Kiowa Tribe v. U.S. Department of Interior, ___ F. Supp. 3d ___, 2022 WL 1913436 (W.D. Okla. June 3, 2022)

- **Holding:** Tribes failed to establish a substantial likelihood of success for preliminary injunction purposes with respect to claims under the APA, IGRA and RICO seeking to enjoin the opening of another tribe's class III gaming facility.
- **Summary:** The Fort Sill Apache Tribe has a class III compact with the State of Oklahoma. The National Indian Gaming Commission also has approved its class III gaming ordinance under the Indian Gaming Regulatory Act. FSAT is in the process of opening a casino on the "Tsalote Allotment"—a 160-acre parcel of land taken into trust for it in 2001 by the Secretary of the Interior. The neighboring Kiowa Tribe and the Comanche Nation sued the Interior Department, federal officials, and FSA officers challenging the anticipated gaming operation. They alleged three claims: "(1) against the Federal Defendants, a declaration under the Administrative Procedure Act ... that the Tsalote Allotment ... is not owned by FSAT; (2) against the FSA Defendants, 'a declaration that [FSAT] may not conduct gaming on the Tsalote Allotment. because such gaming would violate the Indian Gaming Regulatory Act ...; and (3) against the FSA Defendants, a declaration that gaming on the Tsalote Allotment by FSAT will violate [the Racketeer-Influenced and Corrupt Practices Act]." Plaintiffs simultaneously requested entry of a temporary restraining order to prohibit the casino's opening. The district court denied the motion on lack-of-probability-of-success grounds.

  Plaintiffs predicated their APA claim on the argument "that, pursuant to the 1867 Treaties of Medicine Lodge and 25 C.F.R. § 151.8, the consent of the Kiowa Tribe, Comanche Nation, and Apache Tribe was required for the Tsalote Allotment to be acquired in trust for FSAT." The court agreed with federal Defendants that the claim was likely barred by the six-year limitation period in 28 U.S.C. § 2401(a) because they "supplied documents reflecting that all three tribes were notified in June 2001 of the United States' application to acquire the Tsalote Allotment in trust for FSAT." It quoted at length from *Comanche Nation, Okl. v. United States*, 303 F. Supp. 2d 1196 (W.D. Okla. 2005), which rejected a challenge to the Bureau of Indian Affairs' "approval of an acquisition of a portion of a Comanche Nation allotment by the United States to be held in trust for FSAT" under § 2601(a) where the Nation, "'through the exercise of reasonable diligence, could have learned of the facts which give rise to its claims in regard to [BIA's] decision' on the date that 'equitable title was transferred to the FSA Tribe and the transfer was recorded in the BIA land titles and records office.'"

  The court held that the IGRA-based challenge likely would fail because "[i]t is well established in the Tenth Circuit that 'IGRA provides no private right of action against [a] Tribe, [a] State, the federal government or any official or agency thereof.'" Here,

  > [a]s pleaded and argued to the Court by Plaintiffs, the IGRA Claim is not an appeal taken against NIGC to challenge any gaming-related decision or opinion of that commission. It is, rather, a claim directed at FSA officials that attempts to bring a "private right of action" "to enforce compliance with the statute's provisions." ... Plaintiffs therefore have not presented a claim that is reviewable by this Court pursuant to 25 U.S.C. § 2714.

  The court also deemed as "unsupported by any discussion of the statutory provision or citation to relevant authority" the "nominal argument" that Plaintiffs raised "in passing that FSAT's Class III gaming operations on the Tsalote Allotment 'will violate [FSAT's]

gaming compact with Oklahoma,' which recites that the tribe may conduct Class III gaming only on its own Indian lands.'"

The RICO likely lacked merit because "Plaintiffs have not shown a substantial likelihood of success on their claim that FSAT's acquisition of the Tsalote Allotment was invalid or on their claim that operation of the Casino will violate IGRA." Consequently, they "cannot show a substantial likelihood that they could successfully show that the FSA Defendants' intent to open and operate the Casino amounts to a RICO conspiracy and agreement to conduct FSAT's affairs 'through a pattern of racketeering activity.'"

The court did reject the FSA Defendants' sovereign immunity defense, concluding that "Plaintiffs' Complaint presents a substantial claim for relief and seeks to prevent the FSA Defendants from violating federal law through opening and operating the Casino" and that, therefore, "it has been sufficiently shown that the *Ex parte Young* exception applies to allow the claims for prospective injunctive relief against the FSA Defendants, at least those raised against them in their official capacities, to proceed."

- **Relevant (2022) Deskbook Sections:** 7:21 n.9; 12:50 n.1