

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

STATE OF OKLAHOMA, )  
)  
Plaintiff, )  
)  
v. )  
)  
(1) TIGER HOBIA, as Town King )  
and member of the Kialegee Tribal )  
Town Business Committee; )  
(2) THOMAS GIVENS, as 1<sup>st</sup> )  
Warrior and member of the Kialegee )  
Tribal Town Business Committee; )  
(3) JOHN DOE No. 1, as 2<sup>nd</sup> Warrior )  
and member of the Kialegee Tribal )  
Town Business Committee; )  
(4) LYNELLE SHATSWELL, as Secretary )  
and member of the Kialegee Tribal )  
Town Business Committee; )  
(5) JOHN DOE No. 2, as Treasurer )  
and member of the Kialegee Tribal )  
Town Business Committee; )  
(6) JOHN DOE No. 3, as a member )  
of the Kialegee Tribal Town Business )  
Committee; )  
(7) JOHN DOE No. 4, as a member )  
of the Kialegee Tribal Town Business )  
Committee; )  
(8) JOHN DOE No. 5, as a member )  
of the Kialegee Tribal Town Business )  
Committee; )  
(9) JOHN DOE No. 6, as a member )  
of the Kialegee Tribal Town Business )  
Committee; )  
(10) JOHN DOE No. 7, as a member )  
of the Kialegee Tribal Town Business )  
Committee; )  
(11) FLORENCE DEVELOPMENT )  
PARTNERS, LLC, an Oklahoma limited )  
liability company; and )  
(12) KIALEGEE TRIBAL TOWN, a )  
federally chartered corporation; )  
)  
Defendants. )

Case No. \_\_\_\_\_

**PLAINTIFF'S BRIEF IN  
SUPPORT OF MOTION  
FOR PRELIMINARY  
INJUNCTION**

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## I. INTRODUCTION

Plaintiff, the State of Oklahoma (“State”), by and through its undersigned counsel, moves this Court, pursuant to Fed. R. Civ. P. 65, to preliminarily enjoin Defendants Tiger Hobia, as Town King and member of the Business Committee (“Committee”) of the Kialegee Tribal Town, a federally recognized Indian tribe organized under Section 3 of the Oklahoma Indian Welfare Act, 25 U.S.C. §§ 501-510 (“OIWA”) (“Kialegee Tribal Town”), Thomas Givens, as 1st Warrior and member of the Committee, John or Jane Doe No. 1, as 2nd Warrior and member of the Committee, Lynelle Shatswell, as Secretary and member of the Committee, John or Jane Doe No. 2, as Treasurer and member of the Committee, John and Jane Does Nos. 3-7, as members of the Committee, Kialegee Tribal Town, a federally chartered corporation under Section 3 of the OIWA (“Town Corporation”), and Florence Development Partners, LLC (collectively, “Defendants”), and anyone acting by, through, or under them, from taking any action to construct or operate a Class III gaming facility (“Casino”) on land in the town of Broken Arrow, Oklahoma (“Broken Arrow Property”).

Defendants have commenced construction of the Casino on the Broken Arrow Property, despite that operation of a Class III casino on the Property will be in direct violation of the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 (“IGRA”), and the Gaming Compact between the Kialegee Tribal Town and the State of Oklahoma executed on April 14, 2011 (“State Gaming Compact”). The State Gaming Compact permits gaming only on the “Indian lands” of the Kialegee Tribe as defined by IGRA. The Broken Arrow Property is *not* the Indian lands of the Kialegee Tribal Town, and thus Defendants’ current casino construction activities on the Broken Arrow Property are in violation of both the State Gaming Compact and the IGRA.

If Defendants are not immediately halted in their efforts to construct and operate an illegal casino, contrary to the public interest, the State will sustain immediate and irreparable injury that far outweighs any injury Defendants may experience if an injunction is issued. Unless the Defendants are enjoined from their ongoing illegal activities, their construction activities will adversely affect the area surrounding the Property despite that the State Gaming Compact and federal law foreclose the Kialegee Tribal Town from operating a Class III gaming facility on the Property, and their actions will serve as a precedent that will fuel similar efforts throughout the State of Oklahoma to construct and operate casinos on lands that are not within a compacting tribe's jurisdiction, and over which the compacting tribe does not exercise governmental powers. The State requests the Court schedule a hearing on the Motion for preliminary injunction at the earliest date possible.

This Brief is supported by the Affidavit of David L. Wooden, City Manager, City of Broken Arrow, Oklahoma, attached as Exhibit 1 and Exhibits 1-A to 1-D. The State incorporates its Verified Complaint and Motion for Preliminary Injunction herein.

## **II. FACTUAL BACKGROUND**

### **A. The Parties**

The State of Oklahoma is a State of the United States of America and possesses all the sovereign rights and powers of a State. The individual defendants are members and officials of a federally recognized Indian tribe, the Kialegee Tribal Town. The Committee is the Kialegee Tribal Town's governing body, and the governing body of the Town Corporation. The individually named defendants are members of the Committee and are residents and citizens of the State of Oklahoma. The Town Corporation is a corporation that was issued a federal corporate charter under Section 3

of the OIWA by the Secretary of the Interior (“Secretary”), in which the Town Corporation has waived its sovereign immunity from suit. A copy of the Corporate Charter is attached as Exhibit 2. Florence Development Partners, LLC, is an Oklahoma limited liability company, registered on April 5, 2011, and is the putative lessee of the Broken Arrow Property. Upon information and belief, Florence Development Partners’ members include the Town Corporation, Marcella Giles, and Wynema Capps. A copy of the LLC’s registration information is attached as Exhibit 3. Ms. Giles and Ms. Capps are enrolled members of the Muscogee (Creek) Nation.

### **B. The Broken Arrow Property**

In 1833, the United States government entered into a treaty with the Muscogee (Creek) Nation of Indians<sup>1</sup> to establish a reservation for the tribe, in fee simple, that included what is now the Broken Arrow Property. Treaty with the Creeks, 1833, 7 Stat. 417; *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1441 (D.C. Cir. 1988). In 1866, a new treaty between the Creek Nation and the United States decreased the size of the reservation, though it continued to encompass what is now the Broken Arrow Property. Treaty with the Creeks, 1866, 14 Stat. 785.

In 1901, the United States entered into a treaty with the Muscogee or Creek Tribe of Indians by Act of March 1, 1901, 31 Stat. 861 (“1901 Act”). The 1901 Act required the tribe to issue allotments of all its reservation land to individual Indians. Under the 1901 Act, a restricted fee patent was issued to Tyler Burgess, a full-blooded

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<sup>1</sup> Although the treaty is with the “Muscogee or Creek Nation of Indians,” contemporary scholarship often refers to the “Creek Nation Confederacy,” reflecting the modern understanding that different tribal towns were a confederacy. See *Harjo v. Kleppe*, 420 F. Supp. 1110, 1144 (D.D.C. 1976), *aff’d sub nom.*, *Harjo v. Andrus*, 581 F.2d 949 (D.C. Cir. 1978).

enrolled Creek member, for land including what is now the Broken Arrow Property, on August 6, 1903. *See* Final Decree, District Court of Tulsa County (August 11, 1971), attached as Exhibit 4.

Decades after the Creek Nation's reservation had been divided into allotments pursuant to the 1901 Act, including that granted to Mr. Burgess, in 1941 the Kialegee Tribal Town organized as a distinct tribe pursuant to Section 3 of the OIWA, and its Constitution was approved by the Secretary of the Interior ("Secretary") on April 14, 1941.<sup>2</sup> *See* KIALEGEE TRIBAL TOWN OF OKLAHOMA CONST. AND BY-LAWS, art. II., attached as Exhibit 5; *Kialegee Tribal Town of Oklahoma v. Muskogee Area Director, Bureau of Indian Affairs*, 19 IBIA 296 (April 17, 1991), attached as Exhibit 6. The Kialegee Tribal Town is headquartered in Wetumka, Oklahoma, has approximately 500 members, and does not have a reservation or other land. The Broken Arrow Property is more than 70 miles away from the Kialegee Tribal Town headquarters.

The Broken Arrow Property, the allotment granted to Mr. Burgess as a full-blooded enrolled Creek member, has passed to Ms. Capps and Ms. Giles, both of whom are enrolled members of the Muscogee (Creek) Nation.<sup>3</sup> Ms. Capps and Ms. Giles are

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<sup>2</sup> The Muscogee (Creek) Nation organized pursuant to the OIWA in 1979. *See Alabama-Quassarte Tribal Town v. United States*, CIV-06-558-RAW, 2010 WL 3780979, at \*2 (E.D. Okla. Sept. 21, 2010) (rejecting the suggestion that because the Alabama-Quassarte Tribal Town organized under the OIWA prior to the Muscogee (Creek) Nation, it was "recognized" first); *see also Harjo*, 420 F. Supp. at 1140 (discussing the federal acknowledgment of the Muscogee (Creek) Nation prior to its organization under the OIWA).

<sup>3</sup> The State requests the Court to take judicial notice under Fed. R. Evid. 201 of the Constitution of the Muscogee (Creek) Nation (1979), a copy of which is attached as Exhibit 9. Under Article III, Section 2 of the Constitution of the Muscogee (Creek) Nation:

Persons eligible for citizenship in the Muscogee (Creek) Nation shall consist of Muscogee (Creek) Indians by blood whose names appear on the

direct descendants of Mr. Burgess, and continue to own the Broken Arrow Property in restricted fee status. *See* Order Approving Final Account, Distribution and Discharge and Confirming Heirship, District Court In and For Tulsa County (January 25, 2003), attached as Exhibit 7.

On April 12, 2011, the Kialegee Tribal Town and the State of Oklahoma entered into the State Gaming Compact. *See* Gaming Compact between the Kialegee Tribal Town and the State of Oklahoma, attached as Exhibit 8. The Department of the Interior approved the State Gaming Compact on July 8, 2011. The State Gaming Compact permits the Kialegee Tribal Town to “operate covered games,” *id.* Pt. 4, “only on *its* [Kialegee Tribal Town’s] *Indian lands* as defined by IGRA,” *id.* Pt. 5(L) (emphasis added).

In January, 2011, the Kialegee Tribal Town attempted to enter into a Prime Ground Lease with Ms. Capps and Ms. Giles, as well as a Ground Sublease between the Kialegee Tribal Town and Golden Canyon Partners, LLC,<sup>4</sup> for the purpose of constructing a casino to be known as the Red Clay Casino on the Broken Arrow Property. *See* Petition for Approval of Prime Ground Lease, filed in the District Court In and For Tulsa County (January 27, 2011), at ¶¶ 3-4, attached as Exhibit 11. Golden Canyon Partners planned to construct the proposed casino and then sublease the casino

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final rolls as provided by the Act of April 26, 1906 (34 Stat. 137), and persons who are lineal descendants of those Muscogee (Creek) Indians by blood whose names appear on the final rolls as provided by the Act of April 26, 2006 (34 Stat. 137) (*except that an enrolled member of another Indian Tribe, nation, band, or pueblo shall not be eligible for citizenship in The Muscogee (Creek) Nation*).

MUSCOGEE (CREEK) NATION CONST. art. III, § 2 (Emphasis added.).

<sup>4</sup> Golden Canyon Partners, LLC was incorporated in the State of Nevada in 2009. The manager is Luis R. Figueredo. A copy of the registration information is attached as Exhibit 10.

to the Kialegee Tribal Town for operation. *Id.* Ms. Capps and Ms. Giles filed a petition in Tulsa County District Court seeking approval of the Prime Ground Lease pursuant to the Act of August 4, 1947, 61 Stat. 731. The Solicitor General of the Department of the Interior intervened on behalf of the Secretary of the Interior, objecting to the proposed Prime Ground Lease and related transactions. *See* Secretary's Recommendation and Request that Court Withhold Approval of Prime Ground Lease, attached as Exhibit 12. The Muscogee (Creek) Nation also sought leave to intervene to object, and on August 17, 2011, the Tulsa District Court entered its Order refusing to approve the proposed Prime Ground Lease and the transactions contemplated thereby. *See* Order attached as Exhibit 13. The Tulsa District Court concluded that "an individual citizen cannot transfer government jurisdiction over his or her property by the terms of a lease." *Id.* ¶ 8.

Kialegee Tribal Town Corporation and Ms. Capps and Ms. Giles, through Vicki J. Sousa, counsel for the Kialegee Tribal Town, formed Florence Development Partners, LLC on April 5, 2011. *See* Exhibit 3. Upon information and belief, Florence Development Partners has contracted with Golden Canyon Partners, a Nevada corporation, to construct the Casino and then lease the Casino to the Kialegee Tribal Town or the Town corporation for operations. Ms. Capps and Ms. Giles entered into a lease of the Broken Arrow Property with Florence Development Partners, LLC, with a term of six years and eleven months. Upon information and belief, this lease has not been submitted to a district court of the State of Oklahoma or to the Bureau of Indian Affairs ("BIA") for approval, but it recently was filed with the Tulsa County Clerk. *See* Certified Copy of Memorandum of Lease (recorded January 3, 2012), attached as Exhibit 14. Until very recently, the Broken Arrow Property was undeveloped. *See*

Exhibit 1, Affidavit of Dave Wooden. Grading, site preparation, and other construction-related activities for the casino commenced in late December 2011 on the Broken Arrow Property and are proceeding without the approval and authorization of any federal, state, or local authority. *See id.* ¶ 7.

The Broken Arrow Property is located within the city limits of Broken Arrow, Oklahoma, across the street from a technical school, and near residential subdivisions, and it is one-half mile from the site of a planned elementary school and pre-kindergarten center. *See id.* ¶ 5. The Broken Arrow City Council and local neighborhood associations and residents have expressed their opposition to the Casino. *See id.* ¶ 8.

### **III. STANDARD FOR GRANTING THE MOTION**

A preliminary injunction is warranted pending the outcome of this matter in order to preserve the status quo and to prevent further irreparable harm to the State of Oklahoma. The purpose of a preliminary injunction “is merely to preserve the relative positions of the parties until a trial on the merits can be held.” *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981).

In determining whether to grant a preliminary injunction, the court must consider and balance four factors: (1) whether the movant has a substantial likelihood of success on the merits; (2) whether “the movant will suffer irreparable harm unless the injunction issues”; (3) whether “the threatened injury to the movant outweighs any harm the proposed injunction may cause the opposing party”; and (4) whether the public interest will be served by an injunction. *Kiowa Indian Tribe of Oklahoma v. Hoover*, 150 F.3d 1163, 1171 (10th Cir. 1998). No factor is dispositive; the court must consider the factors together to determine whether injunctive relief should issue. *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1246-47 (10th Cir. 2001) (determining

that when the moving party could demonstrate the latter three factors, “the first factor becomes less strict”). The decision to issue a preliminary injunction is within the discretion of the district court. *See id.* at 1243.

#### **IV. ARGUMENT**

##### **A. The State has a Substantial Likelihood of Success on the Merits**

###### **1. This Court has jurisdiction over the action**

This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 25 U.S.C. § 2710(d)(7). 28 U.S.C. § 1331 provides federal question jurisdiction. “[T]he interpretation of IGRA presents a federal question suitable for determination by a federal court. Further, an action seeking the enforcement of a tribal gaming compact arises under federal law.” *Muhammad v. Comanche Nation Casino*, 742 F. Supp. 2d 1268, 1276 (W.D. Okla. 2010) (internal quotation marks and citations omitted). Additionally, Section 2710(d)(7)(A)(ii) of the IGRA grants federal courts jurisdiction over “any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact entered into [under the IGRA] that is in effect.” *See id.* at 1277 (“IGRA expressly authorizes federal court jurisdiction for certain actions, such as actions by a tribe or state to enjoin a violation of a gaming compact.”).

###### **2. The Kialegee Tribal Town does not have jurisdiction over the Broken Arrow Property, and it does not exercise governmental control over the Broken Arrow Property**

Defendants may not construct and operate a casino on the Broken Arrow Property because the Broken Arrow Property is not the Kialegee Tribal Town’s “Indian land” as defined by the State Gaming Compact and federal statutes and regulation. The IGRA provides a statutory basis for the regulation and operation of Indian gaming.

*Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 48 (1996). The National Indian Gaming Commission (“NIGC”) was created to implement the IGRA, and has issued implementation regulations. 25 U.S.C. § 2704. Indian gaming may not be conducted if not in compliance with the statute and regulations.

The IGRA states that an Indian tribe may engage in gaming under the IGRA only as authorized by Compact entered into by the tribe and the State, approved by the IGRA and on “Indian lands” that are “within such tribe’s jurisdiction.” 25 U.S.C. § 2710(b)(1), (d)(1). The IGRA requires that Class III gaming be permitted only on “Indian lands” pursuant to an ordinance or resolution by the “Indian tribe *having jurisdiction over such lands.*” 25 U.S.C. § 2710(d)(1)(A)(i) (emphasis added). The IGRA defines “Indian lands” as:

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

25 U.S.C. § 2703(4) (emphasis added). The NIGC regulations further clarify “Indian lands”:

*Indian lands* means:

- (a) Land within the limits of an Indian reservation; or
- (b) Land over which an Indian tribe exercises governmental power *and* that is either—
  - (1) Held in trust by the United States for the benefit of any Indian tribe or individual; or
  - (2) Held by an Indian tribe or individual subject to restriction by the United States against alienation.

25 C.F.R. § 502.12 (emphasis added). To conduct Class III gaming under both the statute, 25 U.S.C. § 2710(d)(A)(i), and the regulation, a tribe must both have jurisdiction *and* exercise governmental power over the land.

To determine whether the Broken Arrow Property is “Indian land,” the Court must satisfy itself that the Compact and both statutory requirements are satisfied. The existence of tribal jurisdiction is a threshold requirement to the exercise of governmental power. *See, e.g., Kansas v. United States*, 249 F.3d 1213, 1229 (10th Cir. 2001) (“*Miami 2001*”). The Court must determine that the Kialegee Tribal Town has jurisdiction over the Broken Arrow Property *before* reaching the question of whether the Kialegee Tribal Town is exercising governmental power. “[B]efore a sovereign may exercise governmental power over land, the sovereign, in its sovereign capacity, must have jurisdiction over that land.” *Miami 2001*, 249 F.3d at 1229; *see Miami Tribe of Oklahoma v. United States*, 656 F.3d 1129 (10th Cir. 2011) (“*Miami 2011*”). The absence of a tribe’s jurisdiction over a distant allotment of another tribe’s land ends the inquiry into whether property is a tribe’s “Indian land” for purposes of the IGRA.

**a. The Kialegee Tribal Town does not have jurisdiction over the Broken Arrow Property**

The Kialegee Tribal Town does not have jurisdiction over the Broken Arrow Property. It is undisputed that the Broken Arrow Property is not on reservation land, as the Kialegee Tribal Town does not have a reservation. *See* 25 U.S.C. § 2703(4)(B). Nor is the Broken Arrow Property held in trust for the Kialegee Tribal Town, or held by the Kialegee Tribal Town, or an enrolled member thereof, subject to restriction against alienation. 25 C.F.R. § 502.12(b). Rather, the Broken Arrow Property is held in fee subject to federal restriction against alienation, for the benefit of members of the Muscogee (Creek) Nation, by Ms. Capps and Ms. Giles. However, the Kialegee Tribal Town is now, and since 1936, has been a separate and independent federally recognized

tribe.<sup>5</sup> Ms. Capps and Ms. Giles are enrolled members of the Muscogee (Creek) Nation, not the Kialegee Tribal Town. Any tribal jurisdiction over the Broken Arrow Property, if it were to exist, would more likely reside in the Muscogee (Creek) Nation, not with the Kialegee Tribal Town. The purported and unapproved lease from enrolled members of the Muscogee (Creek) Nation is not enough to establish jurisdiction over the Broken Arrow Property.

The Kialegee Tribal Town may not unilaterally determine the jurisdictional status of the Broken Arrow Property. The question of jurisdiction “focuses principally on congressional intent and purpose, rather than [the] recent unilateral actions” of a tribe. *Miami 2001*, 249 F.3d at 1229. The Interior Board of Indian Appeals has refused to take land into trust for the Kialegee Tribal Town when the land was in the reservation boundaries of the former Confederacy reservation. *Kialegee Tribal Town of Oklahoma*, 19 IBIA 296. The Board acknowledged that the Kialegee Tribal Town had no land, and upheld a refusal by the BIA Area Director to take certain land into trust without the concurrence of the Muscogee (Creek) Nation. *Id.* at \*2. The Board determined that the land was within the former reservation of the Muscogee (Creek) Nation, “the [Muscogee (Creek)] Nation has had beneficial title to the land for 50 years,” and the Muscogee (Creek) Nation was “an eligible assignee” to a deed to the land. *Id.* at \* 6. This Board determination remains valid today and indicates that the State will succeed on the merits.

A series of cases relating to a tract of land in Kansas highlight that jurisdiction over tribal lands is established by federal authority, not individual action. In the *Miami*

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<sup>5</sup> Organization under Section 3 of the OIWA is not, in itself, sufficient to establish a tribe’s jurisdiction over any land. See *Alabama-Quassarte Tribal Town*, CIV-06-558-RAW, 2010 WL 3780979, at \*2 (discussing the Department of the Interior’s actions to take land in to trust for a tribe that was landless when it organized under Section 3 of the OIWA).

cases, the District of Kansas and Tenth Circuit grappled with land known as the Maria Christina Reserve No. 35 (“Reserve”), title to which the owner wanted to transfer to the Miami Tribe of Oklahoma for the purposes of developing gaming facilities. *Miami 2011*, 656 F.3d at 1131. The Reserve had been part of the Miami Tribe’s reservation in the mid-1800s, but Congress “expressly abrogated the Tribe’s jurisdiction.” *Id.* at 1144. Additionally, the Reserve had been allotted to a non-tribal member. *Id.* at 1145. Although the owners consented to the Miami Tribe’s exercise of jurisdiction, the Tenth Circuit concluded that the Miami Tribe does not have jurisdiction over the land because “an Indian tribe’s jurisdiction derives from the will of Congress, not from the consent of fee owners pursuant to a lease under which the lessee acts.” *Id.* (quoting *Miami 2001*, 249 F.3d at 1230-31). Similarly, the Kialegee Tribal Town does not have jurisdiction over the Broken Arrow Property simply because Ms. Giles and Ms. Capps consented to a lease of the land.

A recent opinion by the NIGC is instructive. In *In re Indian Lands—Iowa Tribe of Oklahoma; Whitecloud Allotment*, the NIGC opined on the question of whether certain land was “Indian land” upon which the Iowa Tribe of Oklahoma could conduct gaming under the IGRA. Memorandum at 1 (January 7, 2010), attached as Exhibit 15. The Whitecloud Allotment was part of the Iowa Tribe’s reservation, and, in 1891, a member of the Iowa Tribe was allotted 80 acres. *Id.* at 2-3. The allotment subsequently was divided into two pieces; one piece was held in equal parts by a member of the Iowa Tribe and a member of the Otoe-Missouria Tribe, and the other piece was 80 per cent owned in trust by the Iowa Tribe and 20 per cent owned by 20 individuals of many different tribes. *Id.* at 4-5. In discussing the question of whether the Iowa Tribe maintained jurisdiction over the allotment when members of other tribes owned of the

land, the NIGC stated that a tribe's jurisdiction is a matter of "congressional intent and purpose." *Id.* at 7-8 (stating that it is "not aware of any federal case law that established whether a tribe maintains exclusive tribal jurisdiction over a former-reservation allotment granted to a member of that tribe when ownership of the allotment is later inherited in part by members of other tribes"). The NIGC emphasized that jurisdiction arises from federal government action, not probate law, stating that it would be difficult to use an inheritance to conclude that "the original allottee could lose exclusive jurisdiction over an allotment taken from its own reservation." *Id.* at 8. The NIGC distinguished the *Miami* cases, and concluded that the Iowa Tribe had jurisdiction because:

the allotment . . . was granted to a member of the tribe seeking to exercise jurisdiction; the Iowa tribe has always treated the parcel as being under its jurisdiction; the legislation that allotted lands within the Iowa Tribe's reservation did not contemplate that the Iowa Tribe would move away; and indeed the Iowa Tribe did not move from its Oklahoma land base when its reservation was allotted.

*Id.* at 9.

The NIGC's *Whitecloud Allotment* opinion demonstrates the fallacy behind Defendants' public assertions that the Kialegee Tribal Town and the Muscogee (Creek) Nation both have non-exclusive jurisdiction over the Broken Arrow Property. The State is unable to locate any statute or act by which the federal government granted joint authority or jurisdiction over the Broken Arrow Property. *Cf. Alabama-Quassarte Tribal Town v. United States*, CIV-06-558-RAW, 2010 WL 3780979, at \*8 (E.D. Okla. Sept. 21, 2010), (denying a summary judgment motion when a genuine issue of material fact existed as to whether the plaintiff Tribe or the Muscogee (Creek) Nation was the beneficial owner of the land in question).

The Broken Arrow Property was allotted to Mr. Burgess, an enrolled member of the Muscogee (Creek) Nation. His property passed, via inheritance, to the current owners, both enrolled members of the Muscogee (Creek) Nation. The purported lease between Defendants and the current owners of the Broken Arrow Property is insufficient to vest the Kialegee Tribal Town with jurisdiction to render the Broken Arrow Property the Tribal Town's land for purposes of the IGRA.<sup>6</sup> Just as the Tulsa District Court concluded, an individual cannot transfer jurisdiction over his or her property to a new government through a commercial lease. Jurisdiction of Indian tribes is established by federal statute. Here, there is no evidence that the federal government gave jurisdiction over the Broken Arrow Property to anyone other than the Muscogee (Creek) Nation. As a result, the Kialegee Tribal Town does not have the jurisdiction over the Broken Arrow Property.

**b. The Kialegee Tribal Town does not exercise governmental power over the Broken Arrow Property**

Even if the Kialegee Tribal Town were to have jurisdiction over the Broken Arrow Property, it does not exercise governmental power on that property. The IGRA and regulations do not define “governmental power.” It has been defined, however, as “concrete manifestations of [government] authority.” *State of R.I. v. Narragansett Indian Tribe*, 19 F.3d 685, 703 (1st Cir. 1994) (citing as examples of that authority the establishment of a housing authority, recognition from the Environmental Protection Agency for purposes of water regulation, administration of health care programs, job

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<sup>6</sup> As discussed below, the purported lease of the Broken Arrow Property has not been approved by the district court of Tulsa County or by the Secretary of the Interior as required by 25 U.S.C. § 415. Even if such lease were approved, it would only vest an interest in Florence Development Partners, LLC, not the Kialegee Tribal Town, and thus would fail to establish the Broken Arrow Property as “its [Kialegee Tribal Town's] Indian lands” as required by Part 5(L) of the State Gaming Compact.

training, education, community services, social services, real estate protection, conservation, and public safety). Other factors that assist in this analysis include

(1) whether the areas are developed; (2) whether tribal members reside in those areas; (3) whether any governmental services are provided and by whom; (4) whether law enforcement on the lands in question is provided by the Tribe or the State; and (5) other indicia as to who exercises governmental power over those areas.

*Cheyenne River Sioux Tribe v. State of S.D.*, 830 F. Supp. 523, 528 (D.S.D. 1993), *aff'd*, 3 F.3d 273 (8th Cir. 1993). In the Whitecloud Allotment opinion, the NIGC used these factors to determine that the Iowa Tribe exercised governmental power over the land because it provided extensive law enforcement services and exercised criminal jurisdiction. Ex. 14, Memorandum at 10.

The exercise of governmental power requires more than mere pro forma actions taken once a tribe has determined to make gaming use of a particular plot of land. When Defendants commenced construction on the Broken Arrow Property, they did not have governmental power over the land. The land previously was undeveloped. *See* Wooden Affidavit, Ex. 1 at ¶ 6. Upon information and belief, since Defendants entered into a lease for the Broken Arrow Property, the Committee has passed a resolution to establish a satellite tribal office. They claim to be currently flying a flag at the Broken Arrow Property, to have installed fencing, and to have posted a sign indicating that the land is the property of the Kialegee Tribal Town. These recent, pretextual actions are insufficient to establish “governmental control.” Further, the actions Kialegee Tribal Town has initiated and proposes are primarily proprietary, reflecting its alleged ownership of the land, not the delivery of governmental services to the area in which it is located.

### **3. The NIGC has not approved the construction and operation of a casino on Broken Arrow Property by the Kialegee Tribal Town**

Under the IGRA, Class III gaming is permitted when it is “authorized by an ordinance or resolution that (i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands, . . . and (ii) is approved by the [NIGC] Chairman.” 25 U.S.C. § 2710(d)(1)(A). The determination of whether land where a casino is proposed is “Indian land” “is a determination that the NIGC must have an opportunity to make in the first instance, in that it is charged with administering and interpreting the statute.” *Citizens Against Casino Gambling in Erie County v. Kempthorne*, 471 F. Supp. 2d 295, 327 (W.D.N.Y. 2007).

The Kialegee Tribal Town has not received the requisite approval from the NIGC Chairperson, and therefore the construction and operation of the casino on the Broken Arrow Property is an ultra vires action by Defendants. In a letter to the Kialegee Tribal Town King, Tiger Hobia, dated September 29, 2011, NIGC Chairwoman Tracie Stevens communicated her approval of amendments to the gaming ordinance. Letter from Tracie Stevens, attached as Exhibit 16. In this letter, Chairwoman Stevens specifically stated:

I note that the Tribe has submitted a notice that a facility license [pursuant to 25 C.F.R. § 559.1] is under consideration for a partially restricted allotment that is held by non-members of the Tribe and that a lease of that land has not yet been approved by the Department of the Interior. *My approval of this ordinance does not constitute a determination that the Tribe has jurisdiction over that parcel or that the parcel constitutes Indian lands eligible for gaming under IGRA.*

*Id.* (emphasis added). *Cf. Wells Fargo Bank, N.A. v. Lake of the Torches Econ. Dev. Corp.*, 658 F.3d 684, 699 (7th Cir. 2011) (affirming the district court’s conclusion that “because the contract was a management contract under IGRA and had not been

approved by the Chairman, it was void *ab initio* and that the offending provisions could not be severed.”). The State is not aware of subsequent approval of a tribal ordinance permitting gaming on the Broken Arrow Property by the NIGC.

Because Defendants have not received approval of a gaming ordinance specifically authorizing gaming on the Broken Arrow Property, the construction of a casino, the operation of which would be in violation of the IGRA, must be halted.

#### **4. The proposed casino violates the State Gaming Compact**

The proposed casino is not permitted under the State Gaming Compact. The IGRA only permits Class III gaming when it is “conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the state.” 25 U.S.C. § 2710(d)(1)(C). The State Gaming Compact permits the Kialegee Tribal Town to “establish and operate enterprises and facilities that operate covered games only on *its* Indian lands as defined by IGRA.” Ex. 7 (emphasis added). Even if it were “Indian land” under the IGRA, which it is not, the Broken Arrow Property is *not* “*its* [Kialegee Tribal Town’s] Indian land” as require by Part 5(L) of the State Gaming Compact, as Kialegee Tribal Town does not have any possessory interest in the lands, members of the Kialegee Tribal Town do not hold interests in the Property, and the Town does not does not exercise jurisdiction or governmental power over the property. The proposed Casino would operate in violation of the State Gaming Compact.

The federal government has *never* concluded that the Broken Arrow Property is the Indian land of the Kialegee Tribal Town. In his letter approving the State Gaming Compact, Assistant Secretary of Indian Affairs for the Department of the Interior, Larry Echo Hawk, stated that the approval of the State Gaming Compact, in itself, was inadequate to commence gaming operations. Assistant Secretary Echo Hawk stated that,

in addition, “a tribe’s gaming facility must be located on Indian lands that are eligible for gaming under IGRA, [and] a tribe must have a Class III gaming ordinance approved by the Chairman of the NIGC that is in effect . . . .” Letter of Assistant Secretary Echo Hawk, attached as Exhibit 17. Without the determination that the Broken Arrow Property is the Indian land of the Kialegee Tribal Town, the construction of a casino, the operation of which would be in violation of the IGRA, violates the State Gaming Compact.

**5. The lease has not been approved by the district court or the BIA**

As a final indication of the illegality of Defendants’ construction of a casino on the Broken Arrow Property, Defendants failed to obtain the required state district court or BIA approval of the lease. Defendants have not secured approval of lease by members of the Five Civilized Tribes by the district court for the Oklahoma county in which the property is located as required by the Act of August 4, 1947, 61 Stat. 731 (the “1947 Act”). Defendants undoubtedly are aware of this requirement, as they previously sought approval of the initial lease from the Tulsa District Court. Because Defendants have not sought, much less received, approval for the lease, it is void.

Nor have the Defendants secured any other federal approval for the lease, such as approval of the lease of restricted Indian land under 25 U.S.C. § 415; 25 C.F.R. § 162.104(d) (“Any other person or legal entity, including an independent legal entity owned and operated by a tribe, must obtain a lease under these regulations before taking possession.”). As neither the district court for Tulsa County nor the BIA has approved the purported lease between the owners of the Broken Arrow Property and Florence

Development Partners, the lease is void.<sup>7</sup> The failure of the lease leaves Defendants with *no* interest in the Broken Arrow Property.

**B. The State Will Suffer an Immediate and Irreparable Injury in the Absence of a Preliminary Injunction Preserving the Status Quo**

The State and people of Oklahoma will suffer an irreparable injury resulting from Defendant's illegal construction and operation of a casino in the town of Broken Arrow, and a preliminary injunction is necessary to minimize the harm by preserving the status quo. By commencing construction of a casino without complying with federal and state law, Defendants have "place[d] [the State's] sovereign interests and public policies at stake." *Miami 2001*, 249 F.3d at 1227 (affirming the district court's entry of a preliminary injunction "because the State of Kansas claims the NIGC's decision places its sovereign interests and public policies at stake, we deem the harm the State stands to suffer as irreparable if deprived of those interests without first having a full and fair opportunity to be heard on the merits"). A preliminary injunction is necessary to halt the deprivation of these important state rights. *See Kiowa Indian Tribe*, 150 F.3d at 1171-72 (concluding that interference with tribe's sovereign status is sufficient to establish irreparable harm).

Furthermore, the citizens of the State will suffer immediate and irreparable injury in the absence of an injunction. "A plaintiff suffers irreparable injury when the court would be unable to grant an effective monetary remedy after a full trial because damages would be inadequate or difficult to ascertain." *Winnebago Tribe of Nebraska v. Stovall*, 205 F. Supp. 2d 1217, 1221-22 (D. Kan. 2002), *aff'd*, 341 F.3d 1202 (10th Cir. 2003). It

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<sup>7</sup> The apparent effort to circumvent the approval requirement by entering into a lease shorter than seven years in no way relieves the parties of the need for federally authorized approval. This transparent attempt is apparently premised, erroneously, on 25 U.S.C. § 81, which pertains only to lands of tribes.

will be impossible to undo the detrimental effects to the community by the ongoing construction. The increase in construction activities has caused, and will continue to cause, a decrease in the standard of living for the residential neighbors of the Broken Arrow Property; this decrease will continue unless the Court orders the immediate halt to and reversal of all already-completed construction activities. The Court could not grant the State effective relief if construction of an illegal casino continues unabated, and thus a preliminary injunction is necessary to preserve the status quo until such time as the Court reaches a conclusion on the merits.

### **C. Defendants Will Not Suffer Injury if an Injunction is Issued**

Given that the State has established a strong likelihood of success on the merits, there is no serious claim that Defendants will suffer harm from the issuance of a preliminary injunction. Defendants cannot sustain any injury, much less a substantial one, as a result of an order that requires them to obey the law. By proceeding with construction of a casino without obtaining, or having any likelihood of obtaining, the necessary federal approval, Defendants are “largely responsible for their own harm.” *Davis v. Mineta*, 302 F.3d 1104, 1116 (10th Cir. 2002); *see also Sierra Club v. U.S. Army Corps of Engineers*, 645 F.3d 978, 997 (8th Cir. 2011) (concluding that any harm to the party opposing injunctive relief was “largely self inflicted” as it had spent \$800 million without waiting for a \$40 permit to be issued). Defendants have no right to earn money by violating the law. *See Storer Communications, Inc. v. Mogel*, 625 F. Supp. 1194, 1203 (S.D. Fla. 1985) (“The alleged illegal activities of the defendants are not worthy of any protection by this Court.”). Defendants will not suffer any injury if their current efforts in constructing a casino are enjoined until they can demonstrate compliance with the State Gaming Compact and federal and law.

#### **D. The Public Interest Will Be Served by an Injunction**

The issuance of a preliminary injunction will not be adverse to the public interest. The public has a clear interest in having its laws enforced. *See Video Gaming Technologies, Inc. v. Bureau of Gambling Control*, 356 Fed. Appx. 89, 94 (9th Cir. 2009). The public also has an interest in preserving its quality of life, including safe access to schools, non-elevated levels of traffic and crime, and lower risk of problem gambling.

Issuance of a preliminary injunction will prevent the Defendants' continued steps towards the construction and operation of a class III gaming facility that could not operate in compliance with the State Gaming Compact and the IGRA. The public interest cannot be served by Defendants' continued disturbance of the property and surrounding area without any arguable basis for operation of a Class III facility in compliance with federal law; the public interest is served, rather, by ensuring compliance with federal law. The Court should "give great weight to the fact that Congress already declared the public's interest and created a regulatory and enforcement framework." *In re Sac & Fox Tribe of Mississippi in Iowa/Meskwaki Casino Litig.*, 340 F.3d 749, 760 (8th Cir. 2003); *see Davis*, 302 F.3d at 1116. Issuing a preliminary injunction would further the purposes of the IGRA, which is concerned with protecting gaming as a source of Indian economic development—if one tribe is permitted to build a casino on the land of another tribe, the policy as to the second would be undermined. *See* 25 U.S.C. § 2702; *In re Sac & Fox*, 340 F.3d at 760 ("Congress viewed effective regulation and respect for regulatory authority as being in the public's interest.").

In addition, Defendants' current actions are contrary to the public policy of the State of Oklahoma. The Oklahoma legislature, expressing the policy and public interest

of the state, in the Tribal-State Gaming Act, offers to negotiate a tribal-state gaming compact with any tribe for gaming on land that meets the requirements of the IGRA. Okla. Stat. Ann. tit. 3A, § 280. The State entered into a compact with the Kialegee Tribal Town, and the State Gaming Compact expressly limits gaming to “its Indian lands,” incorporating the definition of “Indian land” supplied by the IGRA. Because the Kialegee Tribal Town does not have jurisdiction over the Broken Arrow Property, Defendants are not just violating the IGRA, they are violating the State Gaming Compact. In addition, State’s interest is reflected in its statutory criminalization of illegal gambling with its anti-gambling statute, Okla. Stat. Ann. tit. 21 § 941. The public interest, therefore, is served by preventing a continued violation of federal and state law by Defendants.

## **V. NO BOND SHOULD BE REQUIRED**

The State of Oklahoma should not be required to post a security to secure the requested preliminary injunction. A district court “has ‘wide discretion’ under [Fed. R. Civ. P. 65 (c)] in determining whether to require security.” *Winnebago Tribe of Nebraska*, 341 F.3d at 1206 (quoting *Cont’l Oil Co. v. Frontier Ref. Co.*, 338 F.2d 780, 782 (10th Cir.1964)). If the court determines “there is an absence of proof showing a likelihood of harm,” the bond requirement may be excused. *Cont’l Oil Co.*, 338 F.2d at 782. As the State has established its likelihood of success on the merits, there will be no harm to Defendants in halting their steps towards constructing and operating an illegal casino immediately, rather than awaiting a trial on the merits. *See Crowe & Dunlevy, P.C. v. Stidham*, 609 F. Supp. 2d 1211, 1226 (N.D. Okla. 2009), *aff’d*, 640 F.3d 1140 (10th Cir. 2011). Furthermore, should any damages be awarded against the State arising out of the issuance of a preliminary injunction, the State, as a state, has the assets to

satisfy an award. *Cf. Cont'l Oil Co.*, 338 F.2d at 783 (“The evidence shows that Frontier is a corporation with considerable assets and that it is able to respond in damages if Continental does suffer damages by reason of the injunction.”).

## **VI. CONCLUSION**

The State of Oklahoma has demonstrated that it is entitled to a preliminary injunction order enjoining Defendants from constructing and operating a casino on the Broken Arrow Property. Failure to enjoin the construction and operation of the casino will cause irreparable injury to the State, while the grant of the injunction will not substantially injure Defendants, and the public interest favors the entry of the requested injunction.

For the foregoing reasons, the State respectfully moves the Court for a preliminary injunction enjoining Defendants from constructing and operating a casino on the Broken Arrow Property until trial can be conducted on this action for a permanent injunction.

Dated: February \_\_\_\_\_, 2012.

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