

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

SWANDA BROTHERS, INC., an Oklahoma  
corporation,

Plaintiff,

vs.

CHASCO CONSTRUCTORS, LTD., LLP, a Texas  
limited partnership,

Defendant,

vs.

Case No. CIV-08-199-D

LUNA GAMING RANDLETT, LLC,  
Third-Party Defendant,

and

F.G. HAGGERTY COMPANY, INC.  
Intervenor.

---

**DEFENDANT, CHASCO'S RESPONSE TO KIOWA CASINO  
OPERATIONS AUTHORITY'S RENEWED MOTION TO DISMISS**

---

RANDALL K. CALVERT, OBA #14154  
DENIELLE N. WILLIAMS, OBA # 30296  
CALVERT LAW FIRM  
1041 NW Grand Boulevard  
Oklahoma City, Oklahoma 73118  
Telephone (405) 848-5000  
Fax (405) 607-3070  
E-mail: [rcalvert@calvertlaw.com](mailto:rcalvert@calvertlaw.com)  
[dwilliams@calvertlaw.com](mailto:dwilliams@calvertlaw.com)  
*Attorneys for Chasco Constructors*

Defendant, Chasco Constructors, Ltd., L.L.P., (“Chasco”) hereby submits its Response to Kiowa Casino Operations Authority’s (“KCOA”) Renewed Motion to Dismiss. For the reasons set forth below, Chasco requests this Court deny KCOA’s Renewed Motion to Dismiss filed on October 16, 2012.

### **STATEMENT OF THE CASE**

On May 1, 2008 (before it filed its Third-Party Complaint against the KCOA in the instant case), Chasco filed a Demand for Arbitration with the American Arbitration Association (“AAA”). Chasco named the KCOA as the Respondent. Chasco paid the AAA a filing fee in the amount of \$8,000.00. ***See Exhibit 1.***

On May 22, 2008, the KCOA and Chasco participated in an administrative call with the AAA. Chasco and the KCOA agreed on the time and place of the arbitration hearing and several other procedural details. On May 30, 2008, the KCOA filed a counterclaim against Chasco. ***See Exhibit 2.*** The KCOA’s counterclaim sought damages from Chasco in the amount of \$2,500,000.00 for the alleged failures of Chasco and its subcontractors. ***See Exhibit 2.***

Because the KCOA’s claim included alleged failures of Chasco’s subcontractors, the parties believed it was necessary to involve Chasco’s subcontractors in the arbitration. However, the AAA did not have jurisdiction over each subcontractor. In order to fully resolve all claims between the KCOA and Chasco, the two parties jointly determined that this federal court would provide a forum that could exercise jurisdiction over all the parties (Chasco, the KCOA, and the subcontractors). Accordingly, the KCOA’s attorney (Ryland

Rivas) informed the AAA that the “parties wish to abate for now and give notice to proceed in the future if the matter is not resolved.” ***See, Exhibit 3.***

In this Court, Chasco filed its Third-Party complaint against the KCOA with the consent of the KCOA’s former counsel, Ryland Rivas. The KCOA then raised its sovereign immunity objection. Now, after the case has been pending for nearly three years in this Court, the KCOA has renewed its misguided assertion that it is entitled to sovereign immunity.

### **ARGUMENT**

The KCOA attempts to muddle the sovereign immunity issue. The simple facts are: 1) the Kiowa Indian Counsel (“KIC”) authorized “construction financing and other agreements” containing provisions requiring disputes to be resolved in arbitration enforceable in state or federal court; 2) The KCOA approved the Chasco Construction Agreement, waiving sovereign immunity, in accordance with the provisions of its Second Amended Charter; 3) An arbitration clause inserted in a contract is a valid waiver of sovereign immunity; and 4) The KCOA filed a counterclaim against Chasco, further waiving its sovereign immunity.

#### **I. Sovereign Immunity Was Properly Waived by the Kiowa Indian Tribe and the Kiowa Casino Operations Authority.**

In determining whether a tribe has waived its immunity, courts may consider provisions of tribal law. For example, in *Native American Distributing*, 546 F.3d 1288, 1293-95 (10th Cir. 2008), the Tenth Circuit analyzed tribal law to determine whether a tobacco company was a governmental entity entitled to immunity rather than a commercial enterprise that would not be. *See also Breakthrough Management Group, Inc. v. Chukchansi*

*Gold Casino and Resort*, 629 F.3d 1173, 1193-98 (10th Cir. 2010) (considering a tribal ordinance in analyzing whether a casino and a tribal development authority were entitled to sovereign immunity and explaining that “[the non-Indian plaintiff] [was] *free to litigate the waiver issue before the [federal] district court* and to appeal from an adverse ruling on this issue [to the Tenth Circuit]”) (emphasis added); *Smith v. Hopland Band of Pomo Indians*, 115 Cal.Rpt.3d 455, 462 (Cal. App. 4<sup>th</sup> 2002) (“The question whether [a tribal] act constitutes a waiver [of sovereign immunity] is one of Federal law.”) (citing *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411 (2001)).

**A. By Means of Ballot Issue A-05-02, the Kiowa Indian Council Waived Sovereign Immunity.**

The Constitution of the Kiowa Tribe requires that the Kiowa Indian Council (all members of the Kiowa Tribe over the age of eighteen years old) (“KIC”) vote to authorize a waiver of the Kiowa Tribe’s (“Tribe”) sovereign immunity. [Doc. No. 158-4, pp. 9-10]. In a prior motion, the KCOA asserted that “*no such election has been had.*” [Doc. No. 71, p.3, ¶ 3]. Contrary to that assertion, on July 9, 2005, the KIC approved Ballot Issue A-05-02, which provided:

Shall the Kiowa Indian Council affirm the authority of the KBC and the Kiowa Casino Operations Authority to enter into financing construction and other agreements for the purpose of constructing and operating a gaming facility, which agreements provide for any disputes to be resolved pursuant to binding arbitration enforceable in state and federal court.

[Doc. No. 158-1 and Doc No. 158-2]. The election was certified by the Kiowa Election Board on July 15, 2005.

By means of Ballot Issue A-05-02 and in accordance with the Kiowa Constitution, members of the KIC authorized contracts pertaining to a gaming facility and requiring the resolution of disputes by arbitration. “An arbitration clause alone is sufficient to expressly waive sovereign immunity.” *C & L Enterprises, Inc., v. Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411, 417-423. The KIC expressly waived its sovereign immunity pursuant to the election on Ballot Issue A-05-02.

By its terms, the Chasco Construction Agreement at issue here falls squarely within the class of agreements authorized by Ballot Issue A-05-02. The agreement calls for Chasco to construct a gaming facility for the KCOA. Thus, under the terms of the Ballot Issue A-05-02, the Agreement is a “construction . . . agreement for the purpose of constructing and operating a gaming facility.” Further, the Chasco Construction Agreement’s waiver of immunity clause comports with the terms of A-05-02.

The KCOA argues that Ballot Issue A-05-02 does not apply to the Chasco Construction Agreement because that agreement had not yet been negotiated when the Tribe approved A-05-02, and it was not specifically referenced. The KCOA’s constricted reading of Ballot Issue A-05-02 makes little sense. A-05-02 authorized certain kinds of agreements in plain, open-ended language (referring to “financing construction and *other agreements* for the purpose of constructing and operating a gaming facility,” without describing those agreements with any more particularity). [Doc. No. 158-1 and Doc No. 158-2] (emphasis added). The use of the term “other agreements” indicates that the Ballot Issue was broad in

scope: as long as those “other agreements” were “for the purpose of constructing and operating a gaming facility” the KCOA had the authority to enter into them.<sup>1</sup>

Moreover, that open-ended language makes eminent sense. When the KIC approved Ballot Issue A-05-02, no gaming facility had been opened. As a result, KIC members could not know what specific agreements would be necessary to operate it. The Ballot Issue authorized agreements that would be negotiated in the future.

In arguing that, despite its plain language, A-05-02 did not authorize the Chasco Construction Agreement, the KCOA invokes two documents [Doc. No. 185-7 and Doc. No. 185-8]: the Horse letter and the Akin Gump letter. KCOA’s view is that, because those letters refer to other specific agreements—but not the Chasco agreement—Ballot Issue A-05-02 does not authorize the Chasco Construction Agreement.

KCOA’s argument is not persuasive. Neither the Horse letter nor the Akin Gump letter purports to interpret the terms of A-05-02. Instead, the Horse letter merely reviews certain other agreements and concludes that those other agreements contain the dispute resolution provisions authorized by A-05-02. Similarly, the Akin Gump letter addresses the enforceability of specific credit documents. It too does not address the question of the kinds of agreements to which A-05-02 applies.

---

<sup>1</sup> See *Vytar Assocs. v. Mayor & Aldermen of City of Annapolis*, 483 A.2d 1263, 1266 n.4 (Md. 1984) (explaining that “other” is an “uncompromising word to be considered broadly”) (citation and internal quotation marks omitted); *Sturdy v. Allied Mut. Ins. Co.*, 457 P.2d 34, 39 (Kan. 1969) (applying the following definition of “other”: “not being the one (as of two or more) first mentioned or of primary concern[;] . . . being the ones distinct from the one or those first mentioned or understood [;] . . . not the same[;] different[;] . . . [;][m]ore, additional . . .”) (citation omitted).

If the KIC's intent was to limit the authority to specific agreements, the KIC would have listed the agreements by name. Accordingly, this Court should reject KCOA's implausible interpretation of Ballot Issue A-05-02. By means of A-05-02, the KIC voted and approved the waiver of sovereign immunity.

**B. The KCOA's approval of Chasco Construction Agreement also Constitutes a Waiver of Sovereign Immunity, in accordance with the provisions of its Second Amended Charter.**

The KCOA was properly formed in compliance with Tribal rules and regulations.<sup>2</sup>

---

<sup>2</sup> Article V, Section 1(e) of the Constitution and Bylaws of the Kiowa Indian Tribe provides that the KIC has the power to enter into "contracts with federal, state, or local governments or private firms." Subsection (i) of Article V provides that the power to contract may be delegated to the Kiowa Business Committee ("KBC"). [Doc. No. 124-1, at 3]. On June 4, 1977, pursuant to a ballot issue, the KIC specifically delegated its power to contract to the KBC. [*Akin Gump Memorandum*, Doc 124-1, at 3].

The Constitution also addresses the powers of the KBC. In particular, it authorizes the KBC to appoint subordinate committees; promulgate ordinances; and develop economic and commercial enterprises. [Doc. No. 158-4]. On June 26, 1995, pursuant to its Constitutional authority, the KBC enacted the Kiowa Gaming Ordinance ("Gaming Ordinance") pursuant to Resolution No. CY-95-39. [Doc. No. 158-5]. The Gaming Ordinance established the Kiowa Gaming Commission (the "KGC") and provided it the power to establish tribal gaming operations, such as the KCOA.

The KCOA was established and confirmed as an instrumentality and commercial enterprise of the Kiowa Indian Tribe of Oklahoma, a federally recognized Indian tribe, pursuant to Article V, Section 2 of the Constitution and Bylaws of the Tribe. The KCOA is an unincorporated business enterprise of the Tribe, having autonomous existence separate and distinct from the Tribe. [Doc. No. 158-10] (*Second Amended and Restated Charter of the KCOA*, Article 4 Section 4.01). The KCOA was formed on September 1, 2004, by the KGC pursuant to Article VIII of the Kiowa Indian Tribe Gaming Ordinance of 1995, as amended, and Resolution No. GC-2004-01 [Doc. No. 158-6] of the KGC. The actions of the KGC in forming the KCOA were approved by the KBC by Resolution No. CY-2004-101 on September 1, 2004. [Doc. No. 158-7].

Pursuant to these rule and regulations, the KCOA's Second Amended and Restated Charter addressed the waiver of sovereign immunity.<sup>3</sup>

Under the terms of the Second Amended Charter, the KCOA has the power to “enter into, make, perform and carry out, cancel and rescind contracts, agreements and understandings for any lawful purpose pertaining to the purpose for which the authority was established.” [Doc. No. 158-10] (*Second Amended and Restated Charter*, Article 10, Section 10.05). The Second Amended and Restated Charter of the KCOA provides the purpose of the KCOA “shall be to take any and all actions in furtherance of developing, constructing, furnishing, equipping, owning, leasing, operating, managing, maintaining, promoting and financing all gaming, resort and hospitality business of the Tribe, and engaging in any other lawful activity in furtherance thereof.” [Doc. No. 158-10].

Importantly, the Second Amended Charter also grants the KCOA the power to “allow the [KCOA] to sue and be sued in its name, upon any contract, claim or obligation arising out of its activities under this Charter and to agree by contract to waive the [KCOA's] immunity from suit.” *See id.*, Article 10 Section 10.16. A waiver of sovereign immunity pursuant to Article 10 Section 10.16 will permit recourse against the assets, revenues, or activities of the KCOA if the waiver is (a) in writing and expressly states that such waiver shall permit recourse and enforcement only against the assets, revenues or activities of the

---

<sup>3</sup> The Second Amended and Restated Charter was adopted by Resolution No. GC-2005-4 of the Kiowa Gaming Commission, effective as of April 22, 2005, and adopted by the Business Committee pursuant to Resolution No. CY-2005-\_\_\_\_ on April 26, 2005 [Doc. No. 158-9] (*Second Amended and Restated Charter*, Article 1, Section 1.01).



KCOA; and (b) the waiver is duly approved by the Board of Trustees. *Id.*, Article 5 Section 5.01.

The waiver of sovereign immunity contained in the Chasco Construction Agreement comports with the requirements of KCOA's Second Amended and Restated Charter. The Construction Agreement's waiver provision explicitly states that the waiver is only for the assets, revenues or activities of the KCOA:

The owner [KCOA] does not consent to the enforcement, levy or other execution of any judgment for money or other damages against any assets, real or personal, of the Kiowa Indian Tribe of Oklahoma other than Gaming Assets.<sup>4</sup>

[Doc. No. 158-3].

In its Renewed Motion to Dismiss, the KCOA admits that the Construction Agreement – containing the dispute resolution provision – was approved by the Board of the KCOA. *KCOA Renewed Motion to Dismiss*, Doc. No. 185, p. 6. (“Chasco proceeded with work under a contract **approved by the board of the KCOA.**”) (emphasis added). Accordingly, this Court should conclude that the KCOA entered into the Construction Agreement with the proper authorization.<sup>5</sup>

---

<sup>4</sup> Gaming Assets is defined as “any now owned or hereafter acquired property of Owner [KCOA] that is used in or associated with present or future gaming operations conducted by Owner [KCOA], the Tribe, or any Affiliate or instrumentality thereof, within 50 miles of Randlett, Oklahoma, and all entertainment, recreation, food and beverage, hotel, retail and other related operations conducted on Indian Lands held in trust for the Tribe that are reasonably related to such operations.” [Doc. No. 158-3].

<sup>5</sup> In prior briefs to this Court, Chasco has noted that, despite tribal requirements, the KCOA Board's meeting minutes from November 18, 2005 to December 31, 2005 (the time period during which the Construction Agreement was signed are missing). KCOA resolutions for the time period of October 1, 2005 through the present are also missing. Therefore, the  
(continued...)

**C. The KCOA's approval of Chasco Construction Agreement Constituted a Proper Delegation of Authority.**

The KCOA further argues that its entering into the Construction Agreement constituted an improper delegation of authority. It cites language from the Kiowa Constitution that authorizes the KIC to delegate its powers to the KBC. [*See* Doc. 185 at 9] (citing Kiowa Const art V, § 1, cl. (I)). The KCOA notes that the Constitution does not expressly refer to delegation to the KCOA. *See id.* (stating that “[n]othing in the Constitution . . . provides that the KIC may delegate its powers to tribal departments or entities other than the KBC”).

The KCOA's argument is misguided. When the controlling law authorizes the delegation of authority to a particular agency or official, subdelegation to a subordinate entity

---

<sup>5</sup>(...continued)  
resolution of the KCOA Board approving the Chasco Construction Agreement is missing.

Nevertheless, there is substantial evidence that the Agreement was approved by the KCOA Board. In particular, the KCOA requested the law firm of Akin Gump and the KCOA's construction consultant, Mr. Woodson, review the Construction Agreement. The minutes of the KCOA Board of Trustees (“Board”) meeting of November 1, 2005 reflect that the Board voted unanimously to approve the Construction Agreement pending Ryland Rivas' review of the agreement. [Document No. 158-14].

In its order of September 25, 2012, this Court noted its serious concern about the missing documents. *See* Doc No. 179, at 9. The Court reserved its ability to draw a permissive inference that the missing documents would undermine the KCOA's assertion of immunity. *Id.* at 11.

In light of the KCOA's admission that it entered into the Agreement, no inference from the missing documents is necessary. If, for some reason, the KCOA, renews the argument that it did not approve the agreement, Chasco submits that the permissive inference from the missing documents is warranted.

or official is presumptively permissible, absent affirmative evidence of contrary intent. *See U.S. Telecom Ass'n v. F.C.C.*, 359 F.3d 554 (D.C. Cir. 2004); *see also, United States v. Knauer*, 635 F.Supp.2d 203 (E.D. N.Y.2009) (applying the same principle). Here, the delegation authorized by the Constitution from the KIC to the KBC is broad. It includes the power to contract, appoint subordinate committees, and develop economic and commercial enterprises—like the KCOA. There is no indication of any restriction on the KBC’s power to delegate its authority to subordinate entities like the KCOA. Indeed, the delegation to the KCOA to enter into contracts like the one at issue here is entirely consistent with the KBC’s authority. Tellingly, the KCOA does argue otherwise.

Accordingly, this Court should reject the KCOA’s argument that its entering into the Agreement constituted an improper delegation of authority

## **II. Exhaustion and Abstention Are Not Required.**

The KCOA also asserts that the Kiowa tribal courts “should be afforded the first opportunity to rule on the undecided constitutional issues relating to the authority of the KIC to delegate its powers to the KCOA.” [Doc. No. 185, at 14]. It invokes the doctrines of tribal exhaustion and tribal abstention. *See id.* at 12-15. These arguments are also misguided. As explained in Section I (*see pgs. 3-4*) federal and state courts may consider whether a tribe has waived its immunity.

“Exhaustion, the Court explained, is ‘not a jurisdictional prerequisite,’ but rather is a ‘matter of comity.’” *Alzheimer & Gray v. Sioux Mfg. Corp.* 983 F.2d 803, 814 (7th Cir. 1993) (*quoting Iowa Mutual Insurance v. LaPlante*, 480 U.S. 9, 16 (1987)). Where a tribe explicitly agrees to submit to arbitration in a routine contract provision, “refus[ing]

enforcement of this routine contract provision would be to undercut the Tribe's self-government and self-determination." *Altheimer*, 983 F.2d at 815. "To apply the tribal exhaustion rule would place before the tribal court a dispute that must be resolved by the laws of distant jurisdictions." *Id.* at 814.

Here, the KCOA agreed to waive sovereign immunity by agreeing to the dispute resolution provision in the Construction Agreement and filing a counterclaim against Chasco. Refusal to enforce the waiver of sovereign immunity would undercut the self-government and self-determination of the Kiowa Tribe.

Additionally, courts should consider the following policies when determining whether the exhaustion of tribal remedies is required: (1) "Congress's long-standing commitment to tribal self-government and self-determination, including the development of independent tribal courts[;]" (2) whether "the orderly administration of justice would be advanced by allowing the tribal courts to develop a full record[;]" and (3) whether the pursuit of a tribal court remedy would allow a federal courts to have the benefit of the tribal court's expertise. *Pittsburg & Midway Coal Min. Co. v. Watchman*, 55 F.3d 1531, 1536 (10th Cir. 1995).

These policies do not support the application of the exhaustion doctrine here. Most importantly, despite the KCOA's assertion, the Kiowa Tribe does not have an independent tribal court. The Kiowa Tribe uses the court system provided by the Bureau of Indian Affairs. In addition, this case revolves around a dispute resolution provision contained in a validly approved and executed contract – it does not revolve around tribal law. The KCOA entered into a contract with Chasco that expressly authorized the resolution of disputes through arbitration enforceable in a federal court.

As to abstention, the KCOA cites cases involving parallel proceedings in two different forums. [See Doc. No. 185, at 15]. There are no such parallel proceedings here.

Accordingly, the doctrines of exhaustion and abstention do not support the dismissal of Chasco's claims against the KCOA.

### **III. The Arbitration Clause Constitutes a Valid Waiver of Sovereign Immunity.**

The Supreme Court has held that when a tribe enters into a written agreement that contains an agreement to arbitrate, the tribe has waived any sovereign immunity it may have had with respect to any claim arising under that agreement. *C&L Enterprises v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 419-20 (2001). Specifically, the Supreme Court held that “by the clear import of [an] arbitration clause [in the contract], the Tribe is amenable to . . . suit to enforce an arbitral award.” *Id.* at 414. Despite the need for a “clear waiver” of sovereign immunity, the Supreme Court held that if a tribe enters into an agreement containing an arbitration clause, sovereign immunity is waived. *Id.* at 418. *See also Rosebud Sioux Tribe v. Val-U Const. Co. of South Dakota, Inc.*, 50 F.3d 560, 562 (8th Cir. 1995) (arbitration clause in contract executed by tribe was an express waiver of sovereign immunity); *Village of Eyak v. GC Contractors*, 658 P.2d 756, 760 (Alaska 1983) (arbitration clause in contract being sued upon was an express waiver of immunity).

Here, the Construction Agreement the KCOA entered into with Chasco contained an arbitration provision. This arbitration provision is a clear waiver of sovereign immunity. Because the KCOA waived sovereign immunity it should not be allowed to raise a defense of sovereign immunity.

#### **IV. The KCOA's Counterclaim Against Chasco Also Waives Sovereign Immunity.**

The KCOA's counterclaim constitutes a further waiver of sovereign immunity. "By initiating a lawsuit, the Tribe waives immunity as to claims of the defendant which assert matters in recoupment arising out of the same transaction or occurrence which is the subject matter of [the] . . . suit. . . . [B]y initiating [a] lawsuit, the Tribe necessarily consents to the court's jurisdiction to determine the claims brought adversely to it." *Rupp v. Omaha Indian Tribe*, 45 F.3d 1241, 1245 (8th Cir. 1995) (internal citations and quotations omitted); *see also Guaranty Trust Co. of New York v. U.S.*, 304 U.S. 126 (1938) ("By voluntarily appearing in the role of suitor it abandons its immunity from suit and subjects itself to the procedure and rules of decision governing the forum which it has sought. Even the domestic sovereign by joining in suits accepts whatever liabilities the court may decide to be a reasonable incident of that act."); *Berrey v. Asarco, Inc.*, 439 F.3d 636, 643 (10th Cir. 2006) (by bringing a claim for damages from environmental harm to Quapaw lands, tribe waived sovereign immunity with respect to counterclaims for recoupment of damages); *In re White*, 139 F.3d 1268, 1271 (9th Cir. 1998) ("Initiation of a lawsuit is an action that 'necessarily establishes consent to the court's adjudication of the merits of that particular controversy,' including the risk of being bound by an adverse determination."); *Rosebud Sioux Tribe v. A&P Steel, Inc.*, 874 F.2d 550 (8th Cir. 1989)); *United States v. Oregon*, 657 F.2d 1009, 1014 (9th Cir. 1981).

Because the KCOA filed a claim against Chasco, it waived its immunity against any claims by Chasco arising out of the same transaction or occurrence as the claims the KCOA made. The KCOA's counterclaim in essence is its consent to the jurisdiction of the court to determine the adverse claims asserted against it.

**V. The KCOA Is Attempting an End Run Around the Judiciary.**

In its Renewed Motion To Dismiss, the KCOA also appears to attempt an end run around the judiciary. In particular, it now states that this Court “should dismiss this action for reference to an arbitrator.” [Doc. No. 185, at 17-18]. That assertion is inconsistent with its prior positions.

In particular, the KCOA first voluntarily filed claims against Chasco in arbitration. Then, it voluntarily participated in the arbitration. Subsequently, the KCOA’s counsel expressed to Chasco’s counsel its agreement to proceed in federal court. Chasco then filed its Third-Party Complaint in this proceeding, relying on the KCOA’s agreement.

The KCOA never raised the issue of arbitration until its Renewed Motion to Dismiss. Apparently, it now requests to return to the AAA and arbitrate. Sovereign immunity does not permit the government to sue a third party and then pick and choose the judicial constraints and contractual obligations with which it will abide. See, *Guaranty Trust Co. v. United States*, 304 U.S. 126, 134 (1938) (“By voluntarily appearing in the role of suitor [the sovereign] abandons its immunity from suit and subjects itself to the procedure and rules of decision governing the forum which it has sought.”).

It is evident that KCOA is merely employing bad faith litigation tactics to prevent Chasco from ever having its claims adjudicated. Despite the KCOA’s constant changing positions, if the KCOA wants to once again return to arbitration, the Court should require it to unequivocally state its consent to arbitration and then assess all refiling fees to the KCOA.

**CONCLUSION**

A valid waiver of sovereign immunity occurred. The issues before this Court are much simpler than the KCOA argues in its Motion to Dismiss. This Court has jurisdiction to rule on the issue of sovereign immunity. Chasco respectfully requests this Court review Chasco's pleadings and supporting evidence and find the KCOA validly waived sovereign immunity. The Court should either (a) deny KCOA's Motion to Dismiss and allow this litigation to continue, or, alternatively (b) order the KCOA and Chasco to return to arbitration.

Respectfully submitted,

s/Denielle N. Williams

RANDALL K. CALVERT, OBA #14154

DENIELLE N. WILLIAMS, OBA # 30296

CALVERT LAW FIRM

1041 NW Grand Boulevard

Oklahoma City, Oklahoma 73118

Telephone (405) 848-5000

Fax (405) 607-3070

E-mail: [rcalvert@calvertlaw.com](mailto:rcalvert@calvertlaw.com)

[dwilliams@calvertlaw.com](mailto:dwilliams@calvertlaw.com)

*Attorneys for Chasco Constructors*



**CERTIFICATE OF SERVICE**

I hereby certify that on the 30th day of October, 2011, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to all counsel or record herein:

Drew A. Webb  
Mark D. Spencer  
McAfee & Taft, P.C.  
211 North Robinson Ave., 10th Floor  
Oklahoma City, OK 73102-7101  
*Attorneys for Plaintiff, Swanda Brothers, Inc.*

T. Scott Spradling  
Mark R. McPhail  
Spradling, Kennedy & McPhail, LLP  
1601 NW Expressway, Suite 1750  
Oklahoma City, OK 73110  
*Attorneys for Intervenor, F.G. Haggerty Company, Inc.*

William A. Johnson  
David A. Elder  
Matthew A. Brockman  
Hartzog, Conger, Cason & Neville  
201 Robert S. Kerr Avenue  
1600 Bank of Oklahoma Plaza  
Oklahoma City, OK 73102  
*Attorneys for Third Party Defendant  
Luna Gaming Randlett, LLC*

Robert K. Roach  
Matthew D. Anderson  
Gibson, Hotchkiss, Roach & Davenport  
807 8th Street, 8th Floor  
Wichita Falls, TX 76301-3368  
*Attorneys for Intervenor, F. G. Haggerty Company, Inc.*

Amos E. Black, III  
Black Zynda Black  
101 W. Broadway Avenue  
P.O. Box 159  
Anadarko, OK 73005  
*Attorneys for Third Party Defendant  
Kiowa Casino Operating Authority*

Stephen R. Ward  
Daniel E. Gomez  
CONNER & WINTERS, LLP  
400 One Williams Center  
Tulsa, Oklahoma 74172  
*Attorneys for Third Party Defendant  
Kiowa Casino Operating Authority*

s/Denielle N. Williams  
DENIELLE WILLIAMS