**IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS**

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| STATE OF KANSAS, ex rel. Derek Schmidt, Attorney General, State of Kansas, and BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF CHEROKEE COUNTY, KANSAS,<br><br>Plaintiffs,<br><br>v.<br><br>NATIONAL INDIAN GAMING COMMISSION; et al.,<br><br>Defendants. | ) | No. 15-cv-4857-DDC-KGS |

**BRIEF OF TEN QUAPAW TRIBAL GOVERNMENTAL PARTIES IN SUPPORT OF MOTION TO DISMISS**

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**BRIEF OF TEN QUAPAW TRIBAL GOVERNMENTAL PARTIES IN SUPPORT OF MOTION TO DISMISS**

Defendants, the Downstream Development Authority of the Quapaw Tribe of Oklahoma (O-Gah-Pah), the Quapaw Tribal Development Corporation, John L. Berrey, Barbara Kyser Collier, Art Cousatte, Thomas Crawfish Mathews, Larry Ramsey, Tamara Smiley-Reeves, Rodney Spriggs, and Fran Wood, all entities, officers, or directors of enterprises of the Quapaw Tribe of Oklahoma (or the O-Gah-Pah) (collectively the "Tribal Defendants" or the "Defendants"), file this brief in support of their motion to dismiss the claims asserted against them in this action (ECF No. 50) pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6) for lack of subject matter jurisdiction and pursuant to the doctrine of tribal sovereign immunity.

**INTRODUCTION**

In 2012, Kansas Governor Sam Brownback and local leaders in Cherokee County began encouraging the Quapaw Tribe of Oklahoma (the "O-Gah-Pah") (referred to herein as the "Quapaw Tribe," the "Tribe," or "Tribal") to request a tribal-state gaming compact that would provide for payment of a percentage of the profits from class III gaming directly to county governments. The Tribe began productive discussions with the Brownback administration in early 2013, and shortly thereafter submitted an initial compact proposal, and—also with the encouragement of the Governor—requested an advisory opinion from the National Indian Gaming Commission (the "NIGC") to confirm that gaming lawfully could be conducted on its Kansas trust land. Subsequently, Kansas began promoting the development of a state-owned casino in southeastern Kansas. Unknown to the Tribe, at some point during the negotiations the Governor and local leaders reversed their support and began preparing for this litigation.

This case, then, arises from an initiative by Kansas to protect its hoped-for state casino from competition from an Indian tribe's existing casino. The state parties' claims, however, lack

any basis in the law—not only the claims against the federal parties but also those asserted against the Tribal parties, which are derivative of the federal claims. Further, the Kansas parties seemingly have tried to avoid tribal sovereign immunity by naming 18 individual Tribal officers and directors—apparently randomly chosen and without any good faith inquiry into the authority of the individuals being targeted—in order to try to characterize this as an officer suit permitted under the so-called doctrine of *Ex parte Young*. But the claims in this case could not satisfy the requirements for such a suit in any context. The *Young* doctrine is inapplicable to cases such as this involving Indian gaming, for which Congress has established a comprehensive regulatory scheme that does not permit its application.

Contrary to the assertions by the State of Kansas and the Board of County Commissioners of Cherokee County (referred to collectively herein as the "State"), the Tribe and its officers have followed federal law to the letter, and they even availed themselves of a non-mandatory procedure for obtaining an advisory legal opinion to confirm the eligibility of the Indian land at issue for gaming. Because the doctrine of *Ex parte Young* is inapplicable under these circumstances, and because the underlying claims against the NIGC and the other federal parties could not be pursued as a matter of law, the claims against the individually named Tribal parties are barred by sovereign immunity.

## BACKGROUND

Underlying the issues in this case is the legal distinction between classes of Indian gaming, and the power of the governments to which Congress has assigned jurisdiction over each. Under well-established federal law, as recognized under the Indian Gaming Regulatory Act of 1988 (the "IGRA"), Indian tribes retain exclusive jurisdiction to regulate class I and class II gaming—essentially traditional gaming and bingo-based gaming—with federal oversight. *See*

25 U.S.C. § 2710(a). Class III gaming—generally involving card games and Las Vegas-style slot machines and other games not included in classes I and II—may be conducted by an Indian tribe only pursuant to a tribal-state gaming compact permitting such gaming.[1] *See id.* § 2710(d)(1). This case arises from failed tribal-state gaming compact negotiations between the Kansas governor and the Quapaw Tribe, and the State's subsequent decision to attempt to prevent the Tribe from engaging even in class II gaming on its Indian land in the future, which it may do as a matter of right recognized by federal law.

The Quapaw Tribe has in recent years served as a leader in economic development for the so-called "Tri-State" region—the area where the states of Oklahoma, Kansas, and Missouri meet, which includes the southeastern corner of Cherokee County. In 2008, the Tribe opened the Downstream Casino Resort on Indian land along the Kansas-Oklahoma border, thereby creating in excess of 1,000 new jobs—not only for Tribal members but also for the community as a whole in the surrounding area. (Ex. A ¶¶ 3 & 4.) The Tribe has since become involved in a range of economic development efforts benefitting the entire Tri-State area, including in planning for expanded waste water treatment capacity, in environmental clean-up at the Superfund Sites at former mining areas, and in the expansion of rural law enforcement protection and fire and emergency medical services, among others. (Ex. A ¶ 5.)

Due to its location along the Kansas-Oklahoma state line, the main parking lots and other infrastructure for the Tribe's resort are located on land in Kansas, which was conveyed into trust

[1] In essence, Congress divided regulatory jurisdiction over the classes of Indian gaming, and gave tribes exclusive responsibility over class I and II gaming, and assigned to states substantial oversight over tribal class III gaming. Under this regime, Congress expressly permitted states to sue Indian tribes only in one narrow instance—to enjoin *class III gaming activity* being *conducted on Indian lands* and being conducted *pursuant to a class III tribal-state gaming compact*. *See id.* § 2710(d)(7)(A)(ii).

in 2012. (Ex. A ¶ 3.) Shortly thereafter, various Kansas officials—including Governor Brownback and local officials in Cherokee County—began encouraging the Tribe to pursue a tribal-state class III gaming compact, for the purpose of developing a class III gaming facility on the Kansas side of the border at some future date. (Ex. A ¶¶ 7 & 8.) As discussed by the parties, such a compact would have benefitted Cherokee County financially by committing a portion of the proceeds from class III gaming to be paid directly to the county and other local governments. (Ex. A ¶¶ 8 & 9.)

Following a meeting with the Chairman of the Quapaw Tribe, John L. Berrey, the Governor assigned Chris Howell, the Governor's Tribal Liaison and Executive Director of Native American Affairs, to meet with the Tribe to assist with the compact negotiations. (Ex. A ¶¶ 8 & 9.) Howell met with Tribal representatives in February 2013, and provided advice concerning the forthcoming negotiations and about the form of the proposed compact.[2] Subsequently the Tribe submitted a proposed compact to Governor Brownback, and also requested an advisory opinion from the Office of the General Counsel of the NIGC concerning the eligibility of the land for gaming—a procedure provided for under 25 C.F.R. § 292.3, but which is not mandatory. (Ex. A ¶¶ 9 & 10.)

Throughout the discussions, Governor Brownback made clear to the Tribe that he would proceed with compact negotiations only if the Tribe confirmed its right to conduct gaming on its trust land in Cherokee County.[3] (Ex. A ¶¶ 9 & 10.) The Tribe thus requested the letter opinion

[2] Howell emphasized that for political reasons Governor Brownback could not publicly support expanded gaming, but could support the project as an economic development initiative for Cherokee County. Howell further advised the Tribe to follow and to acknowledge the governor's political "Road Map for Kansas" in their proposals for the compact. (Ex. A ¶ 9.)

[3] This requirement was made clear to the Tribe throughout the discussions. (Ex. A

from the NIGC not only out of its diligence, but because Governor Brownback made a favorable opinion a requirement for his pursuing the compact negotiations to a conclusion. (Ex. A ¶¶ 10 & 11.) The NIGC attorney's letter opinion the State now seeks to challenge, then, was a condition made by Governor Brownback as part of the compact discussions.

In late 2013 and early 2014, the previously mutually cooperative discussions between Governor Brownback and the Tribe stalled. In early 2014, the Kansas Legislature dramatically reduced the fees necessary for an applicant to obtain approval to develop and manage a state casino in the Southeastern Kansas Gaming Zone, which includes Cherokee and Crawford Counties.[4] (Ex. A ¶ 12.) The Kansas Lottery Commission began seeking applications to develop a state-owned casino in the zone in July of that year. (Ex. A ¶ 12.) Currently, there are three applications pending, including one for a proposed casino in Cherokee County. (Ex. A ¶ 12.)

The Acting General Counsel of the NIGC, Eric N. Shepard, issued an advisory letter opinion dated November 21, 2014, which is the subject of the state's challenge, and which confirmed that the Tribe's Kansas trust land was eligible for class II gaming.[5] (Ex. E.)

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¶¶ 8 & 11.) In September 2013, Howell confirmed this in writing by advised the Tribe that the compact negotiations would need to await the release of the advisory opinion to be issued by NIGC's counsel. (Ex. A ¶ 11.)

[4] The current initiative is only the latest such attempt to develop a state casino in southeastern Kansas, which faces competition from not only the Tribe's resort by also several other casinos in the area. Cherokee County is located within a short distance of a number of Indian casinos—including large destination resorts—in Oklahoma. There is a general consensus in the gaming business that the regional market has reached a saturation point. (Ex. A ¶ 7.)

[5] In his letter, Shepard opined that the Tribe's trust land was eligible for gaming due, in part, to its location within the Tribe's last reservation in Kansas. However, the location of trust land is not the end of the analysis, which involves a number of other legal requirements. (Ex. E at 4-15.) Shepard's opinion does not address the Tribe's ability to conduct class III

Thereafter, Governor Brownback failed to respond to inquiries from the Tribe concerning the status of compact negotiations. (Ex. A ¶ 14.) The Governor's general counsel sent a letter to the Tribe dated April 9, 2015—the day this lawsuit was filed—advising that the state planned to attempt to challenge Shepard's opinion in court. (Ex. A ¶ 14.)

Since the class III gaming compact negotiations with Kansas never progressed, the Tribe has not pursued plans for conducting gaming on its Kansas trust land. (Ex. A ¶ 13; Ex. D ¶ 12.) No genuine dispute exists that the Tribe is not conducting any gaming activity—including class III gaming—on its Kansas trust land, that no gaming facility is being constructed on the land, and therefore that no gaming is imminent.[6]

**UNDISPUTED JURISDICTIONAL FACTS**

The following jurisdictional facts are undisputed or are not in genuine dispute, as evidenced by the attached exhibits:[7]

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gaming on the land, which class of gaming can be conducted on Indian land only pursuant to a tribal-state gaming compact permitting such gaming. *See* 25 U.S.C. § 2710(d)(1)(C).

[6] The State is seeking an injunction to bar the Tribe from conducting gaming on its Kansas trust land, (ECF Nos. 14 & 15), although this necessarily is a request for an injunction prohibiting the Tribe from conducting *class II* gaming, since the Tribe has no class III tribal-state gaming compact. Not only does the State lack jurisdiction over class II gaming on Indian lands, but it can offer no evidence that any gaming is occurring on the land. (Ex. A ¶ 13; Ex. D ¶ 12.)

To support its argument for an injunction, the state has provided only a handwritten note by the Tribe's Chairman to Governor Brownback, which was sent *after* this lawsuit was filed, and which does not even mention gaming. (ECF No. 13-10.) The State made no effort to contact or consult with the Tribe about gaming on the land before filing this action. (Ex. A ¶ 16.) In fact, the letter was drafted tongue-in-cheek in view of the Governor's lack of good faith in the failed compact negotiations, as evidenced by his first encouraging the Tribe to pursue a compact, and then—without any notice—suing the NIGC over an advisory opinion letter obtained at his insistence. (Ex. A ¶¶ 15 & 16.) This litigation likely could have been avoided entirely had the governor simply contacted the Tribe to discuss his inability politically to continue supporting a class III compact. (Ex. A ¶ 15.)

[7] For purposes of this Motion and supporting brief, the Statement of Facts in the

1. The United States holds title to approximately 124 acres of land for the benefit of the Quapaw Tribe within the Kansas portion of the Tribe's reservation (known as the "Quapaw Strip"), as promised to the Tribe pursuant to the Treaty of May 13, 1833, 7 Stat. 424 (Kappler, 1904, vol. 2, p. 395) (hereinafter the tract is referred to as the "Kansas Trust Land"). (ECF No. 13 at ¶ 11; Ex. A ¶ 3.)

2. On the Kansas Trust Land are located the main parking lots for the Downstream Casino Resort, as well as other ancillary facilities and infrastructure for the resort. (ECF No. 13 at ¶ 16; Ex. A ¶ 3.) The same facilities were located on this tract when it was taken into trust by the Secretary of the Interior in 2012, and there has been no change in the use of that tract since that date. (Ex. A ¶ 6.)

3. The Tribe has not conducted, and is not conducting any gaming—including class I, II, and III gaming—on the Kansas trust land. (Ex. A ¶¶ 6 & 16.) At present, the Tribe has no plans to construct a gaming facility on the Kansas Trust Land or to conduct gaming on such land. (Ex. A ¶ 16.)

4. Of the Tribe's elected leadership and officers and directors named in this litigation, none had any authority over the issuance of the opinion letter by the NIGC's counsel. Only the members of the Tribal Business Committee and the Downstream Development Authority have any potential decision-making authority with respect to the future development or operation of gaming activities on the Kansas Trust Land. (Ex. A ¶ 17.) All of the other individuals named are either Tribal regulatory agency officers or are members of the boards or management of Tribal enterprises that have no authority with respect to the development of

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"United States' Brief in Support of Motion to Dismiss," along with the supporting exhibits, is hereby adopted and incorporated by reference. *See* Fed. R. Civ. P. 10(c) (permitting for incorporation of filings by reference).

gaming, or with respect to any potential future Tribal gaming in Kansas. (Ex. A ¶ 17; Ex. B ¶ 2; Ex. C ¶ 2; Ex. D ¶¶ 3-5.)

**STANDARDS OF REVIEW**

The question of whether tribal sovereign immunity bars an action is a matter of subject matter jurisdiction and is properly challenged under Rule 12(b)(1). *See Miner Elec., Inc. v. Muscogee (Creek) Nation*, 505 F.3d 1007, 1009 (10th Cir. 2007). The burden of establishing subject matter jurisdiction is on the party asserting jurisdiction. *See Port City Props. v. Union Pacific R.R. Co.*, 518 F.3d 1186, 1189 (10th Cir. 2008). Where a motion challenges the factual basis underlying a plaintiff's assertion of subject matter jurisdiction, as opposed to a facial challenge to the substantive allegations in a plaintiff's pleading, a court may look beyond the pleadings and may consider documentary and similar evidence concerning the challenged jurisdictional facts. *See Paper, Allied-Indus., Chem. & Energy Workers Int'l Union v. Continental Carbon Co.*, 428 F.3d 1285, 1292-93 (10th Cir. 2005). In deciding a motion to dismiss for lack of subject matter jurisdiction under tribal sovereign immunity, a court is not required to take any of a plaintiff's allegations as true. *See id.*

As with other motions challenging a court's subject matter jurisdiction, a motion seeking a dismissal on the basis of tribal sovereign immunity is a threshold matter to be determined before any other issue in the case.[8] *See Kiowa Indian Tribe of Okla. v. Hoover*, 150 F.3d 1163,

[8] In view of the importance of the doctrine, a challenge to a federal court's jurisdiction on the basis of tribal sovereign immunity ordinarily is raised at the start of litigation, and an order denying the defense is immediately appealable. *See, e.g., Osage Tribal Council ex rel. Osage Tribe of Indians v. United States Dept. of Labor*, 187 F.3d 1174, 1179-80 (10th Cir. 1999) (applying collateral order doctrine to administrative order rejecting tribal sovereign immunity defense); *Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians of Fla.*, 63 F.3d 1030, 1050 (11th Cir. 1995); *see also Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 147, 113 S. Ct. 684, 689 (1993); *Garramone v. Romo*, 94 F.3d 1446, 1452

1172 (10th Cir. 1992) (noting "Tribe's full enjoyment of its sovereign immunity is irrevocably lost once the Tribe is compelled to endure the burdens of litigation"); *see also Guttman v. New Mexico*, 325 F. App'x 687, 692 (10th Cir. 2009) (same). Sovereign immunity is not merely a defense to an action, but is a jurisdictional bar. *See United States v. Mitchell*, 463 U.S. 206, 215, 103 S. Ct. 2961, 2967 (1983). The very purpose of sovereign immunity is to prevent the indignity of subjecting the sovereign party to the coercive judicial process. *Puerto Rico Aqueduct & Sewer Auth.*, 506 U.S. at 146, 113 S. Ct. at 689. Such immunity from suit effectively disappears if a case is erroneously permitted to continue. *See Guttman*, 325 F. App'x at 691.

## SUMMARY OF THE ARGUMENT

In this case, the State of Kansas and Cherokee County seek equitable relief to prevent the Quapaw Tribe from engaging in class II Indian gaming on its Kansas trust land—despite the fact that clear federal law gives states no jurisdiction or regulatory control over such gaming on Indian lands. Further, all suits against Indian tribal governments, as well as against the officers and directors of such governments and enterprises, are barred—as are claims against federal and state officers—by the doctrine of sovereign immunity, unless Congress or a tribe has provided consent or a waiver. No such waiver or consent exists in this case, therefore the claims against the three Tribal enterprises—suits directly *against the Tribe* itself—are barred on their face. The claims against the individual officers could proceed only if the State could establish some

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(10th Cir. 1996). Without such interlocutory review, the value of the immunity to the sovereign could be lost. *See Puerto Rico Aqueduct & Sewer Auth.*, 506 U.S. at 146, 113 S. Ct. at 689 (noting immediate appeals of denials of immunity are necessary to ensure that sovereigns' interests are fully vindicated); *see also* 17A *Moore's Federal Practice* § 123.51, at 123-167 (3d ed. 2015) (noting an immediate appeal is necessary "because the value of immunity would be lost as litigation proceeds past motion practice").

applicable exception to tribal governmental immunity, which it cannot.

Recognizing the lack of any waiver of tribal sovereign immunity in this case, the State named 18 Tribal officers and directors—apparently randomly selected without any consideration of their authority—in an attempt to recast this as a so-called "officer suit" pursuant to the doctrine of *Ex parte Young*. However, the State cannot as a matter of law satisfy the requirements for applying *Young* as to the individual Tribal officers in this case for four primary reasons.

1. The State can allege no ongoing violation of federal law, a fundamental requirement for an officer suit under *Young*. The Tribe has, in fact, fully complied with federal law, including in obtaining an advisory opinion from the NIGC concerning the eligibility of its Kansas trust land for class II gaming. No gaming is occurring on the land or is or is imminent, and even if the Tribe were engaged in class II gaming there still would be no violation of the IGRA. Under established federal law, Kansas has no jurisdiction over class II gaming, and therefore has no federal cause of action against the Tribal officers and directors arising under a federal statute. Only if the Tribe had a class III gaming compact with Kansas, or if class III gaming were occurring on the Tribe's Indian land in Kansas, might the State be in a position to assert regulatory jurisdiction over Tribal gaming activities.

2. The State's asserted "violation of federal law" is, in fact, merely an allegation of a civil remedy based on an equitable theory, which is insufficient as a matter of law to support an application of *Ex parte Young*. Courts have made clear that the application of *Young*—a legal fiction that overcomes a defendant's important governmental immunities—cannot rest on a mere civil theory of recovery, but rather requires a recurring violation of the supreme authority of federal law. Even if an equitable remedy could serve as the basis of an officers suit, the State's

asserted equitable theory could not be sustained as a matter of law.

3. Even if the other requirements of *Young* could be met, the State cannot as a matter of law use *Tribal* officers and directors—most of whom have no authority with respect to Tribal gaming business—to support a claim that they somehow violated federal law through a *federal agency's* issuance of an advisory letter opinion. Individual officers must, at a minimum, have a legal nexus to the asserted federal law violation that is the basis of a *Young* suit by virtue of their authority and legal duties. In this case, the asserted violation is a challenge by the State to the issuance of an advisory letter opinion by an attorney at the NIGC. The Tribe and its officers cannot be held responsible for the non-binding advice the agency ultimately provided.

4. Finally, under the IGRA Congress provided a comprehensive statutory scheme for the regulation of Indian gaming, which cannot properly be overcome by *Ex parte Young* in any event. The United States Supreme Court has made clear that the Young doctrine cannot be used to rewrite Congress' intent in creating a comprehensive regulatory scheme.

The lack of any legal or factual merit to the State's claims against the Tribal officers and directors reveals the intended purpose of the case—to support separate ongoing efforts to develop a state-owned casino in an already highly competitive and saturated gaming market, and, perhaps to deter the Tribe from engaging in class II gaming on its Kansas Trust Land in the future. The State cannot satisfy the legal requirements to bring an officer suit against the 18 individual Tribal officers and directors pursuant to *Ex parte Young*, as a matter of law. For the reasons set forth herein, the claims against all of the Tribal Defendants should be dismissed in their entirety.

## ARGUMENT & AUTHORITIES

### I. NO CONSENT TO SUIT OR CONGRESSIONAL ABROGATION OF SOVEREIGN IMMUNITY EXISTS THAT PERMITS THE STATE OF KANSAS TO SUE THE TRIBAL PARTIES

As governments, Indian tribes—like the federal government and the states—are cloaked with sovereign immunity, except to the extent they grant valid waivers or unless Congress clearly provides for suits for specific claims. In this case, the State can point neither to any applicable waiver or consent granted by the Tribe's government or otherwise, nor to any congressional enactment permitting suits arising from its claims relating to the NIGC's Indian gaming lands opinion. In particular, the State has no jurisdiction to assert a cause of action against the Tribe concerning class II gaming activities, present or future. Absent any such waiver or congressional abrogation of the Tribe's immunity, the State's claims against the Tribe and its enterprises and arms and its officers and directors are barred and are also beyond this Court's jurisdiction.

As confirmed recently by the United States Supreme Court in unequivocal terms, federally recognized Indian tribes are sovereign governments that enjoy immunity from unconsented lawsuits. *See Michigan v. Bay Mills Indian Community*, 572 U.S. ___, 134 S. Ct. 2024, 2030-31 (2014); *see also, e.g., Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754, 118 S. Ct. 1700, 1702 (1998). Immunity from suit has long been recognized as a fundamental aspect of an Indian nation's inherent sovereignty.[9] *See, e.g., Oklahoma Tax*

[9] Tribal sovereign immunity is recognized as a "a necessary corollary to Indian sovereignty and self-governance." *See Three Affiliated Tribes of the Ft. Berthold Reservation v. Wold Eng'g, P.C.*, 476 U.S. 877, 890, 106 S. Ct. 2305, 2313 (1986). The doctrine is based on federal law and the treatment of Indian tribes as distinct sovereign nations that were not included in the federal system. *See Blatchford v. Native Village of Noatak*, 501 U.S. 775, 782, 111 S. Ct.

*Comm'n v. Citizen Band of Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509, 111 S. Ct. 905, 909 (1991); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S. Ct. 1670, 1677 (1978). Tribal sovereign immunity applies to both governmental and tribal commercial activities, and to suits for money damages as well as to suits for declaratory and injunctive relief.[10] Indian tribes face a number of challenges in exercising their sovereignty, due to, among other factors, their limited land bases, the limitations on their jurisdiction over non-Indians, and their limited resources. Without sovereign immunity tribes effectively would lose much of their ability to function independently as sovereign governments. *See generally Cohen's Handbook of Federal Indian Law* § 7.05, at 636 (2012 ed.) (discussing scope of tribal sovereign immunity).

The cloak of tribal sovereign immunity extends not only to the tribal government itself, but also to individual tribal officers and employees acting in their official capacities and within the scope of their authority.[11] *See, e.g.*, *Fletcher v. United States*, 116 F.3d 1315, 1324 (10th Cir. 1997); *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479-80 (9th Cir. 1985). Additionally, tribal sovereign immunity "extends to subdivisions of the tribe, including Tribal business and commercial enterprises." *Native Am. Distrib. v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1292 (10th Cir. 2008). Underscoring this, the Supreme Court has made clear that "[s]overeign immunity deprives [a] federal court of jurisdiction to entertain lawsuits against [the]

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2578, 2583 (1991) (noting "it would be absurd to suggest that the tribes surrendered immunity in a [constitutional] convention to which they were not even parties").

[10] *See, e.g.*, *Kiowa Tribe of Okla.*, 523 U.S. at 760, 118 S. Ct. at 1705 (commercial activities); *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1271 (9th Cir. 1991).

[11] As it applies to tribal officials and tribal employees acting in their representative capacity and within the scope of their authority, this immunity is identical to that enjoyed by the tribe itself. *See Romanella v. Hayward*, 933 F. Supp. 163, 167 (D. Conn. 1996).

tribe, its subdivisions and business entities, as well as its officials acting in their official capacities." *See Native Am. Distrib.*, 546 F.3d at 1293; *FDIC v. Meyer*, 510 U.S. 471, 475, 114 S. Ct. 996, 1000 (1994).

In keeping with its overall nature and importance to tribal sovereignty, tribal sovereign immunity may be waived only through express and unequivocal waivers validly granted by the tribe or as provided through an act of Congress. *See, e.g.*, *Santa Clara Pueblo*, 436 U.S. at 58-59, 98 S. Ct. at 1677; *Memphis Biofuels, LLC v. Chickasaw Nation Indus., Inc.*, 585 F.3d 917, 921-22 (6th Cir. 2009); *Multimedia Games, Inc. v. WLGC Acquisition Corp.*, 214 F. Supp. 2d 1131, 1139-40 (N.D. Okla. 2001). Waivers of tribal sovereign immunity cannot be implied, but rather must be "unequivocally expressed." *Santa Clara Pueblo*, 436 U.S. at 58-59, 98 S. Ct. at 1677; *Seneca-Cayuga Tribe of Okla. v. State ex rel. Thompson*, 874 F.2d 709, 715 (10th Cir. 1989) (holding immunity waivers are strictly construed and cannot be implied). Without a valid, unequivocal waiver of tribal sovereign immunity, claims against a tribe, its arms, and its officials are barred.

In this case, the State can point to no consensual waiver of immunity granted to it by the Tribe to pursue any claims, including—and especially concerning—its claims relating to its challenge to Shepard's opinion letter. Likewise, no congressional authorization for this action exists. The advisory opinion that is the subject of the State's claims was issued by the Office of the General Counsel of the NIGC pursuant to regulations promulgated pursuant to the IGRA. *See* 25 C.F.R. Part 292 subpart B (2014); *see also* 25 U.S.C. § 2719. Neither the IGRA nor the regulations provide an authorization for direct actions by states against Indian tribes to challenge such opinions. In fact, the plain language of the IGRA makes clear that such opinions are not to

be deemed as appealable final agency actions.[12]

In general, the states have no jurisdiction to regulate tribal class II gaming, and in particular states lack the right under federal law to sue tribes directly with respect to class II gaming activities conducted on Indian lands. Indian tribes have a recognized right to conduct class II gaming on their Indian lands within states that otherwise permit such gaming. *See* 25 U.S.C. §§ 2710(a)(2) & (b); *see also Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 690 (1st Cir. 1994); *Mashantucket Pequot Tribe v. State of Connecticut*, 913 F.2d 1024, 1026 (2d Cir. 1990). Accordingly, the IGRA makes clear that states have no authority to regulate class II gaming. *See United Keetoowah Band of Cherokee Indians v. Okla.*, 927 F.2d 1170, 1177 (10th Cir. 1991; *Alabama v. PCI Gaming Authority*, 15 F. Supp. 3d. 1161, 1188 n.28 (M.D. Ala. 2014); *Wyandotte Nation v. Sebelius*, 337 F. Supp. 2d 1253, 1257 (D. Kan. 2004), *aff'd in part, vacated in part & remanded*, 443 F.3d 1247 (10th Cir. 2006); *see also* 25 U.S.C. § 2710(a).

The IGRA provides for a waiver of tribal immunity in only one narrow instance—for suits by states to enforce class III tribal-state gaming compacts. *See* 25 U.S.C. § 2710(d)(7)(A)(ii); *see also Bay Mills Indian Cmty.*, 134 S. Ct. at 2032; *Florida v. Seminole Tribe of Florida*, 181 F.3d 1237, 1242 (11th Cir. 1999). No class III compact is in effect between the Tribe and Kansas, Congress has provided for no cause of action by states against tribes, and, accordingly no congressional consent exists for the State to sue the Tribe or its arms and agencies. *See PCI Gaming Authority*, 15 F. Supp. 3d at 1188 n.28; *Wyandotte Nation*, 337

[12] The text in the IGRA specifies which actions of the NIGC are deemed to be final agency actions subject to appeal or to judicial review pursuant to the Administrative Procedures Act (the "APA"), including decisions on tribal gaming ordinances, management contracts, existing ordinances and contract, and civil penalties. *See* 25 U.S.C. § 2714 (noting actions under §§ 2710 through 2713 are final agency actions subject to judicial review); *see also* 5 U.S.C. § 704 (providing only final agency actions are reviewable under the APA).

F. Supp. 2d at 1257. This action against three Tribal entities and the 18 Tribal officers and directors named in this case therefore is barred.

## II. NONE OF THE FUNDAMENTAL REQUIREMENTS FOR A STATE TO OBTAIN PROSPECTIVE INJUNCTIVE RELIEF AGAINST INDIVIDUAL TRIBAL OFFICERS ARE SATISFIED IN THIS CASE

Confronted with the absolute bar of tribal sovereign immunity, the State has named as party defendants 18 individual Tribal officers and directors—none of whom have authority over the NIGC attorney's issuance of the letter opinion—in their official capacities, and thereby plainly hoping to invoke the so-called doctrine of *Ex parte Young*. However, an application of *Young* has limits, including that it permits suits against officers only where a government or its officers are engaging in an *ongoing violation of federal law*—a requirement that cannot be satisfied in this case. To the contrary, the Quapaw Tribe and its officers have acted in full compliance with federal law, as specifically confirmed by Shepard's opinion letter. The State cannot satisfy this and other fundamental requirements for bringing an action pursuant to *Young*, and has no other legal theory available that could overcome tribal governmental immunities.

### A. The State Can Allege No Ongoing Violation of Federal Law, Including the IGRA, Because the Tribe Has No Class III Gaming Compact

Originally applied to compel state officials to comply with federal law, the doctrine of *Ex parte Young* today has been applied to allow suits against both state and tribal officers, but only for prospective injunctive relief to prevent ongoing violations of federal law. *See Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441 (1908). This doctrine avoids the bar of sovereign immunity by use of a so-called legal fiction—namely, that officers who act in violation of federal law are stripped of authority to act because authority cannot be granted to violate federal law. *See id.* at 159-60. This legal theory does not, however, have an open-ended application to any suits against

officers, as the State's strategy of randomly naming Tribal officers and directors suggests. Indeed, there must be an actual and identifiable ongoing violation of federal law for which injunctive relief is appropriate to prevent. *See Verizon Maryland, Inc. v. Public Service Comm'n of Maryland*, 535 U.S. 635, 645, 122 S. Ct. 1753, 1760 (2002); *ANR Pipeline Co. v. Lafaver*, 150 F.3d 1178, 1188 (10th Cir. 1998) (noting "only allegations of violations of federal law are sufficient to come within the *Ex parte Young* rule").

The Tenth Circuit recently strongly confirmed the requirement that *Ex parte Young* may be applied only where there is an ongoing violation of a federal law in *State of Oklahoma v. Hobia*, 775 F.3d 1204 (10th Cir. 2014), a case involving a state action to compel tribal officers not to conduct class III gaming off of Indian lands. The court in *Hobia* found there was no ongoing violation of federal law, because the relevant statute, the IGRA, "is concerned only with class III gaming on Indian lands." *Id*. at 1213. Therefore, the State could not allege a violation of federal law, and could not state a claim for relief under the IGRA.[13] *See id*. Importantly, as the Tenth Circuit made clear, an action may not proceed under an *Ex parte Young* theory if the plaintiff has no statutory right of action—in other words, if it cannot state a claim for an actual violation of a federal law. *See id*.

In this case—as in *Hobia*—the State has no right of action against the Quapaw Tribe that could serve as the basis for an officer suit. It is undisputed that the Tribe has no tribal-state gaming compact with the State of Kansas, and therefore it cannot presently engage in class III gaming within Kansas. It is also undisputed that the Tribe is not engaging in any gaming

[13] The *Ex parte Young* doctrine applies only to violations of federal law. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 105-06, 104 S. Ct. 900, 910-11 (1984). States have other remedies available for addressing violations of state law. *See Bay Mills Indian Community*, 134 S. Ct. at 2031.

activities within Kansas. The only type of gaming the Tribe could conduct in Kansas without an approved compact—and the only type of gaming therefore currently covered by Shepard's opinion—is class II gaming. But, as memorialized within the IGRA, Indian tribes have the right to conduct class II gaming without regulation by the states. *See Narragansett Indian Tribe*, 19 F.3d at 704; *PCI Gaming Authority*, 15 F. Supp. 3d at 1188 n.28. The IGRA provides states with a cause of action only to enforce class III tribal-state gaming compacts. *See Narragansett Indian Tribe*, 19 F.3d at 690. The State thus has no cause of action under the IGRA to sue a tribe with respect to ongoing or even planned class II gaming activities, and therefore can make no claim for any ongoing violation of federal law.

To the contrary, the Tribe has acted in compliance with federal law, as specifically confirmed by the NIGC. In Shepard's letter, he opined that the land "is eligible for gaming under the last recognized reservation exception of IGRA . . . ." (Ex. E at 1-8.) The State's claim in this case is, in fact, not an attempt to compel compliance with federal law, but rather is an indirect challenge of this purely advisory opinion—a cause of action involving only the agency—and which was not even a final agency action.[14]

Not only does the State's claim that the Tribe is in violation of the IGRA fail because any gaming on the lands would be in compliance with federal law, it also fails because the IGRA is not implicated unless and until gaming actually occurs. *See* 25 U.S.C. § 2702 (providing "[t]he purpose of [the IGRA] is to provide a statutory basis for the *operation of gaming* by Indian tribes") (emphasis added); *id*. § 2719 (providing for gaming on lands within a tribe's "last

[14] Not only did Governor Brownback make the advisory opinion a requirements for negotiations, but the State in essence is attempting to create a violation of federal law out of the Tribe's compliance with a procedure set forth in federal regulations by which it could voluntarily confirm the eligibility of Indian lands acquired after October 1988 for gaming. *See* 25 C.F.R. § 292.3(a) (providing tribes "may" request opinions as to existing trust lands).

recognized reservation"); *see also Michigan v. Sault Ste. Marie Tribe of Chippewa Indians*, 737 F.3d 1075, 1082-83 (6th Cir. 2013) (rejecting request for injunction because IGRA does not apply to future events that may never occur). But, no genuine dispute exists that gaming is not occurring on the land.[15] Even if class II gaming were occurring on the land there still would be no violation of federal law.

The Tribe requested and received an advisory letter opinion regarding the eligibility for gaming on the land in the future, a voluntary procedure provided under federal regulations, which cannot reasonably constitute a violation of federal law. The IGRA cannot be used to invoke *Ex parte Young* and sovereign immunity requires the case to be dismissed.[16]

**B. The State's Broadly Pleaded Theory of Equitable Estoppel Is Not the Equivalent of a Violation of Federal Law for Purposes of the *Ex parte Young* Doctrine**

The State's claims rest in part on an unsupported contention that the Tribe misled the Bureau of Indian Affairs (the "BIA") when it applied to have its Kansas land at issue taken into trust, and therefore that Kansas (not the federal government) can assert an equitable claim. But

[15] The State's stated basis for the action against the Trial parties not only lacks any justification in fact, but it, remarkably, also ignores the legal procedures that much be completed before gaming can occur on Indian lands. Among others, Indian gaming facilities must be licensed under a procedure which involves both tribal regulators and the NIGC. *See* 25 C.F.R. Part 559 (2014) (facility license notifications and submissions). No such license has been granted nor have any licensing procedures been started with respect to the Tribe's Kansas trust land. (Ex. D ¶¶ 6-11.) By seeking emergency injunctive relief, the State is ignoring the complexity and extent of the regulation of tribal gaming.

[16] To avoid dismissal based on sovereign immunity, a plaintiff must allege that the official acted in violation of federal law and therefore outside any delegated authority. *See Pearlman v. Vigil-Giron*, 71 F. App'x. 11, 15 (10th Cir. 2003). For a court to invoke the *Ex parte Young* exception, a plaintiff's allegations of a violation of federal law must have some merit, and must not be frivolous. *See Muscogee (Creek) Nation v. Pruitt*, 669 F.3d 1159, 1167 (10th Cir. 2012). In *Pearlman*, the Tenth Circuit rejected a plaintiff's *Ex parte Young* argument because the claim to a constitutional right to write-in voting was frivolous. *See* 71 F. App'x at 16. In this case, as in *Pearlman*, the States' allegations of an ongoing violation of IGRA are nothing more than unsupported assertions.

the essence of the State's contention is that an Indian tribe cannot change the use of trust land from its stated intentions at the time a fee-to-trust application is filed, which has no basis in the law. Additionally, a tribe's statement of its intended use of land at the time a fee-to-trust application is filed is a matter between the tribe and the federal government. Further, the State's contentions are disproved by the undisputed fact that the use of the land remains unchanged. Regardless, the State cannot as a matter of law based a *Young* claim on a civil *equitable remedy*, and its claim is legally irrelevant in this analysis.

The *Ex parte Young* doctrine rests on the theory that governmental officers are stripped of their authority to act when in violation of the supreme authority of federal law. *See Ex parte Young*, 209 U.S. at 160, 28 S. Ct. at 454. An equitable remedy arising under civil common law is not a "supreme authority of federal law," and thus does not strip an official's sovereign immunity protection when acting under tribal authority.[17] Without an ongoing violation of federal law "the 'need to promote the supremacy of federal law' underlying the *Ex Parte Young* exception is absent." *Stewart*, 57 F.3d at 1553 (quoting *Pennhurst State School & Hosp.*, 465 U.S. at 101, 104 S. Ct. at 908). To hold that an equitable remedy prohibits a tribal official from acting under tribal authority, and under the protection of sovereign immunity, would be an intrusion on tribal sovereignty. Thus, *Ex parte Young* is inapplicable in a suit against tribal

[17] *See Pennhurst State Sch. & Hosp.*, 465 U.S. at 106, 104 S. Ct. at 911 (noting violation of state law cannot be held to invoke the *Ex parte Young* doctrine because state law is not the supreme federal authority which strips an official of his sovereign immunity protection); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 69 S. Ct. 1457 (1949) (holding a tort claim is insufficient to strip away the sovereign immunity of an officer); *see also Green v. Mansour*, 474 U.S. 64, 68, 106 S. Ct. 423, 426 (1985) (denying application of *Ex parte Young* because notice relief is not an ongoing violation of federal law); *Johns v. Stewart*, 57 F.3d 1544, 1552 (10th Cir. 1995) (rejecting application of the *Ex parte Young* doctrine because it was only designed to end continuing violations of *federal* law, without which, a suit is merely a suit against a state).

governmental officials that is based upon the remedy of equitable estoppel.

In *Larson v. Domestic & Foreign Commerce Corp.*, the Supreme Court explored whether allegations in a tort claim—a civil action similar to estoppel—could be sufficient to strip away the sovereign immunity of an officer, and the Supreme Court held it could not. *See Larson*, 337 U.S. at 695, 69 S. Ct. at 1464. The court reasoned that even if a wrong can be established by the plaintiff,

> "it does not establish that the officer, in committing that wrong, is not exercising the powers delegated to him by the sovereign. If he is exercising such powers the action is the sovereign's and a suit to enjoin may not be brought unless the sovereign has consented."

*Larson*, 337 U.S. at 693, 69 S. Ct. at 1463. The court further held "if the actions of an officer do not conflict with the terms of his valid statutory authority, then they are the actions of the sovereign, whether or not they are tortious under the general law." *See id.* 337 U.S. at 695, 69 S. Ct. at 1464.

Akin to a tort or state law, equitable estoppel is not a "supreme authority" that can strip away sovereign immunity. Equitable estoppel "rather than being an actual cause of action, is more precisely characterized as an equitable doctrine that suggests a tort-related theory." 28 Am. Jur. 2d *Estoppel & Waiver* § 28 (2015). Estoppel cannot be used to obtain results that are forbidden by a statute or are contrary to a law. *See Am. Sur. Co. of New York v. Gold*, 375 F.2d 523, 528 (10th Cir. 1966). Moreover, the right to object for a want of subject-matter jurisdiction cannot be lost by estoppel. *See* 28 Am. Jur. 2d *Estoppel & Waiver* § 31. Much more is required—an actual violation of a federal statute—for an application of *Young* in this context, as courts have recognized.[18] Thus, equitable estoppel cannot be used to strip away the sovereign

[18] For example, in *Afzall ex rel. Afzall v. Commonwealth*, 639 S.E. 2d 279 (Va.

immunity of tribal officials, and cannot be used to create subject matter jurisdiction, because it is not a supreme federal authority.[19]

Further, the State's theory lacks any force in even suggesting that a violation of federal law has occurred. Equitable estoppel can apply only when the party knowingly misrepresents facts. *See Tsosie v. United States*, 452 F.3d 1161, 1165-66 (10th Cir. 2006). When the Tribe submitted its application to have the land taken into trust, the purpose stated—that of non-gaming purposes—was consistent with the intent of the Tribe at that time, and, in fact, the use of the land remains unchanged. Further, a party to be estopped "must intend that his [or her] conduct will be acted upon or must so act that the party asserting the estoppel has the right to believe that it was so intended." *Spaulding v. United Transp. Union*, 279 F.3d 901, 909 (10th Cir. 2002). The so-called representations at issue were made in an application to the BIA, not to the State. No matter the Tribe's intentions, the land into trust analysis under § 2719(a)(2)(B) and

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2007), the court correctly reasoned that subject matter jurisdiction "can only be acquired by virtue of the Constitution or some statute" and the right to object for a want of jurisdiction cannot "be lost by acquiescence, neglect, estoppel or in any other manner." *Id.* at 282.

[19] Historically the *Ex parte Young* exception has been applied only to federal *statutory* violations. *See Ex parte Young*, 209 U.S. at 167, 28 S. Ct. at 457 (noting immunity cannot extend when in violation of the supreme authority of the United States, that being the specific provisions of the Constitution itself); *see also Worcester County Trust Co. v. Riley*, 302 U.S. 292, 296-97, 58 S. Ct. 185, 186-87 (1937) (noting "generally suits to restrain action of state officials can, consistently with the constitutional prohibition, be prosecuted only when the action sought to be restrained is without the authority of state law or contravenes the statutes or Constitution of the United States"); *Cory v. White*, 457 U.S. 85, 90-91, 102 S. Ct. 2325, 2329 (1982) (upholding *Worcester* and refusing to narrow the Eleventh amendment to apply when an official acting under authority of the sovereign is not violating the statutes or Constitution of the United States).

While the Tenth Circuit used federal common law to apply the *Ex parte Young* exception in *Crowe & Dunlevy, P.C. v. Stidham*, its holding was based on clear Supreme Court precedent "recognized as the supreme law of the United States," not an equitable remedy. *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1156 (10th Cir. 2011). Moreover, the court did not address or differentiate the binding Supreme Court precedent set forth in *Riley*.

25 C.F.R. § 292.4(b)(2) remains the same, and involved a decision by the Secretary of the Interior by and through the BIA, not the State of Kansas.

Furthermore, equitable estoppel must "rest on substantial grounds of prejudice or change of position, not on technicalities." *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 323, 56 S. Ct. 466, 472 (1936). The State alleges only that it "did not have the opportunity to be fully heard" during the land into trust application process. (ECF No. 15, at 13.) This is not a detrimental injury, but a mere technicality.[20]

Even assuming any representations by the Tribe in its land-into-trust application could serve as the basis of some claim, such representation would be at most, a single occurrence, not an ongoing violation, and therefore could not be sufficient to invoke the *Ex parte Young* doctrine. *See Breard v. Greene*, 523 U.S. 371, 378, 118 S. Ct. 1352, 1356 (1998) (holding *Ex parte Young* did not apply when a federal official did not provide notice to a foreign consulate of an arrest, even though rights may have been lost, because failure to notify was a single occurrence in the past and was not ongoing). The representations the State relies on in its equitable estoppel claim are not a violation of federal law, are insufficient to establish estoppel, and are nothing more than a single occurrence.

Kansas cannot establish any ongoing and recurring violation of a federal law by the Tribe or its officers, and it cannot sustain a claim under *Ex parte Young*, as a matter of law. A claim of

[20] The State has no evidence that it would not have otherwise taken such a position in an application for gaming purposes. To the contrary—and as referenced by the United States in the brief supporting its motion to dismiss—the State did not cite any tribal representations as a reason for the withdrawal of their opposition in its withdrawal letter. (ECF No. 15-3; ECF No. 43, at 31.) Rather, the State stated it made the decision to withdrawal its opposition only after consultation with local community leaders and residents determined such withdrawal would be in the "best interest" of the State, as it could "strengthen our working relationship with the tribe" and "help our county grow." (ECF No. 15-3.)

estoppel cannot be used to invoke the *Young* exception in this case under any view of the law.

### C. The State's Asserted "Violation" of Federal Law Actually Involves an Impermissible Challenge to the Letter Opinion, With Which the Tribal Defendants Have No Nexus

The State also cannot satisfy the requirements of *Young*, because the Tribal officers being sued have no connection with, or authority concerning, the asserted "violation" of federal law—an advisory opinion issued by an attorney at the NIGC, the substance or conclusions of which the State disputes. The State has sued nearly every individual whose name appears on the internet as an officer or director of an enterprise of the Tribe, without any investigation as to their roles or duties within the Tribe. In fact, none of these individual Tribal officials are committing an ongoing violation of federal law, nor do any of them have any nexus to the "violations" alleged by the State, which involve positions taken by an attorney at a federal agency.

An official must have a particular duty to commit the ongoing violation and demonstrate a willingness to exercise that duty. *See Peterson v. Martinez*, 707 F. 3d 1197, 1205 (10th Cir. 2013). The mere "fact that the [tribal] officer, by virtue of his [or her] office, has some connection with the enforcement of the act, is the important and material fact." *Ex parte Young*, 209 U.S. at 157, 28 S. Ct. at 453. However, the Tribal officials named by the State in this suit are not officials with duties to commit the ongoing violations of federal law alleged by the State—namely, the issuance by counsel at the NIGC of an advisory opinion that the Tribe's Kansas trust land is eligible for gaming.

Making clear that it is the conclusions in the NIGC attorney's opinion letter that are at issue in this case, the State alleges that the Department of Interior's interpretation, and the NIGC's application, of certain sections of the IGRA was arbitrary and capricious. (ECF No. 13 ¶ 37, at 14-15.) The State also contends that the Department of Interior failed to consider case

law in its enactment of federal regulations. (ECF No. 13 ¶¶ 43-45, at 16.) The State in general claims that NIGC wrongly applied the law and did not consider all facts when issuing an opinion letter determining the tribe's land is eligible for gaming operation under the IGRA. But none of these claims allege any wrongdoing by the Tribal parties or any violation of federal law. The Tribal officers named as defendants in this case took no part in enacting or applying or interpreting the federal regulations, or in issuing the opinion letter. These alleged "violations" cannot remotely be ongoing violations of federal law by the Tribe or its officers.

In a similar case, *Peterson v. Martinez*, the Tenth Circuit held the *Young* doctrine inapplicable to the director of the Colorado Department of Public Safety because that officer had no connection with enforcement of a statute prohibiting sheriffs from issuing concealed handgun licenses to non-state residents. *See id*. 707 F.3d at 1205. The court held for the exception to apply, an officer must have the particular duty to enforce the statute in question and demonstrate the willingness to exercise that duty. *See id.* In this case, as in *Martinez*, the Tribal officials do not have a nexus to the alleged activities nor have any demonstrated a willingness to commit a violation of federal law.

Similarly, in *Day v. Sebelius*, a group of university students sued the governor of Kansas and other state officials seeking to enjoin the parties from enforcement of a statute allowing illegal aliens to attend state universities. *See id.* 376 F. Supp. 2d 1022, 1025 (D. Kan. 2005), *aff'd sub nom. Day v. Bond*, 500 F.3d 1127 (10th Cir. 2007). In that case, this Court held that because the governor was not involved in the enforcement of the statute, she could not be sued in the action. *See id.* at 1031. The Court reasoned that "general enforcement power . . . is not sufficient to establish the connection to the statute required to meet the *Ex parte Young* exception." *Id.* Even if the Tribe was conducting class II gaming on its Kansas trust land, the

IGRA makes clear that this would be a matter to be addressed between the Tribe and the NIGC, and that Kansas would have no jurisdiction over such gaming, and therefore such an activity could not be a *violation of federal law* for purposes of this analysis. Even general enforcement power over Tribal gaming—which many of the named Tribal officers and directors lack—would in that instance be insufficient to support a claim under a *Young* theory.

The State cannot, as a matter of law, identify any ongoing and recurring violation of federal law sufficient to support an officer suit. Because the State cannot identify a violation of federal law committed by the Tribal parties, the *Young* exception cannot apply as a matter of law.

## III. THIS COURT LACKS SUBJECT MATTER JURISDICTION OVER THIS ACTION BECAUSE CONGRESS DID NOT INTEND FOR STATES TO CIRCUMVENT IGRA BY INVOKING *EX PARTE YOUNG*

The *Ex parte Young* exception is not broadly applied to any and all suits against governmental officers, as the State's action suggests, and could not be properly applied in this case even if the State could assert a violation of IGRA or some other "violation of federal law." As a key step in the analysis when *Young* is asserted, federal courts "examine Congress' stated intent with respect to the scope of statutory remedies" to determine "whether Congress has expressed an intent, through some kind of statutory scheme, to limit or prevent potential remedies in a private cause of action." *Lafaver*, 150 F.3d at 1189; *see also Ellis v. Univ. of Kansas Med. Ctr*., 163 F.3d 1186, 1197 (10th Cir. 1998). In this case, Congress created an intricate statutory remedial scheme with respect to the enforcement of gaming activities by tribes, which provides the remedies it intended, and which thereby prevents an application of *Young*.

In order to create a federal right of action, a statute must reflect Congress's clear intent to benefit directly the particular plaintiff in the case. *See Lewis v. New Mexico Dept. of Health*, 261

F.3d 970, 977 (10th Cir. 2001). The only federal statute the State has alleged the Tribe has violated is the IGRA, which, as courts have definitively held, does not create a right of action by states against tribes with respect to class II gaming activities.[21] As have others, this Court has recognized that IGRA limits the causes of action available to states to those specifically enumerated in the IGRA. *See Hartman v. Kickapoo Tribe Gaming Comm'n*, 176 F. Supp. 2d 1168, 1175 (D. Kan. 2001), *aff'd*, 319 F.3d 1230 (10th Cir. 2003). As this court explained, "[h]ad Congress intended [any other] cause of action under IGRA, it would have provided for it explicitly." *Id.*

In *Oklahoma v. Hobia*, the Tenth Circuit ordered a case dismissed with prejudice for lack of subject matter jurisdiction where the state failed to allege a violation of federal law. *See Hobia*, 775 F.3d at 1213. The court held that "[a]lthough the State's complaint alleges the defendants' efforts to conduct class III gaming violated IGRA . . . the fact of the matter is, as *Bay Mills* clearly held, that IGRA is concerned only with Class III gaming on Indian lands." *Id.* (citing *Bay Mills Indian Community*, 134 S. Ct. at 2032). Thus, the circuit held that the state had failed to state a claim for relief under the IGRA, and rejected the state's motion for a preliminary injunction. *See id.* at 1214. Here, as held in *Hobia*, the IGRA does not grant a right to the State to enjoin gaming activities. Congress, accordingly, did not intend for states to have the right to bring such an action through an *Ex parte Young* exception.

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[21] *See Seminole Tribe of Florida*, 181 F.3d at 1245-46 (states have "no implied right to action under IGRA for injunctive or declaratory injunctive relief"); *Narragansett Indian Tribe*, 19 F.3d at 690 ("[a]s a practical matter, then, a state ordinarily may regulate casino gambling on Indian lands only in pursuance of a consensual compact"); *Seneca-Cayuga Tribe v. State ex rel. Thompson*, 874 F.2d 709, 713 (10th Cir. 1989) (states have no interest in gaming activities conducted on Indian lands); *Neighbors of Casino San Pablo v. Salazar*, 773 F. Supp. 2d 141, 148 (D.D.C.), *aff'd*, 442 F. App'x 579 (D.C. Cir. 2011) (noting decision to take an enforcement action for illegal gaming absent a tribal-state compact is the NIGC's, and neither a court nor state can compel the NIGC to undertake such enforcement actions).

Congress's intent to prohibit claims by states over class II gaming activities on Indian lands is even clearer upon a review of the IGRA's intricate remedial scheme constructed by Congress. When such a detailed remedial scheme is in place, the *Ex parte Young* doctrine should not be applied. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 74, 116 S. Ct. 1114, 1132 (1996). The Supreme Court has expressly held the IGRA's intricate remedial scheme prohibits use of the *Ex parte Young* doctrine for claims arising under the act. *See id.* 517 U.S. at 75-76, 116 S. Ct. at 1133. The Court stated that applying the *Young* doctrine would effectively rewrite IGRA's statutory scheme, an action courts have no authority to carry out. *See id.* 517 U.S. at 76, 116 S. Ct. at 1133. This precedent is directly applicable in this case, and would prevent the application of *Young*, even if the State could satisfy the other requirements for an application of the doctrine.

Congress has set forth a comprehensive structure for the regulation of gaming on Indian lands, which does not include granting states the authority to enjoin tribal gaming activities on Indian lands where no tribal-state compact is present and where no class III gaming is underway. *See* 25 U.S.C. §§ 2710 & 2714. As one court explained,

> "IGRA includes a number of express rights, and some of those go directly to states, but those that go to states come from tribal-state compacts . . . . These provisions of IGRA demonstrate that Congress carefully allocated regulatory and enforcement authority for tribal gaming among the federal government, the states, and the tribes. In short, IGRA explicitly gives states an enforcement role, but only through agreed-upon terms negotiated between the state and the tribe and embodied in the tribal-state compact . . . ."

*PCI Gaming Authority*, 15 F. Supp. 3d at 1188 n.28. Congress established a careful balance of authority between governments in the regulation of tribal gaming in the IGRA. If Congress had intended for states to enjoin class II gaming on Indian lands, it would have explicitly provided for it. To grant the State the right to regulate tribal gaming on Indian lands without a compact

through the use of the *Ex parte Young* doctrine would be contrary to the designed intent of Congress. *See Bay Mills Indian Cmty.*, 134 S. Ct. at 2039 (refusing to rewrite the IGRA by creating a new exception to the waiver of sovereign immunity in the IGRA because such holding would usurp Congress's policy judgment).

The Tribe's sovereign immunity cannot be circumvented by invoking the *Ex parte Young* against Tribal officials in this case, and in particular in an effort by the State to prevent the Tribe from engaging in class II gaming at some point in time in the future. Therefore, the State's purported claims against the Tribal entities and the 18 governmental officers and directors are covered within the regulatory regime incorporated under the IGRA, and the statute cannot be overridden by an application of *Young*.

**CONCLUSION**

The State's claims against the three Tribal entities are claims *against the Tribe* barred by sovereign immunity. Additionally, the State cannot pursue suits against individual Tribal officers and directors in this case because the doctrine of *Ex parte Young* may not be applied to contravene the comprehensive regulatory regime established by Congress under the IGRA. Further, the State could not, in any event, satisfy the requirements for invoking the Young doctrine. For the foregoing reasons, the claims against the three Tribal entities and the 18 individual Tribal officers and directors asserted in the Amended Complaint should be dismissed for lack of subject matter jurisdiction.

Respectfully submitted,

s/ Paul M. Croker

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** Admitted pro hac vice.*

**CERTIFICATE OF SERVICE**

I hereby certify that on this the 15th day of June, 2015, I electronically transmitted a full, true, and correct copy of the above and foregoing instrument, the "BRIEF OF EIGHT QUAPAW TRIBAL GOVERNMENTAL PARTIES IN SUPPORT OF MOTION TO DISMISS," to the Clerk of Court using the Electronic Case Filing System (the "ECF System") for filing and transmittal of a Notice of Electronic Filing to the filing following ECF registrants (names only):

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A full, true, and correct copy of the above and foregoing was also on the same date deposited in the regular United States mail, with proper postage fully prepaid thereon, addressed to the following:

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## APPENDIX OF EXHIBITS

The following exhibits are hereby submitted in support of the "BRIEF OF TEN QUAPAW TRIBAL GOVERNMENTAL PARTIES IN SUPPORT OF MOTION TO DISMISS."

| Exhibit No. | Title/Description |
|---|---|
| A. | Declaration of John L. Berrey, Chairman, Quapaw Tribe of Oklahoma (June 15, 2015). |
| B. | Declaration of Marilyn Rogers, Chairman, Quapaw Casino Authority of the Quapaw Tribe of Oklahoma (O-Gah-Pah) (June 12, 2015). |
| C. | Declaration of Rodney Spriggs, President, Quapaw Tribal Development Corporation (June 12, 2015). |
| D. | Declaration of Barbara Kyser Collier, Director, Quapaw Tribal Gaming Agency (June 12, 2015). |
| E. | Letter from Eric N. Shepard, Acting General Counsel, National Indian Gaming Commission, to Stephen R. Ward, Conner & Winters, LLP (Nov. 21, 2014). |