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 NUMBER: 5:22-CV-00425**

PLAINTIFF COMANCHE NATION'S OPPOSITION TO THE FORT SILL APACHE TRIBE DEFENDANTS' SUPPLEMENTAL MOTION TO DISMISS

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INTRODUCTION

In 1867, the United States made a solemn promise to *both* the Comanche Nation and Kiowa Tribe in a treaty (the "supreme Law of the Land" under the Constitution), called the First Treaty of Medicine Lodge: no tribe of Indians would share their joint reservation (the "KCA Reservation") without their consent. Defendants are now violating this treaty provision—the Fort Sill Apache Tribe ("FSAT") is exercising jurisdiction within the historic KCA Reservation to unlawfully operate a casino. The Kiowa Tribe has settled its claims against Defendants. Nevertheless, the Comanche Nation has not consented to the FSAT's exercise of jurisdiction—therefore that exercise of jurisdiction must stop. And, because that unlawful casino is an illegal competitor of the Comanche Nation's casinos, the Comanche Nation clearly has standing. This case is truly that simple.

Unable to argue against such a straightforward premise, the FSAT Defendants attempt to mis-frame the issue and sow confusion. The issue in this case is that the *FSAT* is illegally *asserting* jurisdiction over the Tsalote Allotment. Yet, the FSAT Defendants create a strawman—misstating the issue in this case as the whether the *Comanche Nation* is *losing* jurisdiction over the Tsalote Allotment. While the loss of jurisdiction was one injury to the Kiowa Tribe, both the Kiowa Tribe and Comanche Nation alleged that the illegal competition from the FSAT's unlawful assertion of jurisdiction to open a casino was the injury flowing from Defendants' unlawful conduct. ECF 51 ¶¶ 1, 54-59. Therefore, even with the Kiowa Tribe's exit from this action via settlement, nothing has changed.

The Comanche Nation still has not consented (as required by both federal regulations, 25 C.F.R. § 151.8, and the First Treaty of Medicine Lodge) to the FSAT

acquiring jurisdiction within the KCA Reservation. As a result of this lack of consent, the FSAT does not have jurisdiction over the Tsalote Allotment, and its operation of a casino there is a violation of the Indian Gaming Regulatory Act ("IGRA"), the FSAT's tribal-state compact with Oklahoma, the Racketeer Influenced and Corrupt Organizations ("RICO") Act, and the First Treaty of Medicine Lodge. This illegal operation of a casino is injuring the Comanche Nation. The Comanche Nation has lawful casinos that compete in the same geographic market as the FSAT's illegal casino. This is an injury-in-fact that is traceable to the FSAT Defendants' conduct and that is redressable by a favorable decision in this action (which would enjoin further operation of that casino).

Given that the complexion of this case has not changed, it is not surprising that the FSAT Defendant's arguments mostly recycle arguments from prior briefing. Specifically, FSAT Defendant argue (as they have before) that the 1867 First Treaty of Medicine Lodge was abrogated by a 1900 Act of Congress that allotted the KCA Reservation—the Act forced the KCA tribes to cede land for non-Indian settlement while reserving some "allotments" for tribal members. However, the U.S. Supreme Court has been exceedingly clear—an Indian treaty may only be abrogated by a "clear and plain" statement from Congress. *United States v. Dion*, 476 U.S. 734, 738 (1986). *Nothing* in that 1900 Act expressed any intent by Congress to allow an Indian tribe to acquire jurisdiction within the ceded portions of KCA Reservation—indeed, the purpose of the Act was to reduce the amount of Indian land within the KCA Reservation, not create more Indian land for other tribes to use (as the FSAT is attempting here). Even more fundamentally, by its own terms, allotments are *not* part of the land ceded by the Act. Therefore, the parcel of land at issue

in this case—the Tsalote Allotment—was *expressly* exempted from the Act's diminution of treaty rights (if any). Accordingly, the Comanche Nation's treaty right to consent to the FSAT acquiring jurisdiction over the Tsalote Allotment cannot have been abrogated.

The only new argument advanced by the FSAT Defendants is that the Comanche Nation previously agreed to the transfer of jurisdiction over a separate parcel of land (the Kerchee Allotment) to the FSAT without the Kiowa Tribe's consent. This argument is untethered to any doctrine—the FSAT Defendants do not (and cannot) argue that estoppel applies to the Comanche Nation, for example. Therefore, the "argument" proves nothing. If the Kiowa Tribe wishes to challenge the casino on the Kerchee Allotment as violating its rights under the First Treaty of Medicine Lodge, the Kiowa Tribe is free to do so. Ironically, the only thing that this new argument proves is that the entire premise of the FSAT's arguments is faulty. Unlike the prior litigation in which the Comanche Nation did affirmatively consent to the transfer of jurisdiction over the Kerchee Allotment to the FSAT, it is notable that the Kiowa Tribe did not actually affirmatively consent to the transfer of jurisdiction over the Tsalote Allotment to the FSAT. (Although, as discussed herein, each tribe has its own independent right to consent, in any event). For all these reasons, and the others discussed below, the FSAT Defendants' motion must be denied.

In support of its Opposition, the Comanche Nation hereby incorporates by reference all facts, arguments, and authorities stated in their previous Opposition to the FSA Defendants' Motion to Dismiss (ECF 80) and their Motion for Preliminary Injunction (ECF 53) as though fully set forth herein. In further support of its Opposition, the Comanche Nation recites certain relevant facts as set forth below.

RELEVANT FACTUAL BACKGROUND

Plaintiff Comanche Nation is a federally-recognized Indian tribe that operates six casinos on its reservation in southwestern Oklahoma. ECF 51 ¶ 4. The reservation was originally set aside in 1867 through the First Treaty of Medicine Lodge, to which both the Kiowa Tribe and Comanche Nation were signatories. *Id.* ¶ 22; *Id.* Ex. 1, Art. 2. That treaty expressly provided that the reservation was exclusively for members of the Kiowa Tribe and Comanche Nation, and that no other Indians or tribes of Indians could be settled on the reservation without the consent of both the Kiowa Tribe and Comanche Nation:

> The United States agrees that [the*] following district of country, to wit: commencing at a point where the Washita River crosses the 98th meridian, west from Greenwich; thence up the Washita River, in the middle of the main channel thereof . . . shall be and the same is hereby set apart for the absolute and undisturbed use and occupation of the tribes herein named, ***and 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*** . . . . .

Id. Ex. 1, Art. 2.

It is *indisputable* that in 1867 this language was understood to mean that the consent of *both* the Kiowa Tribe and Comanche Nation was needed for another tribe to acquire ownership of land and jurisdiction over land within the KCA Reservation. This is indisputable because the *same* day that the First Treaty of Medicine Lodge was signed, the Second Treaty of Medicine Lodge was also signed. Treaty with the Kiowa, Comanche, and Apache, Oct. 21, 1867, 15 Stat. 589 ("Second Treaty of Medicine Lodge"). In the Second Treaty of Medicine Lodge, *both* the Kiowa Tribe *and* Comanche Nation gave their consent for the Apache Tribe of Oklahoma to share in the KCA Reservation. *Id.*

This treaty right to consent to another tribe sharing the KCA Reservation has never been extinguished. In the late nineteenth century, the United States began pursuing a new Indian policy utilizing allotment, parcels of the reservation were granted to individual Indians, with the remainder opened to non-Indian settlement. ECF 51 ¶ 25. In 1900, Congress passed a statute allotting the KCA Reservation. Act of June 6, 1900, 31 Stat. 676. While the purpose of the Act was obviously to open *portions* of the KCA Reservation to non-Indian settlement, *nowhere* in the Act did Congress express any intent to allow *other* Indian tribes the ability to obtain Indian land within the KCA Reservation or exercise jurisdiction within the KCA Reservation. *Id*. Moreover, Congress *expressly exempted* allotments from the scope of the Act:

> ***Subject to the allotment of land***, in severalty to the individual members of the Comanche, Kiowa, and Apache tribes of Indians in the Indian Territory, as hereinafter provided for, . . . and *subject to the conditions hereinafter imposed*, and for the considerations hereinafter mentioned, the said Comanche, Kiowa, and Apache Indians *hereby cede, convey, transfer, relinquish, and surrender*, forever and absolutely, without any reservation whatever, express or implied, all their claim, title, and interest, of every kind and character, in and to the lands embraced in the following described tract of country in the Indian Territory . . . .

Id. art. I (emphasis added). One of those allotments—the Tsalote Allotment—was for George Tsalote, a Kiowa. ECF 51 ¶ 28; *Id.* Ex. 2. Tsalote's heirs later sold the land to the FSAT in 2001. *Id.* ¶ 46. In 2001, the Bureau of Indian Affairs ("BIA") transferred the Tsalote Allotment in trust to the FSAT after presumably relying on two withdrawn legal opinions. *Id.*; ECF 18 Ex. 6. The FSAT then held the Tsalote Allotment for years without asserting jurisdiction over it, until they announced, in February 2022, that they would be building a gaming facility on the Tsalote Allotment. ECF 51 ¶ 47. The FSAT did not seek

permission to build the casino from the Kiowa Tribe, who maintained jurisdiction over the property. *Id.*

The Comanche Nation and the Kiowa brought suit to prevent the FSAT from opening the casino. *See generally* ECF 1. On February 28, 2023, the Kiowa notified the Court regarding a settlement agreement with the FSAT Defendants, the United States Department of the Interior, Bryan Newland, and Darryl LaCounte. ECF 117. The Comanche Nation remains as plaintiff in this litigation. *Id.* In the settlement agreement, the Kiowa Tribe agrees to dismiss its claims, but does not actually consent to any transfer of jurisdiction over the Tsalote Allotment to the FSAT. *See generally* ECF 117 (Settlement Agreement between Kiowa and Defendants containing no mention of Kiowa Tribe's consent to FSAT's exercise of jurisdiction).

ARGUMENT

The FSAT Defendants' standing argument is based on a supposed lack of injury: the FSAT Defendants argue that the Comanche Nation did not lose jurisdiction over the Tsalote Allotment, and therefore has no injury. The FSAT Defendants further argue that the First Treaty of Medicine Lodge was abrogated and that one time in prior litigation the Kiowa Tribe did not consent to a transfer jurisdiction over an original Comanche allotment. Each of the FSAT Defendants' arguments are unavailing. The Comanche Nation is quite clearly being injured—its lawful casinos must now compete with a new and illegal casino in the same geographic market. The First Treaty of Medicine Lodge has not been abrogated—the Act the FSAT Defendants identify expressly exempts the Tsalote Allotment from its scope by its own terms. And, the prior 2005 litigation proves nothing

other than to highlight the lack of the Kiowa Tribe's affirmative consent to the transfer of jurisdiction, notwithstanding their exit from this action. The Supplemental Motion to Dismiss should be denied.

A. Standard of Review

Standing is a jurisdictional requirement that "may be challenged by a motion under Rule 12(b)(1)." *Moler v. Enbridge Emple. Servs.*, 2022 U.S. Dist. LEXIS 19624, at *7 (W.D. Okla. Feb. 3, 2022) (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103-04 (1998)). A motion for lack of subject matter jurisdiction under Rule 12(b)(1) "generally take[s] one of two forms: (1) a facial attack on the sufficiency of the complaint's allegations as to subject matter jurisdiction; or (2) a challenge to the actual facts upon which subject matter jurisdiction is based." *City of Albuquerque v. U.S. Dep't of Interior*, 379 F. 3d 901, 906 (10th Cir. 2004) (citation omitted).

A party brings a "facial attack" under Rule 12(b)(1) when a party "do[es] not seek to introduce any evidence to show the Court lacks jurisdiction." *Sequeira v. McClain*, 2017 U.S. Dist. LEXIS 49246, at *10 (D. Colo. Mar. 31, 2017). Where a party facially challenges jurisdiction under Rule 12(b)(1), the reviewing court must accept all factual allegations as true and must draw all reasonable inferences in favor of the pleader. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *see also Ambraziunas v. Bank of Boulder*, 846 F. Supp. 1459, 1462 (D. Colo. 1994) ("In ruling on a motion to dismiss … for lack of jurisdiction over subject matter under Rule 12(b)(1) … I must accept all factual allegations as true and must draw all reasonable inferences in favor of the pleader." (citing *Williams v. Meese*, 926 F.2d 994, 997 (10th Cir. 1991))). In addition, when considering when a

plaintiff has Article III standing, a federal court "must assume plaintiff's claim has legal validity." *Awad v. Ziriax*, 754 F. Supp. 2d 1298, 1303 (W.D. Okla. 2010) (citing *Initiative and Referendum Inst. v. Walker*, 450 F.3d 1082, 1088 (10th Cir. 2006)).

A motion to dismiss for failure to state a claim under Rule 12(b)(6) similarly tests the "legal sufficiency of a complaint." *Brokers' Choice of Am., Inc. v. NBC Universal, Inc.*, 861 F.3d 1081, 1103 (10th Cir. 2017). In evaluating a Rule 12(b)(6) motion to dismiss, to grant the motion, "it must appear beyond doubt that the plaintiff can prove no set of facts that would entitle him to relief." *Swanson v. Bixler*, 750 F.2d 810, 813 (10th Cir. 1984); *see also Lessman v. McCormick*, 591 F.2d 605, 607-08 (10th Cir. 1979) (same). As such, "[a]ll well pleaded facts . . . must be taken as true," and "[a]ll reasonable inferences must be indulged in favor of the plaintiff, and the pleadings must be liberally construed." *Swanson*, 750 F.2d at 813 (citing *Mitchell v. King*, 537 F.2d 385 (10th Cir. 1976) & *Gas-a-Car, Inc. v. American Petrofina, Inc.*, 484 F.2d 1102 (10th Cir. 1973)).

"The party invoking federal jurisdiction bears the burden of establishing the[] elements [of standing]." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (citing *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231 (1990); *Warth v. Seldin*, 422 U.S. 490, 508 (1975)). "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'" *Calvey v. Obama*, 792 F. Supp. 2d 1262, 1268-69 (W.D. Okla. 2011) (quoting *Lujan*, 504 U.S. at 561).

The FSAT Defendants have lodged both a facial attack on the sufficiency of Comanche Nation's allegations as to subject matter jurisdiction and a motion to dismiss for failure to state a claim. As such, Comanche Nation is entitled to a presumption that all factual allegations contained within the First Amended Complaint are true, and all reasonable inferences must be drawn in favor of Comanche Nations.

B. The FSAT Defendants' Unlawful Gaming Injures the Comanche Nation

The FSAT Defendants' first argument comes under the header "The Comanche Nation's Claims Under 25 CFR § 151.8 Should be Dismissed." ECF 123 at 4. The FSAT Defendants then attempt to characterize the Comanche Nation's claim against the FSAT Defendants as one concerning the loss of jurisdiction of the Kiowa Tribe over the Tsalote Allotment. This is completely false. The Comanche Nation's claim against the FSAT Defendants relates not to any *loss* of jurisdiction by the Comanche Nation but the unlawful and invalid *assertion* of jurisdiction by the FSAT. The FSAT has no jurisdiction over the Tsalote Allotment because the FSAT did not comply with § 151.8 in obtaining the Tsalote Allotment. Moreover, because the FSAT did not comply with § 151.8, the Tsalote Allotment is not eligible for Class III gaming under the FSAT's tribal-state compact with Oklahoma. And, because the Tsalote Allotment was acquired after October 17, 1988, it is not eligible for any type of gaming under IGRA. Therefore, the FSAT's casino on the Tsalote Allotment is an illegal gambling operation under the RICO Act. The Comanche Nation thus has standing for the simple reason that competition with an illegal casino is not mere "market competition" (ECF 123 at 7) as the FSAT Defendants argue, but instead is a cognizable injury for standing purposes.

1. Tsalote Allotment is Not Eligible for Gaming by FSAT

The FSAT cannot use the Tsalote Allotment for gaming—any gaming there by the FSAT is unlawful because it violates both federal regulations and IGRA. As explained previously, the Bureau of Indian Affairs' land acquisition regulations for Indian tribes are found at 25 C.F.R. Part 151, and those regulations were incorporated into the FSAT's gaming compact with the State of Oklahoma. *See* ECF 80 (Comanche Nation Opposition to FSAT Motion to Dismiss) at 10-13 (citing Okla. Stat. § 3A-280). Moreover, the FSAT's gaming compact also incorporated IGRA's definitions of Indian lands, including the October 1988 cutoff date for found in IGRA. *See* ECF 51-7 (FSAT tribal-state compact) at 5(L) (noting that nothing in compact is to be construed to expand the definition of "Indian lands" as that term is understood in IGRA). Therefore, whether the Tsalote Allotment was validly acquired pursuant to Part 151 is germane to whether the FSAT has the ability to lawfully conduct gaming under its tribal-state compact on the Tsalote Allotment.

The FSAT does not have this ability because its acquisition of the Tsalote Allotment violated 25 C.F.R. § 151.8. Section 151.8, entitled "Tribal consent for nonmember acquisitions" provides:

> An individual Indian or tribe may acquire land in trust status on a reservation other than its own *only when the governing body of the tribe having jurisdiction over such reservation consents in writing to the acquisition*; provided, that such consent shall not be required if the individual Indian or the tribe already owns an undivided trust or restricted interest in the parcel of land to be acquired.

25 C.F.R. § 151.8. The KCA Reservation is a shared reservation between three tribes: the Kiowa Tribe, Comanche Nation, and Apache Tribe. Therefore, from the perspective of the

FSAT, the KCA Reservation is "a reservation[1] other than its own." And, under the plain text of the regulation, land could be transferred in trust status to the FSAT on the KCA Reservation *only* if the governing bodies of all three tribes consented in writing. The Comanche Nation did not consent in writing, and the inquiry ends—the FSAT did not validly acquire trust lands under Part 151 of the regulations.

The FSAT Defendants attempt to severely confuse the § 151.8 issue with extraneous and immaterial matters—such as arguments that the KCA Reservation was disestablished or that the Comanche Nation did not have jurisdiction over the Tsalote Allotment. These are red herrings. For instance, the FSAT Defendants argue that the KCA Reservation was disestablished, ECF 123 at 4-5, and while the Comanche Nation disagrees, the question is completely irrelevant. The regulations *expressly* define "reservation" as used in § 151.8 to include ***both extant and former*** Indian reservations. 25 C.F.R. § 151.2(f) ("'Indian reservation' means that area of land constituting the former reservation of the tribe"). Therefore, whether or not the KCA Reservation has been disestablished, it is still a "reservation" for purposes of § 151.8.

Similarly unavailing is the FSAT Defendants' assertions that the Comanche Nation has not lost jurisdiction—that is completely immaterial. Even if the Kiowa Tribe had provided written consent for the transfer of the Tsalote Allotment in the Settlement Agreement (which it has not, *see infra* at 22), the Comanche Nation, as a tribe with

[1] Notably, in their brief, the Federal Defendants attempt to re-write this text to refer to an *allotment*, rather than "a *reservation* other than its own." The text expressly references reservation, and applies to all land within a reservation.

jurisdiction over the KCA reservation, would still retain its right to consent to the FSAT taking jurisdiction over the Allotment.[2] It is likewise immaterial that the Tsalote Allotment was an original Kiowa Allotment rather than an original Comanche Allotment. Once again, as made clear by the plain text of the regulations, Section 151.8 applies to *all land* within a former Indian reservation—whether fee land, trust land for a tribe, or trust land for a tribal member. *See* 25 C.F.R. § 151.2(g) ("'Land' means real property or any interest therein.").

The FSAT also attempt to confuse the issue by arguing that the Bureau of Indian Affairs has "wide discretion" or that it had some interest in the Tsalote Allotment that allowed the Bureau to take the land into trust (without regard to the fact it was another tribe's reservation) under 25 C.F.R. § 151.3. Section 151.3, however, is a statement of policy, ***not*** an exception to the other requirements of Part 151, such as the requirement for written consent of the Comanche Nation found in § 151.8. Therefore, whatever "discretion" the Bureau of Indian Affairs had, it did not have discretion to arbitrarily waive its own requirements. *Edwards v. Califano*, 619 F.2d 865, 869 (10th Cir. 1980) (concluding that an agency "cannot ignore the plain terms of [its] own regulations."). Nor could the Bureau simply disregard the Comanche Nation's treaty rights, discussed below. *Minn. v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 185, 208 (1999) (affirming injunction against state officials stopping them from interfering with Indian treaty rights);

[2] This reasoning applies with equal force to the Apache Tribe—in fact, this is exactly what the Comanche Nation alleged in its Amended Complaint as the basis for its 25 C.F.R. § 151.8 claim. *See* ECF 51 at 17 ("Under 25 C.F.R. § 151.8, transferring the Tsalote Allotment, or any portion thereof, to the FSA Tribe required the *written* consent of the Kiowa Tribe, Comanche Nation, and Apache Tribe").

cf. Mott v. United Sates, 283 U.S. 747, 751-52 (1931) (Secretary of the Interior "cannot merely of his own volition make gifts or donations of the Indian's restricted land."); *Timpanogos Tribe v. Conway*, 286 F.3d 1195, 1203 (10th Cir. 2002) ("the Department of the Interior ***cannot under any circumstances abrogate an Indian treaty*** directly or indirectly. Only Congress can abrogate a treaty, and only by making absolutely clear its intention to do so." (citing *United States v. Washington*, 641 F.2d 1368, 1371 (9th Cir. 1981)) (emphasis added)); *see also United States v. Good*, No. 13-072 (JRT/LIB), 2013 U.S. Dist. LEXIS 168180, at *36 (D. Minn. Nov. 25, 2013) (holding that Secretary of Interior's regulations did not abrogate treaty rights where enabling legislation did not indicate intent to abrogate treaty by Congress).

Because the acquisition of the Tsalote Allotment violated the federal regulations, it is not eligible for gaming under the FSAT's tribal-state compact. Moreover, because it was not acquired by the FSAT until 2001 (well after the October 17, 1988 cutoff date), the land is not eligible for gaming at all under IGRA. 25 U.S.C. § 2719(a). Again, here, the FSAT's arguments are all irrelevant. *Even if* the FSAT Defendants are correct in all their arguments that the Comanche Nation had no right to consent to their land and jurisdiction acquisition (which they are not), and *even if* the Kiowa Tribe had consented to a transfer of jurisdiction (which it did not), IGRA would *still* prohibit gaming by the FSAT on land that it did not acquire until some twenty-three years after the statutory deadline.[3] Therefore,

[3] In Oklahoma, the most common exception to the 1988 cutoff date is the former reservation exception. 25 U.S.C. § 2719(a)(2)(A)(i). It is indisputable that the Tsalote Allotment is not within the FSAT's former reservation.

without the blessing of Congress through IGRA, the FSAT's casino is an illegal gambling operation for which Congress has provided a private right of action in civil RICO. *See* 18 U.S.C. § 1964.

2. Operation of an Illegal Casino by FSAT Confers Standing on Comanche Nation

Because the FSAT did not properly acquire the Tsalote Allotment under § 151.8, and did so in 2001 well after the 1988 cutoff in IGRA for gaming eligibility, the Comanche Nation is suffering an injury-in-fact that is traceable to the FSAT Defendants' conduct and redressable by a favorable decision in this case.

Congress has expressly provided that *any* Indian tribe aggrieved by another Indian tribe's violation of its compact can bring a claim to enjoin that tribe from engaging in Class III gaming. *See* 25 U.S.C. § 2710(d)(7)(A)(ii) (U.S. 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"). Congress has also expressly provided a private right of action to stop operation of an illegal gambling business that constitutes a pattern of racketeering. *See* 18 U.S.C. § 1964(a) (providing injunctive relief for RICO violations); 18 U.S.C. § 1961(1) (defining racketeering under RICO to include an illegal gambling business).

As obvious as it may seem, courts recognize that forcing a market participant to compete against illegal operations by a competitor is a cognizable injury-in-fact for standing purposes. *See, e.g., Renewable Fuels Ass'n v. United States EPA*, 948 F.3d 1206, 1233 (10th Cir. 2020) ("loss of even a small amount of money is ordinarily an 'injury'"

including a loss that occurs where "agencies lift regulatory restrictions on their competitors or otherwise allow increased competition") (citations omitted) (overruled on other grounds); *Cherokee Nation v. U.S. Dep't of the Interior*, 2022 U.S. Dist. LEXIS 212044, at *32 (D.D.C. Nov. 23, 2022) (illegal-competition injury stemming from illegal gaming operations is "a cognizable injury-in-fact for standing purposes"); *see also Carpenters Indus. Council v. Zinke*, 854 F.3d 1, 5 (D.C. Cir. 2017) ("Economic harm to a business clearly constitutes an injury-in-fact. And the amount is irrelevant. A dollar of economic harm is still an injury-in-fact for standing purposes."); *El Paso Nat. Gas Co. v. FERC,* 50 F.3d 23, 27 (D.C. Cir. 1995) ("The nub of the 'competitive standing' doctrine is that when a challenged agency action authorizes allegedly illegal transactions that will almost surely cause petitioner to lose business, there is no need to wait for injury from specific transactions to claim standing."); *cf. Bay Mills Indian Community v. Little Traverse Bay Bands of Odawa Indians*, 1999 U.S. Dist. LEXIS 20314, at *7-18 (W.D. Mich. Aug. 30, 1999) (granting a preliminary injunction enjoining illegal gaming conducted in violation of a tribal-state compact).

This injury is traceable to the FSAT Defendants—who are the officials in charge of the FSAT's illegal gaming operation. And the injury is redressable by the remedy the Comanche Nation seeks—an injunction preventing the FSAT Defendants from operating the illegal casino. Therefore, the Comanche Nation has standing to assert its IGRA and RICO claims against the FSAT Defendants.

C. Comanche Nation's Treaty Right to Consent to Other Tribes Sharing Jurisdiction Within Reservation Has Not Been Abrogated

In addition to asserting IGRA and RICO claims against the FSAT Defendants, the Comanche Nation asserts a claim under the First Treaty of Medicine Lodge. Again, the injury from the FSAT Defendant's violation of the treaty is illegal competition, and that injury is traceable to Defendants' conduct, and would be redressable through an injunction against them. Therefore, the FSAT Defendants' argument regarding the treaty is to simply argue that it has been abrogated. This is an argument that the FSAT Defendants previously made, and is an argument that is entirely meritless. No Act of Congress has ever abrogated the Comanche Nation's right to object to another tribe acquiring jurisdiction within the KCA Reservation. *See* ECF 53 at 14-15; ECF 80 at 8-10.

It is well established that abrogation of Indian treaties is not a matter to be taken lightly. A treaty between the United States and an Indian tribe can ***only*** be abrogated by an Act of Congress. *United States v. Dion*, 476 U.S. 734, 738 (1986); *see also United States v. Washington*, 827 F.3d 836, 854 (9th Cir. 2016) (The United States may abrogate a treaty with an Indian tribe "only by an Act of Congress"). Such abrogation cannot be done by implication—Congress can only abrogate a treaty by a ***clear statement of intent*** to do so. *Dion*, 476 U.S. at 738 (requiring "Congress' intention to abrogate Indian treaty rights be clear and plain" and in the absence of an explicit statement, will not "lightly impute[]" the intent to abrogate); *NLRB v. Pueblo of San Juan*, 280 F.3d 1278, 1284 (10th Cir. 2000) ("[The Tenth Circuit has been] extremely reluctant to find congressional abrogation of treaty rights' absent explicit statutory language."); *EEOC v. Cherokee Nation*, 871 F.2d

937, 938-39 (10th Cir. 1989) (same). Any act that is alleged to have abrogated a treaty should be read to not abrogate that treaty unless Congress made "absolutely clear" its intent to abrogate the treaty. *Timpanogos Tribe*, 286 F.3d at 1203. And in making a decision whether to abrogate a treaty, Congress must actually consider the conflict between the relevant statute and the treaty in order to justify abrogating a treaty with a tribe. *Dion*, 476 U.S. at 739-40 ("What is essential [in deciding to abrogate a treaty] is clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other"); *United States v. Fox*, 573 F.3d 1050, 1052 (10th Cir. 2009) (same).

Following these general principles, in light of the plain language of the First Treaty of Medicine Lodge, the Treaty gives at least both of the Comanche Nation and the Kiowa Tribe an *independent* right to consent to any other tribe acquiring jurisdiction within the KCA Reservation.[4] *See* ECF 51 Ex. 1, Art. 2 (creating reservation for "the absolute and undisturbed use and occupation of" the Kiowa Tribe and Comanche Nation and "for such other friendly tribes or individual Indians as, from time to time, they may be willing[] to admit among them"). This is a right that plainly existed at the time the treaty was executed—indeed that very same day the consent of *both* the Kiowa Tribe and Comanche

[4] The Apache Tribe may also have that right under the Second Treaty of Medicine Lodge. ECF 51 at 8 ¶ 23. Even if the Apache Tribe had such a right, it is of no consequence—the Apache Tribe's rights are not the basis for the Comanche Nation's assertion of its own treaty rights, as the Comanche Nation has its own independent right to the consent under the Frist Treaty of Medicine Lodge.

Nation was given for the Apache Tribe to share the reservation. No Act of Congress has abrogated the right since.

The only Act of Congress offered as a candidate by the FSAT Defendants is the Act of June 6, 1900, 31 Stat. 676, which allotted the KCA Reservation. Article I of that Act provided:

> ***Subject to the allotment of land***, in severalty to the individual members of the Comanche, Kiowa, and Apache tribes of Indians in the Indian Territory, as hereinafter provided for, and *subject to* the setting apart as grazing lands for said Indians, four hundred and eighty thousand acres of land as hereinafter provided for, and *subject to the conditions hereinafter imposed*, and for the considerations hereinafter mentioned, the said Comanche, Kiowa, and Apache Indians *hereby cede, convey, transfer, relinquish, and surrender*, forever and absolutely, without any reservation whatever, express or implied, all their claim, title, and interest, of every kind and character, in and to the lands embraced in the following described tract of country in the Indian Territory . . . .

(emphasis added). While the purpose of this Act was to open up land to non-Indian settlement, the Court should not read the Act to have abrogated the First Treaty of Medicine Lodge *en toto*, as Defendants urge. *Dion*, 476 U.S. at 739 (courts are "extremely reluctant to find congressional abrogation of treaty rights" because "Indian treaty rights are too fundamental to be easily cast aside"); *United States v. Payne*, 264 U.S. 446, 448 (1924) (Treaties must be harmonized with allotment, "since an intention to alter, and pro tanto, abrogate, the treaty, is not to be lightly attributed to Congress"); *see also Lower Brule Sioux Tribe v. South Dakota*, 711 F.2d 809, 823 (8th Cir. 1983) (tribe that lost "treaty rights to exclusively own, occupy and utilize [reservation] land" retained "treaty rights to hunt and fish free of state regulation" on the same land). The Act of June 6, 1900 cedes land to the United States for the purposes of non-Indian settlement. Therefore, the Act obviously

abrogates the treaty to the extent that the Comanche Nation were attempting to exclude a *fee* owner of private land from a *ceded portion* of the reservation. But, the FSAT is ***not*** a fee owner of private land nor is the Tsalote Allotment on the ceded portion of the reservation.

1. 1900 Act Did Not Express Any Intent to Abrogate Consent Rights On Ceded Lands

Opening portions of an Indian reservation for non-Indian settlement on fee lands is *entirely distinct* from allowing another tribe to obtain jurisdiction over tribal trust lands on that reservation. Accordingly, just because Congress forced cession of land within the KCA Reservation to open to settlers, it does not at all follow that Congress also eliminated the right of the Comanche Nation to consent before another tribe would acquire Indian lands within the KCA Reservation. Indeed, even when a tribe cedes lands, that tribe still enjoys treaty rights on the ceded lands until those rights are abrogated by Congress. *Mille Lacs Band of Chippewa Indians*, 526 U.S. at 185, 208 (holding tribe retained usufructuary rights on ceded lands).

Nothing in the Act suggests an intent by Congress to abrogate the Comanche Nation's right to consent to additional tribes exercising jurisdiction on its reservation—the Act does not mention other tribes must less provide a pathway from them to acquire jurisdiction within the KCA Reservation. *See generally* Act of June 6, 1900, 31 Stat. 676 *et seq.* (no mention of forfeiture of treaty right to consent to new tribes acquiring jurisdiction).

Nothing in the record presented by the FSAT Defendants indicates any intent, much less a clear intent, by Congress to permit a new Indian tribe to obtain jurisdiction of Indian lands within the KCA Reservation. Congress does not even appear to have considered the issue. In fact, the purpose of the Act was to reduce the amount of Indian lands within the reservation, a purpose entirely at odds with the Defendants' argument that the Act enabled a new tribe to obtain Indian lands within the KCA Reservation. Accordingly, the Court cannot deem the Comanche Nation's treaty right abrogated by implication. Absent a clear statement from Congress, the Comanche Nation's right remains intact, and it may object to the FSAT (or any other tribe besides the Kiowa and Apache Tribes) obtaining sovereign jurisdiction within the historic KCA Reservation.

2. 1900 Act Does Not Apply to the Tsalote Allotment

Even more fundamentally, assuming *arguendo* that the Act abrogated the treaty on the ceded lands, the Tsalote Allotment was expressly *exempt* from the Act. *See* Act of June 6, 1900, 31 Stat. 672, 676-77 (1900 Act provides that tribes are forced to relinquish rights in KCA reservation "***[s]ubject to*** the allotment of land"); *Mustang Prod. Co. v. Harrison*, 94 F.3d 1382, 1386 (10th Cir. 1996) ("subject to allotment of land" language excludes allotments from a tribe's cession of land and therefore remain "part of Indian country even after the reservation [is] disestablished"). The Congressional intent of the Act was for allotments—such as the Tsalote Allotment—to remain Indian country subject to the treaty. As a result, the Act cannot have possibly extinguished the Comanche Nation's treaty right to consent to another tribe acquiring jurisdiction or ownership over the Tsalote Allotment.

Because the Comanche Nation clearly had an unextinguished treaty right to consent to transfer of the Tsalote Allotment—and did not so consent—the FSAT have no jurisdiction over the Allotment. Without jurisdiction, the gaming by the FSAT is unlawful. The assertion of jurisdiction concomitant with the FSAT's gaming operations violates the First Treaty of Medicine Lodge, violates IGRA, and also violates RICO because the operation of the Warm Springs Casino by the FSAT constitutes a pattern of racketeering, as alleged in the complaint. As such, the FSAT's unlawful gaming is a particularized injury conferring Article III standing to the Comanche Nation, as described above.

D. Transfer of Jurisdiction over Kerchee Allotment Only Demonstrates Faulty Premise of Defendants' Arguments

The FSAT Defendants' final argument concerns the 2005 *Comanche Nation* litigation. In a nutshell, the FSAT Defendants argue that because the Kiowa Tribe chose not to participate in litigation in which the Comanche Nation expressly agreed to the transfer of jurisdiction over a Comanche allotment, the Comanche cannot now participate in litigation regarding a Kiowa allotment. This is a logical *non sequitur* that is unmoored to any legal doctrine. In particular, the FSAT Defendants do not argue that the Comanche Nation made any representation to them that the participation of the Kiowa Tribe was not required such that it is now estopped (not that estoppel could abrogate a treaty in any event, only Congress can abrogate a treaty).

Therefore, the only thing that the FSAT Defendants' argument proves is that their acquisition of the other parcel of land is subject to challenge by the Kiowa Tribe, should it chose to do so. That would be a separate case, not before the Court, and poses no barrier

here. The Kiowa Tribe is responsible for intervening in and asserting their rights in a litigation in which they have an interest, such as the 2005 litigation—the Comanche Nation has no control over them. The fact that the Kiowa Tribe elected not to participate in the 2005 litigation has no bearing on the current dispute.

Notably, the FSAT Defendants' discussion of the 2005 *Comanche Nation* litigation highlights a significant shortcoming in their settlement agreement with the Kiowa Tribe. While the Kiowa Tribe's consent to the FSAT's jurisdiction is irrelevant to this dispute because the Comanche Nation has its own independent right to consent, as discussed above, it is notable that the Kiowa Tribe did not actually provide that consent. At the resolution of the 2005 litigation, the Comanche Nation explicitly provided its consent to the FSAT's exercise of jurisdiction. ECF 51 at 13 ¶ 42. In contrast here, the Kiowa Tribe has merely agreed to dismiss its claims. It has not provided its affirmative written consent to the FSAT's jurisdiction. *See generally* ECF 117 (no mention of Kiowa Tribe's consent to FSAT's exercise of jurisdiction). Accordingly, to the extent the FSAT Defendants' argument is premised on such consent, their argument is faulty for this additional reason.

CONCLUSION

For the foregoing reasons, the Court should deny the FSAT Defendants' Supplemental Motion to Dismiss.

Dated: April 11, 2023

Respectfully submitted,

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