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' OBJECTION TO APPELLANT'S MOTION FOR INJUNCTIVE RELIEF PENDING APPEAL

June 10, 2016.

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Wichita and Affiliated Tribes ("Tribe"), Terri Parton, Jesse E. Jones, Myles Stephenson, Jr., S. Robert White, Jr., Shirley Davila, Gladys Walker, and Karen Thompson (collectively "Appellees") oppose the **APPELLANT'S OPPOSED MOTION FOR INJUNCTIVE RELIEF PENDING APPEAL** (Doc. 01019634608) ("Motion")[1] filed by the Caddo Nation ("Appellant") as follows:

SUMMARY OF OBJECTION

1. The appeal is premature, and the order vacating a temporary restraining order is not appealable.
2. Appellant has not shown a likelihood of imminent, irreparable injury sufficient to justify entertaining the appeal.
3. In any event, Appellant has not shown it is entitled to injunctive relief.

BACKGROUND

Appellant filed suit in the U.S. District Court for the Western District of Oklahoma on May 25, 2016, filing a complaint and a motion seeking a temporary restraining order ("TRO") and a preliminary injunction. The suit accused the Appellees of violating of two federal laws: the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321, *et. seq.*, and the National Historic Preservation Act

[1] Appellees note that Appellant did not file any request for a stay or similar post-decisional relief pending appeal with the District Court as required by Fed. R. App. P. 8. By filing this objection, Appellees do not waive any available defenses, such as (but not limited to) sovereign immunity, failure to join indispensable parties, or failure to establish standing, which Appellees have not yet had an opportunity to present to the District Court at this premature point in litigation.

("NHPA") 54 U.S.C. § 300101, *et seq.* Specifically, Plaintiff sued to prevent the construction of the Wichita History Center (also called the "Project"), which is funded by a grant from the U.S. Department of Housing and Urban Development ("HUD").

On May 26, 2016, less than 24 hours into the litigation, the District Court held a hearing on Appellant's request for a TRO. Following the hearing, the Court entered a TRO through Wednesday, June 1. On Tuesday May 31, 2016, the District Court entered a well-reasoned 19-page order vacating the TRO (the "May 31 Order"), holding:

> *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].

May 31 Order, at 19 (emphasis added). The District Court cabined its analysis to the issuance and vacation of the TRO, and has not yet held a hearing or ruled on the issue of whether Appellant's request for a preliminary injunction should be entertained.

Appellant filed its notice of appeal on June 7, 2016, apparently under the mistaken impression that the May 31 Order denied its request for a preliminary

injunction, even though the District Court's reasoning was limited to the issue of the TRO. May 31 Order, at 15 n. 13. The deadline for the Appellees to file a brief objecting to the Appellant's request for a preliminary injunction is June 15, 2016. The District Court held a hearing on Appellant's request for a TRO, not a preliminary injunction. The District Court granted a TRO and then vacated that TRO via the May 31 Order.

The May 31 Order did not generally deny the Appellant's motion for a preliminary injunction. In that regard, Appellees have filed a written objection to the Appellant's request for further injunctive relief, which is attached hereto as Exhibit 1 and hereby incorporated by reference.

THE MAY 31 ORDER IS NOT APPEALABLE

The Tenth Circuit has held that the "denial of a TRO is not generally appealable." 28 U.S.C. § 1292(a)(1). Two exceptions exist to this rule: first, if the order denying the TRO instead "operates as a preliminary injunction" or is an appealable final order, then the order can be appealed. *Mears v. New Mexico*, 39 F.3d 1192 (10th Cir. 1994). Second, "when an appellant will suffer irreparable harm absent immediate review," the order can be appealed. *Duvall v. Keating*, 162 F.3d 1058, 1062 (10th Cir. 1998) (holding that appellant's pending execution fell within the exception); *see also, Baranowski v. Hart*, 486 F.3d 112, 120 n. 4 (5th

Cir. 2007) ("[I]t is well established in this circuit that the denial of an application for a temporary restraining order is not appealable.").

Courts must construe these exceptions narrowly: "Congress intended appeals from interlocutory orders to be strictly limited to the unusual situations wherein such appeals are expressly authorized." *St. Louis Shipbuilding & Steel Co. v. Petroleum Barge Co.*, 249 F.2d 905, 907 (8th Cir. 1957). *See also Matterhorn, Inc. v. NCR Corp.*, 727 F.2d 629, 633 (7th Cir. 1984); *Switzerland Cheese Ass'n v. E. Horne's Mkt., Inc.*, 351 F.2d 552, 553 (1st Cir. 1965), *aff'd sub nom. Switzerland Cheese Ass'n, Inc. v. E. Horne's Mkt., Inc.*, 385 U.S. 23 (1966) (statutes permitting interlocutory appeals should be construed strictly); *Florida v. United States*, 285 F.2d 596, 600 (8th Cir. 1960). Courts should shy away from creating piecemeal litigation, and must not grant an exception to "the general congressional policy against piecemeal review" unless it is absolutely necessary. *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 83-84 (1981). Absent this showing, interlocutory appeal is precluded.

Appellant has failed to meet its burden to show that this premature appeal is necessary or warranted. Neither exception applies to the case at hand, and the appeal and associated request for an injunction should be dismissed accordingly.

I. The District Court has Not Decided Appellant's Request for a Preliminary Injunction

First, as noted above, the District Court has yet to rule on the issue of Appellant's request for a preliminary injunction. At the hearing on Appellant's request for an emergency TRO, the District Court received exhibits and heard oral arguments. Its Order granting the TRO recognized that the District Court was considering only Appellant's Emergency Motion for a TRO. Temporary Restraining Order, at 2 (May 26, 2016) ("A hearing was held this date regarding plaintiff's motion for TRO."). In fact, Appellant's Brief in Support of the Emergency Motion was similarly limited to considering Appellant's Request for a TRO (Plaintiff's Brief in Support of Emergency Motion for TRO, filed May 25, 2016). Likewise, the District Court's May 31 Order was limited to considering Appellant's request for a TRO. May 31 Order at 5 n. 7, 15 n. 13, 19 (noting the District Court did not have the benefit of any briefing from defendants). The May 31 Order was constrained to the facts before the District Court at that point in time, including—in total—Appellant's Complaint and Emergency Motion for TRO and Preliminary Injunction, an emergency hearing on the issue of the TRO, and Appellees' proffered exhibits presented at the emergency hearing.

The District Court confined its order to determining whether, under the facts presented, Appellant had failed to satisfy its burden to show entitlement to a TRO.

The District Court found the facts presented to it did not satisfy the Appellant's burden to show its entitlement to a TRO.

II. Appellant Does not Face Irreparable Harm, and Its Claims are Structurally Deficient

In this case, Appellant does not face any risk of irreparable harm. Of particular note is that Appellant did not label its Motion as an emergency under 10th Cir. R. 8.2. As a fundamental matter—as will be established once the Tribe has an opportunity to fully present the facts in this case—the Appellant's concerns about possible human remains or other significant artifacts underlying the site of the History Center are completely unsupported by history, fact, eyewitnesses, or science.

To the extent the concerns are even genuinely held, Appellant waited for more than a year after Appellees requested consultation before raising concerns about the History Center project. Moreover, Appellant failed to ever raise concerns in previous decades, including when Caddo Nation's elected leadership and tribal membership each voted to grant exclusive jurisdiction and development authority to the Wichita Tribe. *Resolution of the Caddo Nation of Oklahoma*, No. 02-2007-01 (Feb. 6, 2007) (approved unanimously) (District Court Doc. 28-3); *Resolution of the Caddo Nation Membership*, No. 04-2007-02 (Apr. 7, 2007) (approved unanimously) (District Court Doc. 28-4).

With Appellant's consent, the History Center site was used for decades for agriculture—including permitting extensive plowing and harvesting activity on this site, which Appellant variously terms:

a. a "sacred site," (Motion, at 18), and/or

b. a "Caddo burial site" (Motion, at 1, 4-5, 10-11), and/or

c. an archaeological site associated with Riverside Indian School (Declaration of Kimberly Penrod, at ¶¶ 14, 19, 30 (May 25, 2016)), and/or

d. a gravesite associated with Riverside Indian School (Declaration of Tamara Francis-Fourkiller, at ¶¶ 12-15, 25 (May 25, 2016)), and/or

e. a site of cultural patrimony (Plaintiff's Brief in Support of Emergency Motion for TRO, at 4 (May 25, 2016)), and/or

f. a site of "sacred objects" (Plaintiff's Brief in Support of Emergency Motion for TRO, at 2, 3, 5 (May 25, 2016)).

Appellant apparently cannot decide *which* of these types of sites this particular location is, or its particular significance to the Caddo. Appellant's concerns are decades overdue, inconsistent, and poorly founded. As the District Court correctly found in vacating the TRO, any risk of harm the Appellant faces is the result of its own inaction and inattention.

In fact, now Appellant argues that it does not have to know why or how this site is significant to it, so long as it claims some significance is related to this site. Motion, at 10-11. In its Motion, Appellant argues that it *will* be irreparably harmed unless it can determine whether there are any "Caddo remains and or funerary objects" in the area, and confirms that at this point, Appellant does not know whether its claims that "human remains and sacred funerary objects" can be substantiated. Motion, at 10-11. Appellant asks for this relief to ensure that it can waylay construction *until* it determines whether its claims are valid. *Id*. In support of its request that this Court step in and take action to vacate the District Court's ruling, Appellant admits to its "failure to provide the precise location and names of unmarked Caddo graves and remains," as well as its "inability to identify the precise location and identity of unmarked graves," which (it argues) may or may not be located at this site. Motion, at 11, 18 (arguing that Appellee should be enjoined "until or unless" Appellant can engage in more testing, and confirming that at this point in time, Appellant is "unable" to determine whether human remains or sacred objects are located at this site).

Appellant's claims of irreparable harm are based on nothing more than conjecture. Despite repeated requests for information, even following the expiration of the consultation period, the record is devoid of any evidence from the Appellant that its claims have a basis in fact or otherwise demonstrate a possibility

of irreparable harm. Speculative harm does not amount to irreparable injury, and Appellant has not demonstrated a probable risk, much less a significant risk, that it will experience harm that cannot be compensated after the fact by monetary damages. *Greater Yellowstone Coal. v. Flowers*, 321 F.3d 1250, 1258 (10th Cir. 2003).

III. In Any Event, Appellant's Request for Injunctive Relief Fails Now for the Same Reasons It Failed Before: Appellant Cannot Establish the Four Prerequisites to Issuing Injunctive Relief

A TRO, like a preliminary injunction, is an extraordinary remedy. "Each of these 'is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion.'" *Mazurek v. Armstrong*, 520 U.S. 968 (1997). Appellant has failed to—and ultimately cannot—satisfy the requirements for showing it is entitled to the injunctive relief it seeks and, accordingly, its Motion should be denied.

Appellant's argument here is a rehash of those presented to—and rejected by—the District Court. The same defects the District Court discussed in its May 31 Order have not changed during the intervening week. Appellant was not entitled to a TRO then, and cannot overcome the onerous burdens it must overcome to show itself entitled to injunctive relief pending appeal now. Appellant must clearly demonstrate it is entitled to injunctive relief. A motion requesting an injunction pending appeal requires the court to engage in the same

inquiry required for reviewing the grant or denial of a preliminary injunction, including weighing whether the party is likely to succeed on the merits. *Populist Party v. Herschler*, 746 F.2d 656, 659 (10th Cir. 1984). The Tenth Circuit has held that it "should deny the motion for injunction pending an appeal" when a party fails to make a "sufficient showing of likelihood of success on the merits." *Id.*, at 658-59. Appellees' Objection to the Appellant's Motion for Preliminary Injunction in the District Court further reinforces the spurious nature of Appellant's claims and inability to satisfy the standards for injunctive relief.

To obtain relief under 10th Cir. R. 8.1, the Appellant must satisfy the same four-factor test imposed for evaluating requests for TROs and preliminary injunctions at the District Court level.

> The first factor, a strong showing of a likelihood of success on the merits, requires more than a mere possibility that relief will be granted. Similarly, simply showing some possibility of irreparable injury fails to satisfy the second factor.

Nken v. Holder, 556 U.S. 418, 420 (2009).

Appellant has not demonstrated that it is likely to succeed on the merits of its claims. Based on the facts before the District Court, the District Court correctly held that Appellant fell far short of meeting this burden because the Appellees complied with their obligations under federal law, and Appellant declined to participate in the consultation opportunities afforded to it.

As the District Court found, Appellant could not show it was entitled to a TRO. This Court should defer to the District Court's reasoning in this regard.

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

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

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

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

Moreover, in this case, the requested injunctive relief would, in essence, stay the District Court litigation and grant Appellant a preliminary injunction—an issue on which the District Court has yet to rule.

> A stay is an "intrusion into the ordinary processes of administration and judicial review," . . . and accordingly "is not a matter of right, **even if irreparable injury might otherwise result to the appellant**[.]"

Nken, 556 U.S. at 427 (emphasis added)(citations omitted).

The May 31 Order was well reasoned and well founded. It was based on Appellant's utter failure to produce anything resembling hard facts. The District Court's sound reasoning should not be disturbed, and the Motion should be denied.

WHEREFORE, Appellees ask the Court to deny the Appellant's Motion, dismiss this appeal for lack of jurisdiction under 28 U.S.C. § 1292(a)(1), 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 10, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on June 10, 2016, 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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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Certificate of Compliance With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because **this brief contains 2,680 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).**

2. 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 Word 2010 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;

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/s/ Michael D. McMahan