

NO. 16-6161

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

CADDO NATION OF OKLAHOMA

Plaintiff-Appellant,

v.

WICHITA AND AFFILIATED TRIBES, *et al.*

Defendants-Appellees

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

Honorable Joe Heaton, Chief Judge

**APPELLEES' MOTION TO DISMISS FOR MOOTNESS
10TH CIR. R. 27.3(A)(2)**

June 2, 2017

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Wichita and Affiliated Tribes ("Wichita Tribe"), Terri Parton, Jesse E. Jones, Myles Stephenson, Jr., S. Robert White, Jr., Shirley Davila, Gladys Walker, and Karen Thompson (collectively "Appellees" or "Wichita Tribe") file this Motion¹ for Summary Disposition of this appeal filed by Caddo Nation of Oklahoma ("Caddo") based on mootness and in support state as follows:

SUMMARY OF MOTION

Caddo filed suit to enjoin construction of the Wichita Tribe's History Center. During the pendency of this case, the Wichita Tribe completed construction on the History Center. As a result, the relief Caddo sought is now unavailable and this case is moot.

In its **BRIEF OF PLAINTIFF-APPELLANT** (Doc. 01019804463) ("Brief"), Caddo raises with some apparent uncertainty the issue that the History Center is complete, and indicates that the status of construction is not contained in the record, but does not provide the Court with the latest available information. Out of an abundance of caution, and in the interest of informing the Court's deliberations, the Wichita Tribe is filing this motion as a way to advise the Court about the status of the History Center project and its bearing on this appeal.

¹ Contemporaneously herewith, the Wichita Tribe has filed its **ANSWER BRIEF OF APPELLEE**.

ARGUMENT AND AUTHORITIES

Under Article III of the U.S. Constitution, federal courts may adjudicate only actual, ongoing cases or controversies. *Deakins v. Monaghan*, 484 U.S. 193, 199, 108 S. Ct. 523, 528, 98 L. Ed. 2d 529 (1988); *Preiser v. Newkirk*, 422 U.S. 395, 401, 95 S. Ct. 2330, 2334, 45 L. Ed. 2d 272 (1975). To invoke the jurisdiction of a federal court, a litigant must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision. *Allen v. Wright*, 468 U.S. 737, 750–751, 104 S. Ct. 3315, 3324, 82 L. Ed. 2d 556 (1984) *abrogated by Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 188 L. Ed. 2d 392 (2014); *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 471–473, 102 S. Ct. 752, 757–59, 70 L. Ed. 2d 700 (1982).

This case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate. To sustain jurisdiction over a case, it is not enough that a dispute was very much alive when suit was filed, or when review was obtained in the Court of Appeals. *Deakins*, 484 U.S. at 199; **1254 *Steffel v. Thompson*, 415 U.S. 452, 459, n. 10, 94 S. Ct. 1209, 1216, n. 10, 39 L. Ed. 2d 505 (1974). The parties must continue to have a "personal stake in the outcome" of the lawsuit, *City of Los Angeles v. Lyons*, 461 U.S. 95, 101, 103 S. Ct. 1660, 1665, 75 L. Ed. 2d 675 (1983) (quoting *Baker v. Carr*, 369 U.S. 186, 204, 82 S. Ct. 691, 703, 7

L. Ed. 2d 663 (1962)). **"The crucial question is whether granting a present determination of the issues offered will have some effect in the real world."**

Wyoming v. U.S. Dep't of Agr., 414 F.3d 1207, 1212 (10th Cir. 2005) (emphasis added) (quoting *Citizens for Responsible Gov't State Political Action Comm. v. Davidson*, 236 F.3d 1174, 1182 (10th Cir. 2000)).

Under 10th Cir. R. 27.3(A)(2), a party may seek summary disposition based on mootness. Under 10th Cir. R. 27(A)(3)(a), the motion should be filed within 14 days of the Notice of Appeal "unless good cause is shown." The Wichita Tribe did not earlier file this motion because the Parties were engaged with the Circuit's Mediation Office pursuant to the Court's September 13, 2016, referral (Doc. 10404607), exploring possible avenues to resolve this case. All briefing deadlines were continued numerous times by agreement, so it was unclear whether this matter would proceed to the briefing stage. In fact, the first indication the Wichita Tribe had that this matter was no longer in mediation was the ECF notification that Caddo had filed its Brief.

In support hereof, the Wichita Tribe attaches the Affidavit of President Terri Parton. As noted in the Parton Affidavit, and as demonstrated in the included photographs, the History Center is complete. The building is finished and scheduled to open this summer. During construction, no human remains, burials, funerary objects or other items of cultural significance were unearthed.

Caddo originally filed suit to obtain relief in the form of a declaration that the Wichita Tribe violated certain federal laws and that:

3. The Defendants, their agents and employees, immediately be enjoined during the pendency of this action and permanently from continuing construction on the History Center at the twenty acre tract located 1.5 miles north of Anadarko, Oklahoma described as being E/2 NW & SW Sec. 10 Towshp [sic] 7 Range 10 West, Caddo County, Oklahoma.

4. The Defendants, their agents and employees, be ordered to initiate and conduct good faith consultations with the Plaintiff and other interested parties in order to consider relocation of said History Center to a site having no adverse impacts on significant cultural and religious areas;

Caddo initiated this appeal after the District Court entered, then vacated, a temporary restraining order that blocked construction for a few days. The District Court found that Caddo had not demonstrated a likelihood of success on the merits to support its request for injunctive relief against the Wichita Tribe. Caddo chose to appeal rather than pursue post-decisional relief, such as a stay or rehearing, at the District Court level.

As a result, the reason for Caddo's appeal – to stop construction of the History Center – is moot. That relief is no longer available to Caddo. In other words, a present determination of the issues offered will **not have** some effect in the real world **because there is no current construction activity to enjoin.**

In its Brief, Caddo plays coy regarding the status of the History Center with statements such as, "Although construction of the History Center itself may now be complete (nothing in the record indicates that it is) . . ." (Brief at 1) and "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 . . ." (Brief at 8). However, tacitly acknowledging the facts on the ground, Caddo improperly tries to expand the scope of the relief it requested to include an injunction against operation of the History Center.

The History Center is located a mere 14 miles south of Caddo's headquarters, casino and other facilities, and is located along a heavily traveled highway that is the primary route between Anadarko, Oklahoma, on the south, and Caddo's headquarters, to the north. The History Center is located roughly 1.5 miles north of the Bureau of Indian Affairs Anadarko Agency, (including CFR court, BIA law enforcement, and other departments with which Caddo interacts regularly), the Bureau of Indian Affairs Southern Plains Regional Office, and an Indian Health Services clinic, all of which are utilized by Caddo membership. The Caddo Nation Head Start facility is located across the highway from the History Center, roughly one-quarter of a mile away, near Riverside Indian School and the Wichita Tribe's headquarters.

Thus, it is difficult to imagine that the completion of the construction has somehow escaped Caddo's knowledge. The Construction happened in full view of the Caddo, who declined to pursue post-judgment relief calculated to halt construction during the pendency of this appeal, and whose leadership blocked construction vehicles at the site (Aplee. Supp. App. 1-4) the day Caddo filed suit for emergency relief with an avowed desire to protect a "sacred site." Caddo now effectively represents that it has not bothered to monitor the status of the construction project that precipitated this litigation – litigation that escalated **in a mere 14 days** from Complaint to Notice of Appeal.

Because construction of the History Center is complete, Caddo is no longer entitled to the relief it requested, *i.e.*, an injunction preventing construction. This appeal is moot.

WHEREFORE, Appellees ask the Court to dismiss this appeal as moot, and grant the Appellees all additional relief to which they are entitled including, but not limited to, attorney fees and costs incurred in their defense.

June 2, 2017

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CERTIFICATE OF SERVICE

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

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and deposited three (3) true and correct paper copies of same with Federal Express, Tracking No. 8101 0733 6786, consistent with 10th Cir. R. 31.5.

/s/ Michael D. McMahan

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

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

1. This brief complies with the type-volume limitation of Fed. R. App. P. 27(d)(2) because **this brief contains 1,369 words, excluding the parts of the brief exempted by Fed. R. App. P. 27(a)(2)(b).**

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

/s/ Michael D. McMahan

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

- (1) all required privacy redactions have been made per 10th Cir. R. 25.5;
- (2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents;
- (3) the digital submissions have been scanned for viruses with the most recent version of Webroot Secure Anywhere Endpoint Protection for Windows version 9.0.15.65, last updated June 1, 2017, and according to the program are free of viruses.

/s/ Michael D. McMahan