

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

MUSCOGEE (CREEK) NATION,
a federally recognized Indian tribe,

Plaintiff,

v.

Case No. 26-cv-00003-CVE-JFJ

WADE FREE, in his official capacity as
Director, Oklahoma Department of Wildlife
Conservation, and
RUSSELL COCHRAN, in his official
capacity as special prosecutor appointed by
the Governor,

Defendants.

**MUSCOGEE (CREEK) NATION'S REPLY IN SUPPORT OF
MOTION FOR PRELIMINARY INJUNCTION**

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Defendants posit an array of arguments in opposition to the Nation’s motion for a preliminary injunction. All of them lack merit.

I. The Nation Does Not Seek a Disfavored Injunction.

Defendants contend that the Nation’s requested injunction is disfavored and subject to a heightened standard because it (1) alters the status quo; (2) is mandatory; and (3) provides all the relief the Nation could recover through a trial on the merits. Defs. Resp. 10. While the Nation’s motion would satisfy a heightened standard in any event, none of these categories describes the injunction it seeks.

First, “[a]n injunction disrupts the status quo when it changes the last peaceable uncontested status existing between the parties before the dispute developed.” *Beltronics USA, Inc. v. Midwest Inventory Distrib., LLC*, 562 F.3d 1067, 1070–71 (10th Cir. 2009) (quotation marks omitted). Defendants contend that the last such status quo was the “century” preceding *McGirt v. Oklahoma*, 591 U.S. 894 (2020). Defs. Resp. 11. This overlooks the undeniable fact that *McGirt* ended that status quo and ushered in a new one. Oklahoma once accepted that *McGirt* resulted in a “seismic shift in jurisdiction,” Petition for a Writ of Certiorari at 19, *Oklahoma v. Castro-Huerta*, 597 U.S. 629 (2022) (No. 21-429), 2021 WL 4296002, at *19, including with respect to hunting and fishing regulation. As Oklahoma Attorney General Gentner Drummond has explained:

After McGirt ..., the State did not systematically prosecute tribal members for hunting on their reservations pursuant to tribal wildlife codes. Indeed, when the [ODWC] itself requested guidance from the Attorney General in August 2024, it was advised to refrain from exercising state jurisdiction over Indians in Indian country and to rely on cross-deputization agreements instead. The Department followed that counsel for over a year—until the Governor directed it to reverse course and begin citing tribal members in October 2025.

Respondent’s Response to Petitioners’ Application To Stay at 5, *Okla. Dep’t of Wildlife Conservation v. Drummond*, No. 123,759 (Okla. Sup. Ct. filed Feb 17, 2026) (emphasis added) (citation omitted). Far from disrupting a peaceable status quo, then, the Nation’s motion seeks a return to the circumstances prior to Defendants’ current, contested position. *See also* Letter from Drummond to Dir. Wade Free, ODWC, at 4 (Nov. 6, 2025) (Dkt. 2-2) (describing ODWC’s October 2025 directive as “an aggressive shift in ODWC law enforcement policy”).

Second, the requested preliminary injunction is prohibitory, not mandatory. An injunction is mandatory if it “affirmatively requires the nonmovant to act in a particular way, and as a result places the issuing court in a position where it may have to provide ongoing supervision to assure the nonmovant is abiding by the injunction.” *Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1261 (10th Cir. 2005) (brackets, ellipses, and citation omitted). By contrast, the Nation’s requested injunction would simply prohibit Defendants from asserting jurisdiction over Nation citizens. Ongoing supervision would not be necessary under these circumstances. Defendants would presumably comply with the Court’s proscription, and if not, contempt proceedings would be in order.

Third, for the full relief criterion to be satisfied, the Tenth Circuit “require[s] that the effect of the order, once complied with, *cannot be undone*,” such as an injunction requiring “disclosure of confidential information[.]” *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1247–48 (10th Cir. 2001) (emphasis added) (citations omitted). Defendants nowhere mention this requirement, and it is not met. They will be able to resume their challenged activities if they ultimately prevail.

The Nation accordingly does not seek a disfavored injunction. But as demonstrated in the subsections below, it can make the “strong showing” on likelihood of success and balance of

harms that would be required even were its requested relief disfavored. *See Nat’l Ass’n of Indus. Bankers v. Weiser*, 159 F.4th 694, 704, 726–27 (10th Cir. 2025).

II. Defendants Have Not Undermined the Nation’s Likelihood of Success on the Merits.

The Nation seeks to preliminarily enjoin Defendants’ asserted jurisdiction only over Nation citizens acting within the Nation’s Indian country. Nation Opening Br. (“Nation Br.”) at 1. As demonstrated below, with one highly distinguishable exception, Defendants cite *not a single case* in which a court has upheld state regulation of member Indians hunting or fishing within their tribe’s Indian country. They instead rely entirely on cases addressing state jurisdiction over (1) Indians exercising treaty rights *outside* of Indian country or (2) *non*-members in Indian country—making no attempt to account for those obviously determinative distinctions.

A. Defendants’ “Conservation Necessity” Cases Are Inapposite.

A predominant theme of Defendants’ brief is that state regulation of tribal member hunting and fishing on non-Indian fee lands within their reservation (including state licensure requirements) is presumptively valid so long as the regulations are necessary for conservation. *See* Defs. Resp. 13–14, 20–23, 26. But with a single highly distinguishable exception addressed below, the conservation necessity doctrine pertains only to state regulation of *off*-reservation treaty rights. *Puyallup Tribe v. Dep’t of Game of State of Wash.*, 391 U.S. 392 (1968) (“*Puyallup I*”), which Defendants principally rely on, involved off-reservation fishing. And the Court explained there that its conservation necessity precedents recognize the power of states

to impose on Indians equally with others such restrictions of a purely regulatory nature concerning the time and manner of fishing *outside the reservation* as are necessary for the conservation of fish[.]

In other words, the “right” to fish *outside the reservation* was a treaty “right” that could not be qualified or conditioned by the State. But “the time and manner of fishing * * * necessary for the conservation of fish” ... were within the reach of state power.

Id. at 399 (emphases added) (quoting *Tulee v. Washington*, 315 U.S. 681, 684 (1942)); *see also*, e.g., *Crow Tribe of Indians v. Repsis*, 73 F.3d 982, 992 (10th Cir. 1995) (“[T]he [Supreme] Court has recognized that states may regulate *off-reservation* treaty rights ‘in the interest of conservation’” (emphasis added) (quoting *Puyallup I*, 391 U.S. at 398)), *abrogated on unrelated grounds by Herrera v. Wyoming*, 587 U.S. 329 (2019).

Unsurprisingly, then, in addition to *Puyallup I*, every conservation necessity case that Defendants cite involves state regulation of Indians engaged in *off-reservation* activity. *See* Defs. Resp. 13–14, 20–21 (citing *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999) (*off-reservation* treaty rights); *Herrera*, 587 U.S. 329 (same); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, 760 F.2d 177 (7th Cir. 1985) (same)); *id.* at 22 (citing *Oregon v. Wagner*, 524 P.3d 564, 567 (Or. Ct. App. 2022) (same and explaining that the “conservation necessity standard” applies to “State authority to regulate *off-reservation* treaty rights” (citation omitted)); *United States v. Williams*, 898 F.2d 727, 728 (9th Cir. 1990) (illegal sale of moose meat “outside of the Reservation”); *Washington v. McCormack*, 812 P.2d 483 (Wash. 1991) (Indian of Nez Perce Reservation in Idaho charged with illegal sale of elk meat in Washington under asserted treaty right)).¹

Notably, Defendants’ *off-reservation* caselaw is apposite in this one sense: those cases make clear that, while states may regulate certain aspects of *off-reservation* treaty activities when necessary for conservation, they “may not ... condition[] tribal members’ exercise of [off-reservation] hunting, fishing, and gathering rights on obtaining a state hunting or fishing

¹ *See* American Indian Law Deskbook § 9:15 & n.14 (May 2024 Update) (citing *Williams* and *McCormack* as among cases addressing “to what extent treaties securing *off-reservation* fishing and hunting rights preempt state regulations as applied to treaty Indians”).

license.” *Cohen’s Handbook of Federal Indian Law* § 20.03[3][b], at 1307 (Nell Jessup Newton & Washington, eds., 2024) (“*Cohen’s*”) (citing *Tulee*, 315 U.S. at 684); *see also Puyallup I*, 391 U.S. at 401 n.14 (likening state licensure requirement for off-reservation treaty activities to an impermissible attempt “to tax the exercise of a federal right” (quotation marks omitted)). That states cannot impose licensing requirements on the exercise of off-reservation rights renders all the clearer the invalidity of Defendants’ attempt to impose such requirements on *on*-reservation hunting and fishing by Nation citizens.

The lone case cited by Defendants in which a court has permitted state regulation of on-reservation hunting or fishing by tribal members as a conservation necessity is *Puyallup Tribe, Inc. v. Dep’t of Game of State of Wash.*, 433 U.S. 165 (1977) (“*Puyallup III*”). As the Nation explained in its opening brief, that case involved a tribe’s assertion of “untrammelled on-reservation fishing rights” in a manner that threatened to “completely” destroy the fish population available to off-reservation fishers by “virtually exterminat[ing] the ... fishery[.]” Nation Br. 14 (emphasis omitted) (quoting *Puyallup III*, 433 U.S. at 168, 176); *see also, e.g., New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331–32 (1983) (*Puyallup III* involved “exceptional circumstances”).

Defendants have nowhere credibly suggested that the on-reservation hunting and fishing activities of Nation citizens—under Nation restrictions identical to those the State imposes on non-Indians throughout Oklahoma—presents a threat remotely comparable to that at issue in *Puyallup III*. Defendants’ conservation necessity argument accordingly fails. *See Cohen’s* § 20.03[3][b], at 1306 (discussing conservation necessity doctrine as applicable to state regulation of “off-reservation treaty hunting, fishing, and gathering” (citations omitted)); *id.* at § 20.02[2][b], at 1283 (discussing *Puyallup III* as lone exception where Supreme Court has

authorized state regulation of on-reservation fishing, which is “severely restricted” to “exceptional circumstances” (citation omitted)).

B. Defendants’ “Fee Lands” Cases Are Inapposite.

A second predominant theme of Defendants’ response is that they may regulate activities of Nation citizens on non-Indian fee lands within the Creek Reservation because Indian rights to hunt and fish are tied to ownership and possession, and when land within Indian country is alienated in fee to non-Indians, tribes lose (and states gain) jurisdiction over it. *See* Defs. Resp. 1–3, 12, 17–18, 22–25. As discussed in the Nation’s response to Defendants’ motion to dismiss, *McGirt*—relying on more than a century of Supreme Court precedent—directly addressed and emphatically rejected this proposition. *See* Muscogee (Creek) Nation’s Resp. to Defs.’ Joint Mot. To Dismiss Pl.’s Compl. (Dkt. 35) at 15–16.²

The cases relied on by Defendants, Defs. Resp. 17–18, once again do not remotely support its argument. Two of them involved regulation of off-reservation activities. *See Or. Dep’t of Fish and Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 764 (1985); *Organized Vill. of Kake v. Egan*, 369 U.S. 60, 75 (1962). Two involved regulation of non-member conduct. *See South Dakota v. Bourland*, 508 U.S. 679, 681 (1993); *Nevada v. Hicks*, 533 U.S. 353, 358 (2001).

² Defendants’ repeated assertion that “the Nation only asserts jurisdiction on trust lands” and not fee lands, Defs. Resp. 16, is wrong. The Nation’s Conservation Code extends to the “lands of the Muscogee (Creek) Nation, whether held in fee simple title or in trust,” 23 MCNCA § 2-104(A), which is coterminous with 18 U.S.C. § 1151(a), and further confirms that “[n]othing in this Code shall be construed to limit or waive any aspect of the Muscogee (Creek) Nation’s sovereign authority to regulate activities conducted in whole or in part within the exterior boundaries of the Muscogee (Creek) Nation,” 23 MCNCA § 2-104(C) (emphasis added). And that is how the Nation applies it. *See* Decl. of Sec’y of Interior Affs. Trenton Kissee ¶ 4 (stating that the Nation’s “wildlife laws and regulations ... apply to hunting and fishing on all lands within the Creek Reservation. 23 MCNCA § 2-104(A)”). No warrant exists for Defendants to ascribe alternative interpretations to the Nation’s Code. *See Quapaw Tribe of Okla. v. Blue Tee Corp.*, 653 F. Supp. 2d 1166, 1191 (N.D. Okla. 2009) (Eagan, C.J.) (“Jurisdiction to ... interpret tribal constitutions and laws ... lies with Indian tribes[.]” (quotation marks and ellipsis omitted)).

The Defendants' reliance on *Northern Arapahoe Tribe v. Hodel*, 808 F.2d 741 (10th Cir. 1987), *see* Defs. Resp. 3, 18, fares no better. *Northern Arapahoe* holds that two tribes sharing possession of a reservation both enjoy rights to hunt and fish on the reservation by virtue of that possession. "The very principles of Indian law which dictate that the Shoshone Tribe have hunting and fishing rights notwithstanding the lack of an express treaty provision dictate that the Arapahoe have equivalent rights." 808 F.2d at 748. The decision nowhere suggests that those rights to hunt and fish, and to regulate such activity, are limited to the lands physically owned or occupied by the tribes. To the contrary, the Circuit recognized that two tribes had "equal rights to hunt on the reservation," *id.*, and that over time the tribes "have managed reservation wildlife both jointly and separately," *id.* at 744, despite the fact that one tribe occupied "the eastern section of the reservation," and the other occupied lands "farther to the west," *Shoshone Tribe of Indians of Wind River Rsrv. in Wyo. v. United States*, 299 U.S. 476 (1937).

Defendants' reliance on *United States v. Felter*, 752 F.2d 1505 (10th Cir. 1985), and *Cheyenne-Arapaho Tribes of Okla. v. Oklahoma*, 618 F.2d 665 (10th Cir. 1980), likewise fails. *Felter* nowhere limits its holding to trust lands. *See* 752 F.2d at 1508–09 (stating that the "question involved in this appeal is whether defendant can be held criminally liable ... for unlawfully hunting and fishing *on the reservation*," concluding that the "Indians retained the right to hunt and fish *on reservation land*" and rejecting contention that Indians "do not possess the right to hunt and fish upon *lands included in Indian reservations*" because "[t]he right to hunt and fish *on reservation land* is a long-established tribal right." (emphases added) (citation omitted)). *Cheyenne-Arapaho* likewise holds that where the lands at issue "*are Indian Country within the meaning of s 1151(a)*," state laws "do not apply ... to hunting and fishing by [tribal]

members” unless authorized by Congress. 618 F.2d at 668, 669 (emphasis added)); Nation Br. 12.³

Defendants are simply wrong, moreover, that *Cheyenne-Arapaho* upholds “dual regulation”—i.e., tribal and state—of Indian hunting and fishing on “fee lands within Indian country,” Defs. Resp. 18–19 (citation omitted). *Cheyenne-Arapaho* limits that holding to “non-Indian lands located within the 1869 reservation,” which it recognized to be a “*disestablished* reservation,” 618 F.2d at 667 (emphasis added). And while Defendants contend that Bureau of Indian Affairs policy “rejects any such tribal right to hunt or fish beyond trust lands free of state regulation,” Defs. Resp. 18 n.7, the passage they quote in support of that contention again has to do with “*Off-Reservation Hunting, Fishing and Gathering by Indians.*”⁴

Defendants’ reliance on *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316, 328 (2008), for the proposition that “once tribal land is converted into fee simple, the tribe loses plenary jurisdiction over it,” Defs. Resp. 18 (citation omitted), fares no better. The Nation does not assert “plenary” jurisdiction over non-Indian fee lands within its Reservation, which would give it exclusive authority over non-Indians on those lands. That is a far cry from the Nation’s claims, which pertain only to the ability to regulate Indian activity. *See also United States v. Cooley*, 593 U.S. 345, 352 (2021) (describing *Plains Commerce* as among “our prior cases denying tribal jurisdiction over the activities of *non-Indians* on a reservation” (emphasis added)).

³ Tellingly, 18 U.S.C. § 1151(a)—which provides that “all land within the limits of any Indian reservation” is Indian country “notwithstanding the issue of any patent” and is central to the holdings of *McGirt* and *Cheyenne-Arapaho*—is nowhere mentioned in Defendant’s response brief or its motion to dismiss.

⁴ U.S. Dep’t of Interior, Indian Affairs Manual, Part 56, ch. 1, ¶ 1.2(B), <https://www.bia.gov/policy-forms/manual> (emphasis added).

Finally, *Montana v. United States*, 450 U.S. 544 (1981), and *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408 (1989), *see* Defs. Resp. 19, are likewise inapposite. *Montana* “concern[ed] ... the power of an Indian tribe to regulate hunting and fishing by non-Indians on lands within its reservation[.]” 450 U.S. at 547 (emphasis added). And *Brendale* likewise addressed tribal authority to regulate the use of non-Indian fee land by non-Indians. *See* 492 U.S. at 414; *Cooley*, 593 U.S. at 351 (describing *Brendale* as among “cases involving a tribe’s jurisdiction over the activities of non-Indians within the reservation” (emphasis added)).

C. The *Castro-Huerta* / *Bracker* Framework Does Not Apply.

In response to Defendants’ motion to dismiss, the Nation has explained how controlling Supreme Court and Tenth Circuit precedents foreclose courts from departing from *McGirt* and Tenth Circuit decisions directly addressing state jurisdiction over Indians based on the notion that *Castro-Huerta*—which repeatedly disclaims any intent to reach that issue—impliedly undermined those prior precedents. *See* Dkt. 35 at 23–25. This Court has hewed to these precedents, holding, after explicitly acknowledging *Castro-Huerta*’s rule regarding non-Indians, that “the Supreme Court requires a ‘clear expression of the intention of Congress’ before the state or federal government may prosecute crimes committed by Indians on tribal lands,” *United States v. Iski*, Case No. 24-CV-0493, Case No. 25-CV-0028, 2026 WL 123292, at *4 (E.D. Okla. Jan. 16, 2026) (quoting *United States v. Hopson*, 150 F.4th 1290, 1299 (10th Cir. 2025) (quoting *McGirt*, 591 U.S. at 929)).⁵

⁵ *McGirt* is clear that this principle applies to Indian “conduct committed in ‘Indian country,’” 591 U.S. at 898, including where “individual parcels have passed hands to non-Indians,” *id.* at 906.

Defendants identify no valid reason why this Court should reverse course. For example, they assert that *Castro-Huerta* holds that a state’s admission to statehood “necessarily repeals” Indian treaty rights unless those rights were reserved “by express words” in the statehood act. Defs. Resp. 17 (citation omitted). But that reasoning applies to treaty terms conferring jurisdiction over non-Indians. Accordingly, *Castro-Huerta*—which describes state criminal jurisdiction over non-Indians as “the narrow jurisdictional issue in this case,” 597 U.S. at 648—qualifies the passage reproduced by Defendants with “as relevant here,” and supports it solely with citation to two seminal Court precedents upholding state criminal jurisdiction over *non-Indians* in Indian country, *id.* at 654 (citing *United States v. McBratney*, 104 U.S. 621, 623–24 (1881) (holding that absent “express words” to the contrary in the enabling legislation, statehood confers on a state “criminal jurisdiction over its own citizens and other white persons throughout the whole of the territory”); *Draper v. United States*, 164 U.S. 240, 242–46 (1896) (same)). Indeed, the Supreme Court has “methodically repudiated” the proposition that statehood abrogates the treaty hunting and fishing rights of Indians absent express words to the contrary in the statehood act, holding instead that the opposite rule prevails. *Herrera*, 587 U.S. at 339; *see also id.* at 344 (reaffirming that Congress “must clearly express its intent” in statehood act to abrogate Indian treaty rights upon statehood (quoting *Mille Lacs*, 526 U.S. at 202)).⁶

⁶ Defendants’ perfunctory attempt to diminish the Nation’s treaty rights because they do not expressly reference hunting and fishing, Defs. Resp. 17 & n.6, is a nonstarter. “[T]he right to hunt and fish on reservation land is a long-established tribal right[.]” *United States v. Fox*, 573 F.3d 1050, 1054 (10th Cir. 2009) (quoting *Felter*, 752 F.2d at 1509). That right “need not be expressly mentioned [by] treaty,” *United States v. Dion*, 476 U.S. 734, 738 (1986); *see also Fox*, 573 F.3d at 1053 (quoting same); *Timpanogos Tribe v. Conway*, 286 F.3d 1195, 1202 (10th Cir. 2002) (quoting same); *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 406 (1968) (upholding Indian treaty rights where “[n]othing was said in the 1854 treaty about hunting and fishing rights”); *Cheyenne-Arapaho*, 618 F.2d at 666 (upholding Indian treaty rights where “Indian hunting and fishing rights are not specifically mentioned in the 1865 or 1867 treaties”).

Nor do Defendants cite to a *single* case applying *Bracker* to an assertion of state jurisdiction over member Indians in Indian country. *See* Defs. Resp. 15–16 & n.5 (citing *City of Tulsa v. O’Brien*, Case Number: S-2023-715, 2024 WL 5001684, at *8 (Okla. Crim. App. Dec. 5, 2024) (non-member Indians); *Stitt v. City of Tulsa*, 565 P.3d 857, 858–59 (Okla. Crim. App. 2025) (same); *Muscogee (Creek) Nation v. Kunzweiler*, Case No. 25-CV-75-GKF-JFJ, 2025 WL 3124450, at *4–5 (N.D. Okla. Nov. 7, 2025) (same, appeal pending); *id.* at 23–24 (citing *White Earth Band of Chippewa Indians v. Alexander*, 683 F.2d 1129, 1137 (8th Cir. 1982) (non-members); *Otoe-Missouria Tribe of Indians v. N.Y. State Dep’t of Fin. Servs.*, 769 F.3d 105, 115 (2d Cir. 2014) (denying preliminary injunction due to “insufficient evidence” that case involved “on-reservation activity” and that the state regulation targeted tribal entities)). And again, neither *Montana* nor *Bourland* involve the regulation of member Indians. *See supra* pp. 6, 9.

D. *McGirt* Is Not Limited to the Major Crimes Act.

Defendants repeatedly assert that *McGirt* is limited to the Major Crimes Act (MCA), 18 U.S.C. § 1153. *See* Defs. Resp. 1 n.1, 3, 12. But this Court has already ruled otherwise. *See Iski*, 2026 WL 123292, at *4 (Eagan, J.) (stating, in non-MCA case, that “the Supreme Court requires a ‘clear expression of the intention of Congress’ before the state or federal government may prosecute crimes committed by Indians” (quoting *Hopson*, 150 F.4th at 1299 (quoting *McGirt*, 591 U.S. at 929))); *United States v. Ballard*, Case No. 24-CV-0626-CVE-SH, 2026 WL 125927, at *4 (N.D. Okla. Jan. 16, 2026) (Eagan, J.) (same).⁷

This Court is correct, as *McGirt* cannot plausibly be interpreted otherwise. *McGirt* first addresses whether the Creek Reservation is Indian country under 18 U.S.C. § 1151(a). To do so,

⁷ *McGirt* is unequivocal that this clear expression rule applies fully on “parcels [that] have passed hands to non-Indians,” 591 U.S. at 906. *See* Dkt. 35 at 15–16.

the Court undertook a detailed historical and legal analysis and concluded that “Congress established a reservation for the Creeks,” with “boundary lines which will secure a country and permanent home” for the Nation and within which, “with exceptions, the Creeks were to be ‘secured in the unrestricted right of self-government,’ with ‘full jurisdiction’ over enrolled Tribe members and their property.” *McGirt*, 591 U.S. at 899–900, 902 (quoting and citing Treaty with the Creeks art. XIV, Mar. 24, 1832, 7 Stat. 366, 368; Treaty with the Creeks preamble, Feb. 14, 1833, 7 Stat. 417, 418; Treaty with Creeks and Seminoles art. XV, Aug. 7, 1856, 11 Stat. 699, 704); *see also id.* at 909 (recognizing that the Nation exercised “significant sovereign functions over the lands in question,” including “the power to collect taxes, operate schools, [and] legislate through tribal ordinances”); *id.* at 912 (discussing Nation’s present-day “criminal and civil” jurisdiction within the Creek Reservation). These binding conclusions cannot be squared with any notion that the Court’s recognition of the Creek Reservation is limited to the MCA, which (enacted in 1885) postdated Congress’s establishment of the Creek Reservation by half a century and addressed only federal jurisdiction, *see United States v. Wheeler*, 435 U.S. 313, 325 n.22 (1978) (describing MCA as a “carefully limited intrusion of federal power into the otherwise exclusive jurisdiction of the Indian tribes” (citation omitted)); *McGirt*, 591 U.S. at 898 (describing MCA as an “incursion” on tribes’ pre-existing rights “to govern themselves” within their Indian country).

To be sure, *McGirt* states that “[t]he only question before us ... concerns the statutory definition of ‘Indian country’ as it applies in federal criminal law under the MCA,” *id.* at 935. But § 1151 is “the statutory definition of ‘Indian country’ as it applies in federal criminal law under the MCA,” so by that statement *McGirt* simply explains that its holding is limited not to the MCA but to § 1151. The Court underscored that fact by noting that there are many contexts

in which § 1151 is the controlling definition of Indian country, *see id.* (“Of course, many federal civil laws and regulations do currently borrow from § 1151 when defining the scope of Indian country.”), but also others where it is not, *see id.* (“[O]ften nothing requires other civil statutes or regulations to rely on definitions found in the criminal law.”). The dissent agreed that, beyond criminal law, many “federal laws, triggering a variety of rules, spring into effect when land is declared a reservation,” *id.* at 971 (Roberts, C.J., dissenting), and outlined numerous civil jurisdictional outcomes that follow when that occurs, *id.* at 972–73. Accordingly, every member of the *McGirt* Court recognized that the Court’s § 1151 Indian country determination extends to contexts in which § 1151 provides the governing definition of Indian country. And this is beyond doubt such a case. *See Cheyenne-Arapaho*, 618 F.2d at 668, 669 (where lands “are Indian Country within the meaning of s 1151(a),” “state hunting and fishing laws do not apply, directly or indirectly, to hunting and fishing by [tribal] members”).⁸

Finally, limiting *McGirt* to the MCA cannot be reconciled with *Castro-Huerta*. *Castro-Huerta* is a non-MCA case, yet states without qualification that “[i]n light of *McGirt* and the follow-on cases [concerning other reservations], the eastern part of Oklahoma, including Tulsa, is now recognized as Indian country,” 597 U.S. at 634. Accordingly, the Court (including all of the *McGirt* dissenters) had no difficulty recognizing that “[t]he jurisdictional dispute in this [non-MCA] case arises ... [in] Indian country” as that term is defined in “18 U.S.C. § 1151,” *id.* at 636. If *McGirt* is limited to the MCA, *Castro-Huerta* is, in its entirety, a non-sequitur.

* * *

⁸ *See also DeCoteau v. Dist. Cnty. Ct. for Tenth Jud. Dist.*, 420 U.S. 425, 427 n.2 (1975) (“While s 1151 is concerned, on its face, only with criminal jurisdiction, the Court has recognized that it generally applies as well to questions of civil jurisdiction.”).

In sum, Defendants have not undermined the Nation’s likelihood of success on the merits. They instead—case upon case, without acknowledgement or explanation—invite this Court to apply doctrines limited to state jurisdiction over non-members in Indian country or over Indians outside of Indian country to deny the Nation’s preliminary injunction motion, which involves neither and is governed by a different body of Supreme Court and Tenth Circuit precedents by which this Court remains bound. Defendants’ Response is an invitation to sow doctrinal confusion and commit clear legal error that the Court should decline.

III. Defendants Fail To Counter the Nation’s Showing of Irreparable Harm.

Defendants premise their irreparable harm argument on the strawman proposition that the Nation’s claims do not extend to fee lands within the Reservation. *See* Defs. Resp. 28 (stating that Nation does not “purport[] to exercise jurisdiction over tribal members except on trust lands”). That is wrong. The Nation asserts jurisdiction over its citizens’ hunting and fishing activities throughout the Reservation. *See supra* n.2; Dkt. 35 at 14 & n.6.

From that false premise, Defendants contend that “[t]he Nation fails to articulate a meaningful way” in which Defendants’ conduct “violates any specific tribal sovereignty interest,” Defs. Resp. 27. To the contrary, the Nation has set forth in extensive detail how Defendants’ actions interfere with its ability to govern and protect its citizens and to vindicate its federally guaranteed authority to enforce its own laws within its Reservation, supported by numerous sworn witness declarations and grounded in controlling Tenth Circuit precedents that Defendants nowhere engage. *See* Nation Br. 19–23.⁹

⁹ For example, Defendants refer to the possibility that “tribal citizens will follow State law *instead of* tribal law” as an “unsubstantiated fear,” Defs. Resp. 28. But the Nation substantiated that assertion with the sworn testimony of Nation citizens that they are, in fact, complying with state law in lieu of tribal law right now. *See* Compl. (Dkt. 2) ¶¶ 39–41; Decl. of Trey Downum

Defendants next contend that the Nation has not shown irreparable harm because, under the separate sovereigns doctrine, nothing “would prevent the Nation from likewise prosecuting [its citizens] under tribal law,” Defs. Resp. 27 (citing *Kunzweiler*, 2025 WL 3124450, at *5). But *Kunzweiler*, a decision that is on appeal in the Tenth Circuit, involves non-member Indians (despite Defendants’ attempt to obscure that fact by substituting “[tribal citizen],” *id.*, where the court used “nonmember Indian”) and rests its irreparable harm reasoning on its conclusion that the Nation had not yet (for purposes of preliminary relief) shown that “concurrent criminal jurisdiction over nonmember Indians unlawfully infringes on tribal self-government,” 2025 WL 3124450, at *4. In *Iski*, by contrast, this Court stated:

Iski’s argument concerning the separate sovereigns doctrine also seeks to minimize the sovereign interests asserted by plaintiffs in this case. The United States and the tribal plaintiffs are alleging that they have exclusive jurisdiction over Indian defendants who commit crimes in Indian country. Defendant’s argument wholly disregards the effect of *McGirt* and, if plaintiffs are correct, there is no concurrent jurisdiction giving rise to application of the separate sovereign doctrine.

2026 WL 123292, at *5. Though set forth in the context of a motion to dismiss, this reasoning applies squarely here. *Cheyenne-Arapaho* is unequivocal that where lands “are Indian Country within the meaning of s 1151(a),” “state hunting and fishing laws do not apply, directly or indirectly, to hunting and fishing by [tribal] members,” 618 F.2d at 668, 669. Defendants—despite citing more than a hundred cases in their motion to dismiss and in opposition to the instant motion—have not pointed this Court to *a single case* supporting a contrary conclusion.

Nor do Defendants account for *Prairie Band, Ute Indian Tribe of the Uintah and Ouray Rsrv. v. Utah*, 790 F.3d 1000 (10th Cir. 2015), or *Wyandotte Nation v. Sebelius*, 443 F.3d 1247

¶¶ 13–15; Decl. of Jordan Pettigrew ¶¶ 13–19; Decl. of Sec’y of Interior Affs. Trenton Kissee ¶¶ 48–50; Nation Br. 19–20. Defendants cannot rebut the Nation’s arguments by ignoring them.

(10th Cir. 2006), where—as this Court recognized in *Iski*, 2026 WL 123292, at *4—the Tenth Circuit found that, as a matter of law, assertions of state jurisdiction over Indians in a tribe’s Indian country constitute irreparable harm to tribal sovereignty warranting a preliminary injunction. Indeed, in *Iski* this Court highlighted *Ute Indian Tribe*’s focus on Utah’s “disregard [of] a binding Tenth Circuit decision concerning the boundaries of an Indian reservation and the prosecution of a tribal member for traffic offenses committed on reservation land,” *id.*, which led then-Judge Gorsuch to conclude that “the district court should have issued a preliminary injunction and must do so now” because “the harm to tribal sovereignty in this case is perhaps as serious as any to come our way in a long time,” *Ute*, 790 F.3d at 1005. Here, Defendants are likewise engaged in a wholesale disregard of precedent, asserting the right to prosecute Nation citizens for hunting and fishing on Creek Reservation land in clear disregard of precedent including *Cheyenne-Arapaho* and *Ute Indian Tribe*. They likewise disregard *McGirt*’s affirmation of the continuing legal status of the Creek Reservation, referring to that same reservation as a “former reservation,” Defs.’ Joint Mot. To Dismiss Pl.’s Compl. (Dkt. 30) at 15, and deriding the Nation’s use of “the undefined term ‘Creek Reservation,’” *id.* at 1, despite the fact that *McGirt* uses that same term no less than twenty times in finding that it meets the § 1151 definition of Indian country and concludes that, “[u]nder any definition, this was a reservation,” 591 U.S. at 902.

As for Defendants’ assertion that “the Nation agrees that the State laws ... are essential” for conservation, Defs. Resp. 28 (citing Nation Br. 6), the Nation’s papers will be searched in vain for any such agreement with respect to state laws as applied to Indians. And as to Defendants’ litany of rhetorical questions as to how requiring Nation citizens to comply with state licensing and harvest reporting requirements would “supplant any tribal authority or

sovereignty,” *id.* at 28, the Nation has thoroughly answered those questions with substantive factual support, *see* Nation Br. 19–23. Ignoring arguments does not rebut them.

Finally, Defendants assert that “the Nation’s significant delay in seeking relief ... ‘cuts against finding irreparable injury’” where “[t]he only change it points to is ODWC’s public clarification of the same principle that has governed since statehood[.]” Defs. Resp. 28 (quoting *Fish v. Kobach*, 840 F.3d 710, 753 (10th Cir. 2016)). This defies reality. The ODWC’s October 2025 directive was not a “clarification,” it was a new policy, and the Nation filed suit within months of its pronouncement. That it was a new policy is amply confirmed by the statements of Oklahoma’s Attorney General, who has expressed considerable concern over Defendants’ change in course, *see supra* pp. 1–2. Moreover, Defendants suggest no prejudice resulting from the alleged delay. That alone forecloses their argument. *See Kobach*, 840 F.3d at 753 (holding that defendant “fails to make any argument as to how the particular delay at issue here undercuts a finding of irreparable harm. He argues only the length of the delay and fails to show how that delay prejudiced him. This failure alone is sufficient for us to reject his delay rationale.”).

IV. Defendants Fail To Counter the Nation’s Showing that the Balance of Harms and Public Interest Favor a Preliminary Injunction.

Defendants contend that “a tribal exemption from State licensing requirements would cost the ODWC \$3.8 million annually,” Defs. Resp. 30, which their witness describes as “catastrophic for Oklahoma’s conservation programs,” Aff. of Andrea Crews ¶ 11. However, as noted above, federal law prohibits states from requiring Indians to purchase state licenses even for *off-reservation* treaty hunting and fishing, *see supra* pp. 4–5, and *Cheyenne-Arapaho* is clear that state regulations do not apply to tribal members hunting and fishing in their tribe’s Indian country, 618 F.2d at 669. Defendants cannot claim harm from being enjoined from doing what “they have no legal entitlement to do in the first place,” *Ute Indian Tribe*, 790 F.3d at 1007.

Even were this argument cognizable, this motion, to which the balance of harms pertains, involves only a preliminary injunction, not a permanent one, and Defendants’ witness estimates the impact to be \$1.7 million for the remainder of fiscal year 2026, Crews Aff. ¶ 10. Moreover, Defendants’ estimates reflect an injunction applicable to all Five Tribes. *Id.* ¶ 7. But even were the entire amount attributable to the Nation’s injunction, and even if the witness’s estimate of the number of tribal hunters and fishers was not wholly unsubstantiated, *see id.* ¶ 8, \$1.7 million can hardly be described as “catastrophic” for a state with a budget of \$12 billion. As this Court recognized in *Iski*, “[f]ederal law is replete with examples in which state law has had to accommodate tribal sovereignty[.]” 2026 WL 123292, at *4 (citation omitted).

Defendants further assert that the Nation’s injunction will “interfere with State contracts,” “jeopardiz[e] longstanding hunting-access leases, and threaten[] to cause ODWC to breach its federal and intergovernmental agreements.” Defs. Resp. 29. But Defendants and their declarants fail to point the Court to the terms of any such contracts, leases, or agreements—apparently asking the Court to take their dire warnings on faith based on the speculative legal conclusions of a fact witness whose expertise is in wildlife ecology and management, Crews Aff. at 2.

That leaves Defendants’ claims that should a temporary injunction issue for the pendency of this case, jurisdictional, management, and enforcement chaos will ensue,

creating a fragmented jurisdictional system [that] 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.

Defs. Resp. 29.

But there has already been a test run of the effects of the Nation’s requested preliminary injunction in the several years before the ODWC began asserting its authority to prosecute

Nation citizens within the Creek Reservation in October 2025. During that period, the Nation’s Division of Agriculture and Natural Resources (DANR) and the ODWC “had a productive and fruitful working relationship ... coordinating to pursue important shared land management and conservation goals,” including cooperating on “habitat projects,” and the DANR’s “shar[ing] [of] all the data it collects with the ODWC in the spirit of cooperation and coordination,” including “harvest information reported by Nation citizens, information on threatened and endangered species and habitats,” and on “other threats to shared conservation goals.” Decl. of Sec’y of Interior Affs. Trenton Kissee ¶¶ 36–40. Defendants nowhere dispute this testimony.

Defendants’ arguments and those of its witnesses also ignore the fact that, prior to the ODWC’s change in policy, “[l]aw enforcement officers from the Nation and the ODWC ... worked together to share critical information and address violations of federal and tribal law within the Creek Reservation,” Decl. of Deputy Att’y Gen. Geraldine Wisner ¶ 18. Indeed, a month after *McGirt* issued, “the ODWC was added to the list of agencies included within Bureau of Indian Affairs’ (BIA) Deputation Agreement with the Nation,” under which both ODWC and Nation conservation officers “are able to react immediately to observed violations of the law and other emergency situations within the Creek Reservation, regardless of the Indian status of the suspected offender,” with each agency referring the offender to the appropriate jurisdiction. *Id.* ¶¶ 13–14 (citation omitted). Under that agreement, “the ODWC’s game wardens issued citations” to Indians “and referred the matters to the Nation. When the Nation would prosecute a case referred by the ODWC, the arresting ODWC officers would testify in tribal court about the facts of the asserted violation.” *Id.* ¶ 18.

Again, neither Defendants nor their witnesses dispute, or even acknowledge, these sworn facts. And critically, they point to not a single adverse jurisdictional, biological, or enforcement

impact that occurred during this period of cooperation. Had any occurred, Defendants could and certainly would have so asserted in their brief or their roughly fifty pages of witness declarations. They did not, limiting their warnings to speculation about future impacts. But as the Supreme Court recognized in *McGirt*, “it is unclear why pessimism” about the future impacts of respecting the Nation’s sovereignty within its Reservation “should rule the day,” because

Oklahoma and its Tribes have proven they can work successfully together as partners. Already, the State has negotiated hundreds of intergovernmental agreements with tribes, including many with the Creek. These agreements relate to taxation, law enforcement, vehicle registration, hunting and fishing, and countless other fine regulatory questions. No one before us claims that the spirit of good faith, comity and cooperative sovereignty behind these agreements will be imperiled by an adverse decision for the State today any more than it might be by a favorable one.

McGirt, 591 U.S. at 936–37 (quotation marks and citations omitted). Because Defendants have chosen to withdraw themselves from cooperation with the Nation, they have themselves to blame for any harm that choice might cause them in the event of an injunction and should not be heard to claim that any such harm “cannot be remedied,” Defs. Resp. 29; *see also, e.g., Davis v. Mineta*, 302 F.3d 1104, 1116 (10th Cir. 2002) (stating that “the self-inflicted nature of [the] harm weighs in favor of granting preliminary injunctive relief” (brackets, ellipsis, and citation omitted)), *abrogated on other grounds by Dine Citizens Against Ruining Our Env’t v. Jewell*, 839 F.3d 1276 (10th Cir. 2016); *Pizza Inn, Inc. v. Allen’s Dynamic Food, Inc.*, Case No. CIV-23-00164-PRW, 2023 WL 3015297, at *6 (W.D. Okla. Apr. 19, 2023) (stating that “courts afford little weight to self-inflicted harms when conducting the balancing inquiry” (citation omitted)).

CONCLUSION

The Nation respectfully requests that the Court grant the preliminary injunction.

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CERTIFICATE OF SERVICE

I certify that on March 3, 2026, this document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

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