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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* Plaintiff, vs. DARRYL LaCOUNTE, LOUISE REYES, NORMA GOURNEAU, RAY NATION, MICHAEL BLACK and other unknown individuals, in their individual and official capacities, and DARWIN ST. CLAIR and CLINT WAGON, Chairman and	)	Civil Action No. CV-16-11 BLG-SPW NORTHERN ARAPAHO TRIBE'S OPENING BRIEF IN SUPPORT OF ITS MOTION FOR PRELIMINARY INJUNCTION

Co-Chairman of the Shoshone Business Council, in their individual and official capacities,	)
Defendants.	)

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I. INTRODUCTION.

After years of effort to improve the lives of tribal members and the management of programs shared with the Eastern Shoshone Tribe ("EST"), the Northern Arapaho Tribe ("NAT") chose to break out of a failed system and institute new ways to self-govern and cooperate. In response, Defendants insist that the NAT has somehow surrendered its sovereign and property rights to a separate Indian Tribe, a notion so novel and radical its implementation must be rejected and restrained.

Shoshone Business Council Defendants (St. Clair, Wagon) purport to act on behalf of the NAT through a former "joint" council ("JBC") that has not existed since 2014. Federal Defendants authorize as much, funding the Shoshone Business Council ("SBC") to unilaterally manage programs for both Tribes. Reminiscent of the tale of *The Emperor's New Clothes*,[1] Defendants claim that the SBC is clothed in the robe of a "joint" council acting on behalf of both the SBC and the Northern Arapaho Business Council ("NABC") – that SBC is two councils, and not merely one.

The Tribes may decide to share certain programs or endeavors, or not. Shared efforts require cooperation from both. But Defendants are trying something

[1] Hans Christian Anderson, 1837.

they could never do before, even under the old "joint" council system: make decisions unilaterally on behalf of both Tribes. The NAT seeks injunctive relief to protect the status quo, where only the NAT is authorized to act on behalf of the NAT and where shared programs must be administered cooperatively by both Tribes.

II. HOW THE TRIBES CAME TO BE AT WIND RIVER.

The NAT originally occupied parts of Colorado, Kansas, Montana, Nebraska and Wyoming. By 1811, the Arapaho camped primarily along the North Platte River and south as far as the Arkansas River. Buffalo hunting was a primary means of subsistence and a cultural significance for the NAT.

In 1851, the Arapaho was one of a number of Tribes that signed the Treaty of Fort Laramie (September 17, 1851) 11 Stat. 749. Pursuant to the 1851 treaty, the Arapaho and Cheyenne Tribes' territory encompassed areas of southeastern Wyoming, northeastern Colorado, western Kansas and western Nebraska. Despite the 1851 Treaty, settlement by non-Indians began in Arapaho territory. As a result of this settlement, game disturbance and other factors, the Arapaho began to withdraw north of the Platte River into Wyoming and Montana.

In 1868, the NAT and the United States entered into another treaty in which the Tribe agreed to accept some portion of Medicine Lodge Creek, an area on the

Missouri River near Fort Randall, or the Crow Agency near Otter Creek on the Yellowstone River (Treaty of May 10, 1868) 15 Stat. 655.

Between 1870 and 1877, the NAT was not settled upon any defined reservation and continued to negotiate with the United States for a permanent homeland. From 1871 to 1877, the NAT was attached to the Red Cloud Agency in western Nebraska. Because of poor management and outright fraud by resident agents, all of the Tribes served by that agency suffered from near-starvation conditions and sought relief from other agencies.

The Wind River Valley was used in common by several Tribes, including the Crow, Sioux, Cheyenne, Arapaho, and, to a lesser extent, Shoshone. The Shoshone Tribe did not include the Wind River Valley as part of its aboriginal territory in its Indian Claims Commission case. Despite this, the Treaty with the Eastern Band Shoshoni and Bannock of July 3, 1868, 15 Stat. 673, provided that the Wind River Reservation would be set aside for the "Shoshonee Indians herein named, and such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them." The Shoshone Tribe first actually settled at Wind River in 1871, and thereafter agreed to admit several other bands, lodges and members of other Tribes. In 1877, they consented to admit the Northern Arapaho. After a Northern Arapaho

delegation traveled to Washington, D.C., the United States confirmed the arrangement. "From this time forward [1878], therefore, the Shoshones and Arapahoes will be identified with whatever pertains to the future history of this reservation. ..." Annual Report, Commissioner of Indian Affairs to the Secretary of the Interior for the year 1878, Washington: Government Printing Office, at 148.

Since 1878, the Wind River Reservation has been the home of the NAT and the Eastern Shoshone Tribe ("EST"), each with distinct rules for tribal membership and forms of government. As mentioned, each Tribe has its own treaties with the United States. Each Tribe is entitled to have the United States accept land into trust in the name of the specific Tribe, when that Tribe's resources are used to acquire the property. 25 U.S.C. §574a(a). "*Each tribe governs itself separately* by vote of the tribal membership at general council meetings or by vote of its elected business council. A joint business council of representatives from both tribes deals with certain matters of common interest." *Northern Arapahoe Tribe v. Hodel*, 808 F.2d 741, 744 (emphasis added) (10th Cir. 1987). Each Tribe has its own separate General Council (a body comprised of members of the Tribe meeting as a group), membership roll, membership criteria, elected Business Council, internal governing documents, tribal codes, federal contracts, intergovernmental compacts with the State of Wyoming, and regulatory bodies (e.g., gaming agencies, housing

authorities). No member of one Tribe may vote, hold office or legislate on behalf of the other. The Tribes have rejected efforts to adopt a joint constitution that would consolidate their respective governments (see below).

When it existed, the JBC consisted of both Tribes' Business Councils meeting together and, when possible, acting together cooperatively (*see* 6 N.A.C. 103, Doc. #1-3, Ex. 1 to Complaint), also available on Westlaw and northernarapaho.com). Affirmative votes from a majority of the members of *both* the SBC *and* the NABC were required for action to be approved (decl. of NABC Chairman Dean Goggles, attached as Exhibit 14). No single Tribe was authorized to act on behalf of the other without its consent. *Id*.

III. WHAT DEFENDANTS ARE DOING NOW TO ALTER THE STATUS QUO.

SBC Defendants are now making decisions on a regular basis regarding shared programs of the Tribes and presenting themselves as an entity cloaked with the authority of the NAT, without NAT consent, as set forth in more detail in the Complaint (Doc. #1) (incorporated herein by reference).

Federal Defendants encourage and ratify these actions and have granted self-determination or "638" contract funds to SBC as if it represents both Tribes. They are acting under color of federal law, but beyond their lawful authority. Their actions are on-going and fresh instances of their unlawful conduct arise regularly.

The following are key examples, to date, known to NABC:

A. On February 10, 2016, NABC obtained a copy of a January 27, 2016, memorandum allegedly authored by both Tribes, but approved only by the SBC. It announces a new "restructuring" and "reorganization" of the Shoshone and Arapaho Tribal Court ("Tribal Court") that "reflects the values of the people of the Wind River Reservation." The memorandum asserts that the action has been taken by both Tribes (through the former JBC) even though it was issued without the consent of the NABC (Doc. #1-15, Ex. 13 to Complaint). Federal Defendants have contracted solely with the SBC for funds allocated to judicial services to both Tribes, over the objection of the NAT.

B. On December 17 and 24, 2015, the SBC directed the Tribal Court Administrator to advertise all positions with the Tribal Court. The memoranda assert that the action has been taken by both Tribes (through the former JBC), though done without consultation with or consent of the NABC (Doc. #1-10, Ex. 8 to Complaint). NABC has also received copies of "Notices of Employment" posted by the SBC Defendants on their website, purporting to announce on behalf of both Tribes that there are vacancies for the positions of chief judge, associate judges, prosecutor and public defender for the Tribal Court (attached hereto as Exhibit 16).

C. On January 27, 2016, NABC obtained a copy of minutes purporting to be of a "joint" meeting between both Tribes and three separate oil and gas companies held on October 7, 2015 (Doc. #1-4, Ex. 2 to Complaint). The SBC asserted to these companies that the "JBC" still exists and that SBC is now making decisions for both owners (both Tribes) of the shared mineral estates. SBC approved three lease renewals and a salt water disposal lease, purportedly on behalf of both Tribes (relevant excerpted transcript pages, redacted, Doc. #1-4, Ex. 2 to Complaint).

D. On January 28, 2016, SBC advertised notices of employment for supervisor, game warden, and secretary of the Shoshone and Arapaho Fish and Game Department without consultation with or consent of the NABC. The notices assert that the action has been taken by both Tribes (through the former JBC), and includes the use of the image of Arapaho Chief Black Coal, also without the consent of the NABC (Doc. #1-11, Ex. 9 to Complaint). Federal Defendants have contracted solely with the SBC for funds allocated for fish and game regulation to both Tribes, over the objection of the NAT.

Several months ago, the NAT suspected that the SBC Defendants were about to embark on the aforementioned course of conduct. NABC members met with the Director of the Bureau of Indian Affairs, Defendant Michael Black, in Washington,

D.C., to object to any action usurping the powers of the NAT. At each meeting, the BIA assured the NAT that shared federal contracts, program expenditures, policies, and other management decisions would continue to require the approval of both Tribes (copy of November 10, 2015, letter to BIA Director Black, Doc. #1-8, Ex. 6 to Complaint). These assurances led the NAT to believe the Federal Defendants would not violate the rights of the NAT, which in turn allowed SBC Defendants to progress even further in their plans to usurp tribal authority.

IV. LEGAL STANDARD.

"The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held." *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981), *accord U.S. Phillips Corp. v. KBC Bank N.V.*, 590 F.3d 1091, 1094 (9th Cir. 2010).

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). "'[S]erious questions going to the merits' and a balance of hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood

of irreparable injury and that the injunction is in the public interest." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011). "A sliding scale approach, including the 'serious questions' test, preserves the flexibility that is so essential to handling preliminary injunctions, and that is the hallmark of relief in equity." *Id*. at 1139 (Mosman, concurring).

V. ARGUMENT.

A. The Injunctive Relief Sought Will Preserve the Status Quo and Requires No Affirmative Federal Action.

The NAT challenges an unprecedented usurpation of its authority; injunctive relief will preserve the status quo until the Court can reach the merits.

SBC Defendants have asserted publicly that the former JBC still exists, albeit in a new configuration where only the SBC acts as the "joint" council. The status quo, even under the old JBC format, has always required the approval of each Tribe regarding management of programs shared by both Tribes, whether or not meeting in joint session. "[T]he JBC operated as a voluntary means for the two Tribes to meet and take action on matters of common interest. ... Neither Tribe has, or had, any authority to act for, or make decisions on behalf of, the other Tribe. ..." (statement of appeal by Tribal Court Chief Judge St. Clair, Doc. #1-13, Ex.11 to Complaint, at 4). In the course of an appeal before the Interior Board of Indian

Appeals (IBIA),[2] the Chief Judge supports maintaining the status quo, where "all actions regarding administration of the Court would require approval by both Tribes." February 22, 2016, letter from Judge St. Clair to counsel for the NAT regarding protection of the status quo pending mediation between the parties, attached hereto as Exhibit 17.

An injunction against Defendants' efforts to strip the NAT of its property and sovereign rights will not require Defendants to take substantial affirmative action; rather, it will only require, as always, the approval of both Tribes for action to be taken regarding shared funds or programs.

B. The NAT is Likely to Succeed on the Merits.

(1) *Violations of Federally Protected Sovereign Rights are Clear*.

The sovereign right of each federally recognized Tribe to determine its own form of government is a guiding principle of federal law and policy. Unless specifically divested by Congress, Tribes "retain their existing sovereign powers."

[2] The Tribal Court, through Chief Judge St. Clair, submitted a "638" funding application that would fund the Court directly as a "tribal organization." The BIA denied the application on the grounds that consent from each of the Tribes in a "tribal organization" is required for that organization to enter into a funding contract and the EST did not consent. Instead, the BIA granted the judicial services funding to the SBC, over the objection of the NABC. The Court appealed to the IBIA. NABC also appealed, in support of the Court's funding application, and the two cases have been consolidated. The appeals are at a preliminary stage.

U.S. v. Wheeler, 435 U.S. 313, 323 (1978). Implicit in the terms of each treaty was the agreement that matters of self-government "remained exclusively within the jurisdiction" of the particular tribe. *Id*. at 324. "A quintessential attribute of sovereignty is the power to constitute and regulate its form of government." *Cohen's Handbook of Federal Indian Law [Cohen]*, §4.01[2][a] 2012 ed. at 213. This right includes whether and how to participate with other governments in shared projects or programs. "An Indian nation is free to maintain or establish its own form of government, unless Congress has passed a statute dictating [otherwise]. ..." *Cohen*, §4.01[2][a] at 213 citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 62-63 (1978). The NAT has not surrendered any of its rights of self-government. No federal agency may make any decision "with respect to a federally recognized Indian tribe that classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes." 25 U.S.C. §476(f). Justice Cardozo noted that since 1878, in "numberless" ways, the Arapaho "equality of right and privilege [on the Wind River Reservation] became a postulate of daily life." *Shoshone Tribe v. U.S.*, 299 U.S. 476, 488 (1937).

NAT and EST are each listed separately among the federally recognized Tribes. *See* 25 C.F.R. §83.6(a), notice of list of federally recognized Tribes, and

Federal Register / Vol. 81, No. 19 / Friday, January 29, 2016 / Notices (NAT cited at p. 5020, EST cited at p. 5023).[3] Federal recognition of the NAT "is a formal political act confirming the tribe's existence as a distinct political society, and institutionalizing the government-to-government relationship between the tribe and the federal government." *Cohen*, §3.02[3] at 133-34. "Recognition" is a "legal term of art" which "permanently establishes" this relationship and institutionalizes the Tribe's status, "along with all the powers accompanying that status such as the power to tax, and to establish a separate judiciary." H.R. Rep. 103-781, 103rd Cong., 2d Sess., 2 (1994). Recognition also "imposes upon the Secretary of the Interior specific obligations to provide a panoply of benefits and services to the tribe and its members," *id.*, and "establishes tribal status for all purposes," *id.* at 3. *See also Cohen*, §3.02[3] at 134.

Neither the EST nor the NAT operate their respective governments pursuant to a written constitution. "Some tribes operate without a written constitution. The absence of a written constitution does not affect the self-governing powers of Indian nations under federal law." *Cohen*, §4.04[3][b] at 260, citing 25 U.S.C. §478b, and with respect to privileges or immunities, federal agencies cannot differentiate between Tribes based on their form of government; 25 U.S.C. §476(f)

[3] https://www.gpo.gov/fdsys/pkg/FR-2016-01-29/pdf/2016-01769.pdf.

and (g); and *Kerr-McGee Corp. v. Navajo Tribe*, 471 U.S. 195, 198-99 (1985) (Navajo Tribe may tax non-Indians despite its lack of a constitution).

Nor have the Tribes' governing bodies approved of any constitution or other organic document that would create a "joint" governing body with authority over both Tribes. "Under the Indian Reorganization Act of 1934, Indians living on any given reservation were allowed to organize into federally recognized tribes, whether or not they were linguistically, culturally, or politically united." *Cohen*, §3.02[2] at 133. Indian Reorganization Act constitutions were pushed onto many Tribes during that era and restricted tribal sovereignty.

At Wind River, "[n]either Tribe has a written constitution, charter or bylaws." Letter from EST attorney Marvin Sonosky to U.S. Public Housing Administration dated April 5, 1963 (attached hereto as Exhibit 18). Despite admissions by EST on this subject, SBC asserted otherwise in *Eastern Shoshone Tribe v. Northern Arapaho Tribe*, 926 F.Supp. 1024, 1032 (D.Wyo. 1996). In that case, SBC presented a draft constitution that had been recommended for adoption in 1938 that it claimed had been duly approved. SBC relied on the document as "evidence" in support its "common sovereignty" theory and its claim that the NAT could not establish its own housing authority. Federal Judge Alan B. Johnson found, after a full evidentiary hearing on the matter, that "that document [the

'constitution'] has never been adopted by the supreme authority of the Eastern Shoshone Tribe, that is, [its] General Council. Nor was it adopted by the Northern Arapaho." Hearing transcript excerpt, Vol. II, pp. 131-32 (attached hereto as Exhibit 19). The fact that the "constitution" was considered but not approved by either Tribe shows a positive intent *not* to consolidate tribal governments into a joint council, or otherwise.

The Court rejected the argument of the SBC that the NABC could not act independently in matters affecting the Reservation generally. NABC argued that the Shoshone and Arapaho joint council was essentially a joint powers board[4] operating with the consent of each Tribe, but without any authority independent of each Tribe. The EST had presented a "common sovereignty" theory which the U.S. District Court flatly rejected.

In *Northern Arapaho Tribe v. State of Wyoming*, 2002 WL 31961497 (D.Wyo. Feb. 6, 2002, No. 00-CV0221-J), aff'd 389 F.3d 1308 (10th Cir. 2004),

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[4] Joint powers boards are composed of the entities which participate on them. That participation does not infringe on the powers of its individual members. *See*, e.g., *Weston County Hosp. Joint Powers Board v. Westates Construction Co.*, 841 P.2d 841, 846-47 (Wyo. 1992) ("The participating entities, whatever they may be, do not merge. Instead, they simply agree to create and support a different and independently managed organization that exists and functions for their mutual benefit. In doing so, they do not surrender or delegate any of their individual rights and prerogatives.").

aff'd *en banc* 429 F.3d 934 (10th Cir. 2005), Wyoming had argued that the NAT's "governmental decision making is subject to the approval of another Tribe [the Shoshone]." (2002 WL 31961497, p. 3.) The Court rejected Wyoming's theory that the State was only obligated to negotiate a gaming compact with both Tribes, acting together, because there was only one Reservation. Today, the NAT operates its Class III gaming pursuant to Secretarial procedures issued under the Indian Gaming Regulatory Act. (Although not a gaming compact, the Northern Arapaho Gaming Procedures are available at: http://www.indianaffairs.gov/WhoWeAre/AS-IA/OIG/Compacts/index.htm). The EST operates its gaming separately under a compact with the State of Wyoming. *Id*. Each Tribe regulates its own gaming activities by separate law.

As noted earlier, each Tribe has its own separate General Council (comprised of meetings of its own tribal members), membership roll, membership criteria, elected Business Council, internal governing documents, and tribal codes. "All tribes, in almost all circumstances, limit tribal voting rights to individuals with tribal membership or citizenship. Because of the central role tribal membership determinations play in tribal identity and self-governance, Indian tribes retain the inherent and exclusive right to define tribal membership." *Cohen*, §4.06[1][a] at 280-81, citing also to §4.01[2][b]. Thus, members of the NAT have no right to

vote in EST elections, whether for members of the SBC, agencies of the EST, or otherwise, and have no right to participate in the EST General Council, which serves as the legislative body for the EST (Exhibit 14, Goggles decl. at para. 4-5). Likewise, members of the EST cannot vote or hold elective office in the NAT government.

A Tribe's "authority over [its] members extends to the criminal law area as well as civil regulatory area." *Cohen*, §4.01[2][d] at 220. "Retained criminal jurisdiction [of tribes] over members is accepted by our precedents and justified by the voluntary character of tribal membership and the concomitant right of participation in a tribal government, the authority of which rests on consent..." *Id.* citing *Duro v. Reina*, 495 U.S. 676, 694 (1990) and *Santa Clara Pueblo*, 436 U.S. at 55-56.

The courts and Congress have long recognized "the unique trust relationship between the United States and the Indians." *Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985). "Supreme Court decisions require the trust obligation owed by the United States to the Indians be exercised according to the strictest fiduciary standards." *Nance v. E.P.A.*, 645 F.2d 701, 710 (9th Cir. 1981) (internal citations omitted). "In carrying out its treaty obligations with the Indian tribes the Government is something more than a mere contracting party. ... [The

United States] has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards." *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942) (internal citations omitted).

"It is fairly clear that *any* Federal government action is subject to the United States' fiduciary responsibilities toward the Indian tribes." *Nance*, 645 F.2d at 711 (emphasis added). "The courts have applied the trust responsibility to limit federal administrative action, especially in the context of administration of tribal property by the Department of Interior; [and] to constrain federal agencies conducting actions relating to Indian tribes. ..." *Cohen*, §5.04[3][a] at 415 (internal cites omitted).

The payment of funds to a tribal council "which, to the knowledge of the Government officers charged with the administration of Indian affairs and the disbursement of funds to satisfy treaty obligations, was composed of representatives faithless to their own people and without integrity would be a clear breach of the Government's fiduciary obligation." *Seminole Nation*, 316 U.S. at 297 (internal citations omitted). In the case at bar, the Federal Defendants have paid funds to the SBC which were intended by Congress for the benefit of the NAT

and its members. The SBC is not elected by and not accountable to members of the NAT. BIA's authorization of SBC to exercise unilateral control over such funds (as well as over certain non-federal funds of NAT) is a breach of the federal trust obligation to the Arapaho people.

The notion that SBC is cloaked with the authority of both Tribes, acting through a non-existent "joint" council, is absurd and violates long-standing principles of tribal sovereignty and the Federal Defendants' trust obligations to the Northern Arapaho Tribe.

(2) *Defendants Unlawfully Convert Property and Funds of the NAT.*

As set forth above and in the Complaint (Doc. #1), Defendants have deprived the NAT of its own property and funds (including property of the shared Fish and Game Department and fines collected by the Tribal Court) and converted them to their own uses. Defendants likewise have deprived the NAT of funds and "638" programs intended by Congress for the benefit of the Tribe and its members and converted those to their own uses.

(3) *Defendants have Diminished Privileges and Immunities of the NAT.*

"Departments or agencies of the United States shall not promulgate any regulation or make any decision or determination... with respect to a federally

recognized Indian tribe that classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes." 25 U.S.C. §476(f). Furthermore, "[a]ny regulation or administrative decision or determination of a department or agency of the United States... that classifies, enhances, or diminishes the privileges and immunities available to a federally recognized Indian tribe relative to the privileges and immunities available to other federally recognized tribes by virtue of their status as Indian tribes shall have no force or effect." 25 U.S.C. §476(g).

In explaining the effect of these statutes, the Assistant Secretary for Indian Affairs stated: "Basically, this Act represents an 'equal footing' doctrine for Tribes in that they all have the same sovereignty and political relationship with the United States regardless of the means by which they were recognized or the method of their governmental organization." *Walter Rosales v. Sacramento Area Director*, 32 IBIA 158, 165, 1998 WL 233748, 6 (internal citations omitted). The United States cannot "sub-classify a tribe by denying it privileges and immunities available to other federally recognized tribes." *Butte Cty., Cal. v. Hogen*, 613 F.3d 190, 198 (D.C. Cir. 2010).

Defendants unlawfully subclassify the NAT as one which, unlike any other Tribe, is not permitted to make its own laws and not permitted to determine its own

form of government, or how it cooperates with other governments. Defendants treat NAT as if it were not on an equal footing with the EST.

(4) *Defendants Violate the Equal Protection Clause*.

Defendants' refusal to recognize the Tribes as separate governments creates fundamental Equal Protection Clause violations, primarily with respect to the "one person, one vote" rule. Members of the NAT comprise about 71% of the total membership of both Tribes and elect the six (6) members of the NABC. Members of the EST comprise about 29% of the total and elect the six (6) members of the SBC. The former JBC consisted of the twelve (12) members of both councils, but action required the affirmative votes of not just a simple majority of the twelve (12), but a majority of the members of each Business Council – at least four (4) votes were required from the NABC plus at least four (4) votes from the SBC.

The SBC is now acting alone for both Tribes, through the artifice of a defunct joint powers board. In essence, Defendants impose a new form of government on the NAT which deprives the Tribe and its members of the right to vote in that government.[5] "[E]ach and every citizen has an inalienable right to full and effective participation in the political process" of his or her government.

[5] Even if the Tribes choose to consolidate, the NAT would not consent to a system in which the votes of EST members were weighted nearly three to one against the votes of NAT members.

Reynolds v. Sims, 377 U.S. 533, 565 (1964). All other rights, "even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). When a scheme substantially burdens the right to vote – and complete denial of the right does so most starkly – the scheme is subject to "strict scrutiny." *Green v. City of Tucson*, 340 F.3d 891, 899 (9th Cir. 2003). The NAT has no representation in an entity installed by Defendants in an administrative *coup d'etat* to control the NAT's interests. Defendants' actions violate the Equal Protection Clause of the Fourteenth Amendment, including the "one person, one vote" rule.

C. NAT Faces a Threat of Irreparable Injury.

Violations of tribal sovereignty constitute irreparable harm, *ipso facto*. "[I]nfringement of federally protected rights of self-government and self-determination... cannot be remedied by any other relief other than an injunction. ..." *Tohono O'odham Nation v. Schwartz*, 837 F.Supp. 1024, 1034 (D.Ariz. 1993) (State exercise of authority in violation of tribal sovereignty enjoined). Violations of tribal jurisdiction "results in irreparable injury vis-a-vis the Tribe's sovereignty" and must be restrained, *E.E.O.C. v. Karuk Tribe Hous. Auth.*, 260 F.3d 1071, 1077 (9th Cir. 2001) (subpoena from federal agency which infringes on tribal sovereignty enjoined). *See also Wyandotte Nation v. Sebelius*, 443 F.3d 1247, 1255 (10th Cir. 2006) (citing *Seneca-Cayuga v. Oklahoma*, 874

F.2d 709, 716 (10th Cir. 1989) and *Kiowa Indian Tribe of Oklahoma v. Hoover*, 150 F.3d 1163, 1171-72 (10th Cir. 1998)); *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1250-51 (10th Cir. 2001).

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

Unilateral operation of the Tribal Court creates serious jurisdictional questions for a large class of litigants in the Tribal Court. For example, NAT estimates that over 70% of the cases heard in the Tribal Court involve members of the NAT, over which the EST lacks jurisdiction.[6] Without the consent of the NAT, the SBC is without authority to appoint judges, manage staff, or set rules or policies for a shared court system. Court staff who lose their jobs by unilateral action of the SBC will have no meaningful redress if they cannot be reinstated until after trial or appeal. Litigants depend on the experienced judiciary of the Tribal

[6] "No federal statute mandates either the necessity or manner of establishing tribal courts. ... Most tribal courts are established by tribal legislative enactments rather than tribal constitutions." *Cohen*, §4.04[3][c][iv][B] at 265.

Court, but instead will have their cases heard by new appointees selected only by the SBC, an effect which cannot be remedied after trial or appeal in the case at bar.

D. Harm to the NAT Outweighs Any Harm to Defendants.

Defendants are trying something they have never done before, even under the old "joint" council system: making decisions unilaterally on behalf of both Tribes. The SBC has no legitimate interest in usurping the authority of the NAT; nor do Federal Defendants have a legitimate interest in helping them do it. Denial of sovereign and property rights of the NAT contravenes federal treaty and trust obligations to the NAT and breaches decades of federal Indian law and policy. Protecting the status quo, which requires the approval of both Tribes in matters involving shared tribal programs, does not harm legitimate interests of the Defendants.

Defendants also lack any legitimate interest in misrepresenting to other governments, business or the public that they speak for the NAT. Use of the NAT's name, its historic leaders, or other indicia asserting that actions or statements have been endorsed by the NAT when they have not is not an interest to be weighed in the balance.

E. An Injunction is Not Contrary to the Public Interest.

Supporting tribal self-government is a matter of public interest. *Prairie*

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

Preventing a likelihood of public confusion also benefits the public interest. "Once the plaintiff has demonstrated a likelihood of confusion, it is ordinarily presumed that the plaintiff will suffer irreparable harm if injunctive relief is not granted." *Vision Sports, Inc. v. Melville Corp.*, 888 F.2d 609, 612, n. 3 (9th Cir. 1989) (trademark infringement enjoined). The same is especially true here, where Defendants' unauthorized use of the name and symbols of Northern Arapaho government are likely to confuse other governments, businesses and the public. Indeed, Defendants' actions purport to represent the official conduct of the Northern Arapaho government, including the adoption of regulations and formal policies. The opportunity for public confusion and injury is even more likely in this context than in cases involving infringement of a company trademark.

VI. RELIEF SOUGHT.

Plaintiff requests the injunctive relief set forth below.

A. Injunction as to Shoshone Business Council. SBC Defendants be enjoined, until further order or judgment of the Court, from taking the following

actions:

1. Distributing materials or using letterheads, labels, or symbols which identify the author or source of the material as including NAT or the NABC, including use of the image of the historic Arapaho Chief Black Coal, or distributing materials which represent that they have been authored, approved or ratified by the NAT or NABC without the written consent of NABC.

2. Representing to federal agencies, tribal, state or local governments, business entities or the public that SBC is authorized to make decisions or take actions unilaterally on behalf of the NAT or without its consent, whether through a "joint" council or otherwise.

3. Managing "638" or other programs shared by the Tribes without the written consent of both Tribes. "Management" includes advertising job positions, interviewing prospective employees, suspending, terminating or modifying the terms of employment of current employees, including judges or other officials of the Tribal Court, approving payments, or amending budgets, policies or procedures affecting such programs.

4. Making or approving decisions regarding the assets or property of the NAT, without the consent of NABC.

B. Injunction as to Federal Defendants. Federal Defendants be enjoined, until further order or judgment of the Court, from taking the following actions:

1. Representing to other federal agencies, tribal, state or local governments or the public that SBC is or has been authorized by the United States to make decisions or take actions unilaterally on behalf of the NAT or without its consent, whether through a "joint" council or otherwise. Such prohibition shall specifically include authorizing, approving or ratifying unilateral action by the SBC with respect to shared "638" programs of the EST and NAT.

2. Authorizing, approving or ratifying unilateral action by the SBC, whether through a "joint" council or otherwise, which purports to manage shared "638" programs of the Tribes. Such prohibition shall specifically include unilateral property or program decisions, personnel directives, budget approvals or policy changes.

3. Authorizing, approving or ratifying unilateral action by the SBC, whether through a "joint" council or otherwise, which purports to approve decisions regarding the assets or property of the NAT, without the consent of the NABC.

VII. CONCLUSION.

In an effort to improve the lives of Reservation residents and the management of shared programs, the NAT chose to break out of the failed "JBC" system and institute new ways to self-govern and cooperate with the EST. In response, Defendants claim that the NAT has somehow surrendered its sovereign and property rights to the EST, a notion so unusual and radical that its implementation must be rejected and restrained.

DATED March 4, 2016.

/s/ Mandi A. Vuinovich
Andrew W. Baldwin
Berthenia S. Crocker
Kelly A. Rudd
Mandi A. Vuinovich
Attorneys for Plaintiff
Northern Arapaho Tribe

CERTIFICATE OF SERVICE

I hereby certify that the foregoing has been or will be served in the same manner as the Summons and Complaint in this matter.

/s/ Mandi A. Vuinovich
Mandi A. Vuinovich

CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(d)(2)(E), the attached brief is proportionately spaced, has a typeface of 14 points and contains 5,917 words, excluding the caption and certificates of service and compliance, table of contents and authorities, and exhibit index.

DATED this 4th day of March, 2016.

/s/ Mandi A. Vuinovich
Mandi A. Vuinovich