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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ALTURAS INDIAN RANCHERIA,

NO. CIV. S-10-1997 LKK/EFB

Plaintiff,

v.

O R D E R

KENNETH L. SALAZAR,
et al.,

Defendants.

_____ /

Plaintiff, the Alturas Indian Rancheria ("Tribe"), filed suit against the Department of the Interior and its officials (collectively "defendants," the "Secretary," or the "Department") for failing to renew its self-determination contract in violation of the Indian Self Determination and Education Assistance Act ("ISDA") and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 704 and 706. Plaintiff seeks an order, inter alia, declaring that it is entitled to renewal of its self-determination contract under the ISDA, 25 U.S.C. § 450 et seq.

In response to plaintiff's allegations, defendants have filed

1 a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1), alleging
2 that this court lacks subject matter jurisdiction because plaintiff
3 has failed to exhaust administrative remedies and there is no final
4 agency action.

5 For the reasons stated below, defendants' motion to dismiss
6 is DENIED.

7 **I. Background**

8 Plaintiff is a federally-recognized tribe. (Compl. ¶ 8.) The
9 governing body of the Tribe is the General Council, which is
10 comprised of all members of the Tribe over eighteen years of age.
11 (Compl. ¶ 15.) The Tribe's last undisputed General Council
12 consisted of five members: Phillip Del Rosa, Wendy Del Rosa, and
13 the three members collectively referred to as the "Rose Faction"
14 – Darren Rose, Jennifer Chrisman, and Joseph Burrell. (Defs.' Mem.
15 Supp. Dismiss 3; Pls.' Mem. Supp. Op. 3.) On February 28, 2009, the
16 General Council of the Tribe voted to adopt two individuals, Calvin
17 Phelps and Don Packingham, as members of the Tribe. The Del Rosa
18 group, which includes Phelps and Packingham, and the Rose Faction
19 disagree about whether Phelps and Packingham are merely honorary
20 members of the Tribe or whether they have full membership,
21 including voting rights on all Tribal matters. (Defs.' Mem. Supp.
22 Dismiss at 3; Pls.' Mem. Supp. Op. 4.) They also dispute the
23 validity of an attempt to remove Phillip Del Rosa as Chairman of
24 the Tribe. (Defs.' Mem. Supp. Dismiss at 3; Pls.' Mem. Supp. Op.
25 5.)

26 In April and May of 2009, both the Del Rosa group and the Rose

1 Faction contacted the Bureau of Indian Affairs ("BIA") regarding
2 their membership and governance dispute. See Pl.'s Opp'n, Exhibit
3 F. In June 2009, the BIA's Northern California Agency
4 Superintendent (the "Superintendent") issued two letters, dated
5 June 6 and June 19, informing the Del Rosa group and the Rose
6 Faction of his decision that, due to the Tribe's internal dispute,
7 all the Tribe's General Council members, including the adoptees,
8 were to be given an opportunity to vote on any request for federal
9 action and that a minimum of four of the seven members would have
10 to vote in favor of any such request. (Defs.' Mem. Supp. Dismiss
11 at 3-4; Pls.' Mem. Supp. Op. 5-6.; Exhibit F). On July 2, 2009, the
12 Rose Faction appealed the Superintendent's decision to the Regional
13 Director of the BIA's Pacific Regional Office. (Exhibit G; see
14 Defs.' Mem. Supp. Dismiss at 4; Pls.' Mem. Supp. Op. 6.)

15 On December 31, 2009, while the Rose Faction's July 2 appeal
16 was pending, a self-determination contract that the Tribe had with
17 the BIA under the ISDA expired prompting the need for the Tribe to
18 submit a contract renewal proposal to the BIA. (See Compl. ¶ 22.)
19 The ISDA directs the Secretary of the Department, upon request from
20 an Indian tribe, to enter into self-determination contracts with
21 tribal organizations. See 25 U.S.C. § 450f(a)(1). A tribal
22 organization is "the recognized governing body of any Indian tribe;
23 any legally established organization of Indians which is controlled
24 sanctioned, or chartered by such governing body or which is
25 democratically elected by the adult members of the Indian community
26 to be served by such [an] organization and which includes the

1 maximum participation of Indians in all phases of its
2 activities..." 25 U.S.C. § 450b(1).

3 Once the Secretary receives a contract proposal from a duly-
4 authorized tribal organization, he has ninety days to either (1)
5 approve the proposal and award the contract, or (2) issue a written
6 notification declining the proposal for one of five reasons listed
7 in § 450f(a)(2). See 25 U.S.C. § 450f(a)(2) (emphasis added). If
8 the Secretary declines the proposal, he must "state any objections
9 in writing[,]" "provide assistance to the tribal organization to
10 overcome the stated objections," and "provide the tribal
11 organization with...the opportunity for appeal on the objections
12 raised..." 25 U.S.C. § 450f(b). "[I]n lieu of" filing such appeal,
13 a tribal organization may "exercise the option" to initiate federal
14 court action pursuant to section 450m-1(a). See § 450f(b).

15 On February 26, 2010, the BIA's Northern California Agency
16 (the "Agency") received a request from the Rose Faction, purporting
17 to act on behalf of the Tribe, for renewal of the Tribe's ISDA
18 self-determination contract. (Compl. ¶ 25.) This is the request at
19 issue in this action. As of February 26, 2010, however, the Tribe's
20 membership and governance dispute remained unresolved. Following
21 the Rose Faction's July 2 appeal, the BIA Regional Director had
22 vacated the Superintendent's June 2009 decisions on January 29,
23 2010, stating that, until the Tribe resolved its internal dispute,
24 the BIA would recognize the Tribe's General Council as consisting
25 of only five members, excluding the adoptees. (Defs.' Mem. Supp.
26 Dismiss at 4; Pls.' Mem. Supp. Op. 6.) The Del Rosa group then

1 appealed the BIA Regional Director's January 29 decision to the
2 Interior Board of Indian Appeals (the "Board"). (Defs.' Mem. Supp.
3 Dismiss at 4; Pls.' Mem. Supp. Op. 7.)

4 On February 19, 2010, the BIA Regional Director issued a
5 letter to the Del Rosas clarifying that, while their appeal was
6 pending, the BIA would continue, in the interim, to recognize the
7 Tribe's governing body as constituted prior to the governance
8 dispute for purposes of government-to-government relations. (Pls.'
9 Mem. Supp. Op. 7. (citing Pls.' Exhibit I).) Plaintiffs allege that
10 the February 19 letter constituted a decision by the BIA Regional
11 Director that went into effect on or around March 19, 2010 pursuant
12 to 25 C.F.R. 2.6(b) – which states that BIA official's decisions
13 "shall be effective when the time for filing a notice of appeal has
14 expired" if no appeal has been filed – because the Del Rosa group
15 appealed only the BIA Regional Director's January 29 decision. Id.
16 Plaintiffs further allege that the February 19 "decision" led to
17 the award of a self-determination contract for road and repair
18 construction to the Tribe on April 15, 2010. (Pls.' Mem. Supp. Op.
19 7.) That contract is not at issue in the instant action and, given
20 the Board's subsequent decision to vacate the BIA Regional
21 Director's January 29 decision, it is irrelevant to the court's
22 analysis.

23 On May 14, 2010, while the Del Rosa group's appeal of the BIA
24 Regional Director's January 29 decision was pending, the Agency
25 received another request to renew the Tribe's expired contract.
26 (Defs.' Mem. Supp. Dismiss at 4; Exhibit 4.) The second request

1 came bearing signatures from two of the four members of the Del
2 Rosa group, who were also purporting to act on behalf of the Tribe.
3 (See Defs.' Mem. Supp. Dismiss at 4; Exhibit 4.) On May 25, 2010,
4 the Superintendent returned both requests, noting the Tribe's
5 internal dispute and explaining that he did not have jurisdiction
6 to determine if either request was from a "tribal organization" as
7 defined under the ISDA because, at the time that the Tribe's
8 dueling factions submitted their contract renewal requests, the Del
9 Rosa group's appeal of the BIA Regional Director's January 29
10 decision regarding the composition of the Tribe's governing body
11 was pending before the Board. (Defs.' Mem. Supp. Dismiss at 4;
12 Pls.' Mem. Supp. Op. 8.)

13 On June 29, 2010, the Board vacated both the BIA Regional
14 Director's January 29 decision and the Superintendent's June 2009
15 decisions regarding the Tribe's governance dispute because, at
16 the time those decisions were issued, there was no pending matter
17 requiring federal action that would justify taking a position on
18 the Tribe's governance dispute. Del Rosa v. Acting Pacific
19 Regional Director, Bureau of Indian Affairs, 51 IBIA 317, 320
20 (2010). It is "well-established that the ultimate determination
21 of tribal governance must be left to tribal procedures," Wasson
22 v. Western Regional Director, 42 IBIA 141, 158 (2006), unless
23 "the Department must deal with the tribe for
24 government-to-government purposes, [then] the Department may need
25 to recognize certain individuals as tribal officials on an
26 interim basis, pending final resolution by the tribe." LaRocque

1 v. Aberdeen Area Director, 29 IBIA 201, 203 (1996).

2 As the Board noted, however, by the time the Del Rosa
3 group's appeal came before it, both factions had submitted ISDA
4 contract proposals to the BIA. Del Rosa, 51 IBIA at 320.
5 Defendants claim that in order to act on the proposals, the BIA
6 would have to address the tribal membership and governance issues
7 and recognize a governing body on an interim basis, pending the
8 tribe's final resolution of the dispute. See id.; LaRocque, 29
9 IBIA at 203. The Board's decision to vacate the BIA's prior
10 governance determinations returned jurisdiction to the BIA to
11 address the Tribe's governance and membership issues in the
12 specific context of considering the ISDA contract proposals. Del
13 Rosa, 51 IBIA at 320; see also Alturas Indian Rancheria v. N.
14 Cal. Agency Superintendent, Bureau of Indian Affairs, 52 IBIA 7,
15 9 (2010). The Board subsequently affirmed the Superintendent's
16 May 25 decision not to act on the contract proposals for lack of
17 jurisdiction because of the then-pending Del Rosa appeal and
18 remanded the case to the Superintendent to determine, in the
19 first instance, the threshold issue of whether the Rose Faction
20 should be recognized, on an interim basis or otherwise, as having
21 the authority to submit the proposal on behalf of the tribe.
22 Alturas Indian Rancheria, 52 IBIA at 10.

23 Following the Board's decisions, the Rose Faction filed the
24 Complaint in the instant action on July 27, 2010. (Defs.' Mem.
25 Supp. Dismiss at 5; Pls.' Mem. Supp. Op. 9.) On August 18, 2010,
26 in response to the Board's remand, the Superintendent reaffirmed

1 his May 25 determination that the BIA would consider the Tribe's
2 General Council to be composed of seven members and that the BIA
3 would require a majority vote from the General Council in order
4 to move forward with any federal action, pending tribal
5 resolution of the membership and governance dispute. (See Defs.'
6 Mem. Supp. Dismiss at 5; Pls.' Mem. Supp. Op. 9.) The
7 Superintendent then returned the contract proposals to both
8 factions because neither proposal met the quorum requirement.
9 This pre-award decision¹ on the ISDA contract proposal is subject
10 to appeal pursuant to 25 C.F.R. Part 900, Subpart L. Two days
11 later, the Rose Faction appealed the Superintendent's August 18
12 decision to the BIA Regional Director and that appeal is still
13 pending. (Defs.' Mem. Supp. Dismiss at 5; Pls.' Mem. Supp. Op.
14 9.) The BIA Regional Director anticipates deciding the Rose
15 Faction's appeal by the end of October 2010. (Defs.' Reply Pls.'
16 Mem. Supp. Op. 4.)

17 **II. Analysis**

18 The Tribe² seeks an order declaring, inter alia, that it is

19
20 ¹ The Board treats BIA decisions refusing to act on ISDA
21 proposals on the ground that the submitting party has not shown
22 that the proposal is authorized by the tribe as an "otherwise
23 appealable pre-award decision" under 25 C.F.R. § 900.150(i). See
24 Trenton Indian Service Area v. Turtle Mountain Agency
25 Superintendent, 47 IBIA 60, 60 (2008).

26 ² The complaint in the instant action states that it was
submitted on behalf of the Alturas Indian Rancheria (the "Tribe").
The present composition of the Tribe and its General Council is a
matter of dispute within the Tribe. The members who purport to
represent the Tribe in bringing this action are Darren Rose,
Jennifer Chrisman, and Joseph Burrell—the Rose Faction. The caption
of this Order and references to the Tribe as plaintiff shall not

1 entitled to renewal of its self-determination contract under the
2 ISDA, 25 U.S.C. § 450 et seq., and that its proposed contract is
3 deemed approved by operation of law. (Compl. ¶¶ 2-3.) The Tribe
4 argues that it is entitled to such an order because the BIA
5 failed to take action on the Tribe's contract renewal request
6 within the statutorily-required time-period in violation of the
7 APA, 5 U.S.C. §§ 704 and 706, and because it did not comply with
8 the declination requirements of Section 102 of the ISDA, 25
9 U.S.C. § 450f. (See Compl. ¶¶ 1-3.)

10 Defendants do not dispute that BIA did not comply with the
11 statute's declination procedures. Instead, defendants first argue
12 that the court has no jurisdiction over the ISDA claim because
13 the BIA has been unable to determine whether the Rose Faction
14 qualifies as an authorized "tribal organization" under the ISDA;
15 that issue is currently pending appeal before the BIA. (Defs.'
16 Mem. Supp. Dismiss at 1, 7.) Further, defendants maintain that,
17 even if the court were to assume that the Rose Faction could be
18 considered a "tribal organization," the pending appeal precludes
19 the Tribe from proceeding directly to court. (Defs.' Mem. Supp.
20 Dismiss at 7.) Secondly, defendants argue that the court lacks
21 jurisdiction over the APA claim because the Rose Faction has not
22 exhausted its administrative remedies, and there is no final
23 agency action.

24 _____
25 be construed as an expression of any view on the merits of the
26 underlying tribal dispute or whether the Rose Faction could bring
this action in the name of the Tribe.

1 **A. Standard for a 12(b)(1) Motion to Dismiss**

2 It is well established that the party seeking to invoke the
3 jurisdiction of the federal court has the burden of establishing
4 that jurisdiction exists. KVOS, Inc. v. Associated Press, 299
5 U.S. 269, 278 (1936); Assoc. of Medical Colleges v. United
6 States, 217 F.3d 770, 778-779 (9th Cir. 2000). On a motion to
7 dismiss pursuant to Fed. R. Civ. P. 12(b)(1), the standards that
8 must be applied vary according to the nature of the
9 jurisdictional challenge.

10 When a party brings a facial attack to subject matter
11 jurisdiction, that party contends that the allegations of
12 jurisdiction contained in the complaint are insufficient on their
13 face to demonstrate the existence of jurisdiction. Safe Air for
14 Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004). In a
15 Rule 12(b)(1) motion of this type, the plaintiff is entitled to
16 safeguards similar to those applicable when a Rule 12(b)(6)
17 motion is made. See Sea Vessel Inc. v. Reyes, 23 F.3d 345, 347
18 (11th Cir. 1994), Osborn v. United States, 918 F.2d 724, 729 n.6
19 (8th Cir. 1990); see also 2-12 Moore's Federal Practice - Civil
20 § 12.30 (2009). The factual allegations of the complaint are
21 presumed to be true, and the motion is granted only if the
22 plaintiff fails to allege an element necessary for subject matter
23 jurisdiction. Savage v. Glendale Union High Sch. Dist. No. 205,
24 343 F.3d 1036, 1039 n.1 (9th Cir. 2003), Miranda v. Reno, 238
25 F.3d 1156, 1157 n.1 (9th Cir. 2001). Nonetheless, district courts
26 "may review evidence beyond the complaint without converting the

1 motion to dismiss into a motion for summary judgment” when
2 resolving a facial attack. Safe Air for Everyone, 373 F.3d at
3 1039.

4 Alternatively, when a party brings a factual attack, it
5 “disputes the truth of the allegations that, by themselves, would
6 otherwise invoke federal jurisdiction.” Id. Specifically, a party
7 converts a motion to dismiss into a factual motion where it
8 “present[s] affidavits or other evidence properly brought before
9 the court” in support of its motion to dismiss. Id. Unlike in a
10 motion to dismiss under Fed. R. Civ. P. 12(b)(6), the court need
11 not assume the facts alleged in a complaint are true when
12 resolving a factual attack. Id. (citing White v. Lee, 227 F.3d
13 1214, 1242 (9th Cir. 2000)). While the motion is not converted
14 into a motion for summary judgment, “the party opposing the
15 motion must [nonetheless] furnish affidavits or other evidence
16 necessary to satisfy its burden of establishing subject matter
17 jurisdiction.” Id. When deciding a factual challenge to subject
18 matter jurisdiction, district courts may only rely on facts that
19 are not intertwined with the merits of the action. Id.

20 **B. Subject-Matter Jurisdiction under ISDA**

21 This court has “original jurisdiction over any civil action
22 or claim against the appropriate Secretary arising under” ISDA.
23 25 U.S.C. § 450m-1(a). The instant dispute arises from the
24 Secretary’s failure to respond to plaintiff’s contract renewal
25 request submitted pursuant to ISDA.

26 ISDA directs BIA, “upon the request of any Indian tribe by

1 tribal resolution," to enter into self-determination contracts
2 with a tribal organization. 25 U.S.C. § 450f(a)(1). "If so
3 authorized by an Indian tribe[,]...a tribal organization may submit
4 a proposal" for such a contract and BIA "shall, within ninety
5 days after receipt of the proposal approve the proposal and award
6 the contract" unless BIA "provides written notification to the
7 applicant that contains a specific finding that clearly
8 demonstrates" one of five valid reasons for declining the
9 contract renewal. Id. § 450f(a)(2). Defendant argues that ISDA's
10 90-day provision was never triggered since the BIA never received
11 a contract proposal from a duly authorized tribe. The Tribe
12 argues that any governance dispute that existed at the time that
13 the contract proposal was submitted is irrelevant to the
14 Secretary's obligations under ISDA.

15 Long-standing policy, as well as federal court precedent,
16 require the Department, when faced with an obligation to interact
17 with a governing body during a governance dispute, to temporarily
18 recognize a governing body to interact with. See, Goodface v.
19 Grassrope, 708 F.2d 335 (8th Cir. 1983). Normally, the Department
20 recognizes the last undisputed governing body. Poe v. Pacific
21 Regional Director, 43 IBIA 105, 112 (2006). In this case, the
22 last undisputed governing body was the five-member Governing
23 Council. When the Secretary received a contract proposal from
24 that governing body, ISDA's provisions were triggered, and the
25 Secretary had 90 days to accept or decline the proposal.

26 Plaintiff's claim against the Secretary therefore arises


1 under ISDA, and this court has original jurisdiction pursuant to
2 25 U.S.C. § 450m-1(a).

3 **III. Conclusion**

4 For the foregoing reasons, defendant's motion to dismiss for
5 lack of subject-matter jurisdiction, ECF No. 6, is DENIED.

6 IT IS SO ORDERED.

7 DATED: October 15, 2010.

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11 LAWRENCE K. KARLTON
12 SENIOR JUDGE
13 UNITED STATES DISTRICT COURT
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