

---

**IN THE SUPREME COURT OF THE STATE OF OKLAHOMA**

---

**LOYMAN COSSEY,**

Plaintiff/Respondent,

v.

**CHEROKEE NATION ENTERPRISES, L.L.C.**  
formerly known as **CHEROKEE NATION**  
**ENTERPRISES, INC.;** and  
**CHEROKEE NATION ENTERPRISES, INC.,**

Defendants/Petitioners.

**CASE NUMBER 105,300**

---

**RESPONSE BRIEF OF PLAINTIFF/RESPONDENT, LOYMAN COSSEY**

---

**Appeal from the District Court of Rogers County**  
**The Honorable Dynda Post, District Judge**  
**Rogers County Case Number CJ-2006-762**

---

Larry A. Tawwater, OBA No. 8852  
Darren M. Tawwater, OBA No. 18854  
**THE TAWWATER LAW FIRM, P.L.L.C.**  
One Leadership Square  
211 North Robinson, Suite 1950  
Oklahoma City, Oklahoma 73102  
Telephone: (405) 319-7300  
Facsimile: (405) 319-7350  
Email: dtaw@tawlaw.com  
**ATTORNEYS FOR PLAINTIFF/  
RESPONDENT**

**FEBRUARY 22, 2008**

**FILED**  
**SUPREME COURT**  
**STATE OF OKLAHOMA**  
**FEB 22 2008**  
**MICHAEL RICHIE**  
**CLERK**

INDEX

---

<b><u>SUPPLEMENTAL SUMMARY OF THE RECORD</u></b>	1
<hr/>	
<b><u>SUMMARY OF THE ARGUMENT</u></b>	2
<hr/>	
<i>Bittle v. Bahe</i> , 2008 OK 10, ---P.3d --- (mandate pending)	2
<hr/>	
3A O.S. § 281	3
<hr/>	
<b><u>ARGUMENT AND AUTHORITY</u></b>	4
<hr/>	
<b><u>PROPOSITION I:</u></b>	
<b>THE CHEROKEE NATION IS NOT A PARTY TO THIS SUIT. CHEROKEE NATION ENTERPRISES IS THE NAMED DEFENDANT AND IT MAY NOT ASSERT SOVEREIGN IMMUNITY.</b>	
<hr/>	
<b>A. Tribal gaming is extensive in Oklahoma.</b>	4
<hr/>	
<b>B. The Cherokee Nation will not pay a judgment rendered in this case.</b>	5
<hr/>	
<i>Diepenbrock v. Merkel</i> , 97 P.3d 1063 (Kan.App. 2004)	10
<hr/>	
<i>Dixon v. Picopa Constr. Co.</i> , 772 P.2d 1104 (Ariz. 1989)	9
<hr/>	
<i>Gallegos v. Pueblo of Tesuque</i> , 46 P.3d 668 (N.M. 2002)	10
<hr/>	
<i>Kizis v. Morse Diesel Int'l, Inc.</i> , 794 A.2d 498 (Conn. 2002)	10
<hr/>	
<i>Maxa v. Yakima</i> , 924 P.2d 372 (Wash. App. Div. III 1996)	6
<hr/>	
<i>Runyon v. Ass'n of Vill. Council Presidents</i> , 84 P.3d 437 (Alaska 2004)	7
<hr/>	

---

<i>Worrall v. Mashantucket Pequot Gaming Enterprise</i> , 131 F.Supp.2d 328 (D.Conn 2001)	11
--	----

---

**PROPOSITION II:**

<b>THE CHEROKEE NATION CONSENTED TO SUIT IN A COURT OF COMPETENT JURISDICTION. THIS WAS AN EXPLICIT WAIVER OF SOVEREIGN IMMUNITY.</b>	11
---	----

---

<b>A. The Compact does not support Defendant/ Petitioner's assertion of sovereign immunity.</b>	12
---	----

---

<b>B. The phrase "court of competent jurisdiction" does not mean "tribal court."</b>	14
--	----

---

3A O.S. § 280	14
---------------	----

---

<i>Ruth v. Westinghouse Credit Co., Inc.</i> , 373 F. Supp. 468 (W.D. Okl. 1974)	16
---	----

---

<i>Tyler v. Shelter Mut. Ins. Co.</i> , 2008 OK 9, --- P.3d --- (mandate pending)	15
--	----

---

<i>Wylie v. Chesser</i> , 2007 OK 81, 173 P.3d 64	15
---	----

---

25 U.S.C. § 1326	17
------------------	----

---

**PROPOSITION III:**

<b>CHEROKEE NATION ENTERPRISES AWAILED ITSELF OF OKLAHOMA LAW. IN SO DOING, IT WAIVED SOVEREIGN IMMUNITY.</b>	18
---	----

---

<b>A. Cherokee Nation Enterprises, Inc. is registered with the Oklahoma Secretary of State.</b>	18
---	----

---

18 O.S. § 1130	18
18 O.S. § 1134	18
18 O.S. § 1138	18
<b>B. Cherokee Nation Enterprises, Inc. converted to a Limited Liability Company.</b>	18
18 O.S. § 2003(1)	19
18 O.S. § 2042(B)	19
18 O.S. § 2048	19
18 O.S. § 2050	19
18 O.S. § 2059	19
<b>C. Pursuant to the Compact, Cherokee Nation Enterprises agreed to State regulation in the area of gaming.</b>	19
3A O.S. § 263	20
3A O.S. § 271	20
3A O.S. § 282	19
3A O.S. § 282(A)	20
3A O.S. § 282(B)	20

3A O.S. § 282(G)	20
<b>D. Cherokee Nation Enterprises has sought and received numerous alcoholic beverage licenses in Oklahoma.</b>	21
<b>E. Cherokee Nation Enterprises has availed itself of Oklahoma state courts as a plaintiff.</b>	21
<b><u>PROPOSITION IV:</u></b>	21
<b>TRIBAL SOVEREIGNTY IS NOT WITHOUT LIMITS.</b>	
25 U.S. C. § 2703	24
<i>Brendale v. Confederated Tribes and Bands of Yakima</i> , 492 U.S. 408, 109 S.Ct. 2994 (1989)	22
<i>Cherokee Nation v. Georgia</i> , 30 U.S. (5 Pet.) 1 (1831)	21
<i>Lumber Industry Fund v. Warm Springs Forest Products Industries</i> , 939 F.2d 683 (9 <sup>th</sup> Cir. 1991)	24
<i>Mescalero Apache Tribe v. Jones</i> , 411 U.S. 145, 93 S. Ct. 1267 (1973)	25
<i>Montana v. U.S.</i> , 450 U.S. 544, 101 S.Ct. 1245 (1981)	22
<i>San Manuel Indian Bingo &amp; Casino v. NLRB</i> , 475 F.3d 1306 (D.C. Cir. 2007)	22
<i>Wash. v. Confederated Tribes of Colville Indian Reservation</i> , 447 U.S. 134, 100 S.Ct. 2069 (1980)	22
<b><u>CONCLUSION</u></b>	25
<b><u>CERTIFICATE OF SERVICE</u></b>	27

Plaintiff/Respondent, Loyman Cossey, submits the following response in opposition to the Brief in Chief of Cherokee Nation Enterprises, L.L.C. formerly known as Cherokee Nation Enterprises, Inc. For the following reasons, the trial court's exercise of jurisdiction over this matter should be affirmed.

### **SUPPLEMENTAL SUMMARY OF THE RECORD**

On October 19, 2005, Plaintiff suffered a closed-heard injury when he fell in a casino owned and operated by Cherokee Nation Enterprises, Inc. (*Petition at ¶ 1*, Rec. Page 1; *Summary of Incident*, Rec. Page 172<sup>1</sup>.) On October 19, 2005, Plaintiff was given a "Tort Claims Procedure Packet" by representatives of Cherokee Nation Enterprises, Inc. (Tort Claims Procedure *Packet*, Rec. Page 223-24.) On January 27, 2006, Plaintiff filed a claim with the Cherokee Nation Enterprises, Inc. (*Claim against the Cherokee Nation Enterprises, Inc.*, Rec. Page 170-172.) The claim was served upon Cherokee Nation Enterprises, Inc. and not the Cherokee Nation Indian Tribe. (*Id.*) The claim was denied.

Cherokee Nation Enterprises, Inc. is not an Indian tribe – it is a corporate entity formed under the laws of the Cherokee Nation and registered with the State of Oklahoma as a foreign corporation. (*Certificate of Authority*, Rec. Page 1). After the incident giving rise to this lawsuit, Cherokee Nation Enterprises, Inc. was converted and changed its name to Cherokee Nation Enterprises, L.L.C. (hereinafter "The L.L.C."). (*Certificate of Conversion*, Rec. Page 41.) Both the corporation and limited liability entities are registered with the Oklahoma Secretary of State as foreign entities doing business in the State of Oklahoma. (*Certificate of Authority*, Rec. Page 1, 41.)

In November, 2004, the Cherokee Nation entered into a compact with the State of Oklahoma so the Tribe could operate Class III gaming machines in the State of Oklahoma. (*Compact*, Rec.

---

<sup>1</sup> Each citation to "Rec. Page" shall refer to the consecutive page numbers appearing at the bottom of the Record filed by Defendant/Petitioner.

Page 123-133; 201-220.)<sup>2</sup> The Compact articulated various obligations and requirements the Cherokee Nation must meet to operate a gaming facility in Oklahoma. *Id.* Included in the Compact were provisions related to disputes with patrons regarding payment of prizes and tort matters. *Id.* The Compact required the Cherokee Nation to, among other things; acquire \$250,000.00 in liability insurance for incidents that occur at the gaming facilities it operates. (*Compact at ¶ 6(A)(1)*, Rec. Page 201.) The Compact also stated that the Tribe consented to suit related to tort claims (*Compact at ¶ 6(C)*, Rec. Page 205) and its insurer would not assert tribal sovereign immunity as a defense in the case. (*Compact at Part 6(A)(3)*, Rec. Page 202.) The Tribe established a corporate entity to operate casinos. The L.L.C is the insured on the policy. (*Letter*, Rec. Page 225.)

#### **SUMMARY OF THE ARGUMENT**

The, L.L.C., *not the Cherokee Nation*, requests that this Court reverse the District Court of Rogers County which properly found it has jurisdiction over Plaintiff/Respondent's claim. The L.L.C. overlooks several important facts in its Brief in Chief.

1. the L.L.C. is not the Cherokee Nation. It is a separate corporate entity that does not receive sovereign immunity.
2. If immunity did attach to the L.L.C., such immunity was explicitly waived when the Tribe entered into the Tribal Gaming Compact (hereinafter "Compact") with the State of Oklahoma.
3. The L.L.C. also waived its sovereign immunity by registering with the State of Oklahoma as a Limited Liability Company by engaging in gaming and other activities regulated by the State of Oklahoma.

---

<sup>2</sup> The record filed by Defendant/Petitioner contains page numbers at the bottom of each page. The page numbers are, in places, out of order. Therefore, Plaintiff/Respondent will cite to all relevant pages in the record, even if out of order.

4. Even if the L.L.C. had not explicitly waived sovereign immunity in the Compact, it was waived by virtue of the reasons expressed in *Bittle v. Bahe*, 2008 OK 10, --- P.3d ---. The Court's decision in *Bittle* is instructive here. There, the Court held that an Indian tribe does not enjoy sovereign immunity from Dram Shop liability because it sought the State's permission to sell alcoholic beverages and, in so doing, agreed to be bound by Oklahoma law. *Id.* at ¶ 53. Both *Bittle* and the present case deal with negligence that occurred in an Indian casino.

What the L.L.C. seeks here is status of "super citizen", a notion specifically rejected in *Bittle*. *Id.* at ¶ 22. It claims immunity from State court jurisdiction, effected only by its internal regulations. The Court's rationale applies here. The L.L.C. is not a super citizen and is subject to the jurisdiction of the District Court of Oklahoma in claims such as the one presented in this case.

Oklahoma has a strong public interest in regulating tribal gaming within its borders. Cherokee Nation Enterprises agreed to the regulatory acts of this State, including the penalties, regulation and liability associated with operating casinos in Oklahoma. The Compact is a statutory creature; its requirements are found in 3A O.S. § 281 – the State-Tribal Gaming Act. Cherokee Nation Enterprises agreed to the terms of the Compact, and in so doing, consented to suit in Oklahoma courts.

The Compact was the result of a bargained exchange – the Tribe did not have to operate casinos in Oklahoma. It did, however, have to seek the State's approval if it wanted to operate Class III games in this State. In order to gain authority to operate casinos, the Tribe elected to enter into the Compact and enter into a Operating Agreement with the L.L.C. operate it.

The L.L.C. argues it is immune from suit in Oklahoma courts based on two provisions in the Compact. First, it claims to only have consented to suit in a "court of competent jurisdiction." (*Compact at Part C*, Rec. Page 205.) Second, it claims a "court of competent jurisdiction" can only

mean its tribal court because the Compact states “[t]his compact shall not alter tribal, federal or state civil adjudicatory or criminal jurisdiction.” (*Compact at Part 9*, Rec. Page 299.) This argument is contrary the intent of the Oklahoma Legislature as expressed in the State-Tribal Gaming Act. The language of the statute was not created in a vacuum. Rather, the Legislature’s intent can be gleaned from the plain language of the statute and its use throughout the Oklahoma statutes. The phrase “court of competent jurisdiction” appears hundreds of times in the Oklahoma statutes, yet never refers to a tribal court.<sup>3</sup> The trial court properly determined that the Compact waives tribal sovereign immunity up to the limits of liability insurance in the case. Therefore, its ruling should be affirmed.

### ARGUMENT AND AUTHORITY

#### PROPOSITION I:

#### **THE CHEROKEE NATION IS NOT A PARTY TO THIS SUIT. CHEROKEE NATION ENTERPRISES IS THE NAMED DEFENDANT AND IT MAY NOT ASSERT SOVEREIGN IMMUNITY.**

##### **A. Tribal gaming is extensive in Oklahoma.**

Tribal gaming is widespread in Oklahoma and the rest of the United States. Almost 3000 individuals in Oklahoma are employed by the L.L.C. as part of its gaming operation. (*Cherokee Casino Website*, Rec. Page 139.) Over 500,000 individuals nationwide are employed in the Indian gaming industry. In 2004, Indian gaming in the United States generated gross revenue of nearly \$19 billion. (*An Analysis of the Economic Impact of Indian Gaming in 2004*, Rec. Page 143.)

It cannot be questioned that tribal gaming is an expansive enterprise in Oklahoma. The L.L.C., and the other Indian gaming entities, have grown their gaming operations to such a degree that it is comparable in employment statistics to the housing industry and hospital industry in Oklahoma. In 2000, the Indian gaming industry employed nearly 3,900 people in Oklahoma. At

---

<sup>3</sup> Plaintiff/Respondent did not find a use of the phrase meaning “tribal court” in the Oklahoma Statutes.

the same time, the single family home industry employed 4,372 contractors and the petroleum products sector employed nearly 4,000 workers. (Grant, Spilde and Taylor, *Social and Economic Consequences of Indian Gaming in Oklahoma*, The Native Nations Institute for Leadership, Management and Policy, 2003.) Cherokee Nation Enterprises employees over 2,860 people throughout northeastern Oklahoma and had a payroll of over \$101 million in 2006. (*Cherokee Casino Website*, Rec. Page 139.)

The prevalence of tribal gaming, and the huge number of non-Indians solicited to participate, leads to the conclusion Indian tribes, and certainly not separate corporate entities, should not be protected from tort liability arising out gaming operations in Oklahoma. The L.L.C. contends it is, in effect, a super citizen not subject to the law in the same manner as other large employers in this State. The Compact and the law mandates otherwise.

**B. The Cherokee Nation will not pay a judgment rendered in this case.**

The Cherokee Nation was not named in this lawsuit. Rather, the L.L.C. is the Defendant. (*Petition*, Rec. Page 220.) The L.L.C. gives only 30% of net profit to the Cherokee Nation. (*Cherokee Casino Website*, Rec. Page 139.)<sup>4</sup> It operates in a separate fashion; it hires and fires its own employees and simply provides funds to the Cherokee Nation if a profit is made. *Id.* The distinction between the Tribe and the L.L.C. is relevant to the issue presented in this case. In *Bittle*, *supra*, the Court stated:

The tribal interests are confined to the Indian tribe's internal affairs and tribal self-government consistent with the tribe's dependent status because an Indian tribe's retained inherent sovereign power is no greater than the tribe's dependent status and does not extend to activities involving non-members absent express congressional delegation of power.

*Id.* at ¶ 16.

---

<sup>4</sup> The record does not contain information regarding the flow of cash from Cherokee Nation Enterprises to the Cherokee Nation. Cherokee Nation Businesses, L.L.C. is the sole member of the L.L.C. and may receive distribution of the gaming funds prior to the Tribe's portion of the profit.

It was unclear in *Bittle* whether there was a separate corporate entity formed to operate the casino. *Id.* at ¶ 4, fn. 1. However, the Court concluded sovereign immunity was waived nonetheless. *Id.* at ¶ 54. The Court also stated:

It is sovereignty that gives rise to the immunity from private suit in order to protect the dignity of the sovereign.

*Id.* at ¶ 22.

There is no evidence, and the argument has not been made, that the dignity of the sovereign will be tarnished through state court jurisdiction in this case. The “sovereign” is not a party and will not pay a judgment in this case.

In *Maxa v. Yakima* 924 P.2d 372 (Wash. App. Div. III 1996), a non-Indian employee sued a tribally-affiliated corporation for breach of employment agreement and promissory notes. *Id.* at 766. The Court found that the fuel delivery company engaged in transactions both on and off the reservation and was, therefore, subject to state court jurisdiction. *Id.* at 768-769. The Court also found that the state's interest was superior and held that “considering the State's interest in interpreting and enforcing contracts made with its citizens, and the negligible threat to tribal self-government, we find that the district court here had jurisdiction over the parties and the subject matter. *Id.*”

The Court can take judicial notice of the numerous advertising signs that line the highways of this State where the Indian tribes actively seek customers from outside the confines of Indian casinos or Indian tribes. Hardly a television or radio show goes by where a tribal casino is not advertised or the activity of the tribe is not self-promoted. Indian gaming in Oklahoma does not stop at the property line of the casinos. Tribal gaming is advertised and solicited throughout this State and draws a large number of customers who are not tribal members.<sup>5</sup>

---

<sup>5</sup> A good example of the reach of tribal gaming comes from the proposed \$400 million casino complex proposed to be built in Oklahoma City by the Shawnee Tribe.

In *Runyon v. Ass'n of Vill. Council Presidents*, 84 P.3d 437 (Alaska 2004), tort actions were brought against the Association of Village Council Presidents (AVCP) to recover for student's injuries stemming from the inadequate supervision of Head Start teachers. The ACVP was a nonprofit Indian-based organization which ran the local Head Start program, as well as a wide range of other traditionally governmental programs that served fifty-six tribal villages in the area.

The fact AVCP, not the tribes themselves, would be liable for any judgment proved dispositive. Recognizing the policy rationale behind sovereign immunity is "motivated in significant part by the need to ensure that tribal assets are used as the tribe wishes, without threat from litigation", the Court found AVCP was not entitled to the protection of the villages' sovereign immunity. *Id.* at 441.

In *Runyon*, the Court articulated a standard to be applied when determining whether a corporate entity formed by an Indian tribe is protected by sovereign immunity. The Court stated:

The entity's financial relationship with the tribe is therefore of paramount importance - if a judgment against it will not reach the tribe's assets or if it lacks the "power to bind or obligate the funds of the [tribe]," it is unlikely that the tribe is the real party in interest. If, on the other hand, the tribe would be legally responsible for the entity's obligations, it may be an arm of the tribe. In such a case other factors, relating to how much control the tribe exerts or whether the entity's work is commercial or governmental, may assist in the determination.

*Id.* at 440-41.

Here, there is nothing in the record to demonstrate a judgment in this case would reach the Cherokee Nation's assets or that the L.L.C. has the power to bind the resources of the Cherokee Nation. Indeed, the very purpose of forming a limited liability company is to insulate other

---

(newsok.com/article/3196433/1201196425)(accessed February 21, 2008). There, the Shawnee Tribe proposes to build a major casino nearly 200 miles from its tribal headquarters. Given the distance, it is unlikely the project will be staffed and patronized with a high percentage of tribal members. Rather, the operation will likely employ and cater to non-Indian residents of Oklahoma City.

individuals or entities from liability. The L.L.C. also has an insurance policy that was in force and effect on the date of Plaintiff's injury providing liability coverage to the L.L.C. (*August 16, 2006 Letter*, Rec. Page 225; *Compact at Part 6(1)*, Rec. Page 201.) This does not meet the test contemplated in *Runyon*.

The insurance policy is not the only mechanism insulating the Cherokee Nation from its casino operations. Cherokee Nation Business, L.L.C. formed the L.L.C. It also entered into an operating agreement with the L.L.C. The Agreement identifies the L.L.C as "Company" and Cherokee Nation Businesses, L.L.C. "Member." The Operating Agreement is contained in the record at Pages 16 to 37.

The Agreement states the "[m]ember shall not be personally liable for any debts, liabilities or obligations of the Company, whether arising in contract, tort, or otherwise, solely by reason of being a member of the Company." (*Operating Agreement at ¶ 7.1*, Rec. Page 21.) The following graphical depiction represents the layers of corporate structure involved:

TABLE 1.

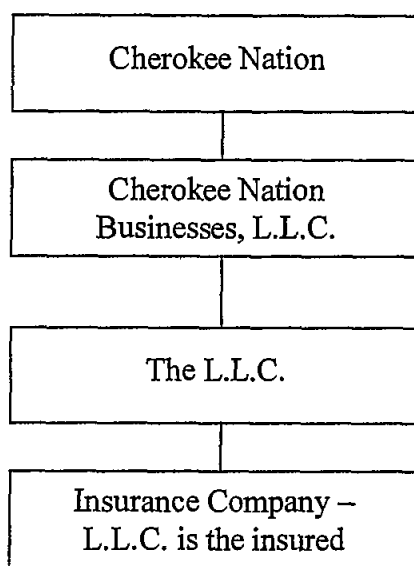


Table 1 demonstrates there are two layers of corporate structure and an insurance policy between a judgment in this case and the Cherokee Nation. The Operating Agreement also states

that the Company [The L.L.C.] is required to indemnify the Member [Cherokee Nation Businesses, L.L.C.] in the event of a third-party proceeding such as the present. (*Operating Agreement at ¶ 8.1, Rec. Page 32.*) Thus, there is nothing in the record to demonstrate Cherokee Nation could be responsible for paying a judgment in this case.<sup>6</sup> Therefore, tribal assets and sovereignty are not at issue in this motion.

The Court in *Runyon* also stated:

The tribes' use of the corporate form protects their assets from being called upon to answer the corporation's debt. But this protection means that they are not the real party in interest.

*Id.* at 441.

The L.L.C. is the named Defendant and real party in interest. The Enterprise was formed as separate corporate entity to operate casinos in Oklahoma. It is logical to assume these corporations were formed to provide the Tribe with the requisite protection associated with such entities.

In *Dixon v. Picopa Constr. Co.*, 772 P.2d 1104 (Ariz. 1989), a case cited by Defendant/Petitioner at page 24 of its brief, the plaintiff was injured in an accident involving a truck owned by a construction company incorporated by an Indian tribe. The accident occurred off-reservation and the plaintiff was not a tribal member. The Court held that the doctrine of sovereign immunity was “never meant to protect entities conducting non-tribal business” and that the activities in question were “independent of any activity connected with tribal self-government or the promotion of tribal interests.” *Id.* at 1109. The Court focused on the fact that the tribe would not be subject to a judgment in the case. *Id.* Rather, the purchase of general liability insurance covering the construction company’s negligence and a limited liability clause contained in the corporation’s charter insulated the Community’s assets from construction company’s debts. The Court concluded

---

<sup>6</sup> Defendant/Petitioner placed nothing in the record to demonstrate, and has not argued, that a judgment in this case would be paid by the Cherokee Nation.

that the purchase of liability insurance is evidence that the Community expected its construction company to be liable for its torts.” *Id.* at 1110.

The Court stated:

Tribal sovereign immunity does not apply to individual Indians, but only to Indian tribes and their subordinate economic organizations. Here the Community created an artificial individual, a corporation, and charged it with all the power to act “to the same extent as natural persons might or could do . . . .” No extrinsic evidence shows that this corporation was intended to act or did act as an extension of tribal government. This artificial individual is not, therefore, a subordinate economic organization and is not entitled to assert the tribal immunity defense.

*Id.* at 1111 (internal citations omitted).

Like the defendant corporation in *Dixon*, the L.L.C. in this case carries liability insurance that is required by the Compact. And, like the defendant corporation in *Dixon*, the L.L.C. here is an artificial individual that is not a subordinate economic organization and therefore not entitled to assert tribal immunity. The L.L.C. is a vehicle the Tribe chose to operate its casinos while insulating itself from liability. The L.L.C. is not the Tribe and cannot enjoy the Tribe’s immunity.

**PROPOSITION II:**

**THE CHEROKEE NATION CONSENTED TO SUIT IN A COURT OF COMPETENT JURISDICTION THEREBY EXPLICITLY WAIVING SOVEREIGN IMMUNITY.**

The L.L.C. does not enjoy sovereign immunity and may be sued in State court. Assuming, *arguendo*, it could somehow assert tribal sovereign immunity, it would be subject to the jurisdiction of Oklahoma courts. The Cherokee Nation and the L.L.C. consented to suit regarding tort claims, prize claims and disputes under the Compact. The Rogers County District Court correctly ruled it has jurisdiction over this matter.

**A. The Compact does not support Defendant/Petitioner's assertion of sovereign immunity.**

The Compact established various rights and obligations the Cherokee Nation must meet in order to operate gaming facilities in Oklahoma. The Compact states in pertinent part:

- A. Tort claims. The enterprise shall ensure that patrons of a facility are afforded due process in seeking and receiving just and reasonable compensation for a tort claim for personal injury or property damage against the enterprise arising out of incidents occurring at a facility, hereinafter "tort claim", as follows:
1. During the term of this Compact, the enterprise shall maintain public liability insurance for the express purpose of covering and satisfying tort claims. The insurance shall have liability limits of not less than Two Hundred Fifty Thousand Dollars (\$250,000.00) for any one person and Two Million Dollars (\$2,000,000.00) for any one occurrence for personal injury, and One Million Dollars (\$1,000,000.00) for any one occurrence for property damage, hereinafter the "limit of liability", or the corresponding limits under the Governmental Tort Claims Act, whichever is greater. No tort claim shall be paid, or be the subject of any award, in excess of the limit of liability;
  2. The tribe consents to suit on a limited basis with respect to tort claims subject to the limitations set forth in this subsection and subsection C of this Part. No consents to suit with respect to tort claims, or as to any other claims against the tribe shall be deemed to have been made under this Compact, except as provided in subsections B and C of this Part;
  3. *The enterprise's insurance policy shall include an endorsement providing that the insurer may not invoke tribal sovereign immunity in connection with any claim made within the limit of liability if the claim complies with the limited consent provisions of subsection C of this Part. Copies of all such insurance policies shall be forwarded to the SCA;*

\* \* \* \* \*

*(Compact at Pages 10-11, Rec. Page 13-14.)*(emphasis added).

The Compact states that the enterprise shall be subject to suit, and its insurance company is estopped from asserting sovereign immunity, so long as the notice provisions in the Compact are followed. *Id.* It is undisputed in this case that Plaintiff/Respondent complied with the notice provisions contained in the Compact. *(Defendant/Petitioner's Opening Brief at page 4.)* Once the provisions are met, the Compact states:

9. A judicial proceeding for any cause arising from a tort claim may be maintained in accordance with and subject to the limitations of subsection C of this Part only if the following requirements are met:

- a. the claimant has followed all procedures required by this Part, including, without limitation, the delivery of a valid and timely written tort claim notice to the enterprise,
- b. the enterprise has denied the tort claim, and
- c. the claimant has filed the judicial proceeding no later than the one-hundred-eightieth day after denial of the claim by the enterprise; provided that neither the claimant nor the enterprise may agree to extend the time to commence a judicial proceeding, and . . .

*(Compact at Page 12, Rec. Page 203.)*

The Compact also states:

- C. The tribe consents to suit against the enterprise in a court of competent jurisdiction with respect to a tort claim or prize claim if all requirements of paragraph 9 of subsection A or all requirements of paragraph 11 of subsection B of this Part have been met; provided that such consent shall be subject to the following additional conditions and limitations . . . .

*(Compact at Part 6(C), Rec. Page 205.)*

The Compact articulates a system by which the L.L.C. may be sued for tort claims.<sup>7</sup> The Compact utilizes the term “court of competent jurisdiction,” yet does not define the term. Defendant/Petitioner argues that a later provision in the Compact – Part 9 – demonstrates waiver of sovereign immunity is not contemplated by the Statute. The provision upon which Defendant/Petitioner relies states:

This Compact shall not alter tribal, federal or state civil adjudicatory or criminal jurisdiction.

*(Compact at Part 9, Rec. Page 299.)*

---

<sup>7</sup> The L.L.C. cites a portion of the Compact that requires that a claimant is afforded Due Process. The Constitution of the Cherokee Nation, tribal rules and tribal ordinances are not contained in the record. Therefore, it is impossible to determine whether Due Process is afforded a non-tribal member in tribal court. The absence of these documents from the record leaves many unanswered questions. For example, is a non-tribal member guaranteed a trial by jury in tribal court for claims in excess of \$1,500.00 just as he is in Oklahoma state court pursuant to Oklahoma Constitution, Article 2, Section 19? The answer is not ascertainable from the record in this case.

The language does not support the conclusion the L.L.C. is immune from suit in this case. The Compact, through the language identified above, waives sovereign immunity to the extent liability insurance is available to protect the Cherokee Nation. Such coverage is present in this case.

**B. The phrase “court of competent jurisdiction” does not mean “tribal court.”**

The L.L.C. argues it is a sovereign entity which cannot be sued except where Congress permits such a suit or where the Tribe waives its immunity. It also argues that the Compact does not alter its status as a sovereign entity and, therefore, “court of competent jurisdiction” cannot mean the courts of Oklahoma. L.L.C. is the real party in interest and it acknowledges that tribal sovereign immunity may be waived by a tribe. In this case, the waiver was explicitly provided for in the Compact.

Pursuant to Subsection C of the Compact, the Cherokee Nation “consents to suit against the Enterprise in a court of competent jurisdiction with respect to a tort claim.” (*Compact at Page 14, Pl. App. 14.*) A “court of competent jurisdiction” carries a specific legal connotation in terms of where a suit may be initiated. *Black’s Law Dictionary* 4<sup>th</sup> Edition (1968) defines a “court of competent jurisdiction” as “a court having the power and authority of law to determine the question in controversy.” The trial courts of this State fit within the simple definition of the phrase. However, the dictionary is not all that exists to aid in resolving the phrase’s meaning.

The language of the model compact approved by the Oklahoma Legislature for use in Indian gaming matters is contained in 3A O.S. § 280. The language of the Compact is statutory; it was drafted and passed by the Legislature. It is an “offer” to Indian tribes creating a mechanism by which the tribes may operate gaming in Oklahoma. *Id.* The offer did not have to be accepted by the tribes. Rather, a tribe could reject the offer and opt not to operate gaming in Oklahoma. The Cherokee Nation elected to participate in tribal gaming and entered into the Compact. Cherokee

Nation Enterprises is, therefore, bound by the statutory meaning of the phrase “court of competent jurisdiction.”

A search of the Oklahoma statutes reveals that the phrase “court of competent jurisdiction” appears at least 539 times<sup>8</sup>. Plaintiff/Respondent’s research did not locate a use of this phrase by the Legislature referring to tribal court.

In *Wylie v. Chesser*, 2007 OK 81, 173 P.3d 64, 71, the court stated:

The primary goal of statutory construction is to ascertain and follow the intention of the Legislature. If a statute is plain and unambiguous and its meaning clear and no occasion exists for the application of rules of construction a statute will be accorded the meaning expressed by the language used. However, where a statute is ambiguous or its meaning uncertain it is to be given a reasonable construction, one that will avoid absurd consequences if this can be done without violating legislative intent. Further, the Legislature will not be presumed to have done a vain and useless act in the promulgation of a statute, nor will an inept or incorrect choice of words be applied or construed in a manner to defeat the real or obvious purpose of a legislative enactment.

*Id.*

In *Tyler v. Shelter Mut. Ins. Co.*, 2008 OK 9, ¶ 12, --- P.3d --- (mandate pending), the Court described statutory interpretation as follows:

In determining whether a statute applies to a given set of facts, we focus on legislative intent which controls statutory interpretation. Intent is ascertained from the whole act in light of its general purpose and objective considering relevant provisions together to give full force and effect to each. The Court presumes that the Legislature expressed its intent and that it intended what is expressed.

*Id.* at ¶ 12.

Against this backdrop, the Legislature’s use of the phrase “court of competent jurisdiction” should be interpreted consistently with the use of the phrase throughout the Oklahoma statutes.

---

<sup>8</sup> The phrase may occur more frequently. However, the electronic manner in which Plaintiff/Respondent researched this issue revealed that the phrase appears 539 times in the Oklahoma statutes.

Thus, a “court of competent jurisdiction” includes State courts – something a sophisticated corporate entity like the L.L.C. knew when it entered into the compact.

In *Ruth v. Westinghouse Credit Co., Inc.*, 373 F. Supp. 468 (W.D. Okl. 1974), the Court addressed whether a state court was a “court of competent jurisdiction” to hear a cause of action based on a federal statute. The Court stated:

The Courts have uniformly held that a state court is a ‘court of competent jurisdiction’ in which an action may be brought to enforce liability imposed by a federal statute.

*Id.*

The Court noted that it would be illogical for Congress to draft a statute creating a cause of action and using the phrase “court of competent jurisdiction” while limiting the reach of the statute to federal courts. *Id.* The same is true here. If, as the L.L.C. argues, the Compact was intended to limit tort claims to tribal court, the Compact could easily have expressed such intent by replacing “court of competent jurisdiction” with “tribal court.” The Oklahoma Legislature did not use such language; it used a term it had used hundreds of time before. There can be no doubt that at the time the Legislature drafted the language for the model compact it clearly meant “court of competent jurisdiction” to include courts of this State.

Contained in the Compact is also a waiver of sovereign immunity as to issues arising under the Compact. Part 12(3) states:

Notwithstanding any provision at law, either party to the Compact may bring an action against the other in a federal district court for the de novo review of any arbitration award under paragraph 2 of this Part. The decision of the court shall be subject to appeal. Each of the parties hereto waives immunity and consents to suit therein for such limited purposes, and agrees not to raise the Eleventh Amendment to the United States Constitution or comparable defense to the validity of such waiver.

(*Compact at Part 12(3)*, Rec. Page 216.)

This portion of the Compact dispels Defendant/Petitioner's suggestion (and *Amici*) that the Compact does nothing to alter state and tribal civil adjudicatory jurisdiction. This provision of the Compact clearly states that both the State and the Tribe consent to suit in federal court. If, as the L.L.C. argues, the Compact did nothing to change jurisdiction, this Part of the statute/Compact is rendered meaningless.

Finally, the L.L.C. argues at page 16 of its Brief in Chief that the consent of the members of a tribe is necessary to confer civil adjudicatory jurisdiction on the state courts of Oklahoma. Defendant/Petitioner cites 25 U.S.C. § 1326 for this proposition. The statute was not cited and this argument was not made in the trial court. There is nothing in the record to demonstrate consent was not, in fact, given. The record does, however, contain the Compact which speaks to tribal authority. Part 16 of the Compact states:

This Compact, as an enactment of the people of Oklahoma, is deemed approved by the State of Oklahoma. No further action by the state or any state official is necessary for this Compact to take effect upon approval by the Secretary of the Interior and publication in the Federal Register. *The undersigned tribal official(s) represents that he or she is duly authorized and has the authority to execute this Compact on behalf of the tribe for whom he or she is signing.*

*(Compact at Part 16, Rec. Page 219)(emphasis added).*

The signatory for the Tribe represented that he had the authority to enter into the Compact – a document that contained at least two explicit waivers of sovereign immunity. If he did not, in fact, have the authority to sign the Compact it is void and the L.L.C.'s operation of class III gaming machines in Oklahoma is illegal.

### **PROPOSITION III:**

**CHEROKEE NATION ENTERPRISES AVOIDED ITSELF OF OKLAHOMA LAW.  
IN SO DOING, IT WAIVED SOVEREIGN IMMUNITY.**

Even if the L.L.C. were somehow entitled to immunity and even if that immunity had not been explicitly waived in the Compact, it would have no immunity in light of the Court's recent

decision in *Bittle, supra*. In *Bittle*, as in the present case, the complained of activity occurred in an Indian casino. In *Bittle*, the Court concluded the application for a liquor license prevented the casino from asserting immunity for Dram Shop liability. In the present case, the L.L.C. has likewise taken several actions that, applying the rationale of *Bittle*, would prevent the L.L.C. from asserting immunity in this case.

**A. Cherokee Nation Enterprises, Inc. is registered with the Oklahoma Secretary of State.**

On June 25, 2005, Cherokee Nation Enterprises, Inc. registered with the State of Oklahoma. (*Certificate of Authority*, Pl. App. 1.). In so doing, Cherokee Nation Enterprises, Inc. knowingly subjected itself to the laws of the State of Oklahoma. 18 O.S. § 1130 states:

A foreign corporation, upon receiving a certificate from the Secretary of State, shall enjoy the same rights and privileges as, but not greater than, a corporation organized under the laws of this state for the purposes set forth in the statement filed by the corporation with the Secretary of State pursuant to which such certificate is issued and, except as otherwise provided in the Oklahoma General Corporation Act, *shall be subject to the same duties, restrictions, penalties and liabilities now or hereafter imposed upon a corporation organized under the laws of this state with like purpose and of like character.*

18 O.S. § 1130(emphasis added).

The State regulates foreign corporations in various ways. For example, 18 O.S. § 1134 establishes a fine for failing to register with the Secretary of State. *Id.* 18 O.S. § 1138 explicitly grants the courts of this State jurisdiction to enjoin foreign corporations from transacting business in this State if it did not comply with the Title 18 registration requirements. *Id.*

**B. Cherokee Nation Enterprises, Inc. converted to a Limited Liability Company.**

On July 20<sup>th</sup>, 2006, Cherokee Nation Enterprises, Inc. applied for registration as a foreign limited liability company with the Oklahoma Secretary of State. Such status was granted and the L.L.C. was formed. (*Certificate of Conversion*, Rec. Page 175.) Oklahoma law is clear regarding the non-preferential status that such companies are afforded:

A foreign limited liability company holding a valid registration in this state shall have no greater rights and privileges than a domestic limited liability company. The registration shall not be deemed to authorize the foreign limited liability company to exercise any of its powers or purposes that a domestic limited liability company is forbidden by law to exercise in this state.

18 O.S. § 2042(B).

A foreign limited liability company appoints the Office of the Secretary of State as its agent for service of process with respect to a cause of action arising out of the transaction of business in this State. 18 O.S. § 2048. The Attorney General is authorized to maintain an action against a foreign limited liability company to restrain it from transacting business in Oklahoma. 18 O.S. § 2050. 18 O.S. § 2059 grants the district courts of this State jurisdiction to enforce the provisions of the Oklahoma Limited Liability Company Act. *Id.*

The Oklahoma statutes establish a system by which the State may regulate foreign limited liability companies. The Act was established by the Oklahoma Legislature in 1992 and effective in September of that year. 18 O.S. §§ 2048, 2050 & 2059. The Compact was signed by the Tribe on November 2004 (Rec. App. At 219) and Cherokee Nation Enterprises converted to a Limited Liability Company in July 2006 (Rec. Page 175.) The Oklahoma Limited Liability Act states that a limited liability company may “sue, be sued, complain and defend in all courts.” 18 O.S. § 2003(1). The L.L.C. was undoubtedly aware, as a sophisticated business entity, of the significance of registering as a limited liability company in Oklahoma. It unequivocally agreed that it may sue or be sued in “all courts.” *Id.* Its position here is inconsistent with the duties and obligations arising out of Title 18 and its registration as a limited liability company in Oklahoma.

**C. Pursuant to the Compact, Cherokee Nation Enterprises agreed to State regulation in the area of gaming.**

The Oklahoma statutes provide various mechanisms by which the State regulates tribal gaming. *See, e.g.*, 3A O.S. § 282. Subsection A grants the Oklahoma Horse Racing Commission

the authority to charge \$50,000 to each applicant seeking the State's permission to operate gaming pursuant to the State-Tribal Gaming Act. 3A O.S. § 282(A). The Oklahoma Horse Racing Commission is also granted the authority to charge an additional fee to gaming applicants sufficient to cover the costs of regulating gaming in Oklahoma. 3A O.S. § 282(B). The statute establishes various fees the Oklahoma Horse Racing Commission may charge for licenses related to gaming in Oklahoma. 3A O.S. § 282(G).

Title 3A also establishes a system of revenue payments to the State for gaming operations (3A O.S. § 263) and Section 271 establishes minimum standards for electronic amusement games. Other provisions of the State-Tribal Gaming Act establish other thresholds or standards gaming operations must meet in order to receive the State's permission to conduct gaming in Oklahoma.

The Court in *Bittle* stated:

Thunderbird casino agreed to be bound by the laws of this state and thereby waived any immunity it may have had to suit in the Oklahoma courts including common law negligence for dram shop liability.

*Id.* at 53.

The sale of liquor in Oklahoma without a license is illegal. The operation of gambling devices is also illegal without being licensed and granted the authority to do so by the State. The parallels are sufficiently analogous to render *Bittle* controlling in this case. The Court also stated:

Like any other state-licensed commercial vendor operating a bar and serving alcoholic beverages for consumption on the premises, the Tribe is subject to the criminal and civil jurisdiction of the state courts and may be hailed into state court to answer allegations that it furnished alcoholic beverages to a noticeably intoxicated customer.

*Id.* at 55.

The regulation of gaming in Oklahoma is analogous to the regulation of alcoholic beverages. Both require permission of the State to do something that is otherwise illegal. The result in this case is more compelling in light of the Tribe's explicit waiver of sovereign immunity.

**D. The L.L.C. has sought and received numerous alcoholic beverage licenses in Oklahoma.**

The L.L.C. applied for, and received, numerous alcoholic beverage licenses in Oklahoma. In Sequoyah County alone the L.L.C. applied for, and received, seven beverage licenses. (Sequoyah County District Court Case Numbers: BV-06-18, BV-06-21; BV-06-22; BV-06-23; BV-06-24; BV-06-30 and BV-06-32; Oklahoma Supreme Court Network, Non-OCIS Counties Docket System accessed February 21, 2008.) In Rogers County there are too many to list. This serves as additional evidence the L.L.C. subjected itself to the regulation and laws of the State of Oklahoma.

**E. Cherokee Nation Enterprises has availed itself of Oklahoma state courts as a plaintiff.**

The L.L.C. has appeared numerous times as a plaintiff in the District Courts of Oklahoma County. For example, the L.L.C. is the named Plaintiff in an action filed in the Rogers County District Court – the very Court from which it now appeals. (*Docket Sheet*, Rec. Page 167-69.) It makes little sense that a corporate entity registered with the State of Oklahoma as a limited liability company may sue in Oklahoma courts, but at the same time claim it is also immune from suit in those same courts. Fundamental fairness prohibits such a result.

**F. The L.L.C.'s cases are distinguishable.**

In its brief, Defendant/Petitioner cites *Kizis v. Morse Diesel Int'l, Inc.*, 794 A.2d 498 (Conn. 2002), for the proposition tribal sovereign immunity applies in this case. In *Kizis*, the Gaming Authority for the Mohegan Tribe of Indians of Connecticut was sued. *Kizis* is easily distinguishable from the present case because the Cherokee Nation was not sued. The same distinction exists in other cases cited by Defendant/Petitioner, including *Gallegos v. Pueblo of Tesuque*, 46 P.3d 668 (N.M. 2002).

Defendant/Petitioner also cited *Diepenbrock v. Merkel*, 97 P.3d 1063 (Kan.App. 2004), in its brief. The language of the compact in that case was described by the Court as follows:

The Potawatomi compact gives the tribe civil jurisdiction over Indians and non-Indians for “all transactions or activities which relate to Class III gaming on the Reservation.” Tribal State Gaming Compact, Section 14(a) (1995). Moreover, the tribe is treated as if it were the State for “[t]ort claims arising from alleged injuries to patrons of the Tribe’s gaming facilities.” Compact, Section 3(D).

*Id.* at 105.

The compact in Kansas specifically states that the tribe has civil jurisdiction over Indians and non-Indians for all transactions or activities related to Class III gaming. *Id.* The Oklahoma Legislature could have utilized similar language in 2004 – nine years after the Kansas compact was codified, but it did not.

The L.L.C. also cited several cases on page 23 of its brief for the proposition sovereign immunity extends to tribal entities. These cases generally deal with tribal “agencies” and not separately formed corporations like the L.L.C. Included in the cases cited by Defendant/Petitioner was *Worrall v. Mashantucket Pequot Gaming Enterprise*, 131 F.Supp.2d 328 (D.Conn 2001). The case was cited for the proposition that an Indian casino is a tribal agency deserving of sovereign immunity. The Court in *Worrall*, however, cited several cases that recognized the distinction between a tribe and a separately formed tribal corporation. *Id.* at 329-30. The Court also found that a judgment in that case would presumably be paid by the tribe. *Id.* at 330. That is not true in this case.

#### **PROPOSITION IV:**

##### **TRIBAL SOVEREIGNTY IS NOT WITHOUT LIMITS.**

The L.L.C. takes the untenable position that the Cherokee Nation, and all its corporate entities, are completely shielded from liability and judgment in state courts. The L.L.C.’s argument is contrary to this Court’s decision in *Bittle* and other cases addressing the issue.

The United States Supreme Court declared in 1831 that an Indian tribe is “not a state of the Union.” *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 15 (1831). The Court has further clarified

the limited nature of tribal sovereignty. It describes a tribe's status as below that of an individual state holding its retained sovereignty. The extent and limits of tribal sovereignty and sovereign immunity are therefore provided by common law, statutes and documents like the Compact discussed above. These limits have been established through various court decisions and tribal sovereignty is now recognized as divested "to the extent it is inconsistent with the tribe's dependant status" or "involves a tribe's relations with nonmembers of the tribe." *Brendale v. Confederated Tribes and Bands of Yakima*, 492 U.S. 408, 428, 109 S Ct. 2994 (1989).

In *Montana v. U.S.*, 450 U.S. 544, 564, 101 S.Ct. 1245 (1981), the Supreme Court found that "Indian tribes have lost many of the attributes of sovereignty." *Id.* The Court held that tribes did not have the civil authority to regulate wildlife gaming on reservation lands owned by non-Indians. An important factor in determining the extent of tribal sovereignty is whether there is a tradition of self-government in the area in question. If no tradition is found, or if it is determined that the balance of state, federal, and tribal interests so requires, the backdrop of tribal sovereignty will be accorded less weight. *Wash. v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 154-159 (1980).

This type of analysis was recently applied in *San Manuel Indian Bingo & Casino v. NLRB*, 475 F.3d 1306 (D.C. Cir. 2007). There, an Indian casino attempted to avoid application of the National Labor Relations Act to its business operations, relying on the argument that tribal sovereignty placed the tribe's commercial enterprises outside the scope of the National Labor Relations Board. The Court disagreed and noted that "an examination of Supreme Court cases show tribal sovereignty to be at its strongest when explicitly established by a treaty or when a tribal government acts within the borders of its reservation, in a matter of concern only to members of the tribe." *Id.* at 1312. "Conversely, when a tribal government goes beyond matters of internal self-

governance and enters into off-reservation business transactions with non-Indians, its claim of sovereignty is at its weakest.” *Id.* at 1313.

The San Manuel Tribe, like the L.L.C. in this case, argued their casino operation was a matter of self-governance. The Court rejected this argument and concluded that any activity of a tribal government could be considered “governmental”, but the term is meant to be used “in a restrictive sense to distinguish between traditional acts governments perform and collateral activities that, though perhaps in some way related to the foregoing, lie outside their scope.” *Id.* at 1313. While recognizing that “the principle of tribal sovereignty in American law exists as a matter of respect for Indian communities”, the Court distinguished this limited principle from one of “absolute autonomy” which would allow a tribe to “operate in a commercial capacity without legal constraint.” *Id.* at 1314. The Court stated:

*First, operation of a casino is not a traditional attribute of self-government. Rather, the casino at issue here is virtually identical to scores of purely commercial casinos across the country. Second, the vast majority of the Casino’s employees and customers are not members of the Tribe, and they live off the reservation. For these reasons, the Tribe is not simply engaged in internal governance of its territory and members, and its sovereignty over such matters is not called into question.*

*Id.* at 1315 (emphasis added).

Plaintiff/Respondent, like the majority of customers who patronize the 24,000 square foot casino the L.L.C. operates, is not a tribal member. The casino in question is not located on an Indian reservation to Plaintiff’s knowledge.<sup>9</sup> According to the National Park Service, the Cherokee Nation reservation is located in Cherokee County. ([www.nps.gov/history/nagpra/ DOCUMENTS/ RESERV.PDF](http://www.nps.gov/history/nagpra/DOCUMENTS/RESERV.PDF) (accessed February 20, 2008)). The casino is located in Roland, Oklahoma, which is in Sequoyah County.

---

<sup>9</sup> There is nothing in the record to demonstrate the casino in this case is situated on the Cherokee reservation.

The Indian Gaming Regulation Act, 25 U.S.C. § 2703, defines “Indian Country” as follows:

The term “Indian lands” means--

- (A) all lands within the limits of any Indian reservation; and
- (B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power.

25 U.S.C. 2703.

There is nothing in the record to demonstrate the status of the land upon which the casino at issue in this case rests. The L.L.C. argues, by implication, that the Compact required gaming operations to be in Indian Country and, therefore, it was. While the Compact may state as much, there is nothing in the record to demonstrate the provision was one with which the Tribe complied. Regardless, the casino is an off-reservation business enterprise whose customers are largely non-Indian.

In *Lumber Industry Fund v. Warm Springs Forest Products Industries*, 939 F.2d 683 (9th Cir. 1991), a pension fund brought action to recover pension contributions from a tribally owned and operated sawmill. The tribe argued that the operation of the sawmill was an integral part of their self-governance. The court noted that the tribe was free to form and operate a pension plan and free to transfer its employees to the plan at the end of the collective bargaining agreement. However, by transferring its employees to the tribal plan before the bargaining agreement’s expiration, the tribe exposed itself to liability for unpaid contributions. In allowing the suit to go forward, the court noted that it would “subject the mill to possible liability for money damages, but will not usurp the tribe’s decision-making process.” *Id.* at 685.

*NLRB and Lumber Industry* both involve the application of federal law to tribal activities. However, the Supreme Court also uses this reasoning to define the limits of tribal sovereignty when dealing with the applicability of state law.

In *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962), Alaska sought to apply its state law concerning certain fish traps operated by the Thinget Indians in non-reservation waters. After specifying several ways in which tribal sovereignty had given way to state interests, the Court concluded that even on reservations state laws may be applied to Indians unless such application would interfere with reservation self-government or impair a right granted or reserved by federal law.” *Id.* at 75. The Court concluded Alaska’s regulation of the tribe’s fishing rights was permissible. This principle was reaffirmed in *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 92 S.Ct. 1267 (1973).

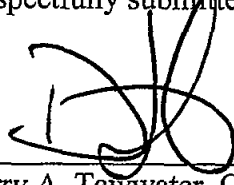
*Jones* involved a tribe that operated a ski resort outside their reservation, though contiguous with reservation land. New Mexico sought to impose a tax on the receipts of the resort. The Court again held that “State laws may be applied to the activities of Indians and tribes unless such application would interfere with reservation self-government or would impair a right granted or reserved by federal law.” *Id.* at 148.

The L.L.C. presented no evidence that the trial court’s exercise of jurisdiction would interfere with tribal self-government or impair a right granted to the Cherokee Nation. Therefore, Defendant did not meet its burden of demonstrating this Court is without jurisdiction to hear Plaintiff’s claim.

### CONCLUSION

The trial court correctly ruled it has jurisdiction over Plaintiff/Respondent’s claim and that ruling should be affirmed.

Respectfully submitted,



---

Larry A. Tawwater, OBA No. 8852  
Darren M. Tawwater, OBA No. 18854  
**TAWWATER LAW FIRM, P.L.L.C.**  
One Leadership Square  
211 North Robinson, Suite 1950  
Oklahoma City, OK 73102  
Telephone: (405) 319-7300  
Facsimile: (405) 319-7350  
**ATTORNEYS FOR PLAINTIFFS**

**CERTIFICATE OF SERVICE**

This is to certify that on the 22<sup>nd</sup> day of February, 2008, this document was sent via First

Class Mail, postage prepaid, to:


Straton Taylor  
Mark Ramsey  
Bradley Mallett  
**TAYLOR, BURRAGE, FOSTER,  
MALLET, DOWNS & RAMSEY**  
400 West Fourth Street  
Post Office Box 309  
Claremore, OK 74018

And

Diane Hammonds  
Attorney General of the Cherokee Nation  
Post Office Box 948  
Tahlequah, OK 74465  
**ATTORNEYS FOR DEFENDANT**

And

Candi Czapansky  
Rogers County Court Clerk  
219 South Missouri Street  
Claremore, Oklahoma 74017



---

Larry A. Tawwater  
Darren M. Tawwater