Case No. 2017-6247

In the

United States Court of Appeals

for the

Tenth Circuit

COMANCHE NATION OF OKLAHOMA,

Plaintiff-Appellant,

v.

RYAN ZINKE, Secretary U.S. Department of the Interior,
JAMES CASON, Acting Deputy Secretary U.S. Department of the Interior,
JONODEV OSCELOA CHAUDHURI, National Indian Gaming Commission
and EDDIE STREATER,

Defendants-Appellees.

Appeal from a Decision of the United States District Court for the District of Oklahoma - Oklahoma City
Case No. 5:17-CV-00887-HE · Honorable Joe Heaton, Chief U.S. District Judge

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

REGULATIONS

STATUTES

OTHER AUTHORITIES

I. INTRODUCTION

The Government has troubled to emphasize the distinction between 25 C.F.R. Part 151 (Part 151) – which governs acquisitions in trust for the benefit of Indian Tribes with respect to "on reservation" and "off reservation" lands – and the Indian Gaming Regulatory Act (IGRA) – which prescribes requirements for taking land into trust for gaming purposes, but is no independent warrant for acquiring land into trust for gaming purposes.

Yet the Nation has plainly argued that **both** Part 151 and IGRA require a showing of governmental jurisdiction, prior to approval of any "on reservation" acquisition under Part 151, in Oklahoma and elsewhere; and prior to approval of any gaming under IGRA's "Oklahoma exception", which, like Part 151, ensures that Tribes in Oklahoma stand on equal footing with Tribes elsewhere with respect to any "on reservation" gaming opportunities.[1]

Aspersions to the effect the Nation's jurisdictional "arguments ... reflect fundamental misconceptions about IGRA's scope and about basic principles of tribal jurisdiction over fee lands within Indian reservations," Answering Brief at

[1]We note the Record of Decision relating to the trust acquisition for gaming purposes, addressed gaming eligibility under IGRA before addressing the basis for acquiring the land in trust pursuant to Part 151, JA 180 , suggesting the determinations are of at least equal importance.

23, seem out of place, especially when recent history shows that Government long staked out mistaken positions as to "basic principles" of Indian law.

The decision in *Carcieri v. Salazar*, 555 U.S. 379 (2009) for example, turned on the definition of "now" – whether a Tribe is "now under federal supervision" within the meaning of the Indian Reorganization Act of 1934 (IRA) authorizing Tribal trust acquisitions. The Government and its representatives long – and mistakenly – interpreted "now" to mean, not as of time of enactment in 1934; but as of any future time that agency officials happened to fix their eyes upon the "now under federal supervision" requirement.

Match-E-Be-Nash-She-Wish Band v. Patchak, 567 U.S. 209 (2012) (*Patchak*) also concerned a basic question, the nature of claims subject to the Quiet Title Act of 1972, (QTA). The Supreme Court held that the QTA, and its Indian lands exception, only apply where, as "Quiet Title Act" indicates, a plaintiff is seeking to quiet title in his or her own right. The holding now seems basic: The legal principle nonetheless eluded the Government and its

representatives from passage of the QTA in 1972, until the Supreme Court decision in *Patchak* some 40 years later.[2]

Recent history thus shows that common wisdom of many years can ultimately prove to be uncommonly wrong. The Government's view here – that IGRA's "former reservation" exception for Tribes in Oklahoma applies to land anywhere within the territorial boundaries of a former reservation, without regard to the existence of governmental jurisdiction prior to any trust acquisition – should prove to be as wrong as firmly held views in other Indian law contexts.

And indeed, we mentioned in our opening brief an apparent effort to moot the challenge here by means of a legislative fix introduced in the Oklahoma legislature. Opening Brief at 5-6. Such an effort shows that, in certain influential quarters in the State, there is some doubt about the Government's position being upheld.

[2]We have indicated that *Patchak* opened the possibility of challenging an acquisition in trust for Indian gaming purposes, and believe this is the first such challenge in Oklahoma in the post-*Patchak* era. The Government has not suggested otherwise.

We also note that in January 2017 – the month the first trust acquisition for gaming in Oklahoma in the post–*Patchak* era took place[3] – a bill emerged again in the United States Senate which would define "Indian lands" for the first time to include "any lands in the State of Oklahoma that are within the boundaries of a former reservation ...." Tribal Labor Sovereignty Act of 2017, S.63 115th Cong. (2017-2018).

An effort in the Congress that could well have the effect of mooting the basic – and foreseeable – jurisdictional challenge here suggests that interests with influence national in scope also have some doubt about the Government's position otherwise surviving judicial challenge.[4]

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[3]The Government has explained the six month delay in publishing the requisite notice of trust acquisition in the Federal Register by reference to a directive from the Trump Administration to defer publishing in the Federal Register immediately after the Inaugural on January 20, 2017. Answering Brief 16. However, it has done nothing to explain the circumstances of informal notice that obviously went to the Chickasaw Nation, which broke ground at Terral two months before formal publication took place. It has also done nothing to explain the reason for withholding informal notice of the trust acquisition from Tribes including the Comanche Nation, when they have such an obvious interest in a nearby gaming operation being developed by a Tribe which already has a very significant gaming presence in the State.

[4]Oklahoma bears witness to the effect of the Government's application of the "Oklahoma exception" to IGRA's prohibition against gaming on lands acquired after October 1988: The Government has treated 3/4 of the State, including original treaty lands once occupied by the Five Civilized Tribes, as reservation lands eligible for Indian gaming upon being acquired in trust. If Congress should enact

We also note the basis for the trust acquisition at Terral was an implicit warrant for such an acquisition purported to appear in the Indian Reorganization Act of 1934, described in the Record of Decision as follows:

> The [IRA] authorized the Secretary to take land into trust for those named Oklahoma Indian tribes [including the Chickasaw] pursuant to Section 5 of the IRA [now codified at 25 U.S.C. § 5108], because it did not include Section 5 in the list of the IRA sections that would not apply to the named Oklahoma tribes.

Id. at 8. JA 186.

However, the Oklahoma Indian Welfare Act enacted two years later included authority quite as specific as the phrase "now under federal supervision" at issue in *Carcieri,* concerning land acquisitions for Tribes in Oklahoma, in relevant part as follows:

> The Secretary of the Interior is authorized, in his discretion, to acquire ... any interest in lands, ... within or without existing Indian reservations, including trust or otherwise restricted lands now in Indian ownership: Provided, That such lands shall be agricultural and grazing lands of good character and quality in proportion to the respective needs of the particular Indian or Indians for whom such purchases are made. Title to all lands so acquired shall be taken in the name of the United States, in trust for the tribe, band,

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Tribal Labor Sovereignty Act as proposed, the State will bear witness to something even more dramatic: The same 3/4 of the State treated instantly as casino– eligible "Indian lands" within the meaning of IGRA, 25 U.S.C. § 2703(4)**,** without need to pursue the lengthy trust acquisition process.

> group, or individual Indian for whose benefit such land is so acquired, and while the title thereto is held by the United States....

Act of June 26, 1936, ch. 831, §1, 49 Stat. 1967, codified at 25 U.S.C. § 5201.

In any proceedings going forward the Nation could well expand the grounds for challenging the trust acquisition at Terral to include lack of authority for any purpose other than that Congress specifically granted in the OIWA as to "agriculture and grazing lands ...."

The Government has taken the position that the limited administrative record produced in the proceedings below – the record is missing any of the underlying documentary alleged to support the Record of Decision and Environmental Assessment (EA) – nonetheless sufficed to show compliance with the requisites of the National Environmental Policy Act, as against the Nation's claims that flaws in the purported EA produced by the Chickasaw Nation's own Environmental Services Department are so obvious and fundamental that remand was warranted to ensure compliance with NEPA, with respect to a project likely to be exponentially larger in scope than the relatively modest operation subject to the Chickasaw's purported assessment of potential environmental impacts.

The Government argues in part that the Nation "waives its NEPA arguments because it mentioned them for the first time only in its reply brief [below]." Answering Brief at 23.

However, the Nation and its representatives did not **see** the circumscribed version of the record until the Government filed it as part of the opposition to preliminary injunctive relief.

The Nation's submission in reply was thus their first opportunity to address the NEPA issues in specific terms. They had addressed in the Nation's Complaint the systemic non–compliance with NEPA over the course of many years, involving dozens of trust acquisitions destined for Indian gaming. Complaint for Declaratory and Injunctive Relief, § 36. *See also* JA 407-476 (the subject deeds). They also noted in their motion for preliminary relief that, if past proved to be prologue, the record once produced would likely show fundamental departures from NEPA's requirements as well. Brief in Support fo Plaintiff's Motion for Preliminary Injunction at 4, n.3. JA 39**.**

However, they did not see the Record of Decision (produced minus the alleged supporting material), purported Environmental Assessment (also minus any supporting material), or resulting Finding of No Significant Environmental Impact (FONSI) until the Government made them a part of the opposition to preliminary injunctive relief.

We also note that it is in the context of an appellate Answering Brief, that the Government has disclosed where the Chickasaw allegedly made the requisite

notice of Environmental Assessment and FONSI available to the public. Answering Brief at 47. One is a reference impossible to verify, "*Classifieds*, The Ada News, March 17, 2016." *Ibid.* The other is an apparent reference to a website of the *Clay County Leader. Ibid.*

The citation to the *Clay County Leader* website takes up more than two lines of numerals, letters and typographic symbols. If we were to repeat the citation here, it would conclude, "(last unsuccessful visit, April 19, 2018)". Thus the record is still missing evidence of compliance with NEPA's fundamental requirement of notice.

We treat the jurisdiction and NEPA issues further, before renewing the Nation's request that the Court reverse the district court decision to deny preliminary injunctive relief; and remand to the Department of Interior for purposes of compliance with the requisites of NEPA.

II. ARGUMENT

A. PART I51 AND IGRA REQUIRE THE EXISTENCE OF GOVERNMENTAL JURISDICTION, FOR AN ACQUISITION IN TRUST, AND FOR APPROVAL FOR INDIAN GAMING AS A "FORMER RESERVATION" IN OKLAHOMA

The Government has done little to rebut the Nation's argument that the important underlying purpose of Part 151's "former reservation" language in 1980 – and IGRA's "Oklahoma exception" eight years later – was to ensure that Tribes

in Oklahoma stood on the same footing as Tribes elsewhere. *See* "*Land Acquisitions*", 48 FR 62034, 62035 (September 18, 1980), JA 79; and Senate Report 99-493 (September 24, 1986), p. 10. JA 83

Indeed, the Government has yet to cite, before the district court or in this proceeding – a single "on reservation" acquisition for gaming purposes outside Oklahoma that has not related to land already subject to the acquiring Tribe's jurisdiction.

The Government has missed the significance of this Court's decision in *Mustang Production Company v. Harrison*, 94 F.3d (10th Cir. 1996) altogether. Answering Brief at 34. The Nation offered it as an example of the fundamental jurisdictional issues still being litigated in Oklahoma, nearly a century after reservations in the State were thought disestablished, as to whether Tribes had any regulatory jurisdiction – there imposition of excise taxes on energy production – with respect to allotments held in trust for tribal members. The continuing jurisdictional issues in Oklahoma helps explain the effort to ensure that they would not disadvantage Tribes there with respect to Tribal trust acquisitions, or efforts to engage in Indian gaming on lands taken into trust for Oklahoma Tribes.

The Government also suggests we "seek to turn the holding in *Montana [v. United States*, 450 U.S. 544 (1981)] on its head," Answering Brief at 32, by

arguing it stands for the idea that non–Indian fee lands within the boundaries of a reservation are outside tribal jurisdiction. However, the Supreme Court there plainly held that the Crow Tribe lacked jurisdiction to regulate fishing and hunting on non–Indian fee lands within the borders of the reservation:

> Since regulation of hunting and fishing by nonmembers of a tribe on lands no longer owned by the tribe bears no clear relationship to tribal self-government or internal relations, ... the general principles of retained inherent sovereignty did not authorize the Crow Tribe to adopt Resolution No. 74-05 [regulating hunting and fishing on non–Indian fee land within boundaries of reservation]."

Id. at 564-565 (footnote omitted)..

The Court acknowledged exceptions:

> A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements...., [and] may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe...."

Ibid. (citations omitted).

Since the decision in *Montana,* Indian Tribes have plainly had the burden of proving the existence of "retained inherent authority" in order to regulate activity on non–Indian fee lands within historic reservation boundaries.

If a Tribe were seeking to have non–Indian fee land within historic reservation boundaries acquired for gaming purposes, it could well meet the

requirement of regulatory authority by entering a consensual relationship with the owner for acquisition of the property in trust as an off reservation acquisition, which would also prove the point: Indian Tribes outside Oklahoma must have governmental jurisdiction of lands within their reservations in order to have them acquired in trust for gaming as an on reservation acquisition**.**

18 U.S.C. § 1151, cited in the Answering Brief at 28, n. 2, also helps make the Nation's point, in that it shows Tribal jurisdiction has long been an element of each defined category of "Indian country": "all land within the limits of any Indian reservation under the jurisdiction of the United States Government ..., *id., §* 1151(a); all dependent Indian communities within the borders of the United States ..., *id.,* § 1151(b); and (c) all Indian allotments, the Indian titles to which have not been extinguished ...." *Id.*, 1151(c).

The Government also indicates that "the Secretary **presumes** that tribes have jurisdiction over their current reservations and all other lands that constitute Indian country when it applies 151.2 (f) and 151.10." Answering Brief at 31 (emphasis added).

We think it would be presumptuous for the Secretary to "presume[] that tribes have jurisdiction over their current reservations ..." Answering Brief at 31, when 151.2(f) defines reservation as "area of land over which a tribe has

jurisdiction", a definition which necessarily presumes the Secretary will make the requisite **finding** that a tribe actually "has jurisdiction" with respect to the subject "area of land."

We also submit the Government has **conceded** the Nation's fundamental jurisdictional argument, as follows: "In IGRA, Congress similarly chose to treat trust land [subject to governmental jurisdiction] within disestablished reservations (whether in Oklahoma or elsewhere) the same as trust land [subject to governmental jurisdiction] within current reservations for purposes of allowing gaming on lands acquired in trust after IGRA's enactment. That choice is a completely separate matter from the Secretary's choice in promulgating its Part 151 regulations."[5] Answering Brief at 36.

Thus it is the Government that has argued elsewhere for an approach that turns common understanding on its head. Traditional understanding of "reservation" has always included the idea that lands constituting a reservation,

[5]We disagree that the "choice is a completely separate matter from the Secretary's choice in promulgating its Part 151 regulations," in that the same concern – that Oklahoma Tribes stand on equal footing with Tribes elsewhere – motivated Part 151's coverage of a "former reservation" in Oklahoma; and IGRA's "former reservation" in Oklahoma exception from the prohibition against gaming on lands acquired after October 1988.

like other categories of "Indian country" described by 18 U.SC. § 1151, are subject to Tribal jurisdiction.

Elimination of the requirement of jurisdiction from "former reservation" in Oklahoma has been a unique uncoupling of "reservation" from "jurisdiction". It has plainly afforded Tribes in the State of Oklahoma an advantage that neither the Department of Interior in 1980, nor the United States Congress in 1988, could have foreseen, or intended, that "former reservation" be applied to lands within historic reservation boundaries in Oklahoma that have long since passed out of tribal jurisdiction.[6]

The Government has also missed the significance of the unusual events that preceded promulgation of the 2008 regulation missing the express requirement of "governmental jurisdiction" requirement that was included in the version originally proposed eighteen months earlier, after a two year notice and comment period.[7]

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[6]The analysis would be no different if the Supreme Court were eventually to affirm *Murphy v. Royal*, which could well mean that reservations of each of the Five Civilized Tribes were never disestablished. The trust acquisition would plainly be an "on reservation" acquisition subject to the governmental jurisdictional requirement of 25 C.F.R. § 151.2(f).

[7]We note that the regulations that appeared in May 2008 – with no additional period of notice and comment – defined "reservation" without specific reference to governmental jurisdiction, though the definition of "reservation" in 25 C.F.R. § 151.2(f) includes such a requirement. *See* 25 C.F.R. § 292.2. JA 114:

The subsequent version appeared with no additional notice to, or comment from, interested parties, and without any intelligible explanation for omitting the express requirement of governmental jurisdiction.

As we have explained, the second version also appeared during the very period the *Apache* litigation from the U.S. District Court for the Western District of Oklahoma was on remand to the Department of Interior for findings as to whether a parcel where the Chickasaw Nation was intent operating a dog track was "Indian lands" within the meaning of IGRA.

We have argued that, at the least, these circumstances showed that the "former reservation" phrase appearing in IGRA is ambiguous, thereby warranting a lesser standard of deference to the Government's interpretation of the statutory

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> Reservation means:
>
> (1) Land set aside by the United States by final ratified treaty, agreement, Executive Order, Proclamation, Secretarial Order or Federal statute for the tribe, notwithstanding the issuance of any patent;
>
> (2) Land of Indian colonies and rancherias (including rancherias restored by judicial action) set aside by the United States for the permanent settlement of the Indians as its homeland;
>
> (3) Land acquired by the United States to reorganize adult Indians pursuant to statute; or
>
> (4) Land acquired by a tribe through a grant from a sovereign, including pueblo lands, which is subject to a Federal restriction against alienation

language, and thereby freeing the courts to look to the underlying purposes of the "former reservation" language used in Part 151, and later in IGRA.

The Government has invoked *United States v. Mead, Corp.*, 533 U.S. 218 (2001) for the proposition that a *Chrevron* standard of deference is warranted where "Congress delegated authority to make rules carrying the force of law ..., and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *Id.* at 226-27.

However, the Supreme Court made also made clear in *Mead* that "the consistency of an agency's position is a factor in assessing the weight that position is due." *Id.* at (quoting *Good Samaritan Hospital v. Shalala*, 508 U.S. 402, 417 (1993).

We respectfully submit the omission of an express governmental jurisdiction requirement in May 2008, without any additional notice and comment period following on the two year period that proceeded the October 2006 proposal – that plainly represented the best thinking of officials at the Department of Interior at the time – is a lack of consistency that should weigh heavily in "assessing the weight that [later] position is due." *Ibid.*

B. THE LIMITED ADMINISTRATIVE RECORD BEFORE THE DISTRICT COURT WAS ADEQUATE TO SHOW DEPARTURES FROM REQUIREMENTS OF THE NATIONAL ENVIRONMENTAL POLICY ACT

The Nation has argued that even the limited administrative record before the district court was nonetheless adequate to show departures from procedural and substantive requisites of the National Environmental Policy Act so significant that remand was warranted to ensure compliance, with respect to a gaming operation likely to be exponentially greater in scope than the relatively modest projected operation purportedly review by the Chickasaw Nation's own Environmental Services Department.

The Nation has also argued that assurance of compliance with NEPA in this instance – the first challenge to a trust acquisition for gaming in Oklahoma since the Supreme Court decision in *Patchak* opened the possibility of such a challenge – is especially important, when uncontradicted evidence in the record shows some 40 trust acquisitions for the benefit of the Chickasaw and others of the Five Civilized Tribes (FCT) plainly destined for Indian gaming that took in the absence of any assessment as to potential environmental impacts, JA 407-476, likely because any acquisition was thought unassailable once in trust.

The Government is apparently indifferent to a record of systemic non-compliance with the National Environmental Policy Act serving to benefit the FCT over the course of many years: It has not even troubled to mention it.

In any case, we submit that the Governments's response to evident departures from the requirements of NEPA in this instance is misplaced, beginning with the argument that the "Court should not consider Comanche's NEPA arguments on appeal because Comanche advanced them for the first time in its reply brief below.... Those arguments are thus waived ...." Answering Brief at 41. *But see supra* at 5-6.

The district court addressed the Nation's "NEPA arguments" in cursory fashion, holding simply that "economic impacts, standing alone, are ordinarily not a basis for claim under the NEPA. *See Cure Land, L.L.C. v. U.S.Dept. of Agriculture*, 833 F.3d 1223, 1235 (10th Cir. 2016). As a result, plaintiff's evidence of the competitive impact of the project on plaintiff's operations is insufficient to show a likelihood of success on the NEPA claim...." (footnote omitted). Order at 15-16. JA 531-532.

However, unlike the Nation here, the plaintiff in *Cure Land* did "not contend that the agency failed to take a 'hard look,' ... at the Environmental Assessment

amendment's impacts on the natural environment, and ... failed to show that the agency's environmental analysis was otherwise flawed." *Ibid.* (citation omitted).

Nor did the plaintiff in *Cure Land* allege departures from fundamental procedural requisites in preparation of the EA. *Ibid.* ("So long as the record demonstrates that the agencies in question followed the NEPA procedures ..., the court will not second-guess the wisdom of the ultimate decision." ... (citation omitted)).

As for the "zone of interest" requirement for purposes of standing analysis – which the Government has addressed for the first time in an appellate Answering Brief, at 42 – a plaintiff meets the requirement by asserting an interest "'arguably within the zone of interests to be protected or regulated by the statute' that he says was violated." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 224 (2012) (quoting *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970)).

This "zone of interests" test "is not meant to be especially demanding." *Id.* at 225 (quoting *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399 (1987)). It "forecloses suit only when a plaintiff's 'interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.'" *Id.* (quoting *Clarke*, 479 U.S. at 399).

We submit that the Department of Interior's own regulations with respect to projects having potential environmental impacts on Indian Tribes – which were invariably ignored here – should suffice to show the claims fall within any requisite zone of interest for standing purposes, when the Nation alleged it is a "nearby Tribe" within the State–Tribal Compact approved by the Government, with an existing operation less than 45 miles away at Devol, Oklahoma, and an impending operation on a Tribal trust allotment less than 10 miles away from the Chickasaw site at Terral. Complaint for Declaratory and Injunctive Relief, § 8. JA 11.

The Department of Interior's Indian Affairs National Environmental Policy (NEPA) Guidebook, 59 IAM-3H (August 2012) provides in part as follows: "Through allotments the BIA has trust responsibility to individual Indians as well as tribes. The BIA will seek to involve all stake holders (tribes and allottees) in the NEPA process. Any requests by other tribes to participate as a cooperating agency with respect to the preparation of a particular EA or EIS must also be considered and either accepted or denied. However, the BIA retains sole responsibility and discretion in all NEPA compliance matters." *Id.,* § 2.3 ("Tribal Involvement").

Section 6.4.7 ("Consultation") provides that "[a]ffected tribes and appropriate tribal programs should always be included in this consultation."

Appendix 15 to the Guidebook is the Interior Departmental Manual (DM). 516 DM § 10.3A(2), *Guidance to Tribal Governments,* provides in most relevant part, "Tribal governments affected by a proposed action shall be consulted during the preparation of environmental documents, and, at their option, my cooperate in the review or preparation of such documents." *Id.,* § 10.3A(2)(a).

III. CONCLUSION

For the foregoing reasons, and for such reasons as already been stated, Appellant Comanche Nation of Oklahoma respectfully requests that this Court reverse the decision of the district court denying preliminary injunctive relief on the ground that the trust acquisition took place in the absence of governmental jurisdiction; and hold that the record before the district court was inadequate to establish compliance with the requirements of the National Environmental Policy and warrants remand to the Department of Interior for further proceedings.

/s/ Richard J. Grellner
Richard J. Grellner
Attorney for Appellant,
Comanche Nation of Oklahoma

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

As required by Fed. R. App. P. 32(a)(7)(B), I certify that this brief contains 4,284 words. I relied upon WordPerfect to obtain the word count. I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

As required by Fed. R. App. P. 32(a)(5) and (6), I certify that this brief has been prepared in a proportionally spaced typeface, Times New Roman, font size 14-point for the body of the brief and font size 14-point for all footnotes.

Dated: April 24, 2018

/s/ Richard J. Grellner
Richard J. Grellner
Attorney for Appellant,
Comanche Nation of Oklahoma

CERTIFICATE OF DIGITAL SUBMISSION

Counsel for Appellant hereby certifies that all required privacy redactions have been made, which complies with the requirements of the Federal Rules of Appellate Procedure 25(a)(5).

Counsel also certifies that the hard copies submitted to the Court are exact copies of the ECF filing of April 24, 2018.

Counsel further certifies that the ECF submission was scanned for viruses with the most recent version of a commercial virus scanning program (Vipre software version 10.0.72328; Definitions version 66220 - 7.75771 [April 24, 2018]; Vipre engine version 3.9.2671.2-3.0), and according to the program, is free of viruses.

Dated: April 24, 2018

/s/ Richard J. Grellner
Richard J. Grellner
Attorney for Appellant,
Comanche Nation of Oklahoma

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of April, 2018, I electronically filed the Appellant's Reply Brief with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

I further certify that seven (7) printed copies of the Appellant's Reply Brief will be shipped via Federal Express overnight delivery to the Clerk, United States Court of Appeals for the Tenth Circuit, Byron White U.S. Courthouse, 1823 Stout Street, Denver, Colorado, 80257-1823, for delivery to the Court within two (2) business days of the above date.

Dated: April 24, 2018

/s/ Richard J. Grellner
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Attorney for Appellant,
Comanche Nation of Oklahoma