

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

KIOWA TRIBE AND COMANCHE
NATION,

Plaintiffs,

V.

THE UNITED STATES
DEPARTMENT OF THE INTERIOR,
ET AL.

Defendants.

Case. No. 5:22-CV-00425

Hon. Charles B. Goodwin

**SPECIAL APPEARANCE OF THE FORT SILL APACHE TRIBE OF
OKLAHOMA DEFENDANTS’ REPLY IN SUPPORT OF THEIR MOTION TO
DISMISS**

Defendants Lori Gooday Ware, Chairwoman, Pamela Eagleshield, Vice Chairman, James Dempsey, Secretary-Treasurer, Jeanette Mann, Committee Member, Jennifer Heminokey, Committee Member, Dolly Loretta Buckner, Committee Member, Philip Koszarek, Chairman of the Fort Sill Apache Gaming Commission, Naomi Hartford, Vice-Chairman of the Fort Sill Apache Gaming Commission, Michael Crump, Commissioner of the Fort Sill Apache Gaming Commission, Lauren Pinola, Commissioner of the Fort Sill Apache Gaming Commission, and Debbie Baker, Commission of the Fort Sill Apache

Gaming Commission¹, specially appear and hereby file their Reply Brief to Plaintiff Kiowa Tribe’s Opposition to the Fort Sill Apache Defendants’ Motion to Dismiss. [Doc. No. 102].

I. INTRODUCTION AND SUMMARY

Plaintiffs the Comanche Nation and the Kiowa Tribe initiated this litigation on May 24, 2022, challenging the sovereignty of the Fort Sill Apache Tribe (the “FSAT”) over a tribal allotment held in trust by the United States of America on behalf of the FSAT. The background of this litigation is sufficiently detailed in the FSAT Defendants’ Motion to Dismiss [Doc. No. 59] and their Reply in Support [Doc. No. 91] filed in response to the Comanche Nation’s Brief in Opposition to the FSA Defendants’ Motion to Dismiss [Doc. No. 80]. The FSAT Defendants incorporate by reference their Reply in Support of their Motion to Dismiss. [Doc. No. 91]. The FSAT Defendants file this Reply to address issues raised by the Kiowa Tribe’s Brief in Opposition to the FSAT Defendants’ Motion to Dismiss. [Doc. No. 102].

II. ARGUMENT AND AUTHORITIES

A. The FSAT Defendants Have Not Violated the Medicine Lodge Treaties

The Kiowa Tribe and the Comanche Nation consented to the establishment of a permanent reservation for the FSAT within the KCA Reservation on February 17, 1897.

The First Treaty of Medicine Lodge states in relevant part:

¹ Defendants Lori Gooday Ware, Pamela Eaglesfield, James Dempsey, Jeanette Mann, Jennifer Heminokeky, Dolly Loretta Buckner, Philip Koszarek, Naomi Hartford, Michael Crump, Lauren Pinola, and Debbie Baker are referred to herein as the “Fort Sill Apache Tribe Defendants” or the “FSAT Defendants.”

...[T]he [reservation] is hereby set apart for the absolute and undisturbed use and occupation of the tribes herein named for such other friendly tribes or individual Indians as, from time to time, they may be willing [with the consent of the United States] to admit among them; and the United States now solemnly agrees that no persons except those herein authorized so to do and except such officers, agents, and employees of the Government as may be authorized to enter upon Indian reservation in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article, or in such territory as may be added to this reservation, for the use of said Indians.

[Doc. No. 51-1, Art. 2]. The First Treaty of Medicine Lodge states that land may be given to other friendly tribes (with the consent of the United States) so long as the Kiowa Tribe, Comanche Nation, or the Apache Tribe are willing to “admit [the ‘friendly tribes’] among them.” *Id.* This is exactly what Plaintiffs’ tribal leaders did on February 17, 1897. [Doc. No. 60, p. 2]. On that date, the Kiowa Tribe and the Comanche Nation entered an agreement with the United States that provided the KCA Reservation would be used “for the permanent settlement” of the FSAT. This agreement was executed by the “chiefs and headmen of the Kiowa, Comanche, and Kiowa-Apache tribes” and states in relevant part:

[H]aving had due notice and consideration, the additions, by executive order, of the following described portions of our reservation to the military reservation of Fort Sill, Oklahoma, for the permanent settlement thereon of the Apache prisoners of war, who are now located on the original Fort Sill military reservation by Act of Congress.

H.B. Frissell, *et al*, 42 *The Southern Workman*, 214 (1913). In accordance with the terms of the First and Second Treaties of Medicine Lodge, the FSAT was permanently and properly placed within the KCA Reservation. In concert with the February 17, 1897, agreement, an executive order signed by President Grover Cleveland set apart 26,897 acres of land within the KCA Reservation “for the permanent location thereon of the Apache

prisoners of war.” H.R. REP. NO. 62-684, at 54 (1912). The Fort Sill Apache Tribe is the name used today by those “Apache prisoners of war,” and the FSAT Defendants are the duly appointed leaders of what is now a federally recognized tribe.

The FSAT Defendants argue in their Motion to Dismiss and in their Reply to the Comanche Nation’s Objection to their Motion to Dismiss that they are not bound by the First and Second Treaties of Medicine Lodge. However, were the FSAT Defendants subject to the Treaties of Medicine Lodge, Plaintiffs’ claims still fail. The FSAT were properly placed within the KCA Reservation by agreement of the United States and Plaintiffs on February 17, 1897, as well as by the executive order of President Grover Cleveland. *Parravano v. Babbitt*, 70 F.3d 539, 544 (9th Cir. 1995) (holding that reservations created by executive order have the same legal significance as those granted by treaty). The FSAT have the same rights in the disestablished KCA Reservation as the Kiowa Tribe or the Comanche Nation.

The simple truth of this matter is that, not only were the FSAT properly placed in the KCA Reservation, but they have taken the steps necessary to place the Apache Wye in trust and conduct gaming operations on the Apache Wye.

Because the FSAT Defendants are not bound by the First and Second Treaties of Medicine Lodge, Plaintiffs fail to state a claim for which relief can be granted. Further, because Plaintiffs consented to the permanent placement of the FSAT within the KCA Reservation, Plaintiffs fail to state a claim for which relief can be granted even if this Court holds that the FSAT Defendants are subject to the First and Second Treaties of Medicine Lodge.

B. The FSAT Defendants Did Not Violate IGRA

Despite acknowledging that the Apache Wye is held in trust by the United States Secretary of the Interior for the benefit of the FSAT, Plaintiffs argue that it is under the jurisdiction of the Kiowa Tribe. [Doc. No. 102, at p.5]. This is incorrect. The history of how this land came to be held in trust for the specific benefit and under the jurisdiction of the Fort Sill Apache Tribe is detailed in the FSAT Defendants' Response in Opposition to Plaintiffs' Motion for Temporary Injunction and in their Motion to Dismiss. [Doc. Nos. 59 and 60]. The Kiowa Tribe does not own the Apache Wye. The Apache Wye is not held in trust for the Kiowa Tribe. The Apache Wye is not within a reservation governed by the Kiowa Tribe as the KCA Reservation has not existed since it was disestablished by Congress in 1900. *Martinez v. State*, 2021 OK CR 40, ¶ 24, 502 P.3d 1115, 1120 ("The record convinces us that Congress intended to disestablish the Kiowa Comanche Apache Reservation, and did so, by the Act of 1900. ***Nothing***...casts serious doubt on this legal conclusion in previous cases, even in light of *McGirt*.") (emphasis added).

The Kiowa Tribe argues that the Apache Wye is not FSAT Indian land because it is within the disestablished KCA Reservation. [Doc. No. 102, p. 5]. This is incorrect because: (1) pursuant to the February 17, 1897 agreement between the Kiowa Tribe and the United States, the FSAT were properly and permanently placed within the KCA Reservation; (2) the FSAT were properly and permanently placed within the KCA Reservation by executive order; (3) the FSAT purchased the Apache Wye allotment; (4) the Secretary of the Interior took the Apache Wye into trust for the benefit of the FSAT in 2001; and (5) the FSAT took

the required actions pursuant to the Indian Gaming Regulatory Act to operate a casino on the Apache Wye.

When the Secretary of the Interior acquires land to hold in trust for a tribe, they are required to consider the impact this action will have on surrounding tribes, the state in which the land is located, the municipalities that will lose tax income, and the jurisdictional and use conflicts which may arise as a result. 25 C.F.R. § 151.10(e); 25 C.F.R. § 151.10(f); and 25 U.S.C. § 5108 *et al.* When the Secretary of the Interior acquires land in trust under IGRA, the lands must be contiguous to a reservation or the tribe can show that the gaming establishment would be in the best interests of the tribes and not detrimental to the surrounding community. 25 U.S.C. § 2719(b)(1)(A). Further, the Secretary of the Interior **must consider competing tribal interests** when acquiring land to be held in trust for an Indian tribe. *Id.* After accomplishing this process, which included the provision of notice to Plaintiffs, the Apache Wye was taken into trust for the benefit of the FSAT.

In summary, the FSAT has as much right to operate a casino, or otherwise exercise jurisdiction, in the former KCA Reservation as the Kiowa Tribe or Comanche Nation and has taken the appropriate statutory steps to do so. There are no viable claims for Plaintiffs pursuant to IGRA.

C. Plaintiffs Have Not Alleged a Pattern of Behavior Under RICO

The FSAT is operating a class III gaming operation pursuant to its gaming compact with the State of Oklahoma on property held in trust for its benefit and under the auspices of IGRA. [Doc. No. 59, p. 11-13]. Pursuant to 25 U.S.C. § 2719(a), (a)(2)(A)(i), and (a)(2)(B), *inter alia*, the FSAT's gaming operations on the Apache Wye are legal. As

rackeering (otherwise known as criminal activity) is a required element of any RICO claim, and the FSAT Defendants have not engaged in rackeering, Plaintiffs' RICO claim must fail.

Further, to state a claim under RICO, Plaintiffs must allege facts sufficient to show that the FSAT Defendants conspired to engage in a pattern of criminal behavior. *Boyle v. United States*, 556 U.S. 938, 949 (2009). Plaintiffs First Amended Complaint alleges no facts that would indicated the FSAT Defendants have engaged in a pattern of behavior, much less a pattern of rackeering behavior. *Torwest DBC, Inc. v. Dick*, 628 F. Supp. 163, 167 (D. Colo. 1986), *aff'd*, *Torwest DBC, Inc. v. Dick*, 810 F.2d 925 (10th Cir. 1987) (holding that allegations of conduct for a "single purpose, result, set of participants, victim, and method of commission" is not sufficient to establish a pattern of behavior cognizable under RICO). Plaintiffs' First Amended Complaint alleges no pattern of criminal behavior by the FSAT Defendants, and their RICO claims should be dismissed as a result.

III. Conclusion

For the reasons stated above, the Plaintiffs claims alleged in their First Amended Complaint should be dismissed with prejudice. The FSAT Defendants further request an award of attorney fees and costs as well as any other relief available under law or equity.

Dated: November 3, 2022

s/ Joshua D. Wells

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CERTIFICATE OF SERVICE

I, Joshua D. Wells, certify that on November 3, 2022, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing. Based on the records on file, the Clerk of Court will transmit a Notice of Electronic Filing to those registered participants of the ECF System.

s/ Joshua D. Wells