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

COMANCHE NATION OF OKLAHOMA	)	
Plaintiff,	)	
v.	)	**Case No. CIV-17-887-HE**
DAVID BERNHARDT, Secretary U.S. Department of Interior; TARA M. SWEENEY, Assistant Secretary for Indian Affairs, U.S. Department of Interior; and JOHN TAHSUDA, Principal Deputy Assistant Secretary for Indian Affairs, U.S. Department of Interior	)	
Defendants.	)	

SECOND AMENDED COMPLAINT

1. The Comanche Nation of Oklahoma brings an action for declaratory and injunctive relief deriving from violations of the Administrative Procedures Act (APA) and National Environmental Policy Act (NEPA) in connection with Defendants' acquisition in trust for the benefit of the Chickasaw Nation of Oklahoma and for gaming purposes at Terral, Oklahoma.

I. JURISDICTION AND VENUE

2. The Court has jurisdiction of the controversy pursuant to the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*, 28 U.S.C. § 1331, 1362 and 2201.

3. Venue lies pursuant to 28 U.S.C. § 1391(e), in that a substantial part of the events giving rise to the claim occurred in this judicial district.

II. THE PARTIES

4. Plaintiff Comanche Nation of Oklahoma ("Comanche" or "Nation") is a federally recognized Indian Tribe headquartered in Lawton, Oklahoma. *See* Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 84 Fed. Reg. 1200, 1201 (February 1, 2019).

5. Defendant David Bernhardt is Secretary of Interior, and as such ultimately responsible for ensuring that the Department operates consistent with federal law and policy. He is named in his official capacity.

6. Tara M. Sweeney is Assistant Secretary for Indian Affairs. She is named in her official capacity.

7. John Tahsuda is Principal Assistant Secretary for Indian Affairs. He is named in official capacity.

III. LEGAL BACKGROUND

A. ADMINISTRATIVE PROCEDURE ACT

8. The APA provides a right of action against final agency actions and decisions. 5 U.S.C. §§ 702, 704.

9. Reviewing courts shall hold unlawful and set aside agency actions or decisions that are "(A) arbitrary, capricious, an abuse of discretion, or otherwise not in

accordance with law; (B) contrary to constitutional right, power, privilege or immunity; © in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; [or] (D) without observance of procedure required by law." 5 U.S.C. § 706(2)(A)-(D).

10. Reviewing courts shall also compel agency action unlawfully withheld or unreasonably delayed. 5 U.S.C. § 706(1).

B. NATIONAL ENVIRONMENTAL POLICY ACT

11. The National Environmental Policy Act is our "basic national charter for the protection of the environment." 40 C.F.R. § 1500.1. Congress enacted NEPA "[t]o declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; [and] to enrich the understanding of the ecological systems and natural resources important to the Nation." 42 U.S.C. § 4321.

12. The Council on Environmental Quality ("CEQ"), established under NEPA within the Executive Office of the President, is responsible for coordinating federal environmental efforts and has promulgated regulations implementing NEPA. 40 C.F.R. §§ 1500-1508.

13. Executive Order 11,514 was promulgated "in furtherance of the purpose and policy of the National Environmental Policy Act of 1969." Exec. Order No. 11,514, 3 C.F.R. 531 (1971), *as amended by* Exec. Order 11,991, 3 C.F.R. 123 (1978). This

executive order requires all Federal agencies to "[p]roceed, in coordination with other agencies, with actions required by section 102 of the Act," and to "comply with the regulations issued by the [CEQ] except where such compliance would be inconsistent with statutory requirements." *Id.* § 2(f), (g).

14. "NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and *before* actions are taken." 40 C.F.R. § 1500.1(b) (emphasis added).

15. To accomplish these purposes, NEPA requires all agencies of the federal government to prepare a "detailed statement" that discusses the purpose and needs for, environmental impacts of, and reasonable alternatives to, all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)©. This statement is commonly known as an environmental impact statement ("EIS"). To determine whether a federal action will result in significant environmental impacts and requires an EIS, the federal agency may first conduct an environmental assessment ("EA"). 40 C.F.R. § 1501.4. If a federal agency makes a finding of no significant impact, it may avoid conducting an EIS. *Id.*

16. The EIS process is intended "to help public officials make decisions that are based on understanding of environmental consequences, and to take actions that protect, restore, and enhance the environment." 40 C.F.R. § 1500.1©. "Public scrutiny" of this information is "essential to implementing NEPA." *Id.* Where the government has

acted prior to fulfilling its NEPA obligations, projects authorized by government action must be suspended until NEPA's requirements are met.

17. Agencies must integrate NEPA "at the earliest possible time to insure the planning and decisions reflect environmental values." 40 C.F.R. § 1501.2.

18. Agencies shall not commit resources prejudicing the selection of alternatives prior to making a final decision. 40 C.F.R. § 1502.2(f). An EIS must assess the environmental impacts of proposed actions, rather than justifying decisions already made. 40 C.F.R. § 1502.2(g).

19. An EIS must be prepared early enough "so that it can serve practically as an important contribution to the decision-making process and will not be used to rationalize or justify decisions already made." 40 C.F.R. § 1502.5.

20. An agency must "specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action." 40 C.F.R. § 1502.13. Examination of alternatives is the "heart of the environmental impact statement" and must include a "no action" alternative. 40 C.F.R. § 1502.14(d). The "no action" alternative is foreclosed and meaningless if action is already occurring.

21. The examination of alternatives must also include "appropriate mitigation measures not already included in the proposed action or alternatives." 40 C.F.R. § 1502.14(f).

22. An agency must not prejudice or foreclose important choices during an ongoing NEPA review. Thus, an agency must take "appropriate action to insure that the objectives and procedures of NEPA are achieved" when a non-Federal applicant is "about to take an action within the agency's jurisdiction" that would "[h]ave an adverse environmental impact" or "[l]imit the choice of reasonable alternatives" before the agency issues a record of decision on a project. 40 C.F.R. § 1506.1(a), (b).

23. Connected actions or actions that result in cumulative impacts when viewed with other proposed actions should be discussed in the same EIS. 40 C.F.R. § 1508.25.

24. An agency's NEPA obligations do not end with the initial NEPA analysis. NEPA imposes a mandatory and continuing duty to supplement previous environmental documents. If substantial changes are made, or there are new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts, the agency must prepare a supplement to the draft or final EIS. 40 C.F.R. § 1502.9(c).

IV. FACTUAL BACKGROUND

25. The Chickasaw Nation sits atop a gaming empire in the State of Oklahoma generating more than $1 Billion in annual net gaming revenue derived from several dozen casinos in the State. The record shows that, with the exception of the Chickasaw casino at Terral that is the subject of this litigation, no effort to comply with the requisites of the National Environmental Policy Act ever took place.

26. The most recent Chickasaw casino is located at Terral, Oklahoma and very near the Red River. The water quality of the Red River is of vital importance to the Comanche Nation, in part because of its stake in a distribution and sales regimen to be managed and quantified by the United States at trustee.

27. The Chickasaw gaming operation at Terral requires retention "lagoons" for human and other waste so massive they are visible from space.

28. Defendants delegated preparation of the Environmental Assessment (EA) of the risks relating to the project, including the risk to water quality in the nearby Red River, to the Chickasaw's own Environmental Services Department, which, not surprisingly, concluded that a time consuming and expensive Environmental Impact Statement (EIS) was unnecessary.

29. The Chickasaw Agency's treatment of the massive retention lagoons necessary for the project at Terral was by rote and conclusory, and included the inaccurate assertion the lagoons would lie to the north of the casino. Instead the retention lagoons lie to the south of the casino, very near the Red River.

30. The Chickasaw retain the capacity to locate additional retention lagoons to the north of the casino in the event that one very experienced observer's view proves correct, namely, that the Chickasaw actually intend eventually to expand the gaming operation at Terral into a destination resort just across the Red River from the Wichita Falls market. Thus a disinterested assessment of potential risks to the Red River attributable to massive

retention lagoons at Terral is absolutely vital.

31. During the pendency of this lawsuit, the Chickasaw sought to have land acquired in trust for a comparable gaming operation at Ardmore, Oklahoma, which would also require massive retention lagoons for disposal of human and other waste.

32. Perhaps chastened by criticism here of the decision to delegate preparation of an EA for the project at Terral to an agency of the Chickasaw Nation, the Bureau of Indian Affairs contracted with Analytical Environmental Services (AES), located in Sacramento, California, for purposes of an EA for the Chickasaw project at Ardmore.

33. AES' treatment of the retention lagoons necessary for the project at Ardmore was much more detailed and specific as to means of handling any risks, but the EA AES prepared in January 2019 contains no ultimate recommendation as to the need for an Environmental Impact Statement.

34. AES' website shows dozens of environmental projects involving Indian Tribes across the country, and reports that AES has prepared over the years, including a number of Environmental Assessments.

35. The Chickasaw project at Ardmore does not appear on the AES website, nor does the AES website include reference to the EA prepared relating to the Chickasaw project at Ardmore, giving rise to a reasonable inference that AES ultimately concluded it would be necessary to prepare an EIS for the project at Ardmore; and that such a finding during the pendency of this proceeding was so unpalatable for the Chickasaw Nation that its

representatives prevailed on AES to remove from its website any mention of the project or EA relating to the Chickasaw gaming project at Ardmore.

V. CLAIM
(APA, NEPA)

36. Plaintiff incorporates the allegations in paragraphs 1 through 35 herein by reference.

37. Defendants permitted the Chickasaw Nation's own Environmental Services Department to prepare an Environmental Assessment ("EA") that yielded the unsurprising Finding of No Significant Environment Impact ("FONSI) – which obviated the need to prepare the Environmental Impact Statement – while citing to a host of documentary material not yet disclosed to the Comanche Nation.

38. The involved federal agency may designate an applicant to prepare an EA. However, "[i]f an agency permits an applicant to prepare an environmental assessment, the agency ..., shall make its own evaluation of the environmental issues and take responsibility for the scope and content of the environmental assessment." 40 C.F.R. § 1506.5(b) (July 1, 2016) ("*Environmental Assessments").* The record produced thus far is missing any indication BIA officials made any "evaluation of the environmental issues [or took] responsibility for the scope and content of the environmental assessment."

39. Defendants produced the EA produced by the Chickasaw's own environmental agency in connection with proceedings on the ultimately unsuccessful effort to secure preliminary injunctive relief preventing continued development of the Chickasaw project

at Terral; and remand to Interior for compliance with the requirements of NEPA.

40. However, Defendants withheld the documentary material cited by the Chickasaw agency, including several letters from the Governor of the State of Oklahoma objecting to the project at Terral; and, even more critically, the actual and requisite notice of the project that may be NEPA's most fundamental requirement. *See* 40 CFR § 1501.4(b) (requiring agencies to involve environmental agencies, applicants, and the public, to the extent practicable); *Id*. § 1501.4(e)(1) (requiring agencies to make Findings of No Significant Environmental Impact (FONSIs) available to the affected public); *Id.* § 1501.4(e)(2) (requiring agencies to make FONSIs available for public review for thirty days before making any final determination on whether to prepare an Environmental Impact Statement of proceed with an action).

41. Defendants have yet to produce evidence, first, that notice actually went forward; and second, that it was reasonably calculated to notify surrounding communities and Indian Tribes likely to be affected by the impending project, which is likely to prove much greater in size and scope than projected by the Chickasaws

42. It took a dogged reporter to track down "ads [that] ran in just two newspapers, one of which is headquartered in Ada and scarcely read by the Comanche. The second, the *Clay County Leader*, circulates in parts of Jefferson County but is a modest border weekly — based in Texas, not Oklahoma." Rogers, David, "Feds Accused of Stacking Deck for Chickasaw Gaming Empire", *Politico* (September 18, 2018)

43. There is notice reasonably calculated to notify a surrounding and concerned community; then there is "notice" reasonably calculated to suppress the information of potential concern. The foregoing "notice" in each instance was in the latter category, in plain violation of NEPA.

44. The trust acquisition for gaming purposes for the benefit of the Chickasaw Nation at Terral, Oklahoma took place without the fulfilling the requirements of the National Environmental Policy Act, thereby rendering the acquisition and approval for Indian gaming arbitrary, capricious, and an abuse of discretion pursuant of the Administrative Procedure Act.

PRAYER FOR RELIEF

WHEREFORE, the Comanche Nation of Oklahoma respectfully requests that this Court grant the following relief:

a. Declare trust acquisition for the benefit of the Chickasaw Nation at Terral, Oklahoma void *ab initio* and without legal effect for want of any effort to comply with plainly applicable requirements of NEPA;

b. Alternatively, declare that the trust acquisition for gaming purposed at Terral, Oklahoma took place without compliance with fundamental requisites of NEPA; remand to the Department of Interior for compliance with such fundamental requirements; and enjoin any further gaming on the site pending compliance with NEPA; and

e. Grant such additional relief as may be just and proper.

Respectfully submitted this 29th day of September, 2020,

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