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 DAVILLA, 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**

DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS

COME NOW The Wichita and Affiliated Tribes (Wichita, Keechi, Waco, and Tawakoni), and Terri Parton ("Parton"), Jesse E. Jones ("Jones"), Myles Stephenson, Jr. ("Stephenson"), Vanessa Vance ("Vance"), Shirley Davilla ("Davilla"), Nahuseah Mandujano ("Mandujano"), and Matt Roberson ("Roberson") in their official capacities (collectively, the "Tribal Officials" and, with The Wichita and Affiliated Tribes, "Defendants" or the "Wichita Tribes"), appearing specially by and through counsel, file this reply brief in support of their Motion to Dismiss (Doc. 63) ("Motion" or "Mot. Dis.

SUMMARY OF REPLY

The Wichita Tribes thoroughly disagree with Caddo's debunked recitation of the history of the Riverside School and other issues discussed primarily on pages 1-6 of its opposition brief (Doc. 66) ("Opposition Brief" or "Opp. Br."). Nonetheless, the essential issues of service, mootness, limitations, standing, and other jurisdictional issues, are purely legal in nature and may be decided without reference to any disputed underlying facts. The Court must dismiss Caddo's claims because, *inter alia*, (1) Caddo has failed to properly serve the Defendants; (2) Caddo has failed to join indispensable parties; (3) Caddo lacks standing; and (4) Caddo has failed to state a claim upon which relief can be granted.

STANDARD OF REVIEW

"[T]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true to 'state a claim that relief is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss." *Id.* at 679. Moreover, "[d]etermining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court

to draw on its judicial experience and common sense." *Id.* (citation omitted). Caddo has not presented a plausible claim for relief, but rather claims that are moot, speculative, devoid of objective factual support and based largely on Caddo's own inaction. Caddo's claims should be dismissed.

Should the court choose to refer to the Motion's attached exhibits, conversion to a summary judgment motion would not be required. Except for Exhibit A (a satellite image of the 20-acre tract), the exhibits are records of either the United States or the Wichita Tribes. Matters of public record, including government agency records and judicial records, may be considered in deciding a motion to dismiss without converting the motion to one for summary judgment. *Jean Alexander Cosmetics, Inc. v. L'Oreal USA, Inc.*, 458 F.3d 244, 257 n.5 (3d Cir. 2006). Nevertheless, the Court may readily decide the legal issues raised in the Motion without the attached exhibits.

CLAIMS MUST BE DISMISSED FOR LACK OF SERVICE

Plaintiff's claims should be dismissed as to all of the Tribal Officials in their individual capacities because none have been properly served—the summonses were merely left with an employee at the Wichita Tribes' offices. *See* returns of service, Docs. 12-19 and 65. **All claims** against Committee Members Vance, Roberson, and Mandujano (the "New Committee Members") in their official capacities must be dismissed because they have only been *improperly* served in their *individual* capacities (no summonses were issued for the New Committee Members in their official capacities), and Caddo has filed no proof of service as to Committee member Mandujano at all.

Caddo must establish proper service under Federal Rule of Civil Procedure ("Rule") 4. In this case, Caddo must: (1) comply with Oklahoma law (which is substantively identical to the Federal Rules); (2) effectuate personal delivery; or (3) leave a copy at the usual place of abode. Rule 4(e)(1)-(2). Caddo attempts to utilize "actual notice" as to the New Committee Members because they are represented in their official capacities by the same counsel as the other Tribal Officials. "Actual notice of the suit [is] insufficient to satisfy service of process requirements" even where defendants utilize the same counsel. *Commodities Future Trading Comm'n v. Wall St. Underground, Inc.*, 221 F.R.D. 554, 557 (D. Kan. 2004). Leaving a copy of the summons at the defendant's place of employment, rather than at the defendant's dwelling, is not valid personal service. *Marshall v. Warwick*, 155 F.3d 1027, 1030 (8th Cir. 1998). Also ineffective is leaving the summons with someone at a defendant's place of business who is not a duly authorized agent for personal service. *Torres v. Gaines*, 130 F. Supp. 3d 630, 635 (D. Conn. 2015).

Caddo has not served *any* of the Tribal Officials in their individual capacities, despite having had two (2) years to do so, warranting dismissal of all "individual capacity" claims. Rule 12(b)(5). As Caddo has not served the New Committee Members in their official capacities either, *all* claims against them must be dismissed.[1]

STATE LAW CLAIMS ARE TIME-BARRED

Even assuming proper service (which there is none), Oklahoma's two (2) -year statute of limitations, which has expired, bars Caddo's state law claims for unjust

[1] All "official capacity" claims against the other Executive Committee members must also be dismissed but for different reasons.

enrichment and equitable estoppel. 12 O.S. § 95(3); 76 O.S. § 5.5. Under Oklahoma law, the statute of limitations begins to run when the cause of action accrues, which occurs "when the litigant could have first maintained the cause of action to conclusion," and is 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 (Okla. 1998). The cause of action accrues when the action the complaint seeks to remedy occurred, not when "simply the realization of all the by-products . . . which form the basis of Plaintiffs' claim" occurred. *Id.* Federal courts apply this rule when adjudicating state-law based claims. *Legacy Crossing, LLC v. Travis Wolff & Co., LLP*, 229 F. App'x 672, 678 (10th Cir. 2007); *Huddleston v. Huddleston*, 2014 WL 5317922, at *1 (W.D. Okla. Oct. 16, 2014). When a litigant possessed the means to discover it had a claim, the cause of action has accrued, and the statute of limitations begins to run. *Legacy Crossing, LLC*, 229 F. App'x at 678; *McCain*, 975 P.2d at 867.

Caddo knew, or should have known, that the Wichita Tribes planned to build on the 20-acre tract no later than January 9, 2015. Order, Doc. 27, at 5. At the latest, Caddo knew, or should have known, that the Wichita Tribes were in the construction process when Caddo received the January 7, 2016, letter. Mot. Dis., Exhibit B. Moreover, all the purported flaws in the Wichita Tribes' National Environmental Policy Act ("NEPA") and National Historic Preservation Act ("NHPA") compliance upon which Caddo bases its claims had occurred prior to January 7, 2016. Therefore, at the latest, Caddo was on notice of its claims no later than January 7, 2016. However, because Caddo's Amended Complaint does not

relate back to the original date of filing (see below), Caddo's claims for unjust enrichment and equitable estoppel are barred by Oklahoma's statute of limitations.

None of the Tribal Officials—certainly not Committee members Vance, Mandujano, and Roberson[2]—could have expected to be sued personally for Caddo's brand-new state-law claims within ninety (90) days after the filing of the original complaint. "[Rule] 15(c)(3) permits a claim against a new defendant to relate back to an original timely pleading for purposes of the statute of limitations only if there was an identity mistake as to the proper party to be named and that mistake is chargeable to the new defendant." *Andonissamy v. Hewlett-Packard Co.*, 547 F.3d 841, 853 (7th Cir. 2008). Caddo has alleged no mistake chargeable to the new Tribal Officials, so Caddo's claims do not relate back.

Because Caddo's state law claims do not relate back to the date of the original complaint, they are time-barred. Moreover, Caddo acknowledges "the reality that the History Center is now constructed and complete." Opp. Br. at 9. Thus, Caddo's claims relating to pre-construction compliance with NEPA and NHPA are moot. Because Caddo's NEPA and NHPA claims are moot, the Court should decline to exercise jurisdiction over Caddo's pendent state law claims. 28 U.S.C. § 1367(c)(3). Accordingly, Caddo's claims for unjust enrichment and equitable estoppel should be dismissed entirely.

HUD AND DELAWARE NATION ARE INDISPENSIBLE PARTIES

United States Department of Housing and Urban Development ("HUD") made an administrative decision to release funding for the History Center based in part on the

[2] These Tribal Officials assumed office after this case was filed and were not involved in the decisions that led to this litigation.

Wichita Tribes' compliance with NEPA and NHPA. HUD is an indispensable party when failing to join it "would deprive it of the right to defend the integrity of its administrative decisions." *Boles v. Greeneville Hous. Auth.*, 468 F.2d 476, 479 (6th Cir. 1972). Similar to the appellants in *Boles*, Caddo attacks a HUD-funded project as violating federal law. *Id.* HUD approved the Wichita Tribes' project based on its own interpretation of federal law. *Id.* Thus, when Caddo "attack[s] the [project], [it] indirectly attack[s] HUD's administrative decision approving the [project]." *Id.*

"HUD is responsible for [the Wichita Tribes'] procedural compliance," despite the Wichita Tribes' responsibility to perform the substantive environmental and historical reviews. *Soc'y Hill Towers Owners' Ass'n v. Rendell*, 20 F.Supp.2d 855, 872 (E.D. Penn. 1998), *aff'd*, 210 F.3d 168 (3rd Cir. 2000). Contrary to Caddo's misleading description (Opp. Br. at 16-17), the court in *Society Hill* actually held that although HUD had properly delegated its responsibilities under NHPA to the grantee, "HUD [was] responsible for the [grantee's] procedural compliance." *Id*. Thus, all the cases Caddo cites names HUD (or its Secretary) as a defendant or deems them indispensable. *See, e.g.*, *Heeren v. City of Jamestown*, 817 F.Supp. 1374 (W.D. Ky. 1992) (HUD and its Secretary, and noting that HUD has a duty to ensure grantees comply with NEPA's procedural requirements and HUD regulations); *Soc'y Hill*, 20 F.Supp.2d 855 (HUD and its Secretary); *Boles*, 468 F.2d 476 (indispensable party); *Brandon v. Pierce*, 725 F.2d 555 (10th Cir. 1984) (Secretary).

To grant the relief Caddo seeks—namely, a declaration that the Wichita Tribes violated NEPA and NHPA—"this [C]ourt would be compelled to hold in effect that not only did HUD misinterpret its own [regulations], but that it also misconceived its function

and prerogatives under [NEPA and NHPA]." *Boles*, 468 F.2d at 479. HUD's policies, procedures, and regulations should not be reviewed "without at least affording the agency the opportunity to be heard in support of its present operation." *Id.* The potential prejudice to HUD far outweighs any hardship to Caddo, which it suffers by its "own failure to bring HUD in the case as a party." *Id.* at 480.

Similarly, Delaware Nation is an indispensable party that may not be joined. On one hand, Caddo argues Delaware is not indispensable because the case does not concern the distribution of funding; on the other, Caddo is seeking a ruling on the management of what it alleges is jointly-held land, coupled with a claim of unjust enrichment that, if true, would also affect Delaware Nation. Caddo's allegations make clear that without the presence of Delaware Nation, any relief awarded would be incomplete, in large part because Delaware Nation would not be bound thereby, and Delaware Nation could attempt to subject the Wichita Tribes to separate, inconsistent litigation. Because Delaware Nation and HUD are indispensable parties incapable of joinder, this case must be dismissed.

CADDO LACKS STANDING

Caddo does not have standing. Standing has not one (1) but three (3) elements, which the plaintiff—Caddo—must establish: (1) an injury in fact; (2) a causal relationship between the injury and the challenged conduct; and (3) redressability. *Protocols, LLC v. Leavitt*, 549 F.3d 1294, 1298 (10th Cir. 2008). Caddo acknowledges "the reality that the History Center is now constructed and complete." Opp. Br. at 9. Thus, Caddo's claims relating to pre-construction compliance with federal law are moot. Caddo "has asserted 'injury of an alleged increased environmental risk'" (Opp. Br. at 19) but no harm that is

"actual, threatened, or imminent, not merely conjectural or hypothetical" as required to establish standing. *Comm. to Save the Rio Hondo v. Lucero*, 102 F.3d 445, 449 (10th Cir. 1996). Caddo's "alleged increased environmental risk" falls well short of establishing a redressable injury in fact in relation to a completed construction project.

The History Center's completion forces Caddo to seek relief for hypothetical actions: the Wichita Tribes' purported future development plans in the area. *See* Opp. Br. at 20 (referring generally to a "tract of land"). A claim based solely on something that **could happen** is not ripe; abstract claims are not suitable for adjudication. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 579 (1992). Caddo has alleged no injury in fact because it has alleged only **possible** activity sometime in the future, rather than activity that is actual, threatened, or imminent. Even if "alleged increased environmental risk" described an injury (which is does not), that injury is not redressable. Caddo lacks standing to seek a permanent injunction against future development because Caddo has shown no "actual, threatened, or imminent" development or injury. Thus, Caddo has failed to establish the elements of standing, and, by extension, subject matter jurisdiction.

Caddo further lacks standing because the 1846 Treaty did not abrogate the 1835 Treaty, in which the Caddo Tribe promised never again to form a government. Caddo tries to neutralize the 1835 Treaty with an 1846 Treaty to which it was not a party.[3] Article I of the 1846 Treaty states that it applies to the "*undersigned* chiefs, warriors, and counsellors,

[3] Caddo misleadingly identifies the 1846 Treaty as "Treaty with the Comanche, Aionai, Anadarko, Caddo, Etc.," however, the name of the treaty as ratified by the Senate is "Treaty with the Comanches and Other Tribes."

for themselves and their said tribes or nations." Treaty with the Comanche and Other Tribes art. I, May 15, 1846, 9 Stat. 844 (emphasis added). Caddo did not sign the 1846 Treaty and was not a party thereto. 1846 Treaty, 9 Stat. at 847-48 (listing signatories' tribal affiliation).[4]

Even if it were a party, neither the 1846 Treaty, nor the Bureau of Indian Affair's ("BIA") purported recognition of Caddo, would abrogate Caddo's agreement to "never more return to live settle or establish themselves as a nation tribe or community of people within the [United States]." Treaty with the Caddoes art. II, Jul. 1, 1835, 7 Stat. 470, 471. "[T]he 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)). Congress must use "explicit statutory language" in legislation or a subsequent treaty to supersede or abrogate prior Indian treaties. *United States v. Dion*, 476 U.S. 734, 738 (citing *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566 (1903)); *see also South Dakota v. Bourland*, 508 U.S. 679, 687 (1993); *Reich v. Great Lakes Indian Fish & Wildlife Comm'n*, 4 F.3d 490, 493 (7th Cir. 1993); *United States v. Sohappy*, 770 F.2d 816, 818 (9th Cir. 1985). "Absent explicit statutory language, [courts are] extremely reluctant to find congressional abrogation of treaty rights." *Dion*, 476 U.S. at 739 (quoting *Menominee Tribe v. United States*, 391 U.S. 404, 412 (1968)). Courts will not lightly infer an intention to abrogate or modify a treaty without explicit language. *Id*.

[4] The signatory tribes were the "Comanches," "Wacoes," "Keeches," "Tonkaways," "Wichetas,"Towa-karroes," and "Wacoes."

Put simply, there are no "bank shots" where treaty abrogation is at issue. Abrogation may only be found if Congress actually considered the conflict between its intended action and the provisions of a treaty, and chose to resolve the conflict by modifying or abrogating the treaty. *Dion*, 476 U.S. at 739-40. Thus, only Congress can abrogate the 1835 Treaty, and it has not done so. The BIA's purported recognition of Caddo was *ultra vires*. As for the 1846 Treaty, it does not use "explicit statutory language" required under *Dion*. Caddo points to no explicit statutory language or other evidence that Congress considered the conflict between the 1846 Treaty and the 1835 Treaty and chose to abrogate the latter. When considered with the fact that Caddo was not even a party to the 1846 Treaty and its name was included in the ratification, the status of Caddo's 1835 Treaty—and its agreement to "never more return to live settle or establish themselves as a nation tribe or community of people within the [United States]"—is evident: it remains the Supreme Law of the Land.

CONCLUSION

In neither its Amended Complaint, nor its Opposition Brief, has Caddo advanced a plausible claim for relief that can withstand the Wichita Tribes' Motion to Dismiss. Caddo has failed to properly serve Defendants; Caddo has not established standing; Caddo's claims are moot; Caddo has failed to join indispensable parties who are incapable of joinder; Caddo's new claims, which form the basis of the Amended Complaint, do not relate back and are time-barred. Accordingly, this litigation should be dismissed as prayed in the Wichita Tribes' Motion to Dismiss.

May 2, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on May 2, 2018, a true and correct copy of the above and foregoing with exhibits (if applicable), was served on the following via the Court's ECF system:

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