IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

Veronica Muhammad,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 09-0968-D
	)	
Comanche Nation Casino,	)	Removed from the District Court of
	)	Comanche County, State of Oklahoma,
Defendant.	)	No. CJ-2009-751

Comanche Nation Casino's
Response to Motion to Remand

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Table of Contents

Table of Authorities

Cases

Statutes

Other Authorities

Regulations

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The Comanche Nation Casino opposes Muhammad's Motion to Remand (Doc. 11).[1] Muhammad's Petition expressly relies on the federally approved Gaming Compact between the Comanche Nation and the State of Oklahoma (effective Jan. 27, 2005) (Doc. 1-4) ("Compact") as the source of the State court's authority. By doing so, Muhammad raises the following questions over which the Court has federal-question jurisdiction: (1) Whether the Indian Gaming Regulatory Act authorizes the State to acquire jurisdiction over civil actions against the Nation arising in Indian country, and, if so, (2) Whether the State gained such jurisdiction in the federally approved Compact. Muhammad's action also falls within the two artful-pleading exceptions to the well-pleaded-complaint rule: substantial federal question and complete preemption.

[1] Muhammad raises several arguments in her Motion to Remand unrelated to the Court's removal jurisdiction that were also raised in her Response to the Nation's Motion to Dismiss (Doc. 9). Out of an abundance of caution, the Nation incorporates herein the arguments contained in its Reply in Support of its Motion to Dismiss (Doc. 12).

Background

This action involves a tort claim by Muhammad against a tribal-government gaming facility operated by an arm of the Comanche Nation to fund tribal programs.[2] Congress has expressly recognized that the purpose of tribal-government gaming is the promotion of strong tribal governments, which necessarily includes strong tribal-court systems. 25 U.S.C. §§ 2701(4), 2702(1). The gaming facility lies within the Nation's territorial jurisdiction. The Nation's police provide law enforcement at the facility. The Nation's public health and safety laws govern the facility. The Nation's civil and criminal law applies to disputes involving Indian defendants that arise in the facility. And the Nation's court-system adjudicates such disputes.[3] These facts purge Muhammad's tort of its supposed "State law" character.

If Muhammad had been injured at a race track in Texas, or a casino in Las Vegas, no one would expect Oklahoma law to apply or the Oklahoma District Court for Comanche County to hear her tort action. Certainly, no one would expect her claim to be brought in an Oklahoma court if her injury had occurred in a sister state's

[2] Federal law requires the facility's net revenues to be used: (1) to fund tribal government operations or programs; (2) to provide for the general welfare of the Nation and its members; (3) to promote tribal economic development; (4) to donate to charities; or (5) to help fund local government agencies. 25 U.S.C. § 2710(b)(2)(B).

[3] The Nation exercises its judicial authority (except for juvenile matters) through the federally administered Court of Indian Offenses for the Comanche Nation ("Tribal Court") located in Anadarko, Oklahoma. 25 C.F.R. § 11.100(b)(3). Federal law provides that the Tribal Court has jurisdiction "over all civil actions arising within the territorial jurisdiction of the court" in which "at least one party is an Indian." 25 C.F.R. § 11.116. Muhammad was informed that the Tribal Court has exclusive jurisdiction to adjudicate her tort claim. See Tort Claim Form 3 (Ex. 1, hereto).

governmental building. But Muhammad's claimed injury occurred in a building owned and operated by another sovereign—the Comanche Nation—and located that sovereign's territory. The Tribal Court has exclusive jurisdiction over Muhammad's tort claim, and it is unreasonable for her to expect to sue the Nation in an Oklahoma court.

Federal law and policy shields the Nation from State court jurisdiction over tort actions against Indians arising in Indian country. Congress required Oklahoma to disclaim jurisdiction over Indian country as a condition to joining the Union. Act of Congress, June 16, 1906, 34 Stat. 267–78. Federal courts have recognized that this Enabling Act preserves federal and tribal jurisdiction over Indians in Indian country, exclusive of the State. See, e.g., Indian Country U.S.A. v. Oklahoma ex rel Okla. Tax Comm'n, 829 F.2d 967, 976–81 (10th Cir. 1987) (holding that State had not acquired civil jurisdiction over Indians in the Creek Nation's Indian country); Muscogee (Creek) Nation v. Hodel, 851 F.2d 1439, 1446 (D.C. Cir. 1988) (noting that "under current law, Oklahoma has no jurisdiction over Indians" in Indian country). Though Congress established a method for Oklahoma to gain jurisdiction over civil actions arising in Indian country against Indians, Oklahoma has not done so. See Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (repealed and reenacted in 1968) (codified as amended at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321–26, and 28 U.S.C. § 1360) ("Public Law 280"); United Keetoowah Band of Cherokee Indians v. Oklahoma ex rel. Moss, 927 F.2d 1170, 1178 n.17 (10th Cir. 1991).

The Supreme Court has found that, absent Public Law 280 jurisdiction, federal law protects Indians in Indian country from state-court jurisdiction over civil actions against

Indians arising in Indian country, and that state-court jurisdiction infringes tribal governmental authority by denying tribal courts the opportunity to resolve such claims.[4] Williams v. Lee, 358 U.S. 217, 223 (1959) (explaining that it was "immaterial that the respondent [was] not an Indian" because the issue is "the authority of Indian governments over their reservations"); Fisher v. Dist. Ct., 424 U.S. 382, 389 (1976); Three Affiliated Tribes v. Wold Eng'g, 467 U.S. 138, 148 (1984) ("to the extent that [a prior state decision] permitted North Dakota state courts to exercise jurisdiction over claims by non-Indians against Indians . . . it intruded impermissibly on tribal self-governance"). The Court has also found that states cannot acquire jurisdiction over such actions without following the Public Law 280 process. Kennerly v. Dist. Ct., 400 U.S. 423 (1971).

The Indian Gaming Regulatory Act, Pub. L. No. 100-497, 102 Stat. 2467 (Oct. 17, 1998) (codified at 18 U.S.C. §§ 1166–1168, 25 U.S.C. §§ 2701–2721) ("IGRA") does not authorize state courts to acquire jurisdiction over tort actions arising in Indian country against tribes. See 25 U.S.C. § 2710(d)(3)(C)(i–ii); Letter from George Skibine, Director of the Office of Indian Gaming Management, to John Arthur Smith, New Mexico Legislator ¶¶ 3-4 (Jan. 28, 2000) (Ex 2, hereto) (explaining that IGRA does not allow tribes to transfer jurisdiction over tort claims to state courts); Compact Approval Letter 3 (Dec. 23, 2004) ("Congress intended to prevent compacts from being used as subterfuge

[4] Muhammad argues that a line of Supreme Court cases beginning with Montana v. United States, 450 U.S. 544 (1981), prohibits the Nation's court from exercising jurisdiction. (Doc. 11 at 8). That line of cases deals only with actions against non-Indian defendants in tribal courts. The Supreme Court has never applied the Montana test to a case brought by a non-Indian plaintiff against an Indian tribe. See Smith v. Salish Kootenai College, 434 F.3d 1127, 1135–41 (9th Cir. 2006).

for imposing state jurisdiction on tribes concerning issues unrelated to gaming.") (Ex. 3 hereto). Moreover, federal law and policy have consistently supported the development of tribal courts and protected their jurisdiction. See, e.g., Indian Tribal Justice Act, Pub. L. No. 103-176, 107 Stat. 2004 (Dec. 3, 1993) (codified at 25 U.S.C. §§ 3601–3631); Indian Tribal Justice Technical and Legal Assistance Act of 2000, Pub. L. No. 106-559, 114 Stat. 2778 (Dec. 21, 2000) (codified at 25 U.S.C. §§ 3651–3681); Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 18–19 (1987) (discussing federal policy of promoting development of tribal courts). "Congress and the Federal courts have repeatedly recognized tribal justice systems as the most appropriate forums for the adjudication of disputes affecting personal and property rights" in Indian country. 25 U.S.C. § 3651(6). "Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians." Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

Finally, Oklahoma and the Nation expressly agreed in their federally approved Compact that State courts would not acquire jurisdiction over actions such as Muhammad's. See Compact pt. 9; Affidavit of Brad Henry (Apr. 30, 2008) (Ex. 4 hereto); Affidavit of Scott Meacham (May 2, 2008) (Ex. 5 hereto). Granting the Motion to Remand would deny the Nation an opportunity to have its federal rights protected in a federal forum and would force the Nation to submit to the jurisdiction of a foreign sovereign in violation of federal law. Iowa Mutual, 480 U.S. at 14 (recognizing that federal law generally divests state courts of jurisdiction over actions against Indians arising in Indian country that infringe on tribal sovereignty).

Arguments and Authorities

Below, the Nation establishes that: (1) the central purpose of the well-pleaded-complaint rule—to allow plaintiffs to choose a federal or state forum—is not served in this case; (2) on its face, Muhammad's Petition raises federal-law issues that give the Court federal-question jurisdiction under the well-pleaded-complaint rule; and (3) the action satisfies both artful-pleading exceptions to the well-pleaded-complaint rule: the substantial-federal-question exception and the complete-preemption exception.

1. Remanding this action does not further the purpose behind the well-pleaded-complaint rule.

Defendants to a state-court action raising a federal question have a right to remove the action to federal court. "Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable . . . ." 28 U.S.C. § 1441(b). The removing defendant bears the burden to establish removal jurisdiction. See Martin v. Franklin Capital Corp., 251 F.3d 1284, 1290 (10th Cir. 2001). Removal jurisdiction under § 1441(b) is coextensive with federal-question jurisdiction under 28 U.S.C. § 1331. Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 8 (1983). A cause of action arises under federal law for purposes of federal-question jurisdiction if the dispositive issues stated in the complaint require the application of federal law, including federal common law. See Nicodemus v. Union Pacific Corp., 440 F.3d 1227, 1236 (10th Cir. 2006) ("federal common law applies to resolve the dispute"); Ivy Broadcasting v. American Tel. & Tel. Co., 391 F.2d 486, 492 (2d Cir. 1968). "A district court has **no**

discretion to remand a claim that states a federal question." Gaming Corp. v. Dorsey & Whitney, 88 F.3d 536, 542 (8th Cir. 1996) (emphasis added).

A cause of action "arises under federal law only when the plaintiff's well-pleaded complaint raises issues of federal law." Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 63 (1987). The well-pleaded-complaint rule requires the federal question to appear on the face of the complaint. Karnes v. Boeing Co., 335 F.3d 1189, 1192 (10th Cir. 2003). Although a federal defense alone does not create removal jurisdiction,[5] the complete-preemption and substantial-federal-question exceptions to the well-pleaded-complaint rule can give federal courts jurisdiction over a well-pleaded state-law action. Caterpillar Inc., v. Williams, 482 U.S. 386, 392 (1987); Nicodemus, 440 F.3d at 1232 ("a plaintiff may not circumvent federal jurisdiction by omitting federal issues that are essential to his or her claim") (citations omitted).

The well-pleaded-complaint rule allows a plaintiff to be the master of her case and to file a state action rather than a federal action. But the rule fails to account for an important element of the present dispute. The rule assumes that only two possible legal-

[5] The Nation is not seeking to remove based on its sovereign-immunity defense. "[A] defense of tribal immunity 'does not convert a suit otherwise arising under state law into one which, in the statutory sense, arises under federal law.'" Okla. Tax Comm'n v. Native Wholesale Supply, No. 08-818, 2008 WL 4619808 (W.D. Okla. Oct. 16, 2008) (quoting Okla. Tax Comm'n v. Graham, 489 U.S. 838, 841 (1989)). Graham is easily distinguishable, as is the Tenth Circuit decision in Okla. Tax Comm'n v. Wyandotte Tribe, 919 F.2d 1449 (1990). Both involved tax actions based on the State's authority to tax certain transactions with non-Indians in Indian country. See, e.g., Washington v. Confederated Tribes, 447 U.S. 134, 155 (1980). Unlike Muhammad's Petition, the Graham and Wyandotte complaints raised only state-law tax claims. Moreover, the only federal issue requiring resolution in Graham and Wyandotte was sovereign immunity. Here, Muhammad raises federal issues of state-court jurisdiction, Compact interpretation, and interpretation of the IGRA. And her claim arises under tribal law.

systems exist in which a plaintiff—as master of her complaint—may choose to bring her action: state and federal. See, e.g., Caterpillar, 482 U.S. at 392 ("The rule makes the plaintiff the master of the claim; he or she may avoid federal jurisdiction by **exclusive reliance on state law**.") (emphasis added).

Muhammad's tort claim arose outside this binary framework. It did not arise in the State's jurisdiction and is not governed by State law. Rather, it arose within the territorial jurisdiction of the Comanche Nation, and is against the Nation itself. It is an action arising under tribal law[6] over which the Tribal Court has exclusive jurisdiction. Williams, 358 U.S. at 217–18 (ruling that federal common law gives tribal courts exclusive jurisdiction over civil actions against Indians arising in Indian country absent a congressional authorization of state court jurisdiction). The dearth of decisions applying the well-pleaded-complaint rule to actions arising in Indian country demonstrates only that the situation has not often arisen.[7] It does not license the master of the complaint to invent state-law claims where—as a matter of federal law—none exist.

[6] See Stock West Corp. v. Taylor, 964 F.2d 912, 920 (9th Cir. 1992) (implicitly recognizing that tort claims against tribal entities in Indian country arise under tribal law; finding that tribal court must determine whether a tribal law "applies to" a tort claim arising from on- and off-reservation activities); American Well Works Co. v. Layne & Bowler Co., 241 U.S. 257, 260 (1916) ("A suit arises under the law that creates the cause of action.").

[7] For an example of a federal court exercising removal jurisdiction over such a case, see Burlington Res. Oil & Gas Co. v. Colo. Oil and Gas Conservation Comm'n, 986 F.Supp. 1351, 1354–56 (D. Colo. 1997) (removing and dismissing state-court action arising in Indian country over which state lacked jurisdiction).

2. Muhammad's Petition satisfies the well-pleaded complaint rule by expressly raising a federal question.

As the master of her complaint, Muhammad chose to press a claim for a determination that the State court has jurisdiction under the federally approved Compact. "The Defendant, Comanche Nation, is a tribal entity registered in the State of Oklahoma **under the Compact so that this court has jurisdiction over the persons and subject matter**."[8] (Pet. ¶ 2, Ex. 6, hereto) (emphasis added). Whether the federally approved Compact gives the State court jurisdiction over Muhammad's tort claim against the Nation is a federal question sufficient to confer federal-question jurisdiction on this Court. See, e.g., Pueblo of Santa Ana v. Kelly, 104 F.3d 1546, 1557 (10th Cir. 1997) (finding federal-question jurisdiction to determine gaming compact's validity); Wisconsin v. Ho-Chunk Nation, 512 F.3d 921, 933–34 (7th Cir. 2008); (finding federal-question jurisdiction to review compact allocation of jurisdiction); New Mexico v. Pueblo of Pojoaque, 30 Fed. Appx. 768 (10th Cir. 2002) (unpublished) (finding federal-question jurisdiction to resolve gaming-compact dispute and to interpret IGRA). Since Muhammad based her Petition on an alleged right under the federally approved Compact to have the State court hear her tort action, the "threshold allegation was plainly enough alleged to be based on federal law." Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 667 (1974). See also Franchise Tax Board, 463 U.S. at 13 (a case "might still 'arise under' the laws of the United States if a well-pleaded complaint established that its right

[8] There is no such thing as an Indian tribe being "registered with the State of Oklahoma." The Nation is a federally recognized Indian tribe, 74 Fed. Reg. 40,218 (Aug. 11, 2009), that exercises legislative, regulatory, and adjudicatory authority over its territory.

to relief under state law requires resolution of a substantial question of federal law in dispute between the parties.").

By identifying the Compact as the basis for the State court's jurisdiction, Muhammad's Petition necessarily requires an interpretation of the IGRA to determine whether the State **could have** acquired jurisdiction over Muhammad's action in the Compact. The interpretation of IGRA is a federal question. Kelly, 104 F.3d at 1557 ("IGRA is a federal statute, the interpretation of which presents a federal question suitable for determination by a federal court."). It also raises the question of whether the State has acquired jurisdiction under federal law, and that question itself is sufficient to confer federal-question jurisdiction on this Court. Seneca-Cayuga v. Oklahoma ex rel. Thompson, 874 F.3d 709 (10th Cir. 1989) (upholding district court's exercise of jurisdiction over action against State court judge); Segundo v. City of Rancho Mirage, 813 F.2d 1387, 1389 (1987) (finding federal-question jurisdiction to determine whether Public Law 280 extends state's civil jurisdiction into Indian country); Oglala Sioux Tribe v. C&W Enters., 516 F.Supp. 2d 1039, 1042– (D.S.D. 2007) (finding federal-question jurisdiction over action to enjoin state court from exercising jurisdiction over contract action against the Tribe arising in Indian country).

Further, Muhammad has plainly filed her State court action to avoid the required tribal administrative process for tort claims and the Tribal Court's exclusive jurisdiction to adjudicate those claims following the administrative process. Her attempt to avoid the Tribal Court's jurisdiction also raises a federal question sufficient to invoke federal-question jurisdiction. See Gaming World Int'l Ltd. v. White Earth Band of Chippewa

Indians, 317 F.3d 840, 848 (8th Cir. 2003). ("[A]n action filed in order to avoid tribal court jurisdiction necessarily asserts federal law;" finding federal-question jurisdiction on that basis, among others).

The corollary question raised by Muhammad's assertion of State court jurisdiction—whether the Tribal Court has exclusive jurisdiction—is also one that "must be answered by reference to federal law and is a 'federal question' under § 1331." Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 852 (1985); See also Kerr-McGee Corp. v. Farley, 115 F.3d 1498 (10th Cir. 1997) (finding federal-question jurisdiction over tribal-court jurisdiction over mass toxic tort claims); Bruce H. Lien Co. v. Three Affiliated Tribes, 93 F.3d 1412 (8th Cir. 1996) (finding federal-question jurisdiction over question of tribal court's jurisdiction). Actions by tribes to enforce tribal law against non-Indians in federal court also raise inherent federal questions sufficient to satisfy the well-pleaded-complaint rule. See, e.g., Morongo Band v. Rose, 893 F.2d 1074, 1078–79 (1990).

Muhammad's Petition asks the State court to determine that the Compact gives it jurisdiction. The federal questions, therefore, arise in the complaint and not as a defense.

3. Muhammad's action raises substantial and disputed questions of federal law.

The Supreme Court and the Tenth Circuit have both found that a case may arise under federal law "if its 'well-pleaded complaint establishes either that federal law creates the cause of action **or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law**." Morris v. City of Hobart, 39 F.3d

1105, 1111 (10th Cir. 1994) (quoting Franchise Tax Bd., 463 U.S. at 27–28) (1983)) (emphasis added). Thus, "even though a plaintiff asserts only claims under state law, federal-question jurisdiction may be appropriate if the state-law claims implicate significant federal issues." Nicodemus, 440 F.3d at 1232.

Where a state action raises a substantial and disputed question of federal law, a federal cause of action is not necessary to establish federal-question jurisdiction. Grable & Sons Metal Prods., Inc. v. Darue Eng. and Mfg., 545 U.S. 308, 314 (2005). "[T]he question is whether the 'state-law claim necessarily raise[s] a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities.'" Nicodemus, 440 U.S. at 1233 (quoting Grable, 545 U.S. at 314). A complaint containing only state-law claims nevertheless presents a substantial federal question for purposes of federal subject-matter jurisdiction when the following requirements are met: (1) the state law claims necessarily raise a federal issue; (2) the federal issue is disputed and substantial; and (3) providing a federal forum for the resolution of the federal issue will not disrupt the division of labor between the federal and state courts. See Grable, 545 U.S. at 312–14; Nicodemus, 440 F.3d at 1234–36.

A. Muhammad's claim necessarily raises an issue of federal law.

Muhammad's Petition raises several issues of federal law "the resolution of which are necessary to grant the relief" she seeks. Nicodemus, 440 F.3d at 1234. These questions include: (1) whether the IGRA authorizes the State to acquire jurisdiction over

a tort action against the Nation arising in Indian country; and (2) if so, whether the federally approved Compact gave the State such jurisdiction. The Petition recognizes that the State court lacked jurisdiction over such claims before the Compact, and it pins the State's acquisition of jurisdiction on the Compact (Ex 6, ¶ 2), which is "quite clearly . . . a creation of federal law." Cabazon Band of Mission Indians v. Wilson, 124 F.3d 1050, 1056 (9th Cir. 1997). See Dorsey, 88 F.3d at 546 (compacts "are a creation of federal law").

The Compact between the Comanche Nation and the State of Oklahoma is not an Oklahoma law. Contrary to Muhammad's representations (Doc. 11 at 8–10), the State Legislature did not draft the model compact. Representatives of the Oklahoma Governor and various Indian tribes did. See 3A O.S. § 280 (offering model compact "through the concurrence of the Governor after considering the executive prerogatives of that office and the power to negotiate the terms of a compact between the state and a tribe"); (Exs. 4 and 5. Obviously, the model-compact language included in the State's State-Tribal Gaming Act, 3A O.S. §§ 261–282, is part of a State statute. But the model compact is separate and distinct from the Compact executed by the Nation's government and approved by the United States. The State enacted the State-Tribal Gaming Act to create a legal infrastructure to comply with federal law. IGRA requires states to negotiate in good faith with tribes for Class III gaming compacts, 25 U.S.C. § 2710(d)(3)(A), if the state "permits such gaming for any purpose by any person, organization or entity." 25 U.S.C. § 2710(d)(1)(B). Before the State-Tribal Gaming Act, whether the State could enter into a compact for anything other than horse racing and off-track betting was disputed. See

Absentee Shawnee Tribe v. Oklahoma, No. 99-1379 (W.D. Okla. closed Nov. 19, 2004). The model compact, codified at 3A O.S. § 281, had no force or effect until it was approved by the Comanche Nation's government, executed by the Comanche Nation Chairman, approved by the United States, and published in the Federal Register. At that point, the Compact became a contract between the two sovereigns and a creature of federal law.[9]

The interpretation of interstate or state-tribal compacts raises federal-law issues sufficient to create federal-question jurisdiction. Pueblo of Santa Ana v. Kelly, 932 F. Supp. 1284, 1294 (1996) aff'd 104 F.3d 1546 (1997) cert. denied 522 U.S. 807 (1997) (analogizing tribal-state compacts to interstate compacts). For interstate compacts, the Supreme Court has recognized that the terms of an interstate compact are not "**unilateral state action but the terms of a consensual agreement**, the meaning of which, because made by different States acting under the Constitution and **with congressional approval**, **is a question of federal law**." Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275, 279 (1959) (emphasis added). Federal courts have reached the same conclusion with respect to state-tribal compacts. Cabazon, 124 F.3d at 1056 (9th Cir. 1997) (exercising federal-question jurisdiction to interpret and enforce tribal-state compact).

The Compact is not a unilateral action of the State of Oklahoma, but a consensual agreement between the Nation and the State authorized by a federal statute and approved

[9] The IGRA authorizes the State and the Nation to enter into gaming compacts and dictates what may be included in those compacts. 25 U.S.C. § 2710(d)(3). State-tribal compacts must be approved by the United States before they become effective. 25 U.S.C. § 2710(d)(3)(B).

by the United States. The Nation is not a party to any State court decisions interpreting its Compact, and any State court decisions interpreting the Model Compact are inapplicable to the Nation's Compact.[10] It is inappropriate for the courts of one party to a compact to interpret its terms. See State ex rel. Dyer v. Sims, 341 U.S. 22, 28 (1951) (rejecting state court's authority to decide the meaning of an interstate compact). Without resolving these questions of federal law, Muhammad's tort action cannot proceed.

B. The federal issues presented by Muhammad's claim are both disputed and substantial.

The Supreme Court recognized in Grable that "federal jurisdiction demands not only a contested federal issue, but a substantial one, indicating a serious federal interest in claiming the advantages thought to be inherent in a federal forum." 545 U.S. at 313. But, "a case should be dismissed for want of a substantial federal question only when the federal issue is (1) wholly insubstantial or obviously frivolous, (2) foreclosed by prior cases which have settled the issue one way or another, or (3) so patently without merit as to require no meaningful consideration.'" Nicodemus, 440 F.3d at 1236 (quoting Wiley v. Nat'l Collegiate Athletic Ass'n, 612 F.2d 473, 477 (10th Cir. 1979)).

The federal issues raised by Muhammad's action are disputed. Muhammad disputes that federal law and the federally approved Compact give the Tribal Court

[10] Similarly, Muhammad's attempt to apply the narrow Rooker-Feldman doctrine (Doc. 9 at 15) is misplaced because the Nation is not a party to the Oklahoma Supreme Court decisions interpreting other tribes' compacts. Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 287 (2005). The Supreme Court has recently warned that lower courts have extended the doctrine far beyond its contours. Id. at 283; Lance v. Dennis, 546 U.S. 459, 464 (2006).

exclusive jurisdiction (Doc. 11 at 11–15), though she chose to base her State court action on the Compact (Pet. ¶ 2).

The federal issues are also substantial—they go to the heart of the federal government's protection of Indian tribes from state's assertion of jurisdiction over civil actions against Indians arising in Indian country. The Nation challenges Muhammad's assertion that the State has acquired jurisdiction over tort actions by virtue of Public Law 280 or any other congressional action. The IGRA does not authorize the State to acquire such jurisdiction through a gaming compact,[11] and even if it did, the parties expressly agree in the Compact not to alter preexisting State court jurisdiction. (Doc. 1-4, pt. 9). The State court's exercise of jurisdiction in this matter would violate that promise, making Muhammad's claim that the State court has jurisdiction a substantial federal question.

> "Congress, in passing IGRA, did not create a mechanism whereby states can make empty promises to Indian tribes during good-faith negotiations of Tribal-State compacts, knowing that they may repudiate them with immunity whenever it serves their purpose. IGRA necessarily confers jurisdiction onto federal courts to enforce Tribal-State compacts and the agreements contained therein."

Cabazon, 124 F.3d at 1056. The overarching federal Indian policy, common law, and statutory framework protecting the Nation from Muhammad's State Court action

[11] As discussed in the Nation's Reply to Muhammad's Motion to Dismiss (Doc. 12 at 5–6), Muhammad also alleges—incorrectly—that that the Nation expressly consented to State court jurisdiction over tort actions in a previous horse-racing compact. (Doc. 11 at 15). Muhammad's assertion that the 1999 compact gives the State court jurisdiction over her action also raises a substantial and disputed federal question.

demonstrate the substantial nature of the federal questions raised by Muhammad's action in this case.

C. Consideration of Muhammad's claim in a federal forum will not disturb any congressionally approved balance of federal and State judicial responsibilities.

Resolving Muhammad's claim—that the federally approved Compact has given State courts jurisdiction—in a federal forum will not disrupt "the sound division of labor between state and federal courts." Nicodemus, 440 F.3d at 1237. As noted above, federal common law protects Indian tribes from the assertion of state-court jurisdiction over civil actions against tribes arising in Indian country, and Congress supports the promotion of strong tribal government and tribal court systems. In the context of this case, there is no congressionally approved balance of federal and State judicial responsibilities. The Nation's judicial system is responsible for resolving Muhammad's tort action as a matter of federal law. Congress has only authorized the State to acquire jurisdiction over such actions by following the Public Law 280 process, which Oklahoma has not done.

The Supreme Court in Grable was concerned with creating a "potentially enormous shift of traditionally state cases into federal courts." Grable, 545 U.S. at 319. The result of permitting actions like Muhammad's to be resolved in a federal forum, would be to maintain the status quo. Actions that arise in Indian country, and over which tribal courts have exclusive jurisdiction, would stay in tribal court, just as the State and the Nation agreed to do in the Compact. (Doc. 1-4 pt. 9). However, remanding this

action would result in an enormous shift of tribal-law cases into state courts, against the intention of Congress, the Department of the Interior, the Oklahoma Executive Branch (which negotiated the Compact terms), and the Nation (which expected the Compact to protect the Tribal Court's existing jurisdiction).

Removing this case would not disturb any balance of judicial responsibilities. The State has no judicial responsibilities with respect to actions such as Muhammad's. The only reason Muhammad could enter a gaming facility in the Nation's Indian country is that the Nation has inherent governmental authority to authorize and conduct such activities within its jurisdiction. California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987) (finding that states have no role in the regulation of Indian gaming). Unless and until Oklahoma acquires Public Law 280 jurisdiction over the Nation's Indian country, or Congress authorizes Oklahoma to assume jurisdiction over tort actions against Indians arising in Indian country, no federal-state balance exists to disturb.

Muhammad's action implicates significant and disputed federal questions over which the Court should exercise jurisdiction under 28 U.S.C. § 1331.

4. Federal law completely preempts Muhammad's claims.

This case also satisfies the second exception to the well-pleaded-complaint rule: the complete-preemption exception.[12] Complete preemption occurs when Congress so

[12] The term "complete preemption" has caused confusion, and it is important to note that the complete-preemption exception to the well-pleaded-complaint rule is not substantive preemption, but a rule of federal jurisdiction permitting recharacterization of a state-law claim to a federal claim so that removal would be proper. Lister v. Stark, 890 F.2d 941, 944 n.1 (7th Cir. 1989) ("The use of the term 'complete preemption' is unfortunate, since

completely occupies a particular area that any civil complaint arising out of the area is necessarily federal in character. Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 63–64 (1987); Caterpillar, 482 U.S. at 393. Muhammad's claims are inextricably intertwined with federal law and policies which completely preempt her purported State law claims. Her State law claims are also completely preempted by the IGRA, which provides a specific federal cause of action for interpreting its allocation-of-jurisdiction provisions.

A. Federal statutes and common law promoting and protecting exclusive tribal-court jurisdiction over civil actions against Indian tribes completely preempt Muhammad's action.

Though courts typically apply complete preemption to cases involving a specific federal statute, the Supreme Court has also found complete preemption of state-law claims where extensive federal laws and policies protect tribal interests. See Oneida Indian Nation v. Oneida County, 414 U.S. 661 (1974). Although the Court did not use the term "complete preemption," it considers Oneida a complete-preemption decision. See Caterpillar, 482 U.S. at 393 n.8 (characterizing Oneida as involving a "state-law complaint that allege[d] a present right to possession of Indian tribal lands [that] necessarily asserts a present right to possession under federal law, and is thus completely preempted and arises under federal law") (internal quotations omitted). Oneida involved an action by the Oneida Indian Nation to recover damages for the use of land taken in

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the complete preemption doctrine is not a preemption doctrine but rather a federal jurisdiction doctrine.").

violation of the federal Nonintercourse Act, 1 Stat 137 (July 22, 1790).[13] The district court found that the complaint raised a cause of action arising under New York state law and dismissed. 414 U.S. at 665. The Court of Appeals affirmed, ruling that the federal issue was not a necessary element of the complaint. Id. The Supreme Court reversed finding that the right to possession arose under federal law, even though the cause of action appeared to be a standard state-law property action. The Court relied on federal policies protecting the Indians' aboriginal right of occupancy to find that the case arose under federal law for purposes of § 1331 jurisdiction. Id. at 668–69. The Nation was subject to the protection of federal law, even if its claim was not "based upon a treaty, statute, or other formal government action." Id. at 669 (quoting United States v. Santa Fe Pacific R. Co., 314 U.S. 339, 347 (1941)).

The Supreme Court recognized that the well-pleaded-complaint rule fails to account for situations in which federal common law and federal Indian policy protects the rights of Indian tribes. "[T]he assertion of a federal controversy . . . rests on the not insubstantial claim that federal law now protects, and has continuously protected . . . possessory rights to tribal lands, **wholly apart from the application of state law principles which normally and separately protect a valid right of possession**." Id. at 677. The Court clearly saw the traditional state-law possessory-interest issues as sufficiently intertwined with federal Indian law to give the federal courts jurisdiction. Similarly, while tort actions are typically viewed as arising under state law, Muhammad's

[13] The Nation's Notice of Removal mistakenly states that Oneida was an action against the Oneida Indian Nation. (Doc. 1, ¶ 19). In fact, the action was filed by the Oneida Indian Nation to recover rental payments on the property. Oneida, 414 U.S. at 667.

tort action arises under the Nation's tribal law. The alleged injury occurred in Indian country, and Muhammad's action is against the Nation. Federal law requires the application of tribal law in such circumstances. And, like the action in Oneida, Muhammad's state-law tort action implicates the Nation's federally protected right to be free from State court jurisdiction without its consent. See Williams, 358 U.S. at 223; 25 U.S.C. § 1322(a).

B. The Indian Gaming Regulatory Act completely preempts Muhammad's action.

Muhammad's Petition includes a claim that the federally approved Compact authorizes the State court to exercise jurisdiction over her tort claim. Although she attempts to disguise the federal nature of this claim, she is effectively seeking declaratory judgments that: (1) the Compact allocates jurisdiction to the State over tort actions; and (2) IGRA authorizes the Compact's supposed transfer of jurisdiction over such actions to the State.[14] For her claims to be successful in State court, it must be determined that IGRA authorizes the Compact to allocate jurisdiction over tort actions arising in Indian country against the Nation. Muhammad's Petition seeks an interpretation of the

[14] Muhammad's claim for an interpretation of the Compact, when properly characterized as a declaratory-judgment action, is sufficient to provide this Court with removal jurisdiction. See Franchise Tax Board, 463 U.S. at 19 ("Federal courts have regularly taken original jurisdiction over declaratory judgment suits in which, if the declaratory judgment defendant brought a coercive action to enforce its rights, that suit would necessarily present a federal question."). The Oklahoma Declaratory Judgments Act requires no specific pleading to obtain declaratory relief where other relief is sought. 12 O.S. § 1252 ("when a party seeks other relief, a court may grant declaratory relief where appropriate").

Compact, which necessarily requires an interpretation of IGRA's allocation-of-jurisdiction provisions found at 25 U.S.C. § 2710(d)(3)(C)(i-ii).

The dispositive question in determining whether a particular statute preempts a state-law claim is whether the federal statute provides the exclusive cause of action for the claim asserted. Beneficial Nat'l Bank v. Anderson, 539 U.S. 1 (2003). In Beneficial National Bank, the Court framed the question as whether the statute provides the exclusive cause of action in relation to the **type** of claim. For complete preemption to apply, it is not necessary for the statute to allow the plaintiff to assert the cause of action, but rather that the statute must provide the exclusive cause of action for this type of claim. Id. at 9–11. The Ninth Circuit examined this distinction in In re Miles, 430 F.3d 1083, 1091–92 (9th Cir. 2005).

Miles involved purely state-law claims filed in state court by third parties to an involuntary bankruptcy petition. The third parties, relatives of the bankruptcy debtor, sought damages for the bad-faith filing of the involuntary petition in federal court. The Miles court recognized that Bankruptcy Reform Act of 1978 did not create a cause of action for the third-party state-court plaintiffs, but that it did create a federal cause of action for the party to the bankruptcy action. Although the Act was silent as to state law claims by third parties, the court found that "Congress did not intend third parties to be able to circumvent" the federal process by pursuing such claims. Id. at 1091. "The test for complete preemption set forth by the Supreme Court in Beneficial National Bank does not also require that Congress permit third parties to recover under the exclusive cause of action it created as a predicate to federal removal jurisdiction." Id. (internal

citations omitted). These decisions are consistent with the Tenth Circuit's rejection of removal jurisdiction where a federal statute created no cause of action, for the defendant or anyone else. Schmeling v. NORDAM, 97 F.3d 1336, 1339, (10th Cir. 1996). Federal courts have also recognized that "[t]he issue of whether complete preemption exists is separate from the issue of whether a private remedy is created under a federal statute. Complete preemption can sometimes lead to dismissal of all claims in a case." Dorsey, 88 F.3d at 547 (citing Caterpillar, 482 U.S. at 391).

Like the third parties to the bankruptcy in Miles, Muhammad is a third party to the Compact, which is a creature of federal law and created as the exclusive means for the establishment of Class III gaming activities in the Nation's Indian country. Her State court action demands and requires an interpretation of both the Compact and the IGRA's allocation-of-jurisdiction provisions. But whether IGRA creates a private right of action **for Muhammad** to pursue such a claim (it does not) is irrelevant to the complete-preemption analysis. IGRA provides the exclusive cause of action for this type of claim. Congress specifically authorized federal actions brought by states and tribes to interpret IGRA's allocation-of-jurisdiction provisions. 25 U.S.C. §§ 2710(d)(3)(C)(i-ii), 2710(d)(7)(A)(ii); Wisconsin v. Ho-Chunk Nation, 512 F.3d 921, 933–34 (7th Cir. 2008) (finding that IGRA created federal cause of action to interpret the provisions permitting tribes to allocate limited jurisdiction to states in gaming compacts); Kelly, 104 F.3d at 1557 ("IGRA is a federal statute, the interpretation of which presents a federal question suitable for determination by a federal court."). That Congress required those actions to be brought by states or tribes does not change the fact that the IGRA authorizes the

actions and completely preempts third-party actions, such as Muhammad's, in State court.[15] To find otherwise would unlawfully permit third parties to "circumvent" the federal process for resolving such disputes. See In re Miles, 430 F.3d at 1091.

IGRA also reveals a broader congressional intention to completely preempt third-party actions in state court that would permit the states to extend their civil jurisdiction into Indian country in violation of federal law. Congress intended for IGRA "to expressly preempt the field in the governance of gaming activities on Indian lands" and to prevent the states from imposing jurisdiction on the tribes for issues unrelated to gaming through "subterfuge." S. Rep. No. 100-446, at 5-6, 14 (1988) reprinted in 1988 U.S.C.C.A.N. 3071, 3075–76, 3084 (Ex. 7, hereto). See also Dorsey, 88 F.3d at 547 (finding that "[e]xamination of the text and structure of IGRA, its legislative history, and its jurisdictional framework likewise indicates that Congress intended it to completely preempt state law"). In Dorsey, the court found that IGRA completely preempted state-law claims brought by a gaming management company against a law firm for its activities in Indian country. The court also found IGRA's complete-preemption power "reinforced when the statute is viewed in the context of Indian law." Id.

Here, as in Dorsey, the claims pressed by Muhammad have a direct impact on the Nation because they would subject the Nation to State court jurisdiction without consent, in violation of Public Law 280, federal common law, IGRA, and the Compact's express preservation of the preexisting jurisdictional structure.

[15] Of course, since the Court has removal jurisdiction over Muhammad's claim for an interpretation of the Compact, her tort claim can also be removed via the supplemental-jurisdiction statute, 28 U.S.C. § 1367(a).

Conclusion

Muhammad's tort action arose in the jurisdiction of the Comanche Nation. Muhammad's Petition raises federal questions regarding the proper interpretation of the federally approved Compact and the Indian Gaming Regulatory Act. The Court has original jurisdiction over those claims. Muhammad's action also satisfies the artful-pleading exceptions to the well-pleaded-complaint rule. The action raises substantial and disputed federal questions, and federal law completely preempts her claims. Removal is proper. Muhammad's Motion to Remand should be DENIED.

Respectfully submitted,

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Certificate of Service

I hereby certify that on October 19, 2009, I electronically transmitted the attached document to the Clerk of the Court using the ECF System for (1) filing and (2) transmittal of a Notice of Electronic Filing to the following ECF registrants:

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