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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

NORTHERN ARAPAHO TRIBE, for itself and as *parens patriae*,

Plaintiff,

v.

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.

No. 1:16-cv-11-BMM

FEDERAL DEFENDANTS' BRIEF IN SUPPORT OF ITS MOTION TO DISMISS

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I. INTRODUCTION

This is an intertribal dispute between the plaintiff Northern Arapaho Tribe ("NAT") and the Eastern Shoshone Tribe ("EST") that should be resolved out of court to work out long-standing issues regarding the operation of federally-funded programs on the Wind River Reservation, which both tribes share. Instead, plaintiff filed in this Court a complaint and motion for preliminary injunction against federal defendants and Shoshone Business Council ("SBC") defendants. This case, however, is not appropriate for resolution in federal court.

This Court should dismiss this case for lack of subject matter jurisdiction because the NAT's claims are not cognizable under the Indian Self Determination Act or the Administrative Procedure Act. This Court should also dismiss the NAT's claims concerning the EST for failure to join a required party under Rule 19 because the EST is immune from suit in federal court. Finally, this Court should dismiss for failure to state a claim on which relief could be granted plaintiff's claims under the equal protection component of the Fifth Amendment's Due Process Clause; 25 U.S.C. § 476; the Indian Trust Doctrine; and for conversion.

II. BACKGROUND

A. Statutory Background

On the request of a tribe or tribal organization, the Indian Self Determination Act ("ISDA"), Pub. L. No. 93-638 ("638"), 88 Stat. 2203, *codified as amended at*

25 U.S.C. § 450 *et seq*., requires the Bureau of Indian Affairs ("BIA") to enter into a self-determination contract (sometimes referred to as a "638 contract") with the tribe to administer any program, function, service or activity that is currently provided by the BIA for the benefit of the tribe. 25 U.S.C. § 450f(a)(1); *see also id.* (proposal must be supported by a tribal resolution). The Act requires the BIA to transfer the funds that it "would have otherwise provided for the operation of the programs [if the agency had continued to provide the service itself]." *Id.* § 450j-1(a)(1).

If the BIA declines a proposal or declines to renew an existing contract, the agency must notify the tribe in writing. 25 U.S.C. §§ 450f(a)(2), (b). A tribe may begin an administrative appeal or, assuming the jurisdictional prerequisites are met, proceed in the court of claims or federal district court. 25 U.S.C. § 450m-1(a); 25 C.F.R. § 900.31.

After the BIA has awarded a contract, however, any claim relating to the contract is subject to § 450m-1(a) and (d) and the Contract Disputes Act ("CDA"), Pub. L. No. 95-563, *codified as amended at* 41 U.S.C. § 7101 *et seq*. *See* 25 U.S.C. § 450m-1(a), (d); 25 C.F.R. § 900.218. The CDA requires presentment to the agency's contracting officer (known at the BIA as an "awarding official") of any claim relating to the contract. 41 U.S.C. § 7103; 25 C.F.R. § 900.217; *id.* § 900.219. The awarding official must issue a written decision setting out the facts

and reasons for her decision. 25 C.F.R. §§ 900.221-22. A claimant may appeal the decision of the awarding official administratively or directly to the court of claims or district court. 25 U.S.C. § 450m-1; 25 C.F.R. § 900.222(e).[1]

B. Factual Background

The BIA–a component of the Department of the Interior–provides a broad range of services, both directly and through funding agreements with tribes and tribal organizations, to 2.3 million American Indian and Alaska Natives who are members of 567 federally-recognized tribes.

The EST and the NAT jointly share the Wind River Reservation in Fremont County, Wyoming. The BIA provides direct services to the NAT and the EST in several areas: (i) Law Enforcement; (ii) Executive Direction & Administration; (iii) Facilities Management; (iv) Agriculture; (v) Forestry; (vi) Trust Services; (vii) Probate; (viii) Irrigation; and (ix) Real Estate. *See* Decl. of Norma Gourneau ¶ 4 (filed herewith).[2]

[1] If necessary, the BIA may terminate a contract through reassumption. *See* 25 C.F.R. § 900.246 *et seq*. A reassumption is a rescission, in whole or in part, of a contract and assumption or resumption of control or operation of the contracted program by the BIA without the consent of the Tribe. *See id.* § 900.246. A reassumption triggers notice and a right to an administrative hearing. *See id.* § 900.250(c).

[2] Federal defendants submit this declaration for background purposes and in support of their opposition to the NAT's preliminary injunction, and do not rely on the facts contained therein for their motion to dismiss.

Both Tribes are represented by business councils: the SBC and Northern Arapaho Business Council ("NABC"). For more than 30 years, the SBC and the NABC have worked together to manage certain jointly held assets and certain jointly operated programs via a Shoshone and Arapaho ("S&A") Joint Business Council ("JBC"). Over the years, the BIA has entered into numerous 638 contracts with the JBC for the JBC to take over operation of a number of shared programs including, among others, the S&A Tribal Court and the S&A Fish and Game program. Gourneau Decl. ¶ 6.

On September 9, 2014, the NABC informed the BIA that it had withdrawn from the JBC. *See* Ltr. fr. Darrel O'Neal to Norma Gourneau (Sept. 10, 2014), Ex. 1 to Gourneau Decl. In the letter, the NABC indicated that it expected "joint tribal programs [to] remain unaffected." *Id.*; Ltr. fr. Dean Goggles to Norma Gourneau (Aug. 28, 2015) (stating that other joint programs "may proceed under on-going authority from both Tribes" as provided in the 1987 S&A Law & Order Code), Ex. 3 to Gourneau Decl. On September 11, 2014, the BIA wrote back to the NABC asking for clarification of how the NABC intended joint programs to operate. Ltr. fr. Norma Gourneau to Darrell O'Neal (Sept. 11, 2014), Ex. 2 to Gourneau Decl. The NABC has not provided clarification. Gourneau Decl. ¶ 9; Ltr fr. Norma Gourneau to Dean Goggle (Dec. 22, 2015), Ex. 4 to Gourneau Decl.

In the absence of any indication from the tribes about how they intended to proceed to manage the shared programs after the NABC's withdrawal from the JBC, the BIA faced a decision: it could terminate the 638 contracts and reassume federal operation of the shared programs, or it could extend the contracts to operate the shared programs on a short-term basis while the Tribes attempted to find a new way to jointly manage the contracts. The BIA chose the latter. It invited both Tribes to submit proposals for new contracts to jointly operate the shared programs. Gourneau Decl. ¶ 9. In the meantime, the BIA extended, on a temporary basis, the judicial services, fish and game, and water engineers contracts with the SBC on behalf of the JBC: (i) from September 30, 2014, until March 31, 2015; (ii) from March 31, 2015, until July 10, 2015; (iii) from July 10, 2015, until September 30, 2015; and (iv) from September 30, 2015, until September 30, 2016. *Id.*

C. Plaintiff's Complaint

The NAT brings claims against identified and unidentified federal defendants in their official and individual capacities, as well as against tribal defendants Darwin St. Clair and Clinton Wagon, chair and co-chair of the SBC. *See* Compl. ¶¶ 5-6, ECF No. 1, Feb. 22, 2016. The vast majority of the allegations in the complaint are targeted at the tribal defendants. *See* Compl. *passim*. The NAT alleges that federal defendants "authorize, condone, and actively assist" the

tribal defendants' conduct. *Id.* ¶ 28; *see also id.* ¶¶ 44, 48, 75-76, 81-82. The NAT also alleges that federal defendants are "imposing a form of government" on the Tribe and "dictating to the NAT how it must exercise its sovereign and ownership authority with the EST" by forcing it to work with the EST. *Id.* ¶¶ 45-46. The NAT further alleges that federal defendants assured the Tribe that they would not award 638 contracts to operate shared programs without the consent of both tribes, but then awarded those contracts to the SBC. *Id.* ¶¶ 59, 74. The NAT additionally alleges that federal defendants have told oil and gas companies that they may renew leases through the JBC. *Id.* ¶ 67.

The complaint seeks declaratory relief and a permanent injunction prohibiting federal defendants from: (i) breaching their duty of trust to the NAT; (ii) converting funds and property of the NAT; (iii) denying the NAT equal protection; and (iv) diminishing their privileges and immunities. *Id.* ¶¶ 86-92; *id.*, Prayer for Relief, ¶¶ A-C. Accompanying this relief, the NAT seeks: (i) a constructive trust for its funds and property in defendants' control; (ii) rescission of the 638 contracts; and (iii) an accounting of all funds and property of the NAT. *Id.*, Prayer for Relief, ¶¶ D-F.

III. STANDARD OF REVIEW

Facial motions to dismiss brought under Federal Rule of Civil Procedure 12(b)(1), for lack of subject matter jurisdiction; Rule 12(b)(6), for failure to state a

claim; and Rule 12(b)(7), for failure to join an indispensable party, share the same basic principle that the court treats non-conclusory allegations as true and resolves disputed facts in favor of the plaintiff. *E.g.*, *Stutson v. Bureau of Prisons*, No. 11-cv-3979, 2012 WL 1438982, at *2 (N.D. Cal. Apr. 25, 2012) (Rule 12(b)(1)); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (Rule 12(b)(6)); *Paiute-Shoshone Indians of Bishop Cmty. of Bishop Colony v. City of Los Angeles*, 637 F.3d 993, 996 n.1 (9th Cir. 2011) (Rule 12(b)(7)).

IV. ARGUMENT

This Court lacks subject matter jurisdiction over the NAT's claims. Federal district courts are courts of limited jurisdiction; "[t]hey possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). As a result, "[i]t is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction." *Id.* Concurrently, the principle of sovereign immunity limits the subject matter jurisdiction of federal courts. *Vacek v. U.S. Postal Serv.*, 447 F.3d 1248, 1250 (9th Cir. 2006). The United States, as sovereign, can only be sued to the extent it has waived its sovereign immunity. *Id.* Similarly, "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo v. Martinez*, 436

U.S. 49, 58 (1978). Waivers must be construed strictly in favor of the sovereign, and not enlarged beyond what the statutory language requires. *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685-86 (1983); *Santa Clara Pueblo*, 436 U.S. at 58.

A. This Court Lacks Subject Matter Jurisdiction Over Plaintiff's Claims Against Federal Defendants

This Court should dismiss the NAT's claims brought against federal defendants because the Tribe fails to identify a jurisdictional basis for those claims beyond simply citing to several federal question statutes. Compl. ¶ 3; *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1199 (9th Cir. 2004) (plaintiff must "satisfy the non-constitutional standing requirements of the statute under which he or she seeks to bring suit."). Although the complaint's recitation of claims is woefully inadequate in identifying the specific facts that support each claim, *see* Fed. R. Civ. P. 8(a), the complaint appears to cite two statutes–the ISDA and 25 U.S.C. § 476(f)–as the statutory basis for its allegations. However, those statutes do not provide a jurisdictional basis for suit, and the Administrative Procedure Act's ("APA") cause of action does not remedy that deficiency here.

1. The NAT Cannot Proceed Under the ISDA

The NAT cannot pursue its claims under the ISDA. The ISDA provides federal courts with original jurisdiction to consider a tribe or tribal organization's challenge to the agency's declination of a proposal for a 638 contract. *See* 25 U.S.C. § 450m-1(a). But the NAT is not challenging the BIA's declinations of any

638 contract proposals awarded to the NAT; instead, it seeks rescissions of the 638 contracts the BIA entered into with the SBC on behalf of the JBC. *See* Compl., Prayer for Relief ¶ E. Once a contract has been awarded, the ISDA provides that any claim relating to the contract is subject to the Contract Disputes Act. *See* 25 U.S.C. § 450m-1(a), (d); 25 C.F.R. § 900.218. But the CDA only allows claims brought by "a party to a Federal Government contract," 41 U.S.C. § 7101(7), not claims brought by third-parties. *NavCom Def. Elec., Inc. v. Ball Corp.*, 92 F.3d 877, 879 (9th Cir. 1996).

Even if ISDA provided the NAT with a cause of action, the NAT could not proceed without first presenting its claim to the agency's contracting officer and awaiting a final decision. The ISDA's presentment and exhaustion requirement is mandatory. 41 U.S.C. §§ 7103, 7104, 7108; 25 C.F.R. § 900.219; *see also Seneca Nation of Indians v. U.S. Dep't of Health & Human Servs.*, No. 14-cv-1493, 2015 WL 7180514, at *1 (D.D.C. Nov. 13, 2015) ("Complaints . . . advancing '[a]ny . . . claim relating to' a contract, must first be submitted to the contracting officer for decision in accordance with the [CDA]."") (quoting 25 C.F.R. § 900.218(a)); *Cloverdale Rancheria of Pomo Indians of Cal. v. Jewell*, 593 F. App'x 606, 610 (9th Cir. 2014) (exhaustion requirement applies to ISDA challenges); *Pueblo of Zuni v. United States*, 467 F. Supp. 2d 1099, 1106 (D.N.M. 2006). Thus, even if

the ISDA provided the NAT with a cause of action, it could not proceed until it has presented and exhausted its claims.[3]

2. This Court Cannot Consider Plaintiff's Remaining Claims under the APA

Nor can the NAT's remaining claims be considered under the APA. The APA allows a plaintiff to seek judicial review of federal agency actions and to obtain non-monetary relief for legal wrongs resulting from a final action undertaken by an agency or by an agency officer or employee, where, as here, no other statute provides a cause of action. 5 U.S.C. §§ 702, 704, 706. The APA, however, does not make every agency action subject to judicial review. *Heckler v. Chaney*, 470 U.S. 821, 828 (1985).

Section 702 of the APA provides a limited waiver of sovereign immunity in actions against the government challenging agency action and seeking relief other than money damages. 5 U.S.C. § 702. Section 704, however, limits judicial review to "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. § 704. *Gallo Cattle Co. v. U.S. Dep't of Agric.*, 159 F.3d 1194, 1198 (9th

[3] Nor does the NAT avoid the CDA's presentment and exhaustion requirements by alleging statutory or constitutional violations. The CDA's scope "encompasses any disputes that 'relate[] to a contract.'" *Lockheed Martin Corp. v. Def. Contract Audit Agency*, 397 F. Supp. 2d 659, 665 (D. Md. 2005) (quoting 41 U.S.C. § 7103(a)). These include everything from "questions of contract administration," *Kellogg Brown & Root Servs., Inc. v. United States*, 117 Fed. Cl. 764, 770 (2014), to "constitutional claims [that] are contractually-based." *Tucson Airport Auth. v. Gen. Dynamics Corp.*, 136 F.3d 641, 648 (9th Cir. 1998).

Cir. 1998); *see also Oregon Nat. Desert Ass'n v. U.S. Forest Serv.*, 465 F.3d 977, 982 (9th Cir. 2006). This limitation precludes relief under the APA here.

a. Plaintiff Cannot Pursue its Claims Under the APA Until it Exhausts its Administrative Remedies

As an initial matter, the NAT cannot pursue its claims against the BIA under the APA absent exhaustion of its administrative remedies. *White Mountain Apache Tribe v. Hodel*, 840 F.2d 675, 677-78 (9th Cir. 1988) (plaintiff must exhaust BIA remedies before seeking APA relief); *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 192-93 (1985) ("whether administrative remedies must be exhausted is conceptually distinct . . . from the question whether an administrative action must be final before it is judicially reviewable."). BIA regulations provide a detailed set of procedures to appeal Department of the Interior actions. *See* 25 C.F.R. §§ 2.1–2.21. Those procedures are, for purposes of the APA, mandatory, and "[n]o decision, which at the time of its rendition is subject to appeal to a superior authority in the Department, shall be considered final so as to constitute Departmental action subject to judicial review under 5 U.S.C. 704." 25 C.F.R. § 2.6(a). The NAT makes no allegation that it exhausted its administrative remedies before the BIA. Its failure to do so deprives this Court of the ability to hear the Tribe's claims under the APA.[4]

[4] The Ninth Circuit has not explicitly determined whether these provisions constitute a jurisdictional bar. *See, e.g., McBridge Cotton & Cattle Corp. v.*

b. The NAT's Remaining Claims Do Not Constitute Agency Action Reviewable Under the APA

The NAT cannot maintain the remainder of its claims under the APA because it has failed to allege any final agency action as the basis for these claims. *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997); *Ore. Nat. Desert Ass'n*, 465 F.3d at 984 (action is final only when the agency "has rendered its last word on the matter"); *Gen. Atomics v. U.S. Nuclear Reg. Comm'n*, 75 F.3d 536, 540 (9th Cir. 1996) (agency's notice of plans to make a decision in the future is generally not final); *Hecla Min. Co. v. EPA*, 12 F.3d 164, 164 (9th Cir. 1993) (preliminary actions are "not final"). Nor can the Tribe show that any of the alleged actions "impose an obligation, deny a right, or fix some legal relationship." *Fairbanks N. Star Borough v. U.S. Army Corps of Eng'rs*, 543 F.3d 586, 591 (9th Cir. 2008) (quoting *Ukiah Valley Med. Ctr. v. FTC*, 911 F.2d 261, 264 (9th Cir. 1990)). Practical consequences–even "profound economic consequences" in the real world–are not enough. *Id.*; *Columbia Riverkeeper v. U.S. Coast Guard*, 761 F.3d 1085, 1095 (9th Cir. 2014) (agency action must have "direct and appreciable *legal* consequences" . . . "which effectively gives it the force of law") (emphasis added). In any event,

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Veneman, 290 F.3d 973, 978-79 (9th Cir. 2002). Even if exhaustion is not a jurisdictional bar, however, courts still "should require compliance" unless the suit's colorable claim is "collateral to a substantive claim of entitlement" and "one whose resolution would not serve the purposes of resolution." *Id.* at 980. Here, the NAT's challenge is fundamental, not collateral, to its claim against the BIA. Nor could the NAT credibly show that exhaustion would be futile.

even where the finality requirement of 5 U.S.C. § 704 may not apply, "a court may as a prudential matter refrain from reviewing nonfinal agency action." *Ukiah Valley Med. Ctr.*, 911 F.2d at 266.

Although the NAT complains of a number of purported BIA actions, none of them constitutes final agency action that provides a basis for this Court's review under the APA. First, the NAT highlights a number of so-called "assurances" that the federal defendants allegedly made, *see* Compl. ¶¶ 59-61, but assurances are neither the consummation of an agency's decisional processes nor do they have the force of law. *Fairbanks N. Star Borough*, 543 F.3d at 591. Second, the NAT claims that "certain BIA officials have told oil and gas companies that leases may be renewed only through the former JBC." *Id*. ¶ 67. Again, there are no allegations in the complaint that these conversations had the force of law, or that they constituted the "completion of the decisionmaking process"–especially given that there are no allegations that any leases have actually been renewed. *Franklin v. Massachusetts*, 505 U.S. 788, 797 (1992). Third, the NAT alleges that the BIA has "endorsed" the SBC's alleged upcoming changes to the Tribal Court. Compl. ¶¶ 75-76. There are no allegations, however, that these "endorsements" were legally binding, and in any event, an agency's non-binding announcement of future plans is generally not considered final. *See Gen. Atomics*, 75 F.3d at 540. Finally, the NAT complains that the federal defendants "have authorized" the "SBC

Defendants [to] remove[] guns and ammunitions, and other equipment, from the Game Department office." Compl. ¶ 81. But there is no evidence that this purported authorization was legally required for the SBC to remove the equipment, and if an agency action lacks legal consequence, it also lacks finality. *Columbia Riverkeeper*, 761 F.3d at 1095. In short, the only truly final agency actions at issue in this case are the self-determination contracts issued on a temporary basis to the SBC on behalf of the JBC during the intertribal dispute; the other actions are either interlocutory or not legally determinative. *See Ukiah Valley Med. Ctr.*, 911 F.2d at 264 n.1 ("finality is . . . a jurisdictional requirement").[5] The APA thus does not provide this Court with subject matter jurisdiction over plaintiff's claims.

B. This Court Cannot Consider the NAT's Claims Concerning the EST, Because the EST is Not a Party to this Case

This Court lacks subject matter jurisdiction over the NAT's claims concerning the EST, which is a not a party to this case but is a party to the 638 contracts the NAT seeks to rescind and is otherwise the subject of the NAT's complaint. The EST, however, is immune from suit in federal court. *Northern Arapaho Tribe v. Harnsberger*, 697 F.3d 1272, 1281-82 (10th Cir. 2012) (holding that the EST is an indispensable party to suit brought by the NAT). Among other

[5] Nor, for that matter, do the NAT's allegations about the BIA's assurances, endorsements, *etc*. constitute "agency action" even if final. *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 62 (2004) ("[A]gency action" is defined in § 551(13) to include "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.").

reasons, "a party to a contract is [required], and if not susceptible to joinder, indispensable to litigation seeking to decimate that contract." *Dawavendewa v. Salt River Project Agr. Imp. & Power Dist.*, 276 F.3d 1150, 1157 (9th Cir. 2002).

Rule 19 sets out a three-step process for determining whether a party is indispensable to a lawsuit. First, a court determines whether a party is "required" (or "necessary"), which occurs:

> if either: (1) the court cannot afford 'complete relief among existing parties' in the [party's] absence, or (2) proceeding with the suit in its absence will 'impair or impede' the [party's] ability to protect a claimed legal interest relating to the subject of the action, or 'leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.'

Alto v. Black, 738 F.3d 1111, 1126 (9th Cir. 2013) (quoting Fed. R. Civ. P. 19(1)(A)-(B)). Second, a court determines "whether joinder is feasible, or is barred by sovereign immunity." *Id.* Finally, a court must decide "whether the case can proceed without the absentee, or whether the absentee is an 'indispensable party' such that the action must be dismissed." *E.E.O.C. v. Peabody W. Coal Co.*, 400 F.3d 774, 779 (9th Cir. 2005); *see also* Fed. R. Civ. P. 19(b).

1. The EST is a Required Party

The EST, as a signatory to several 638 contracts with the BIA, has legally-protected interests in the continuation of those contracts. Should the NAT be successful in seeking rescission of those contracts, *see* Compl., Prayer for Relief ¶ E, the EST's interests would be "impair[ed] or "impede[d]." Fed. R. Civ. P.

19(a)(B)(i). It is a "fundamental principle that a party to a contract is [required], and if not susceptible to joinder, indispensable to litigation seeking to decimate that contract." *Dawavendewa*, 276 F.3d at 1157; *see also Ward v. Apple Inc.*, 791 F.3d 1041, 1053 (9th Cir. 2015) ("[A]ll parties to a contract are [required] in an action to set aside the contract."); *Wilbur v. Locke*, 423 F.3d 1101, 1113 (9th Cir. 2005) (collecting cases in tribal context), *abrogated on other grounds by Levin v. Commerce Energy*, 560 U.S. 413 (2010). The NAT seeks additional relief directly against the EST. *See* Compl., Prayer for Relief ¶¶ A-F. Accordingly, the EST is a required party.

2. Joinder is Not Feasible Because the EST Is Immune as a Sovereign

The EST cannot be joined as a party because it is protected by tribal sovereign immunity. "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo*, 436 U.S. at 58. Tribal sovereign immunity also "extends to tribal officials when acting in their official capacity and within the scope of their authority." *Cook v. AVI Casino Enters.*, 548 F.3d 718, 727 (9th Cir. 2008). The NAT has identified no such waiver here.

Nor can the NAT pursue its claims against EST officials instead of the EST under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908),[6] as it does not apply here. *Dawavendewa*, 276 F.3d at 1160 (citing *Burlington N.R.R. v. Blackfeet Tribe*, 924 F.2d 899 (9th Cir. 1991)); *see also Harnsberger*, 687 F.3d at 1281-82 (*Ex parte Young* exception did not apply to the NAT's suit involving the EST).

First, the NAT has not identified an applicable federal statute or federal common law that the tribal defendants are alleged to have violated. The NAT repeatedly invokes the ISDA, but that statute governs obligations the United States owes to Indian tribes, not obligations that Indian tribes owe to each other.[7] *E.g.*, 25 U.S.C. § 450f. Nor does 25 U.S.C. § 476(f) apply to the EST; it applies only to "Departments or agencies of the United States." 25 U.S.C. § 476(f). And the Fourteenth Amendment does not apply to Indian tribes. *United States v. Bryant*,

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[6] *Ex parte Young* provides an exception to sovereign immunity, allowing for a suit against a state official if the suit "seeks only prospective injunctive relief in order to end a continuing violation of federal law." *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 73 (1996).

[7] In its opposition to tribal defendants' motion to dismiss, ECF No. 51, the NAT argues that "tribal officials are acting under color of federal law" when carrying out ISDA contracts. *Id.* at 7. Not so. In support of that claim, the NAT cites a portion of ISDA stating that "any civil action or proceeding involving such claims [resulting from the performance of an ISDA contract] brought hereafter against any tribe . . . shall be . . . an action against the United States . . . and be afforded the . . . coverage of the Federal Tort Claims Act." 25 U.S.C. § 450f notes. This provision waives the sovereign immunity of *the United States*, not a tribe. *See Snyder v. Navajo Nation*, 382 F.3d 892, 897 (9th Cir. 2004) ("Congress therefore provided that the United States would subject itself to suit under the Federal Tort Claims Act for torts of tribal employees hired and acting pursuant to such self-determination contracts under the [ISDA].").

769 F.3d 671, 675 (9th Cir. 2014), *cert. granted*, 136 S. Ct. 690 (2015). Finally, the NAT fails to identify a federal law that would apply to its claims that EST has converted its property and funds.

Second, even if this Court determines that NAT properly alleges that the tribal defendants have violated federal law, *Ex parte Young* still would not apply because the requested relief would run against the tribe-qua-sovereign. "A suit is against the sovereign if 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 government from acting, or to compel it to act." *Dawavendewa*, 276 F.3d at 1160 (quoting *Shermoen v. United States*, 982 F.2d 1312, 1320 (9th Cir. 1992)); *see also Shermoen*, 982 F.2d at 1320 (concluding that an officer's suit could not be maintained when, "[a]lthough the amended complaint names individual tribal council members as defendants, it is clear from 'the essential nature and effect' of the relief sought that the tribe 'is the real, substantial party in interest.') (quoting *Ford Motor Co. v. Dep't of Treasury of Ind.*, 323 U.S. 459, 464 (1945)). Moreover, "*Ex parte Young* cannot be used to obtain an injunction requiring the payment of funds from a [sovereign's] treasury, or an order for specific performance of a [sovereign's] contract." *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 256-57 (2011). In this case, the NAT seeks the rescission or reformation of contracts entered into by the SBC, which is the

governing body of the EST, *see* Compl., Prayer for Relief ¶¶ A, E, and the transfer of property from the EST, *see id.* ¶ D. The Tribe also seeks declaratory relief clarifying the sovereign status of the EST. *Id.* ¶ A(i). Such relief necessarily runs against the EST as the sovereign, and *Ex parte Young* could not apply.

3. The EST is an Indispensable Party

If a required party cannot be joined, this Court must determine whether that party is so indispensable that the entire action must be dismissed. Four factors determine whether a party is indispensable:

> (1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties; (2) the extent to which any prejudice could be lessened or avoided . . . ; (3) whether a judgment rendered in the person's absence would be adequate; and (4) whether the plaintiff would have an adequate remedy if the action was dismissed for nonjoinder.

Fed. R. Civ. P. 19(b). "Although Rule 19(b) contemplates balancing the factors, 'when the [required] party is immune from suit, there may be very little need for balancing Rule 19(b) factors because immunity itself may be viewed as the compelling factor.'" *White v. Univ. of Cal.*, 765 F.3d 1010, 1028 (9th Cir. 2014) (quoting *Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456, 1460 (9th Cir. 1994). *But see Dawavendewa*, 276 F.3d at 1162 (applying four-part balancing test to determine that tribe is indispensable).

Even if this Court were to apply the four-factor test here, however, it would demonstrate that the EST is an indispensable party. First, with respect to prejudice,

"[t]he prejudice to the [tribe] stems from the same impairment of legal interests that make the [tribe] a [required] party under Rule 19(a)(2)(i)." *Dawavendewa*, 276 F.3d at 1162. Second, the prejudice to the EST's contractual and other rights cannot be lessened, as the adverse judgment the NAT seeks will necessarily impair EST's contract and other interests. Nor can the United States represent the EST's interests, *see White*, 765 F.3d at 1028, as "[i]n disputes involving intertribal conflicts, the United States cannot properly represent any of the tribes without compromising its trust obligations owed to all tribes," *Quileute*, 18 F.3d at 1460. Third, a judgment rendered in the EST's absence would not be adequate, since any relief "necessarily results in the above-described prejudice." *Dawavendewa*, 276 F.3d at 1162. Finally, with respect to whether the NAT would have "a viable alternative forum in which to seek respect," *id.*, the NAT has administrative remedies that are available to it, as shown in prior proceedings before the agency. *See S&A Tribal Ct. v. Wind River Agency, BIA*, Nos. 16-34, 16-40 (IBIA). Moreover, even if no alternative remedy could lie, there is a "wall of circuit authority" holding that the EST would still be indispensable. *White*, 765 F.3d at 1028. Absent the ability to proceed against the EST, the NAT's claims concerning the EST must be dismissed.

C. This Court Should Dismiss Plaintiff's Complaint for Failure to State a Claim

1. Plaintiff Fails to State a Claim for Relief under the Equal Protection Clause

This Court should dismiss the NAT's equal protection claim. Equal protection "embodies a general rule that [the government] must treat like cases alike but may treat unlike cases accordingly." *Vacco v. Quill*, 521 U.S. 793, 799 (1997). But in requiring that like cases must be treated alike, the Constitution permits "'rough accommodations,'" even those that are "'illogical.'" *Weinberger v. Salfi*, 422 U.S. 749, 769 (1975) (quoting *Metropolis Theater Co. v. City of Chicago*, 228 U.S. 61, 69-70 (1913)). Even if there is differential treatment, however, equal protection claims are, absent a suspect classification, subject only to a rational basis review, which is highly differential to the government. *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1279-80 (9th Cir. 2004); *United States v. Hancock*, 231 F.3d 557, 566 (9th Cir. 2000). Equal protection analysis "is not a license for courts to judge the wisdom, fairness, or logic'" of government decisionmaking. *Heller v. Doe*, 509 U.S. 312, 319 (1993); *Kahawaiolaa*, 386 F.3d at 1279, 1283.[8]

[8] Government action "passes muster under the Equal Protection Clause so long as there is any reasonable conceivable state of facts that could provide a rational basis for the classification." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313, 315 (1993). A court cannot "require that the government's action actually advance its stated purposes, but merely look to see whether the government could have had a legitimate reason for acting as it did." *Wright v. Incline Vill. Gen.*

In this case, the NAT alleges that the BIA's "attempt[] to install the SBC as a governing body over the NAT," violates its equal protection rights. Compl. ¶ 91. The NAT appears to base this allegation, at least in part, on the agency's decision, during this intertribal dispute, to continue to award 638 contracts to the SBC on behalf of the JBC. *Id.* ¶ 70. As a preliminary matter, the NAT does not appear to have stated a claim for an equal protection violation, as it fails to allege that it is similarly-situated to the JBC (now managed by the SBC), the entity with which the BIA had previously determined was eligible, as a tribal organization, to enter into 638 contracts to manage the shared programs. *Freeman v. City of Santa Ana*, 68 F.3d 1180, 1187 (9th Cir. 1995) (plaintiff must identify a similarly-situated class against which the plaintiff' can be compared); *Atty. Gen. v. Irish People, Inc.*, 684 F.2d 928, 946 (D.C. Cir. 1982) ("Discrimination cannot exist in a vacuum; it can be found only in the unequal treatment of people in similar circumstances."). Even if the JBC's status as a tribal organization previously authorized by both tribes to enter into contracts to manage these shared programs was not dispositive, there would still be a rational basis for the BIA's actions. Courts have held that during

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Improvement Dist., 665 F.3d 1128, 1141 (9th Cir. 2011). Additionally, "[t]he burden is on the one attacking the . . . arrangement to negative every conceivable basis which might support it." *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973). Finally, even if the government's "assumptions underlying [its] rationales may be erroneous, . . . the very fact that they are 'arguable' is sufficient . . . to 'immunize' the [government's] choice from constitutional challenge." *Vance v. Bradley*, 440 U.S. 93, 112 (1979).

intra-tribal disputes, it is rational for the BIA to continue a government-to-government relationship with the last undisputed governing body, to preserve the continuity of important tribal services. *See Goodface v. Grassrope*, 708 F.2d 335, 338-39 (8th Cir. 1983); *see also Alturas Indian Rancheria v. Salazar*, No. 10-cv-1997, 2010 WL 4069455, at *6 (E.D. Cal. Oct. 18, 2010). Given this policy, it would be rational for the BIA to apply this framework to this inter-tribal dispute.[9]

2. Plaintiff Fails to State a Claim for Relief under 25 U.S.C. § 476

This Court should dismiss the NAT's claim brought under 25 U.S.C. § 476(f). Section 476(f) is a limited provision that prevents the federal government from creating favored or disfavored categories of federally recognized tribes. It does not provide a cause of action, nor can one be implied, *Alexander v. Sandoval*, 532 U.S. 275 (2001), so this must be reviewed under the APA. The BIA has not created any such categories here, and so NAT necessarily fails to state a claim.

Section 476(f) provides:

[9] The NAT also claims an equal protection violation under the "one-person, one-vote" rule. Compl. ¶ 91. This principle requires that legislative districts within a sovereignty be of approximately equal population. *E.g., Evenwel v. Abbott*, 136 S. Ct. 1120, 1123-24 (2016). Here, however, 638 contracts were awarded to the SBC–a situation far removed from the malapportioned districts generally at issue in one-person, one-vote cases. In any event, courts have sustained one-person-one-vote challenges to temporary government measures not unlike what the BIA did here. *See Weinrib v. Montgomery Cty. Bd. of Educ.*, 743 F. Supp. 808, 812-13 (M.D. Ala. 1990) (holding that, while temporary method chosen by the school board "may not be perfect," it does not violate equal protection); *see also Republican Party of Ore. v. Keisling*, 959 F.2d 144, 145-46 (9th Cir. 1992).

> Departments or agencies of the United States shall not promulgate any regulation or make any decision or determination . . . with respect to a federally recognized Indian tribe that classifies, enhances, or 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). This provision "prohibit[s] making distinctions among those Indian tribes that have attained federal recognition." *United Houma Nation v. Babbit*, No. 96-cv-2095, 1997 WL 403425, at *7 n. 11 (D.D.C. July 8, 1997). In other words, the federal government cannot create favored or disfavored *categories* of federally recognized tribes. Agencies cannot, for example, "exclu[de] Alaska Native–and only Alaska Natives from [land disposition processes]" without violating the statute. *Akiachak Native Cmty. v. Salazar* ("*Akiachak I*"), 935 F. Supp. 2d 195, 197 (D.D.C. 2013); *Akiachak Native Cmty. v. Jewell* ("*Akiachak II*"), 995 F. Supp. 2d 1, 5 (D.D.C. 2013). Nor can they distinguish between tribes based on when they were first federally recognized. *Akiachak II*, 995 F. Supp. 2d at 5; *see also* 140 Cong. Rec. 11,234 (daily ed. May 19, 1994) (Statement of Sen. McCain) ("The purpose of [section 476(f)] is to clarify that [the statute] was not intended to authorize the Secretary of the Department of the Interior to create *categories* of federally recognized tribes.") (emphasis added).

Section 476(f) is of no help to the NAT, because the BIA has made no categorical distinctions with regard to the Tribe. The NAT does not allege, nor could it, that the BIA is treating it differently based on when it was first federally

recognized, *Akiachak II*, 995 F. Supp. 2d at 5, its geographical location, *Akiachak I*, 935 F. Supp. 2d, at 197, or indeed, on any other categorical basis. Nor could it claim that the BIA categorically excluded them from contracting under the ISDA.

Indeed, the only case to have considered section 476(f) in any detail, *Akiachak I*, demonstrates that the statute is inapposite. There, the Secretary of the Interior promulgated a "regulation govern[ing] the taking of land into trust under Section 5 of the Indian Reorganization Act." *Akiachak I*, 935 F. Supp. 2d at 197. The regulation, however, excluded "Alaska Natives–and only Alaska Natives–from the land-into-trust application process." *Id.* The court held that this regulation violated § 476(g)[10] because it was a "regulation[] that discrim[inated] among Indian tribes." *Id.*; *see also id.* at 210 ("[T]he Alaska exception is a regulation that diminishes the privileges of . . . Alaska Natives relative to all other Indian tribes, by providing that the Secretary will not consider their petitions to have land taken into trust."). These types of facially categorical determinations, the court concluded, were improper. In this case by contrast, the NAT's challenge to the award of 638 contracts during an intertribal dispute is far removed from the scope of § 476(f).

[10] Section 476(g) is identical to section 476(f) but applies to actions occurring before May 31, 1994.

3. Plaintiff Fails to State a Claim for Breach of Trust

The NAT brings a general claim that the federal defendants have breached their duty of trust to the NAT. Compl. ¶ 88. However, the BIA lacks a freestanding fiduciary obligation to Tribes that is separate and apart from any responsibilities put in place by the ISDA or other statutes or regulations. *See, e.g.*, *Gros Ventre Tribe v. United States*, 469 F.3d 801, 810-11 (9th Cir. 2006); *Hopland Band of Pomo Indians v. Jewell*, 624 F. App'x 562 (9th Cir. 2015). The NAT's trust claim, unbridled to any specific statutory provision that establishes such a duty, fails.

4. Plaintiff Fails to State a Claim for Conversion

The NAT brings a claim for conversion against all defendants. Conversion is a state tort, *see Love v. United States*, 915 F.2d 1242, 1245-46 (9th Cir. 1989) (discussing Montana tort of conversion), not a violation of federal law that allows for review under the APA. *See* 5 U.S.C. § 706(2). Moreover, ifthe NAT intended to bring a conversion claim under the Federal Tort Claims Act, it would have had to administratively exhaust its claims before it could proceed here, *McNeil v. United States*, 508 U.S. 106, 111-12 (1993), which it has not done.

D. This Court Should Dismiss Claims Against Federal Defendants in Their Individual Capacities and Against Unknown Federal Defendants

This Court should dismiss the NAT's claims brought against federal defendants in their personal capacities, *see* Compl. ¶ 5, because the NAT seeks no

individual relief against these defendants. "Personal-capacity suits seek to impose personal liability upon a government official for actions he takes under color of . . . law. Official-capacity suits, in contrast, generally represent only another way of pleading an action against an entity of which an officer is an agent." *Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985). Here, the NAT does not seek to impose personal liability on any of the federal defendants in their individual capacities; rather, they seek injunctive and declaratory relief against the BIA. Such relief can and should be sought against the federal defendants in their official capacities only, and so the individual claims should be dismissed.[11]

V. CONCLUSION

For the foregoing reasons, this Court should dismiss plaintiff's complaint.

[11] The caption of the NAT's complaint names "other unknown individuals" in the federal government, but does not address those individuals in the complaint's body. *See* Compl. This Court should strike the reference to unknown individuals. Fed. R. Civ. P. 10(a) (requiring caption to "name all the parties").

Dated: April 28, 2016

Respectfully Submitted,

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L.R. 7.1(d)(2)(E) CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the word-count requirements of L.R. 7.1(d)(2)(A), as modified by this Court's April 28, 2016, Order, ECF No. 64, and is 6,999 words as measured by Word's word-count function.

s/ James D. Todd, Jr.
JAMES D. TODD, JR.

CERTIFICATE OF SERVICE

I certify that on April 28, 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/ James D. Todd, Jr.
JAMES D. TODD, JR.