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UNITED STATES DISTRICT COURT

DISTRICT OF COLUMBIA

CALIFORNIA VALLEY MIWOK TRIBE, MARIE DIANE ARANDA, JOSHUA FONTANILLA, YOLANDA FONTANILLA, MICHAEL MENDIBLES, BRONSON MENDIBLES, JASMINE MENDIBLES, LEON MENDIBLES, CHRISTOPHER RUSSELL, and ROSALIE RUSSELL,

Plaintiffs,

v.

DEB HAALAND, U.S. Secretary of the Interior; BRYAN NEWLAND, Assistant Secretary for Indian Affairs; AMY DUTSCHKE, Regional Director, Bureau of Indian Affairs; HARLEY LONG, Superintendent, Central California Agency, Bureau of Indian Affairs,

Defendants.

Case No. 1:22-cv-01740-JMC

PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR PRELIMINARY INJUNCTION; MEMORANDUM OF POINTS & AUTHORITIES IN SUPPORT THEREOF

[ORAL HEARING REQUESTED PURSUANT TO LCvR 7(f) AND 65.1(d)]

TABLE OF CONTENTS

Page

I. INTRODUCTION 1
II. BACKGROUND 4
III. ARGUMENT 7
  A. There Are Serious Questions on the Merits Here. 8
  B. Plaintiffs Will Be Irreparably Harmed Absent an Injunction 8
  C. The Balance of Hardships and Public Interest Favor Granting an Injunction. 11
  D. No Bond Should Be Required. 12
IV. CONCLUSION 12

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES

Page(s)

Cases

Booth v. Bowser,
597 F. Supp. 3d 1 (D.D.C. 2022) 8

Brendale v. Confederated Tribes & Bands of Yakima Indian Nation,
492 U.S. 408 (1989) 9

Cayuga Indian Nation v. Vill. of Union Springs
293 F. Supp. 2d 183 (N.D.N.Y. 2003) 10

Chemehuevi Indian Tribe v. McMahon,
No. ED CV 15-1538 DMG (FFMx)), 2016 U.S. Dist. LEXIS 189513 (C.D. Cal. Aug. 16, 2016) 10

Conservation Law Found. v. Ross,
422 F. Supp. 3d 12 (D.D.C. 2019) 9

DSE, Inc. v. United States,
169 F.3d 21 (D.C. Cir. 1999) 13

Fortson v. Morris,
385 U.S. 231 (1966) 4, 10

Indian Tribe of Okla. v Hoover,
150 F.3d 1163 (10th Cir. 1998) 10

Jorgensen v. Cassiday,
320 F.3d 906 (9th Cir. 2003) 13

League of Women Voters of United States v. Newby,
838 F.3d 1 (D.C. Cir. 2016) 8, 13

Madias v. Dearborn Fed. Credit Union,
916 F. Supp. 659 (E.D. Mich. 1996) 12

Marks v. Stinson,
1994 U.S. Dist. LEXIS 1586 (E.D. Pa. Feb. 18, 1994) 12

Montana v. United States,
450 U.S. 544 (1981) 9

Mova Pharm. Corp. v. Shalala,
140 F.3d 1060 (D.C. Cir. 1998) 8

Ohio Republican Party v. Brunner,
582 F. Supp. 2d 957 (S.D. Ohio 2008) ... 12

P.J.E.S. v. Wolf
502 F. Supp. 3d 492 (D.D.C. 2020) ... 13

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

Purcell v. Gonzalez,
549 U.S. 1 (2006) ... 11

Ramirez v. U.S. Customs & Border Prot.,
477 F. Supp. 2d 150 (D.D.C. 2007) ... 9

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

Sherley v. Sebelius,
644 F.3d 388 (D.C. Cir. 2011) ... 8

United States v. Cooley,
141 S. Ct. 1638 (2021) ... 10

Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.,
559 F.2d 841 (D.C. Cir. 1977) ... 9

Williams v. Rhodes
393 U.S. 23 (1968) ... 10

Winnebago Tribe of Nebraska v. Stovall,
216 F. Supp. 2d 1226 (D. Kan. 2002) ... 10

Statutes

Administrative Procedures Act ("APA") ... 3, 9

Rules

Federal Rules of Civil Procedure Rule 65 ... 1,12

LCvR 65 ... 1,5

LCvR 7(f) ... 1

NOTICE OF MOTION AND MOTION FOR PRELIMINARY INJUNCTION

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that Plaintiffs, the California Valley Miwok Tribe, Marie Diane Aranda, Joshua Fontanilla, Yolanda Fontanilla, Michael Mendibles, Bronson Mendibles, Jasmine Mendibles, Leon Mendibles, Christopher Russell, and Rosalie Russell, hereby move the Court for a preliminary injunction enjoining the Defendants here from (1) facilitating or conducting any votes to approve the constitution of the California Valley Miwok Tribe (the "Tribe"), among the "Eligible Groups" as defined in the May 31, 2022 determination of the Assistant Secretary, Indian Affairs Bryan Newland (the "Newland Memo"), or (2) to take any other action purportedly to organize the Tribe based on the "Eligible Groups" as defined in the Newland Memo.

This motion is made pursuant to Rule 65(a) of the Federal Rules of Civil Procedure and LCvR 65. This motion is required because the Newland Memo is unlawful, and moving forward with the Election, or any other action based on that Determination, would irrevocably harm the rights of tribal members, who are among the Plaintiffs here.

This motion is supported by the attached Memorandum of Points and Authorities; the Declarations of Colin West and Michael Mendibles and attached exhibits; the Proposed Order; all pleadings and files of record; and any evidence that the Court may receive at or before any hearing on this motion.

Based on the facts laid out in the attached Memorandum of Points and Authorities and pursuant to LCvR 7(f) and 65.1(d) , Plaintiffs request an expeditious oral hearing on this motion.

MEMORANDUM OF POINTS & AUTHORITIES

I. INTRODUCTION

The legal issues pending before this Court are fundamental to identifying which individuals have the exclusive, inalienable right to determine the fate and future of the Tribe. For more than a decade, these issues have been disputed and litigated, and this Court will soon provide much needed clarity. Yet rather than let the judicial process resolve these fundamental issues, the Bureau of Indian Affairs (the "BIA") has begun to move forward with the organization of the Tribe based on the BIA ruling that this Court is actively reviewing. Specifically, the BIA is gearing up to conduct a vote to approve a constitution for the Tribe, and that vote will include individuals who, Plaintiffs have shown, are not rightful members of the Tribe.

If allowed to go forward, the BIA's organization efforts will injure the Tribe and its members. The injuries to the Tribe's sovereignty will be irreparable, for nonmembers' involvement in the drafting and ratification of a tribal constitution cannot be undone by a court order. Accordingly, by this motion, Plaintiffs ask this Court to issue a temporary injunction that maintains the status quo and enjoins the BIA from organizing the Tribe while this Court resolves the fully briefed and fully argued summary-judgment motions.

From the summary-judgment briefs, oral argument, and administrative record, the Court is well aware of the pertinent background. In 2015, the Washburn Determination defined the "Eligible Groups" who can participate in the formation of the Tribal government, including voting for its constitution. For years thereafter, Plaintiffs, who Defendants recognize are members of the Eligible Groups under any definition, asked the BIA to conduct a Secretarial Election so that the Tribe could form a federally recognized government. The BIA turned a deaf ear to these pleas until in 2021.

Yet no Secretarial Election occurred because, in 2022, the BIA abruptly changed course. The Assistant Secretary of the Interior – Indian Affairs Bryan Newland made a flawed, unlawful decision (the "Newland Memo") that radically changed the Washburn Determination. The Newland Memo expanded the Eligible Groups to include individuals who are not members of the Tribe. In June 2022, Plaintiffs brought this suit to challenge the Newland Memo under the

Administrative Procedures Act ("APA"), asking the Court to vacate that Memo and bar the BIA from proceeding with organizing the Tribe based on the Memo's eligibility criteria.

On May 3, 2023, this Court heard oral arguments on Plaintiffs' and Defendants' cross motions for summary judgment. Since that hearing, Plaintiffs have asked the BIA to halt its actions toward organizing the Tribe based on the Newland Memo, until this Court issues a ruling. The BIA has declined to slow down and has even declined Plaintiffs' requests to advise them in advance of what steps the BIA intends to take to form a Tribal government.

Plaintiffs recently learned (1) that the BIA has taken several aggressive steps toward forming a Tribal government and constitution, steps based on votes of the wrongly defined "Eligible Groups," and (2) that the BIA deliberately hid those steps from Plaintiffs' counsel. On August 30, 2023, the BIA held a meeting among the "Eligible Groups" (as the Newland Memo defines them) to discuss formation of the Tribe's government. The BIA refused Plaintiffs' counsel's requests to share the meeting's agenda in advance and barred Plaintiffs' counsel from observing the meeting, which was held in person and via Zoom. At the meeting, the BIA, without prior notice, held a vote regarding what document would form the basis of the Tribe's constitution. Also at the meeting, the BIA announced that it is forming an eight person "Constitutional Committee," drawn from the flawed "Eligible Groups," to draft a constitution. The BIA stated that it would select that Committee's members on September 8.[1]

The BIA delayed Plaintiffs' counsel's access to any documentary evidence of its activities until those activities had already occurred. The BIA, for example, delayed release of the PowerPoint used at the meeting and the stenographic transcript of the meeting, until September 14, 2023 – which was *after* the vote concluded and *after* the Committee's planned formation date of September 8, 2023.

That vote, and the formation of the Constitutional Committee, are significant steps toward establishing the Tribe's government and adopting a constitution. And both involved the wrongly defined "Eligible Groups" making key decisions about the Tribe's future. If Plaintiffs are right on

[1] While the BIA announced that it would select the Constitutional Committee members on September 8, 2023, as of October 10, 2023, no names have been announced.

the merits of their case – that is, if the Newland Memo's eligibility criteria are unlawful – both steps deeply infringed on the Tribe's sovereignty.

Worse, as announced at the August 30 meeting, the BIA intends to take another step that will violate the Tribe's sovereignty even more. As soon as the BIA-selected Constitutional Committee drafts a constitution, the BIA will circulate a petition among the wrongly defined "Eligible Groups," asking them to vote to approve the constitution. Once 51% of the individuals in the wrongly defined Eligible Groups do so, the constitution will be presented to the BIA's Regional Director for ratification. Voting is "the sacred and most important instrument of democracy and of freedom." *Fortson v. Morris*, 385 U.S. 231, 250 (1966). A constitution is a foundational document that will dictate the functioning of the Tribe's government indefinitely. Permitting a group that includes individuals who are not members of the Tribe to vote on adoption of the Tribe's constitution would irrevocably damage the Tribe's sovereignty.

To prevent that irreparable injury, Plaintiffs now ask this Court to issue a preliminary injunction, pausing the BIA's efforts to conduct this vote and from taking any further efforts to form a government. Plaintiffs have not sought immediate, interim relief from the Court before now because it appeared that Defendants were not going to cause Plaintiffs and the Tribe irreparable injury. But now that such injury appears imminent, Plaintiffs have no choice but to seek the Court's intervention. The law entitles Plaintiffs to the relief they seek:

First, as the summary judgment briefing demonstrates, Plaintiffs are likely to succeed on the merits of their claim that the Newland Memo is arbitrary and capricious. At the very least, that briefing establishes that there are serious questions on the merits. Because the Court took the summary judgment motions under advisement five months ago, Plaintiffs do not here repeat their challenges to the Newland Memo, but simply incorporate them by reference.

Second, absent an injunction, Plaintiffs will suffer irreparable injury. Having people who are not members of the Tribe *write* a constitution then vote to approve that constitution will undermine the Tribe's sovereignty and legitimacy in ways that can never be repaired.

Third, the balance of hardships tips decidedly in Plaintiffs' favor. A delay of this vote for the time this Court needs to rule on the merits of Plaintiffs' case will not harm Defendants at all,

1 while permitting this vote to proceed will harm Plaintiffs severely and irrevocably.

2 Pursuant to LCvR 65.1, this application is accompanied by a certificate of Plaintiffs'
3 counsel, confirming that actual notice of the time of making the application, and copies of all
4 pleadings and papers filed in the action to date or to be presented to the Court at the hearing, have
5 been furnished to Defendants. *See* Declaration of Colin West ("West Decl.") ¶ 2. Further,
6 pursuant to LCvR 65.1(d), based on the facts and argument detailed below, Plaintiffs request an
7 expeditious oral hearing on this motion.

8 **II. <u>BACKGROUND</u>**

9 Most of the evidence supporting this motion has been set forth previously in Plaintiffs'
10 motion for summary judgment; in Plaintiffs' brief in opposition to Defendants' summary
11 judgment; and at the May 2, 2023, hearing on those motions. Plaintiffs will not repeat that
12 evidence or argument here and instead incorporate them all by reference and attach the transcript.
13 *See* West Decl., Ex. D. Below, Plaintiffs focus on evidence not yet brought to this Court's
14 attention, namely (1) Plaintiffs' efforts to ensure that Defendants do not move forward with
15 forming a Tribal government based on the Newland Memo's criteria until this Court rules on the
16 merits of this case, and (2) Defendants' rejection of those efforts.

17 Plaintiffs filed suit in June 2022 and tried at once to secure a means to preserve the status
18 quo until the merits are decided. On August 31, 2022, Plaintiffs' counsel wrote to counsel for
19 Defendants requesting that they confirm that the BIA would not conduct a Secretarial Election, or
20 take any other action to form a Tribal government using the Newland Memo's voting criteria,
21 before the Court decides the merits of the case. *Id*. ¶ 3, Ex. A. Defendants' counsel did not
22 respond. *Id*.

23 On September 30, 2022, the BIA published a notice on its website stating that "[t]he
24 Bureau of Indian Affairs, Central California Agency (Bureau) plans to assist the California Valley
25 Miwok Tribe, aka Sheep Ranch Rancheria (Tribe) with organization of a formal government
26 structure by individuals who are eligible to participate in such a process." *Id.* ¶ 4, Ex. B. It
27 indicated that the BIA intended to conduct an "initial virtual meeting [to] provide information
28 concerning the organization process and procedures that will be used to determine eligibility to

participate in organization of the Tribe" on November 28, 2022. *Id.*

On November 29, 2022, the BIA posted a "Notice of Eligibility" on its website. *Id.* ¶ 5, Ex. C. The BIA announced its intent to form a Tribal government "by individuals who are eligible to participate in such a process, consistent with the December 30, 2015 decision by the Assistant Secretary – Indian Affairs [the Washburn Determination], *as revised May 31, 2022, by the Assistant Secretary – Indian Affairs [the Newland Memo]*." *Id.*, Ex. C (emphasis added). The BIA further stated that those wishing to participate in the process would need to submit Certificates of Degree of Indian Blood forms establishing their eligibility to participate in the Election by January 12, 2023. *Id*. Each Plaintiff here submitted certificates by the deadline, and each received confirmation by the BIA that they were eligible to participate in the process. *Id.* ¶ 6.

Briefing on the parties' cross motions for summary judgment concluded on March 13, 2023. Dkt. 33. The Court held a hearing on those motions on May 2, 2023. The Court has yet to rule. On July 31, 2023, the BIA posted on its website that it would hold an August 30, 2023, meeting, among the Eligible Groups as the Newland Memo defines them, "to discuss the process in which a proposed governing document will be developed to move forward to an eventual petition for a Secretarial Election." *Id.* ¶ 8, Ex. E. In response, Plaintiffs' counsel emailed Defendants' counsel and requested, in light of the pending litigation, that the BIA "limit any concrete steps toward [a Secretarial Election] until Judge Cobb has decided the merits of the . . . lawsuit" *Id.* ¶ 9-10, Exs. F, G. Plaintiffs' counsel further requested that the BIA inform them in advance what "steps BIA intends to take after the [August 30] meeting, and when, so that my clients can plan accordingly." *Id.*

On August 15, 2023, Defendants' counsel responded, in relevant part, that although the BIA anticipated no actual election before May 2024, the agency would not commit to taking no further steps toward that election until this Court issues its decision, nor would the agency tell Plaintiffs' counsel what it intended to do, or when.[2] *Id.*

The August 30, 2023 meeting was held in person and on Zoom. Participants included many individuals who *are not* in the "Eligible Groups" as the Washburn Determination defines

[2] Plaintiffs advised the Court of these developments on August 17, 2023. (Dkt. 36)

them, but who apparently *are* in the "Eligible Groups" as the Newland Memo defines them. *Id.* ¶ 12; *see also* Mendibles Decl., ¶ 8. For example, one of the meeting participants was Gilbert Ramirez, Jr. (West Decl., Ex. H at 17:12-13). Mr. Ramirez does not claim to descend from Lena Hodge Shelton who was named in the 1915 Census, but instead from John Jeff, who was named in the 1929 Census. West Decl., ¶ 13. Plaintiffs requested that their counsel be permitted to attend the meeting virtually. *Id.* ¶ 10, Ex. G. Defendants refused without explanation, except to say that only members of their version of the Eligible Group were invited. *Id.*

Many Plaintiffs attended the meeting (because, as both sides agree, Plaintiffs are members of the Eligible Groups under both the Washburn and the Newland criteria). Mendibles Decl., ¶ 8. At it, a BIA official, Harley Long, gave a presentation via PowerPoint regarding the BIA's plans for organizing the Tribe, which included specific dates and goals. Mendibles Decl. ¶ 9-10. The BIA did not share the PowerPoint with attendees.

Because Plaintiffs (who are not lawyers) had unclear and conflicting understandings of what the BIA said at the meeting (*see* West Decl. ¶ 11), Plaintiffs' counsel requested that the BIA provide "any sort of documentation that the BIA used as talking points at the meeting." *Id.* ¶ 12, Ex. H. The BIA refused and offered no reason for doing so. *Id.* And though the meeting was transcribed by a court reporter, the BIA refused to provide the name of the court-reporting service, thus preventing Plaintiffs' counsel from purchasing a transcript. *Id.* ¶ 12.)

The BIA finally posted the transcript and the PowerPoint on its webpage on September 14, 2023. *Id.* ¶ 12, Exs. I, J. Those documents revealed that the BIA has a multi-step plan for forming the Tribe's government, many of which were steps the BIA had already undertaken, and many of which involve votes by the "Eligible Group" as the Newland Memo defines them. *Id.*

First, at the meeting, the BIA took a vote among the participants[3] regarding the document that would form the basis of the constitution that the Tribe would eventually adopt, namely, whether (1) to use a constitution that was the subject of a Secretarial Election in 2019 as the base document[4], or (2) to start with an entirely new document. Mendibles Decl. ¶ 9 The vote

[3] It is unclear how many people attended the meeting.

[4] In 2019, the BIA conducted a Secretarial Election, purportedly among members of the Tribe, to vote on the "Tribe's" proposed constitution. Mendibles Decl., ¶ 4. Plaintiffs sued to stop the

concluded on September 1, 2023. *Id.*; *see also* West Decl., Exs. I, J. The BIA has yet to publicly announce the results of this vote.

Second, the BIA announced that it would form an eight-person "Constitutional Committee," which BIA officials would select from individuals from Newland-defined "Eligible Groups" who applied to participate. Mendibles Decl. ¶ 10. This Committee, starting with the base constitution that resulted from the aforementioned vote, is to refine the draft constitution with input from the Newland-defined "Eligible Groups". *Id.* The BIA stated it would select the Committee by September 8, 2023.[5] *Id.*; *see also* West Decl., Exs. I, J.

After the Committee develops a constitution, the BIA will facilitate the circulation of a petition among the Newland-defined Eligible Groups, which will request that the voters approve the constitution. *Id.* Once 51% of the Newland-defined Eligible Groups approve the constitution, a petition will be submitted to the BIA for validation. *Id.* Thereafter, the BIA will conduct a Secretarial Election regarding whether to adopt or reject the constitution. *Id.*; *see also* West Decl., Exs. I, J.

III. ARGUMENT

To obtain a preliminary injunction, Plaintiffs must show: (1) a substantial likelihood of success on the merits, or at least a serious question on the merits, (2) that the movant would suffer irreparable injury if the injunction were not granted, and (3) that the balance of hardships weighs in favor of the injunction. *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1066 (D.C. Cir. 1998); *Booth v. Bowser*, 597 F. Supp. 3d 1, 16 (D.D.C. 2022). Courts employ a "sliding-scale" approach to weighing these factors, which "allow[s] that a strong showing on one factor could make up for a weaker showing on another." *Sherley v. Sebelius*, 644 F.3d 388, 392 (D.C. Cir. 2011); *League of Women Voters of United States v. Newby*, 838 F.3d 1, 7 (D.C. Cir. 2016). Here, all the factors weigh in favor of granting the requested injunction here.

Election, since the BIA's voter rolls included individuals who were not within the Eligible Groups as the Washburn Determination defined them. *Id.* While the election went forward, the BIA later invalidated the election's results because voters included individuals who were not within the Eligible Groups. *See* Dkt. 28 at 13-14 (citing to CVMT-005356-57 in the Administrative Record).

[5] *See* supra, footnote 1.

1 **A. <u>There Are Serious Questions on the Merits Here.</u>**
2 Plaintiffs believe they are likely to succeed on the merits. As argued already in this case,
3 the Newland Memo is irrational, arbitrary and capricious, and it violates the APA in several
4 respects. At the very least, there are serious questions as to the merits. *Id.*; *see also Wash. Metro.*
5 *Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F. 2d 841, 844 (D. C. Cir. 1977) (to obtain an
6 injunction, "it will ordinarily be enough that the plaintiff has raised questions going to the merits
7 so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus
8 for more deliberative investigation."); *see also Ramirez v. U. S. Customs & Border Prot.*, 477 F.
9 Supp. 2d 150, 155 (D. D. C. 2007).
10 **B. <u>Plaintiffs Will Be Irreparably Harmed Absent an Injunction</u>**
11 Irreparable injury is an injury that money cannot adequately compensate after the fact. *See*
12 *Conservation Law Found. v. Ross*, 422 F. Supp. 3d 12, 34 (D. D. C. 2019). Money cannot come
13 close to compensating Plaintiffs and the Tribe for the injuries they will likely suffer if the BIA's
14 organization efforts are not halted pending a final decision in this case. For one thing, Plaintiffs
15 have no right to sue Defendants for money, so any injuries Plaintiffs suffer are irreparable by
16 definition. And as explained below, the magnitude and quality of those injuries are significant.
17 *See Air Trans. Ass'n of America v. Export-Import Bk. of the U. S* , 840 F. Supp. 2d 327, 335 (D.
18 D. C. 2012) (recognizing that "significant" economic harms count as irreparable injuries when
19 caused by government defendants with sovereign immunity).
20 An Indian tribe's sovereignty is its most fundamental and vital interest, as tribal
21 sovereignty protects not only a tribe's identity and dignity but also its self-sufficiency. Tribes are
22 not sovereign in all the same ways as states or the federal government. Rather, they are sovereign
23 in at least two critical respects—as to "tribal self-government" and as to their "control over other
24 aspects of its internal affairs." *Brendale v. Confederated Tribes & Bands of Yakima Indian*
25 *Nation*, 492 U. S. 408, 425 (1989)." Indian tribes retain their inherent power to determine tribal
26 membership" and "to regulate domestic relations among members," and tribes' sovereign
27 interests are at their height when something "threatens or has some direct effect on the political
28 integrity, the economic security, or the health or welfare of the tribe." *Montana v. United States*,

450 U. S. 544, 564–566 (1981). *Accord United States v. Cooley*, 141 S. Ct. 1638, 1642 (2021) ("Indian tribes may, for example, determine tribal membership, regulate domestic affairs among tribal members, and exclude others from entering tribal land.").

Across many cases, federal courts have held that threats to tribal sovereignty—threats to tribal self-government, to tribal membership, and to tribal political integrity—are irreparable injuries that warrant injunctive relief. Such threats injure a tribe's fundamental interests, and a tribe cannot "be adequately compensated for" those injuries "in the form of monetary damages." *Prairie Band of Potawatomi Indians v. Pierce*, 253 F. 3d 1234, 1251 (10th Cir. 2001) . *See, e. g.*, *Chemehuevi Indian Tribe v. McMahon*, No. ED CV 15-1538 DMG (FFMx)), 2016 U. S. Dist. LEXIS 189513, at *24 (C. D. Cal. Aug. 16, 2016) ("interference with tribal sovereignty is an irreparable injury because it cannot be adequately compensated for in the form of monetary damages") (internal quotations omitted); *Winnebago Tribe of Nebraska v. Stovall*, 216 F. Supp. 2d 1226, 1233 (D. Kan. 2002) (finding irreparable injury where "scope or tribal sovereignty" is threatened because such "can not be measured in dollars")*; Cayuga Indian Nation v. Vill. Of Union Springs*, 293 F. Supp. 2d 183, 196-197 (N. D. N. Y. 2003) (infringement of tribal sovereignty constitutes irreparable injury); *Indian Tribe of Okla. V Hoover*, 150 F. 3d 1163, 1171-72 (10th Cir. 1998) (irreparable harm as a matter of law where seizure of tribal assets and prohibition against full enforcement of tribal laws significantly interferes with the tribe's self-government); *Seneca Cayuga Tribe v. Oklahoma*, 874 F. 2d 709, 716 (10th Cir. 1989) ("Without the preliminary injunction, the Tribes would face the prospect of significant interference with their self-government.").

The BIA has not just *decided* that nonmembers should be part of the Tribe's organization efforts; the BIA has now embarked upon a course of action that actively includes nonmembers in the Tribe's organization efforts. Organization efforts—voting on procedures, drafting a constitution, approving the constitution, and then holding elections—are obviously political acts directly related to the Tribe's self-government, political integrity, and dignity interests. *See Fortson v. Morris* 385 U. S. 231, 250 (1966) ("A vote … is the sacred and most important instrument of democracy and of freedom."); *Williams v. Rhodes* 393 U. S. 23, 30 (1968) ("the

1 right of qualified voters … to cast their votes effectively … rank[s] among our most precious
2 freedoms.”). The constitution that the BIA has asked a committee to draft will directly regulate
3 tribal self-government until amended or replaced. The BIA has indicated the constitution at issue
4 here will:

5 - Provide a framework for the exercise of political authority by the Tribe;
6 - Identify the governing body of the Tribe;
7 - Identify and allocates powers and processes of the Tribe and
8 - Identify the requirements for tribal membership.

9 *See* Mendibles Decl., ¶ 10, West Decl., Exs. I, J.

10 Nonmembers’ involvement in these organizational efforts will irreparably injure the Tribe.
11 The Tribe cannot simply start anew if the now-underway BIA process is halted by a final
12 judgment in Plaintiffs’ favor. Tribal members’ faith in the organization process will be injured if
13 the BIA makes progress, just as if voters in a state or federal district had to redo an election
14 tainted by fraud, discrimination, or another defect. *See Purcell v. Gonzalez*, 549 U. S. 1, 4 (2006)
15 (“Confidence in the integrity of our electoral processes is essential to the functioning of our
16 participatory democracy.”). Faith in the electoral process is an important reason why courts,
17 presented with serious concerns about the integrity of an upcoming election, exercise their
18 equitable powers sooner rather than later.” As an election draws closer,” the risk of voter
19 confusion and disenfranchisement “will increase.” *Id.* at 5. To maintain voter confidence, then,
20 decisive, early injunctive relief is far preferable to eve-of-the-election interference and to
21 invalidating election results after the fact.

22 The invalid organization process can have other lasting effects. In 2019, the BIA
23 conducted an election for the Tribe to approve or reject a constitution. Mendibles Decl., ¶ 4; *see*
24 *also* Dkt. 28 at 13-14. Plaintiffs objected to that election, and sued to stop it because the voter
25 rolls included individuals who were not members of the “Eligible Groups” under the Washburn
26 Determination. *Id.* The BIA pressed forward and held the Election. *Id.* Even though the BIA later
27 admitted that Plaintiffs’ objections were right and invalidated the Election’s results (*see* Dkt. 28 at
28 14), the constitution that was illegitimately drafted during the process remains viable. As the BIA

disclosed at the secret meeting, it views that constitution as one that the Tribe could still adopt. It seems reasonably likely that Tribe members, faced with a choice of writing a new constitution or adopting the procedurally illegitimate one, will prefer the easier option. The point is, there really is no starting over from scratch, and the process that the BIA has begun could foreseeably have an impact in the future.

The political integrity of the Tribe is under threat by the involvement of nonmembers in drafting the Tribe's constitution and then voting to approve or reject it. Before that process goes too far, the Court should order the BIA to pause it and thereby prevent the Tribe from suffering yet another series of irreparable injuries to its tribal sovereignty.

C. <u>The Balance of Hardships and Public Interest Favor Granting an Injunction.</u>

The last two factors—balance of hardships and the public interest—weigh entirely in favor of the Tribe.

The balance of hardships weighs in the Plaintiffs' favor because they will suffer great harm without an injunction while Defendants will suffer none with an injunction. To avoid the irreparable injuries discussed above, Plaintiffs seek to maintain the status quo until this Court rules on the parties' cross-motions for summary judgment. The status quo—in which the Tribe remains unconstituted—has been the status quo for at least a decade, perhaps even a century. There is no reason to rush a process that has never moved quickly. Defendants, by contrast, will suffer no hardship by delaying organization efforts for a few more months while the Court rules on the summary-judgment motions. The Defendants have offered no explanation as to why, after doing nothing *for years*, it is now suddenly critical that an Election proceed.

Also, the public interest favors granting the requested injunction because the public interest favors safeguarding the legitimacy of elections. *See Ohio Republican Party v. Brunner*, 582 F. Supp. 2d 957, 966 (S. D. Ohio 2008) (public interest weighed in favor of injunction designed to ensure that only eligible voters voted – "is hard to imagine a public interest more compelling than safeguarding the legitimacy of the election of the President of the United States."); *Marks v. Stinson*, 1994 U. S. Dist. LEXIS 1586, at *38-39 (E. D. Pa. Feb. 18, 1994) ("The public interest is served when the integrity of the election process is upheld"); *Madias v.*

1 *Dearborn Fed. Credit Union*, 916 F. Supp. 659, 661 (E. D. Mich. 1996) (the "public interest in
2 the integrity of the election process . . . weighs in favor of the injunction."). Moreover, courts
3 have found that a party's likelihood of success on the merits "is a strong indicator that a
4 preliminary injunction would serve the public interest" because "[t]here is generally no public
5 interest in the perpetuation of unlawful agency action." *League of Women Voters of United States*
6 *v. Newby*, 838 F. 3d 1, 12 (D. C. Cir. 2016).

7 **D. No Bond Should Be Required.**

8 "[N]o restraining order or preliminary injunction shall issue except upon the giving of
9 security by the applicant, in such sum as the court deems proper, for the payment of such costs
10 and damages as may be incurred or suffered by any party who is found to have been wrongfully
11 enjoined or restrained." Fed. R. Civ. P. 65(c). The language "in such sum as the court deems
12 proper" vests broad discretion in the district court to determine the appropriate amount of an
13 injunction bond. *DSE, Inc. v. United States*, 169 F.3d 21, 33 (D.C. Cir. 1999). This "include[s]
14 the discretion to require no bond at all." *P.J.E.S. v. Wolf* , 502 F. Supp. 3d 492, 520 (D. D. C.
15 2020). Here, no bond should be required. In the statute's words, a bond is meant to pay for
16 "damages [that] may be incurred or suffered by any party who is found to have been wrongfully
17 enjoined or restrained." Fed. R. Civ. P. 65(c).

18 Here, delaying the BIA's rush to another invalid election would not harm it at all. On the
19 contrary, it would likely save the BIA from itself, by having them avoid having to re-do an
20 election, again. *See Jorgensen v. Cassiday*, 320 F. 3d 906, 919 (9th Cir. 2003) (waiving bond
21 appropriate where "there is no realistic likelihood of harm to the defendant from enjoining his or
22 her conduct.").

23 **IV. CONCLUSION**

24 The Court should order BIA to halt its organization efforts pending final decision in this
25 case.

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