

No. 24-6221

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Comanche Nation,

Plaintiff/Appellee,

v.

Lori Gooday Ware, et al.,

Defendants/Appellants.

Appeal from the United States District Court for the Western District of
Oklahoma,

Case No. 22-CV-00425-G (Hon. Charles B. Goodwin)

APPELLANTS' OPENING BRIEF

Oral Argument Requested

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STATEMENT OF RELATED CASES

Counsel for Appellants is not aware of any prior or related appeals.

JURISDICTIONAL STATEMENT

As explained below, the claims against the Appellants—members of the Fort Sill Apache Tribe’s Business Committee and Commissioners of the Fort Sill Apache Gaming Commission, named in both their official and individual capacities (“Tribal Officials”)—are barred by sovereign immunity. Accordingly, the district court does not have jurisdiction over these claims. *See Miner Elec., Inc. v. Muscogee (Creek) Nation*, 505 F.3d 1007, 1009 (10th Cir. 2007) (sovereign immunity deprives a court of subject matter jurisdiction).

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 and the collateral order doctrine. *See, e.g., Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1177 n.1 (10th Cir. 2010) (“A district court’s order denying a motion to dismiss involving a claim of tribal sovereign immunity is an immediately appealable collateral order.”). The Court also has jurisdiction to consider the Tribal Officials’ alternative defense of qualified immunity, and should do so because it is closely intertwined with sovereign immunity and resolving it now serves the interest of judicial economy. *Behrens v. Pelletier*, 516 U.S. 299, 307 (1996) (“[A]n order rejecting the defense of qualified immunity at either the dismissal stage or the summary judgment stage is a ‘final’ judgment subject to

immediate appeal.”); *Moore v. City of Wynnewood*, 57 F3d. 924, 928–29 (10th Cir. 1995) (recognizing limited pendent appellate jurisdiction where the issues are inextricably intertwined or necessary to ensure meaningful review).

The district court denied, in part, the Tribal Officials’ motion to dismiss on September 30, 2024. App. Vol. 3 at 235–57. The Tribal Officials timely filed their Notice of Appeal on October 15, 2024. Fed. R. App. P. 4(a)(1); App. Vol. 3 at 258.

ISSUES PRESENTED FOR APPEAL

1. Whether Comanche Nation can circumvent the Fort Sill Apache Tribe’s sovereign immunity by naming tribal officials in their official and personal capacities as defendants when the Tribe is the real party in interest.

2. Whether IGRA or RICO permit a third party to bring claims against a tribe or its officials, where the statutes provide a comprehensive remedial scheme but contain no abrogation of tribal sovereign immunity or private right of action for such claims.

3. Whether tribal officials are entitled to qualified immunity from claims asserted against them in their individual capacities, where Comanche Nation has not alleged that any official acted outside the scope of his or her discretionary authority or violated a clearly established right.

STATEMENT OF THE CASE

In 1901, the United States took a 160-acre parcel of land in southwestern Oklahoma into trust on behalf of George Tsalote, a member of the Kiowa Tribe, pursuant to the Dawes Act, which provided for allotment of Indian lands to individual Indians. App. Vol. 3 at 237; App. Vol. 2 at 11 ¶¶ 25, 28; 25 U.S.C. Ch. 9 (1887). The beneficiaries of that trust parcel (referred to hereinafter as the “Tsalote Allotment”) changed from heir-to-heir over the course of a century, and in 2001, the Bureau of Indian Affairs approved a sale of the full beneficiary interest to the Fort Sill Apache Tribe (“Tribe”). App. Vol. 2 at 16 ¶ 46; App. Vol. 3 at 237.

After acquiring the full beneficiary interest in the Tsalote Allotment, the Fort Sill Apache Tribe opened a gas station and convenience store on the property. App. Vol. 1 at 207. For several years, it operated the business without any significant dispute or action related to its activities on the land. App. Vol. 1 at 109–10, 120, 140, 180. During this time, the Tribe entered into a Tribal-State gaming compact with the State of Oklahoma, which was approved by the Department of the Interior in 2005, laying the foundation for the Tribe’s future gaming operations. App. Vol. 3 at 202, 237.

In 2020, the Fort Sill Apache Tribe submitted a letter to the National Indian Gaming Commission (“NIGC”), per 25 C.F.R. § 559.2, informing the NIGC of its intent to construct and open a new tribal gaming facility on the Tsalote Allotment.

App. Vol. 3 at 237. Though the NIGC received a letter from the Kiowa-Comanche-Apache Intertribal Land Use Committee setting forth reasons why it believed the lands might not be eligible for gaming, the NIGC implicitly disagreed—NIGC never expressed any concern to the Fort Sill Apache Tribe, and it declined to take any enforcement action. App. Vol. 2 at 17 ¶¶ 51–52; App. Vol. 3 at 202–03, 238. In 2022, the Fort Sill Apache Gaming Commission issued Class II and Class III Gaming Licenses for the new gaming facility, the Warm Springs Casino (“Casino”). App. Vol. 3 at 40, 42. With facility licenses and no noted NIGC concerns, the Fort Sill Apache Tribe proceeded to open the Casino on June 15, 2022. App. Vol. 2 at 17 ¶ 53; App. Vol. 3 at 238.

Just three weeks before the Casino’s opening, two neighboring tribes, Appellee/Plaintiff Comanche Nation and former Plaintiff Kiowa Tribe,¹ brought this suit. App. Vol. 1 at 34–61. In their operative Amended Complaint, Comanche Nation and Kiowa Tribe (jointly, “Plaintiffs”) asserted claims under the Administrative Procedure Act (“APA”) against the Department of the Interior and officials of the Bureau of Indian Affairs (“Interior Defendants”), alleging that their approval of the Fort Sill Apache Tribe’s acquisition of the interest in the Tsalote Allotment violated 25 C.F.R. § 151.8 (now 25 C.F.R. § 151.7) because Interior failed to obtain consent

¹ Kiowa Tribe voluntarily dismissed its claims. App. Vol. 3 at 136–46.

from the Kiowa Tribe, Comanche Nation, and Apache Tribe. App. Vol. 2 at 19–22. Plaintiffs also alleged that by allowing the Fort Sill Apache Tribe to own or exercise jurisdiction over land within the former Kiowa-Comanche-Apache Reservation, the Interior Defendants were violating the Second Medicine Lodge Treaty. App. Vol. 2 at 23–24. Plaintiffs also sued the Chairman of the National Indian Gaming Commission (“NIGC Defendant”) under the APA to compel agency action to halt the Casino’s operations. App. Vol. 2 at 36–38. (The Interior Defendants and NIGC Defendant are collectively referred to herein as the “Federal Defendants.”) Finally, Plaintiffs brought claims against the Tribal Officials/Appellants—six members of the Fort Sill Apache Tribe’s Business Committee (its governing body) and five Commissioners of the Fort Sill Apache Gaming Commission (which regulates the Tribe’s gaming operations), named in both their official and individual capacities. They alleged that the Tribal Officials were acting in violation of the First Medicine Lodge Treaty (Count Three), the Indian Gaming Regulatory Act (“IGRA”) (Count Four), and the Racketeer Influenced and Corrupt Organizations Act (“RICO”) (Count Five). App. Vol. 2 at 24–36. Plaintiffs apparently recognized that the Fort Sill Apache Tribe itself cannot be sued and did not name the Tribe as a Defendant. App. Vol. 2 at 3.

Plaintiffs twice sought injunctive relief to stop the Casino’s operations, which the district court twice denied, both times concluding that Comanche Nation failed

to show that it is likely to succeed on the merits of any of its legal claims. App. Vol. 1 at 62–64 (motion for TRO); App Vol. 1 at 205–221 (order denying TRO); App. Vol. 2 at 202–203 (motion for PI); App. Vol. 3 at 254–56 (denial of PI).

Both the Tribal Officials and the Federal Defendants moved to dismiss Plaintiffs’ claims. *See* App. Vol. 1 at 22–29 (ECF Dkt. # 59, 63, 123, 124). After extensive briefing on threshold jurisdictional issues and Plaintiffs’ request for a preliminary injunction—*see, e.g.*, App. Vol. 2 at 237–67 (Tribe’s motion to dismiss); App. Vol. 3 at 77–109 (opposition); *id.* at 110–20 (reply); *id.* at 147–59 (Tribe’s supplemental motion to dismiss); *id.* at 160–88 (opposition); *id.* at 189–99 (reply); *see also* App. Vol. 1 at 22–30 (identifying additional briefing)—the district court issued two rulings. First, it granted the Federal Defendants’ motions to dismiss in full, rejecting all claims brought under the APA and the Second Medicine Lodge Treaty. App. Vol. 3 at 200–34. Second, the court granted in part and denied in part the Tribal Officials’ motions to dismiss. App. Vol. 3 at 235–57. While it properly dismissed Comanche Nation’s claim under the First Medicine Lodge Treaty (Count Three), it declined to dismiss two remaining claims against the Tribal Officials: the IGRA claim (Count Four) and the RICO claim (Count Five). *Id.*

The other parties do not challenge either order, so this appeal concerns only whether the Tribal Officials are immune from suit.

SUMMARY OF THE ARGUMENT

Comanche Nation's IGRA and RICO claims should have been dismissed because they are barred by tribal sovereign immunity. Comanche Nation seeks to circumvent this immunity by nominally suing tribal officials, instead of the Fort Sill Apache Tribe itself. But the Tribe is the real party in interest, and longstanding precedent holds that sovereign immunity cannot be avoided by simply naming officials instead of the sovereign. *See Lewis v. Clarke*, 581 U.S. 155, 161 (2017); *Native Am. Distrib. v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1297 (10th Cir. 2008).

The Tribe has not waived its immunity, and Congress has not abrogated tribal sovereign immunity under IGRA or RICO for the type of claims Comanche Nation asserts. IGRA provides a cause of action only in narrow circumstances—namely, suits brought by the United States, or by compacting parties, over gaming on Indian lands. 25 U.S.C. § 2710(d)(7); *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 791 (2014). RICO, for its part, provides no private cause of action to seek injunctive relief and contains no abrogation of tribal immunity. 18 U.S.C. § 1964(c); *see, e.g., Snedeker v. Colorado et al.*, No. 24-1173, 2025 WL 831345, at *2 (10th Cir. Mar. 17, 2025). Comanche Nation's claims do not fit into IGRA's or RICO's remedial schemes.

Comanche Nation also cannot invoke *Ex parte Young* to avoid sovereign immunity. The Supreme Court has expressly held that *Ex parte Young* is unavailable under IGRA. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 75 n.17 (1996). Comanche Nation’s novel attempt to use RICO to enjoin the Tribe’s gaming operations is likewise foreclosed by IGRA’s remedial scheme and the absence in RICO of any cause of action for private parties to seek injunctive relief. *See Hengle v. Treppa*, 19 F.4th 324, 356–57 (4th Cir. 2021).

Finally, Comanche Nation’s claim against the Tribal Officials in their individual capacities for monetary damages fails for two independent reasons. First, because Comanche Nation’s claims rest entirely on the Tribe’s conduct—and not on any individualized misconduct—the Tribe is the real party in interest, and the officials are entitled to assert the Tribe’s sovereign immunity. *Native Am. Distrib.*, 546 F.3d at 1296–97. Second, even if this Court were to conclude that the Tribe is not the real party in interest, the Tribal Officials are entitled to qualified immunity, as Comanche Nation has not identified an action by any individual that violated a clearly established right. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Indeed, Comanche Nation does not allege any individual conduct at all. Its Complaint rests entirely on the assertion that the *Tribe’s* gaming operations are unlawful.

Accordingly, this Court should reverse the district court's order denying the Tribal Officials' motions to dismiss Comanche Nation's IGRA and RICO claims.

ARGUMENT AND AUTHORITIES

I. This Court's Review Is *De Novo*.

This Court reviews *de novo* a district court's determination of subject matter jurisdiction, including whether tribal sovereign immunity bars the suit. *See Miner Elec.*, 505 F.3d at 1009. Similarly, this Court reviews *de novo* the question of whether defendants are entitled to qualified immunity, at this stage accepting all well-pleaded factual allegations in the complaint as true and viewing them in the light most favorable to the plaintiff. *Montoya v. Vigil*, 898 F.3d 1056, 1065 (10th Cir. 2018).

II. Comanche Nation's Claims Are Barred Because the Fort Sill Apache Tribe, the Real Party in Interest, Is Immune from Suit.

Indian tribes are sovereign governments, and like other sovereigns, they are immune from suit unless Congress has unequivocally abrogated that immunity or the tribe has clearly waived it. *See Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509 (1991); *Fletcher v. United States*, 116 F.3d 1315, 1324 (10th Cir. 1997). As discussed below, the Fort Sill Apache Tribe has not waived its sovereign immunity in this case, nor has Congress abrogated it for the types of claims Comanche Nation asserts. The Tribe is therefore immune from suit.

Tellingly, Comanche Nation did not even attempt to sue the Fort Sill Apache Tribe directly. And its own pleadings concede that the Tribe “cannot be liable for money damages due to sovereign immunity.” App Vol. 2 at 19 ¶ 59. Instead, Comanche Nation seeks to do indirectly what it cannot do directly: impose liability on the Fort Sill Apache Tribe by suing its officials. But that effort is foreclosed by well-established precedent.

When a party sues a government officer, courts look past labels to determine whether the sovereign is the “real, substantial party in interest.” *See Native Am. Distrib.*, 546 F.3d at 1296; *see also Lewis*, 581 U.S. at 161 (citing *Hafer v. Melo*, 502 U.S. 21, 25 (1991)). “In making this assessment, courts may not simply rely on the characterization of the parties in the complaint, but rather must determine in the first instance whether the remedy sought is truly against the sovereign.” *Lewis*, 581 U.S. at 162. The suit is against the sovereign—even if framed as a suit against officials—where “the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration,” or “if the effect of the judgment would be to restrain the Government from acting, or to compel it to act.” *Dugan v. Rank*, 372 U.S. 609, 620 (1963) (internal marks omitted); *see also Native Am. Distrib.*, 546 F.3d at 1296–98 (looking to the relief sought and the allegations of the complaint).

If the suit is effectively against the sovereign, then a “plaintiff generally may not avoid the operation of tribal immunity by suing tribal officials.”² *Native Am. Distrib.*, 546 F.3d at 1296–97 (citing *Fletcher*, 116 F.3d at 1324); *see also Kenai Oil & Gas, Inc. v. Dep’t of the Interior*, 522 F. Supp. 521, 531 (D. Utah 1981) (“Tribal immunity may not be evaded by suing tribal officers”), *aff’d*, 671 F.2d 383 (10th Cir. 1982).

Suits against tribal officials in their official capacities are generally understood as suits in which the tribe is the real party in interest. *See Native Am. Distrib.*, 546 F.3d at 1296. As the Supreme Court explained in the analogous context of suits against state officials, suits against government officers in their official capacities “generally represent only another way of pleading an action against an entity of which an officer is an agent,” so officers are entitled to the same immunities as the sovereign they represent. *Kentucky v. Graham*, 473 U.S. 159, 165–66 (1985); *Native Am. Distrib.*, 546 F.3d at 1296.

And even when officials are nominally sued in their individual capacities, a plaintiff’s allegations and requested relief may reflect that the real party in interest is actually the sovereign, and the individuals thus share in the sovereign’s immunity.

² The *Ex parte Young* doctrine provides a limited exception to the general rule that government officials are immune from suit unless sovereign immunity has been waived or abrogated. But as addressed below in section IV, the *Ex parte Young* exception does not apply to Comanche Nation’s claims in this case.

See Native Am. Distrib., 546 F.3d at 1296–97; *Mestek v. Lac Courte Oreilles Cmty. Health Ctr.*, 72 F.4th 255, 261 (7th Cir. 2023) (though tribal health center employees were sued in both their official and personal capacities, they were entitled to sovereign immunity because the requested relief “would effectively run against the Tribe”); *see also Breakthrough Mgmt. Grp., Inc.*, 629 F.3d at 1180 n.6 (where a tribal employee, named in his individual capacity, was acting in the course and scope of his employment at a tribal casino, “whatever immunity is enjoyed by the Authority and the Casino is shared by [the employee]”).

Here, Comanche Nation’s claims are aimed squarely at the Fort Sill Apache Tribe. Comanche Nation alleges that the Tribe’s gaming operations are unlawful under IGRA because the Tribe lacks jurisdiction over the Tsalote Allotment. App. Vol. 2 at 4–5, 27 ¶¶ 1, 98. Comanche Nation further alleges that the Tribal Officials are violating federal law and violating the Tribal-State compact by operating a casino on land that is not “the F[ort] S[ill] A[pache] Tribe’s Indian land.” App. Vol. 2 at 27 ¶ 98. But it is the Tribe—not individual officers—who operate the Casino.

The processes and actions enabling operation of the Casino are those of the Tribe and tribal entities, not individuals. For instance, the Tribe’s Business Committee enacted, and has periodically amended, its gaming ordinance, which the NIGC approved; the ordinance was most recently amended over a decade ago. *See* 87 Fed. Reg. 24586, 24587 (Apr. 26, 2022) (listing all tribes with approved Class III

gaming ordinances, including the Fort Sill Apache Tribe); *see also* Fort Sill Apache Tribe, “Gaming Ordinance,” NIGC (Dec. 1, 2010), <https://www.nigc.gov/images/uploads/gamingordinances/ftsillapachetribeofok-20110420LettertoTribefrNIGCreApprovalofFtSillgamingordinance.pdf>. The Tribe’s Business Committee enacted a tribal resolution authorizing tribal officials to conduct gaming on the Tsalote Allotment, and the Tribe’s independent Gaming Commission issued facility licenses approving Class II and Class III gaming at the Casino. App. Vol. 2 at 50–51; App Vol. 3 at 42. The land on which the Casino is located is held in trust for the Tribe, not tribal officials or individuals. App. Vol. 2 at 52–54. It is the Tribe that is asserting jurisdiction over the land. And the Tribe is the party to the Tribal-State compact in question, not individual officers. App. Vol. 2 at 145–201. Further still, Comanche Nation does not allege that any named individual is personally conducting gaming operations.

That same reasoning dooms Comanche Nation’s RICO claim. The crux of its theory is that the Tribal Officials are responsible for operating a casino in violation of federal law. *See* App. Vol. 2 at 30–34. But the Casino is operated by the Tribe, under a facility license issued by the Tribe’s independent Gaming Commission. The treble damages Comanche Nation seeks—whether calculated as lost revenue or as disgorgement of profits—would be calculated based on the Tribe’s operation of the Casino (and its alleged competition with Comanche Nation’s casino operations).

Comanche Nation alleges no personal misconduct, no pursuit of individual gain, and no action beyond the scope of the officials' delegated authority. In the absence of a claim that *individuals* are harming the Comanche Nation, any monetary award would necessarily be tied to the actions of the Tribe itself.

The relief sought confirms that this is, at bottom, a suit against the sovereign. Comanche Nation asks the court to shut down the Casino, enjoin conduct carried out under tribal authority, impose obligations on tribal officials acting on behalf of the Tribe, and award damages based on the Tribe's activity. That is a textbook suit against the Tribe. *See, e.g., Fletcher*, 116 F.3d at 1324. Because the Fort Sill Apache Tribe is the real party in interest, and because it is immune from suit, Comanche Nation's claims must be dismissed.

III. Congress Has Not Abrogated, and the Fort Sill Apache Tribe Has Not Waived, Sovereign Immunity for These Claims.

It is well-established that a congressional abrogation of sovereign immunity must be "unequivocally expressed" rather than implied." *Bay Mills*, 572 U.S. at 790 (quoting *C & L Enters., Inc. v. Citizen Band Potawatomi Tribe of Okla.*, 532 U.S. 411, 418 (2001); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978)). The burden rests on the plaintiff to prove a valid waiver or abrogation of sovereign immunity. *Muscogee (Creek) Nation v. Okla. Tax Comm'n*, 611 F.3d 1222, 1227 (10th Cir. 2010) (citing *Sydney v. United States*, 523 F.3d 1179, 1183 (10th Cir. 2008)). Comanche Nation has not and cannot meet that burden. As discussed below,

it is undisputed that the Fort Sill Apache Tribe has not waived its sovereign immunity in this case. Moreover, Congress has not abrogated tribal sovereign immunity for the types of claims Comanche Nation asserts. The Fort Sill Apache Tribe and its tribal officials are therefore immune from suit. *See Native Am. Distrib.*, 546 F.3d at 1296.

A. The Tribe Has Not Waived Its Sovereign Immunity or the Immunity of its Officials.

Comanche Nation does not allege that the Fort Sill Apache Tribe has waived its sovereign immunity. To the contrary, it acknowledges the Tribe's sovereign immunity and does not name the Tribe as a defendant. App. Vol. 2 at 3–39. The Tribal Officials agree: there has been no waiver. Thus, it is undisputed that there is no waiver of immunity that could allow Comanche Nation's claims to proceed.

Instead of alleging that the Tribe has waived its immunity, Comanche Nation implicitly argues that Congress abrogated the Tribe's immunity under IGRA and RICO. But, as discussed below, Congress did not abrogate tribal sovereign immunity for Comanche Nation's claims under either statute. The Fort Sill Apache Tribe and the Tribal Officials are therefore immune from suit.

B. IGRA Does Not Abrogate Sovereign Immunity for Comanche Nation's Claims.

Congress has not abrogated tribal sovereign immunity for the type of IGRA claim Comanche Nation asserts. In 25 U.S.C. § 2710(d)(7)(A), Congress carefully crafted a limited jurisdictional framework authorizing specific causes of action under

IGRA. That framework does not reach claims brought by one tribe to stop another tribe's gaming activities or challenge the actions of another tribe's officials. Comanche Nation's claim falls well outside the limited circumstances in which IGRA authorizes federal jurisdiction over tribes.

As the Supreme Court recognized in *Seminole Tribe of Florida v. Florida*, IGRA created an "elaborate remedial scheme" governing tribal gaming. 517 U.S. 44, 50 (1996). That scheme gives federal courts jurisdiction over only three categories of claims: (1) actions by tribes against states for failure to negotiate compacts in good faith, (2) an action by a state or a tribe to enjoin "class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact," and (3) enforcement actions brought by the United States. 25 U.S.C. § 2710(d)(7)(A).

The first and third categories are irrelevant here. To the extent Comanche Nation attempts to frame its claim as falling under the second category, *see App. Vol. 2 at 25 ¶ 89*, it fails. The statute's text is limited to suits by tribes or states seeking to enjoin "class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact." 25 U.S.C. § 2710(d)(7)(A)(ii). Thus, even if IGRA abrogates tribal immunity for one tribe to enjoin the gaming activities of another (it does not), it could only do so if the claim meets both the "Indian lands" requirement and the "in violation of any Tribal-State compact" requirement.

But the very premise of Comanche Nation’s claims is that the land in question does *not* qualify as “Indian lands” under IGRA for purposes of the Fort Sill Apache Tribe’s gaming activities. App. Vol. 2 at 27, 31–32 ¶¶ 98, 118. Assuming *arguendo* that is correct (it is not), then Comanche Nation’s claims do not fit within IGRA’s framework. *See Bay Mills*, 572 U.S. at 791 (“A State’s suit to enjoin gaming activity on Indian lands . . . falls within § 2710(d)(7)(A)(ii); *a similar suit to stop gaming activity off Indian lands does not.*” (emphasis added)).

IGRA’s definition of “Indian lands” requires the land to be either (A) within an Indian reservation or (B) trust/restricted land over which an Indian tribe exercises governmental power (and thus jurisdiction). 25 U.S.C. § 2703(4). Comanche Nation alleges that the Tsalote Allotment is within *its* reservation (the former Kiowa-Comanche-Apache Reservation), App. Vol. 2 at 27 ¶ 98, but, as a matter of law, the Kiowa-Comanche-Apache Reservation has been disestablished. App. Vol. 3 at 227; *see Tooisgah v. United States*, 186 F.2d 93, 97 (10th Cir. 1950); *Martinez v. State of Oklahoma*, 502 P.3d 1115, 119 (2021). Accordingly, subsection (A) of § 2703(4) cannot apply, and Comanche Nation must instead show that a tribe exercises governmental power over the land.

Yet Comanche Nation argues (and seeks a declaration) that the Fort Sill Apache Tribe “has no jurisdiction over the Tsalote Allotment.” App. Vol. 2 at 25, 27 ¶¶ 86, 98; *id.* at 38. Again assuming *arguendo* that Comanche Nation is correct on

this point (it is not), the Tsalote Allotment would not be “Indian lands” as defined by IGRA because it would not be land over which a tribe “exercises governmental power.” 25 U.S.C. § 2703(4); 25 C.F.R. § 502.12. As a matter of law, a tribe cannot exercise governmental power over land unless it has jurisdiction over the lands in its sovereign capacity. *See Kansas v. United States*, 249 F.3d 1213, 1229 (10th Cir. 2001) (“[B]efore a sovereign may exercise governmental power over land, the sovereign, in its sovereign capacity, must have jurisdiction over that land.”). Thus, if, as Comanche Nation claims, the Fort Sill Apache Tribe lacks jurisdiction over the Tsalote Allotment, then Comanche Nation cannot also claim the land meets the definition of “Indian lands” under IGRA.

Perhaps recognizing its predicament, Comanche Nation offers a novel—but unavailing—argument that the Tsalote Allotment is the Indian lands of *another* tribe (the Kiowa Tribe). App. Vol. 2 at 27 ¶ 98. However, as stated, the Tsalote Allotment is not reservation land, as the Kiowa-Comanche-Apache Reservation has been disestablished. Nor is the land trust land over which the Kiowa Tribe exercises governmental power, as is required for it to be the Kiowa Tribe’s “Indian land” under § 2703(4)(B). The Department of the Interior holds the Tsalote Allotment in trust for the Fort Sill Apache Tribe, not for the Kiowa Tribe (or any other tribe). App. Vol. 2 at 52. As a matter of law, a tribe cannot exercise governmental power—or jurisdiction—over lands held in trust for a different tribe. *See, e.g., Plains Commerce*

Bank v. Long Family Land and Cattle Co., 554 U.S. 316, 328–29 (2008); *Okla. Tax Comm’n v. Sac & Fox Nation*, 508 U.S. 114, 125 (1993). And although Comanche Nation challenged the Fort Sill Apache Tribe’s trust acquisition, the district court rejected its challenge. App. Vol. 3 at 204, 221, 233. Because the United States holds the Tsalote Allotment in trust solely for the Fort Sill Apache Tribe, it cannot be “Indian lands” of any other tribe for purposes of IGRA.

Comanche Nation’s challenge with identifying if and how the Tsalote Allotment meets the “Indian lands” requirement also undermines its ability to show a “violation of any Tribal-State compact”—another requirement for a party seeking to avail itself of § 2710(d)(7)(A)(ii) in IGRA’s remedial scheme. The entirety of Comanche Nation’s claim that the Tribal Officials are violating the Tribe’s gaming compact relies on the allegation that the Tsalote Allotment is not “Indian lands” so gaming on that land violates Section 5(L) of the Compact. App. Vol. 2 at 27 ¶¶ 97–99; *id.* at 212, 216, 228. But Section 5(L) incorporates IGRA’s definition of “Indian lands.” App. Vol. 2 at 163–64 (Compact, Part 5(L): “The [Fort Sill Apache] tribe may establish and operate enterprises that operate covered games only on its Indian lands as defined by IGRA. . . .”). Thus, if Comanche Nation argues that the Tsalote Allotment qualifies as “Indian lands” under IGRA, its claim does not meet the compact violation requirement. *See* 25 U.S.C. § 2710(d)(7)(A)(ii) If, on the other hand, Comanche Nation argues the lands are not “Indian lands,” then its claim does

not meet the “Indian lands” requirement. *See id.* The Tsalote Allotment cannot be both “Indian lands” for purposes of satisfying the statute but not “Indian lands” for purposes of the Tribal-State compact. Thus, Comanche Nation’s claims are beyond IGRA’s remedial framework.

Comanche Nation’s attempt to use IGRA’s remedial scheme fails for an additional reason: because Congress did not authorize private party suits against tribes for violations of IGRA. Nothing in IGRA’s text or legislative history suggests that Congress contemplated or intended to authorize one tribe to challenge another tribe’s compliance with its compact. Section 2710(d)(7)(A) is narrowly tailored and limits federal jurisdiction to specific parties and disputes. *See Hartman v. Kickapoo Tribe Gaming Comm’n*, 319 F.3d 1230, 1232 (10th Cir. 2003).

The first two provisions of § 2710(d)(7)(A) address only those parties directly at the Tribal-State compact bargaining table: A tribe can sue a state for failing to negotiate in good faith to enter into a compact, and either the tribe or the state may sue the other to enjoin gaming that violates the compact they signed. *Bay Mills*, 572 U.S. at 795; 25 U.S.C. § 2710(d)(7)(A)(i)–(ii). The third provision empowers only the United States—not neighboring tribes—to enforce IGRA beyond the scope of a compact. Outside those three narrow scenarios, IGRA “creates no statutory right of action” and does not abrogate sovereign immunity. *Oklahoma v. Hobia*, 775 F.3d

1204, 1213 (10th Cir. 2014) (citing *Bay Mills*, 572 U.S. at 788 n.2); *see also Seminole*, 517 U.S. at 74–75.

This Court’s decision in *Hartman v. Kickapoo Tribe Gaming Commission* confirms that § 2710(d)(7)(A) does not authorize private parties to bring claims against tribes, states, or the federal government for alleged violations of IGRA. 319 F. 3d 1230, 1232 (10th Cir. 2003). In that case, this Court affirmed the dismissal of all IGRA-based claims against a tribal gaming commission, its individual commissioners, and various state and federal defendants, emphasizing that “IGRA contains no implied private right of action in favor of an individual seeking to enforce compliance with the statute’s provisions.” *Id.* at 1232. This Court cautioned that courts may not imply additional remedies where Congress has expressly provided only a limited set of enforcement mechanisms. *Id.* at 1232–33. Thus, as in *Hartman*, IGRA’s remedial framework bars Comanche Nation’s novel claim.

IGRA’s framework is not accidental—it reflects Congress’s intent to balance tribal sovereignty, state interests, and federal oversight in a tightly controlled structure. *See, e.g.*, S. Rep. 100-446 (1988), 1988 U.S.C.C.A.N. 3071, 3075, 3083, 3093. The result is a remedial scheme that is, by design, symmetrical and self-contained. Comanche Nation’s claims, by contrast, are outside that structure. They do not involve a compact to which Comanche Nation is a party, nor do they arise under any cause of action recognized by IGRA. Permitting these claims to proceed

would upend the balance Congress struck and conflict with decades of precedent confirming the narrow scope of IGRA's limited abrogation of tribal sovereign immunity.

C. RICO Does Not Abrogate Tribal Sovereign Immunity to Authorize a Request for Injunctive Relief.

Comanche Nation's RICO claim does not fare any better. This Court has already expressed skepticism that RICO abrogates sovereign immunity in any context, recently noting that it lacks "any precedents stating that RICO has abrogated Eleventh Amendment immunity." *Snedeker*, 2025 WL 831345, at *2 (rejecting argument that RICO abrogated a State's sovereign immunity). That logic applies with full force to tribal immunity. Nothing in RICO suggests any "clear and unequivocal" intent by Congress to abrogate the Indian tribes' sovereign immunity. *See Weaver v. United States*, 98 F.3d 518, 520 n.2 (10th Cir. 1996) (dismissing RICO claims against U.S. because RICO does not expressly waive sovereign immunity); *cf. United States v. Neff*, 787 F. App'x 81, 92 (3d Cir. 2019) (stating, in a tribal member's appeal of a criminal RICO action, that "tribal sovereign immunity might stymie a state civil enforcement action or consumer suit" under RICO).

Recognizing that sovereign immunity bars any claim for money damages against the Fort Sill Apache Tribe under RICO, Comanche Nation does not seek

monetary damages against the Tribal Officials in their official capacities.³ App. Vol. 2 at 38–39. Comanche Nation does, however, seek declaratory and injunctive relief against the Tribal Officials in their official capacities—even though RICO does not allow a private plaintiff to seek such relief.

RICO, like IGRA, contains a comprehensive remedial scheme. It establishes criminal penalties in 18 U.S.C. § 1963 and provides civil remedies in § 1964. The civil remedial provision further distinguishes between public and private enforcement. Section 1964(b) empowers the United States to seek equitable relief. Section 1964(c), by contrast, permits only private suits for money damages.

Section 1964(c) notably omits any reference to equitable relief for private plaintiffs. Courts—including this one—have been reluctant to read equitable remedies into that omission. As this Court explained, there is “considerable doubt that equitable relief is available to private RICO plaintiffs under any circumstances.” *Switzer v. Coan*, 261 F.3d 985, 992 (10th Cir. 2001) (citing *Bolin v. Sears, Roebuck & Co.*, 231 F.3d 970, 977 n. 42 (5th Cir. 2000); *Lincoln House, Inc. v. Dupre*, 903 F.2d 845, 848 (1st Cir. 1990)); *see also Sensoria, LLC v. Kaweske*, 581 F. Supp. 3d

³ Comanche Nation does seek monetary damages against the Tribal Officials in their personal capacities—relief which is barred because the Tribe is nonetheless the real party in interest, addressed above in Section II, or, alternatively, because the individuals are entitled to qualified immunity, addressed below in Section V.

1243, 1271 (D. Colo. 2022) (dismissing request for injunctive relief as part of plaintiff's RICO claims).

That view is widely shared. The Fourth, Fifth, and Ninth Circuits have each concluded that RICO does not authorize private plaintiffs to sue for injunctive relief. *See Hengle*, 19 F.4th at 356–57 (affirming dismissal of RICO claim against tribal officials because RICO does not authorize private RICO plaintiffs to sue for injunctive relief); *In re Fredeman Litig.*, 843 F.2d 821, 829–30 (5th Cir. 1988) (equitable relief is not available to private plaintiffs under RICO); *Religious Tech. Ctr. v. Wollersheim*, 796 F.2d 1076, 1084–88 (9th Cir. 1986); *but see Chevron Corp. v. Donziger*, 833 F.3d 74, 137 (2d Cir. 2016) (equitable relief is available under RICO); *Nat'l Org. for Women, Inc. v. Scheidler*, 267 F.3d 687, 697 (7th Cir. 2001) (same), *rev'd on other grounds*, 537 U.S. 393 (2003). Courts have also noted that Congress specifically considered and then declined to include injunctive relief for private plaintiffs when drafting RICO. *In re Fredeman Litig.*, 843 F.2d at 829; *Wollersheim*, 796 F.2d at 1084–88.

Just a few years ago, the Fourth Circuit confronted this exact issue in *Hengle v. Treppa*, where private plaintiffs brought RICO claims for injunctive relief against tribal officials. 19 F.4th at 357. The court firmly rejected the plaintiffs' claim, holding that “although the government may sue for prospective relief, private plaintiffs may sue only for treble damages and costs.” *Id.* at 354–56. Because the

plaintiffs sought equitable relief beyond what § 1964(c) allows, their claims were dismissed. *Id.* at 357.

Notwithstanding this on-point authority, the district court below rejected the Tribal Officials’ argument that they were immune to RICO claims on the grounds that Comanche Nation had presented “multiple persuasive decisions inconsistent with this position.” App. Vol. 3 at 252 (citing cases). But those decisions are inapposite. In *Brice v. Haynes Investments, LLC*, the district court expressly noted that sovereign immunity was “irrelevant” because the defendants—who were not tribes, tribal entities, or tribal officials—*admitted* that they were not entitled to invoke sovereign immunity as a defense. 548 F. Supp. 3d 882, 900 (N.D. Cal. 2021). In *Wilhite v. Awe Kualawaache Care Center*, the dispute involved a RICO claim for monetary damages, not a claim for injunctive relief, as Comanche Nation seeks against the Tribal Officials in their official capacities. No. CV 18-80-BLG-SPW, 2018 WL 3586539, at *1 (D. Mont. July 26, 2018). The final case, *Gingras v. Think Finance, Inc.*, permitted private equitable relief under RICO only because Second Circuit precedent required it. 922 F.3d 112, 124 (2d Cir. 2019) (citing *Chevron Corporation v. Donziger*, 833 F.3d 74 (2d Cir. 2016)). That precedent is an outlier, and the Fourth Circuit in *Hengle* directly rejected it, calling the Second Circuit’s reasoning “flawed” because it relied on Section 1964(b) (which allows the *U.S. Attorney General* to seek injunctive relief) to interpret Section 1964(c). *Hengle*, 19

F.4th at 354.

The Second Circuit approach is also out of step with this Court’s precedent. The Tenth Circuit has repeatedly emphasized that courts cannot “engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide.” *See, e.g., Safe Streets All. v. Hickenlooper*, 859 F.3d 865, 902 (10th Cir. 2017) (quoting *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 145 (1985)). For injunctive relief to be available, Congress must create it. *Safe Streets*, 859 F.3d at 902–03 (citing *Mitchum v. Foster*, 407 U.S. 225, 237 (1972)). For *any* remedy to be available against tribes and their officials, Congress must clearly and unequivocally abrogate tribal sovereign immunity. *Nanomantube v. Kickapoo Tribe in Kan.*, 631 F.3d 1150, 1152 (10th Cir. 2011). Congress did not create an equitable remedy available to private plaintiffs under RICO at all, let alone expressly abrogate sovereign immunity to allow a private party to seek injunctive or declaratory relief against a sovereign tribe. Accordingly, Comanche Nation’s claim for injunctive relief under RICO must be dismissed.

IV. Comanche Nation Cannot Use *Ex parte Young* to Pursue an Unauthorized IGRA or RICO Claim Against Tribal Officials in Their Official Capacities.

Unable to identify any waiver or abrogation of tribal sovereign immunity under IGRA or RICO, Comanche attempts to invoke the *Ex parte Young* doctrine to

bypass sovereign immunity, at least for its claims for injunctive relief. But that path is closed.

Ex parte Young provides a limited exception to sovereign immunity for certain claims brought against government officials. Specifically, when a claim is (a) brought against an official in his or her official capacity and (b) seeks only prospective injunctive relief to prevent a continuing violation of federal law, the court will pretend the claim is not an action against the sovereign and thus not subject to sovereign immunity. *ANR Pipeline Co. v. Lafaver*, 150 F.3d 1178, 1188 (10th Cir. 1998), *overruled on other grounds as recognized in Hill v. Kemp*, 478 F.3d 1236, 1259 (10th Cir. 2007). But *Ex parte Young* cannot be “rotely applied” to allow every case seeking declaratory and injunctive relief against a government official, as doing so would undermine the principle of sovereign immunity. *Hill*, 478 F.3d at 1256 (citing *Idaho v. Coeur d’Alene Tribe of Idaho*, 521 U.S. 261, 270 (1997)).

The Supreme Court has repeatedly cautioned that when legislation prescribes a particular set of remedies, courts should not read other remedies into the statute—particularly where such remedies might be wielded against a sovereign entity or official. *See Nat’l R. R. Passenger Corp. v. Nat’l Ass’n of R. R. Passengers*, 414 U.S. 453, 458 (1974); *Seminole*, 517 U.S. at 74. Courts therefore may not use *Ex parte Young* to create a cause of action; the doctrine only “provides a path around sovereign immunity *if* the plaintiff already has a cause of action from somewhere

else.” *Michigan Corr. Org. v. Michigan Dep’t of Corr.*, 774 F.3d 895, 905 (6th Cir. 2014) (italics in original) (citing *Indiana Prot. & Advocacy Servs. v. Indiana Family & Soc. Servs. Admin.*, 603 F.3d 365, 392–93 (7th Cir. 2010) (en banc) (Easterbrook, J., dissenting on other grounds)).

Here, there is no path to a viable IGRA or RICO claim through *Ex parte Young*. Congress provided a comprehensive remedial scheme to address unlawful tribal gaming activity, and neither IGRA nor RICO authorizes one tribe to seek injunctive relief against another. Accordingly, a tribe cannot invoke *Ex parte Young* to seek injunctive relief against another tribe’s officials under either statute.

A. Supreme Court Precedent Confirms that Congress Did Not Authorize *Ex parte Young* Suits Under IGRA.

Comanche Nation cannot avoid sovereign immunity by suing the Tribal Officials in their official capacity and invoking *Ex parte Young* for its IGRA claims. The Supreme Court has already concluded that Congress did not intend to authorize *Ex parte Young* suits under IGRA. *See Seminole*, 517 U.S. at 75 n.17.

As discussed above, IGRA contains a detailed and limited remedial scheme, reflecting Congress’s clear intent to restrict who may bring claims and under what circumstances. *See id.* at 74–76; compare to *Verizon Md., Inc. v. Pub. Serv. Comm’n of Md.*, 535 U.S. 635, 647 (2002). The statute vests tribes with primary authority to regulate gaming on Indian lands through their tribal gaming commissions, with federal oversight provided by the NIGC, and enforcement powers granted to the

United States and, in limited instances, to states that are parties to a Tribal-State compact. *See* 25 U.S.C. §§ 2706, 2710(d)(7), 2713. That scheme is not accidental, and it leaves no room for the application of *Ex parte Young*. As this Court has warned, “federal courts are not free to imply the wide-ranging, judge-made remedial doctrine of *Ex parte Young* when Congress has seen fit to craft a significantly narrower statutory remedy.” *Hill*, 478 F.3d at 1256 (quoting *ANR Pipeline*, 150 F.3d at 1189). Applying *Ex parte Young* to IGRA would impermissibly rewrite the IGRA’s statutory scheme, an action courts have no authority to carry out. *Seminole*, 517 U.S. at 74–76.

Given the plain instruction of *Seminole* and this Court’s precedent, Comanche Nation cannot use *Ex parte Young* to bring a claim that Congress excluded. Therefore, sovereign immunity bars Comanche Nation’s IGRA claim, and the district court erred in permitting that claim to proceed.

B. Comanche Nation Cannot Use *Ex parte Young* Under RICO to Circumvent the Fort Sill Apache Tribe’s Sovereign Immunity.

Comanche Nation also invokes *Ex parte Young* in an effort to dodge tribal sovereign immunity on its RICO claim. But it makes no difference whether a plaintiff brings suit under IGRA or RICO to enjoin tribal gaming operations—*Ex parte Young* is unavailable where Congress has enacted a detailed, carefully calibrated remedial scheme. RICO’s statutory framework reflects Congress’s intent to limit enforcement to specific actors and remedies—and *Ex parte Young* cannot be

used to create a path to remedies that Congress did not authorize.

As a preliminary matter, and as Comanche Nation appears to recognize, *Ex parte Young* does not provide any basis for seeking monetary damages on the RICO claim. App. Vol. 2 at 39 (seeking damages only against the Tribal Officials in their personal capacities). *Ex parte Young*, even where applicable, does not extend to claims for monetary damages. *ANR Pipeline*, 150 F.3d at 1187.

As discussed above in Section III.C, RICO provides private plaintiffs a limited remedy: treble damages and attorneys' fees. 18 U.S.C. § 1964(c). Injunctive relief is available under RICO *only* for actions by the United States. *Hengle*, 19 F.4th at 354. And for allegations that a tribe is engaged in unlawful gaming operations on Indian lands, it is IGRA—not RICO—that sets the remedial scheme. Moreover, for individual gaming activities outside of Indian lands that violate state criminal laws, state governments have prosecutorial authority. *See Bay Mills*, 572 U.S. at 796. In other words, there is a robust and detailed remedial scheme in place to combat unlawful gaming in the United States, and that framework does not include claims by private parties seeking to enjoin tribal gaming operations. *Ex parte Young* is unavailable for Comanche Nation's novel RICO claim.

V. Comanche Nation’s Attempt to Sue the Tribal Officials in Their Personal Capacities Fails Because Either the Tribe Is the Real Party in Interest or the Tribal Officials Are Entitled to Qualified Immunity.

As discussed above, this case is a challenge to discretionary decisions and actions of the Fort Sill Apache Tribe’s governmental bodies. Tribal Officials, regardless of whether they are named in their official or personal capacities, are immune from suit because the Tribe is the real party in interest. But even if, for argument’s sake, this Court concludes that the Tribe is not the real party in interest, Comanche Nation’s claim for monetary damages against the Tribal Officials named in their individual capacities must still be dismissed due to the individuals’ qualified immunity.

While the district court did not rule directly on qualified immunity, qualified immunity, like sovereign immunity, is an immunity from suit rather than a defense to liability, and it should therefore be resolved “at the earliest possible stage in litigation.” *Pearson v. Callahan*, 555 U.S. 223, 232 (2009) (quoting *Hunter v. Bryant*, 502 U.S. 224, 227 (1991)). This Court may determine whether the conduct alleged by Comanche Nation violated clearly established law (a determinative element of qualified immunity), even if that issue not fully briefed below or if it is raised for the first time on appeal. *See Cox v. Glanz*, 800 F.3d 1231, 1244–46 (10th Cir. 2015); *Dean v. Blumenthal*, 577 F.3d 60, 67 n.6 (2d Cir. 2009).

Under well-settled law, qualified immunity protects government officials performing discretionary functions from civil liability unless their conduct violates clearly established constitutional or statutory rights. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Pueblo of Pojoaque v. New Mexico*, 214 F. Supp. 3d 1028, 1078 (D.N.M. 2016), *aff'd*, 863 F.3d 1226 (10th Cir. 2017). Indeed, qualified immunity is “the norm for public officials and serves to insulate from suit all but the plainly incompetent or those who knowingly violate the law.” *Lewis v. Tripp*, 604 F.3d 1221, 1225 (10th Cir. 2010) (quoting *Harlow*, 457 U.S. at 806; *Malley v. Briggs*, 475 U.S. 335, 341 (1986)) (internal marks omitted). Accordingly, “officials enjoy a presumption of immunity when the defense of qualified immunity is raised.” *Pahls v. Thomas*, 718 F.3d 1210, 1227 (10th Cir. 2013).

To overcome this presumption, Comanche Nation has the “heavy two-part burden” to show (1) a violation of a statutory or constitutional right; and (2) that the right was clearly established at the time of the alleged violation. *See Harlow*, 457 U.S. at 818; *Cox*, 800 F.3d at 1245 (defendants entitled to qualified immunity unless the record “clearly demonstrate[s] the plaintiff has satisfied his heavy two-part burden”). Unless both prongs are satisfied, the claim must be dismissed before the commencement of discovery. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

As government officials, the Tribal Officials enjoy the presumption of qualified immunity. Comanche Nation cannot meet its burden to overcome that

presumption, even taking its allegations as true. First, the Tribal Officials’ conduct at issue—voting to approve facility licenses and to authorize casino operations—was plainly undertaken within the scope of each defendant’s official role. The Fort Sill Apache Gaming Commission is authorized to issue facility licenses. *See* 25 U.S.C. § 2710(b); *see also* 87 Fed. Reg. 24586; Fort Sill Apache Tribe, “Gaming Ordinance,” *supra*, at § XII. The Tribe’s Business Committee is authorized to enact resolutions and ordinances, including those necessary to initiate gaming operations on lands held in trust for the Tribe. *See id.* The Tribe’s Business Committee and the Tribe’s Gaming Commission engaged in discretionary policy decisions carried out under express tribal and federal authority. *Id.* The individuals serving on the Business Committee and Gaming Commission are entitled to exercise their judgment when voting on such measures.⁴

Notably, Comanche Nation alleges no personal misconduct, no self-dealing, and no conduct outside the scope of each individual’s delegated role. In fact, it does not identify any specific action taken by any individual defendant at all. It is not enough for Comanche Nation to just allege that its rights were violated or that

⁴ The individual defendants are also entitled to legislative immunity for acts taken in their legislative capacity, such as voting on ordinances, resolutions, and policies concerning tribal gaming. Legislative immunity extends to tribal officials performing legislative functions under tribal law. *See Runs After v. United States*, 766 F.2d 347, 354 (8th Cir. 1985) (recognizing legislative immunity in tribal context).

defendants, as a collective and undifferentiated whole, were responsible for those violations. *See Pahls*, 718 F.3d at 1228. Comanche Nation “must identify specific actions taken by particular defendants, or specific policies over which particular defendants possessed supervisory responsibility, that violated [its] clearly established constitutional rights” to avoid qualified immunity. *See id.*

And even if Comanche Nation had alleged individualized misconduct, Comanche Nation has not alleged that the Tribal Officials violated a clearly established constitutional or statutory right. The “clearly established” prong of the qualified immunity analysis ensures that governmental actors are given fair warning that their conduct is unconstitutional or unlawful before they are held liable for damages based on that conduct. *See PJ ex rel. Jensen v. Wagner*, 603 F.3d 1182, 1196–97 (10th Cir. 2010). A right is “clearly established” when “a Supreme Court or Tenth Circuit decision is on point, or if the clearly established weight of authority from other courts shows that the right must be as the plaintiff maintains.” *Id.* at 1196–97 (quoting *Harmon v. Pollock*, 586 F.3d 1254, 1260 (10th Cir. 2009) (internal quotation marks omitted)).

Comanche Nation’s legal theory in this case depends on the notion that the Tribal Officials violated Comanche Nation’s treaty rights. *See Harlow*, 457 U.S. at 818. But the district court already rejected that theory in dismissing Comanche Nation’s treaty-based claims. App. Vol. 3 at 227, 243 (“Comanche Nation fails to

show how the tribes' First Treaty right . . . can reasonably still be intact after those tribes agreed [to cede all claim to that land].”). A right cannot be “clearly established” when the very legal theory asserted has already been rejected by a federal court; the law must be settled, not disputed or rejected, to overcome qualified immunity. *Harlow*, 457 U.S. at 818.

Besides, the district court correctly recognized that Comanche Nation’s claims are “based upon an apparently novel and certainly complicated theory of liability” that has never been recognized by any court or agency. App. Vol. 3 at 255–56. No clearly established law put the Tribal Officials on notice that approving or regulating tribal gaming at the Casino would violate anyone’s rights (nor does it). IGRA and RICO do not create individual rights enforceable by the Comanche Nation, so they cannot serve as the basis for overcoming qualified immunity. Even if they could, the Tribal Officials had every reason to believe their conduct was—and gaming activities remain—lawful.

Qualified immunity is designed for cases like this—where officials acted within their authority and in accordance with a reasonable understanding of the law. Comanche Nation has not identified any specific act by any individual defendant, nor any settled law that would have warned the Tribal Officials of unlawful conduct. Qualified immunity therefore bars the claims against them, and the individual-capacity claims must be dismissed. *See White v. Pauly*, 580 U.S. 73, 79 (2017).

CONCLUSION

For the reasons stated above, the Tribal Officials request that this Court reverse the district court's partial denial of their motion to dismiss. This Court should remand with instruction to the district court to dismiss Comanche Nation's claims in their entirety and with prejudice.

STATEMENT REGARDING ORAL ARGUMENT

Appellants respectfully request oral argument. Given the complexity of sovereign immunity issues and Comanche Nation's novel theories asserted under IGRA and RICO, oral argument will assist the Court in resolving the important legal questions presented in this appeal.

Respectfully submitted this 31st day of March, 2025.

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CERTIFICATE OF SERVICE

I hereby certify that on March 31, 2025, I electronically filed the foregoing using the Court's CM/ECF system, which will send notification of such filing to the following:

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Date: March 31, 2025

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ADDENDUM

Indian Gaming Regulatory Act, 25 U.S.C. § 2701 et seq.

25 U.S.C.A. § 2703. Definitions

For purposes of this chapter--

(1) The term “Attorney General” means the Attorney General of the United States.

(2) The term “Chairman” means the Chairman of the National Indian Gaming Commission.

(3) The term “Commission” means the National Indian Gaming Commission established pursuant to section 2704 of this title.

(4) The term “Indian lands” means--

(A) all lands within the limits of any Indian reservation; and

(B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power.

(5) The term “Indian tribe” means any Indian tribe, band, nation, or other organized group or community of Indians which--

(A) is recognized as eligible by the Secretary for the special programs and services provided by the United States to Indians because of their status as Indians, and

(B) is recognized as possessing powers of self-government.

(6) The term “class I gaming” means social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations.

(7)(A) The term “class II gaming” means--

(i) the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith)--

(I) which is played for prizes, including monetary prizes, with cards bearing numbers or other designations,

(II) in which the holder of the card covers such numbers or designations when objects, similarly numbered or designated, are drawn or electronically determined, and

(III) in which the game is won by the first person covering a previously designated arrangement of numbers or designations on such cards,

including (if played in the same location) pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo, and

(ii) card games that--

(I) are explicitly authorized by the laws of the State, or

(II) are not explicitly prohibited by the laws of the State and are played at any location in the State,

but only if such card games are played in conformity with those laws and regulations (if any) of the State regarding hours or periods of operation of such card games or limitations on wagers or pot sizes in such card games.

(B) The term “class II gaming” does not include--

(i) any banking card games, including baccarat, chemin de fer, or blackjack (21), or

(ii) electronic or electromechanical facsimiles of any game of chance or slot machines of any kind.

(C) Notwithstanding any other provision of this paragraph, the term “class II gaming” includes those card games played in the State of Michigan, the State of North Dakota, the State of South Dakota, or the State of

Washington, that were actually operated in such State by an Indian tribe on or before May 1, 1988, but only to the extent of the nature and scope of the card games that were actually operated by an Indian tribe in such State on or before such date, as determined by the Chairman.

(D) Notwithstanding any other provision of this paragraph, the term “class II gaming” includes, during the 1-year period beginning on October 17, 1988, any gaming described in subparagraph (B)(ii) that was legally operated on Indian lands on or before May 1, 1988, if the Indian tribe having jurisdiction over the lands on which such gaming was operated requests the State, by no later than the date that is 30 days after October 17, 1988, to negotiate a Tribal-State compact under section 2710(d)(3) of this title.

(E) Notwithstanding any other provision of this paragraph, the term “class II gaming” includes, during the 1-year period beginning on December 17, 1991, any gaming described in subparagraph (B)(ii) that was legally operated on Indian lands in the State of Wisconsin on or before May 1, 1988, if the Indian tribe having jurisdiction over the lands on which such gaming was operated requested the State, by no later than November 16, 1988, to negotiate a Tribal-State compact under section 2710(d)(3) of this title.

(F) If, during the 1-year period described in subparagraph (E), there is a final judicial determination that the gaming described in subparagraph (E) is not legal as a matter of State law, then such gaming on such Indian land shall cease to operate on the date next following the date of such judicial decision.

(8) The term “class III gaming” means all forms of gaming that are not class I gaming or class II gaming.

(9) The term “net revenues” means gross revenues of an Indian gaming activity less amounts paid out as, or paid for, prizes and total operating expenses, excluding management fees.

(10) The term “Secretary” means the Secretary of the Interior.

25 U.S.C. § 2710. Tribal gaming ordinances

(a) Jurisdiction over class I and class II gaming activity

(1) Class I gaming on Indian lands is within the exclusive jurisdiction of the Indian tribes and shall not be subject to the provisions of this chapter.

(2) Any class II gaming on Indian lands shall continue to be within the jurisdiction of the Indian tribes, but shall be subject to the provisions of this chapter.

...

(d) Class III gaming activities; authorization; revocation; Tribal-State compact

(1) Class III gaming activities shall be lawful on Indian lands only if such activities are--

(A) authorized by an ordinance or resolution that--

(i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands,

(ii) meets the requirements of subsection (b), and

(iii) is approved by the Chairman,

(B) located in a State that permits such gaming for any purpose by any person, organization, or entity, and

(C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect.

...

(3)(A) Any Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities. Upon receiving such a request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact.

(B) Any State and any Indian tribe may enter into a Tribal-State compact governing gaming activities on the Indian lands of the Indian tribe,

but such compact shall take effect only when notice of approval by the Secretary of such compact has been published by the Secretary in the Federal Register.

...

(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).

(B)(i) An Indian tribe may initiate a cause of action described in subparagraph (A)(i) only after the close of the 180-day period beginning on the date on which the Indian tribe requested the State to enter into negotiations under paragraph (3)(A).

(ii) In any action described in subparagraph (A)(i), upon the introduction of evidence by an Indian tribe that--

(I) a Tribal-State compact has not been entered into under paragraph (3), and

(II) the State did not respond to the request of the Indian tribe to negotiate such a compact or did not respond to such request in good faith,

the burden of proof shall be upon the State to prove that the State has negotiated with the Indian tribe in good faith to conclude a Tribal-State compact governing the conduct of gaming activities.

(iii) If, in any action described in subparagraph (A)(i), the court finds that the State has failed to negotiate in good faith with the Indian tribe to conclude a Tribal-State compact governing the conduct of gaming activities, the court shall order the State and the Indian Tribe to conclude such a compact within a 60-day period. In determining in such an action whether a State has negotiated in good faith, the court--

(I) may take into account the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities, and

(II) shall consider any demand by the State for direct taxation of the Indian tribe or of any Indian lands as evidence that the State has not negotiated in good faith.

(iv) If a State and an Indian tribe fail to conclude a Tribal-State compact governing the conduct of gaming activities on the Indian lands subject to the jurisdiction of such Indian tribe within the 60-day period provided in the order of a court issued under clause (iii), the Indian tribe and the State shall each submit to a mediator appointed by the court a proposed compact that represents their last best offer for a compact. The mediator shall select from the two proposed compacts the one which best comports with the terms of this chapter and any other applicable Federal law and with the findings and order of the court.

(v) The mediator appointed by the court under clause (iv) shall submit to the State and the Indian tribe the compact selected by the mediator under clause (iv).

(vi) If a State consents to a proposed compact during the 60-day period beginning on the date on which the proposed compact is submitted by the mediator to the State under clause (v), the proposed compact shall be treated as a Tribal-State compact entered into under paragraph (3).

(vii) If the State does not consent during the 60-day period described in clause (vi) to a proposed compact submitted by a mediator under clause (v), the mediator shall notify the Secretary and the

Secretary shall prescribe, in consultation with the Indian tribe, procedures--

(I) which are consistent with the proposed compact selected by the mediator under clause (iv), the provisions of this chapter, and the relevant provisions of the laws of the State, and

(II) under which class III gaming may be conducted on the Indian lands over which the Indian tribe has jurisdiction.

...

Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961–68

18 U.S. Code § 1964 - Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted

in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

ATTACHMENT

Comanche Nation v. U.S. Dep't of Interior et al., Case No. CIV-22-425-G,
ECF Dkt. # 140, Order (dated September 30, 2024)

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA**

COMANCHE NATION,)	
)	
Plaintiff,)	
)	
v.)	Case No. CIV-22-425-G
)	
UNITED STATES DEPARTMENT OF THE INTERIOR et al.,)	
)	
Defendants.)	

ORDER

Now before the Court are the Motion to Dismiss (Doc. No. 59) and Supplemental Motion to Dismiss (Doc. No. 123) filed by the FSA Defendants.¹ Plaintiff Comanche Nation has responded (Doc. Nos. 80, 126) and the FSA Defendants have replied (Doc. Nos. 91, 129).

I. Background

Plaintiffs Comanche Nation and Kiowa Tribe filed this action on May 24, 2022, raising three claims “to prevent an illegal casino from conducting unlawful gaming within Plaintiffs’ reservation” and seeking entry of a temporary restraining order. Compl. (Doc.

¹ The FSA Defendants are each sued in both their individual and official capacities and are identified as: Lori Gooday Ware, Fort Sill Apache Tribe (“FSAT”) Chairwoman; Pamela Eaglesfield, FSAT Vice-Chairman; James Dempsey, FSAT Secretary-Treasurer; FSAT Committee Members Jeanette Mann, Jennifer Heminokeky, and Dolly Loretta Buckner; Philip Koszarek, FSAGC (“Fort Sill Apache Gaming Commission”) Chairman; Naomi Harford, FSAGC Vice-Chairman; and FSAGC Commissioners Michael Crump, Lauren Pinola, and Debbie Baker.

No. 1) ¶ 1. On June 3, 2022, the Court denied Plaintiffs’ request for a temporary restraining order. *See* Order of June 3, 2022 (Doc. No. 31).

Plaintiffs filed an Amended Complaint (Doc. No. 51) and a motion for preliminary injunctive relief against the FSA Defendants (Doc. No. 52). Plaintiff Kiowa Tribe then voluntarily dismissed its claims as to all defendants. *See* Doc. Nos. 117, 118. Following a telephonic status conference with the parties, the Court ordered the defendants to file any supplemental motions regarding the standing of remaining plaintiff Comanche Nation to continue to pursue this action. *See* Order of Mar. 7, 2023 (Doc. No. 120). The Federal Defendants² and the FSA Defendants then each timely filed a supplemental motion to dismiss. *See* Doc. Nos. 123, 124.

II. The Amended Complaint

Plaintiff Comanche Nation is a federally recognized Indian tribe that operates six or more casinos in southwestern Oklahoma. Am. Compl. ¶ 4. In 1867, through the First Treaty of Medicine Lodge and the Second Treaty of Medicine Lodge, the Kiowa-Comanche-Apache (“KCA”) Reservation was established in southwestern Oklahoma. *Id.* ¶¶ 22-24.

In 1892, the United States, through “the Jerome Agreement,” “acquired a substantial portion of the KCA Reservation and allotted individual tracts of land to the individual

² The Federal Defendants are: the United States Department of the Interior (“DOI”); Bryan Newland, in his official capacity as Assistant Secretary—Indian Affairs; Darryl LaCounte, in his official capacity as Director of the Bureau of Indian Affairs (“BIA”); and Sharon Avery, in her official capacity as Acting Chair of the National Indian Gaming Commission (“NIGC”).

members of the three tribes.” *Comanche Nation v. United States*, 393 F. Supp. 2d 1196, 1200-01 (W.D. Okla. 2005); *see* Am. Compl. ¶¶ 25-26. In 1901, the 160 acre-parcel of land within the KCA Reservation boundaries that is disputed in this matter was allotted to George Tsalote, a Kiowa Tribe member. *See* Am. Compl. ¶ 28. This tract (the “Tsalote Allotment”) “w[as] held in trust by the United States for the beneficial use of the Indian owner.” *Comanche Nation*, 393 F. Supp. 2d at 1201; *see* Am. Compl. ¶ 38.

On June 26, 2001, the Tsalote Allotment was deeded to the United States of America in trust for the Fort Sill Apache Tribe of Oklahoma (the “FSA Tribe”). Am. Compl. ¶ 46. “For years, the FSA Tribe held the Tsalote Allotment without attempting to exercise any form of jurisdiction on the land.” *Id.* ¶ 47.

In April of 2005, the DOI approved the FSA Tribe’s Class III Tribal Gaming Compact with the State of Oklahoma. *See id.* ¶¶ 41-42. In February of 2022, the FSA Tribe announced that it was constructing a casino, called the Warm Springs Casino, on the Tsalote Allotment. *Id.* ¶ 47. Comanche Nation, the Kiowa Tribe, and the Kiowa Comanche Apache Intertribal Land Use Committee began investigating how the FSA Tribe could be constructing a casino on the Tsalote Allotment. *Id.* ¶ 48. Comanche Nation learned that on September 18, 2020, the FSA Tribe had submitted a letter to the National Indian Gaming Commission (“NIGC”) informing the NIGC of its intent to construct and open a new tribal gaming facility on the Tsalote Allotment and requesting a 60-day expedited review pursuant to 25 C.F.R. § 559.2(a)(1). *Id.* ¶ 49. Upon Comanche Nation’s information and belief, the Chair of the NIGC has not responded to that request. *Id.* ¶ 50.

On April 27, 2022, the Kiowa Comanche Apache Intertribal Land Use Committee sent a letter to the NIGC, complaining of the Warm Springs Casino and requesting agency action, and supplemented that letter on April 28, 2022. *Id.* ¶ 51. The NIGC acknowledged receipt of the letter but has done nothing to stop or prevent the opening of the Warm Springs Casino. *Id.* ¶ 52. The Warm Springs Casino opened June 15, 2022, and offers both Class II and Class III gaming, as defined by the Indian Gaming Regulatory Act. *Id.* ¶ 53.

III. Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6)

The FSA Defendants assert that Comanche Nation’s allegations reflect that the Court lacks subject-matter jurisdiction to hear the claims of the Amended Complaint and, therefore, such claims should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(1). Such a facial attack on the pleading’s allegations regarding subject-matter jurisdiction “questions the [pleading’s] sufficiency and requires the court to accept the allegations as true.” *Smith v. United States*, 561 F.3d 1090, 1097 (10th Cir. 2009); *see also E.F.W. v. St. Stephen’s Indian High Sch.*, 264 F.3d 1297, 1302-03 (10th Cir. 2001). As the party asserting federal jurisdiction, Comanche Nation bears “the burden of alleging the facts essential to show jurisdiction.” *U.S. ex rel. Stone v. Rockwell Int’l Corp.*, 282 F.3d 787, 797 (10th Cir. 2002) (internal quotation marks omitted).

Citing Federal Rule of Civil Procedure 12(b)(6), the FSA Defendants also seek dismissal of the pleading for failure to state a claim upon which relief can be granted. In analyzing a motion to dismiss under Rule 12(b)(6), the court “accept[s] as true all well-pleaded factual allegations in the complaint and view[s] them in the light most favorable

to the plaintiff.” *Burnett v. Mortg. Elec. Registration Sys., Inc.*, 706 F.3d 1231, 1235 (10th Cir. 2013). “[T]o withstand a Rule 12(b)(6) motion to dismiss, a complaint must contain enough allegations of fact, taken as true, ‘to state a claim to relief that is plausible on its face.’” *Khalik v. United Air Lines*, 671 F.3d 1188, 1190 (10th Cir. 2012) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). While the Rule 12(b)(6) standard does not require that a plaintiff establish a prima facie case in the pleading, the court discusses the essential elements of each alleged cause of action to better “determine whether [the plaintiff] has set forth a plausible claim.” *Id.* at 1192.

A complaint fails to state a claim on which relief may be granted when it lacks factual allegations sufficient “to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact).” *Twombly*, 550 U.S. at 555 (footnote and citation omitted). Bare legal conclusions in a complaint are not entitled to the assumption of truth; “they must be supported by factual allegations” to state a claim for relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

IV. *Count Three: Violation of the First Treaty of Medicine Lodge*

In Count Three of the Amended Complaint, Comanche Nation alleges that the FSA Defendants are liable for violation of the First Treaty of Medicine Lodge (“First Treaty”), 15 Stat. 581 (1867); see *Oneida Cnty. v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 234-36 (1985) (discussing tribal members’ use of “a common-law action to vindicate their aboriginal rights”). Comanche Nation alleges that the First Treaty “reserved to the Kiowa Tribe and Comanche Nation the KCA Reservation, and specifically provided that the reservation would be for their exclusive use and occupation unless these tribes consented

to another tribe sharing the reservation.” Am. Compl. ¶ 76. “With the sole exception of the Apache Tribe, the Kiowa Tribe and Comanche Nation have not consented to share or admit upon the KCA Reservation any other tribe.” *Id.*; *see also id.* ¶ 83 (“Plaintiffs have never agreed to the FSA Tribe exercising jurisdiction within the KCA Reservation generally and have never agreed to the FSA Tribe exercising jurisdiction over the Tsalote Allotment specifically.”). Therefore, Comanche Nation alleges that “[t]he FSA Tribe’s assertion of jurisdiction over the Tsalote Allotment,” including through operation of the Warm Springs Casino, is a violation of the First Treaty. *Id.* ¶ 84. Comanche Nation seeks entry of a declaratory judgment determining that the Kiowa Tribe, and not the FSA Tribe, has jurisdiction over the Tsalote Allotment, as well as “injunctive relief prohibiting the FSA Tribe from exercising any jurisdiction over the Tsalote Allotment, including . . . assessing sales taxes or offering any Class II or Class III gaming under IGRA.” *Id.* ¶ 86.

The FSA Defendants argue that dismissal is required because, among other reasons, Comanche Nation has not shown that it has standing to pursue this claim under Article III of the U.S. Constitution. *See* FSA Defs.’ Suppl. Mot. to Dismiss at 3-4, 8-9; FSA Defs.’ Suppl. Reply at 9.

“Article III of the United States Constitution only extends federal judicial power to cases or controversies.” *United States v. Meyers*, 200 F.3d 715, 718 (10th Cir. 2000). “Article III standing is a jurisdictional requirement for a plaintiff to plead and prove, and a lack of standing may be challenged by a motion under Rule 12(b)(1).” *Altstatt v. Bd. of Cnty. Comm’rs for Okla. Cnty.*, No. CIV-22-811-D, 2023 WL 6208550, at *2 (W.D. Okla. Sept. 22, 2023); *see also U.S. ex rel. Stone*, 282 F.3d at 797. When considering whether

Article III standing is established, a federal court “must assume plaintiff’s claim has legal validity.” *Awad v. Ziriox*, 754 F. Supp. 2d 1298, 1303 (W.D. Okla. 2010) (citing *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1088 (10th Cir. 2006)); accord *Diné Citizens Against Ruining Our Env’t v. Bernhardt*, 923 F.3d 831, 841 (10th Cir. 2019) (noting that a party “need not prove the merits of [its] claim in order to establish standing”). At the pleading stage, a plaintiff’s burden in establishing standing is “lightened considerably.” *Petrella v. Brownback*, 697 F.3d 1285, 1292 (10th Cir. 2012).

To have standing to sue, a plaintiff must properly allege: (1) it “ha[s] suffered an injury in fact—an invasion of a legally protected interest”—“that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotation marks omitted); *New England Health Care Emps. Pension Fund v. Woodruff*, 512 F.3d 1283, 1288 (10th Cir. 2008).

Comanche Nation alleges that the FSA Defendants are liable for violation of Article 2 of the First Treaty, which was signed in 1867. This provision set forth the geographic boundaries of the KCA Reservation and then prescribed that this land

shall be and the same is hereby set apart for the absolute and undisturbed use and occupation of the tribes herein named, and for such other friendly tribes or individual Indians as, from time to time, they may be willing (with the consent of the United States) to admit among them; and the United States now solemnly agrees that no persons except those herein authorized so to do and except such officers, agents, and employees of the Government as may be authorized to enter upon Indian reservation in discharge of duties enjoined

by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article, or in such territory as may be added to this reservation, for the use of said Indians.

First Treaty art. 2, 15 Stat. at 582 (emphasis added) (editor's mark omitted).

“On October 6, 1892, the United States negotiated an agreement with the Kiowa Tribe, Comanche Nation, and Apache Tribe for the allotment of lands of the KCA Reservation to individual members of the three tribes. This was known as the Jerome Agreement.” *Comanche Nation*, 393 F. Supp. 2d at 1200. “Pursuant to the Jerome Agreement, the United States acquired a substantial portion of the KCA Reservation and allotted individual tracts of land to the individual members of the three tribes.” *Id.* at 1200-01.

In 1900, Congress ratified the Jerome Agreement, proclaiming:

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

Act of June 6, 1900 (“1900 Act”), art. I, ch. 813, 31 Stat. 676, 676-77 (1900).

The FSA Defendants argue that, because the KCA Reservation was disestablished pursuant to the 1900 Act, Comanche Nation fails to allege an injury in fact. *See* FSA Defs.’ Suppl. Mot. to Dismiss at 3-4, 7-8 (citing *Martinez v. State*, 502 P.2d 1115 (Okla. Crim. App. 2021)). The FSA Defendants assert that, as a result of the 1900 Act, “there is

no KCA Reservation reserved for the exclusive use and occupation of the Comanche Nation” and thus no violation of any associated treaty right. *Id.* at 8.

Comanche Nation does not dispute that such an abrogation of its treaty rights would deprive it of standing but argues that Comanche Nation may still enforce its rights under the First Treaty, as the 1900 Act was enacted to open the KCA Reservation “for non-Indian settlement on fee lands,” not for “from allowing another tribe to obtain jurisdiction over tribal trust lands on that reservation.” Pl.’s Suppl. Resp. at 25.

The relevant authorities persuasively demonstrate, however, that the rights Comanche Nation attempts to now enforce are inconsistent with the effect of the 1900 Act and so must have been extinguished by that legislation. It is now well established that in the 1900 Act Congress “intended to dissolve the tribal government” and “disestablish the organized reservation.” *Tooisgah v. United States*, 186 F.2d 93, 97-98 (10th Cir. 1950); *accord Pittsburg & Midway Coal Mining Co. v. Yazzie*, 909 F.2d 1387, 1421 (10th Cir. 1990); *In re Yates*, 349 P.2d 45, 47 (Okla. Crim. App. 1960). It is further established that Congress “did so” disestablish the KCA Reservation via the 1900 Act. *Martinez*, 502 P.3d at 1120. Whatever additional purposes of Congress may have been possible, Comanche Nation fails to show how the tribes’ First Treaty right to “absolute and undisturbed use and occupation” of the land within the former reservation can reasonably still be intact after those tribes agreed to “cede, convey, transfer, relinquish, and surrender, *forever and absolutely, without any reservation whatever*, express or implied, all their claim, title, and interest, of every kind and character, in and to” that same land. First Treaty art. 2; 1900 Act art. I (emphasis added); *cf. Tooisgah*, 186 F.2d at 99 (noting that with the 1900 Act

“the reservation was dissolved and tribal government broken up”); *Martinez*, 502 P.3d at 1119 (explaining that the 1900 Act confirmed “complete . . . surrender of all tribal claims to their reservation lands”). *See generally McGirt v. Oklahoma*, 591 U.S. 894, 904 (2020) (noting that Congress commonly expresses its intent to disestablish a reservation through “language evidencing the present and total surrender of all tribal interests” (internal quotation marks omitted)).

Comanche Nation alternatively asserts that the 1900 Act does not apply at all to the Tsalote Allotment. *See* Pl.’s Suppl. Resp. at 26-27. Specifically, Comanche Nation points to the text of the 1900 Act prescribing that the surrender of the tribes’ interest in the land was made “[s]ubject to the allotment of land, in severalty to the individual members of the Comanche, Kiowa, and Apache tribes of Indians in the Indian Territory.” 1900 Act art. I. Because the Tsalote Allotment is one of the referenced allotments in severalty, argues Comanche Nation, the 1900 Act “cannot have possibly extinguished the Comanche Nation’s treaty right to consent to another tribe acquiring jurisdiction or ownership over the Tsalote Allotment.” Pl.’s Suppl. Resp. at 26.

Beyond quoting the “[s]ubject to” language, Comanche Nation offers no authority for the conclusion that the Tsalote Allotment is “outside the scope” of the 1900 Act, and the Court finds that Comanche Nation’s position does not align with a reasonable reading of the 1900 Act or relevant case authority. As noted above, the Tsalote Allotment was allotted to a Kiowa tribal member. *See* Am. Compl. ¶ 28. Article II of the 1900 Act prescribed that such an allotment was part of, and included in, the lands over which the tribes were relinquishing their interest:

Out of the lands ceded, conveyed, transferred, relinquished, and surrendered by Article I hereof, and in part consideration for the cession thereof, it is agreed by the United States that each member of said Comanche, Kiowa, and Apache tribes of Indians over the age of eighteen (18) years shall have the right to select for himself or herself one hundred and sixty (160) acres of land to be held and owned in severalty, to conform to the legal surveys in boundary[.]

1900 Act art. II.

The quoted text makes clear that allotments such as the Tsalote Allotment were selected “*out of the lands ceded*”—i.e., the lands to which the tribes surrendered any interest in Article I—rather than lands separate from the ceded lands. *Id.* (emphasis added); *accord Tooisgah*, 186 F.2d at 97 (explaining that “[t]he allotment of lands in severalty within the limits of [an] established reservation” would not, standing alone, disestablish the reservation or “exclude the allotments from [the reservation of which they were a part]”). And when the tribal government “dissolve[d]” pursuant to the 1900 Act, the KCA Reservation was likewise “dissolved.” *Id.* at 97, 99. Thus, the allotments were “not considered to be retained reservation lands,” as Comanche Nation suggests. *Yazzie*, 909 F.2d at 1421; *see also United States v. Burnett*, 777 F.2d 593, 596 (10th Cir. 1985).

Comanche Nation therefore fails to show that it retains any right to seek redress for violation of the First Treaty as to the Tsalote Allotment. Because Comanche Nation has not met its burden to establish standing on Count Three, dismissal is required pursuant to Federal Rule of Civil Procedure 12(b)(1).

V. *Count Four: Violation of the Indian Gaming Regulatory Act*

In Count Four, Comanche Nation brings a claim for violation of the Indian Gaming Regulatory Act (“IGRA”), 25 U.S.C. §§ 2701 et seq. Pursuant to IGRA, class III gaming

is lawful on Indian lands only if the gaming is: (i) authorized by an ordinance or resolution that meets certain requirements; (ii) located in a State that permits such gaming; and (iii) “conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under [§ 2710(d)(3)] that is in effect.” *Id.* § 2710(d)(1).

Comanche Nation invokes 25 U.S.C. § 2710(d)(7)(A)(ii), which provides:

(7)(A) The United States district courts shall have jurisdiction over—

...

(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 [§ 2710(d)(3)] that is in effect[.]

Id. § 2710(d)(7)(A)(ii); *see* Am. Compl. ¶¶ 88-89.

According to Comanche Nation, the operation of the Warm Springs Casino should be enjoined because the gaming is being conducted unlawfully and in violation of a tribe-state compact that is itself unlawful. *See* Am. Compl. ¶¶ 94, 99; *id.* Ex. 7, FSAT-Okla. Compact (Doc. No. 51-1). First, the gaming is violating IGRA’s prescription that class III gaming “shall be lawful on Indian lands only if . . . authorized by an ordinance or resolution that . . . is adopted by the governing body of the Indian tribe having jurisdiction over such lands.” 25 U.S.C. § 2710(d)(1)(A)(i). Because the FSA Tribe lacks jurisdiction over the relevant lands, that tribe’s adoption of the ordinance or resolution did not conform to this statutory requirement. *See* Am. Compl. ¶¶ 1, 86, 92, 98.³ Second,

³ Comanche Nation also suggests that the casino’s class II gaming is violative of a separate provision of IGRA, *see* Am. Compl. ¶ 92 (citing 25 U.S.C. § 2710(b)).

operation of the Warm Springs Casino is violative of 25 U.S.C. § 2719(a), which generally prohibits gaming on lands acquired in trust after October 17, 1988. *See id.* ¶¶ 93, 98.

Comanche Nation alleges that these illegalities result in the relevant gaming being “conducted in violation of” the compact entered into by the FSA Tribe and the State of Oklahoma (the “2005 Compact”). 25 U.S.C. § 2710(d)(7)(A)(ii). More specifically, because the Compact incorporates IGRA’s requirement that the compacting tribe must have jurisdiction over the lands where the gaming is being conducted, by expressly stating that the FSA Tribe may establish and operate gaming facilities only on “‘*its* Indian lands as defined by IGRA,’” the FSA Tribe’s gaming is violating that requirement. Am. Compl. ¶ 97 (emphasis added) (quoting 2005 Compact pt. 5(L)); *see also* 25 U.S.C. § 2710(d)(3)(A) (prescribing that an Indian tribe “having jurisdiction” over the gaming lands shall request the State to enter into a compact). Comanche Nation further alleges that the gaming on the Tsalote Allotment should be enjoined pursuant to § 2710(d)(7)(A)(ii) because “Oklahoma’s offer of a compact to the FSA Tribe was expressly conditioned on the compact relating to ‘Indian lands . . . over which the tribe has jurisdiction . . . and [are] a part of the tribe’s “Indian reservation” as defined in 25 C.F.R., Part 151.2 or ha[ve] been acquired pursuant to 25 C.F.R., Part 151.’” Am. Compl. ¶ 96 (first omission in original) (quoting Okla. Stat. tit. 3A, § 280). Because the FSA Tribe does not have jurisdiction over the allotment, the allotment is not part of the FSA Tribe’s reservation, and the FSA Tribe’s acquisition of the allotment was invalid under 25 C.F.R. § 151.7 (formerly § 151.8), it is alleged that the tribal gaming is being conducted in violation of the compact with the State of Oklahoma. *See id.* ¶ 98.

A. Rule 12(b)(1): Constitutional Standing

The FSA Defendants argue that Comanche Nation lacks Article III standing to bring both this claim and Count Five (addressed below) because Comanche Nation fails to sufficiently show an injury in fact caused by the allegedly unlawful operation of the Warm Springs Casino. *See* FSA Defs.’ Suppl. Mot. to Dismiss at 6-8.

To satisfy the injury-in-fact requirement for Article III standing, a party must allege that the injury is “concrete and particularized and actual and imminent, not conjectural or hypothetical.” *N. Mill St., LLC v. City of Aspen*, 6 F.4th 1216, 1229 (10th Cir. 2021) (internal quotation marks omitted). An injury is concrete where it is a “real,” not abstract, harm to a legally protected interest and is particularized where it affects a party “in a personal and individual way.” *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016) (internal quotation marks omitted). A real injury can be tangible, such as a physical or monetary harm, or it can be intangible, such as a reputational harm. *See TransUnion LLC v. Ramirez*, 594 U.S. 413, 425 (2021).

At this pleading stage, “general factual allegations of injury resulting from the [defendants’] conduct may suffice,” for the Court “presum[es] that general allegations embrace those specific facts that are necessary to support the claim.” *S. Utah Wilderness All. v. Palma*, 707 F.3d 1143, 1152 (10th Cir. 2013) (internal quotation marks omitted). Comanche Nation pleads that the unlawful operation by the FSA Tribe of the Warm Springs Casino “is diverting revenue from [Comanche Nation’s] casinos” and “reducing revenue available for government programs.” Am. Compl. ¶ 59. “For standing purposes, a loss of even a small amount of money is ordinarily an ‘injury.’” *Czyzewski v. Jevic*

Holding Corp., 580 U.S. 451, 464 (2017). And these allegations “are firmly rooted in the basic laws of economics that [Comanche Nation] would get a little more . . . gaming business at its Oklahoma casinos if the [FSA Tribe’s] Oklahoma casinos did not conduct . . . gaming.” *Cherokee Nation*, 643 F. Supp. 3d at 109 (internal quotation marks omitted). Further, the harm is not alleged to result merely from competition but from “illegal competition,” which “is a cognizable injury-in-fact for standing purposes.” *Id.* at 108.

For these reasons, Comanche Nation has shown an injury in fact sufficient to demonstrate Article III standing as to Counts Four and Five.

B. Rule 12(b)(7): Failure to Join a Party

The FSA Defendants also seek dismissal on the basis that Comanche Nation has failed to join Fort Sill Apache Tribe and/or Apache Tribe and/or the Kiowa Comanche Apache Intertribal Land Use Committee (“KCAILUC”) in this lawsuit, despite these entities being required parties under Federal Rule of Civil Procedure 19. *See* FSA Defs.’ Mot. to Dismiss at 25-30.

As an initial matter, such dismissal would rest upon Rule 12(b)(7) of the Federal Rules of Civil Procedure, but the FSA Defendants do not discuss that Rule or present its relevant standards to the Court. The motion’s disjointed argument—in which it is asserted both that the FSA Tribe is immune from suit and that it is not—fails to show that any of these entities’ joinder is required to allow the Court to afford complete relief or that Rule 19(a) otherwise requires dismissal. *See* Fed. R. Civ. P. 19(a)(1)(A)-(B). It follows that the motion fails to show that any of these entities’ inability to be joined requires dismissal under Rule 19(b). *See id.* R. 19(b); *Citizen Band Potawatomi Indian Tribe of Okla. v.*

Collier, 17 F.3d 1292, 1293 (10th Cir. 1994) (“The proponent of a motion to dismiss under Rule 12(b)(7) has the burden of producing evidence showing the nature of the interest possessed by an absent party and that the protection of that interest will be impaired by the absence.”).

Further, governing authority supports the proposition that the FSA Tribe is not a necessary and indispensable party here, where the FSA Defendants are sued in their official capacities as tribal officials of the FSA Tribe. *See, e.g., Sac & Fox Nation of Mo. v. Norton*, 240 F.3d 1250, 1258-60 (10th Cir. 2001) (reversing district court’s dismissal under Rule 19 where, although the tribe had an economic stake in the litigation, “[t]he absence of the [tribe] d[id] not prevent the plaintiffs from receiving their requested declaratory relief” and a named defendant’s interests were “substantially similar, if not virtually identical, to those of the [tribe]”); *Kansas v. United States*, 249 F.3d 1213, 1225-27 (10th Cir. 2001) (“[M]ost importantly, the potential for prejudice to the Miami Tribe is largely nonexistent due to the presence in this suit of not only [federal defendants], but also the tribal officials and [the other party to the gaming contract].”). Similarly, on the current record, the Court does not find that either the Apache Tribe—which is not alleged to have jurisdiction over the allotment—or the KCAILUC—which is not an Indian tribe and does not appear central to Comanche Nation’s claims—is a necessary and indispensable party.

C. Rule 12(b)(6): Failure to State a Claim

The FSA Defendants seek dismissal of Count Four for failure to state a claim upon which relief can be granted. In essence, they argue that Comanche Nation has not pleaded a plausible claim for violation of IGRA because (i) the 2005 Compact’s reference to

“Indian Lands” includes the Tsalote Allotment, (ii) the NIGC has discretion “to make Indian lands determinations” and oversee gaming, and (iii) the FSA Tribe went through the approval process set out by IGRA and overseen by NIGC to establish the Warm Springs Casino. *See* FSA Defs.’ Mot. to Dismiss at 19-20. The FSA Defendants also dispute Comanche Nation’s contention that the FSA Tribe’s acquisition of the Tsalote Allotment and operation of the casino violated/are violating federal regulations, treaties, and statutes. *See id.*; FSA Defs.’ Reply at 4-11.

Such briefing ignores material aspects of Comanche Nation’s theory of liability and fails to recognize that the Court must accept the Amended Complaint’s well-pleaded allegations as true and view them in Comanche Nation’s favor. *See Burnett*, 706 F.3d at 1235. Rather than showing any lack of plausibility in Count Four, these arguments attempt to defeat the claim on its merits based upon the FSA Defendants’ version of the facts and legal conclusions. Having considered the pleading, the Court concludes that Comanche Nation has adequately stated a claim to enjoin the casino’s class III gaming due to its being conducted in violation of the 2005 Compact, as summarized above. *See* Am. Compl. ¶¶ 87-101; 25 U.S.C. § 2710(d)(7)(A)(ii).

VI. Count Five: Violation of RICO

Finally, Comanche Nation asserts that the FSA Defendants are violating the Racketeer Influenced and Corrupt Organizations Act (“RICO”), 18 U.S.C. §§ 1961-1968. RICO prescribes in relevant part that it is “unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such

enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." *Id.* § 1962(c).

Comanche Nation's theory of liability under RICO rests upon the premise that because the FSA Tribe, an "enterprise," runs the Warm Springs Casino, it is knowingly operating an illegal gambling business under 18 U.S.C. § 1955 and engaging in money laundering under 18 U.S.C. § 1956 because the casino is not authorized under IGRA (and therefore also not authorized under Oklahoma law). *See* Am. Compl. ¶¶ 102-130. Comanche Nation seeks a declaration that the FSA Defendants have violated RICO by conspiring to open the casino and injunctive relief preventing the FSA Tribe's operation of the casino or any gaming on the Tsalote Allotment. *See id.* ¶ 131.

The FSA Defendants first assert that they are not "person[s]" subject to liability under RICO because "person" in the statutory scheme does not expressly include tribal officials or tribes. *See* FSA Defs.' Mot. to Dismiss at 23 (citing 18 U.S.C. §§ 1961(3), 1962). They relatedly argue that they are immune to RICO claims due to their status as sovereign officials. *See id.* Comanche Nation presents multiple persuasive decisions inconsistent with this position, however, and the Court will not dismiss the claim on this basis. *See* Pl.'s Resp. at 26-27 (citing *Wilhite v. Awe Kualawaache Care Ctr.*, No. CV-18-80, 2018 WL 3586539, at *2 (D. Mont. July 26, 2018); *Brice v. Haynes Invs., LLC*, 548 F. Supp. 3d 882, 900-01 (N.D. Cal. 2021)); *cf.* *Gingras v. Rosette*, No. 5:15-cv-101, 2016 WL 2932163, at *28 (D. Vt. May 18, 2016) (holding that tribes are suable persons under RICO and, while they enjoy immunity, they were liable to suit for injunctive relief), *aff'd sub nom. Gingras v. Think Fin., Inc.*, 922 F.3d 112 (2d Cir. 2019).

Next, the FSA Defendants seek dismissal on the RICO claim under Rule 12(b)(6), arguing that Comanche Nation’s allegations reflect not a pattern of racketeering activity but, rather, that all the defendants acted within their rights and in accordance with applicable statutes and regulations in opening the Warm Springs Casino. *See* FSA Defs.’ Mot. to Dismiss at 22 (“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.”).

“To successfully state a RICO claim, a plaintiff must allege four elements: (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.” *Robbins v. Wilkie*, 300 F.3d 1208, 1210 (10th Cir. 2002) (internal quotation marks omitted); *accord George v. Urb. Settlement Servs.*, 833 F.3d 1242, 1248 (10th Cir. 2016). The FSA Defendants do not specifically address these elements, and the Court concludes that each is adequately pleaded in the Amended Complaint. *See, e.g.*, Am. Compl. ¶¶ 103-104 (identifying either the FSA Tribe or a division thereof as an enterprise operating in an affecting interstate commerce), 111-126 (alleging the manner and means of the conspiracy to engage in money laundering and illegal gambling), 127 (representing that Comanche Nation has been injured in its business or property by the FSA Defendants conducting the affairs of the enterprise unlawfully). At this early pleading stage, Count Five has been sufficiently pleaded “on the assumption that all the allegations . . . are true (even if doubtful in fact).” *Twombly*, 550 U.S. at 555.

VII. Comanche Nation's Motion for Preliminary Injunction

Comanche Nation has filed a Motion for Preliminary Injunction Against the FSA Defendants (Doc. No. 52), as well as supporting papers (Doc. Nos. 53, 54, 55). The FSA Defendants and the Federal Defendants have each responded (Doc. Nos. 60, 64), and Comanche Nation has replied (Doc. Nos. 66, 67, 68). The Court incorporates by reference herein the factual findings made in its Order of June 3, 2022, following an evidentiary hearing on Plaintiffs' request for a temporary restraining order. *See* Order of June 3, 2022, at 2-4. As the parties have submitted extensive briefing as well as supporting exhibits, the Court declines to conduct a separate hearing on the Motion for Preliminary Injunction. *See* LCvR 78.1.

In its Motion, Comanche Nation seeks an order enjoining the FSA Defendants from causing (1) the FSA Tribe to exercise any jurisdiction over the Tsalote Allotment and (2) the Warm Springs Casino to conduct class III gaming. *See* Pl.'s Mot. Prelim. Inj. at 1-2.

A. Relevant Standards

As explained by the Tenth Circuit,

Ordinarily, a movant seeking a preliminary injunction must establish (1) a substantial likelihood of success on the merits; (2) irreparable injury to the movant if the injunction is denied; (3) the threatened injury to the movant outweighs the injury to the party opposing the preliminary injunction; and (4) the injunction would not be adverse to the public interest.

Dominion Video Satellite, Inc. v. Echostar Satellite Corp., 269 F.3d 1149, 1154 (10th Cir. 2001); *see also* Fed. R. Civ. P. 65(a). A showing on “[e]ach of these elements is a prerequisite for obtaining” injunctive relief. *Diné Citizens Against Ruining Our Env't v. Jewell*, 839 F.3d 1276, 1281 (10th Cir. 2016).

An application for injunctive relief “is addressed to the sound judicial discretion of the district court.” *Goodpaster v. Okla. Gas & Elec. Co.*, 291 F.2d 276, 278 (10th Cir. 1961); accord *Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1258 (10th Cir. 2005). “Because a preliminary injunction is an extraordinary remedy, the movant’s right to relief must be clear and unequivocal.” *Dominion Video Satellite*, 269 F.3d at 1154.⁴

B. Discussion

Comanche Nation has not met its burden to show a substantial likelihood of success on the merits. Critically, Comanche Nation’s request is focused upon its argument that as to Count Three (violation of the First Treaty) it has “present[ed] a prima facie case showing a reasonable probability that it will ultimately be entitled to the relief sought.” *Salt Lake Trib. Publ’g Co. v. AT & T Corp.*, 320 F.3d 1081, 1100 (10th Cir. 2003) (alteration and internal quotation marks omitted); see Pl.’s Br. Prelim. Inj. (Doc. No. 53) at 10-11, 15-24. But Count Three is herein being dismissed in its entirety, as discussed *supra*, and cannot supply the basis for entry of extraordinary relief.

Comanche Nation also cites Count Four (violation of IGRA), primarily relying upon its amended pleading allegations as support for shutting down the Warm Springs Casino during the pendency of this litigation. See Pl.’s Br. Prelim. Inj. at 15, 24-29. While Comanche Nation has stated a facially plausible claim in Count Four, as summarized above, this claim is based upon an apparently novel and certainly complicated theory of

⁴ The parties dispute whether Comanche Nation is seeking relief that is “disfavored” and therefore must satisfy a “heightened standard.” *Fish v. Kobach*, 840 F.3d 710, 723 (10th Cir. 2016). The Court need not decide because Comanche Nation fails to make an adequate showing under either standard.

liability that will require proof of multiple underlying acts of unlawful conduct, by the FSA Defendants and others, ranging over more than 20 years and as yet not found to be improper by any other court or agency. *See* Am. Compl. ¶¶ 87-99 (alleging violations of: 25 U.S.C. §§ 2710(b), (d)(3)(A), (d)(7)(A)(ii), and 2719(a); 25 C.F.R. §§ 151.2 and 151.7; and the 2005 Compact). Further, the FSA Defendants’ alleged liability under the IGRA relies in part upon Comanche Nation’s contention that “[t]he FSAT’s assertion of jurisdiction on the Tsalote Allotment violates the First Treaty”—the cause of action for which has been dismissed as to all defendants. Pl.’s Br. Prelim. Inj. at 26. Accordingly, the fact Comanche Nation has sufficiently pleaded a claim for ultimate injunctive relief does not amount to a clear and unequivocal showing of entitlement to the “drastic relief” of an extraordinary interim remedy. *Schrier*, 427 F.3d at 1258 (internal quotation marks omitted) (noting that a preliminary injunction is “to be provided with caution” and “only in cases where the necessity for it is clearly established” (internal quotation marks omitted)). Neither the pleading allegations nor the supporting submissions fulfill Comanche Nation’s burden to show it is substantially likely to prevail upon the merits of Count Four.

Because Comanche Nation cannot satisfy its burden to show that it is substantially likely to succeed on the merits, the Court need not reach the other three elements necessary for a preliminary injunction to issue. *See Nova Health Sys. v. Edmondson*, 460 F.3d 1295, 1299 (10th Cir. 2006); *Diné Citizens*, 839 F.3d at 1285.

CONCLUSION

For these reasons, the Motion to Dismiss (Doc. No. 59) and Supplemental Motion

to Dismiss (Doc. No. 123) are GRANTED IN PART and DENIED IN PART, as follows:

- Count Three of the Amended Complaint is dismissed without prejudice pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure; and
- Count Four and Count Five of the Amended Complaint remain pending.

IT IS FURTHER ORDERED that Comanche Nation's Motion for Preliminary Injunction (Doc. No. 52) is DENIED.

IT IS SO ORDERED this 30th day of September, 2024.



CHARLES B. GOODWIN
United States District Judge