

**IN THE DISTRICT COURT OF CUSTER COUNTY  
STATE OF OKLAHOMA**

FIRST BANK AND TRUST COMPANY, )

*Plaintiff,* )

v. )

THE CHEYENNE AND ARAPAHO )  
TRIBES; JANICE PRAIRIE CHIEF- )  
BOSWELL, in her representative capacity, if )  
any, as the alleged Governor of the )  
CHEYENNE AND ARAPAHO TRIBES; )  
LESLIE WANDRIE-HARJO, in her )  
representative capacity, if any, as the alleged )  
Governor of the CHEYENNE AND )  
ARAPAHO TRIBES, )

*Defendants.* )

Case No. CV-2011-53

**BRIEF IN SUPPORT OF JOINT CONSOLIDATED MOTION TO DISMISS FOR LACK  
OF SUBJECT MATTER JURISDICTION, FAILURE TO JOIN A NECESSARY AND  
INDISPENSIBLE PARTY, AND BECAUSE ANOTHER CASE IS PENDING**

In support of Defendants the Cheyenne and Arapaho Tribes and Governor Janice Prairie Chief-Boswell's *Joint Consolidated Motion to Dismiss for Lack of Subject Matter Jurisdiction, Failure to Join a Necessary and Indispensible Party, and Because Another Case is Pending*, Defendants submit the arguments set forth below:

**ARGUMENT**

**I. THE SUIT IS BARRED BY SOVEREIGN IMMUNITY AND THEREFORE THE COURT LACKS SUBJECT MATTER JURISDICTION**

**A. Tribal Sovereign Immunity Bars this Suit.**

The Cheyenne and Arapaho Tribes' Constitution ("Chey. & Arap. Const."), art. X, § 1 provides:

The Tribes shall possess Sovereign Immunity. Nothing in this Constitution shall be deemed to waive Sovereign Immunity from suit. Only the Legislature and the Tribal Council may authorize a waiver of Sovereign Immunity by law. Any authorization by the Legislature to waive Sovereign Immunity shall be specific, for a limited scope and duration, in writing, and shall be limited to a maximum of one hundred thousand dollars per party. Any authorization by the Tribal Council to waive Sovereign Immunity shall be specific, for a limited scope and duration, and in writing.

*Id.* (emphasis added). Chey. & Arap. Const. art. X, § 2 provides:

The Tribes and its Officials and Employees acting in their official capacity or within the scope of their authority shall be immune from suit brought by any party not subject to the Jurisdiction of the Tribes except to the extent waived in accordance with the law.

*Id.* (emphasis added). Chey. & Arap. Const. art. X, § 3 provides:

The Tribes and its Officials and Employees acting in their official capacity or within the scope of their authority shall be immune from suit except for suits in equity filed exclusively in the Courts of the Tribes by any party subject to the Jurisdiction of the Tribes to enforce rights and duties established by law or this Constitution. 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 their authority.

*Id.* (emphasis added). *See excerpt of Constitution*, attached hereto as **Exhibit 1**.

Tribal sovereign immunity from suit is a judicially accepted doctrine. "Indian tribes enjoy sovereign immunity from civil suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation." *Kiowa Tribe of Oklahoma v. Mfg. Tech., Inc.*, 523 U.S. 751, 760 (1998). "As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Dilliner v. Seneca-Cayuga Tribe*, 2011 OK 61, ¶12, 258 P.3d 516, 519. Waivers of immunity cannot be implied, but must be unequivocally expressed. *Id.* Absent an effective waiver or consent, "a state court may not exercise jurisdiction over a recognized Indian tribe." *Id.*

Tribal sovereign immunity extends to tribal officials and "generally immunizes tribal officials from claims made against them in their official capacities." *Native Am. Distrib. v. Seneca-*

*Cayuga Tobacco Co.*, 546 F.3d 1288, 1296 (10th Cir.2008). Tribal sovereign immunity extends to a tribe's commercial as well as to its governmental activities and protects the tribe or tribal entity regardless of whether its activities take place on or off a reservation. *State ex rel. Edmondson v. Native Wholesale Supply*, 2010 OK 58, ¶31, 237 P.3d 199, 210.

In this case, Congress has not authorized suit against the Cheyenne and Arapaho Tribes ("Tribes"). "The Tribes' Constitution clearly and unequivocally provides that the Tribes and its officers acting within their official capacities "shall be immune from suit . . . ". Chey. & Arap. Const. art. X, § 2. Nothing in the Tribes' Constitution waives sovereign immunity for the causes set forth in Plaintiff's *Petition*. Further, the Tribes did not consent to this suit and the Bank Documents lack any clear and unequivocal waiver of sovereign immunity. Therefore, tribal sovereignty bars the present suit.

**B. Plaintiff Cannot Avoid the Operation of Sovereign Immunity by Suing Defendant Boswell in An [Unofficial] "Representative Capacity."**

Plaintiff cannot circumvent tribal immunity through "a mere pleading device." *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 70–71 (1989). "The general rule is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter." *Hawaii v. Gordon*, 373 U.S. 57, 58, (1963). Thus, determining whether the sovereign is the real party in interest depends upon the relief sought by the plaintiff. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100–01 (1984). The "real, substantial party in interest is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants." *Regents of the Univ. of California v. Doe*, 519 U.S. 425, 429 (1997).

Here, Plaintiff has attempted to evade the Tribes' immunity by suing Janice Prairie Chief-Boswell in her [unofficial] "representative capacity." However, what is clear from the *Petition* is that Plaintiff wants relief in the form of a declaratory judgment as to who the Governor is and



therefore who has control of the Tribes' account. *Pet.* ¶¶ 16-17. Such relief would clearly interfere with the public administration and affect the disposition of unquestionably sovereign property. Accordingly, Plaintiff's pleading device of suing Janice Prairie Chief-Boswell in her [unofficial] "representative capacity" in an attempt to get around the Tribes' sovereign immunity should be rejected.

## **II. THE TREASURER IS A NECESSARY AND INDISPENSABLE PARTY THAT CANNOT BE JOINED BECAUSE OF SOVEREIGN IMMUNITY**

A party may move to dismiss for "[f]ailure to join a party" if, in the absence of that party, "complete relief cannot be accorded among those already parties." 12 Okla. Stat. § 2012(B)(7); *Id.* § 2019. If a necessary party cannot be joined, "the Court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed . . .". *Id.* § 2019(B). In making its determination, the Court shall consider the following factors:

(1) To what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; (2) The extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; (3) Whether a judgment rendered in the person's absence will be adequate; and (4) Whether the plaintiff will have an adequate remedy if the action is dismissed for non-joinder.

*Id.* Joinder is mandatory if a party is necessary or indispensable. *Gettler*, 1987 OK 57, 739 P.2d 515, 517.

According to Chey. & Arap. Const., art VII, § 4, "Monies which have been appropriated by law shall not be drawn from the Treasury except by signature of the Governor. Spending government revenues or drawing monies from the Treasury without authorization and appropriation by law and without a signature by the Governor shall constitute embezzlement and fraud against the Tribes and which shall be punishable by a jail term of up to one year and a fine of up to five thousand dollars per offense." *Id.* § 4(b). The Treasurer shall safeguard and be responsible for the

financial assets and practices of the Tribes. *Id.* § 4(e). *See excerpt of Constitution*, attached hereto as **Exhibit 2**.

Here, the Treasurer is a necessary party because he is charged with safeguarding and being responsible for the financial assets and practices of the Tribes. Thus, any decision rendered in the Treasurer's absence would prejudice him and affect his responsibility to safeguard and be responsible for the financial assets of the Tribes deposited at First Bank and Trust Company. However, the Treasurer cannot be joined because like the Governor, he is cloaked with the Tribes' sovereign immunity from suit. Accordingly, this case must be dismissed as the Treasurer cannot be joined. Protective provisions in the shaping of relief cannot be framed to protect the Treasurer because a decision by this Court will necessarily affect and impinge on the above-referenced constitutional duties.

### **III. THIS COURT LACKS JURISDICTION BECAUSE OTHER ACTIONS ARE PENDING BETWEEN THE SAME PARTIES FOR THE SAME CLAIMS**

#### **A. The Tribes Possess Inherent and Exclusive Power Over Matters of Internal Tribal Governance.**

Oklahoma state court jurisdiction is not proper for internal tribal governance because the Tribes possess inherent and exclusive power. *Montana v. U.S.*, 450 U.S. 544, 564 (1981). **The Supreme Court has recognized that tribes have long-exercised the right to self-governance under federal law. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). Tribes have the power to make their own substantive law in internal matters and to enforce that law in their own forums. *Id.* at 55–56. If a tribal forum is available to resolve the matter, courts have specifically held that the aggrieved party must seek relief in that forum and that subjecting an intra-tribal dispute to a forum other than the one the tribes have established for themselves infringes on sovereignty. *Id.* at 59.**

Thus, Oklahoma state courts may not exercise jurisdiction over matters of internal tribal governance when a tribal forum exists for resolving that matter.

Here, this Court lacks authority as a matter of federal law to interfere with the Tribes' internal governance. The Tribes are a distinct, independent political community, retaining their natural rights of self-governance. The Tribes have their own Constitution, system of government, courts, a governor, and a tribal council. Furthermore, a tribal forum is available to resolve this matter. To go forward in this forum infringes on the Tribes' sovereignty.

**B. The Tribes Have Decided Who Their Governor Is.**

The Chey. & Arap. Const. establishes the manner by which the Tribes' Governor is selected. "The Governor and Lieutenant Governor shall be elected by the eligible voters of the Tribe." Chey. & Arap. Const., art. VII, § 1(b). "The Governor and Lieutenant Governor shall serve four year terms or until a successor has been sworn into office." *Id.* § 2. The Governor is vested with executive power to "execute, administer, and enforce laws." *Id.* § 4(a). Executive power is also vested in the Governor to oversee expenditures of government revenues. *Id.* § 4(a). Once elected, the Tribes' Governor remains in that position until her lawful term ends, she resigns from office, or she is validly removed in accordance with constitutional processes. *Flyingman v. Election Commission*, SC-07-13 at 13 (Chey. & Arap. S. Ct. Sept. 24, 2007), attached hereto as **Exhibit 3**.

In November 2009, Governor Prairie Chief-Boswell was duly elected as Governor of the Tribes. Her four year term has not expired; she has not resigned; and she has not been validly removed from office in accordance with the constitutional processes. Further, the Tribes have held the same. *See Motion to Quash the January 17, 2012 [Invalid] "Order" of Former Supreme Court Justices and Order quashing, In Re: [Invalid Declaration of] Vacancy in the Office of Lieutenant Governor*, Case No. SC-2012 (Jan. 25, 2012), attached hereto as **Exhibit 4**; and *Resolution No.*



050711STC-001, Finally Resolving the Purely Intra-Tribal Dispute As to Whom the Governor is, Who the Supreme Court Justices are, the current composition of the Third Legislature, and who the Attorney General is, and disapproving/disavowing/annulling any and All Attempts to Submit This Intra-Tribal Dispute to Any Entity Outside the Cheyenne and Arapaho Tribes' Constitutional System, attached hereto as **Exhibit 5**.

C. **The Bureau of Indian Affairs Is Considering Who the Tribes' Governor Is.**

*Harjo v. Southern Plains Reg'l Dir., Bureau of Indian Affairs*, is pending in the Interior Board of Indian Appeals ("IBIA") between Leslie Wandrie-Harjo and Janice Prairie Chief-Boswell. *Assignment of Docket Numbers for Interim Recognition Decision Appeals, Order for Regional Director to Separately Identify the Record for Each Decision, and Order Granting Extension for Submission of Record*, 12 IBIA 120/121/051/065/066 (Feb. 17, 2012), attached hereto as **Exhibit 6**. In that case, IBIA is struggling with whether or not it will decide who the Tribes' Governor is for purposes of implementing its government-to-government relationship. *Id.* As an additional matter, the issue before this court of who the Tribes' Governor is was also already brought in federal court and dismissed for lack of subject matter jurisdiction. There, the Court found that the relief requested could only be granted to the extent the court can resolve the intratribal dispute as to who the Tribes' Governor is. *Leslie Wandrie-Harjo v. Janice Prairie Chief-Boswell*, CIV-11-171-F (W.D.Okla.), Order of August 15, 2011, at p. 8, attached hereto as **Exhibit 7**.

**CONCLUSION**

For these reasons, Defendants the Cheyenne and Arapaho Tribes and Governor Janice Prairie Chief-Boswell respectfully request the Court dismiss the action for lack of **subject matter jurisdiction**, failure to join a necessary and indispensable party, and because another case is pending involving the governorship issue.

Respectfully submitted this 15<sup>th</sup> day of March, 2012.

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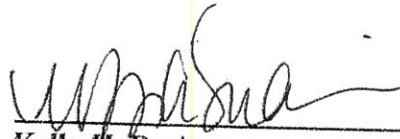


## CERTIFICATE OF SERVICE

The undersigned certifies that the original of the foregoing **BRIEF IN SUPPORT OF JOINT CONSOLIDATED MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION, FAILURE TO JOIN A NECESSARY AND INDISPENSIBLE PARTY, AND BECAUSE ANOTHER CASE IS PENDING** in this matter was served via Federal Express, on the District Court of Custer County, Oklahoma, on March 15, 2012. Also on this day, a true and correct copy of the foregoing was contemporaneously mailed via U.S. Mail, postage pre-paid to:

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