

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

**SWANDA BROTHERS, INC., an
Oklahoma corporation,**

Plaintiff,

v.

**CHASCO CONSTRUCTORS, LTD,
L.L.P., a Texas limited partnership,**

Defendant and Third-Party Plaintiff,

v.

LUNA GAMING RANDETT, LLC,

Third-Party Defendant.

and

F.G. HAGGARTY COMPANY, INC.,

Intervenor.

Case No. CIV-08-199-D

**BRIEF OF THE KIOWA CASINO OPERATIONS AUTHORITY
IN SUPPORT OF MOTION TO DISMISS FOR LACK OF SUBJECT
MATTER JURISDICTION**

Stephen R. Ward, Okla. Bar No. 13610
Daniel E. Gomez, Okla. Bar No. 22153
CONNER & WINTERS, LLP
4000 One Williams Center
Tulsa, Oklahoma 74172-0148
Telephone: (918) 586-8978
Telecopier: (918) 586-8698

Amos E. Black, III, Okla. Bar. No. 827
Thomas R. Zynda, Okla. Bar No. 10015
BLACK & ZYNDA
101 W. Broadway Avenue
Anadarko, Oklahoma 73005
Telephone: (405) 247-2548
Telecopier: (405) 247-2559

**ATTORNEYS FOR KIOWA CASINO
OPERATIONS AUTHORITY**

October 16, 2012

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
BACKGROUND	2
STANDARDS APPLICABLE TO RULE 12(b)(1) MOTIONS	5
SUMMARY OF THE ARGUMENT	6
ARGUMENT & AUTHORITIES	7
I. ANY ATTEMPTED DELEGATION TO THE KCOA OF THE POWER TO GRANT WAIVERS OF IMMUNITY IS A NULLITY UNDER EXISTING TRIBAL LAW	7
A. The Kiowa Constitution Expressly Limits Any Delegation of the Power to Grant Limited Waivers of the Tribe’s Immunity from Suit.....	7
B. To the Extent the July 2005 Ballot Issue Comprised a Delegation of Power to the KCOA to Grant Future Waivers of Immunity, it is Not Valid	9
C. Tribal Constitutional Questions Must be Decided in the First Instance by the Tribal Courts	12
II. EVEN IF THE BALLOT ISSUE VALIDLY APPROVED A WAIVER OF IMMUNITY FOR THE CONSTRUCTION CONTRACT IT COULD, BY ITS TERMS, HAVE AUTHORIZED ONLY AN ARBITRATION, NOT LITIGATION.....	15
III. THE OPEN FACTUAL MATTERS IN THIS CASE, EVEN IF RESOLVED IN FAVOR OF CHASCO, WOULD NOT ALTER THE LEGAL VALIDITY OF THE PURPORTED LIMITED WAIVER OF IMMUNITY	18
CONCLUSION.....	20
CERTIFICATE OF SERVICE	v
APPENDIX OF EXHIBITS	vi

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>American Indian Agricultural Credit Consortium, Inc. v. Standing Rock Sioux Tribe</i> , 780 F.2d 1374 (8th Cir. 1985)	16
<i>Bally Export Corp. v. Ballicar, Ltd.</i> , 804 F.2d 398 (7th Cir. 1986).....	5
<i>Beers v. Arkansas</i> , 61 U.S. (20 How.) 527 (1857).....	16
<i>Berrey v. Asarco, Inc.</i> , 439 F.3d 636 (10th Cir. 2006)	16
<i>Boudreau v. United States</i> , 53 F.3d 81 (5th Cir. 1995)	5
<i>C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.</i> , 532 U.S. 411, 121 S. Ct. 1589 (2001).....	10, 18
<i>Colorado River Water Conservation District v. United States</i> , 424 U.S. 800, 96 S. Ct. 1236 (1976).....	15
<i>Department of Legal Affairs v. Rogers</i> , 329 So.2d 257 (Fla. 1976)	10
<i>Dry v. United States</i> , 235 F.3d 1249 (10th Cir. 2000).....	16
<i>Fent v. Oklahoma Water Resources Board</i> , 235 F.3d 553 (10th Cir. 2000)	5
<i>International Union, United Automobile, Aircraft, & Agricultural Implement Workers of America v. Cardwell Manufacturing Co.</i> , 304 F.2d 801 (10th Cir. 1962)	18
<i>Iowa Mutual Insurance Co. v. LaPlante</i> , 480 U.S. 9, 127 S. Ct. 971 (1986)	14, 15
<i>Jicarilla Apache Tribe v. Andrus</i> , 687 F.2d 1324 (10th Cir. 1982).....	16
<i>Kiowa Indian Tribe of Oklahoma v. Hoover</i> , 150 F.3d 1163 (10th Cir. 1992)	5, 16
<i>Memphis Biofuels, LLC v. Chickasaw Nation Industries, Inc.</i> , 585 F.3d 917 (6th Cir. 2009)	12, 19, 20
<i>Miner Electric, Inc. v. Muscogee (Creek) Nation</i> , 505 F.3d 1007 (10th Cir. 2007).....	5
<i>Namekagon Development Co. v. Bois Forte Reservation Housing Authority</i> , 517 F.2d 508 (8th Cir. 1975).....	17

<i>National Farmers Union Insurance Companies v. Crow Tribe of Indians</i> , 471 U.S. 845, 105 S. Ct. 2447 (1987).....	14
<i>Native American Distributing v. Seneca-Cayuga Tobacco Co.</i> , 546 F.3d 1288 (10th Cir. 2008)	11, 16, 20
<i>Oklahoma Tax Commission v. Citizen Band Potawatomi Tribe of Oklahoma</i> , 498 U.S. 505, 111 S. Ct. 905 (1991).....	18
<i>Osage Tribal Council ex rel. Osage Tribe of Indians v. United States Department of Labor</i> , 187 F.3d 1174 (10th Cir. 1999).....	4
<i>Peterson v. Shearson/American Express, Inc.</i> , 849 F.2d 464 (10th Cir. 1988)	18
<i>Pittsburg & Midway Coal Mining Co. v. Watchman</i> , 52 F.3d 1531 (10th Cir. 1995).....	15
<i>Potts v. Bruce</i> , 533 F.2d 527 (10th Cir.).....	13
<i>Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc.</i> , 506 U.S. 139, 113 S. Ct. 684 (1993).....	4
<i>Railroad Commission of Texas v. Pullman Co.</i> , 312 U.S. 496, 61 S. Ct. 643 (1941)	15
<i>Ramey Construction Co. v. Apache Tribe of the Mescalero Reservation</i> , 673 F.2d 315 (10th Cir. 1982).....	5
<i>Sac & Fox Tribe of the Mississippi v. Bureau of Indian Affairs</i> , 439 F.3d 832 (8th Cir. 2006)	14
<i>Sanderlin v. Seminole Tribe of Florida</i> , 243 F.3d 1282 (11th Cir. 2001)	12, 20
<i>Santa Clara Pueblo v. Martinez</i> , 436 U.S. 49, 98 S. Ct. 1670 (1977).....	10, 18, 19
<i>Smith v. Moffett</i> , 947 F.2d 442 (10th Cir. 1991)	14
<i>State v. Julson</i> , 202 N.W.2d 145 (N.D. 1972)	11
<i>Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians of Florida</i> , 63 F.3d 1030 (11th Cir. 1995)	4
<i>Texaco Inc. v. Zah</i> , 5 F.3d 1374 (10th Cir. 1993).....	14
<i>U.S. Steelworkers of America v. Warrior & Gulf Navigation Co.</i> , 363 U.S. 574, 80 S. Ct. 1347 (1970)	18
<i>United States v. Tsosie</i> , 92 F.3d 1037 (10th Cir. 1996)	14

<i>United States v. United States Fidelity & Guaranty Co.</i> , 309 U.S. 506, 60 S. Ct. 653 (1940).....	16
<i>Wheeler v. United States Department of Interior</i> , 811 F.2d 549 (10th Cir. 1987)	13
<i>Winnebago Tribe of Nebraska v. Kline</i> , 297 F. Supp. 2d 1291 (D. Kan. 2004)	11
<i>World Touch Gaming, Inc. v. Massena Management, LLC</i> , 117 F. Supp. 2d 271 (N.D.N.Y. 2000)	11

Unpublished Decisions

<i>Tofpi v. Hon. Lisa Otippoby</i> , Nos. CIV-09-A12 & PO-09-A02, at 2-3 (Ct. Indian Offenses, BIA Anadarko Agency Apr. 23, 2009).....	8
--	---

Constitutions, Statutes, Regulations & Rules

Kiowa Const. art. I, § 2	2
Kiowa Const. art. I, § 3	3
Kiowa Const. art. V, § 1	2, 8, 9
Kiowa Const. art. V, § 2	8
Kiowa Const. art. VII.....	11
Indian Tribal Self-Determination and Education Assistance Act, 25 U.S.C.A. § 450a (West 2001).....	13
Indian Civil Rights Act, 25 U.S.C.A. § 1301 et seq. (West 2001)	13
Fed. R. Civ. P. 12(b)(1).....	1
25 C.F.R. § 11.100(a) (2012).....	8
25 C.F.R. § 11.100(b) (2012).....	8

Other Authorities

F. Cohen, <i>Handbook of Federal Indian Law</i> Ch. 4 (1982 ed.)	13
17A <i>Moore’s Federal Practice</i> § 123.51 (3d ed. 2012)	5

**BRIEF OF THE KIOWA CASINO OPERATIONS AUTHORITY
IN SUPPORT OF MOTION TO DISMISS FOR LACK OF SUBJECT
MATTER JURISDICTION**

The Kiowa Casino Operations Authority (the “KCOA”) submits this brief in support of its motion pursuant to Fed. R. Civ. P. 12(b)(1) to dismiss the claims asserted against it in this action.

INTRODUCTION

As part of the development of an Indian casino project in 2005, the KCOA, the gaming enterprise of the Kiowa Tribe of Oklahoma (the “Kiowa Tribe” or the “Tribe”), entered into a construction agreement with a replacement contractor, Chasco Constructors, Ltd., L.L.P. (“Chasco”). Chasco proceeded with work under a contract approved by the board of the KCOA, in spite of existing uncertainty under Kiowa Tribal law about whether that body unilaterally could award binding contracts. After the project opened various issues arose concerning the construction, and, subsequently, the gaming facility failed to achieve financial projections, and the underlying litigation, as well as other lawsuits, resulted. Notwithstanding the issues relating to the enforceability of its contract—and despite its contractual commitment to resolve disputes exclusively in arbitration—Chasco asserted a third-party complaint to join the KCOA in this litigation.

The KCOA hereby renews its motion to dismiss to assert the defense of sovereign immunity—an action it takes not to invoke a technicality to avoid potential responsibility in this dispute over construction retainage, but to vindicate important tribal sovereignty interests and to hold Chasco, a party which entered into the agreement fully on notice about the relevant issues under Kiowa law, to its contractual bargain.

BACKGROUND

Facts Relating to Authorization of the Chasco Construction Agreement

In December 2005 the KCOA and Chasco, a general contractor, entered into the construction agreement at issue in this case (the “Construction Contract”) relating to the development of a planned “Kiowa Resort and Casino” for the Kiowa Tribe in Cotton County, Oklahoma. Shortly after construction was started the original contractor filed for bankruptcy protection, which resulted in the engagement of Chasco as a replacement general contractor, and, later, disputes about the construction work arose as the facility was nearing completion. Additionally, in part because financial projections were never realized, the project has been the subject of other litigation. Chasco’s third-party complaint arises from a dispute over payment of the ten percent retainage contractually withheld from the final payment to the contractor to “secure [Chasco’s] performance of its obligations.”¹ (Ex. 1, § 5.1.2.)

Well known at the time the Construction Contract was entered into were the issues unique to Kiowa law relating to obtaining binding and enforceable contracts with Tribal entities. The Tribe is governed by a “Constitution and By-Laws” (the “Kiowa Constitution” or “Constitution”), which, in contrast to the organic documents of other tribes retains in the Kiowa Indian Council or “KIC”—a body consisting of all members of the Tribe over the age of 18—many of the key governmental powers typically exercised by elected tribal councils. *See* Kiowa Const. art. I, § 2 (Ex. 2). Notably, the KIC retains the power to approve all “[c]ontracts with federal, state or local governments or private firms.” Kiowa Const. art. V, § 1(e).

¹ Chasco engaged the plaintiff in this action, Swanda Brothers, Inc. (“Swanda”), a mechanical and plumbing systems fabricator, and other subcontractors to perform work on the project. (Second Am. Complaint ¶ 6, at 2 (Doc. 129).)

In April 2005, Kiowa Business Committee, the elected governing body of the Tribe, and the board of the KCOA adopted resolutions expressly approving—by name—the pending agreements with the project developers, lenders, and the original general contractor.² (Exs. 3 & 4). Subsequently, a Ballot Issue was presented to the KIC concerning the project agreements, which provided as follows:

“ISSUE: A-05-02: 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 or federal courts.”

(Ex. 5, at 3.) This ballot question was approved by the KIC on July 9, 2005. (Ex. 5, at 1.) At the time it was understood as an approval by the KIC of the transaction documents that previously had been approved by the KBC and the KCOA in April 2005. (Exs. 7 & 8.)

Subsequent to the July 2005 ballot issue, the original general contractor, Klewin Gaming and Hospitality/Kiowa I, LLC, was replaced. (Ex. 1 ex. G.) The Construction Agreement between Chasco and the KCOA was entered into as of December 7, 2005. (Ex. 1, at 1.) However, no new ballot issue was submitted to the KIC with respect to the new agreement with Chasco, and the KBC also did not approve the Construction Contract.

Procedural Background

Chasco initially sought to assert a third-party complaint against the KCOA earlier in this litigation (Doc. 67), and the KCOA responded with a motion to dismiss (Doc. 71) based upon the bar of the doctrine of sovereign immunity. The Court entered an order dated March 30, 2012, granting KCOA’s initial motion to dismiss. (Doc. 98.) Among other grounds for its ruling, the

² The KBC is empowered to act on certain enumerated matters as set forth in the Constitution. *See* Kiowa Const. art. I, § 3. The KCOA is an unincorporated business enterprise wholly owned and operated by the Kiowa Tribe.

Court reasoned, in part, that issues of tribal law had been presented outside of the jurisdiction of this Court to consider. Chasco sought a reconsideration of the dismissal (Doc. 114), which the Court granted (Doc. 141). Following discovery of jurisdictional facts, the KCOA filed a second motion to dismiss on the basis of sovereign immunity on May 10, 2011. (Doc. 148.)

In an order dated September 25, 2012 (Doc. 179), the Court denied a motion by Chasco for sanctions based on the KCOA's inability to locate certain board minutes relating to the Construction Contract. The Court reserved finding a permissive inference that the KCOA's failure to produce the requested documents would be harmful to its assertion that this case should be dismissed on tribal immunity grounds. (Doc. 179, at 10-11.) Concerning the KCOA's second motion to dismiss, the Court noted that the discovery issues had prevented full briefing that would permit a final ruling. (Doc. 179, at 10-11.) However, the Court stated that if the KCOA "continues to have a good faith belief that the evidence warrants a renewed motion to dismiss on tribal immunity grounds," it would consider a renewed motion to dismiss.³ (Doc. 179, at 11.)

³ The issues before the Court in this and the previous motions to dismiss asserted by the KCOA involve important principles of tribal sovereignty on which a definitive ruling by the Court is needed. In view of the importance of the doctrine, a challenge to a federal court's jurisdiction on the basis of tribal sovereign immunity ordinarily is raised at the start of litigation, and an order denying the defense is immediately appealable. Without such interlocutory review, the value of the immunity to the sovereign could be lost. *See, e.g., Osage Tribal Council ex rel. Osage Tribe of Indians v. United States Dept. of Labor*, 187 F.3d 1174, 1179-80 (10th Cir. 1999) (applying collateral order doctrine to administrative order rejecting tribal sovereign immunity defense); *Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians of Fla.*, 63 F.3d 1030, 1050 (11th Cir. 1995); *see also Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146, 113 S. Ct. 684, 689 (1993) (noting immediate appeals of denials of immunity are necessary to ensure that sovereigns' interests are fully vindicated).

The KCOA does not take lightly the time the issues in this motion have taken to adjudicate. However, the KCOA does not believe it can responsibly proceed with the litigation without obtaining a ruling on the key disputed issues, including whether the immunity waiver was given with authority under tribal law, and whether the waiver, if validly given, permitted only an arbitration.

STANDARDS APPLICABLE TO RULE 12(b)(1) MOTIONS

Whether sovereign immunity applies to bar an action is a jurisdictional issue that is ripe for determination pursuant to a Rule 12(b)(1) motion. *See Miner Elec., Inc. v. Muscogee (Creek) Nation*, 505 F.3d 1007, 1009 (10th Cir. 2007); *Ramey Constr. Co. v. Apache Tribe of the Mescalero Reservation*, 673 F.2d 315, 318 (10th Cir. 1982). Unless a tribal government has waived immunity from suit, or unless Congress has clearly and unequivocally abrogated tribal immunity for the particular claims alleged, a federal court lacks jurisdiction to hear claims against the tribe. *See Fent v. Oklahoma Water Res. Bd.*, 235 F.3d 553, 557-59 (10th Cir. 2000) (holding that once effectively asserted, sovereign immunity is a jurisdictional bar to the exercise of federal subject matter jurisdiction).

Once jurisdiction has been challenged in a motion to dismiss, the party asserting that subject matter jurisdiction exists—in this case Chasco—bears the burden of establishing its existence by a preponderance of the evidence. *See Boudreau v. United States*, 53 F.3d 81, 82 (5th Cir. 1995) (noting burden on plaintiff to establish jurisdiction). As a result, it is Chasco's burden to prove that a valid waiver of immunity exists to permit its claims against the KCOA to proceed. *See Bally Exp. Corp. v. Ballicar, Ltd.*, 804 F.2d 398, 401 (7th Cir. 1986) (noting when defendant United States moved to dismiss for lack of subject matter jurisdiction, plaintiff was required to show waiver of federal sovereign immunity). As with other motions challenging the Court's subject matter jurisdiction, a motion seeking a dismissal on the basis of sovereign immunity must be addressed before the merits of the case are litigated. *See Kiowa Indian Tribe of Okla. v. Hoover*, 150 F.3d 1163, 1172 (10th Cir. 1992) (noting "Tribe's full enjoyment of its sovereign immunity is irrevocably lost once the Tribe is compelled to endure the burdens of litigation"); *see also* 17A *Moore's Federal Practice* § 123.51, at 123-166 to -167 (3d ed. 2012)

(noting an immediate appeal is necessary “because the value of immunity would be lost as litigation proceeds past motion practice”).

SUMMARY OF THE ARGUMENT

Like all American Indian nations, the Kiowa Tribe is governed by a unique Constitution and unique legal institutions. One of the unique features of the Kiowa Constitution as interpreted by the Tribal courts is that only the KIC possesses the retained power to waive sovereign immunity. No clear tribal law currently exists that would allow the delegation of this power from the KIC to the KCOA—which is a key focus of the authority of the KCOA to enter into binding and enforceable contracts. Based on considerations of comity, tribal courts should be given the opportunity in the first instance to rule on matters of tribal constitutional law, including the issue of whether the KIC validly delegated authority to the KCOA through the July 2005 Ballot Issue to approve the Construction Contract.

Aside from the issues of Tribal constitutional law, and even if the Tribal courts were to find that the KIC validly delegated to the KCOA the authority to waive tribal sovereign immunity, the contractual waiver at issue by its very terms permitted only arbitration as the exclusive means for dispute resolution. This contractual limitation comprises an enforceable condition for the grant of the attempted waiver, and therefore must be enforced if the waiver of immunity was validly given.

Chasco proceeded with work under a construction contract absent approval by either of the two constitutional bodies of the Kiowa Tribe vested with the power to authorize binding and enforceable agreements. For the reasons set forth herein, this case must be dismissed to permit the *Tribal courts* to resolve important and substantial questions of *Tribal constitutional law* concerning the enforceability of the dispute resolution language in the Construction Contract.

ARGUMENT & AUTHORITIES

I. ANY ATTEMPTED DELEGATION TO THE KCOA OF THE POWER TO GRANT WAIVERS OF IMMUNITY IS A NULLITY UNDER EXISTING TRIBAL LAW

Controlling tribal law makes plain that the Kiowa Indian Council alone has been granted the power to consent to suits against the Tribe and its arms and enterprises. In certain circumstances not at issue in this case, the Constitution may permit the KIC to delegate its power to approve waivers of immunity. But the Constitution expressly provides that such powers may be delegated only to the Kiowa Business Committee, the elected governing body of the Tribe. Although the question has never been addressed directly by the Tribe's legal institutions, the plain text of the Constitution and existing tribal law in the area indicate that a delegation or re-delegation of the power to grant limited waivers of immunity to the KCOA is a nullity.

A. The Kiowa Constitution Expressly Limits Any Delegation of the Power to Grant Limited Waivers of the Tribe's Immunity from Suit

Each and every Indian nation is a separate and distinct sovereign with its own form of government and laws, and therefore, the ability of each tribal government and its subordinate entities to enter into binding and enforceable contracts depends on its unique governmental legal institutions. The Kiowa Tribe's Constitution, as a unique tribal organic document, contains certain limitations on the division of powers that are atypical in Indian country. On its face, the Kiowa Constitution is designed to retain in the KIC—all of the adult members of the Tribe—most governmental powers and the control of the delegation of such powers. This constitutional scheme—while serving its apparent purpose of placing extensive control in the KIC—obviously makes it difficult for the KBC and the KCOA and other tribal arms and departments to enter into commercial transactions.

Article V of the Kiowa Constitution vests in the KIC and the KBC certain enumerated powers, none of which mention waivers of tribal sovereign immunity. *See* Kiowa Cont. art. V, §§ 1 & 2. In fact, the Constitution expressly vests the power to contract, a power associated with the grant of waivers of tribal sovereign immunity, in the *KIC* and *not in the KBC*, the body in the Tribe responsible for the daily business of governance. *See* Kiowa Const. art. V, § 1, cl. (e). Further, the Constitution expressly provides that “[a]ll other powers not vested in the business committee by Section 2 of this Article shall be retained by the Kiowa Indian Council.” Kiowa Const. art. V, § 1. Article V makes thus clear that “all powers” of the tribal government not expressly assigned to the KBC under the Constitution are retained by the KIC. The plain text of the Constitution thus retains in the KIC the unenumerated power to consent to lawsuits to enforce contracts of the Tribe, unless such power is properly delegated.

Currently, no known rulings or decisions of the Tribe’s courts or its other legal institutions specifically address how and to what extent the KIC may delegate its powers, including its unenumerated powers. However, the Tribal courts have affirmed that the power to waive sovereign immunity is specifically and exclusively retained by the KIC.⁴ As that court has noted, “[t]he most significant of the powers retained by the Kiowa Tribe, is the power of the Kiowa Tribe to preserve its sovereign status,” and “[a]ccordingly, the KIC has sole authority to execute a waiver of tribal immunity.” *See* Opinion, *Tofpi v. Hon. Lisa Otippoby*, Nos. CIV-09-A12 & PO-09-A02, at 2-3 (Ct. Indian Offenses, BIA Anadarko Agency Apr. 23, 2009) (Doc. 82-1). This is entirely consistent with the plain language of the Constitution.

⁴ The Kiowa Tribe does not have independent tribal courts, so the Tribe currently uses the courts provided by the Bureau of Indian Affairs for tribes which have not established their own courts, the Court of Indian Offenses and the Court of Indian Appeals. *See* 25 C.F.R. § 11.100(a) & (b) (2012).

Further, the constitutional text appears to place certain general limitations on the ability of the KIC to delegate its powers. The language of Article V enumerating the powers of the KIC provides that “any of the above powers *may be delegated to the business committee.*” Kiowa Const. art. V, § 1, cl. (i) (emphasis added). This language on its face thus permits the KIC to delegate its listed powers, but such delegation appears to be valid solely when made to the KBC. The KIC has, in fact, delegated its power to approve contracts to the KBC, but not to the KCOA, through a ballot issue passed on June 4, 1977. (Ex. 2, at 19.) Nothing in the Constitution, however, provides that the KIC may delegate its powers to tribal departments or entities other than the KBC. In view of the overall constitutional scheme, under which many key governmental powers are intended to be retained in the KIC, the language of the Constitution appears to mean what it says—that powers of the KIC may be delegated only to the other branch of government, the elected Business Committee.

B. To the Extent the July 2005 Ballot Issue Comprised a Delegation of Power to the KCOA to Grant Future Waivers of Immunity, it is Not Valid

Under the plain text of the Kiowa Constitution, then, Tribal law permits a delegation of powers of the KIC only to the KBC, and no existing Tribal law authorizes a delegation of key governmental powers—including the power to grant limited waivers of tribal sovereign immunity for commercial transactions—to a Tribal entity created by the KBC. Further, the July 2005 ballot question adopted by the KIC with respect to the project raises additional questions of Tribal law, including its intended scope and purposes. In contrast to resolutions commonly used by tribal governmental bodies to approve binding contracts, the July 2005 ballot issue does not expressly grant a waiver of sovereign immunity for enforcement of the project transaction documents, or use other clear and express language indicating the intent to approve such a

waiver.⁵

The July 2005 ballot question asked tribal voters to “affirm the authority” of the KBC and the KCOA to enter into financing, construction, and other agreements relating to the casino project, and noted that such agreements would “provide for any disputes to be resolved pursuant to binding arbitration enforceable in state or federal courts.” (Ex. 5, at 3.) On its face, this language does nothing more than “affirm” the validity of the agreements the KBC and the KCOA had previously approved in conjunction with the project. As of July 2005, the only contracts that were in existence and awaiting approval by the KIC were the agreements with the developers and the lenders and the initial general contractor.⁶ (Exs. 3 & 4.) This leaves in question whether, as a matter of tribal law, the ballot issue was intended to include an approval of the Construction Contract, which was with a contractor not yet engaged and with whom an agreement would not be negotiated for another four months. If the ballot issue had any legal force with respect to the Construction Contract, it necessarily would not be as the approval by the KIC of existing agreements but as a *delegation* of the power to the KCOA on an ongoing basis to enter into such binding agreements in the future.⁷

⁵ Any waiver of the broad immunity from suit enjoyed by tribes and arms of tribal governments must be made expressly, clearly, and unequivocally, and for the particular claims alleged. *See, e.g., Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-59, 98 S. Ct. 1670, 1676 (1977). It is well established that such waivers of tribal sovereign immunity cannot be implied, but must be “unequivocally expressed.” *Id.*; *see also C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418, 121 S. Ct. 1589, 1594 (2001).

⁶ The available evidence relating to the ballot issue further supports the conclusion that the KIC contemplated *only* the existing transaction documents when it passed the ballot issue—not future agreements, including the Construction Agreement. (Exs. 7 & 8.)

⁷ *See Dep’t of Legal Affairs v. Rogers*, 329 So.2d 257, 267 (Fla. 1976) (finding that a state statute adopting Federal Trade Commission decisions is only valid under Florida constitution as to decisions in existence at the time of passage due to nondelegation doctrine);

In fact, the use of a ballot issue itself for the purpose for which it was used with respect to the casino development requires further clarification under tribal law. Certainly, such ballot issues are not constitutional amendments, the procedure for which is specified under the constitution. *See* Kiowa Const. art. VII. Any member of the KIC can write and submit a ballot question at a KIC meeting, and ballot questions subsequently approved frequently have been rescinded through new ballot questions presented at subsequent meetings. Indeed, immediately subsequent to the July 2005 ballot issue a Business Committee submitted a ballot issue that would have voided the July 9, 2005 ballot issue. (Ex. 6.) The Kiowa Hearing Board, a constitutional body with the power to rule on the validity of ballot questions, invalidated the subsequent ballot question because it might impact existing agreements with the project developers and a financier, and thereby negatively impact the Tribe. (Ex. 6.) This controversy points to the ephemeral nature of ballot questions in general, and fails to provide an answer as to their legal force.

All of this calls into questions whether the KIC's actions in July 2005 authorized agreements by the KCOA not then in existence as binding contractual obligations. To be valid and enforceable, any waiver of sovereign immunity given through a KIC action for a particular contract must have been granted within its constitutional powers. It is established that for a waiver of tribal immunity to be effective it must be made in conformity with *tribal* law.⁸ As

State v. Julson, 202 N.W.2d 145, 151 (N.D. 1972) (declining to construe a statute adopting a federal statute to include amendments of the federal act post-passage to avoid state constitutional delegation challenge).

⁸ *See Winnebago Tribe of Neb. v. Kline*, 297 F. Supp. 2d 1291, 1303 (D. Kan. 2004); *World Touch Gaming, Inc. v. Massena Mgmt., LLC*, 117 F. Supp. 2d 271, 275 (N.D.N.Y. 2000).

corollary, waivers of immunity given without authority are void as a matter of law.⁹ Based on the plain text of the Kiowa Constitution and existing tribal law, the KIC did not have the power to make an open-ended delegation of such authority to the KCOA. Under existing tribal law, to the extent the July 2005 ballot question was intended to be a delegation of such powers, existing tribal law demonstrates that it was an ultra vires act of the KIC, and thus a waiver of immunity based upon such action was a nullity.¹⁰

C. Tribal Constitutional Questions Must be Decided in the First Instance by the Tribal Courts

To the extent that the questions involving the validity and enforceability of the Construction Contract turn on disputed questions of Kiowa constitutional law, the Kiowa courts must resolve such issues in the first instance. It is well-established that how a tribal government is constitutionally empowered to govern its own affairs is an issue reserved to the tribe itself under the doctrine of tribal exhaustion or, alternatively, the doctrine of tribal abstention.

Both of these doctrines arise out of the inherent sovereignty of Indian tribes and

⁹ See, e.g., *Memphis Biofuels, LLC v. Chickasaw Nation Indus., Inc.*, 585 F.3d 917, 922 (6th Cir. 2009) (holding tribal entity purporting to waive sovereign immunity in a contract did not validly do so where the board of the entity did not approve the waiver by resolution); *Native Am. Distrib. v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1295 (10th Cir. 2008) (holding tribal entity was not equitably estopped from asserting immunity because “misrepresentations of the Tribe’s officials or employees cannot affect its immunity from suit”); *Sanderlin v. Seminole Tribe of Fla.*, 243 F.3d 1282, 1288 (11th Cir. 2001) (rejecting argument that tribal representative had actual or apparent authority to waive immunity because “[s]uch a finding would be directly contrary to the explicit provisions of the Tribal Constitution”).

¹⁰ A different question would be presented in this case if the KBC—the entity to which the KIC may constitutionally delegate certain powers—had approved the Construction Contract. Indeed, this was the procedure followed with respect to the initial transaction documents, each of which were approved by the KBC and the KCOA, and then submitted to the KIC for approval. With respect to the original transaction documents approvals were thus provided by all of the constitutional bodies. Yet this same procedure was not followed with respect to the Construction Contract.

Congress's policy supporting tribal self-determination. They represent

“[t]he most basic principle of all Indian law, supported by a host of decisions, is that those powers which are lawfully vested in an Indian tribe are . . . ‘inherent powers of a limited sovereignty which has never been extinguished’ The tribes began their relationship with the federal government with the sovereign powers of independent nations. Upon coming under the authority of the United States . . . certain limitations upon the external powers of tribal self-government necessarily followed. But the United States from the beginning permitted, then protected, the tribes in their continued internal government The established tradition of tribal independence within a tribe's territory has survived the admission of new states, citizenship of the Indians, and other changes in American life. Today that tradition of tribal sovereignty furnishes the backdrop against which all federal Indian laws are to be read.”

Wheeler v. United States Dep't of Interior, 811 F.2d 549, 551 (10th Cir. 1987) (quoting F.

Cohen, *Handbook of Federal Indian Law* Ch. 4, at 231-32 (1982 ed.)). The federal courts “have also encouraged self-government,” and have noted “that when a dispute is an intratribal matter, the Federal Government should not interfere.”¹¹ *Wheeler*, 811 F.2d at 551 (citing *Potts v. Bruce*, 533 F.2d 527, 529-30 (10th Cir.)). Allowing

“unconditional access to the federal forum [to intratribal issues] would place it in direct competition with the tribal courts, thereby impairing the latter's authority over reservation affairs. Adjudication of such matters by any nontribal court also infringes upon tribal lawmaking authority, because tribal courts are best qualified to interpret tribal law.”

Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 16, 107 S. Ct. 971, 976-77 (1986). Because of the federal policy of tribal self-governance and self-determination, and due to considerations of the comity that should exist between two sovereigns, federal courts have developed the doctrines of tribal exhaustion and tribal abstention. This court should therefore decline to rule on the

¹¹ More than 40 years ago, Congress set in motion a policy of recognizing and encouraging Indian self-government. *See, e.g.*, Indian Civil Rights Act, 25 U.S.C. § 1301 et seq.; Indian Tribal Self-Determination and Education Assistance Act, 25 U.S.C. § 450a.

meaning of the Kiowa Constitution based on these two doctrines.¹²

The tribal exhaustion rule “provides that as a matter of comity, a federal court should not exercise jurisdiction over cases arising under its federal question or diversity jurisdiction, if those cases are subject to tribal jurisdiction, until the parties have exhausted their tribal remedies.”¹³

United States v. Tsosie, 92 F.3d 1037, 1041 (10th Cir. 1996) (quoting *Texaco Inc. v. Zah*, 5 F.3d 1374, 1376 (10th Cir. 1993)). The exhaustion rule “does not require an action to be pending in tribal court.” *Id.* In this case, the Kiowa 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. If the Court dismisses this case pursuant to the tribal exhaustion doctrine, the federal policy of self-determination will be advanced by allowing the expertise of the Kiowa courts to resolve a matter of Kiowa law. The Kiowa courts’ ruling could then be challenged in federal court, but the Court would then have the benefit of a Kiowa court ruling on Kiowa law.

In the alternative, this Court should dismiss the claims against the Tribe based on the

¹² The admonition of *Iowa Mutual* was recognized by this Court in its Order of March 30, 2010 (Doc. No. 98), when it noted that “ ‘[j]urisdiction to resolve internal tribal disputes, interpret tribal constitutions and laws . . . lies with Indian tribes and not in district courts.’ ” (Doc. No. 98 (quoting *Sac & Fox Tribe of the Mississippi v. Bureau of Indian Affairs*, 439 F.3d 832, 835 (8th Cir. 2006))).

¹³ There are “three federal policy concerns behind the tribal court exhaustion rule;” “(1) to further the congressional policy of supporting tribal self government; (2) to promote the orderly administration of justice; and (3) to obtain the benefits of tribal expertise.” *Id.* at 1042 (quoting *Zah*, 5 F.3d at 1377-78, and citing *Nat’l Farmers Union Ins. Cos. v. Crow Tribe of Indians Nat’l Farmers*, 471 U.S. 845, 105 S. Ct. 2447 (1987)). While affirming that tribal court jurisdiction is a federal question, the Supreme Court in *Iowa Mutual* found that “considerations of comity direct that tribal remedies be exhausted before the question [of whether a tribal court has jurisdiction over a matter] is addressed by the District Court.” *Iowa Mutual*, 490 U.S. at 15 (discussing *Nat’l Farmers Union Ins. Cos.*)). “Where comity concerns are present, ‘[j]urisdiction presumptively lies in the tribal court . . . unless Congress has expressly limited that jurisdiction.’ ” *Tsosie*, 92 F.3d at 1041 (quoting *Smith v. Moffett*, 947 F.2d 442, 444 (10th Cir. 1991)).

abstention doctrine. Like the tribal exhaustion doctrine, the tribal abstention doctrine arises from considerations of comity between sovereigns, the orderly administration of justice, and respect for the federal policy of Indian self-determination through self-governance. *See Pittsburg & Midway Coal Mining Co. v. Watchman*, 52 F.3d 1531, 1536-37 (10th Cir. 1995). Exhaustion

“is required as a matter of comity, not as a jurisdictional prerequisite [T]he rule is analogous to principles of abstention [E]ven where there is concurrent jurisdiction in both state and federal courts, deference to state proceedings renders it appropriate for the federal courts to decline jurisdiction in certain circumstances [S]trong federal policy concerns favor[] resolution in the nonfederal forum.”

Iowa Mutual, 480 U.S. at n.8 (citing *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 96 S. Ct. 1236 (1976)). These principles strongly warrant the Court’s abstaining from ruling on unresolved matters of Kiowa law.¹⁴

As the Supreme Court noted in *Iowa Mutual*, the considerations of comity between sovereigns, the strong federal policy of Indian self-determination, and the need for the orderly administration of the courts make unsettled matters of tribal law analogous to unsettled matters of state law for abstention doctrine purposes. Thus, this Court should abstain from exercising jurisdiction over the unsettled matters of Kiowa constitutional law and dismiss this case.

II. EVEN IF THE BALLOT ISSUE VALIDLY APPROVED A WAIVER OF IMMUNITY FOR THE CONSTRUCTION CONTRACT IT COULD, BY ITS TERMS, HAVE AUTHORIZED ONLY AN ARBITRATION, NOT LITIGATION

Even assuming the KCOA validly, and with full legal authority, approved a waiver of tribal sovereign immunity to permit an enforcement of its agreement with Chasco, the dispute

¹⁴ The abstention doctrine applies whenever “a federal court of equity is asked to decide an issue by making a tentative answer which may be displaced tomorrow by [an] adjudication [in a court within the jurisdiction].” *Railroad Comm’n of Tex. v. Pullman Co.*, 312 U.S. 496, 500, 61 S. Ct. 643, 645 (1941). As in the context of the state jurisdiction, because determinations of tribal law belong to the highest court of the tribe, determinations of undecided tribal law by a federal court “cannot escape being a forecast rather than a determination.” *Id.* at 499.

resolution provisions in the Construction Contract plainly and unequivocally provide for a limited waiver of immunity to permit only an arbitration proceeding. The body of law surrounding the interpretation and enforcement of tribal waivers of immunity granted for contractual transactions—often referred to as “transactional waivers” of immunity—recognizes across the board that such waivers can be subject to conditions. The language of the Construction Contract sets forth a limited waiver of immunity that is clearly conditioned on its being used solely and exclusively for purposes of an arbitration. Chasco would not, under any view of the applicable law, be entitled to use such a waiver in litigation.

No question exists that the KCOA, as an arm of the Kiowa Tribe, enjoys broad immunity from unconsented suits unless either the tribe has validly waived its immunity for particular claims or unless Congress has authorized the suit.¹⁵ *See, e.g., Kiowa*, 523 U.S. at 754, 118 S. Ct. at 1702; *United States v. United States Fidelity & Guar. Co.*, 309 U.S. 506, 512, 60 S. Ct. 653, 656-57 (1940); *Berrey v. Asarco, Inc.*, 439 F.3d 636, 643 (10th Cir. 2006); *Dry v. United States*, 235 F.3d 1249, 1253 (10th Cir. 2000); *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324, 1344 (10th Cir. 1982). Waivers of such immunity for particular commercial transactions are entirely voluntary acts, and therefore, a tribe or tribal entity “may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted.” *American Indian Agric. Credit Consortium, Inc. v. Standing Rock Sioux Tribe*, 780 F.2d 1374, 1378 (8th Cir. 1985) (quoting *Beers v. Arkansas*, 61 U.S. (20 How.) 527, 529 (1857)). When a tribe or tribal entity consents to suits “any conditional limitation it imposes on that consent must be

¹⁵ Tribal sovereign immunity extends not only to the tribe’s government, but also to the enterprises that Indian tribes use to generate revenues for tribal governmental functions and services, and to create a substitute for the tax bases enjoyed by other governments. *See Native Am. Distrib.*, 546 F.3d at 1292.

strictly construed and applied.” *Namekagon Dev. Co. v. Bois Forte Res. Hous. Auth.*, 517 F.2d 508, 510 (8th Cir. 1975). The Construction Contract sets forth just such conditions.

The dispute resolution provisions of the Construction Contract, set forth in its Exhibit “A,” contain relatively standard language for waivers of immunity in commercial transactions. The attempted waiver of immunity is clearly characterized as a “Limited Waiver of Sovereign Immunity.” (Ex. 1 ex. A.) Further, the terms setting forth the scope of the purported waiver provide that the 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,” other than defined “Gaming Assets,” except in certain specified forums and “solely and exclusively” to

“(1) resolve any dispute, claim, question, controversy, action or disagreement between the Owner and the Builder that arises under this Agreement and/or the Contract documents whether arising under law or in equity and whether arising during or after the expiration of this Agreement and/or the Contract Documents (“*Claims*”);
(2) to compel arbitration of a Claim under the Construction Arbitration Rules of the American Arbitration Association (“AAA”);
(3) to enforce (i) the arbitrators’ decision with respect to arbitration of a Claim under the commercial arbitration rules of the AAA or (ii) any related judgment or award of any applicable judicial body; and
(4) for no other purpose whatsoever.”

(Ex. 1 ex. A, § II (*italics in original*).) Further, and in keeping with conditions placed on any waiver of immunity, the Construction Contract contains a mandatory arbitration clause. (Ex. 1 ex. A, § III.)

The language in the Construction Contract could not be plainer that, as a condition of any waiver of immunity, and assuming it was a valid waiver, the KCOA limited its consent to enforcement of the agreement to the resolution of disputes in an arbitration. Based on the clear language of the dispute resolution provision of the Construction Contract, including the clearly stated conditions on the limited waiver of immunity language, the Court should dismiss this

action for reference to an arbitrator. *See, e.g., Peterson v. Shearson/American Express, Inc.*, 849 F.2d 464, 465-66 (10th Cir. 1988) (“When a contract mandates arbitration, courts generally will enforce the arbitration clause absent a waiver.”); *Int’l Union, United Auto., Aircraft, & Agric. Implement Workers of Am. v. Cardwell Mfg. Co.*, 304 F.2d 801, 803 (10th Cir. 1962) (“[A]n order to arbitrate should not be denied unless it may be said ‘with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.’”) (quoting *U.S. Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 583, 80 S. Ct. 1347, 1353 (1970)).

III. THE OPEN FACTUAL MATTERS IN THIS CASE, EVEN IF RESOLVED IN FAVOR OF CHASCO, WOULD NOT ALTER THE LEGAL VALIDITY OF THE PURPORTED LIMITED WAIVER OF IMMUNITY

In its Order of September 25, 2012 (Doc. No. 179), the Court reserved the right to draw a permissive inference that the minutes of the meetings of the KCOA Board of Trustees allegedly held between November 1, 2005, and January 1, 2006—which the KCOA was unable to produce during jurisdictional fact discovery—would be harmful to KCOA’s argument that it did not lawfully consent to enforcement of the Construction Contract. Yet the issues relating to these minutes cannot change the outcome of the questions relating to the legal validity of the KIC’s delegation of authority to the KCOA to consent to enforcement of the Construction Contract. Under existing tribal law, the waiver for arbitration was not validly authorized, and therefore, any actions by the Board of the KCOA to grant a limited waiver of immunity were ultra vires.

As noted, in order to be valid an attempted waiver of tribal sovereign immunity must be express and unequivocal. *See C & L Enters.*, 532 U.S. at 418, 121 S. Ct. at 1594 (citing *Oklahoma Tax Comm’n v. Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505, 509, 111 S. Ct. 905, 909 (1991), and *Santa Clara Pueblo*, 436 U.S. at 58, 98 S. Ct. at 1677). Such waivers of

tribal sovereign immunity cannot be implied. *See Santa Clara Pueblo*, 436 U.S. at 58-59, 98 S. Ct. at 1677. If a procedure is set forth in tribal law or in a tribal entity's charter for the waiver of tribal immunity, that procedure must be followed for the waiver to be valid. *See Memphis Biofuels*, 585 F.3d at 922. The burden is on the party asserting jurisdiction to prove that the Tribe has waived tribal immunity by a preponderance of the evidence.

Assuming that the KIC had the authority to delegate the power to waive sovereign immunity to the KCOA and did so, the KCOA's Amended Charter lays out the specific procedure for granting limited waivers of the KCOA's immunity. The procedure requires approval by the Board of Trustees of the KCOA of any limited waiver. (KCOA Second Amend. & Restated Charter, art. 5, § 5.01 (Doc. No. 158-10).) At most, the effect of a permissive inference would be to establish that the Board's procedures were followed—or were completed—with respect to the approval of the Construction Contract. Even if all of the required procedures were followed, and even if the minutes and resolutions reflected that the KCOA board approved the Construction Contract and further expressly approved the limited waiver of immunity set forth in the Construction Contract, that would not address the key issue in this case—namely, that the dispute resolution provisions of the contract were not approved by the KCOA on the basis of clear authority afforded under tribal law.

In broader terms, and even if the unlocated documents could be dispositive, no basis exists under controlling law for the Court to imply a valid and binding waiver of immunity based on the KCOA's inability to produce documents. Such a permissive inference would deem, as true, the fact that the missing minutes contain an unequivocal approval of the waiver in the Construction Contract, and thus would estop the KCOA from arguing otherwise. However, numerous courts have held that waivers of tribal sovereign immunity cannot be found by this

means through the application of the doctrine of estoppel. *See, e.g., Memphis Biofuels*, 585 F.3d at 922 (declining to find a waiver by estoppel where board approval was not given); *Native Am. Distrib.*, 546 F.3d at 1295 (misrepresentations of tribal officials cannot affect a tribe's immunity to suit); *Sanderlin*, 243 F.3d at 1288 (actual or apparent authority of a tribal representative to waive immunity cannot affect the explicit provisions of a Tribal Constitution regarding the waiver of sovereign immunity). The use of a permissive inference to find a waiver of sovereign immunity would thus result in the implication of a waiver where no express and unequivocal assent to such a waiver was given.

Even if a permissive inference could imply that the Board unequivocally approved the limited waiver of sovereign immunity in the Construction Contract, such a determination would not change the outcome. Only the KIC has the authority to approve waivers of sovereign immunity, and that authority cannot be delegated to a tribal entity like the KCOA. Thus, the key issue of tribal law in this case—whether the KIC may delegate the authority to waive sovereign immunity to the KCOA, through its Charter or otherwise—cannot be resolved through the application of a permissive inference or estoppel.

CONCLUSION

As a matter of existing Kiowa law, the KIC cannot delegate its power to waive sovereign immunity, and it did not authorize the waiver in the Construction Agreement by direct action. The claims asserted in Chasco's third-party complaint against the KCOA are thus barred, and this Court lacks subject matter jurisdiction over this action. This action should be dismissed.

Respectfully submitted,

Amos E. Black, III, Okla. Bar. No. 827
Thomas R. Zynda, Okla. Bar No. 10015
BLACK & ZYNDA
101 W. Broadway Avenue
Anadarko, Oklahoma 73005
Telephone: (405) 247-2548
Telecopier: (405) 247-2559

s/ Stephen R. Ward

Stephen R. Ward, Okla. Bar No. 13610
Daniel E. Gomez, Okla. Bar No. 22153
CONNER & WINTERS, LLP
4000 One Williams Center
Tulsa, Oklahoma 74172
Telephone: (918) 586-8978
Telecopier: (918) 586-8698

ATTORNEYS FOR KIOWA CASINO
OPERATIONS AUTHORITY

CERTIFICATE OF SERVICE

I hereby certify that on this the 16th day of October, 2012, I electronically transmitted a full, true, and correct copy of the above and foregoing instrument, the “BRIEF OF THE KIOWA CASINO OPERATIONS AUTHORITY IN SUPPORT OF MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION,” to the Clerk of Court using the Electronic Case Filing System (the “ECF System”) for filing and transmittal of a Notice of Electronic Filing to the filing following ECF registrants (names only):

Matthew D. Anderson, Esq.
Amos E. Black, III, Esq.
Matthew A. Brockman, Esq.
Randall K. Calvert, Esq.
David A. Elder, Esq.
William A. Johnson, Esq.
Mark R. McPhail, Esq.
Robert K. Roach, Esq.
Kristen M. Simpsen, Esq.
Mark D. Spencer, Esq.
T. Scott Spradling, Esq.
Drew A. Webb, Esq.
Denielle N. Williams, Esq.
Thomas R. Zynda, Esq.

I further hereby certify that on the 16th day of October, 2012, I served the same document by regular United States mail, with proper postage fully prepaid thereon, on the following, who are not registered participants in the ECF:

None

s/ Stephen R. Ward

Stephen R. Ward, Okla. Bar No. 13610
CONNER & WINTERS, LLP
4000 One Williams Center
Tulsa, Oklahoma 74172
Telephone: (918) 586-8978
Telecopier: (918) 586-8698

APPENDIX OF EXHIBITS

Following is a listing of the exhibits submitted in support of the “BRIEF OF THE KIOWA CASINO OPERATIONS AUTHORITY IN SUPPORT OF MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION.”

Exhibit No.	Title/Description
--------------------	--------------------------

Documents

- | | |
|----|--|
| 1. | “Construction Agreement” between the Kiowa Casino Operations Authority and Chasco Constructors, Ltd., L.L.P. (dated Dec. 7, 2005). |
|----|--|

Tribal Legal Materials

- | | |
|----|--|
| 2. | Constitution and Bylaws of the Kiowa Indian Tribe (Mar. 13, 1970). |
| 3. | KBC Res. No. CY-2005-160-A, Approving Amended Credit Documents, Transaction Documents, and Other Matters in Connection with Financing of the Project” (Apr. 26, 2005). |
| 4. | KCOA Res. No. CY-2005-____, Approving Amended Credit Documents and Transaction Documents in Connection with Financing of the Project” (Apr. 19, 2005). |
| 5. | Kiowa Election Board, Certification of Tribal Election (July 9, 2005). |
| 6. | Kiowa Hearing Board, In re Decision of Kiowa Election Board in Refusing to Place Question No. 4 on the Ballot (Nov. 3 & 20, 2005). |

Other Materials

- | | |
|----|--|
| 7. | Akin Gump, “Frequently Asked Questions About the Casino Project” (Nov. 17, 2005). |
| 8. | Letter from Billy Evans Horse, Chairman, KBC, to Philip N. Hogen, Chairman, National Indian Gaming Comm’n (Feb. 28, 2006). |