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.	§	

FSAT DEFENDANTS' RESPONSE AND OBJECTION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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

RULES

REGULATIONS

OTHER AUTHORITIES

I. INTRODUCTION

The FSAT Defendants specifically appear and respond to the Plaintiffs' Motion for Preliminary Injunction (the "Motion").

II. BACKGROUND

On July 1, 1852, the United States of America entered a treaty with the Apache Nation of Indians. The treaty intended, among other things, to "designate, settle and adjust the territorial boundaries of the Apache's lands." *Fort Sill Apache Tribe of Okla. v. United States*, Nos. 30-A, 48-A, 19 Ind. Cl. Comm. 212, 239 (June 28, 1968). A band of Apache, led by Geronimo, surrendered to the United States Army as an "Army in the Field" in 1886. *Tombstone Epitaph*, April 2, 1886, *Dateline*, 30-32. They were taken as prisoners of war by the United States Federal Government (the "Federal Government") and held at Fort Sill. *Scott v. United States*, 33 Ct. Cl. 486 (1898).

After being sent to Florida, an alarming mortality rate forced the Federal Government to move the Apache prisoners of war to the "more temperate climates" of Arizona and New Mexico. John Anthony & John Turcheneske,. *The Chiricahua Apache Prisoners of War: Fort Sill, 1894-1914*, 144 (1997). This move faced objections from the congressional delegates of Arizona and New Mexico. *Id.* As a result, the United States moved the Apache prisoners of war were to the Fort Sill Military Reservation which was within the exterior boundaries of the Kiowa, Comanche, and Apache ("KCA") Reservation in Oklahoma. *Id.* at 54.

The KCA Reservation was established by the Treaty of Medicine Lodge. *Treaty with the Kiowa and Comanche, 1867* (Medicine Lodge Treaty), Oct. 21, 1867, 15 Stat. 581. The Federal Government obtained 23,040 acres of land from the KCA Tribes, and established the Fort Sill Military Reserve ("Fort Sill"). *Comanche Nation, Okl. v. United States*, 393 F. Supp. 2d 1196, 1200 (W.D. Okla. 2005). When the Federal Government moved the Apache prisoners of war to Fort Sill, it negotiated for an additional 26,987 acres of land from the KCA Tribes for the Fort Sill Military Reserve. *United States Congressional Serial Set*, 7 (1912).

The Kiowa Tribe and Comanche Nation executed an agreement on February 17, 1897 (the "Agreement"), which stated that a portion of their reservation would be used "for the permanent settlement" of the Apache Prisoners of War. The Agreement states in 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)*.

President Cleveland set apart 26,987 acres of land in the KCA Reservation for the "exclusive use for military purposes for the permanent location thereon of the Apache prisoners of war" on February 26, 1897, by Executive Order. H.R. REP. NO. 62-684, at 54 (1912).

Congress disestablished the KCA Reservation by the Act of June 6, 1900, 31 Stat. 672 (the "Disestablishment Act"). On August 24, 1912, Congress passed an act providing for the "relief and settlement of the Apache Indians now confined as prisoners of war at Fort Still Military Reservation, Oklahoma, on lands to be selected for them by the Secretary of the Interior and the Secretary of War." *United States Congressional Serial Set* at 7. . United States: U.S. Government Printing Office. This put the prisoners into two camps: first, those who wished to go to the Mescalero Apache Reservation in New Mexico, and second, those who elected to not join the Mescalero Apache Tribe and remain in Oklahoma.

In response to 37 Stat. 518, the Federal Government unilaterally relocated the Apache who chose to stay in Oklahoma to allotments in the disestablished KCA Reservation. UNITED STATES STATUTES AT LARGE, 62 Cong. Ch. 388, August 24, 1912, 37 Stat. 518. Neither the Kiowa Tribe nor Comanche Nation objected to the relocation of the Fort Still Apache to the allotments within the disestablished KCA Reservation.

After the passage of the Indian Claims Commission Act of 1946, 60 Stat. 1049 ("ICCA"), the FSAT filed successful claims before the Indian Claims Commission ("ICC") for the loss of their property in New Mexico and Arizona. *Fort Sill Apache v. United States*, Nos. 30-A, 48-A, 19 Ind. Cl. Comm. 212 (June 28, 1968); *see also United States v. Fort Sill Apache Tribe of State of Okla.*, 533 F.2d 531 (Ct. Cl. 1976). Further, the FSAT brought successful claims before the ICC for the loss of its lands on the disestablished KCA Reservation. *Fort Sill Apache Tribe of Oklahoma v. United States*, 41 Ind. Cl. Comm. 72 (1977); *Fort Sill Apache Tribe of Okl. v. United States*, 477 F.2d 1360 (Ct. Cl. 1973). After

the awards for these losses were determined, the FSAT formally organized, with the encouragement of the Federal Government, and established a membership roll and approved a constitution. This was completed in 1976 with the approval of the FSAT Constitution. Fort Sill Apache Tribe of Okla. Const. Oct. 30, 1976. Following their successful claims and formal organization, the United States Congress officially recognized the FSAT's former reservation lands as existing in the State of Oklahoma. *Mineral Leasing of Certain Indian Lands*, PL 106–67, 13 Stat 979 (1999).

In 1995, the FSAT purchased 0.53 acres of former Comanche allotment, which was owned at the time by a member of the Kiowa Tribe in Lawton, Oklahoma. The FSAT forwarded a fee-to-trust application to the Bureau of Indian Affairs for the purpose of holding that parcel of land in trust for the FSAT. The Department of the Interior issued two opinions, one in 1996 and the other in 1997 regarding this parcel of land. The Department of the Interior found that the FSAT had legal and equal standing in the disestablished KCA Reservation by reason of the 1897 agreement of the Kiowa Tribe and Comanche Nation and by operation of law. As a result of those opinions, the Federal Government took the 0.53 acre site and held it in trust for the benefit of the FSAT.

In 2000, the Comanche Nation filed suit in the Court of Indian Offenses against the FSAT and its tribal leadership, claiming that the 0.53 acre site was part of an original Comanche allotment and remained under the jurisdiction of the Comanche Nation, despite the fact that it was held in trust by the Federal Government for the FSAT. Every one of the Comanche Nation's claims were summarily dismissed on the grounds of sovereign and qualified immunity. *Comanche Nation v. Darrow*, No. CIV-02-A04 (Court of Indian

Offenses Jan.16, 2002). The Comanche Nation appealed, and it was denied as well. *Comanche Nation v. Houser*, CIV-04-A01P (Court of Indian Appeals 2004).

In 2005, the Comanche Nation tried another strategy, this time seeking declaratory and injunctive relief against the Federal Government. *Comanche Nation, Okl. v. United States*, 393 F. Supp. 2d 1196 (W.D. Okla. 2005). Being unsuccessful in their prior attempts to control land held in trust for the FSAT, the Comanche Nation brought that action to keep the Department of the Interior from approving the FSAT's Class III gaming Compact with the State of Oklahoma. The court issued a preliminary injunction against the Department of the Interior, which was appealed to the Tenth Circuit Court of Appeals. On or about March 8, 2007, the parties settled the matter (the "Settlement Agreement"). In the Settlement Agreement, the Comanche Nation agreed to dissolve the preliminary injunction and dismiss the action and to "not exercise any civil or criminal jurisdiction…[on the] 0.53 acre parcel." [Doc. No. 51-4, ¶2.] In return, the FSAT agreed to withdraw any pending trust acquisitions of original Comanche allotments. *Id.* at ¶3.

The land in dispute in this action is commonly referred to as the "Apache Wye," and is referred to as such through the remainder of this Response. It was purchased and taken into trust by the Federal Government for the benefit of the FSAT in 2001, prior to the Settlement Agreement. The FSAT has been operating a business on that location since May 2018. It was never a Comanche Nation allotment, and therefore does not fall under the terms of the Settlement Agreement. *Comanche Nation, Okl.*, 393 F. Supp. 2d 1196.

Like all other property held in trust by any tribe, the Apache Wye is under the sole control and sovereign jurisdiction of the FSAT.[1]

III. ARGUMENT

A. Standard of Review

The purpose of a preliminary injunction is to "preserve the relative positions of the parties until a trial on the merits can be held. *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). The United States Supreme Court has established four factors that a movant must prove before they are entitled to a preliminary injunction: "the [movant] must demonstrate (1) a likelihood of success on the merits; (2) a likelihood that the moving party will suffer irreparable harm if the injunction is not granted; (3) the balance of equities is in

---

[1] The FSAT fully complied with the Facility License Notifications and Submissions requirements of 25 C.F.R. § 559.2 which states:

(a) A tribe shall submit to the Chair [of the NIGC] a notice that a facility license is under consideration for issuance at least 120 days before opening any new place, facility, or location on Indian lands where class II or III gaming will occur.

(1) A tribe may request an expedited review of 60 days and the Chair shall respond to the tribe's request, either granting or denying the expedited review, within 30 days.

(2) Although not necessary, a tribe may request written confirmation from the Chair.

(b) The notice shall contain the following:

(1) The name and address of the property;

(2) A legal description of the property;

(3) The tract number for the property as assigned by the Bureau of Indian Affairs, Land Title and Records Offices, if any;

(4) If not maintained by the Bureau of Indian Affairs, Department of the Interior, a copy of the trust or other deed(s) to the property or an explanation as to why such documentation does not exist; and

(5) If not maintained by the Bureau of Indian Affairs, Department of the Interior, documentation of the property's ownership.

(c) A tribe does not need to submit to the Chair a notice that a facility license is under consideration for issuance for occasional charitable events lasting not more than one week.

the moving party's favor; and (4) the preliminary injunction is in the public interest." *Republican Party of New Mexico v. King*, 741 F.3d 1089, 1092 (10th Cir. 2013) (*citing Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)). When weighing these factors, courts "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Amoco Prod. Co. v. Vill. of Gambell, AK*, 480 U.S. 531, 542 (1987).

In addition, the Tenth Circuit has found three situations where issuing an injunction is "specifically disfavored" and, thus, requires a heightened standard. *See, O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 975 (10th Cir. 2004), *aff'd and remanded sub nom. Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006). These types of disfavored injunctions include: "(1) preliminary injunctions that alter the status quo; (2) mandatory preliminary injunctions; and (3) preliminary injunctions that afford the movant all the relief that it could recover at the conclusion of a full trial on the merits." *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 975 (10th Cir. 2004), *aff'd and remanded sub nom. Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006). The Tenth Circuit originally described the heightened standard to bear by a movant as "heav[y]" and "compelling[]," but it has since modified it, requiring courts to "closely scrutinize[]" whether a party is entitled to a preliminary injunction in these specific instances. *SCFC ILC, Inc. v. Visa USA, Inc.*, 936 F.2d 1096, 1099 (10th Cir. 1991), *holding modified by O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973 (10th Cir. 2004), *holding modified by O Centro Espirita Beneficiente Uniao Do Vegetal*, 389 F.3d 973 (now

requiring courts to "closely scrutinize[]" whether to issue a preliminary injunction so as to "assure that the exigencies of the case support the granting of a remedy that is extraordinary even in the normal course.").

Respectfully, Plaintiff's Motion should be "closely scrutinized" by this Court because it both seeks to alter the status quo and it affords the movant the relief it is seeking to recover at the conclusion of a full trial on the merits. *Id.*

As noted by this Court in its *Order Denying Plaintiff's Motion for Temporary Restraining Order*, all of Plaintiffs' claims in its original Complaint and the Amended Complaint filed on June 16, 2022, are for the sole purpose of stopping gaming from taking place on the Apache Wye or Tsalote Allotment. [Doc. No. 31, p. 2.] Should this Court grant Plaintiffs' Motion, it would require the FSAT Defendants to take affirmative action to shut down gaming at the Apache Wye Warm Springs Casino, after having spent approximately $6 million to construct the casino while costing the FSAT substantial revenues, and thereby reducing services available to the FSAT citizens. *See* Exhibit 1, Declaration of Valerie R. Devol (the "Devol Decl."). One only needs to look at a newspaper to see that inflation and the tripling of energy costs over the past year have placed intense pressure on all Americans, and especially members of the FSAT. *Id.* The FSAT funds its members' higher education tuition, provides for its elderly citizens, and delivers Tribal aid, COVID relief, funeral assistance, childcare programs, a children's shelter and social services to its members. *Id.* These services are particularly important with the current costs of living, and unlike Plaintiffs' speculative statements about how market competition may impact their gaming enterprises, a preliminary injunction will quite literally take money from these key

programs by blockading the source of their funding. *Id.* Every FSAT member will be noticeably impacted by the shutting off of the source of these revenues and the FSAT will lose all of the funds it has invested. *Id.*

With the exception of Plaintiffs' meritless claim that the FSAT Defendants violated RICO in an implausible conspiracy with the Federal Government involving the opening of the Apache Wye Warms Springs Casino, Plaintiffs' claims all seek the same declaratory and injunctive relief sought in their Motion. *Barber v. Sutmiller*, No. CIV-15-78-C, 2017 WL 1208022, at *4 (W.D. Okla. Mar. 9, 2017), *report and recommendation adopted,* No. CIV-15-78-C, 2017 WL 1207841 (W.D. Okla. Mar. 31, 2017), *vacated,* No. CIV-15-78-C, 2017 WL 1957525 (W.D. Okla. May 10, 2017), and *report and recommendation adopted,* No. CIV-15-78-C, 2017 WL 1957525 (W.D. Okla. May 10, 2017).

In addition to granting the Plaintiffs all of the relief it could recover at trial, the granting of Plaintiffs' Motion would alter the status quo. *O Centro Espirita Beneficiente Uniao Do Vegetal*, 389 F.3d at 975. There is no dispute that the Apache Wye property has been held in trust by the Federal Government for the benefit and use of the FSAT since 2001. Plaintiffs cannot dispute that in April of 2005, the Department of the Interior approved FSAT's Class III Tribal Gaming Compact with the State of Oklahoma. [*Order*, Doc. No. 31, p. 3.] It is also not disputed that the FSAT has been operating a business at the Apache Wye since at least 2018. *Id.* Further, there is no dispute that the FSAT is fully licensed and authorized by Congress under the language of the Indian Gaming Regulatory Act ("IGRA") by statutory and regulatory review and approval of the National Indian Gaming Commission ("NIGC"), and by its Tribal Gaming Compact with the State of

Oklahoma, to operate a casino on the Apache Wye property. Exhibit 1-A, Warm Springs Gaming License. The Warm Springs Casino is currently open and operational. Exhibit 1, ¶7. "An injunction disrupts the status quo when it changes the 'last peaceable uncontested status existing between the parties before the dispute developed.'" *Beltronics USA, Inc. v. Midwest Inventory Distribution, LLC*, 562 F.3d 1067, 1070–71 (10th Cir. 2009). Plaintiffs in the present action seek to disrupt the status quo, FSAT's sovereign jurisdiction over its property that has been in place for twenty-one (21) years.

As a result, a heightened standard of scrutiny applies. Plaintiffs will be unable to make a strong showing both on the likelihood of success on the merits and with regard to the balance of harms. *Id.* This heightened standard accords with the historic purpose of the preliminary injunction, which is to "preserve the relative positions of the parties until a trial on the merits can be held." *Univ. of Texas*, 451 U.S. at 395.

B. Plaintiffs are Unlikely to Succeed on the Merits of their Claims

i. The FSAT Defendants Possess Sovereign Immunity

It is undisputed that the FSAT is recognized as a sovereign Indian Tribe by the Federal Government. [Doc. No. 51, ¶59; *see also Mineral Leasing of Certain Indian Lands*, PL 106–67, October 6, 1999, 113 Stat 979.] Because of this fact, the FSAT is immune from suit. Just like Federal and State governments, federally recognized tribes are immune from lawsuits, unless they have waived their sovereign immunity, or a federal treaty or statute has abrogated or limited tribal immunity. *See Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751 (1998); *see also, Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 511 (1991).

Tribal sovereign immunity extends to off-reservation activities of the tribe and applies to both governmental and commercial activities. *Id.* Congress may choose to abrogate or waive tribal sovereign immunity, but the waiver must be clear and unequivocal. *See, e.g. Indian Tribal Economic Development and Contracts Encouragement Act of 2000*, 25 U.S.C. § 81 (linking tribal waiver or disclosure of sovereign immunity to Secretarial approval of contracts). In the same way, if a tribe waives sovereign immunity, it must be "unequivocally expressed." *United States v. Testan*, 424 U.S. 392, 399 (1976). Under the Indian Gaming Regulatory Act ("IGRA"), any entity that conducts gaming on tribal lands is required to be wholly owned by the tribal government and to serve tribal purposes. 25 U.S.C. § 2701. As such, the FSAT Gaming Commission enjoys the FSAT's sovereign immunity. *Allen v. Gold Country Casino*, 464 F.3d 1044 (9th Cir. 2006).[2]

Plaintiffs have attempted to make an "end-run" around the FSAT's sovereign immunity by naming the FSAT Defendants (all FSAT governmental officials) in their official and individual capacities as opposed to bringing an action against the FSAT or the FSAT Gaming Commission. [Doc. No. 51, ¶¶9-18.] Tribal officials, in the same way as Federal and state government officials, enjoy the protection of sovereign immunity when acting in their official capacity. *Kentucky v. Graham*, 473 U.S. 159, 159–60 (1985) ("…it is clear that a suit against a government officer in his or her personal capacity cannot lead to imposition of fee liability upon the governmental entity."); *Crowe & Dunlevy, P.C. v.*

[2] Both the Kiowa Tribe and Comanche Nation have used this very doctrine of sovereign (and qualified) immunity to protect their off-reservation activities. *Cohen v. Winkelman*, 302 F. App's 820 (10th Cir. 2008) and the aforementioned *Kiowa Tribe of Oklahoma v. Mfg. Techs, Inc.*, 523 U.S. 741 (1998).

Stidham, 640 F.3d 1140, 1154 (10th Cir. 2011) ("[Tribal] immunity extends to tribal officials, so long as they are acting within the scope of their official capacities"); *see also Nahno-Lopez v. Houser*, 625 F.3d 1279 (10th Cir. 2010).[3]

Plaintiffs can present no evidence, or even allege, that the FSAT Defendants were acting outside of their official capacity. Therefore, Plaintiffs cannot present a credible argument as to why the FSAT Defendants should not receive the benefit of the FSAT's sovereign immunity. In addition, Plaintiffs present no evidence, or allege, that the FSAT Defendants have waived sovereign immunity. Plaintiffs claim to seek an injunction against the FSAT Defendants as individuals, but the clear reality is that Plaintiffs' seek to enjoin the FSAT as a sovereign entity from using land, belonging to the FSAT as a sovereign entity, for purposes that have been approved by the Federal Government and its gaming compact with the State of Oklahoma. FSAT is clearly the real party in interest, as the FSAT Defendants are all being sued as a result of their actions as officials of the FSAT. *Hafer v. Melo*, 502 U.S. 21, 25 (1991) ("Suits against state officials in their official capacity therefore should be treated as suits against the State."). Plaintiffs' claims against the FSAT Defendants all sound solely in their official capacities. [Doc. No. 51, ¶¶82-131.]

Plaintiffs' claims against the FSAT Defendants are meritless and have no chance of success. Plaintiffs have failed to show a likelihood of success on the merits because their

[3] The Comanche Nation has tried this same tactic, filing suit against the FSAT tribal leadership before in the early 2000s and were rebuffed on sovereign and qualified immunity defenses. *Comanche Nation v. Darrow*, No. CIV-02-A04 (2002) and *Comanche Nation v. Houser*, No. CIV-04-A01P (Court of Indian Appeals 2004)

claims are barred by the FSAT's sovereign immunity. Thus the Plaintiffs are not entitled to a preliminary injunction. *Republican Party of New Mexico*, 741 F.3d at 1092.

ii. The Medicine Lodge Treaties are Inapplicable to the FSAT Defendants

Plaintiffs bring claims against the FSAT Defendants for violation of the First Treaty of Medicine Lodge. [Doc. No. 51, ¶¶82-86.] Plaintiffs' entire Motion for Preliminary Injunction is based on the fact that they have brought claims pursuant to the First Treaty of Medicine Lodge. [Doc. No. 53, p. 8.] Plaintiffs neglected to inform the Court that the FSAT is not a signatory to the First Treaty of Medicine Lodge Creek and is not bound by its terms.

On October 21, 1867, the Comanche Nation and the Kiowa Tribe entered the First Treaty of Medicine Lodge Creek. *Comanche Nation, Okl. v. United States*, 393 F. Supp. 2d 1196, 1200 (W.D. Okla. 2005). The FSAT was not a party. *Id.* That same day, the Comanche Nation and Kiowa Tribe entered the Second Treaty of Medicine Lodge Creek wherein the Comanche Nation and the Kiowa Tribe agreed to share their reservation with the Apache Tribe, an entity separate from the FSAT. *Id.* Once again, the FSAT was not a party. *Id.*

Generally, 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.). When requesting declaratory relief, a plaintiff has no ability to enforce an agreement against a defendant that has no rights or

responsibilities under the contract. *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002); *Vincent v. Lindsey Mgmt. Co.*, No. 12-CV-210-JED-PJC, 2013 WL 6732661, at *8 (N.D. Okla. Dec. 19, 2013) (because the party against whom declaratory judgment was sought was not a party to the agreement, "it lacks a sufficient stake in the Court's determination of the agreement to permit a declaratory judgment action to proceed against it"); *see, e.g., Holmes v. Chesapeake Appalachia, LLC*, No. 5:11CV123, 2012 WL 3647674 (N.D.W. Va. Aug. 23, 2012) (holding that a declaratory judgment action would not be permitted to proceed against defendant who was not party to the contract at issue).

Because the FSAT and the FSAT Defendants, in their individual and official capacities, are not bound by the terms of the First or Second Medicine Lodge Creek Treaties, Plaintiffs' claims for violation of these treaties fail as a matter of law.

iii. Plaintiffs Have No Private Right of Action Under IGRA

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 private rights of action. For example, IGRA provides a private right of action for suit by a Tribal entity to compel action by the Indian Gaming Commission 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 explicit 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 By & Through Tamiami Dev. Corp. v. Miccosukee Tribe of Indians of Fla.*, 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).

Plaintiffs specifically allege that they are allowed bring claims under 25 U.S.C. § 2710(d)(7)(A). [Doc. No. 53, p 8.] The statute provides as follows:

> (7)(A) The United States district courts shall have jurisdiction over--
> (i) any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith,
> (ii) 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 entered into under paragraph (3) that is in effect, and
> (iii) any cause of action initiated by the Secretary to enforce the procedures prescribed under subparagraph (B)(vii).

25 U.S.C. § 2710(d)(7)(A).

Specifically, Plaintiffs bring claims against the FSAT Defendants pursuant to 25 U.S.C. § 2710(d)(7)(A)(ii). [Doc. No. 51, ¶¶87-101.] Plaintiffs can only succeed on this cause of action if they prove that the FSAT does not have a valid gaming compact with the State of Oklahoma or that the FSAT is in violation of their gaming compact with the State of Oklahoma. Plaintiffs freely acknowledge that the FSAT has a gaming compact with the State of Oklahoma. [Doc. No. 51, ¶94.] Plaintiffs also admit that the Apache Wye is "Indian land" and specifically a "Kiowa allotment." *Id.* at ¶27. Plaintiffs further admit that the Apache Wye is held in trust for the benefit of the FSAT and has been for twenty-one (21)

years. *Id.*at ¶46. However, Plaintiffs still continue to allege that the FSAT Defendants are conducting gaming on lands that are not within the FSAT's jurisdiction. *Id.* at 92.

Plaintiffs are wrong. 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 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,* No. 06-CV-0001S, 2007 WL 1200473 (W.D.N.Y. Apr. 20, 2007). Plaintiffs fully complied with 25 C.F.R. § 559.2 which governs the process for seeking a "Indian lands determination" from the NIGC. Exhibit 1, Devol Decl. In other words, prior to building the Apache Wye Warm Springs Casino, the FSAT Defendants successfully completed the regulatory process by which the NIGC determines a tribe's jurisdiction to operate gaming on a parcel of land. *Id.* 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 has 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 on the Apache Wye property.

As Plaintiffs' correctly stated in their Amended Complaint, the FSAT's gaming compact with the State of Oklahoma applies to "Indian lands…over which the tribe has jurisdiction as recognized by the Secretary of the Interior and as part of the tribe's 'Indian reservation.'" [Doc. No. 51, pp. 24-25.] Tribes in Oklahoma that are without a reservation

as of October 17, 1988, are allowed to conduct gaming on lands within their former reservations or contiguous to other land held in trust or restricted status for the tribe in Oklahoma. 25 U.S.C. § 2719(a)(2)(A)(ii). All parties agree that the Apache Wye is held in trust for the FSAT in the State of Oklahoma. [Doc. No. 51, ¶43.]

Because Plaintiffs have no private right of action under IGRA, their claims against the FSAT Defendants fail as a matter of law. Because the FSAT has jurisdiction over the Apache Wye and a valid gaming compact with the State of Oklahoma, Plaintiffs claims under 25 U.S.C. § 2710(d)(7)(A)(ii) fail as well.

iv. Plaintiffs RICO Claims Have No Merit

1. 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 the Act to require a civil RICO plaintiff to show that a defendant's section 1962 violations proximately caused plaintiff's injury. *Hemi Grp., LLC v. City of New York, N.Y.*, 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 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, 113 Stat 979 (1999). 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, pursuant to 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). As stated above, 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 held in trust in Oklahoma 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, and certainly do not meet the heightened burden required to receive the historically disfavored relief sought by Plaintiffs pursuant to *O Centro Espirita Beneficiente Uniao Do Vegetal*, 389 F.3d at 975. 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."). 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.

2. 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 the 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 actions as official representatives of a sovereign tribe, are similarly insulated from RICO's reach. *See Stoner v. Santa Clara Cnty. Off. 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 Rsrv.*, 608 F. App'x 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,* 517 F. App'x 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 Defendant, have immunity to claims brought under RICO. *Gingras v. Rosette*, No. 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). Plaintiffs' RICO claims against the FSAT Defendants fail as a matter of law. Their Motion for Preliminary Injunction fails as well.

C. Plaintiffs Provide No Evidence of Irreparable harm

Plaintiffs fail to show a likelihood of success on the merits, and they likewise fail to present evidence of irreparable harm. Plaintiffs argue that competition with their casinos is irreparable harm. [Motion at p. 23.] Plaintiffs claim that these irreparable damages are also intangible because they do not know how it will impact the budgets of the Kiowa Tribe and Comanche Nation, if at all. *Id.*

To meet the irreparable harm standard, the harm alleged "must be both certain and great, and that it must not be merely serious or substantial. *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1250 (10th Cir. 2001) (internal citations omitted). Competition for business is not irreparable harm, even when the competition arises from

the violation of exclusive rights memorialized by contract, which it does not in the present circumstances. *Paradise Distributors, Inc. v. Evansville Brewing Co.*, 906 F. Supp. 619, 623 (N.D. Okla. 1995) n. 4 (exclusive right to distribute product not sufficient to support irreparable harm finding); *Baker's Aid, a Div. of M. Raubvogel Co. v. Hussmann Foodservice Co.*, 830 F.2d 13, 16 (2d Cir. 1987) (rejecting argument that irreparable harm automatically follows breach of a non-compete agreement). Plaintiffs cannot claim that damages are "certain" or "great."

Plaintiffs argue that, should the FSAT Defendants be allowed to continue operating a casino at the Apache Wye, Kiowa and Comanche citizens will not be able to afford funerals, the elderly will be unhoused, youth services will be removed, and the Kiowa Tribe and Comanche Nation will generally be unable to provide the resources a modern government seeks to supply for its citizens. Motion at p. 24. Each of these arguments apply equally to the FSAT with the additional fact that Plaintiffs seek to stop the citizens of the FSAT from receiving these benefits by shutting down the FSAT's means of generating revenue. Ex. 1, ¶9. Plaintiffs weakly proffer a speculative loss of revenue (there is no evidence that the Apache Wye Warm Springs Casino will have any impact on Plaintiff's gaming operations) resulting from possible marketplace competition. Plaintiffs, both significantly larger than the FSAT by every metric, fail to provide evidence of any harm arising out of the operation of the FSAT casino at Apache Wye, much less irreparable harm. The existence of the FSAT's casino at Apache Wye does not damage Plaintiffs' unique market position or diminish the public's goodwill towards Plaintiffs' competing casino operations. *See, e.g., Tom Doherty Assocs., Inc. v. Saban Ent., Inc.*, 60 F.3d 27, 38

(2d Cir. 1995) (irreparable harm arises where loss of ability to market unique product damages company's prospective goodwill); *Reuters Ltd. v. United Press Int'l, Inc.*, 903 F.2d 904, 907–08 (2d Cir. 1990) (damages to goodwill as a result of loss of unique product supports finding of irreparable harm); *Ferry-Morse Seed Co. v. Food Corn, Inc.*, 729 F.2d 589, 592 (8th Cir. 1984) (company irreparably harmed where it would suffer disadvantage in competitive market by inability to sell unique product); *Green Stripe, Inc. v. Berny's Internacionale*, 159 F. Supp. 2d 51, 56–57 (E.D. Pa. 2001) (irreparable harm arises from denial of ability to sell unique product and inability to obtain market substitute). The Apache Wye Warm Springs Casino is one of at least thirteen (13) casinos within an hour's drive of its location, and one of six (6) within thirty minute's drive. Ex. 1, ¶11. The impact of the Apache Wye Warm Springs Casino on Plaintiffs' businesses, if any impact exists at all, is negligible, whereas the impact of shutting down the Warm Springs Casino will be massive. *Id.* at ¶9. Economic loss "usually does not, in and of itself, constitute irreparable harm...." *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1889 (10th Cir. 2003) (citations omitted).

The most Plaintiffs can possibly prove to this Court is that the FSAT casino at Apache Wye offers competition in the gaming marketplace. At the very least, the FSAT Defendants are entitled to limited discovery to determine what, if any, damages Plaintiffs have suffered, or are likely to suffer, should Plaintiffs' Motion be denied. Monetary damages such as those alleged by Plaintiffs are easily calculable. The fact that Plaintiffs have failed to provide any information on this topic to the Court is telling and shows that

Plaintiffs' alleged damages are merely speculative and over stated to exact a result from this court.

D. The Balance of Equities are in the FSAT Defendants' Favor

Contrary to Plaintiffs unsubstantiated claims, the balance of equities goes against the granting of a preliminary injunction. If the Court grants Plaintiffs' Motion, between twenty and thirty people will immediately be out of work. Their families will lose the income generated by employees at the Apache Wye Warm Springs Casino. In addition, the Fort Sill Apache Tribe, made up of the Chiricahua and Warm Springs Apache, are one of the smallest Federally recognized tribal entities in Oklahoma with approximately 800 members. Motion at p. 25. The Warm Springs Casino represents approximately $6 million of investment to make it operational and closing it would have a substantial negative impact including potentially denying the FSAT members access to services in a critical time when inflation and fuel prices are extreme, the aftereffects of COVID are still being felt, including increased burial costs, increased need for elder support, higher secondary education costs to train and re-train FSAT members, and increased primary education costs for virtual learning and related issues. *See* Exhibit 1, Devol Decl.

In the current economic environment, the ending of the employment of approximately 20-30 FSAT employees (impacting a substantial portion of the total number of members of the FSAT) and the loss of significant revenues to a small tribe like the FSAT is significant, and Plaintiffs have not shown that the balance of harms favors granting of a motion for preliminary injunction. Ex. 1, ¶¶9, 12.

E. Public Interest Favors the FSAT Defendants

Plaintiffs' only argument that the public interest factor is in favor of preliminary injunction is that Plaintiffs are Goliath, with approximately 29,000 members, while the FSAT is David, with approximately 800 members. COMANCHE NATION LORDS OF THE PLAINS, https://comanchenation.com/our-nation/about-us (last visited June 22, 2022); *see also*, Motion at p. 25; Ex. 1, ¶10.

More to the point, the Tenth Circuit Court of Appeals has held that tribal self-government is a matter of vital public interest. *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1253 (10th Cir. 2001) (denying a motion for preliminary injunction against tribe issuing its own vehicle license plates). In fact, not only is it a matter of public interest, but it is a "paramount federal policy" that tribes, like the FSAT, are independent and develop strong sources of income and self-government. *Seneca-Cayuga Tribe of Oklahoma v. State of Okl. ex rel. Thompson*, 874 F.2d 709, 716 (10th Cir. 1989). The Apache Wye meets the definition of Indian lands[4] and Congress has in no way abridged the FSAT's jurisdiction over the Apache Wye. Plaintiffs seek to interfere with the FSAT's right to self-determination, self-governance, and economic independence. The public interest factors weigh in favor of the FSAT Defendants and for denial of Plaintiffs' Motion.

F. Plaintiffs Should be Forced to Post a Substantial Bond

Fed. R. Civ. P. 65 requires that the party seeking a preliminary injunction post a bond. The security bond protects the enjoined party and limits the liability of the applicant

[4] 25 C.F.R. § 502.12.

for the injunction. *Monroe Div., Litton Bus. Sys., Inc. v. De Bari*, 562 F.2d 30, 32 (10th Cir. 1977). While the Apache Wye Warm Springs Casino has only been open since June 15, 2022, the FSAT Defendants can confidently state that it represents millions in revenue for the FSAT members. These damages cannot be recovered except through further litigation before this Court. While it is helpful to the FSAT Defendants that Plaintiffs have willfully submitted themselves to the jurisdiction of this Court so that they can be sued pursuant to Fed. R. Civ. P. 65.1 for wrongful injunction, Plaintiffs should be forced to post a substantial bond to help compensate the FSAT Defendants for the damages suffered in the event it is determined that a wrongful injunction has been entered.

IV. CONCLUSION

For the foregoing reasons, the FSAT Defendants respectfully request that the Court deny Plaintiffs' Motion for Preliminary Injunction.

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