

**IN THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF OKLAHOMA**

JOHN DAUGOMAH	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. CIV-16-1045 D
	)	
LARRY ROBERTS, ET AL.,	)	
	)	
Defendants.	)	

**FEDERAL DEFENDANTS RESPONSE TO MOTION FOR TEMPORARY  
RESTRAINING ORDER, AND PRELIMINARY INJUNCTION TO HALT  
KIOWA TRIBAL ELECTION**

The individually named defendants, all federal employees, respond to Plaintiff’s Motion for extraordinary relief as Ordered (Doc. 7) by the Court.

**STATEMENT OF THE CASE**

The Constitution of the Kiowa Tribe of Oklahoma provides for the Kiowa Business Council (KBC) to represent the Kiowa Tribe in all official matters. The Bureau of Indian Affairs (BIA) has not been able to recognize the leadership for the Kiowa Tribe for several years impacting the general governance of the Tribe and its government to government relations with the United States, to include grant, benefit, and other mutually beneficial programs.

The Kiowa Tribes Constitution (attached hereto as Exhibit 1) clearly and unambiguously states: “Should the Kiowa Business Council be permanently unable to raise a quorum, the *Commissioner of the Indian Affairs or his authorized representative*

*may call and supervise and election to bring the committee up to its full complement and prescribe the rules of procedure.*” (emphasis added) (Kiowa Constitution Article IV, §3).

This provision of the Kiowa Constitution is Tribal law and pursuant to this provision, BIA officials have legally, successfully and appropriately provided for that election. Pretty much all that remains is for the last ballots to be received before Saturday, September 17<sup>th</sup>, and for those ballots to be counted and the election certified for the voting part of the elections to be complete. Exhibit 2, Amended Timeline.

The election has already been successful. More than 1,900 Kiowa Tribal members registered to vote. Forty-two (42) candidates registered for office and appeared on the ballot. Exhibit 3, Sample Ballot.

Plaintiff, who states he is member of the Tribe entitled to vote, is not a candidate for election and does not appear to have contested the candidacy of anyone for Tribal office. He simply seeks to stop the ballot count, further delaying any opportunity of the Tribe or its members to return to a functioning government. His arguments are several and only general in description. They basically seem to be that the federal employees have made arbitrary and capricious decisions in the run-up to the election and that in an undescribed manner his due-process rights have been violated. In His principal arguments appear to be 1) that the federal employees can't act under tribal law, they must act under federal law. His administrative appeals to date on this issue have all been

denied. His challenges to the actual election results and methods are premature. The election rules clearly provide for post-election challenges.

## **ARGUMENT**

### **PROPOSITION I**

#### **THE FEDERAL EMPLOYEES HAD AUTHORITY TO ACT**

Mr. Daugomah asserts that Principal Deputy Assistant Secretary-Indian Affairs Roberts lacked any federal statutory authority to call for a tribal election. In fact, federal statute vests the Secretary with sweeping authority over Indian matters. Congress's authority over Indian matters is plenary. ("Congress has plenary authority to legislate for the Indian tribes in all matters, including their form of government"); *Winton v. Amos*, 255 U.S. 373, 391, 41 S. Ct. 342, 65 L. Ed. 684, 56 Ct. Cl. 472 (1921) ("Congress has plenary authority over the Indians and all their tribal relations, and full power to legislate concerning their tribal property"); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565, 23 S. Ct. 216, 47 L. Ed. 299 (1903) ("Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government"); *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 308, 23 S. Ct. 115, 47 L. Ed. 183 (1902) *quoted in United States v. Jicarilla Apache Nation*, 564 U.S. 162, 175 (2011).

Congress delegated to the Secretary of the Interior responsibility for "the supervision of public business relating to" Indians. 43 USC 1457. The authorities of the

Secretary have been delegated to the AS-IA via 209 DM 8. While the scope of the Secretary's authority is probably not as broad as Congress's, the Secretary's authority under 43 USC 1457 is probably sufficient such that, *if there were no tribal constitution*, AS-IA would have the authority to take any action permitted by federal law (e.g., IRA) to organize the Tribe.

Tribal constitutions can be viewed as limiting or precluding DOI involvement in tribal affairs; in effect, building a wall of tribal sovereign immunity around matters that are strictly internal to the tribe. The specific provision of this Tribe's Constitution can be seen as a gap intentionally left by the tribe in its wall of sovereignty, permitting DOI to exercise authority over the tribe's internal matters in certain very limited circumstances. See the discussion at *Hammond v. Jewell*, 139 F. Supp. 3d 1134, 1137-38 (ED Cal. 2015), including footnote. 1.

Mr. Daugomah is completely incorrect in asserting that the federal government, or its employees cannot act, particularly when Tribal law provides for federal action.

## **PROPOSITION II**

### **PLAINTIFF'S DUE PROCESS RIGHTS HAVE NOT BEEN VIOLATED**

Without more than a conclusory statement, Plaintiff alleges that the election and election process violate his due process rights. He seems to imply that the issuance of a second election packet may have interfered with his rights by 'altering key deadlines' in the election process. He, however, never identifies which deadlines nor the harm he suffers.

In fact, a review of the deadlines between the two election packets, attached as Exhibits 2-6 shows that the later deadlines actually *extended* periods which one would think Plaintiff would find beneficial. For example, the period to challenge a candidate was *extended* by two days. Plaintiff makes not allegation that he did not know the voting procedure, would be or has been denied the right to be a candidate or vote.

### **PROPOSITION III**

#### **PLAINTIFF LACKS STANDING TO BRING THIS SUIT**

The Plaintiff bears the burden of establishing that he has standing to bring this cause of action. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). A plaintiff has standing only if he can allege that (1) he has suffered a person injury that is concrete and particularized, and not conjectural or hypothetical, but actual and imminent, (2) that this injury is traceable to the Defendants unlawful conduct; and (3) that the injury is likely to be redressed by the requested relief. *Keen v. United States*, 981 F.Supp 679, 684 (U.S.D.C. District of Columbia) 1997.

Plaintiff alleges only that is he an enrolled adult member of the Kiowa Tribe of Oklahoma and he is therefore eligible to vote. Plaintiff is not a tribal official (as he concedes in his complaint, and which fact deprives him of standing. This does not grant standing to challenge the actions of the BIA.

### **PROPOSITION IV**

#### **ALTERNATIVELY, PLAINTIFF HAS FAILED TO ESTABLISH HIS RIGHT TO EXTRA-ORDINARY RELIEF UNDER RULE 65**

A party seeking a relief under Rule 65 must satisfy the traditional four-factor test in order to be awarded temporary relief:

The requesting party must demonstrate (1) that it has a substantial likelihood of prevailing on the merits; (2) that it will suffer irreparable harm unless the preliminary injunction is issued; (3) that the threatened injury outweighs the harm the preliminary injunction might cause the opposing party; and (4) that the preliminary injunction if issued will not adversely affect the public interest.

*Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1246 (10th Cir. 2001).

Plaintiff fails to meet any of the required elements. Plaintiff, absent his conclusory statements fails to make meet his burden of establishing a substantial likelihoods of prevailing on the merits. In fact, the ‘merits’ of the election have yet to be established. The election has not been completed, the post-election challenge period has not even started. He is premature in any effort to thwart the election process. Simply having had administrative appeals denied does not meet his burden of establishing the likelihood of prevailing on the merits in future proceedings. Plaintiff does not establish this factor.

Second, plaintiff cannot establish irreparable harm. “The party seeking injunctive relief must show that the injury complained of is of such imminence that there is clear and present need for equitable relief.” *Schrier v. University of Colorado*, 427 F.3d 1253, 1267 (10th Cir. 2005) (quoting *Heideman v. South Salt Lake City*, 348 F.3d 1182, 1189 (10th Cir. 2003)). “An injury is irreparable only when money damages would provide an inadequate remedy.” *Robinson v. Carney*, No. 07-0236, 2007 WL 2156391 at 2 (W.D.

Okla. July 27, 2007); *see also Heideman v. South Salt Lake City*, 348 F.3d 1182, 1189 (10th Cir. 2003) (“It is also well settled that simple economic loss usually does not, in and of itself, constitute irreparable harm; such losses are compensable by monetary damages.”). There has been no showing of any harm much less any actual harm from having the ballots counted and allowing the post-election dispute period to run. Rather the harm is Plaintiff’s last minute challenge to the election in an obvious attempt to thwart the members of the Kiowa Tribe for exercising the rights provided under their constitution.

Third, “[t]o be entitled to a preliminary injunction, the movant has the burden of showing that ‘the threatened injury to the movant outweighs the injury to the other party under the preliminary injunction.’” *Heideman v. South Salt Lake City*, 348 F.3d 1182, 1190 (10th Cir. 2003) (quoting *Kikumura v. Hurley*, 242 F.3d 950, 955 (10th Cir. 2001)). As has been shown, there are more than 1,900 Tribal members who have registered to vote and who have probably already voted in this election for one or more of the 42 candidates for office. After many years, the Kiowa Tribe is on the verge of a functioning government under its laws. Plaintiff seeks to thwart that opportunity by conclusory allegations without support. The ability of the Kiowa Tribe to have a functioning government, to take its place with other sovereign governments and engage in receiving the benefits of government to government relations with the United States far outweighs any alleged and undescribed injury Plaintiff might suffer. Lastly, “[a] movant also has

the burden of demonstrating that the injunction, if issued, is not adverse to the public interest.” *Heideman v. South Salt Lake City*, 348 F.3d 1182, 1191 (10th Cir. 2003).

There is little more that need to said on this issue. The public interest of the is to have the Kiowa Tribe have a functioning government without further delay.

Plaintiff simply fails to meet his burden for preliminary injunction.

### CONCLUSION

Plaintiff’s conclusory statements are insufficient to meet his high burden under Rule 65 for the extraordinary relief of a Temporary Restraining Order or Preliminary Injunction. The potential harm to the Kiowa Tribe and its members far outweighs to the harm, if any to the Plaintiff. Plaintiff, challenge is premature for he does not yet even know if he disputes the election results, which if he does he still can challenge post-election. Plaintiff’s Motion for Temporary Restraining Order and Preliminary Injunction should be denied.

Respectfully submitted,

MARK YANCEY  
United States Attorney

*s/Kay Sewell*  
KAY SEWELL OBA #10778  
TOM MAJORS OBA #5637  
Assistant U.S. Attorneys  
United States Attorney’s Office  
Western District of Oklahoma  
210 Park Avenue, Suite 400  
Oklahoma City, Oklahoma 73102  
(405) 553-8700 (Office)



(405) 553-8885 (Fax)  
[Kay.Sewell@usdoj.gov](mailto:Kay.Sewell@usdoj.gov)  
[Tom.Majors@usdoj.gov](mailto:Tom.Majors@usdoj.gov)

OF COUNSEL:  
CHARLES R. BABST, JR.  
Attorney Advisor  
Office of the Solicitor  
U.S. Dept of Interior  
7906 East 33<sup>rd</sup> Street, Ste. 100  
Tulsa, OK 74145

**CERTIFICATE OF SERVICE**

I hereby certify that on September 15, 2016, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

Jason B. Aamodt, Counsel for Plaintiff

I hereby certify that on September 15, 2016, I served the attached document by regular mail on the following, who are not registered participants of the ECF System:

none

*s/Kay Sewell*  
Assistant U.S. Attorney