UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

CALIFORNIA VALLEY MIWOK TRIBE, MILDRED FERN BURLEY, SILVIA FAWN BURLEY, RASHNEL KAWEHILANI REZNOR, ANGELICA JOSETT PAULK, TRISTIAN SHAWNEE WALLACE, DAVEEN RONELLE WILLIAMS, DARYL STEVEN BURLEY, WILLIAM DAVID BURLEY JR. III, MICHELE DENISE BURLEY, Plaintiffs, v. DEB HAALAND, SECRETARY OF THE UNITED STATES DEPARTMENT OF THE INTERIOR, et al., Defendants.	CASE NO. 1:24-cv-00947-TSC

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

Plaintiffs move this Court for immediate injunctive and equitable relief to stay Defendants further use of the Certificate of Degree of Indian Blood; and, Defendants' determinations related the Certificate of Degree of Indian Blood application process until this Court has determined (1) its lawfulness under 5 U.S.C. § 553 and (2) whether its use and the agency's determinations designates a purely racial status to individuals who may not be Indians, and are not, nor have they ever been, members of the California Valley Miwok Tribe ("Tribe"). Both questions are squarely before this Court in this matter.

Defendants intend to hold a Secretarial Election to organize the Tribe under Section 16 of the Indian Reorganization Act (25 U.S.C. 5123), on October 1, 2024. Defendants reached this point by making a series of determinations related to the use of the Certificate of Degree of Indian Blood applications. One such decision was to accept a Petition for a Secretarial Election, scheduled to be held October 1, 2024, and that action by Defendants is subject to a new Complaint before this District Court, 1:24-cv-2455, challenging the acceptance and validation of the Petition under 5 U.S.C. § 706.

Here, Plaintiffs seek an equitable remedy to halt, and stay, further action by the Defendants related to any action derived from the use of the Certificate of Degree of Indian Blood to organize, reorganize, or hold an election to adopt a tribal constitution, approved by individuals the Defendants pursuant to 25 C.F.R. Part 81 including those authorized to participate after submission of a Certificate of Degree of Indian Blood form and application.

As Plaintiffs describe below, Plaintiffs meet this Circuit's rigorous showings allowing this Court to issue a preliminary injunction and provide equitable relief to stay further actions by Defendants until this Court has the opportunity to rule on whether Defendants should have

promulgated a regulation in accordance with 5 U.S.C. § 553, even if no regulation was required, and declare that the Defendants created a race-based classification system in violation of the U.S. Constitution.

Plaintiffs believe that Defendants' use of the Certificate of Degree of Indian Blood has authorized individuals, that Defendants determined to be eligible ancestors of the Tribe, to participate in a Secretarial Election. Defendants further authorized those individuals to submit signatures in the form of an unlawfully validated Petition in order to request that the Defendants hold a Secretarial Election pursuant to 25 C.F.R. Part 81. (Subject to Administrative Procedure Act ("APA") challenge in 1:24-cv-2455 in this District). The determination of eligibility to participate in a Secretarial Election does not translate to being eligible to participate in the submission of a petition for a Secretarial Election to adopt a tribal constitution. Here is the heart of why a stay is prudent now.

As Defendants would agree, the Certificate of Degree of Indian Blood does not grant tribal membership status into a federally recognized Indian Tribe. Without the status of membership into a tribal government, individuals who are nonmembers of a federally recognized tribe cannot submit a petition for a Secretarial Election. Defendants issued Certificate of Degree of Indian Blood designations are *only* racially classified as Indians and are without any political rights in a tribal government. Over the course of this matter, Plaintiffs will show that Defendants use of the Certificate of Degree of Indian Blood, and its unpublished rules, is *ultra vires* and is extending *political rights* to individuals who are not recognized by the Tribe in violation of the U.S. Constitution.

Until now, a preliminary injunction was unnecessary. However, Defendants continued down a road that would forever displace the Tribe's members and its control over its self-

determination. Defendants scheduling and intention on holding an unlawful Secretarial Election based on issues squarely before this Court must not continue. The Defendants were placed on notice by the filing of Plaintiffs' Complaint that their practice and use of the Certificate of Degree of Indian Blood was being challenged and to permit a Secretarial Election based on the use of the Certificate of Degree of Indian Blood was unlawful.

Defendants' continued use and reliance on the Certificate of Degree of Indian Blood process must not be permitted until this Court examines these issues on their merits in this matter and makes a determination. Plaintiffs are likely to succeed on the merits of their claims in this matter and have, at least, raised serious questions going to their merits. The balance of equities weighs sharply in favor of the Plaintiffs, and an injunction is in the public interest. As such, the Plaintiffs respectfully request that the Court grant their Motion for Preliminary Injunction.

Plaintiffs find it is ironic that the Defendants utilize an unlawful agency procedure to create a body politic for a long recognized Indian tribe when that procedure has been historically meant to be wielded for the systematic eradication of Indigenous people. Plaintiffs seek a Preliminary Injunction to prevent further unlawful agency actions. Plaintiffs seek injunctive relief requiring the Defendants to cease the use of Certificate of Degree of Indian Blood and the practice of racial classification. They also seek declaratory and other relief available under applicable civil rights statutes.

JURISDICTION AND VENUE

1. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 because the asserted claims arise under the U.S. Constitution and laws of the United States.

2. This Court also has jurisdiction over this action pursuant to 28 U.S.C. § 1361 in that Plaintiffs seeks to compel officers and employees of the United States and its agencies to perform duties owed to Plaintiffs.

3. This Court also has jurisdiction over this action pursuant to 28 U.S.C. § 1362 because the Tribe is an Indian tribe duly recognized by the Secretary of the Interior, and the matter in controversy arises under the Constitution, laws, or treaties of the Unites States.

4. Venue is proper in this Court under 28 U.S.C. § 1391(e) because the Secretary of the Interior, the Assistant Secretary - Indian Affairs, and the Bureau of Indian Affairs ("BIA") are located in this district.

5. This Court has jurisdiction to issue a Preliminary Injunction pursuant to the Administrative Procedure Act and the jurisdictional grounds stated in the Plaintiffs' Complaint. More specifically, a reviewing court "may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve the status or rights pending conclusion of the review proceedings." 5 U.S.C. § 705.

6. The Court also has jurisdiction to issue a Preliminary Injunction under the All Writs Act, 28 U.S.C. § 1651(a), allowing courts "to issue all writs necessary or appropriate in aid of their respective jurisdictions."

7. The Court's power includes "limited judicial power to… maintain the status quo by injunction pending review of an agency's action through the prescribed statutory channels." *FTC v. Dean Foods Co.*, 384 U.S. 597, 604 (1996); *see also Jackson v. Dist. of Columbia*, 254 F.3d 262, 268 (D.C. Cir. 2001).

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PROCEDURAL POSTURE

Plaintiffs filed their Complaint on April 4, 2024. Defendants filed a Motion to Dismiss June 4, 2024. Plaintiffs filed their response June 24, 2024, Defendants filed their Reply, July 12, 2024.

CONCISE STATEMENT OF FACTS

Plaintiffs' Complaint provides details concerning the Plaintiffs and circumstances of the allegations. Plaintiffs offer the following key facts to provide context for the Tribe's request for a Preliminary Injunction.

This issue in this Preliminary Injunction, is at the heart of Plaintiffs' Complaint: the lawful use of Certificate of Degree of Indian Blood forms and informal procedures; and the Defendants use of Certificate of Degree of Indian Blood to determine the race of individuals to request that the Defendants hold a federal election, called a Secretarial Election, for the purposes of adopting a federally approved Tribal constitution pursuant to the Indian Reorganization Act (1934), *codified* at 25 U.S.C. § 5123.

1) Bureau of Indian Affairs Certificate of Degree of Indian Blood Process to Determine Indian Race

From October 2021 until January 2023, the Defendants held two organizational meetings where the Bureau of Indian Affairs ("BIA") announced the Certificate of Degree of Indian Blood process at issue in this case. The process consisted of the BIA announcing that individuals from the public, *believing* that they have ancestral ties to the California Valley Miwok Tribe, could submit an application using the Certificate of Degree of Indian Blood form.

In 2015 the Assistant Secretary – Indian Affairs determined that if a Secretarial Election was held in accordance with Section 16 of the Indian Reorganization Act, and its accompanying

regulations at 25 C.F.R. Part 81, three "eligible groups" of ancestors must participate. Letter from Assistant Secretary – Indian Affairs, Kevin Washburn (December 31, 2015).

From October 2021 until January 2023, Defendants held two organizational meetings and introduced a process by which individuals believing they had ancestral ties to the Tribe could submit application using the Certificate of Degree of Indian Blood form, along with related processes described by Defendants. That process included a public solicitation for Certificate of Degree of Indian Blood Applications.

On or about October 29, 2021, the Tribe discovered that the BIA Central California Agency posted a Public Notice to its internet website. That Notice purports to call an "initial meeting" to "determine eligibility to participate in organization of the Tribe" on or about November 30, 2021, at 1:30 p.m. On November 30, 2021, Defendants held an online meeting to describe the procedure it will follow to "organize" California Valley Miwok Tribe under the Indian Reorganization Act to draft a tribal constitution. Defendants stated that its effort to organize the California Valley Miwok Tribe under an IRA constitution is pursuant to directives contained in the 2015 Decision by then Assistant Secretary – Indian Affairs Kevin Washburn, which set forth criteria to determine which persons are eligible to participate in organization of the Tribe and set a procedure for such organization.

Based on information known to the Plaintiffs, at or about the time of the November 20, 2021, meeting Defendants described the following procedures:

a) Persons claiming to be eligible for membership in the Tribe must download a Certificate of Degree of Indian Blood form from Defendants' website, complete the

form, and submit the form with supporting documentation to Defendants by January 14, 2022.

b) Defendants will determine whether the person has demonstrated lineal descent from:

   i. Persons listed on the August 13, 1915, Census of Indians at or near Sheep Ranch, Calaveras County, California;

   ii. Descendants of Mabel Hodge Dixie; or

   iii. Jeff Davis, listed on the June 6, 1935, Approved List of Voters for Indian Reorganization Act of Sheep Ranch Rancheria, Calaveras County, California.

c) The Superintendent will issue a determination of eligibility to each applicant based on the CDIB within sixty (60) days.

d) If Defendants determine a person to be ineligible, under the above criteria, a person may appeal against that decision under the disenrollment regulations of 25 C.F.R. Part 62.

e) Defendants will hold a meeting of all persons it independently determines to be eligible for membership for the purposes of drafting and ratifying a constitution.

f) Defendants will organize a meeting of eligible participants for a Secretarial Election under 25 C.F.R. Part 81.

At the November 2021 meeting, Defendants described the process it will use to organize the Tribe under an IRA constitution. 1) Each individual wanting to be an eligible participant must submit a Certificate of Degree of Indian Blood application to BIA by January 14, 2022. The Certificate of Degree of Indian Blood will be used to determine lineal descendancy. 2) BIA's

evaluation of the Certificate of Degree of Indian Blood must show the applicant is a lineal descendant from one of three groups: (a.) An individual on the August 13, 1915, census; (b.) An individual on the June 6, 1935, approved list of voters (only Jeff Davis); or (c.) Descendants of Mabel Hodge Dixie. 3) The Superintendent will issue a determination of eligibility to each applicant based on the Certificate of Degree of Indian Blood within sixty days. 4) An applicant receiving an unfavorable determination will have thirty days to appeal against the decision following the procedures in 25 C.F.R. Part 62. 5) BIA will organize a meeting of eligible participants for a Secretarial Election under 25 C.F.R. Part 81.

The procedures described by Defendants on or about November and December 2021 are neither established in the 2015 Washburn Decision, or any other decision; nor do they conform to the Defendants' regulations under 25 C.F.R. Part 81 for Secretarial Election Procedures. In short, these procedures are not found in any publicly available document.

The Plaintiffs submitted their applications on or about January 14, 2022, for the second time in two years. Defendants received an unknown number of Certificate Degree of Indian Blood applications on or before January 12, 2022. Defendants did not issue a Certificate of Degree of Indian Blood determination in accordance with any previously used form or format or procedure to the Plaintiffs. Defendants instead issued letters to individuals that submitted applications stating that such individuals were, or were not, eligible to participate in Defendants' organization process. Those letters stated that individuals who were determined not to be eligible to participate may appeal to Defendants' decision under 25 C.F.R. Part 61.

On or about May 31, 2022, the Assistant Secretary – Indian Affairs issued a Decision, purportedly modifying the determination related to one "eligible group" from the 2015 Decision, while purportedly leaving the remainder of the 2015 Decision in place. Following this 2022

Decision, the Defendants again publicly solicited applications for Certificates of Degree of Indian Blood.

On or about September 30, 2022, Defendants issued a public notice that it, "plans to assist the California Valley Miwok Tribe, aka Sheep Ranch Rancheria (Tribe) with organization of a formal government structure by individuals who are eligible to participate in such a process." In this same announcement, Defendants required individuals to register for a virtual meeting held on November 28, 2022, where Defendants would "provide information concerning the organizing process and procedures that will be used to determine eligibility to participate in organization of the Tribe based on applicable Department and Bureau decisions regarding organization of the Tribe." No reference to the applicable decisions were provided. Defendants also did not cite any statutory or regulatory authority to conduct the publicly noticed process. Defendants held a virtual meeting on November 28, 2022.

On November 29, 2022, Defendants issued a public notice that Defendants "plans to assist the [Tribe] with organization of a formal government structure by individuals who are eligible to participate in such a process, consistent with the December 30, 2015, decision by the Assistant Secretary – Indian Affairs, as revised May 31, 2022, by the Assistant Secretary – Indian Affairs." Defendants required "a descendant of a person listed on [one of four government documents that] want to be considered for participation in the organization process [to submit] the Certificate of Degree of Indian Blood form along with supporting documentation…." Defendants required all such persons to "show lineal descendancy" from one of four groups or individuals. Defendants established a deadline for all submissions on January 12, 2023. Again, Defendants did not cite any statutory or regulatory authority to conduct the process or to use Certificate of Degree of Indian Blood in the process.

In the Spring of 2023, Defendants issued a letter to individuals that submitted a Certificate of Degree of Indian Blood application in response to their second public notice soliciting Certificate of Degree of Indian Blood applications.

On July 31, 2023, Defendants issued another public notice for an organizational meeting on August 30, 2023. This meeting was limited to selected individuals Defendants deemed "eligible to participate." Defendants prohibited individual participants from being represented by counsel. At this meeting on August 30, 2023, at the Calaveras County Fairgrounds, it was announced by the Defendants that it would form a "Constitution Committee" consisting of eight individuals, selected at random, from the pool that the Defendants deemed eligible to participate. This Constitution Committee, under the guiding hand of the Defendants, would select one of two starting places to draft a constitution. Those deemed eligible to participate in the Secretarial Election would be permitted by the Defendants to express their preference for one of the two choices at the end of the meeting. The drafted governing document would be used as the foundation for a petition to request a Secretarial Election.

On September 14, 2023, Plaintiffs requested the identification of the individuals that attended the meetings that were selected by Defendants for a "Constitution Committee" and a transcript of the August 30, 2023, meeting. Almost two weeks later Defendants communicated to Plaintiffs that no individuals had been selected for the Constitution Committee. Plaintiffs did not receive a transcript of the meeting.

On or about January 2024 the members of the Constitution Committee were selected. Defendants held a virtual meeting to develop a proposed constitution on or about January 18, 2024.

Plaintiffs filed their Complaint, in this matter, on April 4, 2024.

On or around April 23, 2024, California, Defendants provided Notice on the Central California Agency website announcing that the Bureau of Indian Affairs, Central California Agency received a petition to the Secretary of the Interior to call and conduct a Secretarial Election on a proposed tribal constitution of the California Valley Miwok Tribe. California Valley Miwok Tribe – Organizational Information, Bureau of Indian Affairs (April 23, 2024), https://www.bia.gov/regional-offices/pacific/central-california-agency/cvmt.

On May 22, 2024, members of the Tribe challenged Defendants' Notice of a Petition for Secretarial Election in accordance 25 C.F.R Part 81.

On June 22, 2024, Defendants determined the challenges were "without merit" dismissing the challenges. That determination was the final agency action pursuant to the regulations. That determination is challenged before this district in 1:24-cv-02455, filed Aug. 23, 2024.

Following the dismissal of the challenges by Defendants, Defendants have taken additional steps to hold an election under 25 C.F.R. Part 81. A purported Secretarial Election vote is scheduled to occur on October 1, 2024.

2) Defendants' Decision Giving Rise to this Cause of Action and a Request for Immediate Injunctive Relief

Plaintiffs' Complaint [Doc. 1] in this matter details the circumstances that give rise to challenging the use of Certificate of Degree of Indian Blood, and all actions utilizing the Certificate of Degree of Indian Blood to determine eligibility to participate in the Secretarial Election under 25 U.S.C. 5123, § 16 of the Indian Reorganization Act of 1934 to organize, reorganize and otherwise affect the status of a currently organized, federally recognized tribal government. For the reasons set forth in this memorandum Plaintiffs seek injunctive relief.

LEGAL STANDARD

This Court has jurisdiction to issue an injunction to preserve the s*tatus quo*. The Administrative Procedure Act ("APA") affords interested parties the right to seek judicial review of agency actions. 5 U.S.C. §702. Furthermore, upon judicial review, the reviewing court "may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings." 5 U.S.C. § 705.

Alternatively, the Court has jurisdiction to enjoin the Defendants from taking actions to validate and conduct a Secretarial Election under the All Writs Act, 28 U.S.C. §165l(a). The All Writs Act allows courts "to issue all writs necessary or appropriate in aid of their respective jurisdictions." 28 U.S.C. §165l(a). That includes "limited judicial power to ... maintain the *status quo* by injunction pending review of an agency's action through the prescribed statutory channels." *FTC v. Dean Foods Co.*, 384 U.S. 597, 604 (1996); *see also Jackson v. District of Columbia,* 254 F.3d 262, 268 (D.C. Cir. 2001) (applying this rule where dismissal would have irreparably harmed the plaintiff).

Issuing a Preliminary Injunction is also appropriate when it is necessary to "maintain the *status quo* by injunction pending review of an agency's action through the prescribed statutory channels." *Dean Foods*, 384 U.S. at 604. To obtain the injunctive relief by Preliminary Injunction, a "moving party must show: (1) a substantial likelihood of success on the merits, (2) that it would suffer irreparable injury if the injunction were not granted, (3) that an injunction would not substantially injure other interested parties, and (4) that the public interest would be furthered by an injunction." *Baumann v. District of Columbia*, 655 F.Supp.2d 1, 6 (D.D.C. 2009) (citing *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006)); *Winter v.*

Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008). A movant is "not required to prove his case in full" at the Preliminary Injunction stage. *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981).

ARGUMENT

Plaintiffs request relief in the form of a Preliminary Injunction prohibiting the Defendants further use of the Certificate of Degree of Indian Blood to organize, re-organize or otherwise alter the government of the California Valley Miwok Tribe. But for Defendants use of the Certificate of Degree of Indian Blood applications to determine individuals that make up or create "eligible groups" of individuals, the Defendants would be unable to conduct a Secretarial Election as scheduled for October 1, 2024. Until this Court determines whether Defendants use of the Certificate of Degree of Indian Blood form and process are lawful under 5 U.S.C § 553, and pass constitutional muster, the Defendants should cease their use of the Certificate of Degree of Indian Blood and all actions that have flowed therefrom. Therefore, Plaintiffs seek a Preliminary Injunction prohibiting Defendants from further action in use of the Certificate of Degree of Indian Blood in their attempts to organize the Tribe, a federally recognized tribe until such time as the Tribe, Congress, or this Court deems appropriate.

1) This Court has Authority to Enjoin Defendants the Outcome of this Matter

Plaintiffs seek injunctive relief with respect to the Defendants use of the Certificate of Degree of Indian Blood to determine membership in the California Valley Miwok Tribe without the rulemaking, adjudication and decision-making established in the APA. The Defendants know well that their use of the Certificate of Degree of Indian Blood does not establish membership in the Tribe, because such membership is a tribal, not federal, decision. (*see*: 65 Fed. Reg. at 20776, 20785, § 70.28(a) (April 18, 2000) ("Only a tribe may determine membership).

§70.28 Do I become a member of an Indian Tribe when the Bureau issues me a Certificate of Degree of Indian or Alaska Native Blood?

No.

(a) A CDIB issued by the Bureau does not establish membership in a federally recognized Indian tribe. Only a tribe may determine membership.

(b) The issuance of a CDIB is not an enrollment action and 25 CFR 62.4 is not applicable to actions related to CDIBs.

It has long been held by the Supreme Court that an Indian tribe has the right to self-government, *Wheeler v. United States Dept. of the Interior*, 811 F. 2nd 549 (10th Cir. 1987), and the right to determine its own membership criteria. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). *See also*: *Picayune Rancheria of Chukchansi Indians v. Pacific Regional Director, Bureau of Indian Affairs*, Docket No. IBIA 23-021 (July 3, 2023)(*referred to* Assistant Secretary – Indian Affairs, Decision May 9, 2024) (Dismissing the Chukchansi claims for lack of standing and affirmed Regional Director's decision to alter an individual's tribal affiliation and Indian blood – stating, "[t]his decision *does not automatically qualify the descendants* of anyone … for benefits through the [BIA], nor does it certify their eligibility for enrollment in a Federally recognized tribe." at 1; "Tribal membership matters are central manifestations of Tribal sovereign authority." at 2). As the Defendants concede, the determination of tribal affiliation and blood quantum by use of the Certificate of Degree of Indian Blood does not have any legal effect on a Tribe, but instead only applies to an individual for limited federal purposes (i.e., Indian employment preference and federal loans, based upon defined minimum blood quantum).

Although the Defendants may have—that is subject question before this Court—afforded some individuals the status of "eligible" to participate in the reorganization the Tribe under the

IRA, that designation cannot or does not permit the Defendants or the designated individuals on their own or as the Defendants proxy to initiate the Secretarial Election process under 25 C.F.R Part 81. As the regulations under 25 C.F.R Part 81 make clear, the permissive action to petition the Secretary for such an election is reserved for *tribal members*. This strikes against the Defendants further because there is no reference to Certificates of Degree of Indian Blood in the *entirety* of in Title 25 of the U.S. Code, there is no mandate by Congress, no grant of authority, to the Defendants to create or issue Certificates of Degree of Indian Blood, and there are no regulations in the Code of Federal Regulations authorizing or governing Certificates of Degree of Indian Blood. Even if there was any ambiguity in the statute or regulation, such ambiguity must be interpreted in favor of the Tribe. *San Manuel v. N.L.R.B*, 475 F.3d 1306, at 1311 (D.C. Cir. 2007) (citing the "longstanding principles that (1) ambiguities in a federal statute must be resolved in favor of Indians and (2) a clear expression of Congressional intent is necessary before a court may construe a federal statute so as to impair tribal sovereignty.") (citations omitted).

This Court has authority under the All Writs Act, 28 U.S.C. §1651, to intervene to prevent a litigant from being irreparably harmed and to preserve the availability of meaningful judicial review. *AstraZeneca Pharmaceuticals LP v. Burwell*, 197 F.Supp.3d 53, 56 (D.D.C. 2016). The U.S. Supreme Court has the long-recognized federal courts' power to preserve its jurisdiction or maintain the status quo "pending review of an agency's action through prescribed statutory channels." *Id*. (citing *F.T.C. v. Dean Foods Co.*, 384 U.S. 597, 604 (1966)). That authority is more than sufficient to enjoin Defendants from utilizing Certificate of Degree of Indian Blood, while this Court reviews the Defendants' actions under 5 U.S.C. § 553 and the U.S. Constitution.

Section 705 of the Administrative Procedures Act states that, "[on] such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including

the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings." 5 U.S.C. §705. Congress clearly authorized federal courts to intervene when agency actions would cause an irreparable injury. The power of federal courts to grant stays pending judicial review if "firmly embedded in our judicial system" and "a power as old as the judicial system of the nation." *Nken v. Holder*, 556 U.S. 418, 427 (2009) (quoting *Scripps-Howard Radio, Inc. v. F.C.C.*, 316 U.S. 4, 13 (1942).

Application of the Certificate of Degree of Indian Blood to determine eligibility to participate in the Secretarial Election violates the APA, violates the basic tenants of Indian affairs of self-government and self-determination afforded by Plaintiffs as members of the California Valley Miwok Tribe, a federally recognized Indian tribe, and violates the U.S. Constitution.

Any action taken by the Defendants utilizing the Certificate of Degree of Indian Blood process to determine the membership of the Tribe will leave Plaintiffs with fleeting opportunity to seek relief. Once Defendants hold the Secretarial Election and Defendants validate results purportedly adopting a constitution for the Tribe, individuals that submitted Certificates of Degree of Indian Blood applications after responding to a public solicitation will *de facto be Indians under federal law.* There is no rewind button for a tribe that is stripped of its sovereign right to self-government through an unlawful agency action.

2) Plaintiffs have a Substantial Likelihood of Success on the Merits

a. Defendants Have Violated the Administrative Procedure Act-Rule Making 5 U.S.C. § 553

Plaintiffs challenge the Defendant's use of Certificate of Degree of Indian Blood to determine tribal membership when no statute or regulation dictates the scope and procedure for this specific use, or any specific use, and no regulation has been developed through APA notice and comment procedures. The use of a Certificate of Degree of Indian Blood for any purpose requires notice and comment rulemaking, which it has not undergone. The Defendants attempted to go through the proper rulemaking process beginning in 1999 and abandoned in 2014. During that time the Defendants did not propose rules for using a Certificate of Degree of Indian Blood for the purpose of membership.

The APA requires an agency to undertake rulemaking process when issuing "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or when Defendants for good cause finds . . . that notice and public procedure are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. §553(b). Exceptions "will be narrowly construed and only reluctantly countenanced." *Am. Fed'n of Gov't Emp., AFL-CIO v. Block*, 655 F.2d 1153, 1156 (D.C. Cir. 1981) (citing *State of New Jersey, Dep't of Env't Prot. Agency v. E.P.A.*, 626 F.2d 1038, 1045 (D.C. Cir. 1980). Exceptions, where asserted, are not "escape clauses" as Congress noted during the drafting of the APA. S.Rep.No. 752, 79th Cong., 1st Sess. (1945).

As described in Plaintiffs' Complaint, Defendants have been on long-notice that the use of Certificates of Degree of Indian Blood require rulemaking. In fact, in the late 1990s and early 2000s, Defendants identified the necessity to undertake rulemaking and issued notice and comments periods on several occasions. Defendants promptly abandoned the efforts but continued to use the informal, unnoticed process including for the purposes at issue in this manner. At minimum, a stay is necessary to examine the limits of 5 U.S.C. § 553.

Further, Defendants' use of the Certificate of Degree of Indian Blood is further troubling because is use in this instance cuts to the heart of tribal sovereignty. Defendants are redefining the term "Member of a Tribe or Tribal Member," for the purpose of 25 C.F.R. Part 81 from "any person who meets the criteria for membership in a tribe and, if required by the tribe, is formally enrolled" to any person determined by Defendants to be a member through the use of the Certificate of Degree of Indian Blood. 25 C.F.R. §81.4. Beyond an interpretation, Defendants have created a new process for a purpose not found in any publicly available document.

A Preliminary Injunction is warranted until this Court can determine whether rulemaking was required before the Certificate of Degree of Indian Blood may be used for purposes at issue in this matter.

b. Plaintiffs Second Claim for Relief – Defendants Have Violated the U.S. Constitution Fourteenth (Equal Protection) and Fifteenth Amendments (Race-Based Voting Preference)

The Plaintiffs have a substantial likelihood of success on the merits because the Defendants are pressing forward by use of a regulatory process that was not promulgated within proper APA procedure that does nothing more than to create a race-based criterion, and for purposes of voting in a federal election. A Secretarial election is a federal election. *See*: 25 C.F.R. §§ 81.4 "Secretarial Election"; § 81.11; § 81.16; § 81.27. Defendants have taken the process a step further and used the unlawful procedure to select individuals the Defendants deem to meet the Agency-created membership criteria in an Indian tribe in violation of the Fourteenth and Fifteenth Amendments to the U.S. Constitution. Indeed, without tribal membership as recognized by the Tribe, and reliance only on the Defendants' determination by use of the Certificate of Degree of Indian Blood, the

determination is nothing more than a racial classification. *See*: *Morton v. Mancari*, 417 U.S. 535 (1974).

Rather than fulfill the Department of Interior's duty of trust and protection by enforcing the Tribe's own defined membership criteria, the Defendants seek to cast the Plaintiffs aside and reorganize the Tribe in the shape of the Defendants' own likeness. Since the beginning of the Defendants' crusade to terminate the organized governing body of the California Valley Miwok Tribe, the Tribe has received notice through public postings on the Central California Agency, Bureau of Indian Affairs website and received very little voluntarily disclosed information. The Secretarial Election, which the Defendants intend to hold comes from the Defendants inviting itself inside the inner working of tribal governance, contrary to its own regulations which states that to request a Secretarial Election the tribe must submit "a duly adopted tribal resolution, tribal ordinance, or other appropriate tribal documentation requesting the Secretary to call a Secretarial election, or, . . . a petition that has been verified by the Bureau as having the minimum number of required signatures of tribal members." 25 C.F.R. §81.6. The California Valley Miwok Tribe did not call for a Secretarial Election and its enrolled members did not submit a petition to the Defendants for validation. The petition signatories are the alleged members that the Defendants designated through the installed Certificate of Degree of Indian Blood process.

Congress' power over Indian Affairs is frequently described as one that is "plenary and exclusive," and is derived from the Indian Commerce Clause. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989). Congress maintains broad power over Indian affairs, including the ability to abrogate a tribe's sovereign immunity, diminish a tribe's inherent powers, including defining a tribe's membership. However, Congress has not acquiesced nor utilized its power to delegate, implement, or authorize the use of a Certificate of Degree of Indian Blood to determine

tribal membership. *Morton v. Mancari*, 417 U.S. 535, 551-552 (1974). Without a grant of power from Congress, the Defendants do not have the power to intrude on one of the most fundamental and inherent principles of Indian law, that a tribe has the power to determine its own membership. *See Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 54-57, 72, n. 32 (1978). ("[a] tribe's right to define membership for tribal purposes has long been recognized as central to its existence[.]"); *see also Ordinance 59 Ass'n v. U.S. Dep't of Interior Sec'y*, 163 F.3d 1150, 1160 (10th Cir. 1998) ("tribes, not the federal government, retain authority to determine tribal membership.); *Martinez v. Southern Ute Tribe*, 249 F.2d 915, 920–21 (10th Cir.1957) ("The courts have consistently recognized that in absence of express legislation by Congress to the contrary, a tribe has the complete authority to determine all questions of its own membership, as a political entity[.]')

Plaintiffs are likely to succeed on the merits of these claims, and at a minimum have raised significant questions going to the merits of their claims.

3) An Injunction is Necessary to Avoid Irreparable Harm to Plaintiffs

> "If you can't change them, absorb them until they simply disappear into the mainstream culture.... In Washington's infinite wisdom, it was decided that tribes should no longer be tribes, never mind that they had been tribes for thousands of years."
>
> —Senator Ben Nighthorse Campbell

The basic premise of sovereignty is the ability to create laws and be ruled by them. The Defendants have ignored tribal law and their federal trust responsibility in using the Certificates of Degree of Indian Blood in this manner, and their disregard infringes upon tribal sovereignty. This Preliminary Injunction is necessary to prevent irreparable harm to Plaintiffs from the violation of basic tenants of Indian affairs of self-government and self-determination afforded to Plaintiffs as Indians and members of the California Valley Miwok Tribe, which, once violated by the

unwarranted interference of the Defendants without express congressional authorization, cannot be recreated.

Actions infringing on tribal sovereignty must be enjoined in order to preserve that sovereignty because harm to a tribe's sovereignty "cannot be remedied by any other relief other than an injunction." *Tohono O'odham Nation*, 837 F. Supp. at 1029; *c.f. Bowen v. Doyle*, 880 F. Supp. 99, 136 (W.D.N.Y. 1995) (citing *United States v. Michigan*, 508 F. Supp. 480, 492 (W.D. Mich. 1980)) (right of self-government protected by the Supremacy Clause of the Constitution, deprivation of such rights causes damage "presumed to be irreparable and an injunction should issue as a matter of course.").

"[T]he basis for injunctive relief in the federal courts has always been irreparable injury and the inadequacy of legal remedies." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) (citation omitted). The long-standing standard in this Circuit requires that the injury be certain and great and must be actual and not theoretical. *Center for Public Integrity v. U.S. Dep't of Defense*, 411 F.Supp.3d 5, 12 (D.D.C. 2019). Injunctive relief "will not be granted against something merely feared as liable to occur at some indefinite time." *Connecticut v. Massachusetts*, 282 U.S. 660, 674 (1931). The party seeking injunctive relief must show that "[t]he injury complained of [is] of such imminence that there is a 'clear and present' need for equitable relief to prevent irreparable harm." *Ashland Oil, Inc. v. F.T.C.*, 409 F.Supp. 297, 307 (D.D.C. 1976); *aff'd*, 548 F.2d 977 (D.C. Cir. 1976). Irreparable harm is more than a mere injury, but when the plaintiff cannot obtain adequate compensatory relief without a stay. *Virginia Petroleum Jobbers Ass'n v. Fed. Power Commn.*, 259 F.2d 921, 925 (D.C. Cir. 1958).

First, the feared outcome is not occurring at some indefinite point in time, there is an exact date, October 1, 2024. This is when, through the efforts of Defendants, a tribal government will

effectively be terminated by administrative action without any authorization of Congress to do so. The path of the Defendants is to revitalize the sin of America's Termination Era—the long abandoned federal policy that explicitly sought to eliminate Indian tribes from legal existence. When the Secretarial Election occurs, the Defendants will have effectively unseated the rightful government of the California Valley Miwok Tribe and replace it by installation with a federally selected group of people, dozens who are known to not be members of the Tribe. This will cause irreparable harm to the Tribe's sovereignty, self-determination and dignity. Without a preliminary injunction to stop the Defendants continued actions and use of the Certificate of Degree of Indian Blood criteria to determine eligibility in the Secretarial Election, the political and social stability of the California Valley Miwok Tribe will be permanently upended, and the enrolled tribal members will be diluted into the abyss; both without a chance for judicial review of serious and important legal questions.

This is not a dispute over the electoral process analogous to voter registration requirements or fundraising limitations, as this District has characterized this dispute in the past. *California Valley Miwok Tribe v. Haaland*, 2023 WL 8005033. Rather it is a dispute over the right of self-governance. Fundamental to the existence and autonomy of a tribe as a sovereign government is the right to determine the membership criteria for enrollment and accept or deny membership of applicants who meet the Tribe's criteria for enrollment. This is analogous to the United States of America's undisputed sovereign right to grant citizenship to immigrants based on criteria established in law. There is a difference between the United States and Indian tribes because of Congress' plenary power over Indian affairs. However, Congressional action is not at issue here, and that is part of the problem. A federal agency, acting on its own accord, without going through

the procedures established in the APA has taken it upon itself to designate membership in the Tribe for the purpose of the Secretarial Election.

Allowing the Defendants to dictate the government of an already organized and federally recognized Indian tribe violates the sovereignty of all tribes; especially the California Valley Miwok Tribe in this case. Far from being theoretical or an aspirational goal, sovereignty and self-determination form the foundation of any tribe's existence as a political entity. Such a procedure, if successful would permit the Defendants, upon any perceived agency initiative, or whim, to dissolve and reform any tribe in the United States in any way its officials deem fit. This Court must reign in this unchecked administrative action. At the very least, this Court should grant a preliminary injunction until these weighty matters can be decided on the merits.

4) The Injunction would not Substantially Injure other Interested Parties

A recurrent theme is that of the most basic and long-established principles of Indian law, that a tribe has the authority to determine its own membership. *See United States v. Wheeler*, 435 U.S. 313 (1978); *Cherokee Intermarriage Cases*, 203 U.S. 76 (1906); *Roff v. Burney*, 168 U.S. 218 (1897). A tribe has the power to set membership requirements through usage, written law, treaty with the United States or through inter-tribal agreements. *Delaware Indians v. Cherokee Nation*, 193 U.S. 127 (1904). The California Valley Miwok Tribe maintains a membership ordinance, which sets the requirements for membership in the Tribe, and a process for potential enrollees to apply through for tribal membership. While the Tribe has complete authority to determine tribal membership, the Defendants have the duty to construe the membership requirements of the Tribe's Ordinance. *See Baciarelli v. Morton*, 481 F.2d 610, 611–12 (9th Cir. 1973).

Defendants would not be harmed if this Court were to bar the Defendants from conducting a Secretarial Election where membership is based on the BIA's Certificate of Degree of Indian

Blood. *FBME Bank Ltd. v. Lew*, 125 F.Supp.3d 109, 129 (D.D.C. 2015) (granting preliminary injunction to "hold[] Defendants to its full procedural obligations" when merely delaying the implementation of the rule would "provide the parties with additional time to litigate the contours of Defendants' obligations without meaningfully affecting" the government's interest). Here, the Defendants must fulfill its full procedural obligations first before its implementation and use of the Certificate of Degree of Indian Blood.

This Court has recognized that preliminary injunctions are appropriate when the relief "will result in no discernable injury to defendants." *Elzie v. Aspin*, 841 F.Supp. 439, 443 (D.D.C. 1993). Defendants will not experience hardship by any delay in the implementation of the Certificate of Indian Blood classification procedure. The Defendants attempted to promulgate regulations on the use of Certificate of Degree of Indian Blood beginning in approximately 1999, with the effort ultimately being abandoned in 2014. The deemed leadership dispute that began in roughly 2003 ended in 2017. During that time the government of the Tribe, its General Council, have continued to operate effectively in governing the Tribe, and the Defendants continue to function. Defendants do not experience any hardship from a delay in their efforts to "reorganize" an organized tribe.

Collaterally and moreover, the status quo does not divest anyone of any rights. Over fifteen years several lawsuits vetted the necessity of a greater tribal community to reorganize the status of the California Valley Miwok Tribe. The holding of these cases squarely was (1) a determination that there were ancestors that were "eligible" and those (2) in those "eligible groups" may participate in a validly called and held Secretarial Election pursuant to the Indian Reorganization Act. Hence, other parties in the "eligible groups" would not suffer any injury as they have never before been Indians or members of the Tribe pursuant to federal law. These unenrolled non-members, who the Defendants have decided are now qualified members by use of the Certificate

of Degree of Indian Blood, do not have a vested legal or political interest that would justify continuing the use of Certificate of Degree of Indian Blood until this Court has an opportunity to examine the use and practice. Any argument that Defendants must move forward is illusory and based on pure hypothetical impacts on individuals with not special political status as Indians that benefit from statutory or constitutional duties or obligations. Therefore, the group selected by the Defendants through the Certificate of Degree of Indian Blood cannot experience a hardship from a delay because those individuals have no right to participate in tribal governance.

5) The Public Interest would be Furthered by an Injunction

The requested preliminary injunction would serve the public interest. The public interest is best served by having federal agencies comply with the requirements of federal law, particularly the notice and comment requirements of the APA. *Patriot, Inc. v. U.S. Dept. of Housing and Urban Dev.*, 963 F.Supp. 1 (D.D.C. 1997). This is especially true in the context of tribal-federal relations as it is also in the public interest to honor the government-to-government promises that were made to Indian tribes as political entities. "Great nations, like great men, should keep their word." *Fed. Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 142 (1960) (Black, J., dissenting). Further, Congress has clearly shown that its policy is that of self-determination and self-governance for tribal nations. *See* Geoffrey D. Strommer & Stephen D. Osborne, *The History, Status, and Future of Tribal Self-Governance Under the Indian Self-Determination and Education Assistance Act*, 39 Am. Indian L. Rev. 1, 16 (2015).

The balance of public interest weights in favor of an injunction as the Certificate of Indian Blood procedure has failed to undergo notice and comment procedure and stands as a "hidden regulation," existing only inside the records of the BIA. Applying this new theory to the field of Indian law would potentially upend hundreds of tribes across the United States by transferring the

determination of tribal membership from the tribes themselves to the Defendants, without Congressional authority to do so. Currently, Defendants are reconnecting with its old, dark institutional roots by employing a policy from the Allotment Era where officials would determine if an Indian was "civilized enough" to manage their own property, with the tinges of racism that were on the front lines during the Termination Era, eradicating tribes from federal recognition to effectuate federal initiatives meant to destroy the trust obligations to Indians.

The requested preliminary injunction would best serve the public interest. The public interest is best served by having federal agencies comply with the requirements of federal law. "Failure to comply with the letter of the law … offends public interests." *Sac & Fox Tribe of Iowa v. United States*, 264 F. Supp. 2d 830, 842 (N.D. Iowa), *aff'd in part, rev 'din part, In re Sac & Fox Tribe of Miss. in Iowa/Meskwaki Casino Litig.*, 340 F.3d 749 (8th Cir. 2003).

Injunctive relief is in the public interest.

CONCLUSION

For the foregoing reasons stated herein, the Plaintiffs respectfully request that this Court enter a preliminary injunction until there is a resolution of the merits of Plaintiffs' claims. Plaintiffs previously believed there was ample time for this Court to resolve these issues, but now there is a pressing issue at hand and a precipice date of October1, 2024. The status quo must be preserved for this Court to have time to rule on these critical issues.

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Respectfully submitted,

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By: /s/ Peter D. Lepsch

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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of September, 2024, I caused the service of the attached **Memorandum of Points and Authorities In Support of Plaintiffs' Motion for Preliminary Injunction** by filing it with the Clerk of the Court via the CM/ECF System, which sends a Notice of Electronic Filing to all parties with an e-mail address of record who have appeared and consented to electronic service. To the best of my knowledge, all parties to this action receive such notices.

By: /s/ Peter D. Lepsch

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