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.	)	

FEDERAL DEFENDANTS' MOTION TO DISMISS COMANCHE NATION WITH BRIEF IN SUPPORT

Respectfully Submitted,

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Pursuant to Federal Rule of Civil Procedure 12(b)(1), the Federal Defendants[1] respectfully move for dismissal of Comanche Nation's claims raised against the Federal Defendants. In support thereof, the Federal Defendants submit the following.

I. BACKGROUND

This Motion to Dismiss focuses on Comanche Nation's lack of standing to bring Counts One, Two, and Six against the Federal Defendants. As the Court is well aware of the facts of this case, the facts provided herein will be succinct and narrowly tailored to the issues raised in this Motion to Dismiss.[2]

On June 16, 2022, Comanche Nation and Kiowa Tribe filed their Amended Complaint with the Court. ECF No. 51 (Am. Compl.). The Amended Complaint revolves around Comanche Nation's dissatisfaction with the opening and operation of the Warm Springs Casino by the Fort Sill Apache Tribe (hereinafter the "FSAT Defendants"). The Warm Springs Casino is located on the Tsalote Allotment. The FSAT Defendants possess jurisdiction over the Tsalote Allotment by way of a transfer in trust to the FSAT Defendants in 2001. Prior to 2001, the Tsalote Allotment was held in trust for an individual member of the Kiowa Tribe.

The Amended Complaint raises three claims against the Federal Defendants. Count

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[1] The United States Department of the Interior ("DOI"); Bryan Newland, in his Official Capacity as Assistant Secretary – Indian Affairs ("Assistant Secretary Newland"); Darryl LaCounte, in his Official Capacity as Director of the Bureau of Indian Affairs ("Director LaCounte"); and Sequoyah Simermeyer, in his Official Capacity as Chairman ("Chairman Simermeyer") of the National Indian Gaming Commission ("NIGC") are collectively the "Federal Defendants."

[2] A more robust case history is in Federal Defendants' Motion to Dismiss (ECF No. 63).

One is an Administrative Procedure Act ("APA") claim challenging DOI's alleged failure to obtain consent of the Comanche Nation prior to transferring the Tsalote Allotment to the FSAT Defendants in 2001, which consent the Comanche Nation asserts the DOI was required to obtain pursuant to 25 C.F.R. § 151.8. In Count Two, Comanche Nation asserts the same failure to obtain consent claim as a treaty claim, arguing consent is there required by the terms of the First Treaty of Medicine Lodge. In Count Six, Comanche Nation brings a second APA action against the National Indian Gaming Commission ("NIGC") for allegedly failing to take enforcement action against the Warm Springs Casino and FSAT Defendants, which Comanche Nation alleges is required by 25 U.S.C. § 2716(b).

On February 27, 2023, former-Plaintiff Kiowa Tribe, the FSAT Defendants, and the Federal Defendants entered into a Settlement Agreement that resolved the litigation as to the Kiowa Tribe. Consequently, Kiowa Tribe filed a Notice of Voluntary Dismissal (ECF No. 117) dismissing all of its claims with prejudice. On March 2, 2023, this Honorable Court dismissed all claims of Plaintiff Kiowa Tribe. ECF No. 118. Comanche Nation is thus the sole remaining Plaintiff, yet has no personal interest in nor jurisdiction over—past or present—the piece of land at center in this litigation. Comanche Nation thus lacks standing, and the Federal Defendants respectfully request this Court dismiss its claims against the Federal Defendants.

II. STANDARD OF DISMISSAL FOR LACK OF STANDING UNDER FED. R. CIV. P. 12(b)(1)

"Federal courts are not 'ombudsmen of the general welfare.'" *Cherokee Nation v. United States Dept. of Interior*, 2022 WL 17177622, at *8, --- F. Supp. 3d. --- (D.D.C. 2022) (citing *Valley*

Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 487 (1982)). "Each plaintiff must have standing to seek each form of relief in each claim." *Am. Humanist Ass'n, Inc. v. Douglas Cty. Sch. Dist. RE-1*, 859 F.3d 1243, 1250 (10th Cir. 2017) (quoting *Bronson v. Swensen*, 500 F.3d 1099, 1106 (10th Cir. 2007)). "The doctrine of standing asks whether a litigant is entitled to have a federal court resolve his grievance. This inquiry involves 'both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise.'" *Kowalski v. Tesmer*, 543 U.S. 125, 128 (2004) (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)).

To establish Article III standing, a plaintiff is required to show: "(1) an injury in fact that is both concrete and particularized as well as actual or imminent; (2) a causal relationship between the injury and the challenged conduct; and (3) a likelihood that the injury would be redressed by a favorable decision." *Protocols, LLC v. Leavitt*, 549 F.3d 1294, 1298 (10th Cir. 2008) (internal quotation marks omitted). "In general, this inquiry seeks to determine 'whether [the plaintiff has] such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination.'" *Wyoming ex rel. Crank v. United States*, 539 F.3d 1236, 1241 (10th Cir. 2008) (quoting *Massachusetts v. Env't Prot. Agency*, 549 U.S. 497, 517 (2007)).

A plaintiff bears the burden of establishing standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). "It is a long-settled principle that standing alone cannot be inferred argumentatively from averments in the pleadings but rather must affirmatively appear in the record." *Phelps v. Hamilton*, 122 F.3d 1309, 1326 (10th Cir. 1997) (quoting *FW/PBS v. City of Dallas*, 493 U.S. 215, 231 (1990)). Thus, where standing is challenged, a court must presume

lack of jurisdiction "unless the contrary appears affirmatively from the record." *Renne v. Geary*, 501 U.S. 312, 316 (1991) (quoting *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 546 (1986) (internal quotation omitted)). Moreover, a plaintiff must demonstrate standing to sue against each defendant. *See Rolaff v. Farmers Ins. Co., Inc.*, No. CIV-19-0689-J, 2020 WL 4939172, at *3 (W.D. Okla. Mar. 19, 2020) (dismissing several defendants because the "Plaintiffs have no standing to assert any claims against" these defendants). And "a plaintiff may have standing to bring some, but not all, claims raised in a complaint." *Santa Fe Alliance for Pub. Health and Safety v. City of Santa Fe, New Mexico*, 993 F.3d 802, 813 (10th Cir. 2021).

When considering whether a plaintiff has standing at the motion to dismiss stage, "both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Warth v. Seldin*, 422 U.S. 490, 501 (1975). Although "standing … is assessed at the time of the original complaint, even if the complaint is later amended[,]" the amended complaint is examined to "assess[] a plaintiff's claims, including the allegations in support of standing." *Southern Utah Wilderness Alliance v. Palma*, 707 F.3d 1143, 1152-53 (10th Cir. 2013) (citations omitted).

III. ARGUMENT

a. Comanche Nation Lacks Standing to Bring Counts One, Two, and Six Against the Federal Defendants

Comanche Nation fails to establish the three elements required for standing. Comanche Nation lacks standing to challenge, under the APA, the Federal Defendants' alleged failure to acquire written consent from the Kiowas, Comanches, and Apaches. Likewise, Comanche Nation also lacks standing under now-abrogated treaty provisions which, in any

event, have been fulfilled via settlement and compromise. Lastly, Comanche Nation lacks standing to bring an APA action against the Federal Defendants for an alleged failure by the NIGC to take enforcement action to stop "illegal" gambling. As discussed below, Comanche Nation's claims do not present even the possibility of an immediate injury in fact that could be redressable by a favorable decision in this case.

i. Comanche Nation Fails to Allege an Injury in Fact

"'[T]o satisfy Article III's case or controversy requirement, a litigant in federal court is required to establish its *own* injury in fact.'" *Bear Lodge Multiple Use Ass'n v. Babbitt*, 175 F.3d 814, 821 (10th Cir. 1999) (emphasis in original) (quoting *National Council for Improved Health v. Shalala*, 122 F.3d 878 (10th Cir. 1997)). To establish injury in fact, a "plaintiff must allege that it suffered an injury in fact, which must be (1) 'concrete and particularized' and (2) 'actual or imminent, not conjectural or hypothetical.'" *Rocky Mountain Peace & Justice Ctr. V. United States Fish and Wildlife Service*, 40 F.4th 1133, 1151 (10th Cir. 2022) (citing *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016)). "Establishing injury in fact requires 'a factual showing of perceptive harm.'" *Bear Lodge Multiple Use Ass'n*, 175 F.3d at 821 (quoting *Lujan*, 504 U.S. at 566).

"The concreteness prong of this element requires that the injury be 'real, and not abstract.'" *Cherokee Nation,* 2022 WL 17177622, at *8 (citing *Spokeo, Inc.*, 578 U.S. at 340). "A 'real' injury can be 'tangible,' as with monetary harms, or it can be 'intangible' as with reputational harms." *Id.* (citing *Transunion LLC v. Ramirez,* 141 S. Ct. 2190, 2204 (2021)). "But a mere 'injury in law'—that is, the violation of some abstract legal right without real-world effect on the plaintiff—is not a 'real' injury under standing's concreteness requirement." *Id.* A plaintiff "may not 'employ a federal court as a forum in which to air … generalized

grievances about the conduct of government.'" *Citizens for Responsibility & Ethics v. U.S. Office of Special Counsel*, 480 F. Supp. 3d 118, 133 (D.D.C. 2020) (quoting *Valley Forge Christian Coll.*, 454 U.S. at 483); *United States v. Hays*, 515 U.S. 737, 743 (1995) ("generalized grievance against allegedly illegal governmental conduct" insufficient for standing).

To meet the "particularized" prong, the injury must affect a plaintiff "in a personal and individual way." *Spokeo*, 578 U.S. at 1543 (quoting *Lujan*, 504 U.S. at 560 n.1). "In cases where 'the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but is ordinarily substantially more difficult to establish.'" *Rocky Mountain Peace & Justice Ctr.*, 40 F.4th at 1151 (quoting *Defs. Of Wildlife*, 504 U.S. at 562) (quotations omitted in original).

1. Comanche Nation Fails to Allege an Injury in Fact for Count One

For Count One, Comanche Nation alleges DOI failed to obtain written consent of the Kiowa Tribe, Comanche Nation, and Apache Tribe under 25 C.F.R. § 151.8. Comanche Nation lacks standing to sue under 25 C.F.R. § 151.8. First, 25 C.F.R. § 151.8 does not confer any rights on the Comanche Nation, at least with respect to the Tsalote Allotment. The language of 25 C.F.R. § 151.8 indicates "the governing body of the tribe having jurisdiction over such reservation" must consent. The Amended Complaint fails to plead that Comanche Nation is "the tribe having jurisdiction" over the Tsalote Allotment. Instead, the Amended Complaint acknowledges that "allotments are considered to be within the jurisdiction of whichever of the three tribes the original allottee was a member[,]" (Am. Compl., ¶ 38), and the Kiowa Tribe had jurisdiction over the Tsalote Allotment prior to its transfer in trust to the FSAT Defendants. Am. Compl., ¶ 86 ("Plaintiffs are entitled to a declaration that … the

Kiowa Tribe has jurisdiction over the Tsalote Allotment."), ¶ 98 ("The Tsalote Allotment is within the jurisdiction of the Kiowa Tribe …."); ¶ 130 ("The Kiowa Tribe has jurisdiction over the Tsalote Allotment, and the construction of an illegal casino on that site has deprived the Kiowa Tribe of revenue and the opportunity to use the Tsalote Allotment for its own purposes."). Therefore, not only did Comanche Nation fail to allege it has or had jurisdiction over the Tsalote Allotment, its own pleading concedes that it was the Kiowa Tribe that at one time exercised such jurisdiction.

As such, the Kiowa Tribe was the tribe which could have arguably asserted jurisdiction over the Tsalote Allotment for purposes of 25 C.F.R. § 151.8, just as the Comanche Nation did in with respect to the Kerchee Allotment in 2005. Indeed, the Amended Complaint indicates that transfer of the Kerchee Allotment in trust to the FSAT Defendants required consent of (only) the Comanche Nation "consistent with the allotment remaining within the jurisdiction of the Comanche Nation." Am. Compl., ¶ 39. Thus, it would be inconsistent (and illogical) for Comanche Nation to now argue that its consent was required for transfer of the Tsalote Allotment. To be sure, the Comanche Nation's 2005 settlement agreement directly contradicts any such argument as it provides for the consent of the Comanche Nation, and only the Comanche Nation, for the exercise of jurisdiction over the Kerchee Allotment. *See* Am. Compl., ¶ 42.

Here, if consent was required prior to transfer of the Tsalote Allotment, it would have been required of the Kiowa Tribe given the Tsalote Allotment was an original Kiowa

allotment.[3] And, in fact, the Kiowa Tribe has consented to the FSAT Defendants' use of this land, including operation of the casino. Even if Comanche Nation pleaded some sort of injury tangentially caused by operation of the casino, such injury would be unrelated to a failure to obtain consent claim under 25 C.F.R. § 151.8. Any claim under 25 C.F.R. § 151.8 has now been extinguished by the Settlement Agreement entered into by the only KCA tribe with any possible claim to jurisdiction over the Tsalote Allotment. *See* ECF No. 117. Moreover, any injury the Comanche Nation could have asserted is now moot, as raised in more detail in Section III(b) below.

Even assuming, *arguendo*, Comanche Nation could have standing to pursue a failure to obtain consent claim under 25 C.F.R. § 151.8, it fails to allege any "real-world effect" on the tribe from this alleged procedural violation. The alleged injury is the same as the alleged violation, but the two must be distinct. And importantly, the Amended Complaint concedes that if any party sustained an injury in fact for this issue, it was the Kiowa Tribe. *See* Am. Compl., ¶ 65 ("The actions of the BIA Defendants further violate their trust obligations to at least the Kiowa Tribe by depriving it of land that it could acquire for economic development or other purposes."). Tellingly, the Comanche Nation never alleges it ever possessed jurisdiction over the Tsalote Allotment or that it was deprived use of this land in any way. Instead, a now-dismissed party is the only one who could arguably assert such a claim to this land and any injury in fact related to its transfer.

[3] This requisite conclusion applies with equal force to Comanche Nation's asserted treaty claim in Count Six, discussed below.

2. Comanche Nation Fails to Allege an Injury in Fact under Count Two

Count Two likewise alleges a failure to obtain consent claim, but is based on the terms of the First Treaty of Medicine Lodge. Am. Compl., ¶ 77. First, and as noted in the Federal Defendants' Motion to Dismiss, the KCA Reservation was disestablished in 1900 and the terms upon which the Comanche Nation relies are now abrogated.[4] *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) (noting Kiowa, Comanche, and Apache Indians "ceded, conveyed, transferred, relinquished and surrendered forever and absolutely all their claim, title and interest of every kind and character in and to the lands embraced in the reservation."); *Martinez v. State*, 2021 OK CR 40, ¶¶ 15, 18-22, 24, 502 P.3d 1115 (Okla. Crim. App. 2021). That is, when Congress disestablished the KCA reservation and opened the surplus lands to non-Indian settlement, it abrogated the tribes' treaty rights to "absolute and undisturbed use and occupation" of the KCA Reservation. *See id.* Thus, Comanche Nation cannot now rely on abrogated treaty rights to assert a failure-to-obtain-consent claim.[5]

Furthermore, as indicated at footnote 26 of the Federal Defendants' Unified Reply (ECF No. 108), it is unclear whether Comanche Nation argues that the First Treaty of Medicine Lodge requires consent of all three KCA tribes to the transfer of trust allotments,

[4] Relatedly, even assuming such treaty rights remained valid, both the Kiowa Tribe and Apache Tribe would be required parties to this litigation under Fed. R. Civ. P. 19. The absence of these two tribes from the current litigation speaks volumes.

[5] As with Count One, Comanche Nation's 2005 litigation and settlement agreement are instructive and indicative of the gamesmanship the tribe is playing in order to attempt to assert a claim.

just the Kiowa Tribe and Comanche Nation, or only the tribe of whom the original allottee was a member.

Even if Comanche Nation could assert a claim under the First Treaty of Medicine Lodge, it fails to plead an injury in fact from this alleged treaty violation. The Amended Complaint asserts only "intangible harms to [the Comanche Nation's] self-determination, sovereignty, and government that result from the violation of [its] treaty rights." Am. Compl., ¶ 79. These "abstract injur[ies] to … sovereignty [are] not sufficient to confer standing." *Cherokee Nation*, 2022 WL 17177622, at *14 (citations and quotation marks omitted). "[D]eprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right in vacuo—is insufficient to create Article III standing." *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009). Because Comanche Nation has failed to allege a concrete interest affected by the Federal Defendants' alleged treaty violations, it lacks standing to bring such a claim.

Moreover, as briefed in the Federal Defendants' Motion to Dismiss (ECF No. 63), the United States has not waived sovereign immunity to be sued in federal district court for treaty claims. Because the United States has not waived sovereign immunity for treaty claims, any alleged injury is insufficient.

3. Comanche Nation Fails to Allege an Injury in Fact under Count Six

For Count Six, Comanche Nation brings an APA action claiming the NIGC had a mandatory duty to report the Warm Springs Casino to federal law enforcement officials and was required to undertake enforcement action. Am. Compl., ¶¶ 132-142. The vague injuries asserted within Count Six include an allegation that revenue is being diverted and that "NIGC

owes a duty to [Comanche Nation] to promote [its] economic development, self-sufficiency, and tribal government, and to protect [its] means of generating tribal revenue." Am. Compl. ¶ 140.

As briefed by the Federal Defendants in their Motion to Dismiss (ECF No. 63), Comanche Nation cannot bring suit under IGRA because the NIGC enjoys prosecutorial discretion, and the United States has not waived sovereign immunity for the claim alleged there. Case law makes clear that Congress vested the NIGC with discretion to civilly enforce gaming under IGRA. *Board of Com'rs of Cherokee County, Kan. v. Jewel*, 956 F. Supp. 2d 116, 124 (D.D.C. 2013). "And the Supreme Court has held that 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 and therefore is presumptively unreviewable." *Id.* (citing *Heckler v. Chaney*, 470 U.S. 821, 831 (1985)) (additional citation and quotation marks omitted). Comanche Nation has no private right of action to coerce NIGC into taking certain enforcement action. Even if it did, Comanche Nation has failed to allege a direct injury in fact related to such alleged inaction.

Comanche Nation's injury allegedly caused by NIGC's lack of enforcement action appears to be the threat of diverted revenue. Am. Compl., ¶ 140. In support of this alleged injury, the Amended Complaint provides only that the FSAT Defendant's Warm Springs Casino is located 22.6 miles from the Comanche Nation's Spur Casino and 32.7 miles from the Comanche Casino. The Amended Complaint is devoid of any other specific information describing a concrete and particularized harm. There are no estimates of customers or profits lost. In fact, no allegations whatsoever demonstrating and quantifying the unsubstantiated

diversion of business. Comanche Nation asks this Court to make the large inferential leap that distance equals lost revenues. This request, however, disregards Comanche Nation's burden of showing injury in fact and is detrimental to its standing to bring this claim.

The Amended Complaint also references an alleged duty owed by NIGC "to Plaintiffs to promote their economic development, self-sufficiency, and tribal government…." Am. Compl., ¶ 140. Such generalized grievances of intangible harms do not constitute injury in fact for purposes of Article III standing. *See Hays*, 515 U.S. at 743 ("generalized grievance against allegedly illegal governmental conduct" insufficient for standing). This is especially so when the Comanche Nation has brought an APA claim attacking the NIGC's alleged lack of enforcement action on a piece of land over which it lacks jurisdiction. Comanche Nation fails to allege an injury in fact related to Count Six.

In sum, Comanche Nation's generalized grievances and alleged procedural violations untethered to specific injuries fail to satisfy the first element of standing. For this reason alone, Comanche Nation's claims against the Federal Defendants must be dismissed.

ii. Comanche Nation's Alleged Injuries are Not Traceable to the Federal Defendants' Conduct

A plaintiff must allege "a substantial likelihood that the defendant's conduct caused plaintiff's injury in fact." *Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1156 (10th Cir. 2005). In other words, a plaintiff must show that its injury is "fairly traceable to the challenged action." *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 180 (2000). A plaintiff is required to show that its injury was "not the result of the independent action of some third party not before the court." *Nova Health Sys.,* 416 F.3d at 1158 (quoting *Lujan*, 504

U.S. at 560).

"Generally, this is a 'but for' test—if some part of the alleged injury would not have occurred, or will occur, but for the challenged action, then the injury is fairly traceable to the challenged action." *Cherokee Nation*, 2022 WL 17177622, at *8 (citing *Am. Fed'n of Gov't Emps., AFL-CIO v. United States*, 104 F. Supp. 2d 58, 63 (D.D.C. 2000)). "But if the injury would occur regardless of the challenged action—say, because some separate action would independently cause it in full—then the fair-traceability test is not met." *Id.* (citing *Delta Constr. Co. v. EPA*, 783 F.3d 1291, 1297 (D.C. Cir 2015)). "The more attenuated or indirect the chain of causation between the government's conduct and the plaintiff's injury, the less likely the plaintiff will be able to establish a causal link sufficient for standing." *Ctr. for Biological Diversity v. Dep't of Interior*, 563 F.3d 466, 478 (D.C. Cir. 2009).

1. Comanche Nation's Injuries are not Fairly Traceable to the Alleged Violations in Counts One and Two

With respect to Counts One and Two, the Comanche Nation challenges the Federal Defendants' alleged transfer of the Tsalote Allotment to the FSAT Defendants without the written consent of the Comanche Nation. Comanche Nation alleges violations of procedural rights in Counts One and Two, but concedes no concrete interests were affected by these alleged violations. *See* Am. Compl., ¶ 74 ("The FSA Tribe then held the land without using it to cause any injury to Plaintiffs until February 2022, when it announced the construction of the Warm Springs Casino.") (emphasis added). Instead, Comanche Nation concedes it was only injured in February 2022, when the FSAT Defendants announced the construction of the Warm Springs Casino. This concession is important for two reasons.

First, it highlights that conduct of third parties—sovereign nations at that—are the root actions at issue. Indeed, it is the FSA Tribe's opening of a casino that the Comanche Nation is repackaging as an attenuated APA or treaty claim against the federal government. *See Nova Health Sys.,* 416 F.3d at 1158 (quoting *Lujan*, 504 U.S. at 560) (a plaintiff must show that its injury was "not the result of the independent action of some third party not before the court."). And even if the Court found that Comanche Nation could assert a claim under the First Treaty of Medicine Lodge, the claim would now appear aimed at the Kiowa Tribe—the Comanche Nation's former co-Plaintiff—for consenting to the admission of the FSAT Defendants to KCA lands, at least with respect to the Tsalote Allotment.[6]

Second, any injury related to the casino is too far attenuated from the alleged procedural violation. Comanche Nation's Amended Complaint confirms its injury arose in 2022 (Am. Compl., ¶ 74)—21 years after the transfer of the Tsalote Allotment to the FSAT Defendants in 2001 (Am. Compl., ¶ 67). This timeline strongly indicates the allegedly unlawful transfer is not responsible for Comanche Nation's claimed injury occurring 21 years later. Furthermore, the alleged failure to obtain Comanche Nation's consent did not result in the opening of a casino. Specifically, before a tribe can conduct Class III gaming on Indian lands, it must at a minimum complete the following steps: (1) have an approved gaming ordinance,[7] (2) obtain

[6] The language in the First Treaty of Medicine Lodge on which Comanche Nation relies states that the KCA Reservation "is hereby set apart for the absolute and undisturbed use and occupation of the [Comanche Nation and Kiowa Tribe], and for such other friendly tribes or individual Indians as from time to time, they may be willing [with the consent of the United States*] to admit among them[.]"

[7] 25 U.S.C. §§ 2710(d)(1)(B) & (d)(1)(A); 25 C.F.R. part 522.

gaming licenses and furnish required notices associated with those licenses,[8] and (3) have an approved compact.[9] Importantly, Comanche Nation does not and could not plead the transfer of the land immediately conferred Class III gaming rights. The alleged transfer of land without Comanche Nation's consent is too far attenuated and indirect to establish the causal link sufficient for standing.

2. Comanche Nation's Injuries are not Fairly Traceable to the Alleged Inaction in Count Six

With respect to Count Six, Comanche Nation alleges NIGC's failure to take discretionary enforcement action has resulted in reduced tribal revenue. Comanche Nation, however, fails to plead facts sufficient to tie its claim of reduced revenue to this specific allegation of inaction by the NIGC. Comanche Nation does not plead a date by which NIGC was required to take enforcement action nor any allegation of profits lost after enforcement action should have been taken. Thus, there is no assertion in the four corners of the Amended Complaint tying the NIGC's alleged inaction to reduced tribal revenues caused by the continued operation of the casino.

Even assuming the NIGC is responsible for the casino remaining operational, the ultimate harm Comanche Nation alleges it suffers in Count Six is the casino operating in the first place. Comanche Nation has pleaded no exacerbation of any injury from this alleged failure to take enforcement action, which would be required under this indirect chain of causation for standing purposes. Moreover, this attenuated theory again assumes that the

[8] 25 C.F.R. part 559.

[9] 25 U.S.C. § 2710(d)(1)(C).

NIGC's alleged lack of enforcement action is solely responsible for the Warm Springs Casino's operation. Those facts are not before this Court. Any action or inaction by NIGC related to its discretionary enforcement authority is unrelated to the alleged loss of tribal revenues. Thus, Comanche Nation has failed to plead a traceable injury in fact for Count Six.

iii. Comanche Nation's Alleged Injuries Lack Redressability

"Third, the plaintiff must show that the injury is redressable—that it is 'likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.'" *Rocky Mountain*, 40 F.4th at 1152 (citing *Defs. of Wildlife*, 504 U.S. at 561 (internal citation and quotation marks omitted)). "This analysis is 'virtually always the reciprocal' of the second, fair-traceability element." *Cherokee Nation*, 2022 WL 17177622, at * 8 (citing *Vietnam Veterans of Am. v. Shinseki*, 599 F.3d 654, 658 (D.C. Cir. 2010)).

"Typically, redressability is absent only when the Court's decision would have 'no real effect' on the plaintiff's injury." *Id.* (citing *Kaspersky Lab, Inc. v. U.S. Dep't of Homeland Sec.*, 909 F.3d 446, 465 (D.C. Cir. 2018)). "For instance, as with causation, redressability is absent when the independent action of some third party would still cause the entire injury." *Id.* (citations omitted). Thus, to establish redressability, Comanche Nation must show that the relief sought will remedy its alleged injuries. *Steel Co. v. Citizens for a Better Enviroment*, 523 U.S. 83, 107 (1998) ("Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement.").

1. Comanche Nation's Alleged Injuries Under Counts One and Two are Not Redressable

With respect to Count One, Comanche Nation seeks "a declaration that the Tsalote

Allotment is not owned by the FSA Tribe." Am. Compl., ¶ 66. This requested relief will not cure the alleged procedural violation because the Kiowa Tribe has already consented to the FSAT Defendants' operation of the Warm Springs Casino on the Tsalote Allotment. Given Kiowa has consented, Comanche Nation has no relief for its alleged procedural violation. Moreover, given Comanche Nation has no real injury in fact, other than the alleged procedural violation, no relief could cure this alleged injury. What is done is done; we cannot turn back time to obtain Comanche Nation's consent, as it claims the Federal Defendants should have done. Because there is no concrete deprivation of interest stemming from this alleged procedural violation, there is no remedy that could cure it.

With respect to Count Two, Comanche Nation pleads it is "entitled to declaratory and injunctive relief compelling the Federal Defendants to respect their treaty rights, rescind the transfer of title of the Tsalote Allotment to the FSA Tribe, and/or take whatever action is necessary to prevent the FSA Tribe from exercising any jurisdiction over the Tsalote Allotment." Am. Compl., ¶ 80. Again, even if the Court ordered all of these things to occur, none would alter the fact that the alleged treaty violation—if true—has already occurred. Comanche Nation acknowledges no remedies at law available for its alleged treaty violation. *See* Am. Compl., ¶ 79 ("[r]emedies at law are inadequate to compensate [Comanche Nation] for the intangible harms….").

Moreover, no remedy would result in closure of the casino—the ultimate relief Comanche Nation seeks. Comanche Nation requests the Federal Defendants be compelled to rescind the transfer of title of the Tsalote Allotment to the FSA Tribe. Even if this happened, Comanche Nation provides no facts to support a conclusion that Kiowa Tribe, if

it resumed jurisdiction, would shutter an otherwise profitable casino. Thus, Comanche Nation's alleged injuries lack redressability. *See Board of Com'rs of Cherokee County, Kan.*, 956 F. Supp. 2d at 128 (holding that plaintiff lacked standing because it failed to show it was "reasonably likely that the parties would agree to shut down an apparently lucrative business rather than agreeing to share its proceeds.").

2. Comanche Nation's Alleged Injuries Under Count Six are Not Redressable

For Count Six, Comanche Nation requests "injunctive relief compelling the NIGC Defendants to report the Warm Springs Casino's violations of federal law to federal law enforcement officials and to take enforcement action against the FSA Tribe and Warm Springs Casino." Am. Compl., ¶ 142. In order to find redressability, the Court must assume the "federal law enforcement officials" to whom Comanche Nation claims the NIGC was required to report, would take the specific enforcement action the Comanche Nation assumes. As argued in the Federal Defendants' Motion to Dismiss, however, such duty is entirely discretionary, and the Comanche Nation offers no facts to support its assumption of enforcement action favorable to its position.

Furthermore, as discussed above, with respect to Comanche Nation's recasting of NIGC's mandatory enforcement action, Comanche Nation asks this Court to assume in tandem with it that enforcement action results in closure of the casino. Comanche Nation's Amended Complaint, however, pleads no facts in support of such a conclusion. Thus, Comanche Nation fails to allege injuries related to the Federal Defendants that could be redressed through judicial action.

iv. Comanche Nation Lacks Standing To Bring APA Claims Under Count One or Count Six

For Counts One and Six, Comanche Nation "invoke[s] the limited waiver of sovereign immunity provided for in the APA." *Impact Energy Res., LLC v. Salazar*, 693 F.3d 1239, 1245 (10th Cir. 2012). "The APA permits challenges to agency action only by individuals 'adversely affected or aggrieved' by that action." *Donelson v. United States Through Dept. of Interior*, 730 F. App'x 597, 601 (10th Cir. 2018) (citing 5 U.S.C. § 702)). "This provision parallels the Article III standing requirement that a plaintiff must have suffered an injury in fact." *Id.* (citation and quotation marks omitted). Moreover, "[t]his step injects a prudential standing requirement into § 702, requiring plaintiffs to demonstrate that the interest they seek to protect is 'arguably within the zone of interests to be protected or regulated by the statute in question.'" *State v. Nat'l Indian Gaming Commission*, 151 F. Supp. 3d 1199, 1211 (D. Kan. 2015) (citing *Kansas v. United States*, 249 F.3d 1213, 1222 (10th Cir. 2001)).[10]

"Federal courts 'have jurisdiction to review only final agency actions.'" *Donelson*, 730 F. App'x at 602. (citing *McKeen v. U.S. Forest Serv.*, 615 F.3d 1244, 1253 (10th Cir. 2010) (quotation omitted). "Plaintiffs 'bear the burden of alleging the facts essential to show jurisdiction … mere conclusory allegations of jurisdiction are not enough.'" *Id.* (citing *U.S. ex rel. Hafter D.O. v. Spectrum Emergency Care, Inc.*, 190 F.3d 1156, 1160 (10th Cir. 1999) (quotation

[10] The zone of interests requirement for bringing an action under the APA was previously considered part of the prudential standing requirement. In 2014, however, the Supreme Court clarified that "'prudential standing is a misnomer' as applied to the zone-of-interests analysis, which asks whether 'this particular class of persons ha[s] a right to due under this substantive statute.'" *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 127 (2014) (quoting *Ass'n of Battery Recyclers, Inc. v. Env't Prot. Agency*, 716 F.3d 667, 675-76 (D.C. Cir. 2013) (Silberman, J., concurring).

omitted). When raising an APA claim, "[p]laintiffs have the burden of identifying specific federal conduct and explaining how it is final agency action." *Id.* (citing *Colo. Farm Bureau Fed'n v. U.S. Forest Serv.*, 220 F.3d 1171, 1173 (10th Cir. 2000)). "This requirement focuses litigation on the specific 'agency action' by which a plaintiff claims to be 'adversely affected or aggrieved.'" *Id.* (citing 5 U.S.C. § 702). "Each specific final agency action should be treated as giving rise to an independent claim, and thus named plaintiffs must allege that each challenged action has caused some injury to them." *Id.*

As explained by this Court, a finding of "final" agency action requires two conditions be met:

> First, the action must mark the "consummation" of the agency's decisionmaking process, it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow.

Cheyenne-Arapaho Gaming Commission v. United States, No. CIV-04-1184-R, 2006 WL 8436383, at *3 (W.D. Okla. Dec. 4, 2006).

1. Comanche Nation Fails to Identify a "Final Agency Action" it is Aggrieved By

To assert an APA claim, Comanche Nation must first identify the final agency action and also must show it has suffered an injury because of that action. With respect to Count One, Comanche Nation appears to suggest that the 2001 land transfer was a final agency action, yet it fails to plead how it was "adversely affected or aggrieved" by such final agency decision, particularly as the transfer apparently was without injury to the Nation for at least 20 years. *See* Am. Compl., ¶ 74.

With respect to Count Six, Comanche Nation again fails to identify specific federal conduct and explain how it is final agency action. Comanche Nation's pleading shortcoming is instructive because Count Six admits no final agency action has occurred. Quite the opposite—Comanche Nation seeks to hold NIGC liable for actions it alleged NIGC has not yet taken. Am. Compl, ¶ 141 ("…NIGC had a mandatory duty to take some action…."). Comanche Nation's Amended Complaint is devoid of any facts showing "consummation" of any agency decisionmaking process. *See Cheyenne-Arapaho Gaming Commission*, 2006 WL 8436383, at *3 (holding "the action must mark the 'consummation' of the agency's decisionmaking process").

Moreover, 25 U.S.C. § 2714 strongly indicates that any decision (or lack thereof) relating to 25 U.S.C. § 2716(b) is not considered a final agency decision for APA purposes. "Section 2714 of the IGRA explicitly identifies which NIGC actions are final for purposes of judicial review under the APA." *State v. Nat'l Indian Gaming Comm.*, 151 F. Supp. 3d at 1211. 25 U.S.C. § 2714 provides:

> Decisions by the Commission pursuant to Sections 2710, 2711, 2712, and 2713 of this title shall be final agency decisions for purposes of appeal to the appropriate Federal district court pursuant to [the APA].

25 U.S.C. § 2714. Notably, this section of IGRA does not provide for judicial review of decisions made under 25 U.S.C. § 2716(b). Thus, any alleged NIGC decision stemming from Count Six is not considered a final agency decision for purposes of filing an APA appeal.

Comanche Nation, in addition to the reasons set forth above, lacks standing to pursue its APA claims because it fails to identify specific final agency action as to claims for which it

might possess standing and fails to challenge final agency action which affect its land. Thus, Counts One and Six should be dismissed for lack of jurisdiction.

2. Comanche Nation's Interests are Not Protected by IGRA

Count Six of the Amended Complaint alleges NIGC failed to undertake discrete agency action required by IGRA. As discussed above, to establish standing to sue under the APA, Comanche Nation must show it suffered an injury in fact because of the challenged agency action. *Air Courier Conference of America v. American Postal Workers Union AFL-CIO*, 498 U.S. 517, 523 (1991). Once Comanche Nation has shown it is adversely affected, it must also "show that [it] is within the zone of interests sought to be protected through [IGRA]." *Id.* (citing *Lujan v. Nat'l Wildlife Fed.*, 497 U.S. 871 (1990)) (additional citations omitted). "Specifically, 'the plaintiff must establish that the injury [it] complains of ([*its*] aggrievement, or the adverse effect *upon [it]*) falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint.'" *Id.* (emphasis in original) (citing *Lujan*, 497 U.S. at 883).

As set forth in Count Six, Comanche Nation asserts that 25 U.S.C. § 2716(b) mandates NIGC's non-discretionary action to report the Warm Springs Casino to federal law enforcement officials. Comanche Nation's attempted application of this section of IGRA against the NIGC is unprecedented, unsupported by law, and certainly outside the zone of interests this particular statute was enacted to protect. Specifically, Comanche Nation takes Section 2716(b) outside of its context. Section 2716 mandates that the NIGC preserve certain information as confidential. Section 2716(a) directs that "Except as provided in subsection (b) of this section, the Commission shall preserve any and all information received pursuant

to this chapter as confidential pursuant to the provisions of paragraphs (4) and (7) of section 552(b) of title 5." Section 2716(b), on the other hand, provides that NIGC "shall, when such information indicates a violation of Federal, State, or tribal statutes, ordinances, or resolutions, provide such information to the appropriate law enforcement officials." Therefore, Section 2716(b) is an exception to Section 2716(a)'s confidentiality mandate. Comanche Nation confuses the confidentiality exception afforded to the NIGC under Section 2716(b) with alleged mandatory enforcement actions.

25 U.S.C. § 2714, as discussed in Section III(a)(iv)(1) above, is instructive because that section outlines the specific NIGC decisions that can be challenged under the APA. Notably, this section of IGRA does not provide for judicial review of NIGC's provision of confidential information to other law enforcement agencies under § 2716(b).[11]

Determining when and how to enforce IGRA falls squarely within the prosecutorial discretion of the Federal Defendants. The federal government's enforcement decisions "involve 'a complicated balancing of a number of factors which are peculiarly within [the agency's expertise].'" *Artichoke Joe's v. Norton*, 216 F. Supp. 2d 1084, 1114-15 (E.D. Cal. 2002) (quoting *Heckler v. Chaney*, 470 U.S. 821, 830 (1985)). Consequently, in the context of the APA, under which the Comanche Nation brings Count Six, there is a "presumption against judicial review of an agency's decision not to undertake an enforcement action because such decisions are generally committed to agency discretion." *Id.* at 1114. "The Court is not free to examine

[11] Importantly, the United States has not waived sovereign immunity to be sued for any action or inaction under the authorities set forth in 25 U.S.C. § 2716(b). The limited waiver of sovereign immunity under the APA does not extend to the claim alleged in Count Six.

[IGRA's] legislative history looking for ways to expand the universe of decisions that Congress saw fit to define as final agency action." *State v. Nat'l Indian Gaming Commission*, 151 F. Supp. 3d at 1215. Thus, Comanche Nation's appeal under § 2716(b) is not within the zone of interests protected by that section.

b. Comanche Nation's Claims are Moot

Even assuming Comanche Nation has standing for Counts One, Two, and Six, these claims became moot when the Kiowa Tribe consented to the transfer of jurisdiction over the Tsalote Allotment to the FSAT Defendants. Therefore, Comanche Nation's claims against the Federal Defendants must be dismissed as moot.

As the Supreme Court explained:

> A case becomes moot—and therefore no longer a "Case" or "Controversy" for purposes of Article III—"when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Murphy v. Hunt,* 455 U.S. 478, 481, 102 S. Ct. 1181, 71 L.Ed.2d 353 (1982) (*per curiam*) (some internal quotation marks omitted). No matter how vehemently the parties continue to dispute the lawfulness of the conduct that precipitated the lawsuit, the case is moot if the dispute "is no longer embedded in any actual controversy about the plaintiffs' particular legal rights." *Alvarez, supra,* at 93, 130 S. Ct. 576.

Already, LLC v. Nike, Inc., 568 U.S. 85, 91 (2013).

At the outset of this litigation, former-Plaintiff Kiowa Tribe arguably had standing to pursue some of its claims given it had historically asserted jurisdiction over the Tsalote Allotment. However, the Kiowa Tribe has settled its claims, acknowledged the FSAT Defendants' exercise of jurisdiction over the Tsalote Allotment, and resolved its dispute with respect to the operation of a Class III casino on that parcel. Accordingly, the Kiowa Tribe

dismissed with prejudice all claims against all Defendants. For the reasons explained above, the Kiowa Tribe's consent of jurisdiction extinguishes any potential claims attacking the 2001 land transfer or NIGC's enforcement decisions. Accordingly, Counts One, Two, and Six should be dismissed.

IV. CONCLUSION

For the reasons set forth above, the Federal Defendants request this Court find the Comanche Nation lacks standing to bring Counts One, Two, and Six of the Amended Complaint and dismiss the Federal Defendants from this matter.

Respectfully Submitted,

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