NO. 16-6161

IN THE 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

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APPELLANT'S OPPOSED MOTION FOR INJUNCTIVE RELIEF PENDING APPEAL

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COPORATE DISCLOSURE STATEMENT

The Caddo Nation of Oklahoma, pursuant to Fed. R. App. P. 26.1, certifies that it has no stock and therefore no publicly held corporation owns 10% or more of its stock.

__/s Mary Kathryn Nagle_____
Mary Kathryn Nagle

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I. Introduction

Plaintiff-Appellant Caddo Nation of Oklahoma ("Caddo Nation") seeks to ensure that the remains of its ancestors are not desecrated as a result of construction taking place on lands the United States holds in shared trust for the Caddo Nation. Defendants-Appellees Wichita and Affiliated Tribes ("Wichita Tribe"), also a shared trust beneficiary of the land, and Wichita Tribe elected officials (collectively, "Defendants") have commenced construction on the land without Caddo Nation consent and without having complied with federal laws that protect Caddo Nation's ancestors and cultural patrimony. The Caddo Nation requests immediate injunctive relief—pending the outcome of this appeal—to prevent the destruction of Caddo burial sites and the creation of irreparable harm.

The District Court initially granted Appellant's request for a Temporary Restraining Order, but subsequently reversed judgment based on the Court's conclusion that Defendants had satisfied their obligations under federal law. Because the District Court's denial of Appellant's request for injunctive relief is tantamount to the denial of a preliminary injunction, this Court has jurisdiction to consider Caddo Nation's appeal.

II. Statement of Facts

Caddo Nation filed suit on May 25, 2016, alleging Defendants violated Section 106 of the National Historic Preservation Act ("NHPA"), 54 U.S.C. §

306108, the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq.,* and the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. § 4321 *et seq*. The Caddo Nation seeks injunctive relief and a temporary restraining order to protect the sanctity of land that holds the remains of Caddo ancestors and Caddo funerary objects associated with their burials.

The land where Wichita Tribe has begun to construct a History Center is held in joint trust by the United States for the Wichita Tribe, the Caddo Nation, and the Delaware Nation (the "WCD lands"). To construct the proposed History Center, the Wichita Tribe has received a grant from the Department of Housing and Urban Development ("HUD"). May 31 Order at 3-4. The District Court found that with the acceptance of HUD funding, Defendants "'assume[d] the responsibility for environmental review, decision-making, and action that would otherwise apply to HUD under NEPA and other provisions of law that further the purposes of NEPA, as specified in § 58.5 [including NHPA].'" *Id.* at 4. Accordingly, Defendants have assumed the Federal Government's obligations to meet the procedural requirements and protections of NEPA and NHPA.

On January 9, 2015, Defendants sent the Caddo Nation a letter stating that Defendants had received HUD approval for the grant to construct the History Center. May 31 Order at 5. In January 2015, when Defendants sent their letter to Caddo Nation's government, Defendants were well aware no officials were there

to receive it.[1] On October 6, 2014—three months before Wichita Tribe sent its January 2015 letter—the federal Court of Indian Offenses for the Southern Plains Region ("CFR Court") issued an order declaring "all elected positions of the Caddo Nation to be vacant," pending the outcome of a special election. . . . held under the Supervision and direction of the Special Master." Order Removing Caddo Elected Officials (Oct. 6, 2014), *Caddo Nation of Oklahoma v. Brenda Edwards*, Case No. CIV-14-039, Court of Indian Offenses ("CFR Court"). Defendants never sent another letter or any form of notice after the Caddo Nation's government was re-instated.[2]

Subsequently, "[t]he Wichita Tribe then performed an Environmental Assessment ('EA') and subsequently certified to HUD that it had satisfied the environmental review process, which requires compliance with both NEPA and NHPA." May 31 Order at 5. In its EA, Defendants noted that "an investigation

[1] Wichita Tribe admitted, on December 12, 2014, that Defendants were aware Caddo Nation was experiencing an "internal dispute [] that realistically could take years to resolve." *See* Appellant's Br. at 14-15, No. IBIA 14-121 (Dec. 12, 2014), *Wichita & Affiliated Tribes v. Acting Southern Plains Reg'l Dir., Bureau of Indian Affairs*, 62 IBIA 301 (2016). Furthermore, Just six months before, in response to Defendants' attempt to coerce the Department of Interior ("DOI") into effectuating the legal partition of the WCD lands, over the objections of the other two tribes, Defendants' counsel, William Norman, received a letter from the DOI informing him that Caddo Nation's elected government "had been enjoined by the Court of Indian Offenses by an Emergency Ex-Parte Temporary Injunction." June 26, 2014, Letter from BIA Southern Plains Reg. Dir., p. 2 ("June 2014 BIA Letter").

[2] The special election was held on January 10, 2015, and on February 11, 2015, the Caddo Nation's government was re-instated. Order Certifying Caddo Election, *Caddo Nation of Oklahoma v. Brenda Edwards*, Case No. CIV-14-039.

and survey of cultural resources [had been] undertaken by an archeologist, John D. Northcutt, completed on April 6, 2015 ("Northcutt Report")."' *Id.* Mr. Northcutt's archeological survey involved no input on the scope of the survey from Caddo Nation elected officials, elders, or the Nation's Tribal Historic Preservation Officer. *See* Decl. of Caddo Tribal Historic Preservation Officer Kimberly Penrod, pg. 7, ¶ 25 (stating "Caddo Nation was not involved in any type of cultural survey of the area . . . ."). Under the NHPA, oral history provided by tribal elders is acknowledged as valuable information in conducting archeological or cultural studies. *See* 36 C.F.R. § 800.4(b)(1); 36 C.F.R. § 800.4(c)(1). Defendants' EA ultimately made a "Finding of No Significant Impact" ("FONSI"). *See* Compl. Ex. 1 (EA), p. 4. This FONSI was not sent to Caddo Nation as required by 24 C.F.R. § 58.43(a).

This lawsuit follows months of Caddo Nation efforts to make the Wichita Tribe aware of its concerns and offer solutions. On February 16, 2016, tribal leaders from the Caddo Nation, the Delaware Nation, and the Wichita Tribe met to discuss the Wichita Tribe's proposed construction on the WCD Tribes' jointly owned trust lands. Caddo Nation Complaint, filed May 25, 2016 ("Compl."), ¶ 63. At that time, "Caddo elders [] expressed concerns that defendants' construction will disturb and harm Caddo remains." May 31 Order at 7. Defendant Wichita Tribe President Terri Parton stated that the Wichita Tribe's January 9, 2015 letter

to Caddo Nation satisfied their legal duties to consult, and as a result, the Wichita Tribe would not take these concerns into consideration. *Id.* Caddo Nation Chairman Tamara Francis-Fourkiller reminded Defendants that they knew the Caddo Nation could not receive mail in January 2015 because Caddo Nation's government had been suspended at that time. *See* Decl. of Chairman Francis-Fourkiller, ¶ 28. Chairman Francis-Fourkiller also informed President Parton that the Caddo Nation did not consent to the Wichita Tribe's construction of the History Center on lands jointly owned by all three WCD Tribes until or unless the Caddo Nation was permitted to undertake testing sufficient to ensure Caddo remains would not be disturbed. *Id.* at ¶¶ 29-31.

Having been informed that Wichita Tribe intended to commence construction on the History Center, the Caddo Nation sent Defendants a demand letter on April 13, 2016 "insisting that defendants cease construction of the history center until 'adequate consultation' could take place as required by federal law." May 31 Order at 7. Defendants responded on April 18, 2016 with a letter stating that their obligation to consult under NHPA began and ended with their January 9, 2015 letter, and as a result, they were not required by law to take the Caddo Nation's current concerns into consideration. *See id.* at 8.

The Caddo Nation once again sent a letter to Defendants on April 28, 2016, asking "that construction cease until we find a mutually agreeable path forward."

See Compl. Ex. 4, p. 2. As a show of good faith, Caddo Nation offered to perform ground penetrating radar ("GPR") testing on the construction site at Caddo expense; hire and pay for archeological experts to evaluate the property and provide site testing; and have Caddo historic preservation and cultural experts monitor the site. May 31 Order at 9-10. The Caddo Nation requested that the Wichita Tribe not commence construction on the jointly-owned WCD lands until the Caddo Nation had been afforded an opportunity to complete this testing, which the Caddo Nation estimated would take roughly two weeks. *See* Compl. Ex. 4, p. 2.

The Wichita Tribe rejected Caddo Nation's offer in a letter dated May 6, 2016. *See* May 31 Order at 10. With the knowledge that Wichita Tribe's pouring of concrete was imminent, counsel for Caddo Nation notified counsel for Defendants of Caddo Nation's intention to seek injunctive relief at 1:08 p.m. on May 25, 2016. Plaintiff-Appellant Caddo Nation Emergency Motion for TRO, p. 4. Approximately fifty-two minutes after receiving notice that Caddo Nation intended to file for a restraining order, at 2:00 p.m. on May 25, Defendants' "construction crew began pouring the perimeter footings, . . . a concrete and rebar structure following the perimeter of the History Center." Joint Stmt. ¶ 3. The construction crew ceased pouring when Caddo Nation leaders and citizens obstructed the concrete trucks, and then the crew began pouring again the next

morning, at 5:30 a.m., until the District Court entered the temporary restraining order on May 26. *See* Joint Stmt. ¶ 5.

III. The District Court Proceedings

On May 25, 2016, Plaintiff filed an Emergency Motion for Temporary Restraining Order and Preliminary Injunction in the U.S. District Court for the Western District of Oklahoma. On May 26, the District Court held a hearing at which counsel for Plaintiff and Defendants presented argument. Following the hearing, the District Court granted a Temporary Restraining Order ("TRO"), enjoining Defendants that "from proceeding with any construction activities on the history center . . . until Wednesday, June 1, 2016, or further order of the court." TRO, May 26, 2016, at 3 (Exhibit A).

At the conclusion of the hearing, the District Court concluded that "a short TRO is warranted to maintain the status quo . . . ." *Id.* at 2. The District Court then "directed the parties to file a joint statement by noon on May 27, 2016, regarding the status of the construction site, addressing whether the pouring of the floor has been completed." *Id.* at 3. On May 27, 2016, the parties filed their Joint Statement of the Caddo Nation, the Wichita Tribe, and Wichita Tribe Elected Officials on the Current Status of Construction of the Wichita History Center ("Joint Stmt.") (Exhibit B).

Four days later, on May 31, 2016, the District Court issued an order vacating its earlier TRO, stating that because:

> [P]laintiff 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.

May 31, 2016, Order ("May 31 Order") at 19 (Exhibit C). In vacating its prior TRO and denying Appellant's Emergency Motion, the District Court noted that "[t]he Wichita Tribe's use of HUD funds to construct its history center triggered the procedural protections of [NEPA] and [NHPA]." *Id.* at 3 (citing 42 U.S.C. § 4332(2)(C)).[3] The District Court considered whether Plaintiff could establish the requisite likelihood of success on the merits and concluded Plaintiff could not, as a matter of law, because "[t]he Wichita Tribe satisfied its duty to consider alternatives under NEPA" (*id.* at 14), and further because "[b]ased on the record before it, . . . the Wichita Tribe fulfilled its consultation responsibilities under NHPA." *Id.* at 19.

The District Court did not consider the other three factors, and thus the Court's decision to lift the original TRO and deny injunctive relief rests

[3] The District Court further noted that "the tribe [] waived its sovereign tribal immunity" when it agreed to assume the federal government's duties and responsibilities in completing "the Environmental Assessment." May 31, 2016, Order ("May 31 Order") at 4 n.5 (Exhibit C).

exclusively on the Court's determination that Defendants have fully satisfied their legal obligations under both NEPA and NHPA. *See* May 31 Order at 19 n.17.

IV. 28 U.S.C. § 1292 Grants this Court Jurisdiction Over the Appeal

This Court has jurisdiction to review the current appeal because the District Court's "denial of [Appellant's motion for a] temporary restraining order is tantamount to denial of a preliminary injunction[,]" giving rise to appellate jurisdiction under 28 U.S.C. § 1292(a)(1)). *Levesque v. State of Me.,* 587 F.2d 78, 80 (1st Cir. 1978) (citing 28 U.S.C. § 1292(a)(1)). Appellate review is further appropriate at this time because the District Court Order's denial of temporary injunctive relief will result in "irreparable consequences [that can] only be 'effectively challenged' by immediate appeal." *United States v. State of Colo.*, 937 F.2d 505, 507 (10th Cir. 1991). Accordingly, this Court's review falls well within the Court's jurisdiction pursuant to § 1292(a)(1).

Here, the District Court's Order has the same practical effect as the denial of a preliminary injunction because the District Court has ruled, a matter of law, that Appellant cannot establish the requisite likelihood of success on the merits (May 31 Order at 19)—an element necessary for the provision of both temporary and permanent injunctive relief. *See TLX Acquisition Corp. v. Telex Corp.,* 679 F. Supp. 1022, 1028 (W.D. Okla. 1987) (noting that a temporary restraining order is "subject to those standards that must be met for an issuance of a preliminary

injunction."). Specifically, the District Court's Order concluded that "the Wichita Tribe fulfilled its consultation responsibilities under NHPA." May 31 Order at 19. Regarding NEPA, the District Court held "[t]he Wichita Tribe satisfied its duty to consider alternatives under NEPA," and Wichita Tribe "satisfied NEPA's notice requirements." *Id.* at 14. Thus, because the District Court has determined that Plaintiff cannot meet the legal standard necessary to grant a preliminary injunction, Plaintiff Caddo Nation, the District Court's Order has "decide[d] the merits of [the] case," and this Court should "not require [] appellant to go through additional proceedings for a permanent injunction." *N. Stevedoring & Handling Corp. v. Int'l Longshoremen's & Warehousemen's Union, Local No. 60*, 685 F.2d 344, 347 (9th Cir. 1982); *see also Levesque,* 587 F.2d at 80 (affirming appellate jurisdiction where plaintiff "is effectively foreclosed from pursuing further interlocutory relief in the form of a preliminary injunction which would request the same remedy to which the court has already determined he is not entitled.").

Furthermore, the present case presents irreparable consequences that can only be effectively challenged on immediate appeal. Appellant Caddo Nation brought this action to ensure that concrete would not be poured on the site of the proposed History Center until or unless Caddo Nation had the opportunity to use GPR to ensure no Caddo remains and/or funerary objects would be disturbed. Once the pouring of concrete is completed, Appellant Caddo Nation will be unable

to utilize GPR to ascertain the location of human remains and sacred funerary objects on the WCD lands where the Wichita Tribe seeks to construct. As a result, the District Court Order's denial of temporary injunctive relief will result in "irreparable consequences [that can] only be 'effectively challenged' by immediate appeal." *State of Colo.,* 937 F.2d at 507; *see also Populist Party v. Herschler,* 746 F.2d 656, 661 n.2 (10th Cir. 1984) (affirming appellate court jurisdiction over the denial of a motion for temporary restraining order where otherwise "plaintiffs' rights would be irretrievably lost.").

This Court, therefore, has jurisdiction to review the District Court's May 31 Order denying Appellant's Emergency Motion.

V. Standard of Review

This Court reviews a district court's denial of injunctive relief for abuse of discretion. *See Greater Yellowstone Coal. v. Flowers*, 321 F.3d 1250, 1255 (10th Cir. 2003). A district court abuses is discretion when the court "bases its decision on an erroneous conclusion of law or where there is no rational basis in the evidence for the ruling." *Id.* To be entitled to injunctive relief, Plaintiff "must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

VI. Argument

The District Court's determination that Appellant cannot establish the requisite likelihood of success on the merits sufficient to grant injunctive relief constitutes an erroneous conclusion of law. The District Court's denial of injunctive relief, therefore, warrants reversal for four reasons: (1) the District Court erroneously concluded that NEPA does not require Defendants to detail any consideration of reasonable alternatives in Defendants' EA; (2) the District Court erred when it found that mere publication of the FONSI in a newspaper satisfied NEPA's public notice requirement; (3) the District Court erroneously found that Defendants' submission of the January 9, 2015 letter to Appellant Caddo Nation, in a manner through which Defendants knew Caddo Nation would not receive it, satisfied Defendants' obligation to engage in good faith consultation; and (4) the District Court erred when it reasoned that Appellant's failure to provide the precise location and names of unmarked Caddo graves and remains precluded any finding of a NHPA violation.

To be sure, the Wichita Tribe's current construction on the jointly-held WCD lands threatens irreparable harm to the Caddo Nation and its citizens. In consideration of the balance of harms as well as the public interest, the irreparable injury threatened by Defendants' actions, the immediate imposition of injunctive relief pending the final outcome on appeal is warranted and appropriate.

a. Appellant's Claims Are Likely to Succeed on the Merits

i. The District Court Erred in its Determination that Defendants Satisfied Their Obligations under NEPA

First, the District Court erred when it concluded that "[t]he Wichita Tribe satisfied its duty to consider alternatives under NEPA." May 31 Order at 14. In reaching this conclusion, the District Court did not dispute that Defendants' EA fails to give substantial treatment to the consideration of alternatives, but rather, the Court predicated its decision on the fact that "Plaintiff does not suggest alternative sites or even argue that the Wichita Tribe should have selected another location." *Id*. NEPA, however, does not place the burden on Appellant to offer specific alternatives; instead, the statute places the burden on Wichita Tribe to rigorously consider alternatives in the first instance, and afford each alternative actual consideration. Here, Defendants failed to do so.

"The alternatives analysis is characterized as 'the heart' of the environmental impact statement." *Colorado Envtl. Coal. v. Dombeck*, 185 F.3d 1162, 1174 (10th Cir. 1999) (quoting 40 C.F.R. § 1502.14). To comply with NEPA and its regulations, Defendants were "required to rigorously explore all reasonable alternatives . . . in comparative form, and give each alternative substantial treatment in the environmental impact statement." *Id.*

Wichita Tribe's failure to include discussion and consideration of even a single alternative in its EA violates the plain letter law of NEPA. Wichita Tribe's

statement that it "has not been able to consider an alternative site" (EA, p. 8) does not absolve Defendants from their legal obligation to "rigorously explore" alternatives "in comparative form . . . in the environmental impact statement." *Dombeck*, 185 F.3d at 1174. As one example, the Wichita Tribe did not consider other Wichita Tribal lands for the History Center, only this jointly-owned WCD parcel. Nor did Defendants consider locating its History Center in other buildings already in existence. Defendants' stated objective is the preservation of Wichita culture and history. It is not unreasonable, therefore, to require Defendants to comply with NEPA and give a modicum of consideration to other buildings, programs, and means through which Defendants may preserve their culture and history without disturbing the history and culture of another Indian Nation.

The District Court further erred in judgment as a matter of law when the Court concluded that "[b]y publishing the FONSI in the Anadarko Daily News . . . defendants satisfied NEPA's notice requirements." May 31 Order at 14. NEPA's implementing regulations make clear that "[m]ere publication of the FONSI is not [] sufficient." *Dine Citizens Against Ruining Our Env't v. Klein*, 747 F. Supp. 2d 1234, 1261 (D. Colo. 2010). Instead, NEPA's regulations required Defendants to "send the FONSI notice to individuals . . . *to the appropriate tribal*, local, State and Federal agencies . . . ." 24 C.F.R. § 58.43 (emphasis added). This same regulation goes on to state that the responsible entity "*may also* publish the FONSI

notice in a newspaper of general circulation." *Id.* (emphasis added). Publishing the FONSI notice in the local newspaper, however, did not absolve Defendants of their obligation to send the FONSI directly to Caddo Nation, in compliance with § 58.43.

To be sure, NEPA is a procedural statute. NEPA "does not mandate particular results but simply provides the necessary process to ensure that federal agencies take a hard look at the environmental consequences of their actions." *Muckleshoot Indian Tribe v. U.S. Forest Serv.,* 177 F.3d 800, 814 (9th Cir. 1999) (quoting *Robertson v. Methow Valley Citizens Council,* 490 U.S. 332, 350 (1989)) (internal quotation marks omitted). As such, "when an agency has failed to comply with the procedural requirements of NEPA, harm to the environment may be presumed." *Dine Citizens Against Ruining our Env't*, 747 F. Supp. 2d at 1244 (citing *Davis v. Mineta,* 302 F.3d 1104, 1115 (10th Cir. 2002).

Far from technicalities, it is clear that Defendants' failure to comply with NEPA's fundamental procedural requirements—coupled with Defendants' failure to engage in good faith consultation under NHPA—have, so far, unlawfully permitted Defendants to proceed with the commencement of a major federal action that significantly jeopardizes the sanctity of land Caddo elders believe contains the remains their relatives. Had Defendants complied with NEPA's statutory mandates, Caddo Nation's current concerns would not warrant judicial

intervention. Here, however, Defendants' failure to abide by NEPA's baseline requirements warrants injunctive relief. After, and only after, Defendants have complied with NEPA's procedural requirements should they be allowed to proceed with construction.

ii. The District Court Erred in its Determination that Defendants Satisfied Their Obligations under NHPA

The District Court further reached an erroneous conclusion of law when the Court found that "the Wichita Tribe fulfilled its consultation responsibilities under NHPA." May 31 Order at 19. The District Court predicated this decision on the fact that the Wichita Tribe sent a letter to Appellant Caddo Nation requesting their participation/consultation on January 9, 2015, to which Caddo Nation never responded. *See id.* at 16-19.

This Court, however, has held that a "mere request for information is not [] sufficient" to satisfy NHPA § 106 consultation. *Pueblo of Sandia v. United States*, 50 F.3d 856, 860 (10th Cir. 1995). Instead, NHPA, and implementing regulations, required Defendants to "make a reasonable and good faith effort to" consult with Caddo Nation. 36 C.F.R § 800.3(f)(2). The specific facts of this case, coupled with governing law, make clear that Defendants' efforts were not in good faith.

In *Sandia*, this Court found that mailing multiple letters to local Indian Tribes and individual tribal members "known to be familiar with traditional cultural properties" constituted insufficient methods of effectuating the

consultation required by NHPA. *Pueblo of Sandia*, 50 F. 3d at 860. In reaching this conclusion, the *Sandia* Court found that the Forest Service was aware at the time that its efforts were likely unlikely to secure consultation. *See id.* Specifically, this Court noted that the Forest Service was well aware that "tribal customs might restrict the ready disclosure of specific information," and consequently, the Forest Service could not satisfy its NHPA consultation obligation by attempting consultation through a method it knew would likely not succeed. *See id.*

Likewise, in the present case, at the time that Defendants mailed Caddo Nation the letter the District Court determined satisfied their consultation obligations, Defendants were well-aware that the federal Court of Indian Offenses had enjoined the Caddo Nation Tribal Government. Consequently, Defendants sent their letter to a tribal headquarters office where Defendants knew no tribal leaders would receive it. Defendants never followed up with another letter in 2015 after the Caddo Nation's government had been re-instated. Under these circumstances, Defendants' single letter does not constitute the "good faith" effort NHPA § 106 commands.

Further, the District Court erred when it concluded that Appellant was unable to demonstrate the requisite likelihood of success on the merits under NHPA because Appellant had provided "no names or locations" to reveal the

identity or burial site of specific human remains. May 31 Order at 18. The Caddo Nation's inability to identify the precise location and identity of unmarked graves cannot, legally, absolve Defendants of their obligation to engage in good faith consultation. Nothing in NHPA predicates Caddo Nation's right to participate in § 106 consultation on its ability to provide such precise information. Indeed, Congress created § 106 consultation in NHPA to ensure this information is discovered and thoroughly investigated through the consultation process. Requiring an Indian Nation to provide this information before consultation has even commenced, therefore, violates the plain letter law and spirit of NHPA's entire statutory framework.

Finally, Defendants knew that all three tribes – not just the Wichita Tribe – were joint beneficial owners of the lands on which construction would take place. Rather than getting the consent of the Caddo Nation and Delaware Nation to move forward with the project, and respecting the historic and cultural ties each Tribe has to the land, the Wichita Tribe raced to the DOI in a failed effort to force a partition of these lands.

b. Appellant is Likely to Suffer Irreparable Harm

The construction of a permanent structure on a site considered sacred by the Caddo people, a site that Caddo elders believe contains their buried relatives, constitutes irreparable and irreversible harm for which there is no monetary relief.

If and when the pouring of the foundation is complete, any effort to ascertain the exact location of the unmarked Caddo graves and remains will be rendered impossible because, as the District Court acknowledged, GPR testing cannot penetrate or read the ground below concrete. *See* May 31 Order at 10-11 (acknowledging that Defendants' "pouring [of] concrete [], when *completed* would make it difficult, if not impossible, to test for Caddo remains by GPR"). Absent immediate injunctive relief, therefore, Appellant will suffer irreparable harm. *See Quechan Tribe of Fort Yuma Indian Reservation v. U.S. Dep't of Interior*, 755 F. Supp. 2d 1104, 1120 (S.D. Cal. 2010) (finding that irreparable harm standard is met when damage or destruction could occur on lands that "contain human remains"); *Comanche Nation v. United States*, No. CIV-08-849-D, 2008 WL 4426621, at *1, *19 (W.D. Okla. Sept. 23, 2008) ("The construction of a permanent structure on a site considered sacred by the Comanche people, and the substantial burden the presence of the structure would impose . . . would constitute irreparable harm.").

c. The Balance of Harms Tips in favor of Appellant

Plaintiff merely seeks to preserve the status quo while this Court reviews their claims. The balance of hardship, therefore, weighs in favor of Appellant. Should construction continue, Caddo remains and/or cultural patrimony may be destroyed. Defendants, however, face only a delay in construction. Any economic

loss to Defendants is greatly outweighed by the Plaintiff's interest in preserving and protecting Caddo remains.

d. Injunctive Relief Will Serve the Public Interest

Congress built and placed the procedural mechanisms in NEPA and NHPA to serve the public interest. In creating two separate statutes steeped in procedural mandates, Congress made the determination that requiring good faith consultation with Indian Nations protects and preserves the public's interest in sacred sites, lands, and the overall environment. When these procedural requirements have been neglected or overlooked, "[s]uspending a project until that consideration has occurred [] comports with the public interest." *S. Fork Band Council Of W. Shoshone Of Nevada v. U.S. Dep't of Interior*, 588 F.3d 718, 728 (9th Cir. 2009).

VII. Conclusion

Because Plaintiff-Appellant Caddo Nation can meet the requisite standards for injunctive relief pursuant to 10th Cir. R. 8.1, including the jurisdictional requisites, showing of likelihood of success on appeal, the threat of irreparable harm absent injunctive relief, the absence of harm to the opposing party, and the lack of harm to public interest, the Caddo Nation respectfully moves this Court to grant immediate injunctive relief pending this Court's consideration of Appellant's appeal of the District Court's May 31 Order denying injunctive relief.

Respectfully submitted this 8th day of June, 2016.

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CERTIFICATE OF SERVICE

I, Mary Kathryn Nagle, hereby certify that on this 8th day of June, 2016, I electronically transmitted the foregoing document to the Clerk of Court using the ECF system. Based on electronic records currently on file, the Clerk of Court will transmit a Notice of Docket Activity to the following ECF registrants:

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