IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

1. CADDO NATION OF OKLAHOMA, **Plaintiff,** **v.** **1. WICHITA AND AFFILIATED TRIBES;** **2. TERRI PARTON, in her official capacity as Tribal President of Wichita and Affiliated Tribes;** **3. JESSE E. JONES, in his official capacity as Vice President of the Wichita and Affiliated Tribes;** **4. MYLES STEPHENSON, JR., in his official capacity as Secretary of the Wichita and Affiliated Tribes;** **5. VANESSA VANCE, in her official capacity as Treasurer of the Wichita and Affiliated Tribes;** **6. SHIRLEY DAVILA, in her official capacity as Committee Member of the Wichita and Affiliated Tribes;** **7. NAHUSEAH MANDUJANO, in her official capacity as Committee Member of the Wichita and Affiliated Tribes; and** **8. MATT ROBERSON, in his official capacity as Committee Member of the Wichita and Affiliated Tribes,** **Defendants.**	**Case No. 5:16-cv-00559-HE**

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COME NOW the Wichita and Affiliated Tribes ("Wichita Tribes"), Terri Parton ("Parton"), Jesse E. Jones ("Jones"), Myles Stephenson, Jr. ("Stephenson"), Vanessa Vance ("Vance"), Shirley Davila ("Davila"), Nahuseah Mandujano ("Mandujano"), and Matt Roberson ("Roberson") (collectively, "Tribal Officials" and, with the Wichita and Affiliated Tribes, "Defendants" or "Wichita Tribes"), appearing specially by and through counsel, hereby move to dismiss this action based, *inter alia*, on lack of subject matter jurisdiction. In support of this Motion, Defendants state more particularly as follows:

SUMMARY OF MOTION

In the First Amended Complaint ("Complaint") (Doc. 60), Caddo Nation ("Plaintiff" or "Caddo") fails to plead a cause of action upon which relief may be granted, warranting dismissal pursuant to Rule 12(b)(6), because:[1]

a. Caddo's new claims are barred by the applicable statutes of limitations.

b. Caddo's old claims are moot. *Caddo Nation of Okla. v. Wichita and Affiliated Tribes*, 877 F.3d 1171 (10th Cir. 2017).

c. Caddo has failed to join necessary and indispensable parties who are unable to be joined absent their express waiver of sovereign immunity from suit.

d. Caddo lacks standing under both the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 *et seq.*, and the National Historic Preservation Act ("NHPA") 54 U.S.C. §§ 300101 *et seq.*

[1] All references to the Federal Rules of Civil Procedure shall be abbreviated as "Rule XX," e.g., "Rule 12(b)(6)."

e. Caddo failed to bring this action pursuant to the Administrative Procedures Act, 5 U.S.C. § 551 *et seq.* ("APA").

f. The Court lacks subject matter jurisdiction because the Defendants are protected by tribal sovereign immunity that has not been waived.

g. Caddo lacks standing generally because its recognition by the Secretary of the Interior violates federal law.

BACKGROUND

Despite Caddo's emotional pleas to the contrary, this case is not about graves. This case is about economics and Caddo's desire to stifle the Wichita Tribes' efforts to develop lands within its own former reservation. In its First Amended Complaint, Caddo reasserts moot claims, demonstrable falsehoods, (the same ones that prompted a motion for sanctions at the Tenth Circuit), and an imaginary alternate history of the Wichita Reservation and the Riverside School.[2]

Since filing this lawsuit, Caddo has had two (2) years to develop evidentiary support for its claims, but it has failed to do so. Rather than support its claims, Caddo places the

[2] Caddo's primary conceit, that the History Center is located on the site of the original Riverside Indian School, is completely unsupported by the historical record, as will be discussed below. Caddo paints Riverside as a stereotypical "Indian boarding school" operated by the federal government similar to other schools where atrocities occurred. The history of Riverside Indian School, however, differs significantly and Caddo's effort to play to the Court's emotion consists of fabrications. The historical record will demonstrate that the school – wherever it was located – was operated by Quakers, had small enrollment, that the few children who were enrolled frequently came and went, and, in fact, typically camped with their families nearby. Put another way, children were not brought to Riverside; rather, Riverside came to the children.

burden on the Wichita Tribes to prove a negative, i.e., to disprove Caddo's salacious claims of human remains at the site of the Wichita History Center. This lawsuit remains as baseless as it was the day it was originally filed.[3]

Caddo originally attempted to prevent the construction of the Wichita History Center (also called the "Project"), which was funded by a grant from the U.S. Department of Housing and Urban Development ("HUD"), alleging Defendants violated two federal laws, the NEPA and NHPA. After this Court vacated a briefly imposed temporary restraining order ("TRO"), Caddo immediately appealed. "For the remainder of the time this case was on appeal, Caddo Nation did not move for [] an injunction in the district court, though it could have done so under Federal Rule of Civil Procedure 62(c)." *Caddo Nation*, 877 F.3d at 1176. Thus, construction of the History Center "went forward unhindered." *Id*.

The site of the History Center is a small portion of the northwest corner of a 20-acre cleared field that, itself, is a portion of a larger 71-acre tract of land located within the former Wichita Reservation. The History Center sits near the bottom of a steep, wooded hill. See Exhibit A (satellite imagery during construction of History Center). Throughout this litigation, Caddo has deliberately (and without any effort to be accurate) blurred the lines about the History Center's location, implying that the History Center occupies the entire 20-acre field.

[3] "Despite defendants' inquiries, the Caddo Tribe failed to provide specific information . . . other than the declaration of Tamara Francis-Fourkiller, which was filed on May 25, 2016, no names or locations had been provided to Defendants. And what she provided is insufficient and offered too late." Order (Doc. 27) at 16-17.

In the 1870s, there were reports of a day school, then a boarding school, close to the Indian Agent's house, which was located north of the History Center site. *See* Exhibit B (1874 survey of Township 7N, Range 10W).[4] The early school, started by Quakers, was first called the Wichita School, then the Wichita-Caddo School, then the Caddo School. Thomas C. Battey, *The Life and Adventures of a Quaker Among the Indians*, at 316-17 (1875); C. Ross Hume, *Historic Sites Around Anadarko*, 16 Chronicles of Oklahoma 4, at 419, 421 (1938).

Now, in the Complaint, Caddo continues to seek redress for the construction of the History Center, **to have the completed History Center "relocated" (i.e., demolished)**[5] and to prevent hypothetical future development. Caddo insists on asserting primacy over the Wichita Tribes as to Wichita Reservation lands, which invites an exploration of the history underlying its claims. As will be discussed below, this history provides no support for even the most basic allegations in the First Amended Complaint.

STANDARD OF REVIEW

For a motion to dismiss, the Court should take "well pleaded" facts as true, but "unsupported conclusions of the pleader may be disregarded, especially when limited or negated by the substance of the facts pleaded." *Oppenheim v. Sterling*, 368 F.2d 516, 519 (10th Cir. 1966). The Court is not "bound to accept mere legal conclusions or factual claims" at face value when they contradict the evidence presented within the complaint.

[4] The school was operated in at least two (2) different locations, including one (1) location more than a mile south of the History Center. Jon A. Richards, Enoch Hoag, "Report of Commissioner of Indian Affairs," 224 (1873).
[5] First Amended Complaint at 58, ¶ 4.

Olpin v. Ideal Nat. Ins. Co., 419 F.2d 1250, 1255 (10th Cir. 1969). As the Court will see, Caddo's alleged "facts" are conclusory and internally contradictory, rather than well-pleaded.

ARGUMENTS AND AUTHORITIES

Caddo has failed to plead a claim upon which relief may be granted, warranting dismissal under Rule 12(b)(6). The failings of the First Amended Complaint are extensive and comprehensive.

PROPOSITION I: Caddo's New Claims Must be Dismissed Under Rule 12(b)(5).

As an initial matter, Caddo has failed to effect service on three (3) Defendants: Vance, Mandujano, and Roberson, who were elected and assumed office during the pendency of this case, replacing three (3) of the original defendant Tribal Officials. Although Caddo substituted the three (3) new Tribal Officials as Defendants in place of former officials, Caddo now asserts it is suing all the Tribal Officials in their **individual** capacities; and, yet, the summonses served on all the Tribal Officials (as originally named at the time of filing) specified that they were being sued in their **official** capacities. *See* Summonses, filed herein as Doc. 2. All summonses were served on the Tribal Officials at the tribal complex. *See* the returns of service filed herein as Doc. 13-19.

Caddo has never served any of the Tribal Officials in their individual capacities. In that light, Caddo has failed entirely to serve the new Tribal Officials as required by Rule 4(b), which states that "A summons – or a copy of a summons that is addressed to multiple defendants – must be issued for each defendant to be served." Summonses have not even been issued for the new Tribal Officials, who had no way to know within the time allowed

under Rule 4(m) "that the action would have been brought against [them], but for a mistake concerning the proper party's identity." Rule 15(c)(1)(C)(ii). Accordingly, dismissal is warranted as to Defendants Vance, Mandujano, and Roberson under Rule 12(b)(5).

PROPOSITION II: Caddo's New Claims are Barred by the Statue of Limitations

No Relation Back of the First Amended Complaint

Caddo's failure to serve the new Tribal Officials is not a mere technicality, but also relates to the question of whether or not the First Amended Complaint relates back to the original date of filing in 2016. Under Rule 15(c)(1)(b), an amendment relates back if it "asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out – or attempted to be set out – in the original pleading." *See also, Mayle v. Felix*, 545 U.S. 644, 655 (2005) (*quoting* Rule 15(c)(2)). In the First Amended Complaint, Caddo asserts two (2) completely new claims – unjust enrichment and equitable estopple – which are governed by state law and do not arise out of the same course of conduct as that alleged in the Original Complaint (Doc. 1). "[R]elation back is improper when the amended claim 'asserts a new ground for relief supported by facts that differ in both time and type from those the original pleading set forth." *Hernandez v. Valley View Hosp. Ass'n*, 684 F.3d 950, 962 (10th Cir. 2012) (*citing Mayle*, 545 U.S. at 650). Moreover, these claims are barred by Oklahoma's statute of limitations, which has expired. 12 O.S. § 95(3); 76 O.S. § 5.5. Therefore, these claims are time-barred, and must be dismissed.

A plaintiff may not use an amended complaint to raise new claims which are time-barred. Courts will only "save[] an otherwise untimely amendment" asserting new claims "[i]n limited circumstances." *Hernandez*, 684 F.3d at 961. These limited circumstances

only exist if the amendment "'ar[i]se[s] out of the conduct, transaction, or occurrence'" as that complained of in the original complaint. *Mayle*, 545 U.S. at 655 (*quoting* Rule15(c)(2)). "A new pleading cannot relate back if the effect of the new pleading 'is to fault [the defendants] for conduct different from that identified in the original complaint,' even if the new pleading 'shares some elements and some facts in common with the original claim.'" *Full Life Hospice, LLC v. Sebelius*, 709 F.3d 1012, 1018 (10th Cir. 2013) (internal citation and quotation marks omitted), *cert. denied*, 563 U.S. 987 (2011)).

Caddo's two new claims do not relate to the construction of the History Center or the Wichita Tribes' efforts to engage Caddo in consultation as raised in the Original Complaint. In fact, these claims contradict Caddo's Original Complaint. Moreover, Caddo's arguments for unjust enrichment and equitable estoppel[6] are alleged against Wichita tribal officials in their individual capacities, even though three of those officials – Vance, Mandujano and Roberson – were elected after the time period at issue.

Caddo's Original Complaint pursued two causes of action. First, a purported violation of NHPA (Original Complaint ¶¶ 87-108), based on the alleged failure of the Wichita Tribes to make reasonable efforts to consult Caddo, consider alternative construction sites or provide proper notices. Second, a purported violation of NEPA and APA (*id*. ¶¶ 109-29), based on the purported inadequate analysis contained within the Environmental Assessment ("EA"), failure to consider alternative construction locations, and failure to provide adequate public notices. Caddo specifically sought declaratory relief

[6] Estoppel is an affirmative plea which must be proved by the party asserting it. *Sullivan v. Buckhorn Ranch P'ship*, 2005 OK 41, ¶ 30, 119 P.3d 192, 202.

finding violations of NEPA and NHPA, and injunctive relief preventing construction of the History Center, and requiring additional consultation. *Id.* at 28-29. At no point in time did Caddo assert claims against the Tribal Officials in their individual capacities, and instead specifically sued Tribal Officials in their official capacities. *Id.* at 1.

Unlike the Original Complaint, Caddo now purports to seek relief against the Tribal Officials individually for state-law claims of unjust enrichment and equitable estoppel. First Amended Complaint, ¶¶ 214-241. These claims allege Wichita tribal officials acted in their individual capacities "to undertake actions to ensure construction continues on the site of the Riverside Indian Boarding School." ¶ 216. It is clear that these are new claims based on new facts and seek different relief from the Original Complaint; thus, application of the relation back doctrine is improper. *Hernandez*, 684 F.3d at 962.

Specifically, rather than seeking to stop the Tribal Officials from completing a pending construction project, Caddo seeks "restitution damages" from the individual Wichita tribal leaders – something never before sought, despite the fact that the History Center is not the first construction project on this 20-acre parcel of land. A Travel Plaza was constructed previously on this exact same property, within 500 feet of the location of the History Center. See Doc. 22-2, at 2, 5 (picture of the Wichita History Center construction site with the already-completed Travel Plaza located in the background). Caddo Chairwoman Tamara Francis previously confirmed that Caddo knew construction had previously occurred at this site, and yet did not pose an issue to Caddo – "Caddo Nation did not oppose the construction, because we did not have concerns that archaeological items were there and the sites were not considered sacred." Doc. 5, at ¶ 32. Caddo's current

claim of unjust enrichment is not merely absent from its allegations within the Original Complaint; rather, these claims squarely contradict the sworn statement of Caddo's Chairwoman filed with that Original Complaint.

Caddo's claim for equitable estoppel is similarly absent from its Original Complaint. This claim relies upon purported action taken by Wichita tribal President Parton, whereby Caddo alleges that President Parton intended to induce Caddo to forego asserting its rights by making misstatements regarding the Wichita Tribes' intentions to conduct ground penetrating radar ("GPR") testing on a nearby archeological site (located on the opposite side of the 20-acre tract from the Wichita History Center in the southeast corner of the cleared field, see Exhibit A), among other things. First Amended Complaint at ¶¶ 230-236.

Again, contradicting itself, Caddo alleges it relied on a January 7, 2016, letter from President Parton, in deciding to forego filing suit until May, 2016. *Id*. ¶¶ 235-37. This allegation, of course, does not appear in the Original Complaint because **Caddo previously alleged it never received the January 7, 2016 letter.**[7] Original Complaint, at ¶¶ 62-63; *see also* Order, Doc. 27, at 6-7 (May 31, 2016) (noting Caddo's counsel argued that Caddo did not receive the letter in January, 2016, and was not aware of its contents until late

[7] The January 7, 2016, letter (Exhibit C) identified the locations of the two (2) archaeological sites (CD352 and CD353) referenced in the Northcutt report (attached to the First Amended Complaint as Exhibit 2). The letter stated that additional testing would be conducted on Site 352 (the possible Riverside School site) and advised that an avoidance zone had been created to protect the site from "ground disturbing, construction activity." The letter included a map that showed the location of both sites. There are no plans to build on Site 352 or Site 353, both of which lie beyond the Travel Plaza and History Center.

February, 2016). Now, Caddo alleges it relied on the Wichita Tribes' "misstatements" made in the January 7 letter as early as January, 2016. Amended Complaint, ¶ 239.

Thus, Caddo now seeks to enjoin the defendants in their individual capacities from taking action to engage in future development – a remedy Caddo has not sought previously, and one that makes no sense, given the Tribal Officials possess no individual interests in the 20-acre tract. "A new pleading cannot relate back if the effect of the new pleading 'is to fault [the defendants] for conduct different from that identified in the original complaint,' even if the new pleading 'shares some elements and some facts in common with the original claim.'" *Full Life Hospice, LLC*, 709 F.3d at 1018 (*quoting United States ex rel. Miller v. Bill Harbert Int'l Constr., Inc.*, 608 F.3d 871, 881 (D.C. Cir. 2010) (internal citation and quotation marks omitted), *cert. denied*, 563 U.S. 987 (2011)). It is unreasonable to permit a new claim to relate back when the claim is based on the receipt of a letter **Caddo previously asserted it never received.**

State-Law Claims are Time-Barred

Because these new state-law claims for unjust enrichment and equitable estoppel do not relate back to the Original Complaint (*Hernandez*, 684 F.3d at 961-62), these claims are time-barred. 12 O.S. § 95(3); 76 O.S. § 5.5. Under Oklahoma law, the statute of limitations on these claims began to run at the time the cause of action accrued, which occurs "when the litigant could have first maintained the cause of action to conclusion," based on when the cause of action "could or should have been discovered." *McCain v. Combined Commc'ns Corp. of Okla., Inc.*, 975 P.2d 865, 867 1998 OK 94 ¶ 8. To determine when the cause of action accrues, courts look at the time at which the action the complaint

seeks to remedy occurred, not the time when "simply the realization of all the by-products . . . which form the basis of Plaintiffs' claim" occurred. *Id*. Federal courts apply this same rule when adjudicating state-law based claims. *Legacy Crossing, LLC v. Travis Wolff & Co., LLP*, 229 Fed.Appx. 672, 678 (10th Cir. 2007); *Huddleston v. Huddleston*, 2014 WL 5317922, at *1 (W.D. Okla. Oct. 16, 2014). When it is clear that a litigant possessed the means to discover it had a cognizable claim, the cause of action has accrued, and the statute of limitations begins to run. *Legacy Crossing, LLC*, 229 Fed.Appx. at 678; *McCain*, 975 P.2d at 867.

Caddo knew, or should have known, it could become a consulting party no later than January 9, 2015. Order, Doc. 27, at 5. Caddo knew, or should have known, it had failed to become a consulting party when public notice of the Environmental Assessment and Finding of No Significant Impact was made on May 22, 2015. Exhibit D. Caddo knew, or should have known, that the Wichita Tribes were performing additional archeological testing before continuing with its construction plans at the time Caddo received the January 7, 2016, letter. Exhibit B.

Accordingly, Caddo's claims based on unjust enrichment and equitable estoppel accrued no later than January, 2016. The First Amended Complaint was filed March 21, 2018 – more than two (2) months after the statute of limitations expired. Therefore, this Court should dismiss Caddo's claims for unjust enrichment and equitable estoppel.

Caddo's Objections to Wichita Tribes' Use of 20-Acre Tract are Time-Barred

Although not necessarily a "new" claim, Caddo's assertions regarding its interest in the 20-acre tract are barred under the APA's six (6) -year statute of limitations. 28 U.S.C.

§ 2401. In 2007, following more than a decade of negotiation, the Wichita Tribes, Caddo, and Delaware Nation passed identical resolutions ("Partition Resolutions") proportionately allocating 600 acres of land to provide each tribe separate lands for use and development (the "Partition Agreement"), with Caddo receiving 312 acres, Wichita Tribes receiving 180 acres, and Delaware Nation receiving 108 acres.[8] Pursuant to the Partition Agreement, the Bureau of Indian Affairs ("BIA") ordered a survey (*see* Exhibits E and F) to clearly delineate the boundaries of the partitioned acreages. *See also* Exhibit G.[9]

On January 30, 2009, the Department of the Interior published notice that it intended to officially file the survey of the partitioned tracts. 74 Fed. Reg. 5673 (Jan. 30, 2009), attached as Exhibit H. The notice provided interested parties thirty (30) days to object to the official survey filing and was sufficient to trigger the APA statute of limitations. *Hells Canyon Pres. Council v. U.S. Forest Serv.*, 593 F.3d 923, 931 (9th Cir. 2010) (publication of notice that boundary description was available for review triggered statute of limitations). "Actual knowledge of government action . . . is not required for a statutory period to commence. Publication in the Federal Register is legally sufficient notice to all

[8] Caddo remains subject to an 1835 treaty in which the Caddo Tribe gave up all lands and agreed to never reconstitute as a government within the United States (discussed below). Treaty with the Caddo (July 1, 1835) (the "1835 Treaty"), attached as Exhibit I. Various cases, however, support the idea that individual Caddo may hold interests in certain portions of the former Wichita Reservation and are intended to be the ultimate beneficiaries of any related funds distributed to Caddo Nation. *Wichita and Affiliated Tribes of Okla. v. Hodel*, 788 F.2d 765 (D.C. Cir. 1986). To the extent individual Caddo hold such an interest, they agreed to the 2007 Partition Agreement and have not rescinded, or purported to rescind, their approval. Exhibit J.

[9] Exhibit G is the field notes for the survey.

interested or affected persons regardless of actual knowledge or hardship resulting from ignorance." *Shiny Rock Mining Corp. v. United States*, 906 F.2d 1362, 1364 (9th Cir. 1990) (internal quotation marks omitted). Caddo did not file a protest within the thirty (30) days allowed by the Federal Register notice (March 1, 2009), nor did it appeal the filing of the survey before March of 2015. Accordingly, Caddo has waived its objections to the demarcation of the 20-acre tract for the exclusive use of the Wichita Tribes.[10]

Therefore, Caddo's state-law claims of unjust enrichment and equitable estoppel are barred by the applicable statute of limitations. Also barred are any claims or objections Caddo may raise regarding the designation of the 20-acre tract for the exclusive use of the Wichita Tribes. Accordingly, these claims must be dismissed.

PROPOSITION III: Caddo's Remaining Claims are Moot and/or Unripe

Caddo's Claims for Past Harm are Moot

Caddo has based its lawsuit on alleged violations of NHPA and NEPA. Federal courts have consistently held that environmental challenges to completed construction projects are moot. *See Weiss v. Sec'y of Dep't of Interior*, 459 F. App'x 497, 500–501 (6th Cir. 2012) (holding NEPA and NHPA claims moot because construction had been completed); *Sierra Club v. U.S. Army Corps of Eng'rs*, 277 F. App'x 170, 172 (3d Cir. 2008) (dismissing NEPA complaint as prudentially moot because wetlands had already been substantially filled and constructed upon); *One Thousand Friends of Iowa v. Mineta*, 364

[10] Despite the publication of the official government survey noting the divisions agreed to in the 2007 Partition Agreement, the Wichita Tribes continued to push for the issuance of a separate deed to the tract by the BIA for clarity of title. The administrative action seeking the issuance of the deed is currently before the BIA.

F.3d 890, 893 (8th Cir. 2004) ("A NEPA claim does not present a controversy when the proposed action has been completed and no effective relief is available. . . . [Both injunctive and declaratory relief are] similarly mooted by the completion of the construction project."); *Bayou Liberty Ass'n, Inc. v. U.S. Army Corps of Eng'rs*, 217 F.3d 393, 396 (5th Cir. 2000) ("When a party seeks an injunction to halt a construction project the case may become moot when a substantial portion of that project is completed"); *Knaust v. City of Kingston*, 157 F.3d 86, 88 (2d Cir. 1998) (dismissing appeal of denial of injunction in NEPA case because completion of construction rendered case moot). The D.C. Circuit has found a NEPA claim to be moot when the matter in dispute – a plan for wildlife management – had already been implemented. *Fund for Animals, Inc. v. U.S. Bureau of Land Mgmt.*, 460 F.3d 13, 18–19 (D.C. Cir. 2006). Further, Caddo has identified no instance where a court in a NEPA case ordered a defendant to dismantle a completed construction project.

Article III limits federal courts to resolving actual cases or controversies; it "prevents their passing on moot questions – ones where intervening events make it impossible to grant the prevailing party effective relief.*"Burlington N. R.R. Co. v. Surface Transp. Bd.*, 75 F.3d 685, 688 (D.C. Cir. 1996) (citing *Church of Scientology v. United States*, 506 U.S. 9, 11 (1992)). For a federal court to adjudicate a case, "an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997) (citations omitted). The doctrine of prudential mootness refers to the discretion enjoyed by federal courts in exercising their Article III powers. *Penthouse Int'l, Ltd. v. Meese*, 939 F.2d 1011,

1019 (D.C. Cir. 1991). The doctrine "permits the court in its discretion to 'stay its hand, and to withhold relief it has the power to grant' by dismissing the claim for lack of subject matter jurisdiction." *MBIA Ins. Corp. v. F.D.I.C.*, 708 F.3d 234, 245 (D.C. Cir. 2013) (quoting *Chamber of Commerce v. Dep't of Energy*, 627 F.2d 289, 291 (D.C. Cir. 1980)).

A court may declare a case prudentially moot when "[t]he precise conduct that prompted th[e] suit . . . has come to an end" and the plaintiff will have "ample opportunity . . . to renew their complaint." *Chamber of Commerce*, 627 F.2d at 292. A claim is moot if granting a present determination of the issues will not have some effect in the real world. *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1110 (10th Cir. 2010) (*citing Wyoming v. U.S. Dep't of Agric*., 414 F.3d 1207, 1212 (10th Cir. 2005)). This requires a court to ascertain what type of relief the plaintiff seeks and whether it affords the plaintiff meaningful relief. *Id*. Because the History Center is built, there is no relief available to the Caddo under NEPA or NHPA, but Caddo will have an opportunity to renew its complaint IF the Wichita Tribes undertake future development on the 20-acre tract without complying with NEPA and NHPA requirements. In this case, an injunction issued against the Wichita Tribes based on already completed actions would constitute an abuse of discretion. *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 166 (2010).

Caddo's Prospective Claims are Unripe for Adjudication

Caddo seeks to prevent the Wichita Tribes "from taking any further individual action toward the development or operation of any facilities located on the disputed parcel of jointly-owned WCD lands." Amended Complaint at 58. Yet Caddo cites no imminent planned development by the Tribal Officials individually (indeed, the Tribal Officials have

no individual interests in the 20-acre tract and may act only in their official capacities in relation thereto).

"In order for a claim to be justiciable under Article III, it must be a ripe controversy." *New Mexicans for Bill Richardson v. Gonzales*, 64 F.3d 1495, 1499 (10th Cir. 1995). "The question of whether a claim is ripe for review bears on a court's subject matter jurisdiction under the case or controversy clause of Article III of the United States Constitution." *Id*. at 1498-99. "The ripeness doctrine is 'drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction.'" *Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 808 (*quoting Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 57, n. 18 (1993)). "Ripeness is peculiarly a question of timing," *New Mexicans*, 64 F.3d at 1499 (*citing Reg'l Rail Reorganization Act Cases*, 419 U.S. 102, 140 (1975)), "intended 'to prevent the courts through avoidance of premature adjudication, from entangling themselves in abstract disagreements,'" *id*. (*quoting Abbott Labs v. Gardner*, 387 U.S. 136, 148 (1967)).

"Ripeness requires [courts] to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Texas v. United States*, 523 U.S. 296, 300 (1998) (*quoting Abbott Labs*, 387 U.S. at 149 (internal quotations omitted)). "In determining whether an issue is fit for judicial review, the central focus is on 'whether the case involves uncertain or contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *New Mexicans*, 64 F.3d 1495 at 1499 (*quoting* 13A Wright, Miller & Cooper, Federal Practice & Procedure, § 3532 at 112 (1984); *Texas v. United States*, 523 U.S. 296, 300 (quoting same)). "In assessing the

hardship to the parties of withholding judicial resolution, our inquiry 'typically turns upon whether the challenged action creates a 'direct and immediate' dilemma for the parties.'" *Id*. (*quoting El Dia, Inc. v. Hernandez Colon*, 963 F.2d 488, 495 (1st Cir. 1992)). **Moreover, it is the plaintiff – not the defendant – that "has the burden of producing evidence to establish the issues are ripe."** *Signature Props Intern. Ltd. P'ship v. City of Edmond*, 310 F.3d 1258, 1265 (10th Cir. 2002).

Caddo's claims are not fit for review because they involve uncertain or contingent future events that may not occur as anticipated, or at all. Primarily, construction is a complicated process that could be derailed for any number of reasons. If federal funds are being used, then additional requirements such as surveys and consultations must also take place. If any of these pieces are missing, a project could be shut down or postponed. As is clear from the facts in this case, building the History Center was a years-long process, from initial planning to grant applications to completing required studies to finalizing plans, and then, lastly, actually constructing the building. Yet Caddo asks the Court to prevent the Tribal Officials from taking any "individual action" toward development – an impermissibly vague request with aspects that would have no impact at all on Caddo, even if the named individuals could take "individual action" affecting Wichita tribal lands.

The U.S. Supreme Court has been consistent and clear that "allegations of future injury be particular and concrete." *O'Shea v. Littleton*, 414 U.S. 488, 496–497 (1974). "Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects." *Id*. at 495-96. Thus, Caddo's request for a declaratory judgment and related relief

is not only worthless to Caddo, "it is seemingly worthless to all the world." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 106 (1998) (*citing Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 479 (1990)).

Because there is no effective relief to redress the alleged violations of NEPA and NHPA, Caddo's claims relating to the construction of the History Center are moot. Because Caddo has not demonstrated that the Wichita Tribes are currently undertaking additional development on the 20-acre tract (no consultation notices, no Federal Register notices, no grant awards, etc.), Caddo has failed to plead a cause of action that is ripe for adjudication. As a result, Caddo has failed to allege a cause of action upon which relief may be granted, requiring dismissal under Rule 12(b)(6).

PROPOSITION IV: HUD and Delaware Nation are Necessary and Indispensable Parties Who May Not be Joined

Plaintiff has implicated the rights of both HUD and the Delaware Nation[11] – parties who are necessary and indispensable, yet unable to be joined due to sovereign immunity.

When a litigant fails to join an indispensable party, Rules 12(b)(7) and 19 authorize dismissal. *Davis v. United States*, 192 F.3d 951, 959 (10th Cir. 1999). Initially, the moving party must show that the person who was not joined is necessary. *Am. Gen. Life & Accident Ins. Co. v. Wood*, 429 F.3d 83, 92 (4th Cir. 2005) (*citing* 7 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice & Procedure § 1609 (3d ed. 2001)). Once the movant "reveals the possibility that an unjoined party is arguably indispensable," then the

[11] Plaintiff argues on Delaware Nation's behalf but has demonstrated no authority to do so. This attempt to assert another party's position demonstrates that the party should be joined.

burden shifts to the other party "to negate the unjoined party's indispensability to the satisfaction of the court." *Ranger Ins. Co. v. United Hous. of N.M.*, 488 F.2d 682, 683 (5th Cir. 1974) (*quoting Boles v. Greeneville Hous. Auth.*, 468 F.2d 476, 478 (6th Cir. 1972)).

Rule 19 requires joinder of a necessary and indispensable party if:

a. in that person's absence, the court is unable to accord complete relief among existing parties; or
b. that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
    1. as a practical matter impair or impede the person's ability to protect the interest; or
    2. leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Rule 19(a). In a Rule 19(a) analysis, "pragmatic concerns, especially the effect on the parties and the litigation, control." *Challenge Homes, Inc. v. Greater Naples Care Ctr., Inc.*, 669 F.2d 667, 669 (11th Cir. 1982) (internal quotation marks and citation omitted). Courts consider four (4) factors to determine whether the party is indispensable:

a. the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;
b. the extent to which any prejudice could be lessened or avoided by:
    1. protective provisions in the judgment;
    2. shaping the relief; or
    3. other measures;
c. whether a judgment rendered in the person's absence would be adequate; and
d. whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

Rule 19(b); *Davis*, 192 F.3d at 960. These factors are non-exhaustive and do not exclude other "pragmatic considerations." *Molinos Valle del Ciabo v. Lama*, 633 F.3d 1330, 1344 (11th Cir. 2011) (*citing* Fed. R. Civ. P. 19 advisory note).

Delaware Nation is an Indispensable Party That May Not be Joined

Tribal sovereign immunity makes joinder of an absent tribal party infeasible. The Tenth Circuit has upheld the "strong policy . . . favor[ing] dismissal when a court cannot join a tribe because of sovereign immunity." *Davis*, 192 F.3d at 960 (remanding case to district court to analyze all four (4) Rule 19 factors); *see also Davis ex rel. Davis v. United States*, 343 F.3d 1282, 1293 (10th Cir. 2003) (*quoting Enter. Mgmt. Consultants, Inc. v. U.S. ex rel. Hodel*, 883 F.2d 890, 894 (10th Cir. 1989) ("[w]hen . . . a necessary party . . . is immune from suit, there is very little room for balancing of other factors set out in Rule 19(b) . . ."). When questions involve land jurisdiction, tribal sovereign immunity may be an insurmountable bar requiring dismissal of the suit. *N. Arapaho Tribe v. Harnsberger*, 697 F.3d 1272, 1284 (10th Cir. 2012) (upholding the district court's dismissal with prejudice due to tribal sovereign immunity, due to the possibility of unresolved, recurring jurisdictional questions, but remanding with instructions to dismiss without prejudice).

Plaintiff alleges the History Center is located on land owned and controlled jointly by the Wichita Tribes, Caddo and Delaware Nation.[12] The Tenth Circuit has held that when all three (3) tribes' interests might be implicated, all three (3) tribes are necessary and

[12] The Wichita Tribes disagree with this assessment. The Caddo membership agreed to exclusive use of the 20-acre tract by the Wichita Tribes in the 2007 Partition Agreement, and Caddo failed to timely object to or appeal the publication of the survey demarking the 20-acre tract pursuant to the 2007 Partition Agreement.

indispensable parties. *Wichita & Affiliated Tribes of Okla. v. Hodel*, 788 F.2d 765, 774 (D.C. Cir. 1986) (under the four-factor Rule 19(b) analysis, "the Wichitas and Delawares were indeed indispensable parties to the Caddos' cross-claim. . . . In their absence, the cross-claim should have been dismissed."). Based on Plaintiff's allegations, Plaintiff is unable to obtain full and complete relief without the presence of Delaware Nation, who could view Plaintiff's request as prejudicial to its own interests. Indeed, if Plaintiff's legal theories prevail, they could be used against Delaware Nation's currently operating casino. Delaware Nation, then, has not only a claimed interest, but an actual interest in the outcome of this litigation.

As a tribal sovereign that has not waived its sovereign immunity or expressly consented to this suit, Delaware Nation may not be joined. A judgment in Plaintiff's favor without Delaware Nation's presence jeopardizes Delaware Nation's ability to protect its rights: If the Court finds Plaintiff has a cognizable interest in the History Center site, then Plaintiff, likewise, could claim an interest in lands where Delaware Nation operates. Moreover, even if the Court rules for the Wichita Tribes, the Wichita Tribes are at risk of relitigating these same claims if Delaware Nation were to bring a similar suit. Accordingly, absent the presence of Delaware Nation in this lawsuit, the Court should dismiss this action.

HUD is an Indispensable Party That May Not be Joined

A federal agency is a required party to litigation when the integrity of its administrative decision is challenged. *Boles*, 468 F.2d at 479 (6th Cir. 1972). *McCowen v. Jamieson*, 724 F.2d 1421 (9th Cir. 1984). In challenging the Wichita Tribes' compliance with NEPA and NHPA, Caddo has attacked HUD's decision to release construction funding

for the History Center based on its determination that the Wichita Tribes fulfilled all necessary regulatory requirements, including NEPA and NHPA. As with tribes, the United States may not be sued in state or federal courts without its consent. *Minnesota v. United States*, 305 U.S. 382 (1939); *Anadarko, Okla. v. Caddo Elec. Co-op.*, 258 F. Supp. 441, 443 (W.D. Okla. 1966). A proceeding against property in which the United States has an interest is a suit against the United States, requiring the consent of the United States to suit. *Maricopa Cnty., Ariz. v. Valley Nat'l Bank of Phoenix*, 318 U.S. 357 (1943); *United States v. Alabama*, 313 U.S. 274 (1941); *Minnesota*, 305 U.S. at 382.

Where a plaintiff's complaint indirectly attacks the conduct of a non-joined party, the non-joined party is indispensable under Rule 19(b). *See Laker Airways, Inc. v. British Airways, PLC*, 182 F.3d 843, 849 (11th Cir. 1999) (affirming the district court's dismissal upon finding that a non-joined party, a foreign corporation, would be prejudiced if unable to participate in an antitrust action implicating its conduct); *Boles*, 468 F.2d at 479 (holding that HUD was an indispensable party because plaintiff's challenges to a HUD-approved housing project constituted an "indirect[ ] attack" on HUD's administrative decision).

HUD is a necessary party to cases involving its rights. *Lopez v. Arraras*, 606 F.2d 347, 353 (1st Cir. 1979) (court could not resolve claims against state housing authority "without affording HUD the occasion to fully present its position"); *Guesnon v. McHenry*, 539 F.2d 1075, 1077-78 (5th Cir. 1976) (joinder of HUD desirable so HUD could explain its regulations); *Boles*, 468 F.2d at 478-80 (HUD a necessary party when the legality of its actions is at issue); *Gardner v. Nashville Hous. Auth.*, 468 F.2d 480, 481 (6th Cir. 1972) (same); *Williamsburg Fair Hous. Comm. v. N.Y. City Hous. Auth.*, 73 F.R.D. 381, 383-84

(S.D.N.Y. 1976) (HUD a party to suit involving HUD-administered housing programs). Failure to join HUD deprives HUD of its right to defend its administrative decisions.

In this case, Caddo may prevail only if the Court finds HUD misinterpreted its own guidelines and violated federal law by releasing construction funding for the History Center. To make such a determination without joining HUD deprives HUD of the right to defend the integrity of its administrative decisions, making it a required party to this litigation. *McCowen*, at 1423. Because HUD is a required party unable to be joined due to sovereign immunity, the Court must dismiss the case. *Weeks v. Hous. Auth. of Opp, Ala.*, 292 F.R.D. 689, 692 (M.D. Ala. 2013); *Hardy v. IGT, Inc*., No. 2:10–cv–901–WKW, 2011 WL 3583745, at *6 (M.D. Ala. Aug. 15, 2011) (proceeding to Rule 19(b) analysis after concluding that Native American tribe was necessary party that could not be joined on grounds of sovereign immunity).

PROPOSITION V: No Private Right of Action Exists Under NEPA or NHPA

Private rights of action to enforce federal law must be created by Congress. *Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 578 (1979) (remedies available are those "that Congress enacted into law"). The Court's task is to determine whether the federal statute displays an intent to create a private right AND a private remedy. *Transamerica Mortg. Advisors, Inc. v. Lewis*, 444 U.S. 11, 15 (1979). Statutory intent on the creation of a remedy is determinative. *See, e.g., Va. Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1102 (1991); *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 812, n. 9 (1986) (collecting cases). Without it, a private right of action simply does not exist, no matter the circumstances. *See, e.g., Mass. Mut. Life Ins.*

Co. v. Russell, 473 U.S. 134, 145, 148 (1985); *Transamerica Mortg. Advisors, Inc.*, 444 U.S., at 23; *Touche Ross*, 442 U. S. at 575-576.

NEPA does not authorize a private right of action. *New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 704 (10th Cir. 2009); *San Carlos Apache Tribe v. United States*, 417 F.3d 1091, 1097 (9th Cir. 2005); *Noe v. Metro. Atlanta Rapid Transit Auth.*, 644 F.2d 434, 439 (5th Cir. 1981). Although other environmental statutes such as the Endangered Species Act and Clean Water Act create private rights of action, the reason for the distinction is clear: NEPA imposes a "stop, look, and listen" obligation on the federal government, but the Endangered Species Act and Clean Water Act impose obligations on private parties. 33 U.S.C. § 1365(a)(1); 16 U.S.C. § 1540(g).

The Tenth Circuit has not decided whether a private right of action exists under the NHPA, but other circuits have decided none exists, and for good reason. NHPA's status as a "look and listen" statute akin to NEPA weighs against implying a private right of action, as any claim for a violation of NHPA is against the federal government, not a private party. For that same reason, this Court has declined to find a private right of action exists under NHPA. *Order*, at 1 n. 1 (May 31, 2016) (Doc 27) ("May 31 Order"). The Ninth and D.C. Circuits have also reached the conclusion that no private right of action exists under NHPA. *Karst Envtl. Educ. & Prot., Inc. v. E.P.A.*, 475 F.3d 1291, 1295-96 (D.C. Cir. 2007); *San Carlos Apache Tribe*, 417 F.3d at 1091.

Moreover, Plaintiff failed to satisfy the time limit under federal law to object to construction of the History Center. The time limit must be strictly construed; Plaintiff is not entitled to disregard it in the interest of securing a forum to bring its claims. *Irwin v.*

Dep't of Veterans Affairs, 498 U.S. 89, 94 (1990) (recognizing that time limits are "a condition to the waiver of sovereign immunity and thus must be strictly construed"). Plaintiff alleges it is a consulting party, without admitting that it declined to answer requests for consultation on two (2) separate projects and prior to the environmental assessment ("EA"). Therefore, Plaintiff's own actions resulted in its exclusion from the project as a consulting party when the EA was conducted. *See, e.g.*, May 31 Order, at 4-5, 14-16 (noting that Defendants notified Plaintiff, and Plaintiff failed to respond). Under HUD regulations, Plaintiff had thirty (30) days from its receipt of the request for consultation to respond. HUD Notice CPD 12-006 (Doc. 37.11), at 5. HUD assumes a five (5) -day delivery period for mailed requests, meaning Plaintiff had thirty-five (35) days from the date the request was mailed – or until February 13, 2015 – to respond to the request for consultation as a consulting party. *Id*. Plaintiff's failure to respond by this date resulted in its exclusion as a consulting party under HUD regulations, releasing Defendants from any further consulting duty. *Id*. Therefore, for purposes of NEPA and NHPA, **Plaintiff was NOT a** "**consulting party**" through no fault but its own.

PROPOSITION VI: Caddo has Failed to Allege a Cause of Action Under the APA

Because no private right of action exists under NEPA or NHPA, parties are required to proceed under the APA. Accordingly, "person[s] claiming a right to sue must identify some 'agency action' that [adversely] affects [them]." *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882 (1990). And the challenged agency action must be "final agency action for which there is no other adequate remedy in a court." *Pub. Citizen v. Office of U.S. Trade Representatives*, 970 F.2d 916, 918 (D.C. Cir. 1992). Although Caddo identifies the

publication of the Finding of No Significant Impact ("FONSI") on May 15, 2015, as a final agency action, Caddo fails to complete the remainder of its APA analysis.

Caddo vaguely alleges the Wichita Tribes acted arbitrarily and capriciously in violation of the APA. But that is the extent of its analysis under the APA. Similarly, Caddo fails to allege it exhausted administrative remedies prior to filing suit (it did not). Caddo fails to fully address the standard of review in its First Amended Complaint or explain how it will overcome the presumption of validity under the APA.

Substantively then, Plaintiff relies not on the APA, but NEPA and NHPA and, in so doing, makes both false and conclusory statements that the Wichita Tribes' consultation efforts were not reasonable, and that the Wichita Tribes "acted arbitrarily and capriciously, abused their discretion, failed to act in accordance with the law and therefore has violated the APA." Plaintiff includes its opinions as to the Wichita Tribes' consultation efforts – ignoring that Plaintiff itself chose not to consult on two (2) projects on the 20-acre tract before belatedly attempting to stop construction of the History Center. These bare allegations, without more, do not fully address the APA analysis or otherwise satisfy Plaintiff's burden of pleading.

This Court should decline to circumvent the APA to permit suit, absent authority to do so. *San Carlos Apache Tribe,* 417 F.3d at 1097-98. Neither NEPA nor NHPA provide Plaintiff with a private right of action. Thus, Plaintiff has failed to state a claim upon which relief may be granted, warranting dismissal under Rule 12(b)(6).

Caddo Fails to Address Four-Factor Test to Justify Injunctive Relief

Caddo seeks various forms of declaratory and injunctive relief against the Wichita Tribes but does not even attempt to carry out its required burdens to justify that relief. Accordingly, even if Caddo had asserted a claim otherwise cognizable under NEPA, NHPA, or the APA, it would still have failed to properly plead the claim for purposes of Rule 12(b)(6). "The traditional four-factor test applies when a plaintiff seeks a permanent injunction to remedy a NEPA violation." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 157 (2010).

> A plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction."

Id. at 156-57 (quotations omitted). "An injunction should issue *only if* the traditional four-factor test is satisfied." *Id.* at 157 (emphasis added). A presumption that an injunction is a proper remedy for a NEPA violation is a thumb on the scale and is not warranted. *Id.* It is not enough that there is not a good reason that an injunction should *not* issue—the question is whether Caddo is able to demonstrate that one *should* issue under the traditional test. *Id.* at 158.

Caddo Has Not Alleged or Shown Irreparable Injury.

In *Monsanto*, the Supreme Court found that the plaintiffs could not show they would suffer irreparable injury if the defendant was allowed to proceed with a partial deregulation for two independent reasons. 561 U.S. at 162-63. First, if and when the defendant was to violate NEPA, the plaintiffs could simply "file a new suit challenging such action and seek

appropriate preliminary relief." *Id.* At 162. Second, a partial deregulation may not cause "any injury at all, much less irreparable injury." *Id.* At 163.

Similarly, Caddo has not and is unable to show that it will suffer irreparable injury. Were the Wichita Tribes to conduct further development on the 20-acre parcel, Caddo could simply file a new suit and seek appropriate preliminary relief. And, even if the Wichita Tribes were to further develop the 20-acre parcel, such development may not cause Caddo any injury at all, "much less irreparable injury." In any event, Caddo has not *demonstrated* that it will likely suffer irreparable harm if the Court declines to award its requested injunctive relief. Indeed, Caddo makes only one mention of "irreparable harm," and even that harm, as alleged by Caddo, has already occurred. Complaint at ¶ 241. An order prohibiting any further development is not now needed to guard against any present or imminent risk of likely irreparable harm, and it would "improperly [relieve Caddo of its] burden to make the requisite evidentiary showing."

Caddo Has Not Alleged or Shown Remedies at Law Are Inadequate.

Caddo did not include a discussion of this element of the four-factor test in its First Amended Complaint. Caddo's claims related to the History Center are moot, as discussed above. As to Caddo's complaints regarding possible future development, Caddo will have ample time to contest any future development with full access to the legal and equitable remedies available to them IF the Wichita Tribes fail to comply with obligations imposed by federal law.

Caddo Has Not Addressed the Balance of Hardships.

Caddo did not include a discussion of this element of the four-factor test in its First Amended Complaint. Caddo seeks an affirmative injunction directing the parties to discuss the "relocation" (i.e., the demolition) of the History Center. Discussions about relocation would not be fruitful. The Wichita Tribes could not agree to "relocate" the History Center because of the extreme hardship that would result to the Wichita Tribes who spent years planning, securing the funding for, and building the History Center. There is no continuing hardship for Caddo to allow a HUD-funded construction project to remain where it is.

Caddo Has Not Demonstrated a Public Interest.

Again, Caddo utterly fails to address this required element to show that it is entitled to injunctive relief. When Caddo asks the Court to order discussions about "relocating" (i.e., demolishing) the History Center, Caddo is asking that a brand new publicly funded building be torn down. This waste of taxpayer funds is most certainly not in the public interest. Similarly, Caddo's underlying request — that the Court order retroactive relief not contemplated by NEPA or NHPA.

Taken as a whole, Caddo's First Amended Complaint is one that asks the Court to take shortcuts. The public, however, has an interest in the uniform, consistent application of the law. Thus, the public interest militates AGAINST the Court's indulgence of the Plaintiff's careless handling of its own affairs and efforts to circumvent the legal rules and prerequisites applicable to the relief it seeks from this Court.

For the above and foregoing reasons, Caddo has failed to state a cognizable claim for injunctive relief under either NEPA, NHPA or APA, and its First Amended Complaint should be dismissed.

PROPOSITION VII: The Court Lacks Subject Matter Jurisdiction Because Defendants are Protected by Tribal Sovereign Immunity.

Neither the Wichita Tribes, nor Congress, through any of the Federal laws cited by Caddo, has waived the Wichita Tribes' inherent sovereign immunity from suit. It is firmly established that federally-recognized tribal governments are immune from unconsented suit. *See, e.g., Ramey Constr. Co., Inc. v. Apache Tribe of the Mescalero Reservation*, 673 F.2d 315, 318 (10th Cir. 1982). Indian tribes possess "the common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (citations omitted). Tribal immunity applies to both suits for damages as well as those for declaratory and injunctive relief. *E.g., Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269 (9th Cir. 1991). Therefore, absent tribal waiver or congressional abrogation, an Indian tribe is shielded from suit by sovereign immunity, including "suits on contracts, whether the contracts involve governmental or commercial activities and whether they were made on or off a reservation." *Kiowa Tribe of Okla. v. Mfg. Techs., Inc*., 523 U.S. 751, 754, 760 (1998).

Suits against Indian tribes are barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation, which must be strictly construed. *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509, (1991); *see*

also C & L Enters. v. Citizen Band Potawatomi Indian Tribe of Okla., 532 U.S. 411, 419 (2001); *United States v. Testan*, 424 U.S. 392, 399 (1976); *Fletcher v. United States*, 116 F.3d 1315, 1324 (10th Cir. 1997); *Winnebago Tribe v. Babbitt*, 915 F. Supp. 157 (D.S.D. 1996) ("A waiver of sovereign immunity is a prerequisite to this Court's jurisdiction over Plaintiffs' complaint.").

Sovereign immunity is an issue of subject matter jurisdiction to be raised in a motion to dismiss. *See* Rule 12(b)(1); *Bales v. Chickasaw Nation Indus.*, 606 F. Supp. 2d 1299 (D.N.M. 2009). It is not a discretionary doctrine – if a defendant is protected by sovereign immunity, a court does not have subject matter jurisdiction over claims against that defendant. *Fletcher,* 116 F.3d at 1323-26. Tribal sovereign immunity would be rendered meaningless if a suit against a tribe asserting its immunity were allowed to proceed to trial. *Id.* at 1326; *Tamiami Partners v. Miccosukee Tribe of Indians*, 63 F.3d 1030, 1050 (11th Cir. 1995).

Caddo does not allege the Wichita Tribes waived their immunity for itself or its officers. Instead, Caddo alleges merely that Defendant Parton agreed to federal court jurisdiction for purposes of the EA. Under Wichita tribal law, only the Executive Committee has the ability to waive the Wichita Tribes' sovereign immunity. Wichita Governing Resolution, art. V, attached as Exhibit K. The Wichita Tribes did not waive their immunity from suit in connection with the History Center project.

Moreover, Congress has not waived the Wichita Tribes' sovereign immunity through either the APA, NEPA, or NHPA. *See Everglades Ecolodge at Big Cypress, LLC v. Seminole Tribe of Fla.*, 836 F. Supp. 2d 1296, 1308 (S.D. Fla. 2011) (the completion of an

EA did not waive tribal sovereign immunity, even when the tribe made assurances in entering a lease agreement, later found invalid, that it had validly waived sovereign immunity). In contrast, in *North Oakland Voters Alliance v. Oakland*, No. C-92-0742 MHP, 1992 WL 367096 (N.D. Cal. 1992), the court found the City of Oakland had impliedly consented to federal court jurisdiction because HUD regulations provided that grant recipients "are deemed to have assumed all the responsibilities set forth above upon execution of a grant agreement with HUD." However, HUD does not have authority to waive tribal sovereign immunity. *See, e.g.*, *C & L Enters.*, 532 U.S. at 419 (2001); *Testan*, 424 U.S. at 399. This may only be accomplished through an explicit, express waiver made by the Tribe itself or Congress.

Importantly, the court in *North Oakland Voters Alliance* recognized that as a city, Oakland was included in the definition of "local government" found within 36 C.F.R. § 800.2 (governing participants in the Section 106 process). *N. Oakland Voters Alliance*, at *9. However, the law differentiates between "local" and "tribal" governmental officials in delegating legal responsibility for compliance with the Section 106 process. 36 C.F.R. § 800.2(a). When looking at applicable definitions, the statute differentiates between an "Indian tribe," which includes all federally-recognized tribes (54 U.S.C. § 300309; 36 C.F.R. § 800.16(m)), and a "local government," which includes "a city, county, parish, township, municipality, borough, or other general purpose political subdivision of a State" (54 U.S.C. § 300310; 36 C.F.R. § 800.16(n)). Congress's differentiation between a tribe and a city shows intent to treat the two differently.

Furthermore, it is a well-established rule of statutory construction that "if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific." *Midlantic Nat'l. Bank v. N.J. Dep't. of Envtl. Prot.*, 474 U.S. 494, 501 (1986). If Congress intended the NHPA, NEPA, or APA to waive tribal sovereign immunity, it would have explicitly stated so. But Congress did **NOT** explicitly waive tribal sovereign immunity in these statutes. *See, e.g.*, *Everglades Ecolodge at Big Cypress*, 836 F. Supp. 2d at 1308. Without an explicit tribal or congressional waiver of tribal sovereign immunity, this Court may not find an implicit waiver has been made through the actions of one (1) tribal official. *United States v. U. S. Fid. & Guar. Co.*, 309 U.S. 506, 513 (1940).

Sovereign immunity also shields tribal officials acting within the scope of their official capacities. *Fletcher*, 116 F.3d at 1324; *Burrell v. Armijo*, 456 F.3d 1159, 1174 (10th Cir. 2006); *cf. Santa Clara Pueblo*, 436 U.S. at 58*; Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1154 (10th Cir. 2011). In rare instances, courts may permit a suit to be maintained on a limited basis against a government employee who acts outside of his or her authority when the suit is only seeking prospective declaratory or injunctive relief (*Ex parte Young*, 209 U.S. 123, 159-60 (1908)). Rather than attempt the necessary *Ex parte Young* analysis, Caddo attempts a shortcut by purporting to sue the Tribal Officials as individuals, rather than in their official capacities. Nevertheless, Caddo fails to show that any of the Tribal Officials personally took any action, much less took action outside the scope of their official duties. Without more, Caddo has failed to plead the basic facts necessary to show that Tribal Officials acted outside the scope of their authority, and, therefore, they remain shielded by the Wichita Tribe's sovereign immunity from suit.

Moreover, as discussed above, Caddo's claims against the Tribal Officials as individuals do not relate back to the filing of the original Complaint and are, therefore, time-barred.

Caddo sued both a tribal government and tribal officials. Yet, sovereign immunity shields both the Tribe, which received the HUD Grant and is the contracting party on the construction contracts for the History Center, as well as the Tribal Officials. The sovereign immunity of the Wichita Tribes and their Tribal Officials requires this suit to be dismissed.

PROPOSITION VIII: Caddo Lacks Standing

Caddo is Unable to Show Standing Under NEPA or NHPA

"Article III of the Constitution limits the jurisdiction of federal courts to Cases and Controversies." *San Juan Cnty. v. United States*, 503 F.3d 1163, 1171 (10th Cir. 2007) (en banc). *See* U.S. Const. art. III, § 2. "In general, this inquiry seeks to determine 'whether [the plaintiff has] such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination.'" *Wyo. ex rel. Crank v. United States*, 539 F.3d 1236, 1241 (10th Cir. 2008) (Ebel, J.) (*quoting Massachusetts v. EPA*, 549 U.S. 497 (2007)) (internal quotation marks omitted). "[A] suit does not present a Case or Controversy unless the plaintiff satisfies the requirements of Article III standing." *San Juan Cnty.*, 503 F.3d at 1171. To establish standing, a plaintiff bears the burden to establish: "(1) an injury in fact that is both concrete and particularized as well as actual or imminent; (2) a causal relationship between the injury and the challenged conduct; and (3) a likelihood that the injury would be redressed by a favorable decision." *Protocols, LLC v. Leavitt*, 549 F.3d 1294, 1298 (10th Cir. 2008) (internal quotation marks omitted). A plaintiff must show that

a favorable court decision could redress his injury. *See Lujan v. Defenders of Wildlife*, 504 U.S. at 561. "Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998).

When bringing a NEPA claim, the plaintiff must also show that it falls within the zone of interests the statute means to protect. *Comm. to Save the Rio Hondo v. Lucero*, 102 F.3d 445, 447 (10th Cir. 1996).

> To establish an injury-in-fact from failure to perform a NEPA analysis, a litigant must show: 1) that in making its decision without following the NEPA's procedures, the agency created an increased risk of actual, threatened or imminent environmental harm; and 2) that this increased risk of environmental harm injures its concrete interest.

Sierra Club v. U.S. Dep't of Energy, 287 F.3d 1256, 1265 (10th Cir. 2002) (*citing Comm. to Save Rio Hondo*, 102 F.3d at 449). Because NHPA operates in much the same manner as NEPA, the same requirements apply to claims brought under the APA for NHPA violations. *See, e.g., Coal. for Underground Expansion v. Mineta*, 333 F.3d 193, 196 (D.C. Cir. 2003).

Standing is not a mere academic exercise. Actual, concrete harm is the cornerstone for establishing an injury-in-fact. The plaintiff must show an increased risk to its "concrete and particularized interests." *Comm. to Save the Rio Hondo*, 102 F.3d at 449.

> A plaintiff may not merely allege it can imagine circumstances in which it could be affected by the agency action. The risk of environmental harm to the litigant's concrete interests due to the agency's uninformed decisionmaking must be actual, threatened, or imminent, not merely conjectural or hypothetical.

Comm. to Save the Rio Hondo, 102 F.3d 445, 449 (10th Cir. 1996) (citing *Lujan v. Defenders. of Wildlife*, 504 U.S. at 572). To show a purported injury is not merely conjectural or hypothetical, a plaintiff must allege **specific facts** showing there is a genuine issue for trial. Moreover, because even in a motion to dismiss (where the court views the facts in a light most favorable to the non-moving party) the court should not accept mere conclusions as true, especially when the plaintiff pleads contradictory factual information. *Olpin v. Ideal Nat. Ins. Co*., 419 F.2d 1250, 1255 (10th Cir. 1969); *Oppenheim v. Sterling*, 368 F.2d 516, 519 (10th Cir. 1966). This analysis requires the Court to reject Caddo's bald, contradictory assertions in this case.

Caddo has pleaded internally inconsistent facts, demonstrating that Caddo's claimed injury is merely hypothetical. Caddo has failed to provide more than mere speculation that it was, or will be, harmed by the Wichita Tribes' actions or to articulate any relief that will correct any alleged harm. Accordingly, Caddo has failed to carry its burden to clearly demonstrate standing, warranting dismissal of the case for lack of subject matter jurisdiction.

No Concrete Evidence of a School or Graves at the History Center Site

Even setting aside Caddo's failure to properly plead standing, an examination of the history implicated by Caddo's factual allegations demonstrates how baseless Caddo's claims really are. Caddo claims the History Center site is the location of graves or historic artifacts, but produces no supporting evidence in hopes the Court will permit a fishing expedition in which Caddo might seek a scintilla of evidentiary support to further its economic war on the Wichita Tribes. These claims are contradicted by the historical record.

Caddo ignores the facts – even facts clearly elucidated in its own exhibits – and instead relies on unverified, non-specific and unsubstantiated "statements" and "concerns" from unnamed third parties to support their spurious claims that the History Center is located on or near culturally-important sites or graves.

a. The 20-acre tract was for decades a cultivated field. See Caddo's Exhibit 2 at 2, 3, 4, 8. This was the case for more than a century, and with Caddo's consent. Exhibit L.

b. Caddo alleges the Riverside School was located in the western half of Section 10, Township 7N, Range 10W. The original survey of the Wichita Reservation, conducted in 1874, contains no mention of a school anywhere in Section 10 and notes that, **"Several small fields, chiefly cultivated by Caddo Indians, are in the western third of section [10]."** Exhibit M (Field Notes to 1874 survey) at 30. Based on official records, then, if any individuals were buried where Caddo claims, it means **Caddos were farming on top of their graves.**[13]

c. The 1874 survey of Township 10 West contains no documentation of gravesites. Compare this to the survey of Township 9 West (Exhibit N).

[13] Caddo now admits that it trespassed on the 20-acre parcel for the purpose of using "human remains detection" dogs. However, as with the remainder of its evidentiary claims, Caddo provides no corroborating or supporting evidence such as affidavits, reports of findings, descriptions of what locations were searched, etc. Again, the claim of burials on the 20-acre tract contradicts nearly 150 years of historical records, maps, and archeological studies. Caddo has presented nothing that overcomes the Wichita Tribes' evidence and documentation.

d. Caddo has produced no documentation contemporaneous to the operation of the Riverside School that places it in the western half of Section 10, Township 7N, Range 10W. A **POSSIBLE** Riverside School site is identified in Caddo's Exhibit 2 as Site 34CD352. First Amended Complaint, Exhibit 2 at 21. The History Center is near BUT NOT CONSTRUCTED ON TOP OF a different archeological site known as Site 34CD353, which is considered insignificant. **"The site is not considered very significant** because it's [sic] connection to the Indian School 34CD352 is tenuous." First Amended Complaint, Exhibit 2 at 8 and 19; compare First Amended Complaint, Exhibit 16 at 11 (emphasis added).

e. Several possible locations exist for the original Riverside School (then called the Wichita School or Wichita Caddo School), and it is possible there was more than one (1) school operating on the Wichita Reservation in the 1870s. The only confirmed location for a school during this time period was at the commissary building located in the northern portion of Section 15, Township 7N, Range 10W, just north of the Washita River. See Exhibit B (1874 survey); Laurie Tatum, *Our Red Brothers and the Peace Policy of President Ulysses S. Grant* 204 (John C. Winston & Co., 1899). Other possible locations for the school(s) include Site CD352, the agent's house, or near the confluence of the Washita River and Sugar Creek, approximately four (4) miles east of the History Center. See Thomas Battey, *Life and Adventures of a Quaker Among the Indians*, 25, 47-48, 152-53 (Lee & Shepard Publishers 1875; C. Ross Hume, *Historic Sites Around Anadarko*, 16:4; *Chronicles of Oklahoma*, 419 (1938); Report of the

Commissioner of Indian Affairs to the Secretary of the Interior, 237-38 (Government Printing Office 1874).

To date, despite repeated requests, Caddo has failed to provide names of people with knowledge that this site is sacred or a burial site or a site of cultural significance or artifacts, nor has it provided information regarding which locations within the 20-acre tract are at issue.[14] May 31 Order, at 16-17. While Caddo claims to have scholarly documentation to back up its claims, Caddo has failed to produce such documentation. May 31 Order, at 18 n. 16. General speculation that items **may possibly** be affected **is not evidence that such items exist, nor evidence that Caddo will suffer an injury in fact.** Conjecture does not equal probability. Even in this litigation, Caddo has failed to corroborate its claims of irreparable harm with more than mere fantasy. Accordingly, Caddo has failed to establish the standing required under either NEPA or NHPA.

As an additional matter, Caddo alleges that it is a federally-recognized Indian Tribe, which has been the long-held presumption since Caddo purported to reorganize under the Oklahoma Indian Welfare Act ("OIWA") (25 U.S.C. § 5201 et. seq.) in 1938. As recent legal developments have shown, long-held presumptions may sometimes be poorly founded. *Murphy v. Royal*, 875 F.3d 896, 966 (10th. Cir. 2017) (concluding Congress had not disestablished the Creek reservation and that "Decisions about the borders of the Creek Reservation remain with Congress.").

[14] Any affidavit submitted at this point must be viewed with a high level of suspicion. After two years of Caddo circulating misleading statements and untruths about the facts of this case, those false accusations may have become a new self-perpetuating "legend" to be passed off as "oral history."

During its investigation into the history underlying Caddo's claims, the Wichita Tribes discovered that Caddo terminated its government-to-government relationship with the United States in 1835, when the Caddo people promised to move to a place outside the boundaries of the United States and "never more return to live settle or establish themselves as a nation tribe or community of people within the same." Treaty with the Caddo (July 1, 1835) (the "1835 Treaty"), attached as Exhibit I. While courts have recognized the validity of the 1835 Treaty, see *Wichita and Affiliated Bands of Indians in Okla. v. United States*, 89 Ct. Cl. 378, 401 (1939), they have not evaluated whether this specific treaty provision affected the legality of the Caddo's purported attempts to reform its government under the OIWA. "Moreover, the Department of the Interior cannot under any circumstances abrogate an Indian treaty directly or indirectly. Only Congress is able to abrogate a treaty, and only by making absolutely clear its intention to do so." *Timpanogos Tribe v. Conway*, 286 F.3d 1195, 1203 (10th Cir. 2002) (quoting *United States v. Washington*, 641 F.2d 1368, 1371 (9th Cir. 1981) (internal quotes and alterations omitted)).

For its part, Congress has never abrogated the 1835 Treaty or otherwise acknowledged or recognized Caddo's status as a tribe after its purported reorganization. "Treaties constitute the 'supreme law of the land.'" *Skokomish Indian Tribe v. United States*, 410 F.3d 506, 512 (9th Cir. 2005) (quoting *Breard v. Greene*, 523 U.S. 371, 376 (1998) (per curiam)). Indian tribes are divested of those aspects of sovereignty withdrawn by treaty, and tribes are bound to follow express treaty provisions. *Cherokee Nation v. Nash*, 267 F.Supp.3d 86, 116 (D.D.C. 2017). Congress may supersede or abrogate Indian treaties by legislation or subsequent treaty, but to do so Congress must use "explicit statutory

language." *United States v. Dion*, 476 U.S. 734, 738 (citing *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566 (1903)).

It appears likely that because the 1835 Treaty has never been abrogated, Caddo lacks the authority to claim an interest in the land as a federally-recognized tribal government. Combined with Caddo's failure to establish that it has standing under NEPA and NHPA, Caddo's standing to bring this litigation is questionable at best. Accordingly, the Wichita Tribes ask the Court to dismiss this case.

CONCLUSION

This litigation must be dismissed pursuant to Rule 12(b)(6) because:

a. Caddo has asserted claims that are moot, unripe, and on the whole completely unfounded in either fact or law.

b. Neither NEPA or NHPA provides Caddo a private right of action.

c. Caddo has failed to properly plead this case as one under the APA.

d. Defendants are shielded by tribal sovereign immunity.

e. Caddo lacks standing.

Further, this litigation must be dismissed pursuant to Rules 12(b)(7) and 19 because the Delaware Nation and HUD are necessary and indispensable parties who may not be joined because of sovereign immunity. Additionally, this litigation must be dismissed as to Vance, Mandujano, and Roberson under Rule 12(b)(5) for Caddo's failure to effect proper service.

WHEREFORE, Defendants ask the Court to dismiss this action in its entirety, award nothing to the Caddo, and grant the Defendants all additional relief to which they are entitled including, without limitation, attorney fees and costs of defense.

April 4, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on April 4, 2018, a true and correct copy of the above and foregoing with exhibits, was served on the following via the Court's ECF system:

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