IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

STATE OF KANSAS, *ex rel.*)
DEREK SCHMIDT)
Attorney General, State of Kansas,)
)
BOARD OF COUNTY COMMISSIONERS OF)
THE COUNTY OF CHEROKEE, KANSAS,)
)
Plaintiffs,) Case No.
5:15-cv-04857-DDC-KGS
)
v.)
)
NATIONAL INDIAN GAMING COMMISSION;)
et al.,)
)
Defendants.)
)

DEFENDANTS' MEMORANDUM IN SUPPORT OF THE MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs, the State of Kansas and the Board of County Commissioners of the County of Cherokee, Kansas ("Plaintiffs"), submit this memorandum in support of their motion for a preliminary injunction preventing the Quapaw Defendants, as defined in the Amended Complaint (ECF No. 13), and anyone acting by, through, or under them from taking any action to construct or operate any gaming facility located on land in Cherokee County, Kansas.

I. Introduction

The suit involves Section 13, a portion of a 124 acre parcel of land which the Quapaw Tribe of Indians of Oklahoma ("Quapaw" or "Tribe") applied to have taken into trust by the United States for non-gaming purposes. The land was taken into trust by the United States Department of the Interior ("DOI") Bureau of Indian Affairs ("BIA") Miami Agency office.

Despite their assurances that the land was to be used for non-gaming purposes, the Quapaw requested the National Indian Gaming Commission's ("NIGC") opinion on whether Section 13 is eligible for gaming. The Quapaw Defendants have now announced their intention to construct a gaming facility on Section 13 and have moved heavy construction equipment onto the property.

Constructing and operating a casino on Section 13 would violate the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 ("IGRA"). If the Quapaw Defendants are not immediately prevented from constructing or operating a gaming facility, the State and County will sustain immediate and irreparable injury that far outweighs any injury the Quapaw Defendants may experience if an injunction is issued. If the Quapaw Defendants are permitted to begin construction or operation, the surrounding area will be adversely affected and their acts in obtaining trust land through a fraudulent application will fuel similar efforts to construct and operate gaming facilities on lands not accepted into trust for gaming purposes throughout the State. Due to the Quapaw Defendants' stated and demonstrated intention to expand the Downstream Casino Resort and build and operate a casino on the parcel of land in Kansas, a preliminary injunction is necessary to maintain the status quo and prevent illegal and irreparable harm to the State and County while the parties' legal rights are determined.

II. Statements of Fact

Historically, the Quapaw Tribe was removed from its homeland in Arkansas to a reservation that spanned across both the present day states of Oklahoma and Kansas. The portion of the reservation in Kansas included Section 13. The Treaty of 1867 diminished the Quapaw's reservation, and the Quapaws ceded their land in Kansas to the United States. Exhibit 1.[1]

The Quapaw later purchased and had put into trust a tract of land in Oklahoma within

1 In support of this motion, plaintiffs refer to and incorporate Exhibits 1 – 10 attached to the Amended Complaint.

their historic reservation boundaries and adjacent to Kansas. Exhibit 4, p. 2. The Quapaw built the Downstream Casino Resort on that land, and it opened in 2008. A 124 acre parcel of land in Kansas, which included Section 13, is used as a parking lot for the casino. The Quapaw have a Class II gaming ordinance approved by the NIGC. Exhibit 11, attached.

In late 2011 or early 2012, the Tribe applied to have the 124-acre Kansas parcel put into trust for non-gaming purposes. Exhibit 2. The application stated the land was currently used as a parking lot "and that the Tribe plans to continue with that use." Exhibit 2, p. 2. The State and County submitted written comments and objected to the application. Exhibit 3, p. 1. The County withdrew its objection based upon the Quapaw's assurances the parcel would not be used for gaming purposes. On June 8, 2012, the Miami Agency took the 124 acre parcel into trust. Exhibit 4. The Agency rejected the State's arguments the property would be used for expanded gaming based upon the Tribe's statements that it would not be used for gaming. Relying on the Quapaw's assurances and the Miami Agency's findings, the State and County did not appeal the trust decision.

Less than a year later in early 2013, the Quapaw requested a legal opinion from the NIGC regarding whether Section 13 qualified for gaming as one of IGRA's exceptions to the general prohibition on gaming on trust lands acquired after October 17, 1988, pursuant to 25 U.S.C. § 2719. The NIGC notified the State of the Quapaw's request for the legal opinion and solicited comments from the Attorney General. Exhibit 6. In response, the state noted several objections, including: 1) the Quapaw should be equitably estopped from submitting the parcel as one appropriate for gaming because they applied to have the parcel put into trust for nongaming purposes; 2) the "last recognized reservation" exception of § 2719(a)(2)(B) required that the land be within a state in which the tribe is presently located and, without a major governmental

presence in Kansas, the Quapaw's Kansas presence is merely incidental; and, 3) based on *Carcieri v. Salazar*, 555 U.S. 379 (2009), a tribe's present location should be determined at the time IGRA went into effect on October 17, 1988. Exhibit 7.

On November 21, 2014, the NIGC issued an opinion that the parcel did qualify for gaming under the last recognized reservation exception. Exhibit 8. The opinion letter did not address the state's arguments regarding equitable estoppel or *Carcieri*. The opinion letter rejects the State's governmental presence argument and instead applied 25 C.F.R. § 292.4 and found the tribe had a sufficient presence in 2014 in Kansas to allow gaming. The opinion letter concluded the land qualifies for gaming as the Tribe's "last recognized reservation." *Id.*

On December 5, 2014, the Quapaw Defendants announced their intention to expand the Downstream Casino Resort and build and operate a casino on the parcel of land in Kansas. Despite the tribe's assurances to the contrary during the Miami Agency proceedings, Quapaw Chairman John Berrey recently declared it was never a secret that Downstream Casino intended to eventually expand into Kansas - the resort's main parking lot is in Cherokee County, Kansas. According to Chairman Berrey, the desire to expand has been public knowledge for years, he asserted. Exhibit 9.[2] Chairman Berrey recently invited Governor Brownback to attend the casino's grand opening in Kansas "in the coming months." Exhibit 10, attached. Photographs of the area show heavy construction equipment poised for use. Exhibit 10.

III. Preliminary Injunction Standards

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

2 "While in the context of a preliminary injunction hearing the court may consider sworn proof including affidavits, including those based upon information and belief or hearsay (though it may affect the weight given), depositions, transcripts of prior hearings and live testimony." *Pharmanex, Inc. v. HPF*, 221 F.3d 1352 (10th Cir. 2000). Moreover, Chairman Berry's declaration is admissible as an admission by a party opponent under F.R.E. 801(d)(2).

(1981). To obtain a preliminary injunction, a party must satisfy a four-factor test. *Prairie Band of Potawatomi Indians v. Pierce,* 253 F.3d 1234, 1246 (10th Cir. 2001).

> The requesting party must demonstrate (1) that it has a substantial likelihood of prevailing on the merits; (2) that it will suffer irreparable harm unless the preliminary injunction is issued; (3) that the threatened injury outweighs the harm the preliminary injunction might cause the opposing party; and (4) that the preliminary injunction if issued will not adversely affect the public interest.

Id. "If the party seeking the preliminary injunction can establish the last three factors listed above, then the first factor becomes less strict." *Id.* "[I]nstead of showing a substantial likelihood of success, the party need only prove that there are 'questions going to the merits ... so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation.'" *Id.* at 1246-47.

IV. Arguments and Authority

a. The State and County have a substantial likelihood of success on the merits.

The plaintiffs are likely to prevail on the merits of their claims. This court has jurisdiction over the action, equitable estoppel bars the Quapaw Defendants from gaming on Section 13, and the DOI and NIGC's actions are arbitrary and capricious. At the very least, the plaintiffs demonstrate serious and substantial questions about the merits of this case which warrant more deliberate investigation and support issuing a preliminary injunction.

i. This court has jurisdiction over the action.

This court has jurisdiction over this matter under 28 U.S.C. § 1331 and the Administrative Procedure Act, 5 U.S.C. §§ 701, *et seq*. First, 28 U.S.C. § 1331 provides federal question jurisdiction. "IGRA is a federal statute, the interpretation of which presents a federal question suitable for determination by a federal court." *Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546, 1557 (10th Cir. 1997). Second, Section 704 of the Administrative Procedure Act ("APA")

provides "final agency action for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. § 704. The NIGC letter constitutes a final agency action and is appealable in federal district court.

IGRA provides that decisions made under §§ 2710, 2711, 2712, and 2713 are final agency actions subject to federal judicial review. 25 U.S.C. § 2714. "[N]othing in IGRA limits judicial review of the NIGC's decision under the APA; rather § 2714 of IGRA expressly provides for such review." *Kansas v. United States*, 249 F.3d 1213, 1224 (10th Cir. 2001). IGRA does not indicate that the list in § 2714 is a list of "the *only* final NIGC actions subject to judicial review." *United Keetoowah Band of Cherokee Indians in Okla. v. State of Okla., et al.*, No. CIV-04-340 (E. Dist. Okla, 2006) (emphasis in original) (attached as Exhibit 12). The Senate Report on IGRA even states, "[a]ll decisions of the Commission are final agency decisions for purposes of appeal to Federal district court." S. REP. 100-446, 8, 1988 U.S.C.C.A.N. 3071, 3078.

One unpublished Tenth Circuit case addresses whether an "Indian land" opinion letter was a final agency action: *Miami Tribe of Oklahoma v. United States*, 198 F. App'x 686, 687, No. 05-3085, 2006 WL 2392194 (10th Cir. 2006) (unpublished opinion). The *Miami* case is the fourth in a decade-long series of cases involving a particular tract of land. In *Miami*, the Miami Tribe challenged a DOI letter which opined the land at issue was not "Indian land." The NIGC sought the Opinion Letter following the decision in *Kansas v. United States*, 249 F.3d 1213 (10th Cir. 2001), which stayed action on the NIGC's decision that the tract of land constituted "Indian land." *Id.,* 249 F.3d at 1218. The NIGC requested the DOI Opinion Letter, and asked for the DOI to take into account the *Kansas v. United States* holding. *Id.* The DOI Opinion Letter concluded the Tribe could not regain sovereignty over the parcel of land in question and, therefore, could not game on the land.

The Tenth Circuit held the DOI Opinion Letter was not final agency action because Congress "vested the authority to decide gaming contracts under the IGRA with the NIGC." *Miami* at 690. The Court held, "the DOI Opinion Letter is not the final product of agency deliberation regarding the Tribe's jurisdiction over the Reserve and does not have a direct or immediate impact on the Tribe" and only "may predict how the NIGC will eventually resolve the Tribe's gaming application." *Id.* "Only the NIGC's final determination regarding a gaming contract is final agency action subject to appeal under the APA." *Id.*

Miami is not applicable to this situation for two reasons. First, the opinion letter at issue in this case was issued by the NIGC, not the DOI. It is the NIGC's responsibility to determine whether a parcel of land qualifies for application of the last reservation exception to IGRA. 25 C.F.R. § 292.3.

Second, the Quapaw Defendants do not need to apply for a gaming management contract, and a final determination regarding a management contract may never occur. *See* 25 U.S.C. § 2711 ("an Indian tribe *may* enter into a management contract. . ."). "Class II gaming is regulated by Indian tribes, subject to approval and oversight by the National Indian Gaming Commission. . . ." *Wyandotte Nation v. Nat'l Indian Gaming Comm'n,* 437 F. Supp. 2d 1193, 1200 (D. Kan. 2006). The Chairman need only approve a tribal ordinance or resolution regarding Class II gaming. The Quapaw Defendants currently have a Class II gaming ordinance approved by the NIGC. See Exhibit 11, attached.

> There is no explicit requirement in IGRA that, as a precondition to the NIGC's approval, a proposed ordinance identify the specific sites on which the proposed gaming is to take place. IGRA specifies only that, pursuant to an approved ordinance, "[a] separate license issued by the Indian tribe shall be required for each place, facility, or location on Indian lands at which class II gaming is conducted."

N. Cnty. Cmty. Alliance, Inc. v. Salazar, 573 F.3d 738, 744-45 (9th Cir. 2009) quoting 25 C.F.R.

§ 2710(b)(1). The Quapaw Defendants do not use a management contract to operate the Downstream Casino. Thus, the situation envisioned as "final agency action" by the *Miami* court may never occur here. Rather, the Quapaw Defendants may choose to conduct Class II gaming at any time, and the opinion letter is the final decision with regards to the NIGC's opinion as to whether the Quapaw may game on Section 13 under § 2719.

This situation is more similar to the decisions made in *Kansas v. United States*, 249 F.3d 1213 (10th Cir. 2001), *United Keetoowah Band of Cherokee Indians in Okla. v. State of Okla., et al.*, No. CIV-04-340 (E. Dist. Okla, 2006), and *Cnty. of Amador, Cal. v. U.S. Dep't of Interior*, No. CIVS 07-527 LKK/GGH, 2007 WL 4390499, (E.D. Cal. Dec. 13, 2007). In *Kansas v. United States*, the Tenth Circuit examined whether the NIGC's decision that a parcel of land was "Indian land" under IGRA was subject to review. *Kansas v. United States*, 249 F.3d at 1221. The court noted the "Defendants do not seriously challenge the premise that the NIGC's 'Indian lands' determination constitutes a 'decision' made by the NIGC pursuant to § 2710, and therefore, constitutes 'final agency action' reviewable under 5 U.S.C. § 702." *Id.* at 1222. The Defendants did, however, argue the decision was not ripe for review because gaming compact negotiations for Class III gaming had not yet begun. *Id.* at 1223. The Tenth Circuit rejected this argument "[b]ecause the NIGC's decision that the tract constitutes 'Indian lands' within the meaning of IGRA has 'an actual or immediately threatened effect' upon the State of Kansas and its interests, that decision is ripe for review in all respects." *Id.* at 1224 *quoting Lujan v. National Wildlife Fed.,* 497 U.S. 871, 894, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990). "[T]he NIGC's decision affects the State's public policy concerns and 'significant governmental interests' in Class III gaming by imposing a legal duty on the State under IGRA to negotiate a Class III gaming compact at the Tribe's request. S. Rep. 100–446, at 13, *reprinted in* 1988 U.S.C.C.A.N.

at 3083; *see also* 25 U.S.C. § 2710(d)." *Kansas v. United States*, 249 F.3d at 1224.

The Eastern District of Oklahoma case discussed *Kansas v. United States* and applied its holding to an opinion letter more similar to the one at issue here. In *United Keetoowah Band of Cherokee Indians in Okla. v. State of Okla., et al.*, No. CIV-04-340 (E. Dist. Okla, 2006) (Exhibit 12), the Keetoowah submitted a request to the NIGC to review and approve a non-site specific tribal gaming ordinance after they had begun operation of a gaming facility. *Id.* at 2-3 (Exhibit 12). The NIGC sent a letter approving the gaming ordinance once the tribe acquired Indian lands. *Id.* at 3. Then, six years later, the NIGC sent a letter indicating that the NIGC had concluded the land upon which the gaming facility sat was not "Indian land" under IGRA, and IGRA did not apply to the Keetoowah's gaming operation. *Id.*

The Court discussed *Kansas v. United States* and noted the Tenth Circuit's recognition that, "the Supreme Court has articulated [the] test for final agency action as having two conditions. 'First, the action must mark the 'consummation' of the agency's decisionmaking process… And second, the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.''" *Id. quoting Mobil Exploration & Producing U.S., Inc. v. Department of Interior*, 180 F.3d 1192, 1197 (10th Cir. 1999) (internal citations excluded). The Court held the NIGC's letter regarding its determination that the land was not "Indian lands" under IGRA was a "final agency action" reviewable under the APA. *Id.* at 10.

A similar situation exists here. The NIGC opinion letter imposes obligations and legal consequences on the parties. Because of the NIGC's decision that Section 13 is eligible for gaming under the last-recognized reservation exception, the Quapaw have requested the State negotiate a Class III gaming compact. 25 U.S.C. § 2710(d)(3)(A).

Even more, the NIGC's legal opinion has a direct and immediate impact on the situation with regards to Class II gaming. As discussed above, the Quapaw Defendants currently have a Class II gaming ordinance approved by the NIGC and may begin Class II gaming at will. Thus, the NIGC's opinion letter is the consummation of the agency's decisionmaking process with respect to whether the land falls under the last-recognized reservation exception and is eligible for gaming under IGRA.

An unpublished California case also indicates that a legal opinion is a final agency action subject to review under the APA. In *Cnty. of Amador, Cal. v. U.S. Dep't of Interior*, No. CIVS 07-527 LKK/GGH, 2007 WL 4390499, (E.D. Cal. Dec. 13, 2007), a tribe requested an opinion from the NIGC regarding whether a certain parcel of land, which had not yet been taken into trust, would be eligible for gaming under IGRA. Under a Memorandum of Agreement, the DOI rather than the NIGC agreed to review the request. *Id.* at *2. The DOI issued an opinion that "as a legal matter," the lands would qualify for gaming "if and when they are taken into trust." *Id.* at *3. The county sought judicial review of that decision.

The central question for the court was whether the NIGC's decision was a final agency action. The court held, "in short, final agency action is lacking for the simple reason that the trust application has yet to be approved." *Id.* at *4. The court held that the agency's decision had no practical or legal effect because the land had not yet been put into trust. "If and when DOI approves the trust application," the court held, "final agency action will exist, and the county will be able to sue." *Id.* at *5.

Unlike *Cnty. of Amador*, here, Section 13 has already been taken into trust. Thus, because the land was in trust when the NIGC opinion letter was issued, under *Cnty. of Amador*, a final agency action exists and the plaintiffs may bring suit under the APA.

Because the letter is the consummation of the agency's decision with respect to whether Class II gaming may occur, and it has a direct and immediate impact on the parties by obligating the state to negotiate a Class III gaming contract, the NIGC letter is a final agency action subject to review by this court.

ii. Equitable estoppel bars the Quapaw Defendants from gaming on the parcel of land.

"The doctrine of equitable estoppel has two fundamental elements: misrepresentation and detrimental reliance." *United Cities Gas Co. v. Brock Exploration Co.*, 995 F. Supp. 1284, 1297 (D. Kan. 1998). The Kansas Supreme Court has stated:

> Equitable estoppel is the effect of the voluntary conduct of a person whereby he is precluded, both at law and in equity, from asserting rights against another person relying on such conduct. A party asserting equitable estoppel must show that another party, by its acts, representations, admissions, or silence when it had a duty to speak, induced it to believe certain facts existed. It must also show it rightfully relied and acted upon such belief and would now be prejudiced if the other party were permitted to deny the existence of such facts.

Id. quoting Cosgrove v. Young, 230 Kan. 705, ¶ 6, 642 P.2d 75, 76 (1982). Equitable relief may be appropriate where the defendant has "actively misled" the plaintiff in some way, causing it not to timely advance an administrative action. *Million v. Frank,* 47 F.3d 385, 389 (10th Cir. 1995).

Here, the elements of misrepresentation and detrimental reliance are met. 25 U.S.C. § 465 authorizes the Secretary of the Interior to acquire land in trust for an Indian tribe. For the United States to take land into trust status for tribes, certain policies and procedures set forth in 25 C.F.R. § 151 *et seq.* must be followed. The BIA treated the Quapaw's request as an on-reservation acquisition because the land was contiguous and adjacent to land owned by the United States in trust for the tribe. See Exhibit 4 at 3. When considering an on-reservation acquisition, the BIA must consider, among other issues, the purpose for which the land will be used. 25 C.F.R. § 151.10(c).

The Quapaw misrepresented the purpose for which the land would be used in their trust application. In its decision approving the acquisition, the BIA noted that "per the Tribe's application, there will be no change in land use. Currently a parking lot exists on Section 13 and the Tribe will continue to use that land for that purposes [*sic*]." Exhibit 4 at 3. The BIA decided to take the land into trust, because, among other reasons, "the property . . . is for a purpose that is not . . . in conflict with existing land use." Exhibit 4 at 6.

The Quapaw knew the representations to the BIA were false. The recent declaration by Chairman Berrey shows as much. Berrey stated it was never a secret that Downstream Casino intended to eventually expand into Kansas as the resort's main parking lot is in Cherokee County Kansas. The desire to expand has been public knowledge for years. Exhibit 9.[3] Indeed, prior to the Quapaw's application to the BIA, the state received a "Notice of (Gaming) Land Acquisition Application" from the Quapaw Tribe regarding the parcel of land on April 25, 2011. Exhibit 3. Then, less than a year after the land was taken into trust, the Quapaw sought a legal opinion from the NIGC as to whether the land qualified for gaming under the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.*, in May 2013. Now, Chairman Berrey has invited Governor Brownback to the imminent grand opening and construction equipment has been moved to the land. Exhibit 10. It is clear the Quapaw intended to use the land for gaming purposes but misrepresented to the NIGC, the State, and the County their true intentions.

The State and County detrimentally relied on the Quapaw's misrepresentations and will now be harmed if the Quapaw Defendants are permitted to ignore their representations to the BIA.

3 "While in the context of a preliminary injunction hearing the court may consider sworn proof including affidavits, including those based upon information and belief or hearsay (though it may affect the weight given), depositions, transcripts of prior hearings and live testimony." *Pharmanex, Inc. v. HPF*, 221 F.3d 1352 (10th Cir. 2000). Moreover, Chairman Berry's declaration is admissible as an admission by a party opponent under F.R.E. 801(d)(2).

Based on the Quapaw's representations, the County withdrew its objections to the land being taken into trust and the State decided not to appeal the decision. *See* Affidavit of Richard Hilderbrand, attached as Exhibit 13. The plaintiffs would be prejudiced if the Quapaw Defendants now game on the land because the plaintiffs did not have the opportunity to be fully heard regarding their objections to gaming on the land during the administrative process. The County would have maintained its objections and both the State and County would have appealed the decision to the Regional Director of the BIA had the Quapaw been forthright in representing the intended use of the land. Further, had the Quapaw not misrepresented the purpose of the land, the trust decision would have been reviewed not by the regional office but by the Assistant Secretary of the Department of the Interior. See *Wyandotte Nation v. Salazar*, 939 F. Supp. 2d 1137, 1141 (D. Kan. 2013) ("While the Department of Interior's Assistant Secretary for Indian Affairs has generally delegated decision-making authority for fee-to-trust applications to the Department's regional offices, the Assistant Secretary has not delegated that authority with respect to applications that seek to have the United States accept land in trust for gaming purposes.")[4]

The County and State detrimentally relied on the Quapaw's misrepresentations and did not pursue administrative options to object to the land being taken into trust for gaming purposes. All elements necessary to support the application of the doctrine of equitable estoppel are present and plaintiffs are likely to succeed on the merits of their equitable estoppel claim.

iii. The DOI interpretation and NIGC's application of § 2719(a)(2)(B) of IGRA is arbitrary and capricious.

Section 13 is not within the Quapaw Tribe's last recognized reservation. The opinion of the NIGC to the contrary is incorrect, arbitrary and capricious. IGRA's "last recognized

4 If the Assistant Secretary had made the decision on the land in trust application for gaming purposes, that decision clearly would have been subject to challenge under the APA as final agency action. This may have been among the factors that motivated the Quapaw to misrepresent the intended use of the land it sought to have taken into trust.

reservation" exception states,

> Except as provided in subsection (b) of this section, gaming regulated by this chapter shall not be conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988, unless--
>
> . . .
>
> **(2)** the Indian tribe has no reservation on October 17, 1988, and--
>
> . . .
>
> **(B)** such lands are located in a State other than Oklahoma and are within the Indian tribe's last recognized reservation within the State or States within which such Indian tribe is presently located.

25 U.S.C.A. § 2719(a)(2)(B). The DOI's interpretation of "presently located" in enacting administrative regulations implementing § 2719 is arbitrary and capricious and the NIGC's subsequent application of both the regulation and § 2719(a)(2)(B) is likewise arbitrary and capricious.

> Judicial review of both formal and informal agency action is governed by § 706 of the APA, which provides that a "reviewing court shall ... hold unlawful and set aside agency action, findings, and conclusions found" not to meet six separate standards. *Overton Park,* 401 U.S. at 413, n. 30, 91 S.Ct. at 822, n. 30 (citing 5 U.S.C. § 706(2)). Informal agency action must be set aside if it fails to meet statutory, procedural or constitutional requirements or if it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* at 413–14, 91 S.Ct. at 822 (construing § 706(2)(A)–(D), the "generally applicable" standards). Formal agency action must be set aside not only for failing under any of the "generally applicable" standards, but also if the action is unsupported by "substantial evidence" in the hearing record. *Id.* at 414, 91 S.Ct. at 822 (construing § 706(2)(E)). These standards require the reviewing court to engage in a "substantial inquiry." *Overton Park,* 401 U.S. at 415, 91 S.Ct. at 823. An agency's decision is entitled to a presumption of regularity, "but that presumption is not to shield [the agency's] action from a thorough, probing, in-depth review." *Id.*

Olenhouse v. Commodity Credit Corp., 42 F.3d 1560, 1573-74 (10th Cir. 1994) (internal citations omitted).

> The duty of a court reviewing agency action under the "arbitrary or capricious" standard is to ascertain whether the agency examined the relevant data and articulated a rational connection between the facts found and the decision made.

> In reviewing the agency's explanation, the reviewing court must determine whether the agency considered all relevant factors and whether there has been a clear error of judgment.

Id. at 1574.

An agency is afforded *Chevron* deference in its interpretation of a statute where the statute is silent or ambiguous on a particular question. *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 842 (1984). Under that principle, where a statute is silent or ambiguous on a particular question, a court may not substitute its own construction of a statutory provision for an agency's reasonable construction of the statute. *Id.* Even under *Chevron's* "deferential review standard, the agency 'must ... articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.... Normally, an agency ... [decision] would be arbitrary and capricious if the agency ... entirely failed to consider an important aspect of the problem.'" *Kansas v. United States*, 249 F.3d 1213, 1228-29 (10th Cir. 2001) (internal citation omitted). Here, both agencies have failed to address all relevant factors and did not consider important aspects of the statutory application.

1. 25 C.F.R. Part 292.4 is arbitrary and capricious.

On May 20, 2008, the DOI published regulations implementing section 2719 of IGRA. Gaming on Trust Lands Acquired After October 17, 1988, 73 FR 29354-01. The DOI failed to consider case law in enacting its regulatory interpretation of "presently located" in § 2719(a)(2)(B) or the proper temporal application of the phrase. The regulation is therefore arbitrary and capricious. The only case to interpret the meaning of "presently located" for the purposes of § 2719(a)(2)(B) is *Wyandotte Nation v. Nat'l Indian Gaming Comm'n,* 437 F. Supp. 2d 1193, 1206 (D. Kan. 2006). *Wyandotte Nation* held that a tribe is not "presently located" within a state unless it has a "major governmental presence" in that state.

The DOI did not address *Wyandotte Nation*, which had been decided two years prior, in its regulations. The DOI's regulation implementing the last recognized reservation exception differs from *Wyandotte Nation* and requires the land be "[l]ocated in a State other than Oklahoma and within the tribe's last recognized reservation within the State or States within which the tribe is presently located, as evidenced by *the tribe's governmental presence and tribal population*." 25 C.F.R. Part 292.4(b)(2) (emphasis added).

The DOI also did not address any temporal aspect to the phrase and whether "presently located" is to be analyzed as of October 17, 1988 (the date of IGRA's enactment), or the date when it is applied to a particular tract of land. The DOI entirely failed to consider important aspects of the issue in its regulation, including federal court interpretation of the statute and temporal application. The DOI's regulation Part 292 is therefore arbitrary and capricious.

2. The NIGC's application of Part 292.4 and § 2719(a)(2)(B) is arbitrary and capricious.

In its opinion letter, the NIGC applied Part 292.4 and § 2719(a)(2)(B) and concluded Section 13 fell within the Tribe's last recognized reservation in Kansas and is therefore eligible for gaming under 25 U.S.C. § 2719(a)(2)(B) of IGRA. The NIGC noted that IGRA does not define "presently located" but the agency has provided an interpretation in Part 292.4. In its opinion letter, the NIGC acknowledges the discrepancy between Part 292.4 and *Wyandotte Nation*, but argues the DOI is afforded *Chevron* deference regarding Part 292.4 and its interpretation of § 2719(a)(2)(B).

The NIGC analyzed the Quapaw's governmental presence and tribal population in Kansas as of November 21, 2014, when the NIGC legal opinion was issued. The NIGC concluded the Tribe is "presently located" in Kansas and Oklahoma. See Exhibit 8 at 11-15. Because the NIGC determined the Tribe was presently located in both states and Section 13 is

within the original boundaries of the Quapaw Reserve in the State of Kansas, it determined the land fell under the last recognized reservation exception and qualified for gaming. Exhibit 8 at 15.

Because the NIGC analyzed the Quapaw's tribal presence as of the time the legal opinion was issued rather than as of October 17, 1988, when IGRA was enacted, it failed to consider relevant information and improperly applied "presently located" under § 2719(a)(2)(B). PL 100–497 (S 555), PL 100–497, October 17, 1988, 102 Stat 2467. The United States Supreme Court discussed the meaning of a similar phrase in the Indian Regulatory Act ("IRA") in *Carcieri v. Salazar*, 555 U.S. 379 (2009). In *Carcieri*, the Court considered whether the BIA properly accepted a parcel of land into trust under the IRA. *Id.* at 381. The IRA provides land is to be held in trust "for the purpose of providing land for Indians." *Id.* at 381-382, 25 U.S.C. § 465. "Indian" is defined to "include all persons of Indian descent who are members of any recognized Indian tribe *now under Federal Jurisdiction*." *Id.*; 25 U.S.C. § 479 (emphasis added). The Court's inquiry centered on whether "now under Federal jurisdiction" referred to 1998, when the Secretary accepted the parcel into trust, or 1934, when Congress enacted the IRA, *Id.* at 387-88.

The Court held that the use of the phrase "now under Federal jurisdiction" in the IRA referred to a tribe that was under federal jurisdiction at the time of the statute's enactment in 1934. *Id.* at 395. To arrive at its decision, the Court applied "settled principles of statutory construction" and first examined "the ordinary meaning of the word 'now' as understood when the IRA was enacted." *Id.* at 388. It held that at the time, "the primary definition of 'now' was 'at the present time; at this moment; at the time of speaking," which was consistent with the interpretations given to the word "now" by the Court, both before and after the passage of the IRA. *Id.* at 388. When the IRA was enacted, Black's Law Dictionary 1262 (3d ed. 1933)

"defin[ed] "now" to mean 'at this time, or at the present moment' and not[ed] that 'now as used in a statute *ordinarily* refers to the date of its taking effect . . . .'" *Id.* As further support, the Court noted Congress did not use the phrase "now or hereafter" as it did in another section of the IRA indicating that the term "refers solely to events contemporaneous with the Act's enactment." *Id.* at 389.

IGRA's use of the phrase "presently located" similarly means at the time of IGRA's enactment. At the time IGRA was enacted in 1988, Black's Law Dictionary 5th ed. (West Publishing, 1979) defined "present" as "now existing; at hand; relating to the present time; considered with reference to the present time." Incorporated into the definition of "present," "now" has the same definition in Black's Law Dictionary's 5th Edition as was discussed in *Carcieri*. Thus, under *Carcieri*, "presently located" must be interpreted to mean at the time IGRA was enacted. The Quapaw did not have any lands in Kansas at the time IGRA was enacted and, therefore, were not "presently located" in Kansas.

The NIGC also failed to address the equitable estoppel claims raised in the state's objection letter. The NIGC's failure to consider *Wyandotte Nation*'s "presently located" standard, the temporal application of "presently located" in a manner consistent with *Carcieri* and as discussed above, and the equitable estoppel claim is arbitrary and capricious. At the very least, to determine whether these decisions were arbitrary and capricious, the court must engage in a "substantial inquiry" and a "thorough, probing, in-depth review." A preliminary injunction should therefore be issued to maintain the status quo while the issue is analyzed. *See Kansas v. United States,* 249 F.3d 1213, 1229-30 (10th Cir. 2001) (Preliminary injunction affirmed where NIGC's failure to thoroughly analyze question likely rendered its decision under IGRA arbitrary and capricious.).

b. The injunction will not adversely affect the public interest.

Issuing a preliminary injunction will not adversely affect 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 has an interest in the BIA's process of accepting land into trust being free from fraud. *See U.S. ex rel. Ritchie v. Lockheed Martin Corp.*, 558 F.3d 1161, 1169 (10th Cir. 2009) ("significant public interest" in deterring fraud against the government). The public is further interested in ensuring the proper application of federal law decisions and the appropriate interpretation of federal law.

Issuing a preliminary injunction will prevent the Tribe from constructing and operating a gaming facility that would be in conflict with its land trust application and IGRA. A stated purpose of IGRA is to establish federal regulation of tribal gaming. 25 U.S.C. § 2702. In evaluating whether a preliminary injunction is proper in a case involving the application of IGRA, the Eighth Circuit held "[t]hese statements of purpose demonstrate that Congress placed a high priority on the control of gaming to minimize the secondary effects of gambling and to prevent the appropriation of the benefits of gaming by unrecognized groups. Congress viewed effective regulation and respect for regulatory authority as being in the public's interest." *In re Sac & Fox Tribe of Mississippi in Iowa/Meskwaki Casino Litig.*, 340 F.3d 749, 760 (8th Cir. 2003). Ensuring the proper execution of the administrative process and ensuring the State and County are not misled so as to induce them to forgo their rights in an administrative process is in the public interest.

c. Irreparable harm would occur unless the injunction issues.

The State and County will suffer irreparable injury resulting from the Quapaw's illegal construction and operation of a casino on Section 13. In *Kansas v. U.S.*, the Tenth Circuit held

"the NIGC's decision places [the State's] sovereign interests and public policies at stake" and "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." 249 F.3d at 1227. The court concluded, "[w]e believe the State of Kansas' interests in adjudicating the applicability of IGRA, and the ramifications of such adjudication, are sufficient to establish the real likelihood of irreparable harm if the Defendants' gaming plans go forward at this stage of the litigation." *Id.* at 1228.

Similarly, here, a preliminary injunction would stop the deprivation of the important state rights. The State and County should be afforded the opportunity to ensure they have had a full and fair opportunity to be heard on the issue of whether Section 13 is eligible for gaming. Because the Quapaw misrepresented their intention with the land, the State and County did not have the full opportunity to do so during the initial administrative process.

Further, the County and State would suffer immediate and irreparable injury in the absence of an injunction due to the impact of construction or operation of a gaming facility. "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). "A plaintiff satisfies the irreparable injury requirement for an injunction by demonstrating 'a significant risk that he or she will experience harm that cannot be compensated after the fact by monetary damages.'" *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1210 (10th Cir. 2009) (internal citation omitted). "Purely speculative harm will not suffice, but rather, '[a] plaintiff who can show a significant risk of irreparable harm has demonstrated that the harm is not speculative" and will be held to have satisfied his burden.'" *Id.* (internal citation

omitted).

Not only would construction of a gaming facility immediately increase traffic and affect the surrounding area, but it would also impact the State's current efforts to approve a lottery gaming facility in the area. The State is currently considering proposals for the development of a lottery gaming facility in the southeast gaming zone under the Kansas Expanded Lottery Act ("KELA"), K.S.A. 74-8733, *et seq*. Under KELA, the Kansas lottery may operate one lottery gaming facility in each gaming zone. K.S.A. 74-8734. A lottery gaming facility in the southeast gaming zone, which includes Cherokee County and Section 13, must provide 22% of the lottery gaming facility revenues to the State, 2% to the county in which the lottery gaming facility is located, and 1% to the county within the southeast zone in which it is not located. K.S.A. 74-8734(16)(A). The Quapaw Defendants' direct casino competition lowers the value of the State's gaming facility in that zone.

Any casino built by the Quapaw Defendants, however, would provide no revenue to the State or County to compensate the impacts of such a casino. The County would be obligated to support the gaming facility through emergency management services and road maintenance without any source of financial support for those services. Construction or the operation of an illegal casino will also impact any state lottery gaming facility. Other projects' size or scope may be impacted by the Quapaw Defendants' construction which would consequently impact the amount of revenues provided to the State and County. The loss of market share is an irreparable harm that cannot be measured. *Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharm. Co.*, 290 F.3d 578, 596 (3d Cir. 2002). If it is later determined Section 13 is not eligible for gaming, it will be too late for the state lottery gaming facilities to adapt their plans and the State and County will be irreparably impacted.

The threat of harm is real, imminent, and will be difficult to quantify. The preliminary junction should be issued to maintain the status quo until a final determination is made as to whether Section 13 is eligible for gaming.

d. The threatened injury to the State and County outweighs any harm an injunction may cause the Quapaw Defendants.

The Quapaw Defendants will not suffer any injury as a result of a preliminary injunction. Issuing an injunction to prevent the construction or operation of a gaming facility on Section 13 will maintain the status quo and will not impact the Quapaw Defendants' current operation of the Downstream gaming facility. The Quapaw Defendants have no right to operate a casino on Section 13 if it does not qualify for the last recognized reservation exception, and they will not be harmed by waiting until the court determines if Section 13 is eligible for gaming. *See Kansas v. United States*, 249 F.3d 1213, 1228 (10th Cir. 2001) (Threatened injury to the State outweighed any harm the preliminary injunction may cause because while tribe desired to construct faming facility and reap economic benefits, they would be "entitled to proceed with their plans . . . *only if* the tract qualified as "Indian lands" under IGRA. (emphasis in original)).

e. No bond should be required.

The Plaintiffs should not be required to post a security to secure the requested preliminary injunction. "[A] trial court has "wide discretion" under Rule 65(c) in determining whether to require security." *Winnebago Tribe of Nebraska v. Stovall*, 341 F.3d 1202, 1206 (10th Cir. 2003). "[I]f there is an absence of proof showing a likelihood of harm, certainly no bond is necessary." *Cont'l Oil Co. v. Frontier Ref. Co.*, 338 F.2d 780, 782 (10th Cir. 1964). Because the Plaintiffs have established the likelihood of their success on the merits, there will be no harm to the Quapaw Defendants in restricting their efforts to construct or operate a gaming facility until the parties' rights can be determined.

V. CONCLUSION

For the foregoing reasons, the State and County respectfully request this court grant an order issuing a preliminary injunction to prevent the Quapaw Defendants and anyone acting by, through, or under them from taking any action to construct or operate any gaming facility located on Section 13.

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