UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**Case No. 12 CV 054-GFK-TLW**
	)	
(1) TIGER HOBIA, as Town King and member of the Kialegee Tribal Town Business Committee, et al.;	)	
	)	
Defendants.	)	

RESPONSE OF TIGER HOBIA, LYNELLE SHATSWELL, AND FLORENCE DEVELOPMENT PARTNERS, L.L.C. TO PLAINTIFF'S MOTION AND BRIEF FOR PRELIMINARY INJUNCTION

Joseph R. Farris, OBA #2835
Paula J. Quillin, OBA #7368
FELDMAN, FRANDEN, WOODARD & FARRIS
Williams Center Tower II, Suite 900
2 West 2nd Street
Tulsa, Oklahoma 74103
Tel: 918/583-7129
Fax: 918/584-3814
and
Dennis J. Whittlesey, OBA #009578
DICKINSON WRIGHT PLLC
1875 Eye Street, NW – Suite 1200
Washington, D.C. 20006
Tel: 202/659-6928

ATTORNEYS FOR DEFENDANTS
HOBIA, SHATSWELL and FLORENCE
DEVELOPMENT PARTNERS, L.L.C.

March 19, 2012

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

Defendants Tiger Hobia, as Town King and member of the Kialegee Tribal Town Business Committee, Lynelle Shatswell, and Florence Development Partners, L.L.C. file this response to Plaintiff's motion and brief for preliminary injunction. (Dkt # 6) These Defendants specifically object to the motion for preliminary injunction as served on them in that they are not proper parties to this lawsuit, as briefed in their respective motions to dismiss. Because they are not proper parties, there is nothing to preliminarily enjoin. In any event, given that Plaintiffs have no Article III standing to bring this lawsuit and because there is no case or controversy, it is self-evident that Plaintiff does not have any, let alone substantial, likelihood of success on the merits. As this court noted in Dkt # 61, "jurisdictional issues should be resolved by this Court prior to consideration of Plaintiff's Motion for Preliminary Injunction." Finally, Plaintiff has wholly failed to show that it will be injured unless a preliminary injunction is granted.

INTRODUCTION

Plaintiff is seeking to preliminarily enjoin construction on property located in Broken Arrow. Plaintiff claims that is has standing to seek such an injunction because of its Class III Gaming Compact with the Kialegee Tribal Town. Nothing in the Compact relates to or addresses construction, but rather it relates solely to Class III gaming. (Dkt # 6, Ex. 8) Plaintiff cannot enjoin construction on this property for the purpose of blocking what it *believes may be a future violation* of a Compact when the Compact itself does not cover construction. Additionally, these Defendants are not proper parties to the lawsuit and have no authority over any activity taking place on the subject property. Shatswell has no authority over any of the activity taking place on the subject property. Hobia has acted only in his official capacity on behalf of the Tribe and is therefore exempt from suit by virtue of the Tribe's sovereign

immunity. Florence Development has no Compact or contract with the State such that the State can enjoin any activities of Florence Development.

1. Under the Standards For Preliminary Injunction, Plaintiff Cannot Prevail

The State is seeking a preliminary injunction to block construction activity that does not violate a single state or federal law and is not even mentioned in the Compact (which exclusively regulates gaming). The State's rationale for this request apparently is: "No gaming can be conducted in a building that is not built -- don't build it and nobody can come." It is noteworthy that the foundation of the State's entire case is its own unbriefed, unargued and unadjudicated theory as to when federal Indian Allotment land in restricted fee status does and does not qualify for gaming under federal law. This clearly is not a case for which preliminary injunctive relief is appropriate.

"A preliminary injunction is an extraordinary remedy; it is the exception rather than the rule." *GTE Corp. v. Williams*, 731 F.2d 676, 678 (10th Cir. 1984). Its purpose is to "preserve the relative positions of the parties until a trial on the merits can be held." *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395, 68 L. Ed. 2d 175, 101 S. Ct. 1830 (1981). In making the equitable determination to grant or deny a preliminary injunction, courts grant preliminary relief only if the plaintiff shows "(1) a substantial likelihood of success on the merits of the case; (2) irreparable injury to the movant if the preliminary injunction is denied; (3) the threatened injury to the movant outweighs the injury to the other party under the preliminary injunction; (4) the injunction is not adverse to the public interest." *Kikumura v. Hurley*, 242 F.3d 950, 955 (10th Cir. 2001). A party's right to injunctive relief must be "clear and unequivocal." *Penn v. San Juan Hosp.*, 528 F.2d 1181, 1185 (10th Cir. 1975).

Plaintiff has not articulated in its Complaint or any of its numerous court filings any irreparable harm or injury to its interest that would occur if construction goes forward. The State will not be harmed by the completion of construction; in fact, it is the specter of Class III gaming which has led the State to file suit for what appears to be a means of soliciting public approval of various elected officials. *See Ty, Inc. v. GMA Accessories, Inc.*, 132 F.3d 1167, 1172 (7th Cir. 1997) ("a plaintiff who cannot show any irreparable harm at all from the withholding of a preliminary injunction is not entitled to the injunction however strong his case on the merits, for he has no need for preliminary relief in such a case, no need therefore to short circuit the ordinary processes of the law.").

Plaintiff is seeking to preliminarily enjoin construction and operation of a casino in Broken Arrow. (Dkt No. 6, p. 2) Plaintiff claims that the construction activity will adversely affect the area surrounding the property which notably is zoned for commercial and light industrial development. There is no irreparable harm that will be suffered by Plaintiff. In fact, the only potential harm will be that which may be suffered by Defendants for expending money on construction that Plaintiff claims is not allowed. That is a risk Defendants are willing to take. In short, all of the factors regarding a preliminary injunction weigh in support of Defendants and not in support of Plaintiff.

In determining whether to grant a preliminary injunction the Court considers and balances four factors: 1) whether the movant has a substantial likelihood of success on the merits; 2) whether the movant will suffer irreparable harm unless the injunction issues; 3) whether the threatened injury to the movant outweighs any harm the proposed injunction may cause the opposing party; and 4) whether the public interest will be served by an injunction. *Kiowa Indian Tribe of Oklahoma v. Hoover*, 150 F.3d 1163, 1171 (10th Cir. 1998).

Plaintiff has no likelihood of success on the merits.

Defendants are exempt from suit by sovereign immunity as discussed below. In fact, the *Kiowa Indian Tribe of Oklahoma v. Hoover* case which was cited in Plaintiff's brief supporting motion for preliminary injunction (Dkt 6, p. 7) granted the Kiowa Indian Tribe an injunction against Defendants based on the sovereignty of the Tribe and finding the state court in that case had no jurisdiction to order the Tribe to pay a money judgment on a breach of contact claim. The state court's refusal to grant the Tribe a preliminary injunction was reversed as was the federal district court's dismissal of the Tribe's Section 1983 action regarding its sovereign immunity. The Court in *Kiowa Indian Tribe* stated:

> The Tribe should not be compelled "to expend time and effort on litigation in a court that does not have jurisdiction over them." [citations omitted] The Tribe's full enjoyment of its sovereign immunity is irrevocably lost once the Tribe is compelled to endure the burdens of litigation. [citations omitted]

Id. at 1172.

Plaintiff will not suffer irreparable harm and is therefore not entitled to preliminary injunction.

In fact, Plaintiff identifies no irreparable harm. It simply uses the words "irreparable harm" with the assumption that nothing more is required. The only parties who may suffer harm are the Defendants with their expenditure of funds to continue construction. If by the time construction is completed Defendants are blocked from using the constructed property for Class III gaming, that is a risk Defendants are taking. Plaintiff suffers no risk by Defendants continuing construction.

There is no threatened injury to the State and it certainly does not outweigh the harm to Defendants.

The Gaming Compact under which Plaintiff has filed suit only covers gaming. It does not cover construction. Even assuming Plaintiff could interfere with Defendants' sovereignty rights, it could do so only with respect to alleged violations of the Compact and only to the extent sovereignty is waived in the Compact. Any other activities conducted at the site are not subject to the State's jurisdiction. Enjoining Defendants'activity at this early stage harms Defendants; conversely, not enjoining Defendants does not harm Plaintiff.

The public interest is not served by an injunction.

Plaintiff wants to enjoin alleged illegal activity before any activity subject to the State or this Court's jurisdiction has even taken place, legal or otherwise. If this injunction is granted, the State could file a lawsuit for preliminary injunction against every person in the state, regardless of sovereignty issues, and enjoin them before they committed what the State considers a future possible illegal act.

2. Plaintiff Has No Likelihood of Success on the Merits

The State attempts to confuse the issue of this Court's jurisdiction by alleging that the Kialegee Trial Town does not have jurisdiction over the Broken Arrow Property. This Court need not decide that issue because the State has no standing to raise any of these issues. The State argues that the NIGC has not approved construction or operation of a casino on the property. Again, the State has no standing to raise issues on behalf of the NIGC. The State is not entitled to a preliminary injunction because the State cannot establish standing, a case or controversy, or overcome the barrier of tribal sovereign immunity.

I. Plaintiff Cannot Prevail Because It Has No Article III Standing to Litigate this Case Because There is No Case or Controversy

The Complaint asserts that current construction on the Indian allotment at issue violates the Compact, and demands both preliminary and permanent injunctions to stop the construction and any other development on the land. Significantly, the Complaint does not specify the Compact provision allegedly being violated. This is because there is no such provision.

The Compact exclusively concerns the *actual tribal conduct* of Class III gaming. (Dkt # 6, Ex. 8) At no place in the Compact does the State have any oversight or control over potential gaming operations, nor does the State have any oversight or control over any non-gaming activity on the land, including construction of a building. The Compact is not applicable to construction work and the erection of buildings and other structures.

Neither of the two Compact provisions allowing State action against the Tribe is satisfied by the issues presented in this litigation. Absent a specific and unequivocal waiver of tribal sovereign immunity -- which does not exist in this case -- the Tribe cannot be sued. Neither can any of the Tribal officials.

A. The Legal Standard for Article III Standing

The law is well-established and beyond debate. Only a year ago, the Supreme Court reiterated the jurisdictional requirement for Article III standing imposed on all parties seeking to prosecute claims in federal courts: "To obtain a determination on the merits in federal court, parties seeking relief must show that they have standing under Article III of the Constitution." *Arizona Christian Sch. Tuition Org. v. Winn*, __ U.S. ___, 131 S. Ct. 1436, 1440 (2011).

The issue of standing is of primary importance "[b]ecause it involves the court's power to entertain the suit." *Jordan v. Sosa,* 654 F.3d 1012, 1019 (10th Cir. 2011) (quotations omitted).

Under Article III, "the Federal Judiciary is vested with the 'Power' to resolve not questions and issues but 'Cases' or 'Controversies.'" *Arizona Christian,* 131 S. Ct. at 1441.

"To state a case or controversy under Article III, a plaintiff must establish standing." *Arizona Christian,* 131 S. Ct. at 1442 (citation omitted). "Standing is determined as of the time the action is brought." *Jordan,* 654 F.3d at 1019 (quotations omitted); *see also Utah Animal Rights Coal. v. Salt Lake City Corp.*, 371 F.3d 1248, 1263 (10th Cir. 2004) ("Standing doctrine addresses whether, at the inception of the litigation, the plaintiff had suffered a concrete injury that could be redressed by action of the court").

The minimum constitutional requirements for standing are clear:

> First, the plaintiff must have suffered an "injury in fact" -- an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not "conjectural" or "hypothetical." Second, there must be a causal connection between the injury and the conduct complained of -- the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (citations, quotations and footnote omitted).

In this case, there is no injury the State can claim it is suffering from construction at the site. Indeed, none is even alleged.

B. The State proposes to enjoin construction of a building

The Complaint (Dkt # 1) and the preliminary injunction motion (Dkt # 6) make clear that the only current activity occurring on the Indian Land at issue is construction of a building, but nowhere do they explain the legal basis for enjoining that construction:

Complaint ¶1 repeatedly makes clear that "construction" is the only activity currently underway:

> This action seeks declaratory and injunctive relief to prevent Defendants... from proceeding with construction ... in direct violation of both the April 12, 2011 Gaming Compact between [the Tribe] and the State of Oklahoma [] and the Indian Gaming Regulatory Act, 25 U.S.C. §§2701-2721.
>
> Defendants are actively engaged in the construction of ...Red Clay Casino...
>
> The Defendants' on-going actions to inject gaming into the Broken Arrow community by constructing and placing in operation the proposed casino.... violate the federally enforceable Compact and federal law....

Complaint ¶3 does the same:

> The Defendants' activities further ... violate federal requirements because the construction ... will violate the federally approved Gaming Compact ... which expressly limits the [Tribe] to conducting gaming only on "its Indian lands"....

Complaint ¶5 also makes clear that the Court is being asked to stop construction of a building:

> This Court should declare that the Defendants' efforts to construct ... a [building] are unauthorized by the State Gaming Compact and federal law, and the Court should ... enjoin ... development, construction or operation....

To this same point, the remainder of the Complaint contains so many statements about construction that they need not be specifically cited. While the Complaint also seeks to enjoin Class III gaming on the same Indian allotment land on which it concedes no gaming is currently being conducted, it does not explain how potential gaming activity could possibly be prohibited by any federal or state law so as to establish Article III standing. In this regard, there are numerous claims that future Class III gaming at the site would be illegal based on speculative allegations, such as (1) that the land can never qualify for gaming as a matter of unadjudicated law, (2) that the land does not qualify for gaming based on the State's informal, unilateral and unadjudicated theory that the land is not within the Tribe's jurisdiction or government control,

and (3) the potential exercise of Class III gaming on the land is a current violation of IGRA and the Compact. Still, there is no competent explanation as to how this Court can entertain litigation challenging gaming that may not ever be conducted for reasons unrelated to this litigation. The State is seeking an injunction and preliminary injunction for a hypothetical, alleged illegal activity that has not occurred and may never occur, based on a unilaterally developed theory of first impression that is unbriefed, unargued and unadjudicated. There is no present case or controversy.

Construction is not prohibited on this land, and the State simply fails to explain the statutory basis for asking this Court to enjoin that activity.

C. IGRA neither prohibits the construction of any building nor authorizes litigation seeking to enjoin any gaming not already "being conducted"

The State alleges at Complaint ¶6 that it has statutory authority to prosecute this litigation to enjoin construction when no Class III gaming is being conducted by virtue of IGRA's provisions found at 25 U.S.C. §2710(d)(7), which provides in pertinent part:

> **(7)(A)** The United States district courts shall have jurisdiction over --
>
> * * *
>
> **(ii)** any cause of action initiated by a State or Indian tribe to enjoin a Class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact entered into under paragraph (3)(A) that is in effect....
>
> [Emphasis supplied.]

The authority is clear and unequivocal: the statute regulates gaming activity being conducted and not potential gaming that may be conducted in the future. Moreover, the State has neglected to call the Court's attention to the fact that its own Compact preempts any judicial challenge to gaming disputes with the Tribe, as is discussed at Subsections D and F below, by rigidly defining the process for resolving the very dispute before this Court.

As for IGRA itself, there is no cause of action when no gaming is being conducted.

D. The Compact neither regulates nor prohibits construction of any building.

The Compact is attached to Plaintiff's Brief on Preliminary Injunction. (Dkt # 6, Ex. 8) Its purpose and scope is plainly stated in the Preamble:

> This Compact is made and entered into by and between the Kalegee Tribal Town, a federally recognized Indian tribe (tribe), and the State of Oklahoma (state), with respect to the operation of covered games (as defined herein) on the tribes [sic] Indian lands as defined by [IGRA].
>
> [Emphasis supplied.]

Nothing in the Compact otherwise addresses, or even purports to pertain to, activities occurring prior to the commencement of "the operation of covered games." And, as discussed at Subpart F below, all disputes concerning any element of gaming or the Compact -- including whether a gaming site qualifies as "Indian land" -- must be resolved in accordance with the requirements of the Compact's **Part 12 - DISPUTE RESOLUTION** provisions. When the parties agreed to be bound by Part 12, they contracted (with enforceability) as to the specific and limited manner for resolution of any and all disputes over matters covered by the Compact. There is no allegation in the Complaint that the Dispute Resolution provisions were invoked or followed by the State for the simple reason that they have not been.

E. The State has not cited a single federal or state law prohibiting construction of any building, regardless of its prospective use

Nothing in any of the State's numerous filings in this litigation cited a single federal or state law giving it a legal basis for enjoining construction. Moreover, counsel for Defendants are not aware of any such law.

F. The State cannot litigate any claims under the Compact until and unless it has complied with the Compact's specific Dispute Resolution provisions

The Compact was written by the State and all of its provisions had to be accepted by the Tribe as a condition of being allowed to conduct Class III gaming, as plainly stated by the Complaint ¶28:

> 28. In 2004, Oklahoma established a model tribal gaming compact that is essentially a "pre-approved" offer to federally recognized tribes in the State ("Model Compact"). If a tribe accepts the Model Compact, obtains approval by the Secretary of the Interior, and complies with the requirements of the Compact and the IGRA, the tribe can operate gaming facilities on "its Indian lands," Model Compact, Part 5(L), i.e., lands in which the tribe has a possessory interests [sic] and over which the tribe has jurisdiction and exercises governmental powers.

(Dkt # 6, Ex. 8)

Having unilaterally written and imposed its Compact on the Tribe, the State apparently now believes that it is free to ignore the very strict process for dispute resolution that it legislated and offered to tribes on a "take it or leave it" basis.

To reiterate, the Compact is applicable only when gaming has been commenced. At no place in the document does it purport to extend the State's authority to gaming that may or may not be conducted at some future date. If there is no Class III gaming to regulate, then there can be no dispute under the Compact, and -- in turn -- no case or controversy, and that simple reality is by the State's own hand and dictate.[1]

Critical to any assessment of the State's right to sue the Tribe is the fact that the Compact contains only two circumstances under which the Tribe has agreed to waive its tribal sovereign immunity: (1) a Part 6 limited waiver as to claims associated with torts and prizes, and (2) a Part

[1] While counsel to the Defendants are not aware of any Tribal-State Class III Gaming Compact in the country that purports to regulate pre-gaming development and construction activities, it is possible that the Secretary of the Interior would approve a Compact providing for such regulation. However, this issue is moot for the simple reason that the State did not impose such regulation in its unique "pre-approved" offer to Oklahoma tribes seeking to conduct Class III gaming.

12 limited waiver solely applicable to judicial enforcement of an award rendered through formal arbitration. The first is not relevant to this matter, but the second is controlling. Of additional interest is Compact **Part 9. JURISDICTION**, which states *in toto*: "This compact shall not alter tribal, federal or state civil adjudicatory or criminal jurisdiction." The Tribe therefore kept all defenses of sovereign immunity and objections to jurisdiction except for the narrow instances and procedures allowed in the Compact.

In writing its Compact (Dkt # 6, Ex. 8), the State carefully crafted the Dispute Resolution process found at Part 12, and this Court should accept the State at its own words:

> **Part 12. DISPUTE RESOLUTION**
>
> In the event that either party to this compact believes that the other party has failed to comply with any requirement of this compact, or in the event of any dispute hereunder, including, but not limited to, a dispute over the proper interpretation of the terms and conditions of this Compact, the following procedures may be invoked:
>
> * * *

Part 12 then proceeds to spell out the only process available for dispute resolution -- including judicial -- if the complaining party wishes to pursue it.

> **The Three Step Dispute Resolution process is as follows:**
>
> Paragraph 12.1 provides that the first step in resolving a dispute over interpretation of a Compact provision -- such as whether the Indian allotment land qualifies for gaming -- must be resolved "amicably and voluntarily whenever possible" and requires that the complaining party first serve "written notice" on the other party, which notice shall "identify the specific Compact provision alleged to have been violated or in dispute and shall specify in detail the asserting party's contention and any factual

basis for the claim." And it requires the parties to meet within 30 days of receipt of the notice in an effort to resolve the dispute.

Paragraph 12.2 provides for formal arbitration pursuant to the rules of the American Arbitration Association, with detailed requirements for the conduct of that activity that the parties shall equally bear the expenses incurred.

Paragraph 12.3 provides for federal district court litigation, but specifically restricts such litigation to a *de novo* review of any arbitration award under Paragraph 12.2 with the further provision that the district court decision shall be subject to appeal. Significantly, the State imposed the following language on the Tribe through its "pre-approved" offer of the Compact:

> Each of the parties hereto waives immunity and consents to suit therein for such limited purposes, and agrees not to raise the Eleventh Amendment to the United States Constitution or comparable defense to the validity of such waiver.
>
> [Emphasis supplied.]

The Compact plainly defines the exclusive manner in which the State can raise the issues it is seeking to have this Court adjudicate. For reasons that are not readily apparent to be legal in nature, the State now proposes to ignore the dispute resolution requirements it wrote. In effect, the State believes that the Compact is irrelevant when its requirements are inconvenient.

The State made this bed, but now chooses not to lie in it. The implicit argument that its own Compact is irrelevant is both disingenuous and pettifogging.

II. Plaintiff Cannot Succeed on the Merits Because the Tribe and Tribal Officials Have Sovereign Immunity

The Class III Gaming Compact was executed by the federally recognized Indian Tribe, Kialegee Tribal Town.[2] No other tribal entity, including the federally-chartered Tribal Town Corporation, is party to that Compact or otherwise has any role in the development of the Indian Allotment land at issue in this litigation. Indeed, the Complaint correctly alleges that only Indian tribes may engage in Class III Gaming pursuant to IGRA, without even suggesting that the Tribal Town Corporation can somehow be involved in any gaming activities. Complaint ¶25. Still, the State alleges that the Tribal Town Corporation's Charter has waived tribal Sovereign immunity (Complaint ¶14) without attempting to connect the corporation to the tribe as a matter of applicable federal law.

This is not the first time that a party has attempted to plead that a "sue or be sued" clause in a tribal corporation charter issued pursuant to the Oklahoma Indian Welfare Act of June 26, 1936, 25 U.S.C. §§501-510 (49 Stat. 1967) ("OIWA") constituted a tribal waiver of sovereign immunity. While such an argument has to ignore the facts that the OIWA Tribe was organized and federally recognized separately from the incorporation of the OIWA Tribal Town Corporation, the courts have not. The inconvenient truth is that this very argument has been advanced and rejected.

Simply stated, the argument that the "sue and be sued" clause in OIWA Tribal Town Corporation Charters waives the tribal sovereign immunity has been rejected in previous litigation, including litigation to which the State was a party. *See* Subsection D below and *Seneca-Cayuga Tribe of Okla. v. State of Okla.*, 874 F.2d 709, 715 n. 9 (10th Cir. 1989).

---

[2] *See* Compact at Preamble ("This Compact is made and entered into and between the Kialegee Tribel, a federally recogized Indian Tribe (tribe), and the State of Oklahoma....") and Signature Page ("APPROVED: KIALEGEE TRIBAL TOWN [by] Tiger Hobia, Mekko").

Finally, in recycling its theory of tribal-waiver-through-corporate-charter, the State ignores the well-established body of law that tribal waivers must be (i) made by the tribe itself, (ii) clearly and unequivocally stated and (iii) unquestionably applicable to the claims before the court. And to insure that the waivers are applicable to the claims present, all tribal waivers must be strictly construed by the court for the waiver determines the bounds of the court's jurisdiction.

A. The State's claims as waiver of tribal sovereign immunity

The only sovereignty waivers executed by the Tribe are in the Compact

As discussed above, there are limited waivers of tribal sovereign immunity agreed to by the Tribe at Parts 6 (claims for tort and prize claims) and 12 (Dispute Resolution). However, nothing in the Compact even suggests that the Tribal Town Corporation is a party to that document or that the Tribal Town Corporation has somehow executed a broad -- even general -- waiver of tribal sovereign immunity consenting on behalf of itself, the Tribe and various tribal officials to this lawsuit.

The State affirmatively has avoided and ignored the Compact restrictions as to waiver of tribal sovereign immunity, apparently because they clearly do not apply to this litigation. Yet, the State simultaneously and aggressively invoked the Compact in stating its causes of action. alleging that the Tribe is violating various of its provisions. As a matter of law, it is difficult to imagine the legal and factual arguments that possibly could reconcile this disconnect.

The only sovereignty waiver cited by the State is the "sue and be sued" clause of the Town Corporation Charter

That the State cannot invoke the narrow tribal waivers in the Compact is demonstrated by its allegations at Complaint ¶14, attempting to resurrect an already judicially-rejected theory that a broad and general tribal waiver of sovereign immunity can be found in the Corporate Charter of the Tribal Town Corporation:

> 14. Any sovereign immunity from suit of the Kialegee Tribal Town or the Town corporation is not a defense to this suit because the action is against the officers and [Tribal Business] Committee members of such entities sued in their official capacities, and Article 3(b) of the corporate charter of the Town Corporation provides that it has the power "to sue and be sued."

The State in briefing before this Court has identified and cited to The Tribal Town Corporate Charter as "Doc. 6, Ex. 2" at page 2 of its Document 51, but that citation is erroneous. Doc. 6, Ex. 2 is the "Registration Information for Florence Development Partners, LLC, registered April 5, 2011, in the State of Oklahoma as an Oklahoma limited liability company." The State has not made the Corporate Charter a part of the record. Nevertheless, attached hereto for the Court's convenience is the Corporate Charter. (Ex. 1)

B. The applicable provisions of the Tribal Town Corporation Charter

Section 3 of the Corporate Charter identifies the Corporate Powers reserved to the Tribal Town Corporation; however, nothing in Section 3 purports to cede the enumerated corporate powers to any other entity or person. Indeed, the Section's pertinent language makes clear that it is not establishing broad and general rights for any third party:

> *Corporate Powers.*
>
> 3. The Kialegee Tribal Town, subject to any restrictions contained in the Constitution and laws of the United States or in the Constitution and By-Laws of the tribal town, and to the limitations of sections 4 and 5 of this Charter shall have the following corporate powers as provided by section 3 of the Oklahoma Indian Welfare Act of June 26, 1936:
>
> * * *
>
> (b) to sue and be sued; to complain and defend in any courts: *Provided, however,* That the grant or exercise of such power shall not be deemed a consent by the tribal town or by the United States to the levy of any judgment, lien, or attachment upon the property of the tribal town other than income or chattels specially pledged or assigned.

This section only details the powers retained by the Corporation, including the corporate right to initiate litigation and waive its corporate sovereignty for the purposes of contracting. The Tribal Corporation cannot waive the Tribe's sovereign immunity and there is nothing to establish that it has done so.

The Tribal Town Corporation is not the Tribe. Moreover, the Tribal Constitution (Dkt # 6, Ex. 4) does not even purport to establish a waiver of tribal sovereignty. Indeed, if there was a general waiver such as the one suggested by the State, then logic says that the limited waivers in the Compact are superfluous. Moreover, the logic goes further, in that the lack of any sovereign immunity would extend to every Oklahoma Indian tribe that organized under the Oklahoma Indian Welfare Act, a universal waiver that would come as a great surprise to all those tribes as well as the United States Department of the Interior and its Bureau of Indian Affairs. Equally surprising would be the realization that the waiver determination sought likely would negate the tribal sovereign immunity of hundreds of Indian tribes in the United States currently conducting business through tribal corporations with similar "sue and be sued" provisions in their corporate charters without any further waiver of tribal sovereign immunity.

C. Statement of federal law controlling waivers of tribal sovereign immunity

The State is urging this Court to articulate a principle that there can be an inadvertent broad and general waiver of tribal sovereign immunity that is simply contrary to one of the most important and consistently-protected tenets of Indian Law in this country. Bluntly stated, the State is distorting the law, for it well-established that waivers of tribal sovereignty must be unequivocally expressed and strictly construed in accordance with the specific language used by the tribe.

It is a "fundamental principle of Indian law that Indian tribes are sovereign entities." *Seneca-Cayuga Tribe of Okla. v. State of Okla.*, 874 F.2d 709, 714 (10th Cir. 1989). It has "long been settled law that retained tribal sovereign immunity is co-extensive with that of the United States." *Id.* at 715 (citations omitted). A federal court has no jurisdiction "over a suit against a tribe absent either an effective waiver or consent by the tribe . . . " *Id.* (quotation and citation omitted).

While tribal sovereign immunity "is not absolute, waivers of sovereign immunity are *strictly construed." Id.* (citing *Ramey Const. Co., Inc. v. The Apache Tribe of the Mescalero Reservation,* 673 F.2d 315, 320 (10th Cir. 1982)) (emphasis added). Stated another way, "a waiver of sovereign immunity cannot be implied but must be unequivocally expressed." *Ramey,* 673 F.2d at 318 (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978)). When that consent to be sued is given, "the terms of the consent establish the bounds of a court's jurisdiction." *Id.* at 320.

The requirement that a waiver of tribal immunity "be 'clear' and 'unequivocally expressed' is not a requirement that may be flexibly applied or even disregarded based on the parties or the specific facts involved." *Ute Dist. Corp. v. Ute Indian Tribe*, 149 F.3d 1260, 1267 (10th Cir. 1998) (citation omitted), *aff'd in part and remanded in part, Ute Distrib. Corp. v. Sec'y of the Interior,* 584 F.3d 1275 (10th Cir. 2009), *cert. denied, Ute Distrib. Corp. v. Salazar,* 130 S. Ct. 3285 (2010). More precisely, absent a "clearly expressed waiver by . . . the tribe . . . , the Supreme Court has refused to find a waiver of tribal immunity based on policy concerns, perceived inequities arising from the assertion of immunity, or the unique context of a case." *Id.*

Tribal sovereign immunity "extends to subdivisions of the tribe, including Tribal business and commercial enterprises." *Swanda Bros., Inc. v. Chasco Constructors, Ltd., L.L.P.,* 2010 U.S.

Dist. LEXIS 30699, *6 (W.D. Okla. Mar. 30, 2010) (citing *Native Am. Dist. v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1292 (10th Cir. 2008)). Absent an express waiver by an Indian tribe, "sovereign immunity deprives the federal courts of jurisdiction to entertain lawsuits against [the] tribe, its subdivisions and business entities, as well as its officials acting in their official capacities." *Id.* (citing *Native Am. Dist.*, 546 F.3d at 1293; *F.D.I.C. v. Meyer*, 510 U.S. 471, 475 (1994)).

D. The courts have rejected claims that "sue and be sued" clauses in tribal corporate charters constitute waivers of tribal sovereign immunity

The State has lost this argument in the past. Yet, it is now presenting the same issues without even mentioning -- let alone distinguishing -- case law of which it is or should be fully aware.

The State mistakenly thinks that the relevant phrase is intended to be some kind of blanket waiver of tribal sovereign immunity. However, the courts have reviewed this very corporate charter language and found otherwise. In the process, they have explained the reason the relevant clause was written in the first place.

The Tenth Circuit has addressed this specific point, stating that tribal corporate charters "usually include a 'sue and be sued' clause to enable the tribes to engage in commercial activity as corporations without losing their sovereign immunity as tribes." *Seneca-Cayuga Tribe of Okla. v. State of Okla., supra,* 874 F.2d at 715 n. 9 (10th Cir. 1989). "[tribal] corporate charters usually include a 'sue and be sued' clause to enable the tribes to engage in commercial activity as corporations without losing their sovereign immunity as tribes." Continuing, the *Seneca-Cayuga Court* stated, "[t]his court has held that the presence of such a clause in a tribal corporate charter does not waive the tribe's immunity as a tribe." *See Ramey Constr. Co., supra, 673 F.2d at 320 (emphasis added); see also Kenai Oil & Gas, Inc. v. Department of Interior, 522 F.Supp.*

521 (C.D. Utah 1981), aff'd and remanded, 671 F2d 383 (10th Cir. 1982). See also Gold v. Confederated Tribes of the Warm Springs Indian Reservation, 478 F. Supp. 190, 196 (D.Or. 1979); Boe v. Fort Belknap Indian Community, 455 F. Supp. 462 (D.Mont. 1978), aff'd, 642 F.2d 276 (9th Cir. 1981); Atkinson v. Haldane, 569 P.2d 151 (Alaska 1977); but see Martinez v. Southern Ute Tribe, 150 Colo. 504, 374 P.2d 691 (1962) (construing "sue and be sued" clause as rendering tribe amenable to suit in Colorado state court under Colorado constitution); *cf. Fontenelle v. Omaha Tribe of Nebraska, 430 F.2d 143 (9th Cir. 1970)* (tribe/corporation distinction not raised).

As discussed above, this provision is designed to allow tribes to engage in commercial activities as corporations without losing their tribal sovereignty and otherwise inadvertently waiving their tribal sovereign immunity. The State's jurisdictional claims are simply wrong.

3. Shatswell Is Not a Member or Secretary of the Committee and Has No Authority That Needs to Be or Can Be Preliminarily Enjoined

As briefed in Shatswell's motion to dismiss, Shatswell has no authority over this project at all. She cannot be preliminarily enjoined from doing something that she is not doing. In order to conserve the Court's time, Shatswell refers the Court to all her arguments in Dkt # 63, rather than repeating them here.

4. Hobia, in His Capacity as Mekko and a Member of the Committee Has No Individual Liability For Actions of the Tribe and There Is Nothing That Can Be Preliminarily Enjoined

As briefed in Hobia's motion to dismiss, Hobia should be dismissed as a party. In order to conserve the Court's time, Hobia refers the Court to all his arguments in Dkt # 62 rather than repeating them here. As shown above, there is nothing for the Court to preliminarily enjoin with respect to Hobia.

5. Plaintiff Has No Claim Against Florence Development Partners, L.L.C. and There is Nothing That Can Be Preliminarily Enjoined

As briefed in Florence Development Partners L.L.C.'s motion to dismiss, Florence Development Partners, L.L.C. should be dismissed as a party. In order to conserve the Court's time, Florence Development Partners, L.L.C. refers the Court to all its arguments in Dkt # 64 rather than repeating them here. In any event, there is nothing, as shown above, for this Court to preliminarily enjoin with respect to Florence Development.

CONCLUSION

These Defendants respectfully request that the Court deny Plaintiff's motion for a preliminary injunction for the reasons stated above.

Respectfully submitted,

FELDMAN, FRANDEN, WOODARD & FARRIS

/s/ Paula J. Quillin
Joseph R. Farris, OBA #2835
Paula J. Quillin, OBA #7368
Williams Center Tower II, Suite 900
2 West 2nd Street
Tulsa, Oklahoma 74103
Tel: 918/583-7129
Fax: 918/584-3814
and
Dennis J. Whittlesey, OBA #009578
DICKINSON WRIGHT PLLC
1875 Eye Street, NW – Suite 1200
Washington, D.C. 20006
Tel: 202/659-6928

ATTORNEYS FOR DEFENDANTS
HOBIA, SHATSWELL, AND FLORENCE
DEVELOPMENT PARTNERS, LLC

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of March, 2012, I electronically transmitted the foregoing document to the Clerk of the Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

M. Daniel Weitman
dan.weitman@oag.ok.gov

Lynn H. Slade
lynn.slade@modrall.com

William C. Scott
bscott@modrall.com

R. Tom Hillis
thillis@titushillis.com

/s/ Paula J. Quillin