BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General
Civil Division

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

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

Attorneys for Federal Defendants

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

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

Plaintiff,

v.

DARRYL LaCOUNTE, LOUISE REYES, NORMA GOURNEAU, RAY NATION, MICHAEL BLACK, and other unknown individuals in their individual and official capacities.

Defendants.

No. 1:16-cv-11-BMM
No. 1:16-cv-60-BMM (consolidated)

DEFENDANTS' BRIEF IN RESPONSE TO PLAINTIFF'S MOTION FOR A TEMPORARY RESTRAINING ORDER

TABLE OF CONTENTS

I. INTRODUCTION 9

II. FACTUAL BACKGROUND 10

III. STANDARD OF REVIEW 12

IV. ARGUMENT 13

A. Plaintiff Is Not Likely to Succeed on the Merits 13

1. Plaintiff's TRO Motion Is Unrelated to Allegations Contained in Either of its Complaints 13

2. Only One of Plaintiff's Claims is Ripe for Review 14

3. The NAT Lack Standing to Challenge Federal Defendants' Actions Concerning Alleged Violation of the Rights of Individual Arapaho Tribal Members 15

a. Plaintiff Lacks Standing to Bring Claims for Unspecified Injuries on behalf of Unidentified Third Parties 16

b. Plaintiff Cannot Pursue These Claims Under the Doctrine of *Parens Patriae* 16

4. This Court Lacks Jurisdiction over Plaintiff's Claims against Federal Defendants 18

a. Plaintiff cannot obtain relief under the *ultra vires* doctrine 18

b. The Administrative Procedure Act Does Not Provide an Applicable Waiver of Immunity for Review of Plaintiff's Claims 19

5. The BIA Has Acted Within its Statutory Authority in Establishing a CFR Court 21

a. The BIA is Willing to Provide the NAT with Arrest Records in Compliance with the Privacy Act of 1974 23

b. The NAT Has Not Demonstrated that BIA Police Are Violating Their Legal Obligations 25

6. Federal Defendants Have Not Violated a "Duty to Consult" 27

7. The Tribal Court Has No Right to Remain in the BIA-Owned Court Building 28

B. The NAT Has Not Established That the Remaining Factors Weigh in Favor of a TRO 29

V. CONCLUSION 32

TABLE OF AUTHORITIES

CASES **PAGE(S)**

Abbott Labs. v. Gardner,
387 U.S. 136 (1967) 14

Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel., Barez,
458 U.S. 592 (1982) 16

Allen v. Reid,
No. 15-cv-1905, 2016 WL 3136859 (D. Minn. June 3, 2016) 14

Bennett v. Spear,
520 U.S. 154 (1997) 20

Booth v. Churner,
532 U.S. 731 (2001) 20

Brendale v. Confederated Tribes & Bands of Yakima Indian Nation,
492 U.S. 408 (1989) 21

Citizen Potawatomi Nation v. Norton,
248 F.3d 993 (10th Cir. 2001) 17, 30

Clark v. Bank of Am. N.A.,
No. 14-cv-232, 2015 WL 1433834 (D. Idaho Mar. 27, 2015) 14

Corus Staal BV v. United States,
502 F.3d 1370 (Fed. Cir. 2007) 20, 21

Darby v. Cisneros,
509 U.S. 137 (1993) 20, 21

Dennis v. Thomas,
09-cv-1317, 2010 WL 3927488 (D. Or. Oct. 4, 2010) 14

Drakes Bay Oyster Co. v. Jewell,
747 F.3d 1073 (9th Cir. 2014) 13

Fair Elections Ohio v. Husted,
770 F.3d 456 (6th Cir. 2014) 16, 26

Fla. Paraplegic Ass'n v. Miccosukee Tribe of Indians of Fla.,
166 F.3d 1126 (11th Cir. 1999) 17

Gallo Cattle Co. v. USDA,
159 F.3d 1194 (9th Cir. 1998) 20

Gen. Motors Corp. v. EPA,
363 F.3d 442 (D.C. Cir. 2004) 20

Haw. Cty. Green Party v. Clinton,
124 F. Supp. 2d 1173 (D. Haw. 2000) 15

Haw. Helicopter Operators Ass'n v. F.A.A.,
51 F.3d 212 (9th Cir. 1995) 22

Heath v. Alabama,
474 U.S. 82 (1985) 22

Kescoli v. Babbitt,
101 F.3d 1304 (9th Cir. 1996) 17, 30

Kowalski v. Tesmer,
543 U.S. 125 (2004) 16, 26

Larson v. Domestic & Foreign Commerce Corp.,
337 U.S. 682 (1949) 18, 19

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) 16

Lujan v. Nat'l Wildlife Fed'n,
497 U.S. 871 (1990) 21

Massachusetts v. Mellon,
262 U.S. 447 (1923) 16, 17

Mazurek v. Armstrong,
520 U.S. 968 (1997) 12, 20

Messerschmidt v. Millender,
132 S. Ct. 1235 (2012) 26

NAT v. Burwell,
118 F. Supp. 3d 1264 (D. Wyo. 2015) 17

Navajo Nation v. Wash. Super. Ct. for Yakima Cty.,
47 F. Supp. 2d 1233 (E.D. Wash. 1999) 17

Nickler v. Cty. of Clark,
648 F. App'x 601 (9th Cir. 2016) 30

Ohio Forestry Ass'n v. Sierra Club,
523 U.S. 726 (1998) 14

Or. Nat. Desert Ass'n v. U.S. Forest Serv.,
465 F.3d 977 (9th Cir. 2006) 18

Osage Producers Ass'n v. Jewell,
-- F.3d ---, 2016 WL 3093938 (N.D. Okla. June 1, 2016) 20, 21

Patel v. Gonzales,
No. 06-1090, 2007 WL 433102 (W.D. Wash. Jan 25, 2007) 15

Pennhurst State Sch. & Hosp. v. Halderman,
465 U.S. 89 (1984) 18

Quileute Indian Tribe v. Babbitt,
18 F.3d 1456 (9th Cir. 1994) 21

Reno Air Racing Ass'n v. McCord,
452 F.3d 1126 (9th Cir. 2006) 31

Riverbend Farms v. Madigan,
958 F.2d 1479 (9th Cir. 1992) 22

Schlesinger v. Reservists Comm. to Stop the War,
418 U.S. 208 (1974) 16

South Carolina v. North Carolina,
558 U.S. 256 (2010) 17

South Delta Water Agency v. U.S. Dep't of Interior,
767 F.2d 531 (9th Cir. 1985) 19

Spokeo, Inc. v. Robins,
136 S. Ct. 1540 (2016) 16

Stock W. Corp. v. Lujan,
982 F.2d 1389 (9th Cir. 1993) 19, 21

Stuhlbarg Int'l Sales Co. v. John D. Brush & Co.,
240 F.3d 832 (9th Cir. 2001) 12

Teague v. Bad River Band of Lake Superior Chippewa Indians,
236 Wis. 2d 384 (2000) 23

Tillett v. Hodel,
730 F. Supp. 381 (W.D. Okla. 1990) 22

Timbisha Shoshone Tribe v. Kennedy,
687 F. Supp. 2d 1171 (E.D. Cal. 2009) 30

Tohono O'odham Nation v. Ducey,
130 F. Supp. 3d 1301 (D. Ariz. 2015) 30

United States v. Lara,
541 U.S. 193 (2004) 22

United States v. Red Lake Band of Chippewa Indians,
827 F.2d 380 (8th Cir. 1987) 21

United States v. Santee Sioux Tribe of Neb.,
254 F.3d 728 (8th Cir. 2001) 17

United States v. Wheeler,
435 U.S. 313 (1978) 21, 22

United States v. Yakima Tribal Court,
806 F.2d 853 (9th Cir. 1986) 18

United Tribe of Shawnee Indians v. United States,
253 F.3d 543 (10th Cir. 2001) 19

Vacek v. U.S. Postal Serv.,
447 F.3d 1248 (9th Cir. 2006) 20

Vt. Yankee Nuclear Power Corp. v. NRDC,
435 U.S. 519 (1978) 22

White v. Univ. of California,
765 F.3d 1010 (9th Cir. 2014) 17, 30

White Mountain Apache Tribe v. Hodel,
840 F.2d 675 (9th Cir. 1988) 20

Wilson v. Omaha Indian Tribe,
442 U.S. 653 (1979) 28

Winter v. Nat. Res. Def. Council, Inc.,
555 U.S. 7 (2008) 12

STATUTES & REGULATIONS

5 U.S.C. § 552a 24, 25
18 U.S.C. § 666 22
18 U.S.C. § 841 22
18 U.S.C. § 922 22
18 U.S.C. § 1152 22
18 U.S.C. § 1153 22
18 U.S.C. § 1163 22
18 U.S.C. § 1165 22
18 U.S.C. § 1170 22
18 U.S.C. § 2261 22
25 U.S.C. § 2801 26
25 U.S.C. § 2802 26
25 U.S.C. § 2803 26
25 U.S.C. § 5301 *et seq* 9
25 C.F.R. § 11.449 22

I. INTRODUCTION

Having obtained a preliminary injunction that prevents the Bureau of Indian Affairs ("BIA") from awarding a contract under the Indian Self Determination Act ("ISDA"), 25 U.S.C. § 5301 *et seq*., to operate shared BIA programs on the Wind River Reservation to one Tribe without the consent of the other Tribe, the Northern Arapaho Tribe ("NAT") now asks this Court to allow it to effectively do just that. As this Court is aware, the contract providing federal funds to operate the Shoshone and Arapaho Tribal Court expired on September 30, 2016, and the Tribes have not agreed to a new contract. Although the NAT has continued to operate the Tribal Court with its own tribal funds, the Eastern Shoshone Tribe ("EST") issued a tribal resolution withdrawing recognition of the Tribal Court. Accordingly, to comply with this Court's injunction and to protect public safety, the BIA established a CFR Court for the Wind River Reservation.

Since establishing the CFR Court, the BIA has been consulting with the Tribes and the Tribal Court to develop separate agreements with each Tribe for allocating and transferring cases between the courts and clarifying the role that BIA Police, which provides law enforcement services to the entire Reservation, can and will play in interacting with both courts. Those negotiations have continued with counsel for the NAT sending a draft Memorandum of Agreement ("MOA") to undersigned counsel for the BIA on October 26, and with the BIA sending its own draft to each Tribe on October 28.

Before even providing the BIA with the October 26 proposal, however, the NAT filed the present motion for a temporary restraining order ("TRO motion"), ECF No. 114, seeking this Court's involvement in decisions that will affect how the courts and BIA police will operate for members of both Tribes on the Reservation.

This Court should deny the NAT's motion for a myriad of reasons: (1) the new claims have nothing to do with the allegations in either of the two complaints filed in the consolidated cases before this Court; (2) all but one of the claims are

unripe; (3) the NAT lacks standing to pursue claims on behalf of unidentified tribal members; (4) this Court lacks jurisdiction over the forms of relief sought; and (5) many of the forms of relief the NAT seeks are either precluded by federal law or can only be resolved through the negotiation with both Tribes that is currently ongoing. Nor does the NAT have any right to remain in the BIA-owned court building without permission of the BIA or consent of the EST. This Court should thus reject the NAT's attempt to inject this Court into these disputes, and allow the ongoing negotiations to continue.

II. FACTUAL BACKGROUND

1. On September 30, 2016, the BIA's 638 contract providing federal funds to the EST to operate the Shoshone and Arapaho Tribal Court (hereafter "Tribal Court") expired. Each Tribe submitted a separate proposal for a new contract to jointly operate the Tribal Court for Fiscal Year 2017. *See* Ex. 1, Decl. of Norma Gourneau ¶ 5. After evaluating both proposals, BIA offered to award a 638 contract to both Tribes on the condition that both Tribes agree to sign the same contract and to jointly operate and oversee the Tribal Court. *Id.* Neither Tribe has indicated that it is willing to do so. *Id.*

2. Also on September 30, Acting Deputy Assistant Secretary–Indian Affairs ("AS-IA") Larry Roberts issued a memorandum approving the establishment of a CFR Court on Wind River Reservation.[1] Ex. 1-A. That memorandum waived certain regulations at 25 C.F.R. Part 11 to allow the CFR Court to serve as a unified system of justice for all residents of the Reservation. *Id.* The waiver did not affect the jurisdiction of the Tribal Court, but instead permitted a CFR Court to operate even if a Tribal Court is in operation. Gourneau Decl. ¶ 4. On that same date, the BIA sent a letter to the Chair of each Tribe advising them of the BIA's intent to establish a CFR Court for the Wind River Reservation, and posted a public notice at the court

[1] Also known as a Court of Indian Offenses. *See* 25 C.F.R. Part 11.

building. Exs. 1-B, 1-C. Notice of the AS-IA's approval and waiver has also been published in the Federal Register. 81 Fed. Reg. 74667 (Oct. 27, 2016); 81 Fed. Reg. 74809 (Oct. 27, 2016).

3. On October 3, the BIA learned the Tribal Court was continuing to operate without federal funding. Gourneau Decl. ¶ 6. The BIA thus delayed opening the CFR Court. *Id.*

4. On October 4, the Northern Arapaho Business Council ("NABC") issued a memorandum stating that it would continue to operate the Tribal Court with its own tribal funds. *Id.* ¶ 7. The Tribal Court continues to operate in Building 109, a BIA-owned and BIA-maintained court building. *Id.* ¶¶ 6, 18. *See also* Exs. 1-I, 1-J.

5. On October 6, the Shoshone Business Council ("SBC") submitted to BIA a Tribal Resolution withdrawing its recognition of the Tribal Court and requesting that the BIA immediately establish a CFR Court for its tribal members. *Id.* ¶ 8. *See also* Ex. 1-E.

6. On October 7, the NAT asked BIA for permission for the Tribal Court to remain in Building 109. Gourneau Decl. ¶ 9. On October 17, the BIA declined the request of the NABC to allow the Tribal Court to continue operating in Building 109. *Id.* ¶ 10.

7. On October 18, the BIA established a CFR Court on the Wind River Reservation. *Id.* ¶ 11. *See also* Ex. 1-H. The BIA stated that it recognized the right of the NAT to operate a tribal court, and stated that it recognized that there would be many cases in which the CFR Court and the Tribal Court would likely have concurrent jurisdiction. Ex. 1-H. The agency informed the Tribal Court that it was proposing a protocol to govern the allocation and transfer of cases between the courts. *See id.*

8. Also on October 18, the BIA, through its CFR Court Magistrate, began consulting with the Chief Judge of the Tribal Court about establishing a protocol for the allocation and transfer of new and existing cases between the courts. *Id.* ¶ 12. No

final decisions were reached between the NAT and the BIA or between the EST and the BIA. *Id.*

9. BIA Police began issuing citations to the CFR Court on October 18, Ex. 2, Decl. of Douglas Noseep ¶ 11, and the CFR Court began hearing cases on October 21. *Id.* ¶ 13. BIA is currently operating the CFR Court in the court room when the Tribal Court is not in session and in the Wind River Agency building. Gourneau Decl. ¶ 13.

10. Neither the NAT nor the Tribal Court prosecutor has submitted a written request for BIA Police records. Noseep Decl. ¶ 21. Nor has the CFR Court received any written requests for transfers of pending matters to the Tribal Court. Gourneau Decl. ¶ 17.

11. On October 26, the NAT filed the present motion. ECF No. 114. Shortly thereafter, the NAT emailed a draft memorandum of agreement ("MOA") to undersigned counsel concerning the allocation of cases between the courts. Gourneau Decl. ¶ 14. On October 28, the BIA emailed its own draft MOA, to each Tribe. *Id.* ¶ 15. The NAT responded to the BIA's draft on November 7. *Id.*

12. The Tribal Court continues to occupy Building 109 without permission of the BIA and without consent of the EST. Gourneau Decl. ¶ 18.

III. STANDARD OF REVIEW

Issuance of a TRO, as a form of preliminary injunctive relief, is an extraordinary remedy, and plaintiffs have the burden of proving the propriety of such a remedy by clear and convincing evidence. *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997). The showing required for a TRO is the same as that required for a preliminary injunction. *Stuhlbarg Int'l Sales Co., Inc. v. John D. Brush & Co., Inc.*, 240 F.3d 832, 839 (9th Cir. 2001). First, a plaintiff must establish that it is "likely to succeed on the merits." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Second, plaintiff must show that irreparable harm is "likely in the absence of an

injunction." *Id.* at 21-22 (preliminary relief cannot issue based on speculation or the mere "possibility of irreparable harm"). Third, a court "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Id.* at 24. Finally, the court "should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Id.*[2]

IV. ARGUMENT

A. Plaintiff Is Not Likely to Succeed on the Merits

1. Plaintiff's TRO Motion Is Unrelated to Allegations Contained in Either of Its Complaints

This Court lacks jurisdiction over the NAT's TRO motion because both the alleged conduct complained of and the relief requested are well beyond the scope of the either the complaint plaintiff filed in *NAT v. LaCounte*, No. 16-11, or in *NAT v. Jewell*, No. 16-60. In *NAT v. LaCounte*, plaintiff challenges the BIA's award of 638 contracts to the EST providing federal funding for Fiscal Year 2016 for shared programs. In *NAT v. Jewell*, plaintiff challenges the BIA's declinations of NAT proposals for 638 contracts to take over all or a portion of funding allocated for shared BIA programs to create and operate new programs solely for the benefit of the NAT and its members. Neither complaint has anything to do with the allegations now raised in plaintiff's TRO motion, which concerns alleged injuries to the NAT's operation of a tribal court with its own funds. Nor is the Office of Justice Services ("OJS"), a BIA subagency that staffs BIA police on Wind River, a named defendant in either suit, yet plaintiff seeks substantial injunctive relief from OJS in the instant motion. *See* Mot. ¶¶ 1-4.

Courts repeatedly deny TRO motions that are based on allegations and claims

[2] When the federal government is a party, the balance of equities and public interest factors may be merged. *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014).

for relief that are unrelated to the complaint filed in the case. *See, e.g., Allen v. Reid*, No. 15-1905, 2016 WL 3136859, at *4 (D. Minn. June 3, 2016) ("[T]o the extent that [plaintiff] seeks injunctive relief for alleged mistreatment and retaliation that are unrelated to the claims in his Amended Complaint, he is not entitled to such relief."); *Clark v. Bank of Am. N.A.*, No. 14-232, 2015 WL 1433834, at *8 (D. Idaho Mar. 27, 2015); *Dennis v. Thomas*, No. 09-1317, 2010 WL 3927488, at *1 (D. Or. Oct. 4, 2010). This Court should deny plaintiff's motion because it seeks relief beyond the scope of either complaint in the consolidated cases.

2. Only One of Plaintiff's Claims is Ripe for Review

Apart from the Tribal Court's alleged right to remain in the BIA-owned building, none of plaintiff's claims is ripe for this Court's review. The ripeness doctrine "prevent[s] the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967), *overruled on other grounds*, *Califano v. Sanders*, 430 U.S. 99 (1977). In determining whether a case is ripe, a court considers: "(1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented." *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 733 (1998).

Apart from its alleged right to remain in Building 109, the NAT cannot show that that the remainder of its claims are ripe. With respect to plaintiff's claims about the allocation or transfer of cases between the courts and interactions with BIA police, the NAT admits that it and the BIA are continuing to work together to develop procedures governing the relationship between the CFR court and the tribal court. Mem. at 8, 13; Decl. of John St. Clair ¶¶ 3-4, ECF No. 115-8. *See also*

Gourneau Decl. ¶ 14. The EST and the BIA are also involved in parallel discussions. *Id.* No final decisions have been reached, as the BIA and the Tribes continue to negotiate. *Id.* And even assuming that the NAT had standing to raise the hardships of its unspecified individual members, *infra*, at 8-10, it has not identified any individual who has actually been harmed by the operation of the CFR Court. *Infra*, at 14-16.

By contrast, both defendants and the EST would be harmed if this Court dictates the results of these negotiations. This Court's involvement could interfere with the agency's ability to resolve with both Tribes a host of legal and pragmatic issues surrounding the operation of courts with concurrent jurisdiction on the Wind River Reservation. This Court should thus find that all but plaintiff's claim that it can remain in the Building 109 are unripe. *Haw. Cty. Green Party v. Clinton*, 124 F. Supp. 2d 1173, 1195 (D. Haw. 2000) (challenges to "ongoing [agency] processes" "are not ripe for adjudication because there has been no 'final' agency action that would allow review."); *see also Patel v. Gonzales*, No. 06-1090, 2007 WL 433102, at *2 (W.D. Wash. Jan. 25, 2007) (same).

3. The NAT Lack Standing to Challenge Defendants' Actions Concerning Alleged Violation of the Rights of Individual Arapaho Tribal Members

In establishing a CFR Court, the BIA recognized the right of the NAT and the EST to operate tribal courts, and acknowledged that in many cases the CFR Court and a tribal court might have concurrent jurisdiction over a matter.
Gourneau Decl. ¶ 11. The BIA has proposed a protocol to govern the allocation and transfer of cases between the courts. *Id.* ¶¶ 12, 14. The NAT contends that the CFR Court's exercise of jurisdiction over Arapaho tribal members "violates the rights and liberty interests of those criminal defendants." Pl.'s Mem. at 14, ECF No. 115. *See also id.* at 2, 20 (raising concerns about Arapaho crime victims). Indeed, the alleged infringement of the rights of these *unidentified* third parties appears to be the entire basis for bringing the TRO Motion at this time. *Id.* at 2. The NAT, however, lacks

standing to bring these claims on behalf of these individuals.

a. Plaintiff Lacks Standing to Bring Claims for Unspecified Injuries on behalf of Unidentified Third Parties

The NAT lacks standing to bring claims on behalf of unspecified injuries suffered by unidentified third-party Northern Arapaho criminal defendants and crime victims. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016) ("For an injury to be 'particularized,' it 'must affect the plaintiff in a personal and individual way.'") (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 n.1 (1992)); *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004) ("a party generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties."). Nor can NAT maintain standing based on the "generalized interest of all [its] citizens." *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 217 (1974).

In this case, plaintiff does not identify any particular Arapaho criminal defendant or crime victim. Mem. at 14-15. Nor does the NAT identify a particular arraignment or other proceeding that was allegedly conducted improperly, or a particular criminal case that was dropped for the alleged failure to properly follow certain procedures. *Id.* at 15-16. The NAT, as a third-party to these alleged injuries, lacks the ability to bring suit to vindicate these abstract claims. *Kowalski*, 543 U.S. at 129; *Fair Elections Ohio v. Husted*, 770 F.3d 456, 461 (6th Cir. 2014) (plaintiff may not assert rights "of individuals not even presently identifiable").

b. Plaintiff Cannot Pursue These Claims Under the Doctrine of Parens Patriae

Nor can the NAT pursue these claims under the doctrine of *parens patriae*. The *parens patriae* doctrine allows a sovereign to sue to affirm its "quasi-sovereign" interest. *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601 (1982). The NAT, however, cannot assert *parens patriae* standing against the federal government. *Accord Snapp*, 458 U.S. at 610 n.16 (citing *Massachusetts v. Mellon*, 262 U.S. 447, 485-86 (1923)). The Supreme Court has explained that citizens of a state "are also citizens of

the United States," and therefore "[i]t cannot be conceded that a state, as *parens patriae*, may institute judicial proceedings to protect citizens of the United States from the operation of the statutes thereof." *Mellon*, 262 U.S. at 478, 485. The Court stressed that "it is no part of [a state's] duty or power to enforce [its citizens'] rights in respect of their relations with the federal government;" "it is the United States, and not the state, which represents [its citizens] as *parens patriae*." *Id.* at 485-86. The same reasoning applies to Tribes, which, just like States, are sovereigns: as sovereigns whose citizens are also citizens of the United States, they cannot then sue the United States. *See, e.g., Fla. Paraplegic Ass'n v. Miccosukee Tribe of Indians of Fla.*, 166 F.3d 1126, 1135 (11th Cir. 1999) (holding that tribes must "comply with the same rules that bind all other political subdivisions of the United States"); *NAT v. Burwell*, 118 F. Supp. 3d 1264, 1277-78 (D. Wyo. 2015) (applying Tenth Circuit law concerning *parens patriae* standing of states to the NAT).

Nor can the NAT use *parens patriae* standing to assert claims of only *some* of its members. *S. Carolina v. N. Carolina*, 558 U.S. 256, 266 (2010) (*parens patriae* action is asserted on behalf of "all [of] its citizens."); *United States v. Santee Sioux Tribe of Neb.*, 254 F.3d 728, 734 (8th Cir. 2001) (*parens patriae* doctrine cannot be used to confer standing on the Tribe to assert the rights of some members of the Tribe); *NAT*, 118 F. Supp. 3d at 1277-78 (NAT lacks *parens patriae* standing to only sue on behalf of its employees); *Navajo Nat. v. Wash. Sup. Ct. for Yakima Cty.*, 47 F. Supp. 2d 1233, 1240 (E.D. Wash. 1999), *aff'd* 331 F.3d 1041 (9th Cir. 2003). Thus, plaintiff lacks standing to assert claims on behalf of individual tribal members.[3]

[3] If, on the other hand, this Court were to find that the NAT *does have* standing to pursue claims of these tribal members, the EST would necessarily also have a similar interest in protecting the interest of its tribal members with cases currently pending before the Tribal Court. As a result, this Court would have to dismiss any part of the NAT's claims that could affect the EST or its tribal members pursuant to Federal Rule of Civil Procedure 19(a). *White v. Univ. of Cal.*, 765 F.3d 1010, 1028 (9th Cir. 2014); *Kescoli v. Babbitt*, 101 F.3d 1304, 1311 (9th Cir. 1996). *See also Citizen Potawatomi Nation v. Norton*, 248 F.3d 993, 1000-01 (10th Cir. 2001).

4. This Court Lacks Jurisdiction over Plaintiff's Claims against Defendants

This Court should deny plaintiff's motion for a TRO because it lacks subject matter jurisdiction over plaintiff's claims.

a. Plaintiff cannot obtain relief under the* ultra vires *doctrine

Contrary to plaintiff's contention, Mem. at 13, the *ultra vires* doctrine does not allow for judicial review of plaintiff's claims here. The *ultra vires* doctrine allows a court to enjoin unconstitutional acts of a governmental official. *United States v. Yakima Tribal Court*, 806 F.2d 853, 859 (9th Cir. 1986) (citing *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689-90 (1949)). Apart from unconstitutional conduct, however, "there is no *per se* divestiture of sovereign immunity when statutes or regulations are violated while an agent is pursuing his authorized duties." *Id.* at 860.[4] The *ultra vires* doctrine cannot be used to review a simple "claim [of] invasion of … legal rights," as "it would [otherwise] make the constitutional doctrine of sovereign immunity a nullity." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 112 (1984) (quoting *Larson*, 337 U.S. at 693). Nor can it be used if the relief requested would "require affirmative action by the sovereign or the disposition of unquestionably sovereign property." *Larson*, 337 U.S. at 691 n. 11.

In this case, plaintiff does not identify, individually or collectively, any federal official whose conduct it is challenging. *See* Mem. *passim*. Nor does it even allege that any federal official is acting outside of a particular statutory duty, let alone acted in an unconstitutional manner. *Id.* To the contrary, NAT does not challenge the authority of the BIA to establish a CFR Court and does not challenge the authority of BIA Police to operate on the Reservation, but rather only challenges the manner in which these various unidentified BIA officials are acting. *Id.* In complaining about the

[4] Plaintiff has advanced Sixth Amendment claims on behalf of unidentified Arapaho tribal members. Mem. at 15. As shown above, however, plaintiff fails to allege any particular violation and lacks standing to bring claims on behalf of these third parties. *Supra,* at 8-10.

manner in which CFR Court staff and BIA Police operate, plaintiff does not claim that any BIA employee is acting beyond his or her delegated power. Plaintiff nevertheless seeks an order requiring BIA to let the Tribal court remain in the BIA-owned building and preventing it from taking "any action affecting the Tribal Court in any way," and requiring BIA Police to: (i) turn over arrest records to the Tribal Court prosecutor; (ii) deliver criminal detainees to the Tribal Court for arraignment, trial and sentencing; (iii) carry out, serve, and execute Tribal Court orders; and (iv) execute Tribal Court arrest warrants. ECF No. 114 ¶¶ 1-4. Such proposed remedies venture far beyond the limits of relief available under the *ultra vires* doctrine. *Larson*, 337 U.S. at 691 n. 11; *United Tribe of Shawnee Indians v. United States*, 253 F.3d 543, 548 (10th Cir. 2001).[5]

b. The Administrative Procedure Act Does Not Provide an Applicable Waiver of Immunity for Review of Plaintiff's Claims

Nor can plaintiff proceed against defendants under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-06. "Federal agencies and instrumentalities, as well as federal employees acting in their official capacities within their authority, are … immune from suit" absent a congressional waiver of sovereign immunity, *S. Delta Water Agency v. Dep't of Interior*, 767 F.2d 531, 536 (9th Cir. 1985), and the principle of sovereign immunity limits the subject matter jurisdiction of federal courts. *Vacek v.*

[5] This Court's October 17, 2016, ruling concerning the *ultra vires* doctrine does not apply here. *See* Order at 5-6, ECF No. 113. In *Assiniboine & Sioux Tribes of Ft. Peck Indian Reservation v. Bd. of Oil & Gas Conservation of State of Mont.*, 792 F. 2d 782, 791 (9th Cir. 1986), which this Court cited, the Ninth Circuit concluded that the APA's "committed to agency discretion" restriction, 5 U.S.C. § 701(a), might not apply to "claims that an agency has acted outside its statutory authority." Unlike that case, federal defendants are not claiming here that any decisionmaking is committed to agency discretion, and none of the challenged BIA actions are "final" under the APA. Moreover, while the "jurisdictional nature of the administrative appeal requirement" can be lessened, that can be done "only in cases where the agency has already announced its final decision or there are other indicia of administrative bias that would render an appeal futile." *Stock W. Corp. v. Lujan*, 982 F. 2d 1389, 1394 (9th Cir. 1993). There is no final decision here, and the BIA is actively soliciting comments to assist in determining the best path forward.

U.S. Postal Serv., 447 F.3d 1248, 1250 (9th Cir. 2006). Plaintiff's motion does not identify any applicable waiver of sovereign immunity, and so is presumably relying on the waiver for nonmonetary relief provided by the APA. Section 704 of the APA, however, limits the APA's waiver of immunity to review of final agency action, *Gallo Cattle Co. v. USDA*, 159 F.3d 1194, 1198 (9th Cir. 1998); *see Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (final agency action "mark[s] the consummation of the agency's decision-making process . . . it must not be of a merely tentative or interlocutory nature."), and, importantly, agency action is not final until "an aggrieved party has exhausted all administrative remedies expressly prescribed by statute or agency rule." *Darby v. Cisneros*, 509 U.S. 137, 146 (1993). Nor may federal courts "assert jurisdiction to review agency action until the administrative appeals are complete." *White Mountain Apache Tribe v. Hodel*, 840 F.2d 675, 677 (9th Cir. 1988). Where, as here, such exhaustion is a statutory requirement, *see Darby*, 509 U.S. at 147, a court may "not read futility or other exceptions into" the requirement. *Booth v. Churner*, 532 U.S. 731, 741 n.6 (2001); *Corus Staal BV v. United States*, 502 F.3d 1370, 1379 (Fed. Cir. 2007); *Osage Producers Ass'n v. Jewell*, __ F. Supp. 3d __, 2016 WL 3093938, at *7 (N.D. Okla. June 1, 2016).

Apart from the BIA's denial of the NAT's request to remain in Building 109, plaintiff can make no showing of any final agency action that would permit judicial review. *Or. Nat. Desert Ass'n v. U.S. Forest Serv.*, 465 F.3d 977, 982 (9th Cir. 2006); *Gen. Motors Corp. v. EPA*, 363 F.3d 442, 450 (D.C. Cir. 2004) (concluding that "letters [that] were part of [an] ongoing dialogue" did not reflect the consummation of the agency's decision-making process, and were therefore not final agency action reviewable under the APA). The NAT acknowledges that consultation between Tribal Court staff and CFR Court staff has been ongoing. Mem. at 8-9. Indeed, such consultation is continuing even now, and the agency has made no final decision regarding interactions between the CFR Court and the Tribal Court or BIA Police and the

Tribal Court. Gourneau Decl. ¶ 14; Noseep Decl. ¶¶ 12, 19, 28.

Nor can the NAT show that it even attempted to invoke, let along exhaust, its administrative remedies available under 25 C.F.R. Part 2 for any of its claims. *Stock W. Corp.*, 982 F.2d at 1389 (noting past dismissals of APA challenges to BIA decisions because plaintiffs "failed to take the required administrative appeal [based on] ... the jurisdictional nature of the administrative appeal requirement."). Plaintiff cannot avoid this exhaustion requirement by claiming futility. *Darby*, 509 U.S. at 147; *Corus Staal BV*, 502 F.3d at 1379; *Osage Producers Ass'n,* 2016 WL 3093938, at *7. This Court thus lacks subject matter jurisdiction to review any of plaintiff's claims.[6]

This Court should thus reject the NAT's attempt to obtain judicial supervision over the BIA's development of an inter-sovereign court operations and transfer protocol as relief that cannot be obtained under the APA. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 893 (1990).

5. The BIA Has Acted Within its Statutory Authority in Establishing a CFR Court

The NAT contends that the Wind River CFR Court lacks jurisdiction over Arapaho tribal members. Mem. at 13. Although the BIA agrees that the NAT continues to possess an inherent right to enforce laws against its members, that right is not exclusive. *United States v. Wheeler*, 435 U.S. 313, 332 (1978). Rather, a tribe's inherent sovereignty "is divested to the extent it is inconsistent with the tribe's dependent status." *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408, 425 (1989). Tribal sovereignty thus cannot be extended "to prevent the federal government from exercising its superior sovereign powers." *Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456, 1459 (9th Cir. 1994); *United States v. Red Lake Band of Chippewa Indians*, 827 F.2d 380, 382 (8th Cir. 1987) ("tribe may not interpose its

[6] Nor, contrary to plaintiff's suggestion, Mem. at 3, does the ISDA provide for review here. The ISDA's judicial review provision, 25 U.S.C. § 5331(a), applies only to actions concerning proposed or existing contracts, but plaintiff's TRO does not challenge any agency conduct relating to a proposed or an existing contract.

sovereign immunity against the United States."). Contrary to plaintiff's contention, the federal government has authority to enforce, on tribal lands, the Indian Country Crimes Act, 18 U.S.C. § 1152, *or* the Major Crimes Act, 18 U.S.C. § 1153, as well as 18 U.S.C. §§ 666(a)(2), 841(a), 922(g), 1163, 1165, 1170, 2261(a)(1)-(2), 2262. The federal government also has authority to establish a CFR Court on tribal lands. *Tillett v. Hodel*, 730 F. Supp. 381, 383 (W.D. Okla. 1990) (CFR Court "is a valid exercise of the power of the Secretary of the Interior as delegated to him by the Congress which holds plenary power over Indian tribes.").[7] When the federal government has established a CFR Court, moreover, that court may exercise criminal and civil jurisdiction over numerous matters concerning tribal members, *see generally* 25 C.F.R. part 11, and may also enforce agency-approved tribal ordinances. 25 C.F.R. § 11.449. Thus, plaintiff's claim that the CFR Court lacks jurisdiction over Arapaho tribal members is without merit.

Nor does the federal government's exercise of this authority infringe on the rights of the NAT or its tribal members. The Supreme Court has consistently recognized the right of separate sovereigns to exercise jurisdiction over criminal defendants. *United States v. Lara*, 541 U.S. 193, 210 (2004); *Wheeler*, 435 U.S. at 329-30; *Heath v. Alabama*, 474 U.S. 82, 88 (1985). Thus, contrary to plaintiff's contention, both the Tribal Court recognized by the NAT and the Wind River CFR Court have concurrent criminal and civil jurisdiction over matters concerning Arapaho tribal members.[8]

---

[7] To the extent plaintiff challenges the AS-IA's waiver regulations allowing the establishment of the CFR Court on Wind River, such waiver complies with the good cause requirements of 5 U.S.C. § 553(b) & (d), *Riverbend Farms v. Madigan*, 958 F.2d 1479, 1485 (9th Cir. 1992), and does not violate due process. *Vt. Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 524 (1978). Moreover, BIA has left the record open for comment and has indicated that it may modify operation of the Wind River CFR Court in response to comments. *Cf. Haw. Helicopter Operators Ass'n v. F.A.A.*, 51 F.3d 212, 215 (9th Cir. 1995).

[8] If, indeed, the EST were to also establish and operate a tribal court operated for the benefit of Shoshone Tribal members, it would also have concurrent jurisdiction over its tribal members.

As a practical matter, however, rather than have more than one court exercising jurisdiction over a tribal member for the same criminal or civil matter, the BIA has proposed to negotiate with each Tribe a protocol allocating and transferring, on a case-by-case basis, new and existing cases between the courts, depending on such factors as the tribal membership of the parties (or of the crime victim). Gourneau Decl. ¶¶ 12, 14. The Tribes and the BIA might agree that a party may transfer a case after consideration of a motion by one party to case, or by stipulation of all parties. Alternatively, either the CFR Court or a tribal court could consider a motion for a change of venue to the other court. *Cf., e.g., Teague v. Bad River Band of Lake Superior Chippewa Indians*, 236 Wis. 2d 384 (2000) (approving venue considerations between tribal and state courts in Wisconsin). Indeed, BIA, through its CFR Court Magistrate, has already discussed a potential protocol for the transfer of such cases, and has even proposed certain factors that can be considered on a case-by-case basis. Gourneau Decl. ¶ 12. Continuing that discussion, the BIA has sent to each Tribe a draft MOA addressing these types of issues. *Id.* ¶ 14. The protocol could be thus part of any MOA agreed to by the BIA and the NAT and the BIA and the EST. All of this was in process when the NAT filed this TRO motion. In the meantime, however, the CFR Court has not received any written requests for transfers of pending matters to the Tribal Court. *Id.* ¶ 17.

a. The BIA is Willing to Provide the NAT with Arrest Records in Compliance with the Privacy Act of 1974

The NAT seeks to compel the BIA to provide records of arrests made by BIA police of Arapaho tribal members. Mot. ¶ 1. However, because BIA arrest records are covered by the Privacy Act, the BIA cannot provide those records without complying with the requirements of that Act. Noseep Decl. ¶¶ 15-17.

The Privacy Act "prohibits disclosure of any record which is contained in a system of records ... to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record

pertains." 5 U.S.C. § 552a(b). The Act provides an individual whose records were disclosed in contravention with the requirements of the Act with a private right of action to obtain damages and fees. *Id.* § 552a(g)(1)(D), (g)(4). The Act also provides criminal penalties against any agency employee who willfully discloses a record from a Privacy Act-protected system of records without complying with the requirements of the Act. *Id.* § 552a(i)(1).

The Privacy Act, however, does permit—but does not require[9]—an agency to disclose a record "to another agency or an instrumentality of any governmental jurisdiction with or under the control of the United States for a civil or criminal law enforcement activity if the activity is authorized by law, and if the head of the agency or instrumentality has made a written request to the agency which maintains the record specifying the particular portion desired and the law enforcement activity for which the record is sought." 5 U.S.C. § 552a(b)(7). The Office of Management and Budget ("OMB") has interpreted this provision to allow an agency, "upon receipt of a written request, [to] disclose a record to another agency or *unit of State or local government* for criminal or law enforcement activity." OMB Guidelines 40 Fed. Reg. 28,955 (July 9, 1975) (emphasis added). Record-requesting authority may be delegated down to lower-level agency officials when necessary, but not below the "section-chief" level. 40 Fed. Reg. at 28,955.[10] To comply with the Privacy Act, however, the request

[9] The right to obtain records arises under the Freedom of Information Act, 5 U.S.C. § 552, not the Privacy Act.

[10] Further interpreting § 552a(b)(7), the Department of Interior ("DOI") allows BIA to disclose arrest records "[t]o any criminal, civil, or regulatory law enforcement authority (whether Federal, State, territorial, local, tribal or foreign) when a record, either alone or in conjunction with other information, indicates a violation or potential violation of law—criminal, civil, or regulatory in nature, and the disclosure is compatible with the purpose for which the records were compiled." DOI-10, System of Records Notice ("DOI-10 SORN") (4), 79 Fed. Reg. 31975, 31976 (June 3, 2014). Pursuant to these requirements and procedures, OJS provides "all possible information allowed by law" and thus allows "[l]aw enforcement personnel from another department" to review agency records. BIA-OJS Law Enforcement ("LE") Handbook (3d ed. 2015) §§ 9-07-01(A), 9-52-04(A). *See* Noseep Decl. ¶ 17. To ensure compliance with the Privacy Act, OJS "ensure[s] that the review is for

must still be made in writing, *on a case-by-case* basis. 5 U.S.C. § 552a(b)(7); *cf. Reyes v. Supervisor of DEA*, 834 F.2d 1093, 1095 (1st Cir. 1987) (allowing claim to proceed based on alleged violation of failure to follow requirements of § 552a(b)(7)).

In this case, BIA Police can turn over arrest records to the NAT, its tribal court, and/or its tribal court prosecutor, but only if those entities comply with the requirements of the Privacy Act, DOI-10 SORN (4), and the BIA-OJS LE Handbook. Noseep Decl. ¶¶ 19-20. One way the NAT could facilitate compliance would be for the Tribe, as sovereign, to authorize an appropriate official, perhaps the Tribal Court prosecutor, authority to request in writing, on a case-by-case basis, the individual arrest records of an Arapaho tribal member. *Cf.* OMB Guidelines, 40 Fed. Reg. at 28,955; BIA-OJS Handbook § 9-52-04(D). Only after BIA has received each request in writing can BIA grant the request without exposing itself to civil liability to the individual whose records were disclosed, and only after BIA has received such a request can BIA agency employees grant the request and provide the arrest records without fear of criminal prosecution. Noseep Decl. ¶¶ 19-20. This arrangement is exactly the kind of issue that the BIA and the Tribe may be able to resolve in a MOA, Noseep Decl. ¶ 19. To date, however, the BIA has received one oral request, but no written requests for records. *Id.* ¶ 21.

b. The NAT Has Not Demonstrated that BIA Police Are Violating Their Legal Obligations

Without citation to any specific incident or statutory duty, the NAT additionally contends that BIA Police operating on the Wind River Reservation are refusing to: (i) present arrestees held in the BIA operated jail to the Tribal Court; (ii) cooperate with Tribal Court police regarding on-going criminal matters; and (iii) refusing to honor Tribal Court arrest warrants. Mem. at 13. Such unspecified and unsubstantiated allegations are insufficient to support the extraordinary remedy of

---

legitimate purposes," and allows access to a record only after completion of an "Access to Records Form." *Id.* §§ 9-52-04(C)-(D).

preliminary injunctive relief. *Kowalski*, 543 U.S. at 129; *Fair Elections Ohio*, 770 F.3d at 461 (plaintiff may not assert rights "of individuals not even presently identifiable"). In any event, the NAT may be able to resolve each of these concerns through an MOA with the BIA.

BIA Police derive their authority from the Indian Law Enforcement Reform Act, 25 U.S.C. § 2801 *et seq*. The ILERA grants BIA Police the authority to enforce federal law, and "with the consent of the Indian tribe," tribal laws. *Id.* § 2802(c)(1). That authority expressly includes serving warrants, summonses, or other orders relating to a crime committed on tribal lands, including those issued by a CFR Court. *Id.* §§ 2802(b)(1), 2803(a)(2), (2)(A). A tribe may also authorize BIA police to serve such warrants, summonses, or other orders. *Id.* § 2803(a)(2)(B).

In this case, the BIA provides direct law enforcement and corrections services for the Wind River Reservation. Noseep Decl. ¶ 5. These officers are primarily responsible for all law enforcement within the exterior boundaries of the Reservation without regard to whether the alleged offender is an Arapaho or Shoshone tribal member. *Id.* ¶ 4. BIA Police do not maintain records about the enrollment status of an individual and do not inquire about whether an individual is enrolled in a particular tribe. *Id.*

The expiration of the existing 638 contract and the EST's withdrawal of recognition of the Tribal Court, however, have raised substantial legal questions about the continuing authority of the Tribal Court to exercise jurisdiction over Eastern Shoshone tribal members. Noseep Decl. ¶¶ 19, 25 & 27. Until such questions are resolved, moreover, BIA Police face the risk of additional limitations on their qualified immunity. *Id.* ¶ 25. *See generally Messerschmidt v. Millender*, 132 S. Ct. 1235, 1244 (2012) ("doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'").

The agency also faces a risk of civil liability. Noseep Decl. ¶ 25. Nor could a TRO issued by this Court requiring BIA Police to provide these services to the Tribal Court settle the question of these officers' qualified immunity, the performance of which might later be found by another court to violate a clearly established constitutional or statutory right of which a reasonable person should have known, nor settle questions of agency liability for violations of due process, negligent supervision, or other related claims.

In the absence of an MOA clarifying the relationship between BIA Police and the Tribal Court, BIA Police have been issuing citations to the CFR Court since October 18, 2016. *Id.* ¶¶ 11, 22. Such issuance does not preclude the NAT or a criminal defendant from seeking to transfer the matter to the Tribal Court. Gourneau Decl. ¶ 17. Contrary to plaintiff's claims, moreover, OJS officers have continued to appear to give testimony in Tribal Court when subpoenaed, *id.* ¶ 23, and have continued to enforce warrants and orders of the Tribal Court after taking them to the CFR Court to be "domesticated," *i.e.*, recognized as foreign orders. *Id.* ¶ 24. Additionally, OJS has continued to enforce criminal sentences entered by the Tribal Court prior to October 5, 2016. *Id.* ¶ 26.[11]

OJS, moreover, is willing to modify any of these practices to the extent the NAT and the BIA as well as the EST and the BIA enter into separate MOAs providing for a different arrangement for appearing for testimony, enforcing Tribal Court warrants and orders, and carrying out sentences. *Id.* ¶ 28. In the meantime, resolution of these issues is not appropriate for this Court.

6. Defendants Have Not Violated a "Duty to Consult"

The NAT asserts—in general terms—that defendants have failed to consult

[11] In the absence of an MOA between the NAT and the BIA, however, there are substantial legal questions about the ability of OJS to carry out sentences imposed the Tribal Court. *Id.* ¶ 27. As a result, OJS has requested the CFR Court prosecutor seek the transfer of all pending criminal cases to the CFR Court to ensure OJS may enforce any penalties imposed. *Id.*

with it, in violation of an undefined legal obligation. However, as discussed above, those consultations are ongoing, and no final decisions have been made. Accordingly, this claim is not ripe and, moreover, is entirely without merit.

7. The Tribal Court Has No Right to Remain in the BIA-Owned Court Building

Without citation to any authority, Mem. at 17-20, the NAT contends that the Tribal Court can remain in federally-owned and maintained Building 109, even though its authorization to use the building was provided in the Fiscal Year 2016 638 contract for the Tribal Court that expired on September 30, 2016. It is particularly ironic that the NAT now seeks to obtain judicial relief from this Court to use the building, absent the consent of the EST, when the NAT originally brought this litigation to eliminate that 638 contract because of absence of approval by both Tribes.

Contrary to plaintiff's contention, 25 U.S.C. § 194 does not place the burden on BIA to demonstrate ownership of Building 109. *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 667 (1979) (25 U.S.C. § 194, which places the burden in property disputes on the "white man," does not apply in Indian property disputes against a sovereign). Nevertheless, the BIA has owned the Building 109 since 1982, when the NAT and EST transferred the property back to the BIA. Gourneau Decl. ¶ 18. *See also* Ex. 1-I. The BIA has maintained Building 109 and paid the building's utility bills ever since. Gourneau Decl. ¶ 18. *See also, e.g.*, Ex. 1-J.

Thus, to the extent that the NAT has any right to occupy the building, it is a right that would be conveyed via a 638 contract or other agreement with the BIA, and with the approval of the EST. The NAT does not, however, have a right superior to the EST to occupy the building to operate a program only for the benefit of the NAT and its members. *Accord* Order at 24, *NAT v. LaCounte*, No. 16-11, ECF No. 113. The Tribal Court is no longer recognized by the EST. Ex 1-E. As a result, the Tribal Court no longer provides a shared service on the Wind River Reservation. Rather, it is the CFR Court that now provides shared judicial services for the all tribal members

on the Reservation, and BIA has an ownership right to use Building 109 to carry out its mission.

Nor is there basis for the NAT's claim of hardship from the needs of Tribal Court staff to access records. The NAT has been on notice since August 3, 2016, that, in the absence of the Tribes' agreement on a new 638 contract to operate the Tribal Court, BIA would seek return of BIA owned property and buildings as part of the contract close out process. Gourneau Decl. ¶ 18. Moreover, the BIA has made every effort to work with Tribal Court staff to assist with the relocation of the Tribal Court. Ex. 1-H, at 2.[12]

So, too, must fail the NAT's contention that the Tribal Court could remain in Building 109 if it were to prevail in its challenge to the BIA's declination of the NAT's proposal for a 638 contract to provide funding for Fiscal Year 2017 to operate an Arapaho Tribal Court in *NAT v. Jewell*, No. 16-60. That proposal does not seek a 638 contract to operate a Tribal Court for the joint benefit of the Shoshone Tribe and the Arapaho Tribe, let alone use the building for that shared purpose. *See* Amended Proposal, *NAT v. Jewell*, ECF No. 23.1. Neither the original nor the amended proposal is supported by an EST tribal resolution. ECF Nos. 1.1, 23.1 Rather, the NAT's proposal only seeks to transfer a portion of funds the BIA has allocated for judicial services on Wind River (which BIA is using and will be using to operate the Wind River CFR Court), to fund a new Arapaho Tribal Court. ECF No. 23.1. Thus, the NAT provides no basis for obtaining an order allowing the Tribal Court to remain in Building 109.

B. The NAT Has Not Established That the Remaining Factors Weigh in Favor of a TRO

Plaintiff fails to establish irreparable harm that would warrant a TRO. First,

[12] Nor does the NAT sufficiently sustain its claim, Mem. at 19-20, that funding conditions for other grant programs provides the Tribal Court with a right to remain in Building 109, as opposed to a tribally-owned building, or explain why such grant agreements could not be revised accordingly.

"[b]ecause the [NAT] has not shown that it is likely to succeed in its claim that [defendants] violated its sovereignty, a likelihood of irreparable harm has not been shown." *Tohono O'odham Nation v. Ducey*, 130 F. Supp. 3d 1301, 1320 (D. Ariz. 2015); *see also Nickler v. Cty. of Clark*, 648 F. App'x 601, 605 (9th Cir. 2016) ("Because Nickler failed to show a likelihood of success on the merits, she also could not show that irreparable harm would likely result from failure to grant the injunction."). Indeed, the BIA has demonstrated that there is no such harm. Second, entry of a TRO could cause irreparable harm to the EST. *See Timbisha Shoshone Tribe v. Kennedy*, 687 F. Supp. 2d 1171, 1188 (E.D. Cal. 2009) (harm that would be caused to third parties justifies denying plaintiff's claims of irreparable injury claim).[13] Nor has the NAT even shown the immediate threat of such harm. *See generally* Gourneau Decl.; Noseep Decl. The Tribe's assertions thus fail to meet this burden.

The balance of equities and the public interest weigh also against granting a TRO. The Tribal Court is only recognized by the NAT, not the EST. All individuals on the Reservation—Northern Arapaho tribal members and Eastern Shoshone tribal members, as well as members of other Tribes or Indians who are not enrolled members of any Tribe—have an interest in seeing justice provided fairly and effectively. The proposed TRO would only frustrate those objectives. The TRO would prevent the "remov[al of] any matter now or hereafter pending in the Tribal Court to any other court without prior order of the Tribal Court," Mot. ¶ B, even though the Tribal Court currently has before it cases involving only Eastern Shoshone tribal members. Moreover, the proposed TRO contains numerous broad, undefined terms: preventing the BIA "[f]rom taking *any* action affecting the Tribal Court *in any*

[13] If, on the other hand, this Court were to find that the NAT's sovereignty is irreparably harmed by the current situation on Wind River, the EST would necessarily face a similar harm. As a result, this Court would have to dismiss any part of the NAT's claims that could affect the EST pursuant to Federal Rule of Civil Procedure 19(a). *White*, 765 F.3d at 1028; *Citizen Potawatomi Nat.*, 248 F.3d at 1000-01; *Kescoli*, 101 F.3d at 1311.

way without prior consultation with the [NAT]," *id.* ¶ C (emphasis added), or "[f]rom taking any action in derogation of the authority of the Tribal Court," *id.* ¶ D, without even defining what such "action" or "derogation" means. Such generality is not in keeping with Rule 65(d)'s specificity requirement. *Reno Air Racing Ass'n v. McCord*, 452 F.3d 1126, 1132 (9th Cir. 2006) (requiring a TRO to provide the defendant "with fair and well-defined notice of the prohibited conduct").

Additionally, the NAT's proposed order would infringe upon the rights of the EST and its tribal members to be subject to EST jurisdiction. The order would require defendants to "deliver law enforcement records pertaining to *all* arrests to the Tribal Prosecutor," Mot. ¶ 1 (emphasis added), despite the fact that many of these records would presumably relate to EST members. The other provisions of the proposed order would have the same problem. *Id.* ¶ 2 (requiring delivery of "criminal detainees to the Tribal Court at the direct of the Court for arraignment, trial, or sentencing"); *id.* ¶ 3 (requiring defendants to cooperate with the Tribal Court with respect to all orders of the Court); *id.* ¶ 4 (requiring defendants to "[e]xecute arrest warrants issued by the Tribal Court"). In essence, the NAT asks this Court to infringe the sovereign rights of the EST—the opposite side of the coin of the same sovereignty offense it now claims. None of these remedies are in the public interest.

Finally, the NAT's proposed order could exacerbate legal uncertainty on the Reservation—and potentially expose the BIA and individual BIA police officers to legal liability. As discussed above, any individual may sue BIA for violating rights under the Privacy Act, and BIA officers could face criminal liability for violating the Act. Noseep Decl. ¶ 19. Similarly, until questions of Tribal Court jurisdiction are clarified, BIA police officers could also face increased risk individual liability for carrying out unlawful orders. *Id.* ¶ 25. The public interest is best served by allowing the BIA, the NAT, and the EST to work to develop a MOAs governing judicial services on the Reservation, which would resolve all of these issues.

V. CONCLUSION

This Court should deny plaintiff's motion.

Dated: November 9, 2016

Respectfully Submitted,

BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General
Civil Division

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

ERIC R. WOMACK
Assistant Branch Director
Federal Programs Branch

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

Attorneys for Defendants

L.R. 7.1(d)(2)(E) CERTIFICATE OF COMPLIANCE

I certify that this brief complies with L.R. 7.1(d)(2)(A) because defendants seek leave of this Court to enlarge the word-count limit.

s/ James D. Todd, Jr.
JAMES D. TODD, JR.

CERTIFICATE OF SERVICE

I certify that on November 9, 2016, I electronically filed the foregoing filing. Notice of this filing will be sent by email to all parties of record by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF System.

s/ James D. Todd, Jr.
JAMES D. TODD, JR.