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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

ALTURAS INDIAN RANCHERIA,

Plaintiff,

v.

KENNETH SALAZAR, et al.,

Defendants.

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

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

Date: October 12, 2010
Time: 10:00 a.m.
Ctrm: 4, 15th Floor
Judge: Hon. Lawrence K. Karlton

INTRODUCTION

This action concerns a request by Darren Rose, Jennifer Chrisman, and Joseph Burrell (collectively the "Rose Faction") that the Bureau of Indian Affairs ("BIA"), an agency in the United States Department of the Interior ("Department"), renew a contract under the Indian Self-Determination and Education Assistance Act ("ISDA") with the Alturas Indian Rancheria ("Tribe"). BIA returned the Rose Faction's contract request on May 26, 2010, noting that there was a leadership dispute between the Rose Faction and another faction of the Tribe which was the subject of a pending administrative appeal, and that BIA could not determine which of the factions represented the Tribe until the appeal was resolved. The Rose Faction filed an administrative appeal of the May 26 decision, and that administrative process is not yet final.

Nevertheless, the Rose Faction, purporting to speak for the Tribe, also brought this lawsuit against the Department, and various officials of the Department and the BIA, asserting that the BIA has failed to act on the Rose Faction's application for a contract renewal in violation of the ISDA and the Administrative Procedure Act ("APA"). This Court does not have jurisdiction over this action because the Rose Faction has elected to pursue an administrative appeal of the BIA's action with regard to their request, and there is no final agency action as the Rose Faction has not yet exhausted its appeals. Thus, this action must be dismissed for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1).

STATUTORY BACKGROUND

Indian Self-Determination and Education Assistance Act Contracts And Appeal Options

In 1975, Congress enacted the ISDA, a statute that was designed to foster Indian self-government by permitting the transfer of certain federal programs to Indian Tribes. See 25 U.S.C. §§ 450, 450a. "'Indian tribe' means any Indian tribe, band, nation, or other organized group or community . . . which is recognized as eligible for the special program and services provided by the United States to Indians because of their status as Indians." § 450b(e). The ISDA directs the Secretary of the Department, upon the request of an Indian Tribe, to enter into "self-determination contracts" with "tribal organizations." See §§ 450f(a)(1), 450b(l). A "self-determination contract" is a contract "entered into . . . between a tribal organization and the [ ] Secretary for the planning, conduct and administration of programs or services which are otherwise provided to Indian tribes and their members pursuant to Federal law." § 450b(j). "'[T]ribal organization' means the recognized governing body of any Indian tribe; any legally established organization of Indians which is controlled, sanctioned, or chartered by such governing body or which is democratically elected by the adult members of the Indian community to be served by such [an] organization and which includes the maximum participation of Indians in all phases of its activities. . ." § 450b(l).

Under the ISDA, if an Indian Tribe wishes to take over the planning, conduct, or administration of programs or services which are otherwise provided by the Department, it may authorize a tribal organization to "submit a proposal for a self-determination contract, or a

proposal to amend or renew a self-determination contract, to the Secretary for review." See 25 U.S.C. § 450f(a)(2). If the Secretary receives a contract proposal from a duly-authorized tribal organization, he then has 90 days either to (1) approve the proposal and proposed funding levels and award the contract, or (2) issue a written notification declining all or part of the proposal for one of five justifications found in § 450f(a)(2). See 25 U.S.C. § 450f(a)(2). If the Secretary declines to enter into a self-determination contract, he must "state any objections in writing[,]" "provide assistance to the tribal organization to overcome the stated objections," and provide the tribal organization with the opportunity to pursue an administrative appeal. 25 U.S.C. § 450f(b). "In lieu of" pursuing an administrative appeal, a tribal organization may also initiate a federal court action under 25 U.S.C. § 450m-1(a). See 25 U.S.C. § 450f(b). If the Secretary's decision does not comply with the ISDA, a court may enjoin the Secretary "to reverse the declination finding . . . or to compel the Secretary to award and fund an approved self-determination contract." *Id.* § 450m-1(a).

STATEMENT OF FACTS

Background on the Tribe's Governance Dispute

The Tribe's governing body is the General Council. Declaration of Fred Doka, Jr., In Support of Defendants' Motion to Dismiss ("Doka Declaration"), Exhibit 1 at 1. The Tribe's last undisputed General Council consisted of five members: Phillip Del Rosa, Wendy Del Rosa, and the three members of the Rose Faction – Darren Rose, Jennifer Chrisman, and Joseph Burrell. Doka Declaration Exhibit 8 at 4. On February 28, 2009, the five members of the General Council voted to adopt two more people – Calvin Phelps and Don Packingham – into the Tribe. Doka Declaration Exhibits 2 at 3; 3 at 5; 10 at 4. The Del Rosas and the Rose Faction disagree about whether Phelps and Packingham are merely honorary members of the Tribe or whether they have full rights, including voting rights on all Tribal matters. Doka Declaration Exhibits 2 at 2; 3 at 5, 7. They also dispute the validity of an attempt to remove Phillip Del Rosa as Chairman of the Tribe. Doka Declaration Exhibits 2 at 2-4; 3 at 1, 5.

On June 6, 2009, the Superintendent of the BIA's Northern California Agency informed the Del Rosas and the Rose Faction that BIA would require all seven of the General Council

members (*i.e.*, including the adoptees) to be given an opportunity to vote on any request for federal action, and that a minimum of four of the members would have to vote in favor of any such request. Doka Declaration Exhibit 2. The Rose Faction appealed this decision to the Regional Director of BIA's Pacific Regional Office. Doka Declaration Exhibit 1 at 1-2. On January 29, 2010, the Regional Director vacated the Superintendent's June 6 decision, determining that there was no pending matter requiring federal action that would justify getting involved in a Tribal membership dispute, but then going on to state that the Tribe's General Council consisted of only five members (*i.e.*, excluding the adoptees). Doka Declaration Exhibits 3; 1 at 2. The Del Rosas appealed the Regional Director's decision to the Interior Board of Indian Appeals ("IBIA"). *See Del Rosa v. Acting Pacific Regional Director*, 51 IBIA 317 (2010) (attached to Doka Declaration as Exhibit 1). The IBIA vacated both the Superintendent's and the Regional Director's decisions on June 29, 2010, because there was no pending matter requiring federal action that would justify either the Superintendent or the Regional Director taking a position on governance and membership issues. *Id.* at 318.

The ISDA Contract Request At Issue and the Administrative Appeal Process To Date

Prior to the leadership dispute just described, the Tribe and BIA entered into an ISDA self-determination contract. That contract expired on December 31, 2009. Complaint ¶ 22. On February 26, 2010, after the Regional Director's January 29 decision but before the IBIA June 29 Order, the BIA's Northern California Agency received a request from the Rose Faction, purporting to act on behalf of the Tribe, that the expired contract be renewed. Complaint ¶¶ 23, 25, Exhibit B. This is the ISDA contract request at issue in this action. On May 14, 2010, the Northern California Agency also received a request to renew the expired contract from Phillip and Wendy Del Rosa, also purporting to act on behalf of the Tribe. Doka Declaration Exhibit 4. On May 25, 2010, the Northern California Agency Superintendent returned both contract requests, noting that there was a leadership dispute between the Del Rosas and the Rose Faction, and explaining that it could not determine if either request was from a "tribal organization," as the ISDA requires, while the *Del Rosa* appeal was pending before the IBIA. Doka Declaration Exhibit 5 at 1.

Both the Del Rosas and the Rose Faction appealed this decision to the BIA Regional Director. Doka Declaration Exhibits 6 and 7. The Rose Faction also appealed this decision to the IBIA. Doka Declaration Exhibits 8 and 9. On July 6, 2010, the IBIA affirmed the Superintendent's May 25 determination that he lacked jurisdiction to consider the contract proposals because of the pendency of the *Del Rosa* IBIA appeal. 52 IBIA 8, attached to Doka Declaration as Exhibit 9. However, the IBIA went on to explain that the effect of its *Del Rosa* decision "was to return jurisdiction to BIA to consider, as appropriate, issues regarding the Tribe's governance," including whether the Rose Faction's contract proposal was authorized by the Tribe. 52 IBIA 9. It thus affirmed the May 25 decision in part, vacated it in part, and remanded it to BIA for further proceedings. 52 IBIA 10.

On August 18, 2010, the Northern California Agency Superintendent responded to the IBIA's remand by reconsidering both factions' ISDA contract renewal requests. Doka Declaration Exhibit 10. He reaffirmed his earlier determination that the Tribe's General Council had seven members that all had to be provided with an opportunity to vote on requests for federal action, and that a minimum of four of the members would have to vote in favor of any such request. *Id.* at 4. Since neither faction's contract requests met the General Council quorum requirements, the Superintendent returned them. *Id.* at 3-4. Two days letter, the Rose Faction appealed ths decision to the BIA Regional Director, and that appeal is still pending. Doka Declaration Exhibit 11.

The Complaint in this Action

On July 27, 2010, the Rose Faction filed the Complaint in this action, naming as defendants the Department and various officials of the Department and the BIA (collectively "the Defendants"). Court Docket # 2. The Complaint asserts two claims for relief – the first that the Defendants violated the ISDA by failing to approve and fund the Rose Faction's February 2010 request to renew the Tribe's self-determination contract, and the second that the Defendants violated the APA, 5 U.S.C. §§ 704 and 706, by failing to act on the same request. Complaint ¶¶ 30-45.

ARGUMENT

I. Standard for Motion to Dismiss Under F.R.C.P. 12(b)(1).

Jurisdiction is a threshold issue that the Court must address before considering the merits. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-96; 118 S. Ct. 1003 (1998); *McCarthy W. Constructors, Inc. v. Phoenix Resort Corp.*, 951 F.2d 1137, 1140 (9th Cir. 1991). Federal courts are courts of limited jurisdiction and may hear a case only if authorized to do so by the Constitution or by statute. *Kokkonnen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377; 114 S. Ct. 1673 (1994). "A federal court is presumed to lack jurisdiction in a particular case unless the contrary affirmatively appears." *A-Z Int'l v. Phillips*, 323 F.3d 1141, 1145 (9th Cir. 2003) (citation and quotations omitted). It is the plaintiff's burden to prove subject matter jurisdiction when it is challenged under Federal Rule of [Civil] Procedure 12(b)(1). *Kingman Reef Atoll Investments v. United States*, 541 F.3d 1189, 1197 (9th Cir. 2008).

A challenge to jurisdiction under Rule 12(b)(1) "can be either facial, confining the inquiry to allegations in the complaint, or factual, permitting the court to look beyond the complaint." *Savage v. Glendale Union High Sch.*, 343 F.3d 1036, 1039-40 n.2 (9th Cir. 2003); *see also White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). In a factual challenge, "the district court is not restricted to the face of the pleadings, but may review any evidence, such as affidavits and testimony, to resolve factual disputes concerning the existence of jurisdiction." *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988); *see also Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). "'Without jurisdiction the court cannot proceed at all in any cause,'" other than "'announc[e] the fact and dismiss[]'" the case. *Steel Co.*, 523 U.S. at 94-95; 118 S. Ct. 1003 (1998), quoting *Ex parte McCardle*, 74 U.S. 506, 514 (1868).

II. This Court Lacks Jurisdiction Over the Rose Factions's ISDA Claim Because The Rose Faction Elected To File An Administrative Appeal And Is Thus Foreclosed From Also Proceeding Judicially.

Tribal organizations with whom the Department has declined to enter into self-determination contracts have two options under the jurisdictional provision in the ISDA: they can file an administrative appeal under rules and regulations promulgated by the Department, or "in lieu of filing such appeal," they may "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(b). Whether the Rose Faction qualifies as a "tribal organization" for the purposes of the ISDA is currently at issue in its administrative appeal pending before the BIA. Doka Declaration Exhibit 11. But even if the Court were to assume that the Rose Faction could be considered a "tribal organization," the very fact that it has a pending administrative appeal bars it from proceeding judicially as well. The ISDA allows a tribal organization to proceed directly to federal court "in lieu of filing" an administrative appeal, not in addition to filing such an appeal. 25 U.S.C. § 450f(b). Rather than choosing one or the other, however, the Rose Faction has chosen both. It first filed an administrative appeal from the Superintendent's May 25, 2010 letter returning its February 2010 contract request, which it has not yet exhausted, and then filed this action directly challenging BIA's action regarding the same request. The ISDA does not countenance this, and the Court should not either. Accordingly, this Court should dismiss the Rose Faction's first cause of action under the ISDA. *See California Valley Miwok Tribe v. Kempthorne*, E.D. Cal. 2:08-CV-03164-FCD-EFB, Order of February 23, 2009 (dismissing ISDA challenge) (copy appended hereto).

III. This Court Lacks Jurisdiction Over The Rose Faction's APA Claim Because The Rose Faction Has Not Exhausted Its Administrative Appeals and There Is No Final Agency Action.

The Rose Faction's Second Claim for Relief under the APA is premised on the assertion that "the Secretary failed to act on the Contract Renewal Proposal within 90 days" and that "[s]uch failure is arbitrary, capricious, and abuse of discretion." Complaint ¶¶ 41, 44. The Rose Faction neglects to mention that the BIA did act on the Rose Faction's contract request on May 25, 2010, i.e., within 90 days of receiving it on February 26, 2010, by returning it because BIA could not determine if it was authorized by the Tribe, as required by the ISDA. Doka Declaration Exhibit 5 at 1-2. It also fails to mention that it filed two administrative appeals regarding the May 25 decision, that the IBIA and the BIA have taken further action with regard to the contract request, and that it has filed yet another administrative appeal that is currently pending. Doka Declaration Exhibits 7, 8, 9, 10 and 11. Because there is no final agency action here and because

the Rose Faction has failed to exhaust its administrative remedies, this Court lacks jurisdiction over this claim.

Section 706(2) of the APA provides that a "reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2). However, to obtain review under this provision of the APA, plaintiffs must challenge a final agency action pursuant to 5 U.S.C. § 704. *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882, 110 S. Ct. 3177 (1990); *Or. Natural Desert Ass'n v. U.S. Forest Serv.*, 465 F.3d 977, 982 (9th Cir.2006). The question of finality under the APA is jurisdictional. *Id.*, citing *Ukiah Valley Med. Ctr. v. FTC*, 911 F.2d 261, 264 n.1 (9th Cir. 1990). There is no final agency action here. The BIA acted on the Rose Faction's claim within 90 days of receiving it by returning it, but that action did not become final because the Rose Faction filed two administrative appeals – one to the Regional Director and one to the IBIA. Doka Declaration Exhibits 5, 7 and 8. The IBIA affirmed the May 25 decision in part, vacated it in part, and remanded it to BIA for further consideration. Doka Declaration Exhibit 9. The BIA Superintendent promptly reconsidered the contract requests of the dueling factions and returned them, citing as his reason that they were not authorized as required by the ISDA. Doka Declaration Exhibit 10. This action is not final either because the Rose Faction filed yet another administrative appeal two days later on August 20, which is still pending. Accordingly, there is no final agency action at issue here, and this Court lacks jurisdiction over the Rose Faction's APA claim.

Closely related to the fact that there is no final agency action here is the fact that the Rose Faction has failed to exhaust its administrative remedies. It is well-established that "'no one is entitled to judicial relief for the supposed threatened injury until the prescribed administrative remedy has been exhausted.'" *Woodford v. Ngo*, 548 U.S. 81, 88-89, 126 S. Ct. 2378 (2006), citing *McCart v. United States*, 395 U.S. 185, 193, 89 S. Ct. 1657 (1969), quoting *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51, 58 S. Ct. 459 (1938). Exhaustion of remedies gives the agency an opportunity to correct its own mistakes, saves judicial resources, and promotes efficiency, since "[c]laims generally can be resolved much more quickly and

economically in proceedings before an agency than in litigation in federal court." *Ngo*, 548 U.S. at 89, 126 S. Ct. 2378. Because the Rose Faction continues to have an administrative appeal pending regarding its contract request and has thus not exhausted its administrative remedies, this Court should dismiss the Rose Faction's APA claim for lack of jurisdiction.

CONCLUSION

For the foregoing reasons, the Court should dismiss this action in its entirety.

Respectfully submitted,

Dated: September 14, 2010

BENJAMIN B. WAGNER
UNITED STATES ATTORNEY

By: */s/ Sylvia Quast*
SYLVIA QUAST
Assistant United States Attorney

APPENDIX A

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

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CALIFORNIA VALLEY MIWOK TRIBE,

Plaintiff,

v.

DICK KEMPTHORNE, Secretary of The United States Department of the Interior; GEORGE SKIBINE, Acting Deputy Assistant Secretary for Policy and Economic Development–Indian Affairs; DALE RISLING, Regional Director of the Bureau of Indian Affairs; TROY BURDICK, Superintendent of the Central California Agency of the Bureau of Indian Affairs,

Defendants.
_____/

NO. CIV. S-08-3164 FCD/EFB

MEMORANDUM AND ORDER

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This matter is before the court on California Valley Miwok Tribe's ("plaintiff" or "the Tribe") motion for preliminary

injunction against defendants[1] ("defendants," "BIA" or "the government").[2] Plaintiff contends that defendants' failure to renew its annual funding agreement ("AFA") is based upon a misreading of the applicable law, and that the denial of the AFA has caused plaintiff to "shut down tribal operations" and "threatens to preclude the Tribe from entering the Self-Governance Program," which permits the Tribe to provide certain programs and services to its members on behalf of the federal government. (Pl.'s Mem. in Supp. of TRO and Prelim. Inj. ("Pl.'s Mem."), filed Jan. 15, 2009, at 2.) Plaintiff requests the court sequester or disburse to it the funds allocated to the Tribe for the 2008 program year, pending resolution of this action. (Id. at 13.)

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[1] The named defendants are: Dick Kempthorne, Secretary of The United States Department of the Interior; George Skibine, Acting Deputy Assistant Secretary for Policy and Economic Development--Indian Affairs; Dale Risling, Regional Director of the Bureau of Indian Affairs; and Troy Burdick, Superintendent of the Central California Agency of the Bureau of Indian Affairs.

[2] On January 15, 2009, plaintiff filed a motion for temporary restraining order ("TRO") and preliminary injunction, setting the matter for hearing on March 6, 2009, the court's next available law and motion date (Docket #7-2). In conjunction with the motion, plaintiff filed an ex parte application to shorten time on the motion, indicating it needed a decision on or before March 2, 2009, the alleged date by which the Tribe had to apply to be a "Self-Governance Tribe." Considering that March 2 deadline, there was no need to hear the motion as a TRO, and accordingly, the court set the matter for hearing on plaintiff's request for a preliminary injunction for February 20, 2009, the court's next regularly set law and motion date preceding March 2. (Minute Order, filed Jan. 16, 2009.) Thus, contrary to plaintiff's argument in its reply, the government properly responded to the motion as a motion for preliminary injunction, not a motion for TRO. Regardless, however, the standard for a TRO is essentially the same as for a preliminary injunction, and the court's decision herein would be the same whether considering a motion for TRO or preliminary injunction.

Upon the government's denial of the Tribe's 2008 AFA, the Tribe appealed the decision to the Department of the Interior, Board of Indian Appeals ("the Board"), thus initiating the administrative appeals process. See Cal. Valley Miwok Tribe v. Cent. Cal. Agency Superintendent, Bureau of Indian Affairs, 47 IBEA 91, Docket No. IBIA 08-58-A (June 10, 2008) (denying the Tribe's appeal as "untimely"). Rather than exhausting its administrative remedies by appealing the Board's decision to the district court, pursuant to the Administrative Procedures Act ("APA"), 5 U.S.C. § 706, plaintiff filed the instant action, asserting direct claims against defendants based on their denial of the AFA. Under the doctrine of exhaustion of remedies, this court lacks jurisdiction over this matter, and plaintiff's complaint must be dismissed for that reason.

However, even if this court had jurisdiction over this case, plaintiff would not prevail on its motion. A recent district court decision found that the Tribe lacks a recognizable governing body (see Cal. Valley Miwok Tribe v. United States, 424 F. Supp. 2d 197, 202-03 (D.D.C. 2006) ("CVMT I")); the government relied on CVMT I in rejecting the AFA. Because having a recognizable governing body is a prerequisite for the government to contract with an Indian tribe, plaintiff cannot demonstrate a likelihood of success on the merits of its claims sufficient to obtain a preliminary injunction.

For the reasons set forth in more detail below, this action is dismissed for plaintiff's failure to exhaust administrative remedies, or, alternatively, plaintiff's motion for preliminary injunction is denied on the merits as plaintiff cannot

demonstrate a reasonable likelihood of success on its claims.[3]

BACKGROUND

For the past decade, the California Miwok Tribe, a federally recognized Indian tribe (Cal. Valley Miwok Tribe v. United States, 515 F.3d 1262, 1265 (D.C. Cir. 2006) ("CVMT II") (citing 70 Fed. Reg. 71,194, 71,194 (Nov. 25, 2005))), has been mired in internal leadership disputes, bringing into question the legitimacy of the Tribe's organizational structure. The BIA has, on several occasions, refused to recognize the Tribe's governing body. In 2006, a district court ruled in favor of the government, finding that the government was not required to recognize the Tribe as an "organized tribe" when the purported leadership only represented a small percentage of the potential tribal membership. CVMT I, 424 F. Supp. 2d at 202-03. The following represents a chronology of relevant facts and tribal dealings leading to the 2006 litigation and the current litigation.

1. The 2006 Litigation: The Tribe's Attempt to Obtain Approval of their Constitution

In November 1998, upon recommendation of the BIA, the Tribe established a tribal council. CVMT I, 424 F. Supp. 2d at 198. The Tribe subsequently elected Silvia Burley ("Burley") as chairperson of that council in 1999. Id. In 2000, in an attempt to become organized under federal law, Burley requested that the BIA review and approve the Tribe's newly-adopted constitution.

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[3] Because oral argument will not be of material assistance, the court orders this matter submitted on the briefs. E.D. Cal. L.R. 78-230(h).

Id. at 199; CVMT II, 515 F.3d at 1265. The BIA failed to do so in a timely manner and Burley subsequently withdrew her request. CVMT I, 424 F. Supp. 2d at 199; CVMT II, 515 F.3d at 1265. A second effort to organize was similarly unsuccessful. In 2001, the Secretary of the BIA informed Burley that the Tribe's constitution was "defective and the [T]ribe still unorganized." CVMT II, 515 F.3d at 1265. Forming the basis for the BIA's position was the current leadership's failure to "attempt to involve the entire tribe in the organizational process." Id.

Burley, in the Tribe's name, then sued the government for its failure to recognize the tribe as organized, seeking declaratory and injunctive relief. Id. at 1266. The Tribe alleged that the BIA had violated 25 U.S.C. section 476(h) by not recognizing the Tribe's "government, its documents, and its chairperson." CVMT I, 424 F. Supp. 2d at 210. The District Court for the District of Columbia found in favor of the government, holding that the BIA was not required to recognize the Tribe's governing body and its governing documents when the leadership did not actually represent the tribal membership. CVMT I, 424 F. Supp. 2d at 201-03. The court dismissed the Tribe's action for failure to state a claim. Id. at 203. The D.C. Circuit affirmed, noting that the government must work to "promote a tribe's political integrity," which means ensuring that the tribe's leaders represent the tribe *as a whole*. CVMT II, 515 F.3d at 1267 (citing Seminole Nation v. United States, 316 U.S. 286, 296-97 (1942) and Seminole Nation v. Norton, 223 F. Supp. 2d 122, 140 (D.C. Cir. 2002)). As the court articulated, the Tribe "ha[d] a potential membership of 250, [yet] only Burley

and her small group of supporters had a hand in adopting her proposed constitution. This antimajoritarian gambit deserves no stamp of approval from the Secretary." Id. at 1267.

2. The Current Litigation: The BIA's Failure to Renew the AFA

On September 30, 1999, the Tribe, through Burley, became a "contracting tribe" under the Indian Self-Determination and Education Assistance Act ("ISDEAA").[4] (Pl.'s Mem. at 6.) Pursuant to a contract between the Tribe and the BIA, the Tribe was responsible for government organizational tasks, including "drafting a constitution, adopting laws to govern the Tribe, adopting and implementing tribal member enrollment criteria and interacting with the State of California and other states to protect the interests of eligible Miwok Indian children under the Indian Child Welfare Act, 25 U.S.C. section 1901 et seq." (Id. at 6-7.)

Every year from September 30, 1999 to December 31, 2007, the BIA renewed the Tribe's AFA, which provided funds to the Tribe to "operate programs, functions and activities on behalf of the Tribe." (Id. at 7.) Colleen Petty, the Tribe's Financial Administrator/Consultant, submitted the 2008 AFA proposal and resolution to Troy Burdick ("Burdick"), Superintendent of the Central California Agency of the BIA, on October 1, 2007. (Decl. of Colleen Petty, filed Jan 15, 2009 ("Petty Decl."), at ¶ 15; Pl.'s Mem. at 7.) In a letter dated December 14, 2007, Burdick

[4] A "contracting tribe" is one that enters into a self-determination contract for planning, conducting, and administering programs and services under one of the ISDEAA's five delineated purposes. See 25 U.S.C. § 450(a)(1)(A)-(E).

informed the Tribe that the AFA would not be renewed because "[t]he Department of the Interior does not recognize that the California Valley Miwok Tribe has a governing body." (Letter from Troy Burdick, Superintendent, BIA, to Silvia Burley, Dec. 14, 2007 ("BIA's rejection letter")). Burdick cited the 2006 case, CVMT I, to support the BIA's position. Id. The letter notified the Tribe that it had 30 days to file an administrative appeal to the Regional Director of the BIA. Id.[5]

The Tribe received the BIA's rejection letter on December 17, 2007 and requested an informal conference 31 days later on January 17, 2008. (Pl.'s Mem. at 7-8.) The BIA did not respond because the Tribe "missed the 30-day deadline for filing [the] request." (Defs.' Opp'n, filed Feb. 6, 2009, at 13.) Over three months later, on March 18, 2008, the Tribe appealed to the Interior Board of Indian Appeals ("the Board"). Cal. Valley Miwok Tribe v. Cent. Cal. Agency Superintendent, Bureau of Indian Affairs, 47 IBEA 91, Docket No. IBIA 08-58-A (June 10, 2008). The Board dismissed the appeal as "untimely." Id. at 98.

Plaintiff filed the instant action on December 29, 2008, asserting claims for injunctive and declaratory relief based on defendants' alleged violations of the ISDEAA and DOI regulations. (Compl. at ¶¶ 33-45; Pl.'s Mem. at 11-13.) Plaintiff now moves

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[5] In so providing, the letter cited the incorrect appeal procedures; 25 C.F.R. Part 2, cited in the letter, provides the default administrative appeal procedures for decisions where no other regulatory route of appeal is provided. However, when plaintiff appealed the BIA's decision in this case, it employed the correct procedures for appeals under the ISDEAA. See 25 C.F.R. § 900.150-900.176. Significantly, the 30 day deadline for filing an appeal is the same under Part 2 as it is under Section 900.150 *et seq.*, and thus, plaintiff suffered no prejudice from the incorrect citation to the appeals process.

for a preliminary injunction, requesting that the court sequester or release the funds as proscribed in the AFA pending resolution of this action.[6] (Pl.'s Mem. 2.)

ANALYSIS

1. Exhaustion of Administrative Remedies

In response to plaintiff's motion, defendants argue, in the first instance, that this court lacks jurisdiction because plaintiff failed to exhaust its administrative remedies.[7] (Defs.' Opp'n at 12-14.) It is a well-recognized tenet of administrative law that "'no one is entitled to judicial relief for the supposed threatened injury until the prescribed administrative remedy has been exhausted."' Woodford v. Ngo, 548 U.S. 81, 88-89 (2006) (citing McKart v. United States, 395 U.S. 185, 193 (1969) (quoting Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-51 (1938))). Exhaustion of remedies protects agency autonomy, promotes efficiency, and saves judicial

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[6] At times in its papers, plaintiff requests that the court "sequester" the subject funds in order to preserve the status quo during the pendency of this action. However, plaintiff also requests, more clearly at other times in its papers, immediate disbursement of the 2008 funds so that the Tribe can continue to operate its contractual programs (see Reply, filed Feb. 13, 2009, at 13). As set forth below, to obtain such mandatory injunctive relief, plaintiff must meet a higher burden. However, the court does not reach that issue herein because for the reasons set forth below, this action is dismissed for lack of jurisdiction, and/or plaintiff cannot establish a reasonable likelihood of demonstrating a violation of law by defendants, and thus, the court need not consider whether mandatory injunctive relief is warranted in this case.

[7] Defendants also raised the alternative argument that this court lacks jurisdiction because Burley is neither a "tribe" nor a "tribal organization" and thus cannot bring a claim under the ISDEAA. (Defs.' Opp'n at 11-12.) The court does not reach that issue because this case is properly dismissed for failure to exhaust administrative remedies.

resources. Id. at 89. "Proper exhaustion demands compliance with an agency's deadlines and other critical procedural rules because no adjudicative system can function effectively without imposing some orderly structure on the course of its proceedings." Id. at 90. The failure to appeal from an administrative agency's decision is the classic example of a failure to exhaust administrative remedies. See e.g., Lichter v. United States, 334 U.S. 742, 792 (1948).

Here, 25 U.S.C. section 450f(b) delineates the "[p]rocedure upon refusal of request to contract." Specifically, tribal organizations may appeal decisions:

> under such rules and regulations as the Secretary may promulgate, except that the tribe or tribal organization may, *in lieu of* filing such appeal, exercise *the option* to initiate an action in the Federal district court and proceed *directly* to such court pursuant to section 450m-1(a) of this title.

Id. (emphasis added). Section 450(f) thus gives plaintiffs the option to *either* file an administrative appeal under the DOI regulations *or* seek review by the district courts. In this case, the Tribe attempted to do both. It initially sought an informal conference in accordance with the rules and regulations of the ISDEAA. See 25 C.F.R. § 900.154 (stating that an Indian tribe or tribal organization "shall file its request for an informal conference with the office of the person whose decision it is appealing, within 30 days of the day it receives the decision"). The Tribe filed its request 31 days after receiving the BIA's rejection letter. (Pl.'s Mem. at 7-8.) Due to the Tribe's untimely request, the BIA did not respond. (Defs.' Opp'n at 13.) The Tribe then appealed to the next level of review, the Interior

Board of Indian Appeals (the "Board"). Cal. Valley Miwok Tribe v. Cent. Cal. Agency Superintendent, Bureau of Indian Affairs, 47 IBEA 91, Docket No. IBIA 08-58-A (June 10, 2008). After the Board dismissed the appeal as "untimely" (id. at 98), plaintiff did not appeal the Board's decision to the next and final level of review, the district court, pursuant to the APA. Instead, the Tribe filed this action on December 29, 2008, asserting direct claims against defendants for alleged violations of the ISDEAA and DOI regulations; the Tribe did not request review of the Board's decision under the APA.

Under the governing statute, Section 450f(b), the Tribe could have filed this action "*in lieu of*" filing an administrative appeal under the DOI regulations and proceed directly to this court, but it chose the latter and proceeded first through the administrative channels. The plain language of the statute does not give plaintiff discretion to do both. Once it chose to proceed through the administrative process, the Tribe had to complete that process before filing suit herein.

Plaintiff's reliance on Aleutian Pribilof Islands Association, Inc. v. Kempthorne, 537 F. Supp. 2d 1 (D.D.C. 2008) for the contrary proposition is unavailing. In Aleutian, the BIA declined the tribal association plaintiff's request for funds, indicating that it would provide those funds to a regional tribal corporation instead. Id. at 5. The plaintiff requested an informal conference, thus instituting the administrative appeals process. Id. After the Deputy Regional Director recommended upholding the BIA's decision, the plaintiff appealed to the Board, which likewise upheld the BIA's decision. Id. This is

where Aleutian diverges from the present case.

In Aleutian, unlike here, the tribal association plaintiff filed suit in district court, asserting direct claims against the government under the ISDEAA but *also bringing claims pursuant to the APA*, seeking review of the Board's decision. Id. at 7-8. The Aleutian court did not reach the association's ISDEAA claims and instead resolved the entirety of the action under the APA. Id. at 6-7. Thus, in Aleutian, the plaintiff association had fully exhausted its administrative remedies by filing its district court action at least in part based on the APA.

This court acknowledges that in Aleutian, the district court remarked (notwithstanding the full exhaustion in that case) that under the governing statute, a plaintiff is not required to exhaust all administrative levels of review because the statute expressly permits the filing of a direct action in district court. Id. at 8. This observation is dicta, and even if it were not, the court would not find Aleutian persuasive authority on this point. Contrary to the Aleutian court's finding, the plain language of 450f(b) clearly provides that a plaintiff may "*exercise the option*" of foregoing the administrative appeals process and proceed "*directly*" to the district court. This choice, however, is to be made "*in lieu of*" the administrative appeals process (not "in addition to" that process), thus indicating that a plaintiff cannot choose to do both. Indeed, to allow both would be contrary to the interests of promoting agency autonomy, judicial efficiency, and consistency of judgments.

Ultimately, to support its statement that exhaustion of remedies is not required under the ISDEAA, the Aleutian court

relied on Congress's use of the word "may" (i.e., "a tribe *may*, in lieu of filing such appeal, exercise the option to initiate an action in Federal district court . . . .") Id. at 8. The permissive word "may," however, simply emphasizes a tribe's *choice* or "option" of avenues, it does not mean that a tribe may institute either process *at any time*.

Because the Tribe here has not sought review of the Board's decision pursuant to the APA, it has failed to exhaust its administrative remedies, and thus, this court lacks jurisdiction over this action and must dismiss plaintiff's complaint.[8]

Nevertheless, the court notes that even if plaintiff had properly exhausted its administrative remedies and this court had jurisdiction over this matter, plaintiff would not prevail on the instant motion. Because the government had grounds to reject the Tribe's AFA on the basis of the Tribe's failure to have a recognizable "tribal organization," plaintiff cannot demonstrate it is likely to prevail on its claims in this action.

2. Injunctive Relief

A. Standard

Typically, to prevail on a motion for preliminary injunction, plaintiff must show: (1) a likelihood of success on the merits, (2) that plaintiff is likely to suffer irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in plaintiff's favor, and (4) that an injunction

[8] Defendants' incorrect citation to the relevant appeal procedures does not impact the court's decision. Plaintiff concedes it employed the correct procedures when effectuating its appeal, and the 30 day deadline was the same under the default procedures cited by defendants as the applicable procedures.

is in the public interest. Winter v. Nat'l Res. Def. Council, Inc., 129 S. Ct. 365, 374 (2008). However, "[t]he[se] standard requirements for equitable relief need not be satisfied when an injunction is sought to prevent the violation of a federal statute which specifically provides for injunctive relief." Trailer Train Co. v. State Board of Equalization, 697 F.2d 860, 869 (9th Cir. 1983); see also, United States v. Estate Pres. Serv., 202 F.3d 1093, 1098 (9th Cir. 2000) ("The traditional requirements for equitable relief need not be satisfied since [the statute] expressly authorizes the issuance of an injunction.").

The cases defendants cite are inapposite. Hecht Co. v. Bowles, 321 U.S. 321 (1944) merely gives a court discretion in granting an injunction where the statute authorizes such relief, emphasizing the flexible nature of equitable relief. Id. at 329. The statute at issue in Rondeau v. Mosinee Paper Corp., 422 U.S. 49 (1975) is distinguishable from the statute in this case, as it did not expressly authorize injunctive relief. See Rondeau, 422 U.S. at 323 nn. 1-4 (delineating the applicable statutory provisions). In fact, Justice Brennan's dissent implies that *had* the statute expressly authorized such relief, a showing of irreparable harm would not have been necessary. See Rondeau, 422 U.S. at 65 (Brennan, J., dissenting) (arguing that the statute at issue did in fact impliedly authorize injunctive relief, and thus, irreparable harm did not need to be shown).

Here, the statute at issue grants district courts the authority to "order appropriate relief including money damages [and] injunctive relief . . . (including immediate injunctive

relief to reverse a declination finding . . . or to compel the Secretary to award and fund an approved self-determination contract)." 25 U.S.C. § 450m-1. Thus, the court need only consider plaintiff's likelihood of success on the merits in determining whether to grant a preliminary injunction.

Finally, where a plaintiff seeks a mandatory injunction, like plaintiff's request for immediate disbursement of the funds here, a court must apply heightened scrutiny to determine whether the facts and law favor the plaintiff. Dahl v. HEM Pharmaceuticals Corp., 7 F.3d 1399, 1403 (9th Cir. 1993)(citing Anderson v. United States, 612 F.2d 1112, 1114 (9th Cir. 1980)).

B. Likelihood of Success on the Merits

In enacting the ISDEAA, Congress sought to effectuate a "strong Federal policy of self-determination" on the part of Indian tribes." 25 U.S.C. § 450a; 25 C.F.R. § 900.3. The Secretary of the United States Department of the Interior ("DOI") is required, "upon the request of any Indian tribe by tribal resolution," to enter into a self-determination contract with federally-recognized Indian tribes, allowing the tribal organization to plan, conduct, and administer certain authorized "programs or services which are otherwise provided to Indian tribes and their members pursuant to Federal law . . . ." 25 U.S.C § 450f(a)(1); 25 U.S.C. § 450b(j).

The ISDEAA provides five specific circumstances under which the Secretary may reject proposed contracts.[9] 25 U.S.C.

[9] The five grounds for denying a contract under Section 450f of the ISDEAA are as follows:

(A) the service to be rendered to the Indian

§ 450f(2). In doing so, the DOI must provide written notice to the applicant, clearly demonstrating that the proposed contract falls within one of the five statutory bases for denying a contract. Id. Echoing the strong policy in favor of such contracts, Federal regulations specifically state that the Secretary cannot "decline an Indian tribe or tribal organization's proposed successor annual funding agreement . . . if it is substantially the same as the prior annual funding agreement." 25 C.F.R. § 900.32.

In this case, both parties concede that defendants did not provide written notice demonstrating that the Tribe's proposed AFA fell within one of the five statutory grounds for denying a contract. (Pl.'s Mem. at 12; Defs.' Opp'n at 14 n.6.; BIA's rejection letter.) However, as defendants emphasize,

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> beneficiaries of the particular program or function to be contracted will not be satisfactory;
>
> (B) adequate protection of trust resources is not assured;
>
> (C) the proposed project or function to be contracted for cannot be properly completed or maintained by the proposed contract;
>
> (D) the amount of funds proposed under the contract is in excess of the applicable funding level for the contract, as determined under section 450j-1(a) of this title; or
>
> (E)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(2)

> "[t]here [is] no need for [the] BIA to address the five statutory bases for declining an ISDA contract . . ., because [the Tribe] could not satisfy an even more fundamental requirement in the statute--the requirement that DOI contract with a 'tribal organization.'"

(Def.'s Opp'n at 14 n.6.) The DOI may only enter into self-determination contracts with "tribal organizations." See 25 U.S.C. § 450(b) (defining "self-determination contract" as "a contract . . . entered into . . . between a tribal organization and the appropriate Secretary for the planning, conduct and administration of programs or services . . . ."). The ISDEAA defines "tribal organization" as "the recognized governing body of any Indian tribe; any legally established organization of Indians which is controlled, sanctioned, or chartered by such governing body or which is democratically elected by the adult members of the Indian community to be served by such organization and which includes the maximum participation of Indians in all phases of its activities . . . ." 25 U.S.C. § 450b(l).

Although the BIA renewed the Tribe's AFA every year between 1999 and 2007, it did so before the courts affirmed the BIA's position that the Tribe lacked a recognized governing body. CVMT I, 424 F. Supp. 2d at 202-03. In CVMT I, the Tribe brought an action for declaratory and injunctive relief, alleging that the government had interfered with the Tribe's internal affairs and, in refusing to adopt the Tribe's constitution, violated the Indian Reorganization Act, 25 U.S.C. section 476(h). Id. at 197, 201. In dismissing the Tribe's claims, the court agreed with the government's contention that the Tribe lacked a recognized governing body. Id. at 202-03. As the district and appellate

courts expressly stated, the government "ha[s] a duty to conduct business only with lawfully-constituted governing bodies who represent the tribal membership" and thus the government must determine "whether a tribe has properly organized itself to qualify for federal benefits" before contracting with that particular tribe. CVMT I, 424 F. Supp. 2d at 201; CVMT II, 515 F.3d at 1267.

Defendants rejected the Tribe's 2008 AFA because the Tribe lacked a recognized governing body; in doing so, defendants expressly relied upon the court's decision in CVMT I. That decision was affirmed by the circuit court. CVMT II, 515 F.3d at 1267. Although the ultimate issue in those cases may be distinguished from the case at hand, the rationale in CVMT I and II applies equally here. Like CVMT I and II, the BIA's decision here turned on whether the Tribe had a recognizable governing body. The BIA's determination that the Tribe did not was affirmed by the courts in CVMT I and II. Based on those decisions, this court cannot find that plaintiff is likely to succeed on the merits of its claims in this case.

For these reasons, the Tribe cannot establish entitlement to a preliminary injunction. Therefore, even if this court were to reach the merits of plaintiff's claims, plaintiff's motion for a preliminary injunction would be DENIED.

CONCLUSION

Based on the foregoing, the court dismisses this action, without prejudice, for lack of jurisdiction based on plaintiff's failure to exhaust administrative remedies. Alternatively, even assuming arguendo that the court had jurisdiction, plaintiff has

not shown it is likely to succeed on the merits of its claims because the government's basis for denying the AFA has been upheld by the courts.

IT IS SO ORDERED

DATED: February 23, 2009.

FRANK C. DAMRELL, JR.
UNITED STATES DISTRICT JUDGE