CASE NOS. 12-5134/5136
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

STATE OF OKLAHOMA,	)
	)
Appellee/Plaintiff,	)
	)
v.	)
	)
(1) TIGER HOBIA, as Town King and member of the Kialegee Tribal Town Business Committee; et al.,	)
	)
Appellants/Defendants.	)

On Appeal from the United States District Court
for the Northern District of Oklahoma
The Honorable Chief Judge Gregory K. Frizzell
N.D. No. 4:12-cv-00054-GKF-TLW

APPELLANTS' CONSOLIDATED OPENING BRIEF

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Oral Argument is requested.

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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 Nos. 1–7 ("Tribal Officials"), and Kialegee Tribal Town, a federally chartered corporation ("Corporation"), by and through their attorney Fredericks Peebles & Morgan LLP (Martha L. King), and Florence Development Partners LLC ("Florence"), by and through its attorney Dickinson Wright PLLC (Dennis J. Whittlesey), in support of their Consolidated Opening Brief state:

PRIOR OR RELATED APPEALS

Florence filed its Notice of Appeal on August 20, 2012. Aplt. App., vol. II, 556–58. That appeal was consolidated into this case.

STATEMENT OF JURISDICTION

The United States District Court for the Northern District of Oklahoma claimed jurisdiction under the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2710 (d)(7), and federal-question jurisdiction under 28 U.S.C. § 1331. Aplt. App., vol. I, 20–43.

The District Court entered a preliminary injunction on July 20, 2012. Aplt. App., vol. II, 540–47. The Tribal Officials and Corporation filed a notice of appeal in accordance with Rule 4(a)(1) of the Fed. R. App. P. on August 17, 2012. *Id.* at 552–55. Florence filed its notice of appeal on August 20, 2012.

The preliminary injunction is an interlocutory order reviewable under 28 U.S.C. § 1292(a)(1). This court has jurisdiction under 28 U.S.C. § 1331 because this case presents federal questions regarding tribal sovereignty, treaty rights, Constitutional standing, subject-matter jurisdiction, and treaty and statutory interpretation. This Court also has jurisdiction pursuant to 28 U.S.C. § 1291 and the collateral order doctrine that permits appeal of questions of tribal sovereign immunity.

STATEMENT OF ISSUES

1. Whether the district court erred in exercising jurisdiction where the Kialegee Tribal Town ("Tribe"), the Tribal Officials and the Corporation are sovereign immune from suit.

2. Whether the district court erred in dispensing with the Tribe as a party, while making declaratory rulings against the Tribe.

3. Whether the district court erred in stripping the Tribal Officials and Corporation of sovereign immunity, despite the absence of congressional abrogation or tribal waiver.

4. Whether the district court erred in finding the State of Oklahoma ("State") had standing to sue under IGRA and the tribal-state gaming compact alone, rather than requiring the State to prove injury in fact, causation and redressability.

5. Whether the district court erred in relaxing the State's evidentiary burden for a preliminary injunction, as well as misapplied three of the four preliminary injunction factors in the State's favor.

STATEMENT OF THE CASE

The Tribe is a federally-recognized Tribe organized under the Oklahoma Indian Welfare Act ("OIWA"). Aplt. App., vol. III, 538–90.

Tiger Hobia, Thomas Givens, and John Doe Nos. 1-7 are Tribal Officials. Aplt. App., vol. I, 25–48.

The Corporation is a federally-chartered corporation organized under OIWA. Aplt. App., vol. I, 22.

Florence is an Oklahoma limited liability company doing business in the State of Oklahoma. Aplt. App., vol. I, 22, 26.

The State sued the Tribal Officials, the Corporation, and Florence alleging violations of IGRA and a tribal-state gaming compact. Aplt. App., vol. I, 22. The State sought to enjoin the named Defendants alleging violation of IGRA and the tribal-state gaming compact. Aplt. App., vol. I, 22–43.

The Tribal Officials and the Corporation moved to dismiss based on sovereign immunity and that the Tribe was a necessary and indispensable party that could not be joined as it was immune from suit. Aplt. App., vol. I, 223–58; vol. II, 293–330. The Court, however, determined the Tribe was dispensable in the

proceeded against the Tribal Officials, the Corporation, and Florence despite the absence of a waiver of sovereign immunity by Congress or the Tribe. Aplt. App., vol. II, 372–393.

On July 20, 2012, the district court granted a preliminary injunction against the Tribal Officials, the Corporation, and Florence based upon findings against the Tribe and in favor of a non-party the Muscogee Creek Nation ("Muscogee") determining that IGRA had been violated. Aplt. App., vol. II, 533. It also made findings that the Defendants had violated the tribal-state gaming compact even though they were not parties thereto. *Id.* at 534. It held that the Tribe is a "subset" or "band" of a Muscogee, is not a successor-in-interest to the historic Creek Nation, and has no jurisdiction over the lands at issue. Aplt. Appl., vol II, 532–33.

On May 30, 2012, the Defendants filed a Motion to Reconsider a May 18, 2012, oral order to stop developing the Allotment in light of the changed circumstance that the Sisters had become members of the Tribe. Aplt. App., vol. II, 492–98. The Court denied the Motion to Reconsider. Aplt. App., vol. II, 540–47. This appeal followed.

STATEMENT OF FACTS

IGRA codified Indian tribes' rights to engage in gaming on Indian lands. 25 U.S.C. § 2710(b)(1), (d)(1). It defines Indian lands, 25 U.S.C. § 2703(4), 25

C.F.R. § 502.12, and requires tribal-state gaming compacts, 25 U.S.C. § 2710(d)(1)(c) for certain forms of gaming.

The State has a model tribal-state gaming compact which is offered to federally-recognized tribes who own or are the beneficial owners of Indian lands as defined by IGRA. Okla. Stat. tit. 3A, §§ 280–81 (2004).

The Tribe was organized under OIWA, 49 Stat. 1967, ch. 831, (June 26, 1936), *codified as amended* at 25 U.S.C. §§ 501-509, on June 12, 1941, Aplt. App., vol. III, 583–90. The Corporation was organized under OIWA on September 17, 1942, *Id.* at 591–97. The Tribe has a tribal-state gaming compact. *Id.* at 687–718.

Muscogee was also organized under OIWA in 1979. *Id.* at 598–617. Its constitution expressly provided that it would not "in any way abolish the rights and privileges of persons of the Creek Nation to organize Tribal towns or recognize [Muscogee] traditions." *Id.* at 598. Muscogee has a tribal-state gaming compact and a tribal gaming code. http://www.nigc.gov at the "Reading Room". Muscogee (Creek) Nation. *Id.* at 618–86.

Historically Creeks, including the Tribe, were a collection of autonomous Tribal Towns. They identified by their clan or Town not as part of a single, larger tribe. Creeks continue to follow town identification within central tribal government. Aplt. App., vol. II, 403–04; III, 740–41, 748, 752–54, 759–60, 762–65.

Creeks signed multiple treaties with the Federal Government. The 1832 Treaty created the right to self-government. Aplt. App., vol. III, 559–63. *See also Harjo v. Kleppe*, 420 F.Supp.1110, 1119 (D.D.C. 1976) (citing *Angie Debo, The Road to Disappearance* (Univ. of Okla. Press, 1941) p.99). An 1833 Treaty provided that the Creeks' reservation *"be taken and considered the property of the whole Muskogee or Creek nation."* Treaty with the Creeks, 7 Stat. 417, art. IV (Feb. 14, 1833). The 1866 Treaty reaffirmed previous treaty obligations and promised no interference by federal legislation with tribal organizations and rights. Aplt. App., vol. III, 564–70.

In 1901, Tyler Burgess received an allotment ("Allotment"). The Allotment is within boundaries of the former Creek Reservation and owned by members of the Tribe, Wynema Capps and Marcella Giles ("Sisters"). Aplt. App., vol. II, 378.

The Tribe exercises governmental control over the Allotment through exercise of sovereign power and economic development. *Id.* at 417–19.

SUMMARY OF ARGUMENTS

The United States District Court for the Northern District of Oklahoma erroneously denied the Tribal Defendants' Motion to Dismiss the Tribal Officials and the Corporation who are immune from suit, and erroneously failed to find that the Tribe was a necessary and indispensable party that could not be joined. Neither Congress nor the Tribe had waived the Tribe's sovereign immunity. The Court

also erred in exercising subject matter jurisdiction: (1) under IGRA because the Complaint was devoid of any allegations of either "Class III gaming activities" and "Indian lands"; and (2) under 28 U.S.C. § 1331 because that is not an independent conveyance of jurisdiction to the federal courts and requires an unequivocal statutory waiver of tribal sovereign immunity. The Court erred in ruling the Tribal Officials were acting in their individual capacities when they undertook economic development on behalf of the Tribe, on a restricted Indian allotment, on "Indian lands," in accordance with a tribal-state gaming compact, and in accordance with the Tribe's gaming ordinance. The Court also erroneously granted the State a preliminary injunction, because the State had no standing, injury in fact, causation, or redressability under IGRA or the tribal-state gaming compact. It also erred in relaxing the standard for preliminary injunction, as well as in misapplying three out of four preliminary injunction factors.

ARGUMENT

I. THE DISTRICT COURT ERRED IN FAILING TO DISMISS CLAIMS AGAINST THE TRIBE, ITS OFFICIALS, AND THE CORPORATION ON THE BASIS OF SOVEREIGN IMMUNITY

The district court concluded that the Complaint adequately plead facts establishing Article III standing. Aplt. App., vol. II, 392.

This Court reviews a district court's denial of tribal sovereign immunity *de novo*. *Crowe & Dunlevy, P.C. v. Stidam*, 640 F.3d 1140, 1153 (10th Cir. 2011),

citing *Miner Elec., Inc. v. Muscogee (Creek) Nation*, 505 F.3d 1007, 1009 (10th Cir. 2007).

It is well settled that Indian tribes possess common law immunity from suit traditionally enjoyed by sovereign powers. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *accord Berrey v. Asarco Inc.*, 439 F.3d 636, 643 (10th Cir. 2006). A tribe's sovereign immunity renders it judgment-proof unless the Tribe waives the immunity or Congress has abrogated it. *Santa Clara Pueblo*, 436 U.S. at 58; *Kiowa Tribe of Oklahoma v. Mfg. Techs. Inc.*, 523 U.S. 751, 754 (1998); *Okla. Tax Comm'n v. Citizen Board of Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991); *Miner Elec., Inc. v. Muscogee (Creek) Nation*, 505 F.3d 1107, 1009–10 (10th Cir. 2007). A tribal waiver of sovereign immunity cannot be implied, but must be clearly and unequivocally expressed. *E.g., Native Am. Distrib. v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1293 (10th Cir. 2008). Any ambiguity as to Congressional abrogation is resolved in favor of the tribe. *Ute Distrib. Corp. v. Ute Indian Tribe*, 149 F.3d 1260, 1264–69 (10th Cir. 1998) (reversing district court's refusal to dismiss on the ground of sovereign immunity).

Tribal sovereign immunity protects tribal officials "acting within the scope of their official capacities." *Crowe & Dunlevy*, 640 F.3d at1154. *See also Fletcher v. United States*, 116 F.3d 1315, 1324 (10th Cir. 1997); *Burrell v. Armijo*, 456 F.3d 1159, 1174 (10th Cir. 1997). Indeed, an action against officials acting within their

official capacity is construed as an unviable claim against the sovereign itself. *Brandon v. Holt*, 469 U.S. 464, 471–72 (1985); *see also Native Am. Distrib.*, 546 F.3d at 1296 ("the interest in preserving the inherent right of self-government in Indian tribes is equally strong when suit is brought against individual officers of the tribal organization as when brought against the tribe itself"). Tribal sovereign immunity also extends to a tribe's business and commercial enterprises. *Kiowa Tribe of Okla.*, 523 U.S. at 759; *Breakthrough Mgmt. Group, Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1183 (10th Cir. 2010); *Native Am. Distrib.*, 546 F.3d at 1292.

Sovereign immunity is dispositive of jurisdiction and the presence of a federal question does not defeat a tribe's immunity from suit. *Miner Elec., Inc.*, 505 F.3d at 1011 ("We disagree that federal-question jurisdiction negates an Indian tribe's immunity from suit."). Sovereign immunity will therefore defeat jurisdiction even where federal claims are present unless Congress has clearly abrogated immunity or the Tribe has unequivocally waived it. *Id*.

As the State accurately acknowledged, the Tribe is a federally-recognized Tribe organized pursuant to Federal law,[1] (Aplt. App., vol. I, 24–25), and therefore it enjoys the privileges and immunities available to all federally-recognized Indian tribes by virtue of their status, *including sovereign immunity*. The Tribe's immunity

[1] S*ee* 25 U.S.C. § 503; Aplt. App., vol. III, 583–90 (Kialegee Constitution); vol. II, 591–97 (Kialegee Corporate Charter); 77 Fed. Reg. 47868, 47870 (Aug. 10, 2012).

here is unsullied: there has been no Tribal waiver or Congressional abrogation. Without a "clear" and "unequivocal" waiver by the Tribe or a Congressional abrogation, sovereign immunity bars the State's suit against the Tribe. *See Santa Clara Pueblo*, 436 U.S. at 58.

The district court erred in applying the *Ex parte Young* exception to strip the Tribal Officials of sovereign immunity. Aplt. App., vol. II, 385–87. *Ex parte Young* applies only to "ongoing violations of federal law" and "prospective" relief. *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002). *Cf. Lewis v. New Mexico Dept. of Health*, 261 F.3d 970, 975 (10th Cir. 2001) (applying a four-factor test). As discussed below, the Complaint failed to demonstrate any violation of IGRA and the State could not invoke *Ex parte Young* for violations of state law. *See Cash Advance & Preferred Cash Loans v. State*, 242 P.3d 1099, 1112 (Colo. 2010).

Additionally, *Ex parte Young* only strips tribal officials of their immunity if they act outside the scope of their authority. *Tenneco Oil Co. v. Sac & Fox Tribe of Indian of Okla.*, 725 F.2d 572, 574, n.1 (10th Cir. 1984). *See also Crowe & Dunlevy*, 640 F.3d at 1156. Here, the Tribal Officials were sued in their official capacities, but the complained of acts are acts of the Tribe (the party to the compact). Though the Tribal Officials are the agents through whom the Tribe acts, they are not acting in their individual capacities. Even the State is aware of this:

> Declare that the Defendants, *acting on behalf of the Kialegee Tribal Town*, lack authority under federal law to construct or operate a Class III gaming facility on the Broken Arrow Property

Aplt. App. vol. I, 40 (emphasis added). Moreover, it is not the Tribal Officials that are allegedly conducting "Class III gaming activities" on "Indian lands." Enjoining the Tribal Officials only causes the Tribe to cease its activities. This sort of relief against the sovereign, is exactly what is barred. *Cf. Tenneco*, 725 F.2d at 576.

In any event, the Tribal Officials are acting within the scope of their authority. They can regulate land and the Tribe's members; appropriate funds for Tribal public purposes; protect Tribal treaty rights; and exercise of powers delegated to the Tribe by the Secretary of the Interior or other federal officers or agencies. Aplt. App., vol. III, 593–94. Such activities are quintessentially sovereign acts. Therefore, the court erred in applying the *Ex parte Young* exception.

Further, the district court determined the "sue and be sued" clause in the Corporation Charter's stripped the Corporation of its sovereign immunity. Aplt. App., vol. II, 387 ("the 'sue and be sued' language in the Town Corporation's Corporate Charter results in a waiver of sovereign immunity by the Town Corporation"), and 522 ("The 'sue and be sued' language in the Town Corporation's Corporate Charter may constitute a waiver of sovereignty [sic] immunity in actions

involving the corporate activities of the tribe."). These single sweeping sentences represent the entirety of the district court's analysis.

A "sue and be sued" clause would not waive a *tribe's* sovereign immunity of *the tribe* itself. *Seneca-Cayuga Tribe of Okla. v. Oklahoma ex rel. Thompson*, 874 F.2d 709 n.9 (10th Cir. 1989). When determining whether a Charter's "sue or be sued" clause waives a *tribal corporation's* sovereign immunity, this Circuit considers whether the Corporation functions in a governmental capacity, in which case, a "sue and be sued" clause does not waive the Corporation's immunity. *Native American Distributing v. Seneca-Cayuga Tobacco, Co.*, 491 F.Supp. 2d 1056, 1065 (N.D. Okla. 2007), *aff'd*, 546 F.3d 1288 (10th Cir. 2008). Key to the analysis is whether the Corporation is created as "an operating division of the tribe in its governmental capacity" as reflected in the documents creating the corporation and whether the Corporation's activities serve as "essential governmental functions" of the tribe. *Id.* at 1066.

Here, the court failed to apply even a summary analysis, as required by *Native American Distributing*, of whether the Corporation was operating as a subdivision of the Tribe, whether the alleged Class III gaming activities on "Indian land," and whether its acts were part of the governmental functions of the Tribe.

Further, the Charter's "sue and be sued" clause was only a grant of authority to *issue* a waiver, if and when the Tribe deemed it advisable and in the best interest

of the Tribe and its members. *See* Aplt. App., vol. III, 592 (Corporate Charter ¶ 3(b) stating the "powers" of the Tribal Town shall include the right "[t]o sue and be sued"). Thus, the clause was not a waiver itself. It merely authorized the Corporation *to agree* to sue or be sued but no such argument was present here. Neither the Tribe nor the Corporation waived sovereign immunity.

Furthermore, if the court had conducted the analysis, it would have determined that the Corporation was created as a subdivision of the Tribe because the Corporate Charter tasks the Corporation with managing the Tribe's monies and property, protecting the Tribe's treaty rights, and developing the Tribe's resources and economy. Aplt. App. vol. III, 592–94. Thus, the Corporation's alleged acts at issue are governmental services. Accordingly, the Charter's "sue and be sued" clause does not waive the Corporation's sovereign immunity.

II. THE TRIBE WAS INDISPENSABLE AND COULD NOT BE JOINED

The district court's determined that the Tribe was not an indispensable party. Aplt. App., vol. II, 387–88.

This Court reviews a district court's Rule 19(b) determination under an abuse of discretion standard, but legal conclusions underlying a Rule 19 determination are reviewed *de novo*. *Davis ex rel. Davis v. U.S.*, 343 F.3d 1282, 1289 (10th Cir. 2003), citing *Davis ex rel. Davis v. U.S.*, 192 F.3d 951, 957 (10th Cir. 1999).

A. The 19(b) Determination Is Appealable As A Collateral Order

The determination is appealable under the collateral order doctrine. Collateral orders are appealable and appropriately deemed "final" because they are "conclusive orders" that resolve important questions separate from the merits, and that are effectively unreviewable on appeal from the final judgment in the underlying action. *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 130 S.Ct. 599, 605 (2009).

The decisive attribute of a collateral order is "whether delaying review until the entry of final judgment would imperil a substantial public interest or some particular value of a high order." *Id*. (internal quotation omitted). The district court's 19(b) decision infringes upon the Tribe's sovereign immunity and precedes a final judgment.[2]

B. The 19(b) Determination Is Reviewable Under Pendent Appellate Jurisdiction

The district court's dispensability determination is "inextricably intertwined" with an appealable decision and is appropriately reviewed under pendent appellate jurisdiction. *Crowe & Dunlevy,* 640 F.3d at 1148. A pendent claim is considered

[2] This Court recently held that a district court's determination under Fed. R. Civ. P. 19(a) is not appealable under the collateral order doctrine. *Crowe & Dunlevy, P.C.*, 610 F.3d at 1148. The Court did not opine whether the same principle applies to a district court's denial of indispensability under Fed. R. Civ. P. 19(b). It should not, at least in the case where, as here, the denial of indispensability directly affects the rights of an absent sovereign. In that case, a district court's denial of sovereign indispensability under 19(b) should, like a denial of sovereign immunity, be immediately reviewable under the collateral order doctrine.

"inextricably intertwined" if it is coterminous with "the claim before the court on interlocutory appeal—that is, when the appellate resolution of the collateral appeal *necessarily* resolves the pendent claim as well." *Id*. *See also Breakthrough Mgmt. Group, Inc.*, 629 F.3d at 1197.

The district court dispensed with the Tribe because it found under *Ex parte Young* the Tribal Officials were proper parties. Aplt. App., vol. II, 388. The court reasoned that because Hobia was a defendant, there was "virtually no risk the tribe's interests will be impaired or impeded" by the State since "the Kialegee Tribal Town's interests are so closely aligned with Hobia, its Tribal Town King." *Id.* However, *Ex parte Young* did not apply because the State's Complaint is unviable in the absence of the Tribe. A reversal of the district court's *Ex parte Young* determination rendered the Tribe a necessary and indispensable party because the action directly adjudicated the Tribe's inherent sovereign rights. *See* Aplt. App., vol. I, 36–41; vol. II, 533.

Whether the Tribe could have been joined was inextricably intertwined with the question of waiver of sovereign immunity. *Wisconsin v. Ho-Chunk Nation*, 512 F.3d 921, 929 (7th Cir. 2008). The district court ignored the importance of sovereign immunity in the 19(b) context. *See Republic of the Philippines v. Pimentel*, 553 U.S. 851 (2008); *Citizen Potawatomi Nation v. Norton*, 248 F.3d 993, 1001 (10th Cir. 2001) (noting strong policy favoring dismissal under 19(b)

where tribe has sovereign immunity); *Davis v. U.S.*, 192 F.3d 951, 960 (10th Cir. 1999); *Klamath Tribe Claims Comm. v. United States*, 106 Fed. Cl. 87, 97 n.21 (Fed. Cl. 2012). Because the district court's indispensability determination is inextricably intertwined with the matters now on interlocutory appeal, this Court may exercise pendent appellate jurisdiction over the district court's 19(b) determination.

C. The District Court Erred In Ruling That The Defendants' Personal Interests Were Virtually Identical To The Interests of The Tribe

The court erred because the Tribe's interests were not adequately represented in the lawsuit. Aplt. App. vol. I 229-31, vol. II 387-88.

Rule 19(b) mandates review to determine "whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable." *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 108 (1968); *see also* Fed. R. Civ. P. 19(b)(1)–(4). When an indispensable party is immune from suit, immunity itself is the compelling factor. *Enter. Mgmt. Consultants, Inc. v. U.S. ex rel. Hodel*, 883 F.2d 890, 894 (10th Cir. 1989).

A declaration of the scope of the Tribe's sovereign rights is distinguishable from the 19(b) dispensation in the cases erroneously relied upon by the district court. In *Kansas v. United States*, 249 F.3d 1213, 1226–27 (10th Cir. 2001),

Kansas sued the United States for declaratory and injunctive relief from a Federal Agency decision that a parcel of land was "Indian lands." The decision focused on the propriety of the Agency decision and held the interests of the Agency, the tribal officials, and the tribe were virtually identical because they were advocating to uphold the Agency decision. *See id.* It did not state any tribal officials were stripped of immunity under *Ex parte Young*. *Id*.

Similarly, in *Sac & Fox Nation of Missouri v. Norton*, 240 F.3d 1250 (10th Cir. 2001), the Court relied upon the trust doctrine to hold the Wyandotte Tribe was neither required nor indispensable because of the presence of the Secretary of the Interior, whose "interest in defending his determinations is virtually identical to the interests of the Wyandotte Tribe." *Id*. at 1259 (internal quotations omitted).

The Complaint did not name the Tribe as a defendant but sought declarations of the Tribe's rights. The district court stripped immunity from the Tribal Officials under *Ex parte Young*, and determined the Tribe was not a necessary party because the interests of its officials were "so closely aligned" with the Tribe that there was "virtually no risk the tribe's interests will be impaired or impeded." Aplt. App., vol. II, 388. However, *Ex parte Young* applies only where an official *acted in an unauthorized manner or outside the scope of his office.* Therefore, the court erroneously held the Tribal Officials could adequately represent the Tribe's interests, while simultaneously finding the same to not be

acting within their official capacity. But the individual interests of the Tribal Officials could not mirror the Tribe's interests.

D. The District Court Erred In Not Dismissing The State's Action Under 19(b)

The court's judgment that the Tribe has no jurisdiction over the Allotment limited the Tribe's ability to exercise its inherent sovereign rights, prejudiced the Tribe, and was improper under Fed. R. Civ. P. 19(b)(1). The prejudice to the Tribe's sovereign authority could not have been lessened or avoided. Fed. R. Civ. P. 19(b)(2). The district court's decision may be inadequate to the extent it only binds the Tribal Officials. Fed. R. Civ. P. 19(b)(3). Should 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.

E. The District Court Erred In Failing To Consider The Indispensability of The Muscogee Creek Nation

Indispensability can be raised at any time, including after entry of adverse judgment. *Mescalero Apache Tribe v. State of New Mexico*, 131 F.3d 1379, 1383 (10th Cir. 1997). The State alleged the Allotment was "held by two enrolled members of the Muscogee (Creek) Nation" and was "subject to federal restraints against alienation." Aplt. App., vol. I, 22. The Allotment constitutes Indian country under federal law as an allotment subject to federal restraints against alienation. 18 U.S.C. § 1151(c). Whether the Allotment constitutes Indian land

under IGRA requires the district court to adjudicate a tribe's scope of sovereign authority. 25 U.S.C. § 2703(4)(B). In hearings on the State's request for a preliminary injunction, as in its ruling in granting the State's request, the district court assessed and adjudicated the rights of Muscogee over the Allotment, even though Muscogee was not a party to the action.

The district court's "Indian lands" determination, by definition, effects an "allocation of federal, tribal, and state authority with respect to Indians and Indian lands." *Indian Country, U.S.A., Inc. v. Okla. ex rel. Okla. Tax Comm'n*, 829 F.2d 967, 973 (10th Cir. 1987). *See also, N. Arapaho Tribe v. Harnsberger*, 697 F.3d 1272, 1279 (10th Cir. 2012) (acknowledging that land status has significant implications for the governance of that land and the events occurring upon it). Therefore, its determination affects the interests of Muscogee, an indispensable party, whose sovereign immunity would result in dismissal of the State's action. *Republic of Philippines*, 553 U.S. at 861.

III. THE DISTRICT COURT ERRED ON EXERCISING SUBJECT MATTER JURISDICTION

A. The Complaint Did Not Allege Class III Gaming Activities Under IGRA

Jurisdiction and sovereign immunity arguments may be heard on appeal even if not raised below. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 506 (2006); *1mage Software, Inc. v. Reynolds & Reynolds Co.*, 459 F.3d 1044, 1048 (10th Cir. 2006).

A court must make an independent determination of whether subject matter jurisdiction exists, even in the absence of challenge. *Arbaugh*, 546 U.S. at 506. *See also Devon Energy Prod. Co., L.P. v. Mosaic Potash Carlsbad, Inc.*, 693 F.3d 1195, 1208 n.10 (10th Cir. 2012); *Mescalero Apache Tribe v. State of New Mexico*, 131 F.3d 1379, 1386 (10th Cir. 1997).

The Complaint claimed federal jurisdiction under 25 U.S.C. § 2710(d)(7) "and/or" 28 U.S.C. § 1331. Aplt. App., vol. I, 26; vol. II, 374. The district court did not articulate a basis for jurisdiction in dismissing the Tribal Defendants' challenge to subject matter jurisdiction, though it suggested reliance on 25 U.S.C. § 2710(d)(7). Aplt. App., vol. II, 374. However, the court's subsequent finding stated "[t]his Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1331, and has jurisdiction over the parties to this action." *Id.* at 521. In either scenario, no subject matter jurisdiction over the Complaint was present.

IGRA § 2710(d)(7) provides the federal courts jurisdiction over only three types of claims. 25 U.S.C. § 2710(d)(7)(A)(i)–(iii). The Complaint rested jurisdiction on § 2710(d)(7)(A)(ii), granting jurisdiction "to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact." Whether § 2710(d)(7)(A)(ii) conferred jurisdiction over the State's Complaint is a matter of statutory interpretation. *Ho-Chunk Nation*, 512 F.3d at 929. IGRA is to be construed liberally in favor of tribes, with ambiguities

interpreted to their benefit. *United Keetoowah Band of Cherokee Indians v. State of Okla. ex rel. Moss*, 927 F.2d 1170, 1179 (10th Cir. 1991) (citing *Montana v. Blackfeet Tribe of Indians*, 471 U.S 759, 766 (1985)); *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1461 (10th Cir. 1997).

The text of IGRA states that jurisdiction under § 2710(d)(7)(A)(ii), requires, at a minimum (1) "a class III gaming activity"; (2) "located on Indian lands"; *and* (3) "conducted in violation" of a tribal-state gaming compact. These jurisdictional requirements are conjunctive, therefore, all must be present for jurisdiction to lie. *Michigan v. Bay Mills Indian Cmty.*, 695 F.3d 406, 412 (6th Cir. 2012); *See also Ho-Chunk Nation*, 512 F.3d at 933 (finding § 2710(d)(7)(A)(ii) claims limited to compact issues in 2710(d)(3)). Under IGRA's unequivocal text, which must be construed in favor of the Tribe, the Complaint failed to satisfy IGRA's jurisdictional requirements.

Here, the Complaint failed to allege the presence of *any* gaming activity, including "Class III gaming activities," as required by IGRA 2710(d)(7)(A)(ii). IGRA defines "class III gaming activity" as *gambling*, not any other activity sufficient to invoke jurisdiction under § 2710(d)(7)(A)(ii). However, the State sought to impose civil regulatory authority in Indian country merely by alleging potential, future gaming activities. Aplt. App., vol. I, 22–24.

B. The Complaint Did Not Allege "Indian Lands" Under IGRA

The Complaint alleged non-Indian lands of the Tribe. For that reason alone, IGRA jurisdiction fails because the second requirement for invoking IGRA jurisdiction is "Class III gaming activities" be located *on "Indian lands."* 25 U.S.C. § 2710(d)(7)(A)(ii). *Florida v. Seminole Tribe of Florida*, 181 F.3d 1237, 1249 (11th Cir. 1999); *Bay Mills Indian Cmty.*, 695 F.3d at 412; *Citizens Against Casino Gambling in Erie County v. Hogen*, 704 F. Supp. 2d 269, 276 (W.D.N.Y. 2010) *aff'd*, 417 F. App'x 49 (2d Cir. 2011).

A factually analogous case recently decided in the Sixth Circuit, *Bay Mills Indian Cmty.*, 695 F.3d 406, concerned whether Michigan could invoke jurisdiction under 2710(d)(7)(A)(ii) to enjoin the Bay Mills Indian Community from operating a small casino 100 miles from its reservation.[3] The state and the tribe had previously entered into a tribal-state gaming compact under IGRA in 1993, whereby the tribe operated a casino on its reservation. *Id*. at 410. Michigan alleged the off-reservation gaming operations violated the compact since they were conducted on non-Indian lands. *Id.* at 412. Finding "insuperable Article III defects," the Sixth Circuit vacated the injunctive relief on appeal and dismissed the complaint. *Id*. at 412–13. The Sixth Circuit found no jurisdiction could exist for compact violation claims because "Indian land" is a statutory jurisdictional

[3] A second tribe, the Little Traverse Bay Bands of Odawa Indians, also joined in filing suit against Bay Mills.

requirement, and the Complaint "defeat[ed] their argument that [IGRA] supplies jurisdiction" by alleging that the casino site was not "Indian lands" of the tribe. *Id.* at 412. The Sixth Circuit further held that even if the allegations arose "on Indian land" then there could be no violation of the gaming compact, rendering the State's Complaint nonjusticiable on the merits. *Id*. at 412–13.

The State's Complaint suffered from the same jurisdictional and justiciability defects as *Bay Mills*. It alleged the Allotment is not "Indian lands" under IGRA. *See, e.g.,* Aplt. App., vol. I, 33 (Allotment cannot be Tribe's Indian lands); *Id.* at 33, 39 (Allotment not "Indian land" under IGRA); vol. I, 37 (Allotment not Indian land under IGRA or Compact[4]); *Id.* at 38 (Allotment not Tribe's Indian lands under Compact).

The Complaint did not manifest a violation of the gaming compact, as required under IGRA § 2710(d)(7)(A)(ii), because it did not allege "Indian land." The "Location" provision of the gaming compact allows the Tribe to establish and operate "covered games" only on Indian land. The Complaint did not allege "Class III gaming activities" taking place on "Indian land," the only kind of activity governed by the gaming compact. It therefore also failed to allege violation of the terms of the gaming compact, further defeating jurisdiction under IGRA.

[4] Part 5.L of the tribal-state gaming compact defines "Indian lands" by reference to IGRA, and further provides that "Nothing herein shall be construed as expanding or otherwise altering the term Indian lands, as that term is defined in IGRA, nor shall anything herein be construed as ltering the federal process governing the tribal acquisition of Indian lands for gaming purposes." Aplt. App., vol. III, 701. [Gaming Compact, 5.L]

C. The Complaint Did Not State A Claim Under 28 U.S.C. § 1331

28 U.S.C. § 1331 jurisdiction is appropriate "when the cause of action is created by federal law or turns on a substantial question of federal law." *Morris v. City of Hobart*, 39 F.3d 1105, 1111 (10th Cir. 1994). Jurisdiction "must be determined from what necessarily appears in the plaintiff's statement of his own claim in the bill or declaration, unaided by anything alleged in anticipation of avoidance of defenses which it is thought the defendant may interpose." *Gilmore v. Weatherford*, 694 F.3d 1160, 1173 (10th Cir. 2012). Section 1331 confers subject matter jurisdiction against an Indian tribe only *"where another statute provides a waiver of tribal sovereign immunity or where the tribe unequivocally waives its immunity." Miner Elec., Inc.*, 505 F.3d at 1011 (emphasis added). As discussed above, IGRA was not violated and thus, the district court's exercise of jurisdiction under § 1331 was in error. Aplt. App., vol. II, 384–86.

IV. THE STATE LACKED STANDING UNDER IGRA

IGRA provides a "comprehensive framework for gaming activities on Indian lands which seeks to balance the interests of tribal governments, the states, and the federal government." *Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546, 1548 (10th Cir. 1997) (internal quotations omitted). "Assuming other requisites of the Act are met, IGRA permits a federally-recognized Indian tribe to establish gaming facilities on 'Indian lands' within the tribe's jurisdiction." *Kansas*, 249 F.3d at 1218. A tribe may

engage in Class III gaming activities after it adopts a gaming ordinance approved by NIGC and enters into a tribal-state gaming compact. 25 U.S.C. § 2710(d).

Standing is an essential component of the case or controversy requirement of the United States Constitution ensuring that plaintiff's claims arise in a concrete factual context that is appropriate for a judicial resolution. U.S. CONST. art. 3, § 2; *Valley Forge Christian Coll v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982). This court reviews a district court's determination of standing *de novo*. *Am. Atheists, Inc. v. Davenport*, 637 F.3d 1095, 1113 (10th Cir. 2010); *Hackford v. Babbitt*, 14 F.3d 1457, 1465 (10th Cir.1994).

To have standing (1) a plaintiff must have suffered an "injury in fact," defined as an invasion of a legally protected interest that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) there must be a causal connection between the injury and the conduct complained of, such that the injury is fairly traceable to the challenged action of the defendant; and (3) it must be likely, not merely speculative, that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). Each element of standing "must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at successive stages of the litigation." *Id*. at 561. Courts

determine standing at the time the action is brought. *Jordan v. Sosa*, 654 F.3d 1012, 1019 (10th Cir. 2011).

The State, as the party invoking federal jurisdiction, was required to demonstrate its Article III standing, and bore the burden of establishing the elements of standing. *Lujan*, 504 U.S. at 561. Standing requirements cannot be relaxed by statute. *Valley Forge Christian Cell. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 646, 487 n.24 ("Neither the Administrative Procedure Act, nor any other congressional enactment, can lower the threshold requirements of standing under Art. III."). Having failed to allege an injury in fact that is concrete and particularized, or actual and imminent, the State was unable to establish standing under IGRA.

A. The State Did Not Show Injury in Fact

To establish standing, a plaintiff must first prove that it has suffered an injury in fact, which is an invasion of a legally protected interest that is both concrete and particularized, and actual or imminent. *Diamond v. Charles*, 476 U.S. 54, 64 (1986). Such an injury cannot be conjectural or hypothetical, and must be "certainly impending to constitute injury in fact." *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990) (internal quotations omitted). For example, the operator of a gaming facility may not allege an injury due to competition without "present[ing] facts and figures demonstrating and quantifying the diversion of business." *Sault*

Ste. Marie Tribe of Chippewa Indians v. United States, 288 F.3d 910, 916 (6th Cir. 2002). There is no basis to relax the standing requirements simply "because asserted injuries are pressed by a state." *Massachusetts v. EPA*, 549 U.S. 497, 536 (2007) (Roberts J., dissenting).

Here, the State did not show an injury under IGRA as a party to the Compact or as *parens patriae* of the citizens of Oklahoma. Rather, the State alleged a hypothetical injury not qualifying as concrete and particularized. *Lujan*, 504 U.S. at 560–61.

The district court's reliance on *Massachusetts v. EPA*, allowing the state to have "special solicitude" in standing requirements was erroneous. In *Massachusetts*, the court found that Massachusetts was entitled to relaxed standing analysis not merely because it was a state, but because it had a procedural right to challenge the EPA's actions as a quasi-sovereign entity. *Massachusetts*, 549 U.S. at 520. There, Massachusetts had suffered a concrete injury in its capacity as a landowner because EPA had refused to regulate greenhouse gas emissions despite a congressional mandate. *Id*. at 521–22. Thus, even when a state sues in its capacity as a quasi-sovereign to protect its interests and those of its citizenry from air pollution,[5] or other environmental threats endangering the public's health or

[5] The district court cites *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907) for the proposition that a state has *parens patriae* standing to challenge an action that affected the State's power over its territory. However, in *Tennessee Copper*, the State of Georgia enjoined copper

welfare, there is a concrete and particularized injury in the form of an actual—ongoing or future—harm. Here, the State could not establish such harm.

When a state asserts a *parens patriae* action, it must still prove an injury-in-fact sufficient to satisfy the standing requirements of Article III of the United States Constitution. *Table Bluff Reservation v. Phillip Morris, Inc.*, 256 F.3d 879, 885 (9th Cir. 2001); *Chiles v. Thornburgh*, 865 F.2d 1197, 1208 (11th Cir. 1989); *People of State of Illinois v. Life of Mid-America Ins. Co.*, 805 F.2d 763 (7th Cir. 1986). Therefore, it must demonstrate the principle element of Article III standing —that it suffered an "injury in fact" that is both "concrete and particularized" and "actual or imminent, not 'conjectural' or 'hypothetical.'" *Lujan*, 504 U.S. at 560–61.

The State alleged it will suffer irreparable injury in that a casino on the Allotment will "adversely affect, and in fact transform, the surrounding area . . . ." Aplt. App., vol. I, 39. Although this alleged injury was vague, speculative, and not in sufficiently concrete terms, the district court found injury in fact. But allegations of future harm such as "conflicts with and would adversely affect adjoining and nearby uses and is inappropriate in the proposed location" is not a distinct and palpable injury. *See Sears v. Hull*, 961 P.2d 1013, 1017–18 (Ariz. 1998) (finding an injury insufficient where it was alleged that a gaming facility would expose

companies located in Tennessee from discharging pollutants that were inflicting "a wholesale destruction of forests, orchards and crops" across the border in Georgia. *Id.* at 236. While the State of Georgia had *parens patriae* standing to challenge an action affecting its territory, a concrete, particularized, and actual injury had occurred in the form of forest and crop destruction.

plaintiffs' children to "conduct contrary to the[ir] values," result in "urban crowding, traffic and stresses" and cause "economic loss" to surrounding homes and businesses) Here, the State did not allege injuries that were concrete or particularized.

Additionally, the State failed to satisfy the requirements to bring a *parens patriae* action. In *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592 (1982), the Supreme Court set forth the necessary elements for a state to bring a *parens patriae* action. Subsequent courts have elucidated the three-part test:

> To establish *parens patriae* standing under *Snapp*, the plaintiff must allege the following three elements: (1) the State must have alleged injury to a sufficiently substantial segment of its population; (2) the State must articulate an interest apart from the interests of particular private parties; and (3) the state must express a quasi-sovereign interest.

Quapaw Tribe of Okla. v. Blue Tee Corp., 653 F. Supp. 2d 1166, 1179 (N.D. Okla. 2009) (citations omitted) (internal quotations omitted)). Commencing a *parens patriae* action requires a state to satisfy all three prongs of this test. *Id*. In addition, "[t]he governmental entity must also show that the threatened injury is not speculative." *Id*. Thus, a state may bring a *parens patriae* action when an actual or imminent injury falls upon a substantial segment of its population. A state's ability to establish standing under *parens patriae* is limited because the state can only assert a claim that injures a right common to all of its citizens. *See Snapp*, 458 U.S. at 600. Therefore, the injury must be so broad that a state's sovereign interests are

implicated and it is not "merely litigating the personal claims of its citizens." *Pennsylvania v. New Jersey*, 426 U.S. 660, 665 (1976). *See also Maryland v. Louisiana*, 451 U.S. 725, 737 (1981) (*parens patriae* allowed "where the injury alleged affects the general population of a state in a substantial way").

The State did not establish all three elements necessary to maintain a *parens patriae* action, and as a result, and its Complaint was insufficiently "concrete to create an actual controversy between the State and the defendant." *Snapp*, 458 U.S. at 602. The alleged injury did not affect a substantial segment of Oklahoma's population as a whole. In *Snapp*, the court reiterated that a state must allege "injury to a sufficiently substantial segment of its population," not just an "injury to an identifiable group of individual residents." *Id.* at 607. *Parens patriae* actions are favored where a "great many citizens" of a state are faced with increased costs aggregating millions of dollars. *Maryland*, 451 U.S. at 739. While the State complained that the casino's location will cause an injury "to several residential subdivisions" and "a proposed new elementary school," it did not constitute a "sufficiently substantial segment" of Oklahoma's population. The State alleged *parens patriae* but did so to protect the interests a small segment of Broken Arrow's population, and one *proposed* elementary school. Thus, the State represented the interests of "a small group of citizens who are likely to challenge"

the harm directly, *Maryland*, 451 U.S. at 739, and consequently did not satisfy the first *Snapp* element.

The district court erroneously relied upon the State's allegation that the casino "conflicts with and would adversely affect adjoining and nearby uses and is inappropriate in the proposed location." A quasi-sovereign state interest must be "more . . . than injury to an identifiable group of individual residents." *Id*. The State, having only alleged speculative and attenuated harm, did not meet the requirements of a quasi-sovereign interest.

The State did not show the threatened injury was imminent. As discussed *supra*, there were no violations of the Compact or IGRA. The Complaint alleged only possible future injury to a *proposed* elementary that will not occur if the school is never built. Moreover, the alleged adverse effects to the residential subdivisions were hypothetical at best as the Complaint alleged no increased traffic, crime, or other socio-economic stresses. Alleged economic loss to the immediate community surrounding a proposed casino is a speculative injury. *Sears*, 961 P.2d at 1017–18. Because the State did not meet the *Snapp* requirements and did not show the alleged injury was more than speculative, the State did not allege an injury in fact sufficient to satisfy Article III standing or the *parens patriae* doctrine.

B. The State Did Not Show Causation

Without a concrete and particularized injury, causation was not met. Causation demands that the injury be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." *Lujan*, 504 U.S. at 561 (citation omitted). To satisfy this requirement, a state must show that a tribe's violation of IGRA and the Compact caused its injury. *See Habecker v. Town of Estes Park, Colo.*, 518 F.3d 1217, 1225 (10th Cir. 2008). Here, the Tribe neither violated the tribal-state gaming compact nor IGRA because the Tribe has not conducted "Class III gaming activities" and the State alleged the activity is on non-Indian lands.

C. The State Did Not Show Redressability

The Tenth Circuit requires a plaintiff to "demonstrate a substantial likelihood that the relief requested will redress its injury in fact." *Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1158 (10th Cir. 2005). "A plaintiff satisfies the redressability requirement when he shows that a favorable decision will relieve a discrete injury to himself." *Larson v. Valente*, 456 U.S. 228, 244, n.15 (1982). Congress has not accorded a procedural right under IGRA to circumvent Article III standing requirements; therefore, the State must meet all the normal standards for redressability and immediacy. *Massachusetts*, 549 U.S. at 517–18. As discussed above, the State failed to demonstrate a concrete, actual, and imminent injury.

Until an injury occurs or is quantified and particularized in more concrete terms, a cause of action cannot not be redressed. As a result, the State could not satisfy redressability.

V. THE STATE LACKED STANDING UNDER THE TRIBAL-STATE GAMING COMPACT

The State also lacked standing under the tribal-state gaming compact. As discussed *supra*, IGRA provides that a tribal-state gaming compact may be negotiated whereby a state can govern the conduct of "Class III gaming" on "Indian lands." 25 U.S.C. §§ 2701, 2710(d). "[C]lass 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 . . . by the Indian tribe that is in effect." *Id*. at § 2701(d)(2)(C). Upon tribal and federal approval of the State's model gaming compact, a tribe may commence Class III gaming operations in compliance with the compact's terms. *See* Okla. Stat. tit. 3A, §§ 280–81. While a state has an interest in ensuring compliance with the terms of a compact, *Kansas*, 249 F.3d at 1223–24, it may not use a compact to regulate activity not covered by the compact.

Here, the Tribe and the State entered into a tribal-state gaming compact that was approved by the Tribe and Secretary of the Interior. But, as discussed *supra*, the compact did not vest the State with standing to proceed in this case because the State did not allege "Class III gaming activity" on "Indian land." Thus, because the compact did not establish standing, the State did not satisfy Article III elements.

Ripeness is a question of timing as its purpose is to prevent a premature judicial decision. *See Abbott Labs v. Gardner*, 387 U.S. 136, 148 (1967). Ripeness focuses "not on whether the plaintiff was in fact harmed, but rather whether the harm asserted has matured sufficiently to warrant judicial intervention." *Morgan v. McCotter*, 365 F.3d 882, 890 (10th Cir. 2004) (citing *Warth v. Seldin*, 422 U.S. 490, 499 n.10 (1975)).

Ripeness analysis involves (1) whether the issues are fit for judicial decision, and (2) whether the parties would suffer hardship if judicial consideration is withheld. *Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 201 (1983). Courts examine "whether [a] determination of the merits turns upon strictly legal issues or requires facts that may not yet be sufficiently developed." *New Mexicans for Bill Richardson v. Gonzales*, 64 F.3d 1495, 1499 (10th Cir. 1995). Where the issues have not yet been fully developed or are dependent upon future events that are uncertain or may never occur, a court is required to stay its hand. *McCotter*, 365 F.3d at 890. *See also Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1098 (10th Cir. 2006).

The Tenth Circuit found an interpretation of a tribal compact involved complex questions of federalism, tribal sovereignty, and property rights of a tribe, and was unripe until the property rights of the tribe were determined. *Tarrant Reg'l Water Dist. v. Herrmann*, 656 F.3d 1222, 1250 (10th Cir. 2011). Similarly, in

Sisseton-Wahpeton Sioux Tribe v. U.S., 804 F. Supp. 1199, 1205 (D.S.D. 1992), the district court found a tribe's action unripe because it was unclear whether the tribe's casino would include gaming.

Here, the Tribe neither violated the compact nor IGRA, and there was no factual development of an injury in fact to the State's quasi-sovereign interest. Instead, the violation rested on "contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998). Therefore, the claims were not ripe.

Under the hardship prong, courts examine whether the challenged action creates an immediate dilemma for the parties involved. *New Mexico for Bill Richardson*, 64 F.3d at 1499. Because the State showed only a hypothetical injury, it did not satisfy the requirement that hardship result from a concrete and particularized injury. *Lujan*, 504 U.S. at 560–61. Instructively, in *Bay Mills*, the Court held the State's claim was ripe because the state had entered into a revenue-sharing compact with Little Traverse Band's casino, approximately 40 miles from Bay Mills casino, and the state was *actively* losing money on account of the Bay Mills casino. *Bay Mills*, 695 F.3d at 411.

Here, the State did not demonstrate hardship because the Tribe had not commenced "Class III gaming activities" and the alleged injuries to the health and well-being of nearby residents would be speculative. Further, IGRA provides the

State legal remedies when a compact violation occurs. Because the injuries alleged by the State are speculative and hypothetical, a judicial determination should have been deferred. Without such delay, the Complaint rested on events that may never occur. *Texas*, 523 U.S. at 300.

VI. NO PRELIMINARY INJUNCTION SHOULD HAVE ISSUED

The Tenth Circuit reviews a district court's grant of a preliminary injunction for abuse of discretion. *Flood v. ClearOne Commc'ns, Inc.*, 618 F.3d 1110, 1117 (10th Cir. 2010). An abuse of discretion "occurs when the district court commits an error of law or relies upon clearly erroneous factual finding." *Id*. (citation omitted). A district court's interpretation of a treaty or statute and the historical findings of fact necessary for such interpretation are reviewed *de novo*. *Pittsburgh & Midway Coal Min. Co. v. Yazzie*, 909 F.2d 1387, 1393–94 (10th Cir. 1990).

A. The Factors

A preliminary injunction may be issued if a movant has shown: (1) the movant will suffer irreparable harm unless the injunction issues; (2) there is a substantial likelihood the movant ultimately will prevail on the merits; (3) the threatened injury to the movant outweighs any harm the proposed injunction may cause the opposing party; and (4) the injunction would not be contrary to the public interest. *Kiowa Indian Tribe of Okla. v. Hoover*, 150 F.3d 1163, 1171 (10th Cir. 1998). Because a preliminary injunction is an extraordinary remedy, the movant's

right to relief must be clear and unequivocal. *Prairie Band*, 253 F.3d at 1246. The State's evidence failed to satisfy these conditions, and the district court erred in granting the preliminary injunction.

1. Irreparable Harm

The court erred when it held that the State would suffer irreparable harm in the absence of an injunction against the Tribal Officials, Corporation, and Florence even though the State failed to demonstrate any harm to its interests. Aplt. App., vol. II, 536–37.

Irreparable harm is shown where a plaintiff demonstrates a significant risk he or she will experience harm that cannot be compensated by monetary damages because such damages would be inadequate or difficult to ascertain. *Greater Yellowstone Coal. v. Flowers*, 321 F.3d 1250, 1258 (10th Cir. 2003); *Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001). Irreparable harm is not harm that is "merely serious or substantial," but harm that is of "such imminence that there is a clear and present need for equitable relief to prevent irreparable harm." *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1189 (10th Cir. 2003).

The district court held the State (1) had an interest in enforcing the gaming compact "prior to a violation,"[6] (2) other tribes would be adversely affected, (3)

[6] The only authority relied on by the district court is inapposite. In *Kansas v. United States*, 249 F.3d 1213 (10th Cir. 2001), irreparable harm consisted in the loss of state sovereignty over state lands taken into trust by the United States for the benefit of an Indian tribe. Here, the Allotment

and development on the Allotment will detrimentally affect the living standard of nearby residents. Aplt. App., vol. I, 66–67; vol. II, 536–37 (noting State's interest in protecting "other tribes or bands of Indians having legitimate gaming facility).

IGRA does not provide injunctive relief for "gaming activities" on non-"Indian lands," and the record lacks evidence showing how the State will suffer irreparable harm. Moreover, the Allotment is zoned commercial and light industrial. Aplt. App., vol. I, 266. Were the Allotment "Indian land" of the Muscogee, as the district court concluded, then Class III gaming is permissible on the Allotment as Muscogee has a compact. www.ok.gov/OGC/Compacted_Tribes. Because both the Tribe and Muscogee have gaming compacts approved by the State and the Department of Interior, "Class III gaming activities" on the Allotment could not cause irreparable harm.

As for the district court's conclusion that a finding of shared jurisdiction would set off a "race" between Creek tribal towns to lay claims to Creek lands under IGRA (Aplt. App., vol. II, 533), this is precisely the sort of speculative, unfounded fear that is *insufficient* to warrant injunctive relief. *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1210 (10th Cir. 2009) (finding purely speculative harm insufficient to show irreparable harm).

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is a restricted Indian allotment already Indian country. In *New York v. Shinnecock Indian Nation*, 280 F. Supp. 2d 1 (E.D.N.Y. 2003), irreparable harm consisted in a then-federally *unrecognized* tribe's attempt to build a casino on *state* land in violation of *state* gaming and environmental laws.

2. Relative Weight of The Harms

The court erred as a matter of law when it held that any potential harm to the State caused by the absence of a preliminary injunction outweighed the harm it caused to the Tribal Defendants because it utterly failed to consider the harm caused to the Tribe in its analysis. Aplt. App. vol. II, 537. To be entitled to a preliminary injunction, a movant must show the threatened injury to the movant outweighs the injury to the other party under the preliminary injunction. *Kikumura*, 242 F.3d at 955; *Prairie Band*, 253 F.3d at 1251. A State's interference with a tribe's sovereignty can constitute an irreparable injury. *Wyandotte Nation v. Sebelius*, 443 F.3d 1247, 1255 (10th Cir. 2006) (citing *Hoover*, 150 F.3d at 1172–73 and *Seneca-Cayuga Tribe of Oklahoma ex rel. Thompson v. Oklahoma*, 874 F.2d 709, 716 (10th Cir. 1989)); *Kansas*, 249 F.3d at 1227–28 (finding interference with tribe's sovereign status sufficient to establish irreparable harm).

Here, the Tribe's sovereign interests were at stake because the Tribe is a treaty tribe, it is a sovereign government that is immune from suit, it exercises jurisdiction over a restricted allotment held by its members, and it has a tribal-state gaming compact. Aplt. App., vol. II, 299–322. As discussed *supra*, the district court's holding diminished the Tribe's sovereign authority without affording it a full and fair opportunity to be heard on the merits which constitutes irreparable harm to the Tribe. The district court did not consider harm to the Tribe's sovereign

interests when "balancing the harms" to the parties. Aplt. App., vol. II, 537. Rather, it merely considered the State's sovereign interests.

3. Success On The Merits

The district court's holding that the State was substantially likely to succeed on the merits of its claim that the Tribe lacked any authority under federal law to conduct gaming activities on "Indian lands," Aplt. App. vol. II, 524-36, was an abuse of discretion because the State failed to establish such gaming activities were present.

The essence of the State's Complaint is that the Tribe is a subordinate tribal sovereign to Muscogee and the Tribe could not exercise jurisdiction over the Allotment because the Allotment was "not Indian land over which the Tribal Town has jurisdiction." Aplt. App., vol. II, 535-36.

The State's burden was not satisfied by merely raising questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation. *Otero Sav. & Loan Ass'n v. Fed. Reserve Bank of Kansas City, Mo.*, 665 F.2d 275, 278 (10th Cir. 1981). That relaxed standard is only available in this Circuit where the other three (3) requirements for a preliminary injunction were satisfied. *Kikumura*, 242 F.3d at 955. The State did not show either irreparable harm nor a balance of harms weighted in its favor (see above). Further, because the preliminary injunction sought by the State was disfavored, the State had to make a

strong showing both with regard to the likelihood of success on the merits and with regard to the balance of harms. *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 975 (10th Cir. 2004) *aff'd and remanded sub nom. Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006).

a) The State's Complaint Raised Issues Too Uncertain To Warrant A Preliminary Injunction

A movant's right to injunctive relief must be "clear and unequivocal," *Prairie Band*, 253 F.3d at 1246, thus, to doubt is to deny. *Madison Square Garden Corp. v. Braddock*, 90 F.2d 924, 927 (3d Cir. 1937); *Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 813 (4th Cir. 1991). Courts have found no likelihood of success on the merits in cases that venture into "unsettled legal landscape[s]," *Heredia v. Santa Clara Cnty.*, No. C-06-4718, 2006 WL 2547816, at *2 (N.D. Cal. Sept. 1, 2006), and which rely upon legal propositions which are not "clear and plain." *Plain Dealer Pub. Co. v. Cleveland Typographical Union No. 53*, 520 F.2d 1220, 1230 (6th Cir. 1975), *cert. denied*, 428 U.S. 909 (1976).

Here, the district found the State was likely to succeed on the merits even though the court itself repeatedly pointed out that the issues being litigated represented not merely unsettled areas of law, but ones that were novel and "cutting edge." *See* Aplt. App., vol. II, 488–89 (noting the cutting-edge nature of the positions); Aplt. App., vol. II, 527 (question of shared jurisdiction over

restricted allotment "an issue of first impression"); Aplt. App., vol. II, 531 (to date, no court or agency has applied the concept of shared jurisdiction to restricted allotments). In the presence of novel and cutting-edge issues of law and fact, the State's Complaint could not satisfy requisite substantial likelihood of success. *Miller v. Am. Telephone & Telegraph Corp.*, 344 F. Supp. 344, 349 (E.D. Pa. 1972).

b) The District Court Abused Its Discretion By Characterizing The Tribe As A "Subset" of The Muscogee Creek Nation

The principal basis for the district court's legal conclusion that the State had established a substantial likelihood of success on its claims appears to be its conclusion that the Tribe is a "subset group" or "band" of the Muscogee. Aplt. App., vol. II, 532. This appears to be the court's basis for subordinating the sovereign authority of the Tribe to those of the State and Muscogee. *See, e.g., id.* The district court's conclusion was based on a 1934 Opinion of the Solicitor of the Department of the Interior, an opinion expressly disavowed when Congress amended the Indian Reorganization Act in 1934. *See* 25 U.S.C. § 476(e).

The Tribe is a federally-recognized tribe. 77 Fed. Reg. 47868, 47870 (Aug. 10, 2012); *Cherokee Nation of Okla. v. Babbitt*, 117 F.3d 1489, 1499 (D.C. Cir. 1997) (inclusion of a group of Indians on the Federal Register list ordinarily suffices to establish that the group is a sovereign power and binds the judiciary to

recognize it as such). *See also* 25 U.S.C. § 479a-1; 25 C.F.R. § 83.5(a) (requiring the Department of Interior to publish a list of all tribes entitled to receive federal services by virtue of their status as Indian *tribes*). The State recognized the Tribe as a *tribe* having the full, unfettered breadth of sovereign authority when the State entered the gaming compact with it. The federal judiciary recognizes the Tribe as an autonomous tribe separate from Muscogee. *See, e.g., Harjo v. Andrus*, 581 F.2d 949, 951 n.7 (D.C. Cir. 1978) (noting the historical Creek Nation's structure of autonomous tribal towns); *Kleppe*, 420 F.Supp. at 1117–18; *Mitchell v. U.S.*, 9 Pet. 711, 725 (1835) (upholding land titles transferred to private individuals "upon deeds from various *tribes* of Indians belonging to the great Creek Confederacy") (emphasis added). As discussed *supra*, as a federally-recognized tribe, the Tribe enjoys the identical privileges and immunities available to all federally-recognized Indian tribes by virtue of their tribal status.

The court's determination that the Tribe was merely a "subset" of Muscogee impermissibly divested the Tribe of the full scope of its inherent sovereignty. It is axiomatic that a tribe is subject *only* to the authority of the United States and its sovereign authority that can be diminished by Congress alone. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987) ("tribal sovereignty is dependent on, and subordinate to, only the Federal Government) (quoting

Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 154 (1980)); *Jicarilla Apache Tribe v. U.S.*, 601 F.2d 1116, 1126 (10th Cir. 1979).

c) The District Court Abused Its Discretion By Adding "Tribal Relationship" To The Statutory Requirements of IGRA

The district court held that the tribal-state gaming compact's use of the term "Indian lands as defined by IGRA" meant that the Tribe must establish "a tribal relationship with the lands in question" in addition to the statutory requirements of jurisdiction and governmental powers over such lands as required by IGRA. Aplt. App., vol. II, 526. Nowhere does IGRA require "a tribal relationship" with land and the district court explained neither the requirement nor its source. Even if a "tribal relationship" were required, the Tribe possessed it (1) because it is a successor-in-interest to the Creek Confederacy along with the other federally-recognized Creek tribal towns; and (2) because the owners of the Allotment are enrolled in the Tribe. A successor in interest to a historical tribe is a tribe whose members descend from members of a historical tribe and who have maintained a governmental organization. *See United States v. Washington*, 520 F.2d 676, 693 (9th Cir. 1975). Thus, the district court committed an error of law when it determined that the Tribe was not a successor-in-interest to the historic Creek Nation and did so without explanation (Aplt. App., vol. II, 533), even though the

Tribe is a Creek Tribal Town and recognized signatory to the Treaties signed by Chiefs of the Creek Confederacy.

Here, it is uncontested that the Tribe's members descend from the members of the historic Creek Confederacy. Creek Tribal Towns have remained vital governments throughout Creek history. *See Kleppe*, 420 F.Supp. at 1135. The Tribe organized in 1941, while the modern Muscogee (Creek) Nation organized in 1979 as a separate sovereign; both are successors of the historic Creek Nation. The Tribe's relationship is further demonstrated by the fact that the Allotment owners are dually-enrolled members of the Tribe and Muscogee. Aplt. App., vol. II, 494.

The court erred when it reasoned that the tribal membership of the Allotment owners impacts the Tribe's jurisdiction over the Allotment. *See* Aplt. App., vol. II, 531, 540–47. It is well-settled that a tribe retains civil jurisdiction over its "Indian country." *Indian Country, U.S.A.*, 829 F.2d at 973. "Numerous cases confirm the principle that the Indian country classification is the benchmark for approaching the allocation of federal, tribal, and state authority with respect to Indians and Indian lands." *Id.* "Indian country" includes "all *Indian allotments*, the Indian *titles to which have not been extinguished."* 18 U.S.C. § 1151(c) (emphasis added); *Mustang Prod. Co. v. Harrison*, 94 F.3d 1382, 1385 (10th Cir. 1996). In Oklahoma, Indian Country includes all land within the limits of a tribe's current *and former* reservations. 18 U.S.C. § 1151(c). *See also United States v. Pelican*,

232 U.S. 442 (1914). That is, in Oklahoma, a tribe has jurisdiction over Indian-owned allotments, if Indian title to such allotments has never been extinguished and such allotment lies within the tribe's former reservation. An allotment owner's membership does not impact a tribe's civil jurisdiction over the allotment.

Here, the Allotment is a restricted parcel, owned by members of the Tribe, and it has never been transferred to non-Indian ownership. Thus, the Tribe exercises jurisdiction over the Allotment because it is Indian country.[7]

The district court erroneously relied on the membership of the Allotment owners, *see* Aplt. App., vol. II, 531 (noting the Sisters' father was not a member of the Tribe), and a line of inapposite cases to determine that the Tribe had no jurisdiction over the Allotment, *id.* at 543-47 (discussing *Miami* line of cases: *Miami Tribe of Okla. v. United States*, 927 F.Supp. 1419 (D. Kan. 1996) ("*Miami Tribe I*"); *Miami Tribe of Okla. v. United States*, 5 F.Supp. 2d 1213 (D. Kan. 1998) ("*Miami Tribe II*"); *State ex rel. Graves v. United States*, 86 F.Supp. 2d 1094 (D. Kan. 2000) ("*Miami Tribe III*"); *Kansas v. United States*, 249 F.3d 1213, 1219 (10th Cir. 2001) ("*Miami IV*"); and *Miami Tribe of Okla. v. United States*, 656 F.3d 1129, 1145 (10th Cir. 2011) ("*Miami V*").

At issue in the *Miami* cases was land over which a tribe's jurisdiction had been clearly and expressly abrogated. In contrast, here the Allotment (i) is an

[7] Whether the Tribe has a property interest in the former Creek Reservation is discussed in subsection (d) below.

original Creek Indian allotment restricted against alienation by the United States, (ii) has never passed out of Creek Indian family-ownership for 110 years, (iii) Congress has not clearly and expressly abrogated Indian ownership of the parcel, and (iv) no Tribe has sold the parcel to a non-Indian or was compensated for such parcel. Thus, the Allotment is "Indian country" and it is distinguishable from the *Miami* parcel. Additionally, unlike the non-Indian parcel owners in *Miami* who were adopted, the Sisters here have always been members of the Tribe and, in fact, satisfy the Tribe's membership and blood-quantum requirements. Aplt. App., vol. II, 494.[8]

d) The Facts And Law Supported A Finding of Dual Tribal Jurisdiction

The district court erred when it held that the Tribe does not share jurisdiction with Muscogee over the Allotment. The district court partially relied on its finding that, unlike the Constitution of Muscogee, the Tribe's Constitution "neither claims nor defines any geographic or territorial jurisdiction of the Tribal Town." Aplt. App., vol. II, 530.

However, the State recognized the Tribe has jurisdiction over Indian lands, as defined by IGRA, when it entered into the tribal-state gaming compact with the Tribe. Further, the Tribe's Corporate Charter preserves the Tribe's right to assert jurisdiction over land and the State did not establish that the Corporation Charter's

[8] Members of all tribal towns are dually-enrolled in the Creek Nation and their Tribal Town.

explicit reservation of *land, allotment rights, and the Tribe's treaty rights*, did not constitute the Tribe's preservation of its jurisdiction in treaty lands. Even if the Tribe did not claim territorial jurisdiction in its Constitution, this would not prevent a tribe from exercising or claiming jurisdiction to the former reservation lands of a tribal entity to which it is a successor-in-interest. *See Williams v. Clark*, 742 F.2d 549, 554 (9th Cir. 1984) ("The Quileute Tribe's failure to state expressly in its constitution that the Quinault Reservation is part of its territory does not extinguish the tribe's allotment rights in the reservation).

The district court further abused its discretion in determining that the Tribe does not have "shared jurisdiction" "over all lands within the historic bounds of the Creek Nation" without offering either and explanation or authority. Aplt. App., vol. II, 533. The court's only rationalization was that finding shared jurisdiction would cause "races" between the four federally-recognized Creek Tribal Towns "to establish governmental control over parcels of Indian Country within the historic bounds" of the Creek Confederacy. *Id*. That was a pure speculation.

The Tribe shares jurisdiction over land of the former Creek Reservation with all the successors of the historic Creek Nation—the Tribal Towns and Muscogee. Tribes share jurisdiction over reservation lands where they (1) obtained an interest in the land by treaty, and (2) such interest has not been clearly and expressly abrogated by Congress. *Williams*, 742 F.2d at 553.

As part of the Creek Confederacy, the Tribe acquired an interest in the former Creek Reservation via the 1832 and 1833 Treaties. The plain language of those treaties refer to the Creek tribe as a plural entity—not a singular entity, meaning the United States understood that it reserved the lands to a group of independent tribal towns and not a unified political entity. The 1833 Treaty states that land shall be "taken and *considered the property of the whole Muskogee or Creek nation*, as well as those now residing upon the land, as the great body of said nation who still remain on the east side of the Mississippi." 7 Stat. 417, 419 (1833) (emphasis added). The 1832 Treaty states "The Creek tribe of Indians *cede* to the United States all of *their* land, East of the Mississippi river." Aplt. App., vol. III, 560 (emphasis added). Prior to 1941, the Bureau of Indian Affairs recognized that the Tribe and all the other Tribal Towns of the Creek Confederation had an interest in the lands and monies allocated to the Creek Nation. *Id.* at 765.

The Tribe retains jurisdiction over the Allotment because its status was never abrogated by a clear act of Congress nor is it fee land. A tribe's rights in reservation land can only be abrogated by subsequent acts of Congress, where Congressional intent to abrogate such right is clear and plain. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998) (collecting various Supreme Court cases).

The Tribe's interest is evidenced because Tribal Towns and their members receive allotments throughout the former Creek Reservation. The ability of individual Quiluete members to receive allotments throughout the Quinault reservation evidenced the Tribe's allotment interest in the Quinault Reservation. *Williams*, 742 F.2d at 552. Similarly, here, a member of the Tribe, Neal Freeman, owns an individual allotment held in trust in Wagoner, Oklahoma, *which lies 88.9 miles away from Wetumka, Oklahoma and seven (7) miles from the Allotment at issue.* Aplt. App., vol. II, 490–91. *Crowe & Dunlevy*, 640 F.3d at 1143 (acknowledging that members of the Thlopthlocco Tribal Town reside on land held in trust for them and such land is within the historic boundaries of Muscogee).

The land exchanges embodied in the Creek Treaties evidence the Tribe's interest in the former Creek Reservation. Where a tribe cedes land in exchange for lands in a reservation, such cession evidences the tribe's allotment interest in the acquired reservation lands. *See Shoshone Tribe of Indians of the Wind River Reservation in Wyoming v. United States*, 299 U.S. 476, 485–93 (1937) (implicitly finding that where tribe secured right to reservation land by treaty and ceded its aboriginal land in exchange for reservation land, the tribe secured a compensable property right in the reservation land); *Williams*, 742 F.2d at 553. Here, the Tribe and other Creek Tribal Towns of the Creek Confederacy ceded their land in the southeastern United States *in exchange for* the former Creek Reservation.

e) Tribal Jurisdiction Does Not Derive From Federal Authority

The district court abused its discretion by holding as a matter of law that the question of tribal jurisdiction over land "focuses principally on congressional intent and purpose, rather than recent unilateral actions" by a tribe. Aplt. App., vol. II, 546–47 (citing *Kansas*, 249 F.3d at 1229). The authority relied on by the district court is inapposite. In *Kansas*, this Court rejected the "unilateral" effort by a tribe to restore to lands tribal jurisdiction that Congress had expressly and clearly abrogated over a century earlier. *Id*. at 1229 ("An Indian tribe retains only those aspects of sovereignty not withdrawn by treaty or statute."). The same can be said of the other cases relied on by the district court. *Miami V*, 656 F.3d at 1145.

A tribe's inherent sovereign authority includes the ability to assert legal jurisdiction over both its members and its territory. *See South Dakota v. Bourland*, 508 U.S. 679, 687–88 (1993) (discussing that a determinative factor in cases where Indian jurisdiction is not found is that lands are owned by *non-Indians*); *United States v. Wheeler*, 435 U.S. 313, 323, 328 (1978); *Native Am. Distrib.*, 546 F.3d at 1292. Here, when the Tribe organized and gained federal recognition as a tribe, it implicitly retained its right to assert jurisdiction over its members and its territory. In its Corporate Charter of 1942, it expressly empowered the Corporation to preserve the Town's "existing land holdings," and to "protect all rights guaranteed

to the Kialegee Tribal Town by Treaty." (Aplt. App. Vol. III, 592, 594). There has not been a Federal treaty with the Tribe only; thus, the Tribe's reserved treaty rights arise from treaties between the Creeks and the United States. The district court identified no act of Congress that expressly or clearly subjugated the Tribe to the modern Muscogee (Creek) Nation.

f) The Tribe Exercises Governmental Control Over The Allotment

To exercise governmental control over land, a tribe must show a "presence of concrete manifestations of [government] authority." *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 703 (1st Cir. 1994). The Tribe concretely manifested its governmental control[9] of the Tyler Burgess allotment with various site-related activities evidencing tribal governmental control and in accordance with the five factors enumerated 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). The five factors are only indicative, not required or all-inclusive, and are: (1) whether the areas are developed; (2) whether tribal members reside in those areas; (3) whether any government services are provided and by whom; (4) whether law enforcement

[9] Both IGRA and its legislative history are silent as to what activity demonstrates "governmental control" of restricted fee land and case-law is sparse on the matter. The NIGC has stated that the five *Cheyenne* factors are "potentially relevant to a determination of whether a tribe exercises governmental power over subject lands for purposes of IGRA." *See* Indian Land Opinion rendered on January 7, 2012, *Indian Lands – Iowa Tribe of Oklahoma; Whitecloud Allotment* at 10, *available at* http://www.nigc.gov at the "Reading Room" dropdown link.

on the land in question is provided by the Tribe or the State; and (5) other indicia as to who exercises governmental power over those areas.

The Tribe's activity demonstrates governmental control over the Allotment. The Tribe has an office there, provides governmental services to its members there, has developed it, provides law enforcement there, and tribal members reside in the surrounding Tulsa metropolitan area. Aplt. App., vol. II, 417–419, 520.

The district court committed an error of law when it concluded that these listed activities were "pretextual attempts to 'manufacture' the exercise of government authority." *Id.* at 534–35. The court provided no explanation for such conclusion. The Tribe's activities were planned and underway as of January 21, 2011, and the Tribe had exercised the requisite government control over the Allotment before this litigation. It is not unusual for the Creek tribes to increase or manifest their governmental authority over a parcel only when they are preparing to develop such parcel and, thereby, have an economic interest in the parcel. *Id.* at 486–87.

g) The Heightened Evidentiary Standard

The Tenth Circuit disfavors three types of preliminary injunctions: (1) those that disturb the status quo; (2) those that are mandatory as opposed to prohibitory; and (3) those that afford movants substantially all the relief they may recover at the conclusion of a full trial on the merits. *Prairie Band of Potawatomi Indians v.*

Pierce, 253 F.3d 1234, 1247 n.4 (10th Cir. 2001). A disfavored preliminary injunction is closely scrutinized to assure that the exigencies of the case support such extraordinary remedy. *O Centro*, 389 F.3d at 975.

1. The Status Quo.

The injunction sought by the State was disfavored because it altered the status quo. Aplt. App., vol. II, 524. This is important because in such circumstance, the State has a heightened evidentiary burden to show *both* its likelihood of success on the merits *and* a the balance of harms weighted in its favor. *O Centro*, 389 F.3d at 976. As explained above, the State failed. The status quo is defined by:

> the *reality* of the existing status and relationships between the parties, regardless of whether the existing status and relationships may ultimately be found to be in accord or not in accord with the parties' legal rights.

SCFC ILC, Inc. v. Visa USA, Inc., 936 F.2d 1096, 1100 (10th Cir. 1991). An injury resulting from a preliminary injunction "that disturbs the status quo by changing the relationship of the parties *is* a judicially inflicted injury." *O Centro*, 389 F.3d at 978.

The district court committed an error of law in finding the status quo was not disturbed because the "status quo" on the Allotment was the Tribe exercising its undiminished sovereign authority free from State interference. *See O Centro*, 389 F.3d at 980. The court erroneously used the State's sovereign interests in

regulating gaming activities as its benchmark for the status quo, Aplt. App., vol. I, 66, and in keeping the Allotment as it was "immediately before the defendants commenced construction activities on the [Allotment]," Aplt. App., vol. II, 524. However, 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.

The district court also disturbed the well-established balance of federal, state, and tribal sovereign interests. It determined that the Tribe possessed a lesser sovereignty as being a "subset group[] or 'band[]' of the Muscogee (Creek) Nation." *Id.* at 532 (citing 1 *Op. Sol. On Indian Affairs* 478, Solicitor's Opinion M–27796, Nov. 7, 1934 and stating "Muscogee (Creek) Nation did not abolish the tribal towns," including Kialegee). As Congress made clear, the Tribe enjoys the identical privileges and immunities available to federally-recognized Indian tribe by virtue of their status as Indian tribes, notwithstanding any federal regulation or administrative determination that may previously have classified, enhanced, or diminished such privileges and immunities. 25 U.S.C. § 476(g).

The district court abused its discretion by holding in the alternative, but without any explanation, that even if the injunction changed the status quo, the State had "met the heightened burden by making a strong showing of likelihood of success on the merits with regard to the balance of harms." Aplt. App., vol. II,

524. The district offered *no* explanation and cited to *no* evidence showing how the State had met its heightened evidentiary burden.

CONCLUSION

This Court should reverse the district court's orders, dissolve the preliminary injunction, and remand this matter with instructions to dismiss the case.

STATEMENT OF COUNSEL AS TO ORAL ARGUMENT

The State sued a federally-recognized Indian tribe, its Tribal Officials and a tribal enterprise, alleging violations of IGRA and a tribal-state gaming compact.

The Tribe, Tribal Officials, and Corporation filed motions to dismiss arguing the Tribe and Muscogee Creek Nation were necessary and indispensable parties. They also argued the Tribe could not be joined as it was immune from suit. The Court determined the Tribe was dispensable and proceeded against the Tribal Officials and Corporation despite no waiver by Congress or the Tribe of the Tribe's sovereign immunity.

It proceeded to grant a preliminary injunction against the Tribal Officials and Corporation with findings against the Tribe and in favor of non-party the Muscogee. It also made findings that IGRA was violated even though no "class III gaming activities" or "Indian lands" were alleged, and findings that the tribal-state gaming compact was violated even though the Tribal Officials and Corporation are

not a party to that compact. It also granted the preliminary injunction despite the State failing to satisfy its evidentiary burden.

The Tribal Officials and Corporation filed their Notice of Appeal on August 17, 2012. Florence filed its Notice of Appeal on August 20, 2012.

The Tribe, Tribal Officials, Corporation, and Florence respectfully request oral argument.

ADDENDUM PURSUANT TO 10th CIRCUIT RULE 28.2

Respectfully submitted this 30th day of November, 2012.

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As required by Fed. R. App. P. 32(a)(7)(c), I certify that this brief is proportionally spaced and contains 13,579 words.

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I hereby certify that a copy of the foregoing **CONSOLIDATED OPENING BRIEF** as submitted in Digital Form via the court's ECF system, is an exact copy of the written document filed with the Clerk and has been scanned for viruses with Viper Enterprise, Sunbelt Software version 4.0.4301, Virus Definition File Dated: 11/26/12 and, according to the program, is free of viruses. In addition, I certify all required privacy redactions have been made.

By: /S/ KELLY H. BASINGER
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Litigation Legal Secretary

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I hereby certify that the foregoing **CONSOLIDATED OPENING BRIEF, INDEX OF ADDENDUM, AND INDEX OF APPENDIX** was served on this 30th day of November, 2012, via the Court's CM/ECF system which will send notification of such filing to all parties of record below. Also on this day, hard copies of each document were served on the 10th Circuit Court of Appeals and all parties of record.

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CASE NOS. 12-5134/5136
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

STATE OF OKLAHOMA,	)
Appellee/Plaintiff,	)
v.	)
(1) TIGER HOBIA, as Town King and member of the Kialegee Tribal Town Business Committee; et al.,	)
Appellants/Defendants.	)

On Appeal from the United States District Court
for the Northern District of Oklahoma
The Honorable Chief Judge Gregory K. Frizzell
N.D. No. 4:12-cv-00054-GKF-TLW

APPELLANTS' APPENDIX (VOLUME I) TO CONSOLIDATED OPENING BRIEF

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(The contents of this Appendix are included in written form only)

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