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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' REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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

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I. INTRODUCTION

The Court held a hearing on the merits of this case in early May 2023, and will soon issue a decision. By this motion, Plaintiffs seek a brief pause in the BIA's efforts to form a Tribal government, to enable the Court to finish the decision. If the BIA's efforts are not paused, and if the Tribe prevails on the merits, the BIA's organizational efforts will cause several irreparable injuries to the Tribe overall and to Plaintiffs specifically. Defendants' arguments for why this Court should deny this motion, and let them proceed to organize the Tribe pending this Court's decision, are meritless.

First, Defendants object that Plaintiffs need to show more than "serious questions on the merits" to win a preliminary injunction. Defendants' argument about the standard is wrong and pointless. This Circuit's cases holding that "serious questions on the merits" support a preliminary injunction are still good law, and even if they were not, Plaintiffs have shown a likelihood of success here, as the Court knows from the earlier briefing and hearing.

Second, Defendants argue this motion is *too early* because the injuries Plaintiffs' motion seeks to avoid are not sufficiently imminent. However, a Secretarial Election in May 2024 *is* sufficiently imminent —it is only a few months from now, no longer a speculative possibility— and Defendants must take many harmful intermediate steps before then. Defendants also argue, totally inconsistently, that this motion is *too late* because Plaintiffs should have sought interim relief when the case began. Plaintiffs brought this motion as soon as they learned of Defendants' concrete and imminent plans to organize the Tribe under the unlawful criteria challenged here.

Third, Defendants' arguments that the injuries Plaintiffs seek to prevent are neither concrete nor irreparable misstate the facts and the law. As many cases have held, the kinds of injuries to sovereignty that Plaintiffs' motion seeks to enjoin are irreparable, severe, and cannot be later remedied.

Finally, the balance of equities tips sharply in Plaintiffs' favor. Defendants will suffer no hardship from a brief pause. By contrast, absent the brief requested injunction, Plaintiffs will suffer repeated and irreparable injuries to their sovereignty.

II. ARGUMENT

A. Plaintiffs Are Likely to Succeed on the Merits

Defendants argue that cases in this Circuit providing that a preliminary injunction motion can issue when there are "serious questions on the merits" – as opposed to likelihood of success – have been called into question. Federal Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction (Dkt. 38) ("Opp.") at 7. This argument fails for two reasons.

First, as Defendants and the cases they cite admit, while the "serious questions" test has come under scrutiny, it remains good law. *Clevinger v. Advoc. Holdings, Inc.*, No. CV 23-1159 (JMC), 2023 WL 4560839, at *4, n.2 (D.D.C. July 15, 2023) ("the D.C. Circuit has ***suggested, but not decided***, that the sliding scale approach does not survive *Winter's* holding") (emphasis added); *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 239 F. Supp. 3d 77, 83 (D.D.C. 2017) ("Whether a sliding-scale analysis ***still exists or not***, courts in our Circuit have held that a failure to show a likelihood of success on the merits alone is sufficient to defeat the motion.") (emphasis added).

Second, whether the "serious questions" test still applies should not change the outcome here: Plaintiffs *are* likely to succeed on the merits - for the reasons stated in Plaintiffs' motion for summary judgment and further explicated at the oral argument on that motion.

B. Plaintiffs Face Imminent Injury Absent an Injunction

Observing that "injunctive relief will not be granted 'against something merely feared as liable to occur at some indefinite time in the future,'"[1] Defendants argue that injunctive relief is inappropriate here because Plaintiffs' injuries are speculative and not imminent. Opp. at 11. Defendants focus on the fact that there are several steps that must occur between now and next spring before a final constitution can be approved. *Id.*

This argument misses the point. The injuries Plaintiffs' motion asks this Court to address are not merely those that will result from a *final* approval of the constitution—though that certainly is an imminent, nonspeculative injury. *See* Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Preliminary Injunction (Dkt. 37) ("Motion") at 6-7. Plaintiffs

[1] Opp. at 11 (citing *United Farm Workers v. Chao,* 593 F. Supp. 2d 166, 170 (D.D.C. 2009).

will also be injured by the several concrete steps that Defendants recently made clear they intend to take between now and that final approval, each of which will injure Plaintiffs. *See id.* Most imminently, the BIA's hand-selected "Constitutional Committee" – which BIA officials have chosen from individuals in Newland-defined Eligible Groups – is now charged with drafting a constitution. *See id.* Thereafter, the BIA will facilitate the circulation of a petition among the Newland-defined Eligible Groups, which will request that the BIA-identified voters approve the constitution. *Id. Precisely* when that will occur is not clear (because Defendants are keeping Plaintiffs and the Court in the dark)[2], but it is nonetheless clear and certain that without intervention from this Court those steps will happen in the near term. As a matter of law, those actions are imminent, and Defendants do not argue otherwise.

Defendants' purported contrary authorities are irrelevant. In *He Depu v. Oath Holdings, Inc.*, No. CV 17-635 (RDM), 2021 WL 4399528, at *4 (D.D.C. Sept. 27, 2021), the Court found that a purely economic impact, a 2% diminution of trust assets, was not "irreparable injury." In *Coal. for Parity, Inc. v. Sebelius,* 709 F. Supp. 2d 6, 9 (D.D.C. 2010), the Court denied a *temporary restraining order*—which, by rule, can last for no more than 28 days—upon finding that the challenged agency rule would not take effect for six months. Contrary to Defendants' arguments, *Sebelius* does not hold that injuries six-months-from-now are never imminent. And in *Cayuga Nation v. Zinke*, 302 F. Supp. 3d 362, 373 (D.D.C. 2018), the court found that the claimed injuries were dependent on the actions of "other courts or non-parties over which this Court does not have control." The inclusion of state courts and other agencies made the injuries too speculative and uncertain; the court further held that granting relief might not even stop the

[2] Defendants dispute that they hid their plans from Plaintiffs (Opp. at 12, n.2), but they are wrong. For example, when Plaintiffs' counsel wrote Defendants to learn what steps would be taken or announced at the August 30 meeting, Defendants declined to state. West Decl. (Dkt. 37-2) ¶ 9-10, Exs. F, G. Plaintiffs' counsel was not permitted to observe the August 30 meeting. *Id.*, ¶ 10-11. While Plaintiffs requested the PowerPoint of the meeting – which laid out Defendants' plans – Defendants waited two weeks to provide it, offering no reason for the delay. *Id.*, ¶ 12. The PowerPoint itself includes multiple deadlines that had already passed by the time the PowerPoint was posted, such as submitting interest sheets to serve on the Constitutional Committee (deadline of September 1), and the preference for either "creat[ing] a new governing document" or "work[ing] off the 2019 Constitution" (deadline of midnight on August 30). *Id*, Ex. J. Similarly, Defendants - for no reason at all - ignored Plaintiffs' request for the court reporter's name, thus preventing Plaintiffs from getting an expedited transcript. *Id.*, ¶ 12.

injuries in question. None of these factors are present here, where the injuries to tribal self-governance and sovereignty are caused entirely by the BIA's actions and are imminently occurring.

Defendants cite another decision involving this Tribe, *CVMT v. Jewell* ("*CVMT IV*"), No. 2:16-01345-WBS-CKD, 2016 WL 6217057 (E.D. Cal. Oct. 24, 2016), but that case is distinguishable. There, the preliminary injunction motion asked the Court to bar the BIA from recognizing a 2013 version of a tribal constitution. *CVMT IV,* 2016 WL 6217057 at *3. However, the injury at that point *was* speculative and purely theoretical because the BIA had taken no concrete steps toward recognition. *See CVMT IV,* 2016 WL 6217057 at *3 ("The December 2015 Decision only authorized the Regional Director to accept additional submissions from Dixie to determine whether the 2013 Constitution is valid.") Here, by contrast, the BIA announced a series of concrete steps at the August 30, 2023, meeting, some of which have already taken place, and others, like the formation of the Constitutional Committee and the circulation of the petition, are unquestionably imminent, and which will harm the Tribe's sovereignty. *See* Motion at 6-7.[3]

After arguing that Plaintiffs' motion is *too early*, Defendants flip 180 degrees and argue that the motion is *too late*. Defendants suggest that Plaintiffs should have sought interim relief immediately after filing the complaint or the motion for summary judgment. Opp. at 12, 14. As a matter of basic logic, Plaintiffs' motion cannot be both too early and too late. The truth is, it is right on time.

Plaintiffs did not delay in bringing this motion. When Plaintiffs filed their complaint in June 2022, Defendants had merely announced an unspecific intention to help organize the Tribe based on the Newland Memo's criteria; Defendants had not announced any concrete steps toward that goal. There was nothing then to enjoin. The same was true after the hearing on the parties' cross-motions for summary judgment: without concrete steps or a plan, there was nothing for the Court to enjoin. Throughout this case, Plaintiffs have diligently attempted to determine what

[3] In the same vein, Defendants cite a *brief* filed by intervenors opposing a preliminary injunction in connection with the 2019 Secretarial Election. Opp. at 11. A brief is not persuasive authority. What's more, the injury that plaintiffs sought to enjoin in that case was the BIA's recognition of a tribal government, which was uncertain to occur. Opp. at 11-12.

specific steps Defendants intend to take and when, so that Plaintiffs could seek the Court's protection if necessary. *See* Motion at 5-7. Any delay here is Defendants' fault, as they have stonewalled Plaintiffs at every turn. As soon as Plaintiffs learned of Defendants' intent to take the specific steps that this motion seeks to enjoin, they brought this motion. *See id.* Defendants' claim of "delay" is baseless.

Defendants' authorities are not to the contrary. In *Heart 6 Ranch, LLC v. Zinke*, 285 F. Supp. 3d 135 (D.D.C 2018) and *Jack's Canoes & Kayaks, LLC v. Nat'l Park Serv.*, 933 F. Supp. 2d 58, 81 (D.D.C. 2013), the plaintiffs waited three months and one month, respectively, *after* a contract termination to seek to enjoin the termination. *See Heart 6 Ranch*, 285 F. Supp. 3d at 144; *Jack's Canoes,* 933 F. Supp. 2d at 81. Here, the actions Plaintiffs seek to enjoin have not yet occurred, and Plaintiffs filed the motion as soon as practicable after learning of those actions.

C. The Injuries Plaintiff Seek to Avoid Are Concrete and Irreparable

As Plaintiffs' motion demonstrates, (1) the actions Plaintiffs seek to enjoin will harm the Tribe's sovereignty, and (2) injuries to sovereignty are irreparable. Motion at 9-10. Defendants' arguments to the contrary are baseless.

Defendants argue that "Plaintiffs' claim to be injured because the inclusion of 1929 census descendants in the CVMT organizational process harms CVMT's sovereignty. . . assumes that they are correct on the core dispute in this case—that Plaintiffs are the only people eligible to take part in CVMT's initial organization." Opp. at 13-14. Defendants label Plaintiffs as just a "faction" of the Tribe. *Id.* At most, Defendants' argument shows that two preliminary injunction factors—likelihood of success and irreparable injury—are intertwined, which is no reason to deny the motion.[4] The evidence Plaintiffs submitted demonstrates they are not just a "faction." They *are* the Tribe, the only people who, under the Washburn Determination, can organize the Tribe.[5] At bottom, the key point is that Defendants do not dispute that involving non-Tribal members in the

[4] At some level, *every* preliminary injunction motion rests on the assumption that the plaintiff is correct on the merits. For example, when two neighbors are fighting over ownership of a building that one neighbor wants to knock down, the challenger's injury (loss of the building) is intertwined with his or her claim of ownership. So too here.

[5] *Cayuga Nation v. Zinke,* which Defendants cite for this proposition, is distinguishable, because there, unlike here, the Court had found that plaintiffs were *unlikely* to succeed on the merits. 302 F. Supp. 3d at 374.

Tribe's organization is an injury to the Tribe's sovereignty. Motion at 9-10.

Defendants argue that Plaintiffs have submitted no evidence showing that Defendants' conduct will injure them (Opp. at 8-9), but that is false. Plaintiffs submitted the Declaration of Michael Mendibles – who is indisputably a member of the Tribe under any criteria – which describes the specific impact on him and other Tribal members that this injury to the Tribe's sovereignty will have. Mendibles Decl. (Dkt. 37-2) ¶ 5, 11. In response, Defendants assert that Mr. Mendibles' declaration should be disregarded because it is (supposedly) inconsistent with another declaration he submitted in which (1) he testified in support of a 2018 Constitution under which 1929 Census members were permitted to be in the Tribe, and (2) he stated his belief that the Tribe had more than ten people – potentially hundreds. Opp. at 14-15.

Defendants are wrong. *First*, under that 2018 Constitution, the Tribe *chose* to permit 1929 Census members to be Tribal members, they were not *forced* – as the BIA now intends to do – to admit them as Tribal Members.[6] Dkt. 38-4 at para. 8 (stating that, under that Constitution, "All members of the Eligible Groups *and 1929 Census Descendants* are eligible for Tribal membership.") (emphasis added). Thus, approval of that 2018 Constitution did not impact the Tribe's sovereignty. *Second*, Mr. Mendibles' earlier testimony occurred when he was under the belief that admitting 1929 Census Defendants would only *slightly* increase the Tribes' rolls – by less than ten percent. *Id.* at para. 11. *Third,* Mr. Mendibles testified that the Tribe may consist of approximately 200 members when he erroneously believed that John Jeff was Jeff Davis's son – a belief that the BIA later proved was false. Administrative Record ("AR") (Dkt. 34-65) at CVMT-005356-5370.

Citing *St. Croix Chippewa Indians of Wisconsin v. Kempthorne*, 535 F. Supp. 2d 33, 36 (D.D.C. 2008) Defendants argue that Plaintiffs' injuries are not irreparable because they can be remedied in "the ordinary course of litigation." Opp. at 17. However, *St. Croix* involved injuries that were "purely economic in nature." *St. Croix*, 535 F. Supp. at 37. Here, Plaintiffs' injuries are

[6] In this regard, Mr. Mendibles' position is consistent with the Washburn Determination, which stated that "[w]hether the descendants of the Miwoks identified in the 1929 Census shall be included in the organization of the CVMT is an internal tribal decision that shall be made by the individuals who make up the Eligible Groups." AR (Dkt. 34-43) at CVMT-003719-3726.

not economic. Even if the Court rules for the Plaintiffs at a later date, the injuries to self-governance, tribal sovereignty, and faith in the organization process will have occurred and cannot be remedied with money damages.

Citing *Am. Ass'n for Homecare v. Leavitt,* No. CV-08-0992 (RMU), 2008 WL 2580217, at *5 (D.D.C. June 30, 2008), Defendants argue "that courts will not base a finding of 'irreparable injury' on a procedural violation standing alone." Opp. at 16-17. *Leavitt*, however, has nothing to do with this case. There, the court held that a statutory violation which did not injure the plaintiff and had already occurred did not automatically establish irreparable injury. *Id.* Here, the Tribe's claim of irreparable injury does not rest on a statutory violation, but instead on real world acts that will infringe the Tribe's sovereignty.

Defendants argue that Plaintiffs' harms are not irreparable because they can file an APA challenge to the BIA's approval of election results. Opp. at 16. But the injury here is *not* solely the BIA's approval of election results. In addition to that harmful *result*, Plaintiffs will be injured by the harmful *process*. Motion at 6-7. The forthcoming efforts and agency actions—voting on procedures, drafting a constitution, approving the constitution, and then holding elections—are all political acts directly related to the Tribe's self-government, political integrity, and dignity interests. *Each* of these steps impacts the rights of qualified voters (the actual Tribe members) to cast their vote effectively, even before the final election and recognition by the BIA. *See Fortson v. Morris* 385 U.S. 231, 250 (1966); *see also Williams v. Rhodes* 393 U.S. 23, 30 (1968) ("the right of qualified voters … to cast their votes effectively … rank[s] among our most precious freedoms.") *Prairie Band of Potawatomi Indians v. Pierce*, 253 F. 3d 1234, 1251 (10th Cir. 2001), *Chemehuevi Indian Tribe v. McMahon*, No. CV-15-1538-DMG (FFMx), 2016 WL 4424970, at *10 (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 of tribal sovereignty" is threatened because such "can not be measured in dollars"). An APA challenge to a BIA approval of election results will not remedy the harms to the Tribe's sovereignty and dignity interests that occur when

nonmembers participate in the organization process; an APA challenge is not a suitable alternative to stopping such harm through issuance of a preliminary injunction here.

D. The Public Interest and Balance of Equities Weigh in Plaintiffs' Favor.

The public interest and balance of the equities weigh heavily in Plaintiffs' favor. Plaintiffs are not asking for an endless delay that will cause any of the harms Defendants articulate in their Opposition. The parties' summary judgment motions have been fully briefed and argued. At the oral argument, the Court recognized the importance of these issues, assuring the parties that it recognized the desire to resolve the motions promptly. West Decl., Ex. D (MSJ Hearing Transcript), at 4:7-8. A decision from the Court may be imminent and so any delay would be minimal.

Defendants' contention that the balance of equities does not weigh in Plaintiffs' favor simply repeats Defendants' arguments about irreparable harm. Opp. at 18-19. Defendants do not disagree that, if Plaintiffs are correct about the nature of the upcoming injuries, the balance of equities weighs in Plaintiffs' favor.

As Plaintiffs' motion shows, 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 still have not articulated why it is now suddenly critical that an election proceed quickly. The short pause Plaintiffs seek is minor when compared to progressing to an election that will be illegitimate. *Marks v. Stinson,* No. CV-93-6157, 1994 WL 47710, at *14 (E.D. Pa. Feb. 18, 1994) ("The public interest is served when the integrity of the election process is upheld"); *Madias v. Dearborn Fed. Credit Union*, 916 F. Supp. 659, 661 (E. D. Mich. 1996) (the "public interest in the integrity of the election process . . . weighs in favor of the injunction.").

Defendants argue that the "the public interest would be advanced by allowing that larger CVMT community to move forward with an election rather than allowing a small faction to enjoin that election." Opp. at 19. However, whether the "larger CVMT community" is legally entitled to participate in the Tribe's governance is a question that this Court will soon decide, as is whether Plaintiffs here are a "faction," as opposed to the only true members of the Eligible

Group. The public interest is served best by proceeding with a non-urgent Tribal election only after all the potential challenges are litigated.

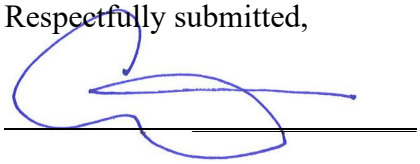
On this issue, Defendants point to the Court's order denying Plaintiffs' motion for a preliminary injunction regarding the 2019 election, asserting that decision suggests that the Court should deny Plaintiffs' requested injunction here. Opp. at 20. However, 2019 instead shows the exact opposite. In 2019, as here, the BIA moved forward with an election, disregarding Plaintiffs' objections that the voter rolls consisted mainly of people ineligible to vote under the Washburn Determination. *See* Dkt. 28 at 13-14 (citing to CVMT-005356-57 in the Administrative Record). Months later, the BIA was forced to admit that Plaintiffs were right and invalidated the election results. *Id.* As a result, all of the BIA's and the Tribe's efforts regarding that election were wasted, and it took years to recover from that self-inflicted injury. The Court's granting this brief injunction would save the BIA – and the Tribe – from a similar debacle.

III. CONCLUSION

The Court should grant Plaintiffs' motion, and grant the brief pause the motion requests.

Dated: October 24, 2023.

Respectfully submitted,



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