NO. 16-6161

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

CADDO NATION OF OKLAHOMA

Plaintiff-Appellant,

v.

WICHITA AND AFFILIATED TRIBES, *et al.*

Defendants-Appellees

On Appeal from the May 31, 2016, Order from the United States District Court for the Western District of Oklahoma No. 5:16-cv-00559-HE

Honorable Joe Heaton, Chief Judge

APPELLEES' ANSWER BRIEF

June 2, 2017.

ORAL ARGUMENT NOT REQUESTED

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STATEMENT OF PRIOR OR RELATED APPEALS

There are no prior or related appeals.

GLOSSARY

TERMS RELATING TO THE HISTORY CENTER CONSTRUCTION SITE

Division	A 71-acre division of the WCD Lands, also referred to in the record as Parcel B. This parcel was ceded to the Wichita Tribe in the 2007 Partition Agreement
Field	The 20-acre cleared field, historically used for agriculture, located within the 71-acre Division.
Partition Agreement	The mutual agreement entered into by the WCD Tribes in 2007 to proportionately partition 600 acres of the WCD Lands to provide each WCD Tribe separate lands for use and development with Caddo receiving 312 acres, Wichita Tribe receiving 180 acres, and Delaware Nation receiving 108 acres.
Partition Resolutions	Identical resolutions passed by the WCD Tribes agreeing to and effectuating the Partition Agreement.
Tract	The small portion of the Field upon which the History Center, parking areas, etc., were constructed.
WCD Lands	Land held in trust by the United States jointly for the Wichita and Affiliated Tribes, Caddo Nation and Delaware Nation.
WCD Tribes	Wichita and Affiliated Tribes, Caddo Nation and Delaware Nation.

TERMS RELATED TO CONSULTATION PROCESS

APA	Administrative Procedures Act 5 U.S.C. § 701 *et seq.*
EA	An environmental assessment conducted pursuant to NEPA and/or NHPA.
FONSI	Finding of No Significant Impact issued following completion of the EA.
NEPA	National Environmental Policy Act, 42 U.S.C. § 4321, *et. seq.*

NHPA	National Historic Preservation Act, 54 U.S.C. § 300101, *et seq.*
Section 106 Process	The consultation process under Section 106 of the National Historic Preservation Act, 54 U.S.C. § 300101, *et seq.*, specifically 54 U.S.C. § 306108.

Wichita and Affiliated Tribes, Terri Parton, Jesse E. Jones, Myles Stephenson, Jr., S. Robert White, Jr., Shirley Davila, Gladys Walker, and Karen Thompson (collectively "Appellees" or "Wichita Tribe"), hereby submit the following brief in answer to the **BRIEF OF PLAINTIFF-APPELLANT** ("Brief") filed by Caddo Nation of Oklahoma ("Caddo").

I. ISSUES PRESENTED FOR REVIEW

1. Whether the Court has jurisdiction to entertain this appeal from an order vacating a temporary restraining order.
2. Whether the District Court correctly determined Caddo failed to carry its burden to demonstrate it was entitled to a temporary restraining order, in particular because Caddo had not demonstrated a likelihood of success on the merits.

II. JURISDICTIONAL STATEMENT

This discussion of jurisdiction dips briefly into the procedural and factual history, though these matters are developed further, later. In particular, the Wichita Tribe disagrees with Caddo's recitation—and misrepresentation—of the facts. At every turn, "facts" Caddo claims are undisputed are, in reality, disputed. The facts do not support Caddo's claims, so from the Complaint to Caddo's Brief, Caddo has

demonstrated hysteria, a poor grasp of the facts, failure to conduct basic research, and a willingness to ignore or misstate matters that are easily checked.

Caddo sued to enjoin a Wichita Tribe construction project (the "History Center" or "Project") on land designated for the sole and exclusive use of the Wichita Tribe pursuant to a 2007 agreement (the "Partition Agreement") entered into jointly by the Wichita Tribe, Delaware Nation and Caddo (collectively, the "WCD Tribes")—an arrangement that, by its own terms, remains in effect unless all three WCD Tribes withdraw approval. App. 169, 177-178, 355 Caddo alleged the Wichita Tribe violated the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321, *et. seq.*, and the National Historic Preservation Act ("NHPA") 54 U.S.C. § 300101, *et seq.,* primarily claiming the Wichita Tribe failed to comply with NHPA's consultation process ("Section 106 Process"[1] or "consultation").

Construction was well underway when Caddo filed suit.[2] A few days after granting Caddo's request on a temporary basis, the District Court issued an order (the

[1] 54 U.S.C. § 306108.

[2] Caddo asserts—multiple times—that the Wichita Tribe began pouring perimeter footings less than an hour after learning Caddo intended to sue, as if concrete was poured in response to the suit. Quite to the contrary, pre-construction activities had been ongoing for months. Preparatory dirt work and site clearing occurred in April 2016, and trenches for the concrete footings were dug on May 16, 2016, in preparation for pouring projected to occur on May 25, 2016. App. 60, 153-154. Caddo's counsel called the Wichita Tribe's counsel on May 25, 2016, demanding an immediate halt to construction and threatening litigation. Some of Caddo's leaders and members then entered the construction site without authorization to disrupt work once the footings were approximately 2/3 complete. App. 153-154. Caddo's

"May 31 Order") vacating the temporary restraining order ("TRO"). Caddo then took the unusual step of appealing the May 31 Order, rather than seeking more expedient post-decisional relief.

Because federal courts have limited jurisdiction, this Court has an independent obligation to examine its own jurisdiction and the District Court's jurisdiction even when the parties have not raised the issue. *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541, 106 S. Ct. 1326, 1331, 89 L. Ed. 2d 501 (1986); *Kennedy v. Lubar*, 273 F.3d 1293, 1301-02 (10th Cir. 2001).

A. Review of the May 31 Order is Improper

Under 28 U.S.C. § 1292(a)(1), appellate courts have jurisdiction to review orders "granting, continuing, modifying, refusing or dissolving injunctions." The "denial of a TRO is not generally appealable" except "when an appellant will suffer irreparable harm absent immediate review." *Duvall v. Keating*, 162 F.3d 1058, 1062 (10th Cir. 1998) (holding appellant's pending execution fell within the exception). When a district court's order fails to expressly grant or deny an injunction, jurisdiction is appropriate only in those limited circumstances where the order "has the practical effect of doing so." *Miller v. Basic Research, LLC*, 750 F.3d 1173, 1176

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expectation throughout their belated consultation effort (as well as this litigation) seemed to be that the Wichita Tribe should simply cancel the project because Caddo asked and evidence supporting Caddo's claims was not required.

(10th Cir. 2014) (quotation omitted). Besides demonstrating an order represents an effective denial, a litigant must also show "(1) the 'appeal will further the statutory purpose of permitting litigants to effectually challenge interlocutory orders of serious, perhaps irreparable, consequence' and, (2) the order can be 'effectually challenged' only by immediate appeal." *Id.* (*quoting Carson v. Am. Brands, Inc.*, 450 U.S. 79, 84, 101 S. Ct. 993, 67 L. Ed. 2d 59 (1981)). Caddo satisfies **neither** prong of this test.

a. Caddo did not challenge the May 31 Order by seeking a stay or rehearing. Nor did Caddo seek a hearing on its request for a preliminary injunction. Thus, Caddo has not demonstrated this appeal was necessary "to effectually challenge" an interlocutory order.

b. Instead, on June 8, 2016, Caddo sought an injunction from this Court that the Wichita Tribe opposed, noting Caddo's failure to comply with Fed. R. App. P. 8.

c. Even after this Court denied Caddo's motion for injunctive relief for failure to comply with Fed. R. App. P. 8, Caddo did not seek post-decisional relief.

d. Caddo repeatedly attacks the District Court for not ruling on its request for a preliminary injunction—even though this appeal disrupted the District Court's deliberations—and argues that, with the passage of time, the May 31 Order has the "practical effect" of denying Caddo's request for a

preliminary injunction.[3] This passage of time is wholly attributable to Caddo's decision to immediately appeal—foregoing more expeditious remedies—and should not be rewarded.

e. Another result of the passage of time is **the Project is now complete.** The History Center is built, exhibits are being completed, and the building will open to the public in (or perhaps before) July. *See* Appellee's Motion to Dismiss as Moot, filed contemporaneously herewith.

B. This Case is Moot; Relief Unavailable to Caddo

Federal courts are limited by the "case or controversy" requirement of Article III of the U.S. Constitution. Inherent to the "case or controversy" requirement is the necessity there be some form of relief at stake.

> It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.

North Carolina v. Rice, 404 U.S. 244, 246, 92 S. Ct. 402, 404, 30 L. Ed. 2d 413 (U.S. 1971).

[3] During roughly seven of the twelve months about which Caddo complains, the Parties were engaged with the Circuit Mediation Office—per the Court's September 13, 2016, referral (Doc. 10404607)—and briefing deadlines were continued by agreement multiple times.

Caddo sued to enjoin construction of the Project. Because the History Center is now constructed, the relief Caddo originally requested is unavailable. Thus, any decision on the merits of the appeal would be little more than an advisory opinion.

Conceding that completed construction renders this appeal moot, Caddo has improperly attempted to **expand the scope of the relief it seeks** and asks this Court to enjoin operation of the History Center—an issue never before the District Court—claiming baselessly that operation will inflict further damage.

As used in Fed. R. Civ. P. 54(a), "Judgment" means "a decree and any order from which an appeal lies." Generally, one is entitled to a judgment granting the relief made out by the allegations of the complaint. Fed. R. Civ. P. 54(c); *Preas v. Phebus*, 195 F.2d 61, 63 (10th Cir. 1952); *Schoonover v. Schoonover*, 172 F.2d 526, 530 (10th Cir. 1949). The judgment in this case did not address the issue of whether to enjoin operation of the History Center because Caddo did not seek that relief **until now**.

An injunction blocking a construction project is quite different from an injunction preventing operation of a completed taxpayer-funded facility. Caddo's new request involves additional and distinct considerations and raises issues different from those presented to the District Court.

> Propounding new arguments on appeal in an attempt to prompt us to reverse the trial court undermines important judicial values. In order to preserve the integrity of the appellate structure, we should not be considered a

> "second-shot" forum, a forum where secondary, back-up theories may be mounted for the first time. Parties must be encouraged to give it everything they've got at the trial level. Thus, an issue must be presented to, considered [and] decided by the trial court before it can be raised on appeal.

Tele-Commc'ns, Inc. v. C.I.R., 104 F.3d 1229, 1233 (10th Cir. 1997) (citations and quotations omitted).

> It is clear in this circuit that absent extraordinary circumstances, we will not consider arguments raised for the first time on appeal. This is true whether an appellant is attempting to raise "a bald-faced new issue" or "a new theory on appeal that falls under the same general category as an argument presented at trial." We have therefore repeatedly stated that a party may not lose in the district court on one theory of the case, and then prevail on appeal on a different theory.

McDonald v. Kinder-Morgan, Inc., 287 F.3d 992, 999 (10th Cir. 2002) (citations and quotations omitted).

Caddo did not "give it everything they've got" at the trial level, opting instead to hurriedly file an appeal, foregoing post-decisional relief from the District Court calculated to prevent construction. Caddo could never explain specifically how it would be damaged by construction and allowed construction to proceed. This mootness results directly from Caddo's decisions, and Caddo must live with the consequences.

Accordingly, Caddo fails to demonstrate why this Court should find an exception to entertain an appeal of an order vacating a TRO under 28 U.S.C. § 1292(a)(1).

C. Other Issues Deprive the Court of Jurisdiction

On June 16, 2016, following entry of the May 31 Order and Caddo's Notice of Appeal (June 7, 2016, App. 81-84), the Wichita Tribe timely filed a Motion to Dismiss in the District Court (Aplee. Supp. App. 18-48). The motion was fully briefed but has not been considered in light of the pending appeal. The issues raised below, but not considered, include sovereign immunity, failure to join necessary and indispensable parties that cannot be joined, and Caddo's failure to exhaust administrative remedies before filing suit.

1. Appellees are protected by tribal sovereign immunity

Neither the Wichita Tribe, nor Congress via NEPA, NHPA or the Administrative Procedures Act 5 U.S.C. § 701 *et seq.* ("APA"), has waived or abrogated the Wichita Tribe's inherent sovereign immunity from suit. Although the District Court found differently, this Court has an obligation to independently evaluate whether its exercise of subject matter jurisdiction is appropriate.

It is firmly established that federally-recognized tribes are immune from unconsented suit. *See, e.g., Ramey Const. Co. v. Apache Tribe of Mescalero*

Reservation, 673 F.2d 315, 318 (10th Cir. 1982). Indian tribes possess "the common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978) (citations omitted). Tribal immunity applies to suits for damages as well as those for declaratory and injunctive relief. *E.g., Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269 (9th Cir. 1991). Any purported waiver or congressional abrogation must be strictly construed. *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509, 111 S. Ct. 905, 112 L. Ed. 2d 1112 (1991); *United States v. Testan*, 424 U.S. 392, 399, 96 S. Ct. 948, 47 L. Ed. 2d 114 (1976); *Fletcher v. United States*, 116 F.3d 1315, 1324 (10th Cir. 1997).

If a defendant is protected by sovereign immunity, a court lacks subject matter jurisdiction. *Fletcher*, 116 F.3d at 1323-26. Tribal sovereign immunity would be meaningless if a suit against a tribe asserting its immunity were allowed to proceed. *Id.* at 1326; *Tamiami Partners By & Through Tamiami Dev. Corp. v. Miccosukee Tribe of Indians of Florida*, 63 F.3d 1030, 1050 (11th Cir. 1995).

Under the Wichita Tribe's law, the Executive Committee conducts business on behalf of the Wichita Tribe, including waiving the Wichita Tribe's sovereign immunity. Wichita Governing Resolution, Appee. Supp. App. 50, art. V. The Executive Committee is a seven-member body of elected officials, including the President, Vice-President, Secretary, Treasurer, and three Councilmen. *Id.* Action by

four Executive Committee members is necessary to conduct business on behalf of the Wichita Tribe. *Id*. art. XV, § 2. The President of the Wichita Tribe is responsible for presiding over Executive Committee meetings and has supervisory duties over the Wichita Tribe's affairs, but lacks authority to unilaterally waive the Wichita Tribe's sovereign immunity. *Id*. art. XII, § 1.

Caddo does not allege the Wichita Tribe waived its immunity for itself or its officers. Instead, Caddo alleges merely that Defendant Parton agreed to federal court jurisdiction in the Environmental Assessment ("EA"). However, Indian tribes are not included in the definition of "local government" found within 36 C.F.R. § 800.2 (governing participants in the NHPA Section 106 Process). In delegating legal responsibility for compliance with the Section 106 Process, the statute differentiates between an "Indian tribe", which includes all federally recognized tribes (54 U.S.C. § 300309; 36 C.F.R. § 800.16(m)), and a "local government", which includes "a city, county, parish, township, municipality, borough, or other general purpose political subdivision of a State" (54 U.S.C. § 300310; 36 C.F.R. § 800.16(n)).[4]

Congress's differentiation between a tribe and a "local government" shows intent to treat the two differently. "[I]f Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific." *Midlantic*

[4] *See also*, 36 C.F.R. § 800.2(c)(2)(ii)(B): "Nothing in this part alters, amends, repeals, interprets or modifies tribal sovereignty …"

Nat. Bank v. N.J. Dep't of Envtl. Prot., 474 U.S. 494, 501, 106 S. Ct. 755, 88 L. Ed. 2d 859 (1986). Thus, if Congress intended the NHPA, NEPA, or APA to waive tribal sovereign immunity, it would have explicitly stated so. But Congress did **NOT** explicitly waive tribal sovereign immunity in these statutes. *See, e.g.*, *Everglades Ecolodge at Big Cypress, LLC*, 836 F. Supp. 2d at 1308. Without explicit tribal or congressional waiver or abrogation of sovereign immunity, no valid waiver exists. *United States v. U. S. Fid. & Guar. Co.*, 309 U.S. 506, 513, 60 S. Ct. 653, 84 L. Ed. 894 (1940).

Sovereign immunity also shields tribal officials acting within the scope of their authority. *Burrell v. Armijo*, 456 F.3d 1159, 1174 (10th Cir. 2006); *Fletcher*, 116 F.3d at 1324; *cf. Santa Clara Pueblo*, 436 U.S. at 58*; Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1154 (10th Cir. 2011). Caddo has not alleged the Wichita Tribe officials have acted beyond the scope of their authority. *Ex parte Young*, 209 U.S. 123, 159–60, 28 S. Ct. 441, 52 L. Ed. 714 (1908).[5] Although Caddo makes numerous vague and conclusory allegations that the Wichita Tribe and its officials violated NEPA and NHPA, Caddo has not alleged any **specific** action, much less action outside the authority of the Wichita Tribe's officials. Without more, the Court lacks a basis to find that either the Wichita Tribe or its officials are subject to suit.

[5] This analysis as to tribal officials sued in their official capacities, where the real party in interest is the tribe itself, was unchanged by the recent case of *Lewis v. Clarke*, 137 S. Ct. 1285 (2017).

For this Court to exercise jurisdiction, the Wichita Tribe's immunity must have been abrogated unequivocally, not implicitly, by Congress. *See Nanomantube v. Kickapoo Tribe in Kan.*, 631 F.3d 1150, 1152 (10th Cir. 2011). At best, Caddo suggests only implicit abrogation. Accordingly, the sovereign immunity of the Wichita Tribe and its officials requires dismissal of this suit.

2. Based on Caddo's allegations, Delaware Nation is an indispensable party that cannot be joined

Caddo alleges the History Center was built on land owned and controlled jointly by the WCD Tribes.[6] Where the WCD Tribes' interests are concerned, all three tribes are necessary and indispensable parties without whom litigation must be dismissed pursuant to Fed. R. Civ. P. 12(b)(7) and 19 ("Rules" 12(b)(7) and 19, respectively). *Wichita & Affiliated Tribes of Oklahoma v. Hodel*, 788 F.2d 765, 774 (D.C. Cir. 1986) (under four-factor Rule 19(b) analysis, "the Wichitas and Delawares were indeed indispensable parties to the Caddos' cross-claim .... In their absence, the cross-claim should have been dismissed." Based on Caddo's allegations that all three WCD Tribes own the land in question and Caddo's challenge to the 2007 Partition

[6] The Wichita Tribe disagrees with Caddo's assessment based on the 2007 Partition Agreement, the WCD Tribes' cession of exclusive governmental authority on certain lands to a single WCD Tribe and past practices of the federal government honoring and even encouraging these agreements. *See* discussion, *infra*, of the IBIA Proceeding currently on remand before the BIA.

Agreement, Caddo cannot obtain full and complete relief without Delaware Nation, who cannot be joined because of sovereign immunity and who could view the relief requested by Caddo as prejudicial to its own interests.

When a litigant fails to join a party who is indispensable, Rules 12(b)(7) and 19 authorize dismissal of the suit. *Davis v. United States*, 192 F.3d 951, 959 (10th Cir. 1999). While it does not dispose of the Rule 19 four-factor analysis, the Tenth Circuit has upheld the "strong policy that has favored dismissal when a court cannot join a tribe because of sovereign immunity." *Davis*, 192 F.3d at 960; *see also Davis ex rel. Davis v. United States*, 343 F.3d 1282, 1293 (10th Cir. 2003) (*quoting Enter. Mgmt. Consultants, Inc. v. U.S. ex rel. Hodel*, 883 F.2d 890, 894 (10th Cir. 1989) ("[w]hen ... a necessary party ... is immune from suit, there is very little room for balancing of other factors set out in Rule 19(b) ...")). When questions concerning jurisdiction over certain tracts of land are involved, tribal sovereign immunity presents an insurmountably high bar, necessitating dismissal of the suit. *N. Arapaho Tribe v. Harnsberger*, 697 F.3d 1272, 1284 (10th Cir. 2012) (upholding district court's dismissal because tribe could not be joined due to sovereign immunity, and suit could not be litigated due to possibility of unanswered, recurring jurisdictional questions).

Failure to join an indispensable party does not necessarily deprive the court of jurisdiction, but the failure **does** destroy the court's power to grant any relief which

in any way affects an absent indispensable party. *Washington v. United States*, 87 F.2d 421, 427 (9th Cir. 1936). A plaintiff's failure to join an indispensable party may be raised either by the trial court or an appellate court. 3 Moore's Federal Practice 19.07; *Boris v. Moore*, 152 F. Supp. 602, 608–09 (E.D. Wis. 1957), *aff'd sub nom. Boris v. Hamilton Mfg. Co.*, 253 F.2d 526 (7th Cir. 1958).

3. HUD Is An Indispensable Party That Cannot Be Joined

Caddo has also implicated the rights of the U.S. Department of Housing and Urban Development ("HUD"), which is a necessary and indispensable party incapable of being joined because of sovereign immunity.

> [W]here an initial appraisal of the facts reveals the possibility that an unjoined party is arguably indispensable, the burden devolves upon the party whose interests are adverse to the unjoined party to negate the unjoined party's indispensability to the satisfaction of the court.

Ranger Ins. Co. v. United Hous. of N. M., Inc., 488 F.2d 682, 683 (5th Cir. 1974) (*quoting Boles v. Greenville Hous. Auth.*, 468 F.2d 476, 478 (6th Cir. 1972)). To determine whether to dismiss under Rule 12(b)(7), the Court must analyze whether a party is necessary and indispensable under Rule 19, which requires joinder if:

a. in that person's absence, the court cannot accord complete relief among existing parties; or

b. that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:

1. as a practical matter impair or impede the person's ability to protect the interest; or
2. leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Fed. R. Civ. P. 19(a). In a Rule 19(a) analysis, "pragmatic concerns, especially the effect on the parties and the litigation, control." *Challenge Homes, Inc. v. Greater Naples Care Ctr., Inc.*, 669 F.2d 667, 669 (11th Cir. 1982) (quotation marks and citations omitted). The Court must engage in a four-factor analysis to determine whether the party is indispensable:

a. the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;
b. the extent to which any prejudice could be lessened or avoided by:
    1. protective provisions in the judgment;
    2. shaping the relief; or
    3. other measures;
c. whether a judgment rendered in the person's absence would be adequate; and
d. whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

Fed. R. Civ. P. 19(b); *Davis*, 192 F.3d at 960. These factors are non-exhaustive and are not meant to exclude other "pragmatic considerations." *Molinos Valle Del Cibao, C. por A. v. Lama*, 633 F.3d 1330, 1344 (11th Cir. 2011) (*citing* Fed. R. Civ. P. 19 advisory note).

HUD funded the Project. HUD approved the History Center in its final form and released construction funding after determining the Wichita Tribe had fulfilled all necessary regulatory requirements. Thus, Caddo has attacked HUD's administrative decision approving the Project.

As with tribes, it is axiomatic that the United States may not be sued in state or federal courts without its consent. *Minnesota v. United States*, 305 U.S. 382, 59 S. Ct. 292, 83 L. Ed. 235 (1939); *City of Anadarko, Okla. v. Caddo Elec. Coop.*, 258 F. Supp. 441, 443 (W.D. Okla. 1966). A proceeding against property in which the United States has an interest is a suit against the United States, necessitating the consent of the United States to suit. *Maricopa Cty., Ariz. v. Valley Nat. Bank of Phx.*, 318 U.S. 357, 63 S. Ct. 587, 87 L. Ed. 834 (1943); *United States v. Alabama*, 313 U.S. 274, 61 S. Ct. 1011, 85 L. Ed. 1327 (1941); *Minnesota*, 305 U.S. 382.

Furthermore, when the integrity of a federal agency's administrative decision is challenged, the agency is a required party. *Boles*, 468 F.2d at 479. Therefore, cases involving HUD require the agency to be joined as a necessary party. *See Lopez v. Arraras*, 606 F.2d 347, 353 (1st Cir. 1979) (HUD was a necessary party because the court could not feasibly "resolve this controversy without affording HUD the occasion to fully present its position.") *See also Guesnon v. McHenry*, 539 F.2d 1075, 1077-78 (5th Cir. 1976) (joinder of HUD desirable so HUD could explain one of its regulations); *Boles*, 468 F.2d at 478–80 (HUD a necessary party when legality of its

actions is at issue); *Gardner v. Nashville Hous. Auth.*, 468 F.2d 480, 481 (6th Cir. 1972) (same); *Williamsburg Fair Hous. Comm. v. N.Y.C. Hous. Auth.*, 73 F.R.D. 381, 383-84 (S.D.N.Y. 1976) (in suit against housing authority, where HUD was responsible for administering federally assisted housing programs, HUD was properly made a party).

Neither Caddo nor the Wichita Tribe can adequately protect HUD's interests in defending its administrative decisions. Because granting relief to Caddo would require the Court to find (either implicitly or explicitly) HUD misinterpreted its own guidelines and violated federal law by releasing project funding to the Wichita Tribe, HUD could be severely prejudiced by the decision. To make such a determination without joining HUD is to deprive HUD of the right to defend the integrity of its administrative decisions, making it a required party to this litigation. *McCowen v. Jamieson*, 724 F.2d 1421, 1423 (9th Cir. 1984). Because HUD is a required party but may not be joined due to sovereign immunity, this case should be dismissed rather than proceed in HUD's absence. *Weeks v. Hous. Auth. of Opp, Ala.*, 292 F.R.D. 689, 692 (M.D. Ala. 2013).

4. Caddo Lacks a Private Right of Action under NEPA and NHPA

While Caddo sued under NEPA and NHPA, neither of these statutes afford Caddo a private right of action.

Congress must create private rights of action to enforce federal law. *Alexander v. Sandoval*, 532 U.S. 275, 286-87, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 578, 99 S. Ct. 2479, 61 L. Ed. 2d 82 (1979). Courts must interpret statutes to determine whether congressional intent to create both a private right and a private remedy exists. *Transamerica Mortg. Advisors, Inc. (TAMA) v. Lewis*, 444 U.S. 11, 15, 100 S. Ct. 242, 62 L. Ed. 2d 146 (1979). Statutory intent on this latter point is determinative—without congressional intent to create a private remedy, no cause of action exists. *See, e.g., Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1102, 111 S. Ct. 2749, 115 L. Ed. 2d 929 (1991); *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 812, n. 9, 106 S. Ct. 3229, 92 L. Ed. 2d 650 (1986) (collecting cases); *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 145, 148, 105 S. Ct. 3085, 87 L. Ed. 2d 96 (1985); *Transamerica Mortg. Advisors, Inc. (TAMA)*, 444 U.S. at 23; *Touche Ross & Co.*, 442 U.S. at 575-576.

No private right of action exists under NEPA. *New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 704 (10th Cir. 2009); *San Carlos Apache Tribe v. United States*, 417 F.3d 1091, 1097 (9th Cir. 2005); *Noe v. Metro. Atlanta Rapid Transit Auth.*, 644 F.2d 434, 439 (5th Cir. 1981).

Although the Tenth Circuit has not decided whether NHPA provides a private right of action, other circuits have conclusively determined none exists. Like NEPA,

NHPA imposes duties on the federal government, which weighs against implying a private right of action. *Karst Envtl. Educ. & Prot., Inc. v. EPA*, 475 F.3d 1291, 1295-96 (D.C. Cir. 2007); *San Carlos Apache Tribe*, 417 F.3d 1091. Accordingly, the District Court declined to find a private right of action exists under NHPA. App. 62-63,80.

5. Caddo Failed to Proceed Under the APA

Because no private right of action exists under NEPA or NHPA, parties must proceed under the APA, which requires them to "identify some 'agency action' that [adversely] affects [them]." *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882, 110 S. Ct. 3177, 111 L. Ed. 2d 695 (1990). The challenged agency action must be "final agency action for which there is no other adequate remedy in a court." *Pub. Citizen v. Office of U.S. Trade Representatives*, 970 F.2d 916, 918 (D.C. Cir. 1992); *Pub. Citizen v. U.S. Trade Representative*, 5 F.3d 549, 551 (D.C. Cir. 1993). Additionally, NEPA requires the "final agency action" be a "major federal action," which is akin to "federal undertakings" under NHPA due to the "operational similarity" between NEPA and NHPA. *See Sac & Fox Nation of Mo. v. Norton*, 240 F.3d 1250, 1263 (10th Cir. 2001); *San Carlos Apache Tribe*, 417 F.3d at 1097. *Found. on Econ. Trends v. Lyng*, 943 F.2d 79, 85 (D.C. Cir. 1991). This Court should not circumvent

the APA to permit suit absent explicit statutory language. *San Carlos Apache Tribe*, 417 F.3d at 1097-98.

Caddo must overcome the extremely high bar set by the APA, requiring proof the Wichita Tribe's actions were:

> a. arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> b. contrary to constitutional right, power, privilege, or immunity;
>
> c. in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> d. without observance of procedure required by law;
>
> e. unsupported by substantial evidence in a case subject to [5 U.S.C. § 556 and 557] or otherwise reviewed on the record of an agency hearing provided by statute; or
>
> f. unwarranted by the facts to the extent the facts are subject to trial de novo by the reviewing court.

5 U.S.C. § 706(2). Under this "very deferential" standard, the Court presumes the Wichita Tribe's actions are valid, and must determine whether the Wichita Tribe made reasonable decisions based on consideration of relevant factors. *Sierra Club, Inc. v. Bostick*, 787 F.3d 1043, 1047 (10th Cir. 2015); *Hillsdale Envtl. Loss Prevention, Inc. v. U.S. Army Corps of Engineers*, 702 F.3d 1156, 1165 (10th Cir. 2012).

Although Caddo includes a throwaway allegation that it has complied with the APA, Caddo has relied directly on NEPA and NHPA to pursue its claims. Caddo

fails to discuss the APA's standard of review, how it can overcome the presumption of validity of the Wichita Tribe's actions under the APA, and makes mere repetitive, conclusory statements regarding application of law, such as the Wichita Tribe did not make reasonable effort to consult Caddo and violated the NHPA and NEPA. These bare allegations, without more, do not address the APA analysis or otherwise satisfy Caddo's burden of pleading.

6. This suit is an impermissible collateral attack on an agency proceeding

Caddo makes numerous incorrect conclusory statements about the status of the small tract of land upon which the Project was constructed (the "Tract").[7] These statements constitute an impermissible collateral attack on a matter currently under administrative review, and which Caddo failed to timely appeal. As discussed below, the Tract is involved in an appeal by the Wichita Tribe to the Interior Board of Indian Appeals ("IBIA") pursuant to the APA ("IBIA Proceeding"). However, Caddo failed to contest the status of the 2007 Partition Agreement in the IBIA Proceeding and is

[7] The Tract (the construction site, parking area, etc.) occupies a small portion of the northwest corner of a 20-acre cleared field ("Field") that itself is a portion of a larger 71-acre division ("Division") of the WCD Lands located within what was once known as the Wichita Reservation. In 2007, Caddo and Delaware Nation ceded exclusive governmental control over this Division to the Wichita Tribe in the Partition Agreement.

precluded from now doing so. Wichita and Affiliated Tribes, v. Acting S. Plains Reg. Dir., Bureau of Indian Affairs, , 62 IBIA 301 ("IBIA Decision"), App 321-327.

When a party makes vague allegations that amount to a collateral attack on a matter resolved by another judicial forum, dismissal is proper. *See Smith v. Kirby*, 53 F. App'x 14, 15-16 (10th Cir. 2002) (dismissing prisoner's § 1983 complaint collaterally attacking his criminal conviction). Questions from one lawsuit are not open to re-examination in any collateral proceeding involving the same parties, and dismissal of the later proceeding is appropriate. *Staley v. Espenlaub*, 43 F.2d 98, 98 (10th Cir. 1930) (*citing Bryan v. Kennett*, 113 U.S. 179, 5 S. Ct. 407, 28 L. Ed. 908 (1885)).

Collateral estoppel, or issue preclusion, is not limited to situations in which the exact same issue is before two courts. *B & B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293, 1303, 191 L. Ed. 2d 222 (2015). "Rather, where a single issue is before a court and an administrative agency, preclusion also often applies." *Id.* When Congress has authorized an agency to resolve a dispute, such as a dispute over land title between two tribes, the Court should presume Congress expects issue preclusion to apply unless a statute provides otherwise. *Id.*

Caddo collaterally attacks a matter currently under review by the Bureau of Indian Affairs ("BIA" or "Bureau") on remand from the IBIA. In the IBIA Proceeding, Caddo received multiple extensions of time to express its views on the

2007 Partition Agreement, yet Caddo never filed **anything** of substance with the IBIA.[8] App 323-325. The IBIA ultimately held Caddo's failure to file any response concerning the 2007 Partition Agreement did not prevent the BIA from determining whether to reissue deeds to the WCD Tribes consistent with the Partition Agreement. *Id.* Caddo failed to appeal this decision.

Since the BIA's administrative review began in 2007, Caddo has **never** objected to the consummation of the Partition Agreement within the context of the administrative proceeding. Despite alleging Delaware Nation also objects to the Partition Agreement, this is not the stance the Delaware Nation took before the IBIA.[9] This litigation is Caddo's **first** formal protest to the Partition Agreement.[10] As a result, any ruling on Caddo's claims will necessarily pre-empt the BIA's pending review.[11] While the 2007 Partition Agreement is not a primary issue in Caddo's Complaint, to the extent Caddo seeks relief that would affect the Agreement or require the Court to render an opinion on the Agreement's validity, the issue is

[8] The IBIA Proceeding, derived from the original joint request by the WCD Tribes to secure individual "record title" to the tracts for each respective tribe, not to secure federal acknowledgement of individual tribal jurisdiction over the partitions, which already exists.
[9] Aplee Supp. App. 73-74.
[10] Although Caddo alleges its Council acted to suspend its Partition Resolution, this action does not overcome the approval of the Partition Agreement by the Caddo membership. *See* App. 179-188.
[11] Alternately, BIA is also a necessary and indispensable party that cannot be joined because any waiver of sovereign immunity would be tied to the APA, and the administrative process has not yet concluded with a final agency action.

subject to the doctrine of collateral estoppel. *B & B Hardware, Inc.*, 135 S. Ct. at 1303.

Similarly, Caddo did not file timely administrative appeals of the Wichita Tribe's decisions relating to the Project. Caddo relies on the Wichita Tribe's assumption of federal agency responsibilities as a way around sovereign immunity, but any resulting sovereign immunity waiver is necessarily tied to Caddo's exhaustion of the attendant administrative procedures. *See, e.g., San Carlos Apache Tribe*, 417 F.3d at 1096 (citing *Lane v. Pena*, 518 U.S. 187, 197, 192, 116 S. Ct. 2092, 135 L. Ed. 2d 486 (1996)) ("Absent a clear waiver, sovereign immunity precludes suit against the United States. NHPA offers no basis to infer a waiver of sovereign immunity.") (holding that NHPA does not create a private right of action, and any claim made seeking to redress NHPA violations must be brought under the APA, which provides for a private right of action and waiver of federal sovereign immunity). Caddo initiated no administrative appeals before litigating.

D. Conclusion of Jurisdictional Statement

As discussed above, this appeal was improper from the outset as an appeal from an order vacating a TRO because Caddo failed to demonstrate it lacked any other course of action. Additionally, this litigation should be dismissed for several other reasons:

a. The Wichita Tribe is protected by sovereign immunity.

b. Delaware Nation, under this Court's precedent, is an indispensable party that cannot be joined due to sovereign immunity.

c. HUD is a necessary and indispensable party that cannot be joined due to sovereign immunity.

d. Caddo lacks a private right of action under both NEPA and NHPA and failed to exhaust its remedies under the APA.

e. This case is an impermissible collateral attack on the IBIA Proceeding and IBIA Decision, which Caddo failed to appeal pursuant to the APA.

Caddo has presented no evidence or argument overcoming these issues to justify the Court's exercise of jurisdiction in this case. Accordingly, this appeal should be dismissed.

III. STATEMENT OF THE CASE

Caddo appealed the May 31 Order vacating a TRO that blocked construction on the Project for a few days. The Project is now complete. Nothing of historical significance was unearthed during construction, demonstrating the utter lack of merit to Caddo's original claims. *See* **Appellee's Motion to Dismiss for Mootness**, filed contemporaneously herewith.

Nevertheless, Caddo persists, seeking an affirmative retroactive obligation on the Wichita Tribe to go above and beyond the notification and consultation provisions of NEPA and NHPA. Caddo wants to require the Wichita Tribe to have had an intimate grasp of Caddo's inner workings, to have taken a paternalistic attitude that Caddo could not manage its own affairs, and to have begged Caddo to engage in NHPA/NEPA consultation. Appellant seeks to have the Wichita Tribe bear the burden of Caddo's internal political woes.

Neither NEPA nor NHPA imposes such an obligation. Federal law does not require or empower the party seeking consultation to adjudge who is competent to consult or investigate when a notified party fails to engage in consultation. *Vill. Of Logan v. U.S. Dep't of Interior*, 577 Fed. App'x 760, 770 (10th Cir. 2014). These laws simply require good-faith notice to potentially affected parties. The Wichita Tribe provided this required notice to Caddo and, consistent with its past practice, Caddo failed to respond. Neither NEPA nor NHPA required the Wichita Tribe to ask **why** Caddo failed to respond. *Id*. The Wichita Tribe provided Caddo all notices required by law; Caddo's failure to respond is its own responsibility. *Id*.

Accordingly, the District Court correctly found Caddo could not demonstrate the requisite likelihood of success on the merits or otherwise support its request for injunctive relief. App. 80.

A. Factual Background

1. Tract History

The Tract (History Center, parking area, etc.) occupies a small portion of the northwest corner of the 20-acre cleared Field that itself is a portion of the larger 71-acre Division of the WCD Lands located within what was once known as the Wichita Reservation. The Wichita Reservation was located in the Wichita Tribe's traditional homelands, which extended from western Texas, through southwestern Oklahoma and into Kansas. In contrast, Caddo's traditional homelands were located in an area that extended from southeastern Oklahoma into Louisiana. After relocation to Indian Territory, however, Caddo was included among the "affiliated bands" located on the Wichita Reservation and participating in the 1891 Jerome Commission land cessation agreement. 25 Stat. 876 (1895).

The Tract sits at the bottom of a steep, wooded hill.[12] App. 159, App. 405 (Tract located at approximately white dot). In the 1870s, there are reports of a day school, then a boarding school, at or near this location, close to the Indian Agent's house.[13] The early school was called the Wichita School, then the Wichita-Caddo School, then the Caddo School. Thomas C. Battey, *The Life and Adventures of a*

[12] Throughout its Brief (and underlying record), Caddo blurs the lines between the 71-acre Division, the 20-acre Field, the small History Center Tract, the Kiowa Cemetery and the wooded hillside north of the Tract.

[13] There are three separate potential locations for the school before its current-day location.

Quaker Among the Indians, at 316-17 (1875); C. Ross Hume, *Historic Sites Around Anadarko*, 16 Chronicles of Oklahoma 4, at 419, 421 (1938).

At its peak, the school served about 100 students. Jonathon Richards, Office of Indian Affairs, *Annual Report of the Commissioner of Indian Affairs, for the Year 1871*, at 476-77 (1871); Johnathon Richards, Office of Indian Affairs, *Annual Report of the Commissioner of Indian Affairs, for the Year 1874*, at 237-38 (1874). The school burned down in 1878 (no reported deaths), and was later restarted at its present-day location, a half-mile to the west, where it became known as Riverside Indian School.

For the few documented student deaths, burials were on top of the hill in what is known as the Kiowa Cemetery, far away from the History Center Tract. Battey, *supra*, at 70. While the hill is included within the 71-acre Division ceded to the Wichita Tribe, the Kiowa Cemetery itself is excluded and still shared by the WCD Tribes.

Other than burials in the Kiowa Cemetery, there are no records of burials located—or human remains or funerary objects found—on the 71-acre Division, the Field or the Tract. Recent archaeological studies document two sites on the 20-acre field, known as sites 352 and 353, and confirm the absence of burials. App. 371-404. The Tract is outside both sites 352 and 353.

Site 352, far from the Tract, is the more significant site and is presumed to be related to the schoolhouse. Site 352 also contains prehistoric lithic scatter (stone flakes resulting from the manufacture of chipped stone artifacts), but the site's integrity was long ago severely degraded by farming activity. Timothy Baugh, *et al*., *Cultural Resources Inventory of the WCD Lands in Caddo County, Oklahoma*, at 31, 33 (1995). App. 437,439.

Site 353, thought to be an outlying school building, lies northwest of site 352 but, again, farming activity, authorized by all three WCD Tribes, severely degraded the site. App. 342-347, 372, 375, 377, 380, 383, 394, 396, 397, 399, 439, 440.[14] Most artifacts found at the site were broken glass and old nails scattered by plowing and water runoff. App. 377, 381-386, 396, 397, 399-401.Originally, the Project was to be located closer to Site 352, but was moved to its current location to avoid disturbing potential artifacts.

For decades—with Caddo's consent—the 20-acre Field, including the Tract was used for agriculture from which Caddo received revenue. App. 342-347. Naturally, agriculture entailed extensive plowing and harvesting activity on the Tract. App. 375, 377 (noting 76%-99% disturbed by use as cultivated field). Despite this history, Caddo labels the Tract as the location of burials or other archaeological

[14] Additionally, the Tract sits near Highway 281, which was built/relocated through the tract in the 1950s. *See* aerial photos, Aplee. Supp. App. 14-16.

and cultural importance. These concerns[15] about what lies beneath the Tract, however, are decades overdue, inconsistent with past treatment of the Tract, and poorly founded, as demonstrated by the fact nothing of significance—in particular no human remains—was unearthed during construction. The historic agricultural use of the Tract alone supports the District Court's finding that Caddo could not demonstrate a likelihood of prevailing on the merits of its claims.

Nevertheless, Caddo continues to argue it will be irreparably harmed unless it can determine whether anything exists to justify its claims, even though nothing was identified during construction. Caddo's claims of irreparable harm are nothing more than conjecture. Speculative harm does not equal irreparable injury, and Caddo never demonstrated a probable—much less significant—risk it would experience irreparable harm.[16] *Greater Yellowstone Coal. v. Flowers*, 321 F.3d 1250, 1258 (10th Cir. 2003).

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[15] Caddo's position requires the Court to assume the implausible: that members of the WCD Tribes who lived decades ago—closer in time to the historical events to which Caddo refers—permitted agriculture and road construction to take place in a location that could endanger burials and sacred sites. It also implies inappropriately that the Wichita Tribe, to whom these ancestral homelands originally belonged, has less knowledge or concern about avoiding sensitive sites than Caddo.

[16] Caddo admitted on the record to its "failure to provide the precise location and names of unmarked Caddo graves and remains," as well as its "inability to identify the precise location and identity of unmarked graves," which (it argued) may or may not even be located at this site. **APPELLANT'S MOTION FOR INUNCTION PENDING APPEAL**, Doc. 01019634608, at 12, 18.

Caddo's speculation has, in hindsight, proven completely unfounded because nothing of historical interest was unearthed during construction. The processes the Wichita Tribe followed during the planning and construction process have been validated.

2. WCD Land Partition History

Caddo erroneously states, "There is no dispute that the land at issue is jointly-owned and held in trust by the Federal Government for the benefit of three Tribal Nations." Brief at 29. However, there IS a very significant and fundamental dispute on this issue. The Wichita Tribe's position has been—and continues to be—that the Tract was included in lands ceded to the Wichita Tribe in 2007 by mutual agreement of the three WCD Tribes. Although these lands are still held in trust for the WCD Tribes, the three WCD Tribes agreed in 2007 that each WCD Tribe could claim certain lands for its own exclusive use and development. The Wichita Tribe began development work on its portion soon after—and without objection—as the WCD Tribes began working with federal authorities to obtain specific and separate trust deeds to the ceded lands.

The WCD Tribes have long co-managed the lands held in federal trust jointly for the WCD Tribes ("WCD Lands"). Nevertheless, for decades the WCD Tribes have operated pursuant to various agreements (or partitions) under which each WCD

Tribe has individually exercised sole authority over portions of the WCD Lands. These lands over which a particular WCD Tribe has sole authority are referred to variously as "set-asides" or "partitioned lands." In 1982, the United States confirmed the WCD Tribes themselves hold authority to partition the WCD Lands,[17] and a tribe may utilize its partitioned lands as it sees fit without further action from the United States. App. 162

In 2007, following more than a decade of negotiation, the WCD Tribes passed identical resolutions ("Partition Resolutions") proportionately partitioning 600 acres[18] of the WCD Lands to provide each WCD Tribe separate lands for use and development (the "Partition Agreement"), with Caddo receiving 312 acres, Wichita Tribe receiving 180 acres, and Delaware Nation receiving 108 acres. App. 163-188, 348-355. These resolutions granted "perpetual, exclusive use and governmental authority" to each respective tribe, for the express purpose of developing the partitioned lands. App. 165, 173, 350. The Partition Resolutions explicitly provided the Partition Agreement could not be rescinded or terminated unilaterally by any one tribe. App. 169, 177-178, 355. Only unanimously could the WCD Tribes terminate

[17] Only the United States, however, may issue a deed conveying "record title" to a single tribe. The United States has not done this, even with the set-aside lands the WCD Tribes have used for decades for their tribal headquarters. Therefore, "record title" to the lands underlying the tribes' tribal headquarters still rests in the United States for the benefit of all three WCD Tribes.

[18] More than 1900 acres of land held jointly by the WCD Tribes remain undivided.

the Partition Agreement. *Id*. Despite Caddo's arguments on this point, Caddo has produced no evidence the Partition Agreement has been terminated by its express terms.

In 2007, the WCD Tribes submitted their Partition Resolutions to the Anadarko Agency, asking the Agency to issue separate deeds pursuant to the Partition Agreement so the partitioned tracts would reflect trust ownership for an individual tribe, rather than all three WCD Tribes. The Anadarko Agency Superintendent recognized the resolutions were passed consensually, and "it is possible for the three tribes *to have exclusive use of their parcels*" effective immediately before the separate deeds were executed. App. 356-357. The Anadarko Agency's primary concern was whether it had the authority to issue the deeds itself or whether the deeds would need congressional authorization. Ultimately, after several years of delay, the Anadarko Agency directed the WCD Tribes to seek congressional authorization, which they did in April 2010. App. 246.

In February 2013, after finally being advised by members of Congress that congressional action was not necessary, the Wichita Tribe approached Assistant Secretary of Indian Affairs, Kevin Washburn, asking him to approve the partition pursuant to the Indian Reorganization Act of 1934, 25 U.S.C. § 461-479 (now § 5101, *et seq.*), Oklahoma Indian Welfare Act, 25 U.S.C. § 503 (now § 5201, *et seq.*), and/or Indian Lands Consolidation Act, 25 U.S.C. § 2201-2219. App. 247.

On June 7, 2013, the Superintendent of the Anadarko Agency concluded BIA had authority to approve the partition under (then) 25 U.S.C. § 464 and 25 C.F.R. Part 152 and promised "speedy closure," but required an appraisal. The Wichita Tribe appealed the appraisal requirement as duplicative of the process the WCD Tribes followed before reaching the Partition Agreement six years prior. App. 248.

On January 14, 2014, the Wichita Tribe asked the Regional Director of the BIA Southern Plains Region to rule on the appeal pursuant to 25 C.F.R. § 2.8. App. 248. In response, the Regional Director requested comments from Caddo and Delaware Nation. The Delaware Nation supported the Partition Agreement;[19] Caddo requested and received no fewer than six extensions of time to respond and ultimately failed to do so. App. 248-248.

On June 26, 2014, the Regional Director announced an indefinite delay pending resolution of Caddo's leadership dispute. The Wichita Tribe appealed the delay to the IBIA. App. 249.

Finally, on March 22, 2016, (and before the Wichita Tribe commenced construction on the Project) the IBIA concluded "it was arbitrary and capricious for the Regional Director to withhold action," declined to consider the merits of the Wichita Tribe's appeal, vacated "the Regional Director's June 26, 2014, decision"

[19] Because of the limited record developed in the District Court, this document has been included in the Aplee. Supp. App. at 73-74.

and remanded " to the Regional Director for further consideration and issuance of a new decision." App. 326. Caddo never appealed this decision.

In fact, Caddo never challenged the validity of the Partition Agreements in the IBIA Proceeding, which is still under consideration on remand. Accordingly, Caddo is precluded in this litigation from seeking a determination regarding the Partition Agreements or the Tribe's ability to operate on the Tract.

3. Project History

In 2008, after receiving confirmation from each WCD Tribe and the BIA that it may utilize its partitioned lands for its own exclusive use, the Wichita Tribe began developing its partitioned lands.[20] Specifically, the Wichita Tribe built a travel plaza near the Tract for which it obtained HUD funding in 2009. 74 Fed. Reg. 81, 19581

[20] Caddo incorrectly alleges the Wichita Tribe needed assent from WCD Enterprises, Inc., ("Enterprises") whom it alleges is vested with the management of all WCD Tribes' "construction, leases, and other projects on WCD Lands." App. 9 (*but see* Declaration of Tamara Francis-Fourkiller (App. 140, at ¶16, alleging—mistakenly so—that the 2007 Partition Agreement was entered by the "WCD Enterprise Board"). Enterprises is a state-chartered corporation formed in 1972 as the contracting entity for certain federal programs and to manage a 51-acre parcel of WCD Lands not at issue here. App. 358-370. Each WCD Tribe delegated authority to Enterprises to develop an industrial park complex. App. 368-370. The lease for the 51-acre parcel expired in 1999; thus, Enterprises lacks *any* current legal authority to manage *any* WCD lands. Tribal resolutions are required from each of the WCD Tribes to conduct transactions related to WCD Lands, except for those set aside for an individual tribe's exclusive use. *See, e.g.*, App. 342-347, (approving lease agreement for WCD lands, even while Enterprises had authority over the 51-acre parcel). Caddo's assertion of Enterprise's authority is incorrect and misleading.

(Apr. 29, 2009). During the development process, the Wichita Tribe requested consultation with Caddo, but received no response. App. 69. The Wichita Tribe conducted an EA that found no significant anticipated impacts from the project. App. 196. Despite the extensive excavation required for the 3,200-square-foot travel plaza, parking lot, fuel islands and two underground fuel storage tanks, no human remains or culturally significant items were unearthed during construction. Caddo has recently reaffirmed its failure to engage in consultation for the travel plaza which is located less than 1,000 feet from the History Center, (App. 405, approximate location of History Center at white dot) was purposeful and unopposed "because we [Caddo] did not have concerns that archaeological items were there and the sites were not considered sacred." App. 142-142.

The Wichita Tribe next began development on the History Center next to the travel plaza, also with HUD funds. The Wichita Tribe conducted extensive archaeological inventories to ensure no historically significant areas would be affected by construction. This included a Cultural Resources Survey, completed April 6, 2015, and an EA that covered the rest of the 20-acre cleared field. (Aplee. Supp. App. 6-13); (App 371-404).[21] The Wichita Tribe sent notice of the Project to Caddo requesting consultation, but Caddo failed to respond. App. 230.

[21] The Tribe originally planned the History Center for a different location on the 20-acre parcel but moved it to the current Tract after studies showed construction on the original location **might** impact historically-sensitive items deemed ineligible for

After the EA was completed, notice of the Finding of No Significant Impact ("FONSI") was published in the *Anadarko Daily News* on May 22, 2015, consistent with federal requirements. App. 231. Notice of additional archaeological investigation and geophysical testing was sent to Caddo's Chairwoman on January 7, 2016. App. 232-234. Despite sending several notices and requests for consultation, the Wichita Tribe never received a response from Caddo concerning either the travel plaza or History Center until at least eight months after the FONSI for the History Center was issued—after construction contracts were signed and construction preparations were well underway.

B. Procedural History

Caddo filed suit on May 25, 2016, accusing the Wichita Tribe of violating NEPA and NHPA and asking the District Court to enjoin construction of the History Center.

On May 26, 2016, roughly 24 hours later, the District Court held a hearing on Caddo's request for a TRO. Following the hearing, the Court entered a TRO through Wednesday, June 1, 2016. On Tuesday May 31, 2016, the District Court issued a well-reasoned 19-page order (the May 31 Order), holding:

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listing on the National Register of Historic Places (none of which are gravesites). *See* discussion of Site 352, *supra.*

> *Based on the record before it*, the court concludes that the [Wichita] Tribe fulfilled its consultation responsibilities under NHPA. Plaintiff did not meet its burden of showing a violation of the Act.
>
> Having concluded that plaintiff failed to demonstrate it is likely to succeed on the merits of its claim that defendants violated the APA by their noncompliance with NEPA or NHPA, the court vacates the TRO previously entered and **DENIES** plaintiff's motion for TRO [Doc. #3].

App. 80 at 19 (emphasis added). The District Court confined its analysis to the issuance and vacation of the TRO and has not yet held a hearing or ruled on Caddo's request for a preliminary injunction or the Wichita Tribe's Motion to Dismiss.

After bringing this appeal, Caddo sought emergency relief from this Court, relying on 28 U.S.C. § 1292(a)(1). However, Caddo had not sought a stay or similar relief from the District Court as required by Fed. R. App. P. 8, nor did it assert doing so was impracticable. This Court denied Caddo's request for extraordinary relief for Caddo's failure to comply with Fed. R. App. P. 8, then sought additional briefing from Caddo concerning the Court's jurisdiction over the appeal, which Caddo declined to provide. The Court thereafter sought input from the Wichita Tribe regarding jurisdiction, in response to which the Wichita Tribe argued this Court lacks jurisdiction under 28 U.S.C. § 1292(a)(1). In an August 11, 2016, Order (Doc. 01019671034) the Court declined to rule on jurisdiction, expressly leaving the issue for panel review.

IV. ARGUMENT

If the Court finds jurisdiction to entertain this appeal, the District Court's decision to vacate the TRO must be affirmed unless Caddo can clearly demonstrate the District Court abused its discretion, which Caddo is unable to do.

The District Court correctly found Caddo had not shown a likelihood it would succeed on the merits of its claims because the Wichita Tribe fulfilled its obligations under NEPA and NHPA and even agreed to consult with Caddo on the Project on the eve of construction, a year after the time to do so had passed, but was under no obligation to do so or revise its conclusions.

A. Standard of Review

A TRO, like a preliminary injunction, is an extraordinary remedy. "Each of these 'is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion.'" *Mazurek v. Armstrong*, 520 U.S. 968, 117 S. Ct. 1865, 138 L. Ed. 2d 162 (1997). The District Court correctly found Caddo failed to satisfy the requirements for showing it was entitled to the injunctive relief it sought.

Caddo's arguments on appeal rehash those presented to—and rejected by—the District Court. The defects the District Court discussed in its May 31 Order have not changed during the intervening year. Caddo must clearly demonstrate it is

entitled to injunctive relief. Caddo was not entitled to a TRO then, and cannot overcome the onerous burdens it must overcome to show itself entitled to injunctive relief now. Caddo did not show a likelihood of success on the merits of its claims. Based on the facts presented, the District Court correctly held Caddo fell far short of meeting this burden because the Wichita Tribe complied with its obligations under federal law. This Court should defer to the District Court's reasoning in this regard.

> We review the district court's denial of plaintiffs' motion for preliminary injunction for abuse of discretion. An abuse of discretion occurs only when the trial court bases its decision on an erroneous conclusion of law or where there is no rational basis in the evidence for the ruling.

Wilderness Workshop v. U.S. Bureau of Land Mgmt., 531 F.3d 1220, 1223-24 (10th Cir. 2008) (citations and quotations omitted).

> The standard for abuse of discretion is high. The state must show that the district court committed an error of law (for example, by applying the wrong legal standard) or committed clear error in its factual findings. We have previously described abuse of discretion as an arbitrary, capricious, whimsical, or manifestly unreasonable judgment.

Winnebago Tribe of Nebraska v. Stovall, 341 F.3d 1202, 1205–06 (10th Cir. 2003) (citations and quotations omitted).

The May 31 Order was based on Caddo's utter failure to produce anything resembling hard facts. App. 77-79. The District Court's sound reasoning should not be disturbed, in particular now that the relief Caddo sought is unavailable.

B. Caddo Has Not Satisfied the Standards for Issuance of Injunctive Relief

Although injunctive relief preventing construction of the History Center is moot, Caddo now seeks injunctive relief preventing operation of the facility. Although improper from a jurisdictional standpoint, as discussed above, Caddo has not demonstrated it is entitled to this relief.

1. Caddo Has Not Shown a Likelihood of Prevailing on the Merits

Caddo failed to—and is unlikely to ever—demonstrate a likelihood of success on the merits of its Complaint, for several reasons.

First and foremost, Caddo has not demonstrated the Wichita Tribe failed to engage in the NEPA or NHPA Section 106 Process. App. 79-80. Even though Caddo failed to timely engage in consultation, the Wichita Tribe thoroughly considered Caddo's belated concerns, repeatedly asked for more information, and weighed what little information Caddo provided against the onerous burden created by Caddo's proposed plan. App. 26, ¶ 76; App. 130-131; App. 235; App. 334-356; App. 338. The Wichita Tribe then carefully proceeded, having already taken mitigating measures to reduce any possible harm from the construction project by moving the location of the History Center from one side of the Field to another, instituting a 100-foot avoidance zone around what may be the remnants of a burned building foundation, and delineating steps to take should construction unearth an item of potential

historical significance, including human remains. The discovery plan required the Wichita Tribe to notify the BIA and neighboring tribes, including Caddo. App. 69. **NO ITEMS OF SIGNIFICANCE WERE UNEARTHED DURING THE CONSTRUCTION PROCESS** demonstrating this litigation, from the outset, has been a complete waste of time and resources—an effort by an embattled Caddo official to artificially generate a cause and a following at the Wichita Tribe's expense.

2. Caddo consulted on a Texas project while ignoring the Wichita Tribe's consultation request

Caddo has blamed the Wichita Tribe for Caddo's failure to consult, stating "the [Wichita] Tribe took advantage of the Caddo Nation's political turmoil," and declaring the Wichita Tribe did not make "a good faith effort [to consult] because there was no Caddo Nation Tribal Council in the beginning of 2015." App. 141-142. Nevertheless, Caddo WAS monitoring and participating in NEPA and NHPA matters around the same time it received the Wichita Tribe's January 9, 2015, consultation request.

Specifically, Caddo responded to a December 19, 2014, draft Environmental Impact Statement ("EIS") published for comment by the U.S. Fish and Wildlife Service (79 Fed. Reg. 75830, Dec. 19, 2014) in connection with a project in Bexar County, Texas, with a response deadline of March 19, 2015:

> The Caddo Nation of Oklahoma stated the project would not impact sights of interest to the Caddo Nation.

80 Fed. Reg. 79091 (Dec. 18, 2015).[22] The Wichita Tribe's January 9, 2015, letter requesting consultation, per HUD guidelines, was deemed received by Caddo not later than January 14, 2015, which was a mere 27 days after the Fish and Wildlife Service notice was published.

Further, the record demonstrates Caddo was represented by counsel during its leadership dispute and decisions were being made at some level about how to deal with the IBIA Proceeding, even if that decision was to seek extensions of time. App 516, 519-520.

Thus, Caddo's claims of paralyzing governmental dysfunction fall flat. Caddo responded to a Federal Register notice for a project in southern Texas yet neglected to respond to the Wichita Tribe's contemporaneous delivery of a consultation request for a project located on Caddo's doorstep, adjacent to the Wichita Tribe's travel plaza, also located on the 20-acre Field. Whether by deliberate decision or inattention to detail, Caddo's failure to respond does not constitute a failure to consult by the Wichita Tribe. Caddo must live with the consequences of its decision to forego engaging in consultation. *Vill. Of Logan*, 577 Fed. App'x at 770.

[22] A copy has been included at Aplee. Supp. App. 75 for the Court's convenience.

3. The Wichita Tribe consulted after Caddo raised belated protests.

Even though the Wichita Tribe's consultation invitation to Caddo satisfied its obligations under federal law, the Wichita Tribe nevertheless consulted with Caddo, even though the law does not impose a duty on the Wichita Tribe to do so, much less revisit, revise, or rescind decisions made over a year before Caddo raised its objections. *Narragansett Indian Tribe v. Warwick Sewer Auth.*, 334 F.3d 161, 167 (1st Cir. 2003).

On February 18, 2016, more than one year after the Wichita Tribe sent the consultation request, and approximately eight months after the FONSI was published in the *Anadarko Daily News*—the only local newspaper serving the Anadarko area—Caddo finally raised objections. While Caddo raised concerns about a "sacred site" and "Caddo burials," (Brief at 8-9) "and/or sacred objects" (Brief at 10) at this construction site, Caddo never provided information regarding what types of "sacred lands", "burials", "and/or sacred objects" may be affected.[23]

Caddo admits the Wichita Tribe identified Caddo as a potentially interested Indian Tribe (as required by NHPA), and mailed a notice to "Caddo Indian Tribe of

[23]Protection of historic and cultural artifacts is of paramount importance to the Wichita Tribe. The odds that items of cultural interest to the Wichita Tribe could be located on the WCD Lands, as part of the Wichita Tribe's ancestral homelands, far exceed the likelihood items related to Caddo's history will be found.

Oklahoma, Tribal Historic Preservation Office" on January 9, 2015, informing Caddo of the project, the scope of the project, the location of the project, and requesting Caddo engage in consultation. Brief, at 14-15; App. 230.

Based on its own failure to respond,[24] Caddo claims the Wichita Tribe's consultation request was insufficient. For tenuous support, Caddo relies on the easily-distinguishable case *Pueblo of Sandia v. United States*, 50 F.3d 856, 860 (10th Cir. 1995). In *Pueblo of Sandia*, the Tenth Circuit found the U.S. Forest Service failed to make a reasonable effort to fulfill its consultation obligations under NHPA. The Forest Service sent a letter requesting information, received "numerous claims" and documentation showing traditional cultural properties would be affected by the project, and "withheld relevant information from the [State Historic Preservation Officer] during the required consultation process" in order to find no historic properties would be affected. *Id.* at 860-62. Rather than support Caddo's position, *Pueblo of Sandia* instead stands for a proposition not at issue in this case, *i.e.*, a party cannot ignore information received through consultation to find no historic properties will be affected.

[24] Again, this is the second construction project on this same Field, located within 1000 feet of the first project. The travel plaza also elicited no response from Plaintiff, apparently because Caddo did not think *any* archaeological items would be disturbed, and the location was not considered sacred to Caddo. App. 142-143.

In seeking consultation, the Wichita Tribe did not ignore or suppress information adverse to its interests in the History Center project **because the Wichita Tribe received no information indicating any historic properties could be affected by the relocated Project.** Unlike the situation in *Pueblo of Sandia*, after the Wichita Tribe notified Caddo of the Project, Caddo sent no timely communication whatsoever, much less information showing traditional cultural items would be affected, affidavits documenting religious or traditional practices occurring on the Tract, or otherwise expressing any concerns about adverse effects of the Project.

4. Caddo's Failure to Respond Constitutes Waiver of Consultation

HUD has developed procedures explaining the tribal consultation process. App. 476. "HUD's policy is to request a response to the invitation to consult within 30 days." App. 480. HUD allows five days for delivery by mail. If a tribe fails to respond, no further consultation is required. *Id.* Thus, Caddo's failure to respond within thirty (30) days of receiving written notice, or by February 13, 2015, constituted Caddo's wavier of consultation. Caddo's waiver resulted in its exclusion as a consulting party and released the Wichita Tribe from further obligations to engage in or seek consultation with Caddo. *Id.* Caddo did not attempt to consult until

approximately February 2016—over a year after Caddo received the notice and request for consultation.

Caddo's claims resemble those of the Narragansett Tribe in *Narragansett Indian Tribe, supra.* In *Narragansett*, the tribe sought to stop construction of a sewer pipeline running through a sensitive archaeological area. While the sewer authority sent the tribe a letter requesting consultation, the tribe failed to respond in writing, although it responded orally requesting information about ongoing archaeological studies. *Narragansett*, 334 F.3d at 164. The tribe later claimed an ancient burial ground would be disturbed by construction, but produced only a witness who testified he vaguely remembered human remains being found during a previous construction project. *Id.*

The First Circuit denied the tribe's request for a preliminary injunction, finding Section 106 mandated the sewer authority give the tribe "a reasonable opportunity to identify its concerns," but did not mandate any particular result. *Id.* at 166–67. The tribe relied on *Pueblo of Sandia* as authority that a single request for information does not fulfill consultation duties, but the court found the argument unavailing *Id.* at 169. The court held the sewer authority complied with Section 106 by considering the tribe's belated objections. *Id.* Because the tribe failed to respond within thirty (30) days, the sewer authority was permitted to proceed. *Id.* at 167. While the tribe could later reenter the consultation process, it could not "turn back

the clock" and "demand a reversal of the prior finding" that construction would not affect any significant archaeological material. *Id.* "[C]onsultation is not the same thing as control over a project." *Id.* at 168.

To excuse its dilatory objections, Caddo relies on the wholly inapplicable case of *Comanche Nation v. United States*, No. CIV-08-849-D, 2008 WL 4426621, at *2 (W.D. Okla. Sept. 23, 2008). *Comanche Nation* is thoroughly distinguishable, principally because:

a. Comanche Nation was decided under the Religious Freedom and Restoration Act ("RFRA"), 42 U.S.C. § 2000bb et seq., rather than NHPA or NEPA.

b. In support of its request for injunctive relief, Comanche Nation produced multiple witnesses with specific testimony concerning the religious importance of the site in question, the present-day use of the site for religious purposes, and the historic efforts by the Nation and the Army to limit development and use of the 55-acre area in which the site was located.

c. Comanche Nation had timely responded to the initial consultation requests sent by the Army, but the Army subsequently, and improperly, withheld detailed information about the location of construction in an effort to avoid drawing objections from the Comanche Nation and others concerned about the project.

None of these factors apply to Caddo's claims. Caddo failed to provide specific information or testimony, did not allege any current religious importance, and did not timely respond to the Wichita Tribe's initial request for consultation.

Accordingly, Caddo did not and has not established it is likely to succeed on the merits of its claim. The District Court's May 31 Order should be affirmed.

5. Caddo did not establish immediate, irreparable harm

The substantial threat of irreparable harm is "perhaps the single most important prerequisite for the issuance of a preliminary injunction" or TRO. Wright, Miller & Kane, § 2948.1, Grounds for Granting or Denying a Preliminary Injunction—Irreparable Harm, 11A Fed. Prac. & Proc. Civ. § 2948.1 (3d ed.). A court may issue a TRO only when the moving party provides specific facts showing immediate and irreparable injury, loss, or damage will result before the adverse party's opposition to a motion for preliminary injunction can be heard. Fed. R. Civ. P. 65.

Here, Caddo failed to meet this requirement, providing only speculation rather than specific facts. In a letter sent to Caddo's counsel on May 6, the Wichita Tribe noted its concern:

> [W]e have not received information about what type of objects may be adversely affected other than some general speculation that there may be **possible** human remains, sacred objects, and/or sacred places. No specific information—such as statements from tribal members or non-

> tribal members with firsthand knowledge relating to this parcel, or even the names of such tribal members or non-tribal members—has been provided. Moreover, no specific locations within this parcel have been identified. Not knowing which lands within this parcel are at issue, or what type of artifacts may be in these undisclosed locations, puts the [Wichita] Tribe in a very difficult position. While the [Wichita] Tribe has no desire to harm any human remains, sacred objects, or sacred places, it is unable to simply forego utilizing this parcel indefinitely, given the efforts to identify and avoid any such items as part of the prior and current development.

App. 235. Likewise, Caddo's pleadings and presentation to the District Court have consistently lacked any verifiable information. App. 139-144, ¶ 12 ("I **believe** there are gravesites at the location"), ¶ 13 ("Bodies **may** have been moved that were located at a cemetery in that same area ..."), ¶ 38 ("I **believe** this site to be the location of Caddo remains and artifacts.").

Furthermore, Caddo's claims that children from the school were buried under the Tract conflict with surviving historic records. The only documented graves are in the Kiowa Cemetery, far from the Tract. Battey, *Supra*, at 70.

As discussed above, Caddo's commitment in the 2007 Partition Agreement to cede control over the Tract (and the entire 71-acre Division) to the Wichita Tribe directly contradicts Caddo's current contention that the Tract is a "sacred place" or holds sacred objects or is a burial ground. App. 171-187. Caddo's failure to engage in consultation for the travel plaza or the History Center shows Caddo did NOT place great importance on the 20-acre Field. Caddo downplays its prior failure to consult on the travel plaza by stating the "Caddo Nation did not oppose the construction,

because we did not have concerns that archaeological items were there and the sites were not considered sacred." App. 142 ¶ 32. However, it seems highly unlikely Caddo can both *not know* whether significant cultural items or burials are located under the Tract, yet *know* these same types of items are not present at the travel plaza site, located nearby on the same Field. App. 142.

Second, Caddo's contention that the Tract is sacred (Brief, at 8) is contradicted by Caddo's past practice of ceding all jurisdiction and governmental authority for this parcel to the Wichita Tribe for the express purpose of development (App. 171-188), as well as assenting to leasing this parcel for agricultural use (App. 342-347) and reaping the profits thereof.

Speculation that items **may possibly** be affected **is not proof such items exist.** Conjecture is not probability. The Wichita Tribe conducted several archaeological studies on the 20-acre site, and none indicate any human remains located on or even near the Tract. App. 371-404, 407-475. Whereas Caddo rely on rumor, the Wichita Tribe relied on **actual scientific study** to conclude the Project would not damage burials or cultural objects—study that has withstood the actual construction process, during which no burials or cultural artifacts were located or indicated.

Just as its baseless allegations were insufficient to justify blocking construction of the History Center, they provide even less support for blocking operation of the completed facility. The record does not support that Caddo will

suffer any harm, and nothing has occurred in the year since the May 31 Order to bolster Caddo's claims or validate its bare allegations of potential harm.

6. Public interest does not favor injunctive relief

The Tract is located within the Wichita Tribe's aboriginal homelands, and the Wichita Tribe's presence at this location predates that of Caddo. The impetus for building the History Center, rather than a revenue-generating project, was so the Wichita Tribe could have a proper facility for preserving its own historic artifacts and cultural patrimony. Aplee. Supp. App. 8-9. The History Center is meant to remedy this by providing a permanent facility to preserve the history of the Wichita people, for the benefit of the entire Wichita Tribe as well as the community at large. *Id.* Construction of the History Center brought much needed employment to the area, and its operation will help revitalize the greater Anadarko area, which is impoverished and in great need of development. *Id.*

Moreover, the public has an interest in the uniform, consistent application of the law. Caddo had a time limit under federal law to object to the History Center, and failed to do so. This time limit cannot be disregarded simply to give Caddo a judicial forum. *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 94, 111 S. Ct. 453, 112 L. Ed. 2d 435 (1990) (recognizing time limits are "a condition to the waiver of sovereign immunity and thus must be strictly construed"). This Court should not

condone Caddo's attempt to raise unsubstantiated eleventh-hour claims to scuttle the History Center after the Wichita Tribe followed the proper procedures, requested consultation, conducted scientific research, and made informed decisions. Thus, the public interest militates AGAINST the Court's indulgence of Caddo's efforts to circumvent the legal rules and prerequisites applicable to the relief it seeks.

Nor would the public interest support allowing a completed taxpayer-funded facility to sit unused where Caddo has produced nothing concrete to justify its claims. To do so would be a waste of both the Wichita Tribe's limited resources and more than $1 million in taxpayer dollars that funded the HUD grant used to build the History Center.

7. The Wichita Tribe Would be Harmed by an Injunction

Injunctive relief would harm the Wichita Tribe. The Wichita Tribe—at considerable expense—properly followed the consultation processes under NEPA and NHPA and should not be prevented from operating the completed facility. Caddo did not ask that the Wichita Tribe be prevented from operating the History Center until filing its Brief. That issue was never before the District Court, and to grant that relief now against the Wichita Tribe would be extremely prejudicial to the Wichita Tribe's interests, particularly when Caddo sat by for a year, did not pursue prudent

post-decisional relief to halt construction, and watched as the History Center was being built.

V. CONCLUSION

The District Court correctly found Caddo had not carried its burden to support its request for injunctive relief against the Wichita Tribe. The Wichita Tribe complied with its obligations under NHPA and NEPA and tried to consult with Caddo, who failed to timely engage. Caddo brought its concerns to the Wichita Tribe a year too late, after the construction process was underway. Even so, the Wichita Tribe heard and carefully considered Caddo's eleventh-hour claims, but Caddo refused to provide more than speculation and rumor as a basis to stop the Project. Accordingly, Caddo was not and is not entitled to injunctive relief. The May 31 Order should be affirmed, and Caddo should not be awarded injunctive relief preventing the Wichita Tribe from operating the History Center.

Moreover, because the May 31 Order vacated a TRO, it is not appealable, and Caddo has not demonstrated any legitimate reason why the Court should apply the narrow exception to the rule. The Court further lacks jurisdiction because the Appellees are shielded by sovereign immunity; Caddo failed to join indispensable parties who cannot be joined because of sovereign immunity; neither NEPA or NHPA provide Caddo a private right of action; Caddo failed to properly proceed

under the APA and is staging an improper collateral attack on a proceeding currently on remand to the BIA from the IBIA.

This appeal lacks any substantive basis, and is procedurally improper. Accordingly, this appeal should be dismissed.

WHEREFORE, Appellees ask the Court to dismiss this appeal, remand to the District Court with direction to dismiss the litigation, and award Appellees all additional relief to which they are entitled, including costs and attorney fees.

June 2, 2017.

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ORAL ARGUMENT STATEMENT

Because the issues presented are largely jurisdictional or otherwise matters of law, the Wichita Tribe does not believe oral argument will materially aid the Court's deliberations. Accordingly, the Wichita Tribe opposes Caddo's request for oral argument.

CERTIFICATE OF SERVICE

I hereby certify that on June 2, 2017, consistent with Fed. R. App. P. 25(a), Fed. R. App. P. 25(c)(2) and 10th Cir. R. 25.3, I electronically filed the foregoing using the court's CM/ECF system which will send notification of such filing to the following:

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and deposited seven (7) true and correct paper copies of same with Federal Express, Tracking No. 8101 0733 6786, consistent with 10th Cir. R. 31.5.

/s/ Michael D. McMahan

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) because **this brief contains 12,862 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 10th Cir. R. 32(b).**

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5)(A) and the type style requirements of Fed. R. App. P. 32(a)(6) because **this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14 Point Times New Roman.**

/s/ Michael D. McMahan

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

(1) all required privacy redactions have been made per 10th Cir. R. 25.5;

(2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents;

(3) the digital submissions have been scanned for viruses with the most recent version of Kaseya Antivirus 9.2.0.0 / Kaspersky Endpoint Security 10 for Windows 10.2.4.674, last updated June 1, 2017, and according to the program are free of viruses.

/s/ Michael D. McMahan