

**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

This court remanded to the Court of Indian Appeals, the appellate division of the Court of Indian Offenses, the issue of whether the Court of Indian Offenses may exercise jurisdiction over the action (CIV-08-A12) filed by Comanche Nation, Oklahoma (“Comanche Nation”) against CDST-Gaming I, LLC (“CDST”) pursuant to the Comanche Nation Tribal Court Civil Jurisdiction Ordinance of 2011 (“2011 ordinance”). The appellate division, at its discretion, remanded the issue to the trial division of the Court of Indian Offenses for initial determination. After considering the parties’ submissions and arguments, the trial division, in a written order, held that the 2011 ordinance confers jurisdiction over the Comanche Nation’s action. The trial division also *sua sponte* certified its written order for interlocutory appeal to the appellate division. Although the appellate division had not yet rendered a decision on the jurisdictional issue, this court, in accordance with its remand order, reopened these

proceedings for determination of the issue. Shortly thereafter, the appellate division rendered a decision sustaining the trial division's decision. The court found jurisdiction over Comanche Nation's action to exist on the basis of the 2011 ordinance. As the tribal remedies, including tribal appellate review, have been exhausted, the court proceeds to determine the jurisdictional issue.

I. Relevant Facts and Procedural History

The facts and procedural history relevant to the court's analysis of the jurisdictional issue are as follows.

In March of 2008, CDST commenced arbitration proceedings against the Comanche Nation under American Arbitration Association procedures. CDST asserted several claims against the Comanche Nation, including breach of contract.

In April of 2008, the Comanche Nation filed a declaratory judgment action against CDST in the Court of Indian Offenses, seeking a declaration that the agreements upon which CDST relied in the arbitration proceedings were signed without tribal authority and were void and non-binding on the Comanche Nation. The case, entitled, Comanche Nation v. CDST Gaming I, LLC, CIV-08-A12, was assigned to Magistrate Philip D. Lujan ("Magistrate Lujan").

CDST, a non-Indian, sought dismissal of the tribal court action for lack of personal jurisdiction. CDST argued that it had not stipulated to the tribal court's exercise of jurisdiction as required by the provisions of 25 C.F.R. § 11.103(a).¹

¹ Section 11.103(a), which was effective at the time, provided:

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.

In May of 2009, Magistrate Lujan denied CDST's dismissal motion. Magistrate Lujan concluded that the jurisdictional rule of 25 C.F.R. § 11.116(a),² which took effect August 11, 2008, applied to the case and authorized the tribal court to exercise jurisdiction over CDST. Magistrate Lujan also found that even if the jurisdictional rule of 25 C.F.R. § 11.103(a) applied, that section authorized the court to exercise jurisdiction over CDST because CDST had stipulated to the court's exercise of jurisdiction.

Shortly thereafter, CDST commenced this action against the Comanche Nation, Magistrate Lujan, in his official capacity, and the Court of Indian Offenses for the Comanche Nation. In the Verified First Amended Complaint for Declaratory and Injunctive Relief ("Amended Complaint"), CDST seeks a declaratory judgment that CDST has not stipulated or consented to the jurisdiction of the Court of Indian Offenses as required by § 11.103(a). CDST also seeks a declaratory judgment that the decision of the Court of Indian Offenses to exercise jurisdiction over CDST is unlawful and invalid and that the Court of Indian Offenses has no authority over CDST pursuant to § 11.103(a). CDST additionally seeks an injunction prohibiting the Court of Indian Offenses from exercising jurisdiction over CDST in connection with the Comanche Nation's complaint. CDST further seeks an award of attorney's fees and expenses.

² Section 11.116(a) provided:

Except as otherwise provided in this title, each Court of Indian Offenses has jurisdiction over any civil action arising within the territorial jurisdiction of the court in which:

- (1) The defendant is an Indian; or
- (2) Other claims, provided at least one party is an Indian.

The Comanche Nation, the Court of Indian Offenses, and Magistrate Lujan filed motions seeking to stay this action pending CDST's exhaustion of its tribal court remedies. Defendants argued that CDST was required, but failed, to seek review of Magistrate Lujan's decision from the appellate division of the Court of Indian Offenses.

In July of 2009, the court entered an order granting defendants' motions to stay and administratively closed the proceedings. Subsequently, CDST filed a motion requesting the trial division of the Court of Indian Offenses to stay the trial court proceedings and to certify the question of whether the Court of Indian Offenses can exercise jurisdiction over CDST to the appellate division of the Court of Indian Offenses. The trial division granted the motion.

In January of 2010, the appellate division issued an opinion affirming Magistrate Lujan's decision to deny CDST's motion to dismiss. Although the appellate division concluded that Magistrate Lujan erred in applying the new jurisdictional rule of § 11.116(a), the appellate division concurred with Magistrate Lujan's finding that CDST had stipulated to the court's exercise of jurisdiction for purposes of 25 C.F.R. § 11.103(a).

CDST filed a motion in this action in March of 2010 requesting the court to reopen this case and determine whether the Court of Indian Offenses may lawfully exercise jurisdiction over CDST. Despite defendants' opposition to CDST's motion, the court issued an order in November of 2010, granting CDST's motion and reopening these proceedings. The court directed defendants to answer or otherwise respond to CDST's Amended Complaint.³

³ Subsequently, the Court of Indian Offenses stayed the proceedings relating to the Comanche Nation's action against CDST pending resolution of this action.

Thereafter, defendants sought dismissal of CDST's Amended Complaint under Rule 12(b)(1) and Rule 12(b)(7), Fed.R.Civ.P. Defendants argued that the court lacked subject matter jurisdiction over CDST's claims against the Comanche Nation based upon tribal sovereign immunity and that the dismissal of the Comanche Nation also required dismissal of the entire action because the Comanche Nation could not be joined as a party under Rule 19, Fed.R.Civ.P. Defendants, Court of Indian Offenses and Magistrate Lujan (the "Federal Defendants"), also sought dismissal of the Amended Complaint under Rule 12(b)(6), Fed.R.Civ.P., for failure to state a claim.

In August of 2011, the court entered an order granting dismissal of the Comanche Nation but denying dismissal of the entire action. As to the Federal Defendants' Rule 12(b)(6) challenge, the court denied dismissal of the claims for declaratory and injunctive relief but granted dismissal of the claim for an award of attorneys' fees.

Subsequently, the Comanche Nation sought reconsideration of the court's ruling concerning dismissal of the entire action. Around the same time, CDST and the Federal Defendants filed cross-motions for summary judgment on the issues of whether the Court of Indian Offenses may exercise jurisdiction over the Comanche Nation's action against CDST pursuant to § 11.103(a), § 11.116(a) and the 2011 ordinance, which had been passed by the Comanche Business Committee in April of 2011.

The court, in July of 2012, entered an order denying the Comanche Nation's motion for reconsideration. In that same order, the court granted summary judgment in favor of CDST on the issue of whether the Court of Indian Offenses may exercise jurisdiction over the Comanche Nation's action against CDST pursuant to § 11.103(a). The court found no express stipulation by CDST to the tribal court's jurisdiction as

required by the provisions of § 11.103(a). The court determined that it need not address the issue of whether the Court of Indian Offenses could exercise jurisdiction under § 11.116(a), as the Federal Defendants had not argued in their summary judgment papers that jurisdiction was proper under § 11.116(a). As to the issue of whether the Court of Indian Offenses could exercise jurisdiction over the Comanche Nation's action against CDST under the 2011 ordinance, the court found that the issue should be decided in the first instance by the Court of Indian Appeals. The court therefore denied without prejudice the summary judgment motions of CDST and the Federal Defendants regarding the 2011 ordinance and remanded the issue for determination by the Court of Indian Appeals, the appellate division of the Court of Indian Offenses. As previously stated, the Court of Indian Appeals remanded the issue to the trial division which found, by written order, that the 2011 ordinance conferred jurisdiction on the Court of Indian Offenses to hear the Comanche Nation's action against CDST. After the trial division's *sua sponte* certification of its order for interlocutory appeal, the appellate division sustained the trial division's ruling.

In December 2012, the court reopened this action for determination of the jurisdictional issue involving the 2011 ordinance. The Comanche Nation filed a motion seeking to intervene in this action for the exclusive purpose of defending against CDST's claim for declaratory relief (that the Court of Indian Offenses has no authority to exercise jurisdiction over the Comanche Nation's action against CDST). In January of 2013, the court granted the Comanche Nation's motion and granted it leave to file an answer to the Amended Complaint. The Comanche Nation thereafter filed its answer.

The court held a status conference in this case in February of 2013 and the court directed the parties to file the briefs that were filed in Court of Indian Appeals, together with the papers filed in the Court of Indian Offenses that are referred to in the

filings in the Court of Indian Appeals. CDST and the Comanche Nation complied with the court's directive and filed all papers submitted to the tribal courts. *See*, doc. nos. 159 and 160. The Federal Defendants thereafter filed a notice stating that they partially adopted the Comanche Nation's briefs filed in the tribal courts. *See*, doc. no. 161.

Subsequently, CDST gave notice to the court of, and submitted for the court's review, a new complaint filed by the Comanche Nation against CDST in the Court of Indian Offenses (CIV-13-027) and a motion to dismiss filed by CDST seeking to dismiss the new action. CDST stated that the notice was provided so that the court could have all documents and arguments related to the issue of whether the Court of Indian Offenses has jurisdiction over CDST in order to comprehensively address all related issues. The Comanche Nation, in response to CDST's notice, advised the court that the new action was conditionally filed with an assurance of voluntary dismissal if it is determined that the Court of Indian Offenses has jurisdiction over the 2008 action. The Comanche Nation advised that a motion to stay had been filed seeking to stay the 2013 action pending a determination by this court of the jurisdictional issue relating to the 2008 action. Further, the Comanche Nation advised that if the court determines that the Court of Indian Offenses does not possess jurisdiction over the 2008 action, then CDST's new jurisdictional defense that the 2011 ordinance does not apply to "future" cases may or may not be relevant to the Court of Indian Offenses. The Comanche Nation asserts that that defense is not relevant to this case and that it has not waived sovereign immunity as to the new jurisdictional issue (*i.e.* the issue that may become relevant in the action it conditionally commenced). CDST, in reply to the Comanche Nation's response, states that the issue of whether the Court of Indian Offenses can exercise jurisdiction over CDST pursuant to the 2011 ordinance is not limited to "pending" cases. CDST

maintains that the parties agreed in the joint status report filed in this action that the district court stayed proceedings to allow the tribal courts to address jurisdiction regarding “pending and future” cases. It asserts that the fact the Comanche Nation only waived sovereign immunity as to the whether the 2011 ordinance applies just to “pending” cases does not prevent the court from making a determination as to whether the 2011 ordinance can apply to “future” cases involving CDST.

Subsequently, CDST gave notice to the court of, and submitted for its review, additional briefing filed in the new Comanche Nation case, to which the Comanche Nation responded. In a reply brief, CDST stated in a footnote in pertinent part:

As stated in the parties Joint Status Report (Doc. 157, p. 2), the issue sent back to the Court of Indian Appeals and which is now presently before this Court, is whether the CIO can exercise jurisdiction over CDST pursuant to the 2011 Ordinance for “pending and future cases.” If the Court disagrees with CDST’s position, however, CDST respectfully requests leave to amend its complaint to make additional claims and arguments addressing the specific issue of whether the CIO can exercise jurisdiction over CDST pursuant to the 2011 Ordinance for both “pending and future cases.” CDST knows of no valid reason why the parties should not resolve all of their jurisdiction-related arguments at this time.

See, doc. no. 176, n. 1.

II. Treatment of the Parties’ Papers Filed in the Tribal Courts

As stated, the court directed the parties to file in this court the briefs that were filed in the Court of Indian Appeals, together with the papers filed in the Court of Indian Offenses that are referred to in the filings in the Court of Indian Appeals. In accordance with the court’s directive, CDST filed “CDST-Gaming I, LLC’s September 2012 Motion to Dismiss Regarding Jurisdiction and the 2011 Ordinance;” “CDST-Gaming I, LLC’s December 2012 Supplemental Brief;” and “CDST-Gaming

I, LLC's Reply Brief Re 2011 Ordinance." The motion and briefs also attached exhibits. The Comanche Nation filed "Comanche Nation's Brief Re Remanded Issue from Western District of Oklahoma in Case No. CIV-09-521-F and Combined Response to CDST's Renewed Motion to Dismiss." The Comanche Nation's brief and combined response also attached exhibits. In addition, the Comanche Nation filed "Comanche Nation's Answer Brief" and "Appendix to Comanche Nation's Answer Brief." The answer brief and appendix were submitted in response to CDST's December 2012 supplemental brief. As previously stated, the Federal Defendants partially adopted the Comanche Nation's briefs filed in the tribal courts. Specifically, the Federal Defendants adopted Sections I, II, IV of Comanche Nation's Answer Brief and Exhibits 2-5 of the Appendix to Comanche Nation's Answer Brief.

Prior to the remand of this action, this matter was before the court upon CDST and the Federal Defendants' cross-motions for summary judgment. The court denied the motions without prejudice on the issue of whether the Court of Indian Offenses may exercise jurisdiction over the Comanche Nation's action against CDST under the 2011 ordinance. In their joint status report filed after the reopening of this case, the parties state that they "believe that the purely legal issue presented by this controversy regarding jurisdiction of the Court of Indian Offenses can be determined on briefs." *See*, doc. no. 157, p. 1. Consequently, the court treats the papers filed by CDST and Comanche Nation in the tribal courts, and the papers of the Comanche Nation partially adopted by the Federal Defendants, as the parties' cross-motions for summary judgment under Rule 56, Fed. R. Civ. P.⁴

⁴ The court notes that 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 was not raised by the parties' pleadings filed in accordance with Rule 7(a), Fed. R. Civ. P. The issue, however, has been litigated with the consent of the parties through their cross-motions for summary judgment and the court treats the issue, so litigated, as if it were raised by the pleadings in accordance with Rule 15(b)(2), Fed. R. Civ. P. *See, Torry v. Northrop Grumman Corp.*, 399 F.3d

III. The 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. 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

(c) 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, doc. no. 160, Ex. 1 to Appendix to Comanche Nation’s Answer Brief.

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

876, 877-879 (7th Cir. 2005) (issue not raised by pleadings was tried by consent in summary judgment context when issue had been clearly litigated); Kulkarni v. Alexander, 662 F.2d 758, 762 (D.C. Cir. 1978) (issue was raised in course of presentation on cross-motions for summary judgment and therefore was treated as if raised in pleadings); 3 James WM. Moore, et al., Moore’s Federal Practice, § 15.18[1](3d ed. 2013).

or his or her designee, shall be enforceable in the Court of Indian Offenses and shall supersede any conflicting regulation.⁵

On June 10, 2011, the Regional Director of the Southern Plains Regional Office of the Bureau of Indian Affairs approved the 2011 ordinance.

IV. Applicability of the 2011 Ordinance

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,

⁵ 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.

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).

The 2011 ordinance states that it is to apply to all “pending” cases, which would include the present case. Thus, because the 2011 ordinance includes an express statement of the regulation’s temporal reach, this court previously determined that that language controls. *See*, Order, doc. no. 140, p. 21. As a result, there would be no need to resort to judicial default rules and no need to determine whether the 2011 ordinance has a retroactive effect, *i.e.* 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. Landgraf, 511 U.S. at 280.

In its papers, however, CDST argues that the 2011 ordinance is not entitled to the same deference as Congressional legislation for two reasons. First, CDST contends that the Comanche Business Committee, in deciding the temporal reach of the 2011 ordinance, did not conduct an analysis of whether the benefits of retroactivity outweighed the potential unfairness of retroactivity application. CDST asserts that the 2011 ordinance was passed for two specific purposes: (1) to overrule the effect of the Honorable David L. Russell’s decision in Panther Partners, LLC v. Lujan, No. CIV-09-1251-R (W.D. Okla. June 10, 2010), and (2) to defeat CDST’s argument in this case that the Court of Indian Offenses did not have jurisdiction over it. Because the Comanche Business Committee did not perform a fairness analysis as Congress itself

is required to do in order to pass retroactive legislation, CDST contends that the 2011 ordinance is not entitled to the same deference as Congressional legislation.

Secondly, CDST asserts that the 2011 ordinance is not entitled to the same deference given to Congressional legislation because the ordinance is an act of an administrative agency and an administrative agency cannot pass retroactive legislation without specific Congressional authorization. In so arguing, CDST relies upon the Supreme Court's statement in Bowen that "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." Bowen, 488 U.S. at 208. CDST contends that Congress has enacted no express or specific authorization for the Bureau of Indian Affairs, the Department of the Interior or the Comanche Business Committee to pass retroactive legislation.

Upon review, the court concludes that neither the Comanche Business Committee nor the Bureau of Indian Affairs have the authority to promulgate retroactive regulations. The Comanche Nation and the Federal Defendants have not pointed to any express or specific authority from Congress for the promulgation of retroactive regulations.⁶ Nothing in 25 C.F.R. § 11.108 or its predecessor, 25 C.F.R. § 11.100, and nothing in 25 U.S.C. § 2 or 25 U.S.C. § 9, provides for such authority. Therefore, the fact that the 2011 ordinance states that it is to apply to "pending" cases

⁶ The court rejects the Comanche Nation's argument in its papers that its tribal legislative activity, *i.e.* passage of the 2011 ordinance, is not subject to the limitation of having express or specific authority from Congress in order to pass retroactive rules. The Code of Federal Regulations requires the approval of the Assistant Secretary-Indian Affairs or his or her designee of a tribe's ordinance in order for an ordinance to supersede a conflicting regulation. As approval of an ordinance by an administrative agency is required, the court concludes that the administrative agency must have express or specific authorization from Congress in order to approve an ordinance that may be retroactive.

does not mean that the 2011 ordinance can apply, if the 2011 ordinance would have a retroactive effect.

Thus, the court must determine whether the 2011 ordinance has a retroactive effect. In Landgraf, the Supreme Court stated that a statute has a retroactive effect if “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.” Landgraf, 511 U.S. at 280. CDST, in its papers, argues that the 2011 ordinance impairs CDST’s substantive contract rights. Specifically, CDST contends that the 2011 ordinance impairs its contractual right to arbitrate the Comanche Nation’s case against it. CDST maintains that the Contracts Clause of the U.S. Constitution prevents governmental entities from passing any law impairing the obligations of contract. According to CDST, the parties clearly agreed in the operative agreement to resolve any controversy or claim arising out of or relating to the agreement before an arbitrator applying American Arbitration Association rules. Because the parties selected arbitration as their forum for resolution, CDST asserts that that forum must decide the dispute between the parties. CDST contends that the only contractual issue that could come before a court is whether the arbitration provision itself is invalid. However, CDST points out that the Comanche Nation is not claiming the arbitration provision is invalid. Instead, it is arguing that the entire operative agreement is invalid because the person who signed the agreement had no authority to bind the Comanche Nation. CDST contends that that issue is one for the arbitrator. Because the 2011 ordinance would impair its contractual right to arbitrate the Comanche Nation’s case against it, CDST contends that the 2011 ordinance cannot be applied to the Comanche Nation’s case.

Upon review, the court concludes that the 2011 ordinance does not have a retroactive effect. The court rejects CDST’s position that the 2011 ordinance impairs

CDST's right to arbitrate the Comanche Nation's case. The majority of federal courts have concluded that it is for the court, rather than the arbitrator, to decide whether the signatory to an agreement containing an arbitration clause lacked the authority to commit the alleged principal. *See*, Sphere Drake Ins. Ltd. v. All American Ins. Co., 256 F.3d 587, 591 (7th Cir. 2001); Sandvik AB v. Advent Intern. Corp., 220 F.3d 99, 107 (3d Cir. 2000); Three Valleys Municipal Water District v. E.F. Hutton & Co., Inc., 925 F.2d 1136, 1140 (9th Cir. 1991); N&D Fashions, Inc. v. DHJ Industries, Inc., 548 F.2d 722, 729 (8th Cir. 1976); *see also*, Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 444 n. 1 (2006) ("The issue of the contract's validity is different from the issue whether agreement between the alleged obligor and obligee was ever concluded. Our opinion . . . does not speak to the issue . . . whether the signor lacked authority to commit alleged principal . . ."). The cases cited by CDST to support its position, Acquire v. Canada Dry Bottling, 906 F. Supp. 819, 825 (E.D. N.Y. 1995) and Nilsen v. Prudential-Bache Sec., 761 F. Supp. 279, 287 (S.D.N.Y. 1991), involved claims of fraud and duress in seeking to avoid enforcement of a contract containing an arbitration clause. The Comanche Nation's suit against CDST does not allege claims of fraud or duress. Rather, it challenges whether the Comanche Nation's chairmen had authority to bind the Comanche Nation to certain agreements, one of which contained an arbitration provision. *See*, Ex. 7 to Exhibits to Comanche Nation's Brief Re Remanded Issue From Western District of Oklahoma in Case No. CIV-09-521-F and Combined Response to CDST's Renewed Motion to Dismiss, doc. no. 160-4. That issue is therefore one for a court rather than an arbitrator. Thus, the 2011 ordinance, which permits the exercise of jurisdiction over the Comanche Nation's action, does not impair any contractual right of CDST to arbitrate.⁷

⁷ The court also rejects CDST's argument that the Contracts Clause prevents application of the 2011 ordinance. Under U.S. Const. art. I, § 10, cl. 1, "[n]o State shall . . . pass any . . . Law

The court concludes that the 2011 ordinance falls within the category of statutes which “confer[] . . . jurisdiction,” Landgraf, 511 U.S. at 274, and does not raise retroactivity concerns. Such an ordinance “takes away no substantive right but simply changes the tribunal that is to hear the case.” Landgraf, 511 U.S. at 274. Both Oklahoma and Arizona courts would have had jurisdiction to hear the claim raised by the Comanche Nation in the Court of Indian Offenses. The 2011 ordinance simply gives the Court of Indian Offenses jurisdiction to hear the claim. And the 2011 ordinance should govern because it “speak[s] to the power of the court rather than to the rights or obligations of the parties.” *Id.* The court finds that the 2011 ordinance is distinguishable from the amendment in Hughes Aircraft Co. v. U.S. ex rel. Schumer, 520 U.S. 939 (1997), which “creat[ed] jurisdiction where none previously existed.” *Id.* at 951. As stated, the issue of whether the Comanche Nation’s chairmen had authority to bind the Comanche Nation to the subject agreements is one for the court and not the arbitrator. Moreover, Oklahoma and Arizona courts would have jurisdiction to hear the Comanche Nation’s claim against CDST. The 2011 ordinance simply adds another court which has jurisdiction to be able to entertain the claim. It does not create jurisdiction where none previously existed.

Because the 2011 ordinance does not have retroactive effect, the court concludes that it may be applied in connection with Comanche Nation’s action against CDST that was filed in 2008. It specifically states that it is to apply to “pending” cases and the 2008 action was pending at the time the 2011 ordinance was approved by the Bureau of Indian Affairs. Although CDST, in its papers, argues that application of the 2011 ordinance to the Comanche Nation’s case would be unfair

impairing the Obligation of Contracts.” The 2011 ordinance was not passed by any state. It was passed by the Comanche Business Committee and approved by the Bureau of Indian Affairs. CDST has not cited any authority that the Contracts Clause would govern in such circumstances. In any event, as discussed by the court, the 2011 ordinance does not impair CDST’s right to arbitrate.

because it changes the rules in “the middle of a game,”⁸ the court concludes its application is appropriate since it “takes away no substantive right but simply changes the tribunal that is to hear the case.” Hamdan v. Rumsfeld, 548 U.S. 557, 577 (2006) (quotation omitted); *see also*, Landgraf, 511 U.S. at 274 (“We have regularly applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed.”). The presumption against retroactivity does not apply because the 2011 ordinance has no retroactive effect. *Id.* The court concludes that the Court of Indian Offenses may exercise jurisdiction over the Comanche Nation’s action based upon the 2011 ordinance.⁹ The court therefore concludes that the Comanche Nation and the Federal Defendants are entitled to summary judgment on the issue of whether the Court of Indian Offenses may exercise jurisdiction over the Comanche Nation’s action against CDST in the 2008 action pursuant to the 2011 ordinance. The court concludes that CDST is not entitled to declaratory relief against the Comanche Nation and is not entitled to declaratory or injunctive relief against the Federal Defendants.

Because the court concludes that the Court of Indian Offenses has jurisdiction over the Comanche Nation’s action against CDST filed in 2008 by virtue of the 2011 ordinance, the court concludes that it need not decide whether to allow CDST to

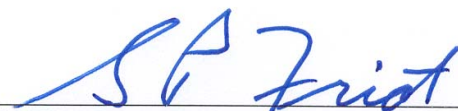
⁸ *See*, CDST-Gaming I, LLC’s September 2012 Motion to Dismiss Regarding Jurisdiction and the 2011 Ordinance, p. 12.

⁹ In its papers, CDST asserts that the 2011 ordinance, which is tribal law, cannot be applied for jurisdictional purposes because the parties’ agreement states that federal law and Oklahoma law are to govern. The court concludes, however, that the contractual choice of law does not impact whether the 2011 ordinance confers jurisdiction on the Court of Indian Offenses. The clause states that “[t]his Agreement is to be governed by federal law, and to the extent not inconsistent therewith, the laws of the State of Oklahoma.” Ex. 3 to Exhibits to Comanche Nation’s Brief Re Remanded Issue From Western District of Oklahoma in Case No. CIV-09-521-F and Combined Response to CDST’s Renewed Motion to Dismiss, doc. no. 160-4, p. 12. The clause does not in any way refer to the issue of jurisdiction. Furthermore, the Comanche Nation’s action against CDST is challenging the validity and binding effect of the agreement.

amend its amended complaint under Rule 15, Fed. R. Civ. P., to add declaratory and injunctive relief claims in regard to whether the Court of Indian Offenses can exercise jurisdiction over Comanche Nation's 2013 action against CDST under the 2011 ordinance. Comanche Nation has represented to the court that the 2013 action was only filed conditionally with an assurance of voluntary dismissal if it is finally determined that the Court of Indian Offenses possesses jurisdiction over the 2008 action.

Accordingly, treating the tribal court papers filed by Comanche Nation and the tribal court papers of the Comanche Nation partially adopted by the Federal Defendants, as motions for summary judgment under Rule 56, Fed. R. Civ. P. (doc. nos. 160 and 161), the motions are **GRANTED**. Treating the tribal court papers of CDST as a motion for summary judgment (doc. no. 159), the motion is **DENIED**. Judgment shall issue forthwith.

ENTERED this 4th day of March, 2014.



STEPHEN P. FRIOT
UNITED STATES DISTRICT JUDGE