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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BRIEF OF PLAINTIFF-APPELLANT

ORAL ARGUMENT REQUESTED

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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. JURISDICTIONAL STATEMENT

This Court, and the District Court, have jurisdiction to hear Caddo Nation's claims that the Wichita and Affiliated Tribes ("Wichita Tribe") unlawfully commenced—and now continue—construction that threatens to harm Caddo remains and cultural patrimony on lands jointly owned by the Caddo Nation, the Wichita Tribe, and the Delaware Nation ("WCD Tribes") without the consent of Caddo Nation and in violation of federal law. On May 25, 2016, the Wichita Tribe commenced pouring concrete for the construction of a History Center on the lands jointly-owned by the WCD Tribes ("WCD lands") approximately fifty-two minutes after receiving notice from Caddo Nation's counsel that Caddo Nation planned to file a lawsuit to delay the construction and allow for consultation concerning Caddo remains and cultural patrimony on the lands where the Wichita Tribe wished to construct. *See* Aplt. App. at 042.

Although construction of the History Center itself may now be complete (nothing in the record indicates that it is), the Wichita Tribe has made clear it intends to continue with the construction of other buildings, parking lots, dance arenas, and projects on the jointly-owned WCD lands and, to date, has refused to allow Caddo Nation to undertake the necessary testing to ensure that Caddo remains and patrimony will not be harmed during the course of Wichita Tribe's continued development.

The violations of federal law outlined below vest this Court with jurisdiction to hear Caddo Nation's appeal and impose injunctive relief.

A. District Court Jurisdiction

The Caddo Nation's claims arise under federal law, and as a result, the District Court has original subject matter jurisdiction under 28 U.S.C. § 1331. First, the District Court is vested with subject matter jurisdiction over Caddo Nation's claims that request declaratory relief under 28 U.S.C. § 2201, and injunctive relief under 28 U.S.C. § 2202.

Second, the District Court is vested with jurisdiction over Caddo Nation's claims under both the National Historic Preservation Act ("NHPA"), 54 U.S.C. § 300101 *et seq.* (Aplt. App. at 020-024),[1] as well as the Administrative Procedure

[1] The Caddo Nation has not, at this stage in the proceedings, asserted its NHPA claim under the Administrative Procedure Act ("APA"), as several federal courts of appeal have recognized a private right of action under the NHPA. *See, e.g.*, *See Boarhead Corp. v. Erickson*, 923 F.2d 1011, 1017 (3rd Cir. 1991) (noting that "[t]his Court, along with other courts of appeals, has recognized that federal question jurisdiction and a private right of action generally exists in actions arising under the [National Historic] Preservation Act."); *Vieux Carre Prop. Owners, Residents & Assoc., Inc. v. Brown*, 875 F.2d 453, 458 (5th Cir. 1989) (holding "a private right of action against an agency arises under" the NHPA). Furthermore, in *Pueblo of Sandia v. United States*, 50 F.3d 856 (10th Cir. 1995), this Court noted that plaintiff's APA claim was separate from their NHPA claim (*see id.* at 858 n.1), and made no statement that would imply that a private right of action is prohibited under the NHPA. *See id.* Accordingly, lower courts within the Tenth Circuit have exercised jurisdiction over claims brought directly under the NHPA and have not required plaintiffs to re-plead their claims under the APA. *See, e.g.*, *Comanche Nation v. United States*, No. CIV-08-849-D, 2008 WL 4426621, at *4 (W.D. Okla.

Act ("APA"), 5 U.S.C. § 701 *et seq.*—wherein Caddo Nation alleges that the Wichita Tribe's completion of the Environmental Assessment with no consideration of alternatives—and without adequate publication—is an arbitrary, capricious, abuse of discretion, or otherwise not in accordance of law, in violation of the National Environmental Policy Act ("NEPA), 42 U.S.C. § 4321 *et seq.*. *See* Aplt. App. at 011-013, 036-037. Because the Wichita Tribe issued its Finding of No Significant Impact ("FONSI") on May 15, 2015, there has been "final agency action" and Caddo Nation's suit is timely under 40 C.F.R. § 1500.3.

B. Appellate Court Jurisdiction

This Court's review falls well within the Court's appellate jurisdiction pursuant to 28 U.S.C. § 1292(a)(1). The District Court denied Caddo Nation's Motion for Temporary Restraining Order on May 31, 2016 (Aplt. App. at 062-080), and just shy of an entire year later, the District Court has yet to issue a decision on Caddo Nation's Motion for Preliminary Injunction—nor has the Court scheduled the motion to be heard at a hearing. The indefinite delay on any resolution of Caddo Nation's motion for preliminary injunction renders the District Court's May 31 Order tantamount to the denial of a preliminary injunction, and as a result, this Court has jurisdiction to consider Caddo Nation's current appeal

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Sept. 23, 2008) (analyzing a private NHPA claim with no analysis of whether claim should be brought under the APA).

under 28 U.S.C. § 1292(a)(1). Appellate review is further appropriate because the May 31 Order has, and will continue to, cause "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).

Given that almost twelve months have passed since the District Court denied Caddo Nation's request for injunctive relief it is clear that "[t]he labels [used by] the plaintiff and the district court cannot be dispositive of whether an injunction has been requested or denied." *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1185 n.11 (10th Cir. 1999). That is, the fact that the District Court did not title its May 31 Order a denial of Caddo Nation's "Motion for Preliminary Injunction" in no way precludes this Court's review or jurisdiction. *See id.*; *see also Tooele Cty. v. United States*, No. 15-4062, 2016 WL 1743427, at *2 (10th Cir. May 3, 2016) (concluding that "jurisdiction is not controlled by . . . the name that a district court attached to an order," but instead is determined by the order's effects on the relief appellant requested).

As this Court has repeatedly affirmed, 28 U.S.C. § 1292(a)(1) affords this Court with jurisdiction to review "[i]nterlocutory orders … granting, continuing, modifying, refusing or dissolving injunctions." Specifically, this Court has recognized that "[i]n order [for this Court] to have appellate jurisdiction[,] . . . the challenged order must: (1) have 'the practical effect of refusing an injunction,' (2)

threaten a 'serious, perhaps irreparable, consequence,' and (3) be 'effectually challenged' only by immediate appeal." *Forest Guardians*, 174 F.3d 1178, 1185 (10th Cir. 1999) (quoting *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 84, (1981)). Here, the District's Court's May 31 Order demonstrates all three.

First, the passage of almost twelve months since the District Court's May 31 Order with no subsequent decision on Caddo Nation's motion for preliminary injunction—and not even a scheduled hearing[2]—establishes that the Court's Order has had the "practical effect" of denying the Caddo Nation's Motion for Preliminary Injunction. *See Mt. Graham Red Squirrel v. Madigan*, 954 F.2d 1441, 1449-50 (9th Cir. 1992) (concluding that "delaying a hearing on [plaintiff's] motion to enjoin construction . . . until after the [construction] had been substantially completed . . . effectively denie[s] the motion" for injunctive relief and therefore provides for immediate appellate jurisdiction). Accordingly, the May 31 Order constitutes a denial of Caddo Nation's motion for preliminary injunction.[3] *See* 1 C. Wright & A. Miller, *Federal Practice and Procedure,* § 2962,

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[2] Caddo Nation's Emergency Motion for Temporary Restraining Order and Preliminary Injunction (Aplt. App. at 039-044) specifically asked the District Court to: "Set specific date and time, by agreement of the parties or upon the conclusion of the hearing on the temporary restraining order, for a full and complete hearing on Plaintiff's Motion for Preliminary Injunction after allowing a sufficient period of time to conduct discovery. . . ." *See id*. at 043.

[3] Caddo Nation filed suit on May 25, 2016. Aplt. App. at 009. At that time, Caddo Nation also filed an Emergency Motion for Temporary Restraining Order and Preliminary Injunction (*id*. at 039) along with the Complaint. The District

at 614 (1973) ("[W]hen a court declines to make a formal ruling on a motion for a preliminary injunction, but its action has the effect of denying the requested relief, its refusal to issue a specific order will be treated as equivalent to the denial of a preliminary injunction and will be appealable.").

The District Court's indefinite delay in ruling on Caddo Nation's Motion for Preliminary Injunction, therefore, demonstrates the requisite "effect of denying an injunction" and gives rise to this Court's jurisdiction. *See, e.g.*, *Cedar Coal Co. v. United Mine Workers*, 560 F.2d 1153, 1161 (4th Cir. 1977) ("the indefinite continuance amounted to the refusing of an injunction and is appealable"), *cert. denied*, 434 U.S. 1047 (1978); *see also Wis. Right to Life State Political Action Comm. v. Barland*, 664 F.3d 139, 146 (7th Cir. 2011) (holding that an order deferring a ruling on preliminary injunction "had the effect of denying an injunction" rendering immediate appeal proper); *Procter & Gamble Co. v. Kraft Foods Glob., Inc.*, 549 F.3d 842, 846 (Fed. Cir. 2008) (holding appellate court had jurisdiction to review "the effective denial" of plaintiff's motion for a preliminary injunction where trial court "refused to consider" the merits of plaintiff's motion

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Court conducted an adversarial TRO hearing on May 26, 2016, during which the Wichita Tribe and elected officials submitted hundreds of pages and exhibits. *See Id*. at 160-341. After initially granting Caddo Nation's TRO, five days later, the District Court issued its May 31 Order, lifting the May 26 injunction and denying Caddo Nation's request for temporary injunctive relief. *Id*. at 062-080. To date, the District Court has not scheduled a hearing on Caddo Nation's request for a preliminary injunction.

for preliminary injunction); *cf. Wyandotte Nation v. Nat'l Indian Gaming Comm'n*, 99 F. App'x 836, 838 (10th Cir. 2004) (finding no appellate jurisdiction where "there is every indication that the district court 'contemplates a prompt hearing on preliminary injunction.'") (internal citation omitted). Here, the Wichita Tribe can point to no indication that the District Court contemplates a hearing on Caddo Nation's motion for preliminary injunction before construction is complete, and accordingly, appellate jurisdiction over the May 31 Order is appropriate.

Furthermore, the District Court's Order has the same practical effect as the denial of a preliminary injunction because the District Court has ruled, as a matter of law, that Caddo Nation cannot establish the requisite likelihood of success on the merits (Aplt. App. at 080)—an element necessary for the provision of both temporary and permanent injunctive relief. Specifically, the District Court's Order concluded that "the Wichita Tribe fulfilled its consultation responsibilities under NHPA." *Id*. Regarding NEPA, the District Court held "[t]he Wichita Tribe satisfied its duty to consider alternatives under NEPA," and the Wichita Tribe "satisfied NEPA's notice requirements." *Id.* at 075. Thus, the District Court's May 31 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 v. State of Me., 587 F.2d 78, 80 (1st Cir. 1978) (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.").

As to the second and third "strands of analysis" under this Court's decision in *Forest Guardians*, this Court has jurisdiction over the current appeal because the May 31 Order "(2) threaten[s] a 'serious, perhaps irreparable, consequence,' and (3) [can] be 'effectually challenged' only by immediate appeal." *Forest Guardians*, 174 F.3d at 1185. The Caddo Nation brought suit to ensure that construction of the History Center would not be completed until or unless the Caddo Nation had the opportunity to use Ground Penetrating Radar (GPR) and other tests to ensure no Caddo remains and/or funerary objects would be disturbed. *See* Aplt. App. at 026-027. The Caddo Nation has received no communication from the Wichita Tribe to indicate that construction is complete or that the History Center is open and in operation, and once the History Center is opened, the risk of irreparable harm and consequence will continue unabated until Caddo Nation is allowed to undertake the requisite testing to ensure the Center's operations do not disturb Caddo remains.

Thus, nearly twelve months after the District Court's May 31 Order, the threat of irreparable consequences has not abated; it has only increased. At this point in the proceedings, appellate review of the District Court's denial of Caddo

Nation's motion for a temporary restraining order is necessary, otherwise "plaintiffs' rights w[ill] be irretrievably lost" once the Wichita Tribe is permitted to open and operate its History Center on the jointly-owned WCD lands. *Populist Party v. Herschler*, 746 F.2d 656, 661 n.2 (10th Cir. 1984). This Court, therefore, has jurisdiction to review the District Court's May 31 Order denying Caddo Nation's Emergency Motion for Temporary Restraining Order and Preliminary Injunction.

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. Wichita Tribe Seeks to Construct on Land Owned Jointly by All Three WCD Tribes

The history of federal laws, policies, and decisions that led to the joint-ownership of the land at issue in the current litigation began in 1872. That year, Indian Affairs Commissioner F.A. Walker entered into an agreement with a delegation of the predecessors to the Wichita Tribe, Caddo Nation, and Delaware Nation ("WCD Tribes") to set aside 743,610 acres located between the main channels of the Canadian and Washita Rivers, from the 98th Meridian to west longitude 98° 40.' Aplt. App. at 015. At this time, on the same site where the Wichita Tribe now seeks to build their History Center, the Bureau of Indian Affairs built and opened the original Riverside Indian Boarding School, a school the Bureau kept in operation from 1871 to 1878. *See* Aplt. App. at 507. Caddo children attended this school, and those that died while in attendance at the school were

buried on location at the Boarding School; consequently, Caddo Indians were, at one time, buried on the WCD lands where the Wichita Tribe now seeks to construct. *See* Aplt. App. at 139, 148.

Regarding the precise location of the proposed History Center, Caddo oral history indicates that "[y]ears ago, Caddo remains were moved from the lower lands [the construction site] to the higher land near the 'Kiowa Cemetery' up the hill." Aplt. App. at 134. The remains were moved to make way for a highway that was built, but not all remains were moved. *See id.* at 139. Consequently, Caddo Nation citizens remain concerned that other Caddo graves "continue to be located in the construction area" on the site of the former Riverside Indian Boarding School. *Id.* at 134.

The fact that the land at issue in this litigation is jointly owned by three Tribes is the product of federal policies and legislation dating back to the late 1800s, and in particular, the "Jerome Agreement"—an agreement allotted WCD lands to tribal members; the Jerome Agreement was subsequently ratified by Congress with the Act of March 2, 1895 (28 Stat. 876, 894-898).

On September 11, 1963, Assistant Secretary of the Interior, John A. Carver Jr., issued Executive Order 3228 and restored the majority of the lands lost in the Jerome Agreement to the WCD Tribes. *See* Exec. Order No. 3228, 28 Fed. Reg. 10,157 (Sept. 11, 1963); *see also* Aplt. App. at 142. The express purpose of

Executive Order 3228 was to restore the lands so "that each member of the Wichita Band, Caddo Tribe, and Absentee Band of Delaware Indians will share equally in the benefits to be derived therefrom." *Delaware Tribe of W. Okla. v. Acting Deputy Assistant Sec'y – Indian Affairs*, 10 IBIA 40, 42 (July 30, 1982) (quoting *Letter to Will J. Petner (of BLM) from Assistant Sec'y John A. Carver, Jr.* (May 31, 1963)). Aplt. App. at 015-16.

In recognition of this executive purpose, the BIA developed an apportionment formula meant to divide income received from the jointly-held lands between the three Tribes, in proportion to the WCD Tribes' population at that time. *See Delaware Tribe of W. Okla.*, 10 IBIA at 56; *see also Wichita & Affiliated Tribes v. Clark*, Civ. Action No. 83-0602 (D.D.C. Jan. 25, 1985), *aff'd*, 788 F.2d 765, 770 (D.C. Cir. 1986). Aplt. App. at 016. Since the 1980s, and through today, the BIA has consistently and continuously divided incomes from jointly-held lands between the WCD Tribes based on current population counts, as affirmed by the federal courts. *Id*.

In 1972, the Wichita Tribe, Caddo Nation and Delaware Nation formed W.C.D. Enterprises, Inc. ("WCD Enterprises") "for the benefit of and in the interest" of the Tribes. W.C.D. Enterprises, *Articles of Incorporation,* Aplt. App. at 365; *see also* Aplt. App. at 016. WCD Enterprises, a corporation that continues to operate today, is composed of nine persons on the Board of Directors, with the

Executive Committees of each member Tribe appointing three Directors each. Through its Board of Directors, WCD Enterprises maintains responsibility for the management of all jointly-owned WCD lands, and is tasked with "undertak[ing] [any and all] [] studies and analyses of the economic needs of the Reservation, to prepare plans to execute the same to operate projects and *to provide for the construction . . . of any project*." Aplt. App. at 364 (emphasis added); *see also* Aplt. App. at 016-17.

The Wichita Tribe did not consult with WCD Enterprises prior to commencing construction on the History Center, and as a result, the Wichita Tribe's ongoing construction is taking place without the required consent from WCD Enterprises. *See* Aplt. App. at 020.

In 2007, each of the three Tribes passed identical resolutions setting aside 600 acres of WCD jointly held lands for the exclusive use of each individual Tribe. *See Resolution of the Caddo Nation Council*, No. 02-2007-01 (Feb. 2, 2007), Aplt. App. at 171-78; *Resolution of the Wichita and Affiliated Tribes*, No. WT-07-09 (Jan. 9, 2007), Aplt. App. at 163-70; *Tribal Resolution of the Delaware Nation*, No. 07-019 (Feb. 2, 2007), Aplt. App. at 348-55; *see also* Aplt. App. at 017. After the resolutions passed, the WCD Tribes each sent a letter to the Superintendent of the BIA's Anadarko Agency informing the BIA of the Tribes' respective resolutions and requesting the BIA to approve the Tribes' partition of the jointly-

owned WCD lands and transfer title for the 600 acre partitions to each individual WCD Tribe. *Letter to Superintendent Betty Tippeconnie from Gary McAdams, LaRue Parker, and Kerry Holton* (Feb. 8, 2007). Aplt. App. at 017.

In response to this request, the BIA Superintendent stated that the BIA did not have the requisite legal authority to transfer title of the jointly-held trust lands to any of the individual WCD Tribes because such a "partition w[ould] require congressional authority," and could not be accomplished by the BIA alone. *Memorandum to Regional Director, Southern Plains Region, from Superintendent, Anadarko Agency* (May 7, 2007), Aplt. App. 356-57. Accordingly, the BIA Superintendent never signed any legal documents to effectuate the WCD Tribes' requested partition. Aplt. App. at 017. The WCD Tribes requested Congress to effectuate the partition, but Congress has never acted to transfer legal title to any of the individual Tribes. *Id*. As a result, the lands where the Wichita Tribe seeks to construct remain jointly-owned by all three WCD Tribes.

Furthermore, on June 7, 2013, the BIA Anadarko Agency determined that partitioning the WCD lands would require an appraisal of the lands under 25 C.F.R. § 152.25(b). Aplt. App. at 018. Absent such an appraisal, no transfer of legal title could take place. *Id*. Less than one month later, on July 3, 2013, in response to growing concerns about the lack of an appraisal, lack of congressional authority, and lack of BIA approval for the partition, the Caddo Nation Council

suspended its earlier 2007 Resolution and passed a new Resolution stating that Caddo Nation did not agree to the Tribes' partition of the jointly-owned WCD lands. *See* Aplt. App. at 018. By suspending their 2007 Resolution, the Caddo Nation made clear that any unilateral steps taken to effectuate a partition of the jointly-held WCD lands would be unlawful. *Id*.

Additionally, on February 23, 2016, Delaware Nation's Executive Committee passed a resolution rescinding its 2007 Resolution (Delaware Nation Resolution 07-019), concluding "that the unequal division of the land is not in the best interests of the Citizens of the Delaware Nation" and, further, that "the Delaware Executive Committee intends to seek an equal division based on value and partition of lands under the joint jurisdiction of the WCD." Delaware Executive Committee Resolution, #2016- 023, *Resolution Rescinding WCD Land Partition Resolution 07*-019; *see also* Aplt. App. at 018.

Today, two of the three WCD Tribes stand opposed to the Wichita Tribe's attempt to claim individual ownership over land that the United States holds in trust for the benefit of all three Tribes.

B. Wichita Tribe Uses HUD Funds to Construct History Center and Assumes the Agency's Duties Under NEPA and NHPA

In early 2015, the Wichita Tribe decided to construct its History Center on the jointly owned WCD lands. Aplt. App. at 019. To fund the construction of its proposed History Center, the Wichita Tribe accepted a grant from the Department

of Housing and Urban Development ("HUD"). Aplt. App. at 064. The Wichita Tribe's use of HUD funds to construct its History Center constitutes an "undertaking" under NHPA and a "Major Federal action" under NEPA. *See* 36 C.F.R. § 800.16(y) (defining "undertaking" in NHPA as a "project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency. . . [projects] carried out with Federal financial assistance . . . ."); 40 C.F.R. § 1508.18(a) (defining "Major Federal action" in NEPA as "projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies . . . .").

Thus, by accepting HUD funding, the Wichita Tribe and elected officials "'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 065. Under NEPA, the Wichita Tribe performed an Environmental Assessment ("EA") (Aplt. App. at 115-24), and in doing so, listed itself as the Responsible Entity with the responsibility of not only completing the EA, but ensuring compliance with all of NEPA's provisions and regulations. Aplt. App. at 115.[4]

[4] *See* 24 C.F.R. § 58.2(a)(7)(i) ("Responsible entity means: With respect to environmental responsibilities . . . a recipient under the program.").

As the Responsible Entity, the Wichita Tribe certified to HUD that the Tribe had completed the environmental review process in compliance with both NHPA and NEPA. *See* Aplt. App. at 124. By signing the EA, Wichita President Terri Parton consented to federal court jurisdiction for any action brought to enforce the Wichita Tribe's compliance with NHPA and NEPA in completing the EA. *See id.*[5]

C. The Wichita Tribe's Efforts to Engage in Good Faith Consultation Consist Only of Sending a Single Letter

When Wichita Tribe and Caddo Nation leaders met to discuss the proposed construction of the History Center on February 18, 2016, Wichita President Parton informed Caddo Chairman Francis that the Wichita Tribe had sent the Caddo Nation a letter requesting consultation on January 9, 2015. Aplt. App. at 025. In turn, Chairman Francis informed President Parton that the Caddo Nation did not receive the letter in 2015 and had only become aware of it at the February 18, 2016 meeting.[6] Aplt. App. at 141.

Chairman Francis requested consultation at that time, and President Parton refused, stating that the Wichita Tribe's January 2015 letter satisfied the Tribe's

[5] The implementing regulation, 24 C.F.R. § 58.4, permits Indian Tribes to assume the agency's authority for complying with the environmental review process. When a Tribe assumes this authority, the Tribe also accepts responsibility for compliance with NHPA. *See* 24 C.F.R. § 58.5.

[6] Caddo Chairman Francis stated that "I learned of this [January 9, 2015] letter at the meeting between Wichita, Delaware, Caddo, and the BIA in February 2016." Aplt. App. at 141.

obligations to consult with Caddo Nation under the law. Aplt. App. at 025. Furthermore, although Caddo Nation was made aware of the January 9, 2015 letter requesting consultation in February 2016, Caddo Nation did not receive an actual copy of the letter until one month later on March 28, 2016. *See* Aplt. App. at 106. Because President Parton refused Chairman Francis's February 2016 request for consultation, the Caddo Nation was not permitted to engage in actual consultation with the Tribe that had assumed the federal agency's duties and responsibilities under NHPA and NEPA.

The fact that Caddo Nation did not receive the January 9, 2015 letter in January 2015 should come as no surprise to the Wichita Tribe, or their elected officials. In January 2015, when the Wichita Tribe allegedly sent the letter to Caddo Nation's government, the Tribe was well aware that no officials were there to receive it. On October 6, 2014—three months before the January 2015 letter was allegedly sent—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." Aplt. App. at 516-17.

On December 12, 2014, the Wichita Tribe acknowledged it was aware the Caddo Nation was experiencing an "internal dispute [] that realistically could take years to resolve." *See* Aplt. App. at 251-52. Furthermore, just six months before, in

response to the Wichita Tribe's 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—Wichita Tribe's 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. 2 ("June 2014 BIA Letter"), Aplt. App. at 520.

On February 11, 2015—just one month after the Wichita Tribe sent its letter—the Caddo Nation's government was re-instated.[7] The Wichita Tribe, however, never followed up with another letter, or any form of communication concerning the proposed construction. That is, after sending the January 9, 2015 letter, the Wichita Tribe waited an entire year to send another letter on January 7, 2016. Aplt. App. at 023.

This January 7, 2016 letter gave notice to the Caddo Nation that the Wichita Tribe had undertaken archeological investigation and geophysical testing on location site CD-352, a site located on the jointly-owned WCD lands where the Wichita Tribe now constructs its History Center, and furthermore, that this location

[7] 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, Aplt. App. at 524.

could be eligible for the National Register of Historic Places. Aplt. Appl 232-34. Specifically, the Tribe's January 7, 2016 letter stated that "CD-352 may be eligible for the national Register and should be avoided." *Id*. at 232. The letter further stated that the site of the proposed History Center is "thought to be associated with the original Riverside Indian School that was established in 1871 for Wichita, Caddo, and Delaware children," and a "100 feet avoidance zone has been established around CD-352 to protect it from any ground disturbing, construction activities." *Id*.

Furthermore, in completing its EA, the Wichita Tribe stated, affirmatively, that "[t]he project will not affect any historic properties in Accordance with the SHPO letter attached." Aplt. App. at 119. The SHPO letter attached to the EA details an investigation and survey of cultural resources undertaken by an archeologist, John D. Northcutt, completed on April 6, 2015 ("Northcutt Report"). *See* Aplt. App. at 022; *see also id*. at 119.[8] In his report, Northcutt found that the lands where the Wichita Tribe seeks to construct its History Center contain an archeological site containing artifacts that date back to the 1800s. The Northcutt Report also found that the site where the Wichita Tribe seeks to build the History Center "has some potential to produce more artifacts that relate to an 1870's/1880's period Indian school important to Oklahoma's history." Aplt. App.

[8] Excerpts from the Northcutt Report are available in Aplt. App. at 492-511.

494. The Northcutt Report further states that "[t]his site is considered possibly eligible for the National Register if future excavations find significant artifacts below the surface." *Id.*

The Wichita Tribe, however, decided "not to fund further archeological investigation" Aplt. App. at 022. Despite the Caddo Nation's joint ownership in the land, the Wichita Tribe did not notify the Caddo Nation when the initial investigation was taking place, nor did the Wichita Tribe provide Caddo Nation an opportunity to provide comment, participate, or have any involvement with the Wichita Tribe's assessment of the cultural resources on the jointly-held WCD lands. *Id.*

The Wichita Tribe subsequently concluded its EA on May 15, 2015, and on May 22, 2015, the Wichita Tribe published its Finding of No Significant Impact ("FONSI") in the Anadarko newspaper. *See* Aplt. App. at 096. The EA makes clear that the Wichita Tribe did not consider a single alternative to the construction of the proposed History Center on the jointly-owned WCD lands. Aplt. App. at 122.

The Wichita Tribe and its elected officials never mailed, emailed, or sent the EA and/or FONSI to Caddo Nation until March 28, 2016. *See* Aplt. App. at 106 (noting that information was "sent to Plaintiff's counsel on March 28, 2016.").

D. Caddo Nation Requests to Perform and Pay for GPR Testing

After the Caddo Nation learned of the Wichita Tribe's plans to construct the History Center in February 2016, Caddo elders expressed concerns that the lands where the Wichita Tribe seeks to construct contain the remains of their relatives. At least ten Caddo elders have stated they believe Caddo burials remain on the WCD lands where the Wichita Tribe seeks to construct its History Center, the same location as the former Riverside Indian Boarding School that Caddo children attended. Aplt. App. at 140.

Concerned about construction of the History Center and the lack of consultation and consent, Caddo and Delaware Nation officials met with the Wichita Tribe on February 18, 2016, in Oklahoma City. Aplt. App. at 024. At this meeting, Caddo Chairman Francis told Wichita President Parton that the Caddo elders have concerns about the disturbance of Caddo burials and Caddo cultural items located on the WCD lands where the Wichita Tribe seeks to unilaterally construct. Aplt. App. at 141. Chairman Francis further told President Parton that the Caddo Nation had not been provided with an opportunity to participate in the §106 consultation process, and as a result, there had not been adequate consultation with Caddo Nation to identify historic properties and address Caddo Nation's concerns regarding Caddo remains and Caddo cultural patrimony. *Id*.

In response, President Parton insisted that the January 9, 2015 letter allegedly sent by the Wichita Tribe satisfied the Tribe's legal obligations to consult, and the Wichita Tribe was under no legal obligation to accommodate Caddo Nation's concerns regarding Caddo remains and Caddo cultural patrimony.[9] *See* Aplt. App. at 025.

Disturbed that the Wichita Tribe was considering planning to commence construction without having first consulted with and received the consent of the Caddo Nation, on April 13, 2016, the Caddo Nation sent a demand letter to the Wichita Tribe insisting that the Tribe and elected Wichita officials refrain from commencing any construction on the jointly-owned WCD lands until adequate consultation could take place in compliance with federal law. *See* Aplt. App. at 126-27. In the April 13, 2016 letter, the Caddo Nation once again expressed its concerns that many Caddo elders believe that the proposed site for construction holds remains of Caddo ancestors and cultural artifacts. *Id*. at 126. The Caddo Nation further stated that without actual consultation, the Caddo Nation "does not consent to the Wichita Tribe's construction of the proposed History Center on the WCD Tribes' jointly-held lands." *Id.*

[9] The Caddo Nation did not receive an actual copy of the January 9, 2015 letter until counsel for the Wichita Tribe, William Norman, emailed a copy to Caddo Nation's counsel on March 28, 2016. *See* Aplt. App. at 106.

Five days later, on April 18, 2016, the Wichita Tribe responded with a letter to the Caddo Nation stating that the Wichita Tribe had the "right to the exclusive use and control" of the WCD lands where it wanted to construct the History Center. Aplt. App. at 129. At the same time, the Wichita Tribe claimed to have fully complied with the requirements of both NHPA and NEPA and refused to engage in consultation. *See id.*

In response, the Caddo Nation requested a meeting of the three Tribes, and on April 22, 2016, Wichita, Caddo, and Delaware officials met at the Wichita Tribe headquarters. At this meeting, Caddo Nation expressed its continued concerns that Wichita Tribe's desire to proceed immediately with construction could cause the destruction of human remains and cultural artifacts at the site of the History Center construction. *See* Aplt. App. at 026. At the April 22, 2016 meeting, officials from the Wichita Tribe told Caddo Nation and Delaware Nation officials that the Tribe would pour concrete for the History Center in less than two weeks. *See id*.

Six days later, on April 28, 2016, the Caddo Nation sent the Wichita Tribe a letter with a set of proposals discussed by the parties at the April 22, 2016 meeting. Aplt. App. at 134-35. Specifically, Caddo Nation proposed that: Caddo Nation be permitted to perform GPR testing at Caddo Nation's own expense; Caddo Nation would be permitted to provide archeological experts that would be present during

construction and help monitor the construction site; and Caddo Nation would be formally noticed if construction unearths any new artifacts or objects of cultural and/or historical significance. *See id*. at 135. The Caddo Nation further explained that any GPR testing and archeological work would take no more than two weeks to complete, and after that, Caddo Nation would consent to the Wichita Tribe's construction on the WCD lands, absent any archeological finding that would require remediation or addressing. *See id.*

Eight days later, on May 6, 2016, the Wichita Tribe rejected Caddo Nation's offer. In the Tribe's May 6, 2016 letter, the Wichita Tribe stated it would not delay the commencement of construction to allow Caddo Nation to undertake GPR testing. *See* Aplt. App. at 071.

With the knowledge that the Wichita Tribe's pouring of concrete was imminent, counsel for Caddo Nation notified counsel for the Wichita Tribe of Caddo Nation's intention to seek injunctive relief at 1:08 p.m. on May 25, 2016. *See* Aplt. App. at 042. Approximately fifty-two minutes after receiving notice that the Caddo Nation intended to file for a restraining order, at 2:00 p.m. on May 25, Wichita Tribe's "construction crew began pouring the perimeter footings, . . . a concrete and rebar structure following the perimeter of the History Center." *See* Aplt. App. at 060.

The record makes clear, therefore, that Caddo Nation sought to enjoin the Wichita Tribe's construction since approximately fifty-two minutes *before* the Wichita Tribe commenced pouring concrete on May 25, 2016.

E. Procedural History

1. District Court Proceedings

On May 25, 2016, Caddo Nation filed an Emergency Motion for Temporary Restraining Order and Preliminary Injunction (Aplt. App. at 039) in the U.S. District Court for the Western District of Oklahoma. On May 26, the District Court held a hearing on the Emergency Motion. Following the hearing, the District Court granted a Temporary Restraining Order ("TRO"), enjoining the Wichita Tribe and its elected officials "from proceeding with any construction activities on the history center . . . until Wednesday, June 1, 2016, or further order of the court." Aplt. App. at 058.

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*. On May 27, 2016, the parties filed the 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."), Aplt. App. at 059-061. The Joint Statement noted that "[o]n May 25, 2016, at approximately 2:00 PM, the construction crew began

pouring the perimeter footings, which consist of a concrete and rebar structure following the perimeter of the History Center." *Id*. at 060. The parties further jointly stated that "[a]t this point, the remainder of the foundation of the History Center has not been completed." *Id*. at 061.

Four days later, on May 31, 2016, the District Court issued an order vacating its earlier TRO, stating that because "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." Aplt. App. at 080.

In vacating its prior TRO and denying Caddo Nation'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 064 (citing 42 U.S.C. § 4332(2)(C)).[10] The District Court, however, concluded the Caddo Nation could not establish the requisite likelihood of success on the merits, as a matter of law, because "[t]he Wichita Tribe satisfied its duty to consider alternatives under NEPA" (*id.* at 075), and further "[b]ased on the record before it, . . . the Wichita Tribe fulfilled its consultation responsibilities under

[10] 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." Aplt. App. at 065.

NHPA." *Id.* at 080. The District Court did not address the Wichita Tribe's failure to obtain the consent of the Caddo and Delaware Nations.

Because the District Court determined the Caddo Nation could not establish a likelihood of success on the merits, as a matter of law, the Court did not consider the additional three factors necessary to the provision of injunctive relief. *Id*. Accordingly, the District Court's decision rests solely on the conclusion that the Wichita Tribe fully satisfied its obligations under NEPA and NHPA. *See id.* On May 7, 2016, Caddo Nation filed its Notice of Appeal "to the United States Court of Appeals for the Tenth Circuit from the District Court's May 31, 2016, Order . . . ." Aplt. App. at 081.

The District Court has yet to rule on the Caddo Nation's Motion for Preliminary Injunction.

2. Appellate Court Proceedings

On July 1, 2016, this Court gave Caddo Nation fourteen days to:

> File a memorandum brief describing any legal basis for this court to exercise jurisdiction over this appeal now. Alternatively, the appellant may file a notice indicating that it will rest on the argument regarding appellate jurisdiction presented in its motion seeking injunctive relief from this court pending appeal[.]

Order at 2, July 1, 2016 (ECF No. 01019650129). On July 14, 2016, Caddo Nation filed its Notice to Rest on Argument Presented in Motion for Injunctive Relief Pending Appeal. Aplt. Notice, July 14, 2016, ECF No. 01019656721.

Subsequently, on July 14, 2016, this Court instructed the Wichita Tribe and elected officials "to provide any additional argument regarding appellate jurisdiction." Order at 1, July 14, 2016 (ECF No. 01019657196). The Wichita Tribe and elected officials filed their Brief Concerning Lack of Jurisdiction on July 21, 2016. Aplee. Br. Concerning Lack of Jurisdiction, July 21, 2016 (ECF No. 01019660859).

This Court then issued an Order on August 11, 2016, stating that "[u]pon careful consideration, the question of this court's jurisdiction to review the district court decision being appealed here is referred to the panel of judges that will decide this appeal on the merits." Order at 1, August 11, 2016 (ECF No. 01019671034). This Court's August 11 Order further stated that "[t]he court's consideration of the jurisdictional issue will benefit from complete briefing of all issues involved in this appeal and plenary review following completion of merits briefing." Order at 2.

The record on appeal was complete as of August 25, 2016. *See* Notice, Aug. 25, 2016 (ECF No. 01019678091).

III. Statement of Issues Presented for Review

1. Whether the District Court abused its discretion when it denied the Caddo Nation's requested injunctive relief based on the conclusion that the Caddo Nation could not establish the requisite likelihood of success on the merits for its claim under NHPA?

2. Whether the District Court abused its discretion when it denied the Caddo Nation's requested injunctive relief based on the conclusion that the Caddo Nation could not establish the requisite likelihood of success on the merits for its claims under the APA, alleging violations of NEPA?

IV. Summary of Argument

There is no dispute that the land at issue is jointly-owned and held in trust by the Federal Government for the mutual benefit of three Tribal Nations. There is no dispute that this particular tract of jointly-owned lands is the location of the former Riverside Indian Boarding School. There is no dispute that at one time, Caddo children were forcibly removed from their homes and placed in this school, where, tragically, some lost their lives and were buried on the jointly-owned lands. There is no dispute that these lands hold significant cultural and historic significance to the Caddo Nation. Furthermore, there is no dispute that in accepting the federal funding from HUD, triggering NEPA and NHPA's protections, the Wichita Tribe willingly assumed the agency's duties and responsibilities to engage in the sovereign government-to-government consultation with the Caddo Nation that NHPA commands. Finally, there is no dispute that the Wichita Tribe's efforts to engage in good faith consultation under NHPA §106 consist of nothing more than

sending one single letter at a time when the Wichita Tribe knew the Caddo Nation government—because it had been temporarily enjoined by the Federal Government—would not receive the letter. The only question, therefore, is whether the Wichita Tribe—having assumed HUD's duties under the law—made a good faith effort to effectuate them. As the facts and law discussed below demonstrate, the Wichita Tribe did not.

The District Court, therefore, abused its discretion when it concluded that merely sending a single letter—with no reasonable expectation that the letter would actually be received—satisfies NHPA's requirement for "good faith consultation" under § 106, and that as a result, Caddo Nation could not establish the requisite likelihood of success on the merits to warrant injunctive relief. In this instance, the Wichita Tribe's reliance on one letter alone "confuse[s] 'contact' with [NHPA's] required 'consultation.'" *Quechan Tribe of Fort Yuma Indian Reservation v. U.S. Dep't of Interior*, 755 F. Supp. 2d 1104, 1118 (S.D. Cal. 2010).

The District Court further abused its discretion when it concluded that the Wichita Tribe has fully complied with its obligation to consider alternatives under NEPA, and that as a result, the Caddo Nation could not demonstrate the requisite likelihood of success on the merits to warrant injunctive relief. The Wichita Tribe's EA admits—and the Tribe does not dispute—the Tribe *did not* consider any

alternatives. NEPA mandates the consideration of alternatives,[11] and thus the District Court's conclusion here constitutes an error as a matter of law. Moreover, the District Court abused its discretion when it found that mere publication of the FONSI in a newspaper satisfied NEPA's public notice requirement.[12]

For these reasons, and the reasons articulated more fully below, the Caddo Nation respectfully requests reversal of the District Court's May 31 Order and the provision of immediate injunctive relief.

V. Argument

A. 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); *Davis v. Mineta*, 302 F.3d 1104, 1110–11 (10th Cir. 2002). "A district court abuses its discretion where it commits a legal error or relies on clearly erroneous factual findings, or where there is no rational basis in the evidence for its ruling." *Davis*, 302 F.3d at 1111 (internal citations omitted). This Court

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[11] *See* 42 U.S.C. § 4332(E) (noting agencies shall "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal . . . ."); 40 C.F.R. § 1508.9(b) (stating an EA "[s]hall include . . .alternatives as required by section 102(2)(E) . . . .").

[12] *See* 24 C.F.R. § 58.43(a) ("As a minimum, the responsible entity must send the FONSI notice to individuals and groups known to be interested in the activities, to the local news media, to the appropriate *tribal*, local, State and Federal agencies . . . .") (emphasis added).

"examine[s] the district court's underlying factual findings for clear error, and its legal determinations *de novo*." *Id.*

To be entitled to injunctive relief, Caddo Nation "must establish that [the Nation] is likely to succeed on the merits, that [the Nation] is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [the Nation's] favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

B. The District Court Abused its Discretion in Concluding that Caddo Nation Cannot Establish a Likelihood of Success on the Merits of the Nation's NHPA Claim

The District Court abused its discretion when—in reliance on an erroneous conclusion of law—it determined that the Caddo Nation could not establish the requisite likelihood of success to warrant injunctive relief because the Wichita Tribe had fully complied with its obligations under NHPA. The District Court's conclusion cannot be squared with this Court's own authority, specifically this Court's decision in *Pueblo of Sandia*, wherein the Court made clear that attempting to effectuate consultation through a method the agency knows will fail does not—and cannot—satisfy the agency's duty and obligation to engage in good faith § 106 consultation. *See Pueblo of Sandia v. United States*, 50 F.3d 856, 860 (10th Cir. 1995).

Here, there is no dispute that the Wichita Tribe sent its single, solitary January 2015 letter to Caddo Nation at a time when the Tribe knew Caddo Nation's government had been enjoined. Moreover, instead of following up *one month later*—in February 2015—when the Wichita Tribe knew the Caddo Nation Government had been re-instated and could once again receive mail at its headquarters, the Wichita Tribe made no attempt to follow up at all. And, in February 2016, when Caddo Nation's Chairman learned of the January 2015 letter and informed the Wichita Tribe that the Nation wanted to engage in consultation, President Parton refused. Even in April 2016—a good two weeks before Wichita Tribe stated it would begin to pour concrete—the Tribe once again refused to allow the Caddo Nation to consult and perform GPR and other tests to ensure Caddo remains and cultural resources would not be disturbed by the Tribe's construction. This conduct does not constitute good faith consultation under federal law.

1. NHPA Requires a Good Faith Effort to Engage in Consultation with Indian Tribes

The NHPA speaks directly to the requirement that the federal agency—or here, the Wichita Tribe—consult with Indian Tribes through the § 106 process. Specifically, the Act states: "In carrying out its responsibilities . . . , a Federal agency shall consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to property described in subsection (a)." 54 U.S.C. § 302706(b). That is, "[t]he [106] process is designed to foster

communication and consultation between agency officials, the SHPO, and other interested parties such as Indian tribes, local governments, and the general public." *Pueblo of Sandia v. United States*, 50 F.3d 856, 859 (10th Cir. 1995).

The governing agency created by NHPA—the Advisory Council on Historic Preservation (the "Council" or "ACHP")—has "established regulations for federal agencies to follow in complying with section 106 [of the NHPA]." *Id*. Federal courts afford the Council's regulations and guidance significant deference in the administration of NHPA. *See CTIA-Wireless Ass'n v. F.C.C.*, 466 F.3d 105, 116 (D.C. Cir. 2006) ("Congress has entrusted one agency with interpreting and administering the section 106 of the NHPA: the Council.").

The Council's Guidebook makes clear that consultation requires more than sending a single letter or making one attempt to contact a Tribe. Indeed, according to the Council, "[c]onsultation constitutes more than simply notifying an Indian Tribe about a planned undertaking." *Consultation with Indian Tribes in the Section 106 Review Process*: *A Handbook*, ACHP Office of Native American Affairs ("ONAA") 6 (Dec. 2012), http://www.achp.gov/docs/consultation-indian-tribe-handbook.pdf. Furthermore, the 2000 regulations further expressly recognize that respect for tribal sovereignty is a guiding principle of § 106 consulting. *See* 36 C.F.R. §§ 800.2(c)(2)(ii)(B)-(C) ("Consultation with an Indian tribe must

recognize the government-to-government relationship between the Federal Government and Indian tribes.").

"Consultation means the process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them regarding matters arising in the section 106 process." 36 C.F.R. § 800.16(f). To comply with § 106, an agency official must "ensure" that the process provides Tribes with "a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties . . . articulate its views on the undertaking's effects on such properties, and participate in the resolution of adverse effects." 36 C.F.R. § 800.2(c)(2)(ii)(A); *see also* 36 C.F.R. § 800.2(c)(2)(ii)(B) (requiring that agencies put forth a "reasonable and good faith effort" to consult with Tribes in a "manner respectful of tribal sovereignty.").

As one court has interpreted the implementing regulations, "[t]he consultation requirement is not an empty formality; rather, it 'must recognize the government-to-government relationship between the Federal Government and Indian tribes' and is to be 'conducted in a manner sensitive to the concerns and needs of the Indian tribe.'" *Quechan Tribe of Fort Yuma Indian Reservation v. U.S. Dep't of Interior*, 755 F.Supp. 2d 1104, 1108-09 (S.D. Cal. 2010) (quoting 36 C.F.R. § 800.2(c)(2)(ii)(C)).

2. The Wichita Tribe Failed to Engage in Good Faith Consultation

The Wichita Tribe's efforts to engage in consultation amounted to nothing more than sending a single letter in January 2015. This Court, however, has interpreted the aforementioned regulations to hold that mailing a letter alone does not satisfy the good faith consultation requirement embodied in § 106. *See Pueblo of Sandia*, 50 F.3d at 860. Indeed, "mere *pro forma* recitals do not, by themselves, show [the agency] actually complied with the law." *Quechan Tribe*, 755 F.Supp. at 1113 (concluding agency failed to satisfy § 106 duty to consult despite having sent a letter "replete with recitals of law (including Section 106), professions of good intent, and solicitations to consult with the Tribe."). Affording an Indian Nation with a reasonable opportunity requires more than sending a single letter full of buzzwords. *See id.*

Federal courts interpreting NHPA have instead held that the Act "requires an agency to 'stop, look and listen' . . . ." *Comanche Nation v. United States*, No. CIV-08-849-D, 2008 WL 4426621, at *18 (W.D. Okla. Sept. 23, 2008). In the present case, the "documentation that might support a finding that true government-to-government consultation occurred is *painfully thin*" (*Quechan Tribe*, 755 F.Supp. 2d at 1118 (emphasis added)), and as a result, the District Court's conclusion that the Wichita Tribe satisfied its § 106 duty to consult constitutes an abuse of discretion and an erroneous conclusion of law.

Under this Court's decision in *Pueblo of Sandia*, the Wichita Tribe's use of a method the Wichita Tribe knew would fail did not satisfy the Tribe's duty and obligation to engage in good faith § 106 consultation. In *Pueblo of Sandia*, the Forest Service had "mailed letters to local Indian tribes" requesting detailed information to document the historic significance and location of the properties that would be affected by the agency action. 50 F.3d 856, 860 (10th Cir. 1995). The Tribes, however, did not provide the information requested in the agency's letter. *Id.* Having made a request for information that the Tribes failed to provide, the Forest Service considered its consultation efforts complete. *See id.* This Court evaluated the efficacy of the agency's consultation efforts and concluded that a "mere request for information is not []sufficient" to satisfy NHPA § 106 consultation. *Id.* That is, this Court concluded that the Forest Service's efforts failed to satisfy its obligations under the law because the agency was aware at the time that written correspondence would more than likely fail to secure actual consultation with the Tribes.

Like the Forest Service in *Pueblo of Sandia*, the Wichita Tribe knew, at the time, that sending the Caddo Nation a letter in January 2015 would more than likely fail to secure actual consultation. As of October 6, 2014—three months before the Wichita Tribe sent its January 9, 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." Aplt. App. at 516-17. The Wichita Tribe admitted, on December 12, 2014, that the Tribe was aware Caddo Nation was experiencing an "internal dispute." Aplt. App. at 248-55.

The dispute, however, was resolved two months after the Wichita Tribe made the aforementioned statement. Under the supervision of the BIA, the Caddo Nation's special election was held on January 10, 2015 (one day after the Wichita Tribe asserts it sent its letter requesting consultation), and on February 11, 2015, the Caddo Nation's government was re-instated. Aplt. App. at 524. Thus, just one month after the Wichita Tribe sent a letter it knew it would not be received, Caddo Nation's government was re-instated.

Comanche Nation v. United States further supports reversal of the District Court's denial of injunctive relief. In *Comanche Nation*, the United States Army stated that because the Army had sent a letter to the Comanche Nation informing the Nation of its intention to construct of a 43,000 square foot building and had received no response, the United States Army had "fulfilled its responsibility to make a reasonable and good faith effort to consult with the Comanche Nation...." *Comanche Nation*, No. CIV-08-849-D, 2008 WL 4426621, at *16 (W.D. Okla. Sept. 23, 2008). The Army further asserted it had fully satisfied § 106's good faith

consultation requirement because the objections that Comanche Nation did ultimately voice were "asserted after the close of the 30 day comment period announced in the [Army's] August 10, 2007 Section 106 letter," and as a result, "were brushed off by [the Army] as untimely." 2008 WL 4426621, at *19.

The District Court rejected the Army's assertion that the belated timing of the Comanche Nation's objections to the construction project absolved the agency of any obligation to consider the Nation's objections and engage in § 106 consultation. *See* 2008 WL 4426621, at *19. The *Comanche Nation* District Court reasoned that NHPA "requires an agency to 'stop, look and listen,'" and "the evidence in the present case suggests that [the Army] merely paused, glanced, and turned a deaf ear to warnings of adverse impact." *Id.* Specifically, the District Court found that the Army could not dismiss the Comanche Nation's concerns that unmarked graves would be harmed simply because the Nation's concerns were expressed "after the close of the 30 day comment period announced in the . . . Section 106 letter," and accordingly, the District Court concluded that the Army's consultation "efforts fell short of the reasonable and good faith efforts required by the law." *Id*. at *19.

Like the agency in *Comanche Nation*, the Wichita Tribe dismissed Caddo Nation's objections on the basis that they were "untimely." *See* Aplt. App. at 089 (arguing that Wichita Tribe invited Caddo Nation to consult but Caddo Nation

"failed to respond or object to construction until approximately February, 2016."). Thus, the Wichita Tribe cannot object to Caddo Nation's attempts to engage in consultation solely on the basis that they are untimely, and as a result, the Tribe's consultation efforts fall "short of the reasonable and good faith efforts required by the law." *See Comanche Nation*, No. CIV-08-849-D, 2008 WL 4426621, at *19 (W.D. Okla. Sept. 23, 2008).[13]

The District Court's conclusion that the Wichita Tribe's January 9, 2015 letter fully satisfied the Tribe's duty to engage in good faith consultation under NHPA § 106 constitutes an erroneous conclusion of law, and as a result, an abuse of discretion that warrants this Court's reversal.

C. The District Court Abused its Discretion in Concluding that Caddo Nation Cannot Establish a Likelihood of Success on the Merits of the Nation's NEPA Claims

The District Court further denied Caddo Nation's request for injunctive relief on the grounds that the Caddo Nation could not establish the requisite likelihood of success on the merits, concluding that the Caddo Nation's NEPA

[13] In this regard, the District Court's reliance on *Village of Logan v. U.S. Dep't of Interior* is misplaced. *See* Aplt. App. at 079 (citing *Village of Logan v. U.S. Dep't of Interior*, 577 F. App'x 760, 770 (10th Cir. 2014)). In *Logan*, the plaintiff "knew" of the ongoing environmental reviews and openly admitted it "made a conscious decision" not to accept the agency's invitation to participate. 577 F. App'x at 770. In contrast, Caddo Nation made no "conscious decisions" regarding the Wichita Tribe's invitation to consult until Caddo Nation was made aware of the Tribe's plans to construct in February 2016.

claims failed as a matter of law. *See* Aplt. App. at 075. To reach this conclusion, the District Court found that the Wichita Tribe satisfied its obligations under NEPA; this conclusion, however, constitutes an abuse of discretion and therefore warrants this Court's reversal.

1. The District Court Erred When It Concluded the Wichita Tribe's Failure to Consider Alternatives Complied with NEPA

In denying Caddo Nation's request for injunctive relief, the District Court concluded that "[t]he Wichita Tribe satisfied its duty to consider alternatives under NEPA" (Aplt. App. at 075) despite the fact the Wichita Tribe did not consider a single alternative. To be clear, the Wichita Tribe's EA openly admits it did not consider a single alternative to the construction of the History Center. Aplt. App. at 122.

Federal law, however, does not allow the Wichita Tribe to circumvent the consideration of alternative locations for the Tribe's History Center, nor does it permit the Tribe to avoid considering alternative programs that would also preserve the Tribe's history. Specifically, NEPA requires that for all "major [f]ederal actions. . . ," the agency must provide "a detailed statement [of] . . . alternatives to the proposed action . . . ." 42 U.S.C. § 4332(C)(iii). As this Court has explained, "[t]he 'heart' of an EIS is its exploration of possible alternatives to the action an

agency wishes to pursue." *New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 708 (10th Cir. 2009) (citing 40 C.F.R. § 1502.14).

To satisfy NEPA's required alternatives analysis, the agency (here, the Wichita Tribe) is required to "*rigorously* explore and objectively evaluate all reasonable alternatives" and give each alternative "substantial treatment" in the environmental impact statement. 40 C.F.R. §§1502.14(a)-(b) (emphasis added). Instead of a sentence stating the agency will not consider alternatives, the agency must "provide *legitimate* consideration to alternatives . . . ." *New Mexico*, 565 F.3d at 711 n.32 (emphasis added). If, "after detailed study," the agency—or here the Wichita Tribe—determines that the considered alternatives will not serve as a sufficient alternative to the proposed action, then the EIS must "briefly discuss the reasons for their having been eliminated.'" *Oregon Nat. Desert Ass'n v. Bureau of Land Mgmt.*, 625 F.3d 1092, 1100 (9th Cir. 2010) (quoting 40 C.F.R. § 1502.14).

Nothing in the Wichita Tribe's EA supports the conclusion that the Tribe gave "legitimate" consideration or undertook a "detailed study" to consider alternatives. Instead, the Wichita Tribe's one sentence statement in its EA demonstrates that the Tribe did not give a single alternative "substantial treatment in the environmental impact statement." 40 C.F.R. § 1502.14(b); *see* Aplt. App. at 122. Although this Court has concluded that "[a] properly-drafted EA must include a discussion of appropriate alternatives to the proposed project" (*Davis v. Mineta*,

302 F.3d 1104, 1120 (10th Cir. 2002)), the Tribe's EA contains *no discussion* of appropriate alternatives. The Wichita Tribe's EA simply states that the Tribe:

> [H]as not been able to consider an alternative site because of the site which is limited in area for development due to the trees and the need to continue to develop the existing area to create a destination business site.

Aplt. App. at 122. This is not a consideration—or even short discussion—of alternatives. This is a statement that the Tribe elected *not* to consider alternatives. The Wichita Tribe's failure to consider—and discuss—a single alternative location for its proposed History Center renders its EA defective and void under federal law.

The Wichita Tribe states that its primary purpose for constructing the History Center is to preserve the Tribe's history; however, there is no rationale reason to believe that the Tribe's history could not be equally preserved and showcased in another building that does not threaten to damage or destroy Caddo remains. The EA's stated bases for avoiding the consideration of alternatives—specifically that there are trees on this piece of jointly owned WCD land, and the fact that the Wichita Tribe would like to transform this land into a "destination business site" (Aplt. App. at 122)—do not justify departure from NEPA's requirement that alternatives be considered. *See Davis*, 302 F.3d at 1122 (noting

that where the "[a]lternatives were dismissed in a conclusory and perfunctory manner" the agency's EA does not comply with NEPA).

Furthermore, although the Wichita Tribe's EA attempts to redefine the purpose of the History Center as transforming the jointly-owned WCD lands into a "business venture site"—federal law does not permit the Tribe to alter the true definition of its purpose so that all other alternative locations are ruled out before they are even considered. *See Davis*, 302 F.3d at 1119 (noting an agency "could not define the project so narrowly that it foreclosed a reasonable consideration of alternatives."); *see also Simmons v. U.S. Army Corps of Eng'rs*, 120 F.3d 664, 666 (7th Cir. 1997) (concluding that NEPA does not permit "an agency to . . . contrive a purpose so slender as to define competing 'reasonable alternatives' out of consideration (and even out of existence).").

The District Court further abused its discretion when it concluded the Wichita Tribe had fully complied with NEPA because the Caddo Nation "does not suggest alternative sites . . . ." Aplt. App. at 74. Federal law does not place the burden on Caddo Nation to select or identify the alternative locations that the Wichita Tribe should have considered. *See Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 765 (2004) (holding that "the agency bears the primary responsibility to ensure that it complies with NEPA . . . ."). Instead, the burden is on the Wichita Tribe to either rigorously explore alternatives with substantial discussion in the

EA, (40 C.F.R. § 1502.14(a)), or, in the alternative, demonstrate with evidence in the record that the failure to consider alternatives is reasonable. *See Davis*, 302 F.3d at 1121 (concluding the agency's failure to consider actual alternatives violates NEPA because "nothing in the record [] justif[ies] the failure of the EA to study the alternatives."). Here, the Wichita Tribe has done neither, and as a result, the Tribe's EA fails to meet the bare minimum threshold imposed by NEPA.

The Wichita Tribe's stated objective is the preservation of Wichita culture and history. It is not unreasonable, therefore, to require the Wichita Tribe to comply with NEPA and give a modicum of consideration to other buildings, programs, and means through which the Tribe may preserve its culture and history without disturbing the history and cultural resources of another Indian Nation.

2. The Wichita Tribe Violated NEPA when it Failed to Send the FONSI Directly to Caddo 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 . . . [the Wichita Tribe] satisfied NEPA's notice requirements." Aplt. App. at 075.

NEPA's implementing regulations make clear that "[m]ere publication of the FONSI is not [] sufficient." *Diné Citizens Against Ruining Our Env't v. Klein*, 747 F. Supp. 2d 1234, 1261 (D. Colo. 2010). Instead, NEPA's regulations required the Wichita Tribe to separately "send the FONSI notice . . . *to the*

appropriate tribal, local, State and Federal agencies . . . .” 24 C.F.R. § 58.43(a). (emphasis added). This same regulation states that the responsible entity “*may also* publish the FONSI notice in a newspaper of general circulation.” *Id.* (emphasis added). “May also publish” does not equal “need only publish.” Publishing the FONSI notice in the local newspaper, therefore, did not absolve the Wichita Tribe of its obligation to send the FONSI directly to Caddo Nation, as required by § 58.43.

The District Court’s conclusion that the Wichita Tribe was not required to send the FONSI directly to Caddo Nation in addition to publishing in a newspaper, therefore, constitutes an abuse of discretion that warrants this Court’s reversal.

D. The Wichita Tribe’s Construction Threatens Irreparable Harm

The District Court, in denying Caddo Nation’s request for injunctive relief, did not reach a conclusion as to whether the Wichita Tribe’s construction on the jointly-owned WCD lands would result in irreparable harm. *See* Aplt. App. at 080. Through allegations and affidavits, however, Caddo Nation has demonstrated that the Wichita Tribe’s construction and operation of a permanent structure on lands known to contain Caddo cultural sites and human remains threatens irreparable harm sufficient to warrant the imposition of injunctive relief. *See, e.g., Colorado River Indian Tribes v. Marsh*, 605 F. Supp. 1425, 1441 (C.D. Cal. 1985)

(concluding injunctive relief is appropriate because "irreparable harm to the cultural and archeological resources [of the Tribe] as a result of the Development is possible"). Furthermore, the Wichita Tribe's failure to comply with the procedural precepts of NEPA establishes harm as a matter of law. *See Davis v. Mineta*, 302 F.3d 1104, 1115 (10th Cir. 2002) (holding under NEPA, "harm . . . may be presumed when an agency fails to comply with the required NEPA procedure.").

Finally, because the Caddo Nation has asserted harms for which there is no monetary relief, injunctive relief is appropriate to ensure Caddo cultural sites and remains are not further, and irreparably, destroyed. *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) (concluding the Department of Interior's approval of a solar energy project would result in irreparable harm because the project would be located on land containing "known historical sites" to which the "Tribe attaches cultural and religious significance to many if not most of the [sites]" and "if the tribe hasn't been adequately consulted and the project goes ahead anyway, this legally-protected procedural interest would be effectively lost."); *see also Comanche Nation*, No. CIV-08-849-D, 2008 WL 4426621, at *19 (W.D. Okla. Sept. 23, 2008) (the "construction of a permanent structure on a site considered sacred by the Comanche people . . . would constitute irreparable harm.").

The provision of injunctive relief is particularly appropriate here because there is *no* dispute that Caddo children were, at one time, buried on these lands, and the Wichita Tribe has repeatedly refused to allow Caddo Nation to undertake the requisite GPR testing to ensure no Caddo are buried on the precise lands where the Wichita Tribe now seeks to construct and operate its History Center. Courts have readily determined that a threat that human remains may be disturbed constitutes irreparable harm sufficient to award injunctive relief. *See*, *e.g.*, *Yankton Sioux Tribe v. U.S. Army Corps of Eng'rs*, 83 F. Supp. 2d 1047, 1060 (D.S.D. 2000) (concluding that the threat of "damage . . . [to] human remains which are sacred and dear to the Tribe" constitutes irreparable harm); *see also Yankton Sioux Tribe v. U.S. Army Corps of Eng'rs*, 209 F. Supp. 2d 1008, 1022 (D.S.D. 2002) (finding "there is a significant threat of irreparable harm to the plaintiffs if there is further exposure of human remains . . . .").

Furthermore, there can be no question that the present case involves the irreparable harm that NEPA and NHPA are designed to prevent: that is, the harm that results when important determinations are made by agencies—or Tribal Nations who undertake federal Trustee duties and obligations—without good faith consultation. *See*, *e.g.*, *Brady Campaign to Prevent Gun Violence v. Salazar*, 612 F. Supp. 2d 1, 24 (D.D.C. 2009), *judgment entered*, No. CIV.A. 08-2243 CKK, 2009 WL 8161704 (D.D.C. July 30, 2009), *and case dismissed*, No. 09-5093,

2009 WL 2915013 (D.C. Cir. Sept. 8, 2009) (NHPA and the NHPA are "extremely important statutory requirement[s]" and the "lack of an adequate environmental consideration looms as a serious, immediate, and irreparable injury."); *Nulankeyutmonen Nkihtaqmikon v. Impson*, 503 F.3d 18, 28 (1st Cir. 2007) ("The irreparable harm consists of the added risk . . . when governmental decisionmakers make up their minds without having before them an analysis . . . of the likely effects of their decision . . . .").

Although the Wichita Tribe commenced pouring construction no less than one hour after Caddo Nation filed its request for injunctive relief in May, the imposition of injunctive relief today would still serve to preserve and protect Caddo Nation's cultural sites on the jointly-owned WCD lands. Enjoining construction at this stage and preventing the Wichita Tribe from opening and operating the History Center would allow for the Caddo Nation to undertake GPR testing immediately to ensure that any further construction or operations would not irreparably harm Caddo cultural artifacts and remains.

Finally, the destruction of sites, and human remains, on the former site of the Riverside Indian Boarding School constitutes damage that cannot be compensated by any type of monetary award. *See Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1250 (10th Cir. 2001) (Irreparable harm is suffered when "the injury can[not] be adequately atoned for in money, or when the district court

cannot remedy [the injury] following a final determination on the merits."). Consequently, the Caddo Nation has demonstrated that the Wichita Tribe's current construction necessitates this Court's intervention and imposition of injunctive relief.

E. The Balance of Equities Tips in Favor of Caddo Nation

The District Court, in denying Caddo Nation's request for injunctive relief, did not reach a conclusion as to whether the balance of equities tips in the Caddo Nation's favor. *See* Aplt. App. at 080; *see also Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (noting a requisite element of injunctive relief is the demonstration that "the balance of equities tips in [the plaintiff's] favor"). Nonetheless, in this instance, the balance of equities favors the Caddo Nation and supports the imposition of injunctive relief. Under this Court's applicable authority, the threatened destruction of Caddo cultural items and Caddo human remains outweighs any potential financial harm the Wichita Tribe may incur from a delay in construction or operation of the History Center once fully constructed.

Furthermore, the Wichita Tribe's questionable conduct—namely, the Tribe's decision to commence construction and pour concrete a mere one hour after learning that Caddo Nation would be seeking legal relief—demonstrates that the equities tip heavily in Caddo Nation's favor.

Moreover, the Wichita Tribe elected to commence construction after rejecting Caddo Nation's request for a two-week delay in the commencement of construction to allow for GPR testing in early April, and despite the fact that Caddo Nation informed the Tribe it had never received the Tribe's letter requesting consultation. Given that the Wichita Tribe elected to press forward under these circumstances, "the fact that [the Wichita Tribe is] now . . . somewhat desperate after having invested a great deal of effort and money is a problem of their own making and does not weigh in their favor." *Quechan Tribe*, 755 F. Supp. 2d at 1121 (S.D. Cal. 2010); *see also Davis*, 302 F.3d at 1116 (noting defendants have "jumped the gun" by entering into contractual obligations "that anticipated a pro forma result" therefore "defendants are largely responsible for their own harm."); *Kos Pharm., Inc. v. Andrx Corp.*, 369 F.3d 700, 728 (3d Cir. 2004) ("We have often recognized that 'the injury a defendant might suffer if an injunction were imposed may be discounted by the fact that the defendant brought that injury upon itself.'").

Accordingly, the balance of harms/equities tips heavily in the Caddo Nation's favor and supports the imposition of injunctive relief to ensure Caddo Nation's cultural resources and human remains are not further harmed by the Wichita Tribe's continued construction and operation on the site of the former Riverside Indian Boarding School.

F. Public Interest Favors Granting Injunctive Relief

The District Court likewise reached no conclusion as to whether an injunction would serve the public interest. *See* Aplt. App. at 080. However, as shown below, the public interest will be served by an injunction that protects the Caddo Nation's cultural resources and prevents further irreparable harm that will otherwise continue until a federal court is able to fully review the merits of Caddo Nation's claims. *See, e.g.*, *Colorado River Indian Tribes v. Marsh*, 605 F. Supp. 1425, 1440 (C.D. Cal. 1985) (granting Tribe's request for injunctive relief because the Court is "mindful of the advancement of the public interest in preserving the [Tribe's cultural] resources.").

The Caddo Nation's claims readily meet this fourth and final criteria since, as courts have recognized, enforcing the procedural requirements of both NEPA and NHPA "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) (concluding that when defendant has not complied with the procedural requirements of NEPA or NHPA, "[s]uspending a project until that [compliance] has occurred [] comports with the public interest."); *Fund for Animals, Inc. v. Espy*, 814 F. Supp. 142, 152 (D.D.C. 1993) (finding "a strong public interest in meticulous compliance with the law by public officials.").

Furthermore, ensuring compliance with these federal laws serves a significant public interest in these circumstances in particular: specifically, where a Tribe seeks to remedy the failure of the Federal Government to consult with the Tribe as a sovereign nation. That is, "in enacting NHPA Congress has adjudged . . . the rights of Indian tribes to consultation to be in the public interest." *Quechan Tribe*, 755 F. Supp. 2d at 1122.

Indeed, Congress' conviction that consultation with Indian Tribes serves the public interest is made evident by the fact that in 1992, Congress took specific action to amend NHPA and include a *statutory* requirement that federal agencies engage in good faith consultation with Indian Tribes. 54 U.S.C. § 302706(b).[14] In doing so, Congress confirmed that the Federal Government has a trust duty and obligation to engage in § 106 consultation with Tribal Nations. *Id.* In this instance, the Wichita Tribe willingly assumed and accepted the Federal Government's trust duty and obligation to consult with Caddo Nation. As a result, permitting the Wichita Tribe to discard that obligation and shirk the responsibility to fully and faithfully engage in good faith consultation with the Caddo Nation would violate the public interest, as well as the integrity of the United States.

[14] The NHPA states: "[i]n carrying out its responsibilities . . . a Federal agency shall consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to property . . . ." 54 U.S.C. § 302706(b).

VI. Conclusion

Because the District Court's denial of the Caddo Nation's request for injunctive relief constitutes an abuse of discretion, and because the Caddo Nation can meet the requisite standards for injunctive relief under Fed. R. Civ. P. 65 (including the jurisdictional requisites, showing of likelihood of success on appeal, the threat of irreparable harm, the balance of equities, and finally that injunctive relief will serve the public interest), the Caddo Nation respectfully asks this Court to reverse the District Court's denial of Caddo Nation's Emergency Motion for Temporary Restraining Order and Preliminary Injunction (Aplt. App. at 039), and further requests this Court to grant immediate injunctive relief enjoining the Wichita Tribe from continuing construction and/or operation of its History Center on the jointly owned WCD lands until good faith consultation under NHPA § 106 has taken place.

Respectfully submitted this 3rd day of May, 2017.

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ORAL ARGUMENT REQUESTED

The Caddo Nation requests oral argument in this appeal. This case presents unique questions involving the application of federal law to one Tribe's use of federal funds to develop of lands that are jointly-owned and held trust by the United States for the benefit of three Tribes. Oral argument will permit counsel for all parties to assist the Court in understanding these issues and the context in which they arise.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7) because, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 10th Cir. Local Rule 32(b), the brief contains 12,872 words. I relied upon my word processor to obtain the count and it is Microsoft Word 2013.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) 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 Office Word 2013 in Times New Roman, 14 point font.

Date: May 3, 2017

/s/ Mary Kathryn Nagle
Mary Kathryn Nagle

CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY REDACTIONS

I certify that: (1) all required privacy redactions have been made in accordance with Fed. R. App. P. 25(a)(5) and 10th Cir. Rule 25.5; (2) every document submitted in digital form or scanned PDF format is an exact copy of the hard copy filed with the Clerk when called for; and (3) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, Symantec Endpoint Protection v. NIS-22.8.0.50, last updated May 3, 2017, and according to the program, are free from viruses.

Dated this 3rd day of May, 2017.

/s/ Mary Kathryn Nagle
Mary Kathryn Nagle

CERTIFICATE OF SERVICE

I, Mary Kathryn Nagle, hereby certify that on this 3rd day of May, 2017, 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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/s/ Mary Kathryn Nagle
Mary Kathryn Nagle

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

CADDO NATION OF OKLAHOMA	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. CIV-16-0559-HE
	)	
WICHITA AND AFFILIATED TRIBES, TERRI PARTON, in her official capacity as Tribal President of Wichita and Affiliated Tribes, JESSE E. JONES, in his official capacity as Vice President of the Wichita and Affiliated Tribes, MYLES STEPHENSON, JR., in his official capacity as Secretary of the Wichita and Affiliated Tribes, S. ROBERT WHITE, JR., in his official capacity as Treasurer of the Wichita and Affiliated Tribes, SHIRLEY DAVILA, in her official capacity as Committee Member of the Wichita and Affiliated Tribes, GLADYS WALKER, in her official capacity as Committee Member of the Wichita and Affiliated Tribes, and KAREN THOMPSON, in her official capacity as Committee Member of the Wichita and Affiliated Tribes	)	
	)	
Defendants.	)	

TEMPORARY RESTRAINING ORDER

Plaintiff Caddo Nation of Oklahoma filed this action against the Wichita and Affiliated Tribes and other defendants seeking declaratory and injunctive relief. Plaintiff's claims are based on its concerns that defendant is building a history center on a

site that Caddo elders believe holds the remains of Caddo ancestors and cultural artifacts. Plaintiff claims the land on which the center is being built is held jointly in trust by the United States for the Wichita Tribe, the Caddo Nation and the Delaware Nation. Plaintiff filed a motion seeking a temporary restraining order ("TRO") enjoining defendants from continuing construction of the history center until the court rules on its motion for preliminary injunction.

A hearing was held this date regarding plaintiff's motion for TRO. Plaintiff argued that defendants failed to comply with its obligations under the National Environmental Policy Act and National Historic Preservation Act. Plaintiff also asserted that defendants has begun to pour the concrete floor for the history center and claimed that, once completed, the concrete would prevent it from being able to conduct the ground-penetrating radar required to determine whether any human remains, funerary objects or cultural items are located at the building site.

At the end of the hearing the court concluded that, under the unusual circumstances existing here, a short TRO is warranted to maintain the status quo for a brief period until it has time to be advised of the status of the construction and consider the parties' submissions and arguments. *See* Gen. Motors Corp. v. Urban Gorilla, LLC, 500 F.3d 1222, 1226 (10th Cir. 2007) ("To obtain a [temporary restraining order], the movant must show: (1) a substantial likelihood of success on the merits; (2) irreparable harm to the movant if the injunction is denied; (3) the threatened injury outweighs the harm that the preliminary injunction may cause the opposing party; and (4) the injunction,

if issued, will not adversely affect the public interest."). The court 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.

IT IS HEREBY ORDERED: Defendants and their officers, agents and employees are enjoined from proceeding with any construction activities on the history center on the lands located one and one-quarter miles north of Anadarko until **Wednesday, June 1, 2016**, or further order of the court.

Because of the short term of the TRO, the court concludes the effect on defendants will be minimal and no security is required.

IT IS SO ORDERED.

Dated this 26th day of May, 2016.

JOE HEATON
CHIEF U.S. DISTRICT JUDGE

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

CADDO NATION OF OKLAHOMA Plaintiff, vs. WICHITA AND AFFILIATED TRIBES, ET AL., Defendants.	)	NO. CIV-16-0559-HE

ORDER

Plaintiff Caddo Nation of Oklahoma ("Caddo Nation") filed this action against defendants Wichita and Affiliated Tribes ("Wichita Tribe), Terri Parton, President of the Wichita Tribe, and other elected officials of the Wichita Tribe, seeking declaratory and injunctive relief. Plaintiff's claims are based on its concerns that defendant is building a history center on a site that Caddo elders believe may hold the remains of Caddo ancestors and cultural artifacts. Plaintiff asserts the land on which the center is being built is held jointly in trust by the United States for the Caddo Nation, the Wichita Tribe and the Delaware Nation. It contends defendants have violated the Administrative Procedures Act, 5 U.S.C. § 701 *et seq.*, the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 *et seq.*; and the National Historic Preservation Act ("NHPA"), 54 U.S.C. §§ 302101 *et seq.*[1]

[1]*Federal courts generally review claims that an agency has violated NEPA and NHPA under the APA. See All. for the Wild Rockies v. Angelita Bulletts, 2016 WL 1734086, at *3 (D. Utah April 29, 2016) ("Because neither NEPA nor NFMA provides a private right of action, federal courts review claims that the FS violated these statutes under the APA."); San Juan Citizens All. v. Norton, 586 F. Supp. 2d 1270, 1282 (D.N.M. 2008) ("The parties have assumed that the APA is the source of judicial review for all three statutes at issue in this case. However, there is conflicting authority over whether a direct right of action exists under NHPA."); contra North Oakland Voters All. v.*

Plaintiff filed a motion seeking a temporary restraining order ("TRO") enjoining defendants from continuing construction of the history center until the court rules on its motion for preliminary injunction. A hearing on the motion was held on May 27, 2016, at which plaintiff argued that defendants failed to comply with its obligations under NEPA and NHPA. Plaintiff also asserted that defendants had begun to pour the concrete floor for the history center and claimed that, once completed, the concrete would prevent it from being able to conduct the ground-penetrating radar tests required to determine whether any human remains, funerary objects or cultural items are located at the building site.

The court concluded at the end of the hearing that, due to the unusual circumstances presented by the case, a short TRO was warranted to maintain the status quo for a brief period. The parties were directed to file a statement regarding the status of the construction site, which they have done. Because the pouring of the floor has not been completed, it appears the testing plaintiff seeks to perform is still possible.

Background[2]

The court will not detail the history of the ownership of the land on which the history center is being constructed. The property is held jointly in trust by the federal government for the Wichita Tribe, Caddo Nation and Delaware Nation ("WCD lands"), but a dispute exists regarding whether the Wichita Tribe has the right to the title to the property as the

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*City of Oakland, 1992 WL 367096, at *5 (N.D. Cal. Oct. 6, 1992) (private right of action exists to enforce NHPA).*

[2]*The facts, taken from the complaint, two declarations, and the parties' proffers at the TRO hearing are essentially undisputed. To the extent a fact is controverted, it will be noted.*

result of resolutions passed by the three tribes. In 2007 the tribes passed identical resolutions partitioning 600 acres of jointly held lands into three parcels for the exclusive use of each individual tribe. *See* Doc. #1-3;[3] defendants' TRO hearing exhibits 2-4; 14-15. They sought recognition of the conveyances by the Bureau of Indian Affairs ("BIA") and the matter is still pending without final resolution by the agency. *See id.*, exhibit 15. The Caddo and Delaware Nations have since attempted to rescind their resolutions. The parties' submissions indicate that all three tribes have, to one degree or another, relied on the assumption that at least a de facto partition of the land has occurred. The court is not, however, being asked to resolve that controversy and it does not prevent it from determining the dispute before it.

After having constructed a travel plaza on land designated for it under the partition arrangement, *see* defendants' TRO hearing exhibits 6-7,[4] the Wichita Tribe decided there was "a need to establish a permanent location to preserve the history of the original inhabitants of Oklahoma, namely the Wichita and Affiliated Tribes." Doc. #1-1. The Department of Housing and Urban Development ("HUD") approved a grant for the Wichita Tribe to construct a 4000 square foot building for a museum as part of the Wichita Historical Center.

The Wichita Tribe's use of HUD funds to construct its history center triggered the procedural protections of the National Environmental Policy Act and the National Historic Preservation Act . 42 U.S.C. § 4332(2)(C) (NEPA's procedural protections apply to "major

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[3]*Page references to briefs and exhibits are to the CM/ECF document and page number.*

[4]*The construction dates for the travel plaza are unknown, although the Environmental Assessment is dated June 7, 2012.*

Federal actions significantly affecting the quality of the human environment ...."); 54 U.S.C. § 306108 (NHPA's protection's apply to a "federally assisted undertaking in any State."). Pursuant to federal law, because of its acceptance of Community Development Block Grants funds from HUD, the tribe was allowed to "assume 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]."[5] 24 C.F.R. § 58.4; 42 U.S.C. § 5304(g); *see* North Oakland Voters All. v. City of Oakland, 1992 WL 367096, at *8 (N.D. Cal. Oct. 6, 1992). In conjunction with its construction of the travel plaza, the Wichita Tribe had similarly assumed statutory obligations under NEPA and NHPA, and the structure was built and has been operating apparently without any objections from plaintiff.

To comply with its duties under the federal acts, the Wichita Tribe sent identical letters dated January 9, 2015, to the Caddo Nation Tribal Historic Preservation Office,[6] the Delaware National Tribal Historic Preservation Office and the BIA Southern Plains Regional

[5]*This assumption of responsibility, pursuant to federal law and under which the Wichita Nation acts as a de facto government agency, provides a basis for the court to exercise jurisdiction over a sovereign Indian tribe. See North Oakland Voters All., 1992 WL 367096, at *9. However, the tribe also waived its sovereign tribal immunity in the Environmental Assessment. See Doc. #1-1, p. 11("The Wichita and Affiliated Tribes certifies to HUD that Terri Parton, in her capacity as President consents to accept the jurisdiction of the Federal Courts if an action is brought to enforce responsibilities in relation to the environmental review process and that these responsibilities have been satisfied.").*

[6]*The declarations attached to the complaint were prepared by the current and former Tribal Historic Preservation Officers("THPO") for the Caddo Nation. Neither held the position when the January 2015 letter was sent.*

Office advising them that HUD had approved a grant to fund the construction of the Wichita Historical Center, including "a single story 4000 S.F. building with concrete or asphalt parking spaces and roads." Defendants' TRO hearing exhibit 8; Complaint, ¶ 49. The letter included the project site and legal description of the property. It also stated:

> Please assist us in complying with the Federal Environment Review process by reviewing the project described and providing your comments of any potential impact on the environment within your jurisdiction. Your timely response will be appreciated."

Id. The Caddo Nation did not respond to the January 2015 letter. Doc. #1-3, pp. 3-4 & n.8. The 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. Complaint, ¶53. It supported its determination in the EA that the project would not affect any historic properties, by attaching the letter from the state history preservation officer ("SHPO"), which "detail[ed] an investigation and survey of cultural resources undertaken by an archeologist, John D. Northcutt, completed on April 6, 2015 ("Northcutt Report").[7] Complaint, ¶57. Mr. Northcutt stated in his report that the lands where the Wichita Tribe sought to construct its history center contained an archeological site, 34CD-352, which included artifacts dating back to the 1800's and had "some potential to produce more artifacts that relate to an 1870's/1880's period Indian school important to Oklahoma's history." Complaint,¶59. While he also stated that the site was

[7]*The court does not have a copy of the report or copies of other documents that might be helpful at least in providing some background information. Because of the timing of the events, it also does not have the benefit of any briefing from defendants.*

"considered possibly eligible for the National Register if future excavations find significant artifacts below the surface," *id*. at ¶60, the Wichita Tribe decided "'not to fund further archeological investigation' at that time." *Id.*

On May 22, 2015, the Wichita Tribe published in the *Anadarko Daily News* the notice regarding its construction project, which stated its finding of no significant impact on the environment and its intent to request that the funds for the project be released. Any person or group which disagreed with the determination or wished to comment on the project was directed to submit written comments by June 12, 2015. Defendants' TRO exhibit 9. Plaintiff did not respond to the Notice.

On January 7, 2016, defendants sent the Caddo Nation Chairman and the Delaware President a letter stating that the Wichita Tribe had received a "grant to conduct an assessment of archaeological sites 34CD-352 and 34CD-353 to determine their eligibility for the National Register of Historic Places." Defendants' TRO exhibit 10. The property, the letter states, currently contains the Wichita Travel Plaza and will be the site of the soon to be built Wichita Museum and Cultural Center. *Id.* The letter also stated:

> The sites are thought to be associated with the original Riverside Indian School that was established in 1871 for Wichita, Caddo, and Delaware children. We have previously conducted a Phase I archaeological survey which was conducted by John Northcutt. Northcutt recommended that no further work was warranted at CD-353 but that CD-352 may be eligible for the national Register and should be avoided. The State Historic Preservation Office concurred and a 100 feet avoidance zone has been established around CD-352 to protect it from any ground disturbing, construction activities.
>
> The Tribe now proposes to do geophysical testing of both sites. The testing will be performed by the Oklahoma Archeological Survey and will consist of

> gradiometry, electrical resistance, ground penetrating radar, and possibly hand-held magnetic susceptibility. If sub-surface features are detected, a plan will then be created to further assess the eligibility for the NRHP.[8] We will keep you informed of the outcomes each step of the way and seek your input on the nomination of the site(s) if the survey results justify a nomination. If you have any questions or comments please contact . . . .

Defendants' TRO exhibit 10. The Caddo Nation did not respond to the January 2016 letter. Doc. #1-3, pp. 3-4 & n.8. Plaintiff alleged in the complaint it never received the letter and was not made aware of its contents until leaders from the three tribes met on February 16, 2016, to discuss the construction. At the TRO hearing, where defendants offered undisputed evidence of plaintiff's receipt of the letter, defendants' TRO exhibit 10, plaintiff argued that when the letter arrived, the Caddo Tribe's leadership was in disarray.

On February 18, 2016, Caddo Nation officials met with defendants and informed them that Caddo elders had expressed concerns that defendants' construction will disturb and harm Caddo remains. The Caddo Nation Chairman also told President Parton that defendants had not sufficiently consulted with plaintiff as required by NHPA. Defendants responded that the January 9, 2015, letter satisfied the duty to consult. Plaintiff then sent a demand letter dated April 13, 2016, insisting that defendants cease construction of the history center until "adequate consultation" could take place as required by federal law.[9] Complaint, ¶74. Plaintiff stated in the letter that

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[8] *National Register of Historic Places.*

[9] *In the letter the Caddo Nation stated that it "want[ed] to move forward in cooperative fashion with the Wichita Tribe and the Delaware Nation to achieve final partition of WCD lands." Doc. 1-2. However, it noted that its ability to do so would be affected by the Wichita Tribe's continued building on the "sensitive, jointly-held trust lands." Id.*

> Caddo Nation leaders have expressed their serious concerns with the Wichita Tribe's ongoing construction of a History Center on one parcel of the jointly held lands. Relying on the knowledge of their elders, Caddo Nation leaders consider the lands that the Wichita Tribe is turning to be a Caddo sacred site. The lands hold the remains of Caddo ancestors and their associated or unassociated funerary objects.

Doc. #1-2. The Wichita Tribe responded with a letter dated April 18, 2016, in which it states that it sent notices to the Caddo Nation "regarding the construction of the Wichita Travel Plaza, as well as the Wichita History Center (both of which are located on the same parcel of set aside lands), and the Caddo Nation declined to respond."[10] Doc. #1-3, pp. 3-4. The tribe noted that "[i]f the Caddo Nation wished to object to the construction of these projects, the time to do so was at the time notice was sent." *Id*. at p. 4. The letter then continues:

> The Wichita Tribe has been overly cautious to ensure that no sensitive sites will be affected by the construction and operation of these facilities, including having an extensive archeological study of this parcel conducted, engaging in consultation with the Oklahoma Archeological Survey and the Oklahoma Historical Center, and by noticing the Caddo and Delaware Nations of its intent to construct the facilities located on this particular parcel of land. There are no sites upon the land eligible for the National Register of Historic Places. Further, while under no obligation to do so as the construction project is not expected to disturb any remains or funerary objects, the Wichita Tribe has developed plans and procedures for the unanticipated discovery of cultural resources should any remains or funerary objects be found. This plan requires notice to the Caddo Nation in the unforeseen circumstance that the construction of the Wichita History Center—or any Wichita construction project—unearths sensitive cultural materials which may be related to the Caddo Nation.

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[10]*The notices are letters sent to the Chairman of the Caddo Nation in May 2013 pertaining to the Travel Plaza, and in January 2016 to the Caddo Nation Tribal Historic Preservation Office and the Chairman of the Caddo Nation pertaining to the history center. See Doc. #1-3, p. 3 nn. 7-8.*

Id.

Leaders from the three tribes met on April 22, 2016. Plaintiff again expressed its concern that defendants' construction of the history center would result in the destruction of human remains and cultural artifacts. Defendants told plaintiff at the meeting that they would be pouring concrete for the history center in a few weeks. A few days later, on April 28, 2016, the Caddo Nation sent defendants a letter constituting its "Proposal to Address Possible Harm to Caddo Resources on Wichita, Caddo, and Delaware (WCD) Lands." Doc. #1-4. In it the Caddo Nation states:

> As stated at the meeting, Caddo oral history indicates that Caddo burials are located on the lower lands on or near the construction site. Years ago, Caddo remains were moved from the lower lands to higher land near the "Kiowa Cemetery" up the hill. Caddos refused to touch the remains, so non-Indians handled them. A non-Indian who handled the remains, who is married to a Caddo, has come forward to reaffirm this event. Caddo Nation officials are concerned that other Caddo graves were not moved and continue to be located in the construction area.
>
> Further, as stated at the meeting, the Wichita Tribe has indicated that construction has unearthed material from the former Riverside Indian Boarding School. Caddo Nation officials are concerned that the remains of children's graves from Riverside may be disturbed. As you know, in one of the tragedies of American history, the Indian children who were forcibly removed from their homes and sent to boarding schools sometimes died and were buried near the boarding schools. Caddo Nation officials would like assurances that steps will be taken to ensure that these graves, which could hold Caddo children as well as children of other Tribes, will not be disturbed.

Id. at p. 2.

The Caddo Tribe proposed to perform ground penetrating radar ("GPR") testing on the construction site at its own expense, which, according to the letter, it expected would take

about two weeks to complete.[11] It also proposed to hire and pay for archaeological experts to evaluate the property and provide site testing. The tribe was not satisfied with the archaeological studies that the Wichita Tribe had conducted; it was concerned with their scope and the fact that they were "not informed by Caddo Nation oral history and information." *Id.* at p. 3. This work, the tribe anticipated, would take about two weeks. Finally, the Caddo Nation proposed that it "be formally noticed if and when construction at the site unearths inadvertent discoveries of any items," *id.*, and that Caddo historic preservation and other cultural experts monitor the site.

In their response, dated May 6, 2016, rejecting plaintiff's proposal, the Wichita Tribe stated:

> As you will recall, at the meeting on April 22, 2016, we requested specific information regarding what locations within the 71-acre parcel were of concern to certain Caddo tribal members. Unfortunately, the letter we received does not include any additional information. For instance, we 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.

Defendants' TRO exhibit 13.

Defendants continued with their construction project and began pouring concrete

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[11] *The Caddo Nation stated in its April 28, 2016, letter that it was waiting to hear back from the contractors it would engage to perform the work as to how long it would take. At the TRO hearing, plaintiff was still unable to provide a specific time estimate.*

which, when completed would make it difficult, if not impossible, to test for Caddo remains by GPR, at least under the actual building site. On May 25, 2016, the Caddo nation filed this action and its motion for a TRO.

Analysis

"To obtain a temporary restraining order], the movant must show: (1) a substantial likelihood of success on the merits; (2) irreparable harm to the movant if the injunction is denied; (3) the threatened injury outweighs the harm that the preliminary injunction may cause the opposing party; and (4) the injunction, if issued, will not adversely affect the public interest." Gen. Motors Corp. v. Urban Gorilla, LLC, 500 F.3d 1222, 1226 (10th Cir. 2007). While the court, like the Wichita Tribe, understands the concern with the potential presence of Caddo human remains, sacred objects or sacred places, it concludes the Caddo Tribe has not met its burden of establishing a substantial likelihood of success on the merits, even under the less strict standard that plaintiff urges is applicable.[12]

The Caddo Nation claims the Wichita Nation violated the notice and consideration of alternatives requirements of NEPA and the consultation requirement imposed by § 106 of

[12]*See Vill. of v. U.S. Dep't of Interior, 577 Fed. Appx. 760, 769 (10th Cir. 2014) ("Prior to the Supreme Court's decision in Winter [v. Natural Res. Def. Council, Inc., 555 U.S. 7 (2008)], this court imposed two different tests depending on the circumstances of the case: in the run-of-the-mill case, we required a plaintiff to show a substantial likelihood of success on the merits, but if a plaintiff could establish that the other three preliminary injunction factors tip strongly in his or her favor, we said the plaintiff needed only to show questions going to the merits are so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation. There is now a question whether either test survived Winter, where the Court stated that to meet the merits prong, a plaintiff needed to show that he was 'likely to succeed on the merits,' 555 U.S. at 20") (internal quotation marks omitted). Plaintiff would not prevail even under the lesser Winter test.*

NHPA and its attendant regulations.

NEPA requires federal agencies to "assess potential environmental consequences of a proposed action" and prepare an environmental impact statement ("EIS"), an environmental assessment ("EA") or a categorical exclusion. Utah Envtl. Cong. v. Russell, 518 F.3d 817, 820-21 (10th Cir. 2008). An agency may prepare an EA if it is uncertain whether a proposed action will significantly affect the environment. *Id.* at 821. An EA is a '"concise public document' that '[b]riefly provide[s] sufficient evidence and analysis for determining whether to prepare' a more detailed EIS." *id.* (quoting 40 C.F.R. § 1508.9). If the agency determines, pursuant to the EA, that a more detailed EIS is not required, it issues a "finding of no significant impact (FONSI), which briefly presents the reasons why the proposed agency action will not have a significant impact on the human environment." *Id.* (internal quotation marks omitted). NEPA "requires only that the agency take a hard look at the environmental consequences before taking a major action. In other words, it prohibits uninformed-rather than unwise-agency action." Utah Shared Access All. v. U.S. Forest Serv., 288 F.3d 1205, 1207-08 (10th Cir. 2002) (internal quotation marks omitted). The court's role in reviewing compliance with the Act is "'is simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary and capricious.'" *Id.* at 1208 (quoting Baltimore Gas & Elec. Co. v. Natural Res. Defense Council, 462 U.S. 87, 97-98 (1983)).

Plaintiff argues that the Wichita Tribe violated NEPA because it failed to "meaningfully consider and discuss alternatives in the process of reaching its decision." Doc.

#4, p. 8. It contends there was no attempt to comply with the duty to "[r]igorously explore and objectively evaluate all reasonable alternatives." 40 C.F.R. § 1502.14. In the EA, the Wichita Tribe gave the following explanations as to why other sites were not considered or implemented:

> ALTERNATIVES TO THE PROPOSED ACTION
> At this time the Wichita and Affiliated Tribes has not been able to consider an alternative site because of the site which is limited in area for development due to the trees and the need to continue to develop the existing area to create a destination business site.
>
> No Action Alternative
> As stated above The Tribe has not considered an alternative site primarily because of the limited frontage property available in the area needed for business development.

Doc. #1-1, p. 9.

"NEPA does not require an agency to analyze 'the environmental consequences of alternatives it has in good faith rejected as too remote, speculative, or ... impractical or ineffective.'" Lee v. U.S. Air Force, 354 F.3d 1229, 1238 (10th Cir. 2004) (quoting All Indian Pueblo Council v. United States, 975 F.2d 1437, 1444 (10th Cir.1992)). The Wichita Nation offered a reasonable explanation as to why other locations for the history center were not feasible –the tribe had limited acreage to work with, trees to work around and the site was already partially developed. Plaintiff does not suggest alternative sites or even argue that the Wichita Tribe should have selected another location. Its concerns are not about the project's effects on the quality of the human environment. Rather the Caddo Nation is attempting to get injunctive relief based on what it describes as the Wichita Tribe's *"prima facie* violation

of NEPA." Doc. #4, p. 8. That is not enough for plaintiff to meet its burden of demonstrating that the Wichita Tribe acted arbitrarily when it did not consider an alternative site for its history center. The "[d]iscussion [of alternatives] must be moored to some notion of feasibility." Lee, 354 F.3d at 1238 (internal quotation marks omitted). The Wichita Tribe satisfied its duty to consider alternatives under NEPA. *See id.* at 1237 ("We apply a rule of reason standard (essentially an abuse of discretion standard) in deciding whether claimed deficiencies in a [final] EIS are merely flyspecks, or are significant enough to defeat the goals of informed decisionmaking and informed public comment.") (internal quotation marks omitted); *see also* Vill. of Logan v. U.S. Dep't of Interior, 577 Fed. Appx. 760, 766-67 (10th Cir. 2014) ("NEPA presumption [arising from noncompliance with NEPA procedure] does not absolve a plaintiff from having to make a specific showing that the environmental harm results in irreparable injury to their specific environmental interests") (internal quotation marks omitted).

Plaintiff contends defendants also violated NEPA by failing to provide adequate notice of their 'finding of no significant impact' (FONSI). Plaintiff disputes that the May 22, 2015, publication in the *Anadarko Daily News* provided sufficient public notice. By publishing the FONSI in the Anadarko Daily News, a "newspaper of general circulation in the affected community," 24 C.F.R. § 58.43, defendants satisfied NEPA's notice requirements. Defendants apparently did not, though, send notice of the FONSI to plaintiff. *See id.* However, the Wichita Tribe attempted to involve the Caddo Nation in the "Federal Environment Review process." Defendants' TRO exhibit 8. Its January 9, 2015, letter

informing the Caddo Nation of HUD's approval of the grant which would fund the construction of the history center went unanswered. While the Wichita Tribe should have sent the FONSI to the Caddo and Delaware Nations,[13] plaintiff did not contend that the tribe was unaware of the construction project. It also does not argue that but for a lack of notice it would have objected to the project due to environmental concerns. *See* Vill. of Logan, 577 Fed. Appx. at 766-67. Plaintiff has not met its burden of showing that defendant acted arbitrarily in assessing the potential environmental consequences of its proposed building.

Under NHPA, federal agencies are prohibited from approving projects such as the history center, unless the agency takes into account the effects of the undertaking on historic properties. 54 U.S.C. § 306108. They must consult with state history preservation officers (SHPOs) and any potentially affected Indian tribes – through a process referred to as Section 106 consultation – to determine whether historic properties or traditional cultural properties exist in the area of the planned activity that might be adversely affected. Narragansett Indian Tribe v. Warwick Sewer Auth., 334 F.3d 161, 166 (1st Cir. 2003); San Juan Citizens All. v. Norton, 586 F. Supp. 2d 1270, 1280-81 (D.N.M. 2008); 36 C.F.R. §§ 800.2(a)(4), (c)(2). If a tribe considers a site that might be affected by the project to have religious or cultural significance, it may become a consulting party. Narragansett Indian Tribe, 334 F.3d at 167. Such a consulting tribe is then entitled to: "a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties,

[13]*It may have. As noted earlier, the court has not received any briefing from defendants and only limited evidence from the parties – that attached to pleadings and proffers at the TRO hearing.*

including those of traditional religious and cultural importance, articulate its views on the undertaking's effects on such properties, and participate in the resolution of adverse effects." *Id*. (citing 36 C.F.R. § 800.2(c)(2)(ii)(A)).[14]

Here , despite the Caddo Nation's arguments to the contrary, the Wichita Tribe did consult with it, or make an effort to consult with it. The Caddo Nation did not respond to the Wichita Tribe's January 9, 2015, letter, in which it informed the Caddo Nation of the planned history center. The Caddo Nation was specifically asked to "assist [the Wichita Tribe] in complying with the Federal Environment Review process by reviewing the project described and providing your comments of any potential impact on the environment within your jurisdiction. Your timely response will be appreciated." Defendants' TRO exhibit 8.[15] A year later, by letter dated January 7, 2016, the Wichita Tribe advised the Caddo Nation that it proposed to have geophysical testing of archaeological sites 34CD-352 and 34CD-353 performed to determine their eligibility for the National Register of Historic Places. Again, the Caddo Nation did not respond. It was not until mid-February that the Caddo Nation informed the Wichita Tribe that Caddo elders had expressed concerns about defendants' construction remains. However, despite defendants' inquiries, the Caddo Tribe failed to provide specific information as to locations within the 71-acre parcel that "were of concern to certain Caddo tribal members" or names of tribal members or non-tribal members who

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[14]*Tribal consultation should be conducted concurrently with the NEPA analysis. See 36 C.F.R. § 800.8; San Juan Citizens All., 586 F.Supp.2d at 1281.*

[15]*The letter was sent to the Caddo Indian Tribe's Tribal Historic Preservation Office.*

could provide such information. Defendants' TRO exhibit 13. Defendants indicate they requested that information at the parties' April 22, 2016, meeting, but it was not provided. *See* Doc. #1-4; Defendants' TRO exhibit 13. Instead what defendants received in return was

> Caddo oral history indicates that Caddo burials are located on the lower lands on or near the construction site. Years ago, Caddo remains were moved from the lower lands to higher land near the "Kiowa Cemetery" up the hill. Caddos refused to touch the remains, so non-Indians handled them. A non-Indian who handled the remains, who is married to a Caddo, has come forward to reaffirm this event. Caddo Nation officials are concerned that other Caddo graves were not moved and continue to be located in the construction area.
>
> Further, as stated at the meeting, the Wichita Tribe has indicated that construction has unearthed material from the former Riverside Indian Boarding School. Caddo Nation officials are concerned that the remains of children's graves from Riverside may be disturbed. As you know, in one of the tragedies of American history, the Indian children who were forcibly removed from their homes and sent to boarding schools sometimes died and were buried near the boarding schools. Caddo Nation officials would like assurances that steps will be taken to ensure that these graves, which could hold Caddo children as well as children of other Tribes, will not be disturbed.

Doc. #1-4, p. 2. As of the date of the TRO hearing, other than the declaration of Tamara Francis-Fourkiller, which was filed on May 25, 2016, no names or locations had been provided to defendants. And what she provided is insufficient and offered too late. Chairman Francis-Fourkiller states in her declaration:

> I believe there are gravesites at the location of the original Riverside Indian Boarding School, a school that was originally established for Wichita and Caddo children. Bodies may have been moved that were located at a cemetery in that same area to make way for a highway that was built, but not all of the bodies were moved. It is my belief that there are still gravesites located at the original Riverside Indian Boarding School. The Wichita Tribe is now in the process of constructing a History Center at the site of the original Riverside Indian Boarding School. I believe this site to be the location of Caddo remains and artifacts.

Doc. #5.[16] This alone does not provide compelling evidence that there are Caddo remains or sacred objects at the construction site.

Plaintiff has not demonstrated that the Wichita Tribe failed to consult or acted arbitrarily in performing its responsibilities under NHPA. See Narragansett Indian Tribe, 334 F.3d at 166-169. While the Wichita Tribe may not have executed its Section 106 duties perfectly, the Caddo Nation was offered the opportunity to participate but did not take it. The problem apparently was due, not to a lack of notice but, as explained by Chairman Francis-Fourkiller, to the "Caddo Nation's political turmoil over the last two years when the Caddo did not have a Native American Graves Protection and Repatriation Act ("NAGPRA") Director or Preservation Officer to protect Caddo interests." Doc. #5, pp. 6-7. *See generally* Vill. of Logan, 577 Fed. Appx. at 770 ("More simply, it matters not why Logan chose not to participate in the NEPA process; having consciously made that choice, Logan must now live with it.").

"Where no historic property has been identified, the Tribe has no basis under NHPA to demand particular actions by the Authority." Narragansett Indian Tribe, 334 F.3d at 168. Nonetheless, the Wichita Tribe has agreed to implement "a NAGPRA 'unanticipated discovery plan' should any cultural resources or human remains be uncovered during

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[16]*The other declarant, Kimberly Penrod, states that she has "documentation for specific burials on the side of the hill where the construction site is located," but does not provide the documentation. She also states that the "Caddo Nation has informed the Wichita Tribe about concerns from elders and scholarly documentation that the site contains the remains of Caddoes and members of other Tribes" but neither identifies the elders nor provides the documentation. Doc. #6.*

construction. If a cultural resource is found, work must stop and a 200-feet avoidance zone must be set up." Defendants' TRO exhibit 17. If human remains are found the plan outlines special procedures for their treatment and also requires that notice be sent to both the Delaware Nation and the Caddo Nation if any cultural resources or remains are unearthed. *Id.*

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].[17]

IT IS SO ORDERED.

Dated this 31st day of May, 2016.

JOE HEATON
CHIEF U.S. DISTRICT JUDGE

[17]*Because plaintiff has failed to establish this factor, it is unnecessary for the court to consider the other three.*