**UNITED STATES DISTRICT COURT**

**FOR THE WESTERN DISTRICT OF OKLAHOMA**

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| Kiowa Tribe and Comanche Nation,<br><br>Plaintiffs,<br><br>v.<br><br>The United States Department of the Interior, et al.<br><br>Defendants. | **CASE NUMBER: 5:22-CV-00425** |

**PLAINTIFF COMANCHE NATION'S BRIEF IN OPPOSITION TO THE FSA DEFENDANTS' MOTION TO DISMISS**

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## INTRODUCTION

Plaintiffs brought this action to stop a casino operated by the Fort Sill Apache Tribe ("FSAT") from conducing unlawful gaming on land within the Plaintiff Kiowa Tribe's jurisdiction. The FSAT's operation of this casino violates the First Treaty of Medicine Lodge, the FSAT's gaming compact with the State of Oklahoma required by the Indian Gaming Regulatory Act ("IGRA"), and constitutes the operation of an illegal gambling business under the Racketeer Influenced and Corrupt Organizations Act ("RICO"). The FSAT's illegal casino injures Plaintiffs by siphoning substantial revenues from their own lawful casino operations. The FSA Defendants move to dismiss Plaintiffs' claims against them under Rule 12(b)(6) for failure to state a claim and under Rule 12(b)(7) for failure to add indispensable parties.

The FSA Defendants offer only half-hearted arguments that Plaintiffs fail to state a claim upon which relief may be granted and many of their arguments improperly rely on "facts" outside of the Amended Complaint. The FSA Defendants first argue that they cannot be liable for violating Plaintiffs' treaty rights because they are not a party to the treaty. But treaties are not contracts, they are the law of the land, and in numerous cases, courts have granted equitable relief against third parties in order to protect the treaty rights of Indian tribes. *Medellin v. Texas*, 552 U.S. 491, 544 (2008) (Breyer, J., dissenting) (a "treaty is the law of the land … to be regarded in courts of justice as equivalent to an act of the legislature."). The FSA Defendants next argue that they have not violated their gaming compact because their casino is on a parcel of land—the Tsalote Allotment—that the Bureau of Indian Affairs ("BIA") transferred into trust for the benefit of the FSAT.

This fact has little to no bearing on whether a particular parcel is "Indian lands as defined by IGRA." ECF 51-7 at Part 5(L). The Tsalote Allotment was acquired by the FSAT after IGRA's statutory deadline for eligibility; the Tsalote Allotment is not within the FSAT's "former reservation"; and the Tsalote Allotment remains under Kiowa jurisdiction, even if the BIA improperly transferred title to the FSAT. Each of these facts renders the Tsalote Allotment ineligible for FSAT gaming, and results in a violation of IGRA and the FSAT's tribal-state compact. With respect to RICO, the FSA Defendants argue that Plaintiffs have no "evidence" that they are engaging in a pattern of racketeering, and that RICO does not apply to them as tribal officials. The FSA Defendants are wrong on all accounts. As to "evidence," Plaintiffs are not required to present any to survive a motion to dismiss. Plaintiffs have alleged that the operation of the Warm Springs Casino constitutes a pattern of racketeering in the form of illegal gambling and money laundering, and it is undisputed that the casino is actually operating. As to the applicability of RICO, the statute provides a private civil right of action to address illegal gambling, tribal officials are subject to RICO, and IRGA provides no defense because the Warm Springs Casino is not authorized by IGRA.

Lacking any real arguments on the merits, the FSA Defendants dedicate much of their briefing to procedure, arguing that they are immune from suit and that the FSAT, the Apache Tribe of Oklahoma ("Apache Tribe"), and the Kiowa Comanche Apache Intertribal Land Use Committee ("KCAILUC") are necessary and indispensable parties. First, the FSA Defendants are not entitled to immunity—the official capacity claims against them are subject to the *Ex parte Young* exception, and sovereign immunity does not extend to

the claims against them in their individual capacities. *See Lewis v. Clarke*, 137 S. Ct. 1285, 1292-93 (2017). Because the FSA Defendants are properly parties to this action, the FSAT itself is not a necessary party, for tribal officials are held to adequately represent the interests of the tribe itself. *See Kansas v. United States*, 249 F.3 1213 (10th Cir. 2001). Second, the key to the FSA Defendants' argument that the Apache Tribe or the KCAILUC are necessary parties, is that they have jurisdiction over the Tsalote Allotment. But the FSA Defendants misconstrue the nature of Plaintiffs' allegations in this case. Plaintiffs do not allege that the Comanche Nation has jurisdiction over the Tsalote Allotment, but rather that it was a signatory to the First Treaty of Medicine Lodge and that its consent was required to transfer jurisdiction of the Tsalote Allotment to the FSAT. For all these reasons, and the others discussed below, the FSA Defendants' motion should be denied.

## RELEVANT ALLEGATIONS

### A. The Treaties of Medicine Lodge Recognize the Sovereignty of the Kiowa Tribe and Comanche Nation, Establish the KCA Reservation, and Create Conditions for Another Tribe Acquiring Jurisdiction There

On October 21, 1867, the United States set aside an Indian reservation for the Kiowa Tribe and Comanche Nation in the First Treaty of Medicine Lodge. Compl. ¶ 22. This treaty specifically noted that other tribes of Indians could *not* be settled on the reservation without the agreement of the Kiowa Tribe and Comanche Nation. *Id.*, Ex. 1, Art. 2. In the first exercise of this consent requirement, the Kiowa and Comanche subsequently entered into the Second Treaty of Medicine Lodge, in which they agreed to share their reservation with the Apache Tribe. *Id.* ¶ 23.

### B. The United States Allots the KCA Reservation

In the late nineteenth century, the United States implemented an assimilationist federal Indian policy, of which "allotment" was the bluntest instrument. *Id.* ¶ 25. Under allotment, small parcels of reservation lands held in common were granted to individual Indians, with the remainder of land opened to non-Indians. *Id.* Most of the land of the KCA Reservation was allotted pursuant to an Act of June 6, 1900, 31 Stat. 672 (the "1900 Act"). *Id.* ¶ 26. Relevant here, one such allotment (the "Tsalote Allotment) was granted to a Kiowa tribal member named George Tsalote. *Id.* ¶ 28; Ex. 2.

### C. Chiricahua Apache Obtain Allotments Within the Historic Boundaries of the KCA Reservation But Do Not Share Title to the KCA Reservation

On February 17, 1897, the Kiowa, Comanche, and Apache provided consent to the mostly Chiricahua Apache prisoners of war to settle specifically on lands that today form the Fort Sill Military Reservation. This limited consent was later memorialized in an Executive Order dated February 26, 1897. *Id.* ¶¶ 29-33. When these Chiricahua Apache prisoners of war were ultimately released, the majority settled on the Mescalero Apache Reservation. Approximately 80 such Chiricahua Apache wished to remain in Oklahoma and received allotments purchased for this purpose within the historic boundaries of the KCA Reservation. Although the Kiowa, Comanche, and Apache Tribe did not object to these Chiricahua Apache allotments, they never agreed that these Chiricahua Apache would share jurisdiction over the KCA Reservation. Nor did Congress, with its general instruction to the Secretary of the Interior and the Secretary of War to select lands for the Chiricahua Apache, do any more than grant restricted ownership to small parcels purchased

within the historic boundaries of the KCA Reservation. *Id.* ¶ 37. In 1976, the Chiricahua Apache who remained in Oklahoma, along with their descendants, were federally acknowledged as the Fort Sill Apache Tribe. *Id.* ¶ 35.

### D. The FSAT Acquire the Tsalote Allotment and Unlawfully Assert Jurisdiction by Building a Casino without the Kiowa Tribe's Consent

The Tsalote Allotment is not one of the allotments that was provided to the Chiricahua Apache. As such, any claim of FSAT jurisdiction over this parcel is a clear violation the consent provision of the First Treaty of Medicine Lodge. *Id.* ¶ 36. The FSAT purchased the Tsalote Allotment from George Tsalote's heirs. *Id.* ¶ 46. And in 2001, the Bureau of Indian Affairs ("BIA"), presumably relying on two since-withdrawn legal opinions, transferred the Tsalote Allotment in trust to the FSAT. *Id.*; ECF 18 Ex. 6.

For years, the FSAT held the Tsalote Allotment without any attempt to assert jurisdiction over it. ECF 51 ¶ 47. In 2018, they opened a convenience store and gas station. Then, in February 2022, they announced that they would be building a gaming facility, called the Warm Springs Casino, on the Tsalote Allotment. *Id.* The FSAT did not seek or obtain permission to build the casino from the Kiowa, which maintained jurisdiction over the property. *Id.*

### E. Plaintiffs Ask the NIGC to Intervene and Block the Casino, But the NIGC Takes No Action and the Casino Opens

On April 27, 2022, the KCAILUC sent a letter to the NIGC objecting to the Warm Springs Casino and requesting agency action; KCAILUC supplemented the letter on April 28, 2022. *Id.* ¶ 51. The NIGC acknowledged receipt of the letter but took no action to inquire on the "Indian lands" status of the Tsalote Allotment or advise on its eligibility for

FSAT gaming. *Id.* The Warm Springs Casino opened June 15, 2022, and offers both Class II and Class III gaming, as defined by IGRA. *Id.* ¶ 51. The NIGC did nothing to stop the opening of the casino and has done nothing to stop its operations. *Id.* ¶ 52.

### F. The Unlawful FSAT Casino Is Causing Substantial and Irreparable Harm to Plaintiffs

Plaintiffs are dependent on gaming revenue to fund the essential governmental services they provide to tribal members—about 93% of the Comanche Nation's budget comes from gaming revenue, and about 60% of the Kiowa Tribe's budget comes from gaming revenue. *Id.* ¶¶ 54, 56. These essential services include: burial assistance, emergency housing and an assisted living center for elderly tribal members, transportation for the disabled, low-income housing, a youth shelter for abused children, a tribal police force, prosecutor, and court to maintain law and order, prescription assistance and other health services, among other things. *Id.* ¶¶ 55, 57. The illegal competition from the Warm Springs Casino is diverting substantial revenue from Plaintiffs' casinos and reducing funds available for Plaintiffs' government program.[1] *Id.* ¶ 59.

## ARGUMENT

Plaintiffs assert three claims against the FSA Defendants: (1) violation of the First Treaty of Medicine Lodge, (2) violation of the FSAT's tribal-state compact for Class III gaming, and (3) violation of RICO. Each of Plaintiffs' claims is sufficiently pled, and the

[1] When the Amended Complaint was filed, the Warm Springs Casino had been open for one day—insufficient time to quantify its impact. Since that filing, Plaintiff Kiowa Tribe's revenue at its nearest casino is down approximately 51% and the facility is operating at an "unsustainable" loss. ECF 66 at 9.

FSA Defendants' Rule 12(b)(6) motion should be denied. In addition, the FSAT's sovereign immunity does not bar the claims against the FSA Defendants in their official capacity due to the *Ex parte Young* doctrine, and the FSAT's sovereign immunity does not extend to claims against the FSA Defendants in their personal capacities. Because the FSA Defendants are properly parties in their official capacities, the FSAT is not a necessary party. The Apache Tribe and KCAILUC are also not necessary parties, as they have no claim to jurisdiction over the Tsalote Allotment.

## I. PLAINTIFFS STATE A VIABLE CLAIM THAT THE FSA DEFENDANTS VIOLATED THEIR TREATY RIGHTS

The FSA Defendants do not (and cannot) dispute that the First Treaty of Medicine Lodge requires Plaintiffs' consent before jurisdiction over Indian land within the historic boundaries of the KCA Reservation can be transferred to another tribe.[2] Instead, the FSA Defendants' argue that (1) they are not bound by the First Treaty of Medicine Lodge because they were not a party to it, and (2) the BIA transferred ownership of the Tsalote

[2] As explained in Plaintiffs' Opening Brief in Support of Motion for Preliminary Injunction, the First Treaty of Medicine Lodge's provisions requiring Plaintiffs' consent prior to another tribe sharing "use and occupancy" of the KCA Reservation, also required Plaintiffs' consent to another tribe sharing *jurisdiction* over land within the KCA Reservation under well-established principles of federal Indian law and treaty interpretation. ECF 53 at 11(citing *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164, 174-75 (1973) (noting that when lands were reserved for "exclusive use and occupancy of the Navajos," the "lands [were] within the exclusive sovereignty" of the tribe); *Yakama Indian Nation v. Flores*, 955 F. Supp. 1229, 1258 (E.D. Wash. 1997) ("tribes retain absolute sovereignty within those lands reserved for [their] exclusive use and occupancy. . .") Moreover, as explained in that same brief, this treaty right survived allotment. ECF 53 at 12-14. The FSA Defendants do not (and cannot) dispute these fundamental points in either their Motion to Dismiss or in their Opposition to Plaintiffs' Motion for Preliminary Injunction.

Allotment to them, so they must have jurisdiction over land they own. The FSA Defendants are wrong in both respects.

### A. Claims May Be Asserted Against *Any* Party Causing a Violation of Indian Treaties, Even if the Party Was Not a Signatory

Treaty claims may be asserted against *any* party that is causing a violation of the treaty. A treaty is the supreme law of the land. U.S. Const., art. VI, cl. 2. And treaties should be "regarded in Courts of justice as equivalent to an act of the legislature." *Medellin*, 552 U.S. at 544. Accordingly, even though the United States is the only counterparty to Indian treaties, Indian tribes frequently must bring claims against third parties for infringing upon treaty-protected rights. This includes claims that the Supreme Court and Tenth Circuit have allowed to proceed against state officials, *see, e.g.*, *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 185, 208 (1999); *Timpanogos Tribe v. Conway*, 286 F.3d 1195, 1204 (10th Cir. 2002), as well as private parties, *Mille Lacs Band*, 526 U.S. at 185, 208; *United States v. Winans*, 198 U.S. 371, 377, 384 (1905). The FSA Defendants' argument the FSAT was not a signatory to the First Treaty of Medicine Lodge is fundamentally misguided and only proves Plaintiffs' point—as a non-signatory to the First Treaty of Medicine Lodge, the FSAT has no jurisdiction within the reservation created by that same treaty (absent consent of the signatory tribes).

### B. The BIA Cannot Transfer Jurisdiction Over Allotments in Violation of Treaty

The FSA Defendants' only other argument regarding Plaintiffs' treaty claim is that the "act" of the BIA transferring the land into trust for the FSAT "extinguished the jurisdiction of the Kiowa Tribe" due to the BIA's "plenary power." ECF 59 at 7. This is

false—as explained elsewhere, it is *Congress* (not the BIA) that has plenary power over Indian affairs and therefore *only Congress* that has the power to abrogate an Indian treaty. ECF 53 at 14-15. This is something Plaintiffs know all too well, as it was Congressional abrogation of another provision of the First Treaty of Medicine Lodge that established this principle. *See Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903). As the FSA Defendants concede, at the time of allotment, the Tsalote Allotment was under Kiowa jurisdiction. ECF 59 at 7. Because the FSAT identifies no statute whereby Congress specifically authorizes the BIA to transfer jurisdiction of the Tsalote Allotment, the BIA could not do so on its own, and is in violation of the First Treaty of Medicine Lodge. *Timpanogos Tribe*, 286 F.3d at 1203 ("the Department of Interior cannot under any circumstances abrogate an Indian treaty directly or indirectly.").

The FSA Defendants' emphasis on their ownership of the parcel is merely assuming their own conclusion—they assume that they have jurisdiction because they assert that they own the land. But jurisdiction and ownership are distinct concepts. As the Supreme Court recently noted, the United States issued land patents to homesteaders that transferred legal title to land throughout the West, "[b]ut no one thinks any of this diminished the United States' claim to sovereignty over any land." *McGirt v. Oklahoma*, 140 S.Ct. 2452, 2464 (2020). To accomplish that would require "the transfer of a sovereign claim from one nation to another." *Id.* Accordingly, "adjudicating the question of whether a tract of land constitutes 'Indian lands' . . . is 'conceptually quite distinct' from adjudicating title to that land." *Kansas*, 249 F.3d at 1225 (quoting *Navajo Tribe of Indians v. New Mexico*, 809 F.2d 1455, 1475 (10th Cir. 1987)). "One inquiry has little to do with the other as land status

and land title 'are not congruent concepts in Indian law.'" *Id.* The FSA Defendants' argument that their beneficial ownership of the parcel creates jurisdiction fails.

## II. PLAINTIFFS STATE A VIABLE CLAIM AGAINST THE FSA DEFENDANTS UNDER IGRA

### A. IGRA Provides a Private Right of Action Because the FSA Defendants Are Violating their Tribal-State Compact

The FSA Defendants argue, like they did in opposition to Plaintiffs' Motion for Preliminary Injunction, that "Plaintiffs have no private right of action" under IGRA, and then go on to acknowledge that Plaintiffs do, in fact, invoke a section of IGRA that expressly provides a private right of action, 25 U.S.C. § 2710(d)(7)(A). ECF 59 at 8-9. That provision allows Plaintiffs to assert a claim for violation of the FSAT's tribal-state gaming compact. The FSA Defendants inexplicably argue that this private right of action cannot be invoked because "Plaintiffs neglect to lay any foundation by attempting to allege that the FSAT is engaging in Class III gaming thereby triggering a private right of action." ECF 59 at 9. Yet, Plaintiffs did expressly allege that the FSAT is engaging in Class III gaming at the Warm Springs Casino. ECF 51 ¶ 53. Further, the FSA Defendants admit this as an "Undisputed Fact" in their own Motion to Dismiss. ECF 59 ¶ 27.

### B. The Casino Violates the FSAT's Tribal-State Compact Because It Is Not Operating on the FSAT's "Indian Land"

The FSAT's tribal-state compact provides that "[t]he [FSA] tribe may establish and operate enterprises and facilities that operate covered games only on ***its*** Indian lands *as defined by IGRA* . . . Nothing herein shall be construed as . . . altering the federal process governing the tribal acquisition of 'Indian lands' for gaming purposes." ECF 51-7 at Part

5(L) (emphasis added). The FSAT is violating this provision because the Tsalote Allotment is not the FSAT's Indian lands—the land is not within the FSAT's jurisdiction and the land was not acquired in trust for the FSAT until after October 17, 1988, the date-certain contained in IGRA absent exceptions not available here. *See* 25 U.S.C. § 2719.

The FSA Defendants' argument on this point is again to merely conflate ownership with jurisdiction, which is plainly contradicted by the law. As noted above, the Tenth Circuit and other appellate courts have instructed that title to land is conceptually distinct from whether it is "Indian lands" as defined in IGRA. *Kansas,* 249 F.3d at 1225. Indeed, the plain text of IGRA (the definition expressly incorporated by the compact itself) states that "Indian lands" consist of "all lands within the limits of any Indian reservation" and "***any lands . . . over which an Indian tribe exercises governmental power***." 25 U.S.C. § 2703(4)(B) (emphasis added); *see also* 25 C.F.R. § 502.12. In the Tenth Circuit, a prerequisite for the exercise of governmental power over land is jurisdiction. *Kansas*, 249 F.3d at 1229. Therefore, the plain language of the FSAT's tribal-state compact requires that the FSAT have jurisdiction over the Tsalote Allotment.

Yet, for the reasons discussed above, the FSAT has no such jurisdiction—the consent of Plaintiffs would be required under the First Treaty of Medicine Lodge to transfer jurisdiction to another tribe besides the Kiowa, Comanche, or the Apache Tribe, and Plaintiffs did not provide their consent. In *addition* to the Treaty (which by itself forecloses the FSAT from gaming on the Tsalote Allotment), the Tsalote Allotment cannot be the FSAT's Indian lands, as defined by IGRA, under the tribal-state compact because the tribal-state compact incorporates the "federal process" for acquisition of trust lands. ECF

51-7 at Part 5(L). Oklahoma's offer of the compact (a model compact) expressly referenced the regulations for trust acquisitions in 25 C.F.R. Part 151. Okla. Stat. § 3A-280. The FSAT did not follow these regulations—it did not obtain Plaintiffs' written consent to acquire the land as required under § 151.8. Therefore, the FSAT's tribal-state compact location provisions do not authorize Class III gaming at the Warm Springs Casino.

Unable to argue jurisdiction, the FSA Defendants merely attempt to confuse the issue. First, they incorrectly state that the FSAT "has successfully gone through the [casino] approval process . . . overseen by the NIGC for the determination of jurisdiction and the FSAT's right to conduct gaming there." ECF 59 at 10. Not so. The NIGC has *never* made any determination that the FSAT has jurisdiction over the Tsalote Allotment or that the FSAT has the ability to conduct gaming there. Significantly, the NIGC has a regulatory process that permits an Indian tribe to ask for the NIGC to issue an Indian lands opinion under 25 C.F.R. § 292.3, but the FSAT *never* followed this process. Instead, the FSAT simply noticed the NIGC that it would be conducting gaming on the Tsalote Allotment. Under 25 C.F.R. § 559.2, this is not an "approval process" that results in any jurisdictional determination.

Notably, when the FSA Defendants made this argument in the preliminary injunction context, they were afforded an opportunity to submit proof of their allegations that the NIGC had made a "determination" that the FSAT has jurisdiction over the Tsalote Allotment, but offered no such evidence. The FSA Defendants showed only that they had alerted the NIGC to the existence of the casino, and that the NIGC had taken no action yet to force the closure of the casino. Here, in the context of a motion to dismiss, the FSA

Defendants' argument is even weaker. Plaintiffs' claims must be measured by the contents of the Amended Complaint, not by unsupported "facts" outside of it. *Gee v. Pacheco*, 627 F.3d 1178, 1186 (10th Cir. 2010). Here, of course, the Amended Complaint alleges only that the FSA Defendants have no jurisdiction over the Tsalote Allotment. ECF 51 ¶¶ 1, 24, 37-38, 48, 61-62, 83-84.

Lastly, the FSA Defendants attempt to further confuse the issue by arguing that the Comanche Nation's tribal-state compact is invalid. That issue is the subject of a separate action (*Cherokee Nation v. U.S. Dep't of Interior*, 2021 U.S. Dist. LEXIS 166836 (D.D.C. 2021)[3] and is irrelevant to the issues here. That the FSA Defendants resort to an *ad hominem* attack is indicative of the lack of merit of their argument.

## III. PLAINTIFFS STATE A VIABLE RICO CLAIM

### A. Plaintiffs Sufficiently Plead a RICO Claim Against the FSA Defendants

To state a claim under RICO, Plaintiffs must "plausibly allege" that the FSA Defendants "conducted the affairs of an enterprise through a pattern of racketeering activity." *George v. Urban Settlement Servs.*, 833 F.3d 1242, 1248 (10th Cir. 2016) (internal numbering omitted). As detailed in the Amended Complaint, Plaintiffs more than satisfy this standard. The FSAT is an enterprise that affects interstate commerce, the FSA Defendants are associated with that enterprise (they are tribal officials), and the FSA

[3] As explained in that action, if the Comanche Nation's 2020 compact were ruled invalid, then the provision of that compact rescinding the Comanche Nation's prior compact would also be invalid and that prior compact would go back into effect. Accordingly, the Comanche Nation's ability to conduct Class III gaming would be unaffected because either way it is a party to a tribal-state compact.

Defendants have conspired to conduct the affairs of that enterprise (the FSAT) through a pattern of racketeering activity. *See* 18 U.S.C § 1962(c) (elements of RICO claim); *see also* ECF 51 ¶¶ 111-127. In particular, the FSA Defendants have conspired[4] to have the FSAT own and operate the Warm Springs Casino. The operation of the Warm Springs Casino constitutes a pattern of racketeering because the Warm Springs Casino is an illegal gambling business under 18 U.S.C. § 1955. Oklahoma state law does not authorize the Warm Springs Casino, and it meets all other elements of § 1955. ECF 51 ¶¶ 111-123. Using the proceeds of that illegal gambling to carry on the business the Warm Springs Casino is further racketeering activity under 18 U.S.C. §§ 1956, 1967. *Id.* ¶¶ 111-125. And, this pattern of racketeering has injured Plaintiffs' business, their own (lawful) casinos. *Id.* ¶¶ 127-140. At the pleadings stage, Plaintiffs are not required to allege more.

In fact, the FSA Defendants do not actually argue that the elements of Plaintiffs' RICO claim are not adequately alleged. Instead, they argue that there is "no evidence" that they "engaged in a pattern of racketeering activity." ECF 59 at 12. Plaintiffs need no evidence at all. A Rule 12 motion tests the legal sufficiency of the Complaint, not the evidence. *Aspen Orthopaedics & Sports Med., L.L.C. v. Aspen Valley Hosp. Dist.*, 353 F.3d 832, 837 (10th Cir. 2003) ("The court's function on a Rule 12(b)(6) motion is not to

[4] The FSA Defendants misleadingly suggest that Plaintiffs allege that the federal government is a participant in their conspiracy. ECF 59 at 12. The FSA Defendants make this false statement to foment the impression that the federal government has somehow blessed or approved of the Warm Springs Casino. The federal government has done no such thing—instead, the federal government has merely stayed silent as the FSA Defendants have violated the law. The federal government's abdication of its duties to protect Plaintiffs' lawful means of economic development is the subject of a separate and independent claim against the Federal Defendants.

weigh potential evidence that the parties might present at trial, but to assess whether the plaintiff's complaint alone is legally sufficient . . ."). The FSA Defendants have not identified any legal deficiency within the Amended Complaint itself—and their argument about "evidence" is fundamentally misplaced.

### B. IGRA Is Not A Defense to Plaintiffs' RICO Claim Because Warm Springs Casino Violates IGRA

In addition to arguing the "evidence," the FSA Defendants attempt to argue an affirmative defense—that the Warm Springs Casino is authorized by IGRA. If true, the FSA Defendants' gaming at the Warm Springs Casino would be exempt from state law prohibitions on gambling under 18 U.S.C. § 1166(c), and therefore not a predicate act for a RICO claim under 18 U.S.C. § 1955. Generally, the Court should not evaluate the merits of an affirmative defense on a Rule 12(b)(6) motion, but if the Court were to consider the argument—it fails completely. IGRA does not authorize the Warm Springs Casino.

To start, as it concerns Class III gaming, the Warm Springs Casino violates the FSAT's tribal-state compact, as discussed above at length. The Tsalote Allotment is not the FSAT's "Indian lands, as defined by IGRA" because the FSAT can have no jurisdiction over the Tsalote Allotment, which is an original Kiowa allotment. This lack of jurisdiction means that the Warm Springs Casino not only violates the tribal-state compact, but also violates IGRA's provisions for both Class II and Class III gaming requiring the FSAT to have jurisdiction over land before it conducts gaming there. 25 U.S.C. § 2710(b)(d).

Moreover, *even if* the FSAT had somehow acquired jurisdiction over the Tsalote Allotment, it still may not game there because it is "newly acquired land" (a defined term

under IGRA) for the FSAT. The BIA did not acquire the Tsalote Allotment in trust for the benefit of the FSAT until 2001, ECF 51 ¶ 93, well after the IGRA deadline of October 17, 1988. 25 U.S.C. § 2719(a). Accordingly, it is indisputable that the FSAT may not game on the Tsalote Allotment unless some exception to the October 17, 1988 cutoff exists.

The exception that the FSA Defendants attempt to invoke is for former reservations in Oklahoma, "as defined by the Secretary [of Interior.]" 25 U.S.C. § 2719(a)(2)(A)(i). The Tsalote Allotment, however, is within the KCA Reservation, and the KCA Reservation is *not* the FSAT's former reservation as defined by the Secretary. In fact, the Secretary of Interior is prohibited from taking the position that the KCA Reservation is the FSAT's former reservation because an express condition of the settlement of the prior *Comanche Nation* litigation was the Department of Interior withdraw the legal opinions that suggested the FSAT shared in ownership of the KCA Reservation. ECF 51 ¶¶ 40, 42.

Rather than arguing that Interior recognizes the KCA Reservation as the FSAT's "former reservation," as required by the statutory language, the FSA Defendants argue, without citation, that the "United States Congress has officially recognized the FSAT's former reservation lands as being within the state of Oklahoma." ECF 59 at 12. The FSA Defendants are presumably referring to a 1999 amendment to a mineral leasing act that they have cited previously, Public Law 106-67. This argument defies logic—Congress could not have intended to give the FSAT a share in title to the KCA Reservation (ninety-nine years after the FSA Defendants contend Congress disestablished that reservation) for gaming purposes through a minor amendment to a mineral leasing act.

The FSA Defendants' argument is also unsupported by the actual text of Public Law 106-67. Public Law 106-67 amended a prior statute concerning mineral leasing in North Dakota to allow similar leases in Oklahoma—both inside and outside of the KCA Reservation. In particular, the definition of Indian lands for mineral leasing was amended to be land that:

> (i) is located within—
> (I) The Fort Berthold Indian Reservation in North Dakota; or
> (II) A former Indian reservation located in Oklahoma of—
> (aa) the Comanche Indian Tribe;
> (bb) the Kiowa Indian Tribe;
> (cc) the Apache Tribe;
> (dd) the Fort Sill Apache Tribe of Oklahoma;
> (ee) the Wichita and Affiliated Tribes (Wichita, Keechi, Waco, and Tawakonie) located in Oklahoma;
> (ff) the Delaware Tribe of Western Oklahoma; or
> (gg) the Caddo Indian Tribe . . .

Public Law 10-67, 113 Stat. 979-80 (Oct. 6, 1999). Nothing in this statute mentions the KCA Reservation by name much less deems it the "former reservation" of the FSAT for gaming purposes. Indeed, the text references the Wichita and Affiliated Tribes, the Delaware Tribe, and the Caddo Indian Tribe, and no one has ever suggested that those tribes have been given title to the KCA Reservation (these tribes have their own former reservation elsewhere in Oklahoma). Therefore, the text's reference to "[a] former Indian reservation" does not evince an intent that jurisdiction to the KCA Reservation is being transferred, but rather is merely a general statement recognizing that these allotments happened to be within one of several former Indian reservations.

Because the KCA Reservation is not the FSAT's "former reservation, as defined by the Secretary," the Tsalote Allotment is *not* within the FSAT's "former reservation."

Therefore, the FSAT cannot invoke the "former reservation" exception to the prohibition on gaming on lands acquired after October 17, 1988, 25 U.S.C. § 2719(a)(2)(A), and the Warm Springs Casino is illegal.

### C. RICO Supplies Private Right of Action to Address Illegal Gambling

In reply, the FSA Defendants may argue that no private of action exist under IGRA, and therefore Plaintiffs cannot complain about the FSAT's IGRA violations through a RICO claim. This is one reading of the Court's Order denying Plaintiffs' Motion for a Temporary Restraining Order. But, Plaintiffs' RICO claim does not require IGRA to provide a private right of action because RICO *itself* supplies that private right of action to stop illegal gambling businesses through its "civil remedies" provision, 18 U.S.C. § 1964.

Nearly all of the "racketeering activity" that RICO seeks to address comes from the United States Criminal Code. *See* 18 U.S.C. § 1961. This includes 18 U.S.C. §§ 1955, 1956 and 1957—violations of which by the FSA Defendants constitute the pattern of racketeering activity that Plaintiffs allege here. Obviously, no private right of action ordinarily exists for private parties to enforce federal criminal laws. However, the entire point of civil RICO is to allow a private party to enforce those laws when the other elements of a civil RICO claim are met. Because the Warm Springs Casino is an "illegal gambling business" as defined in 18 U.S.C. § 1955, RICO provides a civil cause of action for Plaintiffs to pursue.

The only relevance of IGRA to this analysis is that IGRA could potentially provide a *defense* to the allegation that the Warm Springs Casino is an illegal gambling business. If IGRA authorizes the Warm Springs Casino, then 18 U.S.C. § 1955 does not apply (which

in turn would provide a defense to §§ 1956 and 1957). 18 U.S.C. § 1166(c). But, as discussed above, that defense fails because the Warm Springs Casino is ineligible for IGRA-sanctioned gaming, and is therefore a violation of § 1955. *See United States v. E.C. Invs.*, 77 F.3d 327, 330-31 (9th Cir. 1996) (holding that § 1955 applies to an Indian tribe's casino, and the consultants operating that casino, where the tribe had not complied with IGRA's requirements for Class III machines). Because the Warm Springs Casino violates § 1955 (and by extension §§ 1956, 1957), RICO supplies a private right of action.

**D. The FSA Defendants Are Persons Subject to Suit Under RICO**

The FSA Defendants next claim RICO is not enforceable against tribal officials because tribal officials are not expressly identified as persons or entities subject to RICO. Defendants' argument is not supportable.[5] First, "laws of general applicability apply with full force to tribes unless Congress has explicitly provided otherwise," *Wilhite v. Awe Kualawaache Care Ctr.*, 2018 U.S. Dist. LEXIS 125383, *4, 2018 WL 3586539 (D. Mont. July 25, 2018) (holding that tribes are not exempt from RICO), and the RICO statute makes no mention of Indian tribes or tribal officials. The statute therefore plainly does not evince any Congressional intent that tribal officials should be excluded from RICO.

Second, RICO defines "person" to include "any individual or entity capable of holding a legal or beneficial interest in property," 18 U.S.C. § 1961(3), and "that broad

[5] The FSA Defendants cite to no authority indicating that Tribal officials are not included among the "persons" that are subject to RICO. Each of the cases cited by the FSAT Defendants pertains to claims asserted under the False Claims Act, a wholly unrelated statute passed by Congress for wholly unrelated purposes.

definition contains no specific exemption for tribes." *Gingras v. Rosette*, Case No. 15-cv-101, 2016 U.S. Dist. LEXIS 66833, *82 (D. Vt. May 18, 2016).

Lastly, numerous courts throughout the country have permitted RICO claims to proceed against tribal officials in their official capacities. *JW Gaming Dev., LLC v. James*, 2020 U.S. Dist. LEXIS 60264, *9, 2020 WL 1667423 (N.D. Cal. Apr. 3, 2020) (denying tribal defendant's motion for summary judgment to dismiss civil RICO claims); *Miccosukee Tribe of Indians of Fla. v. Cypress*, 814 F.3d 1202, 1205 (11th Cir. 2015) (considering the merits of civil RICO claims against former tribal officials); *Gingras v. Think Fin., Inc.*, 922 F.3d 112, 124 (2nd Cir. 2019) (holding that RICO "applied substantively to the Tribe" in suits for "prospective, injunctive relief"); *Brice v. Haynes Invs., LLC*, 548 F. Supp. 3d 882, 901 (N.D. Cal. 2021) (denying summary judgement on RICO claims against employees of tribal entity). And the only court that has considered the FSA Defendants' argument that tribal officials are not "persons" within the meaning of the RICO statute has rejected it. *Rosette*, 2016 U.S. Dist. LEXIS 85.

In fact, Defendants sole citation in support of their RICO-specific immunity argument directly contradicts their position: "tribal officials in their official capacity may be sued for injunctive relief for conduct occurring outside of [the tribe's] Indian lands that violates 18 U.S.C. § 1962." *Rosette*, 2016 U.S. Dist. LEXIS 85. This is precisely the relief Plaintiffs seek here. The Tsalote Allotment is the Kiowa Tribe's Indian lands, and therefore Plaintiffs seek injunctive relief to stop an illegal gambling business occurring outside of the FSAT's Indian lands that violates RICO.

## IV. THE FSA DEFENDANTS ARE NOT IMMUNE FROM SUIT, AND THE FSAT IS NEITHER A NECESSARY NOR INDISPENSABLE PARTY

The FSA Defendants argue in circles that the FSAT is immune from suit. While acknowledging that the *Ex parte Young* doctrine permits suits against tribal officials in their official capacities, the FSA Defendants simply argue that they are immune because Plaintiffs' claims fail on the merits. ECF 59 at 15-16. Because Plaintiffs have adequately alleged their claims, as discussed above, *the Ex parte Young* doctrine applies, as the Court has already concluded. ECF 31 at 10.[6]

Because the FSA Defendants are sued in their official capacities as tribal officials of the FSAT, the FSAT cannot be a necessary and indispensable party under Fed. R. Civ. P. 19. "By this logic, virtually all public and private activity on Indian lands would be immune from any oversight[.]" *Diné Citizens Against Ruining Our Env't v. U.S. Office of Surface Mining Reclamation & Enforcement*, No. 12-cv-1275, 2013 U.S. Dist. LEXIS at *6 (D. Colo. 2013). "This is neither the intent nor the import of Indian sovereign immunity." *Id.* Accordingly, the Tenth Circuit has already rejected the same argument the FSA Defendants make here. In *Kansas*, the State of Kansas and three Indian tribes operating gaming facilities in the State filed suit against the Secretary of Interior to prevent her from taking a tract of land into trust on behalf of the Wyandotte Tribe and approving gaming activities on the tract. Officials of the Wyandotte Tribe were also named as

[6] Moreover, for the claim brought against the FSA Defendants in their individual capacities, sovereign immunity cannot apply under binding Supreme Court precedent. *Lewis*, 137 S. Ct. at 1292-93. While *Lewis* acknowledged that personal immunity defenses "distinct from sovereign immunity" may apply to officials, *id.* at 1293 n.2, the FSA Defendants identify no such personal immunity defense.

defendants, but the Tribe itself was not. After the district court dismissed the action under Fed. R. Civ. P. 12(b)(7) on the grounds that the Wyandotte Tribe was a necessary and indispensable party who could not be joined due to sovereign immunity, the Tenth Circuit reversed. While the Tenth Circuit acknowledged the Wyandotte Tribe had a strong interest in the case, it concluded that the Tribe was neither a necessary nor indispensable party under Rule 19 because (i) its interests would be adequately protected by the federal defendants and tribal officials and (ii) nothing indicated that the Tribe's absence created a risk of subjecting parties to multiple or inconsistent obligations. 249 F.3d at 1226-27.

The D.C. Circuit reached the same result in *Vann v. United States D.O.I.*:

> As a practical matter, therefore, the Cherokee Nation and the Principal Chief in his official capacity are one and the same in an *Ex parte Young* suit for declaratory and injunctive relief. As a result, the Principal Chief can adequately represent the Cherokee Nation in this suit, meaning that the Cherokee Nation is not a required party for purposes of Rule 19. By contrast, if we accepted the Cherokee Nation's position, official-action suits against government officials would have to be routinely dismissed, at least absent some statutory exception to Rule 19, because the government entity in question would be a required party yet would be immune from suit and so could not be joined. But that is not how the *Ex parte Young* doctrine and Rule 19 case law has developed.

701 F.3d 927, 929-30 (D.C. Cir. 2012).

In the alternative, if the Court believes the FSAT is a necessary party, Plaintiffs respectfully request leave to add it as a party. Significantly, the FSAT would not be immune in this action due to the "immovable property exception" to sovereign immunity. The key issue in this case is whether the Kiowa Tribe or the FSAT has jurisdiction over the Tsalote Allotment. When two sovereigns dispute who has jurisdiction over territory, the common-law "immovable property exception" to sovereign immunity typically applies.

*See generally Upper Skagit Indian Tribe v. Lundgren*, 138 S.Ct. 1649, 1655-63 (2018) (Roberts, J., concurring); *Cayuga Indian Nation of N.Y. v. Seneca Cty.*, 978 F.3d 829, 835-37 (2d Cir. 2020). Moreover, with respect to Plaintiffs' IGRA claim under § 2710(d)(7)(A)(ii), Congress has waived the FSAT's sovereign immunity. *See* ECF 31 at 10 n.5 *(citing Michigan v. Bay Mills Indian Cmty*., 572 U.S. 782, 791 (2014): IGRA "abrogates tribal sovereign immunity" as to actions "to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact.").

## V. THE APACHE TRIBE AND KCAILUC ARE NOT NECESSARY OR INDISPENSABLE PARTIES

Under Rule 19(a), a party is required to be joined if (A) the court cannot accord complete relief among existing parties in that party's absence, or (B) the party claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may: "(i) as a practical matter impair or impede the person's ability to protect the interest; or (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest." Fed. R. Civ. P. 19(a). The FSA Defendants argue that the Apache Tribe and the KCAILUC[7] are necessary parties under Rule 19(a), but fail to show that complete relief cannot be accorded in their absence or that the outcome of this litigation will affect their interests.

[7] The FSA Defendants do not explain why KCAILUC—which is not a tribe that can possess sovereign jurisdiction but rather an intertribal association with representatives from Plaintiffs and the Apache Tribe—is a necessary party. But the FSA Defendants appear to think that, because the Apache Tribe is a constituent of KCAILUC, the KCAILUC stands in the shoes of the Apache Tribe for jurisdictional purposes. Plaintiffs disagree with this implicit premise, but the Court need not address it because the Apache Tribe is not a necessary party under Rule 19(a).

In fact, the FSA Defendants' entire argument on this point is built on a flawed premise. The FSA Defendants argue that because the Comanche Nation alleges it shares jurisdiction over the Tsalote Allotment, the Apache Tribe must also have jurisdiction over the allotment, and any decision regarding jurisdiction over the allotment must involve all tribes with a claim to it. ECF 59 at 19-29. But, the FSA Defendants misunderstand Plaintiffs' allegations. To be clear, Plaintiffs allege that the *Kiowa Tribe* has jurisdiction over the Tsalote Allotment, not the Comanche Nation. That is the significance of the prior *Comanche Nation* litigation settlement—the settlement recognized that jurisdiction over allotments within the KCA Reservation resides with the tribe in which the original allottee was enrolled. ECF 51 ¶¶ 38-42; *see also id.* ¶ 27. George Tsalote was a Kiowa and not Apache, and the Apache Tribe has never claimed to have jurisdiction over the Tsalote Allotment.

The Comanche Nation's interest in this action does not depend upon any sovereign jurisdiction over the Tsalote Allotment, but rather it turns on the Defendants' deprivation of Comanche Nation's sovereign authority under the terms of the First Treaty of Medicine Lodge to refuse consent to tribes acquiring jurisdiction over land within the KCA Reservation. *Id.* ¶ 22. Significantly, Comanche Nation's refusal to consent to the FSAT's acquisition of jurisdiction would be effective regardless of whether the Apache Tribe consented (which it has not). Therefore, complete relief can be accorded among the existing parties, and the interests of the Apache Tribe do not make it a necessary party. The lack of consent of either the Comanche Nation or Kiowa Tribe is alone determinative

of the question of the FSAT's jurisdiction, and participation of additional parties is not required.

Similarly, the KCAILUC is not a necessary party. The KCAILUC is not a federally recognized Indian tribe. *See* Indian Entities Recognized by and Eligible to Receive Services From the United States Bureau of Indian Affairs, 87 Fed. Reg. 4636, 4636-4641 (Jan. 28, 2022). It is merely a committee formed from representatives of the Kiowa Tribe, Comanche Nation, and Apache Tribe. ECF 51 ¶ 48. The purpose of this committee is to administer lands jointly owned by the three tribes. The Tsalote Allotment is not one of the lands jointly owned by the three tribes, as it was an original Kiowa allotment. Contrary to the FSA Defendants' arguments, the KCAILUC does not have any claim to jurisdiction over the Tsalote Allotment and is therefore not a necessary party. Because the Apache Tribe and KCAILUC are not necessary parties, they cannot be indispensable parties. *Citizen Potawatomi Nation v. Norton*, 248 F.3d 993, 997 (10th Cir. 2001).

## CONCLUSION

The Court should deny the FSA Defendants' Motion to Dismiss.

Dated: August 4, 2022

Respectfully submitted,

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