IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

NEWTOK VILLAGE, and NEWTOK VILLAGE COUNCIL

- Petitioners,

vs.

ANDY T. PATRICK, JOSEPH TOMMY, and STANLEY TOM,

- Defendants.

Case No. 4:15-cv-00009-RRB

MEMORANDUM IN SUPPORT OF MOTION FOR ENTRY OF DEFAULT

[FRCP 55(b)(2); Local Rule 55.1]

The Plaintiffs seek a default judgement directing the Defendants to 1) cease any representation that they are the governing body of Newtok Village, or otherwise represent Newtok Village pending a final decision by the Interior Board of Indian Appeals, and 2) turn over all records and property of Newtok Village to the Newtok Village Council for the reasons contained in the accompanying memorandum.

The Defendants have failed to timely file an answer to the complaint filed in this case. Specifically, the complaint in this matter was filed on April 21, 2015.[1] A summons was served by the Alaska State Troopers on June 4, 2015.[2] No answer has been filed by any of the Defendants. On July 7, 2015, the undersigned sent an e-mail to two of the Defendants (Mr. Patrick and Mr. Tom) advising them of an intention to seek a default.[3] That same day,

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1 Docket No. 1
2 Docket Nos. 5-7
3 Exhibits 1 (Affidavit of Counsel) and 2 (e-mail exchange with Tom John) (attached)

seeking injunctive and not monetary relief.[15] Default judgment should not be different in kind than what is sought in the complaint.[16] Whether to grant a motion for default judgment is within the Court's discretion.[17] In *Eitel v McCool,*[18] the Ninth Circuit provided guidance respecting the exercise of this discretion noting that this Court should consider the following factors: 1) the possibility of prejudice to the plaintiff, 2) the merits of the Plaintiff's substantive claim, 3) the sufficiency of the the complaint, 4) the sum of money at stake in the action, 5) the possibility of a dispute concerning the material facts, 6) whether the default was due to excusable neglect, and 7) the policy favoring decisions on the merits. As set out below, the application of the *Eitel* factors warrant entry of the requested default judgment in this case.

III. **THE PLAINTIFF IS IN SUBSTANTIAL RISK OF HARM.** The Tribe will suffer substantial and immediate harm if no injunction issues in this matter, which satisfies the first *Eitel* factor. The problems facing Newtok, Alaska are set out in the Mertarvik Strategic Management Plan (attached).[19] As detailed in that report

> Newtok is a growing Yup'ik Eskimo village located on the Yukon Kuskokwim Delta along the western coast of Alaska near the confluence of the Newtok and Ninglick Rivers. ...(T)he communities health and safety are currently threatened by severe coastal erosion and flooding. The Ninglick River, which is a tidally influence and connects to Baird Inlet to the Bering Sea, is eroding toward the village at an average pace of 72 feet per year (with an observed rate of up to 300 feet in one year) and has been moving toward the village for decades. Erosion projections... indicate that the river could reach the school by 2017.[20]

15 *TeleVideo Systems, Inc. v Heidenthal,* 826 F. 2d 915, 917-918 (9th Cir., 1987); *Sprint Nextel Corp. v Welch,* at 2, *citing Geddes v United Financial Group,* 559 F. 2d 557, 560 (9th Cir., 1977) and *Microsoft Corp. v Nop,* 549 F. Supp. 2D 1233, 1235 (E. D. Cal., 2008)
16 FRCP 54(c)
17 Draper v Coombs, 792 F.2d 915, 924-25 (9th Cir. 1986); *Lau Ah Yew v Dulles,* 236 F. 2d 415, 416 (9th Cir. 1956)
18 *Eitel v McCool,* 782 F.2d 1470, 1471-72 (9th Cir. 1986)
19 Ex. 10
20 Id., at 1

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In response to this immediate threat, the village has planned to relocate to Mertarvik, a site located across the Ninglick River on Nelson Island.[21] The cost of such a move is very substantial, and a wide array of State and Federal agencies are cooperating and providing funding and other assistance to the tribe in its relocation efforts, including the Alaska Department of Commerce, Community and Economic Development (DCCED), Alaska Department of Environmental Conservation (DEC), U.S. Corp of Engineers, U.S. Department of Housing and Urban Development (HUD), and Federal Emergency Management Agency (FEMA).[22] There is no serious dispute about the immediate threat that the village will be destroyed. [23] The Defendant's actions interfere with the Tribe's efforts to relocate the village.

On the other hand, the Defendants is will not suffer any harm. They have no legal claim to be tribal officials, and depriving them of such claims, or the possession of tribal property, does no harm to their legitimate interests. Rather, as residents of the Village, their homes face the same danger of destruction shared by other residents of the village. Thus, while a balance of the hardships is not necessarily part of the applicable test, it is clear that the Defendants will not suffer any cognizable harm upon issuance of the injunction.

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21 Id.
22 Id., at ii and iii
23 The Strategic Management Plan may be taken as an admission by the Defendants. The Defendant Stanley Tom was the prior tribal administrator, and worked closely in the development of the Mertarvik Strategic Management Plan. Id. See also Complaint

IV. THE TRIBE'S COMPLAINT STATES A CLAIM UPON WHICH THE TRIBE IS LIKILY TO PREVAIL.

The second two *Eitel* factors – the merits of the Plaintiff's substantive claim and the sufficiency of the the complaint – may be considered together, and require the plaintiff to "state a claim on which the [plaintiff] may recover" *Pepsico, Inc v Cal. Sec. Cans,* 238 F. Supp. 2D 1172, 1175 (C.D. Cal., 2002) *citing Danning v Lavine,* 572 F.2d 1386, 1388 (9th. Cir. 1978). Plaintiff's claims have merit and the complaint sufficiently allege supporting allegations to support claims to enforce a valid administrative decision of the IBIA, and fraud.

a) Claim To Enforce Valid Federal and State Administrative Decisions. As a general matter, the BIA is the principal agency charged with the administration of the United States "government-to-government" relationship with American Indian tribes. 25 USC §§ 2, 9, and 13.[24] In the event of a tribal leadership dispute, the BIA has the power, and in some cases the obligation, to recognize one of the competing tribal factions claiming to be the tribal government in order to carry out its statutory obligations, which includes administration of federal grants and contracts to the tribe. *Goodface v Grassrope,* 708 F.2d 335, 339 (8h Cir., 1983); See also *Bucktooth v Acting Eastern Area Dir.,* 29 IBIA 144, 149 (1996)

At the current time, the BIA recognizes the "New Council" headed by Paul Charles (i.e. the Plaintiff) as the tribal government for Newtok Village. The IBIA has issued a final decision upholding recognition of the New Council, which is "res judicata" as between the

24 For a general discussion of the authority of the BIA pursuant to these three (3) statutes, see COHEN, HANDBOOK OF FEDERAL INDIAN LAW, § 5.03 (2005 Ed.)

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Plaintiffs and the Defendants to this action. *Chavez v. Bowen,*844 F.2d 691 (9th Cir. 1988) (principles of res judicata apply to administrative decisions). See also Restatement (Second) Judgements §83(1) (1982) *Res judicata* principles require federal courts to give preclusive effect to administrative decisions.[25] While there are exceptions to the rule, the Plaintiffs are unaware of any such exception that might apply to the case at issue.

Equally, this dispute has been the subject of state administrative proceedings, which have also determined that the Plaintiffs are the state recognized tribal governing body for purposes of administering state grants and contracts.[26] The Defendants did not seek any judicial review of that decision. Under 28 USC §1738, federal courts must give preclusive effect to state court judgments.[27] Equally, final state administrative decisions similarly have preclusive effect in federal court.[28]

Thus, state and federal administrative decisions have determined that the Plaintiffs constitute the *bona fide* governing body for Newtok Village for the purposes of applying for, receiving, and administering assistance from state and federal agencies on behalf of Newtok Village. As noted above, those decisions are entitled to be given full force and effect by this Court, and the actions of the Defendants flagrantly seek to undermine those decisions and interfere with the proper administration of federal and state agencies efforts to provide Newtok Village

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25 Restatement (Second) Judgements §24 (1982)
26 See Ex. 5.
27 *Allen v. McCurry*, 449 U.S. 90,96 (1980).
28 *Kremer v. Chemical Construction Corporation*, 461 U.S. 461, 466 (1982).

with assistance at this critical time.

b) Fraud. The Defendants' – Patrick, Tommy and Tom – are essentially attempting to defraud state, federal and private enities of money and other resources by claiming that they are the legitimate governing body of Newtok.

The elements of fraud "The elements of fraud ... are (a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or scienter); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage."[29] The facts pled in the complaint, and deemed to be true by operation of the Defendant's default,[30] are sufficient to establish that the Defendants' – Patrick, Tommy and Tom – have attempted to commit fraud in the past and are likely to continue in the future.

Prior to the decisions of the BIA Area Director, the State DCRA Director and the IBIA, the leadership of the tribe for federal and state assistance was a bona fide dispute. However, after the decision by the BIA and the State to recognized the "New Council" as the bona fide governing body of the tribe for federal and state assistance, the dispute was resolved. As a result of this record, the Defendant's fraud is clear.

As noted, the Defendants are representing themselves as the tribal governing body for

29 *Lightle v. State*, 146 P.3d 980, 983-984 (Alaska 2006). *See also Seybert v. Cominco Alaska Exploration*, 182 P.3d 1079, 1094 n. 48 (Alaska 2008); *Jarvis v. Ensminger*, 134 P.3d 353, 363 (Alaska 2006); *Anchorage Chrysler Center, Inc. v. DaimlerChrysler Corp.*, 129 P.3d 905, 914 (Alaska 2006). The test comes from the *Restatement (Second) of Torts* §§ 525, 526, 531, and 538 (1977). See also *Sprint Nextel Corp. v Welch, supra at 6.*

30 *TeleVideo Systems, Inc. v Heidenthal,* 826 F. 2d 915, 917-918 (9th Cir., 1987); *Sprint Nextel Corp. v Welch,* at 2, *citing Geddes v United Financial Group,* 559 F. 2d 557, 560 (9th Cir., 1977) and *Microsoft Corp. v Nop,* 549 F. Supp. 2D 1233, 1235 (E. D. Cal., 2008)

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the purposes of receiving land from the Native Corporation and state and federal money. That representation is clearly false because the BIA and the State have determined that they are not the tribal governing body for these purposes. It is also incontestable that the Defendants have knowledge of falsity of these representations because they have received copies of the IBIA and state decisions. It is also incontestable that their claims to tribal official status are intended to induce reliance, because the statements are intended to get third parties to provide the Defendants with money and other resources. And finally, the Tribe and the bona fide tribal council – i.e. the Plaintiffs – have experienced damage in the form of confusion amount state and federal agencies in providing assistance. Thus, the Defendants are clearly engaged in continuing efforts to defraud such agencies to obtain funds and other resources that should go to the Plaintiffs.

c) **Summary.** As a result, Plaintiff's claims have merit and the complaint sufficiently allege supporting allegations to support claims to enforce a valid federal and state administrative decisions and fraud, which satisfy the second and third *Eitel* factors.

IV. SUBSTANTIAL RESOURCES ARE AT STAKE FOR THE TRIBE; NO MONEY JUDGMENT IS SOUGHT AGAINST THE DEFENDANTS. Under the fourth *Eitel* factor, the Court should consider the amount of money at stake in relation to the seriousness of the Defendant's conduct. *Pepsico,* 238 F. Supp., at 1176 Usually, the fact that the Plaintiffs are not seeking monetary damages is sufficient to establish that this factor weighs in favor of entry of default judgment. *Sprint Nextel Corp,* 2014 WL 68957, at 7. However, as explained in the Metarvik Strategic Management Plan, the amount of funding from state and federal agencies needed to move the village is substantial, amounting to

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several million dollars.[31] This fact strongly weighs in favor of the entry of a default judgment providing for the injunction requested.

V. **THERE IS NO SERIOUS FACTUAL DISPUTE.** As noted, this matter have been the subject of federal and state administrative proceedings which have largely determined the facts of the matter, and clearly establish that there is no serious factual dispute. As noted above, the administrative decisions in this matter preclude any serious claim by the Defendants that they constitute the tribal government of Newtok Village.

VI. **THE DEFAULT WAS NOT DUE TO EXCUSABLE NEGLECT.** As the return of service from the Alaska State Troopers indicate, the complaint in this matter was properly and personally served upon the Defendants. As noted in the e-mail exchange between the undersigned and Tom John, the Defendants were actually and physically served with a notice from the undersigned attorney that the tribe would seek a default in this matter. The Defendant's wholly ignored the summons and the notice that the tribe would seek a default. There is no excusable neglect by the Defendants that would justify the failure of the Defendants to answer the complaint or oppose the default.

VII. **THE ENTRY OF A DEFAULT JUDGMENT ADVANCES THE POLICY FAVORING DECISIONS ON THE MERITS.** Normally, the policy favoring decisions on the merits weighs against the entry of default judgments. However, that is not the case in the present matter. The requested injunctive relief seeks to enforce administrative decisions by the BIA, IBIA and the State, which have been opposed by the

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31 Ex. 6

Defendants. The Defendants actually received opportunities to present any and all claims and fully participated in those decisions, even seeking an appeal to the Board of Indian Appeals vis-a-vis the BIA decision. The dispute between the parties was administratively adjudicated and administrative decisions were made. An injunction to enforce those decisions clearly promotes the policy favoring decisions on the merits. In these unique circumstances, the seventh *Eitel* factor weighs in favor of the entry of a default judgment.

VII. SERVICE OF THE DEFAULT JUDGEMENT, ENFORCEMENT ATTORNEY FEES AND COSTS

Newtok is fairly remote, being 100 miles west of Bethel, Alaska making service of process difficult. The Plaintiffs are requesting the Court to permit Tom John, the Tribal Administrator, to serve the default judgment in order to reduce costs. Alternatively, the Tribe does employ a Village Police Officer (VPO) who would be able to serve the order.

In the event that the Defendants fail to comply with this order, the Tribe will seek a writ of assistance to permit the Alaska State Troopers to remove the Defendants from the tribal premises and recover the tribal records. It is strongly hoped that this is not necessary.

Finally, the Tribe understands that it has the ability to seek attorney fees and costs in this matter, however, the Tribe intends to forgo such if the Defendant's voluntarily comply with the Court's order. For this reason, the Tribe requests, and has included in the proposed order, that the Tribe be permitted 30 days to address this issue, rather than the usual 10 days.

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CONCLUSION

For the reasons stated above, the Court should enter the requested default judgment, directing the Defendants to 1) cease any representation that they are the governing body of Newtok Village, or otherwise represent Newtok Village pending a final decision by the Interior Board of Indian Appeals, and 2) turn over all records and property of Newtok Village to the Newtok Village Council.

Respectfully submitted this 23rd day of September, 2015

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