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

NORTHERN ARAPAHO TRIBE,	)	Civil Action No. CV-16-11
for itself and as <i>parens patriae</i>	)	BLG-SPW
	)	
Plaintiff,	)	
	)	
vs.	)	NORTHERN ARAPAHO TRIBE'S
	)	REPLY BRIEF IN SUPPORT OF
DARRYL LaCOUNTE, LOUISE	)	ITS MOTION FOR PRELIMINARY
REYES, NORMA GOURNEAU,	)	INJUNCTION
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 individual )  
and official capacities, )  
 )  
Defendants. )

## **I. INTRODUCTION**

Federal self-determination contracts may not be awarded to any “tribal organization” without “the approval of each such Indian tribe” which will benefit from the services provided. 25 U.S.C. 450b(1), Indian Self-Determination and Education Assistance Act (“ISDEAA”). Furthermore, no federal agency may make any decision with respect to a federally recognized Indian tribe that “diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes.” 25 U.S.C. §476(f) and (g). Despite these clear statutory provisions, Federal Defendants awarded ISDEAA contracts, including one to the “Eastern Shoshone Business Council [SBC] on behalf of the Joint Business Council for Judicial Services for the Shoshone and Arapaho Tribes,” without the consent of the Northern Arapaho Tribe (NAT). *See* Exhibit 21 at p. 3, attached hereto.<sup>1</sup> In doing so, Federal Defendants have unlawfully diminished the privileges and immunities of the NAT by authorizing SBC Defendants (SBC) to act unilaterally on behalf of

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<sup>1</sup> NAT obtained a copy of this ISDEAA contract through the Freedom of Information Act on March 8, 2016.

both Tribes.

SBC Defendants are deemed part of the Bureau of Indian Affairs (BIA), acting under color of federal law, when performing ISDEAA contracts for the BIA. Pub.L.No. 101-512, Title III, 314, 104 Stat. 1915, 1959-60 (1990) (codified at 25 U.S.C. §450f notes). Together, Defendants have hijacked the authority of NAT to consent, or not consent, to the award of ISDEAA contracts for the benefit of NAT and its members and are in the process of unlawfully “restructuring” the Tribal Court. A preliminary injunction is needed to stop these on-going violations of federal law.

## **II. AN EQUAL SAY FOR THE TRIBES IN SHARED MATTERS IS THE STATUS QUO**

SBC admits that “[t]he actual status quo has been for both Tribal councils to have an equal say on matters of common interest.” Doc. 40 at 14. The status quo, even under the old JBC format, required the approval of each Tribe regarding management of programs shared by both Tribes, whether or not meeting in joint session. *See* Doc. 17-3 at 5. SBC now upends the status quo in purporting to speak for NAT on ISDEAA contracts that have historically been managed cooperatively.

SBC claims that NAT wants to interrupt the performance of these shared ISDEAA contracts. Doc. 40 at 14. To the contrary, the Northern Arapaho

Business Council (NABC) has worked hard to protect those programs in the face of unilateral actions by SBC, including efforts in this lawsuit to prevent the wholesale replacement of Tribal Court judges and court staff.

SBC also claims that NAT has a “scheme to avoid an equal vote by a smaller Tribe [EST].” Doc. 40 at 15. Nothing in the pleadings supports such a claim. NAT simply seeks to prevent the SBC from acting on behalf of NAT without its consent. Injunctive relief would preserve what SBC now admits has been the status quo regarding shared programs.

### **III. NAT IS LIKELY TO SUCCEED ON THE MERITS**

SBC makes a series of admissions which substantiate on-going violations of 25 U.S.C. §450b(l) and 25 U.S.C. §476(f) and (g).

A. *SBC admits NAT is a federally recognized Tribe.* SBC admits that NAT is a federally recognized Indian Tribe and that “NAT’s sovereign rights stem from its federal recognition.” Doc. 40 at 27. “Recognition” is a “legal term of art” which “permanently establishes” a government-to-government relationship with the United States and institutionalizes the Tribe’s status, “along with all the powers accompanying that status...”. H.R. Rep. 103-781, 103<sup>rd</sup> Cong., 2d Sess., 2 (1994). *See also Cohen*, §3.02[3] at 133-34.

B. *SBC admits the JBC was comprised of two separate councils.* SBC

agrees that the JBC was “comprised of 6 members of the SBC and 6 members of the Northern Arapaho Business Council,” decl. of SBC Chairman St. Clair, Doc. 40-1 at 3, para. 8, and decl. of SBC Co-Chairman Wagon, Doc. 40-2 at 2, para. 8, and that when meeting in the JBC, resolutions were “signed by the Chairman of each Tribe,” *see* Doc. 40 at 9, not by a single chairman of JBC. SBC does not contest that when meeting in the JBC, affirmative votes from a majority of the members of *both* the SBC *and* the NABC were required for action to be approved. Doc. 17-3 at 5, para. 13. No single Tribe was authorized to act on behalf of the other without its consent. This is the hallmark of a joint powers board, where approval by each constituent government is required and none of the participating governments surrenders any of its independent sovereignty simply by participating. *E.g., Weston Cty. Hosp. Joint Powers Bd. v. Westates Const. Co.*, 841 P.2d 841, 846-47 (Wyo. 1992).

C. *SBC admits the JBC was a “tribal organization.”* SBC also concedes that the JBC was (they claim it still is) a “tribal organization” as defined in the ISDEAA, Doc. 40 at 10 (“the JBC, a tribal organization within the definition of 25 U.S.C. §450(b)[sic](1)...”). That section provides that no contracts may be awarded without “the approval of each such Indian tribe” which will benefit from the services provided. The provision is plain and unambiguous. *Council for Tribal*

*Employment Rights v. U.S.*, 112 Fed. Cl. 231, 248 (2013). The nature of the JBC as a “tribal organization” under this definition is consistent with its status as two separate councils, acting together as a voluntary joint powers board. Federal Defendants have awarded contracts and authorized actions by SBC, as a federal contractor, without “the approval of each such Indian tribe.”

The SBC has “accepted the Northern Arapaho Business Council’s choice to withdraw from JBC. ...” Doc. 40-1 at 55. NABC has a choice in the way it structures its participation or cooperation with other governments, and SBC has accepted that. Then SBC takes a wrong turn. Acting under color of federal law, it attempts to make decisions unilaterally on behalf of both Tribes.

*D. SBC admits it has unilaterally taken control of “JBC” on behalf of both Tribes, without a vote to do so by both Tribes.* The SBC admits that a quorum of only four (4) members of the SBC purports to alter the membership and quorum requirements of the former JBC, resolving that “the Joint Business Council is now comprised of the Eastern Shoshone Business Council with a quorum of four (4) Eastern Shoshone Business Councilmembers and ESBC [SBC] will oversee all Joint Business Council issues.” Resolution 2015-10770, Doc. 40-1 at 56. This resolution is the primary mechanism through which SBC now purports to take action on behalf of NAT. SBC does not deny this, but openly announces it with

the approval and authorization of the BIA.

*E. SBC admits it is taking actions for NAT over the objections of NAT.*

Defendants St. Clair and Wagon declare under penalty of perjury that “[n]either I nor the Shoshone Business Council has represented that we are the official representatives of the Northern Arapaho Tribe.” Doc. 40-1 at 7, para. 44; Doc. 40-2 at 7, para. 44. However, Resolution 2015-10770, Doc. 40-1, 55-56, purports to be a resolution of both Tribes and includes the image of the historic Arapaho Chief Black Coal. The resolution clearly demonstrates the on-going, unlawful practice by SBC of speaking on behalf of NAT. Additional examples include directives to the Tribal Court Administrator to advertise jobs at the Court which are not vacant (Doc. 1-10), leasing the oil and gas interests of NAT to third parties without consent of the NAT (Doc. 1-4 at 5,9,10 and 11), and “restructuring” the Tribal Court (Doc. 1-15). *See also* Doc. 1-11 and 1-14. SBC does not deny such conduct, but openly announces that it is doing so under color of federal law.

*F. SBC admits it is restructuring the Shoshone and Arapaho Tribal Court under the direction of Federal Defendants and without a vote to do so by both Tribes.* Pursuant to its self-declared authority under Resolution 2015-10770, SBC has announced it is “restructuring” and “reorganizing” the shared Tribal Court system unilaterally, saying it is “engaged in actions required by the BIA

Program Review,” Doc. 40 at 27.<sup>2</sup> They cite to a BIA report that criticizes perceived shortcomings in the Court itself, Doc. 40-1 at 4-5. (The Court has responded to the BIA report and has itself already made improvements in system management. *See* Exhibit 22, attached hereto.) BIA Defendant Reyes is a key author of the BIA report. SBC acts as a federal contractor with respect to these ISDEAA contracts and is “restructuring” the Court at the insistence, or under the direction, of Federal Defendant Reyes.

*G. SBC misstates NAT’s position.* SBC says there are no violations of NAT’s sovereign rights because NAT’s argument centers on monies paid for ISDEAA contracts and such funds are only a matter of statutory right. Doc. 40 at 19. This entirely misses important points set forth by NAT in its brief. Usurpation of the authority of NAT by SBC is, indeed, a violation of the federal rights of NAT as a sovereign government. Doc. 17-1 at 19-21. Violations include SBC’s unilateral management of ISDEAA funds, which are contracted in part for the benefit of NAT, and public pronouncements that SBC, under color of federal law, acts on behalf of NAT without its consent. SBC suggests that the ISDEAA has nothing to do with tribal sovereignty, but only federally recognized Tribes (or

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<sup>2</sup> NAT does not concede that SBC Defendants are “only” taking actions “required” by the BIA review.



“tribal organizations” with the consent of the affected Tribes) are eligible for ISDEAA funding. 25 U.S.C. §450b(l).

25 U.S.C. §450b(l) ensures that Tribes have an equal say in the provision of funds or services provided to them through a “tribal organization,” *Council for Tribal Employment Rights*, 112 Fed. Cl. at 249. NAT has not asserted that it has a right to ISDEAA funds to the exclusion of the SBC.

*H. Defendants unlawfully diminish the privileges and immunities of NAT.* The United States cannot “subclassify a tribe by denying it privileges and immunities available to other federally recognized tribes.” *Butte Cty., Cal. v. Hogen*, 613 F.3d 190, 198 (D.C. Cir. 2010) and 25 U.S.C. §476(f) and (g). SBC does not explain why the unilateral performance of its federal contract obligations, awarded to a “tribal organization” without the consent of NAT, does not diminish the federally protected rights of NAT or of its members. SBC presents half-hearted arguments, without supporting authority, that the sovereignty of NAT may somehow be diminished in relation to that of SBC.

For example, SBC says NAT cannot produce a treaty that “gave them rights in the Wind River Reservation.” Doc. 40 at 26. But SBC agrees that NAT’s sovereign rights stem, at least in part, from its federal recognition. Doc. 40 at 27. SBC does not explain how its position could square with the “equal footing”

doctrine codified in 25 U.S.C. §476(f) and (g) or the body of federal law on this subject. *See* Doc. 17-1 at 27-29. Many Tribes have reservations today in specific areas not reserved for them by treaty, but by other methods. *Cohen's Handbook of Federal Indian Law*, 2012 ed., §1.03[9] at 71. SBC's other arguments are equally unavailing.

1. *The JBC was not an immutable form of government under the LOC.*

SBC says that the Shoshone and Arapaho Law and Order Code ("LOC") mentions the JBC about 90 times, implying that those references impose the JBC format on both Tribes. But SBC omits the most meaningful definitions of the JBC:

"Council" means the Joint Business Council *consisting of the Business Council of the Shoshone Tribe and the Business Council of the Arapaho Tribe* [emphasis added]." LOC 12-1-4(3).

"Joint Business Council" means the Eastern Shoshone Business Council and the Northern Arapaho Business Council, *the respective governing bodies of the Tribes, acting in joint session* [emphasis added]." LOC 14-21-1(4).

"Joint Business Council" means the Shoshone Business Council and the Arapaho Business Council, *the respective governing bodies of the tribes, acting in a joint meeting* [emphasis added]." LOC 11-4-1(3).<sup>3</sup>

None of the LOC provisions establishes the JBC, which existed prior to

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<sup>3</sup> Other definitions in the LOC simply say that the "Joint Business Council" means "the Joint Business Council of the Shoshone and Arapaho Tribes." *See, e.g.,* LOC 11-1-1(2)(f).

enactment of the LOC. None of the LOC provisions supports the proposition that the JBC consists of only the SBC. To the contrary, and despite SBC's unilateral declaration in Resolution No. 2015-10770, the LOC shows how both Tribes treated the JBC as a cooperative body comprised of each Business Council when meeting together.

Nor are general references in the LOC to the JBC determinative. Statutory references to an entity or office in existence at the time of legislative enactment are not uncommon, and they do nothing to immutably establish that entity or office, unless the statute expressly provides for it. *See* 25 U.S.C. §262, which requires persons trading on Indian reservations to be licensed by "the Commissioner of Indian Affairs," even though the duties of the Commissioner now reside with the Assistant Secretary for Indian Affairs.

2. *No constitution imposes the JBC as an immutable form of government.*

SBC concedes that "[t]he Shoshone General Council, comprised of all [EST] Tribal members 18 years of age or older, is the supreme governing body for the Tribe." Doc. 40-1 at 3, para. 2, and Doc. 40-2 at 3, para. 2. They are careful to avoid any statement that their supreme governing body has approved the 1938 draft constitution and by-laws, because it has not. It is untrue that NAT approved a final document. The U.S. District Court in *E. Shoshone Tribe v. N. Arapaho Tribe*,

926 F.Supp. 1024, 1032 (D.Wyo. 1996), found and concluded that the draft 1938 constitution “has never been adopted by the supreme authority of the Eastern Shoshone Tribe, that is, [its] General Council. Nor was it adopted by the Northern Arapaho.” Hearing transcript excerpt, Vol. II, pp. 131-32, Doc. 17-8 at pp. 3-4. SBC is precluded from arguing otherwise now. *See Clark v. Bear Stearns & Co.*, 966 F.2d 1318, 1320 (9<sup>th</sup> Cir. 1992).

SBC concedes in their declarations that the draft constitution has not been “strictly adhered to,” saying only that it established a “general pattern” for JBC. Doc. 40-1 at 4, para. 10, and Doc. 40-2 at 4, para. 10. But constitutions are “a superior, paramount law,” to be faithfully followed. *Marbury v. Madison*, 5 U.S. 137, 177 (1803). In essence, SBC concedes that all the “constitution” ever did was serve as a guide for some of the procedures later used voluntarily by the Business Councils when meeting in the old JBC.

*I. Conversion and Equal Protection Claims.* NAT’s claims for unlawful conversion of federal and non-federal funds and property flow from Defendants’ violations of 25 U.S.C. 450b(1) and 25 U.S.C. §476(f) and (g). NAT may decide for itself how to most effectively cooperate with other governments. NAT supports a cooperative approach to shared programs and property, but SBC’s unilateral assertion that it may act on behalf of NAT and its members, who are not

entitled to vote in elections or hold office with the Shoshone Tribe, violates the “one person, one vote” principle.

#### **IV. NAT FACES A THREAT OF IRREPARABLE INJURY**

Violations of tribal sovereignty constitute irreparable harm, *ipso facto*,<sup>4</sup> and SBC agrees. Doc. 40 at 23. SBC argues that NAT has no property right to any particular ISDEAA funding, missing the point that its unilateral declaration of authority to direct the actions of NAT infringes not only on property rights, but on the federally recognized sovereign rights, privileges and immunities of NAT. It is clear that SBC broadly asserts the authority of NAT through the old JBC, purporting to bind NAT to oil and gas lease renewals, wholesale replacement of Tribal Court and Fish and Game Department staff, and the management and use of shared tribal equipment and tribal funds.

Voluntary participation in the old JBC format does not create an immutable, perpetual consent to allow federal contracts with the SBC, acting unilaterally on behalf of both Tribes as the former JBC. But this seems to be exactly what SBC argues in order to meet the “consent” requirement of 25 U.S.C. 450b(l). Nothing in the laws of the Tribes or the United States permits this result.

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<sup>4</sup> *Tohono O’odham Nation v. Schwartz*, 837 F.Supp. 1024, 1034 (D.Ariz. 1993).

## **V. HARM TO NAT OUTWEIGHS ANY HARM TO DEFENDANTS**

SBC now agrees that “[t]he actual status quo has been for both Tribal councils to have an equal say on matters of common interest.” Doc. 40 at 14. Protecting the status quo, which requires the approval of both Tribes in matters involving shared tribal programs, does not harm legitimate interests of the Defendants. Defendants lack any legitimate interest in misrepresenting to other governments, businesses or the public that SBC speaks for NAT.

## **VI. AN INJUNCTION IS NOT CONTRARY TO THE PUBLIC INTEREST**

Defendants’ actions purport to represent the official conduct of the Northern Arapaho government, including the adoption of regulations and formal policies. The opportunity for public confusion and injury is apparent.

SBC Defendants say an injunction will terminate judicial services on the Reservation. Doc. 40 at 28-29. To the contrary, participation by both Tribes is the only legitimate way under federal law to perpetuate a shared court system. Unilateral actions by the SBC, at the behest of the Federal Defendants, are *ultra vires* and have raised alarm among litigants seeking to appear before the Court. *See* Doc. 28 at 4 (“...the current actions being taken by EST and the Federal Defendants... are not within the law and are harmful to all who depend upon the Tribal Court for access to justice.”). Unilateral operation of the Tribal Court

creates serious jurisdictional questions for a large class of litigants in the Tribal Court. Without the consent of NAT, the SBC is without authority to appoint judges, manage staff, or set rules or policies for a shared court system.

## **VII. CONCLUSION**

Defendants have hijacked the authority of NAT to consent, or not consent, to the award of ISDEAA contracts for the benefit of NAT and its members, in violation of 25 U.S.C. 450b(1). They do so under a theory that the privileges and immunities of NAT are somehow diminished in relation to the EST, which allows SBC to act on behalf of NAT without its consent. Their actions violate 25 U.S.C. §476(f) and (g). Defendants are now in the process of unlawfully “restructuring” the Tribal Court, approving oil and gas leases, and other unlawful actions. A preliminary injunction is needed to stop these on-going violations of federal law.

DATED this 1<sup>st</sup> day of April, 2016.

/s/Andrew W. Baldwin

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### **CERTIFICATE OF SERVICE**

I hereby certify that on April 1, 2016, I electronically filed the foregoing filing. Notice of this filing will be sent by email to all parties of record by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF System.

/s/ Mandi A. Vuinovich

Mandi A. Vuinovich

### **CERTIFICATE OF COMPLIANCE**

Pursuant to Local Rule 7.1(d)(2)(E), the attached brief is proportionately spaced, has a typeface of 14 points and contains 3,118 words, excluding the caption and certificates of service and compliance, table of contents and authorities, and exhibit index.

DATED this 1<sup>st</sup> day of April, 2016.

/s/ Mandi A. Vuinovich

Mandi A. Vuinovich