IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

STATE OF KANSAS, *ex rel.* *DEREK SCHMIDT* *Attorney General, State of Kansas,*	)	
BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF CHEROKEE, KANSAS,	)	
Plaintiffs,	)	
v.	)	Case No. 5:15-cv-04857-DDC-KGS
NATIONAL INDIAN GAMING COMMISSION; et al.,	)	
Defendants.	)	

PLAINTIFFS' RESPONSE IN OPPOSITION TO THE QUAPAW DEFENDANTS' MOTION TO DISMISS

Plaintiffs, the State of Kansas and the Board of County Commissioners of the County of Cherokee, Kansas, respond to defendants', the Downstream Development Authority of the Quapaw Tribe of Oklahoma (O-Gah-Pah), the Quapaw Tribal Development Corporation, John L. Berrey, Barbara Kyser Collier, Art Cousatte, Thomas Crawfish Mathews, Larry Ramsey, Tamara Smiley-Reeves, Rodney Spriggs, and Fran Wood (collectively the "Tribal Defendants"), motion to dismiss as follows.

This court has subject matter jurisdiction to reach and decide the merits of this action. Further, the Amended Complaint states claims upon which relief may be granted. Thus, the Tribal Defendants' motion must be denied.

INTRODUCTION

The Quapaw Tribe of Indians of Oklahoma ("Quapaw" or "Tribe") applied to have a tract

of land in Kansas adjacent to their Downstream Casino in Oklahoma taken into trust by the United States for non-gaming purposes. The land was taken into trust by the United States Department of the Interior ("DOI") Bureau of Indian Affairs ("BIA") Miami Agency office. At issue herein is the question of whether the land, once was taken into trust became "Indian lands" pursuant to 25 U.S.C. § 2703(4). Gaming on trust lands acquired after October 17, 1988, is generally prohibited by IGRA unless the land fulfills certain requirements set forth in 25 U.S.C. § 2719, which do not exist in this case.

Despite the assurances by the Quapaw that the land was to be used for non-gaming purposes, the Quapaw requested the National Indian Gaming Commission's ("NIGC") opinion on whether the Kansas land is eligible for gaming. The Quapaw Defendants have announced and continue to publically affirm their intention to construct a gaming facility on the land. Plaintiffs contend the Kansas land does not meet the requirements in § 2719 to be eligible for gaming.

Because the Kansas land does not meet the § 2719 exception, constructing and operating a casino on the land would violate the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 ("IGRA") and the Tribal Defendants should be estopped from doing so based on their representations to the BIA. The exception to sovereign immunity based on *Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908), applies as plaintiffs allege ongoing violations of federal law and seek prospective relief.

ARGUMENTS AND AUTHORITY

Standards of Review

The Tribal Defendants bring their motion to dismiss under Fed. R. Civ. P. 12(b)(1) and 12(b)(6) for lack of subject matter jurisdiction and pursuant to the doctrine of tribal sovereign immunity. To survive a motion for failure to state a claim upon which relief can be granted, a

plaintiff's complaint "does not need detailed factual allegations," but must contain enough facts "to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The Court must "accept as true all well-pleaded factual allegations in a complaint and view these allegations in the light most favorable to the plaintiff." *Smith v. United States*, 561 F.3d 1090, 1098 (10th Cir. 2009). The Court may also consider exhibits attached to the complaint. *Id.* The Court must not weigh the potential evidence, but simply "assess whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted." *Id.* (internal quotation marks and citations omitted).

Under Fed.R.Civ.P. 12(b)(1), in reviewing a facial attack on the complaint "a district court must accept the allegations in the complaint as true." *Holt v. United States*, 46 F.3d 1000, 1002 (10th Cir. 1995). If the 12(b)(1) motion attacks the facts asserted as the basis for subject matter jurisdiction, "a district court may not resume the truthfulness of the complaint's factual allegations," and may review documents outside the pleadings to determine whether subject matter jurisdiction exists. *Id.*

The Tribal Defendants allege the State has no jurisdiction to assert a cause of action against the Tribe concerning class II gaming activities. ECF 51, p. 12. The Tribal Defendants invoke the protection of sovereign immunity and argue the Tribe, its members, and corporate entities are immune from suit. At least one tribal corporate entity has waived sovereign immunity. Plaintiffs, however, bring suit against individual tribal officers in their official capacity for prospective relief only, and thus tribal immunity does not shield those defendants from suit under the doctrine of *Ex parte Young*.

I. The Downstream Development Authority has waived sovereign immunity

The Tribal Defendants acknowledge that tribal sovereign immunity may be waived. *See*

ECF 51, p. 14. At least one tribal corporate entity has waived its sovereign immunity for this suit. The Downstream Development Authority's charter gives it the power to "Sue Persons in its own name" and to "consent to the exercise of jurisdiction over any suit or over the Authority by the federal courts." (Exhibit A[1]). A "sue and be sued" clause is interpreted as an express waiver of a tribal corporation's sovereign immunity. *See Marceau v. Blackfeet Hous. Auth.*, 455 F.3d 974, 979-81 (9th Cir. 2006), *opinion adopted in part, modified in part on reh'g*, 519 F.3d 838 (9th Cir. 2008) *opinion amended and superseded on denial of reh'g,* 540 F.3d 916 (9th Cir. 2008) *and opinion reinstated in part, superseded in part,* 540 F.3d 916 (9th Cir. 2008); *Rosebud Sioux Tribe v. A & P Steel, Inc.*, 874 F.2d 550, 552 (8th Cir. 1989); *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) (". . . sue and be sued clauses in corporate charters function as express waivers of immunity if they are found to apply to the tribal entity sued in the litigation."). Defendant Berrey has acknowledged that the Downstream Development Authority has involvement and decisionmaking authority relating to gaming on the Kansas land. ECF 51.1, ¶ 17. As the Downstream Development Authority has waived its immunity from suit, it and its officers have no immunity to prevent suit against them in their official capacity.

II. Suit against individual tribal officers in their official capacity is appropriate under *Ex parte Young.*

The tribal defendants conflate the standards for subject matter jurisdiction under *Ex parte Young* and the 12(b)(6) standard for stating a claim upon which relief may be granted. Absent subject matter jurisdiction, the court may not reach the merits of the Amended Complaint. Where, as here, the Amended Complaint does state claims against the tribal defendants, they

1 Attached is a copy of the resolution adopting an ordinance chartering the Downstream Development Authority and a copy of the Charter of the Downstream Development Authority of the Quapaw Tribe of Oklahoma (O-Gah-Pah) available at: https://www.quapawtribe.com/ArchiveCenter/ViewFile/Item/201.

cannot use the circular and flawed logic that the content of the complaint proves or disproves subject matter jurisdiction.

Ex parte Young, 209 U.S. 123 (1908), permits a suit against a tribal official for prospective declaratory and injunctive relief as an exception to the doctrine of sovereign immunity. "In *Ex Parte Young*, the [Supreme] Court held that the Eleventh Amendment generally will not operate to bar suits so long as they (i) seek only declaratory and injunctive relief rather than monetary damages for alleged violations of federal law, and (ii) are aimed against state officers acting in their official capacities, rather than against the State itself." *Hill v. Kemp*, 478 F.3d 1236, 1255-56 (10th Cir. 2007). *Ex Parte Young* is "an exception not just to state sovereign immunity but also to tribal sovereign immunity." *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1154 (10th Cir. 2011).

The Tribal Defendants argue the plaintiffs cannot satisfy the requirements for the *Ex parte Young* exception to apply. ECF No. 51, § II. The Tribal Defendants, however, seek to impose a higher standard of review than the law requires. Even so, plaintiffs have alleged a threatened violation of federal law which is sufficient to meet the *Ex parte Young* requirements.

A. The Tribal Defendants seek to impose a higher standard of review than the law requires to determine whether Ex parte Young *applies.*

To determine whether *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." *Verizon Maryland, Inc. v. Pub. Serv. Comm'n of Maryland*, 535 U.S. 635, 636, (2002) (emphasis added). The Tenth Circuit has held,

> whether the plaintiff has alleged an ongoing violation of federal law [ ] "does not require us to ascertain whether state officials actually violated federal law. Instead, 'we only need to determine whether Plaintiffs state a non-frivolous, substantial claim for relief against the [s]tate officers that does not merely allege a violation of federal law 'solely for the purpose of obtaining jurisdiction.'"

Muscogee (Creek) Nation v. Pruitt, 669 F.3d 1159, 1167 (10th Cir. 2012) (internal citations omitted). "[T]he inquiry into whether suit lies under *Ex parte Young* does not include an analysis of the merits of the claim. See *Coeur d'Alene, supra,* at 281, 117 S.Ct. 2028 ("An *allegation* of an ongoing violation of federal law ... is ordinarily sufficient" (emphasis added))." *Verizon Maryland, Inc. v. Pub. Serv. Comm'n of Maryland*, 535 U.S. 635, 646, (2002). Thus, the Tribal Defendants arguments as to the merits of the whether there actually is an ongoing violation of law is irrelevant to determine whether *Ex parte Young* applies.

In *Muscogee (Creek) Nation*, the Tenth Circuit held the district court erred when it held the *Ex parte Young* exception did not apply because, while the plaintiffs appropriately requested prospective relief against state officials acting in their official capacities, they did not set forth a "plausible claim of a violation of federal law." In essence, "the district court relied on the same standard that applies to a motion to dismiss for failure to state a claim under Fed.R.Civ.P. 12(b)(6)." The Tenth Circuit held that to equate the two standards was in error. "Because '[j]urisdiction is not defeated by the possibility that averments might fail to state a cause of action on which petitioners [can] actually recover,' our analysis of subject matter jurisdiction does not turn on whether the complaint states a valid cause of action." *Muscogee (Creek) Nation*, 669 F.3d at 1168 (internal citations omitted).

The Tribal Defendants liken this situation to *Pearlman v. Vigil-Giron*, 71 F. App'x 11, 2003 WL 21666673 (10th Cir. 2003) (unpublished). In *Pearlman*, the *pro se* plaintiff brought suit alleging his First and Fourteenth Amendment rights under the United States Constitution would be violated if the Secretary of State distributed a general election ballot containing printed candidate names versus only spaces for voters to write-in names of candidates. *Id.* at 12. The plaintiff's claim was dismissed because he failed to assert a non-frivolous violation of federal

law. *Id.*at 15. The Tenth Circuit held the claim was frivolous because there was a United States Supreme Court case which directly held that prohibiting write-in voting was constitutional and inherently rejected the argument for any constitutional right to a ballot constructed solely for write-in voting. *Id.* (citing *Burdick v. Takushi*, 504 U.S. 428, 437-39 (1992)).

Here, however, the Tribal Defendants can point to no federal case which prohibits a sovereign for being equitably estopped from gaming on land based on representations made in a land trust application. The representations made during that process altered the way the trust application was evaluated and were relied upon by the plaintiffs in their involvement in the trust application. ECF No. 13, ¶ 22. The Tribal Defendants also do not identify a case in which the DOI's interpretation of 25 C.F.R. § 292.4 has been upheld in light of *Carcieri v. Salazar*, 555 U.S. 379 (2009). Based upon this case law, plaintiffs contend the Kansas land does not meet the exception set forth in 25 U.S.C. § 2719 and is therefore not eligible for gaming. ECF No. 13, ¶¶ 36-39. To game on the land would be illegal and a violation of IGRA.

Thus, Plaintiffs' claims are not frivolous and are grounded in case law. *See* ECF No. 13, ¶¶ 36-39. Thus, this court has subject matter jurisdiction over the claims and the *Ex parte Young* exception to tribal sovereign immunity applies.

B. Plaintiffs have alleged ongoing threatened violation of federal law sufficient to support the application of Ex parte Young.

Plaintiffs have alleged a threatened violation of federal law sufficient to support application of the *Ex parte Young* doctrine, including the Tribal Defendants' repeated and public assertions they will build on land in Kansas, which would violate federal law and from which they should be precluded based on federal common law equitable estoppel principles.

Plaintiffs argue no violation of law has occurred because IGRA is not implicated unless and until gaming actually occurs. ECF 51, p. 18. The *Ex parte Young* requirement that the

violation of federal law be ongoing is satisfied when the violation of law is threatened, even if the threat is not yet imminent. *Summit Med. Associates, P.C. v. Pryor*, 180 F.3d 1326, 1338 (11th Cir. 1999). In *Summit Med. Associates*, the Eleventh Circuit considered whether sovereign immunity barred suit against the Governor, the Attorney General, and the District Attorney challenging the Alabama Partial-Birth Abortion Act of 1997. *Id.* at 1329. The defendants argued the plaintiffs had not challenged any action that an Alabama officer had actually taken, rather only the responsibilities such officers had in their status as state officers. *Id.*at 1337. The Eleventh Circuit disagreed that the "possibility" of a violation of law was not sufficient to justify the application of *Ex parte Young*. The court held, "the ongoing and continuous requirement merely distinguishes between cases where the relief sought is prospective in nature, *i.e.*, designed to prevent injury that will occur in the future, and cases where relief is retrospective." *Id*. Thus, where there is a threat of future violation of law "that may be remedied by prospective relief, the ongoing and continuous requirement has been satisfied." *Summit Med. Associates, P.C.*, 180 F.3d at 1338. *See also McBurney v. Cuccinelli*, 616 F.3d 393, 399 (4th Cir. 2010) ("where there is a threat of future enforcement that may be remedied by prospective relief, the ongoing and continuous requirement has been satisfied" and declining to require that the threat be imminent.).

The Amended Complaint expressly and repeatedly alleges the threat of a violation of federal law in that the Tribal Defendants are preparing to act in violation of federal law. The Tribal Defendants have announced their intentions to build and operate a casino on the Kansas land *See* ECF 13, ¶¶ 26-27. The Tribal Defendants continue to publically assert these intentions. The Plaintiffs are not challenging the Tribal Defendants' right to seek an Indian lands opinion from the NIGC, but rather are prospectively ensuring the Tribal Defendants do not act upon that letter because the NIGC's application of the "last reservation exception" is wrong, and to

conduct gaming on such land would be a violation of IGRA and federal law. See ECF No. 13, ¶¶ 37-39. IGRA prohibits Tribes from conducting gaming, including Class II gaming, on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988, unless certain requirements are met. 25 U.S.C. §§ 2710(a)(2), 2719. The Amended Complaint alleges that to conduct gaming on the Tribe's trust land in Kansas would not meet those requirements and thus, constitute a violation of federal law. ECF 13, ¶¶ 17, 37-39, 41-47. Thus, the Amended Complaint seeks prospective relief to prevent the tribal members from acting in violation of federal law.

Defendant Berrey has acknowledged that members of the Tribal Business Committee and Downstream Development Authority would have possible decisionmaking authority with regards to future gaming on the Kansas land. ECF No. 51.1, ¶ 17. Further, the Tribal Defendants have made repeated and public announcements of their intentions to build and operate a gaming facility on the Kansas land. The Amended Complaint fully pleads allegations authorizing prospective relief against the Tribal Defendants and suit lies under *Ex parte Young*.

Defendants further argue equitable estoppel is insufficient to support application of *Ex parte Young.* The plaintiffs' estoppel claim against the Tribal Defendants is based in federal common law and is sufficient to support the application of *Ex parte Young*. "*Ex parte Young* is not limited to claims that officials are violating the federal Constitution or federal statute; it applies to federal common law as well." *Salt River Project Agr. Imp. & Power Dist. v. Lee*, 672 F.3d 1176, 1182 (9th Cir. 2012).

In *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140 (10th Cir. 2011), the Tenth Circuit examined whether the alleged unlawful exercise of tribal court jurisdiction in violation of federal common law was an ongoing violation of "federal law" sufficient to sustain the application of

Ex parte Young. *Id.* at 1155. The court noted there is no case "refusing to apply the doctrine because the alleged violation was merely one of federal common law." *Id.* Because there was "an established right to be protected against the unlawful exercise of Tribal Court judicial power," the court held the action fell within the *Ex parte Young* exception, and was not barred by sovereign immunity.

Similarly, here, estoppel is an established federal right "invoked to avoid injustice." *Heckler v. Cmty. Health Servs. of Crawford Cnty., Inc.*, 467 U.S. 51, 59-60, 104 S. Ct. 2218, 2223-24, 81 L. Ed. 2d 42 (1984).

> [T]he traditional elements of equitable estoppel are: (1) the party to be estopped must know the facts; (2) the party to be estopped must intend that his conduct will be acted upon or must so act that the party asserting the estoppel has the right to believe that it was so intended; (3) the party asserting the estoppel must be ignorant of the true facts; and (4) the party asserting the estoppel must rely on the other party's conduct to his injury.

Penny v. Giuffrida, 897 F.2d 1543, 1545-46 (10th Cir. 1990). "'[I]t is well settled that the doctrine of equitable estoppel, in proper circumstances' may be invoked against a sovereign "in a variety of . . . contexts." *Fredericks v. C.I.R.*, 126 F.3d 433, 448 (3d Cir. 1997) *acq., IRS Announcement Relating to: Fredericks*, 1998-2 C.B. XIX (IRS ACQ 1998) and *acq. recommended by BARRY I. FREDERICKS V. COMMISSIONER*, AOD-1998-04 (IRS AOD Aug. 31, 1998) citing *Simmons v. United States*, 308 F.2d 938, 945 (5th Cir.1962). *See also United States v. Lazy FC Ranch*, 481 F.2d 985, 988 (9th Cir. 1973) (". . . the estoppel doctrine is applicable to the United States where justice and fair play require it.").

The Tribal Defendants acknowledge that the Tenth Circuit has applied *Ex parte Young* on the basis of a federal common law violation in *Crowe & Dunlevy, P.C.*, but argues the court did not address *Worcester County Trust Co. v. Riley*, 302 U.S. 292, 296-97, 58 S.Ct. 185, 186-87 (1937), and the premise that for the action of a state official to be restrained, the action to be restrained

must contravene the statutes or Constitution of the United States. ECF No. 51, p. 29, fn. 19. This situation meets that requirement. If the Tribal Defendants game on the Kansas land, they will be in violation of IGRA as the land does not meet the exception set forth in 25 U.S.C. § 2719 and is not eligible for gaming.

The Tribal Defendants' arguments that the plaintiffs' theory "lacks any force in even suggesting that a violation of law has occurred" is irrelevant as the court will not determine the merits of whether a violation actually occurred. ECF 51, p. 29; *Verizon Maryland, Inc.*, 535 U.S. at 646. Even so, plaintiffs have alleged facts sufficient to support an equitable estoppel claim. The Tribal Defendants note equitable estoppel can apply only when the party knowingly misrepresents facts. *Id.* citing *Tsosie v. United States*, 452 F.3d 1161, 1165-66 (10th Cir. 2006). Plaintiffs have alleged the Tribal Defendants knew "for years" they intended to use the Kansas land for gaming. ECF No. 13, ¶ 27. Despite this knowledge, the Tribal Defendants misrepresented to the Bureau of Indian Affairs that the Kansas land was to be used for non-gaming purposes. That representation impacted the procedure for taking the land into trust and the plaintiffs relied to their detriment on those representations during the trust proceedings. Thus, the *Ex parte Young* standards have been met, and this court has subject matter jurisdiction.

III. Plaintiffs do not seek to circumvent IGRA as their claims do not arise under that statutory scheme, but are based in the common law principles of equitable estoppel.

The Tribal Defendants argue *Ex parte Young* does not apply because Congress created a statutory scheme in IGRA which provide the remedies Congress intended and preclude plaintiffs' claims. *Ex parte Young* was narrowed by *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 74, 116 S. Ct. 1114, 1132, 134 L. Ed. 2d 252 (1996), which held, "where Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created

right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon *Ex parte Young.*" Plaintiffs' claims, however, do not arise under IGRA.

In *Ellis v. Univ. of Kansas Med. Ctr.*, 163 F.3d 1186 (10th Cir. 1998), the Tenth Circuit acknowledged this limitation when the plaintiff brought suit alleging violations of her rights under the First and Fourteenth Amendments and 42 U.S.C. §§ 1981, 1983, 198, and 1988. *Id.* at 1189. The court, however, did "not reach the issue whether Congress prescribed in §§ 1983 and 1985 a detailed remedial scheme barring application of *Ex parte Young* because Ellis' claims with respect to those remedial statutes arise under the Constitution." *Id.* at 1197.

Similarly, here, plaintiffs' claims against the Tribal Defendants arise not under IGRA specifically, but from the common law principles of equitable estoppel. There is no "detailed remedial scheme" to be applied when the Tribal Defendants have intentionally misrepresented their intentions with the Kansas land and deprived plaintiffs the opportunity to be fully heard during the trust application process. Plaintiffs' claims sound in common law and there is no statutory right at issue. Thus, an action based on *Ex parte Young* is permissible.

CONCLUSION

Plaintiffs have sufficiently alleged an ongoing violation of federal law and seek prospective relief. The Tribal Defendants' efforts to impose a higher standard of review in applying *Ex parte Young* which essentially asks the plaintiffs' to prove the merits of their entire case should be denied. Instead, a "straightforward inquiry" demonstrates that an exception to the Tribal Defendants' sovereign immunity under *Ex parte Young* and the Tribal Defendants' motion to dismiss should be denied.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing on the 6th day of July, 2015, with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to the following:

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I further certify that I mailed the foregoing to the following non-CM/ECF participants:

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