IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

COMANCHE NATION	)	
OF OKLAHOMA	)	
584 NW Bingo Road	)	
Lawton, OK 73502	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. CIV-17-887-HE**
	)	
RYAN ZINKE	)	
Secretary	)	
U.S. Department of the Interior	)	
1849 C Street NW	)	
Washington, DC 20240	)	
	)	
JAMES CASON	)	
Acting Deputy Secretary	)	
U.S. Department of the Interior	)	
1849 C Street NW	)	
Washington, DC 20240	)	
	)	
JONODEV CHAUDHURI	)	
National Indian Gaming Commission	)	
90 K Street, N.W. Suite 200	)	
Washington, D.C. 20002	)	
	)	
EDDIE STREATER	)	
Regional Director	)	
Bureau of Indian Affairs,	)	
Eastern Oklahoma Region	)	
3100 W. Peak Boulevard	)	
Muskogee, OK 74401	)	
	)	
Defendants.	)	
	)	

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

I. INTRODUCTION

1. The Comanche Nation of Oklahoma brings an action for declaratory and injunctive relief voiding a recent trust acquisition in Jefferson County, Oklahoma by the U.S. Department of Interior ("Department") for the benefit of the Chickasaw Nation ("Chickasaw" or "Chickasaw Nation"), and necessarily preventing any licensure of the planned casino, for failure to adhere to (a) longstanding jurisdictional requirements for taking land into trust for the benefit of Indian Tribes; and (b) requirements of the National Environmental Policy Act ("NEPA") relating a trust acquisition for gaming purposes.

2. The acquisition for the benefit of the Chickasaw Nation in Jefferson County is the latest in a long series of trust acquisitions for gaming purposes in Oklahoma made by the Departmental officials without any showing that the Chickasaw had governmental jurisdiction of the land sought to be acquired in trust, a fundamental requirement for Tribes outside the State seeking to have land acquired in trust for their benefit.

3. The longstanding failure of Departmental officials and designees to adhere to fundamental requisites of federal law and policy with respect to dozens of

trust acquisitions for Indian gaming purposes in the State has enabled the Chickasaw and others of the "Five Civilized Tribes" (FCT) to corner the lion's share of an Indian gaming market in the State generating some $4.3 Billion annually. Sophisticated analyses of likely net revenue from gaming facilities opened over the years with the help of compliant BIA officials suggest that the Chickasaw Nation alone has managed to accumulate more than $10 Billion in cash reserves held in the United States and abroad.

4. The tremendous economic success the FCT have enjoyed – frequently at the expense of others among the 39 federally recognized Tribes in the State – is attributable to gaming operations which they owe in substantial part to cooperative BIA officials willing to ignore or bend the fundamental attribute of governmental jurisdiction with respect to lands targeted for acquisition, and very often the requirements of NEPA as well.

II. JURISDICTION AND VENUE

5. The Court has jurisdiction of the controversy pursuant to the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*, 28 U.S.C. § 1331, 1362 and 2201.

6. Venue lies pursuant to 28 U.S.C. § 1391(e), in that a substantial part of the events giving rise to the claim occurred in this judicial district.

III. THE PARTIES

7. Plaintiff Comanche Nation of Oklahoma ("Comanche" or "Nation") is a federally recognized Indian Tribe headquartered in Lawton, Oklahoma. *See* Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 82 Fed. Reg. 4915, 4916 (Jan. 17, 2017).

8. The Comanche have several Class III gaming operations on trust lands in Southwest Oklahoma pursuant to a State-Tribal Compact ("Compact") with the State of Oklahoma, all located on lands that have been in trust for more than a century. Three of the Nation's four casinos are of modest size, and the fourth is a medium sized operation located less than 45 miles from the latest trust acquisition on behalf of the Chickasaw: The Nation is therefore a "nearby Tribe" within the meaning of the Compact and eligible for prospective revenue from a Chickasaw casino in Jefferson County acquired in violation of law and policy. The Nation also has plans for a gaming operation to be located little more than ten miles away from the Chickasaw site in Jefferson County.

9. Defendant Ryan Zinke is Secretary of the U.S. Department of the Interior. He is named in his official capacity.

10. Defendant James Cason is Acting Deputy Secretary of the U.S. Department of the Interior. He is named in his official capacity.

11. Defendant Jonodev Chaudhuri is Chair of the National Indian Gaming Commission. He is named in his official capacity.

12. Defendant Eddie Streater is Regional Director for the Bureau of Indian Affairs' Eastern Oklahoma Region. He is named in his official capacity.

Upon information and belief, the Nation also alleges the following:

IV. FACTS

A. IRA, OIWA, IMPLEMENTING REGULATION AND THE "OKLAHOMA EXCEPTION" TO IGRA

13. Congress enacted the Indian Reorganization Act in 1934, the Oklahoma Indian Welfare Act two years later, both in order to help ameliorate the effects of the General Allotment Act of 1887, and the Curtis Act of 1898 (which extended the disastrous allotment policy to reservation lands of the Five Civilized Tribes), which together caused some 90 million acres to pass out of Indian ownership.

14. Congress thereby delegated authority to the Department to acquire communal tribal lands in trust for tribes, which were expected to be devoted primarily to agriculture. Indeed, the OIWA specifically required any lands

acquired to be suitable for "agricultural purposes."

15. Perhaps because very little controversy attended efforts to help Tribes rebuild communal land bases in the years following passage of the IRA and OIWA, it was not until September 1980 that the Department first promulgated regulations relating to land acquisitions in trust for Indian Tribes. "Land Acquisitions", 48 Fed. Reg. 62034 (September 18, 1980).

16. In the regulation promulgated as 25 C.F.R. Part 120a, the Department defined "Indian reservation" in terms similar to those Congress was later to use apply respect to the "Oklahoma exception" to the restriction against gaming on lands acquired after passage of the Indian Gaming Regulatory Act. *See* 25 U.S.C. § 2719(a)(2) (gaming permitted if "the Indian tribe has no reservation on the date of enactment ... and – (A) such lands are located in Oklahoma and – (i) are within the boundaries of the Indian tribe's **former reservation**, as defined by the Secretary ...." (emphasis added)).

17. § 120a.2(f) of the regulations promulgated in September 1980 provided as follows:

> "Indian reservation" means that area of land **over which the tribe is recognized by the United States as having governmental jurisdiction**, except that, in the State of Oklahoma or where there has been a final judicial determination that a reservation has been disestablished

> or diminished, "Indian reservation" means that area of land constituting the **former reservation** of the tribe as defined by the Secretary (emphases added).

Id. at 62036.

18. The drafters of Part 120a explained that "[p]roblems with the definition of an 'Indian reservation' ... were perceived by many because of the possible implication that the disestablishment or total allotment of a reservation extinguished the reservation, or because the boundaries of some reservations is pending determination... [L]anguage [plainly extending acquisition authority to lands within former reservations] has been inserted to resolve these problems." 48 Fed. Reg. at 62035.

19. The Department was intent on ensuring that Tribes in Oklahoma in particular – where common wisdom long held that reservations had been subject to allotment and disestablished by 1906 – would have the same status and opportunity as Tribes elsewhere with respect to trust acquisitions.

20. 25 C.F.R. Part 151 succeeded Part 120a, and incorporated the same definition of "Indian reservation", reflecting the same concern that Oklahoma Tribes stand on the **same** footing as Tribes elsewhere:

> * * * Indian reservation means that area of land **over which the tribe is recognized by the United States as having governmental jurisdiction**, except that, in the

> State of Oklahoma or where there has been a final judicial determination that a reservation has been disestablished or diminished, Indian reservation means that area of land constituting the **former reservation** of the tribe as defined by the Secretary. (emphases added)

Id., § 151.2(f).

21. IGRA's legislative history also shows that, in carving out the "Oklahoma exception" to gaming eligibility for post–1988 trust acquisitions, Congress was motivated by the same determination to have Oklahoma Tribes stand on the **same** footing as Tribes elsewhere. *See* Senate Report No. 99-493, "To Establish Federal Standards and Regulations for the Conduct of Gaming Activities on Indian Reservations and Lands and for Other Purposes" (September 24, 1986) p. 10 ("[IGRA] treats these Oklahoma tribes the same as all other Indian tribes. This section is necessary ... because of the unique historical and legal differences between Oklahoma and tribes in other areas.")

22. However, the evidence of many years shows that the Five Civilized Tribes in particular, with the cooperation of friendly, if not collusory, BIA officials, have stood on a footing far **superior** to Tribes elsewhere: Tribes outside Oklahoma plainly must show, with respect to any on–reservation trust acquisition, that it relates to "an area of land over which the Tribe is

recognized by the United States as having governmental jurisdiction ...." 25 C.F.R. § 151.2(f).

23. In Oklahoma dozens of trust acquisitions for gaming purposes have taken place without regard to the existence of "governmental jurisdiction," even after the Department proposed regulations specifically incorporating the requirement. *See "Gaming on Trust Lands Acquired After October 17, 1988",* 71 Fed. Reg. 58769 (October 5, 2006), at 58772 ("Former reservation means lands that are within the jurisdiction of an Oklahoma Indian tribe and that are within the boundaries of the last reservation of that tribe in Oklahoma ....").

24. The Department ultimately revised the definition of "former reservation", by omitting the specific requirement of governmental jurisdiction. *See* 25 C.F.R. § 292.2 ("lands in Oklahoma that are within the exterior boundaries of the last reservation ..."), an arbitrary and capricious departure from longstanding policy to have Oklahoma Tribes stand on an equal - not superior - footing with Tribes elsewhere.

25. The Department's only comment with respect to the modification was a misstatement, to the effect that "the definition clarifies that the last reservation be in Oklahoma, which is consistent with the language of the

statute." 73 Fed. Reg. 29356 (May 20, 2008). The version proposed two years before plainly defined "former reservation" by reference to lands "within the boundaries of the last reservation of that tribe in Oklahoma ....") 71 Fed. Reg. at 58772.

26. By ignoring the fundamental requirement of governmental jurisdiction over lands targeted for acquisitions in trust, BIA officials moved the goal line so close to the Chickasaw and other privileged tribes in Oklahoma that they have needed only to fall into the end zone and open up shop, secure in the knowledge that the score was virtually certain to hold up without any replay. For, once land was in trust, the acquisition was commonly thought to be unassailable for any reason.

27. However, in *Match-E-Be-Nash-She- Wish Band of Pottawatomi Indians v. Patchak* ("*Patchak")*, 567 U.S. 209 (2012), the Supreme Court opened the way to challenging trust acquisitions for Indian gaming long considered beyond review: The Court held that the Administrative Procedure Act's waiver of the U.S. Government's immunity applied to a suit challenging a trust acquisition for Indian gaming. Since Mr. Patchak did not seek to quiet title in his own right, the federal Quiet Title Act and its reservation of sovereign immunity with respect to Indian lands did not serve to bar suit

under the APA.

28. BIA and tribal officials concerned about acquisitions in trust made in violation of law and policy could not have taken comfort in the implications of the late Justice Scalia's simple but profound question in *Patchak*: "What if [BIA officials] lied?" There can be little doubt this influential justice was of the considered opinion there should be recourse.

B. THE CHICKASAW NATION HAS A RESERVATION IN OKLAHOMA

29. The United States Congress treated the Five Civilized Tribes and their reservation lands in virtually identical fashion. The U.S. Court of Appeals for the Tenth Circuit, after reviewing the history of Congress' dealings with the Creek Nation in particular, has squarely held that "Congress has not disestablished the Creek Reservation", *Murphy v. Royal*, Nos. 07-7068 & 15-7041 (10th Cir. August 8, 2017), slip op. at 126, and that a crime committed on a restricted trust allotment within its bounds is necessarily outside the jurisdiction of the Oklahoma courts. *Ibid. Cf. Montana v. United States*, 450 U.S. 544, 563-67 (1979) (non–Indian fee lands within bounds of reservation **not** subject to tribal jurisdiction).

30. IGRA restricts gaming on lands acquired after the date of its enactment –

October 17, 1988 – in most relevant part as follows:

> [G]aming regulated by this Act may not be conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe after the date of enactment of this Act unless –
>
> * * *
>
> (2) **the Indian tribe has no reservation on the date of enactment** ... and –
>
> (A) such lands are located in Oklahoma and –
>
> (I) are with the boundaries of the Indian tribe's former reservation, as defined by the Secretary .... (emphasis added).

Id., § 2719(a).

31. The plain import of the groundbreaking *Murphy* decision is that Congress has **never disestablished** the Chickasaw Reservation: IGRA's "Oklahoma exception" with respect to lands of "former reservations" in the State is not applicable to the purported trust acquisition for the benefit of the Chickasaw Nation in Jefferson County.

32. Tribes outside Oklahoma seeking to have lands acquired in trust that are within its reservation boundaries, but not subject to Tribal jurisdiction, as an "off-reservation" acquisition pursuant to the after–acquired lands exception set forth by 29 U.S.C. § 2719(b)(1)(A) (requiring Secretary's approval and concurrence by Governor of State). The Chickasaw lands in Jefferson County are subject to the **same** "off–reservation" acquisition requirements.

C. NATIONAL ENVIRONMENTAL POLICY ACT

33. NEPA, 42 U.S.C. §§ 4321 *et seq.*, and its implementing regulations, 40 C.F.R. §§ 1500 *et seq.*, require federal agencies to evaluate the environmental and socioeconomic impacts of any "major federal action" that significantly affects the quality of the human environment. 42 U.S.C. § 4332; 40 C.F.R. § 1508.14; *see generally* 40 C.F.R. §§ 1500 *et seq*.

34. Agencies generally do so by preparing an Environmental Assessment and/or an Environmental Impact Statement. 42 U.S.C. § 4332(2)(c); 40 C.F.R. §§ 1501.3, 1501.4, and 1502.4.

35. However, if the project involves no "change in use", the applicant is entitled to a "categorical exemption" (or "Cat Ex") from meeting such requirements, 40 C.F.R. § 1508.4, which frequently entail very significant time and resources.

36. BIA officials in the FCT Eastern Regional have frequently greased the skids for the Five Civilized Tribes by according their projects "Cat Ex" determinations – thereby relieving them the requirements of NEPA – for trust acquisitions obviously intended for Indian gaming operations: This has taken place several dozen times. During the same period, BIA required other Tribes in Oklahoma to declare the intended use.

37. Even if BIA has not accorded a "Cat Ex" determination with respect to the purported trust acquisition in Jefferson County, the lack of any notice in the public record thus far suggests that any Environmental Assessment resulted in a Finding of No Significant Environment Impact ("FONSI"), which obviates the need for a time consuming and expensive Environmental Impact Statement.

38. Yet there are a number of very likely and serious environmental impacts and risks associated with the Chickasaw's latest gaming venture : A multimillion dollar bridge spanning the Red River – which lies between the Chickasaw site and the gaming market in Texas – must have been related to the impending casino in Jefferson County; the project has thus far required creation of several "sewage lagoons" so large they are visible from space.

39. Any eventual review of NEPA "compliance" efforts should reveal multiple violations of NEPA law and regulation, including the following:

• 40 CFR § 1501.4(b) (requiring agencies to involve environmental agencies, applicants, and the public, to the extent practicable);

• *Id*. § 1501.4(e)(1) (requiring agencies to make FONSIs

available to the affected public);

• *Id.* § 1501.4(e)(2) (requiring agencies to make FONSIs available for public review for thirty days before making any final determination on whether to prepare an EIS or proceed with an action);

• *Id.* C.F.R. § 1506.5 (making agencies responsible for the accuracy of environmental information submitted by applicants for use in Environmental Assessments and Environmental Impact Statements); and

• *Id.* § 1506.6 (requiring agencies to make diligent efforts to involve the public in preparing and implementing their NEPA procedures).

V. CLAIMS

A. ADMINISTRATIVE PROCEDURE ACT

40. The allegations set forth in paragraphs 1 through 39 are incorporated herein by reference.

41. The Department's acquisition of land in trust for the Chickasaw Nation plainly intended for Indian gaming purposes, without adhering to mandatory requirements for such an acquisition, was arbitrary and capricious, an abuse

of discretion and otherwise in violation of law.

B. NATIONAL ENVIRONMENTAL POLICY ACT

42. The allegations set forth in paragraphs 1 through 24 are incorporated herein by reference.

43. The United States approved the trust acquisition in Jefferson County without complying with mandatory requirements of the National Environmental Policy act, thereby rendering the acquisition void *ab initio.*

VI. PRAYER FOR RELIEF

WHEREFORE, the Comanche Nation of Oklahoma respectfully requests that this Court:

A. Declare, adjudge and decree that final agency action taken by the U.S. Department of the Interior to acquire land in trust for the benefit of the Chickasaw Nation in Jefferson County, Oklahoma was arbitrary and capricious, an abuse of discretion and otherwise in violation of law;

B. Declare, adjudge and decree that the Warranty Deed for the land in Jefferson County approved and accepted by the Regional Director on or about January 19, 2017 is void *ab initio*, and without legal effect.

C. Enjoin the U.S. Department of Interior to direct the Chickasaw Nation against any further development activity on the land subject to the Deed.

D. Enjoin the National Indian Gaming Commission from approving any tribal gaming ordinance or otherwise furthering efforts to conduct gaming operations on the lands in Jefferson County, Oklahoma.

E. Grant Plaintiff an award of attorney fees and costs; and

F. Grant such additional relief as the Court may deem just and proper.

Respectfully submitted this 17th day of August, 2017,

/s/ Richard J. Grellner
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