BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General
Civil Division

MICHAEL W. COTTER
United States Attorney
VICTORIA L. FRANCIS
Assistant U.S. Attorney
UNITED STATES ATTORNEY'S OFFICE
2601 Second Avenue North, Suite 3200
Billings, MT 59101
(406) 247-4633
victoria.francis@usdoj.gov

ERIC R. WOMACK
Assistant Branch Director
JAMES D. TODD, JR.
JOSEPH E. BORSON
UNITED STATES DEPARTMENT OF JUSTICE
Civil Division, Federal Programs Branch
20 Massachusetts Avenue, N.W.
Washington, D.C. 20530
(202) 514-3378
james.todd@usdoj.gov

Attorneys for Federal Defendants

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' OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

TABLE OF CONTENTS

I. INTRODUCTION 8

II. BACKGROUND 9

A. Statutory Background 9

B. Factual Background 10

C. Plaintiff's Preliminary Injunction Motion 13

III. STANDARD OF REVIEW 13

IV. ARGUMENT 14

A. Plaintiff Has No Likelihood of Succeeding on the Merits 14

1. The NAT Has Not Established That This Court Has Subject Matter Jurisdiction 15

a. The NAT Has Not Demonstrated That Its Claims Can Be Brought Under the ISDA 16

b. The NAT Has Not Demonstrated That Its Remaining Claims Can Be Brought Under the APA 17

2. The NAT Has Not Established That This Court Can Consider the NAT's Claims Concerning the EST, Because the EST Is Not A Party to this Case 19

a. The EST is a Required Party 20

b. Joinder is Not Feasible Because the EST Is Immune as a Sovereign 20

c. The EST is an Indispensable Party 22

3. The NAT Has Not Established That It is Likely To Succeed On Its Remaining Claims 23

a. Plaintiff Cannot Establish That it is Likely to Succeed on its Equal Protection Claim. 23

b. Plaintiff Cannot Establish That it is Likely to Succeed under 25 U.S.C. § 476 25

c. Plaintiff Cannot Establish that it is Likely to Succeed on Its Claim for Breach of Trust 26

d. Plaintiff Cannot Establish that it is Likely to Succeed on Its Conversion Claim 27

B. Plaintiff Has Not Established Irreparable Harm 27

C. The Balance of Harms and the Public Interest Weigh Against Granting Preliminary Relief 32

VII. CONCLUSION 34

TABLE OF AUTHORITIES

Cases

Akiachak Native Comm. v. Salazar, 935 F. Supp. 2d 195 (D.D.C. 2013) 26

Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127 (9th Cir. 2011) 14, 27

Alto v. Black, 738 F.3d 1111 (9th Cir. 2013) 19

Alturas Indian Rancheria v. Salazar, No. 10-cv-1997, 2010 WL 4069455 (E.D. Cal. Oct. 18, 2010) 24

Bennett v. Spear, 520 U.S. 154 (1997) 17

Burlington N. R.R. v. Blackfeet Tribe, 924 F.2d 899 (9th Cir. 1991) 21

Cherokee Nat. of Okla. v. Leavitt, 543 U.S. 631 (2005) 30

City of Sausalito v. O'Neill, 386 F.3d 1186 (9th Cir. 2004) 15

Cloverdale Rancheria of Pomo Indians of Cal. v. Jewell, 593 F. App'x 606 (9th Cir. 2014) 16

Ctr. for Food Safety v. Vilsack, 636 F.3d 1166 (9th Cir. 2011) 29

Dawavendewa v. Salt River Project Agr. Imp. & Power Dist., 276 F.3d 1150 (9th Cir. 2002) ..... *passim*

Drakes Bay Oyster Co. v. Jewell, 747 F.3d 1073 (9th Cir. 2014) 32

E.E.O.C. v. Peabody Western Coal Co., 400 F.3d 774 (9th Cir. 2004).....20

Elias v. Connett, 908 F.2d 531 (9th Cir. 1990) 29

Evenwel v. Abbott, 136 S. Ct. 1120 (2016) 25

Ex parte Young,
209 U.S. 123 (1908).....21

Fairbanks N. Star Borough v. U.S. Army Corps of Eng'rs,
543 F.3d 586 (9th Cir. 2008).....18

Franklin v. Massachusetts, 505 U.S. 788 (1992).....18

Freeman v. City of Santa Ana, 68 F.3d 1180 (9th Cir. 1995).....24

Fund for Animals v. Frizzell, 530 F.2d 982 (D.C. Cir. 1975) 31

Goodface v. Grassrope, 708 F.2d 335 (8th Cir. 1983).....24

Gros Ventre Tribe v. United States, 469 F.3d 801 (9th Cir. 2006) 26

Hopland Band of Pomo Indians v. Jewell, 624 F. App'x 562 (9th Cir. 2015).....26

Hurd v. Garcia, 454 F. Supp. 2d 1032 (S.D. Cal. 2006).....29

Jennings v. Seattle Housing Auth.,
No. 08-cv-1820, 2010 WL 596304 (W.D. Wash. Feb. 11, 2010) 27

Kahawaiolaa v. Norton, 386 F.3d 1271 (9th Cir. 2004) 23

Los Angeles v. Lyons, 461 U.S. 95 (1983) 29

Los Coyotes Band of Cahuilla & Cupeno Indians v. Jewell,
729 F.3d 1025 (9th Cir. 2013).....30

Love v. United States, 915 F.2d 1242 (9th Cir. 1989) 27

Lydo Enters. v. City of Las Vegas, 745 F.2d 1211 (9th Cir. 1984) 31

Mazurek v. Armstrong, 520 U.S. 968 (1997) 14

McNeil v. United States, 508 U.S. 106 (1993).....27

Metropolis Theater Co. v. City of Chicago, 228 U.S. 61 (1913) 23

Mich. v. Bay Mills Indian Cmty., 134 S. Ct. 2024 (2014).....30

Morgan Stanley DW Inc. v. Rothe, 150 F. Supp. 2d 67 (D.D.C. 2001) 14

Munaf v. Geren, 553 U.S. 674 (2008) 13, 15

Nat'l Sur. Corp. v. United States, 31 Fed. Cl. 565 (1994) 33

NavCom Def. Elec., Inc. v. Ball Corp., 92 F.3d 877 (9th Cir. 1996) 16

Nev. Restaurant Serv., Inc. v. City of Las Vegas,
No. 15-cv-2240, 2015 WL 7783536 (D. Nev. Dec. 3, 2015) 28

Newdow v. Bush, 355 F. Supp. 2d 265 (D.D.C. 2005).....31

Or. Nat. Desert Ass'n v. *U.S. Forest Serv.*, 465 F.3d 977 (9th Cir. 2006).....17

Premier Nutrition, Inc. v. Organic Food Bar, Inc.,
475 F. Supp. 2d 995 (C.D. Cal. 2007) 28

Prindable v. Ass'n of Apartment Owners of 2987 Kalakaua,
304 F. Supp. 2d 1245 (D. Haw. 2003) 31

Pueblo of Zuni v. United States, 467 F. Supp. 2d 1099 (D.N.M. 2006) 16

Republican Party of Ore. v. Keisling, 959 F.2d 144 (9th Cir. 1992).....25

Rodriguez v. Robbins, 704 F.3d 1060 (9th Cir. 2015).....27

Salazar v. Ramah Navajo Ch., 132 S. Ct. 2181 (2012) 30

Sampson v. Murray, 415 U.S. 61 (1974).....29

Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).....21

Serco, Inc. v. United States, 101 Fed. Cl. 717 (2011) 33

Tohono O'odhmam Nation v. Ducey,
No. 15-cv-1135, 2015 WL 5475390 (Sept. 16, 2015) 30

Tough Traveler, Ltd. v. Outbound Prods., 60 F.3d 964 (2d Cir. 1995).....31

Ukiah Valley Med. Ctr. v. FTC, 911 F.2d 261 (9th Cir. 1990) 18

United Houma Nation v. Babbitt,
No. 96-cv-2095, 1997 WL 403425 (D.D.C. July 8, 1997) 26

United States v. Bryant, 769 F.3d 671 (9th Cir. 2014).....21

United States v. Hancock, 231 F.3d 557 (9th Cir. 2000).....24

United States v. Lara, 541 U.S. 193 (2004) 30

Va. Office for Prot. & Advocacy v. Stewart, 563 U.S. 247 (2011).....22

Va. Petroleum Jobbers Ass'n v. Fed. Power Com'n,
259 F.2d 921 (D.C. Cir. 1958) 29

Vacco v. Quill, 521 U.S. 793 (1997) 23

Ward v. Apple Inc., 791 F.3d 1041 (9th Cir. 2015).....20

Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982) 32

Weinberger v. Salfi, 422 U.S. 749 (1975) 23

Weinrib v. Montgomery Cty. Bd. of Educ.,743 F. Supp. 808 (M.D. Ala. 1990).....25

White Mountain Apache Tribe v. Hodel, 840 F.2d 675 (9th Cir. 1988) 17

White v. Univ. of Cal., 765 F.3d 1010 (9th Cir. 2014).....23

Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank,
473 U.S. 172 (1985).....17

Winnebago Tribe of Neb. v. Stovall, 205 F. Supp. 2d 1217 (D. Kan. 2002) 33

Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7 (2008) 14, 32

Statutes

5 U.S.C. § 706(2) 27

25 U.S.C. § 13.....30

25 U.S.C. § 450.....9

25 U.S.C. § 450f.....9, 21

25 U.S.C. § 450m-1 ..... *passim*

25 U.S.C. § 476..... *passim*

41 U.S.C. § 7101.....9, 16

41 U.S.C. § 7103..... 10, 16

Rules

Fed. R. Civ. P. 19..... 20, 23

Regulations

25 C.F.R. §§ 2.1–2.21 17

25 C.F.R. § 2.6(a).....17

25 C.F.R. § 900.217 10
25 C.F.R. § 900.218 ..... 10, 16
25 C.F.R. § 900.219 ..... 10, 16
25 C.F.R. §§ 900.221-22 10
25 C.F.R. § 900.222(e) 10
25 C.F.R. § 900.246 10
25 C.F.R. § 900.31 9

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 deny plaintiff's motion for preliminary injunction against federal defendants because plaintiff cannot show a likelihood of success on the merits. The NAT's claims are not cognizable under the Indian Self Determination Act, the Administrative Procedure Act, or under any other constitutional or statutory provision. Nor can this Court consider the NAT's claims concerning the EST, because the EST is an indispensable party that is immune from suit. Additionally, the NAT cannot show that it would suffer irreparable harm in the absence of an injunction; or that the balance of hardships or the public interest warrant injunctive relief.

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*. 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;

[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).

(vii) Probate; (viii) Irrigation; and (ix) Real Estate. *See* Decl. of Norma Gourneau ¶ 4, ECF No. 67, Apr. 28, 2016.

Both Tribes are represented by business councils: the SBC and the 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), ECF No. 61-1. In the letter, the NABC indicated that it expected "joint tribal programs [to] remain unaffected." *Id.*; *see also* 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), ECF No. 67-3. 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), ECF No. 67-2. The

NABC has not provided clarification. *See* Gourneau Decl. ¶ 9; Ltr. fr. Norma Gourneau to Dean Goggle (Dec. 22, 2015), ECF No. 67-4.

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.*[2]

[2] On September 8-11, 2015, the BIA conducted an annual S&A Tribal Court Program Quality Review. *See* Gourneau Decl. ¶ 10; *see also* ECF No. 67-6. The review identified numerous deficiencies with contract performance. Gourneau Decl. ¶ 10. As a result, BIA proposed a corrective action plan for the Tribal Court, which called for the JBC and the Tribal Court to correct each of the identified deficiencies in a 30- to 90-day time frame. Gourneau Decl. ¶ 10; *see also* ECF No. 67-7.

C. Plaintiff's Preliminary Injunction Motion

On March 4, 2016, the NAT filed the present motion for a preliminary injunction. *See* Pl.'s Mot. for Prelim. Inj. & Br. in Support ("P.I. Mot."), ECF Nos. 17 & 17-1. Most assertions that are the subject of the NAT's preliminary injunction motion are directed at tribal defendants. *See* ECF No. 17 *passim.* With respect to federal defendants, the NAT asserts only that that the BIA entered into 638 contracts with the SBC on behalf of the JBC to operate of the S&A Tribal Court and the Fish and Game Department for Fiscal Year 2016. *See id.* at 6 ¶ A, 7 ¶ D. Plaintiff further contends that the BIA "encourage[d] and ratif[ied]" tribal defendants' actions that are the subject of the preliminary injunction motion, *see id.* at 5, although the NAT provides no further elaboration about this assertion. *See id. passim.* The NAT additionally asserts, without further elaboration, that the BIA's actions are "on-going." *Id.* at 5. The NAT seeks to enjoin the BIA from: (i) "representing" that SBC can act on behalf of the NAT; and (ii) approving or ratifying unilateral SBC actions concerning shared 638 programs. *Id.* at 26.

III. STANDARD OF REVIEW

"A preliminary injunction is an extraordinary and drastic remedy; it is never awarded as of right." *Munaf v. Geren*, 553 U.S. 674, 679-80 (2008) (quotation marks and citations omitted). The movant bears the burden of demonstrating "by a clear showing" that the remedy is necessary and that the prerequisites for issuance

of the relief are satisfied. *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997). First, a plaintiff seeking a preliminary injunction must establish that it is "likely to succeed on the merits." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Second, a preliminary injunction can issue only upon a showing that irreparable harm is "likely in the absence of an injunction." *Id.* at 21-22 (preliminary relief cannot issue based speculation or the mere "possibility of irreparable harm"). Third, a court deciding a preliminary injunction motion "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Id.* at 24. Finally, the court "should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Id.* [3]

IV. ARGUMENT

A. Plaintiff Has No Likelihood of Succeeding on the Merits

The NAT is not entitled to injunctive relief because it has not shown a likelihood of success on the merits. *See Morgan Stanley DW Inc. v. Rothe*, 150 F. Supp. 2d 67, 73 (D.D.C. 2001) ("[A]bsent a substantial indication of likely success on the merits, there would be no justification for the court's intrusion into the ordinary processes of administration and judicial review."). This factor is

[3] This is a balancing test, so "a stronger showing of one element may offset a weaker showing of another," but plaintiff must "make a showing on all four prongs." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131, 1135 (9th Cir. 2011).

particularly salient in light of the government's jurisdictional challenge, which applies with equal force to a request for preliminary relief. *See Munaf*, 553 U.S. at 690.

As set out below and in more detail in federal defendants' brief in support of their motion to dismiss, *see* ECF No. 66, the NAT fails to meet its burden of demonstrating that this Court has subject matter jurisdiction over its claims against federal defendants. Nor has the NAT shown that the Court can consider NAT's claims concerning the EST, because the EST is an indispensable party that is immune from suit. Additionally, the NAT has failed to demonstrate that it is likely to succeed on its equal protection, 25 U.S.C. § 476, trust, or conversion claims.

1. The NAT Has Not Established That This Court Has Subject Matter Jurisdiction

The NAT has not demonstrated that this Court has subject matter jurisdiction over its claims against federal defendants, as it 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). It cannot show that it could bring its claims under either the ISDA or the Administrative Procedure Act ("APA").

a. The NAT Has Not Demonstrated That Its Claims Can Be Brought Under the ISDA

The NAT has not demonstrated that it is likely to succeed with 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 it 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 Cloverdale Rancheria of Pomo Indians of Cal. v. Jewell*, 593 F. App'x 606, 610 (9th Cir. 2014); *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.

b. The NAT Has Not Demonstrated That Its Claims Can Be Brought Under the APA

Nor can the NAT establish that its claims can be brought under the APA. First, 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). 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 and so cannot show that it will be able to proceed under the APA.

Second, the NAT cannot maintain its non-contract 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"). 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)).

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, though, 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. 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. In short, the only truly final agency actions at issue in this case are the self-determination contracts issued to the SBC, which have not been exhausted, the other actions are either interlocutory or not legally determinative.

2. The NAT Has Not Established That This Court Can Consider the NAT's Claims Concerning the EST, Because the EST Is Not A Party to this Case

The NAT fails to establish that it is likely to succeed on the merits of its claims concerning the EST because this Court lacks subject matter jurisdiction over these claims. The EST 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. Among other 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).

As is more fully-developed in federal defendants' brief in support of their motion to dismiss, Rule 19 sets out a three-step process for determining whether a party is indispensable to a lawsuit. First, the court determines whether a party is "required." *Alto v. Black*, 738 F.3d 1111, 1126 (9th Cir. 2013) (quoting Fed. R. Civ. P. 19(1)(A)-(B)). Second, the court determines "whether joinder is feasible,

or is barred by sovereign immunity." *Id.* Finally, the 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 Western Coal Co.*, 400 F.3d 774, 779 (9th Cir. 2004); *see also* Fed. R. Civ. P. 19(b)).

a. 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."). The NAT seeks additional relief directly against the EST. *See* Compl., Prayer for Relief ¶¶ A-F. Accordingly, the EST is a required party.

b. 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. The NAT has identified no such waiver.

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), as it does not apply here.[4] *Dawavendewa*, 276 F.3d at 1160 (citing *Burlington N.R.R. v. Blackfeet Tribe*, 924 F.2d 899 (9th Cir. 1991)). 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. *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*, 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 the EST has converted its property and funds.

Second, "*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

[4] Ex parte Young provides an exception to sovereign immunity, allowing for a suit against a government 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).

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. Such relief necessarily runs against the EST as the sovereign, and *Ex parte Young* could not apply.

c. The EST is an Indispensable Party

If a necessary party cannot be joined, this Court must determine whether that party is so indispensable that the entire action must be dismissed. Rule 19(b) sets out four factors to consider in making this determination. Fed. R. Civ. P. 19(b). "Although Rule 19(b) contemplates balancing the factors, 'when the necessary 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 before concluding that tribe is indispensable).[5] The EST is an indispensable party; the NAT's claims concerning the EST must be dismissed.

[5] As discussed in greater detail in defendants' motion to dismiss, even if this Court were to apply the four-factor test, it would demonstrate that the EST is an indispensable party.

3. The NAT Has Not Established That It is Likely To Succeed On Its Remaining Claims

a. Plaintiff Cannot Establish That it is Likely to Succeed on its Equal Protection Claim.

The NAT cannot establish that it is likely to succeed on its 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) (tribes' claims subject to rational basis scrutiny because tribal status is a political classification, not a race-based one); *United States v. Hancock*, 231 F.3d 557, 566 (9th Cir. 2000).

As an initial 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). Even if the JBC's status as a tribal organization previously authorized by both tribes were not dispositive, there would still be a rational basis for the BIA's actions. Courts have held that during 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 the inter-tribal dispute here.

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 on behalf of the JBC–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 Cnty. 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).

b. Plaintiff Cannot Establish That it is Likely to Succeed under 25 U.S.C. § 476

The NAT cannot show that it is likely to succeed on its claim brought under 25 U.S.C. § 476(f). That section is a limited provision that prevents the federal government from creating favored or disfavored categories of federally recognized tribes. But the BIA has not created any such categories here, so NAT's claim fails.

Section 476(f) provides that:

> 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. Babbitt*, No. 96-cv-2095, 1997 WL 403425, at *7 n.11 (D.D.C July 8, 1997); *see also Akiachak Native Cmty. v. Salazar*, 935 F. Supp. 2d 195, 197 (D.D.C. 2013), *appeal pending*, No. 13-5360 (D.C. Cir.).[6]

[6] Federal defendants do not endorse the holding in *Akiachak*, particularly its potentially broad definition of "categories." That holding, however, is not implicated in this case, as the BIA has not made any categorical determinations.

But section 476(f) is of no help to the NAT, because the BIA has made no categorical distinctions with regard to the tribe. Congress limited § 476(f) only to decisions which treated tribes differently than other tribes "by virtue of their status as Indian tribes," 25 U.S.C. § 476(f), in other words, it prevents status-based determinations.

c. Plaintiff Cannot Establish that it is Likely to Succeed on Its Claim for Breach of Trust

The NAT cannot establish that it is likely to succeed on its claim that the federal defendants have breached their duty of trust to the NAT. Compl. ¶ 88. The federal government does not have a freestanding fiduciary obligation to the Tribes that is separate and apart from any responsibilities put in place by the ISDA or other statutes or regulations. *See 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, fails.

d. Plaintiff Cannot Establish that it is Likely to Succeed on Its Conversion Claim

The NAT cannot establish that it is likely to succeed in its conversion claim. Conversion is a state-law 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, if the

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.

B. Plaintiff Has Not Established Irreparable Harm

The NAT "must establish that irreparable harm is likely, not just possible, in order to obtain a preliminary injunction." *Alliance for the Wild Rockies*, 632 F.3d at 1131. This is a "demanding standard for [an] extraordinary remedy," *Jennings v. Seattle Housing Auth.*, No. 08-cv-1820, 2010 WL 596304, at *1 (W.D. Wash. Feb. 11, 2010), and it is one that the NAT does not meet.

As an initial matter, the NAT fails to specifically identify how it will be irreparably injured by the federal defendants if it does not receive the preliminary injunction it seeks. *See Rodriguez v. Robbins*, 704 F.3d 1060, 1066 (9th Cir. 2015) (petitioner must show that it "is likely to suffer irreparable harm *in the absence of preliminary relief*.") (emphasis added). The NAT asserts that in September and December 2015, the BIA awarded two 638 contracts to the SBC without consent of the NAT. *See* P.I. Mot. at 6, 8. But it does not seek to preliminarily enjoin those contracts. *See id.* at 26. Rather, it seeks to enjoin the BIA from "approving" or "ratifying" SBC actions, without ever identifying any action that the BIA is imminently about to approve or ratify. *Id.*

The NAT's general assertions fail to demonstrate likely irreparable harm. First, the NAT has only vaguely described the BIA's purported "approvals" or "ratifications", and "vague and unsupported" allegations are not sufficient to establish irreparable injury. *Premier Nutrition, Inc. v. Organic Food Bar, Inc.*, 475 F. Supp. 2d 995, 1007 (C.D. Cal. 2007); *see also Nev. Restaurant Serv., Inc. v. City of Las Vegas*, No. 15-cv-2240, 2015 WL 7783536, at *2 (D. Nev. Dec. 3, 2015) ("vague and speculative" claims of irreparable harms are insufficient). Second, even if these allegations are adequately described, the NAT never attempts to show that they are legally relevant. It does not allege or establish that these purported BIA approvals or ratifications have legal consequence, or are legally required. Without doing so, it cannot show that the BIA–as opposed to the EST–is the cause of its purported harm, and accordingly, that the injunctive relief it seeks against the BIA will remedy such injury.

Nor can the NAT establish that irreparable harm is likely with regard to future contracts. "Injunctive relief is available to a litigant only upon a showing that there is a 'real or immediate threat that the plaintiff will be wronged again.'" *Hurd v. Garcia*, 454 F. Supp. 2d 1032, 1054 (S.D. Cal. 2006) (quoting *Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983)); *see also Ctr. for Food Safety v. Vilsack*, 636 F.3d 1166 (9th Cir. 2011). Here, there is no allegation that the BIA will engage in a similar course of conduct in the future. Indeed, as Wind River Agency

Superintendent Norma Gourneau makes clear in her declaration, should the tribes fail to resolve their dispute over the joint operation of these shared programs by September 30, 2016, the BIA will consider all available options, including reassuming BIA operation of the federally-funded portions of the tribal court and/or the fish and game program. Gourneau Decl. ¶ 9.

Next, the NAT claims as injury that it has lost funds due to be awarded to it under 638 contracts. P.I. Mot at 22. Monetary loss is not an irreparable injury. *See Elias v. Connett*, 908 F.2d 531, 526 (9th Cir. 1990). The NAT's claims that individuals might lose their jobs in the future similarly fails. There is no evidence that such actions are "immediate," and even if there were, the NAT fails to show that the potential replacement of tribal court employees could be not be redressed by relief available in the ordinary course of litigation. *See Sampson v. Murray*, 415 U.S. 61, 90 (1974); *Va. Petroleum Jobbers Ass'n v. Fed. Power Com'n*, 259 F.2d 921, 925 (D.C. Cir. 1958).

The NAT additionally claims that the requested relief will remedy an irreparable injury to its sovereignty. But, as discussed earlier, NAT is not likely to succeed on the merits of that claim, and its argument that its purported injury would be resolved by resolution of that claim must similarly fail. *See Tohono O'odhmam Nation v. Ducey*, No. 15-cv-1135, 2015 WL 5475390, at *14 (Sept. 16, 2015) ("Because the Nation has not shown that it is likely to succeed in its claim

that ADG is violating its sovereignty, a likelihood of this irreparable harm has not been shown."). Nor is it even clear that the NAT's sovereign, as opposed to contractual, rights are at stake in this dispute. Contrary to the NAT's assertions, its right to operate the tribal court or the fish and game department is a contract right that arises under the ISDA, not a sovereign right. Congress has plenary authority over the NAT and all other federally-recognized Tribes. *See Mich. v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030 (2014) ("As dependents, the tribes are subject to plenary control by Congress.") (citing *United States v. Lara*, 541 U.S. 193, 200 (2004)). Congress has expressly exercised its authority over Tribes to give to the BIA, among other things, the power to operate tribal courts on the tribes' lands, *see* 25 U.S.C. § 13, and has offered Tribes under the ISDA the right to take over operation of those BIA programs as a contractor. *See Salazar v. Ramah Navajo Ch.*, 132 S. Ct. 2181, 2188 (2012) ("the [federal g]overnment's obligation to pay" under the ISDA "should be treated as an ordinary contract promise.") (citing *Cherokee Nat. of Okla. v. Leavitt*, 543 U.S. 631, 639 (2005)); *Los Coyotes Band of Cahuilla & Cupeno Indians v. Jewell*, 729 F.3d 1025, 1033 (9th Cir. 2013) (under the ISDA, "a tribe that is receiving a particular service from the BIA may submit a contract proposal to the BIA to take over the program and operate it *as a contractor*") (emphasis added). The NAT's citation to cases holding that

infringement to tribal sovereignty constitutes irreparable injury, *see* P.I. Mot. at 21-22, are thus inapposite to the present dispute.

Finally, the NAT waited several months after issuance of the 638 contracts referenced in the complaint to bring suit. "By sleeping on its rights a plaintiff demonstrates the lack of need for speedy action." *See Lydo Enters. v. City of Las Vegas*, 745 F.2d 1211, 1213-14 (9th Cir. 1984); *Tough Traveler, Ltd. v. Outbound Prods.*, 60 F.3d 964, 968 (2d Cir. 1995) ("[F]ailure to act sooner undercuts the sense of urgency that ordinarily accompanies a motion for preliminary relief and suggests that there is, in fact, no irreparable injury."); *Prindable v. Ass'n of Apartment Owners of 2987 Kalakaua*, 304 F. Supp. 2d 1245, 1262 (D. Haw. 2003). Indeed, delays as short as thirty to forty-five days before seeking relief have been deemed fatal to the irreparable injury requirement. *See, e.g.*, *Newdow v. Bush*, 355 F. Supp. 2d 265, 292 (D.D.C. 2005) (one-month delay); *see also Fund for Animals v. Frizzell*, 530 F.2d 982, 987 (D.C. Cir. 1975) (forty-five day delay). Thus, the NAT fails to establish irreparable harm.

C. The Balance of Harms and the Public Interest Weigh Against Granting Preliminary Relief

Under the third prong of the preliminary injunction inquiry, courts "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Winter*, 555 U.S. at 24. Under the last prong, the courts consider the public interest. *See Weinberger v.*

Romero-Barcelo, 456 U.S. 305, 312 (1982) (noting that where an injunction is sought that would adversely affect the public interest, a court may deny the relief until an adjudication of the merits, even where postponement may be burdensome to the plaintiff). When the federal government is a party, the balance of equities and public interest factors may be merged. *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014).

Here, the balance of equities and the public interest weigh against an injunction. The NAT seeks a vague injunction against undefined harms that would prohibit federal defendants from, among other things, "[a]uthorizing, approving, or ratifying unilateral action by the SBC" relating to the management of self-determination contracts issued in the Fall of 2015. P.I. Mem. at 26, ¶ B(3). It does not define "authorizing, approving, or ratifying" in its motion, but they are broad enough that an injunction prohibiting these actions could limit the BIA's ability to fulfill its responsibility for overseeing 638 contracts. Courts have repeatedly recognized that the public has an interest in preserving the government's ability to administer contracts without unnecessary disruption. *See, e.g., Serco, Inc. v. United States*, 101 Fed. Cl. 717, 721-22 (2011); *Nat'l Sur. Corp. v. United States*, 31 Fed. Cl. 565, 577 (1994). Nor does the NAT acknowledge the harm to the SBC's ability to manage the contracts that would ensue from the requested injunction.

Additionally, maintaining the integrity of contract administration has added import when contracts in question provide "social services, public safety and educational programs that benefit tribal members." *Winnebago Tribe of Neb. v. Stovall*, 205 F. Supp. 2d 1217, 1224 (D. Kan. 2002), *aff'd* 341 F.3d 1202 (10th Cir. 2003). In this case, the BIA has performed an annual audit of the S&A Tribal Court that found significant contract administration deficiencies and has proposed a corrective action plan. *See* Gourneau Decl. ¶ 10; *see also* ECF No. 67-6. The NAT's proposed injunction could disrupt the BIA's ability to conduct additional oversight functions necessary to its administration of these 638 contracts, as the SBC's ability to adopt a corrective action plan or otherwise administer the contracts.

V. CONCLUSION

For the aforementioned reasons, this Court should deny plaintiff's motion for a preliminary injunction.

Dated: April 29, 2016

Respectfully Submitted,

BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General
Civil Division

MICHAEL W. COTTER
United States Attorney
VICTORIA L. FRANCIS
Assistant U.S. Attorney

ERIC R. WOMACK
Assistant Branch Director
Federal Programs Branch

s/ James D. Todd, Jr.
JAMES D. TODD, JR.
JOSEPH E. BORSON
U.S. DEPARTMENT OF JUSTICE
Civil Division, Federal Programs Branch

Attorneys for Federal Defendants

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) and is 6,329 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 29, 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.