

Kevin E. O'Malley
Timothy W. Overton
GALLAGHER & KENNEDY, P.A.
2575 East Camelback Road
Phoenix, Arizona 85016-9225
(602) 530-8000
Attorneys for Defendant CDST-Gaming I, LLC

COURT OF INDIAN APPEALS

ANADARKO, OKLAHOMA

COMANCHE NATION, a federally recognized Indian tribe, Plaintiff, vs. CDST-GAMING I, LLC, an Arizona limited liability company, Defendant.	Case No. CIV 08-A12 Appeal Case No. CIV-10-A02P CDST-GAMING I, LLC'S SEPTEMBER 2012 MOTION TO DISMISS REGARDING JURISDICTION AND THE 2011 ORDINANCE
---	---

Pursuant to the United States District Court for the Western District of Oklahoma's ("District Court") July 23, 2012 Order, Defendant CDST-Gaming I, LLC ("CDST") respectfully submits this motion to dismiss this case as it relates to the issue remanded by the District Court: "whether the Court of Indian Offenses may exercise jurisdiction over the Comanche Nation's action against CDST pursuant to the 2011 Ordinance." For the following reasons, this Court should dismiss the Comanche Nation's (the "Nation") case and allow the matter to be decided through AAA Arbitration.

I. Brief Background And The District Court's July 2012 Order.

After several years and rounds of arguments regarding who has jurisdiction to resolve the substantive dispute between CDST and the Comanche Nation related to the Lawton facility contracts, the District Court recently resolved all but one of the jurisdictional issues the parties presented. Specifically, The District Court overruled this Court's (the "CIA") and Court of Indian Offenses' ("CIO") rulings by holding that the CIO may not exercise jurisdiction over CDST pursuant to 25 C.F.R. § 11.103, because CDST did not expressly stipulate to the CIO's jurisdiction. *See* July 23, 2012 Order, attached hereto as Exhibit A. The District Court's Ruling also recognized that forcing CDST "to litigate in a small, local court system closely related to one of the parties is serious business," and it left unchanged this Court's decision that the CIO could not exercise jurisdiction over CDST pursuant to 25 C.F.R. § 11.116. *See* this Court' January 26, 2010 Opinion, attached hereto as Exhibit B (holding that the CIO could not exercise jurisdiction over CDST pursuant to Section 116 because post-agreement legislation "does more than change procedures; it creates jurisdiction where none existed earlier" and "affect[s] substantive rights of the parties.").

The District Court also resolved the issue regarding which of the parties' contracts govern, when it recognized that the First Amended and Restated Machine Vendor Agreement (the "Amended Agreement"):

- Supersedes, modifies, and amends the Original Agreement in its entirety;
- Confirms the Nation's limited waiver of sovereign immunity;

- Provides for binding arbitration for any controversy or claim arising out of or related to the Amended Agreement;
- Waives the Nation's immunity to be sued on an arbitration award in the District Court;
- "Does not, by any stretch, include an agreement by the parties to submit to the jurisdiction of the Court of Indian Offenses for litigation such as that brought by the Comanche Nation against CDST"; and
- Provides that federal and Oklahoma state laws – *not Indian laws* – govern the agreement.

The District Court did not completely dismiss the case and order AAA Arbitration, however, because the Federal Defendants belatedly argued that the CIO could exercise jurisdiction under the 2011 Ordinance. Because the 2011 Ordinance had not yet been addressed by this Court or the CIO, the District Court did not address the issue, but instead remanded that issue to be presented first to this Court.¹ For the following reasons, the 2011 Ordinance cannot empower the CIO to exercise jurisdiction over CDST to resolve the parties' disputes.

A. The Nation's 2011 Jurisdiction Ordinance Is Inapplicable: Federal And Oklahoma Law - Not Tribal Law - Govern The Parties' Agreement.

The Nation's 2011 Ordinance cannot give the CIO jurisdiction over CDST because the parties' Agreement is clear that federal and Oklahoma law govern:

"Applicable Law. This Agreement shall be governed by federal law, and to the extent not inconsistent therewith, the laws of the State of Oklahoma." The District Court

¹ Because this case has been pending for so long, the District Court also held that in the absence of a final ruling by this Court by December 1, 2012, the District Court would consider the matter at that time.

recognized the application of federal and Oklahoma law to this dispute, including the jurisdiction arguments:

The Amended Agreement further provides that the agreement “shall be governed by federal law, and to the extent not inconsistent therewith, the laws of the State of Oklahoma.” The Original Agreement provides that the agreement “shall be interpreted and construed in accordance with the laws of the COMANCHE TRIBE.” The court concludes that the Amended Agreement, while confirming the existing assignments, cannot be interpreted to contain an express stipulation by the parties consenting to the jurisdiction of the tribal court or the Court of Indian Offenses.

Consequently, the Tribe’s 2011 Ordinance – a tribal, not a federal law – does not apply to the parties’ Agreement, and does not give the CIO jurisdiction over CDST. Instead, federal law and Oklahoma state law apply. And, as noted above, this Court and the District Court already declared that the CIO cannot exercise jurisdiction over CDST pursuant to these federal jurisdictional statutes.

B. Even If The 2011 Ordinance Could Apply To Give The CIO Jurisdiction, This Case Must Be Dismissed Because The Parties Chose AAA Arbitration As The Forum For Resolving Disputes.

The United States Supreme Court has made it clear that when parties contract to resolve disputes in a specific forum, other courts must honor that forum selection and transfer the case to the chosen forum absent some extraordinary reason such as fraud. *M/S Breman v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972) (“The choice of that forum was made in an arm’s length negotiation by experienced and sophisticated businessmen, and absent some compelling and countervailing reasons it should be honored by the parties and enforced by the courts.”). In *M/S Bremen*, the Supreme Court explained:

The correct approach would have been to enforce the forum selection clause specifically unless Zapata could clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching.

Id. at 15. Further explaining the heightened burden the Nation faces in order to avoid its agreement to litigate in AAA Arbitration, the Supreme Court stated:

Whatever ‘inconvenience’ Zapata would suffer by being forced to litigate in the contractual forum as it agreed to do was clearly foreseeable at the time of contracting. In such circumstances it should be incumbent on the party seeking to escape his contract to show that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court. Absent that, there is no basis for concluding that it would be unfair, unjust, or unreasonable to hold that party to his bargain.

Here, the Nation clearly and unequivocally agreed to resolve all disputes before an arbitrator applying AAA Arbitration rules:

17. Negotiated Resolution. *In any controversy or claim arising out of or relating to this Agreement*, or the breach thereof, the parties shall make every good faith effort to resolve the dispute amicably, through direct negotiation. If such direct negotiation is futile or unsuccessful, *the parties agree to go to formal arbitration* under the provisions of Section [18] below.

18. Arbitration. *If any dispute which arises between the parties with respect to this Agreement* is unable to be resolved by direct negotiation, *the dispute shall be settled by binding arbitration* conducted in accordance with the Commercial Arbitration Rules of the American Arbitration Association (“AAA”) then in effect. The arbitrator shall be mutually agreed upon and shall have specific experience involving Indian tribes as litigants, if possible. The decision of the arbitrator shall be binding between the parties. The arbitration shall take place in Comanche County, Oklahoma. The parties shall each bear their own legal fees and expenses

unless, in the opinion of the arbitrators, the position of one party is meritless, in which event the losing party shall reimburse the prevailing party for such fees and expenses.

The District Court also acknowledged the parties' agreement to arbitrate:

The Amended Agreement, as articulated in sections 17 and 18, provides for binding arbitration for any controversy or claim arising out of or relating to the Amended Agreement. Section 19 waives the tribe's immunity to be sued on an arbitration award in the Court of the Comanche Indian Tribe, if any, and/or the United States District Court for the District of Oklahoma. ***The Amended Agreement does not, by any stretch, include an agreement by the parties to submit to the jurisdiction of the Court of Indian Offenses for litigation such as that brought by the Comanche Nation against CDST.***

July 23, 2012 Order, pp. 15-16 (emphasis added).

Additionally, the Tenth Circuit Court of Appeals has established that by consenting to jurisdiction and designating a specific forum as the "exclusive forum" for resolving disputes under a contract, the parties are bound to resolve their dispute in that forum, and have "unequivocally waived" their rights to resolve the disputes in any other forum. *American Soda, LLP v. U.S. Filter Wastewater Group, Inc.*, 428 F.3d 921, 927 (10th Cir. 2005); cf. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985) ("By its terms, the [Federal Arbitration] Act leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed.").

Thus, even if the CIO technically *could* exercise jurisdiction over CDST pursuant to the 2011 Ordinance, the CIO cannot exercise jurisdiction here because the parties clearly chose to litigate any disputes before an arbitrator applying AAA Arbitration rules.

In other words, even if the CIO had jurisdiction, such jurisdiction would not allow the CIO to ignore the parties' agreement and its requirement to participate in AAA Arbitration. As was the case in *M/S Breman*, here "[t]here is strong evidence that the forum clause was a vital part of the agreement, and it would be unrealistic to think that the parties did not conduct their negotiations, including fixing the monetary terms, with the consequences of the forum clause figuring prominently in their calculations." *Id.* at 14; *see also Black & Veatch Constr., Inc. v. ABB Power Generation, Inc.*, 123 F. Supp. 2d 569, 579-581 (D. Kan. 2000) (when a forum selection clause is reasonable, a court can dismiss a case filed in another forum; "The most important factor, however, is the contractual forum selection clause."); Exhibit A (forcing CDST "to litigate in a small, local court system closely related to [the Nation] is serious business"). In this case, it is very clear that AAA Arbitration was a vital, negotiated contract term, which came about specifically because CDST became involved in contract negotiations and performance- the Amended Agreement changed the forum for dispute resolution from the Tribal Court to AAA arbitration.

Moreover, the parties' agreement to AAA Arbitration limits and restricts any court's jurisdiction to solely giving effect to the parties' contract expectations by ordering the parties to participate in AAA Arbitration. *See M/S Breman*, 407 U.S. at 13 ("No one seriously contends in this case that the forum selection clause 'ousted' the District Court of jurisdiction over Zapata's action. The threshold question is whether that court should have exercised its jurisdiction to do more than give effect to the legitimate expectations of the parties, manifested in their freely negotiated agreement, by specifically enforcing

the forum clause.”). Consequently, this Court should do what any other court would be required to do under these circumstances, which is to dismiss this case and/or order the parties to resolve their disputes in AAA Arbitration as required by the Agreement.

C. Disputes Regarding The Applicability Of The Agreement, Including The Parties Choice Of Forum, Must Be Decided By The Arbitrator.

The United States Supreme Court has declared that “arbitration clauses as a matter of federal law are ‘separable’ from the contracts in which they are embedded.” *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 402 (1967). As a result, the *only* contractual issue that could come before the CIO is whether the arbitration provision itself – independently from the remainder of the parties’ Agreement – was procured by fraud or otherwise not enforceable. Said another way, even if this Court concluded that the CIO has “jurisdiction,” the questions becomes “jurisdiction to do what?” The answer is that inasmuch as the Nation is challenging the entire Agreement (along with the arbitration clause-rather than challenging the arbitration clause only), that is a matter that must be decided by arbitration, and the CIO would only have jurisdiction to dismiss the case and order the parties to resolve their disputes in arbitration. *See, e.g., Acquire v. Canada Dry Bottling*, 906 F. Supp. 819, 826 (E.D.N.Y. 1995) (an arbitrator must resolve claims that an entire agreement, containing an arbitration clause, is not enforceable); *Nilsen v. Prudential-Bache Sec.*, 761 F. Supp. 279, 287 (S.D.N.Y. 1991) (“[C]laims of fraud or duress as reason to avoid enforcing the signed contract with its arbitration clause ... themselves [are] subject to arbitration.”).

Here, the Nation does not argue that the parties' specific arbitration clause is invalid. Instead, the Nation argues that the entire Amended Agreement is invalid. Clearly, this is a matter that must be decided by an arbitrator, not by a court. This makes sense, because if there is a challenge to the entire contract, the person chosen by the parties to resolve contract disputes (in this case, the arbitrator) should decide the arguments related to the contract. On the other hand, if the Nation's argument would have been that the specific arbitration clause itself was invalid because of fraud, duress, or some related doctrine, the issue to be decided would be whether parties (who had undisputedly reached an agreement) specifically chose to authorize an arbitrator to resolve disputes related to the agreement. Ordinarily, an arbitrator would not get to decide whether his authority to resolve the contract dispute was procured by fraud; a direct attack on the arbitrator's authority usually would be decided by a court. Once a court determined that the specific arbitration clause was not invalid by reasons of fraud, etc., the court would then be required to send the matter to the arbitrator to resolve all other disputes.

In resolving whether an arbitration clause itself was fraudulently procured or otherwise invalid, courts err on the side of compelling arbitration. "The preeminent concern of Congress in passing the [Federal Arbitration] Act was to enforce private agreements into which parties had entered," a concern which "requires that we rigorously enforce agreements to arbitrate." *Dean Witter*, 470 U.S. at 221. Consistent with this underlying purpose, courts must "construe arbitration clauses as broadly as possible," compelling arbitration "unless it may be said with positive assurance that the arbitration

clause is not susceptible of an interpretation that covers the asserted dispute.” *AT&T Techs., Inc. v. Comm’n Workers of Amer.*, 475 U.S. 643, 650 (1986); *Accord DLC Dermacare LLC v. Castillo*, 2010 WL 5391458, *2 (D. Ariz. 2010) (“The Supreme Court has made clear that ‘any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration[.]’”) (citing and quoting *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983)).

As shown above, the arbitration provision in the parties’ agreement is extremely broad, and clearly dictates that issues of arbitrability are to be decided by an arbitrator. The Nation has not argued that the specific arbitration clause was fraudulently procured or otherwise independently invalid. The Nation’s argument has always been that the entire agreement was invalid because it did not receive proper authorization. This issue clearly must be decided by arbitration.

Moreover, AAA Arbitration Rules, which the parties agreed would govern all disputes related to their Agreement, are clear that the arbitrator has the authority to rule on the validity of the arbitration clause, the underlying agreement, and the arbitrator’s jurisdiction to hear the dispute. American Arbitration Association Commercial Arbitration Rules, Rule “R-7 Jurisdiction” (“The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement. The arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part. . . . A decision by the arbitrator that the contract is null and void shall not for that reason alone render invalid the arbitration clause.”). Thus, even if specific attacks on an

arbitration clause are usually decided by a court, any such attacks in this case would be decided by the arbitrator.²

Thus, this Court should dismiss the Nation's action against CDST, and direct the parties to resolve their dispute—including any claims that the Agreement is not valid or binding—before an arbitrator, pursuant to the Agreement and pursuant to AAA Arbitration Rules.

D. Applying The 2011 Ordinance To This Case Would Be Unfair To CDST.

As noted above, the District Court recognized that forcing CDST “to litigate in a small, local court system closely related to [the Nation] is serious business.” And, of course, this Court recognized more than two and a half years ago that if the CIO exercised jurisdiction over CDST based on post-agreement legislation, it would do “more than change procedures; it [would] create[] jurisdiction where none existed earlier” and “affect substantive rights of the parties.” There can be no doubt that this is exactly what the Nation is doing. Moreover, at the time this Court explained that a post-agreement change to jurisdiction would be unfair, it was not known that the pre-agreement jurisdictional statutes did not empower the CIO to exercise jurisdiction over CDST. Now that the District Court has clarified that the pre-agreement jurisdictional statutes did not authorize CIO jurisdiction, this Court's fairness rationale is even more poignant.

It would be manifestly unfair to allow a contracting party, years after signing the contract and years after being involved in litigation, to change the law that applies to the

² This point may be moot in this case because the Nation has not challenged the specific arbitration clause, meaning there is nothing for a court to decide; all issues must be decided by the arbitrator.

contract and change such a serious right for which CDST bargained. As was stated in *M/S Bremen*, “[t]here is strong evidence that the forum clause was a vital part of the agreement, and it would be unrealistic to think that the parties did not conduct their negotiations, including fixing the monetary terms, with the consequences of the forum clause figuring prominently in their calculations.” *Id.* at 14; *see also* 25 U.S.C. § 1302(a)(9) (“No Indian tribe in exercising powers of self-government shall pass any bill of attainder or ex post facto law.”).

Allowing the CIO to exercise jurisdiction over CDST in this dispute would be permitting a contracting party to unilaterally change the contract and also to overrule both the CIA and the District Court’s rationale regarding federal jurisdictional statutes. This would be akin to changing the rules in the middle of a game, made worse because one of the teams was allowed to change the rules to their own benefit and to the other team’s detriment. It’s one thing to have to play on the road, and quite another to come out of the locker room after halftime and find that the home team moved your goal post and replaced it with another one of theirs. Allowing the Nation to change the agreed-upon forum ten years after the parties agreed to that forum and five years after litigation began is essentially telling CDST that even though it was right all along that the agreed-upon rules called for a neutral playing site, the opposing party has unilaterally changed those rules, and now you have to play them on their home field (and, by the way, they get to move the goal post any time you are getting close to scoring).

II. Conclusion.

For the foregoing reasons, this Court should dismiss the Nation's complaint and order the parties to submit to AAA Arbitration.

RESPECTFULLY SUBMITTED this 13th day of September, 2012.

GALLAGHER & KENNEDY, P.A.

By



Kevin E. O'Malley, Esq.
Timothy W. Overton, Esq.
2575 East Camelback Road
Phoenix, Arizona 85016-9225
Attorneys for CDST-Gaming I, LLC

ORIGINAL sent by Federal Express for
filing and faxed to the Court of Indian
Appeals this 13th day of September, 2012,

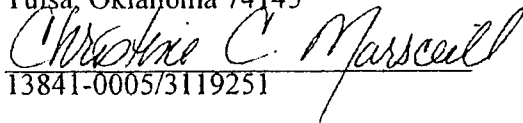
And a copy mailed this 13th day
of September, 2012 to:

William R. Norman, Jr., OBA No. 14919
Kirke Kickingbird, OBA No. 5003
HOBBS, STRAUS, DEAN & WALKER, LLP
101 Park Avenue, Suite 700
Oklahoma City, Oklahoma 73102

Klint A. Cowan, OBA No. 20187
Jay P. Walters, OBA No. 17364
FELLERS, SNIDER, BLANKENSHIP, BAILEY & TIPPENS, P.C.
100 North Broadway, Suite 1700
Oklahoma City, OK 73102

H. Lee Schmidt
UNITED STATES ATTORNEYS OFFICE
210 West Park Avenue, Suite 400
Oklahoma City, Oklahoma 73102

Charles R. Babst, Jr.
OFFICE OF THE TULSA FIELD SOLICITOR
Department of Interior
7906 East 33rd Street, Suite 100
Tulsa, Oklahoma 74145



13841-0005/3119251

EXHIBIT A

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

CDST-GAMING I, LLC, an)	
Arizona limited liability company,)	
)	
Plaintiff,)	
)	
-vs-)	Case No. CIV-09-521-F
)	
COMANCHE NATION, OKLAHOMA,)	
a federally recognized Indian tribe; the)	
COURT OF INDIAN OFFENSES FOR)	
THE COMANCHE NATION; and)	
PHILIP D. LUJAN, Magistrate, Court)	
of Indian Offenses for the Comanche)	
Nation,)	
)	
Defendants.)	

ORDER

Before the court is the Comanche Nation's Motion for Reconsideration of Order Denying Rule 12(b)(7) Dismissal (doc. no. 129). Also before the court are the Motion for Summary Judgment (doc. no. 130) filed by plaintiff, CDST-Gaming I, LLC and the Federal Defendants' Cross-Motion for Summary Judgment (doc. no. 137).

Background

Defendant, Comanche Nation, Oklahoma ("Comanche Nation"), and Defendants, Court of Indian Offenses for the Comanche Nation and Philip D. Lujan, Magistrate for the Court of Indian Offenses for the Comanche Nation (the "Federal Defendants"), previously sought dismissal of the Amended Complaint filed by plaintiff, CDST-Gaming I, LLC ("CDST"), under Rule 12(b)(1) and Rule 12(b)(7) of the Federal Rules of Civil Procedure. Defendants argued that the court lacked subject

matter jurisdiction over CDST's claims against the Comanche Nation based upon tribal sovereign immunity. In addition, defendants argued that the dismissal of the Comanche Nation required dismissal of the entire action because the Comanche Nation could not be joined as a party under Rule 19, Fed. R. Civ. P., in light of tribal sovereign immunity. *See*, Rule 12(b)(7), Fed. R. Civ. P.

In an order issued August 8, 2011 (doc. no. 117), the court determined that the Comanche Nation was entitled to dismissal of CDST's Amended Complaint on the basis of tribal sovereign immunity. The court, however, determined that dismissal of the entire action was not required. The court concluded that the Comanche Nation was not a required party under Rule 19(a). In so concluding, the court found that complete relief could be accorded among the remaining parties to the action despite the absence of the Comanche Nation and that the disposition of this action in the Nation's absence would not as a practical matter impair the Comanche Nation's ability to protect its interest in the outcome of this action. As to the latter finding, the court concluded that the presence of the Federal Defendants in this lawsuit offset any prejudice to the Comanche Nation's interest. The court specifically concluded that the Federal Defendants' interests in defending the decision of the Court of Indian Offenses to exercise jurisdiction over the Comanche Nation's action against CDST were "virtually identical" to the interests of the Comanche Nation. The court also concluded that even if the Comanche Nation should be classified as a required party under Rule 19(a), the Comanche Nation was not an indispensable party under Rule 19(b). The court, in so concluding, balanced the four factors set forth in Rule 19(b) and determined that this action should proceed.

The Federal Defendants had also sought dismissal of CDST's Amended Complaint under Rule 12(b)(6), Fed. R. Civ. P. The court denied the motion in the August 8th order. A scheduling conference was held on December 1, 2011. At the

conference, the parties requested the court to delay further action as the parties had been conferring and negotiating in an attempt to resolve the action and that the parties were working on an agreed judgment that would obviate the need for additional litigation. The parties advised the court that the Comanche Nation was considering filing an additional motion. Subsequently, the Comanche Nation filed its motion for reconsideration and CDST filed its motion for summary judgment. The court held a status conference with counsel for CDST and the Federal Defendants on January 5, 2012 and advised the parties that it would address both the motion for reconsideration and motion for summary judgment at the same time. It declined to suspend briefing on CDST's motion for summary judgment pending a ruling on the motion for reconsideration. Thereafter, the Federal Defendants filed a cross-motion for summary judgment. All motions have been fully briefed and the court proceeds with determination of the motions.

Motion for Reconsideration

The Comanche Nation requests the court to reconsider its order denying the Comanche Nation's request to dismiss this action pursuant to Rule 12(b)(7). The Comanche Nation contends that the primary reason for the court's decision was that the Federal Defendants and the Comanche Nation share "virtually identical" interests. However, the Comanche Nation contends that it has now become clear that the Comanche Nation and the Federal Defendants' interests are not "virtually identical." The Comanche Nation asserts that the Federal Defendants are poised to reach an agreement with CDST whereby the Court of Indian Offenses will not exercise jurisdiction over CDST in the Comanche Nation's action against CDST. The Comanche Nation states that the settlement between the Federal Defendants and CDST will leave the Comanche Nation without a forum to resolve the issue of whether tribal officials may bind the Comanche Nation to contracts or waive

sovereign immunity without authorization from the Comanche Business Committee or Tribal Council. The Comanche Nation contends that the Court of Indian Offenses is the only forum in which it can assert its judicial power and obtain a binding interpretation of tribal law. Because the interests of the Federal Defendants and the Comanche Nation are not completely aligned (in light of the proposed settlement), the Comanche Nation contends that resolving this action without the Comanche Nation may impair its claimed interest in the resolution of the issues presented in this action. The Comanche Nation thus contends that it is a required party under Rule 19(a). In addition, the Comanche Nation contends that it is an indispensable party to the action. According to the Comanche Nation, the balancing of the four factors in Rule 19(b) show that equity and good conscience require dismissal. The Comanche Nation contends that its tribal sovereign immunity justifies dismissal of this action even in the face of potential prejudice to CDST.

The court construes the Comanche Nation's motion as an "interlocutory motion invoking the district court's general discretionary authority to review and revise interlocutory rulings prior to entry of final judgment." Fye v. Okla. Corp. Comm'n, 516 F.3d 1217, 1224 n. 2 (10th Cir. 2008) (quotation omitted); see Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 12 (1983) ("[E]very order short of a final decree is subject to reopening at the discretion of the district judge."). Hence, in adjudicating defendant's motion, the court is not bound by the stricter standard for considering a motion under Rule 59(e) or Rule 60(b), Fed. R. Civ. P. *Id.*; Raytheon Constructors, Inc. v. ASARCO, Inc., 368 F.3d 1214, 1217 (10th Cir. 2003). While the court has the discretion to review and vacate its order denying dismissal of this action under Rule 12(b)(7), the court nonetheless declines to exercise that discretion. Although the Federal Defendants may have been poised to reach a settlement of this action with CDST, including an agreement not to exercise

jurisdiction over CDST in the Comanche Nation's action against CDST, no settlement has in fact been reached. No agreed judgment has been filed in this case. CDST filed its motion for summary judgment on the merits shortly after the Comanche Nation filed its motion for reconsideration and the Federal Defendants have responded and have filed a cross-motion for summary judgment. The Comanche Nation and the Federal Defendants' interests in defending the decision of the Court of Indian Offenses to exercise jurisdiction over the Comanche Nation's action against CDST remain directly aligned. The court continues to conclude that the presence of the Federal Defendants offsets any prejudice to the Comanche Nation. The court rejects the Comanche Nation's contention that it is a required party under Rule 19(a) and that this action should not proceed in equity and good conscience without its joinder. *Accord, Sac & Fox Nation of Missouri v. Norton*, 240 F.3d 1250, 1259 (10th Cir. 2001), *cert. denied*, 534 U.S. 1078 (2002) (determining that the Wyandotte Tribe was neither necessary nor indispensable pursuant to Rule 19 when the Secretary of Interior's interest in the suit was, "[a]s a practical matter . . . 'virtually identical' to the interests of the tribe"); *Kansas v. United States*, 249 F.3d 1213, 1226 (10th Cir. 2001) (determining that the Miami Tribe was neither necessary nor indispensable under Rule 19 when the State of Kansas sought relief from a decision by the National Indian Gaming Commission (NIGC) that land leased by the tribe was "Indian lands" for purposes of the Indian Gaming Regulatory Act, due to the presence of several defendants whose "interests, considered together, are substantially similar, if not identical to the Tribe's interests in upholding the NIGC's decision.").

Motion for Summary Judgment and Cross-Motion for Summary Judgment

CDST requests the court to grant summary judgment in its favor, with a determination that the Court of Indian Offenses may not exercise jurisdiction over CDST in the action filed by the Comanche Nation against CDST. According to

CDST, there are two possible bases under which the Court of Indian Offenses could seek to exercise jurisdiction over CDST: (1) if CDST stipulated to such jurisdiction as provided for in 25 C.F.R. §11.103; or (2) if post-agreement legislation, specifically 25 C.F.R. § 11.116 and the 2011 ordinance,¹ can be applied retroactively to grant the Court of Indian Offenses jurisdiction over CDST in the underlying action. CDST contends that the record in this case shows that CDST did not stipulate to the jurisdiction of the Court of Indian Offenses. Additionally, CDST asserts that the Court of Indian Appeals, the appellate court for the Court of Indian Offenses, has already determined that post-agreement legislation (specifically 25 C.F.R. § 11.116) cannot be retroactively applied to give the Court of Indian Offenses jurisdiction over CDST. CDST contends that it would be inconsistent for the Federal Defendants to now argue that the 2011 ordinance, passed three years after § 11.116 became effective, could apply retroactively to give the Court of Indian Offenses jurisdiction. Consequently, CDST maintains that the court should grant summary judgment in its favor.

The Federal Defendants, in their response and cross-motion for summary judgment, request the court to affirm the decision of the Court of Indian Offenses that it had jurisdiction over CDST under 25 C.F.R. § 11.103 on the basis that CDST stipulated to jurisdiction. The Federal Defendants contend that the decision of the Court of Indian Offenses was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. If the court does not affirm the decision of the Court of Indian Offenses, the Federal Defendants request the court to remand the question of jurisdiction under the 2011 ordinance to the Court of Indian Offenses,

¹ On April 2, 2011, the Comanche Business Committee adopted the Comanche Nation Tribal Court Civil Jurisdiction Ordinance of 2011, Resolution No. 36-11, which was approved by the Bureau of Indian Affairs, by letter dated June 10, 2011. *See*, order (doc. no. 117), p. 13.

specifically, the appellate division, to address the question of whether the 2011 ordinance provides a basis for jurisdiction. The Federal Defendants state that the appellate division could, in its discretion, remand the matter to the Court of Indian Offenses trial division for decision. Alternatively, the Federal Defendants request the court to find that the Court of Indian Offenses may properly exercise jurisdiction over CDST pursuant to the 2011 ordinance. The Federal Defendants maintain that the 2011 ordinance does not raise any retroactivity concerns, arguing that the Supreme Court has recognized that statutes conferring jurisdiction do not trigger the presumption against retroactivity, even when applied to pending cases. The Federal Defendants assert that the 2011 ordinance specifies that it is jurisdictional in nature and applies to all pending and future cases. Further, the Federal Defendants argue that the 2011 ordinance does not affect any substantial contractual rights claimed by CDST because it does not alter any rights CDST possessed when signing the agreements at issue in this case and entering into the consensual relationship with the Comanche Nation. The only burden to CDST, according to the Federal Defendants, is the burden of litigating in the Court of Indian Offenses. The Federal Defendants maintain that this burden does not trigger the anti-retroactivity presumption. Finally, the Federal Defendants contend that the 2011 ordinance does not impermissibly expand the scope of the jurisdiction of the Court of Indian Offenses as because it permits jurisdiction only over actions arising within the territorial jurisdiction of the tribal court and CDST entered into the Comanche Nation's jurisdiction to conduct its business activities.

Under Rule 56, Fed. R. Civ. P., summary judgment is appropriate if "the movant shows that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Rule 56(a), Fed. R. Civ. P. When applying this standard, the court views the evidence and draws all reasonable inferences therefrom in the light most favorable to the party opposing summary

judgment. Atlantic Richfield Co. v. Farm Credit Bank of Wichita, 226 F.3d 1138, 1148 (10th Cir. 2000). “Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.” *Id.* (quotation omitted). When the parties file cross motions for summary judgment, as in this case, the court is entitled to “assume that no evidence needs to be considered other than that filed by the parties, but summary judgment is nevertheless inappropriate if disputes remain as to material facts.” *Id.* (quotation omitted); *see also*, Buell Cabinet Co., Inc. v. Sudduth, 608 F.2d 431, 433 (10th Cir. 1979) (“Cross-motions for summary judgment are to be treated separately; the denial of one does not require the grant of another.”)

Application of the Administrative Procedure Act

In their papers, the Federal Defendants contend that the court must construe this action as one arising under the Administrative Procedure Act (APA), 5 U.S.C. § 701, *et seq.* According to the Federal Defendants, as the Honorable David L. Russell found, in the case of Panther Partners, LLC v. Lujan, Case No. CIV-09-1251-R, order (doc. no. 20) (W.D. Okla. Apr. 19, 2010), that Section 702 of the APA waives sovereign immunity for an action such as this one. The Federal Defendants assert that under the APA, a court may set aside an agency action, like that of the Court of Indian Offenses, only where such action “is arbitrary, capricious, abuse of discretion, or otherwise not in accordance with the law.” 5 U.S.C. § 706(2)(A). The Federal Defendants contend that the court’s task is to determine whether the decision of the Court of Indian Offenses was within the bounds of reasoned decision making. According to the Federal Defendants, the ultimate standard of review under the APA is deferential and presumes the validity of the agency action.

CDST counters that the APA does not govern this action. Although the APA provides the waiver of sovereign immunity, CDST asserts that as explained by Judge

Russell in Panther Partners, the waiver applies whether the suit was brought under the APA or not. CDST points out that the decision of the Tenth Circuit in Simmat v. United States Bureau of Prisons, 413 F.3d 1225 (10th Cir. 2005), cited by Judge Russell, makes it clear that Congress waived sovereign immunity for nonmonetary relief regardless of whether the suit arises under the APA. Consequently, CDST contends that the APA standard of review is not a necessary concomitant of the APA's waiver of sovereign immunity.

The court concludes that the arbitrary and capricious standard of review does not govern the resolution of the issue now before the court. CDST has not brought a claim against defendants under the APA. And the Tenth Circuit, in Simmat, specifically stated that the waiver set forth in 5 U.S.C. § 702 "is not limited to suits under the Administrative Procedure Act." Simmat, 413 F.3d at 1233. Section 702 is a "general waiver of the government's sovereign immunity from injunctive relief." United States v. Murdock Mach. & Engr. Co., 81 F.3d 922, 930 n. 8 (10th Cir. 1996). Thus, the court concludes that the APA's arbitrary and capricious standard is inapplicable.

25 C.F.R. § 11.103

As the court previously concluded in its order denying the Federal Defendants' Rule 12(b)(6) motion:

[T]he Code of Federal Regulations determines whether the Court of Indian Offenses may exercise jurisdiction over the Nation's action against CDST. As relevant here, the Nation exercises its judicial power by way of the Court of Indian Offenses, rather than a tribal court. The Court of Indian Offenses operates under 25 C.F.R. Part 11. That court (and this one, in ruling on the present motion) is bound by the regulations enacted for the Court of Indian Offenses. *See*, 25 C.F.R. § 11.100(b) (effective prior to August 11, 2008) ("It is the purpose of the regulations in this part to provide

adequate machinery for the administration of justice for Indian tribes in those areas of Indian country where tribes retain jurisdiction over Indians that is exclusive of state jurisdiction but where tribal courts have not been established to exercise that jurisdiction.”) 25 C.F.R. 11.102 (Effective August 11, 2008) (“It is the purpose of the regulations in this part to provide adequate machinery for the administration of justice for Indian tribes in those areas of Indian country where tribes retain jurisdiction over Indians that is exclusive of State jurisdiction but where tribal courts have not been established to exercise that jurisdiction”); Auto Owners Ins. Co. v. Saunooke, 54 F. Supp. 2d 585, 586 (W.D.N.C. 1999).

See, order (doc. no. 117), pp. 10-11.

Section 11.103(a) of Title 25 of the Code of Federal Regulations, effective prior to August 11, 2008 and at the time the Comanche Nation’s action was filed against CDST, provides:

Except as otherwise provided in this title, each Court of Indian Offenses shall have jurisdiction over any civil action arising within the territorial jurisdiction over the court in which the defendant is an Indian, and of all other suits between Indians and non-Indians *which are brought before the court by stipulation of the parties*.

See, 25 C.F.R. § 11.103(a) (emphasis added). CDST contends that the record in this case is devoid of any evidence of an express stipulation by CDST to the jurisdiction of the Court of Indian Offenses. The Federal Defendants, on the other hand, contend that certain agreements and assignments demonstrate that CDST expressly stipulated to the jurisdiction of the Court of Indian Offenses. The Federal Defendants also contend that if the Comanche Nation is correct and these agreements and assignments are invalid under tribal law, CDST nonetheless impliedly stipulated to the jurisdiction

of the Court of Indian Offenses by entering into a business relationship with the Comanche Nation.

Initially, the court concludes that § 11.103 requires an express stipulation. The plain language of the regulation indicates that there must be a “*stipulation of the parties*.” 25 C.F.R. § 11.103(a) (emphasis added). A stipulation of the parties would require an agreement between the parties regarding jurisdiction. Black’s Law Dictionary (9th ed. 2009). The conduct of one of the parties, such as entering into a business relationship with a tribe, would not constitute an express stipulation of parties to the tribal court’s jurisdiction.

The Federal Defendants cite Wright v. Cannedy, 2 Okla. Trib. 363, 1992 WL 752144 (Wichita CIA Feb. 20, 1992) in support of their argument for implied stipulation. In that case, Court of Indian Appeals for the Wichita Tribe, interpreting a regulation similar to § 11.103, indicated that “other conduct manifesting the intent of the parties to clearly stipulate to the jurisdiction of this Court” could sustain a recognition of stipulation to the tribal court’s jurisdiction. *Id.* at 370, 1992 WL 752144 at *4. The court, however, concludes that the Wright case does not support a finding that entering to a business relationship with the tribe is sufficient to show a manifestation of intent of the parties to clearly stipulate to the tribal court’s jurisdiction for purposes of § 11.103. Indeed, the parties in Wright had entered into a farming and grazing lease involving Indian trust lands. However, that consensual relationship did not provide a basis for the tribal court’s exercise of jurisdiction over the non-Indians. The court concludes that the appellate court’s reference to “other conduct manifesting the intent of the parties to clearly stipulate to the jurisdiction of this Court” requires something more than entering into a business relationship with the tribe. There must be conduct which shows an express agreement by the parties to stipulate to the Court of Indian Offenses jurisdiction. Even where the tribe’s

counterparty is affiliated with the tribe, as was apparently the case at the outset of the series of transactions now before the court, it can fairly be said that agreeing to litigate in a small, local court system closely related to one of the contracting parties is serious business. An agreement to litigate in that framework should plainly appear. As will be seen, no such agreement plainly appears here.

In their papers, the Federal Defendants contend that certain agreements and assignments contain an express stipulation by CDST to the jurisdiction of the Court of Indian Offenses. CDST argues that there is no evidence in the cited documents that it stipulated to the jurisdiction of the Court of Indian Offenses. According to CDST, the First Amended and Restated Machine Vendor Agreement superseded all documents and specifically provides that any dispute is to be settled by binding arbitration.

The agreements and assignments cited by the parties are as follows. On August 22, 2000, the Comanche Nation and John Harrington Enterprises (“JHE”),² entered into a Machine Vendor Agreement (“Original Agreement”), under which the Comanche Nation gave JHE the right to purchase, install, maintain, control, service and supervise 300 gaming terminals in its Lawton gaming facility for a period of three years. Paragraph 13 of the Original Agreement provided that “[t]he parties agree to resolve any and all disputes of claims involving interpretation, breach, enforceability, or enforcement of this Agreement within the Courts of the COMANCHE TRIBE.” Ex. A to the Verified First Amended Complaint for Declaratory and Injunctive Relief (“Amended Complaint”).

On August 22, 2000, the Comanche Nation and JHE agreed to assign the Original Agreement to Integrity Gaming, Inc. (“Integrity”) for a time certain

² According to CDST, JHE is an entity owned and operated by a member of the Comanche Nation. See, Application for Preliminary Injunction (doc. no. 2), n. 4.

beginning August 22, 2000 and ending September 30, 2001. Ex. B to the Amended Complaint. The assignment provided that upon expiration of the assignment on September 30, 2001, the Original Agreement reverted to JHE.

On July 25, 2001, a second assignment was executed by the Comanche Nation, JHE, Integrity, and CDST. The assignment provided in pertinent part:

This Assignment expressly supersedes the Lease Assignment.

The Assignment to Integrity of the Existing Equipment (96 games) under the Lease [Original Agreement] is hereby extended through September 30, 2002.

Under the terms of the Lease [Original Agreement], an additional 204 devices can be placed at the Lawton facility. With the consent of the Tribe, evidenced hereby, Integrity will place an additional 106 devices at the Lawton facility and the temporary . . . facility. The term of the "New Equipment" . . . will commence on July 26, 2001 and run 36 months thereafter until July 26, 2004. As to the New Equipment, the Lease [Original Agreement] is hereby assigned to [CDST].

This Assignment only pertains to the "New Equipment" identified as Exhibit "A".

This Assignment confirms the limited waiver of sovereign immunity by the Tribe under Section 13 of the Lease [Original Agreement].

Ex. C to the Amended Complaint.

On November 13, 2002, a First Amended and Restated Machine Vendor Agreement ("Amended Agreement") was executed by the Comanche Nation, JHE, Integrity and CDST. Paragraph E of the Recitals of the Amended Agreement provides:

JHE shall continue to be the party principally responsible and shall have the exclusive right to purchase, install, maintain, control, service and supervise the Gaming Equipment in the Center. *This Agreement confirms the existing assignments currently in place and provides JHE with the right to assign its rights to the New Equipment without further action by the Tribe.*

Paragraph F of the Recitals of the Amended Agreement provides:

Based on the foregoing, the parties now desire to amend and restate the Original Agreement in its entirety to provide for the terms and conditions herein, *which shall supercede, modify and amend the Original Agreement in all respects.*

Section 23 of the Amended Agreement also provides in pertinent part:

This Agreement amends, modifies, supercedes and restates the Original Agreement in its entirety.

Ex. D to the Amended Complaint (emphasis added).

Section 17 of the Amended Agreement provides:

In any controversy or claim arising out of or relating to this Agreement, or the breach thereof, the parties shall make every good faith effort to resolve the dispute amicably, through direct negotiation. If such direct negotiation is futile or unsuccessful, the parties agree to go to formal arbitration under the provisions of Section 19 below.

Section 18 of the Amended Agreement provides:

If any dispute which arises between the parties with respect to this Agreement is unable to be resolved by direct negotiation, the dispute shall be settled by binding arbitration conducted in accordance with the Commercial Arbitration Rules of the American Arbitration Association ("AAA") then in effect. The arbitrator shall be mutually

agreed upon and shall have specific experience involving Indian tribes as litigants, if possible. The decision of the arbitrator shall be binding between the parties. The arbitration shall take place in Comanche County, Oklahoma

Section 19 provides in pertinent part:

By this Agreement, the Tribe expressly waives, in a limited manner, its immunity from suit and consents to be sued on an arbitration award in the Court of the Comanche Indian Tribe, if any, and/or United States District Court for the District of Oklahoma

Ex. D to the Amended Complaint.

Although paragraph E of the Recitals states that the Amended Agreement “confirms” the existing assignments, including the second assignment, the second assignment only confirmed “*the limited waiver of sovereign immunity by the Tribe under Section 13*” of the Original Agreement. Ex. C to the Amended Complaint. The second assignment did not confirm the entirety of Section 13. Moreover, paragraph F of the Recitals states that the parties “desire to amend and restate the Original Agreement in its entirety . . . which shall supercede, modify and amend the Original Agreement in all respects.” Section 23 of the Amended Agreement also states that the agreement “amends, modifies, supercedes and restates the Original Agreement in its entirety.” The Amended Agreement, as articulated in sections 17 and 18, provides for binding arbitration for any controversy or claim arising out of or relating to the Amended Agreement. Section 19 waives the tribe’s immunity to be sued on an arbitration award in the Court of the Comanche Indian Tribe, if any, and/or the United States District Court for the District of Oklahoma. The Amended Agreement does not, by any stretch, include an agreement by the parties to submit to the jurisdiction

of the Court of Indian Offenses for litigation such as that brought by the Comanche Nation against CDST. The Amended Agreement further provides that the agreement “shall be governed by federal law, and to the extent not inconsistent therewith, the laws of the State of Oklahoma.” The Original Agreement provides that the agreement “shall be interpreted and construed in accordance with the laws of the COMANCHE TRIBE.” The court concludes that the Amended Agreement, while confirming the existing assignments, cannot be interpreted to contain an express stipulation by the parties consenting to the jurisdiction of the tribal court or the Court of Indian Offenses.³ The court therefore concludes that the Court of Indian Offenses may not exercise jurisdiction over the Comanche Nation’s action against CDST pursuant to 25 C.F.R. § 11.103. Thus, CDST’s motion for summary judgment is granted and the Federal Defendants’ motion for summary judgment is denied on the issues of whether the Court of Indian Offenses may exercise jurisdiction over the Comanche Nation’s action against CDST pursuant to 25 C.F.R. § 11.103.

25 C.F.R. § 11.116

The court need not determine whether the Court of Indian Offenses can exercise jurisdiction over the Comanche Nation’s action against CDST under this provision. The Court of Indian Appeals, the appellate division of the Court of Indian Offenses, ruled that § 11.116 could not apply retroactively to the Comanche Nation’s action against CDST. The Federal Defendants have not argued that the Court of Indian

³ The court notes that the Federal Defendants have represented that the Comanche Nation maintains that all of the agreements and assignments cited by the parties are invalid as they were executed without authority. The Comanche Nation filed its action in the Court of Indian Offenses to determine the validity of the agreements and assignments. The court need not and does not decide whether the agreements and assignments are valid (much less what the consequences would be if they were determined not to be valid). The parties have relied upon the agreements and assignments to show an express stipulation by CDST to the jurisdiction of the Court of Indian Offenses and the court has examined the agreements and assignments for that purpose.

Offenses may exercise jurisdiction over Comanche Nation's action against CDST based upon § 11.106.

2011 ordinance

On April 2, 2011, while this action was pending, the Comanche Business Committee adopted the Comanche Nation Tribal Court Civil Jurisdiction Ordinance of 2011, Resolution No. 36-11, which was approved by the Bureau of Indian Affairs by letter dated June 10, 2011. The 2011 ordinance provides, in pertinent part, that the Court of Indian Offenses:

shall have jurisdiction over any civil action arising within the territorial jurisdiction of the Tribal Court in which:

(a) At least one party is an Indian, provided that the term "Indian" shall not include the Comanche Nation . . . and provided further that actions in which the Comanche Nation . . . is a party shall be governed by subsections 2 and 3 below;

(b) The Comanche Nation . . . is a plaintiff; or

© The Comanche Nation . . . is a defendant

* * * *

This Ordinance is jurisdictional in nature. This Ordinance shall apply to all pending and future cases in the Tribal Court.

See, Ex. 1 to doc. no. 97.

Under 25 C.F.R. § 11.108 (effective August 11, 2008) and its predecessor, 25 C.F.R. § 11.100(e) (effective prior to August 11, 2008), the Comanche Nation may enact ordinances, which, when approved by the Assistant Secretary for Indian Affairs or his or her designee, shall be enforceable in the Court of Indian Offenses and shall

supersede any conflicting regulation.⁴ The Court of Indian Offenses has not addressed whether it may exercise jurisdiction over CDST based upon the 2011 ordinance. The Federal Defendants contend that the Court of Indian Offenses should be afforded an opportunity to rule on the applicability of the 2011 ordinance and that the court should therefore remand the issue to the Court of Indian Offenses. Alternatively, the Federal Defendants contend that if the court declines to remand the matter, the court should find that the 2011 ordinance provides a proper basis for the exercise of jurisdiction by the Court of Indian Offenses over CDST. The Federal Defendants contend that the 2011 ordinance does not raise any retroactivity concerns. They assert that the Supreme Court has recognized that statutes conferring jurisdiction do not trigger the presumption against retroactivity, even when applied to pending cases. The Federal Defendants also contend that the 2011 ordinance does not affect any substantive rights claimed by CDST. They contend that the 2011 ordinance authorizes the Court of

⁴ Section 11.108 provides:

The governing body of each tribe occupying the Indian country over which a Court of Indian Offenses has jurisdiction may enact ordinances which, when approved by the Assistant Secretary-Indian Affairs or his or her designee:

- (a) Are enforceable in the Court of Indian Offenses having jurisdiction over the Indian country occupied by that tribe; and
- (b) Supersede any conflicting regulation in this part.

Section 11.100(e) provides:

The governing body of each tribe occupying the Indian country over which a Court of Indian Offenses has jurisdiction may enact ordinances which, when approved by the Assistant Secretary-Indian Affairs or his or her designee, shall be enforceable in the Court of Indian Offenses having jurisdiction over the Indian country occupied by that tribe, and shall supersede any conflicting regulation in this part.

Indian Offenses to serve as the forum for resolving certain types of civil disputes, including the Comanche Nation's action against CDST. It does not, the Federal Defendants argue, alter any rights that CDST possessed when signing the agreements at issue and entering into the consensual relationship with the Comanche Nation.

CDST contends that the Court of Indian Offenses has already determined, in addressing the applicability of 25 C.F.R. § 11.116 (effective August 11, 2008) that post-agreement jurisdictional legislation cannot apply to give the Court of Indian Offenses jurisdiction because it would create jurisdiction where none existed earlier and it would affect the substantive rights of the parties. CDST contends that it would be futile to remand the issue to the Court of Indian Offenses since its position on the effect of post-agreement jurisdictional legislation has already been decided.

"The tribal exhaustion rule provides that, absent exceptional circumstances, federal courts typically 'should abstain from hearing cases that challenge tribal court jurisdiction until tribal remedies, including tribal appellate review, are exhausted.'" Crowe & Dunlevy, P.C. v. Stidham, 640 F.3d 1140, 1149 (10th Cir. 2011) (quoting Bank of Oklahoma v. Muscogee (Creek) Nation, 972 F.2d 1166, 1170 (10th Cir. 1992)). "The rule is based on Congress's 'strong interest in promoting tribal sovereignty, including the development of tribal courts.'" Crowe & Dunlevy, P.C., 640 F.2d at 1149 (quoting Smith v. Moffett, 947 442, 444 (10th Cir. 1991)). The examination of the issues as to whether the tribal court has jurisdiction over Comanche Nation's action against CDST "should be conducted in the first instance in the Tribal Court itself." National Farmers Union Ins. Co. v. Crow Tribe of Indians, 471 U.S. 845, 856 (1985).

"As a prudential rule based on comity, the exhaustion rule is not without exception." Crowe & Dunlevy, P.C., 640 F.3d at 1150. "[E]xhaustion is not required if it is 'clear that the tribal court lacks jurisdiction,' such that 'the exhaustion

requirement would serve no purposes other than delay.” *Id.* (quoting Burrell v. Armijo, 456 F.3d 1159, 1168 (10th Cir. 2006)).

The court concludes that the issue of whether the 2011 ordinance allows the Court of Indian Offenses to exercise jurisdiction over Comanche Nation’s action against CDST should be addressed in the first instance by the Court of Indian Appeals. The court concludes that CDST has failed to demonstrate that jurisdiction is so clearly lacking under the 2011 ordinance that the adherence to the tribal exhaustion rule would serve no purpose other than delay. CDST contends that in light of the ruling of the Court of Indian Offenses with respect to § 11.116, it is inconsistent for the Federal Defendants to argue that the 2011 ordinance, passed three years after § 11.116, could apply retroactively to give the Court of Indian Offenses jurisdiction. CDST asserts that like § 11.116, the 2011 ordinance has an impermissible retroactive effect because it creates jurisdiction where none existed and affects CDST’s substantive rights. This court, however, notes that the language of the 2011 ordinance is quite different from that of § 11.116. Unlike § 11.116, the 2011 ordinance specifically provides that it applies to “all pending and future cases in the Tribal Court.”

In Landgraf v. USI Film Prod., 511 U.S. 244, 280 (1994), the Supreme Court established a two-part analysis for determining statutory retroactivity:

When a case implicates a federal statute enacted after the events in suit, the court’s first task is to determine whether Congress has expressly prescribed the statute’s proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, i.e., whether it would impair rights a party possessed when he acted, increase a party’s liability for past conduct, or impose new duties with respect to transactions already

completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.

Id. The same analysis applies to federal regulations. Bowen v. Georgetown University Hospital, 488 U.S. 204, 208 (1988) (Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result).

As has been noted, the 2011 ordinance, which was approved by the Acting Regional Director of the Southern Plains Regional Office, states that it is to apply to all pending cases. Under 25 C.F.R. § 11.108 (effective August 11, 2008) and its predecessor, 25 C.F.R. § 11.100(e) (effective prior to August 11, 2008), the Comanche Nation may enact ordinances, which, when approved by the Assistant Secretary for Indian Affairs or his or her designee, shall be enforceable in the Court of Indian Offenses and shall supersede any conflicting regulation. Thus, because the 2011 ordinance includes an express statement of the regulation's temporal reach, that command would appear to govern. Consequently, there would appear to be no need to determine whether the 2011 ordinance has a retroactive effect by impairing rights a party possessed when it acted, increasing a party's liability for past conduct, or imposing new duties with respect to the transactions already completed. The analysis, by the Court of Indian Offenses, of the issues presented by the 2011 ordinance would consequently not be dictated by its prior analysis of § 11.116, which contains no express command as to the regulation's temporal reach.

The court recognizes that this case was filed in 2009 and the Court of Indian Offenses, as well as the Court of Indian Appeals, has addressed the issue of jurisdiction previously. Nonetheless, the tribal court has not had an opportunity to address whether the tribal court has jurisdiction over Comanche Nation's action

against CDST under the 2011 ordinance. The court shall remand this action to the Court of Indian Appeals, the appellate division of the Court of Indian Offenses to address the issue of jurisdiction under the 2011 ordinance. In their response, the Federal Defendants state that the appellate division, in its discretion, could remand the issue to the trial division of the Court of Indian Offenses. Again recognizing that this case has been pending since 2009, the court, in the absence of a final decision by the tribal courts by December 1, 2012, shall proceed with a ruling as to whether the Court of Indian Offenses may exercise jurisdiction over the Comanche Nation's action against CDST under the 2011 ordinance. CDST and the Federal Defendants' motion for summary judgment are denied without prejudice to the court adjudicating the motions in the absence of a final decision from the Court of Indian Offenses as to whether the Court of Indian Offenses may exercise jurisdiction over the Comanche Nation's action against CDST pursuant to the 2011 ordinance. If the Court of Indian Offenses renders a final decision on the 2011 Ordinance issue by December 1, 2012, the court will permit the parties to re-file their motions addressing the 2011 ordinance and the ruling of the Court of Indian Offenses.

Conclusion

Based upon the foregoing, Comanche Nation's Motion for Reconsideration of Order Denying Rule 12(b)(7) Dismissal (doc. no. 129), is **DENIED**. CDST-Gaming I, LLC's Motion for Summary Judgment (doc. no. 130) is **GRANTED** and the Federal Defendants' Cross-Motion for Summary Judgment (doc. no. 137) is **DENIED** on the issue of whether the Court of Indian Offenses may exercise jurisdiction over the Comanche Nation's action against CDST pursuant to 25 C.F.R. § 11.103. CDST-Gaming I, LLC's Motion for Summary Judgment (doc. no. 130) and the Federal Defendants' Cross-Motion for Summary Judgment (doc. no. 137) are **DENIED** without prejudice to the court adjudicating the motions in the absence of a

final decision from the Court of Indian Offenses as to whether the Court of Indian Offenses may exercise jurisdiction over the Comanche Nation's action against CDST pursuant to the 2011 Ordinance. If the Court of Indian Offenses renders a final decision on the 2011 Ordinance issue by December 1, 2012, the court will permit the parties to refile their motions addressing the 2011 ordinance and the ruling of the Court of Indian Offenses. The court **REMANDS** the issue of whether the Court of Indian Offenses may exercise jurisdiction over the Comanche Nation's action against CDST pursuant to the 2011 Ordinance to the Court of Indian Appeals, the appellate division of the Court of Indian Offenses. The court **DIRECTS** the clerk of the court to administratively close this case pending proceedings in the Court of Indian Offenses. If a final decision by the Court of Indian Offenses is rendered prior to December 1, 2012, the parties shall notify the court as soon as practicable so that the court may reopen these proceedings for final adjudication of this action, if appropriate. If the court has not received, by December 2, 2012, notification from the parties of a final decision by the Court of Indian Offenses, the court shall reopen this action to proceed to final adjudication.

ENTERED this 23rd day of July, 2012.


STEPHEN P. FRIOT
UNITED STATES DISTRICT JUDGE

EXHIBIT B

01/26/2010 09:19 FAX 4052477240

COURT OF INDIAN OFFENSES

002

COURT OF INDIAN OFFENSES

FILED

In the Office of the Court Clerk

JAN 26 2010

IN THE COURT OF INDIAN APPEALS
ANADARKO, OKLAHOMA

COMANCHE NATION,

Petitioner,

vs.

CDST-GAMING I, LLC,

Respondent.

Docket _____ Page _____ Recorded _____
in Journal _____ on Page _____
BY: 95
Court Clerk/Deputy

Trial Case No. CIV-08-A12

Appeal Case No. CIV-10-A02P

OPINION

The Trial Court has certified the following question to the Appellate Division of the Court of Indian Offenses for the Comanche Nation:

Whether the Court of Indian Offenses for the Comanche Nation may exercise jurisdiction over this action by the Comanche Nation against CDST-Gaming I, LLC.

The Court has certified this as an interlocutory order for review by the Appellate Division of the Court of Indian Offenses pursuant to the General Rules of the Court of Indian Appeals, Rule No. 1-39(1979). The parties have argued that the jurisdiction of the Court of Indian Offenses is established and governed by regulations published in the Code of Federal Regulations. *Tillet vs. Lujan*, 931 Fed.2d 636 (10th Cir., 1991)

CDST's position is that 25 C.F.R. §11.103(a) prior to 2008 provided that Courts of Indian Offenses were prohibited from exercising jurisdiction over unconsenting non-members, i.e., tribes could not assert jurisdiction over non-Indian persons without their consent.

Nation's position depends to some degree on its interpretation of 25 C.F.R. §11-116(2009) which provides that the Court of Indian Offenses has "jurisdiction over any civil action arising

01/26/2010 09:19 FAX 4052477240

COURT OF INDIAN OFFENSES

003

within the territory or jurisdiction of the Court in which (1) the Defendant is an Indian; or other claims, provided at least one party is an Indian.”

The Trial Judge found that the instant action was pending when the “current jurisdiction rule of 25 C.F.R. §11.116(a)(2) took effect on August 11, 2008 ...” The Trial Judge stated further that the Rule was procedural in nature and effected no substantive rights of CDST-Gaming I, LLC.

The Court found that the Rule applied to this case and authorized this Court to exercise jurisdiction over the case and over CDST-Gaming I, LLC.

CDST-Gaming I, LLC argues that 25 C.F.R. §11.116(a)(2) does more than change procedures; it creates jurisdiction where none existed earlier. This Court agrees that 25 C.F.R. §11.116(a)(2) does affect substantive rights of the parties and finds that the Trial Court erred in relying upon said rule for its decision.

The Court found further that the previous jurisdictional rule, 25 C.F.R. §11.103(a)(2008) required a “stipulation” by non-Indian parties and found that Section 11.103(a) authorized the Court to exercise jurisdiction over this case and over CDST-Gaming I, LLC, for the reason that CDST-Gaming I, LLC had stipulated to the Court’s jurisdiction. The Court rejected CDST-Gaming I, LLC, “novation” arguments stating that the amendment relied upon was not an novation because it extinguished no obligations of the Nation.

The Court further found that CDST-Gaming I, LLC, had stipulated to the Court’s jurisdiction via its conduct, citing *Montana vs. 450 U.S. 544, 565-66 (1981)*.


This Court agrees with the Trial Court’s reasoning pursuant to the Court’s finding that CDST-Gaming I, LLC, had “stipulated” to the Court’s jurisdiction and that no novation occurred.

01/26/2010 09:19 FAX 4052477240

COURT OF INDIAN OFFENSES

0004

It is the opinion of this Court, therefore, that the opinion of the Trial Judge should be affirmed and the Court's denial of the Motion to Dismiss by CDST-Gaming I, LLC, be sustained.



STEVEN L. PARKER
Appeal Officer

CONCURRING:

REBECCA CRYER,
O. RONALD MCGEE
Appeal Officers

2010 BIA OPINION

01/26/2010 09:19 FAX 4052477240

COURT OF INDIAN OFFENSES

001

COURT OF INDIAN OFFENSES
FOR THE SOUTHERN PLAINS REGION TRIBES

P.O. BOX 368
ANADARKO, OKLAHOMA 73005

FACSIMILE TRANSMITTAL SHEET

TO: *Raymond Ramalla* FROM: *Andrea Phillips*
FAX NUMBER: *602-530-8500* DATE: *1/26/10*
RE: *Comanche Tribe* NO. OF PAGES INCLUDING COVER: *1*
Opinion on CDST's Petition
☐ URGENT ☐ FOR REVIEW ☐ PLEASE PROCESS ☐ PLEASE REPLY ☐ AS REQUESTED

NOTES/COMMENTS:

OFFICE OF THE COURT CLERK

Cheryl Koch, Court Clerk
Phone: 405/247-8511
Fax: 405/247-7240
E-mail: Cheryl.Koch@bia.gov

Andrea Phillips, Court Administrator
Phone: 405/247-8508 or 405/247-1542
Fax: 405/247-7240
E-mail: Andrea.Phillips@bia.gov

01/26/2010 09:19 FAX 4052477240

COURT OF INDIAN OFFENSES

002

COURT OF INDIAN OFFENSES

FILED

In the Office of the Court Clerk

JAN 26 2010

**IN THE COURT OF INDIAN APPEALS
ANADARKO, OKLAHOMA**

COMANCHE NATION,

Petitioner,

vs.

CDST-GAMING I, LLC,

Respondent.

)
)
)
)
)
)
)
)
)
)
)

Trial Case No. CIV-08-A12

Appeal Case No. CIV-10-A02P

Docket _____ Page _____ Recorded _____
In Journal _____ on Page _____
BY: 98
Court Clerk/Deputy

OPINION

The Trial Court has certified the following question to the Appellate Division of the Court of Indian Offenses for the Comanche Nation:

Whether the Court of Indian Offenses for the Comanche Nation may exercise jurisdiction over this action by the Comanche Nation against CDST-Gaming I, LLC.

The Court has certified this as an interlocutory order for review by the Appellate Division of the Court of Indian Offenses pursuant to the General Rules of the Court of Indian Appeals, Rule No. 1-39(1979). The parties have argued that the jurisdiction of the Court of Indian Offenses is established and governed by regulations published in the Code of Federal Regulations. *Tillet vs. Lujan*, 931 Fed.2d 636 (10th Cir., 1991)

CDST's position is that 25 C.F.R. §11.103(a) prior to 2008 provided that Courts of Indian Offenses were prohibited from exercising jurisdiction over unconsenting non-members, i.e., tribes could not assert jurisdiction over non-Indian persons without their consent.

Nation's position depends to some degree on its interpretation of 25 C.F.R. §11-116(2009) which provides that the Court of Indian Offenses has "jurisdiction over any civil action arising

within the territory or jurisdiction of the Court in which (1) the Defendant is an Indian; or other claims, provided at least one party is an Indian.”

The Trial Judge found that the instant action was pending when the “current jurisdiction rule of 25 C.F.R. §11.116(a)(2) took effect on August 11, 2008 ...” The Trial Judge stated further that the Rule was procedural in nature and effected no substantive rights of CDST-Gaming I, LLC.

The Court found that the Rule applied to this case and authorized this Court to exercise jurisdiction over the case and over CDST-Gaming I, LLC.

CDST-Gaming I, LLC argues that 25 C.F.R. §11.116(a)(2) does more than change procedures; it creates jurisdiction where none existed earlier. This Court agrees that 25 C.F.R. §11.116(a)(2) does affect substantive rights of the parties and finds that the Trial Court erred in relying upon said rule for its decision.

The Court found further that the previous jurisdictional rule, 25 C.F.R. §11.103(a)(2008) required a “stipulation” by non-Indian parties and found that Section 11.103(a) authorized the Court to exercise jurisdiction over this case and over CDST-Gaming I, LLC, for the reason that CDST-Gaming I, LLC had stipulated to the Court’s jurisdiction. The Court rejected CDST-Gaming I, LLC, “novation” arguments stating that the amendment relied upon was not an novation because it extinguished no obligations of the Nation.

The Court further found that CDST-Gaming I, LLC, had stipulated to the Court’s jurisdiction via its conduct, citing *Montana vs. 450 U.S. 544, 565-66 (1981)*.


This Court agrees with the Trial Court’s reasoning pursuant to the Court’s finding that CDST-Gaming I, LLC, had “stipulated” to the Court’s jurisdiction and that no novation occurred.

01/26/2010 09:19 FAX 4052477240

COURT OF INDIAN OFFENSES

004

It is the opinion of this Court, therefore, that the opinion of the Trial Judge should be affirmed and the Court's denial of the Motion to Dismiss by CDST-Gaming I, LLC, be sustained.


STEVEN L. PARKER
Appeal Officer

CONCURRING:

REBECCA CRYER,
O. RONALD MCGEE
Appeal Officers

2010 BIA/OPINION