No. 18-

IN THE

Supreme Court of the United States

COMANCHE NATION OF OKLAHOMA,

Petitioner,

v.

RYAN ZINKE, SECRETARY, U.S. DEPARTMENT OF THE INTERIOR; JAMES CASON, ACTING DEPUTY SECRETARY, U.S. DEPARTMENT OF THE INTERIOR; JONODEV CHAUDHURI, NATIONAL INDIAN GAMING COMMISSION; EDDIE STREATER, REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS, EASTERN OKLAHOMA REGION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the "former reservation" exception permitting lands acquired by the United States in trust for an Oklahoma Tribe after the effective date of the Indian Gaming Regulatory Act of 1988 to be devoted to gaming purposes, is applicable to lands not subject to Tribal jurisdiction prior to the acquisition.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Comanche Nation of Oklahoma respectfully submits this petition for writ of *certiorari* to review an Order and Judgment of the U.S. Court of Appeals of the Tenth Circuit entered December 14, 2018.

OPINIONS BELOW

The U.S. District Court for the Western District of Oklahoma denied preliminary injunctive relief to the Comanche Nation by decision entered November 13, 2017. The decision is reproduced in the Appendix at. The U.S. Court of Appeals for the Tenth Circuit affirmed in an Order and Judgment entered December 14, 2018 and reproduced in the Appendix at The decision is available at 2018 WL 6601858 (10th Cir. 2018).

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS

The most relevant statutory and regulatory provisions involved are as follows:

Section 5 of the Indian Reorganization Act of 1934 (IRA) provides a statutory basis of the Secretary of Interior "to acquire . . . any interest in lands . . . for the purpose of providing land for Indians." 25 U.S.C. § 5108 .

Section 13 of the IRA provides in part:

> * * * Sections 2, 4, 7, 16, 17, and 18 of this Act shall not apply to the following named Indian tribes, together with members of other tribes affiliated with such named located in the State of Oklahoma, as follows: Cheyenne, Arapaho, Apache, Comanche, Kiowa, Caddo, Delaware, Wichita, Osage, Kaw, Otoe, Tonkawa, Pawnee, Ponca, Shawnee, Ottawa, Quapaw, Seneca, Wyandotte, Iowa, Sac and Fox, Kickapoo, Pottawatomi, Cherokee, Chickasaw, Choctaw, Creek, and Seminole....

Id., § 5118.

Section 1 of the Oklahoma Indian Welfare Act ("Acquisitions of agricultural and grazing lands for Indians [in Oklahoma]") provides in part:

> The Secretary of the Interior is authorized, in his discretion, to acquire ... lands ..., including lands now in Indian ownership: Provided, That such lands shall be agricultural and grazing lands of good character and quality in proportion of the respective needs of the particular needs of the particular Indian or Indians for whom such purchases were made.

Id., 25 U.S.C. § 5201.

25 C.F.R. § 151.2(f) provides:

> * * * 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.

25 C.F.R. § 292.2 provides that "former reservation" means "lands in Oklahoma that are within the exterior boundaries of the last reservation ...".

INTRODUCTION

In Oklahoma, just six Tribes – 15% of the 39 federally recognized Tribes in the State – have managed to corner 85% of an Indian gaming market now generating more than four billion dollars in net revenue annually. The United States Department of Interior ("Department" or "Interior") has treated 2/3 of Oklahoma as open to Indian gaming immediately upon an acquisition in trust for the benefit of Tribes that once had reservations, whether the lands were Indian owned or otherwise subject to continuing Tribal jurisdiction. Some 120 tribal casinos have opened in three decades since the enactment of the IGRA on October 17, 1988, with roughly 2/3rds of them overwhelmingly operated by the few tribes who dominate the market being acquired past the enactment date cutoff for gaming acquisitions.

The Comanche Nation is challenging collusory conduct on the part of officials at the Department of Interior of a kind that has enabled these six Tribes to set up shop anywhere within the boundaries of their last recognized

reservations – even if long out of Indian ownership and beyond the jurisdiction of the United States – contrary to the plain purpose of the "former reservation [in Oklahoma] exception" that Congress carved out for lands acquired after enactment of the Indian Gaming Regulatory Act ("after acquired lands"), which, absent several other exceptions very strictly construed, are not open to Indian gaming operations if acquired after IGRA's passage.[1]

The Comanche had no choice but to bring this challenge. The Chickasaw Nation already has two dozen casinos bringing in more than a billion dollars a year. It is setting up yet another casino at Terral, Oklahoma, less than 45 miles down river from the Comanche Red River Hotel and Casino at Devol.

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1. We are cognizant of the issues now before the Court in *Carpenter v Murphy*, No. 17–1107, whether the reservation of the Creek Nation has been disestablished; and if not, whether the United States has exclusive jurisdiction to prosecute a crime committed on non–Indian land lying within reservation bounds. Indeed, we think the answer in *Murphy*, like the answer here, should turn on the jurisdictional status of the land rather than its location: If held by a non–Indian and out of restricted fee or trust status, the land is no longer under the jurisdiction of the United States, so not "Indian country" within the meaning of 18 U.S.C. 1151: Any alleged crime is subject to prosecution in State court. If land is not now subject to the Tribal jurisdiction – and thereby the jurisdiction of the United States, then it is not subject to acquisition based on IGRA's "former reservation [in Oklahoma]" exception, even if it lies within the boundaries of the last recognized reservation. Like any other "off reservation" acquisition for gaming purposes, it must be approved pursuant to 25 U.S.C. 2719(b) (requiring concurrence by Governor of the State).

The operation at Devol is the economic lifeline of the Comanche Nation: The sixty million dollars in net annual revenue that flow from the Red River Hotel and Casino – just 6% of the yearly take from Chickasaw's several dozen operations – is more than 60% of the funds necessary for the Comanche to sustain vital Tribal operations and social service programs.

The Chickasaw managed to break ground at Terral several months before the Department of Interior published the requisite notice of trust acquisition in the Federal Register. *But see* 25 C.F.R. § 151.12(c)(2) ("If the Secretary or Assistant Secretary approves the request, the Assistant Secretary shall: (I) Promptly provide the applicant with the decision; [and] (ii) Promptly publish in the Federal Register a notice of the decision to acquire land in trust under this part ....").

Even if notice of the trust acquisition for the benefit of the Chickasaw in this instance was six months late, it was nonetheless a historic first: No notice relating to any of several dozen post–1988 acquisitions for the Chickasaw – or for the other favored Tribes' dozens more operations – over a quarter century **ever** appeared in the Federal Register.

Nor had these many trust acquisitions over the years ever been subject to the mandatory requirements of the National Environmental Policy Act, though officials at Interior's Bureau of Indian Affairs had to know the lands were destined for Indian gaming, with obvious potential implications for quality of life in surrounding communities.[2]

2. The record in support of preliminary injunctive relief below included more than forty deeds relating to acquisitions in trust for

BIA officials were willing to grease the skids for the Chickasaw and others of the favored Tribes that came to dominate the market in Oklahoma because common wisdom held that, once in trust for the benefit of a Tribe, the "Indian lands" exception to the Quiet Title Act's waiver of sovereign immunity would insulate the acquisition from any judicial review. *See*, e.g., *Neighbors for Rational Development v. Norton*, 379 F.3d 956, 961 (10th Cir. 2004) ("Neighbors' claim falls within the scope of the Quiet Title Act's limitations on suits. It is well settled law the Quiet Title Act's prohibition of suits challenging the United States' title in Indian trust land may prevent suit even when a plaintiff does not characterize its action as a quiet title action....").

Common wisdom at times proves uncommonly wrong: This Court's decision in *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak* ("*Patchak")* 567 U.S. 209 (2012) ("*Patchak*"), meant that henceforth trust acquisitions for the benefit of Indian Tribes would not be absolutely immune from judicial scrutiny, if challengers to the acquisition were not seeking to quiet title in their own right. The Comanche Nation's lawsuit here is the first post–*Patchak* test of a trust acquisition for gaming purposes in Oklahoma.

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the Tribes that came to dominate gaming in Oklahoma: Each is missing any stated purpose other than "economic development" for lands plainly intended for gaming, a misleading designation that permitted collusory officials at Interior's Bureau of Indian Affairs to find the acquisitions exempt from the requirements of NEPA. Going forward as necessary the Comanche anticipate introducing another forty such deeds, each missing any reference to a specific intended purpose of the lands being acquired in trust, and each of which related to an acquisition destined for Indian gaming.

The Comanche have alleged a host of departures from the requirements of the National Environmental Policy Act.[3] However, the basis for challenge here – which the Comanche Nation urges the Court to take up immediately on writ of *certiorari* to the Tenth Circuit – is simply that, like the many dozens of land acquisitions for gaming purposes in Oklahoma that preceded it, the trust acquisition for gaming at Terral took place based on misapplication of the "former reservation [in Oklahoma]" exception to IGRA's prohibition against gaming on lands acquired after the date IGRA became law: The land at Terral, though perhaps within the last recognized reservation boundaries, was no longer held in restricted fee status, in trust for the benefit of an Indian allottee, or otherwise subject to the jurisdiction of the United States prior to the acquisition. Such jurisdiction is a prerequisite that Congress plainly intended for any acquisition for gaming under the "former reservation [in Oklahoma]" exception, as it is for Tribes outside the State seeking to have lands within a reservation or a last recognized reservation acquired in trust for gaming purposes.

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3. They include permitting the Chickasaw Nation's own – and obviously conflicted – environmental agency to conduct a purported "Environmental Assessment." The result cannot have been surprising: a "Finding of No Significant Impact", which obviated the need for a much more detailed, and time consuming Environmental Impact Statement. As for NEPA's most fundamental requirement – notice to the public – the Department of Interior has yet to produce documentary evidence that any notice ever appeared in affected communities. It took a dogged reporter to track down "ads [that] ran in just two newspapers, one of which is headquartered in Ada and scarcely read by the Comanche. The second, the *Clay County Leader*, circulates in parts of Jefferson County but is a modest border weekly — based in Texas, not Oklahoma." Rogers, David, "Feds Accused of Stacking Deck for Chickasaw Gaming Empire", *Politico* (September 18, 2018).

We treat the subject of land acquisitions for the benefit of Indian Tribes briefly, before tracing the origin of the "former reservation" exception for Tribes in Oklahoma, and the explicit reasons the Congress itself explained for including it in IGRA. We describe the proceedings below, and conclude by reiterating the urgent reason for granting the writ, clarification of a statutory exception long misapplied in favor of Tribes now dominating Indian gaming in Oklahoma, which in this instance poses an existential threat to the Comanche Red River Hotel and Casino at Devol, Oklahoma.

ACQUISITIONS OF LAND IN TRUST FOR INDIAN TRIBES UNDER THE INDIAN REORGANIZATION ACT AND OKLAHOMA INDIAN WELFARE ACT, AND TREATMENT OF "FORMER RESERVATION" LANDS

Congress enacted the Indian Reorganization Act of 1934 ("IRA")[4] in order to ameliorate the disastrous effect of Indian land policies beginning with the General Allotment Act of 1887, which resulted in some 90 million acres passing out of Indian ownership. *See generally* 1-1 *Cohen's Handbook of Federal Indian Law § 1.05. ("The IRA was designed to improve the economic status of Indians by ending the alienation of tribal land and facilitating tribes' acquisition of additional acreage and repurchase of former tribal domains.").*

In most relevant part, Section 5 of the IRA provided a statutory basis for the Secretary of Interior "to acquire . . . any interest in lands . . . for the purpose of providing

4. Wheeler–Howard Act of 1934, Pub.L. 73–383, 48 Stat. 984.

land for Indians." 25 U.S.C. § 5108 .[5] "Title to any lands . . . acquired pursuant to [the IRA] . . . shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands . . . shall be exempt from State and local taxation." *Id.*

Congress did not extend each of the provisions of the IRA to Tribes in Oklahoma: Section 13, now classified as 25 U.S.C. § 5118 (and formerly § 473), provided in relevant part:

> * * * Sections 2, 4, 7, 16, 17, and 18 of this Act shall not apply to the following named Indian tribes, together with members of other tribes affiliated with such named located in the State of Oklahoma, as follows: Cheyenne, Arapaho, Apache, Comanche, Kiowa, Caddo, Delaware, Wichita, Osage, Kaw, Otoe, Tonkawa, Pawnee, Ponca, Shawnee, Ottawa, Quapaw, Seneca, Wyandotte, Iowa, Sac and Fox, Kickapoo, Pottawatomi, Cherokee, Chickasaw, Choctaw, Creek, and Seminole....

Id.

Section 5 was notably was absent from Section 13's list of sections of the IRA not applicable to Oklahoma Tribes. The omission was an apparent implied warrant for Interior to take land into trust for the benefit of Tribes in Oklahoma pursuant to Section 5 as well.

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5. Section 5 was reclassified as 25 U.S.C. § 5108 from 25 U.S.C. § 465. All classification changes in Title 25 became effective in Supplement IV of the 2012 main edition of the United States Code.

Congress proceeded to enact the Oklahoma Indian Welfare Act (OIWA) two years after the IRA.[6] Unlike in the IRA, Congress made very specific reference in the OIWA to land acquisitions for the benefit of Tribes in the State. This specific statutory authority for land acquisitions in Oklahoma extended only to "Acquisitions of agricultural and grazing lands for Indians [in Oklahoma] ....5 U.S.C. § 5201 (formerly § 501).

Perhaps because little controversy attended efforts to help Tribes rebuild communal land bases in the years following passage of the IRA and OIWA, the Department of the Interior ("the Department" or "Interior") did not promulgate regulations relating to land acquisitions in trust for Indian Tribes until 1980. *See* "Land Acquisitions", 48 Fed. Reg. 62034 (September 18, 1980).[7]

In the regulation promulgated as 25 C.F.R. Part 120a, the Department defined "Indian reservation" as follows:

> "Indian reservation" means that area of land **over which the tribe is recognized by the United**

6. Oklahoma Indian Welfare Act of June 26, 1936, Pub. L. –, 49 Stat. 1967.

7. Oddly, in promulgating Part 120a, Interior made no mention of the OIWA's specific authority for "[a]cquisitions of agricultural and grazing lands for Indians" in Oklahoma; as against implied authority to acquire land for potentially broader purposes deriving from omission of Section 5 from the list of sections inapplicable to Oklahoma Tribes appearing in IRA's Section 13. We are aware of no instance in which the Department – or any court – has addressed the dichotomy between the OIWA's specific limiting restriction for land acquisitions in Oklahoma, and the earlier implied warrant for potentially broader purposes appearing in the IRA.

> **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).

Id. at 62036. (emphases added).

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.

The Department was intent on ensuring that Tribes in Oklahoma in particular – where it was long believed reservations had been disestablished, with Indian owned lands thereafter held in trust allotment or restricted fee – would have the same status and opportunity as Tribes elsewhere with respect to acquisitions of land in trust for their benefit.[8]

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8. 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

Indeed, litigation challenging the right of Oklahoma Tribes to exercise jurisdiction even with respect to lands allotted in trust and remaining in Indian ownership was still taking place.

See, e.g. *Mustang Production Company v. Harrison*, 94 F.3d 1382 (10th Cir. 1996). There a consortium oil and gas companies (collectively "Mustang") brought suit against the Cheyenne Arapahol Tribes of Oklahoma ("CNA Tribes) – in 1988, the year Congress enacted IGRA – challenging the CNA Tribes' decision to "impose a severance tax on oil and gas production on allotted lands held in trust for their members." *Id.* at

The basis of the challenge was "that the Tribes do not have authority over the allotted lands and thus cannot tax oil and gas production on those lands. Mustang contends that the Tribes lost jurisdiction over all of the lands in the 1869 reservation, including allotted lands, when the 1890 Agreement disestablished the reservation." *Id.* at 1384-85.

The Tenth Circuit rejected the argument and held for the Cheyenne Arapaho. *Id.* at 1386. But we submit that continuing jurisdictional challenges motivated the drafters of Part 120a to ensure that Oklahoma Tribes in particular would not confront the same potential challenges with respect to "allotted lands for individual tribal members" sought to be acquired by their Tribes,

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reservation means that area of land constituting the **former reservation** of the tribe as defined by the Secretary. (emphases added). *Id.*, § 151.2(f). It was in the context of an answering brief in the Tenth Circuit that Interior asserted for the first time that it presumed jurisdiction of lands within the boundaries of a last recognized reservation outside Oklahoma, but did not cite a single instance in which has invoked such a presumption.

by promulgating the "former reservation" exception in 1980. Oklahoma Tribes would stand on the same footing as Tribes elsewhere with respect to land acquisitions for their benefit.

The legislative history makes clear this was the reason Congress followed suit when it enacted IGRA eight years later[9]: to ensure that Oklahoma Tribes would stand on the same footing as Tribes elsewhere with respect to acquisitions in trust for gaming purposes of lands within former reservation boundaries. *See* U.S. Senate Select Committee on Indian Affairs, *To Establish Federal Standards and Regulations for the Conduct of Gaming Activities On Indian Reservations and Lands, and For Other Purposes* (to accompany H.R. 1920) (S.Rpt.99–493, September 24, 1986). Section 4 of the Senate Report included the following:

> Subsection (a) [of IGRA] makes Indian gaming unlawful on any lands taken into trust by the Secretary of Interior after the date of enactment of this Act, if such lands are located outside the boundaries of such tribe's reservation. It also provides, however, that for purposes of Oklahoma, where many Indian tribes **occupy and hold title to trust lands** which are not technically defined as reservations, such tribes may not establish gaming enterprises on lands which are outside the boundaries of such tribes' **former reservation in Oklahoma, as defined**

9. *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)).

> **by the Secretary of the Interior,, unless such lands are contiguous to lands currently held in trust for such tribes**. Functionally, this section treats these Oklahoma tribes the same as all other Indian tribes. This section is necessary, however, because of the unique historical and legal differences between Oklahoma and tribes in other areas. Subsection (a) also applies the same test to the non–Oklahoma tribes whose reservation boundaries have been removed or rendered unclear as a result of federal court decisions, **but where such tribe continues to occupy trust land within the boundaries of its last recognized reservation**. This section is designed to treat these tribes in the same way they would be treated if **they occupied trust land within the boundaries of its last recognized reservation.**
>
> * * *

Id. (emphases added).

The Committee thus referred to Tribes in Oklahoma that "occupy and hold title to trust lands which are not technically defined as reservations", and made clear they are nonetheless gaming eligible, together with lands outside former reservation bounds but "contiguous to lands currently held in trust for such tribes." *Id.* Whether within or outside former reservation lands in Oklahoma, Tribal jurisdiction was to be a prerequisite for gaming eligibility, just as Tribal jurisdiction was to be a prerequisite for gaming purposes elsewhere, where "reservation boundaries have been removed or rendered

unclear ...," *Id.* These tribes outside Oklahoma and their lands are to be treated "in the same way they would be treated if they occupied trust land [subject to Tribal jurisdiction] within the boundaries of its last recognized reservation." *Id.*

Following passage of IGRA, Interior did not act to promulgate regulations until 2006, following a two year notice and comment period. *See "Gaming on Trust Lands Acquired After October 17, 1988",* 71 Fed. Reg. 58769 (October 5, 2006).

The proposed regulation – obviously reflecting the best thinking of Interior officials and comments gleaned over a two year period – defined "former reservation" as follows: "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 ...." *Id.* at 58772. (emphasis added).

However, the regulation was not formally promulgated for another two years, during which no additional comments were taken. The definition of gaming eligible "former reservation" lands no longer included the express requirement of Tribal jurisdiction. *See* 25 C.F.R. § 292.2 ("former reservation" means "lands in Oklahoma that are within the exterior boundaries of the last reservation ...").

The Department's explained the omission of a jurisdictional requirement in disingenuous fashion, 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). Yet the version proposed two years earlier 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.

This treatment of IGRA's "former reservation" exception – a fundamental reason a handful of Tribes came dominate Indian gaming in Oklahoma – is plainly inconsistent with Congress' purposes in enacting the exception, to ensure that Oklahoma Tribes stand on a footing equal, not superior to Tribes elsewhere – which must show governmental jurisdiction in order to have "on reservation" lands acquired in trust for their benefit 25 C.F.R. § 151.2(f).

PROCEEDINGS BELOW

The Comanche Nation filed suit in the U.S. District Court for the Western District of Oklahoma within 30 days of the notice relating to Interior's decision to take the land at Terral into trust for the benefit of the Chickasaw Nation and for gaming purposes, which appeared in the Federal Register on July 17, 2107.

Interior made the decision to acquire the lands at Terral in trust for gaming purposes some six months earlier, on January 19, 2017. Interior later explained the delay by reference to the Inauguration that took place the following day, January 20th, and a new Administration's right to review any impending agency action prior to formal notice to the public.

The Chickasaw Nation nonetheless managed to break ground for a gaming operation at Terral by the following May, so must have had the courtesy of notice from the

Department on an informal basis. No such courtesy was extended to a nearby and obviously interested Comanche Nation.

The urgency of a rival casino going up within 45 miles of its primary source of vital revenue compelled the Comanche to seek preliminary injunctive relief to forestall development at Terral pending a decision on the merits. The Nation argued, in part most relevant here, that Interior misapplied IGRA's former reservation exception for Oklahoma Tribes by taking lands into trust for gaming purposes that were not subject to Tribal jurisdiction prior to the acquisition.

The District Court was unpersuaded, and held the Comanche unlikely to succeed on the merits of the claim that Tribal jurisdiction at time of acquisition was a prerequisite for IGRA's "former reservation [in Oklahoma]" exception to apply.

The District Court applied the *Chevron* standard of deference, *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984)[10], where there is some statutory ambuity, and held reasonable Interior's application of IGRA's "former reservation" exception as relating to any lands within boundaries of last recognized reservations, whether subject to continuing Tribal jurisdiction prior to acquisition or not.

10. We are bound to note the persuasive sentiment in favor of revisiting the *Chevron* standard of deference. *See Pereira v. Sessions*, 138 S.Ct. 2105, 2121 (2018) (Kennedy, J., concurring) ("I] t seems necessary and appropriate to reconsider, in an appropriate case, the premises that underlie *Chevron* and how courts have implemented that decision.").

The Court of Appeals for the Tenth Circuit affirmed on the same basis, finding that Chevron's deferential standard required upholding Interior's determination that "former reservation" in Oklahoma means all lands within the boundaries of a last recognized reservation of a Tribe there, whether or not long out of Indian ownership and not otherwise subject to continuing Tribal jurisdiction.

REASONS FOR GRANTING THE PETITION

For reasons explained above, we respectfully submit the courts below erred, and overlooked legislative history plainly showing that enactment of the "former reservation [in Oklahoma]" exception in IGRA, like Interior's earlier authorization for acquiring "former reservation" lands in Oklahoma pursuant to 25 C.F.R. Part 120a – now Part 151 – was intended to ensure that Tribes there would not be denied the benefit of land acquisitions, in trust for gaming or otherwise, because reservations in the State had been disestablished, with lands thereafter held in trust allotment or restricted fee status.

Interior's longstanding misapplication of IGRA's "former reservation [in Oklahoma]" exception has meant that 2/3 of the State is gaming eligible upon an acquisition in trust for an Indian Tribe. Six tribes have thereby managed to open approximately 80 casino's in the State, post the enactment date cutoff 10/17/1988 for gaming acquisitions, and now dominate the Indian gaming market.

The latest acquisition for the benefit of the Chickasaw Nation of Oklahoma - a Tribe already operating approximately two dozen post 1988 gaming operations to the tune of a billion dollars annually – is an existential

threat to the economic lifeline of the Comanche Nation, the Red River Hotel and Casino at Devol, Oklahoma.

CONCLUSION

For the foregoing reasons, this Court should grant the petition.

We respectfully submit that this Court should take up an issue of such vital importance immediately on writ of *certiorari* to the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A — ORDER AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, FILED DECEMBER 14, 2018

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 17-6247
D.C. No. 5:17-CV-00887-HE (W.D. Okla.)

COMANCHE NATION OF OKLAHOMA,

Plaintiff-Appellant,

v.

RYAN ZINKE, SECRETARY, U.S. DEPARTMENT OF THE INTERIOR; JAMES CASON, ACTING DEPUTY SECRETARY, U.S. DEPARTMENT OF THE INTERIOR; JONODEV CHAUDHURI, NATIONAL INDIAN GAMING COMMISSION; EDDIE STREATER, REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS, EASTERN OKLAHOMA REGION,

Defendants-Appellees.

ORDER AND JUDGMENT*

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Appendix A

Before LUCERO, McKAY, and MATHESON, Circuit Judges.

Comanche Nation appeals the district court's denial of its motion for a preliminary injunction. We take the view of the district court that Comanche Nation is unlikely to succeed on the merits of its challenge to a decision by the Secretary of the Interior ("the Secretary") to take land into trust for the benefit of Chickasaw Nation and approve the land for gaming. Exercising jurisdiction under 28 U.S.C. § 1292(a), we affirm.

I

In June 2014, Chickasaw Nation submitted an application requesting that the Department of the Interior take approximately thirty acres of land near Terral, Oklahoma (the "Terral site") into trust for the tribe. Chickasaw Nation intends to use the Terral site, located 45 miles from a gaming facility operated by Comanche Nation, for a casino. After reviewing the application, the Secretary determined that: (1) Chickasaw Nation does not have a reservation; and (2) the proposed site is within the boundaries of its former reservation in Oklahoma. Based on these determinations, the Secretary concluded that the subject land could be taken into trust for the tribe under the Indian Reorganization Act ("IRA") and 25 C.F.R. Part 151. The Secretary also determined the land was eligible for gaming under the Indian Gaming Regulatory Act ("IGRA") and 25 C.F.R. Part 292.

Formal transfer of the Terral site occurred in January 2017, and in the same month a Finding of No Significant Impact ("FONSI") was issued based on an Environmental Assessment ("EA") conducted pursuant to the National Environmental Policy Act ("NEPA"). Notice of the trust acquisition was published later that year. Land Acquisitions; The Chickasaw Nation, 82 Fed. Reg. 32,867 (July 18, 2017).

Comanche Nation commenced an action in the United States District Court for the Western District of Oklahoma challenging the Secretary's actions. It brought claims under the Administrative Procedure Act ("APA") and NEPA seeking declaratory and injunctive relief. Shortly after filing its complaint, Comanche Nation moved for a preliminary injunction to prevent Chickasaw Nation from opening its casino on the Terral site.[1] The district court denied that motion for lack of likely success on the merits, and Comanche Nation appealed.

II

Our review of the denial of a preliminary injunction is for abuse of discretion. *Gen. Motors Corp. v. Urban Gorilla, LLC*, 500 F.3d 1222, 1226 (10th Cir. 2007). "A

1 At oral argument, the parties indicated that the casino is now constructed and open. Nevertheless, this case is not moot because an injunction prohibiting operation of the casino could issue. *See Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1311 (10th Cir. 2010) ("When it becomes impossible for a court to grant effective relief, a live controversy ceases to exist, and the case becomes moot." (quotation omitted)).

district court abuses its discretion when it commits an error of law or makes clearly erroneous factual findings." *Wyandotte Nation v. Sebelius*, 443 F.3d 1247, 1252 (10th Cir. 2006).

To obtain a preliminary injunction, a moving party must show:

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

Prairie Band of Potawatomi Indians v. Pierce, 253 F.3d 1234, 1246 (10th Cir. 2001). "It is well settled that a preliminary injunction is an extraordinary remedy, and that it should not be issued unless the movant's right to relief is clear and unequivocal." *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1188 (10th Cir. 2003) (quotation omitted).

A

Judicial review of the Secretary's decision to take the Terral site into trust under IRA and its associated regulations, 25 C.F.R. Part 151, is conducted pursuant to the APA. *See McAlpine v. United States*, 112 F.3d 1429, 1435 (10th Cir. 1997). So also is the Secretary's

determination that the site is eligible for gaming under IGRA and its associated regulations, 25 C.F.R. Part 292. *See Kansas v. United States*, 249 F.3d 1213, 1220 (10th Cir. 2001). Under the APA, we may set aside a decision only if it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A).

Comanche Nation contends that the Secretary's decision taking the Terral site into trust for gaming purposes is invalid because it did not determine that Chickasaw Nation exercised governmental authority over the parcel prior to the acquisition. We review the background statutory and regulatory scheme that governs the Secretary's acquisition of trust land for tribal gaming to provide context for our analysis.

IRA grants the Secretary authority to acquire land in trust for Indian tribes and individuals "within or without existing reservations." 25 U.S.C. § 5108. Under regulations promulgated in 1980, *see* Land Acquisitions, 45 Fed. Reg. 62,034 (Sept. 18, 1980), trust acquisitions are authorized if the "property is located within the exterior boundaries of the tribe's reservation or [is] adjacent thereto." 25 C.F.R. § 151.3(a)(1). The term "reservation" is defined as an

> area of land over which the tribe is recognized by the United States as having governmental jurisdiction, except that, in the State of Oklahoma . . . reservation means that area of land constituting the former reservation of the tribe as defined by the Secretary.

§ 151.2(f). Outside of Oklahoma, a reservation is generally an "area of land over which the tribe is recognized by the United States as having governmental jurisdiction." *Id.* But in Oklahoma, "reservation" means "that area of land constituting the former reservation of the tribe as defined by the Secretary," *id.*, with no governmental jurisdiction requirement.

IGRA governs gaming on "Indian lands," 25 U.S.C. § 2710, defined to include property that "is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power," § 2703(4)(B). The Act generally prohibits gaming on "lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988." § 2719(a). However, the Secretary may permit gaming on so called after-acquired land if a tribe had no reservation on October 17, 1988, and "such lands are located in Oklahoma" and "are within the boundaries of the Indian tribe's former reservation, as defined by the Secretary." § 2719(a)(2)(A)(i). This provision is referred to as the "Oklahoma exception."

The Oklahoma exception delegates to the Secretary the authority to define "former reservation," *see id.*, and the Secretary did so in 2008. *See* Gaming on Trust Lands Acquired After October 17, 1988, 73 Fed. Reg. 29,354 (May 20, 2008). The regulation at issue defines "former reservation" as "lands in Oklahoma that are within the exterior boundaries of the last reservation that was

established by treaty, Executive Order, or Secretarial Order for an Oklahoma tribe." 25 C.F.R. § 292.2. During the rulemaking process, other alternatives were proposed but not adopted.

We agree with the district court that Comanche Nation is unlikely to prevail on the merits of its APA challenge to these regulations. As an initial matter, the claim appears to be untimely. Facial challenges to regulations are subject to a six-year statute of limitations. *See* 28 U.S.C. § 2401(a). The regulations relevant to this case were promulgated in 1980 and 2008. Gaming on Trust Lands Acquired After October 17, 1988, 73 Fed. Reg. 29,354 (May 20, 2008); Land Acquisitions, 45 Fed. Reg. 62,034 (Sept. 18, 1980). Publication in the federal register generally starts the limitations period for facial challenges. *See George v. United States*, 672 F.3d 942, 944 (10th Cir. 2012) ("[P]ublishing a regulation in the Federal Register must be considered 'sufficient to give notice of [its] contents' to 'a person subject to or affected by it.'" (quoting 44 U.S.C. § 1507)); *Dunn-McCampbell Royalty Interest, Inc. v. Nat'l Park Serv.*, 112 F.3d 1283, 1287 (5th Cir. 1997) (limitations period for a facial challenge to a regulation begins to run with publication in the Federal Register).

Comanche Nation insists that it is advancing an as-applied challenge. However, this is not an accurate characterization of the claim. Comanche Nation does not allege that the Secretary misapplied § 292.2 or § 151.2(f) as they are written to Chickasaw Nation's trust and gaming application, but rather that the regulations themselves are contrary to law or are arbitrary because the definition

of "former reservation" does not include a requirement that the tribe have "governmental jurisdiction" over land before it is taken into trust for gaming. Comanche Nation's APA claim thus constitutes a facial challenge to § 292.2 or § 151.2(f) because it would apply to all parties. *See Colo. Right to Life Comm. v. Coffman*, 498 F.3d 1137, 1146 (10th Cir. 2007) ("A facial challenge considers [a regulation's] application to all conceivable parties, while an as-applied challenge tests the application of that [regulation] to the facts of a plaintiff's concrete case.").[2]

Comanche Nation argues that its claim fits within a narrow exception to the six-year statute of limitations that the Ninth Circuit has adopted. In *Wind River Mining Corp. v. United States*, 946 F.2d 710 (9th Cir. 1991), that court concludes that if "a challenger contests the substance of an agency decision as exceeding constitutional or statutory

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2. To the extent that Comanche Nation's claim could be read to allege § 292.2 includes a governmental jurisdiction requirement based on the statutory scheme it implements, we reject the argument. There is no question that the Terral site satisfies the definition of former reservation as adopted by the Secretary in § 292.2. As explained below, IRA and IGRA do not require the Secretary to include a governmental jurisdiction prong in the definition of former reservation.

The claim that § 292.2 conflicts with § 151.2(f) because § 151.2(f) includes a governmental jurisdiction requirement in its definition of "reservation" and § 292.2 does not plainly fails with respect to trust land in Oklahoma. Given that § 151.2(f) provides "in the State of Oklahoma . . . reservation means that area of land constituting the former reservation of the tribe as defined by the Secretary," it does not include a governmental jurisdiction requirement. Thus, there is no conflict between the regulations.

authority, the challenger may do so later than six years following the decision by filing a complaint for review of the adverse application of the decision to the particular challenger." *Id.* at 715. Assuming this court were to adopt that exception, we question whether it would apply to the present facts. The *Wind River* exception would not apply to "a policy-based facial challenge to the government's decision," *id.*, which is the type of challenge Comanche Nation appears to be advancing.

We need not decide whether to apply the *Wind River* exception because Comanche Nation's claim is unlikely to succeed on the merits irrespective of timeliness. Because this court reviews the interpretation of statutes the Secretary is entrusted to administer under the principles articulated in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), we consider Comanche Nation's position to be untenable. Unless "Congress has directly spoken to the precise question at issue," we ask only "whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. We repeat, Congress chose not to define "former reservation" and unambiguously delegated authority to do so to the Secretary. § 2719(a)(2)(A)(i) (referring to lands in Oklahoma "within the boundaries of the Indian tribe's former reservation, *as defined by the Secretary*" (emphasis added)). That definition of former reservation receives "controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 844.[3]

3. We reject Comanche Nation's arguments that the Secretary is not entitled to *Chevron* deference. Comanche Nation fails to

Comanche Nation does not identify any statutory language in either IRA or IGRA that contravenes the Secretary's treatment of former reservations. Nothing in the text of those statutes suggests that a tribe must have governmental jurisdiction over land within its former reservation to make it eligible for the Oklahoma exception. Instead, Comanche Nation argues that the regulation contravenes Congress' intent by treating Oklahoma tribes more favorably than non-Oklahoma tribes, in that only the latter are required to demonstrate governmental jurisdiction. But the Secretary does not impose an independent requirement on non-Oklahoma tribes to make an affirmative showing of governmental jurisdiction on a tract-by-tract basis. The term "governmental jurisdiction" is included in the regulatory definition of "reservation." § 151.2(f). And the Bureau of Indian Affairs ("BIA") presumes that a tribe has governmental jurisdiction over any parcel within the borders of its reservation. *See Atkin Cty. v. Bureau of Indian Affairs*, 47 I.B.I.A. 99, 106-07 (June 12, 2008).

Comanche Nation points to the legislative history of IGRA, which indicates that the Oklahoma exception was

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support its argument that the definition of "former reservation" conflicts with a prior interpretation, *see Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 154, 132 S. Ct. 2156, 183 L. Ed. 2d 153 (2012), merely because it differs from the version originally proposed. To adopt such a view would discourage agencies from engaging in reasoned decision-making through the notice and comment process. Nor is the definition a "convenient litigating position," *id.* (quotations omitted), as it was not advanced for the first time during litigation, but promulgated pursuant to ordinary rulemaking procedures.

deemed necessary to treat "Oklahoma tribes the same as all other Indian tribes." S. Rep. No. 99-493, at 10 (1986). However, the same report expressly recognizes the need for a different standard for Oklahoma tribes in light of the "unique historical and legal difference between Oklahoma and tribes in other areas." *Id.* It indicates that Congress chose the boundaries of such tribes' former reservations to bar them "from acquiring land outside their traditional areas for the express purpose of establishing gaming enterprises." *Id.* The Secretary's interpretation of "former reservation" is entirely consistent with that goal.

The statutory text of the Oklahoma exception expressly delegates to the Secretary responsibility for defining "former reservation." § 2719(a)(2)(A)(i). And the regulatory definition adopted by the Secretary, land "within the exterior boundaries of the last reservation that was established by treaty, Executive Order, or Secretarial Order for an Oklahoma tribe," § 292.2, is consistent with the everyday meaning of the term "former reservation." We agree with the district court that at a minimum the Secretary's interpretation is reasonable, and therefore controls. *Chevron*, 467 U.S. at 844.

Comanche Nation also contends that the Terral site may be ineligible for gaming if the Chickasaw Nation's reservation was never actually disestablished. But its sole support for this proposition is *Murphy v. Royal*, 875 F.3d 896 (10th Cir. 2017), *cert. granted* 138 S. Ct. 2026, 201 L. Ed. 2d 277 (2018). Disestablishment analysis is tribe-specific depending on the particular facts of each individual case. *See Wyoming v. United States EPA*, 875

F.3d 505, 512-13 (10th Cir. 2017) (noting "it is settled law that some surplus land acts diminished reservations, and other surplus land acts did not" depending on "the language of the Act and the circumstances underlying its passage" (quotations omitted)). Our *Murphy* panel concluded the Creek Reservation remains extant, but it did not address the status of the Chickasaw Reservation at all. Comanche Nation's citation to *Murphy* falls well short of demonstrating a likelihood of success on the merits.

Moreover, whether Chickasaw Nation's reservation in Oklahoma has been disestablished likely has no effect on the outcome of this case. Were the Chickasaw Nation's reservation not disestablished, the Terral site would remain within the bounds of that reservation, in which case, the Secretary could conduct an "on-reservation" acquisition. *See* §§ 151.3(a)(1), 151.2(f); *see also Atkin County*, 47 I.B.I.A. at 106-07 (tribes are presumed to have jurisdiction over land within their reservations for purposes of IRA). The Terral site would also be eligible for gaming because it would be within the boundaries of the reservation as it existed in October, 1988. § 2719(a)(1).

B

We conclude, as well, that Comanche Nation is unlikely to succeed on the merits of its NEPA claim. NEPA imposes procedural requirements on agencies before they undertake any major action. *Citizens' Comm. to Save Our Canyons v. Krueger*, 513 F.3d 1169, 1178 (10th Cir. 2008). Under certain circumstances, an agency must prepare an environmental impact statement ("EIS") that details the environmental effects of its proposed action. *Greater*

Yellowstone Coal. v. Flowers, 359 F.3d 1257, 1274 (10th Cir. 2004). However, if an EA "leads the agency to conclude that the proposed action will not significantly affect the environment, the agency may issue a [FONSI] and forego the further step of preparing an EIS." *Id.*

Comanche Nation argues that the Secretary did not take a "hard look" at the environmental impact of the casino project. *See Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 100, 103 S. Ct. 2246, 76 L. Ed. 2d 437 (1983). Yet the record indicates that the BIA completed a detailed EA and issued a FONSI for the trust acquisition of the Terral site for gaming. Comanche Nation's conclusory allegations that the EA does not comply with *Baltimore Gas*, that the BIA has a history of failing to comply with NEPA requirements, and that Chickasaw Nation intends to build larger-than necessary sewer lagoons are not enough to carry the day for obtaining a preliminary injunction. *See Heideman*, 348 F.3d at 1188 (movant's right to relief must be "clear and unequivocal" (quotation omitted)); *see also Krueger*, 513 F.3d at 1176 ("A presumption of validity attaches to the agency action and the burden of proof rests with the appellants who challenge such action.").

Comanche Nation contends the Secretary's NEPA analysis is flawed because it failed to consider the economic effects the new casino would have on Comanche Nation's existing casino. However, "[i]t is well-settled that socioeconomic impacts, standing alone, do not constitute significant environmental impacts cognizable under NEPA." *Cure Land, LLC v. U.S. Dep't of Agric.*, 833 F.3d 1223, 1235 (10th Cir. 2016).

We also reject the argument that the acquisition was arbitrary and capricious because the Secretary failed to consult Comanche Nation. Agencies should consult with "appropriate State and local agencies and Indian tribes." 40 C.F.R. § 1501.2(d). The regulation's use of the term "appropriate" suggests an agency possesses discretion in determining which bodies to consult. *See generally Martel-Martinez v. Reno*, 61 F.3d 916 (10th Cir. 1995) (table). Comanche Nation again relies solely on socioeconomic effects of the new casino, and for the reasons stated above, that is not enough to show it was necessarily an appropriate consulting tribe in this case.

III

Because Comanche Nation is clearly unlikely to prevail on the merits, there is no need to address the remaining factors of the test for preliminary injunctions. *See Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1262 n.2 (10th Cir. 2005). The district court's denial of a preliminary injunction is **AFFIRMED**.

Entered for the Court

Carlos F. Lucero
Circuit Judge

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA, FILED NOVEMBER 13, 2017

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

NO. CIV-17-887-HE

COMANCHE NATION OF OKLAHOMA,

Plaintiff,

vs.

RYAN ZINKE, *et al.*,

Defendants.

ORDER

In this case, plaintiff Comanche Nation of Oklahoma seeks to prevent the opening of a casino being constructed by the Chickasaw Nation in Jefferson County, Oklahoma. The casino facility being constructed is on lands recently taken into trust by the Secretary of the Interior for the benefit of the Chickasaw Nation. Plaintiff challenges the legality of that decision by the Secretary, seeking declaratory and injunctive relief.[1] Plaintiff's complaint

1. The Secretary and Department of the Interior are referred to here as "the Secretary." All claims against the officials of the Department of the Interior and the NIGC are in their official capacities.

also asserts claims against officers of the National Indian Gaming Commission ("NIGC"), seeking to enjoin any action by the NIGC which would further the Chickasaw Nation's effort to open the casino.

Plaintiff moved for issuance of a preliminary injunction. The court held a hearing on the motion on October 26, 2017. Plaintiff tendered some additional evidentiary submissions, and the court heard argument from counsel. Having fully considered the arguments and the relevant legal standards, the court concludes that the motion for preliminary injunction should be denied.

Background

The background facts are largely undisputed. In June of 2014, the Chickasaw Nation submitted an application asking the Secretary to take approximately 30 acres of land, located near Terral in Jefferson County, into trust for gaming and other purposes. The Chickasaw Nation sought to use the land for a casino which would offer class II and class III gaming. The Terral site is approximately 45 miles from a gaming facility operated by plaintiff.

On January 19, 2017, the Secretary made a final determination to take the Terral site into trust.[2] The Secretary's decision was based on, among other things, a determination that the Chickasaw Nation did not have a reservation, but that the proposed site was within

2. The decision was actually made by the Principal Deputy Assistant Secretary for Indian Affairs. [Doc. #20-1].

the boundaries of its former reservation. Therefore, according to the Secretary, the land could be taken into trust as an "on-reservation" acquisition under the Indian Reorganization Act ("IRA"), and could be used for gaming under the Indian Gaming Regulatory Act ("IGRA").

Plaintiff challenges the Secretary's determination here, seeking review under the Administrative Procedure Act, 5 U.S.C. § 500 *et seq.* ("APA"). It also challenges the decision on the basis of non-compliance with the National Environmental Protection Act, 42 U.S.C. § 4321 *et seq.* ("NEPA").

Discussion

The injunctive relief being sought by plaintiff's motion has changed somewhat since the case and motion were originally filed. The complaint and motion initially focused, in substantial part, on preventing the NIGC from issuing a gaming license or other regulatory approval to the Chickasaw Nation. In light of defendants' explanation and submissions as to the NIGC's role, plaintiff has shifted its focus to the propriety of the Secretary taking the property into trust. It challenges the Secretary's determination, rather than any action or inaction of the NIGC, and now essentially seeks to have the court stop the casino project on the basis that the land acquisition was improper and that gaming on the land is therefore unauthorized.

A preliminary injunction is an "extraordinary remedy" which is never "awarded as of right." *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 24 (2008). A party may be

granted a preliminary injunction only when monetary or other traditional remedies are inadequate, and "the right to relief [is] clear and unequivocal." *Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1258 (10th Cir. 2005). To obtain a preliminary injunction, the moving party must show:

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

Prairie Band of Potawatomi Indians v. Pierce, 253 F.3d 1234, 1246 (10th Cir. 2001); Fed.R.Civ.P. 65. The particular injunction sought here is a disfavored one, as it seeks to alter the status quo by rescinding the land acquisition. *See O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 975 (10th Cir. 2004) (injunctions that alter the status quo are disfavored). As a result, the plaintiff must show that the preliminary injunction factors "weigh heavily and compellingly in [its] favor." *Id.* (quoting *SCFC ILC, Inc. v. Visa USA, Inc.*, 936 F.2d 1096, 1098 (10th Cir. 1991) (overruled on other grounds)).[3]

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3. Plaintiff initially urged that a "relaxed" standard should apply to the showing required for likelihood of success on the merits, but now concedes that cases supporting such a standard are inconsistent with the Supreme Court's decision in *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7 (2008). See *N.M. Dept. of Game & Fish v. U.S. Dept. of the Interior*, 854 F.3d 1236, 1246-47 (10th Cir. 2017).

Although the parties' submissions address all factors necessary for a preliminary injunction, the focus at the hearing was on the legality of the Secretary's decision, which goes to plaintiff's likelihood of succeeding on the merits. Having considered the various legal questions involved, the court concludes plaintiff is unlikely to prevail on the merits of its claims and that preliminary injunctive relief is not warranted.[4]

Administrative Procedures Act Claim.

The parties do not dispute that the Secretary's decision to take the Terral site into trust is one subject to judicial review pursuant to the APA. *See McAlpine v. United States*, 112 F.3d 1429 (10th Cir. 1997). Further, plaintiff's standing to challenge the decision is not, in general, disputed. *See Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209 (2012).[5] So the question becomes whether the challenged decision of the Secretary was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2); *McAlpine*, 112 F.3d at 1436.

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4. Having concluded that plaintiff has not shown a likelihood of success on the merits, it is unnecessary to address the parties' arguments as to other factors.

5. *Patchak* involved prudential, rather than Article III standing, but the necessary elements of injury-in-fact, causation, and redressability are present here and the Secretary does not contend otherwise. The Secretary does, however, challenge plaintiff's standing to raise some of the particular legal arguments it offers as the basis for challenging the Secretary's decision.

Appendix B

Plaintiff argues the decision to take the Terral property into trust and the determination that gaming could occur on the property were not in accordance with the law or were otherwise arbitrary and capricious. In particular, the Comanche Nation contends the Secretary's regulations involved here are inconsistent with a Congressional intent to treat all tribes equally, unfairly benefit tribes in Oklahoma compared to tribes in other states, and arbitrarily depart from prior regulations or practice. None of the arguments are persuasive.

As a threshold matter, all of plaintiff's claims challenging the applicable regulations appear to be barred by the statute of limitations. All parties appear to concede that a *facial* challenge to a regulation is subject to a six-year limitations period. *See* 28 U.S.C. § 2401; *Dunn-McCampbell Royalty Interest, Inc. v. Nat'l Park Serv.*, 112 F.3d 1283, 1287 (5th Cir. 1997) (limitations period for a facial challenge to a regulation begins to run when the agency publishes the regulation in the Federal Register); *see also Waltower v. Kaiser*, 17 F. App'x 738, 741 (10th Cir. 2001) (discussing the statute of limitations with regards to facial challenges to statutes). Here, the particular regulations plaintiff challenges were promulgated in 1980 and 2008, more than six years ago. The statute of limitations therefore bars a facial challenge to those regulations. Plaintiff seeks to avoid the bar by arguing that its challenge here is an "as applied" challenge, rather than a facial challenge. But that is plainly not so. For example, plaintiff argues that 25 C.F.R. § 292.2 improperly defines "reservation" because it does not include a requirement that the tribe have "governmental

jurisdiction" over the former reservation. That is a classic facial challenge—arguing what the law is or should be with respect to all persons. An "as applied" challenge is something different, as it focuses on the "application of that [regulation] to the facts of a plaintiff's concrete case." *Colo. Right to Life Comm. v. Coffman*, 498 F.3d 1137, 1146 (10th Cir. 2007). So if, for example, the Comanche Nation was challenging the determination that the Terral site actually is within the scope of the former Chickasaw reservation, and hence within the regulation's definition of "reservation," that would be an "as applied" challenge. That is not what plaintiff seeks to do here. Rather, it seeks to invalidate the regulation to the extent that it deviates from plaintiff's view of what the law is or ought to be. That is a facial challenge, barred here by the statute of limitations. Plaintiff is thus unlikely to succeed on its claim challenging the regulations.

But even if plaintiff's APA claim is not barred by the statute of limitations, it is nonetheless unlikely to succeed on the merits. The thrust of plaintiff's argument is that the regulations promulgated by the Secretary allowing property to be taken into trust for gaming purposes in Oklahoma are deficient in that they do not include a requirement for a showing of "governmental jurisdiction" by the involved tribe over the property being taken into trust.[6] For various reasons, the law does not support that conclusion.

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6. Plaintiff's brief says "the most important basis for challenge is that the property in Jefferson County was not subject to the governmental jurisdiction of the Chickasaw Nation at the time of acquisition . . . ." [Doc. #13-1] at 4.

Appendix B

Plaintiff focuses principally on the law and regulations which generally permit the Secretary to take land into trust. The statute involved is 25 U.S.C. § 2508, part of the IRA, which provides, in pertinent part, that "The Secretary . . . is authorized, in his discretion, to acquire any interest in lands . . . within or without existing reservations . . . for the purpose of providing land for Indians." There is no explicit requirement in the statute that the Secretary acquire only lands over which a tribe has "governmental jurisdiction" and, as the "without or without existing reservations" language suggests, there appears to be no limit in that statute as to what land the Secretary could accept. So the question becomes whether the Secretary has appropriately exercised his discretion via the various regulations or acquisition policies he has adopted in implementing his authority under § 2508.

The regulation setting out the general standard is 25 C.F.R. § 151.3, which authorizes the Secretary to take land into trust for an Indian tribe:

> (1) When the property is located within the exterior boundaries of the tribe's reservation or adjacent thereto, or within a tribal consolidation area;
>
> (2) When the tribe already owns an interest in the land; or
>
> (3) When the Secretary determines that the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing.

A related regulation, adopted in 1980, defines "reservation" as:

> [T]hat area of land over which the tribe is recognized by the United States as having governmental jurisdiction, *except that, in the State of Oklahoma . . . "Indian reservation" means that area of land constituting the former reservation of the tribe as defined by the Secretary.*

25 C. F. R. § 151.2 (emphasis added). The regulation thus permits land to be taken into trust in Oklahoma if the land is part of a tribe's former reservation.[7] Here, there is no dispute that the Terral property is part of either the Chickasaw Nation's former reservation (if its former reservation has been disestablished) or that it falls within the geographical boundaries of its current reservation (if it still exists). The Terral property therefore, appears to fall squarely within either §151.2's general definition of reservation or the "Oklahoma exception" to that definition. Either way, it would be a proper "on-reservation" acquisition.

Plaintiff seeks to avoid this result by arguing that the Chickasaw reservation was never disestablished. It relies on the recent Tenth Circuit Court of Appeals' decision in *Murphy v. Royal*, 866 F.3d 1164 (10th Cir. 2017), where the Court concluded that, contrary to what most everyone had assumed for many years, the Creek Reservation has

7. Other factors not at issue here must also be considered.

not been disestablished by Congress. Reasoning that both the Creek Nation and the Chickasaw Nation are one of the Five Civilized Tribes, which Congress has often dealt with in the same fashion, plaintiff suggests that the Chickasaw reservation in Oklahoma has similarly not been disestablished and that the Secretary's reliance on the "Oklahoma exception" to § 151.2 is therefore invalid.

Plaintiff's argument is unpersuasive for several reasons. First, it probably does not matter—for purposes of this case—whether the reservation was disestablished. If the Chickasaw reservation has been disestablished, then the Secretary's reliance on the properties' *former* reservation status is proper based on § 151.3(1) and the related regulation defining "reservation" to include former reservation lands. If, on the other hand, *Murphy*'s reasoning ultimately leads to a conclusion that the Chickasaw reservation has *not* been disestablished, the most plausible consequence of that determination is that the Chickasaw "reservation" would be treated like any other formal reservation, and would hence be within the scope of § 151.3(1).[8]

Second, it is far from clear that *Murphy* will lead to any particular result as to the Chickasaw reservation. Even if it ultimately becomes final and binding, it is far from

8. Any other conclusion would put an Oklahoma tribe with a current reservation in a *less* advantageous position than tribes with reservations outside Oklahoma. That is inconsistent with what plaintiff argues Congressional policy is, and it certainly appears inconsistent with Congress' interest in protecting Oklahoma tribes, as evidenced by the "exceptions."

clear that a determination relating to the Creek Nation necessarily applies in the same way to the Chickasaw Nation. *See Murphy*, 866 F.3d at 1188, (whether there was specific congressional purpose to "disestablish or diminish a particular reservation depends on the language of the act and the circumstances underlying its passage.")

Plaintiff contends that the disestablishment question is relevant, arguing that if (per *Murphy*) the Chickasaw reservation still exists, the Secretary misapplied the relevant regulations. It relies on *Montana v. United States*, 450 U. S. 544 (1981) as the basis for its argument. So far as the court can determine,[9] plaintiff's position is that since the Terral property was fee land held by a non-Indian at the time it was acquired, then the Chickasaw tribe cannot be said to have exercised governmental jurisdiction over it even if the Chickasaw reservation still exists. Again, the court is unpersuaded. First, *Montana* involved a dispute over whether the state or the Indian tribe had the right to regulate hunting and fishing by non-Indians on reservation land. *Montana*, 450 U.S. at 549. The question here is not one of state jurisdiction versus tribal jurisdiction, but is, instead, whether the land is in the area of land "over which the tribe is *recognized by the United States* as having governmental jurisdiction." 25 C.F.R. § 151.2. Recognition by the United States is the key element, and the court can discern no reason why formal "reservation" status would not qualify as the pertinent

9. Plaintiff's discussion of *Montana* in its brief is very limited—basically little more than a footnote reference.

"recognition."[10] Further, even if *Montana* somehow applies here, it recognizes that Indian tribes retain some aspects of civil jurisdiction even over non-Indian fee lands within the reservation. 450 U.S. at 565-66. In any event, plaintiff offers no persuasive explanation for why it would be an abuse of discretion for the Secretary to conclude that reservation status supplies any necessary "governmental jurisdiction."

In short, plaintiff appears unlikely to succeed on its APA challenge to the land acquisition based on the IRA or the pertinent regulations issued under it.[11]

The same conclusion follows to the extent that plaintiff bases its challenge on IGRA. IGRA is pertinent here because it limits the lands upon which a tribe may build a gaming facility. Under 25 U.S.C. § 2719, gaming may not be conducted on lands taken into trust by the Secretary after the date of enactment of IGRA (October 17, 1988) unless an enumerated exception applies.[12] One of those exceptions, also known as an "Oklahoma exception," was relied on by the Secretary as to the Terral property. The

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10. Any narrower reading seems particularly anomalous in light of Congress' specific authorization to take into trust *both* reservation and non-reservation land.

11. The Secretary's decision included analysis of a variety of factors considered pursuant to his land acquisition regulations. See [Doc. #20-1]. Only the legal issues referenced above are raised by plaintiff as the basis for review by this court.

12. *See also* 25 C.F.R. Part 292, the regulations implementing this section.

exception permits gaming on land taken into trust after 1988 if the Indian tribe had no reservation on the date of enactment, the lands are located in Oklahoma, and the land is within the boundaries of the tribe's *former* reservation.[13] There is no dispute here that the Terral property is within the boundaries of the historical reservation of the Chickasaw tribe. So assuming it is a "former" reservation, the Oklahoma exception plainly applies.

Plaintiff argues the regulation, and in particular the Oklahoma exception, are deficient because the definition of "reservation" does not include a requirement that the tribe have governmental jurisdiction over the property at issue. It suggests the "Oklahoma exception" in § 292.2

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13. Section 2719 provides as follows:

> **(a) Prohibition on lands acquired in trust by Secretary**
>
> Except as provided in subsection (b) of this section, gaming regulated by this chapter shall not be conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988, unless—
>
> […]
>
> (2) the Indian tribe has no reservation on October 17, 1988, and—
>
> (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, or
>
> (ii) are contiguous to other land held in trust or restricted status by the United States for the Indian tribe in Oklahoma; . . . .

puts Oklahoma tribes on a better footing than tribes located outside the state, and therefore invalidates the regulation.[14] However, as the Secretary correctly points out, plaintiff is in no position to rely on this argument. Whatever complaint a tribe outside Oklahoma might have about the regulation on that basis, it is clear plaintiff has no such complaint. It is an Oklahoma tribe and a presumed beneficiary of the distinction or exception that it seeks to attack here. So, whether viewed as a "standing" issue or otherwise, plaintiff is not in position to rely on that argument as a basis for its challenge to 25 C.F.R. 292.2 or the Secretary's determination under it.

Plaintiff also argues the absence of a "governmental jurisdiction" requirement in the regulation is problematic because it is inconsistent with prior determinations of the Secretary.[15] It relies on a rule proposed in 2006 which included a jurisdictional element even as to tribes

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14. As noted above, this is plainly a facial challenge to the regulation. It is also notable that while plaintiff cites § 151.2's requirement of "governmental jurisdiction" to criticize §292.2, § 151.2 does not include that requirement for tribes falling under the Oklahoma exception. In that sense, § 151.2 and § 292.2 are consistent in their treatment of Oklahoma tribes.

15. Although plaintiff's submissions are not clear on the point, it may be arguing that the absence of the requirement also violates some *Congressional* mandate or preference for equal treatment of Indian tribes. However, as the discussion of similar issues arising under IGRA, infra, suggests, Congress has explicitly adopted an "Oklahoma exception" in certain circumstances, recognizing the unique history of Oklahoma and the circumstances of the Indian tribes located there.

in Oklahoma.[16] But that argument is unpersuasive for at least two reasons. First, the proposed rule that plaintiff relies on was just that—proposed. There is no basis for concluding that a regulation which was proposed and thought about years ago, but not adopted, somehow becomes the baseline against which all later regulations should be tested. Second, even if the proposed regulation plaintiff relies on had been adopted, that does not, in and of itself, prove or suggest that a later regulation taking a different tack is therefore arbitrary or capricious.

Finally, to the extent that plaintiff argues against the application of § 292.2's "Oklahoma exception" on the basis of *Murphy*—i.e. the Chickasaw reservation was not disestablished and there is therefore no "former" reservation within the meaning of the exception—the argument fails. If the Chickasaw reservation is eventually determined to still be in existence, the Oklahoma exception would not apply but the general exception for existing reservations would. IGRA specifically permits gaming on lands which were, as of 1988, part of the tribe's reservation.[17] The result is that, regardless of whether the Chickasaw reservation is viewed as disestablished or still existing, § 2719 does not invalidate the action taken here by the Secretary.

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16. Gaming on Trust Lands Acquired After October 17, 1988, 71 Fed. Reg. 58,769-01 (Oct. 5, 2006).

17. 25 U.S.C. § 2719(a)(1) ("Except as provided in subsection (b) of this section, gaming regulated by this chapter shall not be conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988, unless . . . such lands are located within or contiguous to the boundaries of the reservation of the Indian tribe on October 17, 1988").

In sum, IGRA does not provide a basis for challenging the Secretary decision.

The court concludes plaintiff is unlikely to succeed on the merits of its APA claim, based both on the impact of the statute of limitations and on the deficiencies in its substantive arguments.

NEPA Claim.

The motion for preliminary injunction did not even mention plaintiff's claim under NEPA. NEPA was first mentioned as a basis for preliminary injunction in plaintiff's reply brief. That circumstance alone is sufficient to deny the motion to the extent that plaintiff now relies on NEPA. However, even considering the evidence accompanying the reply brief, plaintiff's arguments at the hearing, and its post-hearing submissions, a sufficient basis for issuing an injunction based on the NEPA has not been shown. Apart from general assertions by counsel that the Secretary did not take the necessary "hard look" at environmental compliance, plaintiff offers no evidence which makes a substantial showing of a violation. *See Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 100 (1983) (Congress intended for agencies to take a "hard look" at the potential environmental of projects).

Plaintiff's submissions allude to an alleged history of improper decisions by the BIA relating to compliance with environmental requirements in the context of trust acquisitions. The affidavit of a former BIA supervisor alleges the BIA has previously taken properties into

trust without requiring the preparation of environmental assessments required by NEPA.[18] But it is undisputed that an environmental assessment was prepared as to *this* trust acquisition, which was considered and approved by the Secretary.[19]

Plaintiff also suggests the Chickasaw Nation is building bigger sewage lagoons than would be necessary to service a facility of the size referenced in its applications and that some bigger or more impactful activity must therefore be planned. To the extent this argument is directed to the NEPA claim, it fails to show a non-speculative basis for injunctive relief.

Finally, it appears that plaintiff's NEPA claim is less concerned with environmental impact, as it is ordinarily understood, than it is with the competitive impact of the Chickasaw casino on plaintiff's own casino operation. Such economic impacts, standing alone, are ordinarily not a basis for claim under the NEPA. *See Cure Land, L.L.C. v. U.S. Dept. of Agriculture*, 833 F.3d 1223, 1235 (10th Cir. 2016). As a result, plaintiff's evidence of the competitive impact of the project on plaintiff's operations is insufficient to show a likelihood of success on the NEPA claim.[20]

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18. Affidavit of Steve York [Doc. #26-3].

19. [Doc. #20-1] at 15: "An Environmental Assessment (EA) for the Terral Site was completed on April 20, 2016. The EA was made available for public comment from March 18 to April 18, 2016."

20. Plaintiff's post-hearing submissions include an affidavit from plaintiff's Tribal Administrator and former historic preservation officer stating that the Terral site is within lands

Plaintiff's reliance on the NEPA in connection with this motion appears to have been an afterthought. In any event, plaintiff's submissions directed to the NEPA do not show a likelihood of success on the claims and fall short of the "clear and unequivocal" showing necessary to the issuance of a preliminary injunction.

Conclusion

Plaintiff has not made the necessary showing of likelihood of success on the merits. As a result, its motion for preliminary injunction [Doc. #13] is **DENIED**.

IT IS SO ORDERED.

Dated this 13th day of November, 2017.

/s/
JOE HEATON
CHIEF U.S. DISTRICT JUDGE

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historically occupied or crossed by the Comanche and that burial sites and tribal artifacts may exist in the area. It also suggests consultation with the Tribe as to federal actions is required by the National Historic Preservation Act and the Native American Graves Protection and Repatriation Act. Whatever may be the potential application of those acts to this situation, the affidavit does not support a conclusion that a violation of the NEPA is shown.