No. _____

In The
Supreme Court of the United States

STATE OF OKLAHOMA,

Petitioner,

v.

TIGER HOBIA, as Town King and member of the Kialegee Tribal Town Business Committee; THOMAS GIVENS, as 1st Warrior and member of the Kialegee Tribal Town Business Committee; KIALEGEE TRIBAL TOWN, a federally chartered corporation; and FLORENCE DEVELOPMENT PARTNERS, LLC,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does *Michigan v. Bay Mills Indian Community*, 134 S.Ct. 2024 (2014), require the dismissal of a State's suit to prevent tribal officers from conducting gaming that would be unlawful under the Indian Gaming Regulatory Act and a state-tribal compact when

- the suit for declaratory and injunctive relief has been brought against tribal officials – not the tribe;
- the gaming will occur in Indian country, on the land of another tribe; and
- the state-tribal compact's arbitration provision does not require arbitration before filing suit?

PARTIES TO THE PROCEEDING

Petitioner is the State of Oklahoma.

Respondents Tiger Hobia, the Town King of the Kialegee Tribal Town and a member of the Kialegee Tribal Town Business Committee; Thomas Givens, the 1st Warrior of the Kialegee Tribal Town and a member of the Kialegee Tribal Town Business Committee; John Doe No. 1, the 2nd Warrior of the Kialegee Tribal Town and a member of the Kialegee Tribal Town Business Committee; Lynelle Shatswell, the Secretary of the Kialegee Tribal Town and a member of the Kialegee Tribal Town Business Committee; John Doe No. 2, the Treasurer of the Kialegee Tribal Town and a member of the Kialegee Tribal Town Business Committee; John Does No. 3 through 7, members of the Kialegee Tribal Town Business Committee; Florence Development Partners, LLC, an Oklahoma limited liability company; and Kialegee Tribal Town, a federally-chartered business corporation of the Kialegee Tribal Town tribe, were defendants-appellants below.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

STATUTES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

REGULATIONS

OTHER AUTHORITIES

Petitioner State of Oklahoma ("Oklahoma" or "the State") respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

INTRODUCTION

Sometime in 2009, officials of the Kialegee Tribal Town began entering into a series of questionable land transactions with regard to a parcel of land in a suburb outside of Tulsa, Oklahoma. The parcel was owned by members of another tribe, the Muscogee Creek Nation, and even qualified as "Indian country." The problem for the Kialagee Tribal Town was that they had no historic connection to the parcel and thus the parcel could not qualify as "Indian lands" upon which they could lawfully game pursuant to the Indian Gaming Regulatory Act. The Kialegee's historic lands were in fact some 75 miles away near a tiny town with no real population base to support a casino.

Undeterred, the Kialegee Tribal Town signed agreements with developers who, in turn, entered into a lucrative "consulting" agreement with an elected official of the Muscogee Creek Nation as they sought to secure that tribe's support of the Kialegee's efforts. Ziva Branstetter & Curtis Killman, *Creek Nation chief signed secret contract with developer for BA Kialegee Casino*, TULSA WORLD (Mar. 9, 2015), www.bit.ly/1HuUjia.

Once word of the planned casino leaked out, there was an uproar in the community. The parcel of land was in a residential area, near a church and the proposed site of an elementary school, and was strongly opposed by the local community.

The State of Oklahoma investigated. Once it concluded that the proposed casino would be unlawful under both IGRA and the federally approved gaming compact agreed upon by the State and the Kialegee Tribal Town, Oklahoma went to federal district court and brought "a suit for injunctive relief against * * * tribal officers[ ] responsible for unlawful conduct." *Michigan* v. *Bay Mills Indian Community*, 134 S.Ct. 2024, 2035 (2014).

But after Oklahoma won an injunction from the district court, the Tenth Circuit dismissed Oklahoma's suit for declaratory and injunctive relief. The court of appeals panel did so under the guise of faithfulness to this Court's commands in *Bay Mills,* but it in fact wholesale misapplied the teachings of *Bay Mills* by foreclosing exactly the type of federal court action that this Court in *Bay Mills* deemed permissible.

The Tenth Circuit's misapplication of *Bay Mills*, if left uncorrected, will spawn further confusion as to the scope of tribal sovereign immunity and federal court jurisdiction over this type of claim. This petition should thus be granted, the decision below should be vacated, and the case should be remanded to the

court of appeals with instructions to reconsider the relevance of *Bay Mills*.

OPINIONS BELOW

The opinion of the court of appeals after rehearing (App., *infra*, 1-28) is reported at 775 F.3d 1204. The superseded opinion of the court of appeals (App., *infra*, 29-52) is reported at 771 F.3d 1247. The order of the district court dated July 31, 2012, modifying its preliminary injunction (App., *infra*, 53-58) is unpublished. The order of the district court dated July 30, 2012, denying reconsideration (App., *infra*, 59-69) is unpublished. The order of the district court dated July 20, 2012, granting a preliminary injunction (App., *infra*, 70-121) is unpublished. The order of the district court dated April 26, 2012, declining to grant Respondents' motion to dismiss (App., *infra*, 122-151) is unpublished.

JURISDICTION

The court of appeals initially entered its judgment on November 10, 2014. App., *infra*, 29-31. The court of appeals amended its opinion and entered judgment in response to a motion for rehearing on December 22, 2014. App., *infra*, 1-3. The Court has jurisdiction under 28 U.S.C. 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 2703(4) of Title 25 of the United States Code provides in relevant part:

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

Section 2710(d)(1) of Title 25 of the United States Code provides in relevant part:

> Class III gaming activities shall be lawful on Indian lands only if such activities are * * * authorized by an ordinance or resolution that * * * is adopted by the governing body of the Indian tribe having jurisdiction over such lands, * * * and [are] conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State.

Section 281(5)(L) of Title 3A of the Oklahoma Statutes provides in relevant part:

> The tribe may establish and operate enterprises and facilities that operate covered games only on its Indian lands as defined by IGRA.

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STATEMENT OF THE CASE

Last term, this Court stated that *Ex parte Young*, 209 U.S. 123 (1908), allowed a suit to proceed against a tribal officer for injunctive relief preventing that officer from conducting illegal gaming. *Michigan* v. *Bay Mills Indian Community*, 134 S.Ct. 2024, 2035 (2014). This case presents the question whether a State may bring suit for declaratory and injunctive relief against a tribal officer for conducting gambling outside of that tribe's "Indian lands" in violation of IGRA and an agreed-upon compact or whether, instead, the State must bring some other "cause of action" in order to state a claim. The Tenth Circuit, claiming reliance on *Bay Mills*, held that the State must bring another cause of action.

I. Legal Background

1. The Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. 2701 *et seq*., creates a comprehensive framework governing gaming activities on Indian lands. IGRA provides this framework in order to "promot[e] tribal economic development, self-sufficiency, and strong tribal governments" while preventing "organized crime and other corrupting influences" or other "congressional concerns" from marring the beneficial impact of tribal gaming. 25 U.S.C. 2702.

IGRA divides gaming activities – and regulatory authority over those activities – into three categories. "Class III gaming" covers the relevant games here,

including most casino games. See 25 U.S.C. 2703(8). IGRA specifically authorizes Class III gaming only on Indian lands and only after entering into a compact with the State in which the gaming will occur. 25 U.S.C. 2710(d); *Bay Mills*, 134 S.Ct. at 2028-2029. IGRA also subjects Class III gaming to oversight by the National Indian Gaming Commission. See 25 U.S.C. 2710(d).

"Indian lands" under IGRA can most easily mean the lands within an Indian reservation. 25 U.S.C. 2703(4)(A). However, for some tribes – such as the tribes of Oklahoma – their reservations ceased to exist during the destructive allotment period of congressional policy toward Indians. See *Solem* v. *Bartlett*, 465 U.S. 463, 466-472 (1984) (discussing law surrounding reservation diminution and termination); see also Cohen's Handbook of Federal Indian Law § 1.04 (Nell Jessup Newton ed., 2012) (discussing allotment period). IGRA thus allows for "Indian lands" to be lands with many forms of recognized tribal title and individual Indian title[1] where the tribe exercises "governmental power." 25 U.S.C. 2703(4)(B). The tribe must also have "jurisdiction" over the land

[1] 25 U.S.C. 2703(4)(B) (covering lands with title held by United States for benefit of tribe or individual Indian as well as lands held by tribe or individual with restrictions in favor of United States or with restraints against alienation). Cf. Cohen's Handbook of Federal Indian Law §§ 15.04, 15.06, 1603[1]-[3] (discussing forms of Indian title).

for its gaming activities to be legal. 25 U.S.C. 2710(d)(1)(A)(i).

As a general rule, the State of Oklahoma has banned gambling. See OKLA. STAT. tit. 21, §§ 941 *et seq.* (2011 & Supp. 2014). Outside of tribal gaming, Oklahoma allows legal gambling only in a limited set of circumstances.[2] The State has also extensively cooperated with tribes who wish to engage in gaming activities pursuant to IGRA. Oklahoma has a standing offer for any Indian tribe to enter into a model gaming compact with set terms authorizing gaming on the compacting tribe's "Indian land." OKLA. STAT. tit. 3A, §§ 280-281 (2011 & Supp. 2014). The State's model compact includes terms on minimum standards for gaming, waivers of sovereign immunity for tort claims by customers, and revenue sharing. *Id.* § 281(5)-(7), (11). The compact also includes dispute resolution procedures involving arbitration and litigation in court. *Id.* § 281(12). Crucially, the model compact only allows a signatory tribe to conduct gaming "on its Indian lands as defined by IGRA." *Id.* § 281(5)(L). Oklahoma law does not provide an exception that allows tribal gambling outside of a tribe's own Indian lands. See *id.* § 280 (waiving application of criminal laws concerning gambling only when

[2] Gaming may be conducted under the auspices of the Oklahoma Horse Racing Act, OKLA. STAT. tit. 3A, § 200 *et seq.* (2011 & Supp. 2014), the Oklahoma Charity Games Act, *id.* §§ 401 *et seq.*, and the Oklahoma Education Lottery Act, *id.* §§ 701 *et seq*.

tribal gaming is conducted pursuant to a federally approved compact). But Oklahoma cannot criminally prosecute Indians in "Indian country" such as restricted Indian allotments. See 18 U.S.C. 1151, 1166.

2. In *Bay Mills*, this Court addressed whether sovereign immunity prevented a State's suit seeking to block tribal gaming outside of Indian lands. 134 S.Ct. at 2028 (noting the question presented). In that case, the Bay Mills Indian Community opened a new casino over a hundred miles from its reservation on non-Indian land. *Id.* at 2029. Michigan filed suit against the tribe seeking an injunction against the tribe's gaming activities at the new casino. *Ibid*. The federal district court granted a preliminary injunction in Michigan's favor, but the Court of Appeals for the Sixth Circuit reversed, concluding that tribal sovereign immunity prevented any suit directly against the tribe.

This Court granted certiorari to determine whether sovereign immunity blocked suit against a tribe by a state seeking an injunction against gaming outside of "Indian land" under IGRA. The Court noted the time-honored principle that Indian tribes "exercise 'inherent sovereign authority'" retained subject to congressional oversight. *Id.* at 2030 (citing, among other authorities, *Oklahoma Tax Commission* v. *Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509 (1991); *United States* v. *Wheeler*, 435 U.S. 313, 323 (1978)). Indian tribes' inherent sovereign authority, not unlike the authority of States, includes the traditional immunity from

unconsented suit enjoyed by sovereigns in the American legal tradition. See *Bay Mills*, 134 S.Ct. at 2030-2031.

The Court inquired into whether the Bay Mills Indian Community had consented to suit and whether Congress had abrogated the tribe's immunity. The Court answered the first question in the negative, see *Bay Mills*, 134 S.Ct. at 2035, and it also answered the second in the negative, see *id.* at 2032-2035. In its discussion of abrogation, the Court noted that Congress did provide a limitation of tribal immunity under IGRA. *Id.* at 2032 (citing 25 U.S.C. 2710(d)(7)(A)(ii)). But this abrogation, the Court reasoned, applied only to gaming conducted on "Indian land" as defined by IGRA – and the gaming at issue would occur outside of "Indian land" under IGRA. *Bay Mills*, 134 S.Ct. at 2032. The Court rejected arguments that the locus of gaming could be the tribe's headquarters away from a casino or that IGRA as a whole abrogated sovereign immunity in suits to prohibit off-reservation gaming. *Id*. at 2032-2034. Sovereign immunity would apply.

The *Bay Mills* Court did not leave Michigan and other states entirely without options, however. Addressing the non-Indian lands in *Bay Mills*, the Court observed that "Michigan could bring suit against tribal officers or employees (rather than the Tribe itself) seeking an injunction for, say, gambling without a license." *Bay Mills*, 134 S.Ct. at 2035. Indeed, invoking *Ex parte Young*, the Court stated that "tribal immunity does not bar such a suit for injunctive relief

against *individuals*, including tribal officers, responsible for unlawful conduct." *Ibid.* (emphasis in original) (citing *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 59 (1978)). The Court explained that States could thus "shutter, quickly and permanently, an illegal casino." *Ibid*.

II. Procedural Background

1. The State of Oklahoma intended to do just that when it brought suit against tribal officials of the Kialegee Tribal Town. Tribal officials and their private development partners sought to develop a casino over 75 miles from Wetumka, Oklahoma, where the tribe has its headquarters. App., *infra*, 8, 10. The site they selected sat on a parcel owned in restricted status by Muscogee Creek Nation members in Broken Arrow, a suburb of Tulsa in Oklahoma.[3] App., *infra*, 10-11. Governmental services at the site were

[3] The Kialegee Tribal Town does have a historical connection with the Muscogee Creek Nation, which was at one point a loose confederation of numerous tribal towns, including the Kialegee town. App., *infra*, 77-78. Some individuals thus have membership in both tribes. *Id.* at 42-43. Yet they are otherwise legally separate federally recognized Indian tribes, and the district court determined that the Kialegee Tribal Town in particular has no connection to the site in Broken Arrow. *Id.* at 111. The Kialegee Tribal Town's claim of shared jurisdiction over the parcel in Broken Arrow is akin to Oklahoma claiming shared jurisdiction over a parcel of land in upstate New York, merely because of Oklahoma and New York's common membership in the United States.

provided by the Muscogee Creek Nation and subdivisions of the State of Oklahoma. *Id.* at 96-97.

Efforts by Kialegee officials and private developers to build a casino at the site apparently stretch back as far as 2009. Ziva Branstetter & Curtis Killman, *Creek Nation chief signed secret contract with developer for BA Kialegee Casino*, TULSA WORLD (Mar. 9, 2015), www.bit.ly/1HuUjia. Apparently anticipating legal and political problems with building a casino on land held in restricted status by Muscogee Creek members, the tribal officials' private partners entered into a lucrative "consulting" agreement with an elected official of the Muscogee Creek Nation. *Ibid*. In May 2010, tribal officials and their private partners also attempted to have the owners transfer an interest in the restricted parcel to the tribe's business corporation. App., *infra*, 12. To do so, they had to obtain the approval of a district court in Tulsa County, Oklahoma, pursuant to federal legislation regarding alienation. *Ibid.*; Act of August 4, 1947, § 1, 61 Stat. 731, 731. The state district court declined to grant approval because of its concerns with the transaction's intent. App., *infra*, 12.

Tribal officials and their private business partners next created a joint venture operating company to house future casino operations, Florence Development Partners LLC ("Florence"). Florence entered into a lease with the parcel owners for a period of six years and eleven months to facilitate construction of a casino on the site in Broken Arrow, App., *infra*, 12-13, evading the requirement that a lease of seven

years or longer receive approval from the Secretary of the Interior or a designee, see *ibid.*; 25 C.F.R. 84.003. The lease, signed in May 2011, even granted Florence the right to extend the lease up to four times for ten years each time. App., *infra*, 13. The contracting parties added the Kialegee Tribal Town itself as a party to the agreement in December 2011. *Ibid*. To advance their gaming efforts, tribal officials accepted Oklahoma's model gaming compact and received secretarial approval in 2011, *id.* at 9-10, in addition to requesting an opinion from the National Indian Gaming Commission on whether it could use the selected parcel for gaming, *id.* at 13-14.[4]

Florence's construction of the facility began in December 2011. App., *infra*, 13. The construction immediately set off a firestorm of controversy. *E.g.*, Susan Hylton, *Broken Arrow officials respond to Kialegee casino controversy, accusations*, TULSA WORLD (Feb. 9, 2012), http://bit.ly/1wWlxxl. At the same time, tribal officials opened a "satellite office" on a residence located on the property and hoisted a tribal flag there – despite the fact that no tribal

[4] The chairwoman of the National Indian Gaming Commission later informed tribal officials that the casino site did not satisfy the legal requirements of IGRA for gaming – in a letter dated six days after the federal district court judge's initial entry of a preliminary injunction. See App., *infra*, 14. However, the Tenth Circuit correctly determined that the chairwoman's letter did not constitute final agency action and hence did not render proceedings in this case moot. *Id.* at 18-20.

members lived on or near the parcel. App., *infra*, 96-97.

2. The State of Oklahoma filed suit on February 8, 2012. The State sought a preliminary injunction against further construction. App., *infra*, 14-16. From the beginning, Oklahoma sued only tribal officials, the tribe's business corporation, and Florence. *Id.* at 14.

Oklahoma pled four claims for relief in the complaint. First, the State sought a declaratory judgment that the tribal officials lacked authority under federal law and under the gaming compact to build and operate a casino outside of the tribe's Indian land under IGRA. App., *infra*, 171-172. Second, Oklahoma asked for a declaratory judgment that the parcel at issue was not the tribe's Indian land under IGRA, rendering efforts to conduct gambling there "in direct violation of the requirements" of IGRA and the gaming compact. *Id.* at 173-175. Third, the State requested a preliminary injunction, *id.* at 175-176 and, fourth, a permanent injunction, *id.* at 176-177.

The tribal officials, the tribal business corporation, and Florence filed a motion to dismiss. App., *infra*, 122. They asserted sovereign immunity, failure to join a necessary party (the Kialegee Tribal Town itself), lack of ripeness, and lack of standing. *Id.* at 123. The district court rejected each contention in its opinion of April 26, 2012, and declined to dismiss the case. *Id.* at 151. The district court expressly agreed with Oklahoma that tribal sovereign immunity did

not bar its suit against tribal officials under *Ex parte Young*. *Id.* at 139-141. As the district court recognized, "a tribe's sovereign immunity does not extend to an official when the official is acting outside the scope of the powers that have been delegated to him." *Id.* at 139 (citing *Burrell* v. *Armijo*, 603 F.3d 825, 832 (10th Cir. 2010)). The district court "additionally" cited IGRA's abrogation of tribal sovereign immunity for gaming on Indian lands as support for its ruling. *Id.* at 141-142.

The district court also rejected the other challenges raised against Oklahoma's suit – it determined that the Kialegee Tribal Town would not be a necessary party because the tribal officials would represent the tribe's interests, and Oklahoma could obtain all necessary relief in a suit against the officials. App., *infra*, 142-144. The district court ruled that Oklahoma had standing because it had sovereign interests that would be injured by an illegal casino, an injury caused by tribal officials' conduct and which could be remedied by favorable judgment. *Id.* at 144-149. Finally, the district court determined that the dispute was ripe for adjudication because the casino's operations were sufficiently imminent and because the terms of the arbitration agreement in the federally approved gaming compact did not render arbitration a mandatory first step in resolving a dispute. *Id.* at 149-150.

The district court next held a three-day evidentiary hearing on the State's motion for a preliminary

injunction during May 2012, granting the injunction on May 18, 2012. App., *infra*, 16, 70-71. In a written opinion with findings of fact and conclusions of law issued in July, the court explained that IGRA only authorized tribal gaming activities "on Indian lands" over which the tribe has jurisdiction and exercises governmental power, a requirement mirrored in the agreed-upon and federally approved gaming compact. *Id.* at 103-104. Discussing whether the tribe had authority over the lands in question, the district court noted the history of treaties and other factors showing that only the Muscogee Creek Nation could plausibly have jurisdiction over the parcel. See *id.* at 108-113. The court also concluded that the tribe did not exercise government power over the land in satisfaction of IGRA. *Id.* at 114.

Addressing the other preliminary injunction factors, the court determined that the State would suffer irreparable harm if gambling proceeded on the parcel, that the harm outweighed a delay in the casino's completion, and that the public interest favored enforcement of the IGRA framework and fully litigating any problems before gaming commenced. App., *infra*, 117-119. The district court thus entered an injunction against completing construction – the facilities were admitted by tribal officials to be a casino – or from conducting Class III gaming under IGRA on the property in Broken Arrow. *Id.* at 120-121. The court later denied a motion to reconsider after the tribe added the parcel owners to its membership. *Id.* at 59, 62, 69. The court did partly modify

its injunction to not bar the tribe from building a facility where gambling would not occur, *id.* at 53, 56, 57.

3. An appeal followed. The Tenth Circuit then stayed proceedings pending the outcome of *Bay Mills* in this Court. App., *infra*, 17. Once this Court decided *Bay Mills*, the court of appeals requested briefing on two questions. First, the Tenth Circuit asked whether the case had been mooted by the letter of the National Indian Gaming Commission chairwoman determining that the Kialegee Tribal Town could not conduct gaming on the property. *Id.* at 17-18. The court determined that the case had not been mooted due to the letter. *Id.* at 18-20. Second, the Tenth Circuit asked what impact *Bay Mills* had on the case. *Id.* at 18.

The State argued that *Bay Mills* supported its position: the Court's opinion expressly recognized that sovereign immunity does not prevent a suit against tribal officials under *Ex parte Young*, 209 U.S. 123 (1908). App., *infra*, 24-25; *Bay Mills*, 134 S.Ct. at 2034-2035. But the panel did not agree. The panel put significant weight on a footnote near the beginning of the *Bay Mills* opinion stating that "provisions of IGRA 'may indicate that a party has no statutory right of action.'" App., *infra*, 25 (quoting *Bay Mills*, 134 S.Ct. at 2029 n.2). Reasoning that the jurisdiction grant and abrogation of sovereign immunity in 25 U.S.C. 2710(d)(7)(A)(ii) shows that "IGRA is concerned only with Class III gaming on Indian lands," the Tenth Circuit cited this Court's exacting sovereign

immunity analysis to hold that Oklahoma's complaint "like the State of Michigan's complaint in *Bay Mills*, fails on its face to state a valid claim for relief." App., *infra*, 26 (citing *Bay Mills*, 134 S.Ct. at 2032).

The Tenth Circuit brushed aside the State's reliance on *Bay Mills* and *Ex parte Young*. This Court in its *Bay Mills* opinion, so the Tenth Circuit reasoned, only allowed officer suits for violations of *state* law. App., *infra*, 26-27 (quoting *Bay Mills*, 134 S.Ct. at 2035). Because Oklahoma's suit alleged violations of a federal statute and an agreed-upon compact binding under federal law, the Tenth Circuit reasoned, Oklahoma's suit could not proceed under an *Ex parte Young* theory. App., *infra*, 26-27.

Because its holding as to IGRA did not dispose of the State's claim regarding the agreed-upon compact, the panel searched for another grounds upon which to dispose of the State's case. The court of appeals panel turned to an arbitration provision in the compact, which said that "either party *may* refer a dispute * * * to arbitration." App., *infra*, 27 (emphasis added). The district court had found that the provision did not *require* arbitration before litigation. See *ibid*. Although the tribal officials did not challenge the district court's arbitration holding on appeal, the issue was not briefed, and it was not even raised at oral argument, the appeals court nonetheless relied on the provision and reversed the district court's holding on that point.

The State filed a petition for rehearing and for rehearing en banc. The court of appeals panel granted the petition for rehearing, but only to make minor changes to its original opinion that did not affect the opinion's reasoning App., *infra*, 2-3. Rehearing en banc was not granted. *Ibid*.

REASONS FOR GRANTING THE PETITION

The Tenth Circuit significantly misapplied *Michigan* v. *Bay Mills Indian Community*, 134 S.Ct. 2024 (2014) – a suit against a tribe with no waiver of sovereign immunity and gaming off Indian lands – to this case, one against tribal officials for gaming on Indian country with an inapplicable arbitration agreement. The Tenth Circuit's serious errors, coming right on the heels of *Bay Mills*, threaten to spread significant confusion in the lower courts. Further, tribal officer suits raise a crucial shield for the rights of individuals and States interacting with tribes. This Court has maintained that such suits are available, *e.g., Bay Mills*, 134 S.Ct. at 2035 (citing *Ex parte Young*, 209 U.S. 123 (1908)), yet the Court has not addressed their full scope. Many of the courts of appeals have – and they have accorded a wide berth to their availability. The Court should grant certiorari in this case, vacate the judgment, and remand with instructions to enter judgment consistent with this Court's holding in *Bay Mills*.

I. The Tenth Circuit's Misinterpretation Of *Bay Mills* Will Spread Confusion In The Lower Courts.

The court of appeals at the outset of its opinion professed its desire to "follow[ ] the lead" of *Bay Mills*. App., *infra*, 7. Yet the panel appears to have applied *Bay Mills* to this case based on only the most superficial similarities: the State brought suit to prevent tribal gaming because the gaming would occur on land that is Indian country but that is not the "Indian land" of this particular tribe under IGRA. If the panel had considered the case at any greater level of detail, however, it would have reached a different conclusion. This case has crucial differences from *Bay Mills*, a sovereign immunity case from beginning to end. These differences render the Tenth Circuit's opinion a significant misapplication of *Bay Mills* and warrant review.

1. Oklahoma sued tribal officers, not the tribe. This difference alone puts the case squarely outside the realm of the exacting sovereign immunity abrogation analysis in *Bay Mills*. And this Court itself recognized that officer suits would be available to states like Michigan or Oklahoma under an analogy to *Ex parte Young*. 134 S.Ct. at 2035. Even the Tenth Circuit's own precedents clearly state that suits may proceed against tribal officers for injunctive relief. See *Crowe & Dunlevy, P.C.* v. *Stidham*, 640 F.3d 1140, 1154-1155 (2011); *Burrell* v. *Armijo*, 456 F.3d 1159, 1174 (2006). Other circuits have reached similar

conclusions. *Crowe & Dunlevy*, 640 F.3d at 1154-1155 (collecting examples).

The panel in this case evaded the logical application of this Court's teachings as well as circuit precedents by misinterpreting *Bay Mills* and creating its own faulty construction of IGRA. In *Bay Mills*, the Court noted early on that the general grant of federal question jurisdiction in Section 1331 could provide subject-matter jurisdiction over disputes involving an alleged violation of IGRA. *Bay Mills*, 134 S.Ct. at 2029 n.2; 28 U.S.C. 1331. The last sentence of the extensive footnote observed that provisions of IGRA could show the lack of a "statutory cause of action." *Ibid*.

Footnote in hand, the panel sought to pour Oklahoma out of court. The court of appeals panel interpreted the exacting *Bay Mills* inquiry into sovereign immunity abrogation as an interpretation of *all* of IGRA showing that IGRA "is concerned only with class III gaming on Indian lands." App., *infra*, 26. Based on that view of the "concern" of IGRA, the court of appeals concluded that "no statutory cause of action" under IGRA exists to allow a State to prevent unauthorized tribal gaming. *Ibid*.

Yet the provision interpreted by this Court – 25 U.S.C. 2710(d)(7)(A)(ii) – only involves a grant of subject-matter jurisdiction and an abrogation of sovereign immunity. *Bay Mills*, 134 S.Ct. at 2032. That is why the provision served as the touchstone for a sovereign immunity abrogation analysis. See *ibid*.

The court's analysis in *Bay Mills* does not represent a blank check for tribal gaming off of a tribe's own lands, but the court of appeals treated it like one.

2. Further, the casino *does* sit in "Indian country" and arguably on the "Indian lands" under IGRA of another tribe. The entire problem in the case has always been that the parcel has nothing to do with the Kialegee Tribal Town. In other words, the parcel is not *that tribe's* Indian lands. App., *infra*, 10-11 (noting that the lands were held by another tribe's members); *Id.* at 96-97 (finding that Kialegee Tribal Town provides no governmental services in the area).

"Indian country," for the purposes of various criminal statutes including the federal anti-gambling statute, includes Indian allotments. 18 U.S.C. 1151(c) (defining Indian country to include allotments); 18 U.S.C. 1166 (criminalizing unauthorized gambling in "Indian country"). The parcel at issue in this case is an allotment from the former reservation of the Muscogee Creek Nation. App., *infra*, 10-11. Thus, unlike *Bay Mills*, this is a case involving a parcel in Indian country.

Further, if the parcel satisfies the requirements of being Indian lands for any tribe, it would be the Muscogee Creek Nation. Indian lands under IGRA, when not part of a reservation, must be lands held in trust by the United States for the benefit of a tribe or individual Indian or be held in fee by a tribe or individual Indian with restraints on alienation or restrictions in favor of the United States. 25 U.S.C.

2703(4)(B). Further, the tribe must exercise "government power" over the land. *Ibid*. Two members of the Muscogee Creek Nation held the land in fee with restraints on alienation. App., *infra*, 10-11. Only the Muscogee Creek Nation, of any tribe, provided government services in the area. *Id.* at 96-97. The land simply could not be Kialegee land.

Beyond satisfying IGRA's requirements for Indian lands, Class III gaming may only be conducted pursuant to valid ordinances that are enacted "by the governing body of the Indian tribe having jurisdiction over such lands." 25 U.S.C. 2710(d)(1)(A)(i). The district court in this case made an extensive inquiry into whether the Kialegee Tribal Town had jurisdiction over this property. App., *infra*, 106-113. The court concluded that it did not. *Ibid*.

The Tenth Circuit ignored this problem and omitted any discussion of the Muscogee Creek Nation. Instead, it categorized the case as one about tribal gaming *off* Indian lands. App., *infra*, 25-26.[5] Yet the distinction between *Bay Mills* and this case – which does involve gaming in Indian country and

[5] The complaint does allege that the parcel at issue "is not 'Indian land' for purposes of either IGRA or the State Gaming Compact." App., *infra*, 173. This sentence, in context, is best understood as a statement that the parcel is not the Indian land of that tribe – it would not make sense, for example, to refer to Indian land in general with respect to the compact between Oklahoma and the Kialegee Tribal Town. Further, nowhere in the complaint does the State assert that the parcel does not fall within Indian country.

arguably on Indian lands under IGRA – has crucial relevance. The Tenth Circuit placed significant weight on the availability of a full panoply of *state remedies* in an officer suit under *Bay Mills*. *Compare* App., *infra*, 26-27 *with Bay Mills*, 134 S.Ct. at 2034-2035. But the State does *not* have a full set of remedies in this situation. See 18 U.S.C. 1166 (removing state criminal jurisdiction over gambling in Indian country). The Tenth Circuit appears to expect the State to bring an officer suit analogous to *Ex parte Young* for violations of state law[6] that will occur in Indian country – all because of *Bay Mills*. That cannot be what the *Bay Mills* Court meant.

3. The arbitration agreement in this case has been clearly interpreted by the district court to not impose arbitration as a prerequisite to filing suit. App., *infra*, 150. The arbitration provisions applicable here also include *de novo* review of any arbitration decision and waivers of sovereign immunity. See OKLA. STAT. tit. 3A, § 281(12)(3) (Supp. 2010). In another attempt to match superficial similarities between this case and *Bay Mills*, however, the Tenth Circuit simply assumed that the presence of arbitration procedures in the relevant compact blocked suit. App., *infra*, 26-27. In no sense does the Tenth Circuit even address this problem or the district court's reasoning at all. See *ibid*. The panel *even quoted the*

[6] By itself, such a suit may be problematic. See *Pennhurst State School & Hosp.* v. *Halderman*, 465 U.S. 89, 121 (1984).

permissive language in the agreement. *Ibid*. (noting that "either party *may* refer a dispute * * * to arbitration" (emphasis added)). The tribal officials had not even appealed the district court's interpretation.

Any level of detailed analysis shows the significant differences between this case and *Bay Mills*. And there is no hint that the Tenth Circuit will change course – it already denied a petition for rehearing en banc in this case. App., *infra*, 2-3. By purporting to apply *Bay Mills* based only on superficial similarities rather than using thorough and detailed analysis, the Tenth Circuit's opinion threatens to spread confusion about the effects of *Bay Mills* – just months after the decision. Certiorari can undo these consequences and ensure that the lower courts accurately apply this Court's teachings.

II. Officer Suits Against Tribal Officials Raise An Important Shield For The Rights Of Individuals And States In Light Of The Broad Sovereign Immunity Accorded To Tribes Under *Kiowa* and *Bay Mills*.

The growing breadth of off-reservation tribal activities has rendered some avenue of legal relief all the more important for the protection of individuals, entities, and States. Given this Court's broad understanding of tribal sovereign immunity upheld in *Bay Mills*, suits against tribal officials represent a vital mechanism for safeguarding against those officials' illegal actions. Yet this Court has never clarified the

permissible scope of tribal officer suits, even though it has announced their similarity to *Ex parte Young*. See, *e.g., Bay Mills*, 134 S.Ct. at 2035. Several circuits *have* had the opportunity to address tribal officer suits, however: and they have tended to broadly interpret their availability. See, *e.g.*, *Northern States Power Co.* v. *Prairie Island Mdewakanton Sioux Indian Community*, 991 F.3d 458, 460 (8th Cir. 1993). The court of appeals decision in this case limiting the availability of officer suits thus undermines legal protections of growing significance and departs from the views of the courts of appeals – warranting certiorari.

1. Off-reservation commercial activities first received sovereign immunity protection from this Court in *Kiowa Tribe of Oklahoma* v. *Manufacturing Technologies*, 523 U.S. 751 (1998). There, a tribe had executed a promissory note in exchange for corporate stock and then provoked litigation by not paying on the note. See *id*. at 753-754. Reasoning that sovereign immunity attached to the tribe with no distinction for the location of an activity or its commercial nature, the Court upheld a broad reading of tribal sovereign immunity, see *ibid*., even though the doctrine "developed almost by accident," *id*. at 756, and there were "reasons to doubt the wisdom of perpetuating" it, *id*. at 758.

The principal dissent in *Bay Mills* reiterated many of these concerns. Justice Thomas, joined by Justice Scalia, Justice Ginsburg, and Justice Alito, characterized the *Kiowa* position on tribal sovereign

immunity as an "indefensible" view. *Bay Mills*, 134 S.Ct. at 2050 (Thomas, J., dissenting); see *also id*. at 2046 (Scalia, J., dissenting) ("I am now convinced that *Kiowa* was wrongly decided . . . in the intervening 16 years, its error has grown more glaringly obvious."). Justice Thomas also noted that the "commercial activities of tribes have increased dramatically" since *Kiowa*. *Id.* at 2050-2051. Tribal enterprises range from tourism and resource industries to banking, cigarette sales,[7] and payday loans.[8] The economic breadth of tribes' commercial activities only continues to grow. See, *e.g.,* National Indian Gaming Commission, 2013 Indian Gaming Revenues Increased 0.5% (July 21, 2014), http://1.usa.gov/1FTwS0I.

But this Court upheld *Kiowa*'s broad understanding of sovereign immunity. 134 S.Ct. at 2036-2039. The availability of officer suits for States and individuals to ensure compliance with the law has therefore never been more important – and this Court apparently agrees. See *Bay Mills*, 134 S.Ct at 2035. Accordingly, this Court should grant certiorari to ensure that the Tenth Circuit's misconstruction of *Bay Mills* does not erode such an important protective mechanism.

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[7] See, *e.g., Oklahoma Tax Com'n* v. *Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 507 (1991) (describing one tribe's cigarette sales operations).

[8] Brianna Bailey, *Oklahoma tribe is fined for online payday lending operations*, NEWSOK (Jan. 8, 2015), http://bit.ly/1b5xiHU.

2. This Court has not addressed the scope of tribal officer suits. In *Bay Mills*, the Court observed that a State such as Michigan could "bring suit against tribal officials or employees * * * seeking an injunction for, say, gambling without a license." 134 S.Ct. at 2035. The Court noted that it had analogized to *Ex parte Young* with respect to Indian tribes before. *Ibid.* (citing *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49 (1978)).

In *Santa Clara Pueblo*, a tribe member filed suit against a tribe and one of its officers for violations of the Indian Civil Rights Act, 25 U.S.C. 1301-1303. 436 U.S. at 51. The Court applied the doctrine of tribal sovereign immunity in this context to hold that the tribe itself could not be subjected to suit. *Id*. at 58-59 (reasoning that neither consent nor abrogation applied). Moving on to the tribe member's claim against the officer, the Court noted that "[a]s an officer of the Pueblo, [the tribal official] is not protected by the tribe's immunity from suit." *Id.* at 59 (citing *Puyallup Tribe, Inc.* v. *Department of Game of Washington*, 433 U.S. 165, 171-172 (1977)). The Court went on to discuss whether Congress had intended to create a private right of action under the Indian Civil Rights Act. See *Santa Clara Pueblo*, 436 U.S. at 59. *Santa Clara Pueblo* does not otherwise clarify the scope of officer suits against tribal officials.

Nor does *Puyallup*, which the *Santa Clara Pueblo* court had cited. That opinion was one of several in long-running litigation over fishing rights in the Pacific Northwest. See *Puyallup*, 433 U.S. at 167. The

court had merely stated that, insofar as the tribe acted in the litigation as a representative of tribal members, it could not assert sovereign immunity. See *id.* at 170-171. Other references to *Ex parte Young* and tribal officers have been similarly enigmatic. See *Oklahoma Tax Commission* v. *Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 514 (1991) (speculating that an *Ex parte Young* suit for damages could be available). This Court has not otherwise addressed the breadth of officer suits against tribal officers.

3. Several of the circuit courts have. At least six courts of appeals have expressly recognized the application of *Ex parte Young* to officer suits. These suits often have a broad understanding of officer suits' availability.

The Seventh Circuit in *State of Wisconsin* v. *Baker*, 698 F.2d 1323 (1983), reasoned that where tribal officials act outside the scope of the tribe's sovereign power, those officials attempt to "exercise[ ] a power [the] tribe was powerless to convey" and therefore "should be stripped of * * * immunity," *id*. at 1332-1333.

The Ninth Circuit in *Burlington Northern Railroad Co.* v. *Blackfeet Tribe of Blackfeet Indian Reservation*, 924 F.2d 899 (1991), also recognized that "tribal officials are not immune from suit" in a dispute on the validity of certain tribal taxes, *id.* at 901-902. The Ninth Circuit later overruled the *Burlington Northern* panel's view on tax validity. See *Big Horn*

County Electric Cooperative, Inc. v. *Adams*, 219 F.3d 944, 953 (2000). But that decision did not overrule the *Burlington Northern* court's understanding of officer suits, particularly where prospective injunctive relief is at stake. *Id.* at 954.

The Eighth Circuit in *Northern States Power Co.* v. *Prairie Island Mdewakanton Sioux Indian Community*, 991 F.3d 458 (1993), concluded that tribal officers could be subject to suit under *Ex parte Young* for enforcing a tribal ordinance preempted by federal law, *id.* at 460. The court reasoned that "[i]f the tribe *did not have the power* to enact this ordinance, then the tribal officers were not clothed with the tribe's sovereign immunity." *Ibid.* (emphasis added).

The Eleventh Circuit in *Tamiami Partners, Ltd.* v. *Miccosukee Tribe of Indians of Fla.*, 177 F.3d 1212 (1999), also reached the conclusion that tribal officers could be subject to suit when acting "beyond their authority," *id.* at 1225.

The D.C. Circuit concluded, in a suit involving claims by the descendants of former slaves of the Cherokee Nation, that the principle of *Ex parte Young* allowed a suit to proceed for injunctive relief against tribal officers allegedly violating the Thirteenth Amendment and a post-civil war treaty. *Vann* v. *Kempthorne*, 534 F.3d 741, 750 (2008).

The Tenth Circuit itself expressly recognized the availability of *Ex parte Young* suits against tribal officers in *Crowe & Dunlevy, P.C.* v. *Stidham*, 640 F.3d 1140 (2011). Earlier, the Tenth Circuit had allowed

officer suits to proceed without expressly invoking *Ex parte Young* because "the individual tribal officials acted outside their official authority." *Burrell*, 456 F.3d at 1174 (allowing suit to proceed because complaint sufficiently alleged *ultra vires* action by tribal official).

Several circuits have thus allowed officer suits to proceed against tribal officials. The majority of the circuits to address this problem have simply inquired into whether tribal officers act outside the arena in which their tribe has sovereign authority. At other times, the circuits have asked in more particular terms whether a suit accords with this Court's developed *Ex parte Young* jurisprudence for states. Regardless of which test applies, however, Oklahoma has asserted that tribal officers exceeded the scope of tribal sovereignty in building an illegal casino and that such an action violates federal law.

Because this case implicates an important safeguard for the rights of States, other entities, and individuals in an area of growing national importance – tribal commercial activities – this Court should grant certiorari to prevent the Tenth Circuit's opinion from undermining the established views of the courts of appeals.

III. This Court Can Award Adequate Relief Through A Grant Of Certiorari, Reversal, And Remand For Reconsideration.

This Court has a practice of granting certiorari, reversing or vacating judgment, and remanding for reconsideration in light of some additional factor or new development. See, *e.g.*, *Youngblood* v. *West Virginia*, 547 U.S. 867, 870 (2006); *Department of Justice* v. *City of Chicago*, 537 U.S. 1229, 1229 (2003). In *Youngblood*, this Court reversed and remanded with instructions for West Virginia's highest court to reconsider the petitioner's *Brady* claims after that court's opinion did not address them. *Youngblood*, 547 U.S. at 870. The recency of *Bay Mills* and the erroneous interpretation of that case by the Tenth Circuit warrant this type of relief. A grant of certiorari, reversal, and a remand with instructions requesting that the Tenth Circuit reconsider the question presented would provide adequate relief for the State and would prevent the court of appeals panel's misinterpretation from spreading to other courts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

STATE OF OKLAHOMA, EX REL.,

Plaintiff-Appellee,

v.

TIGER HOBIA, as Town King and member of the Kialegee Tribal Town Business Committee, et al.,

Defendants-Appellants,

and

FLORENCE DEVELOPMENT PARTNERS, LLC, as Oklahoma limited liability company,

Defendant.

THE STATE OF NEW MEXICO, et al.,

Amici Curiae.

STATE OF OKLAHOMA, EX REL.,

Plaintiff-Appellee

v.

No. 12-5134

FLORENCE DEVELOPMENT PARTNERS, LLC, an Oklahoma limited liability company,

Defendant-Appellant,

and

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; KIALEGEE TRIBAL TOWN, a federally chartered corporation,

Defendants.

THE STATE OF NEW MEXICO; STATE OF MICHIGAN,

Amici Curiae.

No. 12-5136

ORDER

(Filed Dec. 22, 2014)

Before **BRISCOE**, Chief Judge, **KELLY** and **BACHARACH**, Circuit Judges.

These matters are before the court on the State of Oklahoma's *Petition for Rehearing or Rehearing En Banc*. We grant panel rehearing to the extent of the

amendments made to the revised Opinion attached to this order. The clerk of court is directed to vacate the decision issued originally on November 10, 2014 and to reissue the attached version.

The *Petition for Rehearing or Rehearing En Banc*, as well as the newly revised Opinion, were also transmitted to all of the judges of the court who are in regular active service and who are not recused. As no member of the panel and no judge in regular active service on the court requested that the court be polled, the request for en banc review is denied.

Entered for the Court

/s/ Elisabeth A. Shumaker
ELISABETH A. SHUMAKER, Clerk

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THE STATE OF NEW MEXICO; STATE OF MICHIGAN,

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STATE OF OKLAHOMA, EX REL.,

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FLORENCE DEVELOPMENT PARTNERS, LLC, an Oklahoma limited liability company,

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and

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Defendants.

THE STATE OF NEW MEXICO; STATE OF MICHIGAN,

Amici Curiae.

No. 12-5136

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA (D.C. No. 4:CV-12-00054-F)

(Filed Dec. 22, 2014)

Matthew Justin Kelly of Fredericks Peebles & Morgan LLP, Washington, DC, (Martha L. King of Fredericks Peebles & Morgan LLP, Louisville, Colorado; Dennis J. Whittlesey, Jr. of Dickinson Wright PLLC, Washington, DC; H. James Montalvo, Law Offices of H. James Montalvo, P.A., South Miami, Florida, with him on the briefs), for Defendants-Appellants.

Patrick R. Wyrick, Solicitor General, (E. Scott Pruitt, Attorney General, Oklahoma Office of the Attorney General, and M. Daniel Weitman, Assistant Attorney General, Oklahoma City, Oklahoma; Lynn H. Slade, William C. Scott and Sarah M. Stevenson of Modrall, Sperling, Roehl, Harris & Sisk, P.A., Albuquerque, New Mexico, with him on the briefs), for Plaintiff-Appellee.

Gary K. King, Attorney General, State of New Mexico, Santa Fe, New Mexico, and Christopher D. Coppin, Special Assistant Attorney General, State of New Mexico, Albuquerque, New Mexico, filed an amicus curiae brief for the State of New Mexico.

Bill Schuette, Attorney General, State of Michigan, John J. Bursch, Solicitor General, State of Michigan, and S. Peter Manning and Louis B. Reinwasser, Assistant Attorneys General, State of Michigan, Lansing, Michigan, filed an amicus curiae brief for the State of Michigan.

Before **BRISCOE**, Chief Judge, **KELLY** and **BACHARACH**, Circuit Judges.

BRISCOE, Chief Judge.

We once again address the subject of Indian gaming and, following the lead of the Supreme Court's recent decision in *Michigan v. Bay Mills Indian Cmty.*, 134 S.Ct. 2024 (2014), emphasize that any federal cause of action brought pursuant to 25 U.S.C. § 2710(d)(7)(A)(ii) of the Indian Gaming Regulatory Act (IGRA) to enjoin class III gaming activity must allege and ultimately establish that the gaming "is located on Indian lands." 25 U.S.C. § 2710(d)(7)(A)(ii). If, as here, the complaint alleges that the challenged class III gaming activity is occurring somewhere other than on "Indian lands" as defined in IGRA, the action fails to state a valid claim for relief under § 2710(d)(7)(A)(ii) and must be dismissed.

The State of Oklahoma filed this action against officials of the Kialegee Tribal Town, a federally recognized Indian tribe in Oklahoma, claiming that they, along with a federally-chartered corporation related to the tribe and a related Oklahoma limited liability company, were attempting to construct and ultimately operate a class III gaming facility on a parcel of land in Broken Arrow, Oklahoma, that was neither owned nor governed by the Tribal Town, in violation of both IGRA and a state-tribal gaming

compact. Defendants moved to dismiss the complaint, but the district court denied their motion. The district court subsequently granted a preliminary injunction in favor of the State that prohibited defendants from constructing or operating a class III gaming facility on the property at issue. Defendants now appeal. Exercising jurisdiction pursuant to 28 U.S.C. § 1291, we conclude that, in light of *Bay Mills*, the State has failed to state a valid claim for relief. We therefore reverse and remand to the district court with instructions to vacate its preliminary injunction and to dismiss the State's complaint.

I

Factual background

a) The Tribe

The Kialegee Tribal Town (the Tribe) is a federally recognized Indian tribe, organized under Section 3 of the Oklahoma Indian Welfare Act (OIWA), 25 U.S.C. § 503 *et seq*. The Tribe, headquartered in Wetumka, Oklahoma, first received federal recognition in 1936. The Tribe has no reservation and, in a 1990 application it submitted to the Bureau of Indian Affairs (BIA), stated "that it 'had no land.'" Add. at 25.

The Tribe is governed in accordance with a constitution and by-laws that were approved by the Secretary of the Interior (Secretary) on April 14, 1941, and ratified by the Tribe on June 12, 1941. The 1941 Constitution established the Kialegee Tribal

Town Business Committee (Business Committee) as the Tribe's governing body.

b) The parties

Defendant Tiger Hobia is the Tribe's Town King, a member of the Business Committee, and a citizen and resident of the State of Oklahoma. Defendant Thomas Givens is the Tribe's 1st Warrior, a member of the Business Committee, and a citizen and resident of the State of Oklahoma.

Defendant Kialegee Tribal Town (the Town Corporation) is a federally chartered corporation. Its federal charter was issued under Section 3 of the OIWA, approved by the Secretary of the Interior on July 23, 1942, and ratified by the Tribe on September 17, 1942. The charter provides the Town Corporation with the power to sue and be sued.

Florence Development Partners, LLC (Florence Development) is an Oklahoma limited liability company doing business in the State of Oklahoma.

c) The gaming compact between the State and the Tribe

In 2004, the State of Oklahoma established a model tribal gaming compact that effectively constitutes a "pre-approved" offer to federally recognized tribes in the State (Model Compact). Add. at 27. If a tribe accepts the Model Compact, obtains approval of the Model Compact by the Secretary of the Interior,

and complies with the requirements of IGRA, the tribe can operate class III gaming facilities on its Indian lands.

On April 12, 2011, the Tribe accepted the Model Compact, and the Tribe and State entered into what is referred to as "the Kialegee Tribal Town and State of Oklahoma Gaming Compact" (Tribal-State Gaming Compact). App. at 692. The Secretary of the Interior approved the Tribal-State Gaming Compact on July 8, 2011. The Tribal-State Gaming Compact authorizes the Tribe to operate gaming "only on its Indian lands as defined by IGRA." Add. at 27 (internal quotation marks omitted).

d) Defendants' construction of a gaming facility in Broken Arrow, Oklahoma

By their own admission, defendants "engaged in the construction of and [had] plan[ned] to operate the Red Clay Casino as a [c]lass III gaming facility under IGRA," App. at 394, "at the southwest corner of Olive Avenue and Florence Place, in Broken Arrow, Oklahoma," *id.* at 30.

e) The location of the gaming facility

The property on which the gaming facility was being built (the Property) is located more than 70 miles away from the Tribe's headquarters and is not held in trust by the United States for the Tribe. Instead, at the time the construction began, the Property was "owned by [sisters] Wynema Capps and

Marcella Gibbs, as tenants in common, subject to federal restraints against alienation." *Id.* at 32. Both Capps and Giles were enrolled members of the Muscogee (Creek) Nation.

The ownership of the Property can be traced to Tyler Burgess, an enrolled Creek Indian of full blood. "In 1901, the Creek Nation and the United States entered into [an] agreement governing the allotment of the Creek Nation's lands." Add at 35. "Under Section 23 of the 1901 agreement, the Principal Chief of the Muskogee Nation was to execute and deliver to each citizen of the Muskogee Nation an allotment deed conveying to him all right, title, and interest of the Creek Nation and of all other citizens in and to the lands embraced in his allotment certificate." *Id.* (internal quotation marks omitted). "On August 6, 1903, as part of the allotment of those lands, an allotment deed and homestead patent [for 160 acres] were issued to Tyler Burgess." *Id.* Burgess was not a member of the Tribe, but rather was an enrolled member of Lochapoka Town (a division of the Creek Nation).

Burgess's allotted land subsequently passed by descent to two heirs: Capps and Giles. Capps and Giles hold the land as tenants in common, subject to federal restrictions and restraints against alienation. The land encompasses the Property at issue.

The Property is not held in trust by the United States for the Tribe or for the benefit of any enrolled member of the Tribe. And, as of May 18, 2012 (the

date of the preliminary injunction hearing held by the district court in this case), the Property was not held by either the Tribe or an enrolled member of the Tribe subject to restriction by the United States against alienation.

f) The leases of the Property

In May 2010, the Town Corporation, "as Tenant, executed a Prime Ground Lease with Capps and Giles, as Landlord, for the . . . Property as a site for a proposed casino facility." *Id.* at 40. Capps and Giles subsequently filed a petition in Oklahoma state district court seeking approval, pursuant to the Act of August 4, 1947, 61 Stat. 731, of the proposed Prime Ground Lease. On August 17, 2011, the state district court entered an order withholding its approval of the Prime Ground Lease. In doing so, the state district court noted "that it was not the appropriate forum to resolve intertribal jurisdictional disputes between the Muscogee (Creek) Nation and the [Tribe], and concluded that an individual citizen cannot transfer government jurisdiction over his or her property by the terms of a lease." Add. at 40 (internal quotation marks omitted).

"In the meantime, on May 10, 2011, Capps and Giles, as Landlord, entered into a separate Ground Lease Agreement with Defendant Florence Development . . . as Tenant, pertaining to the . . . Property" (the May 2011 Lease). *Id.* at 41. "On approximately December 1, 2011, the May 2011 Lease was amended

by a First Amendment to Ground Lease Agreement . . . to add the [Tribe] as a signatory party." *Id.*

The May 2011 Lease "was written to have a term of six year[s] and 11 months so it would not have to be approved by the Secretary of the Interior or his designee." *Id.* But the May 2011 Lease purported to grant Florence Development the right to extend the term of the lease for four periods of ten years each. *Id.*

g) The operating agreement and ensuing construction

In May 2011, the Tribe, Giles, Capps, and Golden Canyon Partners, LLC, "entered into the Operating Agreement of Florence Development . . . to create a joint venture to build and operate the Red Clay Casino." *Id.* at 42.

In December 2011, defendants proceeded with actual construction of the casino on the Property by commencing grading and site preparation. By May 2012, "the structure was up and the inside sprinkler systems were in place." *Id.*

h) The National Indian Gaming Commission's decision

In April 2011, the Tribe sent the National Indian Gaming Commission (NIGC) notice of the Tribe's intent to license a new gaming facility on the Property. The Tribe's purpose in doing so was to obtain a decision from the NIGC regarding "the

gaming-eligible status of the . . . Property." Aplt. Supp. Br. at 10.

On May 24, 2012, the NIGC's general counsel issued a memorandum to the NIGC's chairwoman opining that the Property did not qualify as the Tribe's Indian lands eligible for gaming because the Tribe had not established that it had legal jurisdiction over the Property for purposes of IGRA. The following day, May 25, 2012, the NIGC's chairwoman sent the Tribe a letter adopting the general counsel's opinion. The letter stated that if gaming was commenced by the Tribe on the Property, the chairwoman would exercise her enforcement authority under 25 U.S.C. § 2713 to issue a notice of violation and temporary closure order.

The Tribe requested reconsideration, which the chairwoman denied.

Procedural background

a) The district court proceedings

The State initiated this action on February 8, 2012, by filing a complaint in federal district court against Tiger Hobia, Thomas Givens, other unnamed members of the Kialegee Tribal Town Business Committee (all in their capacities as members and officers of the Business Committee), Florence Development, and the Town Corporation. The complaint sought "declaratory and injunctive relief to prevent Defendants . . . from proceeding with construction or

operation of the proposed 'Red Clay Casino,' in direct violation of both" the Tribal-State Gaming Compact and IGRA. App. at 22. In describing the Property on which the casino was being built, the complaint alleged that it was owned by "enrolled member[s] of the Muscogee (Creek) Nation," *id.* at 32, was "not within the limits of an Indian reservation within the meaning of IGRA," *id.*, was "not held in trust by the United States for the benefit of the" Tribe, *id.*, or "an enrolled member of the" Tribe, *id.* at 33, was "not held by either the . . . Trib[e] . . . or an enrolled member of the . . . Trib[e] . . . subject to restriction by the United States against alienation," *id.*, and that the "Trib[e] . . . d[id] not have a possessory interest in" or "exercise[ ] governmental power" over the Property, *id.* Based upon these alleged attributes, the complaint in turn alleged that the "Property d[id] not meet the definition of 'Indian land' . . . as required by the IGRA." *Id.* at 13; *see id.* ("the Property is not 'Indian lands, as required by IGRA, 25 U.S.C. §2703(4)(A), nor is it, with respect to the . . . Trib[e] . . . 'its Indian lands,' as required by the . . . Gaming Compact").

The "First Claim for Relief" in the complaint alleged that the State was "entitled to a declaratory judgment that the Committee Defendants lack[ed] authority under federal law and the federally approved [Tribal-]State Gaming Compact to construct or operate a gaming facility on the . . . Property." *Id.* at 36. The "Second Claim for Relief" alleged that the State was "entitled to a declaratory judgment that (i) the . . . Property [wa]s not land within the [Tribe's]

jurisdiction and [wa]s not land over which the [Tribe] exercise[d] governmental power and (ii) the Defendants' efforts to construct or operate a [c]lass III gaming facility on the . . . Property [wa]s in direct violation of the requirements of the IGRA and the [Tribal-]State Gaming Compact." *Id.* at 38-39. The "Third Claim for Relief" sought a preliminary injunction "restraining the continued construction and proposed operation of an illegal, unauthorized gaming facility" on the Property. *Id.* at 39. Lastly, the "Fourth Claim for Relief" sought both a preliminary and permanent injunction "restraining the Defendants from proceeding with the construction or operation of the proposed Casino." *Id.* at 40.

Along with its complaint, the State filed a motion for preliminary injunction asking the district court to enjoin defendants from taking any action to construct or to operate a class III gaming facility on the Property.

Defendants moved to dismiss the complaint on a number of grounds, including Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief could be granted. The district court, however, denied defendants' motions.

On May 18, 2012, the district court held an evidentiary hearing on the State's motion for preliminary injunction and, at the conclusion of the hearing, orally granted the State's motion. On July 20, 2012, the district court followed up its oral ruling and issued an opinion and order preliminarily enjoining

defendants from "proceeding with development or construction of the proposed Red Clay Casino or any other gaming facility on the . . . Property . . . [and from] conducting [c]lass III gaming on the . . . Property." *Id.* at 539.

Defendants moved to reconsider or modify the preliminary injunction. In support of their request to reconsider, defendants alleged that in May 2012, Giles and Capps applied for and were granted membership in the Tribe, and that, as a result, the Tribe had a direct interest in the Property. As an alternative to reconsideration, defendants asked the district court to modify the preliminary injunction to allow them to continue construction of buildings on the Property for use as a sports bar or restaurant. The district court denied defendants' motion to reconsider, but granted in part their motion to modify.

Defendants subsequently appealed.

b) Appellate proceedings

On September 5, 2013, we abated these appeals pending the Supreme Court's resolution of *Bay Mills*. On May 30, 2014, the State submitted a status report noting that the Supreme Court had decided *Bay Mills* on May 27, 2014. Later that same day, and in response to the State's status report, we directed the parties to submit supplemental briefs addressing two issues: (1) whether these proceedings had been rendered moot by the NIGC chairwoman's determination that the Tribe lacked jurisdiction to conduct gaming

on the Property; and (2) the impact of the Supreme Court's *Bay Mills* decision on these proceedings. The parties have since complied with our order.

II

Mootness

We turn first to the question of whether this case was rendered moot by the NIGC chairwoman's May 25, 2012 letter determining that the Tribe lacked jurisdiction over the Property to conduct gaming pursuant to IGRA. A case becomes constitutionally moot when the parties no longer have a legally recognizable interest in the result. *City of Erie v. Pap's A.M.*, 529 U.S. 277, 287 (2000). In other words, "[c]onstitutional mootness doctrine is grounded in the Article III requirement that federal courts may only decide actual, ongoing cases or controversies." *Seneca-Cayuga Tribe of Okla. v. Nat'l Indian Gaming Comm'n*, 327 F.3d 1019, 1028 (10th Cir. 2003) (internal quotation marks and brackets omitted). "[T]he conditions under which a suit will be found constitutionally moot are stringent." *Id.* (internal quotation marks omitted).

After carefully examining the chairwoman's letter to the Tribe, we are not persuaded that it necessarily prevented the wrongful behavior alleged by the State in its complaint from occurring. Without question, the letter concluded that the Property was ineligible for gaming by the Tribe pursuant to IGRA. But the letter did not constitute "final agency action" under IGRA.

See 25 U.S.C. § 2714 (defining what constitutes "final agency action" under IGRA). Indeed, the letter itself anticipated the possibility of future agency action by advising the Tribe that if it commenced gaming on the Property, the chairwoman would exercise her enforcement authority under 25 U.S.C. § 2713 and issue a notice of violation and temporary closure order.[1]

Section 2713(b) of IGRA addresses "[t]emporary closure" orders and provides that, "[n]ot later than thirty days after the issuance by the Chairman of an order of temporary closure, the Indian tribe . . . involved shall have a right to a hearing before the Commission to determine whether such order should be made permanent or dissolved." 25 U.S.C. § 2713(b)(2). Section 2713(c) in turn provides that "[a] decision of the Commission . . . to order a permanent closure pursuant to this section shall be appealable to the appropriate Federal district court." 25 U.S.C. § 2713(c).

Thus, in sum, the chairwoman's letter anticipated the possibility of future wrongful conduct on the

[1] Although the letter discussed the requirements for gaming under 25 U.S.C. § 2710, we do not believe that the letter can be read as an exercise of the chairwoman's authority under that section. More specifically, the letter did not involve the approval of any proposed tribal ordinance or resolution authorizing class III gaming activities on the Property, or a tribal-state gaming compact. *See* 25 U.S.C. §§ 2710(d)(1)(A)(iii), (d)(2)(B), (d)(8). Nor, clearly, did the letter concern the chairwoman's authority under 25 U.S.C. §§ 2711 or 2712.

part of the Tribe, i.e., conducting gaming on the Property, and in turn future agency action, i.e., a hearing before the Commission and a final decision as to whether to permanently close the Tribe's gaming facility on the Property. As a result, we cannot characterize the chairwoman's letter as a "final agency decision," nor can we say that the letter rendered the State's claims in this case moot.

The impact of the Supreme Court's Bay Mills decision

Having concluded that the case is not moot, we turn to the other question that we asked the parties to address in their supplemental briefs: the impact of the Supreme Court's recent decision in *Bay Mills* on the State's claims in this case. Although the State suggests that *Bay Mills* supports its claims and the district court's decision to grant a preliminary injunction in the State's favor, our own review of *Bay Mills* persuades us otherwise. As we shall proceed to explain, we conclude that in light of *Bay Mills*, the complaint in this case failed to state a claim upon which relief could be granted and, consequently, the district court erred in granting a preliminary injunction in favor of the State.

a) IGRA and class III gaming activities

To set the stage for examining *Bay Mills*, we begin by briefly outlining certain key provisions of IGRA relating to class III gaming activities conducted

by tribes. Section 2710(d) of IGRA provides that "[c]lass III gaming activities shall be lawful on Indian lands" if certain specified conditions are met. 25 U.S.C. § 2710(d)(1). Among those conditions is a requirement that such class III gaming be "conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State" pursuant to the provisions of IGRA. *Id.* § 2710(d)(1)(C). Section 2710(d) also makes clear that an Indian tribe must "hav[e] jurisdiction over the Indian lands upon which" it seeks to conduct class III gaming activities. *Id.* § 2710(d)(3)(A).

Consistent with its authorization of class III gaming on Indian lands over which an Indian tribe has jurisdiction, IGRA provides that "[t]he United States district courts shall have jurisdiction over . . . any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact entered into" pursuant to IGRA.[2] 25 U.S.C. § 2710(d)(7)(A)(ii). Necessarily, this authorization includes a waiver of a defendant tribe's sovereign immunity. *See Bay Mills*, 134 S.Ct. at 2029 n.2, 2032.

[2] The State's complaint in this case expressly relies on § 2710(d)(7) as a basis for its claims. App. at 26.

b) The holding in Bay Mills

In *Bay Mills*, the State of Michigan filed a federal suit against Bay Mills Indian Community (Bay Mills), a federally recognized Indian Tribe, seeking to enjoin the tribe from operating a class III gaming facility located on land separate from, and not part of, the tribe's reservation. The district court issued a preliminary injunction against Bay Mills. Bay Mills, in compliance with the preliminary injunction, shut down the casino and then filed an interlocutory appeal. The Sixth Circuit vacated the injunction, holding that tribal sovereign immunity barred Michigan's suit against Bay Mills and that IGRA did not authorize the action. The Supreme Court granted certiorari to consider whether tribal sovereign immunity barred Michigan's suit against Bay Mills.

In a 5-4 decision, the Supreme Court affirmed the Sixth Circuit's decision. In doing so, the Court began by noting that "Indian tribes are domestic dependent nations that exercise inherent sovereign authority" and possess "common-law immunity from suit traditionally enjoyed by sovereign powers." 134 S.Ct. at 2030 (internal quotation marks omitted). As a result, the Court held, "[u]nless Congress . . . authorized Michigan's suit, [Supreme Court] precedents demand[ed] that it be dismissed." *Id.* at 2032. Although Michigan argued "that IGRA indeed abrogate[d] the Tribe's immunity from the State's suit," the Court disagreed. *Id.* To be sure, the Court concluded that "IGRA partially abrogates tribal

sovereign immunity in § 2710(d)(7)(A)(ii)[, by] . . . authoriz[ing] a State to sue a tribe to 'enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact.'" *Id.* (quoting IGRA). The Court emphasized, however, that "[a] State's suit to enjoin gaming activity *on* Indian lands . . . falls within § 2710(d)(7)(A)(ii); a similar suit to stop gaming activity *off* Indian lands does not." *Id.* (emphasis in original). And, although the State argued that the tribe's actions in "authoriz[ing], licens[ing], and operat[ing] th[e] casino from within its own reservation" constituted class III gaming activity, the Court disagreed. *Id.* (internal quotation marks omitted). Instead, the Court held, "numerous provisions of IGRA show that 'class III gaming activity' means just what it sounds like – the stuff involved in playing class III games." *Id.* Consequently, the Court held, Michigan's suit to enjoin gaming outside of the tribe's reservation fell "outside § 2710(d)(7)(A)(ii)'s abrogation of immunity." *Id.*

The Court emphasized that, even though "a State lacks the ability to sue a tribe for illegal gaming when that activity occurs off the reservation, . . . a State, on its own lands, has many other powers over tribal gaming that it does not possess (absent consent) in Indian territory." *Id.* at 2034. For example, the Court noted, "Michigan could, in the first instance, deny a license to [the tribe] for an off-reservation casino." *Id.* at 2035. "And if [the tribe] went ahead anyway," the

Court noted, "Michigan could bring suit against tribal officials or employees (rather than the Tribe itself) seeking an injunction for, say, gambling without a license." *Id.* Under *Ex parte Young*, 209 U.S. 123 (1908), the Court noted, "tribal immunity does not bar such a suit for injunctive relief against *individuals,* including tribal officers, responsible for unlawful conduct." *Id.* (emphasis in original). In addition, the Court noted, "if a State really wants to sue a tribe for gaming outside Indian lands, the State need only bargain for a waiver of immunity." *Id.* Indeed, the Court noted, IGRA expressly provides that "a State and tribe negotiating a compact 'may include . . . remedies for breach of contract,' 25 U.S.C. § 2710(d)(3)(C)(v) – including a provision allowing the State to bring an action against the tribe in the circumstances presented here." *Id.* "States," the Court emphasized, "have more than enough leverage to obtain such terms because a tribe cannot conduct class III gaming on its lands without a compact, *see* § 2710(d)(1)(C), and cannot sue to enforce a State's duty to negotiate a compact in good faith." *Id.*

c) The parties' positions regarding Bay Mills

In their supplemental briefs, the parties disagree on the impact of *Bay Mills* on this case. The State argues that *Bay Mills* "fully supports the district court's rulings in this case because the Supreme Court affirmed that (1) 28 U.S.C. § 1331 provides subject matter jurisdiction for a claim arising under

[IGRA], and (2) tribal sovereign immunity does not bar claims against individual tribal officials under the doctrine of *Ex parte Young*." Aplee. Supp. Br. at 1. In contrast, defendants argue that *Bay Mills* "requires remand with instructions to vacate the preliminary injunction and dismiss the complaint in this action." Aplt. Supp. Br. at 2.

Turning first to the State's arguments, it is true that the Supreme Court in *Bay Mills* held that "[t]he general federal-question statute, 28 U.S.C. § 1331, gives a district court subject matter jurisdiction to decide any claim alleging a violation of IGRA," and that "[n]othing in [IGRA] § 2710(d)(7)(A)(ii) or any other provision of IGRA limits that grant of jurisdiction." *Bay Mills*, 134 S.Ct. at 2029 n.2. Thus, there can be no doubt that the district court had subject matter jurisdiction over the State's claim in this case that defendants violated IGRA.

What the State chooses to ignore, however, is the Supreme Court's related note that the provisions of IGRA "may indicate that a party has no statutory right of action." *Id.* And that, we conclude, is precisely the situation here. Although the State's complaint alleges that defendants' efforts to conduct class III gaming violated IGRA because they occurred off

Indian lands,[3] the fact of the matter is, as *Bay Mills* clearly held, that IGRA is concerned only with class III gaming on Indian lands. *Id.* at 2032 ("A State's suit to enjoin gaming activity *on* Indian lands . . . falls within § 2710(d)(7)(A)(ii); a similar suit to stop gaming activity *off* Indian lands does not.") (emphasis in original). Consequently, the State's complaint in this case, like the State of Michigan's complaint in *Bay Mills*, fails on its face to state a valid claim for relief under IGRA.

To be sure, the State's complaint also asserts that the defendants' activities in seeking to conduct class III gaming on the Property violated the provisions of the Tribal-State Gaming Compact. And, the State argues, *Bay Mills* makes clear that, consistent with the doctrine of *Ex parte Young*, tribal sovereign immunity does not bar claims against individual tribal officials. But the State again ignores two important points. First, when the Supreme Court in *Bay Mills* discussed the Ex parte Young doctrine, it did so in the context of noting that "Michigan could bring suit against tribal officials or employees (rather than the Tribe itself) seeking an injunction for" violations of Michigan state law, such as "gambling without a license." *Bay Mills*, 134 S.Ct. at 2035. Notably, the Supreme Court did not discuss whether a state could

[3] As we have noted, the State's complaint specifically alleged that the Property at issue did not qualify as the Tribe's "Indian lands" under IGRA.

file suit against individual tribal officers for violating an IGRA-mandated tribal-state gaming compact. Second, in any event, the Tribal-State Gaming Compact at issue in this case effectively forbids such a suit. Part 12 of the Tribal-State Gaming Compact strictly limits the remedies available "[i]n the event that either party to this Compact believes that the other party has failed to comply with any requirement of this Compact." App. at 715. Specifically, Part 12 provides that "either party may refer a dispute arising under this Compact to arbitration under the rules of the American Arbitration Association . . . , subject to enforcement or pursuant to review as provided by paragraph 3 of this Part by a federal district court." *Id.* Thus, the State is clearly precluded by Part 12 from suing the defendant tribal officials in federal court for purported violations of the Tribal-State Gaming Compact.[4]

For these reasons, we conclude the district court erred in granting the State's motion for preliminary injunction and that the State's complaint fails to state a claim upon which relief can be granted.

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[4] This was also the case in *Bay Mills*, where the compact at issue, "instead of authorizing judicial remedies, sen[t] disputes to arbitration and expressly retain[ed] each party's sovereign immunity." *Bay Mills*, 134 S.Ct. at 2035. The Supreme Court emphasized that "Michigan – like any State – could have insisted on a different deal." *Id.* The same holds true here: the State of Oklahoma could have insisted on a compact that allowed it to sue the Tribe or tribal officials in federal court for violations of the compact, but it failed to do so.

III

We REVERSE and REMAND to the district court with instructions to vacate its preliminary injunction and to dismiss the State's complaint with prejudice.[5] The State's motion to strike non-record materials from the appendix and the State's motion for leave to file surreply are DENIED as moot.

[5] We emphasize that our holding does not, of course, leave the Tribe free to proceed with class III gaming activities on the Property. The NIGC chairwoman's May 25, 2012 letter to the Tribe, though not "final agency action," effectively prohibits the Tribe from conducting class III gaming activities on the Property. And the State, to the extent it believes the Tribe is violating the Tribal-State Gaming Compact, remains free to resolve its concerns by way of arbitration.

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

STATE OF OKLAHOMA, EX REL., Plaintiff-Appellee, v. TIGER HOBIA, as Town King and member of the Kialegee Tribal Town Business Committee; THOMAS GIVENS, as 1st Warrior and member of the Kialegee Tribal Town Business Committee; KIALEGEE TRIBAL TOWN, a federally chartered corporation, Defendants-Appellants, and FLORENCE DEVELOPMENT PARTNERS, LLC, an Oklahoma limited liability company, Defendant. ..... THE STATE OF NEW MEXICO; STATE OF MICHIGAN, Amici Curiae.	No. 12-5134

STATE OF OKLAHOMA, EX REL., Plaintiff-Appellee, v. FLORENCE DEVELOPMENT PARTNERS, LLC, an Oklahoma limited liability company, Defendant-Appellant, and 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; KIALEGEE TRIBAL TOWN, a federally chartered corporation, Defendants. ..... THE STATE OF NEW MEXICO; STATE OF MICHIGAN, Amici Curiae.	No. 12-5136

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA
(D.C. No. 4:12-CV-00054-GKF-TLW)

(Filed Nov. 10, 2014)

Matthew Justin Kelly of Fredericks Peebles & Morgan LLP, Washington, DC, (Martha L. King of Fredericks Peebles & Morgan LLP, Louisville, Colorado; Dennis J. Whittlesey, Jr. of Dickinson Wright PLLC, Washington, DC; H. James Montalvo, Law Offices of H. James Montalvo, P.A., South Miami, Florida, with him on the briefs), for Defendants-Appellants.

Patrick R. Wyrick, Solicitor General, (E. Scott Pruitt, Attorney General, Oklahoma Office of the Attorney General, and M. Daniel Weitman, Assistant Attorney General, Oklahoma City, Oklahoma; Lynn H. Slade, William C. Scott and Sarah M. Stevenson of Modrall, Sperling, Roehl, Harris & Sisk, P.A., Albuquerque, New Mexico, with him on the briefs), for Plaintiff-Appellee.

Gary K. King, Attorney General, State of New Mexico, Santa Fe, New Mexico, and Christopher D. Coppin, Special Assistant Attorney General, State of New Mexico, Albuquerque, New Mexico, filed an amicus curiae brief for the State of New Mexico.

Bill Schuette, Attorney General, State of Michigan, John J. Bursch, Solicitor General, State of Michigan,

and S. Peter Manning and Louis B. Reinwasser, Assistant Attorneys General, State of Michigan, Lansing, Michigan, filed an amicus curiae brief for the State of Michigan.

Before **BRISCOE**, Chief Judge, **KELLY** and **BACHARACH**, Circuit Judges.

BRISCOE, Chief Judge.

We once again address the subject of Indian gaming and, following the lead of the Supreme Court's recent decision in *Michigan v. Bay Mills Indian Cmty.,* 134 S.Ct. 2024 (2014), emphasize that any federal cause of action brought pursuant to 25 U.S.C. § 2710(d)(7)(A)(ii) of the Indian Gaming Regulatory Act (IGRA) to enjoin class III gaming activity must allege and ultimately establish that the gaming "is located on Indian lands." 25 U.S.C. § 2710(d)(7)(A)(ii). If, as here, the challenged class III gaming activity is not located on Indian lands, the action fails to state a valid claim for relief under § 2710(d)(7)(A)(ii) and must be dismissed.

The State of Oklahoma filed this action against officials of the Kialegee Tribal Town, a federally recognized Indian tribe in Oklahoma, claiming that they, along with a federally-chartered corporation related to the tribe and a related Oklahoma limited liability company, were attempting to construct and

ultimately operate a class III gaming facility on non-Indian lands in Broken Arrow, Oklahoma, in violation of both IGRA and a state-tribal gaming compact. Defendants moved to dismiss the complaint, but the district court denied their motion. The district court subsequently granted a preliminary injunction in favor of the State that prohibited defendants from constructing or operating a class III gaming facility on the property at issue. Defendants now appeal. Exercising jurisdiction pursuant to 28 U.S.C. § 1291, we conclude that, in light of *Bay Mills,* the State has failed to state a valid claim for relief. We therefore reverse and remand to the district court with instructions to vacate its preliminary injunction and to dismiss the State's complaint.

I

Factual background

a) The Tribe

The Kialegee Tribal Town (the Tribe) is a federally recognized Indian tribe, organized under Section 3 of the Oklahoma Indian Welfare Act (OIWA), 25 U.S.C. § 503 *et seq.* The Tribe, headquartered in Wetumka, Oklahoma, first received federal recognition in 1936. The Tribe has no reservation and, in a 1990 application it submitted to the Bureau of Indian Affairs (BIA), stated "that it 'had no land.'" Add. at 25.

The Tribe is governed in accordance with a constitution and by-laws that were approved by the

Secretary of the Interior (Secretary) on April 14, 1941, and ratified by the Tribe on June 12, 1941. The 1941 Constitution established the Kialegee Tribal Town Business Committee (Business Committee) as the Tribe's governing body.

b) The parties

Defendant Tiger Hobia is the Tribe's Town King, a member of the Business Committee, and a citizen and resident of the State of Oklahoma. Defendant Thomas Givens is the Tribe's 1st Warrior, a member of the Business Committee, and a citizen and resident of the State of Oklahoma.

Defendant Kialegee Tribal Town (the Town Corporation) is a federally chartered corporation. Its federal charter was issued under Section 3 of the OIWA, approved by the Secretary of the Interior on July 23, 1942, and ratified by the Tribal Town on September 17, 1942. The charter provides the Town Corporation with the power to sue and be sued.

Florence Development Partners, LLC (Florence Development) is an Oklahoma limited liability company doing business in the State of Oklahoma.

c) The gaming compact between the State and the Tribe

In 2004, the State of Oklahoma established a model tribal gaming compact that effectively constitutes a "pre-approved" offer to federally recognized

tribes in the State (Model Compact). Add. at 27. If a tribe accepts the Model Compact, obtains approval of the Model Compact by the Secretary of the Interior, and complies with the requirements of IGRA, the tribe can operate class III gaming facilities on its Indian lands.

On April 12, 2011, the Tribe accepted the Model Compact, and the Tribe and State entered into what is referred to as "the Kialegee Tribal Town and State of Oklahoma Gaming Compact" (Tribal-State Gaming Compact). App. at 692. The Secretary of the Interior approved the Tribal-State Gaming Compact on July 8, 2011. The Tribal-State Gaming Compact authorizes the Tribe to operate gaming "only on its Indian lands as defined by IGRA." Add. at 27 (internal quotation marks omitted).

d) Defendants' construction of a gaming facility in Broken Arrow, Oklahoma

By their own admission, defendants "engaged in the construction of and [had] plan[ned] to operate the Red Clay Casino as a [c]lass III gaming facility under IGRA," App. at 394, "at the southwest corner of Olive Avenue and Florence Place, in Broken Arrow, Oklahoma," *id.* at 30.

e) The location of the gaming facility

The property on which the gaming facility was being built (the Property) is located more than 70 miles away from the Tribe's headquarters and is not

held in trust by the United States for the Tribe. Instead, at the time the construction began, the Property was "owned by [sisters] Wynema Capps and Marcella Gibbs, as tenants in common, subject to federal restraints against alienation." *Id.* at 32. Both Capps and Giles were enrolled members of the Muscogee (Creek) Nation.

The ownership of the Property can be traced to Tyler Burgess, an enrolled Creek Indian of full blood. "In 1901, the Creek Nation and the United States entered into [an] agreement governing the allotment of the Creek Nation's lands." Add at 35. "Under Section 23 of the 1901 agreement, the Principal Chief of the Muskogee Nation was to execute and deliver to each citizen of the Muskogee Nation an allotment deed conveying to him all right, title, and interest of the Creek Nation and of all other citizens in and to the lands embraced in his allotment certificate." *Id.* (internal quotation marks omitted). "On August 6, 1903, as part of the allotment of those lands, an allotment deed and homestead patent [for 160 acres] were issued to Tyler Burgess." *Id.* Burgess was not a member of the Tribe, but rather was an enrolled member of Lochapoka Town (a division of the Creek Nation).

Burgess's allotted land subsequently passed by descent to two heirs: Capps and Giles. Capps and Giles hold the land as tenants in common, subject to federal restrictions and restraints against alienation. The land encompasses the Property at issue.

The Property is not held in trust by the United States for the Tribe or for the benefit of any enrolled member of the Tribe. And, as of May 18, 2012 (the date of the preliminary injunction hearing held by the district court in this case), the Property was not held by either the Tribe or an enrolled member of the Tribe subject to restriction by the United States against alienation.

f) The leases of the Property

In May 2010, the Town Corporation, "as Tenant, executed a Prime Ground Lease with Capps and Giles, as Landlord, for the . . . Property as a site for a proposed casino facility." *Id.* at 40. Capps and Giles subsequently filed a petition in Oklahoma state district court seeking approval, pursuant to the Act of August 4, 1947, 61 Stat. 731, of the proposed Prime Ground Lease. On August 17, 2011, the state district court entered an order withholding its approval of the Prime Ground Lease. In doing so, the state district court noted "that it was not the appropriate forum to resolve intertribal jurisdictional disputes between the Muscogee (Creek) Nation and the [Tribe], and concluded that an individual citizen cannot transfer government jurisdiction over his or her property by the terms of a lease." Add. at 40 (internal quotation marks omitted).

"In the meantime, on May 10, 2011, Capps and Giles, as Landlord, entered into a separate Ground Lease Agreement with Defendant Florence Development . . . as Tenant, pertaining to the . . . Property"

(the May 2011 Lease). *Id.* at 41. "On approximately December 1, 2011, the May 2011 Lease was amended by a First Amendment to Ground Lease Agreement . . . to add the [Tribe] as a signatory party." *Id.*

The May 2011 Lease "was written to have a term of six year[s] and 11 months so it would not have to be approved by the Secretary of the Interior or his designee." *Id.* But the May 2011 Lease purported to grant Florence Development the right to extend the term of the lease for four periods of ten years each. *Id.*

g) The operating agreement and ensuing construction

In May 2011, the Tribe, Giles, Capps, and Golden Canyon Partners, LLC, "entered into the Operating Agreement of Florence Development . . . to create a joint venture to build and operate the Red Clay Casino." *Id.* at 42.

In December 2011, defendants proceeded with actual construction of the casino on the Property by commencing grading and site preparation. By May 2012, "the structure was up and the inside sprinkler systems were in place." *Id.*

h) The National Indian Gaming Commission's decision

In April 2011, the Tribe sent the National Indian Gaming Commission (NIGC) notice of the Tribe's intent to license a new gaming facility on the Property.

The Tribe's purpose in doing so was to obtain a decision from the NIGC regarding "the gaming-eligible status of the . . . Property." Aplt. Supp. Br. at 10.

On May 24, 2012, the NIGC's general counsel issued a memorandum to the NIGC's chairwoman opining that the Property did not qualify as the Tribe's Indian lands eligible for gaming because the Tribe had not established that it had legal jurisdiction over the Property for purposes of IGRA. The following day, May 25, 2012, the NIGC's chairwoman sent the Tribe a letter adopting the general counsel's opinion. The letter stated that if gaming was commenced by the Tribe on the Property, the chairwoman would exercise her enforcement authority under 25 U.S.C. § 2713 to issue a notice of violation and temporary closure order.

The Tribe requested reconsideration, which the chairwoman denied.

Procedural background

a) The district court proceedings

The State initiated this action on February 8, 2012, by filing a complaint in federal district court against Tiger Hobia, Thomas Givens, other unnamed members of the Kialegee Tribal Town Business Committee (all in their capacities as members and officers of the Business Committee), Florence Development, and the Town Corporation. The complaint sought

"declaratory and injunctive relief to prevent Defendants . . . from proceeding with construction or operation of the proposed 'Red Clay Casino,' in direct violation of both" the Tribal-State Gaming Compact and IGRA.App. at 22. According to the complaint, the Tribe lacked both a possessory interest in, as well as jurisdiction over, the Property on which defendants were constructing and intending to operate a casino. As a result, the complaint alleged, defendants' activities "violate[d] federal law requirements including . . . the requirement of the IGRA that gaming operations shall only occur on lands (i) 'title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by the United States against alienation,' (ii) over which an Indian tribe has jurisdiction, and (iii) over which that tribe exercises governmental power." *Id.* at 23 (quoting 25 U.S.C. §§ 2703(4)(B), 2710(d)(1)(A)(i), 2710(d)(1)(C)). The complaint also alleged that "the construction and management of a [c]lass III casino on the Broken Arrow Property w[ould] violate the federally approved Gaming Compact between the [Tribe] and the State of Oklahoma, which expressly limits the [Tribe] to conducting gaming only on 'its Indian lands.'" *Id.*

The "First Claim for Relief" in the complaint alleged that the State was "entitled to a declaratory judgment that the Committee Defendants lack[ed] authority under federal law and the federally approved [Tribal-]State Gaming Compact to construct or operate a gaming facility on the . . . Property." *Id.* at 36. The "Second Claim for Relief" alleged that the

State was "entitled to a declaratory judgment that (i) the . . . Property [wa]s not land within the [Tribe's] jurisdiction and [wa]s not land over which the [Tribe] exercise[d] governmental power and (ii) the Defendants' efforts to construct or operate a [c]lass III gaming facility on the . . . Property [wa]s in direct violation of the requirements of the IGRA and the [Tribal-]State Gaming Compact." *Id.* at 38-39. The "Third Claim for Relief" sought a preliminary injunction "restraining the continued construction and proposed operation of an illegal, unauthorized gaming facility" on the Property. *Id.* at 39. Lastly, the "Fourth Claim for Relief" sought both a preliminary and permanent injunction "restraining the Defendants from proceeding with the construction or operation of the proposed Casino." *Id.* at 40.

Along with its complaint, the State filed a motion for preliminary injunction asking the district court to enjoin defendants from taking any action to construct or to operate a class III gaming facility on the Property.

Defendants moved to dismiss the complaint on a number of grounds, including Fed.R.Civ.P. 12(b)(6) for failure to state a claim upon which relief could be granted. The district court, however, denied defendants' motions.

On May 18, 2012, the district court held an evidentiary hearing on the State's motion for preliminary injunction and, at the conclusion of the hearing, orally granted the State's motion. On July 20, 2012,

the district court followed up its oral ruling and issued an opinion and order preliminarily enjoining defendants from "proceeding with development or construction of the proposed Red Clay Casino or any other gaming facility on the . . . Property . . . [and from] conducting [c]lass III gaming on the . . . Property." *Id.* at 539.

Defendants moved to reconsider or modify the preliminary injunction. In support of their request to reconsider, defendants alleged that in May 2012, Giles and Capps applied for and were granted membership in the Tribe, and that, as a result, the Tribe had a direct interest in the Property. As an alternative to reconsideration, defendants asked the district court to modify the preliminary injunction to allow them to continue construction of buildings on the Property for use as a sports bar or restaurant. The district court denied defendants' motion to reconsider, but granted in part their motion to modify.

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II

Mootness

We turn first to the question of whether this case was rendered moot by the NIGC chairwoman's May 25, 2012 letter determining that the Tribe lacked jurisdiction over the Property to conduct gaming pursuant to IGRA. A case becomes constitutionally moot when the parties no longer have a legally recognizable interest in the result. *City of Erie v. Pap's A.M.,* 529 U.S. 277, 287 (2000). In other words, "[c]onstitutional mootness doctrine is grounded in the Article III requirement that federal courts may only decide actual, ongoing cases or controversies." *Seneca-Cayuga Tribe of Okla. v. Nat'l Indian Gaming Comm'n,* 327 F.3d 1019, 1028 (10th Cir.2003) (internal quotation marks and brackets omitted). "[T]he conditions under which a suit will be found constitutionally moot are stringent." *Id.* (internal quotation marks omitted).

After carefully examining the chairwoman's letter to the Tribe, we are not persuaded that it necessarily prevented the wrongful behavior alleged by the State in its complaint from occurring. Without question, the letter concluded that the Property was

ineligible for gaming by the Tribe pursuant to IGRA. But the letter did not constitute "final agency action" under IGRA. *See* 25 U.S.C. § 2714 (defining what constitutes "final agency action" under IGRA). Indeed, the letter itself anticipated the possibility of future agency action by advising the Tribe that if it commenced gaming on the Property, the chairwoman would exercise her enforcement authority under 25 U.S.C. § 2713 and issue a notice of violation and temporary closure order.[1]

Section 2713(b) of IGRA addresses "[t]emporary closure" orders and provides that, "[n]ot later than thirty days after the issuance by the Chairman of an order of temporary closure, the Indian tribe . . . involved shall have a right to a hearing before the Commission to determine whether such order should be made permanent or dissolved." 25 U.S.C. § 2713(b)(2). Section 2713(c) in turn provides that "[a] decision of the Commission . . . to order a permanent closure pursuant to this section shall be appealable to the appropriate Federal district court." 25 U.S.C. § 2713(c).

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[1] Although the letter discussed the requirements for gaming under 25 U.S.C. § 2710, we do not believe that the letter can be read as an exercise of the chairwoman's authority under that section. More specifically, the letter did not involve the approval of any proposed tribal ordinance or resolution authorizing class III gaming activities on the Property, or a tribal-state gaming compact. *See* 25 U.S.C. §§ 2710(d)(1)(A)(iii), (d)(2)(B), (d)(8). Nor, clearly, did the letter concern the chairwoman's authority under 25 U.S.C. §§ 2711 or 2712.

Thus, in sum, the chairwoman's letter anticipated the possibility of future wrongful conduct on the part of the Tribe, i.e., conducting gaming on the Property, and in turn future agency action, i.e., a hearing before the Commission and a final decision as to whether to permanently close the Tribe's gaming facility on the Property. As a result, we cannot characterize the chairwoman's letter as a "final agency decision," nor can we say that the letter rendered the State's claims in this case moot.

The impact of the Supreme Court's Bay Mills decision

Having concluded that the case is not moot, we turn to the other question that we asked the parties to address in their supplemental briefs: the impact of the Supreme Court's recent decision in *Bay Mills* on the State's claims in this case. Although the State suggests that *Bay Mills* supports its claims and the district court's decision to grant a preliminary injunction in the State's favor, our own review of *Bay Mills* persuades us otherwise. As we shall proceed to explain, we conclude that in light of *Bay Mills,* the complaint in this case failed to state a claim upon which relief could be granted and, consequently, the district court erred in granting a preliminary injunction in favor of the State.

a) IGRA and class III gaming activities

To set the stage for examining *Bay Mills,* we begin by briefly outlining certain key provisions of IGRA relating to class III gaming activities conducted by tribes. Section 2710(d) of IGRA provides that "[c]lass III gaming activities shall be lawful on Indian lands" if certain specified conditions are met. 25 U.S.C. § 2710(d)(1). Among those conditions is a requirement that such class III gaming be "conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State" pursuant to the provisions of IGRA. *Id.* § 2710(d)(1)(C). Section 2710(d) also makes clear that an Indian tribe must "hav[e] jurisdiction over the Indian lands upon which" it seeks to conduct class III gaming activities. *Id.* § 2710(d)(3)(A).

Consistent with its authorization of class III gaming on Indian lands over which an Indian tribe has jurisdiction, IGRA provides that "[t]he United States district courts shall have jurisdiction over . . . any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact entered into" pursuant to IGRA.[2] 25 U.S.C. § 2710(d)(7)(A)(ii). Necessarily, this authorization includes a waiver of a defendant tribe's sovereign immunity. *See Bay Mills,* 134 S.Ct. at 2029 n. 2, 2032.

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[2] The State's complaint in this case expressly relies on § 2710(d)(7) as a basis for its claims. App. at 26.

b) The holding in Bay Mills

In *Bay Mills,* the State of Michigan filed a federal suit against Bay Mills Indian Community (Bay Mills), a federally recognized Indian Tribe, seeking to enjoin the tribe from operating a class III gaming facility located on land separate from, and not part of, the tribe's reservation. The district court issued a preliminary injunction against Bay Mills. Bay Mills, in compliance with the preliminary injunction, shut down the casino and then filed an interlocutory appeal. The Sixth Circuit vacated the injunction, holding that tribal sovereign immunity barred Michigan's suit against Bay Mills and that IGRA did not authorize the action. The Supreme Court granted certiorari to consider whether tribal sovereign immunity barred Michigan's suit against Bay Mills.

In a 5-4 decision, the Supreme Court affirmed the Sixth Circuit's decision. In doing so, the Court began by noting that "Indian tribes are domestic dependent nations that exercise inherent sovereign authority" and possess "common-law immunity from suit traditionally enjoyed by sovereign powers." 134 S.Ct. at 2030 (internal quotation marks omitted). As a result, the Court held, "[u]nless Congress . . . authorized Michigan's suit, [Supreme Court] precedents demand[ed] that it be dismissed." *Id.* at 2032. Although Michigan argued "that IGRA indeed abrogate[d] the Tribe's immunity from the State's suit," the Court disagreed. *Id.* To be sure, the Court concluded that "IGRA partially abrogates tribal sovereign immunity in § 2710(d)(7)(A)(ii) [, by] . . . authoriz[ing]

a State to sue a tribe to 'enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact.'" *Id.* (quoting IGRA). The Court emphasized, however, that "[a] State's suit to enjoin gaming activity *on* Indian lands . . . falls within § 2710(d)(7)(A)(ii); a similar suit to stop gaming activity *off* Indian lands does not." *Id.* (emphasis in original). And, although the State argued that the tribe's actions in "authoriz[ing], licens[ing], and operat[ing] th[e] casino from within its own reservation" constituted class III gaming activity, the Court disagreed. *Id.* (internal quotation marks omitted). Instead, the Court held, "numerous provisions of IGRA show that 'class III gaming activity' means just what it sounds like – the stuff involved in playing class III games." *Id.* Consequently, the Court held, Michigan's suit to enjoin gaming outside of the tribe's reservation fell "outside § 2710(d)(7)(A)(ii)'s abrogation of immunity." *Id.*

The Court emphasized that, even though "a State lacks the ability to sue a tribe for illegal gaming when that activity occurs off the reservation, . . . a State, on its own lands, has many other powers over tribal gaming that it does not possess (absent consent) in Indian territory." *Id.* at 2034. For example, the Court noted, "Michigan could, in the first instance, deny a license to [the tribe] for an off-reservation casino." *Id.* at 2035. "And if [the tribe] went ahead anyway," the Court noted, "Michigan could bring suit against tribal officials or employees (rather than the Tribe itself) seeking an injunction for, say, gambling without a

license." *Id.* Under *Ex parte Young,* 209 U.S. 123 (1908), the Court noted, "tribal immunity does not bar such a suit for injunctive relief against *individuals,* including tribal officers, responsible for unlawful conduct." *Id.* (emphasis in original). In addition, the Court noted, "if a State really wants to sue a tribe for gaming outside Indian lands, the State need only bargain for a waiver of immunity." *Id.* Indeed, the Court noted, IGRA expressly provides that "a State and tribe negotiating a compact 'may include . . . remedies for breach of contract,' 25 U.S.C. § 2710(d)(3)(C)(v) – including a provision allowing the State to bring an action against the tribe in the circumstances presented here." *Id.* "States," the Court emphasized, "have more than enough leverage to obtain such terms because a tribe cannot conduct class III gaming on its lands without a compact, see § 2710(d)(1)(C), and cannot sue to enforce a State's duty to negotiate a compact in good faith." *Id.*

c) The parties' positions regarding Bay Mills

In their supplemental briefs, the parties disagree on the impact of *Bay Mills* on this case. The State argues that *Bay Mills* "fully supports the district court's rulings in this case because the Supreme Court affirmed that (1) 28 U.S.C. § 1331 provides subject matter jurisdiction for a claim arising under [IGRA], and (2) tribal sovereign immunity does not bar claims against individual tribal officials under the doctrine of *Ex parte Young*." Aplee. Supp. Br. at 1. In contrast, defendants argue that *Bay Mills*

"requires remand with instructions to vacate the preliminary injunction and dismiss the complaint in this action." Aplt. Supp. Br. at 2.

Turning first to the State's arguments, it is true that the Supreme Court in *Bay Mills* held that "[t]he general federal-question statute, 28 U.S.C. § 1331, gives a district court subject matter jurisdiction to decide any claim alleging a violation of IGRA," and that "[n]othing in [IGRA] § 2710(d)(7)(A)(ii) or any other provision of IGRA limits that grant of jurisdiction." *Bay Mills,* 134 S.Ct. at 2029 n. 2. Thus, there can be no doubt that the district court had subject matter jurisdiction over the State's claim in this case that defendants violated IGRA.

What the State chooses to ignore, however, is the Supreme Court's related note that the provisions of IGRA "may indicate that a party has no statutory right of action." *Id.* And that, we conclude, is precisely the situation here. Although the State's complaint alleges that defendants' efforts to conduct class III gaming violated IGRA because they occurred off Indian land, the fact of the matter is, as Bay Mills clearly held, that IGRA is concerned only with class III gaming on Indian lands. *Id.* at 2032 ("A State's suit to enjoin gaming activity *on* Indian lands . . . falls within § 2710(d)(7)(A)(ii); a similar suit to stop gaming activity *off* Indian lands does not.") (emphasis in original). Consequently, the State's complaint in this case, like the State of Michigan's complaint in Bay Mills, fails on its face to state a valid claim for relief under IGRA.

To be sure, the State's complaint also asserts that the defendants' activities in seeking to conduct class III gaming on the Property violated the provisions of the Tribal-State Gaming Compact. And, the State argues, *Bay Mills* makes clear that, consistent with the doctrine of *Ex parte Young,* tribal sovereign immunity does not bar claims against individual tribal officials. But the State again ignores two important points. First, when the Supreme Court in *Bay Mills* discussed the *Ex parte Young* doctrine, it did so in the context of noting that "Michigan could bring suit against tribal officials or employees (rather than the Tribe itself) seeking an injunction for" violations of Michigan state law, such as "gambling without a license." *Bay Mills,* 134 S.Ct. at 2035. Notably, the Supreme Court did not discuss whether a state could file suit against individual tribal officers for violating an IGRA-mandated tribal-state gaming compact. Second, in any event, the Tribal-State Gaming Compact at issue in this case effectively forbids such a suit. Part 12 of the Tribal-State Gaming Compact strictly limits the remedies available "[i]n the event that either party to this Compact believes that the other party has failed to comply with any requirement of this Compact." App. at 715. Specifically, Part 12 provides that "either party may refer a dispute arising under this Compact to arbitration under the rules of the American Arbitration Association . . . , subject to enforcement or pursuant to review as provided by paragraph 3 of this Part by a federal district court." *Id.* Thus, the State is clearly precluded by Part 12 from suing the defendant tribal officials in

federal court for purported violations of the Tribal-State Gaming Compact.[3]

For these reasons, we conclude the district court erred in granting the State's motion for preliminary injunction and that the State's complaint fails to state a claim upon which relief can be granted.

III

We REVERSE and REMAND to the district court with instructions to vacate its preliminary injunction and to dismiss the State's complaint with prejudice. The State's motion to strike non-record materials from the appendix and the State's motion for leave to file surreply are DENIED as moot.

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[3] This was also the case in *Bay Mills,* where the compact at issue, "instead of authorizing judicial remedies, sen[t] disputes to arbitration and expressly retain[ed] each party's sovereign immunity." *Bay Mills,* 134 S.Ct. at 2035. The Supreme Court emphasized that "Michigan – like any State – could have insisted on a different deal." *Id.* The same holds true here: the State of Oklahoma could have insisted on a compact that allowed it to sue the Tribe or tribal officials in federal court for violations of the compact, but it failed to do so.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF OKLAHOMA

STATE OF OKLAHOMA, Plaintiff, v. TIGER HOBIA, as Town King and member of the Kialegee Tribal Town Business Committee; et al., Defendants.	)	Case No. 12-CV-054-GKF-TLW

OPINION AND ORDER

(Filed Jul. 31, 2012)

Before the court is defendants' Motion to Modify the Preliminary injunction [Dkt. #137].[1] In the motion, defendants ask the court to "modify [the preliminary injunction order] to allow the [d]efendants to continue construction of buildings to be used for sport bar/restaurant purposes." [*Id.* at 3]. Plaintiff State of Oklahoma (the "state") opposes the motion.

[1] The court, in a minute order entered May 31, 2012 [Dkt. #136], stated it would treat defendant's Notice of Changed Circumstances and Motion for Modification of Court's Oral Order as two separate and distinct motions: (1) a Motion to Modify the Preliminary Injunction; and (2) a Motion to Reconsider the Preliminary Injunction in light of subsequent changed circumstances.

I. Background

The State filed suit on February 8, 2012, seeking declaratory, preliminary, and permanent injunctive relief to prevent Tiger Hobia, Town King of the Kialegee Tribal Town (as well as other tribal officers), Florence Development Partners, LLC ("Florence") and the Kialegee Tribal Town, a federally chartered corporation (the "Town Corporation"), from proceeding with the construction and operation of the proposed "Red Clay Casino" in Broken Arrow, Oklahoma. The State alleged defendants' actions violated both the April 12, 2011 Gaming Compact between the Kialegee Tribal Town and the State (the "Kialegee-State Gaming Compact") and the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 ("IGRA"). The same day, it filed a Motion for Preliminary Injunction. [Dkt. #4].

The court conducted a hearing on the State's Motion for Preliminary Injunction on May 16-18, 2012. At the conclusion of the hearing, the court issued an oral ruling granting the motion. [Dkt. #127].[2] On July 20, 2012, the court entered a written

[2] A week later, on May 25, 2012, Tracie Stevens, Chairwoman of the National Indian Gaming Commission ("NIGC") advised Town King Tiger Hobia the NIGC had concluded that while the Broken Arrow Property qualified as Indian land under IGRA, it is not within the Kialegee Tribal Town's jurisdiction because the Tribe had not demonstrated its legal jurisdiction over the parcel. [Dkt. ##134-1, 134-2]. She directed the Kialegee Tribal Town not to commence gaming under IGRA. [*Id.*]. On May 29, 2012, the Tribal Town submitted a Request for Reconsideration,

(Continued on following page)

Opinion & Order containing findings of fact and conclusions of law. [Dkt. #150]. The court concluded defendants' actions violated IGRA and the Kialegee-State Gaming Compact because the restricted allotment was not the Kialegee Tribal Town's "Indian lands" as defined by IGRA, and that the Tribal Town did not exercise government power over the property within the meaning of IGRA. [*Id.* at 35-37, ¶¶ 37, 40-41]. The court concluded that defendants' "efforts to construct and operate a gaming facility on the Broken Arrow Property violate IGRA and – as to Class III gaming – the Kialegee-State Gaming Compact." [*Id.* at 41].

The court preliminarily enjoined defendants from (1) proceeding with development or construction of the proposed Red Clay Casino or any other gaming facility on the Broken Arrow Property; and (2) conducting Class III gaming on the Broken Arrow Property. [*Id.*]. The court noted defendants had admitted at the hearing the building under construction was "designed to be a sports bar and a casino," but stated "the court will entertain a motion to modify the injunction if defendants wish to alter the purpose of

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in which, *inter alia,* it informed Stevens it had enrolled Giles and Capps as members on May 26, 2012. [Dkt. #138-1]. In a response dated June 8, 2012, the NIGC denied the Request for Reconsideration. [Dkt. #138-2]. Citing *Miami Tribe of Okla. v. U.S.,* 656 F.3d 1129 (10th Cir. 2011), *United States v. Mazurie,* 419 U.S. 544 (1975), and *Kansas v. U.S.,* 249 F.3d 1213 (10th Cir. 2001), Stevens concluded "the change in circumstance presented does not alter the May 25 decision." [*Id.*].

the structure and have obtained the necessary regulatory approvals from the [Bureau of Indian Affairs] and/or the Muskogee (Creek) Nation for the alternative proposed use or uses." [*Id.* at 40-41].

II. Motion to Modify

Defendants seek modification of the preliminary injunction to permit continued construction of the structure and operation of a restaurant/sports bar. Additionally, they advise the court that the property owners have requested defendants "to provide an asphalt surface over the access area and parking surface to allow the interim uses of a portion of the site," including use as a smoke shop. [Dkt. #133 at 2].

In its Motion for Preliminary Injunction, the State sought entry of a preliminary injunction prohibiting defendants from constructing or operation a casino on the Broken Arrow Property. The State did not seek to enjoin the construction and/or operation of any type of non-gaming facility.

This court previously noted it has subject matter jurisdiction over "any cause of action initiated by a State . . . to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact entered into pursuant to IGRA, 25 U.S.C. § 2710(d)(7)(A)(ii)." [*See* Dkt. #105 at 15, 22 (internal quotation marks omitted"]. However, this court is without subject matter jurisdiction over a dispute between the current parties relating to the construction and operation of a restaurant/sports bar

(and/or the laying of asphalt for a parking lot and entrances) on the Broken Arrow property.

As set forth in the court's written Opinion and Order of July 20, 2012, development or construction of a casino is enjoined. [*See* Dkt. #150 at 40-41]. However, this court is without subject matter jurisdiction to enjoin construction and operation of proposed non-gaming facilities. Accordingly, defendants' Motion to Modify is granted so as to clarify the scope of the injunction. Additionally, the first complete sentence on page 41 of Docket #150[3] is stricken. The Motion to Modify is denied to the extent defendants seek an order affirmatively permitting or authorizing "construction of buildings to be used for sport bar/restaurant purposes" [*see* Dkt. #133 at 3], as this court is without subject matter jurisdiction to approve or disapprove the defendants' proposed non-gaming land use.

III. Conclusion

For the reasons set forth above, defendants' Motion to Modify the Preliminary Injunction [Dkt. #137] is granted in part and denied in part.

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[3] The sentence states: "However, the court will entertain a motion to modify the injunction if defendants wish to alter the purpose of the structure and have obtained the necessary regulatory approvals from the BIA and/or the Muskogee (Creek) Nation for the alternative proposed use or uses." [*See* Dkt. #150 at 41].

/s/ Gregory K. Frizzell
GREGORY K. FRIZZELL,
CHIEF JUDGE
UNITED STATES
DISTRICT COURT

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF OKLAHOMA

STATE OF OKLAHOMA, Plaintiff, v. TIGER HOBIA, as Town King and member of the Kialegee Tribal Town Business Committee; et al., Defendants.	)	Case No. 12-CV-054-GKF-TLW

OPINION AND ORDER

(Filed Jul. 30, 2012)

Before the court is defendants' Motion to Reconsider the Preliminary Injunction in light of subsequent changed circumstances [Dkt. #133].[1] In the motion, defendants ask the court to reconsider its Order concerning Kialegee Tribal Town jurisdiction over the site. [*Id.* at 3]. The State of Oklahoma opposes the motion.

[1] The court, in a minute order entered May 31, 2012 [Dkt. #136], stated it would treat Defendant's Notice of Changed Circumstances and Motion for Modification of Court's Oral Order as two separate and distinct motions: (1) a Motion to Modify the Preliminary Injunction; and (2) a Motion to Reconsider the Preliminary Injunction in light of subsequent changed circumstances.

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The court conducted a hearing on plaintiff's Motion for Preliminary Injunction on May 16-18, 2012. At the conclusion of the hearing, the court issued a ruling granting plaintiff's Motion for Preliminary Injunction. [Dkt. #127].[2] On July 20, 2012, the

[2] One week later, on May 25, 2012, Tracie Stevens, Chairwoman of the National Indian Gaming Commission ("NIGC") (citing and attaching an opinion from the DOI Solicitor's Office) advised Town King Tiger Hobia the NIGC had concluded that while the Broken Arrow Property qualified as Indian land under IGRA, it is not within the Kialegee Tribal Town's jurisdiction because the Tribe has not demonstrated its legal jurisdiction over the parcel. [Dkt.##134-1, 134-2]. She directed the Kialegee Tribal Town not to commence gaming under IGRA. [*Id.*]. On May

(Continued on following page)

court filed its written findings of fact and conclusions of law. [Dkt. #150]. The court concluded that defendants' actions violated IGRA and the State Gaming Compact because the Broken Arrow Property was not the Kialegee Tribal Town's "Indian lands" as defined by IGRA, and that the Tribal Town did not exercise government power over the property within the meaning of IGRA. [*Id.* at Conclusions of Law ¶¶ 37, 40-41]. The court concluded that defendants' "efforts to construct and operate a gaming facility on the Broken Arrow Property violate [the Indian Gaming Regulatory Act] and – as to Class III gaming – the Kialegee-State Gaming Compact." [*Id.* at 41].

The court preliminarily enjoined defendants from (1) proceeding with development or construction of the proposed Red Clay Casino or any other gaming facility on the Broken Arrow Property; and (2) conducting Class III gaming on the Broken Arrow Property. [*Id.*]. The court noted in its written order that defendants had admitted the building under construction was "designed to be a sports bar and casino,"

29, 2012, the Tribal Town submitted a Request for Reconsideration, in which, *inter alia,* it informed Stevens that the Tribal Town had enrolled Giles and Capps as members on May 26, 2012. [Dkt. #138-1]. In a response dated June 8, 2012, Stevens denied the Request for Reconsideration. [Dkt. #138-2]. Citing *Miami Tribe of Okla. v. U.S.,* 656 F.3d 1129 (10th Cir. 2011), *United States v. Mazurie,* 419 U.S. 544 (1975), and *Kansas v. U.S.,* 249 F.3d 1213 (10th Cir. 2001), Stevens concluded "the change in circumstance presented does not alter the May 25 decision." [*Id.*].

but stated "the court will entertain a motion to modify the injunction if defendants wish to alter the purpose of the structure and have obtained the necessary regulatory approvals form the [Bureau of Indian Affairs] and/or the Muskogee (Creek) Nation for the alternative proposed use or uses." [*Id.* at 40-41].

II. Motion to Reconsider

In their Motion to Reconsider, defendants advise the court that on May 23, 2012, the owners of the restricted allotment, Marcella Giles and Wynema Capps, applied for enrollment as members of the Kialegee Tribal Town and on May 26, 2012, the Business Committee of the Kialegee Tribal Town voted unanimously the enroll Giles and Capps as members. [*Id.*]. Defendants assert, once again, that they share jurisdiction of the Broken Arrow Property with the Muscogee (Creek) Nation. They also contend the recent enrollment of Giles and Capps as members of the Kialegee Tribal Town – viewed in light of the history of the Muskogee Creek Nation and the Kialegee Tribal Town – "provides the Kialegee Tribal town with a direct interest in the [Broken Arrow Property] and constitutes a change in circumstances that warrants reconsideration."

The decision of whether to grant or deny a motion for reconsideration is committed to the court's discretion. *Hancock v. City of Okla. City,* 857 F.2d 1394, 1395 (10th Cir. 1988). A motion to reconsider "is designed to permit relief in extraordinary circumstances and not to offer a second bite at the proverbial

apple." *Syntroleum Corp. v. Fletcher Int'l, Ltd.,* No. 08-CV-384-JHP-FHM, 2009 WL 761322, at *1 (N.D. Okla. March 19, 2009) (quoting *Maul v. Logan Cty. Bd of Cty. Comm's,* No. CIV-05-605, 2006 WL 3447629, at *1 (W.D. Okla. Nov. 29, 2006). "Grounds warranting a motion to reconsider include (1) an intervening change in the controlling law, (2) new evidence previously unavailable, and (3) the need to correct clear error or prevent manifest injustice." *Servants of the Paraclete v. Does,* 204 F.3d 1005, 1012 (10th Cir. 2000) (citing *Brumark Corp. v. Samson Resources Corp.,* 57 F.3d 941, 948 (10th Cir. 1995). In other words, a motion to reconsider is appropriate when the court has "misapprehended the facts, a party's position, or the controlling law." *Id.*; *see Syntroleum Corp.,* 2009 WL 761322, at *1. "It is not appropriate to revisit issues already addressed or advance arguments that could have been raised in prior briefing." *Servants of the Paraclete,* 204 F.3d at 1012.

The court will not revisit the issue of shared jurisdiction, as it was thoroughly briefed by the parties and considered by the court in its written findings and conclusions. This leaves for consideration the impact of the subsequent enrollment of the property owners as members of the Kialegee Tribal Town.

Where purportedly new evidence is presented in a motion for reconsideration, the court does not abuse its discretion in denying the motion when the new evidence would not change the result. *GFF Corp. v.*

Associated Wholesale Grocers, Inc., 130 F.3d 1381, 1386 (10th Cir. 1997) (holding district court did not abuse its "considerable discretion" in denying motion for reconsideration where allegedly newly-discovered bid tally sheets did not contain information sufficient to satisfy statute of frauds). Thus, the issue before the court is whether the recent enrollment of Giles and Capps as members of the Kialegee Tribal Town – either viewed alone or in concert with the "shared jurisdiction" argument – vests the tribe with shared jurisdiction over the Broken Arrow Property.

The factual scenario in this case is similar in some respects to the facts in a series of decisions pertaining to the Miami Tribe of Oklahoma: *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*"); *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 Oklahoma v. United States,* 656 F.3d 1129, 1145 (10th Cir. 2011).

In *Miami Tribe I,* the Miami Tribe of Oklahoma sought review of an NIGC decision that a restricted Indian allotment ("Reserve No. 35") on which a bingo facility was to be built was not "Indian land" as defined by IGRA. The NIGC, in reaching its decision, evaluated the historical record, including various treaties, United States attorney general opinions, congressional reports and court decisions, and concluded

the tribe had relinquished its jurisdiction of the area at issue no later than 1884 and Congress expressly abrogated the tribe's jurisdiction by legislation passed in 1873. 927 F.Supp. at 1426-27. The court found there was no evidence supporting the tribe's argument that the original allottee, Maria Christiana DeRome, and/or her descendants were members of the tribe. *Id.* at 1427. Likewise, it concluded the tribe had failed to present evidence supporting its assertion the current owners of Reserve No. 35 had consented to become members. *Id.*

The tribe did not appeal the district court's decision. Rather, in 1996, it amended its constitution to remove the blood quantum requirement for membership in the tribe and subsequently passed an ordinance admitting the non-Indian owners of the tract (heirs of Maria Christiana DeRome) into the tribe. *Miami Tribe II,* 5 F.Supp.2d at 1215. The owners, in turn leased the land to the tribe and consented to the tribe's exercise of jurisdiction over the property. *Id.* The tribe asked the NIGC to reconsider its refusal to approve the proposed gaming management contract. The NIGC again determined the land was not "Indian lands" as required under IGRA and refused to approve the contract. *Id.* at 1216. The NIGC decision did not, however, specifically address the issue of whether the tribe had jurisdiction over the property, nor did it contain reference to tribal ordinances and other activities the Tribe asserted were examples of exercise of governmental authority. *Id.* at 1218-1219. As a result, the district court set the decision aside as

an abuse of discretion, finding the agency had "failed to provide a reasoned explanation for its action." *Id.*

On remand, the NIGC determined, based on events subsequent to *Miami I* that the tribe now exercised governmental power over the tract, and that the tract did in fact constitute "Indian lands" within the meaning of IGRA. *Kansas,* 249 F.3d at 1220. Armed with the favorable NIGC decision, the tribe requested that the State of Kansas negotiate a gaming compact for Class III casino gaming. The State of Kansas sued the United States pursuant to the Administrative Procedure Act ("APA"), seeking declaratory and injunctive relief from the NIGC's decision that the tract at issue constituted "Indian lands" within the meaning of IGRA. *Miami III,* 86 F.Supp.2d 1095. The district court, in granting the state's motion for preliminary injunction, held the federal defendants "do not have a colorable claim that the Reserve is Indian Land." *Id.* at 1099.

On appeal, the Tenth Circuit affirmed the district court decision. *Kansas,* 249 F.3d at 1231. In so doing, the court highlighted the importance of the district court's finding, in *Miami I,* that the Miami tribe did not have jurisdiction over the property. It commented:

> Notably, none of the Defendants have ever challenged Miami Tribe I's findings and conclusions regarding the status of the tract. Rather, they rely solely on the Tribe's activities subsequent to Miami Tribe I to claim tribal jurisdiction over the tract – namely (1) the Tribe's adoption of the tract's twenty-plus

> owners into the Tribe, (2) those owners' consent to tribal jurisdiction pursuant to a lease with the Tribe, and (3) the Tribe's recent development of the tract. None of these recent events, however, alters the conclusion that Congress abrogated the Tribe's jurisdiction over the tract long ago, and has done nothing since to change the status of the tract. An Indian tribe's jurisdiction derives from the will of Congress, not from the consent of fee owners pursuant to a lease under which the lessee acts. We conclude the State of Kansas has a substantial likelihood of success on the merits of this cause.

Id. at 1230-31.

Most recently, in *Miami Tribe of Oklahoma,* 656 F.3d 1129, the Tenth Circuit considered whether the BIA erred in refusing to take the Reserve into trust for the Tribe. The court stated that after a review of the history and previous cases, "we can safely conclude the tribe does not have jurisdiction over the Reserve and therefore does not exercise jurisdiction for the purposes of [25 U.S.C.] § 2216(a)." *Id.* at 1143. The court acknowledged the tribe had adopted the Reserve landowners as members of the tribe, received consent from the Reserve landowners to assert tribal jurisdiction pursuant to a lease and developed the Reserve, including regularly maintaining it and providing security. However, it stated, "these are the same activities we rejected as a basis for the tribe's claim of jurisdiction over the Reserve in *Miami IV.*" *Id.* at 1145. It concluded, "Similarly, here, Miami

Tribe cannot 'exercise jurisdiction' . . . without a congressional grant of jurisdiction over the Reserve." *Id.* Further, it stated:

> Even if *Miami IV* were not on point, the case law does not support the proposition that the adoption of a landowner by a tribe confers jurisdiction. *See United States v. Mazurie,* 419 U.S. 544, 95 S.Ct. 710, 42 L.Ed.2d 706 (1975). The tribe cannot create Indian reservation lands ex nihilo by adopting landowners into the tribe and claiming all of the new member's property.

Id. at 1145 n. 16.

This court recognizes that, in contrast to *Miami Tribe of Oklahoma,* the defendants herein do not rely on enrollment *alone* in support of their assertion of jurisdiction over the property. However, this court previously determined, based on its review of congressional intent and purpose as reflected in the relevant legislation and treaties, including but not limited to the Act of March 1, 1901, 31 Stat. 861, which governed the allotment of the Creek Nation's lands, that the Kialegee Tribal Town does not have jurisdiction over the Broken Arrow Property. As previously stated in Paragraph 18 of this court's Opinion and Order of July 20, 2012, the question of jurisdiction "focuses principally on congressional intent and purpose, rather than recent unilateral actions" of a tribe or band. *Kansas v. United States,* 249 F.3d 1213, 1229 (10th Cir. 2001). This court concludes that, in light of congressional intent and

purpose reflected in the relevant legislation and treaties, the recent enrollment of Giles and Capps as members of the Kialegee Tribal Town does not create jurisdiction over the Broken Arrow Property or otherwise alter the court's previous conclusion that the Tribal Town does not have jurisdiction over the property.

III. Conclusion

For the foregoing reasons, defendants' Motion to Reconsider the Preliminary Injunction in light of subsequent changed circumstances [Dkt. #133] is denied.

/s/ Gregory K. Frizzell
GREGORY K. FRIZZELL,
CHIEF JUDGE
UNITED STATES
DISTRICT COURT

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, Plaintiff, v. TIGER HOBIA, as Town King and member of the Kialegee Tribal Town Business Committee; et al., Defendants.	)	Case No. 12-CV-054-GKF-TLW

OPINION AND ORDER

(Filed Jul. 20, 2012)

Before the court is the Motion for Preliminary Injunction [Dkt. # 4] filed by plaintiff, the State of Oklahoma. The plaintiff seeks entry of a preliminary injunction prohibiting defendants from constructing or operating a casino on a restricted Indian allotment in the City of Broken Arrow, Oklahoma.

The court conducted a hearing on the Motion for Preliminary Injunction on May 16, 17 and 18, 2012, and issued a ruling on the record following closing arguments. Based upon the evidence, briefs, and arguments of counsel presented at the hearing, the court enters the following written Findings of Fact and Conclusions of Law pursuant to Rule 65 of the

Federal Rules of Civil Procedure.[1] To the extent the oral pronouncement conflicts with this Opinion and Order, this written Opinion and Order controls.

I. Findings of Fact

1. Plaintiff State of Oklahoma (the "State") is a State of the United States of America.

2. The Kialegee Tribal Town (the "Tribal Town") is not a party to this action. By Opinion and Order filed April 26, 2012, this court denied the defendants' Rule 19 motion to dismiss, finding that the defendants had not met their burden of demonstrating the Tribal Town is a required party that must be joined in order to accord complete relief among the existing parties. [Dkt. # 105, pp. 16-17]. The Tribal Town is federally recognized, organized under Section 3 of the Oklahoma Indian Welfare Act, 25 U.S.C. § 503 (the "OIWA"), with a Constitution and By-laws approved by the Secretary of the Interior ("Secretary") on April 14, 1941, and ratified by the Tribal Town on June 12,

[1] These findings and conclusions address the evidence and arguments before the court at the close of the hearing on the Motion for Preliminary Injunction. Twelve days after the hearing, defendants filed a Motion to Modify the Preliminary Injunction to allow defendants to construct a sports bar/restaurant facility on the property, and a Motion to Reconsider the Preliminary Injunction in light of subsequent changed circumstances [*see* Dkt. ##133, 136, 137]. The State objected to the motions. [Dkt. ##138-139]. Defendants filed their reply briefs on their motions on July 5, 2012. [Dkt. ##145-146]. Those motions will be addressed in separate orders.

1941. The 1941 Constitution established the Kialegee Tribal Town Business Committee (the "Committee") as the Tribal Town's governing body. [*See* Answer, Dkt. # 114, ¶7; PX 2, Kialegee Tribal Town Constitution and By-Laws].

3. Defendant Kialegee Tribal Town, a federally chartered corporation (the "Town Corporation"), is a corporation with a federal charter issued under Section 3 of the OIWA, approved by the Secretary of the Interior on July 23, 1942, and ratified by the Tribal Town on September 17, 1942 ("Charter"). [Dkt. # 114, Defendants' Answer, ¶¶10, 21; DX 2, Kialegee Tribal Town Corporate Charter].

4. Defendant Tiger Hobia is the Town King, or "Mekko," of the Tribal Town, is a member of the Committee, and is a citizen and resident of the State of Oklahoma. Defendant Hobia is also the King, or Mekko, of the Town Corporation. [Dkt. # 114, Defendants' Answer, ¶8].

5. Defendant Florence Development Partners, LLC is an Oklahoma limited liability company doing business in the State of Oklahoma. [*Id.* ¶ 9].

A. The Kialegee Tribal Town

6. The Tribal Town is headquartered in Wetumka, Oklahoma, which is located approximately 75 miles southeast of the allotment involved in this dispute. [*Id.,* ¶18; PX 2, Bylaws, Art. II].

7. At the time of the Tribal Town's federal recognition in 1941, its membership was concentrated in a 15 square mile area around Wetumka, Oklahoma, near the junction of Hughes, McIntosh, and Okfuskee Counties, Oklahoma. [PX 21, Report Regarding the Historical Relationship of the Muscogee (Creek) Nation with the Kialegee Tribal Town, by Gary Clayton Anderson, at 28; Dkt. #130, Testimony of Gary C. Anderson ("Anderson Testimony"), 111:19-23].

8. The Tribal Town has no reservation. [PX 21, Anderson Report, at 44-45]. In 1990, the Tribal Town stated in an application to the BIA that it "had no land." [PX 27, *Kialegee Tribal Town of Oklahoma v. Muskogee Area Director, Bureau of Indian Affairs,* 1991 I.D. LEXIS 59, 19 IBIA 296 (Interior Board of Indian Appeals, decided April 17, 1991) (requiring the consent of the Creek Nation to Tribal Town's application to the BIA to take land into trust, and denying the Tribal Town's application)]

9. The Tribal Town's 1941 Constitution does not define or lay claim to any geographic or territorial jurisdiction. [PX 2, Constitution and By-Laws of the Kialegee Tribal Town, Oklahoma].

10. Article IV, Section 1 of the Tribal Town's 1941 Constitution provides that the "supreme governing body of the Town shall be the adult members of the Town, both male and female who are 21 years of age or older, through the actions of the Business Committee." [*Id.*].

11. Under Article V of the 1941 Constitution, the officers of the Tribal Town are "the Town King, 1st Warrior, 2nd Warrior, Secretary and the Treasurer." Article VI, Section 2 of the 1941 Constitution provides that the elected officers shall "select and appoint five members to serve as an Advisory Committee. . . ." [*Id.*]

12. Article IV of the 1941 Constitution provides that the powers of the Tribal Town are set forth in the Charter of the Town Corporation. [*Id.*] In two Resolutions dated May 15, 2010, authorizing actions of the Tribal Town related to the gaming venture, the Tribal Town references the powers set forth in the Corporate Charter, including but not limited to the power to sue and be sued and to enter into obligations or contracts, as providing powers exercised in the gaming activities. [PX 6, Kialegee Tribal Town Resolution, p. 1; PX 12 (Ex. D, p.1)].

13. Section 2 of the Corporate Charter of the Kialegee Tribal Town states that "the membership, the officers, and the management of the incorporated tribal town shall be as provided in the . . . Constitution and By-laws" [DX 2 at K-1012].

14. Section 3 of the Corporate Charter provides that, "subject to any restrictions contained in the Constitution and laws of the United States or in the Constitution and Bylaws of the tribal town, and to the limitations of section 4 and 5 of this Charter," the Town Corporation shall have the following corporate

powers as provided by section 3 of the Oklahoma Indian Welfare Act of June 26, 1936:

> . . . (b) To sue and be sued; to complain and defend in any courts; *Provided, however,* That the grant or exercise of such power shall not be deemed a consent by the tribal town or by the United States to the levy of any judgment, lien, or attachment upon the property of the tribal town other than income or chattels specially pledged or assigned.

[*Id.* at K1012-13].

15. In 2004, Oklahoma established a model tribal gaming compact that constitutes a "pre-approved" offer to federally recognized tribes in the State ("Model Compact"). 3A Okl. St. Ann. §§ 280-81. If a tribe accepts the Model Compact, obtains approval of the Compact by the Secretary of the Interior, and complies with the requirements of the Compact and the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 ("IGRA"), the tribe can operate Class III gaming facilities on "its Indian lands." [*Id.,* Model Compact, Part 5(L)].

16. On April 12, 2011, the Tribal Town accepted the Model Compact with the State of Oklahoma (the "Kialegee-State Gaming Compact"). [PX 1A, Derek Campbell Aff, with attached Kialegee-State Gaming Compact].

17. The Secretary of the Interior approved the Kialegee-State Gaming Compact on July 8,2011. [*Id.*].

18. The Kialegee-State Gaming Compact authorizes the Tribal Town to operate gaming "only on its Indian lands as defined by IGRA." [*Id.,* Part 5(L)].

B. Background and History

19. The State's first witness at the hearing was Dr. Gary Anderson, an ethnohistorian at the University of Oklahoma. In his opening statement, Counsel for the State told the court that testimony on ethnohistory is important for a number of reasons. First, the State said, it explains "that it was not the intent of the Interior Department to vest [the tribal town] with full powers equal to and certainly not overriding those of the Muscogee (Creek) Nation." [Tr., Dkt. #130, pp. 11:19-12:5]. Second, counsel for the State explained that the ethnohistorian would "testify that the same set of factors, when we look at the approval of the Muscogee Creek Nation, reflect an understanding that the Muscogee Creek Nation has the overriding tribal jurisdiction." [*Id.,* 12:6-9]. Third, the State argues that the historical record forecloses the defendants' argument that they can move 70 miles north from the center of their residence around Wetumka, Oklahoma, to an area of primary authority of the Muscogee (Creek) Nation and establish a casino "that requires a police-power form of jurisdiction and governmental control." [*Id.,* 13:16-14:3]. In its closing arguments, the State appeared to shift ground, stating: "[t]he case is not about some two-tier approach to the sovereignty of tribes. It is not about a definition of what a ["]band["] is. It is not about some

distinction across the board between tribes. It is about a meticulous examination of what constitutes the Tribal Town's Indian lands and whether those criteria are satisfied, simply with respect to this parcel." [Tr., Dkt. # 132, 404:12-17]. Insofar as the State has submitted many proposed findings of fact on matters of Muscogee (Creek) history, and because the defendants contend that this court must consider Creek history contextually and apply the Creeks' understanding of their property rights and jurisdiction at the time of negotiation and execution of the Treaty of 1833, this court makes a number of findings concerning historical matters in order to address the arguments raised by the parties and to put the present controversy in historical context. The court's findings relating to Muscogee (Creek) history provide only a brief synopsis of that history and the materials relied upon by this court in making those findings were the materials admitted into the record and the testimony of plaintiff's expert.

20. In the 1500s, the Creek people inhabited portions of what are today the States of Alabama and Georgia. [PX 21, Anderson Report Regarding the Historical Relationship of the Muskogee (Creek) Nation with the Kialegee Tribal Town, at 2-3].

21. Historically and traditionally, the Creeks were a confederacy of autonomous tribal towns. *Harjo v. Andrus,* 581 F.2d 949, 951 n. 7 (D.C. Cir. 1978). By the early 1700s, two distinct groups of Creek tribal towns had emerged, the so-called Lower Towns, with Coweta as the most significant community, and the

Upper Towns, where Tuckabache became the most prominent. Kialegee was one of the Upper Towns. By the close of the French and Indian War in 1763, the smaller autonomous villages began to give up some status and power to the two largest communities. [PX 21, at 5; Dkt. #130, Tr., 54:14-25].

22. By the early 1800s the Creeks had formed a National Council. [PX 21, at 6-7; Dkt. #130, Tr., 55:10-21, 57:21-58:17].

23. In 1812, civil war broke out among the Creeks. On one side stood a dissident group of traditionalist Upper Creeks, known as the "Red Sticks," who opposed white encroachment on Creek lands and the 'civilizing programs' administered by Benjamin Hawkins, the United States Indian Agent who had married a Creek woman. The Red Sticks won the support of Upper Creek towns and selected Kialegee as their headquarters. On the other side were the Lower Creek "White Sticks," lead by William McIntosh, the son of a British military officer, who favored economic development, including cotton production. Encouraged by the British and the Shawnee leader Tecumseh, the Red Sticks attacked the Lower Creeks in the fall of 1812, fighting pitched battles with McIntosh's forces. In 1813, the United States government sent troops under General Andrew Jackson, who joined forces with McIntosh and some 1,500 Lower Creeks. Jackson and the White Sticks invaded and destroyed many Upper Creek towns, including Kialegee, and eventually killed some 800 Red Sticks at the Battle of Horseshoe Bend on March

27, 1814. The Red Stick War had a profound effect on Creek populations, the number of Creeks living in Alabama dropping by several thousand people. Many historians suggest that the animosity the conflict engendered lasted well into the twentieth century. [PX 21, pp. 6-8].

24. In 1828, nearly 3,000 Lower Creeks from the Coweta District migrated west to Oklahoma. Others followed during the next few years. They built communities along the Arkansas River, recreating towns called Broken Arrow, Coweta, Big Springs, and "Tulsey Town." [PX 21, at 9; Dkt. # 130, Tr., 58:22-59:2].

25. In 1830, Congress passed the Indian Removal Act. In a treaty signed on March 24, 1832, seven Creek Chiefs on behalf of "[t]he Creek tribe of Indians" "cede[d] to the United States all their land, East of the Mississippi river [sic]" in exchange for lands west of the Mississippi River. The United States agreed to provide subsistence expenses for Creeks to immigrate to Oklahoma territory, and "join their countrymen there[.]" [PX 22, Treaty of March 24, 1832, 7 Stat. 366; Dkt. #130, Tr., 74:17-78:12]; *see also, Indian Country, U.S.A., Inc. v. State of Oklahoma,* 829 F.2d 967, 971 (10th Cir. 1987). Article XIV of the Treaty of 1832 provided that '[t]he Creek country west of the Mississippi shall be solemnly guarantied to the Creek Indians, nor shall any State or Territory ever have a right to pass laws for the government of such Indians, but they shall be allowed to govern themselves, so far as may be compatible with the

general jurisdiction which Congress may think proper to exercise over them." [PX 22].

26. In a subsequent treaty resolving land disputes between the Cherokees and Creeks in the country to which they had immigrated, the United States agreed to grant "a patent, in fee simple, to the Creek nation of Indians for the land assigned said nation by this treaty or convention . . . " [Treaty of Feb. 14, 1833, art. 3, 7 Stat. 417, 419]. Article IV of the 1833 Treaty, upon which defendants rely in connection with their argument that the Tribal Town shares jurisdiction over the allotment, provides in part: "the land assigned to the Muskogee Indians, by the second article thereof, shall be taken and considered the property of the whole Muskogee or Creek nation, as well of those now residing upon the land . . . " [*Id.,* art. 4, 7 Stat. 417, 419].

27. Migration of the majority of Upper Creek towns came in the mid-1830s. They built communities including Tuckabatchee and Wetumka, which held a collection of people identified with the Kialegee Town in Alabama. [PX 21, at 9; Dkt. #130, Tr. 58:22-59:6]. The upper and lower towns were separated by approximately forty miles of prairie which was uninhabited for decades after removal. As a result, the two groups hardly spoke to each other. [PX 21, at 9]. When a United States Indian Agent appeared in 1837 to administer to the "Creek nation," the agent noted that each of the two groups had its own leaders. Thus, he recognized two separate "districts," and convinced each district to select a "Principle Chief"

and delegates who would meet once a year at the Creek Agency to discuss the delivery of annuity goods and money coming from the sale of Creek lands in the east. [*Id.,* at 9-10].

28. In 1856, the United States, six commissioners representing the Creeks, and four commissioners representing the Seminole tribes of Indians entered into a treaty whereby the Creek Nation ceded certain lands in present-day Oklahoma to the Seminoles in exchange for compensation. [PX 23, Treaty of August 7, 1856, 11 Stat. 699]. The treaty provided that, "[s]o far as may be compatible with the constitution [sic] of the United States, and the laws made in pursuance thereof, regulating trade and intercourse with the Indian tribes, the Creeks and Seminoles shall be secured in the unrestricted right of self-government, and full jurisdiction over persons and property, within their respective limits." The treaty also provided for the payment of $400,000 to be paid *per capita* under the direction of "the general council of the Creek Nation, to the individuals and members of said nation." [PX 21, at 11; PX 23, Treaty of August 7, 1856; Dkt. #130, Tr., 81:3-83:21].

29. The animosities spawned from the Red Stick Rebellion continued into the Civil War. In July, 1861, the General Council of the Creek Nation ratified a treaty of alliance and friendship with the Confederate States of America. Most men from the Lower Creek Towns (then living in the northern portion of Creek lands in Oklahoma, along the Arkansas River) joined the Confederacy and fought in

the Confederate "Home Guard." Many of the Upper Creeks (then living in the southern part of Creek lands in Oklahoma), under Upper Creek leader Opothleyahola, fled north toward Kansas. Along the way, they fought three battles against Confederate Creeks and regular Confederate troops at the battles of Round Mountain, Chusto-Talasah in what is now Tulsa County, Oklahoma, and Chustenahlah in what is now Osage County, Oklahoma. Upper Creek survivors made their way into Kansas, where some joined the Union, creating a Union brigade of soldiers. [PX 21, pp. 11-12].

30. Following the Civil War, in the Treaty of June 14, 1866, 14 Stat. 785, the United States required the Creeks to cede the western portion of their lands in Oklahoma (estimated in the Treaty to contain 3,250,560 acres) as a penalty for its alliance with the Confederacy. The United States agreed to pay $975,168 for the lands, with $100,000 of that amount paid to Creek soldiers who enlisted in the Federal Army and the loyal refugee Indians and freedmen who were driven from their homes by the rebel forces, to reimburse them for their losses. The treaty affirmed that "the eastern half of said Creek lands, being retained by them, shall, except as herein otherwise stipulated, be forever set apart as a home for said Creek Nation." The treaty makes no mention of Creek tribal towns. [PX 21, at 12-13; PX 24, Treaty of June 14, 1866; Dkt. #130, Tr., 84:21-85:17].

31. In 1867, the Creeks adopted a written constitution. The constitution provided for separation

of powers into executive, legislative and judicial branches. Legislative power was lodged in a National Council, a bi-cameral body composed of a house of Kings and a house of Warriors. Each tribal town was entitled to one member in the "house of Kings," and one in the "house of Warriors," plus an additional member in the house of Warriors for every two hundred persons. The Creeks selected Okmulgee as their capital. [PX 21, at 13; Tr., Dkt. #130, Tr., 61:15-62:12, Article I, 1867 Constitution].

32. The 1867 Constitution of the Muskokee[2] Nation also provided for one Principal Chief, and one "high Court" to be composed of "five competent persons" chosen by the National Council. The constitution divided the Nation into six districts, with each district to be furnished with one company of "Light Horsemen" – one officer and four privates to be elected for a two-year term by the vote of their respective districts. [Articles II-IV, 1867 Constitution, PX 21 at 12-13]. In 1867, there were approximately 44 tribal towns in existence. *Harjo v. Andrus,* 581 F.2d 949, 951 n. 7 (D.C. Cir. 1978).

33. Dissention and distrust continued between traditionalist Creeks from the south and west and progressives from the northern parts of the Muskokee Nation. A rebellion occurred in 1870, led by traditionalists, who distrusted the new government and were

[2] The spelling of the Nation's name has varied over the years.

outraged at the loss of land resulting from the Treaty of 1866. They rallied at Nuyaka, a small town outside of Okmulgee. At one point, 300 traditionalists were confronted by several hundred progressives who feared that the traditionalists would burn the capital. More violence erupted in the 1880s when the traditionalists formed their own "rump" government under the leadership of Isparhecher (a former District Judge of the Muscogee District from 1872 to 1874), who rallied a large number of full-blood Creeks from south of the capital. The dissidents concentrated themselves in the Wetumka District, where Isparhecher formed an army. After Muskokee Nation Lighthorsemen arrested two of Isparhecher's men for breaking the law, Isparhecher's forces freed them during a pitched battle. The Wetumka Creeks declared their independence in 1882. In response, the Indian Agent, with the help of government forces, organized a militia of 1,150 men at Okmulgee, who were sent into the district to restore law and order. In the battle, called the "Green Peach War," the dissidents were routed. [PX 21, at pp. 13-14].

34. In 1887, Congress passed the Dawes Act, also called the General Allotment Act, 24 Stat. 388, which provided for the allotment of tribal lands to individual tribal members. The Five Civilized Tribes, including the Creek Nation, were excluded from the Act. [Dkt. #130, Tr., 62:16-20].

35. In 1893, Congress created the Dawes Commission and empowered it to seek allotment of the

lands of the Five Tribes, including the Muskokee Nation. [Act of March 3, 1893, 27 Stat. 612].

36. In 1898, Congress passed the Curtis Act, which provided for allotment of the Five Tribes' lands and authorized townsites that were opened to non-Indian ownership. [Act of June 28, 1898, 30 Stat. 495; PX 21, at 16-17; Dkt. #130, Tr., 62:18-63:14].

37. In 1901, the Creek Nation and the United States entered into a new agreement governing the allotment of the Creek Nation's lands in order to supersede a provision contained in section 30 of the Curtis Act. [PX 25, Act of March 1, 1901, 31 Stat. 861]; *see also Harjo v. Kleppe,* 420 F.Supp. 1110, 1124 (D.D.C. 1976). Under Section 23 of the 1901 agreement, the Principal Chief of the Muskogee Nation was to execute and deliver to each citizen of the Muskogee Nation an allotment "deed conveying to him all right, title, and interest of the Creek Nation and of all other citizens in and to the lands embraced in his allotment certificate." [PX 25; Tr., Dkt. #130, Tr., 90:1-93:25; PX 21, at 17-18;].

38. On August 6, 1903, as part of the allotment of those lands, an allotment deed and a homestead patent were issued to Tyler Burgess, an enrolled Creek Indian of full blood, for a total of 160 acres of "Indian restricted, individually owned land" in what is today Broken Arrow, Tulsa County, Oklahoma. [PX 12, Petition for Approval of Prime Ground Lease and supporting exhibits; PX 14-15, Answers of Marcella Giles and Wynema Capps in *Oklahoma Turnpike*

Authority v. 5.69 Acres of Land, Case No. 99-cv-300-H in the U.S. District Court for the Northern District of Oklahoma].

39. Tyler Burgess was not a member of the Kialegee Tribal Town. [Dkt. #130, Tr., 31:17-20]. The tribal roll shows Tyler Burgess to have been a member of Lochapoka Town. [PX 21 at 17].

40. In 1936, Congress enacted the Oklahoma Indian Welfare Act (the "OIWA"), which, among other things, granted "[a]ny recognized tribe or band of Indians residing in Oklahoma" the right to organize and to adopt a constitution and by-laws, and obtain corporate charters. [Act of June 26, 1936, 49 Stat. 1967, codified as amended at 25 U.S.C. §§ 503].

41. In 1937, some 16 Creek tribal towns remained active, maintaining "fires, squares and native ceremonial organizations." [PX 21 at p. 27]. Those towns totaled 2,666 people, a small minority of the Creek Nation, whose population had reached 30,000 or more by that time. *Id.*

42. In 1941, as referenced in paragraphs 6 through 14 above, the Kialegee Tribal Town organized and adopted the "Constitution and By-Laws of the Kialegee Tribal Town, Oklahoma." Members of the Kialegee Tribal Town may also be members of the Muscogee (Creek) Nation. [PX 2, Article III]. Two other Creek tribal towns – the Thlopthlocco Tribal Town and the Alabama-Quassarte Tribal Town – also met the BIA's guidelines necessary for organization pursuant to the OIWA. [*Id.*]. Thus, three of the Creek

tribal towns are federally recognized. As entities separate from the Creek Nation, the tribal towns are entitled to receive BIA funding and services directly, rather than through the Muscogee (Creek) Nation. [PX 27, p. 2 fn. 1).

43. In 1979, the Muscogee (Creek) Nation, pursuant to the OIWA, adopted a new constitution providing for three separate branches of government. The 1979 Constitution declares, among other things, that "the political jurisdiction of The Muscogee (Creek) Nation shall be as it geographically appeared in 1900 which is based upon those Treaties entered into by the Muscogee (Creek) Nation and the United States of America. . . ." The Acting Deputy Commissioner of Indian Affairs approved the constitution on August 17, 1979. [PX 3, Constitution of the Muscogee (Creek) Nation]. Citizenship in the Muscogee (Creek) Nation include persons who are lineal descendants of a Muscogee (Creek) Indian by blood whose name appears on the final rolls prepared pursuant to the Act of April 26, 1906 (34 Stat. 137). Id., at Article III. Members of the Kialegee Tribal Town who meet the requirements of citizenship in the Muscogee (Creek) Nation are citizens of the Muscogee (Creek) Nation.

44. In 2002, the Muscogee (Creek) Nation adopted a gaming code, enacted as Chapter 21 of the Muscogee (Creek) Nation Code. The gaming code requires any person conducting gaming on Muscogee (Creek) Nation property to have a valid and current public gaming license issued by the Gaming Commissioner of the Muscogee (Creek) Nation. 21 Muscogee (Creek)

Nation Code, Title 21, § 3-101(A). The code prohibits any other forms of public gaming operations being conducted within the jurisdiction of the Muscogee (Creek) Nation without the written approval of the Gaming Commissioner. 21 Muscogee (Creek) Nation Code, Title 21, § 3-101(B).

C. The Kialegee Tribal Town's Casino Project

45. At the time of the hearing on the State's Motion for Preliminary Injunction, the defendants were actively constructing the "Red Clay Casino," a gaming facility providing Class II and Class III gaming, on property located at the southwest corner of Olive Avenue (South 129th East Avenue) and Florence Street (South 111th Street East), in Broken Arrow, Oklahoma (the "Broken Arrow Property"). Testimony at the hearing was that the defendants intended to operate the Casino by Labor Day, 2012. The Broken Arrow Property is more particularly described as follows:

> The East 1245.3 feet of the North 1245.3 feet of the Northeast quarter of Section Thirty Two (32), Township Eighteen (18) North, Range Fourteen (14) East of the Indian Base and Meridian, Tulsa County, State of Oklahoma, less and except one acre reserve as life Estate for Willis G. Burgess:

LESS AND EXCEPT

A STRIP, PIECE OR PARCEL OF LAND LYING IN PART OF THE Northeast Quarter (NE1/4) of Section 32, Township 18 North, Range 14 East of the Indian Base and Meridian, Tulsa County, Oklahoma. Said parcel of land being described as follows:

Beginning 726.22 feet south of the Northeast corner of said NE 1/4; THENCE South 01°13'28" East along the East Line of said NE ¼ a distance of 519.08 feet; THENCE South 88°38'08" West a distance of 65.00 feet; THENCE North 02°37'56" East a distance of 520.42 feet; THENCE North 88°46'32" East a distance of 30.00 feet to the POINT OF BEGINNING, containing 24,660 square feet or 0.57 acres, more or less.

AND

Beginning 793.14 feet West of the Northeast corner of said NE ¼; THENCE South 01°22'07" East a distance of 30.00 feet; THENCE South 01°23'59" East a distance 20.00 feet; THENCE South 85°29'21" West a distance of 453.05 feet; THENCE North 01°13'22" West a distance of 74.75 feet to a point on the North line of said NE ¼; THENCE North 88°37'08" East along the North line of said NE ¼ a distance of 452.16 feet to the POINT OF BEGINNING, containing 28,211 square feet or 0.65 acres, more or less.

AND

> Commencing at the Northeast corner of said NE ¼; THENCE South 01°13'28" East along the East line of said NE ¼ a distance of 1245.30 feet; THENCE South 88°37'05" West a distance of 440.04 feet to the POINT OF BEGINNING, THENCE continuing South 88°37'05" West a distance of 805.26 feet; THENCE North 01°13'28" West a distance of 423.92 feet; THENCE Southeasterly on the arc of a curve to the left, said curve having a radius of 2101.83 feet (said curve being subtended by a chord bearing South 51°32'54" East, and a chord length of 224.89 feet), an arc distance of 225.00 feet; THENCE South 60°18'28" East a distance of 455.51 feet; THENCE South 80°52'21" East a distance of 245.38 feet to the POINT OF BEGINNING, containing 129,289 square feet or 2.97 acres, more or less.

[Dkt. #114, Defendants' Answer, ¶31].

46. The Broken Arrow Property is located within the geographical boundaries of the Muscogee (Creek) Nation as it appeared in 1900. [Dkt. #130, Tr., 142:9-13].

47. The Broken Arrow Property is a portion of the 160 acres of restricted fee land originally allotted to Tyler Burgess in 1903.

48. The Broken Arrow Property has since passed by descent to two heirs of Tyler Burgess, sisters Wynema L. Capps ("Capps") and Marcella S. Giles ("Giles"), who hold the property as tenants in

common, subject to federal restrictions and restraints against alienation. [PX 14-15]. Neither Capps nor Giles reside on the property. Capps resides in Welty, Oklahoma; Giles is an attorney living in McLean, Virginia.

49. As of the close of the hearing on plaintiff's motion for preliminary injunction on May 18, 2012, neither Capps nor Giles was an enrolled member of the Tribal Town. Capps and Giles are enrolled members of the Muscogee (Creek) Nation. [Dkt. #127-2, Court's Ex. 1, Email listing stipulations agreed to by counsel].

50. The Broken Arrow Property is located more than 70 miles north of the Tribal Town's Headquarters in Wetumka, Oklahoma.

51. The Broken Arrow Property is not held in trust by the United States for the benefit of the Tribal Town. [Dkt. #114, Defendants' Answer, ¶ 38].

52. The Broken Arrow Property is not held in trust by the United States for the benefit of an enrolled member of the Tribal Town. [*Id.,* ¶ 39].

53. As of May 18, 2012, the Broken Arrow Property was not held by either the Tribal Town or an enrolled member of the Tribal Town subject to restriction by the United States against alienation.

54. The Tribal Town has no property interest in the Broken Arrow Property. [Dkt. #131, Tr., 349:1-5].

55. In May of 2010, the Kialegee Tribal Town, as Tenant, executed a Prime Ground Lease with Capps and Giles, as Landlord, for the Broken Arrow Property as a site for a proposed casino facility. [PX 12, pp. OK-00260-00295].

56. On January 27, 2011, Capps and Giles filed a petition in the District Court in and for Tulsa County, Oklahoma, pursuant to the Act of August 4, 1947, 61 Stat. 731 (the "1947 Act"), seeking court approval of the proposed Prime Ground Lease. [PX 12]. The 1947 Act declares, in relevant part, that "no conveyance, including an oil and gas or mineral lease, of any interest in land acquired before or after the date of this Act by an Indian heir or devisee of one-half or more Indian blood when such interest in land was restricted in the hands of the person from whom such Indian heir or devisee acquired same, shall be valid unless approved in open court by the county court of the county in Oklahoma in which the land is situated."

57. On August 17, 2011, the Tulsa County District Court entered an order withholding its approval of the Prime Ground Lease. [Order of 10/17/11, *In the Matter of the Approval of the Prime Ground Lease Agreement of Marcella S. Giles and Wynema L. Capps,* Case No. FB-2011-1 in the District Court of Tulsa County, Oklahoma]. The state court ruled, among other things, that it was not the appropriate forum to resolve intertribal jurisdictional disputes between the Muscogee (Creek) Nation and the Kialegee Tribal Town, and concluded that "an

individual citizen cannot transfer government jurisdiction over his or her property by the terms of a lease."

58. In the meantime, on May 10, 2011, Capps and Giles, as Landlord, entered into a separate Ground Lease Agreement with Defendant Florence Development Partners, LLC, as Tenant, pertaining to the Broken Arrow Property (the "May 2011 Lease"). [PX 7]. On approximately December 1, 2011, the May 2011 Lease was amended by a First Amendment to Ground Lease Agreement [PX 8] to add the Tribal Town as a signatory party. On January 3, 2012, a Memorandum of Lease describing the essential terms of the May 2011 Lease, as amended, was recorded in the office of the Tulsa County Clerk as Document No. 2012000124. [PX 9; Dkt. #131, Tr., 325:20-329:20].

59. Under the May 2011 Lease, Capps and Giles, as Landlord, purported to lease the Broken Arrow Property to Florence Development Partners, LLC, as Tenant, "for a term commencing on the later of May 10, 2011 or the Effective Date (as defined in the Lease) and shall expire on April 1, 2017." The lease was written to have a term of six year and 11 months so it would not have to be approved by the Secretary of Interior or his designee. [Dkt. #131, Tr., 326:10-19]. The May 2011 Lease grants defendant Florence Development Partners, LLC, as Tenant, "the right, privilege, and option to extend the Term of the Lease for four (4) periods of ten (10) years each, upon and subject to the terms and conditions contained in the Lease." The ultimate duration of the May 2011

Lease could, therefore, exceed 46 years. [PX 7, ¶ 2 and Exhibit "D" thereto, ¶ 2; PX 9, ¶¶ 1, 2]. At the hearing, the defendants took the position that the May 2011 Lease is void by operation of law because it is on restricted land and had not received secretarial approval. [Dkt. #131, Tr., 328:15-329:14]. However, the May 2011 Lease, as amended, has not been formally terminated by its parties, and defendant Florence Development Partners, LLC could theoretically present the Lease to the Secretary for approval. [*Id.,* 329:15-20]. Instead of pursuing the gaming venture by means of the May 2011 Lease, defendants decided to utilize a joint venture agreement. [*Id.,* Tr., 329:21-24].

60. In May, 2011, Golden Canyon Partners, LLC, Giles, Capps, and the Kialegee Tribal Town, entered into the Operating Agreement of Florence Development Partners, LLC to create a joint venture to build and operate the Red Clay Casino. [PX 16]. Luis Figueredo, a principal of Golden Canyon Partners, LLC, testified at the hearing that the Operating Agreement had been voided "approximately a month" before the hearing "because there was some provisions in the agreement that could be perceived by the Department of Interior to be encumbrances. And in order for the joint venture agreement to comply with the Court's dicta or the Court's guidance in the *GasPlus* case, you cannot create an encumbrance on the property. So we carefully examined the operating rules and revised them so that we would be in compliance with applicable law regarding

encumbrances on Indian land." [Dkt. #131, Tr., 330:19-331:2].

61. By letter dated September 29, 2011, NIGC Chairwoman Tracie L. Stevens advised Town King Tiger Hobia that the NIGC had approved three amendments to the Kialegee Tribal Town's gaming ordinances, but cautioned: "My approval of this ordinance does not constitute a determination that the Tribe has jurisdiction over that parcel or that the parcel constitutes Indian lands eligible for gaming under IGRA." [PX 10; Dkt. #131, Tr., 321:11-323:14].

62. In December, 2011, defendants proceeded with actual construction of the casino on the Broken Arrow Property by commencing grading and site preparation. At the time of the hearing, the structure was up and the inside sprinkler systems were in place. [Dkt. #131, Tr., 303:23-304:17].

63. On May 1, 2012, Giles, Capps, and Golden Canyon Partners entered into the Amended and Restated Joint Venture Operating Agreement of Florence Development Partners, LLC. [PX 17]. The Amended and Restated Operating Agreement removed the Kialegee Tribal Town as a member because the NIGC had told Figueredo that the previous operating agreement would violate the NIGC's "sole proprietary interest rule." The Amended and Restated Joint Venture Operating Agreement is the agreement currently governing the company developing the Red Clay Casino facilities. [Dkt. #131, Tr., 331:3-332:4].

D. Provision of Governmental Services

64. Most governmental services in the area of the Broken Arrow Property are provided by the City of Broken Arrow. The City of Broken Arrow Police, the Tulsa County Sheriff, and/or the Muscogee (Creek) Lighthorse Police provide law enforcement in the area. The City of Broken Arrow Fire Department provides fire and emergency medical services. The City of Broken Arrow provides water and sanitary sewer services to the area. Educational services in the area of the Broken Arrow Property are provided by the Broken Arrow Municipal School District. The Kialegee Tribal Town does not provide law enforcement or other services to the Broken Arrow Property. [Dkt. #131, Tr., 221:23-25; 232:1-16].

65. The Tribal Town does not have a police force. [Court's Ex. 1; Dkt. # 131, Tr. 346:10-12].

66. The Tribal Town does not have a court or a jail. [*Id.,* 346:10-16].

67. No Tribal Town members live on near the Broken Arrow Property. [*Id.,* 315:3-20,349:22-350:1].

68. Law enforcement, fire, or emergency services for the Broken Arrow Property are provided by the City of Broken Arrow, the County of Tulsa, the State of Oklahoma, or the Muscogee (Creek) Nation pursuant to a cross-deputization agreement between the Muscogee (Creek) Nation and political subdivisions of the State of Oklahoma. The City of Broken Arrow signed the agreement in July, 2006. [PX 32,

Intergovernmental Cross-Deputization Agreement; Dkt. #131, Tr., 233:5-234:15].

69. The Tribal Town does not have a cross-deputization agreement with the City of Broken Arrow. [*Id.,* 234:21-25].

70. After casino development efforts commenced, the Tribal Town opened a satellite office in the residence located on the Broken Arrow Property, and staffed the office with a Kialegee employee. Brochures for grant programs, education programs and health programs are available to tribal members on site. [Id., 307:1-308:11].

E. Exercise of Governmental Control

71. Prior to initiation of efforts to develop and build a casino on the Broken Arrow Property, the Tribal Town did not exercise governmental authority and control over the Broken Arrow Property. After development efforts commenced, the Tribal Town fenced the property, began flying the Kialegee flag from the residential garage on the property, posted signs stating the property was under the governmental control of the Kialegee Tribal Town, opened a satellite office in an existing house on the property, held business meetings in the house, and hired security to patrol the property. [Dkt. #131, Tr., 307:20-309:21].

F. NIGC Determination of Eligibility for Gaming

72. As of May 18, 2012, the day this court granted plaintiff's Motion for Preliminary Injunction by a ruling from the bench, the defendants had not obtained an NIGC determination that the site is eligible for Class III gaming.[3]

G. The Public Interest

73. The public has an interest in the enforcement of state and federal laws – including gaming laws and compacts.

74. The public interest would not be harmed by the entry of a preliminary injunction barring continued construction and operation of the proposed Red Clay Casino because there are ample alternative venues available to the gaming public in the greater Tulsa metropolitan area, including the Cherokee Nation's Hard Rock in Catoosa, Oklahoma; the Muscogee (Creek) Nation's River Spirit Casino in Tulsa, Oklahoma; and the Osage Nation's Osage Casino in Tulsa, Oklahoma.

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[3] On May 25, 2012, the NIGC notified Town King Tiger Hobia that the NIGC Office of General Counsel had opined that the Kialegee Tribal Town does not have jurisdiction over the Broken Arrow Property, and that the Department of the Interiors's Office of the Solicitor concurred with that opinion. [Dkt. #134, Ex. 1]. NIGC Chairwoman Stevens directed the Kialegee Tribal Town "not to commence gaming under IGRA on the Proposed Site." [*Id.*].

II. Conclusions of Law

A. Jurisdiction and Venue

1. This 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.

2. The *Ex parte Young* doctrine is an exception to tribal sovereign immunity. *Crowe & Dunlevy, P.C. v. Stidham,* 640 F.3d 1140, 1154 (10th Cir. 2011). The doctrine proceeds on the fiction that an action against a tribal official seeking only prospective injunctive relief is not an action against the tribe and, as a result, is not subject to the doctrine of sovereign immunity. *Id.* By adhering to this fiction, the *Ex parte Young* doctrine "enables federal courts to vindicate federal rights and hold [tribal] officials responsible to the supreme authority of the United States." *Id., quoting Pennhurst State Scho. & Hosp. v. Halderman,* 465 U.S. 89, 105 (1984). Moreover, tribal sovereign immunity does not extend to a tribal official when the official is acting outside the scope of the powers that have been delegated to him. *Burrell v. Armijo,* 603 F.3d 825, 832 (10th Cir. 2010). If a sovereign tribe does not have the power to take an action, then the tribal official by necessity acted outside the scope of his authority by taking the action on behalf of the tribe, making him liable to suit. Any other rule would mean that a claim of sovereign immunity would protect a sovereign in the exercise of power it does not possess. *Tenneco Oil Co. v. Sac and Fox Tribe of*

Indians of Oklahoma, 725 F.2d 572, 574 (10th Cir. 1984).

3. The "sue and be sued" language in the Town Corporation's Corporate Charter may constitute a waiver of sovereignty immunity in actions involving the corporate activities of the tribe. *Native Am. Distrib. v. Seneca-Cayuga Tobacco Co.,* 491 F. Supp. 2d 1056, 1065 (N.D. Okla. 2007), *aff'd,* 546 F.3d 1288 (10th Cir. 2008).

4. Venue is proper under 28 U.S.C. § 1391(b)(2) because the Broken Arrow Property is located in the Northern District of Oklahoma and a substantial part of the events giving rise to the claims in this case occurred in this district.

B. Preliminary Injunction Factors

5. "The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held." *Univ. of Tex. v. Camenisch,* 451 U.S. 390, 395 (1981).

6. To obtain a preliminary injunction, a plaintiff must show: "(1) a likelihood of success on the merits; (2) a likelihood that the movant will suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in the movant's favor; and (4) that the injunction is in the public's interest. *Crowe & Dunlevy, P.C. v. Stidham,* 640 F.3d 1140, 1157 (10th Cir. 2011).

7. The Tenth Circuit has identified three types of specially disfavored preliminary injunctions as to which a movant must "satisfy an even heavier burden of showing that the four [preliminary injunction] factors . . . weigh heavily and compellingly in movant's favor before such an injunction may be issues": (1) preliminary injunctions that alter the status quo; (2) mandatory preliminary injunctions; and (3) preliminary injunctions that afford the movant all the relief that it could recover at the conclusion of a full trial on the merits. *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft,* 389 F.3d 973, 975 (10th Cir. 2004) (en banc), *aff'd and remanded sub nom. Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal,* 546 U.S. 418 (2006). Any preliminary injunction fitting within one of the disfavored categories must be more closely scrutinized to assure that the exigencies of the case support the granting of a remedy that is extraordinary even in the normal course. *Id.* A party seeking such an injunction must make a strong showing both with regard to the likelihood of success on the merits and with regard to the balance of harms. *Id.* at 976; *Schrier v. University of Co.* 427 F.3d 1253, 1259 (10th Cir. 2005).

8. Defendants assert the injunction sought is one that alters the status quo and thus, the State bears a heightened burden. The court disagrees. The "status quo" is the "last peaceable uncontested status between the parties before the dispute developed." *Schrier v. Univ. of Colorado,* 427 F.3d 1253, 1260 (10th Cir. 2005). Here, the last peaceable uncontested

status was immediately before the defendants commenced construction activities on the Broken Arrow Property. Therefore, the court finds the requested injunction would not alter the "status quo" as defined by the Tenth Circuit.

9. Even if the injunction sought by the State is determined to be one that alters the status quo, this court concludes the State has met the heightened burden by making a strong showing of likelihood of success on the merits and with regard to the balance of harms.

C. Analysis of Preliminary Injunction Factors

1. Likelihood of Success on the Merits

10. Section 2710(d)(1)(A)(i) of IGRA provides in pertinent part that an Indian tribe may lawfully engage in Class III gaming only on "Indian lands" "of the Indian tribe having jurisdiction over such lands." 25 U.S.C. § 2710.

11. The term "Indian lands" is defined in IGRA as:

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

> against alienation and over which an Indian tribe exercises governmental power.

25 U.S.C. § 2703(4); *see also* 25 C.F.R. § 502.12(b).

12. IGRA further mandates that Class III gaming may only be "conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State. . . ." 25 U.S.C. § 2710(d)(1)(C).

13. The State, as a party and federally required signatory to the Kialegee-State Gaming Compact, has a direct and substantial interest in ensuring full compliance with the terms of the Compact. *See Kansas v. United States,* 249 F.3d 1213, 1223-24 (10th Cir. 2001) (noting state has "significant governmental interest" in Class III gaming). The State has an interest in ensuring that all gaming authorized under IGRA only occur on "Indian lands" over which the applicable Indian tribe has jurisdiction and exercises governmental power. *Id.* at 1228. The State also has an interest in protecting its citizens and other tribes or bands of Indians having legitimate gaming facilities on Indian lands under IGRA and a valid State Gaming Compact from unauthorized and inappropriate gaming operations by ensuring that the Tribal Town's proposal does not serve as precedent for expanding casinos into areas where a tribe cannot satisfy the jurisdictional, governmental, and land status requirements of IGRA and the applicable Gaming Compact. *Id.*

14. A case of actual controversy exists between the State of Oklahoma and the defendants concerning whether the Tribal Town's efforts to construct and operate, or license the operation of, a Class III gaming facility on the Broken Arrow Property violates federal law and the Kialegee-State Gaming Compact.

15. Defendants have admitted the purpose of this structure is to conduct gaming activities. Statement of Defendants' counsel (May 16, 2012), Dkt. #130, 35:14-18. Pursuant to IGRA, the Kialegee Tribal Town may only license or engage in Class II or III gaming if the gaming occurs on "Indian lands" that are "within [the] tribe's jurisdiction," 25 U.S.C. §§ 2710(b)(1), (d)(1), and over which the Kialegee Tribal Town exercises governmental power. *Id.* § 2703(4)(B); 25 C.F.R. § 502.12(b).

16. IGRA further mandates that Class III gaming may only be "conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State." 25 U.S.C. § 2710(d)(1)(C). The Kialegee-State Gaming Compact only authorizes licensing of and conduct of gaming operations on "its [the Tribal Town's] Indian lands as defined by IGRA." Kialegee-State Gaming Compact, Part 5.L. The Kialegee-State Gaming Compact's use of the term "its lands as defined by IGRA" makes plain that the Tribal Town must have a tribal relationship with the lands in question and must have both jurisdiction and governmental power over such lands.

17. Courts have uniformly held tribal jurisdiction is a threshold requirement to the exercise of governmental power as required under IGRA's definition of Indian lands. *See, e.g., Kansas,* 249 F.3d at 1229 (holding that "before a sovereign may exercise governmental power over land, the sovereign, in its sovereign capacity, must have jurisdiction over that land"); *Miami Tribe of Oklahoma v. United States,* 927 F. Supp. 1419, 1423 (D. Kan. 1996) ("Absent jurisdiction, the exercise of governmental power is, at best, ineffective, and at worst, invasion.")

18. The question of jurisdiction "focuses principally on congressional intent and purpose, rather than recent unilateral actions" of a tribe. *Kansas v. United States,* 249 F.3d 1213, 1229 (10th Cir. 2001). Jurisdiction is established by federal authority and derives from the will of Congress, not unilateral actions of a tribe or the consent of fee owners pursuant to a lease. *Miami Tribe of Oklahoma v. United States,* 656 F.3d 1129, 1145 (10th Cir. 2011).

19. The Broken Arrow Property is not within the limits of an Indian reservation. The Broken Arrow Property therefore does not fall within the first category of "Indian lands" under § 2703(4)(A) of IGRA.

20. The Broken Arrow Property is not held in trust by the United States for the benefit of any Indian tribe or individual and does not thereby fall within the second category of "Indian lands" set forth in § 2703(4)(B) of IGRA.

21. The Broken Arrow Property *is* Indian land that is "held by [an] . . . individual subject to restriction by the United States against alienation." as set forth in § 2703(4)(B) of IGRA. The parties dispute, however, whether the Kialegee Tribal Town has "jurisdiction" over the Broken Arrow Property as required by IGRA. 25 U.S.C. § 2710(d)(1). The State contends the Muscogee (Creek) Nation – and not the Kialegee Tribal Town – has jurisdiction over the property because it is the successor in interest to the historic Creek Nation. The Tribal Town asserts it shares jurisdiction with the Muscogee (Creek) Nation because it, too, is a successor in interest to the historic Creek Nation.

22. Courts and/or administrative agencies have addressed the issue of shared jurisdiction over property which is part of an Indian reservation or which is held in trust by the United States for the benefit of an Indian tribe.[4] However, the question of shared

[4] *See Williams v. Clark,* 742 F.2d 549 (9th Cir. 1984) (finding Quileute Tribe and Quinault Tribe shared jurisdiction in the Quinault Reservation; *Crowe & Dunlevy, P.C v. Stidham,* 640 F.3d 1140, 1143 (10th Cir. 2011) (acknowledging that members of the Thlopthlocco Tribal Town reside on land held in trust for them by the United States, which is located within the historic boundaries of the Creek Nation); June 24, 2009 Decision of the Assistant Secretary – Indian Affairs in United Keetoowah Band of Cherokee Indians v. Director, Eastern Oklahoma Region (finding both the United Keetowah Band and the Cherokee Nation of Oklahoma are successors-in-interest to the historical Cherokee Nation and both were entitled to have land taken into trust by the Bureau of Indian Affairs pursuant to the OIWA).

jurisdiction of restricted Indian allotments appears to be an issue of first impression.

23. Defendants contend the Kialegee and the (Muscogee) Creek Nation have shared jurisdiction over the Tyler Burgess Allotment based on Article 4 of the 1833 Treaty, which provided the lands assigned in Oklahoma were to be "taken and considered the property of the whole Muscogee or Creek nation." Treaty of Feb. 14, 1833, art. 4, 7 Stat. 417, 419. Defendants assert the 1833 Treaty has never been abrogated and the Creek Nation's history as a confederacy of autonomous tribal towns, combined with the tribe's view of property rights as being communal in nature, compels the conclusion that the modern day Muscogee (Creek) Nation, the Kialegee Tribal Town, the Thlopthlocco Tribal Town and the Alabama-Quassarte Tribal Town all share jurisdiction over all lands conveyed by the 1833 Treaty.

24. In support of their position, defendants invoke the Indian canons of construction and the doctrine of originalism. "The canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians." *Montana v. Blackfeet Tribe of Indians,* 471 U.S. 759, 766 (1985). One of the canons is that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Id. See also United States v. 162 Megamania Gambling Devices,* 231 F.3d 713, 718 (10th Cir. 2000). "[I]f [an ambiguous law] can reasonably be construed as the Tribe would have construed

it, it *must* be construed that way." *Muscogee (Creek) Nation v. Hodel,* 851 F.2d 1439, 1445 (D.C. Cir. 1988). Under the doctrine of tribal originalism, treaties must be interpreted so as to "give effect to the terms as the Indians themselves would have understood them." *Minnesota v. Mille Lacs Band of Chippewa Indians,* 526 U.S. 172, 196 (1999). "[W]e look beyond the written words to the larger context that frames the Treaty, including "the history of the treaty, the negotiations, and the practical construction adopted by the parties." *Id. See also Absentee Shawnee Tribe of Indians of Oklahoma v. State of Kansas,* 862 F.2d 1415, 1418 (10th Cir. 1988).

25. Even applying these canons of construction, however, the jurisdictional view now urged by defendants does not appear to be one that is now or was *ever* a consensus view of the Creek Nation or its tribal towns.

26. Every federal treaty or law related to the property recognizes the Muscogee (Creek) Nation's authority. The Treaty of 1833 granted a patent in fee simple to "the Creek nation of Indians for the land assigned said nation by this treaty or convention . . . " and the assigned land was to be "taken and considered the property of the whole Muskogee or Creek nation, as well of those now residing upon the land." Treaty of Feb. 14, 1833, art. 3 and 4, 7 Stat. 417, 419. The Treaty of August 7, 1856, among the Creeks, Seminoles and United States, provided "the Creeks and Seminoles shall be secured in the unrestricted right of self-government, and full jurisdiction over

persons and property, within their respective limits" and payment of $400,000 to be paid *per capita* under "the general council of the Creek Nation, to the individuals and members of said nation." Treaty of August 7, 1856. The Treaty of June 14, 1866, which forced the Creek Nation to cede the western portion of their lands in Oklahoma as a penalty for its alliance with the Confederacy, affirmed that the remaining lands were to be "forever set apart as a home for said Creek Nation," with no mention of the tribal towns. Treaty of June 14, 1866. The Act of March 1, 1901, governing allotment of the Creek Nation's lands, stated, "The words 'Creek' and 'Muskogee' as used in this agreement shall be deemed synonymous, and the words 'Nation' and 'Tribe' shall each be deemed to refer to the Muskogee Nation or Muskogee tribe of Indians in Indian Territory." 32 Stat., 500, June 30, 1902. The Act provided that the Principal Chief of the Muskogee Nation was to execute and deliver to each citizen of the Muskogee Nation an allotment "deed conveying to him all right, title, and interest of the Creek Nation." *Id.,*

27. The Broken Arrow Property is located within the territory described by the written constitution of the "Muskokee Nation" adopted in 1867. The constitution encompassed all Creek Nation members, Article I, 1867 Constitution. Each of the approximately 44 tribal towns was entitled to representation in the National Counsel. *Id.*; *Harjo,* 581 F.2d 949, 951 n. 7. No tribal towns had a separate constitution.

28. The Kialegee Tribal Town's Constitution, adopted in 1941 pursuant to the OIWA, neither claims nor defines any geographic or territorial jurisdiction of the Tribal Town. [PX 2].

29. In contrast, the Muscogee (Creek) Nation's 1979 Constitution states, "the political jurisdiction of The Muscogee (Creek) Nation shall be as it geographically appeared in 1900 which is based upon those Treaties entered into by the Muscogee (Creek) Nation and the United States of America." [PX 3, Art. 1, Section 2].

30. In 1990, the Kialegee Tribal Town sought to acquire two parcels of land located in Tulsa County, Oklahoma, in trust. In its application to the BIA, the Tribal Town stated that it "presently had no land." The Area Director of the BIA informed the Tribal Town that its request could not be considered without the concurrence of the Muscogee (Creek) Nation, as required by 25 CFR 151.8, because the parcels in question were located within the boundaries of the Nation's former reservation. The Tribal Town appealed the decision to the Board of Indian Appeals, which affirmed the Area Director's decision. The Board held that, "[b]ecause the former Creek Reservation is the Nation's reservation, and not the [Kialegee Tribal Town's] reservation, section 151.8 requires the written consent of the Nation before land within the reservation may be taken in trust for the benefit of [the Kialgee Tribal Town]." *Kialegee Tribal Town of Oklahoma v. Muskogee Area Director, Bureau*

of Indian Affairs, 19 IBIA 296, 1991 ID. LEXIS 59 at *3 (April 17, 1991).

31. The Broken Arrow Property is within the territory described in federal treaties with the Muscogee (Creek) Nation and in both the 1867 Muskogee Nation Constitution and the present Constitution of the Muscogee (Creek) Nation approved by the Department of Interior. Tyler Burgess – the original allottee of the property – was a member of the Muscogee (Creek) Nation and the Lockapoka Tribal Town. He was not a member of the Kialegee Tribal Town. The Broken Arrow Property is located 70 miles away from the headquarters of the Kialegee Tribal Town.

32. To date, no court or administrative agency has applied the concept of shared jurisdiction to restricted allotments. Moreover, the individual nature of allotments, as opposed to reservations and land held in trust for the tribe as a whole, is worth noting. The Supreme Court has explained the objective of allotment of land to individual tribal members was "to end tribal land ownership and to substitute private ownership, on the view that private ownership of individual Indians would better advance their assimilation as self-supporting members of our society and relieve the Federal government of the need to continue supervision of Indian affairs." *Northern Cheyenne Tribe v. Hollowbreast,* 25 U.S. 649, 651 n. 1 (1976).

32. When land is allotted in fee or placed in trust for an individual member of the tribe, any tribal property interest in the allotted parcel is eliminated.

Individual allottees "have vested property rights, including valuable appurtenances to the land such as water rights, grazing rights, and rights to timber, minerals, and fossils." Cohen's Handbook of Federal Indian Law, 2005 ed., § 16.03[3][a]. During the period of restriction, federal law protects allotments against alienation, encumbrance, and taxation. *Id.,* § 16.03[3][b]. If federal restrictions on alienation are removed from a restricted allotment, the allottee owns the land in fee simple absolute. *Id.,* § 1603[4][b][i]. Under the Creek Allotment Act of 1901, the principal chief of the Creek Nation executed and delivered allotment deeds to each citizen of the tribe. The allotment deeds conveyed "all right, title and interest of the Creek Nation and of all other citizens in and to the lands embraced in [the] allotment certificate." 31 Stat. 861, ¶ 23, March 1, 1901. In the 1901 Act, Congress recognized the jurisdiction of the national council of the Creek Nation over "the lands of the tribe, or of individuals after allotment" through the acts, ordinances and resolutions approved by the President of the United States. *Id.,* at ¶ 42.

33. The Kialegee Tribal Town – like the Alabama-Quassarte and Thlopthlocco Tribal Towns – are separately recognized tribal entities under the OIWA. However, all Creek tribal towns are subset groups or "bands" of the Muscogee (Creek) Nation. *See* 1 *Op. Sol. On Indian Affairs* 478, Solicitor's Opinion M-27796, Nov. 7, 1934 (finding the tribal towns "retain sufficient characteristics of a band to identify them as

Indian bands."). The Muscogee (Creek) Nation did not abolish the tribal towns. Rather, it explicitly recognizes them in Article II, Section 5 of its 1979 Constitution: "[t]his Constitution shall not in any way abolish the rights and privileges of persons of the Muscogee (Creek) Nation to organize tribal towns or recognize its Muscogee (Creek) traditions."

34. Although separately recognized by the federal government, the Kialegee Tribal Town does not have "shared jurisdiction" over all lands within the historic bounds of the Creek Nation. If the Tribal Town shares jurisdiction over those lands as it claims, the likely result will be "races" between the four federally recognized Creek entities to establish governmental control over parcels of Indian Country within those historic bounds.

35. The court concludes the Kialegee Tribal Town does not share jurisdiction with the Muscogee (Creek) Nation over the Broken Arrow Property. The Muscogee (Creek) Nation alone, as successor in interest to the historical Creek Nation, has jurisdiction over restricted allotment which constitutes the Broken Arrow Property.

36. This court need not decide here whether the Kialegee Tribal Town may share jurisdiction with the Muscogee (Creek) Nation over other restricted allotments which were originally allotted to members of the Creek Nation who were also members of the Kialegee Tribal Town.

37. The court concludes, under the facts presented, the Broken Arrow Property does not meet the requirement, set forth in the Kialegee-State Gaming Compact, of being "its (the Kialegee Tribal Town's) Indian lands as defined by IGRA."

38. Even if the Tribal Town shares jurisdiction with the Muscogee (Creek) Nation over the Broken Arrow Property, the Tribal Town does not exercise governmental power over the property within the meaning of IGRA, 25 U.S.C. § 2703(4).

39. Meeting the "exercise of governmental power" requirement "does not depend upon the Tribe's theoretical authority, but upon the presence of concrete manifestations of that authority." *Rhode Island v. Narragansett Indian Tribe,* 19 F.3d 685, 703 (1st Cir. 1994). In determining whether a tribe exercises governmental power over a location, courts consider a variety of factors, including (1) whether the area is developed; (2) whether tribal members reside in those areas; (3) whether any governmental services are provided and by whom; (4) whether law enforcement on the lands in question is provided by the Tribe or by a different entity; and (5) other indicia as to who exercises governmental power over those areas. *See Cheyenne River Sioux Tribe v. State of South Dakota,* 830 F. Supp. 523, 528 (D.S.D. 1993).

40. With respect to these factors, the Broken Arrow Property is not developed, and no Kialegee Tribal Town members reside on or near it. Water and sewer services are provided by the City of Broken

Arrow. Law enforcement is provided by the City of Broken Arrow, the Tulsa County Sheriff and/or the Muscogee (Creek) Lighthorse Police. The Tribal Town provides no fire, emergency, medical or educational services at the Broken Arrow Property. The Tribal Town's actions since it initiated gaming development plans, i.e., fencing the property, hiring a private security service, opening a satellite office, making brochures available at the office, hanging a flag on the front of a former residence on the Broken Arrow Property and posting a sign claiming to exercise governmental authority over the property, are merely proprietary in nature and/or pretextual attempts to "manufacture" the exercise of government authority. The Tribal Town's actions do not comprise actual delivery of governmental services. There is no evidence the Tribal Town has delivered any substantive governmental services through or at the Broken Arrow Property, as described in Cheyenne River Sioux Tribe.

41. Defendants have failed to show the Kialegee Tribal Town has exercised governmental authority sufficient to establish the Broken Arrow Property is its "Indian lands" under 25 U.S.C. § 2703(4).

42. The defendants' efforts to construct and operate a gaming facility on the Broken Arrow Property are in direct violation of the requirements of IGRA and, with respect to Class III gaming, the Kialegee-State Gaming Compact. 25 U.S.C. § 2710(b) and (d); Kialegee-State Gaming Compact, Part 5(L).

43. The defendants lack authority under IGRA and the federally approved Kialegee-State Gaming Compact to construct or operate a gaming facility on the Broken Arrow Property. *Id.*

44. Operation of a casino on the Broken Arrow Property would exceed the Tribal Town's powers under federal law and violate federal law requirements including, among others, the requirement of IGRA that gaming operations shall only occur on Indian reservations or lands: (i) "title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by the United States against alienation," (ii) over which the Indian tribe proposing to conduct or license gaming has jurisdiction, and (iii) over which that tribe "exercises governmental power." 25 U.S.C. §§ 2703(4), 2710(d)(1)(A)(i). Specifically, the Kialegee Tribal Town does not have jurisdiction, nor does it exercise governmental power, over the Broken Arrow Property.

45. Operation of a casino on the Broken Arrow Property would exceed the Tribal Town's powers under federal law and violate federal law requirements because the operation of a Class III casino on the Broken Arrow Property will violate the federally approved Kialegee-State Gaming Compact, which expressly limits the Tribal Town to conducting gaming "only on its Indian lands as defined by IGRA." Kialegee-State Gaming Compact, Part 5(L). Oklahoma has a substantial likelihood of success on the merits of its claims in this action because the Red

Clay Casino is not on Indian land over which the Tribal Town has jurisdiction and/or over which the Tribal Town exercises governmental power.

2. Likelihood of Irreparable Harm

46. The State has a substantial interest in adjudicating and enforcing the Kialegee State Gaming Compact and IGRA prior to the violation of those laws and to prevent such violation. *See Kansas,* 249 F.3d at 1227-28; *New York v. Shinnecock Indian Nation,* 280 F. Supp. 2d 1, 5 (E.D.N.Y. 2003).

47. Unless a preliminary injunction is issued enjoining the continued construction and subsequent operation of the proposed Red Clay Casino on the Broken Arrow Property, the State will suffer irreparable injury for which there is no plain, speedy, and adequate remedy at law.

48. Unless a preliminary injunction is issued enjoining the continued construction and subsequent operation of the proposed Red Clay Casino on the Broken Arrow Property, the State's interest in effectuating and ensuring compliance with the terms of the Kialegee-State Gaming Compact will necessarily be adversely affected.

49. Unless a preliminary injunction is issued enjoining the continued construction and subsequent operation of the proposed Red Clay Casino on the Broken Arrow Property, other Oklahoma tribes that have invested in gaming facility operations in reliance

upon and in compliance with IGRA and a valid State gaming Compact will be adversely affected.

3. Balancing of the Harms

50. The threatened injury to the State outweighs the harm that a preliminary injunction may cause the defendants. The defendants will not be prejudiced by an injunction restraining them from proceeding with the construction or operation of the proposed Red Clay Casino because the Tribal Town cannot demonstrate it has or will secure authorization to conduct or license gaming on that site. *See Kansas,* 249 F.3d at 1228 (threatened injury to State outweighed harm to defendants because Tribe would be entitled to proceed with construction and gaming only if tract qualified as "Indian lands" under IGRA).

51. To the extent defendants are harmed by a delay in receiving revenues and/or a loss in revenues, such harm is compensable through monetary damages. *Shinecock Indian Nation,* 280 F. Supp. 2d at 9.

52. Because defendants commenced construction without exercising reasonable due diligence, and without obtaining necessary governmental approvals, they are largely responsible for their own harm, and their costs were "self-inflicted." *Davis v. Mineta,* 302 F.3d 1104, 1116 (10th Cir. 2002). Consequently, the adverse effects of an injunction preventing operation of a casino in violation of the Kialegee-State Gaming Compact and of IGRA are entitled to little, if any, weight.

4. The Public Interest

53. The public interest favors enforcing the statutory and regulatory framework provided by IGRA and the Kialegee-State Gaming Compact and fully litigating the legality of the Tribal Town's operation of a gaming facility on the Broken Arrow Property before gaming may commence. *See In re Sac & Fox Tribe of Mississippi in Iowa/Meskwaki Casino Litig.,* 340 F.3d 749, 760 (8th Cir. 2003).

54. Ample alternative venues are available to the gaming public in the Tulsa area until such time as the legal issues here are finally resolved. *See* Finding of Fact #74, above.

54. The defendants' on-going actions to construct and place in operation the proposed casino on the Broken Arrow Property violate the federally enforceable Kialegee-State Gaming Compact and federal law.

D. Bond

55. Rule 65(c) requires the party seeking a preliminary injunction to give security "in an amount the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." Fed. R. Civ. P. 65(c). "Under this rule the trial judge has wide discretion in the manner of requiring security." *Cont'l Oil Co. v. Frontier Ref. Co.,* 338 F.2d 780, 782 (10th Cir. 1964). If damages are ultimately awarded against the

State, it does not pose a collection risk. *See Radio One, Inc. v. Wooten,* 452 F. Supp. 2d 754, 760 (E.D. Mich. 2006). Therefore, the court will not require the State to post bond.

E. Scope of the Injunction

56. Operation of a gaming facility on the Broken Arrow Property must be enjoined because, as set forth above, such operation would clearly be in violation of IGRA and the Kialegee-State Gaming Compact. In the addition, the defendants admit the building being built "is designed to be a sports bar and a casino." Because the building is designed to be a casino, and because the Tribal Town has no jurisdiction over the Broken Arrow Property, construction is enjoined. However, the court will entertain a motion to modify the injunction if defendants wish to alter the purpose of the structure and have obtained the necessary regulatory approvals from the BIA and/or the Muskogee (Creek) Nation for the alternative proposed use or uses.

III. Conclusion

Defendants' efforts to construct and operate a gaming facility on the Broken Arrow Property violate IGRA and – as to Class III gaming – the Kialegee-State Gaming Compact. Therefore, defendants, and all those acting by, through, for, or under them, are preliminarily enjoined from:

1. proceeding with development or construction of the proposed Red Clay Casino or any other gaming facility on the Broken Arrow Property;

2. conducting Class III gaming on the Broken Arrow Property.

This order shall remain in effect during the pendency of this action unless modified by this Court.

ENTERED this 20th day of July, 2012.

/s/ Gregory K. Frizzell
GREGORY K. FRIZZELL, CHIEF JUDGE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

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

STATE OF OKLAHOMA, Plaintiff, v. TIGER HOBIA, as Town King and member of the Kialegee Tribal Town Business Committee, et al., Defendants.	)	Case No. 12-CV-054-GKF-TLW

OPINION AND ORDER

(Filed Apr. 26, 2012)

Before the court are Motions to Dismiss filed by defendants Tiger Hobia, as Town King and member of the Kialegee Tribal Town Business Committee ("Hobia") [Dkt. #62], Florence Development Partners, LLC ("Florence") [Dkt. #64] and the Kialegee Tribal Town, a federally chartered corporation ("Town Corporation"). [Dkt. #70]. Defendants seek dismissal of this action for failure to state a claim upon which relief can be granted pursuant to Fed.R.Civ.P. 12(b)(6).

The State of Oklahoma ("State") filed suit on February 8, 2012, seeking declaratory and injunctive relief to prevent Hobia (as well as other tribal officers), Florence and the Town Corporation from proceeding with the construction and operation of the

proposed "Red Clay Casino" in Broken Arrow, Oklahoma. The State contends defendants are violating both the April 12, 2011, Gaming Compact between the Kialegee Tribal Town and the State ("State Gaming Compact") and the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 ("IGRA").

Hobia and the Town Corporation assert they are protected by sovereign immunity and are not proper parties. All three defendants argue the court lacks Article III jurisdiction because the State lacks standing to bring this suit. Further, defendants contend the controversy is not ripe for judicial review.

I. Allegations of the Complaint

The Complaint alleges the State possesses sovereign powers and rights of a state with federally recognized and delegated authorities under IGRA. [Dkt. #1, Complaint, ¶6]. As a party and federally required signatory to the State Gaming Compact that the Tribal Town asserts authorizes it to operate a Class III gaming facility on the Broken Arrow Property, the State has a direct and substantial interest in ensuring full compliance with the terms of the Compact, and IGRA specifically authorizes the State to file suit in federal court. [*Id.*] (citing 25 U.S.C. § 2710(d)(7)). Additionally, the State has an interest in protecting its citizens from unauthorized and inappropriate gaming operations by ensuring the proposed casino does not serve as precedent for expanding casinos into areas where a tribe cannot

satisfy the jurisdictional, governmental and land status requirements of the IGRA and the applicable Gaming Compact. [*Id.*].

The Kialegee Tribal Town is a federally recognized Indian tribe organized under Section 3 of the Oklahoma Indian Welfare Act, 25 U.S.C. § 503 (the "OIWA"), with a Constitution and By-laws approved by the Secretary of the Interior on April 14, 1941, and ratified by the Kialegee Tribal Town on June 12, 1941) (the "1941 Constitution"). [*Id.,* ¶7]. The 1941 Constitution established the Kialegee Tribal Town Business Committee ("Committee") as the Kialegee Tribal Town's governing body. [*Id.*] Tiger Hobia, the Town King of the Kialegee Tribal Town, is a member of the Committee and a citizen and resident of the state. [*Id.,* ¶8]. Under Article 2 of the corporate charter of the Town Corporation, the "membership, the officers, and the management of the incorporated tribal town shall be as provided in the [Kialegee Tribal Town's] Constitution and By-laws." [*Id.*]. Hobia is sued in his official capacities as a member and officer of the Committee and the Town Corporation. [*Id.*]. The State alleges the actions of Hobia and other members and officers of the Committee and of the Kialegee Tribal Town and Town Corporation exceed their authority under federal law and, therefore, Hobia is not cloaked with any immunity from suit. [*Id.*].

Florence is an Oklahoma limited liability company doing business in the State of Oklahoma. [*Id.,* ¶9].

The Town Corporation is a federally chartered corporation under Section 3 of the OIWA (the "Town Corporation") doing business in the State of Oklahoma. [*Id.,* ¶10].[1]

The Complaint alleges the court has jurisdiction of the action under 28 U.S.C. § 1331 and/or 25 U.S.C. § 2710(d)(7) to issue relief under 28 U.S.C. § 2201(a). [*Id.,* ¶11]. The action arises under and requires the interpretation and construction of provisions of the Constitution and laws of the United States including, without limitation, IGRA, that Act's implementing regulations, 25 CFR §§ 501-472, and the federally approved Gaming Compact between the Kialegee Tribal Town and the State of Oklahoma. [*Id.,* ¶12]. A case of actual controversy exists between Oklahoma and the defendants with respect to whether the Kialegee Tribal Town and its officials have authority under federal law to construct and operate a gaming facility on the Broken Arrow Property. [*Id.,* ¶13].

The complaint alleges any sovereign immunity from suit of the Kialegee Tribal Town or the Town Corporation is not a defense to this suit because the action is against the officers and Committee members of such entities sued in their official capacities, and Article 3(b) of the corporate charter of the Town

[1] The State, in its Complaint, distinguishes between the Kialegee Tribal Town, a federally recognized tribe, and the Kialegee Tribal Town Corporation, a federally chartered corporation under the OIWA, 25 U.S.C. § 503. The former is not named as a defendant; the latter is.

Corporation provides that it has the power "to sue and be sued." [*Id.,* ¶14]. The State alleges exhaustion of tribal remedies is neither necessary nor appropriate with respect to its claims because the Kialegee Town Tribal Court plainly lacks subject matter jurisdiction over the controversy and IGRA specifically authorizes the State to file its action in federal court. [*Id.,* ¶16] (citing 25 U.S.C. § 2710(d)(7).

The Kialegee Tribal Town is a separate, independent federally recognized Indian tribe which first received recognition as a tribe in 1936. [*Id.,* ¶17]. It allegedly has an enrolled membership of less than 500. [*Id.*]. Headquartered in Wetumka, Oklahoma, the Kialegee Tribal Town has no reservation and has characterized itself as a "landless tribe." [*Id.,* ¶18]. The 1941 Constitution adopted by the Kialegee Tribal Town provides that the "supreme governing body of the Town shall be the adult members of the Town, both male and female who are 21 years of age or older, through the actions of the Business Committee." [*Id.,* ¶19] (quoting Article IV, Section 1 of the 1941 Constitution). Under the 1941 Constitution, "the Business Committee of the Town shall consist of the elected officers and all members of the Advisory Committee." [*Id.*] (quoting Article IV, Section 2 of the 1941 Constitution). The officers of the Town are "the Town King, 1st Warrior, 2nd Warrior, Secretary and the Treasurer." [*Id.,* ¶20] (quoting Article VI, Section 2 of the 1941 Constitution).

On July 23, 1942, The United States Department of the Interior, Office of Indian Affairs, issued a

Corporate Charter to the Town Corporation pursuant to the OIWA (the "1942 Charter"). [*Id.,* ¶21]. The Kialegee Tribal Town ratified the 1942 Charter on September 17, 1942. [*Id.,* ¶21]. Under Section 2 of the 1942 Charter, "the membership, the officers, and the management of the incorporated tribal town shall be as provided in the . . . Constitution and By-laws." [*Id.*]. Section 3(b) of the 1942 Charter provides, "subject to any restrictions contained in the Constitution and laws of the United States or in the Constitution and By-laws of the Tribal Town, and to the limitations of section 4 and 5 of this Charter," the Town Corporation:

> Shall have the following corporate powers as provided by section 3 of the Oklahoma Indian Welfare Act of June 26, 1936: . . . (b) To sue and be sued; to complain and defend in any courts; Provided, however, That the grant or exercise of such power shall not be deemed a consent by the Tribal Town or by the United States to the levy of any judgment, lien, or attachment, upon the property of the Tribal Town other than income or chattels specially pledged or assigned.

[*Id.,* ¶22].

In 1988, Congress passed the IGRA to establish a statutory basis for the operation and regulation of gaming by Indian tribes. [*Id.,* ¶23]. Under the IGRA, gaming is divided into three categories: Class I (defined as "social games solely for prizes of minimal value or traditional forms of Indian gaming engaged

in by individuals as part of, or in connection with, tribal ceremonies or celebration); Class II ("the game of chance commonly known as bingo . . . and card games that (I) are explicitly authorized by the laws of the State, or (II) are not explicitly prohibited by the laws of the State and are played at any location in the State, but only if such cared games are played in conformity with those laws and regulations (if any) of the State regarding hours or periods of operation of such card games or limitations on wagers or pot sizes in such card games"); and Class III ("all forms of gaming that are not class I or class II gaming"). [*Id.,* ¶24] (citing 25 U.S.C. § 2703(6), § 2703(7), § 2703(8)).

IGRA provides that an Indian may engage in Class III gaming only on "Indian lands" and "pursuant to an ordinance adopted by the Indian Tribe having jurisdiction over such lands." [*Id.,* ¶25] (citing 25 U.S.C. § 2710(d)(1)(A)(i)). "Indian lands" are defined as:

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

[*Id.,* ¶26] (citing 25 U.S.C. § 2703(4) and 25 C.F.R. § 502.12(b)).

Additionally, IGRA mandates that Class III gaming may only be "conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State . . . " and approved by the Secretary of the Interior or his or her designee. [*Id.,* ¶27] (citing 25 U.S.C. §§ 2710(d)(1)(C) and (d)(8).

The State alleges that in 2004, it established a model tribal gaming compact that is essentially a "pre-approved" offer to federally recognized tribes in the State ("Model Compact"). [*Id.,* ¶28]. If a tribe accepts the Model Compact, obtains approval from the Secretary of the Interior and complies with the requirements of the Compact and the IGRA, the tribe can then operate gaming facilities "only on its Indian lands as defined by IGRA" (i.e., lands in which the tribe has a possessory interest and over which the tribe has jurisdiction and exercises governmental powers). [*Id.,* ¶28] (citing Model Compact, Part 5(L)).

On April 12, 2011, the Kialegee Tribal Town accepted the model gaming compact with the State of Oklahoma (the "State Gaming Compact"). The Secretary of the Interior approved the State Gaming Compact on July 8, 2011. [*Id.,* ¶29]. The State Gaming Compact only authorizes "covered games," as defined in the Compact, by the Kialegee Tribal Town on "its Indian lands as defined by the Indian Gaming Regulatory Act, 25 U.S.C. § 2703(4)." [*Id.,* ¶30].

The property on which defendants are constructing the gaming facility is located at the southwest corner of Olive Avenue and Florence Place in Broken

Arrow, Oklahoma, a city situated contiguous to and southeast of Tulsa, Oklahoma ("Broken Arrow Property"). [*Id.,* ¶31]. The property is located across the street from the Broken Arrow Campus of Tulsa Technology Center, a vocational and technology school operated by the Tulsa Tech School District No. 18. [*Id.,* ¶32]. The Broken Arrow Property is also located in close proximity to several residential subdivisions and roughly one-half mile from the site of a proposed elementary school and pre-K center. [*Id.*].

The State alleges, upon information and belief, that the Broken Arrow Property is currently owned by Wynema Capps and Marcella Giles as tenants in common, subject to federal restraints against alienation. [*Id.,* ¶33]. The State further alleges, upon information and belief, that Capps and Giles are not enrolled members of the Kialegee Tribal Town but rather are enrolled members of the Muscogee (Creek) Nation. [*Id.,* ¶¶34-35]. The Broken Arrow Property is more than 70 miles north and east from the Kialegee Tribal Town's headquarters in Wetumka, Oklahoma. [*Id.,* ¶36].

The State alleges because the Kialegee Tribal Town does not have a reservation, the Broken Arrow Property is not within the limits of an Indian reservation within the meaning of the IGRA. [*Id.,* ¶37] (citing 25 U.S.C. § 2703(4)(B)). Nor is the Broken Arrow Property held in trust by the United States for the benefit of the Kialegee Tribal Town or for the benefit of an enrolled member of the Kialegee Tribal Town. [*Id.,* ¶¶38-39]. The State also alleges the Broken

Arrow Property is not held by either the Kialegee Tribal Town or an enrolled member of the Kialegee Tribal Town subject to restriction by the United States against alienation. [*Id.,* ¶40].

The State alleges even if allotted lands held by members of another tribe could be considered Indian lands of the Kialegee Tribe – which the State denies – the property cannot be the Kialegee Tribe's "Indian Lands" within the meaning of the State Gaming Compact because the Kialegee Tribal Town does not have a possessory interest in the property. [*Id.,* ¶41]. It contends the Broken Arrow Property does not meet the definition of "Indian land" upon which the Kialegee Tribal Town can conduct Class III gaming because it is not held by members of the Kialegee Tribal Town and the Kialegee Tribal Town is not a tribe "having jurisdiction over such lands," as required by the IGRA, 25 U.S.C. § 2710(d)(A)(i). [*Id.,* ¶42]. Moreover, even if the Kialegee Tribal Town had jurisdiction over the Broken Arrow Property – which the State denies – the property is not land over which the Kialegee Tribal Town exercises governmental power. [*Id.,* ¶43]. Consequently, the property is neither "Indian lands," as required by the IGRA, 25 U.S.C. § 2710(d)(A)(i), nor "its Indian lands," as required by the State Gaming Compact, Part 5(L). [*Id.*].

The State alleges, upon information and belief, that in 2011, the Kialegee Tribal Town attempted to enter into a Prime Ground Lease with Wynema Capps and Marcella Giles covering the Broken Arrow

Property. [*Id.,* ¶44]. Capps and Giles filed a petition in Tulsa County District Court seeking approval of the proposed Prime Ground Lease. [*Id.*]. The State further alleges, upon information and belief, the Kialegee Tribal Town contemplated that, once the Prime Ground Lease was approved, the Kialegee Tribal Town would sublease the Broken Arrow Property to Golden Canyon Partners, LLC, which would then construct the proposed gaming facility and sublease the facility to the Kialegee Tribal Town to operate. [*Id.,* ¶45].

On August 17, 2011, the Tulsa County District Court entered an order refusing to approve the proposed Prime Ground Lease and the balance of the transaction contemplated. [*Id.,* ¶46]. In the order, the court concluded, "an individual citizen cannot transfer government jurisdiction over his or her property by the terms of a lease." [*Id.*].

The State alleges that, prior to the Tulsa County District Court's order, the Kialegee Tribal Town, Capps and Giles restructured their proposed transaction in an effort to evade requirements for judicial or Secretary of the Interior approval of the proposed lease and development of the Broken Arrow Property as a Class III gaming facility. [*Id.,* ¶47]. The State also alleges that in the fall of 2011, Capps and Giles entered into a lease of the Broken Arrow Property to Florence Development Partners, LLC, with an initial term of six years and 11 months. [*Id.,* ¶48]. The State further alleges upon information and belief that, under the lease, the Kialegee Tribal Town has no

possessory interest in the Broken Arrow Property. [*Id.*]. The State also alleges upon information and belief, that the Town Corporation, Capps, Giles and others are members of the defendant LLC, Florence. [*Id.,* ¶49]. The lease has not been reviewed and approved by the Tulsa County District Court, as required by the Act of August 4, 1947, 61 O.S. § 731 (the "1947 Act") or by the Bureau of Indian Affairs as required by 25 U.S.C. § 415 and 25 C.F.R. § 162.104(d). [*Id.,* ¶50].

In late December 2011, defendants began grading and other site preparation and construction-related activities leading to the construction and ultimate operation of the Class III gaming facility on the Broken Arrow Property notwithstanding that (i) Capps and Giles are not members of the Kialegee Tribal Town; (ii) the purported lease of the Broken Arrow Property grants no interest to the Kialegee Tribal Town and has not been approved by Tulsa County District Court; (iii) The Kialegee Tribal Town does not have jurisdiction over the Broken Arrow Property; and (iv) the Kialegee Tribal Town does not exercise governmental functions over the Broken Arrow Property. [*Id.,* ¶51].

The State asserts four claims for relief:

(1) Declaratory judgment that the Committee Defendants lack authority under federal law and the federally approved State Gaming Compact to construct or operate a gaming facility on the Broken Arrow Property. [*Id.,* ¶57]

(2) Declaratory judgment that (i) the Broken Arrow Property is not land within the Kialegee Tribal Town's jurisdiction and is not land over which the Kialegee Tribal Town exercises governmental power and (ii) Defendants' efforts to construct or operate a Class III gaming facility on the Broken Arrow Property are in direct violation of the requirements of the IGRA and the State Gaming Compact. [*Id.,* ¶68].

(3) Entry of a preliminary injunction enjoining defendant or anyone acting by, through or under them, from taking any action to construct or operate a Class III gaming facility on the Broken Arrow Property during the pendency of this action. [*Id.* at 20, ¶3].

(4) Entry of a permanent injunction permanently enjoining defendants, or anyone acting by, through or under them, from taking any action to construct or operate a Class III gaming facility on the Broken Arrow Property. [*Id.,* at 21, ¶4].

II. Standard of Review

Rule 8(a)(2) of the Federal Rules of Civil Procedure provides that a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." The United States Supreme Court clarified this standard in *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 570 (2007), ruling

that to withstand a motion to dismiss, a complaint must contain enough allegations of fact "to state a claim to relief that is plausible on its face." 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw a reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 556. "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitle[ment] to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 555 (internal quotations omitted). On a motion to dismiss, courts "are not bound to accept as true a legal conclusion couched as a factual allegation." *Id.* Under the *Twombly* standard, "the complaint must give the court reason to believe that *this* plaintiff has a reasonable likelihood of mustering factual support for *these* claims." *Robbins v. Oklahoma,* 519 F.3d 1242, 1247 (10th Cir. 2008), quoting *Ridge at Red Hawk, L.L.C. v. Schneider,* 493 F.3d 1174, 1177 (10th Cir. 2007) (emphasis in original). "The burden is on the plaintiff to frame a complaint with enough factual matter (taken as true) to suggest that he or she is entitled to relief." *Robbins,* 519 F.3d at 1247, citing *Twombly,* 127 S.Ct. at 1965 (internal quotations omitted). "Factual allegations must be enough to raise a right to relief above the speculative level." *Id.*

Although the new *Twombly* standard is "less than pellucid," the Tenth Circuit Court of Appeals has

interpreted it as a middle ground between "heightened fact pleading," which is expressly rejected, and complaints that are no more than "labels and conclusions," which courts should not allow. *Robbins,* 519 F.3d at 1247, citing *Twombly,* 127 S.Ct. at 1964, 1965, 1974. Accepting the allegations as true, they must establish that the plaintiff plausibly, and not just speculatively, has a claim for relief. *Robbins,* 519 F.3d at 1247. "This requirement of plausibility serves not only to weed out claims that do not (in the absence of additional allegations) have a reasonable prospect of success, but also to inform the defendants of the actual grounds of the claim against them." *Id.* at 1248. The Tenth Circuit Court of Appeals instructed in *Robbins* that "the degree of specificity necessary to establish plausibility and fair notice, and therefore the need to include sufficient factual allegations, depends on context. . . . [and] the type of case." *Id.* (citing *Phillips v. County of Allegheny,* 515 F.3d 224, 231-32 (3d Cir. 2008)). A simple negligence action may require significantly less allegations to state a claim under Rule 8 than a case alleging anti-trust violations (as in *Twombly*) or constitutional violations (as in *Robbins*). *Id.*

In evaluating a Rule 12(b)(6) motion to dismiss, courts may consider not only the complaint itself, but also attached exhibits and documents incorporated into the complaint by reference. *Smith v. U.S.,* 561 F.3d 1090, 1098 (10th Cir. 2009). The court may consider documents referred to in the complaint if the documents are central to the plaintiff's claim and the

parties do not dispute the documents' authenticity." *Id.*

Although defendants couched their motions as Rule 12(b)(6) motions to dismiss for failure to state a claim, the motions could also be characterized in part as Rule 12(b)(1) motions to dismiss for lack of subject matter jurisdiction. Rule 12(b)(1) motions generally take one of two forms. The moving party may (1) facially attack the complaint's allegations as to the existence of subject matter jurisdiction, or (2) go beyond allegations contained in the complaint by presenting evidence to challenge the factual basis upon which subject matter jurisdiction rests." *Merrill Lynch Bus. Fin. Servs., Inc. v. Nudell,* 363 F.3d 1072, 1074 (10th Cir. 2004) (quoting *Maestas v. Lujan,* 351 F.3d 1001, 1013 (10th Cir. 2003)). Here, defendants have facially attacked the sufficiency of the Complaint's allegations as to the existence of subject matter jurisdiction. In addressing a facial attack under Rule 12(b)(1), the court must "presume all of the allegations contained in the amended complaint to be true." *Ruiz v. McDonnell,* 299 F.3d 1173, 1180 (10th Cir. 2002). Dismissal is proper where "the complaint fails to allege any basis for subject matter jurisdiction over the claims raised therein." *Harrison v. United States,* 329 Fed. Appx. 179, 181 (10th Cir. 2009) (unpublished). In their reply brief, defendants for the first time presented evidence, which does not appear to challenge the factual basis upon which subject matter jurisdiction rests and, in any event, the court has stricken for the purpose of this motion.

III. Analysis

A. Sovereign Immunity Challenge

Hobia and the Town Corporation assert they are not parties to the Gaming Compact and are not themselves constructing a casino; therefore the claims against them should be dismissed. Additionally, they invoke the shield of sovereign immunity. The State argues both defendants are proper parties and neither is immune from a suit for declaratory and injunctive relief under the doctrine of *Ex parte Young*.

Hobia – as Town King – is a member of the Kialegee Tribal Town's governing body, the Kialegee Tribal Town Business Committee ["Committee"], as well as the Town Corporation. As noted above, the State has named him in his official capacities. The State alleges on information and belief the Town Corporation is a member of Florence Development Partners, LLC.[2] The State alleges defendants' activities exceed the Kialegee Tribal Town's powers under federal law and violate federal law, including IGRA and the Gaming Compact.

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[2] In their consolidated Reply, defendants asserted for the first time that the Town Corporation is not a member of Florence. [Dkt. #93 at 4]. They attached the Declaration of Clifford S. Rolls, a Managing Member of Golden Canyon Partners, LLC, in support of this statement. [Dkt. #93, Ex. 1, Rolls Dec.]. The court has stricken the Rolls Declaration because it was offered for the first time in the reply, and because the argument may be addressed in future motions. [Dkt. #104].

"Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." *Crowe & Dunlevy, P.C. v. Stidham,* 640 F.3d 1140, 1153 (10th Cir. 2011) (quoting *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 58 (1978). "This immunity extends to tribal officials, so long as they are acting within the scope of their official capacities." *Crowe & Dunlevy,* 640 F.3d at 1154. "Tribal immunity is similar, although not identical, to immunity afforded to the states under the Eleventh Amendment." *Id.* "Because tribal immunity is a matter of federal common law, not a constitutional guarantee, its scope is subject to congressional control and modification." *Id.*

Although tribal sovereign immunity generally extends to tribal officials acting within the scope of their official authority, a tribe's sovereign immunity does not extend to an official when the official is acting outside the scope of the powers that have been delegated to him. *Burrell v. Armijo,* 603 F.3d 825, 832 (10th Cir. 2010) (citing *Burrell v. Armijo,* 456 F.3d 1159, 1174 (10th Cir. 2006). A tribe's powers are defined by federal statutes. *United States v. Lara,* 541 U.S. 193, 202 (2004), and "an Indian tribe may not unilaterally create sovereign rights in itself that do not otherwise exist." *Kansas v. United States,* 249 F.3d 1213, 1219 (10th Cir. 2001). "If the sovereign did not have the power to make a law, then the official by necessity acted outside the scope of his authority in enforcing it, making him liable to suit. Any other rule would mean that a claim of sovereign immunity

would protect a sovereign in the exercise of power it does not possess." *Tenneco Oil Co. v. Sac and Fox Tribe of Indians of Oklahoma,* 725 F.2d 572, 574 (10th Cir. 1984).

In *Ex parte Young,* 209 U.S. 123, 159-60 (1908), the Supreme Court recognized an exception to Eleventh Amendment immunity for suits against state officials seeking to enjoin alleged ongoing violations of federal law. As the Tenth Circuit has explained:

> The *Ex parte Young* exception proceeds on the fiction that an action against a state official seeking only prospective injunctive relief is not an action against the state and, as a result, is not subject to the doctrine of sovereign immunity. By adhering to this fiction, the *Ex parte Young* doctrine enables federal courts to vindicate federal rights and hold state officials responsible to the supreme authority of the United States.

Crowe & Dunlevy, 640 F.3d at 1154 (quotations and citations omitted).

In *Crowe & Dunlevy,* the Tenth Circuit acknowledged it had previously applied *Ex parte Young* – although implicitly – in the tribal context. *Id.* (citing *Burrell v. Armijo,* 603 F.3d 825, 1174 (10th Cir. 2006) and *Tenneco Oil Co. v. Sac & Fox Tribe of Indians,* 725 F.2d 572, 574 (10th Cir. 1984) (per curiam)). The court stated, "Today we join our sister circuits in expressly recognizing *Ex parte Young* as an exception not just to state sovereign immunity but also to tribal sovereign immunity." *Id.* Further, "[t]he Supreme

Court has explained that, in determining whether the doctrine of *Ex parte Young* applies, a court need only conduct a straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Id.* at 1155 (citing *Verizon Md., Inc. v. Pub. Serv. Comm'n,* 535 U.S. 635, 645 (2002)).

In this case, the State, alleging defendants' official-capacity actions violate IGRA and the Gaming Compact, seeks prospective declaratory and injunctive relief. Pursuant to *Ex parte Young* and *Crowe & Dunlevy,* and accepting as true the well pled allegations of the Complaint, the court rejects the sovereign immunity claims of Hobia and the Tribal Town Corporation, and concludes they are both proper party defendants.

Additionally, Congress has abrogated tribal immunity from suits involving gaming activities. IGRA explicitly provides that the United States district courts shall have jurisdiction over "any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact entered into" pursuant to the IGRA. 25 U.S.C. § 2710(d)(7)(A)(ii). *See also Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.,* 523 U.S 751, 758 (1998) (citing 25 U.S.C. § 2710(d)(7)(A)(ii) as an example of Congressional restrictions of tribal immunity); *Mescalaro Apache Tribe v. State of New Mexico,* 131 F.3d 1379, 1385 (10th Cir. 1997) ("IGRA waived tribal sovereign immunity in the narrow

category of cases where compliance with IGRA's provisions is at issue and where only declaratory or injunctive relief is sought.").

Finally, the "sue and be sued" language in the Town Corporation's Corporate Charter results in a waiver of sovereign immunity by the Town Corporation. *See Native Am. Distrib. v. Seneca-Cayuga Tobacco Co.,* 491 F. Supp.2d 1056, 1065 (N.D. Okla. 2007), *aff'd sub nom., Native Am. Distrib. v. Seneca-Cayuga Tobacco Co.,* 546 F.3d 1288 (10th Cir. 2008).[3] *See also Marceau v. Blackfeet Housing Auth.,* 455 F.3d 974, 979-81 (9th Cir. 2006); *Rosebud Sioux Tribe v. A & P Steel, Inc.,* 874 F.2d 550, 552 (8th Cir. 1989).

B. Rule 19

Defendants assert this action must be dismissed because the Kialegee Tribal Town is an indispensable party under Fed.R.Civ.P. 19. "The moving party has the burden of persuasion in arguing for dismissal." *Rishell v. Jane Phillips Episcopal Mem'l Med. Ctr.,* 94 F.3d 1407, 1411 (10th Cir. 1996) (quoting *Makah Indian Tribe v. Verity,* 910 F.2d 555, 558 (9th Cir. 1990)).

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[3] The Tenth Circuit has held the presence of a "sue and be sued" clause in a tribal corporate charter does *not* waive the *tribe's* immunity as a tribe. *Seneca-Cayuga Tribe Oklahoma v. State of Oklahoma ex rel. Thompson,* 874 F.2d 709, 716 n. 9 (10th Cir. 1989). The State does not contend the language of the corporate charter results in a waiver of sovereign immunity by the Kialegee Tribal Town. [Dkt. #86 at 16].

When faced with a Rule 19 challenge, the court must first determine whether the absent person is a required party to the lawsuit and, if so, whether joinder of the required party is feasible. *Davis v. United States,* 192 F.3d 951, 957 (10th Cir. 1999). An absent party "must be joined as a party if, in that person's absence, the court cannot accord complete relief among existing parties." Fed.R.Civ.P. 19(a)(1)(A), or the person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may impair or impede the non-party's ability to protect the interest or leave a party subject to substantial risk of incurring multiple or otherwise inconsistent obligations. *Id.,* (a)(1)(B). Under Rule 19(b), when joinder of a required party is not feasible, the court must determine "whether, in equity and good conscience, the action should proceed among the existing parties, or should be dismissed."

Here, pursuant to *Ex parte Young,* the State has the legal authority to obtain declaratory and injunctive relief against Hobia, a tribal official, in his official capacity. Further, the Kialegee Tribal Town's interests are so closely aligned with Hobia, its Tribal Town King, that there is virtually no risk the tribe's interests will be impaired or impeded. *See Kansas v. United States,* 249 F.3d 1213, 1226-27 (10th Cir. 2001) (finding the potential for prejudice to the absent Miami Tribe was "largely nonexistent" due to the presence of, *inter alia,* tribal officials).

The court finds defendants have not met their burden of demonstrating the Kialegee Tribal Town is a required party that must be joined in order to accord complete relief among existing parties.

C. Standing Challenge

Hobia, the Town Corporation and Florence Development argue the State has not alleged facts establishing it has standing under Article III of the Constitution to obtain the relief requested.

"Under Article III, the Federal Judiciary is vested with the 'Power' to resolve not questions and issues but 'Cases' or 'Controversies.'" *Arizona Christian School Tuition Organization v. Winn,* 131 S. Ct. 1436, 1441 (2011). To state a case or controversy under Article III, a plaintiff must establish standing. *Id.* at 1442. The minimum constitutional requirements of standing are:

> **First,** the plaintiff must have suffered an "injury in fact" – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not "conjectural" or "hypothetical." **Second,** there must be a causal connection between the injury and the conduct complained of – the injury has to 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." **Third,** it must be "likely," as opposed to

> merely "speculative," that the injury will be "redressed by a favorable decision."

Id. (quoting *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992)) (emphasis added).

1. "Injury in Fact"

The first requirement for standing is that the plaintiff must have suffered an "injury in fact" – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not "conjectural" or "hypothetical." The "injury in fact" element requires the plaintiff to demonstrate an injury to a "legally cognizable right." *See McConnell v. Federal Election Com'n,* 540 U.S. 93, 227 (2003), *overruled on other grounds, Citizens United v. FEC,* ___ U.S. ___, 130 S. Ct. 876 (2010); *Diamond v. Charles,* 476 U.S. 54, 64 (1986); Moore's Fed. Practice § 101.40[5][a] (3d ed. 2006).

The State asserts it has a "legally cognizable right" both as a sovereign and a party to the Compact, and as *parens patriae* of the citizens of Oklahoma. States have two "easily identifiable" sovereign interests: first, the exercise of sovereign power over individuals and entities within the relevant jurisdiction ("this involves the power to create and enforce a legal code, both civil and criminal"); and second, the demand for recognition from other sovereigns ("frequently this involves the maintenance and recognition of borders"). *Alfred A. Snapp & Son, Inc. v. Puerto Rico, ex rel. Barez,* 458 U.S. 592, 601 (1982).

Parens patriae interests are not sovereign interests, but rather "quasi-sovereign" interests which confer standing to maintain lawsuits. *Parens patriae* actions generally fall into two categories. "First, a State has a quasi-sovereign interest in the health and well-being – both physical and economic – of its residents in general." *Id.* at 607. "Second, a State has a quasi-sovereign interest in not being discriminatorily denied its rightful status within the federal system." *Id.* In order to maintain a *parens patriae* action, the State "must articulate an interest apart from the interests of particular private parties, *i.e.,* the State must be more than a nominal party." *Id.* However, "a State does have an interest, independent of the benefits that might accrue to any particular individual, in assuring that the benefits of the federal system are not denied to its general population." *Id.* at 608.

When the State is plaintiff, it deserves "special solicitude" in the standing analysis. *Massachusetts v. E.P.A.,* 549 U.S. 497, 520 (2007). This is particularly true when the State has filed suit to protect its sovereign powers and authorities. *See Georgia v. Tennessee Copper Co.,* 206 U.S. 230 (1907) (concluding that a state had *parens patriae* standing to challenge an action that affected the State's power over its territory).

The Complaint alleges defendants are constructing, with the intent of opening and operating, a casino in violation of IGRA and the Gaming Compact between the State and the tribe. [Dkt. #2, ¶13]. Further, it alleges the site of the casino is in close

proximity to several residential subdivisions and the site of a proposed new elementary school, and "conflicts with and would adversely affect adjoining and nearby uses and is inappropriate in the proposed location." [*Id.,* ¶32].

The court concludes the State has a sovereign interest in enforcing the Gaming Compact, including the location provision in Part 5(L) to which the tribe has agreed. Additionally the State has quasi-sovereign interests in protecting the health and well-being of residents in areas surrounding the site of the proposed casino and challenging an action that affects the State's power over its territory. Further, the allegations of the Complaint describe an interest that is concrete and particularized, as required under *Lujan* and *Arizona Christian School.*

To establish standing, the State must also demonstrate the threat to its interests is actual or imminent. Although the plaintiff must show "a realistic danger of sustaining a direct injury" as a result of defendants' conduct, "[o]ne does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough." *Babbitt v. United Farm Workers Nat'l Union,* 442 U.S. 289, 298 (1979). Thus, contrary to defendants' argument, the requirement of imminent harm does not mean the court must wait until the doors of the proposed casino are thrown open for business to consider the State's claim for injunctive relief.

The court finds the commencement of grading and construction of a facility for Class III gambling operations, combined with public statements by the Kialegee Tribal Town of its intent to conduct such operations, establish impending threatened injury, as required by *Babbitt.*

The court concludes the allegations of the Complaint satisfy the "injury-in-fact" inquiry of the standing analysis.

2. Causation

To satisfy the second element of causation, the State must show that its injury is " 'fairly traceable' to the defendants' actions." *Habecker v. Town of Estes Park, Colo.,* 518 F.3d 1217, 1225 (10th Cir. 2008). The State's alleged injuries are directly traceable to defendants' purported violation of the Gaming Compact and IGRA. Therefore, the causation element is met.

3. Redressability

To satisfy the third element of redressability, plaintiff must "demonstrate a substantial likelihood that the relief requested will redress its injury in fact." *Nova Health Systems v. Gandy,* 416 F.3d 1149, 1158 (10th Cir. 2005). This requires a showing that "a favorable judgment will relieve a discreet injury, although it need not relieve his or her every injury." *Id.* Clearly an injunction prohibiting construction or

operation of a Class III gaming facility would redress the alleged violations of the Compact and IGRA.

The court concludes the Complaint adequately pleads facts establishing Article III standing.

D. Ripeness Challenge

Defendants argue the State has no right under IGRA or the Gaming Compact to obtain an injunction against mere construction of a facility and that its claim for an injunction against Class III gambling is not yet ripe.

"[T]he doctrine of ripeness is intended to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Skull Valley Band of Goshute Indians v. Neilson,* 376 F.3d 1223, 1237 (10th Cir. 2004).

The court has determined that the Complaint's factual allegations establish impending threatened injury sufficient to confer standing. "If a threatened injury is sufficiently "imminent" to establish standing, the constitutional requirements of the ripeness doctrine will necessarily be satisfied." *Am. Civil Liberties Union v. Johnson,* 194 F.3d 1149, 1155 (10th Cir. 1999) (internal quotation marks, citations, brackets omitted). Therefore the court – without deciding at this juncture whether the State may obtain an injunction against *construction* – concludes its request for an injunction against Class III gaming satisfies the requirement of ripeness.

Defendants also assert the State's claim is not ripe because the State, under the terms of the Gaming Compact, must first submit the dispute to arbitration. Part 12 of the Gaming Compact provides that in the event of a dispute, arbitration "*may* be invoked" to attempt to resolve the dispute; either party "*may* refer a dispute arising under the Compact to arbitration;" and either party "*may* bring an action against the other in federal court for the de novo review of any arbitration award." [Dkt. #6, Ex. 7, Compact at 25-26]. The use of the term "may" (as opposed to "shall") indicates the parties intended this remedy to be optional and not exclusive. *See Ryder Truck Rental, Inc. v. Nat'l Packing Co.,* 380 F.2d 328, 332 (10th Cir. 1967). Further, Part 9 of the Compact, "Jurisdiction," provides: "This Compact shall not alter tribal, federal or state civil adjudicatory or criminal jurisdiction." [Dkt. #6, Ex. 7, Compact at 19]. Federal civil jurisdiction exists over "*any* cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact." 25 U.S.C. § 2710(d)(7) (emphasis added).

The court finds that under the Gaming Compact, the State had the *option* to avail itself of the dispute resolution process set out in Part 9 of the Compact, but was not *required* to do so. Therefore, the court concludes Part 9 of the Gaming Compact does not bar the State from seeking relief in this court.

IV. Conclusion

For the foregoing reasons, defendants' Motions to Dismiss [Dkt. ##62, 64, and 70] are denied.

ENTERED this 26th day of April, 2012.

/s/ Gregory K. Frizzell
GREGORY K. FRIZZELL, CHIEF JUDGE
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA,

Plaintiff,

v.

(1) TIGER HOBIA, as Town King and member of the Kialegee Tribal Town Business Committee;
(2) THOMAS GIVENS, as 1st Warrior and member of the Kialegee Tribal Town Business Committee;
(3) JOHN DOE No. 1, as 2nd Warrior and member of the Kialegee Tribal Town Business Committee;
(4) LYNELLE SHATSWELL, as Secretary and member of the Kialegee Tribal Town Business Committee;
(5) JOHN DOE No. 2, as Treasurer and member of the Kialegee Tribal Town Business Committee;
(6) JOHN DOE No. 3, as a member of the Kialegee Tribal Town Business Committee;
(7) JOHN DOE No. 4, as a member of the Kialegee Tribal Town Business Committee;

Case No. 12-CV-054-GKF-TLW

COMPLAINT FOR DECLARATORY JUDGMENT, AND PRELIMINARY AND PERMANENT INJUNCTIVE RELIEF

(Filed Feb. 8, 2012)

(8) JOHN DOE No. 5, as a member of the Kialegee Tribal Town Business Committee;
(9) JOHN DOE No. 6, as a member of the Kialegee Tribal Town Business Committee;
(10) JOHN DOE No. 7, as a member) of the Kialegee Tribal Town Business Committee;
(11) FLORENCE DEVELOPMENT PARTNERS, LLC, an Oklahoma limited liability company; and
(12) KIALEGEE TRIBAL TOWN, a federally chartered corporation;

Defendants.

For its Complaint, the Plaintiff, State of Oklahoma, states as follows:

Introduction

1. This action seeks declaratory and injunctive relief to prevent Defendants, Tiger Hobia, Town King, of the Kialegee Tribal Town, a federally recognized Indian tribe organized under Section 3 of the Oklahoma Indian Welfare Act, 25 U.S.C. § 503 ("OIWA") ("Kialegee Tribal Town"), and the individual members of the Business Committee of the Kialegee Tribal Town, Kialegee Tribal Town, a federally chartered corporation organized under Section 3 of the OIWA ("Town Corporation"), and Florence Development Partners, LLC, an Oklahoma limited liability company

("Florence"), from proceeding with construction or operation of the proposed "Red Clay Casino," in direct violation of both the April 12, 2011 Gaming Compact between Kialegee Tribal Town and the State of Oklahoma ("State Gaming Compact") and the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 (the "IGRA"). Defendants are actively engaged in the construction of and plan to operate the Red Clay Casino, a Class III gaming facility under the IGRA, on certain real property at the southwest corner of Olive Avenue (South 129th East Avenue) and Florence Street (South 111th Street East), in Broken Arrow, Oklahoma ("Broken Arrow Property") that is held by two enrolled members of the Muscogee (Creek) Nation subject to federal restraints against alienation. Contrary to the requirements of both IGRA and the State Gaming Compact, the Kialegee Tribal Town has no possessory interest in the Broken Arrow Property, and the Kialegee Tribal Town neither has jurisdiction over nor exercises governmental powers over the Property. The Defendants' on-going actions to inject gaming into the Broken Arrow community by constructing and placing in operation the proposed casino on the Broken Arrow Property violate the federally enforceable Compact and federal law, and their conduct must be enjoined.

2. The Defendants' activities exceed the Kialegee Tribal Town's powers under federal law and violate federal law requirements including, among others, the requirement of the IGRA that gaming operations shall only occur on lands (i) "title to which

is either held in trust by the United States for the benefit of any Indian tribe or individual or held by the United States against alienation," (ii) over which an Indian tribe has jurisdiction, and (iii) over which that tribe exercises governmental power. 25 U.S.C. §§ 2703(4)(B), 2710(d)(1)(A)(i), 2710(d)(1)(c).

3. The Defendants' activities further exceed the Kialegee Tribal Town's powers under federal law and violate federal law requirements because the construction and management of a Class III casino on the Broken Arrow Property will violate the federally approved Gaming Compact between the Kialegee Tribal Town and the State of Oklahoma, which expressly limits the Kialegee Tribal Town to conducting gaming only on "its Indian lands," and the Kialegee Tribal Town has no possessory interest in the Broken Arrow Property.

4. This Court's equitable jurisdiction is invoked to prevent the Kialegee Tribal Town from undertaking activities to transform the character of the area surrounding the Broken Area Property when the Kialegee Tribal Town lacks any indicia that it can secure approval to operate a Class III gaming facility at the site and when any such effort is foreclosed under the State Gaming Compact and federal law. Unless the Defendants are enjoined from their continuing illegal activities, their actions will serve as a precedent that will fuel similar efforts throughout the State of Oklahoma to construct and operate casinos on lands in which the compacting tribe has no possessory interest and that are neither within a compacting

tribe's jurisdiction, nor over which the compacting tribe exercises governmental powers.

5. This Court should declare that the Defendants' efforts to construct and operate a Class III gaming facility on the Broken Arrow Property are unauthorized by the State Gaming Compact and federal law, and the Court should preliminarily and permanently enjoin the Defendants, and all those acting by, through or under them, from proceeding with development, construction, or operation of the proposed Class III gaming facility.

The Parties

6. The State of Oklahoma is a State of the United States of America possessing the sovereign powers and rights of a State with federally recognized and delegated authorities under the IGRA. As a party and federally required signatory to the State Gaming Compact that the Kialegee Tribal Town asserts authorizes it to operate a Class III gaming facility on the Broken Arrow Property, the State has a direct and substantial interest in ensuring full compliance with the terms of the Compact, and IGRA specifically authorizes the State to file this action in federal court. *See* 25 U.S.C. 25 U.S.C. § 2710(d)(7). The State has a further interest in protecting its citizens from unauthorized and inappropriate gaming operations by ensuring that the Kialegee Tribal Town's proposal does not serve as precedent for expanding casinos into areas where a tribe cannot satisfy the jurisdictional,

governmental and land status requirements of the IGRA and the applicable Gaming Compact.

7. Kialegee Tribal Town is a federally recognized Indian tribe, organized under Section 3 of the OIWA, 25 U.S.C. § 503, with a Constitution and Bylaws approved by the Secretary of the Interior ("Secretary") on April 14, 1941, and ratified by the Kialegee Tribal Town on June 12, 1941 (the "1941 Constitution"). The 1941 Constitution established the Kialegee Tribal Town Business Committee ("Committee") as the Kialegee Tribal Town's governing body.

8. Defendant Tiger Hobia is the Town King of the Kialegee Tribal Town, is a member of the Committee, and is a citizen and resident of the State of Oklahoma. Defendant Thomas Givens is the 1st Warrior, a member of the Committee, and a citizen and resident of the State of Oklahoma. Defendant John Doe No. 1 is the 2nd Warrior, a member of the Committee, and a citizen and resident of the State of Oklahoma. Defendant Lynelle Shatswell is Secretary of the Committee, and is a citizen and resident of the State of Oklahoma. Defendant John Doe No. 2 is the Treasurer of the Tribal Town, a member of the Committee, and a citizen and resident of the State of Oklahoma. Defendants John Doe Nos. 3 through 7 are members of the Committee, and are citizens and residents of the State of Oklahoma. Under Article 2 of the corporate charter of the Town Corporation, the "membership, the officers, and the management of the incorporated tribal town shall be as provided in the [Kialegee Tribal Town's] Constitution and

By-laws." Defendants Tiger Hobia, Lynelle Shatswell, John Doe Nos. 1 through 7 are being sued in their capacities as members and officers of the Committee and of the Kialegee Tribal Town and the Town Corporation. Those Defendants' actions exceed their authority under federal law and, therefore, those Defendants are not cloaked with any immunity from suit of the Kialegee Tribal Town or the Town Corporation. The Defendant members of the Committee are hereinafter referred to as the "Committee Defendants."

9. Florence Development Partners, LLC is an Oklahoma limited liability company doing business in the State of Oklahoma.

10. Kialegee Tribal Town is a federally chartered corporation under Section 3 of the OIWA (the "Town Corporation"), doing business in the State of Oklahoma.

Jurisdiction

11. This Court has jurisdiction over this action under, 28 U.S.C. § 1331 and/or 25 U.S.C. § 2710(d)(7) to issue relief under 28 U.S.C. § 2201(a), among other sources.

12. This action arises under and requires the interpretation and construction of provisions of the Constitution and laws of the United States including, without limitation, the IGRA, that Act's implementing regulations, 25 CFR §§ 501-572, and the federally

approved Gaming Compact between the Kialegee Tribal Town and the State of Oklahoma.

13. A case of actual controversy exists between Oklahoma and the Defendants with respect to whether the Kialegee Tribal Town and its officials have authority under federal law to construct and operate a gaming facility on the Broken Arrow Property.

14. Any sovereign immunity from suit of the Kialegee Tribal Town or the Town Corporation is not a defense to this suit because the action is against the officers and Committee members of such entities sued in their official capacities, and Article 3(b) of the corporate charter of the Town Corporation provides that it has the power "to sue and be sued."

15. Venue is proper in this Court under 28 U.S.C. § 1391(b) because the Broken Arrow Property is located in Tulsa County, Oklahoma, within this District.

16. Exhaustion of tribal remedies is neither necessary nor appropriate with respect to the claims this Complaint presents because the Kialegee Town Tribal Court plainly lacks subject matter jurisdiction over this controversy, and IGRA specifically authorizes the State to file this action in federal court. *See* 25 U.S.C. 25 U.S.C. § 2710(d)(7).

Factual Allegations Applicable to All Counts

The Kialegee Tribal Town

17. The Kialegee Tribal Town is a separate, independent federally recognized Indian tribe. The Kialegee Tribal Town first received federal recognition as a tribe in 1936. Upon information and belief, Kialegee Tribal Town has an enrolled membership of less than 500.

18. Kialegee Tribal Town is headquartered in Wetumka, Oklahoma. Kialegee Tribal Town does not have a reservation and has characterized itself as a "landless tribe."

19. In 1941, pursuant to the OIWA, the Kialegee Tribal Town adopted the 1941 Constitution. Article IV. Section 1 of the 1941 Constitution provides that the "supreme governing body of the Town shall be the adult members of the Town, both male and female who are 21 years of age or older, through the actions of the Business Committee." Article IV. Section 2 of the 1941 Constitution, in turn, declares that the "Business Committee of the Town shall consist of the elected officers and all members of the Advisory Committee."

20. Under Article V of the 1941 Constitution, the officers of the Town are "the Town King, 1st Warrior, 2nd Warrior, Secretary and the Treasurer." Article VI, Section 2 of the 1941 Constitution provides that the elected officers shall "select and appoint five members to serve as an Advisory Committee. . . ."

21. On July 23, 1942, the United States Department of the Interior, Office of Indian Affairs issued a Corporate Charter to the Town Corporation pursuant to the OIWA (the "1942 Charter"). The 1942 Charter was ratified by the Kialegee Tribal Town on September 17, 1942. Section 2 of the 1942 Charter declares that "the membership, the officers, and the management of the incorporated tribal town shall be as provided in the . . . Constitution and By-laws."

22. Section 3(b) of the 1942 Charter provides that, "subject to any restrictions contained in the Constitution and laws of the United States or in the Constitution and Bylaws of the Tribal Town, and to the limitations of section 4 and 5 of this Charter," the Town Corporation

> shall have the following corporate powers as provided by section 3 of the Oklahoma Indian Welfare Act of June 26, 1936: . . . (b) To sue and be sued; to complain and defend in any courts; Provided, however, That the grant or exercise of such power shall not be deemed a consent by the Tribal Town or by the United States to the levy of any judgment, lien, or attachment upon the property of the Tribal Town other than income or chattels specially pledged or assigned.

The Indian Gaming Regulatory Act

23. In 1988, Congress passed the IGRA to establish a statutory basis for the operation and regulation of gaming by Indian tribes.

24. The IGRA divides gaming into three categories: Class I, Class II, and Class III. Class I gaming is defined as "social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations. 25 U.S.C. § 2703(6). Class II gaming is defined as

> the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith) . . . including (if played in the same location) pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo, and card games that (I) are explicitly authorized by the laws of the State, or (II) are not explicitly prohibited by the laws of the State and are played at any location in the State, but only if such card games are played in conformity with those laws and regulations (if any) of the State regarding hours or periods of operation of such card games or limitations on wagers or pot sizes in such card games."

Id. § 2703(7)(A). The definition of Class II gaming specifically excludes "any banking card games, including baccarat, chemin de fer, or blackjack (21) or electronic or electromechanical facsimiles of any game of chance or slot machines of any kind." *Id*. §2703(7)(B). The IGRA defines Class III gaming as "all forms of gaming that are not class I or class II gaming." *Id*. § 2703(8).

25. The IGRA directs that an Indian tribe may engage in Class III gaming under the IGRA only on "Indian lands" "pursuant to an ordinance adopted by the Indian Tribe having jurisdiction over such lands." 25 U.S.C. § 2710(d)(1)(A)(i).

26. The IGRA defines "Indian lands" as:

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

25 U.S.C. § 2703(4); *see also* 25 C.F.R. § 502.12(b) (defining "Indian land.").

27. The IGRA further mandates that Class III gaming may only be "conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State. . . ." 25 U.S.C. § 2710(d)(1)(C). Such a compact must be approved by the Secretary of the Interior or his or her designee. *Id.* §2710(d)(8).

28. In 2004, Oklahoma established a model tribal gaming compact that is essentially a "pre-approved" offer to federally recognized tribes in the State ("Model Compact"). If a tribe accepts the Model Compact, obtains approval by the Secretary of the Interior, and complies with the requirements of the

Compact and the IGRA, the tribe can then operate gaming facilities on "its Indian lands," Model Compact, Part 5(L), i.e., lands in which the tribe has a possessory interests and over which the tribe has jurisdiction and exercises governmental powers.

29. On April 12, 2011, the Kialegee Tribal Town accepted the model gaming compact with the State of Oklahoma (the "State Gaming Compact"). A true and correct copy of the State Gaming Compact is attached as Exhibit 8 to the State's Brief in Support of Motion for Preliminary Injunction. The Secretary of the Interior approved the State Gaming Compact on July 8, 2011.

30. The State Gaming Compact only authorizes the operation of "covered games," as defined in that Compact, by the Kialegee Tribal Town on "its Indian lands as defined by the Indian Gaming Regulatory Act, 25 U.S.C., Section 2703(4)." *See* State Gaming Compact, Part 5(L).

The Site of the Proposed Gaming Facility

31. The property on which the Defendants are engaged in constructing and developing the Class III gaming facility is located at the southwest corner of Olive Avenue and Florence Place, in Broken Arrow, Oklahoma (the "Broken Arrow Property") Upon information and belief, the Broken Arrow Property is and is more particularly described as follows:

The East 1245.3 feet of the North 1245.3 feet of the Northeast quarter of Section Thirty Two (32), Township Eighteen (18) North, Range Fourteen (14) East of the Indian Base and Meridian, Tulsa County, State of Oklahoma, less and except one acre reserve as life Estate for Willis G. Burgess:

LESS AND EXCEPT

A STRIP, PIECE OR PARCEL OF LAND LYING IN PART OF THE Northeast Quarter (NE1/4) of Section 32, Township 18 North, Range 14 East of the Indian Base and Meridian, Tulsa County, Oklahoma. Said parcel of land being described as follows:

Beginning 726.22 feet south of the Northeast corner of said NE 1/4;

THENCE South 01°13'28" East along the East Line of said NE 1/4 a distance of 519.08 feet; THENCE South 88°38'08" West a distance of 65.00 feet; THENCE North 02°37'56" East a distance of 520.42 feet; THENCE North 88°46'32" East a distance of 30.00 feet to the POINT OF

BEGINNING, containing 24,660 square feet or 0.57 acres, more or less. AND

Beginning 793.14 feet West of the Northeast corner of said NE 1/4;

THENCE South 01°22'07" East a distance of 30.00 feet; THENCE South 01°23'59" East a distance 20.00 feet; THENCE South 85°29'21" West a distance of 453.05 feet;

THENCE North 01°13'22" West a distance of 74.75 feet to a point on the North line of said NE 1/4; THENCE North 88°37'08" East along the North line of said NE 1/4 a distance of 452.16 feet to the POINT OF BEGINNING. Containing 28,211 square feet or 0.65 acres, more or less.

AND

Commencing at the Northeast corner of said NE 1/4; THENCE South 01°13'28" East along the East line of said NE 1/4 a distance of 1245.30 feet; THENCE South 88°37'05" West a distance of 440.04 feet to the POINT OF BEGINNING, THENCE continuing South 88°37'05" West a distance of 805.26 feet; THENCE North 01°13'28" West a distance of 423.92 feet; THENCE Southeasterly on the arc of a curve to the left, said curve having a radius of 2101.83 feet (said curve being sub-tended by a chord bearing South 51°32'54" East, and a chord length of 224.89 feet), an arc distance of 225.00 feet; THENCE South 60°18'28" East a distance of 455.51 feet; THENCE South 80°52'21" East a distance of 245.38 feet to the POINT OF BEGINNING. Containing 129,289 square feet or 2.97 acres, more or less.

32. The Broken Arrow Property is located across the street from the Broken Arrow Campus of Tulsa Technology Center, a vocational and technology school operated by the Tulsa Tech School District No. 18, at 4000 W. Florence, Broken Arrow, OK 74011-1740, in close proximity to several residential subdivisions,

and roughly one-half mile from the site of a proposed new elementary school and Pre-K center. Location of a Class III casino in such an area conflicts with and would adversely affect adjoining and nearby uses and is inappropriate in the proposed location.

33. Upon information and belief, the Broken Arrow Property is currently owned by Wynema Capps and Marcella Giles, as tenants in common, subject to federal restraints against alienation.

34. Upon information and belief, Wynema Capps is not an enrolled member of the Kialegee Tribal Town. Instead, Wynema Capps is an enrolled member of the Muscogee (Creek) Nation.

35. Upon information and belief, Marcella Giles is not an enrolled member of the Kialegee Tribal Town. Instead, Marcella Giles is an enrolled member of the Muscogee (Creek) Nation.

36. The Broken Arrow Property is more than 70 miles away from the Kialegee Tribal Town's Headquarters in Wetumka, Oklahoma.

37. Because the Kialegee Tribal Town does not have a "reservation," the Broken Arrow Property is not within the limits of an Indian reservation within the meaning of the IGRA. *See* 25 U.S.C. § 2703(4)(B).

38. The Broken Arrow Property is not held in trust by the United States for the benefit of the Kialegee Tribal Town.

39. The Broken Arrow Property is not held in trust by the United States for the benefit of an enrolled member of the Kialegee Tribal Town.

40. The Broken Arrow Property is not held by either the Kialegee Tribal Town or an enrolled member of the Kialegee Tribal Town subject to restriction by the United States against alienation.

41. The Kialegee Tribal Town does not have a possessory interest in the Broken Arrow Property; therefore, with respect to the Kialegee Tribal Town, the Property could not be "its Indian lands" within the meaning of the State Gaming Compact, even if allotted lands held by members of another tribe could be considered Indian lands of the Kialegee Tribal Town, which the State denies.

42. The Broken Arrow Property does not meet the definition of "Indian land" over which the Kialegee Tribal Town can conduct Class III gaming because it is not held by members of the Kialegee Tribal Town and the Kialegee Tribal Town it is not a tribe "having jurisdiction over such lands" as required by the IGRA, 25 U.S.C. § 2710(d)(A)(i).

43. Even if the Kialegee Tribal Town had jurisdiction over the Broken Arrow Property, which is denied, the Broken Arrow Property is not land over which the Kialegee Tribal Town exercises governmental power. Consequently, the Property is not "Indian lands," as required by IGRA, 25 U.S.C. §2703(4)(A), nor is it, with respect to the Kialegee Tribal Town "its

Indian lands," as required by the State Gaming Compact, Part 5.L.

Kialegee Tribal Towns' Ongoing Efforts to Establish the Red Clay Casino

44. Upon information and belief, in 2011, the Kialegee Tribal Town attempted to enter into a Prime Ground Lease with Wynema Capps and Marcella Giles covering the Broken Arrow Property. Wynema Capps and Marcella Giles filed a petition in Tulsa County District Court seeking approval of the proposed Prime Ground Lease to the Kialegee Tribal Town.

45. Upon information and belief, the Kialegee Tribal Town contemplated that, once the Prime Ground Lease was approved, the Kialegee Tribal Town would sublease the Broken Arrow Property to Golden Canyon Partners, LLC, which would then construct the proposed gaming facility and would sublease that facility to Kialegee Tribal Town to operate.

46. On August 17, 2011, the Tulsa District Court entered an Order refusing to approve the proposed Prime Ground Lease and the balance of the transaction contemplated thereby. A true and correct copy of that Order is attached as Exhibit 13 to the State's Brief in Support of Motion for Motion for Preliminary Injunction. In that Order, the court concluded that "an individual citizen cannot transfer

government jurisdiction over his or her property by the terms of a lease."

47. Upon information and belief, prior to the Tulsa District Court's Order being entered, the Kialegee Tribal Town, Wynema Capps, and Marcella Giles restructured their proposed transaction in an effort to evade requirements for judicial or Secretary of the Interior approval of the proposed lease and development of the Broken Arrow Property as a Class III gaming facility.

48. Upon information and belief, in the fall of 2011, Wynema Capps and Marcella Giles entered into a lease of the Broken Arrow Property to Florence Development Partners, LLC with an initial term of six years and eleven months. On information and belief, no lease has been entered into between the Kialegee Tribal Town and Capps and Giles, and the Kialegee Tribal Town has no possessory interest in the Broken Arrow Property.

49. Upon information and belief, the Town Corporation, Wynema Capps, Marcella Giles, and others, are members of Defendant Florence Development Partners, LLC.

50. Upon information and belief, the lease from Wynema Capps and Marcella Giles to Florence Development Partners, LLC has not been reviewed and approved by District Court for Tulsa County, Oklahoma, as required by the Act of August 4, 1947, 61 Stat. 731 (the "1947 Act") or the Bureau of Indian

Affairs as required by 25 U.S.C. § 415 and 25 C.F.R. §162.104(d).

51. Notwithstanding that (ii) Capps and Giles are not members of the Kialegee Tribal Town, (ii) the purported lease of the Broken Arrow Property, on information and belief, grants no interest to the Kialegee Tribal Town and has not been approved by the District Court for Tulsa County or the Bureau of Indian Affairs, (iii) the Kialegee Tribal Town does not have jurisdiction over the Broken Arrow Property, and (iv) the Kialegee Tribal Town does not exercise governmental functions over the Broken Arrow Property, in late December, 2011 Defendants initiated (or caused the initiation of) significant grading and other site preparation and construction-related activities leading to the construction and ultimate operation of the Class III gaming facility on the Broken Arrow Property. That work is now proceeding at a rapid pace.

First Claim for Relief

(Declaratory Relief Acts in Excess of Tribal Authority)

52. Oklahoma incorporates by reference Paragraphs Nos. 1 through 47 of this Complaint.

53. The Committee Defendants' actions exceed the authority which the Kialegee Tribal Town has or is capable of bestowing upon the individual Defendants under federal law.

54. Because the Kialegee Tribal Town does not have a reservation, under IGRA and the State Gaming Compact, it may only operate gaming operations on "its Indian lands," lands in which it has a possessory interest and over which the Kialegee Tribal Town has jurisdiction and over which it exercises governmental power.

55. The Kialegee Tribal Town, acting through the Committee Defendants, lack authority to develop, construct or operate a Class III gaming facility on the Broken Arrow Property because the Kialegee Tribal Town does not have jurisdiction over or exercise government power over the Broken Arrow Property.

56. A case of actual controversy exists between Oklahoma and the Committee Defendants concerning whether the Kialegee Tribal Town's efforts to construct and operate a Class III gaming facility on the Broken Arrow Property violate federal law and the Kialegee Compact.

57. Oklahoma is entitled to a declaratory judgment that the Committee Defendants lack authority under federal law and the federally approved State Gaming Compact to construct or operate a gaming facility on the Broken Arrow Property.

Second Claim for Relief

(Declaratory Relief Violation of IGRA and State Gaming Compact)

58. Oklahoma incorporates by reference Paragraph Nos. 1 through 57 of this Complaint.

59. Pursuant to the IGRA, the Kialegee Tribal Town may only engage in gaming if the gaming occurs on "Indian lands" that are "within [the] tribe's jurisdiction," 25 U.S.C. §§ 2710(b)(1), (d)(1), and over which the Kialegee Tribal Town exercises governmental power. 25 U.S.C. § 2703(4)(B); 25 C.F.R. § 502.12(b).

60. Moreover, the IGRA mandates that Class III gaming may only be "conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State." 25 U.S.C. § 2710(d)(1)(C). The State Gaming Compact only authorizes gaming operations, with respect to the Kialegee Tribal Town on "its Indian lands as defined by IGRA." Kialegee Compact, Part 5.L.

61. The Broken Arrow Property is not "Indian land" for purposes of either IGRA or the State Gaming Compact.

62. The Broken Arrow Property is not land within the Kialegee Tribal Town's jurisdiction and is not land over which the Kialegee Tribal Town exercises governmental power.

63. The Broken Arrow Property is not land in which the Kialegee Tribal Town has a property interest. The Kialegee Tribal Town does not have a reservation. The Broken Arrow Property is not held in trust for the Kialegee Tribal Town nor is it held by members of the Kialegee Tribal Town. A mere leasehold interest in land held by nonmembers of the Kialegee Tribal Town is insufficient to vest the Kialegee Tribal Town with an interest sufficient to render the Broken Arrow Property the Tribal Town's land for purposes of the State Gaming Compact and IGRA.

64. Even if such a lease could be sufficient, which is denied, the purported lease of the Broken Arrow Property has not been approved by the District Court for Tulsa County, Oklahoma as required by the Act of August 4, 1947, 61 Stat. 731 (the "1947 Act") or by the Secretary of the Interior as required by 25 U.S.C. § 415. The lack of such required approval means that the Kialegee Tribal Town does not even have a current, valid possessory interest in the Broken Arrow Property. The Broken Arrow Property therefore is not "its [Kialegee Tribal Town's] Indian lands" as required by Part 5(L) of the State Gaming Compact.

65. Moreover, even if the Secretary were to approve such lease, on information and belief it would only vest an interest in Florence Development Partners, LLC, not the Kialegee Tribal Town. Consequently, the Broken Arrow Property is not and cannot

become "its [Kialegee Tribal Town's] Indian lands" as required by Part 5(L) of the State Gaming Compact.

66. The Defendants' efforts to construct or operate a Class III gaming facility on the Broken Arrow Property are in direct violation of the requirements of the IGRA and the State Gaming Compact.

67. A case of actual controversy exists between Oklahoma and the Defendants concerning the Kialegee Tribal Town's efforts to construct and operate a Class III gaming facility on the Broken Arrow Property.

68. Oklahoma is entitled to a declaratory judgment that (i) the Broken Arrow Property is not land within the Kialegee Tribal Town's jurisdiction and is not land over which the Kialegee Tribal Town exercises governmental power and (ii) the Defendants' efforts to construct or operate a Class III gaming facility on the Broken Arrow Property is in direct violation of the requirements of the IGRA and the State Gaming Compact.

Third Claim for Relief

(Preliminary Injunction)

69. Oklahoma incorporates by reference Paragraph Nos. 1 through 68 of this Complaint.

70. Oklahoma will suffer irreparable injury for which there is no plain, speedy and adequate remedy at law in the event the construction and operation of

the proposed Kialegee Tribal Town Class III gaming facility proceeds on the Broken Arrow Property.

71. Unless a preliminary injunction is issued, continued construction of the proposed Red Clay Casino adversely affect, and in fact transform, the surrounding area despite that the State Gaming Compact and federal law foreclose the possibility that the Kialegee Tribal Town will be authorized to operate a Class III gaming facility on such Property.

72. The Kialegee Tribal Town will not be prejudiced by an order restraining the continued construction and proposed operation of an illegal, unauthorized gaming facility, because it cannot demonstrate it has or will secure authorization to conduct Class III gaming at such site.

73. The public interest favors enjoining the construction of an illegal, unauthorized gaming facility.

Oklahoma has a substantial likelihood of success on the merits of its claims in this action because the proposed casino is not on Indian land over which the Kialegee Tribal Town has jurisdiction or over which it exercises governmental power.

Fourth Claim for Relief

(Preliminary and Permanent Injunctive Relief)

74. Oklahoma incorporates by reference Paragraph Nos. 1 through 74 of this Complaint.

75. The Kialegee Tribal Town will not be prejudiced by an injunction restraining the Defendants from proceeding with the construction or operation of the proposed Casino.

76. The public interest favors enjoining the Defendants.

77. Oklahoma has a substantial likelihood of success on the merits of its claims in this action.

WHEREFORE, Plaintiff, State of Oklahoma, respectfully requests that the Court:

1. 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;

2. Declare that (i) the Broken Arrow Property is not land within the Kialegee Tribal Town's jurisdiction and is not land over which the Kialegee Tribal Town exercises governmental power, and (ii) the Defendants' efforts to construct or operate a Class III gaming facility on the Broken Arrow Property are in direct violation of the requirements of the Indian Gaming Regulatory Act and the State Gaming Compact;

3. Enter a Preliminary Injunction enjoining the Defendants, or anyone acting by, through or under them, from taking any action to construct or operate a Class III gaming facility on the Broken Arrow Property during the pendency of this action;

4. Enter permanent injunctive relief permanently enjoining the Defendants, or anyone acting by, through or under them, from taking any action to construct or operate a Class III gaming facility on the Broken Arrow Property; and

5. Award the State of Oklahoma its costs incurred in this action and such other and further relief that the Court deems just and proper.

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