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

LESLIE WANDRIE-HARJO, individually and in her official capacity as Governor of the Cheyenne and Arapaho Tribes; THE CHEYENNE AND ARAPAHO TRIBES OF OKLAHOMA, a federally-recognized Indian tribe, Plaintiffs, v. JANICE PRAIRIE CHIEF-BOSWELL, individually and as the Suspended, Impeached, and Removed Governor of the Cheyenne and Arapaho Tribes; et al., Defendants.	**PLAINTIFFS' OPPPOSITION TO SPECIAL APPEARANCE MOTION TO DISMISS AND MEMORANDUM IN SUPPORT FILED BY CHARLES MORRIS AND KIMBERLY RICHEY** Case No. 5: 11-cv-00171-F Judge Stephen P. Friot

Plaintiffs, Leslie Wandrie-Harjo ("Plaintiff Harjo"), individually and as the Governor of the Cheyenne Arapaho Tribes (the "Tribes"), and the Tribes, by and through their attorneys, respectfully submit the following *Plaintiffs' Opposition to Special*

Appearance Motion to Dismiss and Memorandum in Support Filed by Charles Morris and Kimberly Richey ("Opposition") to the April 19, 2011 *"Tribes' Special Appearance Motion to Dismiss"* ("Motion"), Docket 76, and supporting memorandum ("Memorandum"), Docket 77.

Charles Morris and Kimberly Richey have entered their appearance in this matter on behalf (apparently) of the Plaintiff Tribes, but have filed a motion to dismiss the Plaintiff Tribes' complaint. The administrative problems associated with this procedural posture were addressed in Plaintiffs' Motion to Amend the Caption and Docket Sheet, filed on May 6, 2011 ("Motion to Amend"), Docket 86. Pursuant to LCvR7.1(c), this Opposition addresses Mr. Morris and Ms. Richey's Motion and Memorandum, and Plaintiffs' Motion to Amend.

I. PLAINTIFFS' AUTHORITY TO BRING SUIT

Mr. Morris and Ms. Richey's Memorandum, at pp. 2-5, asserts that Plaintiffs "lack authority" to bring this action. In support of this assertion, the Memorandum provides no binding authority, but rather cites to a Connecticut Supreme Court case, two Interior Board of Indian Appeals cases, and two decisions issued by the Tribes' Supreme Court on unrelated matters. Although presented by the Memorandum as an argument distinct from the real party in interest and capacity arguments, Plaintiff Harjo's status as the real party in interest informs and determines her authority to sue.

As explained more fully in section II below, Plaintiff Harjo and the Tribes possess the substantive rights being asserted here—and therefore are the real parties in interest—

and, as such, have the personal right to litigate in federal court—and therefore have capacity. The Tribes' Constitution reserves to the Governor sole signatory authority over the Tribes' monies. Chey. & Arap. Const. Art. VII, Sec. 4(b). The Tribes' Supreme Court explained, in the context of a budget stalemate, the history and importance of the "fiscal accountability and fiscal responsibility" provisions of the Tribes' Constitution, and emphasized the Governor's authority to sign for the expenditure of all of the Tribes' monies appropriated by law, or out of necessity dictated by a budget stalemate situation. *Flyingman v. First Legislature*, SC-2007-0002, pp. 10-12 (Chey. & Arap. S. Ct. Dec. 30, 2009).

Despite her December 17 and 27, 2010 suspension and her March 18, 2010 impeachment and removal, Defendant Boswell maintains unlawful signatory authority over the Tribes' accounts and federal funds at Defendant Banks, and continues to fail to pay certain properly-seated tribal officials and employees while unlawfully paying improperly-seated "officials" and "employees." Defendant Sankey aids Defendant Boswell in this improper allocation of the Tribes' monies as the unconfirmed Treasurer. As the former Lieutenant Governor, who has become Governor by operation of the Tribes' Constitution, Article XII, Section 9, Plaintiff Harjo has the authority to bring this action. As the entity whose monies are alleged to have been and continue to be expended in violation of tribal court orders and the Tribes' Constitution and its Law and Order Code, the Tribes unquestionably have the authority to bring this action. In fact, Mr.

Morris and Ms. Richey admit in their Memorandum, at p. 6, that "the Tribes are the real party in interest."

To the extent that Mr. Morris and Ms. Richey object to acting Attorney General Jeremy Oliver's "authority to bring an action," Memorandum at p. 1, Mr. Oliver was appointed Attorney General by Governor Harjo on December 17, 2010, upon Defendant Boswell's first suspension, and represents Plaintiff Harjo in her official capacity as Governor. Mr. Oliver need not demonstrate that he is a real party in interest, as his participation in this suit is not as a party.

The Motion and Memorandum also request dismissal of the "claims" "assert[ed]" by Governor Harjo and the Tribes on behalf of various tribal officials, employees, and members named in the *First Amended Complaint* because "Plaintiffs lack authority to bring such claims on those persons [sic] behalf and they are not even parties to this action." Memorandum at p. 4. Mr. Morris and Ms. Richey provide no authority or support for this request. These persons and many others have been injured by the actions of Defendants to prevent payment of their salaries and wages. And they rely for recovery of their salaries and wages upon the Governor of the Tribes, who has sole authority to authorize the issuance of paychecks and, as explained above, is the real party in interest because only she has the recoverable right to gain signatory authority from the suspended and impeached former Governor who refuses to relinquish that power.

II. PLAINTIFFS ARE THE REAL PARTIES IN INTEREST AND POSSESS CAPACITY TO SUE

Mr. Morris and Ms. Richey wholly misperceive the role of Fed. R. Civ. P. 17 in this matter, and focus their argument, at pp. 5-6 of the Memorandum, on Rule 17(a)(3) ("Joinder of the Real Party in Interest"), which is not relevant here because the real parties in interest (the Governor and the Tribes) have brought this suit. Here, the analysis need never reach Rule 17(a)(3) because the Plaintiffs have satisfied the real party in interest and capacity requirements.

Fed. R. Civ. P. 17 governs a party's (a) status as the real party in interest and (b) capacity to sue or be sued. "The "real party in interest" principle requires that an action "be brought in the name of the party who possesses the substantive right being asserted under the applicable law." *Esposito v. United States*, 368 F.3d 1271, 1273 (10th Cir. 2004) (citing 6A Charles A. Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1541 at 321 (2d ed.1990)). Here, the Tribes and their Governor are the real parties in interest because they are the parties who possess the substantive right to control the Tribes' bank accounts and federal funds and to provide payment to proper officials and employees under applicable law and federal contracts.

Capacity refers to "a party's personal right to litigate in a federal court" and "issues of capacity are determined by the law of the individual's domicile." *Esposito*, 368 F.3d at 1273. Mr. Morris and Ms. Richey fail to provide any coherent argument against the capacity of Governor Harjo and the Tribes to sue here. It is well-established under federal, Oklahoma, and tribal law that tribes have the capacity to sue. *See, e.g.*, *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 473

(1976) (a tribe's access to federal court is in some respects at least as broad as that of the United States suing as the tribe's trustee); *Quapaw Tribe of Oklahoma v. Blue Tee Corp.*, 653 F. Supp. 2d 1166, 1179-80 (N.D. Okla. 2009) ("Indian tribes, like states and other governmental entities, have standing to sue to protect sovereign or quasi-sovereign interests."); *Griffith v. Choctaw Casino of Pocola*, 230 P.3d 488, 493 (Okla. 2010) (allowing tort suit against tribe); *Flyingman v. First Legislature*, *supra*, at pp. 14-23 (identifying that each branch of the Tribal government, with the possible exception of the Judicial Branch, may sue and be sued).

Additionally, Plaintiffs note that the Legislature's April 2, 2011 waiver of sovereign immunity for this suit further indicates the Governor and the Tribes' explicit authorization and capacity to bring this suit. *See* Plaintiffs' Supplement to First Amended Complaint, attached to Plaintiffs' Motion for Leave to File a Supplement to First Amended Complaint, Docket 82, p. 5 and exhibit 6 thereto.

III. MR. MORRIS AND MS. RICHEY LACK AUTHORITY TO PARTICIPATE FOR PLAINTIFF TRIBES

Mr. Morris and Ms. Richey claim to represent the Tribes. The only support provided for this assertion, however, is the citation at p. 4 of the Memorandum to *Flyingman v. First Legislature*, *supra*, at pp. 14-15, which addresses the ability of the Tribes' Governor to sue in Tribal Court in the event of a budget gridlock with the Legislature. In that case, the Tribes' Supreme Court summarized previous cases to reiterate the unremarkable proposition that a Governor may appoint an Attorney General and Assistant Attorneys General, who:

> *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 [Sovereign Immunity from Suit by Parties Within the Jurisdiction of the Tribes].

Id. (emphasis added). [1] Hence, *Flyingman v. First Legislature* provides authority for Mr. Morris and Ms. Richey to have been appointed by Defendant Boswell, and to have, while Ms. Boswell was properly serving as Governor, brought suit *in tribal court* on behalf of the Tribes or the Governor. It does not, however, provide authority for Mr. Morris or Ms. Richey to effectively intervene (which they have stated at p. 6 they do not want to do) in a federal suit brought by the current Governor and the Tribes as plaintiffs, who are represented, in part, by the acting Attorney General, Jeremy Oliver.

Mr. Morris and Ms. Richey provide no other authority, and no clear explanation, for their participation here. And although Mr. Morris and Ms. Richey have entered their appearance for the Tribes, who are a Plaintiff here, Mr. Morris and Ms. Richey have

[1] Mr. Morris and Ms. Richey also cite certain provisions of the Tribes' Constitution and *Flyingman v. Election Commission*, SC-07-13 (Chey. & Arap. S. Ct. Sept 24, 2007) for the proposition that there are only two ways for a Governor to be removed, which argument was introduced in Defendants Boswell and Sankey's Memorandum in Support of Motion to Dismiss, Docket 71, at pp. 1-2, and responded to in Plaintiffs' Opposition to [Defendant Boswell and Sankey's] Motion to Dismiss, Docket 84, at pp. 3-4. Plaintiffs note the substantial similarity between this argument, as presented in Mr. Morris and Ms. Richey's Memorandum, and the argument presented by Defendants Boswell and Sankey's counsel of record in their Brief in Support of Defendants' Motion to Dismiss, as further evidence that Mr. Morris and Ms. Richey's interests (not fully identified) in this case are being addressed by Defendants Boswell and Sankey and their counsel of record.

postured themselves as representing a defendant, as evidenced by the Motion and Memorandum. In this way, they appear to be representing an unnamed defendant.[2]

The alignment of the arguments between Mr. Morris and Ms. Richey and Defendants Boswell and Sankey's counsel of record further suggests that Mr. Morris and Ms. Richey would be more properly found to represent Defendants Boswell and Sankey, if they represent parties to this suit at all. The practical effect of this substantial alignment of arguments has been that Defendants Boswell and Sankey have had two chances to present Fed. R. Civ. P. 12(b) and other pre-answer defenses. The identity of interests between Mr. Morris and Ms. Richey, on the one hand, and Defendants Boswell and Sankey (and their counsel of record), on the other, is further demonstrated by the "full recitation of facts" attached as Exhibit 4 to the Memorandum ("Exhibit 4"). This document is a nearly-identical[3] copy of the *Notice of Supplementation of Record* filed by

[2] The proper procedure for their participation in this suit, then, would be to move to intervene, which they have not done and could not do. *See Coal. of Arizona/New Mexico Counties for Stable Econ. Growth v. Dep't of Interior*, 100 F.3d 837, 840 (10th Cir. 1996) (an applicant may intervene as of right if, inter alia, the applicant's interest is not adequately represented by existing parties) (citing Fed. R. Civ. P. 24(a)(2)); *see also* Fed R. Civ. P. 24(b) (permissive intervention). Intervention as of right appears to be foreclosed to Mr. Morris and Ms. Richey because, inter alia, their apparent interests in this suit are adequately represented by Defendants Boswell and Sankey's other four attorneys of record. *See* Fed. R. Civ. P. 24(a)(2) ("unless existing parties adequately represent that interest").

[3] The language and arguments of the two documents are identical, except that the captioning and introductory posture were removed in Exhibit 4; administrative references to previous documents and arguments submitted in the BIA matter have been removed from Exhibit 4; p. 10 of Exhibit 4 includes an unsubstantiated description of the events of

Ms. Boswell in the pending appeal of the BIA's January 6, 2011 interim recognition of Ms. Boswell as Governor for ISDEAA purposes. Plaintiffs object to the submission of the information in Exhibit 4 as a 23-page exhibit which, counted together with the 9-page Memorandum, well exceeds the 25-page limit for Briefs established by LCvR7.1(e). However, should this Court accept Exhibit 4 despite the clear rule violation, Plaintiffs further object that Exhibit 4 is not a "full recitation of facts," and therefore attach hereto as Plaintiffs' ***Exhibit 1*** a copy of Plaintiff Harjo's *Response to Notice of Supplementation of Record Pursuant to Remand*, dated April 14, 2011, which was submitted in response to Ms. Boswell's *Notice of Supplementation of Record* in the BIA matter.

Nowhere have Mr. Morris and Ms. Richey offered support for their representation of the Tribes here. Mr. Morris states that the Attorney General "holds the capacity to sue on behalf of the Tribes" under tribal law and Fed. R. Civ. P. 17. Memorandum, pp. 5-6. As explained above, *Flyingman v. First Legislature*, *supra*, at p. 15, explains that the Tribes' Attorney General "may" represent the Tribes or "may" represent Executive Branch officials "as plaintiffs." Hence, Mr. Morris and Ms. Richey may have the right to bring suit, but not to represent an unnamed Defendant.

IV. TRIBAL EXHAUSTION IS NOT RELEVANT

Defendants Boswell and Sankey's Reply to Plaintiffs' [Response in] Opposition to Motion to Dismiss, Docket 88, filed on May 6, 2011, asserts the doctrine of tribal

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March 31, 2011; and p. 19 of Exhibit 4 describes a letter from Paul Knight as "Acting Superintendent" of the BIA. Additionally, the *Notice of Supplementation* included as exhibits most, if not all, of the listed documents.

exhaustion, which they failed to raise in their Motion to Dismiss and Memorandum in Support thereof, both filed on April 8, 2011. Dockets 70 and 71. A court may not consider arguments raised for the first time in a reply brief. *United States v. Mora*, 293 F.3d 1213, 1216 (10th Cir. 2002). Plaintiffs herein respond to the tribal exhaustion argument as raised by Mr. Morris and Ms. Richey at pp. 6-8 of the Memorandum, but reiterate their objection to these counsel's ability to submit a Motion to Dismiss.

The doctrine of tribal exhaustion is inapplicable here. This doctrine relates to a federal court's deference to a tribal court for the latter to first decide its own jurisdiction to adjudicate a civil claim arising on the reservation brought against a non-Indian in tribal court. *Nat'l Farmers Union Ins. Companies v. Crow Tribe of Indians*, 471 U.S. 845, 855 (1985) ("we conclude that the answer to the question whether a tribal court has the power to exercise civil subject-matter jurisdiction over non-Indians in a case of this kind is not automatically foreclosed"). As such, the exhaustion argument of Mr. Morris and Ms. Richey, and of Defendants Boswell and Sankey, has no bearing here.

In any event, Plaintiffs have exhausted their tribal court remedies. Plaintiff Harjo brought an action against Defendant Boswell for a Temporary Emergency Restraining Order ("ETRO") before the Tribal Court on December 17, 2010. As provided for in Section 813 of the Tribes' Law and Order Code,[4] the ETRO was granted without notice

[4] Section 813 provides, in relevant part: "A temporary restraining order may be granted after commencement of the action without written or oral notice to the adverse party or his attorney only if: (a) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to

to Defendant Boswell. *First Amended Complaint*, Docket 46, ¶ 42 and exhibit 4 thereto. Defendant Boswell was served with the ETRO on the same day it issued. *See First Amended Complaint*, Docket 46, exhibit 7. In response, Defendant Boswell improperly "filed" an interlocutory appeal—which the Supreme Court has determined is unavailable on ETROs[5]—of the ETRO with Daniel Webber, rather than the properly-seated Tribal Supreme Court. As noticed in the ETRO, a hearing to determine whether a preliminary or permanent injunction should issue was held on December 27, 2010. Defendant Boswell chose not to attend the hearing, and the Preliminary Injunction issued against her. *First Amended Complaint*, Docket 46, ¶ 42 and exhibit 5 thereto. The Preliminary Injunction identifies ten previous court orders that Defendant Boswell, and two that defendant Sankey, continued to be in violation of as of December 27, 2010.

Defendants Boswell and Sankey have chosen not to appeal the tribal court orders against them. Defendants cannot fail to participate and fail to appeal tribal court

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the applicant before the adverse party or his attorney can be heard in opposition . . . . Temporary restraining orders should not be granted except in cases of extreme urgency."

[5] At the time Ms. Boswell filed her purported Special Appearance Notice of Interlocutory Appeal, dated December 18, 2010, the properly-seated Supreme Court had ruled on the issue of interlocutory appeals, concluding that an appeal on a temporary restraining order is a "legal nullity." *Boswell and Foster v. Third Legislature*, Cheyenne and Arapaho Supreme Court, No. SC-2010-15, December 13, 2010, p. 6; see also *id*. at p. 3 ("We have held many times that the grant or denial of a Temporary Restraining Order that does no more than prescribe a ten-day freeze in the status quo . . . is not an appealable 'final order' for purposes of interlocutory appeal as-of-right[.]"), attached hereto as ***Exhibit 2***. Based on the Court's ruling in *Boswell and Foster*, Boswell's Notice of Interlocutory Appeal was a legal nullity, and particularly so because she failed to request permission from the trial court to file such an interlocutory appeal. *Id*. at p. 6 ("application for appeal . . . shall not stay proceedings in the [trial] court . . . . [and] permission to appeal a TRO is . . . statutorily vested in the trial court itself.") (internal quotations and emphasis omitted).

proceedings and then (improperly) use the doctrine of tribal exhaustion, together with assertions that the "Tribal Court [must be given] the opportunity to decide such issues," Memorandum at p. 8, to prevent remedy. *Nevada v. Hicks*, 533 U.S. 353, 369 (2001) ("In *National Farmers Union* we recognized exceptions to the exhaustion requirement, where 'an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith, ... or where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction.'").

Moreover, the ultimate holding in *Nat'l Farmers Union Ins. Companies*, 471 U.S. at 853, cited in the Memorandum at pp. 6-7, is inapposite here, where tribal court remedies have been repeatedly pursued against Defendants Boswell and Sankey, and any "procedural and jurisdictional nightmare" is imagined by the Defendants or the fault of Defendants. *See id.* (rejecting Respondents' assertion "that the underlying tort action 'has turned into a procedural and jurisdictional nightmare' because *petitioners* did not pursue their readily available Tribal Court remedies") (emphasis added). And Mr. Morris and Ms. Richey's citation to *Kaul v. Wahquahboshkuk*, 838 F. Supp. 515, 518 (D. Kan. 1993) is misplaced since there, the federal court plaintiff—like Defendants Boswell and Sankey here—was found by the court to have exerted a "blanket denial of jurisdiction [which] is not a substitute for an actual attempt to adjudicate."

V. CONCLUSION

Plaintiffs request this Court deny Mr. Morris and Ms. Richey's Motion and Memorandum because Mr. Morris and Ms. Richey appear to be counsel for a nonparty or, alternatively, to be counsel representing substantially the same arguments and interests as Defendants Boswell and Sankey, in their official capacities, and because their arguments regarding real party in interest, capacity, and tribal exhaustion fail on the facts.

Respectfully submitted this 10th day of May 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of May 2011, I electronically transmitted the foregoing **PLAINTIFFS' OPPOSITION TO SPECIAL APPEARANCE MOTION TO DISMISS AND MEMORANDUM IN SUPPORT FILED BY CHARLES MORRIS AND KIMBERLY RICHEY** to the Clerk of Court using the ECF system for filing. Based on the records currently on file, the Clerk will transmit a Notice of Electronic Filing to the following ECF registrants:

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EXHIBIT 1

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GOVERNOR LESLIE WANDRIE-HARJO, CHEYENNE AND ARAPAHO TRIBES, Appellant, v. SOUTHERN PLAINS REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee	IN RE: RECOGNITION OF GOVERNOR FOR ISDEAA PURPOSES RESPONSE TO NOTICE OF SUPPLEMENTATION OF RECORD PURSUANT TO REMAND APRIL 14, 2011

We file this *Response to Notice of Supplementation of Record Pursuant to Remand* ("Response") at the direction of Leslie Wandrie-Harjo in her official capacity as Governor of the Cheyenne & Arapaho Tribes of Oklahoma ("Plaintiff").

On March 28, 2011, the Interior Board of Indian Appeals ("IBIA") in this case issued an Order Vacating Decision and Remanding the Southern Plains Regional Office's January 6, 2011 decision to recognize Janice Prairie Chief-Boswell as Governor "on an interim basis only." The IBIA decision states that the Regional Office failed to explain why it chose to ignore the Tribal Court preliminary injunction suspending Ms. Boswell, and that the record does not otherwise support the Regional Office's decision.[1]

[1] Also on March 28, 2011, the Concho Agency issued a Decision that it "will continue to recognize the Supreme Court Justices recognized by the Supreme Court Order in SC-AD-2010-07. According to that Order, the validly seated Supreme Court Justices in accordance with the Cheyenne and Arapaho Tribes' Constitution are Justice Dennis W. Arrow, Justice Enid K. Boles, Special Justice Kathleen R. Guzman, and Special Justice Lindsay

The law firm of Fredericks Peebles & Morgan LLP submitted a *Notice of Supplementation of Record on Appeal Pursuant to 53 IBIA 121 (03/28/2011)* on behalf of Ms. Boswell ("*Notice of Supplementation*"), dated March 31, 2011. Ms. Boswell's *Notice of Supplementation* listed 48 exhibits.[2]

On April 4, 2011, Plaintiff Harjo, through undersigned counsel, sent a letter to the Regional Office of the BIA noting that the office had not solicited any additional evidence or argumentation from Plaintiff Harjo following the remand order. The letter briefly reiterated Plaintiff Harjo's argument, while encouraging a speedy resolution of the issue after remand. At the time the letter was sent, undersigned counsel and Plaintiff had not yet received Ms. Boswell's voluminous *Notice of Supplementation* and exhibits. Although Plaintiff Harjo desires a speedy resolution to the current crisis, she must respond to the *Notice of Supplementation*.[3] Because the BIA has already received numerous exhibits in this matter, the only documents attached hereto are those Plaintiff Harjo believes have not yet been made part of the record in this action. Plaintiff Harjo understands the "record" here to include all documents and evidence before the Region at the time of its January 6, 2011 remanded decision, in addition to the subsequently submitted documents and information, including this Response.

As you are aware, Ms. Boswell was suspended from the Office of Governor by the Tribal Trial Court's Emergency Temporary Restraining Order ("ETRO") on December 17, 2010, and that suspension was repeated by Preliminary Injunction on December 27, 2010 (both of which actions were part of the January 6, 2011 record). While the December 27, 2010 injunction

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Robertson. In addition, the validly seated Trial Court Judge, who was constitutionally appointed and whose appointment has not been questioned, is Bob Smith." Hence, this Decision recognizes that the Tribal Trial Courts that issued the ETRO and preliminary injunction suspending Ms. Boswell from the Office of the Governor in December of 2010 are the properly seated courts.

[2] The exhibit binder received by Tilden McCoy, LLC contained only exhibits 1-41.

[3] For the BIA's convenience, the organization of this Response attempts to track the organization of the *Notice of Supplementation*.

remains in effect (as it has never been appealed or terminated), pursuant to the Cheyenne and Arapaho Tribes' Constitution, the Tribes' Legislature also then formally impeached and removed Ms. Boswell from the Office of Governor on March 18, 2011. Hence, pursuant to the Tribes' Constitution, Plaintiff Harjo became, by operation of law, acting Governor upon Ms. Boswell's suspension, and Governor upon her impeachment and removal. The record in this matter commands that the BIA recognize Governor Harjo and, as the IBIA plainly admonished, the BIA must recognize the Tribes' own resolution of this dispute. Recognition of Ms. Boswell as Governor finds no support in these circumstances and on this record.

1. SUPREME COURT JUSTICES

A. The Legislature's Denial of Boswell's Nominations

Ms. Boswell nominated four individuals, Daniel Webber, John G. Ghostbear, Mary Daniel, and Jennifer McBee, as Supreme Court Justices. Ms. Boswell purported to swear-in these individuals on September 29, 2010, despite the Legislature's denial of these individuals' nominations. ***See*** Legislative Orders regarding nominations of Webber, Ghostbear, Daniel, and McBee, dated August 6, 2010, attached hereto as ***Exhibit 1***. Judicial nominations must be confirmed by the Legislature. *See* Chey. & Arap. Const. Art. VIII, Sec. 2.

The Tribal Supreme Court affirmed the Legislature's denial of Ms. Boswell's nominees in its Second Supplemental Order in *In re: The Judicial Branch of the Cheyenne and Arapaho Government*, SC-AD-2010-07, on August 12, 2010 ("*Second Supplemental Order*"). The *Second Supplemental Order* was provided as exhibit 5 to the *Notice of Supplementation*, but because of their importance, pages 18-20 are also attached hereto as ***Exhibit 2***. On October 4, 2010, Justice Enid Boles reiterated to Ms. Boswell in a letter, attached hereto as ***Exhibit 3***, that

Ms. Boswell's "appointments cannot be recognized as valid under the Constitution." Justice Boles' letter directs Ms. Boswell to pages 18-20 of the *Second Supplemental Order*.

The *Notice of Supplementation*, at p. 2, discounts the *Second Supplemental Order* and argues that in it "the Supreme Court purported to act by administrative decision outside of its own jurisdiction." Ms. Boswell cites no authority for this jurisdictional argument. But the larger point is that any objection she may have to the jurisdiction or authority of the Tribal Supreme Court may only be addressed *to the Court* itself. It is well-established that the BIA does not sit as an appellate body of tribal court decisions. Ms. Boswell's arguments against the Supreme Court's ability to rule on the legitimacy of the Legislature's denial of her judicial nominees, therefore, have no place in the BIA's determination, for ISDEAA purposes, of whom to recognize as Governor of the Tribes.

Moreover, Ms. Boswell's arguments fall flat against the Supreme Court's own precedent that "this Court, not the Governor, is the final interpreter of our own prior tribal law decisions." *Second Supplemental Order* at p. 16 (emphasis omitted). Therefore, Ms. Boswell's citations to prior Tribal Supreme Court decisions related to the Legislature's permissible actions are irrelevant here because, to the extent they ruled otherwise, they have now been clarified or amended by the ruling in the *Second Supplemental Order*.

The Court's ruling on the Legislature's denial of the judicial nominations in the *Second Supplemental Order* warrants close discussion here because avoidance of this clear determination is fundamental to all of Ms. Boswell's subsequent actions. In addressing the nominations, the Court first notes the particularities of the timing of then-Governor Boswell's nominations and then identifies that "[t]he theoretical question is whether a Governor could completely nullify the Legislature's right to participate in the confirmation process by carefully

consulting the calendar and making his or her judicial nominations on just the right 'magical' day." *Id*. at 19. The Court then notes that rather than adhering to gubernatorial precedent where such "calendar vagaries" have existed, Ms. Boswell chose not to call a Special Session to allow the Legislature to vote on her nominees. *Id*. Faced with two "apparent" constitutional absolutes—the timing of the nomination and confirmation process and the "equally absolute directive that the Legislature has the absolute right to vote to 'approve or disapprove' judicial nominations"—the Court ruled in favor of the fundamental requirement of "the participation of all three political branches" and held that where:

> a Governor has not called a Special Session during which the Legislature could timely vote on judicial nominations . . . . the Legislature may either convene itself (as it deems timely) to vote on judicial nominations before its next Regular Session (which did [sic] on August 6, 2010) or vote on the judicial nominations at its next-scheduled Regular Meeting. In consequence, the Legislature's 5-to-1 August 6 vote against approving those nominees terminated their nominations. Under the circumstances described above, they have not been confirmed by the Legislature by the running of the thirty-day clock.

Id. (emphasis added).

The Constitution provides that Supreme Court Justices serve "four year staggered terms or until a successor is sworn into office." *See* Chey. & Arap. Const. Art. VII, Sec. 3(a). Therefore, Ms. Boswell can seek no refuge from the operation and legal validity of this decision under a theory that only her imposter justices could issue rulings, as the *Second Supplemental Order* was issued on August 12, 2010, well before Ms. Boswell purported to terminate some of the rightful Justices' appointments and swear-in the imposter justices on October 1, 2010.

Additionally, and as the *Second Supplemental Order* points out at p. 20 ("interpreting the "thirty day window" to supersede the Legislature's power to approve or disapprove of the nominees "would generate an absurd result"), Ms. Boswell's suggestion that the Legislature's

denials had to be made during a regular or special session defy reason. Ms. Boswell contends that the relevant Legislature meeting (where the rejections were approved) was not a "regular" or "special" meeting—citing the Tribes' Constitution at Article VI, Sec. 7(a)(vi). However, the entirety of Article VI, including Sec. 7(a)(vi), concerns the "Legislative Process," which Article VI itself defines as the "process for enacting all [Tribal] laws and resolutions." *See* Chey. & Arap. Const. Art. VI, Sec.7(a). In contrast, Article VIII, Section 2 requires that Judges and Justices may be "deemed confirmed" by the Legislature only if the Legislature "fails to approve or disapprove a nominee for Judge or Justice within 30 days of nomination by the Governor." The Constitution nowhere requires such disapproval to be presented in the form of a "law or resolution"—which would be a senseless requirement as Tribal laws and resolutions are subject to presentment and signature *by the Governor*, and a Governor is not likely to sign a bill passed by the Legislature that disapproves his or her judicial nominee. Further, the law-making process (which Ms. Boswell suggests is required) requires more than 30 days to complete, as laws require formal introduction, publication "for at least thirty days," and a public hearing. *See* Chey. & Arap. Const., Art. VI, Sec. 7. Thus, the timeframe within which the Legislature must approve or disapprove a nominee does not allow enough time to complete the law-making process. Finally, by custom and tradition, the Cheyenne Arapaho Legislature (like many others) expresses its intent not merely through lawmaking, but by orders, declarations, proclamations, reports, vetoes, and other non-"law" statements.

The Supreme Court reiterated its conclusion that Ms. Boswell's nominees had been properly denied by the Legislature in its Supplemental Order in *Harjo v. Lynn*, No. SC-2010-14, Dec. 22, 2010, attached hereto as ***Exhibit 4***. This Supplemental Order was issued "to clarify" that Daniel Webber's appointment to the Supreme Court was denied and that he lacked any

authority to have entered the purported stay, on December 20, 2010, of the ETRO suspending Ms. Boswell as Governor. (See discussion at subsection 1(C), below.) The Court explained:

> We have held that the Third Legislature lawfully rejected Mr. Webber's nomination to this Court on August 6, 2010, and that Mr. Webber consequently exercises no judicial power of the Cheyenne and Arapaho Tribes whatsoever.

B. The Authority to Swear In the Justices

Despite the Legislature's denial of Ms. Boswell's judicial nominees, Ms. Boswell proceeded to purport to swear in the new justices and terminate the service of the rightfully serving justices. Regardless of the legal and rational support for the propriety of the Legislature's process to deny Ms. Boswell's nominees, it is notable that Ms. Boswell proceeded to "swear in" the unconfirmed nominees despite having full notice of the Legislature's objection and an invitation to nominate other individuals of her choosing. Perhaps most importantly, the Supreme Court ruled, in the *Second Supplemental Order* of August 12, 2010, attached hereto as ***Exhibit 2*** (and provided as exhibit 5 to the *Notice of Supplementation*), at p. 19, that:

> Article VIII, Section 2 therefore provides for the participation of all three political branches before any new Justice may be sworn into his or her new office by a designated Justice of this Court. [No would-be Judge or Justice may validly claim a Judicial Branch office without having been sworn into office by a designated Justice of this Court.]

(Brackets in original.)

Ms. Boswell's focus on procedural loopholes and arguments, rather than the larger import of the Legislature's demonstrated denial of her nominations, is but one example of her campaign to ignore the rule of law and separation of powers.

Ms. Boswell argues in her *Notice of Supplementation*, at pp. 3-4, that "it is well within" a Governor's duties to swear in new Justices of the Supreme Court. To arrive at this conclusion, Ms. Boswell moves quickly past the Cheyenne and Arapaho Tribes' Constitution, which

provides for all newly elected officials to be sworn into office by a Justice of the Supreme Court. *See* Chey. & Arap. Const. Art. IX, Sec. 14. Ms. Boswell makes much of justices being nominated rather than elected officials, but fails to identify that the Constitution nowhere grants a Governor the power or authority to administer oaths of office. *See, e.g.*, Chey. & Arap. Const. Art. VII. Any ambiguity in the inclusion of "elected" is resolved by the drafters' intent that Supreme Court Justices are to administer oaths of office, as demonstrated by Chey. & Arap. Const. Art. IX, Sec. 14.

The Law and Order Code, last amended in 1988, is subordinate to the Constitution, but also suggests an intent for Justices, not the Governor, to administer oaths of office. Title II, Subpart A, Section 103(d) of the Law and Order Code authorizes only the Chief Justice "or next ranking available Justice of the Supreme Court" to administer oaths. To the extent that Title II, Subpart A, Section 206 of the Law and Order Code provides any guidance here, the quotation cited by Ms. Boswell—that justices' oath of office are "to be administered by the Chief Justice, the Chief Executive Officer, or the ranking available Justice of the Court"—suggests that the oath should be administered by the Chief Justice, and should only be administered by the Chief Executive Officer or ranking available justice if the Chief Justice is unavailable. Here, however, the Chief Justice was available. Ms. Boswell's argument that Section 103(d) is more general than Section 206 merely because it specifically omits mention of the "Chief Executive Officer" is misguided. Ms. Boswell's argument also fails to mention that administration of oaths is specifically reserved to Judges and Justices of the courts by Title II, Subpart A, Section 106(c) of the Law and Order Code ("[a]ll Judges of the District Court, and Special Judges in cases within their authority, shall . . . undertake Have [sic] the power to administer oaths") and Title II,

Subpart A, Section 207(g) of the Law and Order Code (Supreme Court Justices may "[p]erform any of the duties and powers of a District Court Judge in appropriate cases").

C. The Impact of Ms. Boswell's Actions on the Courts and Individuals

Ms. Boswell's purported "Justices" heard no cases nor issued any orders from the time they were "sworn in" by Ms. Boswell on September 29, 2010 until December 20, 2010, when Mr. Webber, alone and in response to the Tribal Court's December 17, 2010 ETRO suspending Ms. Boswell, signed the "Order Staying Enforcement of the Temporary Emergency Restraining Order Pending Consideration of the Appeal" and began to issue "orders" in response to the ETRO. Since this purported (but ineffective) stay, numerous "Writs of Prohibition" have been issued by Mr. Webber under the auspices of the Tribes' Supreme Court, which "Writs" appear to be presented as orders on original actions in violation of the Tribes' Constitution, are often only signed by Mr. Webber without the additional signatures of any other members (rightful or imposter) of the Supreme Court, and which generally have been entered against "defendants" with limited, if any, opportunity to respond, let alone a hearing.

By "Order of Writ of Prohibition" dated December 28, 2010, Mr. Webber purported to "recuse" and "remove" Chief Trial Court Judge Bob Smith, and "appoint" Charles Tripp and Greg Bigler as "Special Judges." First, as Mr. Webber's nomination never received approval under the Constitution, he is not a Supreme Court Justice and his "order" could not have, for that reason alone, removed Chief Judge Smith. Second, the "appointment" by anyone of a Trial Court Judge is not a Constitutionally-recognized method of seating a Judge, and the Constitution does not provide for the seating of "Special Judges." *See* Chey. & Arap. Const. Art. VIII, Sec. 2. Finally, Mr. Tripp has previously been determined by the Southern Plains Regional Office to

be ineligible under the Constitution to serve on the Tribal Court because of a conviction for domestic abuse and his prior failure to meet constitutional eligibility requirements.

On December 28, 2010, Mr. Webber and Charles Morris, the former Attorney General of the Tribes who was suspended on December 17, 2010, concurrent with Ms. Boswell's suspension, entered the Tribal Courthouse and removed Chief Judge Smith and the court clerks Patty Bell and Lena Marquez. The hazard and repercussions of improperly-seated "Judges" and "Justices" purporting to issue orders in cases covering issues as far-reaching as tribal constitutional law, criminal punishment, and child custody under the Indian Child Welfare Act, cannot be overstated. The Tribes' Trial Court hears, on average, between 20-50 cases per week; Mr. Tripp and Mr. Bigler have apparently been purporting to adjudicate cases for nearly four months.

Ms. Boswell's actions related to the Tribes' courts have profound impacts on the courts, the lives of the numerous tribal members who come before the courts, and the lives of judicial officials and employees. Ms. Boswell has refused to pay all of the properly-seated Supreme Court Justices for 2010 and 2011, failed to pay Chief Judge Smith for nine of the twelve months of 2010 (the three months of pay were made under protest even after Ms. Boswell was ordered to pay same by the Tribes' Supreme Court), and has suspended the court clerks without pay.

D. Justice Enid Boles

Justice Enid Boles remained on the Supreme Court throughout 2010, but on December 29, 2010, Mr. Webber issued three "orders" disqualifying Justice Boles from three pending cases and "any case in which Governor Boswell or any member of the Executive branch is a party." Ms. Boswell asserts that Justice Boles' orders were stricken because she "participat[ed] in civil unrest and participation in attempting to overthrow the tribal government." *Notice of*

Supplementation, p. 6. This is more explanation than is given in the "orders" themselves, which were attached as Exhibits 15-17 of the *Notice of Supplementation*. Ms. Boswell argues that Mr. Webber disqualified and quashed Justice Boles' orders because "Justice Boles was an active participant in the attempted takeover of the tribal government." *Notice of Supplementation*, p. 7. It appears that Ms. Boswell (and Mr. Webber) erroneously believe that Justice Boles was present when Plaintiff Harjo and her staff and supporters attempted to gain access to the tribal complex building and administrative files on December 17, 2010, following the ETRO on December 17, 2010 that suspended Ms. Boswell as Governor. Ms. Boswell provides as evidence of Justice Boles' attendance the unsigned, unsubstantiated Security Division Report of "Chief of Security" Heartfield (who would have little reason to know by appearance an out-of-state Supreme Court Justice by sight). Plaintiff Harjo and those members of her administration and staff present on December 17, 2010 can attest that Justice Boles was not present for this event, and in fact lives in Oregon. But even assuming arguendo that Justice Boles had been present at the tribal complex, Ms. Boswell offers no legal defense for the extraordinary remedy of quashing and disqualifying decisions in which Justice Boles participated or "signed" as one of several members of the Supreme Court.

2. TRIBAL COURT DECISIONS

Ms. Boswell's *Notice of Supplementation* gives relatively short shrift to the Tribal Court decisions that first suspended Ms. Boswell from the office of governor in December of 2010. Instead, Ms. Boswell focuses her legal arguments on her impeachment and removal in March of 2011. Although we address elsewhere here Ms. Boswell's arguments pertaining to the Legislature's ability to impeach and remove Ms. Boswell, we urge the BIA to read the December 17, 2010 ETRO and December 27, 2010 Preliminary Injunction (each already part of the record)

in their entirety, as those decisions clearly identify the reasons for Ms. Boswell's suspension, which, because she failed to appeal the Preliminary Injunction, remains in place. After all, the IBIA's decision to remand was based entirely on Ms. Boswell's suspension, because the IBIA did not yet have the fact of Ms. Boswell's impeachment and removal before it.

Ms. Boswell asserts that the Constitution provides "only two (2) ways for a Governor to be removed from her elected position." While it is true that the Constitution provides for a Governor's impeachment and removal at Art. XII, Sec. 2 and a Governor's recall at Art. XII, Sec. 6(b), the Constitution also requires a Governor to "enforce court orders." Chey. & Arap. Const. Art. VII, Sec. 4(a). As the December 17, 2010 ETRO and December 27, 2010 Preliminary Injunction emphasize, Ms. Boswell's determined and consistent refusal to abide by court orders resulted in her suspension from the Office of Governor. As explained in those orders, the Constitution, at Art. X, Sec. 3, does provide for additional relief against any tribal official or employee, which would include a Governor:

> Any Member of the Tribes may bring a suit exclusively in the Judicial Branch to enforce the terms of this Constitution. Sovereign Immunity shall not extend to Officials and Employees acting outside their official capacity or beyond the scope of their authority.

That relief is precisely what Plaintiff Harjo sought and received.

Ms. Boswell's *Notice of Supplementation* fails to identify that the December 20, 2010 "Order" staying enforcement of the ETRO was issued by Mr. Webber alone. As discussed above, at Section 1, Mr. Webber's nomination was properly denied by the legislature and so he had no authority to adjudicate any matters. Although Mr. Webber had apparently not adjudicated any cases or issued any orders from the time of his purported swearing-in on September 29, 2010 until December 20, 2010, he purported to issue a number of orders in late December. He followed the stay with the Order of Writ of Prohibition dated December 26, 2010

(filed December 28, 2010) "recus[ing] and remov[ing]" Chief Judge Smith from "*any* matter before the Cheyenne and Arapaho Courts." This order does not identify with specificity any accusations against Chief Judge Smith, and is signed by only one other purported "Justice," Jennifer McBee. Webber's next action was to issue the three orders against Justice Enid Boles, as explained above, at Subsection 1(D).

Ms. Boswell's argument that the trial court was divested of jurisdiction to issue the December 27, 2010 Preliminary Injunction is erroneous. At the time Ms. Boswell filed her purported Special Appearance Notice of Interlocutory Appeal, dated December 18, 2010, the properly-seated Supreme Court had ruled on the issue of interlocutory appeals, concluding that an appeal on a temporary restraining order is a "legal nullity." *Boswell and Foster v. Third Legislature*, Cheyenne and Arapaho Supreme Court, No. SC-2010-15, December 13, 2010, p. 6; see also *id*. at p. 3 ("We have held many times that the grant or denial of a Temporary Restraining Order that does no more than prescribe a ten-day freeze in the status quo . . . is not an appealable 'final order' for purposes of interlocutory appeal as-of-right[.]"), attached hereto as ***Exhibit 5***. The Court explained the practical problems with appealing TROs by citing a previous case where an appeal on a TRO resulted in a five month delay. *Id*. at p. 4. The Court's observations about the use of such interlocutory appeals as a litigation tactic by the Fredericks firm are notable. *Id*. at pp. 4-5. Based on the Court's ruling in *Boswell and Foster v. Third Legislature*, Boswell's Notice of Interlocutory Appeal was a legal nullity, and particularly so because she failed to request permission from the trial court to file such an interlocutory appeal. *Id*. at p. 6 ("application for appeal . . . shall not stay proceedings in the [trial] court . . . . [and] permission to appeal a TRO is . . . statutorily vested in the trial court itself.") (internal quotations and emphasis omitted).

Because of this, and because Mr. Webber had no authority to prevent Chief Judge Smith from adjudication of the ongoing action brought by Plaintiff Harjo against Ms. Boswell, the Preliminary Injunction issued on December 27, 2010 further suspended Ms. Boswell from the Office of Governor "until further order of this court." Although noticed of the hearing through service of the December 17, 2010 ETRO, Ms. Boswell did not appear. Nor did Ms. Boswell appeal the Preliminary Injunction.

Ms. Boswell's *Notice of Supplementation* dismisses the rightfully-seated Supreme Court's Supplemental Order of December 22, 2010, apparently only on the basis that Mr. Webber would later purport to "disqualify" Justice Boles from this case and strike the order in this case because it was signed by Justice Boles. The Supplemental Order was issued by the properly-seated Court, including Justice Boles who Mr. Webber had no authority to "disqualify," and the opinion in this matter is crucial because it, inter alia, recognizes Ms. Harjo as "acting Governor," Jeremy Oliver as "acting Attorney General," Ms. Boswell as "suspended Governor," and Charles Morris as "attorney." *See Harjo v. Lynn*, Supplemental Order, No. SC-2010-14, December 22, 2010, at (unnumbered) p. 3, provided as exhibit 10 to the *Notice of Supplementation*.

Mr. Webber's February 16, 2011 "Order" quashing the Preliminary Injunction is similarly void. The "order's" lack of substance leaves unclear why Mr. Webber decided to issue the order a month-and-a-half after the Preliminary Injunction was ordered by Chief Judge Smith, and why Mr. Webber issued the "order" at all if Ms. Boswell's position seems to have been that Chief Judge Smith had no authority to issue the Preliminary Injunction in the first place. Additionally, Mr. Webber's February 17, 2011 "Writ of Prohibition" against Plaintiff Harjo is similarly without authority or support.

In footnote 2 on p. 7 of the *Notice of Supplementation*, Ms. Boswell cites section 413 of the Cheyenne and Arapaho Code of Appellate Procedure, which is cited here in its entirety:

> In addition to the authority expressly conferred by this Title or by other Tribal law, a single Justice of the Supreme Court may entertain and may grant or deny any request for relief which under this Title may properly be sought by motion, except that a single Justice may not dismiss or otherwise determine an appeal or other proceeding, and except that the Supreme Court may provide by order or rule that any motion or class of motions must be acted upon by the Court. The action of a single Justice may be reviewed by the Court.

Although we maintain that Mr. Webber lacked all authority, to the extent that this footnote is meant to provide the authority for Webber's unprecedented and unsupported actions, we respond to this argument in the alternative. Section 413 allows for the action of a single Justice only in response to relief sought on motion. Extraordinary Writs, which category includes Mr. Webber's numerous purported "Writs of Prohibition," are governed by section 201 of the Code of Appellate Procedure. Such writs are to be submitted by "filing a petition," which has important legal distinctions from a motion. Section 413 and 201 suggest that actions by single justices are not preferred. Section 413 (action of single Justice may be reviewed by the Court); Section 201 ("In vacation, the alternative Writ may be issued by a single Justice but a preemptory writ should be issued only by a quorum of the Court."). Hence, even if a Justice may act alone on a motion, the Law and Order Code does not permit a single Justice to issue orders on extraordinary writs, as Mr. Webber purports to have done.

3. MS. HARJO'S EFFORTS TO PERFORM HER DUTIES AS ACTING GOVERNOR

Needless to say, Plaintiff Harjo objects to the *Notice of Supplementation*'s characterization of her actions to perform her duties as acting Governor following the ETRO and Preliminary Injunction in December of 2010 that suspended Boswell from the office of governor as efforts to "force recognition of herself."

Plaintiff Harjo reiterates her objection to Ms. Boswell's assertion that Justice Boles in any way participated or was present at the December 17, 2010 effort by Plaintiff Harjo and her staff and administration to gain access to the tribal complex and Tribes' files.

Exhibits 20-24 of the *Notice of Supplementation* demonstrate Plaintiff Harjo's ongoing efforts to notify tribal members and employees of Ms. Boswell's suspension. Further, if anything, they demonstrate her restraint in the face of Ms. Boswell's continued refusal to relinquish the office of Governor, the administration, and signature authority on the Tribes' numerous and substantial bank accounts.

As to the unsubstantiated statements in the *Notice of Supplementation* at pp. 9-10 of Plaintiff Harjo's appearance at a January 8, 2011 Special Tribal Council meeting, Plaintiff Harjo objects to Ms. Boswell's characterization of her actions, and queries the relevance of this information to the BIA's determination.

Plaintiff Harjo does not dispute that since December 17, 2010, she has endeavored to gain control of the Office of Governor, which she views as required under the Constitution. She has been consistently met with Ms. Boswell's refusal to relinquish the office, and the BIA's refusal to assist Plaintiff Harjo to enforce the innumerous tribal court orders—and now warrants—against Ms. Boswell and her affiliates. It is notable that in Plaintiff Harjo's most recent attempt to gain access to the tribal complex, on March 31, 2011, Ms. Harjo and her staff and administration honored the BIA's request to vacate the building on April 1, 2011, while Ms. Boswell did not honor this request and the BIA allowed Ms. Boswell to remain in control of the tribal complex from April 1st to present.

4. "THE BUREAU OF INDIAN AFFAIRS POLICY"

Ms. Boswell states as BIA's "position" that "[The Assistant Secretary for Indian Affairs' office] will not insert itself in internal tribal affairs." This quotation comes from a 2009 letter addressing the unrelated issues of the tribal court asserting civil and criminal jurisdiction over a non-Indian and asserting complaints against Chief Judge Smith, and was provided as exhibit 25 to the *Notice of Supplementation*. However, the Concho Agency—in its March 28, 2011 Decision—recognizes a need to get involved in the current situation: "While normally it is our position that the issue of who constitutes the correct court would be a matter solely for the Tribes to decide, in this case it appears that there is a need to make a decision on this matter."

It is important to understand that the Concho Agency's decision, and Plaintiff Harjo's position, in no way require the BIA to determine an intertribal dispute. In fact, there is no dispute: the Lieutenant/now-Acting Governor, the Legislature, and the Tribal Courts have all determined that Ms. Boswell may no longer occupy the Office of Governor. The only action the Tribes require by BIA is enforcement of the Tribes' own recognition of Plaintiff Harjo as Governor.

As you are well aware, the Tribes rely on the BIA for their law enforcement needs, and Plaintiff Harjo adds another request for immediate assistance to her long list of requests for assistance. Most recently, Plaintiff Harjo and Attorney General Jeremy Oliver requested the BIA's assistance to enforce warrants against Ms. Boswell and seventeen of her affiliates on charges of impersonating a tribal official and embezzlement that were executed on March 31, 2011. In response to this request for assistance, Michael McCoy of the BIA stated in a meeting with Plaintiff Harjo, Oliver, and others that the BIA would need to assess whether to enforce executed tribal court orders on a "case-by-case-basis." But this would amount to the BIA sitting as an appeals court to the tribal court, which it may not do. The BIA stated this very position in

the 2009 letter cited by Ms. Boswell as exhibit 25 to the *Notice of Supplementation* ("Please be advised that the Bureau of Indian Affairs, Office of Justice Services, Division of Tribal Justice Support, offers technical assistance when an appropriate request is made, however it does not sit as an appellate court.") (emphasis in original).

5. RECOGNITION BY THE LEGISLATURE OF GOVERNOR HARJO

A. Objections to Boswell's Characterizations

Plaintiff Harjo objects to Ms. Boswell's characterization of the Legislature's Proclamations and other resolutions as "purported" because they were executed at sessions called not as regular or special sessions. As discussed above, at subsection 1(A), it would be nonsensical to require the Legislature only to act through a "law or resolution" subject to presentment and signature *by the Governor*, where the subject of the Legislature's actions is the suspension of the Governor and her replacement into Office of the Acting (Lieutenant) Governor and other relevant actions of recognition. The *Notice of Supplementation* includes, at exhibit 26, the Legislature's "Recognition of Acting Governor Leslie Wandrie-Harjo Signature Authority" Proclamation. In addition, we attach hereto relevant other actions by the Legislature to complete the record, namely A Legislative Order to Only Recognize Appointments and Nominations by Acting Governor Leslie Harjo, adopted January 25, 2011, attached as ***Exhibit 6***; and the Recognizing Acting Governor Leslie Wandrie-Harjo Act, enacted February 7, 2011, attached as ***Exhibit 7***.

Plaintiff Harjo also objects to Ms. Boswell's reference to all "Writs" and other documents issued by Mr. Webber as Supreme Court orders. As explained above, at subsection 1(A), Mr. Webber had no authority to issue any such documents under the auspices of the Supreme Court.

It is to be noted (again) that these additional "Writs" lack sufficient detail and are signed only by Mr. Webber or, in rare cases, by other additional improperly-seated justices.

B. Ms. Boswell's Impeachment and Removal Are Valid and Effective

Article XII, Section 2 of the Cheyenne and Arapaho Constitution provides:

> The Legislature shall have the power to impeach and remove a Governor or Lieutenant Governor for good cause by a unanimous vote of the Legislature. The Legislature shall have the burden of proving good cause beyond a reasonable doubt. A Governor or Lieutenant Governor subject to removal shall be provided with adequate notice, be informed of the charges in writing, be given an opportunity to address the Legislature in a public hearing, and be given an opportunity to contest the charges, and prepare and present a defense including presenting witnesses and other evidence. The process to seek the impeachment and removal of the Governor or Lieutenant Governor shall not extend beyond ninety days. The Governor and Lieutenant Governor shall not be subject to impeachment and removal at the same time.

Article XII, Section 9 of the Constitution provides that "[a]ny vacancy in the Office of Governor shall be filled by the Lieutenant Governor who shall serve for the remainder of the unexpired term."

On March 17, 2011, a public hearing was held to impeach Ms. Boswell, which Ms. Boswell did not attend, despite having been duly noticed, having demonstrated her knowledge of the hearing by indicating publicly that she had notice of the hearing and sending a clerk to the hearing with documents identifying Ms. Boswell's objection to the hearing, and being a member of the public that received notice of the hearing according to proper procedure on February 17, 2011. This notice was attached to the *Notice of Supplementation* as exhibit 29. On March 18, 2011, Ms. Boswell was formally impeached and removed by the Cheyenne and Arapaho Tribes' Legislature, pursuant to its power under Article XII, Section 2 of the Tribal Constitution. *See* A Special Resolution to Impeach and Remove Suspended Governor Janice Prairie Chief-Boswell from Office of the Governor, enacted March 18, 2011, attached hereto as ***Exhibit 8***.

Although Ms. Boswell asserts that she was not "provided [with] 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," she was made aware of the charges against her and notified of the impeachment hearing. Ms. Boswell chose not to attend the hearing, however, where evidence was presented (which was, because of Ms. Boswell's absence, uncontested) and where the Legislature provided her the opportunity to present a defense (of which, again, she declined to take advantage).

C. Legislators Spottedwolf and Whiteman Were Properly Removed

Plaintiff Harjo again objects to Ms. Boswell's assertion that documents issued by Mr. Webber related to the recall of Patrick Spottedwolf were issued by the "Tribes' Supreme Court." Plaintiff Harjo also objects to Ms. Boswell's unsubstantiated allegation that "In exchange for Mr. Nowlin's 'new seat in Patrick Spottedwolf's spot,' Mr. Nowlin had to 'sponsor' the bill to impeach Governor Boswell." (internal quotations in original; no citation provided for quotations).

As explained below, the properly-seated Supreme Court has ruled that the recall of Mr. Spottedwolf was properly executed. Proper procedures were also followed by the Legislature to remove Bruce Whiteman from the C1 Legislator's seat. Once again, Ms. Boswell's legal argument that "the Constitution requires a unanimous vote of eight (8) members of the Third Legislature" is unfounded, illogical, and may only properly be brought by appeal to the properly-seated Tribal Supreme Court, not the BIA.

In fact, the Constitution requires a unanimous vote "of the remaining seven Members of the Legislature." Chey. & Arap. Const. Art. XII, Sec. 1. Mr. Whiteman was removed by a vote of the seven remaining members of the Legislature. *See* A Special Resolution to Remove C1

Legislator Bruce Whiteman From the Legislature, enacted March 12, 2011, attached hereto as ***Exhibit 9***. Mr. Whiteman received proper notice of the hearing, which was held on March 12. At the hearing, unrefuted evidence was presented by the Legislature in favor of his removal. Also according to proper procedure, the C1 Legislator seat was then declared vacant by the Election Commission and an election and opportunity for re-election for Mr. Whiteman was held on April 11, 2011. Mr. Whiteman failed to enter his name on the ballot as a candidate for re-election with the Election Commission. Wilma Blackbear was the only candidate for election and was elected to the C1 Legislative seat with 100% of the vote.

The propriety of Mr. Spottedwolf's third recall election was determined by the Supreme Court in *Spottedwolf v. Election Commission*, SC-2010-09, January 20, 2011, attached hereto as ***Exhibit 10***. In *Spottedwolf*, the Court rejected Mr. Spottedwolf's argument that he could not be subject to three recall elections. *Id*. at 3, 6-7. The Court concluded that:

> [Mr. Spottedwolf] stands recalled from his former A-3 office under Article XII, Section 6. The decisions of the Election Commission to declare a vacancy in the A-3 seat in the Third Legislature, and to proceed to conduct a Special Election to fill that seat as provided by Article XII, Section 8(b) and Article IX, Section 11 were therefore correct.

Id. at 8-9.

6. PENDING BIA ACTIONS

Ms. Boswell makes much of the timeline of appeals and burrows into the intricacies of the "appeal" of the Concho Agency's refusal to make an immediate determination. But these lose sight of the big picture, and neglect to recognize that even were the request for immediate determination an "appeal," such an appeal would be rendered moot by the issuance of the March 28, 2011 Decision. To the extent that Ms. Boswell appears to object to the propriety of the issuance of the Concho Agency Decision of March 28, 2011 "despite the apparent appeal taken

from her response," Ms. Boswell offers no authority for such a proposition. Moreover, Plaintiff Harjo was the party who requested immediate action, and as such, Ms. Boswell has no reason to assert procedural objections to the BIA's not having ruled on or effectuated immediate action, other than, it seems, to encourage further delay.

Additionally, all of Ms. Boswell's objections to the timelines for submissions of arguments and assertions that due notice was not received in relation to those timelines must also now be rendered moot, given Ms. Boswell's thorough and voluminous *Notice of Supplementation*.

Ms. Boswell asserts that a letter decision is not effective until time for appeal has run, pursuant to 25 CFR §2.6(b). However, on March 29, 2011, Plaintiff Harjo, through counsel, submitted by fax a letter to the BIA, addressed to Regional Director Dan Deerinwater and Director Michael Black, specifically requesting, inter alia:

> pursuant to 25 CFR § 2.6, that "the official to whom the appeal is made determines that public safety, protection of trust resources, or other public exigency requires that the decision be made effective immediately." An exigency certainly exists here, where Ms. Boswell has unlawfully retained sole signatory authority on all of the Tribes' bank accounts, she refuses to obey numerous tribal court orders, and she has improperly installed her own justices and judges.

March 29, 2011 letter from P. McCoy addressed to the BIA, attached as ***Exhibit 11***.

Plaintiff Harjo has also made numerous requests by telephone, fax, and letter to all relevant offices of the BIA for immediate assistance in enforcing the Tribal Courts' Orders, which are tribal law that the BIA has an affirmative duty to enforce. Pursuant to the Indian Law Enforcement Reform Act, 25 U.S.C. § 2802(c) (as amended by the Tribal Law and Order Act of 2010, P.L. 111-211 (2010), sec. 211(b)(2)(A)), "the responsibilities of the Office of Justice Services in Indian country shall include—(1) the enforcement of Federal law and, with the consent of the Indian tribe, tribal law."

Plaintiff Harjo attaches two additional exhibits relevant to the BIA's pending actions in this matter. The first is a letter, addressed to Padraic McCoy, dated March 17, 2011, which states that the Regional Office "[is] returning two (2) items to you without action, the February 11, 2011, 'Notice of Appeal' and the January 26, 2011, 'emergency request for determination'" because "We, the Bureau of Indian Affairs (BIA), have no way to know or identify tribal/individual's attorneys/representatives unless we are advised by the parties." This letter enclosed what appeared to be the originals of these documents. Plaintiff Harjo's counsel has since provided the Regional Office with a copy of the January 18, 2010 Entry of Appearance submitted in this matter, a letter of verification from Plaintiff Harjo, and return of the original documents. This March 17, 2011 letter is attached hereto as ***Exhibit 12***. The second is a letter to Speaker of the Legislature Michael Kodaseet from Paul Tsosie, the Assistant Secretary's Chief of Staff, dated April 4, which refers to Mr. Kodaseet's letter of December 22, 2010 stating that various BIA officers and employees are monitoring the situation. This April 4, 2011 letter is attached hereto as ***Exhibit 13***.

7. PREVIOUS TRIBAL COURT ASSESSMENTS

Ms. Boswell's *Notice of Supplementation* does not explain why the two tribal court assessments were included in the exhibits, and these two exhibits were not included in the exhibit binders mailed to us. Therefore, we respectfully reserve the right to view and respond to these court assessments if necessary.

8. LEGISLATIVE SESSIONS, INCLUDING IMPEACHMENT AND REMOVAL, WERE PROPER

In the final section of her *Notice of Supplementation*, Ms. Boswell again asserts arguments against rulings of the Supreme Court which only that Court, and not the BIA, may consider (or reconsider). As explained above, at subsection 1(A), Ms. Boswell's citations to

prior cases in support of her argument that the Legislature may only act in regular or special sessions are inapposite where the Supreme Court has specifically ruled that the Legislature's actions in this case were proper, and constitutionally sound. *See Second Supplemental Order* at p. 16 ("this Court, not the Governor, is the final interpreter of our own prior tribal law decisions") (emphasis omitted), provided as exhibit 5 to the *Notice of Supplementation*; excerpt of pp. 18-20 attached hereto as *Exhibit 2*.

Although the *Second Supplemental Order* adjudicates the issue of the Legislature's ability to act outside of regular or special session as it relates to the appointment of Supreme Court Justices, the *Order*, and the Supreme Court's rationale, provides guidance as to the propriety of the Legislature's impeachment and removal of Ms. Boswell. As explained in subsection 1(A) above, the Supreme Court in the *Second Supplemental Order*, when faced with competing constitutional provisions, determined that the procedural timeline and reliance on the Governor for permission to act must yield to the constitution's imperative of the Legislature's ability to act. *See id*. at 19. Also as explained above, at subsection 1(A), it would be nonsensical to require that the Legislature's ability to hold a Legislative session to impeach and remove a sitting (or, in this case, suspended) Governor be reliant upon that sitting (or suspended) Governor's consent, exercised by calling a special session. The *Second Supplemental Order* makes clear that the Supreme Court approves of Legislative action outside of regular or special sessions, and, hence, the Legislature's session to impeach and remove Ms. Boswell was procedurally sound.

The Supreme Court, in the *Second Supplemental Order*, provides additional guidance here in its explanation that a Governor may be suspended from office. Ruling before Ms.

Boswell was suspended or impeached, the Court nonetheless identified the legal foundation for suspension:

> [W]e construe the inherent remedial powers of Cheyenne and Arapaho tribal courts, as granted in the Cheyenne and Arapaho Constitution, to be very broad where a Governor has repeatedly refused to comply with, or to enforce, multiple constitutionally based Orders of this Court that this Court deems necessary to preserve the functioning (and/or the very existence) of the Judicial Branch of Cheyenne and Arapaho tribal Government.
>
> Those remedial Judicial Branch powers do not exclude the power to suspend both the pay of a Governor or any other defiant Executive Branch official (with Embezzlement Clause consequences in the event of further defiance), and to suspend the exercise of purportedly "executive" powers by any Governor who has "gone rogue" by repeatedly refusing, ignoring, or seeking to evade in-force Court Orders instead of enforcing them. *See* Chey. & Arap. Const. art. II; *id*. art. VII, § 4(a); *id*. art. VIII; *id*. art. IX, § 14; *id*. art. X, § 3.
>
> Because the same subsection of Article VII that grants a Governor any "executive" power explicitly limits attempted exercises of those powers by imposing a gubernatorial duty to "enforce court orders" (not just Orders in cases to which the Governor is a party, and not just Order with which a Governor agrees), any Governor who refuses to enforce such Court Orders will have suspended his or her own ability to lawfully exercise any governmental power.

Second Supplemental Order at p. 2 (emphasis omitted).

As a general matter, Ms. Boswell's citation to tribal court precedent for legal propositions as part of a legal objection to the Supreme Court's orders against her are entirely misplaced in this action due to, as previously stated, the Tribal Court being the ultimate arbiter of tribal law. Nonetheless, Plaintiff Harjo herein responds to Ms. Boswell's legal assertions for purposes of preserving the record and because the cases are inapposite.

Ms. Boswell's citation to *In re Invalidity of the Rescheduled Special Session of the Legislature set for March 13, 2008*, No. CNA-SC-08-01, April 28, 2008 is inapposite here, where a Governor would no doubt *not* call a special session of the Legislature for the purposes of her own impeachment. The factual peculiarities of *In re Invalidity* are explained in *Hoffman et al. v. Lynn*, No. SC-2010-0003, July 30, 2010 ("the Wewoka Switch Opinion"), at p. 31, relevant

excerpts attached hereto as ***Exhibit 14***. ("In April 2008, this Court affirmed a carefully reasoned Trial Court decision . . . that a flurry of actions by then-Acting Speaker of the Second Legislature Ida Hoffman . . . in 'recessing,' the 'rescheduling,' then 'cancelling,' then 'reconvening' a Special Session of the Legislature called by then-Governor Darrell Flyingman to vote on two of his Judicial Branch nominations were unconstitutional[.]").

Plaintiff Harjo reserves the right to respond to Ms. Boswell's citations to the decisions in *Flyingman v. First Legislature*, No. SC-2007-01 and -02, Dec. 30, 2009 and Feb. 12, 2010, because we did not receive a copy of these opinion in the exhibit binder provided to us, and Plaintiff Harjo does not have access to these decisions because she has been prevented from accessing the tribal complex and courthouse.

9. ADDITIONAL RELATED FACTS AND EXHIBITS

A. Boswell's Nonpayment of Numerous Tribal Officials and Employees

On February 17, 2011, Ms. Boswell issued an "Executive Order" suspending all stipends of tribal legislators and their staff, with the exception of Mr. Spottedwolf and Mr. Whiteman, such that the at least 21 employees of the Legislative Branch have received no pay for, on average, approximately two months. This "Executive Order" is attached hereto as ***Exhibit 15***. The continued issuance of a legislative stipend to Mr. Spottedwolf disregards the fact that, as explained above at subsection 5(C), he was relieved of his legislative seat by a recall election on November 30, 2010.

Ms. Boswell has refused to pay the properly-seated Supreme Court Justices for all of 2010 and 2011. Ms. Boswell paid trial court Chief Judge Smith for only three months of 2010, which payment was made under protest. Ms. Boswell summarily suspended the duties and wages of the properly-serving court clerks beginning on December 28, 2010.

Despite numerous Tribal Court Orders enjoining and otherwise restraining Ms. Boswell, she continues to provide salaries and wages to numerous justices, judges, officials and employees who have been improperly appointed or who have been terminated concurrent with her suspension.

Apparently following Mr. Webber's "Temporary Restraining Order" dated January 11, 2011 and "Writ of Prohibition" dated March 14, 2011 related to Mr. Spottedwolf's recall (attached to Boswell's Notice of Supplementation as exhibits 34-35), the Election Commission was locked out of their offices on March 16, 2011.

10. CONCLUSION

The Tribes have resolved this dispute for themselves—many times and conclusively. The Tribal Trial Court issued an ETRO suspending Ms. Bowell from office. The Trial Court then issued a Preliminary Injunction again suspending Ms. Boswell from office—which, importantly, remains in effect (notwithstanding Ms. Boswell's later formal removal) because it was issued until further order of the court, and the court has not issued further order on the matter. The Preliminary Injunction was never appealed or overturned, and the "stay" of the Tribes' Supreme Court purporting to restrain the suspension is patently void and a fraud against the Tribes and the BIA as it was written by Mr. Webber, whose nomination to the Supreme Court (as the BIA has agreed by its March 28, 2011 decision) was not confirmed and who is not a Supreme Court Justice for the Tribes. Even more, now the Tribes' Legislature has impeached and removed Ms. Boswell from office pursuant to the Tribes' Constitution. As such, Leslie Harjo automatically became acting Governor upon Ms. Boswell's suspension, and Governor upon her impeachment and removal. The record here is very clear and instructs only one

supportable position: that Leslie Harjo is the Governor and, as the IBIA instructed, the BIA must recognize the Tribes' own resolution of this dispute.

WHEREFORE, Plaintiff Harjo respectfully requests that the Region accept into the record and consider on remand this *Response to Notice of Supplementation of Record Pursuant to Remand*.

PADRAIC I. MCCOY
Tilden McCoy, LLC
2334 Broadway, Suite D
Boulder, Colorado 80304
(303) 323-1922
pmccoy@tildenmccoy.com
California Bar No. 223341
Colorado Bar No. 37710

cc: Leslie Wandrie-Harjo, Acting Governor, Cheyenne & Arapaho Tribes

CERTIFICATE OF SERVICE

I certify that on April 14, 2011, I faxed true and correct copies of the foregoing RESPONSE TO NOTICE OF SUPPLEMENTATION OF RECORD PURSUANT TO REMAND addressed as follows:

ASSISTANT SECRETARY - INDIAN AFFAIRS
Larry Echo Hawk
MS-4141-MIB
1849 C Street, N.W.
Washington, D.C. 20240
Telephone (202) 208-3878
Fax (202) 501-1516

REGIONAL DIRECTOR – BIA SOUTHERN PLAINS REGIONAL OFFICE
Dan Deerinwater
100 Riverside Drive
WCD Office Complex
Anadarko, OK 73005
Telephone (405) 247-6673
Fax (405) 247-5611

REGIONAL SOLCITOR'S FIELD OFFICE, TULSA
Attn: Alan Woodcock and Charles Babst
7906 E. 33rd St.
Suite 100
Tulsa, OK 74145
Telephone (918) 669-7730
Fax (918) 669-7736

SUPERINTENDENT – BIA CONCHO AGENCY
Betty Tippeconnie,
1635 E US Highway 66
P.O. Box 68
El Reno, OK 73036
Telephone (405) 262-7481
Fax (405) 262-3140

I further certify that on April 15, 2011, I will cause to be deposited for mailing by FedEx postage prepaid true and correct copies the foregoing RESPONSE TO NOTICE OF SUPPLEMENTATION OF RECORD PURSUANT TO REMAND and exhibits addressed to the above-listed recipients.

INTERESTED PARTIES
Service will also be made on the following interested or apparent interested parties by United States Postal Service on April 15, 2011:

Fredericks Peebles & Morgan LLP
Thomas W. Fredericks
1900 Plaza Drive
Louisville, Colorado 80027
Attorney for Janice Prairie Chief-Boswell

Rachel Lynn
Tribal Council Coordinator
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Clinton, OK 73601
(580) 515-0370

Tribal Council
Cheyenne & Arapaho Tribes
100 Red Moon Circle
Concho, OK 73022
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Third Legislature, Members
Cheyenne & Arapaho Tribes
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EXHIBIT 2

In the Supreme Court of the Cheyenne and Arapaho Tribes

CONCHO, OKLAHOMA

Janice BOSWELL, Governor, in her official capacity, *Defendant/Appellant,* Brian Foster, CEO, Lucky Star Casino, in his official capacity, *Defendant,* v. THIRD LEGISLATURE, in its official capacity, *Plaintiff/Appellee.*	)	No. SC-2010-15

ON APPEAL FROM NOVEMBER 30, 2010
TRIAL COURT ORDER IN CASE NO. CIV-2010-100

ORDER DISMISSING PREMATURE APPEAL AND REMANDING WITH INSTRUCTIONS TO THE TRIAL COURT

BEFORE: Associate Justice Dennis W. Arrow
Associate Justice Enid K. Boles
Special Justice Katheleen R. Guzman
Special Justice Lindsay G. Robertson

JUSTICE BOLES delivered the Order of the Court.

I.

A.

On November 24, 2010, the Third Legislature filed a Verified Complaint against Governor Janice Boswell (in her official capacity as Governor) and Brian Foster, CEO of Lucky Star Casino (in his official capacity as such). The relief sought by the Legislature was the discontinuance of all construction and/or expansion projects on the tribally-owned and managed Lucky Star Casinos until: [1] the Defendants produce all contracts "in conjunction with" those projects; [2] the Defendants submit those contracts for approval by the Legislature and/or Tribal Council as mandated by Article VII, Sections 4(c) and (d), and Article VI, Section 5(d), of the Tribal Constitution; and [3] the Defendants submit the revenues to be expended for the casino construction and/or expansions for approval in the 2011 tribal Budget.

B.

Article VII, Section 4(d) of the Cheyenne and Arapaho Constitution provides (emphasis added):

> The Governor shall have the power to negotiate and sign a contract, other than a gaming management contract, which has been *previously authorized* by the Tribal Council or Legislature. *No contract shall be valid* which has not been *previously authorized* by the Tribal Council or Legislature. In the event of a conflict between the acts of the Tribal Council and the Legislature regarding the authorization to contract, the act of the Tribal Council shall govern.

Article VII, Section 4(c) requires that any treaty, compact, *or gaming management contract* be subject to ratification by the Legislature (emphasis added). On August 17, 2007, this Court held that the Tribes' former gaming-management contract with Southwest Casino & Hotel Corp. had expired, and that the purported a new gaming-management contract with Southwest had not been constitutionally adopted. *See In re Execution of Casino Gaming Management Contracts* ["*Casino Contracts I*"], No. SC-2007-07, slip op. at 5-15 (Chey. & Arap. S.Ct. Aug. 17, 2007). The Tribes has itself managed the Lucky Star Casinos since August 19, 2007. *Cf. Casino Contracts III,* slip op. at 2-15 (Chey. & Arap. S.Ct. Oct. 1, 2007).

Federal law prohibits a gaming management company from operating a tribally-owned casino without a valid, in-force, federally-approved gaming-management contract. *See* 25 U.S.C. § 2711(a) (Class II gaming); 25 U.S.C. § 2710(d)(9) (Class III gaming). Federally-unapproved gaming-management contracts are void. *See* 25 C.F.R. § 533.7 (2010).

Article VI, Section 5(d) of the tribal Constitution provides (emphasis added):

> The Legislature **shall** enact an annual budget by law which **shall** include a appropriation of operating funds for the Tribal Council, the Executive Branch, and the Judicial Branch. 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. . . . The Legislature **shall** have the power to raise revenue and **appropriate funds for expenditure.** Every funding item in the annual budget must have been previously authorized by law. No monies shall be drawn from except by signature of the Governor and except upon authorization and appropriation by law.

C.

The facts pled in the Third Legislature's Verified Complaint, if true, raise potential financial-misdealing issues that may be of a high order of legal and practical significance. *See generally, e.g.,* CHEY. & ARAP. CONST. Art VII, § 4(b). Paragraphs 2 and 4 of that Complaint allege that Defendants Boswell and Foster (the current Lucky Star CEO, and its former general manager when it was under Southwest Casino & Hotel Corp. management) have "failed to submit any and all contracts for the expansion of the Lucky Star Casinos" for the constitutionally-mandated prior approval. Paragraph 3 alleges that construction was ongoing at the time the Complaint was filed. [*See also* Complaint Exh. "A"]. If tribal funds have been expended or purportedly committed on the alleged expansion, paragraph 5 alleges that such funds have not been appropriated as is constitutionally required. The gravamen of the Complaint suggests that the Legislature may be materially unaware of how casino revenues and/or other tribal funds are now being spent.

D.

The Trial Court entered a Temporary Restraining Order ["TRO"][1] granting the requested relief for 10 days on November 30, 2010, and it set the matter for a preliminary injunction hearing on December 9, 2010. Instead of appearing at that hearing and presenting her legal and factual arguments to the Trial Court, Governor Boswell, through counsel, filed a Notice of Interlocutory Appeal of the Trial Court's November 30 TRO on December 6, 2010.

Because of the filing of the interlocutory appeal, Chief Judge Smith struck the scheduled December 9 hearing on preliminary injunction (and/or other relief) from the Trial Court's docket.

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[1] The Codes of Civil and Appellate Procedure authorize the issuance of "temporary restraining orders" ["TROs"], and the addition of the word "emergency" before "temporary" is mere suplusage and without legal significance. We therefore employ the "TRO" rather than the "ETRO" designation herein.

II.

A.

We have held many times that the grant or denial of a Temporary Restraining Order that does no more than prescribe a ten-day freeze in the status quo (extendable once for ten more days)[2] is not an appealable "final order" for purposes of interlocutory appeal as-of-right under Section 102(a)(1)(iv) of the Code of Appellate Procedure. Special Justice Eby's companion Spring 2009 Orders for a unanimous Court in *The Unappealable TRO Case* [*Spottedwolf v. Flyingman*], No. SC-2009-04 (Chey. & Arap. S.Ct. June 2, 2009), and *Harjo v. Flyingman* [*"Harjo I"*], No. SC-2009-05 (Chey. & Arap. S.Ct. June 2, 2009), explain the operative principles and the controlling Code of Civil Procedure and Code of Appellate Procedure provisions in some detail.

This Court's March 2010 Opinion and Final Order in *Harjo v. Flyingman* [*"Harjo II"*], No. SC-2009-17, slip op. at 24-26 (Chey. & Arap. S.Ct. Mar. 9, 2010), still further explains that principle (and its consequences), applies that principle in detail, and calls attention to the fact that Section 103(c) of the Code of Appellate Procedure enables a party to petition the Trial Court (and if granted, this Court) for *permission* to file an interlocutory appeal of a provisional TRO remedy. *See Harjo II,* slip op. at 25 & nn.91-94. *But would-be Appellant Boswell sought no such permission in this case.*

B.

The instant case provides a practical example of one of the reasons why the drafters of the Codes of Civil and Appellate Procedure prescribed that result. Had Governor Boswell defended her position at the Trial Court's scheduled December 9 hearing, even an *extended* TRO could not have continued past December 19 under Section 813 of the Code of Civil Procedure. If the Trial Court had *denied* injunction (and any final declaratory relief) after the scheduled December 9 Trial Court hearing, no appeal by the Governor would have been necessary for her to remain free of judicial restraint after December 9 (or if the TRO were extended, December 19). Had the Trial Court *granted* non-provisional relief on or after December 9, such an Order *would have been appealable,* and the Governor could have appealed and requested a stay from either the Trial Court or this Court.

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[2] In *Harjo v. Flyingman* [*"Harjo II"*], No SC-2009-17, slip op. at 41-44 & nn. 173-177 (Chey. & Arap. S.,Ct. Mar. 9, 2010), we held that under the specific facts and circumstances of that case (which included thirteen months of litigation, two trips to this Court, a lengthy trial Court hearing, and exhaustive briefing by the parties on the merits), the appealed Trial Court Order had awarded the Plaintiff declaratory relief in addition to a preliminary injunction. In so doing, this Court rejected an argument proffered by Appellant Harjo (through her then-attorney Thomas W. Fredericks) that the appealed Order was solely provisional, and that the case would necessarily require another remand to the Trial Court. *See also Tiger v. Election Comm'n,* No. SC-2009-09, slip op. at 2 & n.2 (Chey. & Arap. S.Ct. Sept. 17, 2009) (holding that where a plaintiff had requested declaratory and injunctive relief as well as a TRO, and the appealed Trial Court Order explicitly denied all relief without qualification, that Order denied all relief for all time, and was consequently a final, appealable Order).

In *Harjo II,* this Court noted:

> As we noted in *Harjo I,* although the premise of the Appellant's *first* appeal was that she had been denied her "day in court" by the granting of the ETRO as an *ex parte* basis, as things turned out, her appeal *delayed* her "day in court" for five months. **Filing an untimely appeal the day before a scheduled hearing is unlikely to accelerate *any* litigant's opportunity to be promptly heard.**

Harjo II, No. SC-2009-17, slip op. at 25 (bold emphasis added).

Along with a cluster of fifteen other highly compressed arguments, would-be Appellant Boswell's December 6 Notice of Appeal herein argues that the Trial Court's granting of the instant TRO on an *ex parte* basis denied her the ability to be promptly heard, *see* Notice of Appeal at 4 (¶ 10), and the caption of the Notice of Appeal includes the words "Expedited Relief Requested." We have given that Notice expedited consideration to prevent the type of lengthy delay that the premature TRO appeal in *Harjo I* generated in that case. And as we observed in an analogous situation in *Harjo II,* filing a premature appeal of the Trial Court's November 30 TRO three days before the Trial Court's scheduled December 9 hearing was also unlikely to accelerate Governor Boswell's opportunity to be promptly heard as provided by tribal law.

C.

Only last Friday, we confronted another premature TRO appeal filed on behalf of Governor Boswell by some of the same attorneys (and the same law firm) who represent the Governor in this case. *See Boswell v. Lynn,* No SC-2010-14 (Chey. & Arap. S.Ct. Dec. 10, 2010). We did not therein determine whether that premature appeal was or was not filed for purposes of delay. But we note that the attorneys who filed the premature TRO appeal on behalf of Governor Boswell in that case were Thomas W. Fredericks, Thomasina Real Bird, Martha L. King, Carla J. Hoke, and Amber Byers, all of whom are members of the law firm of Fredericks, Peebles & Morgan, LLP, of Louisville, Colorado.

We also note that the attorney of record for denied Appellant Patrick Spottedwolf in *The Unappealable TRO Case* [*Spottedwolf v. Flyingman*], No. SC-2009-04 (Chey. & Arap. S.Ct. June 2, 2009), in which we first announced our "unappealable TRO" interpretation of the tribal Codes of Civil and Appellate Procedure, was attorney Thomas W. Fredericks of that law firm. It was Mr. Fredericks' attempted appeal of a TRO (filed on behalf of Mr. Spottedwolf) that we disallowed in that case.

We also note that the attorney of record for denied Appellant Leslie Harjo (then Clerk of the Second Legislature) in *Harjo v. Flyingman* [*"Harjo I"*], No. SC-2009-05 (Chey. & Arap. S.Ct. June 2, 2009), in which we explained at length our "unappealable TRO" interpretation of the tribal Codes of Civil and Appellate Procedure, was also attorney Thomas W. Fredericks. It was Mr. Fredericks' attempted appeal of a TRO (filed on behalf of Ms. Harjo) that we disallowed in that case.

We also note that at all material times during the *Harjo II* litigation, in which we still further explained and amplified the "unappealable TRO" principle, Ms. Harjo's attorney-of-record remained

Thomas W. Fredericks. It was Mr. Fredericks' argument that a Trial Court Order issued after one complete round-trip to this Court, a lengthy hearing, and exhaustive briefing on the merits was only a provisional order (thereby arguably necessitating remand for yet another trip to the Trial Court) that we rejected, with lengthy explanations, *see Harjo II,* No. SC-2009-17, slip op. at 3-6, 24-26, 41-44, in that case.

We also note that the attorneys of record who filed the December 6, 2010 Notice of Appeal of the November 30, 2010 TRO in this case are Thomasina Real Bird and Martha L. King of the Fredericks, Peebles & Morgan law firm.

D.

All attorneys practicing before Cheyenne and Arapaho tribal courts bear the obligation of familiarizing themselves with applicable principles of tribal law, and reviewing the Codes of Civil and Appellate Procedure so that they may avoid filing documents that could legally have only the effect of delay and the consequential waste of tribal resources on useless attorneys' fees. That is extraordinarily important in every case, but it is even more important when the attorneys expect (or hope) to bill the Tribes (assuming, of course, that the bills are within lawfully budgeted amounts) for the preparation of documents to be filed in tribal courts. That is more important still when the attorneys represent a Branch of tribal Government (as here, since the Governor is an official-capacity Trial Court Defendant). And achieving knowledge of the controlling law should not be difficult when the specific attorneys in question, and/or their law firm, represented parties in the very cases in which the controlling interpretations of tribal law were made, clarified, and re-clarified by this Court. Such knowledge might indeed be *presumed.*

Those are not empty standards. Because the filing of documents with Cheyenne and Arapaho courts for the purposes of delay may warrant attorney discipline, and because unawareness of the controlling caselaw as to holdings so frequently made, reiterated, and explained by this Court could alternatively lead to unfavorable inferences about attorney preparation and/or competence, we provide copies of this Order to the members of the Judicial Commission in the event the Commission wishes to make any recommendations to this Court in the exercise of its constitutional authority under Article VIII, Section 9 of the tribal Constitution. *See generally The Mandatory Recusal Case* [*Hoffman v. Lynn*], No. SC-2010-03, slip op. at 1-14 & n.8, 58-59 & n.169, 72-73 (Chey. & Arap. S.Ct. July 30, 2010) (describing the Judicial Commission's authority and some of the provisions of the tribal CODE OF ETHICS FOR ATTORNEYS).

III.

A.

The November 30, TRO is, and purports to be, only a TRO. It is captioned "Temporary Emergency[3] Restraining Order." It provides that it shall be immediately binding upon service on the Defendants, and it set a hearing for December 9, 2010 on further relief. December 9 was within the

[3] *See generally supra* at 2 n.1.

ten-day TRO "window." As a TRO, its duration (unless extended) was limited to ten days. Had it not been appealed, the December 9 hearing would have taken place last Thursday. That hearing would have allowed for the development of a factual and legal record, and could well have generated an appealable Order. But the November 30 TRO is not an appealable Order.

Because TROs are unappealable without the consent of the Trial Court and this Court, the attempted December 6 appeal of the Trial Court Order filed on November 30, 2010 is DISMISSED. Case No. CIV-2010-100 is REMANDED for further proceedings in the Trial Court.

B.

The question of instructions on remand remains. The essential question is how best to desist from rewarding a party whose attorney(s), through attempted gamesmanship, incompetence, or for any other reason, purport to appeal an unappealable TRO.

We confronted that question last Friday in *Boswell v. Lynn,* No. SC-2010-14 (Chey. & Arap. S.Ct. Dec. 10, 2010), and we announced the remedy in that case *only as the law of that case.* That Order remains in full force as to that case, but the remedy we provide herein is not so limited. We find the answer in Section 103(c) of the Code of Appellate Procedure.

Section 103(c) of the Code of Appellate Procedure provides that even where a party has *applied for* and/or *received* permission (and *a fortiori,* where a party has not even *sought* permission) to appeal a TRO, "application for appeal hereunder **SHALL NOT STAY PROCEEDINGS IN THE [TRIAL] COURT, UNLESS THE JUDGE OR THE SUPREME COURT, OR A JUSTICE OF THE SUPREME COURT, SHALL SO ORDER."** *Id.* (emphasis added). The remedy for attempted appeals of TROs in which the Trial Court has denied (or has not been asked for) permission to appeal a TRO is therefore **STATUTORILY** vested **IN THE TRIAL COURT ITSELF.** The remedy is for the Trial Court to simply recognize that the filing of a Notice of Appeal of a genuine[4] TRO is a legal nullity, ***and proceed with the case as if the Notice of Appeal had never been filed at all.*** We held virtually as much in *Harjo II,* No. SC-2009-17, slip op. at 25 & n.94 (Chey. & Arap. S.Ct. Mar. 9, 2010), in which Mr. Fredericks participated as counsel.

---

[4] We acknowledge that there may be situations in which what may superficially appear to be the grant or denial of a TRO is in fact an appealable final order because its text does not merely direct the defendant to stop doing something for ten days, but rather grants or denies relief for all time. *See, e.g., Tiger v. Election Comm'n,* No. SC-2009-09, slip op. at 2 & n.2 (Chey. & Arap. S.Ct. Mar. 9, 2009); *supra* at 3 n.2. In such circumstances, the aggrieved party *must* file a timely Notice of Appeal, or the Trial Court's order will become *res judicata* after the deadline date for filing a Notice of Appeal passes.

But where (as here) the text of a Trial Court Order: **[1]** makes clear that the relief it awards (or denies) is only temporary, **OR [2]** sets a hearing on preliminary injunction and/or other requested relief to occur within the ten-day TRO "window" prescribed by Section 813 of the Code of Civil Procedure, such an Order is **ALWAYS** a "genuine" TRO, the filing of a Notice of Appeal of such an Order is **ALWAYS** a legal nullity, and the Trial Court must **ALWAYS** proceed as if it had never been filed at all. *See* CHEY. & ARAP. CIV. P. CODE § 103(c); *see also Harjo II,* No SC-2009-17, slip op. at 25 & 94; *Harjo I,* No. SC-2009-05, slip op. at 2-4; *The Unappealable ETRO Case* [*Spottedwolf v. Flyingman*], No. SC-2009-04, slip op. at 2-5; *id.* at 2 ("In *Harjo* [*I*], the order appealed from was ***obviously*** not final, ***because it set a hearing on the plaintiff's request for a preliminary injunction."*** (emphasis added)).

If an aggrieved party believes that any Trial Court action is so far outside its jurisdiction (or so untimely) as to call for this Court to issue an extraordinary writ of mandamus or prohibition, that party may file a petition for such relief with this Court. But until or unless this Court *grants* such a Writ, ***the Trial Court shall proceed.***

It is therefore the Trial Court's December 6 decision to *postpone* the scheduled December 9 hearing that was, with 20/20 hindsight, unnecessarily deferential to the proffered Notice of Appeal. Exercising necessary remedial discretion to avoid rewarding a wrongdoing party for his or her wrongdoing, we therefore REINSTATE the November 30, 2010 TRO for ten days from the date on which this Order is filed, DIRECT the Trial Court to conduct the delayed December 9, 2010 hearing for its intended purposes no later than ten days from the date on which this Order is filed, and RULE on whatever requested relief is appropriate for resolution at that time as promptly as reasonably possible. The TRO reinstated by this Order will expire ten days from the date of the filing of this Order, and at the hearing the Trial Court may extend it for no more than three days (to compensate for the days from December 6 to December 9) thereafter.

IV.

Because Governor Boswell's premature appeal *itself* caused the delay in conducting the injunctive and/or declaratory relief hearing that had been scheduled for December 9, 2010, to abate any further delay, we exercise our authority under Section 469(a) of the Code of Appellate Procedure to order that any Petition for Rehearing of this Order be filed no later than 4:00 p.m. on Wednesday, December 15, 2010. Any such Petition may be of no more than five double-spaced pages, and shall contain no attachments whatsoever. The Clerk of Court shall accept no other document for filing in this case tendered by any other party or entity.

The filing of a Petition for Rehearing shall not affect the validity or current force of this Order in any way. Any Petition for Rehearing to which this Court has not responded within two calendar days of its filing is DENIED without further Order of this Court. Pursuant to Section 470 of the Code of Appellate Procedure, we order that the Mandate issue immediately upon the filing of this Order.

The Clerk of Court is directed to file this Order instanter, and to provide copies of it to all parties to this case and their attorneys (if any); to Tribal Council Coordinator Rachel Lynn; to all members of the Third Legislature and its Legislative Counsel; to all members of the Judicial Commission; to Chief Judge Bob A. Smith; to Special Judge Barbara Smith; to Superintendent Betty Tippiconnie, Bureau of Indian Affairs; to Regional Director Dan Deerinwater, Bureau of Indian Affairs; and to Assistant United States Attorney Arvo Q. Mikkanen, Office of the United States Attorney for the Western District of Oklahoma.

Case No. SC-2010-15 is CLOSED.

IT IS SO ORDERED.

Associate Justice Enid K. Boles

ASSOCIATE JUSTICE ARROW, and SPECIAL JUSTICES GUZMAN and ROBERTSON concur.

CERTIFICATE OF MAILING

I, Lena Marquez, Deputy 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-2010-0015, The Third Legislature, Official Capacity, vs. Janice Boswell, Governor, Official Capacity, Brian Foster, CEO, Official Capacity,:

ORDER DISMISSING PREMATURE APPEAL AND REMANDING WITH INSTRUCTIONS TO THE TRIAL COURT

via U.S. Regular mail on the 13th day of December, 2010.

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SC-2010-0015

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