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

CADDO NATION of OKLAHOMA	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. CIV-16-559-HE
	)	
WICHITA AND AFFILIATED TRIBES, TERRI PARTON, in her official capacity as Tribal President of Wichita and Affiliated Tribes, JESSE E. JONES, in his official capacity as Vice President of the Wichita and Affiliated Tribes, MYLES STEPHENSON, JR., in his official capacity as Secretary of the Wichita and Affiliated Tribes, VANESSA VANCE, in her official capacity as Treasurer of the Wichita and Affiliated Tribes, SHIRLEY DAVILA, in her official capacity as Committee Member of the Wichita and Affiliated Tribes, NAHUSEAH MANDUJANO, in her official Capacity as Committee Member of the Wichita and Affiliated Tribes, and MATT ROBERSON, in his official capacity as Committee Member of the Wichita and Affiliated Tribes	)	
	)	
	)	
Defendants.	)	

PLAINTIFF CADDO NATION'S OPPOSITION TO THE DEFENDANTS' MOTION TO DISMISS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

FEDERAL STATUTES

FEDERAL TREATIES

FEDERAL REGULATIONS

FEDERAL RULES OF CIVIL PROCEDURE

CONSTITUTIONAL PROVISIONS

OKLAHOMA STATUTES

OTHER AUTHORITIES

Plaintiff Caddo Nation of Oklahoma ("Caddo Nation") submits its Opposition to the Wichita and Affiliated Tribes ("Wichita Tribe"), President Terri Parton ("President Parton"), Jesse E. Jones, Myles Stephenson, Jr., Vanessa Vance, Shirley Davila, Nahuseah Mandujano, and Matt Roberson's (collectively, "Wichita Officials" and, with the Wichita Tribe, "Defendants") Motion to Dismiss ("Motion" or "Mot.").

I. STATEMENT OF FACTS

a. Defendants Admit They Built On The Site Of The Original Riverside Boarding School

To support their Motion to Dismiss, Defendants claim that there is "No Concrete Evidence Of A School" on the Wichita-Caddo-Delaware ("WCD Tribes") jointly-owned lands ("WCD lands") where Defendants built their History Center. Mot. 36. Defendants' arguments, however, cannot erase the conclusions of their own archeologist, John Northcutt, who noted that because the site was the original Riverside Indian Boarding School, it "could be eligible for the National Register. . . ." Am. Compl. ¶ 11; *id.* at Ex. 2, Pt. 2, 24, ECF No. 60-3. The location of the original Riverside Indian Boarding School is likewise confirmed by the 1963 Executive Order that restored 2,306.08 acres of WCD lands for the benefit of all three WCD Tribes, as the Executive Order specifically refers to the "Riverside Indian School Reserves" and "Wichita-Caddo Cemeteries" as being located within the same twenty-acre parcel as the History Center. Am. Compl. ¶¶ 70-72; *Id.* Ex. 3, ECF No. 60-4. Indeed, the Amended Complaint contains more than sufficient allegations that the school was located on the same twenty-acre tract of land as the

History Center and remains a culturally significant site that warrants protections under federal law. *See* Am. Compl. ¶¶ 1-11, 17, 104-11, 124, 126-27, 129-37, 143, 150-52, 198.

President Parton acknowledged these findings as true in her January 7, 2016 letter to the Caddo Nation. Am. Compl. ¶ 126; *id.* Ex. 12 (stating that "[t]he sites are thought to be associated with the original Riverside Indian School"). Having admitted that they sought to construct on the site of the original Riverside Indian Boarding School, Defendants cannot—without losing credibility—claim that "no evidence" exists to confirm the school's original location.

b. The WCD Lands Over Which Defendants Claim Exclusive Ownership Remain Jointly Owned By All Three WCD Tribes

Defendants once again mischaracterize the status of the WCD lands where they have constructed, and now seek to operate, the History Center. Defendants' allegations in their Motion to Dismiss reflect the very mischaracterizations alleged in the Amended Complaint. For instance, Defendants assert that the Caddo Nation "trespassed on the 20-acre parcel" (Mot. 37 n.13), but the Caddo Nation remains a joint-owner of the lands and thus could not have, under the law, legally trespassed. Until and unless the Federal Government effectuates the partition Defendants have requested, all three WCD Tribes will remain the rightful owners of *all* WCD lands.

Defendants' unlawful attempts to exercise exclusive ownership over the jointly-owned WCD Lands is based entirely on resolutions passed in 2007 by the Delaware Nation and Caddo Nation Governments—resolutions that have since been voided, amended, or otherwise declared void through their respective governments' internal,

sovereign processes. Am. Compl. ¶¶ 34-38. In 2007, the WCD Tribes each passed separate Resolutions attempting to partition 600 acres of jointly-owned land. Am. Compl. ¶ 28. The Bureau of Indian Affairs ("BIA") Superintendent of the Anadarko Agency, however, refused to transfer title for any of the 600 acres because "such a 'partition w[ould] require congressional authority."' *Id.* ¶ 31 (quoting Mem. from Superintendent, Anadarko Agency, to Reg'l Dir., S. Plains Reg. (May 7, 2007)). To date, Congress has taken no action to transfer title to any individual Tribe. Am. Compl. ¶ 32.

On June 7, 2013, the BIA Anadarko Agency determined that partitioning the WCD lands would require an appraisal of the lands under 25 C.F.R. § 152.25(b). *Id.* ¶ 33. The Wichita Tribe, however, has continued to press forward in its efforts to secure a partition with *no appraisal*. *Id.* ¶ 78. The Caddo Nation cannot agree to a partition without the appraisal that the BIA requires before effectuating a partition, and as a result, the Caddo Nation Tribal Council rescinded its earlier Resolution, stating "that there are grounds to suspend Resolution 02-2007-01 pending an appraisal of the lands. . . ." *Id.* ¶ 35. In 2016, the Delaware Nation followed suit. *Id.* ¶¶ 37-38.

Moreover, President Parton recently admitted that title continues to run to all three WCD Tribes, and that the Wichita Tribe does not have unilateral legal authority over the lands where they now seek to construct and operate numerous buildings and businesses. *See id.* at Ex. 4, 12, ECF No. 60-5 (President Parton stating that "the Tribes, individually, never received title to the land"); *see also id.* Ex. 9, 3, ECF No. 60-10 (President Parton stating that "[c]urrently the only land we have title to in our name is the land that we own

that Sugar Creek Casino sits on"—land that does not contain the twenty acres at issue in this proceeding).

c. Defendants Did Not Share The Northcutt Report Until March 2016, And Then Refused To Engage In Consultation

As the legal analysis below will show, the Wichita Tribe's duty to consult in good faith with the Caddo Nation did not begin and end with the Tribe's January 2015 letter. The entirety of the Wichita Tribe's effort to engage in consultation, however, did.[1] Following the Tribe's January 2015 letter, in April 2015, the Tribe's own archeologist published a report (the "Northcutt Report") noting the historical and cultural significance of the site where the Tribe planned to construct its History Center; Northcutt concluded the site could be eligible for inclusion on the National Register of Historic Places (and thus entitled to protections under the NHPA). Am. Compl. ¶ 11; *id.* Ex. 2, Pt. 2, 24, ECF No. 60-3. The Wichita Tribe withheld this critical report until almost a year later in March 2016, at which time the Tribe disingenuously led the Caddo Nation to believe it would engage in meaningful consultation. *Id.* ¶¶ 135, 228.

In February 2016, the Caddo Nation and Delaware Nation raised concerns with the Wichita Tribe's visible activities at the site, which had never been formally disclosed, and sought to address these concerns at a February 18, 2016 meeting held with all three

[1] The Caddo Nation never received the Wichita Tribe's January 2015 letter because the Tribe sent it at a time when it knew the Nation's government had been removed by the United States Federal Government. Am. Compl. ¶¶ 181-86. Notably, when the Caddo Nation Government was re-instated one month later, in February 2015, the Wichita Tribe made no attempt to send another letter, drive down the road for a visit, or pick up the phone to communicate the Tribe's intentions. *Id.*

WCD Tribes. *Id.* ¶¶ 130-33. At this meeting, the Caddo Nation was made aware of the contents of two letters: the January 2015 letter (Am. Compl., Ex. 10, ECF No. 60-11) and the January 2016 letter (Am. Compl., Ex., 12, ECF No. 60-13), and received President Parton's promise that the Wichita Tribe would undertake the ground penetrating radar ("GPR") testing necessary to ensure the historic and cultural significance of the original site of the Riverside Indian Boarding School would be protected. *See* Letter from President Parton (Jan. 7, 2016), Am. Compl., Ex. 12, ECF No. 60-13 ("The Tribe now proposes to do geophysical testing of both sites."). The Caddo Nation sent the Wichita Tribe numerous communications from February to May 2016 (Am. Compl. ¶¶ 139-44, 239), attempting to secure the testing President Parton had promised (including an offer by the Caddo Nation to pay for the GPR testing itself). Am. Compl. ¶¶ 144, 240. On May 6, 2016, Defendants refused. *Id.* ¶ 145.

On May 25, 2016, it became even more evident that President Parton would not honor her promise, as the Wichita Tribe was clearly poised to commence construction. *Id.* ¶¶ 146-48. Fifty-two minutes after Defendants' counsel was informed that the Caddo Nation would be filing a complaint and motion for injunctive relief, Defendants commenced pouring concrete at the site of the original Riverside Indian Boarding School. *Id.* ¶ 149. To date, the Wichita Tribe has never conducted the GPR testing it promised, and has denied the Caddo Nation entry onto the land that the Nation itself rightfully owns. The Caddo Nation relied on Defendants' misrepresentations and deceptive practices, and consequently, did not file its lawsuit to protect its rights and interests until

May 2016, when there could be doubt that the Defendants would neither honor their past promises nor engage in good faith consultation.

II. STANDARD OF REVIEW

This Court's review is limited to the factual allegations in the Amended Complaint and does not extend to any contrary factual allegations and/or evidence in the Motion to Dismiss. *See Miller v. Glanz*, 948 F.2d 1562, 1565 (10th Cir. 1991) ("The court's function on a Rule 12(b)(6) motion is not to weigh potential evidence that the parties might present at trial, but to assess whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted."); *see also Mobley v. McCormick*, 40 F.3d 337, 340 (10th Cir. 1994) (noting that "[t]he nature of a Rule 12(b)(6) motion tests the sufficiency of the allegations within the four corners of the complaint after taking those allegations as true").

The Court, therefore, in reviewing a motion to dismiss, must "accept as true all well-pleaded facts, as distinguished from conclusory allegations, and view those facts in the light most favorable to the nonmoving party." *Beedle v. Wilson*, 422 F.3d 1059, 1063 (10th Cir. 2005). And if the Court considers any of the fourteen exhibits Defendants attached to their Motion to Dismiss, then the Court must treat the Defendants' Motion to Dismiss as a motion for summary judgment. *Miller,* 948 F.2d at 1565 (10th Cir. 1991) ("Rule 12(b) provides that if matters outside the complaint are presented to and not excluded by the court, then the court should treat the motion as one for summary judgment under Rule 56 and not as a motion to dismiss.").

Ultimately, "[t]he issue in reviewing the sufficiency of a complaint is not whether the plaintiff will prevail, but whether the plaintiff is entitled to offer evidence to support [his] claims." *Therrien v. Target Corp.*, 216 F. App'x 751, 752 (10th Cir. 2007). Here, the Caddo Nation's Amended Complaint contains substantial and sufficient factual allegations that easily satisfy this standard—facts that, if proven at trial, would entitle the Caddo Nation to relief.

III. ARGUMENT

a. The Caddo Nation's Claims For Unjust Enrichment And Equitable Estoppel Properly "Relate Back" To The Original Complaint

The Caddo Nation's newly asserted claims for unjust enrichment and equitable estoppel sufficiently "relate back" to the Original Complaint because the newly asserted claims "arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading." Fed. R. Civ. P. 15(c)(1)(B). As the Tenth Circuit Court of Appeals has noted "[s]o long as the original and amended petitions state claims that are tied to a common core of operative facts, relation back will be in order." *United States v. Trent*, 884 F.3d 985, 992-93 (10th Cir. 2018) (internal quotations omitted); *see also Gilles v. United States*, 906 F.2d 1386, 1390 (10th Cir. 1990) (holding relation back is proper in this instance because "[t]he two complaints are grounded on the same nucleus of operative facts . . . ."). Here, the claims for unjust enrichment and equitable estoppel are "tied to a common core of operative facts," namely: (1) the recognized historic status and cultural significance of the WCD lands that comprise the site of the original Riverside Indian Boarding School where Defendants have, and continue to seek to,

construct buildings and businesses;[2] (2) Defendants' repeated false representations, made from January 2016 to May 2016, that they would undertake additional archeological testing to ensure the protection of cultural resources prior to commencing construction of the now complete History Center;[3] (3) Defendants' false representations that the rescinded and void 2007 Caddo Nation and Delaware Nation Resolutions render the Wichita Tribe the sole owner, despite the federal government's refusal to partition of the jointly-owned trust lands.[4] Because the newly alleged claims are based on the "same basic facts and circumstances," permitting the Caddo Nation to proceed with its Amended Complaint in full is proper. *See S. Colorado Prestress Co. v. Occup'l Safety & Health Review Comm'n,* 586 F.2d 1342, 1346 (10th Cir. 1978) (finding relation back is

[2] *Compare* Compl. ¶ 59 (The site relates "to an 1870's/1880's period Indian school important to Oklahoma's history."), *with* Am. Compl. ¶ 5 ("The land at issue is also the site of the original Riverside Indian Boarding School."); Compl. ¶ 60 (site "is considered possibly eligible for the National Register"), *with* Am. Compl. ¶ 106 (site "is considered possibly eligible for the National Register . . . .").

[3] Both the Original Complaint and Amended Complaint cite to President Parton's January 2016 letter, where the Wichita Tribe promised to perform GPR testing at the History Center site. *Compare* Am. Compl. ¶ 126, *with* Compl. ¶ 62. Thus, the core nucleus of operative facts remains the same. *Compare* Compl. ¶ 70, *with* Am. Compl. ¶ 131 (alleging that the Caddo Nation stated construction would harm Caddo remains); Compl. ¶ 74, *with* Am. Compl. ¶ 139 (alleging that the Caddo Nation sent Defendants a letter on April 13, 2016, demanding no construction until GPR testing occurred); Compl. ¶ 78-79, *with* Am. Compl. ¶ 143-44 (alleging that the Caddo Nation sent a letter to Defendants on April 28, 2016, with a set of proposals agreed to at the April 22, 2016 meeting, including that the Caddo Nation pay for the GPR testing); Compl. ¶ 80, *with* Am. Compl. ¶ 145 (alleging that Defendants rejected the Caddo Nation's proposal on May 6, 2016).

[4] *Compare* Compl. ¶ 37, *with* Am. Compl. ¶ 28 (In 2007, all three WCD Tribes passed resolutions agreeing to a partition.); Compl. ¶ 42-43, *with* Am. Compl. ¶ 34-38 (The Caddo Nation and the Delaware Nation voided their 2007 resolutions.); Compl. ¶ 44, *with* Am. Compl. ¶ 36, 38 (The 2007 resolutions are no longer in effect and any reliance on these resolutions is unlawful because federal partition has not taken place.).

proper because the complaint "as amended alleged the same basic facts and circumstances" as the original allegations).

Indeed, the only "fact" or "circumstance" that has changed is the reality that the History Center is now constructed and complete. While this construction renders the Caddo Nation's motion for a preliminary injunction to halt construction of the History Center moot, it does not drastically alter the entire landscape of "operative facts" nor does it preclude the Nation from amending its Original Complaint to add claims that reflect the procedural progression of the litigation itself. *See Caddo Nation of Oklahoma v. Wichita & Affiliated Tribes*, 877 F.3d 1171, 1178 (10th Cir. 2017) (concluding that the Caddo Nation may "have new claims for relief it can seek in district court regarding the operation of the Center or other activities on the site," and "Caddo Nation may seek to amend its complaint or file a new motion for preliminary injunction on the History Center's use . . . ."). The Caddo Nation's claims for unjust enrichment and promissory estoppel, therefore, properly "relate back" to the facts and claims pled in the Original Complaint.

b. Defendants Vance, Mandujano, And Roberson Have Been Served

Defendants assert that the Caddo Nation's claims against Defendants Vance, Mandujano, and Roberson must be dismissed because they "had no way to know within the time allowed under Rule 4(m) that the action would have been brought against them." Mot. 5-6 (internal quotations, brackets, and citations omitted). Defendants' counsel, however, has never communicated to Caddo Nation's counsel that they considered service through their law firm insufficient, and it is hard to believe that these individual

Defendants somehow remained unaware of the present lawsuit given that President Parton has repeatedly discussed the action in the media and in her Newsletter that highlights comments and stories from the Wichita Tribe's leadership. *See* Am. Compl. ¶¶ 22, 23, 80. Because Defendants had actual notice, there is nothing to substantiate any claim of prejudice sufficient to warrant dismissal of the Amended Complaint. *See Geer v. McGregor*, No. 8:10–cv–2219–HMH–JDA, 2011 WL 5508983, at *2 (D.S.C. Oct. 18, 2011) ("[N]oncompliance with Rule 4 . . . does not mandate dismissal where the necessary parties have received actual notice of the suit and have not been prejudiced by the technical defect in service.").

Moreover, these individual Defendants have now been properly served in their individual capacities. Defendants Vance, Mandujano, and Roberson were individually and directly served on April 19, 2018, well within Rule 4(m)'s ninety-day window. This more than satisfies the Rule concerning service. *See Geer*, 2011 WL 5508983, at *3 ("[W]hen there is no prejudice and service can be accomplished, courts generally will quash the insufficient service and allow the plaintiff to perfect service."); *see also Pell v. Azar Nut Co., Inc.*, 711 F.2d 949, 950 n.2 (10th Cir. 1983) ("We note that when a court finds that service is insufficient but curable, it generally should quash the service and give the plaintiff an opportunity to re-serve the defendant.") (citing 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1354, at 586–87 (1969)).

c. The Caddo Nation's Common Law Claims Are Not Barred By Any Statutes Of Limitations

First and foremost, none of Oklahoma's statute of limitations prohibit the Caddo Nation from amending its Original Complaint to include claims for unjust enrichment and equitable estoppel since these two claims, as discussed above, relate back to the operative set of facts in the Original Complaint and are borne out of Defendants' continued conduct, aspects of which formed the basis for Caddo Nation's original request for injunctive relief.

Second, even if this Court were to conclude the claims do not relate back and thus Oklahoma's statute of limitations govern their viability, the factual allegations in the Amended Complaint demonstrate that the Caddo Nation's claims did not accrue until May 6, 2016, when Defendants made clear they would not permit the Caddo Nation to conduct the GPR testing President Parton had stated the Wichita Tribe would itself conduct. *See* Am. Compl. ¶ 123. The Caddo Nation's claims are predicated, in part, on the Wichita Tribe's continued misrepresentations that the Tribe would undertake archeological testing to ensure the protections of Caddo remains and cultural patrimony prior to commencing any construction. *Id*. ¶¶ 123-28. The Caddo Nation, therefore, could not, nor should the Nation have been expected to, have known that President Parton's promise in her January 2016 letter was a lie/misrepresentation before Defendants rejected the Caddo Nation's April 28 offer to pay for the GPR testing on May 6, 2016. *Id*. ¶ 145. The statute of limitations, therefore, began running on May 6, 2016,

and the Caddo Nation's Amended Complaint—filed on March 21, 2018—falls well within this two-year window. *See* Okla. Stat. Ann. tit. 12, § 95(3).

d. The Caddo Nation's Claims Under The APA Are Not Time Barred

In a desperate attempt to manufacture an issue that simply does not exist, Defendants suggest that somehow the APA's six-year statute of limitations began to run on Caddo Nation's NHPA and NEPA claims (brought under the APA) in *2009*—six years before Defendants published their FONSI related to the History Center. *See* Mot. 11-13. Under Defendants' mischaracterization of the statute, the Caddo Nation's claims expired before they even came into existence.

The law, however, is clear. The statute of limitations for raising a challenge to the issuance of a FONSI does not begin to run until the FONSI has actually been issued. *See, e.g., Sierra Club v. U.S. Army Corps of Eng'rs*, 446 F.3d 808, 815 (8th Cir. 2006) ("[T]he six-year statute of limitations for commencing a NEPA action under the APA begins to run when the agency issues a FONSI."). The statute of limitations for the Caddo Nation's APA claims began to accrue, at the earliest, when the Wichita Tribe published its FONSI on May 15, 2015. Accordingly, the six-year statute of limitations on the Caddo Nation's APA claims will not expire until 2021, and because the Original Complaint was filed in 2016, the Nation's APA claims fall well within the statutorily allotted window.

e. The Court Can Provide Effective Relief To Remedy The Caddo Nation's Claims

Defendants erroneously assert that their completion of the History Center's construction automatically renders the Caddo Nation's NHPA and NEPA claims moot.

Mot. 13 (asserting that "environmental challenges to completed construction projects are moot"). This is not the law in the Tenth Circuit, where the Court of Appeals has held that "courts still consider NEPA claims after the proposed action has been completed when the court can provide some remedy if it determines that an agency failed to comply with NEPA." *Airport Neighbors All., Inc., v. United States*, 90 F.3d 426, 428-29 (10th Cir. 1996); *see also Utah Envtl. Cong. v. Russell*, 518 F.3d 817, 824 (10th Cir. 2008) (holding that "the availability of a 'partial remedy' will prevent the case from being moot") (quoting *Church of Scientology v. United States*, 506 U.S. 9, 13 (1992)). Instead of addressing the binding Tenth Circuit authority that makes clear that completion of construction alone does not render environmental challenges moot, Defendants rely exclusively on non-binding authorities from other circuits—none of which speak to or resonate with the factual circumstances of the present case.[5]

Ultimately, the question is not whether construction is complete, but whether the Court remains capable of providing an effective remedy. *See Utah Envtl. Cong.*, 518 F.3d at 824 (holding that the key inquiry regarding mootness is "whether we can effectuate even a partial remedy in this case . . . ."). Like the defendants in *Airport Neighbors*, if the Court finds that Defendants violated NEPA or the NHPA, the Court could order that the History Center be closed or impose restrictions on its operation until Defendants comply

[5] Defendants rely exclusively on authorities from other circuits that have no application to the present case (*see* Mot. 13-14) because the totality of construction here is not complete, made evident by Defendants' repeated public acknowledgements that they plan to continue construction on lands jointly owned by all three WCD Tribes. *See, e.g.*, Am. Compl. ¶¶ 14-15, 153.

with NEPA and consult with the Caddo Nation under the NHPA. The Caddo Nation's Prayer for Relief in the Amended Complaint speaks directly to this remedy, requesting that Defendants "be ordered to initiate and conduct good faith consultations with the Plaintiff and other interested parties in order to consider relocation of said History Center to a site having no adverse impacts on significant cultural and religious areas." Am. Compl. 58 at ¶ 4. The remedies that the Caddo Nation has requested would afford effective relief and sit well within the scope of new claims the Tenth Circuit contemplated on remand. *See Caddo Nation of Oklahoma v. Wichita & Affiliated Tribes*, 877 F.3d 1171, 1178 (10th Cir. 2017) ("That is not to say Caddo Nation does not have *new* claims for relief it can seek in district court *regarding the operation of the Center or other activities on the site.*") (emphasis added).

Finally, accepting the Defendants' arguments that the Caddo Nation's request for relief is now moot simply because the Wichita Tribe completed its construction of the History Center (construction that commenced one hour after counsel was informed this suit would be filed) would permit the Wichita Tribe to "ignore the requirements of NEPA, build its structures before a case gets to court, and then hide behind the mootness doctrine." *Columbia Basin Land Prot. Ass'n v. Schlesinger*, 643 F.2d 585, 591 n.1 (9th Cir. 1981). "Such a result is not acceptable." *Id.* Because the Court can still grant effective relief for the Caddo Nation's NEPA and NHPA claims, the Nation's claims are not moot and instead present a live controversy ripe for this Court's adjudication.

f. The Caddo Nation's Claims Are Ripe

Defendants further claim that the Caddo Nation's request for relief is unripe because the Nation's claims related to further construction "involve uncertain or contingent future events that may not occur as anticipated, or at all." Mot. 17. The Caddo Nation's claims, however, are not based on conjecture, but instead based on Defendants' repeated statements that they intend to continue construction on jointly-owned WCD lands, including the site of the original Riverside Indian Boarding School. *See, e.g.*, Am. Compl. ¶¶ 4, 14, 15, 17, 153. These plans were recently confirmed by opposing counsel, who told the Tenth Circuit Court of Appeals that "[t]here are plans to further develop the site" on November 13, 2017. *Id.* ¶ 14; *see* Oral Argument at 18:25-35, *Caddo Nation of Oklahoma v. Wichita and Affiliated Tribes*, 877 F.3d 1171 (10th Cir. 2017). On February 12, 2008, President Parton confirmed the Wichita Tribe's imminent plans to further develop on WCD lands when she told the Associated Press that "her group can't get development fast enough [at the site of the History Center]." Am. Compl. ¶ 15. To be sure, the future plans to develop the site were considered and included in the Wichita Tribe's own archeological survey. *Id.* ¶ 153; *id.*, Ex. 2, at 10 (stating that the area around the History Center will eventually include "office space, restaurant, hotel, casino, . . .dance grounds, grass hut exhibit, outdoor concert and amphitheater, and parking areas"). No law or authority requires the Caddo Nation to wait until Defendants have literally broken ground on their next phase of construction because—as Defendants have demonstrated—they will rush to complete the construction before judicial review can be

fully undertaken, and then argue that any claims related to that construction have been rendered moot. The Caddo Nation's claims are now ripe for review.

g. Caddo Nation Has Not Failed To Join Indispensable Parties

i. HUD Is Not An Indispensable Party

In an attempt to transform HUD into an indispensable party, Defendants assert that any remedy awarded in Caddo Nation's favor would require "the Court [to] find[] HUD misinterpreted its own guidelines and violated federal law by releasing construction funding for the History Center[,] . . . making it a required party to this litigation." Mot. 23. Defendants, however, point to no laws, regulations, or guidelines that would require this Court to determine HUD's culpability in relation to the Wichita Tribe's own violations of NEPA and NHPA. There are none.

Instead, the applicable law and governing authority dictates quite the opposite, making clear that once HUD has delegated its authority to a Responsible Entity, HUD "completely detaches itself from disputes focusing on the [local government's] compliance with NEPA, warning in its regulations that '[p]ersons and agencies seeking redress in relation to environmental reviews ... shall deal with the recipient *and not with HUD.*'" *Heeren v. City of Jamestown, Ky.*, 817 F. Supp. 1374, 1376 (W.D. Ky. 1992), aff'd, 39 F.3d 628 (6th Cir. 1994) (quoting 24 C.F.R. § 58.77(b)) (emphasis added). Defendants do not contest that President Parton signed the EA on behalf of the Wichita Tribe as the recipient, thereby accepting HUD's delegated authority and concomitant responsibilities to be the Responsible Entity under federal law and HUD's governing regulations. *See* Am. Compl. ¶¶ 98-100; *id.*, Ex. 1, ECF No. 60-1; *see also Soc'y Hill*

Towers Owners' Ass'n v. Rendell, 20 F. Supp. 2d 855, 872 (E.D. Pa. 1998), *aff'd*, 210 F.3d 168 (3d Cir. 2000) (holding that HUD is not a proper party to the litigation because "the City, rather than HUD, is responsible for performing the proper substantive historic review").

Defendants cite to *Boles v. Greeneville Housing Authority*, 468 F.2d 476 (6th Cir. 1972)—a case where HUD had *not* delegated its authority—for the proposition that "[a] federal agency is a required party to litigation when the integrity of its administrative decision is challenged." Mot. 21 (citing *Boles*, 468 F.2d at 479). Here, the Caddo Nation is not challenging the integrity of HUD's decision, but the conduct of Defendants in their substantive environmental reviews under the NEPA and NHPA.[6] HUD has no interest in such claims and, therefore, is not an indispensable party under the law.

The Tenth Circuit has explained that "Congress intended to transfer NEPA responsibilities from the federal agency to the local grant applicant." *Brandon v. Pierce*, 725 F.2d 555, 560 (10th Cir. 1984). Accordingly, "courts would frustrate [congressional] intent if they required HUD" to be held accountable for actions taken '"where the grant applicant has assumed that duty. . . ."' *Heeren*, 817 F. Supp. at 1376 (quoting *Brandon*, 725 F.2d at 560). HUD is not an indispensable party to the present case.

ii. The Delaware Nation Is Not An Indispensable Party

[6] The cases Defendants rely on are inapposite, *see* Mot. 21-23, as they deal with HUD's interest in litigation where HUD had *not* delegated its authority as a federal agency. *See, e.g., Lopez v. Arraras*, 606 F.2d 347, 352 (1st Cir. 1979); *Guesnon v. McHenry*, 539 F.2d 1075, 1078 (5th Cir. 1976); *Gardner v. Nashville Hous. Auth.*, 468 F.2d 480, 481 (6th Cir. 1972); *Williamsburg Fair Hous. Comm. v. N.Y. City Hous. Auth.*, 73 F.R.D. 381, 384 (S.D.N.Y. 1976).

Defendants erroneously rely on an inapplicable holding in *Wichita & Affiliated Tribes of Oklahoma v. Hodel*, 788 F.2d 765, 774 (D.C. Cir. 1986), to assert that the Delaware Nation must be joined, or this case cannot proceed. *See* Mot. 20-21. In *Hodel*, the D.C. Circuit concluded that Rule 19 applied and all three WCD Tribes were indispensable to a claim where one of the three Tribes sought to "obtain[] redistributions of future income" derived from the trust to which all three Tribes are beneficiaries. 788 F.2d at 774. In contrast, the Caddo Nation's claims relate to protecting Caddo remains and cultural patrimony and the Defendants' unjust enrichment from proceeding with construction that threatens these remains in violation of federal law. This case does not concern the legality of any distribution of income derived from WCD lands, and thus does not implicate the Delaware Nation's rights under the law.

The fact that the lands are owned by three Tribes does not alter this Court's analysis under either NEPA or NHPA, as the duties under these two statutes are not tethered to specific land ownership, but rather, are predicated on a "major federal action" (NEPA) or "federal undertaking" (NHPA). Defendants' attempt to conflate the Caddo Nation's claims under NEPA and NHPA with an adjudication of land ownership fails, and the Delaware Nation is, as a result, not indispensable to the litigation. Moreover, the Caddo Nation is not asking this Court to partition the WCD Lands (the request for such relief would implicate the rights and interests of the Delaware Nation), but is instead asking this Court to enjoin the Wichita Tribe from engaging in further construction on these jointly-owned WCD Lands until partition by the Federal Government can be achieved and implemented.

A decision from this Court affirming the obligation of Defendants, as the Responsible Entity to effectuate the procedural requirements of NEPA and NHPA, would constitute legitimate precedent and would not threaten the rights of the Delaware Nation. The Delaware Nation, therefore, is not an indispensable party to this litigation.

h. The Caddo Nation Has Standing And Has Adequately Pled Its Claims Under The APA

i. The Caddo Nation Has Standing

Defendants assert that the Caddo Nation's NHPA and NEPA claims must be dismissed for lack of standing because "Caddo has pleaded internally inconsistent facts, demonstrating that Caddo's claimed injury is merely hypothetical." Mot. 36. Defendants provide no examples of the "inconsistent" facts they believe strip the Caddo Nation of its standing to protect lands they jointly own, nor do Defendants cite any authority stating that "inconsistent" facts strip a plaintiff of its standing to litigate claims under Article III of the United States Constitution. Nonetheless, the Caddo Nation has more than satisfied the "injury in fact" standard that Defendants baldly challenge. To establish an injury in fact under NEPA:

> [T]he litigant must show 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) the litigant must show that the increased risk of environmental harm injures its concrete interests by demonstrating either its geographical nexus to, or actual use of the site of the agency action.

Comm. to Save the Rio Hondo v. Lucero, 102 F.3d 445, 449 (10th Cir. 1996). The Caddo Nation has demonstrated both. The Caddo Nation has asserted "an injury of an alleged increased environmental risk[] due to an agency's uninformed decisionmaking"—in this

case, the Defendants failure to analyze historic and cultural resources (NEPA), Am. Compl. ¶ 169; failure to engage in good faith consultation (NHPA), *id.* ¶ 179; failure to consider alternatives (NEPA), *id*. ¶ 207; and failure to provide adequate public notice of the FONSI (NEPA), *Id.* ¶ 211. *See Sierra Club v. U.S. Dep't of Energy*, 287 F.3d 1256, 1265 (10th Cir. 2002) (concluding plaintiff "has alleged facts sufficient to establish injury-in-fact emanating from the failure of the [agency] to perform the [required] procedural reviews under NEPA . . . .").

Indeed, such procedural failures "may be the foundation for injury in fact under Article III," *Comm. to Save the Rio Hondo*, 102 F.3d at 449, so long as a litigant—as is the case here—is "able to show that a separate injury to its concrete, particularized interests flows from the agency's procedural failure." *Id.* The Caddo Nation's concrete and particularized interest, as set forth in the Amended Complaint, is two-fold: 1) the Caddo Nation holds legally protectable rights as a joint-owner of the tract of land the Defendants are unilaterally developing, Am. Compl. ¶ 4; and 2) the tract of land is the site of the original Riverside Indian Boarding School that was opened in 1871, for the purpose of removing Caddo, Wichita, and Delaware children—a school where young students died and were buried. *Id.* ¶¶ 5-8; *see Winnemem Wintu Tribe v. U.S. Dep't of Interior*, 725 F. Supp. 2d 1119, 1134 (E.D. Cal. 2010) (affirming plaintiff's standing where a plaintiff's alleged interest "in preserving the historical quality of the areas named in the . . . complaint. . . . [is] sufficient to show injury-in-fact"). The Caddo Nation has standing.

ii. Caddo Nation Has Adequately Pled Its Claims Under The APA

Defendants further contest that "[a]lthough 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." Mot. 25-26. Defendants, however, have not identified what portion of the Nation's APA analysis is lacking. The Tenth Circuit has held that "a plaintiff seeking judicial review pursuant to the APA must (i) identify some 'final agency action' and (ii) demonstrate that its claims fall within the zone of interests protected by the statute forming the basis of its claims." *Catron Cty. Bd. of Comm'rs, N.M. v. U.S. Fish & Wildlife Serv*., 75 F.3d 1429, 1434 (10th Cir. 1996) (quotation omitted). Defendants' Motion acknowledges that the Nation satisfied the first requirement; and as to the second, the preceding section of this brief and the entirety of the Caddo Nation's Amended Complaint sufficiently demonstrate that the Nation's claims "fall within the zone of interests protected by" NHPA and NEPA. *See id.*; *supra* 18-20. The Caddo Nation has, therefore, adequately pled its claims under the APA.[7]

i. Caddo Nation Has Not Failed To Meet The Four Factor Test Applied To Motions For Preliminary Injunctions

In their Motion to Dismiss, Defendants conflate the pleading requirements for a *prayer for relief* for a permanent injunction with those required to bring a *claim* for relief

[7] The Amended Complaint is replete with allegations that allege Defendants' actions were "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law." *See* Am. Compl. ¶¶ 162-163, 180, 186, 188 (failure to provide adequate notice and good faith consultation); *Id*. ¶¶ 200, 207, 212, 213 ((1) failure to consult prior to publishing the EA, (2) failure to consider alternatives, and (3) failure to publish the FONSI).

subject to dismissal under Rule 12(b)(6). Defendants mistakenly rely on *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139 (2010), *see* Mot. 27, to borrow a four-factor test that has no bearing on this Court's adjudication of whether the Amended Complaint survives Rule 12(b)(6). *Monsanto* dealt specifically with an appeal "challenging the scope of the relief granted" after the merits of the claims were already adjudicated. *Monsanto*, 561 U.S. at 140. Defendants' attempt to analyze the Caddo Nation's prayer for a permanent injunction as a "claim for injunctive relief," therefore, fails. *See Atomic Oil Co. of Okl. v. Bardahl Oil Co.*, 419 F.2d 1097, 1103 n.11 (10th Cir. 1969) ("[A] permanent injunction is ordinarily issued after a full trial on the merits at which all of these elements have been resolved in favor of the plaintiff.").

j. Sovereign Immunity Does Not Bar The Caddo Nation's Claims

In its May 31 Order, this Court correctly concluded that the Wichita Tribe "waived its sovereign tribal immunity in the [EA]." *Caddo Nation of Oklahoma v. Wichita & Affiliated Tribes*, No. CIV-16-0559-HE, Order Vacating TRO 4 n.5, May 31, 2016, ECF No. 27. To retract its waiver, the Wichita Tribe puts forward arguments and authorities regarding sovereign immunity *generally*, but fails to cite a case, statute, or any other authority to support the proposition that once a Tribe assumes a federal agency's duties and responsibilities under the National Environmental Policy Act ("NEPA), 42 U.S.C. § 4321 *et seq.*, it can later retract its earlier waiver of immunity. There are none.

To be sure, the Wichita Tribe does not deny that it agreed to assume the role of "Responsible Entity" and comply with federal statutes, such as NEPA (*see* 24 C.F.R. § 58.4(a)), nor does the Tribe dispute that President Parton consented to be the "certifying

officer" and thus subject the Tribe "to the jurisdiction of the Federal courts" under 24 C.F.R. § 58.13. Indeed, the Wichita Tribe's EA states:

> The Wichita and Affiliated Tribes certifies to HUD that Terri Parton, in her capacity as President consents to accept the jurisdiction of the Federal Courts if an action is brought to enforce responsibilities in relation to the environmental review process and that these responsibilities have been satisfied.

Am. Compl., Ex. 1, at 10, ECF. No. 60-1. Courts have concluded that where "[a]n officer of the [] Tribe has certified . . . that the tribe will 'assume all of the responsibilities[,]' . . . and that 'the certifying officer ... accept[s] the jurisdiction of the Federal courts,'" then the Tribe has waived its sovereign immunity with respect to challenges brought in federal court. *Garcia v. Akwesasne Hous. Auth*., 268 F.3d 76, 85 (2d Cir. 2001) (quoting 25 U.S.C. § 4115(4)(A)-(B)). As the Tenth Circuit has acknowledged, "Congress intended to transfer NEPA responsibilities from the federal agency to the local grant applicant." *Brandon v. Pierce*, 725 F.2d 555, 560 (10th Cir. 1984).

Defendants erroneously assert that Congress did not intend to transfer such duties to, and waive the sovereign immunity of, the Wichita Tribe and its Officials because "Indian Tribe" was not "included in the definition of 'local government' found within 36 C.F.R. § 800.2." Mot. 32. The exclusion of Tribes from the definition of "local government" is irrelevant, however, because the Tribe's assumption of HUD's duties—and concomitant waiver of sovereign immunity—stems from the Tribe's taking on the role as the designated "Responsible Entity" under 24 C.F.R. § 58.13(a), *not* 36 C.F.R. § 800.2. Notably, 24 C.F.R. § 58.2(7)(a)(ii) includes "Indian Tribe" within the definition of

"Responsible Entity." The Wichita Tribe's citation to an inapplicable regulation, therefore, in no way restores the sovereign immunity the Tribe elected to waive.

Defendants further aver that the Caddo Nation cannot maintain suit against the Wichita Officials in their individual capacities since "Caddo fails to show that any of the Wichita Officials personally took any action, much less took action outside the scope of their official duties." Mot. 33 (citing to *Ex Parte Young*, 209 U.S. 123, 159-60 (1908)). Defendants simultaneously assert that President Parton acted outside the scope of her official authority when she signed the EA and waived Defendants' immunity as "only the Executive Committee has the ability to waive the Wichita Tribes' sovereign immunity." Mot. 31. Defendants contradict themselves. Either President Parton had the authority to sign the EA and waive Defendants' immunity, or she acted outside the scope of her authority and any immunity she individually claims has been waived under *Ex Parte Young*, 209 U.S. 123 (1908).

k. The Caddo Nation Constitutes A Lawfully Federally Recognized Tribe

The Wichita Tribe erroneously asserts that "Caddo terminated its government-to-government relationship with the United States in 1835." Mot. 40. It is true that the 1835 Treaty reflects that Caddo Nation "left" the United States and went to Mexico, and settled on land now known as Texas. Art. II, 1835 Treaty. However, in 1846, the Caddo Nation signed another treaty with the United States. *See* "Treaty with the Comanche, Aionai, Anadarko, Caddo, Etc., 1846." May 15, 1846, 9 Stat. 844 [hereinafter 1846 Treaty]. Article 1 of the 1846 Treaty states that the Caddo Nation (and the Wichita Tribe) "do hereby acknowledge themselves to be under the protection of the United States, and of no

other power, state, or sovereignty whatever." The 1846 Treaty was ratified by the U.S. Senate, and is therefore, under the U.S. Constitution, the "supreme law of the land" that governs the Caddo Nation's legitimate and sovereign-to-sovereign relationship with the United States. 1846 Treaty, 9 Stat. 844; *see also Skokomish Indian Tribe v. United States*, 410 F.3d 506, 512 (9th Cir. 2005). Furthermore, the BIA includes the Caddo Nation on its list of federally recognized Tribes,[8] the 1934 Indian Reorganization Act, which excluded Oklahoma Tribes from most of its provisions, mentions the Caddo Nation by name,[9] and the Executive Order restoring the WCD lands to WCD ownership listed the Caddo Nation as one of the federally recognized Tribes to whose ownership the lands were returned.[10] Defendants' attempts to undermine the legitimacy of the Caddo Nation's federal recognition are baseless and wrong. The Caddo Nation remains a federally recognized Tribe.

IV. CONCLUSION

For the aforementioned reasons, Defendants' Motion to Dismiss should be denied.

[8] Federally Recognized Indian Tribes List Act of 1994, 108 Stat. 4791, *et seq*; Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs, 81 Fed. Reg. 26826 (including "Caddo Nation of Oklahoma").
[9] 25 U.S.C. § 5118; previously codified as 25 U.S.C. § 473.
[10] *See* Exec. Order No. 3228, 28 Fed. Reg. 10157 (Sept. 11, 1963) (restoring 2,306.08 acres of trust land "to tribal ownership for the use and benefit of the Wichita and Affiliated Bands of Indians (Caddo Tribe and the Absentee Band of Delaware Indians of Caddo County, Oklahoma), ..."); *see also* Am. Comp. ¶¶ 70-72.

Respectfully submitted this 25th day of April, 2018.

s/Mary Kathryn Nagle
Mary Kathryn Nagle
Wilson Pipestem, OBA No. 16877
Abi Fain, OBA No. 31370
Pipestem Law, P.C.
320 S. Boston Ave., Suite 1705
Tulsa, OK 74103
918-936-4705 (Office)
mknagle@pipestemlaw.com
wkpipestem@pipestemlaw.com
afain@pipestemlaw.com

Attorneys for Plaintiff Caddo Nation

CERTIFICATE OF SERVICE

I, Mary Kathryn Nagle, hereby certify that on this 25th day of April, 2018, I electronically transmitted the foregoing document to the Clerk of Court using the ECF system. Based on electronic records currently on file, the Clerk of Court will transmit a Notice of Docket Activity to the following ECF registrants:

William R. Norman, OBA No. 14919
K. Kirke Kickingbird, OBA No. 5003
Michael D. McMahan, OBA No. 17317
Randi Dawn Gardner Hardin, OBA No. 32416
Hobbs, Straus, Dean & Walker, LLP
101 Park Ave., Suite 700
Oklahoma City, Oklahoma 73102
Telephone: 405-602-9425
Fax: 405-602-9426
WNorman@hobbsstraus.com
KKickingbird@hobbsstraus.com
MMcMahan@hobbsstraus.com
RHardin@hobbsstraus.com

Attorneys for Defendants Wichita and Affiliated Tribes

s/Mary Kathryn Nagle
Mary Kathryn Nagle