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Winner, Best Appellate Brief in the 1998 Native American Law Student Association Moot Court Competition

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Questions Presented

I. Whether an Indian Nation retains its sovereign immunity from suit when it engages in commercial activities off its reservation, when it waives its sovereign immunity from arbitration proceedings, and when it waives its sovereign immunity in a contract not at issue in the present dispute.

II. Whether state courts lack jurisdiction to adjudicate a matter between an Indian Nation and a non-Indian business partner when the dispute stems from "Indian Country," when tribal court remedies have not been exhausted, and when the contracted arbitration clause provides the sole method of resolving the dispute.

Statement of the Case

Petitioner Spiro Nation of Oklahoma (Spiro Nation) is a federally recognized Nation of Indigenous Peoples whose current territory consists of a 640-acre reservation located in eastern Oklahoma near Spiro, Oklahoma.

On September 30, 1995 at their Tribal headquarters, the Spiro Nation entered into a contract with the Apex Management Company (Apex), a non-Indian owned corporation of Oklahoma, to construct the Spiro Nation Travel Plaza (Travel Plaza) on land in Oklahoma City. (R. at 7.) Once a dispute erupted concerning execution of the contract, Apex filed suit in an effort to enforce the contract under its understanding of the contract's terms.

1. Historical Background of the Spiro Nation. In 1936, the Spiro Nation organized under the newly-enacted Oklahoma Indian Welfare Act (OIWA). (R. at 3.) With this recognition, the Bureau of Indian Affairs (BIA) took Spiro's remaining 640-acre territory into trust. (R. at 3.) This reservation was now Spiro's center and home to its Tribal headquarters. (R. at 3.)

2. The Spiro Nation's Economic Re-Development. In the 1980s, Spiro purchased land near Moffet, Oklahoma. (R. at 3.) The BIA took these lands into trust, and Spiro built the Spiro Nation Travel Plaza at Moffet. (R. at 3.) The Plaza consisted of a gas station, Burger King, trucker's lounge and convenience store; it also sold tobacco products in a similar fashion as in the Spiro Bingo Hall. (R. at 3.)

3. The Bricktown Travel Plaza. In the late 1980s and early 1990s, an old warehouse district of downtown Oklahoma City known as "Bricktown" was primed for re-development as a downtown entertainment and arts center. (R. at 3-4.) This area was once Spiro Nation's traditional western Trading Complex on the North Canadian River; the Nation never relinquished this area in any treaty with the French, Spanish or the United States. (R. at 4.) According to historian Angie Debo and Royce land area maps, Spiro's presence and claim to the area was recognized in U.S. military records, explorer's journals, and missionary diaries. (R. at 4.) These sources noted that Spiro sent three holy men to this site to conduct a blessing ceremony at the summer solstice since the 1830s. (R. at 4.) Further still, when the county in which the area is now located was named at statehood, the area was designated "unassigned lands" representing an area unclaimed by the Western and Eastern tribes of Oklahoma. (R. at 4.)

Spiro selected these traditional lands as the site for its second Travel Plaza. (R. at 4.) Apex Management Company, a non-Indian owned business of Oklahoma, was hired by Spiro to begin designing the project. (R. at 5.) The Chief, the Tribal Economic Director, the Tribal attorney, and all other parties met on several occasions to continue negotiations culminating in a day-long negotiation session in June 1995 at the Spiro Nation's headquarters. (R. at 5-6.)

The project was funded through privately-placed Certificates of Participation, and the Oklahoma National Bank was chosen as the trustee to receive payments from the project. (R. at 5.) Spiro purchased the 12.4-acre property, and the BIA cleared the land to be placed into trust.1 (R. at 5.) Then Spiro leased the "trust" land to Apex under a BIA-approved Land Lease, who in turn, leased the developed land back to Spiro under a BIA-approved Operating Lease. (R. at 5.)

Because it wished to shield its existing assets from any liability stemming from the project, Spiro insisted on certain limitations on its indebtedness if the project failed for any reason. First, on September 25, 1995, the Spiro Tribal Council passed a resolution for a limited waiver of sovereign immunity. (R. at 6.) The limited waiver provided in relevant part:

The Spiro Nation hereby expressly and irrevocably waives such tribal sovereign immunity . . . with respect to any arbitration proceeding that may arise in connection with the Land Lease and/or Operating Lease, the enforcement in any court of competent jurisdiction of any arbitration decision, judgment or

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1. During discovery proceedings, it was revealed that although the BIA had intended to accept the "Bricktown" property into trust and had prepared all the appropriate documents, the documents were not signed due to a furlough imposed on all federal employees. When employees returned to work a month later, the paperwork was filed away because everyone at the BIA believed the trust documents were complete.
award, any mandamus proceeding in any court of competent jurisdiction to enforce the respective provisions of the Land and/or Operating Lease.

(R. at 6.)

Second, monthly rental payments to Apex were to be drawn only from gross revenues of the Travel Plaza. (R. at 6.) Article I of the Operating Lease defined "Gross Revenues" in relevant part as "[g]ross receipts, income and charges, ... whether or not now contemplated or anticipated, now or any time hereafter derived for the benefit of Lessee or any Affiliate of Lessee from the use or operation of the Premises." (R. at 7.)

Third, Article 25 of the Operating Lease included a provision for arbitration which stated, "Any controversy or claim . . . shall be settled by arbitration . . . in any court having jurisdiction thereof." (R. at 7.) Article 30 provided that "Lessor shall be entitled to the restraint by injunction of the violation . . . of any of the covenants, conditions, [etc.] of this Lease." (R. at 7.) Article 40 further bounded the parties by stating that "This lease . . . shall be governed . . . by the substantive law of the State of Oklahoma provided, however, that the foregoing choice of law shall not be construed as a grant of personal jurisdiction by the Lessor or Lessee to the courts of the State of Oklahoma." (R. at 7.)

Finally, on September 30, 1995, the Indenture of Trust was signed at the Spiro Tribal Complex on the Spiro Reservation where all BIA signatures and seals were affixed to the Indenture of Trust and the Land and Operating Leases. (R. at 7.)

During construction of the Plaza, four mounds were unearthed on the Spiro's land. (R. at 8.) This find confirmed that Oklahoma City was the site of the Spiro trading camp because the mounds were typical of those found on the Spiro Reservation. (R. at 8.) With this reunion, Spiro invigorated its traditional ceremonies at the Plaza.

With the unearthing of the mounds, Spiro's Principal Chief sought to re-establish a community on the Plaza land. The Tribe soon built an apartment complex on the West end of the property. (R. at 8.) The "temple-like" buildings contained six family-sized apartments, fast-food restaurants, an office complex, an ATM machine, and a mailbox rental service. (R. at 8.) The office space was rented to the Indian Health Service as a clinic. (R. at 8.) The apartments' occupants consisted of two doctors (both were Spiro Tribal members), a nurse (also a Spiro Tribal member), an Indian assistant U.S. attorney, and their families totaling fifteen Native People living on the Plaza land. (R. at 8.) In addition, two U.S. marshals were cross-deputized by Spiro to provide law enforcement for the area. (R. at 8.)

4. Motor Fuel Tax Contract with the State of Oklahoma. In response to this Court's decision in Oklahoma Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 461 (1995), the Oklahoma Legislature passed new legislation that shifted the point of tax collection from the pump to the refinery. See 68
OKLA. STAT. § 500.63 (Supp. 1997). Titled the "Motor Fuel Tax Code," this scheme would set aside 3% of the State's yearly fuel taxes from which the state would pay all contracting tribes a fixed fee payment of $25,000 and a rebate of ten cents per gallon based on gallons sold in the fourth quarter. (R. at 8.) By agreeing to this scheme, tribes were required to relinquish any challenge to the State's collection of tax at the refinery. (R. at 8.)

Spiro accepted the State's offer on September 30, 1996. (R. at 9.) Along with the above provisions, Spiro also agreed to a limited waiver of sovereign immunity for the collection of taxes and payment of the rebate. (R. at 9.)

To increase sales and ensure a large rebate, Spiro sold gas at slightly below cost during the fourth quarter of 1996. (R. at 9.) While Spiro was successful at increasing sales, the Nation was put into precariously high-debt. (R. at 9.) The Nation planned to make up for the cash short fall at the Bricktown Travel Plaza in early 1997, but unknown to all but a few insiders, a new triple A ballpark began to be built in December 1996. (R. at 9.) This caused significant detours slowing traffic to a trickle, and the Plaza sold little gas. Another large traffic project started at the I-40/I-35 interchange further disrupting traffic flow to the Plaza area. (R. at 9.) In addition, the first quarterly payments of the rebate were not received until February 1997. (R. at 9.) Consequently, there were no gross revenues to be deposited with the Oklahoma National Bank, and no monies were transferred to the debt service account or the Plaza operating account. (R. at 9.)

5. The Travel Plaza is Closed. To avoid defaulting, the Spiro Nation Tribal Council passed a resolution authorizing the Principal Chief to shut down the Travel Plaza by invoking the force majeure clause of the Operating Lease which stated in relevant part:

Any failure to operate the premises as contemplated for more than seven consecutive days . . . shall constitute a default under this Lease unless (a) such failure is due to . . . any . . . cause beyond the reasonable control of Lessee, and (b) Lessee shall be diligently engaged in efforts to resolve the matters giving rise to such failure to operate.

(R. at 9.) The Council felt that the sudden halt of traffic to the area due to the ballpark and interstate construction satisfied Section 7(a)(iii), "any other cause beyond the reasonable control of the Lessee . . . ." (R. at 9.)

6. The Proceedings Below. Because this case involved the first interpretation of the Motor Fuel Tax Code and addressed issues from recent and related cases, the Oklahoma Supreme Court accepted original jurisdiction on an expedited basis. (R. at 10-11.)
On August 1, 1997, the Oklahoma Supreme Court found for Apex Management. (R. at 11.) The court held that the Spiro Nation had waived its sovereign immunity from suit by: (a) conducting business outside of "Indian Country;" (b) the terms of the Operating Lease and Tribal resolutions; and (c) the terms of its Motor Fuel Tax contract with the State of Oklahoma. (R. at 11.) The court further found that Oklahoma state courts were appropriate forums for adjudication by terms of the Operating Lease and because the Travel Plaza was not "Indian Country" under 18 U.S.C. § 1151 (1997). (R. at 11.)

Turning to the question of appropriate relief, the court found that the gas tax rebate under the Motor Fuel Tax contract between the State of Oklahoma and the Spiro Nation was "Gross Revenue" of the Travel Plaza. (R. at 11.) Therefore, the rebate was subject to the terms of the Operating Lease and should be used to fulfill the Travel Plaza contract. (R. at 11.) To execute this finding, the court issued an order requiring Spiro to use the rebate to pay Apex and the Oklahoma National Bank. (R. at 11.)

The Spiro Nation filed a petition for a writ of certiorari with this Court seeking review of the Oklahoma Supreme Court's findings in favor of Apex Management as well as the Oklahoma court's order directing Spiro to pay current and unpaid rent from its Motor Fuel Tax rebate. On October 14, 1997, this Court granted the petition on all issues. (R. at 12.)

Summary of Argument

The United States federal government has long recognized that Indian Nations possess the same common-law sovereign immunity from suit that all sovereign nations maintain. Any deviation from this rule comes only through the unequivocal consent of a tribe or through federal authorization. Because tribes do not have the tax base or the long history of experience in commercial activities, the federal government has extended this waiver of sovereign immunity to include a tribe's commercial endeavors. Therefore, nearly all jurisdictions have held that implied waivers of sovereign immunity are not allowed.

The Oklahoma Supreme Court has continually diverged from this federal and state precedent and sought to impose its jurisdiction onto Indigenous Nations and their territories. In this way, the Oklahoma court attempted to limit the scope of "Indian Country" stating that when an Indian and non-Indian company execute a contract outside of Indian Country, the Indian Nation automatically and impliedly waives its sovereign immunity.

The court has also sought to transform a waiver of sovereign immunity from an arbitration proceeding into a general waiver of immunity from suit. Such reading of an arbitration clause runs counter to not only the strong presumption against tribal waivers of immunity, but also generally accepted principles of contractual arbitration provisions.
The Spiro Nation was clearly within its legislative powers to pass tribal resolutions for the broad governmental objective of protecting the assets of the tribe. Because any waiver of sovereign immunity must be in unmistakable terms, the U. S. Constitution's Contracts Clause cannot require a sovereign to surrender essential attributes of its sovereignty. Further, the federal government's policy in Indian affairs has been to support economic endeavors by tribes, and Congress recognized such assistance would be necessary to further self-development.

Moreover, a contract must be interpreted by its terms and by parties' intent. Because Oklahoma and Spiro did not intend for Apex Management to benefit from execution of the Motor Fuel Tax contract, Apex is not a third-party beneficiary, and therefore, cannot reap benefits of the gas tax rebate due to Spiro Nation. In addition, terms of the contract restrict use of the gas tax rebate to benefit the Tribe and cannot be passed to any third-party when no such intention was indicated.

The questions presented in the present case are whether the Spiro Nation has retained its sovereign immunity from suit and whether Oklahoma state courts lack jurisdiction to adjudicate the Apex-Spiro Nation issues.

**Argument**

I. The Spiro Nation Did Not Waive Its Sovereign Immunity from Suit in the "Bricktown" Travel Plaza Contract with Apex Management

It is well recognized that Indian Nations possess the "common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (citations omitted). In *Martinez*, this Court further established that a waiver of sovereign immunity "cannot be implied but must be unequivocally expressed." *Id.* (emphasis added). This unequivocal waiver can result when a Nation consents to suit or if Congress unilaterally authorizes the waiver. *See Puyallup Tribe v. Dep't of Game of Washington*, 433 U.S. 165, 172 (1977); *United States v. United States Fidelity and Guaranty Co.*, 309 U.S. 506, 512 (1940); *United States v. Oregon*, 657 F.2d 1009, 1013 (9th Cir. 1981). In addition, the immunity of Indian Nations extends beyond the common-law immunity of U.S. federal and state governments to include a Nation's commercial and proprietary activities. *See In re Greene v. Mt. Adams Furniture*, 980 F.2d 590, 596-97 (9th Cir. 1992); *Morgan v. Colorado River Indian Tribe*, 443 P.2d 421, 423-24 (Ariz. 1968).

In the present case, theSpiro Nation did not waive its sovereign immunity from suit. Rather, the Nation expressly agreed to a limited waiver of sovereign immunity in relation to arbitration proceedings only. Arbitration agreements are not determinative of a waiver of sovereign immunity from suit. *See Pan American Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416, 419 (9th Cir. 1989). In addition, tribal commercial
activities, whether inside or outside of "Indian Country," have also failed to be considered unequivocal waivers of sovereign immunity. See In re Greene, 980 F.2d at 596; Sac and Fox Nation v. Hanson, 47 F.3d 1061, 1064-65 (10th Cir. 1995); Morgan, 443 P.2d at 424.

A. Because a Tribe's Waiver of Sovereign Immunity from Suit Must Be Express and Unequivocal, Commercial Activities Outside Spiro's Reservation Cannot Infer a Waiver

It is well settled that where an Indian Nation maintains its sovereign immunity from suit, a state court lacks jurisdiction over that Nation concerning matters arising within Indian Country. See Puyallup, 433 U.S. at 172. Some courts have questioned whether this same rule applies to those activities arising outside the boundaries of an Indian Nation's territory. This Court has yet to address the issue. See Pueblo of Acoma v. Padilla, 490 U.S. 1029, 1029-30 (1989) (denying petition of certiorari) (White, J., dissenting). However, the majority of jurisdictions have held that activities outside "Indian Country" do not constitute an unequivocal waiver of a tribe's sovereign immunity; thereby, tribes remain outside state jurisdiction. See Sac and Fox Nation, 47 F.3d at 1064-65; In re Greene, 980 F.2d at 596; Morgan, 443 P.2d at 424.2

As mentioned above, this Court established that absent an unequivocal waiver or congressional authorization, Indian Nations are exempt from suit. See Martinez, 436 U.S. at 58. The federal policy behind this doctrine is the promotion of "Indian self-government, including its [federal government's] 'overriding goal' of encouraging tribal self-sufficiency and economic development." Oklahoma Tax Comm'n v. Citizens Band Potawatomi, 498 U.S. 505, 510 (1991) (quoting California v. Cabazon, 480 U.S. 202, 216 (1987)). In Potawatomi, this Court further noted that Congress consistently reiterated its support of the sovereign immunity rule in its passage of the Indian Financing Act of 1974 and the Indian Self-Determination and Education Assistance Act. See id.

Further, a waiver cannot be inferred through an Indian Nation's participation in commercial activity. See American Indian Agric. Credit v. Standing Rock Sioux, 780 F.2d 1374, 1378-79 (8th Cir. 1985); Ramey Constr. Co. v. Apache Tribe, 673 F.2d 315, 319 (10th Cir. 1982). These rules have been held to apply both inside and outside of "Indian Country." See Sac and Fox Nation, 47 F.3d at 1064-65. In Sac and Fox, the Tenth

Circuit held that the location of a commercial activity was not indicative of a waiver of sovereign immunity from suit. See id. The court emphasized that "[w]ithout an explicit waiver, the Nation is immune from suit in state court — even if the suit results from commercial activity occurring off the Nation's reservation." Id. at 1065.

In reaching its finding, the Sac and Fox court relied on the Ninth Circuit's enunciation of the "extra-territorial" nature of tribes' sovereign immunity. See In re Greene, 980 F.2d at 596. The In re Greene court explained that assertions of sovereign immunity stem most fundamentally from an Indian Nation's political status as a "third-sovereign," and as such, a Tribe's waiver of its immunity will involve relations with outside parties. See id. Therefore, courts were aware of the inherent external nature of such waivers when they required waivers to be explicit. Consequently, the In re Greene court held that external commercial activities could not strip an Indian Nation of its sovereign immunity. See id.

Conversely, the New Mexico Supreme Court found that by participating in off-reservation commercial activities, a tribe expressly waives its sovereign immunity from suit. See Padilla v. Pueblo of Acoma, 754 P.2d 845, 850-51 (N.M. 1988). In Padilla, the Pueblo of Acoma was engaged in construction business beyond the Pueblo's boundaries when one of its roofing contractors brought an action for breach of contract. See id. at 847-48. In finding a waiver of the Pueblo's immunity, the court relied on the holding in Nevada v. Hall, 440 U.S. 410, 432 (1979).

The Hall decision did not involve Indian and non-Indian parties. Rather, the case concerned the issue of sovereign immunity between states of the Union. See Hall, 440 U.S. at 411-13. In Hall, this Court held that a forum state may deny another state's sovereign immunity if that forum state has waived its own sovereign immunity. See id. at 425-26. This Court further found that when a conflict concerning the sovereign immunity of two states erupts, the sovereign immunity rules of the forum state will control the findings. See id.

Relying on this case, the Padilla court noted that states refrain from exercising jurisdiction over another state as a matter of comity. See Padilla, 754 P.2d at 850. Subsequently, the Padilla court incorrectly extended this reasoning to the case before it declaring that any "exercise of jurisdiction over a sovereign Indian tribe for off-reservation conduct is solely a matter of comity." Id. However, this extension ignores the fact that states and tribes derive their sovereignty from very different sources: states from their status as sovereign governmental bodies that reserved those powers not delegated to the federal government and tribes from their status as independent, sovereign Nations. See U.S. CONST. amend. X; United States v. Winans, 198 U.S. 371 (1905).

Padilla also contradicts the established rule that states may not attempt to diminish tribes' sovereign immunity without clear, congressional consent.
See Potawatomi, 498 U.S. at 509-10. Thus, Padilla's holding is in direct opposition to this Court's most basic doctrine of sovereign immunity which absolutely requires any waiver to be express. See Martinez, 436 U.S. at 58. For these reasons, the Ninth Circuit has been especially critical of the Padilla decision for its deviation from the sovereign immunity doctrine:

If there were error in the Padilla court's analysis, it was in failing to recognize that the scope of tribal immunity in the courts of New Mexico was not wholly a question of New Mexico law. . . . Thus, the court should have looked at the scope of tribal immunity under federal law, rather than the extent of comity afforded under state law.

In re Greene, 980 F.2d at 593-94.

Further diverging from the majority rule, the Oklahoma Supreme Court has sought to carve away from the sovereign immunity doctrine to assert its jurisdiction over Indian commercial activities arising outside of "Indian Country." See First Nat'l Bank in Altus v. Kiowa, Comanche and Apache Intertribal Land Use Comm'n, 913 P.2d 299, 301 (Okla. 1996); Aircraft Equip. Co. v. Kiowa Tribe, 921 P.2d 359, 362 (Okla. 1996) (Aircraft I); Hoover v. Kiowa Tribe, 909 P.2d 59, 60 (Okla. 1995).

Relying on Padilla, the Oklahoma Supreme Court held in Hoover that a contract between a non-Indian business and an Indian Nation was enforceable in state court when the contract was executed outside of "Indian Country." See Hoover, 909 P.2d at 60. As there is little precedent for this conclusion, the court was forced to analogize to decisions applying state regulations over Tribes when they engage in off-reservation activities. See Mescalero Apache v. Jones, 411 U.S. 145, 148-49 (1973); Organized Village of Kake v. Egan, 369 U.S. 60, 75 (1962). Quoting Jones, the court noted that "absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been subject to non-discriminatory state law otherwise applicable to all citizens of the State." Hoover, 909 P.2d at 61 (citations omitted). In Jones, this Court held that New Mexico could impose a non-discriminatory tax on the Tribally-owned ski resort which was operated on lands that the Tribe leased from the federal government. See Jones, 411 U.S. at 157-58. While a state regulatory scheme may apply in some situations, it only goes to the law that is required and confers neither a waiver of a tribe's sovereign immunity from suit nor adjudicatory jurisdiction.

3. Oklahoma is the only jurisdiction to cite Padilla for the proposition that a tribe can waive its sovereign immunity from suit by participating in commercial activities outside the boundaries of its territory. Brian Lake, The Unlimited Sovereign Immunity of Indian Tribal Businesses Operating Outside the Reservation: An Idea Whose Time Has Gone, 1996 Colum. Bus. L. Rev. 87, 108 (1996).
Like Jones, Organized Village of Kake concerns a regulatory scheme to be imposed upon a tribe when it is operating outside the boundaries of its reservation. See Organized Village of Kake, 369 U.S. at 74-75. In Organized Village of Kake, an Alaskan Tribe employed fishing nets in violation of an Alaska conservation law. This Court held that off-reservation hunting and fishing rights fell under the authority of the state unless such application would interfere with reservation self-governance or impair a right granted or reserved by the federal government. See id. at 75.

The Hoover court incorporated this analysis and concluded that because it perceived no interference with the Tribe's self-governance or federal rights of the Tribe, the court could exercise jurisdiction over the Tribe and reject any defense of sovereign immunity. See Hoover, 909 P.2d at 62.

The Hoover court further relied on the proposition that "absent express federal law to the contrary, state courts have jurisdiction over the merits of a tribal immunity defense to claims arising under state laws." Hoover, 909 P.2d at 61 (quoting Oklahoma Tax Comm'n v. Graham, 489 U.S. 838, 841 (1989)). However, the Hoover court misapplied this Court's decision in the Graham case.

In Graham, the Chickasaw Nation sought to remove the complaint brought against it to federal court. This Court held that the existence of a tribal sovereign immunity defense could not convert a state tax claim into federal question jurisdiction. See Graham, 489 U.S. at 840-41. Therefore, Graham merely stands for the finding that federal courts may not hear a claim of sovereign immunity if the petitioner does not have original, federal question jurisdiction. See id. But, the Hoover court expanded Graham to encompass a state court's authority to subject a tribe to the court's jurisdiction as to the merits of the matter — not just the merits of the immunity defense.

The question before the Oklahoma Supreme Court in Altus also concerned whether a contract executed outside of "Indian Country" constituted a waiver of a Tribe's sovereign immunity. See Altus, 913 P.2d at 299-300. In Altus, the Tribes signed promissory notes for a dressmaking business at a local bank that was not located within "Indian Country." The court found its analysis in Hoover dispositive and held that the Tribes had waived their immunity by signing the contract outside of Indian Country. See id. at 301. Therefore, the promissory notes were enforceable in state court, even though the Tribes never consented to state jurisdiction.

In Aircraft I, the Oklahoma Supreme Court again addressed whether a tribe's waiver of sovereign immunity could be inferred from conducting commercial activities outside of "Indian Country." See Aircraft I, 921 P.2d 4.

4. For any court to hear a controversy, it must have three jurisdictional essentials: personal jurisdiction, subject matter jurisdiction, and the power or authority to decide the matter presented. See State v. Patten, 69 P.2d 931, 933 (N.M. 1937).
at 360. Following its earlier reasoning in *Hoover* and *Altus*, the court again held that an implied waiver can exist when tribes conduct business outside "Indian Country." See id. at 362.

The dissent in *Aircraft I* argued that the majority of jurisdictions (including all federal ones) have held that regardless of whether business activities occurred inside or outside of "Indian Country," the doctrine of tribal sovereign immunity from suit remains intact unless expressly waived or authorized by Congress. See id. at 362-363. The dissent reiterated that the federal and state policy behind the sovereign immunity doctrine is to disallow any implied waiver. See id. at 362. The dissent also noted that this series of Oklahoma Supreme Court cases has been criticized as "extremely broad and allows too much room for judicial interpretation to serve as a fair and effective legal standard." Brian Lake, *The Unlimited Sovereign Immunity of Indian Tribal Businesses Operating Outside the Reservation: An Idea Whose Time Has Gone*, 1996 COLUM. BUS. L. REV. 87, 107-08 (1996). The dissent urged the court to follow the reasoning in *Sac and Fox* to find that a tribe cannot expressly waive its sovereign immunity when it conducts business outside of its territory. See *Aircraft I*, 921 P.2d at 363.

In the instant case, the Oklahoma Supreme Court has again attempted to extend the flawed *Padilla* reasoning. This implied waiver of sovereign immunity violates the core doctrine of sovereign immunity, i.e. a waiver must be *unequivocal* and *express*. See *Martinez*, 436 U.S. at 58. As such, the waiver that the court below seeks to impose is an illegitimate inference and cannot stand up to *Martinez*.

In addition, all federal courts that have addressed this issue have found that commercial activities outside a Nation's territory do not constitute an express waiver of sovereign immunity. See *Sac and Fox Nation*, 47 F.3d at 1064-65; *In re Greene*, 980 F.2d at 596; *Morgan*, 443 P.2d at 424. Likewise, the Spiro Nation has not waived its immunity by engaging Apex Management in the Travel Plaza project. Thus, Spiro's business outside the bounds of its 640-acre reservation does not constitute a waiver of its sovereign immunity.

As Oklahoma is the only jurisdiction to rely on *Padilla* and *Hall* for this proposition, the court deviates from established precedent. While judicial innovation can be a useful tool for moving the law forward, it cannot so step out of bounds of judicial precedent as to turn an entire body of law on its head.

Even applying the Oklahoma Supreme Court's reasoning arguendo, the Spiro Nation would still retain its sovereign immunity from suit. First, the contract with Apex was signed on Spiro's reservation at its tribal headquarters. (R. at 7.) Second, all parties participated at a day-long meeting at the tribal headquarters to continue the project's negotiations. (R. at 6.) Third, while a number of the initial negotiations occurred outside of Spiro's territory, the Travel Plaza lands have been reclaimed by Spiro and
are "Indian Country." Therefore, the location of the Travel Plaza cannot infer a waiver of Spiro's sovereign immunity.

B. Spiro Nation's Limited Waiver of Sovereign Immunity from Arbitration Is Not a Consent to Suit

The governing rule regarding interpretation of waivers of sovereign immunity for Indian Nations is that any waiver is to be interpreted liberally in favor of the tribe and restrictively against the claimant. See Maryland Casualty v. Citizens Nat'l Bank of West, 361 F.2d 517, 521 (5th Cir. 1966). In light of this directive, an Indian Nation's waiver of sovereign immunity from arbitration does not garner tribal consent to general adjudicatory jurisdiction. See Pan American Co. v. Sycuan Band of Mission Indians, 884 F.2d 416, 419 (9th Cir. 1989). In Pan American, the Ninth Circuit denied Pan American's attempt to extend the Tribe's waiver of immunity from arbitration to a general waiver of immunity from suit. See id. The court stated that "such a reading of the arbitration clause runs counter to not only the strong presumption against tribal waivers of immunity, but also generally accepted principles governing the interpretation of contractual arbitration provisions." Id. (emphasis added).

The contract dispute in Pan American resulted from a newly-enacted Tribal ordinance which required Pan American to obtain operating licenses from the Tribe. See id. at 417. Confusing the Tribe's role as business partner with its role as a sovereign government, Pan American filed an arbitration claim to challenge the Tribal ordinance as a breach of contract. See id. The arbitrator dismissed the claim as non-arbitrable because the Tribe had not waived its immunity concerning acts of governance, i.e. passing an ordinance. See id. at 417, 420.

When Pan American filed this separate action for breach of contract, the Ninth Circuit recognized that the arbitration clause lacked any language that would indicate tribal consent to suit, and therefore, the Tribe maintained its sovereign immunity. See id. at 419. While Pan American claimed that this result left it without a judicially enforceable remedy, Pan American never properly sought arbitration with the Tribe. See id. Instead, Pan American attempted unsuccessfully to use the arbitration clause to first challenge the Tribe's governmental authority and then to force the Tribe into federal court. Thus in dismissing the suit, the court enforced the remedy to which Pan American had agreed: arbitration.

Similarly, other courts have read arbitration clauses as only a limited waiver of sovereign immunity. See Sokaogan Gaming Enter. Corp. v. Tushie-Montgomery Assocs., 86 F.3d 656, 659-60 (7th Cir. 1996); Rosebud Sioux Tribe v. Val-U Constr. Co. of South Dakota, 50 F.3d 560, 562 (8th

5. See discussion infra Part II.A.
Cir. 1995); *Native Village of Eyak v. GC Contractors*, 658 P.2d 756, 760-61 (Alaska 1983). These courts have required the various parties to submit their contractual disputes to arbitration and abide by the arbitration judgment. Consequently, in these cases tribal immunity was waived only to the extent necessary to allow for arbitration or enforcement of an arbitration judgment. *See id.*

In *Native Village of Eyak*, the Tribe entered into a contract for the construction of a community center which provided that disputes stemming from the contract were to be settled by arbitration. *See Native Village of Eyak*, 658 P.2d at 757. Thus, when the contractor attempted to sue the Tribe in state court for a contract violation, the Tribe successfully asserted the affirmative defense that it was immune from suit because the parties had agreed to submit their disputes to arbitration. *See id.* Therefore, when the court enforced the arbitration judgment, it did not intrude on the Tribe's sovereign immunity. Rather, the court properly held that the Tribe had only waived its immunity to the extent necessary to resolve disputes by arbitration. *See id.* at 762.

Next, in *Rosebud*, the court relied on *Native Village of Eyak*, to reach a similar result. *See Rosebud*, 50 F.3d at 562. In this case, the Tribe contracted for the construction of housing units. *See id.* at 561. The contract included an arbitration clause which, like in *Native Village of Eyak*, only waived the Tribe's immunity from contractual arbitration and invoked the rules of the American Arbitration Association (AAA). *See id.* at 562. When an arbitration judgment was entered against the Tribe, the court was merely asked to enforce the arbitration judgment. *See id.* Recognizing the limited nature of the Tribe's waiver, the court affirmed that the Tribe's waiver of sovereign immunity was only for the purposes of resolving contractual disputes in arbitration and the enforcement of an arbitration judgment. *See id.* at 562-63.

Consistent with this line of cases, the Seventh Circuit also recognized a contractual arbitration clause as a limited waiver of a tribe's sovereign immunity. *See Sokaogan Gaming*, 86 F.3d at 659. In *Sokaogan Gaming*, the court held that by agreeing to submit contractual disputes to arbitration under the rules of the AAA, the Tribe waived its immunity only to arbitration and enforcement of the arbitration judgment in a court of competent jurisdiction. *See id.*

In the case at hand, Spiro Nation's limited waiver of immunity for the purposes of arbitration does not amount to a general waiver of the Tribe's sovereign immunity. In fact, Apex Management lacks any express waiver of sovereign immunity from suit from the Spiro Nation. Therefore, like the non-Indian claimants in the above cases, Apex cannot bypass the arbitration clause to which it agreed and proceed directly to court. Thus, Apex's initiation of court proceedings, without Spiro Nation's consent, is improper.
C. The Waiver of Sovereign Immunity Contained in the Motor Fuel Tax Contract Between the State of Oklahoma and the Spiro Nation Is Not Applicable to the Present Dispute

The State of Oklahoma enacted its Motor Fuel Tax Code \(^6\) in response to this Court's decision in *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 461-62 (1995). The Tribe in *Chickasaw Nation* filed suit to prevent Oklahoma from enforcing state taxes against the Tribe and its members for motor fuels sold by the Tribe's retail stores. This Court held that because the legal incidence of the tax fell on the Tribe as the retailer, the fuel tax was prohibited. *See id.* at 460.

The scheme enacted by the Oklahoma Legislature was to move the point of tax collection from the retailer to the refinery or bulk transfer terminal. \(^7\) By changing the point of collection and offering tribes a guaranteed rebate on the state tax collected, Oklahoma attempted to ensure that it collected the allowable minimum tax on fuel sold to tribal members as well as non-Indians. *See id.*

On September 30, 1996, the Spiro Nation accepted a Motor Fuel Tax Contract with the State of Oklahoma. (R. at 9.) Apex was simply not a party to the Motor Fuel Tax Contract between the Spiro Nation and the State of Oklahoma. (R. at 9.) The Oklahoma Appellate Court addressed when a party will be considered a third-party beneficiary and could thus recover on a breach of contract claim. *Copeland v. Admiral Pest Control Co.*, 933 P.2d 937 (Okla. Ct. App. 1996). The court held that Plaintiff-guest had presented no evidence that a pest control contract entered into by Defendant-motel was made expressly to benefit her. *See id.* The *Copeland* court further held that it was not necessary that third-party beneficiaries be "specifically identified at the time of contracting," but it should appear that the contract was made expressly "for the benefit of a class of persons to which the party seeking enforcement belongs." *Id.*

Similarly, the Tenth Circuit inquired when a third-party beneficiary could collect on a horse's insurance policy. \(^8\) *See Shebester v. Triple Crown Insurers*, 974 F.2d 135, 137 (10th Cir. 1992). The court held that the complaining third-party could not take advantage of the insurance policy. The court explained that "the determining factor is the parties' intent as reflected in the contract" to determine whether a third person can receive the benefit "which might be enforced in the courts." *Id.*

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6. 68 OKLA. STAT. § 500.63 (Supp. 1997).
8. 15 OKLA. STAT. § 29 (Supp. 1997). The section provides: "A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it." *Id.* (emphasis added).
There is no evidence that Apex ever intended to receive a benefit "which might be enforced in the courts." *Id.* at 137. (R. at 9.) Therefore, Apex Management cannot benefit from the waiver of sovereign immunity contained in the Motor Fuel Tax Contract between Oklahoma and the Spiro Nation because it is not a party to that contract, and it is not a third-party beneficiary to the Oklahoma-Spiro contract.

**II. Oklahoma State Courts Are Not Courts of Competent Jurisdiction To Adjudicate the Spiro Nation-Apex Matter**

**A. Oklahoma State Courts Lack Jurisdiction Because the "Bricktown" Travel Plaza Is "Indian Country"**

Where an Indian Nation maintains its sovereign immunity from suit, state courts lack subject matter jurisdiction over any matter arising within Indian Country except where Congress has specifically granted such authority through passage of federal legislation. *See* U.S. CONST. art. I, § 8, cl. 3; *United States v. Mazurie*, 419 U.S. 544, 555 (1975). Therefore, Congress, not a state, retains the authority to define Indian Country and to exclude state jurisdiction in the area. *See Mazurie*, 419 U.S. at 555. In Oklahoma's case, no federal grant of jurisdiction has ever been passed. Moreover, in recognition of federal and Tribal jurisdiction, both the Oklahoma Constitution and the state's Enabling Act disclaim any jurisdiction over Indian Country. *See* OKLA. CONST. art I, § 3; Act of June 16, 1906, ch. 3335, 34 Stat. 267. However, because of the complex jurisdictional history within Oklahoma, Indian Country has experienced many phases. Seeking to settle the law, this Court recently recognized the prevailing presence of Indian Country within the state. *See Oklahoma Tax Comm'n v. Citizen Band Potawatomi*, 498 U.S. 505, 511 (1991).

"Indian Country" is statutorily defined as 1) "all land within the limits of any Indian reservation under the jurisdiction of the United States . . . ."; 2) "all dependent Indian communities . . . whether within the original or subsequently acquired territory . . . ."; and 3) "all Indian allotments . . . ." *18 U.S.C. § 1151(a), (b), (c) (1997).* Further broadening the scope of Indian Country, this Court later interpreted Indian Country to include formal and informal reservations, dependent Indian communities, and Indian allotments. *See Oklahoma Tax Comm'n v. Sac and Fox Nation*, 508 U.S. 114, 123 (1993). However, Indian lands take on many forms and do not always fall

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9. While Oklahoma is not a Public Law 280 state, the state has managed to gain jurisdiction over many civil-regulatory matters concerning Indian property and taxation. For more detailed discussion of the history of Oklahoma's particular jurisdictional relationship with Indian Tribes and "Indian Country," see Kirke Kickingbird, "Way Down Yonder in the Indian Nations, Rode My Pony Cross the Reservation!" From "Oklahoma Hills" by Woody Guthrie, 29 TULSA L.J. 303 (1993).
neatly within one of these three categories; therefore, courts have developed various tests and factors for determining whether a particular property meets the above qualifications of "Indian Country."

This Court stated that the principal test for determining when Indian lands are to be considered "Indian Country" is whether the land has been "validly set apart for the use of the Indians as such, under the superintendence of the Government." United States v. John, 437 U.S. 634, 648-49 (1978) (citations omitted). Thus, formal designation as a "reservation" was immaterial in consideration of lands as Indian Country. See United States v. McGowan, et al., 302 U.S. 535, 538-39 (1938). Rather, the intent of Congress and the Department of the Interior to recognize the lands as under the governance of Native Peoples was the determinative factor. See id.

In fulfilling this policy to set aside lands, the method used by the federal government has not been shown to be of issue. See United States v. Azure, 801 F.2d 336, 338 (8th Cir. 1986). In Azure, the court reiterated that by taking lands into trust, a de facto reservation can be established without the use of a treaty, statute or executive order. See id. (citations omitted). Moreover, while trust status indicates the intent of the federal government to recognize or "set aside lands" as Native Lands, it is not a necessary component of Indian Country. See Potawatomi, 498 U.S. at 511; see also United States v. Sandoval, 231 U.S. 28, 48 (1913) (rejecting an argument that fee simple title to lands precludes a finding of Indian Country).

For example, the Tenth Circuit held that lands in question will be found to be validly set apart "if the federal government takes some action indicating that the land is designated for use by Indians." Buzzard v. Oklahoma Tax Comm'n, 992 F.2d 1073, 1076 (10th Cir. 1993) (emphasis added). In addition, unceded lands owned or occupied by an Indian Nation have been considered to be Indian Country. See United States v. Chavez, 290 U.S. 357, 364 (1933).

Absent clear guidance on the exact constitution of "dependent Indian community," circuit courts have analyzed various factors regarding the conditions of the lands in question. In 1981, the Eighth Circuit set forth four factors to consider in determining a "dependent Indian community:" (1) whether the United States retained title to the lands which the Indians occupy and the authority to enact regulations and laws respecting this territory; (2) the nature of the area in question, i.e. the relationship of the territory's inhabitants to Indian tribes and to the federal government; (3) whether an element of cohesiveness exists among the inhabitants; and (4) whether the lands have been set apart for the use, occupancy and protection of Indian Peoples. See United States v. South Dakota, 665 F.2d 837, 839 (8th Cir. 1981) (citations omitted), cert. denied, 459 U.S. 823 (1982).

In South Dakota, the court applied these factors to an urban, low-rent Indian housing project. The project relied on the city to provide some
services, such as sewer, fire protection, and schools but also accepted federal BIA and IHS programs, such as food stamps, commodity foods, and counseling services. *See id.* at 841. The lands in question were held in trust by the United States for the Sisseton-Wahpeton Sioux Tribe, and the Tribe maintained close ties to the housing project providing health and social services. *See id.* at 839-40. Thus, the court held that this Indian community was indeed a "dependent Indian community" under sec. 1151. *See id.* at 842. The court also noted that the fact that a small number of non-Indians lived in the housing development did not negate a finding of a dependent Indian community. *See id.*

Fourteen years later, the Tenth Circuit adopted the *South Dakota* analysis but added an initial step in the "dependent Indian community" inquiry. *See Pittsburg & Midway Coal Mining v. Watchman*, 52 F.3d 1531, 1543-44 (10th Cir. 1995). Before reaching the *South Dakota* factors, a court should determine the "community of reference" that will be subject to the inquiry. This analysis entails: (1) describing "the status of the area in question as a community" and (2) consideration of that "community of reference within the context of the surrounding area." *Id.*

Applying the *Watchman* analysis in a later case, the Tenth Circuit found that because the area in question was not a community, it could not be a community of reference. *See United States v. Adair*, 111 F.3d 770, 775 (10th Cir. 1997). Further, the area failed to have enough "Indian character" and was not federally dependent to be considered a "dependent Indian community." *See id.* at 776-77. In step one of the *Watchman* analysis, the *Adair* court reasoned that while the Cherokee Tribal members living in the Rocky Mountain area maintained some aspects of a community (a stomp ground, a church, a convenience store), they lacked other critical characteristics that create infrastructure, and in turn, community. *See id.* at 774-75. For example, there was no hospital, doctor, restaurant, grocery store, bank, and no Cherokee/federally-provided services. The lack of defining borders, landmarks, roads, waterways and a mailing address was also crucial to the court's finding.10

Because the *Adair* court determined that the Rocky Mountain area was not a community of reference, it was not required under *Watchman* to continue onto the second half of the analysis; but it did so nonetheless. Here, the court again found that the Rocky Mountain area could not be considered a dependent Indian community. *See id.* at 774-77. The court

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10. Most findings of an Indian community as a "dependent Indian community" have included an analysis of the boundaries of the area. In *Sandoval*, this Court noted the borders of the pueblo. *Sandoval*, 231 U.S. at 48. In *McGowan*, the designation of the "colony" as a distinct area helped to satisfy the determination the Court's finding of Indian Country. *See McGowan*, 302 U.S. at 538-39. In *South Dakota*, the low-rent housing project, while surrounded by a city, was distinct enough to be considered a dependent Indian area. *See South Dakota*, 665 U.S. at 839-40.
stated that the United States did not hold the area in trust (although the court reiterated that this was not a determinative factor) and maintained no regulatory or "protective" legal authority over the area. See id. at 776. In addition, one-half of Rocky Mountain's residents were non-Indian. The court also noted the absence of economic activity in the area, the lack of any governing body, and the residents' dependence on the surrounding area for social services. The court finally stated that the area was never set aside for the "use, occupancy, and protection" of the Cherokees. See id. at 777. For these reasons, the court held that the Rocky Mountain area was not a community, Indian in character, or federally dependent to be considered a dependent Indian community under sec. 1151(b). See id.

In the present case, the State of Oklahoma's most recent attempt to limit the broad definition of "Indian Country" is again out of keeping with this Court's and most circuit court's interpretations of Indian Country. See Sac and Fox, 508 U.S. at 123. While the Travel Plaza is not a "formal" reservation, it does qualify as a dependent Indian community under sec. 1151(b). First, the Travel Plaza land was "validly set apart" for the use of the Spiro Nation under the superintendence of the federal government. See John, 437 U.S. at 648-49. Once Spiro purchased the 12.4 acres, Spiro submitted the lands to the Bureau of Indian Affairs for their placement into trust status. (R. at 4.) Upon reviewing the application, the BIA prepared the documents for final signature and approval. (R. at 10.) Unfortunately, a federal budget crisis ensued bringing a federal work furlough, and the trust documents were not signed. (R. at 10.) However, the BIA fully intended to take the lands into trust and proceeded to support the Travel Plaza land transfer and development as though the lands were in trust.

As such, the BIA Area Director met with all parties to facilitate the Plaza's negotiation. (R. at 6.) The BIA affixed all necessary approvals and signatures to the Plaza's Indenture of Trust, the Land Lease, and the Operating Lease. (R. at 7.) Further still, the BIA located an Indian Health Services clinic on the Plaza lands. (R. at 8.) These actions demonstrate "some action indicating that the land is designated for use" by Spiro. Buzzard, 992 F.2d at 1076. Moreover, trust status is not a requirement of a "dependent Indian community and merely indicates the federal government's intent to set aside lands for a particular tribe." Potawatomi, 498 U.S. at 511; Sandoval, 231 U.S. at 48. In Spiro's case, the actions of the BIA in approving the Leases coupled with its intent to take the lands into trust demonstrate that under McGowan, the BIA recognized the Travel Plaza lands as under the governance of the Spiro Nation and as "Indian Country." See McGowan, 302 U.S. at 538-39.

Second, as recognized in U.S. military records, explorer's journals, and missionary diaries, the Travel Plaza lands are the Western edges of Spiro's traditional territory where the Nation had established a trading center. (R. at 4.) These lands had never been relinquished by Spiro in any treaty with
the French, Spanish or the United States. (R. at 4.) Furthermore, at Oklahoma's statehood, the lands were designated as "unassigned lands;" thus as "unceded lands" occupied and owned by an Indian Nation, the Travel Plaza should again be considered "Indian Country." See Chavez, 290 U.S. at 364.

Third, applying the four-part test from South Dakota, the circumstances of the Travel Plaza lands are indicative of "Indian Country." The first stage of the test is satisfied because the United States, absent the furlough delay, will retain title to the Travel Plaza lands as well as the authority to enact laws affecting the territory. (R. at 10.)

As to the second stage of the test, at least two-thirds of the Plaza's inhabitants are members of federally-recognized tribes with three families being Spiro tribal members; two tribal members are doctors and the third is a nurse. (R. at 8.) These professionals work at the Plaza's Indian Health Service clinic and provide health care and social services to the community. Two of the apartments are inhabited by non-Indians. (R. at 8.) However, non-Indians living in a housing development do not negate a finding of a "dependent Indian community." See South Dakota, 665 F.2d at 842. As mentioned earlier, the BIA intended to take this land into trust and proceeded to regulate the lands and their development. (R. at 10.)

As to the third stage, although surrounded by an urban environment, the Plaza's Indian inhabitants maintain their Tribal cohesiveness by participating in their ceremonies led by Spiro holy men from the reservation, in the economic opportunities now available at the Plaza site, and in the Tribe's daily management of the entire Plaza lands and facilities. (R. at 8.)

The final stage of the South Dakota test is met as the BIA set these lands aside by intending to take the lands into trust, by signing the Travel Plaza's various agreements and contributing to the parties' negotiation. (R. at 7, 10.) Thus, the BIA has demonstrated the separateness of these lands from the greater Oklahoma City area.

Fourth, following Adair's application of the Watchman addition, the Travel Plaza again classifies as "Indian Country." Unlike the Cherokee lands in Adair, the Travel Plaza lands are marked by clear boundaries. The 12.4-acre rectangular property is marked at each corner by four Spiro mounds with Reno Avenue to the north, Interstate 40 to the south and the Santa Fe railroad tracks to the east. (R. at 4.) Moreover, the Plaza community maintains most of the infrastructure that the Adair court found lacking in the Cherokee community at Rocky Mountain. For example, the Plaza's infrastructure contains fast-food restaurants, an office complex, an ATM machine, and a mailbox rental service. (R. at 8.) Two doctors and a nurse work at the on-site Indian Health Service clinic and live in the Plaza's apartment complex. (R. at 8) In addition, two U.S. marshals are cross-deputized by Spiro to provide law enforcement for the area. (R. at 8.)
Therefore, even under Watchman's restrictive test, the Spiro community at the Travel Plaza is found to be "Indian Country" under sec. 1151(b).

While the Plaza satisfies the Adair analysis, the Oklahoma Supreme Court attempts to constrain the scope of "Indian Country" and is inconsistent with this Court's broad interpretations in Oklahoma Tax Comm'n v. Potawatomi and Oklahoma Tax Comm'n v. Sac and Fox. See Potawatomi, 498 U.S. at 511; Sac and Fox Nation, 508 U.S. at 123. In Potawatomi, Oklahoma contended that a tribally-owned convenience store should be subject to state tax laws because the store was located on trust land and not on a formally designated reservation. The Court responded that no "precedent of this Court has ever drawn the distinction between tribal trust land and reservations that Oklahoma urges." Id. Given this Court's broad definition of Indian Country and the significant "Indian character" of the Travel Plaza community, this Court should find that the Spiro Nation's re-established western trading center is "Indian Country" under sec. 1151(b), and therefore, any adjudication arising from it is outside the jurisdiction of the State of Oklahoma.

B. Tribal Court Exhaustion Is Required Prior to Any Hearing in Any Other Jurisdiction

Since 1985, it has been well-established that tribal courts are courts of original jurisdiction in civil, subject matter jurisdiction disputes. See National Farmers Union v. Crow Tribe, 471 U.S. 845, 855-56 (1985). A tribal court's jurisdiction over a matter will require an examination of its sovereignty and any divestment. See id at 855. This Court stated that an "examination should be conducted in the first instance in the tribal court." Id. at 856. The National Farmers Union Court further noted that until the claimant exhausts tribal remedies in tribal court, it would be premature for another court to consider the matter. See id. This Court then remanded the action to the Crow Nation Tribal Court.

Two years later, this Court again held that tribal court remedies must first be exhausted before another court can hear a matter. See Iowa Mutual Insurance Co. v. LaPlante, 480 U.S. 9, 19 (1987). This Court also explained that jurisdiction over non-Indians within Indian territory "presumptively lies in the tribal courts unless affirmatively limited by treaty or federal statute." Id. at 18.

In Spiro's case, there has been no such federal statute or treaty provision. The contract was signed on the Spiro reservation, and negotiations took place on the reservation. (R. at 6-7.) The Oklahoma Supreme Court found that because an Oklahoma Supreme Court judge was a Spiro Tribal member and Apex was a non-Indian company, the tribal exhaustion doctrine was not required. (R. at 11.) First, this Court has never indicated that a tribal member's presence on another sovereign's court constitutes a hearing before a tribal court. Moreover, the fact that Apex is a non-Indian company does
not remove it from Spiro's jurisdiction. Quite the opposite, *Iowa Mutual* and *National Farmers Union* both found that non-Indian parties must first exhaust tribal court remedies. *See Iowa Mutual*, 480 U.S. at 19; *National Farmers Union*, 471 U.S. at 855-56. Therefore, any claim from Apex must first be heard in Spiro's Tribal Court so that it can determine the appropriate forum for jurisdiction.

**C. Arbitration Clause Provided the Sole Method of Resolving Any Dispute Arising from the Apex-Spiro Contract**

When parties agree contractually to an arbitration clause, courts have required the clause's fulfillment and have denied other judicial remedies beyond the enforcement of the arbitration. See *Pan American Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416, 419 (9th Cir. 1989); *Native Village of Eyak v. GC Contractors*, 658 P.2d 756, 760-61 (Alaska 1983). In *Native Village of Eyak*, a lower court required the parties to fulfill their arbitration agreement before it would consider any contract disputes. See *Native Village of Eyak*, 658 P.2d at 758. Then following resolution of the case in arbitration, the Supreme Court of Alaska properly exercised only limited jurisdiction to enforce the arbitration judgment. See *id.* at 760-61.

Thus, even after the parties fulfill their obligation to arbitration, courts do not interpret arbitration clauses as a grant of general adjudicatory jurisdiction. *See Pan American*, 884 F.2d at 419. In *Pan American*, after losing in arbitration, Pan American attempted to assert its claims against the Tribe in Federal District Court. See *id.* at 417. However, the court held that submission to arbitration is not submission to judicial jurisdiction. See *id.* at 419. Consequently, the Ninth Circuit dismissed Pan American's suit against the Tribe because the parties had agreed to resolve their disputes in arbitration, not in court.

Therefore, like *Native Village of Eyak* and *Pan American*, any dispute between the Spiro Nation and Apex must first be resolved in accordance with the contracted terms, i.e., the parties must first resolve their disputes through the terms of the arbitration clause.

**D. Characterization of Spiro's Commercial Activities Do Not Speak to Any Finding of Oklahoma Adjudicatory Jurisdiction over Spiro**

In deciding the present case, the Oklahoma Supreme Court characterized Spiro's Travel Plaza as a non-traditional, tribal economic endeavor. (R. at 11.) *See Rice v. Rehner*, 463 U.S. 713, 722-25 (1983). In so doing, the court relied on *Rice v. Rehner* to find that because the Travel Plaza was not "traditional," it was subject to state regulation. The "traditionalness" of the Plaza is disputable and requires much factual inquiry. (R. at 2, 4.)

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11. *See discussion supra* Part I.B.
Furthermore, it is not the issue before this Court because Apex Management has not brought any dispute of a regulation affecting Spiro and Apex.

The only regulation at all connected to the present dispute is the Motor Fuel Tax contract between the State of Oklahoma and Spiro. Again, this contract is not at issue. Spiro merely issued a limited waiver of sovereign immunity for disputes arising under its contract with the State. This dispute was not brought by Oklahoma; rather the present case was brought by a party not privy to the State contract. Therefore, there is no regulation at issue, and Oklahoma courts cannot exert any jurisdiction in relation to Spiro's contract with the State of Oklahoma.

E. A Legislative Action by the Spiro Tribal Council Does Not Constitute Legislative Impairment and Cannot Confer Oklahoma Jurisdiction

1. Legislative Impairment of a Contract Does Not Apply to Tribal Government Acting Within Its Polic'd Power as Sovereign

The Contracts Clause in Article I of the U.S. Constitution is rooted in ensuring that state legislatures maintain their contractual commitments. See U.S. Const. art. 1, § 10, cl. 1. Recently, the Supreme Court held that the federal government is also liable for its contracts unless the impacts are "merely incidental to the accomplishment of a broader governmental objective." United States v. Winstar, 116 S.Ct. 2432, 2466 (1996). The "sovereign acts" doctrine as discussed in Winstar attempts to "balance the Government's need for freedom to legislate with its obligation to honor its contracts by asking whether the sovereign act is properly attributable to the Government as contractor." Id. at 2465. Under the sovereign acts doctrine defense, which is "an inherent element of every contract to which the government is a party," the United States as contractor will not be held responsible for its acts as sovereign. Hughes Communications Galaxy, Inc. v. United States, 998 F.2d 953, 959 (Fed. Cir. 1993).

The Spiro Nation's legislative decision to close the Bricktown Travel Plaza was performed to protect its citizens from further depletion of its monetary resources until it could obtain refinancing of this business venture. (R. at 9, 10.) Further, a sovereign retains the authority to act as sovereign unless it surrenders this right in unmistakable terms. See Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 147 (1982). The Spiro Nation in contracting with Apex did not surrender its power to legislate for the common good and welfare of its citizens. Further, the Contracts Clause does not require a sovereign to adhere to a contract "that surrenders an essential attribute of its sovereignty." United States Trust Co. of New York v. New Jersey, 431 U.S. 1, 22 (1977). Moreover, no decision of this Court has ever held that the Contracts Clause as it applies to states also applies to Indian tribes.

Furthermore, as a sovereign that is just beginning to venture back into the economic realm, Spiro must maintain economic safeguards for its future
survival as a government. This protection is consistent with federal Indian policy and was most clearly enunciated in Congress' passage of the Indian Reorganization Act (IRA) of 1934. See 25 U.S.C.A. §§ 476, 477 (1997). Congress recognized that tribes, as quasi-sovereign entities, needed assistance in furthering self-development. See 114 CONG. REC. 5518, 5520 (1968). Thus, the Spiro Nation's attempt to further its government should not be placed in the same category as the federal government or the states in construing its actions as a legislative impairment of a contract.

2. Spiro Nation Properly Invoked Force Majeure Clause

In a contract, a force majeure clause "is only operative if a party is rendered unable, wholly or in part, by force majeure or any other cause not reasonably within its control, to perform or comply with any obligations or conditions of the contract." Sabine Corp. v. ONG Western, Inc., 725 F. Supp. 1157, 1170 (W.D. Okla. 1989) (emphasis added). The court in Sabine dealt with a take-or-pay gas purchase contract and found that Defendant-buyer assumed the risk of price deviation because it had obligated itself to pay the highest price "being paid for gas in a four-county area." Id. at 1179. Further, Defendant-buyer had failed to show evidence of any act of a governmental body or authority constituting an act of force majeure. See id. at 1170. The court explained that a force majeure clause cannot be read in isolation but should be seen in light of the whole contract.12 See id. at 1171.

Looking at the Operating Lease in its entirety, the force majeure clause becomes operative once events "beyond the reasonable control of Lessee" occur. (R. at 9.) Although in Sabine, the Defendant-buyer failed to show evidence of any governmental interference beyond its reasonable control, the actions by Oklahoma City and by the Oklahoma Highway Department were beyond Spiro's control — siting of the ballpark across the street from the Travel Plaza, rerouting traffic away from the Spiro territory, and uprooting entire traffic patterns in the "downtown" area to construct the new Interstate interchange system. (R. at 9.) Perhaps most importantly, these governmental actions were not foreseeable. Further, the Spiro Nation had not assumed the risk of any fluctuating market decline and price as the Defendant-buyer in Sabine. See Sabine, 725 F. Supp. at 1171.

Based on the evidence in the record, the Spiro Nation was clearly within its right to invoke the Force Majeure Clause until it could arrange for

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12. An analysis of a force majeure clause requires three steps. First, examine the events that constitute the force majeure; second, ask whether the event was reasonably beyond the control of the party invoking the force majeure clause; and third, inquire into the effect of the event on the performance that is sought to be excused. For a more detailed discussion of the applicability of the force majeure clause, see P.J.M. Declercq, Modern Analysis of the Legal Effect of Force Majeure Clauses in Situations of Commercial Impracticability, 15 J.L. & COM. 213 (1995).
refinancing of the Bricktown Travel Plaza, and the Oklahoma Supreme Court improperly assumed jurisdiction over Spiro.

F. The Motor Fuel Tax Rebate from the State of Oklahoma Is Not Subject to the Terms of the Operating Lease

1. Oklahoma State Courts Lack Jurisdiction to Issue Order Requiring Spiro to Transfer Motor Fuel Tax Rebate to Apex

When a court renders judgment, it must first have full jurisdiction to hear the matter. This long-standing and well-established rule states that a court can give effect to an equitable remedy only if it first has the power to render a judgment. See Aircraft Equip. Co. v. Kiowa Tribe, 939 P.2d 1143, 1148 (Okla. 1997) (Aircraft II) (citations omitted).

Furthermore, a waiver of immunity from suit, and therefore judgment, can be effected only when a tribe expressly provides that certain funds will be made available to suit. See Namekagon v. Bois Forte Reservation, 517 F.2d 508, 510 (8th Cir. 1975). In Namekagon, the Eighth Circuit found that because the Tribe had specifically agreed that Housing and Urban Development funds "will be available" to effect payment on a contract, the Tribe had waived its immunity to levy and execute those funds. See id. at 509-10.

This reasoning was also used in the Fifth Circuit. See Maryland Casualty Co. v. Citizens Nat'l Bank of West, 361 F.2d 517, 521 (5th Cir. 1966). The Maryland Casualty court held that only funds that were especially pledged or assigned could be subject to garnishment proceedings. See id. The court reasoned that because it was the Secretary of the Interior's intention to secure the Tribe's property, "all doubtful expressions therein resolved in favor of the... Tribe." Id.

Following these cases, Spiro never expressly agreed to attachment of the Rebate funds even though Spiro was fully aware of the Rebate and could have included it if Spiro had so intended. While the "Gross Revenues" definition of the Operating Lease describes many possibilities of monies ("present and inconceivable") that could be available for judgment, "all doubtful expressions therein resolved in favor of the... Tribe." Id. Furthermore, unlike the Tribe in Namekagon, Spiro never agreed in the contract that the Rebate "will be available" to effect payment. See Namekagon, 517 F.2d at 510. In regards to the Oklahoma Supreme Court's "suggestion" that general tribal funds may be subject to garnishment, Spiro not only excluded these funds in the contract's provisions, but specifically agreed to a limited waiver of sovereign immunity to protect the Nation's general funds. (R. at 5, 6.) Finally, because Oklahoma state courts lack subject matter jurisdiction over the Spiro Nation, it cannot issue an order requiring Spiro to transfer the Rebate funds to Apex.
2. Gas Tax Rebate Is Not "Gross Revenue" and Not Subject to Apex's Claims for Relief

Principles of contract law require that the intent of the parties making the contract must be construed by the terms of the contract. See Tilley v. Allied Materials Corp., 256 P.2d 1110, 1134 (Okla. 1953). Article I of the Operating Lease defines Gross Revenues in standard contract language and was drafted by a New York bond firm. (R. at 5.) Any ambiguity must be construed in favor of the Spiro Nation. See Maryland Casualty Co., 361 F.2d at 521 (citing Big Eagle v. United States, 300 F.2d 765 (Ct. Cl. 1962). The Spiro Nation had specifically structured the project so that it was liable for its indebtedness out of funds derived directly from income from the Bricktown Plaza. (R. at 10.) Therefore, Spiro Nation's intent was that gross revenue be limited to funds derived from the Bricktown Travel Plaza and not from any other source of Tribal income, including the gas tax rebate. (R. at 10.)

Apex is not entitled to the Spiro Nation's gas tax rebate as the Operating Lease does not include it within the definition of "Gross Revenues."

In addition, section 63(C)(5) of the Oklahoma Motor Fuel Tax Code restricts the use of the rebate fund to benefit "the accepting tribe exclusively for tribal government programs limited to highway and bridge construction, health, education, corrections, and law enforcement." 68 OKLA. STAT. § 500.63 (Supp. 1997). Further still, by the very terms of the contract, the parties have agreed to restrict the use of the rebate funds to benefit Spiro. It is settled law in Oklahoma that a contract will be interpreted by construing the whole instrument, so as to give effect to every part, if reasonably practicable, so that each clause interprets each other. See Board of Regents of Oklahoma Colleges v. Walter Nashert & Sons, Inc., 456 P.2d 524, 535 (Okla. 1969); Mortgage Clearing Corp. v. Baughman Lumber Co., 435 P.2d 135, 147 (Okla. 1967).

Giving full effect to the Motor Fuel Tax Contract between the Spiro Nation and the State of Oklahoma, Apex was not a beneficiary of the Motor Fuel Tax contract, and therefore it cannot take advantage of the Rebate.

Conclusion

For the foregoing reasons, the petitioner respectfully requests this Court to reverse the court below and vacate its judgment.