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

1.	KIALEGEE TRIBAL TOWN and	)	
2.	RED CREEK HOLDINGS, LLC	)	
		)	
	Plaintiffs,	)	
		)	
vs.		)	No. 17-CV-478-CVE-FHM
		)	
1.	KEVIN DELLINGER, Attorney General of the Muscogee (Creek) Nation,	)	
2.	ROBERT HAWKINS, Chief of Police of the Muscogee Creek Lighthorse,	)	
3.	DANIEL WIND III, Deputy Chief of Police of the Muscogee Creek Lighthorse,	)	
4.	JOEY COMSTOCK, Captain of Investigation of the Muscogee Creek Lighthorse,	)	
5.	JOHN LINDSEY, Lead Investigator of the Muscogee Creek Lighthorse,	)	
6.	MUSCOGEE CREEK LIGHTHORSE OFFICER IDENTIFIED AS LAYN 147,	)	
7.	JOHN DOE OFFICERS OF THE MUSCOGEE CREEK LIGHTHORSE	)	
		)	
	Defendants.	)	

MOTION FOR PRELIMINARY INJUNCTION AND TEMPORARY RESTRAINING ORDER

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Kialegee Tribal Town ("Kialegee") and Red Creek Holdings LLC (collectively, "Plaintiffs") move the Court under Federal Rule of Civil Procedure 65(b) for a temporary restraining order and preliminary injunction against Defendants Kevin Dellinger, Attorney General of the Muscogee (Creek) Nation ("MCN"); Robert Hawkins, Chief of Police of the Muscogee Creek Lighthorse; Daniel Wind III, Deputy Chief of Police of the Muscogee Creek Lighthorse; Joey Comstock, Captain of Investigation of the Muscogee Creek Lighthorse; John Lindsey, Lead Investigator of the Muscogee Creek Lighthorse; Muscogee Creek Lighthorse Officer Identified as Layn 147; and additional John Doe officers of the Muscogee Creek Lighthorse to be identified through discovery.

BACKGROUND

Plaintiffs are developing a restaurant known as the Embers Grill where they intend to pursue legal gaming activities. On the evening of August 16, 2017, armed members of the MCN police force known as the "Lighthorse" appeared without warning at the Embers Grill. Several carloads of Lighthorse officers, heavily armed in full tactical gear, swarmed the property. The Lighthorse Defendants forced their way into the building and arrested at gunpoint Kialegee member Steve Bruner, owner of the property where the Embers Grill is located. Mr. Bruner was brought before an MCN court and forced to post bond for charges against him that are vague at best, but more importantly, premised on Defendants' unilateral and erroneous interpretation of federal law. Defendants are now preventing Plaintiffs and their employees from reentering the Embers Grill, have confiscated Plaintiffs' property, and have advised the Chief of the Kialegee Tribal Town that the MCN has issued a warrant for the Chief's arrest. The Defendants' approach was intentional, planned, and violent.

Despite not resisting Defendants, Plaintiffs' employees were held at gunpoint and repeatedly threatened. One Embers Grill employee, Christopher Bullis, was held down with a gun pointed at his head; he was admitted to a local hospital afterward for anxiety arising from this incident. (Ex. 1, Christopher Bullis BIA Complaint). On August 18, 2017, Mr. Bullis sent a complaint to Richard Decora of the Bureau of Indian Affairs via email:

> My Kitchen staff - Lee Luker, Greg Baker, Robert Payne were finishing our day of food testing and cleaning the bar and the dinning room floor up when Heard screaming "EVERYONE F+GET THE F--- ON THE GROUND" being repeated. We could not tell who or why they were screaming this. a Large man with a gun came running at us SCREAMING " Get your fat a-- on the f----- ground" I asked him what was going on and HE said " it dont f----- matter shut the f--- up and get our f----- faces in the ground" I informed him that these men were my staff and that i was there boss and i needed to know what was going on and he again told Me "it doesnt f----- matter" at this time i saw the lettering over his right chest that read "Chief Hawkins" He kept his Weapon pointed at me with his finger on the trigger. This scared me as i could see at least 20 more men with large weapons screaming at other people that were working in the building. after about 15 minuets the Chief had several armed men come over to the four of us and move us to the rest of the group.
>
> I was being held at gun point for about 20 minute before we were told that we were being detained. He would not tell any of us why we were being detained.

(Ex. 1, Christopher Bullis BIA Complaint).

Multiple other individuals can testify to similar harrowing experiences. *See, e.g.*, Ashley Holt, "Broken Arrow Embers Grille employee speaks out after Lighthorse police raided restaurant," *available at* http://www.kjrh.com/news/local-news/broken-arrow-embers-grille-employee-speaks-out-after-lighthorse-police-raided-the-restaurant-wed (August 16, 2017), attached as Ex. 2.

Plaintiffs sue Defendants in their personal capacity and as agents of the MCN, as each of the Defendants either authorized or personally engaged in the August 16 raid. The raid was an act of intimidation designed solely to punish Plaintiffs for requesting the National Indian Gaming

Commission ("NIGC") authorize Kialegee to engage in gaming. Defendants' justification for this terrorizing of Plaintiffs was the possession of "unlicensed gambling devices" and "maintaining an unlicensed gambling premise." Plaintiffs have yet to actually commence any gaming activities or open the Embers Grill to the public.

Defendants' argument supporting their violent intervention is premised entirely on the erroneous position that they are authorized to interpret and enforce IGRA, a federal law. Defendant Dellinger singled out IGRA as Defendants' basis for the raid. (Ex. 3, Dellinger Letter). As reported by one news outlet, "The Muscogee (Creek) Nation has followed through with the commitments stated in its June 6, 2017 letter" to Mr. Bruner.[1] This letter, written by Dellinger, opposed Kialegee gaming on the assumption that Defendants have authority to enforce IGRA:[2]

> the facility is located within the jurisdiction of the Muscogee (Creek) Nation and is therefore subject to the laws and regulations of the Nation and that any gaming contemplated or conducted on the property must adhere to the Nation's laws and regulations, the IGRA, and the regulations of the National Indian Gaming Commission (NIGC).

Plaintiffs have filed suit in the DC District Court regarding the tribal jurisdictional issues disputed by the MCN and Kialegee, but that matter is not before this Court and is not germane to this proceeding. Nevertheless, the DC Complaint details the historical and legal underpinnings as to why Defendants' argument is wrong. (Ex. 4, DC Complaint).

Plaintiffs **do not** ask this Court to construct, apply or otherwise make pronouncements on the law of any sovereign or otherwise interfere with tribal affairs. Plaintiffs do not seek to

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[1] *See* Ex. 5, http://www.fox23.com/news/man-arrested-during-gambling-bust-at-site-of-broken-arrow-gaming-controversy/593923917.

[2] *See* Ex. 6, Muscogee (Creek) Nation Public Relations Statement Concerning the June 6, 2017 Letter: http://mvskokemedia.com/wp/wp-content/uploads/2017/06/FROM-MCN-PUBLIC-RELATIONS-ACTING-DIRECTOR-GEEBON-GOUGE.pdf.

sidestep administrative procedures. **Plaintiffs seek only a temporary restraining order and preliminary injunction to preserve the status quo and enjoin the individual Defendants from taking further action under their wrongfully alleged authority under IGRA. The tribal sovereign jurisdictional issues are now before the NIGC and the United States District Court for the District of Columbia and are not part of this request for TRO and preliminary injunction.** The individual Defendants in this case could not be sued in the District of Columbia, where personal jurisdiction is lacking. Plaintiffs filed the captioned case in this Court seeking a TRO and permanent injunction confirming the individual Defendants' lack of authority to interpret and enforce IGRA and lack of authority to threaten violence and seize property under the auspices of IGRA enforcement.

There is no final agency ruling from the NIGC regarding the Bruner allotment, and there is no final, binding legal authority holding that Kialegee is ineligible to apply to conduct gaming under IGRA. Defendants should be restrained from enforcing their own interpretations of IGRA or acting as though such determinations have already been made and can be enforced by Defendants.

ARGUMENT AND AUTHORITIES

Plaintiffs are entitled to a temporary restraining order and a preliminary injunction because without Court intervention, these individual Defendants will continue to illegally occupy the Bruner allotment, threaten physical violence, and hold Plaintiffs' confiscated personal property. The individual Defendants publicly maintain the legally incorrect position that Kialegee, a federally-recognized Indian Tribe located on Indian Lands with Class II and Class III compact approval, does not fall under the exclusive purview of the IGRA. Regardless whether

this claim is right or wrong, the determination is for the NIGC and the DC District Court to make and enforce.

Nevertheless, Defendants have illegally taken enforcement of IGRA into their own hands. The issues in this request for TRO and injunction are not before NIGC or the DC District Court, and the DC District Court lacks personal jurisdiction over the individual MCN members who have taken violent and coercive action to enforce their own views of federal law. Plaintiffs therefore seek from this Court protection against the continued abuses by these individual Defendants.

A. This Court has Federal Question Jurisdiction, and Defendants Cannot Assert Sovereign Immunity

The Court has federal question jurisdiction over this action because Defendants have based their actions on an interpretation of federal law, specifically the Indian Gaming Regulatory Act of October 17, 1988, 25 U.S.C. § 2701, *et seq*. ("IGRA") and 28 U.S.C. § 1362.

IGRA provides a comprehensive system to regulate gaming activities on Indian lands. *See* 25 U.S.C. §§ 2701-2721. IGRA gives the states, and the tribe that seeks to establish gaming, the primary role in determining whether gaming is permissible. *See New Mexico v. Dep't of the Interior*, No. 1:14-CV-00695-JAP, 2014 WL 10298036, at *14 (D. N.M. Oct. 17, 2014), aff'd sub nom. *New Mexico v. Dep't of Interior*, 854 F.3d 1207 (10th Cir. 2017). "[T]he compacting process, not the Federal government, should determine the niceties of Class III gaming on tribal lands." *Id.* (citing 1988 U.S.C.C.A.N. at 3076) ("[IGRA] does not contemplate and does not provide for the conduct of class III gaming activities on Indian lands in the absence of a tribal-State compact.").

Kialegee has entered into such a compact with the State of Oklahoma, as contemplated by IGRA, yet Defendants seek to intervene and undermine the compacting process established by Congress.

Even if Defendants contest that Kialegee lacks the power to enter into a gaming compact with the State of Oklahoma, this issue centers on the interpretation of IGRA, a federal statute. It is not in the power of Defendants to interpret IGRA and take self-help action based on procedurally improper, self-serving interpretations. Under 18 U.S.C. § 1166(d), the federal government "shall have exclusive jurisdiction over criminal prosecutions of violations of State gambling laws that are made applicable under this section to Indian country. . . ."

Furthermore, Defendants are not immune from suit because they are sued in their personal and official capacities. "[S]overeign immunity 'does not erect a barrier against suits to impose individual and personal liability.'" *Lewis v. Clarke*, 137 S. Ct. 1285, 1291, 197 L. Ed. 2d 631 (2017) (quoting *Hafer v. Melo*, 502 U.S. 21, 30-31, 112 S. Ct. 358, 116 L.Ed.2d 301 (internal quotation marks omitted); *Alden v. Maine*, 527 U.S. 706, 757, 119 S. Ct. 2240, 144 L.Ed.2d 636 (1999)). IGRA does not provide immunity to individual tribal officers even when acting in their official capacity. *Alabama v. PCI Gaming Auth.*, 801 F.3d 1278, 1288 (11th Cir. 2015) (noting "[s]everal other circuits similarly have held that the *Ex parte Young* doctrine applies to make tribal officials subject to suit to enjoin ongoing violations of the Constitution or federal law").

In *Lewis*, the United States Supreme Court confirmed that actors sued in their personal capacity do not have the sovereign immunity of a tribe. *Id.* Thus, "a negligence action arising from a tort committed by Clarke [a tribal member] on an interstate highway" was not a suit against the defendant in his official capacity, and the defendant was not shielded from suit by

sovereign immunity. *Id.* An individual sued in his personal capacity is not "immune from [a] suit solely because he was acting within the scope of his employment." *Id.* at 1291-92. The Supreme Court also rejected defendant's claim that sovereign immunity applied because the tribe was required to indemnify the defendant. *Id.*

B. The Factors for a TRO and Preliminary Injunction are Satisfied

"A TRO preserves the status quo and prevents immediate and irreparable harm until the court has an opportunity to pass upon the merits of a demand for preliminary injunction." *Flying Cross Check, L.L.C. v. Cent. Hockey League, Inc.*, 153 F. Supp. 2d 1253, 1258 (D. Kan. 2001), modified (Mar. 8, 2001). "Beyond these two threshold showings, a movant also must establish the following requirements which are the same for a preliminary injunction: (1) it will suffer irreparable injury unless the temporary relief issues; (2) the threatened injury to the movant outweighs whatever damage the temporary relief may cause the opposing party; (3) the temporary relief would not be adverse to the public interest; and (4) there is a substantial likelihood that the movant will eventually prevail on the merits." *Id.* (citing *City of Chanute v. Kansas Gas and Elec. Co.*, 754 F.2d 310, 313 (10th Cir. 1985)).

"When the first three elements are met, the Tenth Circuit has modified the fourth element so that 'it will ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberate investigation.'" *Id.* (citing *City of Chanute*, 754 F.2d at 314; *Walmer v. U.S. Dept. of Defense*, 52 F.3d 851, 854 (10th Cir.), cert. denied, 516 U.S. 974, 116 S. Ct. 474, 133 L.Ed.2d 403 (1995)).

Courts consider the same factors when ruling on a motion for a temporary restraining order and a motion for a preliminary injunction. *See Vencor Nursing Ctrs., L.P. v. Shalala*, 63 F.

Supp. 2d 1, 7 n.5 (D. D.C. 1999); *Experience Works, Inc. v. Chao*, 267 F. Supp. 2d 93, 96 (D. D.C. 2003) ("The same standards apply for both temporary restraining orders and preliminary injunctions"). Accordingly, Plaintiffs seek both a TRO and, ultimately, an injunction.

Plaintiffs are aware that injunctive relief is "an extraordinary remedy that may only be awarded upon a clear showing that the [movant] is entitled to such relief." *Northglenn Gunther Tood's, LLC v. HQ8-10410-10450 Melody Lane LLC*, CV-16-1468, 2017 WL 3129738, at *2 (10th Cir. July 24, 2017) (citing *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008)). This is an extraordinary situation.

C. TRO and Injunction Will Preserve the Status Quo

A temporary restraining order is necessary to maintain the status quo. Defendants' claim that they can interpret and enforce IGRA has caused considerable turmoil and disruption, including a violent raid on the Bruner allotment and arrest of the property owner by the MCN. Plaintiffs are not seeking an injunction permitting them to engage in gaming, but merely an injunction permitting them to maintain the Embers Grill as a restaurant, free of armed intervention by these individual Defendants, and a return of all property unlawfully taken, until a final, legal determination can be made as to Plaintiffs' authority to engage in gaming.

A temporary restraining order will simply restore the situation to its status quo before Defendants' recent unlawful interference. Plaintiffs will open a restaurant on the Bruner allotment, and gaming operations will begin *only if* Plaintiffs may lawfully do so—a question that is not before this Court. Similarly, the pre-raid status quo will be preserved until this Court decides whether to enter a full injunction against the Defendants. Plaintiffs should be permitted to continue their restaurant business without threat of violence from the Defendants and seizure of property.

D. Plaintiffs are Substantially Likely to Succeed on the Merits Because Defendants Have no Authority to Enforce IGRA

Defendants have no authority to enforce IGRA. As explained in Part I above, Congress passed IGRA to ensure that either the federal government or (in the case of gaming compacts) the individual states could regulate Indian gaming. IGRA was not passed to provide individuals such as Defendants with special police powers to oversee gaming and punish what they deem to be infractions of this law. Yet the June 6, 2017 letter from Defendant Kevin Dellinger states that "IGRA" is the basis for demanding Plaintiffs cease all preparations to establish gaming on the Bruner allotment. (Ex. 3, Dellinger Letter). Defendants have no legal basis to prevent Plaintiffs from applying for or pursing a gaming license, and especially have no basis to seize property or threaten bodily harm because Plaintiffs have the temerity to pursue authority to conduct gaming.

Defendants have no power to enforce IGRA by any means, let alone through the violence and intimidation which began on August 16 and remain a continuing threat.

E. Plaintiffs Will be Irreparably Injured if a TRO and Injunction are Not Granted

It is well-established that "[b]ecause a showing of probable irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction, the moving party must first demonstrate that such injury is likely before the other requirements for the issuance of an injunction will be considered." *Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*, 356 F.3d 1256, 1260 (10th Cir. 2004) (citations omitted).

"Injury is irreparable when it is incapable of being fully compensated by money damages, or where the measure of damages is so speculative that arriving at an amount of damages would be difficult or impossible." *Angier v. Mathews Expl. Corp.*, 1995 OK CIV APP 109, 905 P.2d 826, 830 (*citing Manuel v. Oklahoma City University*, 1992 OK CIV APP 73, 833 P.2d 288). Oklahoma courts have held that continuing trespass cannot be compensated with money

damages. *Id.* "Where a trespasser persists in trespassing upon another's land and threatens to continue the wrongful invasion of the premises, equity will enjoin such continuing trespass." *Id.* (citing *Fairlawn Cemetery Assoc. v. First Presbyterian Church, U.S.A. of Oklahoma City*, 1972 OK 66, 496 P.2d 1185, 1187; *Harrison v. Perry*, 1969 OK 99, 456 P.2d 512). Furthermore, the Tenth Circuit has "repeatedly stated that . . . an invasion of tribal sovereignty can constitute irreparable injury." *Wyandotte Nation v. Sebelius*, 443 F.3d 1247, 1255 (10th Cir. 2006).

Defendants have locked Plaintiffs out of their restaurant and are not only occupying it without permission but preventing entry by Plaintiffs. This action constitutes a continuing trespass. Further, in addition to the continued trespass, Defendants have threatened bodily harm. Most recently, Defendants have threatened to close down the building because of alleged code violations.

Courts in the Tenth Circuit have entered injunctions to prohibit the heavy-handed actions described in this Motion, even where conducted under the guise of regulating business. *Pueblo of Pojoaque v. New Mexico*, No. 1:15-CV-0625 RB/GBW, 2015 WL 10818855, at *9 (D. N.M. Oct. 7, 2015), aff'd sub nom. *New Mexico v. Trujillo*, 813 F.3d 1308 (10th Cir. 2016). In *Pueblo of Pojoaque*, the court granted a temporary restraining order in favor of an Indian tribe in the context of IGRA, finding that "Defendants' protestations that the regulation of vendors doing business with the Pueblo does not constitute regulation of the Pueblo's gaming activities are disingenuous and inconsistent with the record." "Defendants' actions are based, quite clearly, on Defendants' own determination that the post-June 30, 2015 Class III gaming at the Pueblo is illegal—a determination that the Defendants, just as clearly, are without jurisdiction or authority to make." *Id.*

Plaintiffs have already suffered irreparable harm and will continue to suffer additional harm without a TRO and injunction. Plaintiffs' physical property and legal rights have been violated and will be continually violated, all under a legally insufficient pretense, without court intervention. Defendants have taken Plaintiffs' property and now refuse to allow reentry to the Embers Grill, by keeping an armed guard stationed there to prevent access by Plaintiffs, their employees, or Kialegee members. Defendants also advised the Chief of the Kialegee Tribe that the MCN has issued a warrant for the Chief's arrest—again evidencing that the actions taken by Defendants are escalating rapidly, and on specious legal grounds.

F. A TRO and Injunction Will Not Substantially Injure Any Other Party

Relief for Plaintiffs will serve only to secure their peaceful existence during the litigation of the Complaint filed in this Court and during the litigation in the DC District Court. The balance of the equities favors Plaintiffs. A preliminary injunction would not harm anyone, including Defendants. Rather, allowing continued intimidation by Defendants harms the Kialegee as well as any potential economic viability for Plaintiffs' lawful pursuit of its rights.

G. The Public Interest is Furthered When IGRA Issues are Determined by the Appropriate Courts and Agencies

The public interest will be furthered by granting relief to Plaintiffs. Plaintiffs seek only to end the violent intimidation of their members and employees by officials of another tribe who have no legal authority to terrorize Plaintiffs. This conduct occurred at a restaurant where no gaming had been conducted, when Defendants barged in claiming violations of IGRA. Defendants' choice to use the threat of lethal force to further their own economic interests could well have resulted in death or serious injury to the individuals working peacefully on the Bruner property.

It is a "paramount federal policy" to ensure that Indians do not suffer illegal interference with their efforts to "develop . . . strong self-government." *Pueblo of Pojoaque*, 2015 WL 10818855, at *10 (granting temporary restraining order in favor of Indian Tribe under IGRA) (quoting *Seneca–Cayuga Tribe v. Oklahoma ex rel. Thompson*, 874 F.2d 709, 716 (10th Cir. 1989)). In addition, Defendants' actions are against the public interest because they represent an attempt to sidestep the appropriate procedures established by the federal courts and the NIGC for the interpretation of IGRA. IGRA supports Plaintiffs' efforts to promote tribal economic development. *See, e.g., United States v. Cook*, 922 F.2d 1026, 1033 (2d Cir. 1991), cert. denied, 500 U.S. 941 (1991) ("The congressionally declared purpose of the IGRA is to promote tribal economic development and self-sufficiency in addition to shielding the tribes from the influences of organized crime through the enactment of the statutory scheme regulating the operation of gaming by Indian tribes.").

The public interest will be furthered by the requested relief in that future acts predicated on the issue at hand will be stopped.

Finally, Defendants' actions are an attempt to derogate to themselves powers of legal interpretation and enforcement reserved to the NIGC, the State of Oklahoma, and the federal courts. It is in the public interest to prevent the violent, extra-judicial coercion in which the Defendants have engaged.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request a TRO and preliminary injunction preventing Defendants from taking any action as interpreters and the enforcement arm of IGRA. In particular, Plaintiffs request a TRO and injunction prohibiting Defendants from excluding Plaintiffs from the Bruner allotment, threatening personal injury or threatening

unsupported code violations. Finally, the Court should require Defendants to return all personal property confiscated from the Bruner allotment.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that on the 24th day of August, 2017, a true and correct copy of the above and foregoing was mailed, properly addressed and postage fully prepaid to:

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