

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)
employed by the Governor,)

Defendants.)

**DEFENDANTS' JOINT REPLY BRIEF IN SUPPORT OF
MOTION TO DISMISS PLAINTIFFS' COMPLAINT**

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Defendants Wade Free and Russell Cochran (collectively, “Defendants” or the “State”), file this Joint Reply Brief in Support of their Motion to Dismiss (“Motion”) (Doc. 30) to address the arguments raised by Plaintiff, the Muscogee (Creek) Nation (“Nation”), in its Response (Doc. 35).

ARGUMENT AND AUTHORITIES

I. THIS SUIT IS BARRED BY SOVEREIGN IMMUNITY.

The Nation does not challenge the State’s fundamental contention that its suit substantively “seeks to divest the State of all regulatory power over” fee lands in large parts of eastern Oklahoma under *Idaho v. Coeur d’Alene Tribe of Idaho*, 521 U.S. 261, 289 (1997). Instead, the Nation incorrectly responds solely that *Coeur d’Alene* is no longer controlling law. Doc. 35 at 2-3. But the U.S. Supreme Court has not abrogated the *Coeur d’Alene* “functional equivalent” test. See *Virginia Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 257 (2011) (continuing to recognize the viability of *Coeur d’Alene* where a suit is the functional equivalent of a quiet title action). While the Supreme Court has since made clear that *Coeur d’Alene* represents a “narrow exception” to *Ex parte Young*, 209 U.S. 123 (1908), lower courts “must follow its precedent that has ‘direct application in a case’ even if it ‘appears to rest on reasons rejected in some other line of decisions’” and “should not infer anything from dicta or silence.” *Muscogee (Creek) Nation v. Rollin*, 119 F.4th 881, 889 (11th Cir. 2024) (quoting *Rodriguez de Quijas v. Shearson/ Am. Express, Inc.*, 490 U.S. 477, 484 (1989)).

The Nation relies on *Verizon Maryland, Inc. v. Pub. Serv. Comm’n of Maryland*, 535 U.S. 635, 645 (2002), where the Supreme Court held that a district court normally must conduct only a “straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.” The Tenth Circuit followed the Supreme Court’s guidance in *Hill v. Kemp*, 478 F.3d 1236, 1259 (10th Cir. 2007), recognizing that “the sole question for us becomes whether the relief sought by [plaintiff] is prospective, not just in how it is captioned **but also in its substance**” (emphasis added). Accordingly, the Tenth Circuit has held that whether the

plaintiff's claims implicate "special sovereignty interests" is no longer a required step in the *Ex parte Young* analysis. See, e.g., *Muscogee (Creek) Nation v. Pruitt*, 669 F.3d 1159, 1167 n.4 (10th Cir. 2012). However, the court is still required to determine whether the claim substantively seeks only prospective relief and is not the functional equivalent of retrospective relief (such as a quiet title action)—a task not always as simple as looking only at the prayer for relief. See *Hill*, 478 F.3d at 1259 (holding the district court should proceed "in every case to the 'straightforward [or so one might hope] inquiry' whether the relief requested is 'properly' characterized as prospective or is indeed the functional equivalent of impermissible retrospective relief") (emphasis added).

The Nation sidesteps any critical analysis of the "functional equivalent" test of *Coeur d'Alene*, which requires the Court to compare the relief sought by plaintiffs to a quiet title action, because it is clear that the relief it seeks is the wholesale divestiture of the State's police power over hunting and fishing in eastern Oklahoma. Accordingly, just as in *Coeur d'Alene*, when considered in substance, the relief sought by the Nation is more properly characterized as the functional equivalent of a quiet title action, which is not authorized by the *Ex parte Young* fiction.

II. THE NATION'S CENTURY-LONG ACQUIESCENCE TO STATE AUTHORITY BARS THE RELIEF THEY NOW SEEK UNDER EQUITABLE PRINCIPLES SUCH AS LACHES PURSUANT TO *SHERRILL*.

The Nation contends that the State's argument under *City of Sherrill, New York v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005), fails both procedurally and on the merits. As to the procedural issue, it is easily defeated. "Affirmative defenses may be raised in a motion to dismiss when the grounds for the defense appear on the face of the complaint." See *Casteel v. Montereau, Inc.*, No. 19-CV-227-GKF-JFJ, 2019 WL 13298883, at *2 (N.D. Okla. Nov. 1, 2019). Indeed, in *Fernandez v. Clean House, LLC*, 883 F.3d 1296, 1299 (10th Cir. 2018), the case upon which the Nation relies (Doc. 35 at 4-5), the Court held that the complaint must only "alleg[e] the factual basis for [the] elements" of the defense. And further, the court may "take judicial notice of its own files and records, as well as facts

which are a matter of public record,’ without converting a motion to dismiss into a motion for summary judgment.” *Johnson v. Spencer*, 950 F.3d 680, 705 (10th Cir. 2020). Here, as set forth in the State’s Motion (Doc. 30 at 15-17), the “factual basis” for the elements of the State’s defense, as described in *United States v. Osage Wind, LLC*, No. 14-CV-704-GKF-JFJ, 2021 WL 3774685, at *12 (N.D. Okla. Aug. 25, 2021), are present based upon the Complaint and/or matters of public record.

First, the “longstanding, distinctly non-Indian character of the [disputed land] and its inhabitants” is confirmed in *McGirt v. Oklahoma*, 591 U.S. 894 (2020), itself, wherein it was noted that “unrestricted fee lands ... make up more than 95% of the Creek Nation’s former territory” and “Tribe members today constitute a small fraction of those now residing on the land,” *Id.* at 917, 964—and the Nation does not dispute this characterization. Second, that the State “constantly exercised” regulatory authority over hunting and fishing on fee lands since at least 1909 is verified by reference to State law, *see* S.B. 2, 1909 O.S.L. ch. 44 (Mar. 8, 1909); 29 O.S. §§ 1-101 *et seq.* Third, the “long delay” in seeking relief—“decades or more”—is apparent from the record (*i.e.*, from 1909 to 2025).

As to the merits, the Nation’s arguments are no more convincing. This is particularly true as to its reliance on *McGirt*, which addressed only whether the State was properly exercising criminal jurisdiction over major crimes committed in Indian country. It said nothing about the State’s exercise of regulatory jurisdiction over hunting and fishing.

First, the Nation contends that the wrongs of which it complains began in October 2025. This position simply cannot be squared with the historical facts or the law. As referenced above, the State has been exercising jurisdiction over hunting and fishing on fee lands since at least 1909.

Second, the Nation contends that it never relinquished any right to regulate hunting and fishing on fee lands within the outer boundaries of its Indian country. But, again, the public record and law clearly demonstrate otherwise. Both when the Nation originally enacted its Hunting and Fishing Code around 2005, and when it updated the law with its current Wildlife Conservation Code, MCNCA tit.

23, ch. 2 (the “Conservation Code”), in 2022, the Nation limited its jurisdiction 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). Accordingly, the only thing that has recently changed is that the Nation now seeks to reclaim long-abandoned authority to exercise exclusive jurisdiction over hunting and fishing on fee lands alienated long ago.

Third, the Nation argues that it is not undertaking any “unilateral” action to reclaim jurisdiction over hunting and fishing on fee lands within its Indian country. But one need look no further than the Reciprocity Agreement to find otherwise. The Reciprocity Agreement is an inter-tribal agreement to which neither the State, nor the Defendants, is a party. Yet, throughout the Complaint, the Nation claims that as a result of the Reciprocity Agreement, it has regained the right to regulate the conduct of non-member Indians to the exclusion of the State. *See, e.g.*, Doc. 2, at ¶¶ 35-38.

Fourth, the Nation asserts that the State’s “justifiable expectations” in its ability to regulate hunting and fishing by any persons, without regard to tribal citizenship, on fee lands are misplaced, based on *McGirt*. However, the *McGirt* majority says just the opposite. Indeed, the Court specifically noted that equitable principles such as those asserted by the State here are the answer to this very legitimate “concern for reliance interests” that the State originally raised in *McGirt*. Rather than find that the Creek reservation was disestablished, the Court instead found that:

Many other legal doctrines—procedural bars, *res judicata*, statutes of repose, and laches, to name a few—are designed to protect those who have reasonably labored under a mistaken understanding of the law. And it is precisely because those doctrines exist that we are “fre[e] to say what we know to be true ... today, while leaving questions about ... reliance interest[s] for later proceedings crafted to account for them.”

591 U.S. at 936. Of course, this is exactly such a proceeding where those interests are in the spotlight.

For example, the State relied upon its authority to regulate hunting and fishing in acquiring, or entering

leases for, state-owned lands, and indiscriminately enjoining ODWC's ability to enforce state wildlife laws interferes with and threatens its contractual and legal obligations. *See* Doc. 31 at 29-30.

Fifth, and finally, after relying extensively upon the Court's *McGirt* holdings, the Nation conveniently asks the Court to ignore *McGirt* on this last point. According to the Nation, the State cannot rely upon laches to protect its reliance interests in properly regulating hunting and fishing on fee lands because it is "unlawful" conduct that cannot be "cemented" going forward. But there is nothing unlawful about the State enforcing hunting and fishing regulations in Indian country in the interest of conservation and public safety. *See Puyallup Tribe v. Dep't of Game of Wash.* ("*Puyallup P*"), 391 U.S. 392, 395 (1968); *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 177 (1999).

In consideration of the arguments and facts in the public record, the Court should find that the Nations are barred by equitable principles from now claiming, after decades of acquiescence, that Oklahoma's wildlife conservation laws do not apply to tribal members hunting and fishing on fee lands.

III. THE NATION LACKS STANDING TO ASSERT CLAIMS ON BEHALF OF NON-MEMBER INDIANS AND/OR AGAINST MR. COCHRAN.

A. Non-Member Indians.

In response to the State's assertion that the Nation lacks standing to assert claims on behalf of Five Tribe citizens (*i.e.*, non-member Indians), the Nation appears to retreat from the allegations in its Complaint and mischaracterize its legal position. But this bait-and-switch should be rejected by the Court. "If a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006). Because the elements of standing "are not mere pleading requirements but rather an indispensable part of the plaintiff's case," the Tenth Circuit has made clear that "a federal court can't 'assume' a plaintiff has demonstrated Article III standing in order to proceed to the merits of the underlying claim, regardless of the claim's significance." *Colorado Outfitters Ass'n v. Hickenlooper*, 823 F.3d 537, 543-

44 (10th Cir. 2016). Yet, that is what the Nation argues here. *See* Doc. 35 at 11 n.3. It asks the Court to ignore its lack of standing to assert claims as to hunting and fishing by non-member Indians within its Indian country. But the Court must reject this invitation and apply the law.

In its response, the Nation seeks to obscure the breadth of the requested relief, Doc. 35 at 9-10. But this limitation is inconsistent with the Complaint. For example, as to non-member Indians, the Nation cites to the Reciprocity Agreement and contends that “[a]ll those [non-member] hunters and fishers now [hunt and fish within the Nation’s Indian country] under threat of citation and prosecution by Defendants.” Doc. 2, ¶ 10 (emphasis added). Indeed, the Nation claims standing over non-member Indians primarily pursuant to the Reciprocity Agreement. *See id.*, ¶¶ 35-38. But neither the State nor any of its agencies or officers is a party to the Reciprocity Agreement. The inter-tribal Reciprocity Agreement cannot confer standing upon the Nation that does not otherwise exist, as neither the State nor any of its agencies or officers is a party to it, and there can be no case or controversy between the State and the Nations as to an agreement to which the State is not a party and cannot be bound.

And the cases cited by the Nation provide no support for its theory that standing extends to claims on behalf of non-member Indians. Doc. 35 at 10. Both of those cases involved the exercise of State jurisdiction over **member Indians**. *See Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1237 (10th Cir. 2001) (tribe claimed state interference with tribal self-government by requiring state tags despite the fact that “tribal registrations and titles are required for all vehicles owned by the tribal government and for all vehicles owned by tribal members who reside on the reservation”) (emphasis added); *Ute Indian Tribe of the Uintah & Ouray Reservation v. Utah*, 790 F.3d 1000, 1003 (10th Cir. 2015) (tribe challenged the state for “prosecut[ing] tribal members in state court for conduct occurring within the tribal boundaries recognized by” an earlier decision) (emphasis added).

If the Nation does not seek to assert claims for, or obtain relief on behalf of, any non-member Indians, then the Court’s decision on the question of standing should be easy, and it should make clear

that no such claims or requests for relief will be part of this action moving forward.

B. Claims Against Special Prosecutor Cochran.

The Nation attempts to turn the standing requirement on its head with respect to its claims against Special Prosecutor Cochran. According to the Nation’s current laws, unchanged in relevant part since 2005, its jurisdiction is limited to hunting and fishing on trust lands—not non-Indian fee lands. *See* 23 MCNCA §§ 2-103(A), 2-104(A). In other words, the Nation’s Conservation Code does not purport to apply on State lands or other private fee lands within the boundaries of its Indian country. Yet, the Nation contends here that Mr. Cochran purports to infringe on the Nation’s jurisdiction by making “credible threats” of prosecution of Indians who are hunting and fishing on State lands or other non-trust fee lands. In other words, the Nation asserts standing because it is now encouraging its tribal members (as well as non-member Indians) to hunt and fish on State lands and other non-trust fee lands without complying with State law, even though its tribal laws do not even claim to assert jurisdiction over such conduct. How can Mr. Cochran’s actions interfere with the Nation’s tribal self-government when the Nation itself does not even assert jurisdiction over the alleged conduct? The Nation’s claims against Mr. Cochran should be dismissed for lack of standing.

IV. THE NATION FAILS TO STATE A PLAUSIBLE CLAIM FOR RELIEF.

None of the Nation’s additional arguments disputing the State’s contention that its Complaint fails to state a plausible claim for relief is compelling. Contrary to its position: (1) the current ownership and possession of lands within Indian country is a critical component of the Court’s analysis; (2) the Nation’s jurisdiction over hunting and fee lands within Indian country is not exclusive, and its arguments are contrary to the facts and the law; (3) the State is not bound by the Reciprocity Agreement, and it cannot be used to limit the State’s jurisdiction over non-member Indians hunting and fishing on fee lands; and (4) according to *Castro-Huerta*, 597 U.S. at 653-54, at least since statehood, “Indian country has been part of the territory of Oklahoma,” and Oklahoma does not “need a

permission slip from Congress” to exercise its sovereign authority within Indian country.

A. The Status of the Land, whether Held in Trust or Fee, Matters.

The Nation contends that, notwithstanding that its Conservation Code limits jurisdiction to hunting and fishing on trust lands, 23 MCNCA § 2-104(A), the State’s exercise of jurisdiction on non-Indian fee lands would somehow infringe upon its tribal sovereignty. But this legal theory finds no support in *McGirt* or the definition of “Indian country” under 18 U.S.C. § 1151(a). Indeed, even the majority in *McGirt* expressly recognized that the “only question before us ... concerns the statutory definition of ‘Indian country’ as it applies in federal criminal law under the MCA,” and “*nothing requires other civil statutes or regulations to rely on definitions found in the criminal law.*” 591 U.S. at 935 (emphasis added). The Nation has failed to identify any statute or other authority providing exclusive jurisdiction to the tribes over hunting and fishing on fee lands within eastern Oklahoma based on the definition of Indian country under the MCA.

The Nations seek to distract the Court by focusing on whether its “reservation” has been diminished. Doc. 35 at 15-16. But this is a straw man argument—a position never taken by the State in its briefs and one which does not address why the definition of Indian country is applicable to the State’s exercise of jurisdiction over hunting and fishing. *See, e.g., Murphy v. Royal*, 875 F.3d 896, 952 (10th Cir. 2017), *aff’d sub nom. Sharp v. Murphy*, 591 U.S. 977 (2020) (“Whether a reservation has been disestablished or diminished depends on whether its boundaries were erased or constricted, not on who owns title to land inside the lines.”). The question here is not whether the outer boundaries of the Nation’s “reservation” has changed but rather the extent of the State’s jurisdiction over hunting and fishing within those outer boundaries. It is axiomatic that the State is permitted to exercise *some* jurisdiction within Indian country. Indeed, the Supreme Court has consistently made clear that “Indian country is part of the State, not separate from the State,” and “State sovereignty does not end at a reservation’s border.” *Castro-Huerta*, 597 U.S. at 636-37; *Nevada v. Hicks*, 533 U.S. 353, 361 (2001).

B. The Nation’s Jurisdiction within Indian country is Not “Exclusive” on Fee Lands, where Hunting and Fishing is Subject to Dual Regulation.

The Nation next contends that it exercises *exclusive* jurisdiction over hunting and fishing by member Indians within Indian country. Again, this position directly conflicts with its Conservation Code, 23 MCNCA §§ 2-103(A), 2-104(A), which recognizes that the Nation exercises jurisdiction over hunting and fishing only on “certain lands” within Indian country—namely, *trust lands*. The Nation’s reliance on *McClanahan v. State Tax Comm’n of Ariz.*, 411 U.S. 164 (1973), is telling as to the weakness of its legal position. Rather than address U.S. Supreme Court authority expressly holding that states have jurisdiction to regulate hunting and fishing on tribal lands in the interest of conservation and public safety, *see Puyallup I*, 391 U.S. 392, and *Mille Lacs Band*, 526 U.S. 172, the Nation points instead to *McClanahan*, which is a taxation case.

Nor does the Tenth Circuit’s holding in *Cheyenne-Arapaho Tribes of Oklahoma v. State of Okl.*, 618 F.2d 665 (10th Cir. 1980), support the Nation’s proffered outcome. There, the court expressly held that “state hunting and fishing laws do not apply, directly or indirectly, to hunting and fishing by members of the [Tribes] on land held as Indian allotments and on land held in trust by the United States for the Tribes.” *Id.* at 669. That is, the State is precluded from applying its hunting and fishing laws to member Indians hunting on trust lands. With regard to non-Indian fee lands, to the contrary, the court expressly held that hunting and fishing is “not subject to exclusive Tribal control but rather subject to a system of dual regulation.” *Id.* at 667 (citing *Puyallup I*, which involved 99.86% fee lands). And indeed, even *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 406 (1968), relied upon by the Tenth Circuit, involved only tribal lands, which were still held in trust for the tribe. *See Menominee Tribe of Indians v. U.S.*, 388 F.2d 998, 1001 (Ct. Cl. 1967).

C. The Nation Cannot Limit State Jurisdiction by Inter-Tribal Agreement.

The Nation provides no legal authority for its position that the State’s jurisdiction can be preempted by the inter-tribal Reciprocity Agreement to which the State is not a party and is not bound.

While Five Tribe citizens may have consented to the jurisdiction of the Nation, that is irrelevant to any analysis under *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 151 (1980), because the State has not agreed to relinquish its jurisdiction over non-member Indians hunting and fishing on fee lands. And, as the Supreme Court has expressly held, “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.” *Montana*, 450 U.S. at 564; *see also Lower Brule Sioux Tribe v. State of S.D.*, 917 F. Supp. 1434, 1452 (D.S.D. 1996), *aff’d*, 104 F.3d 1017 (8th Cir. 1997) (applying the *Montana* exceptions and holding that no “principles of federal Indian law, whether stated in terms of preemption, tribal self-government, or otherwise, preclude the State from lawfully exercising jurisdiction over nonmember Indians and non-Indians on the fee lands and waters.”). Indeed, the Nation lacks standing to even assert such a claim on behalf of non-member Indians. *See infra*, Section III.A.

D. *Castro-Huerta* Supplies the Preemption Test for State Criminal Jurisdiction.

To the extent the Nation argues that the State is precluded from exercising jurisdiction to prosecute Indians in state court for violations of the State’s wildlife laws and regulations, *Castro-Huerta* supplies the applicable preemption test. Contrary to the Nation’s position that State jurisdiction in Indian country must be expressly authorized by Congress, a State’s jurisdiction in Indian country is presumed and may be preempted only: “(i) by federal law under ordinary principles of federal preemption, or (ii) when the exercise of state jurisdiction would unlawfully infringe on tribal self-government.” 597 U.S. at 638; *see also Puyallup Tribe, Inc. v. Dep’t of Game of State of Wash.* (“*Puyallup III*”), 433 U.S. 165, 171–75 (1977) (confirming that the state had jurisdiction to enforce its regulatory authority against tribal members fishing on the alienated fee lands by prosecutions in state court).

CONCLUSION

For the reasons set forth in their Motion (Doc. 30) and herein, Defendants respectfully request the Court dismiss the Complaint in its entirety under Rules 12(b)(1) and 12(b)(6).

Dated: March 17, 2026

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CERTIFICATE OF SERVICE

I hereby certify that on March 17, 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