NOT FOR OFFICIAL PUBLICATION

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION II

FIRST BANK AND TRUST COMPANY,

Plaintiff/Appellee/Counter-Appellant,

vs.

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/Real Party in Interest,

and

FOURTH LEGISLATURE OF THE CHEYENNE AND ARAPAHO TRIBES and ARAPAHO "LEGISLATIVE BRANCH,"

Case No. 110,909

Real Parties in Interest.)

APPEAL FROM THE DISTRICT COURT OF
CUSTER COUNTY, OKLAHOMA

HONORABLE FLOYD DOUGLAS HAUGHT, TRIAL JUDGE

AFFIRMED IN PART, REVERSED IN PART AND REMANDED WITH DIRECTIONS

Scott Meacham John M. Thompson Elizabeth Barnett LaBauve Adam C. Hall CROWE & DUNLEVY Oklahoma City, Oklahoma	For Plaintiff/Appellee/ Counter-Appellant
Charles Morris ATTORNEY GENERAL Kimberly Richey ASSISTANT ATTORNEY GENERAL CHEYENNE AND ARAPAHO TRIBES Concho, Oklahoma	For Defendant/Appellant/ Counter Appellee The Cheyenne and Arapaho Tribes
Martha L. King FREDERICKS PEEBLES & MORGAN LLP Louisville, CO	For Defendant/Appellant/ Counter-Appellee Executive Branch of the Cheyenne and Arapaho Tribes (captioned as Janice Prairie Chief-Boswell)

OPINION BY KEITH RAPP, JUDGE:[1]

The Defendant, The Cheyenne and Arapaho Tribes (Tribes) and Janice Prairie Chief-Boswell (Boswell) appeal the District Court's decision denying their

[1] Assigned to Author on February 12, 2015

claim of sovereign immunity and imposing the District Court's administrative control over the Tribes' funds in this action by the plaintiff, First National Bank and Trust Company (Bank), for Declaratory Judgment.

BACKGROUND

The Tribes, acting through Boswell opened a banking relationship with the Bank, an Oklahoma chartered bank. Thereafter, at an unknown date, a dispute occurred within the Tribal government. This dispute resulted in the formation of a rival tribal government and at least two governors and two Supreme Courts.

The second Governor, Leslie Wandrie-Harjo, made demands upon the Bank, but without following the adverse claims to deposits statute.[2]

The Bank then sought a Declaratory Judgment in the District Court of Custer County, Oklahoma. The Bank wanted to know who, from the Tribes, is the proper

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[2] 6 O.S.2011, § 905. The statute reads:

> 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; provided, that this law shall not apply in any instance where the person to whose credit the deposit stands is a fiduciary for such adverse claimant, and the facts constituting such relationship are made to appear by the affidavit of such claimant.

signatory and authorized to conduct business with the Bank. The Tribes asserted sovereign immunity by answer and by motion for summary judgment. The District Court denied the claim of sovereign immunity.

The Bank also asked that it be allowed to close the Tribes' accounts and return the funds. The District Court denied this latter request and asserted administrative control over the funds.[3]

The Tribes and Boswell appeal.[4]

STANDARD OF REVIEW

The Oklahoma Supreme Court determined that this is an appeal from an injunction. The Court directed that the appeal would proceed pursuant to 12 O.S.2011, § 993(A)(2), and Okla. Sup. Ct. Rule 1.60(c), 12 O.S.2011, Ch. 15, app. 1.

The granting of an injunction rests, to some degree, within the discretion of the trial court. The judgment will not be disturbed on appeal unless the trial court clearly abused its discretion or that the decision is contrary to the clear weight of the evidence. *Johnson v. Ward*, 1975 OK 129, ¶ 42, 541 P.2d 182, 188; *Dorchester Hugoton, Ltd. v. Dorchester Master Ltd. Partnership*, 1996 OK CIV

[3] The record indicates that the Tribe did not want the funds returned, but whether that be the case, the matter is moot as a result of this Opinion.

[4] The Tribes and an entity identified as the Cheyenne and Arapaho Executive Branch filed motions to supplement the record in this appeal with material that was not presented to the district court. Without determining the Executive Branch's status as a party in this litigation, all of those motions are denied. Okla. Sup. Ct. R. 1.28(b), 12 O.S.2011, ch. 15, app. 1.

APP 60, 925 P.2d 1222. The discretion of the trial court must be exercised within the bounds of sound equitable principles and in consideration of all the facts and circumstances. Since an injunction is an equitable matter, this Court has the power to consider the evidence on appeal. *Amoco Production Co. v. Lindley*, 1980 OK 6, 609 P.2d 733. The appellate court is required to independently examine the entire record. *Public Serv. Co. of Okla. v. Home Builders Assoc, of Realtors, Inc.*, 1976 OK 120, ¶ 5, 554 P.2d 1181, 1184.

A *de novo* standard of review also governs questions concerning the district court's jurisdiction over Indian tribes. *Dilliner v. Seneca-Cayuga Tribe of Oklahoma*, 2011 OK 61, ¶ 12, 258 P.3d 516, 519. Such questions are questions of law and are reviewed *de novo*, which involves a plenary, independent and non-deferential examination of the trial court's rulings of law. *Seneca Tel. Co. v. Miami Tribe of Oklahoma*, 2011 OK 15, ¶ 3, 253 P.3d 53, 54

ANALYSIS AND REVIEW

A. State Court Jurisdiction.

The Oklahoma Supreme Court has recently confirmed that Indian tribes enjoy sovereign immunity. In summary, unless Congress has expressly abrogated tribal immunity or the evidence shows that the tribe expressly and unequivocally waived its immunity, then the tribe enjoys sovereign immunity. *Sheffer v. Buffalo Run Casino, PTE, Inc.*, 2013 OK 77, ¶ 50, 315 P.3d 359, 373.

The facts here are similar to the case of *Healy Lake Village v. Mt. McKinley Bank,* 322 P.3d 866 (AK 2014). There, as here, a tribal dispute resulted in a dispute over who was authorized to conduct banking business. Two groups contended that they were properly elected and constituted the legitimate government. The appellant group is the Fifer Group and the appellee group is the Polston Group.

However, unlike here, one of the competing tribal factions instituted the declaratory judgment action to determine who was authorized to act for the tribe. The bank moved to dismiss because the competing faction was not named in the action.

The Alaska trial court allowed the other competing faction to intervene. The competing factions offered separate versions of the facts about who is in legitimate control of the tribal affairs. The intervening faction, and the bank, urged that the Alaska trial court did not have jurisdiction because of sovereign immunity.

The Alaska trial court agreed with the bank and the intervening faction and dismissed the action. In dismissing the case for lack of subject matter jurisdiction, the Alaska trial court concluded that "there is no dispute that the real, fundamental, and initial issue to resolve is *who is the real party in interest to prosecute the claim against the bank*" (emphasis added) and that determining the real party in interest

would require reaching the merits of the Fifer Group's factual and tribal law arguments about the legitimacy of the two elections.

The Alaska Supreme Court affirmed the dismissal. The Court reasoned that any inquiry into the legitimacy of competing tribal elections was solely within tribe's retained inherent sovereignty. Consequently, the Alaska trial court lacked subject matter jurisdiction over tribal member's declaratory judgment action against bank.

In the case before this Court, the Bank instituted the Declaratory Judgment action. The Bank wants to know who has authority to conduct the Tribes' business with the Bank.[5] However, unlike in the Alaska case, the District Court here was not called upon to *directly* decide the Tribes' dispute. This Court does not consider that the alignment of parties posture of *Healy Lake Village v. Mt. McKinley Bank* is a significant distinguishing factor. The real subject matter of the case here, the same as in Alaska, involves resolution of an intra-tribal dispute over authority to act in a banking matter.

The resolution of the separate tribal dispute here rests solely with the Tribes, just as it did in Alaska. The resolution by the by the disputing tribal factions of their disagreements would resolve for the District Court who has authority, and

[5] The Bank's Declaratory Judgment action necessarily does not and cannot make a claim against the Tribes to obtain or give up property, perform or not perform some action, pay damages, or for some equitable relief.

would provide the threshold *fact* that the District Court must have in order to grant relief to the Bank. But, unlike other fact questions in trials, the "authority fact" is not one that can be determined by a trial court using traditional means, such as evidence leading to proof, or stipulation. The "authority fact" must be, and can only be, provided by the Tribes.

Ordinarily, the District Court has jurisdiction to entertain a bank's statutory Declaratory Judgment action in deposit dispute cases, including whether a tribe has waived its immunity. The three elements of jurisdiction for the rendition of a valid judgment are: (1) jurisdiction of the subject matter; (2) jurisdiction of the parties; and (3) the power to render a particular judgment. *Read v.* Read, 2001 OK 87, 57 P.3d 561; Marzette *v Marzette*, 1994 OK CIV APP 88, 882 P.2d 578.

This Court finds that what has occurred here is that the third *Marzette* element is *compromised to the degree that subject matter jurisdiction does not exist and cannot exist here under the facts.* Thus, the exercise of the power to render a judgment, including to even determine whether immunity has been waived, has been *frustrated* by the failure of the Tribes to resolve the intra-tribal dispute and advise the District Court (that is, provide the critical "authority fact") and the Bank who is the Tribes' authority to conduct business with the Bank, or who now has the Tribes' authority to conduct business with the Bank. In this case the District Court's power is *frustrated* and nothing can be done about it under

current Indian tribal sovereignty jurisprudence.[6] The District Court cannot decide the Tribes' dispute. The District Court cannot command (mandamus) the Tribes to decide the dispute because it does not have the authority or jurisdiction to do so.[7]

The dilemma imposed by the frustration of the District Court's ability to afford relief has no apparent resolution in the absence of a resolution by the Tribes. Therefore, it is unfortunately necessary to direct the District Court to dismiss this action without prejudice for lack of subject matter jurisdiction.

B. Tribes' Funds and Claim Against Boswell.

The District Court cannot exercise of administrative control over the Tribes' funds. This is effectively exercising jurisdiction over the Tribes by curtailing use of the Tribes' funds in order to compel a resolution of a tribal dispute .

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[6] The futility and frustration are compounded by the fact that the Tribes here do not provide full faith and credit reciprocity, so the State courts do not provide full faith and credit to the tribes' court. Rule 30, Rules for District Courts, 12 O.S.2011, Ch. 2, app. 1; *see Barrett v. Barrett*, 1994 OK 92, ¶ 9, 878 P.2d 1051, 1054. Moreover, the Tribes' dispute has resulted in the formation of at least two tribal Supreme Courts.

[7] Contrast, *Erspamer v Derwinski*, 1 Vet. App. 3 (Vet. App. 1990) where agency refusal to act could frustrate ability of appellate court to act so a writ of mandamus would be available; *see*, *Marbury v Madison* 1 Cranch 137 (1803); *Conn v Superior Ct.*, 242 Cal. Rptr. 148 (Cal. Ct. App. 1987) (court's powers not delineated by wishes of litigant and court had inherent power to issue order to prevent frustration of court's authority or process). In *Boucher v. Boucher*, 1989 OK CIV-APP-14, 771 P.2d 242, the Court refused to allow the Appellant to frustrate the continuing jurisdiction of the Oklahoma courts over this child custody matter by secreting the child in a sister state. The Court in *Campbell v. Superior Court*, 34 Cal. Rptr.3d 68, 77 (Cal. Ct. App. 2005) observed that, in England, the common law developed the doctrine that transferees and encumbrancers took with constructive notice of title defects asserted in any pending action to prevent frustration of jurisdiction by transfers *pendente lite*.

The remaining issue involves Boswell's personal liability. A tribal official may be immune from suit in some circumstances and not others. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 98 S. Ct. 1670 (1978). If her conduct was authorized by the Tribes, the suit is barred. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 688, 69 S. Ct. 1457, 1460-61 (1949).

Three acts are at issue, Boswell's conduct in opening the tribes' accounts, her purported waiver of sovereign immunity, and her continuing to conduct transactions after being removed as a tribal official. Whether Boswell had authority to open the accounts is no longer pertinent because the Tribes do not challenge that conduct and apparently do not seek return of the funds. The Record indicates that the Tribes did not authorize any waiver of immunity or continuing the transaction of business after removal.

However, this appeal involves an Order which does not address any individual liability that Boswell may have. Moreover, the Bank's petition limits its claim to declaratory relief. Therefore, the Bank's petition against Boswell must be dismissed, but without prejudice to asserting a claim against Boswell that is not barred by sovereign immunity.

CONCLUSION[8]

Ordinarily, the District Court has jurisdiction to hear and determine the Bank's petition for Declaratory Judgment to determine who has the authority to conduct banking business. However, here the authority is a threshold fact that must be provided by the Tribes.

The District Court does not have jurisdiction to decide the tribal dispute regarding who has the authority to conduct business with Bank. Moreover, under the facts, the District Court cannot even determine whether Tribes have, or have not, waived immunity. Unless and until the Tribes provide the "authority to conduct bank business fact" the power of the trial court to give relief is frustrated and nothing can be done about that under current Indian law jurisprudence. The resolution of that dispute is the real subject matter of the problem facing Bank. Therefore, under the facts the District Court does not have subject matter jurisdiction.

The District Court correctly dismissed the case on the ground of absence of jurisdiction and that Order is affirmed. Next, the District Court erred in assuming administrative control over tribal funds. That Order is reversed and vacated.

The District Court is directed to dismiss, without prejudice, the Bank's petition against Boswell.

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[8] Appellants Cheyenne and Arapaho Tribes' Joint Notice of Supplemental Authority filed October 7, 2013 is noted.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED WITH DIRECTIONS.

THORNBRUGH, J., specially concurs, and FISCHER, P.J., concurs in result.

THORNBRUGH, J., concurring specially:

I concur specially[1] to note that this dispute is, at its core, about who controls the Tribe. The determination of who controls the Tribe, and who has authority to sign or otherwise act on its behalf, is an internal function involving tribal membership, and lies within a tribe's retained inherent sovereign powers. *See Healy Lake Village v. Mt. McKinley Bank*, 322 P.3d 866 (Alaska 2014). I therefore agree that the district court lacked subject matter jurisdiction to consider this dispute from the outset, and that Bank requested a form of relief that an Oklahoma court cannot provide – namely, resolution of the Tribe's internal leadership dispute. It also is not for an Oklahoma court to address whether Boswell did or did not act outside of her authority to sign on behalf of the Tribe. This question also is one that must be answered, in the first instance, by the Tribe, because, of necessity, it requires a determination of who tribal membership has chosen to invest with authority to act on its behalf. On this basis, then, I agree that the district court properly dismissed the action.

[1] This matter was reassigned to the Majority authors in February 2015.

Notwithstanding the fact that the district court properly decided that this is a matter for the Tribe to decide on its own, however, the court erred in attempting to exercise control over the Tribe's bank accounts.

What is to become of these accounts is properly left to Bank and the Tribe to sort out. We note that the Tribe has not made a demand for the account proceeds at this time, even though this matter has been pending since 2012. If, at the end of the day, a dispute still exists that is *outside of the Tribe's exclusive jurisdiction*, the Tribe is free to access an Oklahoma court to resolve it. However, the fact that the Tribe lacks a valid tribal trial court from which it can seek relief may not be used to compel an Oklahoma state court to become involved: this is the inevitable consequence of the "sovereign immunity" to which the Tribe clings and advances. Moreover, the fact that Congress has chosen not to provide an effective external means of enforcement is not for an Oklahoma court to solve.

I therefore concur with Judge Rapp that the district court lacked subject matter jurisdiction as a threshold issue, and that, while the court properly dismissed Bank's request for declaratory relief, it erred when it attempted to take control of the Tribe's money.

FISCHER, P.J., concurring in result:

This case concerns competing claims to accounts opened in the name of the Cheyenne and Arapaho Tribes and various entities owned by the Tribes (Tribal

Accounts) with First Bank, an Oklahoma banking corporation located in Clinton, Oklahoma. The accounts were opened when Janice Prairie-Chief Boswell signed an Account Agreement accompanied by an Account Information document (collectively, Account Documents) prepared by First Bank for each of the Tribal Accounts. Boswell is the only "Authorized Signer" listed for the accounts in this record. Although I concur in the result reached by the Majority, I write specially because in my view the Majority Opinion does not address the possibility that, regardless of the eventual outcome of the intra-Tribal dispute, when the Tribal Accounts were opened Boswell was the Governor of the Tribes with Tribal executive authority to open the Tribal Accounts and sign the Account Documents. The Majority Opinion suggests, if that were the case and the Tribal governance issue were resolved, the district court had jurisdiction to grant relief to the Bank. I do not agree with that proposition. And, in my view, it does not matter who was the Tribes' Governor at the time the Tribal Accounts were opened. There is no construction of the relevant documents by which a court could conclude that the Tribes waived their immunity from the Bank's suit. I would vacate the district court's temporary injunction[1] asserting control over the Tribal Accounts and remand this case with instructions to grant the Tribes' motion for summary judgment based on sovereign immunity.

[1] On July 26, 2012, the Supreme Court determined that district court's order which is the subject of this appeal would be treated as a temporary injunction.

BACKGROUND

In November of 2009, Boswell was elected to a four-year term as the Governor of the Tribes and Leslie Wandrie-Harjo was elected as the Lieutenant Governor. An intra-tribal dispute developed regarding the governance of the Tribes. On December 17, 2010, the Tribes' Trial Court entered an order purporting to suspend Boswell as the Tribes' Governor. On December 27, 2010, Boswell was enjoined by the Trial Court from exercising gubernatorial powers. On February 25, 2011, Boswell signed the Account Documents and opened the Tribal Accounts. Boswell was impeached by the Tribes' Third Legislature on March 18, 2011, and later removed from office. However, on May 7, 2011, it appears that the Tribes' Tribal Council voted to repeal Boswell's impeachment. Nonetheless, on August 17, 2011, one of the Tribes' Supreme Courts[2] (the Arrow Court) entered an order naming Harjo as the Tribes' acting Governor effective December 27, 2011. Despite this action, Boswell maintained that she was the lawfully elected Governor of the Tribes and she continued to conduct transactions in the Tribes' First Bank accounts until the Bank unilaterally imposed an "administrative freeze" on the accounts on April 24, 2012.

[2] The membership of the Tribes' Supreme Court has also been a matter of dispute with two entities, the Arrow Court and the Webber Court, claiming to constitute the "official" Supreme Court for the Tribes.

First Bank filed its petition for declaratory relief naming the Tribes, Boswell and Harjo as defendants.[3] The Bank asked the district court to (1) "declare the contractual rights and duties of the parties in regards to the Tribal Accounts pursuant to 12 Okla. Stat. § 1651, et seq.;" and (2) declare "whether Boswell should remain as the authorized tribal signatory for the Tribal Accounts, or the authorized signatory for the Tribal Accounts should be changed to Harjo." First Bank's request for declaratory relief was tried to the district court on June 8, 2012. At the beginning of that trial, two individuals purporting to act as the Attorney General of the Tribes entered appearances on behalf of the Tribes. Boswell and Harjo were separately represented as were the Third and Fourth Tribal Legislatures. With respect to most of the issues, these parties aligned as either the Boswell faction or the Harjo faction.

The district court's June 21, 2012 Order, as amended on August 6, 2012, is the subject of this appeal. In that Order, the district court concluded that it had jurisdiction because the parties agreed that their account relationship would be governed by Oklahoma law. The district court denied First Bank's request for declaratory relief, including First Bank's alternative request to be permitted to close the accounts and return the funds on deposit to the Tribes. First Bank appeals this aspect of the district court's June 21 Order. The Tribes and Boswell

[3] At some point, it appears that the Tribes' Third Legislature and its Fourth Legislature were both permitted to intervene and participate in the district court litigation.

appeal the remainder of the Order in which the district court denied the Tribes' claim of immunity, asserted jurisdiction over the Tribes and Boswell and took control of the Tribes' accounts enjoining further withdrawals of funds from the accounts except as ordered by the court on application by an interested party. In this appeal, Harjo filed a "Response of Real Party in Interest" in which she asserted that the district court's June 21 Order was "factually-and legally-supported," that the district court "is the only court able to adjudicate" the Bank's claims, that the intra-Tribal dispute had already been resolved in her favor and that the "freeze of the accounts must continue to prevent the unlawful expenditure of Tribal funds."[4] Harjo did not separately appear in this appeal or file a brief.

ANALYSIS

The relationship between First Bank and the Tribes regarding the Tribal Accounts is contractual. *Allied Fidelity Ins. Co. v. Bank of Okla. Nat'l Ass'n*, 1995 OK 36, ¶ 8, 894 P.2d 1101 (relationship between a bank and its depositor is contractual). Funds deposited in a bank become the property of the bank. *Ingram v. Liberty Nat'l Bank & Trust Co. of Oklahoma City*, 1975 OK 45, ¶ 5, 533 P.2d 975 (money deposited is no longer the property of the depositor, but becomes the property of the bank, and the bank becomes debtor to the depositor). A bank's

[4] *Cf.*, *Healy Lake Village v. Mt. McKinley Bank*, 322 P.3d 866 (Alaska, 2014) (affirming dismissal of suit against bank for lack of jurisdiction because only one of two competing tribal factions consented to state court jurisdiction, and determining which tribal faction was entitled access to tribal bank accounts required resolution of intra-tribal governance dispute, a matter within the tribe's retained inherent sovereign powers).

"obligation to the depositor is only to pay out an equal amount upon [the depositor's] demand or order . . . ." *Allied Fidelity*, 1995 OK 36, ¶ 10. As discussed by the Majority, the Bank received demands for the funds in the Tribal Accounts from the competing factions in this litigation. Although the district court continually maintained its lack of jurisdiction to decide intra-tribal matters, it concluded that it did have jurisdiction to decide the contractual relationship of the parties because the Tribes agreed with a State-chartered bank that "their relationship would be governed by state law." In doing so, the district court relied on *Bittle v. Bahe*, 2008 OK 10, 192 P.3d 810, cited by First Bank. After the district court's order in this case, *Bittle* was overruled. *Sheffer v. Buffalo Run Casino, PTE, Inc.*, 2013 OK 77, ¶ 50, 315 P.3d 359.

I. Tribal Immunity

The Cheyenne and Arapaho Tribes are recognized as Indian tribes by the federal government. 78 Fed. Reg. 26384-02 (May 6, 2013). Indian tribes are "distinct political communities." *Worcester v. Georgia*, 31 U.S. 515, 557, 6 Pet. 515 (1832). As such:

> [Indian tribes retain] "their original natural rights" in matters of local self-government. Although no longer "possessed of the full attributes of sovereignty," they remain a "separate people, with the power of regulating their internal and social relations."

Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55, 98 S. Ct. 1670, 1675 (1978) (internal citations omitted). In addition to self-governance, another aspect of the Tribes' sovereignty is a limited immunity from suit. "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." *Id.* at 58, 98 S. Ct. at 1677 (citing *Turner v. United States*, 248 U.S. 354, 358, 39 S. Ct. 109, 110 (1919)). *See also*, *United States v. United States Fid. & Guar. Co.*, 309 U.S. 506, 512-13, 60 S. Ct. 653, 656 (1940); *Puyallup Tribe, Inc. v. Washington Dep't of Game*, 433 U.S. 165, 172-173, 97 S. Ct. 2616, 2620-21 (1977). "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." *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754, 118 S. Ct. 1700, 1702 (1998). The doctrine of tribal immunity is "settled law" and requires dismissal of "any suit against a tribe absent congressional authorization (or a waiver)." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. ___, 134 S. Ct. 2024, 2030-31 (2014). None of the parties argues that Congress has authorized the Bank's suit against the Tribes. Therefore, the district court's jurisdiction over the Tribes is determined by whether the Tribes have waived their immunity from suit.

The guiding principle in deciding whether an Indian tribe voluntarily waived its immunity from suit in state court is well established. "[T]o relinquish its immunity, a tribe's waiver must be 'clear.'" *C&L Enters., Inc. v. Citizens Band*

Potawatomi Indian Tribe of Okla., 532 U.S. 411, 418, 121 S. Ct. 1589, 1594 (2001) (citing *Okla. Tax Comm'n v. Citizens Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509, 111 S. Ct. 905, 909 (1991)). First Bank supports its contention that the Tribes agreed to waive sovereign immunity by signing the Account Agreements pointing to language from the "Account Information" document for the Bank's commercial customers. Page 8 of the Account Information document contains the following:

> **AGREEMENT** – This document, along with any other documents we give you pertaining to your account(s), is a contract that establishes rules which control your account(s) with us. . . . If you sign the signature card or continue to use this account, you agree to these rules. . . . This 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). . . .[5]

First Bank justifiably argues that these two documents must be construed together, and together, they constitute the contract between the parties. "Several contracts

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[5] Although the Account Information document does not contain a signature block and is not signed, First Bank contends the Account Agreements, all of which are signed by Boswell for each of the Tribes' separate accounts, incorporate the Account Information document and this provision. The Bank's contention is well-founded. Boswell's Exhibits 1-A through GG contain copies of the Account Documents, and although these copies of the Account Agreements are not signed by Boswell, her name is typed in the signature area of each document. Further, Boswell's copies of the Account Agreements were identified by the Tribes' Treasurer as the "signature cards" for the Tribes' accounts at First Bank during the June 2012 trial. Finally, as First Bank points out, Boswell's exhibits purporting to constitute documentation of the Tribes' agreement with the Bank include a document titled "Terms and Conditions." The Terms and Conditions exhibits contain the identical language previously quoted from Page 8 of the Account Information document.

relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together." 15 O.S.2011 § 158.[6]

First Bank concludes that the agreement in the Account Documents to subject the parties' contract "to the laws of the State of Oklahoma" constitutes a waiver of sovereign immunity. There are two problems with this argument. First, it ignores the preceding phrase in the same sentence subjecting the parties' contract "to applicable federal laws." That would necessarily include the previously discussed federal law of tribal immunity and the manner in which that immunity can be waived.

The second problem concerns the scope of the parties' agreement evidenced by this language. The language may constitute an enforceable choice-of-law provision requiring, for example, resort to the Oklahoma's Uniform Commercial Code (12A O.S.2011 §§ 1-101 to 15-121), to resolve any presentment and payment disputes regarding the Bank's administration of the Tribes' accounts. *See Dean Witter Reynolds, Inc. v. Shear*, 1990 OK 67, 796 P.2d 296 (valid choice of New York law provision may be enforced in Oklahoma courts); *American Indian Agric. Credit Consortium, Inc. v. Standing Rock Sioux Tribe*, 780 F.2d 1374, 1379–81 (8th Cir.1985) (choice-of-law provision in promissory note without designating the forum in which the law chosen would be enforced was sufficient to invoke state

[6] We apply Oklahoma law in the construction of the parties' contract pursuant to the choice of Oklahoma law provision contained in the Account Documents.

law but insufficient to waive Indian tribe's sovereign immunity). However, with respect to any waiver of the Tribes' sovereign immunity, the Account Information document is merely silent. "To presume that a sovereign forever waives the right to exercise one of its sovereign powers unless it expressly reserves the right to exercise that power in a commercial agreement turns the concept of sovereignty on its head . . . ." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148, 102 S. Ct. 894, 907 (1982) (proper inference from silence regarding inherent attributes of sovereignty is that the sovereign power remains intact).

Finally, *C&L Enterprises*, on which First Bank relies, is distinguishable. The contract in that case included an enforceable choice-of-law provision selecting Oklahoma law to govern the contract. However, there was also a separate agreement to arbitrate the parties' disputes pursuant to Oklahoma arbitration law making the courts of Oklahoma courts of competent jurisdiction for the enforcement of an arbitration award. It was in the latter agreement, read with the choice-of-law provision, that the *C&L Enterprises* Court found an effective waiver with the "requisite clarity of the tribe's sovereign immunity." *C&L Enters.*, 532 U.S. at 418, 121 S. Ct. at 1594. The absence of an arbitration agreement in the Account Documents materially distinguishes this case from *C&L Enters.*

Even if First Bank's construction of the parties' contracts were correct and the language contained in the Account Documents constituted an effective waiver

of the Tribes' sovereign immunity, that would not resolve the jurisdictional issue. Any waiver of sovereign immunity would be effective only if Boswell had the authority to waive sovereign immunity on behalf of the Tribe. "It is a corollary to immunity from suit . . . that this immunity cannot be waived by officials." *United States v. United States Fid. & Guar. Co.*, 309 U.S. 506, 513, 60 S. Ct. 653, 657 (1940).[7] In *Dilliner v. Seneca-Cayuga Tribe of Oklahoma*, 2011 OK 61, 258 P.3d 516, the Supreme Court recognized this principle and held that authorization for a tribal official to sign a contract was not a waiver of sovereign immunity when tribal law reserved to the tribe's business committee authority to waive immunity:

> Courts have rejected equitable estoppel as a basis for waiver of tribal sovereign immunity on the grounds that unauthorized actions of officers and employees do not waive immunity or confer jurisdiction on a court in the absence of an express waiver, applying federal sovereign immunity principles to tribal sovereign immunity.

Id. ¶ 17 (citations omitted).

Therefore, only if Boswell had been properly delegated authority to waive the Tribes' sovereign immunity when she signed the Account Documents can the Tribes be sued by First Bank in Oklahoma state court. In my view, she was not, and it does not matter whether she was the lawful executive at the time. And,

[7] Resort to federal law of sovereignty is appropriate despite differences in governmental aspects of federal, state and local government sovereignty. "These differences, however, do not alter the principles for determining whether any of these governments has waived a sovereign power through contract, and we perceive no principled reason for holding that the different attributes of Indian sovereignty require different treatment in this regard." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148, 102 S. Ct. 894, 907 (1982).

because the Bank points to no account documents signed by any other tribal official in support of its waiver argument, it is not necessary to determine any tribal governance issue or wait for the Tribes to tell the district court who was the Governor at the time the Account Documents were signed. The Account Documents simply do not do what the Bank contends.

To conclude that Boswell did not have authority to waive the Tribes' sovereign immunity, it is first necessary to determine what law to apply. This is not a matter of federal law because the Bank does not rely on any purported waiver of the Tribes' immunity by Congressional action. Likewise, this is not a matter of state law, in my view, because there is no construction of the Account Documents that would show the parties intended to invoke Oklahoma law to resolve matters external to those contracts.[8] As the holding in *Dilliner* makes clear, if an Indian tribe has specified the manner in which its immunity can be waived, "tribal law controls the way sovereign immunity can be waived by the Tribe." *Dilliner*, 2011 OK 61, ¶ 18, 258 P.3d 516. The "sovereignty retained by tribes includes 'the power of regulating their internal and social relations,'" including "the power to

[8] In my view, jurisdictions that apply state agency law to determine the authority of the individual purporting to waive an Indian tribe's sovereign immunity independent of the tribe's consent to the application of state law, do so improperly. *See, e.g., Rush Creek Solutions, Inc. v. Ute Mountain Ute Tribe*, 107 P.3d 402 (Colo. Ct. App. 2004) (where tribal constitution was silent as to the method of waiving sovereign immunity and tribe's CFO was authorized to sign contracts, Indian tribe was bound by waiver in contract signed by CFO pursuant to state law principle of apparent authority).

make their own substantive law in internal matters." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 332, 103 S. Ct. 2378, 2385 (1983).

The dispositive tribal law is found in the Tribes' Constitution. Article II, § 2 of that Constitution establishes that the governmental power of the Tribes is divided into four branches: "Tribal Council, Legislative, Executive and Judicial." Section 3 of Article II provides: "No official of any branch of Government shall exercise any power granted in this Constitution or properly delegated by law to any other branch of Government except as expressly directed or permitted by this Constitution." The Executive Branch of the Tribes' government is established by Article VII of the Constitution and provides that the executive power of the Tribes is vested in the Governor. Among the powers specifically delegated to the Governor is "the power to negotiate and sign a contract . . . which has been previously authorized by the Tribal Council or Legislature." Tribes' Constitution, art. VII, § 4(d). The authority to independently waive sovereign immunity is not a power granted to the Tribes' Governor. In fact, the waiver of sovereign immunity is not mentioned in Article VII of the Tribes' Constitution.

The waiver of sovereign immunity is, however, specifically addressed in Article X of the Tribes' Constitution. Section 1 provides that only the Tribes' Legislature or Tribal Council may authorize a waiver of sovereign immunity. In addition, Section 1 sets out the manner in which those branches of the Tribes'

Government may execute their constitutional authority to waive the Tribes' sovereign immunity:

> 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.

Consequently, the sovereign immunity issue is determined in this case by whether: (1) the Tribal Legislature or the Tribal Council waived sovereign immunity in the manner required by Article X of the Tribes' Constitution; or (2) either entity authorized Boswell to sign the Account Documents as permitted by Article VII, § 4(d). Absent such authorization, Boswell was constitutionally prohibited from signing any contract that waived the Tribes' immunity. Tribes' Constitution, art. II, § 3.

There is no document in this record showing that either the Tribes' Legislature or its Tribal Council waived sovereign immunity with respect to the First Bank accounts. Further, to the extent that the Account Documents could be construed as containing a waiver of the Tribes' sovereign immunity, there is no document in this record by which either the Tribal Legislature or the Tribal Council approved of or authorized Boswell to sign the Account Documents, as required by Article VII of the Tribes' Constitution. As a matter of Tribal law: "No

contract shall be valid which has not been previously authorized by the Tribal Council or Legislature." *Id.* at art. VII, § 4(d). And, as the only Tribal Legislator to testify at trial stated: "We didn't waive sovereign immunity for [the First Bank] contract."

"[T]o relinquish its immunity, a tribe's waiver must be 'clear.'" *C&L Enters.*, 532 U.S. at 418, 121 S. Ct. at 1594. Here, we have just the opposite; a constitutionally specified procedure by which the Tribes' sovereign immunity can be waived and the absence of any evidence showing that procedure was followed. In my view, the Tribes' motion to dismiss and motion for summary judgment based on sovereign immunity should have been granted. *See Dilliner*, 2011 OK 61, 258 P.3d 516. That conclusion leads inevitably to the result reached by the Majority; the district court erred in assuming control of the Tribal Accounts.

II. Boswell's Immunity

Determining that the Tribes may not be sued in this litigation does not, however, resolve the Bank's claim against Boswell. In this appeal, the Bank asserts that independent of any tribal immunity Boswell's conduct is actionable because: (1) she is not protected by any tribal immunity; and (2) she exceeded the scope of her authority as the Tribes' Governor.

As a general rule, sovereign immunity precludes any suit against a government official if the relief sought could not be obtained in a suit brought

directly against the government. *See Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 69 S.Ct. 1457 (1949) (actions of government official within the officer's statutory authority cannot be enjoined or directed by the courts unless constitutionally void).

There are two exceptions to this general rule. First, a government officer acting within the scope of the officer's authority can be sued if the government did not have the authority to authorize the officer's action. *See Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441 (1908); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 98 S. Ct. 1670 (1978) (extending the *Ex parte Young* doctrine to Indian tribal officers). *Accord Tenneco Oil Co. v. Sac & Fox Tribe of Indians*, 725 F.2d 572, 576 n.1 (10th Cir. 1984) (McKay, J., concurring) (allegation that tribal officials acted pursuant to a law the tribe did not have power to enact required reversal of order granting tribal officials' motion to dismiss based on the tribe's sovereign immunity). Second, a government officer acting outside the officer's authority is not protected by the government's immunity. *Larson*, 337 U.S. at 686, 69 S. Ct. at 1460 (personal liability for government officer's actions, whether sounding in tort or in contract, is not precluded because the officer is an instrumentality of the sovereign).

However, where the officer acts outside the authority conferred on the office, the action must provide some independent basis for state court jurisdiction.

See Martinez, 436 U.S. at 59, 98 S. Ct. at 1677 (tribal official "is not protected by the tribe's immunity" if Congress authorizes the suit or independent ground for jurisdiction exists); *Puyallup Tribe, Inc. v. Washington Dep't of Game*, 433 U.S. 165, 97 S. Ct. 2616 (1919) (although tribe was immune, tribal members could be sued for violating state fishing laws). The United States Supreme Court "has never held" that individual agents or officers of a tribe are not liable for damages in actions brought by a state. *Okla. Tax Comm'n v. Citizens Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 514, 111 S. Ct. 905, 912 (1991) (tribal officials may be sued to collect legitimate state taxes).

The potential applicability of these exceptions cannot be determined from this appellate record. First, regardless of who was the lawful Governor, First Bank has not shown that the Tribes lacked authority to authorize someone to open bank accounts, sign the Account Documents, deposit and withdraw funds. Second, Boswell is not alleged to have committed any tort or breach of contract but is sued only in her "official capacity, if any." Further, the district court made no findings as to whether Boswell exceeded any authority she had to act on behalf of the Tribes in her dealings with the Bank. *See Evers v. FSF Overlake Assocs.*, 2003 OK 53, ¶ 18, 77 P.3d 581, 587 (appellate court on review will not make first-instance determinations of disputed law or fact issues). At this stage of the proceedings, First Bank has not shown some independent basis for state court

jurisdiction over Boswell. Therefore, I agree with the Majority; First Bank's claim against Boswell should be dismissed without prejudice.

February 23, 2015