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

COMANCHE NATION OF OKLAHOMA, Plaintiff, v. DAVID BERNHARDT, Secretary, U.S. Department of the Interior, *et al*., Defendants.	)	Case No. CIV-17-887-HE

DEFENDANTS' MOTION TO DISMISS SECOND AMENDED COMPLAINT AND SUPPORTING MEMORANDUM

I. INTRODUCTION

Defendants David Bernhardt, Tara M. Sweeney, and John Tahsuda move this Court to dismiss Plaintiff's Second Amended Complaint, ECF No. 111-1, under Rule 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. This Court dismissed the majority of Plaintiff's claims raised thus far in the litigation, but allowed Plaintiff an opportunity to raise a claim regarding the placement of sewage lagoons on the Terral site. Plaintiff's Second Amended Complaint fails to raise a valid claim regarding placement of the sewage lagoons and it should be dismissed.

II. BACKGROUND

On June 17, 2014, the Chickasaw Nation submitted an application to the Bureau of Indian Affairs ("BIA") requesting that approximately 30.05 acres near the town of Terral

in Jefferson County, Oklahoma ("Terral Site"), be taken into trust for gaming and other purposes. Notice of Decision (Jan. 19, 2017) ("Notice of Decision"), ECF No. 20-1, at 1.[1] The Secretary may take land into trust under the IRA, which provides that "The Secretary of the Interior is authorized, in his discretion, to acquire . . . any interest in lands . . . within or without existing reservations . . . for the purpose of providing land for Indians." 25 U.S.C. § 5108; *see* 25 C.F.R. § 151.1 ("set[ting] forth the authorities, policy, and procedures governing the acquisition of land by the United States in trust status for individual Indians and tribes").

Gaming under the IGRA generally cannot be "conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988." 25 U.S.C. § 2719. There are, however, several exceptions, including one relevant here: the "Oklahoma exception" allows gaming to be conducted on lands located within the former reservation of an Oklahoma tribe who did not have a reservation on October 17, 1988. 25 U.S.C. § 2719(a)(2)(A)(i); 25 C.F.R. § 292.4(b)(1).

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[1] The facts, which Defendants accept for the purposes of this motion only, are mainly drawn from Plaintiff's Second Amended Complaint. *See EEOC v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 624 (D.C. Cir. 1997) (noting general rule that when deciding a Rule 12(b)(6) motion, a court may "consider only the facts alleged in the complaint, any documents either attached to or incorporated in the complaint and matters of which [the Court] may take judicial notice"). "Additionally, 'the Court may consider documents specifically referenced in the complaint where the authenticity of the document is not questioned.'" *Williams v. Amalgamated Transit Union Local 689*, 245 F. Supp. 3d 129, 134 (D.D.C. 2017) (quoting *United Mine Workers of Am., Int'l Union v. Dye*, No. 06-1053(JDB), 2006 WL 2460717 (D.D.C. Aug. 23, 2006)). The Court may also consider the Secretary's Notice of Decision, as it is the decision Plaintiff is challenging and its authenticity is not in question.

After completing an Environmental Assessment ("EA") for the Terral fee-to-trust project on April 20, 2016, the Secretary issued a Finding of No Significant Impact ("FONSI") and made a final determination to acquire the Terral Site in trust for the Chickasaw Nation for gaming and other purposes on January 19, 2017. Land Acquisitions; The Chickasaw Nation, 82 Fed. Reg. 32,867-01 (July 18, 2017); Notice of Decision at 1; ECF No. 20-2 (EA); ECF No. 20-3 (FONSI). The Notice of Decision finds that the Terral Site is located within the Chickasaw Nation's former historic reservation boundaries. Notice of Decision at 1. The Secretary determined that "the Terral Site meets the Oklahoma exception because the Nation had no reservation on October 17, 1988, and the Terral Site is located within the boundaries of the Nation's former reservation in Oklahoma." *Id.* at 3. The Secretary concluded that "pursuant to Section 20 of IGRA, 25 U.S.C. § 2719(a)(2)(A)(i), the Terral Site will be eligible for gaming upon its acquisition in trust." *Id.* at 18. The Notice of Decision directed the Regional Director of the BIA to immediately accept the land in trust. *Id.* After briefing to the new presidential administration and review of the Federal Register notice, the notice was published in the Federal Register on July 18, 2017. 82 Fed. Reg. 32,867-01.

Plaintiff's Complaint raised two claims against the Secretary and the National Indian Gaming Commission for violation of the APA and NEPA. Compl. ¶¶ 40–43, ECF No. 1. After a hearing, this Court denied Plaintiff's motion for a preliminary injunction, which Plaintiff appealed to the Tenth Circuit. Order, ECF No. 33; *Comanche Nation of Okla. v. Zinke*, 754 F. App'x 768 (10th Cir. 2018), *cert. denied*, 139 S. Ct. 2645 (2019).

The Tenth Circuit upheld the denial, finding that Plaintiff was unlikely to prevail on the merits. *See Comanche*, 754 F. App'x at 771. Specifically, the Tenth Circuit found that any challenge to the IGRA regulations was untimely as more than six years had passed since they were promulgated and Plaintiff posed a facial challenge to the regulations. The court also found that "[n]othing in the text of [the Indian Reorganization Act or IGRA] suggests that a tribe must have governmental jurisdiction over land within its former reservation to make it eligible for the Oklahoma exception." *Id.* at 773. Plaintiff filed a petition for a writ of certiorari with the United States Supreme Court, which was denied. *Comanche Nation of Okla. v. Zinke*, 139 S. Ct. 2645 (2019).

Plaintiff then requested that this Court stay the case until the Supreme Court reaches a decision in *Murphy v. Carpenter*, ECF No. 59, which this Court denied, ECF No. 64. On July 30, 2020, this Court partially granted Defendants' motion to dismiss, dismissing Plaintiff's APA claims, and dismissing the majority of Plaintiff's NEPA and NHPA claims as moot because construction has been completed on the Terral site. Order, ECF No. 98. The Court allowed Plaintiff to amend its complaint to add a claim asserting a NEPA or NHPA violation for placement of the sewage lagoons on the property. *Id.* at 98. Plaintiff filed its Second Amended Complaint on October 26, 2020. The Second Amended Complaint raises one claim for violation of the APA and NEPA.[2]

[2] Plaintiff's Second Amended Complaint contains references to a Chickasaw project at Ardmore, Oklahoma. 2d Am. Compl. ¶¶ 31–35. Defendants understand this project to be used for comparison purposes, but to the extent Plaintiff attempts to raise claims based on the Ardmore site, those claims should be dismissed. Plaintiff has not asserted final

III. STANDARD OF REVIEW

A. A Case Should Be Dismissed Under Rule 12(b)(1) if the Court Lacks Subject Matter Jurisdiction.

Jurisdiction is a threshold issue that must be addressed before considering the merits of a case. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94–96 (1998). Federal Rule of Civil Procedure 12(b)(1) provides for dismissal of a claim for lack of subject matter jurisdiction. The burden of proving subject matter jurisdiction rests with plaintiff, the party invoking the federal court's jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994); *Lindstrom v. United States*, 510 F.3d 1191, 1193 (10th Cir. 2007). Federal courts are courts of "limited jurisdiction," and are presumed to lack jurisdiction unless a plaintiff establishes its existence. *Kokkonen*, 511 U.S. at 377; *Montoya v. Chao*, 296 F.3d 952, 955 (10th Cir. 2002).

B. A Case Should be Dismissed Under Rule 12(b)(6) When Plaintiff has Failed to State a Claim Upon Which Relief Can be Granted.

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of a complaint. *Hall v. Witteman*, 584 F.3d 859, 863 (10th Cir. 2009); *Browning v. Clinton*, 292 F.3d 235, 242 (D.C. Cir. 2002). "All well-pleaded facts, as distinguished from conclusory allegations, are accepted as true and viewed in the light most favorable to the nonmoving party." *Teigen v. Renfrow*, 511 F.3d 1072, 1078 (10th Cir. 2007) (citing *Beedle v. Wilson*, 422 F.3d 1059, 1063 (10th Cir. 2005)).

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agency action and the claim is outside the scope of the amendment the Court allowed. Order at 5; *Chem. Weapons Working Grp., Inc. v. U.S. Dep't of the Army*, 111 F.3d 1485, 1494 (10th Cir. 1997) (noting that plaintiffs "must challenge 'final agency action' to confer upon the district court jurisdiction under the [APA]").

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks and citation omitted); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 562 (2007). The court need not accept as true inferences unsupported by facts set out in the complaint or legal conclusions cast as factual allegations. *See Khalik v. United Air Lines*, 671 F.3d 1188, 1191 (10th Cir. 2012). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555); *see also Khalik*, 671 F.3d at 1190 (noting "new, refined standard" from *Iqbal* and *Twombly* wherein "[a] plaintiff must 'nudge [his] claims across the line from conceivable to plausible' in order to survive a motion to dismiss" (quoting *Twombly*, 550 U.S. at 570)).

IV. ARGUMENT

This Court allowed Plaintiff to amend its complaint to add a claim based on placement of the sewage lagoons. Order at 5. Plaintiff has failed to assert a viable, non-moot claim for the placement of the sewage lagoons. Plaintiff also has not raised a non-moot NEPA claim regarding the administrative record or notice given to the Comanche regarding the EA and FONSI.

A. Plaintiff has not asserted a viable claim about the sewage lagoons.

Plaintiff's claim is moot because construction is finished and there is no agency action left to occur. Moreover, Plaintiff's claim is speculative and, even if the allegations are taken as true, does not assert a NEPA violation.

1. Plaintiff's claim is moot.

This Court dismissed the majority of Plaintiff's claims as moot because construction of the casino is complete and no agency action was left to occur. Order at 4–5. Here, too, Plaintiff has not asserted that there is any agency action left to occur. Plaintiff challenged the BIA's decision to take land into trust for the Chickasaw for gaming purposes. The land is now held in trust by the Chickasaw, and the casino has been constructed and is operational. Plaintiff alleges that the placement of the sewage lagoons will allow the Chickasaw to expand their casino, but has not alleged that BIA approval is necessary for such an expansion, much less cited regulations or other sources of law that would require BIA action now that the land is held in trust.

"NEPA and NHPA claims typically 'no longer present [ ] a live controversy when the proposed action has been completed and when no effective relief is available.'" Order at 4 (quoting *Caddo Nation of Okla. v. Wichita & Affiliated Tribes*, 877 F.3d 1171, 1176-77 (10th Cir. 2017)); *see also Airport Neighbors All., Inc. v. United States*, 90 F.3d 426, 428 (10th Cir. 1996)). Given that any alleged injury has already occurred and there is no agency action left to take place, Plaintiff's NEPA claims are moot.

2. Plaintiff does not allege a NEPA violation.

Even if Plaintiff's claims are not moot, Plaintiff has not alleged a viable NEPA violation. First, Plaintiff's allegations are too speculative to state a claim upon which relief can be granted. Plaintiff asserts that the sewage lagoons analyzed in the EA were described as being placed to the north of the casino, but were actually built south of the

casino. 2d Am. Compl. ¶ 29. According to Plaintiff, this placement would allow the Chickasaw to expand the casino at some point. *Id.* ¶ 30. Plaintiff's allegations are entirely speculative and conclusory. The Second Amended Complaint does not provide any factual support for its allegations or offer anything other than "a very experienced observer's view" that the Chickasaw intend to expand their casino. 2d Am. Compl. ¶ 7. "[C]onclusory allegations without supporting factual averments are insufficient to state a claim on which relief can be based." *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). "Moreover, in analyzing the sufficiency of the plaintiff's complaint, the court need accept as true only the plaintiff's well-pleaded factual contentions, not his conclusory allegations." *Id.* (citing *Dunn v. White*, 880 F.2d 1188, 1190 (10th Cir. 1989)). Plaintiff's conclusory allegations that the Chickasaw plan to extend their operations thus are insufficient to state a claim upon which relief can be granted.

Second, even if Plaintiff's allegations that the placement of the lagoons changed and that such placement would allow the Chickasaw to expand their casino were taken as true, Plaintiff has not stated a claim upon which relief can be granted. Plaintiff's claim in its Second Amended Complaint does not reference the sewage lagoons or even allude to their changed location as a violation of NEPA, but focuses on allegations that notice of the EA and FONSI were insufficient. 2d Am. Compl. ¶¶ 36–44. Thus, Plaintiff has not stated a claim based on the placement of the sewage lagoons.

More importantly, Plaintiff does not assert that the change in location resulted in environmental impacts that were not analyzed. Nor does it assert that the BIA's finding

that the project would not have a significant environmental impact was based on the placement of the lagoons to the north. Instead, Plaintiff alleges solely that the changed location indicates that the Chickasaw might seek to expand their casino at some point in the future. 2d Am. Compl. ¶¶ 29–30. But Plaintiff does not tie this allegation to a NEPA requirement that the agency allegedly violated. As such, Plaintiff's claim should be dismissed.

3. Plaintiff lacks standing to challenge the placement of the sewage lagoons because its alleged injury is economic.

In any event, Plaintiff would lack standing to make such a claim because its only alleged injury is increased competition to its casino. *See* 2d Am. Compl. ¶ 30 (noting potential expanded casino would be "just across the Red River from the Wichita Falls market"). Plaintiff must show that it "suffered an injury in fact falling within the 'zone of interests' protected by [NEPA]." *Comm. to Save the Rio Hondo v. Lucero*, 102 F.3d 445, 448 (10th Cir. 1996) (citations omitted). "It is well-settled that socioeconomic impacts, standing alone, do not constitute significant environmental impacts cognizable under NEPA." *Cure Land, LLC v. U.S. Dep't of Agric.*, 833 F.3d 1223, 1235 (10th Cir. 2016) (citing 40 C.F.R. § 1508.14) ("[E]conomic or social effects are not intended by themselves to require preparation of an environmental impact statement."). Plaintiff fails to allege any non-economic injury from the changed location of the sewage lagoons and therefore has not demonstrated standing to raise its NEPA claim.

B. Plaintiff is not entitled to the Administrative Record at this time.

Plaintiff's claim asserts that Defendants have not produced evidence to Plaintiff. 2d Am. Compl. ¶¶ 37–40. The documents Plaintiff references appear to be ones that would be included in the administrative record, which Defendants have not yet fully compiled or lodged because the case has not proceeded beyond the motion to dismiss stage. This Court considered Plaintiff's earlier motion to compel production of the administrative record and held that Defendants were not required to produce the administrative record at the motion to dismiss stage. Order, ECF No. 88. Thus, Plaintiff cannot cite to the lack of the administrative record as "evidence" that a NEPA violation took place. Indeed, the record is not needed in any way to address the multiple jurisdictional defects in Plaintiff's complaint.

Finally, the Court allowed Plaintiff to raise a NEPA claim related to the sewage lagoons. Plaintiff's allegations regarding the record produced thus far are unconnected to its allegations regarding the sewage lagoons and should be disregarded.

C. Plaintiff's Claim should be dismissed because this Court has decided it and it is moot.

Plaintiff's Claim also asserts that the BIA violated NEPA by not providing proper notice of the EA before construction. Again, Plaintiff raised these allegations in its First Amended Complaint. Am. Compl. ¶¶ 82–84. This Court dismissed its NEPA claim, with the exception of the sewage lagoon issue. Order at 4–5. Thus, the Court has already ruled that the allegations regarding notice of the EA and FONSI are moot, and Plaintiff cannot raise them again here.

In addition, the claim is moot because the casino facility has been built and is operating and the alleged procedural violation cannot be remedied. This Court cannot provide a meaningful remedy for lack of notice given that the land has already been taken into trust for the Chickasaw Nation and construction of the gaming facility is complete. *See Caddo Nation*, 877 F.3d at 1176–77 (quoting *Airport Neighbors*, 90 F.3d at 428). Plaintiff's NEPA claim therefore must be dismissed as moot.

V. CONCLUSION

Despite multiple bites at the apple, Plaintiff has failed to demonstrate that it has a viable claim for a NEPA violation regarding location of the sewage lagoons. This Court should accordingly dismiss its claim.

Respectfully submitted,

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CERTIFICATE OF SERVICE

X I hereby certify that on November 25, 2020, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing. Based on the electronic records currently on file, the Clerk of Court will transmit a notice of Electronic Filing to the following ECF registrants:

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