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

NORTHERN ARAPAHO TRIBE, for itself and as *parens patriae*)	Civil Action No. CV-16-11 and No. CV-16-60 GF-BMM (consolidated)
Plaintiff,)	
vs.)	NORTHERN ARAPAHO TRIBE'S REPLY BRIEF IN SUPPORT OF ITS MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION
DARRYL LaCOUNTE, LOUISE REYES, NORMA GOURNEAU, RAY NATION, MICHAEL BLACK and other unknown individuals in their individual and official capacities,)	
Defendants.)	

Table of Contents

Page

Introduction 1

Facts 2

Argument 6

1. NAT is likely to succeed on the merits 6

   A. The BIA cannot displace the NAT Tribal Court 6

   B. The waiver of regulations was flawed and ultra vires 8

   C. The BIA erred in imposing a CFR court at the request of SBC 9

   D. The BIA has no right to remove the Tribal Court from its building 10

      1. The Tribes have superior title to the court building 11

      2. Additional factors show that the BIA does not own the building 12

   E. Even if the Tribal Court building were federal property, nothing prohibits its use by a Tribe to provide services to its members 14

   F. Even if the Tribal Court building were federal property, NAT is entitled to due process prior to ejectment or eviction 16

2. Defendants' Other Arguments Are Unavailing 16

Table of Contents

Page

A. TRO issues are directly related to allegations in NAT's Complaints 17

B. The illegal conduct at issue in the TRO is ripe for review 18

C. NAT has standing to protect the jurisdiction of its court and the rights of its tribal members 19

D. Defendants' claim to have met the consultation requirement is a sham 19

E. This Court has jurisdiction of the case 20

F. Defendants' reliance on the Privacy Act is entirely misplaced 20

G. The BIA is not within its statutory authority 21

Conclusion 21

EXHIBITS LIST

EXHIBITS 92-105

Table of Authorities

Page

Cases

Abbott Laboratories v. Gardner
387 U.S. 136 (1976) 18

Butler v. Principi
244 F.3d 1337 (Fed. Cir. 2001) 13

Califano v. Sanders
430 U.S. 99 (1977) 18

Ctr. For Nat. Sec. Studies v. U.S. Dep't of Justice
215 F.Supp.2d 94 (D.D.C. 2002) 20

In re Hunter's Estate
236 P.2d 94 (Mont. 1951) 11

Joint Anti-Fascist Refugee Comm. v. McGrath
341 U.S. 123 (1951) 16

Lujan v. Nat'l Wildlife Fed'n
497 U.S. 871 (1990) 18

Mathews v. Eldridge
424 U.S. 319 (1976) 16

Minnesota v. Mille Lacs Band of Chippewa Indians
526 U.S. 172 (1999) 8

Moe v. Confederated Salish & Kootenai Tribes
of Flathead Reservation
425 U.S. 463 (1976) 19

Table of Authorities

Page

Nez Perce Tribe et al. v. U.S. Forest Serv.
No. 3:13-CV-348-BLW, 2013 WL 5212317 (D. Idaho Sept. 12, 2013) 19

Nixon v. Warner Communications, Inc.
435 U.S. 589 (1978) 21

Northern Arapaho Tribe v. Jewell
CV-16-60 . . . . *14, 17*

Northern Arapaho Tribe v. St. Clair, et al.
Civil No. 16-0052 15

Nunes v. Ashcroft
375 F.3d 805 (9th Cir. 2004) 17

Osborn v. Warner
694 P.2d 730 (Wyo. 1985) 12

Prairie Band of Potawatomi Indians v. Pierce
253 F.3d 1234 (10th Cir. 2001) *19*

Prairie Oil & Gas Co. v. Allen
2 F.2d 566 (8th Cir. 1924) 12

Shoshone Indian Tribe of the Wind River Reservation,
Wyoming v. United States
71 Fed. Cl. 172 (2006) 12

Sussman v. U.S. Marshals Serv.
494 F.3d 1106 (D.C. Cir. 2007) 21

Tillet v. Hodel
730 F.Supp. 381 (W.D. Okla. 1990) 6

Table of Authorities

Page

United States v. Chemical Found., Inc.
272 U.S. 1 (1926) 13

United States v. Wheeler
435 U.S. 313 (1978) 7, 19

Statutes

25 C.F.R. §1.2 9

25 C.F.R. §11.104(a)(2) 1

25 C.F.R. §900.87(b)(1) 13

5 U.S.C. §552a(b)(11) 21

18 U.S.C. §1152 . . . . 1, 7

18 U.S.C. 1153 21

25 U.S.C. §3601(4) 8, 9

25 U.S.C. §3601(5) 8

25 U.S.C. §5123(f) 23

25 U.S.C. §5123(g) 23

25 U.S.C. §5321 15

Table of Authorities

Page

Other Authorities

17 N.A.C. 101, *et seq.* 10

26A C.J.S. Deeds §7 11

35A Am. Jur. 2d Fixtures §6 10

81 Fed. Reg. 74675 3

81 Fed. Reg. 74809 3

86 C.J.S. Tenancy in Common §4 12

Cohen's Handbook of Federal Indian Law, 2012 Ed.
§3.02[3] 23
§5.03[2] 8
§7.02[1][a] 7

H.R. Rep. No. 474, 23d Cong., 1st Sess., 13 (1834) 7

Shoshone and Arapaho Law and Order Code §1-8-3 5

Uniform Commercial Code §9-334 10

U.S. Const., amend. V. 16

The Northern Arapaho Tribe (NAT) submits the following reply brief in support of its Motion for Temporary Restraining Order (TRO) and Preliminary Injunction (Doc. 114).

Introduction

The United States, through the Bureau of Indian Affairs (BIA), has created an illegal court which is now unlawfully detaining Northern Arapaho Tribal members. Congress has preserved criminal jurisdiction over misdemeanors by Indians in Indian County as part of the inherent sovereign authority of federally recognized Tribes. 18 U.S.C. §1152. The BIA ignores this. 25 C.F.R. §11.104(a)(2) prevents the BIA from imposing a CFR Court without the consent of the NAT. The BIA brazenly announced that it has "waived" the regulation based on a request from the Shoshone Business Council (SBC). The BIA has failed to identify a law that gives it the authority to "waive" regulations in derogation of inherent tribal authority recognized by federal law. The BIA is fully aware that structurally the SBC lacks the authority to de-authorize the Shoshone and Arapaho Court. Yet, the BIA carries out the unlawful bidding of the SBC and is actively attempting to remove Tribal Court staff from the Tribal Court building. The BIA cannot show that it owns the building, nor has any lawful right to undertake a self-help eviction of the Tribal Court.

The BIA's conduct amounts to a lawless exercise in executive power. In their response brief, Defendants resort to evasions. Defendants' discussion of the law presents a litany of syllogisms aimed at enticing the Court to turn and look away from unlawful conduct. Defendants ignore the constitutional rights of the individuals they are sending to jail. Defendants' treatment of the facts creates a misleading picture of what is happening on the ground.

Facts

1. On September 30, 2016, Assistant Deputy Secretary of Interior Roberts waived regulations prohibiting imposition of a CFR Court where a Tribal Court is in place on the assumption that after federal funding ceased "there [would] be no Judicial System operational." This action was first disclosed to NAT on October 18, *see* Doc. 115-14 at 3.

2. On October 3, the Shoshone and Arapaho Tribal Court issued a temporary injunction preventing SBC from interfering with operations of the Court and declaring that the Court "remains open for business." Doc. 115-6.

3. On October 4, Defendant Gourneau was informed in writing that NAT will continue to fund the Tribal Court, which would continue to operate under the Shoshone and Arapaho Law and Order Code (S&A LOC). Doc. 123-5.

4. On October 5, the SBC withdrew its support for the Tribal Court and

demanded that the BIA impose a CFR Court. Doc. 123-6.

5. On October 18, the BIA announced establishment of a CFR Court and began issuing criminal citations to the CFR Court. Doc. 123-12 at 5. Also on that date, the BIA recognized "the right of the Northern Arapaho Tribe to operate a tribal court," Doc.123-9 at 2, and asked NAT to "adopt procedures to transfer new or existing cases concerning the Eastern Shoshone Tribe or Eastern Shoshone tribal members to the CFR Court." *Id.*

6. On October 19, the SBC reasserted its claim to superior authority over law and order on the Wind River Reservation and again insisted that the BIA impose a CFR system "regardless of whether NAT consents." Doc. 115-10 at 3. SBC also called on the BIA to "expel all current occupants of the [court] Building." *Id.* at 2.

7. Also on October 19, at the request of the CFR Magistrate, NABC confirmed that all NAT members should be arraigned in the Tribal Court. Exhibit 92.

8. On October 27, the Department of Interior published notice of the September 30 waiver on the false rationale that "no" judicial system is operational. 81 Fed. Reg. 74675 and 81 Fed. Reg. 74809.

9. On November 4, NAT submitted a draft "MOU" to Gourneau.

Exhibit 93.

10. Defendants began "domesticating" Tribal Court bench warrants. But rather than assisting the Tribal Court with respect to these tribal warrants, the BIA Police and CFR staff arrest, charge, convict and incarcerate individuals based on the asserted authority of the CFR Court, *entirely displacing* the role of the Tribal Court in enforcing Tribal Court warrants. Exhibit 94 at ¶5. Members of NAT are among those affected by the "domestication" of tribal warrants by the BIA.

11. The BIA refused to provide jail rosters or police reports to the Tribal Prosecutor so that she may evaluate and prosecute complaints against NAT criminal detainees. Exhibit 94 at ¶¶2 and 3. When asked by the Tribal Prosecutor for these documents, BIA denied the request without informing her that all she had to do was ask "in writing," *id.* (*Cf.* Doc. 123-12 at ¶21).

12. On inquiry, NAT learned the BIA will not disclose even the records request form itself without a Freedom of Information Act request. Exhibit 95.

13. BIA has consistently refused to consult with the Northern Arapaho Business Council (NABC), meeting on occasion only to inform NAT of the BIA's decisions after they have been made. Exhibit 96.

14. The CFR Court purports to apply tribal law, but has never been authorized by NAT to take any action affecting its members. The CFR Court

departs dramatically from tribal law sentencing guidelines, fails to properly inform detainees of their right to be heard by the Tribal Court, and fails to protect constitutional rights of criminal detainees. The CFR Court accepts guilty pleas without first reading the elements of the crime to the detainee or obtaining a sufficient factual basis for acceptance of jurisdiction or the plea. The CFR Court lacks the institutional capability to carry out judicial functions in a manner that adequately protects the rights of criminal detainees. Exhibits 97 and 98.

15. Defendants refused to disclose which NAT tribal members the BIA has in custody. The CFR Court treats criminal court records as if they are secret and will not allow the Tribal Court, the public or lawyers to see police reports, warrants, criminal complaints, court transcripts, sentencing documents and other court filings that are, in almost every American jurisdiction, a matter of public record.[1] *See* Exhibit 97 at ¶28.

16. On November 17, Defendant Gourneau wrote to the Tribes concerning the preliminary injunction issued by "Administrative Judge" Morris. Exhibit 99. Gourneau interprets the injunction (Doc. 113) as prohibiting

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[1] "The files and records of the Shoshone and Arapaho Tribes shall be open for public inspection." S&A LOC §1-8-3. Records of juvenile and involuntary commitments and adoptions are not open, but are available by judicial authorization. *Id.*

Defendants from issuing "638" contracts to either Tribe for services to its own members; that is, for services which are *not* "multi-tribal, shared services." *Id.*

The BIA failed to consult with NAT in advance of its decisions to waive its regulations, make BIA detainee lists a secret, withhold police reports, and divert all detainees to the CFR system. Counsel for Defendants is unable to make any agreements on behalf of Defendants and cannot identify any individual within the BIA who is so authorized. *See* Exhibit 97 at ¶43. Lacking such an individual with whom NAT could consult, NAT filed its pending Motion.

Argument

1. NAT is Likely to Succeed on the Merits.

A. The BIA cannot displace the NAT Tribal Court.

Central to Defendants' argument is the unsupported proposition that a CFR Court has criminal jurisdiction over members of the affected Tribe which is concurrent with that Tribe's own Tribal Court. Defendants rely on *Tillet v. Hodel*, 730 F.Supp. 381 (W.D. Okla. 1990), a case which did not involve the imposition of a CFR Court on an unwilling Tribe. *Tillet* is inapplicable here and provides no support for Defendants' position.

Defendants do not refute authority provided by NAT regarding its inherent authority to bring tribal members to justice for violations of tribal law. *See* Doc.

115 at 17-20 (Tribes have "exclusive jurisdiction" of intra-Indian offenses and "we can [not] with any justice or propriety extend our laws to" them. *United States v. Wheeler,* 435 U.S. 313, 325 (1978) *citing* H.R. Rep. No. 474, 23d Cong., 1st Sess., 13 (1834). Instead, Defendants claim that they recognize that authority. *See* Doc. 123 at 21 and 123-1 ("[t]he waiver [of regulations] did not affect the jurisdiction of the Tribal Court..."). Defendants then assert that the CFR Court has "concurrent" jurisdiction which can control criminal cases to the *exclusion* of Tribal Court authority. Again, none of the authority on which Defendants rely allows them to displace the NAT Tribal Court without the consent of NAT, whether Defendants seek to do so at the request of the SBC or otherwise.

Defendants also rely on a string cite to federal statutes regulating criminal activities in Indian country, but cite to no language authorizing them to violate the inherent authority of NAT to operate its own judiciary. Indeed, one statute on which Defendants rely expressly does not apply to "offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe... ." 18 U.S.C. §1152. "There is no general federal statute limiting tribal jurisdiction over tribal members... ." *Cohen's Handbook of Federal Indian Law*, 2012 Ed., §7.02[1][a] at 599. *See also,* Indian Tribal Justice Support Act,

25 U.S.C. §3601(4) and (5) ("inherent" tribal authority to establish judiciary).

While Congress has plenary power over tribes, *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999), executive agencies do not. *Cohen* §5.03[2] at 398.

NAT does not challenge authority of the BIA to create a CFR Court for a tribe which properly requests it. But NAT's Motion expressly challenges BIA's authority to impose a CFR Court onto NAT without its consent and to effectively displace the NAT Tribal Court system by diverting criminal defendants out of the Tribal Court process before they even arrive for arraignments. *See* Doc. 115 at 8.

B. The waiver of regulations was flawed and ultra vires.

The Secretary's waiver of regulations in this instance was based on (1) the ascription of overly broad significance to the fact that some trust lands on the Reservation are co-owned by both Tribes ("joint interest"); (2) the false claim that the Shoshone and Arapaho Tribal Court "is currently operating without the support of both Tribes;" (3) the statement that Tribal Court operates with "limited resources;" (4) the false premise that no Tribal Court provides services for NAT; and (5) erroneous conclusions reached by the Secretary without consulting NAT. *See* Exhibit 100.

In any event, waiver of the regulations by the Secretary does not save

Defendants because the source of NAT's authority to operate its own Tribal Court is inherent, not regulatory. *See* 25 U.S.C. §3601(4). The Secretary is not authorized to promulgate or waive regulations which are contrary to federal law, as the regulations themselves recognize. 25 C.F.R. §1.2. Waiver is neither permitted by law nor in the best interests of NAT or its members.

C. The BIA erred in imposing a CFR Court at the request of SBC.

Defendants wrongly concluded that the EST has consented to a CFR Court to displace the Tribal Court. The Shoshone and Arapaho Tribal Court has ruled that "the [Shoshone] Business Council is not authorized to repeal or amend the S&A LOC [Shoshone and Arapaho Law & Order Code] without action by the Shoshone Tribe's General Council. In the absence of that authority, the S&A LOC remains part of the laws of the Shoshone Tribe and this Court remains authorized by the General Council of the Shoshone Tribe to exercise judicial authority on behalf of the Shoshone Tribe." Doc. 115-7, ¶11 at 4.

In its final ruling on November 4, 2016 (Exhibit 101), the Tribal Court concluded that "... the Shoshone and Arapaho Tribal Court continues to operate and provide services to members of the Shoshone Tribe as a matter of Shoshone tribal law."

The Tribal Court also found that the "Shoshone and Arapaho Tribal Court

continues to operate and provide services to members of the Northern Arapaho Tribe pursuant to the laws of that Tribe. *See* 17 N.A.C. 101, *et seq*." Exhibit 101 at ¶8.

In an argument spun from thin air, Defendants assert that NAT seeks to operate a shared BIA program without consent of the other Tribe. Doc. 123 at 9. Defendants provide no explanation or authority for this proposition, because there is none. Defendants made an error of law with respect to the ongoing status of the Shoshone and Arapaho Tribal Court. They compounded that error by imposing a CFR Court on NAT and by preventing criminal cases from reaching the NAT judicial system unless permitted by the BIA. This is the action from which NAT seeks temporary equitable relief.

D. The BIA has no right to remove the Tribal Court from its building.

The Tribal Court occupies a portion of a building on a foundation[2] located on tribal trust land in T. 1 W., R. 1 S., Wind River Meridian, Fort Washakie, Wyoming.[3] The United States claims to be the owner. In support of its claim, the

[2] The Tribal Court building is affixed to the earth and therefore part of the real estate. 35A Am. Jur.2d Fixtures §6 ("An object which is intended to remain permanently in place . . . is a fixture and constitutes a part of the realty."). *See also*, Uniform Commercial Code §9-334.

[3] All lands within the Wind River Reservation are described by reference to the Wind River Meridian.

government attaches a series of photographs, a document dated September 9, 1992, entitled "Real Property Punch Card Data," a Joint Business Council (JBC) Resolution concerning the jail, and an electric power bill.

1. The Tribes have superior title to the court building.

Courts presume "that the ownership of real estate is where the muniment[4] of title places it." *In re Hunter's Estate*, 236 P.2d 94, 99 (Mont. 1951). Proof of ownership of real property is ordinarily shown by evidence of an instrument creating an estate or use in land. *See* 26A C.J.S. Deeds §7. Defendants have produced no deed or other instrument showing conveyance of title from the Tribes to the United States.

In 1887, the President set aside an area within T. 1 N., R. 1 S., W.R.M., Fort Washakie, by Executive Order as a military reservation, but reserved the Tribes' right to pre-emptive use:

> [t]he use and occupancy of the land in question [shall] be subject to such right, title, and interest as the Indians have in and to the same, and that it be vacated whenever the interest of the Indians shall require it, upon notice to that effect to the Secretary of War. [Exhibit 105]

A later Executive Order, signed by President Theodore Roosevelt and dated January 31, 1906, modified the area set aside, but reiterated the Tribes' superior

[4] Documentary evidence.

use right.

The words in the 1887 Order speak for themselves. The United States' use and occupancy is "*subject to such right, title, and interest as the Indians have.*" The Tribes, not the United States, own the land. Further, the Tribes have the authority to "evict" the United States, not *vice versa*.

The NAT and EST each has an undivided one-half interest in tribal trust land within the exterior boundaries of the Reservation. *Shoshone Indian Tribe of the Wind River Reservation, Wyoming v. United States*, 71 Fed. Cl. 172, 173 (2006). They are tenants in common[5] with equal rights to possess the whole ("unity of possession"). 86 C.J.S. Tenancy in Common §4. Consequently, one Tribe cannot exclude the other from the property. *See, e.g., Osborn v. Warner*, 694 P.2d 730, 732 (Wyo. 1985) (one co-tenant cannot establish homestead right against the other); *Prairie Oil & Gas Co. v. Allen*, 2 F.2d 566, 571 (8th Cir. 1924) ("Neither of the tenants in common is entitled to the exclusive possession of all the land to the exclusion of his cotenants…").

2. *Additional factors show that the BIA does not own the building.*

In other federal contracts with NAT, the U.S. acknowledges that the Tribal

[5] The use of the term "tenants in common" is inexact, in that neither co-tenant has the right of partition.

Court premises are property of the Tribes and agrees that the use of Court premises is lawful in-kind consideration for the matching funds requirements of self-determination act grants. Doc. 115-13 at ¶3. In their brief, the Defendants suggest that such contracts can be "modified." This misses the point entirely. Unilaterally modifying the contracts will have no effect whatsoever on the Tribes' property rights.

The Tribal Court has been 638-funded and used the building since 1987. 25 C.F.R. §900.87(b)(1) establishes a non-discretionary duty for the Secretary to develop a list of federal property that has been furnished for use in self-determination contracts prior to October 25, 1994. Defendants have not proffered that list or asserted that the Tribal Court building is on it. Since the Secretary was required to include the Tribal Court building on the list if it were federal property, one must assume it is not federal property. *See Butler v. Principi*, 244 F.3d 1337, 1340 (Fed. Cir. 2001) citing *United States v. Chemical Found., Inc.*, 272 U.S. 1, 14-15 (1926) (the "presumption of regularity" presumes that public officers have properly discharged their official duties).

NAT is not seeking to exclude EST by continuing to use the Tribal Court building. In fact, NAT has on multiple occasions proposed sharing the building with the CFR Court or any tribal court duly authorized by EST. However, the

EST, through the BIA, is seeking to exclude NAT from the use of this property, which NAT and EST hold as tenants in common. Doc. 123-8.

Finally, even if the 1982 JBC Resolution, Doc.123-10 at 2, or the Real Property Punch Card Data, *id*. at 1, were conveyance documents, they refer only to the "Jail Facility." The jail occupies only a portion of the Tribal Court building. Exhibit 94 at ¶8. NAT does not currently claim a right to the use of the jail facility or the police station.

E. Even if the Tribal Court building were federal property, nothing prohibits its use by a Tribe to provide services to its members.

Defendants argue that because NAT's proposal for a judicial services contract to serve members of NAT, which is ripe for review in *Northern Arapaho Tribe v. Jewell*, CV-16-60, does not seek a *joint* court, NAT cannot use the building. Doc.123 at 29. The BIA asserts that only BIA property which is proposed to be used in connection with a contract serving *both* Tribes may be made available to either. Nothing in the Indian Self-Determination and Education Assistance Act (ISDEAA) or its regulations impose such a limit on the availability of government property in connection with self-determination contracts.

At the same time Defendants admit NAT may operate its Tribal Court, they say NAT may no longer use the facility because the CFR Court now provides

"shared services." As discussed above, Defendants interpret "shared services" to mean they may displace NAT Tribal Court criminal jurisdiction with a CFR system. Nothing prohibits the BIA from allowing the one Tribe which has a Tribal Court to function alongside what the BIA operates as a CFR Court.

Defendants appear to argue that this Court's Preliminary Injunction prohibits either NAT or EST from using federal property to provide services to its own members without the consent of the other Tribe. Doc. 123 at 28. The Injunction says "Defendants shall refrain from approving 638 contracts for multi-tribal, shared services without the approval" of both Tribes. Doc. 113 at 24. The Injunction does not prevent Defendants from approving 638 contracts for either Tribe to provide services to its own members; that is, for services which are *not* "multi-tribal, shared services." Such a prohibition would contravene the express right of each federally recognized Tribe to contract to provide services to its own members under the ISDEAA. *See* 25 U.S.C. §5321.

The Tribal Court, in *Northern Arapaho Tribe v. St. Clair, et al.*, considered this very point:

> Neither Tribe may undertake or make unilateral spending or management decisions regarding programs which the Tribes have agreed to share without the consent of the other Tribe. *However, nothing in this Decree requires that formerly shared programs remain shared, or that any future programs must be shared, under a single tribal organization or entity consisting of both Tribes*. Indeed,

> programs for the benefit of either Tribe or its members may be funded separately by each Tribe or by third parties and may be operated by each Tribe separately. In the alternative, if both Tribes agree, programs may be operated together, or cooperatively.

Exhibit 101, ¶(B) at 7 (emphasis added).

Neither Tribe may exclude the other from the shared tribal building. The BIA threatens to use its police power to lock out NAT from its own property. The BIA's ready acceptance of the SBC's illegal request is in flagrant breach of the BIA's fiduciary duties to NAT.

F. Even if the Tribal Court building were federal property, NAT is entitled to due process prior to ejectment or eviction.

In any event, the BIA cannot remove the Tribal Court by force, which it is attempting to do, but must afford NAT due process and an opportunity for impartial review. U.S. Const., amend. V, *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 171-72 (1951), *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976).

2. Defendants' Other Arguments Are Unavailing.

As explained above, the imposition of a CFR Court to displace the existing NAT Tribal Court unlawfully violates the inherent sovereign authority of NAT, federal trust obligations to NAT, and federal law and policy. The remaining points

Defendants offer in opposition to Plaintiff's Motion for injunctive relief are unavailing.

A. *TRO issues are directly related to allegations in NAT's Complaints.*

The core dispute in these cases is whether the BIA can take actions that disregard the sovereign rights of NAT and its members. This is clearly pled in NAT's Complaint. Doc. 1, ¶¶ 76, 77, 83 and C (prayer); *see also Nunes v. Ashcroft*, 375 F.3d 805, 808 (9th Cir. 2004) ("purpose of Rule 15 [is]... to facilitate decision on the merits.") The BIA's conduct in imposing a CFR Court at the request of SBC, over the objection of NAT, is the latest iteration in the core controversy.

NAT's claim for federal funding for its share of judicial services is fully joined. *NAT v. Jewell*, consolidated. Defendants seek to displace the NAT Tribal Court with a CFR system so it may argue in *Jewell* that there is little or nothing left which must be funded through a self-determination contract with NAT. BIA's latest conduct has a direct connection with NAT's claims for 638 funding. Doc. 112 at ¶¶10-16.

NAT need not join the Office of Justice services (OJS) in its Complaint because, as a "sub agency" of the BIA, it is subject to the authority of Defendant Black, the Director of the BIA.

B. The illegal conduct at issue in the TRO is ripe for review.

As a result of the illegal conduct the Defendants have embarked on, they have displaced the inherent sovereign jurisdiction of NAT and its Tribal Court. NAT tribal members have been sent to prison and subjected to court procedures which violate their constitutional rights. The Defendants err in their contention that these issues are not ripe or sufficiently final. When agency action requires a plaintiff to adjust his conduct immediately, the action is "ripe" for review. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891 (1990). Ripeness factors include fitness of the issue for judicial decision and hardship to the parties of withholding court consideration, *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1976).[6] Here, the issue is joined and the hardship on NAT and its judicial system is substantial and immediate.

The Court should ignore the Defendants' suggestion that their illegal conduct should not be restrained because their approach may evolve or change, or that, in light of this briefing, the U.S. may become amenable to settlement. Since their conduct is unlawful and important rights are being infringed, injunctive relief is appropriate. *Lujan, id*. As it stands, the U.S. is leveraging "settlement" discussions off of its illegal conduct.

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[6] Overruled on other grounds, *Califano v. Sanders*, 430 U.S. 99, 105 (1977).

C. NAT has standing to protect the jurisdiction of its court and the rights of its tribal members.

Tribes have standing to seek relief in the federal courts when their sovereign rights are violated. *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1242 (10th Cir. 2001), *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 469 (1976). Moreover, Defendants concede that Tribes have *parens patriae* standing where they "express a quasi-sovereign interest" in protecting the rights of their members. The Defendants erroneously contend that the "exclusive jurisdiction" Tribes have over certain intra-Indian crimes is not even a quasi-sovereign interest. *See Wheeler*, 435 U.S. at 325.

Injunction against ongoing harm to tribal members and detainees serves the public interest and justice, factors in the analysis of why preliminary injunctive relief is warranted. *See* Exhibits 97 and 98.

D. Defendants' claim to have met the consultation requirement is a sham.

As noted earlier, Defendants have failed to consult with NAT regarding a litany of decisions and actions. *See* Exhibits 94, 96, 97 and 100. Like a game of "hide the ball," Defendants present a Byzantine path even to obtain the right information request form. Exhibit 95 at ¶8. Failure to consult, in and of itself, can justify issuance of injunctive relief. *Nez Perce Tribe et al. v. U.S. Forest Serv.*, No.

3:13-CV-348-BLW, 2013 WL 5212317, at *6 (D. Idaho Sept. 12, 2013) (meaningful consultation occurs in advance of a decision).

E. This Court has jurisdiction of the case.

This Court has already ruled that agency actions which are *ultra vires* are subject to immediate court review and are not barred by sovereign immunity. Doc. 113 at 6-8. Displacement of the NAT criminal judicial system with a CFR Court violates the sovereign authority of NAT, violates Defendants' trust responsibilities, and is beyond Defendants' authority.

F. Defendants' reliance on the Privacy Act is entirely misplaced.

After nearly 30 years of providing the Tribal Prosecutor with a daily jail roster and copies of police reports, Defendants say they are suddenly prevented from doing so by the Privacy Act without case-by-case requests for individual arrest records of NAT members, whose very identities they will not divulge. Doc. 123 at 25. Other than perhaps at Guantanamo Bay, the U.S. may not keep secret from the public the names of those whose liberty it has deprived. "Secret arrests are a 'concept odious to a democratic society'... and profoundly antithetical to [our] bedrock values." *Ctr. For Nat. Sec. Studies v. U.S. Dep't of Justice*, 215 F.Supp.2d 94, 96 (D.D.C. 2002), *aff'd in part, rev'd in part*, 331 F.3d 918 (D.C. Cir. 2003) (internal citation omitted). Citizens have a "general right to inspect and

copy public records and documents, including judicial records and documents." *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978).

Defendants neglect to mention 5 U.S.C. §552a(b)(11),which authorizes release of records "pursuant to the order of a court of competent jurisdiction." NAT requests this Court to provide just such an order.[7]

G. The BIA is not within its statutory authority.

BIA's claims to be within its statutory authority does not bear scrutiny. In support, BIA cites to the Major Crimes Act, 18 U.S.C. §1153, but ignores the fact that this legislation addresses a discrete list of felonies. Then, the BIA makes a reference to the plenary power of Congress, and claims the right to divest NAT's "inherent sovereignty" through the exercise of "superior sovereign powers." Here, the BIA attempts to arrogate the power of Congress to itself with no notion of the limits on the authority that Congress has delegated to that agency.

Conclusion

Funding the SBC as if it were the former JBC of both Tribes was Federal Defendants' primary mechanism for frustrating the sovereign authority of NAT

[7] Defendants express a fear of liability under the Privacy Act, but violations "must be so patently egregious and unlawful that anyone undertaking the conduct should have known it unlawful." *Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1122 (D.C. Cir. 2007).

when the Tribe filed its Complaint. Federal Defendants now misuse a request from the SBC to displace the judicial branch of *both* Tribes and impose the CFR Court in its place.[8] Defendants rely on legal authority which permits the BIA to put a CFR Court into place only when an affected Tribe has consented, but cite to no authority which would permit this kind of action against NAT without its consent. Defendants proclaim the CFR Court has concurrent authority over members of NAT when it does not and then, beyond what even that illusory authority could permit, assert an exclusive right to decide which cases reach the NAT Tribal Court and which do not. Defendants literally enforce their imperial edicts against NAT through the power and the physical force of the BIA Police.

When the BIA threatened to impose a CFR Court, NAT presented facts and argument on the matter to this Court, including live testimony at the September 14, 2016, hearing. Defendants' counsel assured this Court that so long as a Tribal Court continues, it would be unnecessary to establish a CFR Court and that if the

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[8] On October 19, the SBC adopted a resolution reasserting sole and exclusive authority over law and order on the Reservation. Doc. 115-10. SBC called on the BIA to "expel all current occupants of the [court] Building," *id.* at 2, and once again insisted that the BIA impose a CFR Court "regardless of whether NAT consents," *id.* at 3. SBC asserts it has a "unique and exclusive standing" by treaty "that recognizes the sovereign right of the [EST] over law and order on the Reservation." *Id.* at 2. Just as they did when awarding self-determination contracts to the "SBC as JBC," Defendants are working hard to carry out these edicts from the SBC.

Tribal Court ceases to exist, a CFR Court then would be established on an emergency basis. Transcript, Motion Hearing, September 14, 2016, at 26, lines 18-22. Now, Defendants impose and displace the NAT Tribal Court despite their admission that NAT has established its Tribal Court and has the right to operate it.

NAT has the right to operate a judicial system for its members and others within its jurisdiction on an equal basis or equal footing with any other Indian Tribe. 25 U.S.C. §5123(f) and (g), *Cohen* §3.02[3] at 133-35.

Attached hereto is a draft order for the Court's consideration.

DATED November 23, 2016.

/s/ Andrew W. Baldwin
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CERTIFICATE OF SERVICE

I hereby certify that on November 23, 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/ Andrew W. Baldwin
Andrew W. Baldwin

CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(d)(2)(E), the attached brief is proportionately spaced, has a typeface of 14 points and contains 5,148 words, excluding the caption and certificates of service and compliance.

DATED this 23rd day of November, 2016.

/s/ Andrew W. Baldwin
Andrew W. Baldwin