Nos. 12-5134 & 12-5136

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

State of Oklahoma,
Appellee/Plaintiff,
v.
Tiger Hobia, as Town King and member of the Kialegee Tribal Town Business Committee; Thomas Givens, as 1st Warrior and member of the Kialegee Tribal Town Business Committee; John Doe No. 1 as 2nd Warrior and member of the Kialegee Tribal Town Business Committee; John Does Nos. 2-7, as members of the Kialegee Tribal Town Business Committee; Florence Development Partners, LLC; and Kialegee Tribal Town, a federally chartered corporation,
Appellants/Defendants.

On Appeal from the United States District Court
For the Northern District of Oklahoma (Frizzell, C.J.)
Case No. 4:12 cv-00054-GFK-TLW

BRIEF OF THE APPELLEE

OKLAHOMA OFFICE OF THE ATTORNEY GENERAL
E. Scott Pruitt
Attorney General
M. Daniel Weitman
Assistant Attorney General
313 NE 21st Street
Oklahoma City, Oklahoma 73105
(405) 521-4274

MODRALL, SPERLING, ROEHL, HARRIS & SISK, P.A.
Lynn H. Slade
William C. Scott
Sarah M. Stevenson
Post Office Box 2168
Albuquerque, NM 87103-2168
(505) 848-1800

Counsel for Appellees

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv
GLOSSARY ix
INTRODUCTION 1
APPELLEE'S SUPPLEMENTAL STATEMENT OF JURISDICTION 1
APPELLEE'S SUPPLEMENTAL STATEMENT OF THE ISSUES 2
APPELLEE'S SUPPLEMENTAL STATEMENT OF THE CASE 3
APPELLEE'S SUPPLEMENTAL STATEMENT OF FACTS 4
A. The Tribal Entities. 4
B. The Property. 5
C. The Efforts to Develop the Red Clay Casino. 8
SUMMARY OF APPELLEE'S ARGUMENT 9
ARGUMENT 10
I. THE FEDERAL STATUTORY FRAMEWORK. 10
II. THE DISTRICT COURT CORRECTLY DETERMINED IT WAS FULLY VESTED WITH ARTICLE III JURISDICTION. 12
A. The District Court Had Subject Matter Jurisdiction Over the State's Complaint 12
1. Both 28 U.S.C. § 1331 and 25 U.S.C. § 2710 provide subject matter jurisdiction. 12
a. Section 1331 jurisdiction exists because whether Defendants are violating IGRA and the Compact are federal questions. 12
b. IGRA provides the district court with an alternative grant of jurisdiction. 14
B. None of the Defendants has Sovereign Immunity from this Suit. 22
1. The claims against the Tribal Officials are proper under *Ex parte Young*. 22
2. The "sue and be sued" clause in the Charter waived the Corporation's sovereign immunity. 24

C. The State has Standing as a Sovereign, as Party to the Compact, and as *Parens Patriae*..... 26

1. The State has a legally cognizable interest in preventing gaming in violation of the Compact. 26

2. The State has established each element of Article III standing..... 28

D. The State Presented Claims Ripe for Judicial Consideration. 30

III. DEFENDANTS' RULE 19 ARGUMENTS ARE NOT PROPERLY BEFORE THE COURT, AND THERE ARE NO PARTIES WHOSE ABSENCE REQUIRES DISMISSAL..... 32

A. The Collateral Order Doctrine or Pendent Appellate Jurisdiction Do not Provide Jurisdiction..... 32

B. Defendants Waived Any Objection to the Denial of the Motion to Dismiss for Failure to Join the Tribal Town..... 35

C. The Nation is Not a Required Party. 36

IV. THE DISTRICT COURT DID NOT ERR IN GRANTING THE PRELIMINARY INJUNCTION. 38

A. Standard of Review. 38

B. The District Court Applied the Correct Standard. 39

C. The District Court Properly Enjoined Defendants. 41

1. The district court correctly found the State would succeed in showing the Tribal Town may not conduct gaming on the Property. 41

a. The Tribal Town does not have jurisdiction over the Property. 42

b. The Tribal Town does not exercise governmental control over the Property. 51

2. The balance of harm favors the preliminary injunction. 53

a. The State would suffer irreparable harm if the preliminary injunction did not issue. 53

b. There was no chance of the preliminary injunction harming Defendants. 54

3. The public interest favors the preliminary injunction. 55

CONCLUSION 56

STATEMENT REGARDING ORAL ARGUMENT 56
CERTIFICATE OF TYPE-VOLUME COMPLIANCE 58
CERTIFICATE OF SERVICE 59
APPELLEE'S ADDENDUM OF AUTHORITIES A-1
INDEX TO APPELLEE'S SUPPLEMENTAL APPENDIX A-14

TABLE OF AUTHORITIES

CASES

Alabama-Quassarte Tribal Town v. United States, CIV-06-588-RAW, 2010 WL 3780979, (E.D. OK. Sept. 21, 2010) 43

Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez, 458 U.S. 592 (1982) 26

Amador Cnty., Cal. v. Salazar, 640 F.3d 373 (D.C. Cir. 2011) 26

Am. Civil Liberties Union v. Johnson, 194 F.3d 1149 (10th Cir. 1999)..... 30

Arbaugh v. Y & H Corp., 546 U.S. 500 (2006) 20

Arizona v. Tohono O'odham Nation, CV11-0296-PHX-DGC, 2011 WL 2357833 (D. Ariz. June 15, 2011) (unpublished) 19, 20, 31

Babbitt v. United Farm Workers Nat. Union, 442 U.S. 289 (1979)..... 29

Bell v. Hood, 327 U.S. 678 (1946)..... 13

Blanchette v. Conn. Gen. Ins. Corps., 419 U.S. 102 (1974)..... 30

Cabazon Band of Mission Indians v. Wilson, 124 F.3d 1050 (9th Cir. 1997).. 13, 14, 22

Cheyenne River Sioux Tribe v. South Dakota, 830 F. Supp. 523 (D.S.D. 1993) 51

Chickasaw Nation v. United States, 534 U.S. 84 (2001)..... 21

Citizen Band Potawatomi Indian Tribe of Okla. v. Collier, 142 F.3d 1325 (10th Cir. 1998)..... 46

Citizen Potawatomi Nation v. Norton, 248 F.3d 993 (10th Cir. 2001) 34

Citizens Exposing Truth About Casinos v. Kempthorne, 492 F.3d 460 (D.C. Cir. 2007) 52

City of Roseville v. Norton, 348 F.3d 1020 (D.C. Cir. 2003) 45

Crowe & Dunlevy, P.C. v. Stidham, 640 F.3d 1140 (10th Cir. 2011)..... *passim*

Davis v. Mineta, 302 F.3d 1104 (10th Cir. 2002)..... 55

Davis v. United States, 192 F.3d 951 (10th Cir. 1999)..... 34

Day v. Bond, 500 F.3d 1127 (10th Cir. 2007) 29

Diamond v. Charles, 476 U.S. 54 (1986) 26

Direx Israel, Ltd. v. Breakthrough Med. Corp., 952 F.2d 802 (4th Cir. 1991) 41

Enter. Mgmt. Consultants, Inc. v. U.S. ex rel. Hodel, 883 F.2d 890 (10th Cir. 1989) 37

Ex parte Young, 209 U.S. 123 (1908) ..... *passim*

Fed. Election Comm'n v. Akins, 524 U.S. 11, 20 (1998) 28

Florida v. Seminole Tribe of Fla., 181 F.3d. 1237 (11th Cir. 1999) 18, 19, 20

Georgia v. Tenn. Copper Co., 206 U.S. 230 (1907) 28

Gilmore v. Weatherford, 694 F.3d 1160 (10th Cir. 2012) 13

Grand Traverse Band of Ottawa & Chippewa Indians v. U.S. Attny. For W. Dist. of Mich., 198 F. Supp. 2d 920 (W.D. Mich. 2002) 50

Harjo v. Kleppe, 420 F. Supp. 1110 (D.D.C. 1976) 45

Heredia v. Santa Clara Cnty., 2006 WL 2547816 (N.D. Cal. Sept. 1, 2006) .. 41

Hilton v. S. C. Pub. Railways Comm'n, 502 U.S. 197 (1991) 22

In re Sac & Fox Tribe of Miss. in Iowa/Meskwaki Casino Litig., 340 F.3d 749 (8th Cir. 2003) 55

Kansas v. United States, 249 F.3d 1213 (10th Cir. 2001) ..... *passim*

Kiowa Tribe of Oklahoma v. Mfg. Technologies, Inc., 523 U.S. 751 (1998) ... 17, 19

Klamath Tribe Claims Comm. v. United States, 106 Fed. Cl. 87 (Fed. Cl. 2012) 34

Leeson v. Transamerica Disability Income Plan, 671 F.3d 969 (9th Cir. 2012) 20, 21

Lewis v. Norton, 424 F.3d 959 (9th Cir. 2005) 19

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) 28, 29

Manygoats v. Kleppe, 558 F.2d 556 (10th Cir. 1977) 38

Massachusetts v. Envtl. Prot. Admin., 549 U.S. 497 (2007) 28

MediaOne of Del., Inc. v. E & A Beepers & Cellulars, 43 F. Supp. 2d 1348 (S.D. Fla. 1998) 55

Mescalero Apache Tribe v. New Mexico, 131 F.3d 1379 (10th Cir. 1997) ..... *passim*

Miami Tribe of Okla. v. United States, 656 F.3d 1129 (10th Cir. 2011) 44

Michigan v. Bay Mills Indian Community, 695 F.3d 406 (6th Cir. 2012) ..... *passim*

Mille Lacs Band of Chippewa Indians v. Minnesota, 853 F. Supp. 1118 (D. Minn. 1994) 38

Miller v. Am. Tel. & Tel. Corp., 344 F. Supp. 344 (E.D. Pa. 1972) 41

Mitchell v. United States, 34 U.S. 711 (1835) 49

Native Am. Distrib. v. Seneca-Cayuga Tobacco Co., 546 F.3d 1288 (10th Cir. 2008) 25, 35, 49

Native Am. Distrib. v. Seneca-Cayuga Tobacco Co., 491 F. Supp. 2d 1056 (N.D. Okla. 2007) 25

New Mexicans for Bill Richardson v. Gonzales, 64 F.3d 1495 (10th Cir. 1995) 30

New York v. Shinnecock Indian Nation, 280 F. Supp. 2d 1 (E.D.N.Y. 2003) .. 53

N. Arapaho Tribe v. Harnsberger, 697 F.3d 1272 (10th Cir. 2012) 48

Pittsburg & Midway Coal Min. Co. v. Yazzie, 909 F.2d 1387 (10th Cir. 1990) 38

Plain Dealer Pub. Co. v. Cleveland Typographical Union No. 53, 520 F.2d 1220 (6th Cir. 1975) 41

Prairie Band of Potawatomi Indians v. Pierce, 253 F.3d 1234 (10th Cir. 2001) 13, 40

Pueblo of Santa Ana v. Kelly, 104 F.3d 1546 (10th Cir. 1997) 10, 13, 27

Republic of Philippines v. Pimentel, 553 U.S. 851 (2008) 33, 34

Rhode Island v. Narragansett Indian Tribe, 19 F.3d 685 (1st Cir. 1994) 30

Rosebud Sioux Tribe v. A & P Steel, Inc., 874 F.2d 550 (8th Cir. 1989) 25

Sac & Fox Nation of Mo. v. Norton, 240 F.3d 1250 (10th Cir. 2001) 37

Salt River Project Agric. Improvement & Power Dist. v. Lee, 672 F.3d 1176 (9th Cir. 2012) 36

Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) 23

Satsky v. Paramount Commc'ns, Inc., 7 F.3d 1464 (10th Cir. 1993) 28

Schrier v. Univ. of Colo., 427 F.3d 1253 (10th Cir. 2005) 39

Sisseton-Wahpeton Sioux Tribe v. United States, 804 F. Supp. 1199 (D.S.D. 1992) 31

Skidmore v. Swift & Co., 323 U.S. 134 (1944) 50

Somerlott v. Cherokee Nation Distrib., Inc., 686 F.3d 1144 (10th Cir. 2012) . 24, 38

South Carolina v. Catawba Indian Tribe, Inc., 476 U.S. 498 (1986) 21

Tamiami Partners v. Miccosukee Tribe of Indians, 63 F.3d 1030 (11th Cir. 1995) 13

Tarrant Reg'l Water Dist. v. Herrmann, 656 F.3d 1222 (10th Cir. 2011) 31

Temple v. Synthes Corp., Ltd., 498 U.S. 5 (1990) 35

Tenneco Oil Co. v. Sac & Fox Tribe of Indians of Okla., 725 F.2d 572 (10th Cir. 1984) 23

Texas v. United States, 523 U.S. 296 (1998) 31

United States v. Beckstead, 500 F.3d 1154 (10th Cir. 2007) 35

United States v. Games-Perez, 695 F.3d 1104 (10th Cir. 2012) 22

Vann v. U.S. Dept. of Interior, 701 F.3d 927 (D.C. Cir. 2012) 36

Verizon Md., Inc. v. Pub. Serv. Comm'n of Md., 535 U.S. 635 (2002) 12, 23, 34

Williams v. Clark, 742 F.2d 549 (9th Cir. 1984) 48

Wisconsin v. Ho-Chunk Nation, 512 F.3d 921 (7th Cir. 2008) 14, 19, 34

Wisconsin v. Stockbridge-Munsee Cmty., 67 F. Supp. 2d 990 (E.D. Wis. 1999) 55

Wyandotte Nation v. Sebelius, 443 F.3d 1247 (10th Cir. 2006) 50

FEDERAL STATUTES AND REGULATIONS

18 U.S.C. § 1151 43

25 U.S.C. § 476 45

25 USC § 477 24

25 U.S.C. § 503 ..... 4, 5, 24

28 U.S.C. § 1292 1

28 U.S.C. § 1331 ..... *passim*

25 U.S.C. § 2107 32

Indian Gaming Regulatory Act

- 28 U.S.C. § 2701 ..... 1, 10
- 25 U.S.C. § 2703 ..... *passim*
- 25 U.S.C. § 2706 5
- 25 U.S.C. § 2710 ..... *passim*

25 C.F.R. § 502.12 11

FEDERAL RULES

Fed. R. App. P. 4 ..... 2, 32

Fed. R. Civ. P. 12 3

Fed. R. Civ. P. 19 ..... *passim*

Fed. R. Civ. P. 52 39

STATE STATUTES

Okl. Stat. Ann. tit. 3A § 280 (2007) 5

BOOKS AND PERIODICALS

11A Wright & Miller Fed. Prac. & Proc. Civ. § 2948.3 (2d ed.) 41

CONGRESSIONAL MATERIALS

S. Rep. 100-446 (1988) 27

AGENCY MATERIALS

In re Indian Lands—Iowa Tribe of Oklahoma; Whitecloud Allotment (NIGC Jan. 7, 2010) 47

Kialegee Tribal Town v. Muskogee Area Director, Bureau of Indian Affairs, 19 IBIA 296 (April 17, 1991) 46

GLOSSARY

Casino	Red Clay Casino, Broken Arrow, Oklahoma
Charter	Corporate Charter of the Kialegee Tribal Town, a federally chartered corporation
Compact	Tribal-State Gaming Compact between Oklahoma and the Kialegee Tribal Town
Corporation	Kialegee Tribal Town, a corporation formed pursuant to Charter under Section 3 of the OIWA
IBIA	Interior Board of Indian Appeals
IGRA	Indian Gaming Regulatory Act, 25 U.S.C. § 2701, *et seq.*
Nation	Muscogee (Creek) Nation)
NIGC	National Indian Gaming Commission
OIWA	Oklahoma Indian Welfare Act, 25 U.S.C. § 501, *et seq.*
Property	Property located in Broken Arrow, Oklahoma, at the southwest corner of Olive Avenue (South 129th East Ave.) and Florence Street (South 111th Street East)
Property Owners	Wynema L. Capps and Marcella S. Giles, owners of the Property
Secretary	Secretary of the Interior
Tribal Town	Kialegee Tribal Town, a federally recognized Indian tribe

INTRODUCTION

The district court preliminarily enjoined Appellants/Defendants, the Tribal Officials of the Kialegee Tribal Town, a federally recognized Indian tribe ("Tribal Town"), and of its federally chartered business corporation, the Kialegee Tribal Town, a federally chartered Corporation ("Corporation"), the Corporation, and a private gaming developer, Florence Development Partners, LLC ("Florence") (collectively, "Defendants"), from completing construction and commencing operation of the Red Clay Casino ("Casino") on land in Broken Arrow, Oklahoma ("Property"), stipulated to be held by members of another tribe, and over which the Tribal Town lacks jurisdiction and does not exercise governmental power. Given the absence of the federally mandated nexus to the site proposed for gaming, the district court correctly concluded operation of the Casino would violate both the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 ("IGRA"), and the federally-approved Tribal-State Gaming Compact ("Compact") between the Tribal Town and Appellee/Plaintiff the State of Oklahoma ("State" or "Plaintiff"). That decision protects vital rights of states (and tribes) to prevent violations of IGRA and federally approved Tribal-State compacts. Defendants appealed. The State responds as follows:

APPELLEE'S SUPPLEMENTAL STATEMENT OF JURISDICTION

The Court has jurisdiction over the appeal of the preliminary injunction order pursuant to 28 U.S.C. § 1292(a)(1), not 28 U.S.C. § 1331 as Defendants

state, Aplt. Br. 2. Although the untimely appeal, *see* Fed. R. App. P. 4(a)(1)(A), of the district court's rulings on tribal sovereign immunity may be reviewed, *see Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1147 (10th Cir. 2011), this Court lacks jurisdiction over Defendants' attempt to appeal the ruling under Fed. R. Civ. P. 19 ("Rule 19"), *id.* at 1149.

APPELLEE'S SUPPLEMENTAL STATEMENT OF THE ISSUES

1. Did the district court correctly conclude it had subject matter jurisdiction over an action to enjoin violations of IGRA and the federally approved Compact?

2. Did the district court correctly conclude that sovereign immunity was not a bar to suit against the Tribal Officials under *Ex parte Young*, or against the Town Corporation, which had waived its immunity from suit?

3. Given that Defendants had substantially completed steps to conduct gaming in violation of the Compact to which the State was a party, did the district court correctly conclude that Article III standing and ripeness requirements were met?

4. Did Defendants waive any appeal of arguments related to the district court's correct Rule 19 ruling?

5. Did the district court properly exercise its discretion in granting the preliminary injunction when the Defendants were imminently opening a casino on lands over which the Tribal Town lacked jurisdiction or governmental control, and the State carried its burden of proof on each preliminary injunction element?

APPELLEE'S SUPPLEMENTAL STATEMENT OF THE CASE

On February 9, 2012, the State brought suit for injunctive and declaratory relief against Defendants to prevent completion of construction and operation of the Casino in violation of the Compact and IGRA. Complaint [Doc. 1] (Aplt. App. 21-43). The State sued Tiger Hobia, as Town King and member of the Business Committees of both the Tribal Town, and the Corporation, Thomas Givens, as 1st Warrior and member of both Business Committees, and John Does Nos. 1-7, as members of both Business Committees (collectively, "Tribal Officials"), the Corporation, and Florence. On April 26, 2012, the district court denied Defendants' motions to dismiss under Fed. R. Civ. P. 12(b)(6) and 12(b)(1), ruling that the court had subject matter jurisdiction, that sovereign immunity did not bar the suit, that the Tribal Town's absence did not require dismissal under Rule 19, that the State had standing, and that the claims were ripe. Opinion and Order, Motion to Dismiss ("OMTD") [Doc. 105] (Aplt. App. 372-93).

Following a three-day hearing at which both sides presented evidence, the district court granted the preliminary injunction on May 18, 2012. Trans. 5/18/12, 437-42 (Aplee. Supp. App. 144-49). On July 20, 2012, the court issued its written findings and conclusions and order granting the preliminary injunction. Opinion and Order, Preliminary Injunction ("OPI") [Doc. 150] (Aplt. App. 499-539). The district court concluded the evidence established that the Tribal Town did not have jurisdiction or exercise governmental control over the Property on which it seeks to

conduct gaming. *Id.* 35-37 (Aplt. App. 533-35). Consequently, the district court ruled that Defendants' actions were in "direct violation of IGRA and . . . with respect to Class III Gaming, the Kialegee-State Gaming Compact," and enjoined development and operation of the Casino. *Id.* 37 (Aplt. App. 535).[1] This appeal follows.

APPELLEE'S SUPPLEMENTAL STATEMENT OF FACTS

A. The Tribal Entities.

The Tribal Town is organized under Section 3 of the Oklahoma Indian Welfare Act, 25 U.S.C. § 503 ("OIWA"). Aplt. Br. 5; Tribal Town Constitution (June 12, 1941) ("Constitution") Art. II (Aplt. App. 584). The Town does not have a reservation, Expert Report by Gary Clayton Anderson, Ph.D. ("Anderson"), 44-45 (Aplt. App. 780-81), and is headquartered in Wetumka, Oklahoma, approximately 70 miles south of the Property. Constitution, Bylaws Art. II (Aplt. App. 588). Its members historically have been concentrated in a 15 square mile area around Wetumka. Anderson 28 (Aplt. App. 764); Trans. 5/16/12, 111:19-23 (Aplee. Supp. App. 118). The Tribal Town's Constitution does not define any geographic or territorial jurisdiction. The Constitution established the Tribal Town's Business Committee as the Tribal Town's governing body. *Id.* Art. IV (Aplt. App. 585). The Tribal Town and the State are parties to the Compact,

[1] On Defendants' motion to modify, the district court clarified that the preliminary injunction order applies only to bar operation of a casino. Opinion and Order, Motion to Modify ("OMM") [Doc. 152] (Aplt. App. 548-551).

authorized under Oklahoma law, Okl. Stat. Ann. tit. 3A § 280 (2007), and approved by the Secretary of the Interior ("Secretary") under IGRA and the regulations of the National Indian Gaming Commission ("NIGC"), to which Congress has delegated authority to implement IGRA. Compact (Aplt. App. 692-718); *see* 25 U.S.C. § 2706.

The Corporation has a federal charter issued under Section 3 of the OIWA ("Charter"), and is a separate entity from the Tribal Town. Corporate Charter (Sept. 17, 1942) (Aplt. App. 592). Article IV of the Tribal Town's Constitution provides that the Tribal Town's powers are set forth in the Charter. Constitution Art. IV, § 3 (Aplt. App. 585). In its Resolutions authorizing actions related to the Casino, the Tribal Town repeatedly referenced powers set forth in the Corporation's Charter, including the power to sue and be sued and to enter into obligations or contracts, as providing the powers exercised in the gaming activities.[2] *See*, *e.g.*, Resolutions TR 05-15-2010A; TR 05-15-2010d (Aplee. Supp. App. 94-99).

B. The Property.

At the time of the preliminary injunction hearing, Defendants had substantially completed construction of the Casino on the Property, located within the Broken Arrow city limits. Answer ¶ 31 [Doc. 114] (Aplt. App. 396); Trans. 5/16/12, 35:14-22 (Aplee. Supp. App. 103). The Property is located across the

[2] Florence is an Oklahoma limited liability company and gaming developer. Florence Registration (Aplt. App. 395).

street from a technical school and in close proximity to residential subdivisions, a then-proposed elementary school, and churches. Answer ¶ 32 (Aplt. App. 397); Trans. 5/17/15, 238:11-13 (Aplee. Supp. App. 127); Photo (Aplee. Supp. App. 150); Video (Aplee. Supp. App. 151).

The Property is one of thousands of allotments across Oklahoma, granted to individual tribal members in the late Nineteenth and early Twentieth Centuries as Oklahoma's Indian reservations were being terminated and transferred to individual ownership. Anderson 16, 17, 20 (Aplt. App. 75-53, 756). The Property, located within the geographical boundaries of the Creek Nation as it appeared in 1900, is part of a 160 acre parcel of "Indian restricted, individually owned" land that was allotted from the Creek Nation to Tyler Burgess, a full-blooded enrolled Creek member, on August 6, 1903. Anderson 17-18 (Aplt. App. 753-54). Burgess was not a Tribal Town member. *Id.* 17 (Aplt. App. 753); Trans. 5/16/12, 35:17-20 (Aplee. Supp. App. 103). The Property passed by descent to Wynema L. Capps and Marcella S. Giles, enrolled members of the Muscogee (Creek) Nation ("Nation") (the "Property Owners"), who hold the Property as tenants in common, subject to federal restraints against alienation, though neither resides on the Property. NIGC Letter, 9/29/11 (Aplt. App. 719); Hobia Letter, 4/11/11 (Aplt. App. 735-36).

The Property is not held in trust by, or subject to restrictions on alienation enforceable by, the United States for the benefit of the Tribal Town, Answer ¶ 38

(Aplt. App. 397), and as of the close of evidence, for any enrolled member of the Tribal Town, *id.* ¶ 39 (Aplt. App. 397); Court's Ex. 1 ("CX1") (Aplee. Supp. App. 100). The Tribal Town has no property interest in the Property. Trans. 5/17/12, 349:1-5 (Aplee. Supp. App. 142). No members of the Tribal Town live on or in the immediate vicinity of the Property. *Id.* 315:6-7, 349:18-350:2 (Aplee. Supp. App. 138, 142-43).

At the hearing, Defendants stipulated that the Property Owners were not enrolled members of the Tribal Town but were instead enrolled members of the Nation. CX1 (Aplee. Supp. Ap. 148). Following the court's ruling, the Tribal Town's Business Committee voted on May 26, 2012, to enroll the Property Owners as members. Resolutions (Aplt. App. 497-98). On May 30, 2012, Defendants filed a motion to reconsider based on the Property Owners' enrollment. Motion to Reconsider [Doc. 133] (Aplt. App. 492-98). The district court denied that motion, Order, Motion to Reconsider ("OMR") [Doc. 151] (Aplt. App. 540-47), but Defendants do not argue the denial was error. Nonetheless, Defendants' Brief refers repeatedly to the Property Owners as "members" of the Tribal Town. *See* Aplt. Br. 6, 45, 46, 47.

The city of Broken Arrow provides most governmental services in the area of the Property, including water, sanitary sewer, school, fire, and emergency medical services, and, together with the Tulsa County Sheriff and/or the Muscogee (Creek) Lighthorse Police, law enforcement. Nation Cross-Deputization

Agreement (Aplee. Supp. App. 93); Trans. 5/17/12, 221:23-25, 232:1-234:25 (Aplee. Supp. App. 124-26). The Tribal Town does not have a police force, a court, or a jail, and provides no law enforcement or other governmental services to the Property. CX1 (Aplee. Supp. App. 100); Trans. 5/17/12, 346:10-16 (Aplee. Supp. App. 140).

C. The Efforts to Develop the Red Clay Casino.

Defendants began earthwork at the Property in late December 2011, Trans. 5/17/12, 304:5-8 (Aplee. Supp. App. 134), without obtaining permits, utility connections, or easements from Broken Arrow, Tulsa County, or State or Federal agencies. The NIGC cautioned, in a September 29, 2011, letter administratively approving gaming ordinance amendments, that its letter "does not constitute a determination that the Tribe has jurisdiction over the [Property] or that the parcel constitutes Indian lands for gaming under IGRA." (Aplt. App. 719). Undeterred, Defendants proceeded with construction until enjoined by the district court.[3]

One week after the district court entered its oral preliminary injunction, the NIGC issued its determination that the Tribal Town does not have jurisdiction over the Property and that, if gaming were to commence on the Property, the NIGC would issue a notice of violation and closure order. NIGC Letter, 5/24/12 (Aplt.

[3] The claimed right to operate the Casino was based on a convoluted series of leases that never received required federal or state approvals and joint venture agreements, some of which the NIGC rejected as not adequately protecting the Tribal Town's proprietary interest. *See* OPI 18-21 (Aplt. App. 516-19).

App. 720-36). The NIGC subsequently denied the Tribal Town's request for reconsideration. NIGC Letter, 6/8/12 (Aplee. Supp. App. 26-29).

SUMMARY OF APPELLEE'S ARGUMENT

The district court possessed subject matter jurisdiction under both 28 U.S.C. § 1331 and 25 U.S.C. § 2710(d)(7)(A)(ii) to preliminarily enjoin Defendants' imminent violations of IGRA and the Compact. The State's claims that Defendants' activities violate IGRA and the federally-approved Compact plainly arise under federal law. Additionally, IGRA grants jurisdiction to enjoin violations of Tribal-State compacts and abrogates tribal sovereign immunity for such suits. *See* Point II.A, *infra*. Because the State sued the Tribal Officials to enjoin actions in excess of their authority under federal law, and the Corporation's Charter contained a "sue and be sued" clause, no Defendant had sovereign immunity from the suit. *See* Point II.B, *infra*. The State has standing because of its concrete and particularized interest in enforcing the Compact to which it was a party and in preventing operation of an illegal casino. *See* Point II.C, *infra*. The Complaint to prevent the imminent opening of the Class III "high-stakes" casino presented claims ripe for judicial resolution. *See* Point II.D, *infra*. Defendants' untimely challenge of the correct denial of the Rule 19 motion is not an appealable issue. *See* Point III, *infra*.

The record fully supports that IGRA and the Compact prohibit the Tribal Town from authorizing or conducting Class III gaming on land belonging to

members of another tribe and over which the Tribal Town both lacks Congressionally conferred jurisdiction and fails to exercise governmental power. *See* Point IV, *infra*. The district court did not abuse its discretion in finding that the Tribal Town's asserted governmental actions "are merely proprietary and/or pretextual attempts to 'manufacture' the exercise of governmental authority," OPI 36 (Aplt. App. 534), and that Defendants will not suffer prejudice because the Tribal Town cannot demonstrate it "has or will secure authorization to conduct or license gaming" on that Property, *id.* 39 (Aplt. App. 537). The district court properly issued a preliminary injunction to prevent illegal gaming and protect the State's interest in enforcing the Compact.

ARGUMENT

I. THE FEDERAL STATUTORY FRAMEWORK.

IGRA established a statutory basis for Indian tribes' operation and regulation of gaming while providing states and tribes with power to control conditions of the gaming through compacts, 25 U.S.C. § 2701, and to enforce federally approved compacts in federal court. 25 U.S.C. §2710(d)(7)(A)(ii); *Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546, 1548 (10th Cir. 1997). IGRA divides gaming into three categories: Class I, Class II, and Class III. 25 U.S.C. § 2703(6)-(8). Class III gaming may only be conducted on "Indian lands," pursuant to a federally approved ordinance or resolution by the "Indian tribe having jurisdiction over such lands." 25 U.S.C. § 2710(d)(1)(A)(i). IGRA defines "Indian lands" as:

> (A) all lands within the limits of any Indian reservation; and
>
> (B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power.

Id. § 2703(4); *see also* 25 C.F.R. § 502.12 (defining "Indian lands"). Additionally, IGRA explicitly limits Class III gaming to "Indian lands of the Indian tribe." 25 U.S.C. § 2710(d)(2)(A), (C); *id.* (3)(B).

IGRA prescribes that a tribe may engage in Class III gaming only as authorized by a Secretary-approved tribal-state compact. 25 U.S.C. §2710(d)(1). Secretarial approval is limited to compacts "entered into between an Indian tribe and a State governing gaming on Indian lands of such Indian tribe." *Id.* § 2710(d)(8)(A).

The Compact limits gaming to "the tribes[']] Indian lands as defined by [IGRA]." Compact Preamble (Aplt. App. 692); *id.* Pt.5(L) (Aplt. App. 701) ("The tribe may establish and operate enterprises and facilities that operate covered games only on *its Indian lands* as defined by IGRA.") (emphasis added).

II. THE DISTRICT COURT CORRECTLY DETERMINED IT WAS FULLY VESTED WITH ARTICLE III JURISDICTION.

A. The District Court Had Subject Matter Jurisdiction Over the State's Complaint.

1. Both 28 U.S.C. § 1331 and 25 U.S.C. § 2710 provide subject matter jurisdiction.

The district court correctly exercised jurisdiction under Section 1331 and IGRA to determine whether Defendants' actions violated IGRA and enter injunctive relief. OPI 23 (Aplt. App. 521); OMTD 15 (Aplt. App. 386). *See Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 642 (2002) (stating that a federal statute need not specifically confer jurisdiction to permit the district court to review for compliance with that federal statute). The State's claims "aris[e] under the . . . laws . . . of the United States," 28 U.S.C. § 1331, specifically, IGRA and the Compact. In addition, 25 U.S.C. § 2710(d)(7)(A)(ii) provides jurisdiction over specific causes of action, including those brought by the State. *See Mescalero Apache Tribe v. New Mexico*, 131 F.3d 1379, 1385 (10th Cir. 1997).

a. Section 1331 jurisdiction exists because whether Defendants are violating IGRA and the Compact are federal questions.

Defendants do not dispute that the Complaint asserts claims "under the . . . laws . . . of the United States." 28 U.S.C. § 1331. Indeed, the interpretation and application of IGRA and the Compact are the core of the State's claims. Rather, Defendants argue that federal question jurisdiction does not exist because "IGRA

was not violated." Aplt. Br. 24. This misconceives the proper application of Section 1331, which provides jurisdiction when the "federal law creates the cause of action or . . . the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law." *See Gilmore v. Weatherford*, 694 F.3d 1160, 1170 (10th Cir. 2012) (quoted authority omitted) (*cited at* Aplt. Br. 24). The State's claims necessarily depend on determination of the substantial federal law question of whether Defendants' conduct of gaming on the Property violates IGRA and the federally-approved Compact. *See Pueblo of Santa Ana*, 104 F.3d at 1557. Federal question jurisdiction does not depend on the plaintiff's success on the merits. *See Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1240 (10th Cir. 2001); *Tamiami Partners v. Miccosukee Tribe of Indians*, 63 F.3d 1030, 1047 (11th Cir. 1995) (Section 1331 jurisdiction existed even though no cause of action stated under IGRA because "it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction") (quoting *Bell v. Hood*, 327 U.S. 678, 682 (1946)).

Defendants' cryptic contention that "IGRA is not violated," Aplt. Br. 24, appears to argue that there is no violation, and no federal question or IGRA jurisdiction, until Defendants initiate gaming in violation of IGRA. Defendants cite no authority for this startling argument that a federal court is powerless to preemptively enjoin a violation of a federal statute. To the contrary, the federal courts so act frequently. *See*, *e.g.*, *Cabazon Band of Mission Indians v. Wilson*,

124 F.3d 1050, 1056 (9th Cir. 1997) ("[T]he Bands' action seeking to enforce the Tribal-State Compacts clearly and necessarily arises under IGRA, and we have jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1362."). Here, the State alleged and proved, and Defendants admitted, that Defendants were preparing to initiate Class III gaming on the Property. The district court had federal question jurisdiction to enjoin an imminently threatened violation of federal law.[4]

b. IGRA provides the district court with an alternative grant of jurisdiction.

The district court correctly concluded it also had subject matter jurisdiction under Section 2710(d)(7)(A)(ii), OMTD 15 (Aplt. App. 386), which provides the

> district courts shall have 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 . . . that is in effect[.]

See Wisconsin v. Ho-Chunk Nation, 512 F.3d 921, 929 (7th Cir. 2008) ("25 U.S.C. § 2710(d)(7)(A)(ii), in addition to conferring federal jurisdiction, also serves as a congressional abrogation of tribal sovereign immunity."); *Cabazon Band*, 124 F.3d at 1056 (stating that "IGRA necessarily confers jurisdiction onto federal courts to enforce Tribal-State compacts and the agreements contained therein[,]" but noting alternate jurisdiction under 28 U.S.C. § 1362).

[4] The State does not contend that Section 1331 acts as a waiver of sovereign immunity. *See* Aplt. Br. 24. Rather, the asserted immunity is inapplicable because suit is against the Tribal Officials under the *Ex parte Young* doctrine, against the Town Corporation under its Charter, and 25 U.S.C. § 2710(d)(7)(A)(ii) abrogates any tribal sovereign immunity. *See* Points II.A.1.b & 2.b, *supra*.

Defendants contend IGRA's plainly intended grant of jurisdiction and abrogation of immunity is ineffective because (i) the State can only enjoin tribes from violating IGRA by gaming on lands on which they can legally conduct Class III gaming, not on lands on which gaming is prohibited; and (ii) IGRA's jurisdictional grant cannot be invoked until the Defendants have been allowed to consummate their violation. Aplt. Br. 21-22. Neither position is tenable.

Defendants' challenge to IGRA jurisdiction (and abrogation of immunity) ignores this Court's decision in *Mescalero Apache*, 131 F.3d 1379, and seeks to extend a questionable Sixth Circuit decision to excise a class of IGRA violation from the statute's jurisdictional grant. Relying heavily on the Sixth Circuit's recent opinion in *Michigan v. Bay Mills Indian Community*, 695 F.3d 406 (6th Cir. 2012), *petition for cert. filed*, 81 U.S.L.W. 3251 (U.S. Oct. 23, 2012) (No. 12-515) ("*Bay Mills*"),[5] Defendants argue that no subject matter jurisdiction exists under IGRA because the Complaint did not allege ongoing "gaming" on "Indian lands." Defendants misperceive both the State's claims and the applicability of *Bay Mills* to this case. *Bay Mills* conflicts with the law of this Circuit and misreads Section 2710(d)(7)(A)(ii).

In *Bay Mills,* Michigan and the Little Traverse Bay Band of Odawa Indians sought to enjoin the Bay Mills Indian Community from operating a Class III casino

[5] The Supreme Court invited the Solicitor General to advise the Court of the views of the United States. 81 U.S.L.W. 3364 (Jan. 7, 2013).

more than 100 miles from its reservation, on land the Community purchased in fee, that is neither held in trust nor subject to federal restrictions on alienation. 695 F.3d at 410. The Sixth Circuit looked narrowly at Section 2710(d)(7)(A)(ii)'s grant of jurisdiction referring to a violation "on Indian lands." The Sixth Circuit ignored IGRA's intent, as reflected in its full text, to provide federal court jurisdiction for a State or Tribe to remedy IGRA compact violations. Instead, "acknowledg[ing] the irony" of its decision, 695 F.3d at 412, the Sixth Circuit held

> [t]he federal courts lack jurisdiction, therefore, to adjudicate the plaintiffs' § 2710(d)(7)(A)(ii) claims to the extent those claims are based on an allegation that the [] casino is not on Indian lands.

Id. at 413. Under Defendants' argument, based on *Bay Mills*,[6] federal courts have jurisdiction to enjoin the operation of an Indian casino operated on a tribe's Indian lands, but could not challenge the construction and operation of a casino on lands that are not "Indian lands of the tribe" conducting the gaming under IGRA. Congress could not possibly have intended such an absurd result when it enacted Section 2710(d)(7)(A)(ii).

---

[6] The firm representing Defendants here represented the Little Traverse Bay Band, and made an argument almost identical to that the State makes here:

> [A]ccording to BMIC's theory, States and Indian tribes have a remedy for compact violations that occur at otherwise legal casinos which are located on Indian lands, but have *no remedy at all* for compact violations that occur at *illegal* casinos located on *non-Indian lands*. Surely Congress did not intend such an absurd result.

Brief for Plaintiff/Appellee Little Traverse Bay Band 11, *Bay Mills*, 695 F.3d 406 (6th Cir. Sept. 28, 2011).

Defendants' subject matter jurisdiction arguments, however, overlook that *Bay Mills* recognized Michigan had properly invoked Section 1331 jurisdiction to determine whether the lands were "Indian lands." 695 F.3d at 413. *Bay Mills* noted Michigan had not sued tribal officials under *Ex parte Young*, but had amended its complaint to do so during the appeal, and the appellate decision was "not to the exclusion of other remedies." *Id.* at 416. Thus, *Bay Mills* demonstrates the propriety of the State's suit against the Tribal Officials under *Ex parte Young*.

Defendants' brief simply ignores that *Bay Mills* is in direct conflict with the law of this Circuit in *Mescalero Apache*, 131 F.3d at 1385. *Mescalero Apache* interpreted Section 2710(d)(7)(A)(ii), to serve as an abrogation of 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." 131 F.3d at 1385.[7] *Mescalero Apache* squarely held that Section 2710(d)(7)(A)(ii) provides jurisdiction and abrogates tribal immunity for New Mexico's action to invalidate a gaming compact. *Id.* Although IGRA provides jurisdiction and abrogates immunity for a suit to enjoin "gaming activity located on Indian lands and conducted in violation of any Tribal-State compact . . . *that is in effect*," the court concluded jurisdiction existed for the state's compact invalidation claim under Section 2710(d)(7)(A)(ii). *Mescalero Apache* correctly concluded that the

[7] Although *Mescalero Apache* used the term "waiver," the IGRA "abrogated" tribal sovereign immunity. *See Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998).

immunity abrogation in Section 2710(d)(7)(A)(ii) for State or Tribal claims "where *compliance with IGRA's provisions* is at issue" was "'unequivocally expressed.'" 131 F.3d at 1385 (emphasis added). This case falls precisely within that narrow class of cases.

This Court's interpretation of IGRA's grant of jurisdiction and abrogation of sovereign immunity is consistent with the statutory language and structure. IGRA limits gaming to the "Indian lands of the Indian tribe" conducting the gaming. 25 U.S.C. § 2710(d)(2)(A). IGRA abrogates tribal sovereign immunity for "*any* cause of action initiated by a State" when the relief sought is "to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact that is in effect[.]" 25 U.S.C. § 2710(d)(7)(A)(ii) (emphasis added). The term "on Indian lands" in Section 2710(d)(7)(A)(ii), like its language requiring a "compact that is in effect," reflects substantive statutory requirements for Class III gaming, not jurisdictional prerequisites to federal court jurisdiction. *Mescalero Apache* correctly interpreted the statute to apply when the complaint directly puts in issue whether IGRA's prerequisites exist, and not to narrow the scope of tribes' and states' enforcement by making the undisputed existence of the prerequisites a condition precedent to jurisdiction and abrogation. *Cf. Florida v. Seminole Tribe of Fla.*, 181 F.3d. 1237, 1240 (11th Cir. 1999) (holding no IGRA claim existed when undisputed that no compact was "in effect").

Bay Mills incorrectly rejected this Court's straightforward holding in *Mescalero Apache* as "'muddled' rather than persuasive." 695 F.3d at 415 (quoting *Seminole Tribe*, 181 F.3d at 1241). Although, as this Court recognized, there was "sparse case law on the issue" at the time of its decision, *Mescalero Apache*, 131 F.3d at 1385, other Circuits now agree with this Court's conclusion on IGRA's grant of jurisdiction and abrogation of tribal sovereign immunity. *See Ho-Chunk Nation*, 512 F.3d at 933 (interpreting Section 2710(d)(7)(A)(ii) to grant jurisdiction and abrogate immunity when "the alleged violation relates to a compact provision agreed upon pursuant to the IGRA negotiation process"); *Lewis v. Norton*, 424 F.3d 959, 962-63 (9th Cir. 2005) (citing *Mescalero Apache* for the proposition that "IGRA waives tribal sovereign immunity in the narrow category of cases where compliance with the IGRA is at issue[,]" and holding that IGRA does not abrogate immunity for an intra-tribal membership dispute); *see also Kiowa Tribe*, 523 U.S. at 758 (citing 25 U.S.C. § 2710(d)(7)(A)(ii) for the proposition that Congress has "restricted tribal immunity from suit in limited circumstances"). *Mescalero Apache*'s holding comports with the statutory language and purpose by providing jurisdiction and abrogating immunity in cases such as this.

The sole case the State has found that addresses a factual situation almost identical to the one at bar is an unpublished District of Arizona case. In *Arizona v. Tohono O'odham Nation*, CV11-0296-PHX-DGC, 2011 WL 2357833, at *3 (D.

Ariz. June 15, 2011) (unpublished), the district court dismissed an argument that suit for an IGRA violation was premature because the lands had not yet been taken into trust, and hence were not "Indian lands," and gaming had not begun. Recognizing that IGRA provides that a compact "be in effect," the court refused to follow the reasoning of *Seminole Tribe*, 181 F.3d. at 124, because, in that case, the "absence of a compact" was undisputed. *Id.* at *4. The *Tohono O'Odham* court concluded

> Congress did not include a similar temporal limitation on when the land at issue in the suit must become Indian lands. Instead, it focused on the nature of the claim: "to enjoin a class III gaming activity located on Indian lands." That is precisely what this lawsuit seeks to do. Congress extended the abrogation to "any" lawsuits "initiated" by a State or Indian tribe to enjoin gaming activity on Indian lands, but without specifying when the lawsuit must be "initiated."

Id. at *3. *Tohono O'odham* ruled the suit was proper even though gaming had not commenced. *Id.* at *4. This Court should likewise reject the argument that IGRA imposed an unstated temporal limitation on when suit may be filed to enjoin gaming in violation of IGRA. Adopting the contrary argument—as the Sixth Circuit did—entirely precludes preemptive relief for a statutory violation.

Even on the Sixth Circuit's own terms, its opinion is flawed. The term "Indian lands," defined in a separate IGRA definitional section, 25 U.S.C. § 2703(4), clearly is substantive and not jurisdictional. *See Leeson v. Transamerica Disability Income Plan*, 671 F.3d 969, 978-979 (9th Cir. 2012), *citing Arbaugh v. Y & H Corp.*, 546 U.S. 500, 516 (2006). The Sixth Circuit's decision appears to fit

Leeson's "drive-by jurisdictional rulings" description, treating non-jurisdictional statutory requirements as jurisdictional without fully analyzing Congressional intent. *Id.* The Property is "Indian lands" in a generic sense, owned under federal restrictions on alienation, albeit by members of another tribe: it's simply not "Indian lands" as defined by Section 2703(4).

Defendants advance the Indian canons of construction, contending IGRA's jurisdictional grant is to be "interpreted to [tribes'] benefit." Aplt. Br. 20-21. Defendants misread the rule and misperceive its application here. First, the canon does not apply to Section 2710(d)(7)(A)(ii) because the Section unambiguously provides jurisdiction for claims by *both* states and tribes and abrogates sovereign immunity of *both* state and tribal parties to compacts. Consequently, Defendants' argument would preclude remedy for tribes as it would for states. Second, "canons are not mandatory rules. . . . They are designed to help judges determine the Legislature's intent as embodied in particular statutory language." *Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001); *see also South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506 (1986) ("The canon of construction . . . , however, does not permit reliance on ambiguities that do not exist; nor does it permit disregard of the clearly expressed intent of Congress."). The canon does not require that the tribal party must invariably prevail.

The Court should reaffirm its holding in *Mescalero Apache*, and, to the extent *Bay Mills* conflicts with *Mescalero Apache*, reject the ruling of the Sixth

Circuit. Defendants—who failed to address *Mescalero Apache* in their discussion of jurisdiction or sovereign immunity—made no argument that this Court should overrule *Mescalero Apache*. Nor should it. The principle of *stare decisis* "counsels against altering this court's long-standing construction of the relevant statutes absent compelling circumstances." *United States v. Games-Perez*, 695 F.3d 1104, 1115 (10th Cir. 2012); *see Hilton v. S. C. Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991) ("Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done.") (quoted authority omitted). Congress has not acted to alter this Court's *Mescalero Apache* holding. Nor are there compelling circumstances present in this case that would require the Court to reconsider its prior holding. The district court had jurisdiction under Section 1331 and IGRA, or either. *See Cabazon Band*, 124 F.3d at 1056 (noting alternate grants of jurisdiction under IGRA or Section 1362 provided subject matter jurisdiction).

B. None of the Defendants has Sovereign Immunity from this Suit.[8]

1. The claims against the Tribal Officials are proper under *Ex parte Young*.

The Tribal Officials have no immunity from suit because they are alleged, and were found, to have exceeded the Tribal Town's authority, the Corporation's

[8] For the reasons discussed in Section II.A.1.b, *infra*, IGRA abrogated the sovereign immunity of tribes, tribal instrumentalities, and officers for suits such as this.

authority, and hence their authority, under federal law. The State does not dispute that "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 58 (1978). The Tribal Officials, however, engaging in continuing violations of federal law, are not immune from suit under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908). *Ex parte Young* permits suits for declaratory and injunctive relief against government—including tribal—officials "to enjoin alleged ongoing violations of federal law." *Crowe & Dunlevy*, 640 F.3d at 1154. Such suits are "not subject to the doctrine of sovereign immunity." *Id.*

> If the sovereign did not have the power to make a law, then the official by necessity acted outside the scope of his authority in enforcing it, making him liable to suit.

Tenneco Oil Co. v. Sac & Fox Tribe of Indians of Okla., 725 F.2d 572, 574 (10th Cir. 1984) (per curiam).

Applying *Ex parte Young* requires only "a straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Md.*, 535 U.S. at 645 (quoted authority omitted, alteration in original). This inquiry "does not include an analysis of the merits of the claim." *Id.* at 646. The Complaint asserts claims against the Tribal Officials to enjoin ongoing violations of IGRA and the federally

approved Compact, and seeks only prospective relief. These claims are proper under *Ex parte Young*.

Defendants' argument that the district court improperly applied *Ex parte Young* because the tribal entities authorized the Tribal Officials' actions, Aplt. Br. 11, misconstrues the doctrine's purpose and application. The Tribal Officials' actions at issue exceeded the authority the Tribal Town or Corporation were capable of bestowing under IGRA, and are thus *ultra vires*. *See Crowe & Dunlevy*, 640 F.3d at 1158, *id.* n.9. [9] The district court correctly concluded that the State's suit against the Tribal Officials was proper under *Ex parte Young*.

2. The "sue and be sued" clause in the Charter waived the Corporation's sovereign immunity.

Suit also was proper against the Corporation, which waived its immunity with the "sue and be sued" clause in the Charter, issued pursuant to the OIWA, analogous to a charter issued under the Indian Reorganization Act, 25 USC § 477. Charter §3(b) (Aplt. App. 253). In the district court, the Corporation argued only that the "sue and be sued" clause does not waive the Tribal Town's immunity. Corporation Motion to Dismiss 20 ("Corp. MTD") [Doc. 70] (Aplt. App. 318). Review of Defendants' new arguments, therefore, is for plain error. *See Somerlott v. Cherokee Nation Distribs., Inc.*, 686 F.3d 1144, 1151 (10th Cir. 2012).

[9] Contrary to Defendants' assertions, Aplt. Br. 10, the State did not assert any state law claims against Defendants.

The argument that the Charter did not waive the Corporation's sovereign immunity injects false issues that deflect attention from a straightforward review of the Charter's clear language. *See* Aplt. Br. 12. The Court need not analyze whether a defendant is functioning in a sovereign or commercial capacity, as that analysis is only material if some subsidiary of a tribe were involved. *See 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."). Because the Corporation waived its own immunity, and the Corporation is party to this suit, the "sue and be sued" clause applies.

Without citation to authority, Defendants argue that the "sue and be sued" clause is merely "a grant of authority to issue a waiver." Aplt. Br. 12. The Charter itself professes the power of the Corporation to "sue and be sued." (Aplt. App. 253). While this Court has not ruled on the precise function of a "sue and be sued" clause, *see Native Am. Distrib.*, 546 F.3d at 1293 n.2, the plain language of the Charter waives the Corporation's immunity. *See Rosebud Sioux Tribe v. A & P Steel, Inc.*, 874 F.2d 550, 552 (8th Cir. 1989) (concluding a "sue and be sued" clause acts as an "express waiver" of sovereign immunity). The district court did not err in ruling that the Charter waived the Corporation's immunity from suit.

C. The State has Standing as a Sovereign, as Party to the Compact, and as *Parens Patriae*.

1. The State has a legally cognizable interest in preventing gaming in violation of the Compact.

The district court correctly ruled that the State established standing as a sovereign, as a party to the Compact, and as *parens patriae*. OMTD 19 (Aplt. App. 390). The State has standing to prevent a violation of IGRA and the Compact, laws it is charged with enforcing as a sovereign. *See Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 601 (1982) (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, both civil and criminal"); *see also Diamond v. Charles*, 476 U.S. 54, 62 (1986) ("[A] State has standing to defend the constitutionality of its statute.") (*cited at* Aplt. Br. 26); *Kansas v. United States*, 249 F.3d 1213, 1223 (10th Cir. 2001) (discussing prudential standing, stating that "[w]e are loath to conclude that in enacting IGRA, Congress intended a State to have no say whatsoever in the largely dispositive question for Indian gaming purposes of whether a tract of land inside the State's borders constitutes 'Indian lands,' within the meaning of IGRA"); *Amador Cnty., Cal. v. Salazar*, 640 F.3d 373, 378 (D.C. Cir. 2011) (a county had standing to challenge the approval of a gaming compact based on the alleged absence of Indian lands on which to conduct gaming). The State asserted a

legally cognizable interest that was injured by Defendants' violation of IGRA and the Compact.

The Compact is a contract between the State and the Tribal Town, which they both have interests in enforcing. *See Pueblo of Santa Ana*, 104 F.3d at 1554 (discussing the legislative history of IGRA's compact provisions); S. Rep. No. 100-446, at 6, 13 (1988) (discussing the balance of interests of tribes and states gaming compacts are to address). Defendants acknowledge that the State "has an interest in ensuring compliance with the terms of a compact." Aplt. Br. 33 (citing *Kansas*, 249 F.3d at 1223-24). Defendants, however, reiterate their argument that, because the Property is not the Tribal Town's "Indian lands," the State has not suffered an injury under the Compact, *id.* In Defendants' view, states have no recourse to require compliance with IGRA and a valid compact that permit gaming only on the "Indian lands" of the tribe. *See* Compact (Aplt. App. 692). It defies logic to assert that the State, as a Compact party, lacks an interest cognizable to challenge the other party's violation of a material Compact term. The district court did not err in concluding the State has standing to enforce the terms of the Compact.

Additionally, the State has standing as *parens patriae*. Aplt. Br. 27-29. The State asserted an interest "in protecting its citizens from unauthorized and inappropriate gaming operations." Complaint ¶ 6 (Aplt. App. 24). While the district court identified the proximity of the Casino to homes and a proposed

elementary school as part of the State's injury, OMTD at 19 (Aplt. App. 390), the crux of the ruling was that *parens patriae* standing was established to advance the State's quasi-sovereign interest to protect all citizens who would be affected by the impact of unauthorized gaming, including spawning of similar illegal activity, if the unauthorized Casino project, on lands not within the scope of the Compact, were not enjoined.[10] The State did not advance a collection of individual interests, but broadly protected all residents from illegal, and potentially harmful, activity and in reliance on the rule of law.

2. The State has established each element of Article III standing.

Under each theory of standing, the State established injury-in-fact, causation, and redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *see Fed. Election Comm'n v. Akins*, 524 U.S. 11, 20, 25 (1998) (applying Article III standing requirements where statutory right to standing); *Satsky v. Paramount Commc'ns, Inc.*, 7 F.3d 1464, 1469 (10th Cir. 1993) (same in *parens patriae* suit).

[10] Although the district court stated that the State deserved "special solicitude" in the standing analysis, OMTD 19 (Aplt. App. 390), citing *Massachusetts v. Envtl. Prot. Admin.*, 549 U.S. 497, 520 (2007), and *Georgia v. Tenn. Copper Co.*, 206 U.S. 230 (1907), there is no indication that the court accorded the State "special solicitude." Defendants' implication that the district court relaxed the standing requirements is wrong. Aplt. Br. 27-28. To the extent the district court extended special solicitude to the State, however, there was no error because IGRA accords it enforcement rights and the State has a "stake in protecting its quasi-sovereign interests." *Massachusetts*, 549 U.S. at 520.

Each of the injuries discussed above is "concrete and particularized" and "actual or imminent." *Lujan*, 504 U.S. at 560 (quoted authority omitted). A party need not "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'l. Union*, 442 U.S. 289, 298 (1979) (quoted authority omitted). The State alleged and proved concrete and particularized injury because, at the time of the hearing, Defendants' unfettered construction and imminent operation of the Casino in violation of IGRA and the Compact threatened practical effects on the lives of the citizens of Broken Arrow and the State, and to create unwarranted precedent that a casino could operate in Oklahoma without regard to IGRA's requirement it be on Indian lands of the tribe. As the district court stated, "the requirement of imminent harm does not mean the court must wait until the doors of the proposed casino are thrown open for business" to consider the State's suit. OMTD 20 (Aplt. App. 391).

Defendants argue that the State did not establish causation and redressability because, in Defendants' view, they had not yet violated IGRA. Aplt. Br. 32. However, for purposes of standing, the Court is to assume "the plaintiff will prevail on his merits argument—that is, that the defendant has violated the law." *Day v. Bond*, 500 F.3d 1127, 1137 (10th Cir. 2007). The district court correctly ruled that the State established causation and redressability. OMTD 20-21 (Aplt. App. 391-92).

D. The State Presented Claims Ripe for Judicial Consideration.

Defendants' argument that the State's claims were not ripe because no gaming had occurred, Aplt. Br. 35, is without merit. When an 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) (quoted authority omitted).

Defendants' actions are a direct affront to the State's sovereign right to enforce the law. At the time of the preliminary injunction hearing, Defendants were nearing completion of construction of a structure that Defendants admit was to be used as a Class III gaming casino. Answer ¶¶ 31, 51 (Aplt. App. 396, 398); Trans. 5/16/12, 35:14-22, 5/17/12, 303:23-304:17 (Aplee. Supp. App. 103, 133-34). The State did not have to wait until the Casino opened to challenge it. *See Blanchette v. Conn. Gen. Ins. Corp.*, 419 U.S. 102, 123 (1974) (concluding a case was ripe although there was "no definitive determination" that a statute would be violated); *New Mexicans for Bill Richardson v. Gonzales*, 64 F.3d 1495, 1501-02 (10th Cir. 1995) (holding a case was ripe although the actions prohibited by the challenged statute had not yet been conducted); *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 693-94 (1st Cir. 1994) (case was ripe despite the contingent nature of gaming compact negotiations); *see also Kansas*, 249 F.3d at 1223-24 (reviewing NIGC Indian lands determination because, although no

gaming compact existed, requiring negotiation of the compact in the absence of Indian lands "depriv[ed] the State of sovereign rights. . . .").

Defendants' authorities are not to the contrary. Aplt. Br. 34-35, *citing Texas v. United States*, 523 U.S. 296, 300 (1998) (suit not ripe when court has "no idea" if complained-of action will occur); *Tarrant Reg'l Water Dist. v. Herrmann*, 656 F.3d 1222, 1249-50 (10th Cir. 2011), *cert. granted*, 81 U.S.L.W. 3364 (U.S. Jan. 4, 2013) (No. 11-889) (claim that required prior adjudication of the tribe's rights not ripe when tribe's rights not yet adjudicated); *Sisseton-Wahpeton Sioux Tribe v. United States*, 804 F. Supp. 1199, 1205 (D.S.D. 1992) (gaming claim not ripe in the absences of an "indication of commitment to this path of action").

Presented with facts similar to those at bar, the district court in *Tohono O'odham* concluded that, as the tribe had announced a Class III casino would be constructed when the "Indian land" issue was resolved, the state's claims were "not merely hypothetical or speculative . . . ." 2011 WL 2357833, at *5. The ongoing and intended further violation of the gaming compact in the absence of preventative relief was a hardship to the plaintiffs. *Id.* at *6. These same factors are present in this case. The district court did not err in concluding that the Complaint stated a claim that was ripe for review.

III. DEFENDANTS' RULE 19 ARGUMENTS ARE NOT PROPERLY BEFORE THE COURT, AND THERE ARE NO PARTIES WHOSE ABSENCE REQUIRES DISMISSAL.

A. The Collateral Order Doctrine or Pendent Appellate Jurisdiction Do not Provide Jurisdiction.

The Corporation moved to dismiss this action under Rule 19 based on the Tribal Town's absence. Corp. MTD 22 (Aplt. App. 320). The district court denied that motion, concluding the Tribal Town was not a "required" party under Rule 19(a). OMTD 16-17 (Aplt. App. 387-88). Defendants do not challenge the district court's Rule 19(a) determination; instead, they have appealed an alleged "Rule 19(b) Determination" and argue the Court has jurisdiction under either the collateral order doctrine or pendent appellate jurisdiction. Aplt. Br. 14.

Defendants fail to address the untimeliness of their appeal from the Rule 19 order. Defendants did not file notices of appeal until August 17 and 20, 2012, (Aplt. App. 552, 556), more than 30 days after the district court denied their motion to dismiss. *See* 28 U.S.C. § 2107(a); Fed. R. App. P. 4(a)(1)(A). This untimeliness deprives the Court of jurisdiction.

Even if the appeal were timely, the Rule 19 order is not a collateral order. In *Crowe & Dunlevy*, the Court held that "the collateral order doctrine does not justify interlocutory review of the district court's Rule 19 determination." 640 F.3d at 1148. Defendants argue *Crowe & Dunlevy* is inapplicable because it concerned a Rule 19(a) determination. Aplt. Br. 14 n.2. Defendants' premise is incorrect because the district court denied their motion on the ground that the Tribe

is not a "required" party under Rule 19(a), OMTD 17 (Aplt. App. 388), and therefore properly did not reach the Rule 19(b) analysis. *Crowe & Dunlevy* controls this case.

Defendants next argue that the Court may review the Rule 19 decision under pendent appellate jurisdiction because the district court's Rule 19 determination is "inextricably intertwined" with its ruling that the Tribal Officials are properly sued under *Ex parte Young*, or that a reversal of the *Ex parte Young* determination would render "the Tribe a necessary and indispensable party." Aplt. Br. 15. *Crowe & Dunlevy* addressed this exact issue and held that "a Rule 19 issue is not sufficiently connected with the other issues properly before us"—including sovereign immunity and the application of *Ex parte Young* to tribal officials—"to justify the exercise of pendent jurisdiction." 640 F.3d at 1149. Defendants are all proper parties to this litigation, and the relief the State seeks will be complete amongst the existing parties. Thus, the Court "can undertake a meaningful analysis" of the issues properly before it without reaching the Rule 19 issues. *Id.* at 1148. Nor, as the Court explained in *Crowe & Dunlevy*, is "the issue of indispensability under Rule 19 . . . a jurisdictional question." *Id.* at 1149. Defendants' appeal of the Rule 19 ruling is not properly before the Court.

Defendants mistakenly rely on *Republic of Philippines v. Pimentel*, 553 U.S. 851 (2008), for the proposition that the Rule 19 issue is "inextricably intertwined" with sovereign immunity issues properly before this Court. Aplt. Br. 15. *Pimentel*

turned on the application of Rule 19(b), it being conceded that the Republic was a required party under Rule 19(a), because the interpleader action sought retroactive monetary relief against the Republic to determine its interest in certain funds, and its interest was not represented by other parties. 553 U.S. at 854-55, 863-64. Unlike the claims in this case invoking the *Ex parte Young* doctrine, overcoming any sovereign immunity barrier for declaratory and injunctive relief, relief could not have been effectuated against officials. *See*, *e.g.*, *Verizon Md.*, 535 U.S. at 645 (stating that *Ex parte Young* suits may be brought for prospective relief only).

The other cases on which Defendants rely are similarly inapposite. Aplt. Br. 15-16; *Ho-Chunk Nation*, 512 F.3d at 929 (silent on Rule 19 or pendent appellate jurisdiction); *Citizen Potawatomi Nation v. Norton*, 248 F.3d 993, 1001 (10th Cir. 2001), *modified on reh'g*, 257 F.3d 1158 (2001) (tribe's damage claims against United States require suit against sovereign, invoking Rule 19(b) analysis); *Davis v. United States*, 192 F.3d 951, 960 (10th Cir. 1999) (reversing indispensability dismissal and noting that Supreme Court precedent "casts doubt on any past notion that tribal sovereign immunity could be an interest compelling in itself for purposes of Rule 19(b)"); *Klamath Tribe Claims Comm. v. United States*, 106 Fed. Cl. 87, 97 n.21 (Fed. Cl. 2012) (action to determine tribe's damage claims without tribe, applying Rule 19(b)). These cases neither support the appealability of, nor show error in, the Rule 19 order. The Court lacks jurisdiction over the Rule 19 order.

B. Defendants Waived Any Objection to the Denial of the Motion to Dismiss for Failure to Join the Tribal Town.

The district court ruled that the Tribal Town is not a required party under Rule 19(a), concluding that the State could receive full relief from the named defendants, the Rule 19(a)(1)(A) analysis, and that the Tribal Town's interests would not be impeded, the Rule 19(a)(1)(B)(i) analysis. OMTD 16-17 (Aplt. App. 387-88). The district court did not, and was not required to, determine the effect of the absence of the Tribal Town under Rule 19(b).

Defendants have not challenged the district court's Rule 19(a) analysis. *See United States v. Beckstead*, 500 F.3d 1154, 1165 (10th Cir. 2007) ("It is insufficient merely to state in one's brief that one is appealing an adverse ruling below without advancing reasoned argument as to the grounds for appeal.") (quoted authority omitted). Because Defendants do not address the district court's conclusion that the Tribal Town is *not* a required party, Defendants have waived any Rule 19 argument. *See Native Am. Distrib.*, 546 F.3d at 1292 n.2 (holding the appellant waived an issue by not adequately addressing it in their opening brief). Defendants, however, erroneously spend significant time arguing that the Tribal Town's absence required dismissal under Rule 19(b). Aplt. Br. 16-18. "Here, no inquiry under Rule 19(b) is necessary, because the threshold requirements of Rule 19(a) have not been satisfied." *Temple v. Synthes Corp., Ltd.*, 498 U.S. 5, 8 (1990).

Even if the Court were to address it, Defendants' Rule 19(b) argument is without merit. "[A] tribe is not a required party under Rule 19 in suits naming a tribal official in his official capacity." *Vann v. U.S. Dept. of Interior*, 701 F.3d 927, 930 (D.C. Cir. 2012) (citing *Salt River Project Agric. Improvement & Power Dist. v. Lee*, 672 F.3d 1176, 1180 (9th Cir. 2012), *and 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 and [the gaming company].")).

Defendants' final point undermines their earlier argument that the Complaint must be dismissed under Rule 19. Defendants state that, "[s]hould the Complaint be dismissed, the State would have an adequate remedy directly against the absent party, the Tribe, under § 2710(d)(7)(A)(iii) of IGRA." Aplt. Br. 18. While it appears Defendants cited an incorrect IGRA provision, Defendants have contradicted their arguments that IGRA provides neither subject matter jurisdiction nor an abrogation of sovereign immunity in this case. Moreover, joinder of the Tribal Town is unnecessary because complete relief can be accorded against Tribal Officials in this case.

C. The Nation is Not a Required Party.

For the first time in this litigation, Defendants argue that absence of the Nation requires dismissal under Rule 19. Aplt. Br. 18-19. Although the "issue of indispensability can be raised at any time," *Mescalero Apache,* 131 F.3d at 1383,

review of unpreserved Rule 19 issues should not be conducted prior to a final ruling on the merits, *see Crowe & Dunlevy*, 640 F.3d at 1148. If the Court reviews this issue, it must

> view the Rule 19 factors entirely from an appellate perspective, considering a victorious plaintiff's interest in preserving his judgment, the defendant's failure to assert his interest, the interest of the outsider, and the interest of the courts and society in judicial efficiency.

Enter. Mgmt. Consultants, Inc. v. U.S. ex rel. Hodel, 883 F.2d 890, 894 (10th Cir. 1989). Defendants fail to address this standard.

Under the proper analysis, the Nation is not a required party. The State has a clear interest in preserving the district court's judgment. Defendants offer no explanation for their failure to raise this argument previously, and judicial efficiency does not favor dismissing this action. *See Mescalero Apache*, 131 F.3d at 1384. Finally, the interests of the "outsider" do not support dismissal of this case. "[C]omplete relief" is possible between existing parties, Rule 19(a)(1)(A), and the Nation has no interest that would be impaired or impeded, or leave existing parties subject to multiple or inconsistent obligations, *id.* (B)(i), (ii). At issue in the Complaint is the illegality of gaming authorized or conducted by the Tribal Town, *not* the Nation. *See Sac & Fox Nation of Mo. v. Norton*, 240 F.3d 1250, 1258 (10th Cir. 2001) ("Because plaintiffs' action focuses solely on the propriety of the Secretary's determinations, the absence of the Wyandotte Tribe does not prevent the plaintiffs from receiving their requested declaratory relief . . . ."). The

district court's orders did not require any affirmative or negative action by the Nation. *See Manygoats v. Kleppe*, 558 F.2d 556, 558-59 (10th Cir. 1977) (concluding an absent tribe was not an indispensable party because "[t]he requested relief does not call for any action by or against the Tribe"); *Mille Lacs Band of Chippewa Indians v. Minnesota*, 853 F. Supp. 1118, 1130-31 (D. Minn. 1994), *aff'd sub nom. Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999) (concluding that absent tribe not a required party when no rights of either party vis-à-vis the absent tribe were at issue). This Court should reject Defendants' arguments related to the Nation.

IV. THE DISTRICT COURT DID NOT ERR IN GRANTING THE PRELIMINARY INJUNCTION.

A. Standard of Review.

The decision to grant a preliminary injunction is reviewed for abuse of discretion. Fed. R. Civ. P. 52(a)(6); *Crowe & Dunlevy*, 640 F.3d at 1157. Review of the district court's interpretation of historical facts is not, as Defendants argue, *de novo*, Aplt. Br. 36, but a mixed question of law and fact. *See Pittsburg & Midway Coal Mining Co. v. Yazzie*, 909 F.2d 1387, 1393-94 (10th Cir. 1990). When a mixed question exists, "the district court's factual findings are reviewed for clear error and its legal conclusions are reviewed *de novo*." *Somerlott*, 686 F.3d at 1148.

B. The District Court Applied the Correct Standard.

Defendants argue that the district court erred in concluding the State had not requested a disfavored preliminary injunction. Aplt. Br. 54. Disfavored injunctions, for which the movant bears a higher burden of proof, include "preliminary injunctions that alter the status quo . . . ." *Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1259 (10th Cir. 2005) (quoted authority omitted).

The relevant status quo, as the district court concluded, the "last peaceable uncontested status existing between the parties before the dispute developed," was prior to Defendants' commencing construction of the Casino. OPI 26 (Aplt. App. 524). (quoting *Schrier*, 427 F.3d at 1260). It is not, as Defendants argue, the brief period after Defendants started construction of the Casino prior to the filing of the Complaint. Aplt. Br. 54.[11] The minute Defendants began constructing the Casino, they altered the status quo. *See Schrier*, 427 F.3d at 1260 (concluding the status quo was when plaintiff held his prior position, the termination of which was the cause of the lawsuit). Even after the State filed its Complaint seeking a preliminary injunction, Defendants proceeded with construction, stating that the possibility of being enjoined was "a risk Defendants are willing to take."

[11] Defendants argue that "the court did not consider the Tribe's sovereign rights or that IGRA did not supply a way for the State to regulate non-class III gaming activities in Indian country." Aplt. Br. 55. These points are meritless. As discussed herein the district court concluded the Tribal Town had *no* sovereign rights over the Property, and Defendants admitted that they intended to conduct class III gaming on the Property.

Defendants' Response to Motion for Preliminary Injunction 3 [Doc. 65] (Aplt. App. 266); Trans. 5/17/12, 271:10-11 (Aplee. Supp. App. 130).

Similarly, the preliminary injunction did not alter any "well-established balance of federal, state, and tribal sovereign interests" over the Property. Aplt. Br. 55. Defendants' witness testified that the Tribal Town did not exercise jurisdiction or governmental power over the Property prior to developing the Casino. Trans. 5/17/12, 349:6-14 (Aplt. App. 491). It was Defendants who attempted to alter the balance of governmental powers over the Property by contracting with the Property Owners.

Likewise, there is no merit to Defendants' argument that granting the preliminary injunction was error because the Complaint raised issues in an "unsettled area of the law." Aplt. Br. 41. The right to a preliminary injunction must be "clear and unequivocal[,]" *Prairie Band*, 253 F.3d at 1246 (quoted authority omitted), but it requires neither well-trod legal ground nor proof of *certainty* of success on the merits. Rather, when the equitable preliminary injunction factors are established, the factor of success on the merits

> becomes less strict—i.e., instead of showing a substantial likelihood of success, the party need only prove that there are questions going to the merits so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation.

Id. at 1246-47 (internal quotation marks, citations, and alterations omitted).

Defendants' authority for this proposition, Aplt. Br. 41-42, *either* stands for the unremarkable proposition that when there is no likelihood of success on the

merits, a preliminary injunction should not issue, *see, e.g., Plain Dealer Pub. Co. v. Cleveland Typographical Union No. 53*, 520 F.2d 1220, 1230 (6th Cir. 1975) (concluding contract did not contain enforceable provision); *Heredia v. Santa Clara Cnty.*, 2006 WL 2547816, *2 (N.D. Cal. Sept. 1, 2006) (denying preliminary injunction when controlling case pending in the Ninth Circuit); *or* applies generally applicable standards to specific facts, *see Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 813-14 (4th Cir. 1991) (stating the "required showing of probability of success on the merits varies" based on the facts) (internal quotation marks and alterations omitted); *Miller v. Am. Tel. & Tel. Corp.*, 344 F. Supp. 344, 347-50 (E.D. Pa. 1972) (finding movant did not meet burden to alter status quo by forcing the non-movant to act "where it has chosen not to"). None of these authorities suggests a higher standard for issuance of preliminary injunction in non-routine cases. *See* 11A Wright & Miller Fed. Prac. & Proc. Civ. § 2948.3 (2d ed.) ("Limiting the preliminary injunction to cases that do not present significant difficulties would deprive the remedy of much of its utility."). The district court applied the proper standard.

C. The District Court Properly Enjoined Defendants.

1. The district court correctly found the State would succeed in showing the Tribal Town may not conduct gaming on the Property.

The district court did not abuse its discretion in ruling that the State had a substantial likelihood of success on the merits of its claims that Defendants were violating IGRA and the Compact because the Property is not the Tribal Town's

Indian lands under IGRA. OPI 37-38 (Aplt. App. 535-36). The construction and the planned operation of what Defendants freely admit was intended to be a Class III Casino, (Answer ¶ 31, admitting the location of the property "on which the Defendants are engaged in constructing and developing the Class III gaming facility") (Aplt. App. 369), was located on lands that were not the Tribal Town's Indian lands, and therefore the Casino violates both IGRA and the Compact.

a. The Tribal Town does not have jurisdiction over the Property.

The district court correctly ruled that the State met its burden of establishing that the Tribal Town does not have jurisdiction over the Property. "A proper analysis of whether the tract is 'Indian lands' under IGRA begins with the threshold question of the Tribe's jurisdiction." *Kansas*, 249 F.3d at 1229. "That inquiry, in turn, focuses principally on congressional intent and purpose, rather than recent unilateral actions of the [] Tribe." *Id.* Defendants dispute the district court's application of this Court's precedent, *see* Aplt. Br. 51, but fail to identify facts in the record demonstrating that the Property was within the federally-recognized and established jurisdiction of the Tribal Town.

The record establishes a lack of Congressional intent to grant the Tribal Town jurisdiction over the Property.[12] Legislation and treaties are "the most

[12] In entering into the Gaming Compact, the State did not "recognize[] the Tribe had jurisdiction over Indian lands, as defined by IGRA . . ." Aplt. Br. 47. The Gaming Compact does not identify lands upon which gaming can be authorized, but instead limits such land to the "Indian lands" of the Tribal Town as defined by IGRA. Compact (Aplt. App. 692, 701).

probative evidence of congressional intent." *Kansas*, 249 F.3d at 1229; *see also Alabama-Quassarte Tribal Town v. United States*, CIV-06-588-RAW, 2010 WL 3780979, at * 3 (E.D. OK. Sept. 21, 2010) (unpublished) (rejecting claims that certain land was actually held in trust for the plaintiff tribe because no record was identified granting the plaintiff tribe jurisdiction). It is undisputed that (1) the Tribal Town does not have a reservation and its Constitution does not assert jurisdiction over any land, (2) the Property is not held in trust or subject to restriction against alienation by the United States for the benefit of the Tribal Town, and (3) the Tribal Town has no real property interest in the Property.[13] Answer ¶¶ 38, 39 (Aplt. App. 397); Trans. 5/17/12, 349:1-14 (Aplt. App. 491); Anderson 44-45 (Aplt. App. 780-81). It is further undisputed that, until after the preliminary injunction hearing, the Property, located over 70 miles from the Tribal Town's headquarters, was not held by a member of the Tribal Town subject to restriction against alienation. CX1 (Aplee. Supp. App. 100). Defendants presented no evidence at trial to establish that Congress granted the Tribal Town jurisdiction over the Property.

"[A]n Indian tribe may not unilaterally create sovereign rights in itself that do not otherwise exist." *Kansas*, 249 F.3d at 1229. Prior to commencing construction of the Casino, the Tribal Town never claimed jurisdiction over the

---

[13] Although the Property fits the definition of "Indian Country" under 18 U.S.C. § 1151, this statute does not define the lands available for gaming under IGRA. 25 U.S.C. § 2703(4).

Property. Trans. 5/17/12, 349:1-14 (Aplt. App. 491). The Tribal Town's subsequent efforts to "manufacture" jurisdiction, such as entering into leases and other agreements with the Property owners, posting signs and flags, and hiring security personnel, are remarkably similar to the tribal actions the Court found insufficient to establish jurisdiction in *Miami Tribe*. In the *Miami* line of cases, *see* Aplt. Br. 46, the landowners consented to the exercise of tribal jurisdiction, and the tribe maintained and provided security on the land. *Miami Tribe of Okla. v. United States*, 656 F.3d 1129, 1145 (10th Cir. 2011). This Court rejected the argument that such actions equated to jurisdiction. "An Indian tribe's jurisdiction derives from the will of Congress, not from the consent of fee owners pursuant to a lease under which the lessee acts." *Kansas*, 249 F.3d at 1231.[14]

The district court's "principal basis" for its conclusion that the Property is not within the Tribal Town's jurisdiction was not, contrary to Defendants' argument, the categorization of the Tribal Town as a "subset group" or "band" of the Nation. Aplt. Br. 42. Rather, the district court considered the relationship of the Nation to the Property in concluding that the Tribal Town lacked jurisdiction and governmental power. However, other decisions, including those Defendants

[14] The district court denied the motion to reconsider based on the post-hearing enrollment of the Property Owners, OMR 8 (Aplt. App. 547), and Defendants have not challenged that ruling here. Even if Defendants had challenged that order, "the case law does not support the proposition that adoption of a landowner by a tribe confers jurisdiction." *Miami Tribe*, 656 F.3d at 1145 n.16; *id.* ("The tribe cannot create Indian reservation lands ex nihilo by adopting landowners into the tribe and claiming all of the new member's property.").

cite, Aplt. Br. 43, have implied an hierarchy between the Muscogee (Creek) Nation and the Tribal Towns. *See Harjo v. Kleppe*, 420 F. Supp. 1110, 1118 (D.D.C. 1976), *aff'd sub nom. Harjo v. Andrus*, 581 F.2d 949 (D.C. Cir. 1978) ("If plaintiffs prevail, there will be no increase or decrease in the quantum or nature of sovereignty exercised by the Creek national government over the tribal towns . . . ."); *see also Crowe & Dunlevy*, 640 F.3d at 1144 ("[T]he relationship of the Tribal Town to the Muscogee Nation . . . remains analogous to a city/state government or state/federal government relationship.") (quoted authority omitted).

Defendants cite no statutory authority for the Tribal Town's alleged jurisdiction. Defendants' reliance on 25 U.S.C. § 476(g) is a red herring. Aplt. Br. 55. 25 U.S.C. § 476 (g), which prohibits executive branch decisions that "classifi[y], enhance[], or diminish[] the privileges and immunities available to a federally recognized Indian tribe relative to other federal recognized tribes," is inapplicable here. *See City of Roseville v. Norton*, 348 F.3d 1020, 1032 (D.C. Cir. 2003) (the statute "protects tribes against agency decisions"). The district court applied IGRA to the Tribal Town, as it must to any tribe purporting to authorize gaming, and in doing so did not limit the Tribal Town's sovereignty.

Defendants also dispute the ruling that the Tribal Town must have a "tribal relationship with the lands in question." Aplt. Br. 44. The plain language of both IGRA and the Compact, however, support this conclusion. IGRA limits gaming to "Indian lands *of the Indian tribe*." 25 U.S.C. § 2710(d)(2)(A), (C); *id.* (3)(B)

(emphasis added); *see id.* § 2710(d)(8)(A) (authorizing the Secretary to approve gaming compacts that permit gaming only "on Indian lands of such Indian tribe"). Furthermore, the Compact permits the Tribal Town to game only on "its Indian lands." Compact (Aplt. App. 692, 701). The district court's conclusion that the Tribal Town may only authorize or conduct gaming on "Indian lands," as defined by IGRA, of the Tribal Town is evident in the plain language of the statute.

Defendants' arguments that the Tribal Town was a "successor-in-interest to the Creek Confederacy," Aplt. Br. 44, or that it had "shared jurisdiction" with the Nation, Aplt. Br. 47, do not establish a "tribal relationship" with the Property. The Interior Board of Indian Appeals, Bureau of Indian Affairs ("IBIA"), in *Kialegee Tribal Town v. Muskogee Area Director, Bureau of Indian Affairs*, 19 IBIA 296 (April 17, 1991), concluded the Tribal Town does not have co-extensive authority with the Nation over land. The IBIA determined that the Nation must consent to the Tribal Town's application to take land into trust because "the parcels in question were located within the boundaries of the Nation's former reservation." (Aplee. Supp. App. 52-61). In reaching this conclusion, the IBIA rejected the argument that the Nation and the Tribal Town had co-extensive jurisdiction over the land at issue, because the Tribal Town had "produc[ed] no evidence whatsoever that the Secretary has ever considered the former Creek Reservation to be [the Tribal Town's] reservation." (*Id.* 60); *see also Citizen Band Potawatomi Indian Tribe of Okla. v. Collier*, 142 F.3d 1325, 1334 (10th Cir. 1998) (Congress

had not abrogated "the Potawatomi Tribe's treaty right to the exclusive use and occupancy of its former reservation" and therefore the Tribe had to consent before land within the boundaries of its former reservation were taken into trust for a different tribe).

Defendants fail to identify any authority supporting their "shared jurisdiction" argument. Although "shared jurisdiction" by more than one tribe over the same land implies joint jurisdiction—not the separate jurisdiction by two different tribes as Defendants claim here—it certainly does not exist in the absence of clear Congressional intent; any other analysis would cause unpredictable results and unending conflicts. NIGC's analysis in *In re Indian Lands—Iowa Tribe of Oklahoma; Whitecloud Allotment* (Jan. 7, 2010), is persuasive. The NIGC concluded that a tribe has "exclusive tribal jurisdiction" over all allotments granted to its members "unless the United States transfers jurisdiction over the land to another tribe through legislation or by trust deed." (Aplt. App. 209-10). Citing *Kansas*, 249 F.3d at 1229, the NIGC stated:

> it would be difficult to square this legal underpinning [that Congress defines tribal sovereignty] with a decision that an Indian tribe automatically gains jurisdiction over new lands when one of its members inherits an ownership interest in an existing trust parcel under another tribe's jurisdiction, or that by the same operation the tribe of the original allottee could lose exclusive jurisdiction over an allotment taken from its own reservation.

(Aplt. App. 210.) The Property was allotted to members of the Nation, not of the Tribal Town, and Defendants presented no evidence at the hearing to the contrary.

Defendants' authorities on "shared jurisdiction" prove nothing. Aplt. Br. 50. Congress granted the reservation at issue in *Williams v. Clark*, 742 F.2d 549 (9th Cir. 1984), to the Quileute and the Quinault Indian Tribes. Because the treaty granted rights to both tribes, the Ninth Circuit concluded that both tribes could exercise jurisdiction over the reservation. *Id.* at 555; *see also N. Arapaho Tribe v. Harnsberger*, 697 F.3d 1272, 1281 (10th Cir. 2012) (considering a factual situation in which treaties and statutes prescribed that two tribes were "effectively co-tenants occupying the same land"). In contrast, the record contains no evidence that Congress granted the Tribal Town jurisdiction over the Property, and the Tribal Town's Constitution does not assert any geographic or territorial jurisdiction for the Tribal Town. Constitution (Aplt. App. 583-90).

Defendants fail to substantiate their argument the district court misunderstood the historical record in concluding Congress never granted the Tribal Town jurisdiction over the Property. The evidence presented at trial established the Property was within the territory granted to the Creek Confederacy—and not the Tribal Town specifically—in treaties with the United States, Treaty of Mar. 24, 1932, 7 Stat. 366 (Aplt. App. 559-63); Treaty of Aug. 7, 1856, 11 Stat. 699 (Aplee. Supp. App. 30-39); Treaty of June 14, 1866, 14 Stat. 785 (Aplt. App. 564-70); Treaty of Mar. 1, 1901, 31 Stat. 861 (Aplee. Supp. App. 40-51); Anderson at 11, 17-18 (Aplt. App. 747, 753-54); Trans. 5/16/12, 61:15-

62:12, 74:17-78:12, 81:3-83:21, 90:1-93:25 (Aplee. Supp. App. 104-117),[15] and over which the Nation proclaimed jurisdiction in its 1979 constitution, Nation Constitution Art. I (Aplt. App. 598).

The record confirms the Tribal Town's lack of jurisdiction. The Tribal Town's Constitution does not assert jurisdiction over the Property, and the Tribal Town's headquarters are more than 70 miles from the Property. Constitution (Aplt. App. 583-90); Trans. 5/16/12, 142:9-13 (Aplee. Supp. App. 119). The Property was allotted to a full-blooded enrolled Creek member, who was not a member of the Tribal Town. Trans. 5/17/12, 31:10-20 (Aplee. Supp. App. 102).

Defendants' argument that the Tribal Town's relationship with the Property is "demonstrated by the fact that the Allotment owners are dually-enrolled members of the Tribe and Muscogee," Aplt. Br. 45, is belied by Defendants' stipulation at the hearing that the Property owners are members of the Nation, not the Tribal Town, CX1 (Aplee. Supp. App. 100). It is also irrelevant, because simply enrolling a member does not confer jurisdiction, and is procedurally improper because Defendants waived objections to the district court's ruling that the subsequent enrollment of the Property owners did not change the jurisdictional analysis by not challenging the court's ruling on motion to reconsider. *See Native Am. Distrib.*, 546 F.3d at 1292 n.2. The pertinent record is that of the preliminary

[15] Defendants do not explain how *Mitchell v. United States*, 34 U.S. 711, 725 (1835), Aplt. Br. 43, stating that "various tribes" made up the Creek Confederacy, is relevant in light of these subsequent treaties between the United States and the Creek Nation.

injunction hearing. Even so, Defendants' own briefing objects to the district court's consideration of the membership of the Property Owners, and states that "[a]n allotment owner's membership does not impact a tribe's civil jurisdiction over the allotment." Aplt. Br. 46.

The evidence presented to the district court established unqualifiedly that the Tribal Town has never had jurisdiction over the Property. The district court's conclusion was corroborated by the determination of the NIGC,[16] one week after the district court's oral preliminary injunction ruling, that the Tribal Town will violate IGRA by conducting gaming on the Property. Defendants neglect to mention that the NIGC concluded that the Tribal Town lacks jurisdiction over the Property and directed the Tribal Town "not to commence gaming under IGRA" on the Property. NIGC Letter, 5/24/12 (Aplt. App. 733). The NIGC later determined that the enrollment of the Property Owners did not change the result. NIGC Letter, 6/8/12 (Aplee. Supp. App. 26-29). The NIGC's parallel conclusion authoritatively supports the district court's conclusion that the State has a substantial likelihood of success on the merits. *See Wyandotte Nation v. Sebelius*, 443 F.3d 1247, 1256

[16] The Court may consider the NIGC's letters as persuasive authority. *See Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (stating that an agency opinion may be given weight dependent "upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control"); *Grand Traverse Band of Ottawa & Chippewa Indians v. U.S. Attny. for W. Dist. of Mich.*, 198 F. Supp. 2d 920, 927-28 (W.D. Mich. 2002), *aff'd* 369 F.3d 960 (6th Cir. 2004) (granting "substantial weight" to an NIGC determination that had considered the exact question before the court).

(10th Cir. 2006) (upholding the district court's ruling that the plaintiff demonstrated likelihood of success on the merits because the Secretary had issued a determination supporting the plaintiff).

b. The Tribal Town does not exercise governmental control over the Property.

The district court did not abuse its discretion in applying the factors articulated in *Cheyenne River Sioux Tribe v. South Dakota*, 830 F. Supp. 523, 528 (D.S.D. 1993), *aff'd* 3 F.3d 273 (8th Cir. 1993), to conclude the Tribal Town does not exercise governmental control over the Property. OPI 36 (Aplt. App. 534). The only record citations Defendants provide are to a document the district court struck from the record,[17] and the district court's preliminary injunction order. Aplt. Br. 53. The evidence established at the hearing, however, strongly supports the district court's conclusion. Defendants' witness, Miami attorney and member of the Casino development team, Luis Figueredo, testified that, prior to entering into a lease with the Property Owners, the Tribal Town manifested no governmental authority over the Property, Trans. 5/17/12, 349:11-14 (Aplt. App. 491), and that, after the Casino development was underway, the Tribal Town opened a satellite office on the Property, hired a private security guard, made available literature about tribal programs, and placed fencing, a flag, and signs proclaiming jurisdiction on the Property. Trans. 5/17/12, 308:4-309:21, 318:8-10 (Aplee. Supp. App. 136-37, 139). Because each of these purported governmental activities was

[17] The State's motion to strike the referenced document is pending.

not commenced until after the Tribal Town entered into a lease with the Property Owners, the district court correctly characterized them as "merely proprietary and/or pretextual attempts to 'manufacture' the exercise of governmental authority." OPI 36 (Aplt. App. 534).

The exercise of governmental power requires more than mere ownership or presence. *See Citizens Exposing Truth About Casinos v. Kempthorne*, 492 F.3d 460, 463 (D.C. Cir. 2007) ("Although the Band calls the property home, the Band does not exercise governmental jurisdiction over the [property], such as authority over land use, law enforcement, building codes, zoning, education, fire service, or judiciary."). At the hearing, Defendants stipulated that the Property was not owned by members of the Tribal Town, and Mr. Figueredo testified that no Tribal Town member lives on the Property. CX1 (Aplee. Supp. App. 100); Trans. 5/17/12, 315:6-17 (Aplee. Supp. App. 138). All governmental services for the Property are provided by the City of Broken Arrow, the County of Tulsa, or the Muscogee (Creek) Nation. Trans. 5/17/12, 221:23-25, 232:1-16, 233:9-234:15 (Aplee. Supp. App. 123-26). As Defendants stipulated, the Tribal Town does not provide education, water, sewer, electrical, fire, law enforcement, or other services to the Property, and does not have a jail or police force. CX1 (Aplee. Supp. App. 100); Trans. 5/17/12, 232:1-16, 315:3-20, 346:10-16, 348:15-25, 349:18-21 (Aplee. Supp. App. 124, 138, 140-42).

Based on the evidence, the district court did not abuse its discretion in finding "[t]here is no evidence the Tribal Town has delivered any substantive governmental services through or at the Broken Arrow Property. . . ." OPI 36-37 (Aplt. App. 534-35). The district court correctly found that, because the Tribal Town does not exercise governmental power over the Property, the Property is not the Tribal Town's Indian lands.

2. The balance of harm favors the preliminary injunction.

a. The State would suffer irreparable harm if the preliminary injunction did not issue.

The district court did not abuse its discretion in concluding the State would be irreparably harmed in the absence of an injunction. OPI 38 (Aplt. App. 536). Irreparable harm is established when a state's

> sovereign interests and public policies [are] at stake, . . . [and] the harm the State stands to suffer [is] irreparable if deprived of those interests without first having a full and fair opportunity to be heard on the merits.

Kansas, 249 F.3d at 1227. In *Kansas*, the Court concluded the state's interests in "adjudicating the applicability of IGRA, and the ramifications of such adjudication," was sufficient to establish irreparable harm. *Id*. at 1228. *Kansas* did not, as Defendants argue, conclude the irreparable harm was caused by the potential loss of sovereignty over land. Aplt. Br. 37 n.6. Nor did the Eastern District of New York, in *New York v. Shinnecock Indian Nation*, 280 F. Supp. 2d 1, 4-5 (E.D.N.Y. 2003), *rev'd on other grounds* 701 F.3d 101 (2d Cir. 2012), rule the

issues related to land status caused irreparable harm warranting an injunction. Instead, that court focused on environmental harm, increased traffic, and violation of anti-gambling laws. Aplt. Br. 37 n.6. Here, the State established irreparable injury based on impacts to its citizens and its interest in compliance with and enforcement of IGRA and the Compact.

Defendants' arguments that no injury exists because of the zoning status of the Property, or because a different tribe may have the right to conduct gaming on the Property, do not alter this conclusion. Aplt. Br. 38. At issue is whether the Tribal Town, through Defendants, may conduct gaming on the Property in compliance with IGRA and the Compact. Even if local zoning contemplates a business with similar impacts, which cannot be determined on the present record, no local or State law authorizes Class III gaming on the Property. Whether a different tribe could conduct gaming was not before the district court, is not before this Court, and is irrelevant to whether Defendants' violation of IGRA and the Compact warranted an injunction. The district court properly concluded that the State would be irreparably harmed in the absence of an injunction.

b. There was no chance of the preliminary injunction harming Defendants.

Defendants argue, without citation to the record in support, that the preliminary injunction caused harm to the Tribal Officials and the Corporation. Aplt. Br. 39. Defendants represented to the district court that they were willing to "risk" any potential harm by proceeding to construct the Casino without necessary

approvals. MTD Response 3 (Aplt. App. 266). Prejudice to the party opposing injunctive relief is given little weight when that party is "largely responsible for their own harm." *Davis v. Mineta*, 302 F.3d 1104, 1116 (10th Cir. 2002); *see MediaOne of Del., Inc. v. E & A Beepers & Cellulars*, 43 F. Supp. 2d 1348, 1354 (S.D. Fla. 1998) (finding no injury when the preliminary injunction would enjoin conduct "already prohibited by state and federal law"). The district court concluded that any harm to Defendants was "self-inflicted," as Defendants had not demonstrated that they had secured the necessary approvals to game from the federal government. OPI 39 (Aplt. App. 537). The district court did not abuse its discretion in ruling that the harm to the State outweighed that to Defendants. *Id.*

Lack of harm to Defendants is underscored by the NIGC's determination that gaming by the Tribal Town on the Property would violate IGRA. Defendants could not have been injured by the injunction since gaming on the Property was prohibited even in the absence of the district court's injunction.

3. The public interest favors the preliminary injunction.

Defendants do not dispute the district court's conclusion that the public interest favors the injunction. Aplt. Br. 7. "Congress viewed effective regulation [of Indian gaming by IGRA] and respect for regulatory authority as being in the public's interest." *In re Sac & Fox Tribe of Miss. in Iowa/Meskwaki Casino Litig.*, 340 F.3d 749, 760 (8th Cir. 2003); *Wisconsin v. Stockbridge-Munsee Cmty.*, 67 F. Supp. 2d 990, 1021 (E.D. Wis. 1999) (stating that the public's interest in enforcing

gaming laws weighs in favor of granting injunctive relief against a tribe that was conducting Class III gaming in violation of a gaming compact). The public interest favors the preliminary injunction.

Because each of the preliminary injunction factors favors enjoining Defendants, the district court did not abuse its discretion in granting the preliminary injunction.

CONCLUSION

The Court should affirm each of the district court's orders.

STATEMENT REGARDING ORAL ARGUMENT

This appeal requires resolution of an important question of law regarding the authority of the State to secure federal court relief from violations of IGRA and federally-approved tribal-state gaming compacts. Oral argument will assist the Court to correctly address issues important to states and to Native American tribes and nations.

Respectfully submitted this 25th day of January, 2013.

OKLAHOMA OFFICE OF THE
ATTORNEY GENERAL
E. Scott Pruitt
Attorney General
M. Daniel Weitman
Assistant Attorney General
313 NE 21st Street
Oklahoma City, Oklahoma 73105
(405) 521-4274

/s/ Lynn H. Slade
MODRALL, SPERLING, ROEHL,
HARRIS & SISK, P.A.
Lynn H. Slade
William C. Scott
Sarah M. Stevenson
Post Office Box 2168
Albuquerque, NM 87103-2168
(505) 848-1800

Attorneys for the State of Oklahoma

CERTIFICATE OF TYPE-VOLUME COMPLIANCE

Pursuant to Fed. R. App. At P. 32(a)(7)(B), I hereby certify that **Appellee's Brief** is proportionally spaced and contains 13,902 words, exclusive of the items identified in Fed. R. App. At P. 32(A)(7)(B)(iii) as not counting toward the type-volume limitation. This figure was calculated through use of the word count function of Microsoft Word 2010, which was used to prepare the brief.

MODRALL, SPERLING, ROEHL, HARRIS & SISK, P.A.

By: */s/ Lynn H. Slade*
Lynn H. Slade

CERTIFICATE OF SERVICE

I hereby certify that on January 25th, 2013, a true and complete copy of the within and foregoing **Appellee's Brief and Index of Appellee's Appendix** 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 parties of record below. I further certify that, on this date, copies of the **Appellee's Appendix** were transmitted to the Clerk of the Court and parties of record by Federal Express.

FREDERICKS PEEBLES & MORGAN LLP
MARTHA L. KING
1900 PLAZA DRIVE
LOUISVILLE, CO 80027

MATTHEW J. KELLY
1301 CONNECTICUT AVE. NW STE. 450
WASHINGTON, DC 20036

ATTORNEYS FOR
TIGER HOBIA, AS TOWN KING AND MEMBER OF THE KIALEGEE TRIBAL TOWN BUSINESS COMMITTEE, THOMAS GIVENS, AS 1ST WARRIOR AND MEMBER OF THE KIALEGEE TRIBAL TOWN BUSINESS COMMITTEE, JOHN DOES NOS. 1-7, AND KIALEGEE TRIBAL TOWN, A FEDERALLY CHARTERED CORPORATION

DENNIS J. WHITTLESEY
DICKINSON WRIGHT
1875 EYE ST. N.W.
SUITE 1200
WASHINGTON, D.C. 20006

ATTORNEYS FOR
FLORENCE DEVELOPMENT PARTNERS, LLC

MODRALL, SPERLING, ROEHL,
HARRIS & SISK, P.A.

By: */s/ Lynn H. Slade*

APPELLEE'S ADDENDUM OF AUTHORITIES

25 U.S.C. § 503

Organization of tribes or bands; constitution; charter; right to participate in revolving credit fund

Any recognized tribe or band of Indians residing in Oklahoma shall have the right to organize for its common welfare and to adopt a constitution and bylaws, under such rules and regulations as the Secretary of the Interior may prescribe. The Secretary of the Interior may issue to any such organized group a charter of incorporation, which shall become operative when ratified by a majority vote of the adult members of the organization voting: *Provided, however*, That such election shall be void unless the total vote cast be at least 30 per centum of those entitled to vote. Such charter may convey to the incorporated group, in addition to any powers which may properly be vested in a body corporate under the laws of the State of Oklahoma, the right to participate in the revolving credit fund and to enjoy any other rights or privileges secured to an organized Indian tribe under the Act of June 18, 1934 (48 Stat. 984) [25 U.S.C.A. § 461 et seq.]: *Provided*, That the corporate funds of any such chartered group may be deposited in any national bank within the State of Oklahoma or otherwise invested, utilized, or disbursed in accordance with the terms of the corporate charter.

INDIAN GAMING REGULATORY ACT (EXCERPTS)

25 U.S.C. § 2703

Definitions

For purposes of this chapter—

***

(4) The term "Indian lands" means—

(A) all lands within the limits of any Indian reservation; and

(B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power.

25 U.S.C. § 2710

Tribal gaming ordinances

(a) Jurisdiction over class I and class II gaming activity

(1) Class I gaming on Indian lands is within the exclusive jurisdiction of the Indian tribes and shall not be subject to the provisions of this chapter.

(2) Any class II gaming on Indian lands shall continue to be within the jurisdiction of the Indian tribes, but shall be subject to the provisions of this chapter.

(b) Regulation of class II gaming activity; net revenue allocation; audits; contracts

(1) An Indian tribe may engage in, or license and regulate, class II gaming on Indian lands within such tribe's jurisdiction, if--

(A) such Indian gaming is located within a State that permits such gaming for any purpose by any person, organization or entity (and such gaming is not otherwise specifically prohibited on Indian lands by Federal law), and

(B) the governing body of the Indian tribe adopts an ordinance or resolution which is approved by the Chairman.

A separate license issued by the Indian tribe shall be required for each place, facility, or location on Indian lands at which class II gaming is conducted.

(2) The Chairman shall approve any tribal ordinance or resolution concerning the conduct, or regulation of class II gaming on the Indian lands within the tribe's jurisdiction if such ordinance or resolution provides that—

(A) except as provided in paragraph (4), the Indian tribe will have the sole proprietary interest and responsibility for the conduct of any gaming activity;

(B) net revenues from any tribal gaming are not to be used for purposes other than--

(i) to fund tribal government operations or programs;

(ii) to provide for the general welfare of the Indian tribe and its members;

(iii) to promote tribal economic development;

(iv) to donate to charitable organizations; or

(v) to help fund operations of local government agencies;

(C) annual outside audits of the gaming, which may be encompassed within existing independent tribal audit systems, will be provided by the Indian tribe to the Commission;

(D) all contracts for supplies, services, or concessions for a contract amount in excess of $25,000 annually (except contracts for professional legal or accounting services) relating to such gaming shall be subject to such independent audits;

(E) the construction and maintenance of the gaming facility, and the operation of that gaming is conducted in a manner which adequately protects the environment and the public health and safety; and

(F) there is an adequate system which—

(i) ensures that background investigations are conducted on the primary management officials and key employees of the gaming enterprise and that oversight of such officials and their management is conducted on an ongoing basis; and

(ii) includes—

(I) tribal licenses for primary management officials and key employees of the gaming enterprise with prompt notification to the Commission of the issuance of such licenses;

(II) a standard whereby any person whose prior activities, criminal record, if any, or reputation, habits and associations pose a threat to the public interest or to the effective regulation of gaming, or create or enhance the dangers of unsuitable, unfair, or

illegal practices and methods and activities in the conduct of gaming shall not be eligible for employment; and

(III) notification by the Indian tribe to the Commission of the results of such background check before the issuance of any of such licenses.

(3) Net revenues from any class II gaming activities conducted or licensed by any Indian tribe may be used to make per capita payments to members of the Indian tribe only if--

(A) the Indian tribe has prepared a plan to allocate revenues to uses authorized by paragraph (2)(B);

(B) the plan is approved by the Secretary as adequate, particularly with respect to uses described in clause (i) or (iii) of paragraph (2)(B);

(C) the interests of minors and other legally incompetent persons who are entitled to receive any of the per capita payments are protected and preserved and the per capita payments are disbursed to the parents or legal guardian of such minors or legal incompetents in such amounts as may be necessary for the health, education, or welfare, of the minor or other legally incompetent person under a plan approved by the Secretary and the governing body of the Indian tribe; and

(D) the per capita payments are subject to Federal taxation and tribes notify members of such tax liability when payments are made.

(4)(A) A tribal ordinance or resolution may provide for the licensing or regulation of class II gaming activities owned by any person or entity other than the Indian tribe and conducted on Indian lands, only if the tribal licensing requirements include the requirements described in the subclauses of subparagraph (B)(i) and are at least as restrictive as those established by State law governing similar gaming within the jurisdiction of the State within which such Indian lands are located. No person or entity, other than the Indian tribe, shall be eligible to receive a tribal license to own a class II gaming activity conducted on Indian lands within the jurisdiction of the Indian tribe if such person or entity would not be eligible to receive a State license to conduct the same activity within the jurisdiction of the State.

(B)(i) The provisions of subparagraph (A) of this paragraph and the provisions of subparagraphs (A) and (B) of paragraph (2) shall not bar the

continued operation of an individually owned class II gaming operation that was operating on September 1, 1986, if—

(I) such gaming operation is licensed and regulated by an Indian tribe pursuant to an ordinance reviewed and approved by the Commission in accordance with section 2712 of this title,

(II) income to the Indian tribe from such gaming is used only for the purposes described in paragraph (2)(B) of this subsection,

(III) not less than 60 percent of the net revenues is income to the Indian tribe, and

(IV) the owner of such gaming operation pays an appropriate assessment to the National Indian Gaming Commission under section 2717(a)(1) of this title for regulation of such gaming.

(ii) The exemption from the application of this subsection provided under this subparagraph may not be transferred to any person or entity and shall remain in effect only so long as the gaming activity remains within the same nature and scope as operated on October 17, 1988.

(iii) Within sixty days of October 17, 1988, the Secretary shall prepare a list of each individually owned gaming operation to which clause (i) applies and shall publish such list in the Federal Register.

(c) Issuance of gaming license; certificate of self-regulation

(1) The Commission may consult with appropriate law enforcement officials concerning gaming licenses issued by an Indian tribe and shall have thirty days to notify the Indian tribe of any objections to issuance of such license.

(2) If, after the issuance of a gaming license by an Indian tribe, reliable information is received from the Commission indicating that a primary management official or key employee does not meet the standard established under subsection (b)(2)(F)(ii)(II) of this section, the Indian tribe shall suspend such license and, after notice and hearing, may revoke such license.

(3) Any Indian tribe which operates a class II gaming activity and which--

(A) has continuously conducted such activity for a period of not less than three years, including at least one year after October 17, 1988; and

(B) has otherwise complied with the provisions of this section

may petition the Commission for a certificate of self-regulation.

(4) The Commission shall issue a certificate of self-regulation if it determines from available information, and after a hearing if requested by the tribe, that the tribe has--

(A) conducted its gaming activity in a manner which--

(i) has resulted in an effective and honest accounting of all revenues;

(ii) has resulted in a reputation for safe, fair, and honest operation of the activity; and

(iii) has been generally free of evidence of criminal or dishonest activity;

(B) adopted and is implementing adequate systems for--

(i) accounting for all revenues from the activity;

(ii) investigation, licensing, and monitoring of all employees of the gaming activity; and

(iii) investigation, enforcement and prosecution of violations of its gaming ordinance and regulations; and

(C) conducted the operation on a fiscally and economically sound basis.

(5) During any year in which a tribe has a certificate for self-regulation—

(A) the tribe shall not be subject to the provisions of paragraphs (1), (2), (3), and (4) of section 2706 (b) of this title;

(B) the tribe shall continue to submit an annual independent audit as required by subsection (b)(2)(C) of this section and shall submit to the Commission a complete resume on all employees hired and licensed by the tribe subsequent to the issuance of a certificate of self-regulation; and

(C) the Commission may not assess a fee on such activity pursuant to section 2717 of this title in excess of one quarter of 1 per centum of the gross revenue.

(6) The Commission may, for just cause and after an opportunity for a hearing, remove a certificate of self-regulation by majority vote of its members.

(d) Class III gaming activities; authorization; revocation; Tribal-State compact

(1) Class III gaming activities shall be lawful on Indian lands only if such activities are--

(A) authorized by an ordinance or resolution that--

(i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands,

(ii) meets the requirements of subsection (b) of this section, and

(iii) is approved by the Chairman,

(B) located in a State that permits such gaming for any purpose by any person, organization, or entity, and

(C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect.

(2)(A) If any Indian tribe proposes to engage in, or to authorize any person or entity to engage in, a class III gaming activity on Indian lands of the Indian tribe, the governing body of the Indian tribe shall adopt and submit to the Chairman an ordinance or resolution that meets the requirements of subsection (b) of this section.

(B) The Chairman shall approve any ordinance or resolution described in subparagraph (A), unless the Chairman specifically determines that--

(i) the ordinance or resolution was not adopted in compliance with the governing documents of the Indian tribe, or

(ii) the tribal governing body was significantly and unduly influenced in the adoption of such ordinance or resolution by any person identified in section 2711(e)(1)(D) of this title.

Upon the approval of such an ordinance or resolution, the Chairman shall publish in the Federal Register such ordinance or resolution and the order of approval.

(C) Effective with the publication under subparagraph (B) of an ordinance or resolution adopted by the governing body of an Indian tribe that has been approved by the Chairman under subparagraph (B), class III gaming activity on the Indian lands of the Indian tribe shall be fully subject to the terms and conditions of the Tribal-State compact entered into under paragraph (3) by the Indian tribe that is in effect.

(D)(i) The governing body of an Indian tribe, in its sole discretion and without the approval of the Chairman, may adopt an ordinance or resolution revoking any prior ordinance or resolution that authorized class III gaming on the Indian lands of the Indian tribe. Such revocation shall render class III gaming illegal on the Indian lands of such Indian tribe.

(ii) The Indian tribe shall submit any revocation ordinance or resolution described in clause (i) to the Chairman. The Chairman shall publish such ordinance or resolution in the Federal Register and the revocation provided by such ordinance or resolution shall take effect on the date of such publication.

(iii) Notwithstanding any other provision of this subsection—

(I) any person or entity operating a class III gaming activity pursuant to this paragraph on the date on which an ordinance or resolution described in clause (i) that revokes authorization for such class III gaming activity is published in the Federal Register may, during the 1-year period beginning on the date on which such revocation ordinance or resolution is published under clause (ii), continue to operate such activity in conformance with the Tribal-State compact entered into under paragraph (3) that is in effect, and

(II) any civil action that arises before, and any crime that is committed before, the close of such 1-year period shall not be affected by such revocation ordinance or resolution.

(3)(A) Any Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the

purpose of entering into a Tribal-State compact governing the conduct of gaming activities. Upon receiving such a request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact.

(B) Any State and any Indian tribe may enter into a Tribal-State compact governing gaming activities on the Indian lands of the Indian tribe, but such compact shall take effect only when notice of approval by the Secretary of such compact has been published by the Secretary in the Federal Register.

(C) Any Tribal-State compact negotiated under subparagraph (A) may include provisions relating to--

(i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity;

(ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;

(iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;

(iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities;

(v) remedies for breach of contract;

(vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and

(vii) any other subjects that are directly related to the operation of gaming activities.

(4) Except for any assessments that may be agreed to under paragraph (3)(C)(iii) of this subsection, nothing in this section shall be interpreted as conferring upon a State or any of its political subdivisions authority to impose any tax, fee, charge, or other assessment upon an Indian tribe or upon any other person or entity authorized by an Indian tribe to engage in a class III activity. No State may refuse to enter into the negotiations described in paragraph (3)(A) based upon the lack of authority in such State, or its political subdivisions, to impose such a tax, fee, charge, or other assessment.

(5) Nothing in this subsection shall impair the right of an Indian tribe to regulate class III gaming on its Indian lands concurrently with the State, except to the extent that such regulation is inconsistent with, or less stringent than, the State laws and regulations made applicable by any Tribal-State compact entered into by the Indian tribe under paragraph (3) that is in effect.

(6) The provisions of section 1175 of Title 15 shall not apply to any gaming conducted under a Tribal-State compact that—

(A) is entered into under paragraph (3) by a State in which gambling devices are legal, and

(B) is in effect.

(7)(A) The United States district courts shall have jurisdiction over—

(i) any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith,

(ii) 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 entered into under paragraph (3) that is in effect, and

(iii) any cause of action initiated by the Secretary to enforce the procedures prescribed under subparagraph (B)(vii).

(B)(i) An Indian tribe may initiate a cause of action described in subparagraph (A)(i) only after the close of the 180-day period beginning on the date on which the Indian tribe requested the State to enter into negotiations under paragraph (3)(A).

(ii) In any action described in subparagraph (A)(i), upon the introduction of evidence by an Indian tribe that—

(I) a Tribal-State compact has not been entered into under paragraph (3), and

(II) the State did not respond to the request of the Indian tribe to negotiate such a compact or did not respond to such request in good faith,

the burden of proof shall be upon the State to prove that the State has negotiated with the Indian tribe in good faith to conclude a Tribal-State compact governing the conduct of gaming activities.

(iii) If, in any action described in subparagraph (A)(i), the court finds that the State has failed to negotiate in good faith with the Indian tribe to conclude a Tribal-State compact governing the conduct of gaming activities, the court shall order the State and the Indian Tribe[2] to conclude such a compact within a 60-day period. In determining in such an action whether a State has negotiated in good faith, the court—

(I) may take into account the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities, and

(II) shall consider any demand by the State for direct taxation of the Indian tribe or of any Indian lands as evidence that the State has not negotiated in good faith.

(iv) If a State and an Indian tribe fail to conclude a Tribal-State compact governing the conduct of gaming activities on the Indian lands subject to the jurisdiction of such Indian tribe within the 60-day period provided in the order of a court issued under clause (iii), the Indian tribe and the State shall each submit to a mediator appointed by the court a proposed compact that represents their last best offer for a compact. The mediator shall select from the two proposed compacts the one which best comports with the terms of this chapter and any other applicable Federal law and with the findings and order of the court.

(v) The mediator appointed by the court under clause (iv) shall submit to the State and the Indian tribe the compact selected by the mediator under clause (iv).

(vi) If a State consents to a proposed compact during the 60-day period beginning on the date on which the proposed compact is submitted by the mediator to the State under clause (v), the proposed compact shall be treated as a Tribal-State compact entered into under paragraph (3).

(vii) If the State does not consent during the 60-day period described in clause (vi) to a proposed compact submitted by a mediator under clause (v), the mediator shall notify the Secretary and the Secretary shall prescribe, in consultation with the Indian tribe, procedures—

(I) which are consistent with the proposed compact selected by the mediator under clause (iv), the provisions of this chapter, and the relevant provisions of the laws of the State, and

(II) under which class III gaming may be conducted on the Indian lands over which the Indian tribe has jurisdiction.

(8)(A) The Secretary is authorized to approve any Tribal-State compact entered into between an Indian tribe and a State governing gaming on Indian lands of such Indian tribe.

(B) The Secretary may disapprove a compact described in subparagraph (A) only if such compact violates--

(i) any provision of this chapter,

(ii) any other provision of Federal law that does not relate to jurisdiction over gaming on Indian lands, or

(iii) the trust obligations of the United States to Indians.

(C) If the Secretary does not approve or disapprove a compact described in subparagraph (A) before the date that is 45 days after the date on which the compact is submitted to the Secretary for approval, the compact shall be considered to have been approved by the Secretary, but only to the extent the compact is consistent with the provisions of this chapter.

(D) The Secretary shall publish in the Federal Register notice of any Tribal-State compact that is approved, or considered to have been approved, under this paragraph.

(9) An Indian tribe may enter into a management contract for the operation of a class III gaming activity if such contract has been submitted to, and approved by, the Chairman. The Chairman's review and approval of such contract shall be governed by the provisions of subsections (b), (c), (d), (f), (g), and (h) of section 2711 of this title.

(e) Approval of ordinances

For purposes of this section, by not later than the date that is 90 days after the date on which any tribal gaming ordinance or resolution is submitted to the Chairman, the Chairman shall approve such ordinance or resolution if it meets the requirements of this section. Any such ordinance or resolution not acted upon at the end of that 90-day period shall be considered to have been approved by the Chairman, but only to the extent such ordinance or resolution is consistent with the provisions of this chapter.

Nos. 12-5134 & 12-5136

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

State of Oklahoma,
Appellee/Plaintiff,
v.
Tiger Hobia, as Town King and member of the Kialegee Tribal Town Business Committee; Thomas Givens, as 1st Warrior and member of the Kialegee Tribal Town Business Committee; John Doe No. 1 as 2nd Warrior and member of the Kialegee Tribal Town Business Committee; John Does Nos. 2-7, as members of the Kialegee Tribal Town Business Committee; Florence Development Partners, LLC; and Kialegee Tribal Town, a federally chartered corporation,
Appellants/Defendants.

On Appeal from the United States District Court
For the Northern District of Oklahoma (Frizzell, C.J.)
Case No. 4:12 cv-00054-GFK-TLW

APPELLEE'S SUPPLEMENTAL APPENDIX

OKLAHOMA OFFICE OF THE ATTORNEY GENERAL
E. Scott Pruitt
Attorney General
M. Daniel Weitman
Assistant Attorney General
313 NE 21st Street
Oklahoma City, Oklahoma 73105
(405) 521-4274

MODRALL, SPERLING, ROEHL, HARRIS & SISK, P.A.
Lynn H. Slade
William C. Scott
Sarah M. Stevenson
Post Office Box 2168
Albuquerque, NM 87103-2168
(505) 848-1800

Counsel for Appellees

TABLE OF CONTENTS

(05/30/2012) Notice of Federal Action, *State of Oklahoma v. (1) Tiger Hobia, as Town King and member of the Kialegee Tribal Town Business Committee; et al.*, United State District Court for the Northern District of Oklahoma, Case No. 4:12 cv-00054-GFK-TLW [Doc. No. 134] ..... Aplee. Supp. App. 1-25

(06/08/2012) Exhibit B to the State of Oklahoma's Response to Defendant's Motion to Reconsider the Preliminary Injunction [Doc. No. 138-2] ..... Aplee. Supp. App. 26-29

Treaty of August 7, 1856, 11 Stat. 699 [Plaintiff's Exhibit 23] ..... Aplee. Supp. App. 30-39

Treaty of March 8, 1901, 31 Stat. 861[Plaintiff's Exhibit 25] ..... Aplee. Supp. App. 40-51

(04/17/1991) Interior Board of Indian Appeals, *Kialegee Tribal Town v. Muskogee Area Director, Bureau of Indian Affairs*, 19 IBIA 296 [Plaintiff's Ex. 27] ..... Aplee. Supp. App. 52-61

(07/01/2006) Cross-Deputization Agreement, Muscogee (Creek) Nation, Broken Arrow (and other jurisdictions) [Plaintiff's Exhibit 32] ..... Aplee. Supp. App. 62-93

(05/15/2010) Kialegee Tribal Town Resolution TR 05-15-2010A TR-2010-515A [Plaintiff's Exhibit 12 at Exhibit E] ..... Aplee. Supp. App. 94-96

(05/15/2010) Resolution, Kialegee Business Committee approving Machine Lease [Excerpt from Plaintiff's Exhibit 6] ..... Aplee. Supp. App. 97-99

(05/18/2012) Stipulation of Exhibits to be used at the Preliminary Injunction Hearing held May 16-18, 2012, *State of Oklahoma v. (1) Tiger Hobia, as Town King and member of the Kialegee Tribal Town Business Committee; et al.*, United State District Court for the Northern District of Oklahoma, Case No. 4:12 cv-00054-GFK-TLW [Court's Exhibit 1] ..... Aplee. Supp. App. 100-101

(05/16/2012) Transcript of Preliminary Injunction Hearing, Vol. I, Opening Statement on Behalf of the Defendant's by Dennis J. Whittlesey [pp.31, 35] ..... Aplee. Supp. App. 102-103

(05/16/2012) Transcript of Preliminary Injunction Hearing, Vol. I, Direct Examination by Lynn H. Slade of Professor Gary Clayton Anderson [pp.61-62, 74-78, 81-83, 90-93, 111, 142] ..... Aplee. Supp. App. 104-119

(05/16/2012) Transcript of Preliminary Injunction Hearing, Vol. I, Cross-Examination by Dennis J. Whittlesey of Professor Gary Clayton Anderson [p.172] .....Aplee. Supp. App. 120

(05/16/2012) Transcript of Preliminary Injunction Hearing, Vol. I, Redirect Examination by Lynn H. Slade of Professor Gary Clayton Anderson [pp.213-214] ..... Aplee. Supp. App. 121-122

(05/17/2012) Transcript of Preliminary Injunction Hearing, Vol. II, Cross-Examination by M. Daniel Weitman of John Bowman [p.221].....Aplee. Supp. App. 123

(05/17/2012) Transcript of Preliminary Injunction Hearing, Vol. II, Direct Examination by M. Daniel Weitman of Norman Stephens [pp.232-234] ..... Aplee. Supp. App. 124-126

(05/17/2012) Transcript of Preliminary Injunction Hearing, Vol. II, Direct Examination by William C. Scott of Christopher Hinton Burskirk [p.238] .....Aplee. Supp. App. 127

(05/17/2012) Transcript of Preliminary Injunction Hearing, Vol. II, Statement of Lynn H. Slade [pp.257-258] ..... Aplee. Supp. App. 128-129

(05/17/2012) Transcript of Preliminary Injunction Hearing, Vol. II, Argument by Joseph R. Farris [p.271] .....Aplee. Supp. App. 130

(05/17/2012) Transcript of Preliminary Injunction Hearing, Vol. II, Direct Examination by Lynn H. Slade of Luis Figueredo [pp. 292-293, 303-304, 307-309, 315, 318, 346, 348-350] ..... Aplee. Supp. App. 131-143

(05/18/2012) Transcript of Preliminary Injunction Hearing, Vol. III, Court Ruling [pp.437-442] ..... Aplee. Supp. App. 144-149

Doug Henderson: View of location and related lands and structure (photo) [Plaintiff's Exhibit 33a] .....Aplee. Supp. App. 150

Doug Henderson: View of location and related lands and structure (video) [Plaintiff's Exhibit 33b] .....Aplee. Supp. App. 151