Mark A. Echo Hawk (*pro hac vice*)
ECHO HAWK & OLSEN, PLLC
505 Pershing Ave., Suite 100
PO Box 6119
Pocatello, Idaho 83205-6119
Phone: (208) 478-1624
Fax: (208) 478-1670
mark@echohawk.com

Majel M. Russell (Montana Bar No. 4057)
Elk River Law Office, P.L.L.C.
145 Grand Avenue, Suite 5
P.O. Box 928
Billings, MT 59101
Phone: (406) 259-8611
Fax: (406) 259-3251
mrussell@elkriverlaw.com

Attorneys for Shoshone Business Council Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

Northern Arapaho Tribe,
for itself and as *parens patriae*

Plaintiff,

v.

Darryl LaCounte, Louis Reyes, Norma Gourneau, Ray Nation, Michael Black and other unknown individuals, in their individual and official capacities,

and

Darwin St. Clair and Clint Wagon, Chairman and Co-Chairman of the Shoshone Business Council, in their

Civil Action No.
CV-16-00011-SPW

**SHOSHONE BUSINESS COUNCIL DEFENDANTS' MEMORANDUM IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION**

individual and official capacities,

Defendants.

COME NOW Defendants Darwin St. Clair and Clint Wagon (referred hereafter collectively as "Shoshone Business Council Defendants"), pursuant to Local Rule 7.1(d)(1)(A) and submit the following points and authorities in opposition to the Northern Arapaho Tribe's (NAT) motion for preliminary injunction.

# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

## Cases



## Statutes

**Other Authorities**



**Rules**

## 1. INTRODUCTION

The Northern Arapaho Tribe (NAT) has gone to great lengths to tell a tall tale about subversion of tribal sovereignty. NAT's sovereignty sophistry is insufficient to warrant injunctive relief.

NAT applied unsuccessfully to provide P.L. 93-638 (638) services on the Wind River Reservation without input from the Eastern Shoshone Tribe (EST). NAT appealed to the Interior Board of Indian Appeals (IBIA). Both tribes are currently participating in the IBIA process dealing with these same facts and circumstances.

The Bureau of Indian Affairs granted the application of the Shoshone Business Council Defendants (SBC Defendants) to provide the services that NAT wanted to deliver. The Shoshone Business Council applied to provide the 638 contract services through the Joint Business Council (JBC), so that NAT could participate equally in the performance of the contract as had been done for years and years.

Rather than participate through the JBC or continue litigation through the IBIA, NAT brought this federal action and now seeks injunctive relief. NAT frantically waves the sovereignty flag as a distraction from the fact that it cannot meet the legal standard for injunctive relief.

**2. STATEMENT OF FACTS**

The Treaty between the Shoshone and United States established the Wind River Reservation and set it apart "...for the absolute and undisturbed use and occupation of the Shoshonee Indians...". *Shoshone Tribe of Indians v. U.S.*, 82 Ct. Cl. 23, 35 (1935); 15 Stat. 673.

In 1869, a band of the Northern Arapahoes (NAT), who had separated from the main body of the Arapaho nation, was wandering about the country looking for a home. Despite the Eastern Shoshone Tribes' (EST) protest, the United States unilaterally placed the NAT on the Wind River Reservation. The NAT do not have a treaty that pertains to the Wind River Reservation.

The U.S. Department of Interior has recorded evidence that the Joint Shoshone and Arapaho Business Council functioned as early as 1927. The Bureau of Indian Affairs (BIA) helped EST and NAT establish a Constitution and set of Bylaws in 1938. These governing documents provided for regulation of common interests through the Joint Business Council (JBC), and both tribes approved these documents.

Following approval, the governing documents were sent to Washington, but there were certain objections made to them by the Commissioner. Changes were agreed upon in principle, subject to the JBC and the Tribal membership approval. These changes were approved by the JBC but were

never formally approved by the tribal membership. Even though the documents were never approved by the tribal members at large, the two tribes continued to operate under the JBC as established.

Since establishment of the JBC, both tribes have ratified the JBC and its actions hundreds of times. The federal government and federal courts have recognized its existence and actions. *See, e.g.*, *Dry Creek Lodge v. Arapahoe and Shoshone*, 623 F.2d 682, 684 (10th Cir. 1980) ("The Tribes have a Joint Business Council which is composed of the Business Councils of each Tribe."); *Northern Arapahoe Tribe v. Hodel*, 808 F.2d 741, 744 (10th Cir. 1987) ("A joint business council of representatives from both tribes deals with certain matters of common interest."). On January 28, 1959 the Joint Shoshone and Arapaho Council adopted a Tribal Plan of Operation establishing policies for Budgets, Personnel, and Property and Supply. Over time, the EST and NAT confirmed that it was the practice of the JBC to hold regular meetings on the second and fourth Wednesdays of each month. For at least 75 years, JBC authority was exercised at these regularly scheduled meetings. The meetings were recorded and minutes kept. Official action was taken by majority vote and memorialized by a single resolution signed by the Chairman of each Tribe.

Through the course of these JBC meetings, The Shoshone & Arapaho Law and Order Code (S&A LOC) was adopted by both Tribes on November 7, 1988. JBC

is referenced in the S&A LOC approximately 90 times and confers on the JBC specific authorities and responsibilities of administration.

Concurrent with the adoption of the S&A LOC, in 1988, the JBC endeavored to contract for the Judicial Services and established the Shoshone and Arapaho Tribal Court. The Shoshone and Arapaho Tribal Court has operated under JBC administration since the time it was established.

For years, both the EST and NAT authorized the JBC, a tribal organization within the definition of 25 U.S.C. § 450(b)(l), to enter into self-determination contracts, pursuant to P. Law 93-638 (638). The JBC has repeatedly entered into many 638 contracts for services including but not limited to water resources program, housing, Johnson O'Malley program, game code program, juvenile court services, and judicial services program.

On September 9, NABC made an announcement that it was dissolving JBC. On September 18, 2014, NABC sent a letter to all Joint Program Directors letting them know that NAT has "withdrawn its participation" in JBC, but that this effect has not changed any effect on the joint programs.

NABC then took further actions to severe itself from the JBC. On September 22, 2014, NABC amended the Northern Arapaho Code which purports to dissolve the JBC, even though the Preface to the NAT Code states that "The provisions of the Northern Arapaho Code apply and are fully enforceable in the Shoshone and

Arapaho Tribal Court, but do not purport to bind or regulate the Eastern Shoshone Tribe or to rescind, amend or supersede the provisions of the S&A LOC."

Acting on its own, NABC sought to contract for the Shoshone and Arapaho Tribal Court Judicial Services contract, but submitted a request that would only serve NAT members. The SBC however has continually been committed to managing joint programs like the tribal court for the benefit of everyone residing on the Wind River Indian Reservation.

SBC has continued to try to work with NABC on joint programs. On October 31, 2014, SBC requested a meeting with NABC to discuss joint issues. On January 28, 2015 SBC requested a meeting with NABC to discuss Joint Business Council issues. On January 30, 2015 NABC rejects the requests to meet and confirms withdrawal from JBC.

NABC's impromptu and rash decision to withdraw from JBC put millions of dollars of federal funding at risk, jobs of tribal members that were employed through those federally funded programs at risk, and even jeopardized the diminishment of the Wind River Reservation.

On August 25, 2015, almost a full year after NABC's withdrawal from JBC, SBC realized that further attempts to get NABC as a participant in the JBC were futile. JBC therefore accepted NABC's withdrawal, and adopted a plan to manage

joint resources and programs for the benefit of those residing on the Wind River Indian Reservation.

In the later summer of 2015, JBC communicated to the BIA its intent to contract for joint programs for the 2016 fiscal year. BIA awarded contracts to EST on behalf of the JBC. But even after receiving the 638 contracts, on behalf of the JBC, SBC still invited NABC to work jointly.

A recent BIA Program Review identified several deficiencies in the Tribal Court including civil rights violations, management failures and salaries in excess of the S&A LOC and industry standards. In February 2016, JBC took action to remedy these deficiencies, consistent with the Corrective Action Plan, including advertising for a qualified Chief Judge, Prosecutor and Public Defender.

NAT has also appealed the BIA's denial of its request to contract for judicial services pursuant to P.L. 93-638 with the Interior Board of Indian Appeals (IBIA). The NAT's appeal with the IBIA is currently pending, and EST is participating as an intervenor party.

**3. STANDARD OF REVIEW**

Every plaintiff seeking a preliminary injunction must establish that: (1) they are likely to succeed on the merits; (2) that they are likely to suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in their favor;

and, (4) that an injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). "A preliminary injunction is an extraordinary remedy never awarded as of right." *Id.* at 376; *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011).

NAT is required to make a substantial evidentiary showing on each requirement of the standard. Sensational statements about sovereignty subversion, and conjecture about coercion between the Federal Defendants and Shoshone Business Council officers are insufficient to meet this exacting standard.

Indeed, NAT has to satisfy a heightened burden in this case because it is seeking to upset the status quo. In the Ninth Circuit, the standard for a preliminary injunction where a party seeks mandatory preliminary relief that goes beyond maintaining the status quo *pendente lite*, is for the court to be "extremely cautious about issuing a preliminary injunction," *Martin v. International Olympic Committee*, 740 F.2d 670, 675 (9th Cir. 1984), and to "not grant such relief unless the facts and law clearly favor the plaintiff. *Committee of Cent. American Refugees v. I.N.S.*, 795 F.2d 1434, 1441 (9th Cir. 1986).

Here, NAT seeks mandatory preliminary relief that goes well beyond maintaining the status quo while litigation is pending. NAT has asked the Court to barge in and disrupt the performance of lawful 638 contracts. This relief goes well beyond maintaining the status quo; and, therefore, NAT has the heightened burden

to show that "the facts and law clearly favor the plaintiff." As will be shown below, NAT cannot satisfy this heightened burden so its motion for a preliminary injunction should be denied.

**4. ARGUMENT**

**a. <u>The Injunctive Relief Sought Will Upset the Status Quo</u>.**

NAT is asking for the Court to upset the status quo. The actual status quo is the continued performance of existing 638 contracts approved by the Federal Defendants. NAT is asking the Court to interrupt performance of 638 contracts. NAT is asking for the Court to change day-to-day affairs.

The actual status quo is for joint matters to be decided by both Tribal Councils meeting jointly. NAT is asking for the Court to freeze all joint programs while NAT ignores the realities of inextricably interwoven interests and disregards the need to meet jointly with the Shoshone Business Council.

The actual status quo has been for both Tribal councils to have an equal say on matters of common interest. NAT is seeking to have more than an equal say. At the heart of NAT's effort is an attempt to stop the Eastern Shoshone Tribe from having an equal vote in Reservation affairs. As part of the JBC, both NAT and the Eastern Shoshone Tribe had equal votes (six members from each Tribal Council). *Declaration of Clinton D. Wagon*, Exhibit B. NAT got tired of the Eastern Shoshone Tribe having an equal vote because NAT has more tribal members and does not want

to split resources on a 50/50 basis. *Id.* NAT proudly points to its population, as the larger Tribe. Due to the population differential, NAT has pushed for per capita division of resources and services, and disliked that it did not have more seats on the JBC than the Eastern Shoshone Tribe. Declaration of Darwin St. Clair, Jr., Exhibit A. Ironically, NAT's attempt to reduce the voting power and equal authority of the Eastern Shoshone Tribe is the very kind of attack on tribal sovereignty about which NAT now complains. NAT's entire effort to disassociate itself from the JBC boils down to a scheme to avoid an equal vote by a smaller Tribe. This is the actual status quo that NAT is trying to change.

**b. The Court Must First Resolve Jurisdictional Matters.**

A federal court may only issue an injunction if it has personal jurisdiction over the parties and subject matter jurisdiction over the claim. *Zepeda v. U.S. I.N.S.*, 753 F.2d 719, 727 (9th Cir. 1983); As set out in the SBC Defendant's Memorandum in Support of Motion to Dismiss or Stay, which is incorporated herein by reference, jurisdiction is absent, and should be a threshold question that is addressed before the merits of Plaintiff's Motion for Preliminary Injunction is heard. *See, e.g., Potter v. Hughes*, 546 F.3d 1051, 1061 (9th Cir. 2008) ("federal courts normally must resolve questions of subject matter jurisdiction before reaching other threshold issues.")

**c. Naming Tribal Officials in Their Individual Capacity in an Attempt to Avoid Sovereign Immunity is an Improper Tactic.**

NAT's Complaint purports to sue the SBC Defendants in their individual capacity as well as their official capacity. It is true that tribal sovereign immunity does not protect an official against individual capacity claims. *See Santa Clara Pueblo*, 436 U.S. 49, 59 (1978). Generally though, an officer sued in his official capacity is entitled to "forms of sovereign immunity that the entity . . . may possess." *Pistor v. Garcia*, 791 F.3d 1104, 1112 (9th Cir. 2015) (*citing Kentucky v. Graham*, 473 U.S. 159, 165 (1985)). An officer sued in his individual capacity, in contrast, although entitled to certain "personal immunity defenses, such as objectively reasonable reliance on existing law," *Id.*, cannot claim sovereign immunity from suit, "so long as the relief is sought not from the [government] treasury but from the officer personally." *Id.* (citing *Alden v. Maine*, 527 U.S. 706, 757 (1999)). Individual or "[p]ersonal-capacity suits seek to impose personal liability upon a government official for [wrongful] actions he takes under color of ... law," and that were taken in the course of his official duties. *Id.*

However, sovereign immunity will apply to bar individual capacity suits against tribal officers where the effect of the judgment would be to compel action or inaction by a tribal government. "In any suit against tribal officers, we must be sensitive to whether "the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the [sovereign] from acting, or to compel it to act." *Id* at 1113

(*quoting Maxwell v. County of San Diego*, 708 F.3d 1075, 1089 (9th Cir. 2013); *Shermoen v. United States*, 982 F.2d 1312, 1320 (9th Cir. 1992)).

This Court should see Plaintiff's tactics in naming defendants in their "individual" capacity as nothing more than a devious attempt to dodge sovereign immunity, even though nothing pled in Plaintiff's Complaint suggests that defendants have taking any action outside of the course of their official duties.

Other courts have held that a plaintiff cannot circumvent tribal immunity by merely naming officers or employees of the tribe when the complaint concerns actions taken in defendants' official or representative capacities and the complaint does not allege they acted outside the scope of their authority. *Chayoon v. Chao*, 355 F.3d 141, 143 (2nd Cir. 2004); *Cook v. AVI Casino Enterprises, Inc.*, 548 F.3d 718 (9th Cir. 2008) ("Plaintiffs [] cannot circumvent tribal immunity through 'a mere pleading device.'" *quoting Will v. Michigan Dept. of State Police*, 491 U.S. 58, 70-71 (1989)).

Permitting such a description to affect tribal immunity would eviscerate its protections and ultimately subject Tribes to damages actions for every violation of state or federal law. The sounder approach is to examine the actions of the individual tribal defendants. Thus the Court holds that a tribal official-even if sued in his "individual capacity" – is only "stripped" of tribal immunity when he acts

"manifestly or palpably beyond his authority. *Bassett v. Mashantucket Pequot Museum and Research Center Inc.*, 221 F. Supp .2d 271, 280 (D. Conn. 2002).

Here, NAT has not alleged that SBC Defendants acted outside of the course of their official duties. NAT has not presented evidence of the Shoshone Business Council Defendants taking independent action to represent NAT or use protected intellectual property. In fact, it is apparent that NAT is really trying to enjoin actions taken by the Shoshone Business Council and/or Eastern Shoshone Tribe, rather than anything the individual SBC Defendants have done.

The relief sought by the Plaintiff can only be performed in the council members' official capacities. The Plaintiff's Complaint seeks no money damages from the individuals. All of the relief sought involves the official duties and internal governance of the SBC Defendants as the Tribe's council members. Accordingly, the Court should construe the "individual capacity" claims against the SBC Defendants and "official capacity" claims, as being barred by tribal sovereign immunity.

**d. NAT Should be Required to Post a Bond.**

Fed. R. Civ. P. Rule 65(c) requires NAT to post a bond as security in an amount to cover damages if the SBC defendants are wrongfully enjoined. If Court enjoins performance of lawfully approved 638 contracts and actions required by a

BIA Corrective Action Plan, tribal members will not receive services from joint programs, and will continue to receive substandard services.

**e. NAT is Not Likely to Succeed on the Merits.**

The SBC Defendants have shown in its Memorandum in Support of Motion to Dismiss or Stay, which is incorporated herein by this reference, why NAT cannot prevail on its claims. In addition to those points previously made, NAT has not met its heightened burden on the claims for trust and federally protected rights, conversion of property and funds, denial of equal protection, and diminishment of privileges and immunities.

**i. There are No Violations of Federally Protected Sovereign Rights.**

Plaintiff's claim of violation of sovereign rights centers on an argument that the monies paid by the United States for 638 contracts infringes upon Plaintiff's sovereign rights. Plaintiff is incorrect on this point because the ability to receive funds through P.L. 93-638 contracts is not an inherent sovereign right, but a statutory grant of powers authorized by Congress. 25 U.S.C. §450a(a) ("The Congress hereby recognizes the obligation of the United States to respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation in the direction of educational as well as other Federal services to Indian communities so as to render such services more responsive to the needs and desires of those communities."); 25 U.S.C. § 450f(a)(1) ("The Secretary is directed, upon

the request of any Indian tribe by tribal resolution, to enter into a self-determination contract or contracts with a tribal organization to plan, conduct, and administer programs or portions thereof . . .").

Not only is Plaintiff's sovereignty unaffected by failing to receive direct funds for 638 contracts, but Plaintiff exercised its sovereign authority to authorize JBC to receive those funds. Plaintiff passed resolutions, which asked the Secretary to enter into self-determination contracts with the JBC for judicial and other services, etc. It also exercised its sovereignty by passing laws that gave the JBC authority to administer the tribal court and other administrative tasks on the reservation.

Plaintiff now tries to unilaterally undo what it has previously done in conjunction with the EST but cries foul when neither the EST nor the United States agrees with its unilateral efforts. What Plaintiff either does not acknowledge or appreciate is that by attempting to force its will and unilaterally undo the JBC and the JBC's administrative authority over 638 programs, Plaintiff is infringing upon EST's sovereignty, the very wrong that Plaintiff complains it has suffered.

As previously explained, "The Secretary is directed, upon the request of any Indian tribe by tribal resolution, to enter into a self-determination contract or contracts with a tribal organization to plan, conduct, and administer programs or portions thereof…" 25 U.S.C. §450f(a)(1). The definition of "tribal organization" includes an organization which is "controlled, sanctioned, or chartered" by a

governing body of an Indian tribe, but where a contract is made to an organization to perform services benefiting more than one Indian tribe, the approval of each such Indian tribe shall be a prerequisite to the making of such contract. 25 U.S.C. § 450b(l).

The Plaintiff and EST used their sovereign authority to "sanction" and/or "charter" the JBC and "controlled" it. Both the EST and Plaintiff gave their initial approval for the JBC to enter into contracts with the Secretary. When the JBC contracted with the Secretary, the JBC took on contractual duties. These duties include providing services to both tribes' members.

JBC is fulfilling its contractual duties. Plaintiff can choose to participate or refrain from participating in the JBC, that is its choice, but the only entity depriving Plaintiff of the opportunity to jointly manage 638 funds is itself. Plaintiff does not have the right to unilaterally restructure the 638 contracting parties or how those 638 contracts will be administered.

**ii. <u>There is No Conversion</u>.**

While NAT may be entitled to programs and services provided by the BIA or its contracting agents, NAT does not have the absolute right to contract with the BIA and receive funds for 638 services. NAT is not losing out on any programs or services. NAT's members are receiving those services, as provided by the JBC.

**iii. There is No Diminishment of Privileges and Immunities.**

Plaintiff has not met its burden in showing that the SBC Defendants have diminished any privileges or immunities of Plaintiff.

**iv. There is No Violation of Equal Protection.**

SBC Defendants are not, as Plaintiff contends, "impos[ing] a new form of government on the NAT." Northern Arapaho Tribe's Opening Brief in Support of Its Motion for Preliminary Injunction, Document 17-1, page 20. Rather, Plaintiff has simply chosen to no longer participate in the JBC. If Plaintiff has a problem with how JBC is administering 638 contracts, it can simply once again participate in JBC or inform BIA that JBC is not meeting is contractual duties.

**f. Denying NAT's Motion does Not Result in Irreparable Harm.**

Under *Winter*, NAT must each establish that irreparable harm is likely, not just possible, in order to obtain a preliminary injunction. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). Under any formulation of the test, the moving party must demonstrate a significant threat of irreparable injury. *Arcamuzi v. Cont'l Air Lines, Inc.*, 819 F.2d 935, 937 (9th Cir. 1987); *Oakland Tribune, Inc. v. Chronicle Pub. Co., Inc.*, 762 F.2d 1374, 1376 (9th Cir. 1985).

Here, there is no danger of losing something irretrievable. 11A *Charles Alan Wright, Arthur P. Miller & Mary Kay Kane, Federal Practice and Procedures*, Section 2948.1 p. 139 (2d ed. 1995). NAT's irreparable injury argument relies

wholly upon the premise the its sovereign rights are being offended. However, NAT fails to point to any Treaty provision, federal statute, or regulation that entitles NAT to operate the Tribal Court or other shared program.

NAT cites *E.E.O.C. v. Karuk Tribe Hous. Auth.*, 260 F.3d 1071 (9th Cir. 2001) as supporting the notion that irreparable harm exists in this case. In *E.E.O.C. v. Karuk*, the Court held that a tribe was not protected by sovereign immunity from an EEOC investigation. Significantly, the Court did not analyze whether a tribe has a sovereign right or jurisdiction to run programs shared by two tribes on the same Reservation. The Court's off-hand reference to irreparable injury cited by NAT, was conditional. NAT left out the initial clause of the phrase it cited, "Assuming that the Tribe is correct in its analysis with respect to jurisdiction…" *Id.* at 1077. The Court should question NAT's premise assumption—that it has a sovereign or jurisdictional right to perform a particular 638 contract or shared program.

While the SBC Defendants may agree that violations of tribal sovereignty constitute irreparable harm, as NAT's own cited case—*Tohono O'odham Nation, v. Schwartz*, 837 F. Supp. 1024, 1034 (D. Ariz. 1993)—suggests, the right of self determination must be 'federally protected.' NAT's argument presumes that it has a sovereign right to perform a particular judicial services 638 contract.

NAT makes a vague reference to lost funding as a reason to find irreparable injury. However, the funding it claims to have lost is 638 contract funding for a

contract it did not receive. If this Court agrees with NAT on this point it is setting dangerous precedent that would allow every applicant denied a 638 contract to claim irreparable harm. NAT did not have a property interest in any particular amount of funding. In addition, NAT has not lost control over the funding because it can join with the SBC to weigh in on the use of funding any day through the joint entity they have used for decades. Moreover, NAT has not lost the value of the funding since its members are still receiving services on the 638 contract and shared programs.

The Court recently granted the Federal Defendants a five-week extension of time to respond to NAT's motion for preliminary injunction. Apparently recognizing that no irreparable harm was occurring that warranted quicker consideration, the Court already denied NAT's attempts to infuse urgency into the injunctive relief analysis for the majority of the claims in this case.

Denying injunctive relief regarding the management of shared programs does not lead to irreparable harm. SBC Defendants' actions are carrying out federal contract obligations related to performance deficiencies identified by the BIA. The BIA Program Review for the Tribal Court imposed a Corrective Action Plan that, when implemented, will provide for better judicial services on the Reservation. *Declaration of Darwin St. Clair*, Exhibit A.

**g. <u>The Balance of Equities Tips in Favor of the Shoshone Business Council Defendants</u>.**

NAT advances the straw-man argument that it must have injunctive relief because equity says "SBC has no legitimate interest in usurping the authority of the NAT." (Northern Arapaho Tribe's Motion for Preliminary Injunction, 23). Of course that is the case. NAT's simplistic twist ignores the facts that the two SBC Defendants have taken no action independent of their official duties, and the Shoshone Business Council has taken action pursuant to federally-approved contract obligations through the Joint Business Council, in which NAT is welcome to participate as they did for decades. This is not a simple case of one tribe acting unilaterally and out of the blue for another tribe. Rather, it is a case of one tribe accepting the realities of inextricably intertwined interests as sovereign in common following decades of jointly exercised sovereign custom to deal with matters of common interest through prescribed federal procedures.

NAT claims equity demands injunctive relief to protect its property rights to contract funds. NAT forgets that no tribe is entitled to a particular amount of 638 funds.

NAT's argument that the balance of equities tips in its favor because it has no say in the current 638 contract fails because NAT has refused to participate in the JBC, which allows full participation to NAT. SBC welcomes and encourages NAT to meet jointly as sovereigns to address performance of existing 638 contracts. NAT

cannot credibly claim it is being shut out when it walked away and refuses to meet jointly.

A telling equitable consideration is that NAT cries foul about the SBC Defendants doing the same thing NAT applied to do. NAT applied to run the Tribal Court through a 638 contract. Interestingly, however, NAT's application did not propose to use the Joint Business Council or similar entity where both Tribes could weigh in on the performance of the contract. If NAT's application would have been granted it would be doing the same it now seeks to enjoin.

NAT claims the balance of equities tips in its favor because it has some amorphous Treaty right that is being undermined. NAT uses careful language to foist the idea upon the Court that it has Treaty rights equivalent to the Eastern Shoshone Tribe on the Wind River Reservation. The Eastern Shoshone Tribe is the only Tribe that has a ratified Treaty specifically pertaining to the Wind River Reservation. NAT may have an unratified treaty, or treaty rights that pertain to another Reservation, but NAT cannot produce a ratified Treaty that expressly gave them rights in the Wind River Reservation. As such, the Eastern Shoshone Tribe is the only true Treaty Tribe on the Wind River Reservation. Of course, both Tribes are federally recognized, and both Tribes have an interest in trust land on the Reservation. However, NAT's land interest is that of a tenant. When the United States unilaterally placed the Northern Arapaho on the Reservation it took land from

the Eastern Shoshone, and that taking was compensated. The Eastern Shoshone Tribe was compensated for land that was taken, but it was not compensated for a taking or diminishment of its sovereignty on the land. After previous federal cases, it is clear that NAT has an undivided interest in the Wind River Reservation, and as a co-tenant NAT has some attributes of sovereignty. NAT's land rights stem from the compensated taking and exist as a matter co-tenancy. NAT's sovereign rights stem from its federal recognition. NAT may have Treaty rights to some other Reservation, but as to the Wind River Reservation NAT has no express Treaty right. Failure to analyze NAT's claims in light of the unique status of the Eastern Shoshone as the only Tribe with a Treaty specifically pertaining to the Wind River Reservation offends equitable principles.

Requiring litigation on the merits without injunctive relief would not result in unequitable hardship to NAT. Preventing the SBC Defendants from the normal course of discovery and litigation will cripple their ability to provide services they have promised and are contractually bound to provide to members of both Tribes. SBC Defendants have only engaged in actions required by the BIA Program Review. Declaration of Darwin St. Clair, Exhibit A. Thus, the balance of equities tips in favor of the Shoshone Business Council Defendants.

**h. An Injunction is not in the Public Interest.**

NAT raised two public interest arguments. First, NAT says that the public interest in generally supporting tribal sovereignty demands immediate injunctive relief. Second, NAT says that injunctive relief will prevent public confusion. Both arguments fail. To the contrary, the public interest element weighs in favor of the Shoshone Business Council Defendants.

NAT's first argument fails because the Court can still protect tribal sovereignty without injunctive relief. NAT failed to articulate why immediate injunctive relief better protects Tribal sovereignty than permitting the Court to gather evidence and address the merits of the case in due course. NAT also failed to point to any legal standard defining the general public interest in supporting tribal sovereignty as mandating injunctive relief where there is an allegation of an affront to tribal sovereignty. Enjoining the two Shoshone Business Council members from undertaking duties intrudes on tribal sovereignty. The injunctive relief NAT requests is as much an affront to tribal sovereignty as the alleged actions about which NAT complains. There is no public interest in immediate injunctive relief that would offend tribal sovereignty in the name of protecting it.

Second, NAT's argument that injunctive relief is necessary because the public has an interest in avoiding confusion fails because such relief would cause more confusion than it would prevent. The injunctive relief requested would terminate

current judicial services on the Wind River Reservation. The standing of the Tribal Court will be called into question. Litigants with pending cases will be confused. Employees of the Tribal Court and other joint programs will be faced with confusion as well. Injunctive relief would likewise terminate provision of services under other shared programs, causing additional confusion. In reality, the public interest weighs in favor of protecting the fragile integrity and continued operation of current contracts and joint programs according to the terms of applicable contracts, until the merits of this matter can be addressed.

The public interest weighs in favor of effective resolutions to conflict. Denying injunctive relief and requiring resolution on the merits will compel both Tribal councils to have reasonable discussions about informal resolution, rather than ignoring each other and resorting to federal litigation on every issue that comes up during litigation. Public interest weighs in favor of informal cooperative resolutions where the Council's meet as sovereigns to resolve ancillary matters, i.e., use of previously approved letterhead.

Another public interest reason to deny injunctive relief is that it would encourage more efficient procedures to resolve this controversy. Allowing the IBIA to develop a full record in the pending administrative proceeding, which NAT chose in the first instance, will make this Court's analysis more efficient.

A further public interest reason to deny injunctive relief is judicial economy. NAT chose its forum to challenge the 638 contracting decisions of the Federal Defendants, which is the crux of this case. NAT chose to file in the IBIA. The Office of Hearings and Appeals is currently handling this very controversy. The IBIA is specially charged and equipped to deal with 638 contracting challenges. Allowing litigation in another federal forum at the same time wastes judicial resources.

Finally, public interest weighs against injunctive relief because the BIA recently conducted a Program Review for the Tribal Court and found that, "Mismanagement of the program is a major concern due to the failure to address corrective actions from previous reviews." *Declaration of Darwin St. Clair*, Exhibit A. "The outstanding issues from the previous review include: no background investigations for the current Court staff, and noncompliance with the Shoshone and Arapaho Law and Order Code relating to Tribal Judges salaries." *Id.*

According to the BIA, the Shoshone and Arapaho Law and Order Code "required a number of the Court positions to be appointed by the JBC…and subcontracts to be approved through the JBC. Again, it appears the Chief Judge [wrongly] signed off on subcontracts. This becomes more of an issue because of the large payments to some subcontractors and potential conflicts of interest."

Other BIA findings and recommendations include:

- "the current program has significant problems that need to be addressed. The attached Corrective Action Plan identifies the primary concerns that need to be corrected within the timetable specified."
- "Salaries of Judges must be clearly addressed by both Tribes. Currently, the salaries are too high, and would need to be justified." [Chief Judge salary - $114,500 / No background check];
- The Chief Judge does not have a valid appointment.
- "Chief Judge St. Clair is circumventing amending the S&A LOC by improperly relying on S&A LOC, Section 4-6-17 when adopting Court Rules."
- "The Chief Judge cannot be contacted after hours."
- "The JBC should immediately appoint an individual as Chief Judge in accordance with S&A LOC, Section 1-3-2."
- "The JBC should immediately appoint three individuals as Associate Judges in accordance with S&A LOC, Section 1-3-2."

Performance of a lawful 638 contract to address matters raised by the BIA Program Review is not an *ultra vires* act, or an affront to sovereignty, and actually serves the public interest.

Because all the *Winter* factors weigh against the issuance of injunctive relief, the Court should deny the motion for preliminary injunction.

**5. CONCLUSION**

Before painting a lasting brush-stroke on the landscape of federal Indian law, the Court should examine the long-standing landmark of Tribal sovereign immunity. The two Shoshone-Business Council members were acting in their capacity as Tribal officials and should not be subject to suit. Issuing a preliminary injunction here is a rushed, wild brush-stroke on the canvass because the elements required for injunctive relief are not met.

No harm has actually occurred. No irreparable harm is eminent. NAT's lawsuit is simply a political show of force disguised with sophistry about sovereignty.

Based on the foregoing points and authorities, the Northern Arapaho Tribe's Motion for Preliminary Injunction should be DENIED.

The Shoshone Business Council Defendants hereby request payment of their costs and fees associated with defending against this action.

Dated this 18th day of March, 2016.

Respectfully submitted,

/s/ Mark Echo Hawk
Mark A. Echo Hawk
ECHO HAWK & OLSEN, PLLC
505 Pershing Ave., Suite 100
PO Box 6119
Pocatello, Idaho 83205-6119
(208) 478-1624
(208) 478-1670
mark@echohawk.com

/s/ Majel M. Russell
Majel M. Russell

ELK RIVER LAW OFFICE, P.L.L.C.
145 Grand Avenue, Suite 5
P.O. Box 928
Billings, MT 59101
Phone: (406) 259-8611
Fax: (406) 259-3251
mrussell@elkriverlaw.com

## CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(d)(2)(E), the foregoing MEMORANDUM IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION contains 5,880 words, excluding caption, certificates of service and compliance, table of contents and authorities, and exhibit index.

ECHO HAWK & OLSEN, PLLC

/s/ Mark Echo Hawk
Mark A. Echo Hawk

**CERTIFICATE OF SERVICE**

I hereby certify that on March 18, 2016 the foregoing MEMORANDUM IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION was electronically filed using the Court's electronic filing system. Notice of the filing will be sent by email to all parties of record by the Court's electronic filing system. Parties may access this filing using through the Court's CM/ECF System.

ELK RIVER LAW OFFICES, P.L.L.C.:

/s/ Majel M. Russell
MAJEL M. RUSSELL