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, Defendants.	No. 1:16-cv-11-BMM FEDERAL DEFENDANTS' REPLY BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS

I. INTRODUCTION

This intertribal dispute between the plaintiff Northern Arapaho Tribe ("NAT") and the Eastern Shoshone Tribe ("EST") over their administration of certain Bureau of Indian Affairs ("BIA") programs on the Wind River Reservation is currently–and appropriately–being addressed through mediation. This will hopefully resolve not only this litigation, but also produce a path forward for both the NAT and the EST that would eliminate the need for the BIA to reassume control over the programs and otherwise result in the loss of federal funding on the Reservation. Mediation is the only vehicle for such a global solution. To the extent, however, that this Court decides to rule on the present motions, it lacks subject matter jurisdiction over plaintiff's claims, and plaintiff fails to state a claim for relief.

II. ARGUMENT

A. The NAT Cannot Show An Applicable Waiver of Sovereign Immunity or Private Right of Action

This Court lacks subject matter jurisdiction over the NAT's claims because the Tribe cannot show an applicable waiver of sovereign immunity or an applicable cause of action that would allow its claims to proceed. Fed. Defs.' Br. in Supp. of Mot. to Dismiss ("MTD"), ECF No. 66; Pl.'s Opp'n ("Opp'n"), ECF No. 82.

1. The ISDA Does Not Provide a Waiver or Right of Action

The ISDA does not provide a sovereign immunity waiver and a private right of action for the causes of action plaintiff sets out in its complaint. Although the ISDA waives immunity and provides a right of action for "any civil action or claim … arising under [ISDA]," 25 U.S.C. § 450m-1(a), BIA regulations clarify that, without exhausting administrative remedies, such challenges are limited to "[a] decision to *decline* to award a self-determination contract," 25 C.F.R. § 900.150(a) (emphasis added), "[a] decision to *decline* a proposed amendment to a self-determination contract," *id.* § 900.150(a) (emphasis added), or "[a] decision *not to approve* a proposal, in whole or in part, to redesign a program." *Id.* § 900.150(d) (emphasis added). The NAT's opposition clarifies that none of its claims challenge such a decision. Opp'n at 11-14.

Where instead, as here, a plaintiff challenges existing self-determination contracts, the ISDA expressly requires that the Contract Disputes Act ("CDA") – and its mandatory exhaustion requirements–"shall apply." 25 U.S.C. § 450m-1(d).[1] BIA regulations clarify that the CDA applies to "[a]ll …DOI self-determination contracts . . . and [a]ll disputes regarding an awarding official's

[1] Contrary to the NAT's claim, Opp'n at 14, the CDA's exhaustion requirement is mandatory, including in the ISDA context. *E.g.*, *Pueblo of Zuni v. United States*, 467 F. Supp. 2d 1099, 1106-07 (D.N.M. 2006) ("exhaustion under the CDA is a jurisdictional requirement"). Moreover, the CDA applies to all challenges to self-determination contracts, not just those seeking money damages. 25 U.S.C. § 450m-1(d).

decision relating to a self-determination contract." 25 C.F.R. § 900.215(a). To the extent that the NAT contends that it seeks to bring its claims under the ISDA to challenge the award, and seek rescission, of existing self-determination contracts, the NAT must plainly comply with the CDA's claim presentment and exhaustion requirements, which it does not allege or contend that it has done.[2] The NAT thus cannot rely on the ISDA's wavier of immunity or its private right of action to proceed.

The NAT's attempts to evade the ISDA's requirements are unavailing. Legislative history, *see* Opp'n at 12 (citing *Shoshone-Bannock Tribes of Fort Hall Reservation v. Shalala*, 988 F. Supp. 1306, 1315 (D. Ore. 1997)), does not supersede the statute's plain language. Nor is there merit to the contention that the CDA does not apply in this context. Opp'n at 13. *See* 25 U.S.C. § 450m-1(d) (CDA "*shall* apply to self-determination contracts.") (emphasis added). And contrary to plaintiff's selective quoting, case law is not to the contrary. *Seneca Nation v. HHS*, No. 14-cv-1493, 2015 WL 7180514, at *1 (D.D.C. Nov. 13, 2015) (where complaint "advanc[es] any other claim relating to a contract," it "*must first be submitted* to the contracting office in accordance with the [CDA].") (emphasis added).

---

[2] The NAT cannot avoid the CDA's requirements by claiming that the 638 contracts violate statutory and constitutional provisions: the CDA applies to all claims, including constitutional ones, that "are predicated on a contract." *Tucson Airport Auth. v. Gen. Dynamics Corp.*, 136 F.3d 641, 648 (9th Cir. 1998).

2. The APA Does Not Provide a Waiver or Right of Action

Nor does the Administrative Procedure Act ("APA") provide a right of action or a waiver of sovereign immunity for the NAT's claims. While § 702 of the APA

> provide[s] a waiver of sovereign immunity …the APA's waiver …contains several limitations[, including] …§ 704, which provides that only "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court, are subject to judicial review."

Gallo Cattle Co. v. USDA, 159 F.3d 1194, 1198 (9th Cir. 1998) (quoting 5 U.S.C. § 704)); *see also Villegas v. United States*, 963 F. Supp. 2d 1145, 1156-57 (E.D. Wash. 2013).[3]

Federal defendants' opening brief demonstrated that any claim against the BIA must first be presented to and exhausted before the agency before it may be considered "final" agency action reviewable under the APA. *Villegas*, 963 F. Supp. 2d at 1157 (citing 25 C.F.R. § 2.6(a)). The NAT does not allege that it presented any of its claims to the BIA. Opp'n at 16-18. That is fatal to its ability to proceed under the APA.[4] "Plaintiff's failure to pursue agency remedies renders § 702's

---

[3] To be sure, "[t]he APA's waiver of sovereign immunity [also] applies where another substantive statute specifically authorizes review of agency action." *W. Shoshone Nat'l Council v. United States*, 408 F. Supp. 2d 1040, 1049 (D. Nev. 2005). Here, the only other potentially relevant form of review is 25 U.S.C. § 450m-1, which, as discussed earlier, is not available.

[4] The NAT appears to argue that exhaustion is not required under the APA. Opp'n at 18. None of the cases it cites support that claim. *Skinner & Eddy Corp. v. United States*, 249 U.S. 557 (1919) predates the APA by decades; *Leedom v. Kyne*, 358 U.S. 184 (1958) is not an APA case; and *Assinboine & Sioux Tribes of*

waiver of sovereign immunity inoperable; accordingly, the Court lacks jurisdiction to hear [its] APA claim." *Timbisha Shoshone Tribe v. Salazar*, 697 F. Supp. 2d 1181, 1188 (E.D. Cal. 2010); *see also Stock W. Corp. v. Lujan*, 982 F.2d 1389, 1393-94 (9th Cir. 1993) ("On three occasions, we have upheld the dismissal of lawsuits challenging BIA decisions under the [APA] on the grounds that plaintiff failed to take the required administrative appeal [based on] …the jurisdictional nature of the administrative appeal requirement.").[5]

In any event, even if this Court ruled that §702's sovereign immunity waiver applied, the NAT's claims would still be barred because the APA would not provide a cause of action here. *San Carlos Apache Tribe v. United States*, 417 F.3d 1091, 1094-99 (9th Cir. 2005). A right of action is a necessary element of any claim, and if the NAT's claims cannot be brought under the ISDA–and they cannot–the only available right of action is the APA. *Id.* Without complying with the APA's mandatory finality and exhaustion requirements, an APA does not provide the NAT with a right of action. *Id.* at 1096.

Fort Peck Indian Reservation v. Bd. of Oil & Gas Conservation of State of Mont., 792 F.2d 782 (9th Cir. 1986) merely concluded it "need not dwell upon the exhaustion issue, since, in fact, exhaustion has occurred." *Id.* at 790.

Federal defendants recognize that there is an intra-circuit split about whether the APA's waiver of sovereign immunity applies only to final (*i.e.*, exhausted) agency actions. *Gros Ventre Tribe v. United States*, 469 F.3d 801, 809 (9th Cir. 2006). Nonetheless, this Circuit has consistently held that exhaustion is required for tribal suits against the BIA. *See Stock W. Corp.,* 982 F.2d at 1393-94.

[5] Separate from the presentment failure–which is dispositive of *all* APA claims–the challenged actions with the exception of the 638 contracts are non-final actions, which do not constitute reviewable "final" action under *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997).

B. Rule 19 Requires the Dismissal of All Claims Against Federal Defendants That Involve the EST

The EST is an indispensable party to this case and Rule 19 therefore precludes this Court from exercising subject matter jurisdiction over the NAT's claims against federal defendants that concern the EST, *i.e.*, claims regarding 638 contracts to which the EST is a party. MTD at 21-28.

1. The EST is a Required Party

The NAT first claims that the EST is not a required party to this case, despite the fact that the present litigation seeks to rescind the EST's 638 contracts. This claim flatly contradicts controlling Ninth Circuit precedent that "a party to a contract is necessary, and if not susceptible to joinder, indispensable to litigation seeking to decimate that contract." *Ward v. Apple Inc.*, 791 F.3d 1041, 1053 (9th Cir. 2015); *see also Manybeads v. United States*, 209 F.3d 1164, 1166 (9th Cir. 2000) (where plaintiff sought to "undo[]" agreements to which tribe was a party, tribe "qualifie[d] as a necessary party under both parts of Rule 19(a)." *Kescoli v. Babbitt*, 101 F.3d 1304, 1310 (9th Cir. 1996). The EST is a party to all the contracts that the NAT seeks to rescind. It is therefore indispensable

Undeterred, the NAT advances the novel contention that, because the contracts are invalid, the EST has no legally protected interest in an action challenging the validity of the contracts. Opp'n at 19-20. The NAT's contention misconstrues the Rule 19 inquiry. "A plaintiff cannot avoid the requirements of

Rule 19 merely b[y] asserting that a party has no legally protected interest. Such circular arguments are unavailing." *Turley v. Eddy*, 70 F. App'x 934, 936 (9th Cir. 2003); *see also Am. Greyound Racing, Inc. v. Hull*, 305 F.3d 1015, 1024 (9th Cir. 2002) ("It is the party's *claim* of a protectable interest that makes its presence necessary.").

2. EST Officials Cannot be Joined Pursuant to *Ex parte Young*

While a tribal official ordinarily cannot be sued in her official capacity, there is a limited exception under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), when that official is allegedly violating a federal law, *and* when the requested relief would not run against the sovereign. MTD at 24-25. The NAT, however, fails to advance a colorable argument that the tribal defendants are violating *any* provision of a federal statute or federal common law. Opp'n at 22. Nor does the NAT rebut federal defendants' showing that the relief the NAT seeks would require the reformation or recession of the EST contract; relief which exceeds *Ex parte Young*'s reach. *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 256-57 (2011). Without satisfying both criteria, the NAT cannot bring an *Ex parte Young* action against tribal officials.

3. The United States Cannot Represent the EST's Interests in an Intertribal Dispute

Contrary to plaintiff's contention, *see* Opp'n at 20, the United States cannot represent the EST's interests in this dispute. The Ninth Circuit has repeatedly held

that "[i]n disputes involving *intertribal* conflicts, the United States cannot properly represent any of the tribes without compromising its trust obligations owed to all tribes." *Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456, 1460 (9th Cir. 1994); *see also Confederated Tribes of the Chehalis Indian Reservation v. Lujan*, 928 F.2d 1496, 1500 (9th Cir. 1991). The cases that the NAT cites all involve intra-tribal disputes, *see* Opp'n at 20, and are unavailing. Even if the interests of the United States and the EST are currently aligned, moreover, those interests could easily diverge in the future. *See White v. Univ. of Cal.*, 765 F.3d 1010, 1027 (9th Cir. 2014); *Cherokee Nation of Okla. v. Babbitt*, 117 F.3d 1489, 1497 (D.C. Cir. 1997).

4. Equity Does Not Counsel Against the Conclusion That the EST is Indispensable

Federal defendants' opening brief demonstrated that the EST is a required party, cannot be joined, and is so indispensable that the action must be dismissed. While Rule 19(b) provides several factors for a court to balance, the key is whether, as here, the party is sovereignly immune from suit: "when the [required] party is immune from suit, there may be very little need for balancing Rule 19(b) factors because immunity itself may be viewed as the compelling factor." *White*, 765 F.3d at 1028. This Court should ignore plaintiff's vague and unsupported appeals to equity. Contrary to plaintiff's contention, Opp'n at 23, the NAT could, and did, proceed under the ISDA against the BIA and the EST before the Interior Board of Indian Appeals. The NAT's voluntarily dismissal of that action does not

give it a right to proceed here. Moreover, even if the alternate forum did not exist, the NAT cannot surmount the "wall of circuit authority" concluding that "virtually all the cases to consider the question appear to dismiss under Rule 19, *regardless of whether a remedy is available*, if the absent parties are Indian tribes invested with sovereign immunity." *White*, 765 F.3d at 1028 (emphasis added).

C. Plaintiff's Complaint Fails to State a Claim

The NAT cannot pursue its remaining claims in the absence of an applicable waiver of immunity or cause of action. Even if it could, however, this Court should dismiss them for failure to state a claim on which relief can be granted.

1. The NAT Does Not State an Equal Protection Claim

The BIA's actions did not violate the Equal Protection Clause. MTD at 28-30. Government action passes muster under the Equal Protection Clause so long as there is "*any reasonably conceivable state of facts* that could provide a rational basis for the classification." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993) (emphasis added). In light of the sudden nature of the NAT's withdrawal from the JBC and the NAT's repeated statements that expected the shared programs to continue operating during the intertribal dispute, it was rational for the BIA to award—on a temporary basis—638 contracts to the SBC on behalf of JBC to manage the shared programs. In *Goodface v. Grassrope*, 708 F.2d 335 (8th Cir. 1983), the court recognized that in a situation where a tribal leadership dispute has

"jeopardized the continuation of necessary day-to-day services on the reservation…. [t]he BIA, in its responsibility for carrying on government relations with the Tribe, is obligated to recognize and deal with some tribal governing body in the interim." *Id.* at 339. While this continuity doctrine emerged in the context of *intra*-tribal disputes, as the NAT correctly notes, it was rational for the BIA to apply it to the unique situation on the Wind River Reservation–especially in light of the extreme disruption in services for members of both Tribes that would have occurred if the BIA was forced to immediately resume operation of the shared programs with little time to prepare. This rationale is all that is required. For even if federal defendants' "assumptions underlying [their] rationale[] may be erroneous, …the very fact that they are 'arguable' is sufficient …to 'immunize' the[ir] choice from constitutional challenge." *Vance v. Bradley*, 440 U.S. 93, 112 (1979).[6]

2. The NAT Does Not State a Claim under 25 U.S.C. § 476

Contrary to plaintiff's contention, 25 U.S.C. § 476(f) does not apply here because it only prevents the federal government from creating different *categories* of federally recognized tribes. 140 Cong. Rec. 11,234 (daily ed. May 19, 1994) (Statement of Sen. McCain) ("The purpose of [section 476(f)] is to clarify that [the

[6] While the NAT brings a "one-person, one-vote" claim, Opp'n at 26-27, it does not explain how the award of a contract is equivalent to the malapportionment of a legislative district, nor does it rebut authority rejecting one-person-one-vote challenges. MTD at 30 n.9.

statute] was not intended to authorize the Secretary of the Department of the Interior to create *categories* of federally recognized tribes.") (emphasis added); *see also* 25 U.S.C. § 476(f) (preventing differential treatment of federally recognized tribes "by virtue of their status as Indian tribes"). Because the NAT never alleges that the federal government is making *categorical* distinctions between the NAT and the EST, nor points to any in its opposition, Opp'n at 28, § 476(f) has no application here.

3. The NAT Fails to State a Claim for Breach of Trust

Cobell v. Norton, 240 F.3d 1081 (D.C. Cir. 2001), does not allow the NAT to proceed with its claims for breach of trust. Opp'n at 28-29. Unlike *Cobell*, the NAT cannot identify any tribal property held in trust by the United States that could be at issue here, let alone a fiduciary obligation that the United States owes to the Tribe. Quite simply, the NAT does not have a trust right to ISDA funds. *Hopland Band of Pomo Indians v. Jewell*, 624 F. App'x 562, 563 (9th Cir. 2015) ("Nothing in the [ISDA] is, however, reasonably read to impose on the United States a specific fiduciary obligation to approve the Tribes' contract applications or to allocate funding for [the tribe]"). Nor, contrary to plaintiff's contention, *see* Opp'n at 29, is there a common law right to sue for breach of trust. *See Gros Ventre Tribe*, 469 F.3d at 810-14. Thus, the NAT does not have a common law right to bring a breach of trust action for contract funds under the ISDA.

4. The NAT Fails to State a Claim for Conversion

The NAT's conversion claim against federal defendants fails. The NAT claims that "SBC took guns, ammunition and equipment from the shared Fish and Game Department." Opp'n at 29. But the subject of this sentence belays the inapplicability of this claim; by the NAT's own accusation, any conversion was wrought *by the SBC*, not federal defendants. Indeed, the NAT never alleges that the federal defendants took any improper actions with regard to any shared property or somehow "converted" program funds that were the BIA's to begin with. Nor can "[a]n asserted right to money …normally …support a claim for conversion. Only if the money at issue can be described as 'specific chattel,' in other words, a 'specific fund or specific money in coin or bills,' will conversion lie." *Horbach v. Kaczmarek*, 288 F.3d 969, 978 (7th Cir. 2002). Here, the NAT identifies no such specific monies.

D. Plaintiff's Individual Capacity and Unknown Defendant Claims Should Be Dismissed

Plaintiff does not seek any relief against any defendants in their individual capacity; they only seek relief against the federal government. Opp'n at 30-31. These individual-capacity claims should be dismissed.

Nor does the NAT's caption-only reference to "unknown defendants" suffice. Unknown defendant claims are proper only when the *existence* of a putatively liable person can be alleged, but her specific identity cannot be "known

prior to the filing of a complaint." *Gillespie v. Civiletti*, 629 F.2d 637, 642 (9th Cir. 1980). Here, plaintiff never alleges any facts necessary to support the conclusion that an unidentified, but real, liable party exists. If such a party is later discovered, the proper remedy is to move to amend the complaint, not keep a placeholder in the caption.

III. CONCLUSION

This Court should dismiss plaintiff's complaint.

Dated: June 3, 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 3,205 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 June 3, 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.