No. 16-36049

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Plaintiff-Appellee,

v.

DARRYL LaCOUNTE, LOUISE REYES; NORMA GOURNEAU; RAY NATION; MICHAEL BLACK; and OTHER UNKNOWN INDIVIDUALS, in their individual and official capacities,

Defendants-Appellants.

On Appeal from the United States District Court
for the District of Montana

BRIEF FOR APPELLEE

ANDREW W. BALDWIN
KELLY A. RUDD
MANDI A. VUINOVICH
Attorneys for Plaintiff-Appellee
Northern Arapaho Tribe
(307) 332-3385
Baldwin, Crocker & Rudd, P.C.
P.O. Box 1229
Lander, WY 82520

Table of Contents

Page

INTRODUCTION 1

JURISDICTIONAL STATEMENT 2

STATEMENT OF THE ISSUES 3

PERTINENT STATUTES AND REGULATIONS 3

STATEMENT OF THE CASE 3

Events in 2015 7

Events in 2016 8

SUMMARY OF THE ARGUMENT 15

STANDARD OF REVIEW 17

ARGUMENT 19

I. NAT's Claims for Injunctive Relief are Not Moot 21

A. The BIA has a Heavy Burden of Proof 21

B. Alleging That Past Illegal Acts Were Justified Does Not Make Them Less Likely to Recur 23

C. Gourneau's Letter Fails to Moot NAT's Need for Injunctive Relief 29

D. Surprisingly, BIA Contends That Its Regulations Limit Their Actions 32

Table of Contents

Page

E. NAT Established a Likelihood of Substantial and Immediate Irreparable Harm 35

F. The District Court was Legally Correct and Within Its Discretion in Granting Injunctive Relief 39

II. NAT Successfully Stated a Cause of Action for Prospective Relief 42

A. Breach of Trust 42

B. ISDEAA 48

C. Ultra Vires Claim 50

D. Privileges and Immunities 51

III. The Injunction is in the Public Interest 52

A. The District Court's Order is Clear 52

B. The Ninth Circuit's Contempt Standards Demonstrate the Disingenuousness of BIA's Fear of Contempt 56

C. The Public Interest and Balance of Equities Favor the Injunction 57

CONCLUSION 58

STATEMENT OF RELATED CASES

CERTIFICATE OF SERVICE

CERTIFICATE OF COMPLIANCE

Table of Authorities

Page

Cases

All. for the Wild Rockies v. Cottrell
632 F.3d 1127 (9th Cir. 2011) 18, 21

American Cargo Transp., Inc. v. United States
625 F.3d 1176 (9th Cir. 2010) 31, 39, 41

Assiniboine & Sioux Tribes of Fort Peck Indian Reservation v. Bd. of Oil & Gas Conservation of State of Montana
792 F.2d 782 (9th Cir. 1986) 50

Akiachak Native Cmty. v. Salazar
935 F.Supp.2d 195 (D.D.C. 2013), *on reconsideration in part sub nom. Akiachak Native Cmty. v. Jewell*,
995 F.Supp.2d 1 (D.D.C. 2013), *vacated on other grounds sub nom. Akiachak Native Cmty. v. United States Dep't of Interior*, 827 F.3d 100 (D.C. Cir. 201 6) 51

Bell v. City of Boise
709 F.3d 890 (9th Cir. 2013) 22, 39

Big Spring v. U.S. Bureau of Indian Affairs
767 F.2d 44 (9th Cir. 1985) 19

Cheyenne River Sioux Tribe v. Kempthorne
496 F.Supp.2d 1059 (D.S.D. 2007) 20

City of Los Angeles v. Lyons
461 U.S. 95 (1983) 37

City of Mesquite v. Aladdin's Castle, Inc.
455 U.S. 283 (1982) 21

Table of Authorities

Page

Cobell v. Norton
240 F.3d 1081 (D.C. Dir. 2001) 43

Council for Tribal Employment Rights v. U.S.
112 Fed. Cl. 231 (2013) 50

Dittman v. California
191 F.3d 1020 (9th Cir. 1999) 19

Dominguez v. Schwarzenegger
596 F.3d 1087 (9th Cir. 2010) 18

E.E.O.C. v. Karuk Tribe Hous. Auth.
260 F.3d 1071 (9th Cir. 2001) 16

Eastern Shoshone Tribe v. Northern Arapaho Tribe
926 F.Supp. 1024 (D.Wyo. 1996) 5

Ewert v. Bluejacket
259 U.S. 129 (1922) 50

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.
528 U.S. 167 (2000) 22

General Signal Corp. v. Donallco, Inc.
787 F.2d 1376 (9th Cir. 1986) 57

Gros Ventre Tribe v. United States
344 F.Supp.2d 1221 (D. Mont. 2004)
aff'd, 469 F.3d 801 (9th Cir. 2006) 44

Hopland Band of Pomo Indians v. Jewell
624 F. App'x 562 (9th Cir. 2015) 45

Table of Authorities

Page

In re Bello
622 F. App'x 663 (9th Cir. 2015) 19

In re Dual-Deck Video Cassette Recorder Antitrust Litigation
10 F.3d 693 (9th Cir. 1993) 56

In re Taggart
124 F.App'x 571 (9th Cir. 2005) 56

Johnson v. Couturier
572 F.3d 1067 (9th Cir. 2009) 18

Katie A. ex rel. Ludin v. L.A. Cnty.
481 F.3d 1150 (9th Cir. 2007) 17

Kiowa Indian Tribe of Oklahoma v. Hoover
150 F.3d 1163 (10th Cir. 1998) 36

Lahoti v. VeriCheck, Inc.
586 F.3d 1190 (9th Cir. 2009) 18

Los Coyotes Band of Cahuilla & Cupeno Indians v. Jewell
729 F.3d 1025 (9th Cir. 2013) 46, 47

M.R. v. Dreyfus
697 F.3d 706 (9th Cir. 2012) 18

Marceau v. Blackfeet Hous. Auth.
540 F.3d 916 (9th Cir. 2008) 48

Menominee Indian Tribe of Wisconsin v. United States
136 S.Ct. 750 (2016) 44

Table of Authorities

Page

Morongo Band of Mission Indians v. F.A.A.
161 F.3d 569 (9th Cir. 1998) 45

Morton v. Ruiz
415 U.S. 199 (1974) 43

Navajo Health Foundation-Sage Mem'l Hosp., Inc v. Burwell
No. CV 14-0958 JB/GBW, 2016 WL 7257245,
(D.N.M. Nov. 23, 2016) 20, 25

Northern Arapahoe Tribe v. Hodel
808 F.2d 741 (10th Cir. 1987) 4

Okanogan Highlands Alliance v. Williams
236 F.3d 468 (9th Cir. 2000) 45

O'Shea v. Littleton
414 U.S. 488 (1974) 37

Pom Wonderful LLC v. Hubbard
775 F.3d 1118 (9th Cir. 2014) 18

Prairie Band of Potawatomi Indians v. Pierce
253 F.3d 1234 (10th Cir. 2001) 36, 52

Pyramid Lake Paiute Tribe v. Burwell
70 F.Supp.3d 534 (D.D.C. 2014) 19, 26, 38

Ramah Navajo Sch. Bd., Inc. v. Babbitt
87 F.3d 1338 (D.C. Cir. 1996), *amended* (Aug. 6, 1996) 23, 25, 31, 40

Red Lake Band of Chippewa Indians v. Dep't of the Interior
624 F.Supp.2d 1 (D.D.C. 2009) 19

Table of Authorities

Page

Rosebrock v. Mathis
745 F.3d 963 (9th Cir. 2014) 22, 32, 39

Sac and Fox Nation of Mo. v. LaFaver
905 F.Supp. 904 (D. Kan. 1995) 52

Samish Indian Nation v. United States
419 F.3d 1355 (Fed. Cir. 2005) 47

Seminole Nation v. United States
316 U.S. 286 (1942) 47

Seneca-Cayuga v. Oklahoma
874 F.2d 709 (10th Cir. 1989) 36

Shoshone-Bannock Tribes at Fort Hall Reservation v. Shalala
988 F.Supp. 1306 (D.Or. 1997) on reconsideration 999 F.Supp.
1395 (D.Or. 1998) 25, 48, 49, 53

Spring v. U.S. Bureau of Indian Affairs
767 F.2d 614 (9th Cir. 1985) 42

Susanville Indian Rancheria v. Leavitt
No. CIV 07-259 GEB/DAD, 2008 WL 58951
(E.D. Cal. Jan. 3, 2008) 20

Thalheimer v. City of San Diego
645 F.3d 1109 (9th Cir. 2011) 18

Tohono O'odham Nation v. Schwartz
837 F.Supp. 1024 (D.Ariz. 1993) 35, 36

Trailer Train Co. v. State Bd. of Equalization
697 F.2d 860 (9th Cir. 1983) 38

Table of Authorities

Page

United States v. City and County of San Francisco
310 U.S. 16, 60 S.Ct. 749, 756–57, 84 L.Ed. 1050 (1940) 38

United States v. Concentrated Phosphate Export Assn.
393 U.S. 199, 89 S.Ct. 361, 21 L.Ed.2d 344 (1968) 18

United States v. Mitchell
463 U.S. 206 (1983) 48

United States v. W.T. Grant Co.
345 U.S. 629 (1953) 21, 35

Vertex Distrib., Inc. v. Falcon Foam Plastics, Inc.
689 F.2d 885 (9th Cir. 1982) 56, 57

White v. Lee
227 F.3d 1214 (9th Cir. 2000) 22, 32, 39

Winter v. Nat. Res. Def. Council, Inc.
555 U.S. 7 (2008) 20

Wyandotte Nation v. Sebelius
443 F.3d 1247 (10th Cir. 2006) 36

Statutes

6 N.A.C. 103(g)(1)(C) 5

25 U.S.C. §5123 . . . . . 16, 51

Table of Authorities

Page

Indian Self-Determination and Education Assistance Act:
- 25 U.S.C. §5301 *et seq.* 1
- 25 U.S.C. §5301(a)(1) 27
- 25 U.S.C. §5302 57
- 25 U.S.C. §5304(l) 9, 16, 20, 24, 27, 32, 33, 43, 50, 52, 53
- 25 U.S.C. §5321(a)(1) 43
- 25 U.S.C. §5321(a)(2) 25, 26, 49
- 25 U.S.C. §5321(a)(2)(B) 44
- 25 U.S.C. §5321(a)(4) 54
- 25 U.S.C. §5321(f) 43
- 25 U.S.C. §5324(i) 54, 58
- 25 U.S.C. §5324(i)(l) 24
- 25 U.S.C. §5330 46
- 25 U.S.C. §5331 . . . . . 15, 19, 23, 25, 41, 49
- 25 U.S.C. §5331(a) 2, 38, 49
- 25 U.S.C. §5331(d) 49
- 25 U.S.C. §5332 46

28 U.S.C. §1292(a)(1) 2

28 U.S.C. §1331 2

28 U.S.C. §1343 2

28 U.S.C. §1362 2

28 U.S.C. §1367(a) 2

28 U.S.C. §2201 2

Shoshone & Arapaho Law and Order Code:
- S&A LOC §1-3-2 9
- S&A LOC §1-3-5 9

Table of Authorities

Page

Regulations

25 C.F.R. Part 11 13

25 C.F.R. §11.100 . . . . . 12, 13, 14, 15, 33

25 C.F.R. §11.102 13

25 C.F.R. §11.104(a) 15, 33

25 C.F.R. §11.201(a) 12, 14, 15, 33

25 C.F.R. §900 Subpart E 37

25 C.F.R. §900.4(b). 44

25 C.F.R. §900.6 . . . . . 34, 35

25 C.F.R. §900.8 35

25 C.F.R. §900.12 33

Other Authorities

81 Fed. Reg. 74675 (Oct. 27, 2016) 33

81 Fed. Reg. 74809 (Oct. 27, 2016) 33

Annual Report, Commissioner of Indian Affairs to
the Secretary of the Interior for the year 1878,
Washington: Government Printing Office 4

Table of Authorities

Page

Cohen's Handbook of Federal Indian Law, 2012 Ed.*:*
§3.02[3] 4
§4.01[1][a] 57
§5.03[1] 37

H.R. Rep. No. 103-781, 103rd Cong. 2d Sess. (1994) 4

https://www.merriam-webster.com/dictionary/multi 53

http://trib.com/lifestyles/recreation/new-interior-secretary-zinke-sets-sights-on-balance/article_a60311c6-7dd1-5f6c-a40c-528fd9c91093.html 59

S.Rep. 100-274 (1988) 22, 23, 26, 34, 38, 40, 41, 44, 46, 54

INTRODUCTION

The Bureau of Indian Affairs ("BIA")[1] violated express provisions of a statute for more than a year and now asks the Court to trust the agency because, after Plaintiff filed suit, it wrote a letter promising not to violate the statute again. Incredibly, BIA contends both that its promise renders the preliminary injunction moot and that it needs to take future actions free from the constraints of "ambiguities" it now discovers in its promise. Rather than apply a common sense reading of the injunction or seek a clarification from the court that issued it, BIA institutes this appeal. BIA argues that now it can be trusted because its regulations will prevent repeat abuses, even though the agency has plowed a swath of those regulations in order to avoid their requirements with respect to the Northern Arapaho Tribe ("NAT").

NAT's rights to self-determination and tribal sovereignty have been repeatedly ignored and truncated by the BIA, not because the facts required it, but because BIA "apparently considered it easier" than complying with the ISDEAA.[2] ER 3. Because of past bureaucratic "recalcitrance," Congress has empowered district courts to provide injunctive relief for violations of the ISDEAA and tightly

---

[1] For clarity and ease of identification, NAT refers to Appellants as "BIA."

[2] Indian Self-Determination and Education Assistance Act, 25 U.S.C. §5301 *et seq*.

circumscribed BIA's discretion. Under the statute, BIA is not entitled to the deference typically provided to government agencies.

The "ambiguity" BIA now discovers in its own promise to NAT is currently before the District Court on cross-motions for summary judgment. (Those motions ask the Court to adjudicate which of the ISDEAA contract services at issue may be provided to each Tribe by each Tribe separately.) This Court should uphold the preliminary injunction and allow the District Court to adjudicate any remaining "ambiguity" BIA now finds in its promise to the NAT.

JURISDICTIONAL STATEMENT

BIA correctly states that NAT asserted jurisdiction in the District Court under 28 U.S.C. §§1331, 1343, 1362 and 2201. ER 96-97, ¶ 3. The District Court also asserted supplemental jurisdiction under 28 U.S.C. §1367(a). ER 15. More narrowly, the District Court also determined that it could review the alleged *ultra vires* actions of the BIA. ER 7-8. Likewise, the Court found that it had subject matter jurisdiction under the ISDEAA. 25 U.S.C. §5331(a). ER 8-11.

The District Court entered its preliminary injunction on October 17, 2016. ER 24. BIA filed a notice of appeal on December 15, 2016.

This Court has jurisdiction under 28 U.S.C. §1292(a)(1).

STATEMENT OF THE ISSUES

1. Whether the District Court ruled correctly when it found that the "Gourneau Letter" lacked sufficient legal force to render the NAT's concerns moot.

2. Whether the District Court correctly found that NAT stated a cause of action.

3. Whether the District Court correctly found that the public interest and balance of equities weigh in favor of granting the injunction here, where NAT faces the threat of injury to tribal sovereignty and loss of self-determination, and because Ninth Circuit law protects parties from contempt where they act under a good faith, reasonable interpretation of the law.

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes and regulations are reproduced in the addendum to this brief. Except for the following, all applicable statutes, etc., are contained in the brief or addendum of Appellants, DktEntry 11-1.

STATEMENT OF THE CASE

Since 1878, the United States has made the Wind River Reservation home

for NAT and the Eastern Shoshone Tribe ("EST").[3] Each Tribe has distinct rules for tribal membership and separate forms of government. Each has its own treaties and is recognized separately by the United States.[4] "*Each tribe governs itself separately* by vote of the tribal membership at general council meetings or by vote of its elected business council." *Northern Arapahoe Tribe v. Hodel*, 808 F.2d 741, 744 (emphasis added) (10th Cir. 1987). Separate self-governance includes separate General Councils (bodies comprised of members of the Tribe meeting as a group), membership rolls, membership criteria, elected Business Councils, internal governing documents, tribal codes, federal contracts, intergovernmental compacts with the State of Wyoming, and regulatory bodies (e.g., gaming agencies, child support enforcement, housing authorities). No member of one Tribe may vote, hold office or legislate on behalf of the other. Despite federal efforts over the years, both Tribes have rejected efforts to adopt a joint constitution that would

[3] The Shoshone Tribe first actually settled at Wind River in 1871, and thereafter agreed to admit several other bands, lodges and members of other Tribes. In 1877, they consented to admit the Northern Arapaho. After a Northern Arapaho delegation traveled to Washington, D.C., the United States confirmed the arrangement. Annual Report, Commissioner of Indian Affairs to the Secretary of the Interior for the year 1878, Washington: Government Printing Office, at 148.

[4] Federal recognition "imposes upon the Secretary of the Interior specific obligations to provide a panoply of benefits and services to the tribe and its members" and "establishes tribal status for all purposes." H.R. Rep. No. 103-781, 103rd Cong. 2d Sess., at 3 (1994). *See also Cohen's Handbook of Federal Indian Law* §3.02[3] at 134 (2012 ed.).

consolidate their respective governments. *Eastern Shoshone Tribe v. Northern Arapaho Tribe,* 926 F.Supp. 1024, 1032 (D.Wyo. 1996), hearing transcript excerpt, Vol. II, pp. 131-32. SER 3-4.

Today, approximately 10,100 NAT members and 4,100 EST members depend on the provision of certain contract services under the ISDEAA. SER 6. NAT tribal members constitute at least 70% of the tribal members being served by these contracts.[5]

Despite the lack of a Constitution or Bylaws, the federal government historically has pressured NAT and EST to meet in joint session. The federal government ultimately referred to this combined group as the Joint Business Council ("JBC"). SER 22. The Tribes were equally represented on the JBC,[6] and later provided approvals for ISDEAA contracts through JBC resolutions. Affirmative votes from a majority of the members of *both* the Shoshone Business Council ("SBC") *and* the Northern Arapaho Business Council ("NABC") were required for action to be approved for both Tribes. SER 9. No single Tribe was

---

[5] As much as 85% of those served by the Shoshone and Arapaho Tribal Court are members of the NAT. (SER 15, Testimony of Judge St. Clair, September 14, 2016 hearing.)

[6] S*ee* 6 N.A.C. 103(g)(1)(C), included in NAT's supplement hereto as well as at SER 36. This and other titles of the Northern Arapaho Code are available on Westlaw and northernarapaho.com.

authorized to act on behalf of the other without its consent. *Id*. In that manner, JBC served as one means (one "tribal organization") through which both Tribes could carry out certain ISDEAA contracts cooperatively, providing ISDEAA services to members of each Tribe. These contracts included ones for judicial services, transportation, game and fish, and water resources. SER 7.

Though favored by the BIA, the old JBC system was fraught with persistent financial and management problems for the Tribes. On September 9, 2014, NAT withdrew from the JBC because of significant, long-standing dysfunction in JBC management structures and threats to NAT's tribal sovereignty created by the ill-defined structure of the JBC. SER 20, SER 42. Immediately thereafter, NAT notified Defendant Gourneau of the JBC's dissolution and that ISDEAA (sometimes called "638") contracts could continue as before, except that approvals would be required from each Business Council meeting separately instead of through the JBC format. SER 67, ER 39. NAT also notified Defendant LaCounte. SER 68-69. Withdrawal from that system did not signal a refusal to work cooperatively with the EST – quite the opposite. NAT expected most of the programs shared by the Tribes at that time to continue to operate cooperatively, with approval by each Council, just not through the JBC format. SER 21, SER 67-68. As it turns out, the EST and BIA have resisted cooperation outside of the

old process.

When 638 contracts for programs that had been shared were expiring on September 30, 2014, the BIA extended them to March 30, 2015, and a second time to September 30, 2015. SER 40. During that period, NAT worked to develop a Memorandum of Agreement ("MOU") with the EST and BIA regarding the management of these shared programs, but no agreement was reached. SER 70.

Events in 2015

On September 25, 2015, purporting to represent both Tribes through the former JBC, the EST submitted applications for the next cycle of ISDEAA programmatic funding. Only days later, on September 30[7] (SER 40-41, 43-44), *more than a year after it had notice of the JBC's dissolution*, and without notice to or approval from NAT, the BIA awarded a contract for judicial services to the "Eastern Shoshone Business Council on behalf of the Joint Business Council." ER 90. BIA awarded this and other ISDEAA contracts to the SBC to unilaterally manage programs for both Tribes. BIA claimed that the SBC was clothed in the robe of the former "joint" council acting on behalf of both the SBC and the NABC – that SBC was two councils, and not merely one. *Id.*

On October 6, Superintendent Gourneau met with the NABC to advise tribal

[7] Other documents show the date as October 1, 2015.

leaders of her decision to award judicial services and other ISDEAA contracts to SBC as if it were the former JBC. SER 39-40. NABC voiced objections to this. Gourneau indicated the decision was "mine" to make. *Id*. at SER 48. Gourneau indicated a lack of familiarity with the laws of the Tribe. *Id.* at SER 49. Gourneau also stated that she had not consulted with any lawyer for the federal government in the process of reaching this decision. *Id.* at SER 48. Tribal leaders asked Gourneau to reconsider that decision. *Id.* at SER 51.

Twice in late 2015, NABC met in Washington, D.C., with the Director of the BIA at that time, Defendant Michael Black. Each time, NABC objected to BIA approval of any contracts to the "SBC as JBC." Each time, the BIA assured NAT that shared federal contracts, program expenditures, policies, and other management decisions would continue to require the approval of both Tribes. ER 120-121.

Events in 2016

In February, 2016, SBC began unilaterally advertising Tribal Court jobs, including that of the Chief Judge, other judges, prosecutors, public defender, clerks, and other staff.[8] SBC characterized its effort as "restructuring" and

[8] Contrary to the notice provided by these job announcements, Judges, prosecutors, court administrator, and juvenile and probation officers may be removed from office only for "neglect of duty or gross misconduct" after notice

"reorganizing" the shared Tribal Court system without input from NAT, saying SBC "engaged in actions *required by the BIA* Program Review" (emphasis added). SER 75.[9] BIA Defendant Reyes is a primary author of the BIA Review.

Unilateral "restructuring" of the Tribal Court by SBC and BIA made it clear that despite the express promises of Defendant Black, and a clear precondition to contracts awarded under ISDEAA,[10] BIA was committed to its illegal course of action. NAT filed suit to protect its sovereign and federal statutory rights on February 22.

On March 4, NAT filed a motion for preliminary injunction seeking relief that, in part, would bar EST from unilaterally restructuring the Tribal Court system on behalf of both Tribes. SER 82.

On March 15, in response to NAT's motion for preliminary injunction, Defendant LaCounte promised that the BIA would not authorize, approve or ratify

---

and hearing. Shoshone and Arapaho Law and Order Code ("S&A LOC") §1-3-5. Judges are appointed to terms of office and subject to retention elections under the. S&A LOC §1-3-2. The S&A LOC is available on Westlaw and shoshone-arapaho-tribal-court.org.

[9] SBC cited to a BIA report that criticized perceived shortcomings in the Court itself. The Court was responsive to the BIA report and subsequently made adjustments in certain administrative functions. SER 76.

[10] 25 U.S.C. §5304(l), and other provisions of ISDEAA, discussed in more detail elsewhere in this brief.

SBC contracts for formerly shared programs or SBC decisions regarding programs, assets or property of NAT without NABC's approval. SER 88-90.

On April 6, in reliance on this promise, the parties requested and the District Court later granted (SER 91) a stay of proceedings to allow them to continue on-going efforts to settle the litigation.

SBC refused to participate in mediation unless it was dismissed from the suit. On May 20, NAT voluntarily dismissed SBC as a party so that SBC would join the mediation. All parties agreed that mediation should be assisted by retired Minnesota District Judge and sitting White Earth Nation Tribal Court Chief Judge Robert Blaeser. By mid-July, Mediator Blaeser concluded that mediation had failed and openly placed the blame with the SBC. SER 97. The parties made several further efforts to work toward settlement in August, without success. NAT and BIA notified the District Court of these developments on September 1. *Id.*

In a breach of LaCounte's promises, the BIA issued a second Tribal Court Review/Report on July 29 which ratified the defunct JBC as having authority to govern the judiciary for both Tribes. The BIA Report acknowledged that SBC alone would be "restructuring" the court (SER 106), questioned the adoption of court rules by the Chief Judge "without approval of the JBC," (SER 118), and urged the defunct JBC to immediately address procedures for emancipation of

children (SER 119). The BIA Report approves of numerous actions taken by the SBC as JBC and recommends additional changes in court administration be made by the SBC, acting for both Tribes. Defendant Nation addressed the report to the Chairman of the nonexistent JBC. SER 98.

On August 3, Defendant Gourneau wrote that, as of September 30, BIA would no longer authorize or fund ISDEAA program services carried out through "SBC acting as JBC." ER 35 ("Gourneau letter"). That letter indicates that in the absence of an agreement between both Tribes, the BIA will not provide funding to either Tribe for programs that were previously shared. *Id.*

In another breach of LaCounte's promises, on August 18, the BIA Police enforced "lay off" notices issued unilaterally by the SBC to the entire staff of the Tribes' Joint Finance Office (JFO). SER 122-124, SER 131-132, SER 138. Previously, the JFO had provided financial management oversight for the shared tribal programs. SER 122.

In yet another breach of LaCounte's promises, BIA endorsed SBC's control, as ISDEAA program administrators, of monies which belong to the NAT (fees and fines collected through the Fish and Game program and Tribal Court). SER 129 and SER 18-19. This misappropriation of federal funds, designated by Congress for the NAT, continued from November, 2015, to at least September 2, 2016, thirty

(30) days *after* the "Gourneau letter." SER 129.

The District Court heard NAT's Motion for preliminary relief (SER 82) on September 14. NAT was concerned that despite regulatory and other prohibitions, BIA might be considering the imposition of a CFR Court on the NAT, and so NAT presented testimony and argument on that issue. Counsel for BIA informed the Court that so long as a Tribal Court continued, it would be "unnecessary" to establish a CFR Court. SER 14.

After the September 14 hearing, NAT learned that BIA had transferred $1,393,318 in federal funds to the "SBC as JBC" for operation of the Tribal Court. SER 142. Also after that hearing, NAT learned that SBC Chairman Darwin St. Clair had transferred at least $989,500 of those funds to a bank account controlled solely by the SBC. SER 144.

Two weeks after the hearing, on September 30, the Principal Deputy Assistant Secretary - Indian Affairs to the Acting Director, BIA, requested a "waiver of 25 C.F.R. 11.100 and 11.201(a) and any other applicable regulations in 25 CFR" that would otherwise prevent BIA from imposing a CFR Court system on the NAT. SER 147. NAT was not informed and did not learn of this maneuver until October 18. SER 165-166 and 181.

During 2016, NAT submitted ISDEAA contract proposals to serve *only the*

NAT for four formerly shared programs (judicial, water resources, fish and game, and "Meadowlark" youth drug counseling). All were denied and NAT appealed pursuant to the ISDEAA. SER 148 (Amended Complaint, October 13, 2016).

BIA revealed to NAT that it intended to impose a judicial system on the Wind River Reservation as set forth in 25 C.F.R. Part 11 ("CFR" courts).[11] SER 160. Imposition of the system on the NAT would violate these regulations. The CFR Court system would displace the existing Tribal Court system and represent a significant change in the status quo.

The District Court granted NAT's first motion for preliminary relief on October 17. ER 1. Shortly thereafter, NAT filed for additional preliminary relief that would bar BIA from imposing its CFR court on the NAT. SER 161.

On October 18, NAT learned that BIA had, in fact, waived its own regulations regarding imposition of a CFR Court. Prior to the waiver, the regulations did not permit imposition of a CFR court on the Wind River Reservation, with respect to NAT, which has authorized the Tribal Court system

---

[11] When judicial services are provided directly by the BIA and not through an ISDEAA contract, they are provided through a "Court of Indian Offenses" or "CFR" court governed by 25 C.F.R. Part 11. However, the BIA is not authorized to establish a CFR court to provide judicial services where, as here, tribal courts have been established. 25 C.F.R. §11.102. In addition, CFR courts are only authorized with respect to the tribes specifically listed in the regulations and NAT is not among those listed tribes. 25 C.F.R. §11.100.

since 1987. Defendant Gourneau delivered to NAT a memorandum from then Principal Deputy Assistant Secretary - Indian Affairs to the Acting Director, BIA. SER 146. The memorandum had been approved on September 30, 2016. The memo requested a "waiver of 25 C.F.R. 11.100 and 11.201(a) and any other applicable regulations in 25 CFR" on the premise that as of October 1, 2016, "there will be *no Judicial System operational to protect the health and safety of the community*." (Emphasis added). *Id*. Ironically, in her letter to Tribal Court Chief Judge John St. Clair that same day, Gourneau recognized that NAT continues to operate its Tribal Court, and has the right to do so. SER 166. Gourneau even requested protocols for the transfer of cases from the CFR to the Tribal Court for those cases involving the NAT or its members. *Id.*

On October 28, Gourneau delivered a demand to Judge St. Clair that he and all 24 Tribal Court personnel vacate the courthouse by midnight that Sunday, October 30. Gourneau had earlier requested discussion about how the Tribal Court would vacate the courthouse, claiming it belonged to the United States. BIA has provided no deed or other title in support of its claim (BIA controls the Land Titles and Records Office - LTRO - located in Billings, Montana). SER 165. Subsequently, NAT provided the District Court with evidence that the Tribes own that property. Removal of the Tribal Court from the courthouse would prove to be

highly disruptive. SER 171.

On November 21, NAT provided comments to the Assistant Secretary outlining why BIA's waiver of its own regulations was *ultra vires*. SER 173-182. BIA argued that it has "emergency" powers to violate or waive 25 C.F.R. §§11.100, 11.104(a) and 11.201(a) in order to displace the NAT Tribal Court system. Subsequently, BIA admitted that NAT may operate its Tribal Court alongside the CFR Court, which BIA operates to provide services to the EST. SER 166. BIA has not yet succeeded in removing the Tribal Court from its courthouse.

NAT's second motion for injunctive relief, directed at imposition of the CFR Court (not at issue in this appeal), was denied on March 7, 2017, on grounds that the allegations in the Motion fall outside the Complaint, which was filed before BIA sought to impose a CFR court or evict the Tribal Court.

SUMMARY OF THE ARGUMENT

Because 25 U.S.C. §5331 expressly authorizes what would otherwise be considered equitable relief, Tribes need not demonstrate the traditional equitable grounds – only that the agency has violated the ISDEAA.

Even if the traditional injunction standards applied, NAT has established all four elements. Defendants have failed to demonstrate that the District Court based its decision either on an erroneous legal standard or on clearly erroneous findings

of fact. Circumstances do not render ISDEAA inapplicable to the NAT. NAT is likely to succeed on the merits, particularly given that BIA has effectively acknowledged it violated the ISDEAA, 25 U.S.C. §5304(l). BIA efforts to cast NAT's claim as moot fall short. Incredibly, BIA contends both that its promise to abide by the ISDEAA renders the preliminary injunction moot and that it needs to take future actions free from the constraints of that promise. Express provisions of ISDEAA and relevant regulations failed to prevent BIA's clear violations and its promise to now refrain from its illegal activities is only months old.

Injury to tribal sovereignty is irreparable, particulary where, as here, the agency authorizes the delivery of governmental funds, property and services to the NAT by another tribe, without NAT's consent. *See e.g., E.E.O.C. v. Karuk Tribe Hous. Auth.*, 260 F.3d 1071, 1077 (9th Cir. 2001).

The District Court correctly found that NAT had a likelihood of success on its claims for breach of trust. Alternatively, NAT has also shown a likelihood of success on its ISDEAA claim for injunctive relief to prevent violations of the Act as applied to NAT, an *Ex Parte Young* style action based on Gourneau's *ultra vires* approval of contracts in violation of 25 U.S.C. §5304(l), NAT's claim for violation of privileges and immunities protected in 25 U.S.C. §5123, and NAT's claim for equal protection.

The public interest and balance of harm factors likewise weigh in favor of the injunction. Congress concluded that injunctions are a vital means of achieving the public interest and are a favored remedy under the ISDEAA. Furthermore, following a long record of "bureaucratic recalcitrance" in complying with the ISDEAA, Congress narrowly circumscribed BIA's authority. As a result, BIA does not retain the discretion that it might have under other statutes.

Finally, BIA claims that a fear of being found in contempt hinders future ISDEAA contracting. But courts in the Ninth Circuit will not find a party in contempt if it acts in good faith and applies a reasonable interpretation of an order.

BIA claims that an "ambiguity" it has found in its own promise, which formed the basis of the Injunction, hinders BIA's provision of services. But BIA's denial of contract proposals immediately prior to the Injunction use the same language. BIA cannot credibly contend that the Injunction is the source of its new found concern.

STANDARD OF REVIEW

Courts review an order granting a preliminary injunction for an abuse of discretion. *See Katie A. ex rel. Ludin v. L.A. Cnty.*, 481 F.3d 1150, 1155 (9th Cir. 2007). "Under this standard, [a]s long as the district court got the law right, it will not be reversed simply because the appellate court would have arrived at a

different result if it had applied the law to the facts of the case." *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1115 (9th Cir. 2011) (alteration in original) (quoting *Dominguez v. Schwarzenegger*, 596 F.3d 1087, 1092 (9th Cir. 2010)). "This review is 'limited and deferential,' and it does not extend to the underlying merits of the case." *Johnson v. Couturier*, 572 F.3d 1067, 1078 (9th Cir. 2009).

"To determine whether a district court abused its discretion ... we review factual findings for clear error. [*All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011)]. Clear error results 'from a factual finding that was illogical, implausible, or without support in inferences that may be drawn from the facts in the record.' *M.R. v. Dreyfus*, 697 F.3d 706, 725 (9th th Cir. 2012) (internal quotation marks omitted). In other words, we defer to a district court's factual findings unless, 'based on the entire evidence,' we are left with 'a definite and firm conviction that a mistake has been committed.' *Lahoti v. VeriCheck, Inc*., 586 F.3d 1190, 1196 (9th Cir.2009) (internal quotation marks omitted)." *Pom Wonderful LLC v. Hubbard*, 775 F.3d 1118, 1123 (9th Cir. 2014).

"The 'heavy burden of persua[ding]' the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness." *United States v. Concentrated Phosphate Export Assn*., 393 U.S. 199, 203, 89 S.Ct. 361, 21 L.Ed.2d 344 (1968).

This Court may affirm the District Court on "any ground supported by the record, even if the District Court relied on different reasons." *Big Spring v. U.S. Bureau of Indian Affairs*, 767 F.2d 44 (9th Cir. 1985). *See also Dittman v. California*, 191 F.3d 1020, 1027 n. 3 (9th Cir. 1999), cited in *In re Bello*, 622 F. App'x 663, 664 (9th Cir. 2015).

ARGUMENT

The District Court properly found that the NAT had stated a cognizable claim for declaratory and prospective injunctive relief in light of the BIA's bureaucratic recalcitrance and the ongoing annual process of ISDEAA contracting.

Courts have confirmed that because 25 U.S.C. §5331 expressly authorizes equitable relief, Tribes need not demonstrate traditional equitable grounds. "Because the IDEAA[sic] specifically provides for both injunctive and mandamus relief to remedy violations of the Act, 25 U.S.C. §450m-1(a) [now §5331], however, the Tribe need not demonstrate the traditional equitable grounds for obtaining the relief it seeks." *Pyramid Lake Paiute Tribe v. Burwell*, 70 F.Supp.3d 534, 545 (D.D.C. 2014). Other federal district courts have likewise held that a Tribe or tribal organization need not demonstrate the traditional grounds for equitable relief to obtain injunctive or mandamus relief under the ISDEAA. *See, e.g., Red Lake Band of Chippewa Indians v. Dep't of the Interior*, 624 F.Supp.2d 1,

25 (D.D.C. 2009) (granting specific performance on an ISDEAA contract without considering the usual grounds for such relief, because the statute provides for injunctive relief); *Susanville Indian Rancheria v. Leavitt*, No. CIV 07-259 GEB/DAD, 2008 WL 58951, at *10-11 (E.D. Cal. Jan. 3, 2008) (holding that a plaintiff seeking injunctive relief under the ISDEAA need not satisfy the traditional equitable requirements), cited in *Navajo Health Foundation-Sage Mem'l Hosp., Inc v. Burwell*, No. CV 14-0958 JB/GBW, 2016 WL 7257245, at *24 (D.N.M. Nov. 23, 2016); *Cheyenne River Sioux Tribe v. Kempthorne*, 496 F.Supp.2d 1059, 1068 (D.S.D. 2007) (ordering a writ of mandamus and preliminary injunction where the plaintiffs had not established the traditional equitable requirements, but had established that the DOI Secretary's contract declination decision violated the ISDEAA).

Here, NAT has shown clear violations of the ISDEAA, including 25 U.S.C. §5304(l), and is entitled to the injunctive relief granted by the District Court.

Even if the traditional equitable standards applied, the District Court correctly concluded that NAT has met them. "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v.*

Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008). "'[S]erious questions going to the merits' and a balance of hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest." *All. for the Wild Rockies v. Cottrell*, 632 F.3d at 1135. "A sliding scale approach, including the 'serious questions' test, preserves the flexibility that is so essential to handling preliminary injunctions, and that is the hallmark of relief in equity." *Id*. at 1139 (Mosman, concurring).

The NAT established the factors supporting a preliminary injunction and the District Court carefully drafted its injunction to track the very promise which BIA now contends is too onerous to be ordered to follow.

I. NAT's Claims for Injunctive Relief are Not Moot

A. The BIA has a Heavy Burden of Proof

"It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982). "[I]f it did, the courts would be compelled to leave '[t]he defendant ... free to return to his old ways.'" *Id*., at 289, n. 10 (citing *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953)). Accordingly, "the standard we have announced for

determining whether a case has been mooted by the defendant's voluntary conduct is stringent: 'A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur'... The 'heavy burden of persua[ding]' the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (internal citations omitted).

Although a government entity might typically be presumed to act in good faith when it changes its policy, "when the Government asserts mootness based on such a change it still must bear the heavy burden of showing that the challenged conduct cannot reasonably be expected to start up again." *Rosebrock v. Mathis*, 745 F.3d 963, 971 (9th Cir. 2014), citing *White v. Lee*, 227 F.3d 1214, 1243-44 (9th Cir. 2000); *see also Bell v. City of Boise*, 709 F.3d 890, 898-99 & n. 13 (9th Cir. 2013).

Furthermore, Congress found that its original presumption that the BIA would act in good faith when administering the ISDEAA was misplaced. BIA has a long history of "total disregard for the intent of Congress as expressed in the Indian Self-Determination Act." S.Rep. 100-274, 38 (1988). "Precisely *because* the Secretary had consistently failed to behave in a reasonable manner (despite the

risk of 'outraged reactions to such a misuse of discretion,' *id*.), Congress elected specifically to cabin the Secretary's discretion under the Act." *Ramah Navajo Sch. Bd., Inc. v. Babbitt*, 87 F.3d 1338, 1345 n. 9 (D.C. Cir. 1996), amended (Aug. 6, 1996). In a series of amendments to the original Act, Congress circumscribed the agency's discretion and conferred original jurisdiction upon district courts, concurrent with the Court of Claims, over civil actions arising under the ISDEAA. Congress did so to provide aggrieved parties direct access to remedies for violations of the statute. S.Rep. 100-274, 34 (1988), 25 U.S.C. §5331.

For reasons set forth in the following sections, the BIA has failed to carry its burden of proof that NAT's claim is moot.

B. Alleging That Past Illegal Acts Were Justified Does Not Make Them Less Likely to Recur

BIA tries to justify its actions but fails to carry the burden of proving that the challenged conduct cannot reasonably be expected to recur. Indeed, BIA demonstrates that it continues to believe it has broad discretion under ISDEAA, even to the extent of violating the law. The very letter from Gourneau that BIA says makes the injunction moot maintains that BIA's failures to comply with ISDEAA were "reasonable." ER 35. This is not the case.

To this day, BIA defends its actions as if it intends to repeat them. Its opening brief argues that "[u]se of the courts by non-parties [NAT] to challenge or

prevent the award of self-determination contracts would cause substantial and unpredictable disruption to this [ISDEAA] scheme." DktEntry 11-1 at 40. But NAT was denied ISDEAA contracts because BIA awarded them to another Tribe ("SBC as JBC") on the fiction that a former multi-tribal organization continued to speak or act on behalf of the NAT. Under BIA's theory, its action would escape review despite the express precondition to the award of such contracts under 25 U.S.C. §5304(l) ("where a contract is let or a grant made to an organization to perform services benefitting more than one Indian tribe, *the approval of each such Indian tribe shall be a prerequisite* to the letting or making of such contract or grant") and the acknowledged right of a tribe to withdraw from a multi-tribal organization under 25 U.S.C. §5324(i)(l) ("If a self-determination contract requires the Secretary to divide the administration of a program that has previously been administered for the benefit of a greater number of tribes than are represented by the tribal organization that is a party to the contract, the Secretary shall take such action as may be necessary to ensure that services are provided to the tribes not served by a self-determination contract..."). BIA's inverted approach to its obligations under ISDEAA provides little assurance that it will not find a new way to fund "SBC as JBC" in the future.

Following the initial rollout of ISDEAA, Tribes continued to struggle

against "bureaucratic recalcitrance." To address the problem, Congress circumscribed BIA's discretion "as tightly as possible." *Ramah Navajo Sch. Bd.*, 87 F.3d at 1344; *Shoshone-Bannock Tribes at Fort Hall Reservation v. Shalala*, 988 F.Supp. 1306, 1315 (D.Or. 1997) on reconsideration 999 F.Supp. 1395 (D.Or. 1998). *See also Navajo Health Foundation-Sage Mem'l Hosp., Inc v. Burwell, No. CV 14-0958 JB/GBW, 2016 WL 7257245, at *47 (D.N.M. Nov. 23, 2016)* (detailing Congress' frustration with BIA's obduracy and the additional limitations Congress set on BIA's actions under ISDEAA). Congress spelled out which regulations the Department of Interior could issue under ISDEAA. It provided direct access to the courts, allowing aggrieved parties to skip agency review for violations of the Act. 25 U.S.C. §5331. It enumerated limited bases on which a contract proposal could be declined, placing the burden squarely on the BIA to "clearly demonstrate" the reasons for its decisions. 25 U.S.C. §5321(a)(2).

ISDEAA and the Senate Report accompanying the 1988 amendments emphasize Congress' efforts to enable each individual Tribe to design and administer programs that serve it and its members:

> Section 102. Declaration of Policy. - The existing declaration of policy is amended to emphasize the commitment of the United States ***to assist individual Indian tribes*** to strengthen tribal program administration and reservation economics. This change in the statement of policy is intended to strengthen the government-to-government basis of Federal services to tribes, and to emphasize the

> need for the Federal government to recognize the diversity of individual Indian tribes. This section is also intended to emphasize the need for the Federal government ***to consider tribal needs on a tribe-by-tribe basis***, and to move beyond the tendency to develop "generic" policies applicable to all tribes regardless of needs or conditions. A corollary of this statement is that new tribal policy proposals, if they are to be effective, will ***have to come from the tribes themselves***. Therefore, the Committee amendment declares that the Federal government needs to be ***more flexible*** in responding to policies proposed by the tribes.

S.Rep 100-274 at 16 (emphasis added). BIA continues to see its violation of ISDEAA Congressional policy as "reasonable." ER 35.

BIA argues that it was trying to avoid "disruption" and "layoffs of tribal employees." DktEntry 11-1 at 26. In fact, the NAT-funded Tribal Court has retained most of its employees; the CFR Court chose to hire new employees. SER 183-190. And, without advance notice or input from NAT, BIA police enforced the unilateral "lay-offs" of shared finance office staff by "SBC as JBC." These staff members were employees of both Tribes. SER 127-130. Furthermore, avoidance of layoffs is not a statutory reason for declination, 25 U.S.C. §5321(a)(2); it is not a legally sufficient reason to deny contract funding for NAT and provide it to the "SBC as JBC" instead. *Pyramid Lake*, 70 F.Supp.3d at 542 ("ISDEAA requires the Secretary to accept a tribe's contract proposal unless a specifically enumerated declination criterion exists"). Regardless how much BIA desires to exercise discretion and impose its own approval criteria on NAT,

Congress has not authorized BIA to decline contracts based on its unsupported conclusions that the NAT's efforts to assume certain programs would be "wasteful" or its "hope[]" that the Tribes would come to an agreement. DktEntry 11-1 at 26.

In addition to their violations of the plain language of 25 U.S.C. §5304(l), BIA also violated the policy and intent of ISDEAA. ISDEAA was established to end:

> the prolonged Federal domination of Indian service programs [which] has served to retard rather than enhance the progress of Indian people and their communities by depriving Indians of the full opportunity to develop leadership skills crucial to the realization of self-government, and has denied to the Indian people an effective voice in the planning and implementation of programs for the benefit of Indians which are responsive to the true needs of Indian communities.

25 U.S.C. §5301(a)(1).

It is not BIA's role to persist in its paternalistic view about what best serves NAT; it is BIA's responsibility under ISDEAA to provide NAT the opportunity to take on services for its own Tribe. Notably, despite BIA's failure to fund the Tribal Court, NAT's continued operation of the NAT-focused Tribal Court illustrates that no collapse of programs or public safety problems arose. BIA does not need to come to the rescue. Rather, it just needs to abide by the ISDEAA.

A propos of nothing related to mootness, BIA attempts to deflect

responsibility for issuing contracts to SBC by quoting NAT's statement that "[j]oint tribal programs remain unaffected." DktEntry 11-1 at 26. The full context of that quote proves BIA was on notice that separate resolutions from each Tribe were required for the administration of programs that might continue to be shared:

> Dissolution of the JBC does not diminish our efforts to cooperate with the Eastern Shoshone Tribe. Joint tribal programs remain unaffected. Coordination through Council Chairmen or committees will continue. The main difference is that *decisions by each Tribe will be expressed through their own Business Council resolutions, and not through the former JBC.*

SER 21. (Emphasis added). *See also* SER 67 and 68.

The BIA distorts NAT's position, which was that shared programs could continue to operate with the approval of each Business Council, on its own separate record, rather than through the former JBC format. But when BIA denied NAT's right to withdraw from the JBC and issued contracts to the SBC as if it were authorized to act for both Tribes, NAT strenuously objected and eventually filed its Complaint. NAT has remained willing to cooperate with respect to programs the two Tribes agree to share, but that option has been out of reach. Simultaneously, NAT sought to contract for federal services to the NAT and its members. BIA's eagerness to twist NAT's position into something the BIA favors provides little assurance that it will not find an excuse to fund "SBC as JBC" in the future.

BIA still tries to deflect attention from its statutory violations by claiming that "the root of the problem" is a disagreement between the Tribes. DktEntry 11-1 at 20. So long as BIA maintains this fiction, repeated violations are likely to occur.

BIA's contention that its ongoing refusal to abide by the spirit and letter of ISDEAA "cannot reasonably be expected to recur," relies on the assumption that BIA acts reasonably. This mischaracterizes BIA's pattern of behavior with respect to NAT. As noted earlier, BIA has repeatedly taken actions that contravene or circumvent express provisions of law which NAT could not have expected. When NAT relied on promises by BIA, the agency breached them. When NAT relied on federal regulations, BIA waived them. When NAT relied on statutory provisions, BIA decided it was reasonable to violate them. This pattern of unreasonable acts supports the District Court's determination. The BIA has failed to carry its burden of proof that further violations cannot reasonably be expected to recur if the preliminary injunction were lifted.

C. Gourneau's Letter Fails to Moot NAT's Need for Injunctive Relief

Inherent in BIA's argument that Gourneau's letter rendered the injunction moot is the premise that BIA's promise is meaningful. The facts show otherwise. The letter itself calls BIA's violations of ISDEAA "reasonable." ER 35. The

agency acts as if the express dictates of Congress may be disregarded when BIA decides that doing so is justifiable.

Furthermore, BIA has on multiple occasions violated corollary promises by Defendant LaCounte that BIA will not ratify actions by "SBC as JBC" regarding program administration and conversion of funds of the NAT.[12] The BIA's Court Review repeatedly ratifies actions by the "SBC as JBC" as if NAT had not withdrawn from the JBC. The Review even recommends actions to be taken by the "SBC as JBC" without the approval of the NAT. SER 196. BIA police officers have enforced personnel decisions of the "SBC as JBC." SER 199-201, SER 207, and SER 215. Defendant LaCounte has endorsed and permitted "SBC as JBC" to take Fish & Game and Tribal Court revenues of the NAT as well as federal funds intended by Congress for the NAT. SER 206. Federal funds continued to be transferred to "SBC as JBC" as late as September 27, 2016. SER 250.

The BIA also misrepresented and later violated specific promises to NAT made in two different meetings in Washington, D.C. late in 2015. ER 120. Defendant Black and others in attendance assured NAT that BIA would not issue contracts for services to NAT to another Tribe without the consent of the NAT. *Id*.

[12] The LaCounte promise (declaration) was made on March 15, 2016. SER 90. The "Gourneau letter" was issued on August 3, 2016. ER 35.

NAT later learned the contract for judicial services with SBC "on behalf of the Joint Business Council" had already been issued by BIA on October 1, 2015. ER 61-63. Additional contracts were issued to "SBC as JBC" for Fish & Game and water resources on January 13, 2016. ER 29-30, 33-34.

BIA has repeatedly acted as if it has broad discretion when implementing ISDEAA, even though Congress has expressly limited that discretion. *Ramah Navajo Sch. Bd.*, 87 F.3d at 1344. This mistaken understanding of its powers under the law are evident in the BIA's ongoing defense of its illegal actions. DktEntry 11-1 at 29. The agency's inability to understand its obligations and constraints under ISDEAA render any "presum[ption] that the government is acting in good faith" baseless. Unlike in *American Cargo Transp., Inc. v. United States*, 625 F.3d 1176 (9th Cir. 2010), where the issue concerned conflicting interpretations of regulations by two different agencies, the BIA admits its actions were inconsistent with the law but remains at ease with the violation, implying it would violate ISDEAA again if doing so were "reasonable."

Under equitable principles, these actions undermine any presumption of good faith or trustworthiness that might otherwise apply and emphasize that BIA has not met its burden of proof that the issue is moot. As noted earlier, similar concerns over unreasonable agency action led Congress to create unique statutory

injunctive relief under ISDEAA as an important tool for enforcement of the Act. S.Rep. 100-274, 34 (1988). Until BIA takes responsibility for the error of its ways – instead of attributing its actions to "reasonableness" or "hopes" – any presumption of good faith on this record is misplaced.

Finally, the Gourneau letter itself is still fresh, issued in August of 2016, only two months prior to the injunction. In *Rosebrock*, the agency's promise had remained unbroken for more than three years before the court considered the matter. 745 F.3d at 974. In *White*, the promise had been unbroken for four years. 227 F.3d at 1244. Even now, only seven months have passed and the promises by BIA, as noted above, have been repeatedly broken.

D. Surprisingly, BIA Contends That Its Regulations Limit Their Actions

BIA's contention that regulations will limit its future actions and render the injunction moot is surprising, to say the least. BIA clearly violated 25 U.S.C. §5304(l). The injunction seeks to prevent future violations. Having ignored the statute, BIA now maintains that its regulations are more compelling and will prevent future violations. The argument is not founded in reason – statutes supersede regulations. Furthermore, BIA has demonstrated that it will not be constrained by its regulations. When they did not serve BIA's purposes, BIA amended or waived its regulations rather than comply with them. The Wind River

Indian Reservation was not listed as an area where CFR courts could be established and the BIA may not impose a CFR court where a tribe is operating a Tribal Court. 25 C.F.R. §11.100 and §11.201(a). So, when the BIA decided to establish a CFR court anyway (without NAT's consent), BIA promulgated amendments to 25 C.F.R. §11.100, 81 Fed. Reg. 74675 (Oct. 27, 2016), and waivers of 25 C.F.R. §11.104(a) and 25 C.F.R. §11.201(a), 81 Fed. Reg. 74809 (Oct. 27, 2016). BIA's assertion that existing regulations assure BIA's compliance fails to acknowledge their recent waiver of inconvenient regulations.

BIA implies that until October 1, 2017, the 638 contracts were merely being renewed and therefore were not subject to ISDEAA's provision requiring approval by any Tribe being served. 25 U.S.C. §5304(l). Even a "renewal proposal" must be submitted *by the tribal organization* that seeks the contract renewal. 25 C.F.R. §900.12. Beginning in September, 2014, BIA was repeatedly notified, including through letters, meetings, and mediation that the JBC had been dissolved and that SBC did not represent the NAT. In 2015, NAT submitted its own proposals for Judicial Services, Meadowlark, Fish and Game, and Tribal Water Engineer for FY 2016. Regardless of whether FY 2016 proposals from "SBC as JBC" were for initial or "renewal" contracts, BIA knew full well that NAT had rescinded its support for the former JBC. Nonetheless, BIA approved contracts to SBC,

masquerading as the former JBC.

In amending ISDEAA, Congress clearly spoke to this issue: "These amendments, while providing the stability of mature contracts, are not intended to decrease the ability of tribal governments to exercise oversight of self-determination contracts. ***This oversight includes the right of a tribal government to rescind support for a self-determination contract when the tribal organization no longer appropriately meets the needs of the tribe.*** Such authorization to contract and oversight of the contract by the tribal governing body should be conducted without coercion by the Federal agencies." S.Rep. 100-274, 23 (1988) (emphasis added).

But coercion is exactly what BIA exercised. Refusing to recognize NAT's "right... to rescind," BIA engaged in further machinations that violated that right. BIA decided not to grant the contracts to JBC *per se* but, even worse, to the SBC "on behalf of the JBC."

In a corollary argument, BIA contends that contracts to "SBC as JBC" were not "initial contracts" and so also were not subject to 25 C.F.R. §900.6. Dkt Entry 11-1 at 22. But the Tribes together, not SBC alone, had carried out the remainder of the contracts in 2014-2015 (FY 2015). SBC had never before proposed to provide contract services for both Tribes prior to 2015-2016 (FY 2016). (SBC has

never had authority from NAT to act on its behalf.) In fact, SBC's proposals were for "initial contracts" subject to the very regulations BIA unlawfully avoided. BIA says these regulations will prevent violations going forward (which it says will render the injunction moot). 25 C.F.R. §§900.6, 900.8; Dkt Entry 11-1 at 21. But BIA blatantly mischaracterizes the proposals in order to rationalize its violation of the regulations. The agency's contention that the regulations alone will prevent future violations rings hollow.

E. NAT Established a Likelihood of Substantial and Immediate Irreparable Harm

As the court in *United States v. W.T. Grant Co.*, 345 U.S. 629 (1953) held, determinations of fact regarding an injunction are best made by the trial court. The fact finder's discretion is "necessarily broad." *Id*. at 633.

Following extensive briefing and a hearing where the existing Tribal Court Chief Judge testified, the District Court found that NAT's claim of irreparable harm from future contract approvals was "compelling" and that the BIA had committed to "no legally binding policy that would prevent such approvals." ER 22. "The prospect of allegedly unlawful approvals in the future poses irreparable harm to NAT." *Id*. As the District Court acknowledged, "harm to a tribe's sovereignty 'cannot be remedied by any other relief other than an injunction.'" *Id. citing Tohono O'odham Nation v. Schwartz*, 837 F.Supp. 1024,

1034 (D. Ariz 1993).

Violations of tribal sovereignty constitute irreparable harm, *ipso facto*. "[I]nfringement of federally protected rights of self-government and self-determination... cannot be remedied by any other relief other than an injunction. ..." *Tohono O'odham Nation*, 837 F.Supp. at 1034 (State exercise of authority in violation of tribal sovereignty enjoined). Violation of tribal jurisdiction "results in irreparable injury vis-a-vis the Tribe's sovereignty" and must be restrained, *E.E.O.C.*, 260 F.3d at 1077 (subpoena from federal agency which infringes on tribal sovereignty enjoined). *See also Wyandotte Nation v. Sebelius*, 443 F.3d 1247, 1255 (10th Cir. 2006) (citing *Seneca-Cayuga v. Oklahoma*, 874 F.2d 709, 716 (10th Cir. 1989), and *Kiowa Indian Tribe of Oklahoma v. Hoover*, 150 F.3d 1163, 1171-72 (10th Cir. 1998)); *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1250-51 (10th Cir. 2001).

Where the interference with tribal self-government places NAT in the position of losing funding for governmental or social services, the irreparable harm element of the preliminary injunction standard is also satisfied. *See Kiowa*, 150 F.3d at 1168; *Prairie Band of Potawatomi Indians*, 253 F.3d at 1250-51; *Seneca-Cayuga*, 874 F.2d at 716. BIA's actions deprive the NAT of control over funding and programs for the benefit of NAT and its members.

BIA relies heavily on *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), and *O'Shea v. Littleton*, 414 U.S. 488 (1974). However, *Lyons* and *O'Shea* present notably different fact patterns and issues from the case at bar. In both *Lyons* and *O'Shea*, the parties were seeking an injunction to prevent certain actions by police and state judicial officers, respectively, that might happen if the parties were again arrested and subjected to the contested actions. Future occurrences were largely speculative and claimants could limit their interaction with police (defendants). Here, however, NAT's relationship with BIA is neither speculative nor unlikely to recur. Nor is it one where NAT can limit interaction by being law-abiding. Rather, BIA and NAT have an ongoing relationship that includes annual ISDEAA proposals, contracts, and contract administration. BIA is obligated to negotiate for these contracts, provide technical assistance to the Tribe, re-design programs, and take other steps to ensure success of the contract proposals. *See* 25 C.F.R. §900 Subpart E. The BIA is a lead agency through which the United States fulfills its treaty and trust obligations to Indian tribes. *See generally, Cohen's Handbook of Federal Indian Law* §5.03[1] at 396 (2012 ed.).

Lyons did not evaluate whether a claim for injunctive relief had become moot. Rather, *Lyons* addressed whether the "preconditions" for asserting an equitable claim existed. *Id.* at 109. Mr. Lyons sought an injunction against the

City barring the use of police choke holds after he had been arrested and injured by such a hold. But "[t]he speculative nature of Lyons' claim of future injury requires a finding that this *prerequisite* of equitable relief [showing irreparable injury] has not been fulfilled." *Id.* at 111 (emphasis added).

Here, the question whether injunctive relief is available for NAT has been answered affirmatively by Congress. 25 U.S.C. §5331(a) (providing for injunctive and mandamus relief). As Congress noted in drafting its 1988 ISDEAA amendments, "Section 110(a) [25 U.S.C. §5331(a)] provides parties aggrieved by federal agency violations of the Self-Determination Act *the right* to seek injunctive relief in the United States District Courts." S.Rep. 100-274, 34 (1988) (emphasis added). And when a federal statute specifically provides for injunctive relief, "[t]he standard requirements for equitable relief need not be satisfied when [the] injunction is sought to prevent the violation of a federal statute which specifically provides for injunctive relief." *Trailer Train Co. v. State Bd. of Equalization*, 697 F.2d 860, 869 (9th Cir. 1983), *citing United States v. City and County of San Francisco*, 310 U.S. 16, 30-31, 60 S.Ct. 749, 756-57, 84 L.Ed. 1050 (1940). *See also Pyramid Lake*, 70 F.Supp.3d at 545 ("...the Tribe need not demonstrate the traditional equitable grounds for obtaining the relief it seeks [under ISDEAA]").

The District Court correctly found that NAT faced the likelihood of

irreparable harm arising from future contract approvals to "SBC as JBC" and that a preliminary injunction was appropriate.

F. The District Court was Legally Correct and Within Its Discretion in Granting Injunctive Relief

BIA relies on the general presumption that agencies act in good faith to argue that the Gourneau letter renders the need for the injunction moot. This argument fails both under ISDEAA's mandates and in light of BIA's actions towards the NAT relative to the contract proposals at issue in this case.

"Although we presume a government entity is acting in good faith when it changes its policy, *see Am. Cargo Transp., Inc. v. United States*, 625 F.3d 1176, 1180 (9th Cir.2010), the government entity still must meet its heavy burden of proof, *White*, 227 F.3d at 1244." *Bell*, 709 F.3d at 901, *Rosebrock*, 745 F.3d at 971. One important factor in determining mootness where the policy change is not statutory or regulatory, as here, is whether "the policy has been in place for a long time when we consider mootness[.]" *Rosebrock*, 745 F.3d at 972. In *Rosebrock*, the policy change had been in effect over three years at the time the Ninth Circuit reviewed it.[13] In *White*, 227 F.3d at 1244, the change had been in effect over four

[13] The email directive confirming policy enforcement was sent on June 30, 2010. The Ninth Circuit ruled on March 14, 2014.

years.[14] Here, the policy change, which is merely a letter from the Wind River Superintendent (not even from Gourneau's bosses, Defendants LaCounte or Halgerud), was in effect for just over two months when the District Court ruled.[15] Furthermore, unlike the cases on which BIA relies, promises to NAT have been breached repeatedly (set forth earlier in this brief).

Numerous factors weigh against attributing "good faith" to the BIA in this instance. Congress found that BIA has a history of "total disregard for the intent of Congress as expressed in the Indian Self-Determination Act." S.Rep. 100-274, 38 (1988). A frustrated Congress passed the 1988 amendments which "circumscribe[d] as tightly as possible" the BIA's actions. *Ramah Navajo Sch. Bd.*, 87 F.3d at 1344. "Precisely *because* the Secretary had consistently failed to behave in a reasonable manner (despite the risk of 'outraged reactions to such a misuse of discretion')... Congress elected specifically to cabin the Secretary's discretion under the Act." *Id*. at 1345, n 9 (internal citation omitted). Congress also provided a new section which conferred upon district courts original jurisdiction, concurrent with the Court of Claims, over civil actions or claims

[14] The Court withheld its opinion as to whether the case was moot after a period of 16 months, which was the length of time the policy change had been in effect when the District Court entered its injunction. *Id.*

[15] The letter has now been in effect only about seven months, buttressed by the preliminary injunction.

arising under the Self-Determination Act to provide aggrieved parties direct access to remedies for violations. S.Rep. 100-274, 34 (1988), 25 U.S.C. §5331. Congress did not leave the administration of ISDEAA to any presumption that the BIA would act in good faith.

As the court in *American Cargo Transp.* noted, "[o]f course there is always the possibility of bad faith..." 625 F.3d at 1180. In the case at bar, the litany of BIA's actions in violation of ISDEAA, including Gourneau's *ultra vires* acts, ER 7, and violations of their own sworn statements speaks for itself. The District Court correctly found that BIA committed to no legally binding policy that would prevent such future approvals. It also had sufficient evidence countering any general presumption of trustworthiness or good faith. Such a presumption also would be contrary to Congress' findings and the severe limitations it imposed on BIA's discretion because of persistent and troubling violations of ISDEAA.

Other instances of BIA's ongoing reluctance to abide by ISDEAA pervade this case. As set forth earlier, BIA has breached its repeated promises not to issue ISDEAA contracts for shared programs and not to approve or ratify actions by "SBC as JBC" without the approval of NAT.

BIA has also insisted that NAT's Tribal Court vacate the courthouse long shared by NAT and EST. Multiple notices informed employees of imminent

eviction, legal fees were necessarily expended, and threats from the BIA proliferated. Good faith has not been in evidence and must not be credited to the BIA in this matter.

Ironically, BIA closes its mootness argument by stating "[t]he BIA therefore cannot 'change its position,' ER 6, without changing its own regulations." DktEntry 11-1 at 34. As addressed above, BIA has done just that in a closely related issue by amending or waiving regulations related to CFR courts that otherwise would protect the NAT.

II. NAT Successfully Stated a Cause of Action for Prospective Relief

NAT brought actions for declaratory judgment and permanent injunctive relief based on violations of ISDEAA, breach of trust, *ultra vires* actions, conversion, denial of equal protection and diminishment of NAT's privileges and immunities. All of the claims arose out of BIA's denial of NAT rights under ISDEAA, treaty and other federal laws, and basic property rights. The District Court ruling should be upheld on any basis supported by law or fact. *Spring v. U.S. Bureau of Indian Affairs*, 767 F.2d 614, 616 (9th Cir. 1985).

A. Breach of Trust

Federal Defendants say that NAT's breach of trust claim is untethered to any specific statutory provision. This statement cannot square with the statutory

violations outlined in NAT's Complaint and further developed in its briefing. *See* ER 103 at ¶¶37-38 (25 U.S.C. §450f(a)(1));[16] ER 103-104 at ¶¶39, 41; ER 106-107 at ¶¶52, 53; ER 111-112 at ¶¶69, 70 (25 U.S.C. §450b(l));[17] and ER 117 at ¶92 (25 U.S.C. §476(f)).[18] 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).

Congress confirmed the trust relationship while legislating ISDEAA: "The right of tribal self-government is further protected by the trust relationship between the Federal Government and Indian tribes. Trust obligations define the required standard of conduct for federal officials and Congress. Fiduciary duties form the substantive basis for various claims against the federal government for breach of its

---

[16] Transferred to 25 U.S.C. §5321(a)(1).

[17] Transferred to 25 U.S.C. §5304(l).

[18] Transferred to 25 U.S.C. §5321(f).

trust responsibility. Even more broadly, federal action toward Indians as expressed in treaties, agreements, statutes, executive orders, and administrative regulations is construed in light of the trust responsibility. As a result, the trust relationship is one of the primary cornerstones of Indian law." S.Rep. 100-274, 3 (1988). ISDEAA requires that adequate protection of trust resources be assured and recognizes BIA's fiduciary responsibilities to a Tribe with respect to trust resources. 25 U.S.C. §5321(a)(2)(B). The regulations confirm that ISDEAA does not terminate, reduce, amend or waive the United States' trust responsibility to Tribes or tribal members. 25 C.F.R. §900.4(b).

BIA's reliance on *Menominee Indian Tribe of Wisconsin v. United States*, 136 S.Ct. 750, 757 (2016) is inapt. In *Menominee*, the Court ruled that where a directly relevant statute sets forth unambiguous time limits for filing, the general trust relationship will not override that statute or justify a grant of equitable tolling. *Id*. NAT does not seek to override any statutory provision by citing to a general trust relationship. To the contrary, NAT asks only that BIA comply with express statutory provisions that precisely define and implement the trust responsibility.

This Court has recognized that to fulfill its trust obligation, the government must comply with applicable statutes. *Gros Ventre Tribe v. United States*, 344 F.Supp.2d 1221, 1227 (D. Mont. 2004), aff'd, 469 F.3d 801 (9th Cir. 2006) (trust

obligations fulfilled by complying with statutes); *Morongo Band of Mission Indians v. F.A.A.*, 161 F.3d 569, 574 (9th Cir. 1998); *Okanogan Highlands Alliance v. Williams*, 236 F.3d 468, 479 (9th Cir. 2000). Here, the District Court found that BIA admitted it has not complied with applicable statutes. ER 7. ("Gourneau Letter seems to acknowledge that the BIA acted beyond its authority when it issued the 638 contracts.") BIA has breached its statutory and trust obligations. NAT sought and the District Court granted an equitable remedy for the claim.

BIA also relies on *Hopland Band of Pomo Indians v. Jewell*, 624 F. App'x 562, 563 (9th Cir. 2015), which is inapt. In *Hopland*, the Tribes asserted that the BIA's failure to approve ISDEAA contracts for law enforcement programs,[19] constituted a breach of its trust responsibilities. Unlike in *Hopland*, NAT does not allege that the United States has a "specific fiduciary duty to approve" NAT's proposals. This interlocutory appeal does not involve deliberations of contract proposals. Rather, NAT maintains that the United States has a fiduciary duty to comply with – not violate – ISDEAA, which specifically addresses how the United States' ongoing duty to provide direct services to Tribes must be provided. As Congress noted, under ISDEAA, "Secretaries are required to transfer resources and

[19] These Tribes are in California, a PL-280 state, where the state has criminal jurisdiction over tribal lands.

control over those programs to the tribe." S.Rep. 100-274, 6 (1988). ISDEAA is a detailed statute setting forth the Secretaries' duties and obligations to Indians in the provision of services that recognize tribal sovereignty. Specific provisions expressly address trust resources, 25 U.S.C. §5330,[20] and affirm that trust responsibilities are not waived, amended, or limited. 25 U.S.C. §5332.[21]

BIA cites *Los Coyotes Band of Cahuilla & Cupeno Indians v. Jewell*, 729 F.3d 1025, 1038 (9th Cir. 2013) for the proposition that the discretion the BIA retained for lump-sum allocations of funds (which are not at issue here) leaves it immune from any breach of trust claims based on its violations of ISDEAA. This mixes apples and oranges. Lump-sum allocation occurs separate from and prior to the granting of self-determination contracts. As previously addressed, Congress strictly limited BIA's discretion with respect to the issuance and administration of ISDEAA contracts. The discretion *Los Coyotes* recognized does not extend to the

---

[20] "[T]he appropriate Secretary may ...immediately rescind a contract or grant, in whole or in part, and resume control or operation of a program, activity, function, or service, if the Secretary finds that (i) there is an immediate threat of imminent harm to the safety of any person, or imminent substantial and irreparable harm to trust funds, trust lands, or interests in such lands, and (ii) such threat arises from the failure of the contractor to fulfill the requirements of the contract." 25 U.S.C. §5330.

[21] "Nothing in this chapter shall be construed as... (2) authorizing or requiring the termination of any existing trust responsibility of the United States with respect to the Indian people." 25 U.S.C. §5332.

issuance and administration of ISDEAA contracts once the allocation of funds to a type of service has already been made, as in the case at bar. Notably, the BIA acknowledged in *Los Coyotes* that the Indian trust doctrine does create the duty to comply with generally applicable statues and regulations. *Los Coyotes Band of Cahuilla & Cupeno Indians v. Salazar*, No. 10CV1448 AJB NLS, 2011 WL 5118733, at *8 (S.D. Cal. Oct. 28, 2011), *rev'd in part sub nom. Los Coyotes Band of Cahuilla & Cupeno Indians v. Jewell*, 729 F.3d 1025 (9th Cir. 2013).

Here, the United States has violated (and to this day dismisses such violation as "reasonable") a specific provision of the statute essential to self-determination by each Tribe and tribal control of resources and sovereignty promised by treaty. The District Court rightly compared these facts to those in *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942) (where the federal government makes payments to "representatives faithless to their own people and without integrity" it breaches its duty of trust.). ER 19. Here, federal funds for NAT were paid to a separate Tribe and that Tribe (SBC) also converted tribal funds of the NAT to its own purposes.

The BIA also relies on *Samish Indian Nation v. United States*, 419 F.3d 1355 (Fed. Cir. 2005). But *Samish* did not strike down breach of trust claims based on violations of ISDEAA. *Samish* addressed a claim for money damages

based on lack of federal recognition of a tribe. The Tribe sought damages for ISDEAA contracts and other funds the Tribe might have won had it been federally recognized over a certain time period. The Court concluded that ISDEAA could not be the basis for Tucker Act jurisdiction. *Id.* at 1368. NAT does not assert Tucker Act jurisdiction.

Finally, BIA relies on *Marceau v. Blackfeet Hous. Auth.*, 540 F.3d 916 (9th Cir. 2008), and *United States v. Mitchell*, 463 U.S. 206 (1983). Unlike in those cases, the breach of trust claim undergirding the injunction here is not based on the *failure* to undertake an affirmative duty, e.g., to build houses or manage forests. Rather, the breach of trust arises here from affirmative *action* that violates specific ISDEAA provisions and which directly damaged services and property of the NAT.

B. ISDEAA

As the District Court found, NAT's ISDEAA claim is properly before the Court. In its amendments to ISDEAA, Congress provided "an additional remedy in federal district court to address the agencies' consistent failures over the past decade to administer self-determination contracts in conformity with the law." ER 9 (internal quotation marks omitted), citing *Shoshone-Bannock Tribes*, 988 F.Supp. at 1316 (D. Or. 1997). "The United States district courts shall have

original jurisdiction over any civil action or claim against the appropriate Secretary arising under this chapter…" 25 U.S.C. §5331. If money damages (one of only several types of remedies provided by 25 U.S.C. §5331) were claimed, then the presentment provisions related to the Contract Disputes Act might be relevant, 25 U.S.C. §§5331(a) and (d). Here, where injunctive relief is requested, those requirements do not apply.

Significantly, 25 U.S.C. §5331 provides that "***any*** civil action or claim…arising under this chapter" (emphasis added) may be brought in District Court. The only limitation is the requirement established for claims for money damages, inapplicable to NAT's injunction. Multiple amendments of ISDEAA, were necessitated by "bureaucratic recalcitrance," *Shoshone-Bannock Tribes,* 988 F.Supp. at 1315. ISDEAA now places the burden on BIA to prove its declinations by "clearly demonstrat[ing]" its reasoning, narrowly circumscribes BIA's discretion, approves proposals by operation of law if BIA does not respond in a timely manner, 25 U.S.C. §5321(a)(2), and provides direct access to the courts. The only reasonable reading of 25 U.S.C. §5331(a) is that when Congress said "any civil action or claim…arising under this chapter," it meant just that. Congress sought to empower tribes to enforce the statute in the face of BIA's continued mismanagement. BIA seeks to inoculate itself against federal court scrutiny for

granting unlawful ISDEAA contracts through the simple act of *executing* those unlawful contracts, then claiming the matter is moot. This result makes 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).

NAT has stated a claim for declaratory and injunctive relief based primarily on violations of 25 U.S.C. §5304(l). The District Court found that NAT is likely to succeed in demonstrating BIA's violation of the statute, given BIA's seeming acknowledgment thereof. ER 20. Reasons supporting preliminary relief in the context of the breach of trust claim apply with equal force to the ISDEAA claims.

C. Ultra Vires Claim

"Courts have widely held that claims that an agency has acted outside its statutory authority are reviewable even though its decision on the merits might be unreviewable as committed to agency discretion." *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). NAT claimed that BIA exceeded its statutory authority and breached Congressionally imposed duties when it issued contracts in clear violation of 25 U.S.C. §5304(l). The District Court found that the Gourneau letter "seems to acknowledge that the BIA acted beyond its authority

when it issued the 638 contracts" (ER 7) and the "statute's plain language seems to confirm that the BIA acted *ultra vires* in approving the contracts at issue." *Id.* Reasons supporting preliminary relief in the context of the breach of trust claim apply with equal force to the *ultra vires* claim.

D. Privileges and Immunities

NAT stated a claim under 25 U.S.C. §5123, which bars any action that "classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes. ..." This claim provides another alternate basis for the injunction. As the evidence shows, BIA has authorized SBC 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 fact that BIA has made the distinction between the Tribes 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. §5123 is actionable. *Akiachak Native Cmty. v. Salazar*, 935 F.Supp.2d 195, 197 (D.D.C. 2013), *on reconsideration in part sub nom. Akiachak Native Cmty. v. Jewell*, 995 F.Supp.2d 1 (D.D.C. 2013), *vacated on other grounds sub nom. Akiachak Native Cmty. v. United States Dep't of Interior*, 827 F.3d 100 (D.C. Cir. 2016).

III. The Injunction is in the Public Interest

Supporting tribal self-government is a matter of public interest. *Prairie Band of Potawotami Indians*, 253 F.3d at 1253 citing *Seneca-Cayuga*, 874 F.2d at 716); *see also Sac and Fox Nation of Mo. v. LaFaver*, 905 F.Supp. 904, 907-08 (D.Kan. 1995) ("The public also has a genuine interest in helping to assure Tribal self-government, self-sufficiency and self-determination.").

BIA's allegation that the injunction is against the public interest demonstrates its persistent failure to comprehend the policy and mandates of ISDEAA, its refusal to act reasonably in furtherance of NAT's self-determination goals, and its continued obfuscation of the law in an effort to block 638 contracts to NAT. The injunction enforcing 25 U.S.C. §5304(l) clearly applies only to contracts to perform services benefitting more than one ("multi") Tribe. Further, BIA's purported fear of being held in contempt is disingenuous in light of the Ninth Circuit's contempt law, which protects litigants for reasonable, good faith interpretations of an order.

A. The District Court's Order is Clear

The District Court was unambiguous in its Order, referencing the Gourneau letter and that the 638 contracts to which it applied were for "multi-tribal, shared services." ER 24. "Multi-tribal" tracks the statutory provision which addresses

services benefitting "more than one Indian tribe." 25 U.S.C. §5304(l). "Multi" commonly means "more than one." *See* https://www.merriam-webster.com/dictionary/multi. The District Court also specifically stated that the Order was tracking the terms of §5304(l): "No harm would inure to the public interest if the Court were to issue a preliminary injunction that tracked the terms of the Gourneau Letter (ER 35), and more explicitly, the terms of Sec. 5304(l)." ER 23.

Now, BIA complains that an injunction based on BIA's own written promise, and using BIA's own language, is somehow too vague for BIA to interpret. A commonsense reading of the Order and §5304(l) is that where a tribal organization seeks to provide services to more than one Tribe, each Tribe that it intends to serve must submit a supporting resolution.

Congress has forbidden the criterion that BIA now seeks to impose – that NAT's proposals have supporting resolutions from EST. NAT's proposals would not serve EST. The legislative history of ISDEAA speaks directly to this point. Congress amended ISDEAA in 1988 because it was frustrated by the BIA's "bureaucratic recalcitrance" in implementing the law. *Shoshone-Bannock Tribes*, 988 F.Supp. at 1315. Congress said it is "clear from the definition of 'tribal organization' that a tribal organization *needs to obtain tribal resolutions only from the tribes it proposes to serve*. For example, if a tribal organization proposes to

serve five tribes, then the tribal organization needs to obtain tribal resolutions of support from those five tribes only." S.Rep. 100-274 at 20 (1988) (emphasis added). One Tribe need not obtain permission from another to provide services to its own members, and BIA's insistence on this violates the law and policy of the ISDEAA. At the root of BIA's arguments is the notion that BIA may deem certain services or programs formerly shared by the Tribes to be frozen in time and require them to be shared forevermore. SER 195, ¶7. This ignores ISDEAA's severability requirements. *See, e.g.*, 25 U.S.C. §5321(a)(4); 25 U.S.C. §5324(i).

BIA complains that the NAT contract proposals (which are the subject of a separate complaint in CV-16-60, consolidated here) would "affect" EST such that the programs involved must be "shared." This issue is before the District Court now on cross motions for summary judgment, but is irrelevant here. The "shared" programs before the Court are those which have formerly been administered by both Tribes through the defunct JBC – they are finite and established. (Judicial services, fish and game, water resources, transportation and "Meadowlark" drug counseling for tribal youth).[22] BIA suggests an expansion of the word "shared" in order to conjure illusory problems.

[22] These are the primary programs formerly "shared" through the JBC. There may be some other, occasional examples of such programs not listed here.

Moreover, BIA's determination to impose its promise that once a program was "shared," it must always remain so (and consequently require resolutions from both Tribes) does not have its genesis in the Injunction. In the brief period after Gourneau sent her letter (August 3, 2016) and before the Injunction was granted (October 17, 2016), BIA was using the exact same flawed premise. On September 19, 2016, BIA declined NAT's Meadowlark (youth drug counseling services) proposal saying: "The NABC proposes to provide services formerly or currently provided to members of the Northern Arapaho Tribe by the Meadowlark program of the Shoshone and Arapaho Tribes. We have previously notified the Northern Arapaho Business Council that the BIA would not accept proposals for formerly shared programs without agreement and resolutions from both Tribes." SER 203. This was true even though, as the declination letter acknowledged, "the proposal as submitted proposes only to serve members of the Northern Arapaho Tribe." *Id.* On the same date, using identical language, BIA also declined the Fish & Game proposal, SER 205, and the Tribal Water Engineer (water resources or "TWE") proposal, SER 207.

BIA complains that the injunction is "open to good faith debate." Even if that were true, BIA is protected from contempt sanctions when it acts in good faith (discussed below).

The evidence shows that although BIA now alleges that the Injunction forces them to "err on the side of treating programs as shared services" (DktEntry 11-1 at 44), BIA was already using its overly broad interpretation prior to the Injunction. It is not the District Court that erred in entering the Injunction; it is the BIA that continues to err in misapplying ISDEAA and preventing NAT from achieving the self-determination Congress mandated all tribes should have the opportunity to attain. Furthermore, the question whether the BIA's interpretation is overly broad is now ripe for determination. That determination by the District Court will almost certainly resolve any "ambiguities" BIA has raised about its own language, and which, if any, programs must be "shared."

B. The Ninth Circuit's Contempt Standards Demonstrate the Disingenuousness of BIA's Fear of Contempt

The Ninth Circuit has been clear: "a person should not be held in contempt if his action appears to be based on a good faith and reasonable interpretation of the court's order." *In re Taggart*, 124 F. App'x 571 (9th Cir. 2005), citing *In re Dual-Deck Video Cassette Recorder Antitrust Litigation*, 10 F.3d 693, 695 (9th Cir.1993) (internal quotation marks and citation omitted). *See also Vertex Distrib., Inc. v. Falcon Foam Plastics, Inc.*, 689 F.2d 885, 889 (9th Cir.1982). Moreover, "[su]bstantial compliance" with the court order is a defense to civil contempt, and is not vitiated by "a few technical violations" where every reasonable effort has

been made to comply. *Id*. at 891; *see also General Signal Corp. v. Donallco, Inc.*, 787 F.2d 1376, 1378-79 (9th Cir.1986). The burden of proof on the party alleging civil contempt is "clear and convincing evidence," not merely a preponderance of the evidence. *Vertex*, 689 F.2d at 889.

BIA's fear of contempt under these generous standards strains credulity. The agency contends it faces the "threat of good-faith attempts to implement the ISDA," DktEntry 11-1, but Ninth Circuit law protects them from that very threat. A good faith, reasonable interpretation of a Court order, where every reasonable effort has been made to comply, is all that is required to protect the BIA from being found in contempt. If BIA is concerned about its interpretation of the Injunction, it should have asked the District Court for clarification.

C. The Public Interest and Balance of Equities Favor the Injunction

ISDEAA is a landmark statute that changed how services were to be provided to Tribes. Congress sought to enable Indians to "achieve the measure of self-determination essential to their social and economic well-being." 25 U.S.C. §5302. The public interest is best served by upholding ISDEAA and the United States' fiduciary obligation to ensure the Tribes' continuing integrity as self-governing entities. *Cohen's Handbook of Federal Indian Law* §4.01[1][a] at 210 (2012 ed.). As shown above, the BIA's ability to properly provide services on the

Wind River Reservation is not in any way limited by the Injunction. BIA does not have the discretion to force an effective consolidation of the Tribes through its unfounded premise that these programs must be shared forever. The plain language of the statute, along with legislative history, mandates that BIA work with individual Tribes (if that is what the Tribe seeks) to enable each individual tribe to provide services for itself. ISDEAA allows tribes to "withdraw approval" from multi-tribal organizations and to sever portions of contract services previously combined. 25 U.S.C. §5324(i). This is the public interest.

NAT withdrew from JBC because of its oppressiveness and NAT's inability to effectively make decisions for its members in that setting. Since then, BIA has worked against ISDEAA's self-determination directives on the Wind River Reservation. BIA cannot now hide behind the general presumption of good faith, applicable outside the ISDEAA, and assert that the balance of equities and public interest merge. The BIA is not hindered by the Injunction any more than it is hindered by the ISDEAA or its own promises in the Gourneau letter.

CONCLUSION

BIA claims to be bound by its promise and, therefore, that it should be free from that promise. BIA discovers "ambiguities" in its own language and asks to be relieved of the Injunction so it can re-define its own obligations under ISDEAA.

Rather than apply a common sense reading of the Injunction or seek a clarification from the court that issued it, BIA institutes this appeal. BIA argues that now it can be trusted because its regulations will prevent repeat abuses, even though the agency mischaracterizes ISDEAA proposals in order rationalize its violations and waives those regulations when it wants to avoid their requirements entirely with respect to NAT.

The District Court's Preliminary Injunction should be affirmed. The District Court neither abused its discretion nor erred as a matter of law. As Secretary of Interior Zinke recently said: "[I]t goes back to respect and sovereignty that each tribe in my judgement has to have the authority, the tools to carve their own path... the Department of the Interior is to understand [that] culturally many of these tribes are different, and their path may be unique to them, and I have to respect that."[23] It is time for the BIA to show similar respect for the ISDEAA and the NAT.

DATED March 13, 2017.

/s/ Andrew W. Baldwin
Andrew W. Baldwin
Kelly A. Rudd
Mandi A. Vuinovich
Attorneys for Plaintiff-Appellee
Northern Arapaho Tribe

[23] http://trib.com/lifestyles/recreation/new-interior-secretary-zinke-sets-sights-on-balance/article_a60311c6-7dd1-5f6c-a40c-528fd9c91093.html.

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Appellee states that it knows of no related case pending in this Court.

/s/ Andrew W. Baldwin
Andrew W. Baldwin

CERTIFICATE OF SERVICE

I hereby certify that on March 13, 2017, I electronically filed the foregoing with the Clerk of the Court using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the CM/ECF system.

/s/ Andrew W. Baldwin
Andrew W. Baldwin

Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28-1.1(f), 29-2(c)(2) and (3), 32-1, 32-2 or 32-4 for Case Number 16-36049

Note: This form must be signed by the attorney or unrepresented litigant *and attached to the end of the brief.*

I certify that (*check appropriate option*):

☐ This brief complies with the length limits permitted by Ninth Circuit Rule 28-1.1.
The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☒ This brief complies with the length limits permitted by Ninth Circuit Rule 32-1.
The brief is [13,534] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☐ This brief complies with the length limits permitted by Ninth Circuit Rule 32-2(b).
The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable, and is filed by (1) ☐ separately represented parties; (2) ☐ a party or parties filing a single brief in response to multiple briefs; or (3) ☐ a party or parties filing a single brief in response to a longer joint brief filed under Rule 32-2(b). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☐ This brief complies with the longer length limit authorized by court order dated [ ]
The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6). The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable.

☐ This brief is accompanied by a motion for leave to file a longer brief pursuant to Ninth Circuit Rule 32-2 (a) and is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32 (f), if applicable. The brief's type size and type face comply with Fed. R .App. P. 32(a)(5) and (6).

☐ This brief is accompanied by a motion for leave to file a longer brief pursuant to Ninth Circuit Rule 29-2 (c)(2) or (3) and is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☐ This brief complies with the length limits set forth at Ninth Circuit Rule 32-4.
The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

Signature of Attorney or Unrepresented Litigant: /s/ Andrew W. Baldwin

Date: Mar 13, 2017

("s/" plus typed name is acceptable for electronically-filed documents)

ADDENDUM

Table of Contents

Page

6 N.A.C. 103(g)(1)(c) . . . . . Add. 1

25 U.S.C. §5123 . . . . . Add. 1

25 U.S.C. §5301 . . . . . Add. 4

25 U.S.C. §5330 . . . . . Add. 5

25 U.S.C. §5332 . . . . . Add. 6

28 U.S.C. §1292 . . . . . Add. 6

28 U.S.C. §1331 . . . . . Add. 7

28 U.S.C. §1343 . . . . . Add. 7

28 U.S.C. §1362 . . . . . Add. 8

28 U.S.C. §1367 . . . . . Add. 8

28 U.S.C. §2201 . . . . . Add. 9

25 C.F.R. §11.100 . . . . . Add. 9

25 C.F.R. §11.102 . . . . . Add. 11

25 C.F.R. §11.104 . . . . . Add. 11

25 C.F.R. §11.201 . . . . . Add. 12

25 C.F.R. §900.4. . . . . Add. 12

25 C.F.R. §900.12 . . . . . Add. 12

18 Fed. Reg. 74809 (Oct. 27, 2016) . . . . . Add. 14

6 N.A.C. 103

Section 103 - Joint Powers.

. . .

(g) Joint Business Council Dissolved.

(1) Findings.

(C) Joint Powers Board. The joint business council was a joint powers board, the authority of which was dependent upon the separate authority of the NABC and the Eastern Shoshone Business Council (or other authority of the Eastern Shoshone Tribe as determined by that Tribe). When the joint business council took action, it did so as the business council of each Tribe acting cooperatively and in concert with each other. Actions taken through the joint business council also could have been taken by separate action of each Business Council in coordination or cooperation with each other.

25 U.S.C. §5123

§ 5123. Organization of Indian tribes; constitution and bylaws and amendment thereof; special election

(a) Adoption; effective date

Any Indian tribe shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, and any amendments thereto, which shall become effective when--

(1) ratified by a majority vote of the adult members of the tribe or tribes at a special election authorized and called by the Secretary under such rules and regulations as the Secretary may prescribe; and

(2) approved by the Secretary pursuant to subsection (d) of this section.

(b) Revocation

Any constitution or bylaws ratified and approved by the Secretary shall be revocable by an election open to the same voters and conducted in the same manner as provided in subsection (a) of this section for the adoption of a constitution or bylaws.

(c) Election procedure; technical assistance; review of proposals; notification of contrary-to-applicable law findings

(1) The Secretary shall call and hold an election as required by subsection (a) of this section--

(A) within one hundred and eighty days after the receipt of a tribal request for an election to ratify a proposed constitution and bylaws, or to revoke such constitution and bylaws; or

(B) within ninety days after receipt of a tribal request for election to ratify an amendment to the constitution and bylaws.

(2) During the time periods established by paragraph (1), the Secretary shall--

(A) provide such technical advice and assistance as may be requested by the tribe or as the Secretary determines may be needed; and

(B) review the final draft of the constitution and bylaws, or amendments thereto to determine if any provision therein is contrary to applicable laws.

(3) After the review provided in paragraph (2) and at least thirty days prior to the calling of the election, the Secretary shall notify the tribe, in writing, whether and in what manner the Secretary has found the proposed constitution and bylaws or amendments thereto to be contrary to applicable laws.

(d) Approval or disapproval by Secretary; enforcement

(1) If an election called under subsection (a) of this section results in the adoption by the tribe of the proposed constitution and bylaws or amendments thereto, the Secretary shall approve the constitution and bylaws or amendments thereto within forty-five days after the election unless the Secretary finds that the proposed constitution and bylaws or any amendments are contrary to applicable laws.

(2) If the Secretary does not approve or disapprove the constitution and bylaws or amendments within the forty-five days, the Secretary's approval shall be considered as given. Actions to enforce the provisions of this section may be brought in the appropriate Federal district court.

(e) Vested rights and powers; advisement of presubmitted budget estimates

In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local governments. The Secretary shall advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Office of Management and Budget and the Congress.

(f) Privileges and immunities of Indian tribes; prohibition on new regulations

Departments or agencies of the United States shall not promulgate any regulation or make any decision or determination pursuant to the Act of June 18, 1934 (25 U.S.C. 461 et seq., 48 Stat. 984) as amended, or any other Act of Congress, 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.

(g) Privileges and immunities of Indian tribes; existing regulations

Any regulation or administrative decision or determination of a department or agency of the United States that is in existence or effect on May 31, 1994, and that classifies, enhances, or diminishes the privileges and immunities available to a federally recognized Indian tribe relative to the privileges and immunities available

to other federally recognized tribes by virtue of their status as Indian tribes shall have no force or effect.

(h) Tribal sovereignty

Notwithstanding any other provision of this Act--

> (1) each Indian tribe shall retain inherent sovereign power to adopt governing documents under procedures other than those specified in this section; and
>
> (2) nothing in this Act invalidates any constitution or other governing document adopted by an Indian tribe after June 18, 1934, in accordance with the authority described in paragraph (1).

25 U.S.C. § 5301

§ 5301. Congressional statement of findings

(a) Findings respecting historical and special legal relationship, and resultant responsibilities

The Congress, after careful review of the Federal Government's historical and special legal relationship with, and resulting responsibilities to, American Indian people, finds that--

> **(1)** the prolonged Federal domination of Indian service programs has served to retard rather than enhance the progress of Indian people and their communities by depriving Indians of the full opportunity to develop leadership skills crucial to the realization of self-government, and has denied to the Indian people an effective voice in the planning and implementation of programs for the benefit of Indians which are responsive to the true needs of Indian communities; and . . .

25 U.S.C. § 5330

§ 5330. Rescission of contract or grant and assumption of control of program, etc.; authority; grounds; procedure; correction of violation as prerequisite to new contract or grant agreement; construction with occupational safety and health requirements

Each contract or grant agreement entered into pursuant to sections 5321 and 5322 of this title shall provide that in any case where the appropriate Secretary determines that the tribal organization's performance under such contract or grant agreement involves (1) the violation of the rights or endangerment of the health, safety, or welfare of any persons; or (2) gross negligence or mismanagement in the handling or use of funds provided to the tribal organization pursuant to such contract or grant agreement, or in the management of trust fund, trust lands or interests in such lands pursuant to such contract or grant agreement, such Secretary may, under regulations prescribed by him and after providing notice and a hearing on the record to such tribal organization, rescind such contract or grant agreement, in whole or in part, and assume or resume control or operation of the program, activity, or service involved if he determines that the tribal organization has not taken corrective action as prescribed by the Secretary to remedy the contract deficiency, except that the appropriate Secretary may, upon written notice to a tribal organization, and the tribe served by the tribal organization, immediately rescind a contract or grant, in whole or in part, and resume control or operation of a program, activity, function, or service, if the Secretary finds that (i) there is an immediate threat of imminent harm to the safety of any person, or imminent substantial and irreparable harm to trust funds, trust lands, or interests in such lands, and (ii) such threat arises from the failure of the contractor to fulfill the requirements of the contract. In such cases, the Secretary shall provide the tribal organization with a hearing on the record within ten days or such later date as the tribal organization may approve. Such Secretary may decline to enter into a new contract or grant agreement and retain control of such program, activity, or service until such time as he is satisfied that the violations of rights or endangerment of health, safety, or welfare which necessitated the rescission has been corrected. In any hearing or appeal provided for under this section, the Secretary shall have the burden of proof to establish, by clearly demonstrating the validity of the grounds for rescinding, assuming, or reassuming the contract that is the subject of the

hearing. Nothing in this section shall be construed as contravening the Occupational Safety and Health Act of 1970, as amended.

25 U.S.C. § 5332

§ 5332. Sovereign immunity and trusteeship rights unaffected

Nothing in this chapter shall be construed as--

(1) affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by an Indian tribe; or

(2) authorizing or requiring the termination of any existing trust responsibility of the United States with respect to the Indian people.

28 U.S.C. § 1292

§ 1292. Interlocutory decisions

(a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:

> (1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court; . . .

28 U.S.C. § 1331

§ 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1343

§ 1343. Civil rights and elective franchise

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

> (1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;
>
> (2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;
>
> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;
>
> (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

(b) For purposes of this section--

(1) the District of Columbia shall be considered to be a State; and

(2) any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

28 U.S.C. § 1362

§ 1362. Indian tribes

The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1367

§ 1367. Supplemental jurisdiction

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties. . . .

28 U.S.C. § 2201

§ 2201. Creation of remedy

(a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country (as defined in section 516A(f)(10) of the Tariff Act of 1930), as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

(b) For limitations on actions brought with respect to drug patents see section 505 or 512 of the Federal Food, Drug, and Cosmetic Act, or section 351 of the Public Health Service Act.

25 C.F.R. § 11.100

§ 11.100 Where are Courts of Indian Offenses established?

(a) Unless indicated otherwise in this title, these Courts of Indian Offenses are established and the regulations in this part apply to the Indian country (as defined in 18 U.S.C. 1151 and by Federal court precedent) occupied by the following tribes:

> (1) Santa Fe Indian School Property, including the Santa Fe Indian Health Hospital, and the Albuquerque Indian School Property (land held in trust for the 19 Pueblos of New Mexico);
>
> (2) Skull Valley Band of Goshutes Indians (Utah);

(3) Te–Moak Band of Western Shoshone Indians (Nevada);

(4) Tribes located in the former Oklahoma Territory (Oklahoma) that are listed in paragraph (b) of this section;

(5) Tribes located in the former Indian Territory (Oklahoma) that are listed in paragraph (c) of this section;

(6) Ute Mountain Ute Tribe (Colorado); and

(7) Winnemucca Indian Tribe.

(b) This part applies to the following tribes located in the former Oklahoma Territory (Oklahoma):

(1) Apache Tribe of Oklahoma;

(2) Caddo Nation of Oklahoma;

(3) Comanche Nation (except Comanche Children's Court);

(4) Delaware Nation;

(5) Fort Sill Apache Tribe of Oklahoma;

(6) Kiowa Indian Tribe of Oklahoma;

(7) Otoe–Missouria Tribe of Indians; and

(8) Wichita and Affiliated Tribe of Indians.

(c) This part applies to the following tribes located in the former Indian Territory (Oklahoma):

(1) Eastern Shawnee Tribe of Oklahoma;

(2) Modoc Tribe of Oklahoma;

(3) Ottawa Tribe of Oklahoma;

(4) Peoria Tribe of Indians of Oklahoma; and

(5) Seneca–Cayuga Tribe of Oklahoma.

(d) This part applies to the Indian country (as defined in 18 U.S.C. 1151 and by Federal precedent) within the exterior boundaries of the Wind River Reservation in Wyoming.

25 C.F.R. § 11.102

§ 11.102 What is the purpose of this part?

It is the purpose of the regulations in this part to provide adequate machinery for the administration of justice for Indian tribes in those areas of Indian country where tribes retain jurisdiction over Indians that is exclusive of State jurisdiction but where tribal courts have not been established to exercise that jurisdiction.

25 C.F.R. § 11.104

§ 11.104 When does this part apply?

(a) The regulations in this part continue to apply to each tribe listed in § 11.100 until either:

(1) BIA and the tribe enter into a contract or compact for the tribe to provide judicial services; or

(2) The tribe has put into effect a law-and-order code that establishes a court system and that meets the requirements of paragraph (b) of this section. . . .

25 C.F.R. § 11.201

§ 11.201 How are magistrates for the Court of Indian Offenses appointed?

(a) Each magistrate shall be appointed by the Assistant Secretary—Indian Affairs or his or her designee subject to confirmation by a majority vote of the tribal governing body of the tribe occupying the Indian country over which the court has jurisdiction, or, in the case of multi-tribal courts, confirmation by a majority of the tribal governing bodies of the tribes under the jurisdiction of a Court of Indian Offenses. . . .

25 C.F.R. § 900.4

§ 900.4 Effect on existing tribal rights.

Nothing in these regulations shall be construed as:

. . .

(b) Terminating, waiving, modifying, or reducing the trust responsibility of the United States to the Indian tribe(s) or individual Indians. The Secretary shall act in good faith in upholding this trust responsibility; . . .

25 C.F.R. § 900.12

§ 900.12 Are the proposal contents requirements the same for renewal of a contract that is expiring and for securing an annual funding agreement after the first year of the funding agreement?

No. In these situations, an Indian tribe or tribal organization should submit a renewal proposal (or notification of intent not to renew) or an annual funding agreement proposal at least 90 days before the expiration date of the contract or existing annual funding agreement. The proposal shall provide funding information in the same detail and format as the original proposal and may also identify any significant proposed changes.

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4285–DR; Docket ID FEMA–2016–0001]

North Carolina; Major Disaster and Related Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of a major disaster for the State of North Carolina (FEMA–4285–DR), dated October 10, 2016, and related determinations.

DATES: Effective October 10, 2016.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated October 10, 2016, the President issued a major disaster declaration under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the ''Stafford Act''), as follows:

I have determined that the damage in certain areas of the State of North Carolina resulting from Hurricane Matthew beginning on October 4, 2016, and continuing, is of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the ''Stafford Act''). Therefore, I declare that such a major disaster exists in the State of North Carolina.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes such amounts as you find necessary for Federal disaster assistance and administrative expenses.

You are authorized to provide Individual Assistance and assistance for debris removal and emergency protective measures (Categories A and B) under the Public Assistance program in the designated areas, Hazard Mitigation throughout the State, and any other forms of assistance under the Stafford Act that you deem appropriate subject to completion of Preliminary Damage Assessments (PDAs). Direct Federal assistance is authorized.

Consistent with the requirement that Federal assistance is supplemental, any Federal funds provided under the Stafford Act for Hazard Mitigation and Other Needs Assistance will be limited to 75 percent of the total eligible costs. Federal funds provided under the Stafford Act for Public Assistance also will be limited to 75 percent of the total eligible costs, with the exception of projects that meet the eligibility criteria for a higher Federal cost-sharing percentage under the Public Assistance Alternative Procedures Pilot Program for Debris Removal implemented pursuant to section 428 of the Stafford Act.

Further, you are authorized to make changes to this declaration for the approved assistance to the extent allowable under the Stafford Act.

The time period prescribed for the implementation of section 310(a), Priority to Certain Applications for Public Facility and Public Housing Assistance, 42 U.S.C. 5153, shall be for a period not to exceed six months after the date of this declaration.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Elizabeth Turner, of FEMA is appointed to act as the Federal Coordinating Officer for this major disaster.

The following areas of the State of North Carolina have been designated as adversely affected by this major disaster:

Beaufort, Bladen, Columbus, Cumberland, Edgecombe, Hoke, Lenoir, Nash, Pitt, and Robeson Counties for Individual Assistance.

Beaufort, Bertie, Bladen, Brunswick, Camden, Carteret, Chowan, Columbus, Craven, Cumberland, Currituck, Dare, Duplin, Edgecombe, Greene, Hoke, Hyde, Johnston, Lenoir, Nash, New Hanover, Onslow, Pamlico, Pasquotank, Pender, Perquimans, Pitt, Robeson, Tyrrell, Washington, and Wayne Counties for debris removal and emergency protective measures (Categories A and B), including direct federal assistance, under the Public Assistance program.

All areas within the State of North Carolina are eligible for assistance under the Hazard Mitigation Grant Program.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households in Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2016–25598 Filed 10–26–16; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

[178A2100DD/AAKC001030/A0A501010.999900 253G]

Court of Indian Offenses Serving the Wind River Indian Reservation

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice of Waiver of Certain Parts of 25 CFR Part 11.

SUMMARY: This notice accompanies the interim final rule establishing a Court of Indian Offenses (also known as CFR Court) for the Wind River Indian Reservation. It waives the application of certain sections of the regulations for the Court of Indian Offenses serving the Wind River Indian Reservation to allow BIA to establish a CFR court when necessary. It will also allow the Assistant Secretary—Indian Affairs to appoint a magistrate without the need for confirmation by the tribal governing body.

DATES: This notice is effective on October 27, 2016.

FOR FURTHER INFORMATION CONTACT: Ms. Elizabeth Appel, Director, Office of Regulatory Affairs & Collaborative Action—Indian Affairs, (202) 273–4680; *elizabeth.appel@bia.gov.*

SUPPLEMENTARY INFORMATION: Courts of Indian Offenses operate in those areas of Indian country where tribes retain jurisdiction over Indians that is exclusive of State jurisdiction but where tribal courts have not been established to fully exercise that jurisdiction. The Eastern Shoshone Tribe and the Northern Arapaho Tribe have a joint interest in the Wind River Indian Reservation; however, the current tribal court operating on the reservation, the Shoshone & Arapaho Tribal Court, is currently operating without the support of both Tribes, and with limited resources. To ensure the continued administration of justice on the Reservation, BIA is taking steps to ensure that judicial services will continue to be provided if the Shoshone & Arapaho Tribal Court ceases operations. Therefore, the Secretary has determined, in her discretion, that it is necessary to waive 25 CFR 11.104(a) and 25 CFR 11.201(a) on the Wind River Indian Reservation to ensure that the Bureau of Indian Affairs can establish and operate a Court of Indian Offenses immediately in the event that the Shoshone and Arapaho Tribal Court ceases operations.

Section 11.104(a) provides that 25 CFR part 11 applies to Tribes listed in

§ 11.100 until either BIA and the Tribe enter into a contract or compact for the Tribe to provide judicial services, or until the Tribe has put into effect a law-and-order code that meets certain requirements.

Section 11.201(a) provides that the Assistant Secretary—Indian Affairs appoints a magistrate subject to confirmation by a majority vote of the Tribal governing bodies.

The waiver will allow BIA to establish a CFR court when necessary and to allow the Assistant Secretary—Indian Affairs to appoint a magistrate without the need for confirmation by the Tribal governing body.

Dated: October 17, 2016.

Lawrence S. Roberts,

Principal Deputy Assistant Secretary, Indian Affairs.

[FR Doc. 2016–26041 Filed 10–26–16; 8:45 am]

BILLING CODE 4337–15–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–NER–FIIS–DTS–21798; PX.P0201786a.00.1]

Draft Fire Island Wilderness Breach Management Plan/Environmental Impact Statement, Fire Island National Seashore, New York

AGENCY: National Park Service, Department of the Interior.

ACTION: Notice of availability.

SUMMARY: The National Park Service (NPS) announces the availability of the Draft Fire Island Wilderness Breach Management Plan and Environmental Impact Statement (Draft Breach Plan/EIS) for Fire Island National Seashore, New York. The Draft Breach Plan/EIS presents and analyzes the potential consequences of three alternatives that will guide the management of the breach that occurred in the Otis Pike Fire Island High Dune Wilderness during Hurricane Sandy in October, 2012.

DATES: The comment period will end on December 12, 2016. A public meeting will be held on November 7, 2016.

ADDRESSES: Copies of the Draft Breach Plan/EIS will be available online for public review at *http://parkplanning.nps.gov/FireIslandBreachManagementPlan.* A limited number of hard copies will be available upon request. The public meeting will be held at the Patchogue-Watch Hill Ferry Terminal at 150 West Ave. in Patchogue, New York. Comments can be submitted electronically at *http://parkplanning.nps.gov/FireIslandBreachManagementPlan.* Comments in hard copy (*e.g.*, in a letter) can be sent by U.S. Postal Service or other mail delivery service or hand-delivered to: Chris Soller, Superintendent, Fire Island National Seashore, 120 Laurel Street Patchogue, NY 11772. Written comments will also be accepted at the public meeting.

FOR FURTHER INFORMATION CONTACT: Kaetlyn Jackson, Fire Island National Seashore, 120 Laurel Street Patchogue, NY, 11772, 631–687–4770.

SUPPLEMENTARY INFORMATION: On October 29, 2012, Hurricane Sandy created three breaches in the barrier island system off the south shore of Long Island, New York, including one within the Otis Pike Fire Island High Dune Wilderness Area (Fire Island Wilderness) which is within the boundaries of Fire Island National Seashore (Seashore).

The existing Breach Contingency Plan, developed by the U.S. Army Corps of Engineers in 1996, is the only guidance currently in effect to address breaches along coastal Long Island from Fire Island Inlet east to Montauk Point. Action is needed at this time because the Breach Contingency Plan is outdated and does not adequately address management of breaches in the Fire Island Wilderness.

Managing a breach in designated wilderness is different from managing breaches outside wilderness areas, as the NPS must manage federal wilderness to preserve wilderness character. Management of the Fire Island Wilderness must comply with the Wilderness Act of 1964; the 1980 Otis Pike Fire Island High Dune Wilderness Act (Pub. L. 96–585); and the 1983 *Wilderness Management Plan, Fire Island National Seashore*, which governs NPS actions taken in the Fire Island Wilderness. However, while the wilderness breach must be managed to protect wilderness character, the Otis Pike Fire Island High Dune Wilderness Act does not preclude closure of a wilderness breach if closure were needed ''to prevent loss of life, flooding, and other severe economic and physical damage to the Great South Bay and surrounding areas.'' Therefore, pursuant to the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), the NPS prepared this Draft Fire Island Wilderness Breach Management Plan and Environmental Impact Statement (Draft Breach Plan/EIS) to develop a management strategy for the breach in the Fire Island Wilderness. The Draft Breach Plan/EIS has several goals:

- Ensuring the continued integrity of the wilderness character;
- protecting the natural and cultural features of the Seashore and its surrounding ecosystems;
- protecting human life; and
- managing the risk of economic and physical damage to the surrounding areas.

Scoping and early engagement with other agencies, tribes, stakeholders, and the public began in late 2014 and continued through 2015. Formal public scoping was initiated with the publication of a Notice of Intent to Prepare an EIS in the **Federal Register** (80 FR 53886, Sept. 8, 2015). Early in the scoping period, the US Army Corps of Engineers, New York district and the State of New York, Department of Environmental Conservation agreed to be cooperating agencies in development of the Breach Plan/EIS.

The Draft Breach Plan/EIS evaluates two action alternatives and the no-action alternative.

Alternative 1—Mechanical closure of the wilderness breach as soon as possible.

Alternative 2 (no action)—The evolution, growth, and/or closure of the wilderness breach would be determined by natural barrier island processes and no human intervention would occur to close the breach or to reopen the breach if it were to close by natural processes.

Alternative 3 (proposed action and NPS preferred alternative)—The evolution, growth, and/or closure of the breach would be determined by natural barrier island processes, and human intervention to close the breach would occur only ''to prevent loss of life, flooding, and other severe economic and physical damage to the Great South Bay and surrounding areas.'' The NPS would develop criteria that indicate the breach poses a threat to life and/or property. As long as monitoring data show that the established criteria have not been exceeded, the NPS would allow the breach to be shaped entirely by natural processes with no human intervention. The breach may remain open or it may close naturally. If monitoring data indicate that the established criteria have been exceeded, the breach would be mechanically closed as soon as practicable.

Alternative 3 is identified as the NPS preferred alternative because it allows the breach to be managed according to NPS resource management policies and wilderness directives while allowing closure if necessary to prevent ''loss of life, flooding, and other severe economic and physical damage to the Great South Bay and surrounding areas.''