

**FILED**  
Court of Indian Offenses  
Southern Plains Region

MAY 05 2017

By   
Court Clerk/Deputy

**IN THE COURT OF INDIAN APPEALS  
FOR THE SOUTHERN PLAINS REGION  
ANADARKO, OKLAHOMA**

**CDST-Gaming I, LLC,** )  
**an Arizona Limited** )  
**Liability Company,** )  
**Appellant/Defendant,** )  
  
**vs.** )  
  
**Comanche Nation, a federally** )  
**recognized Indian tribe** )  
**Appellee/Plaintiff.** )

**Trial Case No. CIV-08-A12  
Appeal Case No. APP-16-003**

**DECISION AND ORDER**

The question before the Court is whether Comanche Nation (Tribe) waived its sovereign immunity with respect to a binding arbitration clause contained in gaming machine vendor agreements signed by the Tribal Chairman (Chairman) on behalf of Tribe. Defendant CDST-Gaming I, LLC (CDST) appeals from the trial court's order granting summary judgment in favor of Tribe and denying summary judgment for CDST. Parties each moved for summary judgment upon the issue of whether the Chairman had authority to enter into an agreement or waive sovereign immunity on behalf of Tribe. Both parties maintain there are no material facts in dispute on the issue, and the trial court has so found. The trial court found tribal law controls the determination of waiver of sovereign immunity. The trial court further found, based upon the factual record and pursuant to the Tribe's Constitution, the Chairman did not have authority to enter into the vendor agreements in question or to waive sovereign immunity on behalf of the Tribe. We affirm the order and judgment of the trial court.

## **I. Background.**

### **A. Litigation History.**

The Comanche Indian Tribe is a federally recognized Indian tribe whose government is called Comanche Nation, with headquarters in Lawton, Oklahoma. CDST is an Arizona limited liability company.

The underlying controversy relates to the lease or placement of gaming machines by CDST in the Tribe's gaming facility at Lawton, Oklahoma. Gaming equipment had been placed in the tribal gaming facility by CDST and/or its predecessor from August, 2000 to February, 2005, when a dispute between the Tribe and CDST arose related to the arrangement.

On March 14, 2008, CDST commenced arbitration proceedings against the Tribe under American Arbitration Association (AAA) procedures. CDST asserted several claims against Tribe, relying upon written agreements containing or affirming arbitration and waiver of sovereign immunity clauses that had been signed by the Chairman.

On April 25, 2008, Tribe filed an action for declaratory judgment against CDST in the Court of Indian Offenses, seeking a declaration that the written agreements upon which CDST relied in arbitration proceedings were signed by Chairman without authority under tribal law and were void and non-binding on Tribe.

From 2009 to 2014, issues related to CDST's amenability to be sued by Tribe as a non-Indian defendant in the Court of Indian Offenses were litigated and determined in the course of proceedings in the trial court, in this Court of Indian Appeals, and in the United States District Court for the Western District of Oklahoma, culminating in a decision rendered March 4, 2014 by U.S. District Judge Stephen P. Friot<sup>1</sup> affirming the Court of Indian Offenses' exercise of jurisdiction over Tribe's 2008 declaratory judgment action against CDST, based

upon the intervening Comanche Nation Tribal Court Civil Jurisdiction Ordinance of 2011.<sup>2</sup> Judge Friot's order found that the Tribe's suit against CDST challenges whether the Tribe's Chairmen had authority to bind the Tribe to certain agreements, one of which contained an arbitration provision. It further found it is for a court, rather than an arbitrator, to decide whether the signatory to an agreement containing an arbitration clause lacked authority to commit the alleged principal.

### **B. Pleadings.**

On July 1, 2014, Tribe filed an Amended Complaint in the case below seeking a declaratory judgment that Tribe did not waive its sovereign immunity with respect to any dispute between Tribe and CDST, that Tribe has not agreed to arbitrate any such dispute, and that any written agreements CDST relies upon for its contrary contentions are void on several grounds, including that Tribal Chairman was not authorized to waive Tribe's sovereign immunity or to assent on behalf of Tribe to arbitrate any controversy between Tribe and CDST.

CDST filed an Answer asserting that CDST is not subject to the jurisdiction of the Court of Indian Offenses except on the issue of whether the parties entered into the subject agreements either by authorized signatures of Tribal Chairman or by ratification or estoppel based upon the conduct of the parties. CDST acknowledged the court, rather than an arbitrator, must decide the issue of signatory authority. CDST asserted Tribal Chairman had signatory authority on behalf of Tribe based upon federal law.

CDST filed a Limited Counterclaim, contained in its Answer, seeking a declaratory judgment that: 1) the court's jurisdiction over CDST is limited to the issue of whether the parties entered into the subject agreements, and 2) the parties entered into the subject agreements.

Tribe filed its Motion for Summary Judgment requesting the court declare the written agreements upon which CDST relies to be void *ab initio*, not binding

on the Tribe, not effectuating a waiver of Tribe's sovereign immunity, and, therefore, not imposing on Tribe a legal obligation to arbitrate the claims asserted by CDST in the AAA proceeding. Tribe asserted, as the basis for its request for declaratory judgment, that Chairman was not authorized to sign a contract or waive Tribe's sovereign immunity absent a constitutionally authorized delegation of such powers and, further, that neither the Tribe's Constitution nor the Tribal Council authorized Chairman to sign the vendor agreements or to waive Tribe's sovereign immunity, nor did the Tribal Council directly waive Tribe's sovereign immunity.

Tribe thereafter filed a Conditional Stipulation for Summary Judgment Motion stating that, for purposes of its motion, Tribe relied only upon its contention that, in view of Art. XII, § 1 of Tribe's Constitution, Tribal Chairmen were not authorized to sign the instruments in controversy. CDST filed a Response and Cross-Motion for Summary Judgment requesting the court dismiss this case and order the parties to resolve their disputes in AAA arbitration. CDST asserted Tribe is bound by the agreements signed by Tribe's Chairman because Tribe's Business Committee had validly authorized Chairman's signatures pursuant to Business Committee's authority under Tribe's Constitution and pursuant to the request of the Comanche Nation Gaming Commission, a body legislatively created and empowered by Business Committee to conduct Tribe's gaming, and that further Tribe had by its conduct ratified the agreements.

### **C. Vendor Agreements.**

The document which gives rise to this action is entitled First Amended and Restated Machine Vendor Agreement with an effective date of November 11, 2002. It recites that it is an agreement between CDST and the Tribe. It is signed by Johnny Waqua, Chairman, on behalf of the Comanche Indian Tribe. In part, it contains the following:

Paragraph 18. Arbitration. If any dispute which arises between the parties with respect to this Agreement is unable to be resolved by direct negotiation the dispute shall be settled by binding arbitration.

Paragraph 19. Tribe's Limited Waiver of Sovereign Immunity. By this Agreement, the Tribe expressly waives, in a limited manner, its immunity from suit and consents to be sued on an arbitration award in the Court of the Comanche Indian Tribe, if any, and/or United States District Court for the District of Oklahoma.

The November 11, 2002 vendor agreement, signed by Johnny Waqua, Chairman on behalf of Tribe, references and amends an August 22, 2000 Machine Vendor Agreement between John Harrington Enterprises (JHE) and J. Waqua, Chairman, on behalf of Tribe. The original vendor agreement of August 22, 2000, signed by J. Waqua and John Harrington (JHE), was assigned the same date to Integrity Gaming, Inc. and was subsequently partially assigned to CDST by separate "Assignment" signed by J. Waqua, John Harrington (JHE), Integrity Gaming, Inc., and James D. Howard, Jr., CDST-Gaming I, LLC, to be effective July 22, 2001.

Neither the 2000 Machine Vendor Agreement or the 2001 Assignment contained clauses regarding arbitration or waiver of Tribe's sovereign immunity.<sup>3</sup> Arbitration and waiver of sovereign immunity are introduced for the first time in this course of dealing between CDST and Chairman by the November 11, 2002 First Amended Agreement.

On September 8, 2003, a document entitled First Amendment to First Amended and Restated Machine Vendor Agreement amended the November 11, 2002 Agreement and recited that the parties ratified and confirmed all the terms and provisions and the continued force and effect of the November 11, 2002 Agreement. It was signed by Wallace Coffey, Chairman, Comanche Indian Tribe.

## II. Standard of Review

Summary judgment is appropriate where the material facts regarding an essential element of a claim are not in dispute, and the decision is a matter of law. Federal Rules of Civil Procedure Rule 56 (a).<sup>4</sup> This Court will review the record and the trial court's decision *de novo*, including findings of fact and conclusions of law. *Doebele v. Sprint/United Management Company*, 342 F. 3d 1117 (10th Cir. 2003) (“In determining whether summary judgment is warranted, we review the district court's order *de novo*”). *See Selnke v. Med. Imaging of Colo.*, 248 F. 3d 1249, 1255 (10th Cir. 2001) (finding appellate courts view evidence and draw reasonable inferences therefrom in the light most favorable to the nonmoving party). *See also Hennigh v. City of Shawnee, et al.*, 156 F. 3d 1249 (10th Cir. 1998), citing *Murray v. City of Sapulpa*, 45 F. 3d 1417 1419 (10th Cir. 1995) (citations omitted).

## III. Analysis of Applicable Law

### A. Issues of arbitrability, contract formation, and waiver are for judicial determination.

Whether the parties agreed to arbitrate must be decided by the court, not an arbitrator. “Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator.” *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649 (1986). “Courts should not assume that the parties agreed to arbitrate arbitrability unless there is ‘clear and unmistakable’ evidence that they did so.” *First Options of Chicago Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). When an Indian tribe is a party, and arbitration effects a waiver of sovereign immunity, “clarity” on this issue is especially significant. We find that the arbitration clause<sup>5</sup> contained in the relevant vendor agreement does not clearly provide that the issue of arbitrability will be determined by the arbitrator.

Likewise, the issues raised by Tribe, that it did not authorize Chairman to sign or enter into the agreement containing the arbitration clause with CDST and that it did not authorize Chairman to waive Tribe's sovereign immunity, are issues for the court, not an arbitrator, to decide. The validity of signatory authority and of contract formation are issues to be judicially determined. *See Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 296 (2010); *Sphere Drake Ins. Ltd. v. All Am. Ins. Co.*, 256 F. 3d 587, 591 (7th Cir. 2001); *Will-Drill Resources, Inc. v. Samson Resources Co.*, 352 F. 3d 211, 218-219 (5th Cir. 2003); *Three Valleys Municipal Water Districe v. E.F. Hutton & Co.*, 925 F. 2d 1136, 1140-41 (9th Cir. 1991). An Indian tribe's challenge to the validity or formation of an agreement or of a waiver of sovereign immunity must be judicially determined. *See Bruce H. Lien Co. v. Three Affiliated Tribes*, 93 F. 3d 1412, 1419 (8th Cir. 1996).

**B. An Indian tribe enjoys sovereign immunity, and a waiver of sovereign immunity by an Indian tribe, to be effective, must be clear and expressed, it may never be implied.**

It is a well established principle of federal law that Indian tribes enjoy the same immunity from suit enjoyed by other sovereign powers and that an Indian tribe is immune from suit unless the tribe has waived its sovereign immunity or Congress has authorized the suit. "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978), citing *Turner v. United States*, 248 U.S. 354, 358 (1919); *United States Fid. & Guar. Co.*, 309 U.S. 506, 512-13 (1940); *Puyallup Tribe, Inc. v. Washington Dep't of Game*, 433 U.S. 165, 172-73 (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 Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998). In the relinquishment of sovereign immunity, a tribe's waiver must be clear or Congress must unequivocally express the abrogation of immunity. Tribal waiver or

Congressional consent or abrogation may not be implied. A tribe's waiver must have the "requisite clarity." *C&L Enters., Inc. v. Citizen Band Potawatomie Indian Tribe of Okla.*, 532 U.S. 411, 418 (2001) (citations omitted). "The Supreme Court has made it plain that waivers of tribal sovereign immunity cannot be implied on the basis of a tribe's actions, but must be unequivocally expressed." *State of Florida v. Seminole Tribe*, 181 F. 3d 1237, 1240-41 (11th Cir. 1999).

**C. A tribe, as with any government, is bound only by acts of its governmental officials within their actual governmental authority.**

"Contracts of public officials entered without constitutional, statutory, or other authority are void . . . Moreover, a party contracting with a government agency may not rely on the agent's assertion of authority, if such authority does not exist." 73A C.J.S. *Public Contracts* § 3.

"Whatever the form in which the government functions, anyone entering into an agreement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority." *Fed. Crop. Ins. Corp. v. Merrill*, 332 U.S. 380, 384 (1947). "It is well established that a government official may not bind the United States by entering into a contract to perform unauthorized acts." *Nat'l Audubon Soc. Inc. v. Watt*, 678 F. 2d 299, 307-08 (D.C. Cir. 1982).

Tribe is a sovereign government, and law applicable to governments on public contracts, not private commercial dealings, controls. "Indian sovereignty, like that of other sovereigns, is not a discretionary principle subject to the vagaries of the commercial bargaining process or the equities of a given situation." *MM&A Productions, LLC v. Yavapai-Apache Nation*, 316 P. 3d 1248, 1254 (Ariz.Ct.App. 2014).

This Court finds that a tribal officer's authority is governmental, and is strictly limited by the government's organic documents.



**D. Burden regarding contract formation and waiver of sovereign immunity is on the party asserting the validity of the contract and waiver.**

Under Federal Rule of Civil Procedure 56, the nonmoving party on summary judgment must produce necessary evidence to support an essential element of that party's claim or defense. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-24 (1986). The Federal Rules of Civil Procedure supplement this court's procedures. Court of Indian Offenses Rule of Civil Procedure 2.1.

In an action involving contract formation, the party asserting the validity of the contract bears the burden that the contract was made by a person having authority to bind the government. *Dalaly v. United States*, 3 Cl.Ct. 203,206 (1983). In a declaratory judgment action challenging contract formation, the party asserting the validity of the contract has the burden on the issue under *Celotex*. The party asserting the contract's validity "carries the burden to show that the United States is bound by the subject contract." *Consortium Venture Corp. v. United States*, 5 Cl. Ct. 47, 49 (1984) aff'd 765 F. 2d 163 (Fed. Cir. 1985).

In this case, CDST asserts that Tribal Chairman has contracting and signatory authority to bind Tribe to terms of the subject agreements. CDST bears the burden on those issues.

**E. Law to be applied in determining tribal waiver of sovereign immunity.**

The determinative question is whether Tribe waived its sovereign immunity. The answer depends upon whether Tribal Chairman had authority to execute the subject agreements on behalf of Tribe and further had authority to consent to arbitration and waiver of immunity. The arbitration and waiver of sovereign immunity clauses in the relevant agreements clearly would effect a waiver of sovereign immunity, if the agreements were validly entered. The determination of Tribal Chairman's authority to enter and sign the agreements on behalf of Tribe

requires interpretation of Tribe's Constitution, Tribal Council resolution(s), and Tribal Business Committee resolutions and ordinances.

1. The November 11, 2002 agreement contains a choice of law provision.<sup>6</sup> The Court finds that in a contract enforcement case in which the determining issue is whether there is signatory authority to contractually bind a sovereign party, a provision in the contract ostensibly governing choice of law does not govern the reviewing court's determination of what law applies. In other words, a choice of law provision in a contract not validly formed, or void *ab initio*, has no incipient life or effect and cannot control the court's analysis of the validity of the contract's formation.

2. CDST urges the Court to apply the findings and holding of *C&L Enterprises, Inc. v. Citizens Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411 (2001). The Supreme Court, in *C&L Enterprises*, found it an "appropriate case" in which to apply common law rules of contract construction to an agreement between an Indian tribe and a non-Indian company, where the agreement contained an arbitration clause and a choice-of-law clause that state law governed. The Court found that the tribe clearly consented to the arbitration clause and to enforcement of arbitral awards in state court and thereby waived tribal sovereign immunity. CDST asserts *C&L Enterprises, Inc.* to be "a case eerily similar to this one" and controlling regarding the issue of tribal waiver of sovereign immunity.

This court recognizes that *C&L Enterprises, Inc.* is controlling on issues of requisite clarity of expression of tribal waiver of sovereign immunity and of enforcement consequences of such tribal waiver. However, *C&L Enterprises, Inc.* does not speak to the issue of signatory authority to execute an agreement or waive sovereign immunity on behalf of an Indian tribe. In *C&L Enterprises, Inc.*, the Court specifically noted that the issue of whether "the members of the Tribe who executed the contract lacked the authority to do so on the Tribe's behalf" was not

aired in state court, was not before the Court for review, and therefore would not be addressed. See *C&L Enterprises, Inc.*, 532 U.S. at 423, n. 6. In this case, the issue is whether the member of the Tribe who executed the vendor agreement lacked the authority to do so on the Tribe's behalf. Unlike *C&L Enterprises, Inc.*, this was raised and aired in the court below and is properly before this court for review. The cases are distinguishable.<sup>7</sup>

3. Alternatively, CDST asserts the application of federal law to the issue of waiver of sovereign immunity by an Indian tribe should lead this Court to apply the law governing waivers of sovereign immunity by foreign governments. This argument was not raised in the trial court and appears to have been raised for the first time in Appellant's Opening Brief. Tribe's appellate counsel did not submit a response or an objection to CDST's appellate argument so raised. This Court may decline to consider additional issues or arguments not raised or presented to the trial court.<sup>8</sup> This Court will discuss CDST's argument in analyzing the issue of signatory authority to waive sovereign immunity.

CDST points to *C&L Enterprises, Inc.*, as citing the Restatement (Third) of the Foreign Relations Law, and relying upon *Kiowa Tribe*, 532 U.S. at 751 for the proposition that the Supreme Court, in analyzing waivers of tribal sovereign immunity, found it "instructive" to consult "the law governing waivers of immunity by foreign sovereigns." CDST, based on *Kiowa Tribe* and *C&L Enterprises, Inc.*, urges that the law of foreign waiver of sovereign immunity has the import of "federal law" and has controlling effect regarding waiver of sovereign immunity by an Indian tribe. CDST cites Restatement (Third) of the Foreign Relations Law of the United States, at § 456, as providing: "When a person has authority to sign an agreement on behalf of a (foreign) state, it is assumed that the authority extends to a waiver of immunity contained in the agreement."

The Court, in *C&L Enterprises, Inc.*, cited the referenced section of Restatement (Third) for the proposition that “[U]nder the law of the United States ... an agreement to arbitrate is a waiver of immunity from jurisdiction in ... an action to enforce an arbitral award rendered pursuant to the agreement ...”

Again, the waiver effect of a valid agreement to arbitrate is not the issue in this case. The language of waiver in the subject vendor agreement is clear and would effect a waiver with attendant consequences, if the agreement is valid. The issue in this case is whether the agreement is valid. Again, the facts and the issues of this case are distinguishable from those of *C&L Enterprises, Inc.*

Likewise, the language from *Kiowa Tribe* referenced by CDST does not apply here. In *Kiowa Tribe*, the Supreme Court, in discussing its adherence to the Court’s precedent regarding sovereign immunity of Indian tribes, acknowledged congressional authority to abrogate or limit tribal sovereign immunity. The Court found that Congress, with knowledge of the Court’s precedents, has not acted to limit or abrogate the status of tribal sovereign immunity. The Court compared such inaction by Congress in the area of tribal affairs with the affirmative decision by Congress to take action in the area of foreign affairs, noting that Congress in 1976 enacted the Foreign Sovereign Immunities Act to clarify and set more predictable and precise rules regarding the waiver of sovereign immunity by foreign sovereigns.

This Court finds that *C&L Enterprises, Inc.* and *Kiowa Tribe* are not applicable to the issues of signatory authority and validity of the subject agreements and waiver of sovereign immunity, as urged by CDST.

Additionally, even accepting the Restatement’s principle that an authorized signatory of a foreign sovereign has an assumed authority to waive sovereign immunity on behalf of the foreign sovereign, its application in a particular case would require a preliminary examination of the facts supporting the signatory’s

actual authority under law to sign the document in question on behalf of the foreign sovereign. As such, the Restatement's principle would, by analogy, support this Court's analysis.

4. As the party advancing the validity of the contract and waiver of immunity, CDST does not explain why state law principles of agency or apparent authority should apply to determine internal tribal matters or questions of tribal authority or law, especially the authority of a tribal official to bind the tribe or waive its sovereign immunity. An application of state or common law principles as urged by CDST appears in conflict with the Supreme Court's admonition that tribal immunity, subject to diminution or abrogation by Congress, "is a matter of federal law and is not subject to diminution by the States." *Kiowa Tribe*, 523 U.S. at 756.

The case relied upon by CDST in urging the application of state common law or general laws of agency to support a finding of apparent authority by Tribal Chairman to contract and waive immunity is not persuasive. The opinion, *Rush Creek Solutions, Inc. v. Ute Mountain Ute Tribe*, 107 P. 3d 402 (Colo. App. 2004), in its application of state agency law, is an outlier in its reasoning among other courts considering the same issue. See *Memphis Biofuels, LLC v. Chickasaw Nation Industries, Inc.*, 585 F. 3d 917, 922 (6th Cir. 2009) ("Courts have held that unauthorized acts of tribal officials are insufficient to waive tribal-sovereign immunity," summarizing numerous authorities and applying rule to uphold immunity); *Sanderlin v. Seminole Tribe of Florida*, 243 F. 3d 1282, 1286-87 (11th Cir. 2001) (finding tribal chief lacked authority to waive sovereign immunity and Tribal Council did not pass any resolution purporting to effect a waiver); *World Touch Gaming, Inc. v. Massena Management, LLC*, 117 F. Supp. 2d 271 (N.D.N.Y. 2000) (dismissing contract claim by lessor/seller of casino gaming equipment against tribe, upholding tribe's immunity notwithstanding explicit waivers in contracts, because Tribal Council had not executed or authorized those waivers as

required by the tribal constitution -- also rejecting attempt to rely on “apparent authority”); *Hydrothermal Energy Corp. v. Fort Bidwell Indian Community*, 170 Cal App. 3d 489 496 (Cal App. 1985) (holding tribe’s chairperson could not waive tribal immunity, since nothing in tribe’s constitution and bylaws gave her such authority); *MM&A*, 316 P. 3d at 1253-54 (relying on *Hydrothermal* and on *Dilliner v. Seneca-Cayuga Tribe*, 258 P. 3d 516 (Okla. 2011) and other authorities, to hold that tribal official’s waiver of immunity requires express delegation by the tribe, and rejecting attempt to rely on “apparent authority”); *Sharp Image Gaming, Inc. v. Big Sandy Rancheria*, 2002 WL 3184972, \*2 (Cal. App. 2002) (unpublished) (rejecting casino gaming manufacturer’s motion to compel arbitration on purported tribal sales contract for gaming machines, holding manufacturer failed to satisfy its burden of proving the tribe had authorized its chairperson to waive tribal immunity, and “a tribal official cannot waive the tribe’s sovereign immunity unless the tribe has expressly delegated that authority to that official.”); *Lobo Gaming, Inc. v. Pit River Tribe of California*, 2002 WL 922136 (Cal. App 2002) (holding in action by purported lessor of casino gaming equipment, tribal council could not waive immunity because constitution conferred that power on tribal membership); *Red Lake Band of Chippewa Indians v. American Arbitration Association*, 1981 U.S. Dist. LEXIS 13304 (D. Minn. 1981) (holding that absent a tribal constitutionally authorized delegation of authority, “the officers of a recognized Indian tribe have no power to effect a waiver of the tribe’s sovereign immunity,” and enjoining arbitration); *Winnebago Tribe of Nebraska v. Kline*, 297 F. Supp. 2d 1291, 1303-04 (D. Kan. 2004) (upholding tribal immunity because no evidence showed that a purported tribal waiver was authorized); *Swanda Bros., Inc. v. Chasco Constructors, Ltd.*, 2010 WL 1372523, \*4-\*5 (W.D. Okla. 2010), order vacated on other grounds, 2011 WL 13112062 (W.D. Okla. 2011) (finding no evidence showed the Tribal Council authorized tribal casino entity to waive tribal immunity

in accordance with tribal constitution, which did not delegate such powers to others, and waiver issue was one for tribal court).

Moreover, “apparent authority ordinarily cannot serve as a means of holding a state, county, or municipal sovereign to a contract. A contractor must ascertain whether a public contract complies with constitutional provisions, statutes, charters, and ordinances, so far as they are applicable, and if it does not, it performs at its peril.” 73A C.J.S. Public Contracts § 8.

5. No precedent has been cited, and this Court is not aware of any, that requires the application of federal common law to the issue of a tribal official’s agency status or power to contract or to waive sovereign immunity on behalf of a tribe. As will be discussed hereinafter, the record in this case does not contain any resolutions by the Tribal Council or code provisions by the Tribal Business Committee establishing generally applicable tribal agency principles.

Courts have looked to tribal law to determine issues implicating an Indian tribe’s exercise of sovereign powers, waiver of tribal sovereign immunity, and jurisdiction. *Native American Distributing v. Seneca-Cayuga Tobacco Company*, 546 F. 3d 1288, 1295 (10th Cir. 2008). *Sanderlin*, 243 F. 3d at 1287. *Memphis Biofuels, LLC*, 585 F. 3d at 922. And see cases cited in paragraph 4 above.

The determination of the Tribal Chairman’s authority to enter and sign the subject agreements on behalf of the tribe requires interpretation of the Tribe’s law.

#### **IV. Law of Comanche Tribe**

##### **A. Constitution**

The Tribe’s organizing document is its Constitution, the *Constitution of the Comanche Indian Tribe*, ratified in 1966 and last amended in February, 2002. Provisions of the Tribe’s Constitution central to the Court’s analysis of issues in this case are as follows:

## **Article IV - ORGANIZATION AND OFFICERS**

**Section 1.** The supreme governing body of this organization shall be the **Comanche Tribal Council.**

**Section 2.** In addition to the tribal council, there shall be elected a **Comanche Business Committee.**

**Section 3.** The **elected officers** of the tribal council shall be a tribal chairman, a tribal vice-chairman, and a tribal secretary-treasurer. In addition these officers shall serve in the same capacity on the Comanche Business Committee.

## **Article V - TRIBAL COUNCIL**

**Section 1.** The **Tribal Council** shall consist of **all members of the Comanche Indian Tribe** who are **eighteen (18) years of age or older.**

**Section 7.** Subject to the approval of the Secretary of the Interior or his authorized representative where applicable, **the authority of the Comanche Tribal Council shall include and be exclusive with respect to the following:**

(a) To change, modify, alter or revoke **membership rules.**

(b) To **execute leases, contracts or permits for five (5) or more years** with regard to property which is owned exclusively by the Comanche Indian Tribe, but this does not include any individually-owned land or personal property.

(c) To **elect tribal officers and members of the business committee ...**

(d) To **authorize the expenditure of funds** which may be deposited to the exclusive credit of the Comanche Indian Tribe . . .

(e) To **select and authorize tribal delegations to transact business on behalf of the tribe . . .**

(f) The **salary of the Chairman** of the Business Committee shall be established by the Tribal Council by the **adoption of an annual tribal operating budget.**

**Section 9.** To **hire an Administrator/Manager to administrate the tribal government ... under the direction of business committee.**

**Section 10.** To **hire an attorney to represent the tribe in legal matters.**

## **Article VI - BUSINESS COMMITTEE**

**Section 1.** The Comanche Business Committee shall be composed of seven (7) members of the Comanche Indian Tribe ... and be elected as provided in Art. VII . . . .



**Section 7.** The **duties, responsibilities and authorities** of the **business committee** shall include the following:

- (a) To establish and maintain the tribal membership roll ...
- (b) To determine qualification of candidates nominated for office and to conduct election of tribal officers and business committeemen pursuant to the provisions of § 2, Art. VII, of this constitution.
- (c) To **execute leases, contracts or permits** with regard to property which is owned exclusively or jointly by the Comanche Indian Tribe, but this does not include any jurisdiction over individually-owned land or personal property.
- (d) To **develop annual budgets** for the **financing of Comanche tribal operations** and to **present such budgets to the tribal council for final consideration as to adoption or rejection** (by vote of the Tribal Council).
- (e) To **develop proposals** ... including, but not limited to, **programs involving employment, health, education, ... activities of the tribe.** Such program proposals shall be presented to the tribal council for **final consideration as to adoption or rejection** (by vote of the Tribal Council).
- (f) To **implement, administer, and report on progress of programs adopted by the tribal council.**
- ...
- (i) **Such additional duties and/or responsibilities** which may be assigned to the **business committee by the tribal council by appropriate resolution approved in tribal council assembled.**
- (j) To promulgate and enforce **ordinances and codes governing law and order to protect the peace, health, safety, and general welfare** on land determined to be within Comanche tribal jurisdiction.

## **Article XII - DUTIES OF OFFICERS**

**Section 1.** The **Chairman** shall be the **Chief Executive** of the Comanche Indian Tribe **exercising the authorities and powers as delegated** to his office by this **constitution and the Comanche Tribal Council.** He shall **preside at all meetings** of the **Tribal Council** and the **Business Committee** and be the **principal member of all tribal delegations.** When so authorized by the **Comanche Tribal Council,** he shall sign necessary papers and instruments for the Comanche Indian Tribe. (emphasis added)

## **B. Analysis of Constitution**

The Tribe's Constitution establishes Tribe's government (naming it the Comanche Nation), with a stated purpose "(T)o define, establish and safeguard the rights, powers and privileges of the tribe and its members." Art. II, § 1. The Constitution establishes the Comanche Tribal Council as the "supreme governing body" of the Tribe. The Tribal Council is comprised of all adult members of the tribe and meets annually and as specially called. In addition to the Tribal Council, the Constitution establishes a Comanche Business Committee composed of seven members. The Constitution does not designate the Business Committee as a "governing body" of the Tribe, though it is an elective governmental body with significant duties and authorities, as delegated and defined by the Constitution or as assigned by the Tribal Council. Included as officers of both the Tribal Council and Business Committee are three offices: Chairman, Vice-Chairman and Secretary-Treasurer. The seven committee positions are elective, by vote of tribal members within sixty days of the annual Tribal Council meeting, at which committee candidates are nominated from the floor.<sup>9</sup> The Tribal Council has the duty to fill vacancies in committee positions for some unexpired terms.<sup>10</sup> The Tribal Council may recall any officer or committeemen for neglect of duty or disreputable conduct by majority vote at council meeting assembled of sufficient quorum.<sup>11</sup>

Though Tribe's Constitution does not contain the word "sovereignty," the Constitution in its preamble speaks as follows: ". . . we, the members of the Comanche Indian Tribe . . . with the determination to promote, through united efforts, the general well-being of our tribe and to secure to ourselves and our descendants the rights, powers and privileges provided by law, do solemnly ordain and establish this organization and adopt the following constitution." The

Constitution thereafter provides that the Tribe's people, assembled as a council, shall be the supreme governing body of the Tribe.

In examining Tribe's Constitution, as the document which establishes and organizes the government of the Comanche Tribe of Indians, this Court reads the articles of the Constitution together and as a whole toward the purpose of understanding the Constitution's schematic for the Tribe's governance by its people. This Court applies standard rules of constitutional construction:

“Object of construction, applied to a constitution, is to give effect to intent of framers and of the people adopting it. Intent is found in the instrument itself; and, when the text of a constitutional provision is not ambiguous, the courts, in giving construction thereto, are not at liberty to search for meaning beyond the instrument.” *Lake County v. Rollins*, 130 U.S. 662 (1889)

“[A Constitution's] words and phrases were used in their normal and ordinary . . . meaning.” *District of Columbia v. Heller*, 554 U.S. 570, 576 (2008) (quoting *United States v. Sprague*, 282 U.S. 716 (1931)).

“It is a universally recognized rule of construction that, in ascertaining both the intent and general purpose, as well as the meaning, of a constitution or a part of thereof, it should be construed as a whole. As far as possible, each provision should be construed so as to harmonize with all the others, yet with a view to giving effect to each and every provision in so far as it shall be consistent with a construction of the instrument as a whole. 16 C.J.S., Constitutional Law, § 23, p. 62, citing cases from practically every state in the union.” *Latting v. Cordell*, 172 P. 2d 397 (Okla. 1946).

From our reading of the Tribe's Constitution, as the Tribe's government is organized, the following clearly hold true:

1. The Comanche Nation governs as a people, its supreme governing body being all adult tribal members assembled as the Tribal Council.

2. Art. V, § 7 of the Constitution provides that the authority of the Tribal Council shall be exclusive with respect to certain governmental functions. Art. VI, § 7 enumerates the duties, responsibilities and authorities of the Business Committee. The Business Committee is subordinate to the Tribal Council, the Tribe's governing body, and the Business Committee primarily serves to facilitate the Tribal Council's over-arching supervision and governance of the Tribe. This supportive and functional role of the Business Committee is demonstrated by a reading of Art. V, § 7 and Art. VI, § 7 together:

- a. The Tribal Council controls the rules for tribal membership; the Business Committee maintains the tribal membership roll per the council's rules.
- b. The Business Committee determines qualification of candidates for office; from among the candidates so qualified, the Tribal Council elects the tribe's officers and Business Committee members.
- c. The Business Committee develops proposed annual budgets for financing tribal operations for consideration by the Tribal Council for adoption or rejection. The Tribal Council adopts the tribe's annual operating budget and salary for the Chairman.
- d. The Tribal Council authorizes the expenditure of tribal funds.
- e. The Business Committee develops program proposals regarding employment, health, education, and other activities of the tribe for presentation to the Tribal Council. The Tribal Council gives final consideration to such program proposals and adopts or rejects them.
- f. The Business Committee implements, administers and reports on the progress of such programs adopted by the tribal council.
- g. The Tribal Council selects and authorizes tribal delegations to transact business on behalf of the tribe.

- h. The Tribal Council hires the Tribal Administrator/Manager, who under the direction of the Business Committee administrates the tribal government.
- i. The Tribal Council hires an attorney to represent the Tribe in legal matters.
- j. The Tribal Council may assign additional duties and/or responsibilities to the Business Committee by resolution in Tribal Council assembled. The Business Committee “shall” have only those additional duties or responsibilities that are assigned to the Business Committee by the Tribal Council.

The language of Arts. IV, V and VI is clear and unambiguous in its meaning. Art. IV’s establishment of the Tribal Council as the supreme governing body of the tribe is consistent with the provisions of Arts. V and VI regarding the respective and coordinated authorities, responsibilities and duties of the Tribal Council and the Business Committee, and the provisions are mutually supportive.

In addition, the Tribal Council and the Business Committee each have authority to execute contracts on behalf of the Tribe and the Business Committee has authority to pass and enforce tribal ordinances and codes.

The Constitution does not authorize the Business Committee to authorize the Chairman to sign agreements, contracts or necessary documents on behalf of the Tribe. The Tribal Council has such authority reserved to it under Art. **XII**, § 1.

The Constitution does not authorize the Business Committee to delegate any of its authorities, including its authority to contract, to the Chairman.

The Constitution does not authorize the Business Committee to waive the Tribe’s sovereign immunity or to authorize the Chairman to do so.

**3.** The Tribe’s Chairman, as the chief executive of the Tribe, is a functionary of the Tribe and of its people, the Tribal Council. Art. XII, § 1 provides that the Tribal Chairman shall:

- a. be the chief executive of the tribe;

- b. exercise the *authorities and powers as delegated to his office by the constitution and the Tribal Council.*
- c. *preside at all meetings of the Tribal Council and the Business Committee;*
- d. be the *principal member of all tribal delegations;* and,
- e. *when so authorized by the Tribal Council, he shall sign necessary papers and instruments for the Comanche Indian Tribe.*

The Tribal Chairman has only those authorities and powers as delegated to his office by the Constitution and the Tribal Council.

The Tribal Chairman has authority to sign necessary papers and instruments for the Tribe only when so authorized by the Tribal Council.

The Tribal Chairman is not authorized by the Constitution to contract or sign agreements on behalf of the Tribe.

The Tribal Chairman is not authorized by the Constitution to waive the Tribe's sovereign immunity.

4. This Court finds the language of Art. XII, § 1, standing alone, to be unambiguous in its meaning in all respects. This Court additionally finds that, in the context of the Constitution as a whole, the clear import of Art. XII, § 1 remains undiminished when read together with Arts. IV, V and VI, as to the organization of the Tribe's government and the delegation of respective authorities, duties and responsibilities to the Tribe's Council, Business Committee and officers.

This Court finds the designated constitutional authorities of the Tribal Council, the Business Committee and the Tribal Chairman to be compatible and not in conflict. Constitutional provisions must be read to harmonize and in a manner "which will render every part and every word operative as against a construction which will render some portions or words nugatory." *Blondes v.*

*State*, 294 A.2d 661, 669-70 (Md. App. 1972). “If possible, effect shall be given to every clause.” *D. Ginsberg & Sons, Inc. v. Popkin*, 285 U.S. 204, 208 (1932).

The Art. XII, § 1 provision limiting the signatory power of the Chairman pursuant only to Tribal Council authorization does not conflict with the Art. VI, § 7 (j) authority of the Business Committee to pass ordinances and codes. The Business Committee may adopt an ordinance or code to protect the “peace, health, safety, and general welfare” which does not empower the Chairman to bind the Tribe to any instrument.

Similarly, the Art. XII, § 1 provision limiting the signatory power of the Chairman to being only pursuant to Tribal Council authorization is not in conflict with the Art. VI, § 7 (c) authority of the Business Committee to execute leases or contracts. The Business Committee has the constitutional authority to execute a contract or lease of less than five years duration related to tribal property. Such authority to act as a body is constitutionally non-delegable, and there is no showing of necessity for the Business Committee to not exercise this constitutional authority and duty as a body, as discussed hereinafter. This constitutional requirement serves a purpose of ensuring that a single member of the Business Committee, including the Chairman, cannot, on his or her own, purport to approve and execute leases and contracts on behalf of the Tribe, or purport therein to waive the sovereign immunity of the Tribe. Not only are Art. XII, § 1 and Art. VI, Sec 7 (c) not in conflict, they appear to harmonize to serve a significant governmental purpose and as a tribal protection, if complied with by governmental bodies and officers.

While there is no conflict between Art. XII, § 1 and Art. VI, § 7 (j) or between Art. XII, § 1 and Art. VI, § 7 (c), if there were a conflict between or among them, the specific provision of Art. XII, § 1 (requiring Tribal Council authorization for Chairman to sign instruments on behalf of Tribe) would control

under settled rules of constitutional construction. “It is an established axiom of constitutional law that where there are both general and specific constitutional provisions relating to the same subject, the specific provision will control.” *Clouse ex rel Clouse v. State*, 16 P.3d 757, 760 (Ariz. 2001); *de’Shea v. Reed*, 572 P. 2d 821, 823 (Colo. En Banc 1977) (same). A well-established canon of statutory construction is that the specific governs the general. *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639 (2015).

This Court finds that Art. XII, § 1 is both unambiguous and directly applicable in the facts and circumstances of this case. Art. XII, § 1 grants to the Tribal Council the authority to delegate authorities and powers to the Chairman and to authorize the Chairman to sign instruments on behalf of the Tribe. The remaining issue for the Court is whether the Tribal Council granted or delegated such authorities or powers to the Chairman in relation to the subject vendor agreements.

**C. Trial court findings regarding Tribal Council actions as to signatory authority or authority for waiver of sovereign immunity.**

1. The trial court’s findings as to actions or resolutions by the Tribal Council regarding signatory authorization are supported by the record and adopted by this Court as follows:

a. There were no instances within the period 1996-2004 of the Tribal Council authorizing the Chairman to sign particular documents on behalf of the Tribe.

b. There are no Tribal Council resolutions within the period 1996-2004 authorizing the Business Committee/Chairman to sign documents on behalf of the Tribe.

2. The trial court’s findings as to actions or resolutions by the Tribal Council regarding waiver of sovereign immunity are supported by the record and adopted by this Court as follows:



a. There are no Tribal Council resolutions/minutes within the period 1996-2004 produced in the record reflecting waiver of sovereign immunity.

b. The Comanche Nation, through counsel, examined Tribal Council meeting minutes from 1996-2004 and “has located no instance where the Tribal Council has waived the Comanche Nation’s sovereign immunity.”

c. The Tribal Council minutes of the April 15, 2000 and the April 17, 2004 Annual Meetings show that the subject of waiving immunity is noted as discussed, however neither set of minutes reflect that a motion was made or a resolution passed to waive the Tribe’s sovereign immunity.

d. At the April 15, 2006 Annual Council Meeting, the Tribal Council passed Resolution 01-06 (authorizing the Business Committee to make limited waivers of sovereign immunity) and passed a motion for the issue of waiver of sovereign immunity to be voted upon by “all the people” by referendum. The resolution was adopted by majority vote by tribal referendum on July 22, 2006.

e. At all times relevant to the vendor agreements at issue, there is no evidence that the Tribal Council was ever requested to or did waive sovereign immunity.

f. There is nothing in the record to indicate that the Tribal Council had delegated the authority to waive the Tribe’s sovereign immunity during the relevant period 1996-2004.

g. There is nothing in the record to indicate that the Business Committee was in the practice of waiving the Tribe’s sovereign immunity or of authorizing the Chairman to waive the Tribe’s sovereign immunity during the relevant period 1996-2004.

h. Based on the record, “the Tribe would not have contemplated nor accepted a practice by the Chairman waiving the tribe’s sovereign immunity without Tribal Council authorization.”

**D. This Court's findings regarding signatory authority and waiver of sovereign immunity.**

1. This Court adopts the findings of the trial court as given above.
2. This Court finds no evidence in the record that the Tribal Council ever specifically or generally authorized the Chairman to contract or to sign necessary documents or leases or to waive sovereign immunity on behalf of the Tribe, nor is there evidence that the Chairman ever sought such signatory authority or waiver authority from the Tribal Council.
3. There is no evidence in the record that prior to 2006 the Tribal Council ever authorized the Tribal Business Committee to waive sovereign immunity on behalf of the Tribe, either in a specific instance for a particular purpose or as a general grant of such authority to so act on behalf of the Tribe regarding specified matters.
4. There is no evidence in the record that the authority to waive sovereign immunity was sought by the Tribal Business Committee or by the Chairman from the Tribal Council at either an annual meeting of the Tribal Council or at a special meeting of the Tribal Council called or requested by the Chairman or the Business Committee. The Constitution provides a process for calling special council meetings. Art. V, § 3.
5. There is no evidence in the record that either the Tribal Council or the Tribal Business Committee were presented with or were aware of or discussed the terms of the Vendors Agreements at issue in this case prior to their being signed by the Chairman. There is no evidentiary basis to conclude that either the Tribal Council or the Business Committee approved the Vendor Agreements at issue in this case. There is no evidentiary basis to conclude that either the Tribal Council or the Business Committee approved or authorized a waiver of sovereign immunity regarding the Vendor Agreements at issue in this case.

**E. 2006 Tribal Council resolution authorizing waiver of sovereign immunity.**

On July 22, 2006, the Tribal Council, by majority vote of tribal members by 1298 to 652, passed and enacted Resolution No. 01-06<sup>12</sup> authorizing the Tribal Business Committee to approve contracts on behalf of the Tribe containing waivers of sovereign immunity with limitations regarding relief, damages, enforcement and jurisdiction, and further authorizing the Tribal Business Committee to consent to suit regarding personal injury or property damage resulting from negligence solely against an insurance policy of the Tribe up to limits of liability (this being consistent with provisions of the standard tribal/state gaming compact). The Resolution further provides that any contract entered into by any official or employee in violation of the Resolution shall be deemed against the public policy of the Tribe and shall be void and unenforceable.

The resolution cites as authority: 1) Art, V, § 7(b), Const. as recognizing Tribal Council's authority to approve tribal contracts running longer than five years; 2) Art. VI, § 7(c), as recognizing Business Committee's authority to approve tribal contracts; and 3) Art. VI, § 7(i), as permitting Tribal Council to assign duties or responsibilities to Business Committee. The resolution states "the Tribal Council desires to direct the Business Committee with respect to approval of contracts containing waivers of Comanche Nation sovereign immunity."

The Court notes that this Tribal Council resolution on sovereignty and its waiver is not at issue here. However, this Court finds it appropriate to discuss this resolution in the broader context of the immunity a sovereign possesses and the sovereign's authority to diminish its immunity.

The Constitution does not contain the word "sovereignty" and is silent regarding waiver of immunity. Immunity from suit is an inherent, integral and fundamental attribute of sovereignty possessed by any nation. A corollary to the principle that a nation possesses such "sovereign" immunity is that the nation,

being sovereign, has the inherent authority to waive such immunity as the nation decides. In the event the supreme governing law of a nation, its constitution, is silent on such fundamental issue, the issue may be addressed by amendment of the constitution or by action of the nation's governing body in conformance with the constitution. Here, that governing body is the Comanche Tribal Council, comprised of all the Tribe's adult members. This Court notes that the Comanche Tribal Council is established by the Comanche Constitution as the "supreme governing body" of the Tribe. The Tribal Council is the only body of the Tribe defined, designated or referred to as a "governing body" by the Constitution. Implicitly and by constitutional grant of certain authorities and duties, the Comanche Business Committee is a governing body of the Tribe, though subordinate to the "supreme" governing body, the Comanche Tribal Council.

This Court finds that the Comanche Business Committee is a governing body of the Comanche Tribe with significant duties and authorities, as delegated and defined by the Constitution, but that the governing body of the Comanche Nation for purposes of authority regarding diminishment of the Tribe's sovereign immunity is the "supreme governing body" of the Tribe, the Comanche Tribal Council. Any alternative would mean that a nation's sovereignty and immunity could be diminished by act of a subordinate tribal governing body or by an individual tribal officer or official, without knowledge or decision of the highest ("supreme") governing authority of the nation. In this case, diminishment of tribal immunity can be accomplished only by amendment of the Constitution or by Tribal Council action, and either avenue requires majority vote of tribal members.<sup>13</sup> In either event, the decision is made by the Tribe as a whole, and any duties or powers that might flow from that decision are delegated by the Tribe as a whole.

Tribal Council Resolution 01-06 illustrates some things about the governance of the Tribe. It is an act of governance by Tribe's members in council

within their duties and responsibilities as Tribe's supreme governing body. It is an act of governance by Tribe's membership that inherently decides whether waiver of Tribe's immunity in a limited way is in Tribe's economic interest. It is an action by Tribe's members that enables and facilitates Tribe's economic development and operations, by delegating defined authorities to their representatives, their Business Committee, in its conduct of business on behalf of Tribe. The resolution further makes clear that Tribe's members, convened as its Council, recognize and understand the membership's role in the constitutional scheme of tribal governance and recognize dangers inherent in unauthorized actions by individual tribal members, officials or employees.

In a broader sense, the resolution demonstrates the functioning of Tribe's government within Tribe's constitutional framework, a framework that provides and delineates the duties and authorities of Tribe's governing bodies and officers and that further provides for delegation by Tribal Council of additional duties and authorities to Tribe's representatives, the Tribal Business Committee, or to Tribe's leader, the Tribal Chairman, or to selected tribal business delegations.

In conclusion, the resolution clearly establishes the basis in tribal law for waiver of Tribe's sovereign immunity, as that authority is defined and delegated by the Tribal Council.

#### **F. The Comanche Nation Tribal Court Civil Jurisdiction Ordinance of 2011**

The Comanche Nation Tribal Court Civil Jurisdiction Ordinance of 2011 was adopted by Comanche Business Committee Resolution 36-11 on April 2, 2011 and approved by the Secretary of the Interior on June 10, 2011,<sup>14</sup> in conformance with 25 Code of Federal Regulations, Sec. 11.108.<sup>15</sup> The ordinance provides, in part: "The Court of Indian Offenses for the Comanche Nation ("Tribal Court") shall have jurisdiction over any civil action arising within the territorial jurisdiction of the Tribal Court in which: . . . The Comanche Nation . . . is a plaintiff . . . or The

Comanche Nation . . . is a defendant . . . Nothing in this Ordinance shall be construed to waive the sovereign immunity of the Comanche Nation . . . This Ordinance is jurisdictional in nature. This Ordinance shall apply to all pending and future cases in the Tribal Court.”

This Court has found this Ordinance confers jurisdiction on the Court of Indian Offenses and permits the exercise of jurisdiction over the Comanche Nation’s action.

**V. Arguments by CDST which, as matters of law, are not applicable to issues of validity of the vendor agreements or waiver of sovereign immunity.**

**A. Tribal Business Committee Resolution Number 06-01**

CDST argues that the Tribal Chairman was authorized by the Business Committee to negotiate and sign the subject vendor agreements by Business Committee resolution. On January 6, 2001, after the original vendor agreement of August 22, 2000 but before the November 11, 2002 first amended vendor agreement, the Tribal Business Committee passed Resolution No. 06-01 stating as follows:

“... the Comanche Business Committee authorizes the Comanche Tribal Chairman/CEO to sign and/or negotiate all contracts, amendments, checks and documents for and on behalf of matters pertaining to the expansions of the Comanche Nation Gaming Centers, (inclusive of water matters, building/construction, machine selection and placement, etc). ...”<sup>16</sup>

This Court has found the Constitution does not authorize the Business Committee to authorize the Chairman to sign agreements, contracts or necessary documents on behalf of the Tribe, and does not authorize the Business Committee to delegate any of its authorities, including its authority to contract, to the Chairman, pursuant to Arts. V, VI and XII, as analyzed hereinbefore. This Court finds, as a matter of law, that Business Committee Resolution 06-01 was a facially

unconstitutional action by the Business Committee and confers no authority and is of no legal effect.<sup>17</sup>

CDST offers in support of such authority a “Memo” from Comanche Nation Gaming Committee to Comanche Business Committee recommending “that the Comanche Tribal Chairman/CEO be authorized to sign and/or negotiate all contracts, amendments, checks and documents for and on behalf of matters pertaining to the expansion of all the Gaming Centers, (inclusive of water matters, building/construction, machine selection and placement, etc.).” This “Memo,” dated December 12, 2000, is offered by CDST as an ostensible grant of authority to the Business Committee by a Tribal Gaming Committee to authorize the Chairman to individually negotiate and execute gaming agreements on behalf of the Tribe and to further agree to arbitration and waiver of sovereign immunity on behalf of the Tribe.<sup>18</sup> This Court notes that the “Memo” is dated some four (4) months *after* the August 22, 2000 original vendor agreement between Chairman Waqua and John Harrington (JHE).

A Tribal Gaming Ordinance was enacted in 1996 by the Tribal Business Committee pursuant to its Art. VI, § 7 (j) Const. authority to “promulgate and enforce ordinances and codes governing law and order to protect the peace health, safety, and general welfare . . . within Comanche tribal jurisdiction.”<sup>19</sup>

This Court finds that the Business Committee, in exercising its authority to enact ordinances for such purposes, cannot create for itself authorities that are beyond its constitutionally enumerated authorities under Art. VI, § 7 (a) through (h), and “(S)uch additional duties and/or responsibilities . . . assigned to the business committee by the tribal council by appropriate resolution . . . ,” per Art. VI, § 7 (i). The Tribal Gaming Ordinance provides that the tribal gaming operation shall be administered and regulated by the Business Committee itself. This cannot

be read or interpreted to endow the Business Committee with powers to exercise authorities beyond the confines of Art. VI, § 7 (i).

This Court concludes that a tribal committee/commission, gaming or otherwise, even one created by ordinance or resolution of the Tribal Business Committee, could not authorize or validate an action by the Business Committee or by the Chairman that was not taken or done in conformance with a power or authority granted by the Constitution to the Business Committee or the Chairman, or so assigned, delegated or authorized by the Tribal Council. The Business Committee could not, by passing an ordinance creating a subordinate agency, grant that agency the power to confer back upon the Business Committee a constitutional power the Business Committee did not previously possess.

This Court finds, as a matter of law, that the referenced “Memo” by a Tribal Gaming Committee confers no authority upon the Business Committee, which it does not constitutionally possess, to authorize the Chairman to individually negotiate and execute gaming agreements on behalf of the Tribe or to agree to arbitration and waiver of sovereign immunity on behalf of the Tribe.

### **B. Practical construction**

CDST argues that certain actions taken by the Business Committee constitute a practice or custom that is due respect as a “practical construction” of constitutional provisions by government officials charged with administering them.

The doctrine of practical construction is not as CDST urges. Where there is no ambiguity in the words of the constitution, custom or practical construction may not apply. Only “when the text is doubtful,” may constitutional power be established by usage. *Inland Waterways Corporation v. Young*, 309 U.S. 517, 525 (1940) citing *United States v. Midwest Oil Co.*, 236 U. S. 459, 473 (1915).

The consensus rule is stated in 11 Am. Jur., Constitutional Law, § 80, as follows: “. . . it has been thoroughly established that acquiescence for no length of



time can legalize a clear usurpation of power where the people have plainly expressed their will in the Constitution and appointed judicial tribunals to enforce it.” A comprehensive analysis and commentary on the doctrine of practical construction is supplied by the Minnesota Supreme Court:

“Resort may be had to practical construction only when the language is ambiguous. Where there is no ambiguity, the mere failure to challenge the use of a power not conferred by the constitution cannot confer it upon a branch of government . . . Hence every authoritative statement of the doctrine of practical construction makes it applicable only in a case of doubtful meaning .. Were the courts, simply because of its extended duration, obliged to follow an erroneous practical construction of a plain provision of it, a Constitution could be amended without consulting the people. Nothing is farther from the basic theory of our government . . . Where the words used in the constitution are clear and unambiguous in their meaning, the constitution cannot be amended under the guise of practical construction.”

*State ex rel. Gardner v. Holm*, 62 N.W.2d 52, 60-62 (Minn. 1954).

Government officials, including legislative bodies, have no power to alter unambiguous constitutional provisions by acting contrary to them. *See Akin v. Missouri Gaming Comm’n*, 956 S.W. 2d 261, 264 (Mo. 1997); *See also S. Tulsa Citizens Coal, L.L.C. v. Arkansas River Bridge Auth.*, 176 P. 3d 1217, 1220 (Okla. 2008) (“Absent an ambiguity, the intent is settled by the language of the [constitutional] provision itself, and the courts are not at liberty to search beyond the instrument for meaning.”).

Further, even in a case where the language of a constitutional provisions is ambiguous, the doctrine of practical construction applies only when the construction given it by governmental officials is contemporaneous to the adoption of the constitution. *See Latting v. Cordell*, 172 P. 2d 397, 408 (Okla. 1946). The instances of incongruence cited by CDST are not contemporaneous with the 1966 adoption of the Constitution.

The record contains four resolutions by the Business Committee from 1998-2000 purporting to delegate authority to the Chairman or his designee to

negotiate and/or sign contracts or documents on behalf of the Tribe.<sup>20</sup> CDST points to these prior resolutions, which contradict or disregard the Art. XII, § 1 requirement of Tribal Council authorization of signatory power for the Chairman, as evidence of the Business Committee's interpretation of its own powers. Some of these resolutions purport to authorize the Chairman to designate someone else to execute and bind the Tribe to future contracts and amendments.

Related to its practical construction argument, CDST argues that Art. XII, § 1 is ambiguous because the Business Committee passed non-compliant resolutions authorizing the Chairman to approve and sign contracts and documents. This argument reverses the proper analysis. The language of the Constitution is first examined, if the language and meaning is plain and clear, it is not ambiguous. Ambiguity is not created by governmental non-conformance with plain and clear language. Constitutional provisions are construed by looking first to "the normal, plain meaning of the language." *Remsen v. Krausen*, 47 A. 3d 613, 618 (Md. App. 2012). Tribal resolutions which conflict with the Constitution must yield to it. The Constitution does not yield to the resolution. The resolution must conform to the Constitution, not vice versa. This Court finds the language of the relevant Constitutional provisions to be unambiguous.

Though the meaning of the language of Art. XII, § 1 is clear, its implication and effect is bolstered by the constructional maxim "*expressio unius est exclusio alterius*" (the naming of one thing is the exclusion of another). Art. XII, § 1, in providing that the Chairman shall sign necessary papers and instruments for the Tribe when so authorized by the Tribal Council, excludes the alternative that the Chairman may do so without Tribal Council authorization.

This Court has found the relevant constitutional provisions to be clear and unambiguous in their language and meaning. Courts have a duty to uphold a Constitution. "It is a sacred duty of the Courts to preserve inviolate the integrity of

the Constitution . . . . Failure to exercise a power granted by the Constitution does not destroy that power . . . . The Constitution . . . . is a higher authority than any act or law of any officer or body assuming to act under it, for such an officer or body must exercise a delegated authority subservient to the basic law by which the delegation was made.” *Waldman v. Ladisky*, 101 N.Y.S. 2d 87, 89 (N.Y. Sup. Ct. 1950).

This Court finds that there is no factual basis or legal basis to give effect or validity to actions by the Business Committee not in conformance with the Tribe’s Constitution, and further that several such actions by the Business Committee do not operate cumulatively to be self-validating or to, in effect, amend the Constitution.

In late 2004, significantly later in time than the Chairmen’s purported waiver and execution of the subject vendor agreements in 2002 (Lease) and 2003 (Amendment), the Business Committee by resolution purported to waive sovereign immunity as a body in two instances, one of which was a resolution approving an offer from the State of Oklahoma to compact with the Comanche Nation for Class III gaming.<sup>21</sup> These subsequent Business Committee resolutions do not contribute any measure or force to CDST’s argument that the doctrine of practical construction is applicable to this case, nor do they retroactively lend illustrative or legal force to the Chairman’s actions or to the subject vendor agreements. This Court’s analysis and holding that the Chairman lacked signatory authority or authority to bind the Tribe or waive its sovereign immunity regarding the subject vendor agreements is not altered by these later actions by the Business Committee.

### **C. Business necessity and economic pragmatism arguments**

CDST argues that reading Art. XII, § 1 to require Tribal Council authorization for the Chairman to sign instruments, such as the vendor agreements, would lead to impractical results. CDST claims business transactions by the Tribe

or its enterprises, no matter how mundane or small or necessarily including waivers of sovereign immunity to conduct commerce, would be stymied by the necessity of repetitive calling of special council meetings for such authorization. This Court does not agree. The relevant provisions of the Constitution allow sufficient flexibility for the Tribal Council to tailor and provide delegated authority to the Chairman, the Business Committee or tribal delegations necessary to conduct the Tribe's daily business and to plan and implement the Tribe's economic development.

Art. V, § 7 (e) grants exclusive authority to the Tribal Council "To select and authorize tribal delegations to transact business on behalf of the tribe." Art. VI, § 7 (i) grants authority to the Tribal Council to assign duties and responsibilities to the Business Committee. Art. XII, § 1 grants the Tribal Council the authority to delegate authorities and powers to the Chairman and to authorize the Chairman to sign necessary papers and instruments.

The Tribal Council may at any time select and provide a tribal delegation with authority, limited or expansive, to transact business, specific or general, on behalf of the Tribe. The Tribal Council may at any time delegate authority, limited or broad, to the Chairman to transact particular business on behalf of the Tribe and/or authorize the Chairman to sign necessary related instruments. The Tribal Council may assign duties and responsibilities to the Business Committee that supplement the constitutional authorities of the Business Committee as necessary to conduct tribal business and economic development. Tribal Council Resolution No. 01-06 (2006), which authorizes the Business Committee to waive sovereign immunity regarding contracts and certain business operations, subject to specific limitations and conditions, is just such an action by the Tribal Council.

Special tribal council meetings may be efficiently called at any time to address any such governmental need or tribal business opportunity. The tribal

council process may have an added benefit in that a process that necessarily takes some time may enhance the deliberative process, whereby time and consideration are duly given to issues and decisions of significance regarding the Tribe's interests by the Tribe's members assembled.

This Court notes that the Constitution does not authorize the Business Committee to delegate its authority in any area to a tribal business delegation or to the Chairman as can the Tribal Council. However, the Constitution does authorize Business Committee members collectively to execute contracts or leases relating to tribal property of five years duration or less. Art. VI, § 7 (c). This is a powerful tool with which the Business Committee conducts the Tribe's business as a body, and it is a power the Business Committee may exercise as regularly and often as necessary to conduct day to day business. This Court cannot contemplate, and the record does not demonstrate, any impediment to Business Committee members collectively so acting. In any event, such collective action is constitutionally required and non-delegable. *See Blind v. Tallbear*, 8 Okla. Trib. 571, 2004 WL 5745445 (Chey.-Arap. D. Ct. 2004) (holding that when a tribal constitution requires a tribal governing body as a whole to perform a tribal function, only the entire group may do so). *See also Housing Authority of Kiowa Tribe of Oklahoma v. Ware*, 10 P. 3d 226, 229 (Okla. 2000) (holding Kiowa Tribal Council was governing body of Tribe with power to select Housing Authority commissioners; Business Committee Chairman had no individual authority to make such appointments).

This Court further notes the Constitution provides for the Tribal Council to hire an Administrator/Manager to administrate tribal government under direction of the Business Committee. Art. V, § 9. This further provides for the Tribe's day to day functioning and conducting of its business.

This Court concludes that the lack of authority for the Chairman to bind the Tribe with his signature, except when so authorized by the Tribal Council, does not hamstring the Tribe in its governance, operation, or business dealings. This Court concludes that such constitutional restriction on the Chairman's authority has both perceived and actual benefits and protections for the Tribe. This Court concludes that the Constitution provides ample mechanisms for the Tribe's business and economic development to be effectively conducted and pursued without the Chairman having individual signatory power independent of Tribal Council authorization, and that constitutional limitations on the Chairman's authority are practical and protective for the Tribe.

#### **D. Equitable arguments**

1. In support of its position regarding Chairman's signatory and waiver authority, CDST offers, for the first time by exhibit attached to its appellate Reply Brief, <sup>22</sup> a March, 2002 attorney opinion letter commissioned by Chairman and contemporaneously provided to CDST. CDST asserts the letter was an "opinion from the Nation's counsel" <sup>23</sup> and therefore a legal opinion upon which CDST should have been able to rely as confirmation of Chairman's signatory authority prior to execution. <sup>24</sup> CDST seems to offer this attorney opinion letter for multiple purposes, including to serve as substantiation of CDST's legal position regarding Chairman's signatory and waiver authority, as a basis for CDST to rely on apparent authority for Chairman to bind Tribe, and as a basis for CDST to claim due diligence or excuse lack of due diligence on its part, in determining the signatory authority of the other contracting party prior to execution.

We note that the record does not show that the attorney opinion letter was offered in the trial court, either in CDST's summary judgment briefing or in the summary judgment hearing process, and no mention of the opinion letter was made in the trial judge's order. The Tribe's appellate counsel did not submit a response

or an objection to CDST's offer of the document or to CDST's appellate arguments based on it. This Court may decline to consider additional issues or arguments not raised or presented to the trial court. See *Public Service Company of Colorado, a Colorado Corporation v. Continental Casualty Company, d/b/a CNA Insurance*, 26 F. 3d 1508, 1515-16 (10th Cir. 1994), and cases cited therein. *Hicks v. Gates Rubber Co.*, 928 F. 2d 966, 970 (10th Cir. 1991) ("The failure to raise the issue with the trial court precludes review except for the most manifest error"); *Accord Petrini v. Howard*, 918 F. 2d 1482, 1483 n.4 (10th Cir. 1990) ("A federal court, as a general rule, will not reverse a judgment on the basis of issues not presented below"); *Lone Star Steel v. United Mine Workers of America*, 851 F. 2d 1239, 1243 (10th Cir. 1988) ("Ordinarily, a party may not lose in the district court on one theory of the case, and then prevail on appeal on a different theory"). This Court will discuss this additional argument by CDST for the limited purpose of discussing the opinion letter's significance in relation the CDST's awareness, prior to execution of the subject vendor agreements, of questions and issues raised as to the Chairman's authority to bind the Tribe and waive sovereign immunity.

This Court finds that the record does not demonstrate that the attorney rendering the opinion was the Tribe's counsel.<sup>25</sup> Whether the Tribe's counsel or not, this Court's analysis of the attorney's opinion and CDST's independent responsibility to determine Chairman's authority is not changed or affected.

This Court finds that the opinion letter does not comprehensively identify or persuasively analyze the relevant law. It is perfunctory and conclusory regarding the central issue of signatory authority of the Tribal Chairman.<sup>26</sup> It does not identify or discuss the need for Tribal Council authority for Chairman to sign necessary instruments. It does not identify or discuss the need for powers and authorities to be delegated by Tribal Council to Chairman. It does not address or discuss any authority of the Business Committee to delegate its powers and duties

to Chairman. It does not identify, analyze or discuss authority under tribal law to waive sovereign immunity, either on the part of Chairman or Business Committee.<sup>27</sup> It does not comment on the complete absence of any language of waiver of immunity in the Business Committee resolution that purports to authorize Chairmen to execute vendor agreements, though the resolution (CBC No. 06-01) is referenced and quoted in the letter. It cites, in part, as authority for Chairman to sign agreements and waive immunity, Art. XII (Chairman as Chief Executive) and the resolution (CBC No. 06-01).

Being mindful of the temporal and situational context in which the attorney opinion was commissioned and utilized by the Chairman, significant questions about the Chairman's conduct are raised. The commissioning of the opinion letter by the Chairman may fairly be viewed as an indication that the Chairman had questions about his authority to sign contracts binding the Tribe or waiving the Tribe's sovereign immunity; or that the Chairman, being cognizant of the constitutional limitations on his authority, sought a written attorney opinion ostensibly empowering him and pre-validating his contemplated actions.

This Court may fairly ask whether a Tribal Chairman would not, during the course of his tenure in office, well know and have a working knowledge of the language of the one section of his tribe's Constitution, Art. XII, § 1, that defines his duties as Chairman, clearly and in three sentences. It may fairly then be asked why a Tribal Chairman, with knowledge of the Constitution's description of his official duties, would willingly accept and utilize a commissioned attorney opinion that does not address the provisions that plainly state his authorities and powers are as delegated to him by the Tribal Council, as is his authority to sign papers and instruments for the Tribe. This Court will not accept the notion implicit in the commissioning of such an attorney opinion, that the Chairman would either not have been already familiar with the concise constitutional provision regarding the



Tribal Chairman's duties or that he would not have understood its plain language and clear meaning.

Curiously, the Chairman commissioned an attorney opinion regarding his authorities to bind the Tribe some nineteen months *after* he purported to possess such authorities by signing the August 22, 2000 original vendor agreement with John Harrington (JHE) and *after* he had executed assignments of that original agreement, including to CDST. Also, curiously, CDST was aware of this contradiction in the Chairman's actions regarding his authorities, CDST being a participating signatory with the Chairman on a preceding assignment of the original vendor agreement and as a contemporaneous recipient of the later attorney opinion letter.

The opinion letter was commissioned and rendered in early March, 2002, approximately six weeks prior to the annual Tribal Council meeting in mid-April, 2002. Given that the Chairman raised the question as to his authority to sign and bind the Tribe to a vendor gaming contract or to waive Tribe's sovereign immunity, would it not have been appropriate and natural in the performance of his duties as the presiding officer of the Tribal Council's meetings to have taken the issue and his question to the Tribal Council for discussion and decision at its annual meeting weeks away, or at a specially called council meeting at any time? <sup>28</sup> The Chairman could have presented and sought approval of the proposed vendor agreements, sought approval of waiver of sovereign immunity, and sought signatory authority at the Tribal Council meeting. The Chairman, with ample time for deliberation and action, chose not to do so. The Chairman and his successor instead opted, in November, 2002 and September, 2003, respectively, to execute an individually negotiated agreement and its amendment and purport to waive the Tribe's sovereign immunity.

Though the opinion letter concludes with the proviso that “Any non-Comanche party should consult with their own attorneys with respect to their legal positions related to the Agreements in question . . .,” it is concerning that the preparing attorney apparently simultaneously provided the commissioned letter, containing the attorney’s professional opinion and advice for the Tribal Chairman, to a representative of CDST, who later was himself the signatory for CDST on the subject vendor agreements.<sup>29</sup> The record does not demonstrate that this commissioned opinion regarding waiver of the Tribe’s sovereign immunity was similarly provided by the rendering attorney to the Tribal Council or to the Tribal Business Committee.

This Court finds, based on this record and CDST’s appellate counsel’s assertion of reliance, that CDST is reasonably charged with contemporaneous knowledge of the creation and content of the offered opinion letter and, consequently, that CDST had actual notice prior to execution of the subject Agreements that the Chairman had put a question of his signatory and waiver authority as Tribal Chairman to an attorney of his commission. This Court further finds that CDST had opportunity to itself examine the opinion letter’s specific references to Const. Art. XII (Tribal Chairman’s Duties) and Const. Art. IV, § 1 (Tribal Council as supreme governing body), and based thereon to inquire and determine whether the Chairman had been authorized by the Tribe’s Council to sign necessary instruments for the Tribe or had been delegated the authority or power by the Tribe’s Council to do this business with CDST or to waive the Tribe’s sovereign immunity.

This Court further finds, given that the resolution (CBC Resolution Number 06-01) by the Business Committee allegedly authorizing the Chairman to bind the Tribe is specifically referenced and partially quoted in the opinion letter, that CDST was on actual notice that the Business Committee’s resolution does not

contain language or any reference to, or purported authorization for, waiver of the Tribe's sovereign immunity by the Chairman. This Court further finds that CDST had opportunity prior to executing the subject Agreements to further inquire and determine whether Tribe's Business Committee had in any way authorized Chairman to waive Tribe's sovereign immunity and whether Tribe's Business Committee, in any event, had such waiver authority to delegate.

This Court finds that CDST's acknowledged receipt of the offered attorney opinion letter does not serve the purposes urged by CDST, nor can it, as a matter of law, excuse CDST's legal responsibility to ascertain the actual authority of an official to sign and bind a sovereign as principal to terms of a document.

2. CDST asserts Tribe operated under the Agreements for an extended time and received and accepted substantial benefits from the operation of the Agreements prior to unilaterally terminating or defaulting without cause, and that Tribe should, therefore, be estopped from later claiming the Agreements were entered without authority and are void.

Acceptance of benefits from a purported agreement does not retroactively bind the government or serve to waive or estop the government's assertion of failure of contract formation. *See Texas A&M Univ. Sys. v. Koseoglu*, 233 S.W. 3d 835, 840 (Tex. 2007) (“[Plaintiff] advances a waiver-by-conduct argument (*i.e.*, that Texas A&M waived its immunity from suit by accepting benefits under its alleged contract with [plaintiff], but we have consistently rejected that position and held that ‘the State does not waive its immunity from a breach-of-contract action by accepting the benefits of the contract’”).

“A contract made by public officers who do not have authority to make it, or an ultra vires contract, is void and unenforceable and cannot be validated by performance.” 73A C.J.S. Public Contracts § 8.

Furthermore, a party contracting with a government has a responsibility to accurately ascertain the bounds of the authority of the person who purports to act for the government.<sup>30</sup> “Whatever the form in which the government functions, anyone entering into an agreement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority.” *Fed. Crop. Ins. Corp. v. Merrill*, 332 U.S. 380, 384 (1947).

This Court notes that equitable estoppel has been found by courts to not be a basis for waiver of tribal sovereign immunity, on grounds that unauthorized actions of tribal officers and employees do not waive immunity or confer jurisdiction on a court. See *Dilliner v. Seneca-Cayuga Tribe*, 258 P. 3d 516, 520 (Okla. 2011) and cases cited therein, *Native American Distributing v. Seneca-Cayuga Tobacco Company*, 546 F. 3d 1288, 1295 (10th Cir. 2008), citing *Merrion v. Jicarilla Apache Tribe*, 255 U.S. 130, 148 (1982). See also, *Memphis Biofuels, LLC v. Chickasaw Nation Industries, Inc.*, 585 F.3d 917, 922 (6th Cir. 2009).

3. Moreover, CDST has indicated that the subject agreements involved significant revenue and/or obligations extending over a number of years. It would be in the individual self-interest of any principal to such an undertaking to independently examine and determine the authority of every agent or signatory to contract on behalf of other principals. This would be especially so in dealings with a purported agent for a sovereign, when, as here, it is acknowledged by all participants, and by the very terms in their Agreement, that enforceability against the governmental principal hinges upon a valid waiver of sovereign immunity.

The Tribal Constitution is a plain and simple document. Its provision regarding the authorities of the Tribal Chairman is contained in three sentences grouped together. Art. XII, Sec. 1. Its provisions regarding the authorities of the Tribal Council and the Business Committee are not lengthy or ambiguous. This

Court has concluded that a reading would give notice that Tribal Council authorization would be necessary for Tribal Chairman to sign any necessary documents or to act to bind Tribe or to waive Tribe's sovereign immunity. This Court has further concluded that the attorney opinion letter commissioned by Chairman would give notice that an examination of Tribe's Constitution by one contemplating significant business with Tribe would be warranted. However, such notice is not necessary. As a matter of law, the responsibility to determine the actual authority of Chairman to bind Tribe lies with the party doing business with Chairman and asserting Chairman's authority.

This Court notes that there is contained in the record an assertion by CDST that John Harrington (JHE's sole owner and manager) is a member of the Comanche Tribe.<sup>31</sup> Mr. Harrington is a signatory on the original August 22, 2000 vendor agreement with Chairman Waqua and on its subsequent assignments and amendments that included the Tribal Chairman and CDST. This assertion by CDST raises the question whether CDST had a contemporaneous understanding that the original vendor agreement and its progeny were agreements between a Tribe's Chairman and another tribal member (Harrington), without either having obtained approval of the agreements by the Tribal Council, of which both Waqua and Harrington would have been members. If so, from CDST's understanding, this collaboration would have involved a business deal, utilizing Tribe's gaming operation opportunities, between two tribal members, one a titled tribal officer, under circumstances of questioned authority, which CDST was willing to join. This business deal between two tribal members, utilizing Tribe's gaming operations, would additionally include their eventual agreement, joined in by CDST, that the sovereign immunity of their Tribe would be waived to assure enforcement for the benefit of CDST and non-Tribe participants. This Court does not draw conclusions, factual or otherwise, from CDST's assertion of Harrington's

tribal membership, but notes the possible implications of such knowledge or understanding by CDST as a party urging application of equitable principles in its favor.

This Court has concluded that the decision of the Chairman not to inform the Tribal Council or seek its approval and authorization was a conscious one. The record indicates that CDST made a conscious decision to move forward with the Chairman and Mr. Harrington and execute assignments and agreements, both before and after its receipt of the Chairman's attorney opinion letter. This Court will not speculate as to reason or motive for proposals and issues not having been brought to the Tribal Council for decision prior to the participants moving forward. The record does not reflect that press of time was a factor regarding negotiation or execution of the Agreements or failure to present them to the Tribal Council or the Business Committee for consideration.

A company or individual, such as CDST and its agent, when doing business with a tribal officer and when contemplating executing agreements that involve significant potential revenues and obligations and purport to bind the Tribe and waive its immunity, has a responsibility, as a matter of law, to ascertain the authority of the tribal officer with whom they are dealing.

4. This Court finds, as a matter of law, that the equitable principles asserted by CDST in urging the validity, or the validation, of the subject agreements are not applicable to governmental contracts in general and are not applicable under tribal law to validate the subject vendor agreements or to waive the Tribe's sovereign immunity.

## **VI. Summary**

The parties each moved for summary judgment upon the issue of whether the Chairman had authority to enter into agreements or waive sovereign immunity on behalf of Tribe. CDST is seeking to enforce a 2002 Lease and a 2003

Amendment against Tribe in the American Arbitration Association. Both parties maintain there are no material facts in dispute on the issue, and the trial court has so found.

This Court finds the material facts regarding the essential element of this claim are not in dispute, and our decision is one of law. This Court reviewed the record and the trial court's decision de novo, including findings of fact and conclusions of law. This Court viewed the evidence and drew reasonable inferences therefrom in the light most favorable to CDST.

The material facts include: 1) the Comanche Indian Tribe is a federally recognized Indian tribe, 2) Tribe's organizing document is the *Constitution of the Comanche Indian Tribe*, 3) the 2002 Lease and the 2003 Amendment were signed only by a Tribal Chairman, and 4) the Tribal Council had not authorized a Tribal Chairman to sign either instrument.

This Court concludes, as a matter of law, pursuant to Art. XII, § 1 of Tribe's Constitution, that the Tribal Chairman, as chief executive of Tribe, has only those authorities and powers as delegated to his office by the Constitution and by the Tribal Council and has authority to sign necessary papers and instruments for the Tribe only when so authorized by the Tribal Council.

This Court further concludes, as a matter of law, that the Tribe's Constitution does not in any of its provisions delegate authorities and powers to the office of the Tribal Chairman as chief executive of the Tribe, other than to preside at all meetings of the Tribal Council and of the Tribal Business Committee and to be the principal member of all tribal delegations.

This Court further concludes, as a matter of law, that the Tribe's Constitution does not itself authorize the Tribal Chairman to contract or sign agreements on behalf of the Tribe, nor does it authorize the Tribal Chairman to waive the Tribe's sovereign immunity.

This Court further concludes, as a matter of law, that the Tribal Chairman was not authorized to sign the instruments in controversy, either by the Tribal Council or by the Constitution itself.

This Court further concludes that the Tribal Council did not authorize the Tribal Chairman to waive the Tribe's sovereign immunity in relation to the subject vendor agreements nor did the Tribal Council act to directly waive the Tribe's sovereign immunity in relation to the vendor agreements.

This Court further concludes, as a matter of law, that the Tribal Business Committee does not have the authority to delegate its constitutional power to contract on behalf of the Tribe to one of its members, including the Tribal Chairman, or to any other person, body or delegation, and that any such purported delegation of authority is without legal effect.

This Court further concludes, as a matter of law, that the purported delegation of authority by the Tribal Business Committee to the Tribal Chairman to contract on behalf of the Tribe was not a valid delegation of authority and was of no legal effect.

This Court further concludes that the Tribal Business Committee did not purport to authorize the Tribal Chairman to agree to arbitration, consent to suit or waive the Tribe's sovereign immunity regarding the subject vendor agreements.

This Court further concludes, as a matter of law, that principles of agency, apparent authority, ratification, practical construction, business necessity/economic pragmatism, equity or equitable estoppel are not applicable to validate a purported contract by a sovereign and are not applicable under the law of the Tribe to validate the subject vendor agreements or to waive the Tribe's sovereign immunity.

This Court further concludes, as a matter of law, that the issues of validity of contract and arbitrability are issues for the court, not an arbitrator, to decide.



The Court of Indian Offenses is a court with jurisdiction to hear and decide this action, pursuant to the Comanche Nation Tribal Court Civil Jurisdiction Ordinance of 2011.

This Court finds and declares the written agreements upon which CDST relies to be void *ab initio*, not binding on the Tribe, not effectuating a waiver of the Tribe's sovereign immunity, and, therefore, not imposing on the Tribe a legal obligation to arbitrate the claims asserted by CDST in the American Arbitration Association proceeding.

The order of the trial court granting Comanche Nation's Motion for Summary Judgment and denying CDST's Cross-Motion for Summary Judgment is therefore affirmed.

Entered this 3rd day of May, 2017.

Albert Ghezzi  
Albert Ghezzi, Appellate Magistrate

Concurring: Rebecca A. Cryer, Appellate Magistrate  
Steven L. Parker, Appellate Magistrate

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<sup>1</sup> *CDST-Gaming I, LLC vs. Comanche Nation, et al.*, W.D.O.K. Case No. CIV-09-521-F (Mar. 4, 2014)

<sup>2</sup> The Comanche Nation Tribal Court Civil Jurisdiction Ordinance of 2011, adopted by Comanche Business Committee Resolution 36-11 on April 2, 2011 and approved by the Secretary of the Interior's designee on June 10, 2011.

<sup>3</sup> The 2000 Machine Vendor Agreement did contain a provision that the parties agree to resolve disputes regarding the Agreement within the Courts of the Comanche Tribe and that, in case of breach of the Agreement by Tribe, JHE had the immediate right of repossession of any gaming terminals placed in the gaming facility.

<sup>4</sup> "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Federal Rules Civil Procedure Rule 56 (a).

<sup>5</sup> "Paragraph 18. Arbitration. If any dispute which arises between the parties with respect to this Agreement is unable to be resolved by direct negotiation, the dispute shall be settled by binding arbitration conducted in accordance with the Commercial Arbitration Rules of the American Arbitration Association ("AAA") then in effect. The arbitrator shall be mutually agreed upon and shall have specific experience involving Indian tribes as litigants, if possible. The decision of the arbitrator shall be binding upon the parties . . ."

<sup>6</sup> Paragraph 24. Applicable Law. This Agreement shall be governed by federal law, and to the extent not inconsistent therewith, the laws of the State of Oklahoma.

<sup>7</sup> CDST cites the decision and order by Judge David Russell in *Comanche Indian Tribe of Oklahoma v. 49, L.L.C., an Oklahoma Limited Liability Company; American Arbitration Association*, W.D.O.K. Case No. CIV-03-18-R (Apr. 3, 2003) as supporting CDST's position. However, as in *C&L Enterprises, Inc.*, the Chairman's authority to sign the subject agreement and the attendant validity of the agreement or its purported waiver of sovereign immunity by arbitration clause was not raised or litigated. Interestingly, central to the case before Judge Russell was the same purported Business Committee resolution (CBC Resolution No. 06-01), but it stated that the Chairman's authority to negotiate and execute gaming agreements pertained to the "New Randlett Gaming Center" instead of to "the expansions of the Comanche Nation Gaming Centers," as the phrase reads in the Resolution No. 06-01 submitted in this case. Resolving questions of authenticity raised by the existence of two versions of CBC Resolution No. 06-01, which conflict regarding a material provision, is not necessary to this Court's determination of the issues herein.

<sup>8</sup> See *Public Service Company of Colorado, a Colorado Corporation v. Continental Casualty Company, d/b/a CNA Insurance*, 26 F. 3d 1508, 1515-16 (10th Cir. 1994), and cases cited therein. *Hicks v. Gates Rubber Co.*, 928 F. 2d 966, 970 (10th Cir. 1991) ("The failure to raise the issue with the trial court precludes review except for the most manifest error"); *Accord Petrini v. Howard*, 918 F. 2d 1482, 1483 n.4 (10th Cir. 1990) ("A federal court, as a general rule, will not reverse a judgment on the basis of issues not presented below"); *Lone Star Steel v. United Mine Workers of America*, 851 F. 2d 1239, 1243 (10th Cir. 1988) ("Ordinarily, a party may not lose in the district court on one theory of the case, and then prevail on appeal on a different theory").

<sup>9</sup> Art. VII, § 2, Const.

<sup>10</sup> Art. VIII, § 1, Const.

<sup>11</sup> Art. VIII, § 2, Const.

<sup>12</sup> Comanche Tribal Council Resolution No. 01-06 appears in the trial record as Defendant's Exhibit 1, Hearing 9/9/2014.

<sup>13</sup> Art. XI, Const. allows for amendment of Constitution upon majority proposal of Business Committee or of 200 members of Tribe approved by Commissioner of Indian Affairs and then by majority vote at election by adult members of Tribe; Art. V, § 1, Const. provides that the Tribal Council consists of all adult members of the Tribe.

<sup>14</sup> The Acting Regional Director of the Southern Plains Regional Office of the Bureau of Indian Affairs approved the 2011 Ordinance on June 10, 2011.

<sup>15</sup> 25 C.F.R. Sec. 11.108 (effective August 11, 2008) provides: “The governing body of each tribe occupying the Indian country over which a Court of Indian Offenses has jurisdiction may enact ordinances which, when approved by the Assistant Secretary-Indian Affairs or his or her designee: (a) Are enforceable in the Court of Indian Offenses having jurisdiction over the Indian country occupied by the tribe; and (b) Supersede any conflicting regulation in this part.”

Its predecessor, 25 C.F.R. Sec. 11.100(e) (effective prior to August 11, 2008) made the same provision with nearly the same language.

<sup>16</sup> Another version of the same purported resolution (CBC Resolution No. 06-01) pertains to “the New Randlett Gaming Center” instead of “the expansions of the Comanche Nation Gaming Centers.” For purposes of analysis, the court will accept the version containing “the expansions of the Comanche Nation Gaming Centers,” given that the site of placement of the gaming machines related to the agreements at issue is at the Lawton gaming facility.

On January 10, 2004, the Tribal Business Committee passed a motion to rescind CBC Resolution No. 06-01.

<sup>17</sup> This Court notes that Business Committee Resolution 06-01 does not purport to additionally authorize the Tribal Chairman to agree to arbitration or consent to suit or to waive the sovereign immunity of the Tribe

<sup>18</sup> In support of the Gaming Commission/Committee's purported authority, as asserted by CDST, to make recommendations that, if followed by the Business Committee, would have the force of tribal law, CDST presents a "Resolution" passed by the "Comanche Gaming Commission" in 1998, regarding an unrelated matter, but which recites that "the Comanche Gaming Commission has been empowered to act in all matters of business in behalf of the Tribe's gaming operations; ..." Such a declaration of empowerment has no foundational support in the record and, in any event, could not serve as a constitutional source of authority for Business Committee Resolution No. 06-01 or for Chairman actions in relation to the vendor agreements.

<sup>19</sup> On March 26, 1996, the Tribal Business Committee enacted the Comanche Nation Gaming Ordinance. The ordinance was enacted subsequent to the federal Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2701, et seq., and is intended to be construed in conformance with IGRA in all respects. The gaming ordinance authorizes the conduct and operation of all forms of Class III and Class II gaming by the Tribe. The ordinance establishes a tribal gaming operation, called the "Comanche Nation Games," as an enterprise of the Tribe having the authority to conduct gaming within the Comanche Nation, which "shall be administered and regulated by the Business Committee and shall be a subordinate agency of the Nation." The ordinance regulates the application of net gaming revenues for tribal purposes, the licensure of employees, prohibition of intoxicants, restriction regarding age, prizes and discrimination, and prohibited acts and penalties.

This Court notes that the 1996 Tribal Gaming Ordinance does not establish a Tribal Gaming Commission or Committee. The record does not contain evidence demonstrating that there is such an entity or, if so, how or when an entity referred to as the Comanche Gaming Commission or Gaming Committee was established, whether by ordinance or by resolution of the Business Committee or by other means.

Consistent with the Constitution, the 1996 Tribal Gaming Ordinance, upon which CDST relies, contains no provision authorizing the Chairman to execute papers or instruments for the Tribe, nor could it constitutionally do so.

<sup>20</sup> CBC Resolution No. 047-98 (1998): reciting that “the Tribal Chairman or his designee, is the official representative of the Comanche Nation, and is authorized to negotiate and approve contracts and any amendments to such.” -in relation to an EPA program grant.

CBC Resolution No. 022-99 (1999): reciting that “the Tribal Chairman or his designee, is the official representative of the Comanche Nation, and is authorized to negotiate and approve contracts and any amendments to such.” -in relation to a grant application for an Indian Environmental Regulatory Enhancement Project.

CBC Resolution No. 037-99 (1999): reciting that “the Comanche Business Committee, on behalf of the Comanche Nation, authorizes Mr. Johnny Waqua, Chairman; Thomas Chibitty, Secretary/Treasurer, be authorized to sign all contractual agreements on behalf of the Comanche Nation.” -apparently in relation to a CHR/EMS Contract.

CBC Resolution No. 13-00 (2000): reciting that the “Tribal Chairman or his designee is the duly authorized representative of the Comanche Tribe designated to negotiate contracts and grants and amendments, thereof, sign checks and documents, . . .” -in relation to a BIA Indian Child Welfare program grant.

<sup>21</sup> First, by resolution on November 6, 2004, the Business Committee approved a tribal-state gaming compact, which contained a limited waiver of sovereign immunity for prizes and for personal injury damages in an insured amount, and authorized the Chairman to sign the compact in substantially the same form as the Class III gaming compact attached to the resolution. Second, by resolution on December 4, 2004, the Business Committee approved a specifically referenced business lease of an individual’s Comanche trust property, including a limited waiver of sovereign immunity for specific performance and actual damages up to \$6,000.00, and authorizing execution of the lease by the Chairman or Vice-Chairman. In each instance of purported waiver of the Tribe’s sovereign immunity, the Business Committee specifically referenced the written document/agreement in question and acted as a body in approving it and authorizing its execution. The referenced trust property lease and tribal-state compact are not at issue in this case.

<sup>22</sup> CDST-Gaming I, LLC’s Reply Brief, Exhibit H

<sup>23</sup> CDST-Gaming I, LLC’s Reply Brief at 17

<sup>24</sup> In its appellate Reply Brief at 15, CDST offers that “[i]n March, 2002, Chairman Waqua commissioned a legal opinion on his authority to sign agreements with a related CDST entity, including his authority to waive sovereign immunity in that contract.” The referenced legal opinion is a letter dated March 4, 2002 by an attorney addressed to Chairman Johnny Waqua. A copy of the offered letter is attached to the Reply Brief as Exhibit H. The commissioned letter states that pursuant to Chairman’s request of March 1, 2002 the attorney reviewed discussion drafts of lease, loan and security agreements between CDST-Comanche, LLC and the Comanche Indian Tribe dated November 10, 2001. The letter preliminarily states the attorney will submit “a copy of this opinion to Jim Howard pursuant to our discussions.” James D. Howard, Jr. is a signatory for CDST on the subject vendor agreements. The commissioned opinion letter was evidently contemporaneously provided to CDST. The attorney letter states, in summary, “I am of the opinion that Chairman Waqua is properly authorized to sign the above referenced Agreements on behalf of the Comanche Indian Tribe . . . also . . . that said Agreements are enforceable via arbitration as contemplated in the arbitration clauses contained in each Document.” CDST asserts that “Given this opinion from the Nation’s own counsel, . . . it is beyond the pale to suggest that . . . CDST should have done more to ensure it was receiving a valid waiver of immunity.” Reply Brief at 17.

The opinion letter states that Art. IV, § 1 of the Tribe’s Constitution establishes the Comanche Tribal Council as the supreme governing body of the Tribe consisting of all adult tribal members, and that the Tribal Council meets annually and specially as called.

The basis for the letter’s opinion the Chairman has authority to sign the referenced documents on behalf of the Tribe is stated as follows: 1) Art. V [sic] of the Constitution establishes the Business Committee as the elected body that has general supervision of Tribe’s day to day activities; 2) Art. XII, § 1 empowers the elected Chairman as Tribe’s Chief Executive; and 3) pursuant to Business Committee resolution dated January 6, 2001 (CBC Res. No. 06-01), Chairman has been authorized “. . . to sign and/or negotiate all contracts, amendments, checks and documents for and on behalf of matters pertaining to the New Randlett Gaming Center, (inclusive of water matters, building/construction, machine selection and placement, etc).” The attorney concludes: “I am of the opinion that the Chairman of the Comanche Tribe is properly authorized to fully obligate the Tribe to the terms of the previously referenced Agreements with CDST-Comanche.”

The opinion letter does not state or discuss that the quoted CBC Res. No. 06-01 contains no language of authority for Chairman to consent to arbitration or suit nor any reference to waiver of Tribe’s sovereign immunity in any manner or regard.

<sup>25</sup> CDST's brief (Reply Brief at 15) admits Chairman commissioned the letter regarding his authority, and the record does not indicate the attorney supplying the letter was Tribe's attorney. The attorney's opinion was written on private business letterhead and as "attorney at law," and the writer does not identify himself as Tribe's attorney or Nation's counsel. Art. V, §10, Const. provides that the Tribal Council hires the Tribe's attorney. There is no showing Tribal Council hired the commissioned attorney. There is no showing Tribal Council was provided with the opinion letter. There is no stated basis in the letter itself for the conclusion that the commissioned attorney was the Tribe's attorney or counsel. There is no basis in the record for this Court to conclude the attorney was the Tribe's counsel.

Furthermore, the content of the letter does not indicate it was prepared for the eyes of the Tribal Council, in that it includes nothing regarding Tribal Council's Art.XII exclusive authority to delegate the authorities and powers of and to Chairman and to authorize Chairman to sign necessary papers and instruments for Tribe.

<sup>26</sup> The thrust of much of the letter is that the arbitration and waiver clauses contained in the examined agreements constitute a clear waiver of sovereign immunity, citing *C&L Enterprises, Inc.*, and the letter recommends against agreeing to enforcement in state courts.

<sup>27</sup> The commissioned opinion does not cite or reference any constitutional authority for the Business Committee to, by resolution or otherwise, delegate or give authority to the Chairman to individually negotiate and sign contracts on behalf of Tribe. Nor does the letter reference or analyze any constitutional basis for its opinion for authority by the Chairman to "fully obligate the Tribe to the terms" of the referenced Agreements, including waiver of Tribe's sovereign immunity.



<sup>28</sup> The tribal chairman is the chairman of the tribal council with the constitutional duty, as chairman, to preside at all tribal council meetings, a constitutional duty he presumably would know and have no uncertainty about. The middle sentence of Art. XII, § 1 provides: “He (Tribal Chairman) shall preside at all meetings of the Tribal Council and the Business Committee and be the principal member of all tribal delegations.”

The Court notes that this provision is contained in one of three sentences comprising all of Art. XII, Sec. 1 (Duties of Tribal Chairman). It lies between Sec. 1’s first sentence limiting the powers of Chairman’s office to those delegated by Tribal Council and Sec. 1’s final sentence providing for signatory powers of Chairman only as authorized by Tribal Council. Three sentences that share the same bunk, so to speak. Looking in on one (Chairman as Chief Executive), would ensure seeing all. Reveille sounded for one, would call all to attention.

This provision (preside at meetings and lead tribal delegations) is consistent with all other provisions of the Constitution that provide and contemplate that the Chairman acts at all times as the leader of a tribal body, whether it be the council, the business committee or a tribal delegation (as selected and authorized by the tribal council), not on his own or as a lone officer, even if that be chief executive, an office having only the powers and authorities as delegated to it by the Tribal Council. In the normal course, the Chairman would have presided at the 2002 annual council meeting, and the record does not indicate otherwise.

<sup>29</sup> This Court notes that this receiving representative for CDST, James D. Howard, Jr., was also the signatory for CDST on an *earlier* Assignment of the original vendor agreement to CDST, predating this attorney opinion letter, on which earlier Assignment Chairman Waqua was also a signatory purporting to exercise authority on behalf of Tribe.

<sup>30</sup> “Contracts of public officials entered without constitutional, statutory, or other authority are void ... Moreover, a party contracting with a government agency may not rely on the agent’s assertion of authority, if such authority does not exist.” 73A C.J.S. Public Contracts § 3.

“Moreover, apparent authority ordinarily cannot serve as a means of holding a state, county, or municipal sovereign to a contract. A contractor must ascertain whether a public contract complies with constitutional provisions, statutes, charters, and ordinances, so far as they are applicable, and if it does not, it performs at its peril.” 73A C.J.S. Public Contracts § 8

<sup>31</sup> Reply in Support of CDST's Motion to Strike ... Declaration of John Harrington, filed July 2, 2015, pp. 1-2, states "Mr. Harrington is a member of the Comanche Nation and was a participant in the gaming equipment leases stretching back to August 2000." The accuracy of this assertion is not independently confirmed by the record, nor is it controverted in the record.

MAY 05 2017

By   
Court Clerk Deputy

IN THE COURT OF INDIAN APPEALS  
FOR THE SOUTHERN PLAINS REGION  
ANADARKO, OKLAHOMA

CDST-Gaming I, LLC, )  
an Arizona Limited )  
Liability Company, )  
Appellant/Defendant, )  
vs. )  
Comanche Nation, a federally )  
recognized Indian tribe )  
Appellee/Plaintiff. )

Trial Case No. CIV-08-A12  
Appeal Case No. APP-16-003

**ORDER DENYING APPELLEE’S MOTION FOR LEAVE  
TO FILE BRIEF IN SUR-REPLY**

Now on this 2nd day of May, 2017, this court having received Appellee’s Motion for Leave to File Brief in Sur-Reply, the Court denies the motion for failure to state good cause, and the Court does not review or consider any of the arguments made in the brief attached to the motion.

s/Albert Ghezzi

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Albert Ghezzi, Appellate Magistrate

Concurring: Steven L. Parker, Appellate Magistrate  
Rebecca A. Cryer, Appellate Magistrate