UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

KIOWA TRIBE and COMANCHE NATION,	§	
Plaintiffs,	§	
v.	§	Case No. 5:22-CV-00425-G
THE UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL.,	§	
Defendants.	§	

SPECIAL APPEARANCE OF FSAT DEFENDANTS AND MOTION TO DISMISS PLAINTIFFS' COMPLAINT FOR FAILURE TO STATE A CLAIM FOR WHICH RELIEF CAN BE GRANTED PURSUANT TO FRCP 12(b)(6) AND FAILURE TO JOIN NECESSARY AND INDISPENSABLE PARTIES PURSUANT TO FRCP 12(b)(7) AND FRCP 19, AND BRIEF IN SUPPORT

Valerie Devol, OBA #19624
vdevol@devollaw.com
A. Daniel Woska, OBA #9900
dwoska@devollaw.com
Joshua D. Wells, OBA #22334
jwells@devollaw.com
Victoria Holland OBA #33197
vholland@devollaw.com
Devol & Associates
15205 Traditions Lake Parkway
Edmond, OK 73003
Telephone (405)225-2300
Facsimile (405)225-2301

and

Phillip E. Thompson
Phillipthomme.com
P.O. Box 467
Point of Rocks, MD 21777
Telephone (301)535-0488
Facsimile (202)905-0057

DATED: July 7, 2022

Attorneys for Fort Sill Apache Tribe Defendants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES Page(s)

STATUTES

OTHER AUTHORITIES

INTRODUCTION

The Fort Sill Apache Tribe ("FSAT") Defendants, 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 FSAT Gaming Commission, Naomi Hartford, Vice-Chairman FSAT Gaming Commission, Michael Crump, Commissioner FSAT Gaming Commission, Lauren Pinola, Commissioner, FSAT Gaming Commission, and Debbie Baker, Commissioner, FSAT Gaming Commissioner, (the "FSAT Defendants"), specially appear and hereby move this Court to dismiss this case pursuant to Rules 19 and 12 of the Federal Rules of Civil Procedure ("FRCP"). In support thereof, the FSAT Defendants would show the following:

UNDISPUTED FACTS

1. The FSAT is a federally recognized Indian Tribe. [Doc. No. 51, Plaintiff's First Amended Complaint (FAC), ¶1.]

2. The FSAT has recently opened a casino. *Id.*

3. The Indian Gaming Regulatory Act ("IGRA") provides authorization for Tribes to provide gaming on Tribal lands. *Id.*

4. The FSAT Defendants are all officials of a sovereign entity. *Id.*

5. The United States Government has permitted the FSAT to open a casino on Tribal lands. *Id.* at ¶2.

6. The United States Department of the Interior ("DOI") is charged with oversight of Indian affairs. *Id.* at ¶5.

7. Lori Gooday Ware is the Chairwoman of the FSAT. *Id.* at ¶9.

8. Pamela Eagleshield is the Vice-Chairman of the FSAT. *Id.* at ¶10.

9. James Dempsey is the Secretary-Treasurer of the FSAT. *Id.* at ¶11.

10. Jeanette Mann is a Committee Member of the FSAT. *Id.* at ¶12.

11. Dolly Loretta Buckner is a Committee Member of the FSAT. *See generally, Id.*[1]

12. Jennifer Heminokeky is a Committee member of the FSAT. *Id.* at ¶13.

13. Philip Koszarek is the Chairman of the FSAT Gaming Commission. *Id.* at ¶14.

14. Naomi Hartford is the Vice-Chairman of the FSAT Gaming Commission. *Id.* at ¶15.

15. Michael Crump is the Commissioner of the FSAT Gaming Commission. *Id.* at ¶16

16. Lauren Pinola is the Commissioner of the FSAT Gaming Commission. *Id.* at ¶17.

17. Debbie Baker is the Commissioner of the FSAT Gaming Commission. *Id.* at ¶18.

18. The United States created a shared reservation for the Kiowa, Comanche, and Apache Tribes, commonly referred to as the KCA Reservation. *Id.* at ¶22.

19. The KCA Reservation has been disestablished. *Id.*, Ex. 1.

---

[1] Although Plaintiffs failed to identify Ms. Buckner as a party to this action in their FAC, Plaintiffs named her in the style of the case.

20. There are joint Tribal properties overseen by the Kiowa, Comanche, and Apache Intertribal Land Use Committee ("KCAILUC"). *Id.* at ¶48.

21. The "Tsalote Allotment," also known as the "Apache Wye" property, is a former Kiowa allotment that, in 2001, was deeded to "the United States of America in trust for the Fort Sill Apache Tribe of Oklahoma." *Id.* at ¶28. The Apache Wye has been held in trust as Indian Country since at least "the early 1990s." *Id.* at ¶¶39, 46.

22. On March 29, 1996, the Bureau of Indian Affairs issued an opinion that the FSAT shared jurisdiction over the KCA Reservation with the Kiowa Tribe, Comanche Nation, and Apache Tribe. *Id.* at ¶40.

23. On November 20, 1997, the Bureau of Indian Affairs affirmed their opinion of March 29, 1996. *Id.*

24. In 2005, the FSAT executed a Settlement Agreement with the Comanche Nation, and only the Comanche Nation, addressing the future purchase of original Comanche allotments. *Id.* at ¶42.

25. The FSAT had purchased the Apache Wye from George Tsalote's heirs prior to the entry of a Settlement Agreement with the Comanche Nation. *Id.* at ¶46.

26. The FSAT complied with the 25 C.F.R. § 559.2(a)(1) by seeking authorization to open a Tribal gaming facility at the Apache Wye. *Id.* at ¶49.

27. The Warm Springs Casino on the Apache Wye allotment opened on June 15, 2022, and currently offers Class II and Class III gaming. *Id.*at ¶53.

28. The National Indian Gaming Commission ("NIGC") has not taken action to stop gaming at the Warm Springs Casino, despite the requests of Plaintiffs. *Id.* at ¶¶49-52.

29. Due to its sovereign status, the FSAT cannot be held liable for money damages. *Id.* at ¶59.

ADDITIONAL FACTS

1. The Apache Wye was held in trust by the Federal government as Indian Country prior to the FSAT's purchase of the land.

2. The Apache Wye has continuously been held in trust since it was purchased by the Tsalote family and continues to be held in trust as Indian Country today for the benefit of the FSAT.

3. The FSAT were not a party to the First or Second Treaties of Medicine Lodge Creek.

4. The Settlement Agreement entered between the FSAT and the Comanche Nation made no reference to the Kiowa Tribal allotments.

5. The Kiowa Tribe, not the Comanche Nation, exercised sovereign jurisdiction over the Apache Wye until it was sold in 2001.

6. The FSAT have held sovereignty over the Apache Wye since 2001.

7. The NIGC Chairman has sole authority, pursuant to IGRA, to issue orders closing gaming activities on Tribal lands.

ARGUMENT FAVORING DISMISSAL

I. THE PLAINTIFFS HAVE FAILED TO STATE A CLAIM FOR WHICH RELIEF CAN BE GRANTED PURSUANT TO FRCP 12(b)(6).

To survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a complaint must contain "enough facts to state a claim to relief that is plausible on its face" *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." *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Although a complaint does not need detailed factual assertions, a pleading that offers only "labels and conclusions" or "pleads facts that are merely consistent with a defendant's liability" will not suffice. *Ashcroft*, 556 U.S. at 678 (citation omitted).

The burden is on Plaintiffs to plead factual allegations that "raise a right to relief above the speculative level." *Bell Atlantic Corp.*, 550 U.S. at 555. Under this standard, all well-pled factual allegations are accepted as true. *Peterson v. Grisham*, 594 F.3d 723, 727 (10th Cir. 2010). However, the Court "will disregard conclusory statements and look only to whether the remaining, factual allegations plausibly suggest the defendant is liable." *Alpenglow Botanicals, LLC v. United States*, 894 F.3d 1187, 1195 (10th Cir. 2018) (citation omitted).

Plaintiffs assert that the FSAT is violating the First Treaty of Medicine Lodge, IGRA, and the Racketeer Influenced and Corrupt Organizations Act ("RICO"). All their assertions are unfounded and are mere legal conclusions couched as factual allegations.

A. Violation of the First Treaty of Medicine Lodge

Plaintiffs' first cause of action against the FSAT Defendants is an alleged violation of the First Treaty of Medicine Lodge, claiming that the Comanche and the Kiowa did not agree to the "FSAT exercising jurisdiction over the Tsalote Allotment." [Doc. No. 51, ¶83.] The Tsalote Allotment was a piece of property held in trust as Indian Country. Now referred to as the Apache Wye, in 2001 the FSAT purchased the land and it continued to be held in

trust as Indian Country by the Federal government for the benefit of the FSAT. The Plaintiffs are asking this Court to prohibit the FSAT from exercising its sovereign jurisdiction over its own Indian Country pursuant to this meritless alleged violation.

i. FSAT Defendants Are Not a Party to the First Treaty of Medicine Lodge

The Plaintiffs' claim and request fail on their face because the FSAT is not a party to the First Treaty of Medicine Lodge. Treaties are treated as contracts between sovereign entities, and they are to be interpreted upon the principles which govern the interpretation of contracts. *BG Grp., PLC v. Republic of Argentina*, 572 U.S. 25, 37, (2014). It is beyond the power of the parties to an agreement to prevent or force action by those who are not parties to the agreement. 21 *Williston on Contracts* § 57:19 (4th ed. May 2022 update).

Asserting a treaty violation claim against the FSAT Defendants, who are non-parties to the treaty, is a failed attempt by the Plaintiffs to circumvent sovereign immunity and the process that should have been, and yet was not, followed under the Administrative Procedures Act when the parcel was taken into trust for the FSAT. Because the FSAT and the FSAT Defendants, in their individual and official capacities, are not bound by the First Treaty of Medicine Lodge, Plaintiffs' claims for violation of that treaty must fail.

ii. The FSAT Rightfully Exercises Jurisdiction Over its Indian Country.

The KCA Reservation was disestablished by the Act of June 6, 1900, 31 Stat. 676 *et seq; Martinez v. State*, 2021 OK CR 40 (Okla. Crim. App. 2021). Indian Country is defined in 18 U.S.C. § 1151 and has three categories – reservations, dependent Indian communities, and allotments "the Indian titles to which have not been extinguished." A tribe cannot unilaterally make land Indian Country. *Buzzard v. Oklahoma Tax Comm'n*, 992 F.2d 1073 (10th Cir. 1993). Lands held in trust located within a disestablished reservation are reservations within the meaning of 18 U.S.C. § 1151(a). *Cheyenne-Arapaho Tribes of Oklahoma v. Oklahoma*, 618 F.2d 665 (10th Cir. 1980); *United States v. Roberts*, 185 F.3d 1125, 1131 (10th Cir. 1999) (holding that "trust status" grants Tribes superintendency over land owned by a Tribe).

Plaintiffs were granted a reservation in the First Treaty of Medicine Lodge in 1867. Thereafter, allotment of the reservation occurred. The Apache Wye was an original Kiowa allotment, and up until that title was extinguished, the Kiowa Tribe exercised its jurisdiction over the parcel. In 2001, this parcel was taken into trust for the benefit and use of the FSAT, making it a reservation for the FSAT[2]. This act extinguished the jurisdiction of the Kiowa Tribe because it extinguished the title of the original Kiowa allotment. The United States is the owner of the property, and the Kiowa Tribe has no authority to assert its jurisdiction over the United States due to the plenary power of the United States over

[2] *Cheyenne-Arapaho Tribes of Oklahoma*, 618 F.2d at 668 (holding "lands held in trust by the United States for the Tribes are Indian Country within the meaning of § 1151(a).")

Tribes. *United States v. Kagama*, 118 U.S. 375, 6 S. Ct. 1109, 30 L. Ed. 228 (1886). The United States has granted the parcel to the FSAT and as such the FSAT is the only Tribe that may exercise jurisdiction over the Apache Wye. For these reasons, Plaintiffs' claim against the FSAT for violations of the First Treaty of Medicine Lodge should be dismissed.

B. IGRA Violations

Congress passed IGRA in 1988, in response to various Tribes' engagement in gaming activities. The NIGC was established[3] pursuant to IGRA to regulate Tribal gaming operations. The NIGC Chairman is vested with power to issue orders of temporary closure of gaming activities, levy and collect civil fines[4], and to empower the Commission to generally monitor, investigate, and inspect[5] tribal gaming operations.

i. Plaintiffs' Have No Private Right of Action

Plaintiffs seek to bring a cause of action against the FSAT Defendants alleging violations of IGRA. [Doc. No. 51, ¶¶87-101.] IGRA provides explicitly for specific private rights of action. For example, IGRA provides a private right of action for suit by a Tribal entity to compel action by the NIGC to approve or disapprove management contracts and explicitly allows for tribes to sue states in some situations. 25 U.S.C. § 2711(d); 25 U.S.C. § 2710(d). The existence of specific provisions authorizing suits under IGRA makes it clear that plaintiffs cannot bring litigation for every violation of IGRA by direct action under the statute. *Tamiami Partners, Ltd. By & Through Tamiami Dev. Corp. v. Miccosukee Tribe of*

[3] 25 U.S.C. § 2704.
[4] 25 U.S.C. § 2705(a).
[5] 25 U.S.C. § 2706(b).

Indians of Florida, 63 F.3d 1030, 1049 (11th Cir. 1995). Where a statute creates a comprehensive regulatory scheme and provides for specific remedies, courts should not expand the coverage of the statute. *Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers*, 414 U.S. 453, 458, (1974). As a result, IGRA provides no private cause of action for Plaintiffs in the present Action. *Hein v. Capitan Grande Band of Diegueno Mission Indians*, 201 F.3d 1256, 1260 (9th Cir. 2000).

ii. Compact Violations

Plaintiffs claim that 25 U.S.C. § 2710(d)(7)(A)(ii), which concerns Class III gaming compacts, provides a private right of action. [Doc. No. 51, ¶89.] Plaintiffs neglect to lay any foundation by attempting to allege that the FSAT is engaging in the Class III gaming thereby triggering a private right of action. Even if FSAT does engage in Class III gaming operations, it is in accord with the FSAT Compact which has been executed by the FSAT and the State of Oklahoma, approved by the United States Department of the Interior ("DOI") published in the Federal Register on August 17, 2018. 83 FR 41102. The FSAT's gaming compact is the same as every tribe in Oklahoma.[6]

The crux of Plaintiffs' compact violation claim lies in the definition of "Indian Lands." All parties agree that the Apache Wye is held in trust for the FSAT in the State of Oklahoma. [Doc. No. 51, ¶43.] The term "Indian Lands" is defined as "Land over which an Indian tribe exercises governmental power and…is held in trust by the United States for

[6] While the Comanche, Otoe, Kialegee Tribal Town, and the United Keetoowah Band executed new gaming compacts in 2020, there is ongoing litigation concerning the validity of these compacts since they are not the Model Gaming Compacts codified in O.S. tit. 3A, § 281.

the benefit of ***any*** Indian tribe or Individual." 25 C.F.R. § 502.12 (emphasis added). The NIGC has discretion to make "Indian lands determinations" or otherwise address the lawfulness of gaming at particular locations. *Citizens Against Casino Gambling in Erie Cnty. v. Kempthorne*, 471 F. Supp. 2d 295 (W.D.N.Y. 2007), *amended on reconsideration in part, Citizens Against Casino Gambling in Erie Cnty. v. Kempthorne*, 06-CV-0001S, 2007 WL 1200473 (W.D.N.Y. Apr. 20, 2007). The Apache Wye Warm Springs Casino is currently operating on a parcel of land that the Federal Government is holding in trust for the benefit of the FSAT and it has successfully gone through the approval process as set out by IGRA and overseen by the NIGC for the determination of jurisdiction and the FSAT's right to conduct gaming there.

Ironically, of any Tribe that might be in violation of the Compact, it would be the Comanche Nation. In 2020, the Comanche Nation executed a new gaming compact with the State of Oklahoma that was published in the Federal Register on June 29, 2020.[7] This resulted in litigation, leading the Oklahoma Supreme Court to rule that this compact was "invalid" as a matter of state law and that the State is not bound by it. *Treat v. Stitt*, 2020 OK 64, 473 P.3d 43, *as corrected* (July 22, 2020), *reh'g denied* (Sept. 14, 2020). Therefore, if the Comanche Nation is conducting Class III gaming at its gaming operations, it is potentially violating IGRA.

[7] 85 FR 38919.

Because Plaintiffs have no private right of action under IGRA, its claims against the FSAT relating to IGRA must fail. The FSAT has jurisdiction over the Apache Wye and a valid gaming compact with the State of Oklahoma. As a result, Plaintiffs' claims under 25 U.S.C. § 2710(d)(7)(A)(ii) fail as well and should be dismissed.

C. RICO Violations

i. Plaintiffs' Amended Complaint Does Not Allege a Successful Claim under RICO

To state a viable RICO Claim against the FSAT Defendants, Plaintiffs must allege they were: (1) "injur[ed] in its business or property (2) by reason of (3) the [FSAT Defendants'] violation of section 1962." *DeGuelle v. Camilli*, 664 F.3d 192, 198 (7th Cir. 2011). The Supreme Court has interpreted RICO to require a civil plaintiff to show that a defendant's section 1962 violations proximately caused plaintiff's injury. *Hemi Grp., LLC v. City of New York,* 559 U.S. 1, 9 (2010). For the purposes of RICO, proximate cause "requires 'some direct relation between the injury asserted and the injurious conduct alleged.'" *Id.* (quoting *Holmes v. Sec. Inv Prot. Corp.*, 503 U.S. 258, 268, (1992)).

Plaintiffs argue that the FSAT Defendants conspired with each other to open an illegal gambling business and launder money at Apache Wye. [Doc. No. 51, ¶¶111-112.] Plaintiffs further allege that the FSAT Defendants have violated RICO because the Warm Springs Casino at Apache Wye has alledgedly not been authorized under IGRA. *Id.* at ¶115.

Plaintiffs are aware that the FSAT is a Federally recognized tribal entity. [MINERAL LEASING OF CERTAIN INDIAN LANDS, PL 106–67, October 6, 1999,

113 Stat 979.] Plaintiffs cannot dispute that the FSAT, as of 2005, has a valid gaming compact with the State of Oklahoma. [*Order*, Doc. No. 31, p. 3.] The Apache Wye property has been held in trust for the benefit of the FSAT since 2001.

Pursuant to IGRA, the FSAT is allowed, as a result of its compact with the State of Oklahoma, to conduct gaming operations on any land located within or contiguous with the boundaries of the Tribe's reservation or on lands within their last-recognized reservation so long as the Tribe is located in the state where the land is located. 25 U.S.C. § 2719(a), (a)(2)(A)(i); and (a)(2)(B). The United States Congress has officially recognized the FSAT's former reservation lands as being within the State of Oklahoma. The FSAT is well within its rights to establish a Tribal gaming operation on Tribal lands in Oklahoma held in trust by the Federal Government for its benefit.

It is Plaintiffs' contention that the FSAT Defendants conspired amongst themselves, and apparently with the NIGC and the United States Department of the Interior, by following the statutes and regulations promulgated under IGRA, to open a casino on land held in trust for the benefit of the FSAT. Plaintiffs' RICO claims are far-fetched on their face. There is no evidence that the FSAT Defendants have engaged in the "pattern of racketeering activity" that Plaintiffs must prove to succeed on their RICO claims. *Boyle v. United States*, 556 U.S. 938, 949 (2009) ("In order to prove the [RICO claim], the [plaintiff] must prove either that the defendant committed a pattern of § 1955 violations or a pattern of state-law gambling crimes."). Quite the opposite. The facts alleged in Plaintiffs' Amended Complaint indicate that the FSAT Defendants acted in good faith

under the auspices of the NIGC and IGRA to open a business on land held in trust for the benefit of the FSAT.

ii. The FSAT Defendants are Immune to Claims Brought Pursuant to RICO

RICO is not enforceable against Tribal officials, which are not expressly included among "persons" or entities subject to RICO. 18 U.S.C. § 1962, 1961(3) ("RICO"). There is a "longstanding interpretive presumption that 'person' does not include sovereign." *Vermont Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 780 (2000) (finding that the term "person" does not include states). The FSAT Defendants, who have been brought before this Court solely as a result of their roles as official representatives of a sovereign tribe, are similarly insulated from RICO's reach. *See Stoner v. Santa Clara Cnty. Office of Educ.*, 502 F.3d 1116, 1122 (9th Cir. 2007) (construing "person" under the False Claims Act in a way that "avoids suits against 'state instrumentalities' that are effectively arms of the state immune from suit"); *see also Howard ex rel. U.S. v. Shoshone-Paiute Tribes of the Duck Valley Indian Reservation*, 608 Fed. Appx. 468 (9th Cir. 2015) (explaining that "the Tribe, like a state, is a sovereign that does not fall within the definition of a 'person' under the [False Claims Act]"). Accordingly, RICO is wholly inapplicable to the FSAT, and thus, by extension, to the FSAT Defendants. *Warren v. United States*, 859 F. Supp. 2d 522, 542 (W.D.N.Y. 2012), *aff'd, Warren v. United States*, 517 Fed. Appx. 54 (2d Cir. 2013).

Further, it is well known that governmental entities (and by extension their officials acting in their official capacity) such as the FSAT Defendants, have immunity to claims brought under RICO. *Gingras v. Rosette*, 5:15-CV-101, 2016 WL 2932163, at *28 (D. Vt. May 18, 2016), *aff'd sub nom. Gingras v. Think Fin., Inc.*, 922 F.3d 112 (2d Cir. 2019) (holding that tribal officials enjoy immunity for the purposes of RICO claims on tribal lands). Whether the FSAT Defendants are not "persons" subject to RICO liability, or they are immune from RICO claims due to their status as sovereign officials, the outcome is the same. The FSAT Defendants are immune from claims under RICO. Gregory P. Joseph, *Civil RICO: A Definitive Guide* § 11(A), and Plaintiffs' RICO claims against the FSAT Defendants fail as a matter of law and this claim should be dismissed.

D. Comanche Settlement Violations

The Comanche Nation attempts to cite violations of the *Agreement of Compromise and Settlement Recitals* of 2007, which clearly states the FSAT will "withdraw and abandon any and all" applications for transfers on any "original Comanche Allotment." [Doc. No. 51-2; *see also* Doc. No. 51, ¶3.] Likewise, the United States agreed to obtain consent from the Comanche Nation for any transfers "located within an original Comanche Allotment." *Id.* ¶4. By Plaintiffs' own admissions in the Complaint, the property at issue here was an original Kiowa allotment. It was never a Comanche allotment. As such, the Agreement is inapplicable to this parcel, and this claim fails as a matter of law.

II. THE FSAT IS IMMUNE FROM SUIT AND IS A NECESSARY AND INDISPENSABLE PARTY.

A. The FSAT has not Waived Sovereign Immunity and the *Ex Parte Young* Exception Does Not Apply.

This Court has already recognized that as a federally recognized Indian tribe with inherent sovereignty, the FSAT is immune from suit.[8] This sovereign immunity extends to those acting in their official capacities. A defendant in an official capacity action—where the relief sought is only nominally against the official and in fact is against the official's office and thus the sovereign itself—may assert sovereign immunity. *Kentucky v. Graham*, 473 U.S. 159, 167 (1985). Tribal officials are immunized from suits brought against them because of their official capacities. *Native Am. Distrib. v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288 (10th Cir. 2008). Under *Ex parte Young*, the exception to sovereign immunity applies against Tribal officials acting in their official capacity if the complaint alleges an ongoing violation of federal law. *Ex Parte Young* 209 U.S. 123 (1908); *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140 (10th Cir. 2011); and *Muscogee (Creek) Nation v. Pruitt*, 669 F.3d 1159 (10th Cir. 2012).

In determining if the *Ex parte Young* exception applies, courts "need only conduct a straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Muscogee (Creek) Nation*, 669 F.3d at 1167, *quoting Verizon Md, Inc. v. Pub. Serv. Comm'n of Md*, 535 U.S. 635, 645 (2002). This Court is not required to ascertain whether Tribal officials violated federal law,

[8] Doc. No. 31, Court Order Denying Plaintiffs' Motion for Temporary Restraining Order, Page 10.

rather the court only "need[s] to determine whether Plaintiffs state a non-frivolous, substantial claim for relief against the [s]tate officers that does not merely allege a violation of federal law 'solely for the purpose of obtaining jurisdiction. *Elephant Butte Irrigation. Dist. of N.M. v. Dep't of Interior*, 160 F.3d 602, 610 (10th Cir. 1998).

Plaintiffs' claims of violations of the First Treaty of Medicine Lodge, IGRA, and RICO all fail because there is no factual or legal basis for the claims. These claims are an attempt by the Plaintiffs to circumvent the sovereign immunity of the FSAT and they should be dismissed.

B. The FSAT has an Interest in this Action and is Necessary Party Under FRCP 19(a).

Federal Rule of Civil Procedure 19(a) deems a party necessary if:

> (1) in the person's absence complete relief cannot be accorded among those already parties, or
>
> (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations by reason of the claimed interest.

Fed. R. Civ. P. 19(a). This standard is similar to the "impair or impede" standard for mandatory intervention under Fed. R. Civ. P. 24(a)(2) and is clearly met by the FSAT here.

The FSAT has an "interest in the outcome of the present litigation that will be prejudiced if [the] case proceeds in its absence." *Brown v. United States*, 42 Fed. Cl. 538, 565 (1998), *aff'd, Brown v. United States*, 195 F.3d 1334 (Fed. Cir. 1999). "Under [Fed. R. Civ. P. 19], the finding that a party is necessary to the action is predicated only on that

party having a claim to an interest." *United Keetoowah Band v. RCFC 19*, No. 03-1433L (Fed. Cl. Sep. 16, 2005) quoting *Shermoen v. United States*, 982 F.2d 1312, 1317 (9th Cir. 1992). The FSAT is the beneficial title holder of the property at issue in the present case. "It is generally recognized that a party claiming title to property that is the subject of litigation has an 'interest' in that litigation." *Id.*

The FSAT has been the only beneficial title holder to this property since it was taken into trust by the United States for the FSAT in 2001. Since its acquisition, the FSAT has utilized the property for its various needs, just like any other tribe or property owner would do. Any action dictating how the FSAT is allowed to use its property clearly triggers the FSAT's use and enjoyment of the property and the FSAT's economic welfare. Further, even if the Plaintiffs were to dismiss the FSAT Defendants from this case, the FSAT would still be considered a necessary and indispensable party. The characterization of a claim or the fact that it has been brought only against federal defendants does not control a determination of whether the claim would affect the rights of an absent Tribe. See *Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456, 1460–61 (9th Cir. 1994).

C. The FSAT is an Indispensable Party Under FRCP 19(b).

The FSAT is a necessary and indispensable party under Fed. R. Civ. P. 19(b). In determining whether a party is indispensable this Court is required to look at several factors, including potential prejudice, the extent of that prejudice, if the judgement rendered without the party would be adequate, and if the Plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

The first factor of Fed. R. Civ. P. 19(b) is whether the nonparty would 'be adversely affected in a practical sense, and if so, would the prejudice be immediate and serious, or remote and minor.'" *U.S. ex rel. Steele v. Turn Key Gaming, Inc.*, 135 F.3d 1249, 1251 (8th Cir. 1998). Plaintiffs' claims at their core concern jurisdictional ownership over the property in question and present an immediate and serious danger of the loss of the ability of FSAT to exercise its sovereignty over this land. Further, although the United States is also a Defendant in this action, the United States is not able to adequately represent the interests of the FSAT. At this juncture, the FSAT can only speculate as to the position of the United States in this matter. If "there is a conflict between the interests of the United States and the interests of Indians, representation of the Indians by the United States is not adequate." *Manygoats v. Kleppe*, 558 F.2d 556, 558 (10th Cir. 1977).

The second factor looks to whether "prejudice could be lessened or avoided." Fed. R. Civ. P. 19(b)(2). There is no way to shape the relief in a way to lessen or avoid prejudice to the FSAT. Any ruling would ultimately affect and abrogate the jurisdiction of the FSAT over this property. Before Plaintiffs attempt to argue that this could be avoided if FSAT would join the suit, "[i]t is wholly at odds with the policy of tribal immunity to put the tribe to this … choice between waiving its immunity or waiving its right not to have a case proceed without it." *Wichita & Affiliated Tribes of Okla. v. Hodel*, 788 F.2d 765, 776 (D.C. Cir. 1986).

For the same reasons, no judgement will be adequate without the FSAT, as the FSAT would be bound by any determination of this Court regarding the jurisdiction of the

property. "The purpose of this factor is "not intended to address the adequacy of the judgment from the plaintiff's point of view," but rather to protect the interest of "the courts and the public in complete, consistent, and efficient settlement of controversies." *Armstrong v. Davis*, 275 F.3d 849 (9th Cir. 2001). In the disposition of any claim of jurisdiction over the FSAT, the FSAT should be able to present an argument advocating for its best interest.

Finally, the Plaintiffs would argue that dismissal would leave them without a remedy. However, for reasons stated below, this matter should be dismissed regardless of whether or not the FSAT is a party. Since the FSAT cannot be joined, and it is a necessary and indispensable party, this case should be dismissed.

III. IF COMANCHE NATION HAS STANDING TO BRING THIS ACTION, THEN THE APACHE TRIBE AND THE KCAILUC ARE NECESSARY AND INDISPENSABLE PARTIES BUT ARE ALSO IMMUNE FROM SUIT.

The Comanche Nation contends it exercises some jurisdiction over the parcel, despite the fact it is in trust for the benefit and use of the FSAT, and that it was an original Kiowa allotment. Because the Comanche Nation received a shared reservation with the Kiowa Tribe and the Apache Tribe,[9] if there is, hypothetically, some lingering jurisdiction of the Comanche Nation, then, so too would there be lingering questions as to the jurisdiction of the Apache Nation, and the KCAILUC. This question of jurisdiction makes the Apache Tribe and the KCAILUC necessary parties under Fed. R. Civ. P. 19(a). Without

[9] Doc. No. 4, Plaintiff's Opening Brief in Support of Motion for Temporary Restraining Order, pp. 2-3.

the Apache Tribe and the KCAILUC, this would leave the FSAT "subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations by reason of the claimed interest." Fed. R. Civ. P. 19(a)(1)(B)(ii).

Thus, Apache Tribe and the KCAILUC are also indispensable parties under Fed. R. Civ. P. 19(b) because there is a potential prejudice that the interest of the Apache and KCAILUC will be adversely affected in determining which entity, or entities, exercise jurisdiction over Indian Country parcels within the historic KCA Reservation. If the Comanche Nation is attempting to assert jurisdiction over an original Kiowa allotment, then the Comanche Nation would also likely have jurisdiction over original Apache allotments. None of the parties currently in this litigation are authorized to speak or act on behalf of the Apache Tribe or the KCAILUC.

Both the Apache Tribe and the KCAILUC have the inherent power of sovereignty and cannot be forced into this litigation because the Apache Tribe is a federally recognized tribe and the KCAILUC is a collective arm and instrumentality of the Kiowa, Comanche, and Apache Tribes. As a result, these two indispensable parties (the Apache Tribe and KCAILUC) cannot be joined, the case should be dismissed.

IV. CONCLUSION

Plaintiffs have failed to allege facts that support their claims pursuant to Fed. R. Civ. P. 12(b)(6). In addition, the FSAT, Apache Tribe, and the KCAILUC are all necessary and indispensable parties to this action pursuant to Fed. R. Civ. P. 12(b)(7) and Fed. R. Civ. P. 19. Therefore, this case should be dismissed with prejudice.

Respectfully submitted,

S/ A. Daniel Woska
Valerie Devol, OBA #19624
vdevol@devollaw.com
A. Daniel Woska, OBA #9900
dwoska@devollaw.com
Joshua D. Wells, OBA #22334
jwells@devollaw.com
Victoria Holland OBA #33197
vholland@devollaw.com
Devol & Associates
15205 Traditions Lake Parkway
Edmond, OK 73003
Telephone (405)225-2300
Facsimile (405)225-2301

and

Phillip E. Thompson
Phillipthomme.com
P.O. Box 467
Point of Rocks, MD 21777
Telephone (301)535-0488
Facsimile (202)905-0057

Attorneys for Fort Sill Apache Defendants

CERTIFICATE OF SERVICE

I, A. Daniel Woska, certify that on July 7, 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/ A. Daniel Woska