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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

WINNEMUCCA INDIAN COLONY, THOMAS R. WASSON, CHAIRMAN

Plaintiffs,

v.

UNITED STATES OF AMERICA ex rel. THE DEPARTMENT OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, WESTERN NEVADA AGENCY, SUPERINTENDENT, and, THE EMPLOYEES, CONTRACTOR AND AGENTS OF THE WESTERN NEVADA AGENCY OF THE BUREAU OF INDIAN AFFAIRS,

Defendants.

Case No.: 3:11-cv-00622-RCJ-VPC

MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION AND MANDATORY INJUNCTION

COMES NOW Plaintiffs, WINNEMUCCA INDIAN COLONY and THOMAS R. WASSON, Chairman, of the WINNEMUCCA INDIAN COLONY, by and through their attorneys of record, HAGER & HEARNE, and respectfully request that this Court enter a temporary restraining order and preliminary injunction to prohibit the Defendant Bureau of Indian Affairs, as hereinafter named, or agents, employees, attorneys, and anyone acting on their behalf, from recognizing William Bills, a person of Filipino

descent and blood, as the only government of the Winnemucca Indian Colony, a federally recognized Native American Indian Tribe for the obvious reason that he is not a Native American and is not descended from the 1916 census which is a requirement of the Constitution and By-laws of the Winnemucca Indian Colony. This Motion is based upon the record in this matter, any hearing before the Court and the Points and Authorities that follow.

I.

Introduction

On July 9, 2012, the United States District Court, the Honorable Robert C. Jones issued an Order on Reconsideration that directed the Bureau of Indian Affairs to recognize a government of the Winnemucca Indian Colony. (Doc. # 105) The BIA on the seventh day after the Order, recognized William Bills as the government of the Winnemucca Indian Colony. This Motion is a request to enjoin the BIA from recognizing William Bills as the government of this federally recognized Tribe because he is not Native American and because this action is arbitrary and capricious and, finally, because it contradicts the Court's Order which stated that the decision must be made "consistent with controlling tribal court rulings."

II.

Legal Argument

A. An injunction is appropriate because of the irreparable harm that will be caused to the Plaintiff if the foreclosure sale occurs.

1. A temporary restraining order is appropriate to stop the breach of trust, the arbitrary and capricious decision that has no basis in law or fact and

finally to stop the BIA from conveying the lands of the Winnemucca Indian Colony to a non Native American.

The United States has adopted a policy exclusively for the Winnemucca Indian Colony that is, in essence, that the BIA will not study the history of the Colony, will not make an investigation into the allegations of William Bills status as a non Native American and is in the process by recognizing William Bills of conveying an interest in Indian lands to a non Native American in violation of the Non Intercourse law of the United States after allowing the possessory interest to have been conveyed in violation of the law for the last 12 years to non members. The United States now argues to this Court that it determined that William Bills is the government of the Winnemucca Indian Colony. First the policy then the statement by the United States must be analyzed to show the effect of the government veto of the Winnemucca Indian Colony existence.

1. **The Policy of the United States is to force the inclusion persons in the membership of the Colony who are not qualified as members according to the present Constitution and By-laws and, further, exclude Thomas Wasson and the members from the Colony and stop the presently scheduled election and the economic development.**

The Interior Board of Indian Appeals has written instructive opinions on the issues that BIA has ignored or refused to act upon, namely, the recognition of a government of a federally recognized Tribe. "Because the United States and its agencies often are engaged in ongoing government to government relations with any given recognized tribe, BIA has the authority and responsibility to identify the ***duly chosen or elected***

tribal governing body to facilitate relations between a tribe and federal agencies." (citing *Greendeer v. Minneapolis Area Director,* 22 IBIA 91, 95 (1992),) (Emphasis added) "Where an internal tribal dispute[1] exists with different individuals or factions claiming to be the lawful governing body, as is the case here, ***BIA properly must look to the tribe's governing documents, and interpret their provisions, to determine who appears to be the lawful tribal governing body."*** (*Richards v. Acting Pacific Regional Director, Bureau of Indian Affairs,* 45 IBIA 187 (2007) (Emphasis added) "While it is undeniably true that internal tribal governmental disputes should be resolved in the first instance through appropriate tribal judicial or non-judicial processes and that BIA should defer to a tribe's reasonable interpretation of its laws, it is equally true that BIA has the authority and the ***obligation*** to determine the governmental body with whom it will engage in government-to government relations. In this case, two U.S. district courts have explicitly directed BIA to independently review the disputed tribal procedures. . . and to grant official recognition to whichever governmental entity embodies the Tribe's choice of government." *Tarbell v. Eastern Regional Director, Bureau of Indian Affairs,* 50 IBIA 219 (2009). (Exhibit 1) "It is well within BIA's authority to monitor tribal governance disputes, gather information, solicit input from tribal factions, provide neutral assistance to facilitate resolution of a dispute if desired by the parties and be

[1] Thomas Wasson, Chairman of the Winnemucca Indian Colony, does not advocate that this litigation arose because of an "internal tribal dispute." This dispute has arisen because persons who are not members of the Winnemucca Indian Colony presently occupy the lands of the Winnemucca Indian Colony. The case law speaks of internal disputes because no cases exist wherein the BIA has allowed occupation of an Indian Colony since the beginning of the twentieth century without compensation to the Tribe. These references are the nearest parallel jurisprudence available.

prepared to issue a decision when some Federal action is required. *Coyote Valley Band of Pomo Indians v. Acting Pacific Regional Director, Bureau of Indian Affairs,* 54 IBIA 320 (2012)[2] (Exhibit 2)

Whereas, IBIA decisions are not particularly binding on this Court, the very fact that these findings have been made by the Administrative Appellate Body that governs the BIA is strong evidence that the BIA is intentionally interfering with intra tribal affairs by not removing the occupation group and intentionally determining the default membership of the Tribe by recognizing William Bills as the government. Further the BIA is not fulfilling its responsibility and obligation to review the files and the history of the Tribe and to investigate to determine the proper government of a federally recognized Tribe as illustrated by these cases of the Interior Board of Indian Appeals.

If, in 2000, BIA had removed the occupying group from the Colony, then BIA could honestly say it had not interfered with the membership determinations of the Colony and it had a neutral and objective "When a tribe is involved in an internal governance dispute, and BIA takes sides in that dispute, BIA is intruding in the tribe's internal affairs." *Coyote Valley Band of Pomo Indians v. Acting Pacific Regional Director, Bureau of Indian Affairs,* 54 IBIA 320 (2012) By not recognizing a government based upon the history and the internal documents of the Tribe and by not evicting the occupation of the Colony Administration Building and smokeshop, the BIA had for 12 years, de facto, interfered in the governance of the Tribe and taken sides as to

[2] The IBIA in rebuking the Western Regional Office for its failure to recognize a government in this case stated that a decision was required because of the allegation by the Wasson group that there was trespass on their property and because of the drug trade occurring on the lands of the Winnemucca Indian Colony. See, *Wasson v. Acting Western Regional Director, Bureau of Indian Affairs,* 52 IBIA 353 (2010)

the membership of the Tribe. Now, in a completely prejudiced and biased act has taken the Colony lands completely away from the membership of the Tribe. This is the policy that has been carried out by the BIA for the Winnemucca Indian Colony in direct opposition to the decisions issued by its own administrative appellate body.

The Plaintiff, Thomas R. Wasson, has established his right to be the Chairman of the Winnemucca Indian Colony lands through the Orders entered by this Court, the Honorable Brian Sandoval,[3] which gave comity to the decision of the Specially Appointed Appellate Panel of the Winnemucca Indian Colony.[4] The decision of the Honorable Brian Sandoval was affirmed by the Ninth Circuit Court of Appeals[5] which was denied certiorari.[6] The complete history of this case demonstrates that the United States District Court has rebuked the BIA in its failure to fund a court of appeals. [7] Further the District Court has rebuked the BIA for not recognizing a government and allowing this chaos to continue. [8]

Rule 65(b) of the Federal Rules of Civil Procedure provides that this Court may issue a TRO without notice to the adverse party where "specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant. . ." The standards for a Temporary Restraining Order are

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[3] March 6, 2008 Order of Brian Sandoval, Exhibit 3

[4] October 6, 2000 decision of the Specially Appointed Appellate Panel of the Winnemucca Indian Colony (also referred to as the Minnesota Panel, Exhibit 4)

[5] Exhibit 4, the Ninth Circuit Decision.

[6] Exhibit 5 Denial of Cert. by the United States Supreme Court.

[7] Decision of the Honorable Howard McKibben, Case No. CV-N-573-HDM, Doc. 24-2721939, 12/10/04

[8] Decision of Honorable Howard McKibben and Case No. 3:11cv00622, Docket 105.

similar to the standards for a preliminary injunction. *Immigrant Assistance Project of the L.A. County of Fed'n of Labor v. INS*, 306 F.3d 842, 873 (9th Cir. 2002).

Injunctive relief is appropriate when the Plaintiff will suffer "irreparable harm" and when the Plaintiff shows "a reasonable probability of success on the merits of its claim." *Number One Rent-a-Car v. Ramada Inns, Inc.*, 587 P.2d 1329, 94 Nev. 779 (1978). In this case, injunctive relief is appropriate because Plaintiffs have been prohibited from continuing economic and construction activity on their own lands based upon the stubborn refusal of the Western Nevada Agency to recognize the Court orders and the order of its own Interior Board of Indian Appeals.

"A preliminary injunction to preserve the status quo is normally available upon a showing that the party seeking it enjoys a reasonable probability of success on the merits and that the defendant's conduct, if allowed to continue, will result in irreparable harm for which compensatory damages is an inadequate remedy. *Memory Gardens v. Pet Ponderosa*, 898 Nev. 1, 492 P.2d 123 (1972)

The cases best suited to preliminary relief are those in which the important facts are undisputed, and the parties simply disagree about what the legal consequences are of those facts. The court in such a case can take the undisputed facts, apply the law to them, and fairly easily decide which party is likely to prevail.

> A party seeking a preliminary injunction must meet a standard which includes: That the moving party may meet its burden by demonstrating either (1) a combination of probable success on the merits and the possibility of irreparable injury; or (2) that serious questions exist and the balance of hardships tips sharply in its favor. *Cassim v. Bowen,* 824 F. 2d 791, 795 (9th Cir. 1987).

The underlying purpose of a temporary restraining order is "to preserve the status quo and prevent irreparable harm before a preliminary injunction hearing may be held." *Granny Goose Foods, Inc. v. Bhd. of Teamsters & Auto Truck Drivers*, 415 U.S. 423, 439, 94 S.Ct. 1113, 39 L.Ed. 2d 435 (1974); *Reno Air Racing Ass'n v. McCord,* 452 F.3d 1126, 1130-31 (9th Cir. 2006). The Plaintiffs have been working to rehabilitate their smoke shop that sat vacant and unattended since February 22, 2000 and posted the election that is to take place in October of 2012 according to the Constitution and Bylaws and the BIA have now stopped all progress on the Colony by recognizing a government that may or may not ever be present on the Colony (as pointed out by the Court, William Bills resides in Fresno, California) and by effectively evicting the members who were re-entering the lands to complete their economic development.

Evidence strongly indicates that William Bills is not Native American. See, Affidavit of Treva J. Hearne and the birth certificate of William Bills, Exhibit 7 with the announcement of birth. The BIA is aware of this evidence and has not requested DNA tests of MR. Bills nor further investigated these allegations. See further the Deposition of William Bills, attached hereto as Exhibit 8.

2. **When the Court weighs the irreparable harm to the Plaintiffs, the harm to the Plaintiffs is substantial.**

The second consideration of the court is the weighing of the harm to the Plaintiffs without the injunction versus the harm to the Defendants if the injunction is granted. The harm to the Plaintiffs will be losing the Colony to a non Native American and the loss of even more of their potential for income to rehabilitate the Colony and finally allow the members to come home. There is no harm to the Defendants since

they are merely bureaucratic agencies with no personal interest in the lands of the Colony. In fact, now that the BIA has determined to defy this Court in its reasonable approach to this matter, the BIA has shown that its only interest is to thwart justice because the United States District Court intervened.

More recent cases have clarified the standard for granting a preliminary injunction. The Ninth Circuit further elaborated on the test for a preliminary injunction, thus: "Under Winter,[9]Plaintiffs must establish that irreparable harm is likely, not just possible, in order to obtain a preliminary injunction. Id. . . We hold that the "serious questions" approach survives Winter when applied as part of the four-element Winter test. In other words, "serious questions going to the merits" and a hardship balance that tips sharply toward the plaintiff can support issuance of an injunction, assuming the other two elements of the Winter test[10] are also met." Alliance for the Wild Rockies et al, v. Cottrell et al, 632 F.3d 1127 (2011)

The Plaintiffs will show that there are serious questions in the that evidence demonstrates that the Defendants have violated the trust relationship, have interfered with the Colony's ability to use its lands by stopping the construction of the smoke shop and required the Plaintiffs once again to hold their election in a car at the edge of reservation lands in order to avoid the violent confrontation that awaits them if William Bills is the government of the Colony.

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[9] *Winter v. Natural Resources Defense Council,* 555 U.s. 7, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008)

[10] A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest. . . ." ". . .*Winter*. . requires the plaintiff to make a showing on all four prongs." (Citations omitted) *Alliance for the Wild Rockies v. Cottrell,* at page 1135. *Id.* at ----, 129 S.Ct. at 374. *American Trucking Associations, Inc. v. City of Los Angeles,* 559 F.3d 1046, 1052 (9th Cir. 2009).

Real property is unique under the laws of the State of Nevada and, therefore, the loss of real property is irreparable harm, particularly when the real property is the homes of the Plaintiffs. Hamm v. Arrowcreek Homeowners Assoc., 183 P.3d 895 (Nev. 2008). The lands of the Winnemucca Indian Colony are the lands of a federally recognized Tribe over which the BIA, as the agent of the United States, has a trust responsibility to this Tribe to protect its lands. The Non-Intercourse Act was passed by Congress for the protection of Indian lands and assets, "A. . .no purchase, grant, lease or other conveyance of lands or any title or claim thereto, from any Indian Nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. . ." at 25 U.S.C. ' 17 (1983).In Golden Hill Pauqussett Tribe of Indians v. Whicker, 39 F.3d 51 (2nd Cir. 1994) the Court noted that the source of the trust relationship was the Non-Intercourse Act.

The Colony's 20 acres and the Colony's 320 acres are held in trust and the Winnemucca Indian Colony is a federally recognized Tribe. Any act or failure to act by the BIA that allows a claim to the lands by other than members of the Colony of the Winnemucca Indian Colony is in violation of the Act. The members of the Winnemucca Indian Colony have been denied the management, control, use and occupation of their lands and assets, which is the very basis of the Act's protection and the source of the trust responsibility of the BIA.

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The Plaintiffs will be irreparably harmed by the loss of the use of their lands as they have been for the last eleven years. The United States defendants on the other hand will be able to state that they defied the United States District Court and will continue to do so. No adequate remedy at law is available to the Plaintiffs to protect their lands.

1. **The Plaintiff will Likely Prevail on his claims**

a. The lawful Council of this federally recognized Tribe has been determined.

As stated above, the United States District Court, District of Nevada, the Ninth Circuit Court of Appeals, the United States Supreme Court and the Interior Board of Indian Appeals have all confirmed the Specially Appointed Appellate Panel for the Winnemucca Indian Colony decision that the Council for the Winnemucca Indian Colony is Thomas Wasson, Chairman who took the place of his father Sharon Wasson who was determined to be the correct Chairman. Judy Rojo, Katherine Hasbruk, Misty Morning Dawn Rojo and Eric Mageira have been properly elected to replace the deceased Council members and to replace William Bills who was properly removed as a member due to his inability to prove Native American status.[11]

[11] The Minnesota panel stated:

> Mr. Bills was properly elevated to the position of Chair pursuant to the by-laws of the Winnemucca Indian Colony of Nevada Article I, Section II. Sharon Wasson was properly appointed to the Wasson Council and subsequently properly appointed Chair of the Wasson Council. The Court finds no hearing for removal of Mr. Bills was ever held. We find that the removal of Mr. Bills was defective resulting in the fact that Mr. Bills is still on the tribal council.
>
> If the remaining members of the Colony Council feel it necessary and appropriate to remove Mr. Bills as a member of the Colony Council and/or disenroll Mr. Bills, then the Colony Council must follow the Constitution and By-Laws including proper notice, procedure, and opportunity to be heard at a hearing. The Colony Council has the responsibility and duty to assure that due process is provided for in any ordinance or procedure in compliance with the Constitution in order to avoid any further defective disenrollment or defective removal of a Colony Council member.

The Minnesota Panel decision that was affirmed by the Courts, required that William Bills be removed according to law. The Minnesota Panel did not confirm him as a member. Therefore, the BIA could not have seriously considered this Court's direction, "The BIA must make its decision consistent with controlling tribal court rulings." The BIA simply vilified this Court by failing to do anything but the opposite of what it was directed to do. In other words, the BIA has issued the challenge to this Court that it will not follow the Court's order just as it hasn't followed the Orders of this Court in the past.

b. The BIA has been asked repeatedly to recognize the lawful government of the Winnemucca Indian Colony and has failed and refused to grant that recognition.

Prior to this Court's intervention with the Western Regional BIA, the Winnemucca Indian Colony had appealed the failure of the Western Nevada Agency to recognize a government three times to the Interior Board of Indian Appeals (IBIA) which stayed its hand until the United States District Court issued its decision in March 2008. Finally, the IBIA issued an opinion that allowed the Regional Office one more chance to make a decision in 2009[12] and when that did not occur, the IBIA reversed the Regional Office in 2010.

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The Minnesota Panel further stated in its Order:

> Therefore, all subsequent activities of the Bills Council are found to be unconstitutional and invalid. The election held on April 2001 is declared an invalid election and in violation of the Constitution.

[12] Exhibit 9, IBIA decision and letter,

On January 4, 2011, after the decisions made by the Courts and recognizing the stubborn refusal of the Regional Office and the Western Nevada Agency of the BIA to recognize the Council of the Winnemucca Indian Colony, counsel for the Colony again requested that the BIA look for an impartial panel to recognize the government.[13] The Regional Office has refused to designate an impartial panel and refused to hold any briefing or hearing on the issue of recognizing a government for the Winnemucca Indian Colony. The BIA did ask for briefs on some predetermined trespass issue after the Interior Board of Indian Appeals ordered it to recognize a government. [14]

The pattern and practice of the Western Regional Office of the BIA is to operate as a dictatorship that is immune to outside direction. When an appellate or judicial body tells the BIA Regional Office what to do, it defies that order and does the opposite or parses the language on what is really required, i.e. recognize a government or make a trespass decision. The federal office of the BIA. Likewise, continued to defy court orders until it was held in contempt on the Corbell case.

The Western Regional Office of the BIA just doesn't get it. It believes that it is immune from obeying a federal court order or any order other than its own arbitrary decisions that have no basis in fact or law. The Western Regional Office has breached its trust relationship with the Winnemucca Indian Colony repeatedly and believes that it can continue to do so with impunity.

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[13] Exhibit 10, Letter to BIA dated January 4, 2011 and letter dated March 24, 2011.

[14] Exhibit11, letter from Regional BIA, March 11, 2011 and July 21, 2011.

The Winnemucca has exhausted all administrative remedies. The stubborn refusal of the BIA to recognize the government of the Colony as Thomas Wasson, Chairman, has made all further administrative remedies futile. In a similar analysis, the Ninth Circuit determined that the exhaustion requirement is not a bar to the United States District Court's jurisdiction if the injunctive relief sought will result in irreparable harm. See, *Anderson v. Babbitt,* 230 F.3d 1158, 1163, 1164 (9th Cir. 2000). Further the Ninth Circuit found that if the administrative process would be futile, then further administrative proceedings are not required. *Rabkin v. Bowles,* 143 F.2d 600, 601 (9th Cir. 1944) and *United States v. Smith,* 254 F2d 930, 933 (9th Cir. 1958). Also see, *Hein v. Capitan Grande Band of Diegueno Mission Indians,* 201 F.3d 1256 (9th Cir. 2000).

c. Public Interest Weighs in Favor of the Preliminary Injunction.

Harm to a community has long been recognized as sufficient harm to warrant an injunction. *See, e.g., Funk Jewelry Co. v. State ex rel. La Prade,* 46 Ariz. 348, 357, 50 P.2d 945, 948 (Ariz.1935); *Caribbean Marine Services Co., Inc., supra*, 844 F.2d at 674 ("Our cases have emphasized, however, that when the public interest is involved, it must be a necessary factor in the district court's consideration of whether to grant preliminary injunctive relief."). "The decision whether to grant . . .relief turns also on whether or not the balance of irreparable damage favors issuance of a preliminary injunction, and on relevant public interests." *Friends of the Earth, Inc. v. Coleman,* 518 F.2d 323, 330 (9th Cir. 1975).

The conveyance of Native American lands, Indian lands to non Indians violates the law. That harm is a sufficiently "concrete and particularized" harm, in that the injury will affect the Plaintiff "in a personal and individual way." *Bates v. United Parcel Service, Inc.* 511 F.3d 974, 986 (9th Cir. 2007) (finding particularized harm sufficient for injunction where refusal to hire driver was part of a written policy and, thus, likely to happen again); *see also Fortyune v. Am. Multi-Cinema, Inc., 364 F.3d 1075, 1081* (9th

Cir. 2004). Thus, this court should consider the harm to this Colony, and grant this motion. Moreover, the BIA has no agency justification for recognizing William Bills. The BIA has failed to provide the record upon which such a decision was made in its initial disclosures. The BIA has provided copies of letters from William Bills to the BIA promising not to sue the Regional Office if he is named as the government by the BIA.[15]

4. The Injunction Will Preserve the Status Quo

By its nature, the relief sought by this Motion is a provisional remedy granted before a hearing on the merits to preserve the subject of the controversy in its currently existing condition. *See Doyne v. Saettele*, 112 F.2d 155, 160 (8th Cir. 1940); *see also Missouri-K.-T. R. Co. v. Brotherhood of Ry. & S. S. Clerks*, 188 F.2d 302, 306 (7th Cir. 1951). A preliminary injunction is not an adjudication on the merits. It seeks to preserve the status quo and prevent irreparable loss of rights before judgment. *Textile Unlimited, Inc. v. A. BMH and Company, Inc.*, 240 F.3d 781, 786 (9th Cir.2001). Here the status quo would be the unfortunate situation of no recognized government. However, if the litigation moves forward, a proper government that is determined by reviewing the history of the Colony, the Constitution and Bylaws and an investigation of the status of Mr. Bills as a non Native American could be expedited. All factors, therefore, militate in favor of relief.

WHEREFORE FOR THE ABOVE-STATED REASONS, the Plaintiff respectfully requests that the Court enter a temporary restraining order and preliminary injunction that would prohibit the United States through its executive agency the Department of the Interior and the Bureau of Indian Affairs from recognizing William Bills as the government of the Winnemucca Indian Colony and prohibiting the BIA from conveying any interest in the lands of the Winnemucca Indian Colony to a non member or non

[15] See, Exhibit 12,, emails to Donna Peterson at the Western Regional Office.

Native American and that no bond be required of the Plaintiffs because no damages are ascertainable to the Defendants.

DATED this 18th day of July, 2012. .o `

o */s/ TREVA J. HEARNE*

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