IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

STATE OF KANSAS, *ex rel.*
DEREK SCHMIDT
Attorney General, State of Kansas

BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF CHEROKEE, KANSAS

Plaintiffs,

v.

NATIONAL INDIAN GAMING COMMISSION;

JONODEV OSCELOA CHAUDHURI, *Acting National Indian Gaming Commissioner, in his official capacity*;

DANIEL J. LITTLE, *Associate Commissioner National Indian Gaming Commission, in his official capacity;*

ERIC N. SHEPARD, *Acting General Counsel National Indian Gaming Commission, in his official capacity;*

DEPARTMENT OF INTERIOR;

SALLY JEWELL, *Secretary of the United States Department of Interior, in her official Capacity;*

KEVIN K. WASHBURN, *Assistant Secretary for Indian Affairs for the United States Department of Interior, in his official capacity;*

Defendants.

No. 15-CV-_____

COMPLAINT

Plaintiff, the State of Kansas, on relation of Derek Schmidt, Kansas Attorney General, and Plaintiff, the Board of County Commissioners of the County of Cherokee, Kansas, for Plaintiffs' Complaint against the Defendants, allege and state as follows:

INTRODUCTION

This is an action by the State of Kansas on relation of its Attorney General, Derek Schmidt, and the Board of County Commissioners of the County of Cherokee, Kansas (collectively, "Plaintiffs") pursuant to the Administrative Procedure Act, 5 U.S.C. §§ 701, *et seq.*, the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701, *et seq.*, the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02, and the United States Constitution.

In this action, the Plaintiffs challenge and seek relief from the November 21, 2014 determination of National Indian Gaming Commission (NIGC) officials that a 124 acre strip of land in Kansas acquired by the Quapaw Tribe of Indians of Oklahoma (Quapaw or the Tribe) and put into trust by the Bureau of Indian Affairs for non-gaming purposes qualifies for gaming under the "last recognized reservation exception" to the Indian Gaming Regulatory Act's (IGRA) general prohibition on gaming on land acquired after October 17, 1988. *See 2*5 U.S.C. § 2719(a)(2)(B); 25 C.F.R. § 292.4(b)(2).

Plaintiffs are aggrieved by the November 21, 2014 determination because the strip of land was taken into trust by the Department of Interior for non-gaming purposes and because the NIGC incorrectly applied 25 U.S.C. § 2719(b)(2)(B), thereby depriving the State of Kansas of the governor's statutory right to concur in and to veto gaming on lands acquired after October 17, 1988, pursuant to 25 U.S.C. § 2719(b)(1)(A).

Plaintiffs are also aggrieved by the Department of Interior's regulation, 25 C.F.R. § 292.4, which implements the last reservation exception to IGRA's general prohibition on gaming on lands acquired after 1988, 25 U.S.C. 2719(b)(1)(A), in a manner contrary to legal authority including U.S. Supreme Court precedent. Plaintiffs are aggrieved by NIGC's reliance on that regulation.

THE PARTIES

1. Plaintiff, State of Kansas, is one of the fifty sovereign States of the United States, and brings this action on relation of its duly-elected Attorney General, Derek Schmidt. The State of Kansas was admitted into the federal union in 1861 on an equal footing with the other member States. Under IGRA, the governor of a state has a statutory right to concur in and to veto gaming on lands acquired after October 17, 1988, 25 U.S.C. § 2719(b)(1)(A), unless the land qualifies for an exception. The NIGC's challenged actions in this case with regard to the 124 acres deprive the State of Kansas and its governor of statutory rights under IGRA. By filing this action for review and for declaratory judgment, the State of Kansas, its officers and employees do not waive Eleventh Amendment immunity from suit as to any claims for damages or other relief against the State, including any counterclaim by the Oklahoma Tribe or any other person or entity.

2. Plaintiff Board of County Commissioners of the County of Cherokee, Kansas ("County"), is the body politic and corporate for Cherokee County and is empowered under Kansas law to, among other powers, sue and be sued and to exercise the powers of home rule. *See* K.S.A. 19-101, 19-101a.

3. Jonodev Osceloa Chaudhuri is Acting National Indian Gaming Commissioner. Daniel J. Little is Associate Commissioner of the NIGC. They are the only current members of the NIGC according to the NIGC's web site. Eric N. Shepard is Acting General Counsel of the NIGC.

4. Sally Jewell is the Secretary of the United States Department of Interior. Kevin K. Washburn is Assistant Secretary for Indian Affairs for the United States at the Department of Interior.

JURISDICTION AND VENUE

5. This Court has jurisdiction over this matter under 28 U.S.C. § 1331, as the action arises under federal law, including the IGRA, 25 U.S.C. §§ 2701, *et seq.*, the Administrative Procedure Act, 5 U.S.C. §§ 701, *et seq.*, the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02, and the United States Constitution.

6. Venue is proper in this District pursuant to 28 U.S.C. § 1391 in that a substantial part of the event or omissions giving rise to the claim occurred in this District and all of the real property that is the subject of the action is located within this District.

ALLEGATIONS COMMON TO ALL COUNTS

7. IGRA, 25 U.S.C. § 2719(a), prohibits gaming on lands acquired by an Indian tribe after October 17, 1988, the effective date of the Act, subject to specific exceptions discussed below.

8. The following quoted history of the Quapaw is from the NIGC's November 21, 2014 (pages 2-3) decision (*infra* Exhibit 8, with footnotes omitted):

> The Tribe was removed from its homeland in Arkansas and ultimately relocated to a reservation that spanned across both the present day states of Oklahoma and Kansas pursuant to the Treaty with the Quapaw, dated May 13, 1833. In accordance with the treaty, the reservation consisted of 150 sections of land. The portion of the reservation in Kansas consisted of approximately 12 full sections of land and 6 fractional sections of land and included Section 13 at issue here. Because the Kansas portion of the reservation was only approximately one-half mile in width from north to south, it came to be known as the Quapaw Strip. The Tribe ceded the Kansas portion of the reservation, except for a small set aside for a member of the tribe, to the United States pursuant to a treaty, dated February 23, 1867. In the same treaty, the tribe ceded approximately 18,500 acres

in the western part of the reservation in Oklahoma to the United States.

9. The Treaty of 1867 diminished the Quapaw's reservation. Article 4 to the Treaty provides:

> The Quapaws cede to the United States that portion of their land lying in the State of Kansas, being a strip of land on the north line of their reservation, about one half mile in width, and containing about twelve sections in all, excepting therefrom one half section to be patented to Samuel G. Vallier, including his improvements. Also the further tract within their present reserve, bounded as follows: Beginning at a point in the Neosho River where the south line of the Quapaw reserve strikes that stream, thence east three miles, thence north to the Kansas boundary-line, thence west on said line to the Neosho River, thence down said river to the place of beginning; and the United States will pay to the Quapaws for the half-mile strip lying in Kansas at the rate of one dollar and twenty-five cents per acre, whenever the area of the same shall be ascertained; and for the other tract described in this article at the rate of one dollar and fifteen cents per acre, whenever the area of the same shall be ascertained by survey, said survey to be made at the cost of the tribe to which said tract is herein provided to be sold under the pre-emption laws of the United States; but all such pre-emption shall be paid in the money of the United States, at the proper land-office, within one year from the date of entry and settlement.

(Exhibit 1.)

10. The Quapaw's reservation was allotted to members of the Tribe under the Act of March 2, 1895, 28 Stat. 876, 907. Because of allotments, tribes in Oklahoma, including the Quapaw, are currently not generally considered to have reservations in the strict definition of the word, but rather "tribal jurisdictional areas" or "tribal statistical areas."

11. On October 17, 1988, when IGRA became effective, the State of Kansas only had within its borders four resident federally-recognized Indian tribes, the Sac and Fox Nation of Missouri in Kansas and Nebraska, the Kickapoo Tribe in Kansas, the Prairie Band of Potawatomi Indians and the Iowa Tribe of Kansas and Nebraska, all of whom had and still have reservations in Kansas. *Oyler v. Allenbrand*, 23 F.3d 292, 295, 296, 299 (10th Cir. 1994).

12. The Quapaw purchased and had put into trust a tract of land in Oklahoma, within

their historic reservation boundaries and adjacent to Kansas. The Quapaw received permission and built the Downstream Casino Resort on that land. The Downstream Casino opened in 2008. (*See infra* Exhibit 4, p. 2, ¶ 8.)

13. A 124 acre parcel of land in Kansas and adjacent to the Downstream Casino Resort property was acquired by the Quapaw in approximately 2006-2007 and has been used by the Quapaw as a parking lot for the casino.

14. On October 17, 1988, the 124 acre parcel of land in question in Kansas, having been ceded by the Quapaw in 1868, was not "Indian lands" for purposes of allowing gaming thereon pursuant to IGRA, 25 U.S.C. § 2703(4).

15. In late 2011 or early 2012, the Tribe applied to have the 124 acre parcel put into trust for non-gaming purposes, and on February 3, 2012, the Miami Agency of the BIA sent the State of Kansas a "Notice of (Non-Gaming) Land Acquisition Application." (Exhibit 2.) The application stated that the land was currently used as a parking lot (for the Quapaw Tribe's adjoining casino in Oklahoma) "and that the Tribe plans to continue with that use." (Exhibit 2, p 2.) The Notice solicited the State of Kansas' written comments on the application. (*Id.*)

16. The State of Kansas and County submitted written comments, objecting primarily that the property was likely intended for gaming purposes. (Exhibit 3, p 1.) The State noted that the Tribe had previously sent the State their own notice for the same parcel, but stated that it was for gaming purposes. (Exhibit 2, Exhibit 3.) The State also objected that the application should not be considered an on-reservation application.

17. The County withdrew its objection to the Quapaw's application to place the land in trust based upon the Quapaw's assurances the parcel would not be used for gaming purposes.

18. On June 8, 2012, the Miami Agency determined to take the land into trust.

(Exhibit 4). It rejected the State's arguments that the property would be used for expanded gaming based upon the Tribe's statements that it would not be used for gaming. (Exhibit 4, p. 4.) The Miami Agency treated the application as an on-reservation application pursuant to 25 C.F.R. § 151.10 because it was adjacent to the casino land already in trust. (Exhibit 4, p. 2, ¶ 8.) The State did not appeal the Miami Agency's decision to the Regional Office.

19. If the Quapaw's Land Into Trust application had been treated as an application for gaming purposes rather than nongaming, the trust decision would have ultimately been with the Assistant Secretary for Indian Affairs, rather than the Regional Office. *(See* Exhibit 5, *Acquiring Land Into Turst for Indian Tribes*, Larry E. Scrivener (Acting Director, Office of Trust Responsibilities); *Wyandotte Nation v. Salazar*, 939 F.Supp.2d 1137, 1141 (D. Kan. 2013) ("While the Department of Interior's Assistant Secretary for Indian Affairs has generally delegated decision-making authority for fee-to-trust applications to the Department's regional offices, the Assistant Secretary has not delegated that authority with respect to applications that seek to have the United States accept land in trust for gaming purposes.")

20. In early 2013, the Quapaw Tribe requested a legal opinion of the NIGC whether the parcel in question qualified for gaming as one of IGRA's exceptions to the general prohibition on gaming on trust lands acquired after October 17, 1988, pursuant to 25 U.S.C. § 2719. Specifically, the exception at issue was the "last recognized reservation exception" set forth in 25 U.S.C. § 2719(a)(2)(B).[1] On May 23, 2013, the NIGC sent Kansas Attorney General Derek

1 "Except as provided in subsection (b) of this section, gaming regulated by this chapter shall not be conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988, unless . . . (2) the Indian tribe has no reservation on October 17, 1988, and . . .
(B) such lands are located in a State other than Oklahoma and are within the Indian tribe's last recognized reservation within the State or States within which such Indian tribe is presently located."

Schmidt a letter notifying him of the Tribe's request the NIGC "issue a legal opinion" and soliciting Schmidt's comments. (Exhibit 6.)

21. In a June 21, 2013 letter, Kansas Assistant Attorney General Stephen Phillips provided comments on behalf of Schmidt to the NIGC. (Exhibit 7). Phillips first noted that the property description was incorrect. He noted that the NIGC's letter incorrectly implied that Governor Brownback supported the casino. Phillips made several arguments. First he argued that because the Quapaw had applied to have the parcel put into trust for nongaming purposes, they should be "equitably estopped from putting forth this parcel as one appropriate for gaming." Phillips stated that State of Kansas chose not to appeal the Miami Agency's decision to put the parcel into trust, based upon the representation that it would be used for nongaming purposes.

Phillips noted that the "last recognized reservation" exception, 2719(a)(2)(B), required that the land be "within the State or States within which such Indian tribe is presently located." He argued the only case to interpret "presently located," *Wyandotte Nation v. NIGC*, 437 F. Supp. 2d 1191, 1206 (D. Kan. 2006), held that a tribe is not presently located within a state unless it has a major governmental presence in the state. *Id.* at 1206. He argued the Quapaw Tribe's seat of government is in Oklahoma, and its presence in Kansas is merely incidental.

Phillips also argued that based on reasoning from *Carcieri v. Salazar*, 555 U.S. 379 (2009), a tribe's present location should be determined at the time IGRA went into effect, October 17, 1988, and that to allow tribes to set up new tribal locations and thereby conduct gaming would eviscerate the limitations of § 2719(a)(2)(B).

22. On November 21, 2014, NIGC Acting General Counsel Eric N. Shepard issued the opinion that is the subject of this action, in which the NIGC determined that the parcel did qualify or gaming under the last recognized reservation exception. (Exhibit 8). The opinion makes no

reference to Phillips' letter. The opinion makes no reference to Phillips' argument that the Tribe should be estopped from gaming on the land. The opinion makes no reference to Phillips' argument that analogous to *Carcieri,* the Tribe's presence within a state should be determined as of October 17, 1988. The opinion rejects *Wyandotte Nation v. NIGC*, and instead relies on a subsequent Department of Interior regulation, 25 CFR § 292.4, which impliedly rejects *Wyandotte Nation's* major governmental presence standard, and instead provides: "Located in a State other than Oklahoma and within the tribe's last recognized reservation within the State or States within which the tribe is presently located, as evidenced by the tribe's governmental presence and tribal population." Applying the 292.4 standard, the opinion examines the Tribe's current status in Kansas and found that it had a presence in Kansas sufficient to allow gaming. The opinion goes on to conclude that because the strip was the Tribe's last reservation within Kansas (and according to the NIGC the Tribe is presently located in Kansas), the tract qualifies for gaming as the Tribe's last recognized reservation.

23. The Tribe, on December 5, 2014, announced its intention to expand the Downstream Casino Resort and build and operate a casino on the parcel of land in Kansas.

24. Under Kansas law, Cherokee County is responsible for the maintenance and repair of its county roads. It will bear the cost of repairing roads that may be damaged by Quapaw construction equipment, just as it will bear the cost imposed by the dramatic increase in vehicle traffic caused by an expanded casino resort.

COUNT I: REVIEW AND DECLARATORY JUDGMENT REGARDING ESTOPPEL TO GAME ON THE TRACT

25. Plaintiffs reallege the allegations set forth in paragraphs 1-18 inclusive, and by this reference incorporates each such allegation herein as if set forth in full.

26. The undisputed facts of record are that less than a year after the tract in question was taken into trust for nongaming purposes by the BIA, as applied for by the Tribe, the Tribe turned around and applied to the NIGC to game on the land. Plaintiffs, relying on the Tribe's representations that the land was to be used for nongaming purposes, failed to appeal from the Miami Agency's preliminary decision to take the land into trust.

27. The Tribe should be bound now by its prior assertions before the BIA and estopped from applying for gaming. Before the NIGC, the Tribe has taken a position clearly inconsistent with an earlier-taken position. Given the short time between the land into trust proceeding, the Tribe's new position creates an impression that the State of Kansas and/or the BIA were misled. Allowing the Tribe to change its position gives them an unfair advantage because the State of Kansas did not appeal the Miami Agency's decision, and because if the application had been properly handled as a gaming application, the ultimate Land Into Trust decision would have been made by the Assistant Secretary for Indian Affairs rather than the Regional Office.

28. The State of Kansas raised the estoppel argument in its letter to the NIGC, yet the NIGC failed to address the argument. The NIGC should have considered this issue.

COUNT II: REVIEW AND DECLARATORY JUDGMENT REGARDING "LAST RESERVATION EXCEPTION"

29. The NIGC's analysis of the Tribe's current presence in a state for purposes of the last reservation exception, rather than the Tribe's presence as of the effective date of IGRA, October 17, 1988, is arbitrary and capricious and erroneous as a matter of law.

30. In interpreting a somewhat analogous provision to the last reservation's "presently located" standard, in *Carcieri v. Salazar*, 555 U.S. 379 (2009), the Court held that for purposes of the Indian Reorganization Act (IRA), the phrase "now under federal jurisdiction" referred only to

tribes that were federally recognized when the IRA became law, and the federal government could not take land into trust from tribes that were recognized after 1934. For purposes of IGRA, where a tribe is "presently located" should refer to the tribe's location as of the passage of IGRA in 1988. To allow tribes to set up new tribal locations and thereby conduct gaming in the new location would eviscerate the limitations of § 2719(a)(2)(B) and as such is arbitrary and capricious.

31. The NIGC's application of the last reservation exception to the Quapaw is also flawed because the obvious purpose of the three exceptions in IGRA to the prohibition on gaming on land acquired after 1988 in section § 2719, is to provide landless and restored tribes with a casino. The Quapaw, having a tribal jurisdictional area, are not landless. The Quapaw have a casino. Interpreting § 2719(a)(2)(B) broadly as done by the NIGC, defeats the obvious purpose of the legislation and is arbitrary and capricious.

III: REVIEW AND DECLARATORY JUDGMENT REGARDING 25 CFR § 292.4

32. Department of Interior's regulation, 25 CFR § 292.4(b)(2), would allow gaming on a tribe's last recognized reservation when the land is "[l]ocated in a State other than Oklahoma and within the tribe's last recognized reservation within the State or States within which the tribe is presently located, as evidenced by the tribe's governmental presence and tribal population."

33. 25 U.S.C. § 2719(b)(2), by way of comparison, provides: "(2) the Indian tribe has no reservation on October 17, 1988, . . . (B) such lands are located in a State other than Oklahoma and are within the Indian tribe's last recognized reservation within the State or States within which such Indian tribe is presently located."

34. The only case to interpret the meaning of "presently located" for purposes of 25 U.S.C. § 2719(b)(2) is *Wyandotte Nation v. NIGC*, 437 F. Supp. 2d at 1206, which held that a tribe is not presently located within a state unless it has a "major governmental presence" in the state.

35. By failing to recognize *Wyandotte Nation v. NIGC*'s major governmental presence standard, the DOI acted arbitrarily and in excess of its authority, and 25 CFR § 292.4 should be declared null and void.

36. The Department of Interior created and implemented 25 CFR Part 292 "Gaming on Trust Lands Acquired After October 17, 1988. 73 Fed. Reg. 29354. In the comments, the DOI did not address *Wyandotte Nation v. NIGC*'s "major governmental presence" standard at all. DOI also did not address any temporal standard—whether the Tribe's present location is determined as of 1988 or the present.

37. By failing to include in 25 CFR § 292.4 a requirement that the Tribe's location be determined as of the date of IGRA's effectiveness, October 17, 1988, the DOI has interpreted 25 U.S.C. § 2719(b)(2), in a manner inconsistent with *Carcieri*, and in an arbitrary manner in excess of DOI's authority, and should therefore be declared null and void.

38. The NIGC's actions in applying 25 CFR § 292.4(b)(2) to the current location of the Tribe, and in a manner inconsistent with *Carcieri*, are arbitrary and in excess of its authority.

REQUEST FOR RELIEF

WHEREFORE, the State of Kansas and the County pray that the Court:

a) Declare that the NIGC and staff acted arbitrarily and in excess of authority by failing to opine that the Quapaw Tribe is estopped to conduct gaming on the land;

b) Declare that the NIGC acted arbitrarily and in excess of its authority by determining the Quapaw's gaming eligibility based on its current presence within Kansas, rather than its presence on October 17, 1988;

c) Declare that the DOI acted arbitrarily and in excess of its authority by implementing 25 CFR § 292.4(b)(2) without a temporal restriction, and in a manner that does not rely on tribes'

major governmental presence.

d) Declare that the NIGC acted arbitrarily and in excess of its authority by relying on 25 CFR § 292.4(b)(2).

Respectfully submitted,

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