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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

DOREEN BROWN, LOUELLA STANTON ELDON BROWN, DWIGHT BROWN, GILBERT GEORGE, ELENA LOYA, ELISA DICK, LOVELLE BROWN, KEVIN DICK & LESLIE SMARTT, JR.;

Plaintiffs,

v.

DEB HAALAND, SECRETARY, UNITED STATES DEPARTMENT OF INTERIOR, in her official capacity,

Defendants,

and

WINNEMUCCA INDIAN COLONY, a federally recognized Tribe,

Intervening Defendant.

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

REPLY IN SUPPORT OF INTERVENING DEFENDANT'S COUNTERMOTION TO DISMISS

Intervening Defendant, the Winnemucca Indian Colony ("Intervenor"), by and through its Chairman, Judy Rojo, and counsel of record, Maddox & Cisneros, LLP, and Reno Law Group, LLC, submits this Reply in Support of its Countermotion to Dismiss. This Reply refutes the arguments in Plaintiffs' Response to the Countermotion ("Response"). Intervenor incorporates the litigation in all courts in this matter, any argument to the Court, and the Points and Authorities that follow.

DATED this 23rd day of December, 2021.

By: /s/ Norberto J. Cisneros_____
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MEMORANDUM OF POINTS AND AUTHORITIES

Plaintiffs fail to provide any cogent argument about why the original Complaint should not be dismissed. The Court should therefore grant Intervening Defendant's Countermotion.

I. The Complaint is now frivolous.

On December 9, 2021, the Court of Indian Appeals issued an Order stating:

> [T]he Court of Indian Appeals for the Southern Plains and Western Regions having received clarification regarding jurisdiction of this Court with regard to matters litigated in the Winnemucca Indian Colony, hereby rescinds its Orders of October 18, 2021, and November 3, 2021. The Court will not exercise jurisdiction over any appeals filed out of the Winnemucca Indian Colony.

Order, attached as **Exhibit 1.**

This decision, which was issued after Intervening Defendant's Countermotion was filed on December 1, 2021, means the Complaint must now be dismissed. Through the Complaint, Plaintiffs sought to compel Defendant United States to comply with an Order

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that barred Plaintiffs' evictions. *See* Emergency Motion for Order Pursuant to LR 7-4, ECF No. 15, 3 at 12-14 ("[T]he emergency order . . . remains in full force, yet unenforced by the agency."); *see also* Nov. 3, 2021, Order, attached as Exhibit A thereto. The Court of Indian Appeals now understands it lacked jurisdiction, as should Plaintiffs. The Complaint is now moot.

In short, there is no basis for arguing that the United States must transmit the record of the eviction case to a court without jurisdiction. Plaintiffs should have been aware of the Court of Indian Appeals' ruling, yet failed to make any mention of it in their December 16, 2021, Response. Plaintiffs should have voluntarily dismissed their Complaint because their argument is now not only moot, but frivolous.

II. Plaintiffs have waived any argument that they are members of the Winnemucca Indian Colony.

Though the Court should now summarily dismiss the Complaint, Plaintiffs' remaining arguments are so egregious and insulting to Indian sovereignty that they compel response. As a start, Plaintiffs have now waived any argument that they are members of the Winnemucca Indian Colony. They have failed to provide evidence of membership, as required for this Court to retain jurisdiction. *See* ECF No. 36 at 11:9-25.

Contrary to Plaintiffs' suggestion, Intervening Defendant did not cause any "irreparable harm" to Plaintiffs. *See* ECF No. 44 at 4:14-28. Plaintiffs chose to become members of other Indian tribes. This point is unrefuted. The fact that Plaintiffs have no standing in any court is the result of their own actions.

III. The Complaint – the only extant version – has nothing to do with 25 U.S.C § 5330.

Unable to meet their burden, Plaintiffs argue they have standing to bring the Complaint because 25 U.S.C § 5330 governing rescission of contracts between the United States and Indian Tribes protects "all persons." But the original Complaint had nothing whatsoever to do with 25 U.S.C § 5330. Such claims were alleged only in Plaintiffs' proposed Amended Complaint.

Every one of Plaintiffs' six claims in the original Complaint were brought not under 25 U.S.C § 5330, but 25 C.F.R. § 11.803, which provides, "Within 20 days after a notice of appeal is filed, the clerk of the court shall certify and file with the appellate division the record of the case." ECF No. 6 at 11:22: - 12:14. Plaintiffs alleged that

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Defendant United States wrongly transferred the record on appeal in Plaintiffs' eviction case to the tribal court. *Id.* Plaintiffs argued that the case should have instead been transferred to the Court of Indian Appeals. *Id.*

Plaintiffs confuse their argument by citing the claims in their proposed Amended Complaint as reasons for keeping alive their original Complaint. But the Court must look at the original Complaint for its analysis for the instant Countermotion. Specifically, the notes for 25 C.F.R. § 11.803 cite various statutes as authority for its enactment. These statutes do not include 25 U.S.C § 5330, or any other statutes pertaining to contractual obligations of the United States. *See* 25 C.F.R. § 11.803 notes (citing 5 U.S.C. § 301 (head of an Executive Department may prescribe regulations); 25 U.S.C. § 2 (Commissioner of Indian Affairs shall manage Indian affairs); 25 U.S.C. § 9 (President may prescribe regulations relating to Indian affairs); 25 U.S.C. § 13 (BIA may spend appropriated money for the benefit of Indians); and 25 U.S.C. § 200 (report of Indian offenses shall be submitted to superintendent of the reservation)). 25 U.S.C § 5330 is not cited because the transfer of an administrative record is not a contractual act.

The Court should dismiss the Complaint as not only frivolous, but also having no basis in statutory or regulatory law.

IV. Plaintiffs fail to meet their burden of establishing this Court's jurisdiction.

Even if 25 U.S.C § 5330 were somehow relevant to Plaintiffs' Complaint – it is not – Plaintiffs' arguments remain meritless.

25 U.S.C § 5330 provides in relevant part that every self-determination contract under 25 U.S.C § 5321 and every grant to a tribe under 25 U.S.C § 5322 shall provide that if the Secretary determines that the tribe's performance involves "violation of the rights or endangerment of the health, safety, or welfare of any persons," the Secretary *may* rescind the contract or resume control. Plaintiffs falsely state that the statute "requires the Secretary to assume responsibility" at such time. ECF No. 44 at 1-13. The statute provides no such mandate.

Neither does the statute allow third parties to sue the United States to enforce such a hostile takeover of a contract relationship between Defendant United States and Intervening Defendant. Plaintiffs' argument leads to a legal absurdity because it assumes that any non-party to a contract can sue for alleged failure to properly administer the

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contract. As third parties, Plaintiffs have no legal rights because any contract between Intervening Defendant and Defendant United States is not for Plaintiffs' benefit. To conclude otherwise would be to suppose that any non-member or indeed any non-Indian could squat on Indian land and sue to stay forever. Contrary to Plaintiffs' statements, reversal of eviction is exactly what they seek. Otherwise, they would not have brought their Complaint.

It comes as no surprise that Plaintiffs have cited no case law indicating that such legal arguments have any validity. If the Court does not dismiss for frivolity, *supra*, Section I, the Court should dismiss for lack of standing and therefore, lack of jurisdiction under Fed. R. Civ. P. 12(b)(1).

V. The tribal court, not this Court, must answer the question of exhaustion.

Plaintiffs argue against exhaustion of tribal remedies on the basis that only this Court has jurisdiction to enjoin Defendant United States. ECF No. 44 at 3:17-26. To the contrary, Intervening Defendant is a party, too, because its rights and sovereignty are threatened. Jurisdiction belongs in the Tribal Court.

Intervening Defendant maintains that Plaintiffs lack standing in both this Court and the Tribal Court. That said, the question of whether a tribal court has the power to exercise subject matter jurisdiction should be first answered in the tribal court itself:

> We believe that examination should be conducted in the first instance in the Tribal Court itself. Our cases have often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination. That policy favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge. Moreover the orderly administration of justice in the federal court will be served by allowing a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed. The risks of the kind of "procedural nightmare" that has allegedly developed in this case will be minimized if the federal court stays its hand until after the Tribal Court has had a full opportunity to determine its own jurisdiction and to rectify any errors it may have made. Exhaustion of tribal court remedies, moreover, will encourage tribal courts to explain to the parties the precise basis for accepting jurisdiction, and will also provide other courts with the benefit of their expertise in such matters in the event of further judicial review.

Nat'l Farmers Union Ins. Cos. v. Crow Tribes of Indians, 471 U.S. 845, 856-57, 105 S.Ct.

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2447, 2454 (1985) (citations omitted). "Relief may not be sought in federal court until appellate review of a pending matter in a tribal court is complete." *Atwood v. Fort Peck Tribal Court Assiniboine*, 513 F.3d 943, 948 ((9th Cir. 2008) (citing *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 17, 107 S.Ct. 971, 976 (1987)). The question of whether a federal court is vested with authority to rule in a matter that remains unresolved before the tribal court is a threshold matter. *Lamphere v. Wright*, 2009 U.S. Dist. LEXIS 102756, at *5 (W.D. Washington, Oct. 29, 2009).

Accordingly, the Tribal Court must determine the question of federal subject matter jurisdiction. Until such time, the Complaint is not ripe for adjudication.

The tribal exhaustion rule should not be lightly set aside, as important policy reasons stand behind the rule. Comity is one of these reasons:

> The tribal exhaustion rule is required for reasons of comity, rather than as a jurisdiction prerequisite. As such, exhaustion is analogous to the principle of abstention, under which resolution is favored in the non-federal forum, even where concurrent jurisdiction exits in both the state and federal courts.

LaPlante, 480 U.S. at 16, 107 S.Ct. at 976. Indeed, federal court restraint is "especially appropriate" where the matter involves "'[t]ribal governmental activity involving a project located within the borders of the reservation.'" *Gaming World Int'l, Ltd. v. White Earth Band of Chippewa Indians*, 317 F.3d 840, 851 (8th Cir. 2003) (quoting *U.S. v. Tsosie*, 92 F.3d 1037, 1041 (10th Cir. 1996).

Here, the idea that Plaintiffs may skirt exhaustion and the tribe's sovereignty and somehow stay on Indian land without being tribal members is alarming. The Court should grant the Motion and end Plaintiffs' frivolous lawsuit.

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VI. Conclusion

Frivolity, lack of jurisdiction, and failure to exhaust tribal remedies are all reasons to dismiss the Complaint. For the foregoing reasons, Intervening Defendant ask the Court to grant the Countermotion.

DATED this 23RD day of December, 2021.

By: /s/ Norberto J. Cisneros____

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