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

NORTHERN ARAPAHO TRIBE, for itself and as *parens patriae*	)	Civil Action No. CV-16-11 BLG-BMM
Plaintiff,	)	
vs.	)	NORTHERN ARAPAHO TRIBE'S RESPONSE TO SHOSHONE BUSINESS COUNCIL DEFENDANTS' MOTION TO DISMISS OR STAY
DARRYL LaCOUNTE, LOUISE 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 individual and official capacities,	)
	)
	)
Defendants.	)

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Plaintiff Northern Arapaho Tribe ("NAT") respectfully submits the following Response to Shoshone Business Council Defendants' Motion to Dismiss or Stay (Docs. 25 and 26). For the reasons that follow, that motion lacks merit and should therefore be denied.

INTRODUCTION

There are two, separate, federally recognized Indian Tribes that reside on the Wind River Indian Reservation in Wyoming: the Eastern Shoshone Tribe ("EST") and the NAT. NAT has approximately 10,100 members; EST has approximately 4,100 members. For decades, each Tribe has contracted with the federal government under the Indian Self-Determination and Education Assistance Act ("ISDEAA"). 25 U.S.C §450 *et seq*. Historically, the two Tribes had contracted to carry out certain self-determination programs cooperatively, through a "tribal organization" known as the Joint Business Council ("JBC"). *See* 25 U.S.C. §450b(l) (defining "tribal organizations"). In 2014, NAT withdrew from JBC in an effort to reform and improve management oversight of cooperative programs. *See* 6 N.A.C. 103(G); Doc. 1, Ex. 1.

Under the ISDEAA, Congress created a "prerequisite" to approval of ISDEAA contracts to tribal organizations: "in any case where a contract is let or grant is made to an organization to perform services benefitting more than one

Indian tribe, the approval of each such tribe" is required. 25 U.S.C. §450b(l).

In flagrant disregard for this law, and without approval from the NAT, the Defendants have arranged and are carrying out ISDEAA contracts to the "Eastern Shoshone Business Council on behalf of the Joint Business Council," including a contract for "Judicial Services for the Shoshone and Arapahoe Tribes of the Wind River Reservation." Doc. 49-1, p. 3 (Ex. 21). This conduct is egregiously *ultra vires*.

As discussed below, this Court has ample jurisdiction to declare the conduct unlawful, enjoin the defendants from ongoing violation of this law, and provide other remedies.

FACTUAL BACKGROUND

Under a heading entitled "Statement of Facts," Defendants St. Clair and Wagon ("SBC" or "SBC Defendants") make a set of factual representations in support of their motion. Some of this is historical background, infused with a Shoshone perspective. *See, e.g.*, Doc. 26, p. 7, citing *Shoshone Tribe v. U.S.*, 82 Ct.Cl. 23, 35 (1935).[1] Other averments in this section lack factual support and are demonstrably false. *See, e.g.*, Doc. 26, p. 8, lines 1-2, "bylaws approved by

[1] NAT was not a party to this case. Therefore, the record does not reflect the Northern Arapaho perspective.

both Tribes;" *compare* Doc. 17-8, pp. 3-4 (Judge Alan B. Johnson: "Constitution and Bylaws. . . never adopted . . . by Eastern Shoshone Tribe . . . nor was adopted by the Northern Arapaho.").

The most significant material in SBC's "Statement of Facts" includes a series of admissions. SBC admits that, when the JBC was in existence, it was not a federally recognized Tribe, but, instead, "a tribal organization within the definition of 25 U.S.C. §450b(l)." Doc. 26, p. 8.

SBC attempts to cast the former JBC in a favorable light, referencing 638 contracts that were historically arranged to flow through JBC with the consent of the business councils of both Tribes. Doc. 26, p. 9.[2] SBC admits that it "has continued operations of the JBC to fulfill 638 contracts without [NAT's] participation." Doc. 26, p. 9. SBC admits that it is doing so under color of federal law, "with approval from the BIA." *Id*; *see also* Doc. 1-4, pp. 5, 11.

SBC also admits that, without consent from NAT, "through the JBC, EST

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[2] SBC glosses over the legacy of Bureau of Indian Affairs paternalism and oppression inherent in the JBC format and the management problems that were born out this construct. *See Arapaho Tribe of the Wind River Indian Reservation v. U.S.*, 93 Fed.Cl. 449, 453 (2010) (reversed on appeal) (BIA misled Tribes through JBC into disadvantageous oil and gas lease conversions); *see also* https://www.hcn.org/blogs/goat/wind-river-reservation-settlement-arrives-but-justice-was-a-long-time-coming (U.S. pays $157 million +/- to settle breach of trust claims arising from unlawful oil and gas lease conversions).

[SBC] submitted a proposal to continue providing judicial services . . .” which the “BIA approved” “to continue providing the same judicial services *previously* approved” by both Tribes. Doc. 26, p. 9 (emphasis added). SBC pays no mind to the fact that 25 U.S.C. §450b(l) requires approval from each tribe that participates in a tribal organization. SBC provides no authority for the notion that – even under the old JBC ground rules – SBC was ever authorized to take action on behalf of NAT. Previously, actions taken through the JBC on behalf of both Tribes always required a requisite number of votes from the elected officials of each Tribe. Doc. 17-3, p. 5, ¶13.

SBC’s treatment of the facts omits any discussion of equally fundamental and profound considerations, such as whether their efforts to commandeer the Court violate existing tribal law or whether SBC and the United States are violating the civil rights of tribal court claimants.

Having admitted to facts that establish a violation of federal law, SBC presents an array of arguments under Fed.R.Civ.P. 12 seeking any sort dismissal that would insulate these violations of federal law from judicial scrutiny or redress.

ARGUMENTS

I. Subject Matter Jurisdiction.

SBC contends that the Court lacks subject-matter jurisdiction over claims

against SBC. As discussed below, these arguments lack merit.

A. Sovereign Immunity.

"An extremely important and well-established exception to the principle of sovereign immunity is that suits against government officers are not barred. The Supreme Court long has allowed suits against officers who are allegedly acting in excess of their legal authority . . .". Erwin Chemerinsky, Federal Jurisdiction, §9.2.2, p. 661 (6th Ed. 2012), *citing Ex parte Young*, 209 U.S. 123 (1908). The U.S. has waived its sovereign immunity for prospective, equitable relief of this sort through 5 U.S.C. §702 (the Administrative Procedures Act), and through the federal common law doctrine which provides for equitable relief against federal officers. *See Cobell v. Babbitt*, 30 F.Supp.2d 24 (D.D.C. 1998); *Larsen v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 704 (1949); *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1328 (D.C. Cir. 1996) ("APA's waiver of sovereign immunity applies to any suit whether under the APA or not"); and *Sea-Land Serv., Inc. v. Alaska R.R.*, 659 F.2d 243, 244 (D.C. Cir. 1981) (defense of sovereign immunity eliminated in actions for specific, non-monetary relief; legislative history explicitly states that the intent of the APA was to waive sovereign immunity in all equitable "actions for specific nonmonetary relief against a United States agency or officer acting in an official capacity"); R. Fallon,

D. Meltzer, & D. Shapiro, Hart and Wechsler's The Federal Courts and the Federal System (4th ed. 1996) (pp. 1036-37). ("Though codified in the APA, the waiver applies to any suit, whether under the APA, §1331, §1361, or any other statute").[3]

With regard to tribal officials, "tribal immunity does not bar such a suit for injunctive relief against individuals, including tribal officers, responsible for unlawful conduct." *Michigan v. Bay Mills Indian Community*, 134 S.Ct. 2024, 2035 (2014) (analogizing to *Ex parte Young*, 209 U.S. 123 (1908)); *see also Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1154-55 (10th Cir. 2011), *citing Vann v. Kempthorne*, 534 F.3d 741, 749 (D.C. Cir. 2008); *N. States Power Co. v. Prairie Island Mdewakanton Sioux Indian Cmty.*, 991 F.2d 458, 460 (8th Cir. 1993); *Tamiami Partners, Ltd. ex rel. Tamiami Dev. Corp. v. Miccosukee Tribe of Indians*, 177 F.3d 1212, 1225-26 (11th Cir. 1999). The Supreme Court has explained that, in determining whether the doctrine of *Ex parte Young* applies, "a court need only conduct a straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized

[3] The fundamental notion that federal courts have jurisdiction over *ultra vires* conduct by federal officials also endures in the context of the APA, in record-review proceedings. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984) (If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress).

as prospective." *Verizon Md., Inc. v. Pub. Serv. Comm'n,* 535 U.S. 635, 645 (2002) (internal quotation marks omitted) (alteration in original). *Tenneco Oil Co. v. Sac and Fox Tribe of Indians of Oklahoma*, 725 F.2d 572, 574-75 (10th Cir.1984) (when complaint alleges that named officer defendants have acted outside authority the tribal sovereign is capable of bestowing, an exception to the doctrine of sovereign immunity is invoked). Here, NAT clearly alleges such conduct and seeks the corresponding relief. Doc. 1, p. 7, *et seq.*

Furthermore, the question of whether sovereign immunity bars suit is different where tribal officials are acting under color of federal law carrying out ISDEAA contracts. Under the ISDEAA, Tribes and tribal organizations may enter into a contract with the federal government in which the federal government funds tribal organizations to assume the administration of programs that the federal government would have otherwise administered on behalf of the Tribe. *See generally, Hinsley v. Standing Rock Child Protective Services*, 516 F.3d 668, 670 (8th Cir. 2008); *Manuel v. U.S.*, 2014 WL 6389572, at 5 (E.D. Cal. Nov. 14, 2014). In this circumstance, Indian Tribes, tribal organizations, or Indian contractors are deemed part of the BIA when they have contracted through an authorized ISDEAA contract. Department of the Interior Related Agencies Appropriations Act, 1991, Pub.L. No. 101-512, Title III, §314, 104 Stat. 1915 (1990) (codified at 25 U.S.C.

§450f note); *Manuel*, 2014 WL 6389572, at 5.

NAT's Complaint is expressly based on allegations that the BIA officials and SBC officials are unlawfully carrying out ISDEAA contracts awarded to SBC, which purports to act on behalf of NAT through the defunct JBC. SBC plainly admits that many of the unlawful acts alleged by NAT – like hiring and firing Court staff – are being carried out under the color of federal law in the course of administering self-determination contracts. Doc. 40, p. 12; Doc. 40-1, pp. 5-6, ¶¶28-30. In this context, SBC officials are deemed to be federal officials; where federal officials act unlawfully, it is well-established that federal courts have the authority to enjoin such conduct. Chemerinsky, *supra* at §9.2.2, *Aid Ass'n for Lutherans v. U.S. Postal Service*, 321 F.3d 1166, 1173 (D.C. Cir. 2003) (judicial review favored when an agency is charged with acting beyond its authority), *citing Dart v. United States*, 848 F.2d 217, 224 (D.C. Cir. 1988) ("when an executive acts *ultra vires*, courts are normally available to reestablish the limits on his authority"). Even at this stage, the assertions that SBC Defendants "have not engaged in *ultra vires* acts" does not bear scrutiny. Doc. 26, p. 14; Doc. 1-4 (Ex. 2); Doc. 1-15 (Ex. 13). In light of this showing, an Fed.R.Civ.P. 12 dismissal is not warranted.

B. Questions of Federal Law.

SBC contends that NAT's Complaint does not present any question of

federal law. This argument ignores (or otherwise attempts to recast) NAT's Complaint. 28 U.S.C.§1331 provides that the district courts shall have original jurisdiction of all civil action arising under the Constitution, laws, or treaties of the United States.[4] The question of whether a plaintiff's complaint adequately alleges a federal question is evaluated under the "well-pleaded complaint rule," which requires that federal questions be clear on the face of a plaintiff's complaint. *Louisville & Nashville Railroad v. Mottley*, 211 U.S. 149 (1908). Questions of federal law are prominent on the face of NAT's Complaint. These include legal questions arising under the ISDEAA (Doc. 1, p. 7, *et seq*.), and questions about the rights of NAT which flow from federal recognition and underlying treaties (*id*. at p. 9). These allegations also establish jurisdiction under 28 U.S.C. §1362 (district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe . . . [arising] under the Constitution, laws, or treaties of the United States).

Furthermore, in the context of the ISDEAA, the jurisdiction of this Court is significantly broader:

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[4] Under 28 U.S.C. §1346, the fact that officers and agents of the U.S are named Defendants also establishes jurisdiction. In fact, because federal officers or employees are not subject to tribal jurisdiction, federal courts are the only courts with jurisdiction over the specific claims advanced by NAT. *See U.S. v. White Mountain Apache Tribe*, 784 F.2d 917, 920 (9th Cir. 1986) (tribal courts lack the power to regulate or limit federal employees in the performance of their duties in Indian country).

> The United States district courts shall have original jurisdiction over *any civil action or claim* against the appropriate Secretary *arising under this subchapter* . . . . In an action brought under this paragraph, the *district courts may order appropriate relief including* money damages, *injunctive relief* against any action by an officer of the United States or any agency thereof contrary to this subchapter or regulations promulgated thereunder, *or mandamus to compel an officer or employee* of the United States. . . .

25 U.S.C. §450m-1(a) (emphasis added).

In conferring this jurisdiction for claims arising under ISDEAA, Congress was explicit in its purpose: to further empower federal Courts to address the BIA's "consistent failures over the past decade to administer self-determination contracts in conformity with the law." *Shoshone-Bannock Tribes of Fort Hall Reservation v. Shalala*, 988 F.Supp. 1306, 1315 (D.Or. 1997), *citing* 1987 Senate Report at 37.

SBC's attempt to cast NAT's Complaint as relating to "internal tribal affairs of SBC" is untethered. SBC admits that the EST and NAT are not the same Tribe, but are two separate federally recognized Tribes. SBC admits that the JBC was "a tribal organization within the definition of 25 U.S.C. §450b(l)." Doc 26, p. 8. SBC admits that is "has continued operations of the JBC to fulfill 638 contracts without [NAT's] participation."[5] Doc. 26, p. 9. SBC admits that it is doing so

[5] Characterization obscures the fact that these are new contracts, not old contracts. To NAT's knowledge, there has never previously been an ISDEAA contract issued to SBC acting on behalf of the JBC.

under color of federal law, "with approval from the BIA." *Id.* SBC's conduct in acting on behalf of NAT is not an internal matter. It is in fact a clear violation of 25 U.S.C. §450b(l) (federal law), which provides that contracts to a "tribal organization . . . benefitting more than one Indian tribe" require "the approval of each such Indian tribe." SBC's reliance on *Eastern Shoshone Tribe v. Northern Arapaho Tribe*, 926 F.Supp. 1024 (D. Wyo. 1996) is unavailing. The case held (among other things) that an application by NAT on its own behalf to HUD for funding did not raise a federal questions. The case at bar presents a very different circumstance. The BIA has awarded an ISDEAA contract to SBC acting on behalf of the former JBC, and purporting to act on behalf of NAT in violation of 25 U.S.C. §450b(l). Nothing in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978), or any other case relied upon by SBC,[6] would condone violations of the ISDEAA or insulate such conduct from the scrutiny of the federal courts.

C. Exhaustion of Administrative Remedies is Not Required or Appropriate.

SBC contends that administrative remedies or IBIA appeals must be exhausted before this Court can assume jurisdiction. This argument lacks merit.

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[6] *Ordinance 59 Ass'n v. Babbitt*, 970 F.Supp. 914, 925 (D. Wyo. 1997) involved a tribal enrollment dispute within EST, which did not involve any action by the federal government or another Tribe.

"Nothing in the Indian Self-Determination Act . . . requires [exhaustion of] the internal remedies provided by its cognizant agency before invoking this Court's subject-matter jurisdiction." *Tunica-Biloxi Tribe of La. v. United States*, 577 F.Supp.2d 382, 404 (D.D.C. 2008).[7] Similarly, where there is unlawful government conduct under the ISDEAA, reliance on "the doctrine of primary jurisdiction" in deference to "administrative expertise" (Doc. 26, p. 32, lines 15-16) is not appropriate. "The Secretary does not merely act as an impartial regulator, but has an obvious conflict of interest . . .". *Shoshone-Bannock*, 988 F.Supp. at 1316.

SBC's suggestions that the Court should abstain (Doc. 26, p. 31) or stay these proceedings (Doc. 26, p. 33) or require record-review type of proceedings (Doc. 26, p. 34) are also misplaced. In the context of the ISDEAA, there "is no doubt that Congress intended to allow a tribe to save time by shortcutting the administrative appeals process . . . and quickly seek relief in a federal district court" while still obtaining "full discovery." *Shoshone-Bannock*, 988 F.Supp. at 1316 *quoting* S. Rep. No. 103-374, 103rd Cong., 2d Sess. 14 (1994). SBC

[7] One caveat to this rule may be a requirement that a contracting party adhere to the procedures set forth in 25 U.S.C. §450m-1(d) before filing suit in federal court for contractual damages. *Pueblo of Zuni v. United States*, 467 F.Supp.2d 1114, 1117 (D.N.M. 2006).

disregards this clear intent of Congress in suggesting the BIA should be afforded "the opportunity to correct its own errors" (Doc. 26, p. 34, line 1) without scrutiny from the federal court. NAT went to great lengths to try to persuade the BIA to correct its errors prior to filing this lawsuit. Doc. 1-8 and Exhibit 25 attached hereto (letter from Northern Arapaho Business Council to Gourneau dated October 13, 2015). The BIA ignored NAT and the ISDEAA both with paternalistic flourish. *Id*.

In denying Applicants' Motion to Intervene (Doc. 50), the Court relied on *Faras v. Hodel*, 845 F.2d 202, 204 (9th Cir. 1988), a case put forward by the United States (*see* Doc. 44, p. 9), which held that 25 C.F.R. part 2 requires exhaustion of administrative remedies for appeals from "actions or decisions by officials of the Bureau of Indian Affairs." *Faras* was decided prior to the 1994 Amendments to 25 U.S.C. §450m-1(a), which are discussed in *Shoshone-Bannock Tribes of the Fort Hall Reservation v. Shalala*, 988 F.Supp. 1306, 1316 (1997) (quoting S. Rep. No. 103-374, 103rd Cong, 2d Sess. 14 (1994), p. 13. Any analysis of whether NAT's claims are subject to exhaustion must consider post-*Faras* amendments to the ISDEAA.

SBC also argues that certain appeals that were previously pending before the IBIA triggers an exhaustion requirement. Those appeals did not arise from the

ISDEAA contracts at issue here, which are ISDEAA contracts awarded to SBC acting through the JBC. *See, e.g.*, Doc. 49-1 (Ex. 21). Background on those appeals is as follows:

Prior to the dissolution of the JBC, several ISDEAA contracts were in place between the federal government and both Tribes, acting as a "tribal organization," through the JBC. In the fall of 2015, approximately one year after the dissolution of the JBC, these contracts were set to expire. On the run-up to the next contract cycle, NAT attempted to coordinate with the U.S. and SBC through government-to-government dialogue on matters related to shared ISDEAA contracts. NAT put forward a draft memorandum of understanding that related to ISDEAA contracts which were previously administered through the JBC. These discussions broke down, and NAT was left in the dark about the future of the programs. Doc. 1-5 (Ex. 3), pp. 1-4; Doc. 1-8 (Ex. 6), pp. 1-2; and Doc. 1-9 (Ex. 7), pp. 1-2.

In order to preserve ISDEAA funding, on behalf of the Shoshone and Arapaho Tribal Court ("Tribal Court"), the Chief Judge submitted an ISDEAA contract proposal for the provision of judicial services. Doc. 1-13, p. 7. The Judge's approach was that because the Tribal Court had been created by both Tribes through the Shoshone and Arapaho Law and Order Code (LOC), it was an

entity which could contract directly with the BIA as a "tribal organization." *Id*. NAT supported this proposal and encouraged SBC to do the same. SBC ignored this request.

NAT also filed an alternative proposal that would fund an Arapaho court, in the event that the BIA refused to maintain the status quo by funding the existing Tribal Court. The BIA denied both proposals.

The regulations related to ISDEAA funding create strict deadlines (30 days) for the filing of appeals related to ISDEAA proposals. 25 C.F.R §900.152. The Tribal Court itself and NAT protectively filed and preserved those appeals.

Contemporaneously, unbeknownst to NAT, the BIA received a contract proposal from SBC, purporting to act through the former JBC on behalf of both Tribes to administer an ISDEAA contract for judicial services. Four days before the old contract expired, Defendant Gourneau awarded the contract that SBC sought. Gourneau did so without any prior notice to NAT and without consulting any attorney within the federal government. Doc 37-4, pp. 5, 9. NAT was not involved in this process. NAT did not receive notice from the BIA of any right to appeal the award of the contract to another party, and NAT did not appeal the award of that contract to the IBIA. Instead, NAT filed this federal court action seeking declaratory and injunctive relief that the contract the BIA awarded to SBC

on behalf of NAT is in violation of federal law.

On March 30, 2016, Judge St. Clair withdrew his appeal before the IBIA. In light of this, NAT also withdrew its appeal on the same matter on April 1, 2016.

The former IBIA appeals arose from ISDEAA contract proposals that are not at issue in this case. They addressed whether the BIA should have awarded an ISDEAA contract to the Tribal Court as a "tribal organization." Those appeals did not extend to the conduct at issue here, and the claims that arise from SBC's unilateral hiring or firing of employees of the Tribal Court or other shared departments, control of shared tribal funds or assets without consent of the NAT, or action under color of federal law regarding approval of oil and gas leases or other matters on behalf of NAT. These claims are beyond the authority of the IBIA to resolve in any event because the IBIA lacks authority to issue the injunctive relief sought by the NAT in the case at bar. *Bulletproofing, Inc. & Richard Medlin (President) v. Acting Phoenix Area Director, Bureau of Indian Affairs*, 20 IBIA 179 (1991); *Northern States Power Co. v. Minneapolis Area Director*, 26 IBIA 1 (1994); *Northern States Power Co. v. Prairie Island Mdewakanton Sioux Indian Community*, 781 F.Supp. 612, 614 (D.Minn. 1991) (IBIA lacked authority to enjoin an Indian Tribe; tribal sovereign immunity did not prevent jurisdiction over tribal officers acting beyond the scope of authority the

sovereign is capable of bestowing).

II. Personal Jurisdiction Over SBC Defendants.

SBC contends that personal jurisdiction is lacking in Montana over SBC Defendants, and implies that jurisdiction in the U.S. District Court for the District of Montana offends "traditional notions of fair play and substantial justice." *See Int'l Shoe Co. v. State of Washington*, 326 U.S. 310, 316 (1945). To withstand a motion to dismiss for lack of personal jurisdiction, a plaintiff must make "only a *prima facia* showing of jurisdictional facts," *Doe v. Unocal Corp.*, 248 F.3d 915, 922 (9th Cir. 2001), where "the court resolves all disputed facts in favor of the plaintiff." *Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1154 (9th Cir. 2006). SBC's jurisdictional attack is based on the assertion that SBC Defendants "have not engaged in any activity" (Doc. 26, p. 19, line 18) cognizable under MT. R. RCP. Rule 4(b)(1), or conduct that would otherwise establish minimum contacts. With no factual support, SBC avers that "SBC defendants have not directed their activities or otherwise invoked the benefits . . . of Montana law." Doc. 26, p. 22, line 3. Upon information and belief, SBC Defendants have been less than fully candid with the Court on this matter.

NAT is aware that SBC actively lobbied the Billings Regional Office of the Bureau of Indian Affairs, pressing for ISDEAA contracts to be awarded to SBC

acting through the former JBC. In September 2015, the undersigned lawyers for NAT were advised by a representative of the Billings Regional Office that SBC had traveled to Billings the prior week to meet with Mr. LaCounte about awarding ISDEAA contracts to SBC acting through the former JBC. NAT believes the U.S. can and should corroborate this. If the U.S. will not do so, NAT requests discovery to develop the full extent of SBC officials' contacts with Montana in this matter. 8 Fed. Prac. & Proc. Civ. §2008.3 (3d ed.), *citing Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 n. 13 (1978) ("where issues arise as to jurisdiction or venue, discovery is available to ascertain the facts bearing on such issues"); *accord Harris Rutsky & Co. Ins. Servs. v. Bell & Clements Ltd.*, 328 F.3d 1122, 1135 (9th Cir. 2003).

Subsequently, on October 1, 2015, an ISDEAA contract to the "Eastern Shoshone Business Council on behalf of the Joint Business Council" for "Judicial Services for the Shoshone and Arapahoe Tribes of the Wind River Reservation" was signed by Ms. Stella Corbin of the Billings Regional Office. Doc. 49-1, p. 1. Chairman Darwin St. Clair, Jr., provide a counter-signature on November 4, 2015.

NAT is also aware that the Billings Regional contracting officer had telephone calls with SBC officials about NAT's attempts to convince the Billings Regional Office to maintain the *status quo* with ISDEAA funding for cooperative

programs. Dec. of Willow (attached hereto as Exhibit 24); *see also* Dec. of Oldman (attached hereto as Exhibit 23).

Contacts of this sort are more than adequate to establish "minimum contacts" under federal law, or to satisfy the requirements of MR. R. RCP. Rule 4(b)(1). *Schwarzenegger v. Fred Martin Motor Co*., 374 F.3d 797, 802 (9th Cir. 2004) sets forth the test which requires: (1) purposeful availment; (2) a claim that arises from forum-related activities; and (3) and exercise of jurisdiction that comports with principles of fair play, substantial justice, and reasonableness.[8] In light of the central role of the Billings Regional Office in these matters (*see* Doc. 36, ¶2), SBC's course of dealing under the ISDEAA through the Billings Regional Office, and efforts in lobbying the Billings Regional Office, this test is amply met. Viewed through the lens of Montana law, such conduct also establishes "minimum contacts." *See Spectrum Pool Products, Inc. v. MW Golden, Inc.* 968 P.2d 728, 730-32 (Mont. 1998) (contract negotiations by telephone and in writing establish jurisdictional contacts).

SBC also maintains regular and systematic contacts with Montana that

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[8] "A strong showing on one axis will permit a lesser showing on another." *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199, 1210 (9th Cir. 2006). A single forum state contact can support jurisdiction if the cause of action arises out of that particular purposeful contact of the defendant with the forum state. *Id*.

satisfy the requirements for "general jurisdiction." *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984). SBC officials are active within both the Montana-Wyoming Tribal Leaders Council and the Rocky Mountain Tribal Leadership Council, where SBC member Ivan Posey serves as Chairman of that Council and SBC is a "key partner" in one of the Council's programs.

III. Venue in the District Court of Montana is Proper.

SBC contends that venue in the District Court of Montana is "wrong" or "improper." This argument lacks merit. SBC relies on *Rivadeneira v. Dept. of Homeland Sec.*, No. CV-15-60-BLG-SPW, 2015WL 5037456 (D. Mont., Aug. 25, 2015), contending that the case interprets 28 U.S.C. §1391(e)(1) as requiring venue in the judicial district where *another* defendant resides. Doc. 26, p. 23, line 20. The *Rivadeneira* case does not stand for that proposition.

28 U.S.C. §1391(e)(1) addresses venue in cases "in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority." A civil action of this sort may:

> be brought in any judicial district in which (A) a defendant in the action resides, (B) a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (C) the plaintiff resides if no real property is involved in the action. Additional persons may be joined as parties to any such action in accordance with the Federal Rules of Civil Procedure and with such other venue requirements as would be

> applicable if the United States or one of its officers, employees, or agencies were not a party.

Id.

NAT's case satisfies these requirements.

Factor A is clearly met. There is no dispute that Mr. LaCounte and Ms. Reyes reside or hold office at the BIA Regional Headquarters in Billings, Montana.

Factor B is also met. SBC lobbied the Billings Regional Office to issue these contracts. The BIA's decision to award contracts was carried out and overseen by the Billings Regional Office. Ms. Corbin, the BIA "Contracting Officer" who acted under Mr. LaCounte's direction in awarding or administering 638 contracts to SBC, is located in Billings. Doc. 49-1 (Ex. 21). Statements from Mr. Black, the Director of the BIA, confirm the central role of the Billings Area Office in this matter. Dec. of Oldman, ¶4. Clearly, "a substantial part of the events" giving rise to the claims occurred in Billings. *See Winnebago Tribe of Nebraska v. Babbitt*, 915 F.Supp. 157, 166-67 (D.S.D.1996) (Nebraska Tribe's claim against BIA Regional Director has venue in South Dakota where the BIA Area Office was located, and substantial events giving rise to claims occurred); *Williams vs. United States*, No. C-01-0024 EDL, 2001 WL 1352885 (N.D. Cal. Oct. 23, 2001) (venue lies where errors or omissions by BIA director occurred).

IV. NAT States a Claim.

On a motion to dismiss for failure to state a claim under Fed.R.Civ.P. 12(b)(6), all allegations of material fact must be accepted as true and construed in the light most favorable to the nonmoving party. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir.1996). Fed.R.Civ.P. 8(a)(2) "requires only a short and plain statement of the claim showing that the pleader is entitled to relief in order to give the defendant fair notice of what the claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal quotation omitted). NAT's Complaint clearly states a claim for violation of federal law, most specifically 25 U.S.C. §450b(l) (approval required from each tribe to award ISDEAA grants to tribal organizations). Doc. 1, pp. 9-10, ¶39, and p. 17, ¶69. In light of SBC's admissions to the facts that substantiate a violation of this federal law, there is little doubt that NAT's claims should survive Fed.R.Civ.P. 12(b)(6) scrutiny. SBC's critique of NAT's enumerated claims for relief misses the forest for the trees.

SBC critiques NAT's first and second claims for relief suggesting "Declaratory Judgment" and "Permanent Injunction" are not "cognizable" claims for relief. Doc. 26, pp. 24-25. SBC ignores that each claim incorporates by reference 84 previous paragraphs that explain and set forth detailed allegations that

establish violations of federal law by federal officials and SBC officials acting under color of federal law. Doc. 1, p. 21, ¶85. As discussed above, the "Supreme Court long has allowed suits against officers who are allegedly acting in excess of their legal authority . . .". Chemerinsky, *supra*, §9.2.2. Such claims are surely "cognizable." NAT's purpose in presenting "declaratory judgment" and "permanent injunction" as its first and second claims for relief was to be clear that it seeks prospective relief for violations of federal law.[9]

SBC also contends that NAT's breach of trust claim does not extend to SBC Defendants. "Federal officials must faithfully execute . . . trust duties" and federal "courts must carefully scrutinize their actions." Stephen L. Pevar, The Rights of Indian Tribes, 34 (4th ed. 2012), *citing Seminole Nation v. U.S.* 316 U.S. 286, 296-97 (1942). Again, SBC fails to appreciate that, when contracting to provide ISDEAA services, tribal officials are deemed federal employees. In this capacity, SBC officials may have liability for their involvement in any breach of trust responsibility by the federal government that was carried out by BIA officials and SBC officials acting in concert.

SBC mischaracterizes NAT's claims for conversion as relating only to

[9] If the Court would prefer any different convention in formatting or pleading such claims, NAT requests the opportunity to amend its Complaint to conform with the Court's preference.

contract obligations rather than personal property. Doc. 26, p. 26. NAT has pled that SBC commandeered ISDEAA program funding and equipment in which NAT held an interest. *See* Doc. 1, pp. 18-19 (SBC transferred federal and tribal funds of NAT to accounts controlled solely by SBC); *id*., p. 20 (SBC took guns, ammunition and equipment from the shared Fish and Game Department). For such conduct, a cause of action lies. *See generally* Restatement (First) of Restitution §138 (1937) (a fiduciary who has acquired a benefit by breach of duty is under a duty of restitution). SBC's critique of NAT's conversion claim fails for similar reasons. *Id*. §128 ("Conversion and Other Tortious Dealings with Chattels").

SBC also contends that NAT has no cause of action for denial of equal protection. Here, SBC makes a remarkable assertion – that SBC is "*unconstrained by* those *constitutional provisions* framed specifically as limitations on federal or state authority." Doc. 26, p. 27, line 15 (emphasis added). Again, SBC Defendants appear completely unaware that, in carrying out an ISDEAA contract for judicial services, they are deemed to be employees of the federal government. In this capacity, SBC officials have been empowered by the BIA to oversee a court system and imbued with federal authority to do so, yet these same officials view themselves as "unconstrained" by "constitutional provisions." These arguments only illustrate the magnitude of the error the BIA has made in awarding this

contract, and the urgent necessity of injunctive relief.

Alongside violations of 25 U.S.C. §450b(l) which Defendants are alleged to have violated, NAT has also alleged violations of 25 U.S.C. §476(f) and (g). 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). SBC denies that a cause of action lies for violations of this law.

SBC misapplies a line of cases dealing with "private causes of action" or "private remedies" which arise under federal statutes. Those cases involve implied causes of action filed by persons who may or may not be within a zone of protected interests. In those cases, the intent of Congress is not always clear. Here, as a federally recognized Tribe, NAT is expressly protected against diminishment of its privileges and immunities by federal agencies and actors. The cause of action is not implied, but one expressly provided to the Tribe (the protected party) against those who are expressly prohibited from violating the sovereign rights of the Tribe (federal actors).

Although SBC relies on it, *Transamerica Mortg. Advisors, Inc. v. Lewis*, 444 U.S. 11, 19 (1979), supports NAT's claim in the case at bar. There, the court said that when Congress declared certain contracts void, it intended to allow private

suits for rescission or for an injunction against continued operation of the contract. 25 U.S.C. §476(g) provides that "[a]ny regulation or administrative decision or determination of a department or agency of the United States. . . that classifies, enhances, or diminishes the privileges and immunities available to a federally recognized Indian tribe relative to the privileges and immunities available to other federally recognized tribes by virtue of their status as Indian tribes shall have no force or effect." By declaring certain actions void, Congress contemplates that the issue of voidness "may be litigated somewhere." *Transamerica*, 444 U.S. at 18. 25 U.S.C. §476(g) presents the kind of statutory language *Transamerica* found sufficient to provide not only a remedy for the NAT, but also a private cause of action and remedies for others who may be affected by the unlawful action.

None of the cases on which SBC relies interprets 25 U.S.C. §476(f) or (g). NAT seeks relief against the very Federal Defendants, and their contractors (the SBC) who are prohibited from diminishing the privileges or immunities of the NAT.

In *Akiachak Native Community v. Salazar*, 935 F.Supp.2d 195 (D.D.C. 2013), Tribes brought suit against the Secretary of the Interior for leaving in place a regulation that treated Alaska Natives differently from other native peoples. The court granted summary judgment to the Tribes, saying 25 U.S.C. §476(g)

prohibited the regulation.

The facts as pled support each of the claims for relief put forward by NAT. NAT is entitled to fully discover the facts underlying the violation of 25 U.S.C. §450b(l) that have been established, and to develop or refine any claims for relief supported by facts that come to light. At this procedural stage, dismissal of any of NAT's claims is not warranted.

V. Indispensable Parties.

SBC Defendants present indispensable party arguments which lack merit. The Orwellian suggestion that NAT must "join the JBC" rises to the level of the absurd. When it was in existence, the JBC was a joint powers board, comprised of NAT and EST. *See EST v. NAT*, 926 F.Supp. at 1027 (defunct housing authority administered by JBC "similar to a joint powers board"). Both Tribes or their officials are joined in this case. Under the *Ex parte Young* Doctrine, the presence of SBC Chairman Darwin St. Clair, Jr., satisfies any requirement related to joinder of the SBC. Mr. St. Clair provided his signature on the unlawful ISDEAA contract between the BIA and the "Eastern Shoshone Business Council on behalf of the Joint Business Council," which indicates that he is "authorized to sign." Doc. 49-1, p. 3 (Ex. 21). In light of this authorization, one would expect that injunctive relief directed to Chairman St. Clair would serve to bar the entire SBC from future

violations of federal law.

Alternatively, in the event that the Court does not require SBC to participate in this case, the Federal Defendants are fully capable of representing any legitimate interests of SBC because, in the context of ISDEAA contracts, SBC Defendants are deemed to be federal employees. *Makah Indian Tribe v. Verity*, 910 F.2d 555, 559 (9th Cir. 1990) (absent Tribes not necessary for claims seeking prospective injunctive relief; U.S. adequately represents Tribe).

CONCLUSION

The core purpose of the ISDEAA was to end the "prolonged Federal domination of Indian Service Programs" that has "served to retard rather than enhance the progress of Indian people." 25 U.S.C. §450(a)(1). Where ISDEAA contracts are made to a tribal organization "to perform services benefitting more than one Indian tribe, the approval of each Tribe is required." 25 U.S.C. §450b(l). Defendants are engaged in ongoing violations of 25 U.S.C. §450b(l) and 25 U.S.C. §476(f) and (g), and actions which infringe on the sovereign rights of NAT. This result should not stand.

NAT respectfully asks the Court to deny SBC's Motion to Dismiss (Docs. 25 and 26).

DATED April 4, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on April 4, 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 6,494 words, excluding the caption and certificates of service and compliance, table of contents and authorities, and exhibit index.

DATED this 4th day of April, 2016.

/s/ Mandi A. Vuinovich
Mandi A. Vuinovich