

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CALIFORNIA VALLEY MIWOK TRIBE,)
 formerly SHEEP RANCH OF ME-WUK)
 INDIANS OF CALIFORNIA,)
)
 Plaintiff,)
)
 v.)
)
 UNITED STATES OF AMERICA,)
 GALE A. NORTON, Secretary of the)
 Interior,)
)
 and)
)
 JAMES E. CASON, Associate Deputy)
 Secretary of the Interior,^{1/})
)
 Defendants.)

No. 1:05CV00739
Judge James Robertson

DEFENDANTS' OPPOSITION TO PLAINTIFF'S
MOTION FOR PRELIMINARY INJUNCTION

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Washington, D.C. 2004

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^{1/} David W. Anderson, formerly the Assistant Secretary - Indian Affairs, is no longer with the Department of the Interior. The position of Assistant Secretary - Indian Affairs is vacant. The duties of the Assistant Secretary have been delegated by the Secretary of the Interior to the Associate Deputy Secretary by Secretarial Order 3259, dated February 8, 2005, as amended on August 11, 2005. James E. Cason, Associate Deputy Secretary is substituted for Mr. Anderson pursuant to Fed. R. Civ. P. 25(d).

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MEMORANDUM IN SUPPORT OF DEFENDANTS' OPPOSITION
TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

The Tribe's preliminary injunction motion is yet another reflection of the underlying internal tribal dispute over leadership, membership and organizational issues which constitutes the very essence of this lawsuit. The Tribe's motion really amounts to the latest episode in an ongoing, seemingly interminable, saga of internal tribal turmoil. **Defendants strongly oppose this latest maneuver to avoid confronting the jurisdictional deficiencies in the Tribe's case, and request that this Court first consider Defendants' pending Motion to Dismiss before ruling on the Tribe's motion for preliminary injunction.**

Plaintiff California Valley Miwok Tribe now challenges the decision of Raymond Fry, Tribal Operations Officer, Bureau of Indian Affairs' Central California Agency, contained in the

October 26, 2005 letter from Mr. Fry to Ms. Silvia Burley, refusing to take action on Tribal Resolution No. R-1-09-26-2005. See Attachment A hereto. This resolution authorized the reprogramming of “Tribal Priority Allocation” (TPA) funds in the amount of \$3,000 for each of three years (fiscal years 2006, 2007, and 2008) for the purpose of transferring these funds “into a special Bureau [BIA Central California Agency] account for the express purpose of expanding the Realty and Environmental Services [offices of the Agency] in the area of fee-to-trust acquisitions by funding the California Fee-to-Trust Program.”² The Tribe sent the Resolution to the Central California Agency for the purpose of having BIA approve it.

As noted, this present challenge (as is true of the Tribe’s challenge to the March 26, 2004 decision of the Superintendent of BIA’s Central California Agency (see Complaint filed April 12, 2005; Memorandum in Support of Defendants’ Motion to Dismiss, filed August 5, 2005 at 1-5)), clearly reflects the underlying internal tribal dispute over leadership and organizational issues which constitutes the very core of this suit. Plaintiff’s motion unavoidably implicates the Defendants’ Motion to Dismiss, which, if granted, would dictate denial of the Plaintiff’s motion. Accordingly, Defendants suggest that the Court first rule on their Motion to Dismiss on which briefing has been completed. In the alternative, Defendants request the Court to deny the Tribe’s motion for a preliminary injunction and then rule on the government’s Motion to Dismiss.

² Under the Indian Self-Determination and Education Assistance Act, Public Law 93-638, Act of January 4, 1975, 88 Stat. 2203, commonly referred to simply as “638” (25 U.S.C. § 450 *et seq.*), tribes can contract with the BIA to perform services that the BIA would otherwise perform pursuant to the Tribe’s Tribal Priority Allocation (TPA). The funds in this case were provided to the Tribe by the BIA pursuant to a “638” contract to enable the Tribe to implement the Aid to Tribal Government Program and, thus, were Federal government, not tribal monies.

FACTUAL BACKGROUND^{3/}

In his February 11, 2005, letter, Michael D. Olsen, the Acting Principal Deputy Assistant Secretary- Indian Affairs, stressed: “The first step in organizing the Tribe is identifying putative tribal members. If you need guidance or assistance, Ray Fry... of the Central California Agency of the BIA can advise you how to go about doing this.” This admonition prompted both tribal factions to set up meetings to discuss the organization of the Tribe. See Attachment B hereto (Third Declaration of Raymond Fry, dated January 3, 2006, ¶12).

Beginning in March, 2005, the Central California Agency’s acting and permanent Superintendents and Mr. Fry held a series of meetings, attended by Mr. Yakima Dixie, (hereditary chief of the Tribe, first Tribal Chairperson, and spokesperson for “putative tribal members,” -- see Motion of Yakima Dixie to Intervene at 2), his tribal consultants, attorneys and prospective tribal members and, on the other hand, representatives of Ms. Silvia Burley. See Attachment B (Id., ¶¶ 13-17).

The principal subjects of discussion at the foregoing meetings were: (1) identification of putative members of the Tribe; (2) organizational approaches/methods that should be considered for use; (3) the concerns of the Yakima Dixie faction about the use of P.L. No. 93-638 contract funds under Ms. Burley’s leadership; (4) the use of non-gaming revenues by the Burley faction; and (5) the lack of Ms. Burley’s personal involvement in any of these meetings. Id., ¶16.

Tribal Resolution No. R-1-09-26-2005, (dated September 26, 2005), authorized a reprogramming of “638” funds in the amount of \$3,000 for each of Fiscal years 2006, 2007 and 2008 for the purpose of joining the fee-to-trust consortium comprised of numerous federally

^{3/} The “Factual Background” of this litigation contained in the Memorandum in Support of the Defendants’ Motion to Dismiss at 5-9 covers the period from 1998 up through February 11, 2005, and is incorporated herein by reference.

recognized tribes in California. The purpose of the BIA's Pacific Region Fee-to-Trust Program is to facilitate putting tribal fee lands into trust. Id., ¶¶ 20, 21. The Department of the Interior is now reviewing the authority for, and appropriateness of, this program. Id., ¶22.

On September 2, 2005, Mr. Yakima Dixie moved to intervene in this case. Just before that, on August 30, 2005, Ms. Silvia Burley, the leader of the other faction of the Tribe, notified Mr. Dixie that he had been officially disenrolled from the Tribe. Id., ¶11. See also Plaintiff's Opposition to Yakima Dixie's Motion to Intervene, at 7-9.

In a letter of October 26, 2005, addressed to Ms. Silvia Burley, from Raymond Fry, Tribal Operations Officer for the BIA's Central California Agency, Mr. Fry stated that he was returning Tribal Resolution No. R-1-09-26-2005, authorizing a reprogramming of Tribal Priority Allocation (TPA) funds [that is, "638" contract monies provided to the Tribe by BIA to enable the Tribe to implement the Aid to Tribal Government Program and thus government, not tribal, monies], in the amount of \$3,000 annually (for Fiscal Years 2006, 2007, and 2008) for use in the BIA's Fee-to-Trust Program without taking any action thereon. See Attachment B (Declaration of Raymond Fry), ¶¶ 23, 24. The stated rationale for the refusal to take action was that ". . . the BIA does not recognize any governing body for the Tribe, nor do we currently have a government-to-government relationship with the California Valley Miwok Tribe . . ." Although Mr. Fry had sent a draft of the letter to Scott Keep, Assistant Solicitor, Tribal Government and Alaska, in the main Office of the Solicitor in Washington, D.C., neither Mr. Fry nor any other official of the BIA's Central California Agency requested Mr. Keep's approval of the draft before it was sent to Ms. Burley. See Attachment D hereto (Declaration of Scott Keep, ¶ 8).

The quoted language was derived from Mr. Fry's reliance on the decision contained in the March 26, 2004, letter from Superintendent Dale Risling to M. Silvia Burley. See

Attachment B hereto (Declaration of Raymond Fry, ¶24). The gist of the March 26th decision was that the Tribe was not “organized” because it had not yet identified the members of the “greater tribal community” and, therefore, the Tribe’s organizational efforts up to then “did not reflect the involvement of the whole tribal community.” The Superintendent concluded that the BIA could not recognize the tribal constitution [or, by extension, any other tribal governing document] or recognize Ms. Burley as Tribal Chairperson. See Attachment A to Defendants’ Reply to Plaintiff’s Opposition to Defendants’ Motion to Dismiss. Mr. Fry’s conclusion that the BIA “does not recognize any governing body for the Tribe” is fully supported by the March 26th letter.

However, the March 26th letter does not appear to support the statement that there is no “government-to- government relationship” between CVMT and the federal government. The decision embodied in the March 26th letter is at the core of the pending lawsuit, as Defendants’ Motion to Dismiss amply demonstrates, and is likewise implicated by the preliminary injunction motion because the Fry letter is derivative of the March 26th letter.

On November 2, 2005, the attorney of record for the Defendants, James M. Upton, had a telephone conversation with Plaintiff’s attorney of record, George Steele. Mr. Steele requested that the October 26th Fry letter be retracted. See Attachment C hereto (Declaration of James M. Upton, ¶2). In response to Mr. Steele’s specific question as to whether Scott Keep had seen a draft of the Fry letter before it was sent out, Mr. Upton stated that Mr. Keep had received a draft of the Fry letter, but that no BIA Central California Agency official checked with Mr. Keep to obtain his approval of the letter before the letter was sent to Ms. Burley. Id. Mr. Upton told Mr. Steele that he would attempt to find out as soon as possible whether BIA would be willing to retract the October 26th letter. Id. Mr. Upton informed Mr. Keep that Mr. Steele wanted to know

if BIA was going to retract the October 26th Fry letter. Attachment D (Second Declaration of Scott Keep, ¶ 9). Mr. Keep could not furnish an answer to Mr. Steele's inquiry, until Mr. Keep had an opportunity to brief the Acting Principal Deputy Assistant Secretary on this matter. See Attachment D (Second Declaration of Scott Keep, ¶ 11). This briefing still had not occurred when Mr. Keep was advised that Plaintiff anticipated filing a motion for a temporary restraining order. Id. ¶¶ 12-14.

Subsequent to the November 2nd conversation, Mr. Upton requested that Mr. Keep contact Mr. Fry directly to determine if the Agency was willing to retract the Fry letter. Mr. Keep stated that he would contact Mr. Fry. Id., ¶3

In a November 21, 2005, telephone conversation with Mr. Steele, Mr. Upton stated that the Central California Agency had not yet responded to Mr. Keep's request and that he had nothing to report. Mr. Upton conveyed Mr. Keep's request that the parties agree on a deadline for the next telephone conversation. Counsel for the parties agreed on a deadline of December 1, 2005. Id., ¶4.

On or about December 2, 2005, Mr. Upton left a message for Mr. Steele that he still did not have anything to report because the Central California Agency had not yet decided whether or not it would retract the Fry letter. Id., ¶5.

On October 28, 2005, the BIA Central California Agency had notified Ms. Burley that it was scheduling an on-site "monitoring" visit for the purpose of reviewing the tribe's use of "638" contract funds for November 28, 2005. See Attachment B (Third Declaration of Raymond Fry, ¶25); see also ¶¶ 18, 19 regarding the purposes of the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450, et seq. (2005). The BIA's regulations establish a standard procedure for the annual monitoring of tribal handling of "638" contract funds. See 25

C.F.R. Part 900 (2005). In addition, the Tribe had agreed to such a visit in the Fiscal Year 2005 Annual Funding Agreement which is a part of the “638” contract between the Tribe and BIA. Fry Deposition, ¶ 25.

On November 7, 2005, Ms. Burley refused to agree to the November 28th visit. Id., ¶¶ 25, 26, 27. In a December 6, 2005 letter, the BIA scheduled a December 12, 2005, site visit at Ms. Burley’s residence/office. Ms. Burley cancelled the site visit. The BIA rescheduled the site visit for December 20, 2005, and, once again, Ms. Burley cancelled the site visit. See Attachment B, Declaration of Raymond Fry. Id., ¶¶ 28-34.

On December 5, 2005, Mr. Upton telephoned Mr. Steele to inform him that the BIA had decided it would not retract the Fry letter and was standing by the position stated therein. See Attachment C hereto (Declaration of James M. Upton, ¶6).

On December 5, 2005, Mr. Chad Everone sent a letter to Superintendent Troy Burdick of the Central California Agency stating that the California Gambling Control Commission had filed an interpleader suit in State court against Silvia Burley, Yakima Dixie, Chad Everone, and Velma Whitebear, in order to resolve the question of how the Commission should handle the distribution of Revenue Sharing Trust Fund (RSTF) monies to the Tribe. See Attachment F hereto. The Commission’s Complaint alleges that it “. . . lacks knowledge and authority to determine the validity of the defendants’ conflicting claims to control of the CVMT’s government, and authority to represent it, and so cannot determine to whom the RSTF monies should be distributed, on behalf of the CVMT.” See Exhibit 5 attached to the Tribe’s Motion for Preliminary Injunction, ¶14. This Fund is comprised of a fixed portion of the gaming revenues earned annually by the federally recognized tribes in California that conduct Indian gaming; these revenues are distributed to the non-gaming tribes, such as the Plaintiff tribe, each year on a

quarterly basis. Id. See also Defendants' Reply to Plaintiff's Opposition to Defendants' Motion to Dismiss at 10-12.

ARGUMENT

I. THE UNITED STATES' MOTION TO DISMISS SHOULD BE CONSIDERED FIRST.

As set forth above, Defendants filed their Motion to Dismiss on August 5, 2005, arguing that the Tribe's case suffers from jurisdictional infirmities. Briefing on Defendants' Motion to Dismiss has been concluded and awaits a ruling by this Court. In their Motion to Dismiss, Defendants argue that: (1) this Court lacks subject matter jurisdiction over this case which, at its core, is really an internal tribal dispute, or, in the alternative; (2) this suit fails to state a claim upon which relief may be granted because the suit, in reality, challenges the March 26, 2004 decision of Superintendent Dale Risling, and Ms. Burley failed to exhaust her (or the Tribe failed to exhaust its) administrative remedies for appealing this decision. Consideration of Defendants' Motion to Dismiss before the Tribe's motion for preliminary injunction is appropriate because this Court must first assure itself that it has jurisdiction. See, e.g., In re Federal Election Campaign Act Litigation, 474 F. Supp. 1051, 1053 (D.D.C. 1979) (If a court believes that it is without subject matter jurisdiction, dismissal is mandatory.). See also Taylor v. Commonwealth of Virginia Department of Transportation, 170 F.R.D. 10, 12 (E.D. Va. 1996); and Watson v. Clark, 716 F. Supp. 1354, 1356 (D. Nev. 1989) (Dismissal is mandatory if the court lacks subject matter jurisdiction). Because Defendants' Motion to Dismiss challenges this Court's subject matter jurisdiction to hear Tribe's claims, it should be heard prior to the Tribe's motion for preliminary injunction.

II. THE ISSUANCE OF A PRELIMINARY INJUNCTION IS AN EXTRAORDINARY REMEDY.

The United States Supreme Court has declared that a preliminary injunction constitutes an “extraordinary and drastic remedy.” Mazurek v. Armstrong, 520 U.S. 968, 972 (1997). The movant for a preliminary injunction bears the burden of making the following four showings: (1) a substantial likelihood of success on the merits; (2) movant will suffer irreparable harm if its motion is denied; (3) injunctive relief would not significantly harm other interested parties; and (4) the public interest would be served by granting injunctive relief. Katz v. Georgetown Univ., 246 F.3d 685, 687 (D.C. Cir. 2001); Mova Pharm. Corp. v. Shalala, 140 F. 3d 1060, 1066 (D.C. Cir. 1998). The federal district court balances the showings made on each of the four factors in order to determine how to rule upon a motion for a preliminary injunction. Mova Pharm. Corp., 140 F.3d at 1066. Defendants submit that this balancing process should lead the Court to deny the motion.

III. PLAINTIFF HAS NOT MADE A SHOWING OF A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS.

Plaintiff must make a “strong showing it is likely to prevail on the merits” - - that is, must establish “a substantial indication of probable success.” Washington Metro. Area Transit Comm’n v. Holiday Tours, Inc., 559 F.2d 841, 842-43, 844 (D.C. Cir. 1977). In the circumstances present here, Plaintiff cannot make the required showing, unless it preliminarily succeeds in refuting Defendants’ arguments that: (1) this Court lacks subject matter jurisdiction over this case which, at its core, is really an internal tribal dispute, or, in the alternative; (2) this suit fails to state a claim upon which relief may be granted because the suit, in reality, challenges the March 26, 2004 decision of Superintendent Dale Risling, and Ms. Burley failed to exhaust her (or the Tribe failed to exhaust its) administrative remedies for appealing this decision. Even

though the PI motion is purportedly aimed at the Fry letter sent to Ms. Burley on October 26, 2005, the Fry letter is really rooted in the March 26th letter, as the Fry Declaration attached hereto makes readily apparent.^{4/}

A. Lack of Subject Matter Jurisdiction.

We reiterate the argument contained in our Motion to Dismiss filed on August 5, 2005, that, at bottom, this lawsuit amounts to nothing more than an internal tribal dispute, and, as a general rule, federal district courts lack jurisdiction over internal tribal leadership, membership and organizational issues. See Memorandum in Support of Defendants' Motion to Dismiss at 9-11. If the Court should find that it lacks jurisdiction over this lawsuit, it follows, a fortiori, that the Plaintiff's PI motion must be denied.

B. Failure to State a Claim Upon Which Relief May be Granted.

Neither Ms. Burley nor the Tribe attempted to file an administrative appeal from the Superintendent's decision contained in the March 26, 2004 letter, even though the letter specified the applicable administrative appeal procedures. This failure to exhaust administrative remedies constitutes a failure to state a claim upon which relief may be granted and the Court should dismiss the Complaint. If the Court should decide to dismiss the Complaint, then it must necessarily deny the Tribe's PI motion. See Memorandum in Support of Defendants' Motion to Dismiss at 12-21 on the argument concerning the failure to state a claim.

In sum, if the purpose of Plaintiff's PI motion is to preserve the status quo until such time as the court can make "a final determination of the merits of the suit" Washington Metro. Area Transit Comm'n. v. Holiday Tours, Inc., 559 F.2d at 844, but the Defendants have pending a

^{4/} This does not mean that because the Tribe did not file an administrative appeal from the March 26th decision, it was somehow precluded from lodging an administrative appeal from the October 26th action.

dispositive motion (based principally on non-merits defenses to the lawsuit), which could be granted solely on the basis of these non-merits defenses, then the Court should rule on that dispositive motion first. If the Court were to grant the Defendants' Motion to Dismiss, the Court would not have to reach the merits of the suit. Accordingly, ruling on the Motion to Dismiss first has the potential for conserving judicial resources. In this regard, we stress that a plurality of the Justices in one decision of the United States Supreme Court voiced a strong objection to having a federal court decide the merits of a case over which the court lacks jurisdiction. Steel Co. v. Citizens for a Better Env't, 523 U. S. 83, 101-102 (1998).

If the Court decides it will not rule on Defendants' Motion to Dismiss first, then, alternatively, we request that the Court rule on the non-merits defenses set out therein (and reiterated above), when considering Plaintiff's preliminary injunction motion.

C. Likelihood of Plaintiff's Success on the Merits.

Plaintiff contends there are two merits issues in this case: "1) whether CVMT possesses the right to make its own laws and be governed by them; and 2) whether Defendants are acting unlawfully by interfering with CVMT's self-governance." (Pl. Memorandum at 11). Plaintiff asserts that the decision in Ransom v. Babbitt, 69 F. Supp. 2d 141 (D.D.C. 1999) stands for the proposition that the Defendants ". . . have the responsibility to interpret, not approve or reject, tribal laws." [Emphasis supplied] Id. However, while Indian tribes have a right to promulgate their own governing documents, the BIA, nonetheless, has the responsibility to ensure that these documents reflect the will of the tribe as a whole, including the greater tribal community in the case of an "unorganized" tribe such as the CVMT. Mr. Fry's October 26, 2005 letter is consistent with this responsibility and did not unlawfully interfere with the CVMT's self-governance.

The threshold fact here is that the Tribe sent Tribal Resolution No. R-1-09-26-2005 to the BIA Central California Agency for the purpose of obtaining BIA approval. See Third Declaration of Raymond Fry, ¶23 (Attachment B hereto). This reality is totally inconsistent with the Tribe's basic argument that the BIA has no responsibility/authority to approve or reject tribal laws and, in and of itself, should preclude any showing of "a substantial indication of [Plaintiff's] probable success." Washington Metro. Area Transit Comm'n., supra, 559 F.2d at 842.⁵⁷

1. **The Will of the Tribal Membership is an Important Element of the Federal-Tribal Relationship.**⁶⁷

More than three and one-half years ago, the Tribe stated in a previous suit against the federal government that ". . . it was an Indian Tribe with a **potential membership of 250 people . . .**" [Emphasis added]. See Attachment B to Defs. Memo. in Support of Motion to Dismiss. As we point out in our Motion to Dismiss, and reiterate here, the Plaintiff has yet to identify which of the 250 potential members should be made members of the CVMT.⁷⁷

The federal-tribal relationship is founded upon the premise that tribal governing

⁵⁷ The Department is now reviewing the existing Fee-to-Trust program of the BIA's Pacific Regional Office. See Attachment B hereto (Declaration of Raymond Fry, ¶22).

⁶⁷ In their Motion to Dismiss, the Defendants analyze the merits of this suit. Defs. Memo. at 21-32; to the extent this Opposition may not reiterate all of the merits arguments in support of Defendants' Motion to Dismiss this case, it incorporates herein any remaining arguments by reference.

⁷⁷ It is ironic that soon after the series of meetings held at the Central California Agency to facilitate the organization of the Tribe began, Ms. Burley wrote to Acting Superintendent Dale Morris that Mr. Melvin Dixie, Yakima Dixie's brother, ". . . may have a right to participate in the organization of the Tribe." See Attachment B (Third Declaration of Raymond Fry, Exhibit 6G attached thereto). This statement could be viewed as an admission by Ms. Burley that at least some individuals in the Yakima Dixie faction should be made members of the CVMT, thereby entitling them to participate in the organization of the Tribe.

documents reflect the will of the tribe as a whole. The Secretary of the Interior has the responsibility to determine whether the governing documents of a tribe with which the Secretary deals actually represent the will of the tribe as a whole. In Ransom v. Babbitt, 69 F. Supp. 2d 141 (D.D.C. 1999) (a decision relied upon by Plaintiff), the failure of the BIA to determine whether a proposed tribal constitution was valid led the court to conclude the BIA was “ . . . derelict in [its] responsibility to ensure that the Tribe make its own determination about its government consistent with the will of the Tribe and the principles of tribal sovereignty.” 69 F. Supp. 2d at 153. While Ransom dealt with an organized tribe, the quoted language logically applies to an “unorganized” Indian tribe, which also should make all of its determinations about tribal governing documents consistent with the will of the greater tribal community. It appears that Tribal Resolution No. R-1-09-26-2005 does not reflect the will of the greater tribal community, because the CVMT has not, as of January 3, 2006, identified which of the **250 potential members** should be made tribal members. In this regard, the February 11, 2005, Olsen letter pointedly states, in pertinent part, as follows: “The first step in organizing the Tribe is identifying putative tribal members.” Yakima Dixie’s Motion to Intervene, filed on September 2, 2005, echoes Mr. Olsen’s concern, because it asserts that Mr. Dixie “is hereditary Chief, by lineal descent, of the Tribe and a Spokesperson for the ‘Putative members of the Tribe.’” Dixie Motion to Intervene at 2.

In sum, Mr. Fry’s October 26th letter is totally consistent with the Department’s responsibility to ensure that Tribal Resolution No. R-1-09-26-2005 reflects the will of the greater tribal community - - that is, all or most of the **potential membership of 250 people**, which, according to the Plaintiff, existed as of **April 25, 2002** (the date the complaint in the prior suit was signed). It follows, then, that the October 26th letter did not unlawfully interfere with the

CVMT's right of self-governance.

2. Neither 25 U.S.C. 476(h) nor 25 U.S.C. 3601(4) Makes Plaintiff Success on the Merits Likely.

Plaintiff relies upon Section 476(h) of the Indian Reorganization Act and Section 3601(4) of the Indian Tribal Justice Act for the proposition that the BIA may not “. . . disregard CVMT's governing documents and Constitution.” Pl. Memo. at 11-12. Plaintiff is really arguing that the government must accept whatever tribal constitution and other tribal governing documents the CVMT has promulgated and has no role to play with respect to these governing documents. However, this argument ignores the Department of the Interior's responsibility for ensuring that an Indian tribe's tribal constitution and other governing documents reflect the will of the tribe as a whole. In the circumstances of this case, that duty extends to ensuring that CVMT's Tribal Resolution No. R-1-09-26-2005 (the governing document put specifically at issue by the PI motion) reflects the will of the greater tribal community, as discussed above. See Defs. Memo. in Support of Motion to Dismiss at 24-28.

Section 476(a)(1) of the Indian Reorganization Act (IRA) (P.L. No. 383, Act of June 18, 1934, 48 Stat. 984 (25 U.S.C. § 461 *et seq.*), has been held to allow the Secretary to reject the results of a Secretarial election held for the purpose of determining whether amendments to a tribal constitution should be approved, where it was unclear whether the approved amendments were supported by a majority of the voting members of the tribe. Shakopee Mdewakanton Sioux (Dakota) Community v. Babbitt, 107 F. 3d 667, 670 (8th Cir. 1997). Clearly, Congress is presumed to know the law when it enacts new legislation. Garrett v. United States, 471 U.S. 773, 793-94 (1985). This presumption necessarily encompasses awareness that the premise of the federal-tribal relationship is that tribal governing documents reflect the will of the tribal membership. Therefore, it follows that when Congress enacted Section 476(h) of the IRA,

Section 476(h) implicitly incorporated the principle that tribal governing documents must reflect the will of the tribe as a whole. It is well established that sections of the same statute are to be read together so as to be consistent. King v. Shaefer, 940 F.2d 1182, 1185 (8th Cir. 1991). Since Section 476(a)(1) has been held to incorporate the Secretary's responsibility to ensure that tribal governing documents reflect the will of the tribal membership/the tribe as a whole, it follows, then, that Section 476(h) implicitly incorporates the same responsibility. Finally, we read Section 476(h) as freeing tribes from the procedural constraints of Sections 476(a) and (c) that apply to tribal requests for the calling of a Secretarial election to approve proposed tribal governing documents (or amendments thereto). Plaintiff has not demonstrated that Section 476(h) effectively negated the Secretary's authority to find that a tribe is "unorganized" and to refuse to recognize a tribal governing document because it does not reflect the will of the greater tribal community (or a majority of the members of that community). Finally, Interior's reading of Section 476(h) is entitled to substantial deference given its expertise in interpreting Indian legislation. Chevron USA, Inc. v. Natural Resources Defense Council, 467 U.S. 837, 844 (1984). The Supreme Court has "... long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." 467 U.S. at 844.

Plaintiff's reliance on the Indian Tribal Justice Act (P.L. No. 103-176, Act of December 3, 1993, 107 Stat. 2004 (codified at 25 U.S.C. 3601, et seq.)) is misplaced as well. The finding in Section 3601(4) is outweighed by the fact that the basic purpose of the Act was "... to improve the administration of justice . . . [in] Indian country and to provide resources to tribal justice systems." H.R. Rep. No. 103-205, reprinted in U.S. Code Cong. & Admin. News, 103rd Cong., 1st Sess. (1993), p. 2425. The same report states, in pertinent part, that "... funding for

tribal courts remains a serious problem. * * * The Committee is aware of many Indian tribes that have not developed tribal justice systems due to a lack of funds.” Id. p. 2429. Unlike Section 476 of the IRA, the Indian Tribal Justice Act does not concern the promulgation of tribal governing documents and should be deemed irrelevant.

3. Defendants Acknowledge there is a Government-to-Government Relationship between the Federal Government and the CVMT.

Notwithstanding the language of the October 26th letter, Mr. Fry’s Declaration establishes that his letter was, in fact, based upon the March 26, 2004 letter of Superintendent Risling to Silvia Burley and the letter’s statement that the BIA “does not recognize any governing body for the Tribe” accurately reflects the decision contained in the March 26th letter, but that the March 26th letter does not appear to support the statement about the absence of a “government-to-government relationship” between the CVMT and the federal government. Defendants submit that the lack of a recognized governing body, in and of itself, adequately supports Mr. Fry’s decision not to take any action on the Tribal resolution. Even though Defendants agree with plaintiff that the October 26th letter could not operate to abolish the government-to-government relationship, the Tribe’s fixation with this issue belies the fundamental issue presented by this case - - namely: the Secretary’s responsibility for ensuring that tribal governing documents promulgated by an “unorganized” tribe reflect the will of the greater tribal community.

In short, Plaintiff has not met its burden of demonstrating a likelihood of success on the merits.

IV. PLAINTIFF HAS NOT SHOWN IT WILL SUFFER IRREPARABLE HARM IF ITS MOTION FOR A PRELIMINARY INJUNCTION IS DENIED.

Plaintiff asserts that the Interior Department’s “unlawful interference with tribal self-governance constitutes irreparable harm.” Pl. Memo at 16-17. The Tribe cites three decisions - -

(1) Prairie Band of Potawatomi Indians v. Pierce, 253 F.3d 1234 (10th Cir. 2001); (2) Kiowa Indian Tribe of Oklahoma v. Hoover, 150 F.3d 1163 (10th Cir. 1998); and (3) Seneca-Cayuga Tribe v. Oklahoma, 874 F.2d 709 (10th Cir. 1989) - - in support of its argument. Id. at 17.

At the outset, we note that the Tribe does not allege that it contemplated the imminent purchase of land which it would request be put into trust. Thus, the October 26th refusal to act upon the Tribal Resolution No. R-1-09-26-2005 did not irreparably harm any anticipated efforts to put tribal land into trust. Also, the premise of the CVMT's argument is that the BIA Central California Agency "unlawfully interfered" with the CVMT's self-governance. To the contrary, we have demonstrated that the fundamental issue here is whether the BIA has the responsibility/authority to ensure the tribal governing documents promulgated by an "unorganized" tribe reflect the will of the greater tribal community, and that the BIA does have such responsibility/authority. Since the premise for the Tribe's argument on irreparable harm is faulty, its argument should be rejected for this reason, as well.

None of the three cited decisions, however, concerns allegedly unlawful actions by the federal government. Kiowa, for example, involved a series of suits against the tribe in state court by tribal creditors. These suits presented the prospect of potential seizure of tribal assets by those tribal creditors and the creation of a bar against the full enforcement of tribal laws bearing on rights of tribal creditors. In Seneca-Cayuga, the state of Oklahoma sued in state court to enjoin the operations of a tribe's bingo games; the federal court granted the tribe's preliminary injunction to head off possible loss of revenue from tribal bingo operations and loss of tribal members' jobs at the bingo parlor. Plaintiff argues: "As in Kiowa and Seneca-Cayuga, Defendants' interference has caused interruptions or complete stoppages of income lawfully due to the Tribe, and upon which the Tribe depends." Pl. Memo at 17.

Unlike the Court of Appeals for the Tenth Circuit, the Court of Appeals for this Circuit has held that “economic loss does not, in and of itself, constitute irreparable harm.” Wisconsin Gas Co. v. Fed. Energy Regulatory Comm’n., 758 F.2d 669, 674 (D.C. Cir. 1985); National Head Start Ass’n v. Department of Health & Human Services, 297 F. Supp. 2d 242, 251 (D.D.C. 2004) (held that alleged loss did not amount to a “significant and irreparable loss”). At a minimum, an alleged monetary loss which can be compensated at a later time does not amount to irreparable harm. Smith, Bucklin & Associates v. Sonntag, 83 F. 3d 476, 481 (D.C. Cir. 1996). While the suit filed in state court against four possible “persons of authority” within the CVMT by the California Gambling Control Commission (Commission) (Exhibit 5 to Plaintiff’s Motion) may delay the distribution of RSTF (Revenue Sharing Trust Fund) monies to the CVMT, the Commission states that it has no [property] interest in the future distributions of RSTF monies to the CVMT. The Complaint also states that the Commission will deposit the scheduled distribution by the CVMT that it is now withholding with the Clerk of the Court (the Superior Court of California for the County of Sacramento).

The current situation does not present the spectre of a permanent, uncompensable loss of the RSTF monies. This is true, in part, because the monies already being withheld from distribution to the CVMT have been deposited with the Clerk of the Court and monies to be scheduled for future distribution to the CVMT will undoubtedly be deposited with the Clerk of the Court, as well. Furthermore, in a letter of August 4, 2005, the Commission stated that its “... trustee status under the [Gaming] Compact [between the State and Indian tribes in California engaged in gaming] demands that we ensure the RSTF contributions go to the [T]ribe for the benefit of the Tribe and not merely an individual member.” See Attachment E (Commission’s letter of August 4, 2005). The Commission was implicitly conceding potential liability for

money damages, if the distributions to the Tribe were not properly made. Therefore, any monetary loss suffered by the Tribe arguably would be “compensable” within the meaning of the Smith, Bucklin & Associates opinion. Accordingly, these “interruptions or complete stoppages of income lawfully due to the Tribe [that is, scheduled distributions of RSTF monies to the CVMT]” (Pl. Memo at 17) cannot constitute “irreparable harm.”⁸

Plaintiff also contends it will be “forced to spend time, effort and money” to defend the state court suit by the Commission. Id. This alleged injury falls into the category of “‘mere’ economic injuries which under *Virginia Petroleum Jobbers* is insufficient to warrant a stay.” Washington Area Transit Commission, 559 F.2d at 843 n. 2. Although Virginia Petroleum Jobbers Ass’n v. Federal Power Commission, 259 F.2d 921 (D.C. Cir. 1958) involved a motion for a stay of proceedings before the Federal Power Commission pending the Circuit’s review of certain administrative orders of the Commission, the Washington Area Transit Commission opinion referenced Virginia Petroleum Jobbers because at that time the factors to be considered in ruling on a stay also applied to motions for preliminary injunctions. 559 F.2d at 842 n.1. In Virginia Petroleum Jobbers, the Court of Appeals for the D.C. Circuit held: “**mere injuries**, however substantial, **in terms of time, money and energy necessarily expended** [on the court’s review of the Federal Power Commission’s orders], are not enough.” [Emphasis added] 259 F. 2d at 925. Similarly the “time, effort and money” that the CVMT allegedly must invest in

⁸ It also appears that any loss suffered would be restricted to the delayed receipt of these RSTF monies by the CVMT. This type of loss would be compensable by the recovery of interest. The August 4th letter of the Commission relates to this issue because in it the Commission stated that any withheld [delayed] distributions would be paid over to the Tribe together with “appropriate accrued interest,” once the question of the appropriate person to whom to pay over the quarterly distribution (then being withheld) was resolved. On the basis of this representation, the CVMT would likely be able to recover interest from the Commission, which should have accrued on distributions paid into the court registry during the time it took to resolve the Commission’s suit.

defending the state court suit against the California Gambling Control Commission does not justify the issuance of a preliminary injunction. Moreover, if the CVMT were to succeed in getting the state court suit dismissed for lack of jurisdiction, it could seek recovery of its attorney fees and costs and other litigation expenses incurred in defending the suit by the Gambling Control Commission.

The Tribe's failure to make any showing of irreparable harm, in and of itself, strongly militates in favor of the denial of Plaintiff's motion. Indeed, on one occasion, this court denied a PI motion solely on the grounds of a lack of irreparable harm; the Court of Appeals affirmed, and noted that the plaintiff was unlikely to succeed on the merits, either. Tenacre Foundation v. Immigration & Naturalization Service, 78 F. 3d 693, 696 (D.C. Cir. 1996).

V. THE ISSUANCE OF A PRELIMINARY INJUNCTION WOULD CAUSE SIGNIFICANT HARM TO THE DEFENDANTS.

The Plaintiff argues that "there is no conceivable interest of Defendants that can be burdened" by the issuance of the requested preliminary injunction. Pl. Memo at 18. To the contrary, the grant of the requested relief will cause significant harm to the Defendants. First, issuance of the injunction would make the CVMT believe it was justified in cancelling three scheduled site visits by the BIA for the purpose of monitoring the Tribe's administration of "638" contract funds provided to the Tribe under the present "638" contract between the CVMT and the BIA, and would strongly encourage it to resist any future site visits. See Attachment B, Declaration of Raymond Fry, ¶¶ 25-34. The governing regulations (25 C.F.R. Part 900) authorize the BIA to conduct at least one site visit per year for the purpose of monitoring a tribe's handling of "638" contract monies. More importantly, the Tribe agreed to the annual monitoring visit in the Fiscal Year 2005 Annual Funding Agreement which is part of the "638" contract between the Tribe and BIA. Id., ¶25. It is important that the BIA be able to ascertain

how such federal funds are being handled. Second, as documented in Attachment B (Declaration of Raymond Fry, ¶¶ 12-17), the BIA has made a vigorous effort to facilitate the organization of the CVMT by attempting to bring together the Burley and Dixie factions within the Tribe/greater tribal community. Although Mr. Dixie, his counsel, consultant and certain supporters attended the meetings at which both tribal factions were represented, held at BIA's Central California Agency, Ms. Burley refused to appear in person at any of these meetings. See Attachment B (Declaration of Raymond Fry, ¶16).

The government-to-government relationship between the Tribe and the federal government is not the "one-way street" that the Tribe's rhetoric strongly suggests. Rather, the Tribe, too, has an obligation to cooperate with lawful and reasonable requests of the BIA of the type described in the preceding paragraph. In short, if the government is not able to conduct business with tribes in a reasonably cooperative fashion, a "two-way street" cannot exist. This reality, when viewed in juxtaposition with the absence of a showing of irreparable harm, tips the "balance of harms" in favor of the Defendants. National Wildlife Federation v. Burford, 835 F.2d 305, 318-19, 326 (D.C.Cir. 1987).^{2/}

VI. THE PLAINTIFF HAS NOT SHOWN THAT THE PUBLIC INTEREST WILL BE SERVED BY ISSUANCE OF THE INJUNCTION.

Plaintiff asserts that the "protection of tribal sovereignty" is the public interest at stake in this case. Pl. Memo at 19. While the promotion of tribal sovereignty is an important aspect of federal Indian policy, this must be balanced against the public interest in the "effective and transparent administration" of federal monies used to finance "638" contracts. Cf. National Head Start Ass'n v. Department of Health and Human Services, 297 F. Supp. 2d 242, 251

^{2/} The grant of Plaintiff's motion would also likely harm Yakima Dixie and other interested third parties.

(D.D.C. 2004) (held that the public's “. . . strong interest in the effective and transparent administration of federal grant programs” outweighed the interest of the plaintiff in avoiding a possible “. . . campaign to discredit Head Start programs as profligate . . . “). In addition, there is a public interest to be served in having BIA continue to facilitate the organization of the CVMT which, in turn, will lead to the creation of a workable government-to-government relationship between the Tribe and the BIA. This organization of the Tribe, not the issuance of a preliminary injunction, is the only real means of ensuring that state and local agencies with which the Tribe now does business will no longer be running the present “risk,” emphasized by the Tribe, of dealing with “unauthorized representatives” of the Tribe. Pl. Memo. at 19.

CONCLUSION

For the reasons set forth above, Defendants respectfully request that the Plaintiff's motion for a preliminary injunction be denied.

Dated this 3rd day of January, 2006.

Respectfully submitted,

Electronically signed
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Attachments