IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE CHEROKEE NATION, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 1:20-cv-02167 (TJK)
	)	
UNITED STATES DEPARTMENT OF THE INTERIOR, *et al.*,	)	
	)	
Defendants.	)	
	)	

PLAINTIFF NATIONS' BRIEF IN SUPPORT OF MOTION TO DISMISS DEFENDANT CHAIRMAN SHOTTON'S COUNTERCLAIM

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Pursuant to Fed. R. Civ. P. 12(b)(1) and (b)(6), the Plaintiffs Cherokee Nation, Chickasaw Nation, Choctaw Nation, and Citizen Potawatomi Nation ("CPN") (collectively "Plaintiff Nations") respectfully request the Court dismiss Defendant Chairman Shotton's Counterclaim, *see* ECF No. 53 ("Countercl."), because that claim is barred by tribal sovereign immunity, and because it is duplicative of both an affirmative defense pled by Defendant Chairman Shotton and the Plaintiff Nations' claims, and there is therefore no need to consider it in any event.

STANDARD OF REVIEW

When a motion to dismiss is brought under both Rule 12(b)(1) and (6), the court must consider the Rule 12(b)(1) contention first. *Schmidt v. U.S. Cap. Police Bd.*, 826 F. Supp. 2d 59, 64 (D.D.C. 2011) (citing *United States ex rel. Settlemire v. District of Columbia*, 198 F.3d 913, 920 (D.C. Cir. 1999); *Eppes v. U.S. Cap. Police Bd.*, 719 F. Supp. 2d 7, 12 (D.D.C. 2010)).

In evaluating a Rule 12(b)(1) motion, the court "must accept as true all factual allegations in the complaint and construe the complaint liberally, granting plaintiff the benefit of all inferences that can be drawn from the facts alleged." *Kialegee Tribal Town v. Zinke* ("*KTT*"), 330 F. Supp. 3d 255, 262 (D.D.C. 2018) (citing *Leatherman v. Tarrant Cnty. Narcotics Intel. & Coordination Unit*, 507 U.S. 163, 164 (1993)); *accord Z St. v. Koskinen*, 791 F.3d 24, 28 (D.C. Cir. 2015); *Ord v. District of Columbia*, 587 F.3d 1136, 1140 (D.C. Cir. 2009); *Jerome Stevens Pharms., Inc. v. FDA*, 402 F.3d 1249, 1253 (D.C. Cir. 2005); *Sparrow v. United Air Lines, Inc.*, 216 F.3d 1111, 1113 (D.C. Cir. 2000). It is "the plaintiff's burden to prove subject matter jurisdiction by a preponderance of the evidence." *KTT*, 330 F. Supp. 3d at 262 (citing *Am. Farm Bureau v. EPA*, 121 F. Supp. 2d 84, 90 (D.D.C. 2000)); *accord McNutt v. GM Acceptance Corp.*, 298 U.S. 178, 182-83 (1936). "In determining whether there is jurisdiction, the Court may 'consider the complaint supplemented by undisputed facts evidenced in the record, or the complaint supplemented by undisputed facts plus the court's resolution of disputed facts.'" *Id.* (quoting *Coal.*

for Underground Expansion v. Mineta, 333 F.3d 193, 198 (D.C. Cir. 2003); citing *Jerome Stevens*, 402 F.3d at 1253).

"A motion to dismiss for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6) challenges the adequacy of a complaint on its face." *Johnson v. Comm'n on Pres. Debates*, 202 F. Supp. 3d 159, 167 (D.D.C. 2106). Such a motion "does not test a plaintiff's ultimate likelihood of success on the merits; rather, it tests whether a plaintiff has properly stated a claim." *Connecticut v. U.S. Dep't of Interior*, 344 F. Supp. 3d 279, 295 (D.D.C. 2018) (citing *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)). "'In evaluating a [Rule 12(b)(6)] motion to dismiss, the Court must accept the factual allegations in the complaint as true and draw all reasonable inferences in favor of plaintiff.'" *KTT*, 330 F. Supp. 3d at 263 (quoting *Nat'l Postal Prof'l Nurses v. USPS*, 461 F. Supp. 2d 24, 27 (D.D.C. 2006)). "To survive a motion to dismiss under Rule 12(b)(6), a complaint must contain sufficient factual allegations that, if accepted as true, 'state a claim to relief that is plausible on its face.'" *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "'A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Id.* (quoting *Iqbal*, 556 U.S. at 678). It is not necessary for the plaintiff to plead all elements of a prima facie case in the complaint. *Connecticut*, 344 F. Supp. 3d at 295-96 (citing *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 511-14 (2002); *Bryant v. Pepco*, 730 F. Supp. 2d 25, 28-29 (D.D.C. 2010)).

On a Rule 12(b)(6) motion, the court can consider, in addition to the materials in the complaint and any materials incorporated into it or attached to it, matters of public record and other materials that are subject to judicial notice. *N. Am. Butterfly Ass'n v. Wolf*, 977 F.3d 1244, 1249 (D.C. Cir. 2020); *Abhe & Svoboda, Inc. v. Chao*, 508 F.3d 1052, 1059 (D.C. Cir. 2007); *EEOC v.*

St. Francis Xavier Parochial Sch., 117 F.3d 621, 624 (D.C. Cir. 1997). The court may also consider "'documents upon which the plaintiff's complaint necessarily relies even if the document is produced not by the plaintiff in the complaint but by the defendant in a motion to dismiss.'" *In re Domestic Airline Travel Antitrust Litig.*, 221 F. Supp. 3d 46, 54-55 (D.D.C. 2016) (quoting *Ward v. D.C. Dep't of Youth Rehab. Servs.*, 768 F. Supp. 2d 117, 119 (D.D.C. 2011)).

SUMMARY OF ARGUMENT

Plaintiff Nations are federally-recognized Indian tribes that are protected from nonconsensual suits, including counterclaims, by tribal sovereign immunity. "An Indian tribe's immunity is co-extensive with the United States' immunity, and neither loses that immunity by instituting an action, even when the defendant files a compulsory counterclaim." *Wichita & Affiliated Tribes v. Hodel*, 788 F.2d 765, 773-74 (D.C. Cir. 1986) (citing *United States v. U.S. Fid. & Guar. Co.*, 309 U.S. 506, 514 (1940)); *accord Ute Indian Tribe v. Utah*, 790 F.3d 1000, 1011 (10th Cir. 2015) (Gorsuch, J.) ("'It's long been settled that an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity.' This principle extends to counterclaims lodged against a plaintiff tribe—even compulsory counterclaims.") (citations omitted). "Absent a clear waiver by the" Plaintiff Nations, *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991) (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978)), Defendant Chairman Shotton's counterclaim is barred.

There is no clear waiver here. To the contrary, Plaintiff Nations' limited waivers in their Tribal-State gaming Compacts are only for specific types of claims and relief that are not at issue here. Nor has Congress abrogated tribal sovereign immunity from Defendant Chairman Shotton's Counterclaim. To do so, "Congress must unequivocally express that purpose," *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 790 (2014), which it has not done here. While Defendant Chairman Shotton relies on 28 U.S.C. §§ 1331 and 1362 and the Declaratory Judgment Act, 28

U.S.C. §§ 2201-2202, to provide jurisdiction for his counterclaim, none of those provisions waive tribal sovereign immunity.

Even assuming, only *arguendo*, that sovereign immunity does not bar Defendant Chairman Shotton's counterclaim, it should be dismissed as redundant of Plaintiff Nations' claims to invalidate the Agreement, i.e., the counterclaim will be moot upon disposition of Plaintiffs' claims.

ARGUMENT

Defendant Chairman Shotton's Counterclaim, ECF No. 109 ("Countercl."), alleges that the Otoe-Missouria Agreement, "was validly entered into and is in full compliance with IGRA," Countercl. ¶ 1, and that Plaintiff Nations "have disrupted and continue to disrupt the [Otoe-Missouria] Tribe's ability to exercise its right under federal law to engage in lawful gaming" under that Agreement, Countercl. ¶ 2. These disruptions allegedly occurred when Plaintiff Nations "in concert with numerous other tribes, organizations, and government officials, began an active campaign against" the Otoe-Missouria Agreement. Countercl. ¶ 75.

The alleged disruptions on which the counterclaim relies include actions taken by Plaintiff Nations in Oklahoma: allegedly encouraging the former Attorney General of Oklahoma to "speak out" against the Otoe-Missouria and Comanche Agreements and issue an official Attorney General's opinion that the Agreements were not validly "entered into" by the State, Countercl. ¶¶ 78-79, 82, 85; allegedly encouraging state legislative leaders to state in a public letter that the Agreements were invalid and to file a petition challenging the Agreements with the Oklahoma Supreme Court, which subsequently found that the Agreements were invalid under Oklahoma law, Countercl. ¶¶ 80-81, 99-100; allegedly encouraging the Oklahoma Indian Gaming Association to "speak out" against the Otoe-Missouria and Comanche Agreements, issue statements based on the Attorney General's opinion that the Agreements were illegal, and suspend Otoe-Missouria from

the Association, Countercl. ¶¶ 76-77, 83, 86-88; and allegedly encouraging an Oklahoma tribal media campaign to circulate statements that the Agreements are illegal, Countercl. ¶¶ 84, 86.

Defendant Chairman Shotton alleges that these alleged actions "have directly frustrated the Tribe's ability to engage in gaming under IGRA, a right that is guaranteed to the Tribe under federal law." Countercl. ¶ 105. He requests a declaration that the Otoe-Missouria Agreement "is valid and in effect under IGRA" or, in the alternative that "any offending provisions" of the Agreement may be severed and the "Tribe may continue to engage in Class III gaming" under the remaining provisions of the Agreement. Countercl. ¶ 112, Prayer for Relief 1 at 65. He also seeks "[a]n award of attorneys' fees, costs, and any other relief as the Court, in its judgment, may deem appropriate." Countercl. Prayer for Relief 2 at 65.

Defendant Chairman Shotton's counterclaim is barred by tribal sovereign immunity and is duplicative of one of his own affirmative defenses and of the Plaintiff Nations' claims. For those reasons, as Plaintiff Nations explain further below, should be dismissed.

I. Defendant Chairman Shotton's Counterclaim Should Be Dismissed Under Rule 12(b)(1) Under Tribal Sovereign Immunity.

The Defendant's Counterclaim should be dismissed under Rule 12(b)(1) for lack of subject-matter jurisdiction because Plaintiff Nations are immune from suit under tribal sovereign immunity. In this Circuit sovereign immunity is jurisdictional, *Tri-State Hosp. Supply Corp. v. United States*, 341 F.3d 571, 575 (D.C. Cir. 2003) (quoting *FDIC v. Meyer*, 510 U.S. 471, 475 (1994)), and motions to dismiss for sovereign immunity are properly brought and considered under Rule 12(b)(1), *e.g., Nemariam v. Federal Democratic Republic of Ethiopia*, 491 F.3d 470, 483 (D.C. Cir. 2007); *Kirkham v. Soc'é Air Fr.*, 429 F.3d 288, 291 (D.C. Cir. 2005); *Morgan v. U.S. Parole Comm'n*, 304 F. Supp. 3d 240, 245 (D.D.C. 2016). It is uncontested that Plaintiff Nations are all federally-recognized Indian tribes. *See* Answer ¶¶ 8-11, ECF No. 109; Countercl. ¶¶ 5-8;

Second Am. & Suppl'd Compl. ¶¶ 8-11, ECF No. 104 ("Compl."). As such, they are immune from both direct suits and counterclaims unless they have clearly waived their immunity or Congress has unequivocally abrogated their immunity. *Kiowa Tribe v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998); *Citizen Band*, 498 U.S. at 509; *Miner Elec., Inc. v. Muscogee (Creek) Nation*, 505 F.3d 1007, 1010 (10th Cir. 2007) (quoting *E.F.W. v. St. Stephen's Indian High Sch.*, 264 F.3d 1297, 1304 (10th Cir. 2001)). Neither has occurred here, and so Defendant Chairman Shotton's counterclaim should be dismissed.

A. Plaintiff Nations Never Waived Their Tribal Sovereign Immunity in any Agreement or Tribal-State Compact.

Defendant Chairman Shotton does not allege that Plaintiff Nations ever waived their tribal sovereign immunity from his counterclaim in an agreement or compact. Nor did they. And the only narrow waivers that Plaintiff Nations have made for certain types of claims do not apply here.

In their Compacts, ECF Nos. 71-2 to 71-5,[1] Plaintiff Nations waive their tribal sovereign immunity in one narrow limited way. That waiver applies only when gaming facility "patrons" sue Plaintiff Nations for tort claims or for the recovery of prizes in a "court of competent jurisdiction." Compact Part 6.C.; *see* Compact Parts 3.20. (defining "patron" as "any person who is on the premises of a gaming facility, for the purpose of playing covered games authorized by this Compact"), 6.A. (defining a tort claim as "a tort claim for personal injury or property damage

[1] Defendant Chairman Shotton incorporates the Model Compact by reference into his Counterclaims, Countercl. ¶¶ 32-33, 71-73, and Plaintiff Nations' compacts are all substantively identical to the Model Compact, *see id.* ¶¶ 32, 72. Additionally, Plaintiff Nations' compacts are public governmental documents, available on public government websites, of which the Court may take judicial notice. *Democracy Forward Found. v. White House Office of Am. Innovation*, 356 F. Supp. 3d 61, 70 n.8, 71 n.9, 72 n.10 (D.D.C. 2019); *see Indian Gaming Compacts*, U.S. Dep't of Interior (last visited Nov. 4, 2021), https://www.bia.gov/as-ia/oig/gaming-compacts; *Tribal Compacts and Agreements*, Okla. Sec'y of State (last visited Nov. 4, 2021), https://www.sos.ok.gov/gov/tribal.aspx.

against the enterprise arising out of incidents occurring at a facility"), 6.B. (defining a prize claim as "a patron's dispute, in connection with his or her play of any covered game, the amount of any prize which has been awarded, the failure to be awarded a prize, or the right to receive a refund or other compensation").[2] Defendant Chairman Shotton is not a patron, and he is not bringing tort or prize claims, so this narrow wavier is not available to support his counterclaim.

Nor does this narrow waiver of tribal sovereign immunity, which only applies to a limited category of claims in certain forums, make Plaintiff Nations susceptible to other sorts of claims. *See Sheffer v. Buffalo Run Casino, PTE, Inc.*, 2013 OK 77, ¶¶14-19, 315 P.3d 359 (citing *Muhammad v. Comanche Nation Casino*, No. CIV-09-968-D, 2010 WL 4365568, at *1, *10-11 (W.D. Okla. Oct. 27, 2010); *Harris v. Muscogee (Creek) Nation*, No. 11-CV-654-GKF-FHM, 2012 WL 2279340, at *1 (N.D. Okla. June 18, 2012); *Santana v. Muscogee (Creek) Nation ex rel. River Spirit Casino*, 508 F. App'x 821 (10th Cir. 2013)). As Defendant Chairman Shotton's counterclaim is not a patron tort or prize claim, Plaintiff Nations did not "unequivocally waive[]"

[2] The Compact contained a waiver of immunity for arbitration and for *de novo* federal court review of the arbitration award, *id.* Part 12.2.-3., but those provisions were invalidated and severed from the Compact by the Tenth Circuit in *Citizen Potawatomi Nation v. Oklahoma*, 881 F.3d 1226, 1236-40 (10th Cir. 2018), *cert. denied* 139 S. Ct. 375, because they provided for *de novo* review of arbitration awards in violation of federal law. Even if that limited waiver were still valid, it would not apply here. The waiver provided only that Plaintiff Nations would waive sovereign immunity for arbitration proceedings brought under Part 12.2., or federal court proceedings brought to enforce or review such resulting arbitration awards, *see* Part 12.3. Furthermore, Part 12.2. provides only that "parties" could refer a "dispute arising under this Compact" to arbitration, which could be enforced by "a federal district court," Part 12.2., and that "either *party to the Compact* may bring an action *against the other* in federal district court for the de novo review of *any arbitration award under* [Part 12.2.]," Part. 12.3. Even if it were still in effect, then, Part 12.2.-3. only waived tribal sovereign immunity for actions brought to enforce the Model Compact. Since Defendant Chairman Shotton alleges that the Otoe-Missouria Tribe is no longer a party to the Model Compact, Countercl. ¶¶ 32-33, 46, (referring to Model Compact as the Otoe-Missouria Tribe's "former compact" or "then-compact"); *id.* ¶¶ 49-50, 52 (contrasting "Model Compact" and "Tribe's Compact"), and since this dispute deals with the Tribe's rights under the Otoe-Missouria Agreement, this cause of action is not available.

their sovereign immunity as to the counterclaim, and the Nations remain immune from it. *See, e.g., Santa Clara Pueblo*, 436 U.S. at 58-59; *Tamiami Partners, Ltd. ex rel. Tamiami Dev. Corp. v. Miccosukee Tribe of Indians*, 63 F.3d 1030, 1048-49 (11th Cir. 1995) (waiver of tribal sovereign immunity for one time of claim did not waive immunity for a different type); *Pan Am. Co. v. Sycuan Band*, 884 F.2d 416, 418-19 (9th Cir. 1989) (same).

The Cherokee, Chickasaw, and Choctaw Nations ("Signatory Nations") have also entered into Off-Track Wagering Compacts ("OTWG Compacts"), *see* ECF Nos. 71-6 to 71-8, which waive their tribal sovereign immunity in limited ways.[3] None of those waivers allow Defendant Chairman Shotton's counterclaim. In those compacts—which Oklahoma and the Signatory Nations entered pursuant to IGRA after they were approved by the Oklahoma Joint Committee on Tribal-State Relations, *see* OTWG Compacts Signature Blocks; Okla. Stat. tit. 74, § 1221(C)(1); *Treat v. Stitt* ("*Treat II*"), ¶¶ 9-10, 2021 OK 3, 481 P.3d 240 and which went into effect after publication of notice in the Federal Register[4]—the Nations narrowly waived tribal sovereign immunity for particular claims made in particular courts.

Namely, the Signatory Nations waived tribal sovereign immunity from tort claims and gaming disputes brought by off-track wagering facility patrons in state or tribal court. Choctaw OTWG Compact § 5(A)(5); Cherokee OTWG Compact and Chickasaw OTWG Compact § 8(a)(4). The Signatory Nations also waived immunity from a claim by the State that the Nations had breached the Off-Track Wagering Compact. Cherokee OTWG Compact and Choctaw OTWG Compact § 15(c) (waiving immunity in U.S. District Court for Eastern District of Oklahoma);

[3] These compacts are public governmental documents, available on public government websites, of which the Court may take judicial notice. *See supra* 6 n.1.

[4] *See* 75 Fed. Reg. 61,511 (Oct. 5, 2010) (Cherokee); 69 Fed. Reg. 34,686 (June 22, 2004) (Chickasaw); 66 Fed. Reg. 30,748 (June 7, 2001) (Choctaw).

Chickasaw OTWG Compact § 15(c) (waiving immunity in Western District of Oklahoma).[5] The relief authorized in the Off-Track Wagering Compacts is limited to a State request that the Court "declare the [Off-Track Wagering] Compact terminated." *Id.* The Section 15(c) waiver for a declaratory judgment action by the State specifically preserves tribal sovereign immunity from "any other equitable remedy" and from any money judgments, except for recovery of unpaid costs of monitoring of Off-Track Wagering under Section 11. *Id.*

Because Defendant Chairman Shotton's counterclaim is not the sort of claim, and does not seek the sort of relief, for which the Signatory Nations waived their sovereign immunity in the Off-Track Wagering Compacts, the Signatory Nations remain immune from Defendant Chairman Shotton's counterclaim, *Santa Clara Pueblo*, 436 U.S. at 58-59; *Tamiami Partners*, 63 F.3d at 1048-49; *Pan Am.*, 884 F.2d at 418-19, and the Court lacks subject matter jurisdiction over it, *see Nemariam*, 491 F.3d at 483; *Kirkham*, 429 F.3d at 291.

B. Plaintiff Nations Did Not Waive Immunity from Defendant Chairman Shotton's Counterclaim by Filing this Action.

Plaintiff Nations did not waive their immunity from Defendant Chairman Shotton's counterclaim by seeking declaratory relief against him and the other Defendants.

1. A Tribe's Decision to Go to Court Does Not Waive Immunity from Counterclaims.

"Supreme Court precedent couldn't be clearer on this point: a tribe's decision to go to court doesn't automatically open it up to counterclaims–even compulsory ones." *Ute Indian Tribe*, 790 F.3d at 1011 (citing *Citizen Band*, 498 U.S. at 509-10). As the Supreme Court has explicitly held,

[5] The Choctaw Nation also waived tribal sovereign immunity from judicial actions brought in the Eastern District of Oklahoma to interpret the OTWG Compact, Choctaw OTWG Compact § 15(C), or to enforce an arbitration decision on the interpretation or an alleged breach of the compact, *id.* § 23(A). It also agreed that, if the Eastern District found it did not have jurisdiction to enforce an arbitration decision, such an action could be brought in State or Choctaw Court. *Id.*

"a tribe does not waive its sovereign immunity from actions that could otherwise not be brought against it merely because those actions were pleaded in a counterclaim to an action filed by the tribe." *Citizen Band*, 498 U.S. at 509 (citing *U.S. Fidelity*, 309 U.S. at 513); *accord Wichita & Affiliated*, 788 F.2d at 773-74 (citing *U.S. Fidelity*, 309 U.S. at 514).

The facts of *Citizen Band* demonstrate that this rule precludes a finding that Plaintiff Nations' lawsuit waived their immunity from Defendant's counterclaim. In *Citizen Band*, CPN filed suit against the Oklahoma Tax Commission to enjoin the Commission from assessing state taxes against cigarette sales by the tribe on tribal land. *Citizen Band*, 498 U.S. at 507. The Commission counterclaimed,

> asking the trial court to: (1) assume jurisdiction over all matters; (2) *issue declaratory relief* setting forth the rights and jurisdiction of the parties; (3) *declare* that Oklahoma had jurisdiction to tax the Potawatomis' sales; (4) *declare* that Oklahoma may enforce its tax laws against the Potawatomis by way of assessments and injunctions; and (5) *enjoin* the Potawatomis from selling cigarettes on which no state excise or sales taxes are collected or remitted.

Citizen Band Potawatomi Indian Tribe v. Okla. Tax Comm'n, 888 F.2d 1303, 1304 (10th Cir. 1989), *rev'd in part on other grounds*, 498 U.S. 505 (1991) (emphasis added); *see Citizen Band*, 498 U.S. at 507-08. On review the Supreme Court held that CPN "did not waive its sovereign immunity" from the Commission's counterclaims "merely by filing an action for injunctive relief." *Citizen Band*, 498 U.S. at 509-10. In so holding, the Court relied on its conclusion in *U.S. Fidelity* that "[p]ossessing . . . immunity from direct suit, we are of the opinion [the Indian nations] possess a similar immunity from cross-suits." *Id.* at 509 (ellipsis and second alteration in original) (quoting *U.S. Fidelity*, 309 U.S. at 513). For that reason, the Court upheld the Tenth Circuit's decision that the CPN was immune from the Commissioner's counterclaims and that they should be dismissed.

These decisions are controlling, as is the D.C. Circuit's earlier decision in *Wichita & Affiliated*, which largely foretold the holding of *Citizen Band*. There, the Wichita and Affiliated

Tribes challenged an administrative decision by the Department of the Interior about how the proceeds from lands held in trust by the federal government should be distributed among three tribes. 788 F.2d at 767. Two other tribes, who would have been directly affected by the administrative decision, intervened in the case, and one cross-claimed against the federal government to adjust the distribution, which would have affected Wichita's interest. *Id.* at 771. Wichita argued the cross-claim should be dismissed under Rule 19 because it was an indispensable party to the claim and could not be joined because it was protected by tribal sovereign immunity from the cross-claim. *Id.* at 771-72, 774.

A panel of the D.C. Circuit, which included then-judges Antonin Scalia and Kenneth Starr, unanimously agreed. The court first made clear that the two intervenor tribes *had* expressly waived sovereign immunity by intervening in an existing suit. *Id.* at 773. "Unlike a situation where a tribe enters a suit as a plaintiff, anticipating that it can only improve or maintain its *status quo*, a tribe intervening as a defendant fully realizes that it might lose that which it already has—preserving its *status quo* is the whole point of the intervention. By so intervening, a party 'renders itself vulnerable to complete adjudication by the federal court of the issues in litigation between the intervenor and the adverse party.'" *Id.* (quoting *Schneider v. Dumbarton Devs., Inc.*, 767 F.2d 1007, 1017 (D.C. Cir. 1985)) (some quotation marks and recursive quotation omitted). By contrast, the plaintiff Wichita Tribe *had not* consented to the other tribe's cross-claim because "[a] tribe does not automatically open itself up to counterclaims simply by virtue of filing a suit. An Indian tribe's immunity is co-extensive with the United States' immunity, and neither loses that immunity by instituting an action, even when the defendant files a compulsory counterclaim." *Id.* at 773-74 (citation omitted). So too here. By filing suit for a declaratory judgment, Plaintiff

Nations did not waive their immunity from Defendant Chairman Shotton's counterclaim, whether compulsory or not.[6]

These principles are firmly rooted in the Supreme Court's decisions on the scope of the United States' sovereign immunity. "An Indian tribe's immunity is co-extensive with the United States' immunity." *Wichita & Affiliated*, 788 F.2d at 773 (citing *U.S. Fidelity*, 309 U.S. at 514). And it is well-established that the United States is immune from a counterclaim: "The objection to a suit against the United States is fundamental, whether it be in the form of an original action, or a set-off, or a counterclaim. Jurisdiction in either case does not exist, unless there is specific congressional authority for it." *United States v. Shaw*, 309 U.S. 495, 503 (1940).[7] *See also* Fed. R. Civ. P. 13(d) ("These rules do not expand the right to assert a counterclaim—or to claim a credit—against the United States…."). This principle "confine[s]" counterclaims against the United States to "reducing the sovereign's recovery," *Nat'l City Bank of N.Y. v. Republic of China*, 348 U.S. 356, 358 n.2 (1955), *i.e.*, a claim for recoupment, which is not at issue here, as Defendant

[6] Defendant Chairman Shotton never asserts that his counterclaim is compulsory. *See* Fed. R. Civ. P. 13(a).

[7] The Supreme Court has acknowledged one exception: In admiralty cases, where the United States seeks compensation for one vessel's collision with a vessel owned by the United States, the owner of the other vessel may assert a counterclaim seeking to determine proportionate liability for the collision, but that is only because:

> The subject matter of a suit for damages in collision is not the vessel libelled but the collision. Libels and cross-libels for collision are one litigation and give rise to one liability. In equal fault, the entire damage is divided. As a consequence when the United States libels the vessel of another for collision damages and a cross-libel is filed, it is necessary to determine the cross-libel as well as the original libel to reach a conclusion as to liability for the collision. That conclusion must be stated in terms of responsibility for damages.

Shaw, 309 U.S. at 502-03. The Court has long since recognized that these considerations do not extend into claims brought in other areas of law. *See United States v. The Thekla*, 266 U.S. 328, 340-41 (1924).

Chairman Shotton had admitted Opposition to Plaintiffs' Motion to Dismiss at 2-3 & n.1, ECF No. 77 ("Shotton Resp."). The United States' sovereign immunity protects against counterclaims for declaratory judgment, since, as its plain terms confirm, "the Declaratory Judgment Act do[es] not waive the federal government's sovereign immunity in…declaratory judgment actions." *United States v. Royal Geropsychiatric Servs., Inc.*, 8 F. Supp. 2d 690, 696 (N.D. Ohio 1998); *see United States v. Assoc'd Air Transp., Inc.*, 256 F.2d 857, 860, 862 (5th Cir. 1958).

2. Decisions from Other Circuits Do Not Establish That the Filing of a Declaratory Judgment Claim Waives Tribal Sovereign Immunity from Counterclaims.

In accord with these general principles, neither this District, nor this Circuit, has ever recognized that an Indian tribe waives sovereign immunity from counterclaims simply by filing a declaratory judgment claim. In earlier briefing, Defendant Chairman Shotton relied on out-of-circuit authorities to argue otherwise. *See* Shotton Resp. at 3-5 (discussing *Tohono O'odham Nation v. Ducey*, 174 F. Supp. 3d 1194 (D. Ariz. 2016); *United States v. Oregon*, 657 F.2d 1009 (9th Cir. 1981); *Oneida Tribe v. Village of Hobart*, 500 F. Supp. 2d 1143 (E.D. Wis. 2007)). These decisions are not precedential in this Court. *See Nw. Forest Res. Council v. Dombeck*, 107 F.3d 897, 900 (D.C. Cir. 1997) (citing *City Stores Co. v. Lerner Shops of D.C., Inc.*, 410 F.2d 1010, 1014 (D.C. Cir. 1969)); *Mesa Power Grp., LLC v. Gov't of Can.*, 255 F. Supp. 3d 175, 181 (D.D.C. 2017) (quoting *In re Korean Air Lines Disaster*, 829 F.2d 1171, 1176 (D.C. Cir. 1987)). The Court should therefore only follow them to the extent that their analysis is correct and persuasive. *See City Stores*, 410 F.3d at 1014 (rejecting as persuasive district court decisions, based on poorly conceived interpretation of another court's opinion); *Lightfoot v. District of Columbia*, 448 F.3d 392, 401 (D.C. Cir. 2006) (Silberman, J., concurring) (rejecting reliance on circuit court opinions that conflict with Supreme Court precedent). Because these cases are inapplicable, contrary to circuit precedent, or otherwise unpersuasive, they do not give the Court a basis to determine that

Plaintiff Nations waived their tribal sovereign immunity for purposes of Defendant Chairman Shotton's counterclaim.

a. Decisions from the Ninth Circuit Do Not Hold Plaintiff Nations Waived Their Immunity Here.

In his prior briefing, Defendant Chairman Shotton cited decisions from the Ninth Circuit that he said showed that the Plaintiff Nation waived immunity from his counterclaim by filing a complaint seeking declaratory relief from his actions. However, the reasoning of those decisions, and the Ninth Circuit's application of them, actually show why Plaintiff Nations' conduct did *not* waive tribal sovereign immunity. He contended *United States v. Oregon* "illustrates how the waiver-by-litigation exception applies," Shotton Resp. at 3, but the ruling in that case turns on specific circumstances absent here. There, the United States had earlier initiated an action to "establish and protect the treaty fishing rights of all Indian tribes occupying the Columbia River basin," in which the Yakima Tribe had intervened as a party plaintiff. 657 F.2d at 1011 (citing *Sohappy v. Smith*, 302 F. Supp. 899 (D. Or. 1969)). When the district court entered judgment in the case, the court "expressly retained continuing jurisdiction in order to expedite enforcement of its decree." *Id.*; *see Sohappy*, 302 F. Supp. at 911. The Yakima Tribe continued thereafter to "appl[y] successfully to the district court for modifications of the original decree." *Id.* The Yakima Tribe and the other original parties and intervenors in the case then signed a "conservation agreement" regarding the management of the fish stock in which the parties "agreed to tender to the Oregon district court any dispute incapable of a negotiated resolution." *Id.* Several years later, pursuant to that decree, the United States sought an injunction from the Oregon district court as to Yakima fishing, which the district court granted. *Id.* at 1011-12.

On appeal, the Yakima Tribe argued that it was immune from this injunction, but the Ninth Circuit found it was not, for two reasons. First, Yakima had consented to being bound by the

court's adjudication of the fisheries at issue in the litigation when it intervened into the case. *Id.* at 1014-15. The Tribe argued that it had not consented to counterclaims, such as the relief that Washington sought, but the court noted that the case, "by seeking a declaration of treaty fishing rights, sought to apportion the Columbia River anadromous fishery among competing sovereigns. It thus has been recognized as analogous to an equitable action in rem." *Id.* at 1015 (*citing*, *e.g.*, *Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 690 n.32 (1979)). "Since the existence of the salmon was inextricably linked to the res in the court's constructive custody, the court was empowered to enjoin interference with that custody." *Id.* at 1016; *see id.* at 1014 n.13. The court also noted that, as part of bringing the action *in rem*, the Tribe necessarily consented to the court's adjudication of its claims against it: "Here, the Tribe intervened to establish and protect its treaty fishing rights; a basic assumption of that action was that there would be fish to protect. Had the original decree found the species to be in jeopardy and enjoined all parties from future fishing in order to conserve the species, the Yakimas could not have then claimed immunity from such an action." *Id.* at 1014. Additionally, the Yakima Tribe had expressly consented to suit in the settlement agreement. *Id.* at 1016. *See Alaska Logistics, LLC v. Newtok Vill. Council*, 357 F. Supp. 3d 916, 926 (D. Alaska 2019) (discussing *Oregon*'s holding that sovereign immunity did not bar injunctive relief where the underlying suit concerned an *in rem* action and where the Tribe had consented to jurisdiction through an agreement).

In sum, *Oregon* addressed an *in rem* case, in which a tribe (1) submitted to the court's resolution of the ownership of a *res* in the court's continuing equitable possession, (2) repeatedly submitted to the court's continuing equitable jurisdiction to adjudicate the disposition of the *res*, and then (3) expressly agreed to that jurisdiction. None of those factors are present here. And even if they were, the result in *Oregon* could not be squared with the rulings in *Wichita &*

Affiliated, *Shaw*, and *U.S. Fidelity*, which make clear that tribal immunity is co-extensive with the United States' immunity, and, except for an exceedingly narrow circumstance not applicable here, counterclaims are not available against the United States.

Defendant Chairman Shotton also cited the Ninth Circuit's statement in *McClendon v. United States*, 885 F.2d 627, 630 (9th Cir. 1989), that "[i]nitiation of a lawsuit necessarily establishes consent to the court's adjudication of the merits of that particular controversy." Shotton Resp. at 3. But in *McClendon*, the Ninth Circuit found that a tribe had *not* waived its immunity from a lawsuit regarding a lease for a piece of property by filing an earlier action which "merely sought a declaration" of ownership of that land. 885 F.2d at 631. It expressly distinguished *Oregon* on the basis that *Oregon* "was analogous to an action *in rem*." *Id.* *Oregon* did not govern *McClendon* because

> [u]nlike the initial action in *United States v. Oregon*, no ongoing equitable remedy was necessary; there was no *res* over which the district court had to maintain control in order to do equity. By initiating the 1972 action, the Tribe merely consented to the court's jurisdiction to decide ownership of the land in question.

Id. (footnote omitted). Similarly, here, Plaintiff Nations consented to the resolution of their claim, arising from the facts alleged in their complaint; not duplicative counterclaims arising from other alleged facts.

In short, neither *Oregon* nor *McClendon* can be used to establish waiver here. And subsequent Ninth Circuit case law indicates that *Oregon* should not be extended beyond its unusual context, much less to a case like this. As the Ninth Circuit recently described:

> *Oregon* "tests the outer limits of [the Supreme Court]'s admonition against implied waivers." *Pan Am. Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416, 420 (9th Cir. 1989); *see also Am. Indian Agric. Credit Consortium, Inc. v. Standing Rock Sioux Tribe*, 780 F.2d 1374, 1380 (8th Cir. 1985) (disapproving of *Oregon* as "press[ing] the outer boundary" of what constitutes an unequivocal waiver). And there are materially relevant differences between that situation and our situation. Unlike the Nation, the tribe in *Oregon* entered an agreement expressing its

> unequivocal consent to submit issues to federal court. Further, the suit in *Oregon* was akin to an equitable in rem action, whereas the Nation's suit is legal, not equitable, in nature. That distinction matters because the court in *Oregon* relied on the equitable nature of the action to distinguish the scenario we have here—namely, an action involving a compulsory counterclaim asserted against the tribe. 657 F.2d at 1015. We have previously distinguished *Oregon* on these same grounds. *See Squaxin Island Tribe v. Washington*, 781 F.2d 715, 723 n.11 (9th Cir. 1986); *Chemehuevi Indian Tribe v. Cal. State Bd. of Equalization*, 757 F.2d 1047, 1053 n.7 (9th Cir.), *rev'd on other grounds*, 474 U.S. 9…(1985).

Quinault Indian Nation v. Pearson ex rel. Estate of Comenout, 868 F.3d 1093, 1099 (9th Cir. 2017); *see Squaxin*, 781 F.2d at 723 n.11 (refusing to apply *Oregon* where "consent was found in the tribe's explicit agreement to submit issues to federal court and where the suit did not involve a money judgment but was analogous to an action *in rem*"); *Chemehuevi*, 757 F.2d at 1053 n.7 ("Entry into a suit may constitute express consent, as it did in…*Oregon.*..but *only if, when entering into the suit, the Tribe explicitly consents* to be bound by the resolution of the dispute ordered by the court") (emphasis added). If *Oregon* "tests the outer limits" of the implied waiver exception to the tribal sovereign immunity doctrine, this case falls well outside of that exception. There is no explicit consent here, and this is not an equitable *in rem* action requiring the court's continuing equitable control of a *res* and concomitant jurisdiction. And, furthermore, as the *Quinault* court explained, the Ninth Circuit's "broader concern" in *Oregon* was that tribes would "employ[] sovereign immunity offensively to prevent a loss in court…." 868 F.3d at 1099. That concern is not present here, as Plaintiff Nations have already submitted to the Court the question that Defendant Chairman Shotton seeks to resolve. The Court's resolution of Plaintiff Nations' claim is binary—either the Agreements are IGRA compacts, or they are not—and Plaintiff Nations will be bound by the Court's determination whether it is in their favor or not.

Even if it had not expressly addressed *Oregon* in *Quinault*, the Ninth Circuit has also recently described the circumstances in which a tribe might waive its sovereign immunity in

litigation on terms that foreclose application of *Oregon* here. In *Bodi v. Shingle Springs Band*, 832 F.3d 1011 (9th Cir. 2016), the Ninth Circuit rejected the argument that a tribe waived its immunity from counterclaims by asserting its statutory right to remove a case filed in state court to federal court under 28 U.S.C. § 1441, and then asserting tribal sovereign immunity in federal court. 832 F.3d at 1015. The court noted that any waiver of tribal immunity must "manifest the tribe's intent to surrender immunity in 'clear' and unmistakable terms." *Id.* at 1016 (quoting *C & L Enters., Inc. v. Citizen Band Potawatomi Tribe*, 532 U.S. 411, 418 (2001)). It went on to explain the scope of waiver in the tribal sovereign immunity context by contrasting it with waiver in the Eleventh Amendment immunity context:

> Tribal immunity is not synonymous with a State's Eleventh Amendment immunity, and parallels between the two are of limited utility. Importantly, States can waive their Eleventh Amendment immunity through litigation conduct that would not effect a waiver of tribal sovereign immunity. For example, a State's filing of a claim may waive its Eleventh Amendment immunity to counterclaims that arise from the same transaction or occurrence, at least in the bankruptcy context. A tribe, in contrast, does not waive its immunity to a compulsory counterclaim by voluntarily filing suit. In addition, *while waiver cannot be implied with respect to tribal immunity, it can be implied under certain circumstances with respect to States' Eleventh Amendment immunity. See Aholelei v. Dep't of Pub. Safety*, 488 F.3d 1144, 1147 (9th Cir. 2007) ("Express waiver is not required; a state 'waive[s] its Eleventh Amendment immunity by conduct that is incompatible with an intent to preserve that immunity.'").

Id. at 1020 (emphasis added) (cleaned up).

Applying these principles, the *Bodi* court rejected the argument that the Supreme Court's holding in *Lapides v. Board of Regents*, 535 U.S. 613 (2002), that States waive their immunity through litigation conduct when they remove a case, should be extended to Indian tribes. 832 F.3d at 1021.[8] The court noted that "[n]othing in the removal statute, 28 U.S.C. § 1441, abrogates

[8] *Bodi* did note that "filing a complaint…invites the court to resolve a specific issue but does not waive immunity as to other issues," *id.* at 1018, but that did not purport to describe the scope of the invitation to resolve the issue or whether it opens the tribe to "mirror image" counterclaims in

tribes' sovereign immunity. And the absence of a dedicated removal provision for tribes says nothing about whether a tribe's decision to invoke its general removal right constitutes a clear waiver of immunity." *Id.*

The *Bodi* court's reasoning provides an independently persuasive analysis of tribal sovereign immunity, based on Supreme Court case law, that is consistent with the analysis of an Eleventh Circuit decision. *See Contour Spa at Hard Rock, Inc. v. Seminole Tribe*, 692 F.3d 1200, 1208 (11th Cir. 2012) (finding that Indian tribes do not waive immunity by removing under the removal statute and noting that in *Citizen Band*, 498 U.S. at 509-10, a Tribe's suit for injunctive relief did not waive its sovereign immunity to counterclaims). Moreover, and ultimately most importantly, this approach is consistent with controlling precedents, namely: the D.C. Circuit's direction in *Wichita & Affiliated* that a tribe does not waive its immunity by availing itself of federal court jurisdiction to improve the *de facto* status quo; and the Supreme Court case law on the sovereign immunity of the United States, which *Wichita & Affiliated* makes clear is co-extensive with tribal sovereign immunity.

This Court should follow the principles described in *Bodi* and *Wichita & Affiliated* and refuse to find that simply filing a declaratory judgment, without more, waives tribal sovereign immunity.

b. Decisions from Other Districts in Other Circuits, Holding That the Filing of a Declaratory Judgment Action Waives Tribal Sovereign Immunity from Certain Counterclaims, are Unpersuasive.

Defendant Chairman Shotton also previously cited two district court cases, neither of which is persuasive and both of which are contrary to *Wichita & Affiliated*. Shotton Resp. at 3-5. The

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all cases. And the reasoning of the case is inconsistent with such a waiver in the declaratory judgment context.

first, *Ducey*—a pre-*Bodi* and pre-*Quinault* case from the District of Arizona—concluded that a tribe waived its immunity from a declaratory judgment counterclaim when it filed a *Young* declaratory judgment action against state officials that addressed the same legal issues as the counterclaim. *Ducey*, 174 F. Supp. 3d at 1204-05. The court's decision rested in part on its conclusion that, by seeking declaratory relief under 28 U.S.C. § 2201, the Tribe "acknowledged the Court's authority to determine those rights and relations and cannot object to the [Defendant]'s counterclaim seeking a contrary determination of the same rights and relations." *Id.* at 1207. That conclusion cannot be squared with *Bodi* and *Quinault*, much less *Wichita & Affiliated*. Nor can it be squared with the text of 28 U.S.C. § 2201, as nothing in that statutory provision addresses tribal sovereign immunity in any way.

Ducey's waiver conclusion also relied on a number of authorities that are not binding here and would be inapposite even if they were. *Ducey* determined that "on the basis of" *Oregon* and *McClendon*, a tribe "is subject to counterclaims addressing those same issues" raised in the complaint. 174 F. Supp. 3d at 1205. But it failed to consider the limitations of *Oregon* and *McClendon* discussed above, and *Bodi* and *Quinault* have since rendered *Ducey*'s reliance on them untenable. *Ducey* also cited the Eighth Circuit's decision in *Rupp v. Omaha Indian Tribe*, 45 F.3d 1241 (8th Cir. 1995), but in that quiet title action, the court found the Tribe had "clearly and unequivocally consented" to counterclaims, *id.* at 1264, where it "affirmatively requested the district court to order the defendants to assert any claims in the disputed lands they possessed against the Tribe" by expressly seeking such an order in its prayer for relief, *id.* at 1244. Plaintiff Nations made no such affirmative request here. Moreover, the Tribe in *Rupp* conceded to the Eighth Circuit during oral argument that it had consented to the counterclaims during the pendency of the suit. *Id.* As another recent decision from the District of Arizona has explained, *Oregon* and

Rupp show that a tribe waives its sovereign immunity from counterclaims only when it expressly agrees that the court can consider those claims. *Ak-Chin Indian Cmty. v. Maricopa-Stanfield Irr. & Drainage Dist.*, No. CV-20-00489-PHX-JJT, 2021 WL 2805609, at *5 (D. Ariz. July 6, 2021).

Ducey also relied on a Tenth Circuit decision, *United States v. Tsosie*, 92 F.3d 1037 (10th Cir. 1996), in which the court found the United States had waived its immunity from counterclaims in a quiet title action when it brought the action on behalf of individual Indians. It did so by analogizing the counterclaims to claims for recoupment, *id.* at 1043, and by relying on an earlier Tenth Circuit decision holding that the United States does not have sovereign immunity in a quiet title action filed on behalf of individual Indians because "[t]he real plaintiff is not the United States," *id.* (quoting *United States v. Taunah*, 730 F.2d 1360, 1362 (10th Cir. 1984)). The dramatically different context of those claims, and the Tenth Circuit's reliance on recoupment, make them inapplicable here and a weak basis for the *Ducey* court's ruling.

The *Ducey* court also relied on the Eastern District of Wisconsin's decision in *Hobart*, the second district court case on which Defendant Chairman Shotton previously relied. Shotton Resp. at 4-5. But *Hobart* is not persuasive. The district court reasoned that the tribe there waived its immunity from a declaratory judgment counterclaim simply by seeking relief under 28 U.S.C. § 2201, *see* 500 F. Supp. 2d at 1149, which, as just shown, does not waive tribal sovereign immunity or provide a basis to imply waiver by litigation conduct. *Hobart* also relied on the Eighth Circuit's decision in *Rupp*, 500 F. Supp. 2d at 1149, but failed to acknowledge or consider *Rupp*'s conclusion that the Tribe waived its immunity from counterclaims in its quiet title action by "affirmatively request[ing] the district court to resolve the ownership of the disputed land by asking the defendants to assert any right, title, interest or estate they may have in the disputed lands." 45 F.3d at 1245. *Cf. Ak-Chin*, 2021 WL 2805609, at *5. Lastly, *Hobart* relied on

Wyandotte Nation v. Kansas City, 200 F. Supp. 2d 1279, 1285 (D. Kan. 2002). *See* 500 F. Supp. 2d at 1149-50. But the District of Kansas in *Wyandotte* found that under principles of recoupment, a Tribe was not immune from some counterclaims on a quiet title action seeking relief other than damages. 200 F. Supp. 2d at 1285. The Tenth Circuit has since rejected reliance on recoupment for counterclaims seeking non-monetary relief, *see Ute Indian Tribe*, 790 F.3d at 1011 (Gorsuch, J.), and Defendant Chairman Shotton himself has disclaimed the use of recoupment for that purpose, Shotton Resp. at 3 n.1, while asserting that recoupment is not implicated in this case at all, *id.* at 2-3.[9]

The bottom line is that the circumstances in which courts have found that a Tribe's litigation conduct can waive immunity are not present here. Nor is what the Ninth Circuit in *Quinault* dubbed the "broader concern" that a failure to find waiver might insulate Plaintiff Nations

[9] Defendant Chairman Shotton also relied on a miscited quotation from the 1982 edition of Cohen's Handbook of Federal Indian Law, that a tribe "necessarily consents to the court's jurisdiction to determine the claims brought adversely to it." Shotton Resp. at 3 (quoting *Handbook of Federal Indian Law* 324 [sic] (Rennard Strickland et al. eds., 1982 ed.) ("1982 edition")). The quoted passage actually appears at page 325, which also says that "[b]y bringing an action in court, a tribe necessarily consents to the court's jurisdiction to determine the claims brought adversely to it. *This consent does not extend to counterclaims*…." 1982 edition at 325 (emphasis added). In support of Defendant Chairman Shotton's preferred citation, the 1982 edition cites *Washington v. Confederated Bands*, 439 U.S. 463 (1979), *see* 1982 edition at 325 n.360. But *Confederated Bands* was not a tribal sovereign immunity case—there the Tribe brought a claim against a state regarding the state's authority under Public Law 280 and lost on appeal. *See* 439 U.S. at 466-68, 502; *see also Three Affiliated Tribes v. Wold Eng'g*, 476 U.S. 877, 892 (1986) ("We have never read Pub[lic] L[aw] 280 to constitute a waiver of tribal sovereign immunity"). So the 1982 edition stands for nothing more than the common-sense notion that, having brought a claim, a tribe can lose and is bound by the judgment. This is consistent with the most recent edition of the Handbook. *See Cohen's Handbook of Federal Indian Law* § 7.05[1][c], at 645 (Nell Jessup Newton et al. eds., 2012 ed.) ("[p]articipation in…litigation can also effect a waiver [of sovereign immunity] for limited purposes, but counterclaims may generally not be asserted, although some courts have permitted counterclaims to recoup damages from the claim if they arise from the same transaction or occurrence"). Plaintiff Nations provided relevant excerpts of both editions, which can be judicially noticed, at ECF Nos. 83-1 and 83-2. *See Plains Com. Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 328, 341 (2008) (Roberts, C.J.) (relying on Cohen's for legal history and principles of Indian law).

from losing. Plaintiff Nations have submitted their declaratory judgment claim to the Court, and if it fails on the merits, it will be because the Agreements at issue here *are* valid compacts. That judgment will be binding on Plaintiff Nations, whether or not Defendant Chairman Shotton's counterclaim is in the case. *See Ak-Chin*, 2021 WL 2805609, at *5 (citing *Quinault*, 868 F.3d 1098). Under the binding precedent of the Supreme Court and the persuasive precedents of other courts, Plaintiff Nations' litigation conduct, and the posture of this case, do not provide a basis on which the Court can find that Plaintiff Nations waived tribal sovereign immunity.

3. This Claim Does Not Sound in Recoupment.

Some courts—but not in this District or Circuit—have recognized that a defendant may bring counterclaims in recoupment against an Indian tribe where the counterclaim does not "involv[e] relief different in kind or nature to that sought by the [tribe]" and does not "exceed[] the amount of the [tribe]'s claims." *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324, 1344 (10th Cir. 1982) (quoting *Frederick v. United States*, 386 F.2d 481, 488 (5th Cir. 1967)); *Rosebud Sioux Tribe v. Val-U Constr. Co. of S.D.*, 50 F.3d 560, 562 (8th Cir. 1995); *Quinault*, 868 F.3d at 1100. Even if this exception were available—and Defendant Chairman Shotton has disclaimed recoupment as a basis for his counterclaim, *see* Shotton Resp. at 2-3 & n.1—Defendant Chairman Shotton cannot bring a recoupment counterclaim here.

Recoupment is "the right of a defendant to have the plaintiff's claim reduced or eliminated because of the plaintiff's breach of contract or duty in the same transaction," *King v. Barbour*, 240 F. Supp. 3d 136, 140 (D.D.C. 2017) (quoting *United States v. Kellogg Brown & Root Servs., Inc.*, 856 F. Supp. 2d 176, 184 (D.D.C. 2012)), and is a "procedural device[] by which a defendant seeks to reduce the amount he owes to a plaintiff by the value of the plaintiff's cross-obligations to the defendant," *id.* (quoting *Nashville Lodging Co. v. Resolution Trust Corp.*, 59 F.3d 236, 246 (D.C. Cir. 1995)). As then-Tenth Circuit Judge Gorsuch explained in his opinion for the unanimous

panel in *Ute Indian Tribe*, recoupment is an "equitable defense that applies only to suits for money damages," and is not available against a tribe's claim for declaratory relief only. 790 F.3d at 1011 (quoting *Citizen Band*, 888 F.2d at 1305); *see id.* at 1011 n.4 (citing *Bolduc v. Beal Bank, SSB*, 167 F.3d 667, 672 n.4 (1st Cir. 1999); quoting *Black's Law Dictionary* 618 (9th ed. 2009)); *accord Quinault*, 868 F.3d at 1100 (citing *United States v. Washington*, 853 F.3d 946, 968 (9th Cir. 2017)) ("recoupment must be monetary[,]" not injunctive or declaratory).

This is in accord with the D.C. Circuit's treatment of recoupment as a defense raised to set off damages, not against other types of relief. The Circuit long ago stated the "rule" of recoupment as, "*[i]n an action for the price of goods sold, or of work done*, the defendant may set up a breach of warranty or a false representation as to the goods, or a defective performance of the work, by way of *recoupment of the sum that plaintiff may recover*." *Bowdler v. Billings-Chapin Co.*, 47 App. D.C. 164, 166-67 (D.C. Cir. 1917) (emphasis added) (quoting *Dushane v. Benedict*, 120 U.S. 630, 637 (1887)). One court in this District has explained the modern formulation of this rule in *qui tam* actions against the federal government:

> [t]o establish a recoupment claim, the defendant must meet three requirements: (1) the claim must arise from the same transaction or occurrence as the government's suit; (2) the relief sought must be of the same kind or nature as the [government's] requested relief; and (3) *any damages* sought cannot exceed *the amount* sought by the government's claim.

United States v. Intrados/Int'l Mgmt. Grp., 277 F. Supp. 2d 55, 60 (D.D.C. 2003) (second alteration in original) (emphasis added) (quoting *United States v. Ownbey Enters., Inc.*, 780 F. Supp. 817, 820 (N.D. Ga. 1991)); *see Washington*, 853 F.3d at 968 ("It is implicit in the use of the word 'amount' in [the] third criterion that a recoupment claim is a monetary claim.").

Since Plaintiff Nations seek only declaratory relief against Defendant Chairman Shotton, the limited recoupment exception to the rule of *Citizen Band* could not apply, even if Defendant Chairman Shotton now reversed course and sought to assert that it does.

Thus, Plaintiff Nations' filing of a suit for declaratory relief against Defendant Chairman Shotton did not waive their immunity to his counterclaim, from which the Nations would be immune had Defendant brought them in a complaint as a plaintiff.

C. Congress Has Not Abrogated Tribal Sovereign Immunity for Defendant Chairman Shotton's Counterclaim.

Congress has not waived Plaintiff Nations' sovereign immunity from Defendant Chairman Shotton's counterclaim. Defendant argues that this Court has jurisdiction under 28 U.S.C. §§ 1331 and 1362, and the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, but none of those authorities waive the Plaintiff Nations' tribal sovereign immunity from this action. Nor does IGRA.

Only Congress can abrogate tribal sovereign immunity, and to do so, "Congress must 'unequivocally express that purpose." *Bay Mills*, 572 U.S. at 790 (quoting *C & L Enters.*, 532 U.S. at 418); *accord Santa Clara Pueblo*, 436 U.S. at 58 ("It is settled that a waiver of sovereign immunity cannot be implied but must be unequivocally expressed.") (quotation marks omitted). None of the statutes on which Defendant Chairman Shotton relies for jurisdiction contain such a waiver. And the courts have consistently held that the statutes upon which Defendant purportedly premises jurisdiction do not waive any sovereign's immunity. 28 U.S.C. § 1331 "does not waive sovereign immunity. Rather, § 1331 presumes a specific waiver of sovereign immunity under some other federal statute." *Cato v. United States*, Civ. No. A. 93-0312, 1993 WL 260698, at *2 (D.D.C. June 30, 1993) (citing *Doe v. Civility*, 635 F.2d 88, 94 (2d Cir. 1980)); *accord Stone v. Holder*, 859 F. Supp. 2d 48, 51 (D.D.C. 2012) (citing *Walton v. Fed. Bureau of Prisons*, 553 F.

Supp. 2d 107, 114 (D.D.C. 2008)). Neither does 28 U.S.C. § 1362 waive immunity. *KTT*, 330 F. Supp. 3d at 264; *Mackinac Tribe v. Jewell*, 87 F. Supp. 3d 127, 140 (D.D.C. 2015) (quoting *Munaco v. United States*, 522 F.3d 651, 653 n.3 (6th Cir. 2008)) ("[J]urisdictional statutes…do not operate as waivers of sovereign immunity.") (alteration and ellipsis in original). Nor does the Declaratory Judgment Act waive sovereign immunity. *Kennedy v. Rabinowitz*, 318 F.2d 181, 186 (D.C. Cir. 1963); *Stone*, 859 F. Supp. 2d at 52 (citing *Walton*, 533 F. Supp. 2d at 114); *see United States v. King*, 395 U.S. 1, 4-5 (1969).

IGRA only provides one narrow waiver of tribal sovereign immunity, but Defendant Chairman Shotton cannot rely on it because it is inapplicable here. *See Bay Mills*, 572 U.S. at 791 (discussing limited nature of abrogation). 25 U.S.C. § 2710(d)(7)(A)(ii) provides that "[t]he United States district courts shall have jurisdiction over . . . any cause of action *initiated by a State or Indian tribe to enjoin a class III gaming activity* located on Indian lands and conducted *in violation of any Tribal-State compact* entered into under [25 U.S.C. § 2710(d)(3)] that is in effect . . . ." (emphasis added). Defendant Chairman Shotton cannot rely on it because it only authorizes lawsuits "to enjoin a class III gaming activity," and he seeks a declaratory judgment, *see* Countercl. Prayer for Relief 1 at 65, and "[a]n award of attorneys' fees, costs, and any other relief as the Court, in its judgment, may deem appropriate," *id.* Prayer for Relief 2. Since suits for these forms of relief are not authorized by Section 2710(d)(7)(A)(ii), Defendant Chairman Shotton's counterclaims for these types of relief are barred. Moreover, Section 2710(d)(7)(A)(ii) only waives tribal sovereign immunity for any cause of action *initiated by a State or Indian tribe*. In contrast, Defendant Chairman Shotton is a party to this case as an *individual tribal official* under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), and does not allege otherwise, *see* Countercl. ¶ 4.

The waiver in 25 U.S.C. § 2710(d)(7)(A)(ii) does not apply for an additional reason. That provision only authorizes federal district courts to hear actions to enjoin gaming "conducted in violation of any Tribal-State compact [entered under IGRA] that is now in effect." Plaintiff Nations are not "in violation" of any Tribal-State compact, and so Plaintiff Nations are immune from Defendant's counterclaim. 25 U.S.C. § 2710(d)(7)(A)(ii) does not define what "in violation" means, so that term should be understood according to its plain and ordinary meaning, determined with reference to dictionary definitions and statutory context. *Citizens for Responsibility & Ethics in Wash. v. FEC*, 316 F. Supp. 3d 349, 389-91 (D.D.C. 2018). A "violation" is "[a]n infraction or breach of the law; a transgression," or "[t]he act of breaking or dishonoring the law; the contravention of a right or duty," *Black's Law Dictionary* (11th ed. 2019), and "to violate" means "break or fail to comply with," *New Oxford American English Dictionary* 1930 (3d ed. 2010). IGRA provides that Tribal-State compacts are required when a tribe wishes to conduct "a class III gaming activity" and that such compacts "govern[] the conduct of gaming activities." 25 U.S.C. § 2710(d)(3)(A). Thus, the necessary criteria for abrogation are only met if Plaintiff Nations are conducting a class III gaming activity in a manner contrary to the manner prescribed by the compact governing that class III gaming activity. But they are not, *see Cherokee Nation v. Stitt*, 475 F. Supp. 3d 1227 (W.D. Okla. 2020), and Defendant Chairman Shotton never alleges otherwise.

II. Defendant Chairman Shotton's Counterclaim Should Be Dismissed Under Rule 12(B)(6) As Redundant Of His Own Affirmative Defense And Of Plaintiffs' Claims.

Defendant Chairman Shotton's counterclaim should be dismissed under Rule 12(b)(6) because it is duplicative of his affirmative defense that invalid provisions of the Agreement should be severed and redundant with Plaintiff Nations' claims that the Comanche Agreement is invalid.

Defendant Shotton seeks in his counterclaim a declaration that the Otoe-Missouria Agreement "is valid and in effect under IGRA" or, in the alternative that "any offending provisions" of the Agreement may be severed and the "Tribe may continue to engage in Class III gaming" under the remaining provisions of the Agreement. Countercl. ¶ 113, Prayer for Relief 1 at 62.

The counterclaim is the mirror image of the declaratory relief Plaintiff Nations seek, namely that the Agreement is not a valid IGRA compact that is not "in effect" under IGRA, Compl. ¶¶ 232-35, 241-44, 266-68, Prayer for Relief 1(*i*) at 131, that it contains provisions that cannot be the subject of IGRA negotiations or compacts, Compl. ¶¶ 245-50, Prayer for Relief 1(d), (e), (g) at 129-30, because they contain terms that otherwise violate IGRA, Compl. ¶¶ 252-255, and because it violates the trust responsibility by purporting to commit the Governor to concur in the Tribe's efforts to obtain trust land in other tribes' jurisdictions in violation of IGRA, Compl. ¶ 263, Prayer for Relief 1(h), that Defendant Shotton's representations that the Agreement is a valid IGRA compact and his actions in furtherance of those representations are unlawful and constitute a continuing violation of federal law. Compl. ¶¶ 266-68, Prayer for Relief 1(*i*) at 131; *see also id.* Prayer for Relief 2 (seeking an order reversing the Defendant Secretary's 'no action' approvals of the Agreements and remanding the matters to the Defendant Secretary for disapprovals of the Agreements"). Similarly, the counterclaim is duplicative of Defendant Shotton's Affirmative Defense 8 that Plaintiff Nations' claim to void the Agreement is "impermissible" as invalid provisions may be severed. Ans. at 46.

A counterclaim for declaratory judgment that is duplicative of claims in the complaint such that resolution of the plaintiff's claims will result in resolution of the counterclaim should be dismissed as it will "fail to serve a 'useful purpose'" in deciding the case. *Sarkis' Cafe, Inc. v.*

Sarks in the Park, LLC, 55 F. Supp. 3d 1034, 1038 (N.D. Ill. 2014); *see also Mille Lacs Band of Chippewa Indians v. Minnesota*, 152 F.R.D. 580, 582 (D. Minn. 1993) (denying motion to amend answer to add counterclaim involving identical factual and legal issues as it "is redundant and will be moot upon disposition of the plaintiffs' claims"). Furthermore, this District has held that "redundant counterclaims are simply superfluous and no exercise of the Court's permissive jurisdiction to hear the requests for declaratory relief is necessary." *Malibu Media, LLC v. Parsons*, No. CV 12-1331 (BAH), 2013 WL 12324463, at *10 (D.D.C. May 31, 2013) (citation omitted).

Accordingly, the Court's decision on Plaintiff Nations' claims that the Agreement is not a valid IGRA compact and contains illegal provisions in light of Defendant Shotton's affirmative defense that the Agreement cannot be voided and, if necessary, illegal provisions can be severed will moot the counterclaim.

Defendant Chairman Shotton earlier insisted that his counterclaim could still serve a useful purpose in the case because if the Plaintiffs' claims against the other Defendants were dismissed for lack of standing, the Court might then "dismiss Plaintiffs' claim against him *sua sponte*," leaving unresolved "the validity of the [Otoe-Missouria Agreement.]" Shotton Resp. at 6-7. In other words, he deemed the counterclaim useful as an insurance policy. In the first place, if Plaintiff Nations' complaint were dismissed *sua sponte*, it would eliminate the basis on which Defendant Chairman Shotton has asserted Plaintiff Nations waived sovereign immunity from his Counterclaim, which would be barred. Second, Defendant Chairman Shotton provides no support for his assertion that the Court may dismiss the claims against him *sua sponte*. And the case law of this circuit shows that position is too precarious to make his duplicative counterclaim useful. In this circuit a district court may dismiss a claim *sua sponte* for: "patent" failure to state a claim

under Federal Rule of Civil Procedure 12(b)(6) or a facial lack of sufficient factual matter to state a plausible claim under Federal Rule of Civil Procedure 8(a), *Fontaine v. JPMorgan Chase Bank, N.A.*, 42 F. Supp. 3d 102, 106-07 (D.D.C. 2014) (citing, *inter alia*, *Baker v. Dir., U.S. Parole Comm'n*, 916 F.2d 725, 726 (D.C. Cir. 1990); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)); or, if the court determines it lacks jurisdiction, either under Federal Rule of Civil Procedure 12(h)(3), *Hurt v. U.S. Ct. of Appeals*, 264 F. App'x 1 (D.C. Cir. 2008) (per curiam), or else under Federal Rule of Civil Procedure 12(b)(1) if the claims are "patently insubstantial" or "essentially fictitious," *Best v. Kelly*, 39 F.3d 328, 330 (D.C. Cir. 1994). None of these circumstances are present here. But even if they were, and Plaintiff Nations' claim against Defendant Chairman Shotton were dismissed, his counterclaim would be accorded the same treatment—*sua sponte* dismissal. *See Pricer v. Deutsche Bank*, 842 F. Supp. 2d 162, 168 (D.D.C. 2012) (citing *Klute v. Shinseki*, 797 F. Supp. 2d 12, 17 (D.D.C. 2011); *Moore v. Motz*, 437 F. Supp. 2d 88, 94 (D.D.C. 2006)); *Hartford Mut. Ins. Co. v. New Ledroit Park Bldg. Co.*, 313 F. Supp. 3d 40, 44-48 (D.D.C. 2018).[10]

Finally, by his own earlier admission, Defendant Chairman Shotton's counterclaim is not needed as an insurance policy. Defendant Chairman Shotton asserted that

> it is abundantly clear that the Otoe-Missouria Tribe could file this *exact* same counterclaim as an independent lawsuit nominally against Plaintiffs' respective tribal leadership [under *Ex parte Young*]. Alternatively, the Chairman could have copy-and-pasted the substantive paragraphs of the counterclaim into third-party complaints and served those third-party complaints on four tribal leaders that would inevitably be represented by the same counsel that already represent Plaintiffs.

[10] Moreover, even assuming that Plaintiff Nations' claims were dismissed, a court may decline to exercise jurisdiction over a permissive counterclaim where there is no independent jurisdictional basis for the counterclaim and the court has dismissed the claims over which it has original jurisdiction. *See Carabillo v. ULLICO, Inc.*, 357 F. Supp. 2d 249, 259 (D.D.C. 2004) (citing 28 U.S.C. § 1367(c)(3)); *supra* at 12 n.6.

Shotton Resp. at 5 n.2.[11] In Defendant Chairman Shotton's view, then, he or the Tribe could file his counterclaim as a separate *Young* action.[12] There is therefore no reason to keep his duplicative counterclaim in the case. *See Hanes Corp. v. Millard*, 531 F.2d 585, 591 n.4 (D.C. Cir. 1976) (court may decline to hear claim for declaratory relief where other remedies are available), *superseded by statute on other grounds as recognized in Nat'l R.R. Passenger Corp. v. Consol. Rail Corp.*, 892 F.2d 1066, 1071-72 (D.C. Cir. 1990); *see also Malibu Media*, 2013 WL 12324463, at *10 (citing *Millard*, 531 F.2d at 591 n.4)).

Thus, Defendant Chairman Shotton's counterclaim is redundant, will become moot on disposition of Plaintiff Nations' claims, and should be dismissed.

CONCLUSION

For the foregoing reasons, the Plaintiff Nations respectfully motion the Court to dismiss Defendant Chairman Shotton's counterclaims under Rule 12(b)(1), because Plaintiff Nations are protected from the counterclaims by tribal sovereign immunity and because Defendant Chairman Shotton's counterclaim is duplicative and will be moot on disposition of Plaintiff Nations' claims.

Respectfully submitted,

Dated: November 22, 2021 By: */s/ Frank S. Holleman*

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[11] Defendant Chairman Shotton's earlier assertion that filing such a *Young* action would "needlessly complicate this lawsuit," Shotton Resp. at 5 n.2, is an unexplained non sequitur.

[12] Of course, even if he or the Tribe had filed such an action, these third-party claims might fail for jurisdictional or procedural reasons or on the merits, which would depend on the pleadings and truth and substance of the allegations. But that would make them no less viable than this counterclaim, and so in the event of dismissal of Plaintiff Nations' claims, any purpose that this counterclaim might serve would be served just as well by such action.

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CERTIFICATE OF SERVICE

I hereby certify that on November 22, 2021, I electronically filed the above and foregoing document and attachments with the Clerk of Court via the ECF System for filing.

/s/ Frank S. Holleman
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