IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MUSCOGEE (CREEK) NATION, a federally recognized Indian tribe, *Plaintiff*, v. WADE FREE, in his official capacity as Director, Oklahoma Department of Wildlife Conservation, and RUSSELL COCHRAN, in his official capacity as special prosecutor employed by the Governor, *Defendants*.	)	Case No. 26-cv-00003-CVE-JFJ

DEFENDANTS' JOINT RESPONSE AND OBJECTION TO MOTION OF THE MUSCOGEE (CREEK) NATION FOR PRELIMINARY INJUNCTION

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Defendants Wade Free and Russell Cochran, sued in their official capacities as officers of the State of Oklahoma (collectively, "Defendants" or the "State"), respectfully file this Joint Response to the Muscogee (Creek) Nation's ("Nation") Motion for Preliminary Injunction ("Motion") (Doc. 8) and request that the Motion be denied.

INTRODUCTION

Since statehood, the State of Oklahoma has exercised undivided criminal and civil jurisdiction in a non-discriminatory manner over all persons within its borders, to include many aspects of the affairs of its citizenry, Indian and non-Indian alike. And pursuant to the State's inherent sovereign authority to manage, protect, and conserve wildlife in the public trust, *see Hughes v. Oklahoma*, 441 U.S. 322, 338–39 (1979), the Oklahoma Department of Wildlife Conservation ("ODWC") has regulated hunting and fishing in Oklahoma for over a century. Even within what is known as "Indian country," the State has consistently exercised its regulatory jurisdiction over hunting and fishing on all publicly and privately owned fee lands (hereinafter, "fee lands")—and is entrusted with special responsibility for lands it owns, leases, or jointly manages with the federal government. But the State has not sought, and does not seek, to apply state hunting and fishing laws "to hunting and fishing by members of [tribes] on land held as Indian allotments and on land held in trust by the United States for the [tribes]" (hereinafter, "trust lands"). *See Cheyenne-Arapaho Tribes of Oklahoma v. State of Okl.*, 618 F.2d 665, 667-69 (10th Cir. 1980); *see also* Ex. 1, Aff. Wade Free, ¶ 3 (ODWC does not extend its enforcement authority to trust lands, except at the request of the tribes pursuant to cross-deputization agreements).

For its part, following the United States Supreme Court's decision in *McGirt v. Oklahoma*, 591 U.S. 894 (2020),[1] in 2022, the Nation enacted its comprehensive Wildlife Conservation Code, MCNCA tit. 23, ch. 2 (the "Conservation Code"), which repealed and replaced its Hunting and Fishing

[1] There, the Court held that Congress had not disestablished the Creek Reservation for purposes of the Major Crimes Act ("MCA") under 18 U.S.C. § 1153(a). *McGirt*, 591 U.S. at 929, 937.

Code that had been in place since approximately 2005. The Conservation Code, and its associated regulations, "track those of the ODWC on a provision-by-provision basis" in the interest of "conservation of shared natural resources" (Doc. 8 at 6)—and this wholesale adoption of the State's Code and regulations, which Oklahoma applies non-discriminatorily to all persons engaged in hunting and fishing within its borders, provides them with a meaningful stamp of validity and necessity. And the Nation's laws today recognize, as they have since 2005, that its jurisdiction is limited to "hunting, fishing, trapping, [and] gathering … on ***lands of the Muscogee (Creek) Nation***, whether held in fee simple title or in trust, and on lands, the alienation of which is restricted by Tribal or federal law, of citizens of the Muscogee (Creek) Nation" (*i.e.*, ***trust lands***). 23 MCNCA § 2-104(A) (emphasis added); *see also* 23 MCNCA § 2-103(A) (tribal laws apply only "on certain lands" within its boundaries). In other words, the Conservation Code does not purport to apply on State lands or other private fee lands within the Creek Reservation.

And yet, spurred by a lawsuit filed by other tribes, and relying primarily on their strained reading of *McGirt*, while ignoring the Court's subsequent decision in *Oklahoma v. Castro-Huerta*, 597 U.S. 629 (2022), the Nation filed this action. It seeks broad declaratory and injunctive relief that would categorically bar the State, its officers, and its executive agencies from enforcing *any* state wildlife laws and regulations against tribal members *anywhere* within its Indian country – even on fee lands, including those owned or historically managed by the State. But the Nation cannot demonstrate a likelihood of success on the merits. Essentially, the Nation asks this Court to reserve to its members a perpetual free hunting and fishing license on fee lands, which the Nation and/or tribal members alienated years ago and that the State now manages for the public trust, citing treaty rights and principles of inherent tribal sovereignty. But no treaty applicable here expressly reserves *any* hunting and fishing rights to the Nation (or its members) as required by *Castro-Huerta*, 597 U.S. at 654. And no decision of the U.S. Supreme Court has ever recognized such implicit rights on fee lands under a theory of inherent tribal

sovereignty. *See also N. Arapahoe Tribe v. Hodel*, 808 F.2d 741, 748 (10th Cir. 1987) (tribes' implied rights to hunt and fish are "rights of possession" that are "derived from their status as occupants of the land"). To the contrary, the Supreme Court has expressly rejected the position that tribal members hold "a special right, nonexclusive but free of state regulation" on alienated lands no longer held in trust for the tribe. *See Oregon Dep't of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 763-64 (1985). Even if the Nation could establish some implicit treaty-based hunting and fishing rights based on possession or occupancy, those rights vanish when the land is alienated. Thus, the Nation's claim fails on its face.

Alternatively, the Nation contends that federal law broadly preempts the exercise of any State jurisdiction in Indian country, whether criminal, civil, or regulatory, in the absence of express Congressional authority. But *McGir*t, the authority on which it relies, did not address, much less displace, the State's general police power or its authority to enforce non-MCA offenses or exercise civil regulatory jurisdiction. And as the U.S. Supreme Court held in *Castro-Huerta*, the presumption is exactly the opposite: "[A]s a matter of state sovereignty, a State has jurisdiction over all of its territory, including Indian country," and "the default is that States have criminal jurisdiction in Indian country unless that jurisdiction is *preempted*." 597 U.S. at 636, 638, 653 (emphasis in original). Because "Indian country is part of the State, not separate from the State," "States do not need a permission slip from Congress to exercise their sovereign authority." *Id.* at 636, 653. Thus, the Nation's legal theory here finds no support in *McGirt*, is foreclosed by *Castro-Huerta*, and conflicts with a long line of precedent recognizing both the States' broad police and trustee powers over wildlife conservation.

Nor can the Nation demonstrate great and immediate irreparable harm to justify the extraordinary remedy it seeks. The only consequence of denying an injunction is the continuation of the same regulatory framework that has governed hunting and fishing in Oklahoma for more than a century. The Nation has never previously challenged this status quo that, at most, imposes minimal

burdens on individual hunters. By contrast, an injunction would inflict substantial and irreversible harm on the State, stripping it of core sovereign and property rights it has exercised since statehood. Enjoining the State from equally enforcing the law would impede Oklahoma's constitutional and statutory conservation responsibilities throughout eastern Oklahoma, disrupt the State's management of hunting and fishing on fee lands, diminish ODWC revenues from the issuance of State hunting and fishing licenses central to its core conservation function, jeopardize longstanding hunting-access leases, and even interfere with state-federal jurisdictional arrangements. The balance of harms weighs decisively against injunctive relief. This Court should reject the Nation's unprecedented—and unsupported—request for sweeping relief and deny the Motion.

FACTUAL BACKGROUND

A. The ODWC's History of Managing the State's Bird, Fish, Game and Wildlife Resources as Necessary for Conservation.

By the turn of the twentieth century, Oklahoma had already experienced dramatic losses in many native wildlife species due to unregulated harvest and habitat changes following statehood. Ex. 2, Aff. Scott Parry, ¶¶ 2, 4-10 (specific wildlife species); Ex. 3, Aff. Kenneth Cunningham, ¶¶ 2-4 (fish).[2] In response to these early declines and the need for coordinated management, just two years later, Oklahoma created what is now the ODWC (then known as the Game and Fish Department). Ex. 1, Aff. Free, ¶¶ 2, 4-5. Since at least 1909, the State has maintained a comprehensive regulatory system governing hunting, possession, sale, and transportation of wildlife, including restrictions on methods of take, seasons, bag limits, and conduct on public and private lands. *See* S.B. 2, 1909 O.S.L. ch. 44 (Mar. 8, 1909).

[2] The State is relying upon the same affidavits and evidence previously submitted in response to the motion for preliminary injunction filed by other Oklahoma tribes in *Cherokee Nation, et al. v. Free*, Case No. 25-cv-630-CVE-JFJ (N.D. Okla. Nov. 18, 2025) (hereinafter, "*Cherokee Nation*"), because the relevant facts—as to the exercise of jurisdiction by the State and ODWC—apply equally across all Indian country in eastern Oklahoma.

The conservation of Oklahoma's wildlife, and the right to responsibly hunt and fish, was so important to the people of Oklahoma that, in 1955, Oklahoma voters made the ODWC and its Commission a constitutional body, specifically tasked with "the control, management, restoration, conservation and regulation of the bird, fish, game and wildlife resources of the State, including the purchase or other acquisition of property for said purposes, and for the administration of the laws pertaining thereto …" OKLA. CONST. art. XXVI, §§ 1, 4 (added by Laws 1955, SJR 22, Section 1, State Question 374, Legislative Referendum 115, adopted at election held July 3, 1956). In 1974, the Legislature enacted the "Oklahoma Wildlife Conservation Code," 29 O.S. §§ 1-101 *et seq.* (the "Code"), conferring certain powers and duties on its Director, 29 O.S. § 3-105, including one requiring all hunters to carry State licenses, 29 O.S. § 4-101(D). And in 2008, Oklahoma voters directly added Article II, Section 36 to the Oklahoma Constitution, providing in relevant part:

> *All citizens of this state* shall have a right to hunt, fish, trap, and harvest game and fish, subject only to reasonable regulation as prescribed by the Legislature and the Wildlife Conservation Commission. *The Wildlife Conservation Commission shall have power and authority to approve methods, practices and procedures for hunting, trapping, fishing and the taking of game and fish.*

OKLA. CONST. art. II, § 36 (added by State Question No. 742, Legislative Referendum No. 345, Nov. 4, 2008) (emphasis added). That language unequivocally applies to all citizens, and there is no carveout for Indians and/or "Indian country."

ODWC is a non-appropriated, user-funded agency that receives no general revenue funds or legislative appropriations from the State of Oklahoma to fund these operations. Ex. 4, Aff. Andrea Crews, ¶ 2. Sales of hunting and fishing licenses provide essential revenues to enable ODWC to carry out wildlife habitat improvement, law enforcement, fish hatcheries, public access programs, land management, and conservation education initiatives. *Id.* ODWC is also able to access substantial matching federal grant funds from these revenues, primarily from the U.S. Fish and Wildlife Service through the Wildlife and Sport Fish Restoration Program ("WSFRP"). *Id.*, ¶ 3. In fiscal year 2025,

ODWC generated approximately $28 million in gross revenue from sales of hunting and fishing licenses and related activities, matched by another $28 million in federal grant reimbursements. *Id.*, ¶ 6. This user-pay/user-benefit system has sustained wildlife conservation in Oklahoma for generations, and it necessarily depends on universal participation by all user groups, including tribal citizens. *Id.*, ¶¶ 7-14, Ex. 1, Aff. Free, ¶¶ 4-15.

Today, pursuant to its constitutional and statutory authority, ODWC regulates hunting and fishing and enforces the wildlife Code and its regulations on public and private fee lands throughout Oklahoma. Ex. 1, Aff. Free, ¶ 2. Its primary mission is "the sound management and use of fish and wildlife resources" throughout the State. Ex. 3, Aff. Cunningham, ¶ 5. ODWC exercises its jurisdiction on all publicly and privately owned fee lands and also manages: (1) approximately 372,405 acres of wildlife management areas ("WMAs"), public lakes, department offices, and fish hatcheries owned in fee by ODWC; (2) approximately 364,656 acres of private land leased for public wildlife management from various individuals or entities; and (3) various properties owned by federal and private entities, comprising more than 700,000 acres, for which ODWC bears wildlife management responsibilities. Ex. 5, Aff. Parry, at ¶¶ 6-15. ODWC's Law Enforcement Division consists of 118 game wardens tasked with enforcing State wildlife and conservation laws throughout the State, including issuing citations, making arrests, serving warrants, and taking subjects into custody. Ex. 6, Aff. Nathan Erdman, ¶¶ 2-4; *see also* 29 O.S. § 3-201(B).

Under the Code, the State requires everyone from the age of 18 to 65 to obtain an annual State license to hunt and/or fish within Oklahoma, subject to certain exemptions. *See* 29 O.S. § 4-112 (hunting); § 4-110 (fishing). One of the exemptions to the licensing requirement is for hunting and fishing by owners or tenants "on land owned or leased by them." 29 O.S. § 4-112(B)(5) (hunting); 29 O.S. § 4-110(B)(4) (fishing). The Code provides that "no person may hunt or take by any means or method upon the land of another without the consent of the owner, lessee or occupant of such land."

29 O.S. § 5-202(A). The State also regulates methods of take, seasons, and bag limits based on decades of biological research, population surveys, and harvest data, for purposes of conservation and population management. Ex. 2, Aff. Parry, ¶¶ 4-12 (wildlife); Ex. 3, Aff. Cunningham, ¶¶ 7-15 (fisheries). For example, ODWC regulations make it "unlawful to place and/or hunt over bait on lands owned or managed" by ODWC. OKLA. ADMIN. CODE § 800:3-1-21.

B. The Nation's Enactment of its Conservation Code and Regulations.

The Nation enacted its Conservation Code in 2022, which repealed and replaced its prior Hunting and Fishing Code. *See* Doc. 8 at 5 & n.1. The Nation's Conservation Code and regulations "track those of the ODWC on a provision-by-provision basis," applying "equivalent" restrictions to its tribal members as the State applies non-discriminatorily to all persons engaged in hunting and fishing in Oklahoma in the interests of conservation and public safety. *Id.* at 6; *see also* Doc. 9, Decl. Wisner, ¶ 8 (provisions of the regulations "are largely identical in substance" to ODWC's regulations). However, just as the prior law did, the Conservation Code limits the exercise of the Creek Nation's regulatory and enforcement jurisdiction to trust lands. 23 MCNCA § 2-104(A). The Nation acknowledges the authority of the State to enforce State law within the outer boundaries of the Creek Reservation, at least as to non-Indians. Doc. 9, ¶ 12. And ODWC is cross-deputized by the Nation to respond to "'observed violations of the law and other emergency situations' within the Creek reservation, regardless of the Indian status of the suspected offender." *Id.*, ¶ 13.

C. The Instant Conflict and the Fee Lands at Issue.

For more than 100 years, the Nation freely acquiesced in the State's longstanding exercise of regulatory authority over hunting and fishing on fee lands, even those within the outer bounds of the Creek Reservation. Indeed, declarations submitted by tribal members confirm that they understood that they were required to comply with State law, including the requirement to purchase licenses, until very recently. *See* Doc. 11, Decl. Pettigrew, ¶ 10 (Creek tribal citizen "last year" purchased Oklahoma

state hunting licenses, and her son registered a deer he shot with the State); Doc. 12, Decl. Downum, ¶ 10 (Creek tribal citizen previously purchased State licenses for himself and his children until *McGirt*, after which he did not purchase a license for his youngest child).

Like many aspects of Oklahoma law and sovereignty, the State's long-settled wildlife conservation framework was cast into substantial uncertainty after *McGirt*. Although the decision has no applicability in the wildlife context, *McGirt's* ripple effects have produced an escalating conflict. In October 2025, the Nation's principal chief issued a statement that "Tribes have enjoyed hunting and fishing rights since time immemorial," and "Muscogee citizens hunting within the boundaries of the [Five Tribes] must adhere to Tribal laws and regulations of the Nation they are hunting within," but apparently not State law. *See* https://www.kswo.com/2025/10/09/tribes-respond-after-odwc-says-tribal-members-require-state-licensing-tribal-lands/ (last visited Feb. 2, 2026). Building on that assertion, the Nation here claims it "enjoys exclusive authority … to regulate hunting and fishing within its Reservation by Five Tribe citizens engaged in such activity pursuant to the Five Tribe Reciprocity Agreement." Doc. 2, ¶ 6. ODWC, in turn, has reiterated that "state fish and wildlife laws apply to everyone in Oklahoma" and "ODWC game wardens will continue to enforce the law and will issue citations to anyone in violation of the state's fish and game laws, regardless of tribal citizenship." *Id.* The Special Prosecutor was subsequently appointed by the Governor of Oklahoma to prosecute violations of the Code and ODWC regulations on non-trust fee lands.

On November 18, 2025, three tribes filed *Cherokee Nation*, which seeks similar relief to that sought by the Creek Nation in this action, as well as a preliminary injunction. And on December 18, 2025, the Oklahoma Attorney General ("OAG") issued Opinion No. 2025-19 regarding the State's jurisdiction in Indian country. Citing the Supreme Court's decision in *Castro-Huerta*, 597 U.S. at 636-38, the Opinion first recognized that "Oklahoma's sovereignty does not stop at reservation borders" and that "state jurisdiction in Indian Country may be preempted in two ways: (1) under ordinary

principles of federal law, or (2) when state jurisdiction unlawfully infringes on tribal self-government." 2025 OK AG 19, ¶ 12 (citing *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980)). After then purporting to conduct the *Bracker* balancing test contemplated under the second prong of *Castro-Huerta* (but without a factual record), the OAG concluded in summary fashion that federal law preempts application of the Code to hunting and fishing by Indians in Indian country (with the exception of State-owned lands)—specifically warning ODWC that his opinions are binding on State actors until they are judicially relieved of compliance. *Id.*, ¶ 31 & n.21. Although the Opinion technically applies only to the Indian county of the three tribes who are plaintiffs in *Cherokee Nation*, out of an abundance of caution, ODWC is likewise not enforcing violations of State law by tribal members within the outer boundaries of the Creek Reservation. And the Special Prosecutor has not to-date filed any matters against Creek members or for conduct occurring on the Creek Reservation (Doc. 8 at 2). On January 27, 2026, ODWC filed an *Application to Assume Original Jurisdiction and a Petition for Writ of Mandamus or Prohibition and/or Other Relief* before the Oklahoma Supreme Court in *Oklahoma Dept. of Wildlife Conservation et al. v. Drummond*, Case No. 123,759, challenging the binding effect of the Opinion on State officials, as well as the legal conclusions reached therein.

Against that backdrop, the Creek Nation here asks the Court to enjoin the State "from regulating and enforcing [S]tate law against Nation citizens hunting and fishing within the Creek Reservation in full compliance with the Nation's own fish and game regulations" (Doc. 8 at 1).

ARGUMENT AND AUTHORITIES

Because injunctive relief is "an extraordinary remedy, the right to relief must be clear and unequivocal." *Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*, 356 F.3d 1256, 1261 (10th Cir. 2004) (internal quotation marks and citation omitted). To obtain a preliminary injunction, the plaintiff bears the burden of establishing: (1) a likelihood of success on the merits; (2) a likelihood that the moving party will suffer irreparable harm if the injunction is not granted; (3) the balance of equities is in the

moving party's favor; and (4) the preliminary injunction is in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).[3] The Nation cannot meet its burden under any of these required factors, let alone make the strong showing required for disfavored injunctive relief.

I. THE NATION SEEKS DISFAVORED INJUNCTIVE RELIEF THAT WOULD ALTER THE STATUS QUO.

Certain forms of injunctive relief are disfavored because they "don't merely preserve the parties' relative positions pending trial" but rather "(1) [] mandate[] action (rather than prohibiting it), (2) [] change[] the status quo, or (3) [] grant[] all the relief that the moving party could expect from a trial win." *Free the Nipple-Fort Collins v. City of Fort Collins, Colorado*, 916 F.3d 792, 797 (10th Cir. 2019). To obtain such a disfavored injunction, a plaintiff must satisfy "a heavier burden on the likelihood-of-success-on-the-merits and the balance-of-harms factors[,]" making a "strong showing" on each of the prongs. *Id.*; *Fish v. Kobach*, 840 F.3d 710, 724 (10th Cir. 2016).

The Nation asks the Court to end State licensing requirements, suspend regulatory enforcement, prevent criminal prosecutions, and compel State officials to treat tribal members differently from all other Oklahoma residents – relief that implicates all three disfavored categories and would fundamentally alter the status quo. The injunction requested would "affirmatively require the nonmovant to act in a particular way, and as a result . . . place the issuing court in a position where it may have to provide ongoing supervision to assure the nonmovant is abiding by the injunction." *Dominion Video*, 356 F.3d at 1261. The relief sought through the Injunction Motion is also virtually indistinguishable from the relief the Nation could expect from a trial win.

Perhaps more importantly, the requested injunction would disturb, not preserve, the status quo. "[T]he limited purpose of a preliminary injunction 'is merely to preserve the relative positions of

[3] Although temporary restraining orders are drastic remedies subject to special considerations, both temporary restraining orders and preliminary injunctions must meet these same requirements. *See* Fed. R. Civ. P. 65(b); *Sampson v. Murray*, 415 U.S. 61, 89 n.59 (1974).

the parties until a trial on the merits can be held.'" *Schrier v. Univ. of Co.*, 427 F.3d 1253, 1258 (10th Cir. 2005). The status quo is "the last **uncontested** status between the parties which preceded the controversy until the outcome of the final hearing." *Id.* at 1260 (emphasis added). In *Muscogee (Creek) Nation v. Kunzweiler*, No. 25-CV-75-GKF-JFJ, 2025 WL 3124450, at *6 (N.D. Okla. Nov. 7, 2025), Judge Frizzell found a similar request by the Nation to prevent the State from asserting criminal jurisdiction over non-member Indians committing non-major crimes within the original boundaries of the Creek Reservation was a disfavored preliminary injunction that would alter the status quo.

The last uncontested status preceding this controversy existed prior to the Court's ruling in *McGirt* – not prior to October 8, 2025, as the Nation contends (Doc. 3-1 at 8 n.12).[4] For more than a century, ODWC has uniformly enforced its facially neutral hunting and fishing laws on all fee lands within the State, including those owned, leased, or managed by the State. *See* Ex. 1, Aff. Free, ¶¶ 2-5. The claimed right of the Nation to hunt free from State regulation on fee lands represents a recent (and significant) departure from that settled practice, spurred at the earliest by the 2020 *McGirt* decision. Indeed, it is only very recently that the Nation began challenging State licensing requirements and entered into the Reciprocity Agreement. An injunction would therefore alter, not preserve, the status quo. Accordingly, and for the independent reason that the Nation cannot satisfy its heightened burden, the disfavored injunctive relief should be denied.

II. THE NATION CANNOT ESTABLISH A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS.

The Nation asserts a legal right to allow all Indians to hunt and fish free of any State regulation, including enforcement of State licensing laws or the wildlife Code, on the Creek Reservation. The

[4] The disruptive impact of *McGirt* is nearly impossible to overstate. *See, e.g., United States v. Budder*, 601 F. Supp. 3d 1105, 1116 (E.D. Okla. 2022), *aff'd.*, 76 F.4th 1007 (10th Cir. 2003) (noting "the reality that *McGirt* dramatically altered what the people of Oklahoma – absent, perhaps, a few appellate lawyers – considered settled jurisdictional questions."); *Oklahoma v. U.S. Dep't of Interior*, 577 F. Supp. 3d 1266 (W.D. Okla. Dec. 22, 2021); *State ex rel. Matloff v. Wallace*, 2021 OK CR 21, ¶ 38, 497 P.3d 686, 692; *United States v. Hamett*, 535 F.Supp.3d 1133, 1135-36 (N.D. Okla. 2021).

sweeping relief requested by the Nation, along with similar relief sought by other the tribes in *Cherokee Nation*, would preclude the State from exercising its regulatory, civil, or criminal jurisdiction over wildlife conservation on roughly 43% of the lands within its borders, more than 95% of which are estimated to be fee lands. Because the Nation cannot establish a likelihood of success for its sweeping relief, the Motion should be denied.

From the outset, the Nation's claims confront substantial legal obstacles. Before this Court may even reach the merits of their claims, the Nation must demonstrate a substantial likelihood of overcoming the threshold, dispositive defenses asserted in the State's Motion to Dismiss. These are no small hurdles. In sum, the Nation must show its suit is not barred by sovereign immunity, equitable principles such as laches, and lack of standing. As set forth more fully in the State's Motion to Dismiss, each independently requires dismissal of this action. On that basis alone, the Nation cannot establish a substantial likelihood of success on the merits.

Even assuming the Nation could clear those threshold hurdles, the legal theories advanced by the Nation on the merits likewise fail. Specifically, the Nation contends that Congress has never expressly granted jurisdiction to the State over hunting and fishing by Indians in Indian country, and therefore, such jurisdiction is lacking. But its legal theory is directly contrary to the *Castro-Huerta* preemption framework, fails to even apply the *Bracker* test, and is fundamentally flawed for three primary reasons. ***First***, *McGirt* does not strip the State of regulatory, civil, or criminal jurisdiction over non-MCA offenses on fee land within Indian country. To the contrary, "[t]he default is that States may exercise criminal jurisdiction within their territory" and "States do not need a permission slip from Congress to exercise their sovereign authority." *Castro-Huerta*, 597 U.S. at 653. ***Second***, the Nation conflates the legal status of *trust lands* (still held in trust by or for the tribe) with *fee lands* (including privately owned land and lands owned or managed by the State). "[T]reaty rights with respect to reservation lands must be read in light of the subsequent alienation of those lands." *Montana*

v. U.S., 450 U.S. 544, 561 (1981); *Puyallup Tribe, Inc. v. Dep't of Game of State of Wash. ("Puyallup III")*, 433 U.S. 165, 174–75 (1977). ***Third***, even within Indian country, the State's enforcement of non-discriminatory laws on hunting and fishing by Indians in the interest of conservation is expressly permitted under long-standing Supreme Court precedent. *Puyallup Tribe v. Dep't of Game of Wash.* ("*Puyallup I*"), 391 U.S. 392, 395 (1968); *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 177 (1999).

A. Principles of Inherent State Sovereignty Authorize Oklahoma to Regulate Hunting and Fishing on all Privately and Publicly Owned Fee Lands within its Borders.

It is beyond dispute that "the States, vested as they are with general police power, require no specific grant of authority in the Federal Constitution to legislate with respect to matters traditionally within the scope of the police power," including "the authority to provide for the public health, safety, and morals." *Dodger's Bar & Grill, Inc. v. Johnson Cnty. Bd. of Cnty. Comm'rs*, 32 F.3d 1436, 1441 (10th Cir. 1994) (citations omitted); *see also Torres v. Lynch*, 578 U.S. 452, 457-58 (2016) ("State legislatures, exercising their plenary police powers, are not limited to Congress's enumerated powers; and so States have no reason to tie their substantive offenses to those grants of authority."). In other words, "[t]he State has the 'sovereign right to protect the general welfare of the people . . . .'" *City of El Paso v. Simmons*, 379 U.S. 497, 508-09 (1965) (cleaned up). While that right is expressly reserved to the States in the Tenth Amendment, sovereignty, not the Constitution, is the source of state police power. *See* U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

Within this inherent sovereign authority, states are granted authority to "impose reasonable and nondiscriminatory regulations on an Indian tribe's treaty-based hunting, fishing, and gathering rights on state land when necessary for conservation." *Herrera v. Wyoming*, 587 U.S. 329, 339-40 (2019); *see also Puyallup I*, 391 U.S. at 398.

(Notwithstanding a tribe's treaty right to fish "at all usual and accustomed places," the Court held that the "manner of fishing, the size of the take, the restriction of commercial fishing, and the like may be regulated by the State in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians."). Since soon after statehood, the State has exercised its sovereign authority over wildlife conservation to manage a comprehensive regulatory system governing hunting, possession, sale, and transportation of wildlife, including restrictions on methods of take, seasons, bag limits, and other conduct on all public and private fee lands within its borders.

More than a century's worth of history, practice, and legal precedent supports the State's authority to regulate hunting and fishing within its borders in the interest of wildlife conservation and sustainability. And the Nation does not dispute that the State's comprehensive regulatory system governing hunting and fishing is reasonable and necessary in the interest of conservation and public safety. Instead, the Nation modeled its own Conservation Code and wildlife regulations after those of the State, specifically including such practices as hunting seasons, bag limits, and restrictions on weapons. *See* Doc. 9, Decl. Wisner, ¶¶ 8-9; Doc. 10, Decl. Kissee, ¶¶ 6-8.

The Nation asks the Court to find that the definition of "Indian country" at issue in *McGirt* is determinative of ***any*** question regarding the appropriate intersection of State and tribal jurisdiction – with the State's authority to regulate Indians, for any purpose, including hunting and fishing, ending at the outer boundary of Indian country unless Congress has expressly stated otherwise. But that is simply not the law.

> To begin with, the Constitution allows a State to exercise jurisdiction in Indian country. Indian country is part of the State, not separate from the State. To be sure, under this Court's precedents, federal law may preempt that state jurisdiction in certain circumstances. But otherwise, as a matter of state sovereignty, a State has jurisdiction over all of its territory, including Indian country. As this Court has phrased it, a State is generally "entitled to the sovereignty and jurisdiction over all the territory within her limits."

Castro-Huerta, 597 U.S. at 636. "Indian country is part of a State's territory," and therefore, "States do not need a permission slip from Congress to exercise their sovereign authority." *Id.* at 638, 653. Accordingly, in the wake of *McGirt*, courts have repeatedly and unequivocally confirmed that State jurisdiction is the default rule and refused to extend *McGirt* beyond its holding. "*McGirt* by its own terms sets forth a *general* rule, not a *per se* rule against criminal jurisdiction of any kind." *City of Tulsa v. O'Brien*, 2024 OK CR 31, ¶ 26, __ P.3d __ (emphasis in original); *see also Freedom Mortgage Corp. v. Springer*, No. 25-CV-288-DES, 2025 WL 2528834, at *2 (E.D. Okla. Sept. 3, 2025) (refusing to extend *McGirt* to a civil law foreclosure action); *Matter of Stroble*, 2025 OK 48 __ P.3d __, ¶ 11 (refusing to extend *McGirt* to the State's civil or taxing jurisdiction). For example, in *O'Brien*, the Oklahoma Court of Criminal Appeals reversed a trial court order dismissing a case against a non-member Indian prosecuted for a traffic violation committed within Indian country, applying *Castro-Huerta* and the *Bracker* test, and finding that Oklahoma's criminal jurisdiction over non-major crimes was not preempted by federal law or as unlawfully infringing upon tribal self-government. 2024 OK CR 31, ¶¶ 17-35, 38; *see also Stitt v. City of Tulsa*, 2025 OK CR 5, ¶ 8, 565 P.3d 857, 860, *corrected* (Mar. 13, 2025), *cert. denied sub nom. Stitt v. Tulsa,* No. 25-30, 2025 WL 2824125 (U.S. Oct. 6, 2025) ("Tulsa's exercise of jurisdiction in this case does not unlawfully infringe upon tribal self-government and Appellant's claims are without merit."). And in *Kunzweiler*, Judge Frizzell denied a tribe's motion seeking to enjoin the State from exercising concurrent jurisdiction over non-member Indians charged with committing crimes not covered by the MCA within Indian country, as not preempted by the General Crimes Act or unlawfully infringing on tribal self-government, again applying *Castro-Huerta* and the *Bracker* test. 2025 WL 3124450, at *4-5.

The history of Oklahoma reflects an appropriate exercise of State jurisdiction over hunting and wildlife on fee lands within its borders. Accordingly, under the framework confirmed in *Castro-Huerta*, the only remaining question is whether the State's jurisdiction in Indian country is "preempted

(i) by federal law under ordinary principles of federal preemption, or (ii) [because] the exercise of state jurisdiction would unlawfully infringe on tribal self-government." 597 U.S. at 638.[5] It is not.

B. State Jurisdiction over Hunting and Fishing by Tribal Members on Alienated Fee Lands is Not Preempted by the Nation's Treaty Rights or Under a *Bracker* Analysis.

The Nation contends that it, and its members, hold implied treaty-based hunting and fishing rights that are exclusive of State regulation across the Creek Reservation. This sweeping argument fails because it does not distinguish between trust lands and fee lands. *See Upper Skagit Indian Tribe v. Lundgren*, 584 U.S. 554, 558-59 (2018) ("Indian reservations today sometimes contain two kinds of land intermixed in a kind of checkerboard pattern: trust land held by the United States and [fee] land held by private parties."). The State does not seek to regulate hunting or fishing by Creek members on any trust lands within the Creek Reservation. And the Nation only asserts jurisdiction on trust lands under its Conservation Code. 23 MCNCA §§ 2-103(A), 2-104(A). Thus, the question before the Court is whether the State is preempted, either by "federal law under ordinary principles of federal preemption" or pursuant to a *Bracker* analysis (*Castro-Huerta*, 597 U.S. at 638), from exercising regulatory jurisdiction on fee lands, including those owned or managed by the State, located within the boundaries of the Creek's "Indian country." The law clearly states that the State's sovereignty is not so preempted. "State sovereignty does not end at a reservation's border." *Nevada v. Hicks*, 533 U.S. 353, 361 (2001) ("Our cases make clear that the Indians' right to make their own laws and be governed by them does not exclude all state regulatory authority on the reservation.").

First, no federal law preempts State jurisdiction over hunting and fishing within its borders, and the Nation does not contend otherwise. *See* Doc. 8 at 11-12 (only citing in passing several federal statutes that the Nation agrees do not apply to Oklahoma). And no provision of the federal criminal

[5] Judge Frizzell has recently held that *Castro-Huerta* provides the proper framework under which lower courts must evaluate and decide whether State jurisdiction in Indian country is preempted in matters not involving the MCA. *See Kunzweiler*, 2025 WL 3124450, at *2.

code singles out misdemeanor wildlife violations as a category subject to exclusive federal enforcement. There is clearly no legal impediment to the State's authority to enforce its wildlife Code and regulations against tribal members hunting and fishing on fee lands.

Second, no treaty expressly authorizes tribal members to hunt and fish free of State regulation. To the contrary, as the Nation admits (Doc. 8 at 11), its treaties are ***silent*** as to hunting and fishing altogether. *See Herrera*, 587 U.S. at 349 ("Treaty analysis begins with the text" to determine whether a treaty right was reserved).[6] As the Court expressly recognized in *Castro-Huerta*,

> "[A]dmission of a State into the Union" "necessarily repeals the provisions of any prior statute, or of any existing treaty" that is inconsistent with the State's exercise of criminal [and civil] jurisdiction "throughout the whole of the territory within its limits," including Indian country, unless the enabling act says otherwise "**by express words**."

597 U.S. at 654 (emphasis added). Nothing in Oklahoma's Enabling Act suggested, let alone expressly provided, that the State was abdicating its authority to exercise jurisdiction over hunting and fishing on non-trust fee lands within its borders. Indeed, to the contrary, the Act referenced only lands "***owned or held*** by any Indian, tribe, or nation." 34 Stat. 267, § 3 (emphasis added); *see also* OKLA. CONST. art. I, § 3. For more than 100 years, the State of Oklahoma has exercised jurisdiction over hunting and fishing on publicly and privately owned fee lands.

Third, even assuming for the sake of argument that pre-statehood treaties impliedly permitted tribal members to hunt and fish on trust lands, no such implied right extends to fee lands. In *Klamath*, the Supreme Court expressly rejected the argument the Nation advances here (Doc. 8 at 11-14) that treaties can implicitly grant tribal members a perpetual "special right" to hunt and fish *free* from any

[6] By contrast, other treaties have contained express reservation of such rights. For example, in *Herrera*, 587 U.S. at 335, an 1868 treaty memorialized that the Crow Tribe "shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts." And in *Tulee v. Washington*, 315 U.S. 681, 683 (1942), an 1859 treaty guaranteed to the Yakima Tribe "[t]he exclusive right of taking fish in all the streams, where running through or bordering said reservation … [and] also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory."

regulation by the State on non-trust land. Indeed, Supreme Court precedent is clear and dispositive on this issue. *See, e.g., Organized Vill. of Kake v. Egan*, 369 U.S. 60, 75-76 (1962) ("This Court has never held that States lack power to regulate the exercise of [implied] Indian rights … or of those based on occupancy."). Any implicit treaty-based hunting and fishing is ownership-based and flows with the land. As to the "millions of acres of non-Indian fee land located within the contiguous borders of Indian tribes … once tribal land is converted into fee simple, the tribe loses plenary jurisdiction over it." *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 328 (2008).

> [W]hen an Indian tribe conveys ownership of its tribal lands to non-Indians, it loses any former right of absolute and exclusive use and occupation of the conveyed lands. The abrogation of this greater right … implies the loss of regulatory jurisdiction over the use of the land by others.

S. Dakota v. Bourland, 508 U.S. 679, 689 (1993); *see also Nevada*, 533 U.S. at 360 (The "absence of tribal ownership [is] virtually conclusive of the absence of tribal civil jurisdiction.").

The Nation argues that, under *United States v. Felter*, 752 F.2d 1505 (10th Cir. 1985), a tribe's right to regulate hunting and fishing by tribal members "within its reservation" is exclusive—as the tribe "sees fit." Doc. 8 at 11. But this argument ignores the fundamental question of ownership. In *Felter*, the land on which the tribal member was fishing without a permit was "held in trust by the United States for the [tribe]." 752 F.2d at 1507. This is significant because any implied rights to hunt and fish on tribal lands are "rights of possession" that are "derived from [a tribe's] status as occupants of the land." *See N. Arapahoe Tribe*, 808 F.2d at 748.[7]

Oklahoma's jurisdiction over fee lands within Indian country was specifically recognized in *Cheyenne-Arapaho*, 618 F.2d at 667-69, where the Tenth Circuit found that state wildlife laws did not apply to hunting and fishing by member Indians "on land held as Indian allotments and on land held

[7] The policy of the Bureau of Indian Affairs similarly rejects any such tribal right to hunt or fish beyond trust lands free of state regulation: "Indians who hunt, fish, trap, or gather off-reservation or on lands not restricted or held in trust are subject to applicable state fish and game laws." Indian Affairs Manual, Part 56, ¶ 1.2(B) (issued Feb. 13, 2017), https://www.bia.gov/policy-forms/manual).

in trust by the United States for the Tribes," but hunting and fishing on fee lands was subject to a system of "dual regulation." For its description of "dual regulation," the Tenth Circuit relied on the Supreme Court's decision in *Puyallup I*, 391 U.S. at 398, which involved 99.86% fee lands (as the tribe had alienated all but 22 acres of their 18,000-acre reservation in fee simple). *Puyallup III,* 433 U.S. at 171-73. Here, the Nation's own laws reflect this distinction. 23 MCNCA § 2-104(A).

Authority of the Supreme Court forecloses the argument that tribes retain implicit hunting and fishing rights that are not tied to possession and occupancy of the land. For example, in *Puyallup III*, the Court rejected a tribe's argument that general treaty language that the land was to be "set apart" for the tribe amounted "to a reservation of a right to fish free of state interference." 433 U.S. at 174. And in *Montana*, the Court held that an 1868 Crow treaty—which like the treaties here contained no express language reserving hunting and fishing rights—created tribal authority only over lands "on which the [Crow] Tribe exercises 'absolute and undisturbed use and occupancy'" and provided "no support for tribal authority to regulate hunting and fishing on land owned by non-Indians." *Montana*, 450 U.S. at 559, 561. Thus, even if an earlier Crow "treaty created tribal power to restrict or prohibit non-Indian hunting and fishing on the reservation, that power cannot apply to lands held in fee by non-Indians[.]" *Id.* at 558-59; *see also Brendale*, 492 U.S. at 422-25 (fee lands allotted to individual members of the Yakima tribe and alienated under the Allotment Act were no longer subject to "any regulatory power the Tribe might have under [a] treaty").

Finally, in *Klamath*, the Court unanimously held that the Klamath Tribe's (*express*) "exclusive right of taking fish in the streams and lakes" under an 1864 Treaty was a "right to be exercised within the reservation" and did ***not*** extend to lands ceded to the United States in 1901, even though those lands were located within the historic reservation boundaries. 473 U.S. at 763-64. The Court further rejected the Tribe's claim of an implied "special right, nonexclusive but free of state regulation" to hunt and fish on the lands no longer held by the tribe. *Id.* at 765-74. The Court distinguished between

trust lands (where tribal rights remain strong) and alienated fee lands (where state regulation applies), specifically rejecting the Tribe's "incorrect" assumption that the "1864 Treaty created hunting and fishing rights that were separate from and not appurtenant to the reservation." *Id.* at 773.[8]

The Nation relies heavily on *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983), for its contention that a tribe's right to regulate hunting and fishing is a key "aspect of tribal sovereignty." Doc. 8 at 1. But the factual context there was the mirror image of this case (and *Puyallup*). There, the tribe owned all but 193.85 of the more than 460,000 acres of the reservation (99.96%) and about 2,000 tribal members resided there compared to fewer than 200 non-Indians (90.9%). 462 U.S. at 325–26. The tribe's constitution, approved by the Secretary of the Interior, specifically charged the tribal council with protecting and preserving the tribe's wildlife and natural resources. *Id.* at 326. Over time, the tribe, in coordination with federal agencies, had developed a sophisticated, reservation-wide wildlife management program and invested heavily in game and fish resources. *Id.* at 328. Given those facts, the Court concluded that the tribe's authority to regulate hunting and fishing preempted State jurisdiction over activities occurring *entirely on trust lands*. *Id.* at 336-341. According to the Court, "[c]oncurrent State jurisdiction would supplant this regulatory scheme with an inconsistent dual system: members would be governed by Tribal ordinances, while nonmembers would be regulated by general State hunting and fishing laws." *Id.* at 339. By contrast, here, 95% or more of the lands are fee lands, and the Nation simply adopted the State's Code and wildlife regulations as its own.

Fourth, whatever implied rights the Nation may hold under its treaties, if any, it is undisputed that those rights remain subject to State regulation "in the interest of conservation."

> [A]n Indian tribe's treaty rights to hunt, fish, and gather on state land are not irreconcilable with a State's sovereignty over the natural resources in the State. Rather,

[8] By contrast, in *Mille Lacs Band*, 526 U.S. at 177, the Court found that an 1837 Treaty guaranteeing the Chippewa Tribe "[t]he privilege of hunting, fishing, and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded" did grant the tribe usufructuary rights not tied to land ownership.

> Indian treaty rights can coexist with state management of natural resources. … Here, the 1837 Treaty gave the Chippewa the right to hunt, fish, and gather in the ceded territory free of territorial, and later state, regulation, a privilege that others did not enjoy. Today, this freedom from state regulation curtails the State's ability to regulate hunting, fishing, and gathering by the Chippewa in the ceded lands. But this Court's cases have also recognized that Indian treaty-based usufructuary rights do not guarantee the Indians 'absolute freedom' from state regulation. We have repeatedly reaffirmed state authority to impose reasonable and necessary nondiscriminatory regulations on Indian hunting, fishing, and gathering rights in the interest of conservation.

Mille Lacs Band, 526 U.S. at 204–05 (citations omitted); *see also Herrera*, 587 U.S. at 339 ("States can impose reasonable and nondiscriminatory regulations on an Indian tribe's treaty-based hunting, fishing, and gathering rights on state land when necessary for conservation."); *Puyallup I*, 391 U.S. at 398 ("But the manner of fishing, the size of the take, the restriction of commercial fishing, and the like may be regulated by the State in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians."). It is generally understood that State law can also address any "substantial detriment to the public safety." *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. State of Wis.*, 760 F.2d 177, 183 (7th Cir. 1985).

The Nation argues that the State cannot establish what it calls "exceptional circumstances" here, but what is better understood as "conservation necessity." Doc. 8 at 14-15. The law in this area is not nearly as restrictive as the Nation suggests, and the State is not required to show that a species will become extinct but for its regulations. In fact, since the Nation has failed to identify a single State wildlife law or regulation that the tribe itself would not also apply against tribal members in Oklahoma, each of the State's laws is entitled to a presumption of validity under the conservation necessity standard. The State bears the burden of establishing the conservation standard only when it attempts to impose non-discriminatory regulations on tribal members that are ***not*** applicable, or would ***not*** be as stringent, under tribal law. For example, in the *Puyallup* cases, the State of Washington sought to regulate fishing activities by tribal members that would have been subject to no tribal regulation at all. To the contrary, here, the Nation implicitly accepts that the State of Oklahoma's wildlife laws and

regulations are necessary and appropriate for conservation—because it adopted those laws and regulations in whole, provision-by-provision. Doc. 8 at 6. Such wholesale adoption by the tribe here stamps Oklahoma's laws with a "presumption of validity" and obviates the need for any further determination of conservation necessity as to any specific State law also adopted by the Nation:

> We therefore find that if an Indian tribe has enacted wildlife laws similar to the state or federal laws that are being enforced against tribe members, the tribal laws create a presumption of validity. The courts must make a finding of the validity of the use of state or federal wildlife laws against tribe members. However, there is no need for a hearing on the issue of conservation necessity if the tribe itself has enacted similar, valid laws. **Trial courts need only establish the existence of such similar laws in order to establish the validity of the state or federal laws.**

United States v. Williams, 898 F.2d 727, 729–30 (9th Cir. 1990) (emphasis added). Although it was the United States enforcing state law against a tribal member in *Williams*, Washington and Oregon have both adopted the Ninth Circuit's approach in actions brought by the State against tribal members. *See State v. McCormack*, 812 P.2d 483, 485 (Wash. 1991) (holding that "tribal enactment of a similar wildlife measure establishes that conservation is necessary even with respect to tribal activities" when considering a law of the State of Washington); *State v. Wagner*, 524 P.3d 564, 566-67 (Or. App. 2022) (holding that the conservation necessity is established "if the tribe itself has enacted similar, valid laws" to those of the State of Oregon that it is seeking to enforce against tribal members).

Fifth, State jurisdiction would not "unlawfully infringe 'on the right of reservation Indians to make their own laws and be ruled by them.'" *Bracker*, 448 U.S. at 142. The Nation does not even cite *Bracker* and references "self-government" only in passing in its argument on the likelihood of success on the merits—though it repeats that phrase elsewhere in its brief. The *Bracker* test begins from the premise that when "state interests outside the reservation are implicated, States may regulate the activities even of tribe members on tribal land." *Nevada*, 533 U.S. at 362. After all, "[o]ur cases make clear that the Indians' right to make their own laws and be governed by them does not exclude all state regulatory authority on the reservation." *Id.* at 361. Under *Bracker*, "'the "who" and the "where"

of the challenged [regulation] have significant consequences,' ones that are often 'dispositive.'" *Otoe-Missouria Tribe of Indians v. New York State Dep't of Fin. Servs.*, 769 F.3d 105, 113 (2d Cir. 2014) (citing *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 101 (2005)). The Nation's argument here asks the Court to focus only on the "who" and ignore the "where" – painting all of "Indian country" with a single stroke. But as to hunting and fishing on fee lands, where the State has enforced its non-discriminatory wildlife laws since statehood, the State's interests are particularly strong vis-à-vis the Nation. *See White Mountain Apache Tribe v. State of Ariz., Dep't of Game & Fish*, 649 F.2d 1274, 1283 (9th Cir. 1981) (the "state interest is shared with, not displaced by, the similar tribal interest when the fish and game are within the boundaries of both the state and the reservation").

Under the *Bracker* test, "the Court considers tribal interests, federal interests, and state interests." *Castro-Huerta*, 597 U.S. at 649. The Supreme Court has repeatedly found that state interests outweigh tribal interests on non-trust fee lands. *See Montana*, 450 U.S. at 557, 563-67 (holding that "[s]ince regulation of hunting and fishing by nonmembers of a tribe on lands no longer owned by the tribe bears no clear relationship to tribal self-government or internal relations, the general principles of retained inherent sovereignty did not authorize" the tribe to enforce its own regulations on fee lands); *Bourland*, 508 U.S. at 688–95 (holding that "[g]eneral principles of 'inherent sovereignty' … do not enable [a tribe] to regulate non-Indian hunting and fishing" on *former* trust lands the tribe had since conveyed).

As to the state interests, uniform enforcement of the State's Code and wildlife regulations is a core exercise of the police power essential for public health, safety, and equitable resource management. *See* OKLA. CONST. art. XXVI, §§ 1, 4 (making the Commission and Department a constitutional body tasked with "the control, management, restoration, conservation and regulation of the bird, fish, game and wildlife resources of the State") (added by Laws 1955, SJR 22, § 1, State Question 374, Legislative Referendum 115, adopted at election held July 3, 1956); *Hughes*, 441 U.S. at

338–39; *Baldwin v. Fish & Game Comm'n of Montana*, 436 U.S. 371, 391 (1978) ("[P]rotection of the wild life of the State is peculiarly within the police power, and the State has great latitude in determining what means are appropriate for its protection.") (citation omitted); *White Earth Band of Chippewa Indians v. Alexander*, 683 F.2d 1129, 1137 (8th Cir. 1982) (In applying the *Bracker* test, "[t]he state has a strong legitimate interest in regulation of hunting and fishing because of its investment in and historic management of reservation game and fish resources."). The State holds wildlife in trust for the benefit of the public and enacts reasonable regulations to conserve species, protect public safety, ensure equitable access, and preserve habitat. The State's authority to regulate hunting and fishing on all fee lands, to include such things as licensing, seasons, methods of take, bag limits, and area restrictions, is essential to the State's overall wildlife conservation goals and to ensure uniform and effective enforcement. *See* Ex. 1, Aff. Free, ¶ 5. The Nation's requested relief would frustrate these conservation objectives and undermine uniform enforcement and the transparency required for uniform management of public wildlife resources.

Another important *Bracker* consideration is that, as in *Montana*, Oklahoma has exercised "near exclusive" regulation of hunting and fishing over fee lands in Oklahoma for over a century. *See* 450 U.S. at 566-67 (recognizing that the tribe "has traditionally accommodated itself to the State's 'near exclusive' regulation of hunting and fishing on fee lands within the reservation"); *see also City of Sherrill, N.Y. v. Oneida Indian Nation of New York*, 544 U.S. 197, 218 (2005) (holding that "long acquiescence may have controlling effect on the exercise of dominion and sovereignty over territory," and "[w]hen a party belatedly asserts a right to present and future sovereign control over territory, longstanding observances and settled expectations are prime considerations").

Contrary to the State's longstanding assumption of jurisdiction over wildlife conservation throughout Oklahoma, it was only in 2022 that the Nation repealed its Hunting and Fishing Code and enacted its comprehensive Conservation Code (via the wholesale adoption of the State Code and

regulations) and began to challenge the State's jurisdiction. This weighs heavily against preemption. Because less than 5% of the Creek Reservation is trust lands, the Nation simply does not possess an inherent sovereign interest comparable to the interest at issue in *Mescalero Apache Tribe*. The Nation has not historically managed wildlife on fee lands within what was recently recognized as Indian country, and has no longstanding history of enforcing conservation laws on non-Indians. There is no comprehensive federal-tribal wildlife management scheme on these fee lands for State law to "disturb and disarrange." *Id.* at 338. To the contrary, the Nation largely copied or adopted the *State's* wildlife laws and regulations, further underscoring the significance and necessity of the *State's* comprehensive system of wildlife conservation. And even in the Nation's own Conservation Code, it recognizes that its jurisdiction is limited to trust lands. 23 MCNCA §§ 2-103(A), 2-104(A). Nothing about the enforcement of the State's wildlife conservation laws in these fee lands has any bearing on a tribal interest in self-governance.

Finally, there are no overriding federal interests that weigh in favor of preemption of State regulation here. As another district court has found, federal regulation over hunting and fishing is typically not comprehensive, and the U.S. Fish and Wildlife Service instead usually relies primarily on state enforcement due to its lack of adequate workforce. *See Lower Brule Sioux Tribe v. State of S.D.*, 917 F. Supp. 1434, 1451 (D.S.D. 1996), *aff'd*, 104 F.3d 1017 (8th Cir. 1997) ("There is simply no overriding federal interest that would be frustrated by State regulation; rather, the federal interest of protecting its financial investment as well as its responsibility to the Indian people must and can only practicably be achieved through State regulation on the nonmember fee lands and waters."). And in several national wildlife refuges, states are expressly given concurrent jurisdiction. *See, e.g.,* 16 U.S.C. § 460hh-2 ("The Secretary shall permit hunting and fishing on lands and waters within the recreation area in accordance with applicable Federal and State laws"); 50 C.F.R. § 32.2(a), (d) (providing that any individual "engaged in public hunting on areas of the National Wildlife Refuge System" must, in

relevant part, "secure and possess the required State license" and "comply with the applicable provisions of the laws and regulations of the State wherein any area is located . . .").

In sum, the law is well-settled that tribes do not retain exclusive rights to regulate hunting and fishing on fee lands within Indian country, and principles of inherent tribal sovereignty do not preempt States from exercising their regulatory jurisdiction over wildlife conservation and management on the same. To the contrary, the State has an extremely strong sovereignty interest in enforcing its wildlife conservation laws in fee lands, and that interest is confirmed by federal law and interests.

Sixth, and finally, the State's enforcement authority over Indians, which has a minor, ancillary overlap with criminal law, is also supported by the U.S. Supreme Court's *Puyallup* trilogy of decisions. After first finding in *Puyallup I* that the State could impose non-discriminatory restrictions on the Indians' treaty-based fishing rights, including regulating the "manner of fishing, the size of the take … and the like," the Court in *Puyallup III*, 433 U.S. at 171-73, confirmed that the State likewise had jurisdiction to enforce its regulatory authority against tribal members fishing on the alienated fee lands. Specifically, the Court held that individual tribal members were **not** immune from suit in state court for violations of Washington's regulations, and state courts "had jurisdiction to decide questions relating to … the **size of the catch** the tribal members may take [and] their right to [fish] **without paying state license fees**." *Id.* at 173 (emphasis added).

Because hunting and fishing rights are necessarily appurtenant to, and not separate from, the land, and extend only to those lands over which a tribe still exercises "absolute and undisturbed use and occupancy," like other tribes that have previously challenged State jurisdiction, the Nation here does not hold any "special right, nonexclusive but free of state regulation" on fee lands within the boundaries of its Indian country in Oklahoma. No implicit treaty right preempts State jurisdiction. And, even if some implied right survived alienation, the State can still regulate hunting and fishing by tribal members in the interest of conservation.

III. THE NATION CANNOT ESTABLISH IRREPARABLE HARM.

"To constitute irreparable harm warranting the issuance of an injunction, the plaintiff must make a prima facie showing of an injury which is certain, great, actual and not theoretical. 'Irreparable harm is not harm that is merely serious or substantial.'" *Nova Health Sys. v. Edmondson*, 373 F. Supp. 2d 1234, 1240 (N.D. Okla. 2005), *aff'd*, 460 F.3d 1295 (10th Cir. 2006) (quoting *Heideman v. South Salt Lake City,* 348 F.3d 1182, 1189 (10th Cir. 2003)); *see also City of Los Angeles v. Lyons*, 461 U.S. 95, 112 (1983) (recommending "restraint" in issuing injunctions against state officers administering state laws).

Rather than attempting to identify certain, great, actual, and non-theoretical harm, the Nation instead asserts that claimed infringement on its "sovereignty" constitutes *per se* harm, relying principally on *Wyandotte Nation v. Sebelius*, 443 F.3d 1247, 1255 (10th Cir. 2006) and *Ute Indian Tribe of the Uintah & Ouray Rerservation v. Utah*, 790 F.3d 1000, 1005 (10th Cir. 2015) (Doc. 8 at 19-23). Even if those cases recognize that an invasion of tribal sovereignty "can" constitute irreparable harm in some circumstances, they do not support the Nation's generalized assertions here. The Nation fails to articulate a meaningful way in which the continued enforcement of Oklahoma's wildlife laws on fee lands, including lands owned, leased, or managed by the State, violates any specific tribal sovereignty interest—particularly given that its own Conservation Code applies only on trust lands by its own terms. *See, e.g., Montana*, 450 U.S. at 564-65. Nothing in the declarations suggests enforcement is occurring or is about to occur on trust land. Nor does the Nation's submission show that the State's citation or prosecution of tribal members for violating State wildlife laws or regulations on fee lands would prevent the Nation from likewise prosecuting them under tribal law, including laws that may be more restrictive than State laws. *See Kunzweiler*, 2025 WL 3124450, at *5 ("Just as a state and the federal government may each – as separate sovereigns – prosecute an individual for the same criminal conduct without causing harm to their respective sovereignty, so too can the Nation and the State exercise concurrent jurisdiction over a [tribal citizen] for the same criminal act without irreparable

harm to the Nation.").

The Nation raises a concern that tribal citizens will follow State law *instead of* tribal law (Doc. 8 at 19-20). This unsubstantiated fear does not represent concrete harm to the tribe. First, the Nation agrees that the State laws, which the Nation has adopted, are essential to "conservation of shared natural resources." Doc. 8 at 6. How, then, can the State's enforcement of those laws on fee lands harm the tribe—particularly when it does not appear that the Nation even purports to exercise jurisdiction over tribal members except on trust lands? Second, the Nation does not charge tribal members for hunting and fishing licenses; a tribal membership card constitutes a valid license. *See* Doc. 9, Decl. Wisner, ¶ 5. How would a tribal member applying for or obtaining a State license to hunt on non-trust lands supplant any tribal authority or sovereignty? The same tribal member does not need to apply (or pay) for a tribal hunting or fishing license. Additionally, there is no threat of harm to the Nation if tribal members are required to report animals harvest from non-trust fee lands to the State. If the Nation wants to keep track of harvests on fee lands, it can require tribal members to report to the Nation as well, or work with the State to share that information. The remaining harms alleged are abstract injuries belonging, if at all, to individual tribal members – not harms suffered by the Nation itself. Doc. 8 at 22-23 (referencing members participating in tribal hunts, hunting and fishing to "feed their families," and their desire to "deepen their ties to their Creek heritage").

Nor can the Nation demonstrate any emergency that would now justify disturbing the long-settled status quo that has existed since statehood. Indeed, the Nation's significant delay in seeking relief (including more than 50 years since the State enacted the Code and more than five years since *McGirt* was issued), "cuts against finding irreparable injury." *Kobach*, 840 F.3d at 753. The only change it points to is ODWC's public clarification of the same principle that has governed since statehood: tribal status does not exempt an individual from compliance with Oklahoma's wildlife laws. ODWC's recent statements did not alter the law; they reiterated it and were necessitated by the tribes' actions

that were contrary to more than a century of established law. The Nation cannot manufacture irreparable harm by generating confusion through novel legal theories of an implied "special right, nonexclusive but free of state regulation." *See Klamath*, at 473 U.S. at 763-64. Any such purported harm is entirely fabricated.

IV. THE NATION CANNOT SHOW THE BALANCE OF EQUITIES TIPS IN ITS FAVOR OR THAT AN INJUNCTION IS IN THE PUBLIC INTEREST.

The third and fourth preliminary injunction standards – the balancing of the equities and the public interest—merge when the government is the party opposing the preliminary injunction. *Black Emergency Response Team v. Drummond*, 737 F. Supp. 3d 1136, 1157 (W.D. Okla. 2024) (*citing Aposhian v. Barr*, 958 F.3d 969, 978 (10th Cir. 2020)).

In contrast to the minimal harms alleged by the Nation, the State faces immediate and significant harm if an injunction issues. ***First***, interference with ODWC's enforcement of State wildlife laws and regulations on fee lands by creating a fragmented jurisdictional system would undermine the integrity of wildlife management in Oklahoma, creating biological risks by preventing or hindering coordinated management of fish and wildlife populations that move across all lands, data gaps relating to lack of complete harvest information, and enforcement gaps for the State's game wardens that cannot be remedied. Ex. 1, Aff. Free, ¶ 18; Ex. 5, Aff. Parry, ¶ 5; Ex. 6, Aff. Erdman, ¶¶ 5-6; *see also* Ex. 2, Aff. Parry, ¶¶ 4-18 (describing concerns related to wildlife management); Ex. 3, Aff. Cunningham, ¶¶ 5-33 (describing concerns related to fisheries management); Ex. 7, Aff. Micah Holmes, ¶¶ 2-7 (describing administrative and other burdens on ODWC).

Second, enjoining the State from enforcing its laws and regulations against all users on fee lands would interfere with State contracts and responsibilities, causing injury to the wildlife resources and citizens of Oklahoma who are the intended beneficiaries of ODWC's wildlife management, jeopardizing longstanding hunting-access leases, and threatening to cause ODWC to breach its federal and intergovernmental agreements. *See, e.g.,* Ex. 5, Aff. Parry, ¶¶ 5-15. For example, under the federal

WSFRP program, ODWC is required to exercise continuing control over all federally-funded real property interests, a task made nearly impossible if ODWC is enjoined from enforcing its regulations against all classes of users of these properties. *Id.*, ¶ 10-11. In other wildlife management areas, ODWC pays significant consideration to private landowners to lease lands to provide hunting and fishing opportunities within the State—and agrees to enforce its regulations on those lands. *Id.*, ¶¶ 12-13 (explaining that ODWC currently leases 184,817 acres from Weyerhaeuser Timber Company under a 3-year contract at $4.17/acre, representing an annual payment of $770,912). Indiscriminately enjoining ODWC's ability to enforce state wildlife laws interferes with and threatens contractual and legal obligations.

Third, precluding the State from requiring hunting and fishing licenses in nearly half the State would have significant financial consequences to ODWC – a non-appropriated agency. Ex. 4, Aff. Crews, ¶¶ 7-14. It is estimated that a tribal exemption from State licensing requirements would cost ODWC $3.8 million annually, which alone exceeds ODWC's total approved Law Enforcement budget of $3 million in FY2026. *Id.*, ¶ 11. The total loss to ODWC's conservation efforts across eastern Oklahoma could exceed $15 million annually, when accounting for federal matching. *Id.*, ¶ 12.

The injury claimed by the Nation does not come close to outweighing the substantial and irreparable harm that would befall the State – harm to all Oklahomans and their collective wildlife resources, to the State's fundamental sovereignty, and to private and public property interests.

CONCLUSION

For these many reasons, Defendants respectfully request the Court deny Plaintiff's Motion for Preliminary Injunction.

Dated: February 13, 2026

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CERTIFICATE OF SERVICE

I hereby certify that on February 13, 2026, I electronically transmitted the foregoing document to the Clerk of the Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the ECF registrants.

s/ Phillip G. Whaley
Phillip G. Whaley