

Sovereign Immunity Waiver Contained in a Memorandum of Agreement between the Spokane Tribe of Indians and the City of Airway Heights Concerning Class III Gaming Activities

CONSENT TO JURISDICTION: LIMITED EXPRESS WAIVER OF SOVEREIGN IMMUNITY

- 5.1 Any party to an arbitration in which an award has been made pursuant to this MOA may petition any federal, state or tribal court of competent jurisdiction, per the priority set forth in subsection 4.1.2.(d), above, to confirm the award.
- 5.2 The City and the Tribe expressly consent to be sued in such courts for the purposes of confirmation of such an award.
- 5.3 The Tribe expressly waives its sovereign immunity specifically and exclusively to the City for the limited purposes of enforcement of this MOA.
- 5.4 The City and the Tribe waive any other immunities they may have solely for the limited purpose of enforcing the Parties' agreement to arbitrate and the final decision of the arbitrator.
- 5.5 The waivers of the parties set forth in this section shall commence on the date the parties execute this MOA.
- 5.6 An award shall be confirmed, provided that:
 - 5.6.1 The award is limited to the purposes of arbitration stated in this MOA.
 - 5.6.2 No monetary damages are awarded other than decisions requiring the payment of sums pursuant to obligations of the parties under this MOA
 - 5.6.3 Awards (ie. judgments) may be made by the arbitrator for only such payments, for injunctive relief, for creation or enforcement of provisions of such agreements, and for declaratory relief, all in respect only to this MOA. Pre and post judgment interest shall accrue on the award at the prime rate of interest published in the Wall Street Journal or other reputable source.
 - 5.6.4 If an award is confirmed, judgment shall be entered in conformity therewith.
 - 5.6.5 The judgment so entered has the same force and effect as, and is subject to all the provisions of law relating to, a judgment in a civil action, and may be enforced like any other judgment of the court in which it is entered.
- 5.7 The express waivers and consents provided for under this Section shall extend to civil actions authorized by this MOA, including, but not limited to, actions to compel arbitration, any arbitration proceeding herein, any action to confirm or enforce any judgment or arbitration award as provided herein, and any

appellate proceedings emanating from a matter in which an immunity waiver has been granted.

- 5.8** Except as stated herein or elsewhere in this MOA, no other waivers or consents to be sued, either express or implied, are granted by either party.
- 5.9** Notwithstanding any other provision of this MOA, the Tribe's waiver of sovereign immunity shall not extend to any assets of the Tribe other than revenues generated by activities that occur on the Trust Property.
- 5.10** The Tribe does not waive any aspect of its sovereign immunity with respect to actions by third parties.
- 5.11** The Tribe's waiver of sovereign immunity is granted only to the City and not to any other individual or entity.
- 5.12** In any court action brought pursuant to this MOA, neither party shall be entitled to recover attorney fees and costs.
- 5.13** In no instance shall the Parties be entitled to consequential damages, punitive damages, or lost profits.

Dispute Resolution Provision of Cigarette Tax Contract between the Spokane Tribe of Indians and the State of Washington:

Dispute Resolution

10.1 Intent

10.1.1 The Tribe and the State wish to prevent disagreements and violations whenever possible, and to quickly and effectively resolve disagreements and violations when they arise.

10.1.2 The parties agree that, to the extent possible, informal methods shall be used before engaging in the formal processes provided by this section.

10.2 Notice of Violation

10.2.1 If either party believes a violation of this Contract has occurred, it shall notify the other party in writing.

10.2.2 The notice shall state the nature of the alleged violation and any proposed corrective action or remedy.

10.2.3 The party receiving notice shall have 10 days to respond, unless the time to respond is extended by agreement of both parties, which agreement shall not be unreasonably withheld in order to allow a complete and accurate response.

10.2.4 The parties shall meet within 14 days of the receipt of the response to the notice of violation, unless the parties agree in writing to a different date.

- 10.2.5 The purpose of the meeting will be to attempt to resolve between them the issues raised by the notice of violation, and provide an opportunity to implement any agreed corrective action.
- 10.2.6 Unless agreed upon by the parties, after 40 days from the date of the initial Notice of Violation, the parties cannot agree on whether a violation has occurred or cannot agree on appropriate corrective action, they shall submit the unresolved issue(s) to mediation pursuant to subsection 10.3.

10.3 Mediation

- 10.3.1 If the parties are unable to resolve a dispute through the process set forth in subsection 10.2, either party may request mediation by giving a written mediation demand to the other party.
- 10.3.2 The rules of the CPR Institute for Dispute Resolution shall apply.
- 10.3.3 The parties shall first attempt to agree upon a mediator.
- 10.3.4 If the parties can not agree on a mediator within 30 days of the written demand, a three person mediation panel shall be used and shall be selected as follows:
- (a) each party shall select a mediator and the two mediators selected by the parties shall jointly select a third mediator.
- 10.3.5 The parties shall have an opportunity to submit both written materials and argument to the mediator, with timelines for such submissions to be set by the mediator.
- 10.3.5 The parties will work with the mediator to resolve their differences.
- 10.3.6 If the parties are unable to reach agreement no later than 80 days from the date of the initial Notice of Violation, the mediator shall render a recommendation on the unresolved issue(s) no later than 90 days from the date of the initial Notice of Violation.
- 10.3.7 The mediator shall not render an independent recommendation on issues on which the parties have reached agreement.
- 10.3.8 If the mediator is required to render a recommendation, no more than 10 days following receipt of the recommendation, the parties shall meet and may: agree to accept the mediator's recommendation, in whole or in part; agree to continue their discussions in light of the mediator's recommendation; agree to submit any unresolved issue(s) to binding arbitration; or, if they cannot agree within 15 days following receipt of the recommendation, either party may require that the unresolved issue(s) be submitted to binding arbitration.
- 10.3.9 The parties shall equally share the costs of mediation.

10.5 Arbitration

- 10.5.1 If any unresolved issue is submitted to binding arbitration, either by agreement of both parties or by the demand of one party in accordance with

subsection 10.3.8, the arbitrator shall be selected by the same method as mediators were selected.

10.5.2 The arbitrator shall establish a timeline to ensure that his/her decision is reached no later than seven months from the initial Notice of Violation.

10.5.3 Any corrective action ordered by the arbitrator must be taken no later than 15 days from the receipt of the arbitrator's decision by the affected party, except that the parties shall grant reasonable extensions as necessary.

10.5.4 The arbitrator shall not render an independent decision on issues on which the parties have reached agreement.

10.5.5 The parties shall equally share the costs of arbitration.

10.6 Remedies

10.6.1 Whenever an issue is submitted to mediation or arbitration under this subsections 10.4 and 10.5, the mediators may recommend, or the arbitrators may direct, corrective action to remedy any violation that has occurred.

10.6.2 In no case shall a mediator or arbitrator render an independent recommendation or decision on any issue on which the parties reach agreement.

10.6.3 Remedies may include: interpretation of Contract terms, changes in reporting, record keeping, enforcement practices, business practices, and/or similar changes.

10.6.3 Remedies shall not include an award of monetary damages or costs of any kind, or the disclosure of any records not specifically subject to disclosure under this Contract.

10.7 Termination of Contract

10.7.1 If, after no more than eight months from the initial Notice of Violation, the parties are unable to resolve a disagreement regarding an alleged violation and/or the appropriate corrective action using the dispute resolution methods authorized in this section, or if a party continues to violate a Contract term after the completion of the arbitration process authorized in this section, this Contract may be terminated.

10.7.2 The parties may, after no less than six months following any such termination, begin negotiation of a new Contract.

10.7.3 The termination provisions of this subsection shall not apply in the case of a Notice of Disagreement that does not involve a violation.

Portion of Spokane Tribe's Response Brief in a case involving whether the Tribe waived their sovereign immunity when providing for administrative review and judicial review of decisions by the Spokane Tribal Gaming Commission:

IV. SUMMARY OF ARGUMENT

The issue in this appeal is not whether the Tribe has waived its sovereign immunity. Rather, the issue in this appeal is whether Mr. Gutierrez has satisfied the conditions necessary to invoke the Tribe's limited sovereign immunity waiver set forth in the Tribe's Gaming Code.

The Gaming Code requires Mr. Gutierrez to first present his Gaming Commission claims to the STGC prior to seeking Tribal Court review. Because Mr. Gutierrez failed to meet this basic requirement of the Tribe's conditional sovereign immunity waiver, the Tribal Court correctly concluded that Mr. Gutierrez is barred from seeking Tribal Court review of his claims.

V. ARGUMENT

A. Because Mr. Gutierrez failed to satisfy the basic requirement of the Tribe's conditional sovereign immunity waiver, the Tribal Court correctly dismissed the Gaming Commission claims.

Indian Tribes long have been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers. *Turner v. United States*, 248 U.S. 354, 358 (1919); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). Tribal sovereign immunity therefore bars suits against a Tribe absent a clear waiver by the Tribe. *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991).

Tribal waivers of sovereign immunity are strictly construed. *Ramey Construction v. Apache Tribe of the Mescalero Reservation*, 673 F.2d 315, 320 (10th Cir. 1982). "Because a waiver of immunity is altogether a voluntary act on the part of [a Tribe] it follows that [a Tribe] may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted." *Missouri River Services v. Omaha Tribe of Nebraska*, 267 F.3d 848, 852 (8th Cir. 2001).

The limited waivers of sovereign immunity set forth in the Tribe's Gaming Code require disputes over initial STGC licensing and enforcement actions to first be heard by the STGC before Tribal Court review. SLOC Chapter 23, *Exhibit 9*. As set forth below, because Mr. Gutierrez failed to meet this important condition of the Tribe's limited consent to suit, the Tribal Court correctly ruled that sovereign immunity bars Mr. Gutierrez's Gaming Commission claims.

1. The Gaming Code requires the STGC to hear appeals of licensing decisions prior to Tribal Court review.

The Gaming Code requires the STGC to vote concerning the approval, denial, suspension, or revocation of a gaming license. *SLOC 23-2.13*. A person who disagrees with a STGC licensing vote must file a "written disagreement" with the STGC. *SLOC 23-2.13*. The STGC must conduct a hearing within 3 working days after receipt of a written disagreement. *SLOC 23-2.13*. At the hearing, "the burden shall be on the applicant to show cause why the Commission's determination was incorrect." *SLOC 23-2.13*.

Following the hearing on the written determination:

The [STGC] shall, within three working days, reach a determination concerning:

- (a) the accuracy of the preliminary certification of facts, and
- (b) whether the license in question should be granted, continued, suspended, revoked, conditioned, or limited, and
- (c) whether or not any other action recommended to the [STGC] including, but not limited to forfeitures, should be taken.

SLOC 23-2.14. The STGC must "inform the subject in writing" within three working days of the "determination." *SLOC 23-2.15*. The subject may appeal the STGC's determination to Tribal Court by filing a written appeal, which "must be filed with the Tribal Court in written form on or before the tenth day following receipt of the written determination of the Commission." *SLOC 23-2.16*. The Tribal Court shall then review, de novo, the STGC's written determination. *SLOC 23-2.16*. The Tribal Court's decision may be appealed to a panel of three associate judges, and must be heard within 30 days. *SLOC 23-2.16*.

Here, the initial STGC decision revoking the DEC facility license is memorialized in Resolution 2006-002-STGC. The limited sovereign immunity waiver embodied in the Gaming Code required Mr. Gutierrez to file a written "disagreement" with the STGC to trigger the administrative hearing mandated under *SLOC 23-2.13*. The only Tribal Court review authorized under the limited sovereign immunity waiver concerning STGC licensing decisions is an appeal of a "written determination" issued by the STGC after the required administrative hearing is conducted. *SLOC 23-2.13, 2.14, 2.15, 2.16*. Mr. Gutierrez neglected to adhere to these requirements and sought Tribal Court review beyond the scope of the Tribe's limited consent to suit. The Tribal Court therefore correctly concluded that sovereign immunity bars Mrs. Gutierrez's appeal of the STGC license revocation.

2. STGC regulations require a hearing before the STGC concerning enforcement actions before Tribal Court review.

Similar to Tribal Court review of STGC licensing decisions, the Gaming Code and STGC implementing regulations require an administrative hearing concerning STGC enforcement actions and issuance of a written decision by the STGC as a precondition to seeking Tribal Court review. Section 2.27 of the Gaming Code requires the STGC to "... promulgate regulations protecting the due process rights of all individuals subject to the enforcement of this Code." The first resolution enacted by the newly-formed STGC in 1995 established administrative hearing procedures to fulfill the mandate embodied in section 2.27. *STGC Resolution 95-001, Exhibit 10.*

The "Adjudication Hearing Procedures" fulfill the requirements within Section 2.27 to ensure that every person affected by the STGC's decisions will be afforded fundamental due process protections, including: 1) notice (Section A); 2) an opportunity to be heard (Section C. 2.); 3) the opportunity to both present evidence and to challenge adverse evidence (Section C. 2); and, 4) the requirement of an objective decision maker (Section C. 10; Section D. 1.; Section E. 2). Notably, any party to the administrative hearing has "the right to appeal of the final decision of the [STGC] in accordance with the Law and Order Code of the Spokane Tribe of Indians" (Section C.2.h).¹

Mr. Gutierrez failed to meet the requirement of the Tribe's limited sovereign immunity waiver to first seek an administrative hearing and a written decision on that hearing by the STGC prior to seeking Tribal Court review of the cease and desist order, even though Mr. Gutierrez previously has availed himself of these hearing procedures in prior disputes with the STGC. *E.g. Shokar v. Double Eagle Casino* (September 20, 1996 Decision of the STGC, *Exhibit 12*); *Double Eagle Casino v. Spokane Tribal Gaming Commission*, 96-138 CV (Notice of Appeal, *Exhibit 13*). The Tribal Court therefore correctly concluded that sovereign immunity bars Mrs. Gutierrez's appeal of the cease and desist order.

B. The Record Supports Affirming the Tribal Court.

¹ The STGC conducted an administrative hearing concerning the cease and desist order on January 24, 2006. *STGC Opinion and Order*, Exhibit 11. For reasons unknown, Mr. Gutierrez failed to appear at the hearing despite being personally served with a notice to appear. *STGC Opinion and Order*, p. 1-2. In its Opinion and Order, the STGC upheld the validity of the cease and desist order. *STGC Opinion and Order*. Mr. Gutierrez has not appealed the Opinion and Order.

The Tribal Court reached the correct conclusion in this case - sovereign immunity bars Mr. Gutierrez's appeals - albeit on different grounds than the Space Lease Agreement language relied upon by the Tribal Court. *Order Dismissing Complaint*, p. 1-2, *Exhibit 1*. Mr. Gutierrez correctly asserts that the limited waivers of sovereign immunity contained in the Tribe's Gaming Code are dispositive to this appeal, as opposed to the Space Lease Agreement language. Appellant's Initial Brief, p. 4-6.

This Court is free to affirm the Tribal Court's decision on "any ground supported by the record." *McQuillion v. Schwarzenegger*, 369 F.3d 1091, 1096 (9th Cir. 2003); *Serrano v. Francis*, 345 F.3d 1071 (9th Cir. 2003). The defendants argued for dismissal below because Mr. Gutierrez's failure to exhaust his administrative remedies created a jurisdictional bar to Tribal Court review of the Gaming Commission claims. *Motion to Dismiss for Failure to Exhaust Administrative Remedies*, p. 5-8.

The doctrine of jurisdictional exhaustion simply is an iteration of a sovereign immunity defense – if a sovereign conditions a sovereign immunity waiver on exhaustion of administrative remedies, failure to exhaust administrative remedies creates a jurisdictional bar to judicial review. Because Mr. Gutierrez failed to exhaust his administrative remedies, the Tribal Court lacked subject matter jurisdiction to hear Mr. Gutierrez's appeals of the Gaming Commission matters. Whether cast as "jurisdictional exhaustion" or sovereign immunity, the rationale and the result are the same.