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 OPENING BRIEF
Oral Argument Requested

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There have been no prior appeals in the matter.

JURISDICTIONAL STATEMENT

The district court had jurisdiction pursuant to 28 U.S.C. § 1331. This Court has jurisdiction pursuant to 28 U.S.C. § § 1292(a).

STANDARD OF REVIEW

The standard of review from a district court's decision to deny a motion for preliminary injunction is abuse of discretion. *Hobby Lobby Stores, Inc. v. Sebelius,* 723 F.3d 1114, 1128 (10th Cir. 2013), *aff'd sub nom. Burwell v. Hobby Lobby Stores,Inc.,* 573 U.S. 22 (2014).

STATEMENT OF THE CASE

I. FACTS RELEVANT TO THE ISSUES PRESENTED FOR REVIEW

The Chickasaw Nation of Oklahoma has several dozen casinos in the State. It is intent on opening yet another, this one on land at Terral Oklahoma that the Department of Interior ("the Department") acquired in trust for the Chickasaw on January 19, 2017. *See* Warranty Deed. Appellant's Appendix (App.) at 59.

The Department is required to notify an applicant for a trust acquisition promptly, and to "promptly publish" notice in the Federal Register. *See* 25 C.F.R.

§ 151.12(c)(2) ("If the Secretary or Assistant Secretary approves the request, the Assistant Secretary shall:

(I) Promptly provide the applicant with the decision; [and] (ii) Promptly publish in the Federal Register a notice of the decision to acquire land in trust under this part ....").

The Department must have given prompt notice of the acquisition to the Chickasaw Nation as required: The record shows the Chickasaw broke ground at Terral in May 2017, some three months after the land was taken into trust, and two months before any notice appeared in the Federal Register.

The Chickasaw project at Terral lies less than 45 miles down the Red River from the Comanche Red River Hotel and Casino at Devol, Oklahoma, which is the Comanche Nation's primary source of revenue, and which is heavily dependant for patronage upon the Wichita Falls market. Affidavit of Jimmy W. Arterberry, ¶¶ 3 and 4. App. at 63-64.

Bound to safeguard its ability to continue funding Tribal operations and programs vital to the Nation and its people, the Comanche made the difficult decision to challenge a trust acquisition for the benefit of another Tribe, on the primary ground that, like the many trust acquisitions that have preceded it, the

acquisition took place based on a fundamental misinterpretation of the Indian Gaming Regulatory Act (IGRA), and its exception to the strict proscriptions Congress imposed against gaming operations on lands acquired after October 17, 1988 – the date of IGRA's enactment – that being if the land relates to the "former reservation" of a Tribe in Oklahoma. 25 U.S.C. § 2719(a)(2)(A)(I).

Intended to ensure that Tribes in Oklahoma – where reservations had long been thought disestablished and divided into allotments whose jurisdictional status was then uncertain – stood on **equal footing** with Tribes elsewhere, the Department has interpreted the "former reservation" language in IGRA for the benefit of the Chickasaw and others of the "Five Civilized Tribes" of Oklahoma in particular– to stand on **superior footing.**

The Department has not disputed that Tribes elsewhere seeking to have lands within a reservation taken into trust pursuant to 25 C.F.R. Part 151, are bound to show governmental jurisdiction as to those lands, because the regulation defines "Indian reservation" as "that area of land over which the tribe is recognized by the United States as having governmental jurisdiction." *Id.*, § 151.2(f).

The Department's misinterpretation of IGRA's "Oklahoma exception", without regard to the existence of governmental jurisdiction as to the lands targeted for acquisition, has allowed the Chickasaw, and others of the "Five Civilized

Tribes" of Oklahoma in particular – Cherokee, Muscogee (Creek), Choctaw and Seminole – to acquire dozens of sites for gaming near major population centers in the State, without regard to the existence of governmental jurisdiction, all virtually without legal challenge from any opposing interest.

The absence of judicial challenge over the years was attributable to common wisdom holding that the "Indian lands" exception of the Quiet Title Act - the only means of challenging title to land in which the United States holds an interest – was an insuperable barrier to challenge. *See*, e.g., this Court's decision in *Neighbors for Rational Development v. Norton*, 379 F.3d 956, 961 (10th Cir. 2004) ("Neighbors' claim falls within the scope of the Quiet Title Act's limitations on suits. It is well settled law the Quiet Title Act's prohibition of suits challenging the United States' title in Indian trust land may prevent suit even when a plaintiff does not characterize its action as a quiet title action....").

The record also shows that, likely because the prospect of a viable legal challenge following an acquisition in trust was so remote, the Five Civilized Tribes and cooperative officials at the Bureau of Indian Affairs, skirted fundamental requirements of the National Environmental Policy Act preliminary to any acquisition in trust for gaming purposes: A former BIA official has furnished evidence showing some forty acquisitions of land in trust for the benefit of the Five

Civilized Tribes plainly intended for the gaming that ultimately took place, where no environmental review of any kind took place. Affidavit of Steve York, ¶¶ 13-15, App at 388.; Exhibit to York Affidavit. App. at 412-476.

However, prospects for a challenge to an acquisition in trust for gaming purposes were to improve dramatically, and so confound common wisdom holding trust acquisitions for gaming purposes beyond the possibility of legal challenge. The Supreme Court held in *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak* ("*Patchak*"), 567 U.S. 209 (2012) that the Administrative Procedure Act's waiver of the U.S. Government's immunity applied to a suit challenging a trust acquisition for Indian gaming. Since Mr. Patchak did not seek to quiet title in his own right, the federal Quiet Title Act and its reservation of sovereign immunity with respect to "Indian lands" did not serve to bar suit under the APA.

The Comanche Nation's lawsuit here is the first post–*Patchak* test of a trust acquisition for gaming purposes in Oklahoma. This lawsuit is also the first instance in which notice of a trust acquisition for the benefit of the Chickasaw Nation plainly intended for gaming purposes has appeared in the Federal Register.

Moreover, the lawsuit here is also the first involving a trust acquisition for one of the Five Civilized Tribes on the basis of IGRA's "former reservation"

exception, following this Court's decision in *Murphy v. Royal,* 866 F.3d 1164, 1233 (10th Cir. 2017)*, pet. for panel rehearing or hearing en banc denied*, Order (10th Cir. 2017, November 9, 2017), *pet. for cert. filed*, No. 17-1107 (February 6, 2018). The Court in *Murphy* held that Congress – which treated the Five Civilized Tribes in virtually identical fashion – has never disestablished the reservation of the Muscogee (Creek) Nation.

We are also bound to note that during the short time the matter has been on appeal, proposed legislation has appeared before a special session of the Oklahoma legislature that could moot the Comanche Nation's challenge here, and also make impossible challenges to any of the other trust acquisitions for the benefit of the Five Civilized Tribes over the years. House Bill 1031 (2d Extraordinary Session of the 56th Legislature (2018), State of Oklahoma), in relevant part "amending 3A O.S. 2011, Section 280, which relates to model tribal contract ....", p. 12. Addendum at 23, 34.

The proposal could have the effect of ratifying any and all trust acquisition for gaming purposes that have taken place in the State since enactment of the Indian Gaming Regulatory Act in 1988, and immunize them from challenge. Nothing could better demonstrate the urgency of the matter than the appearance of this proposal before the Oklahoma Legislature during the very period a challenge

to a trust acquisition for the benefit of the Chickasaw Nation of Oklahoma is taking place based on the absence of governmental jurisdiction prior to acquisition.

II. THE RELEVANT PROCEDURAL HISTORY

A. THE LAWSUIT CHALLENGING THE TRUST ACQUISITION FOR GAMING PURPOSES AT TERRAL, OKLAHOMA

The Comanche filed suit on August 17, 2017, thirty days after notice of a trust acquisition for gaming purposes at Terral finally appeared in the Federal Register. App. at 8.

The Department took the decision to acquire the land into trust on January 19, 2017, was required to give notice of the acquisition promptly, yet waited six months to publish the important fact of an acquisition for gaming purposes less than 45 miles downstream from the Comanche Red River Hotel and Casino at Devol.

During the six month official interval between acquisition and notice, the Chickasaw broke ground at Terral, without any notice of the acquisition, and without notice of any NEPA compliance efforts, making its way to the Comanche and other Tribes in western Oklahoma with a manifest and vital interest in a major competitor intent on entering the same gaming market.

The factual basis for the claims appeared in the Complaint for Declaratory and Injunctive Relief as follows:

> 2. The acquisition for the benefit of the Chickasaw Nation in Jefferson County is the latest in a long series of trust acquisitions for gaming purposes in Oklahoma made by the Departmental officials without any showing that the Chickasaw had governmental jurisdiction of the land sought to be acquired in trust, a fundamental requirement for Tribes outside the State seeking to have land acquired in trust for their benefit.
>
> 3. The longstanding failure of Departmental officials and designees to adhere to fundamental requisites of federal law and policy with respect to dozens of trust acquisitions for Indian gaming purposes in the State has enabled the Chickasaw and others of the "Five Civilized Tribes" (FCT) to corner the lion's share of an Indian gaming market in the State generating some $4.3 Billion annually. Sophisticated analyses of likely net revenue from gaming facilities opened over the years with the help of compliant BIA officials suggest that the Chickasaw Nation alone has managed to accumulate more than $10 Billion in cash reserves held in the United States and abroad.
>
> 4. The tremendous economic success the FCT have enjoyed – frequently at the expense of others among the 39 federally recognized Tribes in the State – is attributable to gaming operations which they owe in substantial part to cooperative BIA officials willing to ignore or bend the fundamental attribute of governmental jurisdiction with respect to lands targeted for acquisition, and very often the requirements of NEPA as well.
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> * * *
>
> 8. The Comanche have several Class III gaming operations on trust lands in Southwest Oklahoma pursuant to a State-Tribal Compact ("Compact") with the State of Oklahoma, all located on lands that have been in trust [and subject to governmental

jurisdiction] for more than a century. Three of the Nation's four casinos are of modest size, and the fourth is a medium sized operation located less than 45 miles from the latest trust acquisition on behalf of the Chickasaw: The Nation is therefore a "nearby Tribe" within the meaning of the Compact and eligible for prospective revenue from a Chickasaw casino in Jefferson County acquired in violation of law and policy. The Nation also has plans for a gaming operation to be located little more than ten miles away from the Chickasaw site in Jefferson County.

* * *

13. Congress enacted the Indian Reorganization Act in 1934, the Oklahoma Indian Welfare Act two years later, both in order to help ameliorate the effects of the General Allotment Act of 1887, and the Curtis Act of 1898 (which extended the disastrous allotment policy to reservation lands of the Five Civilized Tribes), which together caused some 90 million acres to pass out of Indian ownership.

14. Congress thereby delegated authority to the Department to acquire communal tribal lands in trust for tribes, which were expected to be devoted primarily to agriculture. Indeed, the OIWA specifically required any lands acquired to be suitable for "agricultural purposes."

15. Perhaps because very little controversy attended efforts to help Tribes rebuild communal land bases in the years following passage of the IRA and OIWA, it was not until September 1980 that the Department first promulgated regulations relating to land acquisitions in trust for Indian Tribes. "Land Acquisitions",

    48 Fed. Reg. 62034 (September 18, 1980). [App. at 78].

16. In the regulation promulgated as 25 C.F.R. Part 120a, the Department defined "Indian reservation" in terms similar to those Congress was later to use apply respect to the "Oklahoma

exception" to the restriction against gaming on lands acquired after passage of the Indian Gaming Regulatory Act. *See* 25 U.S.C. § 2719(a)(2) (gaming permitted if "the Indian tribe has no reservation on the date of enactment ... and – (A) such lands are located in Oklahoma and – (I) are within the boundaries of the Indian tribe's **former reservation**, as defined by the Secretary ...." (emphasis added)).

17. § 120a.2(f) of the regulations promulgated in September 1980 provided as follows:

> "Indian reservation" means that area of land **over which the tribe is recognized by the United States as having governmental jurisdiction**, except that, in the State of Oklahoma or where there has been a final judicial determination that a reservation has been disestablished or diminished, "Indian reservation" means that area of land constituting the **former reservation** of the tribe as defined by the Secretary (emphases added).
>
> *Id.* at 62036. [App. at 80].

18. The drafters of Part 120a explained that "[p]roblems with the definition of an 'Indian reservation' ... were perceived by many because of the possible implication that the disestablishment or total allotment of a reservation extinguished the reservation, or because the boundaries of some reservations is pending determination... [L]anguage [plainly extending acquisition
>
> authority to lands within former reservations] has been inserted to resolve these problems."
>
> 48 Fed. Reg. at 62035. [App. at 79].

19. The Department was intent on ensuring that Tribes in Oklahoma in particular – where common wisdom long held that reservations had been subject to allotment and disestablished by

1906 – would have the same status and opportunity as Tribes elsewhere with respect to trust acquisitions.

20. 25 C.F.R. Part 151 succeeded Part 120a, and incorporated the same definition of "Indian reservation", reflecting the same concern that Oklahoma Tribes stand on the **same** footing as Tribes elsewhere:

> * * * Indian reservation means that area of land **over which the tribe is recognized by the United States as having governmental jurisdiction**, except that, in the State of Oklahoma or where there has been a final judicial determination that a reservation has been disestablished or diminished, Indian reservation means that area of land constituting the **former reservation** of the tribe as defined by the Secretary. (emphases added)

Id., § 151.2(f).

21. IGRA's legislative history also shows that, in carving out the "Oklahoma exception" to gaming eligibility for post–1988 trust acquisitions, the Congress was motivated by the same determination to have Oklahoma Tribes stand on the **same** footing as Tribes elsewhere. *See* Senate Report No. 99-493, "To Establish Federal Standards and Regulations for the Conduct of Gaming Activities on Indian Reservations and Lands and for Other Purposes" (September 24, 1986) p. 10 ("[IGRA] treats these Oklahoma tribes the same as all other Indian tribes. This section is necessary ... because of the unique historical and legal differences between Oklahoma and tribes in other areas.") [App. at 82].

22. However, the evidence of many years shows that the Five Civilized Tribes in particular, with the cooperation of friendly, if not collusory, BIA officials, have stood on a footing far **superior** to Tribes elsewhere: Tribes outside Oklahoma plainly must show, with respect to any on–reservation trust acquisition,

that it relates to "an area of land over which the Tribe is recognized by the United States as having governmental jurisdiction ...." 25 C.F.R. § 151.2(f).

23. In Oklahoma dozens of trust acquisitions for gaming purposes have taken place without regard to the existence of "governmental jurisdiction," even after the Department proposed regulations specifically incorporating the requirement. *See "Gaming on Trust Lands Acquired After October 17, 1988",* 71 Fed. Reg. 58769 (October 5, 2006), at 58772 ("Former reservation means lands that are within the jurisdiction of an Oklahoma Indian tribe and that are within the boundaries of the last reservation of that tribe in Oklahoma ...."). [App. at 87].

24. The Department ultimately revised the definition of "former reservation", by omitting the specific requirement of governmental jurisdiction. *See* 25 C.F.R. § 292.2 ("lands in Oklahoma that are within the exterior boundaries of the last reservation ..."), an arbitrary and capricious departure from longstanding policy [reflected in law and regulation] to have Oklahoma Tribes stand on an equal - not superior - footing with Tribes elsewhere. [App. at 92].

25. The Department's only comment with respect to the modification was a misstatement, to the effect that "the definition clarifies that the last reservation be in Oklahoma, which is consistent with the language of the statute." 73 Fed. Reg. 29356 (May 20, 2008). [App. at 94]. The version proposed two years before plainly defined "former reservation" by reference to lands "within the boundaries of the last reservation of that tribe in Oklahoma ...."). 71 Fed. Reg. at 58772. [App. at 87].

26. By ignoring the fundamental requirement of governmental jurisdiction over lands targeted for acquisitions in trust, BIA officials moved the goal line so close to the Chickasaw and other privileged tribes in Oklahoma that they have needed only

to fall into the end zone and open up shop, secure in the knowledge that the score was virtually certain to hold up without any replay. For, once land was in trust, the acquisition was commonly thought to be unassailable for any reason.

27. However, in *Match-E-Be-Nash-She- Wish Band of Pottawatomi Indians v. Patchak* ("*Patchak*"), 567 U.S. 209 (2012), the Supreme Court opened the way to challenging trust acquisitions for Indian gaming long considered beyond review: The Court held that the Administrative Procedure Act's waiver of the U.S. Government's immunity applied to a suit challenging a trust acquisition for Indian gaming. Since Mr. Patchak did not seek to quiet title in his own right, the federal Quiet Title Act and its reservation of sovereign immunity with respect to Indian lands did not serve to bar suit under the APA.

28. BIA and tribal officials concerned about acquisitions in trust made in violation of law and policy could not have taken comfort in the implications of the late Justice Scalia's simple but profound question in *Patchak*: "What if [BIA officials] lied?" There can be little doubt this influential justice was of the considered opinion there should be recourse.

B. THE CHICKASAW NATION HAS A RESERVATION IN OKLAHOMA

29. The United States Congress treated the Five Civilized Tribes and their reservation lands in virtually identical fashion. The U.S. Court of Appeals for the Tenth Circuit, after reviewing the history of Congress' dealings with the Creek Nation in particular, has squarely held that "Congress has not disestablished the Creek Reservation", *Murphy v. Royal*, Nos. 07-7068 & 15-7041 (10th Cir. August 8, 2017), slip op. at 126, and that a crime committed on a restricted trust allotment

within its bounds is necessarily outside the jurisdiction of the Oklahoma courts. *Ibid.*...

30. IGRA restricts gaming on lands acquired after the date of its enactment – October 17, 1988 – in most relevant part as follows:

> [G]aming regulated by this Act may not be conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe after the date of enactment of this Act unless –
>
> * * *
>
> (2) **the Indian tribe has no reservation on the date of enactment ... and –**
>
> (A) such lands are located in Oklahoma and –
>
> (I) are with the boundaries of the Indian tribe's former reservation, as defined by the Secretary ....

Id., § 2719(a) (emphasis added).

31. The plain import of the groundbreaking *Murphy* decision is that Congress has **never disestablished** the Chickasaw Reservation: IGRA's "Oklahoma exception" with respect to lands of "former reservations" in the State is not applicable to the purported trust acquisition for the benefit of the Chickasaw Nation in Jefferson County.

32. Tribes outside Oklahoma seeking to have lands acquired in trust that are within its reservation boundaries, but not subject to Tribal jurisdiction, as an "off-reservation" acquisition pursuant to the after–acquired lands exception set forth by 29 U.S.C. § 2719(b)(1)(A) (requiring Secretary's approval and concurrence by Governor of State). The Chickasaw lands in Jefferson County are subject to the **same** "off–reservation" acquisition requirements.

C. NATIONAL ENVIRONMENTAL POLICY ACT

33. NEPA, 42 U.S.C. §§ 4321 *et seq.*, and its implementing regulations, 40 C.F.R. §§ 1500 *et seq.*, require federal agencies to evaluate the environmental and socioeconomic impacts of any "major federal action" that significantly affects the quality of the human environment. 42 U.S.C. § 4332; 40 C.F.R. § 1508.14; *see generally* 40 C.F.R. §§ 1500 *et seq*.

34. Agencies generally do so by preparing an Environmental Assessment and/or an Environmental Impact Statement. 42 U.S.C. § 4332(2)(c); 40 C.F.R. §§ 1501.3, 1501.4, and 1502.4.

35. However, if the project involves no "change in use", the applicant is entitled to a "categorical exemption" (or "Cat Ex") from meeting such requirements, 40 C.F.R. § 1508.4, which frequently entail very significant time and resources.

36. BIA officials in the FCT Eastern Regional have frequently greased the skids for the Five Civilized Tribes by according their projects "Cat Ex" determinations – thereby relieving them the requirements of NEPA – for trust acquisitions obviously intended for Indian gaming operations: This has taken place several dozen times. During the same period, BIA required other Tribes in Oklahoma to declare the intended use.

37. Even if BIA has not accorded a "Cat Ex" determination with respect to the purported trust acquisition in Jefferson County, the lack of any notice in the public record thus far suggests that any Environmental Assessment resulted in a Finding of No Significant Environment Impact ("FONSI"), which obviates the need for a time consuming and expensive Environmental Impact Statement.

38. Yet there are a number of very likely and serious environmental impacts and risks associated with the Chickasaw's latest gaming venture : A multimillion dollar bridge spanning the Red River –

> which lies between the Chickasaw site and the gaming market in Texas – must have been related to the impending casino in Jefferson County; the project has thus far required creation of several "sewage lagoons" so large they are visible from space.
>
> 39. Any eventual review of NEPA "compliance" efforts should reveal multiple violations of NEPA law and regulation ....

III. PROCEEDINGS ON MOTION FOR PRELIMINARY INJUNCTION

The urgent pace and evident scope of the development taking place at Terral compelled the Comanche Nation to move for preliminary injunctive relief immediately, without benefit of an administrative record beyond the notice of trust acquisition for gaming purposes that appeared the month before in the Federal Register. Plaintiff's Motion for Preliminary Injunction (August 30, 2017). App. at 28.

Tribal officials attested to the rapid pace of activity at Terral, and to the devastating and irreparable economic impact a rival casino operation so near the Wichita Falls gaming market was certain to have on the Comanche Red River Hotel and Casino, and the vital revenue stream funding nearly 60% of the Nation's annual budget for Tribal operations and programs. App. at 63-64. *See Seneca-Cayuga Tribe v. Oklahoma*, 874 F.2d 709, 716 (10th Cir. 1989) (for purposes of preliminary injunction, irreparable injury established where threatened loss of revenues and jobs created "prospect of significant interference with [tribal]

self-government"); *see also*, *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1250 (10th Cir. 2001) (granting preliminary injunctive relief where challenged conduct threatened loss of revenue and jobs, and thus significant interference with tribal self–government).

As for the requisite likelihood of success showing for injunctive relief, the Nation explained that "the most important basis for challenge is that the property in Jefferson County was not subject to governmental jurisdiction of the Chickasaw Nation at the time of acquisition,... a fundamental requirement for any Tribe outside Oklahoma seeking to have the Department of Interior take purported "on reservation" lands into trust on its behalf. *See* 25 C.F.R. § 151.2(f) ("... Indian reservation means that area of land over which the tribe is recognized by the United States as having governmental jurisdiction ....")).... (footnotes omitted).

The Nation reiterated the claim that the plain intent of the 1980 regulations defining "Indian reservation" to include a "former reservation" in Oklahoma; and the plain intent of Congress in adopting the same phrase in IGRA eight years later, was to ensure that Tribes in Oklahoma, where common wisdom held that reservations had long been disestablished, *but see Murphy v. Royal*, *supra*, would stand on equal footing with Tribes in other States, where reservations survived the

policy begun in 1887 of breaking up communal tribal lands into individual allotments.

The Nation noted the "alleged probable violations of the National Environmental Policy Act (NEPA) ... should serve as an additional basis to void the acquisition....[but that] [i]t is unable to plead the claims with more particularity without the complete administrative record relating to the trust acquisition in Jefferson County. However, if past is prologue, the record will eventually show substantial departures from the requirements of NEPA: The Nation can introduce dozens of deeds relating to lands taken into trust for the Chickasaw and others of the Five Civilized Tribes as if "no change in use" was contemplated – thereby warranting a "categorical exemption", or "Cat Ex", from time consuming and frequently expensive requirements of NEPA. Yet the evidence would very likely show that BIA officials knew the acquisitions were for purposes of economic development...." App. at 39.

The Nation went on to describe a critical series of events, beginning "[i]n October 2006, when the Department proposed regulations defining "former reservation" in part as "lands that are within the jurisdiction of an Oklahoma Indian tribe ....", 71 Fed. Reg. at 58772 .... [A] lawsuit was pending in this Court before the Honorable David Russell challenging yet another trust acquisition for gaming

purposes on behalf of the Chickasaw, this one relating to a dog track at Marlow, Oklahoma. *Cheyenne–Arapaho Gaming Commission v. United States, et al.,* Case No. 04–cv– 01184– R." App. at 45. The Nation recounted subsequent events relating to the regulation proposed in October 2006 defining "former reservation" as having a requirement of present jurisdiction:

> The Apache Tribe of Oklahoma was one of the Plaintiffs in the litigation before Judge Russell. The Tribe argued, consistent with the regulations proposed in October 2006, that governmental jurisdiction was a prerequisite for any trust acquisition based on "former reservation" status of lands in Oklahoma.
>
> Judge Russell ultimately found the administrative record lacking any evidence that the Chickasaw lands at Marlowe were subject to governmental jurisdiction even **after** the acquisition,[1] and remanded for additional development of the record with respect to the requirement of jurisdiction. *See* Order (Russell, J.) (July 18, 2007) .... [JA].
>
> Thus, it was during the very period the *Apache Tribe* litigation was on remand, that the Department promulgated regulations omitting the requirement of "jurisdiction" from its definition of "former reservation."
>
> The Department did not lodge the expanded administrative record in the *Apache Tribe* litigation until June 14, 2010, almost three

[1]IGRA requires that any Indian gaming take place on "Indian lands", which it defines as"(A) all lands within the limits of any Indian reservation; and (B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power." 29 U.S.C. § 2703(4).

years after Judge Russell ordered remand. By then the Tribe was no longer able to pursue the lawsuit, so had no opportunity to challenge an opinion by Associate Solicitor Edith Blackwell that was included in expanded record....

Ms. Blackwell opined that the trust acquisition at Marlowe met IGRA's definition of "Indian lands" by virtue of the acquisition itself, thus begging the fundamental question whether jurisdiction must exist at time of a proposed acquisition. Much of the opinion reads as if by a surveyor, showing the lands at Marlowe are within the bounds of the Chickasaw Reservation, so met the "former reservation" in Oklahoma exception. Ms. Blackwell did not mention the requirement of jurisdiction of "former reservation" lands proposed in October 2006, nor did she trouble to explain the fundamental change in definition adopted while the *Apache Tribe* case was on remand to the Department.

In reviewing an administrative agency's interpretation of statutory language, the first question for the Court is "whether Congress has directly spoken to the precise question at issue." *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).

If Congress has done so, "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. However "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843.

Defendants are hard pressed to argue that "former reservation" for purposes of IGRA's Oklahoma exception is unambiguous, in light of the fundamental change in definition from 2006, when the Department proposed language requiring governmental jurisdiction as a requisite element of a "former reservation" determination; to May 2008, when the Department omitted the jurisdiction requirement, without any intelligible explanation for dropping it.

Thus the question now before the Court is "whether the agency's answer [to "former reservation" within the meaning of IGRA's "Oklahoma exception"] is based on a permissible construction of the statute." *Ibid.*

In answering this fundamental question, we submit the Court should afford Defendants no more than the standard of deference known variously as *Seminole Rock"* or *"Auer"* deference[2], which requires a reviewing court to assign an agency's interpretation of its own regulations "controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Seminole Rock*, 325 U.S. at 414.

However, as the Supreme Court made clear *in Christopher v. SmithKline Beecham Corp*., 567 U.S. 142 ,132 S. Ct. 2156, 2166, 183 L.Ed 2d 253 (2012), even this level of deference is inappropriate where the record shows the following dynamics at play in the agency action under review:

Deference is undoubtedly inappropriate, for example, when the agency's interpretation is "'plainly erroneous or inconsistent with the regulation.'" [*Auer v. Robbins]*, at 461 (quoting *Robertson* v. *Methow Valley Citizens Council*, 490 U. S. 332, 359 (1989)). And deference is likewise unwarranted when there is reason to suspect that the agency's interpretation "does not reflect the agency's fair and considered judgment on the matter in question." *Auer*, *supra,* at 462 ... This might occur when **the agency's interpretation conflicts with a prior interpretation** , see, *e.g., Thomas Jefferson Univ.* v. *Shalala*, 512 U. S. 504, 515 (1994), or when it appears that the interpretation is nothing more than a "convenient litigating position," *Bowen* v. *Georgetown Univ. Hospital*, 488 U. S. 204, 213 (1988) .... (citations omitted, emphasis added).

Id., 132 S.Ct. at 2166.

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[2]*Bowles v. Seminole Rock & Sand Co*., 325 U.S. 410 (1945); *Auer v. Robbins*, 519 U.S.452 (1997)

> Here, not only did the 2008 regulations omit the requirement of jurisdiction from the definition of "former reservation" in Oklahoma, without any intelligible explanation for the "conflict[] with a prior interpretation", *ibid.,* but the regulations came down while Judge Russell's *Apache Tribe* decision was pending before the Department on remand.
>
> The opinion of the Associate Solicitor that made its way into the administrative record of the lawsuit three years after remand did not mention the requirement of jurisdiction in the regulation proposed in October 2006, and was obviously silent with respect to the change in definition – for unintelligible reasons – that took place in May 2008.
>
> For present purposes, we submit the record shows, not only that "the agency's interpretation conflicts with a prior interpretation," *Christopher, supra* at 2166, but that the Department's "interpretation is nothing more than a 'convenient litigating position.'" *Ibid.* (quoting *Bowen*, *supra* at 213).
>
> App. at 45-49

Thus the Nation below squarely defined the issue as whether the Department's application of IGRA's "former reservation" exception enabling the acquisition at Terral to take place was consistent with the requirements of statute.

As for any NEPA challenge, the Nation also made clear it was "unable to plead the claims with more particularity without the complete administrative record relating to the trust acquisition in Jefferson County." App. at 39.

The Department responded to the motion for preliminary injunctive relief as if the Nation were mounting a facial challenge to the 2008 regulation[3], rather than bringing a claim that a trust acquisition Terral without regard to the existence of governmental jurisdiction took place in violation of IGRA's "former reservation" exception. Defendants' Response to Plaintiff's Motion for Preliminary Injunction. App. at 145.

As for the merits of the claim actually before the district court, the Department argued the "former reservation" exception applied to any lands within the boundaries of a former reservation, without regard to the existence of governmental jurisdiction.

The Department also included in its responsive submission the Department's "Record of Decision" (ROD) relating to the project at Terral. App. at 179. The document is studded with dozens of references to documentary material, including several objections to the project lodged by the Governor of Oklahoma based on concerns about "market saturation" deriving from yet another Chickasaw gaming

[3]A facial challenge to the 2008 regulation could be held barred by the six year statute of limitations period set forth by 28 U.S.C. § 2401. *See*, e.g., *Dunn-McCampbell Royalty Interest, Inc. v. Nat'l Park Serv.,* 112 F.3d 1283, 1287 (5th Cir. 1997).

operation, App. at 188, 190-92; and reference to a requisite notice of NEPA compliance efforts supposedly made available to the public. App. at 193.

However, the Department did not make the Governor's objections a part of the record below, nor did it produce a copy of the actual and requisite notice of NEPA compliance efforts allegedly made available to affected tribes and other interested parties. However, perhaps prompted by allegations of serial violations of NEPA over the course many years which benefitted the gaming ventures of the Five Civilized Tribes in particular, the Department did come forward with a purported "Environmental Assessment" (EA) and resulting "Finding of No Significant Environmental Impact" relating to the project at Terral. App. at 197, 312.

The Department may have intended these documentary submissions to give the impression that straightforward regularity attended the administrative process leading to the trust acquisition. However, the submissions actually gave rise to serious questions as to whether the Department complied with the fundamental procedural requirements of NEP, beginning with the propriety of assigning preparation of the EA, not to a neutral third party, but to the Chickasaw Nation's own Environmental Services Department. App. at 198.

The EA also includes reference to required consultations with the Choctaw Nation, Wichita & Affiliated Tribes and Caddo Tribes of Oklahoma - whose casino operations lie distant from Terral and draw from different markets - but is missing any reference to consultation with the Comanche Nation, which would obviously have a keen interest in a major competitor setting up shop a short distance away, just across the river from the vital Wichita Falls market.

For its part, the Nation noted the obvious defects in a conflicted Chickasaw agency's flawed approach to the requirements of NEPA, while introducing a much more comprehensive analysis of the likely economic impact on its nearby casino, even assuming the Chickasaw's projection of relatively modest casino size were accurate:

> This analysis isolated and examined the impact to Comanche Red River's gross gaming revenue under two different building scenarios for Terral.
>
> - The first assumes as publicly reported, a $10 million facility with 600 gaming machines, 6 table games, and a restaurant and retail space.
> - The second scenario assesses a more aggressive approach assuming the Chickasaw Nation would ultimately expand at the same location to a significantly larger facility on a much grander scale that would include over 2,500 gaming positions, enough dining variety and seating to meet demand, entertainment venues and a hotel.
>
> * * *

> The analysis resulted in a negative impact or loss of revenue for each scenario. Scenario 1 showed a reduction of $8.55 million or 9.7%. The Comanche Red River Hotel and Casino would feel a much larger impact losing 22.7% of their gross gaming revenue or $20.11 million under Scenario 2. "Competitive Impact Analysis Comanche Red River Casino" (October 2017), pp. 1-2. App. at 361.

The Nation also introduced an affidavit from Steve York, a former BIA official intimately familiar with the BIA's Muscogee Regional Office and the longstanding practice of officials there helping the Five Civilized Tribes in particular to skirt the requirements of NEPA on their way to establishing dozens of gaming operations in the State.

Mr. York noted that the acquisition at Terral on behalf of the Chickasaw was the first trust acquisition for gaming in the post-*Patchak* era, and thought it anything but coincidental that a purported Environmental Assessment appeared for the first time in the record of an acquisition on behalf of the Chickasaw that might well be subject to challenge. York Affidavit, ¶ 19. App. at 389.

Mr. York also thought "the assertion of approximately 500 ... gaming machines intended for Terral is not credible. I think it is very likely that the Chickasaw instead plan to develop a much larger facility and eventually a destination resort at Terral." *Id.*, ¶ 23. App. at 390.

During the hearing on the motion, the Nation emphasized the evident departures from the requirements of NEPA, and also emphasized that the probable size of the "total retention" storage lagoons for anticipated waste generated by a casino at Terral suggested that the Chickasaw actually have in mind a destination resort at Terral to rival their Winstar Casino in Thackerville, Oklahoma, the world's largest gaming operation, which made a meaningful and disinterested environmental review especially vital. Transcript of Motions Hearing (October 26, 2017). App. at 554.

The rapid pace of development at Terral, and consequent urgency of the litigation effort challenging it, had made it difficult to address the potential impact of the very recent *Murphy* decision on the Department's application of IGRA's "former reservation" exception to the acquisition at Terral.

However, the Nation's counsel noted that Congress treated the Five Civilized Tribes in virtually identical fashion throughout its dealings with them, beginning with their removal to present-day Oklahoma, and that the implication of the *Murphy* decision is clear: If Congress has not disestablished the Creek reservation, virtually the same evidence is likely to show that Congress has not disestablished the reservations for any of the Five Civilized Tribes. App. at 584.

The Nation's counsel urged that, if the district court were to find remand warranted on other grounds, it would also be appropriate to have the Department address the impact of the *Murphy* decision on any trust acquisition during the course of any remand. App. at 584. *See Wyandotte v Sibelius*, 443 F.3d 1247, 1254 n. 11 (10th Cir. 2006) ("The doctrine of primary jurisdiction allows a federal court to refer a matter extending beyond the conventional experiences of judges or falling within the realm of administrative discretion to an administrative agency with more specialized experience, expertise, and insight." (quoting *Williams Pipe Line Co. v. Empire Gas Corp*., 76 F.3d 1491, 1496 (10th Cir.1996).

IV. RULINGS PRESENTED FOR REVIEW

A. Whether the district court properly adopted the Department's argument that IGRA's "former reservation" exception for Oklahoma Tribes includes no governmental jurisdiction requirement.

B. Whether the district court improperly held the very limited administrative record before the court adequate to show that Department took the requisite "hard look" at the Terral project, notwithstanding a host of departures from fundamental procedural requisites intended to ensure that such a "hard look" in fact takes place.

V. SUMMARY OF ARGUMENT

A. IGRA'S "FORMER RESERVATION" EXCEPTION FOR TRUST ACQUISITIONS IN OKLAHOMA REQUIRES THE EXISTENCE OF GOVERNMENTAL JURISDICTION

The U.S. Department of Interior first promulgated regulations concerning land acquisition policy in 1980. It provided that the Department could take land into trust within an Indian reservation if the Tribe had governmental jurisdiction of those lands. It also provided that the Department could take land into trust within the "former reservation" of a Tribe in Oklahoma.

Congress enacted the Indian Gaming Regulatory Act (IGRA) eight years later and adopted rigorous restrictions against gaming on lands acquired after October 17, 1988, the date of IGRA's enactment. Congress adopted the "former reservation" exception for "post 1988 acquisitions" with respect to Oklahoma Tribes, and for the same reason the Department had eight years before: In Oklahoma common wisdom held that reservations in the State had all been disestablished early in the century, in favor of individual "allotments" to Tribal members, land which in many instances remains in trust for the benefit of individual members to the present day.

The Department in 1980, and the United States Congress eight years later, were intent on ensuring that Tribes in Oklahoma stood on the same footing as

Tribes elsewhere, and could have lands taken into trust with respect to individually owned allotments

The history shows that as late as 1988 – the year Congress enacted IGRA – a consortium of oil and gas companies (collectively "Mustang") brought the original case against the Cheyenne–Arapaho Tribes (CNA Tribes) of Oklahoma, challenging the CNA Tribes' decision to "impose a severance tax on oil and gas production on allotted lands held in trust for their members." *Mustang Production Company v. Harrison*, 94 F.3d (10th Cir. 1996).

The basis of the challenge was "that the Tribes do not have authority over the allotted lands and thus cannot tax oil and gas production on those lands. Mustang contends that the Tribes lost jurisdiction over all of the lands in the 1869 reservation, including allotted lands, when the 1890 Agreement disestablished the reservation. According to Mustang, when the Agreement set aside allotted lands for individual tribal members, it also divested the Tribe of its jurisdiction over those lands." *Id.* at 1384-85.

It was to ensure that Oklahoma Tribes would not confront the same jurisdictional challenges with respect to "allotted lands for individual tribal members" sought to be acquired by their Tribes, that the Department promulgated

the "former reservation" exception in 1980, and that the Congress followed suit eight years later.

However, over the course of many years, the Department failed to ensure that lands within the "former reservations" of Oklahoma Tribes, and especially the Chickasaw Nation and others of the "Five Civilized Tribes", targeted for acquisition for gaming purposes were subject to governmental jurisdiction, which has allowed the Five Civilized Tribes in particular to have lands acquired in trust for gaming purposes near major population centers in the State, and dominate a 4.3 billion dollar gaming market in Oklahoma.

The Quiet Title Act (QTA) is the sole basis for challenging title to land in which the United States has an interest, and common wisdom held that the QTA's "Indian lands" exemption barred any challenge once land was taken into trust for the benefit of an Indian Tribe. *See*, e.g., *Neighbors for Rational Development v. Norton*, 379 F.3d 956, 961 (10th Cir. 2004).

However, in *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak* ("*Patchak*") 567 U.S. 209 (2012), the Supreme Court held that the Administrative Procedure Act's waiver of the U.S. Government's immunity applied to a suit challenging a trust acquisition for Indian gaming. Since Mr. Patchak was not seeking to quiet title in his own right, the federal Quiet Title Act and its

reservation of sovereign immunity with respect to "Indian lands" did not serve to bar suit under the APA.

This is the first challenge to a trust acquisition for gaming purposes in Oklahoma in the post–*Patchak* era.

B. THE RECORD BEFORE THE DISTRICT COURT DID NOT SHOW ANY "HARD LOOK" AT COMPLIANCE WITH NEPA TOOK PLACE, AND SHOWED A HOST OF PROCEDURAL FAILURES THAT ALSO WARRANTED REMAND

NEPA requires federal agencies to take a "hard look" at the environmental consequences before taking a federal action. *Cure Land LLC v. United States Department of Agriculture*, 833 F.3d 1223, 1229-30 (10th Cir. 2016).

The district court mistakenly held the record adequate to establish that such a "hard look" took place, and mistakenly found that the sole basis for the Nation's NEPA challenge was the "socioeconomic impact" of a gaming operation at Terral. *See id.* at 1236 ("socioeconomic impacts, standing alone, do not constitute significant environmental impacts cognizable under NEPA.")

The district court thus ignored a host of fundamental procedural failures, and the important caveat in *Cure Land*, that "[s]o 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)). *Ibid.*

The procedural failures here began with BIA officials turning a blind eye to the conflict of interest inherent in the Chickasaw Nations' own Environmental Services completing a purported Environmental Assessment that resulted in a preordained Finding of No Significant Economic Impact. *See* 40 C.F.R. § 1506.5(b) (July 1, 2016). Addendum at 19.

The record was missing the actual notice to the public that the purported EA was available for inspection, which was especially important to review for adequacy in light of evidence showing that for many years officials at the Bureau of Indian Affairs permitted the Chickasaw and other of the Five Civilized Tribes to skirt the requirements of NEPA, and have land obviously intended for gaming taken into trust without any review of potential environmental impacts.

The record also showed the Chickasaw's Environmental Services Department purported to consult about the proposed gaming project with Tribes whose gaming operations lie more than a hundred miles away and draw from different markets, yet failed to consult with a Comanche Nation with and obvious and keen interest in a planned gaming operation less than 45 miles from the Comanche Nation Red River Hotel and Casino, the Nation's primary source of revenue for vital Tribal operations and programs. *See* 40 C.F.R. § 1501.2(d) July 1, 2016). Addendum at 19.

The record before the district court warranted remand to ensure that a "hard look" at the environmental consequences of a gaming operation at Terral actually takes place.

VI. ARGUMENT

A. IGRA'S "FORMER RESERVATION" EXCEPTION INCLUDES A REQUIREMENT OF GOVERNMENTAL JURISDICTION PRIOR TO ANY ACQUISITION IN IN TRUST FOR GAMING PURPOSES

The standard on motion for preliminary injunction is well-settled. The moving party must show:

> (1) that it has a substantial likelihood of prevailing on the merits; (2) that it will suffer irreparable harm unless the preliminary injunction is issued; (3) that the threatened injury outweighs the harm the preliminary injunction might cause the opposing party; and (4) that the preliminary injunction if issued will not adversely affect the public interest. *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1246 (10th Cir. 2001).

The district court focused almost exclusively upon the "likelihood of success on the merits" element, and concluded the Nation failed to make such a showing[4]:

[4]The court suggested, but did not hold, that the statute of limitations could bar the claim, in that it could represent a "facial challenge" to the May 2008 regulation that made no mention of a governmental jurisdiction requirement. App. at 517. However, the notice of the trust acquisition of January 19, 2017 includes no reference to regulation, but instead refers to statutory authority, including the finding that the Chickasaw request "meets the requirements of the Indian Gaming Regulatory Act's 'Oklahoma exception' ... to the general

Instead the court adopted the Department's argument that IGRA's "former reservation" exception means that an Oklahoma Tribe may set up shop for gaming anywhere within the bounds of an Oklahoma Tribe's former reservation that the Department acquires in trust for its benefit.

The district court found insignificant the regulation proposed in October 2006, interpreting the statutory phrase to include a governmental jurisdiction requirement for lands within a former reservation to be gaming eligible. Order (November 13, 2017) at 13. App. at 529. ("[T]he proposed rule that plaintiff relies on was just that—proposed. There is no basis for concluding that a regulation which was proposed and thought about years ago, but not adopted, somehow becomes the baseline against which all later regulations should be tested.")

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prohibition against gaming on lands acquired in trust after October 17, 1988. Notice, 82 Fed.Reg. 32867 (July 18, 2017). App. at 60. *See*, *Wind River Min. Corp*. v. *United States,* 946 F.2d 710 (9th Cir. 1991), where the court explained that "facial challenges ″to agency actions generally must be raised within six years because "[t]he grounds for such challenges will usually be apparent to any interested citizen within a six-year period following promulgation of the decision." *Id*. at 715. However, when "a challenger contests the substance of an agency decision as **exceeding constitutional or statutory authority,** the challenger may do so later than six years following the decision by filing a complaint for review of the adverse application of the decision to the particular challenger." (emphasis added). *Ibid.*

Yet the proposal plainly represented the best thinking of Departmental officials after a **two year notice and comment period** with respect to the statutory meaning of "former reservation." These officials defined IGRA's "former reservation" exception as including a governmental jurisdiction requirement.

Like Tribes outside Oklahoma seeking to have land within reservation bounds acquired in trust for gaming, Tribes in Oklahoma seeking to have land within former reservation bounds acquired would have to show the existence of governmental jurisdiction, or have the acquisition treated as "off-reservation" pursuant to the after–acquired lands exception set forth by 29 U.S.C. § 2719(b)(1)(A) (requiring Secretary's approval and concurrence by Governor of the State). [5]

The regulation eventually published in May 2008 came down without any additional notice and comment period, and with an explanation for omitting an express governmental jurisdiction requirement from "former reservation" that was as non–sensical as it was brief: "[T]he definition clarifies that the last reservation

[5]The Record of Decision shows the Governor of Oklahoma was against the project. App. at 190-92. Concurrence by the Governor to an "off-reservation" acquisition at Terral was out of the question.

be in Oklahoma, which is consistent with the language of the statute." 73 Fed. Reg. 29356 (May 20, 2008). App. at 94.

The Nation argued before the district court, not that the regulation as originally proposed should apply, but that the stark difference in interpretation of the statute within a period of two years showed that "former reservation" is ambiguous. The ambiguity proved by the Department's different treatment of the phrase warranted a lesser standard of deference applied to the Department's decision to take land into trust for gaming purposes based on IGRA's "former reservation" exception in the absence of the governmental jurisdiction required by statute.

The Nation also noted that the change of language occurred during the course of a remand to the Department for clarification purposes in a case involving a similar challenge to another Chickasaw gaming operation – a dog track at Marlowe, Oklahoma – brought in the U.S. District Court for Western District of Oklahoma (Russell, J.).

The timing also gave rise to the inference that the change in interpretation represented a "convenient litigating position." *Christopher v. SmithKline Beecham Corp.*, *supra,* 132 S.Ct. at 2166.

We respectfully submit the district court failed to account for the fundamental purpose of the "former reservation" phrase for trust acquisitions in Oklahoma, in the first regulatory regime for trust acquisitions promulgated in 1980, and in the Indian Gaming Regulatory Act, which was simply to ensure that Tribes in Oklahoma stand on equal footing with Tribes elsewhere.

The history shows that as late as 1988 – the year Congress enacted IGRA – a consortium of oil and gas companies (collectively "Mustang") brought the original case against the Cheyenne–Arapaho Tribes (CNA Tribes) of Oklahoma, challenging the CNA Tribes' decision to "impose a severance tax on oil and gas production on allotted lands held in trust for their members." *Mustang Production Company v. Harrison*, 94 F.3d (10th Cir. 1996).

The basis of the challenge was "that the Tribes do not have authority over the allotted lands and thus cannot tax oil and gas production on those lands. Mustang contends that the Tribes lost jurisdiction over all of the lands in the 1869 reservation, including allotted lands, when the 1890 Agreement disestablished the reservation. According to Mustang, when the Agreement set aside allotted lands for individual tribal members, it also divested the Tribe of its jurisdiction over those lands." *Id.* at 1384-85.

This Court squarely rejected the argument, holding that "the allotted lands constitute Indian country over which the Tribes have civil jurisdiction. Thus, the Tribes have the power to enact and enforce a severance tax on oil and gas produced on allotted lands." *Id.* at 1386. The Court's analysis of the jurisdictional issue was as follows:

> [D]isestablishment of the reservation is not dispositive of the question of tribal jurisdiction.... In order to determine whether the Tribes have jurisdiction we must instead look to whether the land in question is Indian country. See Indian Country U.S.A. Inc. v. Oklahoma, 829 F.2d 967, 973 (10th Cir.1987) ("[T]he Indian country classification is the benchmark for approaching the allocation of federal, tribal and state authority with respect to Indians and Indian lands."). Indian country encompasses those areas that have been "validly set apart for the use of the Indians as such, under the superintendence of the Government." Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505, 511, 111 S.Ct. 905, 910, 112 L.Ed.2d 1112 (1991) (quoting United States v. John, 437 U.S. 634, 648-49, 98 S.Ct. 2541, 2548-49, 57 L.Ed.2d 489 (1978)).
>
> In Oklahoma Tax Commission v. Sac and Fox Nation, 508 U.S. 114, 123, 113 S.Ct. 1985, 1991, 124 L.Ed.2d 30 (1993), the Supreme Court specifically stated that "Indian allotments, whether restricted or held in trust by the United States," are Indian country. In that case, the state argued that members of the Sac and Fox Nation were subject to state taxation because an 1891 treaty disestablished their reservation. Id. at 121, 113 S.Ct. at 1989. The Court rejected this argument and held that "a tribal member need not live on a formal reservation to be outside the State's taxing jurisdiction; it is enough that the member live in `Indian country.'" Id. at 123, 113 S.Ct. at 1991.

Id. at 1385.

Thus the existence of longstanding disputes relating to tribal jurisdiction in Oklahoma explained the Department's express reference in 1980 to "former reservation" lands eligible to be acquired in trust for the benefit of Tribes in Oklahoma; and the same concern explains Congress's use of the same language eight years later. The point was to make clear that Tribes in Oklahoma, like Tribes outside the State whose reservations had not been disestablished, could have lands acquired in trust, if those lands, like the lands allotted to CNATribal member in *Mustang*, were subject to governmental jurisdiction.

We respectfully submit the record shows that the district court simply missed the fundamental distinction between land within former reservation bounds in Oklahoma as to which governmental jurisdiction exists; and land within former reservation bounds as to which jurisdiction does not exist.

This was apparent in the court's treatment of the *Murphy* decision and its implications for gaming eligibility of the lands at Terral if the analysis in *Murphy* were eventually held applicable to Chickasaw reservation: "If ... *Murphy's* reasoning ultimately leads to a conclusion that the Chickasaw reservation has not been disestablished, the most plausible consequence of that determination is that the Chickasaw "reservation" would be treated like any other formal reservation,

and would hence be within the scope of § 151.3(1)." Order (November 13, 2017). App. at 529.

25 C.F.R. § 151.3(a) provides in relevant part that "land may be acquired for a tribe in trust status: (1) When the property is located within the exterior boundaries of the tribe's reservation or adjacent thereto ...."

However, we submit the suggestion such an acquisition may take place without regard to the existence of governmental jurisdiction is mistaken. 25 C.F.R. § 151.2(f) defines "Indian reservation" as "that area of land over which the tribe is recognized by the United States as having governmental jurisdiction ...."

The Supreme Court has long held that, absent several exceptions not applicable in a trust acquisition context, fee land within reservation boundaries held by a non–Indian is outside the Tribe's governmental jurisdiction. *See,* e.g., *Montana v. United States,* 450 U.S. 544, 563-67 (1977). *See also, City of Sherrill v. Oneida Indian Nation of New York,* 544 U.S. 197 (2005); *Nebraska v. Parker,* 577 U.S. ____, 136 S.Ct. 1072, 1082, 194 L.Ed. 2d 152 (2016) (holding Omaha reservation not diminished, but declining to take up taxation issue); 18 U.S.C. § 1151(a) ("Indian country" includes "all land within the limits of any Indian reservation **under the jurisdiction of the United States Government**, notwithstanding the issuance of any patent, and, including rights-of-way running

through the reservation, . . ." (emphasis added). We anticipate that, if the Court should grant *certiorari* in *Murphy*, it will affirm this Court's holding that Congress has never disestablished the Creek reservation, while also confirming the principle that reservation status does not necessarily mean the existence of governmental jurisdiction as to all lands within the boundaries.

Thus we respectfully submit that, if the reasoning of *Murphy* eventually leads to a similar determinative finding that Congress never disestablished the Chickasaw reservation, then any trust acquisition for gaming purposes at Terral – or anywhere else the Chickasaw could not show governmental jurisdiction – should have taken place as an "off reservation" acquisition, dependent for gaming eligibility upon the approval of the Secretary of Interior and concurrence of the Governor pursuant to 25 U.S.C. § 2719(b)(1)(A).

B. THE RECORD BEFORE THE DISTRICT COURT WARRANTED REMAND TO ENSURE AN UNBIASED "HARD LOOK" AT THE ENVIRONMENTAL RISKS AT TERRAL, AFTER REQUISITE NOTICE TO, AND CONSULTATION WITH, NEARBY TRIBES AND OTHER INTERESTED PARTIES

This Court has described the fundamental purposes of NEPA as follows:

> "[NEPA] declares a broad national commitment to protecting and promoting environmental quality." *Robertson v. Methow Valley Citizens Counci*l, 490 U.S. 332, 348, 109 S.Ct. 1835, 104 L.Ed.2d 351 (1989). To that end, it "imposes procedural requirements intended to improve environmental impact information available to agencies and

> the public." *New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 704 (10th Cir. 2009). NEPA does not, however, "require agencies to reach particular substantive environmental results." *Los Alamos Study Grp. v. U.S. Dep't of Energy*, 692 F.3d 1057, 1060 (10th Cir. 2012). Rather, "it requires only that the agency take a `hard look' at the environmental consequences before taking a major action." *Citizens' Comm. to Save Our Canyons v. Krueger*, 513 F.3d 1169, 1178 (10th Cir. 2008) (quoting *Utah Shared Access All. v. U.S. Forest Serv.*, 288 F.3d 1205, 1207-08 (10th Cir. 2002)).

Cure Land LLC v. United States Department of Agriculture, 833 F.3d 1223, 1229-30 (10th Cir. 2016).

The record before the district court warranted the conclusion that no "hard look" whether compliance with the fundamental requirements of NEPA took place here, beginning with the Department's willful blindness to the inherent conflict of interest that made any unbiased "hard look" on the part of the Chickasaw's own Environmental Services Department impossible. *See* 40 C.F.R. § 1506.5(b) (July 1, 2016) ("*Environmental Assessments.* If an agency permits an applicant to prepare an environmental assessment, the agency ..., shall make its own evaluation of the environmental issues and take responsibility for the scope and content of the environmental assessment.").[6] Addendum at 21.

[6]The Addendum includes this and other regulations relating to the requisites of NEPA compliance in effect during the relevant period.

An Environmental Assessment resulting in a Finding of No Significant Environmental Impact rendered by an agency of the Chickasaw Nation itself were foregone conclusions, and nothing in the record suggests the Department did anything to ensure that a neutral, unbiased review of the likely environmental impacts of the project had in fact taken place before taking the land into trust for gaming purposes.

Indeed, though the Record of Decision makes reference to the requisite notice of the Environmental Assessment and its availability for public inspection – perhaps the most basic requirement of NEPA[7] – evidence of the purported notice itself is missing from the limited documentary production made before the district court.

Against a long history of dozens of trust acquisitions for gaming purposes – thought unassailable before *Patchak* – taking place without NEPA compliance

[7]*See* 40 CFR § 1501.4(b) (requiring agencies to involve environmental agencies, applicants, and the public, to the extent practicable); *Id*. § 1501.4(e)(1) (requiring agencies to make Findings of No Significant Environmental Impact (FONSIs) available to the affected public); *Id.* § 1501.4(e)(2) (requiring agencies to make FONSIs available for public review for thirty days before making any final determination on whether to prepare an Environmental Impact Statement of proceed with an action).

efforts of any kind, the absence of the actual notice from the record here is an especially troubling omission.

Also troubling is the decision shown in the EA – again taken with no apparent Departmental oversight or scrutiny – to limit consultation with Tribal parties to the Choctaw Nation of Oklahoma, which responded the project was not within any area of interest, App. at 304, and to the Wichita and Affiliated Tribes, and the Caddo Tribe. App. at 303. There is no indication the Wichita or Caddo responded at all, likely because their gaming operations also lie more than a hundred miles from Terral and also draw from different markets.

There is no better evidence that the Chickasaw Environmental Services Department was intent on easing the way to a Chickasaw gaming operation at Terral than "consulting" about the project at Terral with Tribes whose gaming operations it would not affect, while ignoring a Tribe with a gaming operation less than 45 away drawing from the same Wichita Falls market the Chickasaw obviously hope to attract.

The failure of consultation with a Tribe with such an obvious and vital interest just a few miles upriver represents yet another departure from the fundamental requisites of NEPA. *See* 40 C.F.R. § 1501.2(d) July 1, 2016) (Requiring agencies to "[p]rovide for cases where actions are planned by private

applicants or other non– Federal entities before Federal involvement so that: * * * (2) The Federal agency consults early with appropriate State and local agencies and Indian Tribes and with interested private persons and organizations when its own involvement is reasonably foreseeable."). Addendum at 19.

Morever, to the extent it is possible to test the assertions of the Record of Decision and EA independently, the result suggests that the Chickasaw Nation and its Department of Environmental Services were not truthful in preparing the Environmental Assessment, either about the actual intended scope of the project, or about the likely environmental impact.

The ROD indicates some 500 Class II and III machines contemplated for the operation at Terral. However, a former BIA official with many years' experience in Indian gaming attested to very serious doubts whether the Chickasaw intend the casino only 500 machines. He believes that a much larger facility, and eventually a destination resort, is in the works at Terral. York Affidavit, ¶ 23. App. at 390.

A "Phase I Environmental Site Assessment (ESA)" was also required for the project at Terral, pursuant to 40 C.F.R. Part 312. The regulations provide in most relevant part that "all appropriate inquiries must be conducted or updated within

180 days of and prior to the date of acquisition of the subject property .... " 40 C.F.R. § 312.20(b) (July 1, 2016). Addendum at 17.

The Chickasaw Environmental Services Department reported in the EA that it conducted a Phase I ESA in June 2013, and made no reference to "updating" the Phase I ESA at any point. App. at 261.

Yet Department reported in its Record of Decision – dated January 19, 2017, the day the trust acquisition took place - that "a Phase I Environmental Site Assessment for the Terral site was completed on March 28, 2016", App. at 192, nearly three years after the Chickasaw reported it taking place. The Department also reported that "an updated Phase I Environmental Site Assessment will be required prior to acquiring the Terral site in trust," App. at 192, an obvious impossibility for a trust acquisition taking place that same day.

The district court ignored these failures of procedural compliance, and relied upon this Court's *Cure Land* decision in holding the record insufficient to warrant remand for an environmental review consistent with the requirements of NEPA, and especially indication that "socioeconomic impacts, standing alone, do not constitute significant environmental impacts cognizable under NEPA." *Id.,*833 F.3d at 1236.

However, unlike the Nation here, the plaintiff in *Cure Land* did "not contend that the agency failed to take a 'hard look," ... at the [EA] amendment's impacts on the natural environment, and has failed to show that the agency's environmental analysis was otherwise flawed." *Ibid.* (citation omitted).

Nor did the plaintiff in *Cure Land* show manifest and multiple 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)).

We submit that the obvious failure to follow "NEPA procedures" were such that the district court here was bound to "second-guess the wisdom of the ultimate decision" and remand for further proceedings to ensure compliance with NEPA.[8]

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[8]The district court noted "post-hearing submissions including] an affidavit from plaintiff's Tribal Administrator and former historic preservation officer stating that the Terral site is within lands historically occupied or crossed by the Comanche and that burial sites and tribal artifacts may exist in the area. It also suggests consultation with the Tribe as to federal actions is required by the National Historic Preservation Act and the Native American Graves Protection and Repatriation Act. Whatever may be the potential application of those acts to this situation, the affidavit does not support a conclusion that a violation of the NEPA is shown." Order (November 13, 2017) at 16, n. 20. App. at 532. However, the Nation did not introduce the information to bolster the NEPA claims, but to point up the additional claims that might have been warranted, if it had benefit of **notice**, as to the trust acquisition, and as to the purported availability of the Environmental

CONCLUSION

For the foregoing reasons, 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

Assessment conducted by the Chickasaw Environmental Services Department.

REQUEST FOR ORAL ARGUMENT

We respectfully submit that oral argument is warranted in light of the importance of the issue presented in the first challenge to an "on reservation" trust acquisition in the post-*Patchak* era, whether Tribes in Oklahoma, like Tribes elsewhere, must show the existence of governmental jurisdiction with respect to lands they are seeking to have taken into trust for gaming purposes.

/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 11,164 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 13-point for the body of the brief and font size 13-point for all footnotes.

Dated: February 22, 2018 /s/ Richard J. Grellner

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

ADDENDUM

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

COMANCHE NATION OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
vs.	)	NO. CIV-17-887-HE
	)	
RYAN ZINKE, *et al.*,	)	
	)	
Defendants.	)	

ORDER

In this case, plaintiff Comanche Nation of Oklahoma seeks to prevent the opening of a casino being constructed by the Chickasaw Nation in Jefferson County, Oklahoma. The casino facility being constructed is on lands recently taken into trust by the Secretary of the Interior for the benefit of the Chickasaw Nation. Plaintiff challenges the legality of that decision by the Secretary, seeking declaratory and injunctive relief.[1] Plaintiff's complaint also asserts claims against officers of the National Indian Gaming Commission ("NIGC"), seeking to enjoin any action by the NIGC which would further the Chickasaw Nation's effort to open the casino.

Plaintiff moved for issuance of a preliminary injunction. The court held a hearing on the motion on October 26, 2017. Plaintiff tendered some additional evidentiary submissions, and the court heard argument from counsel. Having fully considered the

[1] *The Secretary and Department of the Interior are referred to here as "the Secretary." All claims against the officials of the Department of the Interior and the NIGC are in their official capacities.*

arguments and the relevant legal standards, the court concludes that the motion for preliminary injunction should be denied.

Background

The background facts are largely undisputed. In June of 2014, the Chickasaw Nation submitted an application asking the Secretary to take approximately 30 acres of land, located near Terral in Jefferson County, into trust for gaming and other purposes. The Chickasaw Nation sought to use the land for a casino which would offer class II and class III gaming. The Terral site is approximately 45 miles from a gaming facility operated by plaintiff.

On January 19, 2017, the Secretary made a final determination to take the Terral site into trust.[2] The Secretary's decision was based on, among other things, a determination that the Chickasaw Nation did not have a reservation, but that the proposed site was within the boundaries of its former reservation. Therefore, according to the Secretary, the land could be taken into trust as an "on-reservation" acquisition under the Indian Reorganization Act ("IRA"), and could be used for gaming under the Indian Gaming Regulatory Act ("IGRA").

Plaintiff challenges the Secretary's determination here, seeking review under the Administrative Procedure Act, 5 U.S.C. § 500 *et seq*. ("APA"). It also challenges the decision on the basis of non-compliance with the National Environmental Protection Act, 42 U.S.C. § 4321 *et seq*. ("NEPA").

[2] *The decision was actually made by the Principal Deputy Assistant Secretary for Indian Affairs. [Doc. #20-1].*

Discussion

The injunctive relief being sought by plaintiff's motion has changed somewhat since the case and motion were originally filed. The complaint and motion initially focused, in substantial part, on preventing the NIGC from issuing a gaming license or other regulatory approval to the Chickasaw Nation. In light of defendants' explanation and submissions as to the NIGC's role, plaintiff has shifted its focus to the propriety of the Secretary taking the property into trust. It challenges the Secretary's determination, rather than any action or inaction of the NIGC, and now essentially seeks to have the court stop the casino project on the basis that the land acquisition was improper and that gaming on the land is therefore unauthorized.

A preliminary injunction is an "extraordinary remedy" which is never "awarded as of right." Winter v. Natural Res. Def. Council, 555 U.S. 7, 24 (2008). A party may be granted a preliminary injunction only when monetary or other traditional remedies are inadequate, and "the right to relief [is] clear and unequivocal." Schrier v. Univ. of Colo., 427 F.3d 1253, 1258 (10th Cir. 2005). To obtain a preliminary injunction, the moving party must show:

> (1) that it has a substantial likelihood of prevailing on the merits; (2) that it will suffer irreparable harm unless the preliminary injunction is issued; (3) that the threatened injury outweighs the harm the preliminary injunction might cause the opposing party; and (4) that the preliminary injunction if issued will not adversely affect the public interest.

Prairie Band of Potawatomi Indians v. Pierce, 253 F.3d 1234, 1246 (10th Cir. 2001); Fed.R.Civ.P. 65. The particular injunction sought here is a disfavored one, as it seeks to

alter the status quo by rescinding the land acquisition. *See* O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft, 389 F.3d 973, 975 (10th Cir. 2004) (injunctions that alter the status quo are disfavored). As a result, the plaintiff must show that the preliminary injunction factors "weigh heavily and compellingly in [its] favor." *Id*. (quoting SCFC ILC, Inc. v. Visa USA, Inc., 936 F.2d 1096, 1098 (10th Cir. 1991) (overruled on other grounds)).[3]

Although the parties' submissions address all factors necessary for a preliminary injunction, the focus at the hearing was on the legality of the Secretary's decision, which goes to plaintiff's likelihood of succeeding on the merits. Having considered the various legal questions involved, the court concludes plaintiff is unlikely to prevail on the merits of its claims and that preliminary injunctive relief is not warranted.[4]

Administrative Procedures Act Claim.

The parties do not dispute that the Secretary's decision to take the Terral site into trust is one subject to judicial review pursuant to the APA. *See* McAlpine v. United States, 112 F.3d 1429 (10th Cir. 1997). Further, plaintiff's standing to challenge the decision is not, in general, disputed. *See* Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians

[3] *Plaintiff initially urged that a "relaxed" standard should apply to the showing required for likelihood of success on the merits, but now concedes that cases supporting such a standard are inconsistent with the Supreme Court's decision in Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7 (2008). See N.M. Dept. of Game & Fish v. U.S. Dept. of the Interior, 854 F.3d 1236, 1246-47 (10th Cir. 2017).*

[4] *Having concluded that plaintiff has not shown a likelihood of success on the merits, it is unnecessary to address the parties' arguments as to other factors.*

v. Patchak, 567 U.S. 209 (2012).[5] So the question becomes whether the challenged decision of the Secretary was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2); McAlpine, 112 F.3d at 1436.

Plaintiff argues the decision to take the Terral property into trust and the determination that gaming could occur on the property were not in accordance with the law or were otherwise arbitrary and capricious. In particular, the Comanche Nation contends the Secretary's regulations involved here are inconsistent with a Congressional intent to treat all tribes equally, unfairly benefit tribes in Oklahoma compared to tribes in other states, and arbitrarily depart from prior regulations or practice. None of the arguments are persuasive.

As a threshold matter, all of plaintiff's claims challenging the applicable regulations appear to be barred by the statute of limitations. All parties appear to concede that a facial challenge to a regulation is subject to a six-year limitations period. *See* 28 U.S.C. § 2401; Dunn-McCampbell Royalty Interest, Inc. v. Nat'l Park Serv., 112 F.3d 1283, 1287 (5th Cir. 1997) (limitations period for a facial challenge to a regulation begins to run when the agency publishes the regulation in the Federal Register); *see also* Waltower v. Kaiser, 17 F. App'x 738, 741 (10th Cir. 2001) (discussing the statute of limitations with regards to facial challenges to statutes). Here, the particular regulations plaintiff challenges were promulgated in 1980 and 2008, more than six years ago. The statute of limitations therefore

[5] *Patchak involved prudential, rather than Article III standing, but the necessary elements of injury-in-fact, causation, and redressability are present here and the Secretary does not contend otherwise. The Secretary does, however, challenge plaintiff's standing to raise some of the particular legal arguments it offers as the basis for challenging the Secretary's decision.*

bars a facial challenge to those regulations. Plaintiff seeks to avoid the bar by arguing that its challenge here is an "as applied" challenge, rather than a facial challenge. But that is plainly not so. For example, plaintiff argues that 25 C.F.R. § 292.2 improperly defines "reservation" because it does not include a requirement that the tribe have "governmental jurisdiction" over the former reservation. That is a classic facial challenge—arguing what the law is or should be with respect to all persons. An "as applied" challenge is something different, as it focuses on the "application of that [regulation] to the facts of a plaintiff's concrete case." Colo. Right to Life Comm. v. Coffman, 498 F.3d 1137, 1146 (10th Cir. 2007). So if, for example, the Comanche Nation was challenging the determination that the Terral site actually is within the scope of the former Chickasaw reservation, and hence within the regulation's definition of "reservation," that would be an "as applied" challenge. That is not what plaintiff seeks to do here. Rather, it seeks to invalidate the regulation to the extent that it deviates from plaintiff's view of what the law is or ought to be. That is a facial challenge, barred here by the statute of limitations. Plaintiff is thus unlikely to succeed on its claim challenging the regulations.

But even if plaintiff's APA claim is not barred by the statute of limitations, it is nonetheless unlikely to succeed on the merits. The thrust of plaintiff's argument is that the regulations promulgated by the Secretary allowing property to be taken into trust for gaming purposes in Oklahoma are deficient in that they do not include a requirement for a

showing of "governmental jurisdiction" by the involved tribe over the property being taken into trust.[6] For various reasons, the law does not support that conclusion.

Plaintiff focuses principally on the law and regulations which generally permit the Secretary to take land into trust. The statute involved is 25 U.S.C. § 2508, part of the IRA, which provides, in pertinent part, that "The Secretary . . . is authorized, in his discretion, to acquire any interest in lands . . . within or without existing reservations . . . for the purpose of providing land for Indians." There is no explicit requirement in the statute that the Secretary acquire only lands over which a tribe has "governmental jurisdiction" and, as the "without or without existing reservations" language suggests, there appears to be no limit in that statute as to what land the Secretary could accept. So the question becomes whether the Secretary has appropriately exercised his discretion via the various regulations or acquisition policies he has adopted in implementing his authority under § 2508.

The regulation setting out the general standard is 25 C.F.R. § 151.3, which authorizes the Secretary to take land into trust for an Indian tribe:

> (1) When the property is located within the exterior boundaries of the tribe's reservation or adjacent thereto, or within a tribal consolidation area;
>
> (2) When the tribe already owns an interest in the land; or
>
> (3) When the Secretary determines that the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing.

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[6] *Plaintiff's brief says "the most important basis for challenge is that the property in Jefferson County was not subject to the governmental jurisdiction of the Chickasaw Nation at the time of acquisition . . . ." [Doc. #13-1] at 4.*

A related regulation, adopted in 1980, defines "reservation" as:

> [T]hat area of land over which the tribe is recognized by the United States as having governmental jurisdiction, except that, in the State of Oklahoma . . . "Indian reservation" means that area of land constituting the former reservation of the tribe as defined by the Secretary.

25 C. F. R. § 151.2 (emphasis added). The regulation thus permits land to be taken into trust in Oklahoma if the land is part of a tribe's former reservation.[7] Here, there is no dispute that the Terral property is part of either the Chickasaw Nation's former reservation (if its former reservation has been disestablished) or that it falls within the geographical boundaries of its current reservation (if it still exists). The Terral property therefore, appears to fall squarely within either §151.2's general definition of reservation or the "Oklahoma exception" to that definition. Either way, it would be a proper "on-reservation" acquisition.

Plaintiff seeks to avoid this result by arguing that the Chickasaw reservation was never disestablished. It relies on the recent Tenth Circuit Court of Appeals' decision in Murphy v. Royal, 866 F.3d 1164 (10th Cir. 2017), where the Court concluded that, contrary to what most everyone had assumed for many years, the Creek Reservation has not been disestablished by Congress. Reasoning that both the Creek Nation and the Chickasaw Nation are one of the Five Civilized Tribes, which Congress has often dealt with in the same fashion, plaintiff suggests that the Chickasaw reservation in Oklahoma has similarly

[7] *Other factors not at issue here must also be considered.*

not been disestablished and that the Secretary's reliance on the "Oklahoma exception" to § 151.2 is therefore invalid.

Plaintiff's argument is unpersuasive for several reasons. First, it probably does not matter—for purposes of this case—whether the reservation was disestablished. If the Chickasaw reservation has been disestablished, then the Secretary's reliance on the properties' former reservation status is proper based on § 151.3(1) and the related regulation defining "reservation" to include former reservation lands. If, on the other hand, Murphy's reasoning ultimately leads to a conclusion that the Chickasaw reservation has not been disestablished, the most plausible consequence of that determination is that the Chickasaw "reservation" would be treated like any other formal reservation, and would hence be within the scope of § 151.3(1).[8]

Second, it is far from clear that Murphy will lead to any particular result as to the Chickasaw reservation. Even if it ultimately becomes final and binding, it is far from clear that a determination relating to the Creek Nation necessarily applies in the same way to the Chickasaw Nation. *See* Murphy, 866 F.3d at 1188, (whether there was specific congressional purpose to "disestablish or diminish a particular reservation depends on the language of the act and the circumstances underlying its passage.")

[8] *Any other conclusion would put an Oklahoma tribe with a current reservation in a less advantageous position than tribes with reservations outside Oklahoma. That is inconsistent with what plaintiff argues Congressional policy is, and it certainly appears inconsistent with Congress' interest in protecting Oklahoma tribes, as evidenced by the "exceptions."*

Plaintiff contends that the disestablishment question is relevant, arguing that if (per Murphy) the Chickasaw reservation still exists, the Secretary misapplied the relevant regulations. It relies on Montana v. United States, 450 U. S. 544 (1981) as the basis for its argument. So far as the court can determine,[9] plaintiff's position is that since the Terral property was fee land held by a non-Indian at the time it was acquired, then the Chickasaw tribe cannot be said to have exercised governmental jurisdiction over it even if the Chickasaw reservation still exists. Again, the court is unpersuaded. First, Montana involved a dispute over whether the state or the Indian tribe had the right to regulate hunting and fishing by non-Indians on reservation land. Montana, 450 U.S. at 549. The question here is not one of state jurisdiction versus tribal jurisdiction, but is, instead, whether the land is in the area of land "over which the tribe is recognized by the United States as having governmental jurisdiction." 25 C.F.R. § 151.2. Recognition by the United States is the key element, and the court can discern no reason why formal "reservation" status would not qualify as the pertinent "recognition."[10] Further, even if Montana somehow applies here, it recognizes that Indian tribes retain some aspects of civil jurisdiction even over non-Indian fee lands within the reservation. 450 U.S. at 565-66. In any event, plaintiff offers no persuasive explanation for why it would be an abuse of discretion for the Secretary to conclude that reservation status supplies any necessary "governmental jurisdiction."

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[9] *Plaintiff's discussion of Montana in its brief is very limited—basically little more than a footnote reference.*

[10] *Any narrower reading seems particularly anomalous in light of Congress' specific authorization to take into trust both reservation and non-reservation land.*

In short, plaintiff appears unlikely to succeed on its APA challenge to the land acquisition based on the IRA or the pertinent regulations issued under it.[11]

The same conclusion follows to the extent that plaintiff bases its challenge on IGRA. IGRA is pertinent here because it limits the lands upon which a tribe may build a gaming facility. Under 25 U.S.C. § 2719, gaming may not be conducted on lands taken into trust by the Secretary after the date of enactment of IGRA (October 17, 1988) unless an enumerated exception applies.[12] One of those exceptions, also known as an "Oklahoma exception," was relied on by the Secretary as to the Terral property. The exception permits gaming on land taken into trust after 1988 if the Indian tribe had no reservation on the date of enactment, the lands are located in Oklahoma, and the land is within the boundaries of the tribe's former reservation.[13] There is no dispute here that the Terral property is within

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[11] *The Secretary's decision included analysis of a variety of factors considered pursuant to his land acquisition regulations. See [Doc. #20-1]. Only the legal issues referenced above are raised by plaintiff as the basis for review by this court.*

[12] See also *25 C.F.R. Part 292, the regulations implementing this section.*

[13] *Section 2719 provides as follows:*

> ***(a) Prohibition on lands acquired in trust by Secretary***
>
> *Except as provided in subsection (b) of this section, gaming regulated by this chapter shall not be conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988, unless—*
>
> *[…]*
>
> *(2) the Indian tribe has no reservation on October 17, 1988, and—*
>
> *(A) such lands are located in Oklahoma and—*

the boundaries of the historical reservation of the Chickasaw tribe. So assuming it is a "former" reservation, the Oklahoma exception plainly applies.

Plaintiff argues the regulation, and in particular the Oklahoma exception, are deficient because the definition of "reservation" does not include a requirement that the tribe have governmental jurisdiction over the property at issue. It suggests the "Oklahoma exception" in § 292.2 puts Oklahoma tribes on a better footing than tribes located outside the state, and therefore invalidates the regulation.[14] However, as the Secretary correctly points out, plaintiff is in no position to rely on this argument. Whatever complaint a tribe outside Oklahoma might have about the regulation on that basis, it is clear plaintiff has no such complaint. It is an Oklahoma tribe and a presumed beneficiary of the distinction or exception that it seeks to attack here. So, whether viewed as a "standing" issue or otherwise, plaintiff is not in position to rely on that argument as a basis for its challenge to 25 C.F.R. 292.2 or the Secretary's determination under it.

Plaintiff also argues the absence of a "governmental jurisdiction" requirement in the regulation is problematic because it is inconsistent with prior determinations of the

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> *(i) are within the boundaries of the Indian tribe's former reservation, as defined by the Secretary, or*
>
> *(ii) are contiguous to other land held in trust or restricted status by the United States for the Indian tribe in Oklahoma; . . . .*

[14] *As noted above, this is plainly a facial challenge to the regulation. It is also notable that while plaintiff cites § 151.2's requirement of "governmental jurisdiction" to criticize §292.2, § 151.2 does not include that requirement for tribes falling under the Oklahoma exception. In that sense, § 151.2 and § 292.2 are consistent in their treatment of Oklahoma tribes.*

Secretary.[15] It relies on a rule proposed in 2006 which included a jurisdictional element even as to tribes in Oklahoma.[16] But that argument is unpersuasive for at least two reasons. First, the proposed rule that plaintiff relies on was just that—proposed. There is no basis for concluding that a regulation which was proposed and thought about years ago, but not adopted, somehow becomes the baseline against which all later regulations should be tested. Second, even if the proposed regulation plaintiff relies on had been adopted, that does not, in and of itself, prove or suggest that a later regulation taking a different tack is therefore arbitrary or capricious.

Finally, to the extent that plaintiff argues against the application of § 292.2's "Oklahoma exception" on the basis of Murphy—i.e. the Chickasaw reservation was not disestablished and there is therefore no "former" reservation within the meaning of the exception—the argument fails. If the Chickasaw reservation is eventually determined to still be in existence, the Oklahoma exception would not apply but the general exception for existing reservations would. IGRA specifically permits gaming on lands which were, as of 1988, part of the tribe's reservation.[17] The result is that, regardless of whether the

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[15] *Although plaintiff's submissions are not clear on the point, it may be arguing that the absence of the requirement also violates some Congressional mandate or preference for equal treatment of Indian tribes. However, as the discussion of similar issues arising under IGRA, infra, suggests, Congress has explicitly adopted an "Oklahoma exception" in certain circumstances, recognizing the unique history of Oklahoma and the circumstances of the Indian tribes located there.*

[16] *Gaming on Trust Lands Acquired After October 17, 1988, 71 Fed. Reg. 58,769-01 (Oct. 5, 2006).*

[17] *25 U.S.C. § 2719(a)(1) ("Except as provided in subsection (b) of this section, gaming regulated by this chapter shall not be conducted on lands acquired by the Secretary in trust for*

Chickasaw reservation is viewed as disestablished or still existing, § 2719 does not invalidate the action taken here by the Secretary.

In sum, IGRA does not provide a basis for challenging the Secretary decision.

The court concludes plaintiff is unlikely to succeed on the merits of its APA claim, based both on the impact of the statute of limitations and on the deficiencies in its substantive arguments.

NEPA Claim.

The motion for preliminary injunction did not even mention plaintiff's claim under NEPA. NEPA was first mentioned as a basis for preliminary injunction in plaintiff's reply brief. That circumstance alone is sufficient to deny the motion to the extent that plaintiff now relies on NEPA. However, even considering the evidence accompanying the reply brief, plaintiff's arguments at the hearing, and its post-hearing submissions, a sufficient basis for issuing an injunction based on the NEPA has not been shown. Apart from general assertions by counsel that the Secretary did not take the necessary "hard look" at environmental compliance, plaintiff offers no evidence which makes a substantial showing of a violation. *See* Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc., 462 U.S. 87, 100 (1983) (Congress intended for agencies to take a "hard look" at the potential environmental of projects).

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the benefit of an Indian tribe after October 17, 1988, unless . . . such lands are located within or contiguous to the boundaries of the reservation of the Indian tribe on October 17, 1988").

Plaintiff's submissions allude to an alleged history of improper decisions by the BIA relating to compliance with environmental requirements in the context of trust acquisitions. The affidavit of a former BIA supervisor alleges the BIA has previously taken properties into trust without requiring the preparation of environmental assessments required by NEPA.[18] But it is undisputed that an environmental assessment was prepared as to this trust acquisition, which was considered and approved by the Secretary.[19]

Plaintiff also suggests the Chickasaw Nation is building bigger sewage lagoons than would be necessary to service a facility of the size referenced in its applications and that some bigger or more impactful activity must therefore be planned. To the extent this argument is directed to the NEPA claim, it fails to show a non-speculative basis for injunctive relief.

Finally, it appears that plaintiff's NEPA claim is less concerned with environmental impact, as it is ordinarily understood, than it is with the competitive impact of the Chickasaw casino on plaintiff's own casino operation. Such 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

[18] *Affidavit of Steve York [Doc. #26-3].*

[19] *[Doc. #20-1] at 15: "An Environmental Assessment (EA) for the Terral Site was completed on April 20, 2016. The EA was made available for public comment from March 18 to April 18, 2016."*

of the competitive impact of the project on plaintiff's operations is insufficient to show a likelihood of success on the NEPA claim.[20]

Plaintiff's reliance on the NEPA in connection with this motion appears to have been an afterthought. In any event, plaintiff's submissions directed to the NEPA do not show a likelihood of success on the claims and fall short of the "clear and unequivocal" showing necessary to the issuance of a preliminary injunction.

Conclusion

Plaintiff has not made the necessary showing of likelihood of success on the merits. As a result, its motion for preliminary injunction [Doc. #13] is **DENIED**.

IT IS SO ORDERED.

Dated this 13th day of November, 2017.

JOE HEATON
CHIEF U.S. DISTRICT JUDGE

[20] *Plaintiff's post-hearing submissions include an affidavit from plaintiff's Tribal Administrator and former historic preservation officer stating that the Terral site is within lands historically occupied or crossed by the Comanche and that burial sites and tribal artifacts may exist in the area. It also suggests consultation with the Tribe as to federal actions is required by the National Historic Preservation Act and the Native American Graves Protection and Repatriation Act. Whatever may be the potential application of those acts to this situation, the affidavit does not support a conclusion that a violation of the NEPA is shown.*

the foregoing definition may assist in the conduct of all appropriate inquiries in accordance with this part if such person is under the supervision or responsible charge of a person meeting the definition of an environmental professional provided above when conducting such activities.

Relevant experience, as used in the definition of environmental professional in this section, means: participation in the performance of all appropriate inquiries investigations, environmental site assessments, or other site investigations that may include environmental analyses, investigations, and remediation which involve the understanding of surface and subsurface environmental conditions and the processes used to evaluate these conditions and for which professional judgment was used to develop opinions regarding conditions indicative of releases or threatened releases (see § 312.1(c)) to the subject property.

Good faith means: the absence of any intention to seek an unfair advantage or to defraud another party; an honest and sincere intention to fulfill one's obligations in the conduct or transaction concerned.

Institutional controls means: non-engineered instruments, such as administrative and/or legal controls, that help to minimize the potential for human exposure to contamination and/or protect the integrity of a remedy.

§ 312.11 References.

The following industry standards may be used to comply with the requirements set forth in §§ 312.23 through 312.31:

(a) The procedures of ASTM International Standard E2247–08 entitled "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process for Forestland or Rural Property." This standard is available from ASTM International at *http://www.astm.org,* 1–610–832–9585.

(b) The procedures of ASTM International Standard E1527–13 entitled "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process." This standard is available from ASTM International at *www.astm.org,* 1–610–832–9585.

[70 FR 66107, Nov. 1, 2005, as amended at 73 FR 78655, Dec. 23, 2008; 78 FR 79324, Dec. 30, 2013; 79 FR 60090, Oct. 6, 2014]

Subpart C—Standards and Practices

§ 312.20 All appropriate inquiries.

(a) "All appropriate inquiries" pursuant to CERCLA section 101(35)(B) must be conducted within one year prior to the date of acquisition of the subject property and must include:

(1) An inquiry by an environmental professional (as defined in § 312.10), as provided in § 312.21;

(2) The collection of information pursuant to § 312.22 by persons identified under § 312.1(b); and

(3) Searches for recorded environmental cleanup liens, as required in § 312.25.

(b) Notwithstanding paragraph (a) of this section, the following components of the all appropriate inquiries must be conducted or updated within 180 days of and prior to the date of acquisition of the subject property:

(1) Interviews with past and present owners, operators, and occupants (see § 312.23);

(2) Searches for recorded environmental cleanup liens (see § 312.25);

(3) Reviews of federal, tribal, state, and local government records (see § 312.26);

(4) Visual inspections of the facility and of adjoining properties (see § 312.27); and

(5) The declaration by the environmental professional (see § 312.21(d)).

(c) All appropriate inquiries may include the results of and information contained in an inquiry previously conducted by, or on the behalf of, persons identified under § 312.1(b) and who are responsible for the inquiries for the subject property, provided:

(1) Such information was collected during the conduct of all appropriate inquiries in compliance with the requirements of CERCLA sections 101(35)(B), 101(40)(B) and 107(q)(A)(viii);

(2) Such information was collected or updated within one year prior to the date of acquisition of the subject property;

the foregoing definition may assist in the conduct of all appropriate inquiries in accordance with this part if such person is under the supervision or responsible charge of a person meeting the definition of an environmental professional provided above when conducting such activities.

Relevant experience, as used in the definition of environmental professional in this section, means: participation in the performance of all appropriate inquiries investigations, environmental site assessments, or other site investigations that may include environmental analyses, investigations, and remediation which involve the understanding of surface and subsurface environmental conditions and the processes used to evaluate these conditions and for which professional judgment was used to develop opinions regarding conditions indicative of releases or threatened releases (see § 312.1(c)) to the subject property.

Good faith means: the absence of any intention to seek an unfair advantage or to defraud another party; an honest and sincere intention to fulfill one's obligations in the conduct or transaction concerned.

Institutional controls means: non-engineered instruments, such as administrative and/or legal controls, that help to minimize the potential for human exposure to contamination and/or protect the integrity of a remedy.

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(1) Interviews with past and present owners, operators, and occupants (see § 312.23);

(2) Searches for recorded environmental cleanup liens (see § 312.25);

(3) Reviews of federal, tribal, state, and local government records (see § 312.26);

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(1) Such information was collected during the conduct of all appropriate inquiries in compliance with the requirements of CERCLA sections 101(35)(B), 101(40)(B) and 107(q)(A)(viii);

(2) Such information was collected or updated within one year prior to the date of acquisition of the subject property;

(3) Notwithstanding paragraph (b)(2) of this section, the following components of the inquiries were conducted or updated within 180 days of and prior to the date of acquisition of the subject property:

§ 1501.2 Apply NEPA early in the process.

Agencies shall integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts. Each agency shall:

(a) Comply with the mandate of section 102(2)(A) to "utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment," as specified by § 1507.2.

(b) Identify environmental effects and values in adequate detail so they can be compared to economic and technical analyses. Environmental documents and appropriate analyses shall be circulated and reviewed at the same time as other planning documents.

(c) Study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources as provided by section 102(2)(E) of the Act.

(d) Provide for cases where actions are planned by private applicants or other non-Federal entities before Federal involvement so that:

(1) Policies or designated staff are available to advise potential applicants of studies or other information foreseeably required for later Federal action.

(2) The Federal agency consults early with appropriate State and local agencies and Indian tribes and with interested private persons and organizations when its own involvement is reasonably foreseeable.

(3) The Federal agency commences its NEPA process at the earliest possible time.

§ 1501.3 When to prepare an environmental assessment.

(a) Agencies shall prepare an environmental assessment (§ 1508.9) when necessary under the procedures adopted by individual agencies to supplement these regulations as described in § 1507.3. An assessment is not necessary if the agency has decided to prepare an environmental impact statement.

(b) Agencies may prepare an environmental assessment on any action at any time in order to assist agency planning and decisionmaking.

§ 1501.4 Whether to prepare an environmental impact statement.

In determining whether to prepare an environmental impact statement the Federal agency shall:

(a) Determine under its procedures supplementing these regulations (described in § 1507.3) whether the proposal is one which:

(1) Normally requires an environmental impact statement, or

(2) Normally does not require either an environmental impact statement or an environmental assessment (categorical exclusion).

(b) If the proposed action is not covered by paragraph (a) of this section, prepare an environmental assessment (§ 1508.9). The agency shall involve environmental agencies, applicants, and the public, to the extent practicable, in preparing assessments required by § 1508.9(a)(1).

(c) Based on the environmental assessment make its determination whether to prepare an environmental impact statement.

(d) Commence the scoping process (§ 1501.7), if the agency will prepare an environmental impact statement.

(e) Prepare a finding of no significant impact (§ 1508.13), if the agency determines on the basis of the environmental assessment not to prepare a statement.

(1) The agency shall make the finding of no significant impact available to the affected public as specified in § 1506.6.

(2) In certain limited circumstances, which the agency may cover in its procedures under § 1507.3, the agency shall make the finding of no significant impact available for public review (including State and areawide clearinghouses) for 30 days before the agency makes its final determination whether to prepare an environmental impact statement and before the action may begin. The circumstances are:

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(a) Comply with the mandate of section 102(2)(A) to "utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment," as specified by §1507.2.

(b) Identify environmental effects and values in adequate detail so they can be compared to economic and technical analyses. Environmental documents and appropriate analyses shall be circulated and reviewed at the same time as other planning documents.

(c) Study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources as provided by section 102(2)(E) of the Act.

(d) Provide for cases where actions are planned by private applicants or other non-Federal entities before Federal involvement so that:

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(b) If the proposed action is not covered by paragraph (a) of this section, prepare an environmental assessment (§1508.9). The agency shall involve environmental agencies, applicants, and the public, to the extent practicable, in preparing assessments required by §1508.9(a)(1).

(c) Based on the environmental assessment make its determination whether to prepare an environmental impact statement.

(d) Commence the scoping process (§1501.7), if the agency will prepare an environmental impact statement.

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(1) The agency shall make the finding of no significant impact available to the affected public as specified in §1506.6.

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a judicial action which is not final, the agency shall so specify.

§ 1506.4 Combining documents.

Any environmental document in compliance with NEPA may be combined with any other agency document to reduce duplication and paperwork.

§ 1506.5 Agency responsibility.

(a) *Information.* If an agency requires an applicant to submit environmental information for possible use by the agency in preparing an environmental impact statement, then the agency should assist the applicant by outlining the types of information required. The agency shall independently evaluate the information submitted and shall be responsible for its accuracy. If the agency chooses to use the information submitted by the applicant in the environmental impact statement, either directly or by reference, then the names of the persons responsible for the independent evaluation shall be included in the list of preparers (§ 1502.17). It is the intent of this paragraph that acceptable work not be redone, but that it be verified by the agency.

(b) *Environmental assessments.* If an agency permits an applicant to prepare an environmental assessment, the agency, besides fulfilling the requirements of paragraph (a) of this section, shall make its own evaluation of the environmental issues and take responsibility for the scope and content of the environmental assessment.

(c) *Environmental impact statements.* Except as provided in §§ 1506.2 and 1506.3 any environmental impact statement prepared pursuant to the requirements of NEPA shall be prepared directly by or by a contractor selected by the lead agency or where appropriate under § 1501.6(b), a cooperating agency. It is the intent of these regulations that the contractor be chosen solely by the lead agency, or by the lead agency in cooperation with cooperating agencies, or where appropriate by a cooperating agency to avoid any conflict of interest. Contractors shall execute a disclosure statement prepared by the lead agency, or where appropriate the cooperating agency, specifying that they have no financial or other interest in the outcome of the project. If the document is prepared by contract, the responsible Federal official shall furnish guidance and participate in the preparation and shall independently evaluate the statement prior to its approval and take responsibility for its scope and contents. Nothing in this section is intended to prohibit any agency from requesting any person to submit information to it or to prohibit any person from submitting information to any agency.

§ 1506.6 Public involvement.

Agencies shall:

(a) Make diligent efforts to involve the public in preparing and implementing their NEPA procedures.

(b) Provide public notice of NEPA-related hearings, public meetings, and the availability of environmental documents so as to inform those persons and agencies who may be interested or affected.

(1) In all cases the agency shall mail notice to those who have requested it on an individual action.

(2) In the case of an action with effects of national concern notice shall include publication in the FEDERAL REGISTER and notice by mail to national organizations reasonably expected to be interested in the matter and may include listing in the *102 Monitor*. An agency engaged in rulemaking may provide notice by mail to national organizations who have requested that notice regularly be provided. Agencies shall maintain a list of such organizations.

(3) In the case of an action with effects primarily of local concern the notice may include:

(i) Notice to State and areawide clearinghouses pursuant to OMB Circular A–95 (Revised).

(ii) Notice to Indian tribes when effects may occur on reservations.

(iii) Following the affected State's public notice procedures for comparable actions.

(iv) Publication in local newspapers (in papers of general circulation rather than legal papers).

(v) Notice through other local media.

(vi) Notice to potentially interested community organizations including small business associations.

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(vi) Notice to potentially interested community organizations including small business associations.

STATE OF OKLAHOMA

2nd Extraordinary Session of the 56th Legislature (2018)

HOUSE BILL 1031 By: Wallace and Casey of the House

and

David and Fields of the Senate

AS INTRODUCED

An Act relating to amusements and sports; amending 3A O.S. 2011, Section 262, as amended by Section 1, Chapter 115, O.S.L. 2017 (3A O.S. Supp. 2017, Section 262), which relates to state-tribal gaming; eliminating prohibition on certain types of gaming; prohibiting certain types of gaming; providing exception; offering model tribal gaming compact supplement related to non-house-banked table games; defining terms; authorizing fees and seeding related to tribal administration of the games; providing model tribal gaming compact supplement and prescribing content thereof; prescribing procedures for electing acceptance of supplement; providing for certain construction of supplement; requiring payment of funds by tribes in certain amounts; allowing retention of funds by tribes in certain amounts; declaring certain conduct and participation lawful; amending 3A O.S. 2011, Section 280, which relates to offer of model tribal gaming contract; providing for apportionment of fees received by the state; providing for codification; and declaring an emergency.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

SECTION 1. AMENDATORY 3A O.S. 2011, Section 262, as amended by Section 1, Chapter 115, O.S.L. 2017 (3A O.S. Supp. 2017, Section 262), is amended to read as follows:

Section 262. A. If at least four Indian tribes enter into the model tribal-state compact set forth in Section 281 of this title, and such compacts are approved by the Secretary of the Interior and notice of such approval is published in the Federal Register, the Oklahoma Horse Racing Commission ("Commission") shall license organization licensees which are licensed pursuant to Section 205.2 of this title to conduct authorized gaming as that term is defined by this act pursuant to this act utilizing gaming machines or devices authorized by this act subject to the limitations of subsection C of this section. No fair association or organization licensed pursuant to Section 208.2 of this title or a city, town or municipality incorporated or otherwise, or an instrumentality thereof, may conduct authorized gaming as that term is defined by this act.

Notwithstanding the provisions of Sections 941 through 988 of Title 21 of the Oklahoma Statutes, the conducting of and participation in gaming in accordance with the provisions of this act or the model compact set forth in Section 281 of this title is lawful and shall not be subject to any criminal penalties. Provided further, a licensed manufacturer or distributor licensed pursuant to this act may manufacture, exhibit or store as a lawful activity any

machines or devices which are capable of being used to conduct the following types of gaming:

1. Gaming authorized by the State-Tribal Gaming Act; or

2. Other gaming which may be lawfully conducted by an Indian tribe in this state.

B. Except for Christmas Day, authorized gaming may only be conducted by an organization licensee on days when the licensee is either conducting live racing or is accepting wagers on simulcast races at the licensee's racing facilities. Authorized gaming may only be conducted by organization licensees at enclosure locations where live racing is conducted. Under no circumstances shall authorized gaming be conducted by an organization licensee at any facility outside the organization licensee's racing enclosure. No person who would not be eligible to be a patron of a pari-mutuel system of wagering pursuant to the provisions of subsection B of Section 208.4 of this title shall be admitted into any area of a facility when authorized games are played nor be permitted to operate, or obtain a prize from, or in connection with, the operation of any authorized game, directly or indirectly.

C. In order to encourage the growth, sustenance and development of live horse racing in this state and of the state's agriculture and horse industries, the Commission is hereby authorized to issue licenses to conduct authorized gaming to no more than three (3) organization licensees operating racetrack locations at which horse

race meetings with pari-mutuel wagering, as authorized by the Commission pursuant to the provisions of this title, occurred in calendar year 2001, as follows:

1. An organization licensee operating a racetrack location at which an organization licensee is licensed to conduct a race meeting pursuant to the provisions of Section 205.2 of this title located in a county with a population exceeding six hundred thousand (600,000) persons, according to the most recent federal decennial census, shall be licensed to operate not more than six hundred fifty (650) player terminals in any year. Beginning with the third year after an organization licensee is licensed pursuant to this paragraph to operate such player terminals, such licensee may be licensed to operate an additional fifty (50) player terminals. Beginning with the fifth year after an organization licensee is licensed pursuant to this paragraph to operate such player terminals, such licensee may be licensed to operate a further additional fifty (50) player terminals; and

2. Two organization licensees operating racetrack locations at which the organization licensees are licensed to conduct race meetings pursuant to the provisions of Section 205.2 of this title located in counties with populations not exceeding four hundred thousand (400,000) persons, according to the most recent federal decennial census, may each be licensed to operate not more than two hundred fifty (250) player terminals in any year.

Subject to the limitations on the number of player terminals permitted to each organization licensee, an organization licensee may utilize electronic amusement games as defined in this act, electronic bonanza-style bingo games as defined in this act and electronic instant bingo games as defined in this act, and any type of gaming machine or device that is specifically allowed by law and that an Indian tribe in this state is authorized to utilize pursuant to a compact entered into between the state and the tribe in accordance with the provisions of the Indian Gaming Regulatory Act and any other machine or device that an Indian tribe in this state is lawfully permitted to operate pursuant to the Indian Gaming Regulatory Act, referred to collectively as "authorized games". An organization licensee's utilization of such machines or devices shall be subject to the regulatory control and supervision of the Commission; provided, the Commission shall have no role in oversight and regulation of gaming conducted by a tribe subject to a compact. The Commission shall promulgate rules to regulate the operation and use of authorized gaming by organization licensees. In promulgating such rules, the Commission shall consider the provisions of any compact which authorizes electronic gaming which is specifically authorized by law by an Indian tribe. For the purpose of paragraphs 1 and 2 of this subsection, the number of player terminals in an authorized game that permits multiple players shall be determined by the maximum number of players that can participate in that game at

any given time; provided, however, that nothing in this act prohibits the linking of player terminals for progressive jackpots, so long as the limitations on the number of permitted player terminals at each organization licensee are not exceeded. Each organization licensee shall keep a record of, and shall report at least quarterly to the Oklahoma Horse Racing Commission, the number of games authorized by this section utilized in the organization licensee's facility, by the name or type of each and its identifying number.

D. No zoning or other local ordinance may be adopted or amended by a political subdivision where an organization licensee conducts live horse racing with the intent to restrict or prohibit an organization licensee's right to conduct authorized gaming at such location.

E. For purposes of this act, "adjusted gross revenues" means the total receipts received by an organization licensee from the play of all authorized gaming minus all monetary payouts.

F. The Oklahoma Horse Racing Commission shall promulgate rules to regulate, implement and enforce the provisions of this act with regard to the conduct of authorized gaming by organization licensees; provided, regulation and oversight of games covered by a compact and operated by an Indian tribe shall be conducted solely pursuant to the requirements of the compact.

G. If an organization licensee operates or attempts to operate more player terminals which offer authorized games than it is authorized to offer to the public by this act or the terms of its license, upon written notice from the Commission, such activity shall cease forthwith. Such activity shall constitute a basis upon which the Commission may suspend or revoke the licensee's license. The Commission shall promulgate any rules and regulations necessary to enforce the provisions of this subsection.

H. This act is game-specific and shall not be construed to allow the operation of any other form of gaming unless specifically allowed by this act. This act shall not permit the operation of slot machines, ~~dice games, roulette wheels,~~ house-banked card games, house-banked table games involving dice or roulette wheels, or games where winners are determined by the outcome of a sports contest.

SECTION 2. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 280.1 of Title 3A, unless there is created a duplication in numbering, reads as follows:

A. Pursuant to the offer of the Model Tribal Gaming Compact found in Section 280 of Title 3A of the Oklahoma Statutes and the definition of "covered games" in the Model Tribal Gaming Compact codified in Section 281 of Title 3A of the Oklahoma Statutes, which said codified compact offer provides the state may approve additional forms of covered games under said compact by amendment of the State-Tribal Gaming Act, and a compacting tribe may operate such

additional forms of covered games by written supplement to an existing compact, the state hereby approves, subject to the provisions of this section, an additional game offering as follows:

"Non-house-banked table games" means any table game, including but not limited to those table games involving a wheel, ball or dice, operated in a nonelectronic environment in which the tribe has no interest in the outcome of the game, including games played in tournament formats and games in which the tribe collects a fee from the player for participating, and all bets are placed in a common pool or pot from which all player winnings, prizes and direct costs are paid. As provided in this section, administrative fees may be charged by the tribe against any common pool or pot in an amount equal to any fee paid the state; provided, that the tribe may seed any pool or pot as it determines necessary from time to time.

B. Should a tribe that has compacted with the state in accordance with Sections 280 and 281 of Title 3A of the Oklahoma Statutes elect to accept this offer of an additional covered game and, accordingly, to operate non-house-banked table games under the terms of its existing gaming compact with the state, said tribe shall execute a supplement to said compact, to provide as follows:

MODEL TRIBAL GAMING COMPACT SUPPLEMENT

Between the [Name of Tribe]

and the STATE OF OKLAHOMA

To be governed in accord with the [Name of Tribe]'s State-Tribal Gaming Compact ("Compact"), approved by the United States Department of the Interior on [Date], the [Name of Tribe] ("Tribe") accepts the State's offer of an additional covered game codified in Section 280.1 of Title 3A of the Oklahoma Statutes, which offer and this acceptance are subject to the following terms:

Part 1. TITLE

This document shall be referred to as the "[Name of Tribe] and State of Oklahoma Gaming Compact Non-house-banked Table Games Supplement ("Gaming Compact Supplement").

Part 2. TERMS

A. The Tribe hereby memorializes its election to accept the State's offer of an additional covered game, which offer is codified in Section 280.1 of Title 3A of the Oklahoma Statutes.

B. The Tribe agrees, subject to the enforcement and exclusivity provisions of its Compact, to pay to the State ten percent (10%) of the monthly net win of the common pool(s) or pot(s) from which prizes are paid for non-house-banked table games. The Tribe is entitled to keep an amount equal to State payments from the common pool(s) or pot(s) as part of its cost of operating the games. For all purposes, such payment shall be deemed an exclusivity and fee payment under paragraph 2 of subsection A of Part 11 of the State-Tribal Gaming Compact between the electing Tribe and the State.

C. The Tribe's operation of non-house-banked table games pursuant to this Supplement shall, for all purposes, including enforcement and exclusivity, be treated as subject to and lawfully conducted under the terms and provisions of the Compact.

Part 3. AUTHORITY TO EXECUTE

This Gaming Compact Supplement, to the extent it conforms with Section 280.1 of Title 3A of the Oklahoma Statutes, is deemed approved by the State of Oklahoma. No further action by the State or any state official is necessary for this Gaming Compact Supplement to take effect upon approval by the Secretary of the United States Department of the Interior and publication in the Federal Register. The undersigned tribal official(s) represents that he or she is duly authorized and has the authority to execute this Gaming Compact Supplement on behalf of the Tribe for whom he or she is signing.

APPROVED:

[Name of Tribe]

_____ Date: _____

[Title]

C. A tribe electing to accept this additional game offering is responsible for submitting a copy of the executed supplement to the Secretary of the United States Department of the Interior for approval and publication in the Federal Register.

D. Upon approval of a supplement by the Secretary of the United States Department of the Interior, said supplement shall be construed as an acceptance of this offer and a supplement to the tribe's existing State-Tribal Gaming Compact with the state. Thereafter, non-house-banked table games shall be deemed a covered game pursuant to said Compact.

E. Upon approval of a supplement by the Secretary of the United States Department of the Interior and subject to the enforcement and exclusivity provisions of its existing State-Tribal Gaming Compact with the state, the electing tribe shall be deemed pursuant to such supplement to be in agreement to pay to the state ten percent (10%) of the monthly net win of the common pool(s) or pot(s) from which prizes are paid for non-house-banked table games. The tribe shall be entitled to keep an amount equal to state payments from the common pool(s) or pot(s) as part of its cost of operating the games. For all purposes, such payment shall be deemed an exclusivity and fee payment under paragraph 2 of subsection A of Part 11 of the State-Tribal Gaming Compact between the electing tribe and the state.

F. The offer contained in this section shall not be construed to permit the operation of any additional form of gaming by organization licensees or permitting any additional electronic or machine gaming within Oklahoma.

G. Notwithstanding the provisions of Sections 941 through 988 of Title 21 of the Oklahoma Statutes, the conducting of and participation in any game authorized pursuant to this section are lawful when played pursuant to a compact supplement which has become effective in accordance with this section.

SECTION 3. AMENDATORY 3A O.S. 2011, Section 280, is amended to read as follows:

Section 280. The State of Oklahoma through the concurrence of the Governor after considering the executive prerogatives of that office and the power to negotiate the terms of a compact between the state and a tribe, and by means of the execution of the State-Tribal Gaming Act, and with the concurrence of the State Legislature through the enactment of the State-Tribal Gaming Act, hereby makes the following offer of a model tribal gaming compact regarding gaming to all federally recognized Indian tribes as identified in the Federal Register within this state that own or are the beneficial owners of Indian lands as defined by the Indian Gaming Regulatory Act, 25 U.S.C., Section 2703(4), and over which the tribe has jurisdiction as recognized by the Secretary of the Interior and is a part of the tribe's "Indian reservation" as defined in 25 C.F.R., Part 151.2 or has been acquired pursuant to 25 C.F.R., Part 151, which, if accepted, shall constitute a gaming compact between this state and the accepting tribe for purposes of the Indian Gaming Regulatory Act. Acceptance of the offer contained in this section

shall be through the signature of the chief executive officer of the tribal government whose authority to enter into the compact shall be set forth in an accompanying law or ordinance or resolution by the governing body of the tribe, a copy of which shall be provided by the tribe to the Governor. No further action by the Governor or the state is required before the compact can take effect. A tribe accepting this Model Tribal Gaming Compact is responsible for submitting a copy of the Compact executed by the tribe to the Secretary of the Interior for approval and publication in the Federal Register. The tribe shall provide a copy of the executed Compact to the Governor. No tribe shall be required to agree to terms different than the terms set forth in the Model Tribal Gaming Compact, which is set forth in Section 281 of this title. As a precondition to execution of the Model Tribal Gaming Compact by any tribe, the tribe must have paid or entered into a written agreement for payment of any fines assessed prior to the effective date of the State-Tribal Gaming Act by the federal government with respect to the tribe's gaming activities pursuant to the Indian Gaming Regulatory Act.

Notwithstanding the provisions of Sections 941 through 988 of Title 21 of the Oklahoma Statutes, the conducting of and the participation in any game authorized by the model compact set forth in Section 281 of this title are lawful when played pursuant to a compact which has become effective.

1. Prior to July 1, 2008, ~~twelve percent (12%)~~ of all fees received by the state pursuant to subsection A of Part 11 of the Model Tribal Gaming Compact set forth in Section 281 of this title:

a. twelve percent (12%) shall be deposited in the Oklahoma Higher Learning Access Trust Fund, and

b. eighty-eight percent (88%) of such fees shall be deposited in the Education Reform Revolving Fund.

2. On or after July 1, 2008, ~~twelve percent (12%)~~ of all fees received by the state pursuant to subsection A of Part 11 of the Model Tribal Gaming Compact set forth in Section 281 of this title and Gaming Compact Supplements offered pursuant to Section 2 of this act:

a. twelve percent (12%) shall be deposited in the General Revenue Fund, and

b. eighty-eight percent (88%) of such fees shall be deposited in the Education Reform Revolving Fund.

Provided, the first Twenty Thousand Eight Hundred Thirty-three Dollars and thirty-three cents ($20,833.33) of all fees received each month by the state pursuant to subsection A of Part 11 of the Model Tribal Gaming Compact set forth in Section 281 of this title and Gaming Compact Supplements offered pursuant to Section 2 of this act shall be transferred to the Department of Mental Health and Substance Abuse Services for the treatment of compulsive gambling disorder and educational programs related to such disorder.

SECTION 4. It being immediately necessary for the preservation of the public peace, health or safety, an emergency is hereby declared to exist, by reason whereof this act shall take effect and be in full force from and after its passage and approval.

56-2EX-50340 JM 02/05/18

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 February 22, 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 9.6.6194; Definitions version 64788 – 7.75055 [February 22, 2018]; Vipre engine version 3.9.2671.2-3.0), and according to the program, is free of viruses.

Dated: February 22, 2018

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

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of February, 2018, I electronically filed the Appellant's Opening 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 Opening 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: February 22, 2018

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