

Martha L. King, OBA # 30786
Thomasina Real Bird
FREDERICKS PEEBLES & MORGAN LLP
1900 Plaza Drive
Louisville, Colorado 80027
Telephone: (303) 673-9600
Facsimile: (303) 673-9155
mking@ndnlaw.com
trealbird@ndnlaw.com
*Attorneys for the Cheyenne and Arapaho
Tribes' Executive Branch*

**IN THE U.S. DISTRICT COURT FOR
THE WESTERN DISTRICT OF OKLAHOMA**

THE CHEYENNE AND ARAPAHO)	
TRIBES and THE CHEYENNE AND)	
ARAPAHO TRIBES' EXECUTIVE)	Case No.: 2:12-cv- <u>514-D</u>
BRANCH,)	
)	MEMORANDUM IN SUPPORT OF
<i>Plaintiffs,</i>)	MOTION FOR TEMPORARY
)	RESTRAINING ORDER AND
v.)	PRELIMINARY INJUNCTION
)	
FIRST BANK AND TRUST)	
COMPANY,)	
)	
<i>Defendant.</i>)	
)	

Plaintiffs, through counsel and pursuant to Rule 65 of the Federal Rules of Civil Procedure, respectfully submits this *Memorandum in Support of its Motion for Temporary Restraining Order and Preliminary Injunction.*

INTRODUCTION

Plaintiffs seek an immediate temporary restraining order, as well as a preliminary injunction, as Plaintiffs' accounts have currently been extra-judicially seized by

Defendant, and Plaintiffs' essential governmental services are put at risk.

STATEMENT OF FACTS

1. The Cheyenne and Arapaho Tribes is a federally-recognized Indian Tribe.
2. The Tribes maintain certain accounts appropriated by Congress to administer a variety of federal programs through the Indian Self-Determination Education and Assistance Act ("ISDEAA"); cash assets appropriated by the state of Oklahoma to administer a variety of state programs; and appropriated by the Tribes.
3. On April 24, 2012, at approximately 3:35 p.m., Defendant, by and through counsel, notified and emailed a copy of a "Notice of Administrative Freeze." *Notice of Administrative Freeze*, attached hereto as **Exhibit 1**.
4. That *Notice of Administrative Freeze* had the effect of freezing \$6,377,663.93 in federal, state, and tribal cash assets.
5. The cash assets are for provision of essential governmental services including: EMS, provision of funds for lifesaving drugs, home health care, and a place for homeless, abandoned children. Essential governmental services are more specifically described below and in the *Affidavit of LaRenda Morgan, Teresa Dorsett, Roberta Hamilton, Karen Little Coyote, Frank Sheridan, and George Bert*, attached hereto as **Exhibit 2 - Exhibit 7**.

ARGUMENT

The four criteria in deciding whether to issue a temporary injunction are: (1) applicant's likelihood of ultimate success on the merits; (2) irreparable harm to the applicant should the temporary injunction be denied; (3) the balance of equities tips in

applicant's favor; and (4) public policy supports issuance of injunctive relief. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); and *Smith v. Soil Conservation Serv.*, 563 F. Supp. 843, 844 (W.D. Okla. 1982). Even if a court finds that an applicant does not demonstrate a likelihood to succeed on the merits but satisfies other elements, a court may still grant preliminary relief so long as the application "raised questions going to the merits so serious, substantial, difficult and doubtful as to make them a fair ground for litigation and thus more deliberate investigation." *Lundgrin v. Claytor*, 619 F.2d 61, 63 (10th Cir. 1980) (citing *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 740 (2d Cir. 1953)).

A movant must establish four elements to obtain a preliminary injunction: (1) irreparable harm unless the injunction issues; (2) a substantial likelihood of success on the merits; (3) the injury to the movant outweighs the harm caused to the opposing party by issuance of the injunction; and (4) the injunction would not be contrary to the public interest. *Kiowa Indian Tribe of Oklahoma v. Hoover*, 150 F.3d 1163, 1171 (10th Cir. 1998).

A. Defendant Will Ultimately Succeed on the Merits

Defendant lacks authority to seize Plaintiffs' cash assets nor to deprive Plaintiffs' of their use or benefit of the cash assets, temporarily or permanently. The cash assets are derived from: Congress to administer a variety of federal programs through ISDEAA; the state of Oklahoma to administer a variety of state programs; and the Tribes' to administer the afore-mentioned programs.

Defendant does not have authority to extra-judicially employ a "nuclear weapon of

the law. It has no authority to "administratively freeze" Plaintiffs' funds. The unsigned document Defendant attached to its *Notice of Administrative Freeze* is not a document the Tribes have received. *Affidavit of Treasurer Cornell Sankey*, attached hereto as **Exhibit 8**. As such, there is simply no authority to seize Plaintiffs' cash assets. Even if that unsigned document was contractually binding on Plaintiffs, that document would not allow the seizure in this manner and for this duration. To restrict Plaintiffs' use is simply impermissible.

The cash assets that were frozen is in the amount of \$6,377,663.93. The cash assets are for provision of essential governmental services including:

- 24/7 emergency paramedic services;
- 24/7 "advanced pre-hospital services" with advanced level trained medics;
- 24/7 critical care transport;
- ground emergency medical service including first response and ambulatory service in western Oklahoma with the protocol to perform lifesaving techniques such as rapid sequence intubation as in the event of a heart, lung or liver failure;
- medical equipment including diabetic supplies, wheelchairs, oxygen machines, and blood pressure monitors;
- transport persons to dialysis, cardiology, podiatry, urology, and chemotherapy appointments;
- critical lifesaving drugs including insulin, high blood pressure medication, antibiotics, hypertension medication, as well as cancer medication;
- home health care services to the disabled and the bedridden;
- temporary shelters during emergencies;
- emergency response during disasters;
- firefighter services;
- repair to dams and watersheds;
- investigation and provision of adult protective services for those physically, emotionally, sexually, or financially abused and neglected;
- investigation and provision of child protective services for abused, neglected, or exploited children;
- substance abuse program services under Court order;
- substance abuse program services for those who are changing their lives;
- food, clothing, shelter assistance;

- a head start at education for children; and
- foster care placement for children that are homeless and in need of aid.

Affidavits, attached hereto as supra **Exhibit 2 - Exhibit 7**. Additionally, the above-referenced cash assets are for: already earned wages of the Tribes' employees; the Tribes' unemployment tax obligations; state income tax withholdings; and federal income tax, social security and Medicare withholding.

To allow Defendant to extra-judicially seize the Tribes' cash assets either temporarily or permanently is more egregious than that of a "nuclear weapon of the law," such as with pre-judgment injunctions. *Grupo Mexicano de Desarrolla v. Alliance Bond Fund*, 527 U.S. 308, 332 (1999) provided:

[Trial courts have] no authority to issue a preliminary injunction preventing defendants from disposing of their assets pending adjudication of plaintiff's contact claim for money damages.

Id. at 333. The rationale behind this rule is that "until a creditor has established title, he has no right to interfere with the debtor's property, and it would lead to "unnecessary, and perhaps, a fruitless oppressive interruption of the debtor's rights." *Id.* at 320.

Preventing Plaintiffs from using their cash assets for the above-referenced essential governmental services is an unconstitutional and oppressive interruption of Plaintiffs' rights, and Plaintiffs will ultimately succeed on the merits.

B. Plaintiff Will Suffer Irreparable Harm If the Temporary Injunctive Relief Sought is Denied

The next issue is whether or not Plaintiffs will suffer irreparable harm if relief is denied.

It is undisputed that Indian tribes possess sovereignty over its members and its territory. *See New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333 (1983). Any intrusion upon an Indian tribe's sovereignty constitutes irreparable injury as a matter of law. *Kiowa Indian Tribe of Okla. v. Hoover*, 150 F.3d 1163, 1171–72 (10th Cir. 1998); *Winnebago Tribe of Nebraska v. Stovall*, 216 F. Supp. 2d 1226, 1233 (D. Kan. 2002), *affirmed* 341 F.3d 1202 (10th Cir. 2003); *and EEOC v. Karuk Tribe Housing Authority*, 260 F.3d 1071, 1077 (2001).

In *Hoover*, a tribe brought an action against defendants pursuant to 42 U.S.C. § 1983, alleging that the defendants, some of whom had brought breach of contract actions against the tribe in state court, had deprived it of its rights, privileges and immunities secured by the Constitution, and deprived the tribe of its right to sovereign immunity. *Hoover*, 150 F.3d at 1168. The tribe also sought a preliminary injunction in the district court to enjoin defendants from seizing tribal property, *inter alia*. *Id.* The district court denied the tribe request for an injunction, determining that the plaintiff had not demonstrated irreparable injury. *Id.* The Tenth Circuit reversed. *Id.* at 1172.

On appeal, in pertinent part, the Tenth Circuit determined that, contrary to the district court's finding, the tribe established irreparable injury as a matter of law:

First, the seizure of tribal assets, including severance taxes owed to the Tribe, and the concomitant prohibition against full enforcement of tribal laws, significantly interferes with the Tribe's self-government. Second, the Tribe should not be compelled 'to expend time and effort on litigation in a court that does not have jurisdiction over them. The Tribe's full enjoyment of its sovereign immunity is irrevocably lost once the Tribe is compelled to endure the burdens of litigation.

Id. at 1171–72 (internal citations and quotations omitted).

Likewise, in *Winnebago Tribe of Nebraska v. Stovall*, the court determined that the mere fact that state defendants seized the tribe's assets, for the alleged violation of Kansas statutes, constitutes irreparable injury as a matter of law. 216 F. Supp. 2d 1226, 1233 (D. Kan. 2002). In that case, the tribe brought action and sought a preliminary injunction against officials of the state of Kansas, arising out of the State's attempt to enforce a Kansas statute. *Id.* at 1230. The tribe requested that the defendants return seized property. *Id.* The district court granted the request for preliminary injunction, finding, first, that the tribe had satisfied irreparable injury element:

The court finds that plaintiffs have demonstrated that they will suffer irreparable injury in that monetary damages will not be sufficient to undo the damage with which plaintiffs are currently faced. As noted by the court at the July 8, 2002 hearing, this is not a matter of how much capital will be lost if the injunction is not imposed. ***Instead, the issues concern the scope of tribal sovereignty, an issue that cannot be measured in dollars.***

Id. at 1233 (emphasis added).

Defendants appealed, and the Tenth Circuit affirmed. *Winnebago Tribe of Nebraska v. Stovall*, 341 F.3d 1202, 1206 (10th Cir. 2003). At the Tenth Circuit, defendants argued that the district court abused its discretion in granting the temporary restraining order and preliminary injunction. *Id.* at 1205. The Tenth Circuit rejected this contention, stating that, as to the irreparable injury element, the district court correctly determined that that element weighed in tribe's favor because more than economic damages were at stake. *Id.* at 1206. Defendant does not have authority to employ a "nuclear weapon of the law." It has no authority to "administratively freeze" Plaintiffs' funds. The unsigned document Defendant attached to its Notice of Administrative Freeze

is not a document the Tribes have received. *Affidavit of Treasurer Cornell Sankey*, attached hereto as *supra* **Exhibit 8**. Furthermore, it has no established right or title that has been established. To restrict Plaintiffs' use in the manner Defendant did is simply impermissible. *Id.* Also, the allegation of a violation of a constitutional right triggers a finding of irreparable injury because violations of constitutional rights are presumed irreparable. *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

The Tribes are also being injured by the seizure of its cash assets and the concomitant inability to provide the following essential governmental services including:

- 24/7 emergency paramedic services;
- 24/7 "advanced pre-hospital services" with advanced level trained medics;
- 24/7 critical care transport;
- ground emergency medical service including first response and ambulatory service in western Oklahoma with the protocol to perform lifesaving techniques such as rapid sequence intubation as in the event of a heart, lung or liver failure;
- medical equipment including diabetic supplies, wheelchairs, oxygen machines, and blood pressure monitors;
- transport persons to dialysis, cardiology, podiatry, urology, and chemotherapy appointments;
- critical lifesaving drugs including insulin, high blood pressure medication, antibiotics, hypertension medication, as well as cancer medication;
- home health care services to the disabled and the bedridden;
- temporary shelters during emergencies;
- emergency response during disasters;
- firefighter services;
- repair to dams and watersheds;
- investigation and provision of adult protective services for those physically, emotionally, sexually, or financially abused and neglected;
- investigation and provision of child protective services for abused, neglected, or exploited children;
- substance abuse program services under Court order;
- substance abuse program services for those who are changing their lives;
- food, clothing, shelter assistance;
- a head start at education for children; and
- foster care placement for children that are homeless and in need of aid.

Affidavits, attached hereto as supra **Exhibit 2 - Exhibit 7**. Similar to *Winnebago* and *Hoover*, more than economic damages are at stake in this case. The Tenth Circuit has affirmed that the State's seizure of tribal assets is an erosion of an Indian tribe's sovereignty, for which a tribe is irreparably injured as a matter of law. *Kiowa Indian Tribe of Oklahoma v. Hoover*, 150 F. 3d 1163, 1171 (10th Cir. 1998). For these reasons, the Court, in accord with the Tenth Circuit and prior decisions of this court, should find that the Tribe has been irreparably injured as a matter of law. The Tribes and the Executive Branch will suffer great irreparable harm if this Court fails to enjoin Defendant's "Administrative Freeze." The Tribe's sovereignty and its delivery of essential governmental services are damaged in a way that is not monetarily compensable.

C. **Defendant Will Not Suffer Irreparable Harm if this Court Issues the Temporary Injunctive Relief Requested**

The Oklahoma Supreme Court has held that "where issuance of the requested injunction will cause great injury to the defendant and will confer very little benefit upon complainant in comparison, it is proper to refuse an injunction especially when the right is doubtful" *Malnar v. Whitfield*, 708 P.2d 1093, 1095 (Okla. 1985). Further, [a]n injunction will not issue to protect a right not in existence and which may never arise, or to restrain an act which does not give rise to a cause of action." *Sunray Oil Co. v. Cortez Oil Co.*, 112 P.2d 792, 795 (Okla. 1941). Thus, a complainant is not necessarily entitled to an injunction if the alleged damage is nominal, theoretical, or speculative. *Id.* And as a

general rule, the complainant must establish an actual substantial injury against defendant an actual substantial injury. *Id.*

Defendant does not have authority to employ extra-judicially nuclear weapon of the law." It has no authority to "administratively freeze" Plaintiffs' funds. The unsigned document Defendant attached to its *Notice of Administrative Freeze* is not a document the Tribes have received. *Affidavit of Treasurer Cornell Sankey*, attached hereto as *supra* **Exhibit 8**. Furthermore, Defendant has no established right or title that has been established. To restrict Plaintiffs' use to the detriment of congressional intent and health, safety and welfare of the persons who receive program services is simply impermissible.

D. Public Policy Supports Issuance of Injunctive Relief

The public will not be harmed by issuance of the preliminary injunction, as set forth below. First, issuance of the injunction will halt Defendant's extrajudicial seizure of federal, state, and tribal funds used for essential governmental services. Furthermore, the public is not served by cessation of these essential governmental services.

The only consequence entering a preliminary injunction is that the Tribes will continue to provide essential governmental services with the federal, state and tribal funds, and uphold the express Congressional intent of having the programs being administered. The entry of an injunction restores the federal regulatory regime that Defendant has illegally infringed upon. Indeed, the entry of an injunction against Defendant is the only way to serve the public interest in this case. Any other decision condones illegal conduct by Defendant, and there can be no legitimate public interest in such a ruling.

CONCLUSION

The Tenth Circuit has affirmed that the State's seizure of tribal assets is an erosion of an Indian tribe's sovereignty, for which a tribe is irreparably injured as a matter of law. *Kiowa Indian Tribe of Oklahoma v. Hoover*, 150 F. 3d 1163, 1171 (10th Cir. 1998). In addition, the public is not served by Defendant's extrajudicial seizure of person's property. Neither is the public interest furthered by Defendant's seizure of federal, state, and tribal program funds and the cessation of delivery of essential governmental services. Defendant has no authority to seize the Tribes' cash assets. The only consequence entering a preliminary injunction is that this Court will uphold and express Congressional intent of having the programs being administered. The entry of an injunction restores the federal regulatory regime that Defendant has illegally infringed upon. Indeed, the entry of an injunction against Defendant is the only way to serve the public interest in this case. Any other decision condones illegal conduct by Defendant, and there can be no legitimate public interest in such a ruling.

Respectfully submitted this 4th day of May, 2012.

FREDERICKS PEEBLES & MORGAN LLP

/s/ Martha L. King

(Filing Attorney)

Martha L. King, OBA #: 30786

Thomasina Real Bird, Esq.

FREDERICKS PEEBLES & MORGAN LLP

1900 Plaza Drive

Louisville, Colorado 80027

Telephone: (303) 673-9600

Facsimile: (303) 673-9155

Email: mking@ndnlaw.com

Email: trealbird@ndnlaw.com

ATTORNEYS FOR THE CHEYENNE AND

ARAPAHO TRIBES' EXECUTIVE BRANCH

(Signed copy of document bearing signature of

Filing Attorney is being maintained in the office

of Filing Attorney)

CHEYENNE AND ARAPAHO TRIBES

/s/ Kimberly Richey

(Signed by Filing Attorney with permission of
Attorney)

Charles B. Morris, Attorney General

Kimberly Richey, Assistant Attorney General

Cheyenne and Arapaho Tribes

P.O. Box 32

Concho, Oklahoma 73022

Telephone: (405) 422-7421

Facsimile: (405) 422-8220

Email: morrbcchas@yahoo.com

Email: krichey1@sbcglobal.net

ATTORNEYS FOR THE CHEYENNE AND

ARAPAHO TRIBES

(Signed copy of document bearing signature of

Attorney is being maintained in the office of Attorney)