

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

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| COMANCHE NATION, et al. |) | |
| |) | |
| Plaintiffs, |) | |
| |) | |
| v. |) | Case No. _____ |
| |) | |
| UNITED STATES, et al., |) | |
| |) | |
| Defendants |) | |

**PLAINTIFF'S BRIEF IN SUPPORT OF EMERGENCY MOTION FOR
TEMPORARY RESTRAINING ORDER**

Introduction

Plaintiffs Comanche Nation and Jimmy Arterberry, Jr., seek declaratory and injunctive relief against the Defendants for the unlawful construction of a warehouse on a site of significant religious importance to traditional Comanche religious practitioners, including Plaintiff Arterberry. The Defendants intend to begin deep excavation on the site on **Monday, August 18, 2008**. Unless this Court restrains Defendants from proceeding, Plaintiff Arterberry and members of the Comanche Nation will be irreparably harmed. Plaintiffs' request for this emergency relief is narrowly tailored in that it seeks only to preserve the status quo until this Court shall have the opportunity to consider and rule on the motion for preliminary injunction.

I. The Court should issue a temporary restraining order against defendants' construction of the warehouse at the base of Medicine Bluffs.

Injunctive relief under Fed. R. Civ. P. 65 is appropriate in actions to prevent the

violation of federal law by an administrative agency. Patriot, Inc. v. Dept. of Housing and Urban Development, 963 F. Supp. 1, 4 (D.D.C. 1997) (granting preliminary injunction to prevent department from violating plaintiff's rights). A temporary restraining order is appropriate where emergency relief is necessary to hold the status quo in place until the court has an opportunity to hear a request for fuller relief, such as a preliminary injunction. Hospital Resource Personnel, Inc. v. United States, 860 F.Supp. 1554, 1556 (S.D. Ga. 1994). The standard for granting a temporary restraining order is the same as that for preliminary injunction. See, e.g., Reproductive Services v. Keating, 35 F. Supp. 2d 1332, 1334 (N.D.Okla. 1998) (citing Mitel, Inc. v. Iqtel, Inc., 124 F.3d 1366, 1370 (10th Cir.1997)).

The Plaintiffs can establish the four factors necessary to obtain a preliminary injunction: (1) they will suffer irreparable harm if the injunction is not granted; (2) the threatened injury to them outweighs the harm caused to the opposing party as a result of the injunction; (3) the injunction is not adverse to the public interest; and (4) they have a substantial likelihood of success on the merits of the case. Dominion Video Satellite, Inc. v. Echostar Satellite, 356 F.3d 1256, 1260 (10th Cir. 2004). Moreover, given the presence in this case of the first three factors, the test for the last factor—the substantial likelihood of success on the merits—becomes less strict, and the Plaintiffs need only demonstrate that there are "questions going to the merits . . . so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation." Prairie Band of Potawatomi Indians v. Pierce, 253 F.3d 1234, 1246, 1247 (10th Cir. 2001) (internal citations omitted).

a. Plaintiffs will suffer irreparable harm unless the temporary restraining order issues

A finding of irreparable harm is based on such factors as the difficulty in calculating damages, the loss of a unique product, and existence of intangible harms such as loss of goodwill or competitive market position. Dominion Video, 356 F.3d at 1264. Allowing Defendants to proceed with construction of the warehouse would destroy the viewscape of Medicine Bluffs from the traditional starting point of the ascension.

It would also forever prohibit the Nation's members from practicing their traditional religion in the way their ancestors did—by holding ceremonies at the site of the proposed warehouse before ascending Medicine Bluffs on a spiritual journey. These initial ceremonies play a vital role in the rituals associated with Medicine Bluffs.

Allowing a warehouse to be built on this site would prevent the practitioners from engaging in an important religious practice, and would, therefore, irreparably harm practitioners of the religion. See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, (2006) (upholding injunction preventing federal government from seizing shipments under the Controlled Substances Act of hallucinogenic tea used in religious ceremonies).

b. The balance of harms weighs heavily in favor of the Plaintiffs

If the temporary restraining order issues, the Defendants will experience a delay in their construction schedule. When added to the two years or more that have elapsed since the Defendants apparently determined to build the structure at this location, a short delay to consider whether the Defendants provided sufficient consultation or whether the

construction will unlawfully burden the exercise of religion will have little economic impact.

On the other hand, if the restraining order does not issue, the Defendants will quickly build the warehouse, which can likely be constructed in a matter of weeks if not days. At that point the Nation and its members will suffer the permanent destruction of their ability to have a significant religious experience at that site, where traditional practitioners would begin the sacred ascension of Medicine Bluffs. Traditional religious practitioners will also permanently lose the viewscape of the three peaks of Medicine Bluffs from that site at the base of Medicine Bluffs. This view is an important part of the religious exercise in ascending Medicine Bluffs.

The balance of harms weighs heavily in the Plaintiffs' favor. The Plaintiffs merely seek to preserve the status quo ante while the Court reviews their constitutional and statutory claims. In light of these circumstances, the potential harm to the Plaintiffs greatly outweighs any adverse consequences to Defendants resulting from issuance of the restraining order.

c. A temporary restraining order would not be adverse to the public interest

A temporary delay in the construction of a warehouse that would hold items currently in storage at other locations is not adverse to the public interest. Rather, the public interest in the free exercise of religion would be furthered by maintaining the status quo pending a determination by this Court whether the proposed construction would unlawfully burden the exercise of religion for members of the Comanche Nation.

It is also within the public interest for federal agencies to be held to their consultation obligations regarding historical and cultural sites, and for parties affected by federal actions on federal lands to have a voice in the decision-making process. Defendants know that the Comanche Nation and its members hold Medicine Bluffs sacred, and have acknowledged that Medicine Bluffs is a traditional cultural property that has been formally designated to the Ft. Sill Military Reservation.

d. The Comanche Nation has a Substantial Likelihood of Success on the Merits

Plaintiffs' claims sound under the Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb, et seq. (as amended), and the National Historic Preservation Act ("NHPA"), 16 U.S.C. §§ 470, et seq. (as amended).

Plaintiffs have a substantial likelihood of success on their religious freedom claim because they will be prohibited from exercising their religion, and Defendants have little to lose by relocating the proposed warehouse to another site on the vast Ft. Sill Military Reservation. The recent Ninth Circuit decision in Navajo Nation v. U.S. Forest Service, ___ F.3d. ___, 2008 WL 316769 (Aug. 8, 2008), is distinguishable because it did not involve a physical prohibition on the ability to exercise religion. In contrast, the proposed warehouse would completely prohibit members of the Comanche Nation from exercising their religion at the base of Medicine Bluffs where the proposed warehouse would be built, as they have done for generations.

Plaintiffs also have a substantial likelihood of success on their failure-to-consult claim because they can Ft. Sill did not engage in a reasonable or good faith effort to

consult with the Comanche Nation or traditional religious practitioners regarding the proposed warehouse site. The Tenth Circuit has recognized that merely sending a letter is not sufficient when an agency has knowledge of a significant historic or cultural property. Pueblo of Sandia v. United States, 50 F.3d 856 (10th Cir. 1995).

Request for Waiver of Security

Comanche Nation respectfully requests a waiver of the security under Fed. R. Civ. P. 65(c), or, in the alternative, for a nominal security. As demonstrated above, issuance of a T.R.O. and a preliminary injunction would not result in any harm—financial or otherwise—to Defendants that would necessitate security. Where there is no harm to Defendants, security is not required. Wright, Miller & Kane, 11A Fed. Prac. & Proc. Civ.2d § 2954 n. 12. Further, where, as here, the overwhelming balance hardships rests on Plaintiff and not Defendant, security is generally not required. See Elliott v. Kieseewetter, 98 F.3d 47, 60 (3d Cir. 1996). The court should waive security or, in the alternative, require only nominal security from the Tribe.

ATTORNEY FOR PLAINTIFFS

/s/ James M. Burson

William R. Norman, OBA No. 14919

Klint Cowan, OBA No. 20187

James M. Burson, OBA No. 20037

HOBBS, STRAUS, DEAN & WALKER, LLP

Second Floor, 117 Park Avenue

Oklahoma City, Oklahoma 73102

Telephone: (405) 602-9425

Facsimile: (405) 602-9426

E-mail Address: william@hsdwok.com

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above and foregoing was served this 15th day of August, 2008, via process server, U.S. First Class Mail postage prepaid, or facsimile:

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| John C. Richter United States Attorney for the Western District of Oklahoma 210 West Park Avenue, Suite 400 Oklahoma City, OK 73102 Fax: (405) 553-8885 | Michael B. Mukasey Attorney General U.S. Department of Justice Room 4400 950 Pennsylvania Avenue, NW Washington, DC 20530-0001 Fax: (202) 307-6777 |
| Colonel Bridgeford HQ, U.S. Army Garrison, Fort Sill 909 N.W. Hamilton Rd., Ste 120 Fort Sill, OK 73503-9004 Fax: (580) 442-7971 | General Vangjel HQ, U.S. Army Garrison, Fort Sill 7305 McNair Ave., Suite 100 Fort Sill OK, 73503 Fax: (580) 442-4700 |
| Preston Murdoch "Pete" Geren III Secretary of the Army Office of the Secretary of the Army 101 Army Pentagon Washington, DC 20310-0101 Fax: (703) 697-8036 | |

By: /s/ James M. Burson
James M. Burson