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ALTURAS INDIAN RANCHERIA

UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF CALIFORNIA

ALTURAS INDIAN RANCHERIA, a federally-recognized Indian tribe,

Plaintiff,

v.

KENNETH L. SALAZAR, et al.,

Defendants.

Case No. 2:10-CV-01997-LKK-EFB

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS MOTION TO DISMISS

Date: October 12, 2010
Time: 10:00 a.m.
Courtroom: 4, 5th Floor
Judge: Hon. Lawrence K. Karlton

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I. INTRODUCTION

Defendants' Motion to Dismiss misapprehends the nature of Plaintiff's claims and the relief requested in this case. Contrary to Defendants' repeated assertions, Plaintiff does not challenge any "decision" of the Defendants, nor, indeed, any agency "action" by the Defendants in the ordinary meaning of the word. Rather, Plaintiff challenges Defendants' *inaction* — their "unreasonable delay" in taking distinct agency action they are legally required to take under the Indian Self-Determination and Education Assistance Act ("ISDA"), 25 U.S.C. § 450 *et seq.* Such alleged agency inaction is defined to constitute reviewable agency "action" under the Administrative Procedure Act ("APA"), 5 U.S.C. § 551(13), which expressly authorizes and directs reviewing courts to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). Under the express terms of the APA and well-established case law governing review of claims of "unreasonable delay," the exhaustion requirements asserted by Defendants are entirely inapplicable to the Plaintiff's claims.

Plaintiff's Complaint challenges the failure by the Secretary of the Interior ("Secretary") to either approve or decline to enter into a renewal of a "self-determination" contract with the Alturas Indian Rancheria ("Tribe") in accordance with and as required by the ISDA. The command of the ISDA is both express and unambiguous: the Secretary must either approve the contract or decline the contract by following specific declination procedures within 90 days of the submission of a "self-determination" contract proposal. Under ISDA regulations, if the Secretary fails to decline the contract proposal within 90 days, the contract proposal "is deemed approved" by operation of law and the Secretary is required to award and fully fund the contract. 25 C.F.R. § 900.18.

Further, the ISDA itself grants the United States District Courts "original jurisdiction over any civil action or claim" arising under the ISDA, expressly authorizes courts to order "mandamus to compel the Secretary to award and fund an approved self-determination contract[,]" 25 U.S.C. § 450m-1(a), and authorizes Indian tribes to "exercise the option to initiate an action in a Federal district court and proceed directly to such court pursuant to section 450m-1(a)[.]" 25 U.S.C. § 450f. Far from having failed to exhaust its administrative

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remedies, as Defendants allege, before bringing this action Plaintiff actually sought to invoke an administrative remedy it was not required to pursue. And, contrary to Defendants' assertions, the fact that Plaintiff sought to avail itself of an *optional* administrative hearing (from which an optional appeal thereafter would lie) under the ISDA prior to bringing this action does not result in the Tribe having forfeited its right "to proceed directly to . . . court" under the ISDA after the request for the optional administrative hearing was denied and any ability to appeal from the results of such a hearing foreclosed.[1]

In their Motion to Dismiss, Defendants argue that officials within the Bureau of Indian Affairs' ("BIA") were unable to determine within 90 days whether the contract proposal had been submitted by a *bona fide* "tribal organization" due to an asserted unresolved "membership dispute" within the Tribe. In essence, Defendants assert that because subordinate BIA officials could not make such a determination (which Plaintiff denies) the Secretary was and remains discharged of his legal obligation to act within 90 days on the contract proposal. However, the BIA is only a sub-agency within the Department, subordinate to the Secretary, and it is the *Secretary*, not the BIA, that is charged with either approving or declining a contract proposal within 90 days. Although the ISDA requires the Secretary to contract only with Indian tribes and "tribal organizations," (defined to include the recognized governing body of an Indian tribe), Congress did not condition the Secretary's legal obligation to either approve or decline a contract proposal within 90 days upon subordinate officials' ability to agree internally on the effect of a purported membership dispute on their recognition of the composition of a Tribe's governing body. On the contrary, long-standing Interior Department policy and practice command that the Department timely fulfill the Secretary's obligations under the ISDA by contracting with the tribe through interim recognition of tribal officials, usually dealing with the tribe through the last undisputed composition of the tribe's governing body, until the tribe itself has resolved the dispute internally. In fact, the Plaintiff is aware of no other case where the Department has refused to take any action on a self-

[1] Nor, as Defendants allege, is the Tribe's pursuit of an optional administrative remedy unresolved or "not yet exhausted." Def. Mot. at 7, l. 10.

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determination contract on the ground that the BIA internally could not make a determination of whether the contract proposal had been submitted by a *bona fide* "tribal organization."

As explained below, the Tribe itself resolved the membership dispute months before the 90 day deadline had passed in this case, as well as through an administrative adjudication between the members of the Tribe and a California court determination. And, although Defendants assert that the membership dispute has been ongoing since June 2009 and remains unresolved, such "dispute" did not prevent the BIA barely a month before from timely approving, awarding and funding another separate "self-determination" contract to the Tribe that had been requested by on the authority of the exact same Tribal officials as authorized the Tribe's contract proposal in this case. Accordingly, the Defendants' claims that this Court lacks jurisdiction over the instant matter are without merit, and this Court should therefore deny their motion.

II. FACTUAL BACKGROUND

A. Undisputed Facts

The following is a summary of relevant facts as alleged in the Complaint, which the Defendants' Motion to Dismiss does not attempt to contradict.[2]

Plaintiff the Alturas Indian Rancheria is a federally-recognized Indian tribe. (Compl. ¶ 15) The governing body of the Tribe is the General Council. (Compl. ¶ 15) Decisions are made by majority vote of the General Council, which exercises all enumerated powers in the Constitution and also reserves to itself all authority not expressly referred to in the Tribe's Constitution. Declaration of James Qaqundah ("Qaqundah Decl."), Exhibit A, at Art. VII, § 1. The General Council is comprised of all members of the Tribe over the age of eighteen years. (Compl. ¶ 15) The Tribe and the General Council consist of five members: Darren Rose, Jennifer Chrisman, Joseph Burrell, Phillip Del Rosa, and Wendy Del Rosa.

Previously, the Tribe, through its General Council, had entered into a "self-determination" contract, Contract No. CTJ52T50217 ("Contract"), with the Department

[2] Where reference is made solely to Paragraphs of the Complaint, Defendants' Motion to Dismiss did not attempt to contradict such Plaintiff's allegations.

pursuant to the ISDA. (Compl. ¶ 22) The Contract was set to expire, and did expire, on or about December 31, 2009. (Compl. ¶ 22) On February 18, 2010, the Tribe, through its General Council, submitted a complete and correct contract renewal proposal, which contained no material or substantive change from the original Contract ("Contract Renewal Proposal"). (Compl. ¶ 24)

The ISDA provides that, unless the Tribe gives written, voluntary consent to a deadline extension, the Secretary must either approve a contract proposal or decline it according to specific declination procedures within 90 days of receiving a contract proposal. (Compl. ¶¶ 16 - 19) If the Secretary fails to take either of these specified actions, the contract proposal is deemed approved by operation of law, and the Secretary must award and fund the contract in full. (Compl. ¶ 18-20) Furthermore, if a contract renewal proposal contains no material or substantive change from the previous contract, the Secretary must approve the contract proposal within the 90-day period; he has no discretion to take any other action. (Compl. ¶ 21)

The BIA Northern California Agency received the Tribe's Contract Renewal Proposal on February 26, 2010, at which time the 90-day period in which the Secretary must act on the Contract Renewal Proposal began. (Compl. ¶ 25) That 90-day deadline passed on or about May 27, 2010, and the Tribe never consented to an extension of the deadline. (Compl. ¶P 26, 28) As of the filing of the Complaint, and the filing of this Opposition, the Secretary has neither approved nor declined the Contract Renewal Proposal. (Compl. ¶ 28)

B. Facts in Dispute

In addition to the above undisputed facts, the Defendants' Motion to Dismiss contains several factual errors and inaccuracies, particularly in relation to the procedural posture of the Tribe's attempts to compel the Department to fulfill its obligation under the ISDA. Although the Department's internal promotion of a so-called "governance dispute" is irrelevant to the instant action, Plaintiff finds it necessary to correct these inaccuracies.

First, the Defendants assert that, on February 28, 2009, "the five members of the General Council voted to adopt two more people." Def. Mot., at 3. This statement is patently false.

On February 28, 2009, at a duly-called General Council meeting, General Council considered the potential enrollment of two individuals as members of the Tribe. However, for several reasons, the General Council expressly did *not* vote to enroll the two individuals into the Tribe. Instead, the General Council voted to make the symbolic act of granting *honorary membership* to the two individuals. In voting to take this symbolic act, the General Council explicitly established the express conditions that neither individual would be granted any membership rights to vote, participate in revenue payments, or participate in any government affairs. The General Council's discussion before voting and vote to grant the two individuals honorary membership is described in the meeting minutes of the February 28, 2010 General Council meeting. *See* Qaqundah Decl., Exhibit B; *see also* Qaqundah Decl., Exhibit C ("Statement of Reasons"), at 15-17.[3] In addition, three members of the General Council previously submitted sworn declarations, in which each acknowledged that the intent of the General Council was to grant only honorary membership to, and not bestow any actual membership rights onto the two individuals. Qaqundah Decl., Exhibit D.

One month after this vote, three members of the five-member General Council voted to remove one particular member, Phillip Del Rosa, from his position as Chairman of the Tribe's Business Committee, based on several allegations of impropriety and misappropriation of Tribal funds. *See* Qaqundah Decl., Exhibit E. Sometime after being removed from his position, Mr. Del Rosa asserted that the two individuals possessed full membership rights.[4] Mr. Del Rosa wrote to the Superintendent of the Northern California Agency ("Superintendent") and requested that the Superintendent intervene and declare that his removal was invalid.

At Mr. Del Rosa's request, the Superintendent issued two decisions on June 6, 2009 and June 19, 2009, in which the Superintendent purported to adjudicate the Tribe's

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[3] Moreover, as discussed in the Tribe's Statement of Reasons, the General Council's actions at the February 28, 2010 meeting were considered by the United States Postal Service Judicial Officer Department in its July 2, 2010 decision, which concluded, as a matter of fact by a preponderance of evidence, that the General Council did not vote to enroll either individual as a member of the Tribe. *See* Qaqundah Decl., Exhibit C, at 11-12, and accompanying exhibit.

[4] Mr. Del Rosa has not argued that the General Council voted to enroll the individuals as members of the Tribe, but rather has repeatedly argued that the General Council's vote to only grant honorary membership, with no rights of actual membership, was automatically converted into a valid vote to grant the individuals full membership, despite the express intent of the General Council. The Tribe has responded to this argument most recently in its Statement of Reasons. Qaqundah Decl., Exhibit C, at 15-19.

"membership dispute." Qaqundah Decl., Exhibit F. In his decisions, the Superintendent, upon Mr. Del Rosa's assertions, concluded that the two individuals had been enrolled as full members of the Tribe. *Id.* These decisions were not made on a temporary basis in the context of a federal government-to-government relationship. *Id.*

A three-person majority of the General Council ("the Rose Administration") appealed these decisions to the Acting Pacific Regional Director. On January 29, 2010, Acting Pacific Regional Director Dale Risling vacated the Superintendent's 2009 decisions on procedural grounds, agreeing with the Rose Administration that it had been unnecessary and inappropriate for the Superintendent to intervene in internal Tribal matters. *See* Qaqundah Decl., Exhibit G. The Acting Regional Director further stated that, according to precedent of the Interior Board of Indian Appeals ("IBIA") and BIA policy, the BIA would continue to recognize the last undisputed governing body, consisting of five members, until the "membership dispute" was resolved by the Tribe. *Id.*

On February 4, 2010, a majority of the General Council considered whether the two individuals had been enrolled as members of the Tribe by the vote to grant them honorary membership.[5] The Tribe concluded that the two individuals had not been enrolled as members of the Tribe and, furthermore, that neither individual could have been enrolled even if the Tribe had attempted to grant them membership, because neither individual met the membership criteria established in the Constitution and therefore such a vote would have violated the Tribe's Constitution. Qaqundah Decl., Exhibit H.

The Del Rosa Faction, which consists of Mr. Del Rosa and his sister, appealed the Acting Regional Director's January 29, 2010 decision to the IBIA. Mr. Del Rosa apparently also wrote to the Acting Regional Director, seeking clarification of how the BIA would interact with the Tribe while the Department was under the impression that a "membership dispute" existed.

[5] The Tribe does not have a Tribal court. However, as discussed above, the Tribe's General Council expressly reserves to itself all authority not expressly referred to in the Tribe's Constitution. Qaqundah Decl., Exhibit A, at Art. VII. § 1. Accordingly, the authority to adjudicate disputes, including purported "membership disputes," rests with the General Council.

On February 19, 2010, the Acting Regional Director wrote back and clarified that, for purposes of government-to-government relations, the BIA would continue to recognize the Tribe's governing body as constituted prior to the assertion of a "membership dispute" until the purported dispute was resolved. *See* Qaqundah Decl., Exhibit I ("[T]he Bureau will continue to recognize the status quo where government-to-government relations between the Bureau and the Tribe are concerned."). The Del Rosa Faction did not appeal the Acting Regional Director's February 19, 2010 decision, and the letter went into effect on or around March 19, 2010. *See* 25 C.F.R. § 2.6(b).

On April 15, 2010, the BIA acted in conformity with the Acting Regional Director's February 19, 2010 decision and awarded the Tribe a "self-determination" contract for road repair and reconstruction, pursuant to the ISDA. *See* Qaqundah Decl., Exhibit J. This contract was awarded to the Tribe through the Rose Administration, the governing majority of the General Council. *Id.*

On June 29, 2010, the IBIA issued a decision, in which it vacated both the Superintendent's 2009 decisions and the Acting Regional Director's January 29, 2010 decision. The IBIA based its decision to vacate the previous decisions on the same procedural ground as the Acting Regional Director had, that the Superintendent had erred by intervening into the merits of an internal Tribal matter in the first instance. *Del Rosa v. Acting Pacific Regional Director*, 51 IBIA 317 (June 29, 2010). The IBIA did not vacate or reverse the Acting Regional Director's February 19, 2010 decision. *Id.* at 321 ("[T]he Board vacates the Superintendent's decisions of June 6, 2009, and June 19, 2009, and the Regional Director's decision of January 29, 2010.").

As to the Contract Renewal Proposal at issue in the instant case, it is undisputed that the Department received the Rose Administration's Contract Renewal Proposal on February 26, 2010 and failed to either award the contract or decline the contract, pursuant to the declination procedures, within 90 days. However, the Defendants' mischaracterize some of the internal proceedings within the Department regarding the Contract Renewal Proposal.

On May 25, 2010, the Superintendent returned the Contract Renewal Proposal without awarding or declining it. *See* Qaqundah Decl., Exhibit K. While the Superintendent did note that IBIA precedent states that the statutory declination procedures are inapplicable when the Superintendent concludes that the submitting entity is not a "tribal organization," the Superintendent did not make such a conclusion. *Id.* Instead, the Superintendent declined to determine whether the General Council was the appropriate body to submit the request. The Superintendent stated that, because of the pending appeal in the *Del Rosa* matter, the Superintendent did not have authority to make any determination while the *Del Rosa* appeal was pending. *Id.* The Superintendent declined to make any determination, even on a temporary basis, despite the fact that the Acting Regional Director had clarified that the BIA would operate under such interim recognition in his February 19, 2010 letter, and despite the BIA's award of a separate contract to the Rose Administration on April 15, 2010.

The Rose Administration requested a hearing on the record regarding the Superintendent's May 25, 2010 decision directly to the IBIA, arguing, *inter alia*, that the Contract Renewal Proposal was approved by operation of law on or about May 27, 2010, pursuant to the ISDA and corresponding regulations.[6] Qaqundah Decl., Exhibit O.

On July 6, 2010, the IBIA issued its decision, in which it affirmed in part the Superintendent's May 25, 2010 decision. *Alturas Indian Rancheria v. Northern California Agency Superintendent*, 52 IBIA 7 (July 6, 2010). The IBIA rejected the Tribe's argument that the Contract Renewal Proposal was approved by operation of law and rejected the Tribe's request for a hearing on the record.[7] *Id.* at 9-10 & n.6. The IBIA also concluded that, within the internal structure of the Department, the Superintendent did not possess the authority to take action on the Contract Renewal Proposal at the time he issued the decision. *Id.* at 7-8. The IBIA therefore purported to "remand" the matter back to the Superintendent "to determine

[6] The Tribe concurrently sought administrative remedy regarding the May 25, 2010 decision from the Acting Regional Director. However, after the IBIA issued its July 6, 2010 decision, the Tribe withdrew its pending request before the Acting Regional Director.

[7] The Defendants' Motion to Dismiss ignores this critical portion of the July 6, 2010 decision and therefore seemingly misunderstands the Plaintiff's position in the instant action, which is that the Department is bound to act within the 90-day timetable prescribed by Congress, regardless of internal Department obstacles to acting within that timetable.

in the first instance the threshold issue of whether the faction that submitted the proposal should be recognized, on an interim basis or otherwise, as having the authority to submit the proposal on behalf of the Tribe." *Id.* at 10. The IBIA decision ignored the fact that the BIA had already recognized the Rose Administration on an interim basis and had been acting pursuant to that interim recognition, and the fact that the 90-day deadline had passed.

After the IBIA's July 6, 2010 decision, the Rose Administration filed the instant action.

On August 18, 2010, the Superintendent issued another decision. *See* Qaqundah Decl., Exhibit L. Although purporting to respond to the IBIA's "remand" in the July 6, 2010, the Superintendent actually once again declined to take any action on the Tribe's contract proposal. Instead, the Superintendent once again declared that the two individuals had been enrolled as members of the Tribe. *Id.*

The Rose Administration brought an administrative appeal of the Superintendent's August 18, 2010 decision to the Acting Regional Director. Qaqundah Decl., Exhibit M. The Tribe challenged the portions of the August 18, 2010 decision where the Superintendent affirmed his 2009 decisions and his conclusion that the two individuals had been enrolled as members of the Tribe. *See Id.*; Qaqundah Decl., Exhibit C, at 6-7 & n.1.

III. ARGUMENT

A. Legal Standard for Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)

A complaint may survive a Rule 12(b) motion to dismiss if it contains enough facts to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, --- U.S. ---, 129 S.Ct. 1937, 1949 (2009); *Hebbe v. Pliler*, 611 F.3d 1202, 1205 (9th Cir. 2010). However, a different standard of review applies to a motion to dismiss directed at the court's jurisdiction to hear the controversy. *Bonnichsen v. United States*, 969 F.Supp. 614, 619 (D. Or. 1997); *see also Winter v. Calif. Medical Review, Inc.*, 900 F.2d 1322, 1324 (9th Cir. 1987). In such cases, the court may look beyond the face of the complaint to evidence on the jurisdictional question. *Land v.* Dollar, 30 U.S. 731, 735 n.4 (1947); *Biotics Research Corp. v. Heckler*, 710 F.2d 1375 (9th Cir. 1983); *Bonnichsen*, 969 F.Supp. at 619. However, such evidence must be relevant to the question of jurisdiction. *See Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir.

1983) ("In ruling on a challenge to subject matter jurisdiction, the district court is ordinarily free to hear evidence *regarding jurisdiction*.") (emphasis added) (citing *Thornhill Publishing Co. v. General Telephone Corp.*, 594 F.2d 730, 733 (9th Cir.1979)); *see also Roberts v. Corrothers*, 812 F.2d 1173 (9th Cir. 1987).

B. Legal Standard for Claim of Agency Action Unlawfully Withheld or Unreasonably Delayed

Review under the APA is available for all agency "action" that is "final." Section 10(c) of the APA, 5 U.S.C. § 704, provides in part that "*Agency action made reviewable by statute and final agency action* for which there is no other adequate remedy in a court *are subject to judicial review*." (Emphasis added.)

As the result of this statutory command, the courts should apply a "strong presumption that Congress intends judicial review of administrative action." *I.N.S. v. St. Cyr*, 533 U.S. 289, 299 (2001); *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986).

> [T]he Administrative Procedure Act . . . embodies the basic presumption of judicial review to one "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute," 5 U.S.C. § 702, so long as no statute precludes such relief or the action is not one committed by law to agency discretion, 5 U.S.C. § 701(a).

Abbott Laboratories v. Gardner, 387 U.S. 136, 140 (1967); *See also Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971); *Center for Policy Analysis on Trade and Health (CPATH) v. Office of U.S. Trade Representative*, 540 F.3d 940, 944 (9th Cir. 2008).

Central to the Plaintiffs' claims in this current case, the APA expressly defines agency *action* to include agency *inaction*. 5 U.S.C. § 551(13). "Agency action" is defined in § 551(13) to include "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, *or failure to act*." (Emphasis added.) "The final term in the definition, 'failure to act,' is in our view properly understood as a failure to take an agency action – that is, a failure to take one of the agency actions (including their equivalents) earlier defined in § 551(13)." *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 62 (2004).

Where an agency has failed to take action it is legally required to take, or has unreasonably delayed in taking such action, the APA authorizes a reviewing court to provide relief. *Norton*, 542 U.S. at 63-64 & n.1. The APA commands that "[t]he reviewing court shall ... compel agency action unlawfully withheld or unreasonably delayed[.]" 5 U.S.C. § 706(1).

C. Under the ISDA, the Secretary was Required to Take One of the Two Statutorily Proscribed Actions Within the 90-day Deadline.

The ISDA requires that the Secretary of the Interior "shall, within 90 days after receipt of [a contract] proposal, approve the proposal and award the contract unless the Secretary provides written notification to the applicant that contains a specific finding that clearly demonstrates" one of five exceptions. 25 U.S.C. § 450f(a)(2). If the Secretary fails to act on the contract proposal within those 90 days, or does not follow the correct declination procedures, the contract is deemed approved by operation of federal law. 25 C.F.R § 900.18; *Cheyenne River Sioux Tribe v. Kempthorne*, 496 F.Supp.2d 1059, 1068 (D. S.D. 2007) (citing 25 C.F.R. § 900.18). Following approval by default or otherwise, the Secretary must award the contract and disburse the full amount of funds. 25 C.F.R. §§ 900.18 and 900.19.

The Secretary can extend the 90-day deadline to act on a contract proposal in only one instance: "voluntary and express written consent" from the Tribe. 25 U.S.C. § 450f(a)(2); 25 C.F.R. § 900.17. "A proposal that is not declined within the 90 days (or within any agreed extension under [25 C.F.R. §] 900.17) is deemed approved and *the Secretary shall award the contract or any amendment or renewal* . . . ." 25 C.F.R. § 900.18 (emphasis added); *see also* 25 C.F.R. § 900.21 ("[A] proposal can only be declined within 90 days after the Secretary receives the proposal . . . .").

If the Secretary declines a contract proposal, he must, in accordance with 25 U.S.C. § 450f(a)(2) and (b), provide written notification to the applicant that contains a specific finding of one of five reasons a contract proposal may be denied, and the Secretary must provide assistance to the tribal organization to overcome the stated objections. The five reasons a contract proposal may be declined are:

i. The service to be rendered to the Indian beneficiaries of the particular program or function to be contracted will not be satisfactory;

> ii. adequate protection of trust resources is not assured;
> iii. the proposed project or function to be contracted for cannot be properly completed or maintained by the proposed contract;
> iv. the amount of funds proposed under the contract is in excess of the applicable funding level for the contract . . .; or
> v. the program, function, service, or activity (or portion thereof) that is the subject of the proposal is beyond the scope of programs, functions, services, or activities covered under paragraph (1) because the proposal includes activities that cannot lawfully be carried out by the contractor.

25 U.S.C. § 450f(a)(2); *see also* 25 C.F.R. § 900.29. "[T]he Secretary shall have the burden of proof to establish by clearly demonstrating the validity of the grounds for declining the contract proposal (or portion thereof)." 25 U.S.C. § 450f(e)(1); *see also* 25 C.F.R. § 900.163. If the Secretary fails to follow the declination procedure established in the ISDA, the contract proposal is deemed approved by operation of law. *Cheyenne River*, 496 F.Supp.2d at 1068 ("Given the Secretary's failure to comply with the declination statutes and regulations, the . . . contract and successor . . . are deemed approved by operation of law.")

Furthermore, proposals to renew term contracts that contain no material or substantive change are not subject to declination, and the Secretary must award and fund the contract renewal. 25 C.F.R. §§ 900.32, 900.33.

In this case, the General Council sent a letter to the BIA requesting a renewal of an existing "self-determination" contract, which was received by the Northern California Agency on February 26, 2010. This contract renewal contained no material or substantive change and the Superintendent was therefore required to award and fund the contract. *See* 25 C.F.R. §§ 900.32, 900.33. In addition, it is undisputed that neither the Secretary nor his subordinates approved the contract request within 90 days, and that the Tribe did not grant an extension of the 90-day deadline. It is also undisputed that neither the Secretary nor his subordinates followed the declination procedures established by the ISDA. Therefore, when the 90-day deadline passed on or about May 27, 2010, with no action taken by the Secretary or any of his subordinates either to award or decline the Tribe's contract proposal, the contract proposal was automatically approved as a matter of federal law pursuant to the ISDA. 25 C.F.R. § 900.18; *Cheyenne River*, 496 F.Supp.2d at 1068.

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The Defendants' Motion to Dismiss relies on the argument that, because the Department's subordinate officers have failed to internally decipher the BIA's role in facilitating the contract proposal within 90 days, the Secretary is indefinitely relieved of his duty to abide by the statute. This argument contradicts the plain language of the statute. Significantly, the ISDA imposes each of these requirements discussed above on the Secretary of the Interior. While the Secretary may delegate its authority to subordinate officers, such delegation does not discharge the Secretary's obligations. In other words, the failure of the Department's subordinate officers to agree on an approach of how to satisfy the Secretary's obligations does not in any way affect the Secretary's statutorily imposed duties.

As soon as the deadline passed on or around May 27, 2010, with the Secretary taking neither required action, the Contract Renewal Proposal was approved by operation of law. As soon as the contract was approved by operation of law, the Secretary was obligated to award and fund the contract proposal. 25 C.F.R. §§ 900.18 and 900.19. The Secretary's failure to do so violates the ISDA and constitutes a required action "unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1).

1. The BIA's pursuit of an asserted "membership dispute" is irrelevant to the instant action and does not deprive this Court of jurisdiction.

The Defendants' Motion to Dismiss is replete with details relating to a "membership dispute," which was asserted to the BIA by a two-member faction after those two members were removed from office of a subordinate Tribal committee and asked by the General Council to repay several hundred thousand dollars in misappropriated funds.[8] All of these details, along with the entirety of the purported "membership dispute," are irrelevant.

[8] In order to avoid their statutorily-imposed duty, the Defendants champion a "membership dispute." As discussed more fully below, this "membership dispute" was resolved by the Tribe itself in February, 2010, shortly before the General Council submitted the Contract Renewal Proposal. Since that time, the Rose Administration, the three-person majority of the General Council, has continued to run Tribal operations for the benefit of all Tribal members. Notably, the "membership dispute" asserted by the two-member faction was also considered and rejected by both the United States Postal Service and the California Superior Court for the County of Siskiyou, as indicated in the Tribe's Statement of Reasons. *See* Qaqundah Decl., Exhibit C, at 11-12, and accompanying exhibits. Despite the fact that the "membership dispute" has been resolved, the two-member faction continues to maintain the existence of a membership dispute, and the Department has apparently entertained the faction's assertions despite the facts, Department policies, and federal precedent.

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As the complaint alleges and the Defendants acknowledge, the ISDA expressly establishes that the Secretary must take one of two actions within 90 days: he must either approve the contract proposal or decline it according to specific declination procedures. The ISDA conspicuously is devoid of an option to "return" the contract proposal for any reason, including an inability of the Department to internally determine any issues surrounding the Tribe. In fact, both IBIA and federal court precedent affirmatively establish that, when an asserted membership dispute threatens to derail government-to-government relations in the context of the ISDA, the BIA is required to resolve any pending internal Tribal membership disputes, not by commenting on the underlying dispute, but rather recognizing a governing body on a temporary basis until such time as the Tribe itself resolves the dispute; generally, this interim governing body recognized by the BIA is the last undisputed governing body, according to IBIA precedent. In addition, once the Tribe itself resolves the purported dispute, the Department is bound by the Tribe's conclusion.

In this case, the Plaintiff has challenged the Defendant's failure to take a discrete action, explicitly required by statute: the Secretary is required to take one of two actions within 90 days of receiving a contract proposal, pursuant to the ISDA. As such, the question raised before this Court is narrow: whether the Secretary was required to take action within 90 days. As such, the Tribe is rightfully unconcerned with the Department's internal obstacles to meet its requirements under the ISDA. Similarly, the Department's internal events are irrelevant to this Court's review of the Secretary's obligation to act within a certain deadline.

2. The Department should have awarded the contract to the last undisputed governing body for purposes of the self-determination contract.

The Department's internal failure to resolve how to act upon the contract proposal was inconsistent with both federal court and IBIA precedent, as well as the Department's own previous decision in this matter.

It should first be noted that the fact that the Department does not possess the authority to adjudicate internal membership disputes is well established. 25 C.F.R. Part 61 (BIA does not have authority over preparation of membership rolls unless granted to BIA by the Tribe); 25

C.F.R. Part 62 (establishing that the BIA does not have any authority over membership disputes unless a particular tribe has conferred such jurisdiction on the BIA, which the Tribe has not done); *Poe v. Pacific Regional Director*, 43 IBIA 105, 112 (2006) ("It is well-established that the ultimate determination of tribal governance must be left to tribal procedures" (internal quotations and citation omitted)). This well-established tenet remains in effect when an internal membership dispute is asserted in relation to a particular Tribe. *Id.* Thus, to the extent that the Department at any time purports to resolve a tribal membership dispute, it violates this well-established principle.

However, because the Secretary is obligated to interact with tribes, the Department must, on a practical level, sometimes identify a Tribal governing body with which to interact in order to avoid interruptions in Tribal funding. For practical purposes, the Department does so, by recognizing a governing body on a temporary basis for the purposes of self-determination contracts, according to IBIA precedent. *Poe*, 42 IBIA at 112; *see also LaRocque v. Aberdeen Area Director*, 29 IBIA 201 (1996). "Normally, that policy is applied by recognizing the last undisputed officials on an interim basis." *Poe*, 43 IBIA at 112 (citing *Rosales v. Sacramento Area Director*, 32 IBIA 158 (1998).

In addition to the IBIA precedent establishing that the BIA shall recognize a governing body for government-to-government purposes, federal courts require the BIA to temporarily recognize a governing body for purposes of ISDA contracts in order to prevent interruptions in Tribal funds and disruption of Congressional intent in enacting the ISDA. *Goodface v. Grassrope*, 708 F.2d 335,339 (8th Cir. 1983) (establishing that the BIA is obligated to continue relations with the Tribe during a pending membership dispute, and shall do so by recognizing a governing body in the interim).

Accordingly, the Department's mishandling of the Tribe's Contract Renewal Proposal not only failed to discharge the Secretary's duty, but also violated both federal court and the Department's own policy.

In fact, in the instant case, the Department previously followed this precedent and acknowledged the last undisputed General Council for purposes of government-to-government

relations in a letter dated February 19, 2010. Qaqundah Decl., Exhibit I. In this letter, the BIA clarified that, for purposes of government-to-government relations, the BIA would continue to recognize the Tribe's governing body as constituted prior to the assertion of a "membership dispute." *Id.* ("[T]he Bureau will continue to recognize the status quo where government-to-government relations between the Bureau and the Tribe are concerned.").

This February 19, 2010 decision by the Acting Regional Director to recognize the last undisputed governing body during the "membership dispute" was never appealed. Pursuant to the Department's regulations, it therefore went into effect as the official agency position on or around March 19, 2010. *See* 25 C.F.R. § 2.6. Thus, to the extent that the "membership dispute" was still pending at the time the 90-day deadline passed, the Department in fact did have a recognized governing body with which it could interact for purposes of the ISDA.

Moreover, pursuant to the Department's February 19, 2010 decision to recognize the five-person governing body, the Department awarded a self-determination contract to the General Council, via the Rose Administration, on April 15, 2010, pursuant to the ISDA. *See* letter from Agency Contracting Officer Terry Lincoln to Darren Rose, awarding a "self-determination" contract to the Tribe for road repair and reconstruction. Qaqundah Decl., Exhibit J. As such, contrary to Defendants' claims, the Department was not only capable of taking action on the Tribe's Contract Renewal Proposal, it had already taken an identical action sought again by the Tribe no less than the previous month. Whatever internal impediments came up between April 15, 2010, when the Department awarded a self-determination contract pursuant to the ISDA, and May 27, 2010, when the same Department allowed the 90-day deadline to lapse, did not relieve the Secretary of his obligation to take action on the contract within the deadline period pursuant to the ISDA.

3. There is no membership dispute, and the Department was therefore bound to recognize the Tribe's legitimate governing body, the General Council.

At the time the 90-day deadline lapsed, there was no membership dispute because the Tribe had resolved the asserted "membership dispute" on February 4, 2010. Even when the

Department recognizes a governing body on a temporary basis for ISDA purposes, this recognition of the last undisputed governing body is temporary, and is only valid until such time as the Tribe itself has resolved the dispute. *Goodface*, 708 F.2d 335 (8th Cir. 1983) (noting that, although the BIA may identify officials for purposes of a government-to-government relationship on an interim basis, that recognition may only continue only as long as the dispute remains unresolved by the tribe); *see also Poe*, 43 IBIA at 112. Once the Tribe itself has resolved the membership dispute, the BIA is required to abide by the Tribe's decision. In this case, the Department's failure to act contradicted this well-established precedent because it failed to defer to the Tribe's own resolution of the asserted dispute.

The Tribe itself resolved the membership dispute asserted by Phillip Del Rosa on February 4, 2010. On February 4, 2010, the General Council considered whether the two individuals were enrolled as members of the Tribe on February 28, 2010, and determined that neither individual had ever been enrolled as members of the Tribe.[9] In fact, the General Council concluded that neither individual could have been enrolled even if the Tribe had attempted to grant them membership, because such a vote would have violated the Tribe's Constitution. As such, the Tribe concluded that neither individual was or ever was a member of the Tribe, and the "dispute" was resolved."

Accordingly, because there was no membership dispute, the Defendants' claims that the Department was not bound by the 90-day deadline due to internal problems over the purported "membership dispute" are flawed.

D. Department Action on the Tribe's Contract Renewal Proposal was Unlawfully Withheld and Unreasonably delayed.

In *Norton*, the United States Supreme Court emphasized that courts may only compel agency actions that have been "unlawfully withheld." *Norton*, 542 U.S. at 63. Thus, the Court noted that it could only compel a discrete action that an agency is required by law to take, and cannot compel broad programmatic change within the agency. *Id.* at 64. In order to determine whether agency action has been unreasonably delayed or unlawfully withheld, the federal

[9] As discussed above, *supra* footnote 5, the authority to adjudicate disputes, including purported "membership disputes," rests with the General Council.

courts generally have adopted the six-part test set forth in *Telecommunications Research and Action Center v. FCC*, 750 F.2d 70 (D.C. Cir. 1984) ("*TRAC*"); *see also Independence Mining Co., Inc. v. Babbitt*, 105 F.3d 502, 507 (9th Cir. 1997) ("We look to the so-called *TRAC* factors in assessing whether relief under the APA is appropriate."); *Sierra Club v. Thomas*, 828 F.2d 783, 792-97 (D.C. Cir. 1987).

However, in cases where Congress has imposed a firm deadline for performance by the agency, "no balancing of factors is required or permitted." *Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1177 n.11 (9th Cir. 2002). In *Biodiversity*, Congress had imposed a twelve-month deadline for action on the Department of the Interior. *Id.* at 1177. After failing to meet this deadline, the Department urged the Ninth Circuit to apply and weigh the *TRAC* factors in order to justify the delay. *Id.* The Ninth Circuit rejected this attempt to justify the Department's failure to act, stating that balancing of the *TRAC* factors was not only unnecessary, but not permitted when an agency fails to meet Congress' express imposition of a deadline. *Id.* at 1177 n.11. The Ninth Circuit therefore concluded that the Department's "failure to comply with the twelve-month deadline is not in accordance with . . . the governing law." *Id.* at 1177.

Similarly, in this case, Congress imposed an explicit deadline on the Department: the Secretary must take one of two actions within 90 days of receiving a contract proposal. In their motion to Dismiss, the Defendants assert that the Department's internal inefficiency voids Congress's express timetable. In effect, the Defendants argue that certain of the *TRAC* factors, perhaps mainly an assertion that Secretary's delay was governed by some "rule of reason," weigh in favor of allowing the Secretary's delay. However, in the case of action on a contract proposal, Congress imposed a precise deadline for action: 90 days. Accordingly, "no balancing of factors is required or permitted," and any failure to act within that deadline constitutes unreasonably delay. *Biodiversity*, 309 F.3d 1177 & n.11.

Although the balance of factors is neither necessary nor appropriate in this case, it is notable that the balance of the *TRAC* factors weighs in favor of compelling agency action. The *TRAC* factors include:

> (1) the time agencies take to make decisions must be governed by a "rule of reason;" (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and (6) the court need not "find any impropriety lurking behind agency lassitude in order to hold that agency action is 'unreasonably delayed.

750 F.2d at 80 (internal citations omitted). These factors weigh in favor of the Plaintiff.

First, in light of the fact that the Department has a policy of recognizing an interim governing body specifically for the purpose of maintaining government-to-government interactions pursuant to the ISDA, including the fact that the Department actually awarded a contract to the governing body recognized on an interim basis in April 15, 2010, indicates that the Defendants' delay was not governed by any rule of reason. Second, as discussed above, Congress imposed a specific timetable and deadline.

The third and fifth factor are intertwined and therefore best considered together. As alleged in the Complaint, the members of the Tribe have suffered and continue to suffer substantial and irreparable harm as a result of the Department's inaction, including harm to their general welfare and harm to their legitimate and substantial interests in receiving benefits from the governing body of the Tribe, the United States government, and the California state government. The human health and welfare are at stake in this case because fundamental medical, housing, natural resources, water quality, and environmental interests have been and continue to be adversely affected by the Department's inaction.

Regarding the fourth factor, the only effect of compelling action by the Department would be to induce the Department to take one of the two permissible actions on a contract proposal within the statutorily 90-days, rather than considering contract proposals internally for indefinite periods. In the current case, the effect would be minimal because the Department was already interacting with the General Council, through the Rose Administration, on another

contract pursuant to the ISDA. In light of the fact that the Department has already recognized an interim government and awarded it one "self-determination" contract, awarding that same government, whether on an interim basis or on recognition that any purported "membership dispute" has been resolved, would have minimal effect on the Department's ability to carry out its other responsibilities. The Department would not consume significantly more time or resources by taking such action and, in fact, would likely conserve time and resources by acting expeditiously to perform its obligations within the statutorily-imposed timetable.

The final *TRAC* factor merely states that the Court need not conclude that the Defendants' inaction is the result of impropriety in order to find unreasonable delay. No allegation or factual showing is required of the Plaintiffs on this point.

Therefore, even though a balancing of factors is not necessary or permitted because Congress had established an explicit deadline for action, each of the *TRAC* factors weighs in favor of finding that a agency action was unlawfully withheld or unreasonably delayed in the instant case.

E. The Tribe is Not Required to Exhaust an Optional Administrative Remedy for Agency Inaction Prior to Bringing This Action Under the APA.

Section 10(c) of the APA provides:

> Except as otherwise expressly required by statute, *agency action otherwise final is final for the purposes of this section* whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, *unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority*.

5 U.S.C. § 704 (emphasis added). As a result of this provision, the United States Supreme Court squarely rejected any judicially imposed requirement to exhaust administrative remedies prior to bringing an action under the APA. "[W]here the APA applies, an appeal to "superior agency authority" is a prerequisite to judicial review *only* when expressly required by statute or when an agency rule requires appeal before review and the administrative action is made inoperative pending that review." *Darby v. Cisneros*, 509 U.S. 137, 153 (1993) (emphasis in original). Where an agency's "regulations do not explicitly require a petitioner to appeal . . .

prior to seeking judicial review, *such intra-agency review is optional*." *Young v. Reno*, 114 F.3d 879, 882 (9th Cir. 1997). In addition, where the agency regulations do not "effectively render inoperative the challenged [agency action] pending appeal . . . , then exhaustion of administrative appeals is not required." *Idaho Watersheds Project v. Hahn*, 307 F.3d 815, 825 (9th Cir. 2002).

The Department proposes that a party be subjected to further agency process (and resulting agency delay) *before* a court can be asked to remedy the agency's failure or unreasonable delay in taking the action within the statutory deadline in the first place. This argument is not only illogical, it directly conflicts with Congress' intent in enacting the APA, 5 U.S.C. § 706(a)(1). Accordingly, the Plaintiff was not required to appeal the agency's inaction under 25 C.F.R. § 2.8 prior to bringing the instant action to compel the Secretary to take action.

However, although not necessary to the instant case, the Plaintiff did in fact seek to pursue an optional administrative remedy provided in 25 U.S.C. § 450(f)(b)(3), in an attempt to compel the Defendants to satisfy their statutory-imposed obligations. After the 90-day deadline passed, the Plaintiff requested an administrative hearing on the record regarding the subordinate officer's refusal to take action before the 90-day deadline directly to the IBIA. Qaqundah Decl., Exhibit O. In that request, the Plaintiff alleged that the Department had erred by refusing to take action within the statutorily-imposed 90-day deadline and, due to the Secretary's failure to do so, the Contract Renewal Proposal was approved by operation of law. *Id.*

On July 6, 2010, the IBIA issued a decision, in which it denied the Tribe's request for a hearing on the record. *Alturas Indian Rancheria*, 52 IBIA at 9-10 & n.6. As explained below, because the hearing was denied, the Tribe was deprived of an opportunity to seek an appeal of a decision after a hearing under § 450f(b)(3).[10]

[10] The Defendants assert that the administrative proceedings on the Tribe's original appeal of the agency's inaction are still pending. This is incorrect. In fact, a wholly separate administrative appeal is currently pending before the Pacific Regional Director. On August 18, 2010, a subordinate officer issued a decision in which he intruded into internal Tribal matters and purported to interpret Tribal law, in order to announce the supposed membership of the Tribe. Because the BIA is precluded by federal law and IBIA precedent from either intruding into internal membership matters and from interpreting Tribal law, the Rose Administration appealed this decision. *See Poe v.*

F. This Action is Not Precluded by the Tribe Having Sought an Optional Administrative Hearing Under the ISDA.

While Defendants argue that the Tribe failed to exhaust its administrative remedies with respect to the Tribe's claim under the APA, they argue exactly the opposite with respect to the Tribe's claim under the ISDA directly. They claim first, that the Tribe forfeited its right to bring an action under the ISDA by having taken an optional administrative appeal authorized by the ISDA prior to bringing this action. Second, Defendants assert that the optional appeal "has not yet [been] exhausted." Def. Mot. at 7. Defendants theorize that the IBIA, from whom the Tribe sought a hearing, remanded the entire matter to the BIA official whose decision had been appealed, and that the official subsequently made another decision on the matter, which the Tribe again appealed. Essentially, Defendants argue that the Tribe embarked on an administrative merry-go-round ride and have not yet gotten off. The first assertion is contrary to the ISDA and the facts, while the second is contrary to the ISDA, Interior Department regulations governing appeals and the facts.

First, contrary to Defendants' assertions, the ISDA does not limit tribes to pursuing *either* an optional administrative hearing and subsequent appeal *or* bringing a civil action in federal court. Tribes may do either or both.

> Under the ISDEA, a tribe has ***two alternate appeal routes*** when the Secretary declines a self-determination contract. ***The tribe may obtain "a hearing on the record*** with the right to engage in full discovery relevant to any issue raised in the matter ***and the opportunity to appeal*** on the objections raised." 25 U.S.C. § 450f(b)(3) (emphasis added). That ***appeal may either be within the agency or to an Administrative Law Judge*** ("ALJ"). 25 U.S.C. § 450f(e)(2). ***Any review of that decision is governed by the APA. Alternatively, a tribe may*** **"in lieu of filing such appeal, *exercise the option to initiate an action in a Federal district court*."**

Shoshone-Bannock Tribes of the Fort Hall Reservation v. Shalala, 988 F.Supp. 1306, 1316 (D. Or. 1997) (quoting 25 U.S.C. § 450f(b)(3)). Defendants simply misconstrue the language of

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Pacific Regional Director, 43 IBIA 105, 112 (2006) ("It is well-established that the ultimate determination of tribal governance must be left to tribal procedures" (internal quotations and citation omitted)). The appeal currently pending before the Regional Director has nothing to do with whether the Secretary may ignore the 90-day deadline based on internal vacillation over whether to take action on a contract proposal. *See* Qaqundah Decl., Exhibit C, at 6-7 & n.1.

the statute (as well as the palpable intent of Congress). The ISDA provides that the tribe "may proceed directly to [federal] court . . . in lieu of filing such appeal." The choice presented to tribes is that they may choose to proceed in federal court without having first brought an appeal following an optional "hearing on the record." The ISDA *does not say* that the tribe may file an administrative appeal "in lieu of proceeding directly to [federal] court."

In construing a statute, courts must "look to the provisions of the whole law, and its object and policy." *United States Nat'l Bank of Oregon v. Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993). Indian tribes' and tribal organizations' right to an administrative "hearing on the record and the opportunity for appeal on the objections raised" was added to the ISDA by Congress in the 1987 Indian Self-Determination Act Amendments ("1987 Amendments"), P.L. 100-472, Title II, § 201, 102 Stat. 1285 (Oct. 5, 1988). Section 206(a) of the 1987 Amendments also created a remedy in federal court, granting courts "original jurisdiction over any civil action or claim . . . arising under this Act[,]" and authorized courts to enter mandamus relief to compel the Secretary "to perform a duty provided under this Act or regulations promulgated hereunder." This section became 25 U.S.C. § 450m-1. As Congress explained, "[t]he strong remedies provided in these amendments are required because of . . . agencies' consistent failures over the past decade to administer self-determination contracts in conformity with the law." *Shoshone-Bannock Tribes*, 988 F. Supp. at 1315-1316 (quoting S. Rep. No. 100-274, 100th Cong., 1st Sess. at *36 (Dec. 21, 1987).

Six years later, Congress amended 25 U.S.C. §§ 450f(b)(3) and 450m-1(a) to provide even stronger remedies for tribes against administrative malfeasance.

> There is no doubt that Congress intended to allow a tribe to save time by shortcutting the administrative appeal process. In 1994 Congress added to § 450m-1(a) the phrase permitting relief in court "to compel the Secretary to award and fund an approved self-determination contract" in order "to clarify the right of contractors to seek immediate judicial relief to review a declination finding or to secure the award and funding of an approved contract, *without **first** invoking further administrative levels of appeal or similar 'exhaustion' procedures which could further delay the contracting process.*"

Shoshone-Bannock Tribes, 988 F. Supp. at 1316 (quoting S. Rep. No. 103-374, 103rd Cong., 2d Sess. at *5 (Sept. 26, 1994)) (emphasis in opinion; emphasis on "first" added). Similarly, the current regulations, adopted two years after the 1994 amendments, "state[] that an Indian tribe or tribal organization may go directly to Federal district court rather than exhaust the administrative appeal process under this regulation." 61 Fed. Reg. 32482, 32496 (June 24, 1996).

Defendants' reliance on the *California Valley Miwok Tribe v. Kempthorne*, No. 08-CV-03164 (E.D. Cal., Order Feb. 23, 2009) in support of its theory is unavailing. In particular, the Court's conclusion that failure to seek *judicial* review under the APA is a failure to exhaust *administrative* remedies is problematic. *Miwok*, Slip Op. at 12. Even if correct, this holding is inapposite to this case, where Plaintiff is seeking judicial review under the APA. Further, as with all other existing precedent, both judicial and administrative, *but unlike the current case, the Department in California Valley Miwok had determined that the proposed contractor was not a tribal organization within the meaning of the ISDA*, which determination had previously been upheld by the federal courts. The Department made no such determination in this case, and as explained above, its approval of another self-determination contract shortly before its inaction on the contract proposal in this case, as well as other federal adjudicative administrative and state judicial determinations of the facts that would support making such a determination, are to the contrary.

In addition, other more recent judicial authority is contrary to the *California Valley Wiwok Tribe* decision as well as Defendants' theory in this case. In *San Pascual Band of Mission Indians v. Salazar*, No. 09-CV-01716 (D.D.C., Slip Op. March 10, 2010), Qaqundah Decl., Exhibit N, the Department had determined that the self-determination contract proposal in that case had not been submitted by a recognized tribal organization. The Band argued that failure

to follow the declination procedures mandated by the ISDA resulted in the contract having been approved by operation of law and sought a declaration to that effect. The Department sought to have the action dismissed. The Court observed that "[*w*]*hether the Band is entitled to its requested relief in this case depends on whether BIA was correct* in concluding that the resolution supporting the contract proposal was not submitted by a recognized tribal organization." *San Pascual*, Slip Op. at 3. Although that issue was pending on appeal before the Assistant Secretary, the Court declined to dismiss the Band's case and instead stayed the action pending resolution of the administrative appeal.

More importantly, even assuming *arguendo* that Defendants' position is correct that the Tribe may not bring an action in federal court under the ISDA if it has first brought an optional administrative appeal, it does not preclude the Tribe from bringing this action as Defendants urge *because the Tribe never brought the appeal in question*. In the current case, the Tribe requested, *but was not granted*, a "hearing on the record with the right to engage in full discovery relevant to any issue raised in the matter" in accordance with 25 U.S.C. § 450f(b)(3). *See* Qaqundah Decl., Exhibit M; *Alturas Indian Rancheria v. Northern California Agency Superintendent*, 52 IBIA 7 at 8 & 10 n. 6.[11] As such, *the Tribe never was afforded the subsequent "opportunity for appeal* on the objections raised" under section 450f(b)(3). Accordingly, the Tribe never "fil[ed] ***such*** appeal" and the Tribe is not precluded from "exercis[ing] the option to initiate an action in a Federal district court and proceed directly to such court pursuant to section 450m-1(a) . . . *in lieu of filing* ***such*** *appeal*. 25 U.S.C. § 450f(b)(3). Further, the Tribe would not have been precluded from bringing this action if it declined to appeal and instead proceeded directly to this Court, even if it had been afforded a

[11] Unfortunately, the applicable regulations use a nomenclature different from that used in the ISDA. The Department's regulations provide that a request for a "hearing on the record" is to be made by filing a "Notice of Appeal," 25 C.F.R. §§ 900.152 & 900.158. Such "appeal" should not be confused with the "appeal" referred to in 25 U.S.C. § 450f(b)(3). Rather, the § 450f(b)(3) "appeal" is the "appeal" under 25 C.F.R. § 900.165(a) & (c) from a "recommended decision" following a "hearing on the record."

hearing on the record. *Aleutian Pribilof Islands Assoc. v. Kempthorne*, 537 F.Supp.2d 1, 8-9 (D.D.C. 2008).

Finally, Defendants' characterization of both the IBIA decision in *Alturas Indian Rancheria v. Northern California Agency Superintendent* and the Tribe's pending appeal of a subsequent decision by the same BIA official is factually inaccurate and contrary to the regulations governing the effect of IBIA decisions. As explained above, the Tribe's "appeal" was a request for a "hearing on the record" under 25 U.S.C. § 450f(b)(3), although styled an "appeal" under the Department's regulations. The IBIA was required to "grant the request for a hearing unless the IBIA determines that there are no genuine issues of material fact to be resolved." 25 C.F.R. § 900.160(a)(1).[12] Although it did not make such a determination, the IBIA nevertheless denied the Tribe's request for a hearing, and "[n]o further appeal with lie in the Department" from its decision. 43 C.F.R. § 4.21(d). Further, although the IBIA went further and "affirmed" the BIA official's decision not to act on the Tribe's contract proposal, it only "vacated and remanded" the matter "[t]o the extent that the Superintendent's decision might be construed as going beyond relying on [the] jurisdictional bar[, i.e.,] that he lacked jurisdiction to consider the contract proposal[.]" 52 IBIA 7. *See also id.* at 8.

Lastly, although the same official has made another decision and the Tribe has appealed that decision, as explained above, *the Tribe's appeal does not concern that official's decision not to act on the Tribe's self-determination contract proposal. See* Qaqundah Decl., Exhibit M; Qaqundah Decl., Exhibit C, at 6-7 & n.1. Nor, of course, does it concern the IBIA's decision refusing to grant the Tribe a hearing on the record under 25 U.S.C. § 450f(b)(3), from which decision "[n]o further appeal with lie in the Department[.]" 43 C.F.R. § 4.21(b). Accordingly, Defendants are in error in asserting that the Tribe "continues to have an administrative appeal pending regarding its contract request[.] Def. Mot. at 9.

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[12] The IBIA treated the Tribe's hearing request as an "otherwise appealable pre-award dispute" under 25 C.F.R. § 900.150(i). 52 IBIA 7, at 8 n. 2.

IV. CONCLUSION

For the foregoing reasons, the Plaintiff respectfully requests that this Court deny the Defendants' Motion to Dismiss.

Respectfully submitted this 20th day of September, 2010.

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