IN UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 4:12 cv-00054-GFK-TLW
	)	
(1) TIGER HOBIA, as Town King and member of the Kialegee Tribal Town Business Committee, et al.;	)	

THE STATE OF OKLAHOMA'S CONSOLIDATED RESPONSE TO THE MOTIONS TO DISMISS FILED BY DEFENDANTS TIGER HOBIA [Doc. 62], FLORENCE DEVELOPMENT PARTNERS, LLC [Doc. 64], AND KIALEGEE TRIBAL TOWN, A FEDERALLY CHARTERED CORPORATION [Doc. 70]

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ATTORNEYS FOR THE STATE OF OKLAHOMA

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Plaintiff, the State of Oklahoma ("State"), submits this Consolidated Response to the Motions to Dismiss filed by Defendants Tiger Hobia ("Mekko Hobia"[1]), Florence Development Partners, LLC ("Florence"), and Kialegee Tribal Town, a federally chartered corporation ("Corporation") (collectively, "Defendants").[2] As Defendants' separate motions to dismiss rehash essentially the same arguments, the State files this consolidated response addressing all issues raised in the three motions.[3] The Defendants' motions mischaracterize the State's Verified Complaint [Doc. 1] ("Complaint") and the law applicable to assessing its sufficiency. Neither Mekko Hobia, as Mekko of the Tribe and the Corporation, nor the Corporation itself have sovereign immunity from the claims of the Complaint, the Tribe is not indispensable to this action, and Florence is a proper party to the suit. The Complaint pleads claims to avert specific and imminent injuries to the State's sovereign interests and to communities to which it stands as *parens patriae*, affording standing and ripeness, and pleads causes of action stating claims for declaratory and injunctive relief. The Court should deny all remaining motions to dismiss.

I. Introduction

Defendants completely misapprehend the plainly pleaded allegations of the Complaint. This is not a suit to enjoin the "construction of a building." Hobia Motion at 8. Rather, the Complaint alleges the Tribe is a party to a Tribal-State Gaming Compact with the State

[1] The State employs the title "Mekko" in deference to the Kialegee Tribal Town's apparent preference, without waiving the State's allegations that Mekko Hobia acts in the official capacity of "King" of the Kialegee Tribal Town, a federally recognized Indian tribe ("Tribe"), and the Corporation under the Constitution and the Corporation Charter. See Complaint, ¶ 8. Mekko Hobia has identified no official action changing his title or capacity.

[2] Defendant Lynelle Shatswell has been dismissed from this suit pursuant to agreement. [Doc. 80.]

[3] Separately, the "Hobia Motion" [Doc. 62], the "Corporation Motion" [Doc. 70], or the "Florence Motion" [Doc. 64].

("Compact") and is taking affirmative steps on the ground intended for the sole purpose of establishing and operating a Class III casino ("Red Clay Casino") in violation of federal law and the federally approved Compact. Complaint, ¶¶ 3, 4. To prevent those illegal acts, the Complaint pleads claims for prospective relief against officials of the Tribe and the Corporation, under the doctrine of *Ex parte Young,* 209 U.S. 123 (1908), alleging "Defendants' activities exceed the Kialegee Tribal Town's powers under federal law and violate federal law," including the Indian Gaming Regulatory Act, 25 U.S.C. § 2701, *et. seq* ("IGRA"), and the Compact. Complaint, ¶¶ 2, 3. The Complaint also pleads a specific waiver of immunity *of the Corporation*, not of the Tribe as Defendants argue, under the "sue and be sued" clause" of the Corporation's Charter. Sovereign immunity does not bar the State's claims for prospective declaratory and injunctive relief against imminently threatened violations of federal law by the Tribe and Corporation.

Because the Complaint seeks only prospective relief, it does not invade sovereign interests and may be brought against Mekko Hobia in his individual capacity, and the Tribe is not a "required" party under Fed. R. Civ. P. 19(a).[4] However, even if the Tribe were "required," the Tribe may be joined if necessary, because IGRA expressly waives tribal immunity from suit. *See infra* Sec. IV.

The Complaint alleges Florence is an Oklahoma LLC, in which the Corporation is a member, and is the lessee of the Lease that purports to authorize the Tribe, with others on its behalf, to build and operate the Red Clay Casino. *See* Complaint, ¶ 48. The Complaint alleges Defendants are taking steps "at a rapid pace," *see* Complaint, ¶ 51, to create an apparent *fait accompli* to support illegal gaming through the lease to Florence. Florence does not contend it

[4] Of course, the Defendants' contention that the suit only concern Florence's "construction of a building" impeaches their ability to raise indispensability concerns implicating the Tribe.

has sovereign immunity. The Defendants' Motions advance no tenable argument supporting sovereign immunity of any entity bars these claims or that the Tribe is indispensable in this action.

Under IGRA, a tribe cannot operate a Class III Casino except pursuant to a gaming compact entered into with a State. *See* 25 U.S.C. § 2710(d)(1)(C). The Tribe has entered into such a Compact, with the State, providing the Tribe may only operate a Class III casino on "*its* Indian lands as defined by the [IGRA]." *See* Complaint, ¶ 30; Compact Part 5(L) (emphasis added). IGRA defines "Indian lands," in part, as lands of a tribe "having jurisdiction over such lands." 25 U.S.C. § 2710(d)(A)(i). Since the Tribe concedes it has no reservation, the Tribe must rely on IGRA's alternative provision in 25 U.S.C. § 2703(4), which requires the tribe show it "exercises governmental power," over the "Indian lands" in question. The Complaint alleges the Broken Arrow Property, owned by members of another, though historically related, tribe, is not "its Indian lands" of the Tribe, and that the Tribe neither exercises jurisdiction over, nor has regulatory power over the Property. *See, e.g.,* Complaint, ¶ 51. Consequently, the Tribe's efforts to open and operate a Class III casino on the Broken Arrow Property will inarguably violate federal law.

The Complaint alleges that the Defendants are proceeding to construct and intend to operate as expeditiously as possible the Class III Red Clay Casino in violation of IGRA and the Compact. Complaint, ¶ 1. It further alleges that the Defendants' actions will irreparably injure the State's sovereign interests protected in the Compact and will further injure surrounding communities by injecting inappropriate activities. *Id.* ¶¶ 70-71. The Complaint requests a declaratory judgment that Defendants' actions are illegal and preliminary and injunctive relief against such activities. These claims to avert specific injuries from specific illegal acts

demonstrate the State's standing, that its claim are ripe for this Court's resolution, and pleads a cause of action for declaratory and injunctive relief. Although a motion to dismiss must address the pleaded allegations, the Defendants have advanced neither argument nor documentary material controverting these well-pleaded allegations of the Complaint.

II. Standard For Considering A Motion To Dismiss.

Defendants style their motions to dismiss under Fed. R. Civ. P. 12(b)(6). To survive a motion for failure to state a claim upon which relief can be granted, a plaintiff's complaint "does not need detailed factual allegations," but must contain enough facts "to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The Court must "accept as true all well-pleaded factual allegations in a complaint and view these allegations in the light most favorable to the plaintiff." *Smith v. United States*, 561 F.3d 1090, 1098 (10th Cir. 2009). The Court may also consider exhibits attached to the complaint. *Id.* The Court must not weigh the potential evidence, but simply "assess whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted." *Id.* (internal quotation marks and citations omitted).

As Defendants' argue that this suit is barred by the sovereign immunity of certain Defendants and that the State does not have standing question the Court's jurisdiction, their motions may fall under Fed. R. Civ. P. 12(b)(1). In reviewing a facial attack on the complaint, "a district court must accept the allegations in the complaint as true." *Holt v. United States*, 46 F.3d 1000, 1002 (10th Cir. 1995). If the 12(b)(1) motion attacks the facts asserted as the basis for subject matter jurisdiction, "a district court may not presume the truthfulness of the complaint's factual allegations," and may review documents outside the pleadings to determine whether subject matter jurisdiction exists. *Id.*

III. Sovereign Immunity Does Not Bar Claims Against Any Defendant.

Defendants assert that the claims against Mekko Hobia, in his capacities of Mekko of the Tribe and the Corporation, and the Corporation are barred by the doctrine of sovereign immunity. While a tribe is certainly a sovereign that is entitled to sovereign immunity, a tribe is not immune from suit in the presence of a waiver by the tribe or Congressional abrogation of sovereign immunity, *see Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1153-54 (10th Cir. 2011), and its immunity does not bar prospective relief against its officers to prevent ongoing violations of federal law. First, this suit is against Mekko Hobia in his official capacity, as Mekko of both the Tribe and the Corporation, for prospective relief only, and thus tribal immunity does not shield him from suit under the doctrine of *Ex parte Young*. Furthermore, Congress has abrogated the Tribe's immunity from this suit, and the Corporation has waived its immunity, so even if the suit was improper under *Ex parte Young*, there is no sovereign immunity which the Mekko may invoke as officer of the Tribe and Corporation.

A. The Complaint pleads claims against Mekko Hobia and the Corporation within the sovereign immunity exception of *Ex parte Young*.

Defendants motions fail to address the actual allegations of the Complaint and the law in this Circuit. The Complaint alleges ongoing violation of federal law by Mekko Hobia, in acting or authorizing actions on land over which the Tribe has no jurisdiction and exercises no governmental power, or has a valid leasehold interest, and the State seeks prospective relief in the form of a permanent injunction barring anyone acting by, through, or for *all* Defendants, including Mekko Hobia. *See* Complaint, ¶¶ 1-3. Mekko Hobia was sued and served in his official capacities as both an officer of the Tribe [Doc. 35] and an officer of the Corporation [Doc. 22] *See* Kialegee Tribal Town Corporate Charter, ¶ 2 (identifying the officers of the

Corporation as those of the Tribe) [Doc. 62, Ex. 1] ("Charter"). This suit is expressly permitted under the *Ex parte Young* doctrine.

A sovereign may only act through its officials, and officials may only act within their official authorities. *See Burrell v. Armijo*, 603 F.3d 825, 832 (10th Cir. 2010) ("Tribal sovereign immunity generally extends to tribal officials acting within the scope of their official authority. On the other hand, a tribe's sovereign immunity does not extend to an official when the official is acting as an individual or outside the scope of those powers that have been delegated to him.") (internal quotation marks and citations omitted). Tribal powers are federally defined. *See United States v. Lara*, 541 U.S. 193, 202 (2004) (stating that federal law defines the "metes and bounds" of tribal sovereignty). "[A]n Indian tribe may not unilaterally create sovereign rights in itself that do not otherwise exist." *Kansas v. United States*, 249 F.3d 1213, 1229 (10th Cir. 2001). Mekko Hobia, as well as the other soon-to-be-named individual defendants, may not invoke the shield of the Tribe's sovereign immunity as the actions complained of exceed any power granted to the Tribe by Congress.

Defendants do not deny the doctrine of *Ex parte Young* permits a suit against a tribal official for prospective declaratory and injunctive relief as an exception to the doctrine of sovereign immunity. Hobia Motion at 3-4 (*citing Tenneco v. Sac & Fox Tribe,* 725 F.2d 572 (10th Cir. 1984)). They seek to avoid the doctrine, however, by twisting specific language of a concurrence to imply a tribe can authorize its officials to violate federal law. *Id.* (citing *Tenneco*, 725 F.2d at 577 (McKay, J., concurring)). Neither the broad limitation on the doctrine nor the narrow pleading requirements Defendants advance reflect the law. The majority in *Tenneco* correctly reflected the applicable principle: "If the sovereign did not have the power to make the law, then the official by necessity acted outside the law in enforcing it, making him liable to

suit." 725 F.2d at 574. Defendants, however, neglect to cite the recent and dispositive Tenth Circuit guidance on this precise question, *Crowe & Dunlevy*, 640 F.3d 1140. The *Crowe & Dunlevy* court affirmed Judge Kern's conclusion in that *Ex parte Young* applies when the federal court plaintiff seeks prospective declaratory and injunctive relief to enjoin a tribal official from an ongoing violation of federal law, whether the violation is of a federal statute or federal common law. *Id.* at 576.

Contrary to Mekko Hobia's blatant and repeated mischaracterization, *e.g.* Hobia Motion at 3 ("Plaintiff does not allege Mekko Hobia did anything outside his official capacity"), the Complaint expressly and repeatedly alleges that Defendants are preparing to act in violation of federal law and seeks to restrain Defendants from taking such illegal actions. *See* Complaint, ¶¶ 2, 3, 8, 52-57 (First Claim for Relief ("Declaratory Relief-Acts in Excess of Tribal Authority")). The actions of Mekko Hobia in his official capacity exceed his authority under federal law, *see* Complaint, ¶¶ 3, 31, and the Compact, *see* Complaint, ¶¶ 29, 30. This suit is brought against Mekko Hobia in his official capacity, so it is immaterial whether his name appears on the Compact. Further, it is immaterial if the Tribe or the Corporation authorized Mekko Hobia to engage in an ongoing violation of state and federal law. And, federal law, the IGRA, flatly prohibits the Tribe from engaging in Class III gaming except in compliance with a federally approved Compact. Consequently, the Tribe cannot authorize Mekko Hobia to act in violation of federal law. *See Pennhurst State Sch. & Hosp.*, 465 U.S. 89, 105 (1983) (a sovereign cannot authorize its members to violate federal law). Significantly, the *Ex parte Young* inquiry focuses on the allegations of the complaint, not the merits of the claim of violation of federal law. *Verizon Md., Inc. v. Pub. Serv. Comm'n,* 535 U.S. 635, 646 (2002). The Complaint fully pleads

allegations authorizing prospective relief against Mekko Hobia as Mekko of the Tribe and of the Corporation.

B. Congress has abrogated the Tribe's sovereign immunity for these claims.

While suit against Mekko Hobia, and the other individual defendants when identified and named, is undoubtedly proper under the doctrine of *Ex parte Young*, even if it were not, Mekko Hobia may not avail himself of any tribal sovereign immunity, because Congress has abrogated any immunity from this suit. When a sovereign does not have sovereign immunity from suit, its officials do not, either.

The IGRA has abrogated the Tribe's sovereign immunity from suits, such as this, by a State that allege a violation of a tribal-state gaming compact. The IGRA provides for federal civil jurisdiction over "*any* cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact." 25 U.S.C.A. § 2710(d)(7)(A)(ii) (emphasis added). This provision has been interpreted as a waiver of a tribe's sovereign immunity. *See Kiowa Tribe of Oklahoma v. Mfg. Technologies, Inc.*, 523 U.S. 751, 758 (1998) (citing this provision as an example of Congress expressly abrogating tribal immunity); COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, § 7.05[1][b], at 639 (2005) ("Congress has also partially abrogated the immunity of Indian tribes in the [IGRA], but only for suits brought by states to enjoin a Class III gaming activity conducted in violation of a tribal-state compact between the tribe and the state pursuant to the [IGRA].").

The Tenth Circuit has affirmed that this abrogation of sovereign immunity applies in cases, such as this, for prospective relief under a tribal-state gaming compact. "IGRA waived tribal sovereign immunity in the narrow category of cases where compliance with IGRA's provisions is at issue and where only declaratory or injunctive relief is sought." *Mescalero*

Apache Tribe v. State of N.M., 131 F.3d 1379, 1385 (10th Cir. 1997); *see also Wisconsin v. Ho-Chunk Nation*, 512 F.3d 921, 934 (7th Cir. 2008) (determining that Congress abrogated the tribe's immunity for a state's claims brought under IGRA); *Lewis v. Norton*, 424 F.3d 959, 962 (9th Cir. 2005) (citing *Mescalero Apache Tribe*, 131 F.3d at 1385) (same). *But see Florida v. Seminole Tribe of Florida*, 181 F.3d 1237, 1242 (11th Cir. 1999) (declining to apply *Mescalero*'s holding). Because the Tribe is not immune from a lawsuit brought by the State to enjoin a violation of the Compact, and, as a result, there is no sovereign immunity from this suit which Mekko Hobia may assert. *Cf. Crowe & Dunlevy*, 640 F.3d at 1154 (indicating that tribal sovereign immunity must exist before it may be extended to tribal officials).

In abrogating tribal sovereign immunity, the IGRA did not include any "temporal limitation" on when a suit may be brought; it abrogated immunity for "the nature of the claim asserted by [the State]—to enjoin gaming." *Arizona v. Tohono O'odhom Nation*, CV11-0296-PHX-DGC, 2011 WL 2357833, at *3-4, 2011 U.S. Dist. LEXIS 64041, at *11 (D. Ariz. June 15, 2011) (concluding the IGRA waived the tribe's immunity for a suit to enjoin plans for a proposed casino when the tribe had publically stated its intentions to engage in gaming). Contrary to Defendants' major premise, as discussed in more detail below, the State need not wait until gaming has commenced to invoke this Court's jurisdiction.

The cases relied upon by Defendants do not undermine this conclusion. *Ute Distribution Corp. v. Ute Indian Tribe*, 149 F.3d 1260 (10th Cir. 1998),[5] does not assist Defendants. In *Ute Distribution*, the statute at issue, unlike the IGRA, did not contain a provision "expressly subjecting the Tribe to suit." *Id.* at 1265. *Swanda Bros. Inc. v. Chasco Constructors, Ltd., L.L.P.*, CIV-08-199-D, 2010 WL 1372523, 2010 U.S. Dist. LEXIS 30669 (W.D. Okla. Mar. 30,

[5] Hobia Motion at 19; Corporation Motion at 19.

2010),[6] granted a motion to dismiss because the question of whether a waiver of tribal immunity was properly granted under tribal law was a question to be considered, in the first instance, by tribal courts. Defendants make no similar claim here. Far from supporting Defendants, *Tenneco Oil Co.*, 725 F.2d at 574-75,[7] in fact, held that suit was proper against named tribal officials, as the tribe's sovereign immunity does not extend to the conduct of officers beyond their powers. Judge McKay's concurrence, relied upon by Defendants, only discussed the importance of tribal sovereign immunity, but recognized that a suit against an officer may proceed when she "acted outside the amount of authority that the sovereign is capable of bestowing." *Id.* at 577 (McKay, J., concurring). That is precisely the effect of the allegations here.

C. The Corporation's Charter waived its sovereign immunity for this suit.

Stripped of inapposite citations, the Corporation's Motion cites no authority supporting that its Charter did not waive any applicable immunity from the Complaint. *See* Charter, ¶ 3(b). The Charter contains a "sue and be sued" clause. Such clauses are interpreted as express waivers of a tribal corporation's sovereign immunity. *See Marceau v. Blackfeet Hous. Auth.*, 455 F.3d 974, 979-81 (9th Cir. 2006), *amended and superseded on other grounds by* 540 F.3d 916 (9th Cir. 2008); *Rosebud Sioux Tribe v. A & P Steel, Inc.*, 874 F.2d 550, 552 (8th Cir. 1989); *Native Am. Distrib. v. Seneca-Cayuga Tobacco, Co.*, 491 F. Supp. 2d 1056, 1065 (N.D. Okla. 2007), *aff'd sub nom. Native Am. Distrib. v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288 (10th Cir. 2008) ("[S]ue and be sued clauses in corporate charters function as express waivers of immunity if they are found to apply to the tribal entity sued in the litigation."). Whether the federally

[6] Hobia Motion at 19; Corporation Motion at 19.

[7] Hobia Motion at 4-5; Corporation Motion at 5-6.

chartered corporation will be determined to have violated federal and state law is a question on the merits; at this juncture, it is clear that the Corporation has waived its immunity from suit.

Defendants' arguments incorrectly advance cases that stand only for the proposition that a tribal corporation's "sue and be sued" clause does not waive the immunity *of the owner-tribe*. That is not the State's argument. Rather, the State pleaded that the "sue and be sued" clause has waived the immunity of the Corporation and its officers. Complaint, ¶ 22. The Corporation's Motion argues that the Corporation is entitled to sovereign immunity, yet all the cases relied upon by Defendants relate to the sovereign immunity of a tribe. The footnote in *Seneca-Cayuga Tribe of Oklahoma v. State of Oklahoma ex rel. Thompson*, upon which Defendants rely, stands for the unremarkable proposition that the presence of a "sue and be sued" clause in a tribal corporate charter "does not waive the tribe's immunity as a tribe." 874 F.2d 709, 716 n.9 (10th Cir. 1989[8]). The law applicable here, however, is the Tenth Circuit's conclusion that a "sue or be sued" clause is an "unequivocal[] waive[r]" of the immunity of a tribal corporation under Section 503 of the OIWA. *Native Am. Distrib.*, 546 F.3d at 1293. In addition, as the Corporation has waived its immunity from suit, Mekko Hobia, as officer of the Corporation, has no immunity to prevent this suit against him in his official capacity.

IV. The Tribe Is Not A Required Party, But Even If It Were, Its Joinder Is Feasible.

The Corporation's motion contends that this lawsuit must be dismissed because the Tribe is an indispensable party. Corporation Motion at 22-24. This contention is unsupportable. This lawsuit is properly pled against the officials of the Tribe under the doctrine of *Ex parte Young*. Consequently, the Tribe is not a required party under Fed. R. Civ. P. 19(a), and, even if the Court were to determine the Tribe *is* a required party, joinder of the Tribe is feasible under

[8] Hobia Motion at 15, 18; Corporation Motion at 15, 18.

Rule 19(b) because its immunity is abrogated by the IGRA. Thus, dismissal under Rule 19(b) would be improper.

Under Rule 19(a),[9] a person is "required" to be joined as a party when complete relief may not be awarded without that person's joinder, *id.* (a)(1)(A), or the person claims an interest in the action such that proceeding without joinder of the person may either impair or impeded the non-party's interest or leave an existing party subject to multiple obligations, *id.* (a)(1)(B). Under Rule 19(b), a person is not "indispensable" unless (1) the person is determined to be "required" under Rule 19(a), *and* (2) the person cannot be joined; only in that situation, "the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed," considering prejudice to the required person or existing parties, methods of lessening the prejudice, adequacy of the judgment, and whether the plaintiff would have an adequate remedy otherwise. A court is vested with discretion to make the determinations required by Rule 19. *Sac & Fox Nation of Missouri v. Norton*, 240 F.3d 1250, 1258 (10th Cir. 2001). "The moving party has the burden of persuasion in arguing for dismissal." *Rishell v. Jane Phillips Episcopal Mem'l Med. Ctr.*, 94 F.3d 1407, 1411 (10th Cir. 1996) (internal quotation marks and citations omitted).

The Tribe is not a "required" party because complete relief can be afforded the parties to this suit in the absence of the Tribe since the Complaint properly names the officials of the Tribe, and the State's relief can be effected by injunction against Mekko Hobia. *See Kansas*, 249 F.3d at 1227 ("[M]ost importantly, the potential for prejudice to the Miami Tribe is largely nonexistent due to the presence in this suit of . . . the tribal officials."). The interests of the Tribe

[9] While the language of Rule 19 has changed, it has the "same design" and cases discussing and construing prior versions of the Rule are not obsolete. *See Republic of Philippines v. Pimentel*, 553 U.S. 851, 863 (2008).

are properly represented in this litigation by Mekko Hobia in his capacity as tribal official. *See Sac & Fox Nation*, 240 F.3d at 1259 (finding a person is not "required" when its interests are "virtually identical" to the interests of a party of the suit, citing 3A James Moore, MOORE'S FEDERAL PRACTICE § 19.07[2.1], at 19-106 (2d ed.1995) ("[T]he fact that the absent person may be bound by the judgment does not of itself require his joinder if his interests are fully represented by parties present."). The Tribe is not a required party because its interests are sufficiently represented.

Furthermore, there are no barriers to the State's moving the Court to permit the amendment of the Complaint and joinder of the Tribe. As discussed above, Congress has abrogated the Tribe's sovereign immunity to this suit; if the Court determines that the Tribe is a required party, its joinder is feasible. *Cf. Davis v. United States*, 192 F.3d 951, 961 (10th Cir. 1999) (concluding that the district court abused its discretion by concluding that a defense of tribal sovereign immunity alone was sufficient to dismiss a claim under Rule 19). Even if joinder of the Tribe is not feasible, however, this suit should not be dismissed. Under Rule 19(b), the Tribe will not be prejudiced because its officials' "interests . . . are substantially similar, if not identical, to the Tribe's." *Kansas*, 249 F.3d at 1226. Where "the potential for prejudice is minimal, [the court] need not be concerned with the second factor, which addresses the availability of means for lessening or avoiding prejudice." *Sac & Fox Nation*, 240 F.3d at 1260 (internal quotation marks and citations omitted). The third factor also weighs against the conclusion that this suit may not continue without the Tribe, as the Tribe's officials are presumably capable of defending the Tribe's actions. *Id.* Finally, significantly weighing against indispensability is the fact that the State may have no other adequate forum, as the Tribe would presumably assert the same sovereign immunity defense if the Complaint had been filed in state

court. *See Rishell*, 94 F.3d at 1413 ("The absence of an alternative forum would weigh heavily, if not conclusively against dismissal while the existence of another forum would not have as significant an impact in favor of dismissal.") (internal quotation marks and citations omitted).

The cases cited by the Corporation, Corporation Motion at 23-24, do not support dismissal. In *United States ex rel. Hall v. Tribal Development Corp.*, the Seventh Circuit concluded that the tribe was a necessary party because it was unlikely that, "given the Tribe's unwillingness to join the present action, that the Tribe would be aligned against the plaintiff-relators if brought into this suit." 100 F.3d 476, 478 (7th Cir. 1996). Further, the tribe would have been prejudiced as a party to the contract that the plaintiff was attempting to rescind. *Id.* at 479-80. In contrast, in this case the Tribe's interests are presumably aligned with those of its officers, and the State seeks relief in the form of an injunction to enjoin non-compliance with the Compact, not revoke the Compact. Likewise, the Court in *Clinton v. Babbitt*, 180 F.3d 1081, 1090 (9th Cir. 1999), held that in a suit against the federal government, dismissal under Rule 19 was proper because the tribe's interests were not represented at all. *See also Kescoli v. Babbitt*, 101 F.3d 1304, 1307 (9th Cir. 1996) (same). Tenth Circuit precedent establishes that the Tribe is neither a required nor indispensable party, but even if it were "required," its joinder is feasible.

V. The Corporation Is A Proper Party To This Litigation

The Corporation asserts that it can act in concert with the Tribe, through the same responsible official, Mekko Hobia, to violate IGRA and the Compact, but the State can have no remedy against it because the Corporation is not a party to the Compact. Corporation Motion at 1-3. This disregards the allegations of the Complaint, which allege that "Defendants," including the Corporation, are engaged in efforts to develop, construct, and operate the Casino, including that Defendants initiated or caused initiation of grading, site preparation, and other construction.

See Complaint, ¶¶ 37, 51, 66 and 67.[10] The issue is not whether, without discovery, the State can prove the Corporation's precise role; rather, under the caselaw, the State must only plead enough facts to "to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. at 555. Plainly, as the apparent economic development entity for the Tribe and, as is alleged, a member of Florence, it has a substantial role in the Red Clay Casino project and is an active participant in the attempted violation of IGRA. Relief only against the Mekko Hobia, as Mekko of the Tribe, may be inadequate.

The Corporation's motion, like Mekko Hobia's completely misunderstands the law applicable to sovereign immunity. It relies on the same argument regarding *Ex parte Young* rejected by the Tenth Circuit in *Crowe & Dunleavy,* and fails to address the caselaw demonstrating that "sue and be sue" clauses waive a tribal corporation's immunity *See* Point III.A.-C., *supra.* As set forth above, under established Tenth Circuit precedent, the Corporation has waived its immunity in the "sue or be sued" clause in its Charter. The Corporation purportedly is a distinct legal entity from the Tribe, *see* 25 U.S.C. § 503, and even if, as the State expects, the discovery process reveals that the Corporation is acting on behalf of the Tribe to construct and operate a casino, the Tenth Circuit has rejected the suggestion that the IGRA mandates casinos and their operating authorities be considered tribal entities for purposes of sovereign immunity. *Breakthrough Mgmt. Group, Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1192 n.14 (10th Cir. 2010), *cert. dismissed*, ___ U.S. ___, 132 S. Ct. 64 (2011). The Complaint pleads claims for relief against the Corporation.

[10] The State has not yet received the discovery it has requested into the actual parties to the Lease of the Broken Arrow Property, the entities comprising Florence, or the Corporation's role in the Red Clay Casino development.

VI. Florence Is A Proper Party To This Litigation.

Florence's motion concedes it is not shielded by sovereign immunity and asserts legally insufficient arguments that it is not a proper party to this suit. Florence Motion at 6. The Complaint alleges that Florence is an Oklahoma LLC whose members, upon information and belief include the Corporation, Wynema Capps, Marcella Giles, [11] and others and is the Lessee under the Lease to the Broken Arrow Property. Complaint, ¶¶ 48-49. Because Florence is the only party that has a recognized property interest in the Broken Arrow Property,[12] the Complaint alleges it is authorizing other Defendants and individuals or entities acting by, through, and for them, to act illegally on the land. Complaint, ¶ 51. A party to a lease is an interested party in a lawsuit concerning the subject matter of that lease. *See*, *e.g.*, *Jicarilla Apache Tribe v. Hodel*, 821 F.2d 537, 540 (10th Cir. 1987).[13] The Complaint states a claim for relief against Florence to enjoin its participation with the Tribe and the Corporation to open and operate an illegal casino.

Florence does not dispute that it is the Lessee of the Broken Arrow Property. As the Compact only permits gaming on "Indian land," any gaming that were to occur on the Broken Arrow Property would place Florence in violation of federal law. The Complaint alleges that "Defendants," including Florence, are engaged in efforts to develop, construct, and operate the Casino, including that Defendants initiated or caused initiation of grading, site preparation, and other construction. *See* Complaint, ¶¶ 37, 51, 66 and 67. The allegation that Florence is the

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[11] Wynema Capps, Marcella Giles are the apparent allotted landowners of the Broken Arrow Property and members of the Muscogee (Creek) Nation. Complaint, ¶ 34.

[12] The portion of the State's motion for expedited discovery [Doc. 13] that would have permitted it to request for the production of the entire lease regarding the Broken Arrow Property, and thus ascertain if other current parties to the litigation have an interest in the lease, was denied by Judge Wilson. [Doc. 66.]

[13] Even if the State had not sued Florence, it likely would be considered a necessary party.

Lessee of the Broken Arrow Property and working with other Defendants towards opening and operating a Class III casino in violation of IGRA pleads a cause of action for prospective relief against Florence to enjoin such violation. Imminent intentional violation of the law is an irreparable injury for which an injunction is proper as no other remedy at law is available. *See Kansas*, 249 F.3d at 1227. Any injunction that issues will properly enjoin Florence.

VII. This Suit Satisfies Article III's Case or Controversy Requirements.

A. The State has standing.

Article III of the United States Constitution grants federal courts jurisdiction over cases and controversies. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559 (1992). Standing requires, of course, that the plaintiff demonstrate injury-in-fact, causation, and redressability. *Id.*at 560-61. When a State is the plaintiff, the court must consider its "special position and interest" when analyzing standing. *Massachusetts v. E.P.A.*, 549 U.S. 497, 518 (2007) ("*Mass. v. EPA*").

The State has standing both as a sovereign and as *parens patriae* of the citizens of Oklahoma. A state's sovereign interests include "the exercise of sovereign power over individuals and entities within the relevant jurisdiction—this involves the power to create and enforce a legal code" and "the demand for recognition from other sovereigns—most frequently this involves the maintenance and recognition of borders." *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel. Barez*, 458 U.S. 592, 601 (1982); *see also Florida v. Weinberger*, 492 F.2d 488, 494 (5th Cir. 1974) ("Florida has standing, arising from its clear interest both in the manner in which the Medicaid program is administered vis-à-vis its citizens and in being spared the reconstitution of its statutory program."). A *parens patriae* interest includes "the health and well-being—both physical and economic—of its residents in general. . . . [And] not being discriminatorily denied

its rightful status within the federal system." *Snapp*, 458 U.S. at 602. "[A] State's interests in the health and well-being of its residents extend beyond mere physical interests to economic and commercial interests." *Id.* at 609. When the State is plaintiff, it deserves "special solicitude" in the standing analysis. *Mass. v. EPA*, 549 U.S. at 520. This is particularly true when the State has filed suit to protect its sovereign powers and authorities. *See Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907) (concluding that a state had *parens patriae* standing to challenge an action that affected the state's power over its territory).

The State's Complaint establishes that it has standing, even without being granted special solicitude due to its sovereign status. The injury in fact element of standing requires the plaintiff to demonstrate an injury to a "legally cognizable interest." MOORE'S FED. PRACTICE § 101.40[5][a] (3d ed. 2006). The Complaint states that Defendants are constructing, with the intent of opening and operating, a casino in violation of the Compact. Complaint, ¶ 3. Defendants' actions are injuring the State, both as a sovereign and party to the Compact, and as *parens patriae* in protecting the interests of its citizens. *Id.* ¶ 6. "One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough." *Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 298 (1979); *see also Crow Tribe of Indians v. State of Mont.*, 819 F.2d 895, 903 (9th Cir. 1987), *aff'd sub nom. Montana v. Crow Tribe of Indians*, 484 U.S. 997 (1988). The imminent and impending injury asserted by the Complaint satisfies the injury-in-fact inquiry of the standing analysis.

As in many cases, the causation and redressability prongs of the standing analysis are plainly established here. Causation requires proof "of a substantial likelihood that the defendant's conduct caused plaintiff's injury in fact." *Habecker v. Town of Estes Park, Colo.*, 518 F.3d 1217, 1225 (10th Cir.2008). Redressability requires a plaintiff to show that the

requested relief will redress its injury. *Id.* at 1331. The State's irreparable injury is being directly caused by Defendants' actions in violation of the Compact and IGRA. *E.g.*, Complaint, ¶ 66. The State's injury will be redressed by an order of this Court declaring Defendants' actions to be unlawful and permanently enjoining their activities to open and operate an illegal casino. *E.g.*, Complaint, ¶ 70. The Complaint satisfies the Article III standing requirements. The fact that special solicitude must be granted to the State further supports that the Court's exercise of jurisdiction over this lawsuit.

B. The suit is ripe.

The injury complained of in the Complaint is ripe for review. "If a threatened injury is sufficiently 'imminent' to establish standing, the constitutional requirements of the ripeness doctrine will necessarily be satisfied." *Am. Civil Liberties Union v. Johnson*, 194 F.3d 1149, 1155 (10th Cir. 1999) (internal quotation marks, citations, brackets omitted); *Skull Valley Band of Goshute Indians vs. Nielson*, 376 F.3d 1223, 1235-39 (10th Cir. 2004), challenge to State statutes ripe not withstanding that nuclear regulatory commission had not issued a license necessary to authorize project). The Complaint alleges that the Defendants are proceeding "at a rapid pace" to build and open a Class III cause. Complaint, ¶ 51. As previously presented to this Court, Defendants have made public statements that the casino will provide Class III gaming. The State alleges that this conduct will violate the Compact and IGRA. [Doc. 51 at 4.] This suit is ripe for decision now; the Court need not await the playing of the first Casino game.

VIII. The State Has Pleaded All The Requirements For Injunctive Relief.

The Complaint satisfies the requirements for the Court to issue injunctive relief against Defendants. However, the Defendants' Motions challenge only preliminary injunctive relief. *See* Hobia Motion at 20; Corporation Motion at 21. A preliminary injunction should issue when

(1) the movant has a substantial likelihood of success on the merits; (2) "the movant will suffer irreparable harm unless the injunction issues"; (3) "the threatened injury to the movant outweighs any harm the proposed injunction may cause the opposing party"; and (4) the public interest will be served by an injunction. *Kiowa Indian Tribe of Oklahoma v. Hoover*, 150 F.3d 1163, 1171 (10th Cir. 1998). No factor is dispositive; the court must consider the factors together to determine whether injunctive relief should issue. *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1246-47 (10th Cir. 2001); *Ty, Inc. v. GMA Accessories, Inc.*, 132 F.3d 1167, 1172 (7th Cir. 1997) (stating that "the stronger the case on the merits, the less irreparable harm must be shown"). The State has pleaded each of these elements. *See* Complaint, ¶¶ 69-77.

Defendants' motions focus on whether the State has satisfied the irreparable injury requirement for a preliminary injunction, speculating on what the evidence will show at a hearing. In assessing the Complaint, the standard for granting a preliminary injunction requires the demonstrating "that irreparable injury is *likely* in the absence of an injunction." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). The Tenth Circuit has established that the threat of harm to sovereign interests and public policies is sufficient for establishing irreparable injury. *See Kansas*, 249 F.3d at 1227 ("[B]ecause the NIGC's decision places its sovereign interests and public policies at stake, we deem the harm the State stands to suffer as irreparable if deprived of those interests without first having a full and fair opportunity to be heard on the merits."). In *Kansas* the Tenth Circuit upheld the grant of a preliminary injunction against the Miami Tribe's planned Class II gaming facility, stating that

> [w]e believe the State of Kansas' interests in adjudicating the applicability of IGRA, and the ramifications of such adjudication, are sufficient to establish the real likelihood of irreparable harm if the Defendants' gaming plans go forward at this stage of the litigation.

Id. at 1228; *see also Kiowa Indian Tribe*, 150 F.3d at 1172 (finding the interference with sovereign interests constituted irreparable harm); *Prairie Band*, 253 F.3d at 1251 ("Not only is harm to tribal self-government not easily subject to valuation but also, and perhaps more important, monetary relief might not be available to the tribe because of the state's sovereign immunity."). These cases stand for the proposition that harm to a sovereign government's ability to exercise its sovereignty is generally sufficient to establish irreparable harm and the sufficiency of the equitable allegations of the Complaint.

A series of cases from the Eastern District of New York are instructive on the question of whether a State is irreparably harmed by an Indian tribe's intentions to conduct illegal gaming. In *New York v. Shinnecock Indian Nation*, 280 F. Supp. 2d 1, 2 (E.D.N.Y. 2003), the court granted a preliminary injunction enjoining a tribe from, *inter alia*, "taking any steps whatsoever to build or construct any structure on the parcel of land known as Westwoods in the community of Hampton Bays." The defendant tribe planned to open a casino on land it owned in Hampton Bays, and had begun clearing the land in preparation for construction. *Id.* The State of New York applied for, and was granted, a temporary restraining order, and then a preliminary injunction, based on the irreparable injury being caused by the tribe's construction activities. The court concluded that the state satisfied its burden of demonstrating "likely irreparable harm resulting from the construction of a gambling casino at Westwoods without adherence to State and local laws." *Id.* The injuries the state showed were: increased traffic, decreased quality of life of residents and increased pollution; harm to the natural environment; and potential failure to comply with necessary legal requirements. *Id.* at 5-6.

Although the tribe had taken no steps on the land except to commence construction activities, the court concluded that irreparable injury to the state was imminent. "[T]he potential

irreparable harm to the public . . . is certainly imminent, as the Shinnecock Nation has made clear its intentions to begin constructing the gaming facility immediately." *Id.* (finding persuasive the fact that the defendants had held a ground-breaking ceremony). The court rejected the defendants' argument against irreparable harm, which is strikingly similar to that proffered by Defendants:

> Incredibly, the Shinnecock Nation argues that Plaintiffs have failed to exhibit any irreparable harm resulting from the construction of a casino at Westwoods. Instead, Defendants contend they are the ones who would suffer harm if this Court were to grant the State's motion for preliminary injunction. The Shinnecock Nation, the members of which are desperately in need of better housing, jobs, and education, claim a delay in construction of the casino would force Defendants to suffer irreparable injury. Although the Shinnecock Nation could no doubt use the vast revenues that the proposed casino would likely generate, unlike Plaintiffs' alleged damages, Defendants' alleged damages are fully compensable, as they are monetary in nature.

Id. at 5-6. The court also found that the equities were in favor of an injunction, stating that "[t]he likely harm stemming from the construction of a gambling facility to the natural environment and the communities surrounding Westwoods is immense. Conversely, the revenue lost by the Shinnecock Nation, although possibly quite large, is not irreparable, given that it is compensable through monetary damages." *Id.* at 9.

The Eastern District of New York later granted the state's motion for permanent injunction, rejecting the defendants' argument that the injury is "speculative." *New York v. Shinnecock Indian Nation*, 523 F. Supp. 2d 185, 302 (E.D.N.Y. 2007). The court stated:

> there is nothing speculative or remote about the irreparable harm that would result in this case if the injunctive relief is not granted. The Nation formed a Gaming Authority and entered into a Development Agreement for the development, construction, and operation of a 61,000 sf. facility, and subsequently, prior to the issuance of the preliminary injunction, commenced construction activities at the Westwoods site by clearing trees with a bulldozer and other heavy equipment. Where the Nation's intent and imminent plans to build a gaming facility in violation of New York and Town laws have been made clear by words and action, plaintiffs are not required to wait until the facility is built to seek injunctive relief.

Id. The issuance of the permanent injunction was subsequently modified to "be limited to the construction and operation of a casino or gaming on Westwoods." *New York v. Shinnecock Indian Nation*, 560 F. Supp. 2d 186, 188 (E.D.N.Y. 2008). The court refused to grant the broader injunction requested by the state, stating that any proposed construction that did not implicate federal law, *e.g.*, the IGRA, was not within the purview of the court. *Id.* at 192-93.

Similarly, in a case currently pending before the United States District Court of the Western District of Michigan, the court granted a preliminary injunction enjoining an Indian tribe from operating a casino in violation of IGRA. *State of Michigan v. Bay Mills Indian Community*, No. 1:10-cv-1273, Doc. 42 (W.D. Mich. March 29, 2011).. Of significance to the court's conclusion that irreparable injury was established was the fact that the defendant tribe could assert sovereign immunity in a later suit for damages. *Id.* at 15. This is consistent with law in this circuit. *See Chamber of Commerce of U.S. v. Edmondson*, 594 F.3d 742, 770-71 (10th Cir. 2010) ("We conclude that the Chambers will likely suffer irreparable harm absent a preliminary injunction. Imposition of monetary damages that cannot later be recovered for reasons such as sovereign immunity constitutes irreparable injury.").

In this case, to prevent the same irreparable injury as other courts have recognized threated the States of New York and Michigan: the Court should enter an order enjoining Defendants from continuing to harm the State in its sovereign and *parens patriae* interests in a manner that cannot later be remedied with a suit for damage. The State incorporates the discussion of the remaining factors for preliminary injunction set forth in its motion for preliminary injunction and brief in support thereof. [Docs. 4, 6.]

IX. The Compact's Dispute Resolution Provisions Are Inapplicable

Defendants' contentions that the Compact precludes initial resort to federal court review, without exhausting the procedures of Part 12 of the Compact misreads Part 12 and fails to read it in the context Part 9 of the Compact and IGRA's provision authorizing suit in federal court, invoked here. *See* Complaint, ¶ 11 (citing 25 U.S.C. § 2710(d)(7)). Section 2710(d)(7) provides for federal civil jurisdiction over "*any* cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact." (Emphasis added.) Then, Part 9 of the Compact provides "[t]his Compact shall not alter tribal, federal, or state civil adjudicatory or criminal jurisdiction." Finally, Part 12 plainly provides an optional dispute resolution via arbitration with federal court review. Part 12 of the Compact provides that, in the event of a dispute, the Compact's dispute resolution and arbitration procedures "*may be invoked*," first to attempt to resolve the dispute, and then "either party '*may*' 'demand' arbitration." Compact, Part 12, § 2 (emphasis added). Finally, following arbitration, either party 'may' seek review in federal court. *Id.* § 3. "[T]he use of the word 'may' indicates that the parties intended this remedy to be optional and not exclusive." *Ryder Truck Rental, Inc. v. Nat'l Packing Co.*, 380 F.2d 328, 332 (10th Cir. 1967); *cf. Specialty House of Creation, Inc. v. Quapaw Tribe*, 10-CV-371-GKF-TLW, 2011 WL 308903 (N.D. Okla. Jan. 27, 2011), *dismissed sub nom. Specialty House of Creation, Inc. v. Quapaw Tribe of Oklahoma*, 2011-1234, 2011 WL 7429493 (Fed. Cir. Mar. 30, 2011) (concluding that the model gaming compact did not waive tribal immunity for a patent claim). This lawsuit is not precluded by the Compact's dispute resolution provisions.

Defendants' argument fails to construe these provisions together. Federal court plainly is intended as the primary, final forum for the resolution of disputes. However, either party may

require dispute resolution and demand arbitration, subject to federal court review. The Tribe, curiously, did not invoke Part 12 in response to the filing and, consequently, lacks standing to invoke it. Moreover, the process set out in Part 12, requiring attempted resolution, appointment of arbitrators, and then an arbitration process, is ill suited to avert the imminent injury threatened here. This lawsuit does not alter the primary jurisdiction of federal courts to resolve Compact disputes under IGRA. *See* 25 U.S.C. § 2710(d)(7). Nothing in the Compact changes the ability of this Court to exercise jurisdiction established by Congress; indeed, the law of a state could neither limit nor enlarge the jurisdiction of a federal court. U.S. Const. Art. VI, Cl. 2.

X. Conclusion

For the foregoing reasons, the Defendants' Motions to Dismiss should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of April, 2012, a true and complete copy of the within and foregoing The State of Oklahoma's Consolidated Response to the Motions to Dismiss Filed By Defendants Tiger Hobia [Doc. 62], Florence Development Partners, LLC [Doc. 64], and Kialegee Tribal Town, a Federally Chartered Corporation [Doc. 70] was electronically transmitted to the Clerk of the Court using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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I further certify that on this 3rd day of April, 2012, I served the attached document via e-mail on the following, who are not registered participants of the ECF System:

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s/Lynn H. Slade
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