IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

STATE OF ALABAMA, ex rel ASHLEY M. RICH, District Attorney for the Thirteenth Judicial Circuit of Alabama (Mobile County),	)	
Plaintiff,	)	
v.	)	Case No. 14-00066-CG-B
50 serialized JLM Games, Inc. gambling devices, *et al.*,	)	
Defendants.	)	

BRIEF IN SUPPORT OF MOTION TO DISMISS OF ALL DEFENDANTS

Respectfully submitted,

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Overview

The State of Alabama attempts to finesse federal law and disregard the sovereignty and jurisdictional authority of the MOWA Band of Choctaw Indians (hereafter "MOWA" or "Tribe"). The Tribe is recognized by both the United States and the State of Alabama. Nevertheless, on November 7, 2003, District Attorney Ashley Rich ("Rich" or "the District Attorney") seized Class II gaming machines on the MOWA reservation, claiming they violated Alabama gambling laws. (See Forfeiture Complaint attached as Exhibit A, at para. II.1.)

However, the Tribe is not a political subdivision of the State.[1] The State of Alabama has no authority to regulate gaming in Indian Country, and it certainly has no authority to do so through the application of state law forfeiture principles. *See Sycuan Band of Mission Indians v.* Roach, 788 F. Supp. 1498 (S.D. 1992) (Court held that Congress has made clear that states lack the authority to prosecute tribes or even execute search warrants, 788 F. Supp. at 1508.).

The MOWA Band, pursuant to its authority, enacted an amended Tribal Gaming Ordinance (attached as Exhibit C) which defines Class II gaming (Bingo and similar games) by following federal laws as set forth in the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701, *et seq.* It is that definition that

[1] In an October 19, 2012 letter, Attorney General Luther Strange admitted that federal law governs gaming in this situation. (See attached Exhibit B.)

controls the propriety of the gaming – not the District Attorney's application of State gambling rules.

In the balance of this brief, the Defendants first set forth an extensive background of the MOWA, together with a discussion of tribal sovereignty generally. Second, the Defendants address the numerous instances of federal and state recognition of the MOWAs, including the failure of the BIA to properly recognize the Tribe in its petition to the Department of the Interior. Finally, the Defendants argue that because the Tribe enjoys sovereign immunity, and because the District Attorney's claims are preempted, the Court should order the return of the equipment to the Tribe and dismiss this action.

I. ALL INDIAN TRIBES IN THIS COUNTRY ARE "DEPENDENT SOVEREIGNS"

A. "Dependent Sovereigns," defined, and the extent of Tribal Authority.

The notion of tribal independence subject to the supreme authority of the United States is contained within the federal Constitution in the Indian Commerce clause. See U.S. Constit., Art. I, cl. 3.[2] "Congress shall have the power... to regulate commerce with sovereign nations, and among the several states, and with

[2] The United States recognizes indian tribes as "distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by the irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of a particular region claimed…" *Worcester v. Georgia*, 31 U.S. (5 PET) 515 at 559 (1832).

Indian Tribes." *See* also, *Cohen Handbook of Federal Indian Law*, 1982 at 232, 233.[3]

Justice John Marshall established the modern basis for the notion of Indian sovereignty when he described the tribes as "domestic dependent nations" whose relation "to the United States resembles that of a ward to his guardian." *Cherokee Nation v. Georgia*, 30 U.S. (5 PET) 1 (1831). Later, in *Worcester v. Georgia*, the Chief Justice wrote that the Georgia law requiring a license to live with the Cherokee violated the supremacy clause of the federal constitution because it was in derogation of exclusive federal authority to regulate Indian affairs. Significantly, the Court explained that the dependent status of the tribes neither required them to rely on federal law for their governmental power nor did it eliminate preexisting tribal political autonomy. 31 U.S. (6 PET) at 560, 561.[4]

"The precise limits of tribal powers are not readily definable because tribal authority is attributable in no way to adulation to [the tribes] of federal authority." *Cohen* at 246 quoting *U.S. v. Wheeler*, 98 S. Ct. 1079, 1089 (1978). Essentially,

[3] The Indian Commerce Clause recognizes exclusive federal authority over the tribes giving only Congress the ability to negotiate with tribes and other sovereigns. This provision has been the basis for "broad and exclusive federal powers and responsibilities in Indian affairs." (*Cohen* at 233.) The Constitution also excludes "Indians not taxed" from the meaning of "free persons" counted in determining representatives or apportioning direct taxes. U.S. Constit. Art. I, § 2. According to Cohen, such treatment reflects the distinct limited sovereignty of the tribes.

[4] *Worcester* and *Cherokee Nation* laid out the following essential principles that have governed the relationship of tribes to the federal and state governments since: 1. That by reason of their aboriginal political and territorial status, Indian tribes retain elements of sovereignty; 2.That conquest leaves tribal sovereignty subject to attenuation by Congressional legislation but not by State legislative action; and 3. By virtue of their limited sovereignty and dependence on the United States, the federal government has a fiduciary responsibility toward the tribes. See, *Spaeth, American Indian Law Desk Book* (1993).

tribes possess those aspects of sovereignty "that have not been withdrawn by treaty or statute, or by implication as a necessary result of their dependent status." *Wheeler*, 98 S. Ct. at 1086. Therefore, the true inquiry in matters of tribal power is not whether any authority exists to allow the action, but rather whether there is any Congressional restriction preventing the action. See *W. Canby, Jr., American Indian Law* (1981) at 67. Courts have noted that, at a minimum, tribal governing power reaches both "their members and their territory." *U.S. v. Mezurie*, 95 S. Ct. 710 at 717 (1975).

In the context of Indian Gaming, Tracie L. Stevens, Chair of the National Indian Gaming Commission, explained the interaction of federal, tribal and state law in a letter to Governor Bentley:

> The Indian Gaming Regulatory Act was passed by Congress in 1988 to create a federal statutory framework for Tribal gaming. 25 U.S.C. § 2701, et seq. The purposes of the Act include "the establishment of independent Federal regulatory authority for gaming on Indian lands" and "the establishment of Federal standards for gaming on Indian lands." 25 U.S.C. § 2702(3). Further, Congress established the National Indian Gaming Commission to meet its concerns regarding gaming and the protection of it as a means of generating tribal revenues. *Id.*
>
> Subject to the Act's provisions, qualifying tribes conduct Class II and III gaming on their lands. Unlike Class III gaming, which accords a discrete role for states, Class II gaming is within the jurisdiction of the Indian tribes, subject to regulation by the Federal government as set forth in IGRA. 25 U.S.C. § 2701(a)(2). A tribe may engage in Class II gaming on Indian lands within its jurisdiction if the gaming is located within a state that permits such gaming for any purpose, by any person, organization or entity, and the tribe

> adopts a gaming ordinance approved by the NIGC Chairwoman. *Id.* at § 2701(b)(1).
>
> * * *
>
> In enacting this definition, Congress clearly intended that tribes should have every opportunity to take advantage of technology in the play of bingo. IGRA specifically includes bingo played with an "electronic, computer, or other technological aid." ... Thus, so long as a state permits the game of bingo, regardless of the state's definition of the game, an Indian tribe within that state may also play bingo as defined in IGRA. Accordingly, the tribes are not bound to state definitions of the game of bingo. If a state permits paper bingo only, as Mr. Strange represents Alabama does, a tribe within the state may play electronic bingo so long as it otherwise meets IGRA's Class II gaming definition.

(The complete letter to the Governor is attached as Exhibit D.) The District Attorney's actions in seizing and seeking the forfeiture of the Class II machines squarely contravenes all of the principles of federal and tribal law set forth by Chairwoman Stevens.

B. The sovereignty and Tribal Authority of the MOWA Band.

There are several bases on which the MOWA Band of Choctaw Indians rely to support its claim to be an autonomous, sovereign Indian Tribe. Those bases will be collected in two broad categories: federal actions taken in recognition of the Tribe, and Alabama actions taken in recognition of the Tribe.

The MOWA Band of Choctaw Indians are descendants of the Choctaw Indians who entered into the Treaty of Dancing Rabbit Creek with the United States in 1830. That Treaty grants the Choctaw, including those that remained east

of the Mississippi River, the right to live under their own laws. Since the time of the Treaty, the federal government has repeatedly recognized the MOWA as an Indian Tribe. In fact, Alabama recognized this Treaty in 1832 when it stripped other tribes, but not the Choctaws, of the right of self-governance. Similarly, in more recent years, Alabama has recognized the MOWAs, through legislation, resolution, and administrative action.

1. Federal recognition of the MOWA Band – The Treaty of Dancing Rabbit Creek[5]

The Treaty of Dancing Rabbit Creek was executed on September 27, 1830, between the United States and the "Choctaw Nation of Red People." It was ratified by the United States Senate in February, 1831. 4 Stat. 333. The Treaty grants the Choctaws certain lands west of the Mississippi River and payments of money and commodities in exchange for their agreement to move to the west and to surrender their lands east of the Mississippi River. The Treaty also provides that those Choctaws who wish to remain in the United States could do so.[6]

The Treaty's preamble makes specific reference to the State of Mississippi. However, this language does not support any conclusion that the Alabama

[5] The Treaty is attached as Exhibit E.

[6] The MOWAs trace their lineage from those Choctaws who are described in the Treaty who refused to leave south Alabama. While those Choctaws remained, they moved away from the white population to remote communities in northern Mobile and southern Washington Counties. In a case relating to the Choctaw in Mississippi, the United States Supreme Court has acknowledged that the Treaty of Dancing Rabbit Creek did not result in the removal of all Choctaws. *United States v. John*, 437 U.S. 634, 642-44, 98 S.Ct. 2541, 57 L. Ed. 2d 489 (1978).

Choctaws were not included in the Treaty's operation. Article III of the Treaty refers to all land of the Choctaws east of the Mississippi River and makes no limitation to only those in the State of Mississippi. It is generally accepted that Choctaw lands encompassed not only large parts of Mississippi, but also part of west Alabama. The MOWAs currently inhabit part of Washington County, which abuts Choctaw County, Alabama.

Article XIV provides that each Choctaw who properly "signif[ied] his intention to the Agent within six months of ratification of the Treaty" was "entitled to a reservation of one section of 640 acres of land..." with an additional allotment for unmarried children over the age of 10 living with him. This Article requires that the persons "reside upon the lands intending to become citizens of the states for five years after ratification of this Treaty ..." whereupon a "grant in fee simple shall issue." "Persons who claim under this Article shall not lose the privilege of a Choctaw citizen, but if they ever remove are not entitled to any portion of the Choctaw annuity." The "privilege of a Choctaw citizen" is the privilege of "jurisdiction and government" of their people as granted in Article XIV.[7]

It is clear that "[o]nce considered a political body by the United States, a Tribe retains its sovereignty until Congress acts to divest that sovereignty." *U.S. v.*

[7] The last sentence of Article XVIII provides "[a]nd it is further agreed that in construction of the Treaty wherever well-founded doubt shall arise, it shall be construed most favorably toward the Choctaws." This view has been adopted as a canon of construction by Courts interpreting Indian treaties. *See Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1908), *Antoin v. Washington*, 420 U.S. 194, 95 S.Ct. 944, 43 L. Ed.2d 129 (1975).

Deion, 476 U.S. 734, 105 S. Ct. 2215, 90 L. Ed2d 767 (1986). Deion concerns the abrogation of treaty-authorized hunting rights. The Court stated: "[w]hat is essential is clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty." *Id.*, 476 U.S. at 739, 740. Congress has taken no action to abrogate the MOWA's rights under the Treaty of Dancing Rabbit Creek.[8]

2. Federal Recognition of the MOWA Band – Multiple Federal Agencies Recognize the Band.

Apart from the federal government's recognition of the Choctaws in The Treaty of Dancing Rabbit Creek, there are many other instances of federal recognition. Several executive departments of the federal government have specifically afforded federal monies and rights to the MOWA Choctaws as Indian. The MOWA Tribe offers a synopsis in Exhibit F. Here, we note only that the Department of Commerce (Bureau of the Census), the Department of Housing and Urban Development, the Department of Health and Human Services, and the Department of Education, to name a few, have recognized the MOWAs as Indians.

[8] In *United States v. John*, 437 U.S. 634, 642-44, a Major Crimes Act, 18 U.S.C. § 1153 case, the State of Mississippi argued that there was no basis for federal jurisdiction because the Choctaws in that State had been "fully assimilated into the political and social life of the State." *Id.*, 437 U.S. at 652. The United States Supreme Court ruled that "[n]either the fact that the Choctaws in Mississippi are merely a remnant of a larger group of Indians, long ago removed, nor the fact that federal supervision over them has not been continuous, destroys the federal power to deal with them." 437 U.S. at 653.

It cannot be seriously questioned that the United States Government has treated the MOWAs as an Indian Tribe.[9]

3. Alabama's Recognition of the MOWA Band.

In 1832, an Act passed by Alabama's legislature extended the State's civil and criminal jurisdiction over the Indian territory contained within the State. The Act specifically abolished the "laws, usages, and customs now used, enjoyed or practiced, by the Creek and Cherokee Nations of Indians, ... , contrary to the constitution and laws of this State." However, Alabama's Act did not purport to abolish the laws of the Choctaws. *See, Wall v. Williams*, 11 Ala. 826, 839 (1847).

In *Wall*, the Supreme Court of Alabama construed the Act of 1832 to require that Choctaw law govern the dispute, writing:

> It will be observed, that the cohabitation of the defendant and D. W. Wall commenced previous to the extension of the jurisdiction of this State over the Indian territory, by the Act of 1832; that this enactment abolished only the "laws, usages, and customs of the Creek and Cherokee nations of Indians," – leaving those of the Choctaws in full force, except so far as they might interfere with the exercise of the jurisdiction conferred upon the tribunals of the State. There is then nothing in the statute which takes from the contract its dissoluble quality by act of the parties – nor can the asking a reservation under

[9] There is also much anecdotal evidence of the existence of the Tribe from the halls of Congress. Specifically, Frank W. Boykin, a Congressman from Mobile, Alabama, in correspondence to his good friend, Dr. Sam McKee in Virginia, noted:

> ... we have a lot of wild indians. You will remember that Aaron Burr was captured there on our game preserve at McIntosh in 1806; and then a little later, Chief Geronimo, that great fighting chief, was captured there. Well, we sent them all to Oklahoma, after having them in captivity a long time. Well, I still have a lot of them and they work for us. They can see in the dark and they can trail a wounded deer better than some of our trail dogs.

(See Exhibit G attached.)

> the treaty, the acceptance of a patent from the United States for the land embraced by it, and the continued cohabitation of this State for more than five years after the ratification of the treaty, and the departure of the mass of their tribe to the west, have that effect. We have seen that all these cannot take from the defendant and D. W. Wall their citizenship as Choctaws. The treaty secures to them the right of resuming at pleasure their status in the tribe, without referenced to time. It cannot in this view of the case be assumed, that the marriage was consummated in contemplation of a residence in Alabama, so as to make this State the matrimonial domicile, and its laws govern the relation of the parties. Considering the character of the Indians, their indisposition to renounce native habits and associations, the residence of the parties, etc., such an assumption cannot be indulged.

11 Ala. at 828.[10]

The *Wall* Court also suggested that the Choctaws would remain exempt from Alabama's laws "at least as long as they continue a distinct and independent community." *Id.* at 838. That the MOWAs have continued as an independent community and that the Tribe enjoys a government-to-government relationship with the State of Alabama is hardly newsworthy. First, we note that Alabama has legislatively recognized the MOWAs in Acts 79-228 and 79-343. Those Acts are attached as Exhibits H and I respectively. On December 10, 1981, Charles Graddick, as the Attorney General for the State of Alabama, opined that although

[10] The United States Supreme Court agrees: "[t]he powers of Indian Tribes are, in general, inherent powers of a limited sovereign which has never been extinguished." *United States v. Wheeler*, 435 U.S. 313, 322 (1978) (quoting F. Cohen, Handbook of Federal Indian Law 122 (1945)). "With respect to such internal laws and usages, tribes are left with broad freedom not enjoyed by any other governmental authority in this country." *Duro v. Renia*, 495 U.S. 676, 697 (1990) (referring to retained criminal jurisdiction over tribal members).

Alabama Code § 41-9-703(c)[11] gave recognition power to the Southwest Alabama Indian Affairs Commission, before the regulations implementing that statute were effected, the Legislature retained authority to recognize individual tribes as shown through Acts 79-228 and 79-343. Attorney General Graddick wrote that by those statutes, Alabama recognized the MOWAs. (A copy of the Attorney General's letter is attached as Exhibit J.)

Second, the Alabama Senate passed a resolution declaring that "all federal and state Acts and judicial decisions pertaining to Choctaw Indians are reaffirmed and declaring that all state and county agencies shall be bound by those federal and state Acts and judicial decisions. The resolution was passed on January 11, 1994. It is attached as Exhibit K.

Third, the Alabama Legislature recognized the MOWA Choctaw Housing Authority in Alabama Code § 27-7-2 (1975). All of these statutes contain the clause: "All laws or parts of laws which conflict with this Act are hereby repealed."

Fourth, the Alabama Department of Revenue has made the Tribe's property exempt from ad valorem tax because of the sovereign nature of the Tribe and because of the State's recognition of such. (See attached Exhibit L.)

[11] Alabama Code § 41-9-708 provides for the creation of the "Alabama Indian Affairs Commission." The Commission includes representatives from the seven Tribes in Alabama: the Poarch Band of Creeks, the MOWA Band, the Star Clan of Muskogee Creeks, the Echota Cherokees, the Cherokees of Northeast Alabama, the Cherokees of Southeast Alabama, and the Ma-chis Lower Creeks. This legislation, too, has been cited as official state recognition of the MOWA Choctaw and those others Tribes listed in the statute.

Fifth, numerous letters from the governor's office, the attorney general's office, and from legislators attest to a government-to-government relationship. A letter from Governor Guy Hunt dated July 15, 1991 (attached as Exhibit M) describes the MOWAs as "a group of Alabama Choctaw who have lived in tightly knit Indian communities... for over 170 years." Governor Fob James, Jr. penned a letter dated April 25, 1996, which detailed that the MOWAs were recognized by the State of Alabama in 1979, serve on the Alabama Indian Affairs Commission and the Intertribal Council. (Exhibit N.) These letters and others were written in support of federal recognition, later through legislation and the administrative recognition process before the Bureau of Indian Affairs.[12] A letter from James H. Evans, Attorney General for the State of Alabama, dated July 11, 1991 supported passage of the U.S. Senate bill seeking recognition for the MOWAs. (See Exhibit S.) Similarly, a resolution in the House of Representatives of Alabama dated April 8, 1988 recommended federal recognition of the MOWA Band. (See Exhibit T). The belief that the MOWA Band is Indian is a non-partisan one.

Sixth, the State of Alabama Department of Economic and Community Affairs ("ADECA") has negotiated an agreement with the MOWA Band of Choctaw Indians to make payments to the MOWA Band of .317 percent of the State's gross regular Low Income Home Energy Assistance Program ("LIHEAP")

[12] See also attached letters from Alabama's Lieutenant Governor (Exhibit O), Secretary of State (Exhibit P), State Treasurer (Exhibit Q), and Auditor (Exhibit R).

allotment. (See Exhibit U). Moreover, the Tribe has entered into an agreement with the United States Department of the Interior to receive an ORI number issued by the FBI. That ORI number enables the Tribe to participate in the Alabama Criminal Justice Information Center Commission Research Database. The issuance of the ORI number is acknowledgement that the Agency – the Tribe – meets the criteria of a criminal justice agency under NCIC policy. (See Exhibit V).

Finally, we note that the trial courts of the State of Alabama, and other States, have accorded autonomy and sovereignty to those Tribes recognized by the Alabama Indian Affairs Commission. *See, e.g., Bison v. Echota Cherokee Tribe of Alabama, Inc.*, Circuit Court of Lawrence County, State of Alabama, Civil Action No. CV-2000-245, May 15, 2001 (Bison's claims against the Tribe were dismissed based on Tribal immunity) (attached as Exhibit W) and *Ronald O. Etheridge, Sr. v. Irma Lois Davenport and Donnie Daniels*, in the Circuit Court of Pike County, Alabama, Civil Action No. CV-96-M-273, August 16, 1999 (Court granted motion to dismiss filed by Tribal officials of the Star Clan of Muskogee Creeks because it lacked subject matter jurisdiction because the tribe was an autonomous body entitled to immunity (attached as Exhibit X). Both Circuit Courts held that although each Tribe had been incorporated under state law, such

did not constitute a voluntary abandonment of their sovereignty. *See, e.g.*, *Mashbee Tribe v. New Seabury Corp*., 592 F. 2d 575, 585-587 (1st Cir. 1979).

4. Lack of recognition by the BIA.

Even though the MOWA Band of Choctaw Indians are not currently recognized by the United States Department of the Interior, specifically, the Bureau of Indian Affairs, Office of Federal Acknowledgement ("OFA") as a Tribe for the Bureau's administrative purposes, that does not diminish the existing federal and state recognition of the MOWA sovereign status. The MOWA sought BIA recognition from the precursor to the OFA; however, it is the Tribe's position that recognition by one subagency does not defeat hundreds of years of state and federal recognition. Indeed, another agency within the BIA recognized the Tribe. (See discussion, *supra* at 13, regarding ORI number.) The Tribe's view is understandable given the Byzantine process of gaining BIA recognition. That process is being substantially changed.[13]

[13] The Bureau of Indian Affairs, Office of Federal Acknowledgement, has propounded a draft proposal of far-reaching revisions to the Department's process for federal acknowledgment of Indian Tribes. Kevin Washburn, Interior's Assistant Secretary for Indian Affairs, has produced a "preliminary discussion draft" of potential changes to the Interior's process. (That draft is attached as Exhibit Y.) Washburn and other Interior officials have met repeatedly with members of the National Congress of American Indians Federal Recognition Task Force and other Tribal leaders. One of the significant changes of the new regulations is that the new regulations will utilize as a starting point the year 1934, the year the Indian Reorganization Act ("IRA") was passed. Many Tribes were declared organized Tribes at that time. The preliminary discussion draft, under Section 83.10, states "a petitioner that has petitioned under the acknowledgment regulations previously effective and that has been denied federal acknowledgement may not re-petition the OFA under this part unless its request for re-petition includes a preponderance of the evidence that a change from the previous version of the regulations to the current version of the regulations warrants reversal of the final determination." (See Exhibit Y.)

Kevin Gover, a Professor of Law at Arizona State University College of Law in Tempe, Arizona, served as the Assistant Secretary for Indian Affairs at the Department of Interior from November 1997 until January 2001. Gover testified before the Committee on Indian Affairs in April of 2004 that the start date for recognition of Tribes should be 1934. Additionally, Gover suggested that certain petitioners, which had already been denied recognition, should be permitted another opportunity under the revised process established in the bill. In making this suggestion, he stated as follows: "I remain troubled to this day that justice was denied to certain Tribes... Even some of the petitions I personally acted upon leave me wishing that this revised process had been in effect when I was in office. Into this category I would place the MOWA Choctaw." (See Exhibit Z, p. 7.)

When the new regulations are in place, the MOWA have every intention of filing another petition for recognition.

II. ARGUMENT AND ANALYSIS.

The State of Alabama, through Ms. Rich, cannot usurp federal authority and impinge upon tribal sovereignty on lands that both the state and federal governments have repeatedly recognized constitute an Indian reservation. At least two reasons compel this conclusion. First, the MOWA Tribe enjoys sovereign immunity; as such, the Court lacks jurisdiction over the District Attorney's claims.

Therefore, all claims should be dismissed with prejudice pursuant to Rule 12(b)(1).[14]

Further however, Even if the Tribe did not enjoy sovereign immunity, the Court should still order the return of the MOWA's equipment because no forfeiture claims (or any other claims under state law) can set forth a cause of action on which relief can be granted. All such claims are preempted by federal law (IGRA) and must be dismissed. For these reasons, the Court should grant the Motion to Dismiss and return the Tribe's machines.

A. Because the tribe enjoys sovereign immunity, the motion to dismiss must be granted.

As the Eleventh Circuit has recognized, "it is ... clear that 'as a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity.'" *Contour Spa at the Hard Rock*, 692 F.3d at 1203-04 (alteration omitted) (quoting *Kiowa Tribe of Okla. V. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998)); *Furry v. Miccosukee Tribe of Indians of Fla.*, 685 F.3d 1224, 1226 (11th Cir. 2012). Alabama courts have hewed closely this rule for state recognized Tribes. (*See, Wall v. Williams, supra, see also, Bison* and *Ethridge, supra*.

[14] The Court is entitled to consider the voluminous facts set forth in Part I, *supra*, because these facts are necessary elements of the Tribe's sovereign immunity-based factual attack on the Court's jurisdiction. *See, e.g., Lawrence v. Dunbar*, 919 F. 2d 1525, 1529 (11th Cir. 1990) (district court may properly consider matters outside the pleadings when necessary to resolve a factual attack on its jurisdiction.)

The claim that an Indian Tribe which lacks federal recognition by the BIA is not eligible to claim sovereign immunity has been rejected by federal courts and Alabama's courts. *See Bottomly v. Passamaquoddy Tribe*, 599 F. 2d 1061, 1065, n. 5 (1st Cir. 1979) ("[a] Tribe need not prove that it has been 'federally recognized' in order to assert its immunity from suit."); *see also, Alaska ex rel Yukon Flats School District v. Native Village of Venetie*, 856 F. 2d 1384, 1387 (9th Cir. 1988) in which the Court held that tribal status may be achieved notwithstanding lack of federal recognition. In fact, statutory recognition by a State pursuant to the State's general statutes is sufficient for a Tribe to assert sovereign immunity. *See also, First American Casino v. Eastern Pequot Nation,* Superior Court, Judicial District of New London at New London, docket no. 541674 (July 16, 2001) (Robaina, J.) (30 Conn. L. Rptr. 107).[15] *United States v. James*, 980 F. 2d 1314, 1319 (9th Cir. 1992) ("Tribal immunity is just that: sovereign immunity which attaches to a tribe because of its status as a dependent domestic nation.").

Tribal sovereign immunity applies not only to the tribe itself, but also to tribal enterprises that are owned by, and act as an arm or instrumentality of, the tribe. *See, e.g., Miller v. Wright*, 705 F.3d 919, 923-24 (9th Cir. 2013) ("The settled

[15] Cf., *Masayesva v. Zah*, 792 F. Supp. 11, 78 (D. Ariz. 1992). A non-federally recognized tribe can assert sovereign immunity if the tribe has "tribal status," which would require an examination of whether the federal recognition should be upheld or undertake a careful scrutiny of various historical factors. The District Attorney does not purport to have undertaken any such analysis before committing to sieze the Tribe's equipment.

law of our circuit is that tribal corporations acting as an arm of the tribe enjoy the same sovereign immunity accorded to the tribe itself." (quotation and alteration omitted)); *Freemanville Water Sys., Inc. v. Poarch Band of Creek Indians*, 563 F.3d at 1207 n.1; *Sanderford v. Creek Casino Montgomery*, 2013 WL 131432 at *2 (M.D. Ala. Jan. 10, 2013)("Defendant Creek Casino is indistinguishable from the Tribe for the purposes of tribal sovereign immunity.") (Watkins, J.); *Allman v. Creek Casino Wetumpka*, 2011 WL 2313706 at *2 (M.D. Ala. May 23, 2011) (holding that the Poarch Band of Creek Indians' sovereign immunity extended to one of the Tribe's gaming facilities). Hence, the MOWA Choctaw Entertainment Center is similarly immune.

Tribal officials likewise are protected by the tribe's sovereign immunity when acting in their official capacities and within the scope of their authority. *See Tamiami Partners, Ltd. V. Miccosukee Tribe of Indians of Fla.*, 177 F.3d 1212, 1226 (11th Cir. 1999); *Terry v. Smith*, 2011 U.S. Dist. LEXIS 122160, *20-21 (S.D. Ala. July 19, 2011), *adopted by, claim dismissed by* 2011 U.S. Dist. LEXIS 119791 (S.D. Ala. Oct. 14, 2011) ("The Tribe's sovereign immunity extends to its governmental personnel (i.e., tribal officials such as tribal council members and the tribal police chief). ... Consequently, even if plaintiffs could state a claim, any such claim is barred by the Tribal Officials' sovereign immunity...").

The District Attorney does not allege that the MOWA Tribe waived its sovereign immunity in this case, nor does she contend that Congress has abrogated the Tribe's immunity. "[A]n Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998). A waiver of sovereign immunity cannot be implied, it must be unequivocally expressed. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *see also Oklahoma Tax Commission v. Citizen Band Potawatomi Tribe of Oklahoma*, 498 U.S. 505, 509 (1991). Additionally, it is clear as a matter of federal law that the conduct and regulation of gaming activity on Indian lands is within the scope of tribal officials' authority. *See* 25 U.S.C. § 2701(5). The MOWA Tribe, its enterprises, and any individual Defendants are entitled to sovereign immunity, therefore any claim by the District Attorney must be dismissed for lack of jurisdiction. That the MOWAs are not federally recognized by the BIA is of no moment in this analysis. *See Bottomly,* 529 F. 2d at 1065, n. 5.

The District Attorney may argue that she can maintain some form of action against the individual Tribal members by contending that they acted outside the scope of their authority. However, a mere allegation that an official has acted outside the scope of his authority is insufficient to overcome sovereign immunity. *See, e.g.*, *Smith v. Babbitt*, 875 F. Supp. 1353, 1363 (D. Minn. 1995) ("[T]he mere

allegation that tribal officials violated IGRA does not by itself strip them of sovereign immunity."); *Contour Spa at the Hard Rock, Inc. v. Seminole Tribe of Fla.*, 2011 WL 1303163, at *11 (S.D. Fla. March 31, 2011) (rejecting the argument that a mere allegation that a tribal official exceeded his authority was sufficient to overcome sovereign immunity where there was no evidence that the official violated an applicable federal law); *Miller v. Wright*, 2011 WL 4712245, at *4 (W.D. Wash. Oct. 6, 2011), *aff'd*, 705 F.3d 919 (9th Cir. 2013) (dismissing, on immunity grounds, a case alleging that tribal officials exceeded the scope of their federally recognized authority to impose and collect taxes). Any individual Tribal executive enjoys sovereign immunity.

B. The district attorney's claims are preempted.

Even if the Tribe was not entitled to sovereign immunity, the District Attorney's action would still fail under Rule 12(b)(6) because it fails to state any claim upon which relief can be granted against the Tribe. Ms. Rich's putative state law forfeiture claim is preempted by federal law. Whether this Court takes removal jurisdiction based on federal question jurisdiction or through the doctrine of "complete preemption" by the Indian Commerce Clause or IGRA, the result is the same: a failure to state a claim.

1. The Supremacy Clause and the Indian Commerce Clause preempt, at a constitutional level, the State's claims.

The history of the Indian Commerce Clause found in Article I, § 8, clause 3 demonstrates that it gave plenary power to Congress. Congress is the exclusive entity which regulates Indian Tribes unless it delegates otherwise. One historian writes: "There was little fanfare or debate. With the adoption of the Constitution, Indian relations became the exclusive province of federal law." R. Pump, "The Unfulfilled Promise of the Indian Commerce Clause and State Taxation," 63 Tax Lawyer 897, 937.[16] Therefore, United States Supreme Court, in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 107 S. Ct. 1083, 94 L. Ed. 2d 244 (1987), correctly concluded states have no authority to regulate gaming on Indian lands. The Court ruled that Indian Tribes are entitled to license and operate gaming facilities on Indian land without state regulation, if such tribes are located in states that regulate rather than prohibit gaming, even if such gaming is highly regulated. *Id.* at 221-222, 107 S. Ct. 1083.

> If the intent of a state law is generally to prohibit certain conduct it falls under the state's criminal jurisdiction. But if the state law generally permits the conduct at issue subject to regulation, it must be classified as civil regulatory... The shorthand test is whether the conduct at issue violates the state's public policy.

Id. at 209, 107 S. Ct. 1083.

[16] Professor Pump noted that other legal historians attributed the lack of debate to the fact that "all Congress did was ratify the dominant view that the national government had the sole and exclusive right to regulate affairs with all sovereign Indian tribes." *Id.* at n. 160.

The United States District Court for the District of Oregon in *Deuberry v. Kulongoski*, 406 F. Supp. 2d 1136 (D. Ore. 2005), explained the rationale underlying the *Cabazon* Court's reasoning is the "longstanding principle that a state has no jurisdiction over Indian lands unless Congress has expressly ceded that jurisdiction." It is clear that, since at least 1832, the United States Supreme Court has recognized tribal sovereignty. *See, e.g., Worchester v. State of Georgia*, 31 U.S. 515, 557, 6 Pet. 515, 8 L. Ed. 483 (1832) (Tribes were "distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed, by the United States."). This tribal sovereignty is limited only by Congress. *See United States v. Wheeler,* 435 U.S. 313, 323, 98 S. Ct. 1079, 55 L. Ed. 2d 303 (1978) ("The sovereignty that an Indian Tribe retains is of a unique and limited character. It exists only at the sufferance of Congress."). Therefore, only the federal government or the Tribes themselves can subject the Tribes to suit. Tribal sovereignty "is not subject to diminution by the states." *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754, 118 S. Ct. 1700, 140 L. Ed. 2d 981 (1998). *See also, Wyandotte Nation v. Sebelius*, 337 F. Supp. 2d 1253 (D. Kan. 2004). The Indian Commerce Clause, together with the Supremacy Clause, arguably elevate "complete preemption" to the constitutional level.

After the *Cabazon* decision, Congress took note of Indian gaming and IGRA was passed. In the next sections of this brief, we demonstrate that IGRA has preempted the field in the governance of gaming activities on Indian lands. Therefore, the State has no power to undertake any forfeiture action.

2. The District Attorney's claims do not exist under the auspices of IGRA.

The MOWA Tribe, as a sovereign Tribe possessing a treaty relationship with the United States, and as recognized by the State of Alabama, has the exclusive right to regulate gaming activities on its lands. *See, California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 221-222, 94 L. Ed. 2d 244, 107 S. Ct. 1083 (1987) (Indian Tribes located within states that permit gaming, even though such gaming may be highly regulated, are entitled to license and operate gaming without state interference). *See also, Willis v. Fordice, et al.*, 850 F. Supp. 523 at 524 (S.D. Miss. 1994).

In response to the *Cabazon* decision, Congress passed the Indian Gaming Regulatory Act of 1988 (IGRA) which set forth a framework for the growing industry of Indian gaming. See 25 U.S.C. §§ 2701 – 2721 and 18 U.S.C. § 1166.[17]

[17] 18 U.S.C. §§ 1166 – 1168 are criminal regulations pertaining to gaming on Indian lands. Section 1166(d) grants exclusive jurisdiction over criminal prosecutions of violations of state gambling laws to the United States Courts, unless such jurisdiction has been granted to a state by an Indian Tribe pursuant to a Tribal State Compact approved by the Secretary of the Interior. Clearly no such grant of jurisdiction has occurred here.

The statute divides gaming into three classes,[18] each class having a different regulatory scheme. Class I includes social games played for prizes of minimal value and other traditional Indian games. See 25 U.S.C. § 2703(6). Class I Gaming is within the exclusive jurisdiction of the Indian Tribe and is not subject to the provisions of federal law. 25 U.S.C. § 2710(a)(1).

Class II Gaming includes bingo, certain non-banking card games not prohibited by state law, and pull tabs, lotto, punch boards and other games similar to bingo if played in the same location as bingo. 25 U.S.C. § 2703(7)(A). Class II games are allowed on Indian lands in a state which permits such gaming for any purpose by any person and is regulated by the National Indian Gaming Commission. ("NIGC"). 25 U.S.C. § 2710(b). The gaming at issue in this case is Class II, or Bingo. At most, the federal government and the NIGC regulate the gaming, not the State. The State's participation is limited to the determination as to whether the State "permits such gaming for any purpose by any person."

Class III Gaming encompasses all forms of gaming which were not included in Class I or Class II Gaming, including casino gaming, slot machines, and paramutuel betting. 25 U.S.C. § 2703(8). Only in Class III gaming does the State

[18] Section 2701 of IGRA contains Congressional findings concerning gaming on Indian Lands, including: Indian Tribes have the exclusive right to regulate gaming activity on Indian Lands if gaming activity is not specifically prohibited by federal law and is conducted within a state which does not, as a matter of criminal law and public policy, prohibit such gaming activity. 25 U.S.C. § 2701(5).

become directly involved. At that level, the Tribe must negotiate a compact with the State to undertake gaming.

Pursuant to IGRA, the District Attorney's claim would be dismissed because the Act does not give the State such a cause of action. *See, e.g.*, 25 U.S.C. § 2710(d)(7)(A)(ii) (permitting states to bring suit against the National Indian Gaming Commission to enjoin unauthorized Class III gaming, not against tribal defendants); *see also Florida v. Seminole Tribe of Fla.*, 181 F.3d 1237, 1245-49 (11th Cir. 1999). Further, the District Attorney's action would be dismissed because any attempt by the State to regulate gaming activity on Indian lands is completely preempted by Congress' unambiguous intention for IGRA to entirely displace state law. Congress has left no room for the States to regulate gaming activities occurring on Indian lands. In *Lac Du Flambeau Band of Superior Chippewa Indians*, 743 F. Supp. 645, 652-53 (W.D. Wisc. 1990) the Court explained:

> The United States shall have exclusive jurisdiction over criminal prosecutions or violations of state gambling laws that are made applicable under this section [18 U.S.C. § 1166(d)] to Indian country, unless an Indian Tribe, pursuant to a Tribal State Compact approved by the Secretary of the Interior under § 11(d)(8) of the Indian Gaming Regulatory Act, or under any other provision of federal law, has consented to the transfer to the state of criminal jurisdiction with respect to gambling on the lands of the Indian Tribe.

Unlike the doctrine of complete preemption for removal jurisdiction, "ordinary preemption operates to dismiss state claims on the merits and may be invoked in

either federal or state court" as a complete affirmative defense.[19] Here, dismissal is required because even if IGRA does not completely preempt state law (for jurisdictional purposes), IGRA entirely preempts the field of Indian gaming.

The United States has completely occupied the field of Indian gaming through IGRA, which recognizes Indian tribes' "exclusive right to regulate gaming activity on Indian lands..." 25 U.S.C. § 2701(5). *See also*, 25 C.F.R. § 501.2(c) ("Class II gaming on Indian lands shall continue to be within the jurisdiction of an Indian tribe, but shall be subject to the provisions of [IGRA] and this chapter.") 25 C.F.R. § 542.5 ("Nothing in this part shall be construed to grant to a state jurisdiction in class II gaming..."). The Eleventh Circuit has recognized that:

> IGRA "is intended to expressly preempt the field in the governance of gaming activities on Indian lands. ...[U]nless a tribe affirmatively elects to have State laws and State jurisdiction extend to tribal lands,

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[19] *Lamm v. Bekins Van Lines Co.*, 139 F.Supp. 2d 1300, 1304 (M.D. Ala. 2001) (quotation omitted).

As Judge Thompson has explained:

> Complete preemption is importantly distinct from the ordinary preemption of state law by federal law although, as the Eleventh Circuit has observed, the two categories of preemption has often been conflated: "[U]se of the term 'preemption' in this context has caused a substantial amount of confusion between the complete preemption doctrine and the broader and more familiar doctrine of ordinary preemption. For that reason, it is worth pointing out that: complete preemption functions as a narrowly drawn means of assessing federal removal jurisdiction, while ordinary preemption operates to dismiss state claims on the merits and may be invoked in either federal or state court."
> ...
>
> However, complete preemption is unlike ordinary preemption in that the ultimate intent inquiry for the former is not the choice of law question or whether a particular federal law is designed to trump state law but rather the forum selection question of whether Congress intended to establish federal question removal jurisdiction for claims that appear form the plaintiff's complaint to be rooted only in state law and thus otherwise subject to the well pleaded complaint rule.
>
> *Id.* at 104-05 (citations omitted).

> the Congress will not unilaterally impose *or allow* State jurisdiction on Indian lands for the regulation of Indian gaming activities."

Tamiami Partners, Ltd., 63 F.3d at 1033 (emphasis added). *See also, Gaming Corp. of Am. v. Dorsey & Whitney*, 88 F.3d 536, at 544-50 (holding that IGRA left no room for states to regulate or apply state law in any way that "would interfere with the [tribe's] ability to govern gaming."). The MOWA Band has not consented to any state regulation of gaming on its lands by Alabama, and the District Attorney has not alleged to the contrary.

The District Attorney requests an order from the state court declaring that the gaming activities of the MOWA violate State law. In order to resolve the State's claim, this Court must necessarily determine whether state law may be applied to the Tribe's gaming activities on tribal lands – a paradigmatic example of just the sort of state law claim that Congress "unequivocally ... intended to expressly preempt [by occupying] the field in the governance of gaming activities on Indian lands." *Tamiami Partners*, 63 F.3d at 1033 (quotation omitted). Because the District Attorney is clearly attempting to regulate gaming activity on Indian lands, her state law forfeiture claim is preempted by IGRA; and, any Complaint must be dismissed for its failure to state a claim against the Defendants.

Thus, we return to the point of beginning: if the State lacks jurisdiction to criminally prosecute the MOWA Choctaw Tribe, it cannot retain any residual authority to engage in any preliminary law enforcement activities such as searching

for and seizing any "illegal" devices under State law. The warrant issued in this case was clearly not valid under Federal Rule of Criminal Procedure 41(a). This Rule allows the state court to issue a warrant for an alleged violation of federal law. However, the warrant may only be issued upon the request of a federal law enforcement officer or attorney. *See United States v. Radlick*, 581 F. 2d 225, 228 (9th Cir. 1978). The November 7, 2013 search warrant was not issued at the request of any federal officer or attorney and, therefore, the search warrant was not a valid federal search warrant.

Further, the November 7, 2013 search warrant was not valid as a state action. Alabama is without authority to engage in preliminary law enforcement activities if it is without power to prosecute a violation. *See* Clinton, Criminal Jurisdiction Over Indian Lands, 18 Ariz. L. Rev. 503, 572-74 (1976). This rule is consistent with the strong federal policy of minimizing state interference with Tribal life. *Id.* The precise issue presented is whether the state may issue and execute a warrant not complying with Federal Rule 41(a) to search for and seize evidence if the State is without authority to prosecute because of exclusive federal jurisdiction.

The United States Court of Appeals for the Tenth Circuit has addressed this issue. In *United States v. Baker*, 894 F. 2d 1141 (10th Cir. 1990), state authorities executed a state search warrant on a reservation. The evidence seized was later

turned over to federal authorities for use in a federal prosecution. The Tenth Circuit concluded that the evidence should have been suppressed because the search warrant was invalid. The search warrant was not valid as a federal warrant because no one obtained permission pursuant to Rule 41(a). The search warrant was also not valid as a state warrant because the state had no jurisdiction over the reservation to enforce its laws, including the execution of a search warrant, unless Congress consented to the state's jurisdiction.

In *Ross v. Neff*, 905 F. 2d 1349 (10th Cir. 1990), an arrest on Indian lands was determined to be illegal, again, because the state was without jurisdiction to enforce its laws on Indian lands.

Additionally, under general principles of search and seizure law, "when a judicial authority... issues a search warrant... it is presumed that the alleged defense... is within the limits of the issuing authority." J. Varon, Searches, Seizures and Immunities, 408 (2d. ed. 1974).

> The majority view is that jurisdiction is necessary for the protection of the constitutional rights of the individual. The decisions uniformly hold that an issuing authority can only take cognizance of offenses that are within the purview of his authority... The lack of jurisdiction by the issuing authority to issue a search warrant is not to be considered as a mere technicality.

Id. at 409. Since a judicial officer's writ cannot run outside the officer's jurisdiction, *see United States v. Strother*, 578 F.2d 397 (D.C. Cir. 1978), the

November 2013 warrants were invalid because the State did not have the authority to issue them.

Conclusion

The State's effort to use state law forfeiture principles to regulate gaming activity on the MOWA lands is wholly without merit. Federal and state courts have made it clear that Indian tribes, as well as their tribal enterprises and officials, enjoy sovereign immunity against exactly this sort of litigation. Congress has clearly established that the regulation of Bingo on Indian lands is exclusively within the purview of Indian tribes and the NIGC. The Motions to Dismiss must be granted.

Respectfully submitted this the 24th day of February, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of February, 2014, I electronically filed the foregoing with the Clerk of the Court using CM/EFS which will send notification of such filing to all counsel of records, or if any counsel does not participate in CM/EFS, a copy has been served by United States Mail, postage prepaid and properly addressed as follows:

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