IN THE COURT OF INDIAN OFFENSES FOR THE COMANCHE NATION ANADARKO, OKLAHOMA

COMANCHE NATION,	)	
	)	
Plaintiff,	)	
	)	Case No. CIV 08-A12
vs.	)	
	)	
CDST-GAMING I, LLC,	)	
	)	
Defendant.	)	

COMANCHE NATION'S BRIEF RE REMANDED ISSUE FROM WESTERN DISTRICT OF OKLAHOMA IN CASE NO. CIV-09-521-F AND COMBINED RESPONSE TO CDST'S RENEWED MOTION TO DISMISS

JIMMY K. GOODMAN, OBA #3451
HARVEY D. ELLIS, JR., OBA #2694
CROWE & DUNLEVY, P.C.
20 North Broadway, Ste. 1800
Oklahoma City, OK 73102
(405) 235-7700
(405) 239-6651 (Facsimile)
jimmy.goodman@crowedunlevy.com
harvey.ellis@crowedunlevy.com

D. MICHAEL McBRIDE, III OBA #15431
CROWE & DUNLEVY, P.C.
500 Kennedy Building
321 S. Boston
Tulsa, OK 74103-3313
(918) 592-9800
(918) 592-9801(Facsimile)
michael.mcbride@crowedunlevy.com

October 18, 2012

ATTORNEYS FOR PLAINTIFF COMANCHE NATION

EXHIBIT 3

Page(s)

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

CASES

Page(s)

STATUTES AND RULES

COMANCHE NATION'S BRIEF RE REMANDED ISSUE FROM WESTERN DISTRICT OF OKLAHOMA IN NO. CIV-09-521-F AND COMBINED RESPONSE TO CDST'S RENEWED MOTION TO DISMISS

Comanche Nation (the "Nation") files this brief to:

(1) address the jurisdictional issue remanded by the Western District of Oklahoma to the Court of Indian Appeals by Order of July 23, 2012 in *CDST-Gaming I, LLC v. Comanche Nation, Oklahoma, Court of Indian Offenses for the Comanche Nation,* and *Philip D. Lujan,* No. CIV-09-521-F (the "7/23/12 Order") – and by the Court of Indian Appeals to this Court by order filed August 20, 2012; and

(2) respond to CDST's September 2012 Motion to Dismiss Regarding Jurisdiction and the 2011 Ordinance (the "Motion").

In CDST's action in the Western District of Oklahoma ("Western District") it sought to enjoin (i) the Comanche Nation, (ii) the Court of Indian Offenses ("CIO"), and (iii) Magistrate Philip Lujan, from proceeding further in this matter for lack of jurisdiction. In its 7/23/12 Order, the Western District made *three* rulings:[1]

First: The Western District had already dismissed the Nation on grounds of sovereign immunity and denied motions to dismiss the other two defendants ("the Federal Defendants") on the basis of lack of a necessary and indispensable party. 7/23/12 Order, p.2. The Nation moved for and the Western District did reconsider that ruling in its Order, but reached the same result. 7/23/12 Order at pp.3-5.

Second: The Western District granted CDST's motion for summary judgment that CDST did not enter a valid stipulation to permit this Court to exercise jurisdiction over it

[1] The 7/23/12 Order is attached as Exhibit A to CDST's Motion.

in this case pursuant to 25 C.F.R. §11.103. 7/23/12 Order at pp.5-6 and pp.9-16. The Western District found it unnecessary to reach CDST's additional contention that this Court also lacked jurisdiction under 25 C.F.R. §11.116, since the Federal Defendants did not take a position contrary to the holding of the Court of Indian Appeals that the regulation did not retroactively apply. 7/23/12 Order at pp.16-17.

Third: The Western District considered CDST's final contention that this Court also lacks jurisdiction under Comanche Nation Tribal Court Civil Jurisdiction Ordinance of 2011, Resolution No. 36-11, approved 6/10/11 (the "2011 Ordinance"), attached hereto as **Ex. 1.**[2] The Comanche Nation had brought to the court's attention the 2011 Ordinance, approved by the BIA on June 10, 2011 pursuant to 25 C.F.R. §11.108 -- which provides an *independent* jurisdictional basis of this Court in this case.[3] CDST argued that (i) the 2011 Ordinance could not be applied retroactively, and (ii) the holding of the Court of Indian Appeals regarding 25 C.F.R. §11.116 required the same result. 7/23/12 Order at p.6 and pp.17-22. The Western District explicitly ***rejected*** CDST's second contention, that the Court of Indian Appeals' holding regarding retroactivity of 25 C.F.R. §11.116 dictated that the 2011 Ordinance may not be retroactively applied. The

---

[2] **Ex. 1** includes both the 2011 Ordinance and the June 10, 2011 letter from the Regional Director of the Bureau of Indian Affairs approving the Ordinance in accordance with 25 C.F.R. §11.108.

[3] 25 C.F.R. §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."

Western District emphasized that: "Unlike §11.116, the 2011 ordinance *specifically provides that it applies to 'all pending and future cases in the Tribal Court.'*" 7/23/12 Order at p.20. (Emphasis added.) The Western District explained that the decision on §11.116 was consistent with the U.S. Supreme Court's seminal case specifying the standard for construing a law to determine whether it retroactively applies, *i.e.*, *Landgraf v. USI Film Products,* 511 U.S. 244, 280 (1994). The Western District quoted *Landgraf's* holding that when the legislature has "'expressly prescribed the statute's proper reach,'" there is "'no need to resort to judicial default rules.'" 7/23/12 Order at p.20. The Western District explained that since the 2011 Ordinance did prescribe its own proper reach, *Landgraf's* constructional tests to determine its retroactivity were not engaged as they were when analzying §11.116:

> 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 of 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.

7/23/12 Order, p.21.

Since the 2011 Ordinance expressly applies to "all pending and future cases," the issue presented here is not one of construction, but of *validity: i.e.,* whether a legislature may validly enact an intervening law conferring jurisdiction on a court regardless of whether that court possessed jurisdiction when the underlying transaction or conduct

occurred or when a suit was filed -- and the related, incidental question of whether such a law divests "substantive rights" or merely speaks to the power of a court to adjudicate a controversy regarding those rights. For a concise answer, *see Landgraf,* 511 U.S. at 274 -- to which the Nation returns (with other authorities) in Proposition I.

The Western District deferred a final ruling on this issue due to the "exhaustion" doctrine, and therefore remanded for the Court of Indian Appeals, and potentially this Court, "to address the issue of jurisdiction under the 2011 ordinance." 7/23/12 Order at p.22. The Western District directed that (i) "in the absence of a final decision by the tribal courts by December 1, 2012," it would determine the question itself; and (ii) if the tribal courts *did* make such a final decision by December 1, 2012, the Western District would "permit the parties to re-file their motions" to argue the question in that court. *Id.* Thus the Western District will be revisiting the jurisdictional question, but has first deferred to this Court.

Before turning in Proposition I to the retroactivity issue remanded by the Western District, the Nation addresses CDST's *other three propositions* (its Parts A-C relating to choice of law and arbitration) -- which are CDST's leading arguments. CDST relegates discussion of retroactivity to less than *two pages at the end of its brief* (Part D, pp.11-12). CDST's attempt to inject a new, separate procedural motion on other issues in this posture is facially improper.[4] On December 16, 2010 this Court granted CDST's motion

[4] CDST even raised them for the first time in the Court of Indian Appeals, attempting to circumvent this Court's initial determination altogether in defiance of settled procedures. *E.g., Gallegos v. French,* 2 Okla. Trib. 209, 229, 1991 WL 733411 (Delaware CIA June 4,

to stay these proceedings pending completion of the Western District's proceedings. CDST did not raise these other issues in its certified interlocutory appeal from this Court's decision, or in the Western District proceedings for which this action was stayed. The Western District did not remand to consider these other issues. It remanded *solely* to consider the applicability of the 2011 Ordinance, and did so with a strict timetable (7/23/12 Order at pp. 22-23). CDST's improper additional contentions regarding choice of law and arbitration should not delay this Court's disposition of the retroactivity question remanded by the Western District, particularly since CDST itself procured the stay of these proceedings and the Western District obviously did not invite additional delays.

Notably, CDST's improper contention that this controversy should be submitted to arbitration contains CDST's affirmative request for an "*order*" that "*direct[s]*" the Nation to arbitrate. Such relief would require the Court to *exercise* the very jurisdiction that CDST repudiates in this case, an issue addressed further below.

In *Proposition I*, the Nation discusses the remanded retroactivity issue.

In *Proposition II*, the Nation shows that CDST has now consented to this Court's exercise of jurisdiction by its request for affirmative relief.

In *Propositions III and IV*, the Nation addresses the extraneous issues improperly raised by CDST, in the event this Court wants to reach them.

1991) (since appellant "did not raise this issue at the trial level, she cannot raise it for the first time on appeal").

ARGUMENT AND AUTHORITIES

I. THE 2011 ORDINANCE VALIDLY CONFERS JURISDICTION ON THIS COURT FOR "PENDING AND FUTURE" CASES

The 2011 Ordinance is expressly "jurisdictional in nature" and confers jurisdiction on this Court for "pending and future cases ...." **Ex. 1,** pp. 2-3. A tribe's conferral of jurisdiction over pending and future tribal cases to a specified tribal court is neither novel nor impermissible.[5]

In *Landgraf v. USI Film Products,* 511 U.S. 244 (1994), the leading retroactivity case (discussed by the Western District to distinguish 25 C.F.R. §11.116), the Supreme Court stated:

> *We have regularly applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed.* ... Application of a new jurisdictional rule usually "takes away no substantive right but simply changes the tribunal that is to hear the case." Present law normally governs in such situations because jurisdictional statutes "speak to the power of the court rather than to the rights or obligations of the parties," ....

511 U.S. at 274 (citations omitted) (emphasis added). *See also Republic of Austria v. Altmann,* 541 U.S. 677, 693 (2004), where the Court upheld a jurisdiction-conferring alteration to U.S. law on foreign sovereign immunity, and recited *Landgraf,* stating that

[5] *E.g., Rogers v. Todd,* 9 Okla. Trib. 462, 2006 WL 6122525 (Chickasaw Sep. 21, 2006) (**Ex. 2** hereto) (Chickasaw Nation could validly confer jurisdiction over existing cases then pending in Court of Indian Offenses on new tribal court and all such cases were properly transferred to Chickasaw Nation's new tribal court).

"we sanctioned the application to *all pending and future cases* of 'intervening' statutes that merely 'confe[r] or ous[t] jurisdiction.'" (Emphasis added.)[6]

The 2011 Ordinance expressly confers jurisdiction on this Court as to "*all pending and future cases*" in specified categories. It addresses no particular cause of action, nor does it create or divest substantive rights. It "'speak[s] to the power of the court'" rather than creating new jurisdiction over a cause of action where none existed before. 511 U.S. at 274.

Landgraf resolved a question of statutory *construction,* and the Court made clear it was not concerned with the *validity* of even the *non*-jurisdictional statute before it because constitutional constraints on retroactivity are extremely narrow and largely inapplicable to most laws including the Civil Rights laws then before that Court:

> The *Constitution's* restrictions, of course, are of limited scope. Absent a violation of one of those specific provisions, the potential unfairness of retroactive civil legislation is not a sufficient reason for a court to fail to give a statute its intended scope. Retroactivity provisions often serve entirely benign and legitimate purposes, whether to respond to emergencies, to correct mistakes, to prevent circumvention of a new statute in the interval immediately preceding its passage, or simply to give comprehensive effect to a new law Congress considers salutary. However, a requirement that *Congress first make its intention clear* helps ensure that Congress itself has determined that the benefits of retroactivity outweigh the potential for disruption or unfairness.

511 U.S. at 267-68. (Emphasis added.)

As to the *constructional* issue -- whether Congress has made its intention clear -- the Court held that if Congress gave an "express command" as to the retroactive scope of

---

[6] The Court in *Austria* held the foreign *immunity* issues presented a "*sui generis* context" which was not definitively addressed by *Landgraf's* "default rules" (541 U.S. at 696), but the Court borrowed from *Landgraf's* policies to reach the same result.

the law, that command was dispositive. 511 U.S. at 280. If Congress did *not* give such an "express command," however, the Court would apply "judicial default rules" to presume retroactivity was not intended "absent clear congressional intent favoring such a result." 511 U.S. at 280.[7]

Here, of course, the 2011 Ordinance *does* contain an "express command" for retroactivity, since it explicitly applies to "pending cases," as the Western District emphasized in its 7/23/12 Order, p.20. *See* 2011 Ordinance, **Ex. 1**, p.3. *Landgraf's* discussion, quoted above, is unequivocal that such a law properly operates retroactively. 511 U.S. 274 and 280.

To be sure, a law where the legislature does *not* expressly declare a retroactive intent will not be retroactively applied *if* it does *more* than confer jurisdiction on a new forum, by altering rights under a substantive claim or defense to the cause of action. In *Hughes Aircraft Co. v. U.S. ex rel. Schumer*, 520 U.S. 939 (1997), the Court considered an amendment to the False Claims Act and emphasized: "Nothing in the 1986 amendment evidences a clear intent by Congress that it be applied retroactively, and no one suggests otherwise." *Id.* at 946. Because no such clear Congressional intent was expressed, the Court considered whether the amendment affected substantive rights retroactively, and held that Congress could not remove a jurisdictional impediment to

[7] As the Court stated, "while the constitutional impediments to retroactive civil legislation are now modest, prospectivity remains the appropriate default rule. ... Requiring clear intent assures that Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits." 511 U.S. at 272-73.

claims that would have been otherwise foreclosed as a matter of substantive right.[8] The Court distinguished its *Landgraf* holding regarding jurisdiction, quoted above:

> Statutes merely addressing which court shall have jurisdiction to entertain a particular cause of action can fairly be said merely to regulate the secondary conduct of litigation and not the underlying primary conduct of the parties. *Such statutes affect only where a suit may be brought, not whether it may be brought at all.* The 1986 amendment, however, does not merely allocate jurisdiction among forums. Rather, it creates jurisdiction where none previously existed; it thus speaks not just to the power of a particular court *but to the substantive rights of the parties* as well. Such a statute, even though phrased in "jurisdictional" terms, is as much subject to our presumption against retroactivity as any other.

520 U.S. at 951. [Citations omitted.](Emphasis added.) Here, the *Hughes Aircraft* analysis does not apply for two clear reasons: (1) The 2011 Ordinance expressly addresses its own application to pending and future cases; and (2) the 2011 Ordinance does not, in any event, create new substantive rights where none before existed. Rather, the 2011 Ordinance is expressly retroactive and is limited to specifying a jurisdiction where particular kinds of tribal controversies may be adjudicated.

Landgraf is directly on point here. The 2011 Ordinance merely confers jurisdiction on a new tribunal, and there is no federal or other constitutional impediment to doing so.

---

[8] The Court explained that the retroactive amendment "eliminates a defense to a qui tam suit ... and therefore changes the substance of the existing cause of action for qui tam defendants by attach[ing] a new disability, in respect to transactions or considerations already past." [Internal quote marks omitted.] *Id.*, 520 U.S. at 948.

II. CDST SEEKS AFFIRMATIVE RELIEF AND THUS CONSENTS TO THIS COURT'S EXERCISE OF JURISDICTION

In CDST's September 2012 Motion, CDST does not confine itself to seeking dismissal for lack of jurisdiction. CDST repeatedly asks this Court to grant affirmative relief which this Court could only grant if it *possesses* jurisdiction. CDST has thus consented to this Court's exercise of jurisdiction in this case, regardless of other arguments.

In CDST's Motion it seeks an order from this Court *expressly* ***ordering*** the Comanche Nation to arbitrate its dispute with CDST. *See* Motion at p.8 ("[T]his 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." (Emphasis added.)); Motion at p.11 ("[T]his 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." ((Emphasis added.)); Motion at p.13 ("[T]his Court should dismiss the Nation's complaint *and order the parties to submit to AAA Arbitration.*" (Emphasis added.)).

CDST has sought affirmative relief which requires the Court to exercise jurisdiction -- *i.e.,* CDST seeks an order directing the Comanche Nation to arbitrate. Such an order is irreconcilable with a lack of jurisdiction. CDST has thus consented to this Court's exercise of jurisdiction.

Parallels may be found in the bankruptcy context, where the bankruptcy court's summary jurisdiction to determine a claim affecting a party may be predicated on that party seeking affirmative relief. *See, e.g., Inter-State Nat'l Bank of Kansas City v. Luther*, 221 F.2d 382, 386-87, 390 (10th Cir. 1955) ("The narrow and perplexing question here is whether the entry of the Bank's appearance in the bankruptcy proceedings and the filing of its claim constituted requisite consent to the exercise of summary jurisdiction to adjudicate a preference and grant affirmative relief thereon." *Id.* at 386-87. "And, being of the view that the Bank impliedly consented to the jurisdiction of the court, the counterclaim was maintainable under Rule 13(b), F.R.C.P., whether compulsory or permissible. [Citation omitted.] We hold, therefore, that the court acquired jurisdiction of the counterclaim by implied consent, and that it was authorized to adjudicate the preference and give judgment for recovery of the same." *Id.* at 390.); *Bayless v. Crabtree Through Adams*, 108 B.R. 299, 305 (W.D. Okla. 1989) ("Furthermore, the Court notes that the principle of jurisdiction by consent discussed above has been held applicable where, instead of a proof of claim, the creditor asserts a claim for affirmative relief."); *In re LLS America, LLC*, 2012 WL 2564722, *11 (Bankr. E.D. Wash. July 2, 2012) ("Additionally, both defendants consented to personal jurisdiction by filing a motion seeking affirmative relief in this adversary proceeding.").

Having now sought affirmative relief that would *require* the Court to exercise jurisdiction, CDST is no longer in a position to *renounce* the Court's jurisdiction.

III. A CHOICE OF LAW CLAUSE DOES NOT IMPAIR THE EFFICACY OF A JURISDICTIONAL STATUTE

Comanche Nation now turns to CDST's other contentions, in case this Court determines to reach them. CDST's first extraneous contention is that the 2011 Ordinance cannot confer jurisdiction on this Court because the contract that CDST (erroneously) asserts to have been validly executed on behalf of the Nation contains a choice of law clause. Specifically, the Amended Machine Vendor Agreement (Amended "MVA") (**Ex. 3** hereto) provides in ¶24 that the agreement is "governed by federal law, and to the extent not inconsistent therewith, the laws of the State of Oklahoma."

Initially, while CDST is a signatory to the Amended MVA, that agreement alone confers no rights on CDST. As to CDST it only *recites* and "confirms" the *2001 assignment* by John Harrington Inc. to CDST of Harrington's right to lease 106 gaming devices to Comanche Nation. **Ex. 4** hereto, p.1, ¶¶C and E under "RECITALS." Only Harrington and Comanche Nation received any new rights or duties under the Amended MVA, and they terminated all of those rights and duties by separate agreement dated January 2008. *See* **Ex. 5** hereto (the termination agreement without its exhibits). If CDST actually possessed any rights of enforcement under any of the documents, those rights could only derive from the 2001 Assignment with respect to the 2000 MVA's lease of the 106 gaming machines, and would be governed by the 2000 MVA's Choice of Law clause, **Ex. 6,** p.8, ¶23, which provides: "This Agreement shall be interpreted and construed in accordance with the laws of the COMANCHE TRIBE." (Caps in original.)

But that is only the first defect in CDST's choice of law argument. Assuming *arguendo* that CDST was relying on rights in an agreement specifying federal and Oklahoma choice of law, it would not address *jurisdictional* issues. A choice of law clause is not the same as a forum selection clause, and does not even address jurisdiction.[9]

The 2011 Ordinance confers jurisdiction on this Court to determine a limited list of controversies. Neither the validity nor construction of the Nation's governmental act -- the 2011 Ordinance's conferral of jurisdiction on this Court -- is impacted by a contractual choice of law clause. Such a clause is merely an agreement (when it is valid) by contracting parties to select the law which will govern their substantive contract rights.

Finally, even if the choice of law clause upon which CDST relies was contained in the relevant 2000 MVA lease, *and* was a forum selection clause rather than a choice of law clause, it would still not benefit CDST, since it would be no more binding on the Nation than the arbitration clause upon which CDST also relies. As discussed in the next proposition, the purported contract containing the arbitration clause is void *ab initio,*

[9] *See Creative Socio–Medics, Corp. v. City of Richmond,* 219 F.Supp.2d 300, 307 (E.D.N.Y. 2002) ("Choice of law questions are significantly different from questions of jurisdiction. Choice of law provisions, as opposed to forum selection clauses, 'have minimal jurisdictional implications.'"); *Finnimore v. Jobel*, 2007 WL 2390818, *1 (Conn. Super. Aug. 10, 2007) ("'[C]ase law distinguishes choice of law clauses with forum selection. Thus, courts previously have declined to find that an agreement as to the parties' choice of law, in turn, dictates jurisdiction."); *Robbins & Myers, Inc. v. J.M. Huber Corp.,* 2001 WL 967606, *3 (W.D.N.Y. Aug. 23, 2001) ("A choice-of-law clause and a forum selection clause are not the same, and address different needs and concerns."); *Caperton v. A.T. Massey Coal Co., Inc.*, 690 S.E.2d 322, 362 (W.Va. 2009) ("The factors to be weighed in determining the effectiveness of a forum selection clause are materially different from the factors a court will consider in determining the effectiveness of a choice of laws clause and speak to very different problems.").

since it was executed without authority of the Nation's Tribal Council and Business Committee.

IV. THE TRIBAL COURT MUST DETERMINE COMANCHE NATION'S CONTENTION THAT THE PURPORTED ARBITRATION AGREEMENT IS VOID BECAUSE IT WAS EXECUTED WITHOUT AUTHORITY

CDST's second extraneous argument is that an arbitrator must decide whether Comanche Nation validly executed the Amended Machine Vendor Agreement that CDST seeks to enforce because the agreement contains an arbitration clause.

Comanche Nation has contended in every forum that it has not waived its sovereign immunity and that the agreements upon which CDST predicates its right to arbitration were not authorized by either the Nation's Tribal Council or its Business Committee. *E.g.,* **Ex. 7**, 4/25/08 Complaint herein, pp.4-5; **Ex. 8,** Nation's 4/25/08 objection to jurisdiction in AAA proceeding, pp.11-12; **Ex. 9**, Nation's 6/15/09 motion to dismiss in CIV-09-521-F, Western District of Oklahoma, p.5; **Ex. 10,** Nation's 1/25/08 motion to transfer and dismiss in CIV-07-1255-HE (a predecessor action to CIV-09-521-F that was dismissed by CDST). CDST wrongly asserts that the Western District "acknowledged the parties' agreement to arbitrate" (Motion at 6). The Western District was not presented with and did not purport to pass on the Nation's challenge to the validity of any of the contracts. It only found that CDST did not stipulate to tribal jurisdiction as required to invoke 25 C.F.R. §11.103. 7/23/12 Order at pp.10-16.

CDST argues that the Comanche Nation may avoid arbitration only by arguing that the "specific arbitration clause itself was invalid because of fraud, duress, or some related doctrine ...." Motion at 9. To the contrary, the principle CDST cites applies only

when a party opposing arbitration invokes a ground to avoid a *voidable* but existing contract. Comanche Nation contends herein that it *never validly entered* the contract to begin with, *i.e.*, that the contract is "void *ab initio*".

Particularly in the context of a motion to compel an Indian tribe to arbitrate, a tribe's contentions asserting sovereign immunity and denying that the agreement was made with tribal authority must be settled by a court, not an arbitrator. Both federal and state courts are keenly sensitive to question-begging efforts like CDST's that would cause a tribe to relinquish its sovereign immunity. The Western District of Oklahoma has confirmed this repeatedly in cases presenting analogous circumstances. In an action against a different Indian tribe, the Western District of Oklahoma refused to compel arbitration under a purported agreement by which the tribe waived sovereign immunity for the purpose of enforcing an arbitration clause. The tribe disputed the validity of the contract containing the arbitration clause, contending the contract required but lacked NIGC approval. **Ex. 11,** *Hankins v. Fort Sill Apache Tribe of Oklahoma,* No. CIV-03-1191-L, Western District of Oklahoma, 6/16/09 Order (Doc.22-10). The Western District held:

> [P]laintiff's assertion that the Tribe has agreed to litigate in this forum *presupposes validity* of the June 2, 2001 Contract and its limited waiver of sovereign immunity for purposes of compelling arbitration or enforcing an arbitration award. As previously stated, since the Tribe is now challenging the validity of the agreement purporting to allow or require commencement of judicial proceedings in this forum, the court finds that it would be improper to enforce the agreement *until its validity has been determined by the tribal court in the first instance.*

Ex. 11, 6/16/09 Order in *Hankins* at p.9 (emphasis added).[10]

The Eighth Circuit has similarly recognized the primacy of tribal sovereign immunity issues in this context in *Bruce H. Lien Co. v. Three Affiliated Tribes,* 93 F.3d 1412 (8th Cir. 1996). There, a casino management company sued the tribe and others to compel arbitration under a management contract. The tribe objected on the same grounds asserted by the Comanche Nation here -- that it had not waived sovereign immunity and that its former chairman had not been granted authority by the tribal business committee to bind the tribe to the contract containing the arbitration clause. *Id.* at 1415-16. The court emphasized that the tribe was "challenging the legal validity of the contract itself, specifically the actions of its former Chairman leading to the execution of the contract." *Id.* at 1417. The court concluded:

> ... that the underlying issues regarding the contract's validity must be resolved before any other matter can be productively addressed. We believe the District Court should have stayed its proceedings *pending a resolution in the first instance in the Tribal Court of these matters.*

Id. at 1419 (emphasis added).

Similarly, in *Iowa Management & Consultants, Inc. v. Sac & Fox Tribe of the Mississippi in Iowa,* 656 N.W.2d 167 (Iowa 2003), an Indian gaming consulting firm sued the tribe seeking to compel arbitration, and the tribe asserted the contract containing the arbitration clause was "a management contract and is thus void for want of NIGC

---

[10] *See also* **Ex. 12,** *Apache Tribe of Oklahoma v. TGS Anadarko, LLC,* No. CIV-11-1078-D, 9/28/12 Western District of Oklahoma Order, at pp.2-3, where the remanding federal court noted in a removed state court action to enjoin arbitration proceedings that the tribe relied in state court on its state and tribal law claim that the contract was signed without tribal council authority to waive sovereign immunity or agree to arbitration.

approval." *Id.* at 173. The court held this contention had to be judicially resolved, and remanded to the district court to do so: "We are convinced that the tribe has sufficiently asserted a challenge to the entire agreement, including the arbitration clause, based on a failure to secure approval of the NIGC ...."*Id.* at 173.

Even outside the context of a tribal controversy, the result is the same. The federal courts hold that a party may not be compelled to arbitrate a contention on whether the contract was validly made to begin with. *E.g., Three Valleys Municipal Water District v. E.F. Hutton & Co.,* 925 F.2d 1136, 1140-41 (9th Cir. 1991)("[A] party who contests the making of a contract containing an arbitration provision cannot be compelled to arbitrate the threshold issue of the existence of an agreement to arbitrate. Only a court can make that decision."); *I.S. Joseph Co. v. Mich. Sugar Co.,* 803 F.2d 396, 400 (8th Cir. 1986)("Case law supports our holding that the enforceability of an arbitration clause is a question for the court when one party denies the existence of a contract with the other."); *Chastain v. Robinson-Humphrey Co., Inc.,* 957 F.2d 851, 855 (11th Cir. 1992) ("*Prima Paint* has never been extended to require arbitrators to adjudicate a party's contention, supported by substantial evidence, that a contract never existed at all."); *Sphere Drake Ins. Ltd. v. All Am. Ins. Co.,* 256 F.3d 587, 591 (7th Cir. 2001) ("Many appellate courts have held that the judiciary rather than an arbitrator decides whether a contract came into being. ... [A] person who has not consented (or authorized an agent to do so on his behalf) can't be packed off to a private forum. ... Arbitrators lack ... authority to determine their own authority because there is a non-circular alternative (the judiciary) and because the parties do control the existence and limits of an arbitrator's power. No

contract, no power."); *Sandvik AB v. Advent Int'l Corp.*, 220 F.3d 99, 107 (3d Cir. 2000) ("Mindful of the doctrine announced in *Prima Paint*, which did not consider a situation in which the existence of the underlying contract was at issue, we draw a distinction between contracts that are asserted to be "void" or non-existent ... and those that are merely "voidable" ... for purposes of evaluating whether the making of an arbitration agreement is in dispute."); *Will-Drill Resources, Inc. v. Samson Resources Co.*, 352 F.3d 211, 218-219 (5th Cir. 2003) ("We reject the argument that where there is a signed document containing an arbitration clause which the parties do not dispute they signed, we must presume that there is a valid contract and send any general attacks on the agreement to the arbitrator. ... We therefore conclude that where a party attacks the very existence of an agreement, as opposed to its continued validity or enforcement, the courts must first resolve that dispute."); *National R.R. Passenger Corp. v. Boston & Maine Corp.*, 850 F.2d 756, 761 (D.C. Cir. 1988) ("'[I]f the parties disagree as to whether they ever entered into any arbitration agreement at all, the court must resolve that dispute.' [Citation omitted.] Clearly, if there was never an agreement to arbitrate, there is no authority to require a party to submit to arbitration"); *Camping Constr. Co. v. District Council of Iron Workers, Local 378*, 915 F.2d 1333, 1340 (9th Cir. 1990) ("The court must determine whether a contract ever existed; unless that issue is decided in favor of the party seeking arbitration, there is no basis for submitting any question to an arbitrator."); *Par-Knit Mills, Inc. v. Stockbridge Fabrics Co.*, 636 F.2d 51, 55 (3d Cir. 1980) (the question of whether a signatory individual was authorized to contractually bind an organizational party must be determined by the court, not by an arbitrator).

The Tenth Circuit recognized the substantial authority supporting this rule but found it unnecessary to reach the question in *Spahr v. Secco*, 330 F.3d 1266, 1272 n.7 and 1273 (10th Cir. 2003), because even stronger considerations required the court to determine a contention there that a party "lacked the mental capacity to enter into an enforceable contract [which] placed the 'making' of an agreement to arbitrate at issue ...."

The Supreme Court has never held this kind of dispute must be submitted to an arbitrator, and that Court expressly declined to reach the issue while noting appellate authorities that the issue of whether an agreement was ever made is not arbitrable. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444 n.1 (2006) ("The issue of the contract's validity is different from the issue whether any agreement between the alleged obligor and obligee was ever concluded.")

Accordingly, CDST's final basis for seeking dismissal of this action, and an affirmative "order" directing arbitration, is baseless. This Court is the proper tribunal to determine whether the Nation validly entered into the contract by which CDST asserts the Nation waived its sovereign immunity and agreed to arbitration. CDST is not entitled to relegate the Nation to an arbitral forum in violation of its federally protected sovereign immunity by the circular assertion that the contract it seeks to arbitrate – and which the Nation contends is void – contains an arbitration provision endorsing its contention.

CONCLUSION

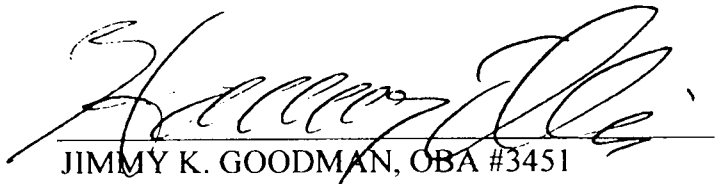
The 2011 Ordinance, which is the sole subject of the Western District's remand Order, unambiguously confers jurisdiction on this Court for "pending and future cases."

This is all that is required under *Landgraf v. USI Film Products,* 511 U.S. 244, 274 and 280 (1994), for the 2011 Ordinance to apply, under settled jurisprudence discussed above. The Court should determine the issue remanded by the Western District by holding that the 2011 Ordinance confers jurisdiction in this matter on this Court, since it expressly applies to "pending" matters and this matter was pending when the Ordinance was adopted; and that in any event the Ordinance does not impair substantive rights of parties in the cases over which it confers jurisdiction. *See* Proposition I.

Second, the Court should hold that since CDST has now *invoked* this Court's jurisdiction by seeking affirmative relief from this Court (*i.e.,* an "order" that "direct[s]" the Comanche Nation to arbitrate), CDST has consented to this Court's exercise of jurisdiction and may no longer repudiate the very jurisdiction upon which its demand for affirmative relief depends. *See* Proposition II.

Finally, CDST's effort to inject additional issues on remand is calculated to delay the timely disposition of the sole issue the Western District remanded, *i.e.,* applicability of the 2011 Ordinance. CDST procured the stay of the proceedings herein, and the Western District's remand order required a final decision by this Court before December 1, 2012, or the federal court will resume proceedings. CDST's contentions relating to choice of law and arbitration are procedurally improper and patently meritless. This Court should either refuse to address them, or summarily reject them for the reasons discussed above. *See* Propositions III and IV.

Respectfully Submitted,



JIMMY K. GOODMAN, OBA #3451
HARVEY D. ELLIS, JR., OBA #2694
CROWE & DUNLEVY
A Professional Corporation
20 North Broadway, Ste. 1800
Oklahoma City, Oklahoma 73102
(405) 235-7700
(405) 239-6651 (Facsimile)
jimmy.goodman@crowedunlevy.com
harvey.ellis@crowedunlevy.com

-AND-

D. MICHAEL McBRIDE III OBA #15431
CROWE & DUNLEVY, P.C.
500 Kennedy Building
321 S. Boston
Tulsa, Oklahoma 74103-3313
(918) 592-9824
(918) 599-6317 (Facsimile)
mike.mcbride@crowedunlevy.com

ATTORNEYS FOR COMANCHE NATION

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of October, 2012, a copy of the foregoing document was mailed by U.S. Mail to the following:

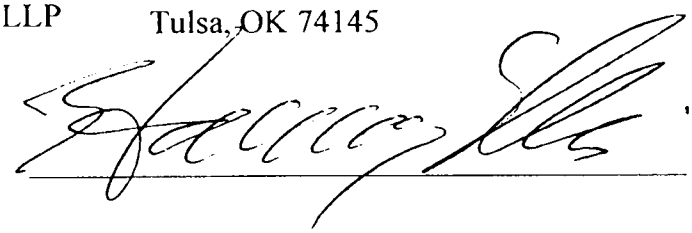
Kevin E. O'Malley
Timothy W. Overton
GALLAGHER & KENNEDY, P.A.
2575 E. Camelback Road
Phoenix, AZ 85016-9225

H. Lee Schmidt
U.S. ATTORNEY'S OFFICE
210 W. Park Ave., Ste. 400
Oklahoma City, OK 73102

James M. Burson
William R. Norman. Jr.
Hobbs, Straus, Dean & Walker, LLP
101 Park Avenue, Suite 700
Oklahoma City, OK 73102

Klint A. Cowan
Jay P. Walters
FELLERS, SNIDER,
BLANKENSHIP,
BAILEY& TIPPENS, P.C.
100 N. Broadway, Ste. 1700
Oklahoma City, OK 73102

Charles R. Babst, Jr.
OFFICE OF THE TULSA FIELD
SOLICITOR
Department of Interior
7906 E. 33rd Street, Ste. 100
Tulsa, OK 74145



2374921.03