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

KIOWA TRIBE and COMANCHE NATION, Plaintiffs,	)	
v.	)	CIV-22-425-G
THE UNITED STATES DEPARTMENT OF THE INTERIOR, *et al.* Defendants.	)	

UNIFIED REPLY OF THE FEDERAL DEFENDANTS TO PLAINTIFFS KIOWA TRIBE AND COMANCHE NATION'S BRIEF IN OPPOSITION TO THE FEDERAL DEFENDANTS' MOTION TO DISMISS

Plaintiff Comanche Nation's ("Comanche Nation" or "Comanche") Brief in Opposition ("Brief") relies on many and varied conclusory assertions and bare allegations to attempt to lift the Amended Complaint over the line from conceivable to plausible. Further, Comanche Nation fails to grapple with many of the Federal Defendants' arguments. Now having filed its Brief in Opposition, Plaintiff Kiowa Tribe ("Kiowa Tribe" or "Tribe") compounds that problem by "largely agree[ing] with the legal arguments made by . . . Comanche Nation … and incorporates them by reference."[1] In short, Plaintiffs fail to articulate plausible claims for relief with respect to Counts One, Two, and Six, and those claims should be dismissed.

[1] Kiowa Tribe Br. in Opp'n to the Fed. Defs.' Mot. to Dismiss ("Kiowa Tribe Br.") (ECF No. 103) at 4.

I. The Comanche Nation cites to, quotes, relies upon, and does not seriously contest documents introduced at the Temporary Restraining Order phase.

First, the Comanche Nation attempts to use the Federal Rules of Civil Procedure as a sword and a shield against the Federal Defendants. The Comanche Nation asserts that the Federal Defendants' arguments violate basic pleading standards inasmuch as the Federal Defendants "ask the Court to take judicial notice of 'the public record'" by citing to documents filed in opposition to the Motion for Temporary Restraining Order.[2] Of course, the Comanche Nation overlooks the preceding sentence in the referenced paragraph wherein the Federal Defendants cite the law indicating that "'the district court may consider documents referred to in the complaint if the documents are central to the plaintiff's claim and the parties do not dispute the documents' authenticity."[3]

In their Amended Complaint,[4] the Comanche Nation incorporates the Superintendent of the Bureau of Indian Affairs' ("BIA") 2001 written notice to the KCA tribes which incorporated signed certified mail return receipts,[5] additional correspondence from 2001 between the BIA and the KCA Land Use Committee,[6] and from 2002 between the BIA and the Kiowa Tribe regarding jurisdiction over the Tsalote Allotment.[7] Beyond merely

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[2] Comanche Nation Br. in Opp'n to the Fed. Defs.' Mot. to Dismiss ("Comanche Nation Br.") (ECF No. 81) at 6-7.
[3] Mot. to Dismiss (ECF No. 63) at 9 (quoting *Alvarado v. KOB-TV, L.L.C.*, 493 F.3d 1210, 1215 (10th Cir. 2007)).
[4] Am. Compl. (ECF No. 51).
[5] *Id.* ¶ 70 (quoting ECF No. 18-3). The Comanche Nation, the Kiowa Tribe, and the Plains Apaches comprise the KCA tribes.
[6] *Id.* ¶ 71 (quoting ECF No. 18-5).
[7] *Id.* ¶ 73 (citing ECF No. 18-7).

referencing these documents, the Comanche Nation quotes entire sentences and phrases, using Federal Rule of Civil Procedure 12 as a sword to assert based on these documents that the Federal Defendants made false statements and fomented false impressions.[8]

And now in response, the Nation wishes to stand behind Rule 12, shielding itself from these very documents. It is for this very reason that the exception to the four corners' rule exists. And, notably, while the Comanche Nation asserts that these "documents were not even authenticated with an affidavit,"[9] the Comanche Nation never actually questions the authenticity of the documents. In short, the Comanche Nation's attempt to undermine documents the Comanche Nation itself incorporated are a strange attempt to rebut the Federal Defendants' arguments regarding Plaintiff's tolled Administrative Procedures Act ("APA") claim.

II. Plaintiffs' tolling arguments rest on spurious assertions unsupported by their own well-pleaded allegations.

Second, Plaintiffs were not diligent in pursuing asserted rights after the 2001 transfer decision, and the Comanche Nation—and the Kiowa Tribe by incorporation of the Comanche Nation's arguments—appear to concede as much. Despite arguing that it "can point to action they took to pursue their rights," the Comanche Nation points to no such action, arguing instead that its "lack of diligence" was "the result of the conduct of Defendants"[10] and that

[8] *Id.* ¶¶ 70-74, 81.
[9] Comanche Nation Br. at 7 n.5.
[10] *Id.* at 11.

challenging the transfer in 2001 "would have been a waste of resources."[11] But that is a clear concession, if not abandonment, and is sufficient to foreclose its equitable tolling argument.

Indeed, this conclusion is only bolstered by the Comanche Nation's reliance on the 2005 *Comanche Nation* litigation. That litigation, in fact, demonstrates the Comanche Nation knew very well at the relevant time how to challenge transfers of trust allotments, going so far as to make the exact same arguments there—that transfer of an allotment to the Fort Sill Apache ("FSA") Tribe violated the APA and the Nation's treaty rights.[12] And the acquisition at issue there occurred two years before the Tsalote transfer. To thus suggest that the Comanche Nation thought nothing could be done to challenge transfers within the KCA Reservation is disingenuous.

Further, the Comamche Nation suggests the United States' representations in the *Comanche Nation* litigation lulled it into believing that the FSA Tribe would not game on the Tsalote Allotment.[13] But the *Comanche Nation* litigation involved only original Comanche allotments, not Kiowa allotments like the Tsalote Allotment here, and contrary to the Tribe's assertion that "*[t]he Plaintiffs* have specifically objected to the [FSA] acquiring land within the KCA Reservation" by reference to that litigation,[14] the Tribe was not a party to that case. And per the Comanche Nation's own assertions, the settlement there provided, at most, that the Comanche Nation would retain jurisdiction over allotments to its own members—the

[11] *Id.* at 13.
[12] *Comanche Nation, Okla. v. United States, et al.*, Case 5:05-cv-328-F, ECF No. 1.
[13] Comanche Nation Br. at 13.
[14] Kiowa Tribe Br. at 3 (emphasis added).

settlement said nothing about Kiowa allotments.[15]

Further, no extraordinary circumstances warrant tolling the statute of limitations. To warrant such tolling, a litigant must show affirmative misconduct by the opposing party. Those circumstances are not present here. Comanche Nation repeatedly asserts the Federal Defendants misled it and affirmatively represented that the Comanche Nation was without recourse.[16] The Tribe joins in these representations, asserting that "[t]he BIA failed to disclose any options for the Plaintiffs to challenge its assertion that the Tsalote Allotment had been transferred and was now under [FSA] jurisdiction."[17] These assertions are false.

Statements regarding the Tsalote Allotment's transfer to the FSA Tribe say nothing about Plaintiffs' ability to challenge that transfer. The BIA did not actively conceal vital facts from Plaintiffs that would be necessary to pursue rights. On the contrary, the BIA gave Plaintiffs actual notice of the trust transfer and a letter citing the regulations at 25 C.F.R. Part 151. If anything, *actual notice* with a citation to go by should have urged Plaintiffs to act. Nevertheless, the Comanche Nation suggests the BIA did not follow the regulations then in effect.[18] But these alleged deviations from the regulations should have given Plaintiffs greater reason to timely challenge the transfer, not less. And those alleged shortcomings do not change that Plaintiffs knew of the transfer. Actual notice is thus undisputed. In short, Plaintiffs equate notice of the decision to approve the trust transfer with a representation that nothing could

[15] Comanche Nation Br. at 13. ("In the 2007 settlement of that dispute, . . . tribes within the KCA Reservation retain jurisdiction over the original allotments to their members.")
[16] Comanche Nation Br. at 15.
[17] Kiowa Tribe Br. at 4-5.
[18] Comanche Nation Br. at 7-9.

be done to challenge that decision. Even if true (which it is not), it is insufficient to demonstrate affirmative misconduct.

Finally, Plaintiffs suggest the elements of equitable tolling should somehow be relaxed because the BIA is the Comanche Nation's fiduciary. But case law provides that Indian tribes are subject to relevant statutes of limitations just as much as private entities are.[19] And the United States Supreme Court ("Supreme Court") recently held that "any specific obligations the Government may have under that relationship are governed by statute" and "the 'general trust relationship' does not override the clear language of" such statutes.[20] The relevant statute here provides a six-year statute of limitations, and, notably, the Comanche Nation did not respond to the Federal Defendants' citation to this case nor did the Tribe seriously attempt to distinguish it.[21] In short, the Federal Defendants move this Court to dismiss Count One of the Amended Complaint.

III. Plaintiffs can assert no stand-alone common law treaty claim because the KCA Reservation has been disestablished, abrogating the specific provisions now cited as support for such a claim.

[19] *Sisseton-Wahpeton Sioux Tribe v. U.S.*, 895 F.2d 588, 592 (9th Cir. 1990) ("Indian Tribes are not exempt from statutes of limitations governing actions against the United States.") (citing *U.S. v. Mottaz*, 476 U.S. 834, 842 (1986)).

[20] *Menominee Indian Tribe of Wisconsin v. United States*, 577 U.S. 250, 258 (2016).

[21] Citing *Menominee*, the Tribe states "[t]he combination of the Federal Defendants' actions and the Plaintiffs' reliance on the federal trust relationship demonstrates 'extraordinary circumstances' that were 'outside [the Plaintiffs'] control.'" But in response to an argument that Petitioner Menominee Indian Tribe of Wisconsin encountered circumstances beyond its control, the Supreme Court held that "excuses" like failing to present a claim because "there may have been significant risk and expense associated" or based on a belief that presentment was futile are "far from extraordinary," even coupled with "the special relationship between the United States and Indian tribes." *Id.* at 255, 258.

Third, the Comanche Nation contends that *County of Oneida v. Oneida Indian Nation*[22] and *Timpanogos Tribe v. Conway*[23] establish the right to a stand-alone treaty claim[24] and that the Federal Defendants' arguments regarding sovereign immunity and the statute of limitations found at 28 U.S.C. § 2401 fail as a result. Specifically, the Comanche Nation suggests that the Treaty of Medicine Lodge (or "Treaty") requires consent to trust acquisitions or transfers separate and apart from the regulations found in 25 C.F.R. Part 151.[25] The Kiowa Tribe takes this further and states that the Treaty "explicitly details that the Kiowa Tribe and the Comanche Nation must consent to any other tribes being settled on the KCA Reservation" and that such provision was triggered at the time of the making of the Second Treaty of Medicine Lodge.[26]

Moreover, Plaintiffs contend that it asserted in the Amended Complaint, seemingly at ¶ 80,[27] *ongoing* violations of federal law separate from the transfer of the Tsalote Allotment itself and to which no statute of limitations would apply.[28] The Kiowa Tribe indeed clarifies that "Plaintiffs are challenging both the initial transfer of the Tsalote Allotment and the

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[22] 470 U.S. 226, 105 S. Ct. 1245 (1985).
[23] 286 F.3d 1195 (10th Cir. 2002).
[24] Comanche Nation Br. at 16-17.
[25] *Id.* at 21-22.
[26] Kiowa Tribe Br. at 2-3. It is unclear whether Plaintiffs contend that the Treaty of Medicine Lodge requires the consent of all three KCA tribes to the transfer of any trust allotment, or just the tribe of whom the original allottee was a member. In the Comanche Nation litigation, the Nation requested notice and consent to transfers of only original Comanche allotments (not allotments of the Kiowa and Apache Tribes), and the other KCA members were not party to that litigation. This suggests that the broader interpretation of the Treaty asserted here is of newer vintage and, at the least, specific to this litigation.
[27] Comanche Nation Br. at 17.
[28] *Id.* at 17, 19. Search as one might, ¶ 80 of the Amended Complaint makes no reference to ongoing violations—nor does any other paragraph at Count Two.

ongoing failure of the Federal Defendants to prevent the [FSA] from exercising jurisdiction over" it.[29] These arguments fail as (1) Congress has abrogated the Comanche Nation's treaty right to the reservation and, as such, (2) any common law right has been foreclosed by the subsequent statutes and regulations governing trust transfers.

A. Because the KCA Reservation was disestablished long ago, Plaintiffs' attempt to derive an extra-legislative consent requirement from the Treaty fails.

First, the Comanche Nation premises its argument on Article II of the Treaty which defined the boundaries of the KCA Reservation and provided the Reservation was "set apart for the absolute and undisturbed use and occupation" of the KCA tribes[30] and that the United States "agrees that no persons except those herein authorized so to do . . . shall ever be permitted to pass over, settle upon, or reside in the territory." But both the United States Court of Appeals for the Tenth Circuit and the Oklahoma Court of Criminal Appeals have held that Congress previously abrogated these treaty provisions when it disestablished the KCA Reservation and opened the surplus lands to non-Indian settlement.[31] In that statute, the KCA tribes, including Plaintiffs, relinquished "all their claim, title and interest" to the Reservation.[32] And while treaty rights may survive disestablishment of a reservation where the treaty makes clear that the rights at issue extend outside reservation boundaries or are

[29] Kiowa Tribe Br. at 6.
[30] The Comanche Nation, the Kiowa Tribe, and the Plains Apaches comprise the KCA tribes.
[31] *See* Act of June 6, 1900, 31 Stat. 676 (ratifying the 1892 Jerome Agreement); *Tooisgah v. U.S.*, 186 F.2d 93, 97-98 (10th Cir. 1950); *Martinez v. State*, 2021 OK CR 40, ¶¶ 15, 18-22, 24, 502 P.3d 1115 (Okla. Crim. App. 2021). Notably, the Comanche Nation participated in the *Martinez* case by filing amicus briefs, 2021 OK CR 40, ¶ 9; further, no appeal followed the *Martinez* decision filed on December 30, 2021.
[32] *Martinez*, 2021 OK CR 40, ¶¶ 15, 22 (citing 31 Stat. 676).

independent of ownership of land, if the treaty rights are tied to reservation status they are abrogated by disestablishment of the reservation.[33]

In sum, Plaintiffs' contention that they still possess a treaty right controlling the procedure for trust transfers within the former KCA Reservation is defeated by the terms of a statute whereby Plaintiffs ceded "all their claim, title and interest" to the former KCA Reservation and that allowed nonmembers and non-Indians to "pass over, settle upon, [and] reside in" the former KCA Reservation in clear contradiction of Article II of the Treaty and its promise that the KCA tribes would enjoy "undisturbed use and occupation" of the former KCA Reservation.

Of course, this is not to suggest that Congress through statute, and the Executive through regulations, cannot provide rights to the KCA tribes within the former KCA Reservation, including the ability to have land taken into trust or to receive transfers of individual trust land as it has through the Indian Reorganization Act, Oklahoma Indian Child Welfare Act, and the regulations found at 25 C.F.R. Part 151. But, critically, the statute and its implementing regulations determine the extent of those rights, not an abrogated treaty, and any such rights are effective under the APA. As a result, the APA's statute of limitations is fully applicable here.

This conclusion thus negates the Comanche Nation's reliance on *Oneida*, the very case it cites in support of Plaintiffs' claim. There, the Supreme Court explained that a federal statute (or implementing regulation) forecloses common law causes of action where the statute speaks

[33] *See Oregon Dept. of Fish and Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 770 (1985).

directly to the question otherwise answered by federal common law.[34] In this case, Plaintiffs' claimed consent requirement cannot stem from the Treaty's reservation guarantee but must, instead, stem, if at all, from the legislatively-created process for acquiring and transferring trust lands. And when it comes to the issue of tribal consent specifically, the regulations at 25 C.F.R. Part 151 provide that a "tribe may acquire land in trust status on a reservation other than its own" in the event "the governing body of the tribe having jurisdiction over such reservation consents in writing to the acquisition[.]"[35] And, here, because the KCA Reservation was disestablished, tribal consent applies, if at all, because Part 151's definition of "reservation" includes "former reservations" in Oklahoma specifically.[36] Thus, to the extent Plaintiffs must consent to trust acquisitions by other tribes within the former KCA reservation, it is only by virtue of legislation and implementing regulations through an APA action, and not the Treaty of Medicine Lodge.

B. Even if a stand-alone treaty claim existed, it would still be barred by the six-year statute of limitations.

Even assuming Comanche Nation could assert a stand-alone, common law treaty claim, it would still be barred by the six-year statute of limitations found in § 2401(a) which specifies that "*every civil action* commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues."[37] The Comanche Nation argues

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[34] *Oneida*, 470 U.S. at 236; *see also Illinois v. Milwaukee*, 406 U.S. 91, 107 (1972) (providing "new federal laws and new *federal regulations* may in time pre-empt the field of federal common law") (emphasis added).
[35] 25 C.F.R. § 151.8.
[36] *See* 25 C.F.R. 151.2(f).
[37] 28 U.S.C.A. § 2401(a) (emphasis added); *see also Tanner-Brown v. Jewell*, 153 F.Supp.3d 102, 107 n.3 (D.D.C. 2016) (providing that treaty claims are subject to the APA's six-year statute

that "*Oneida* holds that there is no statute of limitations whatsoever on tribal property-rights claims," including when brought against the United States. But *Oneida* is distinguishable.[38] *Oneida* concerned whether to apply a state-law statute of limitations to federal-common-law claims by Indians to enforce property rights against two counties in New York, "[i]n the absence of a controlling federal limitations period."[39] In this case, the Court is dealing with claims barred by an applicable federal statute of limitations because the claims are brought against the agencies or components of the United States.[40] Accordingly, even assuming the approval of the transfer of the Tsalote Allotment violated the Treaty, any claim had to have been brought within six years, which it was not.

Finally, with respect to the assertion that Count Two evades an applicable limitations period because it deals with an ongoing violation of the Treaty, the "continuing violations" doctrine "'is not applicable in the context of an APA claim for judicial review.'"[41] Additionally, present consequences of a one-time, discrete violation do not extend the limitations period.[42]

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of limitations); *Red Cloud v. U.S.*, 158 Fed. Cl. 500, 508-11 (2022) (six-year statute of limitations applicable to breach of trust claim premised on treaty).

[38] Comanche Nation Br. at 20.

[39] *Oneida*, 470 U.S. at 240.

[40] *See Begay v. Pub. Serv. Co. of N.M.*, 710 F.Supp.2d 1161, 1201 n. 10 (D. N.M. 2010) ("In *Oneida*[,] . . . however, the Supreme Court was dealing with whether to apply a state-law statute of limitations to federal-common-law claims by Indians to enforce property rights against two counties in New York, an action as to which there was no federal-law statute of limitations. In this case, the Court is dealing with claims against the federal government, which the express language of 28 U.S.C. § 2401 governs[.]").

[41] *Hall v. Regional Transp. Comm'n of Southern Nevada*, 362 F. App'x 694, 695 (9th Cir. 2010) (quoting *Gros Ventre Tribe v. U.S.*, 344 F.Supp.2d 1221, 1229 n.3 (D. Mont. 2004)).

[42] *See Ute Distribution Corp. v. Sec'y of Interior*, 584 F.3d 1275, 1283 (10th Cir. 2009) (rejecting continuing violations exception to 2401(a)'s six-year statute of limitations); *Center For Biological Diversity v. Hamilton*, 453 F.3d 1331, 1335 (11th Cir. 2006); *McCormick v. Farrar*, 147 F. App'x 716, 722 (10th Cir. 2005).

Here, the exercise of jurisdiction over the Tsalote Allotment by the FSA Tribe is a present consequence of the discrete decision to approve transfer of the Tsalote Allotment. As the 2002 Letter to the Kiowa Tribe made clear, the consequence of the transfer of the Tsalote Allotment was that the FSA Tribe now had exclusive jurisdiction over the parcel. Further, the continuing violations doctrine does not apply where the alleged injury is definite and discoverable and a reasonable person knew or should have known that the individual's rights have been violated.[43] Here, Plaintiffs knew that the Tsalote Allotment had been transferred without its consent in 2001. It is the failure to obtain consent that is the crux of Plaintiffs' position, and that failure should not now be taxed against the Federal Defendants. The Federal Defendants move for dismissal of Count Two.

IV. Plaintiffs rely on distinguishable case law to attempt a rebuttal of the National Indian Gaming Commission's discretion.

Plaintiffs assert that *Citizens Against Casino Gambling v. Hogen* ("CACG")[44] establishes the mandatory duty of the National Indian Gaming Commission ("NIGC") to report the allegedly illegal Warm Springs Casino at the Tsalote Allotment to federal law enforcement officials.[45] The Nation states that the plaintiffs in *CACG* are similar to Plaintiffs here insofar as the *CACG* plaintiffs sued the NIGC under 25 U.S.C. § 2713 "to compel it to commence an enforcement action to temporarily close the gaming activities of a tribe that fell out of compliance with the [Indian Gaming Regulatory Act] after a district court overturned the

[43] *See Ute Distribution Corp.*, 584 F.3d at 1283; *Seay v. Okla. Bd. of Dentistry*, No. CIV-17-682-D, 2020 WL 1930452, *4 (W.D. Okla. Apr. 21, 2020).
[44] No. 07-CV-0451S, 2008 WL 4057101 (W.D.N.Y. Aug. 26, 2008).
[45] Am. Compl. ¶ 135; Comanche Nation Br. at 18; Kiowa Tribe Br. at 7.

NIGC's approval of the tribe's gaming ordinance."[46] Further while the Tribe acknowledges that the court in *CACG* recognized NIGC discretion, it asserts NIGC actions here accord with those at issue in *CACG* because NIGC "has been made aware of the existence of the Warm Springs Casino's violation from the Plaintiffs' written objections."[47] CACG is clearly distinguishable, and the NIGC exercises discretion here.

First, Plaintiffs allege in their Amended Complaint that they learned FSA sent a letter to NIGC on September 18, 2020, requesting a 60-day expedited review for the opening of a new gaming facility on the Tsalote Allotment pursuant to 25 C.F.R. § 559.2(a)(1).[48] Next, they contend that "[u]nder applicable gaming regulations, the Chair of the NIGC was required to 'respond to the tribe's request, either by granting or denying the tribe's request' . . . but (on information and belief) has not done so."[49] Plaintiffs next allege that "[o]n April 27, 2022, the [KCA] Intertribal Land Use Committee sent a letter to the NIGC, complaining of the Warm Springs Casino and requesting agency action . . . ."[50] Finally, Plaintiffs allege that "NIGC acknowledged receipt of the letter, but has done nothing to stop or prevent the opening of the illegal . . . Casino."[51] From these allegations in an *Amended* Complaint, Plaintiffs argue that "the NIGC has reason to believe [FSA's] gaming on the Tsalote Allotment is illegal because there has never been a gaming-eligibility determination as to that allotment."[52]

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[46] Comanche Nation Br. at 18.
[47] Kiowa Tribe Br. at 7.
[48] Am. Compl. ¶ 49. Notably, Plaintiffs cite in their Amended Complaint some, but not all, of the regulations governing the facility license process. *See* 25 C.F.R. § 559.
[49] *Id.* ¶ 50.
[50] *Id.* ¶ 51.
[51] *Id.* ¶ 52.
[52] Comanche Nation Br. at 19.

On a motion to dismiss and pursuant to the *Iqbal* two-step approach to determining the factual sufficiency of a complaint, a court "can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth."[53] Here, Plaintiffs make allegations on information and belief. Such allegations are assumptions. Plaintiffs then build upon assumptions to state their claim against NIGC. Indeed, Plaintiffs assert that NIGC itself "has reason to believe" the Warm Springs Casino "is illegal."[54] Apparently, this is so because Plaintiffs sent NIGC a letter stating it was illegal.[55] Against this backdrop, Plaintiffs contend NIGC is without discretion in this case and must report the Warm Springs Casino pursuant to § 2716 to law enforcement. But Plaintiffs' assumptions lack the necessary factual predicate to support their presumptions, and their Count Six is thus insufficiently pled.

Second, the *CACG* ruling cited by Plaintiffs constitutes one ruling at the tail end of a long and complicated case. Indeed, the *CACG* opinion cited by Plaintiffs comes from an order dealing with two post-judgment motions, each of which dealt with the district court's merits-based decision and judgment on the Seneca Nation's eligibility for gaming.[56] The underlying opinion was itself voluminous enough to require an index and a table of acronyms, and, read together, these opinions demonstrate that *CACG* is distinguishable from the present case.[57]

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[53] *Ashcroft v. Iqbal*, 556 U.S. 662, 679, 129 S. Ct. 1937 (2009).
[54] Comanche Nation Br. at 19.
[55] Am. Compl. ¶ 49-51.
[56] 2008 WL 4057101, at *1.
[57] *Citizens Against Casino Gambling v. Hogen*, No. 07-CV-0451S, 2008 WL 2746566 (W.D.N.Y. July 8, 2008).

In *CACG*, NIGC had approved an ordinance,[58] and *CACG* sought to compel the Chair to issue an NOV pursuant to § 2713 as Plaintiffs concede.[59] Here, Plaintiffs contend that NIGC must refer a violation of law—a determination uniquely within agency discretion. Section 2716 upon which Plaintiffs base their claim indicates that it is the Commission that makes these referrals and, thus, it is the Commission that exercises that referral discretion. NIGC's discretion cannot be snuffed out because one party to litigation sends a letter based on the assumptions and presumptions noted above. Indeed, as stated in *Heckler v. Chaney*, "an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion."[60] NIGC maintains this discretion here.

Conclusion

For these reasons, the Federal Defendants ask this Court to dismiss Counts One, Two, and Six from the Amended Complaint and to dismiss the Federal Defendants in their entirety.

[58] *Id.* at **15-16.
[59] *See* Comanche Nation Br. at 18.
[60] 470 U.S. 821, 831, 105 S. Ct. 1649 (1985).

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Respectfully Submitted,

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