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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. 1:16-CV-11-BMM
Plaintiff,	)	
vs.	)	NORTHERN ARAPAHO TRIBE'S RESPONSE TO THE FEDERAL DEFENDANTS' MOTION TO DISMISS
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.	)

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Plaintiff Northern Arapaho Tribe ("NAT") provides the following response to the Federal Defendants ("Defendants") Motion to Dismiss (Docs 65-66). For the reasons that follow, that motion should be denied.

I. INTRODUCTION

Approximately 70% of the Native Americans who live on the Wind River Reservation are enrolled in NAT. Under the plain language of the Indian Self-Determination and Educational Assistance Act ("ISDEAA") and the policy of self-determination that the Act embodies, the elected officials of NAT have the right to contract for ISDEAA services or participate in management decisions related to contracted services that flow to NAT members. Defendants are well-beyond their statutory authority or *ultra vires* in disregarding such rights. In violation of 25 U.S.C. §450b(l), Defendants have circumvented approval requirements that give NAT the right to participate in decisions about how and whether ISDEAA services that flow to NAT members are contracted for and carried out. Essentially, Defendants have attempted to anoint another Tribe to speak for and act on behalf of NAT and its members. This conduct also violates 25 U.S.C. §476(f), which provides that "[d]epartments 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."

Defendants' brief does not include any discussion of, or a single reference to, 25 U.S.C. §450b(l) – a law which they ignore entirely. It is also noteworthy that the U.S. presents no argument that this Court lacks venue, personal jurisdiction over Defendants, or personal jurisdiction over Defendants St. Clair and Wagon ("SBC Defendants").

In their brief, Defendants present a litany of theories that would serve to insulate their unlawful conduct from judicial scrutiny. In essence, Defendants ask the Court to join them in setting aside the law in favor of a broad, paternalistic notion of discretion that is, in the modern era, thoroughly discredited. *See Cohen's Handbook of Federal Indian Law*, §22.01 (2012). As discussed below, Defendants' theories lack merit and their motion should therefore be denied.

II. BACKGROUND

A. Statutory Background.

Defendants offer a summary of the ISDEAA and the procedures involved for funding contracts that are issued to Tribes or tribal organizations. Doc 66 at 8. This summary aggrandizes the role of the Contract Disputes Act ("CDA") in the remedial scheme provided under the ISDEAA. *See* Doc 66 at 9. While one prong

of the ISDEAA allows certain claims to proceed through the CDA, the suggestion that NAT claims are confined to that prong and only cognizable through CDA procedures is not accurate.

The summary omits any reference to 25 U.S.C. §450b(l) – a law Defendants have violated – which would otherwise require NAT's approval of any contract issued to a tribal organization that would provide ISDEAA services to NAT and its members.

The summary is accurate to the extent it acknowledges that ISDEAA disputes can flow directly to "federal district court." *Id.*, citing 25 U.S.C. §450m-1(a); *see also Shoshone-Bannock Tribes of Fort Hall Reservation v. Shalala*, 988 F.Supp. 1306, 1316 (D.Or. 1997).

B. Factual Background.

Defendants present a summary of the factual information underlying these claims, which is styled curiously "for background purposes only," where Defendants "do not rely on the facts contained therein for their Motion to Dismiss." Doc 66 at 10, n. 2. The bulk of this material is presented through a declaration from Defendant Gourneau. Some of this information is not accurate or is subject to dispute. Most problematic is Gourneau's contention that she sought "clarification" about management reforms undertaken by NAT, but was provided

none, leaving her without "any indication from the tribes about how they intended to proceed to manage" shared programs. *Id*., pp. 11-12. In fact, Defendants had been presented with copies of the legislation promulgated by NAT to enact such reforms (6 N.A.C. 103, *et seq*., also available on Westlaw and northernarapaho. com), a copy of a FAQ sheet generated by NAT that summarized the purposes and effects of that legislation (Doc 78-1), and additional letters of explanation from the Northern Arapaho Business Council (Docs 78-2 and 78-3). The main thrust of this reform was fairly straightforward. Because of record-keeping problems and public confusion about the separate sovereign status of each Tribe, NAT would no longer issue governmental approvals related to shared programs on the old Joint Business Council ("JBC") form of resolution. Instead, NAT would provide such approvals through the preferred NAT form of resolution, through the Tribe's governmental headquarters in Ethete, Wyoming, where official records and governments records are maintained.

Having enacted these reforms, NAT proceeded to promulgate resolutions approving ISDEAA funding for the 2015-2016 contract cycle for each and every shared program. In contrast, SBC refused to provide such approval. Instead, SBC pressed BIA officials to adopt the view that NAT had no right to reform its participation in shared programs, that Eastern Shoshone Tribe ("EST") and NAT

were constrained by a "constitution,"[1] and that BIA should therefore give control of shared programs to EST acting on behalf of both Tribes through the JBC.

During this period, NAT was attempting to negotiate a Memorandum of Understanding with SBC about management oversight of shared programs. Both Councils exchanged drafts. But sometime in July, 2015, SBC withdrew from those negotiations. Upon information and belief, this was because SBC had indications from BIA officials[2] that Defendants would give control of shared programs to "SBC acting as JBC." Doc 73-2 at 8. Prior to proffering the Declaration upon which Defendants rely, Gourneau made statements that indicate the following: (1) Gourneau received an application from SBC acting as JBC to take control of the 638 contract related to the shared Tribal Court on September 25, 2015 (*id*. at 5); (2) no notice[3] of this was provided to NAT; (3) Gourneau made the decision to

[1] Additional background on the fallacious "constitution" is provided at Doc 17-1 at 22-24 and Doc 49 at 11-12. Exhibit 32 (attached hereto) also indicates that as of 1976, EST refuted the suggestion that the Tribes were governed by any constitution. The SBC members that authorized Exhibit 32 included current SBC member Robert "Nick" Harris and the father of current Chairman Darwin St. Clair, Jr. *But see* Doc 40 at 8 (the BIA "helped EST and NAT establish a Constitution and set of Bylaws in 1938").

[2] Gourneau denies that she was the official who gave that indication. Doc 73-2 at 14.

[3] This lack of notice and consultation completely disregards the core policy principle embodied in the ISDEAA, which is aimed at "assuring maximum Indian participation in the direction of . . . Federal services to Indian communities so as to

approve the application on September 30, 2015 (*id*. at 2); (4) Gourneau's decision bypassed NAT approval requirements; (5) Gourneau viewed the former JBC as "the legislative body" of the NAT (*id*. at 10); (6) Gourneau arrived at that conclusion without consulting any attorney for the United States because "those decisions are mine" (*id*.); (7) Gourneau had little or no understanding of Title 6 of the Northern Arapaho Code (Doc 1-3) – the legislation that prescribes the authority of NAT to participate in shared programs. *Id.* at 11.

There are significant indications that BIA officials had embarked on the illegal course of treating SBC acting as the former JBC as if it had authority to act on behalf of both Tribes prior to the decision described by Gourneau. *See, e.g*., Exhibit 33 (attached hereto) (August 20, 2015, email authorizing Kiva Consultants[4] to collect JBC records with no notice to NAT).

Contemporaneously, emboldened by such authorizations from BIA officials, SBC took steps to establish control over the Tribal Court. Upon information and belief, SBC sought to remove Chief Judge John St. Clair because of his track record of judicial independence. SBC arranged for the BIA through Defendant

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render such services more responsive to the needs and desires of those communities." 25 U.S.C. §450a(a).

[4] Upon information and belief, Kiva Consultants prepared 638 applications for SBC acting as JBC. No notice was provided to NAT.

Reyes to conduct a review or audit of the Tribal Court, which was conducted September 8-11, 2015. Ms. Reyes approached the review from several inaccurate premises, which are reflected in her report. Doc 40-1 at 10-32. The review also brought to light some significant problems in the administration of the Clerk of Court functions. BIA officials appear to have seized upon these issues as a rationale to award the ISDEAA contract for judicial services to "SBC on behalf of JBC." Doc 66 at 12. But, the notion that problems in Court administration might be addressed in this way violates both federal law (25 U.S.C. §450b(l)), and tribal law (that prescribes how judges and court employees are hired and retained).[5] Moreover, objectively, the decision to anoint SBC to reform the Court does not bear scrutiny. At that time, EST's most current audit (2013) had 21 separate audit findings. EST is currently delinquent in providing an audit for subsequent years.[6]

Defendants' representation that "contracts to SBC on behalf of JBC" were extensions issued on a "temporary basis" is not correct. Doc 66 at 12. Although Defendants never provided copies of the contracts to NAT, the contracts that NAT

[5] Judges are appointed to four-year terms and retained at elections; clerks are 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).

[6] *See* https://harvester.census.gov/facdissem/Main.aspx (Federal Audit Clearinghouse/Eastern Shoshone Tribe).

has now managed to acquire through FOIA are new contracts, not extensions. Ex. 21.

Since the contracts were awarded, information about management oversight of shared programs has not been forthcoming. Exhibit 34 (attached hereto) (Def. St. Clair rebuking finance staff for providing financial information on shared programs to NAT).

C. Plaintiff's Complaint.

Defendants offer a summary aimed at coloring Plaintiff's Complaint. Defendants contend the "vast majority" of the Complaint's allegations are directed at SBC Defendants and downplay the fact (and allegation) that the conduct at issue was under color of federal law pursuant to illegal authorizations from the BIA. Doc 66 at 12. Defendants seem to dispute the allegation that they are "imposing a form of government" on NAT against its will. *Id*., p. 13; *but see* Doc 73-2 at 10, Gourneau remarks: (1) "legislative authority with JBC;" (2) "those decisions are mine," ignoring 6 N.A.C. 1, *et seq*.

III. STANDARD OF REVIEW

"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*, 414 U.S. 661, 666 (1974).

IV. ARGUMENT

Defendants' argument has three main themes: (i) the U.S.'s sovereign immunity bars NAT's claim; (ii) tribal sovereign immunity bars claims for prospective and injunctive relief against officers of EST, even where they are acting under color of federal law, in violation of federal law; and (iii) under such circumstances, Fed.R.Civ.P. 19 effectively insulates the Defendants' unlawful conduct from judicial scrutiny. As set forth below, these arguments lack merit.

A. This Court has Subject Matter Jurisdiction Over Defendants.

"An extremely important and well-established exception to the principle of sovereign immunity is that suits against government officers are not barred. The Supreme Court long has allowed suits against officers who are allegedly acting in excess of their legal authority . . .". Erwin Chemerinsky, *Federal Jurisdiction*, §9.2.2, p. 661 (6th Ed. 2012), *citing Ex parte Young*, 209 U.S. 123 (1908). The U.S. has waived its sovereign immunity for prospective, equitable relief of this sort through 5 U.S.C. §702 (the Administrative Procedures Act), and through the federal common law doctrine which provides for equitable relief against federal

officers. *See Cobell v. Babbitt*, 30 F.Supp.2d 24, 31 (D.D.C. 1998); *Larsen v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 704 (1949); *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1328 (D.C. Cir. 1996) ("APA's waiver of sovereign immunity applies to any suit whether under the APA or not"); *Sea-Land Serv., Inc. v. Alaska R.R.*, 659 F.2d 243, 244 (D.C. Cir. 1981) (defense of sovereign immunity eliminated in actions for specific, non-monetary relief; legislative history explicitly states that the intent of the APA was to waive sovereign immunity in all equitable "actions for specific nonmonetary relief against a United States agency or officer acting in an official capacity"); *Aid Ass'n for Lutherans v. U.S. Postal Serv.*, 321 F.3d 1166, 1173 (D.C. Cir. 2003) (judicial review favored when an agency is charged with acting beyond its authority), *citing Dart v. United States*, 848 F.2d 217, 221 (D.C. Cir. 1988) ("when an executive acts ultra vires, courts are normally available to reestablish the limits on his authority").

Yet, Defendants contend (vaguely) that NAT's Complaint does not properly invoke "several federal question statutes"[7] or satisfy "standing requirements." Doc 66 at 15. Here, it is hard to know what Defendants mean. NAT's Complaint is fairly plain-spoken in alleging that Defendants violated federal law in giving EST

[7] Along with the ISDEAA, NAT's Complaint references 28 U.S.C. §§1331, 1343 and 1362.

control of contracts and resources that relate to ISDEAA services, which implicate NAT's sovereign interests and require NAT's approval.

Similarly, referencing Fed.R.Civ.P. 8(a), Defendants make the conclusory statement that NAT's Complaint is "woefully inadequate." Yet, Fed.R.Civ.P. 8(a) only requires a "short and plain statement" that is evaluated under notice pleading standards. NAT's Complaint provides a measure of factual detail that well-exceeds this threshhold. Given Defendants' failure to consult with or provide notice to NAT of much of the conduct at issue, one might view the level of detail in NAT's Complaint as rather robust.

1. *NAT can proceed under the ISDEAA.* Defendants invest more heavily in their next theory – that "NAT cannot pursue its claims under the ISDEAA." Doc 66 at 15. Defendants admit that the ISDEAA "provides federal courts with original jurisdiction" under 25 U.S.C. §450m-l(a), but then attempt to confine such cases to instances where "the agency's declination of a proposal for a 638 contract" is challenged. First, it is not accurate to suggest that NAT's claims arise from the ordinary circumstance where a Tribe has had an ISDEAA contract proposal declined. Defendants have ignored and violated NAT's sovereign and statutory rights to participate in ISDEAA decision making. 25 U.S.C. §450m-l(a) is not specific to "declination" and is, in fact, cast much more broadly to include

jurisdiction "over *any civil action or claim* against the appropriate Secretary arising under this subchapter [ISDEAA] . . ." (emphasis added). In conferring this jurisdiction for claims arising under ISDEAA, Congress was explicit in its purpose: to further empower federal courts to address BIA's "consistent failures over the past decade to administer self-determination contracts in conformity with the law." *Shoshone-Bannock*, 988 F.Supp. at 1315-16, citing 1987 Senate Report at 37. In light of this backdrop, it is fairly audacious for Defendants to suggest that clear violations of the ISDEAA do not come within the subject-matter jurisdiction of federal courts or are otherwise cabined off within BIA's discretion.

Next, Defendants seek to characterize the relief NAT seeks (again, narrowly)[8] as "recissions of the 638 contracts the BIA entered with SBC on behalf of JBC." Again, Defendants gloss over the fact that BIA violates 25 U.S.C. §450b(l) and 25 U.S.C. §476(f). Instead, Defendants are wholly occupied with conjuring barriers to judicial scrutiny. Defendants would have the Court believe that since the unlawful contract "has been awarded" (Doc 66 at 16) and claims related to the contract are "subject to" (*id*.) the Contract Dispute Act, NAT would therefore have to proceed under the CDA to pursue a claim related to an unlawful ISDEAA contract issued without NAT's approval. Yet this would be futile

[8] A broader discussion of the relief NAT seeks is provided below at p. 22.

because the CDA only permits claims brought by "a party to a government contract," not "third-parties" like NAT. *Id*., *citing NavCom Def. Elecs., Inc. v. Ball Corp*., 92 F.3d 877, 879 (9th Cir. 1996) (Air Force subcontractor has no CDA remedy). Boil this down, and you have a formulation of the law that would allow federal officials involved in issuing unlawful ISDEAA contracts to innoculate themselves against federal court scrutiny through the simple act of executing the unlawful contracts. This result make no sense and the law provides otherwise. *Council for Tribal Employment Rights v. U.S*., 112 Fed.Cl. 231, 249 (2013) (contracts in violation of this section are void *ab initio*); *Ewert v. Bluejacket*, 259 U.S. 129, 138 (1922) ("act done in violation of a statutory prohibition is void and confers no right upon the wrongdoer"). Both the statute and derivative case law clearly establish that, while the CDA is one of several procedural pathways that ISDEAA disputes may proceed through, it is not an exclusive remedy. *Shoshone-Bannock*, 988 F.Supp. at 1316.

Then, in a further expression of their abiding preference for unfettered discretion, Defendants contend that the ISDEAA features "presentment and exhaustion" requirements which are "mandatory." In support, Defendants cite 41 U.S.C. §7103 and related provisions of the CDA (which are probably more germane to claims brought by Air Force contractors), and 25 C.F.R. §900.219, an

ISDEAA regulation that pre-dates the current iteration of 25 U.S.C. §450m-l(a) and applies narrowly to claims that a Tribe has chosen to place before the Contract Appeals Board. These citations do not say that "presentment and exhaustion" are mandatory or otherwise displace the plain language of 25 U.S.C. §450m-l(a).

Defendants also cite three cases. The first, *Seneca Nation v. U.S. Dep't of Health and Human Servs.*, 2015 WL 7180514 * 1 (D.C.C. Nov. 13, 2015), does not hold that "presentment and exhaustion" are mandatory; it explains that under the ISDEAA, "if a dispute arises, tribal organizations may seek damages, injunctive relief or mandamus against the Secretary in federal court," and goes on to characterize several alternate pathways available under the ISDEAA. The CDA route and its associated presentment requirement apply most squarely to "complaints seeking a specific sum under a contract." *Id.*

Cloverdale Rancheria of Pomo Indians of Cal. v. Jewell, 593 F.App'x 606 (9th Cir. 2014) is an unpublished case where individual plaintiffs brought the ISDEAA claims complicated by standing considerations arising from "years of dispute about the governance of the Tribe following its restoration to federally recognized status." *Id.* at 608. Standing considerations were seen to undermine the plaintiffs' claims, and plaintiffs' APA claims were held not to be ripe. Unlike *Cloverdale*, there is no leadership dispute in NAT that triggers a standing question,

and NAT's case does not arise under the same provision of the APA.

In *Pueblo of Zuni v. U.S.*, 467 F.Supp.2d 1099 (D.N.M. 2006), the plaintiff Tribe pressed claims for money damages related to unpaid contract sums, some of which had been previously presented through the CDA, some of which had not. The Court construed 25 U.S.C. §450m-l(a) to require claims for money damages arising from unpaid contract sums to proceed through the CDA and distinguished *Shoshone-Bannock* on this basis. *Id.* at 1108-09. The ruling does not apply to NAT's case because there are no claims for money damages related to unpaid contract sums.

When considering Defendants' arguments about applicability of CDA procedures, one must not lose sight of Defendants' more fundamental contention – that NAT would be barred from presenting any claim through the CDA because, even though the law requires NAT's approval, NAT was not in fact a party to ISDEAA contracts issued to "SBC on behalf of JBC." Here again, Defendants' motives are plain – they don't want the Court looking behind the curtain.

2. *The APA does not prevent this Court from taking jurisdiction*. Defendants contend that the APA prevents this Court from considering NAT's claims. These arguments are not well-founded. Defendants' core contention is that their conduct of the federal defendants is "not final" (Doc 66 at 17, 20). But

this is subject to a caveat: "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 JBC . . .". *Id*. at 21. In light of this admission, it is hard to see what remains of Defendants' finality argument.

The contention that the ISDEAA contract were "temporary" does not bear scrutiny. The contract itself is not designated as "temporary." Doc 49-1 at 12. Under 25 U.S.C. §450j(c), it is contemplated that ISDEAA contracts have a finite term, which the unlawful contract to SBC as JBC does, but there is no authority for the suggestion that an ISDEAA contract to a tribal organization for a term is somehow "temporary" and therefore exempt from legal requirements like 25 U.S.C. §450b(l).[9] Viewed as a matter of common sense, what Defendants have done involves allocating millions of taxpayer dollars; management control of a Tribal Court that exercises territorial jurisdiction over approximately 2.3 million acres; and management control of a water resources board that regulates the allocation of hundreds of thousands of acre feet of irrigation flow. *See generally In*

[9] *See Cobell*, 30 F.Supp.2d at 34. ("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. As the courts of the D.C. Circuit have recognized in the analogous context of review of regulatory rulemaking, '[i]f the possibility of unforseen amendments were sufficient to render an otherwise fit challenge unripe, review could be deferred indefinitely.'").

re General Adjudication of All Rights to Use Water in the Big Horn River System, 753 P.2d 76 (1988). Yet Defendants deny that such action has "direct and appreciable legal consequences." Doc 66 at 19. These attempts to minimize the significance of their actions only underscore why federal court involvement is necessary.

The suggestion that "NAT did not exhaust administrative remedies" (Doc 66 at 18) also rings hollow. Defendants concealed from or mislead NAT (see Ex. 6 (Def. Black assured NABC no contracts would issue without consent of both Tribes.)) about their plan to award ISDEAA contracts to SBC as JBC, then ignored NAT's numerous entreaties to reconsider. In response, Defendants stuck stubbornly to their *ultra vires* course. Under these circumstances, Defendants are not entitled to any sort of administrative law "mulligan." Even in the context of record review cases, when federal officials are beyond their statutory authority, they are entitled to no discretion and the federal courts have jurisdiction to enjoin the conduct and oversee "the end of the matter." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) (the court as well as the agency must give effect to the unambiguously expressed intent of Congress). Congress spoke even more directly to the point when it promulgated 25 U.S.C. §450m-l(a) which removed exhaustion barriers for claims like NAT's. *Shoshone-Bannock*,

988 F.Supp. at 1315. Other suggestions that the actions at issue in this case were not sufficiently "final" (Doc 66 at 21) fail for the same reason – where the federal officials act beyond their discretion, they are entitled to no deference and sovereign immunity does not bar claims for declaratory and injunctive relief. *See Skinner & Eddy Corp. v. U.S.*, 249 U.S. 557, 562 (1919) (when contention is that agency "exceeded its statutory powers . . . courts have jurisdiction of suits to enjoin" the agency); *Leedom v. Kyne*, 358 U.S. 184, 188-89 (1958) (when suit is not to "review" agency action, but to strike it down as in excess of its delegated powers, exhaustion of administrative remedies is not required). *Assiniboine & Sioux Tribes of Fort Peck Indian Reservation v. Bd. of Oil & Gas Conservation of State of Montana*, 792 F.2d 782, 791 (9th Cir. 1986) ("claims that an agency has acted outside its statutory authority are reviewable").

B. Defendants Cannot Use Rule 19 to Hide Behind Their Contractor.

Defendants try to avoid judicial scrutiny through a delegation of authority to a contracting agent (SBC Defendants), claiming that the EST must but cannot be joined under Fed.R.Civ.P. Rule 19. Tribal contractors are deemed part of the BIA when they have contracted through an authorized ISDEAA contract. *See* 104 Stat. 1915 (1990) (codified at 25 U.S.C. §450f note). As such, it would make no sense to apply Rule 19 in the manner Defendants suggest. If allowed to dodge federal

law in this way, Defendants could unlawfully delegate their responsibility to provide services to one Tribe to officials of any other Tribe and defeat the intent of Congress.

Rule 19 requires joinder of persons subject to service of process if complete relief cannot be provided in their absence or the action may impede their interests or leave an existing party subject to substantial risk of incurring inconsistent obligations. If joinder is not feasible, the Court must determine under equitable principles whether the action should proceed in their absence.

1. *SBC Defendants not required*. The presence of SBC Defendants in the case at bar is not "required" for NAT to obtain complete relief as to claims directly related to the award and management of ISDEAA contracts or other illegal conduct sanctioned by the BIA and carried out under color of federal law. If Defendants are enjoined from issuing contracts to SBC "as JBC," then SBC Defendants will no longer be federal contractors illegally authorized to manage ISDEAA contract programs on behalf of NAT without its consent. As to those claims, complete relief may be obtained with or without SBC Defendants.

2. *SBC Defendants do not have a legitimate interest in violating federal law or the sovereign rights of NAT*. Furthermore, the "interest" that might be impeded if an action proceeds without a "required" party must be legally

protected. *Ramah Navajo School Bd. v. Babbitt*, 87 F.3d 1338, 1351 (D.C. Cir. 1996). Here, SBC has no such interest with respect to funds or services Congress intended for NAT. Nor does SBC have a legitimate interest in usurping the authority of NAT to operate its own programs or otherwise act on its own behalf.

3. *The U.S. can represent its ISDEAA contractor's interest*. Even if SBC's interests were legitimate, those interests are not impeded and this action may proceed without SBC when its interests are adequately represented by an existing party. Defendants take the same position with respect to NAT's claims that SBC does – that it may award ISDEAA contracts to SBC "as JBC." When the U.S. construes applicable law in essentially the same fashion as a nonparty Tribe, the action may proceed without that Tribe. *Ramah*, 87 F.3d at 1351, citing *Cassidy v. United States*, 875 F.Supp 1438, 1445 (E.D. Wash.1994); s*ee also Sac and Fox Nation of Missouri v. Norton*, 240 F.3d 1250, 1259 (10th Cir. 2001) (when the U.S. and Tribe have virtually identical interests, the U.S. can adequately represent the Tribe); *Heckman v. U.S.*, 224 U.S. 413, 444 (1912) (prejudice created by the relevant party's absence is mitigated or eliminated by the presence of a party who will represent the absent party's interest).

4. *There is no barrier to joining EST officials when their conduct is beyond their lawful authority*. If SBC were a "required" party whose legitimate

interests could be impeded in its absence, sovereign immunity does not prevent its joinder in this action. The core allegations regarding SBC Defendants is that they act beyond their lawful authority either as federal contractors or as officials of the SBC/EST. Defendants acknowledge that *Ex parte Young*, 209 U.S. 123 (1908), allows suits for prospective relief against government officials to stop ongoing violations of federal law. Doc 68 at 21, fn. 4. The *Ex parte Young* doctrine applies equally to officials of tribal governments. With regard to tribal officials, "tribal immunity does not bar such a suit for injunctive relief against *individuals*, including tribal officers, responsible for unlawful conduct." *Michigan v. Bay Mills Indian Community*, 134 S.Ct. 2024, 2035 (2014) (analogizing to *Ex parte Young* and citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978). The Supreme Court has explained that in determining whether the doctrine of *Ex parte Young* applies, "a court need only conduct a 'straightforward inquiry' into whether complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Maryland, Inc. v. Pub. Serv. Comm'n of Maryland*, 535 U.S. 635, 645 (2002); *Tenneco Oil Co. v. Sac and Fox Tribe of Indians of Oklahoma*, 725 F.2d 572, 574-75 (10th Cir. 1984) (when complaint alleges that named officer defendants have acted outside authority the tribal sovereign is capable of bestowing, an exception to the doctrine of sovereign

immunity is invoked). Here, NAT clearly alleges such conduct and seeks the corresponding relief. Doc 1 at 7, *et seq*.

Defendants assert that NAT seeks payment of funds from the EST "Treasury." Doc 66 at 25. This misconstrues NAT's prayer for relief. In conjunction with declaratory and injunctive relief, NAT seeks imposition of a constructive trust regarding funds or property of NAT, including funds and programs provided by Congress for the benefit of NAT and its members. Doc 1 at 24, ¶D. This relief is also within the parameters set forth under *Ex parte Young*. *See Florida Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670 (1982); *Hollywood Mobile Estates, Ltd. v.Cypress*, 415 F. App'x 207 (11th Cir. 2011). The accounting that NAT seeks (Doc 1 at 24-25) is also a proper remedy. *Cobell*, 240 F.3d at 1103. NAT's prayer for relief includes rescission, or, in the alternative, reformation of the ISDEAA contracts so they are entered into, and controlled by, both Tribes and the BIA. This alternative form of relief is also designed to protect the property interests of NAT from ongoing, unauthorized control by Defendants, and to preserve some flexibility in terms of structuring an appropriate remedy. *See* 17A Fed. Prac. & Proc. Juris. §4232 (3d ed.) (court can enjoin state officers from acting in violation of Constitution or federal regulation or statute that is "supreme law of the land").

5. *Equity counsels against a Rule 19 dismissal*. Even if SBC were a "required" party whose legitimate interests could be impeded in its absence, and Defendants could not adequately represent those interests, the Court should not dismiss the Complaint under applicable equitable principles. Generally, courts will not construe sovereigns to be indispensable parties unless the relief sought cannot be granted without significantly prejudicing the interest of the absent sovereign. *See Choctaw & Chickasaw Nations v. Seitz*, 193 F.2d 456 (10th Cir. 1952), *cert. denied* 343 U.S. 919 (1952). This principle reflects a weighty policy consideration: if unwilling sovereign litigants were considered "indispensable," the violation of certain federal rights would have no remedy. *Id*. at 460-61. This policy consideration is especially weighty where Indian Tribes appeal to the federal courts to defend their sovereign interests. *Sac and Fox Nation of Missouri*, 240 F.3d at 1260 (holding that district court abused its discretion in concluding that the Wyandotte Tribe was an indispensable party and noting that a court should be "extra cautious" before dismissing an action pursuant to Rule 19 if no alternative forum exists).

6. *Harnsberger*. Defendants rely on *Northern Arapaho Tribe v. Harnsberger*, 697 F.3d 1272 (10th Cir. 2012), in support of the theory that EST is an indispensable party. *Harnsberger* is *sui generis* in the body of law it arises

from. In *Harnsberger*, neither the U.S. or EST were sued. At the trial court level, Judge Brimmer *sua sponte* ordered the U.S. and EST to appear, then exercised discretion under Rule 19 to rule that sovereign immunity prevented their joinder. Classically, in disestablishment cases where Native American rights are infringed, federal courts have applied a "traditional solicitude" for the claims of an Indian Tribe. *Solem v. Bartlett*, 465 U.S. 463, 472 (1984). Reservation boundary questions have been straightforwardly addressed by federal courts in a myriad of factual contexts, without joinder of the resident Tribe or Tribes. *Id*. (habeas corpus); *see also Cohen*, §3.04[3], p. 199, *citing Mattz v. Arnett*, 412 U.S. 481 (1973) (confiscated gill nets).

On appeal, the Department of Justice joined the State of Wyoming in defending this application of Rule 19. Dismissal under Rule 19 had the effect of obscuring the way the U.S. was turning a blind eye to unlawful exercise of State jurisdiction within the exterior boundaries of the Wind River Reservation. DOJ subsequently took a position acknowledging that NAT was correct on the merits. http://www.indianz.com/News/2015/016184.asp.

Transposing this exercise of discretion under Rule 19 from *Harnsberger* onto the case at bar would encourage the view that violations of federal law on the Wind River Reservation are somehow beyond the reach of the judicial system.

NAT respectfully requests that the Court decline to exercise discretion in this way.

C. Defendants' Unlawful Conduct Gives Rise to Numerous Claims.

Defendants' Motion to Dismiss does not address NAT's claims under 25 U.S.C. §450b(l) or specifically attack NAT's right to seek declaratory and injunctive relief for violations of federal law. These violations (as described throughout), which comprise the core of NAT's Complaint, also give rise to the additional causes of action enumerated in NAT's Complaint. On a motion to dismiss for failure to state a claim under Fed.R.Civ.P. 12(b)(6), all allegations of material fact must be accepted as true and construed in the light most favorable to the nonmoving party. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996).

1. *NAT states an equal protection claim*. Defendants argue that NAT has failed to show that it is similarly situated to the former JBC and so cannot establish denial of equal protection. Doc 68 at 23. However, Defendants mix apples and oranges. The former JBC *included* NAT. Since its dissolution, SBC has pretended that the old "joint" council still exists and that it now consists of *only* the SBC. A quorum of only four members of the SBC purports to alter the membership and quorum requirements of the former JBC, resolving that "the Joint Business Council is now comprised of the Eastern Shoshone Business Council

with a quorum of four Eastern Shoshone Business Councilmembers and ESBC [SBC] will oversee all Joint Business Council issues." Resolution 2015-10770, Doc 40-1 at 56. The equal protection violation arises not from a comparison of NAT to the former "joint" council, but from Defendants' treatment of SBC as imbued with the power to govern not only itself, but NAT as well. NAT has, in fact, alleged that it (and its elected Business Council) is similarly situated to the EST (and its elected Business Council), but that SBC Defendants, as federal contractors, take unilateral actions affecting the legal interests of NAT without the consent of NAT. *See* Doc 1 at ¶¶7, 8, 15, 16, 22, 23, 28, 42, 43.

If SBC Defendants are not acting under color of federal law as federal contractors, then they are acting either in their capacities as officials of the SBC or, if their actions are not authorized by the SBC, then in their individual capacities. To the extent SBC Defendants act as tribal officials, they now purport to govern 10,000 members of NAT (through the defunct JBC), but deny them the right to vote in SBC elections. Defendants argue that the case at bar is unlike those where legislative districts within a single sovereignty violate the "one person, one vote" principle. Doc 68 at 24. But the course of action to which Defendants have committed has the same result in practice. Defendants deny the separate sovereign authority of NAT in an effort to consolidate both Tribes into a single unit

(legislative district), one in which only the SBC Defendants are empowered as federal contractors and act unilaterally for both Tribes through the former JBC. SBC violates the "one person, one vote" principle made applicable to tribes under 25 U.S.C. §1302. 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).

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. In *Goodface v. Grassrope*, 708 F.2d 335, 337 (8th Cir. 1983), election improprieties led to a dispute about which tribal council had been duly elected by members of the Lower Brule Sioux Tribe. The Circuit Court held "that the district court did have jurisdiction under 28 U.S.C. §1331 to review, pursuant to the APA, the action taken by the BIA in refusing to recognize either tribal council." *Id*. at 338. The Court then required the BIA to deal with one faction or the other while the election dispute was resolved. *Id*. at 339. *Alturas Indian Rancheria v. Salazar*, 2010 WL 4069455 (E.D. Cal. Oct. 18, 2010), followed *Goodface* when faced with a tribal membership and governance dispute within a single Tribe.

Here, there is no intra-tribal election dispute. NAT and EST are each separate federally recognized Indian Tribes. The former "joint" council has been

dissolved since September, 2014. Defendants have contracted with SBC to provide ISDEAA services to NAT without its consent and in clear violation of federal statutes and common law.

2. *NAT states a claim under 25 U.S.C. §476*. Defendants' brief does not respond to the merits of NAT's claim under 25 U.S.C. §476. 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 federally recognized Tribes (NAT and EST). Doc 68 at 25. In fact, Defendants have authorized SBC Defendants to provide federal services for NAT and its members, unilaterally control program management, control shared funds and assets, and purge Tribal Court staff and other program employees, all over the objections of NAT. The reason for treating the two Tribes differently is unclear at this stage in the proceedings, prior to discovery. But the fact that Defendants have made the distinction is abundantly clear, is expressly alleged in the Complaint, and is consistent with the facts revealed to date. This sort of violation of 25 U.S.C. §476 is actionable. *Akiachak Native Cmty. v. Salazar*, 935 F.Supp.2d 195, 197 (D.D.C. 2013).

3. *NAT states a claim for breach of trust*. 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 ¶¶37-38 (25 U.S.C. §450f(a)(1)); Doc 1 at ¶¶39, 41, 52, 53, 69, 70 (25 U.S.C. §450b(l)) and Doc 1 at ¶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. 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. *See Morton v. Ruiz*, 415 U.S. 199, 236 (1974). The U.S.'s "obligations are rooted in and outlined by the relevant statutes and treaties, [but] they are [also] largely defined in traditional equitable terms." *Cobell v. Norton*, 240 F.3d 1081, 1099 (D.C. Dir. 2001).

D. NAT States a Claim for Conversion.

NAT has pled that ISDEAA program funding and equipment in which NAT held an interest has been unlawfully commandeered. *See* Doc 1 at 18-20 (SBC took guns, ammunition and equipment from the shared Fish and Game Department). Conversion is recognized as a matter of federal common law and broadly involves the misappropriation or unauthorized use of property by another; for such conduct, a cause of action lies. *See generally* Restatement (First) of Restitution §138 (1937) (a fiduciary who has acquired a benefit by breach of duty

is under a duty of restitution), *id*. §128 ("Conversion and Other Tortious Dealings with Chattels"). Defendants' references to the Federal Tort Claims Act are inapposite because NAT does not seek money damages.

1. *Claims against unknown federal defendants should remain.* While Fed.R.Civ.P. 10 generally requires names of parties to be listed in the caption, the rule is subject to an exception. When a plaintiff cannot ascertain the true identity of a defendant at the time of filing the complaint, most federal courts typically will allow the use of a fictitious name in the caption, so long as it appears that the plaintiff will be able to obtain that information through the discovery process. 5A Fed. Prac. & Proc. Civ. §1321 (3d ed.); *Wakefield v. Thompson*, 177 F.3d 1160, 1163 (9th Cir. 1999).

Citing *Kentucky v. Graham*, 473 U.S. 159, 166 (1985), Defendants also contend that the named officers are most properly named in their official, rather than individual, capacity. But until discovery is undertaken or Defendants are more forthcoming about who was involved in these violations of federal law (and whether the federal government countenances the conduct), it is not a simple matter to determine who has done what in which capacity. In *ultra vires* cases, "chicken or the egg" dilemmas of this sort are not uncommon. *W.D. Martin v. Hodel*, 692 F.Supp. 637, 639 (W.D. Vir. 1988). While it is true that the distinction

between officers sued in their "official capacity" and "individual capacity" are terms of art that can cause confusion (*see Lawson v. Bouck*, 747 F.Supp. 376, 378-80 (W.D. Mich. 1990), these terms are legal constructs that serve an important purpose – to help ensure that government officials can be held accountable when they act in a manner that is *ultra vires.* At this stage, dismissal of individual capacity claims is not appropriate.

V. CONCLUSION

For the reasons set forth above, Defendants' Motion to Dismiss should be denied.

DATED May 19, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on May 19, 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 6,979 words, excluding the caption and certificates of service and compliance.

DATED this May 19, 2016.

/s/ Mandi A. Vuinovich
Mandi A. Vuinovich