IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

FIRST BANK AND TRUST COMPANY, *Plaintiff/Appellee/Counter-Appellant,* v. THE CHEYENNE AND ARAPAHO TRIBES; JANICE PRAIRIE CHIEF-BOSWELL, in her representative capacity, if any, as the alleged Governor of the CHEYENNE AND ARAPAHO TRIBES, *Defendants/Appellants/Counter-Appellees,* and LESLIE WANDRIE-HARJO, in her representative capacity, if any, as the alleged Governor of the CHEYENNE AND ARAPAHO TRIBES, *Defendant.*	Supreme Court Case No.: **IN-110909** Trial Court Case No.: CV-2011-53 Trial Court Judge Doug Haught District Court, Custer County, Oklahoma **SPECIAL APPEARANCE, JOINT BRIEF-IN-CHIEF OF THE CHEYENNE AND ARAPAHO TRIBES AND THE CHEYENNE AND ARAPAHO TRIBES' EXECUTIVE BRANCH** Nature of Action: Appeal of Interlocutory Order

Martha L. King, OBA # 30786
FREDERICKS PEEBLES & MORGAN LLP
1900 Plaza Drive
Louisville, Colorado 80027
Phone: (303) 673-9600
Facsimile: (303) 673-9600
Email: mking@ndnlaw.com
Attorney for Executive Branch of the Cheyenne and Arapaho Tribes (captioned below as Janice Prairie Chief-Boswell, in her official capacity, if any), Defendant/Appellant

Charles Morris, Attorney General
CHEYENNE AND ARAPAHO TRIBES
P.O. Box 32
Concho, Oklahoma 73022
Phone: (405) 422-7421
Email: morrbchas@yahoo.com
Attorneys for Cheyenne and Arapaho Tribes, Defendant/Appellant

TABLE OF CONTENTS

INDEX

Cases

Statutes

Treatises

Constitutional Provisions

SUMMARY OF THE RECORD

On February 25, 2011, the Tribes, by and through Governor Boswell, opened depository accounts with First Bank and signed contract documents therefor. Def. Trial Exh. 1, Record p. 613; Trial Tr. 76, lines 3-8; *Id.* at 86, lines 24-25; *Id.* at 87, lines 1-8; *Id.* at 242, lines 1-4.

On October 27, 2011, First Bank brought a declaratory judgment action asking the Court to declare the proper signatory for the Tribes' accounts, and for a declaration as to who the Tribes' governor is. *Petition for Declaratory Relief*, October 27, 2011, ¶¶ 16-17, Record pp. 1-5. There was no pleading for an injunction by affidavit or verified petition; no notice that an injunction would be considered; no bond posted by a moving party. *Id.*

The Tribes asserted their sovereign immunity from suit, as did Governor Boswell. *Joint Consolidated Motion to Dismiss for Lack of Subject Matter Jurisdiction*, March 15, 2011, Record pp. 10-89; *Reply to Plaintiff's* and *Wandrie's Objection of Leslie Wandrie-Harjo to Joint Consolidated Motion to Dismiss for Lack of Subject Matter Jurisdiction* both filed on April 13, 2012, Record pp. 238-260 and 261-284; *Joint Consolidated Motion for Summary Judgment*, May 31, 2012, Record pp. 339-397; *Joint Consolidated Trial Brief*, June 4, 2012, Record pp. 470-489; *Motion for Discretionary Stay Pending Appeal and Brief in Support*, July 2, 2012, Record pp. 548-574.

On April 16, 2012, First Bank, the Tribes, the Governor, and Wandrie entered into a *Scheduling Order*, Record pp. 236-237. Pursuant to that order, parties had to exchange preliminary lists of witness and exhibits by May 10, 2012; discovery had to be completed by May 25, 2012; dispositive motions had to be filed by May 31, 2012; proposed findings of fact and conclusions of law had to be filed by May 31, 2012; trial briefs had to be filed by June 6, 2012; and a trial on the merits was set for June 8, 2012.

On April 24, 2012, First Bank "place[d] an administrative hold on all funds in all of the Tribes' accounts at First Bank subject to the signatory authority of the Tribes' Governor." It also froze the funds pending "a decision ... by the Court." *Notice of Administrative Freeze*, April 24, 2012, Record pp. 286-301. It did this despite no one having filed an adverse claim in accordance with the adverse claim statute. Untitled Document, June 21, 2012, attached hereto as Appendix 1 at p. 1; amended Untitled Document, August 6, 2012, attached hereto as Appendix 2 at p. 1; Trial Tr. 42, lines 21-24; *Id.* at 44, lines 4-8 and 18-21; *Id.* at 53, lines 18-20; *Id.* at 57, line 21-25; *Id.* at 60, lines 10-15. Thus, the Tribes' and the Tribes' Governor Janice Prairie Chief-Bowell's demands were not honored. *Notice of Administrative Freeze*, April 24, 2012, Record pp. 286-301; Trial Tr. 86, lines 21-23.

On April 30, 2012, the United States expressed its concern for the Tribes' and Executive Branch's ability to carry out the federal contracts and grants in light of the Bank's administrative freeze, and threatened that if services were discontinued and/or limited it may or would reassume such programs, functions, services and activities. Def. Trial Exh. 7, Record p. 613; Trial Tr. 124, lines 1-8.

On May 24, 2012, the United States indicated its government-to-government relationship for purposes of the federal contracts and grants was with Janice Prairie Chief-Boswell, the elected Governor of the Cheyenne and Arapaho Tribes, and she was the only authorized signature on file with the United States to approve federal contracts and grants payments. Def. Trial Exh. 9, Record p. 613; Trial Tr. 17, lines 22-25; *Id.* at 86, line 9–20.

The Court conducted a trial on the merits on June 8, 2012. *Scheduling Order*, Record pp. 236-237; Untitled Document, June 21, 2012, attached hereto as Appendix 1; amended Untitled

Document, August 6, 2012, attached hereto as Appendix 2.

The Bank relied on the following choice of law provision for its claim that there was a waiver of sovereign immunity:

> [t]his agreement is subject to applicable federal laws and the laws of the state of Oklahoma (except to the extent that this agreement can and does vary such rules or laws).

Pl. Tr. Exhs.1A-B, Record p. 613; Trial Tr. 65, lines 23-25; Trial Tr. 66, lines 1-3.

At trial, the Tribes and Governor Boswell proved Pl. Trial Exhs.1A-B were not provided to them. Trial Tr. 38, lines 12–20; *Id.* at 76, lines 3-22.

At trial, the Tribes and Governor Boswell established the adverse claimants had not followed the adverse claims statute. Untitled Document, June 21, 2012, attached hereto as Appendix 1 at p. 1; amended Untitled Document, August 6, 2012, attached hereto as Appendix 2 at p. 1; Trial Tr. 42, lines 21-24; *Id.* at 44, lines 4-8 and 18-21; *Id.* at 53, lines 18-20; *Id.* at 57, line 21-25; *Id.* at 60, lines 10-15.

At trial, the Tribes and Governor Boswell proved the deposits are for provision of essential governmental services pursuant to federal contracts and grants. Trial Tr. 109, lines 12-25; *Id.* at 110, lines 1-3; *Id.* at 113, lines 24-25; *Id.* at 115, lines 17-22; *Id.* at 116, lines 5-13; *Id.* at 117, line 1; *Id.* at 118, lines 13-18; *Id.* at 124, lines 3-9; *Id.* at 127, lines 14-22.

On June 21, 2012, the Court issued an Untitled Document "den[ying]" the *Petition for Declaratory Relief and Determination of Party Authorized to Act on Behalf of Tribal Accounts* for declaratory relief. It also, without briefing, argument, or the issue being raised at all, "convert[ed] this account to a court supervised account". Untitled Document, June 21, 2012, attached hereto as Appendix 1 at p. 1-2; amended Untitled Document, August 6, 2012, attached hereto as Appendix 2 at

p. 1; Trial Tr. 68, lines 3-17; *Id.* at 69, lines 7-8; *Id.* at 191, lines 3-10; *Id.* at 222, lines 12-17; *Id.* at 223, lines 2-9.

Defendants the Cheyenne and Arapaho Tribes ("Tribes"), and the Cheyenne and Arapaho Tribes' Executive Branch ("Executive Branch") by and through its Governor Janice Prairie Chief-Boswell ("Governor Boswell"), (collectively "the Parties"), hereby specially appear and file this *Special Appearance, Joint Brief-in-Chief.*

STANDARD OF REVIEW

"The standard of review for questions concerning the jurisdictional power of the trial court to act is *de novo*." *Dilliner v. Seneca-Cayuga Tribe*, 2011 OK 61, ¶ 12, 258 P.3d 516, 519. A trial court's grant of injunction is reviewed for abuse of discretion or entry of a decision against the evidence. *Collier v. Reese*, 2009 OK 86, ¶ 11, 223 P.3d 966, 972.

I. A DISTRICT COURT DOES NOT HAVE JURISDICTION OVER DEFENDANTS

A. The Tribes are Immune from Suit

The trial court lacked subject matter jurisdiction over this lawsuit.

Tribal sovereign immunity from suit is a judicially-accepted doctrine. Indian "[t]ribes enjoy sovereign immunity from civil suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation." *Kiowa Tribe of Okla. V. Mfg. Techs., Inc.*, 523 U.S. 751, 760 (1998). "As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Dilliner*, 2011 OK 61, ¶ 12, 258 P.3d at 519. Any waiver of immunity cannot be implied, but must be unequivocally expressed. *Id.* "Absent an effective waiver or consent, a state court may not exercise jurisdiction over a recognized Indian tribe." *Id.* Tribal sovereign immunity also extends both to a tribe's commercial and governmental activities, and it protects the tribe or tribal entity regardless of

whether its activities take place on or off a reservation. *State ex rel. Edmondson v. Native Wholesale Supply*, 2010 OK 58, ¶ 31, 237 P.3d 199, 210.

Tribal sovereign immunity applies to suits for damages as well as those for declaratory and injunctive relief. *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1271 (9th Cir. 1991); *see also Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). "The issue of sovereign immunity is jurisdictional." *Ramey Construction Co., Inc. v. Apache Tribe of the Mescalero Reservation*, 673 F.2d 315, 318 (10th Cir. 1982). While tribes can waive sovereign immunity, a court cannot find waivers of tribal immunity by inference or implication. Instead, to be enforceable, a tribe's waiver of immunity must be clear, explicit and unambiguous. *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 418 (2001); *see also Santa Clara Pueblo*, 436 U.S. at 58. In determining the issue of waiver, a court cannot consider perceived inequities under the facts of the particular case. *See Ute Distrib. Corp. v. Ute Indian Tribe*, 149 F.3d 1260, 1267 (10th Cir. 1998).

In this case, the trial court found that the Tribes had waived their sovereign immunity by virtue of the so-called contract referenced above. Even if that document should have been admitted, a matter in dispute, it contains no clear and unequivocal waiver and no reference of the Tribes' and the Governor's sovereign immunity:

> [t]his agreement is subject to applicable federal laws and the laws of the state of Oklahoma (except to the extent that this agreement can and does vary such rules or laws). The body of state and federal law that governs our relationship with you, however, is too large and complex to be reproduced here.

Pl. Tr. Exhs.1A-B, Record p. 613; Trial Tr. 65, lines 23-25; Trial Tr. 66, lines 1-3.

A similar choice of law provision was interpreted in *Standing Rock*: "[t]his note and the rights and obligations of all parties hereto shall be subject to and governed by the law of the District

of Columbia." *Am. Indian Agric. Credit Consortium, Inc. v. Standing Rock Sioux Tribe,* 780 F.2d 1374, 1376 n.3 (8th Cir. 1985). The *Standing Rock* court found that the promissory note "was a preprinted form agreement . . . designed for transactions involving individuals and not Indian tribes." *Id.* at 1376, n.4. Thus, the court held that such a choice of law clause did not constitute a waiver of the tribe's sovereign immunity. *Id.* at 1380–81.

Here, like *Standing Rock*, there has been no clear and unequivocal waiver. At trial, the Bank did not establish that the so-called contract was ever produced to the Tribes. Trial Tr. 38, lines 12–20; *Id.* at 76, lines 3-22. Moreover, the Tribes' Treasurer testified that the so-called contract was not provided to the Tribes, and the Treasurer submitted the actual contracts that were provided to the Tribes. *Id.* Nevertheless, the choice of law provision is not an express waiver of sovereign immunity and a governor would not even have had authority to enter into it if it were so. *See, e.g. Dilliner*, 2011 OK 61, ¶ 12, 258 P.3d at 519; *Seneca Telephone Co. v. Miami Tribes of Oklahoma*, 2011 OK 15, ¶ 6, 253 P.3d at 55. Accordingly, the trial court lacked subject matter jurisdiction over this suit.

Furthermore, "tribal immunity is a matter of federal law and is not subject to diminution by the States." *Kiowa Tribe*, 523 U.S. at 756. As such, "state law has no bearing on who has the authority to waive the Tribe's sovereign Immunity." *Stillaguamish Tribe of Indians v. Pilchuck Group II, LLC.*, No. C10-995RAJ, 2011 WL 4001088 at *6 (W.D. Wash. 2011), attached hereto as Appendix 4. The court in *Pilchuck* noted that federal courts have readily deferred to tribal law, at least where tribal law provides explicit rules regarding sovereign immunity waivers. *Id.* (citing *Memphis Biofuels, LLC v. Chickasaw Indian Indus., Inc.*, 585 F.3d 917, 922 (6th Cir. 2009) and *Sanderlin v. Seminole Tribe of Florida*, 243 F.3d 1282, 1288 (11th Cir. 2001)). The *Pilchuck* court

concluded that "where tribal law includes specific provisions governing immunity waivers, federal courts respect those provisions." *Id.*

The Tribes have a Constitution that clearly sets forth the procedure by which the Tribes' and Governor's immunity is waived; therefore, the trial court would have to look to Cheyenne and Arapaho Constitution ("Chey. & Arap. Const.") in determining whether there has been a waiver of the Tribes' sovereign immunity. The Chey. & Arap. Const. was admitted into evidence as the Bank's Trial Exh. 2, Record at 613.

Chey. & Arap. Const., art. X, § 1 provides:

> The Tribes shall possess Sovereign Immunity. Nothing in this Constitution shall be deemed to waive Sovereign Immunity from suit. Only the Legislature and the Tribal Council may authorize a waiver of Sovereign Immunity by law. Any authorization by the Legislature to waive Sovereign Immunity shall be specific, for a limited scope and duration, in writing, and shall be limited to a maximum of one hundred thousand dollars per party. Any authorization by the Tribal Council to waive Sovereign Immunity shall be specific, for a limited scope and duration, and in writing.

Id. (emphasis added), attached hereto as Appendix 3. Chey. & Arap. Const. art. X, § 2 provides:

> The Tribes and its Officials and Employees acting in their official capacity or within the scope of their authority shall be immune from suit brought by any party not subject to the Jurisdiction of the Tribes except to the extent waived in accordance with the law.

Id. (emphasis added). Chey. & Arap. Const. art. X, § 3 provides:

> The Tribes and its Officials and Employees acting in their official capacity or within the scope of their authority shall be immune from suit except for suits in equity filed exclusively in the Courts of the Tribes by any party subject to the Jurisdiction of the Tribes to enforce rights and duties established by law or this Constitution. Any Member of the Tribes may bring a suit exclusively in the Judicial Branch to enforce the terms of this Constitution. Sovereign Immunity shall not extend to Officials and Employees acting outside their official capacity or beyond the scope their authority.

Id. (emphasis added).

Defendants raised *Seneca Telephone*, *Dilliner*, and the Chey. & Arap. Const. throughout the

case. *Joint Consolidated Motion to Dismiss for Lack of Subject Matter Jurisdiction*, March 15, 2011, Record pp. 10-89; *Reply to Plaintiff's* and *Wandrie's Objection of Leslie Wandrie-Harjo to Joint Consolidated Motion to Dismiss for Lack of Subject Matter Jurisdiction* both filed on April 13, 2012, Record pp. 238-260 and 261-284; *Joint Consolidated Motion for Summary Judgment*, May 31, 2012, Record pp. 339-397; *Joint Consolidated Trial Brief*, June 4, 2012, Record pp. 470-489; *Motion for Discretionary Stay Pending Appeal and Brief in Support*, July 2, 2012, Record pp. 548-574. Defendants further established at trial that the Bank had neither demonstrated that Congress had waived the Tribes' or the Governor's sovereign immunity, nor that the Legislature or Tribal Council had waived the Tribes' or the Governor's sovereign immunity. Trial Tr. 204, lines 5-18.

B. The Tribes' Governor is Immune from Suit

Parties should not be permitted to circumvent tribal immunity through a "mere pleading device" by nominally suing officials in their unofficial representative capacity. *Will v. Michigan Dept. of State Police,* 491 U.S. 58, 71 (1989). "The general rule is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter." *Hawaii v. Gordon,* 373 U.S. 57, 58 (1963) (per curiam). Thus, determining whether the sovereign is the real party in interest depends upon the relief sought by the plaintiff. *Pennhurst State Sch. & Hosp. v. Halderman,* 465 U.S. 89, 100–01 (1984). The "real, substantial party in interest is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants." *Regents of the Univ. of California v. Doe,* 519 U.S. 425, 429 (1997) (quoting *Ford Motor Co. v. Dep't of Treasury of Ind.*, 323 U.S. 459, 464 (1945)).

Tribal sovereign immunity extends to tribal officials and "generally immunizes tribal officials from claims made against them in their official capacities." *Native Am. Distrib. v. Seneca-Cayuga Tobacco Co.,* 546 F.3d 1288, 1296 (10th Cir. 2008). *Native American Distributing* related tribal

sovereign immunity to federal sovereign immunity and recognized that "'officers of the United States possess no power through their actions to waive an immunity of the United States or to confer jurisdiction on a court' in the absence of an express waiver of immunity." *Id.* at 1295. Thus, officers of a tribe cannot waive the tribe's sovereign immunity absent an express waiver.

Here, Governor Boswell shares in the Tribes' sovereign immunity. She is not a party to the alleged contract with the Bank in her individual capacity. Instead, her "activities are properly deemed to be those of the Tribes." *Allen v. Gold Country Casino*, 464 F.3d 1044, 1046 (9th Cir. 2006). What was evident from the *Petition for Declaratory Relief* is that the Bank wanted a declaratory judgment as to the identity of the Tribes' governor, and therefore, to determine who has control of the Tribes' account. *Petition for Declaratory Relief*, October 27, 2011, ¶¶ 16-17, Record pp. 1-5. Such relief would clearly interfere with the public administration and affect the disposition of unquestionably sovereign property.

Accordingly, the Bank's pleading device of suing Governor Boswell in her unofficial "representative capacity" in an attempt to evade the Tribes' sovereign immunity should have been soundly rejected by the court. However, the trial court impermissibly assumed subject matter jurisdiction over Governor Boswell. Imperatively, the purpose of sovereign immunity is served by recognizing Governor Boswell's immunity.

The district court exceeded its jurisdictional power and the case must be dismissed.

II. A DISTRICT COURT CANNOT DEPRIVE DEPOSITORS OF FUNDS THEY HAVE DEPOSITED IN A BANK

A. A Depositor Has Rights in Its Deposits

The contractual relationship between a bank and its depositor is that of a debtor and creditor. *Sec. Pac. Int'l Bank v. Nat'l Bank of W. Pennsylvania*, 772 F. Supp. 874, 877 (W.D. Pa. 1991);

Beshara v. S. Nat'l Bank, 1996 OK 90, ¶¶ 28–31, 928 P.2d 280, 288–89. When a bank deposit is made without limitations or qualifications, as is usually made in due course of business, subject to being drawn out on demand, the deposit is a 'general deposit,' and is in legal effect a loan to the bank. *Bd. of Comm'rs of McCurtain County v. State Nat'l Bank of Idabel*, 1934 OK 436, ¶ 13, 36 P.2d 281, 284. The contract entered into when the depositor opens a general checking account at a bank is generally implied, and the depositor delivers his funds to the bank in return for which the bank assumes the obligation to pay out on his demand a sum equal to the deposit balance. *Brown v. Eastman Nat'l Bank of Newkirk*, 291 P.2d 828, 830 (Okla. 1955). Thus, the agreement between the depositor and bank is that the bank will accept the deposit and keep it safe until the depositor demands it or orders it paid to others. *Ingram v. Liberty Nat'l Bank & Trust Co. of Oklahoma City,* 1975 OK 45, ¶ 30, 533 P.2d 975, 980.

A fundamental duty of the bank holding a depositor's funds is to honor the withdrawal instructions of its depositor. Law of Bank Dep., Coll. & Cr. Cards ¶ 3.09[2]. This duty is imposed because a deposit in a bank is treated as the bank's promise to pay depositor. *In Re Colonial Realty Co.*, 208 B.R. 616, 618 (Bankr. D. Conn. 1997). The *prima facie* owner of a bank account is the person in whose name the account stands. *Taliaferro v. Reirdon*, 1940 OK 21, ¶ 5, 99 P.2d 500, 503. Because a deposit is a matter of contract between a depositor and the bank, the clear and unambiguous language of the contract controls ownership of the account. *Scott v. Union Planters Bank, N.A.*, 196 S.W.3d 574, 577 (Mo. Ct. App. 2006); *Allied Fidelity Ins. Co. v. Bank of Oklahoma, Nat'l Ass'n,* 1995 OK 36, ¶¶ 8–9, 894 P.2d 1101, 1103–04. Therefore, when a demand is made by check or its equivalent at the bank during ordinary banking hours, the improper refusal to make the funds available is generally considered to be a contractual breach of the bank's obligation to pay the

depositor its money. *Beshara*, 1996 OK 90, ¶ 26, 928 P.2d at 288.

One procedure that will upset the relationship between a bank and its customer is an adverse claim. The purpose of the adverse claims statute is to establish the procedure necessary for an adverse claimant to follow, thereby affording protection to both banks and their depositors from unreasonable interference with their relations, rights, and obligations by the claims of strangers. *Sanders v. First Nat'l Bank & Trust Co. of Tulsa*, 1955 OK 365, ¶ 12, 292 P.2d 160, 163; *see also, Fletcher v. Bank of Meeker*, 1962 OK 192, ¶ 18, 376 P.2d 263, 266–67. Under this statute, an adverse claimant has to procure an order from a court of competent jurisdiction in an action in which the account holder is a party or executes a bond. Okla. Stat. tit. 6, § 905. A bond is necessary to protect the stayed party from damage resulting from an erroneous claim.

An adverse claimant must be a "stranger" to the account who claims to own a deposit instead of the name on the account. 62 A.L.R.2d 1116, § 3. Typical adverse claimants include secured creditors of the depositor, some unsecured creditors, contractors and subcontractors, employers seeking to track down embezzled funds, relatives of the depositor, the depositor's assignee, a victim of the depositor's fraud, a conditional seller claiming funds already deposited in a buyer's account, a bank that mistakenly transfers too much money by wire into the depositor's account with another bank, and a successor trustee on an account. *Stevenson v. First Nat'l Bank of Wash.*, 395 A.2d 21 (D.C. Cir. 1978); *Sec. State Bank v. Valley Wide Elec. Supply Co., Inc.*, 752 S.W.2d 661 (Tex. Ct. App. 1988); *First Bank of Whiting v. Samocki Bros. Trucking Co.*, 509 N.E.2d 187 (Ind. Ct. App. 1987); *Goldstein v. Riggs Nat'l Bank*, 459 F.2d 1161 (D.C. Cir. 1972); *Baden Bank of St. Louis v. Trapp*, 180 S.W.2d 755 (Mo. Ct. App. 1944); *Perkins v. City Nat'l Bank of Clinton*, 114 N.W.2d 45 (Iowa 1962); *Sanders v. First Nat'l Bank & Trust Co. of Tulsa*, 1955 OK 365, 292 P.2d 160; *Peoples*

State Bank v. Caterpillar Tractor Co., 12 N.E.2d 123 (Ind. 1938); *Barnett Bank of Jacksonville, N.A. v. Jacksonville Nat'l Bank*, 457 So.2d 535 (Fla. Dist. Ct. App. 1984); *Arizona Bank v. Wells Fargo Bank*, 713 P.2d 337 (Ariz. Ct. App. 1985). On the other hand, a joint tenant who has equal access to a bank account is not an "adverse claimant" within the meaning of the statute. *Fortune v. City Nat'l Bank & Trust Co.*, 1983 OK CIV APP 30, ¶ 16, 671 P.2d 69, 72.

A bank owes no duty to a person who desires to make an adverse claim, but has not satisfied the requirements of an adverse claims statute. *See Fletcher*, 1962 OK 192, ¶ 18, 376 P.2d at 266; *Samocki Bros. Trucking Co.*, 509 N.E.2d at 195. Where the requirements are not met, the bank should ignore the claim. *See Fletcher*, 1962 OK 192, ¶ 20, 376 P.2d at 267 (finding that plaintiff's failure to comply with statutory requirements meant the bank had no legal obligation to hold account funds).

In this case, Governor Boswell deposited funds into bank accounts at First Bank. Def. Trial Exh. 1, Record p. 613; Trial Tr. 76, lines 3-8; *Id.* at 86, lines 24-25; *Id.* at 87, lines 1-8; *Id.* at 109, lines 12-25; *Id.* at 242, lines 1-4. Governor Boswell established the depository accounts to deposit funds she uses for federal contracts and grants administration. Trial Tr. 109, lines 12-25; *Id.* at 110. Such federal contracts and grants include delivery of:

- Social Services (Trial Tr. 113, lines 24-25);
- Elder Care (Trial Tr. 115, lines 17-22 and Trial Tr. 118, lines 15-16);
- Crisis Emergency Assistance (Trial Tr. 115, lines 17-22);
- Indian Child Welfare (Trial Tr. 116, line 9);
- Youth Shelter (Trial Tr. 116, line 10);
- Violence Against Women Assistance (Trial Tr. 116, line 10);
- Child Care (Trial Tr. 116, line 11);
- Head Start (Trial Tr. 116, line 11);
- Indian Health Services (Trial Tr. 117, line 1);
- Health and Human Services (Trial Tr. 117, line 1);
- Youth Services (Trial Tr. 118, lines 15-16);
- Education (Trial Tr. 124, line 25);

- Health (Trial Tr. 124, line 25); and
- Welfare (Trial Tr. 124, line 25).

If the tribes do not fulfill their obligations, the contracts and grants could be reassumed by the federal government. Def. Trial Exh. 9, Record p. 613; Trial Tr. 109, lines 12-25; *Id.* at 110, lines 1-3; *Id.* at 113, lines 24-25; *Id.* at 115, lines 17-22; *Id.* at 116, lines 5-13; *Id.* at 117, line 1; *Id.* at 118, lines 13-18; *Id.* at 124, lines 3-9.

Based on the deposits, the legal relationship between First Bank and the Governor was that of debtor and creditor. *Beshara*, 1996 OK 90, ¶¶ 28–31, 928 P.2d at 288–89. The Governor is *prima facie* owner of the deposits and is the sole signatory. Def. Trial Exh. 1, Record p. 613; Pl. Tr. Exh. 1B, Record p. 613; Trial Tr. 76, lines 3-8; *Id.* at 86, lines 24-25; *Id.* at 87, lines 1-8; *Id.* at 242, lines 1-4. She is also the sole person recognized to administer the federal contracts and grants on behalf of the United States and the Cheyenne and Arapaho Tribes. Def. Trial Exh. 9, Record p. 613; Trial Tr. 17, lines 22-25; *Id.* at 86, line 9–20. First Bank, by accepting the deposits, assumed the obligation to pay out the Governor's demand. *Eastman Nat'l Bank of Newkirk*, 291 P.2d at 830. The Governor has made a demand which was not honored. *Notice of Administrative Freeze*, April 24, 2012, Record pp. 286-301; Trial Tr. 86, lines 21–23. It has a duty to honor Governor Boswell's withdrawal instructions. Law of Bank Dep., Coll. & Cr. Cards ¶ 3.09[2].

First Bank has refused to honor these instructions because of an alleged adverse claim. Untitled Document, June 21, 2012, attached hereto as Appendix 1 at p. 1; amended Untitled Document, August 6, 2012, attached hereto as Appendix 2 at p. 1; Trial Tr. 42, lines 21-24; *Id.* at 44, lines 4-8 and 18-21; *Id.* at 53, lines 18-20; *Id.* at 57, line 21-25; *Id.* at 60, lines 10-15. Any alleged "adverse claimants" in this case have not followed the adverse claim statute, nor put up a bond to protect the Tribes or the Executive Branch from an erroneous decision. Untitled Document, June 21,

2012, attached hereto as Appendix 1 at p. 1-2; amended Untitled Document, August 6, 2012, attached hereto as Appendix 2 at p. 1; Trial Tr. 68, lines 3-17; *Id.* at 69, lines 7-8; *Id.* at 191, lines 3-10; *Id.* at 222, lines 12-17; *Id.* at 223, lines 2-9. Consequently, the Tribes' and Executive Branch's contractual relations, rights, and obligations have been interfered with in an unlawful manner. Def. Trial Exh. 9, Record p. 613; Trial Tr. 17, lines 22-25; *Id.* at 86, line 9–20.

The district court overlooked the clear nature of depository bank accounts and effectively deprived the depositor of the funds deposited in the accounts. The district court also disregarded the unambiguous contractual requirements between First Bank and Governor Boswell, and allowed unreasonable interference with their relations, rights and obligations even though done in an unlawful manner. For these reasons, the injunction should be vacated as a clear abuse of discretion.

B. This Court has Never Authorized the Issuance of an Injunction *Sua Sponte*

The Fourteenth Amendment to the United States Constitution provides that no state, in enacting or enforcing any law, shall deprive any person of "life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. The guarantee of Due Process of Law is also found in the Constitution of the State of Oklahoma: "No person shall be deprived of life, liberty, or property, without due process of law." OKLA. CONST. art. II, § 7. In *Southwestern Commercial Capital, Inc. v. Cornett Packing Co.*, 2000 OK 19, ¶ 16, 997 P.2d 849, 854 when discussing the due process requirement of notice, the Supreme Court of Oklahoma said:

> It is a fundamental tenet of constitutional law that one may not be deprived of a valuable property interest without first giving notice reasonably calculated under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections....

The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. *Barry v. Barchi*, 443 U.S. 55, 66 (1979).

Courts have rejected *sua sponte* injunctions on account of due process violations. In *Wyandotte Nation v. Sebelius*, 443 F.3d 1247, 1249 (10th Cir. 2006), a district court, on its own and without providing any form of notice, issued its injunction against a tribe. There, the plaintiff had not requested an injunction nor had the district court informed anyone in any public proceeding that it was considering issuing an injunction. *Id.* at 1252. The Tenth Circuit concluded that a *sua sponte* injunction was a clear abuse of discretion because the tribe had not been given notice that an injunction was being considered. *Id.* at 1253. Other courts have similarly ruled such deprivations are clear abuses of discretion. *See e.g., Weitzman v. Stein*, 897 F.2d 653, 658 (2d Cir. 1990) (holding that, in the absence of notice prior to a hearing at which district court issued a *sua sponte* order freezing party's assets, the order was entered in violation of due process); *MLE Realty Assocs. v. Handler*, 192 F.3d 259, 262 (2d Cir. 1999) (vacating a *sua sponte* issued injunction because notice was not given); *Brow v. Farrelly*, 994 F.2d 1027 (3d Cir. 1993) (vacating a *sua sponte* issued injunction); *Tripati v. Beaman*, 878 F.2d 351, 354 (10th Cir. 1989) (holding that the litigant is "entitled to notice and an opportunity to oppose the court's order before it is instituted"); *Procup v. Strickland*, 760 F.2d 1107, 1110 (11th Cir. 1985) (finding that the district court did give adequate notice and opportunity to be heard before issuance of the injunction).

In *Solis v. Matheson*, 563 F.3d 425 (9th Cir. 2009), the Ninth Circuit vacated a district court decision to appoint a receiver when there was no notice, argument, briefing, or prayer for relief in the Complaint regarding such appointment. *Id.* at 438. The court held that receivership could seriously interfere with the defendant's property rights by ousting him or her from control. *Id.* at 437. The *Solis* court also ruled that the Complaint did not mention or plead any facts supporting receivership, did not request receivership as a form of relief, and that the proposed judgment was the first instance

in which a receivership was mentioned. *Id.* at 438. In addition, it found that the district court had not considered on the record any of the relevant factors before determining that it would appoint a receiver. *Id.*

Here, defendants were deprived of their fundamental rights in their depository accounts. The depository accounts are clearly property interests, and both the notice requirement and opportunity to be heard before issuing an injunction were not met. There was no pleading for an injunction by affidavit or verified petition; no notice that an injunction would be considered; no bond posted by a moving party (there wasn't even a moving party); no opportunity for the defendants to discuss the issuance of an injunction and there were no facts shown that an injunction should be issued. *Petition for Declaratory Relief*, October 27, 2011, ¶¶ 16-17, Record pp. 1-5. In fact, at a trial on the merits, an injunction wasn't even mentioned. *Scheduling Order*, Record pp. 236-237; Untitled Document, June 21, 2012, attached hereto as Appendix 1; amended Untitled Document, August 6, 2012, attached hereto as Appendix 2. Such departure offended the standards of due process and deprived the defendants of their fundamental rights to notice and an opportunity to be heard before depriving them access and control of their own depository accounts.

There is simply no support in the law authorizing a trial court to enter an injunction *sua sponte* and without notice and an opportunity to be heard. Consequently, the *sua sponte* injunction should be vacated.

C. The Powers of a District Court Do Not Provide A Basis for the Injunction Issued Here

When a court grants an injunction, it is the exercise of an extraordinary remedy that should not be resorted to unless the basis is plain. *Shell Pipe Line Corp. v. State ex rel. Brett*, 1945 OK 286, ¶ 9, 164 P.2d 970, 971; *Amoco Prod. Co. v. Lindley*, 1980 OK 6, ¶ 50, 609 P.2d 733, 745

("Injunction is an extraordinary remedy and relief by this means should not be lightly granted."); *Smith v. Soil Conservation Serv.*, 563 F. Supp. 843, 844 (W.D. Okla. 1982)("[T]he Court's injunctive power should be exercised with great caution."). "The right to [an] injunction must be established with certainty, and the evidence must be clear, convincing and satisfactory. A mere fear, apprehension, or possibility that injury may result is insufficient." *Roye Realty & Developing, Inc. v. S. Seismic*, 1985 OK CIV APP 43, ¶ 12, 711 P.2d 946, 949. "The discretion of the Court [in granting or denying injunctive relief] must be exercised within sound equitable principles, taking in all the facts and circumstances in the case." *Amoco Prod. Co.*, 1980 OK 6, ¶ 50, 609 P.2d at 745. "The injunction avenue of redress is misused if there is no real emergency, no irreparable harm or there is truly an adequate remedy at law." *First Am. Bank & Trust Co. v. Sawyer*, 1993 OK CIV APP 115, ¶ 26, 865 P.2d 347, 353.

Here, the basis for the issuance of the injunction was not plain. Rather, there was no pleading for an injunction, nor were any of the requirements for an injunction met. *Petition for Declaratory Relief*, October 27, 2011, ¶¶ 16-17, Record pp. 1-5; Okla. Stat. tit. 12, §§ 1383, 1384.1(B)(1), 1386, 1392; *Sunray Oil Co. v. Cortez Oil Co.*, 1941 OK 77, ¶ 34, 112 P.2d 792, 796. At a trial on the merits, no one proved up that the extraordinary remedy and relief by injunction should be granted, nor did the trial court use such power with great caution. Untitled Document, June 21, 2012, attached hereto as Appendix 1; amended Untitled Document, August 6, 2012, attached hereto as Appendix 2. The right to an injunction was not established by anyone, and there was no clear, convincing, or satisfactory evidence put into the record. For these reasons, the injunction should be vacated as a clear abuse of discretion.

CONCLUSION

For the reasons stated herein, Defendants the Cheyenne and Arapaho Tribes and the Cheyenne and Arapaho Tribes' Executive Branch respectfully request this Court vacate the judgment of the district court and order the money be immediately released to them as depositors. The nature of the case and all the facts properly before the Court reveal it lacked jurisdiction over the Tribes and its Governor, and interference with their deposits deprived them of their property rights without due process of law, as well as interfered with the parties' contractual rights.

Respectfully submitted this 30th day of October, 2012.

FREDERICKS PEEBLES & MORGAN LLP

Martha L. King

Martha L. King, OBA # 30786
1900 Plaza Drive
Louisville, Colorado 80027
Phone: (303) 673-9600
Attorney for Executive Branch of the Cheyenne and Arapaho Tribes (captioned below as Janice Prairie Chief-Boswell, in her official capacity, if any), Defendant/Appellant

CHEYENNE AND ARAPAHO TRIBES

Martha King for

Charles Morris, Attorney General
P.O. Box 32
Concho, Oklahoma 73022
Phone: (405) 422-7421
Attorney for Cheyenne and Arapaho Tribes, Defendant/Appellant

CERTIFICATE OF MAILING TO ALL PARTIES AND COURT CLERK

The undersigned certifies that on October 30, 2012, the original + 14 copies of the foregoing **SPECIAL APPEARANCE, JOINT BRIEF-IN-CHIEF OF THE CHEYENNE AND ARAPAHO TRIBES AND THE CHEYENNE AND ARAPAHO TRIBES' EXECUTIVE BRANCH** in this matter was mailed to the Office of the Court Clerk, Oklahoma Supreme Court, Oklahoma via Federal Express delivery. Also on this day, a copy was mailed via U.S. Mail, postage pre-paid to:

Scott Meacham, Esq.
Crowe & Dunlevy
20 North Broadway, Suite 1800
Oklahoma City, Oklahoma 73102
Attorney for Plaintiff/Appellee

Jeremy D. Oliver, Esq.
Law Offices of Jeremy D. Oliver
601 S. Johnson Lane
Wynnewood, Oklahoma 73098
Attorney for Leslie Wandrie-Harjo

District Court, Custer County, Oklahoma
603 B St.
Arapaho, Oklahoma 73620-0240

Kelly H. Basinger

APPENDIX

1. Untitled Document, June 21, 2012.

2. Amended Untitled Document, August 6, 2012.

3. Chey. & Arap. Const. art., X, §§ 1-3.

4. *Stillaguamish Tribe of Indians v. Pilchuck Group II, LLC.*, No. C10-995RAJ, 2011 WL 4001088 at *6 (W.D. Wash. 2011).

APPENDIX 1

IN THE DISTRICT COURT OF CUSTER COUNTY
STATE OF OKLAHOMA
COURTHOUSE
ARAPAHO, OKLAHOMA
Monday, June 21, 2012

FIRST BANK AND TRUST COMPANY,
Plaintiff,

v.

THE CHEYENNE AND ARAPAHO TRIBES; JANICE PRAIRIE CHIEF-BOSWELL, in her Representative capacity, if any, as the alleged Governor of the CHEYENNE AND ARAPAHO TRIBES; LESLIE WANDRIE-HARJO, in her Representative capacity, if any, as the alleged Governor of the CHEYENNE AND ARAPAHO TRIBES,
Defendants.

Matters and Materials Considered

- All evidence and arguments presented at the trial on June 8, 2012
- All briefs filed in this case to include Motions
- Arguments of counsels

History of this case

This petition was filed on October 27, 2011 by the First Bank and Trust Company of Clinton. They ask that the court declare whether Boswell or Harjo should be the authorized signatory for the Tribal Accounts at the Bank. The Bank also asks that they be absolved of any and all liability as to disputes concerning the signatory authority for Tribal Accounts.

All of the defendants appearing in this trial represent two competing governments of the Cheyenne-Arapaho Tribe. Defendant's Prairie Chief-Boswell and Harjo both claim to be the lawful governor of the tribe. Three attorneys appear for the two people who claim to be the lawful attorney general of the tribe(Counsels Morris and Richey appear and are allied with defendant Prairie Chief-Boswell, and counsel Oliver appears for the attorney general allied with defendant Harjo). Competing legislatures have separate attorneys, counsels Ivester and Paris. There are competing court systems.

It appears uncontested that the Bank has received conflicting instructions regarding disposition of funds on deposit for the tribe.

In a related case, CIV-11-171-F, styled Leslie Wandrie-Harjo v. Janice Prairie Chief-Boswell, (W.D. Oklahoma), the dispute regarding who the lawful Governor is was dismissed for lack of subject matter jurisdiction. (Order of August 15, 2011)

In still another related action, CR-12-514-F, styled Cheyenne and Arapaho Tribes, on its own behalf, et al, v. First Bank and Trust Company, all of the parties appeared before The Honorable Judge Friot on June 6, 2012. This court was joined as a defendant in that case. Plaintiff sought a declaration that the District Court of Custer County did not have jurisdiction to proceed in the instant case. Judge Friot said as follows:

The fact is that the controversy within the tribe turned
3 the bank into a stakeholder. When a stakeholder, such as the
4 bank, is put in a position of holding funds and disbursing
them
5 only at its peril, which is clearly the case here, that
6 stakeholder is entitled to hold the stake until the matter has
7 been clarified, even in the absence of that sort of an
8 agreement. And as I have said, I certainly do not criticize
9 the bank for deciding that it could disburse these funds only
10 at its peril.
11 I'm going to conclude by saying it is devoutly to be
12 desired that this matter get resolved at least so far as
13 signatory authority is concerned by the District Court of
14 Custer County in the hearing this Friday. The District Court
15 of Custer County has jurisdiction.

On May 31, 2012, the Cheyenne and Arapaho Tribe filed a motion for summary judgment. No response was filed to that motion. Plaintiff Bank contends they never received a copy of the motion. Defendant Harjo filed a trial brief on June 4, 2012 in which they respond to the issues raised in the Motion for Summary Judgment. Defendant Tribe and Boswell raise the same argument they raised in the Motion to Dismiss filed March 16, 2012. The issue raised is Sovereign Immunity. This court overruled the motion to dismiss and by this writing this court overrules the Motion for Summary Judgment filed by the Tribe and Boswell because summary disposition is not appropriate.

DECISION

I have reviewed Bittle v. Bahe, 192 P.3d 810. It was a part of the analysis in that case that the tribe agreed to be bound by state law when they applied for a liquor license. In the present case, the tribe agreed to be bound by state law when they opened this account. In Bittle, the tribe acknowledged that the casino's agreement to be bound by state law constituted a waiver of any immunity to the subject matter jurisdiction of the Oklahoma courts when the state initiated an action on a violation.

In Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. 751, the court found that the tribe was immune from suit in state court on its contract. However, the contract in that dispute contained a clause that provided that the tribe did not give up any authority of the tribe. The depository contract in the instant case contained no such provision of which this court has been informed. To the contrary, the tribe in the instant case agreed that their account relationship would be governed by state law.

The plaintiff in the instant case has access to tribal courts only at plaintiff's peril. It is an element of the preemption analysis discussed in Bittle that all citizens must be assured that they have access to the court system.

Tribal court jurisdiction is not general jurisdiction. I believe this court has jurisdiction over this account because this is a state chartered bank and its accounts are governed by state law.

I do deny the petition for declatory relief, but I do assume jurisdiction over these funds and I direct the bank not to dispense these funds except on the courts order. In order for these funds to be dispersed tribal authorities must make application to this court with notice to all contestants. Dispersement will be ordered based upon a yet to be determined standard. It is possible that no dispersement can be authorized until tribal turmoil has been resolved.

To do anything other than convert this account to a court supervised account would be tantamount to deciding which of the rival tribal governments is legitimate. I do not believe this court has the authority to make that decision.

I do find that this is a appealable order.

I would like to order the disputing parties to mediation, or judicial settlement discussions, but I do not believe I have the authority to do that without the consent of all disputing parties.

Doug Haught
District Judge

APPENDIX 2

IN THE DISTRICT COURT OF CUSTER COUNTY
STATE OF OKLAHOMA
COURTHOUSE
ARAPAHO, OKLAHOMA
Monday, June 21, 2012

FILED
DISTRICT COURT
Custer County, Okla.
JUN 21 2012
STACI HUNTER
COURT CLERK

FIRST BANK AND TRUST COMPANY,
Plaintiff,

v.

FILED
DISTRICT COURT
Custer County, Okla.
AUG - 6 2012
STACI HUNTER
COURT CLERK

THE CHEYENNE AND ARAPAHO TRIBES; JANICE PRAIRIE CHIEF-BOSWELL, in her Representative capacity, if any, as the alleged Governor of the CHEYENNE AND ARAPAHO TRIBES; LESLIE WANDRIE-HARJO, in her Representative capacity, if any, as the alleged Governor of the CHEYENNE AND ARAPAHO TRIBES,
Defendants.

Matters and Materials Considered

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Doug Haught
District Judge

APPENDIX 3

CONSTITUTION
OF THE
CHEYENNE AND ARAPAHO TRIBES

PREAMBLE

We, the People of the Cheyenne and Arapaho Tribes, in order to sustain and promote our cultures, languages, and way of life, protect our religious rights, establish and promote justice for all People, promote education, establish guidance and direction for our government, respect and protect our natural environment and resources, and advance the general welfare for ourselves and our posterity, do establish this Constitution.

ARTICLE I - BILL OF RIGHTS

Section 1. Bill of Rights. The government of the Tribes shall not make or enforce any law which:

(a). infringes upon religious or cultural beliefs or prohibits the free exercise thereof including the right to possess and use peyote for religious purposes, nor any law which establishes religion;

(b). prohibits the freedom of speech, expression, or of the press, or the right of the People peaceably to assemble, and to petition the government for redress of grievances;

(c). violates the right of the People to be secure in the privacy of their persons, houses, papers, electronic and telecommunications information, vehicles, and effects against unreasonable searches and seizures, nor issue warrants but upon probable cause, supported by oath or affirmation signed by a Judge and particularly describing the place, person, house, or things to be searched, the object and scope of such search, and the person or thing to be seized, nor execute an arrest without probable cause;

(d). subjects any person to search or arrest without informing them of their right to remain silent, to have access to an attorney, to be informed that anything they say can be held against them in a court of law, to have these rights explained at the time of arrest, and to ask the arrested individuals if they understand these rights;

(e). subjects any person to criminal prosecution or punishment more than once for the same offense arising out of the same incident, nor compels any person in any criminal case to be a witness against himself or herself;

(d). In the 2007 election, the eight seats on the Election Commission shall be filled. The election of Election Commission Members shall be held on the date of the General Election in 2007. The person receiving the highest number of votes per District for the position of Election Commission Member shall be seated, provided, that any tie votes shall be decided in a Special Election. Until the 2007 election, the Tribal Council may continue to select and employ Election Board Members who shall serve until replaced in the 2007 election. The existing Election Board in office as of the date of the adoption of this Constitution shall remain in office until properly replaced. No Member of the Election Board may be a candidate for Election Commission Member in the 2007 election. Until an Election Commission is elected in the 2007, the Election Board shall have all the duties and responsibilities as the Election Commission as indicated in this Constitution.

(e). Following the adoption of this Constitution, the incumbent Chief Judge of the Tribal Court, and the three most recent Justices of the Supreme Court, shall remain in office with the full judicial authority to act in accordance with this Constitution until such time as replaced or reappointed in accordance with this Constitution.

ARTICLE X - SOVEREIGN IMMUNITY

Section 1. Sovereign Immunity. The Tribes shall possess Sovereign Immunity. Nothing in this Constitution shall be deemed to waive Sovereign Immunity from suit. Only the Legislature and the Tribal Council may authorize a waiver of Sovereign Immunity by law. Any authorization by the Legislature to waive Sovereign Immunity shall be specific, for a limited scope and duration, in writing, and shall be limited to a maximum of one hundred thousand dollars per party. Any authorization by the Tribal Council to waive Sovereign Immunity shall be specific, for a limited scope and duration, and in writing.

Section 2. Immunity from Suit by Parties Outside the Jurisdiction of the Tribes. The Tribes and its Officials and Employees acting in their official capacity or within the scope of their authority shall be immune from suit brought by any party not subject to the Jurisdiction of the Tribes except to the extent waived in accordance with law.

Section 3. Immunity from Suit by Parties Within the Jurisdiction of the Tribes. The Tribes and its Officials and Employees acting in their official capacity or within the scope of their authority shall be immune from suit except for suits in equity filed exclusively in the Courts of the Tribes by any party subject to the Jurisdiction of the Tribes to enforce rights and duties establishcd by law or this Constitution. Any Member of the Tribes may bring a suit exclusively in the Judicial Branch to enforce the terms of this Constitution. Sovereign Immunity shall not extend to Officials and Employees acting outside their official capacity or beyond the scope of their authority.

APPENDIX 4

(1986). The opposing party must present probative evidence to support its claim or defense. *Intel Corp. v. Hartford Accident & Indem. Co.*, 952 F.2d 1551, 1558 (9th Cir.1991). The court defers to neither party in resolving purely legal questions. *See Bendixen v. Standard Ins. Co.*, 185 F.3d 939, 942 (9th Cir.1999).

Although this case presents several factual disputes that the court cannot resolve on summary judgment, no disputed facts prevent the court from concluding as a matter of law that the Tribe did not waive its sovereign immunity from Pilchuck's arbitration demand. The court cannot, however, foreclose the possibility that STECO authorized Mr. Goodridge Sr. to bind it to the Working Agreement and its immunity waiver.

A. The Tribe Did Not Waive Its Sovereign Immunity.

As the court has noted, tribes are subject to suit "only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe v. Mfg. Techs., Inc.*, 523 U.S. 751, 754, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998). A tribe's waiver of immunity must have the "requisite clarity." *C & L Enters., Inc. v. Potawatomi Indian Tribe*, 532 U.S. 411, 418, 121 S.Ct. 1589, 149 L.Ed.2d 623 (2001). Various cases have refined what level of clarity is necessary for an enforceable waiver. In *C & L*, for example, the court held that an arbitration clause in a contract that did not use the words "sovereign immunity" was nonetheless a sufficiently clear waiver. *Id.* at 415 (quoting arbitration clause), at 420–21 (finding waiver). A waiver of immunity must be express, not implied. For example, in *Allen v. Gold Country Casino*, 464 F.3d 1044, 1047 (9th Cir.2006), the court held that a Tribe had not waived immunity in a suit by one of its employees even though it had agreed to follow state and federal employment law.

*5 Here, the only waiver of immunity to which anyone points is the express waiver contained in the Working Agreement. Again, no one disputes that this waiver has the requisite clarity, the dispute is over whether the Tribe actually agreed to the waiver. The Tribe insists that its failure to expressly authorize Mr. Goodridge Sr. to sign the Working Agreement is the end of the debate. Pilchuck, on the other hand, asks the court to apply principles of agency law to reach the conclusion that Mr. Goodridge Sr. had actual or apparent authority to sign the Working Agreement on behalf of the Tribe. Neither party's position is persuasive.

The Tribe's position ignores that its "policies" for authorizing agents to enter contracts or waive sovereign immunity are nebulous at best. The Tribe's constitution is silent regarding who may waive the Tribe's immunity or the procedures for doing so. Until 2010, no Board resolution or other formal document set forth policies and procedure for waiving immunity.[FN4] At the time Mr. Goodridge Sr. signed the working Agreement, the Tribe had no consistent practice for authorizing people to enter contracts or waive sovereign immunity on its behalf. Mr. Yanity and other Board members contend that the Board's practice was to authorize contracts and sovereign immunity waivers only in written resolutions of the Board. This contention is flatly incorrect. The record reflects that many people have signed contracts purportedly on behalf of the Tribe without any Tribal Board resolution authorizing the act. Manheim Decl. (Dkt.# 25), ¶¶ 9–21 (summarizing contracts entered without Board resolution). None of these agreements contain an express sovereign immunity waiver. The record reflects that while the Tribe entered many contracts pursuant to a written resolution of the Tribal Board, it also entered many contracts without a resolution or any other express approval from the Tribal Board. The record also reflects that agents purporting to act on behalf of the Tribe (most often members of the Board) frequently entered contracts on behalf of the Tribe without the written approval of the Board.

FN4. Mr. Yanity contends that an October 26, 2010 resolution of the Tribal Board "reaffirmed the Tribe's longstanding policy that all waivers of the Tribe's sovereign immunity are only granted by the Board in writing." Yanity Decl. (Dkt.# 18–1) ¶ 9. A resolution adopted years after Mr. Goodridge Sr. signed the Working Agreement (and months after this litigation began) is of no value in illuminating the Tribe's practices in 2006.

Pilchuck's reliance on agency principles ignores thorny choice of law questions. If agency law principles apply when a purported agent of a tribe acts on the tribe's behalf, whose agency law principles apply? Pilchuck urges the application of Washington law, but does not explain why Washington law should apply to a question of tribal authority. Pilchuck also does not explain how its approach avoids the Supreme Court's admonition that "tribal immunity is a matter of federal law and is not subject to diminution by the States." *Kiowa Tribe*, 523 U.S. at 756. Tribal law could supply the relevant agency principles, but the record indicates that the only sources of law for the Stillaguamish Tribe are the Tribe's constitution and the resolutions of the Tribal Board. No Board resolution establishes generally applicable tribal agency principles. The Tribe's constitution is also silent on this subject. The constitution invests the Board with plenary power to take action on behalf of the Tribe. Yanity Decl. (Dkt.# 18–1), Ex. A (Stillaguamish Const. Art. VII). The court assumes that this includes the power to waive sovereign immunity. Nothing in the constitution, however, dictates how the Board must take action. The Board has the power to appoint lesser officials. *Id.* Art. IV. Nothing in the constitution, however, explains what powers the Tribe can delegate to lesser officials. It is entirely possible that the Tribe's constitution permits the Tribal Board, or perhaps even the Board's Chair, to make off-the-record appointments of agents with authority to waive its sovereign immunity. *See id.* Art. XII, § 1 (permitting board to delegate authority to Chair). Federal courts have occasionally applied federal common law in disputes involving tribes, but no precedent that binds this court applies federal common law to the question of a tribal agent's power to waive sovereign immunity. *See, e.g., C & L*, 532 U.S. at 423 (acknowledging that the Court had applied common-law contract interpretation law to arbitration contracts in past).

*6 The court concludes that state law has no bearing on who has the authority to waive the Tribe's sovereign immunity. Unfortunately, no Ninth Circuit precedent of which the court is aware squarely addresses this question. Other federal courts have readily deferred to tribal law, at least where tribal law provides explicit rules regarding sovereign immunity waivers. For example, in *Memphis Biofuels, LLC v. Chickasaw Nation Indus., Inc.*, 585 F.3d 917 (6th Cir.2009), the court concluded that where the charter of a tribal corporation required a resolution of the tribe's board before it could waive sovereign immunity, the charter governed even where the party contracting with the tribal corporation believed the corporation had authority to waive immunity. *Id.* at 922 ("[The contractor] believed that [the tribal corporation] obtained the required approval for the waiver provision—but regardless of what [it] may have thought, board approval was not obtained, and [the corporation]'s charter controls."). In *Sanderlin v. Seminole Tribe*, 243 F.3d 1282, 1288 (11th Cir.2001), the court also applied tribal law, rejecting the notion that the tribe's chief could become vested with actual or apparent authority in contravention of the tribe's constitution. Neither of these precedents binds the court, but the court concludes that they are consistent with the Supreme Court's admonition that "tribal immunity is a matter of federal law and is not subject to diminution by the States." *Kiowa Tribe*, 523 U.S. at 756. The court thus reaches two conclusions: state law plays no role in deciding whether a Tribe has waived its sovereign immunity; [FN5] and where tribal law includes specific provisions governing immunity waivers, federal courts respect those provisions.

FN5. Pilchuck notes that at least two state courts have applied state law to determine questions of authority to waive tribal sovereign immunity. In *Rush Creek Solutions, Inc. v. Ute Mountain Ute Tribe*, 107 P.3d 402, 407–08 (Colo.Ct.App.2004), the court applied Colorado agency principles to determine that an agent with authority to contract on behalf of the tribe had implicit authority to waive sovereign immunity. The Nebraska Supreme Court similarly applied Nebraska agency law principles to conclude that tribe's chairman and vice-chairman had apparent authority to waive the tribe's immunity. *Storevisions, Inc. v. Omaha Tribe*, 281 Neb. 238, 795 N.W.2d 271, 279–80 (Neb.2011) (following *Rush Creek*). But in a recent decision, the Oklahoma Supreme Court concluded that "tribal law controls the way sovereign immunity can be waived by the Tribe." *Dilliner v. Seneca Cayuga Tribe*, No. 109085, 2011 Okla. LEXIS 62, at *13, 2011 WL 2557022 (Okla. Jun. 28, 2011). For the reasons explained above, the court disagrees with the *Rush Creek* and *Storevisions* courts to the extent they hold that state law applies in determining who has authority to waive tribal immunity.

The court assumes, without deciding, that federal common law could apply where tribal law is silent or ambiguous regarding who has authority to waive sovereign immunity. The court need not decide this question because it holds that no principle of federal common law supports a finding that the Tribe authorized a sovereign immunity waiver in this case.

The explanation for the court's holding begins and ends at the October 16, 2006 meeting of the Tribal Board. Pilchuck carefully explains how, in its view, the application of agency principles means that Mr. Goodridge Sr. had authority to sign the Working Agreement (including its sovereign immunity waiver) on behalf of the Tribe. What it does not explain is how, when Mr. Goodridge Sr. and Mr. Nelson came to the October 2006 Board meeting to discuss the RV park project, they did not so much as mention the Working Agreement that Pilchuck had drafted two months earlier to address the project. Nor does it explain how a Working Agreement that contains many terms that no one mentioned at the October meeting, and some terms that directly contradict those mentioned at the October meeting, can be made binding on the Tribe.

At best, the October meeting is evidence that the Board agreed to a skeletal version of the agreement expressed in the Working Agreement, an agreement that included no sovereign immunity waiver. That skeletal version consisted of authorization for Pilchuck to purchase the subject property, conditioned on the Tribe's agreement to lease the land back to Pilchuck to operate the park, or to buy back the property in the event the project failed.[FN6] It is, of course, far from certain that the Tribe made even this limited agreement. Pilchuck makes no compelling case that Mr. Goodridge Jr.'s unilateral statement that Pilchuck would be "safe" to purchase the subject property, accompanied by the rest of the Board's utter silence, is equivalent to approval of anything. But even if Pilchuck could succeed in proving that case, it would fall well short of explaining how the Working Agreement reflects the agreement it made at the October meeting. As noted, the Working Agreement raises the buyback premium the Tribe was obligated to pay from 10 or 12 percent to 30 percent. This is no minor revision, yet the record is utterly silent as to how the Tribe authorized Mr. Goodridge Sr. to agree to such a substantial additional burden on the Tribe. Whatever the Tribe might have agreed to at the October meeting, it was not the Working Agreement.

> FN6. Pilchuck reasons that even if the skeletal agreement discussed at the October meeting made no mention of sovereign immunity or arbitration, the Tribe nonetheless agreed to arbitration and an immunity waiver because it had done so in previous contracts between it and entities with which Mr. Nelson was involved. The court is aware of no authority from any jurisdiction in which a court inserted an arbitration clause or sovereign immunity clause into a contract merely because the parties had done so in previous contracts.

*7 Among many other subjects that no one addressed at the October meeting was whether Mr. Goodridge Sr. was to have any role in executing the Working Agreement on behalf of the Tribe. Pilchuck harps on Mr. Goodridge Jr.'s statement that it was "safe" to purchase the property. It does not suggest that even the most generous reading of the transcript of the meeting would support the notion that the Board somehow authorized Mr. Goodridge Sr. to finalize an agreement on the Board's behalf. Pilchuck asks the court to infer such authorization from the parties' "course of conduct." Pilchuck identifies no principle of federal common law in which course of conduct is relevant to the question of who has authority to sign an agreement. Putting that aside, however, Pilchuck does not show that the Board had a "course of conduct" in which it discussed agreements at its meetings and sub silentio appointed a non-member of the Board to enter a more expansive agreement on behalf of the Tribe later, waiving its sovereign immunity in the process. Rather than recount the evidence Pilchuck has provided of its "course of dealing" with Mr. Goodridge Sr., the court will simply observe that in the time since he left the Tribal Board, there is no evidence at all that Mr. Goodridge Sr. had a practice of waiving the Tribe's sovereign immunity. There is also no evidence that the Board authorized him to do so.

The court acknowledges Pilchuck's evidence that after the October 2006 meeting, Mr. Yanity and other members of the

Board took actions toward completing the RV park project. For example, it appears that Mr. Yanity approved a few environmental studies necessary to the project. If Pilchuck could succeed merely by demonstrating the unfairness of the Tribe's later decision to pull out of the RV park project and assert its immunity from suit in the aftermath, it might well have a chance in this suit. Sovereign immunity, however, is a doctrine whose application frequently leads to unfair results. *See, e.g., Memphis Biofuels*, 585 F.3d at 922 ("This result may seem unfair, but that is the reality of sovereign immunity."); *Native Am. Distributing v. Seneca–Cayuga Tobacco Co.*, 546 F.3d 1288, (10th Cir.2008) ("The Supreme Court has acknowledged that tribes [can] use their immunity as a sword rather than a shield ...."); *Kiowa*, 523 U.S. at 758 (noting "reasons to doubt the wisdom of perpetuation the [tribal sovereign immunity] doctrine," but recognizing Congress's responsibility for limiting tribal immunity). Whether this a case in which the Tribe unfairly used sovereign immunity to back out of an agreement is not a question properly before the court. The question before the court is whether the Tribe waived its sovereign immunity for disputes arising out of the RV park project. The court holds that it did not, as a matter of law.

B. It Is Possible That Further Discovery Will Show that STECO Entered the Working Agreement.

*8 Before any discovery took place in STECO's suit against Pilchuck, STECO filed a motion for summary judgment motion that it was immune from the suit. In many ways, STECO's claim to sovereign immunity mirrors the Tribe's. Tribal corporations enjoy sovereign immunity, so long as they carry out the tribe's business. *Allen*, 464 F.3d at 1046 ("When the tribe establishes an entity to conduct certain activities, the entity is immune if it functions as an arm of the tribe."). So far as the court is aware, Pilchuck does not dispute that STECO is an entity entitled to assert sovereign immunity.

Pilchuck's arbitration demand against STECO faces several hurdles beyond those it faced when attempting to bring the Tribe to arbitration. Whereas the Tribe was at least facially a party to the Working Agreement containing a sovereign immunity waiver, STECO is nowhere mentioned in the Working Agreement. Pilchuck urges the court to overlook this detail. It contends that a court could conclude that the Working Agreement's references to the Tribe "did not just mean the Tribe itself but also its relevant bodies and organizations, including STECO." Def.'s Mot. at 11. Mr. Goodridge Sr. declares that he had authority by virtue of his position as STECO's Chair to enter contracts without the express approval of the STECO board. Goodridge Sr. Decl. ¶ 8. Nonetheless, he asserts that STECO's board did approve the Working Agreement, even though it did not approve it in writing. *Id.* ¶¶ 19, 21.

STECO contends that its charter requires its board to approve all waivers of sovereign immunity in writing. STECO is, like the Tribe, flatly mistaken. Its charter explains that the STECO board has the power to waive STECO's immunity, although it cannot waive the Tribe's immunity. Charter ¶ 3.3(1). The charter does not, however, provide any procedures for waiving immunity. Moreover, despite STECO's insistence to the contrary, nothing in the charter requires the board to take action via written resolution. The board's directors must "in all cases act as a board," but nothing requires their actions to be memorialized in writing. ¶ 5.7. The charter empowers the STECO Chair to sign any document that its board approves, but again does not require approval in writing. Charter ¶ 5.21(a). Moreover, the charter empowers any officer or director to enter contracts on behalf of STECO, and notes that the authorization can be for a specific contract or a more general authorization. Charter ¶ 8.5. Again, there is no requirement that the authorization be in writing. As was the case with the Tribe, Pilchuck presents evidence that STECO's practices regarding contract authorization were haphazard. Sometimes the STECO board authorized particular contracts in writing, sometimes it did not.

Pilchuck insists that further discovery will help it prove that STECO is a party to the Working Agreement and thus waived its sovereign immunity. The court cannot rule out this possibility. It is possible that discovery will reveal that STECO had a practice of binding itself to contracts to which only the Tribe was explicitly a party. It is possible that discovery will show that STECO and Pilchuck understood STECO to be a party to the Working Agreement. It is possible that discovery could show that Mr. Goodridge Sr. had the approval of the STECO board to enter the Working Agreement on behalf of STECO. Regardless of

the likelihood of Pilchuck prevailing in this quest, the mere possibility means that the court cannot grant summary judgment without permitting additional discovery. *See* Fed.R.Civ.P. 56(d).

*9 The court warns Pilchuck, however, that if it puts STECO through the expense of discovery to employ the same strategy that it did in opposing the Tribe's assertion of immunity, the court will consider imposing sanctions. If Pilchuck's additional discovery shows merely that members of the STECO board approved the RV park project, then Pilchuck will fare no better in its dispute with STECO than in its dispute with the Tribe. Pilchuck's task is, at a minimum, to show that STECO's board authorized Mr. Goodridge Sr. to bind STECO to the Working Agreement and its sovereign immunity waiver. If it cannot do so, then additional discovery to show that STECO, like the Tribe, once supported the RV park project is of no value.

The court accordingly orders as follows. No later than September 23, 2011, Pilchuck must choose one of the following options. It can file a statement that that court's holding in the Tribe case against Pilchuck is dispositive of STECO's case against Pilchuck, and permit the court to enter a judgment consisting of a permanent injunction against further efforts to pursue arbitration against STECO. Alternatively, it can file a statement indicating that it has a good faith basis to believe that further discovery will yield evidence that the STECO board authorized Mr. Goodridge Sr. to bind it to the Working Agreement, including its sovereign immunity waiver. In that event, the parties may begin discovery.

IV. CONCLUSION

For the reasons stated above, the court GRANTS the Tribe's motion for summary judgment (Dkt.# 18) and DENIES Pilchuck's motion (Dkt.# 21). The court also DENIES Pilchuck's motion to seal. Dkt. # 19. The court permanently enjoins Pilchuck from commencing or continuing arbitration against the Tribe regarding any dispute arising out of the Working Agreement or any agreement regarding the RV park project that the Tribe made with Pilchuck at its October 2006 Board meeting. The court directs the clerk to enter judgment for the Tribe.

The court will enter a separate order memorializing its decision in STECO's suit against Pilchuck, No. 11–387RAJ.

W.D.Wash.,2011.
Stillaguamish Tribe of Indians v. Pilchuck Group II, L.L.C.
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