

JUN 28 2018

BY 

1071 Grandview Lane
Pawhuska, Ok 74056



T: 918-287-5514
F: 918-287-5468

June 11, 2018

**OPINIONS OF THE ATTORNEY GENERAL
OF THE OSAGE NATION
ONAG-2018-04**

QUESTIONS SUBMITTED BY: The Honorable Geoffrey M. Standing Bear, Principal Chief of the Osage Nation.

This Office has received your request for an Official Attorney General Opinion regarding the Risk to Bluestem Ranch LLC from any legal action against Tallgrass Economic Development LLC.

Wherein you ask:

Is Bluestem Ranch LLC (Bluestem) at risk from any legal action against Tallgrass Economic LLC (TED) due to TED's signing of the General Indemnity Agreement (Agreement) dated May 26, 2017 with Philadelphia Indemnity Insurance Company and other waivers of sovereign immunity.

RELATIONSHIP OF THE PARTIES.

On April 27, 2017, the Tallgrass Enterprise Board adopted Resolution 17-06 authorizing Tallgrass to enter into a General Indemnity Agreement and Limited Waivers of Sovereign Immunity for the purpose of bonding Tallgrass, Support Services, and C & E. *Bluestem was neither part of the Resolution nor a party to the Limited Waivers of Sovereign Immunity.* (emphasis added).

About the same date, the Tallgrass Enterprise Board issued a Limited Waiver of Sovereign Immunity in which Tallgrass, for limited purposes, waived sovereign immunity for itself, Support Services, and C & E, but (1) *not for Bluestem*, and (2) not for the Osage Nation, its assets, or any elected officials, officers or employees of Osage Nation. The applicable contracts for which the waiver was made were bonds and other documents to be written by Philadelphia Indemnity. The waiver was limited to actions Philadelphia Indemnity as surety, any co-sureties, their successors and assigns might pursue arising from any failure of the Principals as parties for which bonds were written under the agreement to perform their obligations or actions, or actions by the surety to enforce its rights under the applicable contracts.

Also on April 27, 2017, Osage LLC, another LLC formed by the Osage Nation under its laws, through its Enterprise Board adopted Resolution 17-04 authorizing Osage LLC to enter into a General Indemnity Agreement and Limited Waivers of Sovereign Immunity for the purpose of bonding Osage LLC and its subsidiaries Osage Pinnacle Design Group LLC (Pinnacle Design), and Osage Innovative Solutions, LLC (Innovative Solutions). The Osage Nation is the sole Member of Osage LLC.

Additionally, around April 2017 Tallgrass and its subsidiaries, Support Services, and C & E, and Osage LLC and its subsidiaries Pinnacle Design, and Innovative Solutions, entered into a General Indemnity Agreement with Philadelphia Indemnity in order to secure bonds for the conduct of business by these specific six Osage entities. Each of these six Osage entities signed the General Indemnity Agreement through James Holder as either CEO or General Manager of each of the entities. Bluestem was not a party to this General Indemnity Agreement and did not sign it. *However, included within the General Indemnity Agreement's definition of Indemnitors, it provides that subsidiaries of any Indemnitor or Principal are themselves Indemnitors, whether or not named in the Agreement. If valid, this would sweep in Bluestem within the logical scope of the definition because it is a subsidiary of Tallgrass.* Agreement Definitions Paragraph 1 (c). (emphasis added).

SOVERIGN IMMUNITY OF BLUESTEM

Section 2-912 of the Osage Limited Liability Act (the Act) provides that the Board of Directors of an LLC wholly owned by the Osage Nation, like Tallgrass, may create by resolution a wholly owned LLC subsidiary owned by the parent LLC "which shall be instrumentalities of the Osage Nation." This is the provision used to create Bluestem. Section 2-913 of the Act provides the terms under which such an LLC may make a limited waiver of its sovereign immunity. As an instrumentality of the Osage Nation, Bluestem enjoys the privileges and immunities of the Nation.

Article IX of Bluestem's Articles of Organization states that pursuant to Section 2-913 of the Act, the Osage Nation did confer on Bluestem sovereign immunity to the same extent the Nation itself would have immunity. Articles, Section 9.1. Section 9.2 of the Articles permits limited waivers of sovereign immunity, but Section 9.2(d) requires a waiver to be granted *only by a resolution adopted by the Bluestem's Board* for the specific granting of a waiver in language that is explicit. The waiver must be included in a written contract or commercial document to which Bluestem is a party. *Id.* Such waivers are to be granted only when necessary to secure a substantial advantage to Bluestem or the Osage Nation. Articles Section 9.2(e). Finally, grants of waivers of sovereign immunity must be specific and limited in duration, applicable grantee, the transaction in question, the property or funds subjected to the waiver, the court having jurisdiction, and the applicable law. Articles Section 9.2(f). These provisions comply with Section 2-913 of the Osage Limited Liability Act.

NO AGREEMENT I AM AWARE OF, INCLUDING THE GENERAL INDEMNITY AGREEMENT, WAIVES SOVEREIGN IMMUNITY OF BLUESTEM.

I am unaware of any agreement that meets these legal requirements for a waiver of sovereign immunity for Bluestem. The only agreement to which I have specifically been referred is the General Indemnity Agreement *other* Osage LLCs have with Philadelphia Indemnity. Unlike these other six Osage LLCs, I have been provided no resolution of Bluestem's Board authorizing the waiver of sovereign immunity. Also, unlike the other six Osage LLCs, Bluestem did not sign the agreement, that is it is not an "undersigned Indemnitor" in the General Indemnity Agreement, and thus is not a *party* to that agreement, whether or not it might logically be swept into the category of Indemnitor inferentially by virtue of the fact it is a subsidiary of Tallgrass.

Thus, the General Indemnity Agreement does not qualify to work a waiver of sovereign immunity because (1) it is not *an explicit* waiver of sovereign immunity as required by Sections 2-913(1) and 2-922(1)(b) of the Act and Articles, Section 9.2(d)(2) and (2). Moreover, it is not "a written contract or commercial document *to which the Company is a party*" as required by the Act Section 2-922(1)(c) and Bluestem's Articles, Section 9.2(d)(3). Furthermore, I am unaware of any document stating that waiver of Bluestem's sovereign immunity is necessary to secure a substantial advantage or benefit for it or the Osage Nation as required by the LLC Act Section 2-922(2) and Bluestem's Articles, Section 9.2(e). Finally, the General Indemnity Agreement lacks the specificity of limited duration, property or funds subject to the waiver, identification of the court having jurisdiction, and what law is applicable as required by the Act, Section 922(2) and Bluestem's Articles, Section 9.2(f).

What is more, just on a practical level, I have no reason to believe that Bluestem, which engages in ranching operations on 43,000 acres of land owned by the Osage Nation, would be in the business of entering into contracts requiring it to be bonded by Philadelphia Indemnity. This makes it unlikely that Bluestem would ever be called upon to indemnify Philadelphia Indemnity for its losses or costs arising from a bond issued on Bluestem's behalf.

However, the General Indemnity Agreement provides that "the *Indemnitors* and Principals for themselves, their heirs, executors, administrators and assigns *jointly and severally*, hereby covenant and agree with the Surety, along with its successors and assigns as follows..." Agreement p. 1 (emphasis added). Because the defined term "Indemnitors" includes subsidiaries of other Indemnitors, and Bluestem is a subsidiary of the Indemnitor Tallgrass, which unlike Bluestem, is a signatory to the Agreement, by contract Bluestem *supposedly* jointly and severally contracted with Philadelphia Indemnity to the terms of the agreement.

I believe this arrangement is questionable as a matter of Tallgrass' authority to enter into a contract. Bluestem's Articles confer management on "an independent Board of Directors" that has "general responsibility for autonomous management" of the business affairs of Bluestem. The Board shall direct, manage and control the business of the Company and have full authority, power, and discretion to make any and all decisions which the Board deems reasonably required in light of Bluestem's business and objectives. Articles Section 3.1. Management of Bluestem is conferred on the Board, not on Tallgrass as its Member. I question how Tallgrass, as the sole Member and the party responsible for authoring Bluestem's Articles, could ignore those Articles and inferentially bind Bluestem to the General Indemnity Agreement without any approval of Bluestem's Board of Directors.

By analogy to corporations, Tallgrass stands in the place of the shareholder of Bluestem. If sued in state court, agreement of the shareholders to a contract does not, without more, generally bind the corporation itself. As the Oklahoma Supreme Court has observed, a contract between certain stockholders of a corporation to which the corporation is not a party does not bind the corporation, and no demand can arise out of such contract against the corporation. *W. Nichols Hills Water Co. v. American-First Trust Co.* 1945 OK 138, ¶ 24, 158 P.2d 691, 695. While Tallgrass, analogous to the shareholder, entered into the Agreement with Philadelphia Indemnity, the company (Bluestem) did not. Therefore, Bluestem is not a party to the Agreement and cannot be considered to have been part of a joint and several agreement between the other six Osage LLCs and Philadelphia Indemnity.

ANY WAIVER OF THE OSAGE NATION'S SOVREIGN IMMUNITY MUST BE CLEAR AND EXPLICIT. BLUESTEM MADE NO SUCH WAIVER.

As a general matter, tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation unless the tribe waives that immunity. *Kiowa Tribe v. Mfg. Techs.*, 523 U.S. 751, 760 (U.S. 1998). To relinquish its immunity, a tribe's waiver must be "clear." *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505, 509, 112 L. Ed. 2d 1112, 111 S. Ct. 905 (1991). An example of a clear waiver was found by the Supreme Court in *C & L Enters. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 418-20, (2001), in which the tribe entered into a written contract on a form it provided in which it agreed to arbitration and to the application of state law for enforcement of an arbitration award. This obviously is a different situation than Bluestem's almost inadvertent and certainly unwitting inclusion in the General Indemnity Agreement as an Indemnitor on a form of contract provided by Philadelphia Insurance and used for transactions not involving tribal entities.¹

While the matter is not entirely free from doubt, I do not believe that the implicit inclusion in the General Indemnity Agreement of subsidiaries of Indemnitors, such as Bluestem, as Indemnitors results in a clear waiver of the Osage's Nation's sovereign immunity as to Bluestem. Unlike the other six Osage LLC entities that (1) are undersigned Indemnitors to the General Indemnity Agreement and (2) that specifically and explicitly waived sovereign immunity to a limited extent, Bluestem neither signed the Agreement nor explicitly waived its immunity by separate resolution and written limited waiver of sovereign immunity. The actions of the six other Osage LLCs

¹ The nature of the document as a boilerplate form may be discerned from the notation at the bottom of page one "rev 9/30/16."

cannot work a "clear" waiver of sovereign immunity either by Bluestem or by the Osage Nation. Thus I believe Bluestem is not liable to Philadelphia Indemnity on the General Indemnity Agreement.

UNDER GENERAL FEDERAL LAW, BLUESTEM IS ENTITLED TO THE SOVERIGN IMMUNITY OF THE OSAGE NATION.

Separate and apart from the Osage Nation law saying that Bluestem has sovereign immunity as an instrumentality of the Osage Nation, *see* LLC Act §§2-912,2-913, general federal law regarding business subsidiaries of Indian nations comes to the same conclusion. In *Breakthrough Mgmt. Group, Inc. v. Chukchansi Gold Casino and Resort*, 629 F.3d 1173, 1195 (10th Cir. 2010), the Tenth Circuit found that a Tribe's Economic Development Authority and its Casino had a sufficiently close relationship to the Tribe to share in its sovereign immunity. The Court considered a number of factors in reaching this conclusion. The same factors compel the conclusion that Bluestem enjoys the Osage Nation's sovereign immunity as a matter of general federal law.

The first factor is the method of creation of Bluestem, *Breakthrough Mgmt.*, 629 F.3d at 1191-92, which was pursuant to Osage Nation law. Second, Bluestem was created to create and stimulate the economy of the Osage Nation, create employment opportunities for its members and to increase their economic well-being in accordance with the policies of the Nation, satisfying the second factor of the purpose for which the entity was created under *Breakthrough Mgmt.*, 629 F.3d at 1192-93. *See* Bluestem Articles of Operation, § 1.5. Particularly, Bluestem ranches on and manages 43,000 acres of Osage Nation land. Its purpose is clearly to aid the Nation and its members and preserve this priceless asset of national land. The third factor is the structure, ownership and management of the entity. *Breakthrough Mgmt.*, 629 F.3d at 1193. This factor favors maintenance of sovereign immunity as well, because Bluestem is part of portfolio of LLCs owned by Tallgrass which is itself owned by the Osage Nation. Tallgrass is charged with economic development generally, and improvement of the lives of Osage Nation citizens. The fourth factor is the Nation's own intent regarding sharing its sovereign immunity. *Breakthrough Mgmt.*, 629 F.3d at 1193. As demonstrated above, the Osage Nation LLC Act and Bluestem's own Articles of Operation indicate the Nation intends Bluestem to be an instrumentality of the Osage Nation having the same sovereign immunity as the Nation itself. The sixth and final factor serves the overall purposes of sovereign immunity. *Breakthrough Mgmt.*, 629 F.3d at 1195. Based on the totality of the circumstances, it is clear that Bluestem and the Osage Nation are so closely related that the activities of Bluestem must be deemed the activities of the Osage Nation itself.

Thus, the better legal view is that Bluestem remains protected by the Osage Nation's sovereign immunity.

UNDER OSAGE LAW, EVEN IN THE EVENT OF A DEBILITATING JUDGMENT AGAINST TALLGRASS, BLUESTEM'S ASSETS ARE PROTECTED.

As noted above, Bluestem is a subsidiary LLC of Tallgrass. Tallgrass is the sole member of Bluestem Ranch LLC. If a debilitating judgment were returned against Tallgrass, by Philadelphia Indemnity or by some other judgment creditor, and, contrary to the analysis above, a court determined that Bluestem was not protected by the Osage Nation's sovereign immunity, Osage LLC Act § 2-605 provides the Osage law of the rights of the judgment creditor. Upon application to a court of competent jurisdiction, including a non-Osage Nation court, by a judgment creditor of Bluestem's member (Tallgrass) the court may charge the LLC interest of the member only as an assignee of the member's (Tallgrass's) LLC interest "in distributions made by the LLC" (Bluestem) to members or other assigned interest holders "in the usual course of business." Thus, Bluestem's responsibility to pay any judgment against Tallgrass would be limited to intercepting any usual distributions made by Bluestem in the usual course of business.

However, the Limited Waivers of Sovereign Immunity by Tallgrass and its subsidiaries Support Services, and C & E, and Osage LLC and its subsidiaries Pinnacle Design, and Innovative Solutions, each at page 1, stipulate to application of the law of Oklahoma and not the laws of the Osage Nation will govern any action pursuant to the waiver. The law of Oklahoma is very similar to that of the Osage Nation in this regard.

In *Southlake Equip. Co. v. Henson Gravel & Sand, LLC*, 2013 OK CIV APP 87, 313 P.3d 289, the Oklahoma Court of Civil Appeals reviewed a case in which the trial court had ordered the judgment debtor to transfer his interest in a limited liability company to the judgment creditor in partial satisfaction of the judgment debt. The appellate court found that this was improper. "The trial court may only charge Debtor to assign the share of the profits and surplus that flow from his membership interest in his Units in EEC until the judgment has been satisfied." *Id.* at ¶11, 313 P.3d at 291.

Section 2034 exclusively describes the rights of a creditor against a judgment debtor member of a limited liability company. It authorizes a court to charge the membership interest of a judgment debtor to a creditor as payment towards the debt until the judgment is satisfied. However, § 2034 narrows the definition of membership interest to mean only the flow of profits or surplus from the member's economic interest in his units of the LLC, and only allows this flow until the judgment is satisfied. Section 2034 specifically states "the judgment creditor has only the rights [or entitlements] of an assignee of the membership interest." The Act defines the rights of an assignee as "entitl[ing] the assignee to share in profits and losses, to receive any distribution or distributions and to receive the allocation of income, gain, loss, deduction, or credit or similar item to which the assignor was entitled to the extent assigned."

Id. at ¶ 8, 313 P.3d at 291. Moreover, any attempt to cause the sale of specific property of an LLC is not tenable under Oklahoma law, because 18 O.S. §2032 specifically declares that the member with the judgment debt has no ownership interest in specific property owned by the LLC: "A capital interest is personal property. A member has no interest in specific limited liability company property."

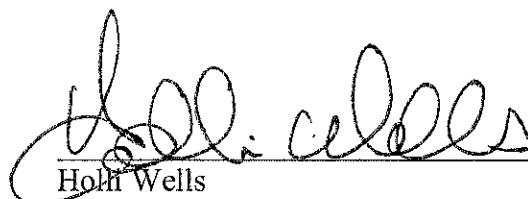
Thus, under either the Osage LLC Act or applicable Oklahoma law pursuant to the Limited Waivers of Sovereign Immunity, a successful judgment debtor against Tallgrass would only be entitled to the Tallgrass's portion (as the sole Member) of any distributions made by Bluestem in the usual course of business.

CONCLUSION.

There are good reasons to believe that Tallgrass was not legally authorized to somehow make Bluestem a party or Indemnitor jointly and severally liable with the six other actual parties to the General Indemnity Agreement. What is more, there are good reasons to conclude that Bluestem has not waived the Osage Nation's sovereign immunity conferred upon it at the time of its creation. Thus, it is not subject to suit for any contractual relationship, if a valid contractual relationship actually exists, with Philadelphia Indemnity.

However, the plain terms of the General Indemnity Agreement seem to sweep Bluestem into the category of Indemnitor and make it jointly and severally liable with the actual parties to the Agreement. While Bluestem has excellent defenses, the result of litigation is inherently uncertain, and in the event of a major action, Philadelphia Indemnity would doubtless be well represented and highly motivated to gain access to Bluestem's assets or income stream.

Respectfully submitted,


Holli Wells
Osage Nation Attorney General