IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

JOHN DAUGOMAH, an adult Member of the Kiowa Indian Tribe, Plaintiff, v. LARRY ROBERTS, et al., Defendants.	)	Case No.: 16-cv-01045-F

PLAINTIFF'S REPLY REGARDING HIS MOTION FOR TEMPORARY RESTRAINING ORDER, PRELIMINARY INJUNCTION, AND PERMANENT INJUNCTION

COMES NOW John Daugomah, Plaintiff, and pursuant to LcV Rule 7.1 respectfully provides this reply in support of his **Motion For Temporary Restraining Order, Preliminary Injunction, and Permanent Injunction** ("Plaintiff's Motion") (Doc. No. 4). Based upon the Defendants' response, there is one legal issue for the Court: Whether 43 U.S.C. § 1457 provides the federal statutory authority for the Bureau of Indian Affairs to call an election pursuant to the Kiowa Tribe's Constitution. Essentially, in their Response the Defendants provide a new justification for their longstanding position that tribal law can confer authority on a federal agency.

The Federal Government's position is preposterous. This new "justification," which was never raised in the Administrative Proceedings below, is not supported by any legal authority. Accordingly, this reply is limited to addressing the Government's new, preposterous position.

In the 175 years of the Department of the Interior administering the Federal Government's affairs relating to Indian tribes, Counsel can find no reference in the law after a complete Shepard's search to anyone ever before arguing that Section 1457's "public business" clause provides the Federal Government with the authority to administer *tribal* affairs. While Section 1457 (and other statutes) clearly give the government "generally conferred authority," the authority to administer "public business," it is clear from the case law that that the Government still needs an "affirmative statutory grant of authority" to enact specific regulations that implement "specific laws," or the Secretary of the Interior "exceed[s its] authority." See *Texas v. United States*, 497 F.3d 491, 509-10 (5th Cir. 2007), citing *Organized Vill. of Kake v. Egan*, 369 U.S. 60, 63, 82 S. Ct. 562, 564, 7 L. Ed. 2d 573 (1962); *Morton v. Ruiz*, 415 U.S. 199, 232, 94 S. Ct. 1055, 1073, 39 L. Ed. 2d 270 (1974); *N. Arapahoe Tribe v. Hodel*, 808 F.2d 741, 748 (10th Cir. 1987); and *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 91 S. Ct. 814, 28 L. Ed. 2d 136 (1971)).

If the Government's argument on this point were correct – that section 1457 permits the Bureau of Indian Affairs to address the internal business of an Indian Tribe, then there would be no need for essentially any specific legislation by Congress relating to Indians. Instead, Congress specifically granted the Bureau of Indian Affairs the authority to call certain special elections in certain instances under the Indian Reorganization and Oklahoma Indian Welfare Acts. *See* 25 U.S.C. § 503 (OIWA) & 476 (IRA). And, the BIA passed regulations for conducting those elections. *See* 25 C.F.R. pt. 81. It just turns out there is no federal authority for calling business committee elections

for the Kiowa Tribe. And, the Government cites none. Moreover, the Government did not follow its own election regulations in this case, which is itself an abuse of discretion.

Beyond its pallid "plenary authority of Congress" argument (the Defendants are not Congress, and the Defendants do not have "plenary authority), the Government cites two cases in support of its argument: *Alto v. Black*, 738 F.3d 1111, 1115, 1123 (9th Cir. 2013) and *Hammond v. Jewell*, 139 F. Supp. 3d 1134, 1137 n.1 (E.D. Cal. 2015). Upon review, beyond some misconstrued language, neither case supports the Government's position. In *Hammond*, the case concerned an action where the tribe had itself acted, the Court noted that "As the BIA recognized in its February 11, 2014 decision, 'the determination of tribal leadership is quintessentially an intra-tribal matter raising issues of tribal sovereignty.' (Feb. 11, 2014 BIA Decision at 6 (quoting *Hamilton v. Acting Sacramento Area Dir.*, 29 I.B.I.A. 122, 123, 1996 WL 165057, at *2 (Mar. 12, 1996)))." *Hammond v. Jewell*, 139 F. Supp. 3d 1134, 1137 (E.D. Cal. 2015).

Hammond does note in footnote 1, "There is an exception where a tribe's own governing documents vest federal agencies with ultimate authority over certain decisions. *Alto v. Black*, 738 F.3d 1111, 1115, 1123 (9th Cir. 2013)." *Hammond*, 139 F. Supp. 3d at 1137 n.1. *Alto* was a membership enrollment dispute, where the Tribal Constitution specifically referred to two federal regulations, and provided that the BIA would resolve enrollment disputes pursuant to those regulations. Subsequently, and before the dispute in *Alto* arose, the regulations in question were dissolved.

After a series of administrative machinations, the Court found that BIA's (and the other relevant agencies) authorities lay not under the tribal constitution or defunct federal regulations, but under other specific federal laws:

> The legal obligations to which the Memorandum Order refers stem not from the coercive power of the court or from the BIA's authority over the Band, but rather from separate federal laws and regulations, **as well as** from tribal governing documents. See, e.g., 42 C.F.R. Part 136 (establishing general principles and program requirements for the Indian Health Service); Indian Civil Rights Act ("ICRA"), 25 U.S.C. §§ 1301-03; Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701-2721. Thus, although the Memorandum Order states that the Secretary is advising the Band "in compliance with the court's order," judicial authority is not the operative force behind any weight the Secretary's words may carry.

Alto v. Black, 738 F.3d 1111, 1121 (9th Cir. 2013) (emphasis added). While *Alto* provides that the BIA may pursuant to a tribal Constitution, it still needs specific federal authority to do so.

CONCLUSION

Halloween is coming, and the BIA would have it come to Kiowa early by engrafting itself Frankenstein style with the arms of authority found only in Tribal law by the application of a general authorizing statute and without the power of any specific authorizing law, in violation of well settled law, and based on a misreading and misapplication of two inapposite Ninth Circuit cases.

Respectfully submitted this
Thursday, September 15, 2016,

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CERTIFICATE OF SERVICE

I hereby certify that on this Thursday, September 15, 2016, I electronically transmitted the attached documents to the Clerk of the Court using the ECF System for filing. I hereby certify that a true and correct copy of the foregoing was mailed via First Class U.S. mail on September 8, 2016, to the following:

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