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15 **UNITED STATES DISTRICT COURT**
16 **DISTRICT OF NEVADA**

17 DOREEN BROWN, LOUELLA
18 STANTON, ELDON BROWN,
19 DWIGHT BROWN, GILBERT
20 GEORGE, ELENA LOYA, ELISA
21 DICK, LOVELLE BROWN, KEVIN
22 DICK & LESLIE SMARTT, JR.,

23 Plaintiffs,

24 v.

25 DEB HAALAND, SECRETARY,
26 UNITED STATES DEPARTMENT
27 OF INTERIOR, in her official
28 capacity,

Defendant.

Case No.: 21-CV-00344-MMD-CLB

RESPONSE TO INTERVENING
DEFENDANT'S "COUNTER-
MOTION TO DISMISS"

1 Comes Now the Plaintiffs, by and through counsel of record, and respectfully
 2 respond to Intervening Defendant's "Counter-motion to Dismiss" (ECF No. 41) as
 3 follows:
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5 I. It is frivolous to argue that Plaintiffs' claims against the U.S. government
 6 require exhaustion in the interim tribal court.
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8 Plaintiffs' original complaint (ECF No. 6) and Plaintiffs' proposed amended
 9 complaint (ECF No. 29) both seek to enjoin the United States Bureau of Indian
 10 Affairs to follow its own statutes and regulations. *United States ex rel. Accardi v.*
 11 *Shaughnessy*, 347 U.S. 260, 74 S. Ct. 499, 98 L. Ed. 681 (1954).¹ But the
 12 Intervenor's motion to dismiss erroneously states that Plaintiffs' are trying to
 13 reverse their evictions (ECF No. 41, p. 7). As a result of this frivolous misstep, the
 14 Intervenor concludes that Plaintiffs' complaint is not "ripe" and should be
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20 ¹ The *Accardi* doctrine is "premised on fundamental notions of fair play underlying
 21 the concept of due process. Its ambit is not limited to rules attaining the status of
 22 formal regulations. As the Supreme Court noted 'where the rights of individuals are
 23 affected, it is incumbent upon agencies to follow their own procedures.'" *Montilla*
 24 *v. Immigration and Naturalization Service*, 926 F. 2d 162, 167 (2d Cir. 1991). The
 25 *Accardi* doctrine has "continued vitality, particularly where a petitioner's rights are
 26 affected. *Id.*" *Emami v. Neilson*, 465 F. Supp. 3d 991, 996-97 (N.D. Cal. 2021).
 27 But see *Doucette v. United States DOI*, 849 Fed. Appx 653, 655 (9th Cir. 2021)
 28 (*Accardi* doctrine not applicable to an agency memo.)

1 dismissed because Plaintiffs have not exhausted their interim tribal court remedies
2 (ECF No. 41, p. 12).

3 The interim tribal court does not have jurisdiction to enjoin a federal agency
4 to follow its own statutes and regulations in relation to the transfer of an agency
5 court record on appeal (ECF No. 6). Likewise, in their proposed amended
6 complaint, the Plaintiffs allege that the Bureau of Indian Affairs agreed with the
7 Intervenor to provide judicial and law enforcement services, but that the Bureau is
8 totally failing to monitor such services, contrary to its own rules, and thereby
9 causing uncontested irreparable harm to Plaintiffs. (ECF No. 29). In short, the
10 interim tribal court has no jurisdiction to adjudicate the proposed amended
11 complaint either, because it seeks an injunction against the United States Bureau of
12 Indian Affairs.

13 This Court, not the tribal court, has jurisdiction to enjoin the Bureau of
14 Indian Affairs to follow the rule of law. It is frivolous to argue that Plaintiffs must
15 exhaust their claims against a U.S. government agency in the interim tribal court.
16 The interim tribal court lacks jurisdiction over any federal agency. The agency in
17 question, however, the Bureau of Indian Affairs, does have a statutory, regulatory
18 and contractual duty to oversee the interim tribal court and law enforcement, but it
19 has miserably failed to do so, causing Plaintiffs irreparable harm.

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28 II. The Plaintiffs have standing to sue the U.S. Government because they are
persons protected under 25 U.S.C. § 5330.

1 As a matter of law, Plaintiffs have standing, as do all persons under 25
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3 U.S.C. § 5330. It provides that: “Each [“638”] contract or grant agreement entered
4 into pursuant to sections 5321 and 5322 of [Title 25] where. . . the tribal
5 organization’s performance under such contract or grant involves the violation of
6 the rights or endangerment of the health, safety, or welfare of *any persons*”
7 requires the Secretary to reassume responsibility for the contracted services “until
8 such time as [she] is satisfied that the violations of rights or endangerment of
9 health, safety, or welfare which necessitated the rescission has been corrected.” Id.
10 (emphasis added).

14 The Plaintiffs are persons protected under 25 U.S.C. § 5330. The Intervenor
15 argues that Plaintiffs are non-members of the Winnemucca Indian Colony and
16 therefore cannot claim any harm and have no legally protected interest. This is
17 false. The statute in question is not dependent on tribal membership. Moreover,
18 Plaintiffs have a legally protected interest in their property and homes on the 20-
19 acre parcel of trust land in Winnemucca, Nevada, where they have resided for
20 decades. Plaintiffs’ harm and legal interest were demonstrated on November 5th,
21 2021, when this Court found Plaintiffs suffered irreparable harm because their
22 homes had been bulldozed and more homes were under threat. The Intervenor was
23 present but did not object to the finding of irreparable harm. Nor did the Intervenor
24 object to this Court's finding of irreparable harm at the Ninth Circuit.

1 This Court would not have determined that Plaintiffs experienced irreparable
2 harm if Plaintiffs did not have a legally protected interest in their homes on the
3 Winnemucca Indian Colony. A finding of irreparable harm shows that Plaintiffs'
4 injury was both concrete and particularized, and actual or imminent.²

6 It still is. More evictions and demolitions are threatened in the coming weeks
7 over the Christmas and New Year's holidays. Plaintiffs are persons who have
8 standing under 25 U.S.C. § 5330 to seek an injunction ordering the Bureau of
9 Indian Affairs to protect them from further irreparable harm.

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12 III. Plaintiffs have standing pursuant to clearly established law.

13 Here the Plaintiffs have standing under federal statute to sue in this Court to
14 enjoin the BIA to reassume judicial and law enforcement services and
15 responsibilities that it has contracted over to the Winnemucca Indian Colony
16 Interim Council until it is satisfied that the interim council's performance under
17 these contracts is not further violating the rights or endangering the welfare of the
18 Plaintiffs. 25 U.S.C § 5330.

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22 The Intervenor writes: "Plaintiffs must seek administrative and/or tribal
23 remedy." (ECF No. 36, p. 8.) On the next page, Intervenor writes, "There is no
24 point in continuing this action [in the District Court] where the appropriate remedy

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² *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L
28 Ed. 2d. 351 (1992).

1 is in Tribal Court, and Plaintiffs, who are not members of the Winnemucca Indian
2 Colony, have no standing. The fact that any case brought by Plaintiffs before the
3 Winnemucca Indian Court also will be dismissed for lack of standing does not
4 mean they may pursue their case here” (ECF No. 36, pp. 10-11).

6 It is illuminating how Intervenors insist Plaintiffs must seek relief in the
7 tribal court yet state plainly that any cause brought by Plaintiffs in the tribal court
8 will be dismissed outright for lack of standing. The Intervenor points out that no
9 court exists where Plaintiffs have standing to challenge the legality of the
10 demolition-evictions that will leave them unhoused.

13 Yet, Plaintiffs are persons under 25 U.S.C § 5330 whose safety and welfare
14 are endangered. This is a situation where, according to the plain language of
15 federal statutes and regulations, the BIA should be stepping in. Plaintiffs’ only
16 option is to enjoin the BIA to protect them as the law requires.

19 Finally, 25 U.S.C. Section 5331(a) governs “638” contract disputes and civil
20 claims. Section 5331(a) says “The United States district courts shall have original
21 jurisdiction over any civil action or claim against the appropriate Secretary arising
22 under this chapter. . . In an action brought under this paragraph, the district courts
23 may order appropriate relief including money damages, injunctive relief against
24 any action by an officer of the United States or any agency thereof contrary to this
25 chapter or regulations promulgated thereunder, or mandamus to compel an officer
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1 or employee of the United States, or any agency thereof, to perform a duty
2 provided under this chapter or regulations promulgated hereunder.” In sum,
3 Plaintiffs do have standing in this Court, and this Court has original jurisdiction
4 over their claims to enjoin the agency to follow the rule of law.
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6 Conclusion
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8 The Intervenor wants *carte blanche* to evict Plaintiffs and bulldoze their
9 homes, regardless of doing irreparable harm. However, the agency has a statutory
10 duty to protect these persons from irreparable harm. The Plaintiffs are suing the
11 agency to make it follow its own rules and regulations and to thereby protect them
12 from additional irreparable harm. Plaintiffs are persons under § 5330. Thus, the
13 Plaintiffs have standing under federal law to sue the agency to make it reasonably
14 follow its own rules. The Intervenor's argument that Plaintiffs must sue the agency
15 in their tribal court for injunctive relief is plainly frivolous.
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19 Wherefore, Plaintiffs submit their Response to Intervening Defendant's
20 "Counter-motion to Dismiss" and respectfully request that the Intervenor's
21 counter-motion be denied.
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23 Dated this 16 day of December, 2021.
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25 s/Jim Salvator
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