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

CDST-GAMING I, LLC, an Arizona limited liability company, Plaintiff, vs. 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.	)	Case No. 5:09-cv-00521-F

NOTICE OF SUBMISSION

NOTICE is hereby given that CDST is submitting the briefs it filed in the Court of Indian Appeals for this Court's consideration. These briefs are attached hereto, and courtesy copies are being sent to the Court.

Respectfully submitted,

By: */s/ Timothy W. Overton*

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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. Commc'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.

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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

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[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.

S P Friot

STEPHEN P. FRIOT
UNITED STATES DISTRICT JUDGE

09-0521p039 rev wpd

EXHIBIT B

IN THE COURT OF INDIAN APPEALS
ANADARKO, OKLAHOMA

COMANCHE NATION,	)	
	)	
Petitioner,	)	
	)	
vs.	)	**Trial Case No. CIV-08-A12**
	)	**Appeal Case No. CIV-10-A02P**
CDST-GAMING I, LLC,	)	
	)	
Respondent.	)	

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.

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

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 Nation NO. OF PAGES INCLUDING COVER:

Opinion re: CDIB Cards

☐ URGENT ☐ FOR REVIEW ☐ PLEASE PROCESS ☐ PLEASE REPLY ☐ AS REQUESTED

NOTES/COMMENTS:

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IN THE COURT OF INDIAN APPEALS
ANADARKO, OKLAHOMA

COMANCHE NATION,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Trial Case No. CIV-08-A12
	)	Appeal Case No. CIV-10-A02P
CDST-GAMING I, LLC,	)	
	)	
Respondent.	)	

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.

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

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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 DECEMBER 2012 SUPPLEMENTAL BRIEF**

Pursuant to the Court of Indian Offenses' ("CIO") November 28, 2012 Order, the issue of whether the CIO can exercise jurisdiction over Defendant CDST-Gaming I, LLC ("CDST") in this matter pursuant to the Comanche Nation's (the "Nation") 2011 Ordinance has been certified for immediate review by this Court (the "CIA"). Because the United States District Court for the Western District of Oklahoma's ("District Court") July 23, 2012 Order put time constraints on a decision from this Court, and because several of these issues have been briefed extensively, CDST will not re-brief those issues. However, as noted in the CIO's Order, additional authorities were presented in the CIO that were not fully briefed. Consequently, CDST respectfully submits this supplement to address those authorities, including the effect of the United States Constitution's Contracts Clause, Article I, Section 10, on the 2011 Ordinance.

One of the Nation's two stated reasons for passing the 2011 Ordinance was to help the Nation in this very litigation by allowing the Nation to drag CDST into Court, depriving CDST of its substantive and substantial right to arbitrate any disputes arising out of the parties' contractual relationship. Nevertheless, the Nation asserted, and the CIO concluded, that because the 2011 Ordinance purports to be jurisdictional in nature, the CIO can apply that Ordinance to exercise jurisdiction over CDST in this matter irrespective of this Court's 2010 Opinion and the United States Constitution's Contracts Clause, which each are clear that courts cannot apply new legislation that affects a contracting party's substantive contract rights, let alone legislation intended to deprive a party of contract rights. In short, the Nation's argument, accepted by the CIO, was that this Court erred when it determined that post-agreement legislation applied in this case "does more than change procedures; it creates jurisdiction where none existed earlier" and "affect[s] substantive rights of the parties." CIA January 26, 2012 Opinion, p. 2. This Court's correct decision was made even without the benefit of the District Court's Order, which made it clear that the CIO could not exercise jurisdiction over CDST under the CFR's jurisdictional statute—clearly proving that, if applied, the 2011 Ordinance would create jurisdiction where none existed before, and deprive CDST of its substantive and substantial contract right to arbitrate rather than be dragged into Court to litigate.

Nevertheless, contrary to this Court's Opinion, the CIO concluded that the post-agreement legislation allowing the CIO to exercise jurisdiction "does not alter any rights or authority either party possessed when they purportedly entered into agreements to do business with each other." CIO November 28, 2012 Order, p. 2. In support of that legal

finding, the CIO stated that it adopted the District Court's reasoning on that point. *Id.* However, the District Court did not determine whether post-agreement legislation affected the parties' substantive contract rights. Indeed, the District Court said that because the 2011 Ordinance purported to be jurisdictional in nature and temporal in reach, "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." CIO November 28, 2012 Order, pp. 2-3 (quoting the District Court's July 23, 2012 Order, p. 21) (emphasis added).

Aside from relying on the District Court's Order, the CIO did not list any rationale for why it disagreed with this Court's Opinion that post-agreement jurisdictional legislation allowing the CIO to exercise jurisdiction over CDST impermissibly affected CDST's substantive contract rights. Instead, the CIO simply determined that the 2011 Ordinance could apply because the Comanche Business Committee ("CBC") said it could apply retroactively, essentially equating the actions of the CBC with those of the United States Congress. *See e.g., Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994) ("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."). This rationale, however, cannot apply to CIO jurisdiction over CDST for two reasons: (1) The actions of the CBC cannot be equated with those of the United States Congress; and (2) Even if the CBC was on par with Congress, the Contracts Clause prohibits application of the 2011 Ordinance to deprive CDST of its substantive and substantial contract rights.

I. The CBC Does Not Receive The Same Deference As Congress.

The Nation and the CIO rely on 25 C.F.R. § 11.108 for the proposition that if the CBC enacts an ordinance, and the Assistant Secretary for Indian Affairs approves that Ordinance, such Ordinance is endowed with the same authority as a law passed by the United States Congress, i.e., that the Ordinance's dictation of its own temporal reach is the end of the analysis regarding whether the Ordinance can be applied retroactively. Such deference, however, is completely inappropriate in this case. Congress is entitled to such deference only when and because "Congress itself has determined that the benefits of retroactivity outweigh the potential for disruption or unfairness." *Landgraf*, 511 U.S. at 268. "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." *Id.* at 272-73. The Nation has not purported to have performed such an analysis. Indeed, the transcript from the April 2, 2011 Comanche Business Committee Meeting demonstrates that the Nation passed the 2011 Ordinance with two specific purposes in mind: (1) to overrule the effect of the Panther Partners case on the Nation, pp. 67-69; and (2) to defeat CDST's argument that the CIO did not have jurisdiction over CDST, pp. 69-70 ("Mr. Burgess: Is this going to be a positive for us with that company? What was it called, CDST Games? They're still trying to pursue that, right? Mr. Norman: Now, the CFR Court has concluded that they have jurisdiction over that case. The federal court also was playing a role here, and so this would assist with respect to that case as well. Mr. Burgess: So that any previous ruling by a CFR Court in that case is standing and the district court is not going to

overrule CFR -- Mr. Norman: Well, it gives us the opportunity to make that happen."). 2.11 CBC Transcript, pp. 65-70, attached hereto as Exhibit A.

To the extent the Nation considered the burden on CDST's contract rights, it did so only to confirm that the new Ordinance would help the Nation in its pending litigation against CDST, i.e. it would assist in defeating and denying CDST's contractual right to arbitrate. Because the Nation did not perform a fairness analysis as Congress itself is required to do, but instead specifically acknowledged that the 2011 Ordinance would help it succeed against CDST in this very litigation, the Nation's 2011 Ordinance is not entitled to the same deference as Congressional legislation.

Moreover, the 2011 Ordinance could not be entitled to the same deference as Congressional legislation because, at best, the 2011 Ordinance would be an act of an administrative agency (the Department of the Interior "DOI" or the Bureau of Indian Affairs "BIA"), which agencies themselves are not on par with Congress and cannot pass retroactive legislation without specific Congressional authorization. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("[A] statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms."). "Even where some substantial justification for retroactive rulemaking is presented, courts should be reluctant to find such authority absent an *express statutory grant*." *Id.* (emphasis added); *accord Univ. of Iowa Hosps. & Clinics v. Shalala*, 180 F.3d 943, 951 (8th Cir. 1999) ("[W]hen Congress delegates legislative authority to an administrative agency, courts will *presume* that the delegation forbids the agency from

creating retroactive prescriptions, and *only express congressional authorization will overcome this presumption.*") (Emphasis added). Congress has made no such express or specific authorization for the CBC, DOI, or BIA to pass retroactive legislation.[1]

II. The Contracts Clause Prohibits Applying the 2011 Ordinance To This Case.

Even if the CBC was endowed with the authority of Congress to pass retroactive legislation, such legislation could not be applied in a case where it would impermissibly affect a party's contract rights, particularly when the entity passing the legislation is a party to the contract and will gain a distinct benefit from the legislation. The District Court opined that at the time of its Order, there did not "appear to be [a] need to determine whether the 2011 Ordinance" affected CDST's substantive contract rights. Based on the United States Constitution's Contract Clause, however, there is a need to determine whether the 2011 Ordinance affects CDST's substantive contract rights, because the Constitution prohibits governmental entities from passing any law "impairing the obligation of contracts." United States Constitution, Article I, Section 10, clause 1 (the "Contracts Clause"); *Parella v. Retirement Bd. of Rhode Island Employees' Retirement Sys.*, 173 F.3d 46, 59 (1st. Cir. 1999) ("The Contract Clause provides that no State shall . . . pass any . . . Law impairing the Obligation of Contracts. Although the original intent of this language was to bar retroactive laws (particularly debtor relief

[1] The CBC is not authorized to pass laws that are binding on the CFR Courts. The Nation's Ordinances can only bind the CFR Courts once the administrative agency, the DOI or BIA, approves such ordinances. Thus, the 2011 Ordinance only applies to this Court as a result of agency laws (25 C.F.R. § 11.108) and agency approval. Congress has not specifically granted either of those agencies express authorization to pass this retroactive legislation.

laws) that would impair private contractual rights, the clause has long been interpreted to apply to public contracts as well.") (internal citations and punctuation omitted).

"Contract Clause claims are analyzed under a two-pronged test. The first question is whether the state law has . . . operated as a substantial impairment of a contractual relationship. If the contract was substantially impaired, the court next turns to the second question and asks whether the impairment was reasonable and necessary to serve an important government purpose." *United Auto., Aerospace, Agr. Implement Workers of America Int'l. Union v. Fortuno*, 633 F.3d 37, 41 (1st Cir. 2011).

Regarding the first prong, this Court already determined that CDST's right to arbitrate this case rather than be dragged into court would be substantially impaired by the application of post-agreement legislation. CIA Opinion p. 2 (post-agreement legislation "does more than change procedures; it creates jurisdiction where none existed earlier" and "affect[s] substantive rights of the parties."). This decision is supported by courts across the United States. *See, e.g., Stott v. Capital Fin. Servs., Inc.*, 277 F.R.D. 316, 337 (N.D. Tex. 2011) ("The class members who have pursued arbitration clearly have a substantive contractual right to arbitration . . . ."); *Olde Discount Corp. v. Tupman*, 805 F. Supp. 385, 391 (D. Del. 1992), *aff'd*, 1 F.3d 202 (3d Cir.1993), *cert. denied*, 510 U.S. 1065, 114 S.Ct. 741, 126 L.Ed.2d 704 (1994) ("loss of [plaintiff's] federal substantive right to arbitrate, should injunctive relief be denied, constitutes irreparable harm"); *Alascom, Inc. v. ITT North Electric Co.*, 727 F.2d 1419, 1422 (9th Cir.1984) (if a party "must undergo the expense and delay of a trial before being able to appeal, the

advantages of arbitration—speed and economy—are lost forever. We find this consequence 'serious, perhaps irreparable.'").

Because CDST's substantive contract rights would be substantially impaired by application of the 2011 Ordinance, the Nation is required to prove that the impairment is reasonable and necessary to serve an important government purpose. Indeed, the Nation cannot choose not to pay CDST merely because it prefers to spend its money elsewhere. *U.S. Trust Co. of New York v. New Jersey*, 431 U.S. 1, 29 (1977) ("Thus a State cannot refuse to meet its legitimate financial obligations simply because it would prefer to spend the money to promote the public good rather than the private welfare of its creditors."). It is the Nation's burden to demonstrate that application of the statute is necessary to meet legitimate goals. *Id.* at 31 ("In the instant case, *the State has failed to demonstrate* that repeal of the 1962 covenant was similarly necessary. We also cannot conclude that repeal of the covenant was reasonable . . . .") (emphasis added); *Mascio v. Public Employees Retirement Sys. Of Ohio*, 160 F.3d 310 (6th Cir. 1998) ("The district court determined that impairment was 'not necessary to advance an important public purpose' here. The defendants have pointed to nothing that persuades us otherwise."); *State of Nevada Employees Ass'n., Inc. v. Keating*, 903 F.3d 1223, 1228 (9th Cir. 1990) ("In this case, the State has not met its burden of proving that the impairment of the public employees' pension rights was necessary to achieve an important public purpose. We hold that the Nevada legislation unconstitutionally impaired the State's contractual obligations."). The Nation has failed to prove that applying the 2011 Ordinance

retrospectively to CDST, rather than only prospectively, was necessary to achieve the only other reason for passing the 2011 Ordinance, to avoid the Panther Partners case.

The Court's analysis, rather than the Nation's self-serving statements about the 2011 Ordinance, determines whether application of the 2011 Ordinance inappropriately affects CDST's substantive and substantial contract rights. *U.S. Trust Co. of New York v. New Jersey*, 431 U.S. at 26 ("[C]omplete deference to a legislative assessment of reasonableness and necessity is not appropriate . . . ."); *see also McGrath v. R.I. Ret. Bd.*, 88 F.3d 12, 16 (1st Cir. 1996) ("[A] state must do more than mouth the vocabulary of the public weal in order to reach safe harbor . . . ."). The CBC's dictation of temporal reach carries even less weight here, because the Nation's self-interest is at stake. *United Auto., Aerospace, Agr. Implement Workers of America Int'l. Union*, 633 F.3d at 41 ("Where the State is alleged to have impaired a public contract to which it is a party, less deference to a legislative determination of reasonableness and necessity is required, because the State's self-interest is at stake.") (citations omitted); *McGrath v. Rhode Island Retirement Bd.*, 88 F.3d 12, 16 (1st Cir. 1996) ("[W]hen a state itself is a party to a contract, courts must scrutinize the state's asserted purpose with an extra measure of vigilance. . . . [I]t is clear that a state must do more than mouth the vocabulary of the public weal in order to reach safe harbor; a vaguely worded or pretextual objective, or one that reasonably may be attained without substantially impairing the contract rights of private parties, will not serve to avoid the full impact of the Contracts Clause.") (citations omitted).

In this case, instead of having a Congress-like weighing and balancing of the benefits and burdens of the legislation in the interest of the greater good of the public, we

have legislative history that includes an express statement from William Norman, the Nation's lawyer in this very case at the time, that passing this Ordinance will help the Nation in its litigation against CDST.[2] This is the exact opposite of what a legislative body is supposed to do in order to determine the temporal reach of a statute, and is specifically prohibited by the Contracts Clause of the United States Constitution.

CDST is not arguing that the Nation cannot apply the 2011 Ordinance to future cases, cases in which such application will not deny a party its substantive and substantial contract rights. Indeed, if the purpose of the 2011 Ordinance was to overcome the ruling in the Panther Partners case, then such purpose may be obtained without depriving CDST of its substantive contract rights. However, because application of the 2011 Ordinance in this case would give the CIO jurisdiction over CDST where no jurisdiction existed before, and would inappropriately deprive CDST of its substantive and substantial contract right to arbitrate disputes rather than being dragged into court, such application is barred by the Contracts Clause, and this Court should dismiss the Nation's case against CDST, allowing the parties to arbitrate as they agreed to do ten years ago.

RESPECTFULLY SUBMITTED this 12th day of December, 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

[2] We now know that without this legislation, the parties would not be in front of this Court at this time, but instead in front of an arbitrator, because the District Court has already determined that the CIO did not have jurisdiction without the 2011 Ordinance.

ORIGINAL sent by Federal Express for filing and faxed to the Court of Indian Appeals this 12th day of December, 2012,

And a copy mailed this 12th day of December, 2012 to:

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Christine C. Marsceill

EXHIBIT A

TRANSCRIPT OF PROCEEDINGS OF THE

COMANCHE BUSINESS COMMITTEE

MONTHLY MEETING

APRIL 2, 2011, 10:15 A.M.

COMANCHE NATION COMPLEX

LAWTON, OKLAHOMA

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Comanche project. So we'll conclude it and get started with it. Thank you.

UNIDENTIFIED SPEAKER: I sure hope you do your history.

UNIDENTIFIED SPEAKER: Mr. Chairman, this business or whoever does the construction, are they subject to all three tribes' TERO?

MR. BURGESS: No, to ours. We're leasing the land, therefore, our ordinances apply.

UNIDENTIFIED SPEAKER: Is there Indian preference involved?

MR. BURGESS: That's what I just said, yes.

MR. HENSON: They have preference in our procurement procedures and also with TERO, so

all those have to be followed.

MR. BURGESS: All right. Resolution 36-11. This is approving the Tribal Court Civil Jurisdiction Ordinance as of 2011.

"Whereas, the CBC is the duly elected official body authorized to promulgate and enforce ordinances and codes, to protect the peace, health, safety and general welfare of the nation and its people within Comanche Nation jurisdiction pursuant to Article 6, Section 7(j) of the constitution; and

"Whereas, the Comanche Business

Committee finds that it is in the best interest of the nation to clarify the jurisdiction of the Court of Indian Offenses for the Comanche Nation, which is also known as the CFR Court; and

"Whereas, the CBC intends that nothing in this resolution shall be deemed a waiver of the Comanche Nation's sovereign immunity pursuit; and

"Whereas, the CBC intends that nothing in this resolution shall be deemed to supercede or conflict with the provisions of 25 CFR, Subsection 11.118.

"Now, therefore be it resolved that

the CBC approves and enacts the tribal court's civil jurisdiction ordinance of 2011 as set forth below to clarify the jurisdiction of the Court of Indian Offenses for the Comanche Nation.

"Be it further resolved that nothing in this resolution or in the Tribal Court Civil Jurisdiction Ordinance of 2011 shall be construed or interpreted as a waiver of the sovereign immunity of the Comanche Nation or any of its boards, commissions, agencies, corporations, enterprises or similar entities."

Gentlemen, would y'all review this, please, if you have some questions? I need a glass of water.

MR. TIPPECONNIE: It's very important to read that section on the next page under 1A, B, C, subset I or 1 and 2.

MR. BURGESS: Jim, did y'all submit this? Do you have a copy? There seems to be some numbering here.

MR. TIPPECONNIE: Remember, we have some numbering that we have to correct.

MR. BURGESS: That's this one.

MR. TIPPECONNIE: We were rushing that, so don't get misled by numbers. We were

going to correct the numbers.

MR. BURGESS: That's the number.

MR. HENSON: 36-11.

MR. TIPPECONNIE: Just forget that, it should be 36.

MR. NORMAN: The purpose of this amendment is to correct or detect a case in federal district court in which a judge determined that a tribe is not an Indian for purposes of the CFR Court, and therefore, cannot ask that court to enforce its laws against a non-Indian gaming vendor, or a non-Indian oil and gas company or any other entity that is doing business with the nation. So initial steps were taken, NCAI resolution was passed urging the Department of the Interior to defend the jurisdiction of CFR Courts

for those purposes so that tribes can enforce the laws against non-Indians businesses.

Department of Interior has not proceeded down that path, and we understand that because of budget concerns and some other political concerns, there is not a desire at this time by the Department to defend the CFR Courts. But an alternative means by which to address and correct that decision is for the nation to adopt

its own jurisdictional statute, which the CFR Court regulations allow. And so the purpose of this is to place the language within the nation's code, which would allow you to enforce your laws against those departments who breach a contract with you, or who refuses to adhere to your tribal codes and that sort of thing.

MR. HENSON: I'll make a motion to approve.

MR BURGESS: I have a motion to approve by Mr. Henson.

MR. NARCOMEY: So we'll have our own tribal court, is that what this is --

MR. BURGESS: No, no, it's CFR.

MR. TIPPECONNIE: If the nation is in the court, the nation, you know, the federal action was action was that it can't be -- it has to be Indians to Indians, right? It can't be a

nation to whomever. So what we're doing here is we're allowing now the nation being acknowledged as Indian, right, so we can act in that case. See, before you say it's only Indian to Indian, not a tribe to that part. So now we're saying the tribe can't act as Indians with that clause, right?

MR. KOSECHEQUETAH: Did he say anything about that case that --

MR. NORMAN: It was the Panther Partners case. It was actually a Kiowa case where the Kiowa tribe brought on an action against a gaming developer in order to clarify that they wanted to terminate the contract. They brought that actually in the CFR Court, and the gaming vendor then removed that to federal, and the federal court determination was that tribe is not an Indian for purposes of CFR Court jurisdiction. And so the federal court then took over the case and the tribe was not allowed to go to its own court.

So this would correct that. This will allow you, for instance, where an oil and gas company is refusing to pay your oil and gas severance taxes, you can take that action to that court and enforce your rights then.

MR. BURGESS: Is this going to be a

positive for us with that company? What was it called, CDST Games? They're still trying to pursue that, right?

MR. NORMAN: Now, the CFR Court has concluded that they have jurisdiction over that

case. The federal court also was playing a role here, and so this would assist with respect to that case as well.

MR. BURGESS: So that any previous ruling by a CFR Court in that case is standing and the district court is not going to overrule CFR --

MR. NORMAN: Well, it gives us the opportunity to make that happen. Now, this is similar to the other laws that have been proposed that you passed on earlier in that you passed a law that gets submitted to the region, and they approve it, and then it becomes enforceable at that time.

MR. BURGESS: Okay, all right. So we have a motion here.

MR. KOSECHEQUETAH: Second, Mr. Chairman.

MR. BURGESS: Are you seconding, Darrell?

MR. KOSECHEQUETAH: Yes.

MR. BURGESS: Oh, okay. All right.

MR. WAUAHDOOAH: I have a question.

The civil codes, they're the federal set of codes in CFR Court? There's a whole list of them?

MR. NORMAN: There are federal

rules that govern the CFR Court that are published in the CFR Court.

MR. WAUAHDOOAH: So we don't need to create the civil --

MR. NORMAN: No, it's the same situation as the other before. There are some gaps in here a federal district court has said, has interpreted those a certain way. But the tribe has the authority to enact its own law and have that take the place of that interpretation.

MR. WAUAHDOOAH: But currently right now the tribe has no civil codes, correct, other than that?

MR. BURGESS: Well, we go by the CFR Court.

MR. TIPPECONNIE: You go by 25 CFR.

MR. WAUAHDOOAH: But we could create our own civil codes.

MR. TIPPECONNIE: When we have a court, expectedly if we have a court.

MR. BURGESS: You didn't get to vote on that, Mark. I called for the vote.

MR. WAUAHDOOAH: Oh, I approve.

MR. BURGESS: Mr. Nelson, could you

wait? We're conducting business here.

MR. NELSON: No need to be rude, sir.

MR. BURGESS: Well, then interrupting us is rude.

MR. NELSON: You don't need to be rude.

MR. BURGESS: "Whereas, the CBC is a duly elected official body authorized to promulgate and enforce ordinances and codes to protect the peace, health, safety, and welfare of the nation and its people within Comanche Nation jurisdiction pursuant to Article VI, Section 7(j) of the constitution; and

"Whereas, the CBC finds that it is in the best interest of the nation to provide for the reimbursement of litigation costs when the nation must sue and prevails in the collection of Comanche Nation taxes.

"Now, therefore be it resolved that the CBC approves and adopts an amendment to Section 214 of the Comanche Nation Revenue and Taxation Act of 1995 to make minor technical edits and to add a provision for the recoup of litigation costs when the nation prevails in litigation to collect taxes."

Gentlemen?

help to provide an employee within our government, so it is still part of our government. Because without those gaming dollars, we don't have many of these programs. So it's still tied into our governmental system. That's my interpretation.

MR. BURGESS: Thank you. Duly noted. Executive session, moving to executive session at 1:54 p.m.

(Open session concluded at 1:54 p.m.)

* * * * * *

R E P O R T E R 'S C E R T I F I C A T E

STATE OF OKLAHOMA)
)
COUNTY OF OKLAHOMA)

I, Kelly Stoabs, Certified Shorthand Reporter for the State of Oklahoma, certify that the above and foregoing meeting transcribed by me is a true and correct transcript of the meeting; that the meeting was held on April 2, 2011, in the State of Oklahoma; that I am not an attorney for nor a relative of any said parties, or otherwise interested in the event of said action.

IN WITNESS WHEREOF, I have hereunto set my hand and seal of office on this the 5th day of May, 2011.

_____
Kelly Stoabs
Certified Shorthand Reporter
for the State of Oklahoma

S E C R E T A R Y ' S C E R T I F I C A T E

I, Robert Tippeconnie, Secretary-Treasurer of Comanche Nation Business Committee, certify that the above is a true and correct transcript of a meeting of CBC Members held at 10:15 a.m. on April 2, 2011, and that the meeting was duly called and held in all respects in accordance with the charters and bylaws of the Comanche Nation and that a quorum was present.

I further certify that the votes and resolutions of the CBC Members of Comanche Nation at the meeting are operative and in full force and effect and have not been annulled or modified by any vote or resolution passed or adopted by the

CBC since that meeting.

Signed: _____ Date: _____
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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. APP-13-001** **CDST-GAMING I, LLC'S REPLY BRIEF RE 2011 ORDINANCE**

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Plaintiff CDST-Gaming I, LLC ("CDST") respectfully submits this reply brief regarding the Comanche Nation's 2011 Ordinance. The Court of Indian Offenses ("CIO") has never had jurisdiction over CDST, and the 2011 Ordinance cannot give the CIO jurisdiction over CDST for several reasons, as detailed below. Consequently, this Court should order the CIO to dismiss the underlying case against CDST, and allow the parties to arbitrate as contemplated by their agreement.

I. INTRODUCTION.

Reduced to its essence, the Nation argues this Court need look no further than the Comanche Business Committee's ("CBC") written intent in enacting the 2011 Ordinance to conclude that it applies. However, because the CBC does not have authority to enact retroactive rules and regulations binding on a federal agency court or Non-Indians, its written intent does not make the 2011 Ordinance applicable to this case. The issue is the scope and extent of the CBC's authority in expanding, retroactively, the jurisdiction of a federal agency court in a pending lawsuit between the Nation and a non-consenting Non-Indian. Indeed, it is undisputed that the CBC gets its authority to pass rules and regulations binding on the CIO from the Bureau of Indian Affairs ("BIA"). Because the BIA itself is not entitled to promulgate retroactive rules and regulations binding on the CIO or Non-Indians without an express grant of authority from the United States Congress, it cannot delegate that authority to the CBC. And, even if Congress had expressly granted such authority, applying the 2011 Ordinance to CDST in this case would violate the United States Constitution's Contracts Clause.

II. SUMMARY OF ARGUMENT.

- The Nation contends the CBC's ability to pass retroactive legislation is on par with or exceeds that of the United States Congress. Congress, however, is the only legislative body with the inherent authority to pass retroactive legislation applicable to federal courts and federal agencies, and even Congress is limited by the restraints of the United States Constitution. The CBC gets its authority to pass legislation binding on the CIO from the Code of Federal Regulations, promulgated by the Bureau of Indian Affairs in conjunction with the Department of the Interior, an Administrative agency. Administrative agencies can only enact retroactive rules and regulations when that power is conveyed by Congress in express terms. Congress has not expressly conveyed authority to the Department of the Interior, the Bureau of Indian Affairs, or the CBC to pass retroactive laws. And, even if it did, application of those laws would be restricted by the United States Constitution.

- The Nation argues not only that a court must decide the validity of the parties' agreement, but the Court of Indian Offenses must be that court. However, even if a court should decide the agreement's validity, it must be a court that has jurisdiction over CDST. Thus, if this Court determines that a court, rather than an arbitrator, must decide the parties' agreement's validity, the Nation is still required to bring its challenge to the agreement to a court with jurisdiction over CDST.[1]

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[1] Three other issues merit mentioning and dispelling:

1. The Nation asks this Court to "revisit" its prior ruling that applying 25 C.F.R. § 11.116 to deprive CDST of its contractual right to arbitrate would affect CDST's substantive contract rights. However, the Nation does not dispute or distinguish CDST's authorities that clearly hold the right to arbitrate rather than be dragged into court is a substantive and substantial contract right. Nor does it quarrel with the proposition that post-agreement legislation forcing CDST to litigate in court impairs CDST's substantive right to arbitrate.

2. The Nation attacks CDST as having an "ever-increasingly disdainful tone in its briefing that tribal laws and courts are somehow substandard or suspect." Nation's Brief, p. 22, n.15. Nonsense. CDST respectfully disputes the Nation's contention that the CBC has unlimited authority, not even constrained by the United States Constitution, to deprive a non-Indian of its substantial rights; a power that Congress itself does not possess. Moreover, like any litigant, CDST objects to having its case heard by a court where the opposing party claims the authority to pass rules and regulations retroactively affecting its substantial rights. No doubt the Nation would object to litigating this dispute in a Court where CDST could pass binding laws

III. ARGUMENT.

This Court correctly determined in its initial ruling that retroactive legislation applied to this case to give the CIO jurisdiction over CDST would impermissibly affect CDST's substantive contract rights. As CDST established in its December 2012 brief, incorporated herein by reference, the right to arbitrate rather than being dragged into court is substantive and substantial. The Nation did not dispute this in its response. The Nation now argues, however, that because the 2011 Ordinance contains language which makes it clear the CBC intends to take away CDST's substantive rights, that is the end of the inquiry. Thus, the issue becomes whether applying the 2011 Ordinance retroactively is permissible simply because the CBC says it applies retroactively.

A. The CBC Cannot Pass Retroactive Legislation Binding On The CIO Or CDST.

The Nation gets its authority to pass laws binding on the CIO from the Code of Federal Regulations. Specifically, 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:

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designed, in part, to give it a leg up in this very litigation. This is not disdain for tribal laws or courts, it is a perfectly reasonable desire not to have an opposing litigant change the rules in the middle of a pending case in a way that affects your rights.

3. CDST never consented to the CIO's or this Court's jurisdiction – not by asking this Court to dismiss the case and allow the parties to go to arbitration, or otherwise. The Nation turns to bankruptcy law because there is no applicable law to support such an argument. Even bankruptcy law, however, does not support the Nation's tactic, as the authorities cited by the Nation involve parties who actually filed claims seeking affirmative relief. CDST has not filed a counterclaim in this action.

(a) Are enforceable in the Court of Indian Offenses having jurisdiction over the Indian country occupied by that tribe; and

(b) Supersede any conflicting regulations 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.

The Code of Federal Regulations is a codification and publication of rules by executive departments and agencies of the federal government. Every regulation in the CFR must be supported by an enabling statute or authority expressly granted by Congress. Indeed, neither an administrative agency nor any other legislative body is authorized to pass retroactive legislation binding on those agencies (and those under their jurisdiction) unless they receive specific authorization from the United States Congress to do so. Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208-09 (1988) ("[A] statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms. Even where some substantial justification for retroactive rulemaking is presented, courts should be reluctant to find such authority absent an express statutory grant.") (citation omitted).

Nowhere in either Section 11.100 or 11.108 does Congress expressly authorize the CBC (or any tribe's governing body) to enact retroactive legislation creating jurisdiction over non-consenting non-Indians, which would be binding on a Court governed by the

Code of Federal Regulations. Just as the Supreme Court found in Bowen, here "[t]he statutory provision establishing the [Comanche Nation's] general rulemaking power contains no express authorization of retroactive rulemaking." Id. at 213.[2]

Rather than address the actual holding in Bowen, the Nation argues Bowen was cited by the District Court to reject the argument that the 2011 Ordinance is impermissibly retroactive. The District Court cited Bowen for the unremarkable proposition that the same two-part analysis performed on Congressional legislation (determining whether Congress has expressly prescribed the statute's reach and, if not, determining whether the statute would have retroactive effect) also should be performed on federal regulations and administrative rules. Bowen did not give carte blanche authority for administrative bodies, or the legislative bodies to which they give authorization, to pass retroactive laws and make them applicable on federal agency courts or non-Indians. In fact, Bowen did just the opposite.

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[2] The Nation presumes and argues that because the "Nation is not a federal administrative agency, and its 2011 Ordinance is not a federal administrative rule," neither the United States Constitution nor any other federal law limits the Nation's authority to pass laws binding on the CIO or on non-Indians. Nation's brief, p. 23. It is axiomatic that the United States Constitution and federal laws do limit the Nation's authority over federal agency courts and Non-Indians, even though the Nation continues to possess attributes of sovereignty when organizing its own government and dealing exclusively with its tribal members. Even legislation adopted pursuant to a Constitutional Amendment is constrained by other applicable portions of the United States Constitution. See Granholm v. Heald, 544 U.S. 460 (2005) (Michigan and New York laws prohibiting or imposing additional burdens on out-of-state wineries' attempts to ship wine directly to in-state consumers violated the Constitution's Commerce Clause; even the authority given to States by the 21st Amendment is limited by the Constitution's Commerce Clause); Nat'l Fed. Of Ind. Bus. v. Sebelius, 567 U.S. ___, 132 S. Ct. 2566 (2012) (Congress lacked authority to pass portions of so-called "Obama-care" law under the Commerce Clause or Spending Clause, but had authority to pass mandate portion under its Constitutional taxing powers).

In Bowen, multiple hospitals challenged the efforts of the Secretary of Health and Human Services to recoup Medicare payments based on a rule that had been struck down before but then later readopted by the agency. 488 U.S. 204, 206-07. In ruling that the Secretary could not apply the new legislation retroactively, the United States Supreme Court held that:

> It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress. In determining the validity of the Secretary's retroactive cost-limit rule, the threshold question is whether the Medicare Act authorizes retroactive rulemaking.
>
> Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result. By the same principle, a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms. Even where some substantial justification for retroactive rulemaking is presented, courts should be reluctant to find such authority absent an express statutory grant.

Id. at 208-09 (emphasis added and citations omitted); See also Univ. of Iowa Hosps. & Clinics v. Shalala, 180 F.3d 943, 951 (8th Cir. 1999) ("[W]hen Congress delegates legislative authority to an administrative agency, courts will presume that the delegation forbids the agency from creating retroactive prescriptions, and only express congressional authorization will overcome this presumption.") (emphasis added); [3] Cherry v. Barnhart,

[3] This principle is not unlike one the Nation has relied on throughout this litigation. See District Court's August 8, 2011 Order, p. 5 ("As with other forms of sovereign immunity, tribal immunity is 'subject to the superior and plenary control of Congress.' Thus, absent explicit waiver of immunity **or express authorization by Congress**, federal courts do not have jurisdiction to entertain suits against Indian tribes.") (Emphasis added and citations omitted).

327 F. Supp. 2d 1347, 1356 (N.D. Okla. 2004) ("While the Court agrees that SSR 00-3p (and SSR 02-1p) provides a more specific statement of the agency's intent to apply the revised listing to claims filed before October 25, 1999, such is not dispositive. As the *Nash* court recognized, the Commissioner must also establish that 'Congress expressly authorized retroactive rulemaking.' There are two criteria for the court to weigh in determining whether the deletion applies retroactively: (1) whether the SSA expressed its clear intention that the deletion apply retroactively and (2) if so, whether Congress has expressly authorized the SSA to promulgate retroactive rules."); Bowen, 488 U.S. at 223-24 (Scalia, J., concurring) ("It is entirely unsurprising, therefore, that even though Congress wields such a power itself, it has been unwilling to confer it upon the agencies. Given the traditional attitude towards retroactive legislation, the regimes established by the APA is an entirely reasonable one. Where quasi-legislative action is required, an agency cannot act with retroactive effect without some special congressional authorization. That is what the APA says, and there is no reason to think Congress did not mean it.").

Thus, rather than authorizing the CBC to pass retroactive legislation binding on the CIO and CDST, Bowen clarifies that the CBC cannot make such legislation binding on the CIO or CDST without an express grant by Congress. Sections 11.100 and 11.108 certainly don't give that authority. And, even if they did, neither the Department of Interior nor the Bureau of Indian Affairs received that express grant from Congress. Indeed, there is a presumption that "Congress intends through its facially unlimited grants of rulemaking authority to confer agencies with the power to issue only prospective

legislative rules. Thus, to overcome this presumption, the agency must establish that Congress expressly provided it with the power to make retroactive rules." Cherry, 327 F. Supp. 2d. at 1357.

The Nation's brief incorrectly characterizes CDST's argument as one focused on the Nation's intent ("the Nation's legislative body did not *intend* for its 2011 Ordinance to apply to pending cases"). Nation's Brief, p. 21. This is not, and has never been, CDST's argument. Instead, CDST simply points out that the CBC does not have the same power as the United States Congress to pass retroactive legislation binding on the Court of Indian Offenses, a federal-agency court established under the Code of Federal Regulations, or on CDST, a non-Indian. Additionally, Congress has not expressly granted the Nation, or the Agency which authorizes the Nation to promulgate rules binding on the CIO, authority to promulgate retroactive rules. The Nation does not cite any contrary authority, but instead addresses an argument never made by CDST (that the Nation did not intend for the 2011 Ordinance to apply retroactively).

B. The United States Constitution's Contracts Clause Also Prevents The CIO From Applying the 2011 Ordinance To Assume Jurisdiction Over CDST.

The United States Constitution prohibits governmental entities from passing any law "impairing the obligation of contracts." United States Constitution, Article I, Section 10, clause 1 (the "Contracts Clause"). "Contract Clause claims are analyzed under a two-pronged test. The first question is whether the state law has . . . operated as a substantial impairment of a contractual relationship. If the contract was substantially impaired, the court next turns to the second question and asks whether the impairment was reasonable

and necessary to serve an important government purpose." United Auto., Aerospace, Agr. Implement Workers of America Int'l. Union v. Fortuno, 633 F.3d 37, 41 (1st Cir. 2011).

As noted in CDST's December 2012 brief, this Court already determined that CDST's right to arbitrate this case rather than be dragged into court would be substantially impaired by the application of post-agreement legislation. CIA Opinion p. 2 (post-agreement legislation "does more than change procedures; it creates jurisdiction where none existed earlier" and "affect[s] substantive rights of the parties."). This holding is unaffected by the 2011 Ordinance's expression of intent.[4] CDST's citation to multiple authorities holding the right to arbitrate is substantive and substantial went unchallenged in the Nation's brief.[5]

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[4] The Nation's brief suggests this Court never found that post-agreement legislation created jurisdiction where none existed before, but instead only found that such legislation affects the parties' substantive rights. Clearly, the substantive right affected by applying post-agreement legislation to grant the CIO jurisdiction over CDST is CDST's right to arbitrate rather than be forced into court. If there was no jurisdiction to drag CDST into court prior to the 2011 Ordinance (a finding confirmed by the District Court), then utilizing the 2011 Ordinance to force CDST into court would be creating jurisdiction where none existed before.

[5] See, e.g., Alascom, Inc. v. ITT North Electric Co., 727 F.2d 1419, 1422 (9th Cir. 1984) (if a party "must undergo the expense and delay of a trial before being able to appeal, the advantages of arbitration—speed and economy—are lost forever. We find this consequence 'serious, perhaps irreparable.'"); Stott v. Capital Fin. Servs., Inc., 277 F.R.D. 316, 337 (N.D. Tex. 2011) ("The class members who have pursued arbitration clearly have a substantive contractual right to arbitration . . . ."); Olde Discount Corp. v. Tupman, 805 F. Supp. 385, 391 (D. Del. 1992), aff'd, 1 F.3d 202 (3d Cir.1993), cert. denied, 510 U.S. 1065, 114 S.Ct. 741, 126 L.Ed.2d 704 (1994) ("loss of [plaintiff's] federal substantive right to arbitrate, should injunctive relief be denied, constitutes irreparable harm").

Because application of the 2011 Ordinance would affect CDST's substantive contract rights, the Nation is required to prove the impairment is reasonable and necessary to serve an important government purpose. Again, CDST's authorities on this point from its December 2012 brief went unchallenged by the Nation.[6] The Nation has not even tried to prove that applying the 2011 Ordinance retrospectively to CDST, rather than only prospectively, was necessary to achieve an important government purpose.

Indeed, the Nation tries to shy away from its counsel's explanation to a CBC member that a vote for passing the 2011 Ordinance would help the Nation succeed in this very litigation against CDST. Not surprisingly, the Nation focuses on its other purpose for passing the Ordinance—to stem the effects of the Panther Partners decision on the Nation's future ability to file lawsuits in the CIO. However, the Nation cannot hide from the fact that the 2011 Ordinance does not need to apply retroactively in order for the Nation to be able to file future lawsuits in the CIO. Indeed, the Nation has not come up with a single reason why the 2011 Ordinance needs to apply retroactively—that is, other than the candid admission that the Ordinance would assist the Nation in this very case.

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[6] See U.S. Trust Co. of New York v. New Jersey, 431 U.S. 1, 29 (1977) ("Thus a State cannot refuse to meet its legitimate financial obligations simply because it would prefer to spend the money to promote the public good rather than the private welfare of its creditors."); *Id.* at 31 ("In the instant case, *the State has failed to demonstrate* that repeal of the 1962 covenant was similarly necessary. We also cannot conclude that repeal of the covenant was reasonable . . . .") (emphasis added); Mascio v. Public Employees Retirement Sys. Of Ohio, 160 F.3d 310 (6th Cir. 1998) ("The district court determined that impairment was 'not necessary to advance an important public purpose' here. The defendants have pointed to nothing that persuades us otherwise."); State of Nevada Employees Ass'n., Inc. v. Keating, 903 F.3d 1223, 1228 (9th Cir. 1990) ("In this case, the State has not met its burden of proving that the impairment of the public employees' pension rights was necessary to achieve an important public purpose. We hold that the Nevada legislation unconstitutionally impaired the State's contractual obligations.").

See April 2, 2011 CBC Meeting Transcript, pp. 69-70 ("Mr. Burgess: Is this going to be a positive for us with that company? What was it called, CDST Games? They're still trying to pursue that, right? Mr. Norman: Now, the CFR Court has concluded that they have jurisdiction over that case. The federal court also was playing a role here, and so this would assist with respect to that case as well. Mr. Burgess: So that any previous ruling by a CFR Court in that case is standing and the district court is not going to overrule CFR -- Mr. Norman: Well, it gives us the opportunity to make that happen."). Even if the Nation could come up with a legitimate reason to try to apply the 2011 Ordinance retroactively, that rationale must be viewed with great scrutiny.[7] And, as pointed out by Justice Scalia in Bowen, if and when an agency believes that the extraordinary step of retroactive rulemaking is crucial, all it need do is persuade Congress

[7] Once again, CDST's on-point authorities went unchallenged by the Nation's brief. See U.S. Trust Co. of New York v. New Jersey, 431 U.S. at 26 ("[C]omplete deference to a legislative assessment of reasonableness and necessity is not appropriate . . . ."); see also McGrath v. R.I. Ret. Bd., 88 F.3d 12, 16 (1st Cir. 1996) ("[A] state must do more than mouth the vocabulary of the public weal in order to reach safe harbor . . . ."); United Auto., Aerospace, Agr. Implement Workers of America Int'l. Union, 633 F.3d at 41 ("Where the State is alleged to have impaired a public contract to which it is a party, less deference to a legislative determination of reasonableness and necessity is required, because the State's self-interest is at stake.") (citations omitted); McGrath v. Rhode Island Retirement Bd., 88 F.3d 12, 16 (1st Cir. 1996) ("[W]hen a state itself is a party to a contract, courts must scrutinize the state's asserted purpose with an extra measure of vigilance. . . . [I]t is clear that a state must do more than mouth the vocabulary of the public weal in order to reach safe harbor; a vaguely worded or pretextual objective, or one that reasonably may be attained without substantially impairing the contract rights of private parties, will not serve to avoid the full impact of the Contracts Clause.") (emphasis added and citations omitted); see also Bowen, 488 U.S. 213 ("Deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate.").

of that fact to obtain the necessary ad hoc authorization." Bowen, 488 U.S. at 224 (Scalia, J., concurring).

One of CDST's authorities the Nation actually attempts to address in its brief is Hughes Aircraft Co. v. U.S. ex rel. Schumer, 520 U.S. 939 (1997), arguing that the statute's divestiture of a defense in *any* court, rather than just one particular court, rendered the statute inapplicable because it affected substantive rights. Nation's Brief, pp. 16-17. The Nation then tries to bolster its position with Republic of Austria v. Altmann, 541 U.S. 677 (2004), arguing that statutes that confer or oust jurisdiction usually take away no substantive right, but instead merely change the tribunal that is to hear the case. Nation's Brief, pp. 16-17. The Nation omits, however, the portion of the Supreme Court's ruling that is most applicable to this issue:

> As we stated in *Landgraf:*
>
> > "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.'"
>
> 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.

Hughes Aircraft Co., 520 U.S. at 951 (citations omitted).

Similarly, the 2011 Ordinance does not simply change the court *where* the parties' dispute could be heard, it changes *whether* the dispute could be heard by a court at all. Under the parties' Agreement, no court could hear the parties' dispute; instead, "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." Agreement, Section 18. As stated by the District Court, "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 . . . ." July 23, 2012 Order, pp. 15-16.

Indeed, a suit on the parties' Agreement could not be brought in any court, including Oklahoma or Arizona state courts. See Nation's Brief, p. 13 (discussing the subject matter jurisdiction of these courts). Instead, as dictated by the parties' Agreement, when a dispute arose, CDST attempted informal negotiations, and then raised the dispute in AAA arbitration. If the Nation disputed whether it was bound by the Agreement its chairman signed upon the approval of the CBC, see Resolution 06-01 and related memo recommending authorization, attached hereto as Exhibit 1, then it could have (and still can) raise those arguments in arbitration.

C. An Arbitrator, Rather Than A Court, Should Decide Issues Regarding The Parties' Agreement; If The Nation Wants To Challenge The Agreement's Validity In Court, It Must Be A Court Having Jurisdiction Over CDST.

The Nation cites numerous authorities in its brief for the unremarkable principle that parties cannot be forced to arbitrate an agreement they did not enter. It also cites cases that say if an Indian Tribe cannot legally enter a gaming contract because such a contract qualifies as a management contract, then the Tribe cannot be compelled to arbitrate a contract not legally made. These authorities miss the point. Here, we are dealing neither with management contracts nor with contracts that were not entered. Indeed, CDST and the Nation not only entered into an Agreement, they performed under the agreement for more than three years.[8] What were the parties doing exchanging goods and money as called for in the written agreement if not performing that agreement for those three years? As fully explained in CDST's September 2012 brief, because the parties had an agreement, and because the Nation admittedly is challenging the entire agreement rather than just the arbitration clause,[9] an arbitrator should decide the parties'

[8] This is not a case where two parties are arguing about whether an agreement was finalized in the first place. In this case, we have: (1) a written agreement; (2) signed by both parties, including the Nation's Chairman; (3) a Comanche Nation Resolution authorizing the Nation's Chairman to sign the contract; (4) a recommendation from the Comanche Nation Gaming Committee to the Comanche Business Committee that the Chairman should be authorized to enter these types of agreements; and (5) performance under the agreement for three years. The fact that the parties performed makes it clear an agreement was entered into. Of course, this is not a concession that the Nation fully complied with all of its contractual obligations. And, while the Nation has argued that the Resolution authorizing its Chairman to enter into this agreement was allegedly forged, there is no allegation that CDST had anything to do with the alleged forgery, and no reason why the burden of the alleged forgery should fall on CDST rather than on the Nation as the party having sole control of the document. Additionally, such an argument is a defense to a clear agreement, which should be considered by an arbitrator.

[9] See Nation's brief, pp. 19-20 ("If the CIO possesses subject matter jurisdiction to determine the Nation's claim, it may decide the asserted contracts are 'void,' as the Nation asserts . . . .").

contract-related disputes. 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). As Judge Hall explained in the well-reasoned concurrence and dissent in Three Valleys Municipal Water District v. E.F. Hutton & Company, Inc., 925 F.2d 1136, 1144-45 (9th Cir. 1991) (Hall, J. concurring and dissenting):

> The majority holds that before an arbitration clause in a contract can bind a party to arbitrate the party must be given an opportunity to dispute the 'very existence' of the contract in district court. . . . .
>
> However, the concern that moves the majority is not the only policy consideration in this area of the law. There is a very strong federal policy in favor of arbitration. Indeed, 'any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration . . . .'
>
> Moreover, since so many contract disputes concern the 'making' of the contract, rather than its voidability, the potential scope of contract arbitration will be severely limited by a rule that requires a judicial determination that a contract exists before the arbitration clause of such contract can be effective. Consider a number of illustrations. First, the question whether there is consideration for exchanged promises or performance goes to the 'making' of a contract. For if there is no consideration, no contract has been formed. Second, the question whether a purported contract is actually a contract or is a mere preliminary negotiation also goes to the 'making' of a contract. Finally, consider the instant case, in which an agent is said to have lacked authority to bind her purported principal. Again, this goes to the 'making' of the contract. Thus, if disputes that concern the 'making' of contracts must be litigated rather than subjected to arbitration, arbitration's potential as an alternative dispute resolution mechanism is substantially limited. As such, the majority's policy about bootstrapping is counterbalanced by the contradictory federal policy that arbitration of contract disputes is to be encouraged.

(Citations omitted). The concurrence and dissent is also on point in discussing how the United States Supreme Court, in Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388

U.S. 395, 402 (1967), rejected an argument that if a contract is not enforceable then the arbitration provision cannot be enforced:

> In dissent, Justice Black asserted the very view now adopted by the majority in this case, that the statute cannot be interpreted so as to allow 'boot-strapping.' Justice Black argued that if a contract is fraudulently induced it is not enforceable, and any arbitration provision within it is therefore ineffective. This view was necessarily rejected by the *Prima Paint* Court.

Three Valleys, 925 F.2d at 1146 (Hall, J. concurring and dissenting) (citation omitted).

And, lest CDST come under attack for citing a concurring and dissenting opinion, the United States Supreme Court reached its decision in Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440 (2006) on virtually the same grounds as those discussed in Judge Hall's concurrence and dissent. In Buckeye Check Cashing, two customers of a check-cashing company signed agreements containing arbitration clauses. Id. at 442. In holding that the customers' challenges to the agreement's validity must be decided by an arbitrator, the Court stated:

> In declining to apply *Prima Paint's* rule of severability, the Florida Supreme Court relied on the distinction between void and voidable contracts. . . . . *Prima Paint* makes this conclusion irrelevant. That case rejected application of state severability rules to the arbitration agreement *without discussing* whether the challenge at issue would have rendered the contract void or voidable.

Id. at 446. In its conclusion, the Court stated:

> It is true, as respondents assert, that the *Prima Paint* rule permits a court to enforce an arbitration agreement in a contract that the arbitrator later finds to be void. But it is equally true that respondents' approach permits a court to deny effect to an arbitration provision in a contract that the court later finds to be perfectly enforceable. *Prima Paint* resolved this conundrum-and resolved it in favor of the separate enforceability of arbitration provisions. We reaffirm today that, regardless of whether the

> challenge is brought in federal or state court, a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator.

Id. at 448-49.

Again, the Nation's argument is that its Chairman purportedly was not authorized to sign the agreement. Even if the Chairman was not authorized to execute the parties' written agreement, "no signature is needed to satisfy the [Federal Arbitration Act's] written agreement requirement." Caley v. Gulfstream Aerospace Corp., 428 F.3d 1359 (11th Cir. 2005). In Caley, a group of employees sued their corporate employer, and the employer moved to compel arbitration. Id. at 1364. When the employees argued that the parties' agreement was not valid because they did not sign it, the Court stated:

> We readily conclude that no signature is needed to satisfy the FAA's written agreement requirement. . . . As the Tenth Circuit has explained, "Decisions under the Federal Arbitration Act . . . have held it not necessary that there be a simple integrated writing or that a party sign the writing containing the arbitration clause. All that is required is that the arbitration provision be in writing." *Medical Dev. Corp. v. Indus. Molding Corp.*, 479 F.2d 245, 348 (10th Cir. 1973).
>
> Second, the overwhelming weight of authority supports the view that no signature is required to meet the FAA's "written" requirement. Indeed, this court has found no decision to the contrary.
>
> Here, the DRP is indisputably in writing. Although the employees' acceptance was by continuing their employment and was not in writing, all material terms-including the manner of acceptance-were set forth in the written DRP. . . . .

Id. (Citations omitted).

Similarly, the Nation's argument about not having a proper or authorized signature on the parties' agreement does not invalidate the arbitration agreement. The Nation cannot dispute that the parties conducted business under the agreement for three years before the Nation had CDST's machines removed from the Lawton casino. And, as the Western District Court held in the Comanche Indian Tribe Of Oklahoma v. 49, L.L.C. case,[10] the Nation can ratify its Chairman's execution of a gaming agreement by actions taken following the Chairman's signature. Thus, even if the Chairman was not formally authorized to put his signature on the parties' agreement, the parties clearly had a written agreement that requires all disputes to be resolved by an arbitrator.

Nevertheless if, after a recommendation, resolution, written agreement, signature, and performance, this Court agrees with the Nation's argument that a court rather than arbitrator must decide the Agreement's validity, then the Nation must raise that issue in a court of competent jurisdiction, i.e., one having jurisdiction over CDST. Just as the Nation partially waived its sovereign immunity to file an answer to CDST's amended complaint in the District Court, the Nation can waive its immunity as necessary to have this issue decided in a court having jurisdiction over CDST. The CIO does not have jurisdiction over CDST, so even if the Agreement's validity had to be resolved by a court, it would not be the CIO.

IV. CONCLUSION.

For the foregoing reasons, the 2011 Ordinance cannot give the CIO jurisdiction over CDST, and this Court should dismiss the underlying matter and allow the parties to

[10] Case No. Civ-03-18-R. A copy of the referenced Order is attached hereto as Exhibit 2.

resolve their disputes in arbitration. If the Nation challenges an arbitrator's authority to resolve the parties' disputes, the Nation should raise those challenges in a court having jurisdiction over CDST.

RESPECTFULLY SUBMITTED this 4th day of February, 2013.

GALLAGHER & KENNEDY, P.A.

By _____

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ORIGINAL sent by Federal Express for filing and faxed to the Court of Indian Appeals this 4th day of February, 2013

And a copy mailed this 4th day of February, 2013 to:

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_____

EXHIBIT 1

Comanche Indian Tribe
Resolution No. 06-01

COMANCHE

RESOLUTION

WHEREAS, the Comanche Indian Tribe is a federally recognized Indian Tribe with a Constitution approved by the Secretary of the Interior on January 9, 1967, to safeguard trial rights, powers and privileges to improve the economic, moral, education and health status of its members; and

WHEREAS, tradition of sovereignty of the Comanche Indian Tribe, since time immemorial long predates the existence of the Tribe, establishes the inherent sovereign powers and rights of the Comanche self-government; and

WHEREAS, the Comanche Business Committee is the duly elected official body designated to conduct business for and on behalf of the Comanche Tribe; and

WHEREAS, the Comanche Business Committee authorizes the Comanche Tribal Chairman/CEO to sign and/or negotiate all contracts, amendments, checks and documents for and on behalf of matters pertaining to the expansions of the Comanche Nation Gaming Centers, (inclusive of water matters, building/construction, machine selection and placement, etc).

NOW THEREFORE BE IT RESOLVED, that the Comanche Business Committee acting for and on behalf of the Comanche Tribal of Oklahoma does hereby authorize this resolution for such intent.

Certification

The above resolution was duly adopted at a regular scheduled meeting of the Comanche C Business Committee meeting held on Saturday, January 6, 2001 at the Comanche Tribal Headquarters, Lawton, OK, by a vote of 5 For, 0 Against, and 0 Abstentions, a quorum being present.

Johnny Wauqua, Chairman

ATTEST

Thomas O. Chibitty

Thomas O. Chibitty, Secretary-Treasurer

Memo

To: Comanche Business Committee
From: Comanche Nation Gaming Committee
Date: December 12, 2000
Subject: Recommendation of Authorization

It is the recommendation of the Comanche Nation Gaming Committee, in order to expedite the completion of the New Randlett Gaming Center and other planned expansion projects, that the Comanche Tribal Chairman/CEO be authorized to sign and/or negotiate all contracts, amendments, checks and documents for and on behalf of matters pertaining to the expansion of all the Gaming Centers, (inclusive of water matters, building/construction, machine selection and placement, etc).

Please take this matter under consideration.

EXHIBIT 2

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

COMANCHE INDIAN TRIBE OF OKLAHOMA,	)	
Plaintiff,	)	
v.	)	**CIV-03-18-R**
49, L.L.C., an Oklahoma Limited Liability Company; AMERICAN ARBITRATION ASSOCIATION,	)	
Defendants.	)	

ORDER

Before the Court are Plaintiff's Application for a Temporary Restraining Order and Motion for Declaratory and Injunctive Relief and Defendant's Motion to Compel Arbitration and request for a stay of these proceedings. Also before the Court is Plaintiff's Motion to Dismiss Counterclaim.

In support of its application and motion, Plaintiff Comanche Indian Tribe of Oklahoma ("Tribe") asserts that it has not effectively waived its sovereign immunity from suit or from arbitration by the American Arbitration Association because the agreements it entered into with Defendant 49, L.L.C. ("49") containing the limited waiver of sovereign immunity and arbitration provision are invalid. Tribe asserts that the agreements are invalid because 1) they are management agreements relating to gaming activity or collateral agreements to management contracts relating to gaming activity which are void because they were not approved by the Chairman of the National Indian Gaming Commission, citing 25

U.S.C. § 2711(a); 25 C.F.R. § 533.7; *Turn Key Gaming, Inc. v. Ogalala Sioux Tribe*, 164 F.3d 1092, 1094 (8th Cir. 1999); and 2) the Machine Agreement and the Lease Agreement are void under 25 U.S.C. § 81(b) as contracts that encumber the Tribe's land for a period of 7 or more years; and 3) the agreements between the Tribe and 49 are invalid under tribal law because not authorized by the Tribal Council or the Business Committee, as required by the Tribe's Constitution.

Defendant in response first asserts that arbitration should be compelled, and that issues as to the validity of the arbitration clauses, the underlying agreements, immunity and the arbitrator's jurisdiction are properly issues for the arbitrator. However, 49 further argues that the contractual arbitration provisions in the agreements at issue compel arbitration of the issues herein and also make it clear that the Tribe has waived its sovereign immunity for purposes of arbitrating contractual disputes under the agreements. Pending such arbitration, Defendant asserts that further proceedings herein should be stayed, but 49 requests that the Tribe be ordered to reimburse 49 for the arbitration costs that 49 paid on Tribe's behalf due to Tribe's refusal to pay any arbitration costs. In the event the Court addresses the other issues raised by Plaintiff's application and motion, Defendant asserts that the agreements do not constitute management agreements under 25 U.S.C. § 2711 because the provisions thereof do not substantially remove or reduce the Tribe's decision-making ability over the operation and management of their gaming operations but are nothing more than standard business clauses designed to protect 49's interests and insure that the Tribe will use the loan

funds in a responsible manner and 49's products in a manner that ensures the profitability of the venture. Additionally, Defendant 49 asserts that the agreements do not require BIA approval under 25 U.S.C. § 81 because the term of each agreement is four years, with an extension option of four years and, in any event, the agreements do not encumber Indian lands. Finally, Defendant 49 asserts that by Resolution 06-01 the Comanche Business Committee authorized Tribal Chairman and Johnny Wauqua to enter into the Lease Agreement, Loan Agreement and Note, all of which pertain to the New Randlett Gaming Center, and ratified his entry into the Machine Agreement which, at least until the Resolution was enacted on January 6, if not until January 18, 2001, when an amendment to the Machine Agreement was signed moving the lease of gaming machines for New Randlett out of the Machine Agreement to a separate lease, related to the New Randlett Gaming Center.

There is no dispute but that the agreements between Tribe and 49 provide for a limited waiver of Tribe's sovereign immunity in the event of a dispute between the Tribe and 49 and that pursuant to that limited waiver, all disputes between the Tribe and 49 are to be resolved through binding arbitration administered by the American Arbitration Association ("AAA") in accordance with its rules and procedures. Complaint at ¶ 11. However, because if Tribe is correct in any of its arguments the agreements between Tribe and 49 would be void *ab initio* and the limited waiver of sovereign immunity for purposes of arbitration would be void as well, the Court addresses Tribe's arguments concerning the validity of the agreements. *See A.K. Management Co. v. San Manuel Band of Mission Indians*, 789 F.2d 785, 789 (9th

Cir. 1986); *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Kean-Argovitz Resorts*, ___ F. Supp.2d ___, 2003 WL 1093922 at *8 (W.D. Mich. Feb. 19, 2003). *But see Sokaogan Gaming Enterprise Corp. v. Tushie-Montgomery Associates, Inc.*, 86 F.3d 656, 659 (7th Cir. 1996) (suggesting illegality of the contract does not vitiate the arbitration clause, citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967)).

Upon the Court's review of the Agreement Regarding Lease of Gaming Machines[1] and Amendment, Equipment Lease Agreement[2], Construction Loan Agreement and Promissory Note (Exhibits "A" through "D" to Plaintiff's Complaint), the Court finds that none of the agreements, individual or collectively, "provides for the management of all or part of [Tribe's] gaming operation." 25 C.F.R. § 502.15. The Court further finds that none of these agreements is an agreement collateral to a management contract. *See* 25 C.F.R. §§ 502.5 & 502.15. The agreements do not grant to 49 the right to manage, operate or control any of Tribe's gaming operations or facilities. The agreements merely require the Tribe to maintain standard business practices and procedures for the protection of 49's interests. Therefore, the approval of the agreements between Tribe and 49 by the Chairman of the National Indian Gaming Commission was not required, see 25 U.S.C. § 2711(a)(1), and the agreements are not void. *Id.*, 25 C.F.R. § 533.7.

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[1]Referred to above as the "Machine Agreement."

[2]Referred to above as the "Lease Agreement."

Section 81(b) of Title 25 of the United States Code provides that

> No agreement or contract with an Indian tribe that encumbers Indian lands for a period of 7 or more years shall be valid unless that agreement or contract bears the approval of the Secretary of the Interior or a designee of the Secretary.
>
> 25 U.S.C. § 81(b).

The Agreement Regarding Lease of Gaming Machines, as amended, and the Equipment Lease Agreement, each provide for an initial term of four years with an optional extension of an additional four years at the end of the initial term. Until the option to extend is exercised, however, the term of such contracts is four years. *See, e.g., State ex rel. Preston v. Ferguson*, 170 Ohio St. 450, 166 N.E.2d 365 (1960). Moreover, neither those agreements nor the Construction Loan Agreement and Promissory Note create a lien or mortgage on the Tribe's lands or in any way encumber the Tribe's lands. Any doubt concerning this is resolved by reference to the legislative history. The Senate Report on the bill to amend Section 81(b) in 2000 indicated that by replacing the phrase "relative to Indian lands" with "encumbers Indian lands," the section would "no longer apply to a broad range of commercial transactions" but would "only apply to those transactions where the contract between the tribe and a third party could allow that party to exercise exclusive or nearly exclusive proprietary control over the Indian lands." Report of the Senate Committee on Indian Affairs, S. Rep. 150, 106th Cong., 1st Sess. 12 (1999). The agreements between Tribe and 49 gave 49 no ownership interest in or control over the Tribe's lands. Accordingly, the

Secretary of Interior's approval or that of its designee was not required for the agreements to be valid. The agreements are not void under 25 U.S.C. § 81(b).

There remains the issue of whether the agreements between Tribe and 49 are invalid under tribal law because not executed in the manner required under the Tribe's Constitution. The relevant provisions of the Tribe's Constitution are as follows:

> ARTICLE V – TRIBAL COUNCIL
>
> Section 7. Subject to the approval of the Secretary of the Interior or his authorized representative where applicable, the authority of the Comanche Tribal Council shall include and be exclusive with respect to the following:
>
> . . .
>
> b) To execute leases, contracts or permits for five (5) or more years with regard to property which is owned exclusively by the Comanche Indian Tribe, but this does not include any individually owned land or personal property.
>
> ARTICLE VI – BUSINESS COMMITTEE
>
> Section 7. The duties, responsibilities and authorities of the business committee shall include the following:
>
> . . .
>
> c) To execute leases, contracts or permits for periods not to exceed five (5) years with regard to property which is owned exclusively by the Comanche Indian Tribe, but this does not include any jurisdiction over individually-owned land or personal property.
>
> ARTICLE XII – DUTIES OF OFFICERS
>
> Section 1. The Chairman shall be the Chief Executive of the Comanche Indian Tribe exercising the authorities and powers as delegated to his office by this constitution and the Comanche Tribal Council . . . [w]hen so authorized by the

> Comanche Tribal Council, he shall sign necessary papers and instruments for the Comanche Indian Tribe. (emphasis added).

It is undisputed that Resolution 06-01, which states as follows, was enacted by a 5-0 vote of the Comanche Business Committee at its regular meeting on January 6, 2001, a quorum (5 members) being present:

> [T]he Comanche Business Committee authorizes the Comanche Tribal Chairman/CEO to sign and/or negotiate all contracts, amendments, checks and documents for and on behalf of matters pertaining to the New Randlett Gaming Center, (inclusive of water matters, building/construction, machine selection and placement, etc.).

It is undisputed that the First Amendment to Agreement Regarding Lease of Gaming Machines, Equipment Lease Agreement, Construction Loan Agreement and Promissory Note all pertain to the New Randlett Gaming Center and that those agreements were signed by Tribal Chairman Johnny Wauqua on January 18, 2001, after the above-quoted resolution was passed. Accordingly, those agreements were executed in accordance with tribal law and are not invalid under tribal law. The Agreement Regarding Lease of Gaming Machines pertained in part to the New Randlett Gaming Center but it predated Resolution 06-01, having been signed by Tribal Chairman Johnny Wauqua on behalf of the Tribe on November 1, 2000. Resolution 06-01 ratified the Tribal Chairman's execution of that agreement to the extent it pertained to the New Randlett Gaming Center. However, the Agreement Regarding Lease of Gaming Machines also related to the Walters Smokeshop, Gymnasium, Double Wide Trailer, a to-be-determined location and the Lawton Facility. There is no resolution authorizing the Tribal Chairman to enter into a lease or contract as it pertained to those

"facilities." Accordingly, absent a showing that the Tribe ratified that Agreement as it pertained to those facilities, of which none is made herein, the Agreement in that respect is invalid.

Plaintiff Tribe's argument that Resolution 06-01 cannot be valid because the minutes of the meeting at which the Resolution itself indicates it was passed do not reflect discussion or approval of the Resolution is without merit. The Resolution itself reflects that it passed 5-0, and it is signed by the Tribal Chairman and attested by the Tribe's Secretary/Treasurer. Nothing in the Tribe's Constitution requires roll call votes or recordation of individual votes in the tribal minutes or requires that a Resolution not reflected in the tribal minutes be considered of no effect. Plaintiff's argument has the effect of placing the burden on Defendant 49 of explaining why Plaintiff Tribe apparently did not keep complete or accurate records when Resolution 06-01 appears on its face to be valid, an effect the Court will not countenance.

In accordance with the foregoing, Plaintiff's motion for declaratory and injunctive relief is GRANTED with respect to the Agreement Regarding Lease of Gaming Machines but only insofar as that Agreement pertains to the Walters Smokeshop, the Gymnasium, the Double Wide Trailer, the to-be-determined location and Lawton, in which respect the Agreement is invalid and unenforceable and for which the incorporated limited waiver of sovereign immunity is unenforceable and 49, L.L.C. is enjoined from bringing legal action against the Comanche Indian Tribe of Oklahoma to enforce that Agreement as it pertains to

those properties. In all other respects Plaintiff's motion for declaratory and injunctive relief is DENIED. The motion of Defendant 49, L.L.C. to compel arbitration of all disputes arising from the agreements to the extent the agreements pertain to the New Randlett Gaming Center before the American Arbitration Association and for a stay of this action pending completion of those arbitration proceedings is GRANTED. Defendant's request for an Order requiring Plaintiff to reimburse Defendant for arbitration costs paid on Tribe's behalf is DENIED inasmuch as that appears to be a matter covered by the arbitration procedure. In light of the foregoing disposition of Plaintiff's motion for declaratory and injunctive relief and Defendant's motion to compel arbitration and for a stay of these proceedings, Plaintiff Tribe's motion to dismiss Defendant's Counterclaim is DENIED as moot in part and premature in part.

IT IS SO ORDERED this 3 day of April, 2003.

DAVID L. RUSSELL
UNITED STATES DISTRICT JUDGE