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

COMANCHE NATION OF OKLAHOMA, Plaintiff, v. SCOTT DE LA VEGA, in his official capacity as Acting Secretary, U.S. Department of the Interior, *et al.*,[1] Defendants.	)	Case No. CIV-17-887-HE

FEDERAL DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS SECOND AMENDED COMPLAINT

I. INTRODUCTION

Federal Defendants moved to dismiss Plaintiff's NEPA claim based on the wastewater lagoons because the claim is moot and fails to state a claim upon which relief could be granted. Defs.' Mot. to Dismiss 2d Am. Compl., ECF No. 113. In response, Plaintiff fails to demonstrate that it has a non-moot viable NEPA claim. *See* Pl.'s Resp. to Def.'s [sic] Mot. to Dismiss 2d Am. Compl., ECF No. 120. Instead, Plaintiff engages in speculation about *future* development by the Chickasaw Nation, but does not

[1] Scott de la Vega is now the Acting Secretary of the Department of the Interior; Darryl LaCounte, is now the Director of the Bureau of Indian Affairs, Exercising the Delegated Authority of the Assistant Secretary–Indian Affairs; and Bryan Newland is the Principal Deputy Assistant Secretary–Indian Affairs. They hereby substituted for David Bernhardt, Tara Sweeney, and John Tahsuda, respectively, pursuant to Rule 25(d) of the Federal Rules of Civil Procedure.

demonstrate that any action approved by the Environmental Assessment ("EA") and Finding of No Significant Impact ("FONSI") has yet to occur. Nor does Plaintiff demonstrate that it has stated a NEPA claim or that it has standing to raise such a claim. As such, this Court should grant Federal Defendants' motion and dismiss Plaintiff's NEPA claim.

II. ARGUMENT

A. Plaintiff's NEPA claim is moot.

Plaintiff fails to demonstrate that its claim is not moot. Relying upon *Caddo Nation of Oklahoma v. Wichita & Affiliated Tribes*, 786 F. App'x 837, 842 (10th Cir. 2019), Plaintiff argues that the case is not moot because "there is good reason to believe that the Chickasaw actually intend to locate additional lagoons to the north of the casino." Pl.'s Resp. at 3. But *Caddo* does not help Plaintiff here. In *Caddo*, the court noted that the EA analyzed a project with four parts — a building, a grass house, a grass arbor, and a ceremonial dance ground — and the record did not show that one part (the ceremonial dance ground) had either been completed or abandoned. 786 F. App'x at 841. Thus, the Caddo Nation could pursue its claim as to the ceremonial dance ground. *Id.* Here, the EA analyzed the environmental effects of taking land into trust for the Chickasaw and development of a gaming facility on that property. EA at 8, 9.[2] Those actions have been taken and completed. The sewage lagoons are not a separate part of the project. In addition, the lagoons have been built. There is no evidence that part of the project the

[2] The EA is found at ECF No. 20-1.

Department analyzed remains to be built. Thus, *Caddo* does not support a finding that the case is not moot.

Further, Plaintiff's evidence of the Chickasaw's intent to locate additional lagoons to the north of the casino is pure speculation. To survive a motion to dismiss, "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 555 (2007). "The allegations must be enough that, if assumed to be true, the plaintiff plausibly (not just speculatively) has a claim for relief." *Robbins v. Oklahoma*, 519 F.3d 1242, 1247 (10th Cir. 2008). Under this standard, "a plaintiff must nudge his claims across the line from conceivable to plausible in order to survive a motion to dismiss." *Smith v. United States,* 561 F.3d 1090, 1098 (10th Cir. 2009). Here, Plaintiff cites no evidence beyond noting that the EA discussed lagoons to be built in the north side of the property, but that they were evidently built south of the property instead. From this, Plaintiff speculates that the gaming facility is merely the first stage of the Chickasaw development of the property. Pl.'s Resp. at 4. But this speculation is lacking sufficient factual support to show that Plaintiff has a right to relief. In addition, Plaintiff cites a 2017 affidavit, attached to its preliminary injunction briefing, where the affiant asserts that the *current* lagoons are sufficiently large as to compel a conclusion that the Chickasaw intend to expand their facility. *Id.* (citing Affidavit of Steve York, ECF No. 26-3). Thus, even assuming that the affidavit is properly considered in opposing the motion to dismiss, Plaintiff actually shows no evidence that additional lagoons are necessary or contemplated.

Plaintiff also asks this Court to conclude that the EA and FONSI are inadequate because the Chickasaw Nation prepared the EA for the Department. But as support for the inadequacy, Plaintiff again relies solely on speculation and unsupported theories, arguing that in another project with an EA prepared by a different contractor ("Ardmore EA"), the EA included more information about the demand and detail of the wastewater system proposed.[3] Pl.'s Resp. at 6. From there, Plaintiff asserts that the Ardmore EA does not appear on the contractor's website and asks the Court to conclude from this that the contractor determined that an Environmental Impact Statement was necessary. *Id.* at 7. Plaintiff makes not only this baseless leap, but also asserts that "it could well have been to the massive retention lagoons intended for the project," and that "it is also reasonable to infer the Chickasaw acted to have any reference to the project on the [contractor's] website withdrawn, and to have the EA of January 2019 showing no finding as to the sufficiency of the EA taken down from the website." *Id*. This pure speculation is insufficient to state a claim that the Department violated NEPA in this case. *Twombly,* 550 U.S. at 555 ("Factual allegations must be enough to raise a right to relief above the speculative level."). This Court should conclude that Plaintiff's claim is moot.

[3] Although it is beyond the scope of this Motion, Plaintiff's assertion that the total analysis of the wastewater treatment system is contained in two paragraphs is false. *See* Pl.'s Resp. at 4–5; EA at 20–22, 69–70, 89–90.

B. Plaintiff has failed to state a claim regarding the placement of the lagoons.

In any event, this Court allowed Plaintiff to amend its Complaint to state a claim for relief under NEPA based on the placement of the lagoons. ECF No. 98 at 5. Plaintiff has not done so. Plaintiff's Second Amended Complaint and Response are devoid of any allegations that the placement of the lagoons to the south of the property results in environmental consequences that were not considered in the EA and that are not moot. Plaintiff refers to the placement near the Red River and "the potential environmental risks" the lagoons pose to the Red River, but does not provide any kind of factual support or explanation. *See* Pl.'s Resp. at 7. In order "to withstand a motion to dismiss, a complaint must contain enough allegations of fact 'to state a claim to relief that is plausible on its face.'" *Robbins*, 519 F.3d at 1247 (quoting *Twombly,* 550 U.S. at 570). These conclusory and speculative allegations are insufficient to state a claim upon which relief can be granted.

Even assuming that the Chickasaw Nation does intend to add additional lagoons or expand their casino at some point in the future, Plaintiff has not demonstrated that the Department should have analyzed this in the EA or that future development would require Departmental approval. If such further agency action is required, it could be challenged at that time, but such a claim is not before this Court and would not be ripe in any event. In *Caddo*, the Caddo Nation argued that its NEPA and NHPA claims are not moot because it allegedly had credible evidence of planned future development. *Caddo*, 786 F. App'x at 842 n.7. The Tenth Circuit rejected this argument, noting that the Caddo

Nation "has never identified any final agency action other than the FONSI set out in the EA," which was specifically limited to the History Project center. *Id.* "Caddo Nation has not identified any basis to conclude any such contemplated development falls within the ambit of the instant APA-based claims." *Id.* Similarly, here, Plaintiff did not identify final agency action beyond the EA and FONSI for the Terrell project. Future development of the site does not fall within the scope of the current claims, which must challenge final agency action.

C. Plaintiff has not shown it has standing to raise its NEPA claim.

Finally, Plaintiff argues that it has standing to raise a NEPA claim because it has asserted more than simply socioeconomic interests. Pl.'s Resp. at 11. But again, Plaintiff has failed to make more than conclusory allegations that the Red River will be harmed or to connect placement of the lagoons to environmental harm to the Red River. As such, Plaintiff has not demonstrated it has standing to raise its NEPA claim.

III. CONCLUSION

Plaintiff's speculative allegations do not demonstrate that this Court can grant Plaintiff meaningful relief. Accordingly, Federal Defendants respectfully request that this Court grant their motion to dismiss and dismiss Plaintiff's NEPA claim with prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

X I hereby certify that on March 1, 2021, 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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