

**IN THE 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.

CIV-22-425-G

**SPECIAL APPEARANCE OF THE FORT SILL APACHE TRIBE DEFENDANTS  
& REPLY IN SUPPORT OF SUPPLEMENTAL MOTION TO DISMISS**

The Fort Sill Apache Defendants<sup>1</sup> specially appear and hereby file their *Reply in Support of their Supplemental Motion to Dismiss the Comanche Nation for Lack of Standing and Failure to State a Claim pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6)*. (Doc. No. 123). The Fort Sill Apache Defendants incorporate by reference all facts, arguments and authorities stated in their *Motion to Dismiss* (Doc. No. 59), *Reply in Support of Motion to Dismiss* (Doc. No. 91) and their *Supplemental Motion*

<sup>1</sup> Lori Gooday Ware, Chairwoman, Pamela Eagleshield, Vice Chairman, James Dempsey, Secretary-Treasurer, Jeanette Mann, Committee Member, Jennifer Heminokeky, 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, Commissioner of the Fort Sill Apache Gaming Commission are referred to herein as the Fort Sill Apache Defendants.

*to Dismiss for Lack of Standing and Failure to State a Claim* (Doc. No. 123). In support of their *Supplemental Motion to Dismiss*, the Fort Sill Apache Defendants state as follows:

### **INTRODUCTION**

The Comanche Nation’s (“Plaintiff” or “CN”) *Opposition to the Fort Sill Apache Tribe Defendants’ Supplemental Motion to Dismiss* (Doc. No. 126, referred to herein as the “*Response*”) fails to address the fatal flaws of its *First Amended Complaint* (Doc. No. 51). Following the settlement between the Kiowa Tribe and the Fort Sill Apache Defendants, the CN now frantically urges this Court to expand the CN’s authority in Southwest Oklahoma to the detriment of the Fort Sill Apache Defendants, Kiowa Tribe, and Apache Tribe and anybody else with an interest in real property in Southwest Oklahoma. The CN twists history and the law in asking this Court to issue a ruling that would impinge on the sovereignty of every federally recognized Indian tribe that currently exercises jurisdiction over real property owned and/or held in trust by the United States Bureau of Indian Affairs (the “BIA”) in the disestablished KCA Reservation. A ruling in favor of the CN would, in practicality, give it veto power regarding land over which it has no rights.

The incongruity of the CN’s position is demonstrated by the fact that it has twisted itself into a pretzel to continue this litigation. The CN has argued that the Apache Tribe is not a necessary party to this litigation, but now argues that the CN’s claims cannot be resolved without the approval of all signatories to the Treaties of Medicine Lodge. (Doc. No. 80, p. 23-25). The CN has argued that this litigation is the same as the 2005 litigation

it instigated regarding the Kerchee Allotment, but now claims it is irrelevant to the present litigation. *See First Amended Complaint*, ¶¶41-42. In summary, the CN: (1) completely fails to address the fact that they have no particularized damages; (2) wholly ignores the Fort Sill Apache Defendants’ arguments regarding the CN’s standing to bring its claims; (3) inundates the Court with disputed historical facts and treaty based arguments that are of little or no relevance to the legal questions before the Court; and (4) asks this Court to greatly expand the CN’s authority over jurisdictions of a multitude of sovereign Tribes operating in the disestablished KCA Reservation.

Lastly, the CN has abjectly failed to answer the simplest question asked by the Fort Sill Apache Defendants, namely, “What’s it to you?” *TransUnion, LLC v. Ramirez*, 210 L.Ed. 2d 568, 141 S.Ct. 2190, 2203 (2021). The CN has not suffered any particularized damages because of the actions of the Fort Sill Apache Defendants, and therefore has no Article III standing to bring its claims.

**a. The CN has no jurisdiction over the Apache Wye Allotment**

“Allotments that remain in trust are Indian lands under the jurisdiction of the tribe in which the allottee is enrolled.” *First Amended Complaint*, ¶38 (emphasis added). In their *Response*, the CN attempts to make a new vintage argument that is in direct contradiction to its *First Amended Complaint*. At the motion to dismiss stage, all allegations in the CN’s *First Amended Complaint* are to be taken as true, even if counsel for the CN strategically change their minds. *Petrella v. Brownback*, 697 F.3d 1285, 1293 (10th Cir.

2012). In its *Response*, the CN asks this Court to ignore the allegations of their *First Amended Complaint* so it can make this new vintage argument.

### **1. What is a Tribal allotment?**

Indian tribes possess attributes of sovereignty over both their members and their territory. *United States v. Mazurie*, 419 U.S. 544, 557, 95 S.Ct. 710, 42 L.Ed.2d 706 (1975).

The Tenth Circuit Court of Appeals has described Indian sovereign immunity as follows:

It is well-established that “Indian tribes are distinct, independent political communities, retaining their original natural rights in matters of local self-government. Although no longer possessed of the full attributes of sovereignty, they remain a separate people, with the power of regulating their internal and social relations.” *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978) (citations and quotations omitted).

*Somerlott v. Cherokee Nation Distributors, Inc.*, 686 F.3d 1144, 1148 (10th Cir.2012).

After the passage of the Indian Reorganization Act (the “IRA”) in 1934, the Department of the Interior did not initiate any reservation allotment programs. *See, e.g.*, 25 U.S.C. §§ 951-58; Act of Aug. 25, 1950, 64 Stat. 470. Since 1934, however, lands can be taken into trust as allotments under the IRA and several other statutes. For example, Section 5 of the IRA authorizes the Secretary of the Interior to place into trust any interest in land acquired by or for an Indian “through purchase, relinquishment, gift, exchange, or assignment.” 25 U.S.C. § 465, applied to all tribes by 25 U.S.C. § 2202; *see also* 25 C.F.R. § 151.4. Section 5 of the IRA authorizes the Secretary of the Interior to place into trust any interest in land acquired by or for an Indian “through purchase, relinquishment, gift,

exchange, or assignment.”<sup>2</sup> 25 U.S.C. § 465. Other statutes authorize land to be placed in trust for an Indian at the Secretary’s discretion. *See* 25 C.F.R. § 151. When (as in the present instance) an interest in trust land is exchanged between Indians or Indian tribes, it remains in trust. 25 U.S.C. § 2216. Land held in trust on behalf of an Indian Tribe is reservation land and is under the Tribe’s jurisdiction. *United States v. Roberts*, 185 F.3d 1125, 1131 (10th Cir. 1999) (“Applying these Supreme Court cases, we believe official ‘reservation’ status is not dispositive and lands owned by the federal government in trust for Indian tribes are Indian Country pursuant to 18 U.S.C. § 1151”).

## **2. 25 C.F.R. § 151.8 does not confer Article III standing as to the Fort Sill Apache Defendants**

The CN’s attempt to shoehorn its Section 151.8 claims into Article III standing for claims against the Fort Sill Apache Defendants fail. For a plaintiff to have Article III standing, the effect of the court’s judgment on the defendant must redress the plaintiff’s alleged injury. *Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1159 (10th Cir. 2005). Should this Court determine that the CN’s claims based in 25 C.F.R. § 151.8 have merit, it would have no bearing on the Fort Sill Apache Defendants. It is not the Fort Sill Apache Defendants’ responsibility to enforce or apply 25 C.F.R. § 151.8, but rather the Bureau of Indian Affairs and the United States Department of the Interior. As such, the CN has no

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<sup>2</sup> The constitutionality of § 465 has been widely upheld against nondelegation challenges. *See, e.g., Michigan Gambling Opposition v. Kempthorne*, 525 F.3d 23, 30 (D.C. Cir. 2008); *South Dakota v. U.S. Dep’t of Interior*, 423 F.3d 790 (8<sup>th</sup> Cir. 2005); *United States v. Roberts*, 185 F.3d 1125, 1137 (10<sup>th</sup> Cir. 1999).

Article III standing to bring its 25 C.F.R. § 151.8 claims against the Fort Sill Apache Defendants as any order issued by this Court would not redress the CN's alleged injury.

Further, the CN's 25 C.F.R. § 151.8 claims fail. The Apache Wye Allotment was formerly held in trust for the Kiowa Tribe and was transferred into trust for the Fort Sill Apache Tribe. When that happened, it became part of the Fort Sill Apache Tribe's "reservation" and immediately came under its jurisdiction. *Roberts*, 185 F.3d at 1131. The CN's primary rebuttal to the Fort Sill Apache Defendants' *Supplemental Motion to Dismiss* is that the Fort Sill Apache Defendants are operating an illegal casino on land over which the Fort Sill Apache Tribe has no jurisdiction. (Doc. No. 126, p. 9-14). This argument is without factual basis. The Fort Sill Apache Tribe has jurisdiction over the Apache Wye Allotment and facilitates gaming pursuant to its compact with the State of Oklahoma. This alleged "illegal gambling" is just a fever dream of the CN.

### **3. The Kiowa Tribe, not the CN, had standing to bring claims under 25 C.F.R. § 151.8**

The CN has no claims against the Fort Sill Apache Defendants or the United States Defendants pursuant to 25 C.F.R. § 151.8. *See Response* at p. 10-13. The CN argues that the Fort Sill Apache Tribe is in violation of Section 151.8 because the acquisition of an allotment requires the "governing body of the tribe having jurisdiction over such reservation [to] consent in writing to the acquisition." *Id.* at p. 10. The Fort Sill Apache Tribe has complied with all necessary statutory and regulatory authorities, but even had it not, the CN has no standing to bring claims on any alleged violations. The Apache Wye

Allotment was formerly a Kiowa Allotment, thus giving the Kiowa Tribe jurisdiction at that time. The CN freely admits as much in its *First Amended Complaint*, stating, “George Tsalote was a member of the Kiowa Tribe, and therefore, the [Apache Wye Allotment] is an ‘original Kiowa allotment’ ...and considered by the BIA and Kiowa Tribe as within the jurisdiction of the Kiowa Tribe.” See *First Amended Complaint*, ¶¶27-28 (emphasis added). The CN has no standing to bring a claim to enforce the Kiowa Tribe’s jurisdiction over the Apache Wye Allotment. The Kiowa Tribe had the opportunity to bring those claims for themselves and chose to release all such claims with prejudice. (Doc. No. 117); *The Wilderness Soc. v. Kane Cnty., Utah*, 632 F.3d 1162, 1171 (10th Cir. 2011) (third-party activists had no Article III standing to enforce the real property rights of the federal government). The CN can no more enforce the alleged jurisdiction of the Kiowa Tribe over the Apache Wye Allotment than the Republic of El Salvador could bring an action to enforce the United Mexican States’ claims over its former lands in California.

The Apache Way Allotment is eligible for gaming. As admitted by the CN, it was land already held in trust by the Bureau of Indian Affairs, under the jurisdiction of the Kiowa Tribe, when purchased by the Fort Sill Apache Tribe on January 26, 2001. See *First Amended Complaint*, ¶¶28-38, 46. The CN admits that the Apache Wye Allotment was immediately transferred into trust by the Bureau of Indian Affairs on behalf of the Fort Sill Apache Tribe. *Id.* at ¶46. In effect, the Apache Wye Allotment has never left trust status at any time relevant to this litigation. The Fort Sill Apache Tribe’s jurisdiction over the Apache Wye Allotment began the moment it was transferred into trust on its behalf.

*Cheyenne Arapaho Tribes of Oklahoma*, 618 F.2d at 668 (holding that “lands held in trust by the United States for the Tribe are Indian Country....”). The CN was notified of this transaction in 2001 and failed to object to the Fort Sill Apache Tribe’s exercise of jurisdiction over the Apache Wye Allotment. The Fort Sill Apache Tribe operated a convenience store on the property until it chose to provide Class III gaming on the property in 2020. Even then, the CN did not object, waiting until a few weeks prior to the opening of the Apache Wye Casino before filing this lawsuit. The CN’s acts disclose that this is not a lawsuit over sovereignty or Tribal self-determination but is a cynical attempt to eliminate market competition.

In addition to being an allotment already held in trust prior to its purchase by the Fort Sill Apache Tribe, the Apache Wye Allotment is within *or* adjacent to the Fort Sill Apache Tribe’s reservation. On February 17, 1897, the Kiowa Tribe and the Comanche Nation executed an agreement which stated that a portion of their reservation would be used for the “permanent settlement” of the Fort Sill Apache Tribe. The February 17, 1897, Agreement states in relevant part:

We, the undersigned, chiefs and headmen of the Kiowa, Comanche, and Kiowa-Apache tribes, assembled in open council with our agent, and with Capt. H. L., 2719(a), (a)(2)(A)(i), Seventh Cavalry, in charge of Apache prisoners of war, do willingly agree, having had due notice and consideration, to 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). The CN hypocritically asks this Court to enforce its treaty rights that created the KCA Reservation, but then asks this Court to ignore the CN's own actions which properly placed the Fort Sill Apache Tribe in the KCA Reservation. The CN cannot have it both ways. Either the KCA Reservation is disestablished, and the Treaties of Medicine Lodge have no bearing or legal authority over the Apache Wye Allotment, OR, the Fort Sill Apache Tribe is properly placed within the disestablished KCA Reservation and it has the same rights and privileges as the CN.

**b. The CN has not alleged particularized damages**

To possess standing to bring a claim under Article III, the CN must allege a personal stake in the case. *Raines v. Byrd*, 521 U.S. 811, 819, 117 S.Ct. 2312, 2317, 138 L.Ed. 2d 849 (1997). Currently up in the CN's constantly revolving selection of contradictory arguments is that the CN possesses Article III standing because the Fort Sill Apache Defendants are operating an illegal gaming operation. This allegation ignores reality, and as described above, the Apache Wye Allotment is currently eligible for gaming under the Fort Sill Apache Tribe's gaming compact with the State of Oklahoma. Because the Apache Wye Casino is not an illegal gambling operation, the CN has not, and cannot, allege it has suffered particularized damages. If the gaming at the Apache Wye Casino is legal, then any losses suffered by the CN are simple market competition. Therefore, the CN has no Article III standing. *Laufer v. Looper*, 22 F.4th 871, 876 (10th Cir. 2022) (holding that Article III standing requires a concrete injury even in the context of an alleged statutory violation).

**c. The CN acknowledges that it has acted in bad faith regarding the Kerchee Allotment**

In its *Response*, the CN brazenly admits that it has abused the legal process in a cynical effort to eliminate market competition. In its *First Amended Complaint*, the CN references the “Kerchee Settlement.” The CN states the settlement required that trust lands in the disestablished KCA Reservation purchased in the future by the Fort Sill Apache Tribe would remain under the jurisdiction of tribe in which the original allottee was a member. In exchange, the CN consented to the Fort Sill Apache Tribe’s exercise of jurisdiction over the Kerchee Allotment. *First Amended Complaint*, ¶42.

Now, the CN argues that: (1) it did not have authority to enter the settlement agreement regarding the Kerchee Allotment; (2) could not consent to the Fort Sill Apache Tribe’s exercise of jurisdiction over the Kerchee Allotment; (3) and could not consent to the Fort Sill Apache Tribe’s operation of gaming on the former Kerchee Allotment without the approval of the Kiowa Tribe and the Apache Tribe. (Doc. No. 126, p. 3). Both the Fort Sill Apache Tribe and the United States Bureau of Indian Affairs relied upon the CN’s representations when entering the Kerchee Settlement. The Bureau of Indian Affairs agreed to withdraw opinions it issued in 1996 and 1997, while the Fort Sill Apache Tribe agreed to limit its sovereignty rights regarding future acquisitions of allotments within the disestablished KCA Reservation. *Id.* at p. 5. More than sixteen (16) years later, the CN claims it induced the Fort Sill Apache Tribe and the United States to enter the Kerchee Settlement via promises it could not keep. *Response* at p. 21.

These bad faith and fraudulent acts by the CN seek to overthrow the entire legal framework by which the United States, Fort Sill Apache Tribe, Kiowa Tribe and Apache Tribe have operated within the disestablished KCA Reservation. This Court should not reward the CN's despicable behavior and abuses of the legal process. The CN has no standing to bring its claims, has suffered no damages, and has no right to attempt to exercise, or determine who may exercise, jurisdiction over the Apache Wye Allotment.

### **CONCLUSION**

The CN has no standing to bring its claims and has alleged no damages. In addition, the CN has revealed its bad faith abuses of the legal process and this Court through its convoluted arguments and admissions. As such, the Fort Sill Apache Defendants request that this Court dismiss all of the CN's claims with prejudice and award the Fort Sill Apache Defendants its attorney fees and costs incurred during this litigation.

Dated: April 18, 2023

s/ Joshua D. Wells  
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**CERTIFICATE OF SERVICE**

I, Joshua D. Wells, certify that on April 18, 2023, 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*