

**IN THE UNITED STATES COURT OF FEDERAL CLAIMS**

_____	)	
SHELDON PETER WOLFCHILD, <i>et al.</i> ,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 03-2684L and
	)	Case No. 01-568L (consolidated)
	)	
THE UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	
_____	)	

**THE UNITED STATES' REDACTED OPPOSITION TO PLAINTIFFS' MOTION  
FOR A HEARING SEEKING TO ENJOIN AND FOR MISCELLANEOUS  
RELIEF**

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**MEMORANDUM**

**I. INTRODUCTION**

Plaintiffs seek truly extraordinary relief in their motion based upon pure conjecture and without demonstrating that there exists any irreparable harm. Plaintiffs request that this Court issue a prospective injunction upon the United States to prevent the future misuse of federally-regulated gaming revenue by the SMSC because they allege that the SMSC have offered monetary compensation if the Oglala Sioux Tribe (“Oglala” or “OST”) rescinds a tribal resolution authorizing it to file an amicus brief before the Supreme court, an action that has already occurred. Pls.’ Br., 25-26. This Court, however, lacks the power to grant the relief sought by Plaintiffs. In the absence of an express grant of jurisdiction from Congress, the Court of Federal Claims does not have the authority to issue declaratory or injunctive relief. *White Buffalo Constr., Inc. v. United States*, 52 Fed. Cl. 1, 5 n. 9 (2002). To the extent the Court determines it has such authority, Plaintiffs’ mere speculation over what actions the Oglala, a non-party potential amicus, may take cannot serve as the basis for an injunction against the United States.

First, Plaintiffs cannot succeed on the merits of their motion. The United States does not have control over the Communities’ gaming revenue. Gaming revenue is tribal property and not resources held in trust by the federal government. *Vizenor v. Babbitt*, 927 F. Supp. 1193, 1203 (D. Minn. 1996). Plaintiffs’ requested injunction could not issue. Second, the allegations contained in the motion do not prove Plaintiffs’ ultimate assertion, that there was interference with the due process of this Court or illegal acts were undertaken. Third, there is no irreparable harm to Plaintiffs. Plaintiffs have shown no

harm other than speculation that a non-party may not file an amicus brief in this case.

Plaintiffs' motion, therefore, should be denied.

## **II. ARGUMENT**

### **A. Legal Standards**

Plaintiffs, in essence, seek a permanent injunction against the United States. A permanent injunction, much like a preliminary injunction, "is extraordinary relief...." *Eracent, Inc. v. United States*, 79 Fed. Cl. 427, 432 (2007). The test for a permanent injunction "is almost identical to that for a temporary restraining order or preliminary injunction." *Labatt Food Serv., Inc. v. United States*, 84 Fed. Cl. 50, 65 (2008). Whereas a preliminary injunction or temporary restraining order requires the likelihood of success on the merits, a permanent injunction requires actual success on the merits. *See Amoco Prod. Co. v. Village of Gambell, Alaska*, 480 U.S. 531, 546 n. 12 (1987) ("The standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that the plaintiff must show a likelihood of success on the merits rather than actual success."). If the plaintiff cannot demonstrate actual success on the merits, permanent injunctive relief cannot be granted. *Nat'l Steel Car, Ltd. v. Canadian Pac. Ry.*, 357 F.3d 1319, 1325 (Fed. Cir. 2004).

Thus, the court must consider the following factors when assessing the viability of issuing a permanent injunction: whether (1) the plaintiff has succeeded on the merits of the case; (2) the plaintiff will suffer irreparable harm if the court withholds injunctive relief; (3) the balance of the hardships to the respective parties favors the grant of injunctive relief; and (4) the grant of injunctive relief is in the public interest. *PGBA, LLC v. United*

*States*, 389 F.3d 1219, 1228-29 (Fed. Cir. 2004) (citing *Amoco Prod. Co.*, 480 U.S. at 546 n. 12). Plaintiffs are not entitled to an injunction if they fail to demonstrate a likelihood of success on the merits. *Nat'l Steel Car, Ltd.*, 357 F.3d at 1325; see *Amazon.com, Inc. v. Barnesandnoble.com, Inc.*, 239 F.3d 1343, 1350 (Fed. Cir. 2001) (noting that both “case law and logic” establish the likelihood of success on the merits and the irreparable harm factors as necessary showings to obtain an injunction).

**B. Plaintiffs’ Motion to Enjoin Should Be Denied**

**1. This Court Lacks the Power to Grant the Relief Sought by Plaintiffs**

Plaintiffs’ motion requests injunctive relief. See Pls.’ Br. at 23-26. Plaintiffs cite to no authority that would allow the Court to grant such equitable relief, and, indeed, no such authority exists. Plaintiffs argue that 28 U.S.C. § 1651(a), the All Writs Act, provides this authority. To buttress their claim, they cite to *Kamen Soap Products Co. v. United States*, 110 F. Supp. 430 (Ct. Cl. 1953). This case provides no authority for their proposition. In *Kamen*, the court found that it could issue a subpoena *duces tecum* for the production of documents against the United States, finding that “a writ of subpoena *duces tecum* may be ‘necessary or appropriate’ in aid of the jurisdiction of this court, and that its issuance would be ‘agreeable to the usages and principles of law’ cannot be questioned.” 110 F. Supp. at 438. In this case, Plaintiffs seek the imposition of an injunction against the United States, which this Court cannot do. See *Security Sav. and Loan Ass’n v. United States*, 983 F.2d 1085, 1992 WL 349334 (Fed. Cir. 1992) (court declined to issue an injunction, holding that the All Writs Act does not confer power on a court to expand its jurisdiction beyond clearly expressed statutory limits); see also *Clark v. Bussey*, 959 F.2d

808 (9th Cir.1992).

In the absence of an express grant of jurisdiction from Congress, the Court of Federal Claims does not have the authority to issue declaratory or injunctive relief. *White Buffalo Constr., Inc.*, 52 Fed. Cl. at 5 n. 9; *see also United States v. King*, 395 U.S. 1, 5 (1969) (“In the absence of an express grant of jurisdiction from Congress, we decline to assume that the Court of Claims has been given authority to issue declaratory judgments.”); *Brown v. United States*, 105 F.3d 621, 624 (Fed. Cir. 1997) (demands for declaratory and injunctive relief are outside the Court of Federal Claims’ jurisdiction). For example, Congress has specifically granted the Court of Federal Claims the power to grant both declaratory and injunctive relief in bid protest cases. *See* 28 U.S.C. § 1491(b)(2) (2001). Congress has not done so in any other area. *Security Sav. and Loan Ass’n*, 983 F.2d at \*3. Otherwise, where permitted by the Constitution or a federal statute(s), the Court of Federal Claims’ jurisdiction is limited to the payment of money damages. *Murray v. United States*, 817 F.2d 1580, 1582-83 (Fed. Cir. 1987). The All Writs Act, 28 U.S.C. § 1651, does not alter this conclusion. Accordingly, the Court should dismiss Plaintiffs’ claim for injunctive relief.

## **2. Plaintiffs Cannot Succeed on the Merits**

To the extent the Court determines it has the authority to issue such an injunction, which the United States asserts that it does not, since Plaintiff’s request is “an extraordinary and drastic remedy,” it must not be granted:

unless movant “clearly carries the burden of persuasion” as to the four prerequisites. *Canal Authority v. Callaway*, 489 F.2d 567 (5th Cir. 1974). “The burden of persuasion in all of the four requirements is at all times upon the plaintiff.” *Id.* at 573.

*United States v. Jefferson County*, 720 F.2d 1511, 1519 (11th Cir. 1983), *reh'g denied*, 724 F.2d 978 (1984). Here, Plaintiffs cannot carry this burden. First, the United States does not have “regulatory authority over IGRA gaming revenues,” as Plaintiffs’ allege. Pls.’ Br. at 26. IGRA allows for the per capita distribution of gaming proceeds to tribal members if such distribution is according to an adopted plan that contains certain provisions and is approved by the Secretary of the Interior. 25 U.S.C. § 2710(b)(3). The Secretary of the Interior has approved the Communities’ gaming revenue allocation plans. The United States, however, has no control over these funds once generated pursuant to an approved plan. The gaming revenue “are generated by the [Indian] Community’s corporate gaming enterprise, are managed by the [Indian] Community, and have no different status than other revenues from tribal businesses.” *Smith v. Babbitt*, 875 F. Supp. 1353, 1369 (D. Minn. 1995). These monies are not funds held in trust by the government for which the United States may exert some control. *See Vizenor v. Babbitt*, 927 F. Supp. at 1203 (the gambling monies are tribal property); *see also Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wis. v. United States*, 259 F. Supp. 2d 783, 791 (D. Wis. 2003) (noting that the IGRA “does not create a situation in which the federal government holds resources in trust for the Indians.”). The Court cannot enjoin the United States in an area in which it has no responsibility or control.

Plaintiffs also have not shown that any violation of law has taken place. There is no law or regulation that prohibits the alleged solicitation described by Plaintiffs. In fact, based on the record presented by Plaintiffs, it is unclear if any solicitation took place, and if so, what impact that alleged solicitation will have on the Oglala decision to file an amicus

brief in this current proceeding. Such speculation cannot be the basis for the extreme remedy Plaintiffs' seek.

Plaintiffs' case citations are inapposite to this matter. *See Pls.' Br.* at 19 n.67, 20 n.70, and 22 n.76. The first case, *Cosby v. Meadors*, 351 F.3d 1324, 1326-27 (10th Cir. 2003) involves the dismissal of an action for failure to pay the filing fee. The next case, *Findlay v. McAllister*, 113 U.S. 104 (1885), concerns a conspiracy of defendants to injure and defraud a plaintiff by preventing the collection of his judgment. Thus, plaintiff was able to maintain an action against the defendants. In the final case, *Michalson v. All*, 43 S.C. 459, 21 S.E. 323 (1895), the South Carolina Supreme court found that a plaintiff had stated a cause of action of conversion of cotton where the cotton had a lien, even though the only remedy to enforce an agricultural lien was provided by statute. These cases do not offer any support for Plaintiffs' requested relief.

The law review article cited by Plaintiffs, John Ferejohn, "Independent Judges, Dependent Judiciary: Explaining Judicial Independence," 72 S. Cal. L. Rev. 353 (1999), also offers no support to Plaintiffs' position. This article presents the author's views on internal and external aspects of judicial independence. In the portion of the article cited by Plaintiffs, the author discusses interest driven theories of judicial independence and the impact of litigant's socio-economic status in improving the chances of prevailing in a controversy. It does not, however, provide any support for the assertion that the judicial process in this case has been in anyway interfered with.

**3. Plaintiffs have not suffered Any Harm and the Harm Alleged is Speculative at Best**

Plaintiffs fail to show that they would be irreparably injured if their motion was denied. When a party seeks injunctive relief, it must demonstrate an immediate and irreparable harm that justifies the exercise of a court's equitable powers prior to a trial on the merits. *Wisconsin Gas Co. v. Fed. Energy Regulatory Comm'n*, 758 F.2d 669, 674 (D.C. Cir. 1985). The burden of justifying interim relief lies with the movant, and threatened, speculative harm does not amount to irreparable injury for purposes of justifying an injunction. *Wisconsin Gas Co.*, 758 F.2d at 674 (the alleged injury "must be both certain and great; it must be actual and not theoretical. Injunctive relief 'will not be granted against something merely feared as liable to occur at some indefinite time.'") (quoting *Connecticut v. Massachusetts*, 282 U.S. 660, 674 (1931)). Plaintiffs articulate no concrete irreparable harm.

Plaintiffs cannot establish irreparable harm based on an event that has not yet happened and which may not happen. The United States notes that Plaintiffs' factual submissions do not support their ultimate allegation of harm. Each declarant bases his or her declaration on conversations or facts "learned" from another source. The ultimate source, however, issued statements that contradict the declarations. Furthermore, the ultimate allegation of harm, that the Oglala Sioux Tribe will not file an amicus brief in this case due to the potential rescission of a prior Oglala resolution is conjecture at this point and cannot be used to support the drastic remedy Plaintiffs' seek. On October 11, Plaintiffs' filed a Factual Update on Oglala Tribal Council's Consideration of the Economic and Business Development Committee's Recommendation to Withdraw *amicus curiae* Support. Dkt. 820. In this update, Plaintiffs' counsel, Erick Kaardal, states that



[REDACTED]

[REDACTED]

[REDACTED] These

declarations are insufficient to support Plaintiffs' ultimate allegations.

Furthermore, it does not follow that because the committee on which Mr. Good Crow sits passed a proposed resolution for the main Oglala Council to consider whether to

rescind the previous resolution authorizing the Oglala to file an amicus brief in the proceedings before the Supreme Court, Oglala is estopped or will not file an amicus brief in support of Plaintiffs in this current proceeding. The only basis for this assertion is contained in the Declaration of Erick G. Kaardal, Plaintiffs' attorney in this matter ("Kaardal Dec."). Mr. Kaardal states that the deadline for Oglala to file an amicus brief is October 22, 2010, and that,

[i]t is my belief after reviewing the Economic and Business Development Committee minutes and transcript that it would apparently be politically impossible for the Oglala Sioux tribe to participate in an *amicus curiae* filing prior to the October 22, hearing.

Kaardal Dec., ¶ 14. He further states that, "[t]he purported effect of the Committee's proposed rescission, in my opinion, is to effectively withdraw all support of the Oglala Sioux Tribe to the *Wolfchild* plaintiffs as *amicus curiae*." *Id.*, ¶ 15. The opinions of Plaintiffs' attorney as to the impact of rescinding a moot resolution on OST's ability to participate as an amicus, however, cannot be the source upon which Plaintiffs may seek the extraordinary relief of a prospective injunction against the United States. Plaintiffs can point to no specific fact that Oglala will not participate as an amicus.

Plaintiffs utterly fail to demonstrate that they will actually suffer any actual harm. It is clear that no presumption of irreparable injury exists. *Amoco Prod. Co.*, 480 U.S. at 545. This failure is sufficient grounds by itself for the Court to deny Plaintiffs' motion. *Smith, Bucklin & Assoc. v. Sonntag*, 83 F.3d 476, 477 (D.C. Cir. 1996) (affirming district court refusal to issue injunction where plaintiff failed to demonstrate irreparable harm); *CityFed Financial Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 747 (D.C. Cir. 1995) ("Because CityFed has made no showing of irreparable injury here, that alone is sufficient

for us to conclude that the district court did not abuse its discretion by rejecting CityFed's request [for a preliminary injunction.']). Because Plaintiffs have not established that there is a concrete threat of irreparable harm, their motion should be denied.

**C. Referral for Investigation**

18 U.S.C. § 1512 is inapplicable to this situation. This statute, tampering with a witness, victim, or an informant, is a criminal statute concerned with protecting and providing for the safe cooperation of victims and witnesses in criminal justice proceedings and to ensure that the federal government does all that is possible within available resources to assist these witnesses and victims of crime. *See* Congressional Findings and Declaration of Purposes for 18 U.S.C. § 1512. In this case, a witness, victim, or informant is not being prevented from testifying in a criminal proceeding. Based on the statements provided by Plaintiffs, it appears that a non-party to these proceedings may not file an amicus brief, but even that position is speculative. It is unclear how this statute would apply.

To the extent Plaintiffs seek to have undersigned counsel refer any matter to a U.S. Attorney, counsel for the United States states that she is in the Natural Resources Section of the Environment and Natural Resources Division and neither she nor her immediate colleagues handle any criminal investigations. Accordingly, counsel for the United States is not in a position to determine whether the circumstances described in Plaintiffs' Motion to Enjoin merit investigation. Should this Court determine that it is necessary, counsel will convey any concern the Court may have to the appropriate investigating authority. Such action would not constitute a referral and would not mean that any investigation

would be undertaken. Pursuant to Department of Justice policy, the Department can neither confirm nor deny whether a matter did or did not merit investigation. *See* United States Attorney Manual 1-7.530 (1); 1-7.531 (stating that the Department of Justice shall not comment on the possible existence of an ongoing investigation except in exceptional circumstances). The United States also notes that Plaintiffs and their counsel may contact the U.S. Attorneys' Offices for the District of Minnesota and South Dakota should they believe that the circumstances warrant.

### III. CONCLUSION

The Court should deny Plaintiffs' request for injunctive relief against the United States. The relief sought cannot be granted and Plaintiffs do not suffer any immediate and irreparable harm. Rather, Plaintiffs' motion is based on speculation over what actions a non-party potential amicus party may take. This conjecture is not enough to support Plaintiffs' drastic request.

Respectfully submitted this 12th day of October, 2010

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 13th day of October, 2010, a copy of the United States' Opposition to Plaintiffs' Motion to Enjoin was filed electronically with the Clerk of the Court through its ECF System and electronic notice was delivered to the parties entitled to receive notice.

DATED: this 12th day of October, 2010.

/s/ Jody H. Schwarz  
Jody H. Schwarz