

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

KIOWA TRIBE et al.,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF THE
INTERIOR et al.,

Defendant.

Civil Case No: 5:22-CV-00425

Hon. Charles B. Goodwin

**PLAINTIFF KIOWA TRIBE’S BRIEF IN OPPOSITION TO
THE FORT SILL APACHE DEFENDANTS’ MOTION TO DISMISS**

I. INTRODUCTION

Plaintiffs in this case challenge the Fort Sill Apache Tribe’s illegal casino operations on a piece of property that is located within the Plaintiff Kiowa Tribe’s jurisdiction and referred to as the Tsalote Allotment. On May 24, 2022, the Comanche Nation and the Kiowa Tribe filed a Complaint against the United States Department of the Interior (“Interior”), Interior officials in their official capacities, the Chairman of the National Indian Gaming Commission (“NIGC”) in his official capacity (collectively, the “Federal Defendants”), and Fort Sill Apache Tribal officials in their individual and official capacities (“FSA Defendants”) to prevent the casino from opening. An Amended Complaint was filed on June 16, 2022. The FSA filed a motion to dismiss alleging that the Fort Sill Apache Tribe was not a party to the First Treaty of Medicine Lodge, that the

Plaintiffs have no private right of action under the Indian Gaming Regulatory Act (“IGRA”), that they are immune from claims brought pursuant to the Racketeer Influenced and Corrupt Organizations Act (“RICO”), and that the Fort Sill Apache Tribe is a necessary and indispensable party. As detailed below, these assertions are incorrect and the FSA Defendants’ Motion to Dismiss should be denied.

The Fort Sill Apache Tribe’s casino is operating illegally on the Plaintiffs’ reservation. Neither the Federal Defendants nor the FSA Defendants have been able to justify the legality of the Fort Sill Apache Defendant’s casino operations.

II. FACTUAL BACKGROUND

The factual background of this case has been described extensively in the briefing for this case. Plaintiff Kiowa Tribe briefly summarizes the relevant facts here and incorporates the facts from Plaintiff Comanche Nation’s Response brief by reference. ECF 80 p. 3-6.

On October 21, 1867, the First Treaty of Medicine Lodge created a reservation (“KCA Reservation”) for the Kiowa Tribe and the Comanche Nation. Treaty with the Kiowa, Comanche (Oct. 21, 1867) (“First Treaty of Medicine Lodge”). The language of the First Treaty of Medicine Lodge explicitly details that the Kiowa Tribe and the Comanche Nation must consent to any other tribes being settled on the KCA Reservation. This consent process was followed in the Second Treaty of Medicine Lodge when the Kiowa Tribe and the Comanche Nation agreed to share their reservation with the Kiowa-

Apache (today known as the Apache Tribe of Oklahoma)¹ Treaty with the Kiowa, Comanche, Kiowa-Apache, 1867 (Oct. 21, 1867) (“Second Treaty of Medicine Lodge”). The Plaintiffs have specifically objected to the Fort Sill Apache Tribe acquiring land within the KCA Reservation in previous litigation. *Comanche Nation, Okl. v. United States*, 393 F. Supp. 2d 1196 (W.D. Okla. 2005). Under the settlement agreement for that litigation, Plaintiff Comanche Nation granted its consent to the Fort Sill Apache’s exercise of jurisdiction over the Kerchee Allotment *only*, and any future gaming activities would take place on the Fort Sill Apache Tribe’s New Mexico reservation. ECF 51 ¶ 44.

The Fort Sill Apache Tribe also shared this understanding about the inability to conduct future gaming activities in Oklahoma as detailed in the Amended Complaint and attached Exhibits. ECF 51 ¶ 45. However, in February 2022, the Fort Sill Apache Tribe announced that it was constructing a casino on the Tsalote Allotment. The Plaintiffs submitted written objections to the NIGC, but the NIGC has done nothing to prevent or stop the opening or operations of the Fort Sill Apache Tribe’s illegal Warm Springs Casino. Plaintiff Kiowa Tribe is dependent on its casinos to fund its government programs and services. The casino funds that are provided contribute to critical and essential services to Tribal members, and approximately 60% of the Kiowa Tribe’s annual budget for government programs and services is funded by the Tribe’s casinos. The illegal competition from the Warm Springs Casino is diverting revenue from the Kiowa Tribe’s essential government programs.

¹ The Apache Tribe and the Fort Sill Apache Tribe are two separate and distinct tribes even though they share ethnic and linguistic similarities.

III. ARGUMENT

Plaintiff Kiowa Tribe largely agrees with the legal arguments made by Plaintiff Comanche Nation in their Response and incorporates them by reference. Plaintiff Kiowa Tribe writes separately to highlight and expand on issues of concern specific to the Kiowa Tribe.

A. The FSA Defendants Violated the Plaintiffs' Treaty Rights and Plaintiffs' Claim is Viable

The FSA Defendants claim that they are not parties to the First Treaty of Medicine Lodge, but that point is irrelevant. As Plaintiff Comanche Nation states in their Response, a United States treaty is “the supreme law of the land.” ECF 80, p. 8 (citing U.S. Const., art. VI, cl. 2.). There is extensive case law where Indian tribes (or the United States as the trustee) have had to file suit against non-signatory parties to enforce their treaty rights. *See e.g., Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999); *United States v. State of Wash.*, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd and remanded*, 520 F.2d 676 (9th Cir. 1975); *United States v. Winans*, 198 U.S. 371, 377, 384 (1905). The FSA Tribe’s assertion of jurisdiction over the Tsalote Allotment by operating a casino that offers Class II and Class III gaming under IGRA, is a violation of the First Treaty of Medicine Lodge.

Plaintiff Kiowa Tribe incorporates by reference Plaintiff Comanche Nation’s Response brief regarding all other legal arguments on this issue. ECF 80, p. 7-10.

B. The FSA Defendants’ Casino is in Violation of IGRA and Plaintiffs’ Claim is Viable

The FSA Defendants claim that IGRA does not allow the Plaintiffs to pursue a private right of action. However, IGRA provides a private right of action for Indian tribe to enjoin Class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact that is in effect. 25 U.S.C. § 2710(d)(7)(A)(ii). IGRA dictates that an Indian tribe may engage in gaming only on “Indian lands” and only on the Indian lands within such tribe’s jurisdiction. 25 U.S.C. § 2710(b) (concerning Class II gaming) (emphasis added); see also *id.* § 2710(d) (permitting Class III gaming on Indian lands only if authorized by an ordinance “adopted by the governing body of the Indian tribe having jurisdiction over such lands”).

The Fort Sill Apache Tribe’s tribal-state compact states that “[t]he tribe may establish and operate enterprises and facilities that operate covered games only on its Indian lands as defined by IGRA. . . . Nothing herein shall be construed as expanding or otherwise altering the term ‘Indian lands’, as that term is defined in IGRA, nor shall anything herein be construed as altering the federal process governing the tribal acquisition of ‘Indian lands’ for gaming purposes.” ECF 51 ¶ 97, Ex. 7 Part 5(L) (emphasis added).

The Tsalote Allotment is “Indian land,” but it is not the Fort Sill Apache Tribe’s Indian land. The Tsalote Allotment is within the jurisdiction of the Kiowa Tribe, not the Fort Sill Apache Tribe. The Tsalote Allotment is not part of the Fort Sill Apache Tribe’s reservation as defined in 25 C.F.R. § 151.2, because the Tsalote Allotment is within the KCA Reservation and the Fort Sill Apache Tribe has no share of the title to the KCA

Reservation. Moreover, the Fort Sill Apache Tribe did not validly acquire the Tsalote Allotment “pursuant to 25 C.F.R., Part 151.” The Fort Sill Apache Tribe’s acquisition of the Tsalote Allotment violated and was contrary to 25 C.F.R. § 151.8 (and violated the First Treaty of Medicine Lodge). Furthermore, the Fort Sill Apache Tribe acquired the Tsalote Allotment after October 17, 1988, it does not meet an exception under IGRA, and therefore the Fort Sill Apache Tribe has no authority under IGRA to conduct gaming on the Tsalote Allotment.

Plaintiff Kiowa Tribe agrees with Plaintiff Comanche Nation’s legal arguments regarding the FSA Defendants’ IGRA violations. Plaintiff Kiowa Tribe incorporates by reference Plaintiff Comanche Nation’s Response brief regarding all other legal arguments on this issue. ECF 80, p. 10-13.

C. Plaintiffs’ RICO Claim Against the FSA Defendants is Viable

Plaintiff Kiowa Tribe agrees with Plaintiff Comanche Nation’s legal arguments with regards to the fact the FSA Defendants are not immune from suit and that the Fort Sill Apache Tribe is not a necessary or indispensable party. Plaintiff Kiowa Tribe incorporates by reference Plaintiff Comanche Nation’s Response brief on this issue. ECF 80, p. 13-20.

D. The FSA Defendants are Not Immune from Suit, and the Fort Sill Apache Tribe is Not a Necessary or Indispensable Party

Plaintiff Kiowa Tribe agrees with Plaintiff Comanche Nation’s legal arguments with regards to the fact the FSA Defendants are not immune from suit and that the Fort Sill Apache Tribe is not a necessary or indispensable party. Plaintiff Kiowa Tribe incorporates by reference Plaintiff Comanche Nation’s Response brief on this issue. ECF 80, p. 21-23.

E. The Apache Tribe and KCAILUC are Not Necessary or Indispensable Parties

Plaintiff Kiowa Tribe agrees with Plaintiff Comanche Nation's legal arguments showing that the Apache Tribe and the Kiowa Comanche Apache Intertribal Land Use Committee ("KCAILUC") are not necessary or indispensable parties. Plaintiff Kiowa Tribe incorporates by reference Plaintiff Comanche Nation's Response brief on this issue. ECF 80, p. 23-25.

IV. CONCLUSION

For the foregoing reasons and those further explained in the Comanche Nation's Response brief, the FSA Defendants' Motion to Dismiss must be denied.

Dated: October 27, 2022

Respectfully Submitted,

/s/ Laura E. Jones
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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of October 2022, I electronically transmitted the attached document to the Clerk of Court using the Electronic Case Filing System for filing. Based on the records currently on file in this case, the Clerk of Court will transmit a Notice of Electronic Filing to those registered participants of the ECF System.

/s/ Laura E. Jones

Laura E. Jones