

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.)

FILED
SUPREME COURT
STATE OF OKLAHOMA

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Dist. Ct. Case No. CV-2011-53

FIRST BANK AND TRUST COMPANY'S ANSWER BRIEF
AND BRIEF-IN-CHIEF ON COUNTER-APPEAL

Appeal from District Court of Custer County

CV-2011-53

Honorable Judge Doug Haught

Declaratory Judgment

SCOTT MEACHAM, OBA #13216
JOHN M. THOMPSON, OBA #17532
ELIZABETH BARNETT LABAUVE, OBA #21102
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November 21, 2012

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FIRST BANK AND TRUST COMPANY

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**FIRST BANK AND TRUST COMPANY'S ANSWER BRIEF AND BRIEF-IN-CHIEF
ON COUNTER-APPEAL**

First Bank and Trust Company ("First Bank"), an Oklahoma banking corporation, maintains various depository accounts (the "Tribal Accounts") on behalf of the Cheyenne and Arapaho Tribes (collectively, "the Tribe"). In accordance with the Tribe's Constitution, the Governor of the Tribe is designated the authorized signatory for the Tribal Accounts. The Tribal Accounts were established in early 2011, at a time when Janice Prairie Chief-Boswell ("Boswell") was the undisputed Governor of the Tribe. The account agreements for the Tribal Accounts were executed by Boswell acting in her official capacity as Governor. As such, First Bank's records reflect that "Janice Boswell" is the authorized tribal signatory for the Tribal Accounts.

Following the creation of the Tribal Accounts and the designation of Boswell as the authorized signatory of the Tribal Accounts, however, a dispute arose as to who is the actual Governor of the Tribe. Although Boswell continues to allege that she is the duly elected and authorized Governor of the Tribe, Leslie Wandrie-Harjo ("Harjo") now asserts that she, rather than Boswell, has become the duly elected and authorized Governor of the Tribe. As a result, Boswell and Harjo have made competing and incompatible demands on First Bank regarding who may act as the authorized signatory on the Tribal Accounts.

First Bank, therefore, was required to seek a determination from the Custer County District Court, pursuant to 12 Okla. Stat. § 1651, as to whom First Bank should recognize as the appropriate signatory authority for the Tribal Accounts. Because First Bank is a neutral party and takes no position as to the identity of the proper signatory, it also sought an absolution of liability for any claims that may be brought against it resulting from the Tribe's inability to establish its own proper signatory authority. Although the trial court appeared to

recognize that First Bank is in an untenable position and had established an "actual controversy" requiring the trial court's determination of "rights, status, or other legal relations" under 12 Okla. Stat. § 1651, the court's Order (filed as amended Aug. 6, 2012) denied First Bank's petition for declaratory relief and instead assumed jurisdiction over the Tribal Accounts, which continue to be maintained by First Bank (although currently subject to an administrative freeze), to control disbursement pursuant to further order by the court.

First Bank counter-appeals and answers the appeal of the Tribe and Boswell (collectively, "Appellants"), objecting to: the contention of Appellants that the trial court lacked jurisdiction over First Bank's petition for declaratory relief; the implication raised by Appellants—despite the lack of any asserted counterclaim—that First Bank violated some kind of duty owed to Appellants and that First Bank somehow was not entitled to seek declaratory relief due to the existence of the adverse claims statute; and the trial court's denial of First Bank's request for a declaration that First Bank is not liable for the Tribe's internal dispute regarding the proper signatory authority on the Accounts. These objections notwithstanding, First Bank believes it is adequately protected from liability by the terms of the trial court's Order as they currently stand. If this Court reverses the trial court's Order on any grounds, however, First Bank should be awarded declaratory relief as sought in its Petition.

I. Summary of the Record

A. Background

Pursuant to the express terms of the Cheyenne and Arapaho Constitution, Article VII, § 4, tribal funds may be expended only upon signature of the Tribe's Governor. Trial Tr. 77:21-25 (June 8, 2012) (R. 612); Pl.'s Ex. 2 (R. 613). Beginning in February 2011, Defendant Boswell, who was the undisputed Governor of the Tribe at that time, went to First

Bank in Clinton, Oklahoma, as authorized by the Tribe's Constitution, and signed the signature cards and account agreements establishing and governing numerous checking accounts at First Bank. Trial Tr. 37:7-11, 49:14-24, 61:5-21; Def. Boswell's Ex. 1 (R. 613); Pl.'s Ex. 1B (R. 613). As part of these transactions, Boswell, as the sole authorized signor on behalf of the Tribe, agreed to certain Terms and Conditions, including in relevant part: "This agreement is subject to applicable federal laws and the laws of the state of Oklahoma."¹ Trial Tr. 65:19-66:3; Pl.'s Ex. 1A (R. 613).

Soon after taking office, Boswell began to battle with the Tribe's legislative and judicial branches, resulting in her being enjoined by the Tribe's Trial Court on December 27, 2010, from further exercise of gubernatorial powers and in her being impeached and removed from office by the Third Legislature of the Tribes on March 18, 2011. Def. Harjo's Ex. 19, *In Re: Recognition of Leslie Wandrie-Harjo as Governor*, Order of the Supreme Court of the Cheyenne and Arapaho Tribes (Arrow Court), SC-AD-2012-01, Jan. 17, 2012, at 17 (R. 613);² Def. Harjo's Ex. 7, *Leslie Wandrie-Harjo v. Janice Boswell*, Preliminary Injunction, In the Trial Court of Cheyenne and Arapaho Tribes, CIV-2010-0107, Dec. 27, 2010 (R. 613); Def. Harjo's Ex. 8, *A Special Resolution to Impeach and Remove Suspended Governor Janice Prairie Chief-Boswell from Office of the Governor*, Mar. 18, 2011, Third Legislature of the Cheyenne and Arapaho Tribes (R. 613).

¹ Appellants argue that they have "proved" Plaintiff's Exhibit 1A was not provided to them. However, the evidence at trial was that the language in Plaintiff's Exhibit 1A was substantially identical to the language in the account agreement executed by Boswell. Trial Tr. 76:19-22, 38:6-39:2. Additionally, each of the account agreements (Def. Boswell's Ex. 1A-GG) entered into evidence by Appellants through the Tribe's Treasurer as those account agreements appearing in the Tribe's records contain a choice of law provision identical to the choice of law provision in Plaintiff's Exhibit 1A, under the subheading "AGREEMENT."

² Since there are two competing Supreme Courts, one aligned with each of the two competing Governors, the Courts will be designated herein as either the Arrow Court or the Webber Court.

Then on March 28, 2011, the Superintendent of the Bureau of Indian Affairs ("BIA") of the U.S. Department of the Interior, Concho Agency, issued a letter ruling determining the BIA would recognize the Arrow Court over the Webber Court as the Tribe's "official" Supreme Court with respect to orders that appear necessary to insure the immediate health, safety, and welfare of tribal citizens. Def. Harjo's Ex. 9 (R. 613). On May 7, 2011, the Tribe's Tribal Council apparently met and passed various resolutions purportedly repealing the impeachment of Boswell, voiding the act of the Tribe's legislature recognizing Harjo as Governor, and reaffirming Boswell as the Tribe's Governor. Def. Boswell's Exs. 2, 5 & 6 (R. 613).

On August 17, 2011, however, the Arrow Court entered an Order recognizing Harjo as acting Governor of the Tribe effective December 27, 2010. Def. Harjo's Ex. 10, *In Re: Temporary Relocation of the Offices of the Judicial Branch, and Formal Recognition of Leslie Wandrie-Harjo as Lawfully Exercising the Gubernatorial Powers of the Cheyenne and Arapaho Tribes*, Order of the Supreme Court of the Cheyenne and Arapaho Tribes (Arrow Court), SC-AD-2011-2, Aug. 17, 2011, at 27 (R. 613).

On August 23, 2011, the Regional Director for the Southern Plains Region of the BIA withdrew his January 6, 2011, decision recognizing Boswell as Governor on an interim basis after reconsideration following vacation and remand of his original decision. Pl.'s Ex. 6 (R. 613). On September 1, 2011, the Regional Director of the BIA issued a Letter Ruling upholding the March 28, 2011, decision by the Superintendent of the Concho Agency recognizing the Arrow Court for limited purposes. Def. Harjo's Ex. 11 (R. 613). Then on January 17, 2012, the Arrow Court entered its Order recognizing Harjo as Governor. Def.

Harjo's Ex. 19. Harjo was sworn in as Governor by the Arrow Court on January 19, 2012. Def. Harjo's Ex. 21, *Certification of Oath of Office*, Jan. 19, 2012 (R. 613).

As is unsurprising from the above facts, Harjo and Boswell each has made competing, contradictory claims on First Bank purporting to be the Governor of the Tribe. Trial Tr. 59:2-4. First Bank also has received conflicting documents from competing tribal courts with respect to the Governor of the Tribe. Trial Tr. 58:1-3, 15-18. Additionally, First Bank has received conflicting documentation from differing legislative entities on behalf of the Tribe as to the proper signatory of the Tribal Accounts on behalf of the Tribe. Trial Tr. 42:8-17; 44:1-21; 57:21-25; Pl.'s Exs. 4, 5 & 8 (R. 613).

On May 24, 2012, the Regional Director of the BIA issued a letter ruling recognizing Boswell **"on an interim basis effective only for a 90 day period"** for "pending and future P638 Drawdown payment requests and any other action necessary to fulfill both the Tribe and Governments contractually obligated responsibilities."³ The decision was expressly made subject to appeal and ultimate resolution of the tribal leadership issue. Def. Boswell's Ex. 9 (emphasis in original document) (R. 613).

B. Pre-trial and Trial Proceedings

First Bank filed the present action on October 27, 2011, seeking a declaratory judgment from the Court as to who it should recognize as signatory authority on the Tribe's Accounts and absolving it from any liability concerning the signatory authority on the Tribe's accounts. Based upon the competing claims as to the proper signatory authority on behalf of

³ Appellants argue that they have "proved" that the "deposits are for provision of essential government services pursuant to federal contracts and grants." However, the testimony at trial reflected that a significant source of the funds for the federal contracts and grants was tribal gambling and that the funds in the Tribal Accounts were utilized for a wide variety of programs, including state, federal, local, and tribal governmental programs. Trial Tr. 109:23-24, 115:17-18, 116:5-13, 117:22-24, 126:4-127:8, 128:4-16.

the Tribe, First Bank was left in a position where it could not ascertain with any reasonable degree of certainty the proper signatory authority with respect to the Accounts. Pl.'s Petition for Declaratory Relief and Determination of Party Authorized to Act on Behalf of Tribal Accounts ¶¶ 6-17 (R. 1); Trial Tr. 45:5-11.

Appellants moved to dismiss First Bank's Petition for lack of jurisdiction and on other grounds; the trial court denied dismissal. Jt. Consolidated Mot. (R. 10, 16); Pl.'s Objection (R. 90); Reply (R. 261); Court Order/Minute (R. 285). The continued uncertainty as to the proper signor as well as First Bank's desire to protect the funds in the Tribal Accounts required First Bank to freeze the Tribal Accounts pursuant to the Terms and Conditions of the Accounts. Trial Tr. 60:10-16; Notice of Administrative Freeze, Apr. 24, 2012 (R. 286); Pl.'s Ex. 1A. Appellants filed a motion for summary judgment, reasserting their argument that the trial court lacked jurisdiction over this matter due to the Tribe's purported sovereign immunity and also arguing that "Governor Janice Prairie Chief-Boswell is the person authorized to administer the Tribes' accounts" (R. 339, 341). Plaintiffs, however, never were served with a copy of this motion. Trial Tr. 114:12-14, 115:1-10. The trial court took the motion under advisement, and a non-jury trial was held June 8, 2012. Trial Tr. 114:23-25.

On June 21, 2012 (with an amended Order entered Aug. 6, 2012), the trial court denied Appellants' motion for summary judgment and denied First Bank's Petition for Declaratory Relief. Order (R. 601). The trial court properly found that it had jurisdiction over this matter and directed that disbursement of funds from the Tribal Accounts would be only upon court order. Order 3. Appellants moved for a discretionary stay of enforcement, which was denied. Mot. for Discretionary Stay (R. 548); Special Appearance & Mot. to Join (R. 575); Pl.'s Response and Objection (R. 579); Reply (R. 583); Dkt. Entry of Sept. 17,

2012. First Bank applied for permission to close the Tribal Accounts and send the proceeds to the account address of record, which was also denied. Dkt. Entry of Sept. 17, 2012

II. Argument and Authorities

A. The District Court Properly Found That It Had Jurisdiction over This Matter.

The trial court's determination that it had jurisdiction over First Bank's action is subject to de novo review by this Court. *Samman v. Multiple Injury Trust Fund*, 2001 OK 71, ¶ 8, 33 P.3d 302, 305; *Conoco, Inc. v. Agrico Chem. Co.*, 2004 OK 83, ¶ 9, 115 P.3d 829, 833. The trial court's finding of jurisdiction was proper and should be affirmed, as district courts of this State are vested with "unlimited original jurisdiction of all justiciable matters." Okla. Const. art. 7, § 7(a). The trial court clearly was authorized to issue relief on First Bank's Petition pursuant to 12 Okla. Stat. § 1651, which provides that the district courts of the State of Oklahoma have jurisdiction to determine the rights, status, or other legal relations of parties, including the construction of any contract or other agreement. Moreover, "[o]nce the equity jurisdiction of the District Court has properly been invoked, the Court possesses the necessary power to fashion appropriate remedies." *State ex rel. Day v. Sw. Mineral Energy, Inc.*, 1980 OK 118, ¶ 19, 617 P.2d 1334, 1338.

1. Defendant Boswell Is Not Entitled to Sovereign Immunity.

Appellants' primary argument that the trial court was not permitted to exercise jurisdiction over them under the doctrine of tribal sovereign immunity. See Aplt. Br. 5-10, citing *Kiowa Tribe of Okla. v. Mfg. Techs. Inc.*, 523 U.S. 751 (1998), and other authorities. Appellants generally assert that a tribe may only be sued where Congress has authorized suit or the tribe has expressly waived its immunity in full compliance with every procedural requirement contained in the tribe's constitution or other governing documents and that such immunity extends to tribal officials acting in their official capacities. As a threshold matter,

the quasi-sovereign immunity generally enjoyed by the Tribe would not extend to bar suits against individual tribal members such as Defendants Boswell and Harjo. *See Puyallup Tribe, Inc. v. Dep't of Game of State of Wash.*, 433 U.S. 165 (1977) (successful assertion of tribal sovereign immunity does not impair authority of state court to adjudicate rights of individual tribal members over which it properly obtained personal jurisdiction).

Additionally, as explained in Appellants' own cited cases, where tribal officials "act beyond their authority, they lose their entitlement to the immunity of the sovereign." *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1271 (9th Cir. 1991) (citing *Ex Parte Young*, 209 U.S. 123 (1908)). A tribal officer "is not protected by the tribe's immunity from suit." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978). Appellants' apparent argument is that Boswell is cloaked with the tribe's immunity because she is a tribal official acting within the scope of her authority. However, this position is a logical impossibility as **both** Boswell and Harjo claim to be Governor and both are supported by their respective tribal Supreme Courts. **Both** individuals cannot be the Governor of the Tribe and, at this point, there is no clear indication from within the Tribe as to which individual is the Governor of the Tribe. Defendant Boswell, therefore, is not protected by any immunity that may be afforded the Tribe in this matter. *See Imperial Granite Co.*, 940 F.2d at 1271.

2. The Agreement with First Bank Waives Any Immunity of Appellants.

With respect to the trial court's exercise of jurisdiction over both Appellants,⁴ Appellants' argument fails to establish that First Bank's action was barred for several

⁴ If the Tribe is not entitled to the protection of sovereign immunity, Defendant Boswell of course could not derivatively enjoy the Tribe's sovereign immunity from suit as a purported officer of the Tribe. Alternatively, if considered to be a non-officer individual tribal member, Boswell would not be entitled to sovereign immunity. *See Puyallup Tribe*, 433 U.S. at 171-72.

reasons—most fundamentally that the Tribe waived any such immunity objection when it expressly agreed that its rights and obligations with respect to the Accounts would be subject to state law when it entered into the account agreement, as recognized by the trial court in its Order at page 3. *See also* Trial Tr. 65:19-66:3; Pl.'s Ex. 1A. Even if the Tribe had not expressly so agreed, such an agreement must be implied from the Tribe's opening an account with a state-chartered bank without seeking any alternative agreement as to governing law and thereby availing itself of the rights, obligations, and limitations associated with the Oklahoma Uniform Commercial Code and other state banking laws.

A similar argument of tribal immunity from state court jurisdiction in the face of a contract calling for state law governance was rejected by the United States Supreme Court in a rare unanimous decision. *C & L Enters., Inc. v. Citizen Band Potawatomie Tribe of Okla.*, 532 U.S. 411 (2001). In *C & L Enterprises*, the Supreme Court held that where a tribe entered into a contract providing for governance under Oklahoma law and enforcement of arbitration awards under the contract in any court having jurisdiction, the tribe waived sovereign immunity and subjected itself to Oklahoma law relating to the arbitration award. *Id.* at 418-19.

Here, the trial court correctly found that the Tribe in the instant case "agreed to be bound by state law when they opened this account." Order 2. This Court has previously addressed the effect of an agreement to be subject to state law in relation to claims of sovereign immunity by an Oklahoma Indian tribe. In *Bittle v. Bahe*, 2008 OK 10, ¶ 52, 192 P.3d 810, 827, the Oklahoma Supreme Court held that a tribally owned casino waived any immunity it may have by virtue of its execution of an application agreeing to be bound by state law. In his concurring opinion, Justice Watt further explained, "[T]he Tribe effectively

waived any right to the shield of sovereign immunity by the casino's agreement to be bound by state law. . . . [O]nce the casino waived its sovereign immunity by agreeing to be bound by Oklahoma law, state law became the measure by which the cause is to be governed." *Id.* ¶ 1, 192 P.3d at 828 (Watt, J., concurring).

Just as in *C&L Enterprises* and *Bittle*, the Tribe entered into a private contract (i.e., the account agreement with First Bank), signed by Defendant Boswell, that clearly provides "[t]his agreement is subject to applicable federal laws and the laws of the State of Oklahoma." Trial Tr. 65:19-66:3; Pl.'s Ex. 1A. The Tribe clearly and unequivocally subjected itself to a determination under state law with respect to rights and liabilities arising under or relating to the account agreement by voluntarily entering into an agreement that is expressly governed by state law. Clearly, a determination of the authorized signor under a state law contract is not as potentially offensive to tribal sovereignty as the enforcement of an arbitration award in state court (*C&L Enterprises*) or subjecting a tribe to dram shop liability in state court (*Bittle*). For this reason alone, the trial court had jurisdiction over Appellants to make a judicial determination of the rights and obligations under the account agreements.

Additionally, as previously mentioned, when a tribe decides to open an account at a bank within the State of Oklahoma, it is by necessity choosing to afford itself of the protections and liabilities related to account ownership, including determinations under state law of authorized signors. Certainly, a tribe would anticipate that matters concerning its bank accounts could and would be determined in state courts under state law. If First Bank had paid an unauthorized check, failed to meet a midnight deadline, or violated any of its presentment warranties with respect to checks deposited, the Tribe would have been able to invoke state court jurisdiction and applicable state law, including the UCC, for a

determination of its rights. For the payment system to work, First Bank, as the Tribe's depository institution, also must have the ability to invoke state court jurisdiction for account related matters such as receiving direction from a court as to who it should recognize as the signatory authority on behalf of a non-individual account owner.

In an attempt to sidestep the necessary logic behind applying Oklahoma law and Oklahoma court jurisdiction to tribal bank accounts, Appellants cite *American Indian Agricultural Credit Consortium v. Standing Rock Sioux Tribe*, 780 F.2d 1374 (8th Cir. 1985). *Standing Rock* involved a question of whether a choice of law provision in a promissory note along with a reference to certain rights and remedies available at law was sufficient to overcome a claim of tribal immunity. *Id.* at 1376. The court held sovereign immunity barred the note holder's collection action filed in the United States District Court for North Dakota since the promissory note did not contain an "express waiver" of sovereign immunity. *Id.* at 1375.

Significantly, *Standing Rock* was decided by the Eighth Circuit before the Supreme Court's decision in *C&L Enterprises*. In *C&L Enterprises*, the Supreme Court made clear that a waiver of sovereign immunity need not be express but that the intent to waive had to be "clear" from the totality of the circumstances. *C&L Enterprises*, 532 U.S. at 418-20. In the present case, which involves account agreements voluntarily initiated by the Tribe's then-undisputed Governor in proper exercise of the authority granted to her by the Tribe's Constitution, the Tribe voluntarily availed itself of the privileges and protections of checking accounts governed solely by state law and expressly agreed that this law (and by implication the courts of the State of Oklahoma) would determine rights and liabilities with respect to the Tribal Accounts.

Even if the Court is persuaded that the Tribe did not agree to be bound by state law in its account agreements or as a matter of law through the opening of the Accounts, several courts have held that tribal sovereign immunity against suit in federal or state courts does not extend to injunctive or declaratory relief actions against a tribe. *See, e.g., TTEA v. Yselta del Sur Pueblo*, 181 F.3d 676, 680 (5th Cir. 1999).

Kiowa [Tribe of Okla. v. Mfg. Techs. Inc.], 523 U.S. 751 (1998)] was an action for damages, not a suit for declaratory or injunctive relief. This difference matters. . . .

The distinction between a suit for damages and one for declaratory or injunctive relief is eminently sensible, and nothing in *Kiowa* undermines the relevant logic. State sovereign immunity does not preclude declaratory or injunctive relief against state officials. There is no reason that the federal common law doctrine of tribal sovereign immunity, a distinct but similar concept, should extend further than the now-constitutionalized doctrine of state sovereign immunity.

Id. (citations omitted)); *accord Comstock Oil & Gas, Inc. v. Ala. & Coushatta Indian Tribes of Tex.*, 261 F.3d 567, 571 (5th Cir. 2001).

Appellants rely upon a Ninth Circuit case, *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1271 (9th Cir. 1991), to argue that the Tribe's purported sovereign immunity extends to bar First Bank's suit seeking declaratory relief. Appt. Br. 6 (also citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978)). In *Imperial Granite*, with no rationale, the court cited *Santa Clara Pueblo* to generally support the proposition put forth by Appellants. *Santa Clara Pueblo*, however, was highly dissimilar to the instant case. The Court only cursorily addressed the contours and scope of tribal sovereign immunity; its primary focus was statutory interpretation and legislative history in determining whether a private federal cause of action was created by a federal statute, the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301 et seq. Further, the *Santa Clara Pueblo* court found that "a tribal

governor [was] not immune from a suit seeking declaratory and injunctive relief against enforcement of a tribal ordinance." *TTEA*, 181 F.3d at 680 (citing *Santa Clara Pueblo*, 436 U.S. at 59).

The Fifth Circuit expressly noted that *Kiowa* and *Santa Clara Pueblo* control and, unlike the Ninth Circuit, narrowly interpreted those cases to draw a well reasoned and rational distinction between a suit for damages and one for declaratory or equitable relief. *See TTEA*, 181 F.3d at 680; *Comstock*, 261 F.3d at 571. The more on-point conclusion of *TTEA* and *Comstock* is that since the doctrine of state sovereign immunity does not extend to declaratory or injunctive relief, there is no proper reason that the federal common law doctrine of tribal immunity should be any broader. Since the relief sought by First Bank is solely declaratory relief (First Bank seeks no damages whatsoever against the Tribe), tribal sovereign immunity should not bar the trial court or this Court from asserting jurisdiction with respect to the Accounts.

3. Any Immunity Was Waived When Appellants Sought Affirmative Relief.

Although Appellants asserted in the trial court and on appeal that the trial court's alleged inability to hear this matter due to tribal sovereign immunity equates to a lack of subject matter jurisdiction, this Court and others have characterized an assertion of sovereign immunity as a challenge to *in personam* jurisdiction. *See, e.g., Cherokee Nation v. Nomura*, 2007 OK 40, ¶ 7, 160 P.3d 967, 971; *Comstock*, 261 F.3d at 569-72.

Assuming one or both Appellants were entitled to assert the bar of sovereign immunity in the trial court, any such challenge was waived when they sought affirmative relief from that court via, inter alia, their Joint Consolidated Motion for Summary Judgment and Brief in Support (R. 339, 341) and the Tribe's Motion for Discretionary Stay Pending Appeal and Brief in Support (R. 548), which Defendant Boswell moved to join (R. 575).

Appellants initially appeared specially (as was required prior to the current version of 12 Okla. Stat. § 2005.2(A)), but they then "went further and asked for affirmative relief," thereby entering a general appearance in the case. "When a party makes an appearance in an action for any purpose other than to challenge the jurisdiction of the court, he thereby enters a general appearance in said cause and waives the right to thereafter challenge said jurisdiction." *Porter v. Okla. Bacone Coll. Trust*, 1959 OK 174, ¶ 7, 346 P.2d 335, 337 (internal quotation marks omitted). In *Porter*, the appellants had filed a special appearance in answer to a petition for distribution and probate of a will; however, they then asked for a delay in the requested distribution until such time as their claim against testator's estate had been established. This Court ruled that the appellants' request for affirmative relief prevented them from challenging the court's jurisdiction. *Id.*; accord *Nomura*, 2007 OK 40, ¶ 7, 160 P.3d at 971 ("When a party makes an appearance and requests affirmative relief, he has waived any challenge to personal jurisdiction.").

Here, Appellants sought summary judgment not just on the basis of purported tribal sovereign immunity, but also on the merits of their argument that Boswell, not Harjo, is the Tribe's Governor and authorized signatory (R. 351-52). In addition, in their summary judgment motion, Appellants specifically requested that the Court lift the administrative freeze that First Bank had placed on the Tribal Accounts (R. 352). Appellants listed among their "Grounds for Recovery" and "Claims for Relief" in the Pre-Trial Conference Order:

1. No waiver of sovereign immunity.
2. Declaratory Judgment that Janice Prairie Chief-Boswell is Governor of the Cheyenne and Arapaho Tribes.
3. Release of the Cheyenne and Arapaho Tribes' funds.
-
1. Dismissal due to no waiver of sovereign immunity.

2. Declaratory judgment that Janice Prairie Chief-Boswell is the sole signature authority for administration of the Tribes' accounts at First Bank & Trust.
3. Immediate release of the Tribes' fund that were "administratively frozen."

(R. 442-43.) And in their motion for discretionary stay, Appellants sought not a "stay," but unfettered access to the Tribal Accounts, and they again argued that Boswell is the only person recognized to administer the funds in the Tribal Accounts and that First Bank's administrative freeze was improper (R. 548-49, 555).

Appellants clearly have invoked the trial court's jurisdiction in these requests for affirmative relief and have waived any challenge thereto. *See Porter*, 1959 OK 174, ¶ 7, 346 P.2d at 337; *Bill Cooper Frac Tank Co. v. Columbia Reg'l Hosp.*, 1993 OK CIV APP 54, ¶ 5, 856 P.2d 586, 588.

B. First Bank and Trust Company Is Entitled to Declaratory Relief

1. *The Trial Court Is Authorized to Issue Declaratory Relief Under 12 Okla. Stat. § 1651.*

A trial court's declaratory judgment orders are reviewable in the same manner as are other judgments. *Okla. City Zoological Trust v. State ex rel. Pub. Emps. Relations Bd.*, 2007 OK 21, ¶ 5, 158 P.3d 461, 463-64 (citing 12 Okla. Stat. § 1654). Where, as here, a court's order on a request for declaratory judgment addresses an issue of law, this Court reviews the decision under a de novo standard. *Cherokee Nation v. Nomura*, 2007 OK 40, ¶ 11, 160 P.3d 967, 972. Further, "[a]n abuse of discretion takes place when the decision is based on an erroneous interpretation of the law, on factual findings that are unsupported by proof, or

represents an unreasonable judgment in weighing relevant factors." *Okla. City Zoological Trust*, 2007 OK 21, ¶ 21, 158 P.3d at 464.⁵

Because First Bank met the requirements for relief under Oklahoma law, it should have been awarded declaratory judgment. The District Court expressly found that: (i) First Bank "has received conflicting instructions regarding disposition of funds on deposit for the tribe"; (ii) the District Court had jurisdiction over the Tribal Accounts; and (iii) the Tribal Accounts are governed by state law. Order at 1-3 (R. 601-03). In other words, First Bank established *all* that was necessary for a declaratory judgment to be issued pursuant to 12 Okla. Stat. § 1651: an "actual controversy" requiring the District Court's determination of "rights, status, or other legal relations." Despite First Bank's clear showing of all these necessary factors, including the trial court's jurisdiction over this matter, the trial court unreasonably weighed these factors and erroneously denied declaratory relief, stating that it lacked the "authority" to issue the requested declaratory judgment. Order 3.

The interlocutory nature of the Order renders its terms subject to modification in the court below. "The trial judge retains *full* control over all *temporary orders* in the case and over the manner of their enforcement. . . . Interlocutory orders made in the course of an action or proceeding are not binding on the trial court when final adjudication of the controversy is crafted." *Depuy v. Hoeme*, 1989 OK 42, ¶ 10 & n.27, 775 P.2d 1339, 1344 & n.27; *see also* 12 Okla. Stat. §§ 993(A)(2), 994(A). In addition, the trial court's decision to deny First Bank's application to close the Tribal Accounts and to disburse the funds of the Tribal Accounts "based upon a yet to be determined standard" leaves this matter in a state of

⁵ Alternatively, if the trial court's Order is evaluated as a temporary injunction, the standard of review "is whether the trial court abused its discretion or entered a decision against the evidence." *Morgan v. Okla. Secondary Sch. Activities Ass'n*, 2009 OK 21, ¶ 21, 207 P.3d 362, 366.

flux that is inequitable to First Bank, who is being forced to maintain the Tribal Accounts against its will and bear any potential liability associated with the accounts.

In the present action, First Bank is merely seeking a determination with respect to who it should recognize as the signatory authority under the state law account agreements it has with the Tribe, as well as a corresponding declaration that First Bank will not be held liable for the Tribe's internal conflicts and mismanagement. Despite Appellants' contentions to the contrary, the necessary parties to such a determination can only be the two competing signor parties—Boswell and Harjo—and the owner of the Accounts—the Tribe. Clearly, this action falls within the scope of § 1651, and therefore the trial court, having correctly found that it had jurisdiction over this matter, was compelled to issue the declaratory relief necessary to protect all the parties and provide certainty to the rights, status, and legal relations of First Bank, the Tribe, and each of the competing Governors.

2. *First Bank Is Not Prohibited from Seeking the Declaratory Relief by an Adverse Claims Statute.*

During the course of this litigation, First Bank placed the Tribal Accounts on an administrative freeze, pursuant to the governing terms and provisions, to allow the Tribal Account balances to be maintained pending the trial court's determination of First Bank's Petition. Notice of Administrative Freeze (R. 286). First Bank implemented this hold on the Tribal Accounts because it was faced with continued uncertainty as to the proper signatory authority. Trial Tr. 60:10-16, Notice of Administrative Freeze, Apr. 24, 2012 (R. 286); Pl.'s Ex. 1A.

Appellants filed no counterclaim or other challenge to the administrative freeze. However, after trial was held on the merits and after the trial court issued its Order, Appellants for the first time raised the argument that the trial court's ruling and First Bank's

implementation of a hold on the Tribal Accounts both were improper because there was no adverse claim made and no bond posted as would be required under Oklahoma's adverse claims statute, 6 Okla. Stat. § 905. Mot. for Discretionary Stay Pending Appeal (R. 548, 549.) Section 905 states in relevant part:

Notice to any bank or trust company doing business in this state of an adverse claim to a deposit standing on its books to the credit of any person shall not be effectual to cause said bank or trust company to recognize said adverse claimant unless said adverse claimant shall also either procure a restraining order, injunction or other appropriate process against said bank or trust company from a court of competent jurisdiction in a cause therein instituted by him wherein the person to whose credit the deposit stands is made a party and served with summons or shall execute to said bank or trust company, in form and with sureties acceptable to it, a bond, indemnifying said bank or trust company from any and all liability, loss, damage, costs and expenses, for and on account of the payment of such adverse claim or the dishonor of the check or other order of the person to whose credit the deposit stands on the books of said bank or trust company

Appellants now ask this Court to rule upon their late-blooming argument that both the trial court's Order and First Bank's administrative freeze violated Section 905. To the extent Appellants argue that First Bank violated this statute, and thereby breached some duty owed to the Tribe, such a claim is barred on account of their failure to present this argument or any evidence thereof to the court below. "This Court does not make first-instance determinations of disputed issues of either law or fact in the exercise of its appellate jurisdiction." *State ex rel. Okla. Corp. Comm'n v. McPherson*, 2010 OK 31, n.6, 232 P.3d 458, 464 n.6. No mention of the adverse claims statute was made until Appellants filed their motion to stay enforcement of the trial court's Order—long after the trial of the merits was concluded. (R. 549.) Appellants did not independently challenge First Bank's administrative freeze prior to issuance of the trial court's Order, and the trial court made no determination as to whether First Bank is somehow liable under the adverse claims statute at any point in the proceedings.

The trial court cannot be reversed for any error in connection with an adverse-claims-statute argument, because no such argument was timely and definitely raised below. "Trial courts are not traditionally reversed for error unless the error was called to their attention at a time when they themselves could reasonably be expected to correct it." *Gaines v. Sun Refinery & Mktg.*, 1990 OK 33, ¶ 20, 790 P.2d 1073, 1080, *overruled on other grounds by Davis v. B.F. Goodrich*, 1992 OK 14, 826 P.2d 587.

Even assuming this Court should consider Appellants' adverse claims argument, this contention fails on the merits. Nothing in the adverse claims statute compels a bank to recognize an adverse claimant when faced with two contestants as to *signatory authority* rather than *ownership*. Appellants themselves argue that an adverse claimant for purposes of the statute "must be a 'stranger' to the account who claims to own a deposit instead of the name of the account." Aplt. Br. 12 (excerpting Barkley Clark et al., *Law of Bank Deposits, Collections and Credit Cards* ¶ 3.09[2] (2012)). First, the "adverse claimant" here—Harjo—did not "claim[] that a deposit belongs to [her] instead of to the one in whose credit it stands on the books of the bank." C.C. Marvel, Annotation, *Construction, Application, and Effect of Statutes Relating to Notice to Bank of Adverse Claim to Deposit*, 62 A.L.R.2d 1116 (2011)). Neither Boswell nor Harjo purports to be the true owner: there never has been any dispute that the funds in the commercial Tribal Accounts are owned by the Tribe, regardless of who is properly designated its Governor-signor. Trial Tr. 38:6-16, 49:22-24, 54:5-14, 55:23-56:2.

Second, Harjo would not be a "stranger" to the Tribal Accounts as would a creditor or an assignee of the Tribe. Rather, Harjo is an individual that First Bank was informed had been recognized by a Supreme Court of the Tribe as Governor, following Boswell's impeachment, and therefore the authorized signatory on the Tribal Accounts. Def. Harjo's

Exs. 7, 8, 9, 10, 11, 19, 21; Pl.'s Ex. 6. Boswell, however, claimed that she remained the rightful Governor and signatory. *See, e.g.*, Def. Boswell's Exs. 2, 5, 6 & 9; Pl.'s Exs. 4, 5 & 8; Tr. 42:8-17, 44:1-21; 57:21-25, 58:1-3, 15-18, 59:2-4. First Bank also has received conflicting documents from competing tribal courts with respect to the Governor of the Tribe. Trial Tr. 58:1-3, 15-18. Were First Bank to believe both Boswell and Harjo, the two would-be Governors would be analogous to joint tenants with the same legal status and access to the account—but neither having a claim of "ownership." The Court of Civil Appeals has held that such joint tenants are not "adverse claimants" 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. Moreover, there is no actual adversity when either claimant would be seeking to withdraw the funds for the sole use and benefit of the Tribe, the undisputed and proper owner of the Tribal Accounts.

Statutes such as 6 Okla. Stat. § 905 are designed "to protect banks from the perilous common law position of vulnerability to suit by either the depositor or the adverse claimant." *Law of Bank Deposits* ¶ 3.09[2]. "The courts have held that these statutes give banks an additional layer of protection rather than displace the common law; therefore, the bank may still impose a temporary freeze against the account and bring its own interpleader action or allow the adverse claimant time to get a court order." *Id.* First Bank sought precisely this protection in filing its Petition. Pursuant to the statute, First Bank would be compelled to recognize the adverse claimant only if served with an appropriate court order or if secured with a bond indemnifying First Bank. *Id.*; 6 Okla. Stat. § 905. Having received neither of these, First Bank did not "recognize" Harjo as contemplated by the statute—First Bank did not provide "payment" to Harjo or change the ownership of the Tribal Accounts. 6 Okla.

Stat. § 905. Instead, First Bank held the funds as a mechanism to protect all parties involved, as it was entitled to do when there is no adverse claim presented within the meaning of Section 905 and pursuant to the account agreements.

C. The Trial Court's Order Was Not an Injunction but, Instead, Was a Permissible Exercise of the Court's Equitable Powers.

The Appellants attack the trial court's Order as an injunction that was not sought by First Bank in its Petition and was outside the trial court's authority to grant. However, the Order on its face is not an injunction, and its substance does not enjoin anyone from doing anything. Instead, the trial court's order seeks to preserve the delicate balance between state interests in the banking and payment systems and tribal interests in self governance. The trial court's ruling allows the Tribe to have access to its funds for tribal purposes under a court supervision structure that protects First Bank from liability, while allowing a dysfunctional tribal government to attempt to exercise effective self-governance and solve its leadership crisis.

Regardless of the label placed on the trial court's action, its judgment should be upheld as a permissible exercise of a trial court's equitable powers. First Bank properly invoked the trial court's equitable jurisdiction in seeking a declaratory judgment as to which party was the authorized signatory on the Accounts. "Once the equity jurisdiction of the District Court has properly been invoked, the Court possesses the necessary power to fashion appropriate remedies." *State ex rel. Day*, 1980 OK 118, ¶ 19, 617 P.2d at 1338; Okla. Const. art. 7, § 7(a). Recognizing the untenable situation in which First Bank found itself due to the Tribe's own actions and the potential for even greater harm of a dysfunctional tribal government to the state's banking and payment systems, the trial court invoked its equitable power and fashioned a remedy to protect the interests of all parties before it. This remedy

protected First Bank and others within the state banking system from potential liability while allowing the Tribe additional time to solve its leadership crisis with an opportunity for the Tribe's bills to be paid as the the two opposing Governors battled for ultimate control of the tribe's governorship and signatory authority.

D. If This Court Reverses the Trial Court's Interlocutory Order on Any Basis, First Bank Should Be Awarded Declaratory Relief as Prayed for in Its Petition.

The above objections notwithstanding, First Bank believes it is adequately protected from liability, at least for the present, by the terms of the trial court's Order as they currently stand. If this Court reverses the trial court's Order on any grounds, however, First Bank should be awarded declaratory relief as sought in its Petition for the reasons outlined above in Section II.B and to protect First Bank from future claims of liability. *Cf.* 12 Okla. Stat. § 2004(B) ("every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled").

III. Conclusion

First Bank requests this Court to uphold the Order of the trial court for the aforementioned reasons. In the event the Court determines the Order should be reversed, this Court should direct the entry of declaratory relief in First Bank's favor as prayed for in its Petition, since First Bank is entitled to an absolution of liability as to the proper signatory authority on the Tribal Accounts and the trial court's Order is subject to modification prior to entry of a final judgment.

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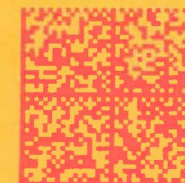
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