionally *directed* the then-working majority of the Election Board to sabotage the 2007 elections).

[7] *See In re Inherent Executive Authority/Spottedwolf v. Hoffman,* Nos. SC-2007-02 & SC-2007-15, slip op. at 8 (Chey. & Arap. S.Ct. Apr. 14, 2008) (*per curiam*).

[8] *See generally The 2007 Elections Case* [*Spottedwolf v. Hoffman*], No. SC-2007-15 (Chey. & Arap. S.Ct. Nov. 7, 2008) (summarizing prior holdings, describing the aftermath, and closing *The 2007 Elections Case*).

Mootness in this case, and invited response. Defendants/Appellees Legislature and Legislators filed a responsive Statement on May 22, 2009. They took the position that this case was **not** moot because we had not yet decided all of the issues we had catalogued in our October 10, 2007 Interim Order.[9]

Plaintiff/Appellant Flyingman filed a responsive Statement on May 26, 2009. He argued therein that the key remaining issues in *Inherent Executive Authority* were budgetary, and as to that cluster of issues this case **was** moot because in the interim a valid *2008* budget had been adopted, and that budget contained a self-sustaining provision that caused it to remain in effect even if no valid 2009 budget were *ever* to be enacted.[10]

D.

In our October 10, 2007 interim order herein, we catalogued 26 issues that Appellant, Appellees or both had asked us to decide in this case, or that were logically and legally anterior to issues that the parties had by that date asked us to decide. In our November 27, 2007 interim order inviting further briefing, we also invited the parties to brief eight issues particular to the purported 2007 tribal budget(s).

In urging us to **not** dismiss this case as moot, Appellee Legislature and/or Legislators (or former Legislators) Hoffman, Bullcoming, Martin, Boswell, Whiteshirt, and Wilson argued in their May 22, 2009 Statement:

> *Some* of the issues were addressed in the Court's Interim Orders and *others* were remanded to the Trial Court. However, there are *still* outstanding issues this Court identified as present in this appeal which were *never addressed* by this Court or the Trial Court on remand. Additionally, **many of the issues are of the UTMOST IMPORTANCE for the effective function of the Tribal government, and resolution of those issues by this Court would SET PRECEDENT which would obviate the need for the filing of additional cases in the Tribal Courts.** As such, **this case is not moot,** and this Court **should issue an opinion disposing of the Court-identified issues present in this case.**[11]

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[9] *See generally In re Inherent Executive Authority,* No. SC-2007-02, slip op. at 4-5 (Chey.& Arap. S.Ct. Oct. 10, 2007) (interim order); *id.,* slip op. at 1-2 (interim order inviting briefing).

[10] *See* [Appellant's] Response to Order Suggesting Mootness at 1 n.1, *In re Inherent Executive Authority,* No. SC-2007-02 (Chey. & Arap. S.Ct. *filed* May 26, 2009).

[11] Appellees' Statement at 1-2, *In re Inherent Executive Authority,* No. SC-2007-02 (Cheyenne & Arapaho S.Ct. *filed* May 22, 2009) (emphasis added).

E.

We are persuaded by that reasoning, and we note in passing that that it is urged upon us by the Legislature, five current Legislators, and a former Legislator who has recently become the Governor-Elect of the Tribes. We agree not only with their reasoning but also its unstated premise: that to endure, the rule of law requires predictability, adherence to settled judicial precedents,[12] and fair notice to all litigants of what the settled law *is*.[13]

We have attempted to keep our docket as current as possible so that we might have the *potential* time to devote to newly-filed appeals demanding our urgent attention. Toward that end, we have kept our docket moving by entering orders suggesting mootness (and inviting response) in cases in which such orders seemed appropriate (including this case).

But in evaluating parties' *responses* to orders suggesting mootness, we have also kept in mind the problem that the Legislature, five current Legislators, and the Governor-Elect highlight in their May 22, 2009 Statement: the need for us to **decide** "issues [that] are of the utmost importance for the effective function of Tribal government," and thereby to **"set precedent** which would obviate the need for the filing of additional cases in the Tribal Courts."[14] We too, believe that pursuing those goals is in the best interests of the Tribes .

Consistent with those goals, we have evaluated with open minds claims that issues facially appearing to be moot might nevertheless also be "of great public importance" and "capable of repetition, yet evading review." We have held that those generally recognized exceptions to the mootness doctrine are also applicable in Cheyenne and Arapaho courts. In cases we decided earlier in 2009, we have applied those "mootness" exceptions at the request of Legislators Martin, Spottedwolf, Whiteman, and Hoffman in the *Anticipatory Constitutional Challenges Cases;*[15] Speaker Spottedwolf in the *Recall Petition Notice Case;*[16] and the Election Commission in the *Absentee Ballot Reasons Case.*[17] As Appellees argue herein, by deciding cases we establish

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[12] *See generally, e.g.,* CHEY. & ARAP. CONST. [2006] art. VIII, § 6(c) ("The Supreme Court shall have the power to interpret the Constitution and laws of the Tribes and to make conclusions of law."); *id.* art VIII, § 6(d) ("The Supreme Court shall have the power to declare the laws of the Tribes void if such laws are not in accord with this Constitution."); *id.* art. VIII, § 6(c) ("Decisions of the Supreme Court shall be final."); *id.* art VIII, § 4(a) ("The Governor shall enforce court orders.").

[13] *See, e.g., id.* art I, § 1(k).

[14] Appellees' Statement at 1-2 (May 22, 2009) (emphasis added).

[15] *See In re Special Tribal Council Meeting Set for November 22, 2008,* No. SC-2009-01, slip op. at 6 (Chey. & Arap. S.Ct. Sept. 1, 2009); *see also id.* (Chey. & Arap. S.Ct. Dec. 3, 2009) (providing the "second half" of our "anticipatory challenge" holdings).

[16] *See Spottedwolf v. Election Commission,* No. SC-2009-18, slip op. at 2 (Chey. & Arap. S.Ct. Dec. 3, 2009).

[17] *See Election Commission v. Whiteman,* No. SC-2009-20, slip op. at 3 (Chey. & Arap. S.Ct. Dec. 17, 2009).

precedent that, *if followed* (and the Constitution *requires*[18] that our decisions be followed), will spare the Tribes and potential litigants on all sides the expense of litigating dozens more cases in the future, and help preserve the rule of law.

We therefore select the course of conduct urged by Appellees in their May 22, 2009 Statement, and we enter this Opinion and Final Order resolving the remaining non-moot issues in this case.

II.

A.

Inherent Executive Authority primarily addresses budgetary and/or spending issues through the lens of inherent gubernatorial powers (and/or duties) to spend tribal funds on essential governmental functions absent a lawful tribal budget. During the past two-and-a-half years, we have resolved many of those (and closely related) issues in this[19] and other[20] cases.

To identify a logical starting point from which we may reason further, we begin with the twenty-six issues we deemed to have been presented to us by the *Inherent Executive Powers* parties for resolution. Their enumeration (with only *brief* descriptions of each) consumed two single-spaced typed pages of our October 17, 2007 interim order,[21] and because all parties hereto will have our October 10, 2007 interim order readily available, we do not replicate those pages verbatim here. We believe it far more useful for present purposes to group those twenty-six issues into categories.

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[18] *See supra* note 12 (quoting some of the controlling constitutional provisions).

[19] *See, e.g., In re Executive Authority,* No. SC-2007-02, slip op. at 8-16 (Chey. & Arap. S.Ct. Oct. 10, 2007) (interim order).

[20] Other cases in which we resolved budgetarily-related and/or expenditure-related issues include: *The Speakership Case* [*Hoffman v. Flyingman*], No. SC-2008-04, slip op. at 36 (Chey. & Arap. S.Ct. Nov. 20, 2008) (recognizing the existence of gubernatorial power to validly appoint a tribal Attorney General, and the necessity of an Attorney General to the Executive Branch's ability to effectively function under the 2006 Constitution's four-Branch structure); *The Legislative Staff Employment Case* [*Hoffman v. Flyingman*], No. SC-2008-10, slip op. at 27-28 & n.57 (Chey. & Arap. S.Ct. Dec. 3, 2009) (recognizing the necessity, for calendar year 2009 purposes, of legislative Budget Analyst and (with one qualification) legislative Research/Grant Writer positions to the ability of the Legislative Branch to effectively function under the 2006 Constitution's four-Branch structure); *The Hoffman Recall Case* [*Hoffman v. Election Commission*], No. SC-2009-06 (Chey. & Arap. S.Ct. Oct. 30, 2009) (extending the benefits of the "funds reasonably necessary to effectively operate" principle to the Election Commission in addition to Branches and constitutionally mandated Departments); *The Spottedwolf Recall Case* [*Spottedwolf v. Election Commission*], No. SC-2009-18 (Chey. & Arap. S.Ct. Dec. 3, 2009) (applying *The Hoffman Recall Case* to the Election Commission's ability to retain qualified and competent *independent* legal counsel).

[21] *See In re Inherent Executive Authority,* No. SC-2007-02, slip op. at 4-5 (Chey. & Arap. S.Ct. Oct. 10, 2007) (interim order).

1.

The first three proffered issues we identified in our October 10, 2007 interim order fall into a broad "meta-theoretical,""overarching constitutional structure," "institutional competence" category. *Should we apply common knowledge about the Tribes' immediately pre-2006 Constitution governmental history in construing that Constitution? Does the 2006 Constitution assign the Judicial Branch a role in preventing a tribal governmental shutdown* (with potentially *very* dire consequences for *some* tribal citizens, and bad consequences for *all*) *if the political Branches gridlock and there is no tribal budget? Does the Constitution require us to simply walk away from the problem under those circumstances, declare the matter a "nonjusticiable political question"* (or something similar), *and let the chips fall where they may? Or does the Constitution require us to order a shutdown where a Governor wants to continue expenditures on tribal services in the interim?*

2.

The issues we numbered "4" through "11" in our October 10, 2007 interim order all deal with the powers of Branches (and/or Branch officials) to sue each other in tribal courts, and the circumstances in which the Tribes must pay the attorneys' fees incurred in the tribal-court litigation that results.

3.

The issues we numbered "12" through "18" in our October 10, 2007 interim order present *general* constitutional questions about budgetary matters that transcend questions about any *particular* budget or any *particular* budget year.

4.

The issue we numbered "19" in our October 10, 2007 order addresses *only* the putative *2006* tribal budget. As noted above, in a November 27, 2007 interim order, we also invited briefing from the parties with respect to the putative *2007* tribal budget(s), and the issue we numbered "20" in our October 10, 2007 interim order addressed the possible impact of 2006 budgetary actions *on* the validity of the 2007 budget(s). In responding to that cluster of issues, we also summarize our prior holdings about the validity of any 2008 and 2009 tribal budgets.

5.

The issues we numbered "21" through "26" in our October 10, 2007 interim order all address not questions of *substantive law,* but of *remedy. Assuming* for *purposes of argument* that the Judicial Branch has a constitutional role to play in budget-gridlock/budget-stalemate situations, *what factors should counsel the exercise of our inherent remedial powers in fashioning a remedial decree?*

B.

We first confront the threshold "standing" issues, and we note at the outset that our prior "standing" (and related sovereign-immunity) decisions have already resolved many of the "what-Branch (or official)-may-sue-what-Branch (or official)-for-what?" questions we describe in Part II-A-2 above.

1.

In the *Legislative Prosecutor/Legislative Subpoena Case,*[22] we held in part that the tribal Constitution allows the Governor to sue *the Legislature* in its *only* (official) capacity for declaratory and/or injunctive relief where the Governor asserts that the Legislature has breached the Article VI, Section 7(a)(vi) Voidness Clause, has unconstitutionally usurped Executive Branch powers, or has unconstitutionally sought to self-aggrandize its own powers at the expense of the Executive Branch.[23] We construed the pursuit of judicial review in such circumstances to be a constitutionally-permissible course of action given the potential alternatives of both "on-the-ground" and jurisprudential chaos (when the Judicial Branch is eventually called upon not only to resolve the *merits* of the underlying dispute[24] but to *remedially* put the toothpaste back into the tube). We note that the above-described holding is also consistent with Appellees' expressed desire to diminish the quantity and adverse consequences of otherwise-avoidable future litigation,[25] and we deem it sufficient to have authorized the Governor's pursuit of declaratory relief in this case. Moreover, we note, it is not the Plaintiff/Appellant Governor, but Defendants/Appellees, who have most recently urged us to rule on the remaining issues in this case.

2.

But in our earlier decisions, we have drawn quite different conclusions about the ability of Executive Branch officials (or others) to bring suit against *Legislators* (including the Speaker). In *In re Special Tribal Council Meeting Set for November 22, 2008,*[26] we held that when Legislators simply *vote on legislation,* they are almost always[27] absolutely immune from civil suit of any kind under Article X, Section 4 of the Constitution because *voting on legislation is the core activity of*

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[22] *Spottedwolf v. Flyingman,* No. SC-2009-23 (Chey. & Arap. S.Ct. Dec. 17, 2009).

[23] *See id.* at 13-15.

[24] *See, e.g., supra* at 4 n. 12 (quoting some of the applicable constitutional provisions).

[25] *See supra* at 3 (quoting Appellees' Statement and Response at 1-2 (May 22, 2009)).

[26] No. SC-2009-01.

[27] *Cf. The Legislative Prosecutor/Legislative Subpoena Case* [*Tall Bear v. Flyingman*], No. SC-2009-01, slip op. at 9 n.22 (Chey. & Arap. S.Ct. Dec. 17, 2009).

Legislators (including the Speaker). Voting is what Legislators *do,* and "official capacity" Article X, Section 4 sovereign immunity shields them from any lawsuits related thereto.[28]

In the *Legislative Prosecutor/Legislative Subpoena Case,*[29] we again applied Article X, Section 4 "official capacity" sovereign immunity to shield Legislators from declaratory and/or injunctive relief for simply having voted, despite the fact that what they voted *for* was void under the Voidness Clause[30] and otherwise unconstitutional.[31] We also held that Speaker Spottedwolf's attempts to generate compliance with subpoenas that we held void under the Voidness Clause (and otherwise unconstitutional) were shielded by his "official capacity" sovereign immunity from a declaratory and/or injunctive-relief lawsuit against him on a variety of grounds. Those grounds include the ground that the "official capacities" of tribal officials having no executive power[32] should be "construed generously" for sovereign immunity (*i.e.,* as a defendant) purposes, and especially so where no clearly established tribal law previously established the proposition on the basis of which the attempted lawsuit is brought. Moreover, precisely because such officials have no executive power, it is almost never *necessary* to sue them.[33]

We did not find it necessary in that case to *re*-address the "official capacity" sovereign immunity of any Legislator (including the Speaker) from any suit having any "attorney's fees" claim *or* request for relief because of our prior holdings that tribal law recognizes no civil claim (or remedy) having *any* attorney's fees component against any tribal official (or Branch).[34] We explicitly stated that we did not imply that "official capacity" sovereign immunity would not *also* protect any tribal official from any attorney's fees claim or request for relief,[35] and lest that *disclaimer* generate any unintended inference (and inevitable litigation), we note herein that "official capacity" sovereign immunity clearly *would also* bar such relief under our holding in *In re Special*

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[28] *See In re Special Tribal Council Meeting Set for November 22, 2008,* No. SC-2009-01, slip op. at 8-9 (Chey. & Arap. S.Ct. Sept. 1, 2009). We therein noted that the same principles apply (*mutatis mutandis*) to Judges' and Justices' "official capacity" sovereign immunity under Article X, Section 5. *See id.*

[29] *The Legislature v. Flyingman,* No. SC-2009-23 (Chey. & Arap. S.Ct. Dec. 17, 2009).

[30] *See* CHEY. & ARAP. CONST. [2006] art. VI, § 7(a)(vi).

[31] *See The Legislature v. Flyingman,* No. SC-2009-23, slip op. at 5-9 (Chey. & Arap. S.Ct. Dec. 17, 2009) (Chey. & Arap. S.Ct. Dec. 17, 2009).

[32] *See generally* CHEY. & ARAP. CONST. [2006] art. X, § 3 (permitting Executive Branch officials to be sued, but *only* for declaratory or injunctive relief, with no possible attorneys' fees recovery available).

[33] *See The Legislature v. Flyingman,* No. SC-2009-23, slip op. at 9-11 (Chey. & Arap. S.Ct. Dec. 17, 2009).

[34] *See id.,* slip op. at 11-12.

[35] *See id.,* slip op. at 12.

Tribal Council Meeting Set for November 22, 2008.[36]

3.

We therefore hold that Governor Flyingman had standing to bring this declaratory-relief lawsuit against Defendant/Appellee Legislature, and that the Legislature's sovereign immunity does not shield it therefrom. But we reach the opposite conclusions about the individual Legislators (and former Legislators[37]) named as Defendants in Governor Flyingman's December 27, 2006 Complaint, and we hold that they must now be DISMISSED as Defendants/Appellees from this case.

III.

We now address the substantive merits, and in sequence we address the five clusters of issues described in Part II-A above.

A.

The first cluster of issues — the "meta"-issues — raises broad questions about the Judicial Branch's budget-gridlock role (if any) in the four-Branch constitutional structure; our obligations to tribal citizens and the Tribes within that constitutional structure; and our institutional competence to effectively step in when the political Branches of tribal Government reach budgetary stalemate. The 2006 Constitution answers a *very* great number of questions with a *very* high degree of specificity, but it neither resolves the "no budget" conundrum directly nor does it speak directly to the Judicial Branch's role (if any) during budgetary stalemate.

We recently noted in passing the possibility that a governmental "cure" may be worse than the original disease,[38] and we are also mindful of that truism's possible application to Judicial Branch remedies. Walking away, compelling a tribal shutdown, and taking palliative action allowing tribal citizens to continue to receive essential governmental services each carries its own constitutional-application and consequentialist problems.

In seeking to resolve that textually unresolved problem, we consider: [1] inter-Branch relations, prerogatives, and checks-and-balances; [2] the ability of the Tribes *as a whole* to maintain *fiscal accountability* for the benefit of the Tribes *as a whole;* [3] the ability of the Tribes *as a whole* to deter the diversion of *tribal* resources and assets to private purposes (whether through

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[36] *See In re Special Tribal Council Meeting Set for November 22, 2008,* No. SC-2008-01, slip op. at 8-10 (Chey. & Arap. S.Ct. Sept. 1, 2009).

[37] Because we construe Article X to require that absolute "official capacity" immunities held by tribal officials under Article X, Sections 4 and 5 remain with them even after leaving office, we also DISMISS *former* Legislator Janice Boswell, and (assuming *arguendo* his status as such, *see, e.g.,* October 10 Order at 10 n.7) former Legislator Roy Dean Bullcoming, as Defendants/Appellees in this case.

[38] *See The Legislative Prosecutor/Legislative Subpoena Case* [*The Legislature v. Flyingman*], No. SC-2009-23, slip op. at 20 & n.53 (Chey. & Arap. S.Ct. Dec. 17, 2009).

embezzlement or otherwise); [4] the necessity for primary budgetary policies to be drawn by the *political* Branches of the Tribes; [5] the strong constitutional preference that a valid budget be lawfully adopted (both to make difficult choices and for political accountability purposes); and [6] the need and legitimate demand of tribal citizens for basic governmental services *irrespective* of transitory politics.

1.

Because the Tribes' unhappy experiences with tribal government as it was practiced by the last Business Committees are noteworthy, among other things, for the federal incarceration of several Business Committee members (and Chairmen) for embezzlement or embezzlement-like offenses, the 2006 Constitution's fiscal accountability and fiscal responsibility provisions are among its most important features. Those devices include:

1 The creation of three new Branches in part to counterbalance the power of the new Legislature — whose first members were the last members of the Thirty-fifth Business Committee;[39]

2. The denial to the new Legislature of **any** executive power not "specifically authorized" by the Constitution (and even within that limitation, only "in accordance" with it[40]), with the result that the Legislature has virtually no executive power that has *any* consequences not *wholly internal to itself;*[41]

3. The denial to the new Legislature of any ability to expend *any* tribal funds directly *or* indirectly (*i.e.,* through Legislators or their agents personally);[42]

4. With the single exception explicitly created by Article VIII, § 6(g) for the *Judicial* Branch, the denial to any non-Executive Branch (or any non-Executive Branch agent) of the power to **administer** tribal funds, **administer** tribal programs, or **administer** anything else that is not **wholly** internal to that Branch;[43] and

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[39] *See* CHEY. & ARAP. CONST. [2006] art. II, § 2; *id.* art. IX, § 15(a); *cf. The WOTA Dissolution Case* [*First Capital Bank v. WOTA*], No. SC-2008-02, slip. op at 4-6 & n.15 (citing cases describing, and describing some of the final official acts of, the Thirty-fourth and Thirty-fifth Business Committees).

[40] *See id.* art X. § 4.

[41] *See, e.g., The Legislative Prosecutor/Legislative Subpoena Case* [*The Legislature v. Flyingman*], No. SC-2009-23 (Chey. & Arap. S.Ct. Dec. 17, 2009); *The Legislative Staff Hiring Case* [*Tall Bear v. Flyingman*], No. SC-2008-10 (Chey. & Arap. S.Ct. Dec. 3, 2009); *The Treasurer Case [Flyingman v. Wilson*], No. SC-2007-01 (Chey. & Arap. S.Ct. Mar. 23, 2007).

[42] *See, e.g.,* CHEY. & ARAP. CONST. [2006] art. VI, § 5(d); *id.* art. VII, § 4(b); *id.* art II, § 3.

[43] *See, e.g., id.* art. VII, § 4(a), (b); *id.* art. II, § 3; *The Legislative Prosecutor/Legislative Subpoena Case* [*The Legislature v. Flyingman*], No. SC-2009-23, slip op. at 21 & nn. 55, 56 (Chey. & Arap. S.Ct. Dec.

5. The grant to the Governor of the power (subject only to judicial review[44] and the Constitution's Embezzlement Clause[45]) to expend budgeted and appropriated tribal funds upon his or her signature alone.[46]

The financial and expenditure-accountability system established by the 2006 Constitution is almost as different from the one that existed under the old single-branch Business Committee system of government as can be imagined.

2.

Where there is an otherwise-lawful tribal budget, the expenditure-accountability system established by the 2006 Constitution is simple to understand. We have construed the word "shall" that precedes Article VI, Section 5(d)'s Operating Funds Clause as mandatory. Beginning with the year after the new Constitution's adoption, we consistently construed the words "operating funds" as synonymous with "funds reasonably necessary to effectively operate."[47] That principle benefits all Branches, constitutionally-mandated Departments, and the Election Commission (an independent commission within the Executive Branch),[48] and *providing that requirement has been satisfied,* the only Judicial Branch duty with respect to a procedurally validly adopted[49] and otherwise-constitutional budget is to *enforce it.* Because of Article VII, Section 4(b)'s Signature of the Governor Clause, only the Governor may expend tribal Funds, and if there is a lawful tribal budget the Governor may expend tribal funds only consistent with the terms of that budget. We deem all of those conclusions to be obvious, and easily drawn from the Constitution's **specific** and **explicit** text.

3.

But where there is no otherwise-lawful tribal budget we have only indirect (and though indirect, **potentially** absolute) prescriptions.

17, 2009).

[44] *See, e.g.,* CHEY. & ARAP. CONST. [2006] art. VII, § 4(a); *id.* art. VIII, §§ 5-7; *id.* art IX, § 3.

[45] *See id.* art. VII, § 4(b).

[46] *See id.*

[47] *See, e.g., The Legislative Staff Employment Case* [*Tall Bear v. Flyingman*], No. SC-2008-10, slip op. at 14 & nn.32, 33 (Chey. & Arap. S.Ct. Dec. 3, 2009) (citing cases).

[48] *See id.* (citing cases).

[49] *See, e.g.,* CHEY. & ARAP. CONST. [2006] art. V, §§ 2(b), 3,4; *id.* art. VI, §§ 5, 6, 7; *id.* art. VII, § 4.

Article VI of the 2006 Constitution contains most of the powers of (and some of the Constitution's limitations on the powers of) the Legislature. It is Article VI, Section 5(d) that most directly establishes the Legislature's portion[50] of the three political Branches' budgetary powers. In part, Article VI, Section 5(d) provides (emphasis added):

> **No** moneys shall be drawn from the Treasury except by **signature of the Governor AND except upon authorization and appropriation by law.**

The capitalized *con*junctive word "and" in the quoted passage appears to make Article VI, Section 5(d)'s prohibition absolute.

Article VII contains most of the powers of (and some of the Constitution's limitations on the powers of) the Governor. It is Article VII, Section 4(b) that addresses most directly the Governor's role in the preparation of the budget (and expenditures by the Governor). After: [1] specifying the June 1 due date for the submission of a proposed annual budget by the Governor to the Legislature; [2] specifying that the proposed budget must include all tribal revenues; and [3] adding for good measure a clause to the effect that "all" really means ***"all,"*** Article VII, Section 4(b) goes on to state (emphasis added):

> Monies **WHICH HAVE BEEN APPROPRIATED *BY LAW*** shall **not** be drawn from the Treasury **except** by **signature of the Governor.** Spending government revenues **or** drawing monies from the Treasury without authorization **AND** appropriation by law **AND** without a **signature by the Governor** shall constitute **embezzlement and fraud against the Tribes . . .**

The *con*junctive "ands" in the above-quoted passage *also* appear to make Article VII, Section 5(b)'s prohibitions absolute.

But as we examine Article VI, Section 5(d), Article VII, Section 4(b), recent tribal governmental history, and the structure of the Constitution as a whole, we believe that there are in fact *two* constitutional interpretations that are permissible:

1. The constitutional expenditure limitation quoted above was intended to apply to *every conceivable* expenditure of tribal funds, so that if there is no lawful tribal budget (and one that has survived judicial review, if challenged), the Tribes' government *must be shut down* (including by us, if we are called upon to do so) with "638" funds frozen in place (under the "'all' means ***'all'***" clause), with the lights turned out and the heat turned off at all tribal buildings, with all tribal salaries stopped, and with all tribal officials and employees sent home.

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[50] *See also id.* art. V, § 2(b) (Tribal Council Branch); *id.* art. VII, § 4(b) (Executive Branch).

The second possible constitutional interpretation is this:

> 2. The Article VI, Section 5(d) and Article VII, Section 4(b) limitations on the Governor's expenditure powers do not *automatically* "trigger" the Embezzlement Clause in "no budget" situations, because the quoted textural prohibitions have a **PRESUPPOSITION** that Article VI, Section 5(b) **states explicitly:** "The Legislature **SHALL** enact an annual budget by law, which **SHALL** include an appropriation of **operating funds** for the Tribal Council, the Executive Branch, and the Judicial Branch. . . ."

Under the second interpretation, the limitations are **CONTINGENT** on the occurrence of an event that the Constitution **COMPELS:** the adoption of a valid tribal budget by the three political Branches of tribal government. If (but **only** if) the resulting gubernatorial power to expend in a "no lawful tribal budget" situation could be checked by *meaningful* judicial review, and if (but **only** if) any gubernatorial exercise of such power could be meaningfully rendered *temporary* by any resulting judicial review, we would deem that second possible interpretation to *also* be constitutionally permissible.

We believe that the two limitations we enumerate would be **constitutionally** compelled before we could adopt the second interpretation, **because:** [1] were it not for the *first* precondition, the **Governor** would have the *de facto* power in a no-budget situation to expend **any** tribal funds on **anything** (effectively nullifying the budgetary powers of the Legislative and Tribal Council Branches); [2] were it not for the *first* precondition, embezzlement-type financial abuses could *de facto* recommence, thereby thwarting perhaps the *major purpose* of the 2006 Constitution; [3] were it not for the *second* precondition, the **Judicial Branch** could carve out **for itself** a major budgetary role in perpetuity, thereby self-aggrandizing **Judicial Branch** powers at the expense of **Executive, Legislative and Tribal Council** Branch budgetary powers; and [4] were it not for the *second* precondition, the Judicial Branch would be treading into technical budgetary matters (and political prioritizations) as to which *every* political Branch [*i.e.*, the Executive Branch, the Legislative Branch, *and* the Tribal Council Branch] has greater institutional competence (and institutional resources) than do we.

There is a third possible **outcome** (irrespective of how we construe the Article VI, Section 4(b) and Article VII, Section 5(d) expenditure limitations). It is this:

> 3. Whatever Article VI, Section 5(d), Article VII, Section 4(b) and/or any other constitutional text or structure may mean, this Court shall simply step aside completely in a "budget stalemate" situation, and allow events to happen "on the ground" as they may. If the Governor spends, then the Governor spends. If he or she does not, then he or she does not, and tribal government shuts down without our doing anything. And if one or two of the political Branches of tribal government decides that the Tribes are open for business and the other one or two political Branches decides that tribal government is shut down, then the Judicial Branch simply stands aside and lets the chips fall where they may.

We rejected that option in our October 10, 2007 interim order in this case,[51] and we do so again today. We do so not only because of the potential *de facto* anarchy to which it might forseeably contribute (with its own adverse pragmatic secondary consequences), but more importantly because we construe the 2006 Constitution as embodying the commitment of tribal citizens to live under the **rule of law.** No matter how difficult it may be to unsort the entangled web, we resolve the following issues on their legal merits so as to provide solid footing on which Governor Flyingman *and all future Governors* may stand in budget-stalemate situations, and so as to provide Governor Flyingman *and all future Governors* with settled law upon which they may rely for Embezzlement Clause (and all other tribal constitutional law) purposes. The 2006 Constitution delegates the power (and *duty*) of constitutional interpretation to this Branch,[52] empowers this Court to declare tribal laws void if unconstitutional,[53] grants this Court the power to issue all remedies in law and equity,[54] makes this Court's decisions final,[55] and demands that as the repositories of tribal executive authority, Governors enforce what we have decided.[56]

We bear those *overarching* principles in mind as we address the second, third, fourth, and fifth "clusters" of issues described in Part II-A above.

B.

The second "cluster" of issues includes two discrete subcomponents: [1] the standing to sue (and capacity to be sued) of the four Branches and/or Branch officers; and [2] the attorneys' fees consequences thereof. We have decided a very great number of "sue and be sued" issues in our earlier decisions, and we need only lightly embellish them herein.

1.

In the *Speakership Case,* we held that "legal representation of the Tribes as such (whether prosecutorially or otherwise) is one of the Executive Branch's core functions,"[57] and we held further

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[51] *See In re Executive Authority,* No. SC-2007-02, slip op. at 6 (Chey. & Arap. S.Ct. Oct. 10, 2007) ("We decline to adopt the 'nonjusticiable political question' doctrine adopted by some other courts for reasons not applicable to the Cheyenne and Arapaho Tribes . . . . [B]udgetary controversies arising from tribal constitutional issues are within this Court's subject-matter jurisdiction and are *therefore* justiciable." (emphasis in original)).

[52] *See* CHEY. & ARAP. CONST. [2006] art. VIII, § 6(c).

[53] *See id.* art. VIII, § 6(b).

[54] *See id.* art. VIII, § 6(c).

[55] *See id.*

[56] *See id.* art. VII, § 4(a).

[57] *Hoffman v. Flyingman,* No. SC-2008-04, slip op. at 36 (Chey. & Arap. S.Ct. Nov. 20, 2008).

that while a Governor may not appoint an Executive Director of the Department of Justice without complying with Article VII, Section 4(h), a Governor may appoint an Attorney General without confirmation.[58] We deem it to be the Constitution's expectation that when the representation burden becomes too great on the tribal Attorney General, Assistant Attorneys General will be budgeted through the normal Budget Process, with the Governor having the power to appoint otherwise-qualified and licensed attorneys to those positions consistent with the Tribal Personnel Policies Manual. The Attorney General and/or Assistant Attorneys General may represent not only the Tribes as a whole (and when constitutionally necessary for purposes of execution, Executive Branch officials as plaintiffs) in *any* litigation, but also any Executive Branch official against whom an "official capacity" lawsuit (in form *or* in fact) is brought under Article X, Section 3.

In the event of a "no-budget" situation, or in the event a budget has been properly adopted as a matter of *procedure* that the Governor believes denies the Executive Branch the assistance of counsel "reasonably necessary for that Branch to effectively operate," the Governor may seek equitable relief against the Legislature in the Trial Court to that effect, and if the Trial Court awards such relief to the Governor (subject to appeal[59]), the Governor may lawfully expend such tribal funds as thereby authorized on private (*i.e.*, non-tribal-employee) counsel without violating the Embezzlement Clause of Article VII, Section 4(b).

2.

Article VII's grants of power to the Executive Branch, Article II's Separation-of-Powers provisions, and the structure of the 2006 Constitution forbid the Legislature from encroaching on the powers of the Executive Branch to legally represent (prosecutorially or otherwise) the Tribes as a whole.[60] Nor does the constitutional structure permit two or more Branches to join in form or in fact to defeat the constitutionally-established separation-of-powers regime. In consequence, *any* such action, whether or not *procedurally* consistent withe the Legislative Process, would be substantively unconstitutional.

But just because the Legislature may not constitutionally establish its *own* prosecutor, its *own* Department of Justice, or usurp any Executive Branch prerogative where the legal representation of the Tribes is concerned[61] it does *not* follow that the Legislature may not employ counsel to assist it in its core task of legislating, or to represent **the Legislature as such** in Cheyenne and Arapaho courts in those few situations in which the Legislature may sue or be sued in its own name. Provided that funds are otherwise-validly appropriated through the Budget Process, the Legislature *may* employ (through the Separation of Powers and Legislative Staff Employment Clause-modified

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[58] *See id.*

[59] *See* CHEY. & ARAP. CONST. [2006] art. VIII, § 5(b); *id.* art. VIII, § 14.

[60] *See, e.g., The Legislative Prosecutor/Legislative Subpoena Case* [*The Legislature v. Flyingman*], No. SC-2009-23 (Chey. & Arap. S.Ct. Dec. 17, 2009).

[61] *See id.*

Legislative Process we described in the *Legislative Staff Hiring Case*[62]) an attorney as Counsel to the Legislature (and if lawfully budgeted, one or more attorneys as Assistant Counsel to the Legislature) to assist it in legislating, and to represent it in Cheyenne and Arapaho tribal courts in those few situations in which it may sue (or be sued) in its own name.

We have recognized the Legislature's ability to initiate litigation (when it acts through "law or resolution" enacted through the Legislative Process[63]) in one situation: to bring suit against the Governor in a "no budget" situation to enforce the Separation-of-Powers-mandated (and Article VI, Section 5(d)-mandated) "funds reasonably necessary to effectively operate" principle.[64] We have also recognized the Legislature's "probable" ability to sue the appropriate Executive Branch official(s) to enforce the Legislature's explicitly-constitutionally-authorized *executive*-function interest in hiring, supervising, disciplining, and terminating its legislative staff employees.[65] Provided that the Legislature has sought to initiate such litigation through "law or resolution" enacted through the Legislative Process, Counsel to the Legislature (and/or any validly-appointed Assistant Counsel to the Legislature) may pursue such civil litigation in the name of the Legislature in tribal courts.

We have also recognized that the Legislature may be sued in its own name in two situations. First, it may be sued in its own name for equitable (*i.e.*, non-monetary, non-attorneys' fees) relief in the very few situations in which it is acting in a *specifically constitutionally authorized* executive-function capacity.[66] Second, it may be sued for equitable relief under the "Voidness Clause" (and other) circumstances we describe in the *Legislative Prosecutor/Legislative Subpoena Case,*[67] as a permissible (but not mandatory) alternative to otherwise-foreseeable on-the-ground chaos. Where the Legislature is sued in its own name for equitable relief in tribal court, Counsel to the Legislature (and/or Assistant Counsel to the Legislature) may proceed *immediately* with a defense, *without* any subsequent "law or resolution" adopted through the Legislative Process, provided that such actions are within that Counsel's otherwise-valid job description.

It may also be the case that, from time to time, the Legislature may adopt a "law or resolution" seeking leave of this Court (or the Trial Court) to participate in pending litigation as

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[62] *See Tall Bear v. Flyingman,* No. SC-2008-10, slip op. at 25 n.49 (Chey. & Arap. S.Ct. Dec. 3, 2008).

[63] We need not decide today whether the "complete" Legislative Process or the "modified" one we described in *Tall Bear* with respect to the Legislature's decision to appoint an otherwise-eligible *specific person* to a budgeted Legislative staff "slot" applies to any decision by the Legislature to initiate a tribal-court suit in its own name.

[64] *See id.,* slip op. at 19 n.51.

[65] *See id.*

[66] *See, e.g. In re Special Tribal Council Meeting Set for November 22, 2008,* No. SC-2009-01, slip op. at 9 (Chey. & Arap. S.Ct. Sept. 1, 2009).

[67] *The Legislature v. Flyingman,* No. SC-2009-23, slip op. at 14 (Chey. & Arap. S.Ct. Dec. 17, 2009); *see also supra* at 7 & nn.22-25 (applying those principles herein).

amicus curiae. Provided that this Court (or the Trial Court) grants the Legislature *amicus curiae* status in a particular case, *how* the Legislature instructs Counsel to the Legislature to respond is a matter *wholly internal to the Legislature, and is of no concern to the Judicial Branch.* [As would be the case with any other tribal citizen, any Legislator disagreeing with the Legislature's "official" response may seek leave of this Court to participate in *amicus curiae* in his or her *individual* capacity, but shall *not* be entitled to counsel compensated by the Tribes in so doing.]

It may also be the case that, from time to time, this Court (or the Trial Court) may affirmatively solicit such views as the Legislature may have on a particular issue in a case in which the Legislature is a nonparty. The Judicial Branch has no power to **compel** the Legislative Branch to respond in any such situation, and the Legislative Branch may simply ignore any such invitation as it sees fit. But as is the case with the *amicus curiae* situations described above, if the Legislature decides to accept an invitation to submit a Statement, how it decides to instruct Counsel to the Legislature to respond *is also a matter wholly internal to the Legislature, and is of no concern to the Judicial Branch* . [The same comments made above with respect to any *individual* Legislator who may be in disagreement with the Legislature's "official" *amicus curiae* position also apply to any such Statement.]

With this Opinion and Final Order, and the dozens of Separation of Powers (and other) cases we have decided since the new Constitution's entry into force on April 4, 2006, we have definitively resolved most (if not all) of the tribal constitutional law disputes that have percolated among the various Branches since 2006. Our decisions on those issues are final under the Constitution,[68] and the Governor is obligated to enforce them.[69] And because the Legislature's capacity to litigate as either a plaintiff or a defendant is so constitutionally limited (and because individual Legislators have no "official capacities" to litigate at all[70]), we believe it to be **constitutionally** impossible for the litigation engine we have witnessed for the last three years to **ever** regenerate itself.

We have thus couched our views about attorneys-for-the-Legislature in the "normalcy" terms we believe were envisioned by the Constitution's drafters: that in virtually all (perhaps all) situations, any "lawyering" that the Legislature will need will be more-than-amply provided by a validly-budgeted (and validly-employed) Counsel to the Legislature and validly-budgeted (and employed) attorneys serving as Assistant Counsel to the Legislature.

Nevertheless, in a "no budget" situation (but because of the Legislature's enormous powers in the *normal* budget-adoption process, **only** in a "no budget" situation), we extend to the Legislature the same prerogative we extended to the Executive Branch with respect to *its* potential need for private, non-employee, tribally-compensated counsel: the option of seeking equitable (*i.e.,* non-monetary, non-attorneys' fees) relief against the Governor to the effect that the retention of such counsel to represent the Legislature as such is necessary to the effective operation of the Legislative Branch *in a particular lawsuit.* The decision to seek such relief would of course be an "action" by

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[68] *See* CHEY. & ARAP. CONST. [2006] art. VIII, § 6(c), (d).

[69] *See id.* art. VII, § 4(a).

[70] *See, e.g., In re Special Tribal Council Meeting Set for November 22, 2008,* No. SC-2009-01, slip op. at 8-13 (Chey. & Arap. S.Ct. Sept. 1, 2009).

the Legislature that may only be validly taken through a "law or resolution" adopted through the Legislative Process.

We authorize no such lawsuit seeking "blanket" relief not limited to a specific, identified lawsuit, and because equitable relief that would be unconstitutional cannot possibly relate to the "funds reasonably necessary to effectively operate" category,[71] we authorize no such lawsuit to pay for outside counsel to execute, administer, or enforce any tribal law, or attempt to do so, or to spend or attempt to spend any tribal funds for any purpose.

3.

The next issues address the ability of Counsel to the Legislature (or *any* non-employee tribally compensated outside counsel) to represent individual Legislators. There are several possible incarnations of that issue.

First, we have recognized that when they have simply *voted,* Legislators enjoy absolute "official capacity" sovereign immunity for having done so irrespective of whether what the Legislator voted for was unconstitutional. In consequence, any Legislator shall be entitled to immediate dismissal, on sovereign immunity grounds, of any suit in form or in fact against him or her for simply having *voted,* including any purported "individual capacity" civil suit arising from his or her simply having voted in a certain way. Because any attorney's task in such a case will not be burdensome (likely necessitating only the preparation of a one-page Motion to Dismiss with citation to one or two cases), we anticipate that if competent, Counsel to the Legislature should be able to accomplish that task without the need to *ever* seek outside private counsel. But be that as it may, because Article X created that civil suit immunity not only for the benefit of Legislators but **for the benefit of the Tribes** (*i.e.,* so that a Legislator may vote his or her conscience without fear of the next "nuisance" lawsuit), we believe that the costs of defending any such case on behalf of the defendant Legislator should be borne *by* the Tribes (almost always, if not always, by compensating the tribal employee who is validly serving as Counsel to the Legislature).

Second, a Legislator may incur attorneys' fees and/or litigation expenses when that Legislator is subjected to the Recall Process by his or her constituents. [Whether as plaintiff or defendant, any such litigation would be individual-capacity litigation.[72]] We have characterized this as a "gray area" issue, "since only a sitting elected tribal official may be subjected to the Recall Process, but the interest of that official is more personal than it is an interest of the Legislature (and/or the Tribes) as a whole."[73]

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[71] *See The Legislative Prosecutor/Legislative Subpoena Case* [*The Legislature v. Flyingman*], No. SC-2009-23, slip op. at 21 (Chey. & Arap. S.Ct. Dec. 17, 2009).

[72] *See The Recall Petition Notice Case* [*Spottedwolf v. Flyingman*], No. SC-2009-18, slip op. at 2, 6 (Chey. & Arap. S.Ct. Dec. 3, 2009).

[73] *In re Special Tribal Council Meeting Set for November 23, 2008,* No. SC-2009-01, slip op. at 2 n.1 (Chey. & Arap. S.Ct. Dec. 3, 2009).

To a large extent, in the *Recall Petition Notice Case*[74] we simplified the legal task of the Legislator in question by particularizing the Due Process Clause notice requirements applicable during the Recall Process. We added that "an elected tribal official should neither have to retain an attorney nor file a lawsuit to promptly obtain [the identified] documents."[75] But because the possibility of recall is a fact-of-life for all elected tribal officials, and because the advantages of incumbency are so vast even without tribally-compensated counsel, in view of the fact that the incumbent has an absolute Due Process Clause right (upon request) to obtain all of the most relevant documents by the close-of-business on the day following his or her request, we construe the Constitution to neither require nor permit attorneys' fees to be provided where a Recall Petition has been filed against any elected tribal official.

Third, a Legislator running for re-election may incur attorneys' fees if his or her *qualifications for office* have been challenged. We have deemed that issue to be an easy one for attorneys' fees purposes, and have concluded that "a sitting Legislator has no more right to be represented by counsel paid for by the Tribes than any other candidate for elective office . . . [whose] qualifications . . . have been challenged."[76] We reaffirm that conclusion today, and it applies both to Counsel for the Legislature *and* to any private counsel for whom *tribal* compensation is sought.

Fourth, a Legislator may incur litigation costs where he or she brings an *individual*-capacity lawsuit as a plaintiff on the grounds that he or she has a non-generalized injury in the *efficacy of his or her vote*. [We have held that the "efficacy of the vote" rationale must be construed *narrowly* so as not to re-generate a Separation-of-Powers-violative litigation engine within the Legislative Branch, and in this context we *do* find the limiting "efficacy-of-a-Legislator's-vote" federal caselaw persuasive.]

Yet though rare, such cases *do* exist,[77] and we conclude that in such cases Legislators seek to vindicate not only their *individual* interests but *tribal* interests (indeed, tribal *constitutional* interests in carrying the constitutional *voting* scheme to fruition). In such cases, we therefore conclude that the Legislator or Legislators in question *may* be represented by Counsel to the Legislature or by budgeted (or, upon prior judicial review based on the "funds reasonably necessary to effectively operate" principle) private tribally-compensated counsel despite the fact that the Legislator is and must be an *individual*-capacity plaintiff in any case.

Fifth, a Legislator may with to initiate other individual-capacity litigation (as might be the case with respect, say, to a minor automobile accident in a Lucky Star parking lot). Obviously, no Legislator may be represented by Counsel to the Legislature (or any other counsel paid for by the Tribes) in such circumstances.

Sixth, a Legislator may wish to initiate litigation as an "official capacity" plaintiff. Because no Legislator (including the Speaker) has any "official capacity" to initiate any litigation *at all*, no

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[74] *See id.*

[75] *See id.* at 5.

[76] *See In re Special Tribal Council Meeting Set for November 22, 2008*, No. SC-2009-01, slip op. at 2 n.1 (Chey. & Arap. S.Ct. Dec. 3, 2009).

[77] *See id.* at 10-13 (Chey. & Arap. S.Ct. Sept. 1, 2009).

Legislator (including the Speaker) may be represented by Counsel to the Legislature (or any other counsel paid for by the Tribes) in such circumstances.

4.

Because of the strong parallels between Article X, Sections 3 and 4, and because neither Legislators nor Judges or Justices have executive or administrative powers not wholly internal to the Branch in question,[78] the sovereign immunity of Judges and Justices tracks, *mutatis mutandis,* that of Legislators. Just as Legislators are absolutely immune under Article X, Section 4 from civil lawsuits of any type based on, relating to, or arising from their having voted, Judges (and Justices) are absolutely immune under Article X, Section 5 form civil lawsuits of any type arising from, based on, or relating to their having adjudicated any case in any way.

Like the Legislative Branch, the Judicial Branch is *also* almost never a litigating Branch. Unlike the Legislative Branch (which is subject to Voidness Clause limitations, the Article X, Section 4 "specifically authorized" "executive function" limitation on its sovereign immunity, and other limitations), the Judicial Branch is not limited thereby. Because the Judicial Branch (and ultimately, this Court) is the final interpreter of the meaning and application of the Constitution,[79] it cannot be and is not amenable to suit. It therefore needs no tribally-compensated attorney(s) to defend it.

In another respect, however, the Judicial Branch is *potentially* similarly situated to *every* other Branch: under the mandatory Operating Funds Clause of Article VI, Section 5(d), each Branch is constitutionally entitled to such funds as are reasonably necessary for it to effectively operate.[80] The Judicial Branch, no less than the political Branches, is constitutionally entitled to such budgetary protections (and to other Separation of Powers protections) as it performs its own tribal governmental functions.[81]

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[78] As contrasted with Legislative Branch powers, Article VIII, Section 6(g) textually grants the Judicial Branch the power to *administer its own appropriated funds.* We have elsewhere reserved definitive interpretation of that provision, and we do so again today.

[79] *See id.* art. VIII, § 6(b)-(d).

[80] *See, e.g., The Legislative Staff Hiring Case* [*Tall Bear v. Flyingman*], No. SC-2008-10, slip op. at 14 (Chey. & Arap. S.Ct. Dec. 3, 2009) (citing cases).

[81] While the Legislative Branch may (through the Legislative Process) make "rules" for the Judicial Branch, *see* CHEY. & ARAP. CONST. [2006] art. VIII, § 6(h), given the high Separation of Powers wall between the four Branches established by the 2006 Constitution, *see, e.g., The Legislative Prosecutor/Legislative Subpoena Case* [*The Legislature v. Flyingman*], No. SC-2009-23, slip op. at 20 (Chey. & Arap. S.Ct. Dec. 17, 2009), the Legislature may not through the guise of "rulemaking" seek in form or in fact to control the outcome of litigation, or to impair, slow down, or otherwise impede the ability of the Judicial Branch to decide cases, or to encroach upon the ability of the Judicial Branch to effectively operate, or to impede or undermine the constitutionally-established role of the Judicial Branch within the four-Branch structure of tribal Government.

A number of our earlier decisions have noted that even where a budget has been validly adopted procedurally, it may deny to a Branch or Branches (or the Election Commission[82]) the constitutionally mandated funds reasonably necessary for that Branch (or the Election Commission) to effectively operate. Because the Legislative Branch occupies both the control and the potentially gridlocking "bottleneck" position in the budgetary process,[83] and because its position in the budgetary process provides it with more than enough budgetary power for it to protect its own interests, as a practical matter the Legislative Branch will likely never suffer such a consequence where a procedurally-validly adopted budget exists. But *no* Branch (except the Executive Branch, and **only** were we to simply "stand aside" in "no budget" situations) necessarily has *enough* funds (indeed, *any* funds) to effectively operate where no procedurally valid tribal budget exists. In such "no budget" situations, we have authorized every other Branch (and the Election Commission) to bring suit in the Judicial Branch to enforce entitlements to the funds reasonably necessary for them to effectively operate.

But what if the aggrieved Branch were the *Judicial* Branch, and the *Judicial* Branch believed either that a *procedurally* valid budget denied it the funds reasonably necessary to effectively operate, or that the Governor was refusing to provide it with such funds in a "no budget" situation? Would the *Judicial* Branch then sue the Governor (or the Legislative and/or Tribal Council Branch), thereby becoming a *litigating* Branch as well as the adjudicating Branch? [Perhaps the Judicial Branch would even have its own right to tribally-compensated counsel?] And if the Judicial Branch *were* to sue any other Branch, *where would the Judicial Branch sue?*

Happily, we need not resolve those conundra, because a far narrower ground for addressing the underlying problem is available. The Supreme Court Justices' current lawful billing rate of $150 per hour for preparation, meeting, communication, research, drafting, oral argument, and all other time expended on tribal judicial business was lawfully established effective 2008, and Article VIII, Section 8 prevents any reduction thereof even *theoretically* by any legislation enacted before the members of the third Legislature assume office. Although this holding will benefit the current Justices very little but may benefit future Justices (including those who may be appointed and confirmed[84] to replace the Justices who may now be lawfully replaced[85]) very much, we simply hold:

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[82] *See The Recall Petition Notice Case* [*Spottedwolf v. Flyingman*], No. SC-2009-28, slip op. at 4 (Chey. & Arap. S.Ct. Dec. 3, 2009).

[83] See CHEY. & ARAP. CONST. [2006] art. VI, § 5(d).

[84] *See* CHEY. & ARAP. CONST. [2006] art. VIII, § 2 (providing the lawful methods for selecting a replacement for a Justice whose term has expired).

[85] Four Justices of this Court may now be lawfully replaced through Article VIII, Section 2 procedures: Acting Chief Justice Rivas and Associate Justice Arrow (who have continued to lawfully serve under the authority of Article IX, Section 15(e)), and Special Justices Eby and Robertson (who continue to lawfully serve as Special Justices pursuant to earlier Supreme Court Orders, and the tribal constitutional-law interpretations provided in *In re Appointment of Special Judges*, No. SC-AD-2007-01 (Chey. & Arap. S.Ct. Aug. 24, 2007). The term of office of Associate Justice Boles will expire no less than four years from the date she was lawfully sworn into office (May 1, 2008). *See* CHEY. & ARAP. CONST. [2006] art. VIII, § 3(a);

[1] that the lawful current billing rate for all time expended by the Justices on Supreme Court business *is* the minimum necessary for the Supreme Court to effectively operate in the future; [2] that Chief Judge Bob Smith's lawful rate of compensation remains what it has been since 2008, and *is* the minimum Chief Judge salary necessary for the Trial Court to effectively operate in the future; and [3] that the current salaries and benefits of the Chief Court Clerk and Assistant Court Clerk (and bailiff court support) as they currently exist, and all 2008-budgeted ancillary support funds provided, are *at a minimum* the amounts reasonably necessary for the Judicial Branch to effectively operate. As the *minimum* amounts required by the mandatory Operating Funds Clause, we hold that while future Budgets may raise those amounts, those amounts may not in the future be diminished.

Given that resolution, we need not herein address any hypotheticals about the Judicial Branch's entitlement to tribally-compensated counsel. To avoid gratuitously squandering tribal resources on future attorneys' fees, we hope never to be forced to rule on that question.

We have previously held that a Trial Court Judge may sue (we hold today, in his or her *individual* capacity) the Governor (as the lawful repository of the tribal executive and expenditure powers) for declaratory and injunctive relief (both negative and mandatory) to vindicate alleged employment rights against unconstitutional and/or otherwise-invalid deprivation.[86] We reaffirm that conclusion today.

5.

We now address the ability of the Tribal Council Branch (and/or Coordinator) to sue or be sued. We begin by summarizing what we have already decided.

In *Lynn v. Bearshield,*[87] we held that a claimant to the Tribal Council Coordinator position may sue another claimant in tribal court to resolve the validity of the competing claims. We reaffirm that holding today.

In our first *In re Special Tribal Council Meeting Set for November 22, 2008* decision,[88] we held under Article V, Section 3(b)'s Five Legislators Clause that the five Legislators who had voted to call a Special Tribal Council Meeting had individual-capacity standing to sue the Tribal Council Coordinator in her official capacity to *compel* the Coordinator to convene the requested meeting. We also held therein that the Tribes' Governor had standing to sue the Tribal Council Coordinator in her official capacity to *enjoin* her from doing so on the grounds that the meeting call was procedurally defective and that the proposed Resolutions were substantively unconstitutional. We also reaffirm those holdings today.

In our second *In re Special Tribal Council Meeting Set for November 22, 2008* decision, we

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In re Invalidity of the Rescheduled Special Session of the Legislature Set for March 13, 2008, No. SC-2008-01 (Chey. & Arap. S.Ct. Apr. 28, 2008).

[86] *See In re Attempted Removal of the Trial Court Judge* [*Tripp v. Flyingman*], No. SC-2007-05 (Chey. & Arap. S.Ct. July 10, 2007).

[87] No. SC-2007-04 (Chey. & Arap. S.Ct. Aug. 15, 2007).

[88] No. SC-2009-01 (Chey. & Arap. S.Ct. Sept. 1, 2009).

held further that: [1] the Trial Court could validly enjoin an Article V, Section 3(b)-called Tribal Council Meeting on the ground that its call (and/or agenda) was *procedurally* defective, but could not do so on the ground that the proposed Tribal Council Resolutions were substantively unconstitutional; [2] that the Tribal Council Coordinator has no "gatekeeper" discretion to omit from the Agenda of any *procedurally* validly called Tribal Council Meeting any proposed Resolution on the ground of its alleged unconstitutionality, or on any other substantive ground; [3] that the Tribal Council Coordinator's duties with respect to the placement of proposed Resolutions on the agenda of a *procedurally* validly called Tribal Council Meeting are purely ministerial, not discretionary; and [4] that the controlling legal principles are enforceable against the Tribal Council Coordinator through a Judicial Branch Writ of Mandamus.[89]

In view of our earlier decisions, and because the Tribal Council Coordinator has some form of executive authority (if only within a narrowly-limited int*ra*-Branch sphere), we have held that the Tribal Council Coordinator *may* be sued (by the Governor, five Legislators who acted together under the Five Legislators Clause, and perhaps others). We have not yet had occasion to rule on whether the Tribal Council Branch may sue anyone in its own name except perhaps the Governor (where there is a procedurally valid budget that denies it the funds necessary to effectively operate, or on the same Operating Funds Clause premise in a "no budget" situation). We need not and do not go further on that question herein.

But based on our prior Tribal Council Branch caselaw, and based also on the independent-legal-counsel rationale we applied to the Election Commission in the *Recall Petition Notice Case,*[90] we conclude that in order to both defend its interests *as a Branch* and to enable the Tribal Council Coordinator to meaningfully defend himself or herself (and the Tribal Council's interests) when the Council Coordinator is sued by anyone having standing to do so, the *Tribal Council Branch must be able to employ and/or retain a competent independent attorney or attorneys to defend that Branch,* at *least* in situations in which the Tribal Council Coordinator is in form *or* in fact an "official capacity" defendant. Because of obvious conflict-of-interest problems, such legal counsel, or such legal counsel's law firm, may **not** represent the Executive Branch, the Legislative Branch, any Executive Branch official, any Legislator, the Election Commission, or any Election Commissioner in any capacity. [For similar conflict-of-interest reasons, no attorney representing any Branch (or the Election Commission) may also represent any person or entity doing business or seeking to do business with the Tribes.]

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[89] *See In re Tribal Council Meeting Set for November 22, 2008,* No. SC-2009-01, slip op. at 2-6 (Chey. & Arap. S.Ct. Dec. 3, 2009).

[90] *Spottedwolf v. Election Commission,* No. SC-2008-18, slip op. at 4-6 (Chey. & Arap. S.Ct. Dec. 3, 2009).

6.

We recently addressed the capacity of the Election Commission and/or Commissioners to sue, be sued, and retain qualified independent legal counsel in the *Recall Petition Notice Case.*[91] We today reaffirm our conclusions therein.

7.

In Part IV below, we apply the reasoning and conclusions of this Part III-B to the eligibility for tribally-paid attorneys' fees of the specific attorneys who have represented the various Branches (and the Election Commission) in virtually all of the inter-Branch litigation of the last three years.

C.

We now address the *general* (*i.e.*, non-year-specific) budget-related constitutional issues, identified as items "12" through "18" in our October 10, 2007 interim order.

1.

Item "12" presents the budgetary "level of detail" issue: how detailed must a budget be in order to be even *procedurally* valid? In answering that question, we construe Article VI, Section 5(d) *in pari materia* with all of the Constitution's other budget and spending provisions, and in light of the Tribes' pre-2006 budget-and-expenditure experiences. So doing, we construe the Constitution to require that every tribal-staff employee position be individually identified and classified, with the salary and/or pay grade/pay rate specifically identified for every staff employee and every tribal official. We hold further that all other expenditures, major purchases, and purchasing categories be identified, by Branch and (in the case of the Executive Branch), by Department, Office, and/or program, at a high level of specificity.

2.

Items "13" through "15" in our October 10, 2007 interim order view the "funds reasonably necessary to effectively operate" issue through three different lenses. We have comprehensively addressed that issue in this and other decisions.

3.

Item "16" asks whether a budget providing a general appropriation for the Legislative Branch (**including** Legislators' salaries), but that does not identify, specify, or "break out" the **amount** of Legislators' salaries within the generalized "Legislative Branch" appropriation category, may even *procedurally* be a lawful budget. For reasons that will need no explanation to any tribal citizen, our

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[91] *Spottedwolf v. Election Commission,* No. SC-2009-18 (Chey. & Arap. S.Ct. Dec. 3, 2009).

answer is that any such budget would be both procedurally and substantively unconstitutional. We also note the applicability of our "level of detail" reasoning and conclusions (two paragraphs above) to that question.

4.

Item "17" asks whether a budget must (or may) authorize (or restrict) the expenditure of funds obtained by the Tribes from sources other than tribal revenues. [Because casino gaming proceeds *are* "tribal revenues" (whether or not there is any gaming-management contract), the primary focus of the question is on federally-provided funds, including but not limited to "638 contract" funds, see 25 U.S.C. § 450 *et seq.*]

In answering that question, we first note the categorical nature of Article VI, Section 5(d)'s second sentence: "The annual budget **shall** include **all** revenue **and** funds **controlled** by the Tribes **including gaming revenue,** and **all** revenue **and** funds **received** by the Tribes from **any and all** sources."[92] The words "shall," "all," "including," "received," and "any and all" are not ambiguous, and we do no more than apply the Constitution's plain meaning in deciding that the answer to the seventeenth question posed in our October 10, 2007 interim order in this case is "yes." [Needless to say, it will be necessary to take great care in the budget preparation-and-adoption process to conforming the budget to applicable federal requirements insofar as the expenditure of federally-provided funds is concerned.]

5.

Item "18" asks whether, consistent with Article VI, Section 5(d), an expenditure may be "authorized" and "appropriated" in a single Bill. In its entirety, the sixth sentence of Article VI, Section 5(d) provides: "Every **funding item** in the annual budget must have been **previously authorized** by law." (emphasis added). On its face, the quoted sentence seems to demand a **negative** answer to the question posed in "item 18." But before drawing the facially obvious conclusion, we comb the Constitution for any corroborating (or potentially undermining) text.

Article VI, Section 5(d) also provides that the Tribes' budget year runs from January 1 to December 31. The Tribes' *budget* year is the *calendar* year. Thus, to be fully effective, and to minimize the need for tribal-court litigation, the annual budget will need to have been finally approved, at the *very* latest, *by December of every year.*

The Constitution grants to the Tribal Council Branch the power to finally approve or

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[92] CHEY. & ARAP. CONST. [2006] art. VI, § 5(d) (emphasis added); *see also id.* art. V, § 2(b); *see The Legislative Staff Employment Case* [*Tall Bear v. Flyingman*], No. SC-2008-10, slip op. at 16 (Chey. & Arap. S.Ct. Dec. 3, 2009) ("[N]o single Branch owns 'its own' funds, or any funds that may be spent other than by passing through the tribal Treasury and being disbursed *only* with the signature of the Governor." (emphasis in original)); *id.* ("All funds beneficially owned by the Tribes (or to the benefit of any Branch thereof) are legally owned by the Tribes *as a whole* . . . ." (emphasis in original)).

disapprove[93] the budget that the Legislature has enacted "by law or resolution"[94] through the Legislative Process,[95] and the Legislature's Budget Bill, like every other Bill, is subject to possible gubernatorial veto[96] and a subsequent attempt by the Legislature to override[97] such a veto. If there is a gubernatorial veto, the veto and override-attempt process could easily consume two calendar months[98] *before* the Legislature submits its final Budget Bill to the Tribal Council Coordinator and the Tribal Council's thirty-day clock[99] begins to run. And given the Article V, Section 4(d) thirty-day window permitted to the Tribal Council Coordinator to provide notice to the tribal citizens of both the time (and in the case of Special Meetings, the place[100]) of the Council Meeting **and** the proposed *Resolutions* to be voted on at the Meeting (*without* any subsequent modifications or other "adjustments"[101]) the Coordinator's provision of constitutionally-required notice will add at *least* thirty more days to the process.

In a (procedurally) "best case" scenario (*i.e.*, one with no veto and therefore no attempt to override), the Legislature **could** adopt a budget at its October Regular Session. and present its proposed Budget (which may not under **any** circumstances be thereafter modified by *anyone* before presentation) to the Governor for signature or veto the following Monday. In the "optimistic" scenario, the Governor will have continued to be vitally involved in the budget process since he or

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[93] *See* CHEY. & ARAP. CONST. [2006] art. V, § 2(b).

[94] *See id.* art. VI, § 5(a).

[95] *See id.* art. VI, § 7(a).

[96] *See id.* art. VI, § 7(a) (iv); *id.* art VII, § 4(g).

[97] *See id.* art VI, § 5(b). We have elsewhere held that "six" means "six" for Article VI, § 5(b) purposes. *See, e.g., The Legislative Prosecutor/Legislative Subpoena Case* [*The Legislature v. Flyingman*], No. SC-2009-23, slip op. at 17-18. We reaffirm that rather obvious constitutional law conclusion today.

[98] We construe the Governor's Article VII, Section 4(g) "ten-day window" in which to veto as admitting of no exceptions, *provided that* the Legislature has *promptly* (*i.e.*, within a calendar day or two) presented a Bill to the Governor for signature or veto. Because the 2006 Constitution is not a "gamesmanship" Constitution, it should go without saying that the Legislature may **not** evade the gubernatorial veto by in form or in fact delaying a Bill's presentation to the Governor. And we have elsewhere held that an explicit gubernatorial veto becomes effective upon presentation at the offices of the Legislature irrespective of whether that veto is presented on any Legislatively-established "form." *See The Legislative Staff Hiring Case* [*Tall Bear v. Flyingman*], No. SC-2008-10, slip op. at 9-10 & n.21 (Chey. & Arap. S.Ct. Dec. 3, 2009). Any "rejection" of a proffered gubernatorial veto by the Legislature, by any Legislator (including the Speaker), or by any agent thereof, is a legal nullity without reference to its rationale.

[99] *See* CHEY. & ARAP. CONST. [2006] art. V, § 2(b).

[100] *See In re Special Tribal Council Meeting Set for November 22, 2008,* No. SC-2009-01, slip op. at 14-15 (Chey. & Arap. S.Ct. Sept. 1, 2009).

[101] *See id.* at 15.

she submitted a budget proposal on or before June 1,[102] and if so the Governor **could** sign the budget a few days thereafter. Under such circumstances, the Legislature **could** submit the proposed budget to the Tribal Council Coordinator by late October, and the Tribal Council Coordinator **could** provide notice of a Special Tribal Council Meeting to approve the Budget Resolution[103] (assuming that a Special Tribal Council Meeting had been validly called to do so[104]) by, say, early November. The Tribal Council **could** then vote to approve (or disapprove[105]) the proposed Budget Resolution at a Special Meeting properly scheduled for early December. The budget adopted by the Legislature through the Legislative Process and (in this hypothetical) signed by the Governor would also become effective for the following budget year on January 1 if the Tribal Council for whatever reason *neither approved nor disapproved* it within thirty days.[106]

That is a "best case" scenario. Any gubernatorial veto of the Legislature's proposed budget (depending on how swift) could add *at least* a month (perhaps two) to the process. For a budget to take effect by January 1 of the following year, assuming that the Governor has called no Article VI, Section 6(b) Special Session of the Legislature with the "purpose"[107] of voting on a proposed Budget Bill, and assuming further a gubernatorial veto of the Budget Bill that the Legislature ultimately sends to the Governor through the Legislative Process, a proposed Budget Bill is likely to need *August or September* Regular Session approval by the Legislature in order for it to: [1] submit it to the Governor for signature or veto; [2] await the veto; [3] place the veto override on the agenda as a Bill to be considered at the next Regular Session for which Article VI, Section 7(a)(ii) notice may be constitutionally provided; [4] override the veto (which we assume for purposes of this

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[102] *See* CHEY. & ARAP. CONST. [2006] art. VII, § 4(b).

[103] *See id.* art. V, § 4(c) ("All decisions of the Tribal Council shall be embodied in a written Resolution.").

[104] *See id.* art. V, §§ 3(b).

[105] *See id.* art. V, § 2(b).

[106] *See id.* Given the interplay of Article V, Section 2(b) and Article V, Section 4(c), we note the potential theoretical impossibility of the Tribal Council's ever being able to vote on any proposed Budget Resolution at any Tribal Council Meeting, since Article V, Section 4(c) requires that thirty days' notice of any proposed Tribal Council Resolution be provided to tribal citizens **at least thirty days before any Meeting,** while Article V, Section 2(b) literally provides that a proposed budget shall be deemed approved by the Tribal Council as a matter of law if it does not approve it **within thirty days of its receipt** by the Tribal Council. Because a literal interpretation of the word "receipt" in Article V, Section 2(b) could effectively nullify the Tribal Council's "exclusive power to approve the annual budget" that is granted in the very same subsection of Article V, Section 2, we construe Article V, Section 2 *as a whole,* and as allowing the Tribal Council such time as is absolutely necessary to convene itself (or to be convened in Special Meeting by the Legislature), and to promptly vote to approve or disapprove a proposed budget that has been validly procedurally submitted to the Tribal Council Coordinator by the Legislature.

[107] *See generally The Speakership Case* [*Hoffman v. Flyingman*], No. SC-2008-04, slip op. at 15-18 (Chey. & Arap. S.Ct. Nov. 20, 2008).

hypothetical); and [5] present the proposed budget to the Tribal Council Coordinator for Tribal Council approval, disapproval, or inaction as provided above.[108] As we note above, in this scenario, the enactment of a proposed budget by the Legislature might well need to occur at the Legislature's *August or September* Regular Sessions to take effect by January 1.

The Constitution **permits** the Governor to make his or her annual revenue projections and to propose his or her annual budget **before** June 1, but **mandates** those activities **by** June 1. A Governor may wish to delay his or her actions on those matters for reasons that are *wholly legitimate* — including the desire to adopt his or her revenue projections (and their expenditure consequences) to rapidly changing economic circumstances (such as those of the last few years). If a Governor chooses to avail himself or herself all of the time specifically afforded by the Constitution, then the Legislature will receive the Governor's revenue projections and proposed budget **on** June 1 of every year. We take judicial notice of the fact that the time between June 1 and the Legislature's October Regular Session (our "best case" scenario for timely budget adoption) is about 130 days, that those days mostly fall within the summer months, and that noteworthy tribal traditional/religious ceremonies take place during those months. Under our "worst procedural case" gubernatorial-veto scenario of necessary budget adoption by the Legislature at its August Regular Session, the interval between budget submission by the Governor and the necessary first budget vote by the Legislature will be about *seventy days* (*i.e.,* from June 1 to about August 10).

The Legislature may (and most likely, will) work on its *own* budget ideas *before* the Governor presents it with his or her proposed budget, thereby expanding the effective time "windows" to some degree. But three conclusions are nevertheless apparent.

First, inter-Branch cooperation between the Executive and Legislative Branches will likely be essential to the generation of a *procedurally* validly adopted budget ready for January 1 implementation.

Second, because of Article VI, Section 5(d)'s *substantive* mandate (independently established by Article II Separation of Powers considerations as well) that each Branch (and the Election Commission) be provided the funds necessary for each Branch (and the Election Commission) to **effectively operate**, inter-Branch cooperation between all four Branches (and the Election Commission) will be necessary in order for the resulting budget to be *substantively* constitutional.

Third, because we construe the constitutional structure as a whole as *favoring and seeking to facilitate* (within the limits described above) the creation of a procedurally and substantively valid tribal budget by the **POLITICAL** Branches of tribal Government (*i.e.,* without any otherwise-necessary Judicial Branch participation), and as also favoring the creation of a procedurally and substantively valid budget in a manner that will permit it to enter into force **ON JANUARY 1,**[109] we construe the word "previously" in Article VI, Section 5(d) to include "earlier in a *contemporaneous* document." Because of our interpretation of that word for Article VI, Section 5(d) purposes today, the answer to the question we number "18" in our October 10, 2007 interim order in this case is "yes."

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[108] *See generally supra* note106.

[109] *Cf.* TRIBAL COUNCIL RES. No. 111806STC-004 (Nov. 4, 2006) ("BE IT RESOLVED [that] the tribal council establishes a **policy** that the Legislature shall act in a **timely manner**, so [the] budget is in place by January 1, 2007." (bold emphasis added)).

D.

The issues we numbered "19" and "20" in our October 10, 2007 interim order address the constitutionality of the purported "interim" 2006 and/or various purported 2007 tribal budgets *specifically.*

1.

The 2006 Constitution entered into force on April 4, 2006, and new Article IX, Section 15(c) called for a Special Election to fill the newly-established offices of Governor and Lieutenant Governor. By the time the Department of the Interior certified the results of the April 4, 2006 Secretarial Election and the Special Election for Governor and Lieutenant Governor conducted, the new June 1, 2006 constitutional deadline for the new Governor to present his revenue estimates and proposed budget to the new Legislature had passed.

In August 2006, however, the Governor submitted to the Legislature a proposed budget for the remainder of 2006, and one for 2007. All parties herein agree that for whatever reason (and we need not resolve the disputed question of "reason" herein), those proposed budgets were less-than-warmly received by many Legislators.

What is uncontroverted is that at its October 10, 2006 Regular Session, the Legislature adopted Bill No. 01-08-05 through the Legislative Process. While its title and text materially conflict with each other on the matter, it appears that Bill No. 01-08-05 purported to establish an interim budget for the remainder of calendar year 2006 *and* for calendar year 2007.

Bill No. 01-08-05 appropriated $60,000 to the "direct and indirect costs of the Office of the Tribal Council Coordinator," and an additional $20,000 for that official's annual salary. It appropriated $864,677 for "salaries and expenses and other direct and indirect costs of the Legislative Branch" to expend, but it did not "break out" Legislators' salaries or indicate on *what* the $864,677 would be spent. Bill No. 01-08-05 on its face authorized Legislators to expend the portion of the appropriation to which they might individually be entitled (also unspecified) in ways not limited by the Bill's text.

Bill No. 01-08-05 appropriated $50,000 to the Governor's salary, $45,000 to the Lieutenant Governor's salary, and $12,498 for the rest of the Executive Branch. It also appropriated $95,268 to the Judicial Branch, and purported to place a moratorium on any expenditure of tribal funds by the Governor on anything else.

Bill No. 01-08-05 need not detain us long. While there are a variety of collateral bases on which we might *also* hold it unconstitutional, it is *procedurally* unconstitutional for: [1] failing to take account of *all* tribal funds, including "638 contract" and other federally-provided funds, in violation of Article VI, Section 5(d) and other constitutional provisions; [2] seeking to assign *to Legislators* the facially-unchecked power to cause the expenditures of tribal funds (including unspecified amounts on their own salaries and/or other compensation), in violation of Article VII, Section 4(b), Article II, Section 3, and other constitutional provisions; [3] seeking to decrease the salary reasonably established by the Tribal Council as the salary of the Tribal Council Coordinator, in violation of Article V, Section 5(b) and Separation of Powers "encroachment" and "self-

aggrandizement" principles; and [4] because of its failure to contain any meaningful level of detail at all, violating Article VI, Section 5(b) on its face; and [5] independently violating Article VI, Section 5(b) because it is primarily a moratorium on tribal spending not controlled by the Legislature, and a moratorium on tribal spending is not a "budget" within the meaning of the Cheyenne and Arapaho Constitution.

Bill No. 01-08-05 was (and is) also *substantively* unconstitutional, *inter alia,* because: [1] it failed to provide each Branch, the Election Commission, and constitutionally-mandated Departments with the funds reasonably necessary to effectively operate mandated by the Operating Funds Clause of Article VI, Section 5(b); [2] it thereby encroached on the powers of the Legislature's coordinate Branches, and sought to self-aggrandize the Legislature's own powers at their expense; and [3] it sought to prevent tribal spending on previously-validly-contracted "638 contract" (or other) tribal commitments to the federal or state governments to provide services to tribal citizens in an amount that may have approached twenty million dollars. Because we conclude that Bill No. 01-08-05 is unconstitutional for a constellation of reasons, it has no impact on the lawfulness of any spending during 2006 *or* thereafter.

We reach many of the same conclusions about "Bill No. 01-2007-04-01," and we also find it procedurally and substantively unconstitutional. Moreover, we conclude that because the Legislature purported to adopt that Bill at an April 20, 2007 Special Session that *it had itself sought to call* (in violation of Article VI, Section 6), the enactment of that "Bill" could not *possibly* be within the Legislature's powers for Legislative Process purposes, and would therefore also be a legal nullity under the Article VI, Section 7(a)(vi) Voidness Clause.[110]

Developments later during the Spring and Summer of 2007 also failed to generate a lawful 2007 budget. At its June 9, 2007 Regular Meeting, the Legislature purported to adopt "Bill No. 01/2007-05-01, but in so doing it failed to provide tribal citizens with the thirty-day notice required by Article VI, Section 7(a)(ii). At the same meeting, through an "administrative resolution" that apparently failed to comply with the Legislative Process, it attempted to call a Special Tribal Council Meeting to approve it. Because of a physical takeover of tribal headquarters on June 19, 2007, Governor Flyingman alleges that he was physically (and unconstitutionally) prevented from vetoing "Bill No. 01/2007-05-01," but we need not address that issue herein, since the "budget" that the Tribal Council approved at the July 21, 2007 meeting (convened by a likely-void "administrative resolution") was *different from* the one that the Legislature had ostensibly approved at its June 9, Regular Meeting, thereby presenting some of the same "moving target" problems we found dispositive in our first *In re Special Tribal Council Meeting set for November 22, 2008* decision.[111]

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[110] Because the Legislature also purported to adopt "Bill No. 01-2007-01-03" at the invalid April 20, 2007 "Special Session" that it had convened for itself, we also hold that that Bill is a legal nullity. And because Article VI, Section 6 denies the Legislature both the power to continue any Regular Session beyond the two-consecutive-day limit established by Subsection 6(a) *and* to "reschedule" a Regular *or* a Special Session, *see, e.g., In re Invalidity of Rescheduled Special Session of the Legislature set for March 13, 2008,* No. SC-2008-01, slip op. at 2-5 (Chey. & Arap. S.Ct. Apr. 28, 2008), any actions purportedly taken at the "rescheduled" January 18, 2007 "Regular" Session of the Legislature are also void *ab initio* under Article VI, Section 7(a)(vi).

[111] No. SC-2009-01, slip op. at 14-15 (Chey. & Arap. S.Ct. Sept. 1, 2009).

And even forgetting any aspect of the Tribal Council's actions (or inactions) and mechanically running the Article V, Section 2(b) thirty-day "clock," "Bill No. 01/2007-05-01" suffers from many (if not all) of the *substantive* constitutional infirmities that plagued the Legislature's earlier efforts to create a valid 2007 tribal budget. For both procedural and substantive reasons, we hold that "Bill No. 01/2007-05-01" also failed to establish a lawful 2007 tribal budget.

We have no information in the Record on the basis of which we may conclude that the *original* 2006 budget (as adopted under the *1975* Constitution by the then-Business Committee) was not then a valid 2006 tribal budget under the old Constitution, and we certainly conclude that under the circumstances of a "split" budgetary year (divided by the April 4, 2006 constitutional change), any 2006 expenditures made by (pre-April 4) Business Committee Chairman/(post July) Governor Darrell Flyingman, AND/OR by (pre-April 4) Treasurer/(post-April 4) *de facto* Interim Treasurer Robert Wilson[112] **CONSISTENT WITH** the "original" 2006 budget were not "embezzlement" within the meaning of new Article VII, Section 4(b), and were otherwise lawful. We further hold that no action taken by the Legislature during 2006 modified the original 2006 budget in any way. But in view both of the mandatory nature of the new Article VI, Section 5(b) Operating Funds Clause, we further hold that any tribal funds expended during 2006 by Mr. Flyingman and/or Mr. Wilson on the expenses of any Branch (or constitutionally-mandated Department, or the Election Commission) that were necessary for that Branch (or constitutionally-mandated Department, or the Election Commission) to perform the functions lawfully assigned thereto by the 2006 Constitution were *also* lawfully made for Article VII, Section 4(b) and all other tribal-law purposes.

2.

For the reasons described above, there never was a valid *2007* tribal budget. But because of the uncertainty of the day, we extend to both Governor Flyingman and (before March 23, 2007) Interim Treasurer Wilson the same authority to have expended tribal funds under the "continuing 2006 budget" *or* the "funds reasonably necessary for a Branch, or constitutionally-mandated Department, or the Election Commission to effectively operate" principle described above with respect to 2006.

3.

We have elsewhere specifically upheld the validity of the 2008 tribal budget, and we so hold again today. We therefore hold further that expenditure of tribal funds by Governor Flyingman during 2008 **CONSISTENT WITH THAT BUDGET,** or taken pursuant to our October 10, 2007 interim order in this case, were also lawfully made for Article VII, Section 4(b) and all other tribal-law purposes.

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[112] It was not until March 23, *2007* that this Court vacated an earlier sequence of Trial Court orders that had concluded that Legislator Wilson, while serving in the Legislative Branch as a Legislator, could also continue to serve as Treasurer in the Executive Branch under the new Constitution. *See The Treasurer Case* [*Flyingman vs. Wilson*], No. SC-2007-01 (Chey. & Arap. S.Ct. Mar. 23, 2007).

4.

We have elsewhere held that there was no lawful tribal budget during 2009, but that Governor Flyingman could (and in some cases, must) continue to make expenditures of tribal funds consistent with the 2008 Budget. [We have also noted that the 2008 Budget contains a self-perpetuating clause in the event that normal procedures fail to generate a subsequent lawful budget. We reaffirm those conclusions today, and we hold further that any expenditures of tribal funds by Governor Flyingman during 2009 consistent with our October 10, 2007 interim order in this case were lawfully made for Article VII, Section 4(b) and all other tribal-law purposes.

5.

It is now almost New Year's Day, 2010. There is nothing in the Record before us, or of which we may take judicial notice, about the existence *vel non* of a lawful *2010* budget. But Governor Darrell Flyingman's term of office as Governor will expire at the moment Governor-Elect Janice Boswell is sworn into office by a Justice of this Court,[113] and at that moment Governor Flyingman's expenditure problems (as well as those of the Tribes) will have become *her* expenditure problems (as well as those of the Tribes).

Because we deem all of the principles we discuss and apply above to be constitutionally compelled, and because we deem every Branch (and constitutionally-mandated Department, and the Election Commission) to have an Article VI, Section 5(d) and Separation-of-Powers guaranteed entitlement to those funds that are necessary for them to effectively operate within the powers granted to each by the 2006 Constitution (and controlling caselaw construing it), except insofar as it has been superseded by any later decisions of this Court (including this one) we *incorporate* our October 10, 2007 interim order in this case *into* this Opinion and Final Order. Upon her swearing-in, now Governor-Elect Boswell will therefore have precisely the same power to *initiate* "funds-reasonably-necessary-to-effectively-operate" litigation as enjoyed by Governor Flyingman during his term of office, because she will then be the repository of tribal executive power,[114] she will be (as Governor Flyingman has been) *suable* as provided above on the basis of that principle.[115] If there is no valid 2010 Budget, she may also continue to expend tribal funds **CONSISTENT WITH THE 2008 BUDGET** until a valid 2010 budget is adopted, and any 2010 expenditures made consistent with the 2008 budget shall be lawfully made for Article VII, Section 4(b) purposes.

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[113] *See* CHEY. & ARAP. CONST. [2006] art. VII, § 2; *id.* art. IX, § 14.

[114] *See id.* art.VII, § 4.

[115] *See id.* art. X, § 3.

E.

In so holding, and with the other reasoning and conclusions we announce above, we have resolved the "remedial" issues we enumerated as items "22" through "26" in our October 10, 2007 interim order in this case.

IV.

Only one specific issue of *application* remains, but that issue is likely (and legitimately) to be of great pragmatic and theoretical interest to every party to this litigation, to Governor-Elect Boswell, and to the attorneys who have represented the Executive Branch, the Legislative Branch, individual Legislators, the Election Commission, and/or Election Commissioners during the past three years. In our attempt to resolve all of the issues remaining in this case, we inevitably confront the question of the *retroactivity* of our above "tribally-compensated counsel" holdings to *past* representation of the Executive Branch, Executive Branch officials, the Legislature, individual Legislators, legislative staff employees Ramona Tall Bear and Vera Franklin, the Tribal Council Coordinator, the Election Commission, and/or individual Election Commissioners.

We will not attempt summarization of the holdings of Part III-B of this Opinion and Final Order (or our related holdings in other cases) at this juncture. Suffice it to say for present purposes that we believe that if this Opinion and Final Order is followed (and the Constitution *requires* it to be followed[116]), we do not deem it **constitutionally** possible for the inter-Branch litigation frenzy of the past three years to ever be replicated again.

But that litigation-fest *did* occur, and it occurred at the very beginning of tribal governance under the new Constitution. As we have noted above, some of that litigation was brought about due to the simple refusal of former tribal election officials to comply with tribal law,[117] and (with the benefit of 20/20 hindsight), other litigation proved necessary to establishing the precedent that both Appellant Flyingman and Appellee Legislature and Legislators have asked us to provide: resolving **"issues of the utmost importance for the effective function of Tribal government, and the resolution [of which] would obviate the necessity of filing additional cases in the Tribal Courts."**[118]

We have now decided a great many of the issues in which the typically-precise 2006 Constitution is not precise, and in many other constitutional decisions we have called the parties' attention to the fact that the constitutional answer was to be found by simply referring *to* the Constitution's usually explicit **text.** But our doing so has required the effective participation of attorneys on all sides. And the attorneys on all sides have almost always been *more* then able in the recent Separation-of-Powers litigation.

In light thereof, and in view of the tribal Constitution's repeated calls for fair notice in a wide

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[116] *See, e.g., id.* art VIII, § 6(c); *id.* art. II, § 1; *id.* art. VII, § 4(a).

[117] *See supra* at 1-2 (discussing the *2007 Elections Case*).

[118] *See supra* at 3 (quoting Appellee's Statement)

variety of contexts, insofar as the right of counsel to receive compensation from tribal funds for their representation of the above-described interests is concerned, we render our Part III-B conclusions only prospectively insofar as they affect the attorneys' fees of the primary attorneys and law firms involved in the last three years' separation of Powers struggles: Robert J. Lyttle (and the Robert J. Lyttle, P.C. law firm) on behalf of the Executive Branch, Executive Branch officials, the Election Commission, and/or individual Election Commissioners; and Thomas W. Fredericks (and the Fredericks Law Firm) on behalf of the Legislature and individual Legislators.[119] To whatever extent that either or both attorneys and/or sets of attorneys have not been paid reasonable attorneys' fees for the representation described in this Part IV, we direct the Governor to pay such attorneys' fees, as having been "reasonably necessary for the Executive and Legislative Branches (and the Election Commission) to effectively operate" from April 4, 2006 until the close-of-business on December 31, 2009.

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[119] The issues we numbered "8" to "11" in our October 10, 2007 interim order in this case also addressed selected attorneys' fees entitlements of attorney Kyme A.M. McGaw and her law firm, the Morisset, Schlosser law firm of Seattle, Washington. While that Order directed that Appellant Flyingman cause the reasonable attorneys' fees of several other attorneys (and/or their firms) to be paid from tribal funds, *see id.* at 11, we entered no order with respect to Ms. McGaw because of residual issues of what Branch (or officials) she sought to represent in the related litigation, and the legal basis on which she claimed to represent anyone. We took explicit notice of potential conflicts-of-interest problems with respect to Ms. McGaw's representation(s) both in our October 10, 2007 interim order in this case, *see id.* at 16 n.31, and in the related *Treasurer Case, see Flyingman v. Wilson,* No. SC-2007-01, slip op. at 16 n.31 (Chey. & Arap. S.Ct. Mar. 23, 2007).

On the basis of documents both in the Record and court documents of which we may take judicial notice, we conclude that Ms. McGaw claimed at various times (sometimes, even in the same case) to represent the Tribes, the Tribal Council, an individual (invalid, it would turn out) *claimant* to the office of Tribal Council Coordinator, the Interim Treasurer, various individual Legislators, and/or a variety of combinations of the above. The Record also reveals that on January 10, 2007, Ms. McGaw declined to represent the Tribal Council Coordinator who was the *rightful* occupant of that position, on the ground that she would take direction only from the *entire* Tribal Council. This Court granted Ms. McGaw permission to withdraw from this case entirely on June 12, 2007.

Lest we unintentionally generate more attorneys' fees-litigation in the future, we hold: [1] that under tribal Separation-of-Powers principles, no attorney may be compensated from tribal funds where the attorney has sought to simultaneously represent more than one Branch, or officials from more than one Branch; [2] that many of Ms. McGaw's attempts to do so after the April 4, 2006 adoption of the new Constitution and before her final June 12, 2007 withdrawal from this case were examples of the types of attorney conflicts-of-interest forbidden, *inter alia,* by Article II Separation of Powers principles; [3] that for purposes of her termination under the terms of her own attorney contract, the new Governor effectively stepped into the shoes of the old Tribal Council (for attorney termination purposes) with the adoption of the new Constitution on April 4, 2006; *see generally* CHEY. & ARAP. CONST. [2006] art. II, §§ 1-3; *id.* art. V, § 2; *id.* art. VII, § 4; [4] that Ms. McGaw had no valid tribal-law claim to compensation by the Tribes for representing any tribal Branch, official, or tribal member after (at the *very* latest) September 18, 2006; and [5] that Ms. McGaw's attorney contract never authorized her to represent the *individual* interests of *any* tribal member in *any* context. For that constellation of reasons, we do *not* hold that Ms. McGaw or the Morisset, Schlosser law firm must or may be compensated by the Cheyenne and Arapaho Tribes for any representation related to this or any other Separation-of-Powers-related litigation.

Beginning on January 1, 2010, the conclusions we reach in Part III-B of this Opinion and Final Order will assume full effect as to the ability of any private attorney to receive any tribal funds for representing the Tribes, any Branch, the Election Commission, any tribal official, any tribal employee, or any other person or entity. Henceforth (if there is a lawful tribal budget), any attorneys' fees must be either specifically budgeted or approved by prior judicial review on the "funds reasonably necessary for a Branch (on the Election Commission) to fulfill its lawful role under the 2006 Constitution" principle. If there is no lawful tribal budget (whether in 2010 or any future budget year) then the Tribes, any Branch, the Election Commission, any tribal official, any tribal employee, or any other person or entity may be represented by counsel compensated by the Tribes (directly or indirectly) **only** as provided in Part III-B above.

V.

We have held above that in order to prevent any "encroachment" by the *Judicial* Branch, we could draw the above conclusions (and thereby assume *any* budgetary role) only if our doing so could effectively be rendered only temporary. We therefore make the following principles explicit:

First, we share the constitutional framers' **very** strong preference that the making of difficult budgetary choices be a task of the **political** Branches, **not** the Judicial Branch.

Second, we have sought to **facilitate,** not impede, those Branches' ability to create a lawful tribal budget by many of the conclusions we have drawn above.

Third, if the political Branches create a procedurally and substantively constitutional budget, the Judicial Branch has no role other than to ensure the compliance of all tribal officials **with** that budget if we are properly called upon to do so.

Fourth, any action the Judicial Branch may take under the above-described principles with respect to any budget year **will be temporary,** because it may be *superseded* by the creation by the **political** Branches of a constitutional budget for the *remainder* of that budget year.

VI.

Any party to this appeal may file a Petition for Rehearing of no more than fifteen pages, with no attachments, no later than 4:00 p.m. on Friday, January 15, 2010. Any Petition for Rehearing shall refrain from simply repeating arguments already made.

Because as Governor-Elect, Janice Boswell is eligible to be sworn into office on Saturday, January 2, 2010 or thereafter, if she so chooses, we also invite her to file a Statement, of no more than fifteen pages, without attachments, in response to this Opinion and Final Order by the date and time specified above for Petitions for Rehearing. Assuming that she has been lawfully sworn into office, we specifically authorize Ms. Boswell to secure the assistance of counsel of her choosing in preparing that Statement, and such counsel[120] may be compensated from tribal funds as "reasonably necessary to the ability of the Executive Branch to effectively function" if she elects to file a counsel-

[120] To avoid, however, the types of conflicts-of-interest we have described above, *see supra* note 119, such counsel may not represent any *other* Branch of tribal Government, any non-Executive Branch officials or employees, or any entity doing business with the Tribes or seeking to do business with the Tribes.

assisted Statement.

The Court Clerk is directed to refuse to file any document *other than* the documents specifically authorized in this Part V, and to refuse to file any document sought to be filed by *any* person or entity in this case after 4:00 p.m. on Friday, January 15, 2010.

VII.

The Clerk of Court is directed to file this Opinion and Final Order instanter, and to provide copies of it to all parties to this appeal and their attorneys-of-record; to all members of the Second Legislature (whether or not parties herein); to Governor-Elect Janice Boswell; to all Legislators-Elect; to the Tribal Council Coordinator; to the Election Commission; to all Election Commissioners; to Betty Tippiconnie, Superintendent, Bureau of Indian Affairs; and to Dan Deerinwater, Regional Director, Bureau of Indian Affairs.

Case No. CIV-2006-89 is ordered CLOSED. Case No. SC-2007-02 is CLOSED.

IT IS SO ORDERED.

Acting Chief Justice Ryland L. Rivas

Justice Dennis W. Arrow

Justice Enid K. Boles

Special Justice Karen Eby

Special Justice Lindsay G. Robertson

Jec. 30. 2009 4:49PM

assisted Statement.

The Court Clerk is directed to refuse to file any document *other than* the documents specifically authorized in this Part V, and to refuse to file any document sought to be filed by *any* person or entity in this case after 4:00 p.m. on Friday, January 15, 2010.

VII.

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Case No. CIV-2006-89 is ordered CLOSED. Case No. SC-2007-02 is CLOSED.

IT IS SO ORDERED.

Acting Chief Justice Ryland L. Rivas

Justice Dennis W. Arrow

Justice Enid K. Boles

Special Justice Karen Eby

Special Justice Lindsey G. Robertson

Dec. 30. 2009 4:49PM

CERTIFICATE OF MAILING

I, Patty Bell, Court Clerk of the Supreme Court for the Cheyenne and Arapaho Tribes do hereby certify that I mailed the following document to those names who appear below in Case No: SC-2007-0002, In re the matter of Executive Authority to conduct essential government functions, Darrell Flyingman, Governor:

OPINION AND FINAL ORDER

via U.S. regular mail on the 30th day of December, 2009.

Mr. Robert J. Lyttle
Attorney For Governor
909 S. Meridian, Ste 540
Oklahoma City, OK 73108

Mr. Darrell Flyingman
Governor
P.O. Box 38
Concho, OK 73022

Mr. Mark Henrickson
Attorney At Law
600 N. Walker, Ste 220
Oklahoma City, OK 73102

Legislature:
Mr. Patrick Spottedwolf
Ms. Ida Hoffman
Mr. Robert Wilson
Mr. Michael Martin
Mr. Richard Williams
Mr. Robert Wilson
Ms. Mary Jo Higgins
Mr. Casper Avans
P.O. Box 38
Concho, OK 73022

Mr. Thomas W. Fredericks
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Governor Elect:
Ms. Janice Boswell
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Legislators Elect:
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Mr. Clifton Ellis
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Certificate Of Mailing
SC-2007-0002

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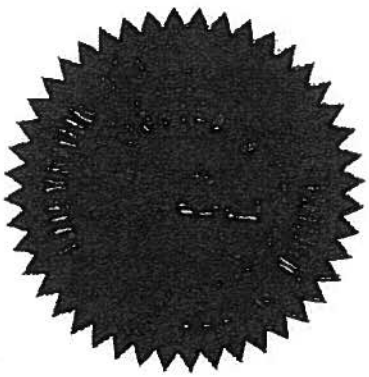
Mr. Ryland L. Rivas
Chief Justice, Supreme Court

Mr. Dennis W. Arrow
Associate Justice, Supreme Court

Ms. Enid Boles
Associate Justice, Supreme Court

Mr. Lindsay Robertson
Special Justice, Supreme Court

Ms. Karen Eby
Special Justice, Supreme Court



Patty Bell
Court Clerk
Cheyenne and Arapaho Supreme Court

EXHIBIT 4

CHEYENNE AND ARAPAHO SUMMARY OF RELEVANT EVENTS

Supreme Court Justices

On July 10, 2010, Governor Janice Prairie Chief-Boswell nominated the following persons to serve as Supreme Court Justices of the Cheyenne & Arapaho Tribes: John G. Ghostbear, Daniel Webber, Mary Daniel, and Jennifer McBee.

On August 6, 2010, six (6) members of the Third Legislature held an invalid meeting in what it termed to be an "open meeting" and purported to take action as the Third Legislature in denying confirmation of all four (4) Supreme Court nominees by separate Legislative Orders Nos. 3L-LO-N-2010-OM1-08-01; 3L-LO-N-2010-OM1-08-02; 3L-LO-N-2010-OM1-08-03; and 3L-LO-N-2010-OM1-08-04. However, as discussed below, the Legislature may only act at a regular or special session of the Legislature and only through the Legislative Process as set forth in the Cheyenne and Arapaho Tribes' Constitution ("Chey. & Arap. Const.") as interpreted by tribal common law.

On August 9, 2010, the 30-day period for the Legislature to confirm or deny the Governor's judicial nominees expired and the nominees were deemed confirmed by the operation of Chey. & Arap. Const. Art. VIII, § 2. "Shall" is mandatory. *Flyingman v. Election Commission*, SC-07-13 at 1, slip. op. (Chey. & Arap. S. Ct. Sept. 27, 2007). The deadlines contained in the Chey. & Arap. Const. have been interpreted strictly. *Id.* at 1-2 (the constitutionally-mandated time limits are not "mere empty technicalities" and discussing the people's wisdom in fixing periods for specific action.)

On August 12, 2010, the Supreme Court purported to act by administrative decision outside of its own jurisdiction as an appellate court and issued its *Second Supplemental Order* in *In Re: The Judicial Branch of the Cheyenne and Arapaho Government*, SC-AD-2010-07, in which the Court simply declared the Legislature's "open meeting" denials of the Governor's judicial nominees were valid and sufficient. This action was invalid as there was no case or controversy before the Supreme Court at the time and it was contrary to the vast precedent which held the Legislature could only act at a regular or special session of the Legislature and only through the Legislative Process if the Legislature wanted its actions to have any effect at all. Otherwise such actions are void because they did not follow the legislative process. *See* Chey. & Arap. Const. Art. VI, §7(a)(vi) ("Any action by the Legislature which does not follow the Legislative Process shall be deemed void and shall not be implemented or enforced by the government, Governor, or any official or employee.")

September 8, 2010 was the 30th day following the Legislature's default approval. It was also thirty (30) days prior to the expiration of the Tribal Council's 60-day window to approve or disapprove the nominees. Therefore, under Chey. & Arap. Const. Art. V, § 4(c), it is also the last day for tribal members to call a special meeting and the last date to submit proposed Tribal Council resolutions.

September 23, 2010 was the last date on which the Tribal Council Coordinator could provide public notice of any upcoming Special Tribal Council Meeting sought by

petition of 150 Tribal members to hold a Special Tribal Council Meeting to consider resolutions pertaining to the nominated Justices.

On September 24, 2010, the Attorney General issued *Formal Opinion No. 10-01*. The *Opinion* provided:

> The Governor's nominees for Supreme Court Justice nominees have been default approved by the constitutional process because the Legislature failed to take valid action within its thirty day (30-day) window and the Tribal Council no longer has time to . . . submit the required resolutions, publically post them, and vote to approve or disapprove the nominees during the remaining days of its six day (60-day) window.

The argument that the Constitution vests sole power in the Judicial branch to swear in new Justices into office is simply incorrect. Article IX, § 14 provides that "[a] Justice of the Supreme Court shall administer the Oath of Office for all newly elected officials of the Tribes on the first Saturday in January following an election." (emphasis added). By its plain language, § 14 clearly applies only to "newly elected officials of the Tribes." The Justices, however, are not elected officials, but rather go through a nomination, confirmation, and approval process. Therefore, § 14, is not applicable to the swearing-in of Supreme Court Justices. Had the drafters intended to require a Justice of the Court to administer the oath to new Justices, the drafters would have made § 14 applicable to new Justices, not just newly elected officials. Instead, § 206 Chey. & Arap. Code of Courts, provides in whole:

> Before assuming office each Justice shall take an oath to support and protect the Constitution of the Tribes and to administer justice in all causes coming before him with integrity and fairness, without regard to the

> persons before him to be administered by the Chief Justice, the Chief Executive Officer, or the ranking available Justice of the Court.

The Cheyenne and Arapaho Code of Civil Procedure ("Code of Civ. P."), Section 5(a) defines Chief Executive Officer as the "Chairperson of the Cheyenne-Arapaho Tribes of Oklahoma[.]" Therefore, according to existing Tribal law, it is well within Governor Janice Prairie Chief-Boswell's duties to swear in new Justices of the Cheyenne and Arapaho Supreme Court.

In a less specific provision that has been superceded by the Tribes' adoption of its Constitution in 2006[1], the Code of Courts § 103(d) provides: "If the nominee for the Judicial Office is confirmed by the Business Committee, the nominee shall be sworn into office by the Chief Justice, or the next ranking available Justice of the Supreme Court." Applying *generalia specialibus non derogant* ("the general does not detract from the specific"), § 206 applies to the swearing in of Supreme Court Justices rather than § 103(d) since 103(d) is more general than § 206. Additionally, because § 103 previously applied to "Manner and Selection of Justices and Judges" it has been superceded by the adoption of the Chey. & Arap. Const. (2006) since Chey. & Arap. Const., Art. VIII, §2 applies to the Selection of Judges and Justices.

Tribal Court Decisions

[1] Cheyenne and Arapaho Constitution ("Chey. & Arap. Const."), Art. II, § 1 provides: "the Constitution of the Tribes shall be the supreme law of the land. All the existing laws of the Tribes shall remain in full force and effect unless such laws are contrary to the terms of this Constitution."

On December 17, 2010, the Tribal Trial Court issued an *Emergency Temporary Restraining Order* in *Wandrie-Harjo v. Boswell,* Case Nos. CIV-2010-0107, SC-2010-0016. This *Temporary Emergency Restraining Order* purports to declare in an *ex parte* order that certain court orders in other cases have been violated, that a *Motion for Temporary Restraining Order* is issued to suspend the executive power of the Governor until further order of the Court; declares a vacancy in the office of the Governor; declares Lt. Governor Harjo as Governor upon Governor Boswell's immediate suspension /removal; and that Governor Boswell's executive powers are indefinitely suspended. This was all issued *ex parte* and contrary to the terms of the Chey. & Arap. Const. which provide only two (2) ways for a Governor to be removed from her elected position.

On December 17, 2010, the Tribal Trial Court issued a *Supplemental Order* in *Wandrie-Harjo v. Boswell,* Case Nos. CIV-2010-0107, SC-2010-0016. The *Supplemental Order* simply included that the process server validly served Governor Boswell "through security" which is contrary to Tribal law and which was done pursuant to legal advice Tribal Trial Court Judge Smith provided to the process server Michael J. Rosenquist. Also, the *Supplemental Order* purports to recognize Jeremy Oliver, legal counsel to the Legislative Branch, as the Attorney General for the Tribes, who had also purportedly received service of unidentified documents.

On December 20, 2010, the Cheyenne and Arapaho Supreme Court issued an *Order Staying Enforc[e]ment of the Temporary Emergency Restraining Order Pending*

Consideration of the Appeal in *Wandrie-Harjo v. Boswell,* Case Nos. CIV-2010-0107, SC-2010-0016.

On December 22, 2010, former members of the Supreme Court signed a *Supplemental Order Extending TRO & Hearing set for December 31, 2010* in *Lynn v. Boswell*, Case Nos. CIV-2010-0084, SC-2010-0014. The *Supplemental Order*, however, extended the *Temporary Restraining Order* in *Wandrie-Harjo v. Boswell* and purported to remand the case to the Tribal Trial Court. Following her participation in civil unrest and participation in attempting to overthrow the tribal government, Justice Enid K. Boles signed the *Supplemental Order* purporting to extend a *Temporary Restraining Order* beyond the statutory period without the consent of the parties and in violation of tribal statute. Justice Boles' *Supplemental Order* was subsequently stricken from the record as set forth below.

On December 26, 2010, the Supreme Court issued an *Order of Writ of Prohibition* in *In Re the Matter of Head Trial Judge, Bob A. Smith*, SC-2010-0017. This *Order of Writ of Prohibition* recused and removed Judge Bob A. Smith from any matter before the Courts until further order of the Supreme Court. All matters pending before Judge Bob A. Smith were immediately stayed and continued. Charles Tripp and Greg Bigler were appointed to the Trial Court as Special Judges.

On December 27, 2010, Judge Bob A. Smith purported to issue a *Preliminary Injunction* in *Wandrie-Harjo v. Boswell,* Case Nos. CIV-2010-0107, SC-2010-0016. Even after Judge Bob A. Smith was removed from all matters before the Court, Judge

Smith purported to both hold a hearing and grant a *Preliminary Injunction* in this case. The case was already on appeal, thus the Trial Court was divested of jurisdiction to hold a *Preliminary Injunction Hearing* or grant further injunctive relief until the case is remanded from the validly-seated Supreme Court.

On December 28, 2010, the Supreme Court issued three (3) separate *Orders* in *Lynn v. Third Legislature*, CIV-2010-0084, SC-2010-14; *Third Legislature v. Boswell*, Case Nos. CIV-2010-0100, SC-2010-0015; and *Wandrie-Harjo v. Boswell,* Case Nos. CIV-2010-0107, SC-2010-0016. These *Orders* strike any *Order* signed by Justice Enid Boles in these cases from the record; disqualify Justice Boles from hearing this case; and disqualify Justice Boles from hearing any case in which Defendant Prairie Chief-Boswell or a member of the Executive Branch is a party due to Justice Boles' actions of December 17, 2010, during which Justice Boles was an active participant in the attempted takeover of the tribal government.

On February 16, 2011, a Supreme Court *Order* was filed in *Boswell v. Wandrie-Harjo*, SC-2010-0016, which quashed the December 27, 2010 *Preliminary Injunction*. Said *Order* further provided that "[a]ny gubernatorial acts taken by Appellee Harjo are hereby voided."

On February 17, 2011, a *Writ of Prohibition* was filed in *Boswell v. Wandrie-Harjo*, SC-2010-0107, prohibiting Wandrie-Harjo from: 1. Attempting to access the Executive Offices; 2. Obstructing governmental function of Janice Prairie Chief-Boswell; 3. Interfering with employees of the Executive Branch; 4. Interfering with employees of

Lucky Star Casino; 5. Interfering with any project at Lucky Star Casino; 6. Threatening to take any adverse employee actions against Tribal personnel, security personnel, Court personnel, or Lucky Star Casino personnel; 7. Disrupting public assemblies including Tribal Council meetings; 8. Assaulting, verbally or physically, any Tribal personnel, security personnel, Court personnel, Lucky Star Casino personnel, or any person attending Tribal Council meetings; 9. Interfering with Janice Prairie Chief-Boswell's authority to sign into law or veto legislation; 10. Interfering with Janice Prairie Chief-Boswell's authority to vote in the case of a tie at the Legislature; 11. Calling "special Sessions" or purporting to carry out any action taken pursuant to such "Special Sessions"; 12. Attempting to access any account of the Tribes, or making any verbal or written statements for the purpose of obtaining the Tribes' property or credit; and 13. Purporting to be the Governor of the Tribes. Finally, the Supreme Court "declare[d] all acts of Appellee Plaintiff that contravene the Constitution as more particularly described [in the Writ] are void as against law and public policy."

Overthrow Attempt

On or about December 17, 2010, Plaintiff Wandrie-Harjo attempted to take over the Executive Offices of the Tribes by use of force. Justice Enid K. Boles was a participant in these events.

On or about December 17, 2010, Plaintiff Wandrie-Harjo issued an Executive Order to various employees of the Executive Branch notifying them Governor Prairie Chief-Boswell "was officially suspended of her Executive Powers" and such individuals

were being placed on administrative suspension without pay by Plaintiff Wandrie-Harjo pending her decision for governmental reorganization.

On or about December 18, 2010, Plaintiff Wandrie-Harjo issued an Executive Notice to the tribal employees of the Lucky Star Casinos (Concho, Clinton, Watonga and Canton) "requiring that all employees remain at their duty location and DO NOT attend the Community Hall as directed by Ida E. Hoffman on Monday, December 20, 2010." The Executive Notice further stated that "[a]ny Directive given by Janice Boswell shall be ignored as null and void as all her executive powers have been constitutionally suspended until further order of the Cheyenne and Arapaho Courts." *Id.*

On or about December 18, 2010, Plaintiff Wandrie-Harjo issued a Second Executive Notice to the tribal employees of the Lucky Star Casinos (Concho, Clinton, Watonga and Canton) asserting that the Trial Court of the Cheyenne and Arapaho Tribes issued an Order "indefinitely suspending the Executive power of Governor Janice Boswell and suspending Governor Boswell from Office until further Order of the Court."

Throughout December, 2010, and to present, Plaintiff Wandrie-Harjo attempted to access bank accounts held in the name of the Tribes.

On or about January 8, 2010, during a Special Tribal Council meeting, Plaintiff Wandrie-Harjo was disruptive and requested that she be recognized as Governor of the Tribes. Plaintiff Wandrie-Harjo attempted to take the microphone away from the person chairing the Tribal Council meeting by physical force, incriminated individuals before the

Tribal Council, and stopped vehicles following the meeting subjecting herself to potential claims of false reporting for emergency service and battery.

On or about January 8, 2010, during a regular session of the Tribal Legislature, Plaintiff Wandrie-Harjo requested she be recognized as Governor of the Tribes. The Speaker of the Legislature purported to recognize her as Governor and allowed her to decide a tie vote on a particular vote.

On or about January 27, 2011, Plaintiff Wandrie-Harjo issued an uncaptioned document to *"Cimmaron Electric Company to Cease and Desist."*

On or about January 31, 2011, Plaintiff Wandrie-Harjo issued a document captioned *"Public Notice"* purporting to call a special legislative session for Monday, February 7, 2011, to recognize acting governor Leslie Wandrie-Harjo – Harjo Act.

On or about March 31, 2011, Plaintiff Wandrie-Harjo and Jeremy Oliver participated in another overthrow attempt. This attempt was violent, and the Tribes' property was broken and destroyed, computers were stolen, the Governor and her staff were physically assaulted, and original files including documents that contain personal financial information and identifying information about tribal members were taken.

The Bureau of Indian Affairs' Policy

The Bureau of Indian Affairs ("BIA"), through Assistant Secretary for Indian Affairs, Larry Echo Hawk, has previously taken the following position:

> [The Assistant Secretary for Indian Affairs' office] will not insert itself in internal tribal affairs out of respect for the government-to-government relationship between tribes and the Federal Government. Court decisions

> affirm our position that Indian tribes have a right to govern their own futures in matters dealing with sovereignty and self determination. As a result, we will honor the sovereignty of your tribal government by not infringing upon your inherent right to govern yourself.

Letter from BIA dated July 28, 2009

Plaintiff Wandrie-Harjo's Attempts to Force Recognition of Herself as Governor

On or about December 17, 2010, some members of the Third Legislature passed "Legislative Proclamation" No: 3L-PO-17DEC2010-12-10, purporting to recognize the signature authority for all expenditures appropriated by the Legislature for which the signature of the governor of the Tribes is necessary be transferred to Leslie Wandrie-Harjo effective December 17, 2010. However, as set forth below, such "legislative proclamation" was outside of a regular or special session of the legislature and therefore void as a matter of Supreme Court precedent and per the express terms of Chey. & Arap. Const., Art. VI, §7(a)(vi)("Any action by the Legislature which does not follow the Legislative Process shall be deemed void and shall not be implemented or enforced by the government, Governor, or any official or employee.")

On or about Friday, February 11, 2011, Leslie Wandrie-Harjo issued a "Public Notice" purporting to call a special legislative session "to impeach suspended Governor Janice Prairechief-Boswell [sic]."

On or about February 17, 2011, the Third Legislature, by and through Rupert Nowlin and Mary Jo Higgins, purported to formally introduce 3L-2011-SS-02-01, "A

Special Resolution to Impeach and Remove Suspended (sic) Governor Janice Prairie Chief-Boswell From Office of the Governor."

On or about Thursday, February 17, 2011, Anne Piper, Legislative Clerk, issued a "Public Hearing Public Notice" purporting to call a special legislative session "to impeach suspended Governor Janice Prairechief-Boswell [sic]."

On or about Friday, March 11, 2011, Leslie Wandrie-Harjo issued a "Public Notice" purporting to call a special legislative session "to impeach suspended Governor Janice Prairechief-Boswell [sic]" for March 18, 2011.

Although the date was not firm, the Third Legislature "scheduled tentatively for the 17th day of March, 2011" at 1:00 p.m. a public hearing [for impeachment], and that Governor Boswell will have the opportunity to contest the charges, and prepare and present a defense."

On or about March 17, 2011, the Supreme Court issued a *Writ of Prohibition or Temporary Restraining Order* prohibiting Leslie Wandrie Harjo and the Third Legislature from: a) continuing with the unconstitutionally-called special legislative session "to impeach suspended" Governor Boswell, b) continuing with 3L-2011-SS-02-01, c) continuing with any proceedings on March 17 or 18, 2011 for impeachment of Governor Boswell, and d) declaring all acts taken in contravention of the *Writ* void *ab initio*.

On or about March 17, 2011, Wandrie-Harjo and the Third Legislature continued with their proceedings, notwithstanding its contravention of the *Writ.* Even though

impeachment is a serious departure from the electorate's selection of Governor, neither Wandrie-Harjo nor the Legislature provided Governor Boswell adequate information about the charges filed against her, the witnesses, the evidence, nor copies of any documents, sufficient to allow her to prepare and present a defense including presenting witnesses and other evidence. Chey. & Arap. Const., Art. XII, § 2. Instead, the charges were ambiguous and devoid of substance: "Violation of Article VII Section 4(A) for Failure to Enforce Court Orders," and "Violation of Article IX Section 14 for Failure to Uphold Her Oath of Office to Uphold the Constitution of the Tribes."

Furthermore, the Constitution requires a unanimous vote of the eight (8) members of the Third Legislature but two (2) legislators would not vote to impeach her. Leslie Wandrie-Harjo and the remaining members of the Third Legislature, therefore, pushed for an illegal and contrived recall election against Patrick Spottedwolf, the Legislator for District A3. To achieve their desired result, Leslie and the remaining members of the Third Legislature disregarded the Constitution which provides "No more than one attempt to remove a Legislator by referral to a special election shall be permitted during a term," as well as ignored the basic due process provisions of the Election Ordinance and the Election Commission's Rules and Regulations. The Supreme Court had to issue a temporary restraining order and emergency writ of prohibition for such obvious violations of the Constitution, Election Ordinance, and the Election Commissions Rules and Regulations. The Supreme Court subsequently held the attempted recall and subsequent attempt to fill the A3 seat void as against Cheyenne and Arapaho law, and

issued a writ of prohibition to void the recall election of Patrick Spottedwolf. Although a writ was in place, the Election Commission purported to conduct a recall election, and declared Rupert Nowlin the Legislator for District A3. In exchange for Mr. Nowlin's "new seat in Patrick Spottedwolf's spot," Mr. Nowlin had to "sponsor" the bill to impeach Governor Boswell.

Wandrie-Harjo and the remaining members of the Third Legislature also had to attempt to remove Bruce Whiteman, the duly-elected Legislator for District C1. The attempted removal of Legislator Whiteman was contrary to the express requirements of the Constitution which requires a referral to a special election before a Legislator may be removed. This did not occur, instead, the Third Legislative bypassed the constitutional will of the Cheyenne and Arapaho electorate and purported to unilaterally remove Legislator Whiteman without regard to the C1 voters. The Tribes' Supreme Court recently issued restraining orders against the Election Commission and those members of the Legislature that refused to afford Legislators Whiteman and Spottedwolf the rights associated with their elected positions.

Thus, the "unanimous" vote requirement set forth in the Chey. & Arap. Const., Art. XII, §2 was not met. Without Legislator Whiteman's and Legislator Spottedwolf's vote in favor of the impeachment, either by virtue of the remaining members of the Third Legislature disregarding their votes, or by virtue of treating their seats as "vacant," the illegally-filled Third Legislature lacked the "unanimous" vote the Constitution expressly requires.

Administrative Appeal Decisions

Appeal of the January 6, 2011 Letter Decision issued by Bureau of Indian Affairs, Regional Director Dan Deerinwater

On January 6, 2011, the Regional Director for the Bureau of Indian Affairs ("BIA") issued a letter decision determining that "the BIA and the Tribes have a government-to-government need to recognize the official signature of Janice Prairie Chief-Boswell on the Contract Modification forms[.]" Moreover, the Regional Office recognized Governor Janice Prairie Chief-Boswell as the Governor of the Cheyenne and Arapaho Tribes subject to the ultimate resolution by the Tribes itself. *Id.*

On February 5, 2011, Plaintiff Wandrie-Harjo sent her *Notice of Appeal* to the Regional Director via Federal Express notifying him that Appellant Wandrie-Harjo has appealed the Regional Director's January 6, 2011 letter decision.

On February 11, 2011, the Interior Board of Indian Appeals ("IBIA" or the "Board") issued a *Pre Docketing Notice, Order for Administrative Record, and Order Allowing Responses to Appellant's Request for Immediate Recognition* which recognized that Appellant "argues that there is an urgent need for Federal involvement and immediate recognition of the Tribal court". Thus, the IBIA allowed the Regional Director and interested parties to "file responses to Appellant's request for immediate relief[]" on or before February 25, 2011. This allowance to file a response was in order

to address the immediate relief the Appellant requested and was not intended to supplant the right afforded to an interested party to file an Answer pursuant to 25 C.F.R. §2.11

On March 7, 2011, the Southern Plains Regional Director, through Terry Bruner, transmitted the Administrative Record to the IBIA. The Administrative Record contained the following documents: 1) Notice of Appeal and Statement of Reasons of Leslie Wandrie-Harjo; 2) Letter from Southern Plains Regional Director recognizing Janice Prairie Chief-Boswell as Governor on an interim basis only; 3) Amendments of Solicitation/Modification of Contracts SF-30; 4) Preliminary Injunction, CIV-2010-0107; 5) Supplemental Order, CIV-2010-0107; 6) Temporary Emergency Restraining Order, CIV-2010-0107, to suspend the Executive power of Governor Janice Prairie Chief-Boswell and from office; 7) Legislative Proclamation No. 3L-PO-17DEC2010-12-01, Recognition of Acting Governor Leslie Wandrie-Harjo Signature Authority; 8) authorized Signature Form for Payment Requests re: P.L. 93-638 Contracts; 9) Bill establishing an act authorizing the Governor to enter into P.L. 93-638 Contracts; and 10) Constitution of the Cheyenne and Arapaho Tribes.

On March 9, 2011, Governor Boswell filed her *Answer* pursuant to 25 C.F.R. § 2.11 which contained the following arguments: 1) Appellant Wandrie-Harjo's *Notice of Appeal* is untimely; 2) Tribal governance disputes must be resolved by Tribal procedures, not by the Federal government or its courts; 3) the Tribal forum has not determined that Appellant Wandrie-Harjo is the Governor or the Acting Governor; and 4) the alleged actions taken by the Third Legislature to pass the Legislative Orders or Bills listed in the

[Notice of Appeal] violate Tribal law. Governor Boswell's Answer requested the IBIA docket and immediately dismiss the appeal pursuant to 25 C.F.R. § 2.17(a) and by those acts, affirm the January 6, 2011 letter decision of Regional Director Deerinwater.

On March 18, 2011, Plaintiff Wandrie-Harjo filed an *Objection to the Untimely Answer of an Interested Party ("Objection")* requesting the Board dismiss without consideration of the merits raised in Governor Boswell's *Answer*. Wandrie-Harjo bases her *Objection* solely on the *Pre-Docketing Notice* which Appellant argues "clearly informed interested parties that their responses to Appellant's notice of appeal may be filed on or before February 25, 2011."

On March 28, 2011, the IBIA issued an *Order Vacating Decision and Remanding* which vacated the January 6, 2011 letter decision and remanded the appeal to the Regional Director for further proceedings. The IBIA found "the limited record relied upon by the Regional Director does not support the [January 6, 2011 letter decision], and that the [January 6, 2011 letter decision] does not sufficiently explain its premise that the issue of Prairie Chief-Boswell's authority was a matter of dispute and uncertainty that rendered it permissible for BIA not to defer to the TRO and preliminary injunction[.]"

Appeal from Inaction of the Concho Agency Superintendent

On January 26, 2011, Appellant Leslie Wandrie-Harjo filed an "Emergency Request for Determination and Assistance" ("Emergency Request") with the Bureau of Indian Affairs, Concho Agency pursuant to 25 C.F.R. 2.8 "to urge the Concho Agency to take immediate action to recognize the properly seated Tribal Trial Court and Supreme

Court judges, justices, and clerk... and to unseat improperly sitting and ineligible purported tribal officers[.]"

On or about February 14, 2011, Governor Boswell received a "Supplemental Filing" which stated it was supplementing the "'Emergency Request For Determination And Assistance' filed on January 25, 2011[.]" *See Supplemental Filing* at 1. Said *Supplemental Filing* was not in supplementation to Ms. Wandrie-Harjo's alleged *Notice of Appeal*.

On March 7, 2011, Governor Boswell filed an *Answer of an Interested Party* responding to the *Supplemental Filing* and generally to the *Emergency Request*, although Governor Boswell had not received a copy of the *Emergency Request* by that time.

On March 22, 2011, Leslie Wandrie-Harjo, by and through Padraic McCoy, filed a *First Amended Verified Complaint and Application for Temporary Restraining Order and Preliminary Injunction* ("*Amended Verified Complaint*") in the Western District of Oklahoma in *Wandrie-Harjo, et al. v. Prairie Chief-Boswell, et al.*, 5:11-cv-00171-F. In paragraph 132 of the *Amended Verified Complaint*, Wandrie-Harjo alleges that "[t]he BIA Concho Agency responded to [Leslie Wandrie-Harjo's] Emergency Request stating that it will provided [sic.] a response within 60 days of the request, to which Plaintiff Harjo filed a Notice of Appeal to the Regional Office, pursuant to 25 CFR § 2[.]" *See Amended Verified Complaint* at 28 ¶ 132. Governor Boswell did not receive a copy of the Concho Agency's response that it will provide a response within 60 days nor a copy of Wandrie-Harjo's purported *Notice of Appeal*.

On March 28, 2011, Superintendent Betty B. Tippeconnie, despite the apparent appeal taken from her response, issued a letter decision recognizing the following individuals as Supreme Court Justices – Dennis W. Arrow, Enid K. Boles, Kathleen R. Guzman, and Lindsay Robertson. The letter decision further provides that "[t]his recognition does not in any way validate that all actions taken or court orders issued by these Judges and Justices are constitutional and will be recognized by the Bureau. The Bureau will recognize orders which appear to be necessary to insure the immediate health, safety and welfare of tribal citizens. Any decision to recognize or not to recognize certain orders issued or actions taken will be on a case by case basis when and if they are brought before us."

Under 25 C.F.R. § 2.6(b), the March 28, 2011 letter decision is not effective until the time to file a notice of appeal has lapsed and only if a notice of appeal is not filed.

On March 31, 2011, Governor Boswell filed a *Notice of Supplementation of Record on Appeal Pursuant to 53 IBIA 121 (03/28/2011).*

On April 4, 2011, Acting Superintendent Paul Knight issued a letter to clarify Superintendent Betty B. Tippiconnie's letter decision of March 28, 2011, stating "no decision has been made on the order of the tribal court suspending the Governor or her authority."

The Legislature May Not Act Outside of Laws or Resolutions and May Only Act at Regular or Special Sessions

The Chey. & Arap. Const. restricts how and when the Legislature may act as a body, allowing it to act only through laws or resolutions which must go through the

legislative process. Art. VI, §§ 5(a) and 7. Moreover, Chey. & Arap. Const. Art. VI, § 6(a) restricts the times the Legislature may meet and act to Regular and Special Sessions. The Chey. & Arap. Const. does not allow the Legislature to convene itself in "open meetings" to pass "Legislative Orders." In interpreting these constitutional provisions, the Cheyenne and Arapaho Supreme Court has previously held that "Legislative Orders . . . are not 'laws or resolutions' adopted through the Article VI, Section 7 Legislative Process, and consequently have no legal force whatsoever." *Flyingman v. First Legislature*, No. SC-2007-02, slip op. at 2 fn 5 (Chey. & Arap. S. Ct. Feb. 12, 2010)(emphasis added) (citing *Flyingman v. Spottedwolf*, No. SC-2009-0023 slip. op. at 3, 16 (Chey. & Arap. S. Ct. Dec. 17, 2009) ("The Legislature has no broad carte blanche to act through Legislative Process-immune "Administrative Resolutions," 'Legislative Orders,' 'Proclamations,' or the like if the Legislature intends the action to have any legal effect at all."). The Supreme Court noted that "because Article VI, Section 7(a)(vi) specifically provides that:

> "any" action taken by the Legislature that does not follow the Legislative Process is "void and shall not be . . . enforced by the Governor, government, or any official or employee," the Judicial Branch (and its Judges and Justices), no less than any other Branch (or any other tribal official) is constitutionally forbidden from enforcing Legislative Order No. 2L-LO-2008-RS-10-06 in any way.

Flyingman v. First Legislature, No. SC-2007-01, slip op. at 2 fn 5 (Chey. & Arap. S. Ct. Fed. 12, 2010).[2] *See Flyingman v. First Legislature*, No. SC-2007-02 (Chey. & Arap. S. Ct. Fed. 12, 2010). *See Flyingman v. Spottedwolf*, No. SC-2009-0023 (Chey. & Arap. S. Ct. Dec. 17, 2009). With respect to the "open meeting" at which the Third Legislature purported to take legislative action, the Supreme Court held that Budget Bill No. 01-2007-04-01 was procedurally and substantively unconstitutional based in part because "the Legislature purported to adopt that Bill at an April 20, 2007 Special Session that *it had itself sought to call* (in violation of Article VI, Section 6), the enactment of that "Bill" could not possibly be within the Legislature's powers for Legislative Process purposes, and would therefore also be a legal nullity under the Article VI, Section 7(a)(VI) Voidness Clause." *Flyingman v. First Legislature*, No. SC-2007-0002, slip op. at 30 (Chey. & Arap. S. Ct. Dec. 30, 2009).

Finally, the Supreme Court has also considered "[w]hether [a] March 13 [reconvened] meeting was constitutionally valid (and consequently, whether the Legislature constitutionally rejected the judicial nominations within the 30-day "window")[.]" *In re Invalidity of the Rescheduled Special Session of the Legislature set for March 13, 2008*, CNA-SC-08-01, at 3 (Chey. & Arap. S. Ct. April 28, 2008). In the same case the Supreme Court held the following with regard to the Legislative confirmation of nominated Judges and Justices:

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[2] Legislative Order 2L-LO-2008-RS-10-06, like the Third Legislature's "open meeting" action, did not follow the constitutional legislative process.

> Since the Legislature may act only through written laws or resolution, *id.* art. VI, § 5(a)d, only in valid legislative sessions, *see id.* art. VI, § 6, and only through the Legislative Process, *id.* Art. VI, § 7(a)(vi), it follows as a matter of logical deduction that the Governor's nominations of Special Judge Bob Smith and Ms. Enid K. Boles would be "deemed confirmed by the Legislature," *id.* art. VIII, § 2, if the Legislature did not reject them through valid processes (and at a valid Legislative Session) within thirty days after their February 22, nominations – that is to say, before March 24, 2008.

Id. at 2. See *In re Invalidity of the Rescheduled Special Session of the Legislature set for March 13, 2008*, CNA-SC-08-01 (Chey. & Arap. S. Ct. April 28, 2008). Thus, according to the Supreme Court's vast legal precedent, the Legislative Orders that the Legislature purported to pass during its August 5, 2010 "Open Meeting" have no legal effect at all and shall not be enforced by anyone. In fact, Chief Judge Bob A. Smith's and Justice Enid K. Boles' *own* claims legitimacy as Supreme Court Justice and Chief Judge of the Trial Court are based entirely on the fact that the Legislature failed to reject them as nominees in a valid Legislative Session.

Michael Kodaseet, an individual Legislator, signed the purported Legislative Orders as "Speaker", however this is insufficient as Legislative action as the Speaker is not identical to the Third Legislature. *Hoffman v. Flyingman*, SC-08-04 at 20 (Chey. & Arap. S. Ct. Nov. 20, 2008)(observing "that under the Cheyenne and Arapaho Constitution, Legislator Hoffman [as then-Speaker] and the Legislature' *are not identical*")(emphasis in original). *See Hoffman v. Flyingman*, SC-08-04 (Chey. & Arap. S. Ct. Nov. 20, 2008). When acting as a body, the Legislature must do so at a regular or special session of the Legislature and through the Legislative Process. These court orders

are legal precedents which must be adhered to and not ignored simply because the decisionmakers are slated for replacement. *See In re Inherent Executive Authority to Conduct Essential Governmental Functions*, SC-2007-0002 at 4 (Chey. & Arap. S. Ct. Dec. 30, 2009)(discussing precedent and the fair notice that settled law provides to all litigants.)