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IN THE UNITED STATES COURT OF FEDERAL CLAIMS

WINNEMUCCA INDIAN COLONY, WILLIS EVANS, CHAIRMAN, Plaintiffs, v. UNITED STATES OF AMERICA ex rel. THE DEPARTMENT OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, Defendants.	Case No.: No. 13-874 L **PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS**

COMES NOW, the Winnemucca Indian Colony ("Colony") by and through its undersigned counsel, TREVA J. HEARNE, and files this Opposition to the Motion to Dismiss filed by the Defendants. In the event the Court determines that the Complaint is deficient, Plaintiff requests leave to amend.

DATED this 18th day of April, 2014

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I. INTRODUCTION

Since August of 2000, Defendants forced the Winnemucca Indian Colony to bring a myriad of litigation in Tribal, Administrative and Federal courts *which was required to reclaim Colony lands*. Litigation in the United States District Court, District of Nevada, and all the litigation in the last decade, centered upon the same core of operative facts – that the Department of Interior, Bureau of Indian Affairs ("BIA") excluded members of the Colony from their lands and left members without any protection. The BIA was *and is* the only police protection available to the members.

The Colony brought the litigation presently in the District of Nevada[1] to prohibit the BIA from interfering with re-entry on their lands. In 2012, the District Court went further and required the BIA had to recognize a tribal government for this federally recognized Tribe. The District Court granted injunctive relief, and the BIA is enjoined from interfering with tribal members' activities on colonial land. (Ex. 1, Doc. #151, page 6.) The Court additionally ordered the BIA recognize a tribal government for this federally recognized Tribe. (Ex. 1, Doc. #151, page 6.) The District Court case is essentially over, decided, implemented and being monitored. At present, the District Court simply retains jurisdiction to monitor the membership and election process which will be concluded in October of 2014.

The District Court stated:

[1] Case No. 3:11cv622-RCJ-VPC, *Winnemucca Indian Colony, Thomas Wasson, Chairman vs. 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.*

> . . . (A)s far as I'm concerned, all the issues have been determined , and the only -- I'm talking about past issues. All of that has been decided, that's water under the bridge. . . .And once I can see that an election has been held then I think it is about time to close this case." (Ex. 2, Transcript of hearing 3/17/14). The Honorable Robert Clive Jones has stated that the case before the District of Nevada arose "out of the refusal of the U.S. Department of the Interior ("DOI") to recognize the current tribal government of the Winnemucca Indian Colony (the "Colony") and the interference of the Bureau of Indian Affairs ("BIA") with the Colony's activities on its own land." (Ex. 3, Doc. No. 19, page 1 "This case arises out of the refusal of the Bureau of Indian Affairs ("BIA") to recognize a tribal government of the Winnemucca Indian Colony, an Indian sovereign recognized by Congress. The proceedings have been acrimonious." (Ex. 4, Doc. # 198, page 1)

In November 2013, the Colony commenced an action in the Federal Court of Claims (Claims Action) to recover monetary compensation for the actions (and inactions) by the BIA. The BIA's conduct precipitating the Claims Action was: 1) in breach of the trust relationship; 2) in violation of the Non Intercourse Act; and 3) deprived the members of this federally recognized Tribe from entering and preserving their Indian lands. Unlike prior litigation, this case is "bottom line" a case for money damages.

Defendants have filed a Motion to Dismiss this action under 28 U.S.C. § 1500,[2] arguing that the claims pending in the District of Nevada and the claims in this action are "'for or in respect to' the same claim(s)" within the meaning of *United States v. Tohono O'Odham Nation*, 131 S. Ct. 1723, 1729 (2011). As will be explained in the Argument section below, the claims in the two cases are not the same claims.

[2] 28 U.S.C. § 1500 provides that: The United States Court of Federal Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States.

Plaintiff's Complaint details facts about the history of this case. These details provide the Court with a perspective and sense of the BIA's egregious acts over the last 14 years. Needless to say, these same facts were cited to the District of Nevada for the same perspective. The District of Nevada has already determined which Council is conducting the membership application process and holding the election. No matter what occurs, that Council will be replaced by the next Council and there will ever be forever into the future, one Council. The allegation by the United States that there are two factions is no longer correct.

The case before this Court is to seek money damages for the Winnemucca Indian Colony. The Colony will not be able to support its members, start any cultural heritage projects that were interrupted in 2000 so abruptly with the murder of Glenn Wasson, or even re-enter their lands without these monies, so it has sought damages against the United States. The damages done by the breach of trust in the conveyance of the possessory interest in the lands to a group of non-members include but are not limited to: 1) the failure to protect the lands of the Colony from violence, thus rendering them unusable; 2) the loss of water rights; 3) the failure to acquire water rights for the potential irrigable acreage; and 4) the recovery of the royalties for the use of the Colony's land for utilities and roads.

Alternatively, Plaintiff requests a stay or, to the extent that the Court believes that the Complaint could be amended to clarify that the claims are not 'for or in respect to' the same claim(s)" it seeks leave to amend the Complaint.

II. FACTS

In 1917 and 1918, President Woodrow Wilson set aside in trust for the Winnemucca Indian Colony in 1917 and 1918 by in Executive Order. (Exhibit 5, Executive Orders). The Colony existed without a government for decades while the persons who resided there worked for the railroad and for local ranches. The homeless Western Shoshone now had a home, but little else is known of what else occurred after 1916. In 1916, a census was taken at the Colony. (Exhibit 6, 1916 Census). The Tribal Constitution and Bylaws define a tribal member as one who is descended from someone on the 1916 census. (Exhibit 7, Constitutional and By-laws adopted in 1970). Separately, the BIA's definition of Tribal membership prohibited Tribal members from joining another Tribe for the purpose of taking monies distributed as a result of being a member of that Tribe.

In 1986, the Western Nevada Agency of the Bureau of Indian Affairs determined that the persons who were acting as the Winnmemucca Indian Colony government did not qualify as Winnmemucca Indian Colony tribal members. (Exhibit 8, letters of BIA, Complaint ☐☐ 23 - 28).[3] The Western Nevada Agency of the Bureau of Indian Affairs

[3] "Many of you will recall that on July 8, 1986, the Superintendent, Bob Hunter; Tribal Operations Officer, Tony Stoliby; and Tribal Operations Specialist, Shirley Bear; met with members of your community to discuss the membership problem. At this meeting, I informed the group of the following problems on the Winnemucca Colony and our concern in trying to resolve the problems:

1. Possible dual enrollment for several members of Fort McDermitt Paiute-Shoshone Tribe who are presently residing on the Winnemucca Colony.
2. Non-members of the Winnemucca Colony who reside on the Colony. The majority of these people do not meet the constitutional requirements for membership at the Winnemucca Colony.
3. At the present time, there are no eligible members residing on the Winnemucca Colony.
4. A defunct tribal council at Winnemucca Colony. The BIA does not recognize the present council and therefore cannot authorize any grants or contracts. (Exhibit 2, 2/5/87 memo to Superintendent, Western Nevada Agency.)

came to this conclusion because, at that time, some of the persons residing on the Colony chose to participate in the Northern Nevada Paiute Judgment Fund distribution. (Complaint ☐☐ 23 – 28)

In the late 80's, the BIA decided who the members were (See Exhibit 9) and who were not members. (Ex. 8) After that, William Bills, by fraud, became a member. (Ex. 10) When the members pointed out that the BIA was allowing a non-Indian and non-members to occupy the lands of the Winnemucca Indian Colony and strip it of all resources, the BIA claimed that it could not recognize a tribal government. The BIA took the Colony assets into its possession including the smoke shop and publicized the search for members who could qualify. (Ex.11 BIA press release). This occurred and a Council was seated and recognized by the BIA in 1990. (Ex. 9, BIA recognition of Glenn Wasson). That Council served through the 1990's until 2000 when Glenn Wasson was murdered.

Within three months of Glenn Wasson's murder, the BIA recognized William Bills, then Sharon Wasson and then William Bills as Chairman of the Colony as outlined in the United States' brief. (U.S. Points and Authorities, page 4) The BIA still believed that it was the determiner of the government to government relationship. The BIA cannot argue that, after those first three months, it no longer had the authority to recognize a government of this federally recognized Tribe.

The United States characterizes this series of events as two "internal" factions fighting for control. (U.S. Points and Authorities, page 1, first sentence) The United

States then recites many facts that are simply incorrect or no longer correct as explained further in this Opposition.[4] The portrayal of this dispute as a split in the tribal government and two factions vying for power is simply incorrect and outdated.

First, the reason that William Bills could not be recognized as the tribal government was far more basic than his failure to qualifiy as a member -- he was not even an Indian. (Ex. 10, William Bill's birth certificate). As soon as the birth certificate from the State of California was received by subpoena, that birth certificate was forwarded to the BIA in July of 2000. Second, the Constitution and By-laws of the Colony specifically and expressly state that the government is controlled by a majority of the Council,[5] and the Chairman only has the authority delegated to him by the Council.[6] William Bills, if he had a legitimate claim to the Vice Chairman position, could not split into a faction because he was only one person. Moreover, William Bills left the Colony in 2002 and his rights did not descend by succession to the supposed "Ayer" group because there was no royalty or fiefdom involved.

These facts are particularly egregious in light of the BIA's proper role as protector of the Winnemucca Indian Colony. The Colony government depends on the BIA to protect its sovereignty. The small Colony of just 40 – 50 members is without the

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[4] Oddly, the United States seems to outright adopt the unsupported statement of the counsel for the occupation group rather than citing to the findings of the District Court. See, Exhibit 5 to the USA Motion. When the United States attempted to argue for the non-member occupation group before the District of Nevada, the Court dismissed it outright as "Unimpressive" and not in compliance with the Order of the Court. (Ex. 12, Doc. # 143, pp. 18, 22, 24, 49, 52)

[5] Article IV, Section 1. No business shall be transacted by the council unless a quorum of three (3) council members is present. (Ex. 7)

[6] Article I, Section 1. The Chairman of the Winnemucca Colony Council, hereinafter referred to as the council, shall preside over all meetings of the council at which he is present and shall perform all duties assigned to him and exercise any authority delegated to him. (Ex. 7)

financial resources to independently protect itself because, unlike other states, gambling is not a unique income source reserved for Tribal members in Nevada. The Colony's police was the BIA. However, instead of protecting and enforcing the sovereignty of this small Colony, the BIA refused to recognize the tribal government and, in effect, transferred the possessory interest of Colony land to non-members and a non-Indian.

But what is more important for the purpose of this case is that the BIA knew in 2000 that the occupiers of the Winnemucca Indian Colony were non-members[7] and, in fact, non-Indian. In 2002, a duly appointed and agreed to Appellate Panel (the Minnesota Sioux Panel) confirmed the members of the Council. (Ex. 1 to the Points and Authorities of the U.S.). The United States now disingenuously represents that there was an internal dispute of intra-tribal factions. In support of its representation, the United States quotes an Inter-Tribal decision that was withdrawn. (U.S. Points and Authorities, p. 14) (Exhibit 13, Decision of the Inter-Tribal Court of Nevada withdrawing all previous decisions including the one cited by the U.S.)

The United States again makes unsubstantiated statements by arguing that there is no proof that Plaintiff complied with the Order of the Honorable Howard McKibben and sent the membership roll to the Minnesota Panel. (U.S. Points and Authorities, page 14) Contrary to the United States' averments, Plaintiff complied, sent the membership roll to the Minnesota Panel, and there was no challenge from any opposing faction. (Ex. 14, Transcript of proceedings). Plaintiff submitted this document to the District Court, and the District Court received the record and it was part of the record filed with the

[7] No one in the Ayer group has been a member of the Winnemucca Indian Colony since before 1986. Some were members of the Lovelock Paiute Tribe and some were members of the Ft. McDermitt Paiute Tribe. (Ex. 8)

Ninth Circuit Court of Appeals. [8] (Exhibit 15, Membership submitted to the Minnesota Sioux Panel pursuant to District of Nevada)

Contrary to the dicta from the Interior Board of Indian Appeals ("IBIA") cited by the United States, (U.S. Points and Authorities, page 6, footnote 3), the conclusion of the IBIA provides a more accurate summary of their ruling.

> The Regional Director's Decision failed to comply with the Board's directive in *Wasson V,* and contains no reasoned analysis nor an identification or discussion of any evidence upon which the Regional Director relied or purported to rely in making his decision not to recognize Appellants as the Colony Council, in the context of Appellants' allegation that trespass was occurring on tribal lands. 53 IBIA 360.

Thus, the facts as submitted by the United States are incorrect in critical areas and do not support the Motion to Dismiss. The picture the United States attempts to paint in its recitation of the facts is that there were means by which the two groups could have settled their differences at any time, but refused to do so.[9] The Winnemucca Indian Colony, as the argument of the United States is stated, should have compromised their rights, allowed persons to negotiate with them who had never been members of the Colony as though they *were* recognized members. However, the persons occupying the Indian lands were the non-members and believed strongly by the members to have been involved in the murder of their uncle, Glenn Wasson. (See, Complaint ☐☐ 34 – 39)

[8] Since, as noted by the Court, the Appellant, William Bills, which was really the Ayer Group, failed to file excerpts of record, the only excerpts were filed by the Appellees, the Winnemucca Indian Colony Council. (Exhibit 16, 9th Circuit Decision and U.S. District decision of 2008)

[9] The Ninth Circuit pointed out in their opinion in affirming the District Court in adopting the Minnesota Panel decision that the parties had agreed to the Minnesota Panel and should be held to that agreement. (Exhibit 16)

II. ARGUMENT

A. Standard of Review.

Defendant moved to dismiss the Complaint pursuant to Rule 12(b)(1) of the Rules of the United States Court of Federal Claims ("RCFC") for lack of subject matter jurisdiction. In considering a motion to dismiss for lack of subject matter jurisdiction, the court must accept as true all undisputed allegations of fact made by the non-moving party and draw all reasonable inferences from those facts in the non-moving party's favor. See, *Trusted Integration, Inc. v. United States,* 659 F.3d 1159, 1163 (Fed.Cir.2011); *Henke v. United States,* 60 F.3d 795, 797 (Fed. Cir. 1995). The court may also consider undisputed facts contained in the record. *Herbert v. Nat'l Acad. of Scis.,* 974 F.2d 192, 197 (D.C.Cir.1992). The burden is on the plaintiff to show jurisdiction by a preponderance of the evidence. *Taylor v. United States,* 303 F.3d 1357, 1359 (Fed.Cir.2002).

B. § 1500 does not divest this Court of jurisdiction because this case involves no "claims for or in respect to which the plaintiff" had another case pending at the time it was filed.

1. **The action in the State of Nevada was brought to enjoin the BIA from arresting the members of the Colony when they re-entered their lands.**

The decisions by the District of Nevada are complete and implemented. The Council in place is the Council that will take applications and determine the membership, hold an election and the cycle will continue which means there can no longer be two factions of any derivation, there is one Council making decisions and the

District of Nevada has put in place the procedure to appeal those decisions. That was the goal of the United States District Court based upon the pleading before it.

The core of operative facts relevant to the District Court litigation are:

1. When the members of the Colony re-entered their lands in 2000, they were arrested by BIA police.
2. When the members of the Colony re-entered their lands in 2010 after much litigation to take control of their lands, they were threatened with arrest by BIA police.
3. The United States District Court, Ninth Circuit Court of Appeals and, by denial of *certiorari*, the United States Supreme Court, granted comity to the decision of the Minnesota Sioux Panel.
4. The burden on the membership was great.
5. The burden on the government was minimal.
6. The membership was suffering irreparable harm in the loss of their Indian lands.
7. The likelihood that the Plaintiff would prevail on the merits was high since the Court reiterated all the Court findings that had already occurred in their favor in this matter.

The remedy, then, was an injunction and finding that the BIA had acted in an arbitrary and capricious manner[10] in not naming a government for this federally recognized Tribe

[10] The District Court stated that "Their (BIA's) response to my orders, to Judge Sandoval's orders, to numerous other orders has been simply to ignore. It leaves me—unless they can give some kind of explanation, rational basis for what they're doing, it leaves me with one conclusion; and that is, it's either a corrupt decision, or a biased decision, or simply one without rational basis." (Ex. 12, Doc. # 143, page 4, lines 7 – 12) "So what I intend to do here, unless you can give me some reasonable, rational explanation for your refusal to recognize, as is your obligation to do, I intend to issue a preliminary injunction. It will bar you from interfering with the Council. It will bar you

for over 12 years and, then, when ordered to by the Court to recognize a government, BIA recognized a 100% Filipino as the tribal government.

2. This Case was Brought Solely to Recover Monetary Damages.

By contrast, the operative facts of this case are those that will be needed to prove that the BIA:

1. Had a trust responsibility based upon a regulation or statute;
2. Breached that trust responsibility by conveying the possessory interest of the property to non-members and a non-Indian for a term of 12 years.
3. Failed to preserve the lands of the Winnemucca Indian Colony for the benefit of the members of the Colony.
4. Then, because of all of this, money damages are due to the Colony for this breach of trust.

The remedy, now, is an award of money damages to the Colony.

The Supreme Court decision in *United States v. Tohono O'Odham Nation*, 131 S. Ct. 1723 (2011) clarified the limitations on jurisdiction contained in § 1500. It held that § 1500 "bars jurisdiction in the CFC (Court of Federal Claims) not only if the plaintiff sues on an identical claim elsewhere—a suit 'for' the same claim—but also if the plaintiff's other action is related although not identical—a suit 'in respect to' the same claim." *Id.* at 1728. The purpose of 28 U.S.C. § 1500 was to save the Government from burdens of redundant litigation. *Tohono*, 131 S. Ct. at 1727.

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from supporting or sustaining any contrary Council. In other words, you've shown by your actions simply contempt for this Court, for the Minnesota Panel, for the Ninth Circuit."(Ex. 12, Doc. # 143, page 18) "I'm making a finding now that they're (BIA) in contempt. They have not followed my Order. And the only explanation I can give for their decision is a biased or corrupt." (Ex. 12, Doc. 143, page 49)

To achieve this goal, § 1500 states that the CFC "shall not have jurisdiction of any claim for or in respect to which the plaintiff . . . has pending in any other court any suit or process against the United States." 28 U.S.C. § 1500. As the language of the statute makes clear, the analysis focuses on the claims asserted by the plaintiff, and whether those claims are redundant or duplicative. Thus, when a claim is not "redundant"—as is the case here—barring jurisdiction does not comport with Congressional intent and should not occur.

This directive of the Supreme Court has been particularly advantageous to Indian Tribes because the monetary and collateral relief authority of the Court of Federal Claims offers a broader set of remedies to Native Americans who can establish breach by the United States of fiduciary and trust duties. In sum, this is a suit for money for which the Court of Federal Claims can provide an adequate remedy, and it, therefore, belongs in that court. *Suburban Mortg. Assoc., Inc. v. U.S. Dept. of Housing and Urban Dev.,* 480 F.3d 1116 (2007).

C. Plaintiff's Claims Properly Request Relief under the Indian Tucker Act.

1. **A Money Making Mandate exists under which the Colony may seek damages including but not limited to, the possessory interest in all their lands, the loss to the value of their lands, and the loss of protection for their lands.**

The United States has a long established trust relationship with the federally recognized Tribes. The lands of the Tribes are held in trust for the benefit of the Tribes. While the Tribe can sue for damages caused upon its property by the United States both under the takings clause of the Constitution and its trust fiduciary relationship. See, *United States v. Mitchell, ("Mitchell II"),* 463 U.S. 206, 103 S.Ct. 2961 (2003). While

the trust relationship cannot stand alone as support for the money mandating duty required for Court of Claims jurisdiction, certainly, control of the property outright as well as being the trustee is enough. But the language of *Mitchell II* makes quite clear that control alone is sufficient to create a fiduciary relationship. The Supreme Court in that case emphasized that:

> [W]here the Federal Government takes on or has *control or supervision* over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided otherwise) even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust or fiduciary connection.

Mitchell II, 463 U.S. at 225, 103 S.Ct. 2961 (quoting *Navajo Tribe of Indians v. United States,* 224 Ct.Cl. 171, 624 F.2d 981, 987 (Ct.Cl.1980)) (emphasis added).

> Under the common law of trusts, it is indisputable that a trustee has an affirmative duty to act reasonably to preserve the trust property. As the Restatement makes clear, "[t]he trustee is under a duty to the beneficiary to use reasonable care and skill to preserve the trust property." *Restatement (Second) of Trusts* § 176 (1959). Comment (b) to this provision makes clear that this obligation extends to the protection of the trust property from loss or damage: "It is the duty of the trustee to use reasonable care to protect the trust property from loss or damage.

White Mountain Apache Tribe v. U.S., 249 F.3d 1364 (Fed Cir. 2001) at page 1378, 1379.

When the BIA excluded the members from their lands and essentially allowed others to use the land rent free and allowed waste to occur, the BIA had a duty as trustee of the lands to protect them in the absence of the members.

> Here we believe that general principles of trust law obligate the United States "to use reasonable care and skill," *Restatement (Second) of Trusts* § 176, to "preserve the trust property from loss, damage or diminution in value." *Branson Sch. Dist. RE–82,* 161 F.3d at 637. This obligation includes an

> obligation to make appropriate repairs to buildings. As stated in 3 Scott & Fratcher, § 188.2, at 53–54, "[t]he trustee is ordinarily under a duty to keep in proper repair buildings and other property that he holds in trust.... Such repairs include whatever is reasonably necessary to preserve the property and to keep it in proper condition." The government as trustee "owes the beneficiary [here, the Tribe] the duty of using the care of a reasonably prudent man in protecting the trust res against decay and deterioration caused by use, by the elements, by catastrophe, or otherwise...."

Bogert, *The Law of Trusts and Trustees,* § 600, at 513. Indeed, under the common law of trusts, "[t]he first duty of a trustee must be to preserve the trust property intact. To do this, he must not suffer the estate to waste or diminish, or fall out of repair...." *Id.* at 514.

The United States has not and cannot point to any Congressional act that authorized the transfer of the possessory interest of the Winnemucca Indian Colony lands to any entity other than its members. In 1917 and 1918, the United States took the Winnemucca Indian Colony lands into trust by for the benefit of the Tribe. (Exhibit 6). The United States acts as a trustee for the lands of the Colony. In fact the BIA removed the government of the Winnemucca Indian Colony and took over management of the lands until a government could be seated in 1986. (Complaint, ☐☐ 23 – 29)

As of 2000, the BIA was the only police enforcement on the Winnemucca Indian Colony. In stark contrast to its designated role as the Colony's protector and police force, the BIA refused to recognize a government for fourteen years since the year 2000 and arrested tribal members when they re-entered tribal lands in 2000 and threatened to arrest the members when they re-entered Tribal lands in 2012. The BIA found the Colony's government dysfunctional in 2000, but unlike in 1986, the BIA failed to protect the lands of the Winnemucca Indian Colony for its members.

The BIA allowed the non-member occupation group, to use the tribal lands rent free and with no obligation to fix the damage to the property. As a result, tribal housing

is in sad disrepair, and the entire Colony is littered with trash and the infra-structure is in shambles. The water rights needed on the 320 acres in arid Nevada is non-existent. Left without protection from BIA, unknown parties were allowed to dam the wet water that previously flowed across the tribal lands. As a result of the failure of the BIA to manage the lands of the Colony, unknown persons inhabited Colony housing, a repeat drug offender occupied the smoke shop and managed it, and the construction of a museum and smoke shop that was begun in 2000 by the murdered Chairman on the 320 was left to deteriorate and crumble after the Colony had invested Colony funds to begin that development. Further, the community views the Winnemucca Indian lands as a dangerous place where drugs and violence are present. Such a reputation will take years to mitigate. These facts and others are pled by the Plaintiff as the loss of value and damage to their property.

The BIA police continue to refuse to protect members of the Winnemucca Indian Colony Council from the non-member occupation group. The Council fears returning on a full time basis for fear of violence. The smoke shop is in such disrepair that it is dangerous for human occupation. When the members held their elections in 2004 and 2006, the BIA police accompanied them and told them they had to leave the Winnemucca Indian Colony lands as soon as the election was done. The tribal members established their rights after litigation in 2010, yet the BIA threatened to arrest them when they entered their lands. This conduct forced tribal members to institute the action in United States District Court so they could re-enter their lands.

2. Federal Law and Regulation requires that a lease is required to possess Indian land.

The money mandating section of the federal law and regulation that stem from the mandates of the Non-Intercourse Act. Because of the Indians cultural view of land, early on the government determined to protect the Tribes from the loss of their lands by requiring what was tantamount to an Act of Congress for the conveyance of any interest in the lands of a federally recognized Tribe.

This concept has evolved to the present regulations adopted in the United States Code and the Code of Federal Regulations which further protect Indian lands by the broad authority of the Department of Interior to approve all leases of Indian lands. For example, 25 C.F.R. 162.005 explains that any party other than the members of the Winnemucca Indian Colony was required to obtain a lease to possess the Indian lands and 25 C.F.R. 162.023 provides the BIA the authority to evict or seek restitution for use of the lands without a lease.

25 U.S.C. § 415 gives the BIA full authority to seek payment for leasing premises and seeking any remedies to protect the property. Its accompanying regulations provide:

> If the lessee does not cure a violation of a business lease within the required time period, or provide adequate proof of payment as required in the notice of violation, we will consult with the tribe for tribal land or, where feasible, with Indian landowners for individually owned Indian land, and determine whether:
> (1) We should cancel the lease. . .

25 C.F.R. 162.467 (a)

In support of the BIA's authority to lease property on behalf of the Tribes, whether the BIA has acted in an arbitrary and capricious manner in either allowing the lease or rejecting the lease also involves an analysis as to whether that signing of the lease or rejection was an abuse of discretion. *Seva Resorts, Inc. v. Hodel,* 876 F.2d 1394 (1989) The abuse of discretion was reasoned upon the elements of whether the lease was in the

Tribe's best interest and protected the Indian lands. See, *Seva Resorts, Inc.,* cited *supra*.

"Congress adopted 25 U.S.C. §415 to encourage long-term commercial leases of Indian land and thereby to enhance its profitable development. " See, *Yavapai-Prescott Indian Tribe v. Watt,* 707 F.2d 1072 (1983). Because the circumstance of the BIA allowing non-members to occupy Indian lands without paying the Tribe, without a lease, and without protection from waste by the BIA, is unheard of and no parallel facts can be found in the prominent case law. That such a circumstance arose where the BIA prohibited the members of the Tribe from re-entering their lands and, at the same time, allowed persons to occupy the land and strip it of all profits and lay waste not only to the land itself but the reputation of the Tribe's existence in that community is appalling. The "Leasing Act was intended to protect 'Indian tribes and their members. . . .the federal government's duty under the Leasing Act, through the BIA, is to ensure that the parties to a lease of Indian land have given adequate consideration to the impacts of the lease on, *inter alia,* neighboring lands and the environment." *Nulankeyutmonen Nkihtaqmikon v. Impson,* 503 F.3d 18 (1st Cir. 2007).

BIA broke the law in allowing this occupation which had no documented lease and no consideration. The BIA prevented the members of the Colony from protecting their lands and allowed the occupation to lay waste to the lands and reputation of the Winnemucca Indian Colony. Moreover, once the BIA prohibited the members from entering their own Indian lands, the BIA had an affirmative duty to protect the lands. *U.S. v. Torlaw Realty, Inc.,* 348 Fed. Appx. 213 (2009) ("Injunction against operation of waste disposal facility on Indian land was warranted; . . . operator had no legal entitlement to occupy allotment . . ." at page 213) See, also, *Skull Valley Bank of*

Goshute Indians v. Davis, 728 F. Supp.2d 1287 (D. Utah 2010) ([DOI]'s mandate is to "defer to the landowners' determination that the lease is in their best interest, to the maximum extent possible.")

Now in 2014 the BIA comes before this Court to make the argument that it was an intra-tribal dispute that the Tribe had to resolve on its own. That is not what happened in 1986 when there was an unqualified government. The BIA took over the lands and managed them and protected them until a new government could be established. Sometime in 2002 there was no one occupying the Winnemucca Indian Colony who had ever been or were qualified to be a member. The BIA was required to enter into a lease, manage the lease and protect the lands of the Winnemucca Indian Colony. This it failed to do. The Colony is owed damages for the trespass, the waste, the loss of funds from their smoke shop, the loss of their wet water, the failure of the BIA to obtain water rights, the failure of the BIA to obtain lease payments for the roads and electric substation on the Indian lands, the loss of the housing rents and the loss of reputation of the Indian lands which are now known as the largest drug distribution center in rural Northern Nevada.

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E. Alternatively, Plaintiff seek Leave to Amend the Complaint or Have the Matter Stayed through October of 2014.

As Justice Ginsburg stated in her dissent in *Tohono O'Odham Nation*:

> …to avoid both duplication and the running of the statute of limitations, the CFC suit could be stayed while the companion District Court action proceeds. That is a common practice when a prior action is pending.
>
> Why is this Court not positioned to direct the CFC to disregard requests for relief simultaneously sought in a district-court action, or at least to recognize that an amended CFC complaint could save the case? I see no impediment to either course, in § 1500 or any other law or rule. (internal citations omitted)

United States v. Tohono O'Odham Nation, 131 S. Ct. at 1740-1741:

Here, the case pending in the District Court in Nevada will be concluded in October of 2014 when the tribal elections are concluded. Alternatively, if the historical recitations are truly sufficient to conflate the cases as the United States contends, Plaintiff seeks leave to amend the Complaint pursuant to RCFC 15(a)(2), which provides that "leave to amend shall be freely given when justice so requires." RCFC 15(a). The United States Supreme Court has held in interpreting the identical provisions of Fed. R. Civ. P. 15(a):

> If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason- such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.-the leave sought should, as the rules require, be "freely given.

Foman v. Davis, 371 U.S. 178, 182 (1962) (citation omitted)

III. CONCLUSION.

For all of these above-stated reasons, the United States' Motion to Dismiss should be denied. If the Court deems appropriate, the Plaintiff requests leave to amend its complaint.

DATED this 18th day of April, 2014

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CERTIFICATE OF SERVICE

It is hereby certified that service of the foregoing PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS was made through the Court's CM/ECF system, which will automatically e-serve the same on the attorneys of record set forth below, on April 18, 2014:

KRISTOFOR R. SWANSON
U.S. Department of Justice
Environment & Natural Resources Division
Natural Resources Section
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Washington, DC 20044-7611