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

NORTHERN ARAPAHO TRIBE, for itself and as *parens patriae*	)	Civil Action No. CV-16-11 BMM
Plaintiff,	)	
vs.	)	NORTHERN ARAPAHO TRIBE'S REPLY BRIEF IN SUPPORT OF ITS MOTION FOR PRELIMINARY INJUNCTION - REPLY TO FEDERAL DEFENDANTS
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.)

I. INTRODUCTION

Federal Defendants begin their response to the Motion for Preliminary Injunction filed by the Northern Arapaho Tribe (NAT) with the mis-statement that this case is a mere "tribal" dispute[1] not appropriate for resolution by the Court. Doc 68 at 8. In violation of an express prerequisite under 25 U.S.C. §450b(l), Federal Defendants issued ISDEAA contracts to "the SBC on behalf of the JBC" on at least four separate occasions. Doc 68 at 12, 19. Despite an express prohibition under 25 U.S.C. §476(f) and (g), Federal Defendants' action "diminishes the privileges and immunities" available to NAT relative to the Eastern Shoshone Tribe (EST). Federal Defendants also admit that when tribal officials take over operation of programs under the ISDEAA, such as the ones involved in the case at bar, those tribal officials manage the programs *"as a contractor"* of the Federal government. Doc 68 at 30. This is true with respect to all of the ISDEAA contracts awarded to SBC "as JBC." With respect to the

[1] Federal Defendants conflate "inter-tribal" (a dispute between tribes) with "intra-tribal" (a dispute within a single tribe). *See* Doc 68 at 24.

judicial services contract, SBC is "restructuring" and "reorganizing" the shared Shoshone & Arapaho Tribal Court ("Tribal Court") system unilaterally, and in violation of tribal law,[2] saying it is "engaged in actions *required by the BIA* Program Review" (emphasis added). Doc 40 at 27. SBC relies on a BIA report written by Federal Defendant Reyes that criticizes perceived shortcomings in the Court itself. Doc 40-1 at 5-6. As a federal contractor, SBC is preparing to terminate Tribal Court judges and staff at the insistence or under the direction of Federal Defendant Reyes. The assertion that NAT raises only an "inter-tribal" dispute is specious.

Together, Defendants have hijacked the authority of NAT to consent, or deny consent, to the award of ISDEAA contracts for the benefit of NAT and its members and are in the process of unlawfully purging program employees. A preliminary injunction is needed to stop these on-going violations of federal law by Federal Defendants and their contractor.

II. AN EQUAL SAY FOR THE TRIBES IN SHARED MATTERS IS THE STATUS QUO

"The purpose of a preliminary injunction is merely to preserve the relative

[2] Judges appointed to four-year terms; retained at elections; clerks selected only by the Court, Shoshone and Arapaho Law & Order Code §§1-3-2; 1-3-9 (available on Westlaw and shoshone-arapaho-tribal-court.org).

positions of the parties until a trial on the merits can be held." *Univ. of Texas v. Camenisch,* 451 U.S. 390, 395 (1981), *accord U.S. Phillips Corp. v. KBC Bank N.V.*, 590 F.3d 1091, 1094 (9th Cir. 2010). Federal Defendants' opposition to the preliminary injunction (Doc 68) does not address, let alone challenge, the nature of the status quo or the need to protect it. *See* Doc 17-1 at 14-16 and 18-19.

SBC has admitted that "[t]he actual status quo has been for both Tribal councils to have an equal say on matters of common interest." Doc 40 at 14. The status quo, even under the old JBC format, required the approval of each Tribe regarding management of programs shared by both Tribes, whether or not meeting in joint session. *See* Doc 17-3 at 5. Federal Defendants upend the status quo by awarding ISDEAA contracts to SBC "as JBC" and thereby authorizing SBC to manage the contracts unilaterally in violation of federal law.

III. NAT IS LIKELY TO SUCCEED ON THE MERITS

If a plaintiff is likely to succeed on a single claim supporting the relief it seeks, courts should grant injunctive relief to preserve the status quo pending trial. *Girls Clubs of Am., Inc. v. Boys Clubs of Am., Inc.*, 683 F.Supp. 50, 52 (S.D.N.Y.), aff'd sub nom. *Girls Clubs of Am. v. Boys Clubs of Am.*, 859 F.2d 148 (2d Cir. 1988), and modified, No. 88 CIV. 1375 (KC), 1989 WL 297861 (S.D.N.Y. May 12, 1989), *Northern Penna. Legal Services, Inc. v. County of Lackawanna*,

513 F.Supp. 678, 681 (M.D.Pa.1981).

Federal Defendants omit any serious discussion of the facts and essentially rely on their legal arguments. NAT has shown a likelihood of success more than sufficient to support preliminary relief.

A. NAT is Likely to Succeed On Its Claims.

Federal Defendants' opposition (Doc 68) does not address the likelihood of success on NAT's claims under 25 U.S.C. §450f(a)(1) or 25 U.S.C. §450b(l).[3]

Federal Defendants' opposition also does not address the merits of NAT's claim under 25 U.S.C. §476(f). Defendants restate the prohibition against distinctions among federally recognized Tribes contained in that statute, then simply declare that the BIA has made no favored or disfavored category between the two Tribes. Doc 68 at 25. But Federal Defendants treat SBC as if it has some form of authority greater than NAT and may therefore act for NAT without its consent, a fact Federal Defendants do not contest. That Defendants have made the distinction between the two Tribes is abundantly clear, is expressly alleged in the Complaint, and is consistent with the facts revealed to date.

Federal Defendants argue that NAT has failed to allege it is similarly

[3] Contracts in violation of this section are void *ab initio*. *Council for Tribal Employment Rights v. U.S.*, 112 Fed.Cl. 231, 249 (2013).

situated to the former JBC, and so cannot establish denial of equal protection. Doc 68 at 23. Federal Defendants mix apples and oranges. The former JBC *included* NAT. NAT has, in fact, alleged that it (and its elected Business Council) is similarly situated to the EST (and its elected Business Council) and that SBC, as federal contractor, provides and manages governmental services for members of NAT, who have no right to vote in SBC elections. *See* Doc 1 at para. 7-10, 12-16, 28, 42, 43. Federal Defendants, by authorizing unilateral actions by SBC, violate the equal protection principle found in the Fifth Amendment and in 25 U.S.C. §476(f).

Federal Defendants try to equate the case at bar with those in which the BIA was faced with competing governing factions *within* a single Indian Tribe. Doc 68 at 24. They rely on cases involving intra-tribal disputes, which are inapposite. NAT and EST are each separate, federally recognized Indian Tribes.

Federal Defendants attempt to avoid responsibility by saying, for the first time, that their award of ISDEAA contracts to the SBC "as JBC" was only a "temporary" government measure. Doc 68 at 12 and 24. Nothing about the awarded contracts identifies them as "temporary." In any event, actions which violate clear federal statutes and common law are no less subject to judicial review because they are alleged, after suit has been filed, to be only "temporary." *Cobell*

v. Babbitt, 30 F.Supp.2d 24, 34 (D.D.C. 1998) ("The fact that the defendants have the power to change the system cannot render the present system they have chosen to be one interlocutory in nature.")

Federal Defendants say that NAT's breach of trust claim is untethered to any specific statutory provision. They do not explain how this statement can square with the statutory violations outlined in NAT's Complaint and further developed in its briefing. *See* Doc 1 at para. 37-38 (25 U.S.C. §450f(a)(1)); Doc 1 at para. 39, 41, 52, 53, 69, 70 (25 U.S.C. §450b(l)) and Doc 1 at para. 92 (25 U.S.C. §476(f)). And although federal obligations are rooted in statutes and treaties, many of the duties are implied from the nature of the federal-tribal relationship. *See Morton v. Ruiz*, 415 U.S. 199, 236 (1974). The transfer of funds and services intended by Congress for NAT to the unilateral control of another Tribe violates the federal duty to deal fairly with NAT.

NAT's claims for unlawful conversion of federal and non-federal funds and property flow from Defendants' violations of 25 U.S.C. §450b(l) and 25 U.S.C. §476(f) and (g). Funds held by the United States for Indians are presumed to be held in trust. *Cobell v. Norton*, 240 F.3d 1081, 1098 (D.C. Cir. 2001). Conversion of tribal trust funds or property is certainly a violation of fiduciary standards. Suits for an accounting of tribal trust funds sought by NAT (Doc 1 at 24-25) are

cognizable under federal law. *Id*.

B. *This Court Has Subject Matter Jurisdiction*.

"Dismissal for lack of subject-matter jurisdiction because of the inadequacy of the federal claim is proper only when the claim is 'so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy.'" *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998), quoting *Oneida Indian Nation of N.Y. v. County of Oneida (Oneida I)*, 414 U.S. 661, 666 (1974). NAT's Complaint should not be dismissed for lack of subject matter jurisdiction.

1. Claims under federal statutes. NAT has submitted claims pursuant to 28 U.S.C. §§1331, 1343, and 1362, which establish subject matter jurisdiction with this Court. Federal Defendants acknowledge NAT's citation to these bases of jurisdiction and then discount them without any analysis. Doc 68 at 15.

NAT has specifically alleged violations of federal statutes (*see* Doc 1 at para. 39, 41, 52, 53, 69, 70, 92), which establish subject matter jurisdiction in the federal courts under 28 U.S.C. §1331 or §1362. *See Steel Company*, 523 U.S. at 89 (1998) and *Oneida I*, 414 U.S. at 666 (1974).

2. Claims under federal common law. NAT has also submitted

claims for violations of its sovereign authority by all Defendants, and specifically by SBC Defendants as agents and contractors of the Federal Defendants. *See* Doc 1 at para. 44-51, 67, 74-77, 89 and Doc 17-1 at 10-27. Alleged violations of federal common law, including that developed in the field of federal Indian law, support jurisdiction under 28 U.S.C. §§1331 and 1362. *Cohen*, §5.05[1][a] at 416; *Oneida I*, 414 U.S. at 666-667 (1974) (Tribe could bring common-law action to vindicate their aboriginal rights); *County of Oneida v. Oneida Indian Nation (Oneida II)*, 470 U.S. 226, 233 (1985) ("...the Indians' common-law right to sue is firmly established"); and *Cobell v. Norton*, 240 F.3d 1081, 1094 (D.C. Cir. 2001) (suit for claims based on common law permitted; APA waives federal officials' immunity for declaratory or injunctive relief).

3. Claims under the ISDEAA. The ISDEAA also establishes an independent basis for subject matter jurisdiction in the federal courts. "The United States district courts shall have original jurisdiction over any civil action or claim against the appropriate Secretary arising under this subchapter. ..." 25 U.S.C. 450m-1(a) (first clause). Federal Defendants do not explain how this clear provision fails to allow NAT's claims to proceed. Instead, Federal Defendants mischaracterize NAT's complaint as one for money damages and then rely on the misdirection to argue that the Court lacks jurisdiction to hear NAT's claims, which

are for declaratory and injunctive relief.[4] Doc 68 at 16.

4. Claims under or allowed by the APA. Federal Defendants try to pigeon-hole NAT's claims as ones which require exhaustion of administrative remedies under 25 C.F.R. Part 2. Doc 68 at 17. However, under the ISDEAA, federal courts have *original* jurisdiction over "any civil action" arising under the Act. *See Ramah Navajo Sch. Bd. Inc. v. Babbitt*, 87 F.3d 1338, 1344 (1996). Only claims for money damages under the ISDEAA are ever subject to exhaustion requirements. 25 U.S.C. §450m-1(a) (second clause). Administrative remedies available under the ISDEAA are set forth in 25 C.F.R. Subpart L, but include the right to bring actions directly to the federal courts. 25 C.F.R. §900.153.

Furthermore, APA's waiver of sovereign immunity applies to any suit whether under the APA or not and federal common law provides equitable relief against federal agents. *See Cobell*, 240 F.3d at 1094 and additional authority at Doc 51 at 15-18.

C. *Federal Defendants Cannot Hide Behind Their Contractors and Rule 19.*

Federal Defendants try to avoid judicial scrutiny and express limits of

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[4] Following 25 U.S.C. 450m-1(a)'s first clause, the ISDEAA also grants district court jurisdiction over "money damages arising" under ISDEAA contracts, which are subject to certain requirements under the Contract Disputes Act, 41 U.S.C. §7101, et seq., 25 U.S.C. §450m-1(a) (second clause).

federal law by delegating their authority to a contracting agent, the SBC Defendants, then claiming that the EST must but cannot be joined under Fed.R.Civ.P.19. If allowed to dodge federal law in this way, Federal Defendants could unlawfully delegate their responsibility to provide services to one Tribe to officials of any other Tribe and avoid judicial scrutiny. NAT will address Rule 19 more specifically in its response to Federal Defendants' Motion to Dismiss, which is due on May 20, 2016.

IV. NAT FACES A THREAT OF IRREPARABLE INJURY

Violations of tribal sovereignty constitute irreparable harm, *ipso facto*. *Tohono O'odham Nation v. Schwartz*, 837 F.Supp. 1024, 1034 (D.Ariz. 1993). NAT's authority to exercise police power, manage ISDEAA contracts and funds Congress intended for its benefit, govern itself, and protect tribal assets flow from its status as a sovereign. SBC unlawfully asserts the authority of NAT under ISDEAA contracts through the old JBC, purporting to exercise the police power of NAT through the Tribal Court, purging the Tribal Court judiciary and staff, replacing employees of the Fish and Game Department, and unilaterally managing shared tribal equipment and tribal funds. These injuries are ongoing.

Federal Defendants complain that NAT has not identified examples of imminent injury from actions of the BIA which approve or ratify governmental

powers being exercised by SBC "as JBC." Doc 68 at 27. But the judicial services contract is one such example, where SBC is "restructuring" and "reorganizing" the shared Tribal Court system unilaterally, in violation of tribal law, saying the actions are required by the BIA. Doc 40 at 27.

Federal Defendants then complain that actions by the BIA have no "legal consequence," and so are not subject to injunctive relief. Doc 68 at 28. But the legal consequence is clear: in the Tribal Court example, unilateral replacement by the federal contractor of judges appointed by both Tribes (and retained by the electorate) violates sovereign authority of NAT to exercise its police power; the ISDEAA, which requires the approval of both Tribes for any "tribal organization" to be empowered to act on behalf of both Tribes; and 25 U.S.C. §476(f), which prohibits the BIA from diminishing the privileges and immunities of one Tribe vis-a-vis another. Federal Defendants miss the point when they say that loss of employment by members of the judiciary is something for which NAT may obtain relief in the ordinary course of litigation. Furthermore, it is not accurate. The loss of Chief Judge John St. Clair, for example, who has served in that capacity since 1982, would be a significant loss to NAT and the litigants who rely on his experience on the bench. Wholesale replacement of the other judges, prosecutors, defenders and clerks is also an impact that the "ordinary course of litigation" may

never repair.

Federal Defendants say that NAT cannot show irreparable harm is likely regarding future contracts. Doc 68 at 28. However, NAT has shown ongoing, irreparable harm under existing contracts, and more is not required. *See Cobell v. Babbitt*, 30 F.Supp.2d at 34. Federal Defendants admit they issued ISDEAA contracts "with the SBC on behalf of the JBC" on at least four separate occasions. Doc 68 at 12, 19. NAT has alleged that "Defendants will continue to violate and interfere with the sovereign and property rights of the NAT and its members as set forth herein." Doc1 at 24. To date, Federal Defendants have not proven NAT to be wrong.

Federal Defendants assert that NAT's claims are based in contract, not on its sovereign status, arguing that the right to operate the Tribal Court or Fish and Game Department arises solely from the ISDEAA. This notion runs afoul of long-established federal law. "Perhaps the most basic principle of all Indian law, supported by a host of decisions, is that those powers lawfully vested in an Indian nation are not, in general, delegated powers granted by express act of Congress, but rather 'inherent powers of a limited sovereign which has never been extinguished.'" *Cohen*, §4.01[1][a] at 207, quoting *U.S. v. Wheeler*, 435 U.S. 313, 322-323 (1978). The right to ISDEAA *funding* arises from the ISDEAA, but the

authority to *self-govern* is inherent. NAT seeks to stop Federal Defendants from representing to others that SBC is authorized by the United States to take actions unilaterally "as the JBC" and to stop the BIA from authorizing, approving or ratifying those actions. Doc 17 at 3-4. This differs qualitatively from what Federal Defendants mischaraterize as a mere "obligation to pay" by the United States. Doc 68 at 30.

Finally, Federal Defendants say that NAT waited several months after issuance of the ISDEAA contracts before filing, and that delay should be fatal to preliminary relief.[5] Doc 68 at 31. But courts should not fault a plaintiff when delay is caused by plaintiff's reasonable reliance on promises by the defendant. *United States v. Georgia-Pac. Co*., 421 F.2d 92, 95 (9th Cir. 1970). During contract negotiations, Federal Defendants assured NAT that no contract would be awarded to provide services to both Tribes without the consent of both Tribes. In early October, NABC learned that Defendant Gourneau had awarded a contract to the SBC, acting alone as the "joint" council, to continue judicial services for both Tribes. (Gourneau approved the SBC proposal on September 30, 2015, within five

[5] Defendants also complain that NAT would not clarify how shared programs would operate after dissolution of the JBC. Doc 68 at 11-12. But *see* attached correspondence to Gourneau and LaCounte, attached hereto as Exhibits 29, 30 and 31.

(5) days of its receipt by the BIA.) Afterwards, Federal Defendants assured NAT that the BIA would not take or support any action allowing the SBC to violate federally protected rights of NAT. These assurances continued well into November, 2015 (*see* November 10, 2015, letter to Black, Doc 1-8 and letter to St. Clair, Doc 1-9). These promises were fraudulent when made and have been broken. *See* Doc 1 at para. 60-61.

V. HARM TO NAT OUTWEIGHS ANY HARM TO DEFENDANTS AND IS NOT CONTRARY TO THE PUBLIC INTEREST

Federal Defendants complain that an injunction against further violations of federal law, including the sovereign rights of NAT, would disrupt the BIA's ability to oversee and administer these contracts. But Federal Defendants have no legitimate interest in ongoing unlawful conduct to be weighed in the balance. Defendants also lack any legitimate interest in misrepresenting to other governments, businesses or the public that SBC speaks for NAT. NAT has not sought a halt to funding provided to SBC Defendants for services intended to benefit their tribal members. NAT has simply sought a prohibition against unilateral action affecting shared programs intended by Congress to benefit NAT and its members.

Federal Defendants do not contest that the unauthorized use of the name and symbols of Northern Arapaho government are likely to confuse other governments,

businesses and the public, and that preventing a likelihood of public confusion benefits the public interest. "Once the plaintiff has demonstrated a likelihood of confusion, it is ordinarily presumed that the plaintiff will suffer irreparable harm if injunctive relief is not granted." *Vision Sports, Inc. v. Melville Corp.*, 888 F.2d 609, 612, n. 3 (9th Cir. 1989).

VI. CONCLUSION

For the foregoing reasons, the Court should grant NAT's Motion for Preliminary Injunction.

DATED this 16th day of May, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on May 16, 2016, I electronically filed the foregoing filing. Notice of this filing will be sent by email to all parties of record by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF System.

/s/ Mandi A. Vuinovich
Mandi A. Vuinovich

CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(d)(2)(E), the attached brief is proportionately spaced, has a typeface of 14 points and contains 3,248 words, excluding the caption and certificates of service and compliance.

DATED this 16th day of May, 2016.

/s/ Mandi A. Vuinovich
Mandi A. Vuinovich